Nos. 16-56666, 16-56684, 16-56688, and 16-56694

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE CHAMBERS, et al.,

Plaintiffs-Appellees,

CHRISTINE KNOTT, GEORGE P. LIACOPOULOS, and W. ALLEN McDONALD,

Objectors-Appellants,

v.

WHIRLPOOL CORPORATION, SEARS HOLDINGS CORPORATION, and SEARS ROEBUCK AND CO.,

Defendants-Appellees/Cross-Appellants.

Appeals from the United States District Court for the Central District of California
Case No. 8:11-cv-01733-FMO-JCG,
The Honorable District Judge Fernando M. Olguin

CONSOLIDATED PRINCIPAL AND RESPONSE BRIEF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS WHIRLPOOL CORPORATION, SEARS HOLDINGS CORPORATION, AND SEARS ROEBUCK AND CO.

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CORPORATE DISCLOSURE STATEMENT

Defendant Whirlpool Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The parent corporation of defendant Sears Roebuck and Co. is defendant Sears Holdings Corporation.

Defendant Sears Holdings Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

District court jurisdiction. The district court had jurisdiction under 28 U.S.C. § 1331 because plaintiffs alleged violations of federal law under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* McD.ER 673, 701-04.[1] The district court also had jurisdiction under 28 U.S.C. § 1332(d) because plaintiffs alleged that the amount in controversy exceeds $5,000,000 and that class members are citizens of states different from those of defendants. *Id.* at 673. For instance, named plaintiff Steve Chambers is a resident and citizen of Maryland, while defendant Whirlpool Corporation ("Whirlpool") is a Delaware corporation with its principal place of business in Michigan. *Id.* at 645, 671.

This Court's jurisdiction. This Court has jurisdiction under 28 U.S.C. § 1291 because the parties appeal from an order and final judgment that disposed of all parties' claims. McD.ER 1-40.

Timeliness of appeals. The district court entered final judgment on October 11, 2016. McD.ER 1-2. Defendants filed a timely notice of appeal on November 9, 2016. Def.SER 1-2. Objectors filed timely notices of appeal on November 7, 2016; November 9, 2016; and November 10, 2016. McD.ER 112-16; L.ER 1-3; K.ER 42-45. See Fed. R. App. P. 4(a)(1)(A).

[1] "McD.ER," "L.ER," and "K.ER" refer to the Excerpts of Record filed by objectors McDonald, Liacopoulos, and Knott, respectively. "Def.SER" refers to defendants' Supplemental Excerpts of Record.

INTRODUCTION

This is an appeal from an award of nearly $15 million in attorneys' fees to class counsel for a settlement that provides only $2 to $5 million in relief, most of which is in coupon form. Plaintiffs originally sought billions in damages and a nationwide recall of 18.4 million Whirlpool-manufactured dishwashers. But they accepted a small claims-made settlement in which owners of 5.8 million dishwashers could seek a 10% to 20% discount on the purchase of a new Whirlpool-manufactured dishwasher. A tiny fraction of owners who paid out-of-pocket expenses to repair a specific and rare part failure also could seek reimbursement. The discount coupon is the *only* relief that 99.8% of the class could ever receive, and it represents the vast majority of the settlement's value.

Because defendants and class counsel could not agree on fees, they submitted the matter to the district court. The district court refused to apply the attorney-fee provisions of the Class Action Fairness Act ("CAFA") that govern coupon settlements, 28 U.S.C. § 1712. It instead applied the "lodestar method" for awarding fees. The district court calculated class counsel's "lodestar figure"—*i.e.*, their hourly rates multiplied by the number of hours they worked—at nearly $9 million. It then applied a 1.68 upward multiplier to increase class counsel's fees by an additional $6 million. The court also refused to value the settlement, let alone perform a "cross-check" for reasonableness by measuring its fee award against the

value of the settlement. Defendants, and several objectors, appeal from the legally erroneous and grossly excessive $15 million fee award.

Objectors also appeal from the district court's approval of the class settlement. Because the settlement is fair and adequate, however, it was properly approved.

This Court should affirm the settlement approval but require a large reduction in class counsel's fees. Under governing case law, those fees should be limited to a fraction of the value of the settlement to the class.

STATEMENT OF THE ISSUES

1. Did the district court violate CAFA when it awarded attorneys' fees to class counsel based on coupon relief but failed to value the coupons at their redemption value and limit the fee to a percentage of that value?

2. Did the district court err when it declined to reduce class counsel's lodestar figure based on lack of success, where plaintiffs sought more than $1 billion in relief but settled for $2 to $5 million in benefits, and where class counsel's lodestar figure far exceeded the value of the settlement to the class?

3. Did the district court err when it applied an arbitrary 1.68 upward multiplier based on factors that are subsumed within the lodestar calculation and that have been disapproved by the Supreme Court and this Court?

4. Did the district court properly approve a class settlement that is fair, reasonable, and adequate for class members?

PERTINENT STATUTES AND RULES

Pertinent statutes and rules are set forth in the Addendum.

STATEMENT OF THE CASE

A. Plaintiffs Alleged That Whirlpool-Manufactured Dishwashers Were Defective And Should Be Recalled.

This case concerns alleged "Overheating Events" in the electronic control board ("ECB") of certain Whirlpool-, KitchenAid-, and Kenmore-branded dishwashers. Def.SER 526-27. Defendant Whirlpool manufactured these dishwashers; defendants Sears Roebuck and Co. and Sears Holdings Corporation own the Kenmore brand. *Id.* at 518-19. Plaintiffs alleged that the ECBs in the dishwashers had a "defect": they might "overheat and cause the dishwasher[s] to emit smoke and fumes and erupt in flames." *Id.* at 568.

Until their final amended complaint, plaintiffs sought to represent a "National Class" and "National Subclass" in addition to state classes. Def.SER 338-39, 459-60, 526-27, 585-86. By their second amended complaint, plaintiffs proposed to represent "all consumers in the United States who purchased or otherwise acquired a Whirlpool-, KitchenAid- or Kenmore-branded Dishwasher." *Id.* at 459. This proposed class covered 18.4 million dishwashers manufactured

over a 17-year period, nearly all of which worked without an ECB malfunction throughout their useful lives. McD.ER 300.

Plaintiffs sought staggering damages and injunctive relief for every member of this enormous class. They alleged that they "would not have purchased, or would have paid substantially less for, their Dishwashers" had they known about the alleged defect, and also "suffered unreasonable diminution of value in their Dishwashers." McD.ER 720, 727; Def.SER 363, 367. Plaintiffs sought "compensatory," "statutory," and "punitive" damages, as well as "disgorge[ment]" of defendants' "ill-gotten gains." Def.SER 415. And they asked the district court to "order Defendants to engage in a corrective notice and recall campaign," which would have required servicing or replacing millions of dishwashers in kitchens across the country. *Id.* at 414.

Because plaintiffs repeatedly amended their complaint, the district court never decided whether plaintiffs stated valid claims. Plaintiffs filed suit in November 2011 and amended their complaint *sua sponte* a month later. McD.ER 783-84; Def.SER 507-54, 567-612. They then filed second and third amended complaints before the district court ruled on defendants' motions to dismiss. McD.ER 785-89; Def.SER 289-417, 430-94. After defendants moved to dismiss the third amended complaint, plaintiffs abandoned their proposed national class and subclass, which prompted the district court to order plaintiffs to amend their

complaint a fourth time. McD.ER 635-770, 790-92; Def.SER 281-88. Defendants' motion to dismiss the fourth amended complaint remained undecided at the time of settlement. See Def.SER 205-80.

B. Because Plaintiffs' Allegations Lack Merit, The U.S. Consumer Product Safety Commission Declined To Order Any Recall.

On several occasions, named plaintiff Steve Chambers and plaintiffs' counsel contacted the U.S. Consumer Product Safety Commission to request a nationwide recall of the supposedly defective dishwashers. McD.ER 300. Whirlpool fully cooperated with the Commission's ensuing investigation. *Id.* at 303. In June 2014, the Commission notified Whirlpool that it had "completed its review" and would take no "further action." K.ER 346. After a lengthy investigation, the Commission thus declined to impose any recall or require any other corrective action.

The Commission's decision was correct. The dishwashers rarely overheated and virtually never resulted in fires outside the dishwasher. K.ER 420. Overheating Events were reported in fewer than 0.09% of all dishwashers in the proposed classes, and the rate of house fires was even more infinitesimal. McD.ER 365. The handful of fires typically occurred when a safety device in the dishwasher had been manually disabled after the time of sale. K.ER 296, 419-20. Whirlpool provided free repairs, free or discounted replacements, and other benefits to dishwasher

owners who reported Overheating Events to the company. *Id.* at 296, 429. No confirmed injury was ever associated with an Overheating Event. *Id.* at 296.

Plaintiffs thus faced an uphill battle in trying this case. They would have to convince a jury that both the Consumer Product Safety Commission's and Whirlpool's engineering experts were wrong. And they would have to prove that a class should be certified even though the 18.4 million dishwashers had different control board designs, different safety features, different warranties, and different post-sale modifications. Individualized questions would have overwhelmed common issues.

In addition, some of plaintiffs' lawyers lost a jury trial in October 2014 involving allegedly defective Whirlpool-manufactured washing machines. Verdict Form, *Glazer* v. *Whirlpool*, No. 1:08-wp-65000-CAB, Dkt. 490 (N.D. Ohio Oct. 30, 2014). Plaintiffs thus knew that defendants would vigorously defend against plaintiffs' meritless claims even if plaintiffs managed to obtain certification of a class. They knew too from that case that Whirlpool would fight class certification with tenacity in the district court and on appeal.

C. The Parties Settled For A Tiny Fraction Of The Requested Relief.

The parties reached a nationwide class settlement in 2015. McD.ER 633. The settlement agreement ("Settlement") defines the class ("Class") to include all U.S. residents who purchased or acquired a "Class Dishwasher," which is defined

as "all KitchenAid, Kenmore, and Whirlpool-brand automatic dishwashers manufactured by Whirlpool between October 2000 and January 2006 that contained either a 'Rushmore' or 'Rush' electronic control board." *Id.* at 563, 570. That definition excludes Whirlpool-manufactured dishwashers "with 'NewGen' or 'Raptor'" control boards, which had different designs. *Ibid.* Whirlpool manufactured 5.8 million Class Dishwashers and 12.6 million dishwashers with NewGen or Raptor control boards, so the Class is a third of the size claimed in the complaints. *Id.* at 306.

The Settlement not only covers far fewer dishwashers than the complaints targeted, but it also provides far less relief than plaintiffs demanded. It does *not* require a recall, consumer warning, or proactive service campaign. It does *not* allow damages under plaintiffs' premium-price, diminution-of-value, or unjust-enrichment theories. It does *not* provide punitive damages. It offers only very limited relief, mostly in the form of coupons.

Coupons. Class Members were eligible for a post-purchase rebate of 10% to 20% off the price of a new Whirlpool-manufactured dishwasher. McD.ER 576-79. To obtain that rebate, Class Members first had to submit a claim requesting a rebate form by June 27, 2016. *Id.* at 73, 579. They then were required to submit a completed rebate form along with proof of a new purchase. *Id.* at 579. Only 2.1%

of the Class ever requested rebate forms, and defendants expect a significantly smaller percentage to redeem them. See *infra* pp. 11-12.

Reimbursements for past Overheating Events. The tiny fraction of Class Members whose dishwashers had an Overheating Event and who paid for repairs or replacements could submit claims for reimbursement. Class Members who paid for repairs could obtain $200 or the documented cost of repair. McD.ER 583. Those who bought replacement dishwashers could receive $200 to $300 (*ibid.*), well below the price of a new Whirlpool-manufactured dishwasher.

