

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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

v.

DUTCH LLC, a California Limited  
Liability Company; and DOES 1 through  
100, inclusive,  
Defendant.

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

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

[Dkt. No. 43]

Before the Court is Plaintiff's third motion for preliminary approval of the proposed class settlement. Dkt. No. 43-1. Because all parties have agreed to the proposed settlement, Defendant Dutch, LLC ("Defendant") does not oppose this motion. Dkt. No. 45. On January 10, 2016, the Court issued a tentative ruling denying Plaintiff's motion for preliminary approval. Dkt. No. 48. The Court held a hearing on the motion on January 19, 2017. After considering the parties' submissions and oral argument, and for the reasons that follow, the Court **DENIES** Plaintiff's motion for preliminary approval.

## **BACKGROUND**

### **1. First Motion for Preliminary Approval**

On April 26, 2016, the Court denied Plaintiff's initial motion for preliminary approval of the class settlement. Dkt. No. 37. The initial proposed settlement provided for: (1) \$20 worth of e-gift certificates for each of the class members; (2) \$250,000 in *cy pres* awards; and (3) up to \$175,000 in plaintiff's attorney's fees with a "clear sailing" provision attached.<sup>1</sup>

The Court identified three problems with the proposed settlement, namely: (1) that the e-gift certificates effectively constituted coupons because they required class members to pay out of their own pocket before they could redeem them; (2) that the *cy pres* award failed to meet the objectives of the underlying consumer protection statutes; and (3) that, when considered in conjunction with the other provisions of the proposed settlement, the "clear sailing" provision "created at least a danger of collusion during the settlement negotiations which is not refuted by the record." *Id.* at 9-15. The Court permitted the parties an additional sixty days to file a renewed motion for preliminary approval of class action settlement that cured the deficiencies identified. *Id.* at 15.

### **2. Second Motion for Preliminary Approval**

On August 16, 2016, the Court denied Plaintiff's second motion for preliminary approval of the class settlement. Dkt. No. 41. For the renewed attempt to propose a settlement, Plaintiff proposed the following: (1) one denim tote bag (\$128 retail value) and \$20 e-gift certificates for the class members; (2) \$250,000 in *cy pres* awards, to the same charities as proposed in the initial settlement; and (3) up to \$175,000 in Plaintiff's attorney's fees with the same "clear sailing" provision attached. *See* Dkt. No. 38, Ex. 1. In other words, the only difference between the first and second proposed settlement was the addition of the denim tote bag. The Court denied the parties' renewed motion for

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<sup>1</sup> The "clear sailing" provision refers to the agreement between Plaintiff's counsel and Defendant that the Plaintiff's attorney fee award will not exceed a fixed amount. *See* Dkt. No. 43-1 at 16.

preliminary approval because it did not cure the deficiencies that the Court had previously identified. Dkt. No. 41 at 2. In particular, the Court emphasized that the second motion did nothing to address the Court's concern that the proposed *cy pres* award did not conform to Ninth Circuit legal authority. *Id.*

### 3. Third Motion for Preliminary Approval

Plaintiff filed the instant motion for preliminary approval on October 14, 2016. Dkt. No. 43. Here, the proposed settlement consists of (1) a current-Elliot brand tote bag (retail value of \$128.00) and electronic gift card codes "redeemable on [www.CurrentElliott.com](http://www.CurrentElliott.com) only and loaded with values of multiples of \$20.00 corresponding to the number of units of Class Products purchased during the Class Period"; (2) \$250,000 in *cy pres* awards; (3) up to \$175,000 in attorney's fees, with the same "clear sailing" provision; and (4) injunctive relief. *Id.* at 6, 11-13.

