**Nos. 18-3847, 18-3866**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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KENNETH CHAPMAN, *et al.*,
*Plaintiffs-Appellees,*

v.

TRISTAR PRODUCTS, INC.,
*Defendant-Appellee,*

and

STATE OF ARIZONA AND ARIZONA ATTORNEY GENERAL
*Proposed-Intervenors/Appellants.*

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On Appeal from the United States District Court
For the Norther District of Ohio
No. 1:16-cv-01114-JG and No. 1:17-cv-02298-JG

# BRIEF OF PROPOSED-INTERVENORS/APPELLANTS

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## STATEMENT IN SUPPORT OF ORAL ARGUMENT

The undersigned respectfully requests oral argument. This appeal raises important questions, including a threshold intervention question that goes to the intervention authority of the states' chief law enforcement or chief legal officers in connection with class action settlement proceedings in federal court (a matter of first impression that has not been addressed by any United States Court of Appeals). Moreover, in determining the validity of the underlying class action settlement, the Court will be required to weigh in on a matter that has a pending circuit split.

## INTRODUCTION

This appeal asks a threshold question: can a state Attorney General intervene for purposes of appeal in a class action settlement proceeding after leading an eighteen-state, bipartisan amicus brief and presenting oral argument at the final fairness hearing in an effort to thwart a coupon settlement that contravenes CAFA, violates Rule 23, and leaves ~99.6% of the nationwide class worse off, even as millions in cash goes to class counsel? The appeal also includes a second chief question: was it error to approve the imbalanced settlement here in light of the failings that the state Attorneys General identified for the district court?

Intervention and appeal here is not only warranted based on the harm the settlement does to consumer class members, it is consistent with the active role the Arizona Attorney General is playing in the class action settlement approval process across the country, helping ensure compliance with CAFA's requirements and drive increased value to consumers in the class action settlement approval process.

In many ways this is precisely the type of class action settlement proceeding in which intervention is warranted because, absent intervention and appeal, there will be no appellate review and correction of the patent settlement approval errors. The active engagement of state Attorneys General is perhaps most important where (as here) the proposed settlement fails to serve the interests of absent class members and there is no class objector (perhaps because the imbalanced nature of

the deal was never directly transmitted to the absent class members most hurt by the deal, as the millions in settlement cash going to class counsel was not disclosed until late in the process, and was not included in any of the notice documentation).

## STATEMENT OF JURISDICTION

The district court issued an order denying the State of Arizona and Arizona Attorney General's Office's (collectively "Arizona") motion to intervene or to be deemed formal objectors on September 4, 2018, and Arizona filed a timely notice of appeal on the same day. Order Denying Intervention, RE-162, Page ID #3754, Notice of Appeal, RE-163, Page ID #3755-56. The district court entered a judgment approving the class settlement and Class Counsel's fees and costs, and reiterating the intervention denial, on September 6, 2018. Judgment, RE-165, Page ID #3759. Arizona timely filed an amended notice of appeal on September 10, 2018. Amended Notice of Appeal, RE-167, Page ID #3763-64. The district court asserted jurisdiction under 28 U.S.C. §1332. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF ISSUES

1. Whether the district court erred and/or abused its discretion by denying the Appellants' Motion to Intervene.

2. Whether the district court erred and/or abused its discretion by denying the Appellants' request to be deemed a formal objector to the proposed class settlement.

3. Whether the district court erred and/or abused its discretion by certifying Plaintiffs' proposed nationwide class.

4. Whether the district court erred and/or abused its discretion by approving the parties' proposed class settlement.

5. Whether the district court erred and/or abused its discretion by approving class counsel's fee request.

## STATEMENT OF THE CASE

This appeal arises out of class action settlement approval proceedings in the Northern District of Ohio. The class action litigation was initiated in May 2016, relating to certain pressure cookers made by Tristar Products, Inc. ("Tristar"). *See, e.g.*, Order Approving Settlement, RE-156, Page ID #3678 (detailing procedural history). Put simply, the allegations centered on the contention that the pertinent pressure cookers had lids that were defective: the lids could be opened by consumers even when still under pressure, meaning the heated contents of the pressure cook could (and did) burst out onto consumers, causing burns and other personal injuries. *Id.*

The case proceeded through motion practice with Tristar disputing the allegations and defeating some claims on a motion to dismiss, although the bulk of Plaintiffs' claims survived. *Id.* (detailing procedural history). The district court denied certification of a nationwide class, instead certifying three separate state classes: Ohio, Pennsylvania, and Colorado. *Id.* (detailing procedural history). The district court explained that the basis for certifying only the state-specific classes was because: "Certifying a nationwide class is inappropriate because individual state law questions would predominate." Class Certification Order, RE-69, Page ID #1228.

On July 10, 2017, the first day of trial, the parties reached a settlement in principle. Once the Ohio action reached a settlement, a related California action that was at an earlier stage of proceedings was transferred to the Ohio district court as part of facilitating a global resolution. The proposed global settlement provided for a nationwide class of "approximately 3.2 million Tristar pressure cooker purchasers." Order Approving Settlement, RE-156, Page ID #3679 (detailing procedural history).

Under the settlement, each claiming class member will receive a coupon for $72.50 off the price of one of three Tristar products, so long as (1) no other promotion is used along with the coupon, (2) the product is purchased directly through Tristar, and (3) the purchase is made within ninety days of the coupon

being activated. Order Approving Settlement, RE-156, Page ID #3679 (detailing procedural history). As the district court explained, "[e]ach of these products cost about $159.00, and class members must pay the difference between the product's retail cost and the value of the credit, plus any shipping and handling fees." Order Approving Settlement, RE-156, Page ID #3679 (detailing procedural history). In addition to the coupon, each claiming class member will receive "a one-year warranty extension on class members' Tristar pressure cookers." which has a relative market value of $5. Order Approving Settlement, RE-156, Page ID #3679 (detailing procedural history). A condition of submitting a claim was watching a video regarding operation of pressure cookers that was prepared by Tristar. Order Approving Settlement, RE-156, Page ID #3679.

Regardless of whether a class member submits a settlement claim, all class members who do not opt out will release all claims, including personal injury claims. Settlement Agreement, RE-126-1, Page ID #2962 (defining released claims as those "of every nature and description whatsoever," including those based on the contention that the "Products are defective, are note safe for their intended use, or pose an unreasonable risk of injury…"). To retain personal injury claims, an unnamed class member must opt out and forgo any settlement benefit. Notice of Class Action Settlement, RE-126-2, at Page ID #3012 ("If you or anyone you know has suffered personal injuries or property damage as a result of a

Pressure Cooker and wish to pursue an individual claim for those personal injuries and/or for a property damage claim, then that Person(s) should Opt-Out of this Settlement.")

The settlement agreement provides special compensation to the named Plaintiffs, in addition to the coupon and warranty extension. In exchange for the release of the named plaintiffs' personal injury and property damage claims, each named plaintiff is to receive $25,000, on top of an agreed-upon incentive award of $6,000 to $7,500 for time spent assisting with the litigation. Settlement Agreement, RE-126-1, Page ID #2974; Judgment, RE-165, Page ID #3759.

The settlement agreement also provided for attorneys' fees, as well as funds for notice and administration. Put simply, Tristar agreed to $2.5 million in fees; that is, Tristar agreed to take no position on any request up to $2.5 million in fees and expenses. Order Approving Settlement, RE-156, Page ID #3680 (detailing procedural history). In addition, up to $890,000 in cash was set aside for notice and claim administration costs.

The settlement was preliminarily approved on January 19, 2018, with notice going out. The notice said as follows:

> Class Counsel for the Ohio Action may apply to the Court for an award of reasonable attorneys' fees and expenses which shall be comprised of Class Counsel's lodestar and expenses in the Ohio Action, in an amount within a range agreed to by the Parties. Class Counsel for the California Action may apply to the Court for an

> award of reasonable attorneys' fees and expenses in an amount not to exceed $225,000.00 to which Tristar agrees not to object. The Court will determine the appropriate fee of Class Counsel.

Notice of Class Action Settlement, RE-126-2, Page ID #3010. No direct notice of the full fee amount was sent to class members.

The Arizona Attorney General received notice of the proposed settlement on February 12, 2018, pursuant to 28 U.S.C. 1712, and thereafter raised concerns with class and defense counsel. After initial discussions with representatives of several state Attorneys General, counsel for the parties began providing updated claims data to the Arizona Attorney General's Office.

