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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

STEVEN RUSSELL, et al.

Plaintiff,

vs.

KOHL'S DEPARTMENT STORES, INC., et al.,

Defendants.

Case No. 5:15-cv-01143-RSK-SP

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Courtroom: 850
Date: September 12, 2016
Time: 9:00 a.m.
Judge: Hon. R. Gary Klausner

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MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court's Order granting Plaintiffs' Motion for Preliminarily Approval of Class Action Settlement and Conditional Certification of Settlement Class (ECF Doc. 71), ("Prelim. App. Order"), and the Court's Order Setting Hearing Date for Final Approval (ECF Doc. 76), Plaintiffs Steven Russell and Donna Caffey ("Plaintiffs") respectfully submit this Memorandum of Points and Authorities in support of their Motion for Final Approval of Class Action Settlement.

I. INTRODUCTION:

Plaintiffs respectfully request that the Court grant final approval of the Settlement as set forth in the Amended Settlement Agreement. As detailed in Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (ECF Doc. 63-1), the Settlement provides that Kohl's will make available a total of $6.15 million to resolve this Litigation. The Settlement was reached after hard fought and contentious litigation involving complex and unresolved issues, and after arms-length negotiations with an experienced mediator. To the extent practicable, the terms and structure of the Settlement Agreement mirror those recently endorsed by the court in *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015).

The money from the Settlement will be used to pay notice and administration costs, attorneys' fees, reimbursement of litigation costs, and Enhancement Payments to Plaintiffs as approved by the Court. The remainder (the "Class Allocation"), is estimated to be approximately $3.6 million and will be distributed to Claimants in the form of gift card credit on a pro rata basis. No portion of the $6.15 million settlement amount will revert to Kohl's. The Settlement here represents an exceptional result for the Settlement Class, particularly given the risks of continued litigation.

The Administrator ("KCC") duly provided Notice of the Settlement to Settlement Class Members, as well as notice to governmental entities in compliance with the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1715. Settlement

Class Members were provided until August 9, 2016 to file claims, opt out or object to the settlement. As discussed below, only 87 of the over 8.8 million Known Class Members have chosen to opt out of the Settlement, over 375,000 have submitted claims for gift card credit, and only 8 objections have been received, one of which was not properly filed with the Court, and none of which have any merit.

II. ARGUMENT:

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

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

A. Proper Notice Has Been Provided:

In its Preliminary Approval order, the Court approved the parties' proposed form and manner of providing notice, finding that the notice sent to Class Members here was a "sufficiently balanced, accurate, and informative way to satisfy due process concerns." (Prelim. App. Order at *6). Based on data received from Kohl's, KCC was provided with a database (the Notice List) that contained 8,823,324 records of potential class members. (Declaration of Orlando Castillejos ("Castillejos Dec.") ¶4). After processing that information, KCC found that 579,917 records were either duplicates or missing a valid email, name or mailing address. (Castillejos Dec. ¶6).

On March 24, 2016, KCC, on behalf of Kohl's, served a CAFA Notice and accompanying enclosures by USPS Priority Mail delivery to the Attorney General of the United States, the attorneys general of all 50 states and territories, informing them

of the proposed Settlement. (Castillejos Dec. ¶3). As of the date of this filing, KCC has received no objection, comment or other inquiries from any such authority. (Id.).

On May 10, 2016, the summary notice was published in the Los Angeles and San Francisco, California regional editions of *USA Today*. (Castillejos Dec. ¶5).

On May 11, 2016, approved notices were sent directly to 8,031,347 Class Members. (Castillejos Dec. ¶7). Notices were sent by email to 5,075,454 Class Members for whom the parties have valid email addresses, and via U.S. mail to the remaining 2,955,893 Class Members for whom the parties have valid mailing addresses, but no email address. (Id.). Of the 5,075,454 email notices first sent, 954,095 were returned as undeliverable. (Id.). After making minor adjustments to improve deliverability, 954,095 adjusted email notices were re-sent on May 25, 2015, to those Class Members whose original email notices were returned as undeliverable. (Id. ¶8). Of those 954,095 re-sent email notices, 865,124 were successfully delivered, and 88,971 were again returned as undeliverable. (Id.). Because Kohl's has mailing addresses for most of those Class Members whose email notices were returned a second time, KCC was able to mail postcard notices on June 9, 2016, to 80,798 of the 88,971 Class Members (91% of those) whose email notices were returned. (Id. ¶9).