The parties agreed that 2,591 known purchasers were "prequalified" for reimbursements based on previously reported Overheating Events. *Id.* at 311. These prequalified purchasers had to confirm their names and addresses and certify that they were entitled to reimbursements. *Id.* at 581.

All other Class Members were required to show that their dishwashers experienced an Overheating Event within 12 years of purchase and before February 25, 2016, and that they paid for repairs or replacements. *Id.* at 580, 583-85. Claims were due by June 27, 2016. *Id.* at 310, 585. Only 0.5% of the Class filed claims for reimbursement—most of which were invalid. See *id.* at 312; *infra* pp. 11-12.

Future Overheating Events. Class Members whose dishwashers experience an Overheating Event between February 25, 2016 and February 24,

2018 may submit a claim for either $100 or 30% off the purchase of a new Whirlpool-manufactured dishwasher. McD.ER 585. Based on past experience, defendants and their experts expect fewer than 200 such claims. *Id.* at 307, 365, 370-71.

Revision to service pointers. Whirlpool agreed to tweak its service pointers and training bulletins to repeat that a safety device helps avoid Overheating Events and to remind servicers to inspect that device and not disable it. McD.ER 591-92. Whirlpool's service pointers already instructed servicers to inspect the device and not disable it; the only change was to expressly state the widely known fact that the device is a safety feature. *Id.* at 310. The Settlement does *not* require Whirlpool to distribute any warnings to Class Members.

Non-Class benefits. Owners of dishwashers with NewGen or Raptor control boards are neither Class Members nor bound by the Settlement. Nevertheless, for the infinitesimal fraction of them who experience an Overheating Event—reported in only 0.06% of those 12.6 million dishwashers (McD.ER 365)—the Settlement extends very limited benefits. *In exchange for a written release of their individual claims*, these non-Class Members could obtain the Class benefits for past or future Overheating Events. *Id.* at 588-91. The deadline for future Overheating Events extends into 2021 for a small fraction of the non-Class Dishwashers. *Id.* at 361, 591.

Attorneys' fees. Because the parties could not agree on fees, the Settlement allowed the district court to award class counsel "reasonable attorneys' fees" paid by defendants. McD.ER 603. Defendants reserved their right to appeal the fee award. *Id.* at 603-04.

D. Purchasers Submitted Claims For Only $2 To $5 Million In Benefits.

Defendants concluded that it would cost them more to litigate this case to a *defense* verdict than to settle. McD.ER 346. The results of the claims process strongly confirmed their analysis.

As of July 7, 2016—ten days after the claim deadline—the claims administrator had received only 133,040 timely claims (L.ER 24), a response rate of 2.3% for Class Members, or 0.7% when owners of NewGen or Raptor machines are included. 122,294 claims requested a rebate form; 106,331 requested *only* a rebate form. *Ibid.* 26,380 claims sought reimbursement. But the claims administrator reported that most reimbursement claims were deficient: they were "submitted without any supporting documentation" (only 7,774 had *any* documentation), "with insufficient documentation," or "for amounts greater than permitted under the Settlement." *Id.* at 24-25. And only 527 of the 2,591 prequalified owners requested reimbursements, for an average prequalified amount of $194. *Id.* at 26.

Over defendants' objection (McD.ER 322), the district court ruled on fees before receiving final data from the claims administrator. Based on the reported data, estimated valid claims rates, and estimated rebate redemptions, defendants and their experts showed that the Settlement would provide $2,572,300 to $5,154,920 in benefits to the Class. *Id.* at 297. The largest driver of that value was coupons: defendants estimated that Class Members would obtain $2,086,909 to $4,504,407 in redeemed coupons. *Id.* at 310-11. Defendants and their experts offered the district court the following specific valuation:

Settlement Benefit Type	Estimated Low Value	Estimated High Value
New dishwasher rebates	$2,086,909	$4,504,407
Prequalified reimbursements	$102,666	$113,708
Non-prequalified reimbursements	$359,100	$405,450
Relief for future Overheating Events	$23,625	$131,355
Revision to service pointers	$0	$0
Total benefits to owners	$2,572,300	$5,154,920

Id. at 316. The class administrator also generated notice costs of more than $1.6 million—money that the Class does not receive. *Id.* at 317.

E. Class Counsel Requested $15 Million In Fees.

Despite the small benefits to the Class, class counsel asked the district court to award them $15 million in fees, using the lodestar method. McD.ER 466, 476-80. They claimed a lodestar figure of $8,948,487. *Id.* at 466. And they requested a supposedly "modest" 1.68 upward multiplier—*i.e.*, a fee award 68% *above* the

product of their rates and hours—insisting that the Settlement "provides full recovery" and "accomplishes Plaintiffs' goal at the outset" of the litigation. *Id.* at 472, 491, 494 (initial capitalization and emphasis removed).

Their lodestar figure included an enormous 9,100 hours of document review—nearly four-and-a-half years of 40-hour workweeks. McD.ER 330. One "very senior" lawyer alone billed more than 2,800 hours on document review at a claimed hourly rate of $460 (K.ER 114), creating a personal lodestar of around $1.3 million for his document review. McD.ER 330-31. One law firm whose rates are not constrained by fee-paying clients sought a blended hourly rate of $463, mostly for document review. *Id.* at 334-35. Another sought a blended hourly rate of $507, a quarter of which was for document review. *Ibid.* By contrast, defendants' attorneys, who answered to fee-paying clients, conducted document review at a blended rate of $97 per hour. *Id.* at 332.

Class counsel argued that it was "inappropriate" for the district court to award fees using the percentage-of-recovery method, under which class counsel receives a percentage of the benefit achieved for the class. McD.ER 499. Class counsel nevertheless claimed that the Settlement was worth "**$55.7 million to $116.7 million.**" *Id.* at 500. This fantasy valuation, which defendants never would have agreed to pay, assumed that *every* Class Member and non-Class Member would submit claims for relief, even though class counsel admitted that "claims

rates of around 5% are not uncommon in class action settlements." *Id.* at 500, 506. The largest driver of plaintiffs' valuation was relief for future Overheating Events, which class counsel priced at $26 to $50 *million*, even though only a few hundred dishwasher owners will ever experience future Overheating Events, let alone submit claims. *Id.* at 509. And class counsel included their own $15 million fee request in their valuation. *Ibid.*

In response, defendants explained that CAFA governs fee awards in all class settlements containing coupon relief and required the district court to award class counsel a percentage of the value of redeemed coupons. McD.ER 320-24. Because the deadline to submit completed rebate forms had not yet passed, defendants asked the court to wait a few months before awarding fees. *Id.* at 322. Defendants further argued that CAFA limited use of the lodestar method to fees attributable only to *non*-coupon relief. *Id.* at 324-29.

Defendants also demonstrated that class counsel's fee request was excessive even under the lodestar method. Defendants asked the court to substantially reduce class counsel's lodestar figure because no fee-paying client would ever pay class counsel's requested rates. McD.ER 330-43. And defendants urged the court to apply a substantial reduction to class counsel's lodestar figure because plaintiffs recovered only a tiny fraction of the relief their complaints demanded and their fees should not dwarf the Class recovery. *Id.* at 344-49. Defendants further showed

that no upward multiplier was warranted. *Id.* at 346-47. Finally, defendants and their experts debunked class counsel's inflated valuation of the Settlement. *Id.* at 304-17.

F. The District Court Awarded Class Counsel Nearly $15 Million In Fees.

The district court approved the Settlement and awarded class counsel nearly all of their requested fees. McD.ER 3-40. The court rejected defendants' argument under CAFA. *Id.* at 19-23. It was "not convinced that CAFA governs attorney's fees" in "diversity actions such as this one." *Id.* at 20. It further suggested that CAFA did not "preempt" the Settlement's "choice of law clause" (*ibid.*), which stated that "the rights and obligations of the Parties"—a term that includes only the plaintiffs, not their lawyers—"shall be construed and enforced in accordance with, and governed by, the laws of the State of California" (*id.* at 567, 612). And the district court ruled that, even if CAFA applied, CAFA allowed the district court to use only the lodestar method because "the settlement includes both coupon relief and monetary relief." *Id.* at 21. The district court thus exclusively used the lodestar method and never attempted to calculate the coupons' redemption value. *Id.* at 23.

The district court acknowledged that, under the lodestar method, "[t]he number of hours reasonably expended" and the "reasonable hourly rate" depend on what fee-paying clients would pay. *Ibid.* Yet the court found that class counsel's "blended rate of $421.60" for 9,100 hours of almost entirely routine document

review was "reasonable," ruling that it would "not second-guess class counsel's staffing decisions." *Id.* at 24-25.

The district court thus calculated class counsel's lodestar figure at $8,818,449. *Id.* at 30.

The district court then handed class counsel an additional $6 million in fees by granting their request for a 1.68 multiplier. *Id.* at 31, 36. The court ruled that "multipliers 'ranging from one to four are frequently awarded'" and that a 1.68 multiplier was "in line with, if not lower than, the multipliers applied by courts in similarly complex class actions." *Id.* at 31. It also found the multiplier reasonable under the factors in *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). *Ibid.* It held that "[l]itigating this case required an extraordinary amount of time and labor"; the "case involved a number of difficult and complex legal questions giving rise to substantial litigation risks"; the "results obtained by class counsel" were not only "impressive," but "particularly impressive given that class counsel began with an 11-state lawsuit and converted it into a nationwide settlement"; and that "one extremely important factor [supporting the multiplier] is the contingent nature of success." *Id.* at 31-32.

The district court denied defendants' requested downward multiplier. *Id.* at 33. It was "not persua[ded]" that "class counsel scored only a 'modest' victory" based on the gross disparity between the relief plaintiffs demanded and the relief

they obtained, or that "class counsel should not be granted an award of attorney's fees that 'dwarf[s] the class's recovery.'" *Ibid.* The court held that "the amount in controversy" is "an aspirational figure." *Ibid.* And it ruled that the Settlement's "small" value "in comparison" to the relief sought "does not reflect a lack of success on class counsel's part, particularly where, as here, the settlement includes non-monetary relief." *Ibid.*

The district court declined to conduct a "cross-check" to compare its award to fees calculated under "the percentage-of-recovery method," largely because it thought the relief obtained was difficult to value. *Id.* at 35. It reasoned that "there is no common fund"; "non-monetary benefits conferred under the settlement cannot be quantified with precision, if at all"; it "could not perform an accurate analysis until 2021, when the claims deadline for future Overheating Events will pass"; and any "analysis would be imprecise to the point of useless" because the "parties' estimates of the gross value of the settlement" range from $4,220,000 to $116,700,000. *Id.* at 35-36. The court thus relied on plaintiffs' made-up valuation (see *supra* pp. 13-14), while refusing to make any factual finding on benefits conferred. The court awarded class counsel $14,814,994 in fees. McD.ER 40.

SUMMARY OF THE ARGUMENT

The district court's award of nearly $15 million in attorneys' fees for a settlement that provides at most $2 to $5 million in benefits defies governing law in three independent ways.

I. The fee award violates CAFA's provisions on coupon settlements. Despite the fact that 99.8% of the Class could only receive coupons for discounts on new dishwashers, the district court held CAFA inapplicable. But Section 1712 unambiguously governs *every* federal class action with a coupon settlement, regardless of whether the settlement also includes non-coupon relief or whether the district court sits in diversity. And the Settlement's boilerplate choice-of-law clause does not supplant CAFA's plain command.

