UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH CHAPMAN et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:16-CV-1114
TRISTAR PRODUCTS, INC.	)	Judge James S. Gwin
Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Other Authorities

INTRODUCTION

The United States, by and through undersigned counsel, respectfully submits the following Statement of Interest regarding the proposed class action settlement in this matter. The settlement would provide substantial benefits to class counsel and the named plaintiffs but leaves millions of class members with nothing more than restrictive "credits" and a release of their claims. For good reason, the Class Action Fairness Act requires careful scrutiny of this sort of coupon settlement, where value flows mainly to the attorneys rather than the represented class. The United States urges the Court to apply that scrutiny here and reject the proposed settlement as currently structured.

The United States, through the Department of Justice's Consumer Protection Branch, receives notice of all proposed class action settlements under the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711–1715 ("CAFA"). While the United States does not share the parties' extensive knowledge of the record or the strengths and weaknesses of the claims in this case, the Consumer Protection Branch litigates on behalf of consumer interests and has relevant experience in bringing consumer harm to light and crafting appropriate remedies. Following examination of the proposed settlement consistent with CAFA, the United States notes the following concerns that lead it to recommend rejecting the proposed settlement in its current form.

First, the limited benefits offered to class members seriously call into question the fairness of the proposed settlement. *See* Fed. R. Civ. P. 23(e)(2); 28 U.S.C. § 1712(e). While settlements by definition are a product of compromise, the unnamed plaintiffs here release their product claims—and potentially personal injury and property damage claims—in exchange for a warranty of nominal value and coupons that require spending significant additional money with the very defendant who allegedly harmed them. The dismal claims rate, which almost certainly will top

out at less than one percent, strongly suggests that the vast majority of class members do not want this proffered relief. The named plaintiffs, in contrast, stand to receive the type of disproportionately large incentive awards that Sixth Circuit case law recognizes can be a disincentive to pressing the claims of unnamed plaintiffs. Class representatives also receive personal injury settlements without being required to opt out of the class action settlement—a benefit not available to other injured class members who have not already resolved such claims.

Second, while the settlement confers extremely limited value to unnamed class members, it unreasonably provides for significant compensation to the lawyers who brought the case. *Settlement Agreement* (Dkt. 126-1) at § VIII.A (class counsel may apply for an award of fees and expenses "in an amount within a range agreed to by the Parties"). Tristar does not oppose class counsel's requests for fees and expenses topping $2.5 million total. *Mot. for Award of Attorneys' Fees* (Dkt. 133) at 2-3. In the class action context, attorney awards should be commensurate with the value actually obtained for the class.

Because of these fairness concerns, the Court should not approve the settlement as currently proposed. At a minimum, the United States respectfully urges the Court to postpone its decision on attorney's fees until the conclusion of the 90-day redemption period for the coupons, at which point the actual value of the settlement to class members can better be quantified.

LEGAL STANDARD

I. Appearance of the United States

Congress has authorized the Attorney General to send "any officer of the Department of Justice . . . to any State or district in the United States to attend to the interests of the United States in a suit pending in a court in the United States." 28 U.S.C. § 517. CAFA requires class action defendants to notify the Attorney General and state officials of proposed class action settlements, which plainly contemplates a role in the process for the Attorney General. 28 U.S.C. § 1715.

While the CAFA notice provision does not grant any specific authority to, or impose any obligation on, federal or state officials, 28 U.S.C. § 1715(f), the Act's legislative history shows that Congress intended the notice provision to enable public officials to "voice concerns if they believe that the class action settlement is not in the best interest of their citizens." "The Class Action Fairness Act of 2005," S. Rep. 109-14 (2005) ("Senate Report") at 5. Congress expected that CAFA notifications would "provide a check against inequitable settlements" and "deter collusion between class counsel and defendants to craft settlements that do not benefit injured parties." *Id.* at 35. It is in the spirit of CAFA that the United States offers its views here.

II. Coupon Settlements and CAFA

Congress enacted CAFA to provide adequate notice of class actions to parties, promote consistent application of governing law, and establish a mechanism for class action settlements to provide "meaningful recovery to the class members" as opposed to "simply [a] transfer [of] money from corporations to class counsel." Senate Report at 4; *see also Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 386 (6th Cir. 2016) (describing how CAFA was enacted "in response to 'perceived abusive practices by plaintiffs and their attorneys in litigating major class actions . . . .'") (quoting *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1243 (10th Cir. 2009)). In particular, Congress found that certain past class action settlements had harmed class members with legitimate claims, while awarding large attorney's fees to class counsel. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 2(a) (2005). Along with reforms that enabled parties to more easily bring class action suits to federal court, CAFA included a "Consumer Class Action Bill of Rights" intended "to help ensure that class actions do not hurt their intended beneficiaries . . . address a number of common abuses . . . [and] encourage greater judicial scrutiny of proposed class action settlements." Senate Report at 30.

