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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA**

LYNETTE FLIEGELMAN, on behalf of herself
and all others similarly situated,

Plaintiffs

vs.

THE TALBOTS, INC and DOES 1 through
100, inclusive,

Defendants.

Case No.56-2018-00513611-CU-BT-VTA

**NOTICE OF MOTION AND
PLAINTIFF'S UNOPPOSED MOTION
FOR ATTORNEYS' FEES, EXPENSES
AND INCENTIVE AWARD**

Date: November 20, 2018
Time: 8:30 a.m.
Judge: Hon. Kevin DeNoce
Dept: 43
Reservation Number: 2360755

1 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL:**

2 On August 2, 2018, this Court granted preliminary approval of the class action settlement
3 in this matter and set a Final Fairness Hearing on November 20, 2018 at 9:00 a.m., in
4 Department 43 located at 800 South Victoria Avenue, Ventura, CA 93009, and ordered that any
5 papers in support of a request for attorneys' fees, expenses, and incentive award be filed with the
6 Court by October 17, 2018. Thus, pursuant to this Court's Order, Plaintiff and Class, submit this
7 Unopposed Motion for Attorneys' Fees, Expenses and Incentive Award ("Motion").

8 Class Counsel and the Class Representative respectfully request that the Court grant the
9 Motion and award the requested attorneys' fees, expenses, and incentive award on the grounds
10 that these payments are fair and reasonable in light of the efforts and risk borne by Class Counsel
11 and the Class Representative.

12 This Motion is based upon this Notice of Motion and Motion, the accompanying
13 Memorandum of Points and Authorities in Support of Plaintiff's Unopposed Motion for
14 Attorneys' Fees, Expenses, and Incentive Award, the supporting Declaration of Zev B. Zysman,
15 the supporting Declaration of Lynette Fliegelman, the records and files in this action, and upon
16 such further and additional papers and argument as may be presented herein.

17 Dated: October 17, 2018

LAW OFFICES OF ZEV B. ZYSMAN, APC

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21 By: 

Zev B. Zysman

22 *Attorneys for Plaintiff and the*
23 *Proposed Settlement Class*
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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF VENTURA**

10 LYNETTE FLIEGELMAN, on behalf of herself)
11 and all others similarly situated,)

12 Plaintiffs)

13 vs.)

14 THE TALBOTS, INC and DOES 1 through)
15 100, inclusive,)

16 Defendants.)
17)
18)

CASE NO 56-2018-00513611-CU-BT-VTA

**MEMORANDUM OF POINTS AND
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1 **I. INTRODUCTION**

2 Plaintiff Lynette Fliegelman (“Plaintiff”), through her counsel, respectfully submits this
3 memorandum in support of Plaintiff’s Unopposed Motion for an Award of Attorneys’ Fees,
4 Reimbursement of Expenses, and an Award of Incentive Fees to Plaintiff in this class action
5 against Defendant The Talbots, Inc. (hereinafter “Defendant” or “Talbots”). This case involves
6 allegations of deceptive discount pricing practices at Talbots Outlet Stores in the State of
7 California. On August 2, 2018, this Court granted Preliminary Approval of the Agreement of
8 Settlement and Release (“Settlement”) and certified the Class.¹

9 This memorandum is filed pursuant to this Court’s Order Granting Motion for
10 Preliminary Approval of Class Action Settlement and in advance of the November 30, 2018
11 deadline for Class Members to file an objection to the Settlement. *In re Mercury Interactive*
12 *Corp. Secs. Litig.*, 618 F. 3d 988, 994 (9th Cir. Cal. 2010) (requiring plaintiff’s counsel’s request
13 for an award of fees to be filed prior to the deadline for objections).

14 The Settlement is the product of months of arms-length negotiations between the Parties,
15 including a full-day mediation before the Hon. Edward A. Infante (Ret.) a highly respected and
16 experienced mediator. Under the Settlement, Talbots will **directly** and **automatically** provide a
17 Merchandise Credit in the amount of \$12.50 to approximately 88,000 individuals for whom
18 Talbots maintains either an email or postal address (i.e., known Class Members), **without** the
19 filing of any claim. In effect, Talbots has agreed to establish a Settlement Fund with a combined
20 value of at least \$1,100,000 in Merchandise Credits (equaling 88,000 Merchandise Credits
21 valued at \$12.50 per Merchandise Credit). Separate and independent from the Settlement Fund,
22 Talbots has agreed to distribute a \$12.50 Merchandise Certificate to each other Class Member
23 whose contact information is not known by Defendant and who timely submits a valid claim.
24 The Parties have streamlined the claims process which is not onerous.

25
26
27 ¹ The memorandum incorporates by reference the definitions in the Agreement of Settlement and
28 Release (the “Agreement” or “Settlement”) filed with the Court on July 5, 2018. All capitalized
terms used herein, shall refer to, and have the same meaning, as those used in the Settlement
unless otherwise indicated.

1 Thus, at minimum, the Settlement provides a direct benefit to the Class in the amount of
2 \$1,100,000, and such a minimum amount is exclusive of attorney's fees, litigation costs, costs of
3 notice, and claims administration. The overall value of the Settlement to the Class could be
4 much more based on the number of additional claims filed.

5 The Settlement also provides that Talbots will pay Class Counsel a total amount of
6 \$325,000 in attorneys' fees and costs and incentive award payment to the Class Representative in
7 an amount of \$3,000. *See* Settlement at §§2.3-2.4. The Parties negotiated a fair and reasonable
8 amount of attorneys' fees and expenses to be paid to Class Counsel and a reasonable incentive
9 award to be paid to the Class Representative only *after* reaching agreement as to all other
10 compensation terms with the direct assistance of Judge Infante. Critically, the award of
11 attorneys' fees, costs, and incentive award *will not* decrease the amounts awarded to the Class as
12 such amounts are to be paid *separate and apart* from the Class benefit. To date, *no* Class
13 Member has objected to the requested fees and expenses and incentive award which was fully
14 disclosed in the Class Notices.

15 Class Counsel now seeks an award of attorneys' fees and costs in the amount of
16 \$325,000. The requested fees and costs are reasonable and appropriate under a
17 lodestar/multiplier analysis because: the requested fees alone are *less* than Class Counsel's actual
18 lodestar of \$327,025 and represents a *negative multiplier*; and the requested fees are fair and
19 commensurate with the nature of the suit, the amount of effort involved, the skill shown by
20 experienced Class Counsel, the work involved in prosecuting this matter, and the excellent
21 results obtained for the Class in the face of legal uncertainty.

22 Awarding fair compensation to Class Counsel for bringing this action to enforce
23 important public policy signals to industry watchers and retailers state-wide that price
24 comparison policies must be fair and not misleading. Given the risks undertaken, as well as the
25 benefits achieved, Class Counsel is entitled to be appropriately compensated.

26 The California Supreme Court requires market rate compensation for attorneys who
27 undertake the risk of contingent, public interest litigation. Class Counsel seeks an attorney's fee
28

1 award of \$314,711.03, litigation costs in the amount of \$10,288.97, and payment to the Class
2 Representative of \$3,000. These requests are supported by well-established California precedent
3 and recognize Class Counsel's hard work, efficiency, and success throughout this litigation.
4 Moreover, the requested awards are fair and reasonable based on the complexity, risk and result
5 obtained as well as the Class Representative's effort and dedication to the litigation.

6 For all of the reasons set forth below and in the Declaration of Zev B. Zysman in Support
7 of Plaintiff's Unopposed Motion for an Award of Attorneys' Fees, Expenses and Incentive
8 Award ("Zysman Decl."), Plaintiff's and Class Counsel's requests for attorneys' fees, costs, and
9 incentive award are each reasonable under California law and should be granted.