### DISCUSSION

The Ninth Circuit has a strong judicial policy that favors settlements in class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 168, 1276 (9th Cir. 1992). However, when the parties settle before class certification, as is the case here, the court must "peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). To that end, a reviewing court must engage in two, separate inquiries: (1) whether the proposed class meets the certification requirements and (2) whether the proposed settlement is "fundamentally fair, adequate, and reasonable." *Id.*

The Court previously addressed both of these requirements in its April 26, 2016 Order denying Plaintiff's first motion for preliminary approval. Dkt. No. 37. At that time, it concluded that Plaintiff had demonstrated that it was proper to certify the class, but had failed to demonstrate that the settlement was fundamentally fair, adequate, and reasonable. *Id.* As such, the Court's inquiry, here, will focus on the latter inquiry.

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## 1           **A. Fundamental Fairness of Settlement**

2           Before approving a proposed class action settlement, a court must find that the  
 3 settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e). When assessing  
 4 whether a settlement meets these criteria, the court must evaluate the “settlement as a  
 5 whole, rather than assessing its individual components.” *Lane v. Facebook, Inc.*, 696  
 6 F.3d 811, 818 (9th Cir. 2012). It is, therefore, not within the district court’s role to  
 7 “delete, modify or substitute certain provisions” of the settlement. *Hanlon v. Chrysler*  
 8 *Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (quoting *Officers for Justice v. Civil Serv.*  
 9 *Comm’n of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982)). Rather, “[t]he settlement  
 10 must stand or fall in its entirety.” *Id.*

11           In assessing the fairness of a settlement, a court generally must weigh:  
 12           (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and  
 13           likely duration of further litigation; (3) the risk of maintaining class action  
 14           status throughout the trial; (4) the amount offered in settlement; (5) the extent  
 15           of discovery completed and the stage of the proceedings; (6) the experience  
 16           and views of counsel; (7) the presence of a governmental participant; and (8)  
 17           the reaction of the class members of the proposed settlement.  
 18           *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). An even  
 19           more exacting fairness standard is required where, as here, the settlement under review  
 20           was negotiated prior to class certification. *Id.* (“consideration of these eight [ ] factors  
 21           alone is not enough to survive appellate review” when there has been no class  
 22           certification). A more probing inquiry is warranted under such circumstances because  
 23           there is an increased danger of “collusion between class counsel and the defendant, as  
 24           well as the need for additional protections when the settlement is not negotiated by a  
 25           courtdesignated class representative.” *Hanlon*, 150 F.3d at 1026. “[C]ourts therefore  
 26           must be particularly vigilant not only for explicit collusion, but also for more subtle signs  
 27           that class counsel have allowed pursuit of their own self-interests and that of certain class  
 28           members to infect the negotiations.” *In re Bluetooth*, 654 F.3d at 947.

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1           **B. *Bluetooth* factors**

2           The causes of action underlying this lawsuit inform the Court’s assessment of the  
3 *Bluetooth* factors and ultimate conclusion that the factors weigh in favor of settlement.

4           Plaintiff has brought suit against Defendant for violation of California’s “Made in  
5 USA” statute (§ 17533.7 of the California False Advertising Law), Unfair Competition  
6 Law (“UCL”) (based on a “Made in USA” statutory violation), and Consumer Legal  
7 Remedies Act (“CLRA”). *See generally* Complaint, Dkt. No. 1-6.