The CAFA Bill of Rights reflects particular congressional concern with "coupon settlements," which provide eligible class members with coupons or vouchers for future purchases from the defendant. *Id*. at 20. Such settlements often provide class members with awards that hold little *practical* value while creating the *illusion* of substantial value to justify paying class counsel generous attorney's fees. *See, e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). Coupon settlements "often do not provide meaningful compensation to class members; they often fail to disgorge ill-gotten gains from the defendant; and they often require class members to do future business with the defendant in order to receive compensation." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1062 (C.D. Cal. 2010) (quoting *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007)). CAFA therefore expressly established guardrails governing coupon settlements. 28 U.S.C. § 1712. These provisions mandate "judicial scrutiny of coupon settlements" in terms that reference the standard Rule 23(e) inquiry and emphasize that approval of such a settlement requires a hearing and written findings that the settlement is actually fair, reasonable, and adequate. 28 U.S.C. § 1712(e).

Aside from the special scrutiny CAFA mandates for coupon settlements, courts in the Sixth Circuit assess the following factors in evaluating class action settlements: "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest." *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). In examining the fairness of a settlement, the Sixth Circuit also examines whether there is a "disparity in the relief afforded under the settlement to the named plaintiffs, on the one hand, and the unnamed class members, on the other hand."

Vassalle v. Midland Funding LLC, 708 F.3d 747, 755 (6th Cir. 2013). The proponents of a settlement bear the burden of proving that it is fair, adequate, and reasonable. *In re: Dry Max Pampers Litig.*, 724 F.3d 713, 719 (6th Cir. 2013).

FACTUAL AND PROCEDURAL BACKGROUND

Class members consist of consumers who purchased for personal use various models of pressure cooker appliances supplied, marketed, sold, and/or distributed by defendant Tristar Products Inc. ("Tristar") between March 1, 2013 and January 19, 2018. *See Settlement Agreement* (Dkt. 126-1) at §§ I.KK, I.RR, I.N; *Preliminary Approval Order* (Dkt. 128) at 2, 5. The pressure cookers were sold both online and through third-party retailers. *Complaint* (Dkt. 1) at 2. Plaintiffs alleged that the pressure cookers contained a defect that could cause super-heated liquid to "erupt" out of the appliance. *Id.* at ¶ 5.

Ultimately, the Court certified certain classes for certain causes of action. Personal injury claims were excluded from the suit, while certain economic damage claims proceeded. *Opinion & Order Resolving Docs. 43, 45, 47* (Dkt. 69) at 2, 7–10. The Court found that the class action could proceed with an "opt-out provision" for individuals who wished to pursue personal injury or property damage claims. *Id*. at 9-10. The Court also ruled that to prevail on their economic damage claims, Plaintiffs would need to establish both that the products had a defect and that the defect rendered the products "worthless." *Opinion and Order* (Dkt. 86) at 2–5. On the afternoon

of the first day of trial, the parties resumed settlement discussions and reached a tentative settlement agreement. *Motion for Fees* (Dkt. 133) at 7–8.[1]

The parties estimate that the proposed settlement agreement now before the Court covers more than 3.2 million pressure cookers sold up to January 2018. *Mot. for Preliminary Approval* (Dkt. 126) at 15. The settlement provides class members with: (a) a year-long limited warranty for pressure cookers subject to the class action commencing on the effective date of the settlement (worth approximately $5); and (b) a non-transferrable "credit" of $72.50 toward the purchase of three different Tristar products, at least two of which (including a newer-model pressure cooker) appear to cost $159. *Settlement Agreement* (Dkt. 126-1) at § IV; Exhibit A.[2] The credits expire in 90 days and can be used only to buy the specified products directly from Tristar. *Settlement Agreement* (Dkt. 126-1) at § I.O. Claimants must pay the difference between the coupon amount and the price of the items, as well as "shipping, processing and handling charges." *Id.* Claimants will not be able to take advantage of offers available to other consumers purchasing the same product, such as "installment financing, bonuses, or incentives such as buy one get one free or at

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[1] A similar action originally filed in the Eastern District of California was consolidated with the present case for a global resolution of claims. *See Pinon v. Tristar Products, Inc.*, Case No. 1:16-at-00177 (E. D. Ca.); *Order to Consolidate* (Dkt. 125); *Mot. for Preliminary Approval* (Dkt. 126) at 8-9.

