UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: **CV 15-05005 SJO (MRWx)** **DATE:** **October 27, 2016**

TITLE: **Horosny et al. v. Burlington Coat Factory of California, LLC**

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANT:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR CERTIFICATION OF SETTLEMENT CLASS [Docket No. 61]

This matter is before the Court on Plaintiffs James Horosny ("Horosny") and Jennifer Price's ("Price") (together, "Plaintiffs") Unopposed Motion for Preliminary Approval of Class Action Settlement and Motion for Certification of Settlement Class ("Motion"), filed September 20, 2016. Defendant Burlington Coat Factory of California, LLC ("Burlington") has not opposed the Motion. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for October 31, 2016. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **DENIES** Plaintiffs' Motion.

I. FACTUAL AND PROCEDURAL HISTORY

This putative class action centers on allegations that Burlington misleads its customers through the use of price tags that contain a "Compare" price that is higher than the price listed as the sale price, but that is untethered to any real-world prices and lacks disclosures required under California law.

A. Allegations in Plaintiffs' Second Amended Complaint

Plaintiffs allege the following in their Second Amended Complaint ("SAC"), filed February 26, 2016. Horosny is and at all relevant times was a resident of Los Angeles County, California, while Price is and at all relevant times was a resident of San Diego County, California. (SAC ¶¶ 8-9, ECF No. 44.) Burlington is a limited liability company organized under the laws of the State of California with its principal place of business in Burlington, New Jersey, and conducts substantial business on a regular and continuous business in this State. (SAC ¶ 10.)

All items offered for sale at Burlington's California stores are displayed with a price tag which provides two prices: "the Burlington sale price, and another significantly higher price described

simply as the 'Compare' price." (SAC ¶ 16.) Burlington uses materially similar price tags at all of its stores throughout California. (SAC ¶ 17.) Burlington does not provide an explanation "of what the word 'Compare' means, or [ ] any information about the comparative price other than the dollar amount and the word, 'Compare.'" (SAC ¶ 18.) Consumers are "simply presented with the [two] prices (the sale price, and the higher 'Compare' reference price), left to guess what the 'Compare' price is, and are led to believe that they are actually saving the difference between the [two] prices." (SAC ¶ 18.) Neither Burlington's price advertisements nor the price tags disclose "where [Burlington] came up with the 'Compare' price." (SAC ¶ 55.) "Burlington also labels many of its products with a second price tag that purports to be the original price tag and which lists a manufacturer's suggested retail price, or 'MSRP.'" (SAC ¶ 19.) Burlington "does not provide any qualifying disclosure informing consumers of what its 'Compare' prices are, or what consumers are supposed to 'compare' [Burlington's] products and/or prices to." (SAC ¶ 66.)

Burlington "has not . . . verified" and was "not reasonably certain that the higher prices it advertised did not appreciably exceed the prices at which substantial sales of the items were being made in California." (SAC ¶¶ 36, 42 (emphasis omitted).) Moreover, "the 'Compare' reference prices . . . were significantly in excess of the highest prices at which substantial sales of those products were made in California." (SAC ¶ 43 (emphasis omitted).) Burlington "did not ascertain whether the 'Compare' prices on its price tags, including those alleged to be MSRPs, were in fact the prices regularly charged by a substantial number of principal outlets in California, or whether its 'Compare' prices were prices at which substantial sales of such products were made in California." (SAC ¶ 44 (emphasis omitted).) Burlington "does not have sufficient evidence to substantiate the validity of its 'Compare' reference prices." (SAC ¶ 31.) Instead, Burlington simply "make[s] up prices which it claims other merchants charge for those products, and then claims that its own prices are significantly lower. . . ." (SAC ¶ 46.)

Plaintiffs, "like all reasonable consumers," reasonably believed that the "Compare" prices "represented the prices that they would expect to pay for the same products at other retailers in their general area." (SAC ¶ 50.) Plaintiffs relied on Burlington's comparative price representations when purchasing merchandise from Burlington's stores. (SAC ¶ 61.) The "Compare" prices "were not the then prevailing retail prices for the products that they purchased from Burlington." (SAC ¶ 51.)

During the relevant time period, Plaintiffs purchased apparel items from Burlington's stores in California. (SAC ¶¶ 12-13.) For example, on October 23, 2014 Horosny purchased nine items from Burlington's West Hills, California store "for a total cash payment of $158.94," each of which "was affixed with a price tag which contained the untrue, deceptive, and/or misleading 'Compare' price representations." (SAC ¶ 116.) Price, meanwhile, purchased an unspecified number of items during the relevant period from Burlington's store on Claremont Mesa Boulevard, each of which contained a price tag with the "Compare" prices. (SAC ¶¶ 127-128.)

Plaintiffs assert the following five causes of action against Burlington in their SAC: (1) unfair business practices in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (2) fraudulent business practices in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (3) unlawful business practices in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (4) false advertising in violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.*; and (5) violation of Cal. Civ. Code §§ 1750, *et seq.* ("CLRA"). (*See generally* SAC.)

Plaintiffs bring the instant action on behalf of themselves and of all other persons similarly situated, namely:

> All persons who, while in the State of California, and between July 1, 2011, and the present (the "Class Period"), purchased from Burlington Coat Factory one or more items at any Burlington Coat Factory store in the State of California with a price tag that contained a "Compare" price which was higher than the price listed as the Burlington sale price on the price tag, and who have not received a refund or credit for their purchase(s). Excluded from the Class are Defendants, as well as Defendants' officers, employees, agents or affiliates, and any judge who presides over this action, as well as all past and present employees, officers and directors of any Defendant.

(SAC ¶ 130.)

B. Procedural Background

Plaintiffs commenced the instant action on July 1, 2015, and noted six related cases pending in the Central District of California against retailers Ross Stores, Inc., DSW Shoe Warehouse, Inc., Stein Mart, Inc., TJ Maxx of CA, LLC., Marshalls of CA, LLC, and HomeGoods, Inc. (Compl., ECF No. 1; Notice of Related Cases, ECF No. 10.) Plaintiffs filed their First Amended Complaint ("FAC") on September 17, 2015, and Burlington shortly thereafter filed a motion to dismiss the FAC. (FAC, ECF No. 15; Mot. to Dismiss Case, ECF No. 16.) The Court denied Burlington's motion to dismiss in its entirety on October 26, 2015, and Burlington filed an Answer to the FAC on November 5, 2015. (Order Den. Mot. to Dismiss, ECF No 30; Answer to FAC, ECF No. 32.) The Court held a scheduling conference on December 14, 2015 during which it set a trial date of October 25, 2016 and a deadline for Plaintiffs to file a motion for class certification of March 14, 2016. (Minutes of Scheduling Conference, ECF No. 36.)