8           Section 17533.7 of the Cal. Bus. & Prof. Code (the “Made in USA” statute) states  
9 that a product may not be represented as “Made in U.S.A.” if the product itself “or any  
10 article, unit, or part thereof, has been entirely or substantially made outside the United  
11 States.” Such a designation is also prohibited if the product or its components were  
12 “entirely or substantially made, manufactured, or produced outside the United States.”  
13 Cal. Bus. & Prof. Code § 17533.7. That a product is designed, engineered, finished, or  
14 otherwise processed in the United States does not render “the foreign work performed on  
15 the part unsubstantial.” *Colgan v. Leatherman Tool Group, Inc.*, 38 Cal. Rptr. 3d 36, 50  
16 (Cal. Ct. App. 2006). Rather, if any substantial creation, manufacture or production of a  
17 product occurs outside of the United States, the “Made in U.S.A” designation is unlawful.  
18 *Id.* at 51. “To prevail on a false advertising claim, a plaintiff need only show that  
19 members of the public are likely to be deceived.” *Id.* at 48 (citing *Freeman v. Time, Inc.*,  
20 68 F.3d 285, 289 (9th Cir. 1995)) A plaintiff can make such a showing by demonstrating  
21 that a reasonable consumer — that is, one who “is not versed in the art of inspecting and  
22 judging a product, in the process of its preparation or manufacture”— would have been  
23 deceived or misled. *Id.* In determining whether a statement is deceptive or misleading,  
24 the primary evidence is the advertising itself. *Brockey v. Moore*, 131 Cal. Rptr. 2d 746,  
25 756 (Cal. Ct. App. 2003).

26           The CLRA prohibits “unfair methods of competition and unfair or deceptive acts  
27 or practices undertaken by any person in a transaction intended to result or which results  
28 in the sale or lease of goods or services to any consumer,” including “using deceptive

1 representations or designations of geographic origin in connection with goods or  
2 services.” Cal. Civ. Code § 1770. The same standards that dictate whether a  
3 representation is deceptive or misleading under the False Advertising Law, also apply to  
4 claims under the CLRA. *Colgan*, 38 Cal. Rptr. 3d at 46 (citing *Consumer Advocates v.*  
5 *Echostar Satellite Corp.*, 8 Cal. Rptr. 2d 22, 29 (Cal. Ct. App. 2003)). As such, any  
6 conduct that is likely to mislead a reasonable consumer violates the CLRA. *Nagel v.*  
7 *Twin Labs., Inc.*, 134 Cal. Rptr. 2d 420, 431 (Cal. Ct. App. 2003).

8 Here, the Plaintiff’s case revolves around the “Made in the USA” label that  
9 Defendant Dutch placed on their jeans during the relevant period. Complaint ¶ 11, Dkt.  
10 No. 1-6 at 3-4. Plaintiff alleges that she bought a pair of Current/Elliot jeans bearing a  
11 Made in the U.S.A label when, in fact, the jeans contained foreign-made buttons, rivets,  
12 zipper assembly, thread, and/or fabric. *Id.* ¶ 12. In the Agreement of Settlement, the  
13 parties indicate that Defendant voluntarily revised its label. Dkt. No. 43-2 at 9.  
14 Accordingly, the genuine dispute, here, generally concerns whether the jeans bought by  
15 class members were comprised of foreign-made parts and whether those parts were  
16 legally significant.

17 Given these relevant legal standards and the record available to the Court, the  
18 Court observes that Plaintiff’s case is relatively strong. Provided that Plaintiff can set  
19 forth evidence proving that the zippers, buttons, and other parts of the jeans were foreign-  
20 made, Plaintiff’s chances of prevailing under California’s false advertising laws would be  
21 high. That said, because the parties settled before the Court could rule on any dispositive  
22 motions or factual disputes, the weight of the Court’s assessment is lessened.  
23 Accordingly, this factor weighs slightly against settlement.

24 The Court further notes, however, that the risk, expense, complexity, and duration  
25 of any litigation, in addition to the risk of maintaining class certification throughout the  
26 suit, weighs heavily in favor of settlement. It is difficult for plaintiffs in false advertising  
27 cases to calculate and prove damages for the entire class. *See, e.g., Colgan*, 38 Cal. Rptr.  
28 3d at 57-63. Any restitution award must be supported by substantial evidence, yet



