

No. 09-17380

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CLRB HANSON INDUSTRIES, LLC,  
DBA Industrial Printing; HOWARD STERN,  
on behalf of themselves and all others similarly  
situated,

Plaintiffs-Appellees,

v.

WEISS & ASSOCIATES, PC,

Appellant,

v.

GOOGLE, INC.,

Defendant-Appellee.

No. 09-17380  
D.C. No. 5:05-cv-03649-JW  
Northern District of  
California, San Jose

**PETITION FOR  
REHEARING AND  
REHEARING *EN BANC***

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**PETITION FOR REHEARING AND REHEARING *EN BANC***

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**STATEMENT REQUIRED BY FRAP 35(b)(1)**

Rehearing or rehearing en banc is warranted here because the decision by the panel in *CLRB Hanson Industries, LLC, et al. v. Weiss & Associates, PC, v. Google Inc.*, No. 09-17380, dated January 5, 2012 (attached hereto in Appendix A), is contrary to the law of this Circuit as expressed in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011). Consideration by the full court is necessary to secure and maintain the uniformity of decisions in this Circuit. A panel rehearing is also warranted because the panel appears to have misapprehended the effect of the Settlement benefits.

Rehearing *en banc* is warranted because this case involves a question of great importance: Do the limitations set forth in the Class Action Fairness Act, 28 U.S.C. § 1712 (“CAFA”), regarding contingent fee awards in a class action settlement that contain a coupon component apply when a Settlement (1) automatically reduces Class Members’ outstanding balances with the defendant; and (2) automatically provides a credit for the amount by which the Settlement benefits exceed a Class Member’s outstanding balance unless the Class Member acts to request monetary payment of the excess amount. The answer to this question has significant implications for the definition of a coupon settlement for the application of CAFA.

## ARGUMENT

**A. THE PANEL’S HOLDING THAT THE CLASS ACTION FAIRNESS ACT’S LIMITATIONS ON CONTINGENT FEE AWARDS IN COUPON SETTLEMENTS IS NOT CONTROLLING IN THIS MATTER IS INCORRECT; AS A RESULT THE PANEL’S MEMORANDUM OPINION CONFLICTS WITH NINTH CIRCUIT PRECEDENT REGARDING THE SCRUTINY APPLIED TO CLASS ACTION SETTLEMENTS AND ATTORNEYS’ FEE AWARDS .**

The Panel’s affirmation of the district court’s approval of the Settlement and award of attorneys’ fees conflicted with the law of this Circuit, as articulated in the recent decision of *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011). The panel’s holding that CAFA’s limitations on contingent fee awards in coupon settlements is not controlling in this matter is incorrect.

The panel’s memorandum opinion (“Opinion”) in *CLRB Hanson Industries, LLC, et al. v. Weiss & Associates, PC, v. Google, Inc.*, No. 09-17380, dated January 5, 2012 (attached hereto in Appendix A), held Settlement “is not a ‘coupon settlement’ and therefore does not trigger the Class Action Fairness Act of 2005's limitations on contingent fees awarded in connection with such settlements.” Opinion, p. 4. The Settlement was not considered a “coupon settlement” because “[t]he settlement gives every class member the option to receive its share of the settlement proceeds in cash or cash-equivalent forgiveness of indebtedness already incurred.” Opinion, pp. 3-4.

The Panel specifically found that this Settlement does not qualify as a coupon settlement. As a result, the Panel did not demand the higher scrutiny required under CAFA. Concomitantly, the Panel affirmed the district court's perfunctory approval of the requested attorneys' fees. Additionally, the finding that the Google Adwords Settlement was not a coupon settlement is also legal error. A cursory review of Congressional intent with regard to CAFA shows Congress wanted the federal courts to scrutinize class-action settlements wherein class members do not receive money damages while at the same time class counsel receive large attorneys fees paid in real money. Committee Report, 109<sup>th</sup> Congress (2005-2006), Senate Report 109-014. Although CAFA never defines a coupon, Congress did not only mean the kind of coupon one clips from the Sunday paper. "Coupon" in the Congressional sense meant any device defendants would rather use in place of the payment of money damages.

