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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH CHAPMAN,)
)
Plaintiff,) Judge Gwin
) Cleveland, Ohio
vs.)
) Civil Action
TRISTAR PRODUCTS, INC.,) Number 1:16CV1114
)
et al.,)
)
Defendants.

- - - - -

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE JAMES GWIN
JUDGE OF SAID COURT,
ON THURSDAY, JULY 12, 2018
- - - - -

Official Court Reporter: Shirle M. Perkins, RDR, CRR
U.S. District Court
801 West Superior, #7-189
Cleveland, OH 44113-1829
(216) 357-7106

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1 THURSDAY SESSION, JULY 12, 2018, AT 8:59 A.M.

2 THE COURT: We're convened today on
3 2016CV1114, Chapman versus Tristar Products. The case is
4 here today for hearing as to whether the settlement reached
5 by the parties should be approved and also here today for
6 hearing on whether the application for fee award should be
7 approved.

8 Does the Plaintiff have any opening statement?

9 MR. EDWARDS: Yes, your Honor. Adam Edwards
10 for the Ohio Plaintiffs.

11 THE COURT: Could you perhaps go to the podium
12 so --

13 MR. EDWARDS: I was going to ask whether your
14 Honor preferred that I sit down here in front of this mike
15 or go to the podium.

16 THE COURT: Just get to a microphone is
17 probably the most important.

18 MR. EDWARDS: Okay. All right.

19 Good morning, your Honor, I first want to say when we
20 tried this case about a year ago, the two lawyers sitting
21 next to me, Mr. Coleman and Mr. Landskroner, were set to do
22 this argument today.

23 Mr. Coleman had a knee replacement a couple years ago
24 and recently found out there was an infection. So he's
25 sitting at home with a PIC line and without a knee joint.

1 So he apologizes for his inability to be here.

2 Mr. Landskroner was admitted to the hospital also
3 yesterday for an infection.

4 THE COURT: Something about this case.

09:22:40 5 (Laughter.)

6 MR. EDWARDS: We're dropping like flies, your
7 Honor. So I hope I make it through this.

8 So I'm going to be -- I'm going to briefly walk
9 through the seven factors. I think the Court is very
09:22:52 10 familiar with the twists and turns of this case. So I'm not
11 going to waste the Court's time with a history unless the
12 Court would like me to. I'm going to proceed with the seven
13 factors the Sixth Circuit has set out to guide the Court in
14 determining whether a class settlement is fair, reasonable,
09:23:07 15 and adequate. And then my colleague, Mr. Silvey here, is
16 going to talk about any issues related to notice, claims,
17 and the fee application.

18 THE COURT: So the first of those is the risk
19 of fraud or collusion.

09:23:20 20 MR. EDWARDS: The risk of fraud or collusion.

21 THE COURT: Anybody -- I'll ask the
22 Intervening to make -- do you have some argument there was
23 fraud or collusion?

24 MR. SKINNER: Your Honor, I have not but
09:23:37 25 there's explicit fraud or collusion, but we believe some

1 courts have looked at the --

2 THE COURT: Well, in this case -- this case,
3 because that's the factor we're considering, is there some
4 argument or evidence that there was fraud or collusion in
5 this case?

09:23:50

6 MR. SKINNER: No argument there was explicit
7 fraud or collusion, other than --

8 THE COURT: What's it mean explicit fraud or
9 collusion? Is there any evidence that there was fraud or
10 collusion?

09:24:02

11 MR. SKINNER: No, your Honor.

12 THE COURT: So why don't you skip that issue.
13 The second issue is the complexity, expense, and
14 likely duration of the litigation.

15 Do you have some argument on that, that this wasn't
16 complex, that the duration wasn't extensive or the expense
17 wasn't great.

09:24:15

18 MS. JENNY: No, your Honor.

19 The United States' position relates to the factor
20 regarding the reaction we asked the class members with
21 regard to --

09:24:31

22 THE COURT: I'm sorry, counsel?

23 MS. JENNY: The reaction of the class members,
24 that's the only of the seven UAW factors the United States
25 takes a position on.

09:24:43

1 THE COURT: Okay. So does anybody make the
2 argument that the state or anybody else make the argument
3 that the settlement wasn't after a relatively complex
4 expensive and extended litigation?

09:25:02 5 MR. SKINNER: No, your Honor.

6 THE COURT: Okay.

7 So why don't you go to the third factor, the amount of
8 discovery engaged in. Do you raise some issue on that?

9 MS. JENNY: No, your Honor.

09:25:14 10 THE COURT: Okay.

11 The fourth factor was the likelihood of success. This
12 is probably Mr. Lewis' argument more, but he -- well, I'll
13 ask -- did the Defense ever in any way suggest that they
14 thought that Plaintiffs' claims were valid?

09:25:42 15 MR. LEWIS: No, your Honor. We did not. This
16 was a hotly contested case right through as your Honor saw
17 the trial's first day and, you know, even in the settlement
18 agreement, we took the position that the Plaintiffs were not
19 going to win their case.

09:25:59 20 THE COURT: Okay.

21 So are you -- are you contending that this was a sure
22 bet for the Plaintiffs that they threw away to get
23 attorney's fees, or that in terms of the settlement itself,
24 that the value in some ways didn't reflect the certainty of
09:26:24 25 winning anything?

1 MS. JENNY: Your Honor, we believe that the
2 parties did perceive some litigation risk.

3 THE COURT: Some?

4 MS. JENNY: Some.

09:26:33 5 THE COURT: Have you read through this case?
6 Do you have any idea what the claim was?

7 MS. JENNY: Yes, defective pressure cookers.

8 THE COURT: What was the -- in order to win
9 that, the Plaintiff -- well, correct me. My recollection
09:26:51 10 was the Plaintiff had to establish that the pressure cookers
11 were worthless.

12 MR. LEWIS: That's correct, your Honor.

13 THE COURT: Okay. Are you saying it was
14 obvious that they were worthless?

09:27:00 15 MS. JENNY: No, not obvious, your Honor, but
16 we believe based on the fact that Tristar admittedly put
17 down nearly \$3.5 million it's shown it is willing to pay,
18 they perceived some risk to achieve global peace and walk
19 away.

09:27:14 20 THE COURT: I'm not sure what that means.

21 MS. JENNY: Tristar has agreed in the
22 settlement agreement --

23 THE COURT: I understand what they agreed to,
24 but what's the --

09:27:24 25 MS. JENNY: We believe the fact Tristar has

1 been willing to pay a certain amount of attorney's fees and
2 notice costs without contesting those fees and notice costs
3 reflects the fact that it perceives litigation risk and they
4 were willing to put money on the negotiating table in order
09:27:40 5 to achieve a settlement and walk away from the case.

6 THE COURT: How many jury trials have you
7 tried, civil jury trials have you tried to conclusion?

8 MS. JENNY: None, your Honor.

9 THE COURT: How would -- either of you tried
09:27:56 10 civil jury trials to conclusion that you'd be able to kind
11 of make an argument that there's not uncertainty in every
12 civil jury trial?

13 MR. SKINNER: No, your Honor. I think
14 speaking for the State, we are not arguing that there needs
09:28:14 15 to be more added to this settlement. The key is what -- how
16 the millions of dollars that are already on the table are
17 being allocated between the absent class members, and the
18 attorneys in this case. The key is once they're -- once
19 there's been an allotment of money put on the table,
09:28:32 20 ensuring that it is fairly and adequately divided between
21 the parties, and numerous courts across the country have
22 noted that each circuit has its own factors it works through
23 but there's an overarching factor, especially under Rule 23,
24 but also the Class Action Fairness Act, that the Judge owes
09:28:50 25 a duty to make sure that the division of that and the

1 benefit provided directly to the class members is fair,
2 adequate, and reasonable.

3 So we're not here to argue the litigation was a sure
4 fire bet or sure to fail or that it should have settled for
09:29:03 5 5 million or 3 million or 2 million, but once the amount of
6 money is set on the table, to ensure that that money
7 properly goes to the class members. That's the key focus of
8 our papers.

9 THE COURT: So do you want to speak -- more
09:29:25 10 specifically in your rebuttal briefing, I understand you
11 argue that the two issues are separate, that the attorney's
12 fees are separate from the -- from the class settlement
13 issue.

14 MR. EDWARDS: Absolutely, your Honor, we
09:29:47 15 believe the case law is clear the first question is whether
16 the settlement -- the proposed settlement is fair, adequate,
17 and reasonable.

18 THE COURT: He seems to be arguing that --
19 that it's the same issue.

09:29:59 20 MR. EDWARDS: I'm -- I think that would be
21 inconsistent with the case law, your Honor.

22 THE COURT: You want to --

23 MR. LEWIS: May I? I think it also -- I think
24 the Government's position also raises, if they're correct,
09:30:11 25 raises serious ethical issues about how you reach a

1 settlement in a class action because -- and we were very
2 careful in this case not to discuss attorney's fees until we
3 already had the deal in place.

4 And what the Government's proposing is that you get
09:30:23 5 the deal in place, and then you -- with the attorney's fees
6 on table and that would be inappropriate. I think the case
7 law is clear you first got to tackle the settlement and you
8 deal with fees secondly and separately.

9 MR. EDWARDS: Absolutely, your Honor.

09:30:35 10 We reached a deal on the terms of the settlement
11 before the issue of attorney's fees ever came up.

