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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

FORMAL OBJECTION OF ANNA ST. JOHN

Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Date: July 31, 2020
Time: 1:30 P.M.

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Introduction

Under this coupon settlement, class members will recover a small fraction of what class counsel are seeking in fees. Ninth Circuit law requires settlement fairness to be evaluated based on "economic reality"—or what class members actually receive. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015); *Jane Roes 1-2 v. SFBSC Management, LLC*, 944 F.3d 1035 (9th Cir. 2019) ("*Roes*"). The economic reality here: the vast majority of the 800,000 vouchers will expire unused after six-month redemption periods; it is likely that no more than 5% of the coupon value will actually be realized by class members. This means that unlike the fictitious $4.8 million "face value" plaintiffs rely on, class members will likely receive less than $500,000 in relief, while the attorneys will walk away with $1.08 million. Such a disproportion violates Ninth Circuit law. With a typical common fund, the Court could correct the disproportion by reducing the requested fees and returning the surplus to the class. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). But the problem here is that class counsel structured the settlement so that the vast majority of any reduction in their fees will eventually revert to the defendant. Even if the Court wanted to flip the numbers to give the class $1 million and the attorneys $200,000 (returning $800,000 in cash to the class), the settlement structure prohibits this Court from making such a correction; therefore, the entire settlement must be rejected.

The Court should deny settlement approval until the parties present a settlement that is fairly apportioned or at least fairly apportionable through a court-ordered reduction in fees.

I. Objector St. John is a member of the settlement class.

During the class period Anna St. John purchased products bearing a discount from The Children's Place stores in the United States. *See* Declaration of Anna St. John ¶ 3 (accompanying this objection and to be considered part of the objection). St. John is not within any of the classes of persons excluded from the settlement. *Id.* She therefore has standing to object. Her full name is Anna Elizabeth Wagner St. John; her business address is 1629 K Street

NW, Suite 300, Washington DC, 20006; her phone number is (917) 327-2392; and her email address is anna.stjohn@hlli.org. *Id.* at ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") represents St. John *pro bono*, and CCAF attorney Theodore H. Frank intends to appear at the fairness hearing on her behalf. *Id.* at ¶ 9. CCAF represents class members *pro bono* where class counsel employs unfair procedures to benefit themselves at the expense of the class. *See, e.g.*, *In re EasySaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018) ("*EasySaver*") (sustaining CCAF's client's objection for failing to abide by the Class Action Fairness Act's strictures on coupon settlements); *Pearson*, 772 F.3d at 787 (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) ("*Pampers*") (CCAF's client's objections "numerous, detailed, and substantive"). Since it was founded in 2009, CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 55-57 & n.37 (2018). Over that time CCAF has recouped more than $200 million for class members by driving settling parties to reach an improved bargain or by reducing outsized fee awards. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2017) (more than $100 million at time). St. John brings this objection through CCAF in good faith to protect the interests of the class. St. John Decl. ¶¶ 10-11. Her objection applies to the entire class; she adopts any objections not inconsistent with this one.

St. John objects to any provisions of Section 3.9 of the settlement that purport to exclude objections that satisfy Rule 23(e) for immaterial grounds. She further objects to Section 3.9(c) to the extent it is interpreted to contradict Ninth Circuit law that, as an objector, she is entitled to seek costs and fees for any common benefit created for the class by her objection.

II. The Court has a fiduciary duty to the 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 Wash. 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." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("*Inkjet*") (cleaned up). And it must not "assume the passive role" that is appropriate for an unopposed motion in ordinary bilateral litigation. *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). In particular, settlement value "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). It is error to exalt fictions over "economic reality." *Allen*, 787 F.3d at 1224.

There is no presumption in favor of settlement approval; the proponents of a settlement bear the burden of proving its fairness. *Roes*, 944 F.3d at 1049 & n.12; *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017). "Where the parties negotiate a settlement agreement before the class has been certified, settlement approval requires a higher standard of fairness and a more probing inquiry." *Roes*, 944 F.3d at 1048 (cleaned up). Approval of a pre-certification settlement will occasion review of "the entire settlement, paying special attention

to the terms of the agreement containing convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of negotiations." *Dennis*, 697 F.3d at 867 (internal quotation omitted).

