No. 16-56307

In the United States Court of Appeals for the Ninth Circuit

IN RE: EASYSAVER REWARDS LITIGATION

JOSUE ROMERO, ET AL.,
Plaintiffs–Appellees,

v.

BRIAN PERRYMAN,
Objector–Appellant,

v.

PROVIDE COMMERCE, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of California, No. 3:09-cv-02094-BAS-WVG

BRIEF OF THIRTEEN STATE ATTORNEYS GENERAL AS *AMICI CURIAE* IN SUPPORT OF OBJECTOR-APPELLANT AND REVERSAL

Mark Brnovich
Attorney General
Paul N. Watkins
Oramel H. (O.H.) Skinner
Dana R. Vogel
Assistant Attorneys General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-5025
o.h.skinner@azag.gov

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STATEMENT OF *AMICI CURIAE*

The Attorneys General of Arizona, Arkansas, Idaho, Louisiana, Maine, Michigan, Missouri, Montana, Nevada, Ohio, Oklahoma, Texas and Wyoming are their respective States' chief law enforcement officers. Their interest here arises from two responsibilities. *First*, the Attorneys General have an overarching responsibility to protect their States' consumers in their roles as chief law enforcement officers. *Second*, the undersigned have a responsibility to protect consumer class members under CAFA, which envisions a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 5 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 35 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

The Attorneys General make this submission to further these interests, speaking on behalf of consumers who will be harmed by the proposed settlement that sends ~$8.5M of the ~$12.5M cash payout to class counsel and leaves class members with only ~$225,000 and a trove of highly restrictive "e-credit" coupons.[1]

SUMMARY OF ARGUMENT

The Attorneys General, acting in a bipartisan coalition, urge the Court to reverse the settlement approval and remand with instructions that to be fair, adequate, and reasonable pursuant to F.R.C.P. 23(e) the settlement must comply with the strictures of the Class Action Fairness Act of 2005, 28 U.S.C. § 1711 *et seq.* ("CAFA"), including Section 1712's coupon limits.

Put simply, CAFA's coupon-settlement strictures apply here and necessitate reversing and remanding. The settlement bears the

[1] The Attorneys General submit this brief as *amici curiae* only as to the overarching issue of settlement approval; the Attorneys General take no position on the merits of the underlying claims, and this submission is without prejudice to any State's ability to enforce its consumer protection laws or otherwise investigate claims related to this dispute. The Attorneys General certify that no parties' counsel authored this brief, and no person or party other than named *amici* or their offices made a monetary contribution to the brief's preparation or submission.

hallmarks of a coupon settlement, as *Online DVD* recently confirmed. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). And the District Court's failure to require full CAFA compliance puts consumers at risk and is reversible error.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT CAFA'S COUPON LIMITATIONS DID NOT APPLY

The Rule 23(e) inquiry "protects unnamed class members 'from unjust or unfair settlements ... when the representatives become fainthearted ... or are able to secure satisfaction of their individual claims by a compromise." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594 (1997). By failing to require full CAFA compliance, including with Section 1712's strictures, the District Court failed to make a proper inquiry and left class members with precisely the type of imbalanced settlement Congress sought to stamp out through CAFA.

A. CAFA Imposes Specific Limitations On Coupon-based Class Action Settlements, Which The District Court Did Not Properly Apply

Section 1712 of CAFA codifies Congress's regulation of coupon settlements, setting a mandate of heightened scrutiny for such settlements as well as specific rules that must be satisfied prior to

judicial approval of any proposed coupon settlement. *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013)

First, CAFA directs courts to apply enhanced scrutiny to coupon settlements. *See* 28 U.S.C. § 1712(e); *Online DVD*, 779 F.3d at 949; *see also In re HP Inkjet,* 716 F.3d at 1178. A court may approve a proposed coupon settlement only after conducting a hearing and issuing a written opinion concluding that the settlement is fair, adequate, and reasonable for class members (including being proportionally fair when considering the difference between the class recovery and class counsel's fee award). *See* 28 U.S.C. § 1712(e).

Second, CAFA imposes a series of specific rules that govern proposed coupon settlements. *See* 28 U.S.C. § 1712(a)-(d); *see also In re HP Inkjet,* 716 F.3d at 1178. A touchstone of these rules is ensuring that class action settlements properly align the interests of class counsel and the absent class members, *i.e.* that class counsel do not negotiate a settlement that provides only illusory value to the class. Indeed, as this Court has explained, "if the legislative history of CAFA clarifies one thing, it is this: the attorneys' fees provisions of § 1712 are intended to put an end to the 'inequities' that arise when class counsel

receive attorneys' fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class." *In re HP Inkjet,* 716 F.3d at 1179 (citing S. Rep. No. 109–14, at 29-32).

