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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MONICA RAEL and ALYSSA HEDRICK, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE CHILDREN'S PLACE, INC., a Delaware corporation, and DOES 1-50, inclusive

Defendants.

ANNA ST. JOHN,

Objector.

Case No. 3:16-cv-00370-GPC-LL

CLASS ACTION

RESPONSE IN OPPOSITION OF ANNA ST. JOHN TO PLAINTIFFS' RENEWED MOTION FOR ATTORNEYS' FEES

Judge: Hon. Gonzalo P. Curiel
Courtroom: 12A
Date: May 3, 2024
Time: 1:30 P.M.

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Introduction

Class counsel asks for fees inconsistent with 28 U.S.C. § 1712(a) and Ninth Circuit law.

Class counsel's initial request of a $1.08 million fee award was ultimately disproportionate relative to their clients' true benefit ($587,000). Such a lopsided allocation would have violated this Circuit's caselaw under Rule 23(e)(2). *See, e.g.*, *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 610 (9th Cir. 2021); *Briseño v. Henderson*, 998 F.3d 1014, 1026 (9th Cir. 2021); *Jane Roes 1-2 v. SFBSC Management, LLC*, 944 F.3d 1035, 1055 (9th Cir. 2019). Fortunately, this Court followed the Class Action Fairness Act (CAFA) and deferred any fee award until after the coupon redemption rate could be determined. Dkt. 142 at 37. The Court was correct: The Ninth Circuit again recently confirmed the narrowness of the *Online DVD* gift card exception to 28 U.S.C. § 1712. *McKinney-Drobnis*, 16 F.4th at 603-05. But while Plaintiffs don't try to relitigate the coupon aspect of the settlement, they now seek to evade CAFA in a different manner.

Although Plaintiffs no longer seek the full $1.08 million fee that they negotiated and previously sought, their $400,000 request remains excessive. When a settlement "only provides for coupon relief," CAFA instructs this Court to base the entire fee request "on the value to class members of coupons that are *redeemed*." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1181-82 (9th Cir. 2013) (quoting in part 28 U.S.C. § 1712(a)) (emphasis added). Notwithstanding the plain language of the statute and circuit law, Plaintiffs base their request on the costs of noticing and administering the settlement in addition to the redemption of coupons. Mem. of Points and Authorities in Support of Plaintiffs' Renewed Motion for Attorneys' Fees ("Fee Mem.") (Dkt. 185-1) at 3-4, 7-8 & nn.13-14. This attempt to "puff the perceived value of the settlement so as to enhance their award"[1] fails; the proper denominator for the percentage-based award dictated by 28 U.S.C. § 1712(a) is "the value to class members of coupons that are redeemed" and nothing else. *See* Section I below.

[1] *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 659 (9th Cir. 2020) (simplified).

If this Court limits the fee award to $200,000, a generous, above-benchmark, yet reasonable 34% of the coupon redemption value, that would leave an unawarded residual of $880,000 from the negotiated $1.08m fee fund. This amount can and should be used to fund another electronic distribution of settlement vouchers to class members—something the Defendants endorse because it is economically and administratively feasible. Dkt. 188. Consistent with Settlement § 2.8 and the Rule 23's preference for class benefit over *cy pres*, it would be premature to allow a distribution to the National Consumer Law Center. *See* Section II below.

I. A CAFA percentage award must only include redeemed coupons in the denominator; the requested fee is excessive in light of that benefit.

Under § 1712(a), "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." And for a settlement that only provides coupon relief—like this one—the portion of the attorney's fee attributable to the coupons "must be one hundred percent." *Inkjet,* 716 F.3d at 1182. But Plaintiffs propose to include the costs of notice and claims administration ($815,890.23) in the denominator for purposes of granting a percentage-based fee. Fee Mem. 3, 7-8. Although Circuit precedent may permit this methodology in non-coupon class settlements, § 1712(a), *Inkjet*, and *Chambers* do not permit it in CAFA coupon-only settlements. "Because the settlement contains only coupons, the fee[] award cannot be 'attributable to' anything but the coupons." *Inkjet,* 716 F.3d at 1182; *accord Seegert v. Lamps Plus, Inc.*, 377 F. Supp. 3d 1127, 1133 (S.D. Cal. 2018).