10 **II. SUMMARY OF LAW, FACTS, AND PROCEDURAL HISTORY**

11 This case is a putative class action brought on behalf of consumers for Talbots' deceptive
12 and misleading labeling and marketing of merchandise it sells at its company-owned Talbots
13 Outlet Stores. Specifically, Plaintiff alleged that the vast majority of the clothing and other items
14 sold at Talbots Outlet Stores in California are manufactured for, and sold exclusively by, those
15 Outlet Stores, and are not discounted merchandise at all. Such clothing and items were never
16 offered to the public at Talbots' mainline retail stores (or at its Outlet Stores) at the prices
17 represented by Talbots at its Outlet Stores as original and/or regular prices (the "Reference
18 Prices"). Thus, Plaintiff contended that the purported mark-down was illusory.

19 Plaintiff also accuses Talbots of taking advantage of the fact that "factory outlets" are
20 commonly understood by the public to be selling the same merchandise that the manufacturer
21 typically sells at its retail stores, but at a discount. Indeed, according to the Business Insider,
22 "[t]he common assumption about outlet stores is that you're getting the same goods that are in a
23 regular retail store without the big price tag." [http://www.businessinsider.com/outlet-stores-](http://www.businessinsider.com/outlet-stores-arent-a-good-deal-2014-5)
24 [arent-a-good-deal-2014-5](http://www.businessinsider.com/outlet-stores-arent-a-good-deal-2014-5).

25 Plaintiff alleges Talbots Outlet Stores typically sell *different* merchandise than their retail
26 counterparts, without informing customers of such and without ever having sold the items at a
27 higher price, thus rendering the purported "sale" price illusory. Indeed, the Federal Trade
28

1 Commission ("FTC") issued a warning in March 2014 expressing concern that merchandise sold
2 at outlet stores is sometimes manufactured exclusively for the outlets and may be of inferior
3 quality than that sold in non-outlet or non-factory store locations. See [https://www.ftc.gov/news-](https://www.ftc.gov/news-events/press-releases/2014/03/ftc-advice-how-shop-wisely-outlet-malls)
4 [events/press-releases/2014/03/ftc-advice-how-shop-wisely-outlet-malls](https://www.ftc.gov/news-events/press-releases/2014/03/ftc-advice-how-shop-wisely-outlet-malls).

5 While the FTC felt that the need to warn customers about the different, inferior products
6 sold at outlet stores or factory stores, Plaintiff claims Talbots took advantage of the
7 misconceptions about outlets and falsely compared, directly or by implication, its inferior outlet
8 products to its higher-end retail products sold in order to induce customers to purchase
9 "discounted" products at the Reference Price.

10 The core of Plaintiff's allegations is distilled as follows: virtually no clothing piece or any
11 other item sold in Talbots Outlet Stores is ever offered or sold by Talbots at the higher Reference
12 Price, but rather is always sold at a purported discount from that price. As such, Plaintiff further
13 alleges that the "Reference Prices" did not, and could not, constitute the prevailing market retail
14 prices within three (3) months immediately preceding the publication of the advertised former
15 prices, as required by California law. And, at bottom, having touted false Reference Prices,
16 Plaintiff claims, Talbots was able to deceive the public into believing that items purchased at
17 Talbots Outlet Stores were a bargain when, in fact, they were not.

18 Through the above actions, Plaintiff alleges Talbots violated California's Business &
19 Professions Code §§17200, *et seq.* (the "UCL"), California's Business & Professions Code
20 §§17500, *et seq.* (the "FAL"), and the California Consumers' Legal Remedies Act, California
21 Civil Code §§1750, *et seq.* (the "CLRA"), and the Federal Trade Commission Act ("FTCA"),
22 which prohibits "unfair or deceptive acts or practices in or affecting commerce" (15 U.S.C.
23 §45(a)(1)) and false advertisements. 15 U.S.C. §52(a).

24 **A. Law Related to Pricing**

25 Plaintiff's allegations of deception have not gone overlooked by Congress or the
26 California legislature. As set forth in the Code of Federal Regulations, as promulgated by
27 the FTC:
28

1 (a) One of the most commonly used forms of bargain advertising is to offer a
2 reduction from the advertiser's own former price for an article. If the former price
3 is the actual, bona fide price at which the article was offered to the public on a
4 regular basis for a reasonably substantial period of time, it provides a legitimate
5 basis for the advertising of a price comparison. Where the former price is genuine,
6 the bargain being advertised is a true one. If, on the other hand, the former price
being advertised is not bona fide but fictitious – for example, where an artificial
price, inflated price was established for the purpose of enabling the subsequent
offer of a large reduction – the “bargain” being advertised is a false one; the
purchaser is not receiving the unusual value he expects. In such a case, the
“reduced” price is, in reality, probably just the seller's regular price.

7 (b) A former price is not necessarily fictitious merely because no sales at the
8 advertised price were made. The advertiser should be especially careful, however,
9 in such a case, that the price is one at which the product was openly and actively
10 offered for sale, for a reasonably substantial period of time, in the recent, regular
11 course of her business, honestly and in good faith – and, of course, not for the
12 purpose of establishing a fictitious higher price on which a deceptive comparison
13 might be based.

14 16 C.F.R. §233.1.

15 In addition, under California Business and Professions Code Section 17501, entitled
16 “*Value determinations; Former price advertisement*,” when a retailer presents purported reduced
17 “sale” prices and compares those prices to former, “original” prices, the purported “original” or
18 “market” price must have been the prevailing market retail price of the article so advertised
19 within the three months next immediately preceding the publication of the advertised former
20 prices. Specifically, Business and Professions Code Section 17501 states: “[N]o price shall be
21 advertised as a former price of any advertised thing, unless the alleged former prices was the
22 prevailing market price...within three months next immediately preceding the publication of the
23 advertisement or unless the date when the alleged former price did prevail is clearly, exactly, and
24 conspicuously stated in the advertisement.” Cal. Bus. & Prof. Code § 17501. Similarly, the
CLRA prohibits “[a]dvertising goods or services with intent not to sell them as advertised,” and
“[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts
of price reductions”. Cal. Civ. Code §§1770(a)(9), (a)(13).

25 The unlawful practice described above has caused a growing concern for consumer
26 watchdogs. In early 2014, four members of Congress wrote a letter to the FTC requesting that the
27 agency look into claims that merchants may be selling lower quality items produced specifically
28 for their outlet stores without properly informing consumers about the difference between those

1 items and the higher-quality products found in regular retail stores. *See*
2 [www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-](http://www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-consumers)
3 [consumers.](http://www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-consumers)

4 **B. Discovery and Investigation Conducted**

5 From the outset of this Action, Plaintiff's Counsel conducted an extensive investigation
6 and independent research regarding the underlying facts. Zysman Decl. at ¶¶5-6. Moreover,
7 Plaintiff's Counsel engaged in extensive informal discovery with respect to the facts and law at
8 issue in this Action. *Id.* Thereafter, once the Parties opted to explore resolution of this Action
9 through private mediation, Talbots provided Plaintiff's Counsel with additional information
10 through which they were able to evaluate and analyze the prospects for settlement. *Id.*

