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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JAMES KNAPP, individually and on behalf of all others similarly situated,

Plaintiff,

v.

ART.COM, INC., a California corporation; and DOES 1 through 50, inclusive,

Defendants.

TIMOTHY SANDEFUR,

Objectors.

Case No. 3:16-cv-00768-WHO

OBJECTION OF TIMOTHY SANDEFUR TO PROPOSED SETTLEMENT

Date: August 9, 2017
Time: 2:00 p.m.
Courtroom: 2
Judge: Hon. William H. Orrick

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SUMMARY OF ARGUMENT

In this coupon settlement, the defendant gets an inexpensive release of claims and an uptick in business. The plaintiffs' lawyers get disproportionate fees. The class gets a coupon for a poster.

The parties' characterization of the settlement relief as $10 "vouchers" rather than "coupons," good for use on Art.com's websites for eighteen months after issuance, cannot save this settlement. The settlement has hallmarks of the coupon-settlement abuse that Congress targeted with the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1711 et seq. As such, it is subject to heightened scrutiny by this Court. *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). The Ninth Circuit's fact-bound determination that the walmart.com gift cards in *Online DVD* were not coupons is the limited exception that proves the rule: No one legitimately can argue that the posters, celebrity and sports photos, art prints, calendars and wall stickers available for $10 or less on Art.com's websites are comparable to the range of useful products that one could purchase on walmart.com with gift cards that never expired and thus operated essentially as cash. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 952 (9th Cir. 2015).

With experienced class-action attorneys, the parties surely know that coupon redemption rates hover in the 1-3% range. Assuming a 2% redemption rate for the class of approximately 2 million members suggests that the benefit to the class will be approximately $400,000. This benefit is not bolstered by the "injunctive relief." Rather than benefit the class, it merely requires Art.com to comply with the law—a commitment other courts have held to be "meaningless"—and benefits only future customers rather than the past-purchasing class members. There is some suggestion that Art.com had undertaken these measures prior to settling, in which case that's another reason that no benefit from the injunctive relief can be attributed to the settlement. Meanwhile, class counsel requested $745,000 in fees and costs, a multiplier of their lodestar. This disproportionate allocation of settlement benefit, combined with clear sailing and a provision routing any fee reduction to a third-party group that takes political positions many class members disagree with rather than supplementing the class relief (and without the constitutionally required notice to the class) constitute the warning signs of a lawyer-driven settlement. *In re Bluetooth Headset Prod. Liab. Litig.* ("*Bluetooth*"), 654 F.3d 935 (9th Cir. 2011).

The settlement should be rejected.

Even if the Court approves the settlement, it should defer any award of fees until it knows the redemption rate of the vouchers. Such a process is mandated by § 1712 of CAFA. *See Inkjet*, 716 F.3d at 1186-87. Under § 1712(a) any portion of the fee award "that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." Because a fundamental focus in determining fee awards is the benefit to the class, and the injunctive relief is valueless, the coupon relief is the primary basis on which fees may be awarded. While § 1712(b) allows the Court to award a lodestar fee that is attributable to obtaining valuable injunctive relief, the feeble injunctive relief here cannot justify the high six-digit fee sought by counsel and, in any event, the award must be discounted to reflect the more significant coupon portion of the settlement. The correct approach, therefore, is to award attorneys' fees only after the voucher redemption rate is known.

ARGUMENT

I. Objector Timothy Sandefur is a member of the class and intends to appear through counsel at the fairness hearing.

Objector Timothy Mason Sandefur is a member of the class. On August 3, 2015, he purchased a canvas print titled "Cook, Tahiti, 1773" from Art.com through the website www.allposters.com. He entered a coupon code to reduce the $329.99 price of the print by $148.50. The print was shipped to 1365 N. Velero St., Chandler, AZ 85225. Declaration of Timothy Sandefur ("Sandefur Decl.") ¶ 3. He is a U.S. resident, currently domiciled in Arizona. *Id.* ¶ 2. He is not an affiliate, officer, director, or current or former employee of Art.com, or any entity in which Art.com has a controlling interest. He has not elected to be excluded from this proceeding or otherwise opted out. He is not a judicial officer assigned to any aspect of this litigation or a member of the immediate family or judicial staff of such an officer. *Id.* ¶ 4. His business address is 500 E. Coronado Rd., Phoenix, AZ 85004. His telephone number is (602) 462-5000. His email address is tmsandefur@gmail.com. *Id.* ¶ 2.

Sandefur intends to appear at the August 9, 2017, fairness hearing through William I. Chamberlain, an attorney with the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF"), which Sandefur engaged to represent him in his objection. At this time, Sandefur does not

intend to call any witnesses at the fairness hearing, but reserves the right to make use of all documents entered on the docket by any settling party, objector, or *amicus*. Sandefur also reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval.

CCAF represents class members *pro bono* in class actions where class counsel employ unfair procedures to benefit themselves at the expense of the class. *E.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed, and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement") (rejecting settlement approval and certification); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling CCAF's founder Ted Frank "[t]he leading critic of abusive class-action settlements"). Since its founding in 2009, CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016).

Because it has been CCAF's experience that class action attorneys often employ *ad hominem* attacks in attempting to discredit objections, it is perhaps relevant to distinguish CCAF's mission from the agenda of those who are often styled "professional objectors." A "professional objector" is a specific term referring to for-profit attorneys who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees. Some courts presume that such objectors' legal arguments are not made in good faith. Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 437 n.150 (2003). This is not CCAF's *modus operandi*. Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: CLASS ACTION LITIG. REPORT (Aug. 12, 2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements and does not extort

attorneys; and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. *See* Decl. of Theodore H. Frank.

To avoid any doubt about his motives, Sandefur is willing to stipulate to an injunction prohibiting him from accepting compensation in exchange for the settlement of his objection. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem). Sandefur brings this objection through CCAF in good faith to protect the interests of the class. Sandefur Decl. ¶ 8.

II. The Court owes a fiduciary duty to unnamed class members.

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *Pampers*, 724 F.3d at 715. Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations." *Id.* "[T]hus there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.*

To guard against this danger, a district court must act as a "fiduciary for the class … with 'a jealous regard'" for the rights and interests of absent class members. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (quoting *In re Washington Pub. Power Supply Sys. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994)). It "must remain alert to the possibility that some class counsel may urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Inkjet*, 716 F.3d at 1178 (internal quotation marks omitted). And it must not "assume the passive role" that is appropriate when confronted with an unopposed motion in ordinary bilateral litigation. *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). In particular, settlement valuation "must be examined with great care to eliminate the possibility that it serves only the 'self-interests' of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012). In this examination, it is error to exalt fictions over "economic reality." *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015).

