

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 SONIA HOFMANN, an individual and on
12 behalf of all others similarly situated,

13 Plaintiff,

14 v.

15 DUTCH LLC, a California Limited
16 Liability Company; and DOES 1 through
100, inclusive,

17 Defendant.

Case No.: 3:14-cv-02418-GPC-JLB

**ORDER DENYING PRELIMINARY
APPROVAL OF PROPOSED CLASS
SETTLEMENT**

[ECF No. 35]

18
19 Before the Court is parties' Motion for Preliminary Approval of Class Settlement.
20 ECF No. 35. The Settlement provides for: \$20 e-gift certificates for the plaintiff class;
21 \$250,000 in *cy pres* awards; and up to \$175,000.00 in plaintiff's attorney's fees with a
22 clear sailing provision attached. For the reasons detailed below, the Court **DENIES** the
23 Motion for Preliminary Approval of Class Settlement.

24 **I. BACKGROUND**

25 On June 30, 2014, Plaintiff sent a thirty day notice of violation to Dutch pursuant
26 to the Consumers Legal Remedies Act, California Civil Code sections 1750 *et seq.*
27 ("CLRA").

28 On September 5, 2014, Plaintiff filed a complaint against Dutch in the Superior

1 Court of California, County of San Diego, captioned *Hofmann v. Dutch, LLC*, Case No.
2 37-2014-0003015-CU-BT-CTL (the “State Court Action”). (Compl. 1:1; ECF No. 1-6.)
3 The complaint alleges four causes of action: 1) Violations of California Business and
4 Professional Code sections 172000 *et seq.* (the “UCL”); 2) Violation of California
5 Business and Professions Code section 17533.7; 3) Violation of the California
6 Consumers Legal Remedies Act (the “CLRA”); and 4) Negligent Misrepresentation.
7 (*Id.*)

8 On October 9, 2014, the Defendant removed the State Action to the United States
9 District Court for the Southern District of California, Case No. 3:14-cv-02418-GPC-JLB.
10 (Notice of Removal 1:1, ECF No. 1.)

11 Plaintiff alleges that Defendant manufactures, distributes, and retails jeans that
12 were labeled as “Made in USA” but contained foreign made components (the “Jeans.”)
13 (Compl. 2:2–5.) Specifically, Plaintiff alleges that the Jeans contain foreign-made
14 buttons, rivets, zipper assembly, thread, and/or fabric. (*Id.* at 4:2–5.) Thus, according to
15 Plaintiff, Defendant falsely marketed and concealed the true country of origin of the
16 Jeans’ components in violation of California law. (*Id.* at 4:6–7.)

17 Presently, the Plaintiff’s Unopposed Motion for Preliminary Approval of a Class
18 Action Settlement and Certification of Settlement Class is before the Court. (Plaintiff’s
19 Notice of Motion and Motion: 1) Granting Preliminary Approval of Class Settlement; 2)
20 Scheduling A Final Approval Hearing; and 3) Directing That Notice Be Sent to Class
21 Members (“Mot. Settl.”), ECF No. 35.) As part of the settlement, Defendant agreed to
22 distribute \$20 coupons to Class Members who submit a valid claim. (Donobli Decl. Ex.
23 1, at 18:5, ECF No. 35-2.) Class Members can receive up to two coupons without proof
24 of purchase, any coupons in excess of \$40 must be supported by proofs of purchase for
25 the Jeans. (*Id.* at 18:7–9.)

26 The Settlement provides a *cy pres* donation of \$250,000, paid over a period of 5
27 years. Defendant will make awards to the following charities: Step Up Women’s
28 Network, FIDM Scholarship, Race for the Cure, Juvenile Diabetes Research Foundation,

1 and Ability First. (Proposed Order Approving Class Settlement (“CAS”) at 11:12–18.)
2 The Settlement also includes an injunction. The injunction requires Dutch to change its
3 labels to reflect the component’s countries-of-origin by adding qualifying language (CAS
4 Ex. 1 at 11:3 – 9.)

