NO. 12-15705
Consolidated with NOS. 12-15889, 12-15957, 12-15996, 12-16010, 12-16038

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re ONLINE DVD RENTAL ANTITRUST LITIGATION,
ANDREA RESNICK; BRYAN EASTMAN; AMY LATHAM; MELANIE MISCIOSCIA; STAN MAGEE; MICHAEL OROZCO; LISA SIVEK; MICHAEL WIENER,
Plaintiffs-Appellees,

THEODORE H. FRANK,
Objector-Appellant,

v.

NETFLIX, INC.; WAL-MART STORES, INC.; WALMART.COM USA LLC,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, No. 4:09-md-2029 PJH

Petition for Rehearing or Rehearing *En Banc* of Appellant Theodore H. Frank

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Petition for Panel Rehearing or Rehearing *En Banc*

Rehearing or rehearing *en banc* is appropriate under Fed. R. App. 40 or Fed. R. App. Proc. 35 because the panel's definition of "coupon" under 28 U.S.C. § 1712 to exclude some (but not necessarily all) "gift cards" "directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity." Cir. R. 35-1. *Compare In re Online DVD Antitrust Litig.*, No. 12-15705 (9th Cir. Feb. 27, 2015) ("Decision") at 29-36 *with Redman v. RadioShack Corp.*, 768 F.3d 622, 635-37 (7th Cir. 2014) (Posner, J.). This Court will only create a circuit split after "painstaking inquiry," but the panel created a circuit split without even mentioning *Redman*, which was brought to the Court's attention in a FRAP 28(j) letter on September 24, 2014. Rehearing is also appropriate because the panel's ruling is based on several inaccurate factual and legal premises, including a misreading of the legislative history. The Decision created a statutory exception of uncertain scope with no support in the statutory text—or even in the legislative history, but instead from the alleged *absence* of discussion in the legislative history—all without looking to contrary precedent or the common usage of "coupon."

Rehearing *en banc* is also appropriate to reconcile this Court's inconsistent precedents, as well as inconsistency with *Redman*, on the question whether class counsel is entitled to fees based on a percentage of the notice, settlement administration, and litigation expenses incurred (regardless of whether those expenses were incurred efficiently), or whether fees must be calculated based only on the value of what the *class members themselves* receive. Here, even if the gift cards are improbably

valued at 100 cents on the dollar, class counsel's Rule 23(h) award was $8.5 million, while the class receives $14.1 million, a ratio of 37.6%. Accurate discounting of the value of the gift cards would produce a higher ratio still. *Compare* Decision 37-38 (district court has discretion to award fees based on gross settlement fund, regardless of how little class receives) *and Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000) (same) *with Redman*, 768 F.3d at 630 *and Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). *En banc* review is needed to reconcile these precedents and appropriately incentivize class counsel to "prioritize[] direct benefit to the class." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013).

Statement of the Case

Plaintiffs brought antitrust litigation against Netflix and Walmart on behalf of a putative class of Netflix customers. This appeal involves the Rule 23(h) award for the class-action settlement with Walmart. Class members could apply online for a "gift card" that could only be used at Walmart's Internet retail website, walmart.com, or, if they instead filled out a form manually and paid postage, could apply for cash compensation. The requirement that class members who wished for cash must apply manually, rather than having the option of applying electronically, raised the administrative costs of the settlement; as a result, $4.5 million of the $27.25 million gross fund went to third-party notice and administration—about $4 per claimant. Class counsel requested a $8,512,500 Rule 23(h) award of fees and expenses. This meant that the 1.18 million claims received "roughly $12 each" in cash or gift cards.

Theodore H. Frank objected on the grounds that the fee request was based on

the aggregate, undiscounted *face value* of *all* the gift cards even though 28 U.S.C. § 1712, enacted as part of the Class Action Fairness Act of 2005 (CAFA), requires that if "a proposed settlement in a class action provides for a recovery of coupons to a class member," attorney's fees must be based on the value of coupons actually redeemed, rather than their aggregate face value.