It is "insufficient" that the settlement happened to be negotiated at "arm's length" through a mediator without "secret cabals" or express collusion of the settling parties. *Roes*, 944 F.3d at 1050 n.13 (internal quotation omitted). Because of the danger of conflicts of interest endemic to class action procedure, the Court must monitor the reasonableness of the settlement as well. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (cleaned up). Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Pampers*, 724 F.3d at 718 (quoting *Dennis*, 697 F.3d at 864).

III. The settlement violates the Class Action Fairness Act.

A. Because this is a coupon settlement, it is disfavored and subject to heightened scrutiny.

Congress passed the Class Action Fairness Act ("CAFA") to combat the incongruity 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); *see also EasySaver*, 906 F.3d at 754-55. 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 v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) (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). When a settlement contemplates unused coupon value reverting to the defendant, the dangers are "even more grave." *Roes*, 944 F.3d at 1053. "Unchecked, such reversions would allow defendants to create a larger coupon pool than they know will be claimed or used, just to inflate the value of the settlement and the resulting attorneys' fees." *Id.* at 1054.

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). Because of the inherent dangers of coupon settlements, CAFA requires a district court to apply "heightened judicial scrutiny" 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; *EasySaver*, 906 F.3d at 755. 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.

Although this Court concluded at the preliminary approval stage that this settlement does not constitute a coupon settlement for purposes of CAFA,[1] "this settlement is not a coupon settlement," Dkt. 122 at 12-16, this determination was legal error. As a non-final interlocutory order, this Court may revisit its preliminary approval holding as justice requires. *Marketquest Grp., Inc. v. BIC Corp.*, 2018 WL 1757526, 2018 U.S. Dist. LEXIS 62359, at *9 (S.D. Cal. Apr. 18, 2018). It should do so to avoid the injustice of depriving potentially millions of class members of the protection of CAFA.

First, even assuming *arguendo* the Court was correct to conclude the $6 settlement vouchers do not constitute CAFA coupons, CAFA applies nonetheless because of the Court's finding that the 25% off vouchers are CAFA coupons "beyond dispute." PAO 15 n.4. By its terms, Section 1712 of CAFA applies to every settlement that include a "recovery of coupons" as a portion of the class's settlement relief. That is simply "the only consistent reading of the Act." *Rougvie v. Ascena Retail Grp., Inc.*, No. 15-cv-724, 2016 WL 4111320, 2016 U.S. Dist. LEXIS 99235, at *84 (E.D. Pa. July 29, 2016) (applying CAFA to settlement where class could choose between cash or store merchandise vouchers); *see also McKnight v. Uber Techs., Inc.*, 2019 U.S. Dist. LEXIS 136706, 2019 WL 3804676 (N.D. Cal. Aug. 13, 2019) (applying CAFA notwithstanding cash option). Any other reading would reduce Sections 1712(b) and 1712(c) to inoperative surplusage. Subjecting mixed coupon/non-coupon settlements to CAFA is even more necessary where, as here, the purportedly non-coupon option is of far less face value than the coupon option. *Hadley v. Kellogg Sales Co.*, 2020 WL 836673, 2020 U.S. Dist. LEXIS 30193, at *26 (N.D. Cal. Feb. 20, 2020). Where the value of the cash option is "not equivalent" the mere existence of a choice does "not permit the Court to conclude that 'any class member, let alone all class members, would have viewed a $20 voucher as equivalently useful to $20 in cash.'" *Id.* (quoting *EasySaver* 906 F.3d at 758) (internal alterations omitted).

[1] *See* Order Granting Preliminary Approval of Class Action Settlement ("PAO"), Dkt. 69 at 14-18.