On May 18, 2018 (two weeks before the objection deadline for class members), consistent with the settlement agreement, Class Counsel moved for $2.5 million in fees and expenses: $2,043,079.45 in fees and $237,355.77 in expenses for Class Counsel in Ohio, and $225,000 in fees and expenses for Class Counsel in California. Plaintiffs' Fee Motion, RE-133, Page ID #3109-3110. Notice of the details of this fee request was not sent to class members.

The claims period closed on July 4, 2018, with 13,107 claims having been filed.[1] This represented a claims rate of approximately 0.4%. In addition to the

[1] The district court calculated the appropriateness of fees and costs using 13,174 as the number of claiming class members, but the final claims number provided to the court by the claims administrator listed only 13,107 claimants. Order Approving Settlement, RE-156, Page ID #3690.

~13,000 claims filed, 137 class members asked to be excluded from the settlement. No objections were filed. The claims administrator also confirmed that the online video (the prerequisite to filing a claim) had been viewed ~31,000 times by the conclusion of the claims period.

The Arizona Attorney General filed an *amicus curiae* brief on June 12, 2018 (with the support of a bipartisan coalition of 17 other state Attorneys General), highlighting the failings of the settlement and urging its rejection by the district court. *See* Brief of Amicus Curiae, RE-136-2, Page ID #3481-3503. That brief raised arguments under CAFA, including Section 1712's coupon limits, as well as Rule 23's overarching requirement that a settlement be fair, adequate, and reasonable (including being proportionally fair when considering the difference between the class recovery and class counsel's fee award). And it explained numerous reasons why, "[w]here there is so much cash in the settlement and so little interest in the coupons and warranties, the settlement can only stand by sending a fair apportionment of the available cash to the class." Brief of Amicus Curiae, RE-136-2, Page ID #3502.

The Arizona Attorney General also participated in the fairness hearing on July 12, 2018, and presented arguments to the district court relating to the flaws in the proposed settlement and the harm final approval would cause to the millions of

consumer class members who would have their claims released (including personal injury claims) without getting any direct benefit from the settlement.

The United States Department of Justice also filed a statement of interest and presented oral argument aligned with the Arizona Attorney General. U.S. Statement of Interest, RE-134, Page ID #3241-3275; Transcript, RE-153, Page ID #3591-3655. In addition to expressing opposition to the imbalanced settlement and fee award, at the fairness hearing the Department of Justice raised the issue of the impermissible conflict of interest between the Class Representatives and the class members, as the former were granted personal injury damages expressly foreclosed to all other class members by the settlement agreement. Transcript, RE-153, Page ID #3503.

At the July 12 fairness hearing, the district court noted its intent to grant approval to both the proposed settlement and class counsel's fee request, with the district court's actual approval and full rationale to be set out in a forthcoming written opinion. Transcript, RE-153, Page ID #3653-3654. Arizona moved to intervene on July 26. Motion to intervene, RE-154, Page ID # 3656-3658.

The district court approved the settlement with adjustments on August 2nd. Order Approving Settlement, RE-156, Page ID #3677-3696. Arizona's motion to intervene for purposes of appeal was denied on September 4, 2018. Intervention Denial, RE-162, Page ID #3745-3754. Arizona timely filed a notice of appeal that

day. Notice of Appeal, RE-163, Page ID #3755-3757. The district court approved $28,500 in incentive awards for representative plaintiffs, $240,009.63 in costs, and $1,980,382.59 in attorneys' fees on September 6, and Arizona filed an amended notice of appeal on September 10. Judgment, RE-165, Page ID #3759; Amended Notice, RE-167, Page ID # 3763-3765.

The district court denied Arizona's motion for intervention of right or to be an objector because it rejected Arizona's claims of a protectable interest in this case and therefore found no alleged injury on which to base Article III standing. Intervention Denial, RE-162, Page ID # 3751. The district court rejected Arizona's motion for permissive intervention because intervention would delay distribution of settlement coupons to class members. *Id.* at #3752.

## SUMMARY OF THE ARGUMENT

This appeal asks a threshold question: can a state Attorney General intervene for purposes of appeal in a class action settlement proceeding after leading an eighteen-state, bipartisan amicus brief and presenting oral argument at the final fairness hearing in an effort to thwart a settlement that delivers value to only ~0.4% of the multi-million consumer class, while leaving the other ~99.6% of the nationwide class worse off, with nothing to show for having all their claims released (including claims for personal injury stemming from the physical injuries allegedly caused by the kitchen products at issue)?

Faced with a settlement that, by the district court's own charitable math, sent 57% of the total settlement value to class counsel (including all settlement cash) and benefited just 13,100 or so out of the multi-million-member class, the district court overlooked pertinent authority and granted its approval with a downward attorneys-fee adjustment. Approval Order, RE-156, Page ID #3691. But that adjustment sent no additional benefit to consumers and instead merely lowered class counsels' portion of the settlement to over 53% (by the district court's own erroneously charitable calculation of the settlement's consumer value). *Id.* at #3691-3692 ($1,910,985 for the class, *including* maximum administration costs, compared to $2,220,392.22 for Class Counsel, including 240,009.63 in costs; although unsaid by the district court, the ratio is 53.7%).

Intervention and appeal here is not only warranted based on the alleged (and actual) harm the settlement does to consumer class members in Arizona, it is consistent with the active role the Arizona Attorney General is playing in the class action settlement approval process, helping ensure compliance with the requirements of CAFA and drive increased value to consumers in the class action settlement approval process.

The appeal also includes a second chief question: was it error to approve the imbalanced settlement here in light of the failings that the State Attorneys General identified in the district court proceedings. The as-approved settlement does not

just leave the vast majority of the consumer class members worse off, it features a litany of reversible errors under Rule 23 and CAFA and so on several independent bases cannot be deemed fair, adequate, and reasonable.

The evident intra-class conflicts should have prevented the district court from certifying the settlement class in the first place. The settlement agreement grants Class Representatives a special cash award for the resolution of their personal injury claims against Defendant, but requires that all other class members waive their personal injury claims without additional compensation. Settlement Agreement, RE-126-1, Page ID #2963, 2976. This conflict was recognized by the district court early-on in the case, and Class Representatives' personal injury claims were dismissed as a condition of certifying the state-level classes, but their ability to recover for them, and in cash, was revived as part of the settlement. Opinion & Order, RE-101, Page ID #2223; Settlement Agreement, RE-126-1, Page ID #2975.

Unlike the special awards to the Class Representatives, the relief available to unnamed class members is a coupon, laden with restrictions. Order Approving Settlement, RE-156, Page ID #3689. The district court expressly acknowledged this fact, but then failed to follow the Coupon Settlement provisions of CAFA, bucking circuit court precedent to approve a fee award for Class Counsel in

violation of both CAFA and Rule 23's fundamental fairness requirements. *Id.* at #3689, 3695.

In many ways this is precisely the type of class action case in which intervention is warranted because, absent intervention and appeal, there will be no appellate review and correction of the patent errors in the settlement. The active engagement of state Attorneys General is perhaps most important where (as here) the proposed settlement fails to serve the interests of absent class members and there is no objector from the class (perhaps because the imbalanced nature of the deal was never directly transmitted to the absent class members most hurt by the deal, as the millions in settlement cash going to class counsel was not disclosed until late in the process, and was not included in any of the notice documentation).

## STANDARD OF REVIEW

Denial of intervention as of right, on the basis of any factor other than timeliness, is reviewed *de novo*. *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). A denial of permissive intervention, as "is reviewed for an abuse of discretion." *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 577 (6th Cir. 2018). A settlement may only be approved by a court after a "finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). District court findings are reviewed "for an abuse of discretion." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717 (6th Cir. 2013). "[W]here the trial court improperly applies the

law or uses an erroneous legal standard," it abuses its discretion. *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007) (quotations omitted); *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

## ARGUMENT

### I. SETTLEMENT APPROVAL HARMED ARIZONA CONSUMERS, THEREBY CONFERRING ARTICLE III STANDING ON THE STATE AND THE ARIZONA ATTORNEY GENERAL

This settlement is imbalanced, leaving millions of consumers worse off, and the Arizona Attorney General, through *parens patriae*, CAFA, and historical practice, is a proper party (at this time, the only available party) to serve the interests of the State of Arizona and Arizona consumer class members by intervening and appealing here. The District Court denied intervention solely for lack of a protectable interest to give rise to standing. Intervention Denial, RE-162, Page ID #3751. But denial of intervention for lack of standing was error—the Arizona Attorney General's interests here turn on the harm to consumers from the settlement, which sends a majority of the settlement value to class counsel (including *all* available cash), rewards named plaintiffs with settlement payments for personal injury claims that are unavailable to absent class members, and leaves over 99% of class members worse off. This harm to consumers, and the concomitant lack of compliance with Rule 23 and CAFA, provide standing to the

undersigned that is adequate to pursue an appeal to reverse the settlement approval. Indeed, the law is clear that merely having made credible allegations of consumer harm here was sufficient for standing.

