No. 18-__

IN THE

Supreme Court of the United States

BRIAN PERRYMAN,

Petitioner,

v.

JOSUE ROMERO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 23(e)(2) of the Federal Rules of Civil Procedure requires that the district court approve class-action settlements only if a settlement is "fair, reasonable, and adequate." The limitations that this language of Rule 23(e) places on the approval of *cy pres* settlements are presently before this Court in *Frank v. Gaos*, No. 17-961 (argued Oct. 31, 2018), on a writ of certiorari to the Court of Appeals for the Ninth Circuit. In this case, the Ninth Circuit applied the same circuit precedent at issue in *Gaos* to sustain a class settlement that resulted in a mere $225,000 in cash refunds to 3,000 class members out of a class of 1.3 million (plus a mostly worthless $20 coupon to each class member).

That $225,000 paid to class members is, however, dwarfed by settlement provisions that paid $8.85 million to class counsel and directed approximately $3 million in *cy pres* to three local schools, including the *alma mater* law school of several of the attorneys. This *cy pres* is being paid to third parties even though it is "technically feasible" to pay the class (Pet. App. 22a): every class member is known from defendants' records and is receiving a distribution. Those *cy pres* awards will quite likely be increased substantially because the court of appeals below reversed the district court's refusal to apply the Class Action Fairness Act, 28 U.S.C. § 1712(a), to the $20 credits, and remanded for a recalculation of fees under that Act. Under the settlement, any decrease in fees serves only to increase the *cy pres* awards, with nothing going to the class.

The question presented in this case is similar to that presented in *Gaos*:

> Whether, or in what circumstances, a *cy pres* award that provides no direct relief or benefit to class members comports with the Rule 23(e) requirement that a settlement binding class members must be "fair, reasonable, and adequate."

Depending on how the Court decides the Rule 23 issue presented in *Gaos*, this case may well warrant summary relief in the form of an order that grants the petition, vacates the Ninth Circuit's decision below, and remands for further proceedings consistent with the Court's decision in *Gaos*. However, at issue in *Gaos* is the standing of the plaintiffs to bring the underlying suit and this Court's Article III jurisdiction to reach the Rule 23 *cy pres* issue presented. The parties and the United States have submitted extensive, post-argument briefing on that issue. In contrast, this case does not present any such jurisdictional questions. Accordingly, should the Court decline to reach the merits of the *cy pres* issue in *Gaos*, plenary review should be granted in this case to address the recurring abuse of Rule 23 class-action settlements that contain substantial *cy pres* awards, and to resolve a circuit split where the Ninth Circuit stands alone in leaving *cy pres* at the discretion of the settling parties with little required scrutiny.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Brian Perryman is a member of the plaintiff class and was an objector in the district court proceedings and the appellant in the court of appeals proceedings.

Respondents Josue Romero, Deanna Hunt, Kimberly Kenyon, Gina Bailey, Alissa Herbst, Grant Jenkins, Bradley Berentson, Jennifer Lawler, Daniel Cox, Jonathan Walter, and Christopher Dickey, were the named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Provide Commerce, Inc.; Regent Group, Inc.; and Encore Marketing International, Inc., were the defendants in the district court proceedings and appellees in the court of appeals proceedings.

Because Perryman is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Rule 23(e)(2) of the Federal Rules of Civil Procedure requires that the district court approve a class-action settlement only upon finding that the settlement is "fair, reasonable, and adequate." The limitations that this language of Rule 23(e) places on a district court's discretion in approving *cy pres* awards to non-class members is presently before this Court in *Frank v. Gaos,* No. 17-961 (argued Oct. 31, 2018). The same issue is presented here on a *cy pres* award of $3 to $9 million sustained by the court of appeals below. Thus, should petitioner prevail in *Gaos,* the Court should grant the petition, vacate the Ninth Circuit's decision below and remand for further proceedings consistent with the Court's decision in *Gaos*. If, however, the Court should fail to reach the *cy pres* issue on which certiorari was granted in *Gaos* because of standing concerns or otherwise, the Court should grant certiorari in this case to address fully the merits of the issue presented in *Gaos* and again here.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 906 F.3d 747, and is reproduced at Pet. App. 1a. The district court's initial decision approving the class-action settlement under Fed. R. Civ. P. 23(e), is reported at 921 F. Supp. 2d 1040, and is reproduced at Pet. App. 27a. The Ninth Circuit's prior decision summarily vacating that initial decision is reported at 599 F. App'x. 274, and is reproduced at Pet. App. 66a. The district court's decision on remand from that decision is reported at 2016 WL 4191048, and is reproduced at Pet. App. 69a.

JURISDICTION

The judgment below was entered October 3, 2018. Justice Kagan extended the time for this petition to February 13, 2019. *See* No. 18A608. This Court has jurisdiction under 28 U.S.C. § 1254(1). As a class member who objected to the settlement, Petitioner has standing to appeal the final judgment. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

RULE INVOLVED

At the relevant time, Rule 23(e)(2) provided, with respect to a proposed settlement, that:

> If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

After amendments taking effect on December 1, 2018, Rule 23(e)(2) reads:

> *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

STATEMENT OF THE CASE

A. Plaintiffs sue over consumer fraud on behalf of a nationwide class and settle in a manner to favor the attorneys and local San Diego universities.

The underlying litigation involves the settlement of a 2009 class action against Provide Commerce, Inc., an online business that sells flowers, chocolates, fruit baskets, and similar items, and Regent Group, Inc., a California Corporation doing business as Encore Marketing International. Plaintiffs brought suit in the Southern District of California, alleging that Provide and affiliated co-defendants fraudulently enrolled 1.3 million class members without consent into a membership rewards program that charged class members' credit cards a monthly membership fee, costing consumers tens of millions of dollars. *Cf.* 15 U.S.C. § 8401(6)–(8) (legislative finding). Provide ceased the business practice when Congress outlawed it in 2010. Restore Online Shoppers' Confidence Act, Pub. L. No. 111-345, 124 Stat. 3618, codified at 15 U.S.C. §§ 8401 *ff*.

Before the district court heard defendants' pending motions to dismiss[1] and before the plaintiffs filed any class certification motions, the case settled. The settlement, reproduced at Pet. App. 80a, created a $12.5 million cash fund, of which class counsel requested an award of $8.65 million in fees and $200,000 in costs under Rule 23(h). Pet. App. 89a, 91a. The class representatives would receive $80,000 of "Enhancement Awards" from the cash fund. Pet. App. 90a. The remaining amount first pays administration costs of the settlement and then pays class members who sought refunds of payments for monthly membership fees after filling out a two-page claim form under penalty of perjury. Pet. App. 92a–94a. In addition to this refund, each class member would receive a direct distribution of a $20 "e-credit" that could be used on Provide Commerce's websites. Defendants agreed neither to contest the amount of attorneys' fees requested, nor to introduce any evidence about the value of the e-credits. Pet. App. 91a.

Any residual unclaimed money, not used for administration costs, from this $3.65 million remainder would go to *cy pres* awards to three San Diego area universities, San Diego State University, University of California San Diego, and University of San Diego School of Law. Pet. App. 94a. USD Law was the *alma mater* of several of the attorneys on the case, though this was not immediately disclosed to the court

[1] Defendants filed separate motions to dismiss. (Dkt. 33, 34). They renewed these motions after plaintiffs filed a fourth amended complaint. (Dkt. 227, 228). Both motions sought to dismiss the complaint on the merits under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. No one contests plaintiffs' standing to sue.

or the class. The settlement provided that the *cy pres* would be

> specified to be used for a chair, professorship, fellowship, lectureship, seminar series or similar funding, gift, or donation program developed and coordinated between Provide Commerce and the respective institutions (depending on the amount of the remainder) regarding internet privacy or internet data security

Pet. App. 94a. (Provide Commerce had used *cy pres* in a previous class action settlement, *Cox v. Clarus*, No. 11-cv-0729 (S.D. Cal.), to endow a professorship in the name of one of its brands. Nancy Kim, *ProFlowers Distinguished Professor of Internet Studies*, 51 Cal. W. L. Rev. 3 (2014).) In exchange, class members released all claims to actual, statutory, and punitive damages. Pet. App. 106a–108a.

B. Perryman objects.

Class member and petitioner Brian Perryman, a Washington, D.C., attorney represented by the Center for Class Action Fairness, objected that the settlement was designed to create the illusion of relief to maximize disproportionate attorneys' fees at the expense of the class. Specifically, Perryman noted that the $20 e-credits were coupons that expired in a year, could not be used in the weeks before Valentine's Day, Mother's Day, and Christmas, and could not be used in conjunction with regularly available 25%-off discounts offered on the site. Thus, class members were exceedingly unlikely to redeem the coupons at all, much less for their full $20 face value, making their value to the class likely under $1 million. Yet,

notwithstanding these realities and in direct contravention to the restrictions on coupon settlements in the Class Action Fairness Act, 28 U.S.C. § 1712 (CAFA), the parties asked the court to value the e-credits at face value, and award fees based on that $26 million valuation.

Perryman also objected that the settlement called for a substantial *cy pres* award even though every class member was known and would receive a distribution of the e-credit. Perryman also took issue with the *cy pres* award beneficiaries, noting that even though the class was nation-wide, the *cy pres* award would go to three San Diego schools which were local to the district court and the defendant. One of these *cy pres* beneficiaries was also the *alma mater* of several counsel to the plaintiff class. Perryman Objection, *EasySaver*, No. 09-cv-02094, Dkt. 258 (S.D. Cal. Dec. 7, 2012); *id*. Dkt. 310 (S.D. Cal. Jul. 2, 2015).

C. The district court approves the settlement and fee request, the Ninth Circuit vacates and remands, and the district court approves the settlement a second time.

Only approximately 3,000 class members submitted refund requests for a total of $225,000 in cash refunds, leaving approximately $3 million of the settlement's cash fund to be distributed to the *cy pres* beneficiaries. Pet. App. 6a. The district court nevertheless approved the settlement and the $8.85 million Rule 23(h) request in full. In particular, the district court held that the CAFA's restrictions on "coupons" did not apply to the "credits" and valued the $20 credits at full face value. Pet. App. 37a-40a.

Perryman objected to the *cy pres* award, arguing that

> 1) there is an intolerable conflict of interest for class counsel owing to a preexisting relationship with a *cy pres* beneficiary; 2) there is an impermissible geographic discontinuity between the composition of the class and the location of the *cy pres* recipients; and 3) *cy pres* is improper when it is feasible to make further distributions to class members.

Pet. App. 41a. The district court rejected each objection. Building on its decision to accord the credits full face value, the district court reasoned that class members who submitted refunds and used the credit would be fully compensated while "silent class members" "will receive greater benefit from the remaining funds if they are distributed to schools for the creation of internet privacy and security programs benefitting internet consumers such as themselves." Pet. App. 48a–49a.

On appeal, the Ninth Circuit summarily vacated and remanded with instructions to reconsider the question of whether the $20 credits were "coupons" within the meaning of CAFA, as construed by an intervening Ninth Circuit decision. Pet. App. 67a–68a. On that appeal, the court of appeals did not consider the merits of the *cy pres* aspects of the district court's decision: "because class settlement is a package deal that must stand or fall in its entirety, we need not now address whether the district court abused its discretion in approving the *cy pres* distribution." Pet. App. 68a (cleaned up).

On remand, the district court, on reassignment to a new judge, once again held that the CAFA's

restrictions on "coupons" did not apply to the settlement's "credits," and again assigned them their full face value. Pet. App. 74a. The district court then awarded the full Rule 23(h) request as justified as 22.7% "of the overall recovery" of $38 million. Pet. App. 76a. The district court therefore "adopt[ed] and reinstat[ed]" its prior orders approving the settlement, including the *cy pres* aspects of the prior order, without considering the intervening law raised by Perryman. Pet. App. 78a.

D. The Ninth Circuit remands for a recalculation of fees given the coupon relief, but, following *Lane v. Facebook*, affirms the settlement approval and *cy pres*.

On Perryman's second appeal, the Ninth Circuit reversed the district court's holding that the $20 credits were not coupons within the meaning of 28 U.S.C. § 1712, and vacated the district court's award of fees. Pet. App. 1a. However, relying on its prior decision in *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), *cert. denied sub nom. Marek v. Lane*, 571 U.S. 1003 (2013), the court rejected Perryman's argument that the approximately $3 million remaining in the settlement fund—which could grow to as much as $9 million if the district court reduces attorneys' fees—should have been distributed to the plaintiff class, and should not have been given solely to San Diego universities.

In so holding, the court of appeals acknowledged that "[i]t might be technically feasible" to distribute this $3 million to non-claimant class members, but concluded that such distribution would be "*de minimis*" in that there are "over a million non-claimants." Pet. App. 22a. The court of appeals likewise ruled that it was not improper to award the *cy pres* funds to three

local San Diego schools, even though the class was nationwide, holding that the *cy pres* was designed to fund "internet privacy and data security" and those topics were "of national scope." Pet. App. 23a. The court similarly concluded that class counsel's alumni connections to one of these schools "did not impermissibly taint the selection process" or create an "appearance of impropriety" because there was no evidence of "a continuing relationship between the attorneys and their alma mater." Pet. App. 24a. The court reasoned that the "specter" of impropriety was "far less haunting" because the "award is tethered to class members' interests and underlying claims." *Id*.

Finally, the court found it "unnecessary to reverse the entire settlement approval in conjunction with [its] vacatur of the fee award," reasoning that "[f]rom class members' perspective, the only thing that reducing the fee award would do is to increase the amount ultimately paid to the *cy pres* recipients." Pet. App. 25a. For that reason, the court of appeals concluded, class members "would not have made different decisions had they known that the fee award would be recalculated" and that "the district court would not have made a different approval decision as to whether the settlement was fair, reasonable and adequate." *Id*. The court of appeals therefore vacated the award of attorneys' fees but otherwise affirmed the district court's approval of the settlement. Pet. App. 26a.

Perryman moved the court of appeals to stay the mandate or extend the time to file a petition for panel rehearing for the decision in *Frank v. Gaos*; the court denied the motion. Pet. App. 79a. The collateral attorney-fee issue is pending in the district court, where class counsel has renewed its motion for the

original award of $8.85 million, and defendants have filed a statement of non-opposition. Dkt. 338, 342. The settlement approval and judgment is final.

REASONS FOR GRANTING THE PETITION

As the Chief Justice recognized in *Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., respecting denial of certiorari from the Ninth Circuit's decision in *Lane*), *cy pres* settlements raise "fundamental concerns." Those concerns are detailed in *Gaos* and are present here as well. Here, as in *Gaos*, the Ninth Circuit relied on the same circuit precedent that impermissibly allows *cy pres* awards to third parties even though it is undisputed that the full amount of the settlement "technically" could have been distributed to class members. Here, as in *Gaos*, the petition "presents an ideal and timely opportunity for the Court to resolve a deep circuit split over the use of *cy pres* awards in class-action settlements and provide much-needed guidance to the lower courts on a recurring issue of substantial importance." *Gaos* Petition at 16.

This Court will likely provide precisely this guidance in *Gaos*, should it reach the merits. Accordingly, this petition should be held pending a decision in *Gaos*. If the Court cannot reach the merits of the Rule 23 *cy pres* issue in *Gaos* because of standing concerns, then this petition should be granted for the same reasons that the petition was granted in *Gaos*. This case presents broad and recurring questions of law and policy that are not limited to any unique aspect of this particular case. Because of these features, and because class-action settlements are amenable to forum shopping, unless this Court intervenes, *cy pres* settlements will continue to find their way to the Ninth Circuit for approval. This case presents an ideal vehicle for addressing the issue of *cy pres*.

Unlike *Gaos*, there are no standing issues presented in this case. The standing of the individual plaintiffs, as alleged victims of a fraud, was uncontested below and is beyond cavil. The Rule 23 *cy pres* issues were fully raised and briefed below and the urgency of guidance from this Court is undiminished.

I. The circuits are in conflict.

As in *Gaos*, in this case, the Ninth Circuit applied its prior decision in *Lane v. Facebook, Inc*., 696 F.3d 811, 819 (9th Cir. 2012), *cert. denied sub nom*, *Marek v. Lane*, 571 U.S. 1003 (2013), to hold that *cy pres* awards were appropriate—even where it is possible to distribute the settlement fund fully to class members—simply because the amounts of those funds, here between $2.50 and $7 per class member, could be considered "*de minimis*." *Lane*, 696 F.3d at 821. In such cases, a *cy pres* award need only "bear[] a direct and substantial nexus to the interests of absent class members." *Id.* In *Gaos*, the Ninth Circuit doubled down on *Lane*, holding that *cy pres* awards are appropriate even if an objector raises possible feasible alternatives that would direct money to some class members and even if the plaintiffs' attorneys may have conflicts favoring certain *cy pres* recipients. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), *cert. granted sub nom. Frank v. Gaos*, No. 17-961, 138 S. Ct. 1697 (2018).

Application of this "nexus" test in this case raises concerns absent even in *Gaos*, which neither had the geographic self-dealing that occurred here, nor an already-identified set of class members in the defendant's records. Here, the Ninth Circuit relied on *Lane* to state that the very "touchstone of the inquiry" is "whether an award bears a 'substantial

nexus to the interests of the class members'" regardless of any conflicts of interest. Pet. App. 23a (quoting *Lane*, 696 F.3d at 821). Yet, the Ninth Circuit then held that this test was satisfied merely because the *cy pres* award here "funds research that is directly responsive to the issues underlying this litigation." *Id.* But the "research" funded by the *cy pres* award was into "internet privacy and data security." *Id.* Unlike in *Lane* and *Gaos*, the claims raised in this case did not turn on "internet privacy" or "data security." Rather, the complaint challenged a deceptive scheme to enroll members of the public into defendants' "rewards program" in which enrollees were charged an activation fee and a monthly membership fee. Pet. App. 3a–5a. In short, under the Ninth Circuit's "substantial nexus" test, as interpreted and applied, the award need not even have a "nexus" to the legal claims asserted in the complaint. The court's "nexus" test is thus meaningless, as it can be molded, via judicial *ipse dixit*, to fit any result deemed sufficiently meritorious in the virtually boundless discretion of judges. That is fundamentally wrong. As with class certification, *cy pres* awards must constitute more than simple "appraisals of the chancellor's foot kind—dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

Other circuits categorically reject the Ninth Circuit's nebulous test. In *Pearson v. NBTY, Inc.*, for example, the settlement allocated $2 million for awards to the 12 million class members, with $1.3 million in unclaimed funds going to a nonprofit as a *cy pres* award. 772 F.3d 778, 780 (7th Cir. 2014). The Seventh Circuit held that the *cy pres* residual was impermissible as a matter of law because the funds could have "feasibly be[en] awarded to the intended

beneficiaries" (the class members), by providing broader notice, simplifying the claims process, or simply mailing checks to people known to have purchased the product at issue from the defendant. *Id.* at 784. Here, in contrast, the Ninth Circuit rejected such alternatives even as it acknowledged that it was "technically feasible" to distribute the entire *cy pres* award to non-claimant class members. Pet. App. 22a. Indeed, the *Pearson* court *reversed* the *cy pres* award even though the *cy pres* beneficiary's mission was found to be fully "consistent" with the actual claims brought by the class (772 F.3d at 784), while in this case, the Ninth Circuit *approved* a *cy pres* award that went to geographically-narrow awardees for purposes that had nothing to do with the underlying claims brought by the class. Moreover, *Pearson* held that *cy pres* should not be valued as a class benefit in calculating attorneys' fees, another proposition rejected by the Ninth Circuit, which values *cy pres* as equivalent to cash directly paid to the class, which will increase fees in this case by millions of dollars. *Compare id. with Google Referrer*, 869 F.3d at 747–48. The conflict between *Pearson* and the Ninth Circuit's decision here is thus stark and multi-dimensional.

The Eighth Circuit took the same approach in *In re BankAmerica Corp. Securities Litigation* to invalidate a *cy pres* distribution of the $2.5 million remaining in the settlement fund where the class members were identified. 775 F.3d 1060, 1062 (8th Cir. 2015). As the court explained, the "inquiry *must* be based primarily on whether 'the amounts involved are too small to make individual distributions economically viable.'" *Id*. at 1064 (quoting American Law Institute, Principles of the Law of Aggregate Litigation § 3.07 (2010)) (emphasis the court's). As in *Pearson*, but contrary to

the Ninth Circuit, there was no requirement that the residual be able to be distributed to *every* single class member; so long as it was feasible to distribute to *some* class members, settlements must do that. The Eighth Circuit further held that the *cy pres* recipient, a local public interest law firm, was improper in a case involving violations of federal and state securities law because the district court "must look for a recipient that 'relates directly to the injury alleged'" and the *cy pres* recipient must be "more closely tailored to the interests of the class and the purposes of the underlying litigation." *Id*. at 1067. *See also In re Airline Ticket Commission Antitrust Litig*., 307 F.3d 679, 683–84 (8th Cir. 2001) ("emphasiz[ing] the importance of tailoring a *cy pres* distribution to the nature of the underlying lawsuit" and holding that "a recipient must relate, as nearly as possible, to the original purposes of the class action and its settlement") (distribution to Minnesota law schools was an abuse of discretion). The result reached by the Ninth Circuit in affirming the *cy pres* awards to three local schools in this case, despite a national class, is incompatible with these principles. *Accord Houck v. Folding Carton Admin. Comm.,* 881 F.2d 494, 502 (7th Cir. 1989) (invalidating, in national antitrust class action, *cy pres* distribution to local law schools, and directing district court to "consider to some degree a broader nationwide use of its *cy pres* discretion").

The Fifth Circuit's decision in *Klier v. Elf Atochem North America, Inc*., is likewise in conflict with the decision below. 658 F.3d 468, 475 (5th Cir. 2011). There, the court rejected a *cy pres* award of unclaimed funds from a class-action settlement, holding that such awards are impermissible if it is "logistically feasible and economically viable to make additional pro rata distributions to class members." Under this

test, a *cy pres* award may be made "only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Id*. As the court stressed, "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members" and "*[c]y pres* comes on stage only to rescue the objectives of the settlement when the agreement fails to do so." *Id.* at 475–76. By contrast, in this case, such a distribution was not only "possible," but was, as the Ninth Circuit recognized, "technically feasible." Pet. App. 22a. The Ninth Circuit thus gave away settlement funds that belonged "solely to the class members" and did so without regard to the "objectives of the settlement" by giving those funds to schools for "research" into matters ("internet privacy and data security") that were irrelevant to the legal claims actually brought by the class.

The Third Circuit has also rejected the Ninth Circuit's permissive approach to *cy pres* awards. In *In re Baby Products Antitrust Litigation,* the court vacated district court approval of a class-action settlement that, due to a low claims rate, would have distributed the bulk of the settlement fund to *cy pres* recipients. 708 F.3d 163 (3d Cir. 2013). "*Cy pres* distributions," the court stressed, "are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members." *Id*. at 169. "Barring sufficient justification," the court concluded, "*cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* By contrast, the Ninth Circuit's *Lane* jurisprudence, at issue in this case and in *Gaos*, broadly sanctions "*cy pres*-only settlements." *Google Referrer*, 869 F.3d at 741. And in this case, the vast "bulk of the

settlement" will go to the *cy pres* recipients, especially after the district court likely reduces the fees through application of the Class Action Fairness Act, as ordered by the court of appeals. (The ratio of *cy pres* to class recovery, possibly more than 40:1 if the district court reduces fees as it should, is even worse than the 5:1 the Third Circuit criticized in *Baby Products*.) In short, the result reached by the Ninth Circuit in this case could not have been reached under the principles of law applied in any of these other circuits.

The December 2018 amendments to Rule 23(e) do not resolve this circuit split, because the Rules Committee explicitly avoided addressing questions on *cy pres*, contemplating the Judiciary's continued engagement in expounding Rule 23—as well as a concern that a procedural rule authorizing *any cy pres* could violate the Rules Enabling Act. Report of Advisory Committee on Civil Rules 25–26 (Dec. 11, 2015).

