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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

MIGUEL OLMEDO, and SIOBHAN MORROW, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

PVH RETAIL STORES, LLC, a Delaware Limited Liability Company, and DOES 1-20,

Defendants.

Case No: 37-2019-00003250-CU-MC-CTL

[E-FILE]

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD

Date: February 7, 2020
Time: 10:30 a.m.
Dept.: C-68

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I. INTRODUCTION

On October 8, 2019, this Court preliminary approved the Settlement as fair, adequate, and reasonable. Plaintiffs now bring this motion for attorney fees representing an amount well below the 25% benchmark of the Settlement floor. Plaintiffs achieved an outstanding Class Settlement in this false discount pricing consumer class action requiring Defendant, PVH RETAIL STORES, LLC ("Defendant" or "PVH") to distribute to the Class at least $6,663,000 worth of Merchandise Certificates. Approximately 663,000 Class Members will ***automatically*** receive a $10 Merchandise Certificate (the "Direct Notice Class Members"). Following agreement on the materials terms of the Settlement, the Parties negotiated Class Counsels' attorneys' fees of $650,000 (inclusive of all costs) and the named Plaintiffs' incentive awards in the amount of $5,000 total (*i.e.*, $2,500 each) to be paid by Defendant subject to court approval. (Settlement Agreement ("SA"), ¶¶ 2.4-2.5; Declaration of Todd D. Carpenter ("Carpenter Decl."), ¶4.) Plaintiffs now respectfully request the Court award $650,000 in attorneys' fees and costs, and incentive award of $5,000 to Plaintiffs for their commitment in serving as Class Representatives.

II. SUMMARY OF CLASS COUNSEL'S WORK

Prior to litigation, Class Counsel spent substantial time investigating Plaintiffs' claims. (Carpenter Decl., ¶¶ 2, 6.) Class Counsel conducted factual and legal investigation that included extensive onsite gathering of pricing data in Defendant's outlet stores and the concomitant impact on consumers, including Plaintiffs. (Carpenter Decl., ¶6.) Class Counsel cross-checked Defendant's pricing practices over numerous locations to confirm they were systematic, coordinated and universally applied. Class Counsel also retained damages expert, economist, Dr. Stephen Hamilton, Ph.D., Director of Graduate Studies in the Department of Economics at California Polytechnic, and principal of OnPoint Analytics, a reputable financial and economics consulting firm, to develop and support the damages alleged by Plaintiffs. (Carpenter Decl. ¶6.) This investigative work was critical to Class Counsel's understanding of Defendant's conduct and the formation of the legal theories advanced by Plaintiffs.

Class Counsel then filed a complaint and an amended complaint seeking monetary damages, restitution, and equitable relief. Thereafter, Defendant removed this action to federal court. Due to Class Counsel's significant pre-litigation work investigating Defendant's practices, settlement negotiations

commenced swiftly following removal in connection with several joint motions extending Defendant's time to respond to Plaintiffs' First Amended Complaint. In October 2018, Defendant provided informal discovery to Plaintiffs, including the annual number of transactions and sales during the Class Period and number of potential Class Members for whom Defendant maintained contact information. On November 29, 2018, the Parties participated in a full day mediation with JAMS Mediator Robert A. Meyer, and, in the days following the mediation, through Counsel's continued efforts and the Mediator's continued involvement, the Parties ultimately agreed on the terms embodied in the Settlement Agreement, before incurring further time and expense into discovery, motion practice and trial preparation.

Prior to mediation, Class Counsel prepared an extensive confidential mediation brief, representing the culmination of Class Counsel's pre- and post-litigation investigative work, including information related to Plaintiffs' purchases, class data from Defendants, Defendants' widespread outlet pricing practices, expert analysis and preparation of a confidential mediation expert report. During this time, Class Counsel worked closely with Dr. Hamilton to develop and prepare the damages model alleged against Defendants. Following settlement in principle, Class Counsel drafted the substantive terms of the settlement and notice plan and engaged in further negotiation over the structure of the Settlement Agreement, which was ultimately agreed to and executed in December 2018. (Carpenter Decl., ¶6.)

III. SUMMARY OF SETTLEMENT TERMS

On October 8, 2019, the Court preliminarily approved, for settlement, the following Class:

> All persons who purchased any Tommy Hilfiger branded product offered at a purported discount from a reference price at a California Tommy Hilfiger Outlet Store from April 18, 2014 to the date of preliminary approval. Excluded from the Class are Defendant, as well as its 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 Defendant. (SA, ¶1.8.)

