Douglas Caiafa, Esq. (SBN 107747)
DOUGLAS CAIAFA, A Professional Law Corporation
11845 West Olympic Boulevard, Suite 1245
Los Angeles, California 90064
(310) 444-5240 - phone; (310) 312-8260 - fax
Email: dcaiafa@caiafalaw.com

Christopher J. Morosoff, Esq. (SBN 200465)
LAW OFFICE OF CHRISTOPHER J. MOROSOFF
42-215 Washington Street, Suite A-37
Palm Desert, California 92211
(760) 469-5986 - phone; (760) 345-1581 - fax
Email: cjmorosoff@morosofflaw.com

Greg K. Hafif, Esq. (SBN 149515)
Michael G. Dawson, Esq. (SBN 150385)
LAW OFFICE OF HERBERT HAFIF
269 W. Bonita Avenue
Claremont, California 91711
(909) 624-1671 - phone; (909) 625-7772 - fax
Email: ghafif@hafif.com

Attorneys for Plaintiffs STACI CHESTER, et al.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

STACI CHESTER, et al.,

Plaintiffs,

vs.

THE TJX COMPANIES, INC., et al.,

Defendants.

EDCV 15-01437 ODW (DTBx)

NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

Courtroom: 5D – First Street
Date: October 16, 2017
Time: 1:30 p.m.
Judge: Hon. Otis D. Wright, II

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on **October 16, 2017,** at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 5D of the United States District Court for the Central District of California, Western Division, located at 350 West First Street, Los Angeles, California 90012, Plaintiffs Staci Chester, Daniel Friedman, Robin Berkoff and Theresa Metoyer (collectively, "Plaintiffs"), will, and hereby do, respectfully move this Honorable Court for an order: (1) granting preliminary approval of the settlement agreement Plaintiffs have executed with Defendant TJX Companies, Inc. ("Defendant") for $8,500,000 (Merchandise Credit with cash redemption option, administrative costs, attorneys' fees and expenses, and incentive awards) pursuant to Fed. R. Civ. Proc. 23(e); and, (2) certifying a class for settlement purposes pursuant to Fed. R. Civ. Proc. 23(b)(3).

This Motion is unopposed by Defendant and is based upon this Notice of Motion; Plaintiffs' Memorandum of Points and Authorities In Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class; the Declaration of Christopher J. Morosoff in support thereof; the Declaration of Douglas Caiafa in support thereof; the Declaration of Jennifer Keough in support thereof; all filed and served concurrently herewith; as well as the pleadings and papers on file in this action, argument of counsel, any other material which may be submitted to the Court, and any other evidence or argument the Court may consider.

Dated: September 18, 2017

Respectfully submitted,
LAW OFFICE OF CHRISTOPHER J. MOROSOFF

By: /s/ *Christopher J. Morosoff*
Christopher J. Morosoff
Attorneys for Plaintiffs
STACI CHESTER, et al.

Douglas Caiafa, Esq. (SBN 107747)
DOUGLAS CAIAFA, A Professional Law Corporation
11845 West Olympic Boulevard, Suite 1245
Los Angeles, California 90064
(310) 444-5240 - phone; (310) 312-8260 - fax
Email: dcaiafa@caiafalaw.com

Christopher J. Morosoff, Esq. (SBN 200465)
LAW OFFICE OF CHRISTOPHER J. MOROSOFF
42-215 Washington Street, Suite A-37
Palm Desert, California 92211
(760) 469-5986 - phone; (760) 345-1581 - fax
Email: cjmorosoff@morosofflaw.com

Greg K. Hafif, Esq. (SBN 149515)
Michael G. Dawson, Esq. (SBN 150385)
LAW OFFICE OF HERBERT HAFIF
269 W. Bonita Avenue
Claremont, California 91711
(909) 624-1671 - phone; (909) 625-7772 - fax
Email: ghafif@hafif.com

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STACI CHESTER, et al,

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vs.

THE TJX COMPANIES, INC., et al,

Defendants.

EDCV 15-01437 ODW (DTBx)

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

Courtroom: 5D – First Street
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION:

Plaintiffs Staci Chester, Daniel Friedman, Robin Berkoff and Theresa Metoyer (collectively, "Plaintiffs") and their counsel have achieved a settlement (the "Settlement") of this action with Defendants The TJX Companies, Inc., T.J. Maxx of CA, LLC, Marshalls of CA, LLC, and HomeGoods, Inc. (collectively, "TJX" or "Defendant"). The Settlement is the product of months of arms-length negotiations between the parties, including mediation with a highly experienced mediator, Hon. Margaret Nagle (Ret.). Defendant has agreed to pay eight million five-hundred thousand dollars **($8,500,000.00**) in cash and cash equivalents for the benefit of Settlement Class Members in Merchandise Credit redeemable for cash at the Settlement Class Members' option, administrative costs, attorneys' fees and expenses, and incentive awards. (See Settlement Agreement, dated September 18, 2017 ("Agreement"), attached as Exhibit A to the Declaration of Christopher J. Morosoff ("Morosoff Dec.")). Claimants will receive Merchandise Credit for the purchase of any product sold at any TJ Maxx, Marshalls or HomeGoods store in California. The Merchandise Credit shall be redeemable for cash, at the Settlement Class Members' option, in an amount equal to 75% of the value of Credit. In addition, and as a direct result of this litigation, Defendant has agreed to change the disclosure/definition of its "Compare At" pricing on its Website and on its signs in its California stores, augment its Primary Signage with additional signage in its California stores, and enhance its comparison pricing practices, including training and auditing programs designed to ensure that it complies with California's price comparison advertising laws. As further detailed in the Agreement, Defendant has also agreed to pay the costs of providing class notice and administering claims, reasonable attorney's fees and costs, and incentive awards to the representative Plaintiffs. These amounts are to be deducted from the $8,500,000, with the remainder to be divided by Class Members who make claims on a pro-rata basis.