12 THE COURT: Okay.

13 MR. EDWARDS: So I don't think the two are any
14 way intertwined.

09:30:50 15 MR. SKINNER: Your Honor, whether they were
16 negotiated separately or not, we now have a deal in which
17 there is an overall pot of money. And if the claims raised
18 this dual problem here, which is the very low claims rate,
19 low direct benefit to the consumers without the request. As
09:31:06 20 the deal was structured, it's entirely conceivable -- it's
21 entirely conceivable that a large attorney's fees award may
22 have been supported had there --

23 THE COURT: Well, if the -- if the chronology
24 was as indicated by Mr. Lewis and Plaintiff's counsel, how
09:31:24 25 would that be? Wouldn't they -- wouldn't the Defendant

1 presumptively try to minimize the costs independent of the
2 attorney's fees? What would be their incentive to --
3 they -- of course, the Defense is trying to pay the least to
4 the Plaintiffs as possible. Why would they try to
09:31:53 5 minimize -- why wouldn't they try to minimize that?

6 MR. SKINNER: They would try to minimize the
7 overall liability, your Honor, and I think going to --

8 THE COURT: If they didn't reach an agreement
9 at the same time for the attorney's fees, how would it be
09:32:07 10 that the class settlement influenced the attorney's fees?

11 MR. SKINNER: It's obviously not different
12 people negotiating the two important components, your Honor,
13 once they settled on the fact it was going to be nonmonetary
14 relief to the class members, once they settled on the fact
09:32:25 15 it was only going to be warranties and coupons that were
16 nonmonetary, I think it's telling that they knew they had
17 set that up and they negotiated fees, and the fees just
18 cannot support, under the case law, the idea that there's
19 this little benefit going to consumers, your Honor.

09:32:42 20 Courts around the country are very clear that even if
21 they're negotiated separately, attorney's fees provisions
22 that are included in proposed class action settlements are
23 like every other aspect, subject to determination as to
24 fundamentally fair, adequate, and reasonable, and even when
09:32:58 25 negotiated separately, they were viewed by the Defendant as

1 being part of the same settlement. And we believe that that
2 is the key part here, your Honor.

3 THE COURT: Okay.

4 So the next factor seems to be the class counsel's
09:33:12 5 opinions as to -- class counsel's representatives' opinions
6 as to the settlement.

7 MR. EDWARDS: Your Honor, I can certainly
8 speak to that.

9 On behalf of the Ohio Plaintiffs attorneys, it was not
09:33:29 10 an easy decision. If we wanted to quick settle this case,
11 we had three mediations or two -- a mediation and two
12 settlement conferences which took place before the week we
13 spent getting ready for trial. We didn't.

14 Both parties needed to see and assess the risks after
09:33:49 15 we put on three witnesses before we could even get Tristar
16 up to a number that was acceptable for settlement.

17 As to the opinions of the class representatives, I
18 personally sat with Ken Chapman, Jessica Vennel, and Jason
19 Jackson. I sat with them for hours in preparation for their
09:34:05 20 deposition testimony. I sat with them for days at a hotel
21 getting ready for the trial in this case. And they are as
22 invested as any clients I've ever had in the outcome of
23 litigation. And I can tell you unequivocally they were
24 pleased with the offer, and it's their opinion this case
09:34:22 25 should be approved and is settled.

1 THE COURT: You want to -- do you have any
2 comment on that, Mr. Lewis?

3 MR. LEWIS: Nothing on that issue, your Honor.

4 THE COURT: Okay.

09:34:31 5 The next factor is under the --

6 MS. JENNY: Your Honor, we do have a comment
7 on the named Plaintiffs.

8 As we noted in our statement of interests, we believe
9 that there's unduly preferential treatment towards the named
09:34:46 10 Plaintiffs.

11 These named Plaintiffs are allowed to resolve their
12 personal injury claims in parallel with settling and
13 remaining in the class action.

14 We believe that this preferential treatment is in
09:35:00 15 violation of the Sixth Circuit decision in Vassalle.

16 THE COURT: I guess I'm -- I somewhat miss how
17 that was preferential. I mean the other members had not --
18 people who had suffered personal injury had an option to opt
19 out, right?

09:35:22 20 MS. JENNY: Yes, your Honor, they had.

21 THE COURT: And how many did?

22 MS. JENNY: 131.

23 THE COURT: As far as you know, the people
24 that opted out are those people that typically had either
09:35:34 25 personal injury or property damage?

1 MR. EDWARDS: 99 out of that number
2 specifically indicated that it was for the reason of to
3 protect personal injury claims, your Honor.

4 THE COURT: Okay.

09:35:45 5 So others had the right to opt out. If Plaintiffs in
6 the settlement received something for the personal injuries
7 just by being in this litigation, wouldn't that be res
8 judicata as to a personal injury claim otherwise?

9 MS. JENNY: Would not be res judicata, your
09:36:15 10 Honor, but we do believe that it violates as well this
11 Court's order on July 3, 2017, Docket 101, striking the
12 attempts to reinsert the Plaintiffs' personal injury claims
13 into this litigation. Tristar moved to strike the personal
14 injury claims, arguing that the named Plaintiffs could not
09:36:32 15 adequately represent the class while simultaneously pursuing
16 their own personal injuries claims. This Court agreed with
17 Tristar and ruled that the Plaintiffs' decision gave them an
18 added benefit that the other unnamed Plaintiffs could not
19 seek.

09:36:50 20 MR. EDWARDS: Your Honor, the -- I believe
21 your order dismisses the Plaintiffs' personal injury claims
22 without prejudice, meaning we didn't try the personal injury
23 cases as part of the trial. We didn't put on evidence of
24 injuries when we tried this case. However, that doesn't
09:37:04 25 mean that their personal injury claims were just

1 extinguished. It appears to me that the Government just has
2 a problem with timing. If the case -- if the injury cases
3 were dismissed without prejudice, they could have refiled
4 those cases today, and then we could settle for the same
09:37:19 5 amount that we settled for. These people were burned very
6 badly and settled their cases for \$25,000. I don't see
7 preferential treatment there.

8 MS. JENNY: Not merely timing, your Honor, if
9 the named Plaintiffs stay in case, they by definition must
09:37:32 10 release any personal injury and property damage claims.
11 Therefore, those claims are extinguished and would not be
12 able to bring them down the line.

13 THE COURT: Wait. If they -- if the dismissal
14 of the personal injury claims was without prejudice, why
09:37:49 15 would they not be able to reassert them?

16 MS. JENNY: Because the scope of the release
17 requires all class members to give all personal injury and
18 property damage claims that occurred during the class
19 window. So by remaining in the class, they release those
09:38:02 20 claims. There is --

21 THE COURT: That's a decision they make later
22 on, right? So they've got a personal pending injury claim,
23 right? And for one reason or another, they make an election
24 to settle it. And my suspicion is Tristar got 100 other
09:38:21 25 personal injury claims, and I may be wrong, but I would

1 suspect you settled some of those.

2 MR. LEWIS: Right, your Honor, and some of
3 those, we settled some personal injury claims prior to
4 reaching this settlement. Right? So those Plaintiffs would
09:38:36 5 have received the cash settlement and can make a claim as
6 part of -- just like the Plaintiffs, the named Plaintiffs
7 here.

8 If we -- if we settle the personal injury claims
9 previously, those folks are still members of the class and
09:38:50 10 can still make their claim, and that's exactly how the
11 Plaintiffs named here are being treated.

12 MS. JENNY: We agree the named Plaintiffs have
13 settled their personal injury claims in the past that would
14 be true, but the settlement agreement specifically envisions
09:39:00 15 as part of a global package, the named Plaintiffs are going
16 to be resolving their personal injury suits in parallel.
17 And this Court specifically said named Plaintiffs cannot use
18 this lawsuit to pursue personal injury on account of damages
19 of fellow class members. They can only seek damages.

09:39:15 20 THE COURT: The next is, the next factor under
21 the UAW case is the reaction of absent class members.

22 How many objections?

23 MS. JENNY: Zero objections, your Honor. We
24 believe, however, for at least two reasons --

09:39:34 25 THE COURT: Let me -- just so the record's

1 clear, we may need evidence on this, but you apparently had
2 e-mails or addresses for a large number of the purchasers?

3 MR. EDWARDS: Absolutely, your Honor.

4 THE COURT: So can you summarize again how
09:39:54 5 notice had been given?

6 MR. EDWARDS: Mr. Silvey's prepared to give
7 all of that information, your Honor.

8 MR. SILVEY: Your Honor, I can talk about
9 that.

09:40:05 10 As you know, from the affidavit or declaration of Ms.
11 Finegan, she described in detail what all was done. There
12 was a website that was set up that as of the 10th, I think
13 the 10th of July, I think had 145,216 visits, 176,266
14 sessions.

09:40:27 15 THE COURT: Just to put that in context, there
16 was roughly a million of these. So --

17 MR. SILVEY: No, there were 3.2 million of
18 these things sold.

19 THE COURT: Okay.

09:40:41 20 MR. SILVEY: Ms. Finegan, the claims
21 administrator believes through the various means, Internet,
22 direct mail, all that, that 83 percent of that population
23 was reached. That would be 2,656,000.

