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12
13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 EASTERN DIVISION
16

17 STACI CHESTER, et al,
18
19 Plaintiffs,
20 vs.
21 THE TJX COMPANIES, INC., et al.,
22 Defendants.
23

EDCV 15-01437 ODW (DTBx)
CLASS ACTION
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
UNOPPOSED MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT

Courtroom: 5D – First Street
Date: May 14, 2018
Time: 1:30 p.m.
Judge: Hon. Otis D. Wright, II

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and the Court’s
3 Order Granting Preliminary Approval of Class Action Settlement and Conditional
4 Certification of Settlement Class (ECF Doc. 113), Plaintiffs Staci Chester, Daniel
5 Friedman, Robin Berkoff and Theresa Metoyer (collectively, “Plaintiffs”)
6 respectfully submit this Memorandum of Points and Authorities in support of their
7 Unopposed Motion for Final Approval of Class Action Settlement.

8 **I. INTRODUCTION:**

9 On December 5, 2017, this Court entered an Order Granting Preliminary
10 Approval of Class Action Settlement and Conditional Certification of Settlement
11 Class (ECF Doc. 113) (“Prelim. App. Order”). Among other things, the Prelim. App.
12 Order directed and proscribed the manner in which notice was to be disseminated to
13 the Class. (Prelim. App. Order at *14). In short, the Court directed that notice be
14 provided to the Class via email and/or postcard (where email and/or mail addresses
15 were known), publication in magazines and newspapers, posting in TJX stores in
16 California, and via a settlement website, all as outlined in Plaintiffs’ Motion for
17 Preliminary Approval (ECF Doc. 112-1). (Prelim. App. Order at *14). As described
18 more fully herein, and in the accompanying declarations submitted concurrently
19 herewith, the Parties have fully complied with the Prelim. App. Order, and there are
20 substantial and sufficient grounds for the Court to grant final approval of the
21 Settlement and enter final judgment accordingly. *Friedman, et al. v. Guthy-Renker,*
22 *LLC*, 2017 WL 6520532, at *1 (C.D. Cal. Aug. 21, 2017). (See Declaration of
23 Douglas Caiafa (“Caiafa Dec”), and Declaration of Jennifer Keough (“Keough Dec”),
24 submitted concurrently herewith.).

25 Plaintiffs brought this case against Defendant The TJX Companies, Inc.
26 (“Defendant” or “TJX”), and its three subsidiary retailers, TJ Maxx, Marshalls, and
27 HomeGoods (collectively referred to herein as “Defendant” or “TJX”), challenging
28 the retailers’ use of advertised reference prices (“ARPs”) on the price tags of

1 merchandise offered for sale in its California stores. Like other “off-price” retailers,
2 TJX uses price tags which list two prices – the selling price, and a higher ARP
3 preceded by the words “Compare At.” Also like other off-price retailers, TJX
4 provides a disclosure to consumers, online and in its stores, of what its “Compare At”
5 ARPs are meant to represent. As a direct result of the Settlement here, TJX has
6 agreed to update its disclosure to consumers by, among other things, eliminating its
7 reference to “estimates,” and making clear that its comparison prices are based on
8 actual prices at which it believes identical or comparable products have sold for at
9 other retailers. (Class Action Settlement Agreement (“SA”), attached as Exhibit A to
10 Caiafa Dec), at ¶¶ 3.4 and 3.5). In addition, TJX has agreed to compensate its
11 California customers (“Settlement Class Members”) by providing each Settlement
12 Class Member who submits a valid claim with Merchandise Credit for the purchase of
13 any product or products sold at any TJ Maxx, Marshalls or HomeGoods store in
14 California. (SA at ¶¶ 1.14, 3.1.1). The Merchandise Credit is redeemable for cash, at the
15 Settlement Class Members’ option, in an amount equal to 75% of the value of Credit for a
16 period of up to one year after issuance. (Id.).