There should be no presumption in favor of settlement approval: the proponents of a settlement bear the burden of proving its fairness. *See, e.g.*, *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017); *True v. Am. Honda Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal. 2010) (citing Herbert Newberg & Alba Conte, 4 NEWBERG ON CLASS ACTIONS § 11:42 (4th ed. 2009)); *accord* American Law Institute, *Principles of the Law of Aggregate Litig.*, § 3.05(c) (2010). Any such presumption would be "inconsistent with [the] probing inquiry" required in this Circuit. *Retta v. Millennium Prods.*, No. CV 15-1801 PSG, 2016 WL 6520138, at *4 (C.D. Cal. Sept. 21, 2016) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)); *see also In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.* ("*GMC Pick-Up*"), 55 F.3d 768, 785 (3d Cir. 1995) ("The court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." (internal quotation marks omitted)).

III. This coupon settlement is subject to the Class Action Fairness Act.

The settlement provides that each class member will receive a $10 "voucher" that can be used toward the purchase of any product on www.art.com. Settlement, Dkt. 53-1, §§ 3.19, 5.2. Based on their features and despite the parties' terminology, the vouchers are coupons subject to the Class Action Fairness Act of 2005 ("CAFA"). CAFA was enacted specifically to address the use of coupon settlements as a cover for the payment of disproportionate attorneys' fees to class counsel in exchange for a cheap release of claims for defendants, while the harmed class members were left with virtually nothing. As such, the Court has a duty to closely scrutinize the actual value the settlement provides to class members in determining the fairness of the settlement.

A. Coupon settlements are disfavored and subject to heightened scrutiny.

Congress passed CAFA to combat its findings that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where … class counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." 28 U.S.C. § 1711 note §§ 2(a)(3), (a)(3)(A). Such unfairness was prevalent because the use of coupons "masks the relative payment of class counsel as compared to the amount of money actually received by the class members." *Inkjet*, 716 F.3d at 1179 (quoting Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1049 (2002)).

Coupon settlements suffer from additional flaws, including that "'they often do not provide meaningful compensation to class members; they often fail to disgorge ill-gotten gains from the defendant; and they often require class members to do future business with the defendant in order to receive compensation.'" *True*, 749 F. Supp. 2d at 1069 (quoting *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1291, 1302 (S.D. Fla. 2007) and citing other cases); *see also Synfuel Techs. v. DHL Express (USA)*, 463 F.3d 646, 654 (7th Cir. 2006). Coupons also can "serve as a form of advertising for the defendants, and their effect can be offset (in whole or in part) by raising prices during the period before the coupons expire." *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001).

It is because of "the[se] well-documented problems associated with such settlements [that] Congress voiced its concern over coupon settlements when it amended [CAFA] to call for judicial scrutiny of attorneys' fee awards in coupon cases." *Reed v. Continental Guest Servs. Corp.*, No. 10 Civ. 5642, 2011 WL 1311886, at *3 (S.D.N.Y. Apr. 4, 2011). Among the varied remedial measures of CAFA, 28 U.S.C. § 1712 sets forth special rules for fee calculation and settlement valuation where "a proposed settlement in a class action provides for a recovery of coupons to a class member." 28 U.S.C. § 1712(a). Because of the inherent dangers of coupon settlements, CAFA requires a district court to apply "heightened judicial scrutiny"[1] and to value the settlement, at least for fee purposes, based "on the value to class members of the coupons that are redeemed," 28 U.S.C. § 1712(a). *See also Inkjet*, 716 F.3d at 1181-86. The Senate Committee's Report on CAFA confirms these legislative aims:

> [W]here [coupon] settlements are used, the fairness of the settlement should be seriously questioned by the reviewing court where the attorneys' fee demand is disproportionate to the level of tangible, non-speculative benefit to the class members. In adopting [Section 1712(e)'s requirement of a written determination that the settlement is fair, reasonable, and adequate], it is the intent of the Committee to incorporate that line of recent federal court precedents in which proposed settlements have been wholly or partially rejected because the compensation proposed to be paid to the class counsel was disproportionate to the real benefits to be provided to class members.

S. REP. 109-14, at 31 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 32.

[1] *See Inkjet*, 716 F.3d at 1178; *Synfuel*, 463 F.3d at 654; *True*, 749 F. Supp. 2d at 1069; *Figueroa*, 517 F. Supp. 2d at 1308.

B. The vouchers are coupons under CAFA.

Although class counsel claim that that "this is not a coupon settlement," Dkt. 69-1 at 5, the caselaw does not support their claim. The parties cannot rely on their characterization of the relief as "vouchers" to evade the effects of CAFA; the legal effect of the relief "is a question of function, not just labeling." *Khatib v. County of Orange*, 639 F.3d 898, 905 (9th Cir. 2011) (interpreting "jail" where statute was silent). Numerous courts have rejected similar semantic efforts to avoid the legal conclusion that certain relief constitutes a coupon. *E.g.*, *Inkjet*, 716 F.3d at 1176 ("e-credits" are a "euphemism" for coupons); *Rougvie v. Ascena Retail Grp., Inc.*, No. 15-cv-00724, 2016 WL 4111320, at *27 (E.D. Pa. July 29, 2016) ("vouchers"); *Fouks v. Red Wing Hotel Corp.*, No. 12-CV-2160, 2013 WL 6169209, at *2 (D. Minn. Nov. 21, 2013) ("vouchers"); *Fleury v. Richemont N. Am. Inc.*, No. C-05-4525, 2008 WL 3287154 (N.D. Cal. Aug. 6, 2008) ("credits"); *True*, 749 F. Supp. 2d at 1069 ("rebates"); *Sobel v. Hertz Corp.*, No. 3:06-cv-00545, 2011 WL 2559565, at *11-*12 (D. Nev. June 27, 2011) ("certificates"); *see also Online DVD*, 779 F.3d at 952 (courts should "ferret[] out the deceitful coupon settlement that merely co-opts the term 'gift card' [or here, voucher] to avoid CAFA's requirements").

"A coupon may be defined as a certificate or form 'to obtain a discount on merchandise or services,'" and "Webster's also defines coupons as 'a form surrendered in order to obtain an article, service or accommodation.' Coupons are commonly given for merchandise for which no cash payment is expected in exchange." *Dardarian v. Officemax N. Am., Inc.* ("*Dardarian I*"), No. 11-cv-00947, 2013 WL 12173924, at *2 (N.D. Cal. July 12, 2013) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988)).