Over the next several months, the parties lodged a number of stipulations to continue relevant pretrial dates, and Plaintiffs filed their SAC. (*See, e.g.*, Stip. for Extension of Time to File Mot. for Class Certification, ECF No. 37; Stip. For Extension of Time to File Preliminary Approval of Class Action Settlement Papers, ECF Nos. 45, 47; SAC.) Plaintiffs filed their first motion for preliminary approval of class action settlement on May 9, 2016, including several declarations and a copy of

the proposed Settlement Agreement. (*See* First Mot. for Prelim. Approval, ECF No. 52.) The Court denied this motion without prejudice in a minute order dated June 9, 2016, citing concerns regarding (1) whether the proposed notice plan provides the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts," Fed. R. Civ. P. 23(c)(2)(A); and (2) "whether the terms of the parties' settlement appear fair, adequate, and reasonable," *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 664 (E.D. Cal. 2008). (Order Den. First Mot. for Prelim. Approval, ECF No. 53.) The Court set a deadline by which Plaintiffs could file a renewed motion, and instructed them to address a number of issues. (*See* Order Den. First Mot. for Prelim. Approval.) Plaintiffs filed the instant Motion on September 20, 2016. (Mot., ECF No. 61.)

II. DISCUSSION

Federal Rule of Civil Procedure 23(e) ("Rule 23(e)") provides that "[t]he claims, issues, or defenses of a . . . class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). "Approval under [Rule] 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 525 (C.D. Cal. 2004). The Ninth Circuit has held that there is a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992) (citations omitted); *see also Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976) (stating that "there is an overriding public interest in settling and quieting litigation," and this "is particularly true in class action suits") (footnote omitted). It is also true, however, that "[i]n the settlement context, the court must pay 'undiluted, even heightened, attention' to class certification requirements because the court will not have the opportunity to adjust the class based on information revealed at trial." *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC (RNBx), 2014 WL 360196, at *1 (C.D. Cal. Jan. 31, 2014) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 952-53 (9th Cir. 2003)).

The Court must therefore evaluate the adequacy of the Amended Settlement Agreement in light of Rule 23(e). *See id.* "Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the 'universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable.'" *Class Plaintiffs,* 955 F.2d at 1276 (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983)).

Because the purpose of this Order is to determine whether preliminary settlement approval should be given, "the court will only determine whether a proposed class action settlement deserves preliminary approval and lay the ground work for a future fairness hearing." *Alberto v. GMRI, Inc.,* 252 F.R.D. 652, 659 (E.D. Cal. 2008) (quoting *DIRECTV*, 221 F.R.D. at 525) (internal quotation

marks and original formatting omitted). "At the fairness hearing, after notice is given to putative class members, the court will entertain any of their objections to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement." *Alberto,* 252 F.R.D. at 659 (citation omitted). "Following the fairness hearing, the court will make a final determination as to whether the parties should be allowed to settle the class action pursuant to the terms agreed upon." *Id.* (citing *DIRECTV, Inc.*, 221 F.R.D. at 525). Overall, "[t]he initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." *Officers for Justice*, 688 F.2d at 625.

A. Certification of the Class

"In order to approve a class action settlement, a district court must first make a finding that a class can be certified." *Vasquez v. Coast Valley Roofing, Inc.,* 266 F.R.D. 482, 485-86 (E.D. Cal. 2010) (citing *Molski v. Gleich*, 318 F.3d 937, 943, 946-50 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.,* 603 F.3d 571, 617 (9th Cir. 2010). Pursuant to Rule 23, "approval of the class is appropriate where the plaintiff establishes the four prerequisites of [Rule] 23(a)—(1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation—as well as one of the three requirements of Rule 23(b)." *Id.* at 486 (citing *Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 365 (D. Ariz. 2009)).

Here, the proposed class is comprised of all persons who purchased one or more products that were advertised with a "Compare at" price and an "Our Low" price, or simply a lower price, either at a California Burlington store or on Burlington's e-commerce website between July 1, 2011 and the date preliminary approval is granted. (Decl. Christopher J. Morosoff in Supp. Mot. ("Morosoff Decl."), Ex. A ("Amended Settlement Agreement" or "ASA") ¶ I(E).) Excluded from the Class are the Court and officers and directors of Burlington and its corporate parents, subsidiaries, affiliates, or any entity in which Burlington has a controlling interest, and the legal representatives, successors, or assignees of any such excluded persons or entities. (ASA ¶ 1(E).) The Court now examines whether this proposed class complies with the requirements of Rule 23(a) and (b).

1. Numerosity

A proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members." *Vasquez*, 266 F.R.D. at 486 (citing *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y.1998)). Here, Plaintiffs aver that Burlington has identified approximately 3.7 million persons meeting the proposed class definition, easily exceeding the number ordinarily found to satisfy the numerosity requirement. (Morosoff Decl. ¶ 25.)

Plaintiffs seeking certification must also establish impracticability of joinder. A court should consider "not only the class size but other factors as well, including the geographic diversity of

class members, the ability of individual members to institute separate suits, and the nature of the underlying action and the relief sought." *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986). The limited size of any individual plaintiff's recovery is also relevant. *See Edmondson v. Simon*, 86 F.R.D. 375, 379 (N.D. Ill. 1980). In this case, where the potential recovery by any individual member of the potential class is presumably relatively small, as evidenced by the proposed $7.50 recovery per potential class member, the Court finds that individual members of the proposed class would likely be unwilling or unable to institute separate lawsuits. Moreover, the filing of individual suits by millions of separate plaintiffs would create an enormous burden on judicial resources.

In sum, the Court finds the numerosity requirement of Rule 23(a)(1) easily satisfied.

2. Commonality

Rule 23(a) also demands "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy the commonality requirement, plaintiffs' "claims must depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, —, 131 S. Ct. 2541, 2551 (2011). "This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013), *cert. denied*, — U.S. —, 135 S. Ct. 53 (2014) (emphasis and internal quotation marks omitted). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

"District courts in California routinely certify consumer class actions arising from alleged violations of the CLRA, FAL and UCL." *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 480 (C.D. Cal. 2012) (collecting cases). This is one of those "routine" cases. Although only one common question of law or fact is needed, this case presents a number of common questions of law or fact that "drive the resolution" of the claims of the putative class. For example, common questions include, but are not limited to: (1) whether Burlington's price-comparison advertising scheme was false or misleading within the meaning of the UCL, FAL, or CLRA; (2) whether Burlington made false statements in its advertisements; (3) whether Burlington's "Compare" advertisements were likely to deceive a reasonable consumer; and (4) whether Burlington's statements regarding its pricing were material to putative class members' purchasing decisions. *See, e.g.*, *Spann v. J.C. Penney Corp.*, 307 F.R.D. 508, 518 (C.D. Cal. 2015). Accordingly, the Court finds the commonality requirement of Rule 23(a)(2) satisfied.