17 The Prelim. App. Order required the parties, with the assistance of a settlement
18 administrator (“JND”), to provide direct notice of the Settlement to Settlement Class
19 Members via U.S. Mail and/or email if known (“Known Class Members”). (Prelim.
20 App. Order at *14). In addition, the parties were to provide publication notice, via
21 newspapers, magazines, postings in TJX stores in California, and the creation of a
22 settlement website, designed to reach as many of those Settlement Class Members for
23 whom the parties had no contact information (“Unknown Class Members”) as
24 practicable. (Id.). The parties estimate the number of Known Class Members to be
25 approximately 22% of the Settlement Class. Notice was timely disseminated and
26 published, and a settlement website activated per the Court’s Order. (See, Keough
27 Dec at ¶¶ 4-18).

1 The results of the notice efforts in this case have been unusually effective and
2 have exceeded the parties' expectations. To date, nearly 208,000 Settlement Class
3 Members (207,962) have submitted claims for their share of Settlement proceeds.
4 (Keough Dec. at ¶25). With an estimated Class size of approximately 8,000,000
5 members, the claims received to date represent a claim rate of approximately 2.6%.
6 In a consumer class action where the parties have contact information for roughly
7 20% of the Class, a 2.6% claim rate is well within the range of approval, and higher
8 than expected by the parties. See e.g., *Spann v. J.C. Penney Corp*, 211 F.Supp.3d
9 1244, 1257 (C.D. Cal. 2016) (approving settlement in deceptive price tag case with a
10 2.75% claim rate); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th
11 Cir. 2015) (approving settlement with a 3.4% claim rate); *In re Toys R Us-Delaware,*
12 *Inc. – (FACTA) Litig.*, 295 F.R.D. 438, 468 n. 134 (C.D. Cal. 2014) (citing authority
13 that claim rates in consumer litigation generally range from 2 to 20 percent).

14 As described more fully herein and in the accompanying declarations of
15 Jennifer Keough and Douglas Caiafa, the Settlement here made available over \$5.3
16 million in Merchandise Credit to Settlement Class Members. As a result,
17 Merchandise Credit redeemable for approximately \$25 worth of merchandise, or \$19
18 in cash, will be distributed to each of the approximately 208,000 Settlement Class
19 Members who have submitted valid claims.

20 Plaintiffs respectfully request that the Court grant final approval of the
21 Settlement as set forth in the SA. The Settlement was reached after hard fought and
22 contentious litigation involving complex and unresolved issues, and after arms-length
23 negotiations with an experienced and highly respected mediator. To the extent
24 practicable, the terms and structure of the SA attempt to mirror those endorsed by the
25 court in *In re Online DVD*, 779 F.3d 934. After a very successful notice effort, TJX
26 will pay over \$5 million in Merchandise Credit, in addition to the costs of notice and
27 claims administration, attorneys' fees and representative enhancements, without any
28 danger that any portion of the Settlement amount will revert to Defendant. The

1 Settlement here represents an exceptional result for the Settlement Class, particularly
2 given the risks of continued litigation.

3 The Administrator, JND, duly provided notice, and will distribute the monetary
4 benefits of the Settlement to Settlement Class Members as provided by the SA and
5 the Court's Prelim. App. Order. Settlement Class Members were provided until April
6 9, 2018, to mail and/or file claims, opt out or object to the Settlement. As discussed
7 below, only 6 of the of the approximately 8 million Settlement Class Members have
8 chosen to opt-out of the Settlement, only 5 of the 8,000,000 have objected (4 of
9 which have been made by serial objectors and are without merit, and the other of
10 which objects to the merits of the lawsuit, not the Settlement). By contrast, whereas
11 only 11 Class Members have opted-out of or objected to the Settlement, nearly
12 208,000 Settlement Class Members have requested to receive the benefits of the
13 Settlement (i.e., a Merchandise Credit with cash value). See, e.g., *Spann*, 211
14 F.Supp.3d at 1258 (approving settlement with class consisting of 5.8 million
15 members where 809 members opted-out and 7 objected).

