NO. 20-15539

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAERBEL MCKINNEY-DROBNIS, *et al.*,
Plaintiffs-Appellees,

Kurt Oreshack,
Objector-Appellant,

v.

MASSAGE ENVY FRANCHISING, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, No. 3:16-cv-06450-MMC

Reply Brief of Appellant Kurt Oreshack

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
Adam E. Schulman
1629 K St. NW, Suite 300
Washington, D.C. 20006
(703) 203-3848
Attorneys for Objector-Appellant Kurt Oreshack

Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Introduction

Regardless of whether the vouchers in this case are "coupons" under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1712, the district court erred as a matter of law in applying the vouchers' "full [face] valuation…despite the fact that all unclaimed *and unredeemed*…vouchers would revert back to the defendants" after the expiration date. *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1054 (9th Cir. 2019) (reversing without reaching question of whether vouchers were "coupons"). Because the parties presented *no* evidence of the likely redemption rate of the vouchers over the sixteen months before they expire, there is no record evidence that the settlement here is not dramatically more lopsided than the one whose approval *Roes* reversed. And the *Roes* settlement, unlike this one, provided substantial cash to class members. Amazingly, plaintiffs never mention *Roes* once. This by itself is reversible error. OB17-27.[1]

In *EasySaver,* this Court "distinguished the $12 Walmart gift cards at issue in *Online DVD-Rental* because those gift cards never expired and could be swapped for cash, or alternatively they allowed class members to buy a wide range of low-cost products under $12." *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 2020 U.S. App. LEXIS 35366, at *21 (9th Cir. 2020) (citing *In re EasySaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018)). The same distinctions apply here that preclude the use of the "limited" exception in *Online DVD*, which, as *EasySaver* held, applies only to coupons all class members view as "equivalently useful" as cash. *In re Online DVD-Rental Antitrust Litig.*,

[1] "OB," "PB," and "DB" refer to the opening brief, plaintiffs' brief, and defendants' briefs respectively.

779 F.3d 934, 952 (9th Cir. 2015). Yet the district court here committed the same reversible error identified in *Chambers* and *EasySaver* by valuing vouchers at their face value instead of the redemption rate. Massage Envy is thus incorrect when it claims (DB3) that Oreshack is not challenging the district court's failure to apply *EasySaver* correctly. Oreshack expressly noted the district court's error (OB31-35), and it is appellees who fail to engage with Oreshack's rebuttal by repeating the district court's errors. The district court got *EasySaver* wrong as a matter of law, and thus came to the wrong conclusions about the applicability of the Class Action Fairness Act and committed reversible error. An affirmance would depart from binding precedent in this Court, create a split with every other circuit to consider the question, and do violence to the English language and the plain meaning of 28 U.S.C. § 1712. OB28-40.

On top of all of that, the settlement contained a "kicker"—which meant that when the district court calculated a fee award that was about $602,000 less than the clear-sailing amount that the parties negotiated to benefit the class attorneys, it went to Massage Envy instead of the class. "If the defendant is willing to pay a certain sum, there is no apparent reason the class should not benefit from the excess allotted." *Roes*, 944 F.3d at 1059-60 (quoting with alteration *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011)). The district court offered no rationale for disregarding this self-dealing in approving the settlement, itself a reversible error under *Bluetooth* and *Roes*, simply finding that there was no "collusion." But the absence of collusion is a necessary, rather than sufficient, condition: a court must also examine "subtle signs that class counsel have allowed pursuit of their own self-interests to infect the negotiations." *Roes*, 944 F.3d at 1043 (quoting with alteration *Allen v. Bedolla*, 787 F.3d 1218, 1223-24

(9th Cir. 2015)). Those signs are far from subtle here, where the attorneys are due to receive more than twice as much as the likely redemption value of the vouchers they negotiated for their clients. OB43-48.

Because of these independent errors of law, the settlement approval must be reversed.

Argument

I. Regardless of whether Massage Envy vouchers are "coupons" under CAFA, the Ninth Circuit requires the district court to evaluate their value as a matter of economic reality. The district court committed reversible legal error in presuming that face value applied even though all parties acknowledged that many vouchers would expire unredeemed and worthless, but failed to present any evidence of their redemption value.

The law requires district courts to examine proposed class action settlement agreements in the light of "economic reality." *E.g.*, *Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015); *accord Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1052-55 (9th Cir. 2019). The economic reality is especially important when the settlement compensates class members not with cash, but with vouchers that can "mask[] the relative payment of class counsel as compared to the amount of money actually received by the class members." *Roes*, 944 F.3d at 1053 (cleaned up).

In *Roes*, a labor class action brought against strip clubs by a class of 4,700 dancers, a settlement provided injunctive relief; a $2 million cash common fund (with a possible augmentation of another $1 million) to make payments of at least $350 per claiming class member; and up to $1 million in "vouchers" that class members could claim instead of cash. 944 F.3d at 1042. The vouchers could be used to pay for dance fees

with the defendant's clubs; class members had two years after the settlement approval to claim vouchers and two years to use the vouchers. *Id.* Attorneys received $950,000. *Id.* at 1043. The district court approved the settlement over objections, holding that the "vouchers" were not coupons because they were worth thousands of dollars and thus were "not the ordinary illusory coupon payment with a more arguable lack of value" and ascribed the full $1 million in value to them. *Id.* at 1052. On appeal, this Court reversed without deciding whether the "vouchers" fell within the ambit of CAFA: either way, the district court had an obligation to determine the actual value to the class instead of assuming a 100% redemption rate. *Id.* at 1051-56.