Thus, when § 1712(a) governs, there is no discretion to base the award in part on the costs that the defendant paid toward notice and administration. *Contra* Fee Mem. 3 n.13, 7. The three Ninth Circuit cases Plaintiffs cite are not to the contrary. *Powers v. Eichen*, 229 F.3d 1249 (9th Cir. 2000), and *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003), both predate the Class Action Fairness Act of 2005 and thus have nothing to say about the § 1712(a) question, and are non-coupon cases in any event. *In re Online DVD-Rental Antitrust Litigation* holds only that

courts have discretion to include the costs of notice and administration in the accounting of class benefit ***when § 1712(a) does not apply.*** 779 F.3d 934, 949-52 (9th Cir. 2015).[2] When § 1712(a) does apply, the denominator "should not include…items" beyond the redemption value of the coupons. *Knapp v. Art.com*, 2018 WL 11348432, 2018 U.S. Dist. LEXIS 244326 (N.D. Cal. Oct. 24, 2018). "CAFA requires that any calculation of the size of the settlement fund—and thus the size of the fee award—be determined using the redemption rate of the coupons." *In re EasySaver Rewards Litig.*, 906 F.3d 747, 758 (9th Cir. 2018).

Similarly, when confronting a fee request attendant to an all-coupon settlement, courts have no discretion to award a fee based on lodestar. *Contra* Fee Mem. 6 n.18, 16 n.26 (relying on an out-of-circuit case following the dissent in *Inkjet*). "[Section] 1712(a) *does* exclude the possibility that lodestar fees may be awarded in exchange for coupon relief." *Inkjet*, 716 F.3d at 1185 (emphasis in original; internal quotation omitted). A lodestar award is only proper for fees attributable to a non-coupon component of settlement relief. *Chambers*, 980 F.3d at 662-65. Here, the settlement contains no non-coupon relief at all. Thus, Plaintiffs err in seeking shelter in a lodestar crosscheck. Fee Mem. 15-20. "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *Inkjet*, 716 F.3d at 1182. Even outside the context of § 1712, a lodestar crosscheck serves as a ceiling, not as a floor. In other words, it works to "confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *In re Bluetooth Heads Prods. Liab. Litig.*, 654 F.3d 935, 945 (9th Cir. 2011) (*quoting In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 n.40 (3d Cir. 1995)). Merely satisfying a lodestar crosscheck does not suffice to justify the reasonableness of a certain fee.

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[2] Even when CAFA does not apply, the better policy is to exercise *Online DVD* discretion to exclude the costs of notice and administration. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (excluding administration expenses in calculating fee percentage because such expenses are "costs, not benefits"). "There is no principled reason to calculate a fee [as a percentage of the expenses incurred]." *Becerra-South v. Howroyd-Wright Empl. Agency, Inc.*, 2021 WL 606245, 2021 U.S. Dist. LEXIS 14633, *14 (C.D. Cal. Jan. 25, 2020) (citing cases).

Briseño, 998 F.3d at 1026 (reversing approval of attorney-driven settlement even though fees were only half of lodestar because they were disproportionate to class recovery).

Given $587,036.29 in coupon redemptions, the $400,000 fee request equals 68% of the value of the redeemed coupons. That would be "clearly excessive under [Ninth Circuit] guidelines." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (declaring 38.9% to be so); *see also Roes*, 944 F.3d at 1051 (45% of gross cash fund is "disproportionate cash allocation"); *In re EasySaver Rewards Litig.*, 2020 WL 2097616, 2020 U.S. Dist. LEXIS 77483, *56 (S.D. Cal. May 1, 2020) (rejecting a proposed fee that would have amounted to 54% "disproportionate share" of the common fund "well above the 25% benchmark standard."); *cf. Redman v. RadioShack Corp.*, 768 F.3d 622, 630-32 (7th Cir. 2014) (55%-67% allocation unfair).