The Settlement Agreement mandates Defendant to automatically distribute $6,663,000 worth of Merchandise Certificates (if used at $10.00 value) to each of the approximate 663,000 Direct Notice Class Members for whom Defendant maintains a valid email and/or mailing address, and who do not request exclusion from the Class, for use at a California Tommy Hilfiger Outlet Store, which may also be used for 25% off a purchase of at least $100. (SA, ¶¶ 1.22, 2.1.) All other Class Members receiving notice via

publication must submit a Claim Form to receive a Merchandise Certificate. All Class Members will have the ability to claim a second Merchandise Certificate by submitting proof of Qualifying Purchase(s) in an aggregate amount of at least $150.01 (SA, ¶ 2.1), thereby raising the Settlement value up to $13,260,000 in the event each Direct Notice Class Member redeems a second Merchandise Certificate. Alternatively, Class Members may elect to use Merchandise Certificates to receive a 25% discount off a total pre-tax purchase of at least $100.[1] The Merchandise Certificates are redeemable for a six-month period from date of issuance, may be used on sale or discounted items, and are freely transferrable. Merchandise Certificates are not redeemable for cash, stackable, and cannot be combined with any other coupon or promotional offer. Class Members who do not submit a timely and valid exclusion request will fully release Defendant and the other Released Parties from any claims associated with Defendant's advertisement of prices or promotions in accordance with ¶¶ 1.10, 1.29, 1.32 and 2.9 of the Settlement Agreement. Further, Class Representatives Olmedo and Morrow have agreed to waive all rights and benefits afforded by Cal. Civ. Code Section 1542. (SA, ¶2.10.)

Under the Settlement Agreement, Defendant further agrees to pay Class Counsel's attorneys' fees and costs of $650,000 and Plaintiffs' incentive award of $5,000 total. (SA, ¶¶ 2.4, 2.5.) Unless otherwise ordered by the Court, Defendant will make such Court-approved payments within 30 business days after the Final Settlement Date and upon receiving Plaintiffs' and Class Counsels' W-9 forms. *Id.* If the Court does not award $650,000.00 in fees and costs or $5,000 in Plaintiffs' incentive award it shall not affect any of the Parties' other rights and obligations under the Settlement Agreement. (SA, ¶2.6.)

IV. FEE AWARD STANDARDS

A. The Provision For Payment of Attorneys' Fees and Costs In The Settlement Agreement Is Appropriate And Should Be Enforced

The United States Supreme Court in *Evans v. Jeff D* (1986) 475 U.S. 717, 738 n.30, held that the parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorney fees. The Supreme Court in *Hensley v. Eckerhart* further held that negotiated, agreed-

[1] Thus, producing a Settlement value of $16,575,000 in the event all Direct Notice Class Members made such election on a $100 purchase (and up to $33,150,000 depending on the number of second Merchandise Certificates redeemed by same): 663,000*$25=$16,575,000; $16,575,000*2=$33,150,000.

upon attorney fee provisions are the ideal towards which the parties should strive: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 437.) The Court stressed that the trial court "has a responsibility to encourage agreement" on fees. (*Blum v. Stenson* (1984) 465 U.S. 886, 902 n.19.)

Here, the requested fee of $650,000 was negotiated during adversarial bargaining by Class Counsel after the substantive terms of the settlement had been negotiated. (Carpenter Decl. ¶4) The fee fairly reflects the marketplace value of Class Counsel's services. As the United States Supreme Court instructed:

> Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior. *Deposit Guar. Nat'l Bank v. Roper* (1980) 445 U.S. 326, 338.

Additionally, the Settlement releases Defendant from all claims that were alleged in the action, including violations of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*, which entitle Class Counsel to recover attorneys' fees and costs as the prevailing party. (See Cal. Civ. Code § 1780(e) ("The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section").) While the CLRA does not define "prevailing plaintiff," the trend is toward a "pragmatic approach" that determines prevailing party status "based on which party succeeded on a practical level." (*Graciano v. Robinson Ford Sales* (2006) 144 Cal.App.4th 140, 150.) Based upon preliminarily approved Settlement, Plaintiffs qualify as "prevailing plaintiffs" under the CLRA and are entitled to fees pursuant to that statute. Additionally, fees Attorneys' fees may be awarded here under the substantial benefit doctrine and/or the private attorney general doctrine pursuant to Cal. Code of Civ. Proc. § 1021.5.[2]

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[2] Under the private attorney general doctrine, attorneys' fees are awarded in cases that enforce rights affecting public policies. (See *California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 741 ("The fundamental objective of section 1021.5 is to encourage suits effectuating a strong public policy by awarding substantial attorney's fees to those who successfully bring such suits.") Successful litigants are entitled to fees when they have: (1) enforced an important right affecting the public interest; (2) conferred a significant benefit on the public or a large class of persons; and (3) imposed a financial burden on the plaintiff out of proportion to his individual stake. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142.) These

B. Applicable Fee Award Standards

California state "[c]ourts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier and the percentage of recovery method." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254. See also *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1809 (recognizing that the percentage method is appropriate where "the amount was a 'certain or easily calculable sum of money'") (internal citations omitted).) The key advantage of the percentage method, applicable here, is that it focuses on the benefit conferred on the class resulting from the efforts of counsel. (*Lealao v. Beneficial California, Inc.*, (2000) 82 Cal.App.4th 19, 48 (percentage of benefit method is result-oriented rather than process oriented).) Many federal courts, including the Ninth Circuit, have also developed a preference for using the percentage method. (See *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir.1990) 904 F.2d 1301, 1311; *In re Hydroxycut Mktg. & Sales Practices Litig.* (S.D. Cal. Nov. 18, 2014) No. 09-2087 BTM(KSC), 2014 U.S. Dist. LEXIS 162106, at *188-89 (utilizing percentage-of-recovery method where settlement value was based in part on free product option).)

