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Class Counsel

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEBORAH JORDAN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

WP COMPANY LLC, d/b/a THE WASHINGTON POST,

Defendant.

Case No. 3:20-cv-05218-WHO

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES, AND INCENTIVE AWARD

Date: November 17, 2021
Time: 2:00 p.m.
Courtroom: 2, 17th Floor

Judge: Hon. William H. Orrick

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

I. INTRODUCTION

As detailed in Plaintiff Deborah Jordan's ("Plaintiff") Unopposed Motion for Final Approval of Class Action Settlement, filed contemporaneously herewith, the reaction of Class Members to the Settlement has been overwhelmingly positive. Of the approximately 320,000 total Settlement Class Members, not a single Class Member objected to the Settlement and only 12 Class Members opted out (*i.e.*, 0.00376% of Class Members).[1] This total absence of objections "raises a strong presumption that the terms of a proposed class settlement action" – including the term concerning attorneys' fees, *see* Settlement ¶ 8.1[2] – "are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (citation omitted); *see also Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009); *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 833-34 (N.D. Cal. 2017) (Orrick, J.); *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *5 (N.D. Cal. July 11, 2014); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008); *Torchia v. W.W. Grainger, Inc.*, 304 F.R.D. 256, 270 (E.D. Cal. 2014); *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004); *Arreola v. Shamrock Foods Co.*, 2021 WL 4220630, at *5 (C.D. Cal. Sept. 16, 2021).

Moreover, the $6.7 million proposed Settlement is outstanding in comparison to other, larger cases brought pursuant to California's Automatic Renewal Law ("ARL"). *See, e.g.*, *Moses v. The New York Times Company*, No. 1:20-cv-04658-RA (S.D.N.Y.). Notably, one such recent ARL settlement involved in-kind relief – "Automatic Access Codes" – substantially similar in nature to the Automatic Account Credit Codes of the proposed Settlement here, and the court in that case expressly found that the settlement was not a "coupon" settlement subject to CAFA. *See Moses v. The New York Times Company*, No. 1:20-cv-04658-RA (S.D.N.Y.). As discussed below, this conclusion is consistent with Ninth Circuit precedent regarding "coupon" settlements under 28 U.S.C. 1712(a). *See*, *e.g.*, *In Re Online DVD-Rental Antitrust Litigation* ("*Online DVD*"), 779 F.

[1] The deadline to object or opt-out of the Settlement was on September 19, 2021. *See* Order Granting Preliminary Approval (ECF No. 50) ¶¶ 14, 20; *see also* 11/3 Declaration of Jennifer M. Keough Regarding Settlement Administration ("Keough Decl.") ¶¶ 19-22, submitted with Plaintiff's contemporaneously filed Motion for Final Approval of Class Action Settlement.

[2] All capitalized terms not otherwise defined herein shall have the same definitions as set out in the Parties' Stipulation of Class Action Settlement Agreement and Release (the "Settlement" or "Settlement Agreement"). *See* 11/3/21 Klorczyk Decl. Ex. 1, Settlement.

3d 934, 950-51 (9th Cir. 2015); *McKinney-Drobnis v. Oreshack*, 2021 WL 4890277 (9th Cir. Oct. 20, 2021). The law in the Ninth Circuit is clear – in common fund cases not subject to CAFA's restrictions on "coupon" settlements, attorneys' fees are assessed against the total value of all cash and non-cash relief distributed to Class Members, not just the benefits claimed. *See, e.g.*, *Online DVD*, 779 F.3d at 953 ("The district court did not abuse its discretion in calculating the fee award as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses. We have repeatedly held 'that the reasonableness of attorneys' fees is not measured by the choice of the denominator.'").

II. ARGUMENT

A. The Settlement Is Not A "Coupon" Settlement

The proposed Settlement in this matter compares favorably to settlements reached in similar cases, including one recent class-wide settlement reached in another ARL case brought on behalf of California subscribers to *The New York Times*.[3] On September 13, 2021, the United States District Court for the Southern District of New York, in *Moses v. The New York Times Company*, No. 1:20-cv-04658-RA (S.D.N.Y.), granted final approval to a similar class-wide settlement under California's ARL and awarded attorneys' fees to class counsel based on the percentage of the total settlement value. *See* Declaration of Frederick J. Klorczyk III in Support of Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement (the "11/3/21 Klorczyk Decl.") ¶ 19; *see also id*. Ex. 6, Order Granting Final Approval in *Moses*, No. 1:20-cv-04658-RA (ECF No. 60) ("*Moses* Final Approval Order"); *id*. Ex 7, Final Approval Hearing Transcript in *Moses*, No. 1:20-cv-04658-RA (ECF No. 61) ("*Moses* Final Approval Hearing Tr."). In doing so, the *Moses* court expressly held that the non-cash component of the settlement fund – "Automatic Access Codes" for free subscription access to *The New York Times* – did <u>not</u> constitute "coupons" within the meaning of CAFA, 28 U.S.C. § 1712(a), and was therefore <u>*not*</u> "subject to the provision of the Class Action

[3] As this Court has recognized, the Ninth Circuit's 25% "benchmark [for awarding attorneys' fees under the percentage method] … can be adjusted upward … based on [among other things] … the awards made in similar cases." *See Alvarez v. Farmers Ins. Exch.*, 2017 WL 2214585, at *3 (N.D. Cal. Jan. 18, 2017) (Orrick, J.) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002)).