11 Specifically, Plaintiff's Counsel was provided with transactional information spanning
12 the Class Period concerning, *inter alia*, the: (i) total number of transactions completed at Talbots
13 Outlet Stores in California; (ii) total number of Class Members for whom Talbots is able to
14 identify in those transactions; and (iii) approximate percentage of Talbots Outlet Products which
15 were previously offered in Talbots mainline retail stores. Zysman Decl. at ¶6. Moreover,
16 Plaintiff was provided with detailed information concerning Talbots' outlet and retail pricing
17 practices relevant to its exclusive branded products sold in its outlet and retail stores and
18 modification of its pricing policies following the filing of the Action. *Id.*

19 In addition to the foregoing, Plaintiff's Counsel also continued to research and monitor
20 decisions issued by various state and federal courts addressing the issues in this Action. *See*
21 Zysman Decl. at ¶6. Likewise, Plaintiff's Counsel continued to investigate the issues underlying
22 the claims in this matter, which included an analysis of consumer behavior as applied to price
23 discounting, and an assessment of available methodologies to estimate damages suffered by the
24 Class as a result of Talbots' conduct. *Id.*

25 **C. Mediation Before The Hon. Edward A. Infante (Ret.) of JAMS**

26 On November 1, 2017, the parties attended an all-day mediation with the Hon. Edward A.
27 Infante (Ret.) of JAMS in San Francisco. Class Counsel provided the mediator with Plaintiff's
28

1 detailed confidential mediation statement, which included an analysis of the evidence and
2 discovery, the relevant case law, and a proposed settlement structure. At the close of the
3 mediation, the Parties reached an agreement on settlement terms; and, over the following
4 months, worked to finalize the Settlement consistent with terms agreed upon at the mediation.
5 Each aspect of this Settlement was vigorously negotiated, including the distribution scheme of
6 the Merchandise Credits, and their specifications, and the Class Notices. The Parties
7 subsequently drafted and executed the Agreement currently before the Court. Zysman at ¶7.

8 **D. Entry of Order Granting Preliminary Approval of the Settlement**

9 On August 2, 2018, the Parties appeared before the Court on their motion for preliminary
10 approval of the Settlement, which the Court granted. *Id.*

11 **III. SETTLEMENT TERMS**

12 The Settlement resolves all claims of Plaintiff and the Class against Talbots related to the
13 alleged false advertising at its California Outlet locations; thus, the Settlement resolves all claims
14 alleged by Plaintiff and the Class including: (i) violations of the UCL; (ii) violations of the FAL;
15 and (iii) violations of the CLRA based on the allegations made in the operative Complaint. A
16 summary of the Settlement terms are as follows:

17 **A. Class Definition** – The Settlement Class is defined as follows:

18 All persons who, during the period of time beginning May 17, 2013 through
19 August 2, 2018, purchased one (1) or more products at any Talbots outlet store in
the State of California and did not receive a refund or credit for their purchase(s).

20 *See* Settlement at §1.8.

21 **B. Class Benefit** – Talbots will provide a benefit to the Class in two (2) ways. First,
22 for all known Class Members, Talbots shall **directly** provide a Merchandise Credit for \$12.50 off
23 any purchase (no minimum purchase requirement). *See* Settlement at §1.2 and §§2.1-2.2. This
24 Class Benefit will be **automatically** emailed or mailed to all known Class Members without the
25 need to file **any** Claim Form. *Id.* at §3.3(b)-(c) and §3.5(a). Thus, notwithstanding the number of
26 claims made, the Settlement provides an estimated benefit directly to approximately 88,000
27 known Class Members, whose contact information Talbots already has. In effect, Talbots has
28

1 agreed to establish a Settlement Fund with a combined value of at least \$1,100,000 in
2 Merchandise Credits (equaling 88,000 Merchandise Credits valued at \$12.50 per Merchandise
3 Credit). *See* Settlement at §1.31. This benefit is the actual benefit that will be received, and will
4 not be diminished by attorneys' fees, litigation costs, and costs of notice and claims
5 administration.

6 Second, separate and independent from the Settlement Fund, Talbots has agreed that for
7 those members of the Class for whom Talbots does not maintain an email or residential address
8 in its databases, such individuals will be able to make a claim via submission of a valid Claim
9 Form. *See* Settlement at §§1.31, 3.5(b). The Parties have streamlined the claims process which is
10 not onerous. These individuals shall also receive a \$12.50 Merchandise Credit. *Id.*

11 The Merchandise Credits are an alternative to cash, and are not a coupon as Class
12 Members are able to use the Merchandise Credits *without* having to pay out of pocket for that
13 product since there is *no minimum purchase requirement*. In fact, there are hundreds of
14 products sold at Talbots Outlet Stores for less than \$12.50 which can be acquired absolutely free
15 by use of the Merchandise Credits. Moreover, the Merchandise Credits are freely transferable,
16 expire after six (6) months, are fully stackable (*i.e.*, may be added together), and can be used
17 with other discounts and promotions, and on items that are on sale or otherwise discounted at any
18 Talbots Outlet Store in California. *See* Settlement at §1.34.

19 In addition to the benefit to the Class, Talbots has agreed to pay for all costs associated
20 with class notice and distribution of the Merchandise Credits (*see* Settlement at §2.7), attorneys'
21 fees and litigation costs (*id.* at §2.4), and Plaintiff's Individual Award (*id.* at §2.3). Critically, all
22 such costs are being paid *separate and apart* from the Class benefit; and thus, will *not* decrease
23 the ultimate amount awarded to the Class.

24 **C. Release of Claims** – Each Class Member (except those who submit a timely and
25 valid request for exclusion) shall fully release Talbots and the other Released Parties as follows:

26 all manner of action, causes of action, claims, demands, rights, suits, obligations,
27 debts, contracts, agreements, promises, liabilities, damages, charges, penalties,
28 losses, costs, expenses, and attorneys' fees, of any nature whatsoever, in law or
equity, fixed or contingent, which they have or may have, arising out of or

1 relating to any of the acts, omissions or other conduct that have or could have
2 been alleged or otherwise referred to in the Complaint, or any preceding version
3 thereof filed in the Action, including, but not limited to, any and all claims related
in any way to the advertisement of prices, discounts, and/or related promotions in
Talbots' outlet stores in California from the beginning of the Class Period to the
date of the Final Order and Judgment.

4 See Settlement at §1.10 and §2.8. Further, Plaintiff shall waive all rights and benefits afforded by
5 section 1542 of the Civil Code as to their claims. See Settlement at §2.9.

6 The Parties submit that the Class Released Claims are appropriate as they are narrowly
7 tailored to the claims at issue in this Action, limited to only those claims that arose during the
8 pendency of this Action, and do not release any claims for which Class Members are not
9 receiving consideration.

10 **IV. CLASS COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES**
11 **AND EXPENSES AS PROVIDED FOR BY THE SETTLEMENT SHOULD BE**
12 **APPROVED**

13 **A. The Amount of Attorneys' Fees Was Negotiated Only After An Agreement**
14 **Was Reached On All Class Compensation and Notice Terms**

15 Litigants should be encouraged to resolve fee issues by agreement. See, e.g., *Hanlon v.*
16 *Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1988); *Malchman v. Davis*, 761 F.2d 893, 905 n.5
17 (2d Cir. 1985) (recognizing "[a]n agreement 'not to oppose' an application for fees up to a point
18 is essential to completion of the settlement, because the defendants want to know their total
19 maximum exposure and the plaintiffs do not want to be sandbagged."), *cert. denied*, 475 U.S.
20 1143 (1986), *abrogated on other grounds sub nom Amchem Prods., Inc. v. Windsor*, 521 U.S.
21 591, 614 (1997).

