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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MONICA RAEL and ALYSSA  
HEDRICK, on behalf of themselves and  
all others similarly situated,  
  
Plaintiffs,  
  
v.  
  
THE CHILDREN’S PLACE, INC., a  
DELAWARE corporation, and DOES 1-  
50, inclusive,  
  
Defendant.

Case No.: 3:16-cv-00370-GPC-LL

**ORDER**

- (1) CERTIFYING PROVISIONAL SETTLEMENT CLASS;**
- (2) GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT;**
- (3) PROVIDING FOR NOTICE TO THE SETTLEMENT CLASS;**
- (4) APPOINTING NAMED PLAINTIFFS, CLASS COUNSEL, AND CLAIMS ADMINISTRATOR; AND**
- (5) SETTING FINAL APPROVAL HEARING AND CRITICAL DATES.**

**ECF NO. 60.**

Before the Court is the Plaintiffs’ amended, unopposed motion for preliminary

1 approval of settlement and provisional class certification. (ECF No. 60.) For the reasons  
2 detailed below, the Court **GRANTS** Plaintiffs’ motion.

3 To assist the reader, the Court sets out the structure of the opinion to follow. In  
4 **Section I**, the Court summarizes the factual and procedural background to this motion,  
5 including the material terms of the Settlement Agreement (“SA”). (*See* ECF No. 60-2,  
6 Ex. 1, SA.) **Section II** addresses the motion for provisional class certification under  
7 Federal Rules of Civil Procedure (“Rules”) 23(a) and 23(b)(2). **Section III** addresses the  
8 motion for preliminary approval of the Settlement Agreement. The Court analyzes four  
9 discrete questions: (a) whether what has been agreed upon is a coupon settlement; (b)  
10 whether the Settlement is fair, reasonable, and adequate; (c) whether the Settlement  
11 shows signs of collusion between Defendant and Class Counsel; and (d) whether the  
12 Notice Plan is adequate. Finally, in the Conclusion at **Section IV**, the Court summarizes  
13 its holdings, findings, and orders to the Parties.

14 The Court advises Class Members reading this opinion that any summary of the  
15 Settlement Agreement is not a substitute for the Agreement itself and directs the reader to  
16 review the Settlement Agreement.

## 17 **I. Background**

### 18 **a. Procedural Background**

19 On February 11, 2016, Plaintiff Monica Rael brought suit on behalf of herself and  
20 all others similarly situated against Defendant the Children’s Place, Inc. (“TCP” or  
21 “Defendant”) and fifty unnamed Does (collectively, “Defendants”). (ECF No. 1.)  
22 Plaintiff Rael amended the complaint three times and added a second Named Plaintiff,  
23 Ms. Alyssa Hendrick (collectively, “Plaintiffs” or “Named Plaintiffs”). (ECF Nos. 9, 19,  
24 29, 37-2.) On November 22, 2017, Plaintiffs filed the Third Amended Complaint  
25 (“TAC”) alleging three causes of actions for violations of (1) California’s Unfair  
26 Competition Law (“UCL”), CAL. BUS. & PROF. CODE § 17200 *et seq.*; (2) California’s  
27 False Advertising Law (“FAL”), CAL. BUS. & PROF. CODE § 17500 *et seq.*; and (3)  
28 California’s Consumer Legal Remedies Act (“CLRA”), CAL. CIV. CODE § 1750 *et seq.*

1 (ECF No. 37-2, Ex. B, TAC at ¶¶ 51–78.) In short, Plaintiffs’ three causes of action stem  
2 from the accusation that Defendant routinely advertises discounted prices from false  
3 original prices to deceive customers as to the real value of their goods and unlawfully  
4 drive sales. (*Id.* at ¶¶ 1–9.)

5 On November 22, 2017, Plaintiffs also filed the initial unopposed motion for  
6 preliminary approval of settlement and provisional class certification. (ECF No. 36.) The  
7 Court heard that motion on February 8, 2018. (ECF No. 42; *see also* Transcript for  
8 February 8, 2018 Hearing (“2018 Tr.”)). On April 2, 2018, the Court stayed proceedings  
9 pending the Ninth Circuit’s decision on the petitions for rehearing *en banc* in *In re*  
10 *Hyundai & Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018). (ECF No. 48.)  
11 The Court denied Plaintiffs’ initial settlement motion on June 8, 2018 as moot. (ECF No.  
12 49.) The Parties filed status updates during the pendency of the stay. (ECF Nos. 50, 53.)

13 On June 17, 2019, the Court lifted the stay. (ECF No. 57.) Then, on October 31,  
14 2019, Plaintiffs filed an amended motion for preliminary approval of settlement and  
15 provisional class certification. (ECF No. 60). Plaintiffs included the declarations of Mr.  
16 Todd Carpenter as Class Counsel, (ECF No. 60-2, 2019 Declaration of Todd Carpenter  
17 (“2019 Carpenter Decl.”)), and Ms. Carla Peak of the firm Kurtzman Carson Consultants  
18 LLC (“KCC” or “Claims Administrator”). (ECF No. 60-3, Declaration of Carla Peak  
19 “Peak Decl.”).<sup>1</sup> On November 22, 2019, TCP filed a notice of non-opposition. (ECF No.  
20 61.)

21 On December 6, 2019, the Court held a second hearing on Plaintiffs’ unopposed  
22 motion. (ECF No. 63; *see also* Transcript for December 6, 2019 Hearing (“2019 Tr.”)).  
23 The Court then ordered the Parties supplement the record with factual support for their  
24 assertions at the hearing. (ECF No. 65.) On January 3, 2020, the Parties filed three  
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27 <sup>1</sup> To be more precise, Plaintiffs first filed the amended motion on October 25, 2019, which the Court  
28 then rejected for a minor procedural error. (ECF Nos. 58, 59.) Plaintiffs quickly corrected that error and  
re-filed the amended motion a few days later. (ECF No. 60).

1 documents complying with the Court’s order: (a) another declaration by Class Counsel  
2 Todd Carpenter dated January 3, 2020, (ECF No. 66, Declaration of Todd Carpenter  
3 (“2020 Carpenter Decl.”)); (b) Plaintiffs’ supplemental briefing, (ECF No. 67); and (c)  
4 the declaration of Vipul Jain, a TCP employee. (ECF No. 68 at 2, Declaration of Vipul  
5 Jain (“Jain Decl.”)).

## 6 **b. Factual Background**

7 This Section summarizes the material facts of the Settlement Agreement, including  
8 (i) the proposed Class, (ii) the releases and warranties provided to Defendant, (iii) the  
9 Voucher Fund created by Defendant to compensate the Class, (iv) the awards to Class  
10 Counsel and the Named Plaintiffs entailed in the Settlement, and (v) the Notice Plan.

### 11 **i. The Proposed Class**

12 Plaintiffs seek provisional certification of a nationwide class including “[a]ll  
13 individuals in the United States who, from February 11, 2012 through the date the Court  
14 enters the preliminary approval order, purchased any product bearing a discount at one of  
15 The Children’s Place retail or outlet stores” (the “Class”). (ECF No. 37-2, TAC at § 43;  
16 ECF No. 60-2, Ex. 1, SA at § 1.8.) “Defendant, Defendant’s counsel, Defendant’s  
17 officers, directors, and employees, and the judge presiding over the action” are to be  
18 excluded. (*Id.* at § 1.8.)

19 Plaintiffs further divide the Class into three Tiers. (*Id.* at § 2.1.) “Tier 1 Authorized  
20 Claimants” include individuals whose qualifying purchases total less than \$50, or any  
21 individuals who do not submit proof of their purchases. (*Id.* at § 2.1(a)). “Tier 2  
22 Authorized Claimants” include individuals whose qualifying purchases total \$50.01 to  
23 \$150. (*Id.* at § 2.1(b)). “Tier 3 Authorized Claimants” include individuals whose  
24 qualifying purchases total more than \$150. (*Id.* at § 2.1(c)). Tier 2 and Tier 3 Claimants  
25 are required to submit proof of their purchases. (*Id.* at §§ 2.1(a)–(b)). Tier 1 Claimants  
26 get one voucher, Tier 2 Claimants get two vouchers, and Tier 3 Claimants get three  
27 vouchers. (*Id.* at § 2.2).

### 28 **ii. The Releases & Warranties**

1 Under the Settlement Agreement, the Class agrees to release TCP from any and all  
2 claims they have against it. (ECF No. 60-2, Ex. 1, SA at § 2.11.) This includes all “Class  
3 Released Claims,” i.e. all claims “arising out of or relating to any of the acts, omissions  
4 or other conduct that have or could have been alleged or otherwise referred to in the  
5 Complaint.” (*Id.* at § 1.10.)