24 THE COURT: So, and were the majority given
09:41:00 25 notice by e-mail or post card or --

1 MR. SILVEY: The majority would probably have
2 been electronic, and the reason I say that is there were
3 734,828 e-mails sent. There were in addition to that,
4 273,213 postcards.

09:41:22 5 So your million figure is about the number that were
6 directly contacted. In addition to that, there were, and
7 this is a mind boggling figure, 157,562,000 ads on 3500
8 different websites. That's the electronic notice that went
9 out. There were also magazine ads. There were the
09:41:45 10 postcards we talked about. The website had another 145 some
11 odd visits.

12 So the claims administrator was confident that we had
13 reached no less than 83 percent of the potential number of
14 buyers.

09:42:05 15 When I had a conversation with her, she was also quick
16 to point out that 2.6 million is the best figure that they
17 can come up with because there may have been people in the
18 3.2 million units sold, some people may have bought two. So
19 there aren't necessarily 3.2 million individuals. There are
09:42:25 20 3.2 million needed sold. So it may be less than 3.2 million
21 individuals sold. The 2.6 is the best estimate of the
22 number of individuals that would have been able to be
23 reached and of them, the 83 percent.

24 THE COURT: Okay. How does this favor you?

09:42:42 25 MR. SKINNER: Your Honor --

1 THE COURT: The reaction of the absent class
2 members?

3 MR. SKINNER: The lack of objections, we
4 believe needs to be understood with the little overall
09:42:51 5 engagement, your Honor. The multi million personal class,
6 only 13,000 engaged and filed a claim. They had to do
7 something in order to get a benefit. If this had had a high
8 engagement rate with a high claims rate as against zero
9 objections, that would be very different than here where you
09:43:09 10 have almost less than half a percent of claims rate. And it
11 is also key in our minds, your Honor, that the notice didn't
12 provide any notice to the absent class members regarding the
13 key in balance that we see in this case.

14 Class members received a notice saying they can obtain
09:43:28 15 a warranty and a coupon. The only concrete discussion of
16 fees was \$225,000. So to the extent, as to other cases in
17 which we filed briefs, your Honor, class members did not
18 know that there were millions of dollars that the Defendant
19 was going to pay out in connection with this case. Had they
09:43:46 20 known that, as part of the notice program, it might have
21 been very different. The fee request came in two weeks --

22 THE COURT: How would you know?

23 MR. SKINNER: It's impossible to know for
24 sure, your Honor, but we think the fact that that was not
09:43:57 25 disclosed and the overall low level of claims in this case

1 helps explain why zero objections is not necessarily a --

2 THE COURT: So kind of going back to the
3 over -- this in some ways addresses the overall settlement.

4 With apologies that I may misrecall, these pressure
09:44:19 5 cookers were generally somewhere in the range of -- I
6 somewhat recall they were somewhere in the range of \$80 to
7 \$120.

8 MR. LEWIS: 150 maybe dollars, yeah, just
9 depending on size, essentially.

09:44:39 10 THE COURT: Okay. And the class period was
11 how long?

12 MR. EDWARDS: 2013 to the day of the
13 preliminary approval hearing I believe, your Honor.

14 THE COURT: So some of them would have been
09:44:49 15 five or six years old?

16 MR. LEWIS: Correct.

17 MR. SILVEY: Correct.

18 THE COURT: So the settlement was they would
19 receive an option to buy a new pressure cooker and apply \$75
09:45:03 20 roughly towards a new purchase?

21 MR. LEWIS: \$72.50 was the number.

22 The resolution was driven by the safety video
23 information, the injunctive relief and then the incentive
24 for watching the safety video was you could get a warranty
09:45:23 25 extension, and one of many products, including a new

1 pressure cooker.

2 THE COURT: And there was some representation
3 that the newer pressure cookers had been redesigned in a
4 fashion that made them safer.

09:45:37 5 MR. SILVEY: Yes, there had been some changes
6 to the design to address the concept of misuse. In other
7 words, it prevents people from misusing the product in
8 violation of the manual. And so yeah -- and with the
9 extended warranty, the practical effect of the extended
09:45:54 10 warranty is that someone could return their three-year-old
11 cooker and get a new cooker with these, you know, new
12 features.

13 THE COURT: So what's the argument on -- so if
14 you've got some cookers that are four or five years old and
09:46:13 15 you get to exchange them, exchange them for somewhere
16 between \$25 and \$50, why is that deleterious towards the
17 people that are part of the class?

18 MR. SKINNER: It's not necessarily
19 deleterious, your Honor, but to the extent that -- the
09:46:37 20 understanding of the warranty is they have to have something
21 that's wrong with it. They also still have to have the
22 pressure cooker. But the key, your Honor, is that --

23 THE COURT: Well, did you require the return
24 of the pressure cooker?

09:46:50 25 MR. SILVEY: For the claim, your Honor, they

1 just have to go through the claims process, which I don't
2 believe requires return of the pressure cooker. They have
3 to fill out the form, provide a proof of purchase, and
4 that's sufficient is what my recollection is.

09:47:04 5 MR. SKINNER: Yeah, that's correct.

6 MR. LEWIS: There's no return required as far
7 as --

8 THE COURT: So --

9 MR. SKINNER: To use the warranty. The Judge
09:47:11 10 is asking about the warranty.

11 THE COURT: No, I wasn't asking about the
12 warranty. I was asking about whether the terms of the
13 settlement were generally favorable to the class members?

14 MR. SKINNER: We don't believe so, your Honor.
09:47:22 15 I think that is evidenced by the fact that only 13,000 class
16 members took the step of claiming access to those
17 warranties, which doesn't go to how many of them will
18 actually get a new pressure cooker. That would be a subset
19 of that 13,000. And there's 13,000 coupons, the maximum
09:47:38 20 number that's going to be distributed. And we think that
21 speaks volumes about the worth the class saw in this
22 release, and the claims rate on the coupons will be known in
23 90 days, your Honor, and we suspect it will be much smaller
24 than 13,000.

09:47:52 25 MS. JENNY: Your Honor, to the point you

1 referenced something about \$25 to \$50, we broke down the
2 math, based upon publicly available information and our
3 statement of interest, and the pressure cooker is currently
4 sold, the replacement, the one replacement pressure cooker
09:48:06 5 offered a brief product, is currently sold on the website
6 for \$159.99 plus \$29.99 with shipping and handling. So
7 approximately \$190 would be the cost to the class members if
8 they which to purchase a pressure cooker.

9 So the costs to the class members to use their coupon
09:48:24 10 to obtain a new pressure cooker is actually \$117, which in
11 most cases is more than most of the class members paid for
12 the original pressure cooker. They would have paid about
13 \$100. That was the most common model.

14 That's why we don't think this is a good deal because
09:48:40 15 class members have to turn over significant amounts of their
16 own money in order to use the coupon.

17 THE COURT: Aren't you back in the
18 circumstance where there's -- there's been almost -- the
19 Defense in the case said that this whole claim was bogus,
09:49:00 20 and that there was no defect in the original pressure
21 cooker.

22 MR. LEWIS: And, your Honor, we have the
23 additional fact that the United States Consumer Products
24 Safety Commission has, in December of '17, we attached this
09:49:17 25 to our papers, dropped its investigation. The defect unit

1 was looking at these cookers and dropped its investigation
2 related to these pressure cookers. That's a new fact that
3 existed or came into play after the settlement.

4 THE COURT: If these were defective, why
09:49:29 5 didn't the United States bring a claim?

6 MS. JENNY: Your Honor, we take no position on
7 whether the products were defective. This again goes to the
8 allocation point that Mr. Skinner mentioned. We believe
9 that the Defendant does receive some litigation risk. We
09:49:44 10 never know what will happen in the civil jury trial and --

11 THE COURT: Well, that -- it sounds like
12 you're arguing for strikes.

13 MS. JENNY: No, your Honor. We believe that
14 Tristar used litigation risk because of the fact it's
09:49:57 15 willing to put up nearly \$3.5 million cash on the table, and
16 we believe that more of that value should be allocated to
17 the class members who are giving up claims in exchange for
18 the benefits being argued.

19 MR. SKINNER: Especially given, your Honor,
09:50:12 20 that the settlement expands beyond to add consumers in 47
21 more states than were issued with the certification.

22 So there's a large number of people who, even if the
23 case had failed on the merits, would still have retained
24 their claims in other states under those states' particular
09:50:28 25 laws.

1 The key here, your Honor, from both I believe the
2 United States and from the State AG is the allocation issue.
3 We're not here to argue whether the claims were slam dunk
4 one way --

09:50:38 5 THE COURT: The allocation issue, maybe we
6 need testimony on this regarding the chronology of the
7 negotiations and the settlement of the underlying lawsuit
8 and independent of the settlement of the fee issue.

9 MR. LEWIS: And I want to address something
09:51:00 10 that the Government -- we didn't agree to a fee. The Court
11 accepts the fee for a class action settlement. And we agree
12 to not object through a certain claim amount of fees, but
13 that's different than agreeing to a fee.

14 And that's what the settlement agreement says, and
09:51:18 15 that's how these are handled. So this allocation issue, I
16 mean the Court's going to decide what the fee is and that's
17 the Court's discretion.

18 MR. SKINNER: Your Honor, we just believe that
19 the Class Action Fairness Act and Rule 23 and --

09:51:34 20 THE COURT: You say that so blightly. Is that
21 what Gascho says.

