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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LINDA RUBENSTEIN, on behalf of
herself and all others similarly
situated,

Plaintiffs,

v.

THE NEIMAN MARCUS GROUP
LLC, a Delaware Limited Liability
Company, and DOES 1-50,
inclusive,

Defendants.

Case No. 2:14-CV-07155-SJO-JPR

**NOTICE OF UNOPPOSED MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, CERTIFICATION OF
THE SETTLEMENT CLASS, SETTING
A HEARING ON FINAL APPROVAL
OF SETTLEMENT, AND DIRECTING
NOTICE TO THE CLASS**

Assigned to Hon. S. James Otero

DATE: May 21, 2018
TIME: 10:00 a.m.
Courtroom: 10C

Complaint Filed: August 14, 2014

**TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR
ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on May 21, 2018 at 10:00 a.m. in Courtroom 10C of the above captioned court, located at 350 W. 1st Street, Los Angeles, California 90012, before the Honorable S. James Otero, pursuant to Federal Rules of Civil Procedure 23(c)(2) and (e), Plaintiff Linda Rubenstein (“Plaintiff”) hereby moves, unopposed, for preliminary approval of a class action settlement. This motion is made on the grounds that the Parties have reached a settlement of this action for which preliminary approval is required. A copy of the Settlement Agreement and exhibits thereto is attached to the concurrently filed Declaration of Joshua A. Fields as Exhibit A.

This motion is based on this notice of unopposed motion and motion, the accompanying memorandum of points and authorities, the Settlement Agreement and exhibits thereto attached to the concurrently filed Declaration of Joshua A. Fields as Exhibit A, the concurrently filed Declaration of Joshua A. Fields, the papers on file in this action and such oral or documentary evidence that may be presented at the hearing on this motion.

KIRTLAND & PACKARD LLP

DATED: April 20, 2018

By: /s/ Joshua A. Fields
MICHAEL LOUIS KELLY
BEHRAM V. PAREKH
JOSHUA A. FIELDS

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**MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, CERTIFICATION OF
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A HEARING ON FINAL APPROVAL
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1 **I. BACKGROUND OF LITIGATION AND SETTLEMENT**

2 Plaintiff Linda Rubenstein (“Plaintiff”) respectfully submits this memorandum
3 in support of her Motion for Preliminary Approval of Class Action Settlement
4 under Federal Rules of Civil Procedure (“Rule”) 23(c)(2) and (e). The Parties
5 resolved this lawsuit (the “Action”) after significant discovery, many months of
6 arm’s length negotiation, exchanges of relevant information, and the mediation
7 expertise of the Honorable Carl West (Ret.). (“Mediator”)

8 Plaintiff brought the Action pursuant to Rule 23 on behalf of herself and all
9 others similarly situated, seeking to represent all persons who purchased products
10 from defendant Neiman Marcus Group LLC’s (“Neiman”) Last Call stores in
11 California labeled with a “Compared to” price, but which products Plaintiff alleged
12 were never sold at Neiman flagship retail stores at or above the advertised
13 “Compared to” price and such products of like grade and quality were not being
14 sold at the “Compared to” price at the time of the purchase in the area of the Last
15 Call store.¹ [See Third Amended Complaint (“TAC”), Docket Entry (“D.E.”) 69]
16 Like all Settlement Class Members she seeks to represent, Plaintiff purchased
17 products from Last Call advertised with a “Compared to” price. (*See Id.*) In her
18 TAC, Plaintiff alleges Neiman’s conduct violated California’s False Advertising
19 Laws, *Business & Professions Code* § 17500 *et seq.* (“FAL”), California’s Unfair
20 Competition Law, *Business & Professions Code* § 17200 *et seq.* (“UCL”), and
21 California’s Consumer Legal Remedies Act, *Civil Code* § 1750 *et seq.* (“CLRA”).

22 **Procedural History of the Mediation**

23 During the course of the litigation, the Parties engaged in extensive motion
24 practice, and written and oral discovery. Percipient and expert witnesses were
25 deposed. In or about July 2017, Plaintiff and Neiman agreed to mediate the issues

26
27 ¹ Plaintiff also sought to represent all California purchasers who bought
28 products Neiman advertised with a “Compared to” price on the Last Call e-
commerce website.

1 in the Action before the Mediator. The Parties engaged in settlement discussions,
2 which included numerous telephonic calls, exchanges of relevant information,
3 submission of mediation briefs, and in-person sessions with the Mediator on August
4 4, 2017 and on December 7, 2017, with discussions ongoing thereafter.² On
5 December 13, 2017, the Parties agreed to preliminary settlement terms. After
6 months further negotiating final, detailed settlement terms, the Parties fully
7 executed the settlement agreement on April 18, 2018. *See* Settlement Agreement
8 and exhibits, Ex. A to Fields Declaration (“Fields Decl.”).

9 **Summary of the Proposed Settlement**³

10 The Parties’ Settlement Agreement proposes certification of a Settlement
11 Class in the Action pursuant to Rule 23(b)(2) and (3) consisting of:

12 all natural persons who purchased one or more products advertised
13 with a “Compared to” price, where such purchase was made from
14 August 7, 2010 through the date of the Preliminary Approval Order,⁴
15 at any of Neiman’s Last Call stores in California or on Last Call’s e-
16 commerce website if the purchaser provided a California billing
address.

