UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH CHAPMAN, et al., Plaintiffs, v. TRISTAR PRODUCTS, INC., Defendant.	Case No. 1:16-cv-1114 Judge James S. Gwin

BRIEF OF *AMICI CURIAE* EIGHTEEN STATE ATTORNEYS GENERAL OPPOSING FINAL APPROVAL OF PROPOSED SETTLEMENT

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TABLE OF CONTENTS

STATEMENT OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURT SHOULD REJECT THE PROPOSED SETTLEMENT 4

A. CAFA Imposes Specific Limitations On Coupon-Based Class Action Settlements 4

B. The Proposed Settlement Turns On Coupons And Yet Fails To Comport With CAFA 6

1. This Is The Type Of Quintessential Coupon Settlement To Which CAFA Was Directed 6

2. The Proposed Settlement Fails To Comport With CAFA's Requirements 10

a. This Settlement Fails Under The Ninth Circuit's Reading Of Section 1712, Which Ties Attorneys' Fees Directly To The Value Of Redeemed Coupons 11

b. This Settlement Also Fails When Applying Only A Lodestar Approach 14

C. It Is Important To Rigorously Apply CAFA's Coupon Limits And In Doing So Reject The Proposed Settlement Here 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Brooks v. Georgia State Bd. of Elections
59 F.3d 1114 (11th Cir. 1995) 19

Cannon v. Ashburn Corp.
No. 16-1452, 2018 WL 1806046 (D.N.J. Apr. 17, 2018).......... 4

Date v. Sony Electronics, Inc.
No. 07-15474, 2013 WL 3945981 (E.D. Mich. July 31, 2013).......... 9

Galloway v. Kan. City Landsmen, LLC
833 F.3d 969 (8th Cir. 2016) 10, 13, 14, 15

Hanlon v. Chrysler Corp.
150 F.3d 1011 (9th Cir. 1998) 19

Hofmann v. Dutch LLC
317 F.R.D. 566 (S.D. Cal. 2016) 9

In re HP Inkjet Printer Litig.
716 F.3d 1173 (9th Cir. 2013) .... passim

In re Sw. Airlines Voucher Litig.
799 F.3d 701 (7th Cir. 2015) 17

Johnston v. Comerica Mortg. Corp.
83 F.3d 241 (8th Cir. 1996) 17

Radosti v. Envision EMI, LLC
717 F.Supp.2d 37 (D.D.C. 2010).......... 7, 13

Redman v. RadioShack Corp.
768 F.3d 622 (7th Cir. 2014) 7, 14, 15

Rougvie v. Ascena Retail Group, Inc.
No. 15-724, 2016 WL 4111320 (E.D. Pa. July 29, 2016) 7

Staton v. Boeing Co.
327 F.3d 938 (9th Cir. 2003) 18

True v. Am. Honda Motor Co.
749 F. Supp. 2d 1052 (C.D. Cal. 2010) 13

Tyler v. Michaels Stores, Inc.
150 F. Supp.3d 53 (D. Mass. 2015) 9, 16

STATUTES

28 U.S.C. § 1711 3

28 U.S.C. § 1712 .... 4, 5

28 U.S.C. § 1712(e) 4

28 U.S.C. § 1715 1

CAFA, PL 109–2, February 18, 2005, 119 Stat 4 18

OTHER AUTHORITIES

S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3 .... 1, 5, 16

STATEMENT OF *AMICI CURIAE*

The Attorneys General of Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nevada, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, and Wyoming are their respective States' chief law enforcement or chief legal 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 or legal officers. *Second*, the undersigned have a responsibility to protect consumer class members under CAFA, which provides an explicit 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, in which class counsel seek approximately $2.5 million in cash after generating for the class nothing more than restricted coupons and an extended warranty of nominal value, both of which only flow to those class members who file a claim (even though all class members will have their claims released), and neither of which has drawn interest from even 1% of the ~3.2 million member class.

SUMMARY OF ARGUMENT

The Attorneys General urge the Court to reject the proposed coupon settlement, in which class and defense counsel seek to release the class's claims (including, it appears, personal injury claims), secure almost $2.5 million in cash for class counsel, and leave the class (more specifically, only those class members who file a claim after watching an online video) with restricted coupons and an extended warranty of nominal value.[1] The coupons here expire in ninety days, are non-transferable, and are only valid for three products, each of which would require class members to spend substantial sums of their own money to purchase. Yet, the proposed settlement fails to comply with the strictures of the Class Action

[1] Amici believe that the Department of Justice has properly flagged concerns surrounding the potential release of personal injury claims. *See* Dkt. 134 at 7, 13.