II. The question presented is important and recurring, and will only grow as parties forum-shop settlements to the Ninth Circuit.

As in *Gaos*, the Rule 23 questions presented in this case are important and recurring. As in *Gaos*, many of the concerns identified by the Chief Justice in *Marek* are present, namely, "when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class." *Marek*, 571 U.S. at 1003. All of these concerns point to the same conclusion: application of the *cy pres* doctrine to class actions settlements should be sharply curtailed if not flatly

prohibited. Although the majority of circuits to consider the issue have reached this conclusion without direction from this Court, this precedent will have a limited impact, as most federal consumer class actions are nationwide in scope and can be forum-shopped to take advantage of the Ninth Circuit's permissive approach.

A. Application of *cy pres* to class-action settlements is a poor fit for the doctrine.

The use of *cy pres* awards as part of a class-action settlement is, in itself, a base contortion of the original purpose of the *cy pres* doctrine as historically applied in equity. As explained by the Seventh Circuit, "[*c*]*y pres* (properly *cy près comme possible*, an Anglo–French term meaning 'as near as possible') is the name of the doctrine that permits a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent." *Pearson*, 722 F.3d at 784. The doctrine originated in the area of charitable trusts and allowed, for example, donations to the March of Dimes to be used for purposes other than polio, once polio was conquered with a vaccine. *Id.* The "changed circumstances," in that example, was the development of the vaccine and the eradication of polio.

The use of *cy pres* to divert money to third parties has become common in class-action settlements. A 2017 article noted the use of *cy pres* in settlements were at their highest levels ever in 2015 and 2016, the most recent years covered in the cited study. Natalie Rodriguez, *Era of Mammoth Cases Test Remedy of Last Resort*, Law360 (May 2, 2017). *See also Marek*, 571 U.S. at 1003 (Roberts, C. J., respecting

denial of certiorari) ("*[c]y pres* remedies, however, are a growing feature of class-action settlements"). But *cy pres* is a poor fit for class actions when courts permit settlements to be gamed to divert material amounts of money away from the class. There are no "changed circumstances" in these class-action settlements. There is no original "benefactor" whose wishes must accommodated "as near as possible," once the true beneficiary purpose ceased to exist. Even more fundamentally, there is no "charitable objective" in a Rule 23 class action. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010) (Weis, J., concurring and dissenting in part). A class action is a procedural device to aggregate private claims for compensation to class members—not to create a charitable trust. *Cf. Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (class action is a "species" of joinder). In short, application of *cy pres* to Rule 23 class settlements unquestionably extends the doctrine far beyond its original roots and rationale into an area where the doctrine's premises are not only utterly absent but *contrary* to the purposes of Rule 23. The doctrine cannot be stretched to encompass Rule 23 class-action settlements. This Court should so hold. *Keepseagle v. Perdue*, 856 F.3d 1039, 1059 (D.C. Cir. 2017) (Brown, J., dissenting) ("*Cy pres* took the judiciary 'to the utmost verge of the law' even before it was applied to class actions" (quoting *Jackson v. Phillips*, 96 Mass. 539, 574 (1867) (quoting English jurist Lord Kenyon))); *cf. also Ira Holtzman, CPA & Assoc. Ltd. v. Turza*, 728 F.3d 682, 689–90 (7th Cir. 2013) (Easterbrook, J.).

B. *Cy pres* creates improper incentives for class counsel.

While both class counsel and a defendant have an incentive to bargain fairly over the *size* of a settlement, they critically lack similar incentives to decide how to divvy it up—including the portion allocated to counsel's own fees. The defendant cares only about the bottom line, and will take any deal that drives it down. Meanwhile, class attorneys have an obvious incentive to seek the largest possible portion for themselves, and too often accept bargains that are worse for the class if their share is sufficiently increased. "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (Posner, J.).

While a defendant and a class counsel might happily agree to a settlement where the defendant simply writes a check to class counsel in exchange for the release of the class's claims, something so blatant is rarely seen outside of John Grisham novels. The problem, however, is that class counsel have various tools for obscuring some of the allocative decisions that get made between counsel and class recovery, and can very subtly trade benefits to defendants for bigger fees. These tools primarily function by inflating the settlement's *apparent* relief, which will in turn justify outsized fee requests absent rigorous doctrinal tests designed to weed them out, accomplishing a result that is effectively economically equivalent to more blatantly abusive settlements.

A notorious tool to game class-action settlements is present here: coupon relief. The settlement awards the class expiring coupons or vouchers or credits to

purchase defendants' goods or services, often with restrictive limitations; class counsel seeks a fee award based on the face value of the coupons; the parties know that the vast majority of the coupons will expire unused, costing the defendant nothing, while the redeemed coupons may be viewed by the defendant as simply a marketing cost. Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 Geo. J. Legal Ethics 1343 (2005); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445, 1448 (2005) (coupon redemption rates are typically less than 3%); *e.g., Rouse v. Hennepin County*, Civ. No. 12-326, 2016 WL 3211814 (D. Minn. Jun. 9, 2016) (only 45 vouchers redeemed in 283,000 member class, with class counsel receiving over fifty times as much as absent class members). When, as here, a district court is bamboozled into crediting the coupons as being worth their face value, it might award exaggerated fees, or approve a settlement thinking it provides class members much more than it actually does.

But *cy pres* also serves the same function of creating the illusion of relief.

When courts award attorneys' fees based on the size of the *cy pres* fund rather than on the amount the class actually directly received, it "ensur[es] that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." John Beisner *et al.*, Cy Pres: A Not So Charitable Contribution to Class Action Practice 13 (2010). Such awards create the illusion of relief that can "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff." Martin H.

Redish *et al*., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 661 (2010) ("Redish"). As a result, class attorneys are financially indifferent as to whether a settlement is structured to compensate their clients or to funnel settlement proceeds to third parties. Because *cy pres* can be used to facilitate an early settlement with a profitable fee award and less resistance from defendants, class attorneys are rewarded for selling their putative clients down the river.

Cy pres can also be an enticing settlement feature for lawyers interested in promoting their own personal political or charitable preferences. It is not uncommon to see publicity photographs of attorneys handing oversized checks to their selected *cy pres* recipients or to see recipients issue public statements of gratitude to the class attorneys. *E.g.,* Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs*, 163 U. Penn. L. Rev. 1463, 1484 (2015) ("Many law firms tout their cy pres victories as public service," citing example of self-promotional website of law firm with its *cy pres* recipients). Class counsels have used *cy pres* awards to fund the development of future litigation and to make sizable donations to their *alma mater*. *See, e.g.*, Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet (Dec. 3, 2007) (describing $5.1 million *cy pres* award to George Washington University School of Law to create a "Center for Competition Law").

"By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members." Redish, 62 Fla. L. Rev. at 650.

Class attorneys are tempted to shirk their constitutional duties to adequately defend class members' legal rights because their compensation is no longer tied to such advocacy. *Id*. When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery, class attorneys' all-too-human predilection will prefer to fund their favorite charities or causes over thousands or millions of anonymous and likely ungrateful class members.

The problem is especially egregious in settlements like the one in this case, where any challenge succeeding in reducing the fee award will go to the *cy pres* recipient, rather than to the class. Class counsel thus reduces the incentive for *anyone* to challenge the fee request. *Cf. Pearson*, 772 F.3d at 786 (noting similar fee-reduction structures precluding recovery by class members of reduced fees are "a gimmick for defeating objectors" that should be presumptively invalid). Here, in the absence of a non-profit public-interest objector, class counsel would have collected $8.85 million for itself, despite winning only $225,000 for the class. And under Ninth Circuit law, which diverges from other circuits as treating a dollar of *cy pres* as equivalent to a dollar of actual class relief, class counsel will still be entitled to over $3 million of the $12.5 million settlement fund, though the vast majority of the net fund will go to a charity at the defendant's direction, rather than to class members whose alleged injury was the reason for that fund for existing.

C. *Cy pres* creates the appearance of impropriety for district court judges.

The Ninth Circuit's affirmance of *cy pres* awards to three local San Diego schools creates the appearance of conflicts of interest, not only with respect to three

class counsel, who are alumni of one of these schools, but also with respect to the district court judges who live in that community and who repeatedly approved the *cy pres* awards in this case and the related *Cox v. Clarus*. See *Klier*, 658 F.3d at 482 (Jones, C.J., concurring) ("[D]istrict courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations."); *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("[W]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety."). Fundamentally, trial courts engage in "judicially impermissible misappropriation" when they conclude that class members are less deserving than a charity. *BankAmerica Corp.*, 775 F.3d at 1065.

Cy pres tempts judges to play benefactor with someone else's money. One judge approved a $1.5 million *cy pres* award to his *alma mater,* recommending a "distinctive" Latin name for the resulting scholarships. *Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788 (M.D. Ga. July 10, 2012). In a recent Google *cy pres* settlement, a district court even *sua sponte* redirected *cy pres* to a university where the district court judge taught as a visiting law professor. *In re Google Buzz Privacy Litig.*, No. 10-00672-JW, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011); Pamela A. MacLean, *Competing for Leftovers*, California Lawyer (Sep. 2, 2011); *see also* Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007). "District courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic

organizations." *Klier*, 658 F.3d at 482 (Jones, C.J., concurring) (cleaned up).

Indeed, the Ninth Circuit has even permitted parties to select a judge's spouse's charity as a *cy pres* recipient without requiring recusal. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (reversing *cy pres* award on other grounds). The First Circuit has likewise refused to require recusal where the district court judge actually served on the board of a *cy pres* recipient. *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 36 (1st Cir. 2012). *Compare Liteky v. United States*, 510 U.S. 540 (1994). Regardless of the relative merits of recusal in these cases, such awards invite public cynicism and are at war with the judicial role. That role "is limited to providing relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (cleaned up). As one court has noted, "[f]ederal judges are not generally equipped to be charitable foundations." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006).

D. *Cy pres* raises First Amendment concerns.

Cy pres awards, sanctioned and enforced by the district courts, also infringe on the First Amendment rights of class members by requiring them to subsidize political organizations or charities, chosen by the district court, class counsel and defendants, but which individual class members may not support or approve. Such forced payments require the "affirmative consent" of the class member and that consent may not be implied or assumed. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2485 (2018) ("Neither an agency fee nor

any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, *unless the employee affirmatively consents to pay*." (emphasis added)).

Fundamentally, governmental power (in the form of a district court order binding class members) may not sanction the redirection of property (a monetary recovery belonging to class members) to third parties to engage in expressive activity without the affirmative consent of the persons to whom those funds belong. As *Harris v. Quinn* stated, "'[t]he government may not prohibit the dissemination of ideas that it disfavors, *nor compel the endorsement of ideas that it approves*.'" 134 S. Ct. 2618, 2639 (2014) (quoting *Knox v. SEIU*, 567 U.S. 298, 309 (2012)) (emphasis added). *Knox* established that "compelled funding of the speech of other private speakers or groups" is unconstitutional in all but the most limited of circumstances, none of which are even arguably present in a *cy pres* context. 567 U.S. at 311. The "affirmative consent" of each class member was not obtained for these *cy pres* awards. They were only afforded notice and the opportunity to opt out of the settlement. Pet. App. 54. Under *Janus*, an "opt out" opportunity is not "affirmative consent" and is thus insufficient. *Janus*, 138 S. Ct. at 2486 (waiver of First Amendment rights "cannot be presumed"). In short, whatever doubt remained after *Knox* and *Harris*, *cy pres* cannot survive *Janus*'s holding that "affirmative consent" is required.

While this case does not challenge the *cy pres* on First Amendment grounds, the doctrine does raise these concerns, and canons of constitutional avoidance militate for interpreting Rule 23 in a way to limit *cy pres*.

E. Class members benefit when courts restrict *cy pres* abuse.

When courts limit the ability of class counsel to profit from *cy pres*, class counsel will respond to court-imposed incentives to "maximize the settlement benefits actually received by the class." *Pearson,* 772 F.3d at 781. That is more than abstract theory: it is borne out by experience:

- While *Baby Products* left open the possibility of approving *cy pres* settlements, it reversed a settlement approval and ordered the district court to consider whether class counsel had adequately prioritized direct recovery in both terms of settlement approval and the fee award. 708 F.3d at 178. On remand, the parties arranged for direct distribution of settlement proceeds, and paid an additional $14.45 million to over one million class members—money the parties initially directed to *cy pres* before a successful objection led to an "exponential increase" in class recovery. *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015).
- In *Fraley v. Facebook*, the district court refused preliminary approval of an all-*cy pres* $20 million settlement, though the class was orders of magnitude larger than the one here, some 150 million in size. Though the settlement fund was less than $0.14 per capita, the parties were, at the behest of the district court, able to create a claims process that distributed $15/claimant to over 600,000 claimants. 966 F. Supp. 2d 939 (N.D. Cal. 2013).

- After objection to a claims-made settlement in a consumer class action over aspirin labeling where the vast majority of funds would have gone to *cy pres*, the parties used subpoenaed third-party retailer data to identify over a million class members (instead of the 18,938 who would have been paid $5 each in the original claims-made structure), and paid an additional $5.84 million to the class. Order 4, *In re Bayer Corp. Litig.,* No. 09-md-2023, Dkt. 254 (E.D.N.Y. Nov. 8, 2013); *id.* Dkt. 218-1.
- A similar successful objection to residual *cy pres* in an antitrust settlement increased class recovery from $2.2 million to $13.7 million. *Pecover v. Electronic Arts, Inc.*, No. 08-cv-2820, 2013 WL 12121865 (N.D. Cal. May 30, 2013); *id.* Dkt. 466.
- On remand in *Pearson*, the parties renegotiated to give class members at least $4 million more in cash. Settlement ¶¶7–8, No. 11-cv-07972, Dkt. 213-1 (N.D. Ill. May 14, 2015).

In short, as *Pearson* reasoned, if courts make lawyers direct money to clients in order to get paid, that is *exactly* what happens. Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, Reuters (Jan. 12, 2015).

F. The circuit split will encourage forum shopping.

The problem of the circuit split is especially acute because large class-action settlements—being both nationwide and non-adversary—can be easily forum shopped. It is a regular feature for class-action settlements to feature a new complaint alleging a larger class to facilitate global settlement; little stops

settling parties from relocating such a complaint in a more favorable jurisdiction for the breezier review. *Cf. also Adams v. USAA Casualty Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017) (reversing district court's sanctions of counsel for abuse of process for dismissing federal action "for the improper purpose of seeking a more favorable forum and avoiding an adverse decision").

The problem is further exacerbated by the Ninth Circuit's unprecedented holding that the resulting leftover of approximately $9 million is "*de minimis*," though it could pay almost $7 to every single class member, and a larger amount to a portion of claiming class members had the parties been required to try to increase the claims rate. That definition of "*de minimis*" would permit ***almost every consumer class-action settlement*** to completely ignore payments to class members. The vast majority of consumer and privacy class-action settlements are for less than a dollar or two per class member. The settlement of a 2015 data breach of insurer Anthem was for a record $115 million—but after attorneys' fees and settlement administration costs, there would be only about $0.65 per class member for the 79-million member class. Editorial Board, *The Anthem Class-Action Con*, Wall St. J. (Feb. 11, 2018). The Ninth Circuit's test would have permitted the parties to divert all of that money to *cy pres* without any penalty to class counsel's fee.

Similarly, the Ninth Circuit recently affirmed a settlement of an antitrust suit that established a $27 million gross fund and paid class members about $14.1 million net in cash and gift cards to 35 million class members. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015). $27 million

divided by 35 million class members is less than 80 cents a class member. Under the rationale of *Google Referrer* and *EasySaver*, it would not be economically viable for the *Online DVD* parties to distribute money to the class. But they did. It was feasible through a *pro rata* claims process that ultimately paid 1.1 million class members a little over $12 each. An affirmance here would permit the settling parties in a similar case to give zero dollars to the class and donate the entire $14.1 million to their favorite charities.[2]

Even the $135,400,000 settlement fund in *Sullivan v. DB Investments* would qualify as "non-distributable" under the Ninth Circuit's approach. After attorneys' fees, there would be less than $1 to $2/class member left for each of the 67 to 117 million consumer subclass members. 667 F.3d 273, 290 (3d Cir. 2011) (*en banc*).

If the circuit split remains, class counsels will be encouraged to breach their fiduciary duties to class members and forum-shop settlements to the Ninth Circuit for higher attorneys' fees and the opportunity to divert millions of dollars of their clients' recovery to their favorite charities.

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[2] As it was, the settling parties attempted to divert over $2 million in uncashed checks to charities such as the Geena Davis Institute on Gender in Media; an objection resulted in that money being distributed to the class. *In re Online DVD Antitrust Litig.*, No. 09-md-2029, Dkt. 659, 661, 668 (N.D. Cal. 2016).

CONCLUSION

The Court should hold the petition pending a decision in *Gaos* and then, depending on the result in *Gaos*, either grant the petition, vacate the decision and remand for further consideration in light of the decision in *Gaos*, or grant plenary review.

Respectfully submitted,

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February 13, 2019

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE EASYSAVER REWARDS LITIGATION,	No. 16-56307
JOSUE ROMERO; DEANNA HUNT; KIMBERLY KENYON; GINA BAILEY; ALISSA HERBST; GRANT JENKINS; BRADLEY BERENTSON; JENNIFER LAWLER; DANIEL COX; JONATHAN WALTER; CHRISTOPHER DICKEY, *Plaintiffs-Appellees*, v. BRIAN PERRYMAN, *Objector-Appellant*, v. PROVIDE COMMERCE, INC.; REGENT GROUP, INC., a California corporation, DBA Encore Marketing International; ENCORE MARKETING INTERNATIONAL, INC., a Delaware corporation, *Defendants-Appellees.*	D.C. No. 3:09-cv-02094-BAS-WVG OPINION

Appeal from the United States District Court for the Southern District of California Cynthia A. Bashant, District Judge, Presiding

Argued and Submitted May 17, 2018
San Francisco, California

Filed October 3, 2018

Before: N. Randy Smith and Michelle T. Friedland, Circuit Judges, and Barbara M. G. Lynn,* Chief District Judge.

Opinion by Judge Friedland

COUNSEL

Theodore H. Frank (argued) and Adam E. Schulman, Competitive Enterprise Institute, Center for Class Action Fairness, Washington, D.C., for Objector-Appellant Brian Perryman.

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* The Honorable Barbara M. G. Lynn, Chief United States District Judge for the Northern District of Texas, sitting by designation.

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OPINION

FRIEDLAND, Circuit Judge:

In this appeal, an objecting class member challenges the district court's approval of a class action settlement resolving claims that Provide Commerce, Inc. and Regent Group, Inc. (collectively, "Defendants") enrolled consumers in a membership rewards program without their consent and then mishandled their

billing information. The settlement makes available $3.5 million to pay settlement administration costs and refund class members' enrollment fees, with any remaining funds designated for three *cy pres* beneficiaries. The settlement also provides that each class member will receive a $20 credit that may be used to purchase additional products from Defendants. It further anticipates that class counsel will receive $8.7 million in attorney's fees. We vacate the fee award because the district court failed to treat the credits as coupons under the Class Action Fairness Act ("CAFA") when calculating that award. We otherwise affirm.

I.

Provide Commerce, Inc. ("Provide") operates online businesses that sell flowers, chocolates, fruit baskets, and other similar items. According to the Complaint, Plaintiff Josue Romero and seven other class representatives (collectively, "Plaintiffs") purchased items from a Provide business and were then presented with a pop-up advertisement for $15 off another item from the same website.[1] Clicking the pop-up directed Plaintiffs to a different website and instructed them to enter their contact information and click "Accept." This process (irrespective of whether Plaintiffs entered their contact information or clicked "Accept") enrolled Plaintiffs in Provide's membership rewards program. Provide then transmitted Plaintiffs' payment information to a separate company, Regent Group, Inc. ("Regent"), which proceeded to charge Plaintiffs a $1.95 activation fee and a recurring $14.95 monthly membership fee. Plaintiffs did not consent

[1] We draw the background facts from Plaintiffs' Complaint. Because the case settled, the truth of Plaintiffs' allegations is not at issue.

to joining the rewards program or, by extension, to having their data transferred to Regent. Plaintiffs also never received "the promised coupons, gift codes, or any other savings benefits."

In 2009, Plaintiffs filed a putative class action against Defendants in the Southern District of California, alleging violations of various state laws arising from Defendants' operation of their membership rewards program. After more than two years of litigation, including extensive discovery and mediation, the parties agreed to settle. The proposed settlement provided class members with two forms of relief: monetary reimbursement of membership fees upon submission of a claim and a $20 credit.

The settlement established a $12.5 million fund from which Defendants would pay up to $8.7 million in attorney's fees; $80,000 in enhancement awards to the named plaintiffs; and $200,000 in litigation costs. The approximately $3.5 million remaining would be available to fund the settlement's administration costs and to reimburse class members for their membership fees "on a pro rata basis up to the full amount owed." To receive such a refund, class members had to submit a claim affirming that they had neither intended to enroll in the program nor used any program benefits other than the initial discount code. After the refunds were issued, any remaining funds were to be distributed as a *cy pres* award to San Diego State University, the University of California at San Diego, and the University of San Diego School of Law "for a chair, professorship, fellowship, lectureship, seminar series or similar funding, gift, or donation program . . . regarding internet privacy or internet data security."

The settlement also directed Defendants to email every class member a $20 credit that could be used to

purchase items on Defendants' websites. Unlike with the refund, class members were not required to submit a claim to receive the credit. The credits would be fully transferable, but they would include a series of restrictions, including that they would expire one year after their distribution date and could not be used in the lead-up to Christmas, Valentine's Day, or Mother's Day. The credits also could not be used for same-day orders, nor could they be combined with other promotions.

In June 2012, the district court preliminarily approved the settlement. The parties informed the court that the class contained approximately 1.3 million consumers who had been enrolled in the rewards program at some point since August 2005.

Class members were then notified of the settlement and given a 135-day period to request a refund, during which only about 3,000 class members did so. Their submitted claims requested a total of $225,000 in cash refunds, leaving approximately $3 million of the settlement's cash fund to be distributed to the *cy pres* beneficiaries.[2] Separately, class counsel moved for $8.7 million in fees and $200,000 in costs.[3]

In January 2013, the district court held a final settlement approval hearing at which class member Brian Perryman ("Objector") objected to the settlement. He argued that the attorney's fee award did not comply with CAFA's requirements for settlements awarding coupons and that the *cy pres* award was

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[2] The 135-day claims period was later extended, but it appears from the record and briefing before our court that the number of refund requests did not significantly increase.

[3] Under the settlement agreement, "class counsel" refers to the four law firms representing Plaintiffs in this case.

improper. The court rejected these objections and issued a final order approving both the settlement and class counsel's accompanying fee request. The district court's order placed the full settlement value at $38 million, including $12.5 million for the cash fund and $25.5 million for the $20 credits to be distributed to the approximately 1.3 million class members. Objector appealed, and we vacated and remanded for further proceedings in light of our decision in *In re Online DVD-Rental Antitrust Litigation* (*In re Online DVD*), 779 F.3d 934 (9th Cir. 2015), which addressed CAFA's coupon settlement provisions.

On remand, the district court determined that, under *In re Online DVD*, the credits should not be construed as coupons, and that it was therefore unnecessary to apply CAFA's requirements for coupon settlements. In the court's view, it was particularly significant that class members had, by virtue of their inclusion in the class, shown "an interest in getting $15.00 off their next purchase" from Defendants. Considering this factor in conjunction with the holding of *In re Online DVD*, the court concluded the "settlement was not a coupon settlement subject to the strictures of section 1712."