16 **II. ARGUMENT:**

17 Federal Rule of Civil Procedure 23 provides that a certified class action may
18 only be settled "with the court's approval." Fed. R. Civ. Proc. 23(e). Whether to
19 approve a class action settlement is "committed to the sound discretion of the trial
20 judge." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

21 In assessing final approval, the Court must first determine whether proper
22 notice has been given. *Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 972
23 (E.D. Cal. 2012); Fed. R. Civ. P. 23(c)(2)(B). Next, it must determine whether the
24 Settlement is "fair, reasonable, and adequate" as required by Fed. R. Civ. P. 23(e)(2).
25 *Id.* Each of these requirements has been met here, warranting final approval.

26 **A. Proper Notice Has Been Provided:**

27 The notice and distribution plan here went better than expected. In its Prelim.
28 App. Order, the Court approved the parties' proposed form and manner of providing

1 notice, finding that the notice disseminated to Class Members here was “the best
2 notice practicable under the circumstances.” (Prelim. App. Order at *14). Based on
3 data received from TJX, JND was provided with a database (the Class Member List)
4 that contained 1,851,635 records of Known Class Members. (Keough Dec. at ¶¶2-3).
5 After processing that information, JND found that 929,860 individuals on the Class
6 Member List had a valid email address. (Keough Dec. ¶4). After sending email
7 notice to each of those email addresses, 87,810 emails were returned as
8 undeliverable. (Id.). Thus, email notice was provided to 842,050 Known Class
9 Members.

10 Pursuant to the SA and the Prelim. App. Order, approximately one week after
11 email notice was disseminated, JND send postcard notices via U.S. Mail to 963,606
12 Known Class Members whose emails were returned or who had no known email
13 address. (Id. at ¶6). Ultimately, after re-mailing postcards to forwarding addresses,
14 only 48,210 postcard notices were returned as undeliverable with no forwarding
15 address. (Id. at ¶8). Thus, the result is that direct notice via email and/or postcard was
16 disseminated to 1,774,678 Known Class Members. This represents approximately
17 22% of the estimated Class.

18 On December 28, 2017, a settlement website was activated as required by the
19 SA and the Court’s Prelim. App. Order (tjxsettlement.com). (Keough Dec. ¶16).
20 Further, during the period from January 4, 2018 through January 9, 2018, the
21 Publication Notice was published in the California editions of *USA Today* and *Parade*
22 *Magazine*, as well as the *Los Angeles Times*, *San Francisco Chronicle*, *San Diego*
23 *Union-Tribune*, *Sacramento Bee*, *Orange County Register*, and *San Jose Mercury*
24 *News*. (Keough Dec. ¶11).

25 In addition to email and postcard notice, publication of the Settlement website,
26 and Publication Notice in eight major newspapers and magazines, tear-away In-Store
27 Notices were posted in each TJ Maxx, Marshalls, and HomeGoods store in California
28 beginning January 9, 2018. (Keough Dec. at ¶13). TJX has reported that as a result of

1 this comprehensive in-store publication notice procedure, over 140,000 tear-away
2 notices were taken by customers from TJX stores during the notice period.
3 (Declaration of Jennifer A. Peoples (“Peoples Dec”) at ¶9).

4 On December 28, 2017, along with activating the settlement website, JND also
5 established a toll free number for Class Members to obtain additional information in
6 both English and Spanish. On the settlement website, potential Class Members have
7 been able to view and/or download relevant documents and information, including,
8 among others, the Settlement Agreement, Long-Form Summary Notice, Notice en
9 Español, Claim Form, Opt-Out Form, Prelim. App. Order, and all of the moving
10 papers related to Plaintiffs’ Motion for Attorneys’ Fees. The web address was set
11 forth in all notices disseminated to the Class, including the Postcard Notice, Long-
12 Form Notice, Email Notice, Publication Notice, and In-Store Notice. The website
13 also has also listed all the relevant deadlines for submitting claims, opt-out requests
14 and objections, and allowed Settlement Class Members to print claim forms and
15 submit them online or via mail. The website also provided instruction on how to opt-
16 out and/or submit objections.

17 As of this filing, JND has received only 6 opt-out requests and 5 objections
18 from a Class of 8 million. (Id. ¶¶20-23). By contrast, JND has received over 207,000
19 claims from Class Members interested in receiving a share of the monetary benefits
20 of the Settlement. (Id. at ¶25).