Fairness Act concerning settlement[s] involving coupons." *Id.* Ex 7, *Moses* Final Approval Hearing Tr. at 13. Accordingly, the *Moses* court assessed the access codes at their face value for the purpose of calculating total settlement value (and attorneys' fees, as a percentage of that total):

> [T]he Court does not agree that this case is subject to the provision of the Class Action Fairness Act concerning settlement involving coupons, 28 U.S.C. 1712(a).
>
> Although the Second Circuit has not interpreted the meaning of "coupon" in a published opinion, the vast majority of courts that have [interpreted the meaning of "coupon" under CAFA], including the Fourth, Sixth and Ninth Circuit Court of Appeals, as well as many judges in this district, have drawn a distinction between coupons which provided discount, and thus force the class member to purchase something from the defendant before receiving the promised benefit and relief, such as this, which provides an entire product free of charge.
>
> Indeed the Second Circuit affirmed the approval of a settlement by an SDNY court which found that relief substantially similar to that contemplated here, a month subscription to defendant's internet radio service did not qualify as a coupon. As a result, the Court will judge the propriety of the fee award as compared to the value of the entire settlement, including the access codes.

Id. Ex. 7, *Moses* Final Approval Hearing Tr. at 13-14 (emphasis added and internal citations omitted) (citing *In Re Online DVD-Rental Antitrust Litigation*, 779 F. 3d 934, 950-51 (9th Cir. 2015)); *see also id.* Ex. 6, *Moses* Final Approval Order at ¶ 16 (granting fees as requested, as percentage of total settlement value, including sum of non-reversionary cash settlement fund and cumulative face value of all Account Access Codes to be distributed to class members).

Likewise, the Settlement here does not implicate CAFA's restrictions on coupon settlements because the non-cash portion of the settlement fund – the "Automatic Account Credit Codes" – do *not* "force the class member to purchase something from the defendant before receiving the promised benefit and relief[.]" *Id*. Indeed, as in *Moses*, the Automatic Account Credit Codes here "provide[] an entire product free of charge," not merely a discount. *Id*. Additionally, the Automatic Account Credit Codes, like the product vouchers in *Moses*, feature a

long period of usability[4] and are freely transferrable, and like the *Moses* class members, Settlement Class Members here also had the choice to receive a *pro rata* cash payment from the Settlement Fund in lieu of the product vouchers by timely submitting a simple cash election form. *See* Settlement ¶ 2.2(f); 11/3/21 Klorczyk Decl. Ex. 6, *Moses* Final Approval Hearing Tr. at 6 ("In the first instance, [class members] had the option of getting cash. … Beyond that, the credits are freely transferable. They don't expire for a substantial period of time, and they are being given to active and inactive subscribers of New York Times. So a considerable portion of the class are still active subscribers, so this is something that, to them, should be viewed as good as cash.").[5]

Given the free transferability of the Automatic Account Credit Codes, the fact that the Codes do not expire, and the existence of a cash alternative, the Court should readily conclude that this is not a "coupon" settlement subject to CAFA. *See In re Online DVD-Rental*, 779 F.3d at 941 (affirming district court finding that "CAFA's coupon-settlement provisions should not apply because the Walmart gift cards were sufficiently different from coupons – especially given the fact that claimants could choose between gift cards and cash, the gift cards were freely transferrable, and they had no expiration date"); *see also Hendricks v. Ference*, 754 F. App'x 510, 512 (9th Cir. 2018) ("Virtually all of the factors identified in *Online DVD-Rental* weigh in favor of the district court's conclusion that the vouchers were not coupons under CAFA. The vouchers did not expire, they were freely transferrable, … and the vouchers had sufficient value that class members could use them to purchase tuna without additional out-of-pocket expense. … Accordingly, we affirm the district court's determination that the settlement was not subject to CAFA's coupon-settlement requirements."); *Williamson v. McAfee, Inc.*, 2017 WL 6033070, at *1 (N.D. Cal. Feb. 3, 2017); *Morey v. Louis Vuitton North America, Inc.*, 2014 WL 109194, *8 (S.D. Cal. 2014); *Fernandez v.*