6 Class Members also agree to waive all “Unknown Claims.” (*Id.* at §§ 1.31, 2.11.)  
7 Under this provision, Class Members waive the protection of California Civil Code §  
8 1542 and thereby relinquish claims which they do “not know or suspect to exist . . . at the  
9 time of executing the release and that, if known . . . would have materially affected . . .  
10 settlement.”<sup>2</sup> (Cal. Civ. Code § 1542; *Id.* at § 1.31.) Per the representation of Class  
11 Counsel, the release of Unknown Claims only extends to “issues that were alleged in the  
12 complaint related to [TCP’s] advertising.” (2019 Tr. at 14.)

13 The Named Plaintiffs likewise release Defendant from future liability. (*Id.* at §  
14 2.12.) Defendant, moreover, admits no wrongdoing and affirmatively denies “each of the  
15 claims and contentions alleged by Plaintiffs in the Action.” (*Id.* at § 2.13.)

### 16 **iii. The Voucher Fund**

17 To compensate the Class for settling this action, the Settlement Agreement  
18 provides for a “Voucher Fund” which will contain 800,000 vouchers to be awarded to  
19 qualifying Class Members. (ECF No. 60-2, Ex. 1, SA at §§ 1.33, 2.1–2.4) Vouchers may  
20 be used at a TCP store, outlet, or online, and come in one of two forms: “(i) \$6 off a  
21 purchase (no minimum purchase) or (ii) 25% off a purchase (of the first \$100).” (*Id.* at §  
22 1.32.) Vouchers are “transferable,” valid for 6 months, and “may be used on items that  
23 are on sale or otherwise discounted.” (*Id.*) Vouchers cannot be “combined with any other  
24 coupon or promotional offer,” redeemed for cash, or replaced if lost, stolen, or damaged.

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27 <sup>2</sup> As with the known claims, the release language encompassing “Unknown Claims” is “limited to a  
28 universe of claims ‘arising out of or relating to any of the acts, omissions or other conduct that have or  
could have been alleged or otherwise referred to in the Complaint . . .’” (ECF No. 60-1 at 25 (quoting  
ECF No. 60-2, Ex. 1, SA at § 1.10)).

1 (*Id.*) The \$6 vouchers are “stackable” while the 25% vouchers are not. (*Id.*)

2 To obtain a voucher, Class Members must comply with the Claims Procedure  
3 detailed in the Settlement Agreement. (ECF No. 60-2, Ex. 1, SA at §§ 3.6–3.10.) The  
4 Procedure permits Class Members to file a claim with the Claims Administrator, object to  
5 the Settlement Agreement, or request to be excluded from the Class. (*Id.*) Class Members  
6 must perform these actions on or before the response deadline, which would initially be  
7 set at 120 calendar days after the entry of this Order. (*Id.* at §§ 1.28, 3.6.) Class Members  
8 may also request to appear at the Fairness Hearing. (*Id.* at § 3.9(c)). In addition to  
9 collecting biographical information, the Claim Form asks Claimants to select their Tier,  
10 note their purchases and any available proof, choose which voucher to obtain, and  
11 provide an e-mail address for electronic delivery. (ECF No. 60-2, Ex. E, Claim Form).

12 As noted, the number of vouchers each Claimant receives will be equal to the Tier  
13 number. (ECF No. 60-2, Ex. 1, SA at § 2.2.) If there are timely claims to more than  
14 800,000 vouchers in the first round of distribution, the Fund will only distribute dollar-  
15 based vouchers, and the value of those vouchers will be calculated on a pro rata basis.  
16 (*Id.* at § 2.4) In subsequent rounds of distribution, Claimants receive vouchers according  
17 to the selections made in their Claim Forms. (*Id.* at § 2.3(a)–(b)). Again, if there are  
18 fewer vouchers left in the Voucher Fund than are timely claimed in any subsequent round  
19 of distribution, the Fund will then disburse only dollar-value vouchers at a pro-rated  
20 value. (*Id.* at § 2.3(c)).

#### 21 **iv. Awards to Counsel and Named Plaintiffs**

22 The Settlement Agreement also permits the Named Plaintiffs and Class Counsel to  
23 recover fees independent of the Voucher Fund. Each Named Plaintiff may recover an  
24 “Individual Settlement Award” of \$2,500 or less, subject to the Court’s approval. (ECF  
25 No. 60-2, Ex. 1, SA at § 2.6.). Class Counsel may seek up to \$1,080,000 in costs and fees  
26 (total), subject to the Court’s approval. (*Id.* at § 2.7.) If the Court awards less than that  
27 maximum amount in fees and costs to Class Counsel, the difference between the actual  
28 award and \$1,080,000 will go to the Voucher Fund or, if certain criteria are met, become

1 a *cy pres* distribution to the National Consumer Law Center. (*Id.* at § 2.8.)

2 **v. The Notice Plan**

3 The Settlement Agreement provides for a tri-part notice structure, hereafter  
4 referred to as the Notice Plan. (ECF No. 60-1 at 9–12.) First, the Claims Administrator  
5 will post the Full Notice – a document explaining the Settlement Agreement, the Class,  
6 this Order, and other information critical to the Class Members – to an internet website  
7 specifically created for this settlement (the “Settlement Website”). (*Id.* at 9; ECF No. 60-  
8 2, Ex. 1, SA at § 3.3(a); ECF No. 60-2, Ex. B, Full Notice)). The Settlement Website will  
9 also contain the Claim Form, TAC, Settlement Agreement, a notice of attorneys’ fees and  
10 costs, and this Order. (ECF No. 60-2, Ex. 1, SA at § 3.3(a)). Claimants may file claims  
11 electronically through the Settlement Website. (*Id.*)

12 Second, the Claims Administrator will “use reasonable efforts to identify those  
13 TCP customers who may be Class Members for whom it has a valid email address” and  
14 provide e-mail notice to those addresses. (*Id.* at § 3.3(b)). These e-mails will come, in  
15 part, from Defendant’s e-mail records of its “rewards club members.” (*See* 2018 Tr. at 2.)  
16 The e-mails – which would go to addresses “in the range of 12.5 million” – will contain  
17 the address of the Settlement Website, and the e-mail and mailing addresses of the  
18 Claims Administrator. (ECF No. 60-3, Peak Decl. at ¶ 4.)

19 Third, the Claims Administrator “will start implementing an online notice program  
20 through the Google Display Network.” (ECF No. 60-2, Ex. 1, SA at § 3.3(c); *see also*  
21 ECF No. 60-2, Ex. D, Online Media Notice.) In sum, these notices will be short online  
22 advertisements, posted to the Google Display Network,<sup>3</sup> that target individuals 18 years  
23 of age or older and contain a link to the Settlement Website. (ECF No. 60-3, Peak Decl.  
24 at ¶¶ 5–8.)

25 The Parties claim that their tri-part Notice Plan will reach approximately 70% of  
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28 <sup>3</sup> *See* Google, Inc., *Display Network Overview*, <https://www.google.ca/ads/displaynetwork/index.html>  
(last visited November 24, 2019).

1 the class on average 2.5 times each. (ECF No. 60-3, Peak Decl. at ¶ 8.) TCP agrees to  
2 bear the “administration costs, notice costs . . . and any other related costs (including, but  
3 not limited to, distribution),” consistent with § 3.3 of the Settlement Agreement, and up  
4 \$1,000,000. (*Id.* at § 2.10.) The Parties, through the Claims Administrator, will execute  
5 the Notice Plan within sixty days (60) of the entry of this order. (*Id.* at § 3.3.)

## 6 **II. Certifying Provisional Settlement Class**

7 This Section examines Plaintiffs’ request for provisional certification of the Class.  
8 Pursuant to Rules 23(a) and 23(b)(3), the Court **GRANTS** this request and provisionally  
9 certifies the Class.

### 10 **a. Rule 23(a) Requirements**

11 Class certification is governed by Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564  
12 U.S. 338, 345 (2011). Under Rule 23(a), the party seeking certification must demonstrate  
13 that “(1) the class is so numerous that joinder of all members is impracticable; (2) there  
14 are questions of law or fact common to the class; (3) the claims or defenses of the  
15 representative parties are typical of the claims or defenses of the class; and (4) the  
16 representative parties will fairly and adequately protect the interests of the class.” Fed. R.  
17 Civ. P. 23. For the foregoing reasons, the Court finds Rule 23(a) is satisfied.

