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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

REPLY IN SUPPORT OF OBJECTION OF ANNA ST. JOHN

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

REPLY

Introduction

Neither of the settling parties denies that 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*"). Indeed, neither in forty-seven combined pages of briefing mentions the words "economic reality" or *Allen* at all, or attempts any effort to do anything other than maintain the obvious fiction that unredeemed coupons are worth the face value to the class, effectively forfeiting any response to St. John's objection. The Court must value the coupons (or "vouchers") at the rate at which they will be redeemed in evaluating the settlement. We *know* that that redemption rate is materially less than 100%, because the settling parties are fighting so hard to preclude this Court from even *considering* the redemption rate, though that consideration is mandated by both 28 U.S.C. § 1712 and by Fed. R. Civ. Proc. 23(e)(2)(C). Again, neither settling party mentions Rule 23(e)(2)(C).

The limited *Online DVD* exception does not apply, and the Court should follow the language of the statute. This is "a proposed settlement in a class action [that] provides for a recovery of coupons to a class member" and 28 U.S.C. § 1712 applies.

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. The settling parties ignore not just "economic reality," but that the vast majority of class members receive no compensation.

Plaintiffs argue that "compared to the cash value of class members' actual damages, the vouchers provide considerable value." Dkt. 87 at 2. But this ignores that, out of twelve million class members, less than 1%, only 101,350, submitted claims. Dkt. 86-4 at ¶¶ 7, 15. (Those claims are unaudited, and ultimately tens of thousands of them may ultimately be rejected.) That some percentage of 101,350 class members may receive more than their damages if they receive and redeem coupons does not change that over 12,000,000 class members will receive nothing.

That by itself does not require rejection of a settlement, of course. A settlement is a compromise, and St. John is not arguing that the compromise needs to be larger. But it does mean under Ninth Circuit law that the attorneys cannot compromise the class's claims so that over 99% of the class gets nothing, and then fail to compromise their own attorneys' fees so that they receive a disproportionate share of the economic reality of the settlement benefit.

St. John provided reasons why the settlement coupons are worth less than ten cents on the dollar, given likely redemption rates. The burden of proving settlement value rests on the settling parties under Ninth Circuit law. *Koby v. ARS Nat'l Svcs.*, 846 F.3d 1071, 1079 (9th Cir. 2017); *accord In re Dry Max Pampers Litig.*, 724 F.3d 713, 719 (6th Cir. 2013). But neither settling party provides any alternative calculation, and each rests on the obvious fiction that every single coupon should be treated as if it were redeemed at full face value. They've forfeited any rebuttal to St. John's calculation.

II. The vouchers are coupons not subject to the narrow *Online DVD* exception.

The mistake the settling parties make is to ignore the language of the statute. *Online DVD* creates a limited exception to the statutory language for gift cards that are essentially identical to cash when the coupons do not expire and can be used to buy hundreds of thousands of different products without providing more cash to the retailer. There's no second exception for a voucher that *almost* satisfies the limited *Online DVD* exception—and there isn't even an "almost" here, as coupons with blackout dates that expire six months after going live and aren't crackable are nothing like the Walmart gift cards without expiration dates issued in the *Online DVD* settlement. These are coupons.

It's irrelevant that the coupons here are marginally superior to the *Easy Saver* coupons; nothing in *EasySaver* implied that that was a close case. These coupons are considerably worse than the gift cards in *Online DVD*. They expire worthless in six months. The $6 vouchers are not "crackable": if they are used for a $3.99 item, the remaining $2.01 disappears in the defendant's coffers. (The word "crackable" never appears in the settling parties' briefs.) And they can only be used for about 1,000 different items under $6, compared to the hundreds of

thousands of items available at Walmart. It's not even clear that these are closer to the *Online DVD* gift cards than the *Easy Saver* e-credits, but that's beside the point: they ***fall far short*** of the *Online DVD* exception. They cannot be considered identical to cash, and that ends the inquiry.

A blackout date is a date when coupons cannot be used. Yes, the blackout dates in these coupons differ from the blackout dates in *EasySaver*, because they last for several months, rather than being particularized to weeks before a specific holiday. But they are blackout dates nonetheless that will depress the redemption rate. A class member will have to hold on to the coupon for months or even over a year, and then remember to use it in a specific window of time or have it expire worthless. That increases the chances that the coupon will not be used, and is another reason why it is *different* from cash, and cannot fall within the limited *Online DVD* exception for gift cards that never expire, can be used at any time, and are effectively indistinguishable from cash.