Second, the conclusion that the $6 settlement vouchers do not constitute CAFA is itself erroneous. In so concluding, the Court relied on the first two *EasySaver* factors: (1) that class members would not need to hand over more of their money to take advantage of the vouchers and (2) that the vouchers are applicable to a wide variety of products. PAO 15-17. When considered in the broader context of *Online DVD*[2] and *EasySaver*, neither factor supports the Court's conclusion.[3]

Online DVD, departing from the language of the statute, identified several features that distinguished the gift cards provided under the settlement at issue there from coupons subject to CAFA to create a narrow exception: 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 the equivalent amount cash instead of a gift card. *Id.* As such, the settlement was not similar to those that

[2] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015) ("*Online DVD*")

[3] Although this Court has no authority to depart from *Online DVD's* test for determining what constitutes a CAFA coupon, St. John submits that Judge Friedland's dissenting opinion in *Hendricks v. Ference* is correct: *Online DVD*'s multifactor inquiry is unwieldly and better replaced instead by a rule that treats "any type of discount, credit, gift card, or voucher as a coupon under CAFA." 754 Fed. Appx. 510, 514 (9th Cir. 2018). While St. John prevails whether or not the *Online DVD* test is used, she preserves this issue for appeal.

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 from the gift cards of *Online DVD*; they are cut from the same CAFA cloth as the credits in *EasySaver*. As in *EasySaver*, Children's Place is "decidedly not [a] giant retailer[]" and "class members can only use the credits to purchase items from a limited universe of products." 906 F.3d at 757. As in *EasySaver*, class members cannot elect cash instead of a $6 coupon. As in *EasySaver*, the vouchers contain an expiration date. As in *EasySaver*, there are blackout periods when class members will not be permitted to use their vouchers.[4] And, as in *EasySaver*, the vouchers are not gift cards under applicable law, and thus unlike gift cards, cannot be redeemed for cash. The following chart illuminates where the $6 settlement vouchers to Children's Place fall along the *Online DVD*/*EasySaver* continuum:

	Online DVD	*EasySaver*	*Children's Place*
Face Value	$12	$20	$6[5]
Blackout Dates	None	Yes[6]	Some[7]
Expiration Date	None	One year after distribution	Six months[8]
Transferable	Yes	Yes	Yes
Usable in conjunction with other outside coupons	Yes	No	No

[4] In the unlikely event that all 800,000 vouchers are claimed and there are no successive distributions, then there would be no blackout dates here.

[5] Redemption rates "may be particularly low in cases involving low value coupons." *Sobel v. Hertz Corp.*, 2011 WL 2559565, at *11 (D. Nev. Jun. 27, 2011).

[6] The *EasySaver* coupons could not be used the week before Christmas, ten days before Valentine's Day or ten days before Mother's Day.

[7] Any second or subsequent round of coupons distributed cannot be used until the previous rounds' expiration period has run. *See* Settlement § 2.3(d).

[8] Settlement § 1.32.

	Online DVD	*EasySaver*	*Children's Place*
Outside offers available that eliminate marginal utility	No	Yes	Yes[9]
Crackable (*i.e.*, can value be retained over multiple purchases)	Yes	No	No
Redeemable for cash	No	No	No
Elected by class members in lieu of cash	Yes	No	No
Number of items that can be purchased at least in part	5-8 million[10]	Undisclosed	Undisclosed
Number of items ("SKUs") that can be purchased in whole (excluding service charges and taxes)	Over 700,000[11]	15-25	1,024[12]

Following *Online DVD* and *EasySaver* respectively, the decisions in *Knapp* and *Seegert* are instructive. *Knapp* involved a settlement providing class members with $10 vouchers to Art.com. *Knapp v. Art.com*, 283 F. Supp. 3d 823 (N.D. Cal. 2017). Although plaintiffs had presented evidence that approximately 100,000 whole products could be obtained with the $10 voucher, this Court refused to liken the vouchers to *Online DVD* gift cards. "Art.com's

[9] St. John Decl. ¶9.

[10] Declaration of Theodore H. Frank in Support of Opposition of Brian Perryman to Motion for Final Approval, *In re EasySaver Rewards Litigation*, No. 3:09-cv-2094-BAS (WVG), Dkt. 310-1 at 5 (S.D. Cal. Jul. 2, 2015).