### 18 **i. Numerosity**

19 The numerosity “requirement is met if the class is so large that joinder of all  
20 members is impracticable.” *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029  
21 (9th Cir. 2012) (citing Fed. R. Civ. P. 23(a)). Impracticability “does not mean  
22 impossibility, but only the difficulty or inconvenience of joining all members of the  
23 class.” *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964)  
24 (quotations omitted). “Where the exact size of the proposed class is unknown, but general  
25 knowledge and common sense indicate it is large, the numerosity requirement is  
26 satisfied.” *In re HiEnergy Techs., Inc. Sec. Litig.*, No. 8:04-CV-01226-DOC, 2006 WL  
27 2780058, at \*3 (C.D. Cal. Sept. 26, 2006). “Although there is no exact number, some  
28 courts have held that numerosity may be presumed when the class comprises forty or



1 more members.” *Krzesniak v. Cendant Corp.*, No. C-05–05156-MEJ, 2007 WL 1795703,  
2 at \*7 (N.D. Cal. June 20, 2007).

3 Here, numerosity is satisfied. Though an estimate of the total number of potential  
4 Class Members eludes the parties, it is reasonable to assume that number may be in the  
5 millions. (*See* ECF No. 60-3, Peak Decl. at ¶ 4 (noting the Claims Administrator expect  
6 to receive e-mail addresses “in the range of 12.5 million” for potentially affected  
7 consumers)). Defendant, moreover, has not disputed numerosity since pre-mediation  
8 discovery took place. (ECF No. 60-2, 2019 Carpenter Decl. at ¶ 3.)

### 9 **ii. Commonality**

10 “To establish commonality, the existence of shared legal issues with divergent  
11 factual predicates is sufficient, as is a common core of salient facts coupled with  
12 disparate legal remedies.” *Parra v. Bashas’, Inc.*, 536 F.3d 975, 978 (9th Cir. 2008)  
13 (quotations and citations omitted). In other words, not all questions of fact and law need  
14 to be common to satisfy commonality. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
15 1019 (9th Cir. 1998); *see also Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003)  
16 (finding commonality for a class of more than 15,000 Boeing workers facing company-  
17 wide discriminatory practices).

18 Here, commonality is satisfied. The Class Members’ claims stem from the same  
19 factual circumstances, namely, the purchasing of TCP merchandise bearing some  
20 discount at a TCP store, outlet, or webpage after February 11, 2012. Likewise, each Class  
21 Member’s claims involve common questions of law, including: “(1) whether defendant’s  
22 price-comparison advertising scheme regarding its private and exclusive branded apparel  
23 and accessories was false or misleading within the meaning of the UCL, FAL or CLRA;  
24 (2) whether defendant made false statements in its advertisements; [and] (3) whether  
25 defendant’s advertisements were likely to deceive a reasonable consumer.” *See Spann v.*  
26 *J.C. Penney Corp.* (“*Spann I*”), 307 F.R.D. 508, 518 (C.D. Cal. 2015), *modified*, 314  
27 F.R.D. 312 (C.D. Cal. 2016). Thus, like the class action in *Spann I*, here the class meets  
28 the requirement of Rule 23(a)(2). *Spann I*, 307 F.R.D. at 518.

1                   **iii. Typicality**

2           Rule 23(a)(3) requires that the “claims or defenses of the representative parties are  
3 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23 “The test of typicality is  
4 whether other members have the same or similar injury, whether the action is based on  
5 conduct which is not unique to the named plaintiffs, and whether other class members  
6 have been injured by the same course of conduct.” *Achziger v. IDS Prop. Cas. Ins. Co.*,  
7 772 F. App’x 416, 417 (9th Cir. 2019) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d  
8 497, 508 (9th Cir. 1992)).

9           Here, typicality is satisfied. Plaintiffs have claims, and suffered injuries, typical of  
10 the Class. As with the other Members, Plaintiffs raise claims under UCL, FAL, and  
11 CLRA pertaining to TCP’s pricing scheme. Also, like other Class Members, Plaintiffs’  
12 primary injury is the loss of income from purchases made at TCP stores as a result of  
13 TCP’s false discounts. Plaintiff Monica Rael, for example, purchased jeans for  
14 “approximately \$7.47” with the understanding that she was receiving a “50%” discount,  
15 only to find that the jeans were not sold at the “original” price in the 90 days preceding  
16 her purchase, and that those jeans “were of lesser value than what she paid.” (ECF No.  
17 37-2, TAC at §§ 13–14.) Similarly, Plaintiff Alyssa Hendrick was “enticed to purchase  
18 jeans” for \$9.99 under the presumption that she had received a 40% discount, only to find  
19 that the jeans were “never offered for sale as the [TCP outlet] at the full regular price of  
20 approximately \$16.50.” (*Id.* at §§ 15–16.) Plaintiffs’ purchases, moreover, are likely  
21 comparably priced to those of many potential Class Members as “[h]undreds of items are  
22 available [at TCP locations and online] for sale at less than \$6.00.” (ECF No. 60-2, 2019  
23 Carpenter Decl. at ¶ 12.)

24                   **iv. Adequacy of Representation**

25           The adequacy requirement “serves to uncover conflicts of interest between named  
26 parties and the class they seek to represent.” *Amchem Prod., Inc. v. Windsor*, 521 U.S.  
27 591, 625 (1997) (citation omitted). Thus, to determine adequacy, the Court must “resolve  
28 two questions: ‘(1) do the named plaintiffs and their counsel have any conflicts of interest

1 with other class members and (2) will the named plaintiffs and their counsel prosecute the  
2 action vigorously on behalf of the class?’. *In re Hyundai & Kia Fuel Econ. Litig.*, 926  
3 F.3d 539, 566 (9th Cir. 2019) (en banc) (quoting *Hanlon*, 150 F.3d at 1020). Adequacy of  
4 representation is designed to deny certification in instances of “actual fraud,  
5 overreaching, or collusion.” *In re Bluetooth Headset Products Liability Litigation*, 654  
6 F.3d 935, 948 (9th Cir. 2011).

7 Here, Plaintiffs have no conflicts of interest with other Class Members that would  
8 render them inadequate representatives. Plaintiffs’ claims are typical of the other  
9 potential members’ claims, so Plaintiffs are unlikely to act against the interests of the  
10 Class. Plaintiffs, moreover, have “stayed abreast of the proceedings” and are willing to  
11 “sit for depositions and participate in discovery” as necessary. (ECF No. 60-2, 2019  
12 Carpenter Decl. at ¶ 16.) Plaintiffs and the Class Members also “share the common goal  
13 of protecting consumer’s rights to have properly [priced] products.” *Cf. Hofmann v.*  
14 *Dutch LLC*, 317 F.R.D. 566, 573–74 (S.D. Cal. 2016).

15 Likewise, Class Counsel is adequate. Class Counsel – the law firm of Carlson  
16 Sweet Kilpela & Carpenter, LLP – is a firm with “experienced consumer class action  
17 attorneys” that have “litigated other cases involving UCL, FLA, and CLRA claims.”  
18 (ECF No. 60-2, 2019 Carpenter Decl. at ¶ 17.) Class Counsel have advised Plaintiffs  
19 through the settlement process, and have made diligent strides to advance their clients’  
20 interests by, for example, conducting “informal pre-mediation discovery,” “attending two  
21 full day mediation sessions with the Honorable Edward A Infante (Ret.) of JAMS, Inc.,”  
22 obtaining the “Expert Report of Christian Tregillis CPA, ABV, CFF, CLP,” and “heavily  
23 negotiat[ing]” this Settlement Agreement. (*Id.* at §§ 4, 5, 11.) These facts show that  
24 Plaintiffs and Class Counsel will “fairly and adequately protect the interests of the class.”  
25 Fed. R. Civ. P. 23(a)(4).

### 26 **b. Rule 23(b)(3) Requirements**

27 “In addition to meeting the numerosity, commonality, typicality, and adequacy  
28 prerequisites, the class action must fall within one of the three types specified in Rule

1 23(b).” *In re Hyundai*, 926 F.3d at 556. Here, Plaintiffs seek certification under Rule  
2 23(b)(3). (ECF No. 37-2, TAC at §§ 41–50.)

3 Plaintiffs contend that the “questions of law or fact common to Class Members  
4 predominate over any questions affecting only individual members,” and a class action  
5 would be the “superior . . . method[] for fairly and efficiently adjudicating the  
6 controversy.” (ECF No. 60-1 at 28 (quoting Fed. R. Civ. P. 23(b)(3)). For the foregoing  
7 reasons, the Court agrees with Plaintiffs’ arguments and finds Rule 23(b)(3) is satisfied.