### A. The As-Approved Settlement Harms Consumers

The as-approved settlement harms consumers by leaving 99.6% of the class worse off post-settlement-approval than they were prior to the settlement, even as millions of dollars change hands. The settlement releases the claims of a multi-million person consumer class (including personal injury claims for physical injury caused by the allegedly defective products) in exchange for only ~0.4% of class members receiving: (1) a $72.50 coupon that is laden with restrictions, and (2) a warranty extension worth at best $5. Said differently, through the as-approved settlement, over three million class members will release their claims in exchange for no value, while 13,107 consumers receive a warranty extension that is worth at most $5, and a $72.50 coupon that (as explained below in detail) is highly restrictive and worth far less than its face value. Motion for Preliminary Approval of Class Action Settlement, RE-126, Page ID #2922-2951.

This is a particularly bad outcome for the class members outside of Ohio, Pennsylvania, and Colorado. Before the settlement, the consumer class members outside those states were not at issue in the litigation and retained their claims—the district court had certified only Ohio, Pennsylvania, and Colorado state classes to

pursue economic injury claims. Class Certification Order, RE-69, Page ID #1228. And therefore a loss at trial would not have bound the consumers from other states or extinguished their claims. But the now-approved settlement expanded the class definition for settlement purposes to include a nationwide class. While this expansion of the class obtained a more valuable release for the defendants, and likely a higher fee for class counsel, it diminished the position of the class members from the states that were not part of the upcoming trial.

In addition to expanding the class, the settlement also expanded the claims at issue by bringing back class personal injury claims, which the district court had specifically excluded from certification for even the three state classes that were certified. This is particularly troubling given that the settlement provides specific compensation for the named plaintiffs' personal injury claims even though: (1) the absent class members have their personal injury claims released without any corresponding compensation, something raised by Defendants and acknowledged by the district court, and (2) Class Counsel dropped any personal injury claims to gain class certification. *Id.* at #1224, 1231-1232.

And this is not just about absolute harm. To be sure, 99.6% of the class is worse off in an absolute sense; but there is also the relative harm to the absent class members of being deprived of the appropriate share of the settlement value. Millions of dollars will change hands, and yet the settlement assures that all the

settlement funds go to the attorneys and claims administrator, representing a majority of the total settlement value (by the district court's own rosy math), and using more realistic numbers, the vast majority.

### B. The Arizona Attorney General Speaks Here As *Parens Patriae* For The Interests Of The Harmed Class Members And Arizona Consumers

Given the harm done by the as-approved settlement, and the settlement's imbalanced nature, the State's interests in the economic welfare of its citizens supports standing that is adequate to allow intervention for purposes of appeal. The State of Arizona, through the Arizona Attorney General, has protectable, quasi-sovereign interests in protecting Arizona consumers in this settlement—the Supreme Court has long recognized that each State has a "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents[.]" *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). And the settlement here impairs the economic well-being of Arizona consumer class members. *See supra* Part I.A. The State's interests in the economic welfare of its citizens thus supports standing for purposes of this appeal. *See*, *e.g.*, *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) ("[T]he State has an interest in protecting and promoting the state economy on behalf of all of its citizens." (reversing denial of motion to intervene by State of Arkansas)); *Zimmerman v. GJS Group, Inc.*, No. 2:17–cv–00304, 2017 WL 4560136, at *5 (D. Nev. Oct. 11, 2017) (granting intervention to Nevada; holding Nevada had

"protectable "interest[s] in the health and well-being—both physical and economic—of its residents in general."). *See* Motion to Intervene, RE-154-1, Page ID #3664-3665.

Arizona's broad interest in protecting its consumers can scarcely be doubted. The Supreme Court has explained that "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Snapp*, 458 U.S. at 607. And Arizona has done just that, enacting laws to protect its consumers from economic harm. For example, Arizona has ethics laws limiting the maximum fees that attorneys may charge, Ariz. S. Ct. R. 42, ER 1.5, and enacted its own version of Rule 23, which similarly requires a settlement to be fair, reasonable, and adequate for consumers. Ariz. R. Civ. P. 23(e)(2). Moreover, Arizona has enacted a prohibition on "deceptive or unfair act[s] or practice[s]" in connection with the provision of services, which is applicable to contingency fees. *See* A.R.S. § 44-1521(5); 1522(A). By enacting unquestionably constitutional legislation directly relating to maximum attorneys' fees, the fairness of class-action settlements, and consumer protection, the State has provided strong evidence that it possesses "standing … as *parens patriae*." *Snapp*, 458 U.S. at 607.

The district court's rejection of this standing theory proves too much. Following the district court's reasoning, an interest in protecting a State's consumers would never be adequate to confer Article III standing, even (as here) where a specific statute identifies a role for a state Attorney General. *See* Plaintiffs' Opposition to Intervention, RE-157, Page ID #3701 ("This generalized duty to protect the interests of a state's citizens under *parens patriae* is insufficient to confer standing."). But that is directly at odds with longstanding acceptance of core state Attorney General functions, including administering consumer protection statutes. The State of Arizona, through the Arizona Attorney General, regularly files consumer protection suits in the name of the State. *See*, *e.g.*, *State of Ariz. v. Saban*, CV2013-005556 (Ariz. Super. Ct. Maricopa Cty.). This includes pursuing consumer protection actions when class actions on behalf of Arizona consumers have already been commenced for the same conduct. *See, e.g.*, *State of Ariz. v. Volkswagen AG*, CV2016-005112 (Ariz. Super. Ct. Maricopa Cty.); *State of Ariz. v. General Motors LLC*, CV2014-014090 (Ariz. Super. Ct. Maricopa Cty.).

Such actions are not based on merely an injury to Arizona's sovereign or proprietary interests, but instead on Arizona's "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents." *Snapp*, 458 U.S. at 607. Said, differently, just as with this appeal, these actions are brought to advance the interests of the state alongside the interests of Arizona consumers, and

are designed to advance those individual interests even when the individuals are not parties. Accepting the district court's *parens patriae* conclusions would call into question the State's being able to bring *any* of these consumer protection actions, since none of them joined individual consumers. But the district court's cramped view of *parens patriae* standing manifestly is *not* the law—just as the State does not need to join individual consumers to have standing to bring a consumer fraud action, it does not require the concurrence of an Arizona class member to have *parens patriae* standing to challenge (and appeal) the settlement here.

### C. The Arizona Attorney General Also Has Protectable Interests Here Under CAFA And Arising From Participation Below

The Arizona Attorney General also has two independent, protectable interests apart from *parens patriae* that render the denial of intervention legal error: protectable interests arising from (1) CAFA specifically inviting participation, and (2) prior participation below.

#### 1. Protectable Interests Under CAFA

First, the Arizona Attorney General has protectable interests here under CAFA, which makes specific in the federal class action settlement area the general citizen protection role that state Attorneys General perform in myriad other contexts. To facilitate state Attorney General participation, CAFA includes a mandatory notice provision that alerts the appropriate state officials (in most

instances, the state Attorney General) of proposed class action settlements that may affect their citizens. *See* 28 U.S.C. § 1715. CAFA mandates that this notice include information detailing the state-specific number of class members, and barring courts from approving a settlement "earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate state official are served with the notice required[.]" *See* 28 U.S.C. § 1715.