5 Finally, the Settlement provides for the payment of attorney’s fees and costs. The
6 parties agreed to a clear sailing provision for Plaintiff’s attorney’s fees not exceeding
7 \$175,000.00. (Mot. Settl. 8:7.) Defendant also agreed to pay for costs for providing
8 notice and administering the claims not to exceed \$90,000.00. (*Id.* at 9:5–9.) The Class
9 Representative will receive a \$5,000.00 incentive payment (*Id.* at 8:8–10.)

10 **II. DISCUSSION**

11 **a. Legal Standard**

12 The Ninth Circuit has a strong judicial policy that favors settlements in class
13 actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 168, 1276 (9th Cir. 1992). However,
14 when the parties settle before class certification, the court must “peruse the proposed
15 compromise to ratify both the propriety of the certification and the fairness of the
16 settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). The Court must
17 first assess whether the proposed class meets the certification requirements and then
18 whether the proposed settlement is “fundamentally fair, adequate, and reasonable.” *Id.*

19 **b. Class Certification**

20 The Court must first address whether the proposed settlement class meets the class
21 certification. The settlement class under Rule 23(b)(3) must meet the prerequisites set
22 forth in Rule 23(a) and the requirements in 23(b)(3). When ruling on class certification
23 in the settlement context, the court “must pay undiluted, even heightened, attention to
24 class certification requirements because, unlike in a fully litigated class action suit, the
25 court will not have future opportunities to adjust the class, informed by the proceedings
26 as they unfold.” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

27 **i. Proposed Settlement Class**

28 The parties seek provisional certification for the following class, “persons in

1 California who purchased in California or through a website maintained by Dutch, LLC,
2 Defendant’s Current/Elliot jeans product that contained any foreign-made component
3 parts that was labeled ‘MADE IN THE USA’ or ‘MADE IN THE USA’ (the ‘Jeans’),
4 from September 5, 2010 to December 31, 2015, for non-commercial use.” (Mot. Settl. at
5 6:9–15.) “Excluded from the Settlement Class are all persons who are employees,
6 directors, officers, and agents of Defendants or its subsidiaries and affiliated companies,
7 as well as the Court and its immediate family and Staff.” (*Id.* at 6:15–18.)

8 **ii. Rule 23(a) Requirements**

9 Rule 23(a) establishes four prerequisites for class certification: 1) numerosity; 2)
10 commonality; 3) typicality; and 4) adequacy. Fed. R. Civ. P. 23(a).

11 **1. Numerosity**

12 The parties contend the settlement class meets the numerosity requirement.
13 Numerosity is met if “the class is so numerous that joinder of all members is
14 impracticable.” Fed. R. Civ. P. 23(a)(1). In the present case, the parties established that
15 Defendant sold 3,446 Jeans directly to customers. (Gallegos Decl. 2:13–14, ECF No. 1-
16 3.) Additionally, Defendant sold 397,982 Jeans wholesale to boutiques and major
17 department stores. (*Id.* at 2:11–12.) Class Members are undoubtedly too numerous to
18 join as plaintiffs, therefore, the settlement class meets the numerosity requirement.

19 **2. Commonality**

20 The parties next contend the settlement class meets the commonality requirement.
21 Commonality is met if “there are any questions of law or fact common to the class.” Fed.
22 R. Civ. P. 23(a)(2). Commonality requires that plaintiffs show a common contention
23 such that “determination of its truth or falsity will resolve an issue that is central to the
24 validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.
25 Ct. 2541, 2551 (2011).