### 8 **i. Predominance**

9 “The Rule 23(b)(3) predominance inquiry asks the court to make a global  
10 determination of whether common questions prevail over individualized ones.” *Torres v.*  
11 *Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). In other words, the Court  
12 asks whether issues “subject to generalized proof . . . predominate over those issues that  
13 are subject only to individualized proof.” *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625,  
14 634 (S.D. Cal. 2010) (internal quotations and alterations omitted). A finding of  
15 predominance ensures “proposed classes are sufficiently cohesive to warrant adjudication  
16 by representation.” *Hanlon*, 150 F.3d at 1022 (internal quotations omitted).

17 Here, common questions predominate over individual questions. As discussed with  
18 respect to commonality, multiple facts and common questions of law bind the class  
19 together. *See supra* Section II.a.ii. Most importantly, regardless of the volume, price,  
20 timing, or location for any Claimant’s qualifying purchase, all claims will require the  
21 Court to analyze whether Defendant’s pricing scheme and pattern of discounting prices  
22 was lawful under California law. Therefore, the Class is sufficiently cohesive to merit a  
23 joint adjudication, and thus the Class meets the predominance requirement.

### 24 **ii. Superiority**

25 The superiority requirement focuses on the determination of “whether the  
26 objectives of the particular class action procedure will be achieved in the particular case.”  
27 *Hanlon*, 150 F.3d at 1023 (citation omitted). The class action method is superior if  
28 “classwide litigation of common issues will reduce litigation costs and promote greater

1 efficiency.” *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).  
2 Likewise, the class-action method is superior where individual litigants are unlikely to  
3 pursue meritorious claims merely because their respective awards would be too small  
4 individually to merit the costs of such litigation. *See Barani v. Wells Fargo Bank, N.A.*,  
5 No. 12-CV-2999-GPC, 2014 WL 1389329, at \*4 (S.D. Cal. Apr. 9, 2014).

6 Here, the superiority requirement is satisfied. As discussed with respect to  
7 numerosity, it is possible that the number of Claimants will range in the hundreds of  
8 thousands. *See supra* Section II.a.i. Consequently, judicial economy favors class-based  
9 adjudication. *Cf. In re Activision Sec. Litig.*, 621 F. Supp. 415, 435 (N.D. Cal. 1985)  
10 (finding joint litigation economic where only 150 claims existed). The Class Members,  
11 moreover, only suffered damages approximately equal to 10% of the sale price of their  
12 respective purchases. (ECF No. 60-2, Ex. 2, Expert Report of Christian Tregillis  
13 (“Tregillis Report”) at ¶ 58; ECF No. 66 at 4, 2020 Carpenter Decl. at ¶ 8.) Thus, given  
14 the low prices of TCP’s inventory, (ECF No. 60-2, 2019 Carpenter Decl. at ¶ 12), “it is  
15 unlikely that individual actions will be filed.” *Barani*, 2014 WL 1389329, at \*4. And,  
16 those damages are “relatively modest compared to the burden and expense that would be  
17 entailed by individual litigation.” (ECF No. 37-2, TAC at ¶ 48.)

### 18 **III. Granting Preliminary Approval of Class Action Settlement**

19 Section III of this Order addresses Plaintiffs’ unopposed motion for preliminary  
20 approval of the Settlement Agreement. (ECF No. 60-1.) As a threshold matter, the Court  
21 holds that the Settlement Agreement does not call for a distribution of coupons within the  
22 meaning of the Class Action Fairness Act of 2005 (“CAFA”), 28 USC 1711 *et seq.* *See*  
23 *generally In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015). The  
24 Court next finds that the Settlement Agreement is “fair, reasonable, and adequate.” Fed.  
25 R. Civ. Pro. 23(e)(2). The Court also applies heightened scrutiny to the Settlement  
26 Agreement because it was reached before the Class was approved and finds there is no  
27 indication of collusion between Class Counsel and Defendant. *See generally Roes, 1-2 v.*  
28 *SFBSC Mgmt., LLC*, 944 F.3d 1035 (9th Cir. 2019). Lastly, the Court finds that the

1 Settlement Agreement provides for the “best notice that is practicable under the  
2 circumstances.” Fed. R. Civ. Pro. 23(c)(2).

3 **a. Whether the Settlement is a Coupon Settlement**

4 Congress passed CAFA “primarily to curb perceived abuses of the class action  
5 device.” *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177 (9th Cir. 2013) (quoting  
6 *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009)). “One such perceived abuse  
7 is the coupon settlement, where defendants pay aggrieved class members in coupons or  
8 vouchers but pay class counsel in cash.” *Id.* (citation omitted). Coupon settlements  
9 present the risk that Class Counsel may “negotiate settlements under which class  
10 members receive nothing but essentially valueless coupons, while the class counsel  
11 receive substantial attorney’s fees.” *Id.* (quoting S. Rep. 109–14, at 29–30 (2005)). As a  
12 result, the unidentified Class Members may be “shortchanged.” *See Redman v.*  
13 *RadioShack Corp.*, 768 F.3d 622, 636-37 (7th Cir. 2014).

14 To mitigate the risk of unfair coupon settlements, CAFA provides for increased  
15 judicial scrutiny. 28 U.S.C. § 1712(e). CAFA also awards attorney’s fees “on the value to  
16 class members of the coupons that are redeemed,” 28 U.S.C. § 1712(a),” instead of “the  
17 amount of time class counsel reasonably expended working on the action” per the  
18 “lodestar” method. *See In re HP Inkjet*, 716 F.3d at 1183. Thus, delineating settlements  
19 that award cash or cash-equivalent certificates from those awarding coupons affects the  
20 calculation of attorneys’ fees and bears upon the fairness of the settlement. *Seegert v.*  
21 *Lamps Plus, Inc.*, 377 F. Supp. 3d 1127, 1130 (S.D. Cal. 2018) (quoting *In re HP Inkjet*,  
22 716 F.3d at 1182–86).

23 Congress did not define the term “coupon” when promulgating CAFA. *In re*  
24 *Online DVD*, 779 F.3d at 950. However, the Ninth Circuit has since fashioned a three-  
25 part test to identify coupons: “(1) whether Class Members have to ‘hand over more of  
26 their own money before they can take advantage of’ a credit, (2) whether the credit is  
27 valid only ‘for select products or services,’ and (3) how much flexibility the credit  
28 provides, including whether it expires or is freely transferrable.” *In re Easysaver Rewards*

1 *Litig.*, 906 F.3d 747, 755 (9th Cir. 2018) (citing *In re Online DVD*, 779 F.3d at 951).  
2 Applying these factors in *In re Online DVD*, the Ninth Circuit found that a \$12 gift card  
3 to Walmart was not a coupon because the “class member need not spend any of his or her  
4 own money” to make another Walmart purchase. *In re Online DVD*, 779 F.3d at 951.  
5 Such gift cards, moreover, were transferable, did not expire, and could be used to  
6 purchase “one of many different types of products” sold for \$12 or less. *Id.* at 951–52. In  
7 addition, consumers could opt to receive \$12 in cash instead of a \$12 gift card. *Id.* at 941.  
8 The Court finds that the \$6 vouchers offered in this Settlement, as with the \$12 gift cards  
9 offered in *In re Online DVD*, are not coupons for the following reasons.<sup>4</sup>

10 First, Plaintiffs do not need to “hand over more of their own money before they  
11 can take advantage of” the vouchers. *In re Easysaver*, 906 F.3d at 757 (quotations  
12 omitted). Plaintiffs present compelling evidence that the purchasing power of a \$6  
13 voucher at TCP is significant. Of the 1,024 items available for purchase online in October  
14 2019, 435 were listed for sale under \$6.00 (i.e., 42%). (ECF No. 66 at 2–3, 2020  
15 Carpenter Decl. at ¶ 4.) The median price point of those items was only \$4.20. (*Id.* at ¶  
16 5.) Also, about 760 items were listed for sale under \$10.00 (i.e., about 75%). (*Id.* at ¶ 4.)  
17 These figures, moreover, likely represent above-average prices for TPC’s retail inventory  
18 as winter seasonal items tend to be “slightly more expensive.” (*Id.*).