1 questions concerning how to quantify the consumer impact of a “Made in the U.S.A.”  
 2 representation or the advantage inuring to Current/Elliott from adopting such marketing,  
 3 poses a formidable challenge to Plaintiff’s case. *See id.* Decertification of the class is yet  
 4 another risk Plaintiff faces. In *Brazil v. Dole*, the Ninth Circuit affirmed a judge’s  
 5 decision to decertify a class seeking damages for food products bearing an “All Natural  
 6 Fruit” label because the plaintiff could not explain how the premium paid for the “All  
 7 Natural Fruit” could be “calculated with proof common to the class.” *Brazil v. Dole*  
 8 *Packaged Foods, LLC*, 660 F. App’x 531, 535 (9th Cir. 2016); *see also Brazil v. Dole*  
 9 *Packaged Foods, LLC*, 2014 WL 5794873, \*14 (N.D. Cal. Nov. 6, 2014). Similarly,  
 10 here, there is no guarantee that a class would be, or remain, certified given the inherent  
 11 difficulties in proving damages on a class-wide basis.

12 The sixth, seventh, and eighth *Bluetooth* factors are either neutral or point in favor  
 13 of settlement. While there is no government participant in the settlement, the Court notes  
 14 that Plaintiff’s counsel are experienced in consumer class actions and have litigated  
 15 similar cases in federal and state court. Dkt. No. 43-2 at 6-7. As for class member  
 16 reactions to the lawsuit, that factor is better addressed at the final, rather than the  
 17 preliminary, approval of settlement and after class members have been given an  
 18 opportunity to object.

### 19 **C. Settlement Provisions**

20 Although the above-mentioned factors weigh in favor of settlement, the Court  
 21 concludes that obvious and material deficiencies in the substance of the settlement (i.e.,  
 22 the fourth *Bluetooth* factor) prevent the Court from approving it as fair, adequate, and  
 23 reasonable.

#### 24 **1. *Cy pres* award**

25 Chief among the settlement’s deficiencies is the *cy pres* award.

26 A *cy pres* remedy is a “settlement structure wherein class members receive an  
 27 indirect benefit (usually through defendant donations to a third party) rather than a direct  
 28 monetary payment.” *Lane*, 696 F.3d at 820. Stated differently, the *cy pres* doctrine

1 allows a court to “distribute unclaimed or non-distributable portions” of a settlement to  
2 the “next best” class of beneficiaries. *Id.* Whether a *cy pres* remedy is fair, adequate and  
3 reasonable depends upon whether the award “account[s] for the nature of the plaintiffs’  
4 lawsuit, the objectives of the underlying statutes, and the interests of the silent class  
5 members.” *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011). An award that  
6 does not target the plaintiff class or that fails to provide reasonable certainty that any  
7 member will be benefitted by the award, will not satisfy the fairness inquiry. *Id.* at 1040.  
8 Thus, a reviewing court that approves a *cy pres* distribution that has no relation to the  
9 class or the underlying claims is applying the incorrect legal standard and abusing its  
10 discretion. *Dennis v. Kellogg Co.*, 697 F.3d 858, 866 (9th Cir. 2012).

11 Plaintiff’s previous settlement proposed that Defendant pay \$50,000 to the Step Up  
12 Women’s Network and that it distribute another \$200,000 among Step Up Women’s  
13 Network, FIDM Scholarship, Race for the Cure, Juvenile Diabetes Research Foundation,  
14 and Ability First. Dkt. No. 38-1 at 18. Here, Plaintiff has modified the previously  
15 submitted *cy pres* award by proposing that Defendant instead donate \$200,000, over four  
16 years, to a scholarship endowment at the consumer science department of a not-for-profit  
17 institution of higher education and an additional \$50,000 to Step Up Women’s Network.  
18 Dkt. No. 43-1 at 22.

19 The Court is perplexed that Plaintiff continues to include the \$50,000 contribution  
20 to Step Up Women’s Network in the *cy pres* award given the Court’s previous conclusion  
21 that the charity failed to meet the objectives of the statutes at issue in this case.

22 Class Members are women who purchased jeans labeled “Made in USA” that  
23 contained foreign-made components; not abstract women without a specific  
24 injury. The chosen charities do not promote consumer protection. Rather the  
25 chosen charities’ missions are: offering mentorship programs to at risk  
teenage girls [Step Up] . . . .