Instead, the Court should award no more than $200,000 as a percentage award, equating to a still generous 34% of the redeemed coupon value. *See Davis v. Cole Haan, Inc.*, 2015 WL 7015328, at *5-*6 (N.D. Cal. Nov. 12, 2015) (awarding 33% of the value of the coupons redeemed); *Galloway v. Kan. City Landsmen, LLC*, 2015 WL 13297964, at *4 (W.D. Mo. Feb. 20, 2015), *aff'd* 833 F.3d 969 (8th Cir. 2016) (same). Even this exceeds the Ninth Circuit's 25% benchmark that Plaintiff asserted to be reasonable in his fee motion. Fee Mem. 7-9.

Under § 1712 only the coupons redeemed may form the basis for a percentage award.

II. The negotiated, but unawarded, fees should be distributed as vouchers to class members under Settlement § 2.8.

Section 2.8 of the Settlement lays out a process for how to allocate unawarded fees: "In the event that the Court does not award" the requested fees, any "reduction shall be made available to" class members according to a simple coupon formula. This is the default option. However, if a new distribution for the unawarded fees is not feasible economically or administratively, then the Settlement's *cy pres* clause activates and the unallocated money is distributed to the National Consumer Law Center. Settlement § 2.8. For the following reasons, the Court should follow the Settlement's default approach and order any residual to be distributed to the class.

First, another distribution of vouchers is economically and administratively feasible. The parties have already completed four rounds of e-voucher distribution for less than $200,000 in total cost. *Compare* Dkt. 91-4 at ¶ 18 (costs before the four distributions), *with* Dkt. 185-6 at ¶ 3 (costs after the four distributions, reflecting an increase of roughly $162,000 over the earlier pre-distribution amount). The residual amounts to $680,000 unrequested from the $1,080,000 in negotiated fees plus any excess the Court identifies in the Plaintiffs' $400,000 fee request. Dkt. 185 at 2. At this price, the Court can easily order another round of e-distribution of vouchers and deliver effective and direct relief to the class.

The Defendants agree to this point and endorse another distribution as administratively and economically feasible. Dkt. 188. The vouchers carry a $6 face value, Settlement § 2.8, which means at least 100,000 class members could get further relief—and thus this supplemental distribution from fees is analogous to other secondary distributions awarded in this Court. *See Connor v. Jpmorgan Chase Bank, N.A.*, 2021 WL 1238862, 2021 U.S. Dist. LEXIS 65011, at *3 (S.D. Cal. Apr. 2, 2021) (Curiel, J.) (finding an $8.19 supplemental payment is non de-minimis and ordering a secondary distribution to 94,000 class members with administrative costs close to $150,000); *Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-cv-01290-BEN-NLS, 2017 U.S. Dist. LEXIS 121844 (S.D. Cal. Aug. 1, 2017) (granting supplemental class distribution of $3 checks to roughly 115,000 class members who cashed their first distribution with an $85,000 administrative cost). St. John would not object if the parties wish to limit the distribution to those class members who have redeemed previous vouchers. *See Connor*, 2021 U.S. Dist. LEXIS 65011, at *5 n.3. Although this would concentrate the benefit in the hands of fewer class members, it would simultaneous also minimize the growing problem of non-redemptions. *Compare* St. John Obj. (Dkt. 75) at 16 (warning of the problem and suggesting the residual provision be amended to avoid it), *with* Dkts. 162, 185-7 (205,480 Round 4 $5.36 coupons disseminated; only 12,882 were redeemed).