22 The United States Supreme Court has indicated that ideally a request for attorneys' fees
23 should not result in a "second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).
24 Accordingly, courts are authorized to award attorneys' fees and expenses where all parties have
25 agreed to the amount, subject to court approval, particularly where the amount is *in addition and*
26 *separate* from the defendant's settlement with the class. See *Local 56, United Food &*
27 *Commercial Workers Union v. Campbell Soup Co.*, 954 F. Supp. 1000, 1005 (D.N.J. 1997)
28 (granting class counsel the maximum amount of fees agreed to by the defendant under the
settlement agreement where 'class members ... retain all that the settlement provides [and] they

1 do not lose any of the negotiated benefits on account of an attorneys' fee and costs award that
2 equals the cap on such an award set forth in the settlement.""). That is the approach which has
3 been taken here and it is quite reasonable under the circumstances. The fee award sought is a
4 **stipulated amount**, and agreed to after extensive negotiations, with the direct assistance of Judge
5 Edward Infante of JAMS.

6 The Parties agree that the negotiated amount of \$325,000 in attorneys' fees and expenses
7 is extremely fair and reasonable in light of Class Counsel's efforts in this case. Consistent with
8 the *Manual for Complex Litigation*, the Parties negotiated the agreed-upon attorneys' fees and
9 costs only **after** negotiating and reaching an agreement as to all other material terms of the
10 settlement, including all class compensation. See *Manual for Complex Litigation*, ¶ 21.7 (4th Ed.
11 2004) ("Separate negotiation of the class settlement before an agreement on fees is generally
12 preferable.") The interests of the Class are promoted by a fee that is negotiated after all class
13 compensation. By deferring the fee negotiation until that time, Class Counsel aligned their
14 interests with the interests of the Class. Once all the material terms of the Settlement were
15 agreed to, Defendant had every incentive to negotiate as low a fee as possible to decrease its
16 overall costs.

17 Here, the resulting agreed-upon attorneys' fees and expense amount is the product of a
18 non-collusive adversarial negotiation, with the assistance of Judge Infante, taking into
19 consideration Class Counsel's prior and future efforts, and the excellent results achieved.
20 Defendant was represented by highly-skilled lawyers from a nationwide law firm who are very
21 experienced in this type of consumer litigation, have litigated on the defense side for many years
22 and are aware of fees paid in other actions of a similar nature. In agreeing to pay \$325,000,
23 Defendant also considered the possibility that Class Counsel might apply for and receive a much
24 larger award, especially in the event of any objection or appeal of the settlement, which would
25 necessarily lead to additional protracted litigation and efforts by Class Counsel to defend the
26 settlement. Rather than take these risks, Defendant agreed to pay the amount of \$325,000,
27 subject to this Court's approval.

1 Class Counsel submits that the requested fees are more than reasonable under the
2 circumstances, reflects an arm's-length compromise, and should be granted approval by the
3 Court.

4 **B. Class Counsel is Entitled to Fees Based on the Proposed "Released" Claims**

5 Under the terms of proposed Settlement, more specifically the release of claims, Talbots
6 shall receive a release of all claims which were, or which could have been, alleged in the Action.
7 This release includes, *inter alia*, violations of the CLRA which entitles Class Counsel to recover
8 attorneys' fees and costs as the prevailing party. *See* Cal. Civ. Code. §1780(d) ("The court *shall*
9 award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this
10 section"); *see also* Cal. Civ. Code. §1794(d).

11 While the CLRA does not define "prevailing plaintiff," the trend is toward a "pragmatic
12 approach" that determines prevailing party status "based on which party succeeded on a practical
13 level." *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 150 (2006); *Kim v.*
14 *Euromotors West*, 149 Cal. App. 4th 170, 179 (2007).

15 Thus, based upon the Settlement, which has already been preliminary approved, Plaintiff
16 qualifies as "prevailing plaintiff" under the CLRA and is entitled to fees.

17 **C. Fees are Warranted Under the Private Attorney General Doctrine**

18 Under the private attorney general doctrine, codified at Code of Civil Procedure §1021.5,
19 attorneys' fees are awarded in cases that enforce rights affecting public policies:

20 The fundamental objective of section 1021.5 is to encourage suits effectuating a
21 strong public policy by awarding substantial attorney's fees to those who
22 successfully bring such suits. The statute is based on the recognition that privately
initiated lawsuits are often essential to the effectuation of the fundamental public
policies embodied in constitutional or statutory provisions.

23 *California Common Cause v. Duffy*, 200 Cal. App. 3d 730, 741 (1987).

24 Successful litigants are entitled to fees under Section 1021.5 when the litigants' efforts:
25 (1) have enforced an important right affecting the public interest; (2) have conferred a significant
26 benefit on the general public or a large class of persons; and (3) have imposed a financial burden
27 on the plaintiff out of proportion to his individual stake in the matter. *Baggett v. Gate*, 32 Cal. 3d
28

1 128, 142 (1982). Each element is satisfied here.

2 Under Section 1021.5, the decision to award attorneys' fees is left to the sound discretion
3 of the trial court. *See Vasquez v. State of California*, 45 Cal.4th 243, 251 (2008). Absent
4 circumstances rendering the award unjust, fees recoverable under Section 1021.5 ordinarily
5 include compensation for "all hours reasonably spent..." not just those spent on successful
6 theories. *See Sundance v. Municipal Court*, 192 Cal.App.3d 268, 273 (1987) (citation omitted).
7 The rationale being that it is impossible for an attorney to determine before starting work on a
8 potentially meritorious legal theory whether it will or will not pan out.

9 **1. The Action Enforced Important Rights and Public Policy**

10 The "important right" criterion in California Code of Civil Procedure § 1021.5 tests
11 whether "the subject matter of the action implicated the public interest." *Beasley v. Wells Fargo*
12 *Bank*, 235 Cal. App. 3d 1407, 1418 (1991). Consumer protection litigation has long been
13 judicially recognized to be vital to the public interest." *Id.* at 1418 (*citing Vasquez v. Superior*
14 *Court*, 4 Cal. 3d 800, 808 (1971)).

15 **2. The Action Conferred Benefits on a Large Class of Persons**

16 The benefits this Action conferred on a sizeable class are beyond dispute. Under the
17 Settlement, Talbots will directly and automatically provide a Merchandise Credit in the amount
18 of \$12.50 to approximately 88,000 known Class Members. In addition, Store Notice will be
19 provided to allow all other customers who may have shopped at Talbots Outlet stores in the
20 Class Period to file a straightforward claim for the \$12.50 Merchandise Certificate, with no proof
21 of purchase. Thus, at minimum, the Settlement will provide a direct benefit to the Class of
22 \$1,100,000, net of attorney's fees, litigation costs, and costs of notice and claims administration,
23 and potentially more depending on the number of additional claims filed.

24 That the Settlement directly provides relief, again without the need to file a claim, to
25 approximately 88,000 individuals, Plaintiff and Class Counsel have more than satisfied the
26 "large persons" element under Section 1021.5. *See Graham v. DaimlerChrysler Corp.*, 34 Cal.
27 4th 553, 561 (2004) (only 1,000 subject vehicles sold to California consumers satisfied the "large
28

persons” requirement of Section 1021.5).

3. *The Burden of Private Enforcement Justifies a Fee Award*

The “financial burden” criterion of Section 1021.5 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.” *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal. 3d 917, 941 (1979); *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors*, 79 Cal. App. 4th 505, 519 (2000) (“The issue, in short, is whether the cost of litigation is out of proportion to the litigant’s stake in the litigation.”); *Notrica v. State Compensation Ins. Fund*, 70 Cal. App. 4th 911, 955 (1999).