[2] Tristar's 10-quart pressure cooker currently costs $159.93 plus $29.99 shipping and handling through the company's website. *See* Exhibit A, https://www.unitycarts.com/_pressure_cooker_PPX10QTWB2/cart.aspx (last accessed June 4, 2018). An extended warranty offered for the pressure cookers is billed as costing $5 per year. *Id.* The same pressure cooker is available at Amazon.com for $159.99 and free shipping. *See* Exhibit B, https://www.amazon.com/Power-Pressure-Cooker-XL-10/dp/B01BVV07KO (last accessed June 4, 2018). Tristar's Power Air Fryer currently costs $159.96 with free shipping (whether Tristar collects handling fees is not clear from the website). *See* Exhibit C, https://www.unitycarts.com/power_airfryer_oven_PAO439TWF/cart.aspx (last accessed June 4, 2018). The "Copper Chef XL Precision Induction Cooktop Set" does not currently appear to be sold on Tristar's webpage.

a reduced price." *Id.* To collect these benefits, claimants must fill out a form and watch a safety video regarding Tristar pressure cooker products. *Id.* at § IV.B.

Under the settlement, class members release all claims relating to defects in the pressure cookers at issue in the litigation, including claims for personal injury and/or property damage. *Id.* at § I.LL; *Mot. for Preliminary Approval* (Dkt. 126) at 19 (individuals "who sustained personal injuries may have an interest in pursuing individualized adjudication of their claims."). The settlement notice emphasizes that individuals must opt out of the settlement class to pursue any personal injury or property damage claims. *Long-Form Notice* (Dkt. 126-2) at 3. The settlement agreement explains that the named plaintiffs will receive $25,000 toward their personal injury and property damage claims, apparently while still representing unnamed class members. *Settlement Agreement* at §§ I.GG, VIII.B. Named plaintiffs also may apply to this Court for "incentive awards" of up to $10,000 "to compensate them for their efforts" in filing the litigation and "achieving the Benefits" listed above on behalf of the unnamed class members. *Id*. at §§ I.W, I.GG.

The Court preliminarily approved the proposed settlement on January 19, 2018. *Preliminary Approval Order* (Dkt. 128) at 5. As of May 14, just 10,382 consumers out of some 3.2 million potential class members had filed claims requesting the warranty and the coupon (and 28 had opted out). *Mot. for Fees* (Dkt. 133) at 10. Class counsel estimated that approximately 40–50 new claims were being received each day, *id.*, which would mean around 13,000 claims by the July 4, 2018, deadline. Even assuming the claims rate increases somewhat before July, it is almost certain that well under one percent of potential class members—perhaps half of one percent—will file a claim in this case. As of the objection deadline, no objections from class members have been posted to the case docket.

ARGUMENT

I. The Proposed Settlement is Unfair Because the Benefit Conferred on Class Members is Worth Little to Nothing, While Named Plaintiffs Receive Disproportionately Preferential Treatment.

A. The "credits" are coupons that warrant special scrutiny under CAFA.

As an initial matter, the "credits" at issue clearly are coupons within the meaning of CAFA. While the statute does not define "coupon," legislative history supports the commonsense conclusion that a coupon is a discount on products or services offered by the defendant. *See* Senate Report at 15 (citing with disapproval class action settlements in state courts where "class members receive nothing more than promotional coupons to purchase more products from the defendants"). Commentators and courts have agreed with that basic formulation. *See* Newberg On Class Actions § 12:11 (5th ed.); *see also Radosti v. Envision EMI*, 717 F. Supp. 2d 37, 54 n.16 (D.D.C. 2010) ("Although Congress did not define the term 'coupon' in the statute, courts have generally considered a coupon settlement to be one that provides benefits to class members in the form of a discount towards the purchase of a product or service offered by the defendant.").

In general, coupon settlements are "a warning sign of a questionable settlement." *Eubank v. Pella Corp.*, 753 F.3d 718, 725 (7th Cir. 2014). The key characteristic of a coupon—and the one that makes its worth to class members so suspect—is that it "force[s] future business with the defendant." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); *see also*, *e.g.*, *Martina v. L.A. Fitness Int'l, LLC*, No. 2:12-cv-2063, 2013 WL 5567157, at *4 (D.N.J. Oct. 8, 2013) (finding a $100 credit towards a gym membership was a coupon because "[i]t is a credit which requires class members to spend money in order to realize the benefit"). Coupons cannot be pocketed like cash and hold value only if plaintiffs choose to engage in the additional transactions. Settlements involving coupons thus present an enhanced risk that "some percentage of the [coupon] claimed by class members will never be used and, as a result, will not

constitute" an expenditure of value transferred from the defendant to the class members. *Synfuel Techs.*, 463 F.3d at 654. In fact, coupons forcing class members to spend additional money with the defendant can amount to marketing tools that benefit the defendant more than the class. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 807–08 (3d Cir. 1995) (coupons toward purchase of new truck found to be "in reality, a sophisticated marketing program"); Senate Report at 16 (describing how some "coupons are a promotional opportunity and not a penalty").