26 *See* Dkt. No. 37 at 13. Dutch’s explanation for continuing to include this \$50,000  
27 donation to Step Up is equally puzzling. “Dutch has been made aware of Ninth Circuit  
28 legal authority that requires a sufficient nexus between the charitable purpose of the



1 charity and the objects of the underlying statutes (i.e., consumer protection statutes in this  
2 Action) but also notes that its consumer demographic is mostly women.” Dkt. No. 43-1  
3 at 10. Continuing to repeat the fact that Defendant’s clientele is mostly women does not  
4 somehow make Defendant’s charitable donation to Step Up legally sufficient. The Ninth  
5 Circuit’s jurisprudence on *cy pres* awards is not optional or vague, but binding and  
6 unequivocal. A *cy pres* award meets the objectives of the underlying statute when the *cy*  
7 *pres* recipient’s mission and the statute’s goals have a non-tenuous connection. *See*  
8 *Naschin*, 663 F.3d at 1040. Donating to a charity that “focus[es] on helping and meeting  
9 the needs of women in our society” does not meet the underlying objectives of the  
10 consumer protection statutes, no matter how many times Plaintiff emphasizes the point.  
11 Dkt. No. 43-1 at 22. Accordingly, this aspect of the *cy pres* award is legally insufficient.

12 Defendant’s proposed donation to an unnamed, unidentified scholarship  
13 endowment at a consumer science department like the one at California State University,  
14 Northridge is likewise deficient under Ninth Circuit jurisprudence. Plaintiff argues that  
15 making such a donation meets the rigorous *cy pres* standard because “making donations  
16 to support the study of and to advocate for consumer science provides direct benefits to  
17 the consumer population as a whole.” *Id.* The Court disagrees. While noble, making a  
18 scholarship to one or two individuals who intend to study consumer science, does not  
19 target the plaintiff class and fails to provide reasonable certainty that any class member  
20 will be benefitted by the award. *See Naschin*, 663 F.3d at 1040.

21 Yet even if Plaintiffs had, say, proposed that Defendant create a new charitable  
22 entity, as was the case in *Lane v. Facebook*, to distribute settlement funds to promote  
23 consumer protection, such a proposal would still be insufficient because Plaintiff has not  
24 identified any *cy pres* beneficiary. The proposed settlement’s failure to offer a concrete,  
25 identifiable beneficiary of the \$200,000 *cy pres* award prevents this Court from  
26 approving the donation. As stated in *Dennis v. Kellogg Co.*, a case involving a settlement  
27 that similarly lacked a named beneficiary, “[t]he difficulty here is that, by failing to  
28 identify the *cy pres* recipients, the parties have restricted our ability to undertake the

1 searching inquiry that our precedent requires.” 697 F.3d at 867. Likewise, here, the  
 2 Court cannot conduct the rigorous review required of it when Plaintiff has failed to  
 3 identify which consumer science department will receive Defendant’s donation. The  
 4 Court is also not persuaded by any suggestion that this determination might be made at a  
 5 later date, as that is not a legally cognizable reason for approving the settlement now. *See*  
 6 *id.* (“Our concerns are not placated by the settlement provision that the charities will be  
 7 identified at a later date and approved by the court”). As such, the Court also finds this  
 8 portion of the *cy pres* award legally insufficient.

9 In sum, Plaintiff’s repeated failure to abide by Ninth Circuit precedent governing  
 10 *cy pres* awards, standing alone, warrants denying the motion for preliminary approval.  
 11 *See Hanlon*, 150 F.3d at 1026 (“[t]he settlement must stand or fall in its entirety”).