CAFA conveys to the States (and state Attorneys General in particular) a specific legal, statutory interest in speaking on behalf of class members against class-action settlements that are contrary to their citizens' interests. Legislative history and floor statements are clear on the intended role for a state Attorney General who receives a CAFA notice. *See* S. Rep. 109-14, at 32 (2005) *reprinted in* 2005 U.S.C.C.A.N. 3, 32 (notice provision "is designed to ensure that a responsible state and/or federal official … is in a position to react if the settlement appears unfair to some or all class members …); *id.* at 33 (officials "have an opportunity to get involved if they think it is appropriate…).[2]

[2] *See also* Class Act. Fair. Act Legis. His. 31-B. Arnold & Porter LLP Legislative History P.L. 109-2, Class Action Fairness Act, Debate, Congressional Records – Senate (February 8, 2005) at *21 (remarks of Sen. Chuck Grassley of Iowa) ("We included [the notification] provision to help protect class members because such notice would provide State officials with an opportunity to object if the settlement terms are unfair to their citizens); *id.* at *35 (remarks of Sen. Herb Kohl of Wisconsin) ("… this bill provides that state attorneys general are notified of proposed class action settlements. This encourages a neutral third party to weigh in on whether a settlement is fair for the plaintiffs and to alert the court if they do not believe that it is.").

Consistent with CAFA"s provisions and the intended role for state officials, state Attorney Generals have stepped in on a wide variety of settlements. *See e.g.*, *In re Google Inc. Cookie Placement*, No. 17-1480, Dkt. 29 (3d Cir. July 10, 2017) (brief of bipartisan state Attorney General coalition urging reversal of *cy pres*-only settlement); *In re EasySaver Rewards Litigation*, No. 16-56307, Dkt. 21 (9th Cir. May 8, 2017) (brief of bipartisan state Attorney General coalition urging reversal of imbalanced coupon settlement); *Cannon, et al. v. Ashburn Corp*., No. 16-1452, Dkt. 68-3 (D.N.J. Feb. 23, 2018) (brief of bipartisan state Attorney General coalition urging rejection of imbalanced coupon settlement). And these efforts have helped generate meaningful outcomes for consumers. *See, e.g.*, *Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261, 268 (S.D. Cal.) (after Arizona-led coalition filed amicus brief and District Court rejected initial deal, revised settlement was reached that increased the cash recovery to the class from $0 to ~$700,000).

The active engagement of state Attorneys General is perhaps most important where (as here) the proposed settlement fails to serve the interests of absent class members and there is no objector from the class (perhaps because the imbalanced nature of the deal was never directly transmitted to the absent class members most hurt by the deal). CAFA is precisely "intended to combat the 'clientless litigation' problem." S. Rep. 109-14 at 34. And one of the sharpest manifestations of that

problem is where a settlement benefits all the attorneys and parties except the absent class members—the kind of case (as here) in which the class counsel and defense counsel reach a deal that provides outsized compensation to class representatives, a broad release to the defendants, millions in fees to class counsel, and yet generates almost no consumer benefit. *See* Brief of Amici Curiae, RE-136-2, Page ID #3498. Indeed, this case is particularly concerning given that the imbalanced nature of the settlement was not fully known to absent class members, as the fee request (which confirmed that millions were to change hands in this case) was not part of the class notice, and was only made public a mere two weeks before the objection deadline. Prior to that filing, the only fee notice consumers saw was a provision of the notice identifying $40,000, leading most consumers to reach the logical conclusion that there was no money to be had for them in this case.

Because "few (if any) plaintiffs closely monitor the progress of the case or settlement negotiations," Attorneys General have an ongoing responsibility under CAFA to protect their citizens when class counsel and the class representatives fail to protect the interests of absent class members—even if that requires intervention for purposes of appeal. S. Rep. 109-14 at 33. But absent intervention here, the interests that Congress has conveyed upon the Arizona Attorney General will be thwarted in precisely the type of case where those interests are most important.

**2. Protectable Interests Arising From Prior Participation**

*Second*, the Arizona Attorney General also has protectable interests arising from participation in the proceeding below, which in turn arise from his seeking to participate regularly in class action settlement proceedings to protect Arizona consumers and ensure statutory compliance. The Arizona Attorney General enlists a team of attorneys to work on CAFA matters, who put in consistent time and resources. With the assistance of this team, the Arizona Attorney General has pushed for improved settlement terms outside of formal filings. *See, e.g.*, Domestic Airlines docket entry. The Arizona Attorney General has also submitted comment letters to federal agencies as well as letters in connection with preliminary approval decisions. *See e.g.*, *Hiroyuki Oda, et al. v. Wilson Sporting Goods Co.*, No. 15-02131, Dkt. 145 (C.D. Cal. Jan. 16, 2018) (letter from Office of Arizona Attorney General urging court to deny preliminary approval because settlement failed to comply with CAFA's coupon strictures). And the Arizona Attorney General has produced a steady stream of briefs speaking against imbalanced settlements in cases across the country, up to and including the Supreme Court. *See, e.g.,* Brief of Attorneys General of 19 States as *Amici Curiae* Supporting Petitioners, *Frank v. Gaos*, No. 17-961(July 16, 2018). Counsel for the Arizona Attorney General has also presented oral argument in trial and appellate courts in connection with CAFA matters. *See, e.g., In re EasySaver Rewards*

*Litigation*, No. 16-56307, Dkt. 64 at 1 (9th Cir. Mar. 22, 2018) (awarding counsel for Arizona Attorney General five minutes of oral argument time); *Cannon, et al. v. Ashburn Corp*., No. 16-1452, Dkt. 100 at 2 (D.N.J. Mar. 27, 2018) (noting appearance of counsel for Arizona Attorney General at fairness hearing).

This involvement forms the basis for a substantial legal interest worthy of intervention, as the Sixth Circuit has explained in a related context. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) ("repeat player" nature of proposed intervenor supported intervention). Indeed, courts have time and again recognized that participation in underlying proceedings can give rise to protectable interests in related judicial proceedings. *See*, *e.g.*, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983) (Court did not have "any difficulty determining that the organization seeking to intervene had an interest in the subject of the suit" in cases "challenging the legality of a measure which it had supported"); *Washington State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) (sponsors of ballot initiative had significant protectable interest in defending initiative against challenge); *see also Miller*, 103 F.3d at 1245-46 (Sixth Circuit favorably citing and following *Babbitt* and *Sagebrush*).

* * *

Any doubt regarding the adequacy of these independent bases falls away when considering the State's *parens patriae* authority in light of the concrete interests CAFA creates and the Arizona Attorney General's historical involvement, as well as the fact that, "[t]he Supreme Court has made clear that when considering whether a [party] has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007)*, aff'd sub nom. District of Columbia v. Heller,* 554 U.S. 570 (2008).[3] As this Court put it, "[i]n determining whether intervention should be allowed, we 'must accept as true the non-conclusory allegations of the motion.'" *Horrigan v. Thompson*, 145 F.3d 1331 (6th Cir. 1998) (table). Put simply, whether independently or together, the interests identified by the Arizona Attorney General satisfy the necessary showings and warrant granting intervention. The State has quasi-sovereign interests in protecting its consumers, the Arizona Attorney General has protectable legal interests under CAFA, and the Arizona Attorney General has protectable interests arising out of its existing participation in this area, with each of these interests alone being enough to meet the intervention standard.

[3] *See also id.* ("Indeed, in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the [moving party], and must therefore assume that on the merits the [moving party] would be successful in their claims."); *accord Macy v. GC Services Ltd. P'ship*, No. 17-5583, 2018 WL 3614580, at *7 (6th Cir. July 30, 2018) (examination of merits impermissible in standing analysis).

## II. THE DISTRICT COURT'S DENIAL OF INTERVENTION RESTS ON LEGAL ERROR

### A. Intervention As Of Right Is Warranted, In Particular Because Of The Protectable Legal Interests That Will Be Impaired Absent Intervention

A party moving to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) must satisfy four requirements: "(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *Miller*, 103 F.3d at 1245; *accord Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993). No party previously disputed satisfaction of the first, second, or fourth considerations. Nevertheless, intervention as of right is warranted as the State easily satisfies all four requirements.