The Ninth Circuit's recent decision in *Online DVD* supports a finding that the "vouchers" are in fact coupons. The court identified several features that distinguished the gift cards provided under the settlement at issue there from coupons subject to CAFA: they "can be used for any products on walmart.com, are freely transferrable … and do not expire, and do not require consumers to spend their own money." 779 F.3d at 951. The court emphasized that the gift cards allowed class members to purchase, without spending any of their own cash, their "choice of a large number of products from a large retailer" (walmart.com). *Id.* at 952 (expressly confining its holding to walmart.com gift

cards "without making a broader pronouncement about every type of gift card that might appear"). What "separates a Walmart gift card from a coupon is not merely the ability to purchase an entire product as opposed to simply reducing the purchase price, but also the ability to purchase one of many different types of products." *Id.* Unexpirable gift cards, as a "fundamentally distinct concept in American life from coupons" operate essentially as cash. *Id.* Moreover, *Online DVD* class members were not forced to do further business with the defendant to realize the benefit because the settlement allowed them to choose cash instead of a gift card. *Id.* As such, the settlement was not similar to those that motivated Congress to enact CAFA by leaving class members with "little or no value." *Id.* at 950.

The vouchers provided under the settlement here differ sharply. Class members cannot elect cash instead of a coupon. The vouchers are valid for only 18 months from the date of issuance, Dkt. 53-1 ¶ 3.19, and Art.com offers nowhere near the range of useful sub-$10 consumer products offered by Walmart. They are not gift cards under applicable law nor can they be used to purchase gift cards. *Id.* Unlike gift cards, small remainders cannot be redeemed for cash. *Id.* Nor can class members redeem more than one voucher in a single transaction. *Id.* In short, and as the below comparison shows, the walmart.com gift cards were more cash-like than the vouchers here in almost every dimension:

	Online DVD	*Art.com*
Face Value	$12	$10
Expiration Date	None	18 months after issuance
Usable in conjunction with other coupons	Yes	Undisclosed[2]

[2] While more than one voucher cannot be used in a single transaction and the vouchers can be used for sale and other promotionally priced items, the settlement is silent on whether a voucher can be combined with *other* vouchers, gift cards, promo codes, etc. If it cannot, evidence of better deals in the marketplace "tends to show that the redemption rate may be very low." *Inkjet*, 716 F.3d at 1179 n.6. "If similar discounts are provided to consumers outside of the class, the benefit to the class might be less than the face amount of the coupon—or perhaps no benefit at all." Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 34 (3d ed. 2010). And even if vouchers can be combined with gift cards and promo codes, the market shows that such items are available at prices heavily discounted from the face value of the promotion (and at greater than $10 savings) on

Crackable (*i.e.* value can be retained over multiple purchases)	Yes	Yes
Redeemable for cash	Yes, when under certain thresholds governed by state law	No
Elected by class members in lieu of cash	Yes	No
Permits purchase of other gift cards	Yes	No
Protected under state and federal regulation of "gift cards"	Yes	No
Duplicative of deals freely available outside the settlement	No	Undisclosed; *see* footnote 2
Number of items that can be purchased in whole	Over 800,000[3]	Approximately 100,000 (Dkt. 54 ¶ 5)
Number of items that can be purchased in part	Over 38 million[4]	Undisclosed

Despite touting the raw number of items available for under $10, plaintiffs acknowledge that "the average purchase price for an un-serviced (i.e., non-framed) product from Art.com during the relevant time period was $17," Dkt. 69-1 at 3—well in excess of the $10 voucher, presumably before tax and shipping are tacked on, even for this lower-cost subset of products that plaintiffs selected as an exemplar for the Court. In fact, when searching "all art" on Art.com, the four options for price sorting are "less than $25," "$25 - $75," "$75 - $150," and "more than $150." *See* St. John Decl. ¶ 5. The same price-sorting options were available for the narrower "Clearance" category. *Id.* ¶ 6. In contrast, walmart.com allows one to price sort products in amounts of, *inter alia*, $0-$10 and $10-$20 or even $0-$5, $5-$10, and $10-$15, depending on the department. *Id.* ¶ 7. While one can find an unframed 8"x10" *Breakfast at Tiffany's* print and landscape prints that might appeal to a small number of class members on clearance for under $10 on art.com, this option is far removed from the $12 gift cards that can purchase "one of many different types of products" on walmart.com. *See id.* ¶¶ 6-7.

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sites such as ebay.com, demonstrating that the true value of a discount is lower than face value. *See* St. John Decl. ¶ 11.

[3] *See* Declaration of Anna St. John ("St. John Decl.") ¶ 7.

[4] Walmart, Form 10-K for fiscal year ended January 31, 2017, at 9 ("Walmart.com … offers access to over 38 million SKUs."), attached as St. John Decl. Ex. 3.

Plaintiffs' attempt to shoehorn their settlement into the strictures of *Online DVD*'s narrow exception implicitly acknowledges this key distinction: They claim that a class member can use a voucher to obtain a product in "diverse categories," Dkt. 69-1 at 5, but acknowledge that the diversity is limited to items such as "posters, celebrity and sports photos, art prints, calendars and wall stickers," Declaration of Gary Takemoto, Dkt. 54 ¶ 5 (describing items available through Art.com that cost "$10 of less, including shipping and sales tax"). These categories all share the common theme of being decorative items that class members might purchase "only 'because they fe[el] beholden to use the [vouchers],' not because they would have otherwise." *See True*, 749 F. Supp. 2d at 1075 (quoting *GM Trucks*, 55 F.3d at 808). Unlike in *Online DVD*, the vouchers cannot be used as fungibly as cash to buy a wide range of commodity-type household, personal care, and grocery items that class members would buy anyway in the ordinary course of their lives. (Who wouldn't use new rolls of paper towels, tubes of toothpaste, or bottles of dish soap?) A key factor in the Ninth Circuit's decision distinguishing the walmart.com gift card from coupons was that a coupon lacks any cash value. The walmart.com gift cards, in contrast to coupons, had cash value "because they are equal to a certain dollar amount and can be spent on a variety of useful goods." 779 F.3d at t 956 at n.9. The instant settlement is more akin to that in *Inkjet*, where the Ninth Circuit held the e-credits provided by the settlement were coupons because the e-credits could only be used to purchase HP printers and printer supplies. Even though there were many products available for a class member to purchase from HP, they all fell into a narrow range of products—just like the products available from Art.com.