[4] In fact, the Automatic Account Credit Codes available to Settlement Class Members here never expire, bringing the Codes closer to their cash equivalent than the vouchers at issue in *Moses*, which will expire 50 years after activation. *Compare* Settlement ¶ 2.2(f) *with* 11/3/21 Klorczyk Decl. Ex. 4, Plaintiff's Reply in Support of Motion for Final Attorneys' Fees in *Moses v. The New York Times Company*, No. 1:20-cv-04658-RA (S.D.N.Y.) ("*Moses* Fee Reply") at 3 ("[T]he 'Automatic Access Codes will not expire for at least 50 years and may be freely transferred[.]'") (citation omitted). Thus, Class Counsel's efforts in this case resulted in an exceptional recovery for the Settlement Class, and Class Counsel should be rewarded for achieving this result.

[5] Here, 183,775 of the 319,395 Settlement Class Members (or 57.5%) are active subscribers to the digital edition of *The Washington Post*. *See* Keough Decl. ¶ 7.

Victoria Secret Stores, LLC, 2008 WL 8150856, at *6 (C.D. Cal. July 21, 2008). Thus, for the purpose of calculating attorneys' fees as a percentage of total settlement value, the Automatic Account Credit Codes here, like the product vouchers at issue in *Moses*, should be treated like cash in an amount equivalent to their face value. *See* 11/3/21 Klorczyk Decl. Ex. 6, *Moses* Final Approval Hearing Tr. at 13-14.

B. *McKinney* Is Inapposite And Does Not Change Ninth Circuit Law

For the same reasons, the Ninth Circuit's recent decision in *McKinney-Drobnis v. Oreshack*, 2021 WL 4890277 (9th Cir. Oct. 20, 2021), is inapposite, and does not represent a fundamental change in the law. In *McKinney*, the Ninth Circuit reversed a district court's grant of final approval to a class-wide settlement under the ARL, pursuant to which class members could "submit claims for 'vouchers' for [defendant's] products and services" "[i]n exchange for the release of all claims[.]" *Id*. at *4. In granting final approval, the district court held that the settlement was not a "coupon" settlement subject to CAFA and therefore awarded fees based on a percentage of the total "face value of the vouchers claimed" ($10 million), rather than "the value of vouchers that class members ultimately redeem[ed]" (*i.e.*, the amount of vouchers distributed to class members, not just the value of such vouchers actually utilized by class members prior to expiration), overruling all objections to the contrary. *Id*. (internal footnote omitted). One of the 19 class member-objectors then timely appealed the district court's decision. *Id*. at *5, *6. On appeal, the Ninth Circuit found the settlement was a "coupon" settlement subject to CAFA, and therefore "vacate[d] and remand[ed] the district court's approval of the settlement and its fee award." *Id.* at *14.

This conclusion does not change or abrogate *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015). Rather, in *McKinney*, the Ninth Circuit applied the multifactor *Online DVD* framework, and the ultimate outcome of its assessment represents a *specific application* of this fact-intensive inquiry, and not a fundamental change in the law. *See id*. at *8 ("[W]e review [the district court's determination that the … vouchers are not coupons under CAFA] … using the *Online DVD* three-factor framework as a guide."). In doing so, the court's analysis focused on several "red-flag provisions [of the settlement agreement] and specific voucher

characteristics" agreed upon by the parties. *Id*. at *6, *14. For example, under the terms of the settlement, "[t]he voucher that each class member receives corresponds to the fee increase the class member paid[,]" with "the smallest voucher[providing a credit] in the amount of $36.28[.]" *Id*. at *3, *8. According to the court, class members receiving a voucher for this amount would have to either "hand over more of their own money before they can take advantage of [the] credit[,]" *id.* at *8, or else use the credit on a product that does not relate to the underlying harm alleged and that they likely do not want:

> [A] $36.28 voucher is not enough to purchase most of Massage Envy's services. Class members receiving the $36.28 voucher could not even purchase a single massage – the service that is the basis for the membership fee that class members were allegedly injured by – without spending their own money. Because the ability to get a massage (rather than ancillary products) is central to the membership program of Massage Envy, on balance we view this factor as favoring the conclusion that the vouchers are coupons.

Id. at *8 (emphasis added).