Again using $38 million as the total value of the settlement, the court then approved the fee award based on both percentage-of-recovery and lodestar calculations.[4] Under the percentage-of-recovery method,

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[4] Under the "percentage-of-recovery method," a fee award is calculated as a percentage of the settlement fund. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). By contrast, the lodestar method entails "multiplying the number of hours the prevailing party reasonably expended on the litigation . . . by a reasonable hourly rate." *Id.* at 941. The lodestar method then allows the court to "adjust [the lodestar fee] upward or

the court concluded that an $8.7 million attorney's fee award was reasonable because it represented 23% of the settlement value—below the 25% benchmark typically used in our circuit. The court then cross-checked the reasonableness of the award using the lodestar method. Based on declarations reciting the hours spent by class counsel on this case and their hourly rates, class counsel's fees came to approximately $4.3 million. The court decided that class counsel's rates and hours were reasonable and, further, that a multiplier of two—necessary for the lodestar figure to match the $8.7 million awarded under the settlement—was appropriate. As a result, the court reinstated its prior approval of the settlement and the fee award.

Objector has appealed again to challenge the attorney's fee and *cy pres* awards. With respect to the fee award, he argues that the district court erred by failing to comply with CAFA's requirements for coupon settlements and, relatedly, that the settlement provides class counsel with a disproportionate share of the recovery. With respect to the *cy pres* award, he contends that *cy pres* relief is not appropriate here and that, even if it were, the district court should have rejected the particular *cy pres* beneficiaries chosen in the settlement.

II.

We address Objector's arguments in turn. We hold that his challenge to the attorney's fee award succeeds because the district court failed to treat the $20 credits

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downward" based on a range of considerations, chief among them "the benefit obtained for the class." *Id.* at 941–42.

as coupons under CAFA, but we reject his *cy pres* arguments.

A.

CAFA imposes restrictions on attorney's fee awards for class action settlements that provide class members relief in the form of coupons. *See* 28 U.S.C. § 1712. Congress targeted such settlements for heightened scrutiny out of a concern that the full value of coupons was being used to support large awards of attorney's fees regardless of whether class members had any interest in using the coupons. *See* S. Rep. No. 109-14, at 15–20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 15–20 (listing examples of settlements "in which most—if not all—of the monetary benefits went to the class counsel, rather than the class members those attorneys were supposed to be representing"). More specifically, Congress was concerned that when coupons that class members would not use were factored into the value of a settlement, they inflated the nominal size of a settlement fund without a concomitant increase in the actual value of relief for the class. *See id.* at 29–30. And when a court relied on the size of such a settlement fund to calculate attorney's fees, this inflation dramatically increased the size of the fee award—allowing class counsel to reap the lion's share of the benefits. *See id.*

To avoid this result, CAFA requires district courts to consider the value of only those coupons "that were actually redeemed" when calculating the relief awarded to a class. *In re Online DVD*, 779 F.3d 934, 950 (9th Cir. 2015); *see also* 28 U.S.C. § 1712(a). Doing so ensures that class counsel benefit only from coupons that provide actual relief to the class, lessening the incentive to seek an award of coupons that class members have little interest in using—either because

they might not want to conduct more business with defendants, or because the coupons are too small to make it worth their while. *See In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir. 2015) ("The potential for abuse is greatest when the coupons have value only if a class member is willing to do business again with the defendant who has injured her in some way, when the coupons have modest value compared to the new purchase for which they must be used, and when the coupons expire soon, are not transferable, and/or cannot be aggregated.").

CAFA, however, provides no definition of "coupon," so courts have been left to define that term on their own, informed by § 1712's animating purpose of preventing settlements that award excessive fees while leaving class members with "nothing more than promotional coupons to purchase more products from the defendants." *In re Online DVD*, 779 F.3d at 950 (quoting S. Rep. No. 109-14, at 15).[5] In *In re Online DVD*, we outlined three factors to guide this inquiry: (1) whether class members have "to hand over more of their own money before they can take advantage of" a credit, (2) whether the credit is valid only "for select products or services," and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable. *In re Online DVD*, 779 F.3d at

[5] As in *In re Online DVD*, we need not decide which standard of review governs our review of whether a credit is a coupon within the meaning of CAFA, because here the district court applied the wrong legal rule when evaluating whether the credits qualify as coupons. *See* 779 F.3d at 950 n.8 (explaining that it was unnecessary to decide on the applicable standard of review because we would affirm under any standard). Failing to identify the correct legal standard constitutes reversible error even under abuse of discretion review. *See Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011).

951. Applying these factors, we held that a $12 gift card to Walmart, awarded as part of a settlement resolving antitrust claims relating to its DVD rentals and sales, did not qualify as a coupon. *Id.* at 951–52. We first explained that a "class member need not spend any of his or her own money" to use the gift card given Walmart's extensive inventory of low-cost products. *Id.* at 951. Relatedly, the gift card provided "not merely the ability to purchase an entire product as opposed to simply reducing the purchase price, but also the ability to purchase one of many different types of products," including numerous products unrelated to DVDs. *Id.* at 952. The gift cards also did not expire and were freely transferable. *Id.* at 951. Finally, class members could receive $12 in cash instead of the $12 gift card, if they made a request by mail. *Id.* at 941. In light of all these factors giving class members significantly more flexibility than typical coupons, we held that the gift cards were not coupons within the meaning of CAFA. *Id.* at 951–52.

Here, the district court relied on an additional factor not present in *In re Online DVD*. It held that the credits should not be construed as coupons in part because it 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. In this case, class members failed to receive a promised credit or received a credit but on terms they had not accepted, and the settlement provided a replacement credit without the unwanted enrollment in its rewards program. But the district court's inclusion of this factor conflated the coupon analysis with whether the settlement was fair and reasonable. Confronting a similar argument in *In re Southwest Airlines Voucher Litigation*, the Seventh Circuit held that drink vouchers awarded to settle

claims that Southwest improperly stopped accepting certain in-flight drink vouchers were coupons under CAFA. 799 F.3d at 704. Even though class members would receive "essentially complete relief" by obtaining the new drink vouchers to replace their invalidated ones, *id.* at 711, the court explained that this equivalence bore on the fairness of the settlement—not on whether the vouchers were coupons under CAFA, *id.* at 706.

Thus, even assuming the district court was correct that "this settlement was specifically tailored to the harm suffered by the class members and the interest they had in receiving" a discount off a future purchase from Defendants' websites, it does not follow that the full face value of all the $20 credits should be used when evaluating the propriety of the fee award.[6] Regardless of the substance of the underlying claim or injury, CAFA prevents settling parties from valuing coupons at face value without accounting for their redemption rate. Accordingly, the district court erred by incorporating an improper factor into its analysis of whether the credit was a coupon under CAFA. *See Enyart*, 630 F.3d at 1159 ("If the [district] court failed to [identify the correct legal rule], we must conclude it abused its discretion." (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc))).

That brings us to the million—here, multi-million—dollar question: whether Defendants' credits are cou-

[6] And 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.

pons. We hold that, applying the correct legal standard, the only logical conclusion is that they are.[7] To begin, the credits are categorically different from the Walmart gift cards. Defendants are decidedly not "giant . . . retailer[s]" in the mold of Walmart or other similar stores, *In re Online DVD*, 779 F.3d at 951, and class members can only use the credits to purchase items from a limited universe of products: flowers, chocolates, and other similar gifts. This universe is even smaller if confined to products that class members can purchase without spending any of their own money—Defendants only claim to sell "15–25 products" for under $20. And that meager list does not even account for shipping charges. When asked in the fairness hearing whether class members could purchase *anything* from one of Defendants' websites for $20 or under if shipping charges are included, counsel responded: "If you include shipping, I'm not sure, but the defendants don't make money off the shipping." Regardless of whether money spent on shipping

[7] Thus, even if abuse of discretion review rather than de novo review applies, *see supra* n.5, we must reverse. As explained below, *see supra* n.8, the district court lacked support for its conclusion that this settlement was comparable to *In re Online DVD* in terms of how many items class members could purchase. Because that was the only factor the district court identified as supporting its decision that would be relevant under the correct legal standard, and because that factor lacks evidentiary support, there are no factors remaining that might weigh in favor of categorizing the credits as coupons. Accordingly, there is no need to provide the district court an opportunity to reevaluate whether the credits qualify as coupons. *See Apache Survival Coalition v. United States*, 21 F.3d 895, 906–07 (9th Cir. 1994) (explaining that we need not remand where the district court abused its discretion by applying the incorrect legal standard if there are no underlying factual disputes and it is in the interest of judicial economy to decide the issue on appeal).

benefits Defendants, however, class members who spend money on shipping are required "to hand over more of their own money before they can take advantage of the coupon," *In re Online DVD*, 779 F.3d at 951.[8]

Moreover, in *In re Online DVD*, Walmart's extensive inventory was significant in part because class members could use the gift cards without obtaining the product—DVDs—that led to their suit in the first place. *See id.* at 952. Here, in contrast, class members cannot use these credits without purchasing an item from Defendants. And, to do so, they must hand over their billing information again to the very company that they believe mishandled that information in the first place, at the very least to pay for shipping. Thus, although class members do not have a product-specific complaint, they cannot reap the benefits of the settlement without reengaging in the same purchasing activity that they believe led to their injury.

The credits at issue here are also far less flexible than those available in *In re Online DVD*. Although freely transferrable, they expire one year after issuance and have a series of blackout periods, including during the days before Valentine's Day, Mother's Day,

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[8] In light of the undisputed evidence that there were at most 25 and possibly zero products class members could purchase without spending any of their own money, the district court lacked support for its conclusion that this settlement was comparable to the settlement from *In re Online DVD* with respect to the number of such products. Even putting aside shipping charges, a range of 15–25 products is in a different realm than the enormous number of products that Walmart sells for under $12. Although class members were generally "not limited to [the] purchase of a specific item or set of items," Defendants' inventory is simply not comparable to the size or breadth of Walmart's inventory.

and other holidays on which consumers most often buy flowers and chocolates. Defendants respond that there is a "reasonable explanation" for those restrictions given their need to preserve their ability to fill and deliver orders in a timely fashion "during peak periods." Maybe so, but the credits still cannot be used in anywhere near the same way as cash—including because they cannot be used on the dates on which people would be most interested in using them.

Plaintiffs stress that class members here could receive both cash (in the amount needed to refund their membership fees) and a gift card, while class members in *In re Online DVD* had to choose either a $12 gift card *or* $12 in cash. *See In re Online DVD*, 779 F.3d at 952. But the fact that the *In re Online DVD* plaintiffs had a choice between cash and a gift card worth the same amount made it easier for us to assess the value of the gift cards. Class members who selected gift cards must have valued them at close to face value, because they selected them over essentially the same value in cash.[9] *See id.* at 952 n.11. It was therefore appropriate to treat the *In re Online DVD* settlement as similar to an all-cash settlement. *See id.* Here, however, it is impossible to draw the same conclusion—nothing in the record could have given the district court reason to believe that any class member, let alone all class members, would have viewed the $20 credit as equivalently useful to $20 in cash.

[9] The only difference in value between the gift card and the cash award in *In re Online DVD* was the cost of a stamp. Although a class member could submit a claim for a Walmart gift card online, a claim for cash could only be submitted by regular mail. *See In re Online DVD*, 779 F.3d at 941.

For all these reasons, we conclude that the only logical conclusion under the correct legal rule is that these credits are coupons under CAFA.

B.

Because the district court incorporated the full face value of the coupons into both its percentage-of-recovery calculation and lodestar calculation of the attorney's fee award, this error requires recalculation of the fee award.

When a fee award in a coupon settlement is calculated using the percentage-of-recovery method, CAFA requires that any calculation of the size of the settlement fund—and thus the size of the fee award—be determined using the redemption rate of the coupons. *Id.* at 949–50; *see also* 28 U.S.C. § 1712(a) ("If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.").[10] Here, the district court approved the settlement under the percentage-of-recovery method on the basis that the $8.7 million award represented only 23% of the total $38 million recovery, which the court viewed as appropriately below the 25% "benchmark" we have generally held to be "reasonable." *In re Bluetooth Headset Prods. Liab. Litig.* (*In re Bluetooth*), 654 F.3d 935, 942 (9th Cir. 2011). But because the $38 million figure did not account for the redemption rate

[10] As we have previously, we note that § 1712 did not escape CAFA's generally "'clumsy' and 'bewildering' wording." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1181 (9th Cir. 2013) (quoting *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681, 686 (9th Cir. 2006)).

of the credits, it is unclear whether the fee award is in fact a reasonable percentage of the settlement fund. Absent the redemption information, we cannot approve the district court's percentage-of-recovery evaluation.

The settling parties contend that the award can nevertheless be upheld based on the district court's lodestar calculation. Under § 1712(b)(1), which relates to "[o]ther attorney's fee awards" in settlements involving coupons, if "a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action." Section 1712(b)(2) further provides that "[n]othing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees."[11] CAFA thus allows courts to use

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[11] Section 1712 contains three subsections that govern the calculation of attorney's fees. *See* 28 U.S.C. § 1712(a)–(c). In *In re HP Inkjet Printer Litigation*, we explained that § 1712(a) "requires that 'any attorney's fee' awarded for obtaining coupon relief be calculated using the redemption value of the coupons" and thus mandates the use of the percentage-of-recovery method for any portion of the attorney's fees in a class action settlement that are "attributable to" the award of coupons. 716 F.3d at 1183–84 (quoting 28 U.S.C. § 1712(a)). By contrast, we explained that § 1712(b) "come[s] into play when a settlement contains both coupon relief and *equitable* relief," and the court uses the lodestar method as any part of its fee calculation. *Id.* at 1185 (emphasis added). By its terms, § 1712(c) provides further instruction regarding settlements that include "an award of coupons to class members and also provide[] for equitable relief, including injunctive relief." 28 U.S.C. § 1712(c). Although settlements like this one that award coupons and monetary relief are not expressly mentioned in *In re HP*, it must be the case that § 1712(b) also encompasses the use of the lodestar method for this

the lodestar approach to determine any portion of attorney's fees not attributable to coupons in mixed settlements that award both coupons and non-coupon relief.

In *In re HP Inkjet Printer Litigation* (*In re HP*), 716 F.3d 1173 (9th Cir. 2013), we explained that CAFA does not, however, permit a district court to approximate "the ultimate value of [a] settlement, and then award[] fees in exchange for obtaining coupon relief without considering the redemption value of the coupons." *Id.* at 1186. In particular, in a mixed settlement, a district court may use the lodestar approach provided that it does so without reference to the dollar value of the settlement fund—or, of course, it may reference the dollar value of the settlement fund if it accounts for the redemption rate of the coupons in calculating that dollar value. We held that the district court in *In re HP* had erred when it set the lodestar fee award in reference to "the 'ultimate value' of th[e] settlement"—which, as calculated there, included the face value of the coupons not adjusted by their redemption rate. *Id.*

Here, the district court similarly went astray when it reverse-engineered the lodestar multiplier using a value of the settlement that included the full face value of all the $20 coupons. The court started with a lodestar fee of $4.3 million, calculated based solely on class counsel's billing rates and hours worked. But the court then worked backward from class counsel's proposed $8.7 million fee award, which the court had already deemed appropriate as a percentage of the total dollar value of the settlement fund. To do

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type of mixed settlement. Such settlements would otherwise exist in a no-man's land with no guidance from § 1712.

so, the court applied a multiplier of 2.1 to match the lodestar fee with the percentage-of-recovery fee. Thus, although the $4.3 million figure was derived independently of any specific consideration of the coupons, it lost this independence when the district court used a multiplier to match the lodestar fee to the percentage-of-recovery fee—which was, by definition, a percentage of the full value of the settlement, including the face value of the coupons.[12] The value of

[12] We recognize that "the benefit obtained for the class" is the "[f]oremost" consideration for a district court in assessing whether it should adjust a lodestar fee. *In re Bluetooth*, 654 F.3d at 942. Likewise, the results obtained may factor into a district court's assessment of the hours reasonably expended on the litigation. *See Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983); *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1211 (9th Cir. 1986), *opinion amended on denial of reh'g*, 808 F.2d 1373 (9th Cir. 1987). But it may be possible in some cases for a district court to evaluate the reasonableness of the hours expended and whether "the level of success achieved by the plaintiff" warrants an upward or downward departure without considering the award of coupons at all. *See id.* at 942 (quoting *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009)). In other words, a district court may be able to determine an appropriate lodestar fee and whether a departure is called for by assessing how fully an individual class member is compensated for his or her injuries, without reference to the size of the class or the size of the settlement fund as a whole. On the other hand, if attorneys argue for or against a lodestar fee or departure based at all on the benefits of the coupons obtained, then the district court must consider the redemption rate when ruling on their request. Of course, because adjustments to the lodestar fee should be "the exception rather than the rule," *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002) (quoting *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1383 (9th Cir. 1990), *overruled on other grounds by City of Burlington v. Dague*, 505 U.S. 557 (1992)), courts should not need to use a departure at all in most cases.

the coupon relief therefore impermissibly informed the district court's approval of the lodestar fee.

Accordingly, the attorney's fee award must be vacated. On remand, the award should be recalculated in a manner that treats the $20 credits as coupons under CAFA.[13] Because we hold that the fee award must be recalculated, we need not address Objector's separate argument that the settlement disproportionately benefits class counsel at the expense of the class. And, in any event, that argument largely collapses into Objector's challenge to the fee award under CAFA.

C.

Objector also challenges the use of *cy pres* to distribute the remaining settlement funds, and, if *cy pres* is to be used at all, the choice of recipients. We hold that it was not an abuse of discretion for the district court to approve the use of *cy pres* here or to approve these particular recipients.

1.

Cy pres provides a mechanism for distributing unclaimed funds "to the 'next best' class of beneficiaries." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011). Under the *cy pres* approach, "class

[13] Because the settlement dictates that the $20 credits will not be distributed until after the final settlement approval, it is impossible to calculate their redemption rate while the settlement is still pending. But, as we explained in *In re HP*, there are ways for the parties to address this challenge. *See In re HP*, 716 F.3d at 1186 n.19. As one example, "a fees award can be bifurcated or staggered to take into account the speculative nature of at least a portion of a class recovery." *Id.* Alternatively, the parties could amend the settlement so that the redemption rate will be ascertainable before the entry of final judgment.

members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment." *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). The settlement agreement here provides for any unclaimed funds to be distributed to San Diego State University, the University of California at San Diego, and the University of San Diego School of Law to support scholarship in the area of internet privacy and data security. Objector argues that the approximately $3 million remaining in the settlement fund should have been distributed to the class instead.

We conclude that it was reasonable for the district court to approve the use of a *cy pres* distribution. The availability of *cy pres* as a mechanism to distribute unclaimed funds rests on the premise that class action settlements will sometimes have just that—unclaimed funds. A settlement is not fatally flawed solely because class members did not deplete the entirety of the settlement fund. If it were, *cy pres* would not exist. Objector suggests that the parties should have spent more on supplemental notice and outreach to non-claimants. But that contention could be made about any class action with remaining funds, and Objector has not identified any flaws in the notice procedure used in this case.

Nor was it an abuse of discretion for the district court to reject Objector's two proposed alternatives for distributing the remaining funds. Objector first suggests that the settlement should have distributed the remaining funds to the existing claimants. But the district court was under no obligation to adopt a distribution approach that might overcompensate

claimants, all of whom will already be fully reimbursed for the money they lost through the rewards program.

Objector alternatively suggests that the remaining funds should have been distributed pro rata to non-claimant class members, whom Defendants will have to identify to distribute the coupons. It might be technically feasible to distribute the funds in this manner. But given that the existing fund contains approximately $3 million, and that there are over a million non-claimants, each non-claimant's recovery would be "*de minimis*," *Lane*, 696 F.3d at 821, particularly once the costs of distribution are deducted. Even if the district court substantially reduces the attorney's fee award, the amount each non-claimant might receive compared to the administrative costs of distribution prevents Objector from showing that the parties' resort to *cy pres* was inappropriate.

2.

The recipients of *cy pres* funding should be selected in light of "the objectives of the underlying statute(s)" and "the interests of the silent class members." *Nachshin*, 663 F.3d at 1039. The court has "broad discretionary powers in shaping" a *cy pres* award. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990). We therefore review the selection of *cy pres* recipients for an abuse of discretion. *Nachshin*, 663 F.3d at 1038.

Objector argues that, even if a *cy pres* distribution was permissible here, these universities were inappropriate recipients because (i) all three are located in San Diego, even though the case involves a nationwide class; and (ii) three of the attorneys working on the

case graduated from the University of San Diego School of Law. We disagree on both counts.

i.

Objector's geographic challenge fails because these beneficiaries have a nationwide reach sufficient to justify their receipt of the *cy pres* award. Although the universities are all based in San Diego, it was reasonable for the district court to conclude that "the . . . funded academic programs will have a nation-wide impact." The award is designed to support scholarship in internet privacy and data security—topics of national scope. That the research will be spearheaded by scholars in San Diego in no way means that its impact will be confined to San Diego.[14] In addition, Objector's singular focus on geography ignores the touchstone of the inquiry: whether an award bears a "substantial nexus to the interests of the class members." *Lane*, 696 F.3d at 821; *see also In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 36 (1st Cir. 2012) ("It is not the location of the recipient which is key; it is whether the projects funded will provide 'next best' relief to the class."). Because this award funds research that is directly responsive to the issues underlying this litigation, the physical location of the beneficiaries is not an overriding consideration.

Objector's contrary argument based on *Nachshin v. AOL, LLC* is unavailing. In that case, which involved a nationwide challenge to AOL's online advertising practices, the settlement awarded its remaining funds to three *cy pres* recipients: the Legal Aid Foundation

[14] And to the extent the universities host seminars that are only accessible to those in San Diego, the equivalent would be true of any *cy pres* recipient, national or otherwise, that held in-person events at its headquarters.

of Los Angeles, the Los Angeles and Santa Monica chapters of the Boys and Girls Club of America, and the Federal Judicial Center Foundation. 663 F.3d at 1037. Reversing the district court's approval of that settlement, we explained that the missions of the selected organizations had nothing "to do with the objectives of the underlying statutes on which [p]laintiffs base[d] their claims." *Id.* at 1040. As a result, the award failed to "account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity." *Id.* at 1036.

That is not the case here. This award promotes a national dialogue on improving internet privacy and data security practices. It accordingly comports with our suggestion in *Nachshin* that the parties identify beneficiaries that will "work to protect internet users" from the types of predatory behavior underlying the lawsuit. *See id.* at 1041. As a result, the district court did not abuse its discretion in approving the selection of these institutions.

ii.

Second, the alumni connections of three of the (many) involved attorneys did not impermissibly taint the selection process. In some cases, "the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." *Id.* at 1039. But that specter is far less haunting where, as here, the award is tethered to class members' interests and underlying claims. *See id.* Moreover, Objector has not suggested that there is a continuing relationship between the attorneys and their alma mater, nor has he challenged the parties' descriptions of what those institutions will do to further the interests of the class. Objector's bare

allegation that the institutions were selected for an improper reason is insufficient to show that it was an abuse of discretion for the district court to approve their selection.

D.

Finally, given both the structure of this settlement agreement and the focus of Objector's challenges, we hold that it is unnecessary to reverse the entire settlement approval in conjunction with our vacatur of the fee award. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 969 (9th Cir. 2009) (reversing a fee award but otherwise affirming the settlement approval). The parties' settlement agreement expressly does not depend on approval of the fee award, and it provides that any decrease in the award "shall only serve to increase" the funds distributed to class members, as well as to the *cy pres* beneficiaries if necessary. Furthermore, because the claims period is now closed, we know that there are ample funds available to fully satisfy all submitted claims for reimbursement. Changing the size of the fee award would not affect those reimbursements. Class members will similarly receive the $20 coupons regardless of the size of the fee award. From class members' perspective, the only thing that reducing the fee award would do is to increase the amount ultimately paid to the *cy pres* recipients. We can therefore be confident that class members would not have made different decisions had they known that the fee award would be recalculated, and also that the district court would not have made a different approval decision as to whether the settlement was fair, reasonable, and adequate.

