UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KYLE CANNON, LEWIS LYONS, AND DIANNE LYONS, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, Plaintiffs, v. ASHBURN CORPORATION, ET AL., Defendants.	Civil Action No. 16-cv-1452-RMB-AMD

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

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STATEMENT OF *AMICI CURIAE*

The Attorneys General of Arizona, Alabama, Arkansas, Idaho, Indiana, Louisiana, Michigan, Mississippi, Missouri, Nevada, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Washington, 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 prescribes 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 has obtained a ~$1.7 million cash payout and yet sends all that money to class

counsel while distributing to class members only highly restrictive coupons (worth at most $2 off per bottle of eligible wine from Defendant's website).

SUMMARY OF ARGUMENT

The Attorneys General urge the Court to reject the proposed settlement, which bears the hallmarks of a coupon settlement and yet fails to 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. The settlement cannot be deemed fair, adequate, and reasonable under F.R.C.P. 23(e) in light of this failure. 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, 623 (1997). Failing to require full CAFA compliance, including with the strictures of Section 1712, will leave class members with precisely the type of imbalanced coupon-based settlement Congress sought to stamp out through CAFA—historical settlement claims rates teach that the likely outcome here will be ~$1.7 million in cash to class counsel with class members redeeming at most ~$800,000 in coupons (*i.e.*, only ~33% of the settlement value).

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. *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013); *Martina v. L.A. Fitness Int'l, LLC*, No. 12-cv-2063-WHW, 2013 WL 5567157, at *4 (D.N.J. Oct. 8, 2013).

First, CAFA directs courts to apply enhanced scrutiny to coupon settlements. *See* 28 U.S.C. § 1712(e); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015); *Martina*, No. 12-cv-2063-WHW, 2013 WL 5567157, at *4 (D. N.J. Oct. 8, 2013); *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, "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 Fails To Comport With CAFA

1. This Is A Coupon Settlement

The "credits" here constitute coupons under CAFA because they are worth significantly less than their face value (the touchstone for determining that something is a CAFA coupon). They come with a litany of restrictions: they expire in one year, are not transferable, are only useful for a restricted selection of wines on the Defendant's website, and can only be used in maximum increments of $2 per bottle of wine, thereby requiring class members to spend substantial sums of their own money to take advantage of the face value of the "credits." And class members are required to complete a multi-step claims process before even accessing and being able to redeem the highly restrictive "credits."[1]

[1] Furthermore, class members may not choose cash in lieu of the "credits." *Compare In re Online DVD*, 779 F.3d at 952 (considering "option of obtaining

First, the "credits" have a looming, one-year expiration date. Dkt. 43-1 at 10 § IV.B. This significantly hampers their value. Courts 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 "credits" are "non-transferable," and must be used solely by the class member for a future purchase on WTSO.com. *See* Dkt. 43-1 at 11 § IV.G. When deciding whether a "gift card" or "voucher" should be classified as a coupon, other courts have factored into the analysis whether the "voucher" or a "gift card" was freely transferable. *See, e.g.*, *In re HP Inkjet*, 716 F.3d at 1176 (non-transferability of "e-credits" was factor in determining they were "coupons").

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cash instead of a gift card" as important consideration) *with* Dkt. 43-1 at 11 § IV.G-H (those who submit valid forms get "credit" code and cannot select cash).

Third, the "credits" are only useful for purchasing some subset of the wines sold on WTSO.com. Dkt. 43-1 at 9-10 § IV.B-C. The settlement permits the "credits" to be used "against purchases of any wine the first time it is offered on WTSO.com (unless use of the Credit would result in a violation of laws relating to the sale of wine or such wine is first offered during a 'Marathon' day), and on *certain other wines* offered on WTSO.com," while elsewhere referring to the limited set of eligible wines as "redemption wines." *Id.* In approving the settlement in *Online DVD*, the Ninth Circuit emphasized that access to a vast array of product types through a large, low-cost retailer (Walmart) was an important factor. 779 F.3d at 951. But here class members cannot use the "credits" at a general retailer like Amazon or Walmart; instead, they can only access a to-be-designated subset of the already limited set of wines sold on Defendant's website.

Fourth, class members are permitted to use only $2 of their "credits" on each bottle, Dkt. 43-1 at 9-10 § IV.B, meaning class members will not be able to use their "credits" to purchase any product on WTSO.com without spending at least some (and in most cases a substantial sum) of their own money. For example, a class member who receives a total of $5 in "credits" would be obligated to purchase at least three bottles of wine during the redemption period in order to fully benefit from the "credits" received. And a class member with $100 in

"credits" will be forced to purchase at least 50 bottles of wine to extinguish the credit balance, and spend as much as $2,000 of their own money to do so.[2]

This fourth consideration alone 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). This is especially so when considered in conjunction with the looming expiration date and inability to transfer the "credits." *See In re HP Inkjet*, 716 F.3d at 1179 ("coupon 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.").