Though *Roes* was central to Oreshack's appeal, plaintiffs never mention it. Massage Envy tries to distinguish *Roes* (DB36-37) by saying that $30 million of vouchers were "made available" in this case and the court only valued the $10 million of vouchers that were claimed. That does not distinguish *Roes*: it is reversible error to use a "full [face] valuation … despite the fact that all unclaimed *and unredeemed* … vouchers would revert back to the defendants" after the expiration date. *Roes*, 944 F.3d at 1054 (emphasis added). The district court committed the same reversible error here.

The "already-claimed vouchers" are not the economically real benefit under either CAFA under *Inkjet*, or Rule 23(e) under *Roes*. *Cf. also Chambers*, 980 F.3d 645, 2020 U.S. App. LEXIS 35366 at *29 (repudiating plaintiffs' valuation based on "face value" of cash reimbursements without acknowledgment that "over 80% of those claims were deemed facially deficient"). There is no economically realistic world in which class members realize 100% or anywhere near 100% of the $10m in distributed vouchers

(either by redemption or secondhand sale). The parties and court acknowledged that below. 1-ER-47-48; 1-ER-60-61.

It was the settling parties' burden to prove the settlement satisfied Rule 23(e)(2)(C)'s proportionality requirements. The district court erred as a matter of law in failing to hold them to that burden and failing to draw the adverse inference from their hiding the ball. Defendants assert that Oreshack's argument about the burden is based solely on the district court's statement about a failure to prove disproportionality. This would be enough to demonstrate reversible error, but Oreshack's complaint is more than that: the settling parties presented *no* evidence of a redemption rate,[2] whether it be from *Hahn*, other cases the parties have litigated, or the settlement administrator had administrated, from expert witnesses, other Massage Envy promotions, evidence of the resale value of the vouchers—nothing. They simply asked the court to presume 100% redemption, and the court did that. As Massage Envy agrees, beginning with a "presumption" of settlement fairness is "improper[]." DB37.[3] So too with presuming

[2] Plaintiffs' claim (PB36 n.5) that the district court had a "reasonable estimate" of a redemption rate is not supported by their record cite. 1-ER-47 (counsel did "not know the redemption rate" and had "not looked into" the ultimate redemption rate given that multiple coupons were issued to *Hahn* class members). *See generally* OB24-26. Even if we accept an overestimate of 20% from *Hahn*, there's a big difference between a $10M face valuation and $2M of redeemed coupons.

[3] Plaintiffs' brief reveals why the district court made this error. Plaintiffs get the law exactly wrong by relying on a quote (PB1) from an inapposite case decided before the 2018 amendments and *Roes* and where the question of allocation between class counsel and the class was never at issue. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Plaintiffs relied on the same misleading quote before the district court. 1-DSER-44.

the individual elements of fairness. Plaintiffs admit "the district court has an obligation to gaze behind the curtain." PB34. The district court did not meet that obligation.

District courts must "scrutinize closely the relationship between attorneys' fees and benefit to the class in order to avoid awarding unreasonably high fees simply because they are uncontested, and ensure that counsel do not secure a disproportionate benefit at the expense of the unnamed plaintiffs who class counsel had a duty to represent." *Roes*, 944 F.3d at 1054 (cleaned up). This means "investigat[ing]" whether non-pecuniary relief is really worth its asserted value and is "not unfairly inflating attorneys' fees." *Id.* Plaintiffs' argument (PB12) that a court can simply defer to settling parties' assertions contrary to common sense is simply not the law.

Massage Envy tries to rescue this reversible error by asserting (DB56) that the redemption rate is only relevant if CAFA applies. This affirmatively misrepresents Ninth Circuit law. *Roes* expressly rejected any need to resolve the question of the applicability of Section 1712. A court has to look at the economic reality "[r]egardless of whether the [Massage Envy] vouchers are officially 'coupons' within the meaning of the Class Action Fairness Act." *Roes*, 944 F.3d at 1052. (*Compare* the subtle but incorrect implication otherwise in DB49.) As in *Roes*, the "vouchers had an expiration date" and "required class members to do business with defendants again in order to redeem." *Id.* at 1053. As in *Roes*, unused vouchers revert to the defendant, "inflat[ing] the value of the settlement and the resulting attorneys' fees." *Id.* at 1054.

Williams v. MGM-Pathe Commc'ns Co., 129 F.3d 1026, 1027 (9th Cir. 1997), which plaintiffs cite (PB38), is not to the contrary. *Williams* involved a fee dispute between plaintiffs and defendants that has nothing to do with a case about settlement fairness

under Rule 23(e). *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014) (rejecting identical argument). And even if *Williams*, a case without class objections, somehow affected Rule 23(e) disputes, it was superseded by the new Rule 23(e)(2)(C). 2018 Committee Notes (requiring consideration of "the attorney-fee provisions" in view of the "proposed claims process" and "relief actually delivered to the class" (emphasis added)). If *Williams* stood for the broader proposition that hypothetical recovery dictates settlement fairness, then *Allen*, *Roes*, and *Vargas v. Lott*[4] would have come out differently.

Roes is not as ambivalent as plaintiffs suggest (PB38-39). "Although we leave the final fairness determination to the district court … we identify several aspects of the settlement that in our view cast serious doubt on whether the settlement meets the applicable fairness standard." 944 F.3d at 1050. *Roes* requires reversal and remand here, but this settlement is worse than *Roes*, not only because of the absence of cash and the resultingly larger disproportion, but because the kicker actually cost the class money. *See* Section III.C below.

[4] 787 Fed. Appx. 372 (9th Cir. 2019).