[11] Declaration of Theodore H. Frank in Support of Opposition of Brian Perryman to Motion for Final Approval, *In re EasySaver Rewards Litigation*, No. 3:09-cv-2094-BAS (WVG), Dkt. 310-1 at 5-6 (S.D. Cal. Jul. 2, 2015).

[12] Declaration of Todd D. Carpenter in Support of Preliminary Approval of Class Action Settlement, Dkt. 66 at 2. An executive of Children's Place, Mr. Jain, avers that TCP has "several hundred thousand items…available in its stores and online for less than $6" but unlike class counsel's, this declaration is cursory and does not appear to control for the uniqueness of the items. Dkt. 68 at 2. Whether the actual number of products available under $6 is closer to 1,024 or "hundreds of thousands," the $6 vouchers are coupons either way.

offerings are not equivalent to "a larger number of products from a large retailer." *Id.* at 837. "Unlike a Walmart gift card where recipients could purchase necessities such as toilet paper or toothpaste, class members here will be forced to purchase a product that they otherwise may not have purchased." *Id.* And in *Seegert*, the settlement provided $18 vouchers, expendable at Lamps Plus retail stores. *Seegert v. Lamps Plus, Inc.*, 377 F. Supp. 3d 1127 (S.D. Cal. 2018). Although 5,800 products were available at or below that price point, those products had relatively "narrow confines"—"light bulbs, track lights, and deck lights" for example. *Id.* at 1132. Unlike the countless SKUs available at Walmart.com, Lamps Plus products were "not everyday products required for purchase." *Id.* Without a cash alternative, *Seegert* found that the Lamps Plus vouchers could not be analogized to the *Online DVD* gift cards, and thus plaintiffs could not escape CAFA's restrictions on coupon settlements.

The preliminary approval analysis goes farthest astray by finding that the $6 vouchers satisfy the second *EasySaver* factor because The Children's Place, while not a "giant" retailer, is a "sufficiently large" one. Dkt. 69 at 17. But it is not enough to offer something more than a "meager" selection of goods; the *Online DVD* exception to CAFA must be limited to truly broad retailers that offer cash-fungible products used in daily life "in the mold of Walmart or other similar stores." *EasySaver*, 906 F.3d at 757. The Children's Place does not meet that standard. It is not meaningfully more diverse in its offerings than Lamps Plus or Cole Haan or Lumber Liquidators, all of which have been distinguished from Walmart.com in the CAFA context. *Compare Seegert*, 377 F. Supp. 3d 1127; *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); *In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d 471, 490 (4th Cir. 2020) (determining that Lumber Liquidators (which offers flooring and items such as table and tile saws, thermostats, countertops, staircase materials, tools, butcher blocks, cleaning supplies and thermostats) was unlike a "giant retailer"). Indeed, the clothing and accessories available at

The Children's Place are niche in a critical respect: the SKUs are limited to "baby, toddler, girls and boys" categories. Dkt. 68 at 1. This limitation is comparable to the Justice brand stores products involved in the *Rougvie* settlement. As *Rougvie* realized, "Because Justice Stores' target market is pre-teens aged 6-14, it is reasonable to expect at least some portion of Justice Stores' consumers between 2012-2015 outgrew Justice Stores' products and prefer cash awards" *Rougvie v. Ascena Retail Grp., Inc.*, No. 15-cv-724, 2016 WL 4111320, 2016 U.S. Dist. LEXIS 99235, at *84 (E.D. Pa. July 29, 2016). Given that the class period here is more than twice as long as the class period in *Rougvie,* the problem of age disutility is even more pronounced, and provides one compelling reason that the $6 vouchers cannot be considered cash equivalents.