Fairness Act of 2005, 28 U.S.C. § 1711 *et seq.* ("CAFA"), including Section 1712's coupon limits. The settlement cannot be deemed fair, adequate, and reasonable under F.R.C.P. 23(e) in light of this failure.

Failing to require full CAFA compliance, including adherence to the strictures of Section 1712, will leave class members with precisely the type of imbalanced coupon-based settlement that Congress sought to stamp out through CAFA. Claims data in this case shows that, even using optimistic expectations for the claims rate between now and the claims deadline, less than one half of one percent (0.5%) of the class will file a claim and receive a coupon and warranty extension. Therefore, the class will receive only a small fraction of the total settlement value—about $1 million in coupons and $70,000 in extended warranties compared to ~$2.5 million in uncontested fees and costs paid in cash.[2] Even assuming that all claimed coupons will be redeemed, this would give the class less than half the value going to class counsel. And, given that coupon redemption rates are invariably far lower than 100%, the reality is likely worse—consumers are likely to receive only a miniscule percentage of the value that class counsel takes home. CAFA applies here and requires rejection of the settlement as now

[2] As discussed below, counsel has represented to the undersigned that the warranties have ~$5 in value based on Defendant's comparable warranty sales.

structured; where there is so much cash in the settlement and so little interest in the coupons and warranties, the settlement can only stand by sending a fair apportionment of the available cash to the class.

ARGUMENT

I. THE COURT SHOULD REJECT THE PROPOSED SETTLEMENT

A. CAFA Imposes Specific Limitations On Coupon-Based Class Action Settlements

Section 1712 of CAFA codifies Congress's regulation of coupon settlements, mandating heightened scrutiny for such settlements as well as rules that must be satisfied prior to judicial approval of a coupon settlement. *E.g.*, *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); *Cannon v. Ashburn Corp.*, No. 16-1452, 2018 WL 1806046, at *10 (D.N.J. Apr. 17, 2018); *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. 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. The CAFA Senate Report made this plain in listing examples of class action settlements "in which most—if not all—of the monetary benefits went to the class counsel, rather than the class members . . . ," and noting that many of the examples are comprised of "'coupon settlements' in which class members receive nothing more than promotional coupons to purchase more products from the defendants." S. Rep. No. 109-14 at 15–17. Indeed, "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).

B. The Proposed Settlement Turns On Coupons And Yet Fails To Comport With CAFA

1. This Is The Type Of Quintessential Coupon Settlement To Which CAFA Was Directed

The "credits" here, which represent almost the entirety of the settlement value to the class, are coupons under CAFA because they come with a litany of restrictions and are worth significantly less than their face value.[3] While the face value is $72.50, that value is illusory: the credit must be used within ninety days, is not transferable, is only useful for three products offered by Tristar, and even for those products, consumers will be required to spend substantial sums of their own money. Indeed, the coupons' questionable value is confirmed by the miniscule claims rate for mere access to the coupons (to say nothing of ultimate redemption): only ~0.36% of class members have submitted claims so far, and even an optimistic extrapolation of the claims data indicates an ultimate claims rate of under 0.5%.

First, the "credits" have a looming, ninety-day expiration date. Dkt. 126-1 at 5 § I.O. This significantly hampers their value. Courts across the country are

[3] The coupons are the overwhelming share of this settlement from the class's perspective. The settlement also includes a warranty extension. But that warranty extension is worth only a nominal amount and forms only a small relative portion of the settlement value—on a May 3, 2018 call with the undersigned, counsel represented that the warranties have about $5 in value based on the price of warranties that Defendant sells. This settlement stands or falls on the coupons.

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.*, *Redman v. RadioShack Corp.*, 768 F.3d 622, 630–31 (7th Cir. 2014) (credits expiring within six months are worth less than face value because "[a]nyone who fails to use the coupon within six months . . . will lose its entire value."); *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").

Second, the "credits" are "non-transferable," and must be used solely by the class member. *See* Dkt. 126-1 at 5 § I.O. Courts consider lack of transferability as a factor pointing toward the coupon nature of a settlement credit. *See, e.g.*, *In re HP Inkjet*, 716 F.3d at 1176 (non-transferability of "e-credits" was factor in determining they were "coupons"); *Radosti v. Envision EMI, LLC*, 717 F.Supp.2d 37, 63 (D.D.C. 2010) (noting transferability as a consideration in coupon analysis); *Rougvie v. Ascena Retail Group, Inc.*, No. 15-724, 2016 WL 4111320, at *25 (E.D. Pa. July 29, 2016) (finding that CAFA applied to settlement of non-transferable vouchers that expired within one year);.