Plaintiffs cite a number of district court cases that have been issued in the wake of *Online DVD* to support their argument that the vouchers here are not coupons. As district court opinions, these interpretations of *Online DVD* are not binding authority. Plaintiffs overlook the more persuasive post-*Online DVD* authority that points in the other direction. *See Davis v. Cole Haan, Inc.*, No. 11-cv-01826-JSW, 2015 WL 7015328, at *4 (N.D. Cal. Nov. 12, 2015) (disclaiming reading of *Online DVD* that rests on a "narrow distinction" between discounts and whole products and concluding that $20 vouchers to Cole Haan stores constituted a CAFA coupon); *Rougvie*, 2016 WL 4111320, at *29 (distinguishing between gift cards in *Online DVD* and expireable vouchers off merchandise purchases

at Justice stores). Further, plaintiffs omit key differences in the settlement relief in the cases they rely upon compared to the vouchers issued here. *See, e.g.*, *Hendricks v. Starkist Co.*, No. 13-cv-00729-HSG, 2016 WL 5462423, at *7 (N.D. Cal. Sept. 29, 2016) ("[L]ike the *Online DVD-Rental* class members, class members here were given a choice between receiving a cash settlement or the vouchers. Additionally, the vouchers have no expiration date, are freely transferrable, are redeemable at any retailer that sells StarKist products, and are redeemable in exchange for [entire] StarKist products."); *Manner v. Gucci Am., Inc.*, No. 15-cv-000045-BAS, 2016 WL 6033545 (S.D. Cal. Oct. 13, 2016) (CAFA was not raised or addressed by the Court; class members received a voucher for an entire free gift); *Johnson v. Ashley Furniture Indus., Inc.*, No. 13cv2445, 2016 WL 866957, at *4 (S.D. Cal. Mar. 7, 2016) (noting wide array of useful products that consumers could obtain without spending their own money, "including plates, bowls, glasses, wall art, trays, vases, candleholders, figurines, table decorations, picture frames, clocks, towels, artificial flowers, pillows, and rugs").

Regarding *In re Easysaver Rewards Litig.*, No. 09-cv-2094-BAS, 2016 WL 4191048 (S.D. Cal. Aug. 9, 2016), with respect, the case was wrongly decided under *Online DVD*, and an appeal brought by Sandefur's counsel is pending before the Ninth Circuit. No. 16-56307. A bi-partisan coalition of Attorneys General from thirteen states filed a brief as *amici curiae* in support of CCAF's position that the settlement relief was a coupon subject to CAFA and observed that, by failing to apply CAFA, the district court's settlement approval impaired consumers' interests and left them with a small fraction of the overall settlement value. The brief is attached St. John Decl. Ex. 1.

In short, the $10 vouchers that expire in 18 months and can be used only for a narrow range of decorative items on a site where the average class member purchase was nearly twice as much fall squarely within CAFA's definition of "coupon" as interpreted by *Online DVD*.

IV. The proposed settlement should be rejected as unfair under Rule 23(e) because it allows class counsel to obtain a disproportionate amount of the settlement proceeds.

A class action settlement may not confer preferential treatment upon class counsel to the detriment of class members. When, as probable here, "counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply

rewarded," a settlement is unfairly tilted toward class counsel. *Bluetooth*, 654 F.3d at 947; *GMC Pick-Up*, 55 F.3d at 803 ("non-cash relief … is recognized as a prime indicator of suspect settlements").

In *Bluetooth*, the Ninth Circuit identified three indicia of an inequitable settlement: (1) unreasonable disparity between the class award and the attorneys' negotiated fee award; (2) "clear sailing," in which the defendant agrees not to oppose class counsel's fee request; and (3) a "kicker," such that any unawarded fees revert to the defendant rather than benefiting the class. 654 F.3d at 947. Here, the settlement has an excessive attorneys' fee provision reinforced by a clear-sailing clause and a clause routing any amount by which the Court reduces the requested fees to a third party rather than to the class, set against the backdrop of illusory coupon and injunctive relief given a valuation by class counsel that violates CAFA. Settlement, Dkt. 53-1 ¶ 5.6. This settlement structure suggests a design intended to insulate class counsel's fee award with the illusion of class recovery, while simultaneously providing the defendant with the inexpensive release of claims and an end to the litigation. *See Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) (if "fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have been obtained.").

A. Disproportionate attorneys' fees

For the court's fairness analysis, the "'ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (quoting *Redman*, 768 F.3d at 630); *see also Allen*, 787 F.3d at 1224 (examining class benefit in terms of "economic reality"). A settlement that allocates to class counsel well in excess of the Ninth Circuit's 25% benchmark cannot be approved. *See, e.g.*, *Dennis*, 697 F.3d at 868 (38.9% fee would be "clearly excessive"); *Allen*, 787 F.3d at 1224 n.4 (fee award that exceeds class recovery by a factor of 3 is disproportionate); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"). This is such a settlement.

While plaintiffs claim that their fee request "represents around 3.5% of the monetary component of the settlement," their calculation is based on a faulty denominator. Dkt. 69-1 at 1. There is zero demonstrable benefit to the class at this stage of the case: Regardless of whether CAFA's

limitations apply, a $10 valuation is unsupportable given that redemption rates in low-value coupon settlements rarely exceed low single-digits, and any value from the injunctive relief is entirely illusory.

1. Voucher Relief

Although class counsel claim that the voucher component of the settlement is worth "up to $20 million," such valuation is fantastical. Mem. ISO Pls' Mot. For Prelim. Approval, Dkt. 52 at 2. There is no chance that class members actually will receive that inflated valuation. Nor is it likely that class members will receive even the $2.3 million in relief necessary to justify the $745,000 in fees and costs that class counsel seek on a 25% benchmark basis.[5]

While it is unknown how many vouchers will be redeemed—notably, by class members who have expressed no discernible interest in receiving them—precedent shows the redemption rate will almost certainly be in the low single digits. *See, e.g.*, *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 971 (8th Cir. 2016) (0.045% of distributed certificates were redeemed); *Cole Haan*, 2015 WL 7015328 (2.3% of distributed vouchers were redeemed); *Dardarian v. OfficeMax N. Am., Inc.* ("*Dardarian II*"), No. 11-cv-00947, 2014 WL 7463317, at *3 (N.D. Cal. Dec. 30, 2014) (reflecting upon a redemption rate of sub-7% of the face value of $10 and $5 distributed to class members); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445, 1448 (2005) (typically "redemption rates are tiny," "mirror[ing] the annual corporate issued promotional coupon redemption rates of 1-3%"); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's*

[5] Litigation expenses should be included in the numerator of the percentage-of-recovery calculation because, otherwise, class counsel are incentivized to treat resources as a litigation expense (because they will be reimbursed) and to increase those expenses (inflating the common fund value), knowing that such reimbursable expenses will not be counted against the 25% benchmark. Every dollar class counsel spends is not just a dollar taken from the class, but effectively would allow class counsel to earn a *commission* on those expenses. At a minimum, if the Court is to exclude litigation expenses from the numerator, it also should exclude those same expenses from the denominator. *See, e.g.*, *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634, 2015 U.S. Dist. LEXIS 67904, at *14-*16 (N.D. Cal. May 26, 2015) (excluding both administrative and litigation expenses before calculating attorneys' fees); *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994) ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses.").