17 The Settlement Agreement provides for Neiman to pay a Gross Settlement Amount
18 of \$2,900,000 to be held in a Qualified Settlement Fund (“QSF”). Participating
19

20 ²Between the in-person mediation sessions, Plaintiff filed her TAC on
21 September 11, 2017 (D.E. 69), and moved to certify a California Class on
22 September 12, 2017 (D.E. 70) which Neiman thereafter opposed (D.E. 79). The
Action was settled before the Court ruled on the class certification motion.

23 ³ All terms are defined in the Settlement Agreement (Fields Decl., Ex. A).

24 ⁴In the Settlement Agreement, the Parties inadvertently defined the Class
Period to run through the date of the *Final* Approval Order, rather than the
25 Preliminary Approval Order. Upon consultation of counsel pursuant to L.R. 7-3
26 prior to the filing of this motion, it was agreed that, for obvious logistical and due
process reasons, the Class Period should instead end upon issuance of the
27 Preliminary Approval Order. Accordingly, by this motion, Plaintiff moves for
28 certification (for settlement purposes, only) of a class bounded by a period ending
upon the Preliminary Approval Order.

1 Class Members may make a claim for monetary compensation from the Net
2 Settlement Fund, i.e. the Gross Settlement Amount minus Claims Administrator
3 Fees and Expenses (not to exceed \$400,000), and minus awards the Court may
4 grant Plaintiff and her counsel.⁵ Each Participating Settlement Class Member shall
5 be entitled to recover from the Net Settlement Fund based on point allocations
6 involving the total purchase price of all Qualifying Purchases, with consideration of
7 whether Proof of Purchase is provided. Neiman also will implement in-store
8 signage and a website posting concerning its “Compared to” prices if such prices
9 are used, in addition to employee training on the issue.

10 **Individual Class Member Benefit**

11 The proposed Settlement Agreement (Fields Decl., Ex. A) provides proposed
12 Settlement Class Members substantial benefit: payment to each qualifying
13 participant from a portion of the Net Settlement Fund. Specifically, each
14 Authorized Claimant will be assigned points that will be divided by the total points
15 of all Authorized Claimants who submit timely and valid Claim Forms. The
16 quotient shall be the percentage of the Net Settlement Fund each Authorized
17 Claimant will receive. Points are determined by the purchase price, including tax,
18 of all Qualifying Purchases by the Authorized Claimant, with additional points
19 available with Proof of Purchase.⁶ Essentially, each Authorized Claimant receives
20 a proportional share of the Net Settlement Fund, which will amount to at least
21 \$1,625,000 (after administrative expenses, attorneys fees/costs, and a Plaintiff
22 service payment that may be awarded are deducted), based on the total amount of
23 purchases made at California Last Call Stores or online, and whether Proof of
24 Purchase is provided. No reversionary interest to Neiman exists as to any amount

25 ⁵Settlement Class Counsel Fees and Litigation Expenses Payment is not to
26 exceed \$870,000 plus costs; Settlement Class Representative Payment is not to
27 exceed \$5,000.

28 ⁶ Section 3.5(a) of the Settlement Agreement (at pages 10-12) details the
point allocation and payment distribution processes. *See* Fields Decl., Ex. A.

1 of the Gross Settlement Fund as the entire fund will be distributed to claimants.
2 Any funds remaining in the Net Settlement Fund at the end due to uncashed checks
3 will be distributed to Public Counsel, the Parties' designated *Cy Pres* recipient.

4 **Notice**

5 **A. Known Class Members**

6 Notice to known class members, i.e., class members for which Neiman has
7 either an e-mail or mailing address, will be sent directly via e-mail, or if no e-mail
8 address is available or the e-mail address results in a bounce-back, via U.S. mail.

9 A copy of the "Email Notice" substantially in the form of Exhibit 1 to the
10 Settlement Agreement (Fields Decl., Ex. A), shall be emailed to Settlement Class
11 Members by the Claims Administrator per the Settlement Agreement's section
12 5.1(a) within thirty (30) days of the Court's entry of the preliminary approval order.

13 To the extent Email Notice is impossible, impracticable or unsuccessful, a
14 Post-Card Notice substantially in the form of Exhibit 1 to the Settlement Agreement
15 (Fields Decl., Ex. A) shall be sent via U.S. Mail to direct Known Settlement Class
16 Members to the Settlement Website, not later than thirty (30) days after the Court
17 enters the Preliminary Approval Order or within seven (7) days after an e-mail
18 bounce-back is received, if Neiman has a physical address for such Known
19 Settlement Class Member.

20 **B. Unknown Class Members**

21 Section 5.2(a) of the Settlement Agreement provides in relevant part that no
22 later than thirty (30) days after the Court enters its Preliminary Approval Order, the
23 Claims Administrator will run a Summary Publication Notice in one or more print
24 publications substantially in the form of Exhibit 2 to the Settlement Agreement
25 (Fields Decl., Ex. A), and publish internet notice sufficient, in the expert opinion of
26 the Claims Administrator, to provide adequate legal notice to Unknown Settlement
27 Class Members in California, to the extent reasonably practicable.