C. The Percentage Method Is the Appropriate Method for Calculating Fees in This Case

When a common fund is created for a class' benefit, Class Counsel may also request attorney fees based on a percentage of that fund: "[W]hen a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (*"Serrano III"*).) The common fund doctrine is "based on the commonsense notion that the 'one who expends attorneys' fees in winning a suit which creates a fund

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criteria are easily met here. (See *Beasley*, 235 Cal.App.3d at 1418 (Consumer protection litigation has "long been judicially recognized to be vital to the public interest.") (internal citations omitted); *Graham v. Daimler Chrysler Corp.* (2004) 34 Cal.4th 553, 561 (only 1,000 subject vehicles sold to California consumers satisfied the "large persons" requirement of Section 1021.5); *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal. 3d 917, 941 (The "financial burden" criterion is met when "the cost of the claimant's legal victory transcends his or her personal interest, that is, when the necessity of pursuing the lawsuit placed a burden on the plaintiff out of proportion to his or her individual stake in the matter."). See also *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 703 (enforcement of California consumer protection laws as an important right affecting the public interest); *Hinojos v. Kohl's Corp.* (9th Cir. 2013) 718 F.3d 1098, 1101, 1107 (declaring unequivocally "price advertisements matter.").)

from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs.'" (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 397 (citation omitted). The Supreme Court routinely awards attorney fees based on a percentage of the recovery. (See *Camden I Condo. Assn., Inc. v. Dunkle* (11th Cir. 1991) 946 F.2d 768, 773 (citing Supreme Court cases computing fees based on a percentage of the common fund).) The California Supreme Court in *Laffitte v. Robert Half Int'l Inc.* specifically addressed and held that trial courts could properly use a "percentage of the fund" method for calculating attorney's fees in a class action case:

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation []—convince us the percentage method is a valuable tool that should not be denied our trial courts.

(*Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 503 (internal citations omitted).)

Further, in quantifying the value of settlement consideration, courts generally calculate the full amount available under the settlement, regardless whether all Class Members claim their payment. (*Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81 (1980); *Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (district court abused its discretion by calculating fees as one-third of the class members' claims rather than one-third of entire settlement fund).)

V. THE REQUESTED FEE AWARD IS APPROPRIATE, FAIR AND REASONABLE UNDER THE PERCENTAGE METHOD

Here, Merchandise Certificates will be sent automatically to Direct Notice Class Members upon approval of the Settlement. Exclusive of claims in response to publication notice, Merchandise Certificates sent to approximately 663,000 Direct Notice Class Members are worth $6,663,000 if used at their $10.00 value. These amounts may increase significantly, and with no ceiling under the Settlement Agreement,

depending on how many Class Members respond to notice by publication or validly seek a second Merchandise Certificate. (See n.1 above.)

Plaintiff seeks a fee award that is less than 10% of the most conservative Settlement valuation of $6,663,000.[3] The Ninth Circuit "benchmark" for awarding fees is 25 percent of the total recovery. (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1047.) The requested fee award is fair and reasonable given Class Counsel's efforts in this case under the percentage method. The parties negotiated the agreed-upon fees and costs only after negotiating and agreeing to all other material terms of the settlement. (See, e.g., *Manual for Complex Litigation* (4th ed. 2004) at ¶ 21.7 ("Separate negotiation of the class settlement before an agreement on fees is generally preferable.").) By deferring the fee negotiation until that time, Class Counsel aligned their interests with the interests of the Class, and Defendant had every incentive to negotiate as low a fee as possible to decrease its overall costs. (See *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th at 33 ("The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery.").) The resulting agreed-upon fee award, which was proposed by Mediator Robert A. Meyer, was the product of a non-collusive adversarial negotiation considering Class Counsels' prior and future efforts and the excellent results achieved. In agreeing to pay $650,000 in the aggregate for fees and costs, Defendant also considered the possibility that Class Counsel might apply for and receive a much larger award, especially in the event of any objection or appeal of the settlement, which would necessarily lead to additional protracted litigation and efforts by Class Counsel to defend the Settlement. Rather than take these risks, Defendant agreed to pay the requested award subject to Court approval.