The District Court failed to properly apply CAFA's mandates and thereby blessed an imbalanced settlement that allows class counsel and Defendants to benefit to the detriment of the absent class members. This was reversible error. The District Court avoided applying CAFA's rules by relying on the erroneous legal conclusion that "this settlement is not a 'coupon settlement' requiring adherence to 28 U.S.C. § 1712." Dkt. 328 at 2; *see also id.* at 5 ("the Court finds this settlement was not a coupon settlement subject to the strictures of section 1712."). The court then assigned a 100% value to the "e-credit" settlement coupons (~$25M); and, based on this improperly inflated valuation, approved an imbalanced division of settlement monies (~$8.5M to class counsel, ~$3M in *cy pres*, and ~$225,000 to class members). Dkt. 328 at 7, 9. Put simply, the District Court refused to apply CAFA's coupon mandates based on an erroneous conclusion of law, and then approved an imbalanced coupon settlement that could not have satisfied CAFA.

B. The Settlement Bears Hallmarks Of A Coupon Settlement, As *Online DVD* Recently Confirmed

The "e-credits" constitute coupons under CAFA because they are worth significantly less than their face value (the touchstone for determining that something is a CAFA coupon). The "e-credit" settlement coupons represent ~$25M of the ~$38M in total value the District Court saw in the settlement. But they come with a litany of restrictions: they expire in one year, are subject to extensive blackout dates, are not stackable with other coupons, are only useful for a narrow set of product types, and require class members to spend their own money to take advantage of the face value. Furthermore, unlike in *Online DVD*, class members may not choose the face value in cash in lieu of the restricted "e-credits"—in order to access ~$25M of the value the District Court saw, class members must accept and use the coupons. *Compare* Dkt. 248-3 at 7 § 2 (automatic delivery of "e-credits"; cannot select instead cash sum in amount of face value), *with Online DVD*, 779 F.3d at 952 (noting importance of fact that "claimants in this case had the option of obtaining cash *instead of* a gift card[.]" (emphasis added)).

First, the "e-credits" have a looming one year expiration date. *E.g.*, Dkt. 328 at 5. This significantly hampers their value. This Court

and others across the country are quick to recognize that when vouchers expire shortly after issuance (as they do here) they are worth significantly less than their face value and are properly considered coupons. *See, e.g.*, *In re HP Inkjet*, 716 F.3d at 1176 (because credits expired "six months after issuance," amongst other failings, settlement's "e-credits" moniker was "euphemism for coupons"); *Redman v. RadioShack Corp.*, 768 F.3d 622, 630-31 (7th Cir. 2014) (credits expiring within six months worth less than face value because "[a]nyone who fails to use the coupon within six months … will lose its entire value."); *see also In re Online DVD*, 779 F.3d at 951 (considering expiration terms as factor in coupon analysis).

Second, the "e-credit" settlement coupons are subject to extensive blackout restrictions. They are invalid during the first two weeks of May leading up to Mother's Day, the week before Christmas, and the ten days up to and including Valentine's Day. *See* Dkt. 248-3, at 10 § 2.2. These blackout restrictions compound with the looming expiration date to limit sharply the "e-credits'" utility. An "e-credit" settlement coupon that must be used within a year but cannot be used around Mother's Day, Christmas, or Valentine's Day does not provide

anywhere near the full face value to the holder. Indeed, the blackout restrictions are especially limiting here given that the blackout dates fall around the major holidays on which the public usually purchases the types of flowers and gift items offered on Defendants' websites.

Third, the "e-credits" are not stackable with other coupons for the eligible websites. Dkt. 248-3 at 10 § 2.2. The Defendants' websites have a prolific number of discount coupons available on the internet. *See, e.g.*, Dkt. 310-1 at 7 ¶31. But, instead of using the "e-credits" like cash to pay for a product after another publicly available discount has been applied, the class members must choose between using the "e-credit" settlement coupon or taking advantage of other available coupons. This is a signal that the "e-credit" settlement coupons are a stand-in for other coupons and are not worth their full listed face value to the class. *See, e.g.*, *In re HP Inkjet,* 716 F.3d at 1179.

Fourth, the "e-credits" are useful only for purchasing a narrow set of product types. In approving the settlement in *Online DVD*, this Court emphasized that access to a vast array of product types through a large, low-cost retailer was an important factor. *In re Online DVD*, 779 F.3d at 951. But here class members cannot use the "e-credits" at a

general retailer like Amazon or Walmart; instead, they can only access the types of flowers and gifts sold on Defendants' eligible websites.