From its inception, this Action has been prosecuted as a class action. It was *not* brought for the exclusive benefit of an individual plaintiff – given its costs, no rational person would have done that – but to benefit the tens of thousands of individuals who Plaintiff alleges may have been deceived by the discount pricing policies alleged. The burden of prosecuting this Action was wholly out of proportion to the financial stake of the Plaintiff, as the amount of her potential recovery was dwarfed by the mere filing fees of the litigation alone.

Indeed, it is the low-recovery per individual case (such as this one) that Section 1021.5 was intended to apply: “the doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney’s fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.” *Woodland Hills*, 23 Cal.3d at 933. Thus, Class Counsel is entitled to attorneys’ fees and costs pursuant to Section 1021.5.

4. *Injustice Would Occur If Attorneys’ Fees Were Not Awarded*

Over the course of this litigation, Class Counsel has been working on a purely contingent basis and has not been compensated by Plaintiff or the Class for their efforts. *See Zysman Decl.* at ¶11. During this time, class action litigation, and particularly the case law under the

1 applicable statutes alleged, has evolved and Class Counsel has had to continually pivot, adjust,
2 and adapt to these changes which, in turn, required Class Counsel to constantly revise the
3 strategy so as to continue with the case. *Id.*

4 It would have been easy for Class Counsel to either dismiss or settle this case
5 individually instead of continuing to litigate this matter. At the onset of this case, however,
6 Class Counsel undertook an obligation to represent Plaintiff and the Class vigorously and, due to
7 their relentless fervor, accomplished a fair, adequate, and reasonable Settlement. *Id.*

8 Class Counsel has diligently litigated this Action on behalf of the Class. In doing so,
9 Class Counsel has expended more than 515 hours and \$10,288.97 in costs. *See Zysman Decl.* at
10 ¶¶5, 12, 32. The class action mechanism is a necessary and useful device to provide redress for
11 numerous individuals who could not realistically maintain separate actions. If a court failed to
12 award attorneys' fees in actions such as this, there would be no enforcement of consumer
13 protection statutes like those at issue here.

14 **V. CLASS COUNSEL IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES IN**
15 **THE AMOUNT OF \$314,711.03**

16 To accomplish the objective set forth in *Woodland Hills*, courts are in agreement that the
17 fee award must be large enough "to entice competent counsel to undertake difficult public
18 interest cases." *San Bernardino Valley Audubon Society v. County of San Bernardino*, 155
19 Cal.App.3d 738, 755 (1984). Accordingly, in light of the risks and delays involved in contingent
20 class action litigation, California courts "recognize two methods for calculating attorneys' fees in
21 civil class actions: the lodestar/multiplier method and the percentage of the recovery method."
22 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001); *see also Lealao*, 82
23 Cal.App.4th at 49-50. The method to be used depends on whether the case involves "fee shifting"
24 or "fee spreading."

25 Fee shifting cases are those in which the obligation to pay attorneys' fees is statutorily or
26 otherwise transferred from the plaintiffs or class to the Defendants and is paid separate from the
27 class recovery. In fee spreading cases, a separate or "common fund" is established for the benefit
28

1 of the class; attorneys' fees are paid out of the common fund and are calculated as a percentage
2 of the class recovery. *Lealao*, 82 Cal.App.4th at 26-27.

3 In the absence of a common fund, and where, as here, Defendant will pay attorneys' fees
4 separately from the Class' relief, it is well established under California law that the lodestar-
5 multiplier method is the appropriate method for calculating attorneys' fees in civil class actions
6 similar to this case. See *Ketchum v. Moses*, 24 Cal.4th 1122, 1137 (2001); *Consumer Privacy*
7 *Cases*, 175 Cal.App.4th 545, 556-57 (affirming that the lodestar approach was properly used to
8 calculate attorneys' fees in consumer privacy cases); *Robertson v. Fleetwood Travel Trailers of*
9 *California, Inc.*, 144 Cal.App.4th 785, 818-19 (2006) (holding that the lodestar method, as the
10 prevailing rule for calculation of statutory attorneys' fees, apply to cases under the Song-Beverly
11 Consumer Warranty Act); *Wershba*, 91 Cal.App.4th at 254.

12 Under the lodestar-multiplier method, the lodestar is calculated by multiplying the reasonable
13 hours expended by a reasonable hourly rate, which is then enhanced by an appropriate multiplier. *Id.*
14 Class Counsel is entitled to recover fees for all hours reasonably spent working on the case.
15 *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1175 (1998) ("the attorney who takes such a
16 [complex] case can anticipate receiving full compensation for every hour spent litigating a claim
17 against even the most polemical opponent.").

18 **A. The Requested Fee is Appropriate Under a Lodestar-Multiplier Analysis**

19 The predominance of the lodestar method for calculating attorneys' fees in private
20 attorney general cases was first established in 1977 in *Serrano v. Priest*, 20 Cal.3d 25 (1977). In
21 *Serrano*, the California Supreme Court held that the starting point for determining the amount of
22 attorneys' fees under the private attorney general doctrine begins by determining the "lodestar"
23 amount. The "lodestar" is calculated by multiplying the time spent by the reasonable hourly
24 compensation for the attorney involved in the presentation of the case. *Serrano III*, 20 Cal. 3d at
25 48, n.23; see also *Maria P. v. Rile*, 43 Cal. 3d 1281, 1294 (1987); *Vo v. Las Virgenes Municipal*
26 *Water District*, 79 Cal. App. 4th 440, 445 (2000). In addition, the "lodestar" should normally
27 include out-of-pocket expenses of the type normally billed by an attorney to a fee-paying client.
28

1 *Bussey v. Affleck*, 225 Cal.App.3d 1162, 1166 (1990); *Guinn v. Dotson*, 23 Cal.App.4th 262, 271
2 (1994); *Beasley v. Wells Fargo Bank*, 235 Cal.App.3d 1407, 1419-22 (1991). The “lodestar”
3 should also include time spent on the fee application itself. *Serrano v. Unruh*, 32 Cal.3d 621,
4 632-38 (1982). As explained below, the requested amount of \$325,000.00 in attorneys’ fees and
5 costs to Class Counsel is clearly reasonable and should be awarded without reduction.

6 **B. The Requested Fees Reflects Class Counsel’s Lodestar with No Multiplier**

7 Class Counsel requests an attorney’s fee award of \$314,711.03. This is less than Class
8 Counsel’s actual lodestar to date which is \$327,025. Under California law, in order to determine
9 whether a fee award is reasonable, the Court may perform a lodestar-multiplier analysis. The
10 lodestar-multiplier method begins with a calculation of time spent and reasonable hourly
11 compensation of each attorney and paralegal who worked on the case. Then to compensate
12 counsel for risk, quality, and result, courts commonly apply a “multiplier” to the lodestar in
13 awarding attorneys’ fees.

14 **1. Class Counsel’s Hourly Rates are Reasonable**

15 Under the lodestar method, reasonable hourly rates are determined by “prevailing market
16 rates in the relevant community” which are the rates a lawyer of comparable skill, experience
17 and reputation could command in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 895
18 (1984). Ordinarily, reasonable hourly rates are based on each attorneys’ current hourly rates.
19 *Vizcaino. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir, 2002) (“[c]alculating fees at [current
20 hourly rates] . . . compensate[s] for delay in receipt of payment”); *WPPSS*, 19 F.3d at 1305 (“The
21 district court has discretion to compensate delay in payment in one of two ways: (1) by applying
22 the attorneys’ current rates to all hours billed during the course of the litigation; or (2) by using
23 the attorneys’ historical rates and adding a prime rate enhancement.”). The relevant community
24 is that in which the court sits, in this case Southern California. *Schwarz v. Sec’y of Health &*
25 *Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995). Class Counsel’s current rates are therefore
26 reasonable if they are in line with the prevailing rates for other attorneys practicing complex
27 litigation in Southern California.