22 MR. SKINNER: The Gascho case, your Honor --

23 THE COURT: First of all, is there some more
24 controlling authority? You talk about authority around the
09:51:48 25 country. Aren't -- aren't I controlled by that decision?

1 MR. SKINNER: The Gascho case, your Honor,
2 itself confirms the District Judge has discretion when
3 there's a cash settlement, a cash fund, a common fund of a
4 known quantity. It's not a case under the Class Action
09:52:04 5 Fairness Act, is not controlled by any of the provisions --

6 THE COURT: So you're saying that 71.12 only
7 covers the coupon settlements?

8 MR. SKINNER: 1712 covers coupon settlements,
9 your Honor. Yeah.

09:52:23 10 THE COURT: Only coupon settlements, right?

11 MR. SKINNER: Correct, your Honor. Only
12 settlements --

13 THE COURT: Because I thought your briefing
14 had suggested that it's broader than that. I thought your
09:52:32 15 briefing suggested that 1712 also is implicated in cases
16 more determined by lodestar factors.

17 MR. SKINNER: 1712 applies to any class action
18 settlement that includes a portion that includes coupons,
19 your Honor. So it applies to cases that include coupons
09:52:58 20 plus other components.

21 The Gascho case only featured cash and the Gascho case
22 confirms this District Judge has discretion as to cash. The
23 Gascho case was very clear, your Honor, in saying that it
24 was dealing with how to divide -- how to resolve fees when
09:53:23 25 there was substantial cash amount not claimed.

1 THE COURT: Yeah, but -- I mean the
2 discussion's broader than that, isn't it?

3 MR. SKINNER: There's some discussion that's
4 broader, your Honor, but the case itself is very clear --

09:53:34

5 THE COURT: The underlying case, there was a
6 cash award, but --

7 MR. SKINNER: Yes.

09:53:46

8 THE COURT: Yeah, but the holding of the
9 Court, the discussion of the Court, did they say that,
10 anywhere in that opinion that this only deals with cash
11 settlements and doesn't apply more generally to class
12 settlements?

09:54:00

13 MS. JENNY: Your Honor, the discussion we
14 believe does support the proposition that cash settlements
15 should be valued differently than cashless settlements. So
16 the --

09:54:20

17 THE COURT: Isn't the big discussion in that
18 case with regard to the overall available benefit to the
19 class members as opposed to the amount that was actually
20 claimed by class members? Isn't that the major focus of
21 that decision?

22 MS. JENNY: Yes, and in determining --

23 THE COURT: What did the Court hold?

09:54:31

24 MS. JENNY: The Court determined that the
25 District Court did not use discretion in taking the midpoint

1 between the cash claimed by the class members and the cash
2 offered to the class members.

3 Although, in doing so, the Gascho court distinguished
4 three different cashless settlements. The objectors and the
09:54:46 5 dissenting Gascho focused on two cases; the Sixth Circuit's
6 decision in Amherst and the Ninth Circuit's decision in
7 Bluetooth, to argue the Gascho majority should look to the
8 amount actually claimed by the class members.

9 THE COURT: What did -- what did they -- did
09:55:01 10 they misunderstand the Boeing case? Did the Gascho court
11 misunderstand the Boeing case holding?

12 MS. JENNY: No, your Honor, but we believe
13 that case is distinguishable because the situation where
14 cash is made available to class members, it may make more
09:55:18 15 sense to look to the cash made available because we know
16 that every class member will value cash. But, as the
17 majority, Gascho specifically distinguished the Fifth
18 Circuit in Strong versus Bellsouth Telecommunications, it
19 noted that Strong had taken a different approach, had
09:55:35 20 actually involved coupon-like benefits, and it termed them
21 phantom benefits rather than cash.

22 We believe that Gascho does stand for the proposition
23 that a District Court would not have used discretion in
24 looking to the value of the inclined compensation actually
09:55:50 25 claimed.

1 THE COURT: We'll get to the fees more
2 generally, but do you have any more argument relative to the
3 appropriateness of the settlement?

4 MR. SILVEY: If you want me to toss the ball
09:56:05 5 back to --

6 THE COURT: Let me -- I'm trying to -- what
7 the Government Intervenors seem to be arguing, they seem to
8 especially be making an argument that the settlement that at
9 least 14,000 people have responded to should be rejected and
09:56:23 10 the benefit should be taken away from those people because
11 the settlement becomes unreasonable because of your fee
12 application.

13 MR. SILVEY: I certainly disagree with that
14 proposition, your Honor.

09:56:37 15 What the Government, the DOJ in particular, says that
16 Page 12 of their brief, put another way, it's reasonable to
17 infer based upon the claims rate that they refer to, that 99
18 percent of the class members either did not receive notice
19 or did not view the coupons as valuable and desirable enough
09:56:55 20 to watch the video and fill out the claim form.

21 Setting aside the fact that that is wholly
22 unsubstantiated and speculation, and as much as I hate to
23 agree with Tristar on anything, as you know going through
24 this case, they've claimed the entire time that most people
09:57:10 25 like these pressure cookers and that could equally be a

1 reason that there are only 13,000 claims in this case. We
2 don't know. That's why the claims rate for the people who
3 have watched the video and sought coupons is no barometer of
4 anything in this case. It's inappropriate because it
09:57:29 5 doesn't reflect as the Gascho court recognized, the universe
6 of relief available to all the class members.

7 As you know, you can lead a horse to water, you can
8 lead a claimant to water, but you can't make them drink.
9 You can make it available to them. That's what a year, now
09:57:47 10 two years of litigation has done, but we can't make them
11 choose it. And there is no evidence and can be no evidence
12 of what unnamed class members' thought processes are.

13 So we wholly disagree with the proposition that the
14 claims made has any relevance to either the fees or whether
09:58:05 15 this Court should approve the settlement.

16 THE COURT: Do you have any concluding
17 arguments on that?

18 MR. SILVEY: Me, your Honor?

19 THE COURT: No. Mr. Lewis.

09:58:15 20 MR. LEWIS: Yes, your Honor.

21 I just wanted to supplement by saying the Government
22 in the AG's place zero value in the their briefing on what
23 was the driver of this settlement, which was information to
24 consumers who are going to use these pressure cookers, the
09:58:33 25 safety videos, which will remain forever. These were videos

1 at our costs created and published and are going to remain
2 forever.

3 And the key issue -- and these folks weren't involved
4 in this litigation, but the key issue we found through the
09:58:47 5 hotly contested case is that many consumers were misusing
6 the pressure cooker and not following the instruction
7 manual. So we invested time and effort and money into
8 providing more information to consumers, and it's not that
9 much different than some of these proxy adjustments that
09:59:06 10 have to be made in the security settlement, where there's no
11 cash given but more information's given to people to help
12 them make a decision or to use a product. And that's
13 exactly what this did.

14 We addressed the problem that was seen through the
09:59:16 15 litigation squarely with that information. That's all we
16 have, your Honor.

17 THE COURT: Let me just go forward.

18 Do you wish to call any witnesses on the
19 reasonableness of the settlement?

09:59:30 20 MR. EDWARDS: No, your Honor.

21 MR. SILVEY: No, your Honor.

22 THE COURT: Okay.

23 Does the Defense?

24 MR. LEWIS: No, your Honor.

09:59:35 25 THE COURT: Okay.

1 Does the Government Intervenor?

2 MS. JENNY: No, your Honor.

3 THE COURT: The second portion of this deals
4 with the reasonableness of the attorney's fees, the
09:59:46 5 application made by the Plaintiffs.

6 You want to make any opening statements you wish
7 regarding that?

8 MR. SILVEY: I do, your Honor.

9 Give me one second to get to that part. Again, the
10:00:12 10 Court knows --

11 THE COURT: Let me just ask, you've got about
12 42, 4300 hours?

13 MR. SILVEY: Correct.

14 THE COURT: And with a lodestar, at rates
10:00:32 15 between looks like 500 to 600 or maybe a little bit lower
16 than that, maybe 450 to 600.

17 MR. SILVEY: That's probably what the average
18 is. I know the top end for the most experienced attorneys,
19 the rate designated is \$600 now but obviously, it's
10:00:57 20 graduated below that for lesser experienced attorneys and
21 staff.

22 THE COURT: So the lodestar's somewhere around
23 two million one?

24 MR. SILVEY: Correct, \$2,043,079.5 as of the
10:01:07 25 date the fee application was made.

1 THE COURT: There's a supplemental declaration
2 that I'm looking at.

3 MR. SILVEY: Right. Yeah. And we would note
4 for the Court and for the record that we aren't seeking
10:01:20 5 anything over what was included in the original fee
6 application.

7 So the time we've spent since then, we aren't seeking
8 anything for. So it's -- the numbers that are the germane
9 numbers are the ones that are in the fee application as of
10:01:34 10 5-18 of this year.

11 THE COURT: Is there any challenge to that
12 number of hours?

13 MS. JENNY: No, your Honor.

14 THE COURT: Is there any challenge to the
10:01:42 15 lodestar?

16 MS. JENNY: No challenge to the lodestar.

17 THE COURT: Not so much the lodestar, but
18 hourly rate?

19 MS. JENNY: No challenge to the hourly rates,
10:01:51 20 your Honor.

21 THE COURT: Okay.

22 MR. SILVEY: Your Honor, just to go forward,
23 sort of similar to what Mr. Edwards did, there are six
24 factors that the Court looks at in determining whether the
10:02:06 25 fees are reasonable.