## 12 **2. Gift Codes**

13 Yet another deficiency in the proposed settlement concerns the gift codes.

14 Coupons require class members to pay their own money before they can take  
 15 advantage of the coupon. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934,  
 16 951 (9th Cir. 2015). Both the courts and Congress generally disfavor coupon settlements.  
 17 *See Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). A court must  
 18 “consider, among other things, the real monetary value and likely utilization rate of the  
 19 coupons provided by the settlement” to determine the fairness of a coupon settlement.  
 20 *See In re Online*, 779 F.3d at 951 (citing S.Rep. No. 109–14, at 31).

21 Courts may reject coupons whose face value is far less than its actual value. *See*,  
 22 *e.g., True v. American Honda Co.*, 520 F. Supp. 2d 1052, 1074 (C.D. Cal. 2010).

23 Coupons are worth less than the same amount of cash and therefore cannot be valued at  
 24 face value. *See id.* Some factors a court weighs to determine the value of the coupon are  
 25 the amount of the discount, transferability of the coupon, class member usage rate, and  
 26 the value of the coupon to the defendant. *See id.* at 1073-75; *Radosti v. Envision EMI*,  
 27 *Inc.*, 717 F. Supp. 2d 37, 43 (D.D.C. 2010).

1 Under the previous settlement, class members would have received a gift card  
2 valued at \$20.00. Dkt. No. 38-1 at 4. Here, members of the class will receive at least  
3 \$20 in electronic gift card codes, and possibly more depending on the number of units  
4 purchased by the class member. Dkt. No. 38-1 at 8 (“Defendant will distribute Current  
5 Elliott . . . electronic gift cards valued at \$20.00 each to participating Class Members . . .  
6 for each qualifying product purchased during the Class Period.”). This change in the  
7 proposed settlement does not address the concerns that were raised by the Court in its  
8 April 26 Order denying Plaintiff’s proposed settlement. *See* Dkt. No. 37. There, the  
9 Court concluded that the gift cards were an inadequate remedy because they were worth  
10 significantly less than their face value and because Plaintiff’s underlying claims were not  
11 frivolous. *Id.* at 11. The Court is not now persuaded that these coupons have been  
12 legally cured just because the settlement proposes that a certain subset of class members  
13 (i.e., those who bought more than one of Defendant’s items) will receive more than one  
14 \$20 gift card. The proposed settlement still fails to contradict the Court’s conclusion that  
15 the “face value” of the gift card “is far less than its actual value,” and thus, the Court still  
16 finds this aspect of the settlement problematic.

17 At oral argument, Plaintiff’s counsel acknowledged the Court’s dissatisfaction with  
18 the gift codes, as stated in its April 26, 2016 Order. Nonetheless, Plaintiff suggested that  
19 the gift codes continued to be part of the final settlement because it is the tote bag and not  
20 the e-gift cards that are the linchpin of the restitution. While the Court appreciates  
21 Plaintiff’s point that the gift coupons are an additional rather than the primary remedy,  
22 the Court is still not prepared to approve a settlement that contains deficiencies that the  
23 Court has identified, but the parties have not meaningfully addressed, ameliorated, or  
24 contradicted. Moreover, the Court observes that Plaintiff’s repeated failure to fashion a  
25 settlement that comports with its concerns, only gives the Court more reason to be  
26 suspicious of whether Plaintiff’s counsel are acting in the interest of the class members.  
27 *In re Bluetooth*, 654 F.3d at 947 (“[C]ourts therefore must be particularly vigilant not  
28 only for explicit collusion, but also for more subtle signs that class counsel have allowed

pursuit of their own self-interests and that of certain class members to infect the negotiations.”)

### 3. Tote Bag

Plaintiff additionally proposes that class members receive one denim tote bag, with a retail value of \$128, as part of the settlement. In its tentative order, the Court expressed concern about the value, to the class, of the tote bag and whether or not it was an appropriate remedy. Dkt. No. 48 at 4. At oral argument, Plaintiff’s counsel emphasized that the tote bag has value — that it can be gifted away, sold on eBay, at a garage sale or that it can be worn — and that such value is worth the eight cents, nine cents, or ten cents that arguably represents the difference between the American-made parts and the foreign-made parts present in Defendant’s jeans.