Clothes of Class Actions, 18 GEO. J. LEGAL ETHICS 1343, 1347 (2005) (noting one settlement where only 2 of more than 96,000 coupons were redeemed); *cf. also Golba v. Dick's Sporting Goods, Inc.*, 238 Cal. App. 4th 1251, 1261 (Cal. App. 4th Dist. 2015) ("of the 232,000 potential class members, only two had submitted claims for coupons"). Redemption rates "may be particularly low in cases involving low value coupons." *Sobel*, 2011 WL 2559565, at *11 ($100 discount "certificate" for car rental). Even in settlements offering cash relief, claims rates are notoriously low in consumer class settlements such as this. *See, e.g.*, *Sullivan v. DB Investments*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (*en banc*) ("consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns" (internal quotation marks omitted)); *In re Livingsocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 18-19 (D.D.C. 2013) (noting 0.25% claims rate); Tiffany Janowicz, *et al.*, Webinar, *Settlement Administration: Impacting Claims Filing Rates*, 24, *available at* http://media.straffordpub.com/products/crafting-class-settlement-notice-programs-due-process-reach-claims-rates-and-more-2014-02-18/presentation.pdf (prominent settlement administrator found that direct mail notice consumer class action settlements result in claims rates of 0-3% when $5 is available and 1-5% when $15 is available); Declaration of Dan Rosenthal ¶ 12, *NVIDIA GPU Litig.*, No. 5:08-cv-4312, Dkt. 357 (founder of class action settlement claims administrator testified that claims rates are typically 0.5% to 1.5%).

Over 11% of class members would have to redeem their vouchers to achieve the $2.3 million class benefit required to conform class counsel's fee and expense request to the 25% benchmark. Precedent shows this is highly unlikely. If the redemption rate is a more typical 2%, class counsel will have allocated over 68% of settlement benefit to themselves. Under Circuit precedent, the settlement should be rejected. *E.g.*, *Dennis*, 697 F.3d at 868; *see also Pearson*, 772 F.3d at 781.

2. Injunctive Relief

In addition to the $10 vouchers, the settlement provides for certain forms of injunctive relief. Specifically, Art.com agrees (1) that "any regular price to which Art.com refers in any advertising will be the actual, bona fide price at which the item was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of business, honestly and in good faith"; and (2) to "implement a compliance program, which will consist of periodic (no less than once

a year) monitoring, training and auditing to ensure compliance with relevant laws, for a period of at least four (4) years from" the effective date. Settlement ¶ 5.1. These measures provide no benefit to the class and should not be assigned any value by the Court in determining settlement fairness.

First, the supposed relief amounts to an injunction to comply with the law, which courts have correctly described as "meaningless" and "valueless." *McClintic v. Lithia Motors, Inc.*, No. C11-859RAJ, 2012 WL 112211, at *4-*5 (W.D. Wash. Jan. 12, 2012); *see also Walker v. City of Calhoun*, __Fed. Appx.__, 2017 WL 929750, at *2 (11th Cir. Mar. 9, 2017) (discussing the "archetypical and unenforceable 'obey the law' injunction"); *Reich v. Walter W. King Plumbing & Heating Contractor, Inc.*, 98 F.3d 147, 151 (4th Cir. 1996) (defendant was the "prevailing party" under a settlement that merely obligated it to do that which the law already required); *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 544-45 (S.D. Ohio 2000) ("[A] defendant's promise to do that which the law already requires is not a valuable benefit."). Requiring Art.com to "comply with the applicable law" by only advertising products at "actual, bona fide prices[]" that have been "offered for sale, for a reasonably substantial period of time" may even lack the specificity necessary for injunctions under Fed. R. Civ. P. 65. *See Monreal v. Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004) ("Generally, injunctions simply requiring the defendant to obey the law are too vague to satisfy Rule 65." (internal quotation marks omitted)).[6]

Galloway is directly on point. 833 F.3d 969. There, the plaintiffs negotiated a settlement that provided coupons and a prospective injunction requiring the defendant to comply with the law. *Id.* at 971. Class counsel sought a full lodestar award under §1712(b), but the court demurred, awarding a percentage of the coupons redeemed under §1712(a) and only 10% of class counsel's lodestar for time spent obtaining the "routine and non-controversial" injunctive relief. *Id.* at 973. The Eighth Circuit affirmed the district court's decision to award only $17,000 instead of the $147,000 requested, but thought even less of the injunctive relief than did the lower court. In fact, "no part of the settlement was properly attributable to obtaining injunctive relief" because "blanket injunctions against general

[6] Even the "compliance program," the most particularized aspect of ¶ 5.1, is amorphous enough to give Art.com unbridled discretion; it consists only of undefined "monitoring, training and auditing to ensure compliance with the relevant laws" that must occur at least once a year for 4 years.

violation of a statute are repugnant to American spirit…." *Id.* at 974 n.3 (quoting *Beatty v. United States*, 191 F.2d 317, 321 (8th Cir. 1951)). Regardless of whether the injunction here is specific enough under Rule 65, it is not specific enough to create *any* settlement value, let alone justify a $700,000 fee award.