26 Here, the proposed Class Members suffered the same injury: they all purchased
27 jeans that Defendant labeled as “Made in USA” but contained alleged foreign-made
28 component parts. The Class Members share several common questions of law: 1)

1 whether Dutch violated California Business and Professions Code section 17533.7; 2)
2 whether Dutch violated California Business and Professions Code section 17200; 3)
3 whether Dutch violated California Consumers Legal Remedies Act; and 4) whether
4 Dutch negligently misrepresented the Jeans as “Made in USA.” (Compl. 1:1; ECF No. 1-
5 6.) A determination into the truth or falsity of the origin of the Jeans’ component parts
6 would necessarily determine the validity of each four of these questions of law for each
7 class member. Accordingly, the proposed settlement class meets the commonality
8 requirement.

9 **3. Typicality**

10 The parties next contend the settlement class meets the typicality requirement.
11 Typicality requires that “the claims or defenses of the representative parties [be] typical
12 of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The named plaintiff
13 must be a member of the class they seek to represent and they must “possess the same
14 interest and suffer the same injury” as putative class members. *Gen. Tel. Co. of Sw. v.*
15 *Falcon*, 457 U.S. 147, 156 (1982) (internal quotations omitted). The Ninth Circuit
16 interprets typicality permissively. *Hanlon*, 150 F.3d at 1020. The representative claims
17 are typical if they are “reasonably co-extensive with those of absent class members,”
18 though they “need not be substantially identical.” *Id.*

19 Here, Plaintiff’s claims arise from the same facts as those of the class: they all
20 purchased Dutch jeans that were labeled “Made in USA” but contained alleged foreign-
21 made components. (Compl. 2:2–5.) Additionally, Plaintiff’s claims are based on the
22 same legal theories as those of the class. Therefore, Plaintiff meets the typicality
23 requirement.

24 **4. Adequacy**

25 Finally, the parties contend the class meets the adequacy requirement.
26 Representative parties must be able to “fairly and adequately protect the interests of the
27 class. Fed. R. Civ. P. 23(a)(4). Representation is adequate if the plaintiff “does not have
28 conflicts of interest with the proposed class” and is “represented by qualified and

1 competent counsel.” *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1185 (9th Cir. 2007).
2 Adequacy of representation is designed to deny certification in instances of “actual fraud,
3 overreaching, or collusion.” *In re Bluetooth Headset Products Liability Litigation*, 654
4 F.3d 935, 948 (9th Cir. 2011) (quoting in part *Staton*, 327 F.3d at 960).

5 In the present action, Plaintiff and Counsel have no conflicts of interest with other
6 Class Members. As discussed above, Plaintiff’s claims are typical of those of other
7 Class Members. Plaintiff and the Class Members share the common goal of protecting
8 consumer’s rights to have properly labeled products.

9 Class Counsel has experience prosecuting consumer rights class actions. (Donobli
10 Decl. 6:12–7:8.) John Donboli was admitted to the State Bar of California in 1999 and is
11 a founding partner at Del Mar Law Group, LLP. (*Id.*) Mr. Donboli practices in class
12 action, and has brought several class actions under California Business and Professions
13 Code section 17533.7. (*Id.*) Therefore, Plaintiffs satisfy the Rule 23(a) class certification
14 prerequisites.

15 **iii. Rule 23(b)(3) Requirements**

16 Class actions under 23(b)(3) must meet two additional requirements. First, the
17 common questions must predominate over individual questions. Fed. R. Civ. P. 23(b)(3).
18 Second, the class action device must be “superior to other available methods for fairly
19 and efficiently adjudicating the controversy.” *Id.*

20 **1. Predominance**

21 Predominance tests “whether proposed classes are sufficiently cohesive to warrant
22 adjudication by representation.” *Hanlon*, 150 F.3d at 1022 (internal quotations omitted).
23 “Rule 23(b)(3) requires a showing that questions common to the class predominate.”
24 *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1191
25 (2013). The District Court must assess the relationship between individual and common
26 issues.