Moreover, the fee request sought a percentage of the inefficient expenditure of administrative costs at the expense of the class, and further double-counted expenses. As a result, Frank objected, class counsel was seeking a disproportionate $8.5 million award though the class would receive only $5.2 million in cash and $8.9 million face value of "gift cards" that would almost certainly have a far lower redemption value. Thus, the attorney's fees would comprise between 37.6% and 62%, depending on the redemption value. The district court overruled the objection, holding that the "gift cards" were not coupons and 28 U.S.C. § 1712 did not apply, and granting the Rule 23(h) request in full. Frank and other objectors appealed.

The panel affirmed on February 27, 2015. It held that the gift cards were not "coupons" as a matter of law because "$12 to spend at a low-priced retailer does not leave [class members] with 'little or no value.'" Decision 32. The panel maintained that "this case is distinguishable from every single coupon-settlement example in the Senate report." *Id.* "The class member need not spend any of his or her own money and can choose from a large number of potential items to purchase. Even if the gift card is only worth $12, it gives class members considerably more flexibility than any of the coupon settlements listed in the Senate report." *Id.* at 33. The "Walmart gift cards can be used for any products on walmart.com, are freely transferrable (though

they cannot be resold on a secondary market) and do not expire, and do not require consumers to spend their own money." *Id.* at 34. The panel acknowledged that some gift cards might be "coupons." *Id.* at 35. For that reason, the panel held, the district court did not err in failing to apply CAFA or in assuming that every single coupon would be redeemed at face value. *Id.* at 36 & n.11. The Decision further rejected Frank's argument against counting $4.5 million of administrative expenses as a settlement benefit, following *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000), without addressing out-of-circuit precedent to the contrary. *Id.* at 37-38.

Argument

I. The class members received "a recovery of coupons" under CAFA.

A. The Panel Decision creates a circuit split with the Seventh Circuit without acknowledging the adverse precedent.

Under CAFA, "[i]f 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." 28 U.S.C. § 1712. Thus, a district court commits reversible error when it computes fees based on the aggregate face value of the coupons. *In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013).

The panel held that the "gift cards" were not coupons because their $12 value could conceivably be used to purchase whole products at walmart.com. Decision 29-36. The Seventh Circuit recently confronted a district-court decision directly on point. In *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014), a class-action settlement

issued $10 "settlement vouchers" to some 83,000 class members. There was no dispute that those vouchers could possibly be used to purchase "6000 items" costing less than $10 at RadioShack without expense to the consumer. *Id.* at 636. At the settling parties' behest, the district court held, as here, that the "vouchers" were not coupons. Speaking for the Seventh Circuit, Judge Posner disagreed:

> We have called this case an "all-coupon" case but class counsel call it a "zero-coupon" case. They say that a coupon that can be used to buy an entire product, and not just to provide a discount, is a voucher, not a coupon. "Voucher" is indeed the term used in the settlement agreement, because the parties didn't want to subject themselves to the coupon provisions of the Class Action Fairness Act. But the idea that a coupon is not a coupon if it can ever be used to buy an entire product doesn't make any sense, certainly in terms of the Act. Why would it make a difference, so far as the suspicion of coupon settlements that animates the Act's coupon provisions is concerned, that the proposed $10 coupon could be used either to reduce by $10 the cash price of an item priced at more than $10, or to buy the entire item if its price were $10 or less? Coupons usually are discounts, but if the face value of a coupon exceeds the price of an item sold by the issuer of the coupon, the customer often is permitted to use the coupon to buy the item — and sometimes he'll be refunded the difference between that face value and the price of the item. …
>
> [F]rom the standpoint of the dominant concerns that animate the provisions of the Class Action Fairness Act regarding coupon settlements it's a matter of indifference whether the coupon is a discount off the full price of an item or is equal to (or for that matter more than) the item's full price. [*Id.* at 635-36.]

Redman concluded, after a tour of the legislative history, that the definition used by the district court (and by the panel here) was "untenable": "There is in short no statutory

or practical reason for distinguishing among coupons that offer 10 percent, 50 percent, 90 percent, or 100 percent cash savings." *Id.* at 636-37. Because the district court incorrectly valued the settlement relief, the Rule 23(h) award was disproportionate to class benefit, and settlement approval must be rejected unless there was reallocation to the class—even though the Seventh Circuit held that the total settlement value was adequate. *Id.* at 630-39.