In this settlement only Class Members who no longer have an AdWords account automatically received money damages. Class members with an AdWords balance greater than the damages they are owed do not have any ability to elect to receive money damages. EOR 171-78; EOR 102-03. In fact, there is only one narrow circumstance in which Class Members have an "option" of any kind, *i.e.*, only Class Members' whose balances are less than the amount of damages to which

they are entitled can make an election for cash. However, they can not elect to receive all of their damages as cash. *Id.* Under the settlement they will automatically receive a reduction of their Adwords account balance, and will then automatically receive the difference between their account balance and settlement benefit in Adwords Credits, unless they take additional action and affirmatively elect to receive cash instead of Adwords Credits. EOR 102-03. Therefore, the Defendant is controlling when and if Class Members receive money damages just as surely as if they were issuing coupons only redeemable to pay the Class Members' AdWords account balance. While the Defendant probably prefers that everyone pay their AdWords account balance, Class Members might prefer to choose how to spend their damage award. The Panel may have overlooked that Class Members with active AdWords accounts whose account balances exceed their Settlement benefits will automatically receive a reduction of their account balance by the amount of benefits owed under the Settlement, with no cash option. EOR 102-03. Significantly, no Class Member with an outstanding account balance has the option of choosing to have the Settlement benefits, up to the amount of that outstanding balance, paid in cash. *Id.* These court-approved settlement provisions render clearly erroneous the Panel's finding that the Settlement "gives every class member the option to receive its share of the settlement proceeds in cash or cash-

equivalent forgiveness of indebtedness already incurred.” Opinion, pp. 3-4.

Class Members with outstanding balances will have their outstanding balances reduced by the Settlement proceeds and potentially receive AdWords Credits. EOR 102-03. However, such Class Members may be disputing the balance Google claims they owe. Nothing in the Settlement addresses that circumstance. Some Class Members may have chosen to not pay their AdWords accounts, either because of Google’s improper conduct that was the subject of the litigation, or for some other reason. Thus, the “forgiveness of indebtedness already incurred” is not necessarily “cash-equivalent,” contrary to the Panel’s finding. *See* Opinion, pp. 3-4. This Settlement functions primarily as a way for Google to even out its balance sheet.<sup>1</sup> Using the Settlement benefits to erase what Google claims

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<sup>1</sup>Appellant Weiss & Associates raised this issue in its Opening Brief:

Those class members whose outstanding balances are less than their settlement proceeds can elect to have that portion of their settlement in excess of their balance paid in cash. (EOR, p. 101) This disparity within the class is not justified, and raises issues of the adequacy of representation. What if the class members who have outstanding balances with Google are in the process of disputing their balances? The Settlement allows Google to write any disputed balances off as paid while still receiving a release of the customer’s claims, while the class member who might have been disputing the balance gets nothing for the release.

Opening Brief, DktEntry 24, p. 20.

are outstanding AdWords account balances, without any verification of the balances Google claims Class Members owe, and without any option to receive cash instead of the balance reduction, is at best a coupon settlement.<sup>2</sup>

Google should not be able to decide how Class Members spend their damages. The principle of coupons is that the issuing party is willing to “give away” something, but only in a way that will ultimately provide a net benefit to the issuing party. This is why coupons are widely used as a marketing tool apart from

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<sup>2</sup>Appellees may contend that Appellant Weiss & Associates did not argue that the writing off of outstanding balances constituted a coupon. Though Appellant’s briefing on the subject may not have been perfectly clear, it is evident from the Reply Brief that Appellant intended for the Panel to consider the use of Settlement benefits to reduce outstanding balances a coupon:

In fact, the only class members certain to obtain a cash distribution under the settlement are those who no longer have active AdWords accounts. For those class members with active AdWords accounts, the default is still to receive AdWords credits; even those class members with active AdWords accounts who owe no money to Google will still have to affirmatively act to receive the benefit of the settlement in anything other than a coupon. (EOR 171-178, Settlement agreement; SER 1-38, transcript of fairness hearing, pg. 10-12).