28 In addition, the Claims Administrator will establish a toll-free number and

1 create and maintain a Settlement Website containing the Settlement Class Notice
2 (substantially in the form of **Exhibit 3**), Claim Form (substantially in the form of
3 **Exhibit 4**), and Opt-Out Form (substantially in the form of **Exhibit 5**), and
4 instructions for submitting objections. Claims Forms will be able to be downloaded
5 from this website and submitted online.

6 This notice to Settlement Class Members is reasonable, appropriate, satisfies
7 due process, and is the best notice practicable here, per Rules 23(c)(2)(B) and
8 23(e)(1). It provides individual notice to a vast number of Settlement Class
9 Members⁷, and wide publication notice to Unknown Settlement Class Members.

10 Similarly, the manner of providing for opt-outs in Section 8.2 of the
11 Settlement Agreement is reasonable, appropriate and satisfies Rule 23(c)(2)(B). The
12 Email Notice, Post-Card Notice and the Settlement Class Notice will instruct
13 Settlement Class Members wishing to exclude themselves from the Settlement to
14 mail to the Claims Administrator, no later than sixty (60) days after Settlement
15 Class Notice is disseminated, a signed Opt-Out Form. A Settlement Class Member
16 who submits a timely and valid Opt-Out Form shall be considered a Non-
17 Participating Class Member and will not be bound by the Settlement.

18 **Actions Requested of the Court**

19 By this Motion, Plaintiff requests the Court enter a “Notice Order” granting
20 preliminary approval. (See Proposed Order of Preliminary Approval of Settlement).
21 That Order authorizes the tasks necessary to allow the proposed settlement process
22 to commence. Those tasks include: (a) conditionally certifying the Settlement
23 Class for settlement purposes only; (b) appointing the Claims Administrator and
24 establishing the QSF; (c) providing notice of the Settlement to affected persons per
25

26 ⁷ For example, during their investigation, Plaintiff’s counsel determined
27 Neiman has email addresses for 177,619 Settlement Class Members who made
28 purchases at California Last Call stores and for 279,397 Settlement Class Members
who made Qualifying Purchases online. (Fields Decl., ¶ 3)

1 the Settlement Agreement's terms; (d) establishing procedures for objections to and
2 exclusions from the proposed Settlement; (e) setting a date for the Fairness
3 Hearing; and (f) appointing Class Counsel and the Class Representative.

4 **II. THE COURT SHOULD PRELIMINARILY CERTIFY THE**
5 **PROPOSED SETTLEMENT CLASS**

6 Plaintiff proposes the Court provisionally certify this action as a class
7 action under Rule 23 for settlement purposes. The Court must satisfy itself, at least
8 conditionally, that Rule 23's requirements are met, and that Plaintiff may be
9 properly appointed Class Representative. *See* Manual for Complex Litigation
10 (Fourth) § 21.632 ["The judge should make a preliminary determination that the
11 proposed class satisfies the criteria set out in Rule 23(a) and at least one of the
12 subsections of Rule 23(b)."] 4 William B. Rubenstein, Alba Conte & Herbert B.
13 Newberg, NEWBERG ON CLASS ACTIONS § 11.25 (4th ed. 2010). Provisional
14 certification is an appropriate device where an agreement to settle occurs before a
15 class is certified for litigation. *See, e.g. Jaffe v. Morgan Stanley & Co., Inc.*, No. C-
16 06-3903 THE, 2008 WL 346417, at *2-3 (N.D. Cal. Feb. 7, 2008); *In re Portal*
17 *Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 1991529, at *2-3 (N.D.
18 Cal. June 30, 2007). Although Neiman would, if contesting class certification on
19 the merits, argue otherwise, the Parties have agreed for settlement purposes the
20 Settlement Class may be certified under Rule 23(b)(2) and (3). The Settlement
21 Agreement and proposed notice allow Settlement Class Members to exclude
22 themselves from the Settlement Class as Rules 23(c)(2)(B)(v) and 23(e)(4) require.

23 **A. The Numerosity Requirement is Met**

24 Rule 23(a)(1) allows a class action to be maintained if "joinder of all
25 members is impracticable" owing primarily, to the large number of people in
26 the proposed class. Fed. R. Civ. P. 23(a)(1); *see also Hanlon v. Chrysler*
27 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Generally, the numerosity
28 requirement is satisfied when the class comprises 40 or more members.

1 *See Celano v. Marriot Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007). In
2 this case, the proposed Settlement Class includes hundreds of thousands of
3 Known Settlement Class Members (*see* Fields Decl., ¶ 3), and an unknown
4 number of Unknown Settlement Class Members. Size renders joinder
5 impracticable here, satisfying numerosity. *See Hanlon*, 150 F.3d at 1019.

6 **B. The Commonality Requirement is Met**

7 Rule 23(a)(2) allows a class action to be maintained if “there are
8 questions of law or fact common to the class.” “Commonality requires the
9 plaintiff to demonstrate that the class members ‘have suffered the same
10 injury.’” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). In
11 other words, the claims of the class members: “must depend on a common
12 contention ... [which] must be of such a nature that it is capable of classwide
13 resolution—which means that a determination of its truth or falsity will
14 resolve an issue that is central to the validity of each one of the claims in one
15 stroke.” *Id.* Here, Settlement Class membership means each Settlement
16 Class Member, by definition, purchased one or more product(s) advertised as
17 having a “Compared to” price at California Last Call stores or online. In the
18 TAC, Plaintiff contends on behalf of each Class Member that Neiman’s
19 conduct violated the FAL, CLRA, and UCL. (*See* D.E. 69) Each Settlement
20 Class Member was subjected to the challenged conduct, so Plaintiff believes
21 answers to common questions, i.e. whether Neiman violated those statutes,
22 and whether Plaintiff and Class Members are entitled to relief, would resolve
23 the claims. Plaintiff contends Settlement Class Members’ claims “stem from
24 the same source,” and commonality exists. *Hanlon*, 150 F.3d at 1019-20.