In sum, KCC successfully emailed and/or mailed 7,889,753 Notices directly to Settlement Class Members contained in the Notice List. (Id. at ¶¶6-9). This represents an actual direct notice rate, or "reach," of 89.4%, an outstanding reach by any measure.[1]

On May 9, 2016, KCC also established a toll free number for Class Members to obtain additional information in both English and Spanish, and developed a

[1] This reach is calculated using the original estimate at the time of preliminary approval of 8.85 million potential class members, which included both class members for whom contact information was available and an estimate of those for whom no direct contact information was known. But even if the number of class members for whom no contact information was larger than estimated and the potential class size was 10 million people, the reach still would be very high (i.e., approximately 75%).

dedicated website on which potential Class Members could view or download relevant documents and information, including the Settlement Agreement, Claim Form, Notice in both English and Spanish, Opt-out Request, and Motion for Preliminary Approval, with all it supporting documents. (Castillejos Dec. ¶¶11-12). The website also listed all of the relevant deadlines for submitting claims, opt-out requests and objections, and allowed Settlement Class Members to submit claims online or print claim forms and submit them via mail. (Id.). The website also provided instruction on how to opt-out and/or submit objections. (Id.).

As of this filing, KCC has received 376,327 timely Claims, which represents a claim rate of approximately 4.2%. (Id. ¶13). KCC has also received 1,177 claims filed after the August 9, 2016, deadline, which are currently under review. (Id.).

Based on the foregoing, the Court should reaffirm that the Class Notice here was "sufficiently balanced, accurate, and informative," and has satisfied due process in that it fairly and adequately informed the Settlement Class of the nature of the action, the terms of the proposed Settlement, the effect of the action and release of claims, their rights to exclude themselves, and their rights to object to the Settlement.

B. <u>There Is No Basis to Disturb the Certification Order</u>:

The Settlement was reached *after* the Court certified a litigation class under Rule 23(b)(2) based on full briefing and a thorough evidentiary record. [ECF Doc. 57]. In connection with the Preliminary Approval Order, the Court certified the current Settlement Class as requested by the parties, finding that "a class action is clearly a superior vehicle for the resolution" of Plaintiffs' claims. (Prelim. App. Order at *4-6). Nevertheless, since a class was already certified at the time of Settlement, and since there is no basis to revisit the Court's certification order (or the Order certifying the Settlement Class), the Court "need not find anew that the settlement class meets the certification requirements of Rule 23(a) and (b)." *Corson v. Toyota Motor Sales U.S.A., Inc.*, 2016 WL 1375838, at *5 (C.D. Cal. April 4, 2016) (citing authorities). Rather, the Court "may focus instead on whether the proposed settlement

is fair, adequate, and reasonable." *Harris v. Vector Marketing*, 2012 WL 381202 at *3 (N.D. Cal. Feb. 6, 2012).

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

Rule 23(e)(2) requires the Court to determine whether the Settlement is fair, adequate and reasonable. Fed. R. Civ. Proc. 23(e)(2). "To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Not all of these factors will apply to every class action settlement, and in some circumstances, one factor alone may prove determinative in finding sufficient grounds for approval. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness, and the settlement must stand or fall in its entirety." *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003) (quoting *Hanlon*, 150 F.3d at 1026). It bears emphasizing that there is a strong judicial policy that favors settlements. *Class Plaintiffs*, 955 F.2d at 1276.

Here, the Court has already preliminarily determined that the Settlement is fair and reasonable, that it comes as the result of hard fought and contentious litigation, and that it is the product of arms-length and non-collusive negotiations conducted by

capable and experienced counsel. (Prelim. App. Order at *5). The Court's conclusion is amply supported by the record, including the contentious motion practice, and the protracted and arms-length settlement negotiations that were conducted with the aid of an experienced mediator. (*Id.*). Indeed, Plaintiffs respectfully suggest that the creation of a non-reverting Settlement Fund, balanced against the risks of further litigation (as evidenced by orders entered by this Court in both this case and in the duplicative *Chowning* case)[2], demonstrates that the Settlement here is exceptionally fair, adequate and reasonable, and that it was reached in the absence of any collusion.

