NO. 11-16097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re HP INKJET PRINTER LITIGATION

NICKLOS CIOLINO, *et al.*,
Plaintiffs-Appellees,

v.

Kimberly Schratwieser and Theodore H. Frank,
Objectors-Appellants,

v.

HEWLETT-PACKARD COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, No. 5:05-cv-03580-JF

Answer of Appellants Kimberly Schratwieser and Theodore H. Frank to the Petitions for Rehearing *En Banc*

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Background

HP was willing to put up $2.9 million in cash to settle three class actions against it over their Inkjet printers. But all of that cash was earmarked for the attorneys, complete with a "clear-sailing" clause and a "kicker," rather than the class. ER177-78.[1]

The class received no cash; rather, they were allowed coupons and injunctive relief that the district court valued at a total of "roughly $1.5 million" with the "discount in the cash value of the [coupons]… mitigated by value of the injunctive relief." Op.7-8; ER30-31. Nevertheless, despite this obvious imbalance between class relief and counsel benefit, the district court approved the settlement without addressing appellant Schratwieser's objection to the self-dealing (ER136-49), and class counsel received a Rule 23(h) award of $2.1 million, with $0.8 million that could have been used to compensate the class returned to HP because of the kicker. Op.8; ER31.

But even the district court's valuation of a paltry $1.5 million was a dramatic exaggeration of the benefit to the class. The injunctive relief was merely a change in future business practices, with nothing prohibiting HP from offsetting the expense by raising prices on ink cartridges. HP would need raise prices only a penny a cartridge to generate $2.6-$4.1 million in revenue and come out ahead at the expense of the class; the district court did not address the objection that the valuation of injunctive relief

[1] "ER" refers to the Excerpts of Record; "Op." to the slip opinion of the panel in this case, and "Dis." to the dissent; "PEB" and "DEB" to plaintiffs' and defendants' petitions for rehearing *en banc*.

must include this potential offset. ER112; ER147; ER109-14; ER27. Meanwhile, the coupons to be disseminated—with a face value of $1.465 million—expire six months after issue, cannot be transferred outside of the owner's immediate family, may not be used in combination with other rebates or coupons for HP products (including other e-credits), and may only be used at the HP.com website. Op.11; ER25; ER176-77. The limitations meant that one objecting class member entitled to over $70,000 of coupons would be required to redeem those coupons in tens of thousands of separate purchase orders $2 at a time—which meant it would only be able to redeem a tiny fraction of its coupons during their six-month life. ER95-97.[2] Furthermore, there was undisputed evidence that HP.com charged substantially more than other Internet vendors and brick-and-mortar stores, and that it would be cheaper for class members to not use the coupons than to use the coupons. ER124-25, 127-28, 137; Op.11 n.6. Indeed, HP would substantially profit from every coupon used: instead of selling an ink cartridge to Amazon or Staples at a wholesale price for resale, HP would be selling the same ink cartridge to an end-user at a $42.99 retail price minus the coupon discount of $2 to $6. ER144; ER127.

The problem, as the panel opinion recognized in reversing the settlement approval, is that the Class Action Fairness Act ("CAFA") explicitly requires ("shall") a court to value coupons at "the value to class members of the coupons that are

[2] The dissent's claim that "it was fair to assume that most of the individuals who had applied for the e-credits would redeem them" (Dis.33 n.4) is thus both absent from the district court's findings (ER25) and directly contradicted by the record. *See also* Op.11 n.6.

redeemed" when a fee award is "attributable to" to the coupon relief. 28 U.S.C. §1712(a), (c). The district court based its fee award on its $1.5 million valuation of the combination of coupons and injunctive relief, but no coupons had been redeemed yet. The fee award, already disproportionate under Ninth Circuit law without explanation of departure from the 25% benchmark, violated CAFA to boot.

Argument

There is no circuit split or conflict with any authoritative opinion; it is the district-court opinion, not the Panel Opinion, that contradicts *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). The petitions simply do not meet the standard of FRAP 35.

Perhaps more importantly, the panel decision was *correct* in reversing a settlement approval that violated the law. Congress specifically noted that it was concerned about the problem of settlements where "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value"—the exact problem created by this self-dealing settlement. 28 U.S.C. §1711 *note* §2(a)(3)(A).