Fifth, there are no products that can be purchased with the "e-credits" on the eligible websites without the user spending at least some (and in most cases a substantial sum) of their own money. There are only a small percentage of items with a list price at or below $20. *See* Dkt. 307-1 (Defendant declaration identifying only fifteen products that were then listed for less than $20).[2] And in almost all those cases, the item price is asymptotic to $20 (~$19.99 or some similar price). This alone demonstrates that the "e-credits" are really settlement coupons.[3]

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[2] A more contemporaneous website review—as the court performed *sua sponte* in *Hofmann v. Dutch LLC*, 317 F.R.D. 566, 575 n.1 (S.D. Cal. 2016)—confirms that there are now even fewer such items.

[3] This Court has made clear that "the ability to purchase an entire product as opposed to simply reducing the purchase price" is potentially one factor that might distinguish "'e-credits' from a coupon." *In re Online DVD*, 779 F.3d at 952. Other Courts, however, have persuasively noted that even the ability to purchase an entire product would not be enough to avoid CAFA where a credit bore hallmarks of a coupon. *See, e.g.*, *Redman*, 768 F.3d at 636 ("[F]rom the standpoint of the dominant concerns that animate the provisions of the Class Action Fairness Act regarding coupon settlements it's a matter of indifference whether the coupon is a discount off the full price of an item or is equal to (or for that matter more than) the item's full price.").

But even for these handful of products with a list price at or below $20, the purchaser must spend almost that same amount of their own money in order to take advantage of the "e-credit." All products on the websites require shipping and handling charges or an add-on purchase (such as a vase for a flower order). *See* Dkt. 310 at 10. These charges, which can total almost $20 at the low end, and total more than $12.99 for shipping and handling alone, push the ultimate checkout cost well above the face value of the "e-credits." Courts are clear that where, as here, class members will have to pay a substantial sum of their own money in order to take advantage of an "e-credit," this strongly indicates that a credit is a coupon under CAFA. *See, e.g.*, *In re Online DVD*, 779 F.3d at 951 (settlement is less like a coupon when "[t]he class member need not spend any of his or her own money[.]"); *Hofmann v. Dutch LLC*, 317 F.R.D. 566, 575 (S.D. Cal. 2016) ("Coupons require class members to pay their own money before they can take advantage of the coupon."); *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53, 55 (D. Mass. 2015) (awards where class members must "transact additional business" with a defendant are, as a matter of law, coupons).

* * *

The "e-credits" in this case are coupons under CAFA. The District Court's decision to disregard CAFA's coupon-settlement strictures and treat the "e-credits" as worth their full face value contravenes the text and purpose of CAFA and constitutes reversible error.

II. THE DISTRICT COURT'S ERRONEOUS ORDER THREATENS THE INTERESTS OF CONSUMERS, WHO ARE INHERENTLY DISADVANTAGED IN THE CLASS ACTION SETTLEMENT PROCESS

A. The Class Action Settlement Process, And Coupon Settlements In Particular, Put Class Members At Risk

In dividing the proceeds of class action settlements, the interests of class counsel and class members can sharply diverge. *In re HP Inkjet*, 716 F.3d at 1178. Class counsel has an incentive to obtain the maximum possible fee award, but that fee almost invariably comes directly out of the class members' pockets. Ultimately, "although under the terms of each settlement agreement, attorneys' fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source." *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996).

Defendants are no help. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum

payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003). To a defendant, the fee award and the class award "represent a package deal," *Johnston*, 83 F.3d at 246, with the defendant "'interested only in the bottom line: how much the settlement will cost him,'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015)

Coupon settlements present particularly severe risks to the class. As this Court has explained, "Congress was rightfully concerned with [coupon] settlements: by decoupling the interests of the class and its counsel, coupon settlements may incentivize lawyers to 'negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees.'" *In re HP Inkjet*, 716 F.3d at 1177–78 (quoting S. Rep. No. 109–14, at 29–30). Therefore, "[t]here are good reasons for imposing [] additional restrictions on coupon settlements." *Tyler*, 150 F. Supp. 3d at 58 n.11. And it is no surprise that "[b]oth the courts and Congress generally disfavor coupon settlements." *Hofmann*, 317 F.R.D. at 575.