Through this Motion, Plaintiffs seek an order: (1) certifying a Settlement Class for settlement purposes only; (2) granting preliminary approval of the Settlement pursuant to

1 Fed. R. Civ. Proc. 23(e); (3) approving the form and manner of Class Notice; (4)
2 establishing a Qualified Settlement Fund ("QSF"); and, (5) setting a date for a final
3 approval hearing. The Settlement satisfies the standards for preliminary approval and
4 should be approved – it is within the range of possible approval to justify sending and
5 publishing notice of the Settlement to Class Members and scheduling final approval
6 proceedings. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015)
7 ("*In re Online DVD*").

8 **II. FACTUAL AND PROCEDURAL BACKGROUND**:

9 Prior to filing this action in July 2015, Plaintiffs' counsel consulted with Plaintiffs,
10 investigated Defendant's pricing practices and researched the law applicable to Plaintiffs'
11 claims. (Morosoff Dec. at ¶7). In the operative Consolidated Amended Class Action
12 Complaint ("CAC"), filed on September 3, 2015 (ECF No. 28), Plaintiffs allege that
13 throughout the Class Period, Defendant has engaged in a deceptive advertising scheme by
14 which it advertised "sale" prices that were substantially lower than advertised "Compare
15 At" prices for the products sold in its California TJ Maxx, Marshalls and HomeGoods
16 stores. Plaintiffs further allege that the higher Compare At prices were deceptive because
17 the Compare At prices were not based on actual prices that identical items sold for either
18 at TJX stores or other retailers, and that Defendant failed to adequately disclose to
19 consumers what its Compare At reference prices were intended to represent. The CAC
20 seeks restitution and injunctive relief under California's Unfair Competition Law, Cal.
21 Bus. & Prof. Code §§ 17200 *et seq.* ("UCL"), False Advertising Law, Cal. Bus. & Prof.
22 Code §§ 17500 *et seq.* ("FAL"), and Consumer Legal Remedies Act, Cal. Civ. Code
23 §1750 *et seq.* ("CLRA"). Defendant denies any wrongdoing in this case, denies Plaintiffs'
24 allegations, and further denies Plaintiffs' assertion that the retailer's pricing practices
25 constituted any violation of California law and/or Federal Trade Commission regulations.

26 Throughout the Litigation, Plaintiffs' counsel engaged in extensive legal research
27 and analysis and conducted extensive discovery. (Morosoff Dec. at ¶9). There were
28 multiple rounds of written discovery conducted by Defendants and Plaintiffs requiring

extensive meet and confers and multiple motions to compel, including the production of thousands of documents by both sides in the litigation. Defendant took the deposition of all four Plaintiffs and Plaintiffs took the 30(b)(6) depositions of Defendant's representative on two occasions. Plaintiffs' counsel received, reviewed and analyzed thousands of documents that Defendant produced in the Litigation, including its voluminous and detailed sales data. (Id.).

On August 18, 2016, the Court denied Defendant's Motion to Dismiss Plaintiffs' operative CAC. (ECF No. 62). On March 1, 2017, Plaintiffs filed a Motion for Class Certification (ECF No. 82), which was subsequently dismissed without prejudice as moot as a result of the proposed Settlement. (ECF No. 107). Plaintiffs' CAC sought certification of the following class under Fed. R. Civ. Proc. 23(b)(2) and/or (b)(3):

> All persons who, while in the State of California, and between July 17, 2011, and the present (the "Class Period"), purchased from TJ Maxx one or more items at any TJ Maxx store in the State of California with a price tag that contained a "Compare At" price which was higher than the price listed as the TJ Maxx 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.[1]

III. THE SETTLEMENT:

The Settlement here is a non-reversionary settlement. The entire amount of the QSF will be distributed for the benefit of Settlement Class Members.

A. Settlement Negotiations:

Throughout early 2017, the Parties engaged in extensive negotiations concerning the possible structure of a class-wide settlement. (Morosoff Dec. at ¶13). These negotiations led to mediation, on May 22, 2017, with Hon. Margaret Nagle (Ret.) of JAMS. (Id.) At the conclusion of a full day of mediation, the parties reached a tentative

[1] Plaintiffs sought certification of two additional subclasses which are identically defined in all respects other than that they include customers of Marshalls and HomeGoods stores. (CAC ¶¶ 186, 188, 190). The three subclasses are referred to collectively herein as the "Class."

agreement with respect to most of the material terms of the Settlement as reflected in the Agreement. (Id.). The parties remained at an impasse with respect to certain terms. Further conferences and negotiations were required, with the participation and assistance of Judge Nagle, before final agreement was reached on all material terms. The parties subsequently negotiated, drafted and executed the comprehensive Settlement Agreement which is currently before the Court. (Morosoff Dec., Exh. A).

B. <u>Terms of the Settlement</u>:

The Agreement is intended to resolve the Litigation in its entirety, and is conditioned on the Court certifying a Settlement Class, for settlement purposes only, and granting final approval of the Settlement. (Ex. A at ¶2.4). The Parties have modeled the Agreement, to the extent possible, after the settlement agreement approved by the Ninth Circuit in *In re Online DVD*. (Morosoff Dec. at ¶14).

1. Monetary Relief:

The Settlement provides that Defendant will make available a fixed sum of $8,500,000.00 (the "Monetary Component") for the benefit of the Class. (Ex. A at ¶3.1). Subject to Court approval, the Monetary Component will be used to pay for Notice and Administration Costs (not to exceed $1,000,000) (Id. at ¶3.1.2), reasonable Attorneys' Fees and Costs (not to exceed 25% of the Class Settlement Amount), and Class Representative Enhancement Payments (not to exceed $7,500 to each Plaintiff). (Id. at ¶¶3.1.3-3.1.4). The amount remaining after these payments shall be paid to Settlement Class Members in the form of Merchandise Credits, redeemable for cash at the Claimant's option, who submit a valid Claim Form on a pro rata basis. (Id. at ¶3.1.1).