Third, the "credits" are only redeemable for one of three products from Tristar, a specialty retailer. *See* Dkt. 126-1 at 5 § I.O. Class members are not

given the option to use their "credits" towards the purchase of any one of the many other products offered by Tristar, much less a vast array of products from a more general retailer. They can only use the credit toward: (1) a Power Cooker, (2) a Power Air Fryer, or (3) a Copper Chef Induction Cooktop Set. Dkt. 126-1 at 4-5 § I.O. And class members must place orders through a designated URL or by telephone, even if the product is available elsewhere on better terms. Dkt. 126-1 at 5 § I.O.

Fourth, and perhaps most notably, out of the three products, not one is available for less than $72.50; indeed, all cost well more than $100. The settlement provides that "the price [of the product chosen] will be the then existing retail price offered by Tristar to other consumers purchasing through a Tristar website or telephone sales representative, with any applicable shipping, processing and handling charges . . . ." Dkt. 126-1 at 5 § I.O. And class counsel has confirmed to the undersigned that the three offered products range in price from $129.97 to $149.99. To redeem the $72.50 "credit," a class member will therefore need to spend a minimum of $57.47 of their own money in addition to whatever "shipping, processing and handling charges" are incurred.

This fourth consideration in particular demonstrates that the "credits" are coupons. 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 a "credit," it strongly indicates that a credit is a coupon under CAFA. *See, e.g.*, *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); *cf. Date v. Sony Electronics, Inc.*, No. 07-15474, 2013 WL 3945981, at *7 (E.D. Mich. July 31, 2013) ($60 gift card from Sony website and its retail outlets was not coupon because the gift card could be used to pay the full price of many available items). This is especially so when considered in conjunction with the looming expiration date (a short ninety days) and inability to transfer the "credits." *See In re HP Inkjet*, 716 F.3d at 1179 ("[C]oupon settlement is likely to provide less value to class members if, like here, the coupons are non-transferable, expire soon after their issuance, and cannot be aggregated.").

The illusory value of the coupons is further confirmed by the negligible claims rate here. Based on claims-related information provided by the parties' counsel, the amici understand that so far only ~0.36% of eligible class members

(11,482 of ~3.2 million) have submitted valid claims.[4] And even a generous extrapolation of the claims rates and patterns in this action (as provided to the undersigned during the claims process) indicates that the ultimate claims rate will top out at below 0.5%.[5] And the ultimate redemption rate for the coupons is expected only to fall from there. *See, e.g., Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 971 (8th Cir. 2016) (noting that only 326 of the 762,210 settlement coupons were redeemed—a redemption rate of 0.045%).

2. The Proposed Settlement Fails To Comport With CAFA's Requirements

Under Section 1712(c), Congress anticipated settlements like the one at hand—a mixed settlement that provides both coupon and non-coupon relief. Courts, however, have taken differing views regarding the reading of CAFA's coupon mandates. Absent Sixth Circuit precedent on point, the Court should adopt the Ninth Circuit's pertinent reading from *In re HP Inkjet*, 716 F.3d at 1179–86, as

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[4] Perhaps tellingly, class counsel never provided this percentage (only ~0.32% at the time of the fee petition) in their initial fee papers. The Motion for Award of Attorneys' Fees focused on contact rates. Dkt. 133 at 10 § II.C. And it emphasized a "response rate" of nearly 5%, which only goes to how many individuals have visited the settlement website. *Id*. But it never provided the key ratio: comparing the actual number of claiming consumers against the multi-million person class size to generate the then-present claims rate of ~.32%.