Plaintiffs' fee request is far below the acceptable thresholds recognized by the Ninth Circuit and California state courts. California courts have been expressly authorized to award fees as "to ensure that

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[3] $650,000/$6,663,000 = 9.8%. Under the other Settlement values discussed herein: $13,260,000 = 4.9%; $16,575,000 = 3.9%. Even under the assumption that only 50% of Class Members redeem the Merchandise Certificate at $10.00 (and the remaining 50% of Merchandise Certificates are unredeemed), Class Counsel's requested fee reflects less than 20% of that estimated financial impact on Defendant ($650,000/$3,315,000 = 19.6%), still well within judicially acceptable limits.

the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." (*Lealao*, 82 Cal.App.4th at 50.) Indeed, the U.S. Supreme Court consistently looks to the marketplace as a guide to determining reasonable fees, including contingency fee arrangements. (*Missouri v. Jenkins* (1989) 491 U.S. 274, 285.) In defining a reasonable fee, the court should mimic the marketplace for cases involving a significant contingent risk, such as this one, and emphasize the unique reliance of our legal system on private litigants to enforce substantive provisions of law in class actions such that attorneys providing these benefits should be paid an award equal to the amount negotiated in private bargaining that takes place in the legal market place. (*Deposit Guar. Nat'l Bank,* 445 U.S. at 338.)

Accordingly, numerous California state and federal courts have award percentage fees of up to 40% or more in fund cases:

- *Adauto v. Door Components, Inc.*, Los Angeles Superior Court Case No. BC469230 (July 1, 2013) (Judge Lee Edmon awarded attorney's fees equal to 40% of the settlement fund, *plus costs*);
- *Albrecht v. Rite Aid Corp.,* San Diego Superior Court Case No. 729129 (Judge Haden awarded attorney's fees equal to 35% of the settlement fund, *plus costs*);
- *Ayala v. Denbeste Manufacturing, Inc.,* Kern County Superior Court Case No. S-1500-CV-275248 (February 7, 2013) (awarded attorney's fees equal to approximately 40% of the settlement funds, *plus costs*);
- *Crandall v. U-Haul International,* L.A. Superior Court Case No. BC 178775, (Judge Czuleger awarded plaintiffs' counsel attorney's fees equal to 40% of the settlement fund);
- *Erlandsen v. FlexCare, LLC, et al..*, Santa Barbara Superior Court Case No. 1390595 (awarding 40% of the settlement funds);
- *Birch v. Office Depot, Inc.* (S.D. Cal. Sep. 28, 2007) No. 06 CV 1690, 2007 U.S. Dist. LEXIS 102747 (awarding a 40% fee on a $16 million wage and hour class action);
- *Rippee v. Boston Mkt. Corp.* (S.D. Cal. Oct. 10, 2006) No. 05cv1360 BTM, 2006 U.S. Dist. LEXIS 101136 (awarding a 40% fee on a $3.75 million wage and hour class action).

Here, the fee request falls far, far below any of these judicially accepted percentages. However, the ultimate inquiry is whether the end result is reasonable. (*Powers v. Eichen* (9th Cir. 2000) 229 F.3d 1249, 1258.) In determining whether the award is reasonable, the Ninth Circuit directs courts to consider several factors, including: (1) the results achieved; (2) the risk of litigation; (3) the skill required; (4) the

quality of work; and (5) the contingent nature of the fee and the financial burden. (*Vizcaino*, 290 F.3d at 1048-50.)

A. Class Counsel Achieved Excellent Results for the Class

Class counsel achieved exceptional results in this case. The Parties reached an arms-length settlement with the assistance of an experienced mediator and former judge after extensive investigation and discovery. (Carpenter Decl., ¶6) Defendant denied liability as well as Plaintiffs' ability to certify the Class. Continued litigation of this lawsuit presented Plaintiffs with substantial legal risks of certifying the class, proving liability, presenting a viable damages model, and defeating any appeals relating thereto. In the face of these significant challenges, Plaintiffs secured real and valuable benefits for the Class, as discussed in Section III above. As a practical matter, no Class Member could recover this amount in an individual case because the costs of litigation would greatly eclipse any individual recovery.[4] Further, if this litigation were pursued further as a class action, it is uncertain whether this Court would certify a class for litigation purposes. Even if the case were successfully tried as a class action, the regressive analysis of class-wide damages could likely yield a diminution in value (*i.e.*, damages) attributed to Defendant's false advertising of less than $10.00 per Class Member. The Settlement provides Class Members with prompt, high-value benefits at an early juncture, avoiding the risks of attendant to providing liability and damages.