Reply Brief, Dkt. Entry 37, p. 14. At oral argument the Panel did not request clarification on this specific issue. The Panel did ask why Appellant considered this Settlement a coupon settlement, and Appellant’s counsel responded that a coupon exists when Class Members receive credit instead of cash. What else is Google’s writing off of outstanding AdWords balances than a “crediting” of Class Members accounts? Google is surely not providing those Class Members any cash distribution.

their use in class action settlement negotiations. In this Settlement, Google is willing to offer a settlement that the parties claim is equivalent to cash, even though some unknown portion of that settlement will be used by Google to reduce outstanding balances of Class Members who no longer advertise with AdWords and who may have no intention of paying the outstanding balance. This is nothing more than Google applying a “credit” to such a Class Member’s account equal to the benefits owed them under the Settlement. No cash actually passes between the Class Members and Google. Appellees agree, stating that “. . . class members who receive AdWords credits either receive them by choice *or are receiving credits that are automatically applied to an outstanding balance owed to Google.*” Answer Brief, DktEntry 29, p. 43 (emphasis in original).

It is respectfully submitted that the Panel was also mistaken in its conclusion that the Google AdWords Settlement did not require the application of CAFA’s limitations on contingent fee awards in coupon settlements. Any time a class member receives a credit for something, be it for part of a product, or an entire product or service, instead of cash, it is a coupon settlement. Although the Class Action Fairness Act does not include the definition of a coupon, even a non-cash benefit that allows a consumer to obtain an entire product, without spending any money, could still be a coupon. *Fleury v. Richemont North America, Inc.*, 2008

WL 3287154, \*2 (N.D.Cal. 2008), *citing* 109 S. Rpt. 14 (2005) (suggesting that settlements where class members received free products were coupon settlements).

The *Fleury* court stated:

The legislative history, however, suggests that even such a noncash benefit could be a coupon. *See* 109 S. Rpt. 14 (2005) (suggesting that the following were coupon settlements: (1) “a recent class action where consumers alleged that a company was selling cribs that were unsafe for use by infants, [and] the class members received *either* a crib repair kit or a coupon for \$55 which could be used toward the future purchase of a Dorel Juvenile Group Product”); (2) “[a]nother recent suit involv[ing] allegations that Poland Spring water does not really come from a spring deep in the woods of Maine,” and the class members received “discounts *or* free water ... over five years and contributions of \$2.75 million to charities”; and (3) a class action where “[a] manufacturer offered consumers who bought a dozen Pinnacle golf balls free golf gloves” but failed to do so, and the class members received three free golf balls) (emphasis added).

*Fleury*, 2008 WL 3287154 at \*2. In *Fleury*, the court declined to use the percentage method to award attorneys’ fees, and instead applied a lodestar analysis, when it did not have information regarding the rate of redemption of consumer credits. *Fleury*, 2008 WL 3287154 at \*3.

In the instant case, the reduction of outstanding balances is very similar to non-cash benefits which entitle a consumer to purchase an entire product. The AdWords Credits are identical to non-cash benefits which entitle a consumer to purchase an entire product. Thus, the only part of the Settlement to which CAFA’s

coupon provisions should not apply is that which automatically distributes cash to Class Members with no outstanding AdWords balance. The other parts of the Settlement are coupons, or are so similar to coupons that the CAFA coupon provisions should apply. Settlement benefits providing for one month of free cable service were “almost certainly coupons under CAFA,” even where class members could opt for a \$5 cash benefit instead. *Parker v. Time Warner Entertainment Co., L.P.*, 631 F.Supp.2d 242, 267 (E.D. New York 2009) Where a settlement offered in-kind relief of two months of a free membership, the settlement shared many characteristics with the “infamous ‘coupon’ settlement.” *Wilson v. DirectBuy, Inc.*, 2011 WL 2050537, \*6 (D. Conn. May 16, 2011). Where class members had the choice to either continue with a plan of service, or cancel the plan and receive a credit, the settlement was like “settlements providing class members with coupons or certificates, where the true value of the award was less than its face value.” *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 852 (5th Cir. 1998). Where a settlement provided for “e-credits” for defendant’s printer products, the court treated the credits as coupons and considered valid the objectors’ concerns that the same problems that plagued coupons were also present in the e-credits, *i.e.*, that the credits did not provide meaningful compensation because they are “non-transferrable and cannot be used with other discounts or coupons” and they fail to