The district court misread CAFA and failed to follow circuit precedent when it awarded lodestar fees based on coupon relief. Section 1712(a), this Court has held, on its face requires that fee awards based on coupon relief be calculated as a *percentage* of the coupons' *redeemed* value. The district court thought Section 1712(b) nevertheless authorized its lodestar-based fee award, but that provision does not apply where, as here, the district court awards any fees based on coupon relief. The district court also erred when it held that Section 1712(c) does not apply if the settlement contains some monetary relief. There is no such exception in

Section 1712(c), and inventing one would encourage manipulative and abusive coupon settlements that Congress intended CAFA to forbid.

This Court should remand with instructions to determine fees under CAFA. Properly calculated—as a reasonable percentage of the value of redeemed coupons plus the lodestar amount applicable to the Settlement's miniscule monetary relief—the fee award should not exceed $2.2 million.

II. It was legal error for the district court to fail to reduce class counsel's lodestar fees based on plaintiffs' lack of success. Precedent establishes that plaintiffs' degree of success is the most critical factor in determining the reasonableness of a fee award. Here, plaintiffs achieved remarkably little success.

First, there is a vast gulf between what plaintiffs sought and what they obtained. Plaintiffs sought billions in damages and a recall of millions of dishwashers. But they accepted a claims-made settlement in which 0.09% of purchasers could submit claims for reimbursement of out-of-pocket expenses, the rest of the Class could seek a discount on the purchase of a new dishwasher, and only a small portion of eligible purchasers did either. Supreme Court and circuit precedent required the district court to give great weight to the disparity between the multibillion dollar amount claimed and the $2 to $5 million in benefits actually obtained. Instead, the court ignored that disparity.

Second, the district court awarded fees that dwarfed the Settlement's limited benefits to the Class. The district court should have valued the Settlement and compared its fee award to the Settlement's value, which would have shown that the fee award was grossly excessive as a matter of law. No reasonable client would pay $15 million in contingent fees to recover $2 to $5 million. The district court's refusal to value the Settlement and perform a cross-check against the actual recovery creates perverse incentives. It encourages class counsel to prolong litigation and drag out settlement to run up their fees, with endless document review by senior lawyers but no incremental benefit to the class.

Accordingly, even if CAFA did not apply here, which it does, a substantial reduction in the fee award is required. This Court should remand with instructions to apply a substantial downward multiplier to class counsel's lodestar to account for plaintiffs' lack of success. Any fee award calculated on that basis should not exceed $4.4 million.

III. The district court erred as a matter of law in applying an arbitrary 1.68 upward multiplier to class counsel's lodestar, which added $6 million to the fee award. The district court thought that upward multipliers are routine. But the Supreme Court and this Court have held that upward multipliers are reserved for exceptional and extraordinary cases in which counsel's contribution is not already captured in the lodestar. Here, plaintiffs achieved a result that was far from

extraordinary, and their efforts are fully captured in the lodestar. Permitting this extraordinary enhancement of an already inflated fee award to stand would warp the settlement process, encouraging collusive settlements and fee appeals. At a minimum, this Court should reverse the upward multiplier and limit the fee award to $8,818,449.

IV. The district court properly approved the Settlement as fair and reasonable after considering objectors' arguments. The Settlement provided appropriate benefits given the weakness of plaintiffs' claims and satisfied all procedural requirements.

STANDARD OF REVIEW

This Court reviews a fee award for abuse of discretion, but a district court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990); accord *A.D.* v. *Cal. Hwy. Patrol*, 712 F.3d 446, 460 (9th Cir. 2013). This Court accordingly reviews *de novo* the district court's legal rulings underlying its fee award, including its interpretation of CAFA. See *Cmty. Ass'n for Restoration of Env't* v. *Henry Bosma Dairy*, 305 F.3d 943, 956 (9th Cir. 2002).

This Court reviews approval of a class settlement for abuse of discretion. *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012).

Under these standards, this Court should reverse the fee award, but affirm the approval of the class settlement.

ARGUMENT

"[C]ourts have an independent obligation to ensure" that an attorneys' fee award "is reasonable." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). The district court's fee award is unreasonable and excessive as a matter of law. First, the fee award violates the CAFA attorney-fee provisions that govern coupon settlements. Second, the district court failed to reduce class counsel's lodestar figure based on plaintiffs' lack of success. Third, the district court's arbitrary 1.68 multiplier contravenes Supreme Court and Ninth Circuit precedent. Each of these legal grounds independently requires reversal.

I. THE FEE AWARD VIOLATES CAFA'S ATTORNEY-FEE PROVISIONS GOVERNING COUPON SETTLEMENTS.

CAFA "govern[s] the calculation of attorneys' fees in class action cases containing a coupon component." *In re HP Inkjet Printers Litig.*, 716 F.3d 1173, 1175 (9th Cir. 2013). There is no doubt CAFA governs here. The Settlement's rebates are "coupons": they offer Class Members a 10% to 20% discount on the purchase of a new Whirlpool-manufactured dishwasher (McD.ER 576-79), which "class members [must] hand over more of their own money" to buy. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 951 (9th Cir. 2015); see *Redman* v.

RadioShack Corp., 768 F.3d 622, 635-36 (7th Cir. 2014) ("Coupons usually are discounts"); McD.ER 21 ("the settlement includes * * * coupon relief").[2]

The district court erroneously stated that CAFA might not govern, and it misinterpreted CAFA's provisions. Those legal errors require reversal.

A. The District Court Erred In Suggesting That CAFA Might Not Apply.

The district court gave two reasons why CAFA might not apply here. First, state law governs fee awards in "diversity actions such as this one." McD.ER 20. Second, CAFA did not "preempt" the Settlement's choice-of-law clause. *Ibid.* Both conclusions are wrong.

1. CAFA's attorney-fee provisions govern every federal court class action containing a coupon settlement.

CAFA's attorney-fee provisions unambiguously govern this case. They apply *whenever* "a proposed settlement in a class action provides for a recovery of coupons to a class member." 28 U.S.C. § 1712(a); accord *id.* § 1712(b)-(c). CAFA defines "class action" to include "*any* civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure." 28 U.S.C. § 1711(2) (emphasis added); see *In re Garcia*, 709 F.3d 861, 864 (9th Cir. 2013) ("'[a]ny' means *any*"). By its plain terms, CAFA governs fee awards in *all* federal

[2] The relief for future Overheating Events also includes a coupon, as owners may obtain a 30% discount on the purchase of a new Whirlpool-manufactured dishwasher. McD.ER 585.

class actions that involve coupon settlements, regardless of whether the district court exercises diversity jurisdiction. *HP Inkjet*, 716 F.3d at 1175; accord S. Rep. 109-14, at 27 (2005) (CAFA "regulates attorneys' fees in class settlements in which coupons constitute all or part of the remedy provided to class members").

Indeed, the same definition of "class action" governs CAFA's related requirement that defendants provide timely notice of proposed settlements to federal and state officials. 28 U.S.C. §§ 1711(2), 1715(b). The district court recognized that CAFA's notice provision applied. McD.ER 10. It had no reason to treat CAFA's attorney-fee provisions differently.

It would be absurd to rule that CAFA does not govern diversity actions. CAFA *expanded* federal court diversity jurisdiction to include class actions just like this one. Pub. L. 109-2, § 4(a), 118 Stat. 9-12 (2005) (enacting 28 U.S.C. § 1332(d)). It would turn CAFA on its head to hold that CAFA yields to state law when a district court exercises diversity jurisdiction *under CAFA*.

Beyond this, the district court erred in viewing this case as a pure "diversity actio[n]." McD.ER 20. Plaintiffs also invoked the district court's federal-question jurisdiction under 28 U.S.C. § 1331 by alleging violations of the federal Magnuson-Moss Warranty Act. McD.ER 673, 701-04. Thus, even if a district court could ignore CAFA in pure diversity actions, it could not ignore CAFA here.

The district court's contrary ruling (McD.ER 20) rests solely on decisions that do not mention CAFA. See *Mangold* v. *Cal. Pub. Utils. Comm'n*, 67 F.3d 1470 (9th Cir. 1995) (predating CAFA); *Rodriguez* v. *Disner*, 688 F.3d 645 (9th Cir. 2012) (not mentioning CAFA or involving coupons); *Roberts* v. *Electrolux Home Prods., Inc.*, 2014 WL 4568632 (C.D. Cal. Sept. 11, 2014) (no part of uncontested fee was based on rebates). None of those decisions overcomes CAFA's unambiguous statutory language.

2. The Settlement Agreement's choice-of-law clause does not supplant CAFA.

The district court also erred in concluding that the Settlement's boilerplate choice-of-law clause trumped CAFA. McD.ER 20. As a matter of law, settling parties in federal court class actions *cannot* contract out of CAFA's attorney-fee provisions. The statutory language is "not permissive"; fee awards in coupon settlements "must be calculated" in the manner prescribed by CAFA. *HP Inkjet*, 716 F.3d at 1181. General choice-of-law clauses are irrelevant. See U.S. Const., art. VI, cl. 2 (Supremacy Clause); *Murphy* v. *DirecTV, Inc.*, 724 F.3d 1218, 1228 (9th Cir. 2013) ("choice-of-law clauses" "have no applicability" when federal law controls); *Petro-Ventures, Inc.* v. *Takessian*, 967 F.2d 1337, 1340 (9th Cir. 1992) (same).

Beyond this, the district court erred in reading the Settlement's choice-of-law clause as an agreement to jettison CAFA. Far from disclaiming CAFA, the

Settlement requires compliance with CAFA. See McD.ER 598, 599 (requiring notice to state and federal officials under CAFA). And even if California law did apply under the Settlement's choice-of-law clause, CAFA *still* would govern because "'California law includes federal law' for purposes of choice-of-law analysis, so that 'a violation of federal law is a violation of [state] law.'" *Bassidji* v. *Goe*, 413 F.3d 928, 933 (9th Cir. 2005).

Allowing parties to contract out of CAFA's attorney-fee provisions would defeat CAFA's core purpose. "Congress passed CAFA 'primarily to curb perceived abuses of the class action device,'" especially "perceived abuse" of "the coupon settlement." *HP Inkjet*, 716 F.3d at 1177. Instead of curbing abusive coupon settlements, the district court's ruling would *encourage* them. To insulate fee awards, parties engaged in collusion would tack on a CAFA disclaimer to every settlement that awards the class "nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees." *Id.* at 1178 (quoting S. Rep. 109-14, at 29-30). That result would defeat Congress's intent.

Finally, the district court (McD.ER 20) relied on two inapposite district court decisions regarding forum-selection clauses, not choice-of-law provisions. See *Norris* v. *Commercial Credit Counseling Servs., Inc.*, 2010 WL 1379732, at *1 (E.D. Tex. Mar. 31, 2010); *Guenther* v. *Crosscheck Inc.*, 2009 WL 1248107, at *1 (N.D. Cal. Apr. 30, 2009). The Settlement contains no forum-selection clause, and

plaintiffs elected to sue in federal court. In short, the district court erred as a matter of law in concluding that CAFA might not apply.

B. The District Court Misconstrued CAFA's Attorney-Fee Provisions.

The district court also erred as a matter of law in holding that its fee award complies with CAFA. CAFA creates "a series of specific rules that govern the award of attorneys' fees in coupon class actions." *HP Inkjet*, 716 F.3d at 1178. The district court did not follow those rules.

Interpreting CAFA's "unambiguous command," this Court held in *HP Inkjet* that, "[w]hen a settlement provides for coupon relief, *either in whole or in part*, any attorney's fee 'that is attributable to the award of coupons' *must* be calculated using the redemption value of the coupons." *Id.* at 1175-76 (emphasis added), 1184. That holding rests on the plain language of 28 U.S.C. § 1712(a), which states (emphasis added):

> 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.