27 Here, the common questions predominate over the individual questions. As
28 discussed above in commonality, there are several common questions bind the class

1 together. The core question is whether Dutch violated California Business and
2 Professions Code 17533.7 when it labeled its jeans “Made in the USA” when they
3 contained foreign-made component parts. Therefore, the class meets the predominance
4 requirement. *Id.*

5 **2. Superiority**

6 The superiority requirement provides a list of four non-exhaustive factors to
7 determine whether the class action device is superior to individual actions. Fed. R. Civ.
8 P. 23(b)(3)(A)-(D). Those factors are:

- 9 (A) The interest of members of the class in individually controlling the
10 prosecution or defense of separate actions;
- 11 (B) The extent and nature of any litigation concerning the controversy already
12 commenced by or against members of the class;
- 13 (C) The desirability or undesirability of concentrating the litigation of the claims
14 in the particular forum; and
- 15 (D) The difficulties likely to be encountered in the management of a class action.

16 *Id.*

17 Factors (C) and (D) are irrelevant because the parties have agreed to a pre-
18 certification settlement. *Amchem Products v. Windsor*, 524 U.S. 591, 620 (1997). The
19 individual claimants have almost no interest in controlling the prosecution of their own
20 actions because individual legal costs far outstrips any potential recovery. Additionally,
21 this Court knows of no concurrent litigation pending concerning the issues in this case.

22 **c. The Settlement**

23 At the preliminary approval stage, the Court must review the parties’ proposed
24 settlement to determine whether the settlement is within the permissible “range of
25 possible of approval” and thus, whether the notice and the scheduling of the formal
26 fairness hearing is appropriate. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal.
27 2008) (internal quotations omitted). The fairness inquiry “focuses primarily upon
28 whether the particular aspects of the decree that directly lend themselves to pursuit of

1 self-interest by class counsel and certain members of the class—namely attorney’s fees
2 and the distribution of any relief, particularly monetary relief, among class members—
3 strictly comport with substantive and procedural standards designed to protect the
4 interests of class members.” *Staton*, 327 F.3d at 960. The settlement is taken as a whole,
5 and not merely in its component parts. *Id.* Additionally, the parties may not collude
6 during settlement negotiations. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458
7 (9th Cir. 2000).

8 **i. Gift Card**

9 The parties argue that the \$20 e-gift certificate is appropriate because Class
10 Members faced a risk that they would receive no compensation at trial. (Mot. Settl.
11 12:14–18.) The parties alleged that proving restitution would require Plaintiff “to expend
12 over \$100,000 in expert fees . . . to develop a restitution model that *might* be approved by
13 this Court.” (*Id.* at 12 n.3.) Additionally, the parties allege that they came to the \$20
14 amount after lengthy negotiations and the amount “is based on calculations of the
15 foreign-made component parts in the Class Products in conjunction with a factoring of
16 the risks of potentially receiving no monetary recovery to the Class at time of trial.” (*Id.*
17 at 7:11–15.)

18 **1. Gift Card as a Coupon**

19 The threshold issue is whether the gift certificate should be considered a coupon.
20 Coupons require class members to pay their own money before they can take advantage
21 of the coupon. *See In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 951 (9th
22 Cir. 2015). The Senate Judiciary Report on the Class Action Fairness Act focused “on
23 settlements that involve a discount—frequently a small one—on class members’
24 purchases from the settling defendant.” *Id.* (citing S.Rep. No. 109–14, at 15–20 (2005)).
25 The report itself listed several examples, including a settlement that offered class
26 members coupons worth \$25 to \$55 off of a future cruise; a \$0.28 Food Lion coupon; and
27 \$0.50 coupons to purchase apple juice. S.Rep. No. 109-14, at 15–20 (2005), 2005
28 U.S.C.C.A.N. 3, 16.