Second, future changes in advertising practice will not benefit class members who, by definition, are past purchasers allegedly already misled by Art.com's previous conduct. *See, e.g.*, *Koby*, 846 F.3d at 1079 (observing "an obvious mismatch between the injunctive relief provided and the definition of the proposed class"); *True*, 749 F. Supp. 2d at 1077 ("No changes to future advertising by Honda will benefit those who already were misled by Honda's representations regarding fuel economy."); *Pampers*, 724 F.3d at 720 ("The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans." (emphasis in original; internal quotation marks omitted)). "[F]uture purchasers are not members of the class, defined as it is as consumers who have purchased [the product]." *Pearson*, 772 F.3d at 786. This Court also recently echoed this reasoning: "The prospective relief, while of some value to future customers, does not provide relief to class members, who have already suffered injury." *Boyd v. Avanquest N. Am. Inc.*, No. 12-cv-04391-WHO, 2015 WL 4396137, at *4 (N.D. Cal. Jul. 17, 2015).

Third, the settlement suggests that Art.com's business practice changes preceded the settlement. *See* Settlement ¶ 5.1 ("As a direct result of this Action…As a further direct result of this Action…"). Thus even if the injunctive relief were meaningful, and even if it did target class members, the codification in the settlement agreement is "of no real value" since it "does not obligate [the defendant] to do anything it was not already doing." *Koby*, 846 F.3d at 1080; *see also Hofmann v. Dutch LLC*, No. 3:14-cv-02418-GPC-JLB, 2017 WL 840646, at *7 (S.D. Cal. Mar. 2, 2017) (refusing to credit injunctive relief when defendant had voluntarily revised its labeling before the settlement). Voluntary pre-settlement changes, later duplicated in settlement, do not count as a compensable class benefit. *See Pampers*, 724 F.3d at 719; *Staton*, 327 F.3d at 961; *Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1090 (C.D. Ill. 2012) (voluntary remedial measures independent of the settlement "should not be considered part of the benefit for forfeiting the right to sue"). It is "the *incremental* benefits" from the settlement

that matter, "not the total benefits" from the litigation. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (emphasis in original).

Thus, the settlement, which includes a plenary waiver of class members' monetary claims, should not be approved, as it would provide class members *qua* class members with no marginal value. *E.g., Koby*, 846 F.3d at 1080 ("Because the settlement gave the absent class members nothing of value, they could not fairly be required to give up anything in return."); *Allen v. Similasan Corp.*, 318 F.R.D. 423, 428 (S.D. Cal. 2016) (repudiating settlement where class members "would be better off opting out, since they would receive the same benefits of the injunctive relief in the Settlement Agreement but would not be giving up their right to sue."). "No one should have to give a release and covenant not to sue in exchange for zero (or virtually zero) dollars." *Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 WL 2215708, at *3 (N.D. Cal. May 29, 2014).

B. The clear sailing agreement

As part of the settlement, Art.com agreed "not to oppose [Class Counsel's fee] request" for $745,000. Settlement ¶ 5.6. This "clear sailing" provision is the second of *Bluetooth*'s warning signs. 654 F.3d at 947; *see also Redman*, 768 F.3d at 637. Because of its presence in the settlement, the Court "has a heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class, being careful to avoid awarding 'unreasonably high' fees simply because they are uncontested." *Bluetooth*, 654 F.3d at 948 (quoting *Staton*, 327 F.3d at 954).

A clear sailing clause is problematic because "by its very nature," it "deprives the court of the advantages of the adversary process." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). *Bluetooth* recognized that a court cannot know what class counsel may have bargained away in exchange for a defendant's agreement not to subject their fee request to adversarial briefing, limiting a court's ability to determine the fairness of a fee request. 654 F.3d at 948. The clause thereby lays the groundwork for lawyers to "urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees" and "suggests, strongly," that its associated fee request should "be placed under the microscope of judicial scrutiny." *Weinberger*, 925 F.2d at 518, 524-25.

Provisions for clear sailing clauses "decouple class counsel's financial

> incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery. They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class."

Vought, 901 F. Supp. 2d at 1100 (quoting *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari)). Indeed, clear sailing is most suspect when the class is paid in coupons or other non-cash relief. *Redman*, 768 F.3d at 637. Coupons typically mask the real value of the class's relief. In such a situation, a defendant that remains adverse to counsel's fee award is the most likely candidate to illuminate a realistic estimate of the class benefit.

C. The "kicker" clause / segregated fee fund and improper *cy pres* recipient

If the Court approves attorneys' fees in an amount less than the $745,000 that Art.com agreed to pay, the settlement provides that the overage will be distributed to the National Consumer Law Center. Settlement ¶ 5.6. This "kicker" arrangement reverting unpaid attorneys' fees to a third-party organization "rather than to the class amplifies the danger" that is "already suggested by a clear sailing provision." *Bluetooth*, 654 F.3d at 949. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Id.* In an ordinary common fund settlement, the district court can reduce the fees such that the class will benefit when the fund available for distribution to the class increases. Here, however, if the Court awards less than $745,000, the only beneficiary will be an organization that takes political positions that many class members oppose.[7] There is no discernible reason any excess funds cannot supplement the class relief instead.

With the kicker, the parties have prevented the court from returning the fees to the class and the class relief to a more appropriate ratio. And it raises concern per *Dennis*'s warning that "[c]y pres distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of the negotiations." 858 F.3 at 867. Sandefur objects to not only to the kicker but also to the National Consumer Law Center being a recipient of

[7] *See* National Consumer Law Center, "Issues," *at* https://www.nclc.org/issues/issues.html.

any funds resulting from a reduced attorneys' fee award.

The "kicker" has the additional self-serving effect of protecting class counsel by deterring scrutiny of the fee award. A court generally will have less incentive to scrutinize a fee award, particularly when there's also a clear-sailing agreement, where the only effect of a reduction in the amount a defendant has already agreed to pay is to revert funds to a third-party organization rather than to increase the value of relief for the class. *See* Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 TUL. L. REV. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER BARONS 522-25 (2011) (same; also arguing that reversionary kicker should be considered *per se* unethical). At a minimum, clear-sailing in conjunction with fee segregation is a red flag that merits a "clear explanation" justifying why the settlement was negotiated in such a manner as to make the class worse off. *Bluetooth*, 654 F.3d at 949.

V. Class notice was defective because the possibility of *cy pres* and the recipient were not publicized in the notice.

Due process demands that notice to class members fairly apprise them of the terms of the settlements such that they have an opportunity to raise objections. The "notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950).[8] That standard is not met where the possibility of *cy pres* and the identity of a beneficiary are not disclosed.

