

No. 09-17380

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CLRB HANSON INDUSTRIES, LLC d/b/a INDUSTRIAL PRINTING,  
and HOWARD STERN, on behalf of themselves and all others similarly  
situated,

Plaintiffs-Appellees,

v.

WEISS & ASSOCIATES, PC,

Objector-Appellant,

v.

GOOGLE, INC.,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of California, San Jose Division

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BRIEF OF APPELLEES  
CLRB HANSON INDUSTRIES, LLC, AND HOWARD STERN

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Stephen D. Susman  
SUSMAN GODFREY L.L.P.  
1000 Louisiana Street, Suite 5100  
Houston, TX 77002  
(713) 651-9366

Marc M. Seltzer  
SUSMAN GODFREY L.L.P.  
1901 Avenue of the Stars, Suite 950  
Los Angeles, CA 90067-6029  
(310) 789-3100

Lester L. Levy  
Michele Fried Raphael  
WOLF POPPER LLP  
845 Third Avenue  
New York, NY 10022  
(212) 759-4600

Rachel S. Black  
Daniel J. Shih  
SUSMAN GODFREY L.L.P.  
1201 Third Avenue, Suite 3800  
Seattle, WA 98101  
(206) 516-3880

Counsel for Appellees

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to FED. R. APP. P. 26.1, appellee CLRB Hanson Industries, LLC, states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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**I. STATEMENT OF ISSUES FOR REVIEW**

The issues presented for review are:

A. Whether Appellant waived its right to appeal the district court's Final Judgment and Attorneys' Fees Order by failing to file a proper and timely objection in the district court.

B. Whether the district court acted within its broad discretion when it approved the proposed settlement as fair, reasonable, and adequate.

C. Whether the district court properly ruled that the notice of proposed settlement satisfied due process, when the notice did not specify class members' individual recoveries but, consistent with Ninth Circuit precedent, stated the aggregate settlement amount and the distribution formula.

C. Whether the district court properly exercised its discretion by awarding attorneys' fees at the "benchmark" level to class counsel.

**II. STATEMENT OF THE CASE**

This is an appeal brought by Weiss & Associates, PC ("Weiss PC"), from two district court orders: (i) Final Judgment and (ii) Order Approving Award of Attorneys' Fees and Expenses, and Class Representative Incentive Compensation Award ("Attorneys' Fees Order"), both issued on September 14, 2009, by the United States District Court for the Northern District of California, San Jose

Division. (ER 153–67.<sup>1</sup>) The Final Judgment approved a settlement of \$20 million for claims alleged in a class action complaint originally filed on August 3, 2005, by CLRB Hanson Industries, LLC, and Howard Stern (“Representative Plaintiffs”), on behalf of themselves and all others similarly situated (collectively, “Plaintiffs”), against Google, Inc. (“Google”). (ER 153–56.) The Attorneys’ Fees Order awarded attorneys’ fees to class counsel at the benchmark level of 25% of the settlement proceeds and expenses of \$147,599.50 (plus all interest accrued thereon), and granted an incentive compensation award of \$20,000 to each of the two Representative Plaintiffs. (ER 165–67.)

The operative complaint—the Second Amended Class Action Complaint (“SAC”), filed on May 4, 2006 (ER 38–60)—alleges five causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unfair competition under the Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200, *et seq.*; (4) untrue and misleading advertising under CAL. BUS. & PROF. CODE § 17500, *et seq.*; and (5) unjust enrichment. (ER 53–59.) The SAC seeks damages, restitution, and injunctive relief to remedy Google’s practice of (1) charging AdWords advertisers up to 120% of their chosen “Daily Budget” on any given day (referred to as the “120% claims”) and (2) charging AdWords

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<sup>1</sup> Record Excerpts of Appellant Weiss & Associates, PC (“ER”).

customers who paused their AdWords campaigns more than their Daily Budget times the number of days their campaigns were not paused during the billing period.<sup>2</sup> (ER 48–50, 59–60.)

After Google moved unsuccessfully to dismiss Plaintiffs’ claim for unfair competition (ER 218–19 [Dkt. Nos. 52, 59]), Google filed three separate motions for partial summary judgment. (ER 200, 203, 216 [Dkt. Nos. 85, 202, 234].) The district court dismissed with prejudice Plaintiffs’ second and fifth causes of action for breach of the implied covenant of good faith and fair dealing and unjust enrichment, and narrowed the applicability of Plaintiffs’ breach of contract claim, ruling that Google’s practice of charging AdWords advertisers up to 120% of their chosen Daily Budget on any given day does not, in and of itself, constitute breach of contract. (ER 201, 204 [Dkt. Nos. 193, 223].)

On December 1, 2008, during the case management conference and hearing on Google’s last motion for summary judgment, Google stated its intent to file yet another motion for summary judgment to dismiss Plaintiffs’ 120% claims in their

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<sup>2</sup> Google’s AdWords service allows AdWords advertisers to create ad campaigns consisting of “sponsored link” ads posted on Google’s websites. (ER 40 [¶ 11], 41 [¶ 14].) When an Internet user clicks on the ad, the user is sent to a website designated by the AdWords advertiser. (ER 40 [¶ 11].) Google generally charges AdWords advertisers based on the number of times their ads are clicked on by users. (ER 42 [¶ 29].) AdWords advertisers set a “Daily Budget” to limit the charges they can incur. (ER 42 [¶ 31].) Customers also can “pause” their ad campaigns to temporarily stop incurring charges. (ER 42 [¶ 27], 46–47 [¶ 38].)

entirety. (SER 244.<sup>3</sup>) Google indicated that it had newly discovered evidence proving that Google had disclosed to potential advertisers during the AdWords sign-up process that it may charge AdWords customers up to 120% of their Daily Budget on any day in order to make up for underdelivery of ads on any other day during the same billing period. (*Id.*) Google subsequently provided class counsel with copies of the purported AdWords sign-up screens, which contained disclosures that raised issues as to Plaintiffs' ability to prove their 120% claims, particularly for class members who signed up for AdWords prior to June 2005. (SER 65 [¶ 91], 218.)

The parties reached a Settlement Agreement following these events. (SER 181–209.) As the district court noted during the fairness hearing, its narrowing of the issues had contributed to the settlement:

I have lived through this case. It was as a result of the Court's rulings that severely narrowed this case to the point where it reached a settlement in a very narrow set of facts as opposed to how the case was originally pled and presented to the Court.

(SER 35–36 [35:21–36:1].)

On May 12, 2009, the district court granted preliminary approval of the proposed settlement and certified the settlement class, approved the form of the

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<sup>3</sup> Supplemental Excerpts of Record of Appellees CLRB Hanson Industries, LLC, and Howard Stern (“SER”).

notice, and ordered that notice be issued to members of the class. (ER 85–111.) Following dissemination of the court-approved notice to members of the class, only four objections were filed, one of which was by a non-class member, Matthew Weiss. (ER 189 [Dkt. Nos. 326, 329–331].) Mr. Weiss filed Preliminary Objections to Proposed Settlement and Notice of Intent to Appear at Fairness Hearing, which is the purported basis for this appeal, on July 14, 2009. (ER 143–49.) After Mr. Weiss was subpoenaed to testify under oath as to the objection, he revealed that he was not a member of the class. (SER 76–77 [3:24–4:4].) Mr. Weiss subsequently filed a “Notice of Scrivener’s Errors,” after the deadline for filing objections had passed, attempting to change the purported objector to “Weiss & Associates, PC” (the Appellant). (ER 150–51.)