Accordingly, when a district court awards attorneys' fees based in part on coupon relief, it "must" award class counsel a "reasonable contingency fee based on the actual redemption value of the coupons awarded." *HP Inkjet*, 716 F.3d at 1184.

CAFA "'exclude[s] the possibility' that lodestar fees may be awarded in exchange for coupon relief." *Id.* at 1185.

The district court violated Section 1712(a)'s unambiguous command. It never calculated the rebates' redemption value. It refused to award fees under "the percentage-of-recovery method." McD.ER 35. And it justified its fee award by citing the Settlement's "incentive for current owners to replace their Class Dishwashers"—*i.e.*, to use *the rebate coupons*. *Id.* at 32. The district court thus contravened Section 1712's basic prohibition: it awarded lodestar fees based on coupon relief. But "CAFA only permits district courts to award lodestar fees when those fees are 'not based on the value of the coupons.'" *HP Inkjet*, 716 F.3d at 1185 (quoting S. Rep. 109-14, at 31). "Since the district court awarded fees that were 'attributable to' the coupon relief, but failed to calculate the redemption value of those coupons, [this Court must] reverse." *Id.* at 1176.

The district court justified its approach by saying that Section 1712(a) applies to "settlements where the only relief afforded to class members is one or more coupons"—and that the Settlement here "is not a pure coupon settlement." McD.ER 21. That was legal error. Section 1712(a) on its face provides that "*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." 28 U.S.C. § 1712(a) (emphasis added). By recognizing that

coupons may account for only a "portion" of a fee award, Section 1712(a) by its plain terms governs settlements that include non-coupon relief. Section 1712(a) applies "[w]hen a settlement provides for coupon relief, either in whole *or in part*." *HP Inkjet*, 716 F.3d at 1175-76 (emphasis added). Indeed, in *HP Inkjet*, this Court applied Section 1712(a) to a settlement that awarded coupon *and non-coupon* relief. *Id.* at 1186. The district court erroneously disregarded Section 1712(a) and *HP Inkjet* in a case where the Settlement's value is based, overwhelmingly, on coupons.

The district court also erred in ruling that Section 1712(b) authorized exclusive use of the lodestar method. McD.ER 21. That subsection states:

> If a proposed settlement in a class action provides for a recovery of coupons to class members, and 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.

28 U.S.C. § 1712(b)(1). This Court has held that Section 1712(b) applies only "if class counsel wants to be paid 'any' fees, and the 'recovery of the coupons is *not* used to determine' those fees." *HP Inkjet*, 716 F.3d at 1183 (emphasis added). Section 1712(b) does not "permit district courts to award lodestar fees in exchange for coupon relief" without "consider[ing] the *actual* value of the class relief, as measured by the coupons' redemption value." *Id.* at 1186. Here, the district court violated Section 1712(b) because it overtly "used" the coupons in awarding fees.

Id. at 1183. It specifically cited the coupons to justify its massive fee award. McD.ER 32.

The district court also erroneously brushed aside Section 1712(c). *Id.* at 22. That subsection states:

> If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—
>
> **(1)** that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and
>
> **(2)** that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

28 U.S.C. § 1712(c). Section 1712(c) "applies whenever a settlement provides both coupon and equitable relief." *HP Inkjet*, 716 F.3d at 1184. It applies here because the Settlement provides both coupons (the rebates) and equitable relief (the very minor revisions to the service pointers). Indeed, the district court recognized that the Settlement provides both "coupon relief" and "injunctive relief." McD.ER 21. The district court therefore should have followed Section 1712(c).

The district court held, however, that Section 1712(c) "does not contemplate – and therefore does not apply to – settlements that involve coupon relief and *monetary* relief." McD.ER 22. But Section 1712(c) does not exempt coupon settlements that include monetary relief from its coverage. Monetary relief plainly

falls within Section 1712(c) as relief "that is not based upon * * * recovery of the coupons." 28 U.S.C. § 1712(c)(2). When a district court awards fees based on coupon and non-coupon relief, Section 1712(c) requires the court to "perform two separate calculations": it must "determine a reasonable contingency fee based on the actual redemption value of the coupons" under Section 1712(a) and then "determine a reasonable lodestar amount to compensate class counsel for *any* non-coupon relief" under Section 1712(b). *HP Inkjet*, 716 F.3d at 1184-85 (emphasis added).

In ruling otherwise, the district court rewrote the statute, which "transcends the judicial function." *Nichols* v. *United States*, 136 S. Ct. 1113, 1118 (2016). And it did so in a case where the monetary relief under the Settlement is vanishingly small. Only 0.09% of dishwasher owners can even seek reimbursement, and the number and value of the coupons vastly exceeds the number and value of the reimbursements. The inclusion of miniscule monetary relief does not immunize a settlement from CAFA's requirements.

The district court thought defendants' interpretation "would punish class counsel for obtaining additional relief." McD.ER 23. Not so. The more coupons the class redeems, the more class counsel get paid, encouraging counsel to increase the redemption rate and value of any coupons. CAFA rewards class counsel for obtaining additional relief. And if class counsel feel disadvantaged by CAFA's

coupon provisions, they can negotiate a settlement without coupons or ask the district court to ignore any coupons when it awards fees. Either option advances a "main purpos[e] of CAFA: discouraging coupon settlements." *HP Inkjet*, 716 F.3d at 1185.

The district court's ruling, by contrast, allows courts to avoid CAFA's mandated percentage-of-recovery method whenever a coupon settlement includes monetary relief, however modest. As the excessive fee award in this case makes plain, the approach followed by the district court violates "Congress's clear intention to tie class counsels' compensation to that of the class" and "tolerate[s] the precise abuse § 1712 set out to eliminate." *Id.* at 1186. It "cannot be overemphasized" that "the attorneys' fees provisions of § 1712 are intended to put an end to the 'inequities' that arise when class counsel receive attorneys' fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class." *Id.* at 1179 (quoting S. Rep. 109-14, at 29-32). Because the district court's fee award does not comply with CAFA—and defeats Congress's stated objectives—it must be reversed. *Id.* at 1187.

C. This Court Should Remand With Instructions That Class Counsel Receive No More Than $2.2 Million In Fees.

This Court should guide district courts on how to calculate fees in a mixed coupon settlement. CAFA lays out two methods: A district court may account for

the coupons in awarding fees, or it may disregard the coupons entirely. Either approach requires limiting any fee award here to no more than $2.2 million.

Fees based on coupon relief. To award fees that take coupons into account, the district court must first value the settlement. Coupons must be valued at their redemption value, as required by CAFA. Non-coupon relief should be valued based on "the benefit to the class." *Bluetooth*, 654 F.3d at 942; see also *Allen* v. *Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015) ("amount of class monetary relief").

Second, the district court should "determine a reasonable contingency fee based on the actual redemption value of the coupons." *HP Inkjet*, 716 F.3d at 1184. The reasonable fee under this Court's precedents is 25% of the value of the coupons that the class redeems. See *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997) (discussing this Court's 25% benchmark standard under the percentage-of-recovery method). The fee award then should be reduced proportionally based on the percentage of the settlement value attributable to the coupons.

Third, the district court should "determine a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained." *HP Inkjet*, 716 F.3d at 1185. That amount also should be reduced proportionally based on the percentage of settlement value attributable to non-coupon relief.

Fourth, the district court should "sum" the "amounts calculated" under steps two and three. *HP Inkjet*, 716 F.3d at 1185. That sum accounts for both the coupon and non-coupon relief. *Id.* at 1184.

Applying that methodology here will require the district court to obtain updated data from the claims administrator on remand. But, on the current record, any fee award based on coupons should not exceed $1,539,775. As noted above (pp. 11-12), under defendants' high-end valuation (which overestimates the Settlement's expected benefits), the Settlement provides up to $4,504,407 in coupon benefits, $113,708 in prequalified reimbursements, $405,450 in non-prequalified reimbursements, and $131,355 in relief for future Overheating Events, for a total value of up to $5,154,920. The coupons make up 87.4% of the Settlement's value, with the remaining 12.6% attributable to non-coupon relief. Under CAFA, class counsel would receive $984,213 for the coupon relief ($4,504,407 × 25% benchmark × 87.4% proportion). The portion of class counsel's fees attributable to non-coupon relief would be *at most* $555,562 ($8,818,449 lodestar figure calculated by the district court × 0.5 multiplier (see *infra* Part II.C.) × 12.6% proportion). The final fee award would be the sum of the two figures, or a maximum of $1,539,775.

Ignoring the coupons. Alternatively, the district court could ignore the coupons entirely and exclusively apply the lodestar method to the non-coupon

portion of plaintiffs' recovery under CAFA Section 1712(b). *HP Inkjet*, 716 F.3d at 1183. Because the non-coupon monetary recovery is very small (at most, $650,513), and because that recovery is available only to a tiny fraction of Class Members and other buyers (at most, 0.09% of them), that approach to fees would require a *significant reduction* to class counsel's lodestar award. Under established law, such miniscule benefits to so small a proportion of buyers warrants a 0.25 multiplier (*i.e.*, a 75% reduction of the lodestar). See *Toussaint* v. *McCarthy*, 826 F.2d 901, 905 (9th Cir. 1987) (applying 0.375 multiplier where "plaintiffs achieved far less than what they originally sought to achieve"); *In re HP Inkjet Printer Litig.*, 2014 WL 4949584, at *3 (N.D. Cal. Sept. 30, 2014) (reducing lodestar by 82%, and holding that lodestar award based on non-coupon relief must be lower than lodestar award based on entire settlement); *In re Bluetooth Headset Prods. Liab. Litig.*, 2012 WL 6869641, at *7 (C.D. Cal. July 31, 2012) (applying 0.25 multiplier because plaintiff's success "was minimal"); see also *infra* Part II.C. Applying a 0.25 multiplier to the lodestar calculated by the district court would result in a maximum fee award of $2,204,612, which still is many times the value of the non-coupon compensation and therefore extremely generous to class counsel.

II. THE DISTRICT COURT ERRED IN FAILING TO REDUCE THE LODESTAR AWARD BASED ON PLAINTIFFS' LACK OF SUCCESS.

Beyond misreading CAFA, the district court committed legal error when it failed to reduce class counsel's lodestar due to plaintiffs' lack of success. "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *HP Inkjet*, 716 F.3d at 1182. A district court that awards fees "under the lodestar method" therefore "*must* adjust the amount of any fees award 'to account for the degree of success class counsel attained.'" *Id.* at 1186 n.18 (emphasis added).

Under the correct legal standards, class counsel should have been awarded at most half of their lodestar figure. They pleaded a run-of-the-mill warranty case as an overbroad class action and sought billions in damages and a nationwide recall of millions of dishwashers against defendants who already were providing relief to most dishwasher owners who reported Overheating Events. McD.ER 303; K.ER 429. Class counsel achieved *no success* on the merits; indeed, the district court did not even determine whether their complaints stated a claim for relief. And the Settlement gives the Class almost none of the relief plaintiffs sought. The only extraordinary aspect of this case, which settled for nuisance value, is class counsel's astonishing fee award.