The Ninth Circuit also took issue with the fact that, "although the vouchers d[id] not expressly limit which [Massage Envy] products or services can be obtained using the vouchers, they are practically limited by the fact that [defendant] does not sell products online and not all [of the eligible] Massage Envy products and services are available at every Massage Envy location" – another characteristic that, according to the court, "favors viewing the vouchers as coupons under CAFA." *Id*. at *8. Additionally, the product vouchers of the *McKinney* settlement were to "expire after eighteen months[,]" which means that class members who have not utilized their vouchers by then will lose out on 100% of their face value. *Id*. at *3, *9. The Ninth Circuit also expressed concerns that the *McKinney* settlement "contain[ed] a 'reverter' or 'kicker' provision, which means that, if the court awards less than $3.3 million in fees, the excess funds revert to [defendant] rather than to the class." *Id*. at *4. According to the court, such provisions "provide warning signs of collusion" because they "increase the risk that class counsel will unreasonably raise the amount of requested fees, and the class members will have less incentive to push back because the recovery of any unawarded fees will inure to the benefit of the defendants, not the class members." *Id*. at *13.

Here, by contrast, the Automatic Account Credit Codes will never require class members to use their own money to redeem the free subscription benefits available under the Settlement. Rather, as noted above, the Settlement provides all Class Members who did nothing during the claims period with credits for completely "free access" to the appropriate WaPo Subscriptions. Settlement ¶ 1.8 (emphasis added); *see also id*. ¶ 2.2(e) ("No payment or billing information will be required for an Inactive Class Member to use the Automatic Account Credit Code."); *id*. Ex. E, Long Form Notice at 5 (noting that there will be "no expectation or obligation to continue using or paying the services beyond the free period"). *Cf. McKinney*, 2021 WL 4890277, at *9 ("Here, the [fact that] … the vouchers fail[ ] to allow most class members to buy massage services – [the defendant]'s flagship offering – without spending their own money … suggests that these vouchers should be viewed in law as coupons."). And unlike in *McKinney*, in this case there is a high nexus between the in-kind benefits and the nature of the harm alleged. That is, Settlement Class Members receiving the Automatic Account Credit Codes will gain up to eight weeks of free access to the appropriate digital WaPo Subscription – "the service that is the basis for the membership fee that class members were allegedly injured by – without spending their own money." *McKinney*, 2021 WL 4890277, at *8.

Moreover, here every Settlement Class Member had the option to submit a valid Claim Form and receive a pro rata cash payment from the Settlement Fund, in lieu of the Automatic Account Credit Codes. *See* Settlement ¶ 2.2(f). The *McKinney* settlement did not contain a cash component and class members therefore did not have an option to receive cash instead of the product vouchers. *See generally*, *McKinney*, 2021 WL 4890277. As this Court has noted, the fact that Class Members have an "option of obtaining cash instead of [Codes], undercut[s] the argument that the settlement forces [Class Members] to buy from the defendant." *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 837 (N.D. Cal. 2017) (Orrick, J.); *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015); *Cody v. SoulCycle Inc.*, 2017 WL 6550682, at *7 (C.D. Cal. Oct. 3, 2017); *Williamson v. McAfee, Inc.*, 2017 WL 6033070, at *1 (N.D. Cal. Feb. 3, 2017).

In addition, the Automatic Account Credit Codes, once distributed, can be utilized by Class Members online, from anywhere in the world. *See* Settlement ¶¶ 1.46, 2.2; *cf. McKinney*, 2021

WL 4890277, at *8 (noting that the "products or services can be obtained using the vouchers … are practically limited by the fact that [defendant] does not sell products online"). Further, the Automatic Account Credit Codes never expire, whereas the product vouchers from *McKinney* would "expire after eighteen months." *McKinney*, 2021 WL 4890277, at *3. As a result, the proposed Settlement here provides Class Members with more flexibility in how and when they use the Codes, and the lack of a deadline to redeem the Codes means they will retain their monetary value for as long as Class Members possess them. Finally, under no circumstances will any portion of the Settlement benefits revert to Defendant. Instead, as *cy pres*, funds for checks not cashed within 180 days of issuance shall revert to the Legal Aid Association of California, a 501(c)(3) entity, or, if it is unable to receive these funds, another California-based, non-sectarian, not-for-profit organization(s) with a similar mission recommended by Class Counsel and Defendant, and approved by the Court.

In sum, the above characteristics of the Automatic Account Credit Codes – namely, the fact that Class Members are never required (or even able) to pay additional monies out-of-pocket in order to take advantage of the subscription benefits, the existence of a *non-reversionary* $2.4 million cash settlement fund and the ability of Class Members to seek cash payments, and the transferability and non-expiration of the Automatic Account Credit Codes – distinguish the instant Settlement from the settlement in *McKinney* and others found to be "coupon" settlements subject to CAFA.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court: (1) approve attorneys' fees, costs, and expenses in the amount of $2,000,000.00, or approximately 29% of the settlement fund; (2) grant Ms. Jordan an incentive award of $5,000.00 in recognition of her efforts on behalf of the Class; and (3) award such other relief as the Court deems reasonable and just.

Dated: November 3, 2021

Respectfully submitted,

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