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3. Typicality

Typicality requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of this requirement "is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (internal quotation marks omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (internal quotation marks omitted) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

Here, Plaintiffs' claims are based on the same legal and remedial theories as those of the putative class members. The claims of Plaintiffs and of any purported class member arise from the same course of events; namely, Burlington's allegedly misleading comparative price advertisements. Thus, the Court finds the typicality requirement of Rule 23(a)(3) satisfied.

4. Adequacy

Rule 23(a)(4) permits certification of a class action if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit applies a two-prong test to determine whether representation meets this standard: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (quoting *Hanlon*, 150 F.3d at 1020).

Here, Plaintiffs have no known interests antagonistic to the interests of other putative class members. (Morosoff Decl. ¶ 20.) Moreover, to the extent the proposed $7,500 incentive award to each of Horosny and Price contemplated in the Amended Settlement Agreement can be viewed as creating disparate interests in the outcome of the litigation, not every conflict of interest between a class representative and class members prevents satisfaction of the adequacy prong; instead, only a fundamental conflcit that goes to the heart of the litigation prevents certification, and speculative conflicts must be disregarded at the certification stage. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 3.26, at 3-143 (3d ed. 1992). As is discussed in more detail in Section II(C)(3), *infra*, the Court finds the two contemplated $7,500 incentive awards to be fair, reasonable, and appropriate compensation for the efforts expended by Plaintiffs prosecution this action, rather than indicia of a fundamentally disparate interest between them and other putative class members.

The Court likewise finds no evidence that Plaintiffs or their attorneys have not vigorously litigated this action, as they reached a proposed settlement that seeks to provide north of $27 million to approximately 3.7 million individuals who were allegedly harmed by Burlignton's advertising

practices, and also would result in injunctive relief. Plaintiffs' counsel appear to be experienced class action litigators who were certified as class counsel in a similar false price advertising case. (Morosoff Decl. ¶¶ 4-5; Decl. Douglas Caiafa in Supp. Mot. ("Caiafa Decl.") ¶ 2.) The Court thus finds that Plaintiffs and their attorneys have served and would continue to serve as adequate representatives in this action.

5. Certification Under Rule 23(b)(3)

"In addition to fulfilling the four prongs of Rule 23(a), the proposed class must also meet at least one of the three requirements listed in Rule 23(b)." *Spann v. J.C. Penney Corp.*, 307 F.R.D. 514 (C.D. Cal. 2015) (citing *Dukes*, 564 U.S. at —, 131 S. Ct. at 2548). Here, Plaintiffs seek conditional class certification under Rule 23(b)(3), (*see* Mot. 21-25), which requires the court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3).

"A court evaluating predominance and superiority must consider: (1) 'the class members' interests in individually controlling the prosecution or defense of separate actions;' (2) 'the extent and nature of any litigation concerning the controversy already begun by or against class members;' (3) 'the desirability or undesirability of concentrating the litigation of the claims in the particular forum;' and (4) 'the likely difficulties in managing a class action.'" *Spann*, 307 F.R.D. at 519 (quoting Fed. R. Civ. P. 23(b)(3)).

a. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623. "Though there is substantial overlap between [the Rule 23(a)(2) commonality test and the Rule 23(b)(3) predominance test], the Rule 23(b)(3) test is far more demanding[.]" *Wolin*, 617 F.3d at 1172 (internal quotation marks omitted). The "focus is on the relationship between the common and individual issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (internal quotation marks omitted). "[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (internal quotation marks omitted).

As noted above, Plaintiffs assert the following causes of action in their SAC: (1) unfair, fraudulent, and unlawful business practices in violation of the Unfair Competition Law ("UCL"); (2) false advertising in violation of California's False Advertising Law ("FAL").; and (3) violation of the CLRA. (*See generally* SAC.) The Court must address the elements of each asserted cause of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, — U.S. —, 131 S. Ct. 2179, 2184 (2011)

("Considering whether questions of law or fact common to class members predominate begins . . . with the elements of the underlying cause of action.") (internal quotation marks omitted).

i. UCL Claims

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. As to the unfair and fraudulent prongs, which Plaintiffs assert here, because the UCL is intended to deter unfair business practices, "relief under the UCL is available without individualized proof of deception, reliance, and injury." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011), *cert. denied*, — U.S. —, 132 S. Ct. 1970 (2012). "A claim under the UCL based on false advertising or promotional practices requires that a plaintiff only 'show that members of the public are likely to be deceived' by the defendant's conduct." *Spann*, 307 F.R.D. at 521 (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 312, 93 Cal. Rptr.3d 559 (2009)). "'Likely to deceive' . . . indicates that the ad[vertisement] is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508, 129 Cal. Rptr. 2d 486 (2003). Because no individualized proof of deception, reliance, and injury is required, the Court can determine whether a violation of the UCL occurred without "separate adjudication of each class member's individual claim or defense." *Zinser*, 253 F.3d at 1190. The Court therefore finds the predominance inquiry satisfied with respect to Plaintiffs' UCL claims.

ii. FAL Claim

Under the FAL, "[i]t is unlawful for any person . . . to make or disseminate . . . [an advertisement] . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading[.]" Cal. Bus & Prof. Code § 17500. Courts often find that common questions predominate in FAL actions because they call for analysis under an objective reasonable person test. *See Tait*, 289 F.R.D. at 481 (collecting cases). This case is no different, and the Court finds that the common question of whether Burlington's price comparison scheme generated false advertisements that deceived consumers predominates under section 17500 of the FAL.

iii. CLRA Claim

The CLRA broadly prohibits "unfair methods of competition and unfair or deceptive acts or practices[.]" Cal. Civ. Code § 1770(a). Specifically, it prohibits "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions." Cal. Civ. Code § 1770(a)(13). In general, to bring a CLRA claim, aplaintiff must show that: (1) the defendant's conduct was deceptive; and (2) that the deception caused defendant to be harmed. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011). In the class context, a CLRA claim "requires each class member to have an actual injury caused by the unlawful practice." *Id.*

California courts often find predominance satisfied in CLRA cases because "causation, on a classwide basis, may be established by materiality, meaning that if the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class [.]" *Tait*, 289 F.R.D. at 480 (internal quotation marks and emphasis omitted) (collecting cases). A misrepresentation is material if "a reasonable man would attach importance to its existence or nonexistence in determing his choice of action in the transaction in question[.]" *Stearns*, 655 F.3d at 1022 (internal quotation marks omitted). "If the misrepresentation . . . is not material as to all class members, the issue of reliance would vary from consumer to consumer and the class should not be certified." *Id.* at 1022-23 (internal quotation marks omitted).

Here, as in *Spann*, common questions with respect to both Burlington's allegedly deceptive conduct and materiality predominate over individual questions of reliance. *See Spann*, 307 F.R.D. at 522-23.

b. Superiority

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy. Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010) (citation and internal quotation marks omitted). "In cases in which plaintiffs seek to recover relatively small sums and the disparity between litigation costs and the recovery sought may render plaintiffs unable to proceed individually, '[c]lass actions may permit the plaintiffs to pool claims which would be uneconomical to bring individually.'" *Spann*, 307 F.R.D. at 531 (quoting *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir.), *cert. denied*, 534 U.S. 973, 122 S. Ct. 395 (2001) (further finding that "[i]f plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover") (internal quotation marks and alteration omitted)).