25 **C. The Typicality Requirement is Met**

26 Rule 23(a)(3) requires “the claims or defenses of the representative
27 parties [to be] typical of the claims or defenses of the class.” Fed. R. Civ. P.
28 23(a)(3). “Under the rule’s permissive standards, representative claims are

1 ‘typical’ if they are reasonably coextensive with those of absent class
2 members; they need not be substantially identical.” *Dukes v. Wal-Mart*, 603
3 F.3d 571, 613 (9th Cir. 2010)(en banc), *quoting Hanlon*, 150 F.3d at 1020,
4 *rev’d on other grounds*, 131 S.Ct. 2541 (2011). As to the representative,
5 “[t]ypicality requires that the named plaintiffs be members of the class they
6 represent.” *Id.* at 613, *citing Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147,
7 156 (1982). The commonality, typicality, adequacy-of-representation
8 requirements “tend to merge” with each other. *Dukes*, 131 S.Ct. at 2551 n.5
9 (citing *Gen. Tel. Co. of Sw.*, 457 U.S. at 157-58).

10 Plaintiff here, like Settlement Class Members, purchased product(s)
11 advertised with a “Compared to” price at California Last Call stores or on
12 the Last Call e-commerce website. She shares interest in redressing claims
13 with the Settlement Class, her claims are typical, and Rule 23(a)(3) is met.

14 **D. Plaintiff and Class Counsel Are Adequate Representatives**

15 Finally, Rule 23(a)(4) and Rule 23(g) together require the named
16 plaintiff and proposed Class Counsel be able to “fairly and adequately”
17 protect and represent the interests of the class, respectively. “Resolution of
18 two questions determines legal adequacy: (1) do the named plaintiffs and
19 their counsel have any conflicts of interest with other class members and (2)
20 will the named plaintiffs and their counsel prosecute the action vigorously
21 on behalf of the class?” *Hanlon*, 150 F.3d at 1020.

22 Here, no conflicts of interest between the Class Representative, Class
23 Counsel, and any members of the proposed Settlement Class exist on any
24 issues. Further, the Class Representative and Class Counsel have already
25 vigorously prosecuted the Action on behalf of the Settlement Class,
26 including filing and service of the lawsuit, serving initial disclosures,
27 opposing multiple motions to dismiss, prevailing on a Ninth Circuit appeal,
28 propounding significant written discovery, analyzing materials Neiman

1 provided, moving for class certification, engaging in settlement discussions,
2 and moving the action forward to resolution. Kirtland & Packard LLP's
3 resume is attached to FieldsDeclaration. (Fields Decl., ¶ 2 and Ex. B)

4 **E. The Proposed Settlement Class Meets Rule 23(b)(2) and (3)**

5 Rule 23(b)(3) provides a class action may be maintained where
6 questions of law and fact common to members of the class predominate over
7 any questions affecting only individuals, and the class action mechanism is
8 superior to other available methods for the fair and efficient adjudication of
9 the controversy. Fed. R. Civ. P. 23(b)(3); *Pierce v. County of Orange*, 526
10 F.3d 1190, 1197 n.5 (9th Cir. 2008). Settlement is proposed, so the Court
11 need not consider trial manageability for settlement class certification
12 purposes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).
13 (citation omitted).

14 The predominance inquiry focuses on the relationship between
15 common and individual issues and “whether proposed classes are sufficiently
16 cohesive to warrant adjudication by representation.” *Id.* at 594. Common
17 issues predominate where a common nucleus of facts and potential legal
18 remedies dominate the litigation. *See Chamberlan v. Ford Motor Co.*, 402
19 F.3d 952, 962 (9th Cir. 2005). Here, Plaintiff believes her claims arise out of
20 the same uniform course of conduct that, by definition, all Settlement Class
21 Members experienced in a uniform manner. For settlement purposes, where
22 manageability of trying the case need not be considered, the predominance
23 requirement is satisfied.

24 In addition, a class action is superior to any other method available to
25 fairly, adequately, and efficiently resolve the proposed Settlement Class
26 Members' claims. Without a class action, most would find litigation costs
27 prohibitive; if they did sue in large numbers, multiple individual actions
28 would inefficiently use the Court's and Parties' resources. Thus, Plaintiff

1 believes a class action is the superior method of adjudicating the Action.