The required portions of the Monetary Component of the Agreement shall be funded through and deposited into a QSF as reflected in the Agreement. (Id. at ¶¶3.2, 9.1-9.8). The QSF will qualify as a "qualified settlement fund" under section 468B of the Internal Revenue Code and sections 1.468B-1, *et seq*. of the Treasury Regulations, as: (1) the QSF is being established subject to approval of the Court, and will be operated pursuant to the terms and conditions of the Agreement; (2) the QSF will be subject to the

1 continuing jurisdiction of the Court; (3) the QSF is being established to resolve or satisfy
2 claims of alleged tort or violation of law; and (4) the QSF will be a trust, and its assets will
3 be segregated from the general assets of the trustee and/or administrator and deposited
4 therein.

5 Claimants will receive their share of the Monetary Component as a Merchandise
6 Credit redeemable for purchases at any TJ Maxx, Marshalls or HomeGoods store in
7 California. Each Merchandise Credit shall be fully transferable, stackable and may be
8 used in connection with any promotional discounts that are otherwise available.
9 Merchandise Credits will have no expiration date and need not be used in full at any time.
10 They will maintain a running balance that will be depleted based only on use until the
11 Claimant's balance is zero. No minimum purchase amount is required to use them. In
12 addition, Settlement Class Members will have the option of redeeming an unused
13 Merchandise Credit for cash in an amount equal to 75% of the Merchandise Credit at the
14 time of its issuance by returning the Merchandise Credit to the Claims Administrator
15 within one (1) year after its issuance. (Ex. A, ¶¶1.14, 3.1.1). Claimants will have ninety
16 days from the date of Notice to submit a Claim Form either electronically through a
17 Settlement Website maintained by the Administrator, or via mail to the Administrator.
18 (Id. at ¶¶5.1, 5.2.2). Following the Settlement Effective Date, Defendant will deliver
19 plastic Merchandise Credits to the Claims Administrator for distribution to all Claimants.
20 (Id. at ¶8.1.3).

21 Like the gift cards offered in *In re Online DVD*, the Merchandise Credits here are
22 an alternative to cash, and are not "coupons" within the meaning of CAFA. They do not
23 expire, may be used to purchase any product at a TJX store, and are redeemable for cash at
24 the Claimant's option. (Ex. A at ¶1.14). The Merchandise Credits here have many of the
25 same attributes as those in *In re Online DVD*, where the gift cards were found not to be
26 coupons because, among other things, they could be used to purchase any product from
27 defendant, were redeemable for cash, were freely transferable and did not expire. *Id.* at
28 950-52.

Several district courts in this circuit have also analyzed whether a store credit should be considered a "coupon" under CAFA, and provide further guidance and support for the conclusion that the Merchandise Credits in this case are not "coupons." For example, the court in *In re Easysaver Rewards Litig*., 2016 WL 4191048 (S.D. Cal. Aug. 9, 2016), found that $20 "merchandise credits" that were valid for any product offered by the defendant retailers, did not require class members to spend any of their own money when using the credits, and were fully transferrable, were "not discount coupons" subject to CAFA, even though they expired after one year and had additional "black-out dates." *Id*. at *2-3.

Similarly, the court in *Hendricks v. Starkist Co*., 2016 WL 5462423 (N.D. Cal. Sept. 9, 2016), also relying on *In re Online DVD*, found that "vouchers" that could be used to purchase Starkist products without the need for class member claimants to spend any of their own money, were "freely transferrable," and had "no expiration date," were "not coupons." 2016 WL 5462423, at *7. Likewise, the court in *Johnson v. Ashley Furniture Industries, Inc*., 2016 WL 866957 (S.D. Cal. Mar. 7, 2016), found that a $25 "Merchandise Voucher" to be used as "store credit" at Ashley Furniture stores was "not a coupon." 2016 WL 866957, at *4. Likewise, the Merchandise Credits here are not "coupons" within the meaning of CAFA.

2. Injunctive Relief:

As a direct result of this Litigation, Defendant has also agreed to implement changes to its price-comparison advertising practices. First, Defendant has agreed that, as of the date of settlement, and continuing forward, it will not violate Federal or California law, including California's specific price-comparison advertising statutes. (Ex. A at ¶3.5). Next, Defendant has also agreed to enhance and expand programs intended to promote legal compliance, including periodic (no less than once a calendar year) monitoring, training and auditing to ensure compliance in its California T.J. Maxx, Marshalls and HomeGoods stores with California and Federal price comparison laws. (Ex. A at ¶¶3.4-3.7).

1 In addition, Defendant has agreed to change the disclosure/definition of its
2 "Compare At" pricing on its T.J. Maxx, Marshalls and HomeGoods websites and on the
3 signs in its California stores. (Ex. A at ¶3.4). Defendant has also agreed to prominently
4 post additional signs in each of its over 300 California stores describing its comparison
5 pricing practices. (Ex. A at ¶3.6). Finally, Defendant has agreed that it will not base any
6 comparison price on an estimate not based on actual market prices, and instead shall base
7 any comparison price on its buying staff's assessment of the market prices for the
8 same or comparable goods. (Id.).

9 **3. The Release**:

10 Settlement Class Members who do not opt out will be deemed to have released
11 Defendant from claims related to the Litigation. (Ex. A at ¶10). To the extent possible,
12 the release language in the Agreement follows the release language approved by the Ninth
13 Circuit in *In re Online DVD*. (Morosoff Dec. at ¶14). While it releases both known and
14 unknown claims, the Release is limited to the universe of facts, occurrences, transactions
15 and claims alleged in the CAC. (Ex. A at ¶10). As a result, the Release is sufficiently
16 limited in scope and should be given preliminary approval. *See Vasquez v. Coast Valley*
17 *Roofing, Inc.*, 670 F. Supp. 2d 1114, 1126 (E.D. Cal. 2009).

18 **4. Notice and Claims Administration**:

19 After consulting with and receiving bids from multiple candidates, Class Counsel
20 retained JND Legal Administration ("JND") to serve as Claims Administrator. (Ex. A at
21 ¶1.6). JND is a highly experienced class action claims administration company.
22 (Declaration of Jennifer Keough ("Keough Dec.") at ¶¶3-9). JND estimates that all costs
23 of Notice and Administration will be not exceed $475,000, and the Parties have agreed to
24 a cap of $1,000,000 for all such costs. (Ex. A. at ¶3.1.2).

