UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LORI COWEN et al.,	)	
Plaintiffs,	)	Case No. 1:17-CV-01530
v.	)	Judge Robert W. Gettleman
LENNY & LARRY'S, INC.,	)	Magistrate Young B. Kim
Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

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INTRODUCTION

The United respectfully submits the following Statement of Interest regarding the proposed class action settlement. The settlement before the Court has a purported $3.5 million value, but that amount disguises the limited benefits it actually offers to class members. In reality, the settlement's cash component will go almost entirely to class counsel, while the bulk of its non-monetary award will consist of free cookies the defendant plans to send to vendors across the country for distribution to whomever those vendors select. Both the Class Action Fairness Act and Federal Rule of Civil Procedure 23(e) demand careful scrutiny of all class action settlements and the invalidation of those that do not strike a fair balance between the interests of class counsel and the interests of class members. The proposed settlement is fatally lopsided. Indeed, it is difficult to imagine a less balanced settlement than one where most of the money goes to class counsel and administrative costs, while class members get far less than their counsel and the general public gets over $3 million in free cookies. The United States thus urges the Court to reject the proposed settlement as it is currently structured.

The United States receives notice of all proposed class action settlements under the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711–1715 ("CAFA"). While the United States does not share the parties' extensive knowledge of the record or the strengths and weaknesses of the claims, the Department of Justice's Consumer Protection Branch litigates on behalf of consumer interests and has relevant experience in bringing consumer harm to light and crafting appropriate remedies. After an examination of the proposed settlement and applicable law, the United States recommends rejecting the proposed settlement for two principal reasons.

First, the limited benefits offered to class members raise serious concerns about the fairness of the proposed settlement. Under the proposed settlement, class members will release all consumer-protection-related claims against the defendant in return for a share of a comparatively small, fixed amount of cash and a large *cy pres* distribution of free cookies to vendors who already sell defendant's

products and who will then give those cookies to whomever the vendors select. That distribution might have some minimal value to the general public, but it does not have any direct value for class members and thus creates only the illusion of "substantial" benefit to the class.

Second, while providing very little value to the class members whose claims it extinguishes, the proposed settlement provides considerable value to class counsel. Class counsel seeks $1.1 million in attorney's fees, which they purport to justify by claiming the settlement confers a $3.5 million "benefit" that will be distributed almost entirely as a *cy pres* award to non-class members. Counsel's outsized fee request is not commensurate with the relief they obtained for class members and is thus not fair and reasonable under CAFA or Rule 23(d). Accordingly, the Court should not approve the proposed settlement in its current form.

LEGAL STANDARD

I. Appearance of the United States

Congress has authorized the Attorney General to send "any officer of the Department of Justice . . . to any State or district in the United States to attend to the interests of the United States in a suit pending in a court in the United States." 28 U.S.C. § 517. CAFA requires class action defendants to notify the Attorney General and state officials of proposed class action settlements, a duty that contemplates a role in the settlement-approval process for the Attorney General. 28 U.S.C. § 1715. While the CAFA notice provision does not expressly grant specific authority or impose explicit obligations upon federal or state officials, 28 U.S.C. § 1715(f), the Act's legislative history shows that Congress intended the notice provision to enable public officials to "voice concerns if they believe that the class action settlement is not in the best interest of their citizens." The Class Action Fairness Act of 2005, S. Rep. No. 109-14, at 5 (2005) ("S. Rep."). Congress expected that CAFA notifications would "provide a check against inequitable settlements" and "deter collusion between class counsel

and defendants to craft settlements that do not benefit injured parties." S. Rep. at 35. The United States thus offers its views here.

II. Standard for Evaluating Class-Action Settlements

In determining whether to approve a settlement as "fair, reasonable, and adequate" under Rule 23(e)(2), a district court must consider the portion of the settlement that will go to attorney's fees. *See, e.g.*, 4 William B. Rubenstein, *Newberg on Class Actions* § 13:61, at 506 (5th ed. 2014) ("If the fees set in the settlement agreement appear unrealistically high, that provision casts doubt on the settlement."). This requirement is explicit in the recent amendments to Rule 23, which took effect on December 1, 2018. Fed. R. Civ. P. 23(e)(2)(A-D). Under Rule 23, courts evaluating a class action settlement must consider whether "the relief provided for the class is adequate, taking into account . . . the terms of any proposed award of attorney's fees." *Id.* at 23(e)(2)(C)(iii). The amended rule makes clear that the relief to the class "is a significant factor in determining the appropriate fee award." Fed R. Civ. P. 23(e)(2), Advisory Committee Note (2018 amendment).