[5] Even assuming 500 new claims per week through the July 4 claim deadline, a rate higher than what class counsel has estimated, the number of claims would only rise to ~14,000 out of ~3.2 million.

that reading presents the most persuasive interpretation of the statute's language, while also embodying Congress' intent in enacting CAFA. Under the Ninth's Circuit's reading, the proposed settlement fails both procedurally and substantively. But even if this Court chooses to adopt instead another Circuit's reading of CAFA, this settlement still fails because coupons comprise the lion's share of this settlement and the ultimate settlement division (as between coupons and warranties on one hand and fees along with costs on the other) leaves consumers with the exact type of imbalanced arrangement that CAFA was designed to prevent.

a. This Settlement Fails Under The Ninth Circuit's Reading Of Section 1712, Which Ties Attorneys' Fees Directly To The Value Of Redeemed Coupons

The application of CAFA in mixed settlements was thoroughly reviewed and unpacked by the Ninth Circuit in *In re HP Inkjet*, 716 F.3d at 1173. "If a settlement gives coupon and equitable relief and the district court sets attorneys' fees based on the value of the entire settlement, and not solely on the basis of injunctive relief, then the district court **must** use the value of coupons redeemed when determining the value of the coupons part of the settlement." *Id*. (emphasis added). *Inkjet* is clear that the application of Section 1712(a) is mandatory for coupon settlements, not permissive. *E.g.*, *id*. at 1181 ("subsection (a) is not

permissive"). "If the district court awards 'any' attorney's fees, and those attorney's fees are 'attributable to the award of coupons,' then the fees award must be calculated in the manner prescribed by § 1712(a) (*i.e.*, using the redemption value of the coupons)." *Id*. at 1181. In a mixed settlement (such as this one), this is done through Section 1712(c), which combines subsections (a) and (b), such that under Section 1712(a) "the court must determine a reasonable contingency fee based on the actual redemption value of the coupons awarded," *id*. at 1184, and then, under Section 1712(b), "the court must determine a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained." *Id.* at 1185.

This settlement proposal is inconsistent with the *Inkjet* interpretation of CAFA both procedurally and substantively. First, the fee request is untethered from the coupon redemption rate, with the requested ~$2.5 million coming up front, without any connection to the value of the restrictive coupons actually redeemed, *see* Dkt. 126-1 at 22 § VIII.A; *see also* Dkt. 133, even though fees can only be calculated after the ninety-day redemption period ends. Second, the fee could not be supported by any possible redemption rate in this case. As it stands, the warranty has a maximum value of ~$70,000 (using optimistic assumptions based on claims data to date), which would present a constrained ceiling on any

lodestar calculation based off the warranty relief under Section 1712(b). And, using the same redemption assumptions, the coupon portion has a maximum value of ~$1 million. Even assuming an implausible 100% redemption rate, applying Section 1712(a) to this amount would generate a coupon-related fee of at most ~$300,000. *See, e.g.*, *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 77 (D.D.C. 2011) (award between twenty and thirty percent is reasonable when using percentage of fund method). And the likelihood is that the value of redeemed coupons will be very low (perhaps measured in the tens of thousands of dollars), as redemption rates of just a few percentage points are common with coupon settlements.[6]

Under the *Inkjet* method, class counsel's fees should be far lower than the requested ~$2.5 million. The redemption rates would ultimately be used to determine a reasonable fee, but it seems that the current fee request is at least five times too high—even assuming an optimistic finish to the claims process along with a 100% redemption rate for claimed coupons—to say nothing of the fee mismatch if there is a more common redemption rate in the single digits.

[6] *See, e.g.*, *Galloway*, 833 F.3d 969, 971 (8th Cir. 2016) (noting coupon redemption rate of 0.045%); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1074 (C.D. Cal. 2010) ("Court is extremely skeptical" of counsel's estimated redemption rates of 7% and 6% "particularly in light of the experience in other cases where less than 2% of the class redeemed similar rebates").

b. This Settlement Also Fails When Applying Only A Lodestar Approach

Even if the Court does not accept the Ninth Circuit's reading of CAFA and alternatively believes that a lodestar option for the coupon component is available at the Court's discretion, the fee request at hand nonetheless fails under CAFA because any lodestar calculation under CAFA is still subject to a limitation that ties the fee request to the "success obtained." In *Galloway,* the Eighth Circuit emphasized that "'degree of success obtained'" was "'the most critical factor'" in awarding fees under CAFA. 833 F.3d at 975. As the Eighth Circuit explained, "[t]he principal focus of § 1712 was to mandate more careful scrutiny of coupon settlements to ensure that the degree of success was properly evaluated." *Id.*

Courts have applied this limitation to reject an unadjusted lodestar method of fee calculation where, as here, the settlement offers very little to the class, *i.e.*, where the "success obtained" is negligible. For example, in *Redman*, the Seventh Circuit reversed a settlement approval that included 83,000 coupons claimed by a multi-million person class (totaling $830,000 in face value) alongside a ~$1 million fee calculated using the lodestar method. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628–630, 632–633, 640 (7th Cir. 2014). And in *Galloway*, the Eighth Circuit used a similar success-focused review of the record to conclude that "any award greater than $17,438.45 would be unreasonable in light of class

counsel's limited success in obtaining value for the class" where the proposed settlement included a low-value injunction and $8,000 worth of coupons actually redeemed by class members. 833 F.3d at 975.