25 JND will establish a toll-free number and web address from which Settlement Class
26 Members can obtain information about the Settlement. (Ex. A at ¶4.4; Keough Dec. at
27 ¶¶12, 34-36). It will also establish a Settlement Website where Settlement Class Members
28

can view and download the Notice, Claim Form, Opt-Out Request Form, CAC and Settlement Agreement. (Ex. A at ¶1.32; Keough Dec. at ¶¶34-35).

No later than 50 days following preliminary approval, JND will send a Post-Card or Email Notice to the approximately 1,300,000 Settlement Class Members for whom the parties have address or email information. (Ex. A at ¶4.3; Keough Dec. at ¶12). Notice will be sent via Email to those Settlement Class Members for whom the parties have email addresses no later than 30 days following preliminary approval, and by Post Card Notice via United States mail to those Settlement Class Members for whom the parties have a physical address no later than 50 days following preliminary approval. (Id.). No later than 50 days following preliminary approval, TJX has also agreed to post notices of the settlement in its stores.

No later than 60 days following preliminary approval, JND will also commence a publication notice plan tailored to reach those Settlement Class Members for whom the parties lack any contact information. (Ex. A at ¶4.3; Keough Dec. at ¶¶12, 24-32). The publication notice will direct Settlement Class Members to the Settlement Website where they can view the full Notice and obtain further information about the Litigation and Settlement. (Id.). JND will also process and audit Claims by Settlement Class Members and Opt-Out Requests, and make Merchandise Credits available to Claimants. (Ex. A at ¶¶5-8).

IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED:

The Settlement here is conditioned upon the Court certifying a Settlement Class, for settlement purposes only, under Fed. R. Civ. Proc. 23(b)(3), to pursue claims for monetary, as well as injunctive, relief. (Ex. A at ¶2.4). The Settlement Class will be defined to include:

> all persons who in the State of California, and between July 17, 2011 and the present (the "Settlement Class Period"), purchased from a T.J. Maxx, Marshalls or HomeGoods store in California one or more items with a TJX price tag that included a Compare At price, and who have not received a

1 refund or credit for all of their purchase(s). Excluded from the Settlement
2 Class are the Settling Defendants, as well as their past and present officers,
3 directors, employees, agents or affiliates, and any judge who presides over
4 this Litigation. (Ex. A at ¶1.27).
5 The Court is endowed with the authority to certify a class for settlement purposes at
6 any time before a decision on the merits. Fed. R. Civ. Proc. 23(c)(1)(C); *Vizcaino v. U.S.*
7 *Dist. Court for Western Dist. Of Washington*, 173 F.3d 713, 721 (9th Cir. 1999). The
8 requested certification order should be granted because it is appropriate to provide
9 monetary, as well as injunctive, relief to Class Members who were exposed to the pricing
10 practices complained of in Plaintiffs' CAC.
11 Plaintiffs' CAC alleges that Plaintiffs purchased multiple products from TJX stores
12 in reliance on the Defendant's "Compare At" reference prices and the supposed savings
13 which Defendant falsely represented that Plaintiffs would receive, which they would not
14 otherwise have purchased but for Defendant's false, deceptive and/or misleading
15 advertising. (CAC at ¶¶ 138-184). The CAC further alleges that Defendant's
16 representations were likely to mislead reasonable consumers into believing that
17 Defendant's prices were significantly lower than the prices consumers would pay for the
18 identical products at other retailers, and that Class Members would enjoy significant
19 savings by purchasing those products from Defendant. (CAC at ¶¶ 57-58).
20 The purpose of class certification is simply a procedural tool for the Court "to select
21 the metho[d] best suited to adjudication of the controversy fairly and efficiently." *Amgen*
22 *Inc. v. Connecticut Ret. Plans & Trust Funds,* 568 U.S. 455, 460, 133 S.Ct. 1184, 1191,
23 185 L.Ed.2d 308 (2013). This action should be certified to proceed as a class action
24 because: (1) the claims of the named Plaintiffs and all other Class Members arise from
25 Defendant's common price advertising; (2) the legal claims of the named Plaintiffs - that
26 Defendant's comparative reference price advertising violates the UCL, FAL and CLRA -
27 are common to all Class Members; (3) the issues to be tried in this case – whether
28 Defendant's comparative reference price claims are material and likely to deceive a

1 reasonable consumer – are common to all Class Members; and, (4) the injunctive and
2 monetary relief provided by the Settlement here will benefit all Class Members.
3 While the Settlement Class must satisfy the requirements of Rule 23, those
4 requirements are easily met here. FRCP 23 provides that "[o]ne or more members of a
5 class may sue . . . as representative parties on behalf of all members" if the prerequisites of
6 FRCP 23(a), and the requirements of at least one subsection of FRCP 23(b), are satisfied.
7 The prerequisites of FRCP 23(a) include that: (1) the class be "so numerous that joinder of
8 all members is impracticable;" (2) "there are questions of law or fact common to the
9 class;" (3) the claims of the class representatives are "typical" of the claims of the other
10 class members; and, (4) the class representatives and their counsel will fairly and
11 adequately represent the interests of the class.
12 **A. <u>Numerosity</u>**:
13 "In the Ninth Circuit, numerosity is presumed to be satisfied when the class exceeds
14 40 members." *Alvidres v. Countrywide Financial Corp*., 2008 WL 1766927 (C.D. Cal.
15 2008), at *2. The Settlement Class here includes approximately 8,000,000 members and
16 therefore satisfies Rule 23(a)(1)'s numerosity requirement.
17 **B. <u>Commonality</u>**:
18 Federal Rule of Civil Procedure 23(a)(2) conditions class certification on
19 demonstrating that members of the proposed class share common "questions of law or
20 fact." *Stockwell v. City & County of San Francisco*, 749 F.3d 1107 (9th Cir. 2014). Rule
21 23(a)(2) requires only "a single significant question of law or fact." *Abdullah v. U.S. Sec.*
22 *Assocs., Inc*., 731 F.3d 952, 957 (9th Cir.2013). Further, a common contention need not
23 be one that "will be answered, on the merits, in favor of the class." *Amgen*, 133 S.Ct. at
24 1191. Instead, it only must be of such a nature that it is capable of classwide resolution.
25 Rule 23(a)(2)'s commonality requirement is construed permissively. *Alvidres*, 2008 WL
26 1766927 at *2 ("There is no requirement that all questions of fact and law be the same for
27 all members of the class. Rather, as long as there are shared legal issues common to the
28 class," which drive the resolution of Plaintiffs' claims, "commonality may be satisfied.").