Moreover, other than the challenges to the *cy pres* award that we rejected above, Objector cabined his arguments on appeal to attacks on the fee award.

We are therefore not presented here with a general challenge to the fairness of the settlement under Federal Rule of Civil Procedure 23(e)(2). Absent an explanation of why the settlement as a whole does not pass muster, we will not assume that we must automatically reverse the settlement in conjunction with vacating the fee award.[15]

III.

For the foregoing reasons, we **VACATE** and **REMAND** the award of attorney's fees but otherwise **AFFIRM** approval of the settlement.

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[15] *In re Bluetooth* is not to the contrary. Although there we reversed an entire settlement based on our decision to vacate the fee award, the settlement included a "kicker" provision under which "all fees not awarded would revert to defendants rather than be added to the *cy pres* fund or otherwise benefit the class." *In re Bluetooth*, 654 F.3d. at 947. As we explained, "the kicker deprives the class of [its] full potential benefit if class counsel negotiates too much for its fees." *Id.* at 949. In contrast, any reduction in attorney's fees in this case will benefit the class. Moreover, the district court's evaluation of the fee award in *In re Bluetooth* was far more deficient than that here. As we explained in that decision, "our discomfort" stemmed in part from "the absence of [an] explicit calculation or explanation of the district court's" attorney's fee decision; there was no lodestar fee for us to even evaluate. *Id.* at 943–44. This lack of explanation undermined our confidence in the district court's settlement approval more generally. *See id.* at 949. In contrast, although the district court here erred by concluding that the credits did not qualify as coupons—which, to be sure, had a significant impact on the court's evaluation of the final fee award—it otherwise calculated the fee award in accordance with our caselaw and then justified its approval of that award.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: EASYSAVER REWARDS LITIGATION,	Lead Case No.: 09cv2094 AJB (WVG) Consolidated Action
This document relates to all actions.	FINAL ORDER APPROVING CLASS ACTION SETTLEMENT; GRANTING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARDS; OVERRULING PERRYMAN'S OBJECTIONS [Doc. No. 255 and Doc. No. 258]

On January 28, 2013, this Court heard plaintiffs Josue Romero, Gina Bailey, Jennifer Lawler, John Walters, Daniel Cox, Christopher Dickey, Grant Jenkins, and Bradley Berentson's (collectively "Plaintiffs") Motion for Final Approval of Settlement (Doc. No. 262) and Motion for (1) Attorneys Fees' and Costs, and (2) Incentive Awards (Doc. No. 255). This Court reviewed and considered: (a) Plaintiffs' motions and the supporting papers, including the Settlement Agreement and Release ("Settlement Agreement"); (b) defendant Provide Commerce, Inc.'s Statement Of Non-Opposition In Support Of Final Approval of Class Settlement (Doc. No. 263); (c) the objection filed by Brian Perryman ("Perryman")

(Doc. No. 258); and (d) oral argument of counsel at the January 28, 2013 hearing. Based on this review and the findings set forth below, the Court GRANTS Plaintiffs' Motion for Final Approval of Settlement, (Doc. No. 262), and Plaintiffs' Motion for (1) Attorneys' Fees and Costs, and (2) Incentive Awards, (Doc. No. 255). The Court also overrules Perryman's objections for the reasons discussed further below.

Background

Plaintiffs' factual allegations are extensive, as set forth in the Fourth Amended Complaint. (Doc. No. 221). In sum, they allege that Defendants' practices of enrolling customers in the Rewards Programs are unfair and unlawful. Plaintiffs contend that Provide-Commerce transmits its consumers' private payment information to its third party marketing partners, Defendants Regent Group, Inc., doing business under Encore Marketing International and Encore Marketing International, Inc. (referred to collectively as "Encore"). (*Id.* at ¶ 1.) Encore then uses this information to charge the consumers credit or debit accounts without permission under the guise that the consumers authorized the charges when they supposedly joined saving programs such as EasySaver Rewards, Red Envelope Rewards, or Preferred Buyers Pass, which Encore manages on Provide-Commerce's behalf. (*Id.*)

Specifically, when class members completed a purchase on one of Provide Commerce's retail websites, they were presented with a pop-up window offering $15 off their next purchase as a "Thank You" gift, and asking them to enter their zip code and email address and click "Accept" to receive the gift. (*Id.* at ¶¶ 3, 26.) Regardless of whether Class members actually or knowingly provided their zip code and email address and clicked "Accept," Plaintiffs' allege that Provide

Commerce transmitted their private payment information to EMI without consent. (*Id.* at ¶ 3.) EMI proceeded to enroll Plaintiffs and Class members in a Rewards Program and charged their credit and debit cards a $1.95 activation fee, followed by a $14.95 monthly fee. (*Id.* at ¶¶ 3, 26.) Plaintiffs allege that the Rewards Programs provided no meaningful benefits and that Class members were enrolled in the Rewards Programs without their knowledge or consent. (*Id.* at ¶ 29.) Plaintiffs challenged Defendants' conduct as violating the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq., the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750, et seq., and the Federal Electronic Funds Transfer Act, 15 U.S.C. § 1693, et seq. (as to EMI only), and Plaintiffs further alleged that the conduct constituted fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, invasion of privacy, unjust enrichment, and negligence.

The parties litigated this matter over a period of several years. Then, on June 13, 2012, Plaintiffs' filed an unopposed Motion for (1) Preliminary Approval of Class Action Settlement, (2) Provisional Class Certification, (3) Distribution of Class Notice, and (4) Scheduling of Fairness Hearing. (Doc. No. 248.) The Court granted Plaintiffs' Motion on June 26, 2012, (Doc. No. 252), and Plaintiffs' subsequently filed the instant Motion for Attorneys' Fees and Costs, and Incentive Awards on November 26, 2012, (Doc. No. 255.) On December 7, 2012, class member Perryman filed a response opposing Plaintiffs' Motion for Attorneys' Fees and objecting to the proposed settlement.[1] (Doc. No. 258.) Plaintiffs'

[1] Counsel received an additional objection to the proposed settlement from Aaron Meyer in the form of a letter dated October 11, 2012. (Pls.' Memo., Doc. No. 262-3.) As an initial

filed a response to Perryman's objections, (Doc. No. 262), and Defendant Provide Commerce, Inc. submitted a notice of non-opposition to Plaintiffs' Motion for Attorneys' Fees within their brief in support of final approval of the class settlement, (Doc. No. 265). As noted above, the Court held a hearing regarding final approval of the settlement and the fees, costs, and incentive award requested by Plaintiffs on January 28, 2013.

Proposed Settlement Terms

The proposed settlement agreement is attached to Plaintiffs' Motion for Preliminary Approval, (Doc. No. 248-3), which the Court granted. The Court sets forth some of the more significant terms of the settlement below.

A. Settlement Class

The proposed settlement class consists of:

> All persons who, between August 19, 2005 and the date of entry of the Preliminary Approval order, placed an order with a website operated by Provide Commerce, Inc. and were subsequently enrolled by Regent Group Inc. d.b.a. Encore Marketing International, Inc. in one or more of the following membership

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matter, Meyer did not file his letter with the Court as instructed in the notice of settlement so it is not properly before the Court. Moreover, Meyer objects to the settlement based upon the alleged disproportion between the class members' recovery and the requested attorneys' fees and incentive awards. This is similar to an argument made by Perryman in his properly filed objection to the proposed settlement agreement; as such, it will be addressed by the Court below.

> programs: EasySaver Rewards, RedEnvelope Rewards, or Preferred Buyers Pass.

(Doc. No. 248-3 at § 1.8.) The class excludes: (a) Defendants; (b) any entities in which Defendants have a controlling interest or which have a controlling interest in Defendants; (c) the officers, directors, employees, subsidiaries, affiliates, and attorneys of Provide Commerce or EMI; and (d) the Judges presiding over this action and any of their employees or immediate family members. (*Id.* at Ex. B – Long Notice Form.)

B. Relief to Class

Defendants have agreed to do the following in exchange for a release of claims and subject to this Court's approval:

> (1) Defendants will, via a neutral professional claims administrator selected from among three proposed by the parties, notify all Class members via direct email or U.S. Mail about their rights under the Settlement Agreement. (Doc. No. 248-3 at § 3.3(a)-(c).)
>
> (2) Provide Commerce will directly email every class member $20 in the form of a merchandise code ("$20 credit"). (*Id.* at § 2.2.)
>
> - Class members are not required to submit a claim to receive the $20 credit. (*Id.*)
> - The $20 credits are fully transferable. (*Id.*)
> - The $20 credits will be valid for one year for online purchases at Proflowers.com, RedEnvelope.com, Berries.com and CherryMoonFarms.com. (*Id.*)

- The $20 credits are not valid for use from December 17 to 24, 2012, February 4 to 14, 2013, May 1 to 12, 2013, and December 16 to 24, 2013 (and corresponding time periods in 2014 through the expiration date of the $20 credits). (*Id.*)
- The $20 credits are not combinable with discount or gift codes, cannot be used with email offers or promotions, but may be used to purchase markdown, bundled, or discounted products. (*Id.*)
- At the time of settlement and at the final approval hearing, Plaintiffs' counsel verified that these websites offered a selection of items under $20.
- The $20 credits may also be applied towards larger purchases.

(3) Defendants will fund a $12.5 million Cash Fund that eligible class members can make claims against for refunds of payments for monthly membership fees. (Doc. No. 248-3 at § 2.1.)

- To make a claim from the Cash Fund, class members can submit their claim electronically at the neutral Claims Administrator's website, a link is provided to them via the direct email notice, or by U.S. Mail. (*Id.* at § 3.6.)
- Class members will only be required to submit their contact information and verify that they did not intend to enroll and did not use the benefits of the pro-

gram (excluding the initial discount code offered for a future Provide Commerce website purchase). (*Id.* at § 2.1(d).)

- Class members will not be required to submit documents, or other proof of having been charged to make a claim. (*See id.*)
- The Claims Administrator will evaluate and calculate all claims for payment based upon Defendants' records. (*Id.* at § 3.7.)
- Claims will be paid on a pro rata basis up to the full amount owed. (*Id.* at § 3.6.)
- The parties must meet and confer in good faith to resolve any disputed claims, with EMI's records being entitled to a rebuttable presumption of accuracy. (*Id.* at § 3.8.)
- The Cash Fund will also be used to pay attorneys' fees and costs, incentive awards and administration costs. (*Id.* at § 2.1(a)-(c).)
- The Cash Fund is non-reversionary, and any remaining funds will be distributed as a *cy pres* award, subject to Court approval, to fund higher education projects relating to internet privacy and consumer protection at California State University at San Diego ("San Diego State University"), University of California at San Diego ("UCSD"), and University of San Diego School of Law ("USD Law School"). (*Id.* at § 2.1(e).)

The total settlement will approximate $38 million dollars if the entire class use the credits and make claims for reimbursement.

C. Class Representatives' Incentive Payments

The proposed settlement agreement provides for incentive awards as follows: a) $15,000 for Class Representatives Romero and Bailey; b) $10,000 for Class Representatives Berentson, Jenkins, Cox and Lawler; and c) $5,000 for, Class Representatives Walters and Dickey. (Doc. No. 248-3 at § 2.1(b).)

D. Attorneys' Fees and Costs

The settlement provides that class counsel may request fees of up to a total of $8.65 million, plus actual costs up to $200,000. Class counsel has requested the entirety of these amounts in their pending motion. (Doc. No. 248-3 at § 2.1(c).)

E. Settlement Administration and Notice

Section 3.3 of the proposed settlement agreement provides the process for notifying the class members of the proposed settlement. The Court-appointed administrator, Garden City Group, sent direct notice via email and/or U.S. Mail to approximately 1.3 million class members in accordance with the approved plan. (Pls.' Final Approval Memo., Doc. No. 262 at 8, n. 2.) On October 11, 2012, the settlement administrator made available an official settlement website and posted the full notice. (Def. Non-Opp., Doc. No. 265 at 16.) Also on October 11, 2012, email notice was sent to 1,292,987 class members. (*Id.*) Subsequently, postcard notices were sent to 233,414 class members on October 31, 2012. (*Id.*)

The notice informed class members who wished to object to the Settlement that they were required to file

their objection with the Court by December 10, 2012, and deliver a copy of the objection to counsel for the parties. (Doc. No. 248-3 at § 3.9, Ex. C – Summary Notice.) As of this deadline, Perryman is the only class member to have filed an objection to the final settlement approval. (Doc. No. 258.) Aaron Meyer submitted a letter objecting to the settlement but it was never filed. (Pls. Final Approval Memo, Doc. No. 265 at 19, n. 5.)

Perryman's Objections to the Proposed Settlement and Opposition to Plaintiffs' Motion for Attorneys' Fees

On December 7, 2012, class member Brian Perryman filed his objection to the proposed final settlement and opposition to Plaintiffs' motion for attorneys' fees. (Doc. No. 258.) Perryman does not object to the total value of the settlement. Rather, Perryman contends that (1) the class counsel has seized a disproportionate share of the recovery in violation of Rule 23(e) and Ninth Circuit law; (2) the fee component does not comply with the Class Action Fairness Act ("CAFA"); and (3) *cy pres* is used impermissibly.[2]

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[2] Plaintiffs contend that Perryman lacks standing to object to the final approval inasmuch as the attorneys' fees requested do not impact his recovery under the terms of the settlement. The Court finds Plaintiffs' argument to be unsupported. The notice to class members invited them to file objections to the proposed final settlement and did not place restrictions on those portions of the agreement to which they could object. Perryman properly filed his objection with the Court and, therefore, has complied with the requirements set forth in the notice. Furthermore, despite Plaintiffs' suggestion that *Zucker v. Occidental Petroleum Corp.* supports a finding that Perryman lacks standing, the Court interprets *Zucker* differently. 192 F.3d 1323, 1326 (9th Cir. 1999) *cert. denied* 120 S. Ct. 1671 (2000). Plaintiffs suggest that *Zucker* determined that an objector lacked standing to contest attorneys'

A. Perryman's contention that the $20 credits constitute coupons under CAFA

As an initial matter, Perryman contends that the $20 credits are, for all intents and purposes, a coupon. Perryman considers the credits to be "particularly pernicious" coupons for two reasons: (1) the credits are not available for use during three flower-giving holidays of Valentine's Day, Mother's Day, and Christmas, and (2) the settlement bars "stacking" the credits with other promotions and coupons, which serves to reduce the value of the $20 credit as the websites often have promotions available. (Doc. No. 258 at 13.) Accordingly, Perryman contends that the $20 credits are actually coupons with a significantly lower value than $20, which inflates the overall proposed settlement award and the requested attorneys' fees are disproportionately high as result.

1. Legal Standard

Special considerations arise in cases involving coupon settlements. CAFA allows a court to approve coupon settlements "only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members." 28 U.S.C. § 1712(e). Although this "fair, reasonable, and adequate" standard is identical to that contained in

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fees when the amount did not affect the objector's award under the settlement. In fact, *Zucker* did not find that the objector to the attorneys' fees lacked standing; rather, the court determined that the issue of standing was irrelevant as the district court had "inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper." *Id.* at 1328. Insomuch as Perryman has properly filed his objections to the requested attorneys' fees and the attorneys' fees are a relevant part of the proposed settlement agreement at issue, the Court will address Perryman's objections.

Rule 23(e)(2), "several courts have interpreted section 1712(e) as imposing a heightened level of scrutiny in reviewing such [coupon] settlements."[3] Likewise, Rule 23 itself may require closer scrutiny of coupon settlements.[4] Accordingly, before granting final approval, the court "must discern if the value of a specific coupon settlement is reasonable in relation to the value of the claims surrendered." *True*, 749 F. Supp. 2d at 1069. Although CAFA defines various other terms, it does not define what constitutes a "coupon." *See* 28 U.S.C. § 1711.

2. Analysis

Having considered Perryman's objections along with the relevant case law considering coupon settlements under CAFA, the Court concludes that the $20 credit in addition to the cash reimbursement fund provides fair, reasonable, and adequate relief to class members based on the nature of Plaintiffs' claims and status of the case. While Perryman objects to the alleged "coupon" offered in the settlement, he largely ignores the fact that there is also a cash fund that provides reimbursement to class members. The proposed settlement is thus not entirely a "coupon" settlement and

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[3] *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1321 (S.D. Fla. 2007)).

[4] *Shames v. Hertz Corp.*, 2012 WL 5392159, *16 (S.D. Cal. Nov. 5, 2012) (citing Fed. R. Civ. P. 23(h), 2003 Advisory Committee Notes ("Settlements involving non-monetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class.")); *see also Sobel v. Hertz Corp.*, 2011 WL 2559565, *6 (D. Nev. June 27, 2011).

distinguishable from other cases involving coupons or vouchers without an accompanying cash fund.[5]

Moreover, there is authority suggesting that CAFA does not apply where class members can opt between cash and credits like the ones objected to by Perryman. In *Shames v. Hertz*, the Court found "[p]ersuasive authority . . . that CAFA does not apply to settlements, such as this one, that offer the option between cash and vouchers for free products (as opposed to *discounts* on products where class members are required to purchase the products and pay the difference between the full and coupon-discounted price)." *Shames v. Hertz Corp.*, 2012 WL 5392159 (S.D. Cal. Nov. 5, 2012) (emphasis in original) (citing *CLRB Hanson Indus., LLC v. Weiss & Assocs., PC*, 465 Fed. Appx. 617, 619 (9th Cir. 2012)). In a recent, unpublished memorandum, the Ninth Circuit noted that a settlement giving "every class member the option to receive its share of the settlement proceeds in cash or cash-equivalent forgiveness of indebtedness already incurred" is not a "coupon settlement" and therefore does not trigger the Class Action Fairness Act of 2005's limitations on contingent fees awarded in connection with such set-

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[5] *Sobel v. Hertz Corp.*, 2011 WL 2559565 (D. Nev. June 27, 2011) (case involves "strictly a coupon settlement" without an accompanying "settlement fund or any provisions for cash payments"); *In re HP Inkjet Printer Litigation*, 2011 WL 1158635 (N.D. Cal. Mar. 29, 2011 (e-credits for HP products treated as coupons where settlement was limited to e-credits and injunctive relief without an accompanying cash fund); *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73 (D.D.C. 2011)(relief awarded in the form of vouchers for future Envision programs with any remaining funds to be distributed to *cy pres* beneficiaries); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856 (C.D. Cal. July 21, 2008)(class members who submit a valid claim will receive a gift card from Victoria's Secret)

tlements. *CLRB Hanson Indus., LLC,* 465 Fed. Appx. at 619.

Significantly, and unlike the situation in *Shames* and *CLRB Hanson*, the proposed settlement in this instance does not require class members to choose between cash reimbursement or the $20 credit; they are entitled to both. The two forms of relief are tailored the nature of Plaintiffs' claims and the alleged harm caused by Defendants' programs. Specifically, the cash fund reimburses class members for the allegedly impermissible credit card charges and the $20 credit serves as a replacement for the $15 "Thank you" gift credit that led to their allegedly unauthorized entry into the membership programs. Based on the nature of the claims and the alleged harms, the Court concludes that cash fund reimbursement combined with the automatic $20 credit provided to every class member offers real and substantial value in relation to class members' injuries, and that the settlement as a whole is fair, reasonable, and adequate.

Furthermore, Perryman acknowledges that "there is no *per se bar* on coupon relief in settlements," but asks that the Court "apply rigorous scrutiny" to the alleged coupon settlement in order to comply with CAFA requirements. Assuming *arguendo* that the credits constitute coupons under CAFA, the Court has undertaken the "rigorous scrutiny" that Perryman requests. Specifically, the Court has satisfied CAFA's requirement that a hearing be held and the Court's findings be in writing. *See* 28 U.S.C. § 1712(e). Moreover, after careful consideration of the parties' arguments, Perryman's objections, and the nature of the settlement compared to Plaintiffs' allegations, the Court finds that the $20 credits, regardless of their classification as coupons or credits, provide an actual value of $20 to the class

members despite the blackout dates and inability to combine the credits with coupons and promotions.[6] Certainly, these types of restrictions may be problematic in some coupon settlements; however, the $20 credits here are transferrable and may be used to purchase entire items without requiring the class members to spend additional money.[7] Most importantly, the $20 credits are in addition to the cash fund reimbursement available to all class members.

For these reasons, the Court finds that the restrictions imposed on the $20 credits do not significantly alter the value of the credit to the class members. The Court further finds that the relief offered by the $20 credits serves a specific purpose that is narrowly tailored to reflect the nature of Plaintiffs' allegations, specifically class members will receive a usable $20 credit of the type that was offered by the websites initially and subsequently caused them to be enrolled in the membership programs. Accordingly, the Court concludes that the class members will

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[6] It is worth noting that Defendants' counsel offered a reasonable explanation for the inclusion of the blackout dates at the hearing on the instant motions. Counsel explained that flower distributors find it difficult to fulfill the number of flower orders received during these time periods. In order to achieve settlement, it was thus important for Defendants to negotiate blackout dates in order to protect themselves during these time periods from have to fulfill orders beyond their fulfillment capacity. Defendants' counsel suggested that this term was material to Defendants' negotiation of the settlement, and it is therefore afforded significant weight by the Court.

[7] Counsel for the parties have represented to the Court that there are a number of items available for purchase under $20, so the credits do not have to serve as discounts on larger purchases. (*See* Pls. Memo., Doc. No. 262 at 7-8; Defs. Memo., Doc. No. 265 at 18.)

receive $20 in value with these $20 credits. Thus, Perryman's objection to the $20 credits and their provisions is overruled.

B. Perryman's objection to the *cy pres* component of the proposed settlement agreement

The settlement designates three institutions as cy pres recipients in order to fund programs regarding internet privacy and security: San Diego State University, UCSD, and USD Law. Perryman argues that the cy pres distribution of the remainder of the $12.5 million cash fund is defective for the following three reasons: 1) there is an intolerable conflict of interest for class counsel owing to a preexisting relationship with a *cy pres* beneficiary; 2) there is an impermissible geographic discontinuity between the composition of the class and the location of the *cy pres* recipients; and 3) *cy pres* is improper when it is feasible to make further distributions to class members, at least when such distributions do not result in a legal windfall. The Court will address each of these arguments individually below.

1. Legal Standard

Several recent Ninth Circuit cases provide valuable insight into the proper application of *cy pres* distributions. To ensure that the settlement retains some connection to the plaintiff class and the underlying claims, a *cy pres* award must qualify as "the next best distribution" to giving the funds directly to class members. *Dennis v. Kellogg Co.*, 687 F.3d 858, 865 (9th Cir. 2012) (citing *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 2011) (internal quotation marks omitted)). Not just any worthy recipient can qualify as an appropriate *cy pres* beneficiary.

Id. To avoid the "many nascent dangers to the fairness of the distribution process," we require that there be "a driving nexus between the plaintiff class and the *cy pres* beneficiaries." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). A *cy pres* award must be "guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members," and must not benefit a group "too remote from the plaintiff class," *Six Mexican Workers*, 904 F.2d at 1308-09. Thus, in addition to asking "whether the class settlement, taken as a whole, is fair, reasonable, and adequate to all concerned," we must also determine "whether the distribution of the approved class settlement complies with our standards governing *cy pres* awards." *Nachshin*, 663 F.3d at 1040 (internal quotation marks omitted).

To remedy growing concerns regarding *cy pres* distribution including the occasional appearance of impropriety by judges and counsel when choosing recipients, the Ninth Circuit held in *Six Mexican Workers* that *cy pres* distribution must be guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members. *Id.* (citing *Six Mexican Workers*, 904 F.2d at 1307).