2 Finally, to the extent the Settlement Agreement also provides for
3 certain injunctive relief (*see* § 4), Plaintiff additionally seeks to certify the
4 Settlement Class pursuant to Rule 23(b)(2). That provision applies where
5 “the party opposing the class has acted or refused to act on grounds that
6 apply generally to the class, so that final injunctive relief or corresponding
7 declaratory relief is appropriate respecting the class as a whole.” Fed. R.
8 Civ. P. 23(b)(2); *see also Wal-Mart Stores, Inc.*, 131 S.Ct. at 2557 (Rule
9 23(b)(2) applies “when a single injunction or declaratory judgment would
10 provide relief to each member of the class”). The agreed-to injunctive relief
11 relates to implementation of disclosures and other measures concerning
12 Neiman’s use of “Compared To” or similar pricing. *See* Settlement
13 Agreement, § 4. By definition, all Settlement Class Members purchased
14 products advertised with a “Compared To” price, and thus the proposed
15 injunctive relief is appropriate classwide, consistent with Rule 23(b)(2).

16 **III. THE COURT SHOULD PRELIMINARILY APPROVE THE**
17 **SETTLEMENT AGREEMENT UNDER RULE 23(e)(2)**

18 Preliminary approval requires only that the Court evaluate whether the
19 proposed settlement: (1) was negotiated at arm’s length, and (2) is within the
20 range of possible litigation outcomes such that “probable cause” exists to
21 disseminate notice and begin the formal fairness process. *See* Manual for
22 Complex Litigation (Fourth) § 21.632-33. The Ninth Circuit identifies
23 numerous factors to assess whether a settlement proposal is fundamentally
24 fair, adequate and reasonable: (1) the strength of the plaintiffs’ case and the
25 risk, expense, complexity, and likely duration of further litigation; (2) the
26 amount offered in settlement; (3) the extent of discovery completed and the
27 stage of the proceedings; (4) the experience and views of counsel; (5) the
28 reaction of the class members to the proposed settlement; and (6) any

1 collusion between the parties. *See In re Mego Fin. Corp. Sec. Litig.*, 213
2 F.3d 454, 458-60 (9th Cir. 2000). To preliminarily assess the proposed
3 settlement's reasonableness, the Court should review the settlement's
4 substance and the process utilized to reach it. *In re Tableware Antitrust*
5 *Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) ("preliminary approval
6 ... has both a procedural and substantive requirement"). Each factor supports
7 finding the settlement here is fundamentally fair, adequate and reasonable.

8 **A. The Strength of Plaintiff's Case and the Risk, Expense,**
9 **Complexity, and Likely Duration of Further Litigation**

10 Neiman has raised, and would continue to raise, challenges to the
11 claims' legal and factual bases. Neiman has contended, among other things,
12 Plaintiff cannot meet her burden to certify a class, because, according to it,
13 reliance and alleged deception are not common issues, and require
14 individualized determinations. Separately, Neiman has contended Plaintiff
15 cannot prove individual or classwide damages, and that it will prevail on
16 summary judgment against Plaintiff's claims on that basis.

17 Although Plaintiff continues to believe in her claims, Plaintiff
18 acknowledges risks associated with class certification, and also risks of
19 losing on the merits. The most significant risk is a Court may reject
20 Plaintiffs' damages models, individual or classwide. The Parties differ as to
21 Plaintiff's likelihood of ultimately prevailing after judgment and appeal;
22 however, it is apparent the proposed class has risk litigating the Action.

23 By contrast, the proposed settlement immediately provides the
24 certainty of valuable benefit to proposed Settlement Class Members. The
25 proposed settlement offers all proposed Settlement Class Members a portion
26 of the price of items they purchased advertised as having a "Compared to"
27 price, i.e. a portion of the financial cost they incurred as a result of the
28 challenged practice. If the case is not settled, it would necessitate

1 continuing to prosecute the litigation through trial and, even if successful
2 there, through a potential appeal. Even if Plaintiff eventually succeeds, there
3 is still the certainty that if the case proceeds in litigation, any potential
4 benefits to the proposed class would be delayed for many years.

5 This Settlement Agreement, like all settlements, strikes a balance
6 between the maximum possible recovery the proposed Settlement Class
7 might obtain by pursuing litigation to the very end, and the risk of failing to
8 obtain any recovery should Neiman prevail. In determining whether this
9 Settlement Agreement is sufficiently fair, adequate and reasonable to justify
10 dissemination of notice to the Settlement Class and scheduling the Fairness
11 Hearing, the Court need only inquire whether the consideration provided to
12 the proposed Settlement Class as the Gross Settlement Amount falls within a
13 reasonable range of settlement “by considering the likelihood of a plaintiffs’
14 or defense verdict, the potential recovery, and the chances of obtaining it,
15 discounted to present value.” *Rodriguez v. West Publishing Corp.*, 563 F.3d
16 948, 965 (9th Cir. 2009), *citing* Manual for Complex Litigation (Fourth) §
17 21.62. The answer to that question is most certainly “yes.”

18 The advantages to proposed Settlement Class Members of approving
19 the proposed settlement and quickly distributing to them the consideration
20 provided exceed what is likely to occur if this case proceeds on a litigation
21 track. For this reason, the strength of Plaintiffs’ case and the risk, expense,
22 complexity, and likely duration of further litigation suggest the proposed
23 settlement agreement is fair, reasonable and adequate under Rule 23(e)(2).

24 **B. The Amount Offered in Settlement**

25 In light of litigation uncertainties, the proposed settlement offer’s
26 value is adequate. Neiman will pay the Gross Settlement Amount of
27 \$2,900,000. This amount represents a significant recovery considering all of
28 Neiman’s proffered defenses, particularly as to proposed classwide damages.