On August 24, 2009, Plaintiffs filed a response to Mr. Weiss’s objection. (SER 136–55.) On the same day, Plaintiffs also filed a Motion for Final Approval of Class Action Certification and Settlement (“Motion for Final Approval”) (SER 210–39) and a Motion for Award of Attorneys’ Fees and Expenses and Class Representative Incentive Compensation Awards (“Attorneys’ Fees Motion”) (SER 156–80).

The district court held a fairness hearing on September 14, 2009. (ER 187 [Dkt. No. 348].) After hearing argument from and questioning class counsel, counsel for Weiss PC, and counsel for two other objectors, the district court

overruled all objections and issued its Final Judgment and Attorneys' Fees Order. (ER 153–56, 165–67.) Only one class member out of over one million appealed. (SER 39 [¶ 3].)

### **III. STATEMENT OF FACTS**

#### **A. The Settlement**

The Settlement Agreement was achieved after three-and-a-half years of intense litigation, extensive briefing and motions practice, substantial pre-trial discovery, one unsuccessful mediation, and arduous arm's-length negotiations. (SER 52 [¶ 3], 53–54 [¶ 4], 65 [¶ 87], 127 [¶ 3].) Prior to the settlement, class counsel conducted an extensive investigation into Plaintiffs' claims, including propounding interrogatories and document requests to Google and obtaining hundreds of thousands of pages of Google documents. (*Id.*) Class counsel also conducted depositions of key Google employees and defended the Representative Plaintiffs in depositions conducted by Google. (SER 127 [¶ 3].) The parties' efforts to settle the action included two face-to-face meetings in December 2008 and January 2009. (SER 243 [¶ 2].) After several weeks of further negotiation, the parties agreed on the terms reflected in the Settlement Agreement in its current form on March 17, 2009. (SER 181–209.)

Under the terms of the Settlement Agreement, Google agreed to settle the class members' claims on the following terms:

- Google agreed to pay \$20 million, together with interest on said sum from March 27, 2009, in a combination of cash and AdWords Credits. (SER 191–92 [¶ 2.2].) Google has already deposited the \$20 million into an escrow account, per the terms of the Settlement Agreement. (SER 192 [¶ 2.3].)
- Google agreed to pay for all administrative costs and expenses incurred in connection with providing notice to and locating the members of the class, and to pay for all fees and costs incurred by the settlement administrator for administering and distributing the settlement proceeds to the class members. (*Id.*)
- The distribution of the settlement proceeds to class members will not require any class member to file a proof of claim. (SER 65 [¶ 89], 188–89 [¶ 1.27].)

Under the Settlement Agreement, class members who owe no balance to Google on their AdWords account will automatically receive their settlement distribution in cash. (SER 188–89 [¶ 1.27].) Class members who owe a balance to Google that is *less* than the amount of their settlement distribution will receive their distribution in either AdWords credits or in a combination of AdWords credits and cash: they will receive AdWords credits equal to the amount they owe Google on their AdWords account (which will be immediately applied to their AdWords account balance), and may elect to receive the remainder of their distribution—that which is in excess of their balance owed to Google—in either AdWords credits *or* cash (their choice). (*Id.*) Class members who owe an AdWords balance to Google that is *greater* than the amount of their settlement distribution will receive their distribution in the form of AdWords credits, which

will immediately be applied to offset the amount the class member already owes to Google. (*Id.*)

The Settlement Agreement does not release any claim a class member has against Google unless the claim relates to the overcharges at issue in this case. The Settlement Agreement defines the “Released Claims” to be those claims that “were or could have been asserted based on the allegations set forth in the complaints filed by the Representative Plaintiffs in the Litigation, specifically including any and all claims based on a Class Member being charged more than his, her, or its Daily Budget.” (SER 189–90 [¶ 1.28].)

**B. Preliminary Approval and Notice of the Proposed Settlement**

On May 12, 2009, the district court issued an Order Certifying Settlement Class and Granting Preliminary Approval of Class Action Settlement (“Order Granting Preliminary Approval”). (ER 85–111.) In that order, the district court stated that objections must be delivered to counsel and filed on or before July 14, 2009, and that the objections must contain proof that the objector was a class member:

[N]o Class Member shall be heard or entitled to contest the approval of terms and conditions of the proposed Settlement, the Order and Final Judgment to be entered approving the same, the Plan of Allocation, or the Fee and Expense Application, unless on or before July 14, 2009, that Class Member has served by hand or by first-class mail written objections and copies of all briefs or other papers (which must contain proof of the dates that the person was an AdWords Advertiser) upon Representative Plaintiffs’ Counsel . . . and upon

counsel for Google . . . and has filed said objections, papers and briefs, showing due proof of service upon Representative Plaintiffs' Counsel and counsel for Google with the Clerk of the Court.

(ER 89–90 [¶ 11].) The notice to members of the class contained similar language: “Any such objection shall include all briefs and other papers to be considered by the Court, and must include the name and address of the person and the dates that the person was an AdWords Advertiser . . . .” (SER 48.) Notably, Mr. Weiss’s filing did not include any proof that he was an AdWords advertiser (because he was not an AdWords advertiser); nor did it provide specificity (beyond the class period) as to the dates that he was a supposed AdWords advertiser. (ER 143–49.)

The district court’s Order Granting Preliminary Approval further stated that any objector who did not abide by the above would be deemed to have waived the objection:

Any Member of the Class who does not object in the manner provided shall be deemed to have waived any such objection, and shall forever be foreclosed from making any objection to the fairness, adequacy or reasonableness of the proposed Settlement, the Final Judgment to be entered approving the Settlement, the Plan of Allocation, or the Fee and Expense Application.

(ER 90 [¶ 12].) The notice to members of the class contained similar language. (SER 47–48.)

The settlement administrator distributed the court-approved notice of proposed settlement via email to class members whose email address was known, and via U.S. mail to class members whose email address no longer worked or was

unknown. (SER 39 [¶¶ 3–4].) In addition, the notice was placed on a website, and a summary notice was published in *The Wall Street Journal* and *USA Today*. (SER 39 [¶¶ 5–6], 50.)

The notice stated the essential terms of the proposed settlement and advised class members of their rights thereunder. (SER 43–48.) It advised class members of the pendency of the action (SER 43), the basic terms of the proposed settlement (including the aggregate settlement amount of \$20 million) (SER 45), class counsel’s intent to seek a fee and expense award of not more than \$5,000,000, plus interest thereon, and for reimbursement of up to \$250,000 of their costs and expenses (SER 44, 48), and class counsel’s intent to seek an incentive compensation award for Representative Plaintiffs (*id.*). The notice also described the facts about the action (SER 44), stated who members of the class are (SER 47), and stated how class members could opt out of the class or object to the settlement (SER 47–48).