#### 1. The Arizona Attorney General's Intervention Effort Was Timely

A motion to intervene is properly viewed as timely where the motion is "within the time period in which the named plaintiffs could have taken an appeal." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977). Indeed, some courts have gone so far as to view filing within the notice-of-appeal deadline as *per se*, conclusive evidence of timeliness. The Sixth Circuit has not adopted a categorical rule of timeliness, but recognizes that *McDonald* sets forth a "general rule" that governs the timeliness inquiry, *Clarke v. Baptist Mem'l Healthcare Corp.*, 641

Fed. App'x 520, 524 (6th Cir. 2016), and that the time to file a notice of appeal is "a factor of major significance." *Linton by Arnold v. Comm'r of Health & Env't, State of Tenn.*, 973 F.2d 1311, 1318 (6th Cir. 1992). Indeed, the Sixth Circuit has repeatedly reversed denials of intervention where the motions were filed within the time to file a notice of appeal. *See*, *e.g.*, *Linton*, 973 F.3d at 1318; *Clarke*, 641 Fed. App'x at 528; *Triax Co. v. TRW, Inc.*, 724 F.2d 1224 (6th Cir. 1984). The State filed its motion before the thirty-day clock on the notice of appeal had even started, let alone run out. And the State had no need to intervene earlier, having submitted *amicus* arguments against the settlement and in favor of a proper division of settlement proceeds, which the Court weighed explicitly at the fairness hearing. *See Triax*, 724 F.2d at 1228 (prior to plaintiff's decision not to appeal, proposed intervenor "had no reason to seek intervention").

**2. The Arizona Attorney General and State of Arizona have substantial, protectable legal interests as *parens patriae*, under CAFA, and as a repeat player, all of which are recognized by precedent and will be harmed absent intervention**

As described above, the State has substantial legal interests in this settlement approval that support Article III standing. Those same interests are more than sufficient to satisfy this Court's liberal standard for protectable interests in this context.[4]

[4] The Sixth Circuit has adopted "a rather expansive notion of the interest sufficient to invoke intervention of right." *Miller*, 103 F.3d at 1245; *see also Bradley v.*

As expounded upon above, the State of Arizona has a quasi-sovereign interest in the physical and economic well-being of its citizens, *See Snapp*, 458 U.S. at 607, and the current settlement harms Arizona citizens. Additionally, CAFA grants the Arizona Attorney General protectable interests it may rely upon to involve itself in class actions at the settlement fairness stage, an interest Congress specifically wanted to recognize in order to combat several problems with cases like this. *See* S. Rep. 109-14, 2005 U.S.C.C.A.N. 3. And, having taken this role seriously, the Arizona Attorney General has become a repeat player in similar class action proceedings, acquiring a participatory interest recognized by court precedent. Any one of these bases is sufficient grounds to recognize Arizona's protectable legal interests to support intervention under Sixth Circuit precedent. As the Sixth Circuit has explained, a proposed intervenor need show "only that impairment of its substantial legal interest is possible if intervention is denied." *Miller*, 103 F.3d at 1247. The combined weight of the three overwhelmingly favors intervention, especially given that no party has contested that if the interests exist they are impaired.

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*Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]his court has acknowledged that 'interest' is to be construed liberally."). As the Sixth Circuit has explained, "an intervenor need not have the same standing necessary to initiate a lawsuit[.]" *Miller*, 103 F.3d at 1245. "Protectable interest" under Rule 24 is broader than Article III standing. And "[t]he inquiry into the substantiality of the claimed interest is necessarily fact-specific," with the understanding that "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Miller*, 103 F.3d at 1245, 1247.

### 3. No other party has or will adequately protect the substantial legal interests that are harmed by the as-approved settlement

Finally, existing parties did not adequately represent proposed-intervenors' interests here and will not do so through an appeal. "[T]he Supreme Court has stated that the burden of demonstrating inadequacy of representation is a minimal one." *Triax*, 724 F.2d at 1227 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). A proposed-intervenor need only "prove that representation *may be* inadequate," and "is not required to show that the representation *will in fact be* inadequate." *Miller*, 103 F.3d at 1247 (emphasis added). Indeed, it can "be enough to show that the existing part[ies] … will not make all of the prospective intervenor's arguments." *Id.*

That standard is easily met here. All existing parties before the Court supported the proposed settlement and have not appealed the settlement's approval. And the district court failed to protect the absent class members.

Indeed, the lack of objectors here strongly supports the State's need to intervene. Absent intervention, the settlement approval will stand, as no existing party has directly appealed the settlement approval. And "'a decision not to appeal by an original party to the action can constitute inadequate representation of another party's interest.'" *Miller*, 103 F.3d at 1248; *see also Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (when interest of absent party not represented, there is inadequate representation).

### B. Given The Role Of State Attorneys General Under CAFA, And The History Of The Underlying Proceedings, It Was Error To Deny Permissive Intervention

Permissive intervention may be granted "if the motion is timely, and if the 'applicant's claim or defense and the main action have a question of law or fact in common.'" *Purnell,* 925 F.2d at 950. As set forth above, this motion is timely. *See supra* 4-5. And here the Arizona Attorney General seeks to raise arguments concerning whether the proposed settlement is "fair, reasonable, and adequate," which this Court is required to consider before approving any settlement. Fed. R. Civ. P. 23(e)(2). The Arizona Attorney General thus raises "a common question of law or fact" issues of law and fact in common with the main action. Fed. R. Civ. P. 24(b).

The district court notably denied intervention on the sole basis that Arizona lacked protectable interests. As explained above, that was error. Nor is there need for a remand here, as no party offered any argument below that discretionary denial of permissive intervention was warranted. The district court's denial of permissive intervention should therefore be reversed.

Permissive intervention is particularly appropriate because, absent intervention, a settlement of substantial value is likely to evade appellate review even as the Sixth Circuit's approach to certain underlying questions at issue remains entirely unclear. As discussed below, there is a persistent, acknowledged

circuit split on how to interpret CAFA in this type of case, on which question the Sixth Circuit has not spoken. Given these considerations, as well as the magnitude of the proposed settlement and fee, this Court should ensure that the Sixth Circuit's views can be ascertained and applied before millions of dollars change hands and millions of consumers lose claims (including personal injury claims) without compensation.

## III. ALTERNATIVELY, IT WAS ERROR TO NOT DEEM THE ARIZONA ATTORNEY GENERAL TO BE A FORMAL OBJECTOR WITH CORRESPONDING APPELLATE RIGHTS

Courts have recognized that objections voiced by state Attorneys General can represent the many absent class members of their respective states and that state Attorneys General may be considered stand-ins for their citizens that have not formally objected to a settlement. *See Wilson v. DirectBuy, Inc.*, No. 3:09-CV-590JCH, 2011 WL 2050537, at *9 (D. Conn. May 16, 2011) (thirty-nine attorneys general filed brief as *amicus curiae* opposing settlement; court viewed brief "as a placeholder for many absent class members' objections."); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007) (discussing meaning of "appearance of the Attorneys General of thirty-five states and the District of Columbia, representing hundreds of thousands, if not millions, of eligible class members."). Therefore, setting aside the meritorious intervention arguments, it was error for the district court to not grant the Arizona Attorney General the status

of being an objector due to the Arizona Attorney General's previous submissions as *amicus curiae* and the fact that the settlement class contains numerous Arizona consumers. *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1033 (N.D. Cal. 1999) (considering objections of multiple organizations "in light of their previous *amicus* status in the litigation").

## IV. GIVEN THAT INTERVENTION IS WARRANTED, THE COURT SHOULD REACH THE SETTLEMENT APPROVAL AND REVERSE

Upon reversing the district court's denial of Arizona's motion to intervene, this Court should turn to and reach a determination on the merits of the settlement approval, reversing the district court on this core question. This Court has already granted Arizona's motion to consolidate its appeals of the district court's denial of its motion to intervene and the district court's approval of the settlement. Consolidation Order, RE-174, Page ID #3809-3811. The issues relating to the approval of the Settlement Agreement have already been briefed, argued, and decided below, so nothing new will be accomplished by remanding to a court that has already issued its final order in the matter, especially as the appeal of that order has been consolidated into this action. And if the inability to advance merits arguments as a party is purely the product of legal error as to intervention, it can properly be corrected by hearing the proposed-intervenors' arguments on the merits on appeal. *Mausolf v. Babbit*, 125 F.3d. 661, 666 (8th Cir. 1997) ("a prospective intervenor who successfully appeals the district court's denial" should

not be prevented from "securing the ultimate object of such motion – party status to argue the merits of the litigation."). Therefore, it is both proper and in the interests of judicial efficiency for this court to proceed directly to considering—and for the reasons below, reversing—the settlement approval on the merits.