1 The crux of Plaintiffs' claims here is that Defendant's reference price advertising
2 was deceptive which was common and consistent throughout Defendant's California
3 stores. The common questions of whether Defendant's price comparison advertising
4 resulted in deceptive price comparisons that were likely to deceive a reasonable consumer
5 is common to all Class Members.
6 In this case, all putative Class Members purchased merchandise from Defendant at
7 one or more of Defendant's stores in California at some time during the Class Period. All
8 putative Class Members were exposed to Defendant's comparative price advertising. All
9 putative Class Members purchased one or more products from Defendant which were
10 each advertised with a comparative reference price which Plaintiffs allege were deceptive.
11 Each putative Class Member's claim arises under the UCL, FAL and CLRA. Plaintiffs'
12 claims and those of all other Class Members arise out of a common course of conduct by
13 Defendant, i.e., Defendant's comparative reference price advertising described in
14 Plaintiffs' CAC. Thus, Rule 23(a)(2)'s commonality requirement is satisfied here.
15 **C. Typicality:**
16 FRCP 23(a)(3) requires that "the claims or defenses of the representative parties are
17 typical of the claims or defenses of the class." The purpose of the typicality requirement
18 "is to assure that the interest of the named representative aligns with the interests of the
19 class." *Wolin v. Jaguar Land Rover North Am. LLC,* 617 F.3d 1168, 1175 (9th Cir. 2010).
20 "The test of typicality is whether other members have the same or similar injury, whether
21 the action is based on conduct which is not unique to the named plaintiffs, and whether
22 other class members have been injured by the same course of conduct." *Id*. "Similar to
23 commonality, the typicality requirement is a permissive standard." *Alvidres*, 2008 WL
24 1766927 at *2.
25 Here, Plaintiffs' claims are based on the same facts and same legal and remedial
26 theories as the claims of the rest of the Class Members. All putative Class Members were
27 exposed to the same allegedly deceptive advertising by the same Defendants. Plaintiffs
28 and each Class Member they seek to represent have all been exposed to Defendant's

allegedly deceptive comparative price advertising. Thus, Plaintiffs' claims are typical of every other putative Class Member's claim. Rule 23(a)(3)'s typicality requirement is therefore satisfied here.

D. <u>Adequacy</u>:

FRCP 23(a)(4) requires that class representative and their counsel "fairly and adequately protect the interests of the class." A two-prong test is used to determine whether this standard is met: "(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 (9th Cir. 2011).

In this case, Plaintiffs have no interests antagonistic to the interests of other Class Members, have diligently litigated this action on behalf of the Class, and have reached a settlement favorable to all Class Members equally. In addition, Plaintiffs' counsel are experienced class action attorneys, will continue to diligently prosecute this action on behalf of the Class, and will continue to commit the time and resources necessary to protect the interests of the Class.

Here, there is no conflict of interest between any Plaintiff and any other Settlement Class Member. Nor are there any issues with respect to the competency of Plaintiffs' counsel. Thus, Rule 23(a)(4)'s adequacy requirement is met here.

E. <u>Rule 23(b)(3) Settlement Class</u>:

In *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 620-21 (1997), the Supreme Court clarified the difference between certifying a litigation class under Fed. R. Civ. Proc. 23(a) and (b) and certifying a settlement class under Rule 23(e). In recognizing that "[s]ettlement is relevant to a class certification," the Supreme Court held that when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems," because the proposal in a request to certify a class for settlement purposes "is that there be no trial." *Id*. at 620.

1 The focus here is "whether [the] proposed class has sufficient unity so that absent
2 members can fairly be bound by decisions of [the] class representatives." *Id*. at 621. Rule
3 23(b)(3) requires that common questions predominate over individual questions.
4 However, it is not necessary to show that each question will be answered in favor of the
5 Class, but only that there is a common methodology for proving liability on behalf of the
6 Class. *Amgen*, 133 S. Ct. at 1191. Under Rule 23(b)(3), the Court need only form a
7 "reasonable judgment" on each certification requirement "[b]ecause the early resolution of
8 the class certification question requires some degree of speculation[.]" *Spann v. J.C.*
9 *Penney Corp*., 307 F.R.D. 508, 514 (C.D. Cal. 2015) ("*Spann*"). "District courts in
10 California routinely certify consumer class actions arising from alleged violations of the
11 CLRA, FAL, and UCL." *Tait v. BSH Home,* 2012 WL 6699247 at *12 (C.D. Cal. Dec.
12 20, 2012). In a similar false pricing case, the court in *Spann* found that "[t]his case is one
13 of those routine cases." 307 F.R.D. at 518. The overriding common question in this case
14 is "whether defendant's [price-comparison] advertisements were likely to deceive a
15 reasonable consumer." *Id*. at 518. "Courts often find that common questions predominate
16 in FAL actions because they call for analysis under an objective reasonable person test."
17 *Id*. at 523. As in *Spann*, "the basic common question [here] – whether defendant's price
18 comparison scheme generated false advertisements that deceived consumers –
19 predominates under the UCL, CLRA, and §17500 of the FAL." *Id*. at 529.
20 At this stage, Plaintiffs must merely "present a likely method for determining class
21 damages, though it is not necessary to show that their method will work with certainty at
22 this time." *Chavez v. Blue Sky Natural Beverage Co*., 268 F.R.D. 365, 379 (N.D. Cal.
23 2010). "[T]he presence of individualized damages cannot, by itself, defeat class
24 certification under Rule 23(b)(3)." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th
25 Cir. 2013). Plaintiffs must simply show that damages "stemmed from the defendant's
26 actions that created the legal liability." *Id*. at 513.
27 Each of the alternative measures for calculating restitution proposed by Plaintiffs
28 throughout this litigation rests on simple, mathematical calculations using Defendant's

objective sales data and Class Member receipts, and thus avoids any individual issues that might defeat certification. *Negrete v. Allianz Life Ins.*, 238 F.R.D. 482, 494 (C.D. Cal. 2006). Restitution here can be calculated using a mechanical process without regard to individualized issues, such as the difference between an item's sale price and its ARP.