Because the amounts that members of the putative class would stand to recover by litigating their claims on an individualized basis appears to be relatively small, and because any member of the class who wishes to control his or her own litigation may opt out of the class, *see* Fed. R. Civ. P. 23(c)(2)(B)(v), the Court finds that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3).

6. Conclusion Regarding Conditional Class Certification

For the foregoing reasons, the Court finds that conditional certification of the following class under Rule 23(b)(3) is appropriate for the purpose of settlement:

All persons who purchased on or more product(s) that were advertised with a "Compare at" price and an "Our Low" price or simply a lower price at one of Burlington's stores in California and/or on its e-commerce website and had product(s) shipped to a California address between July 1, 2011 and the date of this Order. Excluded from the Class are: (a) officers and directors of Burlington and its corporate parents, subsidiaries, affiliates, or any entity in which Burlington has a controlling interest, and the legal representatives, successors, or assignees of any such excluded persons or entities; and (b) the Court.[1]

B. Notice to Class Members

Where, as here, a class is conditionally certified pursuant to Rule 23(b)(3), Rule 23(c)(2), in turn, requires the Court to direct to Class Members the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(A). The notice must "clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner of requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B).

The Class is comprised of two categories of Class Members: Known Class Members—i.e., Class Members for whom Burlington has a name and valid home and/or email address and whose Merchandise Certificate and Post-Card Notice is not returned as undeliverable—and Unknown Class Members—i.e., Class Members for whom Burlington does not have a valid home address and/or email address or whose Merchandise Certificate and Post-Card Notice is returned as undeliverable. (ASA ¶¶ I(U), (V).) The Amended Settlement Agreement contemplates different forms of notice for these two types of Class Members.

No later than thirty (30) days after the Court preliminarily approves the Settlement, the Claims Administrator, KCC, LLC ("KCC") will either (1) mail each of the approximately 3.55 million **Known Class Members** a Merchandise Certificate and Post-Card Notice via U.S. Mail using the mailing address information obtained from Burlington's databases; or (2) email a Merchandise Certificate and Email Notice to such Class Members where Burlington has valid email address(es) in its databases. (ASA ¶¶ I(G), III(M)(2)(a); Morosoff Decl. ¶ 25; Supp'l Burke Decl. ¶¶ 15-16.) These individuals' contact information is stored in a Burlington database based on transactions records,

[1] The Court hereinafter refers to persons meeting this description as the "Class" or "Class Members."

which covers the period from July 3, 2011 to January 28, 2015. (Decl. Marisa Miloszewski in Supp. Mot. ("Miloszewski Decl.") ¶ 8.) Although the Court initially expressed its reservation with giving Burlington the sole option to choose email or physical mail, the Amended Settlement Agreement provides that notice will be sent via email to those Known Class Members for whom Burlington has email addresses, and via mail only to those Known Class Members for whom Burlington has a mailing address but no email address. (ASA ¶ III(M)(2)(a).)

The **Post-Card Notice** and **Email Notice** will be substantially in form of Exhibits A and F, respectively, to the Amended Settlement Agreement, and provide instructions regarding how a Known Class Member may either opt out of the Settlement or voice an objection. (ASA ¶ III(M)(2)(a), Exs. A, F.) KCC estimates that email addresses are available for approximately 401,500 class members, and postal addresses are known for approximately 3,152,500 other Known Class Members. (*See* Decl. Daniel Burke in Supp. First Prelim. Approval Mot. ("First Burke Decl.") ¶ 15; Supp'l Burke Decl. ¶¶ 15-16.) Prior to mailing, each address will be checked against the National Change of Address ("NCOA") database, certified via the Coding Accuracy Support System ("CASS") and verified through Delivery Point Validation ("DPV"). (Supp'l Burke Decl. ¶ 17.) Notices returned as undeliverable will be re-mailed to any address available through postal service information, although no "skip-tracing" will be performed using a paid service. (Supp'l Burke Decl. ¶ 18.) KCC estimates that individual notice will reach approximately 85.4% of the Class, or approximately 3,158,486 Class Members. (Supp'l Burke Decl. ¶ 19.)

The scheme is more complicated for **Unknown Class Members**, of whom there are an estimated 145,000. (Morosoff Decl. ¶ 25.) No later than thirty (30) days after the Court preliminarily approves the Settlement, Burlington will post in each of its California stores a "clear and conspicuous copy" of the **Summary In-Store Notice**, substantially in the form attached as Exhibit C, which contains instructions for Unknown Class Members to submit a claim, opt out, or object. (ASA ¶ III(M)(3)(a), Ex. C.) The Summary In-Store Notice will be approximately 22"x28" and will remain posted for at least thirty (30) days. (ASA ¶ III(M)(3)(a); Decl. Elizabeth Trivino-Velasco in Supp. Mot. ("Trivino-Velasco Decl.") ¶ 2, Ex. A.) Also within thirty (30) days of receiving preliminary approval, KCC will run a **Summary Publication Notice**, substantially in the form attached as Exhibit E, in a quarter-page advertisement in the San Francisco and Los Angeles regional editions of USA Today, which together cover the entire state of California. (ASA ¶ III(M)(3)(b), Ex. E; Supp'l Burke Decl. ¶ 20.) KCC will submit a weekly status report informing Plaintiffs' counsel and Burlington's counsel of timely Elections Not to Participate in Settlement that it receives, as well as the names of such Non-Participating Class Members. (ASA ¶ III(M)(3)(b).)

Also within thirty (30) days of receiving preliminary approval, the Claims Administrator will establish a toll-free number and create and maintain a settlement website at bcfpricingclasssettlement.com containing the **Class Notice** and **Claim Form**, substantially in the

form of Exhibits B and D, respectively, which will be maintained until the Effective Date.[2] (ASA ¶ III(M)(3)(c), Exs. B, D; Supp'l Burke Decl. ¶¶ 21-22.) Although Claim Forms can be downloaded from this website, they cannot be submitted online by Unknown Class Members. (ASA ¶ III(M)(3)(c).) Instead, Claim Forms must be physically mailed within ninety (90) days after notice is disseminated, as determined by the date of postmarking. (ASA ¶ III(M)(5).) The Claims Administrator may review submitted Claim Forms and request additional information or documentation to determine the validity of any claim. (ASA ¶ III(M)(5).) Burlington will also have a ten-day opportunity to review submitted Claim Forms "to confirm that information submitted by the Unknown Class Member is consistent with the information in [Burlington's] databases." (ASA ¶ III(M)(5).) Claimants will have fourteen (14) days from the date of a notice of deficiency to cure any defect(s), submit additional information, and return a corrected Claim Form. (ASA ¶ III(M)(5).) Moreover, Plaintiffs submit that allowing Claim Forms to be submitted online would materially increase the risk of fraud in the claims process and also increase administrative costs, which the Court finds to be reasonable. (Mot. 17.)