21 Based on the foregoing, the Court should reaffirm that the Class Notice here
22 has satisfied due process in that it fairly and adequately informed the Settlement
23 Class of the nature of the action, the terms of the proposed Settlement, the effect of
24 the action and release of claims, their rights to exclude themselves, and their rights to
25 object to the Settlement.

26 **B. There Is No Basis to Disturb the Certification Order:**

27 In its Prelim. App. Order, this Court conditionally certified the current
28 Settlement Class as requested by the parties, finding that “all of the requirements for

1 class certification are met.” (Prelim. App. Order at *9). Nothing has occurred since
2 entry of the Prelim. App. Order that would call the Court’s findings into question.
3 Nor is there any basis to revisit the Court’s Order conditionally certifying the
4 Settlement Class. The Court therefore “need not find anew that the settlement class
5 meets the certification requirements of Rule 23(a) and (b).” *Corson v. Toyota Motor*
6 *Sales U.S.A., Inc.*, 2016 WL 1375838, at *5 (C.D. Cal. April 4, 2016) (citing
7 authorities). Rather, the Court “may focus instead on whether the proposed
8 settlement is fair, adequate, and reasonable.” *Harris v. Vector Marketing*, 2012 WL
9 381202 at *3 (N.D. Cal. Feb. 6, 2012).

10 **C. The Settlement Is Fair, Adequate and Reasonable, and Therefore**
11 **Warrants Final Approval:**

12 Rule 23(e)(2) requires the Court to determine whether the Settlement is fair,
13 adequate and reasonable. Fed. R. Civ. Proc. 23(e)(2).

14 “In determining whether a proposed class action settlement is ‘fair,
15 reasonable, and adequate,’ this Court may consider some or all of the
16 following factors: (1) the strength of plaintiffs' case; (2) the risk, expense,
17 complexity, and likely duration of further litigation; (3) the risk of
18 maintaining class action status throughout the trial; (4) the amount
19 offered in settlement; (5) the extent of discovery completed and the stage
20 of the proceedings; (6) the experience and views of counsel; (7) the
21 presence of a governmental participant; and (8) the reaction of the class
22 members to the proposed settlement.”

23 *Gooding v. Vita-Mix Corp.*, 2018 WL 571881 (C.D. Cal. Jan. 25, 2018) (citing
24 *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009)); see also, *Hanlon*
25 *v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). “The relative degree of
26 importance to be attached to any particular factor will depend upon and be dictated by
27 the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts
28

1 and circumstances presented by each individual case.” *Officers for Justice v. Civil*
2 *Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982).

3 Not all of these factors will apply to every class action settlement, and in some
4 circumstances, one factor alone may prove determinative in finding sufficient
5 grounds for approval. *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.
6 1993). “It is the settlement taken as a whole, rather than the individual component
7 parts, that must be examined for overall fairness, and the settlement must stand or fall
8 in its entirety.” *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003) (quoting
9 *Hanlon*, 150 F.3d at 1026). It bears emphasizing that there is a strong judicial policy
10 that favors settlements. *Class Plaintiffs*, 955 F.2d at 1276.

11 Here, the Court has already preliminarily determined that the Settlement is fair
12 and reasonable, and that it is the product of “serious, informed, non-collusive
13 negotiations.” (Prelim. App. Order at *11). The Court’s conclusion is amply
14 supported by the record, including the protracted and arms-length settlement
15 negotiations that were conducted with the aid of an experienced mediator. (*Id.*).
16 Indeed, Plaintiffs respectfully suggest that the non-reversionary distribution of
17 settlement proceeds to over 200,000 Settlement Class Members, balanced against the
18 risks of further litigation, demonstrates that the Settlement here is exceptionally fair,
19 adequate and reasonable, and that it was reached in the absence of any collusion.

