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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
PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES AND COSTS,
COSTS OF ADMINISTRATION, AND
REPRESENTATIVE ENHANCEMENT
PAYMENTS; MEMORANDUM OF
POINTS & AUTHORITIES IN
SUPPORT THEREOF

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 **I. INTRODUCTION:**

3 Plaintiffs Staci Chester, Daniel Friedman, Robin Berkoff and Theresa Metoyer
4 (“Plaintiffs”) and their counsel achieved a settlement (the “Settlement”) in the above-
5 captioned action whereby Defendant The TJX Companies, Inc. (“Defendant”) has agreed
6 to pay eight million five-hundred thousand dollars (**\$8,500,000.00**) in cash and cash
7 equivalents for the benefit of Settlement Class Members. Payments from the common
8 settlement fund will be in the form of Merchandise Credit redeemable for cash at the
9 Settlement Class Members’ option. The \$8.5 million fund will also be used to pay
10 attorneys’ fees and litigation costs, representative enhancement awards, and the costs of
11 administration related to the Settlement.

12 The claim process has begun, and thus far, with 27 days still left in the Claim
13 Period, over 157,000 Settlement Class Members have submitted claims. As a result of the
14 efforts of Plaintiffs and their counsel, Settlement Class Members who submit claims
15 (“Claimants”) will receive Merchandise Credit which can be used for the purchase of any
16 product sold at any TJ Maxx, Marshalls or HomeGoods store in California, or redeemed
17 by the Claimant for cash if the Claimant prefers cash. The Merchandise Credit is
18 redeemable for cash, at the Claimant’s option, in an amount equal to 75% of the value of
19 Credit. In addition, and as a direct result of this litigation, Defendant has agreed to change
20 the disclosure/definition of its “Compare At” pricing on its website and on its signs in its
21 California stores, augment its signage related to its price advertising with additional
22 signage in its California stores, and enhance its comparison pricing practices, including
23 the implementation of training and auditing programs designed to ensure that it complies
24 with California’s price comparison advertising laws. As further detailed in the Settlement
25 Agreement dated September 18, 2017 (“Agreement”), Defendant has also agreed to pay
26 the costs of providing class notice and administering claims, reasonable attorney’s fees
27 and costs, and incentive awards to the representative Plaintiffs. These amounts are to be
28

1 deducted from the \$8,500,000, with the remainder to be divided by Claimants on a pro-
2 rata basis.

3 On December 5, 2017, this Court granted Preliminary Approval of the Settlement
4 and certified a Settlement Class of approximately 8 million California TJ Maxx, Marshalls
5 and HomeGoods customers based upon the terms of the Agreement. A hearing regarding
6 final approval of the Settlement, as well as the hearing on the instant Motion, is scheduled
7 for May 14, 2018.

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

9 In July 2015, Plaintiffs filed three separate actions against Defendants T.J. Maxx of
10 CA, LLC, Marshalls of CA, LLC, and HomeGoods, Inc. Those three actions have since
11 been consolidated into this one action. Prior to filing the original three complaints,
12 Plaintiffs' counsel engaged in extensive pre-lawsuit investigation including consultations
13 with Plaintiffs, consultations with experts in the field of consumer research and advertised
14 reference pricing, investigation of Defendant's pricing practices and research related to the
15 law applicable to Plaintiffs' claims. (Declaration of Douglas Caiafa ("Caiafa Dec.") at ¶5;
16 Declaration of Christopher J. Morosoff ("Morosoff Dec.") at ¶¶31-32). After requesting
17 and receiving permission to consolidate the 3 separate actions, Plaintiffs filed the operative
18 Consolidated Amended Class Action Complaint ("CAC"), on September 3, 2015 (ECF
19 No. 28). The CAC alleges that throughout the Class Period, Defendant has engaged in a
20 deceptive advertising scheme by which it advertised "sale" prices that were substantially
21 lower than advertised "Compare At" prices for the products sold in its California TJ
22 Maxx, Marshalls and HomeGoods stores. Plaintiffs further allege that the higher Compare
23 At prices were deceptive because the Compare At prices were not based on actual prices
24 that identical items sold for either at TJX stores or other retailers, and that Defendant failed
25 to adequately disclose to consumers what its Compare At reference prices were intended
26 to represent. The CAC seeks restitution and injunctive relief under California's Unfair
27 Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL"), False Advertising
28 Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.* ("FAL"), and Consumer Legal Remedies

1 Act, Cal. Civ. Code §1750 *et seq.* (“CLRA”). Defendant denies any wrongdoing in this
2 case, denies Plaintiffs’ allegations, and further denies Plaintiffs’ assertion that its pricing
3 practices constituted any violation of California law and/or Federal Trade Commission
4 regulations.