In denying Plaintiffs' initial motion for preliminary settlement approval, the Court questioned why the nature and importance of the "Compare" price tag was not specified on the Class Notice. In response, Plaintiffs have revised the Class Notice, replacing the sentence "[t]he lawsuit alleges that Defendant misled shoppers by using comparative reference prices of products sold at its California stores and/or on its website and by failing to disclose its pricing practices to customers" with the following language:

> The Plaintiffs in the lawsuit allege that Burlington used "Compare" reference prices on its price tags that compare Burlington's sales prices to higher prices at other retailers, which lead customers to believe they were getting a better deal than they may actually be getting. The Plaintiffs allege that Burlington's price tags were deceptive because the "Compare" prices may be higher than the actual sales prices for identical products at other retailers. Because Burlington did not disclose to customers what the "Compare" price means, Plaintiffs allege that Burlington did not provide an accurate basis for consumers to compare its prices and products with those sold at other retailers. Burlington denies these claims and contends that it has done nothing wrong.

(ASA, Ex. B.) This detailed explanation is sufficient to provide Class Members with an explanation of the lawsuit.

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[2] The "Effective Date" is the date by which the following has occurred: (1) Burlington has not voided the Settlement; (2) the Amended Settlement Agreement is finally approved by the Court; and (3) the Judgment becomes final. (AASA ¶ I(N).)

The Court also queried whether it would be feasible to have notice conveyed to shoppers at Burlington stores through some other means, such as requiring cashiers to inform customers or having Notice displayed on the front door or at registers. Plaintiffs respond by pointing out that requiring untrained cashiers to discuss legal issues or describe terms of a settlement would not only result in increased customer wait times, but also might result in the dissemination of incorrect information. (Mot. 18-19.) Plaintiffs also explain that many Burlington stores have sliding doors such that Notices would be hidden immediately upon a customer entering the store. (Mot. 18.) The Court finds these responses sufficient to satisfy the Court's concerns regarding the posting of the In-Store Notice.

In this case, the Court finds that the Amended Settlement Agreement provides a robust direct notice plan that is, in large part, tailored to the preferences of and ability to locate millions of individual Class Members and practical given the size of the Class. Indeed, the Settlement contains a number of safeguards against sending notice to invalid addresses. *See Keirsey v. eBay, Inc.*, 2014 U.S. Dist. LEXIS 20684, at *3 (N.D. Cal. Feb. 14, 2014) (finding that individual notice through e-mail, or first class mail in situations where e-mail is not successful, is "clearly the 'best notice practicable'" where the names and e-mail addresses of Class Members are easily ascertainable). The Court has also reviewed the five different Notices—Post-Card Notice, Email Notice, Summary In-Store Notice, Summary Publication Notice, and online Class Notice—and concludes that each clearly and concisely describe the nature of the litigation, the class definition, the claims and issues raised in the litigation, that Class Members may make an appearance through an attorney, that the Court will exclude any member who requests exclusion and how one can request exclusion, and the binding nature of the Settlement. (*See* ASA, Exs. A-C, E-F.) The Class Notice is particularly detailed, and describes the settlement terms and procedure in a comprehensive and straightforward manner. (ASA, Ex. B.) Finally, the various summary notices sufficiently describe the terms of the settlement "to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)). Thus, the Court finds that the notice requirements of Rule 23(c)(2) have been satisfied.

Notwithstanding the Court's tentative conclusion as to the sufficiency of the contemplated notice plan, should the parties decide to move for preliminary settlement approval after reformulating their settlement agreement, the Court orders responses to the following questions. First, why did Burlington cease collecting contact information from customers in California on January 28, 2015? How does Burlington now identify its customers? And would it be impracticable to use a round of "skip-tracing" using a private service where checks and notice mailed to Class Members is returned as undeliverable?

C. Fairness, Adequacy, and Reasonableness of the Amended Settlement Agreement

"Having determined that class treatment appears to be warranted, the [C]ourt must now address whether the terms of the parties' settlement appear fair, adequate, and reasonable." *Alberto v.*

GMRI, Inc., 252 F.R.D. 652, 664 (E.D. Cal. 2008); *see also Class Plaintiffs,* 955 F.2d at 1276. In assessing whether a class action settlement agreement is fair, adequate, and reasonable, courts examine several factors, including:

> [T]he strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). "Given that some of these factors cannot be fully assessed until the court conducts its fairness hearing, 'a full fairness analysis is unnecessary at th[e preliminary approval] stage.'" *Alberto,* 252 F.R.D. at 665 (quoting *West v. Circle K Stores, Inc.*, No. Civ. S-04-0438 WBS GGH, 2006 WL 1652598, at *9 (E.D. Cal. June 13, 2006)).

Instead, preliminary approval and notice of the settlement terms to the proposed class are appropriate where "[1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with the range of possible approval . . . ." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). The Court need not "specifically weigh[ ] the merits of the class's case against the settlement amount and quantif[y] the expected value of fully litigating the matter." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Instead, the Court need only determine whether the proposed settlement is "the product of an arms-length, non-collusive" negotiation. *Id.*

1. Overview of the Settlement Terms

The Amended Settlement Agreement broadly provides that Burlington shall pay up to $29,667,500 in certificates to class members, administrative costs, attorneys' fees and expenses, and incentive awards. (ASA ¶ I(R).) The approximately 3.7 million Class Members stand to receive $27,750,000 in certificates. (ASA ¶ I(E), III(C).) The "Class Period," meanwhile, is defined as the period between July 1, 2011 and the date the Court preliminarily approves the settlement. (ASA ¶ I(K).)

The Amended Settlement Agreement appears to have been reached after months of extensive negotiations concerning the possible structure of a class-wide settlement, which led to mediation with Jeffrey Krivis of First Mediation Corporation on February 10, 2016. (Morosoff Decl. ¶ 11.) At the conclusion of this mediation session, the parties reached a tentative agreement with respect

to most of the material terms currently incorporated in the Amended Settlement Agreement, and finalized the agreement on May 9, 2016. (Morosoff Decl. ¶ 11.) The Amended Settlement Agreement is modeled largely after the one approved by the Court of Appeals for the Ninth Circuit in *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015). (Morosoff Decl. ¶ 12.)

a. Merchandise Certificates

Each Class Member stands to receive one "Merchandise Certificate," which is redeemable for up to $7.50 in credit at one of Burlington's California stores, thus excluding telephonic and online orders. (ASA ¶¶ I(C), III(C).) Class Members will receive only one Merchandise Certificate, regardless of the number of alleged violations. (ASA ¶ III(C).) Merchandise Certificates have no expiration date, are fully transferrable, but are not redeemable for cash or for any other monetary refund. (ASA ¶ III(C).)