Questions about the worth of coupons can lead courts to reject such settlements, especially without more information about the coupon's true monetary value. *See, e.g.*, *Figueroa*, 517 F. Supp. 2d at 1329 (rejecting a settlement that provided class members with $19 coupons to be used at defendant's retail store because, among other reasons, very few class members were likely to redeem the coupons); *Sobel v. Hertz Corp.*, No. 3:06-cv-545, 2011 WL 2559565 (D. Nev. June 27, 2011) (rejecting coupon settlement and noting that the fact that the coupons "may only be redeemed with the issuing defendant" forces class members "to do additional business with the very defendants that wronged them"). It is for good reason that CAFA requires particular scrutiny of coupons such as those contemplated here.

B. The proffered coupons provide little benefit to class members.

The restrictive nature of coupons calls for special consideration when assessing whether a coupon settlement is fair, adequate, and reasonable, such as: (1) whether the coupons are transferable to other consumers, (2) whether a secondary market exists where they could be converted to cash, (3) whether the coupon compares favorably with other bargains generally available, and (4) whether it is likely that class members would actually redeem the coupons. *See* Hon. Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d ed. 2010) ("Rothstein et al.") at 17-18, *available at*

https://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf.[3] In this case, all of these factors demonstrate the low value of the Tristar coupon to class members.

First, the credits would be non-transferable, which significantly limits their utility and value. *See, e.g.*, *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701 (7th Cir. 2015) (noting that "the potential for abuse is greatest when the coupons have value only if a class member is willing to do business again with the defendant who has injured her in some way, when the coupons have modest value compared to the new purchase for which they must be used, and when the coupons expire soon, are not transferable, and/or cannot be aggregated").

Second, the settlement provides no provision for class members to convert coupons to cash. *Settlement Agreement* (Dkt. 126-1) at § I.O. Such coupons by nature must be worth less than face value. *See, e.g.*, *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001) ("[C]ompensation in kind is worth less than cash of the same nominal value.").

Third, the coupons do not compare favorably with other potential bargains. Claimants must select from one of just three Tristar products, purchase them directly from Tristar, at the price set by Tristar, and must also pay shipping and handling expenses to Tristar. Furthermore, claimants must use the coupons within 90 days. The coupons cannot be used to purchase Tristar products from third-party online or local retailers to take advantage of better prices, sales, reduced shipping or handling fees, or promotional offers other retailers might make available.

Class counsel emphasizes that "on average, claimants can obtain through this settlement between 45.3 percent to 72.5 percent of the maximum damages Plaintiffs sought at trial, plus a

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[3] The Federal Judicial Center's class action guide echoes the concern with coupon settlements, noting that they are a "hot button indicator[]" of a settlement term that "show[s] [its] potential unfairness on [its] face." Rothstein et al. at 17.

warranty extension." *Mot. for Fees* (Dkt. 133) at 19. But a review of available facts reveals that the settlement's benefits are not nearly as "impressive" as counsel claims. As noted above, at least two of the proffered products appear to cost approximately twice as much as the face value of the settlement coupon. The pressure cooker available to coupon holders (all individuals with allegedly defective pressure cookers) is a 10-quart model that costs about $190 with shipping and handling fees included. *See Settlement Agreement* (Dkt. 126-1) at § 1.O; Exhibit A (Tristar webpage). Under the terms of the settlement agreement, coupon holders may not take advantage of "installment financing, bonuses, or incentives such as buy one get one free or at a reduced price." *Settlement Agreement* (Dkt. 126-1) at § I.O. Thus, claimants using coupons would not receive incentives such as the "bonus Copper Chef pan" or the half-price "2nd pressure cooker" offered to the general public. Instead, class members must expend approximately $117 to purchase the new 10-quart pressure cooker—more than the amount most class members paid for their original 6-quart pressure cookers. *See Mot. for Fees* (Dkt. 133) at 19 ("The price range of the Pressure Cookers purchased by Settlement Class members was approximately $100.00 to $160.00, with the six-quart model that cost $100.00 being by far the highest seller.").

Fourth, the low number of claims compared to the size of the class illustrates the extremely small percentage of available coupons likely to be redeemed.[4] While approximately 3.2 million

[4] Unsurprisingly, redemption rates in coupon cases traditionally are very low. *See, e.g.*, *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 971 (8th Cir. 2016) (redemption rate of 0.045%); *Davis v. Cole Haan, Inc.*, No. 11-cv-01826, 2015 WL 7015328, at *2 (N.D. Cal. 2015) (noting that 336 of 13,918 class members redeemed voucher, or 2.4%); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445, 1448 (2005) (explaining that coupon redemption rates in settlements are "tiny" and "mirror the annual corporate issued promotional coupon redemption rates of 1-3%").