The notice also specified the formula for computing each class member’s settlement distribution:

The following methodology shall be used to calculate the distribution to each Class member:

$$\frac{(\text{Class Member's Total Overcharges}) \times (\text{Net Settlement Proceeds})}{\text{sum total of Estimate of all Class Members' Total Overcharges}}$$

(SER 46.)<sup>4</sup> In addition, the settlement agreement and the Order Granting Preliminary Approval were posted at the settlement website. (SER 39 [¶ 6].)

### C. Matthew Weiss's Objection

Matthew Weiss, an attorney who is not a class member,<sup>5</sup> filed Preliminary Objections to Proposed Settlement and Notice of Intent to Appear at Fairness Hearing on July 14, 2009. (ER 143–49.) The objection alleges that the proposed settlement is “unfair, inadequate, and unreasonable” and listed eighteen points, summarized as follows:

- (1) Google's revenue from its advertising programs is in the billions of dollars;
- (2) before approving the settlement, the district court must make findings regarding (i) plaintiffs' likelihood of success at trial; (ii) the range of possible recoveries if the case were tried; (iii) whether in light of the range of possible recoveries the \$20 million settlement is still fair; (iv) the complexity, expense, and duration of litigation; (v) the substance and amount of opposition to the settlement; and (vi) the stage of proceedings at which the settlement was achieved;
- (3) the likelihood of success at trial was unknowable by class members;
- (4) the notice must disclose the range of possible recoveries;
- (5) class members cannot knowingly and intelligently decide whether to opt out without knowing the range of possible recovery;

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<sup>4</sup> The notice defines the terms referred to in the formula, such as “Net Settlement Proceeds” and “Total Overcharges.” (SER 46.)

<sup>5</sup> Mr. Weiss has a history of objecting to class action settlements. (*See* Part V, *infra*, at 19 n.7.)

- (6) it is impossible for class members to decide whether the settlement is fair without knowing the possible range of recovery;
- (7) were the possible range of recovery to be disclosed, the district court might find the settlement to be unfair;
- (8) the notice does not disclose the size of the class;
- (9) the notice does not disclose the number of overcharges per class member during the class period;
- (10) the notice does not disclose the average cumulative value of class member overcharges;
- (11) the notice does not disclose the total amount of damages;
- (12) the notice does not disclose what percentage of the estimated damages the \$20 million represents;
- (13) if there were 20 million class members, each class member would recover a dollar before paying attorneys' fees, incentive awards, and costs;
- (14) if each of the hypothesized 20 million class members had been overcharged an average of \$250, the damages would be \$5 billion;
- (15) the notice is insufficient because the aforementioned information is not disclosed;
- (16) the notice states that objections to attorneys' fees must be filed by July 14, 2009;
- (17) the notice fails to convey the basis for class counsel's fee; and
- (18) the district court should have required that class counsel file their motion for attorneys' fees prior to the notice being prepared.

(ER 145–47.)

Although Mr. Weiss's objection provides an AdWords account number and address for Mr. Weiss, it provides no actual proof or specificity of the dates that

Mr. Weiss was an AdWords advertiser, as required by the Order Granting Preliminary Approval. (ER 143–44.) Indeed, no proof exists because, as set forth below, Mr. Weiss was never an AdWords advertiser. The following day, Mr. Weiss’s attorney filed a Notice of New Address, again listing his client as “Objector Matthew Weiss.” (SER 240.)

Mr. Weiss subsequently admitted that he is *not* a member of the class at all and has no standing to object to the settlement. On August 6, 2009, he testified in his individual capacity at a deposition taken by class counsel that he was not an AdWords advertiser. (SER 76–77 [3:24–4:4].) He further testified that he *personally* had a fee arrangement with the attorneys representing him that entitled him to receive “25% of any legal fee that is given as a result of *our* objection and any enhancements.” (SER 94 [34:11–17] (emphasis added).) Mr. Weiss also admitted that he had not read any of the filings in this action (other than the Class Notice) and was unaware of Google’s defenses or the strength of the class’s case. (SER 84 [20:5–12], 90–92 [30:15–32:4].)

Later that day, long after the deadline for filing objections had passed, Mr. Weiss’s attorney of record filed a “Notice of Scrivener’s Errors,” which purports to (1) change the name of the purported objector from “Matthew Weiss” to “Weiss & Associates, PC,” and (2) add a new “AdWords account number/Customer ID.” (ER 150–51.) Neither Mr. Weiss nor Weiss PC requested

permission from the district court to file a late objection; nor did either request or obtain the district court's permission to substitute Weiss PC as the objector.

**D. The District Court's Approval of the Settlement and Fee Award to Class Counsel**

Prior to the fairness hearing, Plaintiffs filed with the district court the Motion for Final Approval (SER 210–39), the Attorneys' Fees Motion (SER 156–80), and a Response to Class Member Objections (SER 136–55), along with supporting declarations from class counsel and the settlement administrator (SER 38–135).

The Motion for Final Approval analyzed the relevant factors for approving a class settlement, explained the fairness and adequacy of the settlement (including relative to the theoretical maximum potential recovery), and discussed why the benefits to the class of settling outweighed the possibility of achieving a larger recovery if litigation were to continue. (SER 229–36.) The Attorneys' Fees Motion analyzed the relevant factors for awarding attorneys' fees, including the quality of work by class counsel, the result achieved, the risks that class counsel undertook in pursuing the litigation, and the reaction of the class. (SER 169–76.) The Attorneys' Fees Motion also compared the \$5 million requested fee to the lodestar amount of \$3.97 million and noted the modest 1.25 implied multiplier. (SER 176.)

During the fairness hearing, the district court questioned class counsel extensively concerning the mechanics of the settlement. (SER 10–17 [10:11–

17:3].) The district court also heard argument from Weiss PC and other objectors. (SER 17–26 [17:4–26:15].) Counsel for Weiss PC argued that the notice did not contain enough information for it to decide whether to opt out of the class, namely what portion of the aggregate settlement it would receive. (SER 17 [17:7–19].) Weiss PC raised *no argument* concerning whether the settlement amount was adequate and expressly stated that its only concern was with not knowing how much it would receive:

I just want to talk to the reasonableness of this settlement or the adequacy of the notice because he’s *not really taking a position that the settlement is reasonable or unreasonable*. His *entire* position is that there is not enough information for him to make a decision.

(SER 17 [17:20–25] (emphasis added).) Nor did counsel for Weiss PC raise any issues with the proposed distribution of cash and AdWords credits, allege that the settlement included a “potential coupon” component, or argue that the fee award was premature. Finally, there was no contest to any of the facts offered in support of the fee award, such as the amount of effort class counsel put into the case:

And it’s obvious what happened here is that counsel put time in the case. I’m not in a position to quarrel or question the time that they put in, and hit the court with the 25 percent benchmark, 5 million out of \$20 million settlement.

(SER 23 [23:14–19].)<sup>6</sup>

After the fairness hearing, the district court issued its Final Judgment approving the settlement, finding “that said settlement is, in all respects, fair, just, reasonable and adequate to the Class, and in the best interests of the Class.” (ER 154 [¶ 4].) In arriving at its conclusion, the district court considered a vast record, specifically noting that it had “considered all papers filed and proceedings had herein and [was] otherwise . . . fully informed in the premises and good cause appearing therefor . . . .” (ER 153.)