1 And if you want, we can use the same procedure we went
2 through beforehand. The first is the value of the video
3 provided. I think we discussed that.

4 Does the Court have any other questions about that or
10:02:19 5 our position on it?

6 THE COURT: No, no.

7 MR. SILVEY: The next thing would be the value
8 of the services rendered. Again, this case involved
9 investigation part of the lawsuit being filed. The lawsuit
10:02:32 10 being filed, significant motion practice that I was
11 personally involved in most of, as well as going up through
12 the trial itself. So our position is certainly that the
13 hours expended by all the firms involved was appropriate and
14 reasonable, and that the rates requested are reasonable. So
10:02:51 15 that's the second element.

16 Does the Court have any questions for me on that?

17 THE COURT: No.

18 MR. SILVEY: The third element would be the
19 fee arrangement. In this case, it was a purely contingent
10:03:04 20 basis so that counsel for the Plaintiffs entered into this
21 case with the knowledge that unless they won, they had no
22 chance to recover anything. There is always a risk that's
23 recognizable. As counsel for Tristar as indicated, they
24 have always maintained and continue to maintain that they
10:03:22 25 weren't at fault, there was no defect, and that they could

1 have won this case. So that risk was certainly present. It
2 wasn't, as the Court described, a slam dunk by any means.

3 So again, we feel the third factor, the contingent
4 basis weighs in favor of approving the awards based on the
10:03:38 5 risk assumed by trial counsel.

6 Does the Court have any questions for me about that?

7 THE COURT: No.

8 MR. SILVEY: Fourth factor, societal interest.

9 Mr. Lewis pointed out very correctly that one of the
10:03:48 10 key benefits in this case is education. In addition to
11 that, there's the warranty extension, which is an important
12 factor because it exceeds the original 60-day warranty by it
13 adds another year to it. And again, not from the date of
14 purchase. I think according to the settlement agreements
10:04:05 15 from the date of the approval process, when the approval
16 process ends; but, that again is an additional benefit that
17 the class as a whole has, that they would not have had.

18 So if a year from now or whenever the starting date
19 is, there's a problem, they can return the product that they
10:04:22 20 wouldn't have been able to do had this litigation not been
21 instituted.

22 So again, the societal interest is served in any
23 consumer action by reaping a benefit on behalf of all
24 consumers that they would not have otherwise had.

10:04:37 25 That's the four element. Does the Court have any

1 questions for me about that?

2 THE COURT: No.

3 MR. SILVEY: The fifth element would be case
4 complexity and risks.

10:04:45 5 The Court asked an interesting case at the beginning
6 of counsel for the Government. Your Honor, I've had about
7 105 jury trials to conclusion. I know well what the risks
8 are. I know what the risks are in this case because while I
9 was stuck in Tennessee, I didn't get to come up for the
10:05:03 10 trial. I was present for everything else in this case. The
11 Court seen me at the initial status conference, at the final
12 pretrial conference. I know what goes into this kind of
13 case. I know how complex it was. And as a result, we feel
14 like the risk that we assumed, as well as the complexity,
10:05:18 15 the difficulty dealing with four very good law firms on the
16 Defense side, certainly justifies the requested fees in this
17 case.

18 Does the Court have any questions for me on that
19 element?

10:05:27 20 THE COURT: No.

21 And then just the complexity in the skill and
22 standing. I don't know if there's, you know, need to
23 comment on that.

24 MR. SILVEY: Certainly if -- if you want to
10:05:41 25 use the barometer of success on motions, obviously we

1 survived a motion to dismiss. We survived a motion to
2 certify. We survived a motion to decertify. We survived
3 the Daubert motion on our expert. We survived motions in
4 limine, so there was a lot of, if that's the yard stick you
10:06:01 5 want to use in terms of class counsel's ability, that's
6 certainly an indicator.

7 We went to trial and ultimately, rather than having
8 the case go to a verdict and lose, the case was settled with
9 what we feel, like again, is a very good result for the
10:06:16 10 class as a whole. So we feel like that would be an
11 indicator of both the number of issues, the complexity from
12 just a litigation tactic standpoint, as well as a
13 demonstration of the ability of class counsel for the
14 Plaintiff's side.

10:06:32 15 THE COURT: Okay. And do you have any
16 comment?

17 MR. LEWIS: No position on the fee
18 application, your Honor.

19 THE COURT: So in terms of the Intervenors,
10:06:44 20 what's the argument under the factors? Is it principally
21 the value of the benefit rendered or --

22 MS. JENNY: Yes, your Honor. It's the value
23 of the benefit rendered. We believe that it's clear from
24 the Supreme Court, for example, in Hennessy versus
10:07:01 25 Eberhardt, the degree of relief which Plaintiff has, has to

1 be taken into account when determining attorney's fees
2 awards. The Sixth Circuit said similar things in Rawlings
3 versus --

4 THE COURT: So in this case, again, there's
10:07:17 5 two options. You can consider all the people that would be
6 available or -- all the benefit that is available and then
7 secondarily, the benefit that was actually claimed. In
8 terms of the benefit actually claimed, is there some
9 argument that these people didn't receive a benefit?

10:07:43 10 MS. JENNY: Your Honor, we believe that the
11 benefit is simply very low. It's --

12 THE COURT: It's easy to second guess, but I
13 mean what -- if they were operating in some ways under a
14 contingent fee arrangement, and they face uncertainty,
10:08:04 15 potentially lose the whole case, are you arguing that
16 Plaintiffs' attorneys are required to take it to verdict or
17 they can otherwise be second guessed for settling for less
18 than the whole loaf?

19 MS. JENNY: No, your Honor. It's certainly
10:08:23 20 not our position they would have to take the matter to a
21 directed verdict. If they really believed they were likely
22 to lose, they could obviously --

23 THE COURT: So they had to show that this was
24 worthless, right?

10:08:35 25 MS. JENNY: Yes, your Honor, a bifurcated

1 process did require them to prove the product is worthless
2 in order to recover.

3 THE COURT: You remember what that testimony
4 was in terms of how many overall claims there had been to
10:08:49 5 the Defendant about defects in the product preceding this
6 litigation?

7 MS. JENNY: I do not recall the precise
8 number, your Honor.

9 THE COURT: Do you have an idea as to what the
10:08:59 10 numbers were?

11 MS. JENNY: 100, I'm not sure.

12 THE COURT: So if it's 100 -- 100 earlier
13 claims about product, you know, being arguably worthless out
14 of 2 or 3 million pressure cookers, does that say anything
10:09:18 15 in terms of whether the benefit available to the whole group
16 was something important?

17 MS. JENNY: We value the benefit to the group
18 by looking at the parameters and restrictions on the coupon.
19 We believe the coupons are so restrictive, they offer very
10:09:39 20 little benefit because of the amount of money the class
21 members have to turn over to the Defendant that's supposedly
22 harmed them.

23 THE COURT: Well, the pressure cookers are
24 somewhere in the range of 100 to 150 at the time they bought
10:09:52 25 them, right?

1 MS. JENNY: Yes, your Honor.

2 THE COURT: So they got between 50 percent and
3 75 percent of what they paid for?

4 MS. JENNY: We disagree because that assumes
10:10:04 5 the value of the coupon, the face value of the coupon is
6 equivalent to its cash value -- and a number of courts -- we
7 cited this in the statement of interest -- disagreed that
8 one can equate the value of a coupon to a statement of cash
9 due to all the restrictions on the coupon and we think --

10:10:19 10 THE COURT: The coupon was restricted to
11 basically use on purchasing three products, right?

12 MS. JENNY: Correct, your Honor, all above the
13 face value of the coupon, and thus, requiring class members
14 to turn over additional money --

10:10:34 15 THE COURT: Yeah, but these were people who
16 never made complaints before, right?

17 MS. JENNY: About their current pressure
18 cooker?

19 THE COURT: Yeah.

10:10:42 20 MS. JENNY: The record indicates there are
21 relatively few complaints but again, we're focused on the --

22 THE COURT: So they have -- they get a \$75
23 coupon?

24 MR. SKINNER: Only the 13,000, your Honor.

10:10:53 25 THE COURT: Yeah, but 13,000, for a \$75

1 coupon, but only say 100 people have earlier complained
2 about problems with the pressure cooker.

3 Why wouldn't that be beneficial to the class or at
4 least those 13,000?

10:11:13 5 MR. SKINNER: There is some benefit to the
6 13,000, your Honor.

7 THE COURT: So in terms of the amount of
8 benefit, if there's no obligation to return the pressure
9 cooker, and there's an option to use the \$75 coupon to
10:11:29 10 purchase two other products, what's the argument that that
11 wouldn't be beneficial to have \$75 applicable to two other
12 products?

13 MR. SKINNER: Your Honor, I don't believe
14 either of the -- we see in this case, it was stated that
10:11:44 15 there's no benefit or that the coupon is completely
16 worthless.

17 THE COURT: So the 13,000 would get -- at
18 least 13,000 would get a coupon that you acknowledge is
19 worth something, and it's on a \$75 coupon on a product that,
10:12:04 20 at least my recollection, was the majority of these were
21 sold in the range of \$100?