And further hindering the value of the coupons is the proposed multi-step claims process. Class members will first receive a notice "includ[ing] an individual Class Member ID Number and a link to the Verification Form." Dkt. 43-1 at 10, §IV.D. Class members are then required to submit the Verification

[2] Wines available on WTSO.com appear to range in price from ~$12.50 to ~$53.

Form (updating contact information, certifying to the purchase of at least one Settlement Wine during the class period, and verifying whether any refunds were received on such wines). *Id.* at 11 §IV.D. Class members will then be sent an email with a "unique non-transferrable individualized code." *Id.* at 11 §IV.G-H. That emailed code is what class members may ultimately use on the WTSO.com website "to access their Credits." *Id.* at 11 §IV.G.[3]

The claims process adds yet another reason why these "credits" are not worth their face value to consumers; not only will all claimed coupons not be redeemed, it is likely that the claim process will reduce the number of "credits" consumers even have in hand to redeem, as it is well accepted that claims rates for small dollar settlements are very low. *See, e.g.*, *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (en banc) (noting evidence that "claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns."); *In re Apple iPhone 4 Prods. Liab. Litig.*, No. 10-md-2188-RMW, 2012 WL 3283432, at *1 (N.D. Cal. Aug. 10, 2012) (claim rate was ~0.25% for $15 cash payment in settlement involving 20 million or more iPhone owners*); see*

[3] Another time-sensitive step is added for those in one of the handful of states where WTSO does not ship, who are eligible to claim a partial-value cash payout (WTSO.com appears to ship to at least forty-six states). *Id.* at 12 § IV.J. And this partial-value cash arrangement further confirms that even the settlement proponents do not believe the "credits" are worth their face value in cash.

also Pollard v. Remington Arms Co., LLC, 320 F.R.D. 198, 214-215 (W.D. Mo. 2017) (gathering cases with claims rates between ~0.25% and ~2%).

2. The Proposed Settlement Nevertheless Fails To Follow CAFA's Coupon Requirements

The proposed settlement fails to apply CAFA's coupon mandates. Under Section 1712(a), "the court must determine a reasonable contingency fee based on the actual redemption value of the coupons awarded." *In re HP Inkjet*, 716 F.3d at 1184. But under the proposed settlement (and related fee request) class counsel will be paid ~$1.7 million up front without any connection to the value of the restrictive "credits" actually redeemed. *See* Dkt. 47; 43-1. 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. 43-1 at 8 § IV.A, and presenting the fees as untethered from the coupons, *e.g.*, Dkt. 47 at 7 (fees should be approved because they "will not diminish the settlement fund"). But these are unpersuasive efforts to circumvent CAFA's plain statuory 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.* at 246, 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).

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 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. As this Court has explained, "Congress included a 'coupon settlement' provision in CAFA to address … the perverse incentive of class counsel to 'negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees.'" *Martina*, No. 12-cv-2063-WHW, 2013 WL 5567157, at *4 (quoting *In re HP Inkjet*, 716 F.3d at 1178).

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 ~$1.7M in cash, yet the class takes home 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[.]"). Even assuming an ultimate redemption rate of ~5-7% (itself high given the expected low claims rate and then the low redemption rate once coupons are claimed) the class is likely to receive only ~$500,000 to ~$800,000 in value from the coupons here.[4] Indeed, to even come close to warranting the requested fees, the ultimate redemption rate in this case would need to approach the nearly unheard of range of 50% or more.[5]

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[4] Indeed, based on information provided by the parties' counsel, amici understand that no more than ~15% of eligible class members have submitted valid claims for "credits," with the ultimate rate of "credit" redemption expected to fall from there.

[5] The injunctive relief identified by class counsel cannot salvage the settlement. Injunctive relief may well be an appropriate resolution to certain class actions, as an injunction assures that the conduct at issue will not be continued. But, the (at best) nominal injunctive relief here rests on a definitional change on WTSO.com that Defendant took over a year ago (pre-settlement), Dkt. 43-1 at 2, and was not identified as "consideration of settlement" in the proposed settlement agreement,

* * *

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 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. And the "credits" here are plainly coupons, as evidenced by their looming expiration date, non-transferability, limitations on products eligible for purchase, and (most tellingly) the fact that class members will have to spend a significant sum of their own money in order to take advantage of the coupon's face value. The Court is required to apply all CAFA's strictures here and reject the proposed settlement in its entirety. *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.'").

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see Dkt. 43-1 at 8-13, § IV. That change cannot now be used to support the imbalanced, coupon-based arrangement that is being proposed.

CONCLUSION

For the forgoing reasons, the undersigned 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.

February 23, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of New Jersey 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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