19 Defendant likewise asserts that, as of December 18, 2019, TCP had “several  
20 hundred thousand items, totaling more than 20 million units, available in its stores and  
21 online for less than \$6. These items include tops, bottoms, sleepwear, shoes, bags,  
22 jewelry, and other accessories in baby, toddle, girls and boys.” (ECF No. 68 at 2, Jain  
23 Decl. at ¶ 3.) Thus, the instant facts differ from those present in coupon settlements. *See,*  
24 *e.g., In re Easysaver.*, 906 F.3d at 757 (“Defendants only claim to sell ‘15–25 products’  
25

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26  
27 <sup>4</sup> It is beyond dispute that the 25% vouchers are coupons within the meaning of *In re Online DVD*.  
28 However, “having a coupon *option* does not necessarily transform a class action settlement into a  
coupon settlement under CAFA.” *Foos v. Ann, Inc.*, No. 11-CV-2794-L, 2013 WL 5352969, at \*3 (S.D.  
Cal. Sept. 24, 2013). Consequently, this does not change the Court’s coupon analysis.

1 for under \$20. And that meager list does not even account for shipping charges.”);  
2 *Seegert*, 377 F. Supp. 3d at 1132 (“Of the 62,000 products, only about 5,800 of them are  
3 under \$ 18” voucher limit); *Linneman v. Vita-Mix Corp.*, 394 F. Supp. 3d 771, 780 (S.D.  
4 Ohio 2019) (“It is undisputed that Class Members will have to spend money . . . as Vita-  
5 Mix containers and blenders . . . exceed the \$70 Gift Card” with prices starting at  
6 “\$144.95”).

7 It is unlikely, moreover, that the Voucher Fund will distribute vouchers of a value  
8 substantially less than \$6 in the first round of distribution. (ECF No. 60-2, Ex. 1, SA at §§  
9 2.3–2.4 (describing the procedure by which vouchers would be disbursed “on a pro rata  
10 basis” in the event that the Voucher Fund is “exhausted by the first round of  
11 distribution”). The Parties estimate that the “approximately 1% of the Class will submit  
12 a claim.” (ECF No. 66 at 3, 2020 Carpenter Decl. at ¶ 6.) This estimate “is based on the  
13 historical claims rate for four similar consumer cases that offered a voucher of similar  
14 value as part of the settlement.” (*See id.*; ECF No. 66-1, Table of Comparable Cases  
15 (including four cases with filing rates ranging from 0.23% to 2.07%)). And, as Plaintiffs  
16 note, consumer class actions tend to result in claims rates in the low single digits. *See*,  
17 *e.g.*, *Bayat v. Bank of the W.*, No. C-13-2376-EMC, 2015 WL 1744342, at \*1 (N.D. Cal.  
18 Apr. 15, 2015) (approving settlement with a “claims rate for the monetary relief portion  
19 of the settlement of roughly 1.9%”); *Spillman v. RPM Pizza, LLC*, No. CIV-A-10-349-  
20 BAJ, 2013 WL 2286076, at \*2 (M.D. La. May 23, 2013) (noting that “less than one  
21 percent of the total class” filed claims); *Touhey v. United States*, No. ED-CV-08-01418-  
22 VAP, 2011 WL 3179036, at \*7 (C.D. Cal. July 25, 2011) (noting that “approximately  
23 2%” of Class Members filed claims); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360,  
24 1377–78 (S.D. Fla. 2007) (noting that about 1.1%, i.e. 118,663 of about 10.3 million  
25 Class Members, filed claims). Considering the Parties’ claims and authorities, the Court  
26 finds it likely that Class Members who file claims and elect the dollar-based vouchers  
27 will receive vouchers of approximately \$6 in value.

28 Second, the vouchers are applicable to a wide variety of products. *In re Online*



1 DVD, 779 F.3d at 951. Like the consumer in *In re Online DVD*, a Class Member need not  
2 apply their voucher to the same item, or the same category of items, that would give rise  
3 to their claim against Defendant. *Id.* at 952 (noting “class members are suing due to an  
4 online-DVD rental agreement” but could purchase “many products beyond DVDs” with  
5 the gift card). Moreover, in contrast to the minimal “inventory” available at the flower  
6 and chocolate store defendant in *In re Easysaver*, TCP operates 961 stores in the United  
7 States, Canada, and Puerto Rico” and an “online store at [www.childrensplace.com](http://www.childrensplace.com).”  
8 Compare *In re Easysaver*, 906 F.3d at 757 with (ECF No. 68 at 2, Jain Decl. at ¶¶ 2–3)  
9 and (ECF No. 60-2, Ex. 2, Tregillis Report at 3 n.4.) TCP is thus a sufficiently large  
10 retailer – even if not a “giant” one like Walmart – to avoid restricting a consumer to a  
11 “meager list” of goods for purchase. *In re Easysaver*, 906 F.3d at 757. And, while  
12 vouchers cannot be used in conjunction “with any other coupon or promotional offer,”  
13 they are applicable to “items that are on sale or otherwise discounted.” (ECF No. 60-2,  
14 Ex. 1, SA at § 1.32.)

15 Third, the vouchers are subject to some concerning limitations in use – but not so  
16 concerning that the vouchers should be treated as coupons within the meaning of CAFA.  
17 On the one hand, the vouchers are “transferrable,” “stackable with each other,” (ECF No.  
18 60-2, Ex. 1, SA at § 1.32), and have no “blackout periods.” *In re Easysaver*, 906 F.3d at  
19 757. On the other hand, they expire in “6 months.” (ECF No. 60-2, Ex. 1, SA at § 1.32).  
20 Plaintiffs’ argument that a six-month window is appropriate “where Class Members are  
21 purchasing products for growing children” does not fully assuage the Court’s concerns,  
22 (ECF No. 67 at 6), as “redemption periods usually are longer” than six months. *Redman*,  
23 768 F.3d at 630 (J. Posner). At a minimum, courts have differed as to whether six months  
24 is appropriate. Compare *Chaikin v. Lululemon USA Inc.*, No. 3:12-CV-02481-GPC, 2014  
25 WL 1245461, at \*3 (S.D. Cal. Mar. 17, 2014) (approving a class action settlement  
26 offering vouchers that expire within six months), and *Foos v. Ann, Inc.*, No. 11-CV-  
27 2794-L, 2013 WL 5352969, at \*3 (S.D. Cal. Sept. 24, 2013) (same), with *In re HP Inkjet*,  
28 716 F.3d at 1176 (noting that Defendants’ “e-credits” were “coupons” in part because

1 they “expire six months after issuance”), and *Davis v. Cole Haan, Inc.*, No. C-11-01826-  
2 JSW, 2013 WL 5718452, at \*3 (N.D. Cal. Oct. 21, 2013) (finding a class action  
3 settlement was a coupon settlement, in part, because of “significant limitations” including  
4 that “the vouchers expire after six months”). The vouchers are also not “redeemable for  
5 cash.” (ECF No. 60-2, Ex. 1, SA at 1.32); see *In re Easysaver*, 906 F.3d at 757–58  
6 (relying in part the lack of redeemability to find the credits were coupons); *Seegert*, 377  
7 F. Supp. 3d at 1132 (same).

8 On the balance, the Court finds that the \$6 vouchers are not coupons. The vouchers  
9 here are intended to provide real value to the consumer and are not the kinds of “rebates  
10 and coupons aim[ed] to facilitate a sale to a purchaser who would not otherwise purchase  
11 a product at a higher price.” See *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052,  
12 1075 (C.D. Cal. 2010). The vouchers, moreover, satisfy the first two *In re Online DVD*  
13 factors and do not present such overwhelming concerns as to the third factor that the  
14 Court’s analysis should shift. Thus, because a Class Member may use the vouchers  
15 without spending more of their own money and the vouchers do not apply only to a  
16 limited set of products or services, the Court finds that the vouchers’ limitations on how  
17 flexibly a Class Member can spend them do not render the vouchers coupons within the  
18 meaning of CAFA. *In re Online DVD*, 779 F.3d at 951.

19 **b. Whether the Settlement Agreement is Fair, Adequate, and Reasonable**

20 Rule 23(e) requires that the Court approve any settlement of class claims. Fed. R.  
21 Civ. P. 23(e)(2). The Court’s oversight function operates on a “strong judicial policy that  
22 favors settlements, particularly where complex class action litigation is concerned.” *Class*  
23 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (citations omitted). Thus,  
24 in approving a class action settlement, the Court advances the “overriding public interest  
25 in settling and quieting litigation,” particularly where resource-intensive class actions are  
26 concerned. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

27 To fulfill its duty, the Court must evaluate “whether a proposed settlement is  
28 fundamentally fair, adequate, and reasonable.” *Staton*, 327 F.3d at 952 (internal quotation

1 marks and citations omitted). Courts should consider some or all of the following factors  
2 in determining if a settlement is fair: “the strength of the plaintiffs’ case; the risk,  
3 expense, complexity, and likely duration of further litigation; the risk of maintaining class  
4 action status throughout the trial; the amount offered in settlement; the extent of  
5 discovery completed and the stage of the proceedings; the experience and views of  
6 counsel; the presence of a governmental participant; and the reaction of the class  
7 members to the proposed settlement.” *Hanlon*, 150 F.3d at 1027; *Staton*, 327 F.3d at 959.