Lastly, though the Court's preliminary approval order sensibly highlights the unusually short six-month expiration period, the non-stackability of the coupons with outside promotions,[13] it overlooks one other major inflexibility of the $6 vouchers. Unless all 800,000 vouchers are claimed, and that seems exceedingly unlikely given the fact that only 105,000 vouchers have been claimed as of April 30,[14] some of the coupons will have blackout dates under the terms of the settlement. Settlement § 2.3(d); *contra* PAO 17 (stating that there are no blackout periods). If, for example, only 200,000 coupons are ultimately claimed, the remaining 600,000 will be restricted by blackout dates: the second round of 200,000 will have a six month blackout date after distribution, the third round of 200,000 will have a twelve month blackout date after distribution, and the fourth round of 200,000 will have an eighteen month blackout date after distribution. Blackout dates are significant restrictions that will certainly depress the redemption rates of the coupons. *EasySaver*, 906 F.3d at 757; *see also* Christopher R. Leslie, *A*

[13] For example, this week The Children's Place is offering on their website a promotional coupon for $10 off $40 or more purchase. St. John Decl. ¶9. Because they are not stackable with this offer, the $6 settlement coupons have no value if the purchaser intends to spend more than $40, because that purchaser would be better off using the $10 coupon from the defendant's website.

[14] Dkt. 73-1 at 12 n.5.

Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation, 49 UCLA L. Rev. 991, 1025 (2002) (criticizing blackout dates). And needless to say, this staging of the redemption process prevents class members from realizing much of the benefit of $6 coupons stackability with each other.

In short, The Children's Place vouchers that expire in six months at staggered intervals and can be used only for a narrow range of children's items fall squarely within CAFA's definition of "coupon."

B. Under CAFA, the Court may not award fees until the redemption rate is known.

28 U.S.C. § 1712(a) commands that "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." The "shall" language is mandatory; in this Circuit, a court has no discretion to award fees for coupon relief in any manner other than a percentage based on the value of the coupons ultimately redeemed. *Inkjet*, 716 F.3d at 1181. A 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. "§1712(a) does exclude the possibility that lodestar fees may be awarded in exchange for coupon relief." *Id.* at 1185 (internal quotation omitted).

Awarding fees now would violate § 1712 of CAFA, which 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. Often, a violation of § 1712 could be remedied by deferring the fee award pending the distribution and redemption of the coupons. Here, however, as explained in the following

section the structure of the settlement prevents fee deferral from being a viable remedy to the unfairness of the current settlement.

IV. Deferring and then reducing class counsel's fee cannot resolve the unfairness of the settlement because the class would not realize any benefit from the vast majority of that reduction.

There should be no dispute that this settlement proposes to confer an award upon class counsel in vast disproportion to the benefit that the class will ultimately realize. For class counsel's $1,080,000 request to equal this Circuit's 25% benchmark, class members would have to redeem $3,240,000 in settlement coupons.[15] Given the conservative $4,800,000 figure of coupon distribution value, this would require a preposterous 67.5% redemption rate.[16] Precedent shows the coupon redemption rate will almost certainly be in the low single digits.

[15] $1.08m / ($1.08m + $3.24m) = 25%

[16] Plaintiffs invite the Court to include the $763,971 in notice and administrative expenses as part of the class benefit as well. Dkt. 73-1 at 15-16. This Court should decline the invitation. While the Ninth Circuit gives courts the discretion to calculate the percentage-of-recovery on the gross fund, the better rule is to calculate percentage-of-recovery after expenses have been deducted from the settlement. In *Redman*, the Seventh Circuit explained, "costs are part of the settlement but not part of the value received from the settlement by the members of the class." 768 F.3d 622, 630 (7th Cir. 2014). Attorneys' fees should be calculated based on the class benefit, and "fees paid to the settlement administrator—do[] not constitute a benefit to the class members." *Myles v. AlliedBarton Security Services, LLC*, No. 12-5761 JD, 2014 U.S. Dist. LEXIS 159790, at *16 (N.D. Cal. Nov. 12, 2014). If costs are included when calculating attorneys' fees, then counsel is being awarded a commission on those costs, creating "perverse incentives" for class counsel to overspend on third parties. *Redman*, 768 F.3d at 630; *see also Kmiec v. Powerwave Tech.*, No. 12-00222-CJC, 2016 WL 5938709, at *5 (C.D. Cal. Jul. 11, 2016) (finding "no principled reason to calculate a fee" by giving counsel a commission their costs). "Put another way, incentives to minimize expenses and to allocate resources properly go much farther toward cost efficiency than can post hoc judicial review." *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994); *see also Bluetooth*, 654 F.3d at 945 (remanding where fee award was far greater than 25% of the fund when notice costs were excluded); *Fishman v. Tiger Nat. Gas Inc.*, 2019 WL 2548665, 2019 U.S. Dist. LEXIS 103608 (N.D. Cal. Jun. 20, 2019) (declining to award 25% of the gross fund; awarding 25% of the net fund instead).