of the pressure cookers were sold, just 10,382 class members had claimed the coupons as of May 14, with another 40 to 50 claims trickling in each day. It seems a safe bet that the final claims rate here—much less the actual *redemption* rate—will be well under one percent. *See, e.g.*, *Cannon v. Ashburn Corp.*, No. CV 16-1452 (RMB/AMD), 2018 WL 1806046, at *16 (D.N.J. Apr. 17, 2018) (noting the "claims rate [in a coupon settlement] does not equal redemption rate . . . ."). Put another way, it is reasonable to infer that *more than 99 percent* of the class members either did not receive notice or do not view these coupons as valuable and desirable enough to watch the safety video and fill out the claim form. Such a small claims rate directly calls into question the fairness of the settlement. *See, e.g.*, *In re: Whirlpool Corp. Front–loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000 (MDL 2001), 2016 WL 5338012, at *20 (N.D. Ohio Sept. 23, 2016) (distinguishing the case before it from a case with a "minuscule" 0.25% coupon redemption rate).

As noted in the Federal Judicial Center guide, "[d]etermining the precise value to the class of the rare beneficial coupon settlement . . . calls for hard data on class members' redemption of the coupons." Rothstein et al. at 18; *Cannon*, 2018 WL 1806046, at *16 (redemption data necessary to determine precise value to the class); *see also Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 28 (D. Conn. 1997) (rejecting coupon settlement because "[t]he value of these coupons is too speculative. Absent a transfer option or other guaranty of some minimal cash payment, there is a strong danger that the settlement will have absolutely no value to the class"). Even if every one of the claimants in this case at the current claims rate were to spend the money necessary to redeem their "credits," the total face value of the coupons used would be around $1 million (assuming approximately 13,000 claims). But the true value of this settlement cannot be assessed by simply multiplying the face value by the number of redeemed coupons. Such an estimate does not take into account the fact that most class members do not want the coupons, and those that do

must turn over significant money of their own and forego incentive benefits (such as free items) that Tristar offers to members of the public.

C. The named plaintiffs received disproportionately large benefits as compared to unnamed class members.

Where a class action settlement "gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members . . . such inequities in treatment make a settlement unfair." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013). The proposed settlement creates a significant disparity between the benefits received by the named class representatives and the benefits offered to everyone else. That is another reason to reject the settlement in its current form.

The proposed settlement agreement states that named plaintiffs each will receive a $25,000 payment "in consideration for personal injury and property damage claims" and up to $10,000 more as an incentive award "subject to approval by the Court." *Settlement Agreement* (Dkt. 126-1) at ¶¶ I.GG, VIII.B. Class counsel's motion for fees includes a request for $10,000 incentive payments to class representatives. *Mot. for Fees* (Dkt. 133) at 24. In contrast, unnamed class members would receive the low-value coupons and one-year warranty discussed above. Moreover, unnamed class members must opt out of the class settlement altogether if they want to pursue unresolved personal injury or property damage claims. *Settlement Agreement* (Dkt. 126-1) at ¶ V.A. Given the difficulty of providing notice to millions of potential class members, it is quite possible that some unnamed plaintiffs could unknowingly lose their ability to sue for personal injuries or property damage related to pressure cookers. Named plaintiffs, by contrast, stand to receive *both* a personal injury/property damages award *and* an incentive payment for work in the class action suit.

The additional remuneration received by the named plaintiffs presents a similar sort of preferential treatment to what the Sixth Circuit rejected in *Vassalle v. Midland Funding LLC*. In *Vassalle*, the Sixth Circuit compared the $17.38 received by unnamed class members with the value of one named plaintiff's forgiven debt of $4,516.57 and rejected a settlement as "unfair to the unnamed class members" because the "$17.38 payment . . . [w]as *de minimis*" in comparison. *Vassalle*, 708 F.3d at 756. Here, even setting aside the incentive payments (which the *Vassalle* named plaintiffs also received) and accepting the face value of the $72.50 coupon and the $5 warranty, the unnamed class members' possible benefit is *smaller* as a percentage of the named plaintiffs' $25,000 personal injury/property damage payments (0.31%) than the analogous ratio in *Vassalle* (0.38%). As compared to the named plaintiffs, unnamed plaintiffs unfairly receive a perfunctory, *de minimis* benefit.

At a minimum, the Court should request documentation supporting the size of the incentive awards to determine whether they are reasonable. Incentive awards may be granted to class representatives for "often extensive involvement with a lawsuit," and they can represent a permissible form of preferential treatment. *See Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). But under Sixth Circuit case law, named plaintiff incentive payments must be "scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain." *Id.* at 897–98. This is because large incentive payments "provide[] a *disincentive* for the class members to care about the adequacy of relief afforded unnamed class members." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013). With such concerns in mind, the Sixth Circuit recently required "specific documentation" to support a proposed $10,000 incentive payment "in the manner of attorney time sheets—of the time actually spent on the case by each recipient of an

award." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 311 (6th Cir. 2016); *see also*, *e.g.*, *Underwood v. Carpenters Pension Tr. Fund*, No. 13-CV-14464, 2017 WL 655622, at *12 (E.D. Mich. Feb. 17, 2017) (applying *Shane Group* and awarding reduced incentive fee awards of $5,000 and $2,500 due to lack of documentation of time expended by class representatives). A similar documentation request here is appropriate.