8 Upon evaluating the foregoing factors, the Court finds that the Settlement  
9 Agreement is fair, adequate, and reasonable. Fed. R. Civ. P. 23(e)(2).

10 **i. The Strength of Plaintiffs’ Case; The Risk, Expense, Complexity and**  
11 **Likely Duration of Further Litigation; and The Risk of Maintaining**  
12 **Class Action Status Throughout the Trial**

13 Settlement is favored where a case is “complex and likely to be expensive and  
14 lengthy to try.” *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1300 (S.D. Cal. 2017),  
15 *aff’d*, 881 F.3d 1111 (9th Cir. 2018) (quoting *Rodriguez v. W. Publ’g Corp.*, 563 F.3d  
16 948, 966 (9th Cir. 2009)). Here, the balance of strengths and risks favors settlement.

17 On the one hand, Plaintiffs’ claims appear strong. Counsel conducted a “years-long  
18 investigation into The Children’s Place’s sale discounting practices” across multiple  
19 jurisdictions which they contend shows “pervasive” violations of California law. (ECF  
20 No. 60-1 at 12.) Plaintiff also obtained an expert whose report corroborates these  
21 accusations and helps calculate damages. (ECF No. 60-2, Ex. 2, Tregillis Report.)

22 On the other hand, the Parties recognize the challenges in continuing to litigate this  
23 matter, including, that “the expense, delay, risks and uncertainties associated with  
24 continued prosecution. . . could take several more years to litigate.” (ECF No. 60-2, 2019  
25 Carpenter Decl. at ¶ 18.) Similarly, Class Counsel acknowledges that the “state of the law  
26 regarding the appropriate method for calculating damages or restitution in these types of  
27 false pricing cases is in flux.” (ECF No. 60-1 at 20; ECF No. 67, 2020 Carpenter Decl. at  
28 3.) Hence, it may be possible that years from now the class would succeed on the merits

1 only to “recover nothing” in damages. *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 326  
2 (C.D. Cal. 2016) (“*Spann II*”); *see also Chowning v. Kohl’s Dep’t Stores, Inc.*, No. CV-  
3 15-08673-RGK-, 2016 WL 1072129, at \*1 (C.D. Cal. Mar. 15, 2016), *aff’d*, 735 F. App’x  
4 924 (9th Cir. 2018), *amended on denial of reh’g*, 733 F. App’x 404 (9th Cir. 2018), *and*  
5 *aff’d*, 733 F. App’x 404 (9th Cir. 2018) (granting defendants summary judgment in a suit  
6 based on allegations of deceptive pricing because the plaintiffs “failed to demonstrate a  
7 viable measure of restitution”); *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 795  
8 (2015) (discussing in detail the complexity of estimating damages in cases where the  
9 harm arises from deceptive advertising).

## 10 **ii. The Amount of Settlement**

11 A settlement is not judged against only the amount that might have been recovered  
12 had the plaintiff prevailed at trial; nor must the settlement provide full recovery of the  
13 damages sought to be fair and reasonable. *Linney v. Cellular Alaska P’ship*, 151 F.3d  
14 1234, 1242 (9th Cir. 1998). “Naturally, the agreement reached normally embodies a  
15 compromise; in exchange for the saving of cost and elimination of risk, the parties each  
16 give up something they might have won had they proceeded with litigation.” *Officers for*  
17 *Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 688 F.2d 615, 624 (9th  
18 Cir. 1982) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)). “It is  
19 well-settled law that a cash settlement amounting to only a fraction of the potential  
20 recovery will not per se render the settlement inadequate or unfair.” *Id.* at 628.

21 Here, Plaintiffs claim that the settlement provides real value to the class, and the  
22 Court agrees for three reasons. (ECF No. 60-1 at 14–15.) First, the Court finds that the \$6  
23 vouchers provide Class Members with adequate purchasing power given the low prices  
24 common to much of Defendants’ inventory. *See supra* Section III.a. Second, the Court  
25 finds that the number of vouchers is sufficient for Claimants to receive vouchers valued  
26 at or about \$6 in the first round of distribution. *Id.* Third, the Court finds that the total  
27 amount in the Voucher Fund – approximately \$5.4 million dollars assuming everyone  
28 opts for \$6 vouchers – is adequate. At the February 8, 2016 hearing, Plaintiffs’ counsel

1 estimated that full relief, i.e. “mak[ing] a voucher available for every single class  
2 member,” would require Defendant to create a Voucher Fund of \$40 million dollars. (*See*  
3 2018 Tr. at 5.) Assuming that the total potential relief in this action ranges up to that  
4 amount, Defendant’s proposed award of \$5.4 million dollars would give the Class a  
5 certain recovery of 13% of the potential award at trial. This number aligns with other  
6 large class actions entailing small-dollar claims. *See In re Omnivision Techs., Inc.*, 559 F.  
7 Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving a total amount estimated to be 6% of  
8 the maximum possible recovery). This amount represents, moreover, a fair compromise  
9 given the surrounding questions regarding the calculation of damages at trial, (ECF No.  
10 60-2, 2019 Carpenter Decl. at ¶ 18; ECF No. 60-1 at 20), and the limited damages that  
11 stem from each sale. (ECF No. 60-2, Ex. 2, Tregillis Report at ¶ 58 (finding that damages  
12 would be equal to a “10% discount” on the price of each qualifying purchase)).

13 Thus, because the Voucher Fund contains sufficient vouchers with real purchasing  
14 power, and the total award represents an informed, negotiated compromise, the Court  
15 finds that the Settlement Amount is fair and reasonable.

16 **iii. The Extent of Investigation and Discovery and the Stage of Litigation**

17 The Settlement Agreement is the result of an arms-length negotiation predicated on  
18 sufficient investigation, discovery and negotiations. First, the parties only exchanged pre-  
19 mediation discovery. (ECF No. 60-2, 2019 Carpenter Decl. at ¶ 3.) They did not engage  
20 in more “substantial discovery,” which could reduce Plaintiffs’ ability to evaluate the  
21 appropriateness of the Settlement. *Cf. Knutson v. Schwan’s Home Serv., Inc.*, No. 3:12-  
22 CV-00964-GPC, 2014 WL 3519064, at \*3 (S.D. Cal. July 14, 2014).

23 The Settlement, however, is informed by Plaintiffs’ thorough investigation. Class  
24 Counsel engaged in the multi-district, “years-long” investigation undertaken to assess  
25 Plaintiffs’ claims and the class claims. (ECF No. 37-2, TAC at ¶ 22–40; ECF No. 60-1 at  
26 12.) During this investigation, counsel photographed and compared “price tags and retail  
27 discount signage in the Defendant’s retail and outlet stores throughout California as well  
28 as select stores in” eight other states. (ECF No. 66, 2020 Carpenter Decl. at ¶ 2.)

1 Plaintiffs reinitiated the investigation over the 2019 holiday season to corroborate their  
2 findings. (*Id.* at ¶ 3.)

3 In addition, the Parties met over two full-day mediation sessions conducted by the  
4 Honorable Edward A. Infante of JAMS, Inc. on December 8, 2016 and April 19, 2017,  
5 and subsequently negotiated, drafted, and executed the instant Agreement. (ECF No. 60-1  
6 at 13–14; ECF No. 60-2, Ex. 2, Tregillis Report). Collectively, these efforts are enough to  
7 satisfy this factor.

#### 8 **iv. Adequacy and Experience of Class Counsel**

9 As discussed with respect to adequacy for class certification, *see supra* Section  
10 II.a.iv, Class Counsel are adequate advisors to the Class. There is no evidence of  
11 animosity or conflicting interests (aside from the clear sailing clause discussed below),  
12 and Class Counsel is sufficiently experienced to advocate on behalf of the Class. (ECF  
13 No. 60-2, 2019 Carpenter Decl. at ¶¶ 1, 13, 17, 18.)