B. CAFA Is Specifically Designed To Address These Risks

As this Court has noted, "Congress passed CAFA 'primarily to curb perceived abuses of the class action device.'" *In re HP Inkjet*, 716 F.3d at 1177 (quoting *Tanoh v. Dow Chem. Co.,* 561 F.3d 945, 952 (9th Cir. 2009)). Congress was well aware of the disadvantages facing class members in the settlement process and the fact that class members were often bound to imbalanced settlements that did not serve their interests. *See, e.g.,* S. Rep. No. 109–14, at 16–20 (citing examples of coupon settlements "in which most—if not all—of the monetary benefits went to the class counsel, rather than the class members those attorneys were supposed to be representing"). And one of the key abuses CAFA targeted was "coupon settlement[s], where defendants pay aggrieved class members in coupons or vouchers but pay class counsel in cash." *In re HP Inkjet*, 716 F.3d at 1177; CAFA, PL 109–2, February 18, 2005, 119 Stat 4 ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where ... counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value[.]").

C. The District Court's Failure To Properly Apply CAFA Has Produced An Imbalanced Settlement That Fails The Class

Here, thanks to the District Court's refusal to apply CAFA's strictures, Defendants are paying ~$12.5M in cash, yet the class almost entirely takes home "e-credits" of dubious value while class counsel gets a tangible ~$8.5M.

This arrangement is precisely why CAFA exists and courts are tasked with policing the "inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003). Outsized fee awards, like the one here, improperly divert money into the hands of class counsel that could and should be going to class members; defendants see fees to counsel and class monies as a package, meaning overpayment to one causes underpayment to the other. *See, e.g.*, *Johnston*, 83 F.3d at 246; *Sw. Airlines*, 799 F.3d at 712; *see also* Henderson, *Clear Sailing Agreements* at 820.

A settlement cannot be in the best interest of the class or fair, adequate, and reasonable under Rule 23 where, as here, it generates business for defendants and provides class counsel with the vast

majority of the settlement cash while the class languishes with almost meaningless coupons. Had the District Court properly applied CAFA, including Section 1712, it should have rejected the settlement in light of the actual value provided to the class. And this would have sent the parties back to the bargaining table to divide the $12M in cash and the dubious coupons in a more equitable fashion that better benefited the class. Instead, the district court abdicated its duties to the class by failing to properly apply CAFA and label the settlement a coupon settlement, leaving the class in its present predicament, with a mere fraction of the ~$12.5M in cash that is changing hands.

* * *

The District Court's avoidance of CAFA's coupon strictures was error. The "e-credits" are certainly coupons, as evidenced by their looming expiration date, blackout restrictions, limitations on stacking with other promotions, and the fact that (most tellingly) class members will have to spend a significant sum of their own money in order to take advantage of the face value of the "e-credits." The District Court was therefore required to apply all CAFA limitations and standards, including Section 1712. But the District Court failed to do so. The

resulting imbalanced settlement should have been rejected under CAFA.

CONCLUSION

For the forgoing reasons, the undersigned Attorneys General, acting in a bipartisan coalition, request that this Court reverse the District Court's settlement approval and remand with instructions to conduct a proper inquiry under CAFA, including applying the limits of Section 1712.

May 8, 2017

Respectfully Submitted,

/s/ Oramel H. Skinner

Mark Brnovich
Attorney General
Paul N. Watkins
Oramel H. (O.H.) Skinner
Dana R. Vogel
Assistant Attorneys General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-5025
o.h.skinner@azag.gov

Counsel for Amicus Arizona Attorney General's Office

ALSO SUPPORTED BY:

LESLIE RUTLEDGE
ATTORNEY GENERAL OF ARKANSAS
323 Center Street, Suite 200
Little Rock, AR 72201

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL
P.O. Box 83720
Boise, ID 83720-0010

JEFF LANDRY
LOUISIANA ATTORNEY GENERAL
P.O. Box 94005
Baton Rouge, LA 70804

JANET T. MILLS
ATTORNEY GENERAL OF MAINE
6 State House Station
Augusta, ME 04333-0006

BILL SCHUETTE
MICHIGAN ATTORNEY GENERAL
P.O. Box 30212
Lansing, MI 48909

JOSHUA D. HAWLEY
ATTORNEY GENERAL OF MISSOURI
P.O. Box 899
Jefferson City, Missouri 65102

TIMOTHY C. FOX
ATTORNEY GENERAL OF MONTANA
P.O Box 200151
Helena, MT 59620

ADAM PAUL LAXALT
ATTORNEY GENERAL OF NEVADA
100 North Carson Street
Carson City, NV 89701

MICHAEL DEWINE
ATTORNEY GENERAL OF OHIO
30 E. Broad St., 17th Floor
Columbus, OH 43215

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105-4894

KEN PAXTON
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548

PETER K. MICHAEL
ATTORNEY GENERAL OF WYOMING
2320 Capitol Avenue
Cheyenne, WY 82002

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 3,194 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

/s/ Oramel H. Skinner

Oramel H. (O.H.) Skinner
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-5025

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Oramel H. Skinner

Oramel H. (O.H.) Skinner
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-5025