The district court belittled defendants' arguments about class counsel's lack of success as a "reference to only one *Kerr* factor: the 'degree of success obtained.'" McD.ER 33; see also K.ER 131-38 (district judge's repeated emphasis on the need to "pay the lawyers for the work that they do," regardless of "the damages received"). But that characterization flies in the face of governing standards. While *Kerr* listed 12 reasonableness factors more than 40 years ago, this Court has repeatedly held that intervening Supreme Court decisions have changed the analysis. *E.g.*, *Bluetooth*, 654 F.3d at 942 n.7; *Morales* v. *City of San Rafael*, 96 F.3d 359, 363-64 & n.9 (9th Cir. 1996).[3]

The Supreme Court has instructed that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992). This Court likewise has held that plaintiffs' degree of success is the "[f]oremost" determinant of reasonableness. *Bluetooth*, 654 F.3d at 942; accord *McCown* v. *City of Fontana*, 565 F.3d 1097, 1101-02 (9th Cir. 2008) ("The reasonableness of the fee is determined primarily by

[3] The *Kerr* factors are: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Kerr*, 526 F.2d at 70.

reference to the level of success achieved by the plaintiff."); *McGinnis* v. *Ky. Fried Chicken of Cal.*, 51 F.3d 805, 810 (9th Cir. 1994) (a fee award "must be 'reasonable in relation to the success achieved'").

The district court did "not properly consider the relationship between the extent of success and the amount of the fee award." *Hensley* v. *Eckerhart*, 461 U.S. 424, 438 (1983). It erroneously concluded that it was irrelevant that plaintiffs settled for a tiny fraction of the relief they demanded. And it refused to compare the fee award to the Settlement's value, which led it to award fees that are untethered to the Class's recovery.

Even if this Court were to find no error under CAFA, it still should reverse and remand with instructions that limit the multiplier to 0.5, which would result in a fee award of no more than $4,409,224.

A. The District Court Erroneously Disregarded The Vast Disparity Between What Plaintiffs Sought And What They Obtained.

The district court erred as a matter of law when it ignored the chasm between what plaintiffs sought and what they obtained. The Supreme Court has "emphasize[d]" that, even when a "plaintiff obtain[s] significant relief," a fee award should be reduced "if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 440.

This Court accordingly has held that "a district court should 'give primary consideration to the amount of damages awarded as compared to the amount

sought.'" *McCown*, 565 F.3d at 1104 (quoting *Farrar*, 506 U.S. at 114); accord *Toussaint*, 826 F.2d at 905 ("we compare the overall relief eventually obtained by the plaintiff to the relief originally requested, and gauge the award accordingly"). It is "unreasonable" to award "full attorney's fees" if "plaintiffs obtained only a small fraction of what they originally sought." *Corder* v. *Brown*, 25 F.3d 833, 836 (9th Cir. 1994) (reversing district court's failure to reduce fees where "plaintiffs recovered only $24,006 out of the $1,000,000 they originally sought"); see also *McCown*, 565 F.3d at 1104-05 (reversing already-reduced fee award because the settlement "fell far short of [plaintiff's] goal"). The district court's inflated fee award here was unwarranted as a matter of law.

Plaintiffs "obtained only a small fraction of what they originally sought." *Corder*, 25 F.3d at 836. Plaintiffs sought a nationwide recall of 18.4 million dishwashers. Def.SER 414. They sought billions in damages under premium-price, diminution-of-value, and unjust-enrichment theories. McD.ER 720, 727. And they sought "consequential damages, statutory damages," and "punitive and exemplary damages." *Id.* at 713, 715. Those demands did not end with the filing of their complaints. Well into 2014—three years after plaintiffs filed suit—plaintiffs sent defendants an "expert report" claiming that plaintiffs could "calculate [classwide] economic damages under the Replacement Cost and Depreciated Value measurements." K.ER 414.

But plaintiffs received none of that relief. The Settlement offers a discount on the purchase of a new dishwasher to less than a third of the complaints' proposed class members. And it offers reimbursement of out-of-pocket expenses to a mere 0.09% of purchasers. Even then, only purchasers who submit timely, valid claims may obtain benefits. The Settlement provides the Class with $2 to $5 million in benefits—less than a tenth of a penny on the dollar that class counsel sought.

The district court held that this extreme disparity was legally irrelevant. It opined that "the amount in controversy" is "an aspirational figure," settlement requires "compromise," and plaintiffs in class actions "tend to inflate the theoretical amount in controversy in the first instance." McD.ER 33. Those observations flatly contradict governing standards, which obligate a district court "to give primary consideration to the amount of damages awarded as compared to the amount sought." *Farrar*, 506 U.S. at 114; accord *Hensley*, 461 U.S. at 440; *McCown*, 565 F.3d at 1104; *Corder*, 25 F.3d at 836; *Toussaint*, 826 F.2d at 905.

The district court also ruled that a "small" settlement "in comparison" to the amount in controversy "does not reflect a lack of success on class counsel's part, particularly where, as here, the settlement includes non-monetary relief." McD.ER 33. But the Settlement is a miniscule fraction of the amount in controversy even when including the trivial non-monetary relief, which the district court did not

even value. The existence of non-monetary relief does not remove this case from *Hensley*, *Farrar*, and this Court's decisions applying the Supreme Court's holdings.

Linney v. *Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998)—on which the district court relied (McD.ER 33)—is not to the contrary. *Linney* did not address fee awards. It considered only whether a settlement was fair and adequate under Rule 23(e). The district court erroneously "conflated the Rule 23(e) standard" with "the requirement that the fee award be 'reasonable in relation to the results obtained.'" *Bluetooth*, 654 F.3d at 944 (quoting *Hensley*, 461 U.S. at 440).

In sum, it was legal error for the district court to disregard the vast disparity between what plaintiffs sought and what they achieved. *Farrar*, 506 U.S. at 114; *Hensley*, 461 U.S. at 440; *McCown*, 565 F.3d at 1104; *Corder*, 25 F.3d at 836; *Toussaint*, 826 F.2d at 905. The district court should have reduced class counsel's fee award for lack of success.

B. The District Court Erroneously Awarded Fees That Dwarf The Class's Recovery.

The district court also erred in awarding fees that dwarf the Class's recovery. Class counsel spent years re-pleading their complaints and nearly 10,000 hours reviewing documents at claimed hourly rates that no client would ever agree to pay. They achieved not one favorable ruling on the merits. And class counsel

settled after the Consumer Product Safety Commission determined that their allegations are baseless and after they lost a protracted jury trial in another product defect case against Whirlpool. K.ER 346; see *supra* pp. 6-7.

Despite all this, the district court awarded class counsel *five times* the value that the Class recovered. The district court refused to compare the fee award to the value of the Settlement. Indeed, it refused to value the Settlement at all. This failure to tether the fee award to the Settlement's benefits was legal error.

1. The district court should have valued the Settlement and performed a cross-check for reasonableness.

This Court has "said many times" that district courts may not "us[e] a mechanical or formulaic approach" in applying the lodestar method "that results in an unreasonable reward." *Bluetooth*, 654 F.3d at 943. "[C]ounting *all* hours expended on the litigation—even those reasonably spent—may produce an 'excessive amount.'" *Id.* at 942. "[T]o ensure faithful representation" of a class, courts must "tether the value of an attorneys' fees award to the value of the class recovery." *HP Inkjet*, 716 F.3d at 1178. It is "improper to award fees that outstrip" a settlement's "benefit" to the class. *Id.* at 1177.

Thus, "even [under] the lodestar method," this Court has "encouraged courts to guard against an unreasonable result by cross-checking their calculations against a second method." *Bluetooth*, 654 F.3d at 944. When performing a cross-check, courts compare the lodestar amount against the settlement's value to assess

whether the lodestar figure is reasonable. Attorneys should not ordinarily receive more than 25% of the value of a settlement. *Petroleum Prods.*, 109 F.3d at 607. "If the lodestar amount overcompensates the attorneys according to the 25% benchmark standard, then a second look to evaluate the reasonableness of the hours worked" is "appropriate." *Ibid.* When "standard calculations yield an unjustifiably disproportionate award," this Court has instructed district courts to "adjust the lodestar * * * accordingly." *Bluetooth*, 654 F.3d at 945.

This cross-check "resembles what lawyers commonly do when they draft a bill based on hours spent, consider the bottom line as compared with the value of the result, then cut the bill if the total seems excessive as compared with the results obtained." *Petroleum Prods.*, 109 F.3d at 607. Of course, "[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary*." *Hensley*, 461 U.S. at 434.

To tether a fee award to a settlement's benefits, a district court must value the settlement. "[A] court cannot judge counsels' success without first calculating the value of the class relief." *HP Inkjet*, 716 F.3d at 1186 n.18. But the district court refused to value the Settlement here. It made "no comparison" between the attorneys' fees sought "and the benefit to the class," and "no comparison between the lodestar amount and a reasonable percentage award." *Bluetooth*, 654 F.3d at 943. It thus was "in the dark" as to "what level of success plaintiffs in fact

achieved." *Id.* at 944. "[T]he district court needed to do more to assure itself—and [this Court]—that the amount awarded was not unreasonably excessive in light of the results achieved." *Id.* at 943. Instead, it applied the lodestar method in a "mechanical" and "formulaic" manner—granting class counsel essentially all of their requested fees and their requested multiplier without valuing the Settlement—precisely contrary to this Court's holdings. *Id.* at 944; see also *In re Magsafe Apple Power Adapter Litig.*, 571 F. App'x 560, 564-65 (9th Cir. 2014) (reversing fee award because the district court "failed to follow the process set out in *Bluetooth*" and "did not cross-check the attorneys' fee award against the percentage-of-the-recovery method").

A cross-check would have revealed that the fee award was "unjustifiably disproportionate." *Bluetooth*, 654 F.3d at 945. The award of $14,814,995 is a whopping 65.7% of the *maximum* total payouts under the Settlement—far above the 25% standard.[4] That unconscionable percentage—or anything close to it—

[4] The 65.7% figure is calculated by dividing the district court's fee award ($14,814,995) by the sum of the following: $14,814,995 (the fee award), $5,154,920 (the Settlement's *high*-end value to the Class), $72,000 (the $4,000 incentive payments to 18 named plaintiffs), $100,000 (the additional payments to Steve Chambers), $508,292 (class counsel's costs), and $1,905,562 (notice and administrative costs). See McD.ER 37-40, L.ER 27, and *supra* pp. 11-12 for the source of these numbers. See also *Bluetooth*, 654 F.3d at 945, for an explanation of this calculation. This calculation is very generous to class counsel. The Seventh Circuit, for example, would exclude the class counsel's and the claims administrator's costs from the denominator, which would result in a higher

cannot survive a "second look" for "reasonableness." *Petroleum Prods.*, 109 F.3d at 607; see *Bluetooth*, 654 F.3d at 945 ("37.2%" is a "disproportionate award"); *Staton* v. *Boeing Co.*, 327 F.3d 938, 973 (9th Cir. 2003) ("38% [is] well above the 25% benchmark"); see also *McGinnis*, 51 F.3d at 810 ("no reasonable person would pay lawyers $148,000 to win $34,000").

The district court's fee award was out of line with class benefits, far exceeding the benchmark ratio established by this Court's precedents, and it "dwarf[ed] class recovery." *Bluetooth*, 654 F.3d at 945. As such, it was unreasonable as a matter of law and must be reversed.

2. The district court's justifications for failing to value the Settlement and apply a cross-check are legally meritless.

The district court's three "reasons" for finding a cross-check "unlikely to be helpful" do not withstand scrutiny. McD.ER 35.

The district court first held that "there is no common fund against which to apply a benchmark." *Ibid.* But "[w]hether or not" this is a "common-fund case," the district court should have performed a cross-check to ensure that "the amount awarded was not unreasonably excessive in light of the results achieved." *Bluetooth*, 654 F.3d at 943.