### A. Certification Of Settlement Class Was Error, As Court's Own Pre-Settlement Analysis Of Intra-Class Conflict Demonstrated

The district court erred in certifying the settlement class because (1) impermissible intra-class conflicts exist between the Settlement Class Representatives and all other settlement class members. The Settlement Agreement provides for the Class Representatives to "each receive $25,000.00 for settlement of their personal injury claims" but provides no personal injury award to any of the remaining class members who must release "any and all" of their claims, including those for personal injury, in exchange for a $72.50 coupon or nothing at all. Settlement Agreement, RE-126-1, Page ID #2975, 2962. This $25,000 personal injury payment is separate from and in addition to Class Representatives' incentive awards. *Id.* at #2975. This violates Sixth Circuit precedent against settlements that "give[] preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members." *Williams v. Vukovich*, 720 F.2d 909, 925 n. 11 (6th Cir. 1983). This Court has "held that such inequities in treatment make a settlement unfair." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013).

At least initially, the district court seemed to recognize the great unfairness this conflict presents, given that the district court dismissed the named plaintiffs' personal injury claims six months before the settlement agreement. Opinion & Order, RE-101, Page ID #2221-2223. In the court's own words, "Named Plaintiffs cannot use this lawsuit to pursue personal injury and economic damages when their fellow Class members may only seek economic damages." *Id.* at #2223. Yet the Settlement Agreement provides relief to Class Representatives in exactly this way, while the only option for other individuals with personal injury claims is to opt out of the settlement. Transcript, RE-153, Page ID #3603, Plaintiffs' Fee Motion, RE-133, Page # 3127. Not only is it problematic to force such a choice on class members when named representatives are being made whole, relying on opting out for this purpose raises the issue of class members who are unaware of the settlement or their rights having their claims barred for a type of injury the class action provided no option for them to recover from in the first place. Only 131 individuals opted out of the class, roughly 1% of the number of individuals who submitted claims, which itself is only 0.4% of the entire class, so the ultimate result is that 3.2 million people will have their claims waived automatically through the settlement, 13,174 will receive a $73 coupon, and a handful of Named Plaintiffs will receive $25,000 for claims under which no other class member is eligible to seek relief.

With the special personal injury award obtained for Class Representatives that was approved by the court, with whom Class Counsel did have a relationship for the duration of the case, there is a clear violation of Rule 23(e)(2)(A)'a requirement that "the class representatives and class counsel have adequately represented the class."

> Because class actions are rife with potential conflicts of interest between class counsel and class members, … district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole.

*Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). The effects of such conflicts abound in this settlement. In certifying this class in the face of these obvious conflicts and violations of Rule 23, which the court expressly recognized prior to the settlement, the district court abused its discretion. Reversal of the certification is, therefore, a judicial imperative.

### B. The Settlement Is Fatally Imbalanced, Even Accepting The District Court's Flawed Treatment Of The Settlement Coupons Here

That the district court abused its discretion is evident from the very language of the court's settlement approval order, which approved the settlement with an award of attorneys' fees that, by the court's own questionable arithmetic, is over 53% of the total fund. After initially determining that the fees Class Counsel requested would amount to 57% of the hypothetical fund, the court correctly noted

that "57 percent is above the norm" and cited authority that a traditional benchmark would be 25%. Order Approving Settlement, RE-156, Page ID #3691. Then, after considering that *In re Polyurethane Foam Antitrust Litigation*, 168 F. Supp. 3d 985 (N.D. Ohio 2016), places "the ordinary range for attorney's fees between 20-30%," the district court announced it sufficient to reduce Class Counsel's fees to 53% of the hypothetical settlement fund. Order Approving Settlement, RE-156, Page ID #3691 n 67 (citing 168 F. Supp. 3d at 1013) (internal quotation marks omitted). Thus, even accepting the court's inclusions and valuations (themselves errors, as discussed below), the district court abused its discretion by citing a 20-30% range of appropriateness for fees before awarding a modified fee that is abusively high on its face (at 53%).

### C. The District Court's Treatment Of The Settlement Coupons Was Contradictory And An Abuse of Discretion

#### 1. CAFA Imposes Specific Limitations In Coupon-Based Class Action Settlements

Rule 23 and CAFA work together to establish a heightened fairness standard for coupon settlements, as Congress was particularly concerned that "coupons that class members would not use" would be used to inflate the value of a settlement "without a concomitant increase in the actual value of relief for the class," thus making a fundamentally unfair settlement appear superficially fair. *In re Easysaver Rewards Litigation*, 906 F.3d 747, 755 (9th Cir. 2018). Section 1712 of

CAFA codifies Congress's regulation of coupon settlements, mandating heightened scrutiny for such settlements as well as rules that must be satisfied prior to judicial approval of a coupon settlement. *E.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013).

First, CAFA directs courts to apply enhanced scrutiny to coupon settlements. *See* 28 U.S.C. § 1712(e); *Cannon v. Ashburn Corp.*, No. 16-1452, 2018 WL 1806046, at *10 (D.N.J. Apr. 17, 2018); *see also In re HP Inkjet,* 716 F.3d at 1178. A court may approve a proposed coupon settlement only after conducting a hearing and issuing a written opinion concluding that the settlement is fair, adequate, and reasonable for class members (including being proportionally fair when considering the difference between the class recovery and class counsel's fee award). *See* 28 U.S.C. § 1712(e).

Second, CAFA imposes a series of specific rules that govern proposed coupon settlements. 28 U.S.C. § 1712(a)–(d); *see also In re HP Inkjet,* 716 F.3d at 1178. The objective of these rules is ensuring that class action settlements properly align the interests of class counsel and the absent class members, *i.e.* that class counsel do not negotiate a settlement that provides only illusory value to the class. The CAFA Senate Report made this plain in listing examples of class action settlements "in which most-if not all-of the monetary benefits went to the class counsel, rather than the class members . . . ," and noting that many of the examples

are comprised of "'coupon settlements' in which class members receive nothing more than promotional coupons to purchase more products from the defendants." S. Rep. No. 109-14 at 15–17. Indeed, "if the legislative history of CAFA clarifies one thing, it is this: the attorneys' fees provisions of § 1712 are intended to put an end to the 'inequities' that arise when class counsel receive attorneys' fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class." *In re HP Inkjet,* 716 F.3d at 1179 (citing S. Rep. No. 109-14, at 29–32).

**2. This Is The Type Of Quintessential Coupon Settlement To Which CAFA Was Directed**

As the district court found, "this is in fact a coupon settlement subject to CAFA's coupon settlement provisions." Order Approving Settlement, RE-156, Page ID #3682. The coupons in this case are laden with the exact characteristics that caused Congress to pass CAFA and that the courts agree are particularly abusive.[5] In the district court's own words, "the coupons have no redeemable cash value, are non-transferrable, expire after ninety days, and can only be used on three Tristar products that must be directly purchased from Defendant Tristar." Order Approving Settlement, RE-156, Page ID #3689.

[5] Both the Seventh and Ninth Circuits warn that the potential for abuse in a coupon settlement is greatest when the coupons require class members to do business with the defendant again, "expire soon, are not transferable, and/or cannot be aggregated," and when the coupon's face value is only a small portion of the purchase for which they must be used. In re Southwest Airlines Voucher Litigation, 799 F.3d 701, 706 (7th Cir. 2015) (citing In re HP Inkjet Printer Litig., 716 F.3d 1173, 1177-79 (9th Cir. 2013)).

The limited value of the coupons is perhaps best encapsulated by analyzing their uniquely limited uses here. None of the three products class members may use their coupons for under the settlement are available for less than $72.50; indeed, they each cost roughly $160, plus $30 shipping and handling. Exhibits of Tristar Website, RE-134-1 and 134-3, Page ID #3266 and 3274. With an all-in cost of roughly $190, the settlement coupon at $72.50 leaves a balance of $117.50 that class members must pay to receive a new pressure cooker (or other of the three products). By matter of comparison, the Tristar "Power Pressure Cooker XL 10 Qt," most analogous to the one offered through the settlement, is available directly through Amazon.com for $134.99 with free shipping.[6] By making coupon redemption a captive process through Tristar rather than in the general marketplace, the class members will be forced to pay an artificially high price, so their coupon in reality only gains a price advantage of about $18.