22 MR. LEWIS: Probably between \$100 and \$150,
23 depending on what the product is. All of the --

24 THE COURT: How suckered the purchaser was?

10:12:20 25 MR. SILVEY: Actually it's the size of the

1 pot, your Honor. I think the six-quart one was a \$100,
2 eight-quart, and ten-quart.

3 THE COURT: I'm corrected. What's the
4 argument that that's not a benefit?

10:12:32 5 MR. SKINNER: It's not an argument -- we are
6 not arguing there's no benefit to the class. We're arguing
7 the benefit to the class pales in comparison to the request
8 here. At the end of the day, 1712 coupon requirements
9 apply, and to the extent the parties are seeking --

10:12:48 10 THE COURT: Did Congress ever write a statute
11 saying that class action settlements were limited to -- or
12 class action fee awards were limited to certain percentages
13 of claims asserted, or claims paid, I should say?

14 MR. SKINNER: Your Honor, when this comes to
10:13:14 15 coupons and to the extent the Court disagrees with that,
16 there's still the overarching legality, as the Court has
17 noted, there's an overarching legality they have to uphold.
18 And so even in the Eighth Circuit, the Court noted that
19 because of the very low claims rate that produced only
10:13:33 20 \$8,000 of redeemed coupons, the Court valued those, added in
21 the valuation for -- in that case, injunctive relief, and
22 said the only -- the high end of the available fees was
23 \$16,000.

24 THE COURT: Does Gascho say it's discretionary
10:13:51 25 with the District Court as to whether to use the lodestar or

1 the percentage?

2 MR. SKINNER: It does, your Honor, and the key
3 there is that that was the case that did not relate to the
4 Class Action Fairness Act. It was not a coupon settlement.
10:14:04 5 It was a cash-only settlement to which different
6 prescriptions apply, although there's still an overarching
7 fairness determination that is required. And again, your
8 Honor, Gascho is very focused in the opinion --

9 THE COURT: Look at the -- look at 1712. Do
10:14:19 10 you have it?

11 MR. SKINNER: Yes.

12 THE COURT: Read along with me and then you
13 can try to answer a question.

14 Under a -- is that the paragraph directed towards fee
10:14:55 15 applications where the fee applications are based upon
16 percentages?

17 MR. SKINNER: I'm not sure I understand your
18 question, your Honor.

19 THE COURT: Is that -- is that paragraph
10:15:11 20 dealing with fee applications that are in effect, contingent
21 percentages of the -- of the award?

22 MR. SKINNER: I believe, your Honor, it speaks
23 to cases where contingent fees, as the counsel in this case
24 noted, where the case is brought on a contingent basis.

10:15:32 25 THE COURT: But I'm not being clear. What I'm

1 saying is does this paragraph -- is it directed towards
2 applications that try to assert a right to a certain
3 percentage of the award and then try to use the total
4 benefit available to class members in determining what the
10:15:57 5 total value of the settlement had been?

6 MR. SKINNER: It certainly would cover that
7 kind of case, your Honor, but the language is very clear
8 that the Court -- if a proposed settlement provides for
9 failure recovery of coupons, the portion of any attorney's
10:16:13 10 fees to class counsel that is attributable to the award of
11 coupons, and at the end of the day, your Honor --

12 THE COURT: Well then, help me with this.
13 Read with me.

14 "If a proposed settlement in the class action provides
10:16:23 15 for a recovery of coupons." So you're saying this case
16 involves that?

17 MR. SKINNER: Most definitely, your Honor.

18 THE COURT: The portion of any attorneys' fee
19 award to class counsel, and then somewhat importantly for my
10:16:40 20 question, that is attributable to the award of coupons,
21 shall be based --

22 MR. SKINNER: Correct, your Honor.

23 THE COURT: So does this speak to the
24 lodestar?

10:16:49 25 MR. SKINNER: We believe it does, your Honor,

1 to the extent that even if this Court chooses to apply a
2 lodestar as Galloway makes it clear there's still an
3 overarching benefit -- the key is the degree of success
4 attained for the class, and that necessarily means
10:17:06 5 contributing the benefit to the class to the coupons.

6 THE COURT: So this doesn't apply directly.
7 You're just saying it goes into the reasonableness of the --
8 of the lodestar because of the success factor?

9 MR. SKINNER: I'm sorry, your Honor. I was
10:17:21 10 trying to skip ahead, and I apologize for that.

11 We believe that, as the majority explains, if the
12 coupons are a part of a settlement and class counsel is
13 seeking fees based on a settlement in which the value that
14 they claim is going to consumers is coupons, that there must
10:17:41 15 be an attribution based on the award of coupon -- the actual
16 coupons redeemed.

17 THE COURT: Follow with me 1712(b)(1). You
18 want to read that for me?

19 MR. SKINNER: Sure, your Honor.

10:17:54 20 "If a proposed settlement in a class action provides
21 for a recovery of coupons to class members."

22 THE COURT: That -- that's our case, right?

23 MR. SKINNER: Correct, your Honor.

24 And a portion of the recovery of the coupons is not
10:18:09 25 used to determine the attorney's fees.

1 THE COURT: So in this case, if we use the
2 lodestar, the portion wouldn't be used, right?

3 MR. SKINNER: That is a reading that some
4 courts have taken, your Honor.

10:18:21 5 THE COURT: Well, read the Congress's
6 language, though, that if a portion of the recovery of
7 coupons is not used to determine attorney's fees to be paid
8 to class counsel, what's it go on to say?

9 MR. SKINNER: And a portion -- and a portion
10:18:41 10 of the recovery is not used, any attorney's fee award shall
11 be based upon the amount of time class counsel reasonably
12 expended working on the action.

13 THE COURT: So your argument is what, though?
14 Under Congress' language, isn't that telling us that if we
10:18:57 15 use the lodestar, determine as to whether the hours were
16 reasonably spent?

17 MR. SKINNER: (b) (1), your Honor, personally
18 to the way we read it and the way that the Ninth Circuit has
19 read it, understanding there is a circuit split on the
10:19:14 20 question --

21 THE COURT: How does the Sixth Circuit read
22 it?

23 MR. SKINNER: The Sixth Circuit made no
24 statement about this, your Honor. You would be the first
10:19:19 25 one weighing in, in the absence of Sixth Circuit guidance.

1 THE COURT: Let's go back to the text of the
2 statute, though.

3 Does the text of the statute support the Ninth
4 Circuit?

10:19:32 5 MR. SKINNER: We believe it does, your Honor,
6 as the Ninth Circuit explained.

7 THE COURT: Which language in the statute
8 supports the Ninth Circuit?

9 MR. SKINNER: We believe, your Honor, that
10:19:43 10 they together explain that when you're looking at things
11 beyond coupon relief, you use (b) (1). So in cases where you
12 have something that is in addition to coupons, and it could
13 be cash, and it could be injunctive relief, could be
14 something in this case, you know, if -- that is the type of
10:20:02 15 thing that then can be with lodestar, and you should have an
16 analysis where the coupons are treated at the time they were
17 redeemed and a reasonable percentage and lodestar has
18 allowed for other relief.

19 THE COURT: Anybody want to respond?

10:20:18 20 MR. SILVEY: Your Honor, I mean I can see an
21 artificial circumstance where if a lawsuit was filed, and
22 the complaint was filed, a motion to dismiss, then they
23 raise the coupon settlement. And the lawyers had 50 hours
24 in it, which was only going to net them \$6,000. But, they
10:20:37 25 said, "No, we've got all these great coupons for people. So

1 let's measure the value of a settlement by the coupons in an
2 attempt to enhance their role in the case. But that's not
3 what we've got here. This is clearly within the paragraph
4 that you read, (b) (1), or (b) (2), I can't remember which one
10:20:53 5 it was right now, but obviously, that's not the case. This
6 is a case that was litigated fully up to and including a day
7 or a half day of trial.

8 It's not one where we're trying to piggy back on the
9 value of the settlement. We're simply asking to be paid for
10:21:08 10 the time that we put in this case.

11 The Court is well aware of what all went on in this;
12 case. It was closely involved in all the motion practice.
13 The Court referred very few things to the Magistrate. So
14 you know what went on. And it would be inappropriate to do
10:21:23 15 as the Government insists and weigh the Plaintiffs'
16 counsel's participation, based solely on the 13,000 people
17 who decided to exercise the coupon rights.

18 This isn't that kind of case. We aren't basing our
19 fee request on the value of the coupons. We're basing our
10:21:40 20 fee request on the hours we devoted to litigating this case.

21 THE COURT: So let's go through this.

22 There's kind of two alternatives, and there's
23 sometimes used -- well, as the Sixth Circuit directed courts
24 to give explanation or to explain which of the two
10:22:03 25 methodologies for determining fees have been applied.

1 MR. SILVEY: Correct that's what Gascho says.

2 THE COURT: And the Court asked to make a
3 determination based upon the nature of the underlying case,
4 correct?

10:22:19 5 MR. SILVEY: Correct.

6 THE COURT: So what in this underlying case
7 suggests that it should be a lodestar test?

8 MR. SILVEY: Again, this is just like the
9 statute says, the nature of the relief in this case exists
10:22:32 10 outside of just the realm of a coupon. The primary relief
11 in this case, if you want to describe this one as the
12 injunctive relief, is the video that tells people about the
13 dangers they didn't know about before. The statistics the
14 Court quoted was very telling, I think.