II. This isn't a close case: the "vouchers" are "coupons."

A. The lower court should have applied CAFA.

Appellees don't seriously dispute that the "vouchers" are "coupons" under a plain-English language definition of "coupon" or under the legislative history of CAFA. OB28-31.[5]

It does not matter (and it didn't matter in *EasySaver*) whether an instrument can be used to buy a whole product. *Contra* PB32-33. The legislative history identifies such vouchers as coupons. OB31. "[T]he idea that a coupon is not a coupon if it can ever be used to buy an entire product doesn't make any sense, certainly in terms of the Act." *Redman v. RadioShack Corp.*, 758 F.3d 622, 635 (7th Cir. 2014). Indeed, the first coupons ever widely issued—in 1887—entitled the recipient to a free glass of Coca-Cola. Plaintiffs' argument is simply baseless. "[C]ontemporary dictionaries generally define a 'coupon' as an item that entitles its holder to a free or discounted product." *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d 471, 489 (4th Cir. 2020).

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[5] Plaintiffs half-heartedly try to create a distinction (PB30-31) between "vouchers" and "coupons." The argument is entirely *ipse dixit*, and contradicts the CAFA legislative history. OB31. But even under plaintiffs' weak attempt, the Massage Envy vouchers fall squarely on the "coupon" side of the ledger: members will use the coupons on promotional introductory offers. OB21 (citing 1-ER-55); DB40.

Plaintiffs' statutory definition of "gift card" (PB31) proves Oreshack's point: the vouchers are not gift cards, because they expire in sixteen months. *Compare* 15 U.S.C. § 1693*l*-1(c) *with* 1-ER-146-47. *See generally* OB14; OB31-33.

Instead, appellees in effect argue that the *EasySaver* test requires a court to disregard the plain meaning of "coupon" and 28 U.S.C. § 1712 and pretend that some coupons aren't coupons. *EasySaver* does no such thing, as *Chambers* points out. *See* page 1 above; *see generally* OB31-36. Unlike gift cards, vouchers expire and cannot be "swapped for cash." *Chambers*, 2020 U.S. App. LEXIS 35366 at *21. They are coupons "despite the settlement agreement's refusal to use that term." *Id.*

Appellees wrongly argue (PB17; DB47) that *EasySaver*'s determination that vouchers that expired and were not freely chosen instead of cash were coupons is distinguishable because those credits required class members to engage in the same business that resulted in injury. But *EasySaver* expressly rejected this argument. The *EasySaver* district court

> concluded that this settlement was 'stronger than' the settlement in *In re Online DVD* in terms of how closely the relief matched class members' alleged injury… [but] inclusion of this factor conflated the coupon analysis with whether the settlement was fair and reasonable.

EasySaver, 906 F.3d 747, 756 (9th Cir. 2018). Massage Envy relies on similar errors of law and analysis from the district court below. *See* DB47 (quoting 1-ER-45, 61); *see also* PB25-26. But "to the extent the settling parties are correct that class members have a strong interest in receiving these coupons, the coupon redemption rate should reflect that interest." *EasySaver*, 906 F.3d at 756 n.6. *Accord In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir. 2015) (CAFA coupon provisions apply to settlement that provided "replacement vouchers for free drinks" (i.e. "coupons given to replace coupons")). In any event, it's not even a distinction: for class members to get

introductory-member pricing, they would have to "hand over their billing information again to the very company that they believe" overcharged them. DB47 (quoting *EasySaver*).

Massage Envy argues that the *Online DVD* exception does not just apply to broad-based retailers like Wal-Mart, but that argument contradicts *EasySaver*:

> To begin, the credits are categorically different from Walmart gift cards. Defendants are decidedly not *giant retailers* in the mold of Walmart or other similar stores, and class members can only use the credits to purchase items from a *limited universe of products*: flowers, chocolates, and other similar gifts.

906 F.3d at 756-57 (emphasis added). It also contradicts *Online DVD*. OB33. Massage Envy here sells 251 unique products. OB10; 1-ER-28. The "limited universe" from the Provide Commerce Defendants in *EasySaver* amounted to thousands of items, certainly nothing like the millions of items sold at Wal-Mart.com, but still more than the few hundred sold by Massage Envy. The better reading of *Online DVD* is that its "limited exception" applies only to broad retailers like Amazon, Wal-Mart, Target, and Apple Pay, which don't require class members to buy siloed categories of wares.

Defendants cherry-pick silly distinctions with other settlements. DB49. What's the principled legal basis—much less textual basis in § 1712—to suggest that if an instrument expires in six months it is a coupon, but if it expires in sixteen months it is not? The extra months just makes it a better coupon, not a non-coupon. We can cherry-pick in the other direction. The credits in *EasySaver* were fully transferable. So were the

drink vouchers in *Southwest*. Transferability doesn't alter the ontology of a coupon.[6] Yes, transferability, stackability, or other hallmarks of flexibility can produce the "best coupons" but they don't transmogifry water into wine or coupons into non-coupons. They just make the coupons more likely to be redeemed—but that's why we track the redemption rate under § 1712.

Appellees otherwise ignore Oreshack's analysis of *EasySaver*, which conclusively demonstrates that the coupons here are coupons under CAFA.