The dissent and the appellees argue that the settlement could be approved, and must be affirmed, because the district court was within its discretion to use the lodestar method for this settlement. That argument contradicts the plain language of CAFA and Congress's stated legislative intent. The appellees' tendentious reading of §1712 would completely nullify Congress's stated purpose by permitting counsel to be "awarded large fees" that dwarf the value of the recovery of the class. Moreover, rather than resolving a circuit split, the appellees' proposed rule of decision requiring affirmance of this settlement would contradict the Ninth Circuit's multiple holdings protecting absent class members from self-dealing in class-action settlements and requiring courts to justify departures from the 25% benchmark. HP's complaint about "practical impediments" are readily avoided by deleting settlement clauses criticized by this Court.

I. The petitions do not meet the "rigid standards" for FRAP 35 because the Panel's interpretation of the Class Action Fairness Act does not conflict with any earlier authoritative rulings of this or any other appellate court.

Only "narrow grounds… support *en banc* consideration" and a petition for *en banc* review must demonstrate that it meets the "rigid standards" of FRAP 35. Advisory Committee Notes to 1998 Amendments to Rule 35; FRAP 35(a) ("*en banc* hearing or rehearing is not favored"). Chief Judge Kozinski, in noting that *en banc* review is cumbersome and thus discouraged, has quoted Judge Posner:

> [W]e do not take cases en banc merely because of disagreement with a panel's decision, or rather a piece of a decision. … We take cases *en banc* to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance—perhaps even to curb a 'runaway' panel—but not just to review a panel opinion for error, even in cases that particularly agitate judges … [*Hart v. Massanari*, 266 F.3d 1155, 1172 n. 29 (9th Cir. 2001) (*quoting EEOC v. Indiana Bell Tel. Co.,* 256 F. 3d 516, 529 (7th Cir. 2001) (Posner, J., concurring)).]

The Panel Opinion here was the first authoritative appellate decision to interpret 28 U.S.C. §1712; there are no "earlier authoritative rulings." As such, it cannot possibly conflict with any earlier authoritative rulings of this or any other appellate court, and there is no grounds for *en banc* review. The Ninth Circuit decisions cited by the parties are not CAFA cases, and there is thus no conflict. The Second Circuit summary order relied upon by HP (but not plaintiffs' petition) is not authoritative.

A. The Panel Opinion does not conflict with *Bluetooth*.

The appellees argue that the Panel Opinion conflicts with *Bluetooth* and Ninth Circuit cases cited by *Bluetooth*.[3] This is wrong.

HP correctly notes that *Bluetooth* condemns a "mechanical or formulaic approach." 654 F.3d at 944; DEB6. *Bluetooth*'s solution for this, stated in the very next sentences of the opinion, is to require a cross-check. 654 F.3d at 944-45. Plaintiffs assert that the Panel Opinion conflicts with this required cross-check. PEB8-9. But the Panel Opinion also commands the same cross-check, citing *the exact same page in Bluetooth* and *the exact same Supreme Court case* that *Bluetooth* relied upon. Op.26 n.18 (*citing Hensley v. Eckerhart*, 461 U.S. 424 (1983)). How can identical holdings be in conflict?

HP gets there by quoting the dissent's *ipse dixit* assertion that the majority's interpretation means that "the attorneys would nonetheless be statutorily entitled to

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[3] The claim is ironic: appellants' main contention on appeal was that *Bluetooth* (which Schratwieser's counsel successfully argued) required reversal, while appellees argued vociferously that *Bluetooth* was distinguishable. As Section III below discusses, *Bluetooth* and other Ninth Circuit precedent would require reversal even in the absence of §1712's limitations on coupon settlements.

receive a fee equivalent to up to the benchmark twenty-five percent of the value of the redeemed coupons, instead of a lodestar fee based on hours worked, which could amount to much less." DEB11; Dis.50-51. But this is baseless. Nothing in §1712(a) requires the percentage to be 25% or forbids the use of a lodestar cross-check as a ceiling. And in the Ninth Circuit, "where awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts ***should*** adjust the benchmark percentage." *Bluetooth*, 654 F.3d at 942 (emphasis added). Nothing in the Panel Opinion, §1712(a), or existing Ninth Circuit law forbids the reduction of the percentage below 25% when it would create a windfall, or even to increase above 25% where class counsel has engaged in unusually but reasonably time-consuming litigation, such as facing vexatious delay tactics from the defendant or taking a case to trial before settling. The Panel Opinion doesn't even mention "25%."