5 Throughout the Litigation, Plaintiffs’ counsel engaged in extensive legal research
6 and analysis and conducted extensive discovery. (Caiafa Dec. at ¶7; Morosoff Dec. at
7 ¶¶33-34). There were multiple rounds of written discovery conducted by Defendants and
8 Plaintiffs requiring extensive meet and confer sessions and multiple motions to compel,
9 including the production of tens of thousands of documents by both sides in the litigation.
10 Defendant took the deposition of all four Plaintiffs and Plaintiffs took the 30(b)(6)
11 deposition of Defendant’s representative on two occasions. (Id.). Plaintiffs’ counsel
12 received, reviewed and analyzed tens of thousands of documents produced in the
13 Litigation, including Defendant’s voluminous and detailed sales data. (Id.).

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

19 All persons who, while in the State of California, and between July 17, 2011,
20 and the present (the “Class Period”), purchased from TJ Maxx one or more
21 items at any TJ Maxx store in the State of California with a price tag that
22 contained a “Compare At” price which was higher than the price listed as the
23 TJ Maxx sale price on the price tag, and who have not received a refund or
24 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

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27 _____
28 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.”

1 **III. THE SETTLEMENT:**

2 The Settlement here is a non-reversionary common fund settlement, which utilizes
3 an Internal Revenue Code compliant Qualified Settlement Fund (“QSF”) for collection
4 and distribution of Settlement proceeds. The entire amount of the QSF will be distributed
5 for the benefit of Settlement Class Members.

6 **A. Settlement Negotiations:**

7 Throughout early 2017, the Parties engaged in extensive negotiations concerning
8 the possible structure of a class-wide settlement. (Caiafa Dec. at ¶10). These negotiations
9 led to mediation, on May 22, 2017, with Hon. Margaret Nagle (Ret.) of JAMS. (Id.) At
10 the conclusion of a full-day of mediation, the parties reached a tentative agreement with
11 respect to most of the material terms of the Settlement as reflected in the Agreement. (Id.).
12 The parties remained at an impasse with respect to certain terms. Further conferences and
13 negotiations were required, with the participation and assistance of Judge Nagle, before
14 final agreement was reached on all material terms. The parties subsequently negotiated,
15 drafted and executed the comprehensive Agreement which has been preliminarily
16 approved by the Court.

17 **B. Terms of the Settlement:**

18 The Agreement is intended to resolve the Litigation in its entirety and is
19 conditioned on the Court certifying a Settlement Class, for settlement purposes only, and
20 granting final approval of the Settlement. (Agreement at ¶2.4). The Parties have modeled
21 the Agreement, to the extent possible, after the settlement agreement approved by the
22 Ninth Circuit in *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir.
23 2015). (Caiafa Dec. at ¶11).

24 **1. Monetary Relief:**

25 The Settlement is the product of months of arms-length negotiations between the
26 parties, including mediation with a highly experienced mediator, Hon. Margaret Nagle
27 (Ret.). The Settlement provides that Defendant will make available a fixed sum of
28 \$8,500,000.00 (the “Monetary Component”) for the benefit of the Class. (Agreement at

1 ¶3.1). Subject to final Court approval, the Monetary Component will be used to pay for
2 Notice and Administration Costs (not to exceed \$1,000,000 (Currently estimated at
3 approximately \$850,000) (Id. at ¶3.1.2), reasonable Attorneys' Fees not to exceed 25% of
4 the Class Settlement Amount (\$2,125,000)), litigation Costs not to exceed \$50,000, and
5 Class Representative Enhancement Payments (not to exceed \$7,500 to each Plaintiff
6 (\$30,000)). (Id. at ¶¶3.1.3-3.1.4). The amount remaining after these payments shall be
7 paid to Claimants on a pro rata basis in the form of Merchandise Credits, redeemable for
8 cash at the Claimant's option. (Id. at ¶3.1.1).

9 The required portions of the Monetary Component of the Agreement shall be
10 funded through and deposited into a QSF as reflected in the Agreement. (Id. at ¶¶3.2, 9.1-
11 9.8). The QSF will qualify as a "qualified settlement fund" under section 468B of the
12 Internal Revenue Code and sections 1.468B-1, *et seq.* of the Treasury Regulations, as: (1)
13 the QSF is being established subject to approval of the Court, and will be operated
14 pursuant to the terms and conditions of the Agreement; (2) the QSF will be subject to the
15 continuing jurisdiction of the Court; (3) the QSF is being established to resolve or satisfy
16 claims of alleged tort or violation of law; and (4) the QSF will be a trust, and its assets will
17 be segregated from the general assets of the trustee and/or administrator and deposited
18 therein.