II. Because of the Imbalance Between the Requested Attorney's Fees and the Value to the Class, this Court Should Defer Ruling on the Attorney's Fees Request Until the End of the Redemption Period

The Sixth Circuit directs district courts assessing requests for attorney's fees to weigh several factors: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 280 (6th Cir. 2016) (quoting *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009)). With the first factor in mind, and the imbalance between the requested attorney's fees and the class benefit, the United States respectfully suggests that the Court—to the extent it does not reject the proposed settlement for the reasons noted above—at least defer awarding attorney's fees until the close of the coupon redemption period.

Typically, courts view the attorney's fee factors through the lens of two calculation methods: the lodestar method, which "better accounts for the amount of work done," and the percentage-of-fund method, which "more accurately reflects the results achieved." *Gascho*, 822 F.3d at 279. It is within the discretion of the district court to "select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Id*.

Class counsel here use the lodestar method in calculating their fee request. Assuming CAFA allows the lodestar method in a coupon settlement,[5] CAFA makes clear that such fee awards are subject to the Court's approval. *See* 28 U.S.C. § 1712(b). As other courts have found, lodestar calculations "may produce an unreasonably high award" in coupon settlements where "the value of redeemed coupons is minimal." *Galloway*, 833 F.3d at 975; *see also HP Inkjet*, 716 F.3d at 1179 ("Indeed, if the legislative history of CAFA clarifies one thing, it is this: the attorney's fees provisions of § 1712 are intended to put an end to the 'inequities' that arise when class counsel receive attorney's fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class.") (citing Senate Report at 29–32). As the Eighth Circuit held, the "degree of success obtained" by class counsel is the most critical factor in evaluating class action fees. *Galloway*, 833 F.3d at 975. Therefore, while "[a] percentage of the fund cross-check is optional," *Gascho*, 822 F.3d at 28–82, such a check produces a useful measure of the reasonableness of a proposed lodestar calculation. *See, e.g.*, *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).

Performing this check here further underscores the unreasonableness of the proposed lodestar calculation. "The first step in the percentage of the fund method is to determine the total monetary value of the Settlement Agreement to the Settlement Class." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 797 (N.D. Ohio 2010), *on reconsideration in part* (July 21,

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[5] There is a circuit split between the Ninth Circuit and certain other Courts of Appeal on the question of whether the lodestar method is permissible at all in a coupon settlement case. *Compare HP Inkjet*, 716 F.3d at 1183–85 *with In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 707 (7th Cir. 2015) (disagreeing with the *HP Inkjet* decision, and holding that "[s]ubsections (a) and (b) [of 28 U.S.C. § 1712] . . . fit together to force a choice between the lodestar method and a percentage of coupons redeemed") *and Galloway v. Kansas City Landsmen, LLC*, 833 F.3d 969, 975 (8th Cir. 2016) (agreeing with *Southwest Airlines*). The United States assumes for purposes of this filing, and without taking a position, that it could be appropriate for class counsel to use the lodestar method in a coupon settlement.

2010). Precisely how to calculate the value of the total class benefit is a "hotly contested issue." *Id.* CAFA envisions that in a coupon settlement, expert testimony may be necessary to estimate the true worth of the coupons. 28 U.S.C. § 1712(d). In *Gascho*, the Sixth Circuit found that a district court could, in its discretion under the circumstances of that case, value a class benefit based on the midpoint between the total relief made *available* to all class members and the actual payment made to claimants. *Gascho*, 822 F.3d at 288. But *Gascho* involved a *cash settlement fund* with an obvious intrinsic value to each class member to whom an award was made available. *Id*. at 273-74. The proposed relief here is a coupon of dubious value.

Contrary to class counsel's arguments, the Tristar coupons will not grant class members an impressive percentage of the economic damages they sought through trial. *Mot. for Fees* (Dkt. 133) at 19. Rather, class members would receive merely the opportunity to buy (albeit at a discount) another product from the defendant who allegedly wronged them, in many cases expending more money than they had paid for their original pressure cooker. The meager claims rate confirms the low value the class puts on that bargain. While class counsel may be able to demonstrate a particular number of hours worked at particular rate to achieve this end result, it is not enough in a class action simply to put in time. "The analogy to hourly billing by law firms fails because law firms bill clients who have agreed to be billed on that basis. Class counsel don't have clients with whom they negotiate billing." *Redman v. RadioShack Corp*., 768 F.3d 622, 635 (7th Cir. 2014) (reversing approval of coupon settlement with attorney fees higher than total value of coupons). A lodestar analysis in a class action case that ignores the critical disparity between an attorney fee request and the actual value of the proposed benefit to unnamed plaintiffs is not appropriate.