But even if one assumes *arguendo* that *Bluetooth* requires cross-check procedures that the Panel Opinion forbids, the appellees ignore a simple and critical distinction between *Bluetooth* and *Inkjet* that means that *Inkjet* cannot damage the uniformity of this Court's decisions: the two cases involve different laws.

Inkjet is a case of first impression involving the interpretation of CAFA's special rules in coupon settlements for calculating the value of coupons; for determining attorneys' fees; and for the scrutiny of coupon settlements. 28 U.S.C. §1712(a)-(c), (e); *see also Synfuel Tech. v. DHL Express (USA)*, 463 F.3d 646, 654 (7th Cir. 2006) (noting in pre-CAFA case that "Congress required heightened judicial scrutiny" of coupon settlements in CAFA) (Wood, J.). *Bluetooth*, and the earlier Ninth

Circuit opinions cited, did not involve a CAFA coupon settlement, or even a post-CAFA settlement for in-kind relief. Thus, even if *Inkjet* did conflict with *Bluetooth* about class-action settlement approval and attorney-fee calculation, the cases would remain uniform because *Inkjet* is a CAFA §1712 case, and *Bluetooth* was decided solely under Rule 23. Nothing in *Inkjet* overrides or conflicts with anything in *Bluetooth* for class-action settlements that have no coupons. Any loss of flexibility in determining attorneys' fees is the result of the statutory scheme, rather than the Panel Opinion. Appellees cite no earlier authoritative CAFA coupon-settlement cases from the Ninth Circuit—nor can they, because *Inkjet* presented a question of first impression.

B. ***Blessing*** is not an "authoritative" decision.

HP—but not plaintiffs, notably—contend that *en banc* review is appropriate because the Panel's interpretation of 28 U.S.C. §1712 creates a circuit split with the Second Circuit's summary order in *Blessing v. Sirius XM Radio, Inc.*, No. 11-3696, 2012 WL 6684572 (2d Cir. Dec. 20, 2012) (summary order). But HP's brief—which fails to mention that *Blessing* was an unpublished summary order without precedential value[4]—misconstrues FRAP 35(b)(1)(B). It is a "question of exceptional importance" only if a panel decision "conflicts with the ***authoritative*** decisions of other United States Courts of Appeals that have addressed the issue." *Id.* (emphasis added); *see also* Advisory Committee Notes to 1998 Amendments to Rule 35 ("The amendment states that the conflict must be with an 'authoritative' decision of another circuit.

[4] While FRAP 32.1 permits the citation of unpublished opinions (*compare Hart*, 266 F.3d at 1180 (pre-FRAP 32.1)), nothing in that rule permits the miscitation of such decisions.

'Authoritative' is used rather than 'published' because in some circuits unpublished opinions may be treated as authoritative."). The unpublished summary order in *Blessing* is not authoritative in the Second Circuit. Second Cir. Loc. R. 32.1.1(a) ("Rulings by summary order do not have precedential effect."). The Second Circuit is free to disregard *Blessing*'s interpretation of §1712 in a future decision. Because there is no conflict with an authoritative decision, FRAP 35(b)(1)(B) is inapplicable.

The petitions do not meet the standard for FRAP 35.

II. The Panel Opinion's interpretation of §1712 is correct.

Not only are there no conflicts to resolve, but there are no errors to correct.

The central question is whether §1712(a) and (c)(1) limit the discretion of the court when calculating attorney's fees. The Panel Opinion provided eleven pages of detailed textual analysis of §1712 explaining why it does limit the court's discretion. Op.16-26. And neither the dissent nor the two *en banc* petitions answer the Panel Opinion's textual arguments.

Rather, the petitions for rehearing en banc focus on §1712(b), particularly §1712(b)(2), which says, in relevant part, that "[n]othing in this ***subsection*** shall be construed to prohibit application of a lodestar … method of determining attorney's fees." No one is contesting that. Subsection (b)(2) does not limit the court's discretion. Subsections (a) and (c)(1) do. *See generally* M. Douglass Bellis, *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges* 8 (Federal Judicial Center 2008)[5] ("A section in turn is normally divided into subsections. These are designated

[5] Available at www.fjc.gov/public/pdf.nsf/lookup/draftcon.pdf/$file/draftcon.pdf.

by lowercase letters: "(a)," "(b)," etc. Each subsection is a complete sentence and idea within itself.").