The district court’s Attorneys’ Fees Order also relied upon the vast record. After “consider[ing] all of the files, records and proceedings in this Action, the Settlement, the risks, complexity, expense and probable duration of further litigation, and the efforts of Representative Plaintiffs and Representative Plaintiff’s Counsel” (ER 166), the district court made the following findings of fact:

(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.

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<sup>6</sup> The two attorneys representing persons opposing the settlement split the issues for argument. Weiss PC’s counsel stated that he was deferring to Mr. Miller’s argument on attorneys’ fees (SER 17 [17:16–19], 20 [20:19–21]), so Mr. Miller’s arguments are attributed to Weiss PC herein.

(ER 166–67 [¶ 4].) The district court “awarded attorneys’ fees in the amount of 25% of the Settlement Proceeds including interest thereon, and reimbursement of expenses in the amount of \$147,599.50.” (ER 166 [¶ 2].) This appeal followed.

#### **IV. SUMMARY OF THE ARGUMENT**

Weiss PC does not have power to appeal the district court’s Final Judgment and Attorneys’ Fees Order because it failed to file a proper and timely objection with the district court. Weiss PC never sought, and the district court never granted, leave for Weiss PC to substitute itself for objector Matthew Weiss. Nor did Weiss PC comply with the district court’s requirement that it submit proof that it was an AdWords advertiser or the dates thereof. The district court’s orders should be affirmed on this basis alone.

Additionally, the district court’s Final Judgment should be affirmed because Weiss PC has not made the requisite strong showing that the district court clearly abused its discretion in determining that the settlement is fair and adequate. First, the district court’s opinion is adequately reasoned and fully supported by the record, and as such, it need not contain any more detailed findings or analysis. Second, Weiss PC’s arguments concerning the alleged unfairness of the AdWords credits component of the settlement are waived because they were not raised with the district court. They also fail on the merits. The district court did not abuse its discretion in determining that providing a settlement distribution in the form of

AdWords credits to class members who currently owe money to Google on their AdWords accounts, to be used to immediately pay or offset the balance due to Google, is fair and adequate. Nor did the district court abuse its discretion in determining that it was fair and adequate for some class members to receive cash while others who owe Google money on their AdWords accounts will receive credits to offset, or pay in full, their balances owed to Google. Finally, Weiss PC's speculation that the settlement amount is significantly less than the potential recovery is unsupported and is an insufficient basis for finding a clear abuse of discretion. Record evidence establishes that the settlement represents a substantial percentage of the potential recovery, especially in light of the risks of zero recovery in this case.

Weiss PC has also failed to demonstrate that the district court erred in ruling that the notice of the proposed settlement satisfied due process. The notice described the essential terms of the settlement and otherwise complied with due process requirements by, *inter alia*, stating the aggregate settlement amount and specifying the distribution formula. Weiss PC's argument that due process requires the notice to provide information that permits class members to ascertain their potential distribution ignores Ninth Circuit authority to the contrary, which holds that a notice that states the aggregate amount available to class members and the formula for determining recoveries is sufficient.

Finally, the district court's Attorneys' Fees Order should be affirmed because Weiss PC failed to raise its objections with the district court. Weiss PC's arguments also fail on the merits because (1) there is no coupon component to the settlement; and (2) the district court made specific findings of fact to support its attorneys' fee award that are detailed, uncontested, and adequately supported by the record.

Accordingly, the district court's Final Judgment and Attorneys' Fees Order should be affirmed.

## V. ARGUMENT

This appeal relates to an objection filed by Matthew Weiss, an attorney and seasoned objector to class action settlements.<sup>7</sup> The appeal is delaying the distribution of a substantial settlement to class members in a case that has been pending, and contentiously litigated, for over four years. In its brief, the purported

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<sup>7</sup> Mr. Weiss testified that his law firm retained two Florida attorneys, Paul Rothstein and Albert Bacharach, to represent him in objecting to this class action settlement. (SER 86 [23:3–14].) He testified that he has objected to “roughly ten” class action settlements. (SER 88 [26:3–26:22].)

Mr. Weiss further testified that he has worked with Messrs. Rothstein and Bacharach in the past in objecting to other class action settlements. (SER 87–89 [25:2–27:2].) Indeed, Messrs. Rothstein and Bacharach are also seasoned class action objectors. They have filed objections to other class action settlements with attorney Steve Miller (who also filed an objection with the district court on behalf of two class members in this action, but did not file a Notice of Appeal). (SER 67 [¶ 98].)

substitute objector (appellant Weiss PC) raises arguments that ignore clear Ninth Circuit authority contradicting its position, relies on misleading snippets of quotations from cases in other circuits, ignores the vast and detailed record before the district court, and presents new issues that were never raised in the district court and may be dismissed on that basis alone. For the reasons detailed below, the district court's orders should be affirmed so that distribution from the \$20 million settlement fund can proceed as ordered by the district court without further delay.

**A. Appellant Failed to File a Proper and Timely Objection, Thereby Waiving Any Right to Appeal the Final Judgment and the Attorneys' Fees Order.**

The district court's orders should be affirmed in their entirety because appellant Weiss PC did not file a proper and timely objection in the district court. As the district court ordered, all objections had to be delivered to counsel and filed "on or before July 14, 2009" with "proof" that the objector was a class member. (ER 89 [¶ 11].) Weiss PC never filed an objection before the deadline and never properly substituted itself for Mr. Weiss as an objector. Its failure to do so waived its right to present any issues on appeal.

Weiss PC did not file a timely and proper objection and therefore has no "power to appeal." *Devlin v. Scardelletti*, 536 U.S. 1, 11 (2002) ("[T]he power to appeal is limited to those nonnamed class members who have objected during the

fairness hearing.”). The attempt to substitute Weiss PC as the objector via a “Notice of Scrivener’s Errors” was invalid on two grounds. First, the objection by Weiss PC was untimely because the entity did not attempt to substitute itself as a new objector until August 6, 2009, well after the deadline for submitting written objections of July 14, 2009. (ER 89 [¶ 11], 150.) Second, Weiss PC did not provide with its filing the requisite proof of the dates that it was an AdWords advertiser. (ER 150–52.) The very point of this requirement was to help ascertain whether an objector is, in fact, a class member. Indeed, Mr. Weiss, by ignoring this requirement, filed an objection even though he is not a class member.

The district court did not waive any of these requirements for Weiss PC; nor did it issue any order permitting Weiss PC to be substituted as the objector or otherwise hold that the requirements for submitting objections set forth in the Order Granting Preliminary Approval were waived as to Weiss PC. Absent such

an order, Weiss PC cannot be deemed to have filed a timely objection.<sup>8</sup> *Cf. Glass v. UBS Fin. Servs., Inc.*, No. 06-4068, 2007 WL 474936, at \*1, 6 (N.D. Cal. Jan. 17, 2007) (denying class member's motion to intervene after the deadline for objecting, noting no basis for "permitting him to evade that deadline by submitting untimely objections to the settlement in the form of a motion to intervene" and further noting that the class member's earlier motion to substitute himself for another objecting class member had been denied).