Finally, the superiority requirement of Rule 23(b)(3) is satisfied because the ultimate recovery by Settlement Class Members would be dwarfed by the cost of litigating on an individual basis, and any Member who wishes to opt out may do so pursuant to the proposed notice plan. In this case, "each class member's claim for restitution involves a relatively small sum of money, and litigation costs would render individual prosecution of such claims prohibitive." *Spann*, 307 F.R.D. at 531. In sum, Plaintiffs contend that the proposed Settlement Class here satisfies the requirements of Rule 23(a), (b)(3), and (e), classwide monetary relief is appropriate here, and the proposed Settlement Class should be certified as requested.

V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED:

The Court must determine whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. Proc. 23(e)(2). However, there is a strong judicial policy that favors settlements. *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992). "[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217, 103 S. Ct. 1219, 75 L. Ed. 2d 456 (1983).

The settlement approval process typically involves two steps. First, the Court must determine whether the proposed settlement merits preliminary approval so that notice can be issued to class members and a final fairness hearing can be scheduled. *See e.g., Pereira v. Ralph's Grocery Co.*, 2010 WL 6510338, at *2 (C.D. Cal. Mar. 24, 2010) (noting that a full fairness analysis is unnecessary at the preliminary approval stage). Second, at the final approval stage, the Court makes a complete determination regarding the fairness, reasonableness, and adequacy of the settlement and hears any objections of class

members. *West v. Circle K Stores, Inc.*, 2006 WL 1652598, at *2 (E.D. Cal. June 13, 2006).

"[P]reliminary 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, 1079 (N.D. Cal. 2007) (emphasis added); *see also Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) ("To determine whether preliminary approval is appropriate, the settlement need only be *potentially* fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval, after such time as any party has had a chance to object and/or opt out.") (emphasis in original). The Court does not need to "specifically weigh[] the merits of the class's case against the settlement amount and quantif[y] the expected value of fully litigating the matter." *Rodriquez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Rather, the Court need only evaluate whether the Settlement is "the product of an arms-length, non-collusive" negotiations. *Id.*

A. <u>The Settlement is the Product of Informed, Arms-Length Negotiations</u>:

This case has been contentiously litigated from the start. (Morosoff Dec. at ¶24). The Settlement was reached after extensive written discovery, depositions, motions to compel, law and motion practice (including resolution of a motion to dismiss, and briefing on a motion for class certification and motion for summary judgment), and protracted settlement negotiations. (Id.). Both parties were represented by experienced class counsel, and Plaintiffs participated throughout the settlement process. (Morosoff Dec. at ¶25). Moreover, the parties did not discuss or negotiate Class Counsel's attorneys' fees and costs, or Plaintiffs' proposed Class Representative Payments, until *after* all other material terms of the Settlement were reached. (Id.)

A settlement negotiated by experienced attorneys and reached with the assistance of an experienced mediator through a negotiating process supports a determination that the

1 process was not collusive. *See e.g. Carter v. Anderson Merchandisers, LP*, 2010 WL
2 1946784, at *7 (C.D. Cal. May 11, 2010) (Settlement is product of arms-length
3 negotiation if it is reached through "formal mediation sessions presided over by an
4 experienced mediator."). The mediator in this action, Judge Nagle, is one of the most
5 well-respected mediators by both plaintiffs and defendants in complex and class action
6 litigation. Moreover, and at the time of negotiating the Settlement here, the Parties were
7 fully versed with the relevant facts and law, and were in a position to make an informed
8 evaluation of "the likelihood of a plaintiffs' or defense verdict, the potential recovery, and
9 the chances of obtaining it[.]" *Rodriquez*, 563 F.3d at 965. The Settlement here is the
10 product of arms-length negotiations and there is *no evidence* to suggest that it is "the
11 product of fraud or overreaching by, or collusion between, the negotiating parties[.]" *Id.*

12 **B. The Amount Offered in Settlement is Fair and Reasonable**:

13 As the Ninth Circuit has noted, "the very essence of a settlement is compromise, 'a
14 yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d
15 at 624. "[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and
16 expensive litigation that induce consensual settlements. The proposed settlement is not to
17 be judged against a hypothetical or speculative measure of what might have been achieved
18 by the negotiators." *Id.* at 625.

19 Here, the Class Settlement Amount of $8,500,000, combined with the injunctive
20 relief, is substantial and falls well within a range of possible approval. This is particularly
21 true given the real and substantial risk that Plaintiffs could have successfully proven
22 liability at trial yet still recovered *nothing* because the entitlement to and amount of
23 restitution in this case are not certain.

24 While Plaintiffs firmly believe that their liability case is exceptionally strong,
25 Defendant has consistently argued that they are not entitled to *any* restitution because
26 restitution must be measured by the difference between the amount paid and value
27 received which, Defendant argues, equals zero. While Plaintiffs dispute this, and have
28 proposed other alternative measures of restitution, the fact and amount of restitution still