The Panel Opinion provides two dictionary definitions of the key phrase "attributable to," both of which support a reading that suggests "attorneys' fees are 'attributable to' an award of coupons whenever '*the* [singular] award of the coupons' is the condition precedent to the award of attorneys' fees." Op.17 (emphasis and brackets in original opinion). This reading, combined with the presence of the word "shall," led the majority to correctly hold that the portion of the fee award for which coupon relief was a condition precedent that "must be calculated in the manner prescribed by §1712(a) (*i.e.*, using the redemption value of the coupons)." Op.16.

In contrast, the dissent starts with the word "award," which is used twice in §1712(a): "the **portion of any attorney's fee award** attributable to the **award of the coupons** shall be based on the value of the coupons . . . redeemed" (emphasis added). The dissent argues that in the first bolded phrase, the word "portion" must refer to a "divisible item or amount," and therefore the word "award" must be synonymous with "monetary value," because it would "make little sense" to speak of a portion of a grant. Dis.42. With this definition of "award" as "value," the dissent proceeds to interpret the second bolded phrase, relying on the consistent meaning canon to argue that "the 'award of the coupons' refers to the monetary value of the coupons," and therefore that the phrase "attributable to" serves simply to connect the two values. Dis.42-43.

This approach is deeply flawed. The Panel Opinion's interpretation that "the award of the coupons" means the "grant," "conferral," or "bestowal" of the coupons is the superior interpretation. Op.17 n.10.

The dissent's error is to rely so heavily on the consistent usage canon to the exclusion of other canons. Canons "are not 'rules' of interpretation … but presumptions about what an intelligently produced text conveys." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 51 (2012). And these presumptions can be undermined by other presumptions. The canon of meaningful variation cuts strongly against the dissent's interpretation. The dissent would have us believe that the phrase "award of the coupons" is synonymous with the value of the coupons. But the phrase "value … of the coupons" is used in the exact same sentence in the statute, and "a material variation of terms suggests a variation in meaning." *Id.* at 170.[6] Moreover, the canon of consistent meaning is a shaky ground on which to base one's entire interpretive scheme. "More than most other canons, [the canon of consistent usage] assumes a perfection of drafting that, as an empirical matter, is not often achieved. . . . [D]rafters more than rarely use the same word to denote different concepts." *Id.*

Moreover, if one is going to apply the canon of consistent usage, one must actually stick with the same definition. The dissent vacillates between defining

[6] The canon of meaningful variation also cuts against the dissent's interpretation of the "portion of any attorney's fee award" as referring to the "value of fees" assessed. Dis.43. In §1712(e), the statute refers to the "portion of the *value* of unclaimed coupons."

"award" as both "the monetary sum awarded to counsel" and "the actual *value* of the fees assessed." Dis.42 (emphasis added). They may be similar—for example, most people value one dollar as being worth one dollar. But they are not synonymous: there is usually a more-than-semantic difference between a thing, and the value of that thing. For example, a pile of gold coins is a "divisible item or amount" that has a tangible existence in the world. The value of those coins is an intangible product of human thought. *E.g.,* Op.11 n.6. The dissent performs this equivocation without acknowledging that it is doing so, but this false equivalency is an absolutely essential premise for the rest of its analysis. If "award" refers to an item, and not a measure of value, then the "award of the coupons" cannot refer to the "monetary value of the coupons." Dis.43. This shaky foundation dooms the dissent's conclusions. Op.17 n.10.