Yet while the Court recognizes that the tote bag is worth more than the minimal amount Defendant saved by selling any given class member a pair of jeans with foreign-made component parts, that miniscule dollar amount is not the essence of Plaintiff’s suit. Plaintiff brought suit under the Consumer Legal Remedies Act, the Unfair Competition Law, and the “Made in USA” statute because Defendant labeled and marketed its jeans as “Made in the USA” when they were, allegedly, “manufactured or produced from component parts that were manufactured outside of the United States.” Complaint ¶ 12, Dkt. No. 1-6 at 4. Given that this is the central allegation of the complaint, the Court remains skeptical that a Current/Elliot tote bag provides value to the class members. *See Koby v. ARS Nat’l Servs., Inc.*, 846 F.3d 1071, 1079 (9th Cir. 2017) (court abused discretion when approving a settlement without “evidence that the relief afforded by the settlement has any value to the class members”). The class members did not buy a tote bag deceptively labeled “Made in the USA,” they bought a pair of jeans.<sup>2</sup> And there is no

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<sup>2</sup> Notably, in *Paz v. AG*, a case upon which Plaintiff relied at oral argument, the approved settlement gifted class members who had bought deceptively-marketed jeans with a free pair of jeans, not a scarf, or a hat, or some other accessory. *See Paz v. AG Adriano Goldschmied, Inc. et al*, 3:14-cv-01372-DMS-DHB (S.D. Cal. filed June 4, 2014), Docket Entries 51, 62.

1 evidence in the record explaining the real economic value of the tote bag, the likely resale  
2 value of the tote bag, or whether the class members are likely to find value in the tote  
3 bag.

4 That is not to say, however, that the tote bag does not have value to the class  
5 members. Indeed, there is too little information available to the Court at this juncture to  
6 make that conclusion. Perhaps, as Plaintiff's counsel indicated at oral argument, class  
7 members will overwhelmingly find the proposed settlement satisfactory. Perhaps they  
8 will not. Regardless, what the Court requires of any preliminary settlement is that  
9 Plaintiff make a showing sufficient for the Court to satisfy the rigorous review required  
10 of it and for the Court to conclude that the proposed settlement is in the interest of the  
11 silent class members. To date, Plaintiff has failed to make any convincing showing.

#### 12 **4. Injunctive Relief**

13 The proposed settlement also contains a permanent injunction.

14 Without admitting any liability or wrongdoing whatsoever, pursuant to California  
15 Business and Professions Code Sections 17203 and 17535, the Enjoined Parties,  
16 and each of them, shall be enjoined and restrained from directly or indirectly doing  
17 or performing any and all of the following acts or practices: representing, labeling,  
18 advertising, selling, offering for sale, and/or distributing any Products that fail to  
comply with the California "Made in USA" Statute.

19 Dkt. No 43-2 at 61. At oral argument, Plaintiff's counsel emphasized that the proposed  
20 injunctive relief is the foundation of the settlement. The Court observes, however, that  
21 the value of injunctive relief does not escape the Court's rigorous review. The settling  
22 parties bear the burden of demonstrating that class members will benefit from the  
23 settlement's injunctive relief. *Koby*, 846 F.3d at 1079. As made evident by the recent  
24 outcome in *Koby v. ARS*, injunctive relief can be deemed "worthless" if it dictates the  
25 Defendant's future behavior, but does nothing to address the past wrongs suffered by the  
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27  
28

1 class. *Id.* at 1079.<sup>3</sup> In addition, injunctive relief may also be deemed “worthless” if it  
2 “does not obligate [the Defendant] to do anything it was not already doing.” *Id.* at 1080  
3 (warning that voluntary behavior adopted by the Defendant, for the purpose of avoiding  
4 further litigation risk, not because of court- or settlement-imposed obligation, imports  
5 minimal value to a settlement). In the proposed settlement, the parties indicated that  
6 Dutch had already “voluntarily revised its labels.” Dkt. No. 43-2. Thus, the Court  
7 observes that it has reason to question whether injunctive relief, standing on its own,  
8 would be a sufficient remedy for the class.