19 Claimants will receive their share of the Monetary Component as a Merchandise
20 Credit redeemable for purchases at any TJ Maxx, Marshalls or HomeGoods store in
21 California. Each Merchandise Credit shall be fully transferable, stackable and may be
22 used in connection with any promotional discounts that are otherwise available.
23 Merchandise Credits will have no expiration date and need not be used in full at any time.
24 They will maintain a running balance that will be depleted based only on use until the
25 Claimant's balance is zero. No minimum purchase amount is required to use them. In
26 addition, Settlement Class Members will have the option of redeeming an unused
27 Merchandise Credit for cash in an amount equal to 75% of the Merchandise Credit at the
28 time of its issuance by returning the Merchandise Credit to the Claims Administrator

1 within one (1) year of its issuance. (Agreement at ¶¶1.14, 3.1.1). Claimants will have
2 ninety days from the date of Notice to submit a Claim Form either electronically through a
3 Settlement Website maintained by the Administrator, or via mail to the Administrator.
4 (Id. at ¶¶5.1, 5.2.2). The deadline for claim submission is currently April 9, 2018.
5 Following the Settlement Effective Date, Defendant will deliver plastic Merchandise
6 Credits to the Claims Administrator for distribution to all Claimants. (Id. at ¶8.1.3). Like
7 the gift cards offered in *In re Online DVD*, the Merchandise Credits here are an alternative
8 to cash, and are not “coupons” within the meaning of CAFA. They do not expire, may be
9 used to purchase any product at a TJX store, and are redeemable for cash at the Claimant’s
10 option. (Id. at ¶1.14). The Merchandise Credits here have many of the same attributes as
11 those in *In re Online DVD*, where the gift cards were found not to be coupons because,
12 among other things, they could be used to purchase any product from defendant, were
13 redeemable for cash, were freely transferable and did not expire. *Id.* at 950-52.

14 **2. Non-Monetary Relief:**

15 Plaintiffs and their counsel have also obtained relief beyond the Monetary
16 Component. As a direct result of this Litigation, Defendant has also agreed to
17 implement changes to its price-comparison advertising practices. First, Defendant
18 has agreed that, as of the date of settlement, and continuing forward, it will not
19 violate Federal or California law, including California’s specific price-comparison
20 advertising statutes. (Agreement at ¶3.5). Next, Defendant has also agreed to
21 enhance and expand programs intended to promote legal compliance, including
22 periodic (no less than once per calendar year) monitoring, training and auditing to
23 ensure compliance in its California T.J. Maxx, Marshalls and HomeGoods stores with
24 California and Federal price comparison laws. (Id. at ¶¶3.4-3.7). In addition,
25 Defendant has agreed to change the disclosure/definition of its “Compare At” pricing
26 on its T.J. Maxx, Marshalls and HomeGoods websites and on the signs in its
27 California stores. (Id. at ¶3.4). Defendant has also agreed to prominently post
28 additional signs in each of its over 300 California stores describing its comparison

1 pricing practices. (Id. at ¶3.6). Finally, Defendant has agreed that it will not base any
2 comparison price on an estimate not based on actual market prices. (Id.).

3 **IV. MOTIONS FOR PRELIMINARY APPROVAL OF SETTLEMENT:**

4 On September 18, 2017, Plaintiffs filed an Unopposed Motion for Preliminary
5 Approval of Class Action Settlement and Motion Certification of Settlement Class
6 (“MPA1”). (ECF No. 109). On October 20, 2017, the Court denied Plaintiffs’ MPA1 but
7 indicated that it was inclined to grant the motion and approve the proposed Settlement so
8 long as the proposed notices were amended to conform to the format addressed in the
9 Court’s order. (ECF No. 111).

10 Specifically, the Court found that the proposed notices should include
11 Defendants’ retail logos to alert Settlement Class Members that the notices concern
12 TJ Maxx, Marshalls and HomeGoods stores. (ECF No. 111). Following issuance of
13 the Court’s Order Denying MPA1, the Parties reviewed the Order, consulted with the
14 Claims Administrator (“JND”), and took those steps necessary to satisfy the Court’s
15 concerns and comply with the Court’s instructions. Specifically, the Parties changed
16 the format of Exhibits 3, 4, 5 & 7 to display the logos, in color, of Defendant TJX,
17 Inc., and its subsidiary retailers TJ Maxx, Marshalls, and HomeGoods. In addition,
18 JND also prepared and submitted a Supplemental Declaration from its CEO, Jennifer
19 M. Keough, describing the steps taken to comply with the Court’s instructions and
20 add the requested color logos to the four notices at issue. Plaintiffs then filed an
21 Amended Motion for Preliminary Approval of Class Action Settlement and
22 Certification of Settlement Class on November 13, 2017 (“MPA2”). (ECF No. 112).
23 Having found the Parties’ changes satisfactory, this Court granted Plaintiffs’ MPA2
24 on December 5, 2017. (ECF No. 113).

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1 **V. ARGUMENT:**

2 **A. The Court Should Approve the Fee Application:**

3 Federal Rule of Civil Procedure 23(h) provides that, “[i]n a certified class
4 action, the court may award reasonable attorney’s fees and nontaxable costs that are
5 authorized by law or the parties[’] agreement.” Fed. R. Civ. Proc. 23(h).