1 remain hotly contested and subject to the Court's discretion. *Pulaski & Middlman, LLC v.*
2 *Google, Inc.*, 802 F.3d 979, 986 (9th Cir. 2015). Accordingly, there is considerable
3 uncertainty as to whether Plaintiffs could recover any restitution even if they were able to
4 prove liability at trial.
5 With respect to the strength of Plaintiffs' case and the risk of further litigation, there
6 is a real risk that Plaintiffs could recover nothing. See, e.g., *Stathakos v. Columbia*
7 *Sportswear Co*., No. 15-cv-04543-YGR (N.D. Cal. May 11, 2017) at *11-13 (dismissing
8 plaintiffs' claims for monetary relief in deceptive price tag case). That is because, in
9 addition to the inherent risk associated with proving liability, Plaintiffs face the risk that it
10 may be difficult to prove a legally and factually supportable measure of damages or
11 restitution. Indeed, this has been perhaps the most hotly disputed issue in this case, even
12 more so than the question of liability.
13 The recent decision in *In re Tobacco Cases II*, 2015 WL 5673070, at **5-9 (Cal.
14 App. Sept. 28, 2015) ("*Tobacco*"), makes this clear, where the plaintiffs established
15 liability on their UCL and FAL claims but the trial court declined to award *any* restitution
16 because the plaintiffs failed to prove a difference between the amount paid and value
17 received. *Id*. In fact, the court in *Tobacco* ordered the plaintiffs to pay the *defendant's*
18 litigation costs of almost $800,000. *Id.* The court of appeals affirmed, holding that the trial
19 court "lacked discretion to award restitution" because the plaintiffs did not establish any
20 price/value differential. *Id.* at *13.
21 Here, it is difficult to dispute that each Class Member received products with *some*
22 value. It could therefore be argued that restitution should be limited to the difference
23 between price paid and value received, which could conceivably result in no monetary
24 recovery. *Id*. While Plaintiffs believe their case is distinguishable from *Tobacco*, and that
25 alternative measures of restitution remain viable in this case, there can be no doubt that
26 Defendant would have moved forward with its argument concerning Plaintiffs'
27 entitlement to restitution if this case did not settle. Settlement negotiations in this case
28 took place with the *Tobacco* decision in mind. (Morosoff Dec. at ¶27).

1 In evaluating the Settlement, it is appropriate to consider the amount that Settlement
2 Class Members will actually recover. Here, Claimants will receive Merchandise Credits,
3 and the amount that they receive will depend on the number of Claims submitted and the
4 fees and costs awarded by the Court. (Ex. A at ¶¶1.14, 3.1-3.2).
5 Assuming that Notice and Administration Costs equal JND's estimate of $475,000,
6 and assuming *arguendo* that the Court awards the full amount requested for Attorneys'
7 Fees and Costs ($2,125,000) and Enhancement Payments ($30,000), there will be
8 $5,870,000 remaining in the Monetary Component for distribution to Claimants.
9 (Morosoff Dec. at ¶31). From that, it is possible to calculate a range of expected benefits
10 to Settlement Class Members based on estimated claim rates. (Morosoff Dec. at ¶32).
11 For example, a 1% claim rate would provide a benefit of approximately $75.00 for
12 each Claimant; a 2% claim rate would provide a benefit of approximately $37.00 per
13 Claimant; a 3% claim rate would provide a benefit of approximately $25.00; and, a 5%
14 claim rate would result in a benefit of approximately $15.00 per Claimant. (Id.).
15 Any evaluation of Plaintiffs' theoretical recovery if they were to prevail at trial,
16 must also consider the additional costs and delay of trial and the risk that Plaintiffs could
17 prove liability yet still recover nothing. *See e.g. Schaffer v. Litton Loan Servicing, LP*,
18 2012 WL 10274679, at *11 (C.D. Cal. Nov. 13, 2012) ("Estimates of a fair settlement
19 figure are tempered by factors such as the risk of losing at trial, the expense of litigating
20 the case, and the expected delay in recovery (often measured in years)."); *Linney v.*
21 *Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("The fact that a
22 proposed settlement may only amount to a fraction of the potential recovery does not . . .
23 mean that the proposed settlement is grossly inadequate and should be disapproved.").
24 Even if Plaintiffs would have prevailed on Defendant's motion for summary judgment,
25 and prevailed on their motion for class certification, and successfully proved their case at
26 trial, the amount of restitution recovered, if any, could vary widely depending on a number
27 of factors. And, if anything were recovered, it could take years to secure, as Defendant
28 would undoubtedly appeal an adverse judgment. In comparison, the Settlement provides a

1 fixed, immediate and substantial recovery of up $8.5 million, plus meaningful prospective
2 remedial relief. The Settlement is therefore fair and reasonable, and certainly within the
3 range of possible final approval.

4 **C. The Settlement Does Not Improperly Grant Preferential Treatment to the**
5 **Class Representatives:**

6 The Agreement authorizes Class Representative Payments for the named Plaintiffs
7 in an amount to be determined by the Court but not to exceed $7,500 each. (Ex. A at
8 ¶¶1.10, 3.1.4). Incentive awards typically range from $2,000 to $10,000. *Bellinghausen v.*
9 *Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015) (collecting cases). In
10 evaluating incentive awards, the Court may consider whether there is a "significant
11 disparity between the incentive award[] and the payments to the rest of the class members"
12 such that it creates a conflict of interest. *Radcliffe v. Experian Info. Solutions, Inc.*, 715
13 F.3d 1157, 1165 (9th Cir. 2013). More importantly, however, are "the number of class
14 representatives, the average incentive award amount, and the proportion of the total
15 settlement that is spent on incentive awards." *In re Online DVD*, 779 F.3d at 947. Finally,
16 the Court must evaluate whether the incentive award was conditioned on class
17 representative's approval and support of the Settlement. *Radcliffe*, 715 F.3d at 1161.
18 Here, it was not. (Morosoff Dec. at ¶¶25, 29).

19 The $7,500 incentive awards requested here do not rise to the level of unduly
20 preferential treatment, and are justified in this case. Indeed, courts have approved similar
21 or greater disparities between incentive awards and individual class member payments.
22 *See e.g. Fulford v. Logitech, Inc.*, 2010 WL 807448, at *3 n.1 (N.D. Cal. Mar. 5, 2010)
23 (collecting cases awarding incentive award payments ranging from $5,000 to $40,000).

24 Here, there are only four class representatives who seek approximately one-third of
25 1% (0.3%) of the $8.5 million total settlement amount. Each of the four Plaintiffs were
26 significantly involved in this action from the outset, including responding to extensive
27 discovery and preparing for and sitting for all-day depositions. This amount is reasonable
28 considering how small the award is in relation to the full amount of the settlement fund.