### 9 **5. Clear Sailing Agreement**

10 The proposed settlement also contains a “clear sailing” provision stating, in  
11 relevant part, that plaintiff’s attorneys will seek no more than \$175,000 in fees and the  
12 defense will not oppose the fee petition. As Plaintiff herself acknowledges, the Ninth  
13 Circuit has expressed concern about “clear sailing” provisions because they carry “the  
14 potential of enabling a defendant to pay class counsel excessive fees and costs in  
15 exchange for counsel accepting an unfair settlement on behalf of the class.” *In re*  
16 *Bluetooth*, 654 F.3d at 947. For this reason, the *In re Bluetooth* court identified “clear  
17 sailing” provisions as a sign of collusion between plaintiffs and defendants and instructed  
18 courts to remain attentive to them. *Id.*

19 With this guidance in mind, the Court observes that although the “clear sailing”  
20 provision is not a bar to settlement approval, it is a red flag indicating that the settlement  
21 may have been unfairly reached. As such, to the extent that the provision appears in any  
22 proposed settlement agreement, the Court will continue to remain vigilant as to the  
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26 <sup>3</sup> “The settlement’s injunctive relief is worthless to most members of the class because it merely dictates  
27 the disclosures ARS must make in future voicemail messages for a period of two years. That relief could  
28 potentially benefit class members who are likely to be contacted by ARS during the two-year window,  
but there is an obvious mismatch between the injunctive relief provided and the definition of the  
proposed class.”



1 underlying fairness of the proposed settlement that accompanies it and whether the  
2 settlement meets the interests of the silent class members.

3 **D. Settlement as a whole**

4 The Court must evaluate the “settlement as a whole, rather than assessing its  
5 individual components.” *Lane*, 696 F.3d at 818. The district court does not have the  
6 authority to “delete, modify or substitute certain provisions” of the settlement. *Hanlon*,  
7 150 F.3d at 1026. “The settlement must stand or fall in its entirety.” *Id.* Given the  
8 above-mentioned defects, the Court cannot approve Plaintiff’s proposed settlement.  
9 Notwithstanding Plaintiff’s protestations to the contrary, the deficiencies in Plaintiff’s  
10 proposal do not fall within the “range of possible approval.” The Court must be satisfied  
11 that any proposed settlement is “fair, adequate, and reasonable,” as that phrase has been  
12 defined by binding, legal precedent, and that any Court approval be supported by sound  
13 legal findings and arguments. Accordingly, the Court concludes that any future motion  
14 for preliminary approval must meaningfully comport with the conclusions laid out in this  
15 order, and the two previous orders denying preliminary approval, and address all of the  
16 relevant concerns addressed therein. The Court will not be persuaded by mere citation to  
17 cases in this district that have approved settlements that are described as “similar.”  
18 Rather, the Court must be satisfied that the record and arguments before it warrant a  
19 finding that the settlement is presumptively “fair, adequate, and reasonable” and ready to  
20 be disseminated to the class.

21 **CONCLUSION**

22 The Motion for Preliminary Approval of Class Action Settlement is **DENIED**. The  
23 Court will permit the parties an additional sixty (60) days from the issuance of this Order  
24 to file a renewed motion for preliminary approval of class action settlement that cures the  
25 deficiencies identified by this Order.

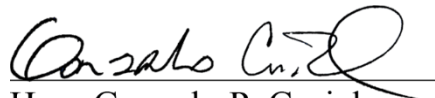
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**IT IS SO ORDERED.**

Dated: March 2, 2017

  
Hon. Gonzalo P. Curiel  
United States District Judge