The weakness of the consistent usage canon suggests that the ordinary meaning canon should trump it. And with regard to §1712(a), ordinary meaning cuts heavily against the dissent. "Award" does not ordinarily mean "value." Op.17 n.10.[7]

Plaintiffs' proposed reading argues that §1712(b)(1) requires the use of a lodestar approach "*if* the district court does *not* use a percentage-of-recovery approach." PEB15 (emphasis in original). But if §1712(b)(1) *commands* lodestar if the district court does not use a pure percentage-of-recovery, when would §1712(c)'s

[7] Nor does "redeemed" mean "requested in a claim," which is the dissent's other attempt to sweep away the restrictions on coupon settlements in CAFA. *Compare* Dis.32-33 n.4 *with* Op.10 n.6, 26.

hybrid approach ever be permissible or applicable? It is the plaintiffs, rather than the majority opinion, that read §1712(c) out of the statute. *See generally* Op.22-26.

As this Court has previously held, S. Rep. 109-14—issued ten days *after* CAFA passed—does not trump the text of CAFA. *Abrego Abrego v. The Dow Chemical Co*., 443 F.3d 676, 683-84 (9th Cir. 2006). CAFA supplies its own purpose and findings. 28 U.S.C. §1711 *note* §2(a)(3)(A). "The best evidence of that purpose is the statutory text … Where that contains a phrase that is unambiguous … we do not permit it to be expanded or contracted by the statements of individual legislators or committees …" *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98-99 (1991). To the extent the legislative history merits weight, the majority cites much more authority from the Senate Report supporting its interpretation than the appellees purport to do; the appellees fail to address the Panel Opinion's extensive analysis and citations. Op.9, 12, 22, 24-25.

But appellees' quoted language purportedly to the contrary (DEB9-10; PEB16) is inconsistent with their own interpretation: both they and the dissent argue that §1712(b) permits lodestar to be used even for a coupon-only settlement, when the Report says merely that lodestar can be used "in connection with a settlement based ***in part*** on coupon relief." S. Rep. 109-14 at 30 (emphasis added); Op. 22. Yes, class counsel "may decline to propose that attorney's fees be based on the value of the coupon-based relief provided by the settlement" and instead seek a lodestar award. This simply means that if the parties concede *arguendo* that the value of the coupons is zero, they can avoid the redemption calculation, and seek a lodestar calculation based on the non-coupon relief in the settlement. *E.g., In re HP Laser Printer Lit.,* 2011 WL

3861703 (C.D. Cal. Aug. 31, 2011) (using lodestar after excluding coupons from fee calculation). But if the coupons are needed as a basis for the attorneys' fees, then a court must use §1712(a) or §1712(c) to calculate the value of the coupons and fees attributable to the coupons. The alternative is to "tolerate the precise abuse §1712 set about to eliminate." Op.26. The district court did not, however, value the coupons at zero; it unquestionably made an estimate of the settlement value that included the coupons. Op.27.[8] The majority correctly held that this violated §1712.

III. Even in the absence of §1712's restrictions, the majority could have reversed on the basis of *Bluetooth* and other Ninth Circuit precedent.

The irony of the appellees relying on *Bluetooth* in their request for *en banc* review is that the district court decision and settlement, on their faces, failed to meet *Bluetooth* standards. *Bluetooth* and other Ninth Circuit cases require reversal, even if one accepts the exaggerated $1.5 million estimate of the settlement value without looking at the value of the coupons actually redeemed.

The concerns about the potential conflict of interest between class counsel and their clients "warrant special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the

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[8] Plaintiffs complain that "under the majority's formulation, the district court must determine which portion of the requested attorney's fees is 'attributable to' the coupons, and which is not." PEB3. This is a complaint about the text of §1712(c), rather than the Panel Opinion—again showing that plaintiffs ask for an interpretation that reads §1712(c) out of the statute. And contrary to plaintiffs' suggestion such apportionment "cannot" be done (PEB3), prevailing-party jurisprudence has long required courts to subdivide lodestar according to the relief obtained. *See Hensley*, 461 U.S. at 434-37.

settlement…" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998); *accord Bluetooth*, 654 F.3d at 947. "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003); *accord Bluetooth*, 654 F.3d at 947.

That collusion can be tacit, rather than explicit: "a defendant is interested only in disposing of the total claim asserted against it" and "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Staton*, 327 F.3d at 964 (*quoting In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995)); *accord Bluetooth*, 654 F.3d at 949; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). Thus, courts judging the fairness of a settlement should not just simply ask whether a settlement was negotiated at arms' length, but whether the attorneys are unfairly pursuing their self-interest at the expense of the class. *Bluetooth*, 654 F.3d at 947; *cf. also* American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.05, *comment b* at 208 (2010).