Redman would find reversible error here. The panel based its conclusion that § 1712 did not apply on the irrelevant fact that it was possible to purchase whole products with the coupons. While the Walmart.com "gift cards" are superior to the RadioShack "vouchers" on one dimension because they do not have an expiration date, the coupons here are inferior on other dimensions, because Walmart.com charges $4.97 shipping on purchases of less than $50 and because the RadioShack vouchers could be resold. 768 F.3d at 628. Too, the RadioShack coupons were for RadioShack customers, while the Walmart.com coupons were for a class of Netflix customers. *Cf. Inkjet,* 716 F.3d at 1178 n.4 (coupons more appropriate "where class members have repeat-business relationships with the defendant"). In any event, whether a coupon's features make redemption difficult ultimately goes to the value of the redeemed coupons, not whether the coupon is a coupon; attorneys are already incentivized to make coupons useful by § 1712. This coupon settlement may be fair under § 1712(e) or Rule 23(e) because its coupons are relatively less abusive than others, but that neither means that the settlement does not "provide[] for a recovery of coupons" to a class member nor that *Inkjet*'s stricture on fees is inapplicable.

Creating a gratuitous circuit split contradicts this Court's precedent. *Zimmerman*

v. Oregon Dep't. of Justice, 170 F. 3d 1169, 1184 (9th Cir. 1999) (Court will only create a circuit split upon "painstaking inquiry"). The panel contradicts *Redman* without mentioning it once, much less undertaking a "painstaking inquiry" before rejecting it.

B. *Redman* is correct.

True, Congress does not define the term "coupon" anywhere in CAFA. Decision 31. "Where a statute does not define a key term, [courts] look to the word's ordinary meaning." *Inkjet,* 716 F.3d at 1181 (citing *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. --, --, 131 S. Ct. 1885, 1891 (2011)). That ordinary meaning and ordinary usage does not limit "coupons" to discounts on products, but also encompasses instruments redeemed for free products.

A coupon is "a ticket, card, or advertisement that entitles the holder to a certain benefit, such as a cash refund or a gift." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed., Houghton Mifflin Harcourt Publishing Company 2013). While a "coupon may be defined as a certificate or form 'to obtain a discount on merchandise or services,'" "Webster's also defines coupons as 'a form surrendered in order to obtain an article, service or accommodation.' Coupons are commonly given for merchandise for which no cash payment is expected in exchange." *Dardarian v. Officemax N. Am., Inc.*, 2013 U.S. Dist. LEXIS 98653, at *6-*7 (N.D. Cal. July 12, 2013) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988)).

Contemporary usage supports this conclusion. State regulations often use "coupon" to describe coupons for free products. *E.g.,* Cal. Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots., Annot. No. 280.0560; 86 Ill. Adm.

Code. 130.2125(c). An infamous marketing disaster involved a "coupon for a free meal" promoted too successfully on Oprah Winfrey's talk show. *In re Kentucky Grilled Chicken Coupon Litig.*, 2010 U.S. Dist. LEXIS 68439 (N.D. Ill. Jul. 8, 2010). The *New York Times* uses"coupon" to describe vouchers for free products. *E.g.*, Scott Cacciola, *West Looms as Knicks Keep Going South*, N.Y. TIMES, Nov. 23, 2013 ("when Smith misfired on a pair of free throws, everyone in attendance received a coupon for a free chicken sandwich as part of a fan promotion"); Jenna Wortham, *Bits: A Breakup on Facebook*, N.Y. TIMES, Jan. 19, 2009 (discussing "a popular Facebook application that offered users a coupon for a free Burger King sandwich"). Et cetera, et cetera.

Instead of looking to common usage, the panel immediately started with legislative history. This would be problematic enough by itself. *See, e.g., Milner v. Dept. of Navy*, 562 U.S. --, --, 131 S.Ct. 1259, 1266 (2011) (Kagan, J.). But the problem is compounded because the panel misread the legislative history, as explained next.