20 The Court should therefore begin its final approval analysis “with a
21 presumption that the settlement is fair and reasonable.” *Garner v. State Farm Mut.*
22 *Auto Ins. Co.*, 2010 WL 1687832, *13 (N.D. Cal. Apr. 22, 2010); *see, e.g.*,
23 *Rodriguez*, 563 F.3d at 965 (“We put a good deal of stock in the product of an arms-
24 length, non-collusive, negotiated resolution”); *Nat’l Rural Telecomm. Coop. v.*
25 *DirecTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

26 ///

27 ///

1 **1. The Strengths of Plaintiffs’ Case Balanced Against the Amount**
2 **Offered in the Settlement Supports Final Approval:**

3 “An important consideration in judging the reasonableness of a settlement is
4 the strength of the plaintiffs' case on the merits balanced against the amount offered
5 in the settlement.” *Nat’l Rural Telecomm. Coop.*, 221 F.R.D. at 526. In evaluating
6 these factors, the Court should assess “objectively the strengths and weaknesses
7 inherent in the litigation and the impact of those considerations on the parties’
8 decisions to reach a [Settlement].” *Adoma*, 913 F. Supp. 2d at 975. However, in
9 balancing, “a proposed settlement is not to be judged against a speculative measure of
10 what might have been awarded in a judgment in favor of the class.” *Id.* As noted by
11 the Ninth Circuit:

12 “Neither the trial court nor [the Court of Appeals] is to reach any ultimate
13 conclusions on the contested issues of fact and law which underlie the
14 merits of the dispute, for it is the very uncertainty of outcome in litigation
15 and avoidance of wastefulness and expensive litigation that induce
16 consensual settlements.

17 *Officers for Justice*, 688 F.2d 625.

18 Plaintiffs respectfully contend that they had a strong case on liability that was
19 appropriately settled for \$8.5 million. As a result of a very effective notice effort,
20 Merchandise Credits redeemable for approximately \$25 worth of merchandise or \$19
21 cash will be distributed to nearly 208,000 Class Members. In addition, TJX has
22 agreed to pay up to \$1,000,000 for the cost of notice and settlement administration, as
23 well as attorney’s fees, litigation costs, and representative enhancement payments
24 awarded by the Court.

25 Though Plaintiffs felt throughout this litigation that their claims were very
26 strong, they also faced substantial risks, and they did not agree to release their claims
27 for nothing. To the contrary, they negotiated a large Settlement by which TJX will
28 pay \$8.5 million in cash and Merchandise Credit without any danger of reversion.

1 When balanced against the strengths of Plaintiff’s case, and the risks of continued
2 litigation, the amount distributed to the Class weighs very strongly in favor of
3 approving the Settlement. “In most situations, unless the settlement is clearly
4 inadequate, its acceptance and approval are preferable to lengthy and expensive
5 litigation with uncertain results.” *Nat’l Rural Telecomm. Coop.*, 221 F.R.D. at 526.

6 **2. The Risk, Expense, Complexity and Likely Duration of Further**
7 **Litigation Supports Final Approval of the Settlement:**

8 The “class’s chance of success if it continued to pursue litigation” may be the
9 “most important[]” factor in evaluating a Settlement. *In re Online DVD*, 779 F.3d at
10 948. Plaintiffs would face significant risks if this case were not settled, despite the
11 strength of Plaintiffs’ case on liability.

12 First, there is a real risk that Plaintiffs could recover nothing. See, e.g.,
13 *Stathakos v. Columbia Sportswear Co.*, No. 15-cv-04543-YGR (N.D. Cal. May 11,
14 2017) at *11-13 (dismissing plaintiffs’ claims for monetary relief in deceptive price
15 tag case); *Sperling v. Stein Mart, Inc.*, No. 5:15-cv-01411-AB (C.D. Cal. Feb. 23,
16 2018) (same); *Chowning v. Kohl’s Dept. Stores, Inc.*, No. 15-cv-008673-RGK (C.D.
17 Cal. March 15, 2016) (same); *Sperling v. DSW, Inc.*, No. 16-55231 (9th Cir. Oct. 19,
18 2017) (affirming District Court’s dismissal of deceptive price tag case). In addition
19 to the inherent risk associated with proving liability, Plaintiffs faced the risk that they
20 could not prove a legally and factually supportable measure of damages or restitution.
21 Indeed, this was perhaps the most hotly disputed issue in this case.