6 Here, Defendant has agreed not to oppose Plaintiff’s request for Attorneys’
7 Fees in the amount of 25% of the Monetary Component of the Settlement
8 (\$2,125,000), plus costs of no more than \$50,000. The amount requested is clearly
9 disclosed in the Class Notice, as required by Federal Rule 23(h)(1). (Agreement,
10 Exhs. 2 (¶21), 3, 4 & 5). The agreed-upon fees are, like all aspects of the Settlement,
11 subject to the Court’s determination of whether the agreement is “fundamentally fair,
12 adequate, and reasonable.” *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003).

13 **1. The Percentage-of-the-Recovery Method is the Appropriate Basis**
14 **for Determining Attorneys’ Fees for the Settlement:**

15 The U.S. Supreme Court “has recognized consistently that a litigant or a lawyer
16 who recovers a common fund ... is entitled to a reasonable attorney’s fee from the
17 fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Staton*, 327
18 F.3d at 967. Here, the attorneys’ fees award should be based on a percentage of the
19 Class Settlement Amount since the Agreement provides a common fund of
20 \$8,500,000. In a common-fund case such as this, the Court has discretion to apply
21 either the lodestar or the percentage-of-the-fund method in calculating a fee award.
22 *Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016).

23 “Because the benefit to the class is easily quantified in common-fund
24 settlements, we have allowed courts to award attorneys a percentage of the common
25 fund in lieu of the often more time-consuming task of calculating the lodestar.” *In re*
26 *Bluetooth Headset Prod. Liability Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *In re*
27 *Online DVD*, 779 F.3d at 952 (approving attorneys’ fee award based on percentage of
28 total settlement fund involving cash and gift cards). While Courts have discretion to

1 utilize either the percentage-of-the-fund or the lodestar method for awarding
2 attorneys' fees, Plaintiffs respectfully suggest that the better exercise of discretion
3 here would be to utilize the percentage method because the non-reversionary
4 common fund makes settlement valuation and application of the percentage method a
5 more straight-forward undertaking. See, *In re Washington Public Power Supply Sys.*
6 *Sec. Litig.* (“*In re WPPSS*”), 19 F.3d 1291, 1295 (9th Cir. 1994); *In re Bluetooth*, 654
7 F.3d at 942 (“[T]he benefit to the class is easily quantified in common-fund
8 settlements . . .”). Here, and since the settlement is non-reversionary and has a
9 readily determinable value, the percentage-of-the-fund method is the most
10 appropriate basis for awarding attorneys' fees.

11 **2. The Amount Requested is Reasonable:**

12 Under the percentage-of-the-fund method, the “court simply awards the
13 attorneys a percentage of the fund sufficient to provide class counsel with a
14 reasonable fee.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). The
15 Ninth Circuit “has established 25% of the common fund as a benchmark award for
16 attorney fees.” *Id.* See also, *Gooding v. Vita-Mix Corp.* (C.D.Cal., Jan. 25, 2018)
17 2018 WL 571881, at *6 (“In the Ninth Circuit, contingency fee recovery is typically
18 in the range of 20% to 33 1/3 % of the total settlement value, with 25% considered a
19 benchmark.”). Here, Plaintiffs request attorneys' fees equal to 25% of the common
20 fund.

21 With respect to the reasonable amount to award from the fund, “[e]mpirical
22 studies show that, regardless whether the percentage method or the lodestar method is
23 used, fee awards in class actions average around one-third of the recovery.” *Chavez v.*
24 *Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008). The Ninth Circuit has also
25 affirmed awards of more than 25% in common fund cases. See e.g., *In re Pacific*
26 *Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (33.3%); *Palmer v. Nigaglioni*,
27 508 Fed. Appx. 658, 658 (9th Cir. 2013) (28%); *Vizcaino v. Microsoft Corp.*, 290
28 F.3d 1043, 1048-50 (9th Cir. 2002) (28%).

1 Consistent with this precedent, the requested fee award of 25% of the \$8.5
2 million common fund is reasonable, appropriate and justified under the circumstances
3 of this case. In fact, on October 4, 2016, counsel for Plaintiffs herein obtained final
4 approval in a similar false advertising case, were approved as class counsel and
5 awarded their full attorneys' fees by Judge R. Gary Klausner in *Russell v. Kohl's*
6 *Department Stores, Inc.*, U.S.D.C. Central District Case No. 5:15-cv-01143-RSK-SP.
7 (ECF No. 96). Specifically, in a settlement which created a common fund of
8 \$6,150,000, Judge Klausner awarded Mr. Caiafa and Mr. Morosoff 25% of the
9 common fund amount. Further, the Court approved payment of litigation costs and
10 administrative costs, as well as the payment of representative enhancements of
11 \$5,000.00 each to Plaintiffs Steven Russell and Donna Caffey. (Id.). Here, an
12 increase in the representative enhancement per class representative from \$5,000 to
13 \$7,500 is warranted based on the additional time and effort required of each
14 representative in this case, including responding to multiple sets of discovery,
15 providing hundreds of pages of private financial documents, and preparing for and
16 attending depositions. (See declarations of Plaintiffs filed concurrently herewith).