The settling parties repeatedly rely (PB15, 19-20, 25, 32; DB48) on the unpublished split decision in *Hendricks v. Ference*, 754 F. Appx. 510 (9th Cir 2018), without persuasively addressing Oreshack's demonstration that that decision contradicted *Online DVD*. OB41-42. Because *Hendricks* is non-binding, this Court and

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[6] Recall too that there is no record evidence of a viable secondary market for Massage Envy vouchers that expire in sixteen months. (Class counsel didn't volunteer to be paid in vouchers for good reason.) Transferability is hardly sufficient demonstration of cashlike behavior in the absence of evidence of a secondary market where vouchers can be sold at face value. An Ebay search for "Massage Envy coupon" would be extra-record, but on December 28, such a search reveals that Massage Envy *gift cards* (which do not expire) were selling for substantial 40% discounts to face value (including the seller covering the shipping expense of the physical gift card). Expiring vouchers would surely require even larger discounts to have any purchasers at all. It was the settling parties' burden to prove that the value of the vouchers was anywhere near face value. There is no record evidence supporting any finding that they met that burden, and the district court erred as a matter of law under *Roes* in simply presuming the vouchers were equivalent to cash.

Rael v. Children's Place (cited at DB50) is not good law: the court reversed itself in response to a Center for Class Action Fairness client's objection, and held the vouchers subject to CAFA. No. 3:16-CV-00370-GPC-LL, Dkt. 105 (S.D. Cal. Oct. 23, 2020).

can simply disregard the erroneous decision without trying to reconcile the two cases. Cir. R. 36-3(a). Plaintiffs criticize Oreshack (PB20-21) for his reading of *Online DVD*, but it's consistent with the *Hendricks* dissent: "the considerations articulated in *In re Online DVD* were not intended to be of equal importance, and that the narrow use of the vouchers here should be given dispositive weight in this case." *Hendricks*, 754 Fed. Appx. at 513 (Friedland, J., dissenting).

Appellees argue (PB22; DB51) that the district court did not abuse its discretion in applying the *EasySaver* test, notwithstanding its absurd conclusion that no one disputes contradicts the plain language of the statute. But whether the settlement relief is a "coupon" for purposes of Section 1712 is a question of statutory interpretation, and thus a question law reviewed *de novo*. Is the *EasySaver* three-factor test a balancing test, or, as *EasySaver*'s author implied in the *Hendricks* dissent, a mandatory checklist? This is a question of law. A court does not have the discretion under *Online DVD* to hold that an expiring instrument that cannot be used as a cash-equivalent to purchase a wide variety of goods and services is not a coupon: it would be an error of law to contradict *Online DVD* like that.[7] If *Online DVD* believed otherwise, it would have not endorsed *Synfuel* or emphasized the different legal nature of non-expiring "gift cards."

[7] Plaintiffs argue (PB23) that the district court found such a "broad range." No, the court didn't: "they are a select group of products and services. It's not just one thing…but it's within a class of products. And that's kind of a distinction from a store like Walmart that sells everything. In the same light, it's a class of products that people are interested in." 1-ER-44-45. Again, the last sentence is error under *EasySaver*. 906 F.3d at 756 n.6.

Plaintiffs also misstate (PB24-25) Massage Envy's pricing by quoting the discounted member pricing: for non-members, prices are twice as much. *See* 1-ER-108;

Plaintiffs mention (PB28) that class members have opted out, but it's hard to see why that's relevant to whether vouchers are coupons. *EasySaver*; *Chambers*; *Inkjet*; and *Lumber Liquidators* all involve (b)(3) opt-out settlements.

Remarkably, plaintiffs have the *chutzpah* to purport to express pride rather than shame that they've negotiated a settlement where 94% of the class has no interest in the relief; they claim this as evidence that the vouchers are desired. PB27. Even assuming *arguendo* the absurd premise that a 94% rejection rate shows desirability, plaintiffs are again making the same legal error *EasySaver* identified: whether discount vouchers are desirable goes to how many of them will eventually be redeemed when a court calculates fees under § 1712, not whether the discount vouchers are coupons. 906 F.3d at 756 n.6. The "only logical conclusion under the correct legal rule is that these credits are coupons under CAFA." *Id.* at 758.[8]

1-PSER-124. Massage Envy cites an assertion during the fairness hearing to the contrary (DB40 (citing 1-ER-55)), but the only record evidence on the subject contradicts the claim. 1-PSER-90.

Plaintiffs further misstate (PB42) the participation rates: non-members were significantly less likely to make claims: yes, 46% of claimants were former members, but the vast majority of the class, as plaintiffs admit (PB8), were former members. 1-ER-91. Massage Envy gets those numbers backwards when it incorrectly says the majority of the class is current members. DB32; DB47-48. Defendants do the math correctly when they note claims rates that are 40% lower for former members than current members, despite questionably characterizing that wide disparity as a "similar rate." DB41.

[8] It's odd that Massage Envy argues (DB51) that Oreshack has "waived" [*sic*, forfeited] an argument about whether the settlement meets the heightened scrutiny under CAFA when Oreshack has argued that the settlement can't survive regular scrutiny under *Roes*. OB15, 19; *see also* OB1-2 (Statement of the Issues #1).

B. Repeated errors by district courts, including the one below, show that *Online DVD* is unworkable in practice and an *en banc* court should overturn it.

Online DVD and *EasySaver* require reversal here. But that so many settling parties try to shoehorn obvious coupons into *Online DVD*'s limited exception to CAFA—and that so many district courts let them do it, even when the coupons are as risible as those in *EasySaver*—shows that its judicially created exception is unworkable and should be reversed. This is not an "implicit[] conce[ssion]" (DB21) that the district court applied *Online DVD* correctly: it's merely noting that *Online DVD*'s belief that courts would "ferret[] out deceitful coupon settlements" has been contradicted by the Ninth Circuit's repeated need to intervene in cases like *EasySaver* and *Chambers* and this one. *Online DVD* underestimated the willingness of settling parties to flout the plain language of the Class Action Fairness Act and try to persuade district courts to erroneously allow the extratextual "limited" exception to swallow the rule. Oreshack's discussion (OB40-43) merely preserves the issue, and gives the Court important background in construing these cases and the need for an opinion with more clarity than previous cases have had.