“requir[e] HP to disgorge ill-gotten gains,” acting rather as a marketing tool. *In re HP Inkjet Printer Litigation*, 2011 WL 1158635, \*2, \*6 (N.D. Cal. March 29, 2011). Similarly, the AdWords Settlement benefits are not transferrable, and allow Google to merely write off outstanding balances that may never have been paid instead of forcing Google to disgorge its gains from its alleged improper conduct. The *HP* court cited to CAFA’s provisions requiring that under a coupon settlement, the award of attorneys’ fees attributable to the coupons should be based on the value to class members of the coupons actually redeemed and awarded attorneys’ fees in the amount of \$1.5 million, almost an 80% reduction in the lodestar. *Id.* at \*9-\*10.

Even if settlement relief is not “identical to a coupon,” it should be treated like a coupon when it is “in-kind compensation” that “shares characteristics” with coupons. *Synfuel Techs., Inc. v. DHL Express*, 463 F. 3d 646, 654 (7th Cir. 2006), *declined to follow on other grounds, Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009). Courts that have not explicitly held that a specific type of in-kind relief was a “coupon” have considered CAFA’s provisions regarding coupon settlements to be “instructive” where settlement benefits were “coupon-like.” *Fleury*, 2008 WL 3287154 at \*2, *citing Yeagley v. Wells Fargo & Co.*, 2008 WL 171083, \*9 (N.D. Cal. Jan. 18, 2008), *reversed on other grounds*, 365 Fed.Appx.

886 (9th Cir. 2010) (reasoning that even if credit report did not qualify as "coupon," CAFA was nevertheless instructive); *see also, In re HP Inkjet Printer Litigation*, 2011 WL 1158635 at \*6.

“[C]ompensation in-kind is worth less than cash of the same nominal value,’ since, as is typical with coupons, some percentage [of the in-kind compensation] [ ] will never be used. . .” *Synfuel*, 463 F.3d at 654, *citing In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001); *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 321-22 (N.D. Ga. 1993) (disagreeing with testimony from credible experts that value of coupons for travel was the same as the face value and finding that “the true value of the certificates to the class depends on when the certificates will be used, how they will be used, and who will be using them.”); *see also Wilson*, 2011 WL 2050537, \*6 (finding that as with most in-kind benefits, the dollar amount ascribed to the benefit did not represent its actual cost to defendant).<sup>3</sup> Even before the application of CAFA’s coupon settlement provisions, courts have adjusted the value of “common fund”

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<sup>3</sup>Of course, the reduction in outstanding balances cannot but be “used,” by definition. Google forces Class Members to “use” this benefit by automatically applying it to their balance. However, this does not mean that the balance reductions are the same as cash. As addressed previously, if Class Members would not have paid their balances, or are disputing the balance, such “relief” under the Settlement is worthless.

settlements that provided non-monetary relief to reflect redemption rates. *See Strong*, 137 F.3d at 852; *see, e.g., In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 348-52 (N.D. Ga. 1993) (adjusting value of settlement for the likelihood that coupons for travel would be used by class members in determining attorneys' fees); *Duhamie v. John Hancock Mut. Life Ins. Co.*, 989 F.Supp. 375, 379 (D.Mass. 1997) (approving the fee request provisionally and permitting immediate partial payment, but reserving the balance for adjustment in light of the actual experience under the settlement, where settlement value was unknown because class could opt to receive either relief against insurance policy or through ADR process); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F.Supp.2d 184, 189-90 (D. Maine 2003) (postponing awarding attorneys' fees until the rate of redemption of vouchers was known).