1 An attorneys' actual billing rate for similar work is presumptively appropriate. *See*
2 *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996). Declarations by
3 counsel are sufficient to evidence the reasonable hourly rate. *See Wershba v. Apple Computer,*
4 *Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also United Steelworkers of Am. v. Phelps Dodge*
5 *Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) ("Affidavits of the plaintiffs' attorney and other
6 attorneys regarding prevailing fees in the community, and rate determinations in other cases,
7 particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the
8 prevailing market rate."). "Courts also frequently use survey data in evaluating the
9 reasonableness of attorneys' fees." *B-K Lighting, Inc. v. Vision3 Lighting*, No. CV 06-0285
10 MMM (PLAx), 2009 WL 3838264, at *5 (C.D. Cal. Nov. 16, 2009) (citing *Mathis v. Spears*, 857
11 F.2d 749, 755-56 (9th Cir. 1988)). Class Counsel's request satisfies all of the foregoing criteria.

12 Class Counsel calculated its lodestar using a billing rate of \$635.00 per hour.² Zysman
13 Decl., ¶¶15-16. No paralegal, secretarial, administrative or other staff time is being billed.
14 Zysman Decl., ¶5.

15 Class Counsel's rate is in line with the rates prevailing in the community for similar
16 services of lawyers of reasonable comparable skill and reputation, and is appropriate given the
17 deferred and contingent nature of counsel's compensation. Zysman Decl., ¶¶ 17-19. All of the
18 matters undertaken by Class Counsel's firm are class actions. Mr. Zysman has been practicing
19 for more than 23 years and has been lead counsel in numerous successful consumer class actions.
20 Zysman Decl., ¶16.

21 Class Counsel's hourly rates have been approved by other judges in Southern California,
22 including Ventura, and awarded in numerous other fee awards. For example, on June 1, 2016, in
23 a consumer class action entitled *Furman v. Station Casinos LLC, et al.*, Case No. 56-2013-
24 00446134-CU-BT-VTA, pending in Ventura County Superior Court, Judge Vincent J. O'Neill

25
26 ² While the use of current hourly rates is appropriate because it accounts for the time value of
27 money where, as here, Class Counsel have *not* been paid contemporaneously with their work on
28 this case (*See, e.g., In re Petroleum Prod. Antitrust Litig.*, 109 F.3d 602, 609 (9th Cir. 1997)), for
the purpose of this Motion, Class Counsel relies on the lower rates in effect in **2017** when the
case was initiated

1 approved Class Counsel's hourly rate which is the *same* as the rate charged here. Zysman Decl.,
2 ¶ 20 and Ex. 2 thereto.

3 Moreover, on March 18, 2014, in a consumer class action entitled *Brown v. Defender*
4 *Security, Co.*, Case No. 12-cv-07319-CAS, pending in Los Angeles in the Central District of
5 California, District Judge Christina A. Snyder approved Class Counsel's hourly rate which is the
6 *same* as the rate charged here. Zysman Decl., ¶ 21 and Ex. 3 thereto.

7 In addition, on March 27, 2013, in a consumer class action entitled *Sosinov v.*
8 *RadioShack, Corp.*, Case No. BC449675, pending in the Los Angeles Superior Court, Central
9 Civil West, Judge William F. Highberger approved Class Counsel's hourly rate which is the
10 *same* as Class Counsel is seeking here. Zysman Decl., ¶ 22 and Ex. 4 thereto.

11 In addition, on February 7, 2012, in a consumer class action entitled *Pomerants v.*
12 *Skechers U.S.A. Inc.*, Case No. BC436360, pending in the Los Angeles Superior Court, Central
13 Civil West, Judge John S. Wiley approved attorney Class Counsel's hourly rate which is the
14 *same* as Class Counsel is seeking here. Zysman Decl., ¶ 23 and Ex. 5 thereto.

15 Moreover, on December 12, 2011, in a class action entitled *Konevskya v. Tommy Bahama*
16 *Group, et al.*, Case No. BC424931, pending in the Los Angeles Superior Court, Central Civil
17 West, Judge Jane L. Johnson approved attorney Class Counsel's hourly rate which is the *same* as
18 the rate charged here. Zysman Decl., ¶ 24 and Exs. 6-7 thereto.

19 Further, on June 27, 2011, in a consumer class action entitled *Burcham v. Welch Foods,*
20 *Inc.*, Case No. CV-10-01427-AHM, pending in Los Angeles in the Central District of California,
21 District Judge A. Howard Matz approved Class Counsel's attorney hourly rate which is the *same*
22 as the rate charged here. Zysman Decl., ¶ 25 and Ex. 8 thereto.

23 Additionally, on September 23, 2008, in a consumer class action entitled *Brand v. Simple*
24 *Tech, Inc.*, Case No. BC360001, pending in Los Angeles Superior Court, Judge William F.
25 Fahey approved Class Counsel's hourly rate which is similar to the rate charged here. Zysman
26 Decl., ¶ 26 and Ex. 9 thereto.

27 ///

1 Further, rates which are comparable to the rates sought here by Class Counsel have been
2 approved by courts in numerous other fee awards in Southern California. As far back as 2005,
3 the court in *Housing Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320738, at *2 (C.D.
4 Cal. Nov. 1, 2005) noted that hourly rates of up to \$650 per hour were routine in Los Angeles at
5 that time. In 2007, the court in *Love v. Mail on Sunday*, No. CV 05-7798 ABC (PJWx), 2007
6 WL 2709975, at *8 (C.D. Cal. Sept. 7, 2007) approved partner rates of \$540-\$690. In 2008, the
7 court in *POM Wonderful LLC v. Purely Juice, Inc.*, No. CV 07-2633 CAS (JWJx), 2008 WL
8 4351842, at *4 (C.D. Cal. Sept. 22, 2008) approved partner rates of \$475-\$750.

9 In further support of the reasonableness of the hourly rates, Plaintiff submits sworn
10 statements by class action attorneys in other consumer class actions prior to 2006 evidencing
11 hourly rates approved by courts in Southern California at even higher rates than the rates charged
12 by Class Counsel now. Zysman Decl., ¶ 27 and Ex. 10 thereto.

13 A 2009 National Law Journal survey further confirms the rates charged by Class Counsel
14 are reasonable. See *Firm-by-Firm Sampling of Billing Rates Nationwide*, Nat'l L.J., 2009. The
15 survey establishes that other prominent firms in Southern California that regularly litigate
16 complex class action cases charge rates up to \$995 for senior partners and \$695 for associates,
17 commensurate with or exceeding the rates charged by Class Counsel. Zysman Decl., ¶ 19 and
18 Ex. 1 thereto (identifying specific law firms).

19 2. Class Counsel's Declared Hours are Reasonable

20 Under California law, every hour reasonably spent on the Plaintiffs' case is compensable:
21 "[a]bsent special circumstances rendering the award unjust, an attorney fee award should
22 ordinarily include compensation for all the hours reasonably spent, including those relating
23 solely to the fee." *Ketchum*, 24 Cal. 4th at 1133. Hours are reasonable if "at the time rendered,
24 [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his
25 client's interest." *Moore v. Jas. H. Matthews & Co.* (9th Cir. 1982) 682 F.2d 830, 839.