En banc might not be necessary if this Court clarifies that *EasySaver* does not create a balancing test, but rather an exception from § 1712 that applies only if *all three* of the *EasySaver* prongs are met: an "equivalently useful to cash" test. 906 F.3d at 758. That would resolve the *Hendricks* dissent's prescient concern about "endless litigation" without a "simpler rule." *Hendricks*, 754 Fed. Appx. at 515 (Friedland, J., dissenting). It would be entirely consistent with all of this Court's other jurisprudence, except the unpublished split decision in *Hendricks*—which can't be reconciled with *Online DVD*'s

endorsement of *Synfuel*. Certainly neither appellee tries to reconcile the two Ninth Circuit cases, or even acknowledges *Online DVD*'s attempt to fit with *Synfuel*.

Indeed, plaintiffs accidentally admit the *Online DVD* line of cases misreads the statute. *EasySaver* holds it important that *Online DVD* class members (unlike the class members here) could choose between cash and coupons. 906 F.3d at 758; *see discussion* at OB14 and OB32. Plaintiffs argue (PB28 n.1) that this Court should disregard this part of *EasySaver*, because § 1712(c) expressly contemplates "mixed" settlements.[9] Plaintiffs are also welcome to seek *en banc* review to reconcile the discrepancy between the precedent and the statute, but *EasySaver* requires as a matter of law a finding that the vouchers are coupons. What plaintiffs can't do is mix and match the parts of *EasySaver* they like on the grounds that the decision contradicts the statute; after all, the district court ruling also contradicts the plain language of the statute.

III. Independent of CAFA, the district court committed reversible error in approving a settlement that exhibits preferential treatment to class counsel.

When approving a class action settlement, courts must vouchsafe not only its adequacy with respect to the strength of the class's claims, but also its fairness with respect to class members' share of the settlement vis-à-vis "any proposed award of attorney's fees." Fed. R. Civ. P. 23(e)(2)(C)(iii); *accord* OB43-49; *Bluetooth*; *Pampers*; *Roes*.

[9] Ironically, in a different part of their brief, plaintiffs quote (PB40) an *Online DVD* footnote about a district court's discretion to determine that gift cards were the equivalent of cash—leaving out the part of the footnote where *Online DVD* said it was because *Online DVD* class members had a cash option and chose the coupons instead of cash, the exact reasoning plaintiffs criticize *EasySaver* for.

Yet, in their answering brief plaintiffs entirely fail to mention Rule 23(e)(2)(C)(iii). Defendant's answer is that "it is axiomatic" that the settlement must survive because Oreshack does not raise other issues of fairness beyond the "myopic" concern of preferential treatment to class counsel. DB2, 19, 24-26. The premise is mistaken as Oreshack's challenge to the coupon valuation *does* constitute a challenge to the "effectiveness of distributing relief to the Class." *Contra* DB25. If the settlement were actually and effectively distributing $10 million of value to the class as the settling parties allege, then Oreshack would not have appealed or even objected.

Massage Envy complains (DB2; DB24-25) that Oreshack did not challenge the district court's discussion of the *Churchill Village* factors. The correct answer to this is "So what?" Even if all eight *Churchill Village* factors favor approval, that is "not enough to survive appellate review." *Bluetooth*, 654 F.3d at 946. The *Churchill Village* factors go to whether the *size* of the settlement is large enough; but Oreshack's objection and appeal is not that the sum value of the gross settlement (approximately between $4-$5 million) is too small; it is about the *allocation* of that sum being unfairly split between class counsel ($2.6 million) and Massage Envy (a $0.6 million kicker reversion), with the class coming in second, or perhaps even third in violation of Ninth Circuit law and Rule 23(e). The *Churchill Village* factors are as irrelevant to this appeal as the question of Rule 23(a) numerosity. It is thus a red herring when appellees expound at length about the difficulty of the case and likelihood of recovery at trial. *E.g.*, PB12, DB19-21. *See* Section III.A below.

Contrary to Massage Envy's arguments, *Campbell v. Facebook* does not override the Ninth Circuit precedents Oreshack relies upon here. 951 F.3d 1106 (9th Cir. 2020).

By any fair reading, *Campbell* did not credit the idea that a lopsided settlement can be approved as long as it satisfies the *Churchill Village* factors. Rather, *Campbell* spent several pages explaining why the *Bluetooth* concerns of self-dealing were ultimately not present in that case. Specifically, (i) Campbell attempted but could not obtain a Rule 23(b)(3) damages class certification; (ii) the settlement thus released only injunctive claims *without releasing damages claims*; *and* (iii) Campbell could justify a fee that amounted to "a substantial lodestar discount" in conjunction with a post-certification Rule 23(b)(2) injunctive-relief-only settlement that the district court found valuable. 951 F.3d at 1125-27. *None* of those justifications apply to this case, where (b)(3) damages claims were released for putative compensation that the district court made no attempt to determine the economic reality of, but over 98% of the class will receive nothing while the attorneys receive a multiple of lodestar.