In *Bluetooth* the Court criticized the district court's analysis not because of its choice of method, rather "the absence of explicit calculation or explanation of the district court's result." *Bluetooth*, 654 F.3d at 943. The district court must provide a concise but clear explanation of its reasons for the fee award, and should consider the relationship between the amount of the fee awarded and the results obtained. *See id.* at 944. The district court, here, did not support its percentage fee award with specific factual findings nor a reasoned explanation of the award. *See*

*generally*, EOR 165-67. The district court with a sweeping brush held generally that plaintiffs had demonstrated that “(i) the results obtained in light of the relevant circumstances of this action support the fee award; (ii) the economics of the prosecution of this action and the experience of Representative Plaintiffs’ Counsel support the fee award; (iii) the fee award is substantially similar to fees approved in similar cases; and (iv) the time and labor required by Representative Plaintiffs and the Representative Plaintiffs’ Counsel is consistent with the fee award and incentive compensative awards.” EOR 166-67. The district court omitted any specific findings. *See generally*, EOR 165-67. The Panel’s affirmation of the district court’s analysis of the attorneys’ fee award contrasts sharply with and is in direct conflict to the *Bluetooth* requirements.

In *Bluetooth*, the objectors, on appeal, challenged the district court for failing to use a lodestar cross-check to assess the reasonableness of the fee award. 654 F.3d at 943. The Ninth Circuit reversed and remanded to the district court, because the district court did not undertake the analysis necessary to ensure that the fee award amount was not unreasonably excessive in light of the results obtained. *Id.* The Ninth Circuit found that the district court lacked a “sufficient basis for determining the reasonableness of the award” when the district court made no “explicit calculation” of a reasonable lodestar, no comparison between the fee

award and the value of the benefit to the class, and no comparison between the lodestar and a reasonable percentage award. *Id.*

In *Google*, the district court failed to determine the value of the Settlement when it assumed that the nominal value of the in-kind relief had the same value to Class Members as cash, and awarded attorneys' fees at 25% of that misapprehended value of the Settlement. *See generally*, EOR 153-64; EOR 165-67. Thus the district court was unable to effectively compare the fee award and the value of the Settlement benefit because the district court overvalued the Settlement. Nor did the district court undertake a lodestar cross-check to ensure the reasonableness of the percentage award. *See generally*, EOR 165-67. *Bluetooth* criticized the district court for failing to perform a cross-check of the fee award. 654 F.3d at 944-45. Noting that a district court abuses its discretion when it uses a formulaic approach to the fee award resulting in an unreasonable fee, the Ninth Circuit considered a cross-check a necessary part of an "adequate explanation of the award." *See id.* at 945 (citations and quotation marks omitted). Because the district court failed to perform the lodestar cross-check, the Ninth Circuit did not have a sufficient basis for evaluating the fee award.

Although the district court in *Bluetooth* reduced fees to well below the lodestar, it gave the Ninth Circuit no direction in terms of the degree of reduction

or “what level of success plaintiffs in fact achieved.” *Id.* at 944. The Ninth Circuit had no basis for affirming the fee award in part because the district court had failed to discuss the value of non-monetary settlement benefits. *Id.* “Settlements involving nonmonetary provisions for class members deserve careful scrutiny to ensure that these provisions have actual value to the class.” Fed. R. Civ. P. 23(h), 2003 Advisory Cmte. Notes. Following the law established under *Bluetooth*, the value of the non-monetary element in the AdWords Settlement, *i.e.*, the AdWords credits automatically being applied to accounts with outstanding balances, similarly deserves much more scrutiny than that applied by the district court or the Panel.

The Ninth Circuit in *Bluetooth* vacated and remanded the settlement approval as well as the fee award because the fee award negotiated by the parties was “possibly unreasonable,” and the district court “did not take this possibility into account in reviewing the settlement’s fairness.” 654 F.3d at 945-46. As addressed in our briefs and at oral argument, the district court failed to apply sufficient scrutiny to its approval of the Settlement. *Bluetooth* requires that the district court’s approval “show not only that ‘it has explored [the *Churchill*] factors comprehensively,’ but that the settlement is ‘not [ ] the product of collusion among the negotiating parties.’” *Id.* at 947. The district court must generally consider the eight factors from *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.