1 By contrast, the Ninth Circuit in *In re Online DVD* found that the \$12 offered gift
2 card to Wal-Mart did not amount to a gift card. 779 F.3d at 952. The Court first
3 discussed the Senate Judiciary Report which focused “on settlements that involve a
4 discount—frequently a small one—on class members’ purchases from the settling
5 defendant.” Unlike the examples from the Senate report, which only gave settlement
6 recipients the ability to receive a discount, the \$12 gift cards to Wal-Mart, a low cost
7 retailer, “[gave] class members \$12 to spend on any item carried on the website of a
8 giant, low cost retailer.” *Id.* at 951. Several other district courts have reached the same
9 conclusion with similar gift cards. *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 255–
10 56 (E.D. Pa. 2011) (holding that \$20 Rite Aid gift cards that can be used for thousands of
11 products are more like cash than coupons); *Fernandez v. Victoria Secret Stores, LLC*, No.
12 CV 06–04149, 2008 WL 8150856, at *2, *4–16 (C.D. Cal. Jul. 21, 2008) (finding that a
13 \$67.50 gift card to Victoria’s Secret was appropriate when the face value of the card was
14 ten times greater than the amount a class would have been entitled for her work).

15 The gift cards in the instant case are essentially coupons because they require Class
16 Members to pay out of their own pocket before they can take advantage of the coupons.
17 While the face value of the coupon is \$20, the average price of the Jeans is \$205. (Mot.
18 Settl. 7:3–5; Gallegos Decl. 2:23–24.) Under the Settlement, the Class Members do not
19 receive restitution, but rather an average 10% discount on a future purchase of denim.
20 Additionally, Class Members whom wish to use the coupons can only spend them at
21 currentelliott.com; not a store location. (Mot. Settl. 6:4.) The least expensive item on the
22 website, including clearance items, currently costs \$58.80.¹ Thus, the highest possible
23 value for a Class Member’s coupons is a 34% discount on a future purchase. Unlike the
24 Walmart coupon in *In re Online DVD* or the Rite Aid gift card in *Reibstein*, the gift cards
25 here cannot purchase an entire pair of jeans, a jacket, or a T-shirt—indeed, any product
26

27
28 ¹ See, e.g., Current/Elliot, The Muscle Tee, <http://www.currentelliott.com/shop/sale/the-muscle-tee-vintage-white-cc-motel> (last visited Apr. 25, 2016).

1 currently offered on Current/Elliot’s website. Because the Class Members must pay out
2 of pocket to utilize the gift card, the gift card amounts to a coupon.

3 **2. Coupon Settlement Analysis**

4 Both the courts and Congress generally disfavor coupon settlements. *See Redman*
5 *v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). A court must “consider, among
6 other things, the real monetary value and likely utilization rate of the coupons provided
7 by the settlement” to determine the fairness of a coupon settlement. S.Rep. No. 109–14,
8 at 31.

9 Courts reject coupons whose face value is far less than its actual value. *See, e.g.,*
10 *True v. American Honda Co.*, F. Supp. 2d 1052, 1074 (C.D. Cal. 2010). Coupons are
11 worth less than the same amount of cash and therefore cannot be valued at face value.
12 *See id.* Some factors a court weighs to determine the value of the coupon are the amount
13 of the discount, transferability of the coupon, class member usage rate, and the value of
14 the coupon to the defendant. *See id.* at 1073–1075; *Radosti v. Envision EMI, Inc.*, 717 F.
15 Supp. 2d 37, 43 (D.D.C. 2010). For example, in *True*, the parties agreed to a settlement
16 that included two rebate options and a cash payment. *Id.* at 1060–61. Rebate “Option A”
17 was a \$1,000 cash rebate for class members who trade in their vehicle and purchase a
18 Honda. *Id.* at 1060. Option B was a \$500 cash rebate for class members who kept their
19 vehicle and purchased a Honda. The court in *True* noted that coupons are worth less than
20 the same amount of cash. *Id.* Honda’s offered rebates were worth even less because they
21 were not transferable. *Id.* Additionally, these coupons cost Honda less and could result
22 in a net benefit with each car purchased. *Id.*