In the Seventh Circuit, judges must "carefully examine proposed settlements for fairness," acting as a "fiduciary" for class members. *Leung v. XPO Logistics, Inc*, 326 F.R.D. 185 (N.D. Ill. 2018) (quoting *Reynold's v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002). Serving that role, courts are to "exercise the highest degree of vigilance in scrutinizing" a proposed class action settlement. *Reynold's*, 288 F.3d at 279. In examining fairness, "courts must consider "the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement." *Synfuel Techs, Inc. v. DHL Expresss (USA), Inc*, 463 F.3d 646, 653 (7th Cir. 2006) (citation and quotation omitted).

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Lenny & Larry's markets and sells "The Complete Cookie" on its website and in retail stores, such as GNC and The Vitamin Shoppe. *Compl.* (Dkt 1) ¶ 14. On February 28, 2017, plaintiffs filed a class action lawsuit against Lenny & Larry's alleging that the packaging and labeling for The Complete Cookie misstated the cookies' protein content. *Compl.* (Dkt 1) ¶ 14-18. Plaintiffs later amended their complaint to add claims related to other nutritional contents allegedly misrepresented on The Complete Cookie labeling. *Am. Compl.* (Dkt 33) ¶ 14. On defendant's motion to dismiss, the Court dismissed certain claims but allowed others to continue. *Opinion and Order* (Dkt 50). Plaintiffs then filed a second amended complaint asserting claims under a variety of statutes, including the Illinois consumer protection statute. *Second Am. Compl.* (Dkt 72). Following a 2017 mediation, the parties engaged in informal discovery and began settlement negotiations. *Id.* On October 25, 2018, the parties filed a joint motion for preliminary approval of the proposed settlement. *Joint Mot. for Settlement Approval* (Dkts 93, 94). The Court granted the parties' motion and scheduled a fairness hearing for March 19, 2019. *Second Am. Compl.* (Dkt 96).

The proposed settlement establishes a fund valued by the parties at $5 million total (the "Settlement Payment"). *Settlement Agreement* (Dkt 94-1) ¶ 11. Lenny & Larry's will fund the Settlement Payment with $1.85 million in cash and $3.15 million in free cookies. *Id.* As to the cash portion, Lenny & Larry's will pay class counsel up to $1.2 million in attorney's fees and less than $110,000 in litigation related expenses. *Id.* at 16-17. The company also will disburse $350,000 in notice and administration costs, and $7,500 in incentive awards to named plaintiffs. *Plaintiff's Fee Mot.* (Dkt 101) ¶ 2. Lastly, Lenny & Larry's will dispense $350,000 to class members to be distributed on a *pro rata* basis among all claimants. *Settlement Agreement* (Dkt 94-1) ¶ 14. Class members who opt for cookies rather than cash will receive up to $30 in free product. *Settlement Agreement* (Dkt 94-1) ¶ 15. Unclaimed

cookies will be distributed nationwide to retail locations as a free giveaway to whomever those retailers select. *Id.*

The settlement class consists of "all United States resident consumers who purchased one or more of Lenny & Larry's The Complete Cookie or other Lenny & Larry's baked goods products" at retail stores or online anytime up to the approval date of the final settlement. *Settlement Agreement* (Dkt 94-1) ¶ 10. Notice of the proposed settlement was provided through the Lenny & Larry's website, certain magazines, and social media banner ads. According to Class counsel, "class members submitted 90,566 claims to date." *Plaintiff's Fee Mot.* (Dkt 101) ¶ 2. Class members' claim submissions were divided into two categories: those with proof of purchase and those without. *Id.* at 3-4. Class members with proof of purchase had the choice of selecting a cash payment, not to exceed the greater of (i) the amount reflected on the proof of purchase up to $50 or (ii) $20. *Id.* Alternatively, class members could choose free cookies up to $30 in retail value. *Id.* at 4. Class members without proof of purchase were given the option of choosing a $10 cash payment or up to $15 in retail value of free cookies. *Id.* Based on the claims data, 90 percent of class members elected to receive cash, and just 10 percent chose cookies. This means over $3 million in free cookies will be distributed to retailers and given away to the general public at the retailers' discretion.

ARGUMENT

The Proposed Settlement Inflates the Value of the Benefit to Class Members and Provides Class Counsel with an Excessive Fee Award Based on the Inflated Value.