The Court should therefore begin its final approval analysis "with a presumption that the settlement is fair and reasonable." *Garner v. State Farm Mut. Auto Ins. Co*., 2010 WL 1687832, *13 (N.D. Cal. Apr. 22, 2010); *see, e.g., Rodriguez v. West Publ'g Corp*., 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution...."); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004).

1. The Strengths of Plaintiff's Case Balanced Against the Amount Offered in the Settlement Supports Final Approval:

"An important consideration in judging the reasonableness of a settlement is the strength of the plaintiffs' case on the merits balanced against the amount offered in the settlement." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 526. In evaluating these factors, the Court should assess "objectively the strengths and weaknesses inherent in the litigation and the impact of those considerations on the parties'

[2] Approximately 2 months after the filing of the instant action, a nearly identical suit was filed against Kohl's in the Southern District of California, and subsequently transferred to this Court. *Chowning, et al. v. Kohl's Department Stores, Inc., et al*. (C.D.Cal.) 2:15-cv-08673-RGK-SPx (*Chowning*). In *Chowning*, this Court entered orders (1) finding that plaintiff could not present a viable measure of restitution to justify an award of monetary relief (No. 15-8673, ECF Doc. 112 at *13), and (2) denying plaintiff's request to certify a class under Rule 23(b)(3) for monetary relief (No. 15-8673, ECF Doc. 123 at *6). In the instant action, the Court also denied Plaintiffs' request to certify a litigation class to pursue monetary relief, instead certifying a class under Rule 23(b)(2) to pursue injunctive relief only. (ECF No. 52).

decisions to reach a [Settlement]." *Adoma*, 913 F. Supp. 2d at 975. However, in balancing, "a proposed settlement is not to be judged against a speculative measure of what might have been awarded in a judgment in favor of the class." *Id.* As noted by the Ninth Circuit:

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

Officers for Justice, 688 F.2d 625.

Plaintiffs respectfully contend that they had a strong case on liability that was appropriately settled for $6.15 million. They believe that they could more than likely prove class wide liability based on common and objective evidence, including Kohl's' sales data, pricing guidelines and other internal records. However, Plaintiffs also faced substantial risks, and they did not agree to release their claims for nothing. To the contrary, they negotiated a large Settlement by which Kohl's will make available a non-reverting monetary fund of $6.15 million. When balanced against the strengths of Plaintiff's case, and the risks of continued litigation, the amount offered in the Settlement weighs very strongly in favor of approving the Settlement.

2. The Risk, Expense, complexity and Likely Duration of Further Litigation Supports Final Approval of the Settlement:

The "class's chance of success if it continued to pursue litigation" may be the "most important[]" factor in evaluating a Settlement. *In re Online DVD*, 779 F.3d at 948. The record here demonstrates the significant risks that Plaintiffs would face if this case were not settled, despite the strength of Plaintiff's case on liability.

First, as evidenced by the summary judgment order entered in the *Chowning* case, there is a very real risk that Plaintiffs could recover nothing. (*Chowning*, No. 15-8673, ECF Doc. 112 at *13). That is because, in addition to the inherent risk

associated with proving liability, Plaintiffs faced the real risk that they could not prove a legally and factually supportable measure of damages or restitution. Indeed, this was perhaps the most hotly disputed issue in this case, even more so than the question of liability.

As the Court's summary judgment order in *Chowning* demonstrates, each of Plaintiffs' proposed measures of restitution and damages here was susceptible to legal and factual challenges that made it far from certain that Plaintiffs could recover anything even if they established liability. (*Id.*). While Plaintiffs believe that their proposed measures of restitution and damages are fully supported in law and fact, the uncertainty surrounding the issue of damages in this case created an exceptionally high risk of further litigation that weighs strongly in favor of final approval.