23 However, courts will approve even seemingly inadequate settlements if the
24 underlying claims are frivolous. *See In re Mexico Money Transfer Litig.*, 267 F.3d 743
25 (6th Cir. 2001). The plaintiff class brought a RICO action over the phrase “Send \$300 to
26 Mexico for \$15,” because the wire transfer company collected the \$15 customer fee as
27 well as the difference between the retail currency exchange rate and the wholesale
28 exchange rate. *Id.* at 745. The class settlement included a \$6 coupon off the price for a

1 future wire transfer. *Id.* at 746. While the coupons were low in value, the fact that the
2 defendants did not appear to break the law allowed the parties to settle for a low amount.
3 *Id.* at 749 (“Nothing in this transaction smacks of fraud, so the settlement cannot be
4 attacked as too low.”).

5 In the instant case, the actual value of the offered coupon is far less than its face
6 value. As discussed above, the discount offered by the coupons falls between 10% and
7 34%, which is no greater than average discounts offered by retail chains. Class Members
8 cannot transfer the coupons, which further limits the coupon’s value. As noted above,
9 Class Members can only spend the coupons at currentelliott.com, not a store location.
10 While the parties claim the amount was aggressively negotiated over, Class Members
11 would value \$20 in cash greater than an on-average 10% coupon on another pair of jeans
12 from a company they allege deceived them about the source of manufacture of the jeans
13 Class Members previously purchased from them. Like *True*, Dutch stands to experience
14 a net benefit from the coupons.

15 Additionally, the underlying claims do not appear to be frivolous in this case.
16 While Dutch does not admit guilt, it recognizes the risks of going to trial and
17 acknowledges it could lose the suit. (Mot. Settl. 11:13–19.) Additionally, Plaintiff’s
18 concerns were on creating an appropriate damages model rather than proving its claims.
19 (*Id.* at 12:14–18.) Therefore, the underlying claims are not frivolous.

20 The \$20 gift card is worth significantly less than face value. Additionally, the
21 underlying claims do not appear to be frivolous. Therefore, the coupon settlement is
22 inadequate.

23 **ii. *Cy Pres* Award**

24 The settlement also includes a direct *cy pres* award. The parties argue that *cy pres*
25 is appropriate in this settlement because Class Members are largely women and the goals
26 of the selected beneficiaries benefit women. (Mot. Settl. 16:4–7.) Additionally, the
27 parties allege that the *cy pres* award ensures that Dutch “incurs a minimum of liability”
28 and, thus, “shows significant usefulness in effectuating the deterrent and disgorgement

1 purposes of” the underlying cause of action. (*Id.* at 16:14–17 (internal quotation marks
2 omitted) (citation omitted).)

3 A *cy pres* remedy is a settlement remedy where the class members receive an
4 indirect benefit rather than a direct benefit. *Lane v. Facebook, Inc.*, 696 F.3d 811, 819
5 (9th Cir. 2012). These awards often take the form of donations by the defendant to third-
6 party charities. *Id.* Typically, *cy pres* awards distribute unclaimed class funds to charity,
7 however, courts have also granted these awards if the award is non-distributable. *See*,
8 *e.g., id.* “[C]*y pres* distribution must be guided by (1) the objectives of the underlying
9 statutes and (2) the interests of the silent class members.” *Naschin v. AOL*, 663 F.3d
10 1034, 1040 (9th Cir. 2011) (citing *Six Mexican Workers v. Ariz. Citrus Growers*, 904
11 F.2d 1301, 1307–08 (9th Cir. 1990)).