2. Analysis

Here, the proposed settlement designates three academic institutions as *cy pres* recipients, specifically San Diego State University, UCSD, and USD School of Law School. (Proposed Settlement, Doc. No. 248-3 at § 2.1(e). The money awarded to the *cy pres* recipients will fund education programs or professorship positions regarding internet privacy or internet data security. (*Id.*) These provisions clearly tie the *cy pres* award to the policies of the statutes underlying Plaintiffs' claims such that the general nature of the distribution does not pose an obstacle to final settle-

ment approval. However, Perryman makes three specific objections to the *cy pres* objections that the Court turns to now.

a. Appearance of Impropriety

First, Perryman objects to the fact that three of the attorneys in this action graduated from USD Law School – lead plaintiffs' counsel James Patterson, associate class counsel Alisa Martin, and defense counsel Michelle Doolin. This is not particularly surprising given that this case was filed in San Diego, counsel and their law firms are located in San Diego, and obviously USD Law School is located in San Diego as well. As support for his objection, Perryman relies upon several cases in which courts voiced concern regarding the appearance of impropriety based upon connections with the proposed *cy pres* beneficiaries. The Court has reviewed these cases and finds that each contained a more significant relationship with the proposed *cy pres* beneficiaries than the alma mater connections here.[8] In contrast to these cases, the

[8] *Houck on Behalf of U.S. v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502-503 (7th Cir. 1989)(On remand for other reasons, the Seventh Circuit found it would be appropriate for the district court to consider a broader nationwide use of its *cy pres* discretion. The previous award named two law schools as the recipients in order to fund class action and antitrust research projects, and the court suggested that the Federal Judicial Center Foundation might be a good alternative recipient in a footnote); *Weeks v. Kellogg, Co.*, 2011 U.S. Dist. LEXIS 155472, *69-70 (C.D. Cal. Nov. 23, 2011) (One of the firms representing plaintiffs had an ongoing relationship with the Westside Food Bank. All the attorneys volunteer annually at the charity and a printout of the website of the Westside Food Bank lists the firm as among the "organizations that have continually offered their support."); *In re Linerboard Antitrust Litigation*, 2008 WL 4542669, *5 (E.D. Pa. Oct. 3, 2008) ("The Court agrees that PILCOP is a well respected public legal services organization in the Philadelphia

appearance of impropriety is not substantial in this instance. There are no allegations of significant relationships with USD Law School beyond it being the alma mater of three attorneys out of the many associated with the case. There is no suggestion that counsel has any further relationship with the school than simply graduating from there. Significantly, USD Law School is one of the three proposed recipients and is not entitled to any greater award than the others. There is a rational connection between the chosen recipients and the nature of the settlement. Furthermore, simply by virtue of it being a law school, USD Law School may be in the best position to develop and research the legal issues associated with internet privacy and security underlying Plaintiffs claims. For these reasons, the Court does not find a significant appearance of impropriety such that it would necessitate replacing the recipients negotiated and agreed upon by the parties.

b. Geographic Distribution

With regard to the geographic distribution of the funds, Perryman contends that the recipients of the *cy pres* award are limited to San Diego, and the *cy pres* distribution is therefore impermissible as it fails to

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area and, in general, is a deserving recipient of cy pres funds. However, because an attorney formerly associated with this case currently serves in a lead role at PILCOP, the Court does not deem it appropriate to direct any of the *cy pres* distribution to PILCOP, and takes no position on whether the Bar Foundation [the other *cy pres* recipient] should do so."); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 577 n. 2 (E.D. Pa. 2005) ("In connection with the University of Pennsylvania, the Court is sensitive to the appearance of conflict in selecting as the beneficiary of the fund an institution with long-established ties to the Eastern District Bench.");

account for the nationwide scope of the class. (Perryman Obj., Doc. No. 258-19.) As support for this proposition, Perryman contends that the Ninth Circuit found local distributions to constitute reversible error in *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011).

In *Nachshin,* the class included more than 66 million AOL subscribers throughout the United States, and the settlement distributed two-thirds of the donations to local charities in Los Angeles, California. *Id.* The Ninth Circuit found that this did not account for the broad geographic distribution of the class. *Id.* However, this was not the full extent of the Ninth Circuit's basis for finding that the *cy pres* distributing failed to target the plaintiff class, or provide reasonable certainty that any member would be benefitted. The court continued as follows:

> Even among the small percentage of plaintiffs located in Los Angeles, there is also no indication that any would benefit from donations to the Boys and Girls Clubs of Los Angeles and Santa Monica or Los Angeles Legal Aid. The proposed donation to the Federal Judicial Center Foundation at least conceivably benefits a national organization, but this organization has no apparent relation to the objectives of the underlying statutes, and it is not clear how this organization would benefit the plaintiff class. . . .
>
> We are also not persuaded by the parties' claims that the size and geographic diversity of the plaintiff class make it "impossible" to select an adequate charity. It is clear that all members of the class share two things in common: (1) they use the internet, and (2) their claims against AOL arise from a pur-

> portedly unlawful advertising campaign that exploited users' outgoing e-mail messages. The parties should not have trouble selecting beneficiaries from any number of non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance.

Id. at 1040-41. Having considered the entirety of the Ninth Circuit's analysis, it appears distinguishable from the *cy pres* distribution at issue here. Unlike the settlement in *Nachshin*, the *cy pres* distribution in this case is directly tied to the statutes underlying Plaintiffs' claims. In *Nachshin*, the benefits from *cy pres* distributions to the Los Angeles Boys and Girls Clubs and Legal Aid would be unlikely to flow to silent class members outside of the Los Angeles area. While those organization certainly provide a tangible benefit within local communities, they provide direct service to local community members with a more limited geographic impact. These two problematic aspects of the settlement in *Nachshin* are not present here.

Significantly, the recipients at issue here are not as limited in geographic scope as the recipients considered in *Nachshin*. As counsel argues, the internet is not limited by geographic boundaries, and the educational impact of the funded academic programs will have a nation-wide impact. By giving the money to academic institutions, counsel contends that the funds will directly contribute to the national academic dialogue involving internet privacy and security. The Court agrees insomuch as these schools serve a diverse student population of students from many states, issue widely-distributed publications, and engage in the overall national academic discourse. Moreover, the required use of the *cy pres* funds targets the class mem-

bers and will benefit silent class members because the class members are all internet consumers. Regardless of their physical location, programs furthering the goals of internet security and privacy will benefit users of the internet everywhere.

On the whole, the location of the recipient is less important than "whether the projects funded will provide 'next best' relief to the class."[9] *In re Lupron Marketing and Sales Practices Litigation*, 677 F.3d 21, 36 (1st Cir. 2012). Indeed, it appears that the overall impact from the proposed *cy pres* distributions will not be limited to San Diego. All internet users will benefit from the proposed funding of ideas and research relating to consumer protection. Therefore, having reviewed the proposed distribution and considered the rationale offered for its structure, the Court concludes that the *cy pres* remedy bears a direct and substantial nexus

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[9] The following excerpt from *In re Lupron Marketing and Sales Practices Litigation*, 677 F.3d 21, 36 (1st Cir. 2012), provides some valuable insight into the geographic distribution consideration:

> First, the Samsell plaintiffs argue that the "next best" requirement is not met because the *cy pres* recipient, DF/HCC, is in Boston while the injuries are to a national class. This objection fails. It is not the location of the recipient which is key; it is whether the projects funded will provide "next best" relief to the class. DF/HCC is required to do work which will have benefits well beyond Boston. The DF/HCC proposal uses a venture capital model to invest in high-impact, high-risk research projects across the globe, with the expectation that promising results will attract grants from more traditional funding sources. DF/HCC says it intends to be a catalyst for large-scale research collaboration by providing incentives to teams of researchers to join forces at the national and international levels. Moreover, the grants will be awarded by an Oversight Board composed of nationwide leaders in prostate cancer research.

to the interests of absent class members and thus properly provides for the "next best distribution" to the class despite the location of the proposed beneficiaries being limited to San Diego. *See Lane v. Facebook*, 696 F.3d 811, 821 (9th Cir. 2012). Significantly, the settlement is not required to provide the "ideal" *cy pres* recipients. *Id.* at 820-21. Accordingly, the Court finds that the geographic distribution in this instance satisfies (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members. As such, Perryman's objection to the geographic aspect of the distribution is overruled.

c. Disproportionate Attorneys' Fees Award

In addition to his first two objections, Perryman objects to the settlement including a *cy pres* distribution at all. Rather, Perryman asks the Court to distribute the *cy pres* leftovers to the class members in addition to the cash settlement fund reimbursements and $20 credits. Defendants raise a persuasive argument that this would constitute an impermissible windfall for the claimant class members at the expense of the silent class members. The settlement already authorizes class members to recover the entirety of any unauthorized charges and further awards a $20 credit worth $5 more than the original "thank you gift" leading to Plaintiffs' claims. In this way, class members may recoup their losses while also receiving some additional benefit through the $20 credit. While class members who avail themselves of both forms of recovery have arguably been made whole by their recovery, silent class members would not benefit from a further distribution to the claimant class members. Silent class members will receive greater benefit from the remaining funds if they are distributed to schools for

the creation of internet privacy and security programs benefitting internet consumers such as themselves. For this reason, the Court declines Perryman's invitation to cancel the *cy pres* distributions in favor of claimant class members.

d. Conclusion

In sum, the Court finds that the *cy pres* distribution in the proposed settlement agreement meets the standards in *Six Mexican Workers*. The nature of the distribution and the proposed recipients are sufficiently tied to the objectives of the statutes underlying Plaintiffs' claims and to the interests of silent class members. Accordingly, and for the reasons set forth above, Perryman's objections to the *cy pres* distributions in the proposed settlement agreement are overruled.

C. Perryman's objection to the requested attorneys' fees and costs

In addition to the objections already discussed, Perryman further contends that the proposed settlement agreement inequitably enriches class counsel and the named Plaintiffs at the expense of the absent class members. In particular, Perryman contends that two of the various indicia that may suggest class counsel is improperly attuned to their own interests rather than those of the class are present here: (1) there is a disproportionate distribution of the award to class counsel, and (2) there is a clear sailing agreement in which opposing counsel agreed not to contest class counsels' requested attorneys' fees.

To the extent that Perryman objects to the amount of requested attorneys' fees based upon their disproportionate relationship with the total settlement award, the Court disagrees with his assessment of the situation. In this instance, class counsel has certainly achieved

a favorable result for the class members. As previously noted, there is a significant cash fund for class member claimants plus automatic $20 credits for every class member that add significant value to the overall settlement award. Pursuant to these terms, class members may recover the entirety of their losses as well as achieve the additional benefit of the credit. As evidenced by the record, this case has been hotly contested over a period of several years. Understandably, class counsel put in a significant number of hours in order to achieve a beneficial result for the class. So long as the requested amount fits within the appropriate method for determining reasonable attorneys' fees, the Court can find no other basis for finding the requested fees to be unreasonable. Based on these considerations, the Court does not find that class counsels' requested fees are out of proportion to settlement achieved.

Perryman also objects to the inclusion of a clear sailing agreement in the proposed settlement. Clear sailing agreements are not prohibited as a general matter, but they may be viewed with suspicion in certain instances. In *In re Bluetooth Headset Products Liability Litigation*, the Ninth Circuit noted that certain types of clear sailing agreements may indicate that class counsel "allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." 654 F.3d 935, 947 (9th Cir. 2011). Particularly, the court objected to the situation in which the "parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries 'the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class.'" *Id.* (quoting *Lobatz v. U.S. W. Cellular of CA, Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000). Similarly, the court

found it problematic "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Id.* Significantly, however, neither of the situations found problematic in *In re Bluetooth Headset Products* are found here. The payment of attorneys' fees is incorporated into the final settlement of the entire action, and the funds for attorneys' fees are not held separate from the class funds. Attorneys' fees are to be taken directly from the cash fund established for class member reimbursement, and any remaining funds will be distributed to the *cy pres* beneficiaries. Moreover, there is no evidence suggesting that the parties reached this settlement as a result of collusion or self-interest. There were numerous settlement proceedings, several of which were presided over by well-respected retired district court judges and magistrate judges. By all accounts, the settlement resulted from an arms-length negotiation process with the benefit of the class members in mind. For all of these reasons, the Court finds little merit in Perryman's argument that the proposed settlement inequitably enriches class counsel and the named representatives at the expense of the absent class members. Accordingly, Perryman's objection in this regard is overruled.

D. Conclusion

When determining whether to approve the proposed settlement agreement, the Court must evaluate its fairness as a whole, rather than assessing its individual components. *See Lane*, 696 F.3d at 818-19. The Ninth Circuit does not require perfection in the view of the Court, but rather an overall determination that the settlement is fundamentally fair. *Id.* Here, the Court is convinced that the proposed settlement is "fair, adequate, and free from collusion." *Id.* Accordingly,

Perryman's objections are overruled, and the Court approves the final settlement agreement proposed by the parties.

Plaintiffs' Request for the Imposition of an Appellate Bond Against Perryman

In Plaintiffs' memorandum in support of final approval of the settlement, Plaintiffs' ask that the Court require Perryman to post a bond in the amount of $60,000 should he appeal the final settlement approval. District courts "may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 954–55 (9th Cir. 2007) (citing Fed. R. App. P. 7). "[T]he purpose of [an appellate bond] is to protect an appellee against the risk of nonpayment by an unsuccessful appellant." *Fleury v. Richemont N. Am., Inc.*, 2008 WL 4680033, at *6 (N.D. Cal. Oct. 21, 2008) (quotations and citations omitted).

In light of the circumstances, the Court declines to impose an appeal bond as the Court has no indication, as of yet, that Perryman intends to appeal the final settlement. While there is case law supporting the imposition of an appeal bond against objectors appealing final settlement approval in certain circumstances, the appeal bonds in those cases were only issued following the objectors' filing notices of appeal.[10] This

[10] *See Fleury*, 2008 WL 4680033 at *6–7 (imposing a $5,000 bond for appeal of the final settlement approval after objector filed notice of appeal); *see also Miletak v. Allstate Ins. Co.*, 2012 WL 3686785, *1 (N.D. Cal. Aug. 27, 2012)(imposed a $60,000 bond for appeal of the final settlement approval after objector filed notice of appeal); *In re MagSafe Apple Power Adapter Litigation*, 2012 WL 2339721, *1 (N.D. Cal. May 29, 2012) (imposing a $15,000 bond on both objectors who filed a notice of

suggests, and the Court agrees, that the imposition of an appeal bond prior to Perryman filing a notice of appeal would be premature. Should Perryman file a notice of appeal in this action, Plaintiffs may file a renewed motion for an appeal bond. At this time, however, Plaintiffs' request for an appeal bond is denied.

Conclusion

Having overruled Perryman's objections and reviewed the proposed settlement agreement, the Court makes the following findings:

1. Unless otherwise specified, capitalized or defined, terms in this Order have the same definition as the same terms in the Settlement Agreement.

2. This Court has jurisdiction over the subject matter of this Action, all parties to the Action, and all Class Members who have not timely and validly requested exclusion.

3. Defendants Provide Commerce, Inc. ("Provide Commerce") and Regent Group, Inc. dba Encore Marketing International, Inc. ("EMI" or "RGI") (Provide Commerce and EMI collectively, "Defendants") provided notice to Class Members in compliance with Section 3.3 of the Settlement Agreement, due process, and

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appeal); *Embry v. ACER America Corp*., 2012 WL 2055030, *1 (N.D. Cal. June 5, 2012)(imposing a $70,650 bond for appeal of the final settlement approval while appeal was pending); *Yingling v. eBay, Inc.*, 2011 WL 2790181, *1 (N.D. Cal. July 05, 2011) (imposing a $5,000 bond for appeal of the final settlement approval after objector filed notice of appeal); and *In re Wachovia Corp. Pick-A-Payment Mortg. Marketing and Sales Practices Litigation*, 2011 WL 3648508, *1 (N.D. Cal. Aug. 18, 2011)(imposing a $15,000 bond for appeal of the final settlement approval after objector filed notice of appeal).

Rule 23 of the Federal Rules of Civil Procedure. Notice was provided on the Internet at the web address of www.membershipprogramsettlement.com. Summary notice was provided by email to each Class Member at the email address that EMI maintains for each Class Member, including persons that had previously indicated that they do not wish to be contacted by EMI. Summary notice was provided by postcard via U.S. mail to all Class Members to whom notice by direct email was not deliverable and for whom EMI had a facially valid postal address, including persons that had previously indicated that they do not wish to be contacted by EMI. The notice: (i) fully and accurately informed Class Members about the lawsuit and settlement; (ii) provided sufficient information so that Class Members were able to decide whether to accept the benefits offered, opt-out and pursue their own remedies, or object to the proposed settlement; (iii) provided procedures for Class Members to file written objections to the proposed settlement, to appear at the hearing, and to state objections to the proposed settlement; and (iv) provided the time, date and place of the final fairness hearing, which the Court subsequently changed and was noted on the settlement website.

4. Defendants gave notice on June 22, 2012, pursuant to 28 U.S.C. § 1715(b). (See Doc. No. 250.) The notice substantively complies with the requirements of 28 U.S.C. § 1715(b) and was sent to the appropriate state and federal officials.

5. For the reasons stated in the Order Granting Preliminary Approval of Class Settlement and Provisional Class Certification (Doc. No. 252), and having found nothing that would disturb these previous findings, this Court finds and determines that the proposed Class, as defined below, meets all of the legal require-

ments for class certification, for settlement purposes only, under Federal Rule of Civil Procedure 23(a) and (b)(3).

6. The Parties have adequately performed their obligations under the Settlement Agreement to date.

7. Upon review of the record pursuant to the factors identified in *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) and *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), the Court hereby finds that the terms and provisions of the Settlement Agreement have been entered into in good faith, and are fair, reasonable, and adequate as to, and in the best interest of, each of the Class Members, and in full compliance with all applicable requirements of the Federal Rules of Civil Procedure, the Rules of the Court, due process, and any other applicable law. With respect to the determination that the Settlement Agreement is fair, reasonable, and adequate, the Court specifically notes that (a) whether the outcome on the merits would result in a ruling in Plaintiffs and the Class's favor is substantially uncertain, *see*, *e.g., Berry v. Webloyalty.com, Inc.*, No. 10-CV-1358-H (CAB), 2011 WL 1375665 at *4-6 (S.D. Cal. Apr. 11, 2011) (holding similar enrollment webpage for other subscription-based membership program was not deceptive);[11] (b) the parties had nearly completed discovery including, but not limited to, the

[11] *Accord Hager v. Vertrue, Inc.*, No. 09-11245-GAO, 2011 WL 4501046, at*6-7 (D. Mass. Sept. 28, 2011); *Hook v. Intelius, Inc.*, No. 10-CV-239 (MTT), 2011 WL 1196305 (M.D. Ga. Mar. 28, 2011); *Baxter v. Intelius, Inc.*, No. SACV 09-1031 AG (MLGx), 2010 WL 3791487 (C.D. Cal. Sept. 16, 2010); *In re Vistaprint Corp. Mktg. & Sales Prac. Litig.*, MDL 4:08-md-1994, 2009 WL 2884727 (S.D. Tex. Aug. 31, 2009), *aff'd, Bott v. Vistaprint USA, Inc.*, No. 09-20648, 2010 WL 3303692 (5th Cir. Aug. 23, 2010).

exchange of a large number of documents, numerous depositions, and expert disclosures; (c) the Settlement Agreement was reached through negotiations with experienced and informed counsel; (d) the consideration provided to the Class reflects substantial benefits to the Class in light of the circumstances of the Action; (e) there are no governmental objectors; and (f) less than a fraction of one percent of the class objected to the settlement.

8. The Court also finds that extensive arm's-length negotiations have taken place, in good faith and free from collusion, between Class Counsel and Defendants' Counsel resulting in the Settlement Agreement. Parts of these negotiations were presided over by Magistrate Judge William Gallo, and other parts of the negotiations were presided over by the experienced mediators Hon. Leo S. Papas (ret.) and Hon. Edward A. Infante (ret.).

9. The arguments of objector Brian Perryman do not preclude approval of the settlement. The primary relief provided in the Settlement Agreement is the availability of the cash payment; each Class Member had the opportunity to make a claim for a cash payment; and secondarily a $20 Credit was provided which not only provided the Class with a substantial benefit, but was more than the $10 to $15 off gift code that was being offered as part of the enrollment process at issue in this Action. The objector has not shown that the proposed *cy pres* recipients have a significant connection, ongoing or past, with Class Counsel or Defendants' Counsel, or that any of them stand to benefit from any distribution to the *cy pres* recipients. Further, the proposed *cy pres* recipients have the appropriate geographic scope given their enrollment and job placement statistics and the fact

that this Action and the subject matter of the *cy pres* funds involve the internet, which lacks geographic scope. The benefits of the proposed *cy pres* recipients extend beyond San Diego County. Finally, the parties' agreement that Defendants would not oppose Class Counsel's request for attorneys' fees up to $8.65 million and costs up to $200,000 does not demonstrate self-dealing by Plaintiffs or Class Counsel.

10. Attorneys' Fees. An award of $8,650,000 in attorneys' fees and of $200,000 in costs to Class Counsel is fair and reasonable in light of the nature of this case, Class Counsel's experience and efforts in prosecuting this Action, and the benefits obtained for the Class.

The Court used the common-fund method to calculate the attorneys' fees award, which is reasonably calculated by dividing the total fee award ($8.650,000) by the reasonable value of the settlement fund ($38,000,000). The value of the settlement fund is supported by the $12.5 million cash fund and the value of $20 Credits, which are fully transferrable and can be used to purchase items under $20 on a number of Provide Commerce's websites. *See, e.g., Fernandez v. Victoria Secret Stores*, LLC, 2008 U.S. Dist. LEXIS 123546, at *38-40 (C.D. Cal. 2008) and *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269, at *22, 28 (N.D. Cal. 2007). Applying this method, the fee awarded constitutes 22.7% of the settlement value, and is within the Ninth Circuit's attorneys' fees benchmark of 25% of the settlement value. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). The attorneys' fees are also reasonable and supported when applying a lodestar crosscheck. Using the lodestar method, the Court finds that Class Counsel's hours and expenses were reasonable. The Court has considered the appro-

priate factors to determine that a multiplier of 2.1 is reasonable and appropriate given the results achieved and the risks undertaken by Class Counsel.

11. Enhancement Awards. An enhancement award of $15,000 each to plaintiffs Josue Romero and Gina Bailey, of $10,000 each to plaintiffs Bradley Berentson, Grant Jenkins, Daniel Cox, and Jennifer Lawler, and of $5,000 to plaintiffs John Walters and Christopher Dickey is fair and reasonable in light of: (a) Plaintiffs' respective risks (including financial, professional, and emotional) in commencing this action as the class representatives; (b) the time and effort spent by the respective Plaintiffs in litigating this action as the class representatives; and (c) Plaintiffs' public interest service.

12. Settlement Payments. Defendants, through the Claims Administrator, must make Settlement Payments from the Net Cash Fund to Authorized Claimants according to Section 2.1(d) of the Settlement Agreement by mailing Settlement Payments to Authorized Claimants no later than twenty-five (25) calendar days after the Final Settlement Date, which is defined under Section 1.11 of the Settlement Agreement.

13. Remainder. Any unclaimed portion of the Net Cash Fund after mailing of Settlement Payments to Authorized Claimants and after any mailed Settlements are returned to the Claims Administrator as undeliverable must be paid on an equal basis to the following non-profit college or university academic institutions located in San Diego County, California, with the payments specified to be used for a chair, professorship, fellowship, lectureship, seminar series or similar funding, gift or donation program developed and coordinated between Provide Commerce and the respective institutions (depending on the amount of

the remainder) regarding internet privacy or internet data security: California State University at San Diego (San Diego State University), University of California at San Diego, and University of San Diego School of Law. Defendants, through the Claims Administrator, must mail or wire the payments from the Net Cash Fund according to the timeline set forth in Section 2.1(e) of the Settlement Agreement.