Notice serves the purpose of allowing each class member to evaluate the settlement and reach an informed decision of their own. *In re Veritas Software Corp. Secs. Litig.*, 496 F.3d 962, 969 (9th Cir. 2007). Accordingly, when a settlement notice to absent class members includes material inaccuracies or omits salient information about the settlement, such notice does not comport with the *Mullane* standard. The notice provided to the class here is deficient because it fails to inform class members that any reduction in attorneys' fees will be sent to the National Consumer Law Center. *E.g.*, *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198 (5th Cir. 2010) (notice failed to clearly inform class

[8] Although *Mullane* did not involve a Rule 23 class action, it long as been held to apply equally to absent class members in such actions. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

members of the possibility of a *cy pres* distribution). Providing the identity of potential *cy pres* recipients preserves the right of absent class members to opt-out of a settlement to distance themselves from causes or institutions that they would rather not support and to voice objection to the recipient.

VI. In the alternative, if the Court approves the settlement, the Court should not award attorneys' fees until the coupon redemption rate is known.

A. The Court's fiduciary role remains central in its evaluation of a fee request.

The Court's fiduciary role remains necessary at the fee-setting stage, where "the relationship between plaintiffs and their attorneys turns adversarial," when counsel's "interest in getting paid the most for its work representing the class [is] at odds with the class' interest in securing the largest possible recovery for its members." *Mercury Interactive*, 618 F.3d at 994 (internal quotation and citation omitted). "That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief provided to the class in the agreement does not detract from the need carefully to scrutinize the fee award" because a defendant is interested only in disposing of the total claim asserted against it." *Staton,* 327 F.3d at 964. Thus, "private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case." *GMC Pick-Up*, 55 F.3d at 821. Allocational conflicts between class counsel and the class do not dissipate simply because a settlement is structured as a constructive common fund rather than a traditional common fund. *Bluetooth*, 654 F.3d at 943.

"Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23. "While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement, Fed. R. Civ. P. 23(h), courts have an independent obligation to ensure the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Bluetooth*, 654 F.3d at 941; *contra* Mem. ISO Pls. Mot. for Attys Fees & Costs ("Fee Mem."), Dkt. 69-1 at 11-12 (request is "presumptively reasonable because it resulted from arm's length negotiations").

B. Class counsel's fee award should be awarded only after the voucher redemption rate is known.

In all cases a fee award needs to be attuned to the result actually achieved for the class, to the

money the settlement actually puts in class members' hands. *See, e.g.*, *Bluetooth*, 654 F.3d at 942. As detailed in Section IV.A, because the class recovers nothing of value from the injunctive relief, the coupon relief is the linchpin of class value and likewise must be the linchpin of any fee award.

CAFA contains special provisions that govern attorneys' fees in settlements in federal court where class members obtain coupon relief. 28 U.S.C §1712. Plaintiffs assert the Court "must apply state law in determining whether a party has a right to attorneys' fees and how to calculate those fees." Fee Mem. 10. This is incorrect; the governing law for fee awards in a coupon settlement in federal court is § 1712, notwithstanding state law. *Davis*, 2013 WL 5718452, at *1 ("[W]here, as here, state law runs counter to a federal statute, federal law governs. [CAFA] governs the calculation of attorneys' fees for coupon settlements in class actions." (internal citation omitted)); *see also Dardarian II*, 2014 WL 7463317, at *4 ("CAFA is the appropriate framework for determining the proper amount of the fee award regardless of whether fees are awarded pursuant to [Cal. Code of Civ. P.] section 1021.5 or otherwise."). A prime object of CAFA's criticism was the "abuse[]" of upside-down federalism of imposing state law on national class actions. *See* 28 U.S.C. § 1711 note §2(a)(4)(C).[9]

[9] Even outside the coupon context, it is doubtful that the California Civil Code and California Code of Civil Procedure would control the award of fees in a nationwide class action settlement in federal court. Beyond CAFA, Fed. R. Civ. P. 23(h), as a trans-substantive procedural rule, trumps inconsistent state law when the two conflict. *See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*., 130 S.Ct. 1431 (2010). To the extent that California fee shifting law would permit a lodestar award without consideration of class benefit, such procedure would be unreasonable under 23(h) and thus must yield to federal law. *See Inkjet*, 716 F.3d at 1186 n.18 ("Even under the lodestar method, the district court must adjust the amount of any fees award to account for the degree of success class counsel attained"); *see also* Notes of Advisory Committee on 2003 Amendments to Rule 23 ("it may be appropriate to defer some portion of the fee award until *actual payouts* to class members are known" (emphasis added)); *id.* ("fundamental focus is the result *actually achieved* for class members" (emphasis added)).

Alternatively, if attorneys' fees are considered a matter of substance rather than procedure, such that state law applies, it is not constitutional to apply the substantive law of one state to absent class members who have no connection to that state. *See Phillips Petro.*, 472 U.S. at 818. Anyway, the court need not decide this larger issue because it is clear that in the coupon context where § 1712 is directly applicable, it overrides inconsistent California law.

Section 1712 is "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." *Inkjet*, 716 F.3d at 1179. Thus, under §1712(a), "the portion of any attorney's fee award to class counsel that is attributable to the award of coupons shall be based on the value to class members of the coupons that are redeemed." *Id.* at 1181 (quoting §1712(a)). The fee is attributable to the award of coupons where the fee is a "consequence" of the coupon relief, or conversely, where the coupon relief "is the conditional precedent" to the fee award. *Id.* "[I]n a case where the settlement provides only coupon relief" "the 'portion' of the attorneys' fees that are 'attributable to the award of the coupons' is necessarily one hundred percent … [and] any attorney's fee award to class counsel ... shall be based on the value to class members of the coupons that are redeemed." *Id.* at 1182. The "shall" language is mandatory; a court has no discretion to award fees for the coupon relief in any manner other than a percentage based on the value of those coupons ultimately redeemed. *Id.* at 1181. "§1712(a) *does* exclude the possibility that lodestar fees may be awarded in exchange for coupon relief." *Id.* at 1185 (emphasis in original; internal quotation omitted).

As explained in Section III.B, the vouchers here qualify as coupons for purposes of CAFA. To evade the limitations of § 1712(a), plaintiffs seek refuge in § 1712(b), which allows for a lodestar-based award when the coupons are not used as a predicate for the fee award (*i.e.* when other non-coupon relief justifies a fee award). Fee Mem. 4-5. Plaintiffs claim that the settlement's prospective injunctive relief provides the necessary hook for a § 1712(b) fee award. Settlement ¶ 5.1. For the many reasons discussed in Section IV.A.2, however, the injunctive relief is of no value to the class and therefore cannot bear the weight of plaintiffs' fee request. Thus, it is not the case that absent coupon relief, plaintiffs could obtain its current lodestar fee request simply on the basis of the injunctive relief.