See, e.g., *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 971 (8th Cir. 2016) (0.045% of distributed certificates were redeemed); Declaration of David Tjen, *Knapp*, No. 3:16-cv-00768-WHO, Dkt. 84-7 (N.D. Cal. Aug. 29, 2018) (declaring that $142,940 worth of vouchers were redeemed; that amounts to only 0.71% of the $20 million face value distributed); *Davis*, 2015 WL 7015328 (2.3% of distributed vouchers were redeemed); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. L. 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 Clothes of Class Actions*, 18 GEO. J. L. ETHICS 1343, 1347 (2005) (noting one settlement where only 2 of more than 96,000 coupons were redeemed). "A redemption rate of 3% would be largely in line with typical redemption rates in email coupon campaigns." *Swinton v. Squaretrade, Inc.*, No. 18-cv-00144, 2020 U.S. Dist. LEXIS 69267, at *30 (S.D. Iowa Apr. 14, 2020) (citing surveys). Even in *Rougvie*, where the settling parties spent more than $12 million on administration costs to pre-print and mail visually appealing hard copy coupons[17] to class members, the redemption rate was still just 7.5%. *Rougvie v. Ascena Retail Grp., Inc.*, No. 15-cv-724, 2019 U.S. Dist. LEXIS 28229, at *11 (E.D. Pa. Feb. 21, 2019) (noting that $30.25 million in coupon value was redeemed from a hypothetical maximum of $402 million).

Here, assuming an above-average 5% redemption rate, the class would realize a total value of only $240,000 and class counsel would capture nearly 82% of the total value obtained from the defendant. If $10 million worth of coupons were distributed, a 5% redemption rate equates to a class benefit of $500,000 and class counsel would capture 68% of the total value obtained from defendant. Neither situation is acceptable under Fed. R. Civ. P. 23. *See, e.g. Dennis,* 697 F.3d at 868 (38.9% fee would be "clearly excessive"); *Roes*, 944 F.3d at 1051 (fee award of 45% of gross cash fund is "disproportionate"); *Allen*, 787 F.3d at 1224 n.4 (fee award that exceeds class recovery by a factor of three is disproportionate); *see also* Fed. R. Civ. P.

[17] Moreover, the *Rougvie* coupons had no blackout dates and a longer expiration period.

23(e)(2)(C)(iii) (instructing courts to consider whether "the relief provided for the class is adequate, taking into account . . . the terms of any proposed award of attorney's fees").

Such a misallocation is unacceptable even if the settlement's vouchers were not CAFA coupons. Regardless, the Court should "recognize[] that some of the same concerns applicable to coupon settlements also apply here and warrant[] closer scrutiny." *Roes*, 944 F.3d at 1052. Even when CAFA does not apply, the Court is "required to scrutinize closely the relationship between attorneys' fees and benefit to the class in order to avoid awarding unreasonably high fees simply because they are uncontested and ensure that counsel do not secure a disproportionate benefit at the expense of the unnamed plaintiffs who class counsel had a duty to represent." *Id.* at 1054 (cleaned up). Settlement relief must always be analyzed in "economic reality." *Allen*, 787 F.3d at 1224.

At preliminary approval, the Court correctly recognized that the settlement clear-sailing agreement (protecting class counsel's right to seek its $1.08 million fee without opposition from the defendant) is "potentially problematic." Dkt. 69 at 24. But the clause is not justified merely because the Court retains ultimate decisionmaking authority over the fee award. *Contra id.* Rule 23(h) always grants the Court that authority; a settlement cannot lawfully divest the Court of it. However, the Court's supervisory authority can only protect the class from the clear-sailing clause if the settlement is structured to permit unawarded fees to revert to class funds. *See Redman,* 768 F.3d at 637 (holding that segregating the fee from the class relief is a "defect"); *Bluetooth,* 654 F.3d at 949 (segregation "amplifies the danger" that is "already suggested by a clear sailing provision").