Where attorneys seek a non-contingent cash award in a coupon settlement, the court should "carefully scrutinize" the agreement and "refuse to allow attorneys to receive fees based on an inflated or arbitrary evaluation of the benefits to be delivered to class members." Federal Judicial Center, Manual for Complex Litigation § 21.71 (4th ed.). Accordingly, it "is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution process is complete." *Id.*; *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 (3rd Cir. 2013) (citing Manual for Complex Litigation § 21.71). Postponing the final assessment of the fee award in this case would result in a relatively minimal delay, given the narrow 90-day coupon redemption window. Data regarding actual redemption rates would permit the Court more fully to evaluate the benefits received by the class. *See* Manual for Complex Litigation at § 21.71 & n.1006 ("[The] single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society." (*quoting* Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 490 (2000))).[6]

CONCLUSION

The terms of the proposed settlement oblige class members to spend their own money to purchase additional products from the company that allegedly put them in danger. Meanwhile, the monetary value of the settlement flows almost entirely toward class counsel. CAFA demands

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[6] In their fee request, class counsel state under the heading "Societal Interest" that "more recent designs of the product have incorporated additional safety mechanisms, which will make the products safer even for those future consumers who are not a part of the Settlement Class." *Mot. for Fees* (Dkt. 133) at 21. It is not clear to what extent the class action or the class action settlement had anything to do with this referenced redesign. The Settlement Agreement itself does not mention any product redesign. Without more information, the settlement should not be interpreted as incorporating binding injunctive relief.

careful examination of such arrangements to determine whether the result for class members is fair, reasonable, and adequate. Here, it is not. This Court should not approve the settlement in its current form, where the value received by class members is so low and the proposed fees to their counsel are so high. At the least, if the Court accepts this settlement, it should postpone consideration of the attorney fees request until after the coupon redemption period, when the value of the benefit to the class will be better understood.

June 6, 2018

Respectfully submitted,

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Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Ohio using the CM/ECF system. All counsel will be notified through that system.

s/Alan J. Phelps
Alan J. Phelps
Consumer Protection Branch

EXHIBIT A

POWER PRESSURE COOKER XL™

AS SEEN ON TV

TWO GREAT WAYS TO ORDER!

FILL OUT THE INFORMATION BELOW OR CALL TOLL FREE 1-800-649-7898

SELECT PAYMENT AND QUANTITY

Includes: 10 Quart Power Pressure Cooker XL and Bonus Items	Select Payment	Select Quantity
	1 Payment of $159.93 + $29.99 S&H	Select Quantity

Get a 2nd Pressure Cooker for Half Price!

You can get a 2nd Power Pressure Cooker XL for 1/2 Price!

Each additional 6 Qt is just $49.95 + $29.99 S&H, 8 Qt is just $64.98 + $29.99 S&H, and 10 Qt is just $79.95 + $29.99 S&H.

Please select the quantity you would like to add to your order.

Select Size Select Quantity

Don't Forget to Add the Lid!

Your Copper Chef pan can be used to cook almost anything! That is why most of our customers are adding the glass lid to their order.

Each lid if only $14.97 plus no additional S&H.

The lid includes a steam release vent and lets you simmer, steam and more!

Select 'YES PLEASE' to upgrade each pan to include the lid!

Select Upgrade

Power Pressure Cooking – Hard Cover Book!

Our Customers have requested more recipes - Eric has delivered with his Hard Cover Recipe Book!

• 138 recipes made for your Power Pressure Cooker!
• 8 Different Recipe Categories - Soups & Chilies, Appetizers, Rice & Pasta, Poultry, Meat, Seafood, Vegetarian, and Sweets!

You can add Eric's recipe book to your order for only an additional $29.97 with **FREE SHIPPING!**

Please select the quantity you would like to add to your order.

Select Quantity

Protect Your Purchase! 6 Year Protection Plan!

We know that life happens – whether accidents, power surges or general wear and tear – so we developed our 6-year Protection Plan that you can add to your order for just $30.00.

- One fee covers your entire order!
- Costs a mere $5.00 per year!

All you have to do is return your unit and we'll replace it and ship it back at no additional cost. It truly is that simple!

Select 'YES PLEASE' to add a 6 Year Protection Plan to your order!

Please Select

ENTER ZIP CODE

State tax will be added to orders for:

CT, FL, NJ, NV, NY, PA

***Enter Zip Code/ Postal Code:**	

ORDER SUMMARY

Product Ordered	Quantity	Price	P&H	Item Total
	0	$0.00	$0.00	$0.00

Have a promo code?