Kohl's would likely have relied on the summary judgment and certification orders in *Chowning*, as the plaintiff there made virtually identical factual and legal claims as Plaintiffs in this case, and sought the exact same measures of restitution and damages proposed by Plaintiffs in this case. As this Court is aware, in *Chowning* this Court rejected the very same measures of restitution that Plaintiffs here sought. *Id.* at *7-13. This Court's rulings in *Chowning*, coming shortly after the parties here negotiated the Settlement, highlight the substantial risk that Plaintiffs would face if they continued to litigate.

The recent decision in *In re Tobacco Cases II*, 240 Cal. App. 4th 779 (2015), also confirms the magnitude of this risk. There, the plaintiffs proved at trial that the defendant's advertising of cigarettes was "deceptive within the meaning of the UCL." *Id.* at 786. Nevertheless, the trial court denied the plaintiffs' request for restitution because it determined that the plaintiffs "received value" from the cigarettes and held that, therefore, the "proper measure of restitution was the difference between the price paid and the actual value received." *Id.* at 787. The California Court of Appeals affirmed. *Id.* at 801-802. While Plaintiffs believe that the holding in *In re Tobacco Cases II* is incorrect as a matter of law, and distinguishable from this case both on the

facts and procedural record, there can be no doubt that Kohl's would have relied on this recent decision to renew its argument concerning the proper measure of restitution had this case proceeded with further litigation.

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

3. The Risk of Maintaining Certification Through Trial Supports Final Approval of the Settlement:

The Class was certified for injunctive relief prior to Settlement. [ECF Doc. 52]. While Plaintiffs did not move for certification of a 23(b)(3) class prior to settlement, and do not foresee any direct risk of maintaining 23(b)(2) certification through trial, they note that this Court's rulings in *Chowning* would unquestionably adversely impact their ability to obtain certification of a Rule 23(b)(3) class for restitution here, thus presenting another risk that weighs in favor of approving the Settlement.

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

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

As detailed in the Preliminary Approval Order, this case was thoroughly litigated at the time of Settlement. (Prelim. App. Order at *4-6). Class Counsel had conducted informal discovery and investigation, and had received, reviewed and analyzed Kohl's' sales data produced for settlement purposes.

In addition, the Complaint had been amended twice, and the parties fully briefed a motion to dismiss, and a motion for class certification. The parties also engaged in countless hours of meet and confer sessions concerning a multitude of issues and motion practice. The parties here were also intimately familiar with the proceedings, documents filed, and orders entered in the *Chowning* case.

The parties here were well informed of their respective strengths and weaknesses, both legally and factually, at the time of Settlement. Accordingly, this factor also "militates in favor of the Court's approval" of the Settlement. *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 528. *See also Adoma*, 913 F. Supp. 2d at 977 (finding settlement fair and a result of arms-length negotiations where the parties engaged informal discovery).

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

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

Class Counsel have extensive experience prosecuting consumer class actions, and after participating in and analyzing the administration of the Settlement here, continue to recommend final approval. (*See e.g.*, Declaration of Christopher J. Morosoff ¶14; Declaration of Douglas Caiafa ¶5). In its Class Certification Order (ECF Doc. 57), the Court certified Class Counsel as adequate representatives of the Class prior to settlement negotiations. Again, in its Preliminary Approval Order (ECF Doc. 71), this Court reiterated that all requirements of Rule 23(a) (including the adequacy requirement) were satisfied. Class Counsel's experience and adequacy is also demonstrated by their success in this case to defeat Kohl's' Motions to Dismiss and obtain class certification prior to settlement. The fact that experienced and

capable attorneys recommend approval of the Settlement should be afforded "great weight." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 528.

6. The Presence of a Governmental Participant:

There was no direct participation in this case by any governmental party. Nevertheless, notice of the Settlement was duly provided to the Attorney General of the United States, and the Attorneys General of all states and territories as required by CAFA. (Castillejos Dec. at ¶3). This allowed the appropriate state or federal official the chance to voice their concerns if they believed that the Settlement was not in the best interest of their citizens. Although the parties received an inquiry from the California Attorney General's office and responded to questions from that office, no governmental authority (including California) has sought to object to the Settlement. This factor therefore weighs in favor of approval. *In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. Sept. 15, 2015) (finding that this factor favored settlement where no government official appeared).