2004). *Id.* at 946. In *Google*, the district court merely stated that it approved the settlement and found it to be fair, adequate and reasonable. EOR 153-54. The Panel, in affirming the district court, did not provide any more substantial analysis than that provided by the district court. *See generally*, Opinion. Thus, the Panel's affirmation of the district court's approval of the Settlement conflicts with the strong precedent of this Circuit.

*Bluetooth* was wary of Class Counsel receiving a disproportionate amount of the Settlement, or being amply rewarded when the class receives "no monetary distribution." 654 F.3d at 947 (citations and quotation marks omitted). Here, though some part of the Class may receive cash, any Class Member with an outstanding balance will receive credit towards that balance (with no consideration of whether the balance was disputed, or was going to be paid at all), and will automatically receive additional credit for the difference between the settlement benefit and the outstanding balance. *See* EOR 102-03. Such in-kind relief does not have the same value as an equivalent amount of cash. *See* discussion above, pp. 9-10. This disparity between the value of the benefits to the class and those to Class Counsel is one indicator "that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations." *Bluetooth*, 654 F.3d at 947. However, the district court never considered the

possibility that the in-kind relief was worth less than its nominal value. See generally, Final Judgment; Order Awarding Attorneys' Fees.

The presence of a "clear sailing agreement" is also evidence of the subordination of class interests to those of counsel necessitating heightened scrutiny. *Id.* The AdWords Settlement included a clear sailing agreement, and neither the district court, nor the Panel, considered its effect. *See* EOR 176-77; *see generally*, EOR 153-64; *see generally*, Opinion.

Neither the district court, nor the Panel, applied the scrutiny to the attorneys' fees and the Settlement required by the *Bluetooth* decision. Thus the Panel's Memorandum Opinion is inconsistent with *Bluetooth* and creates a conflict and inconsistency in this Circuit that requires either a rehearing or a rehearing en banc to resolve.

## CONCLUSION

Because the Opinion overlooked or misconstrued facts about the Settlement, rehearing by the panel would be appropriate. Because the Opinion conflicts with

recent precedent of this Circuit and involves a question of exceptional importance, rehearing *en banc* is warranted.

Respectfully submitted,

/s/ N. Albert Bacharach, Jr.

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**CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1**

I hereby certify that pursuant to Fed.R.App.R. 32(a)(7)(C), Ninth Circuit Rule 32-1, and the attached petition is proportionally spaced, has a typeface of 14 points or more and contains 4,197 words (not exceeding 4,200 words) in compliance with Ninth Circuit Rule 40-1. Headings, footnotes, and quotations have been counted toward the word limitation; certificates and statements of counsel have not been counted toward the limitation.

Dated: January 19, 2012

Respectfully submitted,

/s/ N. Albert Bacharach, Jr.

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 19<sup>th</sup> day of January, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF program. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

Adel A. Nadji Audet & Partners, LLP 221 Main Street, Suite 1460 San Francisco, CA 94105	Alan J. Sherwood Law Office of Alan J. Sherwood 1300 Clay St., Suite 600 Oakland, CA 94612
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/s/ N. Albert Bacharach, Jr.  
 N. Albert Bacharach, Jr.  
**N. Albert Bacharach, Jr., P.A.**

# APPENDIX A

**FILED**

**NOT FOR PUBLICATION**

JAN 05 2012

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLRB HANSON INDUSTRIES, LLC,  
DBA Industrial Printing; HOWARD  
STERN, on behalf of themselves and all  
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Plaintiffs - Appellees,

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WEISS & ASSOCIATES, PC,

Objector - Appellant,

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Defendant - Appellee.

No. 09-17380

D.C. No. 5:05-cv-03649-JW

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
James Ware, Chief District Judge, Presiding

Argued and Submitted November 28, 2011  
San Francisco, California

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: THOMAS and CLIFTON, Circuit Judges, and PRO, District Judge.\*\*

Weiss & Associates, P.C. appeals from the district court's approval of a class action settlement, approval of the notice to the class of the proposed settlement, and award of attorney's fees. We affirm.