### 3. The Settlement Approval Order Charted A Path Untethered From Existing Coupon Precedent

There is a circuit split on how to handle calculation of attorneys' fees when faced with a coupon-based class action settlement (which this Court has yet to

[6]Amazon.com: Power Pressure Cooker XL 10 Qt. https://www.amazon.com/Power-Pressure-Cooker-XL-Quart/dp/B01BVV07KO?ref_=bl_dp_s_web_14692120011&th=1 (last accessed Jan. 15, 2019). The settlement forces customers choosing a pressure cooker to purchase a 10-quart model, but it is worth noting that Amazon also lists an 8-quart model for just $92.47 and free shipping, roughly $25 *less* than the cash outlay under the settlement.

speak on). As the district court recognized, the Ninth Circuit holds that in a coupon-only settlement such as this one, only § 1712(a) applies and lodestar is not available, while the Seventh and Eighth allow for a lodestar calculation under § 1712(b), and then validate this amount via a crosscheck to the success obtained for the class. Order Approving Settlement, RE-156, Page ID #3686.

But in treating the settlement coupons here as worth their face value for purposes of settlement approval analysis, the district court committed error under either side of the circuit split. The touchstone of coupon analysis, as accepted by circuits across the country, is that coupons are not worth their face value to all class members. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 631 (7th Cir. 2014). ("Anyone who sells his coupon will get less than the coupon's face value" and other restrictions "chip[] away at the nominal value of the settlement" coupons.); *Galloway v. Kansas City Landsmen, LLC*, 833 F.3d 969, 972 (8th Cir. 2016) (noting that Congress distinguished between actual money being paid to class counsel and "essentially valueless coupons" distributed to the class); *In re Easysaver*, 906 F.3d at 758 (9th Cir.) ("nothing in the record could have given the district court reason to believe that any class member … would have viewed the $20 credit as equivalently useful to $20 in cash.").

As the Seventh Circuit has warned, "the most abusive method for calculating a fee in a coupon settlement" is "calculating the fee as a percentage of the *face*

*value* of *all* the coupons issued," as opposed to those actually redeemed. Order Approving Settlement, RE-156, Page ID #3687 (citing *Southwest*, 799 F.3d at 708 (internal quotation marks omitted). In the district court's own words, "in this way, CAFA stops attempts by class counsel to make large percentage fee applications appear reasonable by agreeing to a settlement that class members are unlikely to redeem." Order Approving Settlement, RE-156, Page ID #3687. Nevertheless, the district court did just that here. In performing a "Percentage-of-the Fund Crosscheck," the district court sided with the parties "against the great weight of precedent" to determine "that the value of these coupons is equivalent to the coupon's face value." Order Approving Settlement, RE-156, Page ID #3689. This was done "in spite of the fact that the coupons have no redeemable cash value, are non-transferrable, expire after ninety days, and can only be used on three Tristar products that must be directly purchased from Defendant Tristar." *Id.*

Here, in one stroke the district court violated CAFA's mandate to limit the calculation of the coupons' value to that of the coupons actually *redeemed* and did so where the Seventh Circuit opinion the court was ostensibly following states the "potential for abuse is greatest." *Southwest*, 799 F.3d at 706. Such actions violate the admonishment that "the law quite rightly requires more than a judicial rubber stamp when the lawsuit that the parties have agreed to settle is a class action" due

to the "built-in conflict of interest" between class members, the named Plaintiffs, and Class Counsel. *Redman,* 768 F.3d at 629 (7th Cir. 2014).

While this calculation was performed under the guise of validating the lodestar amount, by using a percentage of the coupon value to make this determination, the court is still beholden to CAFA's coupon valuation procedure. As in *In re Easysaver Rewards Litigation*, "[t]he court started with a lodestar fee" but "then worked backward" to validate it with the percentage-of-recovery approach, so "it lost this independence" and became "by definition, a percentage of the full value of the settlement, including the face value of the coupons." 906 F.3d 747, 759 (9th Cir. 2018). In doing this, the court's own words identify that it is flagrantly deviating from precedent to assign the maximum imaginable value to the class members' side of the equation in order to balance out Class Counsel's fees. "What was inappropriate was an attempt to determine the ultimate value of the settlement before the redemption period ended without even an estimate by a qualified expert of what that ultimate value was likely to prove to be." *Redman*, 768 F.3d at 634.

#### 4. The Coupon Analysis Below Was An Abuse Of Discretion Under Any Accepted Method Of Analyzing Coupon Settlements

Regardless of whether a lodestar or percentage of fund is available for calculation of attorney's fees in a coupon-based settlement such as this one, the ultimate fee that is reached must be tied back to and balanced against the actual

"success obtained" for the class. In *Galloway,* the Eighth Circuit emphasized that "'degree of success obtained'" was "'the most critical factor'" in awarding fees under CAFA. 833 F.3d at 975. As the Eighth Circuit explained, "[t]he principal focus of § 1712 was to mandate more careful scrutiny of coupon settlements to ensure that the degree of success was properly evaluated." *Id.*

This "success obtained" crosscheck is an inherent part of a "percentage of the fund" approach to valuing coupon settlements (i.e., the Ninth Circuit's approach), and Courts have applied this limitation to reject an unadjusted lodestar method of fee calculation where, as here, the settlement offers very little to the class, *i.e.*, where the "success obtained" is negligible. For example, in *Redman*, the Seventh Circuit reversed a settlement approval that included 83,000 coupons claimed by a multi-million person class (totaling $830,000 in face value) alongside a ~$1 million fee calculated using the lodestar method. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628–630, 632–633, 640 (7th Cir. 2014). And in *Galloway*, the Eighth Circuit used a similar success-focused review of the record to conclude that "any award greater than $17,438.45 would be unreasonable in light of class counsel's limited success in obtaining value for the class" where the proposed settlement included a low-value injunction and $8,000 worth of coupons actually redeemed by class members. 833 F.3d at 975.

The proposed settlement here, which shares traits with the settlements in *Redman* and *Galloway*, fails for similar reasons even under an unadjusted lodestar approach. In rejecting the settlement in *Redman* based on an erroneous fee review, the Seventh Circuit emphasized that:

> the reasonableness of a fee cannot be assessed in isolation from what it buys. Suppose class counsel had worked diligently—as hard and efficiently as they say they worked—but only a thousand claims had been filed in response to notice of the proposed settlement, so that the total value of the class, even treating a $10 coupon as the equivalent of a $10 bill, was only $10,000. No one would think a $1 million attorneys' fee appropriate compensation for obtaining $10,000 for the clients, even though a poor response to notice is one of the risks involved in a class action.

*Redman*, 768 F.3d at 633. The settlement here closely resembles the scenario the Seventh Circuit conjured for illustrative purposes: a multi-million dollar fee request in a case where only a few thousand claims were filed, and the fee request dwarfs several times over the aggregate face value of the claimed coupons, even assuming (unjustifiably) that the coupons are worth their full face value to each of the claimants. With that in mind, this settlement cannot pass muster under CAFA, even assuming a lodestar fee calculation method is available (contra *Inkjet*).

While precedent encourages taking into account the other, less tangible *Southwest* abuse factors such as the extremely limited redemption period and inability to choose competing brands, simply using the $18 price advantage the coupon confers (as calculated above) demonstrates how truly imbalanced the

settlement is. The award of an $18 coupon to 13,174 individuals gives a maximum possible value of $237,132 if every single one is redeemed, or roughly one tenth of the $2 million in fees ($2.5 million with costs) Class Counsel is set to receive in *cash* under the settlement agreement. This imbalanced result cannot stand under CAFA and violates all notions of fairness under Rule 23. Failure to consider these abuse factors or to entertain evidence as to the actual value of the coupons under § 1712(d) is yet another abuse of discretion.

**5. Following The Best Reading of CAFA—As Provided By The Ninth Circuit—The Settlement Even More Plainly Fails**

This case underscores the importance of applying the Ninth Circuit's reading of § 1712 that Class Counsel's fees in coupon-only settlement *must* be calculated based on a percentage of the value of the coupons redeemed. *In re HP*, 716 F.3d at 1182 (9th Cir. 2013). The Seventh and Ninth Circuits ultimately agree that the interest of fairness requires at least some connection between Counsel's fee and the award achieved by that fee for the class. *Compare In re HP*, 716 F.3d at 1182 ("An attorney who works incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method"), *with Redman*, 768 F.3d at 633 ("[T]he reasonableness of a fee cannot be assessed in isolation from what it buys" regardless of whether "class counsel had worked diligently … a poor response to notice is one of the risks involved in a class action."). Applying the Ninth Circuit's direct route to establishing Class Counsel's fees based on a percentage of the value

of coupons redeemed provides clarity that results in a calculation all circuits ultimately perform, anyway, and avoids the arithmetic gymnastics performed by the district court here in an attempt to skirt § 1712(a)'s redemption requirement by using § 1712(b) as a backdoor to applying a higher valuation than Congress intended.