7. The Reaction of Class Members Supports Final Approval:

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement are favorable to the class members." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 529 (citing cases). Here, the estimated Settlement Class consists of over 8.8 million members. Because Kohl's maintains contact information for a large percentage of its customer base, the parties were able to provide direct notice, via email and U.S. Mail, to nearly 8 million Kohl's customers (7,889,753). (Castillejos Dec. at ¶¶4-10).

In response to the Notice, over 376,327 Settlement Class Members have filed claims seeking benefits from the Settlement. (Castillejos Dec. ¶13). This represents a claim rate of approximately 4.2% of the Settlement Class Members, which is very reasonable in a case such as this. *See e.g.*, *In re Online DVD*, 779 F.3d 934 (approving settlement with a 3.4% claim rate); *In re Toys R Us-Delaware, Inc.* –

(FACTA) Litig., 295 F.R.D. 438, 468 n. 134 (C.D. Cal. 2014) (citing authority that claim rates in consumer litigation generally range from 2 to 20 percent); *Couser v. Comenity Bank*, 2015 WL 5117082, at *7 (S.D. Cal. 2015) (noting that a claim rate of 7.7% was "large" and "higher than average.").

In contrast, only 95 Settlement Class Members (0.001% of the Settlement Class) opted out of the Settlement, and only 8 Class Members (0.0001% of known Settlement Class Members) have voiced an objection to the Settlement. (Castillejos Dec. ¶15). The number of persons opting out of and objecting to the Settlement is infinitesimal when compared to the size of the Settlement Class and can be viewed as "enthusiastic approval" of the Settlement in general. *In re Cathode Ray tube (CRT) Antitrust Litig.*, 2016 WL 3648478, at *9 (N.D. Cal. July 7, 2016). Accordingly, this factor also strongly supports final approval. *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 529; *Klee v. Nissan North America, Inc.*, 2015 WL 4538426, at *9 (C.D. Cal. July 7, 2015) (a small number of opt outs weighs in favor of approval). *See also In re Omnivision Techs.*, 559 F. Supp. 2d at 1043 (noting that 3 objections out of 57,630 potential class members favors approval of the Settlement "[b]y any standard.") (citing *Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement with 45 objections out of 90,000 notices sent)).

a. Response to Objections:

As discussed below, the few objections that were received are without merit, and should each be overruled by the Court.

Objection by Jonathan Michael Peske (not filed with the Court):

Mr. Peske does not object to the fairness, adequacy or reasonableness of the Settlement. Instead, he objects because he finds "this lawsuit to be groundless," and believes that it is "merely" a "payday for the attorneys." Although he opted to not exclude himself from the Class, Mr. Peske wants the Court to know that he "strongly believe[s] that lawsuits like these should not be settled out of court but should

proceed to a full trial." Respectfully, Mr. Peske's objection is not an appropriate objection to a class action settlement and it should be overruled accordingly.

The Court's "duty is to determine whether the settlement is fundamentally fair to the class, not to reexamine the underlying merits of the litigation." *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *5-6 (N.D. Cal. July 11, 2014); *Dennis v. Kellogg Co.*, 2013 WL 6055326, at *3 (S.D. Cal. Nov. 14, 2013). Objections directed at the merits of litigation are objections on behalf of the defendant and not the class. *Larsen*, 2014 WL 3404531, at *6. Such objections "are irrelevant and cannot undermine final approval." *Dennis*, 2013 WL 6055326, at *6. Indeed, if the Court were to disapprove of the Settlement, the parties would go back to litigating this case, which appears to be the opposite of what Mr. Peske desires. His objection should therefore be overruled.

Objection by Russell Monroe (ECF Doc. 77):

Mr. Monroe has a fundamental misunderstanding of the monetary benefit to be provided to the Class. Mr. Monroe's objection is based on his erroneous beliefs that (1) the Settlement Class consists of "35 million" members, and (2) each claimant will receive a gift card worth "less than 10 cents" ("$.097 each"). As discussed and demonstrated herein, Mr. Monroe is mistaken. First, the Settlement Class consists of an approximate 8.8 million members, not 35 million. Next, each claimant is expected to receive a gift card credit worth approximately $9.55 redeemable for merchandise (a large amount of which is priced at $10 or less) at any Kohl's department store in California. This objection should also be overruled.