10:22:48 15 Before this case was listened to, there were 100
16 claims or so where people had actually been hurt. After
17 that, there were 13,000 claims made because people were now
18 educated about the potential problems that Tristar certainly
19 denies exist, that we dispute that, but that people are now
10:23:05 20 educated about the potential for --

21 THE COURT: But in terms of the litigation,
22 what's your argument on that, because it -- it seems like
23 you're almost arguing that that -- this was a hotly
24 contested case from start to finish, right? I mean there --
10:23:27 25 the Defense did everything other than rolling over the

1 Defense. If anything, put this case through, you know,
2 every single defense available.

3 Why would the lodestar application not be the -- do
4 you agree the lodestar is the appropriate methodology to
10:23:52 5 begin the fee analysis?

6 MS. JENNY: Your Honor, the United States
7 actually does not take position as to whether the lodestar
8 is required in circumstance or whether the -- excuse me,
9 whether it would be required to use the value of a coupon
10:24:05 10 under the Ninth Circuit case. Certainly we don't think the
11 lodestar is required.

12 THE COURT: But does the -- I'm not saying
13 whether it's required. I'm saying that in this case, the
14 Sixth Circuit's directed this Court to give explanation as
10:24:20 15 to which between the two methodology of determining fees it
16 has applied and why it applies that.

17 So there's two options in this case. You could use
18 the -- you know, in some ways, the contingent or you can
19 alternatively use the lodestar. Is there some argument that
10:24:41 20 a case this hotly contested, that lodestar isn't a better
21 methodology?

22 MR. SKINNER: Your Honor, you already have the
23 argument from us. And in our papers, we believe that 1712,
24 the best reading of 1712 is that you have to use contingent
10:24:59 25 percentage for the coupons, and you can use lodestar for --

1 it wasn't coupons, which this case doesn't really have, but
2 accepting the fact that your Honor believes that there's a
3 choice between the two, you know, to the extent that your
4 Honor wants to come down on that side of the Circuit split,
10:25:17 5 we -- then you would be choosing to use lodestar.

6 THE COURT: Isn't -- I mean isn't -- aren't
7 greater problems created when you don't use lodestar?

8 MS. JENNY: The Sixth Circuit was able -- in
9 the Rawlings case has said that the lodestar, excuse me, the
10:25:36 10 percentage of the fund methodology more accurately awards
11 counsel for the relief they receive for the class.

12 THE COURT: I'm sorry. And that's obviously
13 true.

14 MS. JENNY: That's why we believe that a
10:25:48 15 percentage of the fund approach here, or at least using the
16 lodestar for the class to adjust backward, it would be
17 appropriate. The Seventh Circuit in the Radio Shack case
18 said regardless of whether the District Court uses a
19 percentage of the coupons or the lodestar, the number of
10:26:09 20 hours expended by attorneys could not be controlling because
21 of the nature of the cash used at issue. The face value,
22 even if one looks at the face value of the requested
23 coupons, it's approximately a million dollars, and the face
24 value of the warranty is approximately 65,000.

10:26:27 25 Those are the two settlement benefits. We also

1 dispute the parties' contention that the safety video
2 requirement is injunctive relief. The settlement agreement
3 itself defines the benefits to be two-prong; the warranty,
4 and the coupon.

10:26:41 5 The safety video is described as a condition on
6 eligibility to receive benefits and, therefore, we do not
7 think it should be considered injunctive relief.

8 MR. SKINNER: Your Honor, the same analysis --

9 THE COURT: It's not -- it's not legal relief,
10:26:55 10 right?

11 MS. JENNY: Excuse me, your Honor?

12 THE COURT: It's not a general damage, is it,
13 watching the video?

14 MS. JENNY: It's a burden imposed on the
10:27:08 15 class, your Honor.

16 THE COURT: So you think it would be better if
17 they -- if class members didn't view the safety video?

18 MS. JENNY: Depends on the class member, but
19 the requirement to watch the video itself imposes a burden
10:27:20 20 in order to obtain the settlement benefits. That's the way
21 the settlement agreement is structured.

22 THE COURT: So coming back to the question
23 then, I'm still not getting much of an answer from you on is
24 -- in a case that has been this hotly contested, isn't
10:27:38 25 lodestar then the better methodology, with an acknowledgment

1 it should be checked against some argument as to the benefit
2 obtained or some consideration of the benefit obtained?

3 MS. JENNY: We consider -- we continue to
4 consider that looking to the value actually received by the
10:28:00 5 class is very important in this case.

6 THE COURT: What's -- well it's important
7 because it's important in checking the lodestar method, but
8 I'm surprised you say that because you're almost encouraging
9 strike suits.

10:28:15 10 So you're encouraging lawsuits where Plaintiffs'
11 attorneys expend almost no money, securities cases or things
12 of that nature, and then companies roll over just to stop
13 the litigation. It seems like you're encouraging that, that
14 if the Plaintiff can get a quick recovery, you're
10:28:45 15 encouraging the use of the fund analysis rather than the
16 lodestar and the reasonable hours spent on the case? That's
17 kind of a surprising position for the Department of Justice
18 to take. You think the value of the fund is the better
19 measure?

10:29:03 20 MS. JENNY: We believe the value of the fund
21 is simply an important consideration because it
22 highlights --

23 THE COURT: No. But you just said a minute
24 ago, you said that should be the principal determiner that
10:29:13 25 the Justice Department was taking the position that the

1 value of the fund, except in rare cases, should be the
2 factor used to determine the attorney's fees.

3 MS. JENNY: Not necessarily, your Honor. We
4 just believe in this case, given the low value to the class
10:29:31 5 members, that it should be an essential consideration. The
6 District Court would not use its discretion unnecessarily if
7 it looked to the lodestar, but we believe the value should
8 be downward for the adjusted -- to account for the low value
9 to the class.

10:29:44 10 MR. SKINNER: Your Honor, I think at the end
11 of the day, we believe that the benefit here is so low that
12 regardless of which of the two methods you begin with, there
13 is an upward constraint that is very real, and it speak to
14 the amounts of the nature of the settlement.

10:29:58 15 THE COURT: What was that saying? There is an
16 upward constraint to --

17 MR. SKINNER: There's a constraint on the fee
18 award, your Honor, because of the incredible --

19 THE COURT: You mean there should be a limit
10:30:10 20 on the fee award?

21 MR. SKINNER: Yes, your Honor.

22 THE COURT: Okay.

23 MR. SKINNER: Ideally, we believe the entire
24 settlement should stand and fall as a whole and fall as a
10:30:22 25 whole so that the parties can go back and properly divide --

1 THE COURT: So if that happens, are you going
2 to undertake the litigation for the 16,000 people who, at
3 least to this point, participated in it? You're going to
4 start that lawsuit?

10:30:37 5 MR. SKINNER: We have full faith if your Honor
6 makes clear to the parties that the fees must be related in
7 an appropriate way, pursuant to Rule 23 and 1712 to the
8 benefit provided to the class, that the parties will
9 properly divide the current settlement allotment to ensure
10:30:55 10 that that occurs.

11 THE COURT: And how many --

12 MR. LEWIS: May I speak to that, your Honor?
13 Just to be clear, if this settlement is not approved,
14 we're going to be in front of a jury and 13,000 people are
10:31:09 15 not going to get the benefit of what they've asked for in
16 the settlement. I mean I just -- I want to make sure that's
17 clear that the Government's position that we're going to run
18 back and redo this settlement, that's not going to happen.

19 So I just want the Government to make sure that the
10:31:24 20 ramifications of its arguments are well known.

21 MR. SKINNER: Your Honor, at the end of the
22 day, the duty you owe is to the absent class members.
23 13,000 members receive a benefit here and millions of them
24 have claims released, including millions who were not part
10:31:41 25 of the trial, would not be part of the trial if it were a

1 loss.

2 THE COURT: Yeah, but they -- they never came
3 forward. They could have either opted out or objected.

4 How do you draw from them that they're disadvantaged?

10:31:56 5 MR. SKINNER: Because they gain nothing from
6 the settlement, and they lose their claims. And so by
7 definition, they're made worse off entirely.

8 THE COURT: You said they gain nothing, but is
9 that kind of an election they made that it's not worth
10:32:11 10 sending in the claim form?

11 MR. SKINNER: At the end of the process, your
12 Honor, now knowing what we know about the number of claims
13 in the settlement and with an almost three and a half
14 million dollars cash changing hands and none of the cash
10:32:29 15 going to consumers, 13,000 of them receiving a warranty and
16 a coupon, and that -- and yet, millions of claims are being
17 released.

18 THE COURT: The coupon's not worth anything,
19 then?

10:32:42 20 MR. SKINNER: Again, your Honor, we said from
21 the beginning the coupons may have some value and that would
22 be revealed at the end of the 90-day redemption period, but
23 as Ms. Jenny has noted, even if you assume against all
24 weight and authority there was 100 percent redemption rate
10:32:58 25 on these coupons, they are still worth no more than \$1

1 million, even as class counsel's going for two and a half
2 million.

3 MS. JENNY: For that reason, your Honor, in
4 our statement of interest, we encourage this Court to defer
10:33:10 5 awarding attorney's fees if this Court does approve the
6 settlement until the end of the 90-day redemption period.