1 Plaintiff believes a particularly straightforward and appropriate method for
2 calculating damages involves a purchase price minus depreciation model. (Fields
3 Decl., ¶ 4) Based on the purchase price minus depreciation model, and given the
4 length of the class period, Plaintiff calculated an absolute best case scenario
5 recovery (100%) of class-wide damages obtained at trial for putative class members
6 could possibly amount to as much as \$120 million. This model, however, would
7 still involve the return of the purchased product to Neiman, an onerous undertaking.
8 Under the current settlement, however, class members are entitled to retain their
9 purchases, therefore significantly discounting the actual benefit potentially received
10 at trial by the class members of even this calculation. (*Id.*)

11 According to Neiman, however, the best-case scenario Plaintiff presents
12 above is drastically inflated, because it contends no damages exist at all.⁸ Neiman
13 contends applicable damages, if any, could only be determined from the price
14 Plaintiff and putative class members paid for Last Call products measured against
15 the value they received. However, Neiman contends this proposed calculation
16 results in *zero dollars* in damages because customers of Last Call chose to purchase
17 the “Compared to” items precisely at the prices paid. Given other results on this
18 very issue in similar cases in this Circuit, a reasonable likelihood exists Neiman
19 could prevail on its damages defenses, and Plaintiff would neither recover any
20 damages nor certify a damages class. *See, e.g. Chowning v. Kohl’s Dep’t Stores,*
21 *Inc.*, 2016 WL 1072129, at *6-9 (C.D. Cal. Mar. 15, 2016) (currently appealed to
22 Ninth Circuit but granting defendant summary judgment by rejecting all plaintiff’s
23 proposed damages models, i.e. (1) full refund model; (2) disgorgement of profits;
24 (3) actual discount model; and (4) price/value differential); *see also, e.g., Caldera v.*
25 *J.M. Smucker Co.*, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) (rejecting
26 damages model, specifically stating “the true value of the products to consumers

27 ⁸ Plaintiff can provide further specific information on calculating potential class-
28 wide damages with her final approval motion if the Court seeks such information.

1 likely varies depending on individual consumer's motivation for purchasing the
2 products at issue."); *Russel v. Kohl's Dep't Stores, Inc.*, 2015 WL 12748629, at *6-
3 7 (C.D. Cal. Dec. 4, 2015) (declining to certify monetary damages class).

4 Although Plaintiff contends she and members of the putative class have been
5 deceived and are entitled to a full refund of the purchase price were the Action to be
6 litigated, Plaintiff acknowledges it is unlikely such a damages model would be
7 adopted given the proffered defenses. Thus, in the settlement context Plaintiff
8 believes a realistic, conservative method for evaluating damages is but a fraction of
9 the purchase price minus depreciation model set forth above. Neiman's contention
10 that the value Last Call purchasers receive is essentially the same to the products'
11 purchase prices also makes estimating the appropriate value of any discount
12 difficult from Plaintiff's perspective. Considering no Settlement Class Members
13 would have to return items purchased under the proposed settlement, each retains
14 whatever value the products have or had in addition to the value obtained through
15 this settlement. Lastly, given the experience with other class action litigation, only
16 a small percentage of Settlement Class Members are anticipated to claim the value
17 offered, as is typical in these types of settlements, so each Authorized Claimant will
18 likely get a higher percentage of value under the Settlement Agreement. Thus, in
19 light of all these considerations, the \$2,900,000 Gross Settlement Amount
20 constitutes valuable consideration.⁹ Further, the Settlement Agreement also
21 provides for certain injunctive relief relating to Defendant's use of "Compared To"
22 or similar pricing. *See* Settlement Agreement, § 4.

23 Given the inherent risks of litigation, the settlement provides a
24 substantial recovery to each Settlement Class Member. From the Gross

25 ⁹ The Gross Settlement Amount is in line with other approved class action
26 settlements in similar cases in this Circuit. *See, e.g. Gatinella v. Michael Kors*,
27 Case No. 1:14-cv-05731, S.D.N.Y. Feb. 9, 2016 (granting final approval of class
28 action settlement where \$4,875,000 paid into common fund as consideration for
settlement of alleged deceptive pricing tag case.)

1 Settlement Amount of \$2,900,000, as would be customary even in individual
2 contingency fee litigation, the Settlement Class Counsel Fees and Litigation
3 Expense Payment, as the Court awards, will then be deducted, as will the
4 Claims Administrator's Fees and the Settlement Class Representative
5 Payment, as awarded. The remaining amount, i.e. the Net Settlement Fund,
6 which cannot be less than \$1,625,000 minus Plaintiff's Counsel's costs only,
7 will then be drawn from to provide each Settlement Class Member a payment
8 determined by a point system based on purchase prices, including tax, of the
9 Qualifying Purchases made, and whether Proof of Purchase is provided. The
10 *entire* Net Settlement Fund shall be allocated to pay the claims of Settlement
11 Class Members who submit valid and timely Claim Forms. (Ex. 4 to
12 Settlement Agreement) The calculation to determine each Settlement Class
13 Member's Payment from the Net Settlement is provided in full in the
14 Settlement Agreement, Section 3.5(a), but can be summarized is as follows:

15 Each Authorized Claimant will receive a pro-rata share of the Net
16 Settlement fund based upon the points assigned to that claimant.
17 Authorized Claimants who do not submit Proof(s) of Purchase, will
18 receive one (1) point. Authorized Claimants who submit Proof(s) of
19 Purchase will receive 4 points for up to the first \$200 of documented
20 purchases plus 1 point for each additional \$200 in documented
21 purchases, up to a maximum of 10 points per Authorized Claimant.