The Federal Rules of Civil Procedure instruct that "[s]ettlements involving nonmonetary provisions for class members . . . deserve careful scrutiny to ensure that these provisions have actual value to the class." Fed. R. Civ. P. 23(2)(C)(h) advisory committee's note. While the Merchandise Certificates are transferrable and have a cash value, they are nevertheless a form of non-monetary relief and must be carefully scrutinized.

Although the Court initially expressed concern with whether the Merchandise Certificates constitute "coupon settlement[s]" within the meaning of the Class Action Fairness Act ("CAFA") in light of the lack of information regarding Burlington's product offering, Plaintiffs have provided additional information revealing that Class Members "need not spend any of [their] own money and can choose from a large number of potential items to purchase" at a "giant, low-cost retailer." *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 951 (9th Cir. 2015). The Merchandise Certificates, which are redeemable for "any item carried" in one of Burlington's California stores, fully cover the cost of more than 2.5 million items in Burlington's stores, and cover more than two-third of the cost of an additional million items. (*See* Decl. Gregory Camaratta in Supp. Mot. ("Camaratta Decl.") ¶¶ 4, 6.) These products are sold in a wide array of departments, including Men's, Women's, Girl's (Juniors), and Kid's apparel and clothing, bags and accessories, sports and athletic wear, shoes, bath products, and cosmetics. (Camaratta Decl. ¶ 4.) Although Plaintiffs have not provided evidence regarding how many items cost significantly more than $10, or what percentage of Burlington's overall product offerings are priced below $10, the Court is convinced that the Merchandise Certificates are more than simply "a discount on another product or service offered by the defendant in the lawsuit." *Fleury v. Richemont North America, Inc.*, No. C-05-4525 EMC, 2008 WL 3287154, at *2 (N.D. Cal. Aug. 6, 2008).

The Court remains troubled, however, by Plaintiffs' response to the Court's question regarding whether it would be equitable to require Class Members to redeem the certificates by purchasing more merchandise from Burlington, rather than by providing Class Members with **vouchers to any**

department store, or instead a **cash refund** of $7.50. In response to this question, Plaintiffs note that Class Members, "by definition, are Burlington customers and purchased items from Burlington stores in California during the Class Period," and therefore "the most logical and efficient way to address the Class's allegations" would be to provide them with certificates to purchase additional items at Burlington. (Mot. 8-9.) This answer is fundamentally flawed. The most "logical and efficient" way to make Class Members whole would be to provide the Class with **checks** for the amount they allegedly overpaid Burlington in response to its advertising practices. The only response Plaintiffs make on this point is that "the parties agreed to provide [Settlement] Class Members with Merchandise Certificates in order to provide them with the maximum value rather than a smaller cash award with an onerous claims process." (Mot. 9.) But Plaintiffs do not explain **why** an "onerous claims process" would be required, or why Burlington would not agree to pay $7.50 in cash instead of in vouchers. The only "logical" explanation the Court can find is that Burlington either (1) expects to increase traffic to its stores via the vouchers so that Class Members can defray the cost of purchases totaling significantly more than $7.50; or (2) does not anticipate a significant number of Class Members coming to Burlington's physical stores to redeem the Merchandise Certificates, finding $7.50 in savings not worth the effort.

The Court also asked the parties why they did not agree to a *cy pres* distribution, particularly in the event the amount of Claim Forms submitted by Unknown Class Members is relatively small. (*See* Order Den. First Mot. for Prelim. Approval.) In response, Plaintiffs state the Claims Administrator estimates that over eighty-five percent (85%) of the Known Class Members will actually receive Merchandise Certificates, which is substantially higher than the typical claim rate where a claims process is involved. (Decl. Supp'l Daniel Burke in Supp. Mot. ("Supp'l Burke Decl.") ¶ 5.) Plaintiffs also claim that because a direct distribution is contemplated, it would not be in the interest of the Class to divert any amount from the Settlement Amount to any outside group. (Mot. 9-10.) This response misses the mark. No money would be "diverted" through the *cy pres* process; rather, a *cy pres* distribution would be made on behalf of those Known Class Members who do not receive the Merchandise Certificates and for those Unknown Class Members who do not submit claims. Theoretically, the *cy pres* award would be $29,667,500, less the value of Merchandise Certificates that actually reached Class Members and other expenses, such as attorneys' fees, administration expenses, and incentive awards.

The Court was also initially troubled by the fact that the $7.50 Merchandise Certificates are not tethered either to the volume or dollar amount of any Class Members' particular purchases or to the typical amount of the "discrepancy" between the "Compare" price and the actual sale price. In response to this stated concern, Plaintiffs note that Burlington does not have a loyalty or rewards program or branded credit card that would enable it to track customer purchases, nor does Burlington's database have customer data that evidences which customers purchased items with "Compare" tags versus customers who purchases items without those tags. (Miloszewski Decl. ¶¶ 4, 7.) Plaintiffs also aver that the administrative cost of gathering this information would be prohibitive, and moreover, that the results would likely be inaccurate. (Miloszewski Decl. ¶ 7.)

Finally, Plaintiffs note that a more finely tuned system would likely require Class Members to complete claim forms and provide proof of purchase, which would both be a burden on the Class Members and would further increase the cost of administration. (Mot. 7.) The Court is satisfied with this answer, and finds the use of a pro-rata distribution to be appropriate in this case.

In conclusion, the Court is not persuaded that the $7.50 Merchandise Certificates constitute reasonable compensation under the circumstances, and concludes that the contemplated distribution of such certificates would render the Amended Settlement Agreement "obviously deficient." The parties will be afforded an opportunity to reformulate their settlement agreement in a manner that does not require Class Members to travel to physical Burlington stores in order to redeem the $7.50 worth of value. The Court envisions a settlement under which checks are mailed to Class Members. Alternatively, the Court may be amenable to a settlement that permits Class Members to redeem vouchers over the phone or online, should the parties be able to provide evidence why this system (1) would not improperly benefit Burlington; and (2) would lead to a large number of Class Members redeeming their vouchers.

b. Injunctive Relief

Burlington has agreed as part of the Amended Settlement Agreement to provide clear and conspicuous disclosures regarding its "Compare" prices or similar pricing practices that offer a comparison price to consumers, both in its California stores and online. (ASA ¶¶ III(G), (H).) Burlington has further agreed to provide additional training for its employees who are responsible for setting and disseminating its "Compare" reference prices and also to implement periodic audition programs related to its in-store and online disclosures for goods sold in California, as well as its "Compare" reference pricing practices. (ASA ¶¶ III(I)-(K).)