22 As the summary judgment orders in *Stathakos*, *Chowning* and *Sperling*
23 demonstrate, each of Plaintiffs’ proposed measures of restitution and damages here
24 was susceptible to legal and factual challenges that made it far from certain that
25 Plaintiffs could recover anything even if they established liability. (*Id.*). While
26 Plaintiffs believe that their proposed measures of restitution and damages are fully
27 supported in law and fact, the uncertainty surrounding the issue of damages in this
28

1 case created a high risk of further litigation that weighs strongly in favor of final
2 approval.

3 TJX would likely have relied on the summary judgment and certification
4 orders in *Stathakos*, *Chowning* and *Sperling*, as the plaintiffs in those cases made
5 very similar factual and legal claims as Plaintiffs in this case, and sought measures of
6 restitution and damages similar to those proposed by Plaintiffs in this case. The
7 rulings in *Stathakos*, *Chowning* and *Sperling* highlight the substantial risk that
8 Plaintiffs would face if they continued to litigate.

9 The recent decision in *In re Tobacco Cases II*, 240 Cal. App. 4th 779 (2015),
10 also confirms the magnitude of this risk. There, the plaintiffs proved at trial that the
11 defendant's advertising of cigarettes was "deceptive within the meaning of the UCL."
12 *Id.* at 786. Nevertheless, the trial court denied the plaintiffs' request for restitution
13 because it determined that the plaintiffs "received value" from the cigarettes and held
14 that, therefore, the "proper measure of restitution was the difference between the
15 price paid and the actual value received." *Id.* at 787. The California Court of Appeals
16 affirmed. *Id.* at 801-802. While Plaintiffs here believe that the holding in *In re*
17 *Tobacco Cases II* is distinguishable from this case both on the facts and procedural
18 record, there can be no doubt that TJX would have relied on this decision in its
19 argument concerning the proper measure of restitution had this case proceeded with
20 further litigation.

21 Finally, the additional time and expense that would be required to obtain a
22 judgment and complete the inevitable appeals process in this case would be
23 substantial and must be compared to the immediate and fixed relief afforded by the
24 Settlement. Taking all these factors together, it is clear the benefits of the Settlement
25 substantially outweigh the risks of further litigation and strongly support approval of
26 the Settlement. See, *In re Online DVD*, 779 F.3d at 948-49; *Linney v. Cellular Alaska*
27 *P'ship.*, 151 F.3d 1234, 1239 (9th Cir. 1988); *In re Omnivision Techs.*, 559 F. Supp.
28 2d 1036, 1042 (N.D. Cal. 2008).

1 **3. The Risk of Obtaining and Maintaining Certification Through Trial**
2 **Supports Final Approval of the Settlement:**

3 Because of challenges related to the existence of a common damages model in
4 cases like this, Plaintiffs here faced a real risk of obtaining and/or maintaining
5 certification of a Rule 23(b)(3) class through trial. Plaintiffs candidly note that the
6 rulings in *Stathakos* and *Chowning v. Kohl's Dept. Stores, Inc.*, No. 15-cv-08673-
7 RGK (C.D. Cal. April 1, 2016) (ECF Doc. No. 123) (denying certification of (b)(3)
8 class for monetary relief in deceptive price tag case), could adversely impact their
9 ability to obtain certification of a (b)(3) class for restitution here, thus presenting
10 another risk that weighs in favor of approving the Settlement.

11 **4. The Stage of Proceedings and Discovery Also Support Approval:**

12 Also important to the Court's analysis is whether the parties have sufficient
13 information to make an informed decision about settlement. *Linney*, 151 F.3d at 1239.
14 "A settlement following sufficient discovery and genuine arms-length negotiation is
15 presumed fair." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 528 (citing cases).

16 This case was thoroughly and contentiously litigated at the time of Settlement.
17 As described in more detail in Plaintiffs' Motion for Preliminary Approval (ECF
18 Doc. 112-1), both parties had completed thorough and exhaustive discovery and
19 investigation, and had received, reviewed and analyzed tens-of-thousands of
20 documents related to TJX's price advertising practices.