22 (Fields Decl., ¶ 4) This is valuable consideration.¹⁰

23 **C. The Extent of Discovery Completed and Proceedings Stage**

24 The amount of discovery obtained prior to settlement is a factor in
25 determining the settlement's fairness. *See Molski v. Gleich*, 318 F.3d 937,
26 953 (9th Cir. 2003). Here, the Parties completed significant discovery.
27 After initial disclosures were exchanged, Plaintiff propounded several sets of
28 interrogatories and requests for production of documents on Neiman, to

¹⁰The Settlement Agreement, Section 3.5(d), also provides for a *Cy Pres* distribution of the sum of any settlement checks not cashed within 90 days of issuance date to the Parties' designated *Cy Pres* recipient: Public Counsel.

1 which it responded. Additionally, Neiman produced responsive documents
2 to Plaintiff, which Plaintiff's counsel analyzed and reviewed. The Parties
3 also engaged in substantial deposition discovery of both fact witnesses as
4 well as experts related to Plaintiff's class certification motion. Finally, the
5 parties fully briefed class certification, which was pending for hearing before
6 this Court at the time a settlement was reached.

7 Plaintiff's counsel believes, based on past experience in class action
8 cases, and the discovery conducted here, that the proposed settlement, rather
9 than continued litigation, is the best option for Settlement Class Members.

10 **D. The Experience and Views of Counsel**

11 Class Counsel's experience suggests the Parties' Settlement is a strong
12 result for the proposed Class and warrants the Court's approval. Class
13 Counsel's support for the proposed settlement confers a presumption of
14 correctness.¹¹ Class Counsel are experienced class action litigators who have
15 successfully litigated numerous complex consumer protection class action
16 cases. After weighing the risks and benefits associated with litigating this
17 case further, Class Counsel reached the opinion the proposed settlement is in
18 the best interests of the proposed Class. The Gross Settlement Amount of
19 \$2,900,000 and corresponding Net Settlement Fund of at least \$1,625,000
20 (minus Plaintiff's counsel's costs only) represents a substantial recovery to
21 Settlement Class Members, particularly in light of defenses Neiman has
22 proffered to Plaintiff's damages claims. Under any circumstances, however,
23

24 ¹¹*See Rodriguez*, 563 F.3d at 965 ("This circuit has long deferred to the
25 private consensual decision of the parties," *citing Hanlon*, 150 F.3d at 1027);
26 *see also Linney v. Cellular Alaska P'ship*, C-96-3008 DLJ, 1997 WL
27 450064, *5 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998)
28 ("The involvement of experienced class action counsel and the fact that the
settlement agreement was reached in arm's length negotiations, after relevant
discovery had taken place create a presumption that the agreement is fair.")

1 payment of the Gross Settlement Amount would be considered a significant
2 result in the context of a class action. Therefore, this factor weighs in favor
3 of preliminarily approving the proposed settlement's terms.

4 **E. The Proposed Class Members' Reaction**

5 The class members' reaction to the proposed settlement is not as
6 meaningful a consideration when a court is determining preliminary approval
7 of a settlement because notice has not been issued and class members are, as
8 yet, unaware of the proposed settlement. Class members will receive notice
9 of the proposed settlement if preliminarily approved, and will have every
10 opportunity to voice their opinions on the proposed settlement.

11 **F. Lack of Collusion Between the Parties**

12 The trial court's evaluation of the settlement "must be limited to the
13 extent necessary to reach a reasoned judgment that the agreement is not the
14 product of fraud or overreaching by, or collusion between, the negotiating
15 parties, and that the settlement, taken as a whole, is fair, reasonable and
16 adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688
17 F.2d 615, 625 (9th Cir. 1982). As discussed above, the proposed settlement
18 is the product of extensive arms length negotiations between well-informed,
19 sophisticated counsel. This is a common fund case, and, thus, Plaintiff's
20 intend to request attorney's fees as percentage of the common fund. Thus,
21 no discussion or agreement as to attorney's fees was necessary as part of the
22 negotiation (although Settlement Class Counsel's fees are limited to a
23 maximum of thirty percent of the Gross Settlement Amount). Further, given
24 the extensive litigation already conducted, including Plaintiff's successful
25 Ninth Circuit appeal of this Court's dismissal, both sides have demonstrated
26 they were prepared to litigate this case through final judgment, if no
27 acceptable resolution could be reached. In short, there can be no question of
28 any collusion. Settlement negotiations were a long, drawn out process over

1 many months, utilizing the expertise of the Mediator over the course of
2 multiple in-person mediation sessions and follow-up correspondence. *See*
3 *Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL 1114010, at *4
4 (N.D.Cal. Apr. 13, 2007) (“The assistance of an experienced mediator in the
5 settlement process confirms that the settlement is non-collusive.”)