Having failed to file a proper and timely objection with the district court, Weiss PC has no right to appeal the district court's Final Judgment and Attorneys'

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<sup>8</sup> Motions for leave to correct scrivener's errors (which Weiss PC did not file) are routinely filed, and are often denied, as are untimely objections to class action settlements. *See, e.g., Minn. Lawyers Mut. Ins. Co. v. Batzli*, No. 09-0432, 2009 WL 3669726, at \*1 (E.D. Va. Nov. 4, 2009) (noting denial of "Motion to Correct Scrivener's Error" in settlement agreement); *Purnell v. Sheriff of Cook County*, No. 07-7070, 2009 WL 1210651, at \*4 (N.D. Ill. May 4, 2009) (noting filing of motion for leave to amend complaint to correct scrivener's error); *Spurgeon v. Olympic Panel Prods. LLC*, No. 08-5436, 2008 WL 4453101, at \*1 (W.D. Wash. Sept. 29, 2008) (noting denial of prior motion to amend complaint "to correct scrivener's errors" and denying new motion to amend as untimely); *Landmark Am. Ins. Co. v. Moulton Props., Inc.*, No. 05-0401, 2007 WL 1451756, at \*5 (N.D. Fla. May 15, 2007) (denying motion to correct scrivener's errors where error was not a "simple clerical mistake"); *Manners v. Am. Gen. Life Ins. Co.*, No. 98-0266, 1999 WL 33581944, at \*22 & n.9, 24 (M.D. Tenn. Aug. 11, 1999) (overruling untimely objections to class settlement); *Cook v. McCarron*, Nos. 92-7042 & 95-0828, 1997 WL 47448, at \*16 (N.D. Ill. Jan. 30, 1997) (denying "motion for leave to file untimely objections"); *In re Centocor, Inc. Secs. Litig.*, No. 92-1071, 1993 WL 189937, at \*7 n.5 (E.D. Pa. June 2, 1993) (refusing to consider "untimely" objection).

Fees Order. *See Devlin*, 536 U.S. at 13 (stating that an untimely objection “implicates basic concerns about waiver and should be easily addressable by a court of appeals”); *Glass*, 2009 WL 1360920, at \*3 (affirming district court’s denial of class member D’Aria’s motion to intervene, stating: “In order to challenge the fairness of the settlement or the reasonableness of class counsel’s fees, D’Aria must either submit a timely objection to the settlement or be granted leave to intervene.”); *see also In re Plastics Additives Antitrust Litig.*, No. 08-3358, 2009 WL 405522, at \*1 (3d Cir. Feb. 19, 2009) (“For an unnamed class member to have standing to appeal a decision in a class action, he or she must have properly raised objections to that decision during the pendency of the litigation.”) (citing *Devlin*, 536 U.S. at 8–9); *In re Integra Realty Resources, Inc.*, 354 F.3d 1246, 1257 (10th Cir. 2004) (holding that class members who neither objected nor sought to intervene in the district court had no right to appeal settlement, stating: “*Devlin* reinforces the proposition that an unnamed class member who does not opt out and desires to appeal a class settlement must at least object in the district court”). Accordingly, Weiss PC has no basis for appealing the district court’s order, and the district court’s orders should be affirmed on this basis alone.

**B. The District Court Properly Exercised Its Discretion to Approve the Settlement Agreement.**

A district court’s determination that a settlement is fair and adequate may be reversed “only upon a *strong* showing that the district court’s decision was a *clear*

abuse of discretion.”<sup>9</sup> *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (emphasis added). “This is especially true in light of the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.” *Linney v. Cellular Ala. P’ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) (internal quotation marks omitted).

In deciding whether to approve a proposed settlement, the basic inquiry is whether the settlement is “fair, reasonable, and adequate” under Rule 23(e)(2). In making this determination, the district court engages in:

balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1992). A district court’s decision based on consideration of the relevant factors “is committed to the sound discretion of the trial judge because he is ‘exposed to the litigants, and their strategies, position and proof.’” *Hanlon*, 150 F.3d at 1026 (quoting *Officers for Justice*, 688 F.2d at 626).

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<sup>9</sup> Weiss PC misstates the standard of review as simply “abuse of discretion.” (Br. of Appellant at 2.)

Weiss PC's argument that the district court's order approving the settlement must be reversed because it does not contain a sufficiently detailed analysis of the facts and the law is wrong. Where, as here, the record shows that the district court "considered the relevant factors and provided a reasoned response to settlement objections," [the Ninth Circuit] will uphold even a conclusory finding that a settlement is fair, reasonable, and adequate." *Shaffer v. Continental Cas. Co.*, Nos. 08-56124 & 08-56125, 2010 WL 106816, at \*1 (9th Cir. Jan. 12, 2010) (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004)).

The 33-year-old Fifth Circuit case cited by Weiss PC does not support its argument that the district court abused its discretion by failing to include more specific findings in its order approving the settlement. *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977), which has never been followed in this circuit for the proposition Weiss PC suggests, states only (in dicta) that the district court should support its conclusions "by memorandum opinion *or otherwise in the record*" so that the appellate court may have a basis for judging the exercise of the trial court's discretion. 559 F.2d at 1330 (emphasis added).

Here, the record before the district court, which was considered and reviewed, provides ample support for the district court's finding "that said settlement is, in all respects, fair, just, reasonable and adequate to the Class, and in the best interests of the Class." (ER 154 [¶ 4].) The briefs and evidence submitted

to the district court established that all of the relevant factors uniformly supported approval of the settlement. (SER 38–155, 181–239.) The district court held a preliminary hearing and a fairness hearing, at which time the district court questioned counsel concerning the mechanics of the settlement and heard argument from Weiss PC (SER 10–26 [10:11–26:15]); considered objections raised by class members and reviewed class counsel’s written responses thereto (*id.*; SER 136–55); and noted that it had overseen extensive pre-trial motion practice and “lived through this case” for years (SER 35–36 [35:21–36:1]). The district court considered Plaintiffs’ Motion for Final Approval, which analyzed the relevant factors, explained the reasonableness of the value of the settlement, and discussed why the benefits to the class of settling outweighed the possibility of achieving a larger recovery if litigation were to continue. (SER 229–36.) In this context, the district court had a more-than-adequate basis to conclude that the settlement “is, in all respects, fair, just, reasonable and adequate to the Class, and in the best interests of the Class.” (ER 154 [¶ 4].)

Weiss PC raises for the first time, here on appeal, arguments about the alleged unfairness of the AdWords credits some class members may receive. Specifically, Weiss PC argues that the settlement is unfair because (1) certain class members will receive AdWords credits in lieu of cash; and (2) class members who receive AdWords credits are treated differently than those who receive cash.

Because Weiss PC did not make these arguments to the district court, it has waived any right to raise them on appeal.<sup>10</sup> *See Slaven v. Am. Trading Transp. Co., Inc.*, 146 F.3d 1066, 1069 (9th Cir. 1998) (“It is well-established that an appellate court will not consider issues that were not properly raised before the district court.”). Weiss PC’s new arguments should be rejected on this basis alone.