In denying Plaintiffs' initial preliminary approval motion, the Court asked for more information regarding (1) where such disclosures will be posted; (2) how prominent the disclosures will be; (3) what information Burlington will provide regarding its pricing practices; (4) who will be training Burlington's buyers and auditing compliance; and (5) what measures will be put in place to ensure compliance and enforcement. (*See* Order Den. First Mot. for Prelim. Approval.) In response, Plaintiffs state that in-store notices will be prominently displayed in the form of 22"x28" posters in the front of each store and on Burlington's website. (Mot. 12; Trivino-Velasco Decl. ¶ 2, Ex. A.) These notices explain that the "comparable value" price is determined by Burlington's buyers and describe what factors go into their determination. (Trivino-Velasco Decl., Ex. A.) Finally, Plaintiffs note that Burlington's "Learning & Development" will design training for Burlington's California buyers, with guidance from its Legal Department. (Mot. 12.) Burlington's Internal Audit group will audit Burlington's compliance with the disclosure aspect of the settlement, and the results of these audits will be reported to Burlington's Legal Department. (Mot. 12.)

Although details regarding the proposed disclosures, training session(s), and auditing systems are not clearly set forth in the Amended Settlement Agreement, the Court nevertheless finds that the nature of the proposed injunctive relief would add value to the Class and would be a net positive for Class Members.

c. Other Payments

The Amended Settlement Agreement also contemplates that Burlington will pay the following sums to the following groups: (1) up to $975,000 to the Claims Administrator in administration fees; (2) up to $7,500 to both Horosny and Price in incentive fees; and (3) up to $927,500 to Plaintiffs' attorneys, Douglas Caiafa APLC and the Law Offices of Christopher J. Morosoff, for reasonable attorneys' fees and costs expended litigating this action. (*See* ASA ¶ I(R).) Notably, the Amended Settlement Agreement provides that should the Court award Plaintiffs and their counsel less in fees and litigation expenses than sought, such an award shall not constitute a material change to the Settlement and shall not affect Plaintiffs' or their counsel's rights or obligations under the Amended Settlement Agreement. (ASA ¶ III(M)(9)(a).) Moreover, Plaintiffs' counsel declares that the parties did not discuss or negotiate attorneys' fees and costs or the proposed incentive awards until after all other material terms, including the $27,750,000 in Merchandise Certificates, were agreed upon. (Morosoff Decl. ¶ 22.)

i. Administrative Fees

The Claims Administrator, Kurtzman Carson Consultants LL ("KCC"), which appears to be one of the nation's largest full-service class action notice and claims administrators, estimates that the notice system discussed in detail above is expected to reach between 74.3 and 83.7 percent of Class Members. (*See* Morosoff Decl. ¶ 17; Burke Decl. ¶¶ 2, 4-11.) KCC further estimates that the cost of settlement administration, inclusive of the Notice Plan, processing of claims, opt-outs and objections, telephone and website support, and certificate disbursements, is approximately $975,000. (Morosoff Decl. ¶ 17; Supp'l Burke Decl. ¶ 7.) These expenses are generally allowable provided their amounts are reasonable. *See, e.g., Alberto*, 252 F.R.D. at 669; *Vasquez*, 266 F.R.D. at 484. The actual amounts expended, however, have not been determined, as the notice plan has not yet begun. Should the Court grant preliminary settlement approval to a future amended settlement agreement, the Court would make a final determination as to the reasonableness of the requested administrative fees at the final approval hearing.

ii. Incentive Awards

The Amended Settlement Agreement contemplates a $7,500 award to both named Plaintiffs. In evaluating incentive awards, the Court may consider whether there is a "significant disparity between the incentive award[] and the payments to the rest of the class members" such that it creates a conflict of interest. *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1165 (9th Cir.

2013). Courts are also to consider "the number of class representatives, the average incentive award amount, and the proportion of the total settlement that is spent on incentive awards." *In re Online DVD*, 779 F.3d at 947.

"Incentive awards typically range from $2,000.00 to $10,000.00," and "[h]igher awards are sometimes given in cases involving much larger settlement amounts." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266-67 (N.D. Cal. 2015) (collecting cases). Although Plaintiffs' proposed $7,500 incentive awards fall in this "typical range," there is a significant disparity between these $7,500 incentive awards and the $7.50 payment to the rest of the class members. Moreover, it does not appear as though the two named Plaintiffs have provided substantial assistance on this case, as neither has submitted a declaration averring the work he or she performed and their counsel only avers they "participated throughout the settlement process." (Morosoff Decl. ¶ 22.) The Court thus finds the requested awards to be unreasonable.

iii. Attorneys' Fees and Costs

"In order for a settlement to be fair and adequate, 'a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement.'" *Alberto,* 252 F.R.D. at 667 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003)). "The district court has discretion to use either the percentage-of-the-fund method or the [lodestar] method in calculating fee awards in common fund cases." *Alberto,* 252 F.R.D. at 667 (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)). In the Ninth Circuit, "no presumption in favor of either the percentage or the lodestar method encumbers the district court's discretion to choose one or the other." *In re Wash. Pub. Power*, 19 F.3d at 1296. Instead, "when determining attorneys' fees, the district court should be guided by the fundamental principle that fee awards out of common funds be reasonable under the circumstances." *Id.* (citation and quotation marks omitted).

As with administrative expenses, should the Court grant preliminary settlement approval to a future amended settlement agreement the Court will ultimately make a final determination as to the reasonableness of the requested attorneys' fees and expenses at the final approval hearing. As part of any such motion for final settlement approval, Plaintiffs must include documentation sufficient to establish an entitlement to the requested fee award.

d. Opting Out and Objecting

The Amended Settlement Agreement contains provisions that permit Class Members, whether Known or Unknown, to either opt out of the settlement or object to the terms of the settlement at the final approval hearing. (*See* ASA ¶ III(M)(6).) Because the Amended Settlement Agreement and various Notices discussed in Section II(B), *supra*, each clearly and conspicuously disclose (1)

that a Class Member must opt out of the settlement by timely submitting a signed Election Not to Participate in Settlement in order to not be bound by its terms; and (2) that a Class Member may object to the settlement by filing and serving on Plaintiffs' counsel, Burlington's counsel, and the Claims Administrator within ninety (90) days after notice is disseminated, the Court concludes that the Amended Settlement Agreement would put Class Members on adequate notice of their rights under the Settlement.

e. Release

The Amended Settlement Agreement contains a lengthy release provision under which Class Members agree to "fully and irrevocably release, waive, and discharge [Burlington and related entities] . . . from any and all past, present, and future liabilities, claims, causes of action (whether in contract, tort, or otherwise, including statutory, common law, property, and equitable claims), damages, costs, attorneys' fees, losses, or demands, **whether known or unknown**, existing or potential, or suspected or unsuspected, **which were or could have been asserted** in the Action **based on the facts alleged therein** . . . ." (ASA ¶ III(N)(1) (emphasis added).) Included in the release are all Unknown Class Members who neither submitted a timely Claim Form nor filed a timely Election Not to Participate in Settlement. (ASA ¶ III(M)(5).) Although this release is relatively broad, because it is limited to causes of action based on facts alleged in the SAC, the Court finds the waiver does not render the Settlement unfair, unreasonable, or inadequate, particularly because it might have been infeasible to settle this litigation without such a waiver and because Class Members who do not wish to have their claims released may opt out of the settlement. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:0-ML-02151 JVS (FMOx), 2013 U.S. Dist. LEXIS 123298, at *279-*280 (C.D. Cal. July 24, 2013); *see also In re OCA, Inc.*, No. 05-2165 Section R(3), 2008 U.S. Dist. LEXIS 84869, at *43-*44 (E.D. La. Oct. 17, 2008) ("Courts have consistently approved releases in class action settlements that discharge unknown claims relating to the factual issues in the complaint.").