Objection by Binh T. Tran (ECF Doc. 79):

Mr. Tran also objects to the merits of the litigation. Mr. Tran merely states that in his opinion, Kohl's' "ads are clear," and he could find "no mal intent in the advertising." His objection simply seeks to advise the Court that "[t]here is fine print that people should read and if they didn't then that's their own fault." This objection is effectively made on behalf of the defendant, rather than the class, and is therefore

"irrelevant and cannot undermine final approval." *Dennis*, 2013 WL 6055326, at *6; *Larsen*, 2014 WL 3404531, at *6. This objection should also be overruled.

Objection by Ann Card (ECF Doc. 80):

Ms. Card mistakenly argues that the Settlement here "is a Coupon Settlement." The premise of Ms. Card's objection, that the Gift Card Credits here are "coupons," is fundamentally incorrect. As the Ninth Circuit explained in *In re Online DVD-Rental*, where consumers are provided with a gift card that can be used at a "giant" retailer to purchase any one of a "large number of potential items" without the need to "spend any of his or her own money," those gift cards are not "coupons." *In re Online DVD*, 779 F.3d at 950-51 (citing with approval as non-coupon settlements cases in which consumers were provided with gift cards, such as a $9 card to Lowe's). Here, Class Members are being provided with Gift Card Credits that can be used to purchase a very large number of items at Kohl's without spending any additional money. (See Declaration of Kristine Vranak at ¶¶ 3-5). The Gift Card Credits do not expire and can be used in combination with other promotional discounts just as if the consumers had purchased their own gift card.[4] The Gift Card Credits simply are not "coupons," and Ms. Card's objection should be overruled.

Objection by Barbara S. Cochran (ECF Doc. 82):

Ms. Cochran objects because she believes (1) "the settlement amount represents only a small portion of actual damages incurred," (2) the "net settlement amount" (Class Allocation) will, in her opinion, "yield miniscule individual awards," (3) Class Members will somehow be required to "rely on outdated records to substantiate their claims," and (4) the requested attorney's fees are not justified. Each

[4] Moreover, like all gift cards, the Gift Card Credit will be subject to California's Gift Card Law, California Civil Code §1749.5(b)(2), which mandates that "any gift certificate with a cash value of less than ten dollars ($10) is redeemable in cash for its cash value." See Order preliminarily approving Amended Settlement Agreement (which provides that "Gift Card Credits are not redeemable for cash, except where required by law." (emphasis in original)). (ECF Doc. 74, ¶4). As noted, the Gift Card Credits here are expected to have a value of $9.55.

of Ms. Cochran's "objections" are unsupported conclusions devoid of any analysis, or factual or legal basis.

First, this Court's summary judgment ruling in *Chowning* raises serious questions regarding whether any Class Member would be able to establish that he or she "incurred" any "actual damages" in this case. Indeed, this Court has found that with respect to the pricing practices alleged here, Kohl's "appears to have stumbled across a gap in statutory coverage with its price-comparison advertising scheme," and that Kohl's "may have found a way to escape liability from monetary damages." (No. 15-8673, ECF Doc. 112 at *13-14). The Court has already concluded on the facts of this case that there appears to be no "viable measure of restitution" to support any claim for monetary relief (i.e., damages) in this case. Thus, Ms. Cochran's objection that the Settlement amount here represents only a small portion of actual damages incurred by Class Members is without merit and should be overruled.

Next, much like Mr. Monroe, Ms. Cochran appears to have a fundamental misunderstanding of the monetary benefit to be provided to the Class. Ms. Cochran mistakenly concludes that claimants here will receive only "miniscule individual awards." Ms. Cochran is mistaken. As discussed and demonstrated herein, each claimant is expected to receive a Gift Card Credit worth approximately $9.55 redeemable for merchandise at any Kohl's department store in California, which is sufficient to purchase any one of a large number of items. (*See* Vranak Dec. at ¶¶4-5).

Likewise, Ms. Cochran is mistaken in her conclusion that any Class Member will be required to "substantiate their claims," let alone rely on any records to do so. There is nothing in the Settlement Agreement here that requires any Class Member to "substantiate" their claim, or to produce, refer to, or rely on any "records" when submitting a claim.