Weiss PC’s arguments also fail on the merits. Weiss’s conclusory assertions that the settlement is unfair because the settlement amount will be distributed in both cash and AdWords credits does not make the requisite strong showing that the district court clearly abused its discretion in approving the settlement. The Settlement Agreement makes clear that only those class members who owe Google more money than the amount of their settlement distribution will be required to accept their distribution in the form of AdWords credits, and only to offset the balance due. (SER 188–89 [¶ 1.27].) The remaining class members will either (i) automatically receive cash, if they have no balance due, or (ii) have the option of receiving the portion of their distribution that exceeds their balance due to Google

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<sup>10</sup> The Ninth Circuit will consider, in its discretion, arguments raised for the first time on appeal only under certain narrow circumstances: “(1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law.” *Turnacliff v. Westly*, 546 F.3d 1113, 1120 (9th Cir. 2008) (internal quotation marks omitted). Weiss PC does not (and cannot) demonstrate that any of these narrow circumstances apply here.

in cash. (*Id.*) Thus, each class member will immediately receive the full benefit of the settlement distribution. This is in no way “tantamount to a coupon settlement” (Br. of Appellant at 14), and Weiss PC cites no authority—because there is none—suggesting that a cash/credit settlement is somehow inherently unfair. Moreover, if a settlement distribution is applied to a balance due that a class member is currently disputing, the Settlement Agreement does not release any claim the class member would have against Google for the disputed amount unless the claim relates to the overcharges at issue in this case. (SER 189–90 [¶ 1.28].)

Finally, Weiss PC’s speculation that the settlement amount is significantly less than the potential recovery does not amount to a strong showing of a clear abuse of discretion. *See Linney*, 151 F.3d at 1242 (disregarding “speculation about what damages ‘might have been’ won”). The settlement amount “‘is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators.’” *Id.* (quoting *Officers for Justice*, 688 F.2d at 625). Instead, this Court recognizes that a settlement is a compromise, “‘a yielding of absolutes and an abandoning of highest hopes.’” *Id.* (quoting *Officers for Justice*, 688 F.2d at 624).

It is well-settled law that a proposed settlement may be reasonable even if it “‘only amount[s] to a fraction of the potential recovery.’” *Id.* at 1242 (quoting *City*

of *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n.2 (2d Cir. 1974)<sup>11</sup>). Indeed, in the *Grinnell* footnote quoted by this Court in *Linney*, the Second Circuit stated: “there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.” 495 F.2d at 455 n.2. Here, class counsel determined that the settlement amount represents a much higher percentage of the potential recovery and thoroughly analyzed the reasonableness of the settlement in light of the risks of zero recovery. (SER 233–35.)

Weiss PC ignores the real possibility of zero recovery that the class faces if the case were litigated to a final resolution. This is not surprising in light of Mr. Weiss’s admissions that, before filing his objection (and before testifying subsequently at deposition), he did not read any of the filings in this action (other than the Class Notice) and was unaware of Google’s defenses or the strength of the class’s case. (SER 84 [20:5–12], 90–92 [30:15–32:4].)

The single district court case cited by Weiss PC in support of its argument that the amount of settlement is inadequate is inapplicable. In *Acosta v. Trans Union, LLC*, 243 F.R.D. 377 (C.D. Cal. 2007), the district court deemed a

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<sup>11</sup> An unrelated holding in *Grinnell* (relating to whether paralegal time may be considered when determining fee awards) was overruled, as recognized in *U.S. Football League v. Nat’l Football League*, 887 F.2d 408, 415 (2d Cir. 1989).

settlement unfair because it provided to the vast majority of the class *no monetary relief whatsoever* and only non-monetary relief of questionable value (a free credit report), even though defendants faced approximately \$1 billion in minimum statutory damages. *Acosta*, 243 F.R.D. at 389–91 (estimating that “only about 1–3% of the class” would receive any payment). By contrast, the settlement here would distribute *monetary* relief to *every* class member who suffered alleged overcharges, with the settlement amount directly apportioned based on each class member’s eligible overcharges, and all without requiring class members to take any action whatsoever. Moreover, minimum statutory damages do not apply in this case. In short, this case is nothing like *Acosta*.

Because Weiss PC has failed to demonstrate that the district court abused its discretion in determining that the settlement was fair, reasonable, and adequate, the district court’s Final Judgment should be affirmed.

**C. The District Court Did Not Err When It Held That Potential Class Members Received Adequate Notice of the Proposed Settlement.**

Weiss PC fails to show that the district court erred in ruling that the notice of the proposed settlement satisfied due process. The district court’s ruling concerning the adequacy of the class notice is a question of law reviewed *de novo*. *Molski v. Gleich*, 318 F.3d 937, 951 (9th Cir. 2003).

Weiss PC raises a single issue with regard to the notice of proposed settlement to class members: it contends the notice was inadequate because it did

not contain information sufficient for individual class members to calculate their recovery under the settlement. (Br. of Appellant at 18.) In making this argument, Weiss PC ignores clear Ninth Circuit authority to the contrary.

“Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009). When describing the settlement, the notice need only “contain[] adequate information, presented in a neutral manner, to apprise class members of the essential terms and conditions of the settlement.” *Id.* In describing recoveries in lump-sum settlements, the Ninth Circuit requires only that the notice state the aggregate settlement amount and the general formula for computing awards. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).<sup>12</sup>

This Court has repeatedly rejected arguments that class notices must provide information sufficient to calculate individual recoveries. In most cases, individual recoveries from lump-sum settlements are simply not determinable at the time of class notice because it is unknown how many members of the class will opt out or

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<sup>12</sup> Counsel for Weiss PC, in other litigation, acknowledged this very holding, even though he fails to cite *Holiday Magic* in Weiss PC’s opening brief submitted to this Court. See Br. of Appellant Pamela Collins at 22, *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948 (9th Cir. 2009) (No. 07-56651), 2008 WL 2110658 (Apr. 3, 2008) (acknowledging that *Holiday Magic* held that notice need not “specify the potential recovery with respect to the individual class members”).

neglect to file a claim. In *Holiday Magic*, for example, the Court rejected the argument that a notice was inadequate because it did not specify class members' potential recovery, noting:

It is obvious, however, that [individual recovery] was a matter of conjecture since it was unknown how many class members would opt out or submit claims. ***The aggregate amount available to all claimants was specified and the formula for determining one's recovery was given. Nothing more specific is needed.***

*Id.* at 1177–78 (emphasis added).

Similarly, in *Torrise v. Tucson Electric Power Co.*, 8 F.3d 1370, 1373–74 (9th Cir. 1993), the Ninth Circuit held that notice was adequate even though the notice did not apprise class members of their individual recoveries. The class members in *Torrise* were stock investors who had suffered trading losses, and they were to share a \$30 million lump-sum settlement in amounts proportional to their eligible losses. *Id.* at 1373. Individual class members could not determine their actual recoveries because the notice did not state the total claims that would be submitted by other class members—in other words, it did not provide the “denominator” that Weiss PC complains is absent from the notice in this case. (Br. of Appellant at 18.) This Court determined that the notice did not violate due process even though, as here, class members could not ascertain what their individual recoveries would be:

Here, the settlement notice states that the aggregate amount of the settlement is \$30 million. It also states that each class member's

recovery will be proportional to “Recognized Loss,” which it defines as 100% of losses resulting from stock bought during the first period ending July 18, 1989, and 25% of losses resulting from stock bought during the second period. ***The notice clearly stated the aggregate amount of the settlement and the formula for computing awards. The notice was adequate under Holiday Magic.***

*Torrise*, 8 F.3d at 1374 (emphasis added).