This Court should reject the proposed settlement because it directs the vast majority of the purported "class benefit" to non-class members and allocates the bulk of its cash award to attorney's fees—leaving far less for the class. Out of the total $5 million in value that the defendant agreed to pay, only about 13 percent will go directly to class members. More than three times that amount ($1.1 million) would be paid to class counsel, and more than eight times that amount (about $3 million in free cookies) would be distributed to random shoppers. This cookie giveaway does not benefit class

members at all; instead, it is effectively a promotional opportunity for Lenny & Larry's and their longstanding health food retailers to draw in consumers with free samples. The inequitable distribution proposed in the settlement agreement is not fair, reasonable, or adequate, Fed. R. Civ. P. 23(e)(2), and this Court should reject it.

A. Class Members Stand to Receive Only a Small Fraction of the Total Settlement Value.

The purported $3.5 million benefit to the class in the proposed settlement is a fiction. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014) (finding class benefit to be far less than its multi-million dollar valuation). According to claims data supplied by the parties, about 70,000 of the 90,000 claimants opted for a cash payment rather than free cookies. Because the cash settlement fund is capped at $350,000—even though over $1.5 million is set aside for fees and costs—the original payments that class members might have expected will be far less after a *pro rata* reduction. For example, a class member who submitted a claim with proof of purchase for $50 likely would receive roughly $25. A class member without proof of purchase seeking the standard $10 claim would instead receive about $5. This *pro rata* reduction "dramatically reduce[s]" the settlement's "apparent value." Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges 18 (3d ed. 2010) ("Rothstein et al.") (describing obstacles that diminish the settlement's value).

Rather than benefiting the class, most of the settlement's value will go to non-class members. Given current claims data, the settlement would direct about $3 million in free cookies to the general public through what amounts to a *cy pres* award.[1] While a *cy pres* award may increase the total size of the settlement fund, that increase is not tantamount to a benefit to the class. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (noting a *cy pres* distribution "may increase a settlement

[1] *Cy pres* is a "doctrine that permits a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent." *Pearson*, 772 F.3d at 784.

fund . . . without increasing the direct benefit to the class"). Indeed, the settlement agreement here is silent on how this free product distribution would benefit the class or reach any of the class members. "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

As the Seventh Circuit has explained, unclaimed funds of a class action "should be used for the class's benefit to the extent that is feasible." *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013) (discussing preferred methods for redistributing unclaimed funds). *Cy pres* awards may be appropriate when injured individuals are unlikely "to come forward and prove their claims or cannot be given notice of the case." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997) (citation and quotation omitted). In this case, however, 90,000 class members came forward to submit claims. The parties know who these claimants are, and the defendant has a shipping and delivery mechanism ready to distribute cookies to those people. A further distribution of cookies—or simply cash, as 90 percent of the claimants preferred—to actual class members rather than retail stores would unquestionably be feasible.

Rather than convey the bulk of its benefit to class members, the proposed settlement appears to be a marketing campaign to distribute defendant's cookies to the public. At present, the Defendant plans to distribute its cookies to stores such as GNC and The Vitamin Shoppe, where the defendant's products are typically sold. The retailers "will provide one free cookie package per customer, no purchase necessary." *Settlement Agreement* (Dkt 94-1) ¶ 14. Much like the coupon settlement the Seventh Circuit rejected in *Redman v. RadioShack Corp.*, the *cy pres* award here has the effect of "boosting [defendant's] business" by attracting new customers, re-activating old ones, and enticing customers to try related or additional products. *See Redman v. RadioShack Corp*, 768 F.3d 622, 631-32 (7th Cir. 2014). A general cookie distribution does nothing for the class, but it does advance Lenny and Larry's "goodwill" and business interests. *See* Rhonda Wasserman, *Cy Pres In Class Action Settlements*, S. CAL.

L. REV., Vol. 88, p. 120, (2014) (explaining how *cy pres* distributions "serve the defendant's interest at the expense of the class").

In short, the settlement's value to the class is, at most, $350,000 in cash and another approximately $113,000 in cookies—a long way from the $3.5 million value the parties have assigned to the settlement. That is not fair, reasonable, or adequate, particularly when the settlement includes an additional $1.5 million that could be allocated to the class rather than to attorney's fees and costs. For that reason, the Court should reject the settlement.