17 When assessing whether the percentage requested is reasonable, the Court may
18 look to factors such as: (a) the results achieved; (b) the risk of litigation; (c) the skill
19 required; (d) the quality of work; (e) the contingent nature of the fee and the financial
20 burden; and (f) the awards made in similar cases. See, *Vizcaino*, 290 F.3d at 1047.

21 **a. Results Achieved:**

22 The results achieved here are exceptional. The Settlement provides that
23 Defendant will pay \$8,500,000 in Merchandise Certificates, administrative costs,
24 attorneys' fees and expenses, and incentive awards. As provided above, Claimants will
25 receive their share of the Monetary Component as a Merchandise Credit redeemable for
26 purchases at any TJ Maxx, Marshalls or HomeGoods store in California, or for cash at the
27 Claimant's option, and each Merchandise Credit will be fully transferable, stackable and
28 may be used in connection with any promotional discounts that are otherwise available.

1 Merchandise Credits will have no expiration date and need not be used in full at any time.
2 Moreover, Settlement Class Members will have the option of redeeming an unused
3 Merchandise Credit for cash in an amount equal to 75% of the Merchandise Credit at the
4 time of its issuance by returning the Merchandise Credit to the Claims Administrator
5 within one (1) year after its issuance. (Agreement at ¶¶1.14, 3.1.1). In addition, Plaintiffs
6 and their counsel have achieved non-monetary relief related to changes in Defendant’s
7 price advertising practices as described more fully herein, in the Agreement, and in MPA1
8 and MPA1. Such non-monetary relief is "a relevant circumstance in determining what
9 percentage of the common fund Class Counsel should receive as attorneys' fees[.]"
10 *Staton*, 327 F.3d at 974 (internal quotation marks omitted); *see also Vizcaino*, 290
11 F.3d at 1049 (upholding fee award where "counsel's performance generated benefits
12 beyond the cash settlement fund").

13 In assessing the results achieved through a class action settlement, courts
14 “recognize that settlement represents a compromise in which the highest hopes for
15 recovery are yielded in exchange for certainty and resolution and guard against
16 demanding too large a settlement” *In re General Motors Corp. Pick-Up Truck*
17 *Fuel Tank Prod’s Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995) (quoting *Manual for*
18 *Complex Litigation* 2d (1985) § 30.44)). Moreover, a settlement is not judged against
19 what might have been recovered had the plaintiff prevailed at trial; nor does the
20 settlement need to provide anywhere near 100% of the damages sought to be fair and
21 reasonable. *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998);
22 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 246 and 250 (2001); *Rebney*
23 *v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1139 (1990).

24 Under similar circumstances, the Ninth Circuit has upheld awards in excess of
25 its 25% benchmark. *See Vizcaino*, 290 F.3d at 1046-50 (affirming district court’s
26 award of 28% of a \$96,885,000.00 class action settlement fund (\$27,127,800.00) for
27 attorneys’ fees, finding that class counsel had “pursued this case in the absence of
28 supporting precedents” and in the face of other serious obstacles). As in *Vizcaino*,

1 Class Counsel undertook this case without knowing whether the theories advanced
2 would prove successful and without any controlling precedents.

3 **b. Quality of Work Performed:**

4 Counsel for Plaintiffs are highly experienced attorneys in complex litigation,
5 and in the area of consumer class actions in particular, and believe that the quality of
6 the legal work they have performed has been professional, competent and of the
7 highest caliber and quality. Moreover, the record in this action, including extensive
8 and complex law and motion, supports this conclusion.

9 As stated above, and prior to filing this action, counsel investigated facts and
10 law relevant to these claims and met with experts and customers of Defendant in an
11 effort to fully evaluate the case from both a factual and legal standpoint. Counsel
12 reviewed scholarly research in the area and spoke with experts in the field. Counsel
13 also researched and analyzed other similar false advertising cases.

14 **c. Skill Required:**

15 This is a complex and somewhat novel case which required considerable skill
16 and effort of experienced counsel for the Class. For example, issues relating to the
17 proper measure of restitution in such a case, if any, are unsettled and will no doubt be
18 the subject of many future Ninth Circuit decisions.

19 Plaintiffs' counsel was also required to use their skill and expertise to evaluate
20 the documentation and other evidence in this action and apply it to the many legal
21 issues in this case. Based on the record herein and the quality of the work produced
22 by Plaintiffs' counsel, as well as the results achieved, it is clear that Plaintiffs'
23 Counsel displayed considerable skill and expertise throughout this action. Courts
24 have recognized that the novelty and difficulty of issues in a case are significant
25 factors to be considered in making a fee award. See e.g., *Vizcaino v. Microsoft Corp.*,
26 142 F. Supp. 2d 1299, 1306 (W.D. Wash. 2001) ("*Vizcaino I*").