B. Class Counsel Assumed Significant Risks

The requested fee award is reasonable in light of the risks incurred by Class Counsel. From the outset, Plaintiffs faced significant risks, including failure to certify the putative class (or having it subsequently decertified) and or failing to prove liability and/or damages. These risks are not merely

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[4] The reasonableness of Class Counsel's fee request is further evidenced by the fact that no Class Members has objected to it. Plaintiffs' intention to request payment of Class Counsel's attorneys' fees and costs in the amount of $650,000 was clearly disclosed to each Class Member in the Court-approved Full Class Notice and in information found on the settlement website. As of the filing of this brief Class Counsel has not been made aware of any objection to the request for attorneys' fees and costs. The lack of objection signifies the Class Members' approval of the requested attorneys' fees. (See *In re Heritage Bond Litig*. (C.D. Cal. June 10, 2005) No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *70 ("The existence or absence of objectors to the requested attorneys' fee is a factor in determining the appropriate fee award.").)

hypothetical. Given these considerations, Class Counsel incurred 100% of the risk, including all litigation costs, devoting their time and labor to identifying Defendant's wrongdoing, evaluating Defendant's liability, analyzing potential legal theories, drafting the complaints, engaging in significant research and investigation, and attending mediation. Class Counsel forewent other employment in order to devote the time necessary to pursue this litigation. (Carpenter Decl. ¶3.) Throughout this time, there was no assurance of success or compensation.

C. The Complexity of the Litigation and Class Counsel's Skill

Litigating this class action through trial would be time-consuming and expensive due to the complexities of proving liability and damages. For instance, Defendant would oppose Plaintiffs' motion for class certification, the Parties would likely move for summary adjudication, and the Parties would each retain numerous experts to analyze the issues such as determining the effect of Defendant's pricing practices on consumers and the price premium attributable to Defendant's purported sale discounts. To this end Class Counsel retained economics expert, Dr. Hamilton, to review and determine the impact of Defendant's false reference prices on consumer behavior and to assess potential economic remedies. Dr. Hamilton identified several potential methodologies to measure the extent that Class Members were overcharged. Class Counsel analyzed these theories against recent case law rejecting restitution-based damages theories in similar deceptive discount pricing cases. (See, e.g., *Chowning v. Kohl's Dept. Stores, Inc.* (9th Cir. 2018) 733 Fed. Appx. 404 (affirming district court's grant of summary judgment that rejected each of plaintiff's proposed measures of restitution); *Stathakos v. Columbia Sportswear Company* (N.D. Cal. May 11, 2017) 2017 WL 1957063 (granting summary judgment and rejecting each of plaintiff's proposed measures of restitution).) By reaching this Settlement, the Parties avoid protracted litigation of these complex issues and avoided incurring significant expert fees.

D. Class Counsel Provided High Quality Work

Class Counsel are experienced in complex class litigation (Carpenter Decl. ¶¶11-12.) and have a thorough understanding of the issues and risks presented by these types of cases, and through their skill and reputation, were able to obtain a settlement that provides an outstanding result for the Class. This efficient manner of this result would not have been reasonably possible were it not for the experience

and reputation of Class Counsel in this area. Class Counsel spent significant time, before and after commencing litigation, investigating Defendant's pricing practices and working with economics expert, Dr. Hamilton, to assess Defendant's liability and the potential economic remedies. The Parties engaged in informal discovery and eventually participated in mediation with a highly regarded mediator, which resulted in mutually satisfactory settlement and notice plan providing an excellent benefit to the Class.

The high quality of the Plaintiffs' opposition is a further testament to the quality of Plaintiffs' representation. Defendant is a large corporation, represented by skilled counsel from a law firm with significant resources and skilled in class action defense. Lead defense counsel has a well-deserved reputation in class action litigation in general. Courts have repeatedly recognized that the caliber of opposing counsel should be taken into consideration. (See, e.g., *In re Marsh & McLennan Cos., Inc. Sec. Litig.* (S.D.N.Y. Dec. 23, 2009) No. 04 Cv. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *56 (reasonableness of fee was supported by fact that defendants "were represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations.").)

E. Class Counsel Took This Case on a Contingent Basis

"The risk that an attorney takes in the underlying public interest litigation has two components: the risk of not being a 'successful party,' i.e., not prevailing on the merits, and the risk of not establishing eligibility for an attorney fee award." (*Graham*, 34 Cal.4th at 583.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. Despite such a challenge, Class Counsel demonstrated to Defendant that it faced significant exposure, compelling it to enter into the Settlement Agreement and provide a significant benefit to the Class. (See *Downey Cares v. Downey Community Dev. Comm'n.* (1987) 196 Cal. App. 3d 983, 997 (enhanced fees in contingent fee cases recognize the delay in receipt of full payment of fees); Posner, Economic Analysis of Law (4th ed. 1992) at 534, 567 ("A contingent fee must be higher than a fee for the same legal services paid as they are performed.").

For these reasons, the requested fee award is appropriate under the percentage method.