12 A *cy pres* award meets the objectives of the underlying statute when the *cy pres*
13 recipient’s mission and the statute’s goals have a non-tenuous connection. *See Naschin*,
14 663 F.3d at 1040. In *Naschin*, AOL agreed to give \$25,000 to three charities: the Legal
15 Aid Foundation of Los Angeles, the Federal Judicial Center Foundation, and the Boys
16 and Girls Club of America in Los Angeles and Santa Monica as part of a class action
17 settlement. *Id.* However, the Ninth Circuit found that none of the stated goals of the
18 charities had anything to do with the underlying statutes. *Id.* According to the Court, the
19 parties should have chosen charities related to the cause of action, such as, “any number
20 of non-profit organizations that work to protect internet users from fraud, predation, and
21 other forms of online malfeasance.” *Id.* at 1041.

22 Second, a *cy pres* award provides reasonable certainty that a member of the class
23 will benefit if a non-tenuous connection exists between the recipient’s mission and the
24 absent class member’s interests. The second prong may be satisfied in by showing that
25 either the donation accounts for the geographic distribution of the class, or the reward
26 provides a reasonable certainty that a member of the class will benefit from the
27 distribution. *See Naschin*, 663 F.3d at 1040. In *Naschin*, the 9th Circuit found that
28 donations to the Boys and Girls Club of Los Angeles and Santa Monica, Los Angeles

1 Legal Aid, and the Federal Judicial Center did not fully account for the broad geographic
2 distribution of the class. *Id.*

3 Finally, “a class settlement fund is non-distributable when the proof of individual
4 claims would be burdensome or distribution costly.” *Six Mexican Workers*, 904 F.2d at
5 1305. In *Naschin*, the Ninth Circuit found the direct settlement impracticable because
6 each class member stood to make three cents, much less than the cost of notice. *Naschin*,
7 663 F.3d at 1037.

8 The *cy pres* award in the instant case fails to meet the objectives of the “Made in
9 the USA” statute because the missions of the selected charities and the statutes’ goals do
10 not share a non-tenuous connection. The chosen recipients are Step Up Women’s
11 Network, FIDM Scholarship, Race for the Cure, Juvenile Diabetes Research Foundation
12 and Ability First. (CAS at 11:13–17.) None of the chosen charities bear any relation to
13 the goal of the statutes, consumer protection.

14 Additionally, the *cy pres* award does not provide reasonable certainty that Class
15 Members will benefit because no connection exists between the recipients’ missions and
16 the absent class members’ interests. The parties argue that the charities benefit the class
17 members because “Defendant has indicated that the recipient of the charitable
18 contribution will be charities that concern women’s issues and have a nexus to California.
19 Dutch makes women’s jeans This is consistent with the goal of donating to charities
20 focusing on helping and meeting the needs of women in our society.” (Mot. Settl.16:4–
21 8.) However, Class Members are women who purchased jeans labeled “Made in USA”
22 that contained foreign-made components; not abstract women without a specific injury.
23 The chosen charities do not promote consumer protection. Rather, the chosen charities’
24 missions are: offering mentorship programs to at risk teenage girls (Step Up); supporting
25 breast cancer research (Race for the Cure); supporting research for juvenile diabetes
26 (Juvenile Diabetes Research Foundation); offering scholarships to aspiring fashion
27 designers (FIDM Scholarships); and offering employment, recreational and socialization
28 special needs programs (Ability First). The chosen charities must benefit the injuries of

1 the class members, not merely relate to their gender.

2 Finally, the direct *cy pres* award is not appropriate in this case because the
3 settlement is distributable to the class members. Unlike the other Ninth Circuit cases
4 which have allowed a direct *cy pres* distribution; the parties do not allege that settlement
5 cannot be distributed to the Class Members due to the expense of notice relative to the
6 award. Indeed, the parties provided that the defendant pay for notice to class members up
7 to \$90,000 while the defendant’s liability is capped at \$1,000,000.00. (Mot. Settl. 9: 6–9;
8 CAS at 11:1–2.)

9 The Settlement’s *cy pres* award does not meet the objective of the underlying
10 statute. Additionally, the award does not provide reasonable certainty that a member of
11 the class will benefit. Finally, the class settlement is not non-distributable. Therefore,
12 the *cy pres* award is inadequate.