B. Class Counsel's Fee Request is Unreasonable Compared to the Limited Benefits Offered to Class Members.

The proposed settlement also contemplates a $1.1 million fee award that is unreasonable in light of the limited benefit to class members. Class counsel assert that this exorbitant fee award is justified by a "substantial" $3.5 million benefit to the class, *Plaintiff's Mot. for Fees* (Dkt 101) at 1, but that number is grossly inflated. As explained above, the vast majority of that "value" will go to the general public, with only about $463,000 in cash and cookies going to actual class members. This $1.1 million fee request for class counsel is plainly not proportional to the under $500,000 benefit going to their class-member clients.

The Seventh Circuit has made clear that courts must carefully scrutinize a proposed settlement's value "to the class and the reasonableness of the agreed-upon attorneys' fees for class counsel." *Redman*, 768 F.3d at 629. In assessing the reasonableness of class counsel's fees, "the central consideration" is class counsel's accomplishments for the class rather than counsel's efforts invested in litigation. *Id.* at 633. Thus, the relevant ratio for calculating attorney's fees is "(1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (7th Cir. 2014) (citation and internal quotation omitted). *Cy pres* awards, incentive awards, and administration and notice costs are excluded from this calculation because they do not directly benefit the class. *Id.* at 781-84.

Here, class counsel claims that its "requested fee of $1,100,000 represents 24% of the net settlement ($1,100,000 divided by $4,600,000)."[2] *Plaintiff's Motion for Fees* (Dkt 101) p. 6. This calculation misapplies the *Pearson* ratio and ignores precedent requiring that *cy pres* be excluded from the fee tabulation. While counsel correctly deducted administration costs and incentive awards from the value to the class, counsel incorrectly included the face value of the free cookies going to the general public. The Seventh Circuit has stressed that in determining the benefit to the class, *cy pres* awards are excluded "for the obvious reason that the recipient of that award was not a member of the class." *Pearson*, 772 F.3d at 781. As another court in this Circuit recently emphasized, class counsel's fees must "be calculated on the benefit the clients actually receive." *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 201 (N.D. Ill. 2018).

Based on claims data, about 7,400 class members in this case submitted claims for $113,000 worth of the free product. The more than $3 million in unclaimed free product that will be distributed to non-class members does not benefit the class and thus must be subtracted from class counsel's fee calculation. *See Pearson*, 772 F.3d at 781 (agreeing with district court's decision to exclude a *cy pres* award from the benefit calculation); *see also*, *e.g.*, *In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp.3d 781, 795 (N.D. Ill. 2015)(explaining *cy pres* awards are not "included in the court's assessment of the settlement's value to the class"). A more accurate calculation shows that class counsel's fee request is, in reality, an outlandish *70 percent of the net settlement*—not the 24 percent they suggest to the Court.[3] Thus, class counsel's requested fees far exceed the maximum amount this

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[2] Counsel calculated the $4,600,000 as $1,100,000 (attorney's fees) + $3,150,000 (free cookies), + $350,000 (cash).

[3] Using the ratio described in *Pearson*, the 70 percent is calculated as $1,100,000 (attorney's fees) ÷ $1,563,000 ($1,100,000 in attorney's fees, $350,000 in cash, and $113,000 in free product).

Circuit's precedent allows. As the Seventh Circuit explained in *Pearson*, "attorney's fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel." *Pearson*, 772 F.3d at 782. Using those ratios, and assuming the Court found the settlement to be fair, reasonable, and adequate overall, the fee range here would more appropriately be somewhere between $228,000 and $463,000.[4]

CONCLUSION

The proposed settlement, combined with the unopposed attorney's fee request, would reward class counsel handsomely for securing a "benefit" that, to the extent it has any value beyond its capped $350,000 cash award, will allocate that value almost entirely to non-class members. Under CAFA and Rule 23(e), this court has an independent obligation to carefully assess proposed class action settlements to determine whether the result for class members is fair, reasonable, and adequate. The settlement here fails that assessment and this Court should accordingly reject it.

February 15, 2019

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[4] The 33 percent figure is based on the ratio: $228,000 ÷ $691,000 ($228,000 in attorney's fees, $350,000 in cash, and $113,000 in free product). The 50 percent figure is based on the ratio: $463,000 ÷ $926,000 ($463,000 in attorney's fees, $350,000 in cash, and $113,000 in free product)

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CERTIFICATE OF SERVICE

I certify that on this 15th day of February, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Illinois using the CM/ECF system. All counsel will be notified through that system.

s/Kendrack D. Lewis
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