Massage Envy truncates a quotation to distort *Campbell* and make it appear more favorable to the defense of the settlement. DB57. Where a (b)(3) monetary recovery is precluded by the litigation posture, *Campbell* found that there was no indication "that the class would have gotten meaningfully more *injunctive or declaratory* relief if [Defendant] had merely been permitted to oppose class counsel's fee application." 951 F.3d at 1127 (italics added). Defendant omits the italicized language because, where monetary class relief is not foreclosed, "the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." *Roes*, 944 F.3d at 1051 (quotation omitted). That likelihood is realized when the fee is not only unopposed but disproportionate. *Campbell* found that a reversionary fee was not problematic when dealing with an injunctive-only Rule 23(b)(2) settlement—no

recovery was going to the class anyway. 951 F.3d at 1126. But in a 23(b)(3) settlement involving nonpecuniary recovery, reversions *are* problematic, because that's money that the defendant made available for settlement that should have gone to the class. *Roes*, 935 F.3d at 1058-60.

Plaintiffs' contrary argument that the separate payment of attorneys' fees allayed any concerns only demonstrates that neither they, nor the district court decision they cite, understand *Bluetooth*. PB46. The separate payment *creates* the issue by preventing any fee reduction—about $600,000 here—from benefiting the class.[10] It also is a "gimmick" to deprive objectors of standing to challenge fees directly: the course both plaintiffs and defendant suggest that Oreshack should have taken. *Compare* PB49; DB51-54, *with Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014); *Glasser v. Volkswagen of Am.*, 645 F.3d 1084 (9th Cir. 2011) (objector lacks standing to challenge counsel's segregated fee where she does not also assert a constructive common fund theory of settlement unfairness).[11]

A. The weakness of the case is irrelevant to the fairness of the allocation.

Both plaintiffs and the defendant seek refuge in the potential litigation obstacles, risks, and weaknesses. PB12, 41 n.7; DB19-20, 26-31. This is non-responsive to Oreshack's appeal because he does not maintain the gross constructive common fund

[10] Nor are plaintiffs right to say that "only" the Class Counsel payment is subject to a reversion (PB47), because the unredeemed coupon value itself will also revert.

[11] Defendant's claim (DB58) that Oreshack has "waived any argument based on the clear-sailing provision" is nonsense. OB46-47, 48-49.

should have been larger. Weak claims are appropriately settled by a modest settlement (and this one was modest at under $5 million in value—$3 or less per class member, made to seem larger only because the vast majority of the class got $0); but plaintiffs' counsel may not negotiate $3.3 million dollars for itself while the absent class members' ultimate recovery will amount to $1 million or so. Oreshack is not claiming that the settlement should have been worth $50 million or $10 million instead of under $5 million. His appeal simply points out that the ratio of class recovery to attorney recovery is impermissibly upside down as a matter of Ninth Circuit law.

For example, in *Bluetooth*, there was no dispute that the underlying claim of consumer fraud because of the danger of hearing loss from headsets—the merits of which the Ninth Circuit rejected in *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009)—was essentially worthless. *Bluetooth*, 654 F.3d at 946. Likewise, in *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013), the underlying claims were so weak that the case only settled while appeal was pending after the district court had dismissed the lawsuit. Even worse, the negotiated fee here was nearly twice lodestar, unlike the fractional multipliers in *Inkjet* and *Bluetooth*.

Defendant's argument conflates *the adequacy* of the settlement relief with the *fairness* of the settlement allocation. *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013), is instructive. Rumors that a new diaper product contained chemicals that caused diaper rash led to a Consumer Product Safety Commission investigation and numerous piggyback class actions. *Id.* at 715. But the class actions were meritless: American and Canadian regulators found no connection between the product

components and diaper rash, and defendant Procter & Gamble had done nothing wrong. *Id.* at 715-16.

The class actions settled for millions in attorneys' fees and perfunctory class relief that the district court found sufficiently valuable to justify approving the settlement. *Id.* at 717. The Sixth Circuit reversed. Yes, the peppercorn of relief was adequate, given the worthlessness of the underlying claims; for this reason, a dissenting *Pampers* judge would have affirmed. 724 F.3d at 723 ("Although the relief offered to the unnamed class members may not be worth much, their claims appear to be worth even less"). But the *Pampers* majority recognized that the settlement wasn't fair: the class was giving up something in that the defendant was willing to settle for millions of dollars, but the attorneys were keeping all of those millions of dollars for themselves. 724 F.3d at 717-18; *cf. also* Advisory Committee Notes to 2018 Amendment of Rule 23(e)(2)(C) ("Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement.").

While *Campbell* observed "how little the class could have expected to obtain if it had pursued claims further" (DB26, quoting 951 F.3d at 1124), it did not do so in its section responding to the issue of self-dealing. Unlike the *Campbell* objector, Oreshack isn't arguing that the relief is "worthless" and that settlement approval was error for that reason. Massage Envy has already agreed to part with a constructive common fund of in the $4 to $5 million range, and "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) (internal quotation omitted).

Further, part of Massage Envy's argument is that the class could not have been certified for litigation because of predominating individual issues and because a subset of the class are subject to a unique defense—the release in the earlier *Zizian* settlement. DB28, DB29-30. But that's the very reason why pre-certification settlements are given more scrutiny in the first place: because class counsel lacked leverage and so negotiated the class's protections under Rule 23(b)(3). Howard M. Erichson, *Civil Litigation Ethics at a time of Vanishing Trial: Settlement in the Absence of Anticipated Adjudication*, 85 FORDHAM L. REV. 2017, 2029 (2017). Heightened scrutiny recognizes that "the requirements for certification are not the defendant's to waive; they are intended to protect absent class members." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013). And it recognizes that settlements "may be discounted based on the merits of the claim" but "should *not* be further discounted by the risk that a claim will not be eventually certified for class treatment." *Porath v. Logitech, Inc.*, 2019 WL 266258, 2019 U.S. Dist. LEXIS 9378, at *5 (N.D. Cal. Jan. 18, 2019), *mandamus den'd*, 784 Fed. Appx. 514 (9th Cir. 2019).