27 The caliber of opposing counsel is another important factor in assessing the
28 quality of Class Counsel's representation of the Settlement Class. See e.g., *Vizcaino I*,

1 *supra* at 1303. Here, Defendant was vigorously represented by Sheppard Mullin
2 Richter and Hampton LLP, as well as Ropes & Gray LLP, both top-tier law firms
3 specializing in complex and class action litigation. Plaintiffs' Counsel acquitted
4 themselves well against these experienced and qualified defense attorneys and
5 achieved an excellent result at every stage of the action, and ultimately by the
6 establishment of the \$8.5 million Settlement Fund.

7 **d. Risks of Litigation:**

8 Risk is likewise an important factor in assessing the reasonableness of a class
9 action settlement fee award. See e.g., *Vizcaino I*, 142 F. Supp. 2d at 1303-04. A high
10 risk factor is one reason for increasing attorneys' fee awards above the 25%
11 benchmark in common fund cases. *Id.*; see also, *In re Pacific Enterprises Sec. Litig.*,
12 47 F.3d 373, 379 (9th Cir. 1995) (33% of common fund as attorneys' fees was fair
13 and reasonable because of the complexity of issues and risks of litigation). Here,
14 Class Counsel have faced many of these same challenges and risks, including the risk
15 of not achieving class certification, and the risk of recovering little or no restitution.

16 **e. Contingent Nature of the Fee:**

17 A fair fee award must include consideration of the contingent nature of the fee
18 where there is no assurance of attorneys' fees or reimbursement of expenses. *See*,
19 e.g., *Vizcaino*, 290 F.3d at 1049-50. Attorneys' fee awards must be sufficient to
20 encourage skilled and determined counsel to take on difficult cases and see them
21 through years of litigation to a fair and adequate resolution for the plaintiffs:

22 It is an established practice in the private legal market to reward attorneys
23 for taking the risk of non-payment by paying them a premium over their
24 normal hourly rates for winning contingency cases. *See* Richard Posner,
25 *Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). Contingent
26 fees that may far exceed the market value of the services if rendered on a
27 non-contingent basis are accepted in the legal profession as a legitimate
28 way of assuring competent representation for plaintiffs who could not
afford to pay on an hourly basis regardless whether they win or lose.

In re WPPSS, 19 F.3d at 1299.

1 The commencement of a class action is far from a guarantee of success. Class
2 Counsel have received no compensation for the considerable time and effort spent
3 throughout approximately 3 years of litigation (and for months of investigation and
4 preparation prior to that), and for tens of thousands of dollars of out-of-pocket costs
5 while litigating for the benefit of the Class. (See Caiafa Dec., Morosoff Dec., and
6 Declaration of Greg Hafif (“Hafif Dec.”) filed concurrently herewith.). Any fee
7 award or reimbursement of expenses has always been a substantial risk, and
8 ultimately any award is within the Court’s discretion. Here, despite the many risks
9 faced, counsel committed their financial and professional resources to this case and
10 achieved a successful result for the substantial benefit of the Settlement Class.

11 **3. A Lodestar Cross-Check Supports the Reasonableness of the**
12 **Requested Award:**

13 The Ninth Circuit does not require a lode-star analysis. *Stetson*, 821 F.3d at
14 1165. See also, *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1122 (C.D.
15 Cal. 2008) (“A lodestar cross-check is not required in this circuit, and in some cases
16 is not a useful reference point.”). However, even in common fund cases, a lodestar
17 cross-check may help a court in determining whether a proposed percentage award is
18 reasonable. See, *Gooding* at *7. As the Ninth Circuit has explained, “[c]alculation of
19 the lodestar, which measures the lawyers’ investment of time in the litigation,
20 provides a check on the reasonableness of the percentage award.” *Vizcaino*, 290 F.3d
21 at 1050. Although “the primary basis of the fee award remains the percentage
22 method, the lodestar may provide a useful perspective on the reasonableness of a
23 given percentage award.” *Id.*; See also, *In re Bluetooth*, 654 F.3d at 944.

24 Here, counsel’s \$2,092,500 lodestar is supported by attorney declarations. (See,
25 Caiafa Dec. at ¶26). Class Counsel’s declarations set forth the details regarding how
26 they spent their time. “[I]t is well established that ‘[t]he lodestar cross-check
27 calculation need entail neither mathematical precision nor bean counting ... [courts]
28 may rely on summaries submitted by the attorneys and need not review actual billing

1 records.” *Gooding* at *7. Compensable activities under the lodestar method include
2 both pre-litigation activities (*e.g.*, interviewing the client, investigating the facts,
3 researching the law, and preparing the initial pleading), and litigation activities (*e.g.*,
4 discovery, conferring with clients, drafting pleadings, making court appearances,
5 travel time, mediation, settlement negotiations, and drafting settlement documents).
6 *Id.*; See also, *Webb v. Bd. of Educ.*, 471 U.S. 234, 243 (1985).