C. The panel decision is premised on multiple errors of law and fact.

The panel's reasoning is premised on multiple errors of law and fact. *First,* the panel maintained that its interpretation was appropriate because "this case is distinguishable from every single coupon-settlement example in the Senate report. The report focuses on settlements that involve a discount—frequently a small one—on class members' purchases from the settling defendant. S. Rep. No. 109-14, at 15-20." Decision 31-33.

But this is wrong. As *Redman* points out, "The Senate Report on the coupon provisions does not define coupon, but treats the term as interchangeable with

'voucher,' and evinces no wish to treat vouchers differently from coupons in the evaluation of a proposed class action settlement." 768 F.3d at 636 (citations omitted). Among the settlements criticized by the Senate Report were one for "free golf balls"; a mixed-cash-and-coupon settlement with a credit-card company for a free book of coupons that normally sold for $19.95; and one for "$15 vouchers towards Cellular One products"—which would conceivably include items such as cables and cases and styluses that cost less than $15. S. REP. NO. 109-14, at 15-20; *see generally Fleury v. Richemont N. Am., Inc.*, 2008 WL 3287154, 2008 U.S. Dist. LEXIS 112459, at *9-*11 (N.D. Cal. Aug. 6, 2008) (expressing skepticism that "coupon" meant only discounts without reaching issue, but cited at Decision 32 for opposite proposition).[1]

Second, the panel relied on other district-court decisions holding that gift cards were not coupons. Decision 33-34. This by itself is odd: appellate courts dictate to district courts and not the other way around. In any case, the district courts are hardly unanimous. *E.g., Davis v. Cole Haan, Inc.*, 2013 WL 5718452, 2013 U.S. Dist. LEXIS 151813, at *7-*8 (N.D. Cal. Oct. 21, 2013); *In re Southwest Air. Voucher Litig.*, 2013 WL 5497275, 2013 U.S. Dist. LEXIS 143146, at *8-*11 (N.D. Ill. Oct. 3, 2013); *Dardarian*, *supra*; *Fleury, supra*. The panel gave no reason to favor its cited district court decisions over these better-reasoned but omitted ones, much less over the Seventh Circuit's *Redman*, which, as noted, the panel ignored.

Third, the panel asserted, citing 15 U.S.C. § 1693*l*-1, that "gift cards are a

[1] Similarly, *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010), relied on at Decision 32, did not hold that *only* discounts were coupons; it simply held that the "rebates" in that case were coupons *because* they were discounts.

fundamentally distinct concept in American life from coupons." Decision 35. Not so. Nothing in CAFA or the Electronic Fund Transfer Act (EFTA) says "gift cards" cannot be coupons, and the panel gives no other support for its assertion. But even assuming *arguendo* that gift cards are a different instrument than coupons instead of a species of the coupon genus, federal regulation of gift cards cuts against calling the settlement benefit here "gift cards" instead of "coupons." The coupons this settlement provided are *excluded* from EFTA's definition of "store gift card." 15 U.S.C. § 1693*l*-1(a)(2)(C)(iii); 15 U.S.C. § 1693*l*-1(a)(2)(D)(iv).

Fourth, the panel's confidence that district courts do not need a bright-line rule to distinguish between gift cards that are coupons and those that are not (Decision 35) is belied by a case the panel itself cited with approval. Decision 31 (citing *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013) (appeal no. 13-55373 pending)). *EasySaver*'s settlement provided "$20 credits" for the defendants' websites offering flower and gift delivery. The "credits" expired after one year; could not be used on Valentine's Day, Mother's Day, or Christmas; and could not be combined with ubiquitous 20%-off gift codes and coupons. *Id.* at 1045. *EasySaver* held CAFA did not apply because there was "a selection of items under $20" available (without accounting for shipping), and valued credits at full face value. *Redman* reversed a similar error. The panel opinion leaves district courts unmoored and creates unnecessary ambiguity in a way *Redman*'s bright-line rule will not.