14. Objection Overruled. The objection of Brian Perryman is overruled for the reasons stated above.

15. Appeal Bond. Pursuant to Rule 7 of the Federal Rules of Civil Procedure, in a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to insure that any appellants have the ability to pay Plaintiffs' costs and fees should opposing an appeal be necessary. *See A&M Records, Inc. v. Napster, Inc*., 239 F.3d 1004, 1028 (9th Cir. 2001); *See also* Fed. R. App. P. 7 ("Rule 7"). Given that Perryman has not filed a notice of appeal or provided the Court with any indication that he intends to appeal the final approval of the settlement, the Court finds an appeal bond to be untimely under the circumstances. Should Perryman file a notice of appeal in this action, Plaintiffs may file a renewed motion for an appeal bond. Accordingly, Plaintiffs' request for an appeal bond is DENIED.

16. Court's Jurisdiction. Pursuant to the parties' request, the Court will retain jurisdiction over this action and the parties until final performance of the Settlement Agreement.

IT IS SO ORDERED.

DATED: February 4, 2013

/s/ Anthony J. Battaglia
Hon. Anthony J. Battaglia
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: EASYSAVER REWARDS LITIGATION, This document relates to all actions.	Lead Case No.: 09cv2094 AJB (WVG) Consolidated Action FINAL JUDGMENT

IT IS HEREBY ADJUDGED AND DECREED THAT:

1. Upon consideration of the Court's final order approving class action settlement (Dkt. No. 271) ("Final Approval Order"), it is hereby ORDERED that judgment is entered on behalf of the settlement class and against Defendants pursuant to the parties' Settlement Agreement and Release as follows.

2. In the Final Order Approving Class Action Settlement, the Court granted final certification, for purposes of settlement only, of a Class pursuant to Federal Rule of Civil Procedure 23(b)(3), defined as: "All persons who, between August 19, 2005 and June 26, 2012, placed an order with a website operated by Provide Commerce, Inc. and were subsequently enrolled by Regent Group Inc. dba Encore Marketing International, Inc. in one or more of the following membership programs: EasySaver Rewards, RedEnvelope Rewards, or Preferred Buyers Pass. Excluded from the Class are (a) Provide Commerce and RGI, (b) any entities in which Provide Commerce or RGI have a controlling interest or which have a controlling interest in Provide Commerce or RGI, (c) the officers, directors, employees, subsidiaries, affiliates, and attorneys of Provide Commerce or RGI, and (d) the Judges presiding over the Lawsuit

and any of their employees or immediate family members."

3. Pursuant to Federal Rule of Civil Procedure 23(c)(3), all persons who satisfy the class definition above are "Class Members." However, persons who timely filed valid requests for exclusion are not Class Members. The list of excluded persons is attached hereto as Exhibit 1.

4. In the Final Order Approving Class Action Settlement, the Court found that notice of the Settlement Agreement and Release ("Settlement Agreement") was provided on the Internet at the web address of www.membershipprogramsettlement.com. Summary notice was provided by email to each Class Member at the email address that EMI maintains for each Class Member, including persons that have previously indicated that they do not wish to be contacted by EMI. Summary notice was provided by postcard by U.S. mail to all Class Members to whom notice by direct email was not deliverable and for whom EMI has a facially valid postal address, including persons that have previously indicated that they do not wish to be contacted by EMI.

5. Pursuant to Federal Rule of Civil Procedure 23(c)(3), all Class Members who have not timely and validly filed requests for exclusion are thus Class Members who are bound by this Final Judgment, by the Final Order Approving Class Action Settlement and by all the terms of the Settlement Agreement, including the release of claims stated therein. Plaintiffs and all Class Members who did not properly request exclusion are hereby: (1) deemed to have released and discharged all claims arising out of or asserted in this action and claims released under the Settlement Agreement, including all claims that could

have been asserted in this action; and (2) barred and permanently enjoined from asserting, instituting, or prosecuting, either directly or indirectly, these claims.

6. Defendants will pay a total of $12.5 million to establish a "Gross Cash Fund." The Gross Cash Fund, minus the attorneys' fees and costs paid pursuant to paragraph 7, enhancement awards paid pursuant to paragraph 8, and all fees and costs incurred by Garden City Group, Inc., ("GCG"), including the costs of administering the settlement and providing notice to the Class Members, shall be deemed the "Net Cash Fund."

7. Class Counsel is awarded $8,650,000 in fees and $200,000 in costs. Payment shall be from the Gross Cash Fund.

8. Plaintiffs Josue Romero and Gina Bailey are awarded $15,000 each as an enhancement award, plaintiffs Bradley Berentson, Grant Jenkins, Daniel Cox, and Jennifer Lawler are awarded $10,000 each as an enhancement award, and plaintiffs John Walters and Christopher Dickey are awarded $5,000 each as an enhancement award. Payment shall be from the Gross Cash Fund.

9. As set forth in the Final Approval Order, Defendants will pay a total of $12.5 million to establish the Gross Cash Fund to be used to pay any and all fees and costs, including, but not limited to, all claims administration fees and costs, Class Counsel's fees and costs award set forth below, and Plaintiffs' enhancement awards set forth below, with the remaining balance, defined as the Net Cash Fund under the Settlement Agreement, to be distributed to Class Members who are eligible for and validly and timely submit Claim Forms in the form of Settlement

Payments as described under Section 2.1(d) of the Settlement Agreement.

10. As set forth in the Final Approval Order, Class Counsel is awarded $8,650,000 in fees and $200,000 in costs. Defendants, through the Claims Administrator, must pay Class Counsel this amount from the Gross Cash Fund according to the timeline set forth in Section 2.1(c) of the Settlement Agreement.

11. As set forth in the Final Approval Order, Plaintiffs Josue Romero and Gina Bailey are awarded $15,000 each as an enhancement award, plaintiffs Bradley Berentson, Grant Jenkins, Daniel Cox, and Jennifer Lawler are awarded $10,000 each as an enhancement award, and plaintiffs John Walters and Christopher Dickey are awarded $5,000 each as an enhancement award. Defendants, through the Claims Administrator, must pay Plaintiffs these amounts from the Gross Cash Fund according to the timeline set forth in Section 2.1(b) of the Settlement Agreement.

12. As set forth in the Final Approval Order, Defendants, through the Claims Administrator, must make Settlement Payments from the Net Cash Fund to Authorized Claimants according to Section 2.1(d) of the Settlement Agreement by mailing Settlement Payments to Authorized Claimants no later than twenty-five (25) calendar days after the Final Settlement Date, which is defined under Section 1.11 of the Settlement Agreement.

13. As set forth in the Final Approval Order, any unclaimed portion of the Net Cash Fund after mailing of Settlement Payments to Authorized Claimants and after any mailed Settlements are returned to the Claims Administrator as undeliverable must be paid

on an equal basis to the following non-profit college or university academic institutions located in San Diego County, California, with the payments specified to be used for a chair, professorship, fellowship, lectureship, seminar series or similar funding, gift or donation program developed and coordinated between Provide Commerce and the respective institutions (depending on the amount of the remainder) regarding internet privacy or internet data security: California State University at San Diego (San Diego State University), University of California at San Diego, and University of San Diego School of Law. Defendants, through the Claims Administrator, must mail or wire the payments from the Net Cash Fund according to the timeline set forth in Section 2.1(e) of the Settlement Agreement.

14. The Court hereby dismisses with prejudice the action.

15. Without affecting the finality of this Final Judgment, the Court retains jurisdiction over the implementation, administration and enforcement of this Final Judgment and the Settlement Agreement, and all matters ancillary thereto.

NOW, THEREFORE, the Court, finding that no reason exists for delay, hereby directs the Clerk to enter this Final Judgment, pursuant to Federal Rule of Civil Procedure 58, forthwith.

IT IS SO ORDERED.

DATED: February 21, 2013

/s/ Hon. Anthony J. Battaglia
Hon. Anthony J. Battaglia
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE EASYSAVER REWARDS LITIGATION, JOSUE ROMERO; DEANNA HUNT; KIMBERLY KENYON; GINA BAILEY; ALISSA HERBST; GRANT JENKINS; BRADLEY BERENTSON; JENNIFER LAWLER; DANIEL COX; JONATHAN WALTER; CHRISTOPHER DICKEY, *Plaintiffs-Appellees*, v. BRIAN PERRYMAN, *Objector-Appellant*, v. PROVIDE COMMERCE, INC.; REGENT GROUP, INC., a California corporation, DBA Encore Marketing International; ENCORE MARKETING INTERNATIONAL, INC., a Delaware corporation, *Defendants-Appellees.*	No. 13-55373 D.C. No. 3:09-cv-02094-AJB-WVG ORDER AND MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court for the Southern District of California Anthony J. Battaglia, District Judge, Presiding

Submitted March 19, 2015[**]
Pasadena California

Before: REINHARDT and GOULD, Circuit Judges and MOTZ,[***] Senior District Judge.

This case is resubmitted as of the date of this order.

Objector-Appellant Brian Perryman appeals the district court's approval of the class settlement agreement reached by Defendant-Appellee Provide Commerce, Inc., Defendant-Appellee Regent Group, Inc., d/b/a Encore Marketing International, and Plaintiffs-Appellees. Perryman contends that the district court abused its discretion in approving the settlement agreement and the attorney's fee award, because the $20 credit offered to the class was a coupon subject to the Class Action Fairness Act, 28 U.S.C. § 1712. Perryman further contends that the district court abused its discretion in approving the *cy pres* distribution.

This case was originally set for argument on February 2, 2015. That argument date was vacated, and submission was deferred pending resolution of *Frank v. Netflix*, No. 12-15705+. On February 27, 2015, we decided *Frank v. Netflix* (*In re Online DVD-Rental Antitrust Litig.*), No. 12-15705, __F.3d __, 2015 WL 846008 (9th Cir. Feb. 27, 2015). Having reviewed

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[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable J. Frederick Motz, Senior District Judge for the U.S. District Court for the District of Maryland, sitting by designation.

the parties' submissions, we vacate the district court's judgment and remand for further proceedings consistent with *Frank*. Because class settlement is a package deal that must "stand or fall in its entirety," we need not now address whether the district court abused its discretion in approving the *cy pres* distribution. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Pursuant to General Order 4.5(e), each party shall bear its own costs on appeal.

VACATED AND REMANDED.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: EASYSAVER REWARDS LITIGATION	Case No. 09-cv-02094-BAS-WVG
	ORDER

I. BACKGROUND

On February 4, 2013, the Honorable Anthony Battaglia issued a Final Order approving the class settlement; granting Plaintiffs' motion for attorneys' fees, costs and incentive awards; and overruling Objector Perryman's objections. [ECF No. 271.] Based on this Order, on February 21, 2013, Judge Battaglia entered a Final Judgment dismissing with prejudice the action and retaining jurisdiction over the implementation, administration and enforcement of the Final Judgment, the Settlement Agreement and all matters ancillary thereto. [ECF No. 277.]

Objector Perryman appealed. While the case was on appeal, it was transferred from the calendar of Judge Battaglia to the calendar of Judge Cynthia Bashant. [ECF No. 295.]

On March 19, 2015, the Court of Appeals issued an order and memorandum vacating the district court's judgment and remanding the case for further proceedings consistent with its newly decided *In re Online DVD-Rental Antitrust Litig.,* No. 12-15709, 779 F.3d 934 (9th Cir. 2015). [ECF No. 302.] On July 27, 2016, this court heard oral argument from the Plaintiffs on behalf of the class members, the Defendants and Objector Perryman, on the effect of *In re Online DVD-Rental Antitrust* on the settlement approved by Judge Battaglia. Having considered the oral arguments as

well as the various written submissions to the court, the court adopts the orders of Judge Battaglia in their entirety [ECF No. 271, 277] and finds this settlement is not a "coupon settlement" requiring adherence to 28 U.S.C. § 1712.

II. STATEMENT OF FACTS

According to Plaintiffs, when class members completed a purchase on one of Provide Commerce Inc. ("Provide Commerce")'s retail websites, they were presented with a pop-up window offering $15.00 off their next purchase as a "Thank you" gift, and asking them to enter their zip code and email address and click "Accept" to receive the gift. [Fourth Amended Complaint, ECF No. 221, ¶¶3, 26.] Provide Commerce then transmitted this private payment information to Encore Marketing International ("EMI") without consent. [*Id.* ¶¶1-3.] EMI proceeded to enroll class members in a Rewards Program and charged their credit or debit cards a $1.95 activation fee, followed by a $14.95 monthly fee. [*Id.* ¶¶3, 26.]

Defendants Provide Commerce and EMI deny these allegations, claiming the Rewards Program details were adequately disclosed and that Plaintiffs entered into electronic contracts with EMI for membership in the Rewards Program. [ECF No. 248-1.]

III. SETTLEMENT TERMS

The Court adopts the Background and Proposed Settlement Terms outlined in Judge Battaglia's Final Order approving class settlement. [ECF No. 271.] However, the Court emphasizes the following findings of fact about the settlement:

1. The total settlement in this case was a $12.5 million non-reversionary cash fund plus

$20.00 merchandise credits [1] automatically sent via e-mail or direct mail to all class members without the need for a claim form submission. If all class members used the full $20.00 merchandise credit, the total settlement would be $38 million. [ECF No. 248-3 §2.]

2. The non-reversionary cash fund was to reimburse those class members who had been charged an activation or monthly fees without their consent. Any amounts left over after reimbursement of all class members seeking reimbursement and after deduction of attorneys' fees and costs would go to a *cy pres* fund to fund higher education projects relating to internet privacy and consumer protection. [*Id.* §2.1d, e.]

3. The settlement was specifically tailored to address the alleged harm inflicted in this case, that is, return of any cash charged to class members' credit or debit cards for unwanted enrollment in the Rewards Program, plus a $20.00 merchandise credit to compensate for the $15.00 "Thank You" gift offer.

4. The $20.00 merchandise credit did not require class members to hand over more of their own money before they could take advantage of it. [ECF No. 262 at 7-8; 265 at 18.]

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[1] The Court uses the term "merchandise credit" in lieu of "coupon" or "gift card" since these latter terms are obviously loaded terms. Whether the "merchandise credit" constitutes a coupon or a gift card depends less on the labels put on it by counsel or the court and more on the inherent nature of how the merchandise credit could be used.

5. The $20.00 merchandise credit was valid for any product or service offered on several different websites, was not valid only for select products or services and could be used for marked down, bundled or discounted products. [ECF No. 248-3 §2.2.]

6. The $20.00 merchandise credits were fully transferrable. [*Id.*]

7. The $20.00 merchandise credits were emailed or direct mailed to class members who had expressed an interest in receiving such a credit by clicking on a pop-up window offering them a $15.00 future credit, entering their zip code and email and clicking on "accept." [*Id.*]

8. The $20.00 merchandise credit did have a one-year expiration date and did have black-out dates. [*Id*.]

IV. APPLICATION OF *DVD-RENTAL ANTI-TRUST LITIGATION*.

In *In re Online DVD-Rental Antitrust Litgation,* 779 F.3d 934 (9th Cir. 2015), the Ninth Circuit found that the proposed class settlement was not a "coupon settlement" subject to the confines of 28 U.S.C. §1712. The Court first found that concerns with "coupon settlements" addressed by section 1712 were concerns about settlements in which class members received nothing more than promotional coupons to purchase more products from Defendants. *Id.* at 950. In particular, the Court pointed to situations where class members were required to give Defendants more money to obtain the benefit of the coupon and where the coupons were only valid for select products or services. *Id.* at 951.

In contrast, the DVD-Rental Antitrust settlement provided class members with a $12.00 Walmart gift card if they submitted a claim through a website, or alternatively $12.00 in cash or a $12.00 Walmart gift card if they submitted a claim by mail. The Court distinguished this type of settlement from one where class members received "a discount—frequently a small one—on class members' purchases from the settling Defendant." *Id.*

The Court placed great emphasis on the fact that the DVD-Rental Antitrust settlement "[i]nstead of merely offering class members the chance to receive a percentage discount on a purchase of a specific item or set of items . . . gives class members $12.00 to spend on any item carried on the website of a giant, low-cost retailer. The class member need not spend any of his own money and can choose from a large number of potential items to purchase." *Id.* The Court also considered that the gift cards were freely transferrable and did not expire. *Id.*

Similar to the DVD-Rental Antitrust settlement, the settlement in this case allows class members to purchase any number of products from several different websites, many of which do not require the class member to spend any of his own money. They are not discount coupons; they are $20.00 that can be used for or toward the purchase of any on-line item. The merchandise credits are not limited to purchase of a specific item or set of items.

However, this case is stronger than the DVD-Rental Antitrust settlement, because this is a case where the class members have expressed a desire to have and an interest in getting $15.00 off their next purchase. That is what made them a member of the class. Each class member clicked on a pop-up offering him or her $15.00

off the next purchase. Therefore, each class member expressed a clear preference for this type of reward. Furthermore, the settlement also involves a cash payment as well as a merchandise credit, so that any class members who were wrongfully charged can be made whole. Therefore, unlike any other settlement the Court has been able to find, this settlement was specifically tailored to the harm suffered by the class members and the interest they had in receiving this "Thank you" gift.

This Court is mindful that this case differs from the DVD-Rental Antitrust settlement in two important respects: the merchandise credits expired after one year and there were black-out dates for use of the credits. The Court recognizes that this militates against construing the merchandise credits as gift cards, but given the other factors, particularly the fact that these merchandise credits were very similar to the "Thank You" gifts that class members were trying to obtain, the Court finds this settlement was not a coupon settlement subject to the strictures of section 1712.

V. ATTORNEYS' FEES AND INCENTIVE AWARD

Ultimately, Objector Perryman's main concern is not that he, or other class members, did not get enough out of the settlement. His concern is that the class attorneys and representatives got too much. Hence, the Court revisits Judge Battaglia's findings that the attorneys' fees and incentive awards were reasonable.

A. Legal Standard

Courts have an independent obligation to ensure that the attorneys' and class representative fees award, like the settlement, is reasonable. *In re Bluetooth*

Headsets Products Liability Litig., 654 F.3d 935, 941 (9th Cir. 2011). Where a settlement produces a common fund for the benefit of the entire class, the courts have the discretion to employ a "percentage of recovery method." *Id.* at 942. Typically, courts calculate 25% of the fund as a "bench mark" for a reasonable fee award. *Id.* The 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases. *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1047 (9th Cir. 2002). Thus, courts are encouraged to cross-check this method by employing the "lodestar method" as well. *In re Bluetooth*, 654 F.3d at 949.

Under the "lodestar method," the Court multiplies the number of hours the prevailing party reasonably expended by a reasonable hourly rate for the work. *Id.* at 941. The hourly rate may be adjusted for the experience of the attorney. *Id.* The resulting amount is "presumptively reasonable." *Id.* However, the Court may adjust this presumptively reasonable amount upward or downward by an appropriate positive or negative multiplier reflecting a whole host of reasonableness factors including the quality of the representation, the complexity and novelty of the issues, the risk of nonpayment, and, foremost in consideration, the benefit achieved for the class. *Id.* at 942.

"[I]ncentive awards that are intended to compensate class representatives for work undertaken on behalf of a class are fairly typical in class actions cases" and "do not, by themselves, create an impermissible conflict between class members and their representative[]." *In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 934, 943 (9th Cir. 2015). Nonetheless, the Court has obligation to assure that the amount requested is fair. *In re Bluetooth,* 654 F.3d at 941.

B. Analysis

Counsel in this case negotiated a class settlement worth as much as $38 million on behalf of 1,500,000 class members. Class counsel requests an $8.65 million award in attorneys' fees, which is 22.7% of the overall recovery, below the typical 25% benchmark.

Nonetheless, Objector Perryman argues that the $38 million is overinflated since it requires class members to use their $20 merchandise credit, and a more realistic assessment of the recovery is the fund with no merchandise credits included, or $12.5 million. The Objector fails to take into consideration the fact that these 1,500,000 class members were individuals who expressed an interest in receiving these merchandise credits. They requested the "Thank you" gifts in the first place. Therefore, the chances of them actually using these gifts are much higher than others who have not expressed a preference or interest in receiving the gifts.

Nonetheless, the Court finds it appropriate to cross-check the requested amount with a lodestar calculation. As of November 26, 2012 (almost four years ago and before any of the pre and post-appeal proceedings), attorneys Patterson, Khoury, Steckler, Stonebarger and Anderson submitted declarations to the Court detailing the reasonable attorney hours expended on this litigation. (ECF No. 255-2 through 255-6.) The Court finds the rates billed by the attorneys (ranging from $625 to $750 for partners; $340 to $450 for associates, $125 to $260 for paralegals, $575 for of-counsel, and $105 for legal assistants) are reasonable and reflect the prevailing rate seen by this Court in other similar cases. Furthermore, the Court has reviewed these bills and finds the hours expended to be reasonable. Class counsel successfully opposed

several dispositive motions in the case, amended the complaint multiple times to conform to discovery, took and defended numerous depositions in California and Maryland, propounded written discovery leading to defense production of 450,000 pages of discovery, issued 22 non-party document subpoenas, organized and coded over a million pages of documents, and participated in six settlement conferences including two private mediations. [ECF No. 255-1 through -6.] The resulting lodestar amount of $4,264,116.50 is presumptively reasonable.

However, the Court also finds that a positive multiplier of 2 is appropriate in this case. The attorneys had a great deal of experience in class action litigation and took a case that was largely of first impression. The case involved the automatic enrollment of individuals in Reward Programs, an area of class action litigation that had not been explored before. This case was taken on a contingency fee basis and has required the lawyers to "float" the costs and attorneys' fees for seven years now, at great risk to them. Finally, the attorneys achieved excellent results for the class—class members got both their "Thank you" gift and their money back from the automatic enrollment. Therefore, the Court finds the requested attorneys' fees are reasonable both under a percentage of recovery and a lodestar calculation.[2]

Furthermore, the Court finds the incentive awards to be reasonable based on the requirements for the named class members in this case. The amounts are tiered based on the amount of time the named class

[2] As the Court noted earlier, this completely omits any attorney hours expended on the appellate and post-appellate process. Obviously, the multiplier would be considerably less now.

members were involved in the litigation and the burdens on each named class member. For Romero and Bailey, for whom counsel is requesting $15,000 each, they were both deposed, subject to written discovery, required to travel and attend mandatory settlement conferences and required to participate in other case-related meetings and conference calls. (Patterson Decl., ECF No. 255-2 ¶¶9-11.) For Berentson, Jenkins, Cox and Lawler, for whom counsel is requesting $10,000 each, they were required to travel to San Diego for depositions and they, too, were subject to written discovery and participated in other case-related meetings and conference calls. (*Id.*) Finally, for Walters and Dickey, for whom counsel is requesting $5,000 each, although they were not deposed, they were required to participate in case-related meetings and conference calls. (*Id.)* All Named Plaintiffs were required to gather information to support their claims and respond to inquiries from class counsel over the now seven years this case has been pending. The Court finds the requested amounts to be reasonable.

VI. ORDER

This Court, having reconsidered the settlement in the light of *In re Online DVD Rental Antitrust Litigation*, adopts and reinstates the Orders of Judge Battaglia. (ECF Nos. 271, 277.) Judgment is entered in the Plaintiff Class Members' favor and the case is dismissed with prejudice.

IT IS SO ORDERED.

DATED: August 9, 2016

/s/ Cynthia Bashant
Hon. Cynthia Bashant
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE EASYSAVER REWARDS LITIGATION, ---------- JOSUE ROMERO; et al., *Plaintiffs-Appellees*, v. BRIAN PERRYMAN, *Objector-Appellant*, v. PROVIDE COMMERCE, INC.; et al., *Defendants-Appellees.*	No. 16-56307 D.C. No. 3:09-cv-02094-BAS-WVG Southern District of California, San Diego ORDER

Before: N.R. SMITH and FRIEDLAND, Circuit Judges, and LYNN,* Chief District Judge.

Objector-Appellant Brian Perryman's motions seeking to stay issuance of the mandate and extend the time to file a petition for panel rehearing or, in the alternative, to stay the mandate pending his filing a petition for writ of certiorari to the United States Supreme Court and the disposition thereof are DENIED.