In another case decided just last year, the Court reaffirmed the holding of *Holiday Magic* and *Torrise*, holding once again that a notice that “describes the aggregate amount of the settlement fund and the plan for allocation, thereby compl[ies] with what we require.” *Rodriguez*, 563 F.3d at 962. The class in *Rodriguez* consisted of “all persons who purchased a bar review course from BAR/BRI in the United States from August 1997 to the present.” *Id.* at 956. The class notice in *Rodriguez* did not include information sufficient to determine the “denominator”—indeed, it did not even state the number of potential class members, even though BAR/BRI’s records presumably would have allowed it to determine that figure.<sup>13</sup>

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<sup>13</sup> The *Rodriguez* notice is available at <http://www.barbri-classaction.com/> (click on “Notice of Proposed Settlement of Class Action and Hearing Regarding Settlement”). There is no indication that either of the notices in *Holiday Magic* or *Torrise* stated the number of potential class members, and neither case suggests such information must be provided in the notice. *See Holiday Magic*, 550 F.2d at 1176 (“The notice advised class members of the pendency of the action, of their potential inclusion in the class, of the terms of the proposed settlement, of the hearing on whether the settlement should be approved, and of their rights to object to the settlement or exclude themselves from the class.”).

The authorities cited by Weiss PC are inapposite. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), did not address whether class notice must allow members to ascertain their potential individual recoveries. Instead, that case held that notice by publication was inadequate with respect to class members with a known place of residence. *Id.* at 320. The other case that Weiss PC relies on, *Oswald v. McGarr*, 620 F.2d 1190 (7th Cir. 1980), is similarly off point. That case addressed whether the notice adequately disclosed the scope of the release. *Id.* at 1198.

Here, the notice satisfied due process because it gave class members the necessary information. The notice provides the aggregate amount of the settlement fund: “The \$20,000,000 settlement and the interest earned thereon are the ‘Settlement Proceeds.’” (SER 45; *see also* SER 43.) The notice then states the formula for computing awards. (SER 46.) This provides “adequate information, presented in a neutral manner, to apprise class members of the essential terms and conditions of the settlement.” *Rodriguez*, 563 F.3d at 962. “Nothing more specific is needed.” *Holiday Magic*, 550 F.2d at 1178. Accordingly, the district court’s Final Judgment should be affirmed.

**D. The District Court Did Not Abuse Its Discretion When It Awarded Attorneys’ Fees and Costs to Class Counsel.**

Weiss PC argues for the first time on appeal that the district court’s award of attorneys’ fees was premature and without sufficient justification. The objection of

Mr. Weiss filed with the district court made no mention of a “potential coupon” component to the settlement and did not raise any objection to the requested attorneys’ fees (other than to state that class counsel’s motion for attorneys’ fees should have been filed before the notice was prepared). (ER 147 [¶¶ 17–18].) Nor did Weiss PC raise any such objections at the fairness hearing, or otherwise dispute the facts set forth in support of Plaintiffs’ Attorneys’ Fees Motion. (SER 17–26 [17:4–26:15].) Because Weiss PC did not raise its arguments in the district court, it waived any right to complain on appeal.<sup>14</sup> *See Slaven*, 146 F.3d at 1069. These arguments should be rejected on this basis alone.

Both of Weiss PC’s arguments also fail on the merits. “In class actions, the district court has broad authority over awards of attorneys’ fees; therefore, [the Ninth Circuit’s] review is for an abuse of discretion.” *In re FPI/Agretech Secs. Litig.*, 105 F.3d 469, 472 (9th Cir. 1997). “The ‘district court abuses its discretion if its decision is based on an erroneous conclusion of law or if the record contains no evidence on which it rationally could have based its decision.’” *Id.* (quoting *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 270 (9th Cir. 1989)). The district court’s underlying factual findings are reviewed for clear error, and any

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<sup>14</sup> None of the situations in which this Court will consider making an exception to the rule that issues not raised with the district court will not be considered on appeal apply here. *See Turnacliff*, 546 F.3d at 1120.

legal analysis relevant to the fee award is reviewed *de novo*. *Fischel v. Equitable Life Assurance Soc’y*, 307 F.3d 997, 1005 (9th Cir. 2002).

Applying these standards, the district court’s Attorneys’ Fees Order should be affirmed. First, Weiss’s argument that the Class Action Fairness Act (CAFA) required the district court to postpone its ruling on attorneys’ fees is wrong because the record demonstrates that the settlement has no “potential coupon” component. Second, the district court’s Attorneys’ Fees Order contained sufficient findings of fact that are supported by the record.

1. *Weiss’s Assertion That the Settlement Has a “Potential Coupon” Component Is Contradicted by the Record.*

Weiss PC’s argument (raised for the first time on appeal) that the award of attorneys’ fees was premature because the settlement “includes a potential coupon element” requiring special handling under CAFA is contradicted by the record. (Br. of Appellant at 19.) No portion of the settlement distribution constitutes a coupon.

A settlement payment does *not* constitute a coupon if, as here, the class member does not need to purchase additional services or otherwise spend money to receive the benefit. *See, e.g., Browning v. Yahoo! Inc.*, No. 04-1463, 2007 WL 4105971, at \*5 (N.D. Cal. Nov. 16, 2007) (“However, the in-kind relief offered in this case [(free credit services)] is not a ‘coupon settlement’ because it does not require class members to spend money in order to realize the settlement benefit.”);

*In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. MDL 1559, 2004 WL 3671053, at \*4 (W.D. Mo. Apr. 20, 2004) (“This [providing of free cellular phone minutes] is not a ‘coupon’ settlement. Class members will not be required to purchase any additional services or items to receive a benefit or cash payment.”).

This understanding is bolstered by the CAFA provision that Weiss PC relies on, which makes clear that Congress’s intent was to limit percentage-of-the-fund fee awards where the fees are based on the face value of coupons whose redemption rate was likely to be low. CAFA requires that if a class action settlement provides for a recovery of coupons to class members, any percentage-of-the-fund attorneys’ fee award must be based on “the value to class members of the coupons that are redeemed.” 28 U.S.C. § 1712(a). The congressional findings explain the issue with the low redemption rates of coupon settlements: “Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.” Pub. L. No. 109-2 § 2(a)(3), 119 Stat. 4, 4 (2005). Such is not the case here.

The Settlement Agreement does not provide for any payments by coupon, and 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*. (SER 188–89 [¶ 1.27].) All class members who do not owe

Google any money on their AdWords accounts will automatically receive cash.

(*Id.*) Those who do have an outstanding balance owed to Google may elect to receive any amount over their outstanding balances in cash:<sup>15</sup>

At the time of distribution, Google will notify each Class Member who is an Active AdWords Advertiser who has a balance due on his, her, or its AdWords account as of the Class Member Distribution Calculation Date that is less than such Class Member's Distribution that *they may elect to receive cash in lieu of AdWords Credits* by contacting Google via email per the instructions set forth on the Notice. Each Active AdWords Advertiser who makes such an election shall receive that portion of the Class Member's Distribution that is in excess of the balance due on his, her, or its AdWords account in cash.