21 In addition, the three original complaints had been consolidated, the parties
22 fully briefed and argued a motion to dismiss, fully briefed a motion for class
23 certification, and were in the process of briefing on Defendant's motion for summary
24 judgment when the Settlement here was reached. The parties also engaged in
25 countless hours of meet and confer sessions concerning a multitude of issues. The
26 Settlement here was also the product of months of arms-length negotiations between
27 the parties, including mediation with a highly experienced and respected mediator.
28

1 The parties here were thoroughly informed of their respective strengths and
2 weaknesses, both legally and factually, at the time of Settlement. Accordingly, this
3 factor also “militates in favor of the Court’s approval” of the Settlement. *Nat’l Rural*
4 *Telecomm. Coop.*, 221 F.R.D. at 528; see also, *Adoma*, 913 F. Supp. 2d at 977
5 (finding settlement fair and a result of arms-length negotiations where the parties
6 engaged in only informal discovery).

7 **5. The Experience and Views of Counsel Support Final Approval:**

8 “Parties represented by competent counsel are better positioned than courts to
9 produce a settlement that fairly reflects each party’s expected outcome in litigation.”
10 *Rodriquez*, 563 F.3d at 967. Accordingly, “[g]reat weight’ is accorded to the
11 recommendation of counsel who are most closely acquainted with the facts of the
12 underlying litigation.” *Nat’l Rural Telecomm. Coop.*, 221 F.R.D. at 528.

13 Class Counsel here have extensive experience prosecuting consumer class
14 actions, and after participating in and analyzing the administration of the Settlement
15 here, continue to recommend final approval. (*See e.g.*, Declaration of Christopher J.
16 Morosoff ¶9; Caiafa Dec. at ¶29; Hafif Dec. at ¶10). In its Prelim. App. Order, this
17 Court found that all requirements of Rule 23(a) (including the adequacy requirement)
18 were satisfied. Class Counsel’s experience and adequacy is also demonstrated by
19 their success in this case to defeat Defendant’s Motion to Dismiss and obtain an
20 exceptional settlement. The fact that experienced and capable attorneys recommend
21 approval of the Settlement should be afforded “great weight.” *Nat’l Rural Telecomm.*
22 *Coop.*, 221 F.R.D. at 528.

23 **6. The Reaction of Class Members Supports Final Approval:**

24 “It is established that the absence of a large number of objections to a proposed
25 class action settlement raises a strong presumption that the terms of a proposed class
26 settlement are favorable to the class members.” *Nat’l Rural Telecomm. Coop.*, 221
27 F.R.D. at 529 (citing cases). Here, the estimated Settlement Class consists of
28 approximately 8 million members. Because TJX maintains contact information for a

1 portion of its customer base, the parties were able to provide direct notice and to
2 1,774,678 Class Members (approximately 22% of the Class). (Keough Dec. at ¶¶4-9).

3 In response to the notice efforts, over 207,000 Settlement Class Members have
4 requested benefits from the Settlement. (Keough Dec. ¶25). This represents a claim
5 rate of approximately 2.6% of the Settlement Class, which is a strong response in a
6 case such as this. See e.g., *Spann v. J.C. Penney Corp*, 211 F.Supp.3d 1244, 1257
7 (C.D. Cal. 2016) (approving settlement in deceptive price tag case with a 2.75%
8 claim rate); *In re Online DVD*, 779 F.3d 934 (approving settlement with a 3.4% claim
9 rate); *In re Toys R Us-Delaware, Inc. – (FACTA) Litig.*, 295 F.R.D. at 468 n. 134
10 (C.D. Cal. 2014) (citing authority that claim rates in consumer litigation generally
11 range from 2 to 20 percent).