26 Class Counsel has spent a total of 515 attorney hours in the prosecution of this Action.
27 These hours are justified by the course of this litigation and by the results obtained. The Zysman
28

1 Decl. ¶¶ 5, 12 sets forth the tasks performed and summarizes the hours expended by Plaintiff's
2 Counsel into categories, grouping the time entries by the nature of the activity. This information,
3 coupled with the additional descriptions herein and in the Zysman Decl., is sufficient to permit
4 the Court to review the time spent.³

5 All of the time billed by Plaintiff's Counsel was legitimately incurred and is consistent
6 with a case that has been pending, litigated and resolved over a period of more than one and one-
7 half years since the original Complaint was filed and thereafter removed. At no time did
8 Defendant simply roll over or capitulate. Plaintiff's Counsel had to diligently litigate this case
9 and take all the litigation steps necessary to obtain the Settlement benefits for the Class.

10 Plaintiff's Counsel undertook tasks that were specific to this case, as described in detail
11 in the Zysman Decl. ¶¶ 6, 12, including: (1) pre-suit investigation and drafting of the original
12 Complaint, which included researching of the applicable law with respect to the claims asserted
13 therein and the potential defenses thereto; (2) drafting formal discovery requests to Defendant,
14 including special interrogatories, request for production of documents, and requests for
15 admissions; (3) reviewing Defendant's informal responses to discovery requests, and documents
16 otherwise obtained through their investigation; (4) engaging in meet and confer sessions with
17 Defendant's counsel regarding the sufficiency of the informal discovery responses and
18 production; (5) consulting with potential expert; (6) drafting PMK deposition notices regarding
19 class certification issues; purpose(s) for Defendant's discount marketing strategy at issue in this
20 case; Defendant's pricing policies, practices, and guidelines with respect to products sold at the
21 Talbots Outlet Stores, including how such policies, practices, and guidelines have changed over
22 time, actual pricing data and discount pricing data (which shows each day a product was offered
23 at a discount); effects of "reference" pricing on consumers; Defendant's knowledge of California

24 ³ It is well-settled under California law that time records are not required of class counsel to
25 support fee awards in class action cases and that declarations by counsel as to time spent are
26 sufficient. *See Concepcion v. Amscan Holdings*, 223 Cal. App. 4th 1309, 1324 (2014)
27 ("Declarations of counsel setting forth the reasonable hourly rate, the number of hours worked
28 and the tasks performed are sufficient."); *see also Wershba*, 91 Cal. App. 4th at 255 ("California
case law permits fee awards in the absence of detailed time sheets."); *see also Dunk v. Ford
Motor Co.*, 48 Cal. App. 4th 1794, 1810 (1996) (stating that lodestar calculation could be based
on counsel's estimate of time spent).

1 Business & Professions Code §17501 and 16 C.F.R. 233.1; and Defendant's efforts to comply
2 with state and federal regulations regarding advertisement of discount pricing at its Outlet Stores;
3 (7) reviewing records and data provided by Defendant relative to its pricing policies and
4 practices of exclusive branded products sold in its Outlet and Retail Stores and modification of
5 its pricing policies following the filing of the instant action; (8) preparing for mediation in San
6 Francisco; (9) researching and drafting class certification motion (withheld filing after the
7 Parties' tentative agreement to settle); (10) negotiating, drafting, editing and finalizing the terms
8 of the Settlement, including the Settlement Agreement, Class Notices, Settlement Website, and
9 Proposed Orders; (11) drafting and filing Motion for Preliminary Approval; (12) fielding and
10 responding to Class Member inquiries regarding settlement and implementation issues; and
11 (13) preparing this Fee Motion and supporting documentation.

12 The bulk of the legal work was conducted by Mr. Zysman. In this way, Class Counsel
13 was able to focus on litigating the issues specific to this case and harnessing the evidence in
14 order to obtain the best settlement results for the Class while minimizing the costs. Zysman
15 Decl. ¶13.

16 Class Counsel further expects to spend a minimum of 20 hours on this case through its
17 conclusion, including drafting the Motion for Final Approval of the Settlement, attending the
18 Final Approval hearing, and overseeing Defendants' compliance with the terms of the
19 Settlement. Accordingly, the effective lodestar is *higher* than the amount submitted herein.
20 Zysman Decl. ¶14.

21 **3. Class Counsel Does Not Currently Seek a Multiplier; However,**
22 **Should the Court Reduce the Lodestar an Upward Multiplier is**
23 **Appropriate**

24 Once the lodestar is calculated, it may be enhanced with a multiplier. *Wershba*, 91
25 Cal.App.4th at 254. The objective of any multiplier is to provide lawyers involved in public
26 interest litigation with a financial incentive. *Ketchum*, 24 Cal.4th at 1133; *see also Press v. Lucky*
27 *Stores, Inc.* (1983) 34 Cal.3d 311, 322 (purpose of multiplier is to "reflect the broad impact of
28 the results obtained and to compensate for the high quality of work performed and the

1 contingencies involved in undertaking this litigation.”). “If this ‘bonus’ methodology did not
2 exist, very few lawyers could take on the representation of a class client given the investment of
3 substantial time, effort, and money, especially in light of the risks of recovering nothing.” *In re*
4 *Washington Public Power Supply System Sec. Litig.*, (9th Cir. 1994) 19 F.3d 1291, 1300. Only
5 when courts properly compensate experienced and able counsel for successful results, such as
6 those here, can they assure the continuing effectiveness of the remedies available through class
7 actions. To accomplish this objective, the fee award must be large enough “to entice counsel to
8 undertake difficult public interest cases.” *San Bernardino Valley Audubon Society v. County of*
9 *San Bernardino* (1984) 155 Cal.App.3d 738, 755.

10 Though Class Counsel believes a multiplier would be fully justified in this case in light of
11 the results achieved, none is requested nor necessary to establish the reasonableness of Plaintiff’s
12 requested fee award of \$314,711.03 (excluding requested expenses) because the base lodestar
13 (\$327,025) is already over that amount. *See Zysman Decl.* at ¶¶4, 36. However, if a multiplier
14 becomes necessary due to any reduction of Class Counsel’s lodestar figure, only a relatively
15 modest multiplier would likely be necessary to reach the requested fee amount, and would be
16 fully justified based on the factors described below.⁴

17 The fact that Class Counsel was able to resolve this matter through settlement, without
18 the need for additional litigation and trial, does not negate a multiplier. Counsel should not have
19 to run up unnecessary lodestar in order to justify a fee. In fact, Class Counsel should be
20 rewarded, not penalized, for their conduct and for their efforts in achieving a resolution of this
21 matter. *See, e.g., Lealao, supra*, 82 Cal. App. 4th at 52.

22 If necessary, applying a multiplier in this case is more than reasonable in light of: (1) the
23 great risk Class Counsel took in litigating this case on an entirely contingent basis; (2) the
24 substantial outlay of time and costs; (3) the consistently evolving case law under the claims
25 alleged; (4) the exceptional results; and (5) the long delay in being compensated. *Serrano III*, 20

26
27 ⁴ Moreover, the effective lodestar is actually less than the amount submitted because the lodestar
28 *excludes* time to be spent for services to be rendered by Class Counsel even after final approval
of the Settlement. *See Zysman Decl.* at ¶

1 Cal.3d at 49.

2 Courts frequently award substantial multipliers to account for the risks Class Counsel
3 taken and the inherent uncertainty in contingency fee arrangements. *See generally Vizcaino v.*
4 *Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002) (approving multiplier of 3.65 and citing
5 a survey of class settlements from 1996-2001 indicating that most multipliers range from 1.0 to
6 4.0), *cert. denied sub nom. Vizcaino v. Waite*, 537 U.S. 1018 (2002); *Chavez v. Netflix, Inc.*, 162
7 Cal. App. 4th 43, 67 (2008) (2.5 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
8 224, 255 (2001) (“Multipliers can range from 2 to 4 or even higher”).