Perhaps plaintiffs brought such a weak case that a single peppercorn would have been adequate compensation for the release, and Massage Envy dramatically overpaid a "windfall." DB19-20. That is irrelevant to the fairness of the *allocation* under Rule 23(e)(2)(C) (a rule plaintiffs never mention), because unfair preferential treatment to class counsel in a settlement requires reversal, even when the underlying litigation is entirely meritless, as it was in *Bluetooth* and *Pampers*. Any newly invented exception to *Bluetooth* and Rule 23(e)(2)(C) for weak cases would have the perverse result that

attorneys are entitled to be paid more for settling weak cases than for settling strong ones.

The weakness of the underlying case is irrelevant.[12]

B. The district court erred by focusing its attention on collusion and shifting the burden to Oreshack to prove unfairness.

Plaintiffs assert that the district court did not improperly shift the burden of persuasion to Oreshack, only that it recognized his "failure to present any supposed facts underlying his arguments." PB38. But the facts are on the face of the agreement; Oreshack has no burden to show any behind-the-scenes collusion. OB37-48. *Lobatz v. U.S. W. Cellular of Cal., Inc.* involved a situation where the objector sought discovery of settlement negotiations, but had failed to make a *prima facie* showing of collusion. 222 F.3d 1142, 1148 (9th Cir. 2000). It has no relevance to Oreshack's objection to a lopsided settlement allocation.

Oreshack wasn't arguing collusion. He was arguing self-dealing, and the *prima facie* evidence for that—that vouchers would expire unredeemed, that the settlement

[12] Also irrelevant: plaintiffs' false *ad hominem* attacks on Oreshack's counsel. PB1. A settlement does not become more or less fair based on the identity of the objector's attorney. For Rule 23(e) to yield its promise of fair settlements, "it may indeed be necessary and desirable for committed individuals to bring serial litigation." *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1175 (9th Cir. 2010) (ADA). Frank has won the majority of Ninth Circuit appeals he's litigated (1-FER-4-5)—*and* three of the four coupon appeals he's argued: *EasySaver*, *HP Inkjet*, and *Redman*. Worse, plaintiffs *know* that their irrelevant arguments and name-calling are false and misleading about Frank's record and motivations because Frank rebutted them in the district court. 1-FER-7-8 (¶¶13-16).

had a clear-sailing clause, that the settlement had a "kicker" that cost the class $602,000—was on the face of the agreement. And Oreshack didn't seek the sort of lengthy discovery at issue in *Lobatz*. Rather, he asked the court to fulfill its duty to inquire into a single number: the likely redemption rate from a coupon settlement in *Hahn*. OB11. Even now, appellees hide this figure from this Court. We *know* that the number is embarrassingly low, because if the number demonstrated that the coupons were worth more than pennies or nickels on the dollar, the parties would have happily disclosed it in the district court or here to eliminate a possible source of reversible error. *See also* OB37-38.

Massage Envy characterizes (DB56) Oreshack's argument as "premised entirely" on a statement during the final fairness hearing. No, though that statement was an error of law, the Court also failed to compel the parties to demonstrate *any* evidence of a redemption rate, which evidence they could have presented from *Hahn,* other cases they have litigated, other cases their administrator has administrated, other promotions from the defendant, etc. Or any evidence of a secondary market value. Or any evidence other than the face value. OB20-26. Under *Roes*, the necessity for these inquires does not turn on Oreshack "show[ing] that CAFA applied." *Contra* DB56.

The settling parties downplay as a "semantic affair" the district court's framing of the issue as a matter of collusion. PB48; *see also* DB55. But it matters more than they let on, because if district courts wrongly view collusion as *the* guidepost, rather than a separate issue, then they'll be likely to defer to the existence of arms' length negotiations or presence of mediators, when the adversarial process is no handbrake against misallocated settlements. *Pampers*, 713 F.3d at 717-18. This Court has repeatedly

confronted this error. *Roes*, 944 F.3d at 1050 n.13; *Bluetooth*, 654 F.3d at 948. And for good reason. No collusion in smoke-filled rooms is required to create an unfair settlement, merely a class counsel and a defendant acting at arm's length in their own self-interest each without putting the interests of absent class members first. Courts that focus on once-in-a-blue-moon collusion will entirely fail to prevent the second, more common and more significant violation of Rule 23(e).

The district court did not "substantively grapple" with the clear sailing or reversion provisions. *Roes*, 944 F.3d at 1051. Particularly, its statement that "well, they won't be paid if they're not paid" (1-ER-68) indicates that it didn't view the $3.3 million clear-sailing fee as part of the constructive common fund as it should have. It doesn't matter whether the first "they" refers to class counsel or the fees themselves as Massage Envy believes (DB59 n.4). Either way it shows that the district court disagreed with *Bluetooth* about whether the combination of clear-sailing and kicker arrangements is pernicious. The district court is entitled to its personal opinion, but it's required to follow the instructions dictated by its superior court. The district court didn't attend to the value and consequences to the class of defendant's agreement not to oppose an award of $3.3 million.

Massage Envy's agreement to not oppose nearly double lodestar fees based on the face value of coupons distributed could not realistically have cost the class nothing in relief. "There is no such thing as a free lunch." *Staton*, 327 F.3d at 964.