In re HP Power Plug and Graphic Card Litigation (cited by Fee Mem. 5), presents a striking contrast. Rather than the free-floating prospective injunctive relief here that targets only those who do business with the defendant in the future, the retrospective injunctive relief in *HP Power Plug* offered class members a free repair and warranty of a product they had already purchased. No. C-06-02254, 2008 WL 2697192, *1 (N.D. Cal. Jul. 7, 2008). Thus, it was reasonable to conclude that the injunctive relief

was the main value of the settlement, and to apply base lodestar methodology under § 1712(b). *Id.* at *2. Because the only relief class members uniquely obtain here are coupons, § 1712(a) takes primacy.

Even if some minor fraction of lodestar were appropriate in recognition of the injunctive relief, class counsel asks for their lodestar for the *entire* litigation *and* a 1.3 multiplier on top of that, without eliminating any time attributable to obtaining the coupon relief. Fee Mem. 12-15, 16-17. This is a situation in which "[t]he class is being asked to 'settle,' yet Class Counsel has applied for fees as if it had won the case outright." *Sobel*, 2011 WL 2559565, at *14. A lodestar approach necessitates "adjust[ing] the amount of any fees award to account for the degree of success class counsel attained," because "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *Inkjet*, 716 F.3d at 1186 n.18 (internal citations and quotation marks omitted); *id.* at 1182. Plaintiffs' excessive request further ignores that, under CAFA, to avoid double-billing, any supplementary lodestar award for non-coupon relief must be decreased to account for the percentage-based coupon award. *Galloway*, 833 F.3d 969 (affirming decision to reduce lodestar by 90% in a mixed coupon/injunctive relief settlement to account for the coupon-based percentage award).

In advocating for a multiplier above one, plaintiffs rely on cases employing lodestar merely as a crosscheck of a percentage of recovery award. Fee Mem. 17. It would be improper to import those crosscheck multipliers in a base lodestar analysis. *See Perdue v. Kenny A.*, 130 S. Ct. 1662, 1669 (2010) ("there is a strong presumption that the lodestar is sufficient") (cited by Fee Mem. 12); *In re Johnson & Johnson Derivative Litig.*, No. 10-2033, 2013 WL 6163858, at *10 (D.N.J. Nov 25 2013) (finding common fund lodestar crosscheck multipliers inapt when using lodestar as a primary fee calculation).

But regardless of the method the Court uses, and even if CAFA didn't apply, in any settlement, a "fundamental focus" in awarding fees is on the "result *actually* achieved for class members." Fed. R. Civ. P. 23(h) (emphasis added). "Where the parties have reached a coupon settlement, the actual monetary value of the coupons redeemed by the class is a prime consideration in th[e] assessment [of reasonable attorneys' fees]: it is an indispensable factor in evaluating the reasonableness of the lodestar figure, and it is determinative when calculating an award as a percentage of the recovery." *Fouks*, 2013 WL 6169209, at *7. "Because redemption rates have a direct and potentially devastating impact on the

actual value received by the class, such lack of evidence prevents any reasoned assessment of the settlement's actual value to the class." *Sobel*, 2011 WL 2559565, at *11; *see also Redman*, 768 F.3d at 634 ("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."). In light of these authorities, class counsel's request for a 1.3 multiplier on their full lodestar is excessive at this stage of the litigation.

The policy reasons for basing an attorneys' fee award on the redemption rate "cannot be overemphasized": "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." *Inkjet*, 716 F.3d at 1179. "Public confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 688-92 (Cal. 2016) (Liu, J., concurring). Exorbitant fees erode public confidence in the class action device. To prevent that erosion, it is "important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." *Piambino v. Bailey,* 757 F.2d 1112, 1144 (11th Cir. 1985).

Deferring or staggering the fee award will enable the Court to award fees based on redeemed coupons consistent with CAFA and will ensure a fee award that is more appropriately proportionate to the actual class benefit. *E.g.*, *Galloway*, 833 F.3d 969; *Rougvie*, 2016 WL 4111320, at *27 ("Congress mandates we award attorneys' fees attributable to the award of coupons based on the value of the class members of the redeemed coupons."); *Cole Haan*, 2015 WL 7015328 (awarding ⅓ of the value of the coupons actually redeemed) (2.3% of the unsolicited coupons were redeemed); *Dardarian I*, 2013 WL 12173924, at *3 ("[T]he Court does not expect it can issue a fee award until the merchandise vouchers have been redeemed and the fairness of the settlement ascertained.").

Even before 28 U.S.C. § 1712(a) mandated this method of valuing coupons, deferring and staggering fee awards was an accepted practice. *See Inkjet*, 716 F.3d at 1186 n.19 (citing cases); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 189-90 (D. Me. 2003) (deferring "award of attorney fees until experience shows how many vouchers are exercised and thus

how valuable the settlement really is"); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 380 (D. Mass. 1997) (staging the fee award based on actual value created for the class); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1283-84 (S.D. Ohio 1996) (same), *aff'd* 102 F.3d 777 (6th Cir. 1996); Notes of Advisory Committee on 2003 Amendments to Rule 23(h) ("[I]t may be appropriate to defer some portion of the fee award until actual payouts to class members are known."). Staggering the fee properly incentivizes class counsel to bestow maximum value upon class members.

CONCLUSION

The coupon settlement allocates a disproportionate share of the benefit to class counsel at the expense of the class and also contains other red flags of a lawyer-driven settlement. Accordingly, the settlement must be rejected under Rule 23(e). If the Court decides to approve the settlement, any fee award should be made after the voucher redemption rate is known.

Dated: July 21, 2017

Respectfully submitted,

/s/ William I. Chamberlain

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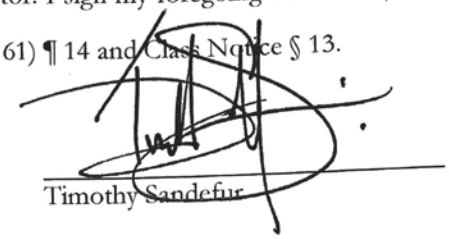
I, Timothy Sandefur, am the objector. I sign my foregoing written objection pursuant to the Court's Preliminary Approval Order (Dkt. 61) ¶ 14 and Class Notice § 13.



Timothy Sandefur

CERTIFICATE OF SERVICE

I hereby certify that, on July 21, 2017, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ William I. Chamberlain
William I. Chamberlain