13 **iii. Clear Sailing Agreement**

14 Finally, the Settlement contains a “clear sailing” provision for attorney’s fees,
15 whereby Defendant has agreed not to contest any award of attorney’s fees that does not
16 exceed \$175,000.00. CAS 2. While the motion does not specifically address why the
17 clear sailing provision was justified, the parties imply that the provision is justified
18 because the settlement process was fair. (Mot. Settl. 2:24–3:4.) The parties negotiated in
19 the presence of a neutral arbitrator, Judge May (Ret.). (*Id.* at 2:25.) The parties allege
20 that the litigation was “hard-fought,” and that “there is . . . every reason to conclude that
21 settlement negotiations were vigorously conducted at arm’s length and without any
22 suggestion of undue influence.” (*Id.* at 12:1 – 5 (quoting in part *In re Wash. Power*
23 *Supply System Sec. Litig.*, 720 F.Supp. 1379, 1397 (D. Ariz. 1989)).)

24 “Clear sailing” provisions carry the risk of “enabling a defendant to pay class
25 counsel excessive fees and costs in exchange for counsel accepting an unfair settlement
26 on behalf of the class.” *In re Bluetooth Headset Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)
27 (quoting *Lobatz v. U.S. West Cellular of California, Inc.*, 222 F.3d 1142, 1148 (9th Cir.
28 2000)). A neutral arbitrator’s presence is not dispositive as to whether the settlement is

1 the product of “fair, adequate and reasonable settlement negotiation[s].” *Id.* The purpose
2 of the Rule 23(e) fairness inquiry is to root out unfairness that is not apparent from the
3 negotiation. *Id.* “[W]hen confronted with a clear sailing provision, the district court has
4 a heightened duty to peer into the provision and scrutinize carefully the relationship
5 between attorney’s fees and benefit to the class, being careful to avoid awarding
6 ‘unreasonably high’ fees simply because they are uncontested.” *Id.* at 948 (citing *Staton*,
7 327 F.3d at 954).

8 In the instant case, the “clear sailing” provision creates at least a danger of
9 collusion during the settlement negotiations which is not refuted by the record. The
10 presence of Judge May does not eliminate the possibility of collusion between the parties
11 in this case. (Mot. Settl. 2:25.) While \$175,000.00 does not seem like an unreasonably
12 high fee, as discussed above, Class Members receive almost no benefit from the
13 settlement. At most, Class Members receive a coupon good for on-average 10% off
14 another pair of jeans from a company they allege previously deceived them.

15 iv. Settlement as a Whole

16 District Courts have preliminarily approved class settlements with minor defects
17 while giving the parties the opportunity to correct those defects. *See, e.g., Alberto v.*
18 *GMRI, Inc.*, 252 F.R.D. 652, 670 (E.D. Cal. 2008). For instance, had the “clear sailing”
19 agreement been the only defect present in the settlement, the Court could have approved
20 the settlement and allowed the parties to cure the defect before the final settlement
21 approval. However, taken as a whole, the settlement in this case contains sufficient
22 deficiencies so as to not warrant preliminary approval. The coupon distribution merely
23 provides a future discount to Class Members; the *cy pres* award gives money to unrelated
24 charities instead of the Class Members; and the “clear sailing” provision gives rise to at
25 least a danger of collusion. Therefore, the Court must deny the settlement.


26 III. CONCLUSION

27 Accordingly, the Motion for Preliminary Approval of Class Action Settlement is
28 **DENIED**. The Court will permit the parties an additional sixty (60) days from the

1 issuance of this Order to file a renewed motion for preliminary approval of class action
2 settlement that cures the deficiencies identified in this Order.

3 **IT IS SO ORDERED.**

4 Dated: April 26, 2016

5 
6 Hon. Gonzalo P. Curiel
7 United States District Judge

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28