Apply

Subtotal:	$0.00
Processing & Handling:	$0.00

Tax:	$0.00
Order Total:	$0.00

PLEASE ENTER EMAIL ADDRESS

***E-mail:**

PAYMENT METHOD - Please enter your payment information below:

MasterCard VISA AMERICAN EXPRESS DISCOVER PayPal

*** Payment Type:**

*** Credit Card Number:**

Credit Card

*** Card Validation #:**

Help

*** Expiration:**

--Month-- --Year--

SHIPPING ADDRESS

*** First Name:**

*** Last Name:**

*** Address1:**

Address2:

*** City:**

*** State:**

*** Phone:**

☐ Check here if your billing address is different from the shipping address entered above.
Important: Billing Name, Address, and Zip Code must be the same as on your billing statement

* Indicates a required field.

Your Order is covered by our 60 Day Money Back Guarantee, Less Processing and Handling, which starts from the day you
receive your shipment.

Standard Delivery Time : 7 - 10 Business Days

PROCESS ORDER

Your card will be charged after you click on the 'PROCESS ORDER' button.

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EXHIBIT B

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Tristar Products Inc.

Power Pressure Cooker XL 10 Qt

318 customer reviews | 174 answered questions

Price: $159.99 & **FREE Shipping**.Details

In Stock.

Want it Sunday, June 3? Order within **5 hrs 6 mins** and choose **Standard Shipping** at checkout. Details

Ships from and sold by Amazon.com. Gift-wrap available.

- One touch preset buttons/Automatic Keep Warm Mode/Slow Cooker Option/ Digital Display
- Safe Lock Lid with Steam release/ Non stick Inner Pot
- Ideal for Canning, Families and holidays
- Replaces six common devices: Slow cooker, Canner, Soup Maker, Steamer, Cookware and Rice Cooker
- 10 Qt Capacity- Dimensions: 16"H x 14.5" W x 13.5" D

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Copper Chef round frying pan 10"
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Copper Chef Round Frying Pan - 10 inch Skillet with Ceramic Non-Stick Coating. Easily Fry ...
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Used & new (18) from $126.28 & FREE shipping. Details

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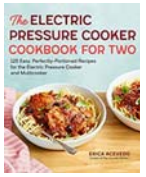

ROCKRIDGE PRESS
Fast, easy, and delicious meals for two

The Electric Pressure Cooker Cookbook for Two: 125 Easy, Perfectly-Portioned...
Releases June 12, 2018
5
$15.29 prime

Ad feedback

Frequently bought together

Total price: $178.58

Add all three to Cart

Add all three to List

EXHIBIT C

PowerAirFryer Oven™

AS SEEN ON TV

TWO GREAT WAYS TO ORDER!
FILL OUT THE INFORMATION BELOW OR CALL TOLL FREE 1-800-200-5099

SELECT PAYMENT, COLOR, AND QUANTITY

Select Payment:

1 payment of $159.96

Includes: 6 Qt Power AirFryer Oven

Select Color and Quantity

Select Color

Select Quantity

+ FREE SHIPPING!

Select Item:

Select Item

GET 1 or GET THEM ALL! Choice of 4 FREE* Items With Your Order While Supplies Last!

***Just pay $9.99 P&H**

(Perfect Rice Cooker, 2-Pc. Knife Set,
9.5" Square Fry Pan or Perfect Slicer w/ Containers)

Available in
Black & White

Perfect Cooker - Black
Select Quantity

Perfect Cooker - White
Select Quantity

Knife Set
Select Quantity

Square Fry Pan
Select Quantity

Perfect Slicer w/ Containers
Select Quantity

Save $40 on Additional AirFryer Oven's!

Norton
SHOPPING GUARANTEE
6/4/2018

SAVE $40

Additional AirFryer Oven's

AVAILABLE IN:

WHITE ☐ BLACK ■ & RED ■

You can add additional Power AirFryer Oven's with all the same bonus items for $40 Off!

Each additional 6 Qt AirFryer Oven is just $119.96 with **FREE SHIPPING!**

Please select the quantity you would like to add to your order.

Select Color ▾ Select Quantity ▾

Maximize Your AirFryer's Abilities with the Power AirFryer Elite!

UPGRADE TO THE ELITE

AVAILABLE IN:

WHITE ☐ BLACK ■ & RED ■

You can Upgrade to the Power AirFryer Elite for just an additional $40.00!

- **Superior Metal Inner Housing** — Maximum Heat Convection Power!
- **Large Fry Basket** — Air Fry Your Favorite Foods Oil-Free!
- **Restaurant-Style Rotisserie Stand** — Holds Hot Rotisserie Meals Steady!
- **Removable Glass Window** — Clean-Up is Even Faster!
- **PLUS MUCH MORE!**

Select 'YES PLEASE' to Upgrade to the AirFryer Elite!

Please Select ▾

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