District courts "must direct notice [of a proposed settlement] in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Our cases require that a settlement notice "describe[] the aggregate amount of the settlement fund and the plan for allocation," *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009), but do not require that such notice allow class members to estimate their individual recovery. *Id.*; *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177-78 (9th Cir. 1977). It is undisputed that the notice in this case specified the aggregate amount of the settlement and described the plan for allocation to the class. The notice met the requirements of Rule 23(e)(1).

The district court did not clearly abuse its discretion in approving the settlement. *See Rodriguez*, 563 F.3d at 963-64. Plaintiffs' motion for approval

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\*\* The Honorable Philip M. Pro, District Judge for the U.S. District Court for Nevada, sitting by designation.

identified and applied the factors articulated in *Rodriguez* and our other cases to the settlement. Appellant's objections did not substantively challenge Plaintiffs' analysis. The objections focused principally on the class notice and did not mention the fairness factors. Applying the abuse of discretion standard to the record as a whole, we affirm the district court's conclusion that the settlement met the requirements of Rule 23(e)(2).

The district court adequately described the analysis by which it reached its conclusion approving the settlement in the context of this case. At the fairness hearing, the court explained that its analysis of the proposed settlement and fees award was informed by its deep involvement with the issues in the case and its earlier summary judgment orders, which touched the relevant factors. *See Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004). More might be required of the district court in a case where an objector convincingly questions the settling plaintiffs' analysis or the fairness of the settlement, but Appellant did not do so here. The district court's approval of the proposed settlement met the requirements of Rule 23(e)(2).

Finally, the district court did not abuse its discretion in the award of attorneys' fees. *See Rodriguez*, 563 F.3d at 967. The settlement gives every class member the option to receive its share of the settlement proceeds in cash or cash-

equivalent forgiveness of indebtedness already incurred. This is not a “coupon settlement” and therefore does not trigger the Class Action Fairness Act of 2005’s limitations on contingent fees awarded in connection with such settlements. *See* 28 U.S.C. § 1712(a). The district court’s attorney’s fees order was brief, but it referred to Plaintiffs attorneys’ substantially uncontradicted evidence and arguments that the requested fees are justified by their work on the case and in line with previous awards in similar cases. The order’s findings of fact and conclusions of law were sufficient under Rule 23(h)(3).

**AFFIRMED.**

## Jami L. Grounds

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**From:** ca9\_ecfnoticing@ca9.uscourts.gov  
**Sent:** Thursday, January 19, 2012 3:18 PM  
**To:** Jami L. Grounds  
**Subject:** 09-17380 CLRB Hanson Industries, LLC, et al v. Weiss & Associates, PC "File a Petition for Rehearing En Banc (FRAP 35; 9th Cir. R. 35-1)"

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### United States Court of Appeals for the Ninth Circuit

#### Notice of Docket Activity

The following transaction was entered on 01/19/2012 at 3:17:40 PM PST and filed on 01/19/2012

**Case Name:** CLRB Hanson Industries, LLC, et al v. Weiss & Associates, PC  
**Case Number:** [09-17380](#)  
**Document(s):** [Document\(s\)](#)

#### Docket Text:

Filed (ECF) Appellant Weiss & Associates, PC petition for rehearing en banc (from 01/05/2012 memorandum). Date of service: 01/19/2010. [8037819] (NB)

The following document(s) are associated with this transaction:

**Document Description:** Main Document

**Original Filename:** 1.19.12 pet. for rehearing en banc FINAL SIGNED.pdf

**Electronic Document Stamp:**

[STAMP acecfStamp\_ID=1106763461 [Date=01/19/2012] [FileNumber=8037819-0]  
[885b5e21e8660efe7e739ace5f70bd669c95d6722c2bda745e91aac7881027623284fb171a67a413:

**Document Description:** Appendix A

**Original Filename:** App. A 1.5.12 9th Circuit opinion.pdf

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[STAMP acecfStamp\_ID=1106763461 [Date=01/19/2012] [FileNumber=8037819-1]  
[5e6fd6cb0452e5faa16d651b7ca14ac32af6fe4ed9861acba7eecf6e117624ffdaa1ae292eed07daed1

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