Under the Ninth Circuit's reasoning, "where the 'portion' of the attorneys' fees that are 'attributable to the award of the coupons' is necessarily one hundred percent—as in a case where the settlement provides only coupon relief—'any attorney's fee award to class counsel … shall be based on the value to class members of the coupons that are redeemed." *In re HP*, 716 F.3d at 1182 (quoting 28 U.S.C. § 1712(a)). In this case, the entire award is made of coupons—the warranty extension is at best an instantly-redeemable coupon—and so Class Counsel's fees must be based on the value of the coupons actually redeemed. To ensure the fees award is not delayed until the end of the redemption period, CAFA even invites the introduction of expert testimony as to the proper valuation of coupons and calculation of expected redemption rates. 28 U.S.C. § 1712(d). But, "against the great weight of precedent," and directly after quoting this Court's precedent that "'[c]ases are better decided on reality than on fiction,'" the district court simply accepts the full face value of all coupons issued without receiving or requiring "expert testimony on the actual value of the coupons" or their likely

redemption rate. Order Approving Settlement, RE-156, Page ID #3689-3690 (quoting *In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013)). This clear failure to follow the direct textual instructions of § 1712(a), as read by the Ninth Circuit, is an abuse of discretion that demands—indeed, nearly begs in the court's own language—to be reversed.

**D. The Lack of Objectors Does Not Confer Validity on the Settlement.**

In an attempt to downplay the district court's refusal to follow the law as only a fringe concern raised by the U.S. Department of Justice and the governments of 18 Amicus States, and not the concern of an approving class, both the district court and Class Counsel note that there were no objectors, including no professional objectors. Order Approving Settlement, RE-156, Page ID #3681, and Transcript, RE-153, Page ID #3648. Such assertions demonstrate no more approval of the terms of the settlement or of Class Counsel's fee than having 13,174 out of 3.2 million people submit claim forms can evidence an overwhelming eagerness to purchase another of Defendant's products at just below the full retail price. "The fact that the vast majority of the recipients of notice did not submit claims hardly shows 'acceptance' of the proposed settlement: rather it shows oversight, indifference, rejection, or transaction costs." *Redman*, 768 F.3d at 628.

The low response rate speaks for itself in establishing the lack of value nearly all of the 3.2 million class members see in the coupon award, yet the entirety of that class will lose its rights to bring their own claims, including personal injury claims, for being included in a class from which they take nothing but Class Counsel will walk away from with millions. This extreme imbalance underscores this suit as precisely the type Congress intended to regulate when it passed CAFA to combat the "clientless litigation" problem. S. Rep. 109-14, 2005 U.S.C.C.A.N. 3, 33.

Another potential reason for the noted lack of professional objectors is the fact that the full amount of Class Counsel's requested fees was not released in the official notice to class members, instead only listing the request of California Class Counsel for $225,000 and referencing the potential for other fees. Notice of Class Action Settlement, RE-126-2, Page ID #3010. Even a diligent potential objector would have trouble as the motion for the full fee request of over $2 million was not filed until May 18, 2018, well into the claims period and roughly two weeks before the June 4, 2018 deadline to file an objection. Plaintiffs' Fee Motion, RE-133, Page ID #3108-3134. And this would have been difficult information for class members to find as the settlement website's FAQ's have still not been updated to reflect anything more than the initial $225,000 announced. *Power Pressure Cooker Settlement Frequently Asked Questions: "What do Plaintiffs and their*

*Lawyers get?"*, http://www.powerpressurecookersettlement.com/home/faqs/#q7 (last accessed Jan. 17, 2019).

## V. REVERSING THE INTERVENTION DENIAL AND SETTLEMENT APPROVAL THROUGH THIS APPEAL IS CRITICAL TO PROTECTING CONSUMERS, WHO ARE DISADVANTAGED IN THE CLASS ACTION SETTLEMENT APPROVAL PROCESS

Directing settlement funds to class members wherever feasible is important. Class actions are largely resolved through settlement. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285 (2002) ("most class action suits settle"; gathering supporting sources as to same). And since class members extinguish their claims in exchange for settlement funds, those "settlement funds are the property of the class[.]" *In re BankAmerica Corp. Sec. Litig.,* 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."); American Law Institute, Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010) ("funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members").

Yet in dividing settlement funds, the interests of class members and other participants can diverge. Class counsel has an incentive to obtain a large fee, causing potential conflicts with the class. *See, e.g., In re HP*, 716 F.3d at 1178

("interests of class members and class counsel nearly always diverge"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("'class actions are rife with potential conflicts of interest between class counsel and class members'"). And defendants rarely help. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003). The fee and class award "represent a package deal," *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with a defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Southwest*, 799 F.3d at 712; *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995) ("Allocation ... is of little or no interest to the defense.").

Coupon settlements present particularly severe risks to the class. "[B]y decoupling the interests of the class and its counsel, coupon settlements may incentivize lawyers to 'negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees.'" *In re HP*, 716 F.3d at 1177–78 (quoting S. Rep. No. 109–14, at 29–30). "Congress passed CAFA 'primarily to curb perceived abuses of the class action device.'" *In re HP Inkjet*, 716 F.3d at 1177 (quoting *Tanoh v.*

*Dow Chem. Co.,* 561 F.3d 945, 952 (9th Cir. 2009)). And one of the key abuses CAFA targeted was "coupon settlement[s], where defendants pay aggrieved class members in coupons or vouchers but pay class counsel in cash." *In re HP Inkjet*, 716 F.3d at 1177; CAFA, PL 109–2, February 18, 2005, 119 Stat 4 ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where ... counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value[.]"); *see also* S. Rep. No. 109–14, at 16–20 (citing examples of coupon settlements "in which most—if not all—of the monetary benefits went to the class counsel, rather than the class members those attorneys were supposed to be representing").

The settlement arrangement now before the court is precisely why CAFA exists and courts are tasked with policing the "inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003). A settlement cannot be in the best interest of the class or fair, adequate, and reasonable under Rule 23 where, as here, it generates business for defendants and provides class counsel with the settlement cash while the class languishes with almost meaningless coupons. Had the District Court properly applied CAFA, including Section 1712, it would have rejected the settlement. And this would have sent the parties back to the bargaining table to

divide the cash and the dubious coupons in a more equitable fashion that better benefited the class. Instead, the district court abdicated its duties to the class, failed to properly apply CAFA, and approved the settlement as fair, adequate, and reasonable, leaving the class in its present predicament, with a mere fraction of the settlement value and none of the cash that is changing hands as part of the settlement.

## CONCLUSION

The Arizona Attorney General should be allowed to intervene, protect the State of Arizona's interests, protect Arizona consumers, and obtain from this court a settlement approval reversal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The foregoing brief was served on counsel for all parties via email on the evening of January 28, 2019, but was not filed on the CM/ECF system due to an electronic glitch in the system that would not allow electronic filing at that time. With the electronic error being resolved, I hereby certify that I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on January 29, 2019. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,700 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Roman type.

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**Addendum of Designations of Relevant District Court Documents**

As 6th Cir. R. 30(g)(1) requires, the State of Arizona and the Arizona Attorney General designate the following district court documents as relevant to this appeal:

RE-1, Complaint, Page ID #0001-0045

RE-69, Class Certification Order, Page ID #1223-1247

RE-101, Opinion & Order, Page ID #2221-2223

RE-126-1, Settlement Agreement and Release, Page ID #2952-3008

RE-126-2, Notice of Class Action Settlement, Page ID #3009-3020

RE-133, Motion for Award of Attorneys' Fees, Page ID #3108-3134

RE-134, Statement of Interest of the United States, Page ID #3241-3264

RE-134-1, Exhibit of Tristar Website, Page ID #3265-3270

RE-134-3, Exhibit of Tristar Website, Page ID #3273-3275

RE-136-2, Brief of Amicus Curiae, Page ID #3481-3508

RE-154, Motion to Intervene, Page ID #3656-3658

RE-156, Order Approving Settlement, Page ID #3677-3696

RE-162, Intervention Denial, Page ID #3745-3754

RE-163, Notice of Appeal, Page ID #3755-3757

RE-165, Judgment, Page ID #3759

RE-167, Amended Notice, Page ID #3763-3765

RE-174, Consolidation Order, Page ID #3809-3811