When class counsel negotiates more benefits for itself than for the class in a consumer class action over quantifiable pecuniary claims (as opposed to, for instance, class actions over civil rights), it must structure the settlement to permit the district court to cure the self-dealing. Instead, class counsel negotiated a "kicker" clause in an attempt to shield their fee request. This adversely affected the class's interests without any offsetting benefit: assuming *arguendo* that the settlement benefit was $1.5 million, HP was willing to pay $4.4 million to settle the litigation, agreeing not to challenge a $2.9 million request by the attorneys. The court partially resolved the unfair fee request by reducing it $0.8 million—but that money reverted to HP instead of the class. The very fact that HP would pay $3.6 million instead of the $4.4 million it was willing to pay (and that the class counsel is *still* receiving the majority of the benefit) demonstrates the settlement's inherent unfairness. *Bluetooth*, 654 F.3d at 949 ("there is no apparent reason the class should not benefit from the excess allotted for fees").

HP's complaint that the case was "weak" (DEB8) may explain why the case settled for well under one cent on the dollar of the original damages claims. It does not justify self-dealing by class counsel to extract the majority of the settlement value at the expense of the class.

The Panel Opinion did not reach these issues because it reversed on §1712 grounds; neither the dissent nor the *en banc* petitions acknowledge or address the *Bluetooth* problems of the district court decision. But *Bluetooth*, by itself, creates two independent grounds for reversal.

First, *Bluetooth* suggests a nonexclusive list of three possible signs of self-dealing. 654 F.3d at 947. As in *Bluetooth*, all three of these "multiple indicia" of unfairness are present in the settlement at bar, though the Panel Opinion did not reach the issue and the dissent failed to discuss them: "counsel receive[d] a disproportionate distribution of the settlement";[9] a "clear-sailing" arrangement providing for the payment of

[9] Class counsel asked for $2.9 million for themselves, when the class would receive benefits that the district court valued at $1.5 million. That is 66% of what is a constructive common fund. *GM Pick-Up*, 55 F.3d at 820 (3rd Cir. 1995) (severable

attorneys' fees separate and apart from class funds without challenge from the defendants (ER178); and a "kicker" arrangement (*id.*) by which the "parties arrange[d] for fees not awarded to revert to defendants rather than be added to the class fund." *Bluetooth*, 654 F.3d at 947-49. A "kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger" that is "already suggested by a clear sailing provision." *Id.* at 949. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Id.*

Bluetooth states that a district court faced with such questionable provisions can only approve a settlement if it is "supported by a clear explanation of why the disproportionate fee is justified and does not betray the class's interests." *Id.* at 949. If the district court is to depart from the 25% figure, it must provide "adequate explanation in the record of any 'special circumstances' justifying a departure." *Id.* at 942; *accord Powers v. Eichen*, 229 F.3d 1249, 1256-58 (9th Cir. 2000). That was entirely absent from the record here: everything the district court stated about the case—that the coupons were of low value and largely a marketing program for HP (ER25-26), that the attorneys brought a relatively meritless case (ER27), that the attorneys had exaggerated the value of the class relief (ER26-31)—suggests that the plaintiffs'

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fee structure "is, for practical purposes, a constructive common fund"); *Johnson v. Comerica*, 83 F.3d 241 (8th Cir. 1996) ("[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal."). That 66% figure is more than double the 25% benchmark in this Circuit. *See, e.g., Dennis v. Kellogg*, 697 F.3d 858, 868 (9th Cir. 2012) (38.9% is "clearly excessive"); *Bluetooth*, 654 F.3d at 942.

conduct is not the type to be incentivized, and any departure should be ***below*** the 25% benchmark rather than above it. The failure to justify the departure was independent grounds for reversal under *Bluetooth* and *Powers v. Eichen*.

Second, though the district reduced the $2.9 million request to $2.1 million (an amount that is still too high under §1712, *see* Section II above) because of the scant relief to the class, it failed to account for the unfairness of the settlement caused by the combination of the oversized fee request and the resulting reversion to HP. This was error. *Cf. Bluetooth,* 654 F.3d at 948 ("[i]t is the settlement *taken as a whole, rather than the individual component parts*, that must be examined for overall fairness. … The settlement must stand or fall *in its entirety*." (emphasis in original, quoting *Hanlon*, 150 F.3d at 1026)).