9 **VI. A “CROSS-CHECK” OF THE REQUESTED FEE UNDER THE PERCENTAGE-**
10 **OF-RECOVERY CONFIRMS THAT THE FEE IS REASONABLE**

11 The second appropriate method for calculating an attorney fee award is percentage-of-
12 recovery. Courts generally use the percentage-of-recovery method for determining the
13 reasonableness of a request for attorneys’ fees in cases involving a traditional “common fund”
14 out of which the awarded attorney fee will be withdrawn from the fund before claims are paid to
15 class members. As set forth above, that is not the situation here. In this case, Class Counsel’s
16 fees are to be paid separately from the monetary relief provided to the Class and will *not* impact
17 or reduce the amount that the Class receives. Therefore, the lodestar method should be used.
18 However, even if the Court used a percentage-of-recovery method based on the value of the
19 settlement as a “cross-check” on the lodestar method, Class Counsel’s request is reasonable.
20 *See Wershba*, 91 Cal. App. 4th 224; *Lealao*, 82 Cal. App. 4th 19.

21 The benchmark for an attorneys’ fee award is 33 1/3% of the common fund. *See Chavez*,
22 162 Cal. App. 4th at 66, n.11 (“fee awards in class actions average around one-third of the
23 recovery.”) A review of class action settlements over the past 10 years shows that the courts have
24 historically awarded fees in the range of 33% to 40%. *See Roos v. Honeywell International, Inc.*,
25 2015 Cal. App. LEXIS 1004, *26 (Nov. 10, 2015) (confirming 37.5% fee award in \$8,150,000
26 class settlement). Here, Class Counsel’s requested fee and costs award of \$325,000 amounts to
27 approximately 29% of the total value of the Certificates delivered to each of the known Class
28 Members which is at least \$1,100,000 (and perhaps more), and thus already is below the

1 benchmark. The \$1,100,000 figure does not account for the additional value arising from
2 Defendant's modification of its pricing practices in Outlet Stores, which benefits the general
3 public. Thus, using the percentage-of-recovery method as a "cross-check" on the lodestar
4 method, Plaintiff's Counsel's requested fee is eminently fair and reasonable.

5 **VII. THE REQUESTED LITIGATION COSTS ARE REASONABLE**

6 Out-of-pocket expenses are compensable under Cal. Code of Civ. Proc. §1021.5 if they
7 would normally be billed to a fee-paying client. *See Beasley v. Wells Fargo*, 235 Cal. App. 3d
8 1407, 1419 (1991), *overruled in part*, *Olson v. Automobile Club of Southern California*, 42 Cal.
9 4th 1142 (2008); *see also Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Cal. Civil Code
10 §1780(d) also provides that "the court shall award costs and attorney's fees to a prevailing
11 plaintiff in litigation filed pursuant to [the CLRA]."

12 Here, Class Counsel are requesting reimbursement of the \$10,288.97 in litigation expenses
13 incurred. (The total award of \$325,000 includes these requested expenses.) As set forth in the
14 Zysman Decl. ¶¶ 31-35, these expenses were necessary for the conduct of the litigation and
15 are reasonable and modest in amount. The expenses include (1) filing and service fees, (2)
16 mediation fees; (3) postage and courier services, (4) copying, (5) process servers, (6) long-
17 distance phone calls, (7) faxes, (8) computerized and database legal research, and (9) travel
18 expenses. These types of expenses are typically billed by attorneys to fee-paying clients in the
19 marketplace. *See Beasley*, 235 Cal. App. 3d at 1421; *Missouri v. Jenkins*, 491 U.S. 274, 285
20 (1989).

21 **VIII. THE INCENTIVE ENHANCEMENT PAYMENT IS REASONABLE**

22 As stated by the California Court of Appeal in the *Cellphone Termination Fee Cases*, 186
23 Cal. App. 4th 1380, 1393-94 (2010) "[i]ncentive awards are fairly typical in class action cases . . .
24 and are intended to compensate class representatives for work done on behalf of the class, to
25 make up for financial or reputational risk undertaken in bringing the action, and, sometimes to
26 recognize their willingness to act as a private attorney general." (citing *Rodriguez v. West*
27 *Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Moreover, the Court of Appeal explained
28

1 that “[T]he rationale for making enhancements or incentive awards to named plaintiffs is that
2 they should be compensated for the expense or risk they have incurred in conferring a benefit on
3 other members of the class.’ An incentive award is appropriate ‘if it is necessary to induce an
4 individual to participate in the suit.” *Cellphone Termination Fee Cases*, 186 Cal. App. 4th at
5 1395. In instituting this litigation, the named Plaintiff has acted as a private attorney general to
6 seek a remedy for what appeared to be a public wrong, in effect providing private enforcement of
7 the consumer protection laws.

8 Plaintiff Lynette Fliegelman diligently fulfilled her obligations in a representative capacity
9 and was instrumental in achieving the relief obtained by the Class. As stated in the declaration
10 that accompanies this Motion, she fulfilled her obligations to the Class over the course of the
11 litigation by, *inter alia*, (1) providing factual background for the class action Complaint; (2)
12 reviewing the Complaint, and other pleadings in this matter; (3) providing documents to counsel;
13 (4) regularly engaging in numerous telephonic conferences and in-person meetings with Class
14 Counsel throughout the litigation concerning all developments; (5) consulting with Class
15 Counsel on the parameters of the proposed Settlement; and (6) reviewing and approving the
16 Settlement of this litigation. Accordingly, the requested \$3,000 incentive award is reasonable.
17 Zysman Decl., ¶ 40

18 In addition, to dedicating a substantial amount of time and effort to enforce the important
19 public policy of consumer protection by pursuing this action on behalf of the Class and achieving
20 the Settlement now before the Court, the Class Representative took significant professional and
21 personal risks. For example, she bore the risk of an adverse judgment should this case prove
22 unsuccessful, thereby risking her own assets and credit.

23 The incentive award sought by Plaintiff is reasonable in comparison to enhancements in
24 other consumer class action settlements. *See, e.g., Cellphone Termination Fee Cases*, 186 Cal.
25 App. 4th at 1395 (approving \$10,000 incentive awards to each of the four class representatives);
26 *Stevens v. Safeway, Inc.*, 2008 U.S. Dist. LEXIS 17119 (C.D. Cal. 2008) (awarding enhancement
27 payments of \$20,000 and \$10,000 to the two named plaintiffs); *Cohorst v. BRE Prop.*, 2012 U.S.

1 Dist. LEXIS 78010 (S.D. Cal. June 5, 2012) (awarding a \$10,000 enhancement payment).

2 Further, the amount sought as an incentive award has already been agreed to by Defendant
3 as part of the Settlement. Thus, it is respectfully submitted that under the circumstances present
4 here, approval of a \$3,000 incentive award is warranted in light of the Plaintiff's efforts and the
5 relief to the Class in this litigation.

6 **IX. CONCLUSION**

7 For all the foregoing reasons, this Court should grant Class Counsel's request for an
8 award of attorneys' fees and expenses and for an incentive award to the Plaintiff.

9
10 Dated: October 17, 2018

LAW OFFICES OF ZEV B. ZYSMAN, APC

11
12 By: 

13 Zev B. Zysman

14 *Attorneys for Plaintiff and the*
15 *Proposed Settlement Class*
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