* The Honorable Barbara M. G. Lynn, Chief United States District Judge for the Northern District of Texas, sitting by designation.

APPENDIX G

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("*Settlement Agreement*") is entered into between plaintiffs Josue Romero, Gina Bailey, Jennifer Lawler, John Walters, Daniel Cox, Christopher Dickey, Grant Jenkins, and Bradley Berentson (collectively "*Plaintiffs*"), individually and in their representative capacity on behalf of the Class, and defendants Provide Commerce, Inc. ("*Provide Commerce*") and Regent Group, Inc. dba Encore Marketing International, Inc. ("*EMI*") (Provide Commerce and EMI collectively, "*Defendants*") (Plaintiffs and Defendants collectively, "*Parties*," or singularly, "*Party*").

RECITALS

A. On August 19, 2009, plaintiff Josue Romero commenced a civil action in the Superior Court of the County of San Diego entitled *Josue Romero v. Provide Commerce, Inc., Regent Group, Inc. dba Encore Marketing International, et al.*, Case No. 37-2009-00096492-CU-BT-CTL. On September 25, 2009, Provide Commerce removed the case to the United States District Court for the Southern District of California, which assigned it Case No. 09-CV-02111.

B. On September 24, 2009, then-plaintiff Bobbi Sledge (who, as explained below, is no longer a named plaintiff) initiated the action entitled *Sledge v. Provide Commerce, Inc.*, Case No. 09 CV-2094 in the United States District Court for the Southern District of California.

C. On November 13, 2009, the United States District Court for the Southern District of California consolidated the *Sledge* and *Romero* cases under Case

No. 09-CV-2094 with the new title *In re EasySaver Rewards Litigation* ("*Action*"), and appointed interim class counsel.

D. The then-plaintiffs filed their consolidated complaint on December 14, 2009. It added two new named plaintiffs (Kenyon and Bailey) and dropped plaintiff Sledge.

E. On February 22, 2010, Provide Commerce and EMI filed motions to dismiss. On August 13, 2010, the district court entered an order granting in part and denying in part the motions, dismissing with prejudice the then-plaintiffs' claims against Provide Commerce for violation of the Electronic Funds Transfer Act and Electronic Communications Privacy Act, and denying the motions as to the then-plaintiffs' other claims.

F. On August 30, 2010, Provide Commerce answered the consolidated complaint, and on September 9, 2010, EMI answered the consolidated complaint. The answers generally and specifically denied the consolidated complaint's allegations and raised several separate and additional defenses.

G. On February 10, 2011, the then-plaintiffs filed a first amended complaint, which added then-plaintiff Albert Parker (who, as explained below, is no longer a named plaintiff). Provide Commerce and EMI answered on March 11, 2011. The answers generally and specifically denied the first amended complaint's allegations and raised several separate and additional defenses.

H. On May 26, 2011, the court granted the then-plaintiffs and Defendants' joint motion for leave to amend to allow the then-plaintiffs to file a second amended complaint. Provide Commerce answered on June 22, 2011 and EMI answered on June 28, 2011. The answers generally and specifically denied the

second amended complaint's allegations and raised several separate and additional defenses.

I. The Action is related to yet another case. In February 2010, then-plaintiff Alissa Herbst filed *Herbst v. Encore Marketing Int'l, Inc., et al.*, Case. No. 2:10-cv-00870 in the United States District Court for the District of New Jersey. *Herbst* was transferred to the United States District Court for the Southern District of California on February 17, 2011, and assigned Case No. 11-cv-00349. On June 17, 2011, the court consolidated *Herbst* with the Action, ordered that the operative complaint would be the second amended complaint in the Action or any subsequent amendment thereto (thus dropping plaintiff Herbst as a plaintiff), and maintained the previously appointed interim class counsel in the Action.

J. On July 28, 2011, the then-plaintiffs filed a third amended complaint, wherein plaintiff Kenyon withdrew and plaintiffs Berentson and Jenkins joined the Action as plaintiffs. Both Provide Commerce and EMI filed motions to dismiss the claims of then-plaintiff Parker. As part of their opposition to the motions to dismiss, then-plaintiff Parker sought to voluntarily withdraw due to his lack of standing, and the remaining then-plaintiffs requested leave to file a fourth amended complaint to add plaintiffs Lawler, Walters, Cox, and Dickey. On December 7, 2011, the Court dismissed plaintiff Parker, granted the remaining then-plaintiffs leave to amend to file the fourth amended complaint, and denied Defendants' motions to dismiss as moot.

K. Plaintiffs filed the fourth amended complaint on December 14, 2011. Plaintiffs assert their claims in their individual capacity and their capacity as representatives of a class of similarly situated persons. Based on the alleged circumstances surrounding their

enrollment in EasySaver Rewards, RedEnvelope Rewards, or Preferred Buyers Pass, Plaintiffs assert a total of ten claims against Provide Commerce and EMI: (1) breach of contract (against Provide Commerce only); (2) breach of contract (against EMI only); (3) breach of implied covenant of good faith and fair dealing; (4) fraud; (5) violations of the Consumers Legal Remedies Act ("CLRA"); (6) unjust enrichment; (7) violation of the Electronic Funds Transfer Act ("EFTA") (against EMI only); (8) invasion of privacy; (9) negligence; and (10) violations of the Unfair Competition Law ("UCL").

L. Provide Commerce and EMI respectively filed motions to dismiss the claims of plaintiffs Lawler, Walters, Cox, and Dickey on January 24, 2012. Such plaintiffs filed their opposition on February 13, 2012, and Defendants filed their respective replies on February 23, 2012. A hearing on the motions to dismiss is presently not set. Defendants have not answered the fourth amended complaint.

M. The Parties have participated in numerous settlement conferences and mediations in an effort to resolve the Action. On December 15, 2010, the Parties appeared before Magistrate Judge William Gallo and participated in an Early Neutral Evaluation conference ordered by the court. On May 18, 2011, the Parties participated in a full-day private mediation session before Judge Leo S. Papas (Ret.). On May 20, 2011, the Parties again appeared before Magistrate Judge William Gallo and participated in a Mandatory Settlement Conference ordered by the court. On June 20, 2011, Magistrate Judge William Gallo conducted a Mandatory Settlement Conference with Defendants and their respective insurance carriers only. Magistrate Judge William Gallo conducted follow up telephone

conferences with all or certain Defendants and all or certain of their respective insurance carriers on July 18, 2011, August 5, 2011, and August 17, 2011. Magistrate Judge William Gallo conducted an in-person Mandatory Settlement Conference with Plaintiffs only on October 7, 2011. The Parties continued to discuss a potential settlement over the next several months, and agreed to attend a second private mediation. On April 9, 2012, the Parties participated in a full-day private mediation session before Judge Edward Infante (Ret.). At the conclusion of the mediation, the Parties reached an agreement on the high-level terms of a settlement, conditioned on the Parties negotiating and executing a complete written agreement, which in turn is subject to court approval.

N. The Parties have investigated the facts and have analyzed the relevant legal issues with regard to the claims and defenses asserted in the Action. Based on these investigations, Plaintiffs believe the Action has merit, while Defendants believe the Action has no merit. The Parties have also each looked at the uncertainties of trial and the benefits to be obtained under the proposed settlement, and have considered the costs, risks, and delays associated with the continued prosecution of this complex litigation, and the likely appeals of any rulings in favor of either Plaintiffs or Defendants.

O. Accordingly, it is now the intention of the Parties and the objective of this Settlement Agreement to avoid the costs of trial and settle and dispose of, fully and completely and forever, any and all claims and causes of action that Plaintiffs asserted or that could have been asserted in the Action.

AGREEMENT

1. DEFINITIONS. The following section defines terms that are not defined above. Some definitions use terms that are defined later in this section:

1.1 The terms *"$20 Credit"* or *"$20 Credits"* means a single transferable $20 credit valid only for on-line purchases at ProFlowers.com, RedEnvelope.com, Berries. com, and CherryMoonFarms.com that Provide Commerce agrees to provide each Class Member. The $20 Credit is subject to certain terms, which are set forth in Section 2.2 of this Settlement Agreement.

1.2 The terms *"Authorized Claimant"* or *"Authorized Claimants"* mean any Class Member who is eligible for and validly and timely submits a Claim Form to receive a Settlement Payment according to the terms of this Settlement Agreement.

1.3 The terms *"Claim Form"* or *"Claim Forms"* mean the form eligible Class Members must complete and timely submit to receive a Settlement Payment under this Settlement Agreement. The Claim Form submitted to the Court for approval must be in the form attached as Exhibit D.

1.4 The term *"Claimant"* means any Class Member who submits a Claim Form for a Settlement Payment under this Settlement Agreement.

1.5 The term *"Claims Administrator"* means the entity, and any successors to that entity, that Defendants retain to administer the Settlement process provided for in the Settlement Agreement, which includes, but is not limited to: (i) preparing, issuing, distributing, emailing, and monitoring all necessary notices and forms, declarations, filings, and related documents, including developing, maintaining, and

operating an Internet website specifically created for the Settlement of this Action; (ii) communicating with and responding to Class Members; (iii) computing Settlement Payments to Authorized Claimants; (iv) establishing or maintaining an account for the Gross Cash Fund; and (v) distributing payments out of the Gross Cash Fund or Net Cash Fund. Defendants will retain the claims administrator after requesting and evaluating quotes from The Garden City Group, Inc., Epiq Consulting, and Rust Consulting. The selected claims administrator need not have the lowest quote, but its quote should not be substantially more expensive.

1.6 The terms *"Class Counsel"* or "*Plaintiffs' Counsel*" means the law firms of Patterson Law Group, APC, Baron & Budd, P.C., Andrus Anderson LLP, and Cohelan Khoury & Singer.

1.7 The terms *"Class*," *"Class Member*," and *"Class Members"* mean all persons who, between August 19, 2005 and the date of entry of the preliminary approval order, placed an order with a website operated by Provide Commerce, Inc. and were subsequently enrolled by Regent Group Inc. dba Encore Marketing International, Inc. in one or more of the following membership programs: EasySaver Rewards, RedEnvelope Rewards, or Preferred Buyers Pass.

1.8 The term *"Court"* means the United States District Court for the Southern District of California.

1.9 The term *"Fairness Hearing"* means the hearing at which the Court decides whether to approve this Settlement Agreement as being fair, reasonable, and adequate.

1.10 The term *"Final Order and Judgment"* means a proposed order and judgment approving the

Settlement of this Action. The order submitted to the Court shall be in the form attached as Exhibit E.

1.11 The term "*Final Settlement Date*" means the date in which either of the following events has occurred: (a) if no appeal or request for review is filed or made, thirty-one (31) days after Defendants receive ECF notice from Plaintiffs or the Court that the Court entered the Final Approval Order and Judgment or (b) if any appeal or request for review is filed or made, fourteen (14) days after the date on which Plaintiffs file and Defendants receive ECF notice that a court entered an order affirming the Final Approval Order and Judgment or denied review after either the exhaustion of all appeals or the time for seeking all appeals has expired.

1.12 The term *"Full Notice"* means the legal notice of the proposed Settlement terms, as approved by Class Counsel, Provide Commerce's Counsel, EMI's Counsel, and the Court, to be provided to Class Members under Section 3.3 of this Settlement Agreement. The Full Notice submitted to the Court for approval shall be in the form attached as Exhibit B.

1.13 The term "*Gross Cash Fund*" means the $12.5 million described in Section 2.1 of this Settlement Agreement.

1.14 The term "*Net Cash Fund*" means the remaining balance of the Gross Cash Fund that shall be distributed to Authorized Claimants as described in Section 2.1 of this Settlement Agreement after payment of any and all fees and costs from the Gross Cash Fund, including, but not limited to, all claims administration fees and costs, court-approved Class Counsel fees and costs award, and court-approved Class Representative enhancement awards.

1.15 The term "*Internet Posting*" means a website set up by the Claims Administrator for the proposed Settlement for the purposes of, among other things, providing the Class with the Full Notice of the Settlement, receiving email addresses from those Class Members receiving Summary Notice by U.S. mail in the event of email undeliverability, receiving Claim Forms submitted by Claimants, and making the Full Notice and Claim Form available for downloading.

1.16 The term *"Membership Program"* or *"Membership Programs"* means EasySaver Rewards, RedEnvelope Rewards, or Preferred Buyers Pass.

1.17 The term *"Named Plaintiffs"* means Plaintiffs in their individual capacities.

1.18 The term *"Preliminary Approval and Provisional Class Certification Order"* or *"Preliminary Approval Order"* means a proposed order preliminarily approving the Settlement of this Action and provisionally certifying the Class. This order must be submitted to the Court in the form attached as Exhibit A.

1.19 The term *"Provide Commerce's Counsel"* means the law firm of Cooley LLP.

1.20 The term "*EMI's Counsel*" means the law firm of Myron M. Cherry & Associates, LLC.

1.21 The term *"Settlement"* means the settlement of this Action and related claims.

1.22 The term *"Settlement Payment"* or *"Settlement Payments"* means a payment to an Authorized Claimant or payments to Authorized Claimants from the Net Cash Fund as described under Section 2.1(d) of this Settlement Agreement.

1.23 The term *"Summary Notice"* means the legal notice summarizing the proposed Settlement terms, as

approved by Class Counsel, Provide Commerce's Counsel, EMI's Counsel, and the Court, which is to be provided to Class Members under Section 3.3 of this Settlement Agreement by email or U.S. mail in the event of email undeliverability. The Summary Notice submitted to the Court for approval shall be in the form attached as Exhibit C.

2. SETTLEMENT TERMS

As consideration for the Settlement, which is subject to Court approval, Defendants will pay a total of $12.5 million and Provide Commerce will provide a $20 Credit to each Class Member according to the terms set forth below. Based on Defendants' verified discovery responses, there are between approximately 1.25 million and 1.35 million Class Members, each of whom will automatically receive the $20 Credit described below and have the opportunity, if they are eligible, to make a claim for a payment from the Net Cash Fund described below.

2.1 Cash Fund. In accordance with Section 2.1(f) of this Settlement Agreement, Defendants will pay $12.5 million to establish the Gross Cash Fund to be used to pay any and all fees and costs, including, but not limited to, all claims administration fees and costs, court-approved Class Counsel's fees and costs award, and court-approved Named Plaintiffs' enhancement awards. The remaining balance – Net Cash Fund – shall be distributed to Authorized Claimants as described below. If the Court approves the Settlement of this Action, and subject to Section 2.1(f) of this Settlement Agreement, Defendants shall make their payments within seven (7) days after the Final Settlement Date. The Gross Cash Fund will pay for, in order:

(a) Claims Administration. All fees and costs incurred by the Claims Administrator for the administration of the Settlement, including, but not limited to: (i) preparing, issuing, distributing, emailing, and monitoring all necessary notices and forms, declarations, filings, and related documents, including developing, maintaining, and operating an Internet website specifically created for the Settlement of this Action; (ii) communicating with and responding to Class Members; (iii) computing Settlement Payments from the Net Cash Fund to Authorized Claimants; (iv) establishing or maintaining an account for the Gross Cash Fund; and (v) distributing payments out of the Gross Cash Fund or Net Cash Fund.

(b) Named Plaintiffs' Enhancement Awards. Enhancement awards of up to $15,000 each for plaintiffs Josue Romero and Gina Bailey (who participated in various court-ordered settlement conferences and the first mediation, responded to written discovery, and had their depositions taken), up to $10,000.00 each to plaintiffs Bradley Berentson, Grant Jenkins, Daniel Cox, and Jennifer Lawler (who responded to written discovery and had their depositions taken, or in the case of plaintiff Lawler, prepared, took time off work, and travelled to San Diego, California for her deposition, which ultimately did not occur), and up to $5,000.00 each to plaintiffs John Walters and Christopher Dickey (who responded to written discovery), subject to Court approval. Plaintiffs agree to not petition the Court for or otherwise seek more than these amounts for enhancements awards. A reduction by the Court or by

an appellate court of the enhancement award sought by Plaintiffs shall not affect any of the Parties' rights and obligations under the Settlement Agreement, and shall only serve to increase the amount of the Net Cash Fund to be distributed as Settlement Payments to Authorized Claimants or any remainder, both of which are addressed in Section 2.1(d)-(e) of this Settlement Agreement. If the Court approves the Settlement of this Action and enhancement awards to the Named Plaintiffs, Defendants agree to pay, through the Claims Administrator as a distribution from the Gross Cash Fund, the enhancement awards approved by the Court up to the amounts specified above to Named Plaintiffs within fourteen (14) days after the Final Settlement Date.

(c) Class Counsel's Attorneys' Fees and Costs Award. Class Counsel's Attorneys' fees and costs award of up to, and not more than, $8.65 million in fees and $200,000 in costs, subject to Court approval. Defendants agree not to oppose this request, and do not currently take and will not take a position on the total Settlement value or total value of the $20 Credit in connection with obtaining Court approval of the Settlement or with respect to Class Counsel's motion or application for attorneys' fees and costs. A reduction by the Court or by an appellate court of Class Counsel's attorneys' fees and costs award shall not affect any of the Parties' other rights and obligations under the Settlement Agreement, and shall only serve to increase the amount of the Net Cash Fund to be distributed as Settlement Payments to Authorized Claimants or any remainder, both

of which are addressed below. Nothing in this Settlement Agreement shall prohibit Class Counsel from appealing any reduction of requested attorneys' fees and costs awarded by Court. In accordance with *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010), Class Counsel will file any papers supporting its request for attorneys' fees and costs with the Court fourteen (14) days prior to the deadline for Class Members to object to the Settlement, as such deadline is defined in Section 3.9 of this Settlement Agreement. Defendants agree to pay, through the Claims Administrator as a distribution from the Gross Cash Fund, Class Counsel's Attorneys' fees and costs award approved by the Court up to $8.65 million to one or more of the Class Counsel, as specified by Class Counsel, within fourteen (14) days after the Final Settlement Date.

(d) Settlement Payments to Class Members. After all payments are made out of the Gross Cash Fund for the items listed in Section 2.1(a)-(c) of this Settlement Agreement, the Net Cash Fund shall be distributed to Authorized Claimants. To be eligible for a Settlement Payment from the Net Cash Fund, a Class Member must submit a Claim Form signed under penalty of perjury stating, among other things, that he/she did not knowingly authorize his/her enrollment in the Membership Program(s) for which he/she was charged and did not take advantage of any of the benefits of the Membership Program(s) other than the dollar-off-code for a future Provide Commerce website purchase. Only Class Members who were actually enrolled in a Membership Program

and were charged at least the activation fee and one monthly membership fee are eligible to receive a Settlement Payment from the Net Cash Fund. No Class Member will be entitled to receive a Settlement Payment from the Net Cash Fund to the extent he/she already received a refund or chargeback of the monthly membership fees he/she paid or to the extent he/she was enrolled but was not charged a monthly membership fee at all. Class Members who used or requested a benefit, directory, or other service provided through any of the Membership Programs other than the dollar-off-code for a future Provide Commerce website purchase (including, but not limited to, cash back on gift cards, travel and/or leisure discounts, discounted movie or theme park tickets or free concierge services), are not eligible to receive a Settlement Payment from the Net Cash Fund. The amount to be received by an Authorized Claimant will depend upon the number of claims submitted and dollar value of such claims, and shall be up to, but not more than, the amount of monthly fees the Authorized Claimant paid for Membership Program(s) less any full or partial refund the Authorized Claimant previously received. Depending upon the number of claims received and the dollar value of such claims, the Net Settlement Fund may be sufficient to pay all Authorized Claimants for the full amount of their claims. If the claims submitted exceed in dollar amount the amount of the Net Cash Fund, Authorized Claimants' payments will be reduced on a prorated basis, such that the total number and dollar value of all Authorized Claimants'

claims shall not exceed the amount of the Net Cash Fund. If the Court approves the Settlement of this Action, Defendants, through the Claims Administrator, must mail the Settlement Payments from the Net Cash Fund to Authorized Claimants within twenty-five (25) calendar days following the Final Settlement Date.

(e) Remainder. Any unclaimed portion of the Net Cash Fund after distribution of Settlement Payments to Authorized Claimants and any returned Settlement Payments to Authorized Claimants will be paid on an equal basis to the following non-profit college or university academic institutions located in San Diego County, California, with the payments specified to be used for a chair, professorship, fellowship, lectureship, seminar series or similar funding, gift, or donation program developed and coordinated between Provide Commerce and the respective institutions (depending on the amount of the remainder) regarding internet privacy or internet data security: California State University at San Diego (San Diego State University), University of California at San Diego, and University of San Diego School of Law. If the Court approves the Settlement of this Action, Defendants, through the Claims Administrator, must mail or wire the payments from the Net Cash Fund to the remainder recipients within sixty (60) calendar days following the Final Settlement Date.

(f) Less Than Full Funding of Cash Fund. Defendants' respective contributions to the Gross Cash Fund shall be conditioned upon and in

accordance with the agreement reached amongst themselves (including their respective insurers). If the total amount of $12.5 million is not contributed to the Gross Cash Fund from Defendants collectively in accordance with the agreement reached amongst themselves and their respective insurers, then the Settlement Agreement shall be null and void *ab initio*, the Final Order and Judgment shall be vacated by its own terms, Defendants shall not be jointly liable for the total amount of the Gross Cash Fund or the contribution of the other, and the Parties shall revert to their respective positions in the Action.

2.2 $20 Credit. Provide Commerce agrees to provide each Class Member with one $20 Credit. The $20 Credit shall be fully transferable and shall be valid only for on-line purchases at ProFlowers.com, RedEnvelope.com, Berries.com, and CherryMoon Farms.com. The $20 Credit will be distributed to all Class Members by email (the email address to which Direct Email Notice was sent for all deliverable Direct Email Notices or if undeliverable and Direct Mail Notice is provided, the email address the Class Member provides to the Claims Administrator). The $20 Credit shall be subject to the following terms: (i) expires one year after distribution date; (ii) not valid for order or delivery of products on December 17 to 24, 2012, February 4 to 14, 2013, May 1 to 12, 2013, and December 16 to 24, 2013 (and corresponding time periods in 2014 through the expiration date should the $20 Credit not be distributed until 2013); (iii) one $20 Credit per Class Member; (iv) not redeemable for cash and not refundable; (v) will not be replaced if lost or stolen; (vi) not valid for Same Day, International or Wedding Services (including, not valid on www.florist

express.net, www.floristexpressonline.net, www.fruitbaskettoday.com, and ProFlowersInternational.com), third party hosted products (*e.g.* wine), or for the purchase of Giftcards; (vii) not combinable with discount or gift codes, cannot be used with hyperlink or URL based offers (including certain email offers or third party promotions) or previous purchases, but does apply to markdown, bundled, and discounted products; and (viii) must be used in a single transaction (no change, credit, or cash given and any balance not used is lost).

3. CLASS SETTLEMENT PROCEDURES

3.1 Cooperation to Obtain Court Approval. The Parties will take all reasonable steps necessary to secure the Court's approval of this Settlement Agreement and the Settlement.

3.2 Preliminary Approval and Provisional Class Certification. As soon as practicable after this Settlement Agreement is signed, Plaintiffs must move or apply for preliminary approval of the Settlement and provisional class certification. The motion or application must request the Court to:

(a) preliminarily approve this Settlement Agreement as being the product of serious, informed, non-collusive negotiations, having no obvious deficiencies, not improperly granting preferential treatment to the proposed class representatives or segments of the class, and falling within the range of possible approval;

(b) preliminarily approve the form, manner, and content of the Full Notice, Summary Notice, and Claim Form described in Sections 3.3 and 3.6, and attached as Exhibits B - D;

(c) set the date and time of the Fairness Hearing between one hundred seventy-one (171) and one hundred eighty-five (185) calendar days after entry of the preliminary approval order, subject to the Court's availability;

(d) provisionally certify the Class under Rule 23(b)(3) of the Federal Rules of Civil Procedure for settlement purposes only;

(e) stay all proceedings in the Action until the Court renders a final decision on approval of the Settlement;

(f) appoint the Named Plaintiffs as Class Representatives for settlement purposes only; and

(g) appoint the law firms of Patterson Law Group, APC, Baron & Budd, P.C., Andrus Anderson LLP, and Cohelan Khoury & Singer as Class Counsel for settlement purposes only.