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percentage calculation, because those costs do not benefit the class. See *Redman* v. *RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) (the "relevant" ratio is "the ratio of (1) the fee to (2) the fee plus what the class members received").

Second, the district court held that "non-monetary benefits" could not be "quantified with precision, if at all," citing the "enhanced safety warnings." McD.ER 35. Putting aside the fact that the Settlement does not even use the word "warnings," much less require "enhanced safety warnings," the so-called "warnings" were *not* distributed to Class Members, clarified instructions already given to service technicians, and were not valued by the district court. Moreover, this Court has cautioned that "complexity" in a settlement "provides class counsel with the opportunity to puff the perceived value of the settlement so as to enhance their own compensation." *HP Inkjet*, 716 F.3d at 1179. For that reason, the advisory committee notes to Federal Rule of Civil Procedure 23(h) state that "nonmonetary provisions * * * deserve careful scrutiny." Fed. R. Civ. P. 23(h), 2003 adv. comm. note. The district court here gave them *none*.

That failure rests with class counsel. Despite bearing the burden to support their fee request with "specific evidence" (*Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010)), class counsel submitted *no* evidence on the value of the tweaks to Whirlpool's service pointers. Class counsel offered no proof that the slight edits offered new knowledge, would be read, or would prevent already unlikely Overheating Events. In fact, class counsel admitted that it is "impossible to calculate" their benefits. McD.ER 509; Def.SER 43.

Injunctive "relief should generally be excluded" from valuations because it is "easily manipulable by overreaching lawyers." *Staton*, 327 F.3d at 945, 974. This case proves the point. Class counsel claimed, with no evidence, that despite the "difficult[y]" in "placing a hard valuation number on this benefit," the revised service pointers "should be valued" at up to $10 million—an arbitrary figure many times the value of the coupons and reimbursements that the Class *actually* receives. McD.ER 508-09. The trivial injunctive relief here should have been valued at $0.

The district court's reliance on *dicta* in *Yamada* v. *Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir. 2016), was misplaced. McD.ER 35. There, this Court vacated a fee award because defendants had not been allowed to examine class counsel's timesheets. 825 F.3d at 545. That holding "obviate[d] the need" for the Court to "reach the merits of Defendants' remaining claims." *Id.* at 546. The Court nevertheless disagreed with the defendants' claim that the district court had conducted a "flawed" "cross-check." *Id.* at 547. This Court explained that, when "classwide benefits are not easily monetized," a cross-check is "discretionary." *Ibid.*

Here, the Settlement's benefits could have been monetized; all the district court had to do was wait a few months. The arguably flawed cross-check in *Yamada* does not compare to the district court's actions in this case. The district court here acknowledged—*and never rejected*—defendants' valuation of the

Settlement at "$4,220,000," which included $1.6 million in notice costs that the Class does not receive. McD.ER 35; see *id.* at 298. But it cited class counsel's imaginary valuation of "$116,700,000" and asserted that "analysis would be imprecise to the point of uselessness." *Id.* at 35-36. That conclusory approach does not suffice. The parties' valuations differed by 2,665%. While a $15 million fee award might be reasonable for a settlement that pays a class $115 million in cash, it is nowhere close to reasonable for *this* Settlement, which provides the Class with $2 to $5 million in benefits.

Even if a cross-check were discretionary, a "judge's discretion is not unlimited." *Perdue*, 559 U.S. at 558. The district court's refusal to value the Settlement and perform a cross-check while awarding $15 million in fees was capricious and legal error. *Bluetooth*, 654 F.3d at 944-45.

"Third," the district court questioned whether it should value the Settlement based on "the value of the claims actually made" or "the total potential class recovery." McD.ER 35. That is no question at all. CAFA required the district court to value the coupons, which comprised the vast majority of the Settlement's benefits, at their "redemption value." *HP Inkjet*, 716 F.3d at 1186 n.18. Moreover, this is a claims-made settlement in which less than 2.5% of the Class filed claims, and class counsel admitted that "claims rates of around 5% are not uncommon." McD.ER 506. It blinks "economic reality" to pretend that 100% of the Class would

submit claims. *Allen*, 787 F.3d at 1224 (reversing fee award that in "reality" exceeds "the maximum possible amount of class monetary relief by a factor of three").

The district court also stated that it "could not perform an accurate analysis" of the Settlement "until 2021, when the claims deadline for future Overheating Events will pass." McD.ER 35. That is wrong too. The district court could have waited a few months for the rebate deadline to close, as defendants requested. That would have allowed the claims administrator to value the redeemed coupons and reimbursements that comprise nearly all the Settlement's value. It also could have "staggered" fee awards as claims for future Overheating Events were submitted. *HP Inkjet*, 716 F.3d at 1186 n.19. Or it could have awarded fees based on "expert testimony" of the Settlement's value. 28 U.S.C. § 1712(d). Nothing prevented the district court from using any or all of these methods to arrive at a rigorous Settlement valuation, which would have shown that the awarded fees are grossly excessive.

In doing otherwise, the district court relied on inapposite cases. McD.ER 33. It cited two civil rights opinions, including a concurrence not embraced by the majority. *Id.* (quoting *Bravo* v. *City of Santa Maria*, 810 F.3d 659, 673 (9th Cir. 2016) (concurrence), and *Gonzalez* v. *City of Maywood*, 729 F.3d 1196, 1209 (9th Cir. 2013)). Both suits challenged police officers' unconstitutional conduct. One

produced an important Fourth Amendment precedent on SWAT team raids (*Bravo*, 810 F.3d at 666-67); the other led a city to "shut down its beleaguered police department" (*Gonzalez*, 729 F.3d at 1210). This case, in stark contrast, involves routine product defect allegations and attorney paper shuffling that set no precedent at all. Indeed, the district court never ruled on defendants' motions to dismiss.

Finally, the district court's rhetorical assertion that the Settlement is "impressive" does not justify the award. McD.ER 32. The district court wrote that the Settlement "secures monetary relief for Class Members who suffered an Overheating Event, provides insurance-like coverage for future Overheating Events, promotes public safety by creating an incentive for current owners to replace their Class Dishwashers, and requires new warnings about the dangers of removing or bypassing [the dishwashers' safety device]." *Ibid.* That description fails to acknowledge that less than 1% of the Class is eligible for reimbursements, while 100% of the Class suffers *res judicata*. It fails to acknowledge the tiny rate of Overheating Events, the less than 2.5% claims rate, or the lack of any confirmed personal injury. And it exaggerates what the service pointer changes actually required. Most importantly, it says nothing about whether the Settlement provides $2 million in benefits, $115 million in benefits, or some number in between. The district court's "impressionistic" finding does not suffice. *Perdue*, 559 U.S. at 558.

3. The district court's failure to value the Settlement and perform a cross-check creates perverse incentives.

Policy considerations cut strongly against the district court's use of the lodestar method without any proportionality cross-check. Because "inflated attorneys' fees are an endemic problem in class action litigation," courts must give "beady-eyed scrutiny" to class counsel's fee applications and ensure that "class counsel's compensation" is "proportioned to the incremental benefits they confer on the class." *Reynolds* v. *Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002). Only in that way can courts ensure that "class action attorneys" are rewarded based on the true "value" they provide "to class members and society." Deborah R. Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 490 (2000). Use of the lodestar method with no cross-check for reasonableness motivates class counsel to prolong litigation and drag out settlement to run up their fees, with endless document review by senior lawyers but no incremental benefit to the class.

Problems with an unchecked application of the lodestar method have been widely recognized. Thirty years ago, a Third Circuit Task Force explained that the lodestar method "creates a disincentive for the early settlement of cases." Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 248 (1986). The lodestar's "emphasis on hours worked" means that lawyers "have little or no incentive to settle cases at the earliest appropriate opportunity. To the

contrary, there appears to be a * * * desire to keep the litigation alive despite a reasonable prospect of settlement, to maximize the number of hours to be included in computing the lodestar." *Ibid.*

As a more recent study likewise observed, "[t]he lodestar approach has been criticized for its potential to overpay attorneys who invest unnecessary time in the litigation (or pad their bills)." Hensler, *supra*, at 490; accord Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 343 (1996) ("Reliance on the lodestar, with its hourly rates, may create incentives to 'pad' hours, waste time, or prolong the litigation").

Justice O'Connor was concerned enough about fee awards untethered to actual class benefits to identify the issue as one warranting Supreme Court review in a future case. *Int'l Precious Metals Corp.* v. *Waters*, 530 U.S. 1223 (2000) (O'Connor, J., statement respecting denial of certiorari). She explained that the "approval of attorney's fees absent any * * * inquiry" into whether there is a "rational connection between the fee award and the amount of the actual distribution to the class" has "several troubling consequences." *Id.* at 1224. It "decouple[s] class counsel's financial incentives from those of the class." *Ibid.* And it "encourage[s] the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in

obtaining recovery, the actual distribution to the class will inevitably be minimal." *Ibid.*

To prevent adverse consequences like these, the Third Circuit Task Force concluded that district courts should "reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered." 108 F.R.D. at 248. Consistent with that objective, the advisory committee notes accompanying the 2003 adoption of Federal Rule of Civil Procedure 23(h) "emphasize the importance of the reviewing court's focus on realistically assessing the value of what class members actually receive in the settlement in setting the fee award for class counsel." Report of the Judicial Conference of the United States on Class Action Settlements 4 (2006), http://www.uscourts.gov/file/cafareportpdf; see Fed. R. Civ. P. 23(h), 2003 adv. comm. note.

The Seventh Circuit likewise has made clear that a fee award should not allow class counsel to profit from mistakenly overvaluing the litigation while the class ends up with only a modest recovery:

> It would be absurd to approve a settlement that awarded class counsel ten times the damages awarded the class * * * on the basis of the amount of time class counsel reasonably expended working on the action even if the expenditure was reasonable given what class counsel reasonably but mistakenly had thought the case worth to the class. For that would be a settlement in which class counsel had been able to shift the entire risk of the litigation to their clients.

Redman, 768 F.3d at 635 (Posner, J.) (internal quotation marks omitted). As the Supreme Court has put it, "[t]he product of reasonable hours times a reasonable rate" cannot "end the inquiry"—a fee award must reflect counsel's "degree of success obtained" for the client. *Hensley*, 461 U.S. at 434, 436.

In short, courts must control fee awards in a way that reduces the incentives to run up unnecessary fees, delay settlement, and "bring cases that will not result in a sufficient number of people actually receiving benefits." Lee H. Rosenthal, *One Judge's Perspective on Procedure As Contract*, 80 NOTRE DAME L. REV. 669, 676 (2005). Encouraging "courts to guard against an unreasonable result by cross-checking their calculations" is essential to achieve that control. *Bluetooth*, 654 F.3d at 944. Affirming the district court's decision to award exorbitant fees without performing a cross-check will only increase overlitigation of marginal claims, wasting judicial and private resources.

C. The Court Should Remand With Instructions To Apply A Downward Multiplier.

If this Court does not cut the fee award under CAFA, as it should do, it should remand with instructions to apply at least a 0.5 downward multiplier to class counsel's lodestar. That would result in a maximum fee award of $4,409,225. A 50% reduction of the lodestar accounts for the fact that plaintiffs achieved only a modest degree of success in settling this case for a tiny fraction of their requested relief.

A 0.5 downward multiplier tethers class counsel's fee award to the Class's recovery. A fee award of approximately $4.4 million falls within the range of the Class's expected benefits under the Settlement. See *supra* pp. 11-12. And that fee award is 36.3% of the Settlement's total payouts under defendants' high-end estimate of the Settlement.[5] To be sure, that percentage is still very high compared to this Court's 25% benchmark under the percentage-of-recovery method. See *Bluetooth*, 654 F.3d at 945 ("37.2%" is a "disproportionate award"). But it is far more reasonable than class counsel's lodestar figure of $8,818,449, let alone the district court's fee award of $14,814,994.