12 By contrast, only 6 Class Members (less than 0.0001% of the Settlement Class)
13 have opted-out of the Settlement. In addition, only 5 Class Members have voiced an
14 objection to the Settlement (also less than 0.0001% of the Settlement Class). (Keough
15 Dec. ¶¶20-23). With an infinitesimal number of persons opting-out or objecting,
16 when compared to the size of the Settlement Class, and over 207,000 Class Members
17 requesting their Settlement benefits, the reaction of Class Members shows
18 “enthusiastic approval” of the Settlement here. *In re Cathode Ray tube (CRT)*
19 *Antitrust Litig.*, 2016 WL 3648478, at *9 (N.D. Cal. July 7, 2016). Accordingly, this
20 factor also strongly supports final approval. *Nat’l Rural Telecomm. Coop.*, 221
21 F.R.D. at 529. See also, *Klee v. Nissan North America, Inc.*, 2015 WL 4538426, at *9
22 (C.D. Cal. July 7, 2015) (a small number of opt outs weighs in favor of approval); *In*
23 *re Omnivision Techs.*, 559 F. Supp. 2d at 1043 (noting that 3 objections out of 57,630
24 potential class members favors approval of the Settlement “[b]y any standard.”)
25 (citing *Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004)
26 (affirming settlement with 45 objections out of 90,000 notices sent)).

27 ///

28 ///

1 **D. Preliminary Response to Objections:**

2 As of the date of this filing, the parties have received five (5) “objections” to
3 the Settlement. Four (4) of those objections are made by serial “professional”
4 objectors and are without any merit. The remaining objection is an objection to the
5 lawsuit, not to the Settlement or any provision of the Settlement. Each of the
6 objections should be overruled. (See, Caiafa Dec. at ¶¶ 22-25).

7 The most recent objection was received from the Court’s CM/ECF System via
8 a Notice of Electronic Filing on April 16, 2018 – the same day the instant Motion was
9 being finalized for filing. (See Objection by Jesse R Parker, ECF Doc. 122, entered
10 on 4/16/2018 at 10:46 AM PDT.). Accordingly, Plaintiffs will file a detailed
11 response to the objections at least 21 days prior to the final approval hearing (i.e., on
12 or before April 23, 2018).¹

13 **E. The Court Should Affirm the Payment of Administrative Fees:**

14 Pursuant to the SA and Prelim. App. Order, JND has already performed
15 extensive and costly work associated with the notice and administration of the
16 Settlement. (*See e.g.* Keough Dec.). In addition, JND still has additional work ahead
17 necessary to conclude the administration of the Settlement. JND therefore anticipates
18 that the total Notice and Administration Costs will be approximately \$1,000,000,
19 which is equal to the “cap” negotiated by the parties. TJX has agreed to pay JND up
20 to \$1,000,000 for notice and administrative costs. (SA at ¶3.1.2). Accordingly,
21 Plaintiffs respectfully request that the Court authorize that JND be paid their actual
22 notice and administration costs incurred, in the amount of \$1,000,000, as provided by
23 the SA.

24 **III. CONCLUSION:**

25 Were this case to proceed to trial, there is a likelihood that the Class would
26 receive no monetary relief. In other words, if not for the Settlement here, there is a
27

28 _____
¹ For an overview of Plaintiffs’ response to the objections, see Caiafa Dec. at ¶¶ 22-25.

1 risk that no Class Member would receive anything. The Settlement here provides real
2 monetary value for all Class Members. As evidenced by the administration of the
3 Settlement, over 200,000 TJX customers in California have requested the monetary
4 benefits of the Settlement, believe this Settlement is fair, and are waiting for their
5 Merchandise Credits to be delivered. In contrast, although 1,774,678 Class Members
6 received direct notice of the Settlement, only 4 serial objectors have objected to the
7 Settlement, 1 Class Member has objected to the merits of the lawsuit, and only 6
8 Class Members have chosen to opt-out. By any measure, the reaction of the Class to
9 the Settlement here strongly suggests that the Settlement is fair, adequate, reasonable,
10 and in the best interests of the Class.

11 For the foregoing reasons, Plaintiffs respectfully request that the Court grant
12 final approval of the Settlement and enter Judgment pursuant to the terms of the SA
13 and the proposed Order and Judgment submitted herewith.

14
15
16 Dated: April 16, 2018

Respectfully submitted,
LAW OFFICE OF CHRISTOPHER J. MOROSOFF

17
18 By: /s/ Christopher J. Morosoff
19 Christopher J. Morosoff
20 Attorneys for Plaintiffs
JAMES HOROSNY and JENNIFER PRICE