7 **a. The Hours Incurred and Tasks Performed Were Reasonable and**
8 **Necessary:**

9 The first step in the lodestar analysis is to calculate the lodestar amount, which
10 is the number of hours reasonably performed at standard hourly rates. *Vo v. Las*
11 *Virgenes Mun. Water Dist.*, 79 Cal. App. 4th 440 (2000). It is well established that in
12 moving for fees, counsel is “not required to record in great detail how each minute of
13 his time was expended.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983).
14 Instead, counsel need only “identify the general subject matter of his time
15 expenditures.” *Id.*; *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000).
16 See also, *Gooding* at *7 (“[I]t is well established that ‘[t]he lodestar cross-check
17 calculation need entail neither mathematical precision nor bean counting ... [courts]
18 may rely on summaries submitted by the attorneys and need not review actual billing
19 records.”).

20 The accompanying declarations of counsel demonstrate that they have
21 collectively, to date, expended over 3,000 hours on this case and detail the type of
22 work that was done, including: (1) pre-litigation research and investigation; (2)
23 litigation activities such as drafting complaints, extensive motion practice, and review
24 and analysis of detailed documentation provided by Defendant and otherwise
25 discovered by Plaintiffs’ counsel; (3) drafting and responding to multiple sets of
26 discovery, and law and motion practice in connection therewith; (4) preparation for
27 and attendance at depositions of Plaintiffs and Defendant; (5) filing a motion for class
28 certification prior to settlement; (6) drafting opposition papers, declarations and

1 separate statement in connection with the motion for summary judgment filed by
2 Defendant; (7) settlement negotiations and mediation, preparation for same, and
3 drafting, re-drafting and finalizing the terms of the Agreement on several occasions;
4 and (8) efforts to obtain Court approval of the Settlement. Defendant vigorously
5 defended this action, and all of the tasks performed by Class Counsel were reasonable
6 and necessary to litigating the claims. Moreover, counsel will continue to dedicate
7 time and resources throughout the final approval and claims administration process.

8 **b. Counsel’s Hourly Rates Are Reasonable:**

9 The test for the reasonableness of an attorney’s hourly rate is based on “the rate
10 prevailing in the community for similar work performed by attorneys of comparable
11 skill, experience, and reputation.” *Chalmers v. City of Los Angeles*, 796 F.2d 1205,
12 1210-11 (9th Cir. 1986); *Children’s Hosp. & Med. Ctr. v. Bunt*, 97 Cal. App. 4th 740,
13 783 (2002). In performing this analysis, courts look to the experience and reputation
14 of class counsel, the complexity of the issues involved, the geographic market in
15 which the case is litigated, and other factors affecting the litigation.

16 In this case, Class Counsels’ declarations describe the substantial experience
17 each attorney and firm has in handling class actions, and they establish the basis and
18 calculation for the hourly rates of the attorneys and paralegals at each firm who
19 worked on this case. (See Caiafa Dec., Morosoff Dec., Hafif Dec.). Counsel billed
20 this case at their usual and customary hourly billing rates, which have been approved
21 as reasonable by other courts presiding over similar complex class action lawsuits,
22 including cases resolved in the Central District of California. See, *Nguyen v. Radiant*
23 *Pharm. Corp.*, 2014 WL 1802293, at *11 (C.D. Cal. May 6, 2014) (approving partner
24 rates of \$750, associate rates ranging from \$325 to \$550, and paralegal rates ranging
25 from \$200 to \$225); *Kearney v. Hyundai Motor Am.*, 2013 WL 3287996, at *8 (C.D.
26 Cal. June 28, 2013) (approving rates ranging from \$650 to \$800 for attorneys).

27 Based on all relevant factors, Plaintiffs respectfully request that the Court
28 award attorneys’ fees in the amount requested, 25% of the Settlement fund.

1 **B. The Court Should Award the Requested Litigation Costs:**

2 Here, the litigation costs are capped at \$50,000. In addition to attorneys' fees,
3 attorneys in a class action "may recover their reasonable expenses that would
4 typically be billed to paying clients in non-contingency matters." *In re Omnivision*
5 *Techs, Inc.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2008); See also, Fed. R. Civ. P.
6 23(h) ("[i]n a certified class action, the court may award . . . nontaxable costs that are
7 authorized by law or by the parties' agreement"); *Mills v. Electric Auto-Lite Co.*, 396
8 U.S. 375, 391-92 (1970).