A 0.5 downward multiplier accords with precedents reducing fees for lack of success. For example, in *Bluetooth*, this Court vacated an $800,000 fee award and instructed the district court to "ensure that the fee award is reasonable considering, *inter alia*, the degree of success in the litigation and benefit to the class." 654 F.3d at 945. The district court on remand applied a 0.25 multiplier and reduced the fee award to $232,759 because plaintiffs' success "was minimal and did not match the level of time and effort that Plaintiffs' counsel put into the case"

[5] The 36.3% figure is obtained by dividing the proposed fee award ($4,409,224) by the sum of the following: $4,409,224 (that fee award), $5,154,920 (the Settlement's high-end value to the Class), $72,000 (the $4,000 incentive payments to the 18 named plaintiffs), $100,000 (the additional payments to Steve Chambers), $508,292 (class counsel's costs), and $1,905,562 (notice and administrative costs). See *supra* note 4.

and the "actual results certainly fell far short of the original goals." 2012 WL 6869641, at *7 (C.D. Cal. July 31, 2012). The same things are true in this case, making a 0.5 multiplier extremely generous. See also *Toussaint*, 826 F.2d at 905 (applying a 0.375 multiplier because "plaintiffs achieved far less than what they originally sought to achieve" and plaintiffs' "proposal to reduce their fee award by one-third is inadequate in light of their limited success"); *Tait* v. *BSH Home Appliances Corp.*, 2015 WL 4537463, at *14 (C.D. Cal. July 27, 2015) (applying a 0.5 multiplier when "class counsel's lodestar" was "a whopping 7.8 times the maximum amount that will be going to class members").

In short, assuming that the Court considers both coupon and non-coupon benefits under the Settlement, it should require a lodestar multiplier no greater than 0.5, which would result in a maximum fee award of $4,409,225.[6]

III. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY APPLYING AN UPWARD LODESTAR MULTIPLIER.

The district court erred as a matter of law when it applied an arbitrary 1.68 upward multiplier that increased class counsel's fees by $6 million beyond their lodestar figure. Every justification that the district court offered for its upward multiplier violates precedents of the Supreme Court and this Court. And the fee

[6] As explained above (*supra* pp. 34-35), a lower multiplier of 0.25 is required under CAFA Section 1712(b), which directs that coupon benefits be excluded from the calculation of fees, leaving only a *de minimis* class benefit of some $650,000 plus inconsequential injunctive relief.

award creates perverse incentives. As a matter of law, this Court should eliminate the upward multiplier.

A. The District Court's Upward Multiplier Violates The Supreme Court's And This Court's Precedents.

1. The district court erroneously assumed that upward multipliers should be frequently awarded.

An upward multiplier is reserved for "rare and exceptional circumstances." *Perdue*, 559 U.S. at 552 (internal quotation marks omitted). There is a "strong" "presumption" against its use. *Ibid.* Even "[w]here a plaintiff has obtained excellent results," an upward multiplier "[n]ormally" should not be awarded. *Hensley*, 461 U.S. at 435. And class counsel bears "the burden of showing" that an upward multiplier "is *necessary*" to make their fee award reasonable. *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992).

The district court's fee award violates these standards. While paying lip service to *Perdue*'s "rare circumstances" language (McD.ER 30), the district court treated upward multipliers as the norm. It quoted pre-*Perdue* decisions in stating that "multipliers 'ranging from one to four are frequently awarded.'" *Id.* at 31 (quoting *Vizcaino* v. *Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002), and *Van Vranken* v. *Atl. Richfield Co.*, 901 F. Supp. 294, 298-99 (N.D. Cal. 1995)). Based on those and other district court cases, it found that "class counsel's request

for a 1.68 multiplier is in line with, if not lower than, the multipliers applied by courts in similarly complex class actions." *Ibid.*

The district court's approach flies in the face of the rule that upward multipliers are for "extraordinary" cases (*Perdue*, 559 U.S. at 546), which "are presented only in the rarest circumstances" (*id.* at 560 (Kennedy, J., concurring)); see *In re Sears, Roebuck & Co. Front-Loading Washer Products Liab. Litig.*, --- F.3d ---, 2017 WL 3470400, at *1-*2 (7th. Cir. Aug. 14, 2017) (eliminating 1.75 multiplier in "difficult case against a powerful corporation," rejecting district court's "novelty/complexity, degree of success, and public interest" justifications). By definition, "extraordinary" cases are not "common" or "frequently" occurring. McD.ER 31. Because the district court "did not apply [the correct] standards," its "large" multiplier must be reversed. *Perdue*, 559 U.S. at 546, 557.

2. The district court's upward multiplier was arbitrary.

The district court's selection of a 1.68 upward multiplier was "essentially arbitrary." *Perdue*, 559 U.S. at 557. "[W]hy [68%] rather than 50% or 25% or 10%?" *Ibid.* The only apparent reason for the 1.68 figure is that class counsel wanted a flat $15 million in fees and selected a multiplier that would reach that amount when using class counsel's requested lodestar figure. See McD.ER 466 ("Class Counsel seek the Court's approval of attorneys' fees of $15 million, which

represents a multiple of 1.68"). That arbitrary multiplier is a sure sign of error. *Perdue*, 559 U.S. at 557.

3. The district court impermissibly double-counted factors subsumed within the lodestar figure.

The district court relied on factors already subsumed within the lodestar figure. "[T]he lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee." *Pennsylvania* v. *Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986). "Taking account of [these factors] again through lodestar enhancement amounts to double counting." *Dague*, 505 U.S. at 563. The Supreme Court accordingly has held that "an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation." *Perdue*, 559 U.S. at 553; accord *Gates* v. *Deukmejian*, 987 F.2d 1392, 1402 (9th Cir. 1992). The district court violated that rule.

Time and hours. The district court believed that an upward multiplier is justified here because "[l]itigating this case required an extraordinary amount of time and labor; the case involved 18 plaintiffs from 11 states suing on behalf of millions of consumers, and took nearly five years of litigation and 'intense negotiations' to settle." McD.ER 31-32. But class counsel's "time and labor" is fully reflected in their lodestar figure; there is no reason to enhance their fee award *beyond* the product of their time and rates. See *Merritt* v. *Mackey*, 932 F.2d 1317, 1324-25 (9th Cir. 1991) (reversing upward multiplier because the "time involved is

clearly subsumed in the lodestar figure," and remanding for a fee award "without the multiplier").

Difficult and complex questions. The district court claimed that "[t]he case involved a number of difficult and complex legal questions giving rise to substantial litigation risks." McD.ER 32. But the Supreme Court has "held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors 'presumably [are] fully reflected in the number of billable hours recorded by counsel.'" *Perdue*, 559 U.S. at 553. "Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award." *Blum* v. *Stenson*, 465 U.S. 886, 888-89 (1984); accord *Greater L.A. Council on Deafness* v. *Cmty. Television of S. Cal.*, 813 F.2d 217, 221 (9th Cir. 1987) ("the novelty and difficulty of issues are inappropriate factors to use in enhancing a fee award, because they are already accounted for" in the lodestar). Here, there were no summary judgment motions, contested class certification proceedings, or trials. The district court did not even rule on defendants' motions to dismiss. Class counsel encountered virtually no litigation risks in settling routine warranty claims before any substantive rulings. All they did was pore over documents while steadily reducing their settlement demands—piling up more and more hours for fewer and fewer Class benefits.

Results and class counsel's skill. The district court claimed that the "impressive" Settlement "undoubtedly took a high level of skill on the part of counsel whom the court has already described as 'among the most capable and experienced lawyers in the country in these kind of cases.'" McD.ER 32. That glowing praise for class counsel in a case that did not advance beyond the motion-to-dismiss stage might suggest that the "awar[d] may [have] be[en] influenced (or at least, may appear to be influenced) by a judge's subjective opinion regarding particular attorneys." *Perdue*, 559 U.S. at 558. But an enhancement cannot be awarded on such an "impressionistic basis." *Ibid.*

Perdue holds that "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance." 559 U.S. at 554. And superior performance generally is captured in the lodestar through higher rates. See *id.* at 554-55 (allowing enhancement only if the lodestar "does not adequately measure the attorney's true market value"); accord *Pennsylvania*, 478 U.S. at 566 ("lower courts erred in increasing the fee award * * * based on the 'superior quality' of counsel's performance"); *Cabrales* v. *County of Los Angeles*, 864 F.2d 1454, 1464 (9th Cir. 1988) (it is "clear" that a lodestar should not be enhanced based on "the special skill and experience of counsel" or "the quality of representation"), *vacated*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989).

Here, the lodestar figure already incorporated the district court's award of generous rates ranging "from $485 to $750 per hour," mainly for reading documents. McD.ER 27. The district court found those rates "reasonable and consistent with those charged by comparable attorneys in the Central District." *Id.* at 28. By increasing the fee award by an extra 68%, "the effect of the enhancement was to increase the top rate for the attorneys to [$1,260] per hour, and the District Court did not point to anything in the record that shows that this is an appropriate figure for the relevant market." *Perdue*, 559 U.S. at 557 (footnote omitted). "There [wa]s nothing unfair about compensating these attorneys *at the very rate that they requested*." *Id.* at 557 n.7.

4. The district court's remaining justifications for its lodestar enhancement are legally erroneous.

The remaining justifications for the district court's upward multiplier are likewise erroneous as a matter of law.

Undesirable litigation. The district court thought this case an "undesirable" one for plaintiffs' counsel to take on because "defendants are 'large corporation[s] with substantial resources.'" McD.ER 32. But class counsel filed this and other cases against defendants *precisely because* of defendants' "substantial resources." They viewed defendants as deep pockets that would pay them for years of document review. Defendants' resources provide no "specific evidence that the

lodestar fee would not have been 'adequate to attract competent counsel.'" *Perdue*, 559 U.S. at 554.

Nationwide settlement. The district court found the Settlement "particularly impressive given that class counsel began with an 11-state lawsuit and converted it into a nationwide settlement." McD.ER 32. The record contradicts that assertion. Plaintiffs' first four complaints sought certification of a nationwide class. Def.SER 338, 459-60, 526-27, 585-86. Their abandonment of that proposed class in their *fourth* amended complaint does not make the Settlement "particularly impressive." McD.ER 32. They never fought for or obtained certification of *any* class for trial. And they settled for nuisance value, so the incremental cost to defendants of the *nationwide* class release was minimal but bought complete peace.

Contingency. The district court found "the contingent nature of success" to be an "extremely important factor" justifying the multiplier. McD.ER 32 (quoting *White* v. *City of Richmond*, 559 F. Supp. 127, 133 (N.D. Cal. 1982)). But relying "on the contingency of the outcome contravenes [the Supreme Court's] holding in *Dague*." *Perdue*, 559 U.S. at 558; see *Dague*, 505 U.S. at 567 ("enhancement for contingency is not permitted"). The district court's error was inexplicable given its understanding that *Dague* "abrogated" *Kerr*: the court applied the very *Kerr* factor that *Dague* abrogated. McD.ER 31-32; see also *Bluetooth*, 654 F.3d at 942 n.7 ("whether the fee was fixed or contingent" is "no longer valid"); *Cann* v.

Carpenters' Pension Tr. Fund for N. Cal., 989 F.2d 313, 318 (9th Cir. 1993) (district court "had no discretion" to apply multiplier based on contingency).