6 **IV. THE PROPOSED NOTICE SHOULD BE APPROVED**

7 Rule 23(e)(1) provides “[t]he court must direct notice in a
8 reasonable manner to all class members who would be bound by the
9 proposal.” The Manual for Complex Litigation recommends “[o]nce the
10 judge is satisfied as to the certifiability of the class and the results of the
11 initial inquiry into the fairness, reasonableness, and adequacy of the
12 settlement, notice of a formal Rule 23(e) fairness hearing is given to the
13 class members. For economy, the notice under Rules 23(c)(2) and the Rule
14 23(e) notice are sometimes combined.” Manual for Complex Litigation
15 (Fourth) § 21.633. Combined notice helps avoid confusion that separate
16 certification and settlement notifications may produce. In evaluating a notice
17 plan, the question is “whether the class as a whole had notice adequate to
18 flush out whatever objections might reasonably be raised to the settlement.”
19 *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

20 Here, the Parties propose to disseminate notice to the Settlement Class
21 Members via Email Notice to Known Settlement Class Members, Post-Card
22 Notice if necessary, and Publication Notice and the Settlement Website for
23 Unknown Class Members. The manner provided for giving such notice in
24 sections 5.1 and 5.2 of the Settlement Agreement ensures “all [class]
25 members who can be identified through reasonable effort will be notified,”
26 and is “the best notice that is practicable under the circumstances.” Fed. R.
27 Civ. P. 23(c)(2)(B). It is also inherently “reasonable”. Fed. R. Civ. P.
28 23(e)(1). Section 5.1(a) provides Neiman will identify from its records and

1 submit a list of all Known Settlement Class Members and their last-known
2 addresses and/or email addresses to the Claims Administrator. It also
3 provides the Claims Administrator will send the Email Notice to Known
4 Settlement Class Members. Section 5.1(b) then provides additional
5 safeguards to maximize notice receipt by Settlement Class Members. In the
6 event Email Notice is not workable, the Claims Administrator will send
7 Known Settlement Class Members the Post-Card Notice via U.S. Mail.

8 Section 5.2 provides for Publication Notice and internet notice, and the
9 Settlement Website to disseminate information and make available Opt-Out
10 Forms and Claims Forms. Each alternative method is designed to ensure the
11 maximum number of Settlement Class Members practicable receive notice
12 under the circumstances.¹² See Fed. R. Civ. P. 23(c)(2)(B).

13 The Email Notice, Post-Card Notice, and Publication Notice, attached
14 to the Settlement Agreement (Fields Decl., Ex. A) as Exhibits 1, 2, and 3,
15 respectively contain the requisite information for proper notice of a class
16 action settlement.¹³ See Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii).

17 **V. THE COURT SHOULD ADOPT THE PARTIES' PROPOSED**
18 **SCHEDULE**

19 The Parties propose a reasonably expeditious schedule giving all
20 interested persons full opportunity to learn about the proposed Settlement
21 and have their views considered. The Parties request the following schedule:
22

23 ¹² The entire Settlement Agreement, including the proposed Notice, will also
24 be made available via the internet on the Settlement Website.

25 ¹³ During the Parties' meet-and-confer discussion prior to the filing of this motion, it
26 was agreed that a provision should be added to the Email Notice advising recipients
27 that any objections to the Settlement must include a statement under penalty of
28 perjury that the objector is a Settlement Class Member. This modification is
reflected in paragraph 3 of the Proposed Order lodged herewith, and the proposed
Notice will be modified accordingly.

- All emailing and mailing of notices, where necessary, be completed by the later of thirty (30) days after entry of the Preliminary Approval Order or twenty (20) days after the Claims Administrator receives the list of Known Settlement Class Members from Neiman;
- the deadline for Settlement Class Members to opt out be set for 60 days after the initial mailing of the Notices, or ----- 2018, if Preliminary Approval is granted on the date of the hearing;
- the deadline for objections to the proposed Settlement be set for 60 days after the initial mailing of the Notices, or -----, 2018, if Preliminary Approval is granted on the date of the hearing;
- the deadline to submit notice of intention to appear at the Fairness Hearing be set for 60 days after the initial mailing of the Notices, or -----, 2018, if Preliminary Approval is granted on the date of the hearing;
- the deadline to submit all materials in support of the request for Final Approval and Class Counsel's request for approval of attorney's fees and costs and reimbursement of expenses shall be set no later than 28 days before the Fairness Hearing, or -----, 2018, if Preliminary Approval is granted on the date of the hearing;
- the Claims Administrator be directed to provide to Settlement Class Counsel a list of all Non-Participating Class Members not later than 14 days after the deadline for submission of Opt-Out Forms, or -----, 2018, if Preliminary Approval is granted on the date of the hearing;
- The Claims Administrator be directed to serve on Settlement Class Counsel and Defendant's Counsel and file with the Court (or arrange for Settlement Class Counsel to file with the Court) a declaration of due diligence setting forth its compliance with its obligations under the Settlement Agreement not later than 14 days prior to the Final Approval Hearing;
- the Fairness Hearing be set no earlier than 120 days after entry of the Preliminary Approval Order, or -----, 2018, if Preliminary Approval is granted on the date of the hearing.

VI. CONCLUSION

For the reasons discussed above, Plaintiff requests the Court enter the Preliminary Approval Order concurrently filed and lodged herewith.

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KIRTLAND & PACKARD LLP

DATED: April 20, 2018

By: /s/ Joshua A. Fields
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*Attorneys for Plaintiff Linda
Rubenstein and all others similarly
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