Second, Rule 23 advocates class distribution over *cy pres* whenever possible. The Ninth Circuit has a "strong preference for distribution to class members instead of cy pres

distributions." *Reid v. I.C. Sys.*, No. 12-cv-02661, 2021 U.S. Dist. LEXIS 166517, *8 (D. Ariz. 2021). A "cy pres award is not appropriate" where "the settlement is distributable to the class members." *Hofmann v. Dutch LLC*, 317 F.R.D. 566, 578 (S.D. Cal. 2016) (Curiel, J.); *accord* American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07(b) (2010). This is because "the cy pres doctrine…poses many nascent dangers to the fairness of the distribution process." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). The *cy pres* doctrine arises from estate law and served to permit "a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent" "as near as possible." *Pearson*, 772 F.3d at 784 (7th Cir. 2014). But with class action *cy pres*, there are no "changed circumstances" nor an original "benefactor" whose wishes must be "accommodated as near as possible"—there are only the wishes of the parties, with the class members lacking any say. Even more fundamentally, there is no "charitable" objective in a Rule 23 class action, so selecting a *cy pres* recipient introduces interests into the class action that are not relevant to Article III's purpose: remedying and compensating plaintiffs who suffered harm. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring and dissenting in part).

Moreover, *cy pres* creates problematic conflicts of interest, or at best the appearance of them. For example, a "potential conflict of interest" exists "between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013); *see also* Martin H. Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010). The federal courts' integrity, too, is threatened by *cy pres*, as commentators and judges alike have observed that *cy pres* allows federal judges—who have a substantial role in class action settlements—to play benefactor with other people's money. Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007); *accord SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415-16 (S.D.N.Y. 2009).

And this case demonstrates yet another "fundamental concern" with *cy pres*, *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari): the parties' use of partisan organizations as recipients for residual funds. Even when a Court decides *cy pres* is appropriate, the funds must be distributed "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1067 (8th Cir. 2015) (emphasis added); *accord Dennis*, 697 F.3d at 865 (adopting a strict "next best" "driving nexus" standard). This limitation is intended to ensure that the *cy pres* relief benefits the class, as Rule 23 presupposes. But this litigation, which centered on consumer fraud in advertising by a national children's clothing store, selected the National Consumer Law Center ("NCLC") as a *cy pres* recipient. The name is a misnomer. While NCLC does engage on some consumer law issues, it also advocates heavily on issues such as "equity," "racial justice," "criminal justice" reform, "student loans" and "access to justice." *Key Issues*, NCLC (accessed March 9, 2024) https://www.nclc.org/our-work/. NCLC leads lobbying and litigation efforts to drive specific political legislation in these areas of law. Thus, just like the proposed settlement in *Hawes v. Macy's, Inc.*, a *cy pres* award to NCLC in this case does not actually remedy "the underlying harm" or reduce "similar harms in the future." 2023 WL 8811499, 2023 U.S. Dist. LEXIS 226617, at *49 (S.D. Ohio 2023) (rejecting a consumer fraud settlement that awarded residual funds to the Public Interest Research Group, an organization that "runs the gamut from climate change to product safety"). Instead, it simply redistributes class money to a "government policy" organization—and one that takes controversial stances irrelevant to this litigation and likely disagreeable to a substantial number of class members at that. *See id.* at *43.

As the former Chief Judge of the Third Circuit has explained, "powerful interest group[s]" that "conduct[] political activity in many fields wholly unrelated to [consumer protection]" are not suitable recipients in a settlement of this litigation. D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 PENN ST. L. REV. 303, 337 (2020). "[A] cy pres award is not a vehicle by which the court, the parties, or counsel may use

monies from the class settlement to propagate their own brand of social justice." *Sourovelis v. City of Philadelphia*, 515 F. Supp. 3d 321, 342 (E.D. Pa. 2021); *see also Hesse v. Godiva,* No. 19-cv-0972-LAP, 2022 U.S. Dist. LEXIS 72641, at *25 (S.D.N.Y. Apr. 20, 2022) (rejecting *cy pres* recipient that "engages in controversial, polarizing advocacy"); *Hofmann*, 317 F.R.D. at 577 (refusing to approve recipients that engaged in broad societal programs).