7 THE COURT: Let me go back. Because -- so
8 you're -- you're comfortable taking the position that you
9 want to kill the whole settlement and kill what seems to
10:33:28 10 have been a benefit for at least 13,000, but you're not
11 willing to undertake the litigation yourself to achieve the
12 success you think should have otherwise been able to have
13 been obtained?

14 MR. SKINNER: Your Honor, at a most basic
10:33:48 15 level, there are certain things that a State Attorney
16 General can do on behalf of consumers.

17 THE COURT: Can you bring a claim for
18 consumers in your state based upon these claims?

19 MR. SKINNER: Not to my knowledge, your Honor.
10:33:59 20 We could bring a consumer fraud claim, but we could not
21 bring a personal injury claim, could not bring an express
22 warranty claim. So there may be certain claims that could
23 have been brought but not these claims brought, and that's
24 just a factor of the jurisdiction of the Court and the
10:34:14 25 statute of the AG's authority.

1 THE COURT: Okay.

2 Do you have any comment on that?

3 MR. SILVEY: Well, your Honor, first of all,
4 the only possible relief that the Government's seeking in
10:34:32 5 this case is to reduce the value of the work that we put
6 into it.

7 And it seems to me inappropriate to allow the
8 Department of Justice and the State AGs to come in and
9 second guess the work that was done in this case, having no
10:34:48 10 concept of what it involved, and supplanting its knowledge
11 for what the Court knows.

12 The Court should be aware and the Court does know,
13 that this -- the basic terms of this settlement were
14 announced a year ago, two days ago. The Court preliminarily
10:35:06 15 approved this case in January. The only thing that has
16 changed since January is we now know exactly how many people
17 sought the coupons out, exactly how many people are -- or we
18 have the best estimates from the claims people about how
19 many people sought the coupons, how many people were reached
10:35:22 20 for notice, and the fact that there was zero objectors from
21 the class. There were zero professional objectors.

22 Despite all that, the Government still maintains that
23 this wasn't a fair settlement, and because of that, it knows
24 more and it knows that the Plaintiffs' attorneys didn't work
10:35:40 25 hard enough. So they shouldn't get paid is the basis of the

1 argument.

2 We heartily disagree with that. The Court certainly
3 knows what went on in this case, and we think the requested
4 fees are appropriate based on the relief, the overall relief
10:35:52 5 sought, the lodestar method is the appropriate method to
6 figure that because this isn't a case that was settled three
7 months in for a coupon. It was one that was tried, that was
8 mediated once and settlement conferenced several times, and
9 only after that, that any agreement was reached.

10:36:11 10 The Court knows what went on in this case and all the
11 work that went into it, and it is inappropriate to be second
12 guessed after the fact by people who didn't participate, who
13 don't know and either won't or can't protect the rights of
14 the people that we did. And that's all we've got.

10:36:32 15 THE COURT: Let me just kind of explicitly
16 find, I find in this case the lodestar written methodology
17 is more appropriate. I think that percentage of created
18 fund is less appropriate in a case such as this that was so
19 hotly contested for -- and so bitterly opposed by the
10:36:55 20 Defendant; over hundreds of filings.

21 The parties in this case made extraordinary efforts.
22 The Defense in this case never once conceded liability. The
23 Defense in this case argued to the jury and cross-examined
24 the Plaintiff's expert witness in a -- in a very competent
10:37:21 25 fashion in trying to suggest that there was no -- no

1 worthlessness of this product, and that the product itself
2 had not been defective.

3 And so against that backdrop of such extended
4 litigation, I find that the lodestar methodology is more
10:37:40 5 appropriate, which brings the Court to a determination as to
6 what the lodestar computation should be.

7 The Court does -- hears no objection from any of the
8 claimants and has received no objection to -- for many of
9 the class members. The Court has as well received no
10:38:11 10 objection from any of the Intervenors as to the number of
11 hours expended, nor has the Court heard any objection as to
12 the hourly rate sought. And I've examined and had
13 significant contact with similar type cases, and the hourly
14 rates sought by the Plaintiff were reasonable. If anything,
10:38:37 15 they tended to be below the benchmark that typically is
16 applied in cases such as this.

17 Beyond that, in most of these cases, or in many of
18 these cases, multipliers are often applied or reward for
19 successful completion of a case. In other words, the hourly
10:39:06 20 rate is sought to be higher because of the difficulty of the
21 litigation, the amount of the litigation, or the success of
22 the case. That hasn't occurred in this case.

23 So I do find that the Plaintiffs in the case
24 reasonably expended the hours. The Court, however, uses the
10:39:37 25 percentage of the fund consideration as a methodology for

1 cross checking this, and specifically in determining whether
2 the overarching goal of reasonable fees is reached in this
3 case.

4 So in -- with regard to that -- and finally, I do find
10:40:08 5 -- perhaps getting ahead of myself just a bit -- I do find
6 the settlement's reasonable, contrary to the Intervenor's
7 surmise.

8 I credit counsel's representation that the fees were
9 not discussed before the settlement was reached, and
10:40:36 10 contrary to the suggestion of the Intervenor, I believe the
11 settlement was likely a back and forth between both sides
12 and was only finally reached when each side determined that
13 a compromise obviated some of the risk factors that attend
14 to all litigation.

10:41:05 15 So I'll approve the settlement. I do find it to be
16 reasonable. In this case, there were -- the overarching
17 backdrop of the case had been that there had been over a
18 million of these products sold. And prior to this
19 litigation, there had been, to my understanding, less than
10:41:34 20 200 complaints about the product.

21 The Plaintiffs brought this case on behalf of a number
22 of Plaintiffs who gave testimony that they had been burned
23 or otherwise badly affected by the pressure cooker lid
24 coming off when pressure still remained in the cookware.
10:42:05 25 The Defense took the position from the start that that was

1 operator error that had caused that. And they continued to
2 keep that position.

3 So in terms of the case itself, it was a hotly
4 contested case. Under the terms of the settlement, there is
10:42:36 5 both some economic benefit to the class members, and
6 alternatively, there is noneconomic benefit. The viewing of
7 the video I find to be valuable or the alternative reading
8 of the video transcript I find, to be valuable.

9 I also find the coupon has value and the amount of the
10:43:11 10 coupon being roughly \$75 I find to be reasonable against the
11 backdrop that the products themselves could have been as
12 much as four or five years old and were not required to be
13 returned and were originally priced at somewhere in the
14 range of 100 to \$150.

10:43:42 15 So a coupon that's worth as much as 50 percent or 75
16 percent of the underlying transaction, I find to be -- to
17 have value for the class members.

18 I do consider the fact that a relatively -- actually a
19 relatively significant number of people applied to it,
10:44:07 20 although a low percentage, but to have a response over
21 13,000 I find to be, if anything, supportive of --
22 supportive of the value of the settlement.

23 Just as an offhand, in these times of identity theft,
24 I think there's also -- there's more appropriate hesitation
10:44:45 25 of people in making claims. I think people correctly have

1 concern that by giving identifying information to -- in the
2 claims process makes them vulnerable to having their
3 identities stolen, and so I'm sure that the people that
4 received notice of this settlement likely will have -- had
10:45:23 5 to and probably will need to make a decision as to whether
6 the risk of identity theft is worth the \$75 discount.

7 But, nonetheless, I then turn to the issue of the
8 attorney's fees. I do find the application's not contested
9 in terms of hours or the rate. The Intervenors largely make
10:45:57 10 an argument that the -- that the Court needs to consider the
11 desired outcomes. As I've indicated, I think the desired
12 outcomes were actually relatively good. Actually, I find
13 them to be good, given the Defendant's presentation as to
14 the Defenses in this case.

10:46:30 15 So I generally approve the application for fees. I do
16 cross check this against, and I have considered the issue of
17 the -- of the percentage of the fund cross check. I find
18 there to be a discretion with the Court in a case such as
19 this. The Supreme Court, in at least some cases, has spoken
10:46:58 20 to the -- that the proper consideration is the right to
21 share in the suit rather than the actual number of claims
22 received.

23 Some other courts have been, especially in cases such
24 as this, have said that the number of claimants is a -- is a
10:47:19 25 more appropriate consideration. The Sixth Circuit seems to

1 give me discretion as to that. And at least the Gascho
2 case, the District Court had used kind of a halfway mark
3 between the value of the claims. If all potential claimants
4 had taken advantage of it, and the value of the claims among
10:47:50 5 those who had taken, you know, had applied claims, I think
6 that is probably a reasonable test in this case to cross
7 check the lodestar event.

8 So I'm going to go through this, and I'll make some
9 final determinations. I'll -- also as suggested by the
10:48:22 10 Gascho case, I'm going to -- I'll write an opinion kind of
11 more fully setting out these thoughts, but in general, I
12 would indicate to the parties that it's my intent to approve
13 the settlement and also to generally approve the attorney's
14 fees.

10:48:44 15 So any other comments or any final comments?

16 MR. SILVEY: Nothing from the Plaintiffs, your
17 Honor.

18 THE COURT: Mr. Lewis?

19 MR. LEWIS: All set for the Defendant. Thank
10:48:56 20 you, your Honor.

21 THE COURT: Okay. Thanks, everyone. And we
22 are adjourned.

23 (Proceedings adjourned at 10:49 a.m.)
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Shirle Perkins
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