Finally, Class Counsel's request for attorney's fees is fully addressed in their separate Motion for Attorney's Fees filed concurrently herewith. Though Ms. Cochran provides no explanation or analysis regarding why she believes Class

Counsel's request for fees "cannot be justified," the Motion for Attorney's Fees demonstrates the reasonableness of Class Counsel's fee request in light of the results obtained for the Class, as well as the time and effort spent achieving those results.

For these reasons, the Cochran objection should be overruled.

Objection by Sarah McDonald (ECF Doc. 81):

Ms. McDonald is represented by attorneys C. Benjamin Nutley and John W. Davis, who appear to be "serial objectors" who have represented third parties in objecting to scores of class action settlements. (See Caiafa Dec. ¶4). "Courts treat with particular disapproval the objections and appeals of 'professional objectors,' whose objections amount to a 'tax that has no benefit to anyone other than to the objectors' but serves to 'tie up the execution of [a] Settlement and further delay payment to the members of the Settlement Class.'" *In re Uponor, Inc. F1807 Plumbing Fittings Prods. Liab. Litig.*, 2012 WL 3984542, at *5 (D. Minn. Sept. 11, 2012); *see also, City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *2 (S.D.N.Y. May 9, 2014) (holding that "pattern of litigiousness from a single attorney-objector without more seriously undermines the credibility of the objection in the eyes of this court."); *In re Initial Public Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010) ("concur[ing] with the numerous courts that have recognized that professional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients.").

A. The Settlement Here is Not a Coupon Settlement:

The entire premise of Ms. McDonald's objection, that the Settlement here is a "coupon settlement," is fundamentally wrong. As discussed above in response to the objection of Ms. Card, the Gift Card Credits which claimants will receive are not "coupons." This fundamentally incorrect conclusion (that the Gift Card Credits here are "coupons") underlies each of Ms. McDonald's objections and thus renders each meritless.

B. The Lone Objection To The Injunctive Relief Portion of The Settlement Is Not Well Taken:

The injunctive relief provisions of the Settlement obligate Kohl's, as part of its pricing compliance program, to "develop[] and roll out…enhanced pricing compliance computer systems" within six months of final approval and to "implement pricing compliance training targeted at relevant buying office personnel, which shall be offered on a regular basis, no less than annually, to ensure that new hires are also appropriately trained on price-comparison advertising requirements" within six months of final approval and continuing for a period of at least four years. (Amended Settlement Agreement at 3.4).

Ms. McDonald is the only Class Member, of the over 8.8 million, to object to the Settlement's injunctive relief provisions. Ms. McDonald asserts that these provisions are "too vague" to (1) "support a finding that they will benefit the class" and (2) "be enforced via contempt motion." (McDonald Objection at *9).

Ms. McDonald is incorrect. Additional training and enhanced compliance systems will help to ensure Kohl's complies with its legal obligations regarding price comparison advertising, and that will benefit the class. Moreover, these provisions contain sufficient criteria concerning timing and implementation to allow the Court to determine whether Kohl's has complied with its obligations under the Settlement Agreement.

Ms. McDonald also asserts that a monetary value cannot be placed on the injunctive relief provisions and that these provisions do not benefit the class any more than members of the general public who may shop at Kohl's in the future. (McDonald Objection at *9-10). But the parties here do not attempt to place a monetary value on the injunctive relief here. Indeed, it is often difficult to place a monetary value on injunctive relief, and it is usually the case that injunctive relief in consumer class actions will benefit all future shoppers at a defendant's stores. These, however, are not reasons to disapprove the Settlement.

Finally, the injunctive relief provisions must be evaluated in light of the entire Settlement, including the monetary relief provisions. Ms. McDonald admits that if this case proceeded to trial the class would "likely" receive no monetary recovery. (McDonald Objection at *2). Thus, the combination here of significant monetary relief and meaningful injunctive relief makes this an eminently fair class settlement.