VI. LODESTAR/MULTIPLIER CROSS-CHECK SUPPORTS THE FEE AWARD

Courts may "cross-check" the proposed fee award against the counsel's lodestar to ensure its reasonableness. (*Vizcaino*, 290 F.3d at 1050.) The goal of both the lodestar and percentage of the recovery

methodologies is the determination of a reasonable fee that is consistent with market rates. California courts also use the lodestar multiplier method to award fees in a class action settlement. (See, e.g., *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33; *Serrano III*, 20 Cal.3d at 48; *Lealao*, 82 Cal.App.4th at 49-50.) The method begins with a calculation of time spent and reasonable hourly compensation of each attorney and paralegal who worked on the case. (*Wershba*, 91 Cal.App.4th at 254.) To compensate counsel for risk, quality, and result, courts commonly apply a "multiplier" to the lodestar. *Id*. The hourly rates used must be based on the hourly rates charged by private attorneys of comparable experience, expertise, and reputation for comparable work. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 640.) Additionally, the lodestar should include out-of-pocket expenses of the type normally billed by an attorney to a fee-paying client. (*Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1166.) It should also include time spent on the fee application itself. (*Serrano*, 32 Cal.3d at 632-38.) Class Counsel's rates here reflect the current market rates by attorneys of comparable experience, skill, and reputation for comparable work. (*See* Carpenter Decl. ¶9.)

The requested fee award, inclusive of costs, of $650,000 is fair and reasonable given Class Counsel's actual fee lodestar of $456,401.00 and costs of $27,564.12 with a modest multiplier of approximately 1.364. (*See* Carpenter Decl., ¶¶ 5-6.) Class Counsel spent a total of 623.5 hours in partner and associate time (not including prospective hours to be spent attending the final approval hearing) plus 672.2 hours of paralegal time and $27,564.12 in costs in the investigation and prosecution of this action. (*Id.*) Todd D. Carpenter, Esq., a shareholder in the law firm of Carlson Lynch LLP, has expended a total of 355.2 hours on the case to date. (Carpenter Decl., ¶ 6.) Mr. Carpenter's hourly rate for complex class action litigation is $750. (Carpenter Decl., ¶¶ 5, 9.) Associate attorneys spent a total of 268.3 hours on the case at an hourly rate of $395 (Carpenter Decl., ¶¶ 5-6.) The hourly rates for these attorneys are reasonable for consumer class action attorneys with similar experience and have been approved by various California State and Federal Courts. (*See* Carpenter Decl., ¶¶ 5, 9-12.)

A. Class Counsel's Hourly Rates are Reasonable

The reasonable market value of the attorneys' services sets the standard measure of a reasonable hourly rate. (See *Ketchum,* 24 Cal.4th 1122.) Courts determine the reasonable market value by examining

whether the rates are "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." (*Children's Hosp. & Med. Ctr. v. Bonta* (2002) 97 Cal.App.4th 740, 783.) Rates awarded to Class Counsel in previous actions and rates awarded to other attorneys practicing complex class action litigation in California are appropriate guides for establishing reasonable market rates. (*Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 904. See e.g., *Carr v. Tadin, Inc.* (S.D. Cal. 2014) 51 F.Supp.3d 970, 978–80 (awarding rates of $650 for partner and $335-375 for associates in 2014 consumer class action); *Hazlin v. Botanical Labs, Inc.* (S.D. Cal. May 20, 2015) No. 13cv0618-KSC, 2015 WL 11237634, at *7 (approving rate of $750 in 2015 consumer class action).)

Class Counsel specialize in complex consumer class actions and regularly litigate cases in federal and state courts. (Carpenter Decl., ¶¶ 10-13.) Moreover, their lodestars are calculated using rates that have been accepted in other class action cases. (*Id.*)

B. Class Counsel's Hours are Reasonable

Class Counsel must demonstrate that their hours were reasonable and necessary to the litigation. (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1320.) Hours are reasonable if they were "reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter. (*Hensley*, 461 U.S. at 431.) In addition to time spent during litigation, reasonable hours include time spent before the action was filed, including to interview clients, investigate facts and the law, and prepare the initial pleadings. (*Webb v. Board of Educ.* (1985) 471 U.S. 234. The fee award also includes time spent to prepare and litigate the attorneys' fee claim. (*Serrano,* 32 Cal.3d at 639.)

Class Counsel spent approximately 623.5 hours in attorney time and 672.2 hours in paralegal time investigating and litigating this case to date. (Carpenter Decl., ¶ 6.) The Declaration of Todd Carpenter, Esq. outlines the extensive work performed by Class Counsel and its staff. (See Carpenter Decl. ¶¶ 2, 6.) The hours expended were wholly reasonable given the issues and complex nature of this action.