The proposed Preliminary Approval and Provisional Class Certification Order must be submitted to the Court in the form attached as Exhibit A.

3.3 Notice. Subject to the Court granting Preliminary Approval of the Class Settlement and Provisional Class Certification, the Parties agree that Defendants, through their retained Claims Administrator, will provide the Class with notice of the proposed Settlement by the following methods.

(a) Internet Posting. Starting no later than seventy-five (75) calendar days after entry of the Preliminary Approval Order, the Claims Administrator will set up an Internet website and post the Full Notice and Claim Form, both of which shall be downloadable. The website will be active for a period of sixty (60) consecutive

calendar days. The website shall be designed and constructed to accept electronic Claim Form submission, and will also provide a mechanism to receive updated email addresses by mail and electronically through the Internet website from those Class Members that receive Summary Notice by U.S. mail as described below. The website domain name shall be non-inflammatory, shall not infringe upon any of Provide Commerce's or EMI's trade names or service marks, and is subject to the approval of each of the Parties, which approval shall not be unreasonably withheld.

(b) Summary Notice By Direct Email. Starting no later than seventy-five (75) calendar days after entry of the Preliminary Approval Order, Defendants, through the Claims Administrator, will send Summary Notice by email to each Class Member at the email address that EMI maintains for each Class Member, including persons that have previously indicated that they do not wish to be contacted by EMI. The Summary Notice sent by email must be in the form attached as Exhibit C, and will provide the URL of the Internet website containing the Full Notice and a U.S. postal mailing address for the Claims Administrator so that Class Members may request a paper copy of the Claim Form or Full Notice by U.S. mail. The email address from which the Summary Notice is sent shall be non-inflammatory, shall not infringe upon any of Provide Commerce's or EMI's trade names or service marks, and is subject to the approval of each of the Parties, which approval shall not be unreasonably withheld.

(c) Summary Notice By Direct U.S. Mail. As soon as reasonably possible after receiving notification of undeliverability, and no later than ninety-five (95) calendar days after entry of the Preliminary Approval Order, Defendants, through the Claims Administrator, will send Summary Notice on a postcard by U.S. mail to all Class Members to whom Summary Notice by direct email was not deliverable and for whom EMI has a facially valid postal address, including persons that have previously indicated that they do not wish to be contacted by EMI. The Summary Notice sent by postcard must be in the form attached as Exhibit C, and will provide the URL of the Internet website containing the Full Notice and a U.S. postal mailing address for the Claims Administrator so that Class Members may request a paper copy of the Claim Form or Full Notice by U.S. mail.

3.4 CAFA Notice. Not later than ten (10) calendar days after the Settlement Agreement is filed with the Court, Defendants shall jointly serve upon the relevant government officials notice of the proposed Settlement in accordance with 28 U.S.C. § 1715.

3.5 Proof of Notice. No later than seven (7) calendar days before the filing date for Plaintiffs' motion in support of the Final Order and Judgment, Defendants must send by email a declaration from the Claims Administrator to Class Counsel confirming that Defendants, through the Claims Administrator, provided the Class with notice of the proposed Settlement in accordance with Section 3.3 of this Settlement Agreement.

3.6 Claim Form. To be entitled to receive a Settlement Payment from the Net Cash Fund, Class

Members must accurately complete a Claim Form, signed under penalty of perjury, and deliver that form to the Claims Administrator no later than one hundred thirty-five (135) calendar days after the entry of the Preliminary Approval Order. The Claim Form must be in the form attached as Exhibit D, and must include certifications acknowledged by Class Members under penalty of perjury that at the time the Class Member was enrolled, he/she did not knowingly authorize his/her enrollment in the Membership Program(s) for which he/she was charged and did not use any of the benefits of the Membership Program(s) other than the dollar-off-code for a future Provide Commerce website purchase. The Claim Form may be submitted electronically or by U.S. mail. The electronic Claim Form on the webpage shall be programmed such that if the Claimant fails to fulfill any of the information or certification requirements before clicking on the "submit" button, the page will immediately display a conspicuous warning window or page in the middle of the screen informing the Claimant of such failure, specifying the deficiency, and explaining that failure to remedy the deficiency will prevent submission of the Claim Form unless remedied. The Claims Administrator shall also take all reasonable actions to contact any Claimant who submits a deficient Claim Form on paper via U.S. Mail. The deficiency notice for a paper Claim Form shall expressly state which pieces of information or certifications must be completed or made for the claim to be deemed non-deficient. The delivery date is deemed to be the date (a) the Claim Form is deposited in the U.S. mail as evidenced by the postmark, in the case of submission by U.S. mail, or by date of delivery if sent by FedEx, UPS, or comparable courier, or (b) in the case of submission electronically through the Internet website for the Settlement, the

date the Claims Administrator receives the Claim Form, as evidenced by the transmission receipt. Any Class Member who fails to submit a valid and timely Claim Form is not an Authorized Claimant and will not receive a Settlement Payment from the Net Cash Fund.

3.7 Right to Verify. The Claims Administrator will review all submitted Claim Forms for completeness, validity, accuracy, and timeliness, and may contact any Claimant to request any missing information required on the Claim Form. The Claims Administrator will determine the validity of any claim, and as part of that determination, verify that, according to EMI's records, the information set forth in a submitted Claim Form is accurate and that the Claimant is a Class Member and is eligible to receive a Settlement Payment. The Claims Administrator may also contact Defendants to determine whether a Claimant is a Class Member and is eligible to receive a Settlement Payment. Defendants are also entitled, at their option, to review submitted Claim Forms.

3.8 Disputed Claims. If the Parties dispute a Claim Form's timeliness or validity, the Parties must meet and confer in good faith to resolve the dispute. EMI's records will be entitled to a rebuttable presumption of accuracy.

3.9 Objections. Any Class Member who has not submitted a timely written exclusion request pursuant to Section 3.10 of this Settlement Agreement and who wishes to object to the fairness, reasonableness or adequacy of the Settlement Agreement or the proposed Settlement or to the attorneys' fees and costs award requested by Class Counsel, must do so by filing a written objection with the Court and delivering a copy of the objection to Class Counsel, Provide Commerce's Counsel, and EMI's Counsel no later than one hundred

thirty-five (135) calendar days after entry of the Preliminary Approval Order. The delivery date is deemed to be the date the objection is deposited in the U.S. Mail as evidenced by the postmark. It shall be the objector's responsibility to ensure receipt of any objection by the Court, Class Counsel, Provide Commerce's Counsel, and EMI's Counsel. To be considered by the Court, the objection must include: (1) a heading containing the name and case number of the Action: *In re EasySaver Rewards Litigation*, Case No. 3:09-cv-02094-AJB (WVG); (2) the Class Member's name, email address, postal address, and telephone number; (3) a detailed statement of each objection and the factual and legal basis for each objection, and the relief that the Class Member is requesting; (4) a list of and copies of all documents or other exhibits which the Class Member may seek to use at the Fairness Hearing; and (5) a statement of whether the Class Member intends to appear, either in person or through counsel, at the Fairness Hearing, and if through counsel, a statement identifying the counsel's name, postal address, phone number, email address, and the state bar(s) to which the counsel is admitted. Any Class Member who files and serves a written objection, as described in this section, has the option to appear at the Fairness Hearing, either in person or through personal counsel hired at the Class Member's expense, to object to the fairness, reasonableness, or adequacy of the Settlement Agreement or the proposed Settlement, or to the award of attorneys' fees and costs. However, Class Members or their attorneys intending to make an appearance at the Fairness Hearing must include a statement of intention to appear in the written objection filed with the Court and delivered to Class Counsel, Provide Commerce's Counsel, and EMI's Counsel, and only those Class Members who

include such a statement may speak at the Fairness Hearing. If a Class Member makes an objection or appears at the Fairness Hearing through an attorney, the Class Member will be responsible for his or her personal attorney's fees and costs.

3.10 Exclusion Requests. Class Members may elect not to be part of the Class and not to be bound by this Settlement Agreement. To make this election, Class Members must send a letter or postcard to the Claims Administrator stating: (a) the name of the Action, "*In re EasySaver Rewards Litigation*"; (b) the full name, address, and telephone number of the person requesting exclusion; and (c) a statement that he/she does not wish to participate in the Settlement, postmarked no later one hundred thirty-five (135) calendar days after entry of the Preliminary Approval Order.

(a) Exclusion List. Defendants must serve on Class Counsel a list of Class Members who have timely and validly excluded themselves from the Class no later than ten (10) calendar days before the filing date for Plaintiffs' motion in support of the Final Order and Judgment. Such list may be attached as an exhibit to the proof of notice declaration from the Claims Administrator addressed in Section 3.5 of this Settlement Agreement.

(b) Blow-up Clause. Despite this Settlement Agreement, if more than one thousand two hundred fifty (1,250) Class Members request exclusion, then either Provide Commerce or EMI may, in either's sole discretion, at any time before the Fairness Hearing, notify Class Counsel in writing that it has elected to terminate this Settlement Agreement. If this Settlement Agreement is terminated under

this section, it will be deemed null and void *ab initio*. In that event: (i) the Provisional Class Certification Order and all of its provisions will be vacated by its own terms; (ii) the Action will revert to the status that existed before the Settlement Agreement's execution date; and (iii) no term or draft of this Settlement Agreement, or any part or aspect of the Parties' settlement discussions, negotiations, or documentation will have any effect or be admissible into evidence, for any purpose, in this Action or any other proceeding.

3.11 Fairness Hearing and Final Order and Judgment. In connection with their motion or application for preliminary approval of the Settlement, Plaintiffs shall request that the Fairness Hearing be held between one hundred seventy-one (171) and one hundred eighty-five (185) calendar days after entry of the Preliminary Approval Order, subject to the Court's availability. Before the Fairness Hearing, Plaintiffs must move or apply for Court approval of a proposed Final Order and Judgment, which shall be submitted to the Court in the form attached as Exhibit E. Class Counsel must file with the Court a complete list of all Class Members who have validly and timely excluded themselves from the Class. Class Counsel must also draft the application papers and give Provide Commerce's Counsel and EMI's Counsel drafts of the motion or application and proposed order to review at least seven (7) calendar days before the application's filing deadline. Defendants shall be permitted, but not required, to file their own joint or individual brief or statement of non-opposition in support of the motion or application for Final Order and Judgment.

3.12 Action Status If Settlement Not Approved, Final Settlement Date Does Not Occur, or Gross Cash Fund Not Fully Funded. This Settlement Agreement is being entered into for settlement purposes only. If the Court conditions its approval of either the Preliminary Approval Order or the Final Order and Judgment on any modifications of this Settlement Agreement or Exhibits thereto (including the Summary Notice, Full Notice, or Claim Form) that are not acceptable to all Parties, if the Court does not approve the Settlement or enter the Final Order and Judgment, if the Final Settlement Date does not occur for any reason, or if the total amount of $12.5 million is not contributed to the Gross Cash Fund as addressed in Sections 2.1 and 2.1(f) of this Settlement Agreement, then this Settlement Agreement will be deemed null and void *ab initio*. In that event (a) the Preliminary Approval Order and all of its provisions or the Final Order and Judgment and all of its provisions, as applicable, will be vacated by its own terms, including, but not limited to, vacating conditional certification of the Class, conditional appointment of Plaintiffs as class representatives and conditional appointment of Plaintiffs' Counsel as Class Counsel, (b) the Action will revert to the status that existed before the Settlement Agreement's execution date, (c) no term or draft of this Settlement Agreement, or any part of the Parties' settlement discussions, negotiations or documentation will have any effect or be admissible into evidence for any purpose in the Action or any other proceeding, and (d) Defendants shall retain all their rights to proceed with their presently pending motions to dismiss and to object to the maintenance of the Action as a class action, and nothing in this Settlement Agreement or other papers or proceedings related to the Settlement shall be used as evidence or argument by any Party

concerning whether the presently pending motions to dismiss should be granted or denied or the Action may properly be maintained as a class action.

3.13 Distribution of $20 Credit. If the Court approves the Settlement of this Action, Provide Commerce, through the Claims Administrator, must email the $20 Credit to Class Members within twenty-five (25) calendar days following the Final Settlement Date.

4. DISMISSAL OF ACTION AND RELEASES

4.1 Judgment and Enforcement. The Parties agree that should the Court grant final approval of the proposed Settlement and enter judgment, the Final Order and Judgment shall include a provision for the retention of the Court's jurisdiction over the Parties to enforce the terms of this Settlement Agreement.

4.2 Class Members' Release. Upon entry of the Final Order and Judgment, Named Plaintiffs and all Class Members who do not validly and timely request to be excluded from the proposed Settlement, and each of their respective successors, assigns, legatees, heirs, and personal representatives release and forever discharge defendants Provide Commerce, Inc. and Regent Group, Inc., and each of their respective direct or indirect parents, wholly or majority owned subsidiaries, affiliated and related entities, predecessors, successors and assigns, partners, privities, and any of their present and former directors, officers, employees, shareholders, agents, representatives, attorneys, accountants, insurers, and all persons acting by, through, under or in concert with them, or any of them, from all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges,

penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, which they have or may have arising out of or relating to any of the acts, omissions or other conduct that have or could have been alleged or otherwise referred to in the Action including, but not limited to, (i) the marketing, advertising, enrollment, registration, disclosure of membership billing terms, handling of personal or financial information, or sharing of contact and payment information as they relate to the Membership Programs, (ii) the past or continued billing, debiting, or charging of fees associated with the Membership Programs, (iii) the adequacy or inadequacy of any notification of enrollment or copy of authorization to debit accounts for any fees associated with any of the Membership Programs (or any alleged failure to provide a copy of such authorization), (iv) the billing cycle, time period, or frequency of the charges for the Membership Programs, and (v) any and all claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, violations of the California Consumers Legal Remedies Act, unjust enrichment, violations of the Electronic Funds Transfer Act, invasion of privacy – intrusion into private matters, negligence, or violations of California's Unfair Competition Law (the "*Released Claims*").

With respect to the Released Claims, the Named Plaintiffs and all Class Members who do not validly and timely request to be excluded from the Settlement, and each of their respective successors, assigns, legatees, heirs, and personal representatives, expressly waive and relinquish, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which provides:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Named Plaintiffs and all Class Members fully understand that the facts in existence at the time this Settlement Agreement is executed and entry of the Preliminary Approval Order may be different from the facts now believed by Named Plaintiffs and Class Members and Class Counsel to be true and expressly accept and assume the risk of this possible difference in facts and agree that this Settlement Agreement remains effective despite any difference in facts. Further, Named Plaintiffs and the Class Members agree that this waiver is an essential and material term of this release and the Settlement Agreement that underlies it and that without such waiver the Settlement Agreement would not have been accepted or agreed to.

4.3 Named Plaintiffs' Release. Upon entry of the Final Order and Judgment, Named Plaintiffs, and each of their successors, assigns, legatees, heirs, and personal representatives release and forever discharge defendants Provide Commerce, Inc. and Regent Group, Inc., and each of their respective direct or indirect parents, wholly or majority owned subsidiaries, affiliated and related entities, predecessors, successors and assigns, partners, privities, and any of their present and former directors, officers, employees, shareholders, agents, representatives, attorneys, accountants, insurers, and all persons acting by, through, under or in concert with them, or any of them, from all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises,

liabilities, damages, charges, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent as of the date the Parties execute this Settlement Agreement.

In addition, Named Plaintiffs, and each of their successors, assigns, legatees, heirs, and personal representatives, expressly waive and relinquish, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which provides:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Named Plaintiffs fully understand that the facts in existence at the time this Settlement Agreement is executed may be different from the facts now believed by Named Plaintiffs and their Counsel to be true and expressly accept and assume the risk of this possible difference in facts and agree that this Settlement Agreement remains effective despite any difference in fact. Further, Named Plaintiffs agree that this waiver is an essential and material term of this release and the Settlement Agreement that underlies it and that without such waiver the Settlement Agreement would not have been accepted or agreed to.

5. ADDITIONAL PROVISIONS

5.1 Defendants' Denial of Wrongdoing. This Settlement Agreement reflects the Parties' compromise and Settlement of the disputed claims. Its provisions, and

all related drafts, communications and discussions, cannot be construed as or deemed to be evidence of an admission or concession of any point of fact or law (including, but not limited to, matters respecting Defendants' presently pending motions to dismiss or class certification) by any person or entity and cannot be offered or received into evidence or requested in discovery in this Action or any other action or proceeding as evidence of an admission or concession.

5.2 Change of Time Periods. All time periods and dates described in this Settlement Agreement are subject to the Court's approval. These time periods and dates may be changed by the Court or by the Parties' written agreement without notice to the Class.

5.3 Real Parties in Interest. In executing this Settlement Agreement, the Parties warrant and represent that they, including Plaintiffs in their individual capacity and representative capacity on behalf of the Class, are the only persons having any interest in the claims asserted in this Action. Neither these claims, nor any part of these claims, have been assigned, granted, or transferred in any way to any other person, firm, or entity.

5.4 Voluntary Agreement. The Parties executed this Settlement Agreement voluntarily and without duress or undue influence.

5.5 Binding on Successors. This Settlement Agreement binds and benefits the Parties' respective successors, assigns, legatees, heirs, and personal representatives.

5.6 Parties Represented by Counsel. The Parties acknowledge that: (a) they have been represented by independent counsel of their own choosing during the negotiation of this Settlement and the preparation of

this Settlement Agreement; (b) they have read this Settlement Agreement and are fully aware of its contents; and (c) their respective counsel fully explained to them the Settlement Agreement and its legal effect.

5.7 Authorization. Each Party warrants and represents that there are no liens or claims of lien or assignments, in law or equity, against any of the claims or causes of action released by this Settlement Agreement and, further, that each Party is fully entitled and duly authorized to give this complete and final release and discharge.

5.8 Entire Agreement. This Settlement Agreement and attached exhibits contain the entire agreement between the Parties and constitute the complete, final, and exclusive embodiment of their agreement with respect to the Action. This Settlement Agreement is executed without reliance on any promise, representation, or warranty by any Party or any Party's representative other than those expressly set forth in this Settlement Agreement.

5.9 Construction and Interpretation. Neither the Parties nor any of the Parties' respective attorneys will be deemed the drafter of this Settlement Agreement for purposes of interpreting any provision in this Settlement Agreement in any judicial or other proceeding that may arise between them. This Settlement Agreement has been, and must be construed to have been, drafted by all the Parties to it, so that any rule that construes ambiguities against the drafter will have no force or effect.

5.10 Headings and Formatting of Definitions. The various headings used in this Settlement Agreement are solely for the Parties' convenience and may not be used to interpret this Settlement Agreement.

Similarly, bolding and italicizing of definitional words and phrases is solely for the Parties' convenience and may not be used to interpret this Settlement Agreement. The headings and the formatting of the text in the definitions do not define, limit, extend, or describe the Parties' intent or the scope of this Settlement Agreement.

5.11 Exhibits. The exhibits to this Settlement Agreement are integral parts of the Settlement Agreement and are incorporated into this Settlement Agreement as though fully set forth in the Settlement Agreement.

5.12 Modifications and Amendments. No amendment, change, or modification to this Settlement Agreement will be valid unless in writing signed by the Parties or their counsel.

5.13 Governing Law. This Settlement Agreement is governed by California law and must be interpreted under California law and without regard to conflict of laws principles.

5.14 Further Assurances. The Parties must execute and deliver any additional papers, documents and other assurances, and must do any other acts reasonably necessary to perform their obligations under this Settlement Agreement and to carry out this Settlement Agreement's expressed intent.

5.15 Agreement Constitutes a Complete Defense. To the extent permitted by law, this Settlement Agreement may be pled as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceedings that may be instituted, prosecuted or attempted in breach of or contrary to this Settlement Agreement.

5.16 Execution Date. This Settlement Agreement is deemed executed on the date the Settlement Agreement is signed by all of the undersigned.

5.17 Counterparts. This Settlement Agreement may be executed in counterparts, each of which constitutes an original, but all of which together constitutes one and the same instrument. Several signature pages may be collected and annexed to one or more documents to form a complete counterpart. Photocopies or PDF copies of executed copies of this Settlement Agreement may be treated as originals.

5.18 Recitals. The Recitals are incorporated by this reference and are part of the Settlement Agreement.

5.19 Severability. If any provision of this Settlement is declared by the Court to be invalid, void, or unenforceable, the remaining provisions of this Settlement will continue in full force and effect, unless the provision declared to be invalid, void, or unenforceable is material, at which point the Parties shall attempt to renegotiate the Settlement or, if that proves unavailing, Named Plaintiffs, Provide Commerce, or EMI can terminate the Settlement Agreement without prejudice to any Party.

5.20 Inadmissibility. This Settlement Agreement (whether approved or not approved, revoked, or made ineffective for any reason) and any proceedings or discussions related to this Settlement Agreement are inadmissible as evidence of any liability or wrongdoing whatsoever in any Court or tribunal in any state, territory, or jurisdiction. Further, neither this Settlement Agreement, the Settlement contemplated by it, nor any proceedings taken under it, will be construed or offered or received into evidence as an admission, concession or presumption that class certification is

appropriate, except to the extent necessary to consummate this Settlement Agreement and the binding effect of the Final Order and Judgment.

5.21 No Conflict Intended. Any inconsistency between this Settlement Agreement and the attached exhibits will be resolved in favor of this Settlement Agreement.

5.22 List of Exhibits: The following exhibits are attached to this Settlement Agreement:

Exhibit A – [Proposed] Order Granting Preliminary Approval of Class Settlement and Provisional Class Certification

Exhibit B – Full Notice

Exhibit C – Summary Notice

Exhibit D – Claim Form

Exhibit E – [Proposed] Final Order Approving Class Action Settlement and Judgment

The Parties have agreed to the terms of this Settlement Agreement and have signed below.

Dated: June 12, 2012
PLAINTIFF JOSUE ROMERO

/s/ Josue Romero
Josue Romero,
Individually and in his Representative Capacity

Dated: June 13, 2012
PLAINTIFF GINA BAILEY

/s/ Gina Bailey
Gina Bailey,
Individually and in her Representative Capacity

Dated: June 13, 2012
PLAINTIFF JENNIFER LAWLER

/s/ Jennifer Lawler
Jennifer Lawler,
Individually and in her Representative Capacity

Dated: June 12, 2012
PLAINTIFF JOHN WALTERS

/s/ John Walters
John Walters,
Individually and in his Representative Capacity

Dated: June 12, 2012
PLAINTIFF DANIEL COX

/s/ Daniel Cox
Daniel Cox,
Individually and in his Representative Capacity

Dated: June 13, 2012
PLAINTIFF CHRISTOPHER DICKEY

/s/ Christopher Dickey
Christopher Dickey,
Individually and in his Representative Capacity

Dated: June 12, 2012
PLAINTIFF GRANT JENKINS

/s/ Grant Jenkins
Grant Jenkins,
Individually and in his Representative Capacity

Dated: June 13, 2012
PLAINTIFF BRADLEY BERENTSON

/s/ Bradley Berentson
Bradley Berentson,
Individually and in his Representative Capacity

Dated: June 13, 2012

DEFENDANT PROVIDE COMMERCE, INC.

/s/ Blake T. Bilstad
By: Blake T. Bilstad
Title: SUP, General Counsel + Secretary

On behalf of Provide Commerce, Inc.

Dated: June 13, 2012

DEFENDANT REGENT GROUP, INC.

/s/ Barry N. Natter
By: Barry N. Natter
Title: General Counsel

On behalf of Regent Group, Inc.