Every reason that the district court offered to justify its lodestar enhancement violates binding precedent or contradicts the record. At the very least, this Court should eliminate the upward multiplier and restrict class counsel's fees to their lodestar figure of $8,818,449.

B. The District Court's Upward Multiplier Encourages Wasteful Litigation, Collusive Settlements, And Fee Appeals.

The district court's application of an upward multiplier creates bad policy. Awards with arbitrary multipliers untethered to degree of success create "disparate" results that will leave "defendants contemplating the possibility of settlement" with "no way to estimate the likelihood of having to pay a potentially huge enhancement." *Perdue*, 559 U.S. at 558-59. "The result is uncertainty. And uncertainty will lead to similar claims being made in many, not just a few, cases." *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 986 (2017). The "consequences" are "potentially serious" and "include changes in the bargaining power" of parties, "risks of collusion," and "making settlement more difficult to achieve." *Id.* at 986-87. "[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff." *Perdue*, 559 U.S. at 559; see also Resnik, *supra*, at 343 ("if judges are permitted to 'enhance' the hourly rate by

multiplying it by some amount (e.g., 1.5 or 2.5), they gain wide-ranging discretion, potentially exercised in an arbitrary fashion").

The hard-to-quantify risk of large fee awards results, in turn, in the types of collusive settlements harmful to class members that this Court criticized in *Bluetooth* (654 F.3d at 946-49), *Allen* (787 F.3d at 1224), and *HP Inkjet* (716 F.3d at 1178 & n.5). No defendant will want to litigate fees if faced with the possibility of an arbitrary multiplier unchecked by class benefits. That will increase the already common yet highly disfavored practice of settling fees and including clauses that forbid or discourage challenges to fee requests, all to the detriment of class members whose recoveries will be reduced to pay class counsel more. See *Bluetooth*, 654 F.3d at 946-49 (describing the practice).

In addition, allowing district courts unfettered discretion in making fee awards uncabined by the legal principles we have described would mean more fee appeals, thus undercutting the need for judicial efficiency. See *Hensley*, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation"); *Nightingale Home Healthcare, Inc.* v. *Anodyne Therapy, LLC*, 626 F.3d 958, 965 (7th Cir. 2010) ("a proceeding for an award of attorneys' fees is not a suit; it is a tail dangling from a suit. We don't want the tail to wag the dog"). Cases that approve excessive fees will encourage class counsel to appeal whenever lower courts rely on limited class benefits to cut back on fee awards. At the same time,

existing precedents that aim to restrain fees will lead defendants hit with excessive fee awards to appeal. Appeals can be minimized by reaffirming the simple legal rule that, in ordinary class actions with limited recoveries, class counsel should receive no more than a fraction of their lodestar figure.

IV. THE DISTRICT COURT DID NOT ERR IN APPROVING THE SETTLEMENT.

The district court properly approved the Settlement. It considered "not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon* v. *Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). The district court found that the relevant factors support approval: without the Settlement, defendants "would have continued to[] vigorously defend the action" and a class might "not [have] be[en] certified" for trial; the Settlement provides "immediate recovery" instead of a "mere possibility" of future relief; its benefits are "fair, reasonable, and adequate" given plaintiffs' claims; the parties conducted discovery; their attorneys recommended approval; and only a "small number" of Class Members objected or opted out. McD.ER 8-9, 11-18.

More than fair, the Settlement's provision of $2 to $5 million in benefits is generous because "plaintiffs were unlikely to succeed on the merits." *Churchill Vill., L.L.C.* v. *Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004). Overheating Events are extremely rare, and the Consumer Product Safety Commission investigated

plaintiffs' allegations and found them meritless. Even objectors concede the weakness of plaintiffs' claims. Knott Br. 13 ("overheating events are rare"); McDonald Br. 33 ("miniscule rate (0.17%) of Overheating Events"). Without the Settlement, the Class likely would have received *no relief*.

Objectors' contrary arguments do not require reversal.

Notice. McDonald (at 46-49) objects that notices to 7,485 Class Members—0.1% of the Class—referred to original but not court-extended deadlines. McDonald admittedly suffered no prejudice: he timely objected. *Id.* at 49. He cites no Class Member who suffered prejudice by not knowing that deadlines had been *extended*. *Id.* at 46. And the extended deadlines were set forth on the settlement administrator's website and phone system. L.ER 23-24. Even if 0.1% of notices were "not perfect," they were adequate "to alert those with adverse viewpoints to investigate and to come forward and be heard." *Online DVD-Rental*, 779 F.3d at 946-47; see *Silber* v. *Mabon*, 18 F.3d 1449, 1453-54 (9th Cir. 1994) (no constitutional right to *actual* notice of class settlement).

Rule 23(a). There is no merit to Liacopoulos's claim (at 32-35) that the district court did not consider Rule 23(a) in granting final approval. The court found in its preliminary approval order that Rule 23(a) requirements were satisfied for settlement purposes. McD.ER 87-91. It reaffirmed those findings in its final approval order, concluding that "circumstances have not changed" despite having

"considered" Liacopoulos's arguments. *Id.* at 10, 16. The district court did not "ignor[e]" Liacopoulos; it *disagreed* with him.

Liacopoulos's contention that Rule 23(a) was not satisfied because of conflicts is incorrect. He asserts (at 41) that "every class member" is either a "past overheating" or "future overheating" "subclass member" and those subclasses are "adversarial" to each other. But more than 99% of Class Members are in *neither* subclass because they did not and will never experience Overheating Events. Nor does Liacopoulos suggest how the Settlement shortchanges either "past overheating" subclass members, who can obtain out-of-pocket reimbursement or replacement costs, or the very few "future overheating" subclass members, who can elect between reimbursement or a substantial discount on the purchase of a new dishwasher after using their dishwasher for over a decade. The alleged conflict has no factual basis or adverse consequences.

Coupons. McDonald is correct (at 33) that the Settlement consists "predominantly" of "coupon relief." But coupon settlements are "particularly appropriate" when, as here, they "provide real benefits." *HP Inkjet*, 716 F.3d at 1178 n.4. The Settlement made *all* Class Members—including the *uninjured* 99.83% of the Class—eligible to replace their decade-old dishwashers by purchasing new Whirlpool-manufactured dishwashers at a discount, and provides additional relief to the potentially injured 0.17% of the Class. That is a real benefit.

And though class counsel "grossly over-estimat[ed] the value of the coupons" (McDonald Br. 34), the actual value of the coupons fairly reflects the low value of plaintiffs' claims.

Non-Class relief. Liacopoulos is wrong in arguing (at 36) that the Settlement "improperly comingle[s]" claims of Class and non-Class Members. The claims-made Settlement does not bind non-Class Members, who must settle their claims individually. Class Members are not harmed as more claims are filed. Indeed, the only "dilut[ion]" Liacopoulos cites (at 39) is that *defendants' costs* increase as more claims are made. That is no prejudice to Class Members.

Chambers's websites. Defendants purchased Chambers's websites for $100,000 because Chambers published inaccurate information regarding Whirlpool and its products, inappropriately used defendants' brand names, caused reputational harm, and diverted consumer traffic from defendants' own websites. The price was based on lengthy negotiations, and the district court concluded that the purchase was "fair and reasonable." McD.ER 38.

Objectors assert a conflict between Chambers and the Class. Knott Br. 21-23; McDonald Br. 49-52. But *seventeen* additional named plaintiffs supported the Settlement, including the websites purchase provision. Def.SER 47-204. "Because the adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative," objectors' challenges to

Chambers's adequacy lack merit. *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund* v. *Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 n.2 (9th Cir. 2001).

Service awards. Liacopoulos (at 37-38) challenges $4,000 service awards made to six non-Class plaintiffs. Those plaintiffs sat for depositions, participated in this litigation, and as non-Class Members were free to settle their claims individually. And the Settlement required the district court to "conside[r]" service awards "separately from" the fairness of the Settlement (McD.ER 605), a requirement the district court followed. *Id.* at 9-18, 37-38. Further, the Settlement provides that any "failure to approve" Service Awards "shall not affect the validity or finality of the Settlement." McD.ER 605. Even if Liacopoulos's argument had merit, the approval order would stand.

Fees. Each objector recognizes that the fee award is an "extraordinary windfall" to class counsel. McDonald Br. 7; Knott Br. 21 ("clearly excessive"); Liacopoulos Br. 2 ("$15 million bonanza"). The court's error in awarding extraordinarily excessive fees, however, does not undermine its approval of the Settlement. The parties settled "without having reached any agreement regarding the amount" of fees. McD.ER 605. The Settlement allowed the court to award only "reasonable" fees, considered "separately from" approval. *Id.* at 603, 605. And the Settlement provided that the fee award "shall not affect the validity or finality of the Settlement." *Id.* at 605. No objector challenges *those* Settlement provisions.

And Knott acknowledges that defendants "vigorously contested [class counsel's] $15 million fee request." Knott Br. 8. The fee award should be reversed, but the settlement approval order should be affirmed.

CONCLUSION

This Court should affirm approval of the Settlement but reverse class counsel's fee award.

If this Court finds error in the fee award under CAFA, it should remand with instructions to apply CAFA's mixed coupon provisions in 28 U.S.C. § 1712(c) or to apply the lodestar method under § 1712(b) based *solely* on the non-coupon relief. In either case, properly calculated fees would not exceed $2,204,612.

If this Court finds no error under CAFA, it should instruct the district court to apply a 0.5 multiplier to class counsel's lodestar figure to reflect their lack of success and the limited benefit to the Class. This would result in a fee award of no more than $4,409,225.

The Court should also hold that no upward fee multiplier is permissible in this case.

Dated: September 6, 2017

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants-Appellees/Cross-Appellants certify that these consolidated cases are all related to one another. Defendants-Appellees/Cross-Appellants further certify there are no other related cases before this Court.

/s/ Stephen M. Shapiro
Stephen M. Shapiro

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and this Court's April 24, 2017 order, Defendants-Appellees/Cross-Appellants certify that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 37(a)(7)(B) and this Court's April 24, 2017 order because it contains 16,322 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Stephen M. Shapiro
Stephen M. Shapiro

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Consolidated Principal and Response Brief of Defendants-Appellees/Cross-Appellants Whirlpool Corporation, Sears Holdings Corporation, and Sears Roebuck and Co. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 6, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Stephen M. Shapiro
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ADDENDUM

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EXCERPTS OF PERTINENT STATUTES AND RULES

28 U.S.C. § 1711. Definitions

In this chapter:

* * *

(2) Class action.--The term "class action" means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

* * *

28 U.S.C. § 1712. Coupon settlements

(a) Contingent fees in coupon settlements.--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.

(b) Other attorney's fee awards in coupon settlements.--

(1) In general.--If a proposed settlement in a class action provides for a recovery of coupons to class members, and 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.

(2) Court approval.--Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

(c) Attorney's fee awards calculated on a mixed basis in coupon settlements.--If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief--

(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

(d) Settlement valuation expertise.--In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

(e) Judicial scrutiny of coupon settlements.--In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

28 U.S.C. § 1715. Notifications to appropriate Federal and State officials

*** * ***

(b) In general.--Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of--

(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

(2) notice of any scheduled judicial hearing in the class action;

(3) any proposed or final notification to class members of--

(A)(i) the members' rights to request exclusion from the class action; or

(ii) if no right to request exclusion exists, a statement that no such right exists; and

(B) a proposed settlement of a class action;

(4) any proposed or final class action settlement;

(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

(6) any final judgment or notice of dismissal;

(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

* * *

(d) Final approval.--An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the

appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

* * *

Federal Rule of Civil Procedure 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

* * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) 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.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

* * *

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).