#### 14 **c. Applying Heightened Scrutiny for Signs of Collusion**

15 The “[C]ourt’s role in the class action settlement process is to protect the rights of  
16 those not involved in negotiating the settlement, generally the unnamed class members.”  
17 *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (quotations omitted); *see*  
18 *also Officers for Justice*, 688 F.2d at 624 (collecting cases). Where a settlement is agreed  
19 upon prior to certification, there is a “greater potential for a breach of fiduciary duty  
20 owed the class during settlement.” *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d  
21 935, 946 (9th Cir. 2011). Consequently, the Court applies greater scrutiny and considers  
22 whether the Settlement Agreement is “the product of collusion among the negotiating  
23 parties.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000), *as*  
24 *amended* (June 19, 2000) (citation omitted).

25 “This more exacting review is warranted to ensure that class representatives and  
26 their counsel do not secure a disproportionate benefit at the expense of the unnamed  
27 plaintiffs who class counsel had a duty to represent.” *Roes, 1-2 v. SFBSC Mgmt., LLC*,  
28 944 F.3d 1035, 1049 (9th Cir. 2019) (quotations omitted). Most commonly, these unjust

1 benefits take the form of (1) a “disproportionate distribution of the settlement” to Class  
2 Counsel; (2) “a ‘clear sailing’ arrangement (i.e., an arrangement where defendant will not  
3 object to a certain fee request by class counsel)”; or (3) “a reverter that returns unclaimed  
4 fees to the defendant.” *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015).

5 Here, the Settlement Agreement “bears none of the typical signs of collusion  
6 between class counsel and defendants.” *In re Hyundai*, 926 F.3d at 569. For example, if  
7 the Court does not award full fees and costs to Class Counsel, the Settlement Agreement  
8 requires that the amount by which the fees were reduced be made available to the Class  
9 as additional vouchers. (ECF No. 60-2, Ex. 1, SA at § 2.8.) The absence of a clause  
10 reverting funds to the Defendant mitigates the fear that the Settlement Agreement is the  
11 product of collusion between Defendants and Class Counsel. *Cf. In re Bluetooth*, 654  
12 F.3d at 947 (citing *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004)  
13 (Posner, J.)) (noting that the reversion of unpaid fees to the defendant may signal  
14 collusion).

15 Likewise, the Agreement does not award Class Counsel disproportionate fees. As  
16 noted, Defendant is likely to pay at least \$5.4 million towards the vouchers. Hence,  
17 because Class Counsel agrees not to seek more than \$1,080,000 to cover fees and costs,  
18 (ECF No. 60-2, Ex. 1, SA at § 2.7), Counsel’s maximum fees do not exceed 20% of the  
19 value of the Voucher Fund. *Cf. Hanlon*, 150 F.3d at 1029 (quoting *Six (6) Mexican*  
20 *Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)) (noting that the  
21 Ninth Circuit “has established 25% of the common fund as a benchmark award for  
22 attorney fees.”) The Court, moreover, finds that the \$5.4 million estimated value of the  
23 Voucher Fund accurately reflects the vouchers’ value to the Class Members because they  
24 are not coupons, as discussed earlier. *See supra* Section III.B. Unlike the vouchers in  
25 *Roes*, for example, these vouchers are useable by Class Members, provide enough  
26 purchasing power that Class Members need not spend additional funds to use them, and  
27 are not exchangeable for only 10% of their value in cash. *Cf. Roes*, 944 F.3d at 1052. In  
28 addition, even if the vouchers are limited by a 6-month expiration window, they are both

1 transferrable and stackable, and can be used in conjunction with existing sales at any TCP  
2 store or online. *See In re HP Inkjet*, 716 F.3d at 1179 (noting that “a coupon settlement is  
3 likely to provide less value to Class Members if . . . the coupons are non-transferable,  
4 expire soon after their issuance, and cannot be aggregated”).

5 In addition, the Court recognizes that the Agreement contains a potentially  
6 problematic “clear sailing” clause as to Class Counsel’s fees. (ECF No. 60-2, Ex. 1, SA at  
7 § 2.7) (“TCP agrees not to object to Class Counsel’s request . . .”) Such clauses create the  
8 risk that “the plaintiff may agree to less for the class in exchange for a higher fee.” *See*  
9 Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1  
10 J. LEGAL ANALYSIS 167, 200 (2009). This risk, however, is mitigated by the Settlement  
11 Agreement’s terms. First, “Plaintiffs must petition the Court for approval of any award to  
12 Class Counsel of attorney’s fees and costs.” (ECF No. 60-2, Ex. 1, SA at § 2.7.)  
13 Consequently, when the Parties bring forward motions for final approval of the  
14 Settlement Agreement, and then report on the vouchers’ distribution, the Court will be in  
15 a position to scrutinize whether the final amount to be awarded should, in fact, reach  
16 \$1,080,000. And, the Court may then reduce the petitioned amount as is reasonable and  
17 assign that the value by which the award is reduced to the Class Members. (*Id.* at § 2.8.)

18 Also, there is no indication that the awards to the Named Plaintiffs here are the  
19 result of collusion or special treatment contrary to the Class’s interest. Awards to Named  
20 Plaintiffs are “fairly typical” in class action settlements. *Rodriguez v. W. Publ’g Corp.*,  
21 563 F.3d 948, 958 (9th Cir. 2009). They properly compensate Named Plaintiffs for the  
22 additional duties required of them to bring forward the litigation and execute a settlement.  
23 *Id.* at 958–59. Here, the awards are reasonable. *Cf. In re M.L. Stern Overtime Litig.*, No.  
24 07-CV-0118-BTM, 2009 WL 995864, at \*1 (S.D. Cal. Apr. 13, 2009) (granting  
25 preliminary approval of an agreement allotting \$15,000 in fees for each Named Plaintiff  
26 from a fund of \$945,960). Afterall, the Named Plaintiffs have served in their role since  
27 2016 and have made themselves available to confer with Class Counsel and for  
28 discovery, as needed. (ECF No. 60-2, 2019 Carpenter Decl. at ¶ 16.)



1           Consequently, for the foregoing reasons, the Court finds that the Settlement  
2 Agreement’s clear sailing clause, awards to Class Counsel and Named Plaintiffs, and  
3 language on reversion show the absence of collusion.

4           **d. Approving the Form, Manner, and Content of the Proposed Notices**

5           Plaintiffs request that the Court approve the proposed Notice Plan and Claims  
6 Procedure. (ECF No. 60-1 at 9–12, 15, 21–22, 31–32.) Rule 23(c)(2) requires the “best  
7 notice practicable under the circumstances” and permits notice to be served by “United  
8 States mail, electronic means, or other appropriate means.” The Notice Plan must clearly  
9 and concisely state in plain, easily understood language:

10           (i) the nature of the action; (ii) the definition of the class certified; (iii) the  
11 class claims, issues, or defenses; (iv) that a class member may enter an  
12 appearance through an attorney if the member so desires; (v) that the court  
13 will exclude from the class any member who requests exclusion; (vi) the  
14 time and manner for requesting exclusion; and (vii) the binding effect of a  
class judgment on members under Rule 23(c)(3).

15 *Rinky Dink Inc v. Elec. Merch. Sys. Inc.*, No. C13-1347-JCC, 2015 WL 11234156, at \*7  
16 (W.D. Wash. Dec. 11, 2015) (quotations omitted). The Ninth Circuit has found that a  
17 Notice Plan is satisfactory if it “alert[s] those with adverse viewpoints to investigate and  
18 to come forward and be heard.” *In re Online DVD*, 779 F.3d at 946.

19           Here, Plaintiffs hired a “leading notice and settlement administration firm,”  
20 Kurtzman Carson Consultants LLC, to design and implement the Notice Plan. (ECF No.  
21 60-3, Peak Decl. at ¶ 2.) Plaintiffs intend to disseminate notice through a tri-part plan:  
22 direct e-mail notice to approximately 12 million potential members, a website containing  
23 the relevant information to understand and file a claim, and a series of online  
24 advertisements targeting individuals 18 years of age or older through Google’s Display  
25 Network. (*Id.* at ¶¶ 5–8.) Based on their experience, and the filings rates in other class  
26 actions offering similar vouchers, Plaintiffs and the Claims Administrator expect that the  
27 Notice Plan will reach approximately 70% of the class on average 2.5 times each. (ECF  
28 No. 60-1 at 10; ECF No. 60-3, Peak Decl. at ¶ 8.)