The proposed settlement here, which shares traits with the settlements in *Redman* and *Galloway*, fails for similar reasons even under an unadjusted lodestar approach. In rejecting the settlement in *Redman* based on an erroneous fee review, the Seventh Circuit emphasized that:

> the reasonableness of a fee cannot be assessed in isolation from what it buys. Suppose class counsel had worked diligently—as hard and efficiently as they say they worked—but only a thousand claims had been filed in response to notice of the proposed settlement, so that the total value of the class, even treating a $10 coupon as the equivalent of a $10 bill, was only $10,000. No one would think a $1 million attorneys' fee appropriate compensation for obtaining $10,000 for the clients, even though a poor response to notice is one of the risks involved in a class action.

Redman, 768 F.3d at 633. The settlement here closely resembles the scenario the Seventh Circuit conjured for illustrative purposes: a multi-million dollar fee request in a case where only a few thousand claims were filed, and the fee request dwarfs several times over the aggregate face value of the claimed coupons, even assuming (unjustifiably) that the coupons are worth their full face value to each of the claimants. With that in mind, this settlement cannot pass muster under CAFA, even assuming a lodestar fee calculation method is available (contra *Inkjet*).

* * *

Regardless of which interpretation of Section 1712 this Court chooses to follow, CAFA clearly applies to this settlement, which is the quintessential type of coupon case that CAFA envisioned, and requires rejection of the settlement as currently structured. Class counsel's fee request of ~$2.5M fails to comport with CAFA's requirements under any reading of the statute.

C. It Is Important To Rigorously Apply CAFA's Coupon Limits And In Doing So Reject The Proposed Settlement Here

CAFA is designed to address the particular, heightened risks that coupon settlements like the one proposed here represent to the interests of consumer class members. "Congress passed CAFA 'primarily to curb perceived abuses of the class action device,'" *In re HP Inkjet*, 716 F.3d at 1177, with a particular focus on coupon settlements, *see, e.g.,* S. Rep. No. 109-14, at 15–20 (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"). "There are good reasons for imposing [] additional restrictions on coupon settlements." *Tyler*, 150 F. Supp. 3d at 58 n.11. "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).

The settlement seeks to avoid applying CAFA's rules (including compliance with 28 U.S.C. § 1712) by identifying the awards as "credits," not coupons, Dkt. 126-1 at 4 § I.O., presenting the fees as untethered from the coupons, *e.g.*, Dkt. 133, and otherwise avoiding reference to CAFA in the pertinent fee papers. But these are unpersuasive efforts to circumvent CAFA's plain statutory requirements, and fail to acknowledge that fees invariably come out of class members' pockets, because "[a]lthough 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). The fee award and class award "represent a package deal," *id.*, with a 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).

Indeed, the proposed arrangement here is precisely why CAFA exists and courts are tasked with policing "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). Thanks to the parties' failure to follow CAFA's strictures, the settlement here offers the type of arrangement that motivated CAFA in the first place—Defendants are paying ~$2.5M in cash, yet the class takes home primarily only "credits" of dubious value. *See* 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[.]").

*   *   *

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 substantial settlement cash while the class languishes with restricted coupons that will (at best) produce only a fraction of the value provided to class counsel in the proposed settlement. Instead of directing money into the hands of consumers, the money available (~$2.5 million), is going straight to class counsel. Where there is so much cash in the settlement and so little interest in the coupons and warranties, the settlement can only stand by sending a fair apportionment of the available cash to the class, which this settlement does not do. The Court is required to apply CAFA here and reject the proposed settlement in its entirety in light of this improper, imbalanced

distribution. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("The settlement must stand or fall in its entirety"; no court has "ability to 'delete, modify or substitute certain provisions.'"); *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1119–20 (11th Cir. 1995) ("'We are not free to delete, modify or substitute certain provisions of the settlement. The settlement must stand or fall as a whole.'").

CONCLUSION

For the forgoing reasons, the undersigned State Attorneys General request that this Court conduct a proper inquiry under CAFA, including applying the limits of Section 1712, and decline to approve the proposed settlement.

June 12, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Ohio using the CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the court's CM/ECF system.

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