Class counsel bristle at being "painted as unethical." PB50. But Oreshack does not argue class counsel were unethical, nor does he seek decertification of the class under Rule 23(g)(4). Class counsel, responding to the perverse incentives created by

district courts' reluctance to follow CAFA, have reached an untenable settlement here under both CAFA and Rule 23(e), one that prioritizes their own interests above the class's. Nevertheless, Oreshack does not object to giving class counsel a second opportunity to reach a fair agreement for the class—*this time*. This Court should place future class counsels on notice that they risk disqualification for such self-dealing. Otherwise, future class counsels will have no incentive to follow the rules. Take a flyer on an unfair settlement: heads, they win and get to extract millions of dollars of preferential treatment from a settlement at their clients' expense; tails, court scrutiny prevents settlement abuse, and the attorneys are forced to renegotiate and reach the settlement they should have negotiated in the first place without any consequence.

It would take a saint to resist that temptation, and legal rules that only operate well with saints tend to be ineffective. As Justice Holmes recognized long ago, courts need to create legal rules that encourage non-saints—even a proverbial "bad man"—to do the right thing. *Cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 2627 (2005). Bright-line standards that attorneys cannot game are better than balancing tests that reward attorneys with millions of dollars if successfully gamed.

C. A bare remand to comply with CAFA does not remedy the $602,000 damage that the segregated fee structure has cost the class.

The settlement deprived the district court of the power to reduce disproportionately high attorney's fees and give that money back to the class. That is the "explanation" defendant seeks (DB21) for why the settlement itself must be reversed rather than just remanded for additional fee proceedings. Unlike in *EasySaver*, the negotiated fee here is segregated by a kicker, such that a recalculation of the fee that

would comply with CAFA does nothing to benefit the class. *See also Inkjet*, 716 F.3d 1173 (reversing settlement approval for failure to comply with CAFA where fee was segregated from class recovery). The Fourth Circuit, which decided *Lumber Liquidators*, has not yet developed a *Bluetooth*-like doctrine skeptical of segregated and disproportionate fees. 952 F.3d 471 (4th Cir. 2020).

Defendant latches on to the district court's erroneous reasoning that "one can always argue" that there is a functional reversion of unawarded fees to the defendant. DB59. But that's just false; plenty of settlements are structured so that reduced fees revert to a common fund, and thus to class benefit. *EasySaver* is one, allowing this Court to affirm the settlement approval, notwithstanding the CAFA violation: on remand millions of dollars returned to the common-benefit fund. *See also Rougvie v. Ascena Retail Grp., Inc.*, No. 15-cv-724, 2019 U.S. Dist. LEXIS 28229 (E.D. Pa. Feb. 21, 2019) (observing that objectors had impelled the settling parties to eliminate the settlement provision that segregated fees, resulting in increased recovery to the class).

Defendant also speculates that there would be no way to practically and feasibly distribute the unawarded fees to the class. DB60. That is both a failure of imagination and not supported by record evidence.[13] At base, Oreshack does identify additional relief that should have been provided to the class. *Contra* DB34. Simply, it is the excess

[13] Defendant also suggests that funding the settlement from a common fund would have reduced class benefits because the costs of administration would have eaten away the class's value. But no one is objecting to the separate payment of administrative costs. Those are already an aspect of the settlement package and there no reason that allowing the class to access the excess fees of the negotiated fee fund would change that.

in class counsel's negotiated fee, $602,000 of that amount has already been recognized by the district court as excessive. OB3, 44-47; 2-ER-104; DB59. A remand for an additional bare fee reduction does not remedy the problem.

IV. Oreshack has standing to challenge settlement approval.

Massage Envy contradicts binding circuit precedent when they accuse Oreshack of lacking standing to bring this challenge to settlement fairness. Oreshack has the right to not have his claim released as part of an unfair settlement, and that includes a settlement that disfavors a segment of the class under Rule 23(e)(2)(D). This Circuit has adopted the consensus reading of *Devlin v. Scardelletti* that "neither Article III nor prudential standing is implicated by the efforts of non-intervening objectors to appeal class-action settlements." *Churchill Village, L.L.C. v. Gen. Electric Co.*, 361 F.3d 566, 572 (9th Cir. 2004). Even if Oreshack were explicitly raising a Rule 23(a)(4) adequacy argument on appeal, he would have had standing to do that. *E.g. Larson v. AT&T Mobility LLC*, 687 F.3d 109, 131 n.34 (3d Cir. 2012); *Union Asset Mgmt v. Dell, Inc.*, 669 F.3d 632, 638 (5th Cir. 2012); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1183 & n.1 (10th Cir. 2002). *Knisley* (DB40) is not to the contrary: "one who fails to file a claim form—might still have standing to appeal the settlement; an appellate court could arguably provide redress by vacating the settlement." *Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1126 (9th Cir. 2002). "Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?" *In re Navigant Consulting, Inc. Sec. Litig.*, 275 F.3d

616, 620 (7th Cir. 2001) (Easterbrook, J.) (pre-*Devlin* case distinguishing Art. III standing from intervention requirement).

Conclusion

The settlement is unfair as a matter of law, and the settlement approval should be reversed. In the alternative, the district court committed multiple independent reversible errors of law under Ninth Circuit precedent and CAFA, and the settlement approval and fee award should be vacated and remanded for further proceedings consistent with the law.

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Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank
Adam E. Schulman
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Telephone: (703) 203-3848
Email: ted.frank@hlli.org

Attorneys for Appellant Kurt Oreshack

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The brief contains 7,944 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Executed on December 28, 2020.

/s/ Theodore H. Frank
Theodore H. Frank

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