Moreover, as part of its "consumer interest" work, NCLC has supported oversized fee requests in other class litigation. *See* Kelly House, *How much should lawyers make in the Flint water crisis settlement?*, BRIDGE MICHIGAN (Jul. 15, 2021), https://www.bridgemi.com/michigan-environment-watch/how-much-should-lawyers-make-flint-water-crisis-settlement (quoting NCLC's Director of Litigation supporting a 31.6% attorneys' fee request in a $641 million settlement). It's understandable why class counsel would favor that advocacy. But many class members would not. *See, e.g.,* Third Circuit Task Force Report, SELECTION OF CLASS COUNSEL, 208 F.R.D. 340, 343-44 (2002) ("[T]here is a perception among a significant part of the non-lawyer population . . . that class action plaintiffs' lawyers are overcompensated for the work that they do"); *Report on Contingent Fees in Class Action Litigation*, 25 REV. LITIG. 459, 466 (2006) ("The most frequent complaint surrounding class action fees is that they are artificially high, with the result (among others) that plaintiffs' lawyers receive too much of the funds set aside to compensate victims.").

Finally, Plaintiffs' claim that "the requested fees and costs will be paid out separately and apart from any benefits paid to the Class," Dkt. 185 at 2, is not correct. The phrase "separate[ly] and apart" does appear in the Settlement, but only in the context of the named "Plaintiffs' Individual Settlement Awards"—not attorney fees or costs. Dkt. 60-2 at § 2.8. This erroneous assertion appears to be an effort to induce the Court to approve the fee. In reality, the requested fees are intertwined with class relief because of the settlement's "formula" dictating that "for each $6 in attorneys' fees and costs not awarded" to counsel, an "additional Voucher is available for distribution to" class members. Dkt. 60-2 at § 2.8.

Indeed this clause was necessary to this Court's settlement approval, because it contrasts with "reverter" clauses that return excess fees to the defendants, an arrangement that the Ninth Circuit holds is a "warning sign" for collusion by the parties and inflated fees by class counsel. *Briseño*, 998 F.3d at 1027; *McKinney-Drobnis*, 16 F.4th at 610-11. Reversions deprive reviewing courts of the authority to rebalance the settlement by exercising Rule 23(h) oversight. If "the defendant is content to pay [millions of dollars] to class counsel but the court finds the full amount unreasonable, there is no plausible reason why the class should not benefit from the spillover of excessive fees." *McKinney-Drobnis*, 16 F.4th at 610. The Settlement here contained a clear-sailing provision, too—*e.g.*, Defendants promised not to contest the fee award, Settlement § 2.7—so inclusion of any reverter would have "increase[d] the risk" that fees were inflated. *Id.* Thus, in approving the Settlement, this Court relied on the "absence" of a reverter to "mitigate[] the fear that the Settlement Agreement is the product of collusion between Defendant and Class Counsel." Dkt. 142 at 20. Premature resort to *cy pres* would re-raise the specter that the attorneys are serving their own interests rather than the class members' interests. *See Knapp*, 283 F. Supp. 3d at 835 (denying NCLC as *cy pres* designee when class counsel had a co-counsel relationship with the organization in an unrelated matter).

"[T]he parties do not allege that the settlement cannot be distributed to the class members"—and Defendants readily endorse another distribution. *Hofmann*, 317 F.R.D. at 578; Dkt. 188. For the foregoing reasons, unawarded fees should be distributed as vouchers to class members under Settlement § 2.8.

Conclusion

For the foregoing reasons, the Court should award no more than $200,000, and should order that the residual from the $1.08m fee fund be distributed to the class under Settlement § 2.8.

Dated: April 1, 2024

Respectfully submitted,

/s/ Theodore H. Frank

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically served the foregoing on all CM/ECF participating attorneys at their registered email addresses, thus effectuating electronic service under S.D. Cal. L. Civ. R. 5.4(d).

DATED this 1st day of April, 2024.

(s) Theodore H. Frank