(*Id.* (emphasis added).) Thus, no class member is forced to redeem a coupon in the future, spend any money, or otherwise purchase any further services from Google to receive the benefit of the settlement. As a result, the settlement does not amount to a coupon or "potential coupon" settlement as Weiss PC suggests. Notably, Weiss PC cites no authority to the contrary. Thus, the district court did not err in granting attorneys' fees.

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<sup>15</sup> Weiss PC's argument refers to footnotes 1 and 2 of its brief for an explanation of what it contends is the potential coupon. (Br. of Appellant at 19.) Those footnotes discuss to the option to receive AdWords credits "not to apply against an already outstanding balance, but to use for future advertising." (*Id.* at 5 n.1.) Weiss PC does not contend that the issuance of credits to cover outstanding balances a class member owes to Google constitutes a coupon.

2. *The District Court Adequately Justified Its Award of Attorneys' Fees.*

The Attorneys' Fees Order itself reveals the fallacy of Weiss PC's last argument that the district court failed to provide sufficient justification for its fee award. After considering "all of the files, records and proceedings in this Action, the Settlement, the risks, complexity, expense and probable duration of further litigation, and the efforts of Representative Plaintiffs and Representative Plaintiffs' Counsel," the district court specifically found 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.

(ER 166–67 [¶ 4].) These factual findings are supported by the vast record and are therefore not clearly erroneous. (SER 38–180.) Based on these facts, the district court did not abuse its discretion in concluding that the fee and expense award is "fair and reasonable." (ER 166 [¶ 4].)

Weiss PC's reliance on *Rodriguez*, 563 F.3d at 968, is inapposite. *Rodriguez* does not suggest that a district court's order granting the benchmark level of attorneys' fees cannot survive scrutiny unless the court explains its choice not to use the lodestar approach to award fees or sets forth detailed findings of fact to the level of minutiae suggested by Weiss PC—especially where, as here, the record

contains ample support for the district court's findings and conclusions. (Br. of Appellant at 22 n.3.) Instead, in *Rodriguez*, the Court remanded the case to the district court to determine whether a conflict arising out of incentive agreements with class representatives—a conflict the district court did not recognize—should affect the fee award. 563 F.3d at 968. And there is no requirement for the district court to explain why it chose the percentage-of-the-fund method. *See Fischel*, 307 F.3d at 1007 (“Nor did the district court err by failing to compare the lodestar result to the 25 percent benchmark.”).

Rules 23(h) and 52(a) of the Federal Rules of Civil Procedure also do not require the district court to engage in an elaborate analysis or recitation of uncontested facts. According to the Advisory Committee Note to Rule 52(a), “the judge need only make brief, definite, pertinent findings and conclusions upon the *contested* matters; there is no necessity for over-elaboration of detail or particularization of facts” (emphasis added). Here, neither Weiss PC, Mr. Weiss, nor any other objector contested *any* of the facts Plaintiffs offered in support of the

fee award in the district court.<sup>16</sup> Accordingly, there was no requirement under Rule 52(a) for the district court to recite more particularized facts in support of its uncontested findings.<sup>17</sup>

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<sup>16</sup> The only argument opposing the fee award at the fairness hearing related to whether the settlement was an “exceptional” result. Weiss PC acknowledged *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), as the “leading case on the 25 percent benchmark,” but claimed erroneously that the “25 percent benchmark is stated in the context of an exceptional result.” (SER 23 [23:12–14, 23:20–23].) Although degree of success obtained is a consideration when awarding attorneys’ fees, the 25 percent fee benchmark is not reserved exclusively for “exceptional” cases:

We leave to the district court the task of determining what this reasonable percentage should be. Nevertheless, the district court should take note that 25 percent has been a proper benchmark figure, which it can then adjust upward or downward to fit the individual circumstances of this case. Such an adjustment, however, must be accompanied by a reasonable explanation of why the benchmark is unreasonable under the circumstances.

*Paul, Johnson*, 886 F.2d at 272–73. Moreover, here, the district court’s conclusion that the results obtained supported the requested fee award is not clearly erroneous.

<sup>17</sup> Even if more detailed findings were required, no remand would be necessary because ample evidence in the record supports the district court’s conclusions:

[A] failure to make the necessary findings does not require remand if a complete understanding of the issues may be had without the aid of separate findings. We think that a complete understanding of the issues herein may be had from the record on appeal. Remand of the case to the district court is therefore unnecessary.

*Swanson v. Levy*, 509 F.2d 859, 861 (9th Cir. 1975) (citations omitted).

The district court's findings of fact were sufficiently detailed, were not clearly erroneous, and were supported by the vast record. Accordingly, the district court's Attorneys' Fees Order should be affirmed.

## **VI. CONCLUSION**

For the foregoing reasons, the district court's Final Judgment and Attorneys' Fees Order should be affirmed.

Dated: March 15, 2010.

Respectfully submitted,

LESTER L. LEVY  
MICHELE FRIED RAPHAEL  
WOLF POPPER LLP  
845 Third Avenue  
New York, NY 10022  
Telephone: (212) 759-4600  
Facsimile: (212) 486-2093  
E-Mail: [llevy@wolfpopper.com](mailto:llevy@wolfpopper.com)  
E-Mail: [mraphael@wolfpopper.com](mailto:mraphael@wolfpopper.com)

STEPHEN D. SUSMAN (TXB #19521000)  
SUSMAN GODFREY L.L.P.  
1000 Louisiana Street, Suite 5100  
Houston, TX 77002  
Telephone: (713) 651-9366  
Facsimile: (713) 654-6666  
E-Mail: [ssusman@susmangodfrey.com](mailto:ssusman@susmangodfrey.com)

MARC M. SELTZER (CSB #54534)  
SUSMAN GODFREY L.L.P.  
1901 Avenue of the Stars, Suite 950  
Los Angeles, CA 90067-6029  
Telephone: (310) 789-3100  
Facsimile: (310) 789-3150  
E-Mail: [mseltzer@susmangodfrey.com](mailto:mseltzer@susmangodfrey.com)

RACHEL S. BLACK (WSBA #32204)  
DANIEL J. SHIH (WSBA #37999)  
SUSMAN GODFREY L.L.P.  
1201 Third Avenue, Suite 3800  
Seattle, WA 98101  
Telephone: (206) 516-3880  
Facsimile: (206) 516-3883  
E-Mail: [rblack@susmangodfrey.com](mailto:rblack@susmangodfrey.com)  
E-Mail: [dshih@susmangodfrey.com](mailto:dshih@susmangodfrey.com)

By     /s/ Rachel S. Black      
Rachel S. Black  
Attorneys for Plaintiffs-Appellees

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William M. Audet  
Adel A. Nadji  
Kevin Lee Thomason  
AUDET & PARTNERS, LLP  
221 Main Street. Suite 1460  
San Francisco, CA 94105

David T. Biderman,  
Farschad Farzan  
M. Christopher Jhang  
Lisa Delehunt Olle  
PERKINS COIE LLP  
Four Embarcadero Center , Suite 2400  
San Francisco, CA 94111-4131

Alan J. Sherwood  
LAW OFFICE OF ALAN J. SHERWOOD  
1300 Clay Street, Suite 600  
Oakland, CA 94612

/s/ Daniel J. Shih