1           The Court finds that the Notice Plan satisfies the requirements of Rule 23. Courts  
2 assessing voucher-based settlements in class actions that deliver notice “primarily  
3 through email” have found similar notice programs to comply with Rule 23. *See, e.g.,*  
4 *Keirsev v. eBay, Inc.*, No. 12-CV-01200-JST, 2014 WL 644697, at \*1 (N.D. Cal. Feb. 14,  
5 2014) (finding that a program delivering notice supported by a “class website” was the  
6 “best notice practicable under the circumstances”); *In re Equifax Inc. Customer Data Sec.*  
7 *Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at \*4 (N.D. Ga. Jan. 13,  
8 2020) (approving a comparable notice plan – i.e., one that includes a settlement website,  
9 online advertising, e-mails, and contact information for the Claims Administrator – which  
10 adds only a “full-page ad in USA Today”).

11           The proposed notices and Settlement Website, moreover, will collectively contain  
12 all of the information necessary to adequately inform interested Class Members how to  
13 engage with the Settlement, including (1) information on the meaning and nature of the  
14 Class; (2) the basic terms and provisions of the proposed settlement; (3) the costs and  
15 fees to be paid out of the Settlement Fund; (4) the procedures and deadlines for  
16 submitting Claim Forms, objections, and/or requests for exclusion; and (5) the date, time  
17 and place of the fairness hearing. (*See* ECF No. 60-2, Ex. B, Full Notice; ECF No. 60-2,  
18 Ex. C, E-Mail Notice; ECF No. 60-2, Ex. D, Online Media Notice; Ex. E, Claim Form.)  
19 With respect to the E-Mail Notice, the Parties recognize the need to ensure adequate  
20 service. (*See* 2019 Tr. at 12.) Also, though not contained in the Settlement Agreement per  
21 the Court’s review, Class Counsel represented to the Court that the Parties are “prepared  
22 to provide” a phone number with which Class Members may contact the Claims  
23 Administrator with questions in English and Spanish. (*Id.* at 13.) As such, the Court  
24 concludes that this Notice Plan provides the best possible notice under the circumstances.

#### 25 **IV. Conclusion & Orders**

26           For the foregoing reasons, the Court **GRANTS** Plaintiffs’ motion for preliminary  
27 approval of the Settlement Agreement and provisional certification of the Class. To  
28 facilitate the implementation of that motion, the Court **ORDERS** the following:

1       **1. The Court hereby orders the following approvals and certifications:**

- 2           a. Approval of the Settlement Agreement. The Settlement Agreement,  
3           including the Full Notice, E-Mail Notice, Online Media Notice, and Claim  
4           Form, are preliminarily approved. (*See* ECF No. 60-2, Exs. B–E.)
- 5           b. Approval of the Class Notice Plan. The Notice Plan is approved. The Parties  
6           and the Claims Administrator will notify Class Members of the Settlement in  
7           the manner specified under Section 3.3 of the Settlement Agreement.
- 8                 i. Additional Order: The Court further **ORDERS** the Parties to comply  
9                 with Cal. Civ. Code § 1781(d) by giving notice of this Settlement by  
10                publication in a newspaper of general circulation in the county in  
11                which the alleged transactions occurred as provided by law.
- 12           c. Provisional Certification of the Class. The Class is provisionally certified as  
13           a class of all individuals in the United States who, within the Class Period,  
14           made a Qualifying Purchase. The Court utilizes these terms as defined in  
15           Section 1 (“Definitions”) of the Settlement Agreement. (*See* ECF No. 60-2,  
16           Ex. 1, SA at §§ 1.8, 1.9, 1.26.)
- 17           d. Approval of CAFA Notice. The Court finds that TCP has attempted to  
18           comply with 28 U.S.C. § 1715(b), per the affidavit of Ms. Jeanne M.  
19           Chernila, Project Manager at KCC Class Action Services, LLC, by sending  
20           sixty (60) “CAFA Notice Packets” to the requisite parties, on December 1,  
21           2017. (*See* ECF No. 61-1.)
- 22                 i. Additional Order: To fully comply with CAFA, the Court **ORDERS**  
23                 the Parties send new CAFA Notice Packets which include notice as to  
24                 the date, time, and location for the Final Fairness Hearing, and a copy  
25                 of this Order.

26       **2. The Court hereby makes the following appointments:**

- 27           a. Conditional Appointment of Class Representatives. Plaintiffs Monica Rael  
28           and Alyssa Hedrick are conditionally certified as the Class Representatives

1 to implement the Parties' settlement in accordance with the Settlement  
2 Agreement.

3 b. Conditional Appointment of Class Counsel. The law firm of Carlson Lynch  
4 Sweet Kilpela & Carpenter, LLP is conditionally appointed as Class  
5 Counsel.

6 c. Conditional Appointment of Claims Administrator. The firm of Kurtzman  
7 Carson Consultants LLC is conditionally appointed as Claims  
8 Administrator.

9 **3. The Court hereby instructs Class Members to review the Settlement**  
10 **Agreement. The Settlement Agreement permits Class Members to (a) file**  
11 **claims for vouchers, (b) object to the Settlement Agreement, and (c) request to**  
12 **be excluded from the Class and Settlement up to 120 days after the entry of**  
13 **this Order. Class Members may also appear at the Fairness Hearing.**

14 a. Claims. Class Members may file a Claim, as explained in Section 3.6 of the  
15 Settlement Agreement.

16 b. Objections. Class Members may object to the Settlement Agreement, as  
17 explained in Section 3.9 of the Settlement Agreement.

18 c. Exclusions. Class Members may request to be excluded from the class, as  
19 explained in Section 3.10 of the Settlement Agreement.

20 d. Appearance at Fairness Hearing. Class Members may appear at the Fairness  
21 Hearing upon request as explained in Section 3.9(c) of the Settlement  
22 Agreement.

23 **4. The Court orders that, if the Settlement Agreement terminates for any reason,**  
24 **the following will occur:**

25 a. Class Certification will be automatically vacated;

26 b. Plaintiffs will stop functioning as Class representatives;

27 c. Class Counsel will stop functioning as Class Counsel; and

28 d. This Action will revert to its previous status in all respects as it existed

1 immediately before the Parties executed the Settlement Agreement, except  
 2 for Plaintiffs’ filing of the Third Amended Complaint. This Order will not  
 3 waive or otherwise impact the Parties’ rights or arguments.

4 **5. Further Action in This Matter by the Parties.**

- 5 a. Stay of Proceedings. All discovery and pretrial proceedings and deadlines  
 6 are stayed until further notice from the Court, except for such actions as are  
 7 necessary to implement the Settlement Agreement and this Order.
- 8 b. Procedures for Implementing the Settlement Agreement. Counsel and the  
 9 Parties are hereby authorized to agree to utilize all reasonable procedures in  
 10 connection with the administration of the Settlement which are not  
 11 materially inconsistent with either this Order or the terms of the Agreement.
- 12 c. Scheduling the Fairness Hearing. On July 31, 2020 at 1:30 p.m., this Court  
 13 will hold a Fairness Hearing to determine if the Settlement should be finally  
 14 approved in Courtroom 2d of the Edward J. Schwartz U.S. Courthouse.
- 15 d. Critical Dates. The Court **ORDERS** all parties adhere to the following dates:

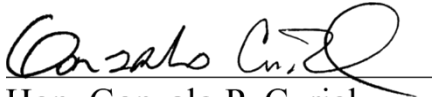
Event	Timing	Date
<b>Last day</b> for Defendant, through the Claims Administrator, to: (1) Send E-Mail Notice, (2) Start operating Settlement Website, and (3) Begin to provide Online Media Notice.	60 days after entry of this Order	<b>3/31/2020</b>
<b>Last day</b> for Plaintiffs to file fee petition.	90 days after entry of this Order	<b>4/30/2020</b>
<b>Last day</b> for Class Members to: (1) File a claim, (2) Request an exclusion, or (3) Object to the Settlement.	120 days after entry of this Order	<b>5/30/2020</b>
<b>Last day</b> for Parties to file briefs in support of the Final Order and Judgment.	One month before the Fairness Hearing	<b>6/30/2020</b>

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Event	Timing	Date
Date of <b>Fairness Hearing</b> (to be held in Courtroom 2D of the Edward J. Schwartz U.S. Courthouse, 221 West Broadway, San Diego, CA 92101)	160 or more days after entry of this Order	<b>7/31/2020 at 1:30 p.m.</b>

This Court may order the Fairness Hearing to be postponed, adjourned, or continued. If that occurs, the updated hearing date shall be posted on the Settlement Website. If the Court determines additional notice is required, the Court may order it as needed upon conferring with the Parties.

**IT IS SO ORDERED.**  
**Dated: January 28, 2020**

  
Hon. Gonzalo P. Curiel  
United States District Judge