Settlement § 2.8 governs the disposition of unawarded fees. It stipulates that under most circumstances, the unawarded fees will be translated into additional rounds of coupon distributions to claiming class members. In the alternative, if three specific conditions obtain, the unawarded fees will be donated *cy pres* to the National Consumer Law Center. This reversion provision gets one thing right: it limits any *cy pres* residual to circumstances in which

direct class benefit is "infeasible." *See* American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. 3.07(b) (2010).

The problem is that an additional coupon distribution to claimants is essentially a reversion to the defendant in disguise. *Cf.* Financial Accounting Standards Board, Accounting Standards Update (ASU) No. 2014-09, Revenue From Contracts With Customers (Topic 606) (2014) (when retailers decide the likelihood of redemption is "remote," they may count unredeemed vouchers value as "breakage" and recognize the unused amount as income). Imagine that the Court correctly defers fees under CAFA to consider the redemption rate. Then imagine that class members ultimately redeem 5% of $10 million in distributed coupon value. Then imagine that the Court reduces class counsel's fee from $1,080,000 to $200,000 to reflect a reasonable percentage of the coupon redemptions. At that point $800,000 could be redistributed to claimants as another coupon, but there is no reason to think that the redemption rate would be any higher than the 5% realized on the original coupons. In other words, 95% of the reduced value would effectively revert to the defendant. "[J]ust because some of the settlement funds are not reversionary does not explain why [95% of the negotiated fee amount] should be nor does it do anything to address the substantive concerns regarding perverse incentives…." *Roes*, 944 F.3d at 1059-60 (internal citation to *Bluetooth*, 654 F.3d at 949 omitted).

The settlement provides that either class counsel or *cy pres* could be paid from the $1,080,000 fee fund in cash, yet it consigns class members to receiving inferior coupons from the same cash fund. There is no reason that a sophisticated administrator like KCC could not, instead of distributing coupons via email, distribute cash through email using micro transaction platforms like PayPal or Venmo. Declaration of Carol C. Villegas, *In re Extreme Networks, Inc.*, No. 5:15-cv-4883, Dkt. 165 (N.D. Cal. Mar. 12, 2019) (declaring that settlement administrator KCC "has done electronic payments in consumer class actions and would be able to process payments of less than $10.00 through PayPal."); Class Action Settlement Agreement, *Koller v. Deoleo USA, Inc.*, No. 3:14-cv-02400-RS, Dkt. 144-4 (N.D. Cal. Apr. 3, 2018) (offering class

members option to obtain payment by another form of electronic transfer such as PayPal, Venmo, Google Wallet or Square Cash); Class Action Settlement Agreement, *In re Google Plus Profile Litig.*, No. 5:18-cv-06164-EJD, Dkt. 57-2 (N.D. Cal. Jan. 6, 2020) (allowing election to receive payment via PayPal or digital check).

As currently written the settlement does not afford this Court the power to "assign" "the value by which the [fee] award is reduced to the Class Members." *Contra* PAO 24. There is "no apparent reason" for that other than insulating class counsel's fee from the scrutiny it deserves. *Bluetooth*, 654 F.3d at 949.

V. Any settlement approval should require reporting to the court about actual redemption rate.

The settlement provides no follow-up to report to the Court what the actual redemption rate of the coupons is. St. John objects to any interpretation of the settlement that precludes her from seeking information at a later date from the defendant how many coupons were actually redeemed if the settlement is approved.

Conclusion

For the foregoing reasons, the settlement is a coupon settlement governed by CAFA. For independent reasons, it must be rejected at least until the parties amend the agreement to allow the settlement class members to benefit from any reduction in attorneys' fees.

Dated: May 29, 2020

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).

In accordance with the class notice, I also caused to be served a copy of this Objection on the settlement administrator via first class mail to the following address:

Rael TCP Pricing Claims Administrator
P.O. Box 43212
Providence, RI 02940-3212

DATED this 29th day of May, 2020.

(s) Theodore H. Frank