9 Here, counsel have incurred over \$40,000 in litigation costs to date. (Caiafa
10 Dec. at ¶28). The most notable expenses were related to retention of experts, costs of
11 mediation, discovery related costs including multiple depositions, filing fees,
12 photocopy and postage, and research that were incurred in the normal course of
13 business and were reasonable and essential to the successful prosecution of this
14 lawsuit. Id. See, *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1367-72
15 (N.D. Cal. 1996) (costs related to retention of experts, photocopy costs, travel
16 expenses, postage, telephone costs, computerized legal research fees, and filing fees
17 may be reimbursed). Reimbursement for these expenses from the QSF is appropriate,
18 as all beneficiaries should bear their fair share of the costs of the litigation, and these
19 are the normal costs of litigation for which counsel traditionally bill paying clients.
20 See, e.g., *Leonard v. Baumer (In re United Energy Corp. Sec. Litig.)*, 1989 WL
21 73211, at *6 (C.D. Cal. Mar. 9, 1989).

22 **C. The Court Should Approve the Proposed Enhancement Payments:**

23 Plaintiffs Staci Chester, Robin Berkoff, Daniel Friedman and Theresa Metoyer
24 Request that this Court grant Enhancement Payments to each of them in the amount
25 of \$7,500 each. (Agreement at ¶3.1.4). The requested Enhancement Payments are
26 warranted based upon Plaintiffs' efforts to protect the interests of the Class, the
27 degree to which the Class has benefitted from those actions, and the amount of time
28 and effort Plaintiffs expended in pursuing the action. (See Declarations of Plaintiffs

1 Chester, Berkoff, Friedman and Metoyer filed concurrently herewith). All four class
2 representatives were required to review and provide hundreds of documents, prepare
3 for and attend their noticed depositions, prepare declarations in support of Plaintiffs'
4 motions, participate in numerous conferences with counsel, engage in discussions
5 regarding settlement, and generally be available to fully participate at every step of
6 this litigation. Additionally, over the past approximately 3 years Plaintiffs have been
7 exposed to significant personal and reputational scrutiny and risk from publicity
8 associated with this lawsuit.

9 Courts routinely approve awards to class representatives for their service to the
10 class as part of their approval of settlements in class actions. See e.g., *In re Mego Fin.*
11 *Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (“[T]he district court did not
12 abuse its discretion . . . in awarding an incentive award to the Class
13 Representatives”). “In the Ninth Circuit, ‘[i]ncentive awards are fairly typical in
14 class action cases.’” *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir.
15 2009). “Such awards ‘are intended to compensate class representatives for work
16 done on behalf of the class, to make up for financial or reputational risk undertaken in
17 bringing the action, and, sometimes, to recognize their willingness to act as a private
18 attorney general.’” *McNeal v. RCM Technologies, Inc.* (C.D.Cal. July 12, 2017) 2017
19 WL 2974918, at *1.

20 Here, Plaintiffs have worked with Class Counsel for approximately 3 years.
21 Each Plaintiff has provided valuable services on behalf of the Class and has been
22 instrumental in bringing about the substantial benefits of the Agreement. The
23 proposed \$7,500 Enhancement Payment to each Plaintiff represents a very small
24 fraction of one percent of the Class Settlement Amount and is well within the range
25 of such awards approved as fair and reasonable by the Ninth Circuit and elsewhere.
26 See e.g., *In re Online DVD*, 779 F.3d at 941-943 (approving trial court's award of
27 \$5,000 to each of the nine class representatives, total \$45,000); *In re TFT-LCD (Flat*
28 *Panel) Antitrust Litig.*, Case No. M 07-1827 SI, 2013 WL 1365900, at *17 (N.D. Cal.

1 April 3, 2013) (approving incentive awards of \$15,000 to each of the 40 court-
2 appointed class representatives); *McNeal* at *2 (approving incentive payments in the
3 amount of \$10,000 to each named class representative.).

4 Moreover, Plaintiffs' approval of the Settlement was not conditioned on their
5 receiving an incentive award, and their rights to an incentive award was not
6 conditioned upon their approval of the Settlement. (See Plaintiff declarations filed
7 concurrently herewith). Accordingly, Plaintiffs' interests did not conflict with or
8 diverge from the interests of the Settlement Class. *Radcliffe v. Experian Info.*
9 *Solutions, Inc.*, 715 F.3d 1157, 1161 (9th Cir. 2013).

10 **VI. CONCLUSION:**

11 For all the reasons set forth herein, Plaintiffs and Class Counsel respectfully
12 request the Court approve the proposed award of Attorneys' Fees in the amount of
13 \$2,125,000 to Class Counsel, plus costs of \$50,000; Costs of Claims Administration
14 and Notice in an amount not to exceed \$1,000,000 to be distributed to JND Legal
15 Administration, the claims administrator; and the proposed Enhancement Payment of
16 \$7,500 each to Representatives Plaintiffs Staci Chester, Robin Berkoff, Daniel
17 Friedman and Theresa Metoyer.

18
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20 Dated: March 13, 2018

Respectfully submitted,
DOUGLAS CAIAFA, A PROF. LAW CORP.

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23 By: /s/ Douglas Caiafa
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Attorneys for Plaintiffs
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