C. The Court Has All Necessary Information to Rule on Plaintiffs' Separate Motion for Attorney's Fees:

Class Counsel's request for attorney's fees is fully addressed in their separate Motion for Attorney's Fees filed concurrently herewith. That motion demonstrates the reasonableness of Class Counsel's fee request in light of the results obtained for the Class, as well as the time and effort spent achieving those results. It also addresses the specious argument that the Court must wait to see how many claimants actually "redeem" their Gift Card Credits before determining a reasonable fee. In short, Ms. McDonald's argument here suffers from her fundamentally flawed premise: the erroneous conclusion that the Gift Card Credits here are "coupons." (See Response to Ms. Card Objection, *supra*.).

D. The Requested Representative Incentive Awards are Reasonable:

"Incentive awards are fairly typical in class action cases." *Rodriguez*, 563 F.3d at 958-959. Incentive awards typically range from $2,000 to $10,000." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015) (collecting cases). Here, the $7,500 requested does not rise to the level of unduly preferential treatment to either Plaintiff. Indeed, courts have approved similar or greater disparities between incentive awards and individual class member payments. *See e.g. Fulford v. Logitech, Inc.*, 2010 WL 807448, at *3 n.1 (N.D. Cal. Mar. 5, 2010) (collecting cases awarding incentive award payments ranging from $5,000 to $40,000). See also, *In re Online DVD*, 779 F.3d at 947-948 (approving incentive awards that "ma[d]e up a mere .17% of the total settlement fund.").

In sum, Ms. McDonald and her serial objector attorneys have failed to properly analyze the Settlement before the Court and have not offered a single objection that would serve as an appropriate basis to disrupt the Court's final approval of the Settlement. Accordingly, her objection should be overruled.

D. The Court Should Affirm the Payment of Administrative Fees:

Pursuant to the Settlement Agreement and Preliminary Approval Order, KCC has already performed extensive and costly work associated with the notice and administration of the Settlement. (*See e.g.* Castillejos Dec.). As of the date of this filing, KCC has incurred Notice and Administrative Costs in the amount of $1,187,489.35, which is over the $936,681 that it estimated for all costs of notice and administration. In addition, KCC still has substantial work ahead necessary to conclude the administration of the Settlement. KCC therefore anticipates that the total Notice and Administration Costs will be approximately $1,300,000, which is more than the $1,000,000 "cap" negotiated by the parties. Accordingly, Plaintiffs respectfully request that the Court authorize that KCC be paid Notice and Administration Costs, up to and including the cap of $1,000,000, from the Cash Component of the Class Settlement Amount as provided by the Settlement Agreement. In addition, Plaintiffs respectfully request that KCC be paid an additional $50,000 from the $75,000 allocated to Class Counsel for reimbursement of their litigation costs.[5]

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[5] Although the administration costs associated with class notice have been higher than anticipated, this will not impact the amount of money available under the settlement for the class. As explained in the class notice, a minimum of $3,597,500 is available from the settlement to be distributed on a pro rata basis to eligible class members in the form of Gift Card Credits. The amount available for the Gift Card Credits from the settlement may be higher than this minimum amount depending on the Court's ruling regarding the amount of attorneys' fees and costs, but it will not be lower regardless of the class administration costs.

III. CONCLUSION:

Were this case to proceed to trial, there is a very strong likelihood that the Class would receive no monetary relief. This Court has ruled in the nearly identical, duplicative *Chowning* case that no viable measure of restitution has been presented that would justify an award of monetary relief. In other words, if not for the Settlement here, it is likely that no Class Member would receive any monetary relief. The Settlement here provides real monetary relief for all Class Members who have submitted timely claims. As evidenced by the administration of the Settlement, over 375,000 Kohl's customers in California have submitted claims, believe this Settlement is fair, and are waiting to receive their share of the Settlement fund. In contrast, although approximately 90% of the Class (7,889,753 Class Members) received direct notice of the Settlement, only 8 of the over 8.8 million customers have voiced any objection to the Settlement, and only 95 have chosen to opt out. By any measure, the reaction of the Class to the Settlement here strongly suggests that the Settlement is fair, adequate, reasonable, and in the best interests of the Class.

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

Dated: August 15, 2016

Respectfully submitted,
LAW OFFICE OF CHRISTOPHER J. MOROSOFF

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