The fee reduction imposed by the district court simply left the remainder in the pockets of the defendants. This is wrong. "If the defendant is willing to pay a certain sum in attorneys' fees as part of the settlement package, but the full fee award would be unreasonable, there is ***no apparent reason*** the class should not benefit from the excess allotted for fees." *Bluetooth*, 654 F.3d at 949 (emphasis added). The reversion of an oversized fee request to the defendant is *per se* self-dealing that makes the settlement inherently unfair under Rule 23(e).

If "class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class." *Lobatz v. U.S. West Cellular of Cal., Inc.,* 222 F.3d 1142, 1147 (9th Cir. 2000). That is exactly what happened here: the excessive fee request combined with the self-dealing kicker meant that the class was deprived of substantial benefit that HP was willing to pay to the class to settle the case. When class counsel bring class litigation to benefit themselves, rather than their putative class clients, the class representatives cannot meet the adequacy requirements of Rule 23(a)(4), and the class should not be certified. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011) (Easterbrook, J.).

For these two independent reasons, it is an affirmance, rather than the Panel Opinion's reversal, that would create a conflict with existing Ninth Circuit precedent.

IV. HP's complaint of a "practical impediment" is an artifact of unfairness in this particular settlement, rather than the Panel Opinion.

HP complains that requiring calculation of the coupon redemption rate before calculating an attorney fee will force a defendant to issue settlement benefits before final approval. This is wrong. It is entirely possible to structure a coupon settlement so that the question of settlement fairness is divorced from the question of the attorney award. The parties chose not to do so here, instead negotiating a settlement with a fee provision shielded by clear sailing and kicker; thus, the fairness of the settlement was inextricably tied up with the question of the fairness of the fees under *Bluetooth*. *See* Section III.A-B above.

But parties could instead choose to negotiate a settlement where there was no specified fee provision. This separates the question of settlement fairness and the fee request, because there has been no settlement money set aside for fees. The fairness hearing decides whether the settlement is fair; the parties then litigate the fee request after the redemption rate is known (or, in the alternative, litigate at the fairness hearing what percentage of the value of the redeemed coupons class counsel will receive, with class counsel then applying for an award on a periodic basis as redemptions are realized and verified with the court).

Or if a defendant insists on capping its fee liability in exchange for clear sailing, the parties need only eliminate the kicker, and establish that a court's reduction of any excessive fee request under the clear-sailing agreement would revert to, say, a supplemental cash distribution to the class (or, if such a distribution was infeasible, an acceptable *cy pres* recipient), instead of the defendant. Once again, the reasonableness of the fee request then becomes collateral to the settlement fairness question, and can be decided in a second proceeding after the settlement is approved, the coupons are redeemed, and the defendant has received the benefit of the class release. If the fee request is excessive relative to the class benefit, the reduction of the request will redound to the class, resolving any problem of disproportionality and settlement unfairness.

Indeed, the Panel Opinion expressly contemplated the possibility of a bifurcated proceeding such as we suggest here. Op.28 n.19 (citing authorities). The Panel Opinion does not "put[] the proverbial cart (attorney's fees) before the horse (class benefits)." DEB 12. Rather, it ensures that the cart (fees) is only put in place after the reins are on the horse (benefits are ascertained). This is consistent with the law of multiple circuits. *Bluetooth*, 654 F.3d at 944 (reversible error to fail to cross-check based on "results obtained" and "actual value to the class"); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 179-80 & n.14 (3d Cir. 2013) (reversible error to approve settlement without knowing actual value of monetary compensation to class when fees outstripped actual class recovery; fact that fee award reflected lodestar multiplier of 0.37 not "outcome determinative").

HP's real complaint is that Congress has acted to discourage coupon settlements. Just so.

Conclusion

The petitions should be denied for the independent reasons that they fail to meet the "rigid standards" of FRAP 35, and because the Panel Opinion is correct. HP's arguments of "practical impediments" caused by the decision are readily resolved with a workaround suggested by the Panel Opinion and ignored by HP.

Discretionary *en banc* review is thus inappropriate.

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Respectfully submitted,

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Proof of Service

I hereby certify that on June 20, 2013, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

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