C. The Requested Multiplier is Reasonable

Once the lodestar is calculated, it may be enhanced with a multiplier. (*Wershba,* 91 Cal.App.4th at 254.) The objective of any multiplier is to provide lawyers involved in public interest litigation with a

financial incentive. (*Ketchum*, 24 Cal.4th at 1123.) "If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing." (*In re Washington Public Power Supply System Sec. Litig.* (9th Cir. 1994) 19 F.3d 1291, 1300. Only when courts properly compensate experienced counsel for successful results can they assure the continuing effectiveness of class actions. To accomplish this objective, the fee award must be large enough "to entice counsel to undertake difficult public interest cases." (*San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 755. The fee requested here represents a multiplier of approximately 1.364 – an amount well within the accepted range for class action cases. (See, e.g., *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 60 (multiplier of 2.5); *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558 (multiplier of 1.75); *Sutter Health Insured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (multiplier of 2.52).)

When determining a multiplier, courts should consider all factors relevant to a given case. (*Serrano III*, 20 Cal.3d at 49.) Here, Plaintiffs' action supports the public interest outlined in California's consumer protection laws and federal regulations regarding deceptive and misleading price discount advertising. The Settlement effectively provides a significant financial benefit to Class Members and creates a real deterrence against future violations. This result alone justifies the requested multiplier. However, courts also consider additional factors, such as (1) the novelty and difficulty of the questions involved; (2) the skills displayed by Class Counsel and the results obtained; and (3) the contingent nature of the fee award. (*Ketchum*, 24 Cal.4th at 1132.) These factors also support the requested multiplier.

1. The Novelty and Difficulty of the Questions Involved

This action presented novel and difficult questions regarding liability under California's consumer protection laws and federal regulations regarding transparency in discount price advertising. Plaintiffs allegations presented difficult and novel legal issues related to proving liability, damages and remedial measures to address the alleged harm. At trial, Plaintiffs would be tasked with proving that Defendant's price advertisements were deceptive and material inducements to consumers' purchasing decision(s), as well as presenting a viable damages model to calculate the amount customers were overcharged as a result of that deception, all of which would require significant expert testimony and expense. (See Section V.C.

above.)

2. The Skills Displayed by Class Counsel and the Exceptional Results Obtained

Class Counsel, Carlson Lynch LLP, specializes in complex class actions and regularly litigate cases in California federal and state courts. (Carpenter Decl., ¶ 11.) Historically, Class Counsel has achieved excellent results for millions of consumers in contested consumer class actions. Equipped with this significant background, Class Counsel worked efficiently and effectively toward a satisfactory and reasonable resolution of the action. Class Counsel investigated the case, assessed its value, and weighed the risks and uncertainties arising from protracted litigation against the certain benefits of the preliminarily approved settlement. (See Sections V.A. and V.D. above.)

3. The Contingent Nature of the Fee Award Warrants the Requested Multiplier

"[A] contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable." (*Rader v. Thrasher* (1962) 57 Cal. 2d 244, 253 (citations omitted).) Class Counsel assumed substantial risk in agreeing to litigate Plaintiffs' cases on a pure contingency basis, including loss of time spent investigating and litigating and costs incurred. With no guarantee of success, the contingent nature of this action heavily supports the application of a positive multiplier, as is consistent with California Supreme Court precedence:

> Under our precedents, the unadorned lodestar reflects the general local hourly rate for a *fee-bearing case*; it does *not* include any compensation for contingent risk … The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes premium for the risk of nonpayment or delay in payment of attorney's fees.

(*Ketchum*, 24 Cal. 4th at 1138. See also Section V.E. above.)

4. Class Counsel's Efforts in Achieving an Expeditious Resolution Support Multiplier

Class Counsel secured an outstanding settlement instead of engaging in additional years of protracted litigation through trial and certain appeal. Accordingly, the requested positive multiplier is warranted. "Considering that our Supreme Court has placed an extraordinarily high value on settlement, it would seem counsel should be rewarded, not punished, for helping to achieve that goal." (*Lealao*, 82

Cal.App.4th at 52 (internal citations omitted); *Bowling v. Pfizer, Inc.* (S.D. Ohio 1996) 922 F.Supp. 1261, 1282-1283 (Courts should reward attorney in case settled "in swift and efficient fashion").)

Class Counsel litigated these matters diligently and took on substantial risk in time, expense and opportunity cost. Accordingly, imposition of a modest multiplier as a cross-check against Plaintiffs' reasonable percent-of-recovery fee request is entirely reasonable and should be awarded.

VII. THE REQUESTED LITIGATION COSTS ARE REASONABLE

Out-of-pocket expenses are compensable under Cal. Code Civ. P. § 1021.5 if they would normally be billed to a fee-paying client. (*See Beasley v. Wells Fargo* (1991) 235 Cal.App.3d 1407, 1419; Cal. Civ. Code. § 1780(d) (providing for costs to prevailing plaintiff in CLRA action).) Class Counsel's requested reimbursement of $27,564.12 in litigation costs incurred to date, which is included in fee request of $650,000 is wholly reasonable. These expenses were necessary to conduct the litigation and are reasonable and modest in light of the benefit conferred on the Class. (Carpenter Decl. ¶ 5.) Costs include, *inter alia*, (1) mediation fees, (2) court filing fees, (3) electronic legal research fees, (4) scanning, photocopying, printing, and extraneous office-related expenses, and (5) expert costs. (*Id.*) These types of costs are typical to those billed by attorneys to fee-paying clients. (See *Beasley,* 235 Cal.App.3d at 1421.)