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f. Miscellaneous Terms

The Amended Settlement Agreement contains a "Blow-up Clause," which gives Burlington sole discretion to nullify the agreement if more than 5,000 Class Members request exclusion. (ASA ¶¶ III(M)(6)(d), (8)(a).) The Amended Settlement Agreement also contains a Right to Void Settlement provision, which likewise gives Burlington sole discretion to void the settlement if the settlement is overturned by a reviewing court, or if this Court "does not grant final approval of the Settlement or grants final approval conditioned on any material change to the terms of the Settlement with respect to the payments to be made to Participating Class Members, or the scope of the release of claims . . ." (ASA ¶ III(M)(8)(b)-(c).)

Although the Court questions why Burlington was given sole discretion whether to void the Amended Settlement Agreement, particularly in the event more than 5,000 Class Members opt out, the Court does not find that these provisions render the Amended Settlement Agreement "obviously deficient" or provide a strong indicator that the agreement is the result of collusion.

2. Review of Applicable *Hanlon* Factors[3]

a. Strength of Plaintiffs' Case

Although Plaintiffs have provided neither evidence nor argument regarding the perceived strength of their case, given the early stage of the litigation and the myriad undecided questions of fact and law, the Court finds that this factor weighs in favor of preliminary approval. *See Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, *5 (C.D. Cal. July 21, 2008) (finding this factor weighed in favor of final approval where motions for summary judgment were pending, "indicat[ing] that the strength of plaintiffs' case has not yet been tested and that it favors a finding that the settlement is fair as a result").

b. Risk, Expense, Complexity, and Likely Duration of Further Litigation

The Court also finds that continuing to litigate this relatively nascent putative class action dispute will present substantial obstacles to Plaintiffs, likely requiring significant investment of both time and money. Discovery is set to conclude in March of 2017, and a jury trial is scheduled for June 22, 2017. (*See* Order Approving Stip., ECF No. 63.) "Because this litigation has terminated before the commencement of trial preparation, factor (2) also militates in favor of the settlement." *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2007 WL 951821, *3 (N.D. Cal. Mar. 28, 2007); *see also In re Portal Software, Inc. Securities Litig.*, No. C-03-5138 VRW, 2007 WL 4171210, *3 (N.D. Cal. Nov. 26, 2007) (recognizing that the "inherent risks of proceeding to summary judgment, trial and appeal also support the settlement").

c. The Risk of Maintaining Class Action Status Throughout the Trial

Whether or not the action would have remained a class action neither weighs in favor of or against a finding that the settlement is fair. Burlington has not challenged conditional certification for settlement purposes, but would likely vigorously challenge certification should the litigation be forced to proceed on the merits.

[3] Because this Order concerns only preliminary settlement, a number of factors, including the class members' reaction to the proposed settlement and the presence of a governmental participant, are not applicable.

d. The Amount Offered in Settlement

This factor is discussed in detail in Section II(C)(1)(a), *supra*. The Court is not persuaded that the amount offered in settlement by way of the Merchandise Certificates provides real value to the Class Members.

e. The Extent of Discovery Completed and Stage of Proceedings

"'The extent of discovery may be relevant in determining the adequacy of the parties' knowledge of the case.'" *DIRECTV*, 221 F.R.D. at 527 (quoting *Manual for Complex Litigation, Third*, § 30.42 (1995)). "'A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.'" *Id.* (quoting 5 W. Moore, *Moore's Federal Practice*, § 23.85[2][e] (Matthew Bender 3d ed.)). In this case, although the parties have not completed discovery, Plaintiffs' counsel has conducted significant informal discovery and has received, reviewed, and analyzed documents produced by Burlington, including its voluminous and detailed sales data and its public filings, which detail Burlington's financial status and pricing practices. (Morosoff Decl. ¶ 8.) Plaintiffs' have also survived a motion to dismiss and spent months negotiating a possible settlement, including with the assistance of an experienced mediator. (Morosoff Decl. ¶ 11.) Thus, the Court concludes that this factor weighs in favor of preliminary settlement approval.

f. The Experience and Views of Counsel

Both Plaintiffs and Burlington appear to be represented by experienced counsel, who have litigated a number of class action disputes. (*See* Morosoff Decl. ¶¶ 4-5; Caiafa Decl. ¶¶ 2-3.) Accordingly, this factor weighs in favor of preliminary settlement approval.

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g. There Is Some Indicia of Collusion

A settlement negotiated by experienced attorneys and reached with the assistance of an experienced mediator through a negotiating process supports a determination that the process was not collusive. *See, e.g.*, *Carter v. Anderson Merchandisers, LP*, Nos. EDCV 08-0025-VAP (OPx), EDCV 09-0216-VAP (OPx), 2010 WL 1946784, at *7 (C.D. Cal. May 11, 2010) (settlement is likely the product of arms-length negotiation if it is reached through "formal mediation sessions presided over by an experienced mediator"). This appears to be the case here, as the parties spent months negotiating a possible settlement and were ultimately assisted by the efforts of an experienced mediator. (Morosoff Decl. ¶ 11.) That said, the nature of the Merchandise Certificates and Plaintiffs' answers to direct questions regarding these certificates is highly troubling to the Court, and leads to a permissible inference of collusion. To the extent one could

draw an inference of collusion from the proposed distribution of Merchandise Certificates, the strength of such an inference would be minimized by providing Class Members a cash payment, or perhaps a voucher that does not require physically entering a Burlington store.

III. RULING

For the foregoing reasons, the Court **DENIES** Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Motion for Certification of Settlement Class. Should the parties wish to renegotiate settlement terms, they are encouraged to do so, with the caveat that the Court will not entertain any settlement relying on Merchandise Certificates similar to the ones contemplated in the Amended Settlement Agreement. The parties have **sixty (60) days** to file any renewed motion for preliminary settlement approval. Should the parties elect to so file, their motion need not address conditional class certification or any other topics with which the Court did not take issue in this Order, provided no material changes impacted these issues. Instead, the bulk of the motion should be dedicated to discussing why the terms of the amended settlement agreement are fair and reasonable to Class Members.

The remaining dates set in the Court's October 13, 2016 Order Approving Stipulation to Extend Scheduled Dates and Deadlines, (ECF No. 63), remain firm.

IT IS SO ORDERED.