Fifth, CAFA's coupon provisions do not exempt "large retailers" or coupons with "flexibility." Decision 34-35. That a Netflix customer might have more "flexibility" and possible purchases (and more possible free purchases) at

Walmart.com than at HP.com com or Proflowers.com means only that these coupons may have a higher redemption rate. But, again, that goes to the fairness of the settlement and the size of the denominator from which a court calculates the eventual Rule 23(h) fee award, not whether § 1712 applies in the first place. The panel's invention of a "large retailer" exception inserts a far more ambiguous term than "coupon" into lower courts' analyses: why is Victoria's Secret (Decision 33) a large retailer, but not OfficeMax in *Dardarian* or RadioShack in *Redman*?

Sixth, even if it were true that § 1712 "coupons" only applied to "gift cards" used for discounts, it is a mathematical certainty that *some* of the 744,202 gift cards will be used for discounts rather than to purchase whole products. Walmart.com is not a dollar store: it sells low-cost items, but also $749 iPhones and $299 swingsets and thousands of other items where a $12 gift card would only be a "discount." (And unless a class member uses the gift card to purchase items for *exactly* its $12 value, either the remainder of the gift card will eventually be used to obtain a discount or will go unredeemed.) The settlement thus "provides for a recovery of [a discount] to a class member" and is subject to § 1712 even under the panel's rationale; that is, at least some class members will use the gift cards to obtain a relatively small "discount… on class members' purchases from the settling defendant." Decision 32. This was an additional reason that *Redman* rejected the idea that the statutory term "coupon" excludes instruments potentially used to purchase whole products: it would add a pointless administratively-difficult layer of complexity to settlement valuation, requiring a determination of both the redeemed value of the coupons and whether coupons were redeemed for a discount or a whole product. 768 F.3d at 637.

For all of these reasons, rehearing or rehearing *en banc* is appropriate.

II. *Powers* should be reversed by the *en banc* court because it prejudices absent class members and conflicts with other circuits' decisions.

This Court has a 25% benchmark for Rule 23(h) awards. For example, in *Dennis v. Kellogg Co.*, the district court awarded $2,000,000 in "fees and costs," and this Court noted that the resulting 38.9% ratio would be "clearly excessive." 697 F.3d 858, 863, 868 (9th Cir. 2012). But in *Powers v. Eichen*, 229 F.3d 1249 (9th Cir. 2000), this Court held that a district court's choice of denominator for calculating a Rule 23(h) ratio is within its discretion, a decision followed by this panel. Decision 37-38.

The panel's rule is problematic, because it means that class counsel has little incentive to "prioritize[] direct benefits to the class" (*Baby Prods.*, 708 F.3d at 178) in negotiating a settlement when payments to third parties such as settlement administrators or possibly even *cy pres* is put on par with actual class recovery—and even, as discussed below, has a perverse incentive to shortchange the class. "[T]he standard [under Rule 23(e)] is not how much money a company spends on purported benefits, but the value of those benefits to the class." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011) (internal quotations and citations omitted). The protection that *Bluetooth* gives class members against attorneys obtaining a "disproportionate distribution of the settlement" (*id.* at 947) can be entirely undercut by the panel's permission for district courts to accept manipulation of the settlement valuation. As the Third Circuit put it, "[c]lass members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Prods.*, 708 F.3d at 178. Even more so for for-profit third parties like

settlement administrators. Here, each $12 gift card was effectively valued by the lower court as providing about $23 of benefit to class members: $12 face value plus $5.76 in fees, $1.44 in attorney expenses, and $3.80 in notice and settlement administration costs. The panel affirmed that fiction, but "[c]ases are better decided on reality than on fiction." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013).