See In re Online DVD, 779 F.3d at 947-948 (approving incentive awards that "ma[d]e up a mere .17% of the total settlement fund."). Finally, Plaintiffs did not condition their approval and support of the Settlement on any of them receiving an incentive award. (Morosoff Dec. at ¶¶25, 29). Accordingly, Plaintiffs' interests do not conflict with or diverge from the interests of the Settlement Class. *Radcliffe*, 715 F.3d at 1161.

D. <u>The Proposed Settlement Has No Obvious Deficiencies</u>:

The Settlement makes available a large amount of monetary relief, plus remedial relief, for the benefit of Settlement Class Members. It is structured to be consistent with *In re Online DVD*, where settlement proceeds were allocated evenly regardless of specific damages incurred by each claimant. 779 F.3d at 941. Examination of the Settlement here reveals no obvious defects.

VI. <u>THE PROPOSED NOTICE SHOULD BE APPROVED</u>:

Rule 23(e) requires that the notice to the Class describe "the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *In re Online DVD*, at 946; *see also Rodriguez*, 563 F.3d at 962 (notice is adequate when it describes "the aggregate amount of the settlement fund and the plan for allocation."). It "does not require detailed analysis of the statutes or causes of action forming the basis for the plaintiff class's claims, and it does not require an estimate of the potential value of those claims." *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012).

A. <u>The Proposed Form of Notice is Accurate and Adequately Informs Class Members of Their Rights</u>:

The Website Notice, Email Notice, Post-Card Notice, Summary Publication Notice, and In-Store Notice, attached respectively as Exhibits 2, 3, 4, 5 and 7 to the Agreement, clearly meet these standards. Each describes the Settlement Class and provides simple and straightforward information about the nature of the action, what options Settlement Class Members have in the case, the effect of their choices of action, and the need to check the Settlement Website for more detail. Each also states the amount of the QSF, and explains

1 that Claimants will receive Merchandise Credits, and that the amount of Merchandise
2 Credit will depend on the amount of attorneys' fees, costs and representative
3 enhancements awarded, and on the number of valid claims received. (Id.). The Notices
4 further state the amount Class Counsel may seek in fees, expenses and Enhancement
5 Payments, the fact that Settlement Class Members will need to submit a Claim Form to
6 obtain relief, the deadline for objecting, opting out or submitting a claim, and the date,
7 time and place of the Final Approval hearing. (Id.). The Notices list a toll-free phone
8 number and website where Settlement Class Members can submit inquiries. (Id.). The
9 Notices are, therefore, adequate and satisfy due process. *In re Online DVD,* 779 F.3d at
10 946.

11 **B. The Proposed Method of Notice Provides for the Best Notice Practicable:**

12 Rule 23(c)(2) requires the Court to direct to Class Members the "best notice
13 practicable" under the circumstances, including "individual notice to all members who can
14 be identified through reasonable effort." *Silber v. Mabon,* 18 F.3d 1449, 1454 (9th Cir.
15 1994). Individual notice through email, or United States mail in situations where email is
16 not successful, is "clearly the 'best notice practicable'" where the names and email
17 addresses of Class Members are easily ascertainable. *See, e.g. Keirsey v. eBay, Inc.,* 2014
18 WL 644697, at *1 (N.D. Cal. Feb. 14, 2014).

19 Here, JND will send an Email and/or Post-Card Notice to all of the approximately
20 1,300,000 Known Class Members via U.S. Mail using the mailing address information
21 from Defendant's databases, or by e-mail where Defendant has valid e-mail addresses in
22 its databases. (Keough Dec. at ¶¶15-23). The Email and Postcard Notice shall provide
23 Known Class Members with instructions regarding how they can elect not to participate or
24 object. (Agreement, Exhs. 3 and 4.). For those Email and Post-Card Notices that are
25 returned as undeliverable, JND will perform a skip-trace to find the most current address
26 and resend the Email and/or Post-Card Notice. (Keough Dec. at ¶¶15-23). This method
27 of sending notice is anticipated to reach, conservatively, slightly over 16 percent of the
28 Settlement Class (i.e., approximately 1.3 million of the estimated 8 million Settlement

Class Members. It is also designed to resemble, to the extent possible, the method used and approved of by the Ninth Circuit in *In re Online DVD*, 779 F.3d at 941; *see also Id.* at 946 (notice provided by both mail and email was sufficient under the Constitution and Rule 23(e)).

In addition, the parties have agreed to publish notice as reflected in Exhibits 2, 5 and 7 to the Agreement. JND will cause the Publication Notice to be printed in the following magazines and newspapers: *Parade Magazine* (California edition); *USA Today* (California edition), *Los Angeles Times*, *San Francisco Chronicle*, *San Diego Union-Tribune*, *Sacramento Bee*, *Orange County Register*, and *San Jose Mercury News*. (Keough Dec. at ¶12).

Further, the notice program will also include an In-Store Notice (Exh. 7) which will be posted in each of the over 300 TJX stores in California for 90 days. Finally, a Website Notice will be posted on the dedicated Settlement Website.

In sum, the Parties have proposed a comprehensive notice campaign that is reasonably calculated to provide notice that is consistent with court approved notice programs in similar matters, and which satisfies due process requirements. (Keough Dec. at ¶¶14, 39). The Notice program therefore should be approved.

VII. CONCLUSION:

The parties have negotiated a fair and valuable Settlement that provides Settlement Class Members with ample financial compensation and important prospective remedial relief. None of this would have happened but for the use of class action procedures,

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dedicated and informed Class Representatives, and experienced Class Counsel. Plaintiffs respectfully request that the Court certify the Settlement Class as requested, preliminarily approve the Settlement, direct that Notice be provided to Settlement Class Members, and set a Final Approval hearing date on April 16, 2017, or as soon thereafter as the Court's calendar permits.

Dated: September 18, 2017

Respectfully submitted,
LAW OFFICE OF CHRISTOPHER J. MOROSOFF

By: /s/ *Christopher J. Morosoff*
Christopher J. Morosoff
Attorneys for Plaintiffs
STACI CHESTER, et al.