VIII. PLAINTIFFS ARE ENTITLED TO REASONABLE INCENTIVE AWARDS

Plaintiffs request reasonable service awards of $5,000 total (*i.e.*, $2,500 each). "[I]ncentive awards are fairly typical in class action cases" and are "designed" to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. See also *Munoz v. BCI Coca-Cola Bottling Co. of L.A.* (2010) 186 Cal.App.4th 399, 412 ("[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk that they have incurred in conferring a benefit on other members to the class.").) An incentive award is appropriate "if it is necessary to induce an individual to participate in the suit." (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1395.)

Here, Plaintiffs maintained continued involvement in the litigation, including reviewing initial

pleadings and continuously communicating with Class Counsel. In agreeing to serve as class representatives, Plaintiffs undertook substantial risks to their reputations in the public domain and thrust themselves into active litigation to enforce an important right for the benefit of the general public. Moreover, Plaintiffs risked potential judgment against themselves if this case had been unsuccessful. In class action losses, class representatives are deemed the losing party liable for the prevailing party's costs. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1433–34.) Few individuals are willing to undertake that risk, particularly since courts have entered judgments against class representatives. (See *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 805–07 (upholding cost award in favor of defendant against class representative in her personal capacity in the amount of $764,552.73).) Lastly, the incentive awards sought by Plaintiffs are relatively low and implicitly reasonable in comparison to other consumer class action settlements. (See e.g., *Morey v. Louis Vuitton North America, Inc.* (S.D. Cal. Jan. 9, 2014) 2014 WL 109194 ($5,000 incentive award in Song-Beverly settlement); *Williams v. Costco Wholesa*le *Corp.* (S.D. Cal. Jul. 7, 2010) 2010 WL 2721452, at *7 ($5,000 incentive award in antitrust case settled for $440,000); *Cellphone Termination Fee Cases,* 186 Cal.App.4th at 1393–94 ($10,000 incentive awards to each of the four class representatives).)

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' unopposed motion for attorneys' fees and costs in the amount of $650,000 and incentive awards to Plaintiffs in the amount of $5,000 total.

Date: January 17, 2020

Respectfully submitted,

/s/ Todd D. Carpenter
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SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SAN DIEGO [E-FILE]	COURT USE ONLY
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): Todd. D. Carpenter (CA 234464) Tel: (619) 762-1900 Scott G. Braden (CA 305051) CARLSON LYNCH LLP 1350 Columbia Street, Suite 603 San Diego, CA 92101	
SHORT CASE TITLE Olmedo, et al. v. PVH Retail Stores, LLC, et al.	JUDGE: RICHARD S. WHITNEY DEPT: 68
ATTORNEYS FOR Plaintiffs Miguel Olmedo and Siobhan Morrow	Case No. 37-2019-00003250-CU-MC-CTL

PROOF OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which the within-mentioned service occurred; and that I am not a party to the subject cause. My business address is 1350 Columbia Street, Suite 603, San Diego, California 92101.

On January 17, 2020, I caused the following document(s) to be served:

- **NOTICE OF UNOPPOSED MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD**
- **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD**
- **DECLARATION OF TODD D. CARPENTER IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS AND INCENTIVE AWARDS**
- **[PROPOSED] ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD**

to each addressee named herein and addressed as follows:

Lary Alan Rappaport PROSKAUER 2029 Century Park East, Suite 2400 Los Angeles, CA 90067-3010 lrappaport@proskauer.com Lawrence Weinstein PROSKAUER 2029 Century Park East, Suite 2400 Los Angeles, CA 90067-3010 LWeinstein@proskauer.com	***Attorney for Defendant*** ***PVH Retail Stores, LLC***

( ) BY MAIL. I am familiar with this firm's practice of collection and processing correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business pursuant to Code of Civil Procedure §1013a.

( ) BY FAX**.** I faxed a copy of the document(s) to the person at the fax number(s) listed in the addressee(s). The telephone number of the sending party facsimile machine was 619.756.6991. The transmission was reported as complete and without error. No error was reported by the fax machine that I used.

( ) BY PERSONAL SERVICE. Class Action Research hand-delivered said document(s) to the addressee(s) designated pursuant to Code of Civil Procedure §1011.

(X) BY ELECTRONIC MAIL TRANSMISSION: A PDF format copy of such document(s) was sent by via e-mail or electronic mail transmission via email to each such person at the e-mail address listed above. The transmission was reported as complete and without error.

( ) BY OVERNIGHT MAIL. I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery with Federal Express this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 17, 2020.

/s/

Scott G. Braden

PROOF OF SERVICE