Under the panel's rule, class counsel has little incentive to ensure efficient settlement administration, because counsel is spending other people's money. *Cf.* ADAM SMITH, THE WEALTH OF NATIONS, Book V, ch. 1 § 107 (1776). This problem was underscored in this case when class counsel agreed to preclude class members from claiming cash electronically, thus permitting the settlement administrator to bill more for more expensive (and much less efficient) manual processing of claims manually, all to benefit defendant Walmart, which preferred giving gift cards to cash. The panel gives district courts the discretion to award the same $4 million Rule 23(h) award for a settlement that pays the class $11 million (but spends $1 million on notice and settlement administration) as for a settlement that awards the class $1 million (but spends $11 million on notice and settlement administration and *cy pres*). Indeed, class counsel can be expected to prefer the latter result, as they earn much more personal gratitude from richly-compensated settlement administrators or from *cy pres* recipients than from absent anonymous class members. The panel's holding leads to other absurd conclusions, such as the possibility that the $0 *Bluetooth* settlement would have been fair had only the parties added a $3 million Super Bowl ad to the notice plan.

Such perverse consequences are not purely hypothetical. In *Baby Products*, the parties structured the claims process so that less than $3 million of the gross $35.5

million settlement fund actually went to the class, and the bulk would go to *cy pres* to be chosen by the parties, with the attorneys awarded $14 million. 708 F.3d at 169-70. In *Redman*, the district court held that a settlement award of $1 million to the attorneys and 83,000 ten-dollar "vouchers" to the class was fair because the total settlement "value" was $4.1 million once $2.25 million in notice and settlement administration costs were included. The panel's reasoning implicitly approves these district courts' settlement approvals as within the discretion authorized by *Powers*.

Redman correctly rejected that analysis and reversed settlement approval. 768 F.3d at 630. "The ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Id*; *accord Pearson*, *supra* (also applying reasoning to *cy pres* when distribution to class possible). *Redman* acknowledged that *Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003), suggested in *dicta* that it would be "reasonable" to include notice costs as a class benefit, but the Seventh Circuit noted that notice and settlement administration expenses are also a benefit to class counsel and the defendant. 768 F.3d at 630. In addition to *Redman*'s reasons, a defendant has no incentive to skimp on notice costs, because failure to give adequate notice deprives a defendant of the benefits of the release it negotiated. *E.g., Besinga v. United States*, 923 F.2d 133, 136-37 (9th Cir. 1991) (permitting relitigation of class action because class notice in previous settlement inadequate); *Hecht v. United Collection Bureau*, 691 F.3d 218 (2d. Cir. 2012) (same). Notice and settlement administration expenses should not be included in the denominator when calculating attorneys' fees.

Similarly, the panel affirmed the district court's choice to both calculate the

25% fee from the gross fund *and* award the attorneys $1.7 million separate expenses from that fund. This application of *Powers* means that class counsel that successfully negotiates a common-fund settlement will receive $1.25 for every dollar of expenses they incur—another perverse incentive for class counsel to shortchange the class by running up expenses. This approach also conflicts with this Court's analysis in *Dennis*, which used the combination of fees and expenses totaling $2 million to calculate the ratio under this Circuit's benchmark. 697 F.3d at 863, 868.

In sum, the panel decision and *Powers* conflict with the rulings of the Third and Seventh Circuits, and conflicts with this Court's decision in *Dennis*. It is bad public policy that undermines the protections given to absent class members in *Bluetooth*. The panel decision gives class counsel perverse incentives to forum-shop national class actions to the Ninth Circuit to take advantage of looser protections against attorneys taking advantage of their clients. If *Powers* dictates the panel's result, *en banc* rehearing is needed to reverse *Powers* and eliminate a circuit split.

Conclusion

This Court should grant rehearing or rehearing *en banc* to correct the panel's errors, provide needed guidance to lower courts, and eliminate circuit splits. Without national uniformity on the two questions in this petition, there will be forum-shopping by putative class counsel in this Circuit at the expense of absent class members.

Dated: March 13, 2015

Respectfully submitted,

/s/ Theodore H. Frank

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Certificate of Compliance
pursuant to Circuit Rules 35-4 and 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing *en banc* is in compliance with Fed. R. App. Proc. 32(c) and does not exceed 15 pages.

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

Executed on March 13, 2015.

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Proof of Service

I hereby certify that on March 13, 2015, 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 who are ECF-registered filers. Additionally, I caused to be sent a copy of the foregoing via first class mail to the following non-registered attorney:

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