That the coupons will only be distributed to class members who requested coupons in a claims process is irrelevant: this was the argument made by the settling parties and the dissent in *Inkjet*, where "many class members had already taken affirmative steps to obtain e-credits," 716 F.3d at 1189 n. 4 (Berzon, J., dissenting), but the Ninth Circuit rejected that argument. This just means that the final redemption rate is likely to be higher than 1%: but it is still far short of the 100% that is required for a coupon to be equivalent to cash. And again, though the settling parties have the burden of proving settlement value, they provide no evidence for what the redemption rate will be, and have forfeited the issue. The settling parties simply rest (Dkt. 88 at 21; Dkt. 87 at 17) on the argument already rejected by the Ninth Circuit in *Inkjet*. TCP *knows* that coupons will expire unused, and could produce accounting statements showing such internal calculations about the number of coupons that will go unused under FASB. St. John Obj. at 16. That TCP has not provided this evidence in its possession, and never mentions St. John's discussion of "breakage" permits the Court to draw the adverse inference that that evidence would be damning of TCP's contention that these coupons will not go unredeemed.

And if nothing else, the risk of a retailer bankruptcy between now and the expiration of the last tranche of coupons suggests that the coupons have a substantial risk of going unredeemed.

The Senate Report does not help the settling parties: Senate Report 109-14 expressly includes examples such as a free crib repair kit, free spring water, or free golf gloves or golf balls as examples of "coupons." That a coupon can be used to purchase a free product does not mean it ceases to be a coupon. Contemporary usage supports this conclusion. A query on the Google web search engine for the phrase "Coupon for a free" returns about 6,100,000 hits (searched July 9, 2020). Publications such as the *New York Times* use the word "coupon" to describe vouchers for free products. E.g., Scott Cacciola, *West Looms as Knicks Keep Going South*, N.Y. Times (Nov. 23, 2013) ("everyone in attendance received a coupon for a free chicken sandwich as part of a fan promotion"). Where two non-exclusive definitions "fall within the plain language" of a non-defined statutory term, and "both create the very dangers and risks that Congress meant . . . to address," the term should be interpreted to encompass both readings. See *Smith v. United States*, 508 U.S. 223, 240-241 (1993).

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."

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). Plaintiffs' request to base fees on lodestar contradicts statutory language and Ninth Circuit law.

III. *Online DVD* gives the Court the discretion to recognize that class counsel should not get a commission on the notice and administration costs.

Online DVD simply gives the Court the *discretion* to include notice and administration costs in the class benefit. It does not require the Court to include these numbers, which provide no benefit to the class. St. John explained why the Court should follow *Redman* and exercise its discretion otherwise. Plaintiffs simply assert their entitlement to these fees.[1]

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 fully benefit from any reduction in attorneys' fees.

[1] Plaintiffs do not dispute St. John is a class member with the right to object, but insinuate that there is something wrong with her being a public-interest attorney, or that her attorney has previously successfully challenged many similarly unfair settlements in the past in the Ninth Circuit. *Compare* Dkt. 87 at 2 *with* Dkt. 75-2. Of course, plaintiffs have no legal basis for those insinuations and cite none. Yes, St. John reserves her right to appeal if the Court issues a ruling inconsistent with Ninth Circuit law and 28 U.S.C. § 1712, but would prefer to prevail at the district court so that such an appeal is unnecessary. When attorneys propose class settlements that comply with Rule 23, they have no fear of an objection from St. John's non-profit organization. *See, e.g., In re Facebook Biometric Info. Privacy Litig.*, Dkt. 465, Plaintiffs' Supp. Br. in Support of Mot. for Prelim. Approval of Settlement at 20-21, No. 15-cv-3747 (N.D. Cal. July 9, 2020) (quoting St. John's attorney in support of settlement approval).

Dated: July 10, 2020

Respectfully submitted,

/s/ Theodore H. Frank
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CERTIFICATE OF SERVICE

I 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 July 10, 2020.

(s) Theodore H. Frank