UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: CV 14-07155 SJO (JPR) **DATE:** May 21, 2018

TITLE: Linda Rubenstein v. The Neiman Marcus Group LLC et al

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT [Docket No. 111]

This matter is before the Court on Plaintiff Linda Rubenstein's ("Plaintiff" or "Rubenstein") Motion for Preliminary Approval of Class Action Settlement ("Motion"), filed April 20, 2018. Defendant The Neiman Marcus Group LLC ("Defendant" or "Neiman Marcus") filed a Notice of Non-Opposition to the Motion on April 30, 2018. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for May 21, 2018. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS** Plaintiff's Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

Plaintiff brought this putative class action in Los Angeles Superior Court on August 7, 2014, alleging that Defendant deceived consumers by including fictitious comparison prices on the price tags of clothing and consumer goods at its Last Call outlet stores. (*See* Notice of Removal, Ex. A ("Compl."), ECF No. 1-1.) Specifically, Plaintiff alleged that the use of these fictitious "Compared to" reference prices violates: (1) California's False Advertising Laws ("FAL"); (2) California's Unfair Competition Laws ("UCL"); and (3) California's Consumer Legal Remedies Act ("CLRA"). Defendant removed the action to this Court on September 12, 2014, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). (*See generally* Compl.)

After multiple permitted amendments, Defendant successfully moved to dismiss Plaintiff's Complaint on the basis that Plaintiff failed to provide plausible factual allegations that demonstrated that the comparison prices were in fact fictitious. (*See* Order Granting Def's Mot. to Dismiss, ECF No. 45.) The Ninth Circuit reversed, noting that "the particular facts as to whether the Compared To prices are fictitious are likely only known to Neiman Marcus" and Plaintiff "cannot reasonably be expected to have detailed personal knowledge of Neiman Marcus's internal pricing policies or procedures." *Linda Rubenstein v. The Neiman Marcus Group LLC*, No. 15-

55890 (9th Cir. 2017) (Mem. at 6, ECF No. 52). The case was remanded to this Court for further proceedings, and Plaintiff filed a Third Amended Complaint ("TAC") on September 11, 2017. (TAC, ECF No. 69.) Plaintiff moved to certify a California Class on September 12, 2017, but the parties reached an agreement to settle prior to the Court's ruling on the motion. (Mot. to Certify Class, ECF No. 70; Notice of Settlement, ECF No. 100.) Plaintiff filed the instant motion on April 20, 2018. (Mot., ECF No. 111.)

B. Factual Background

Plaintiff alleges the following. Neiman Marcus owns and operates forty-one (41) luxury department stores across the United States that offer an assortment of upscale apparel, accessories, jewelry, beauty, and decorative home products. (TAC ¶ 7.) Neiman Marcus also operates thirty-six (36) "Neiman Marcus Last Call" department stores, which offer similar goods at a lower price point. (TAC ¶ 8.) Commonly known as "outlet stores," large retail stores will often operate places like Neiman Marcus Last Call in order to sell discounted out-of-season or unpopular merchandise from their luxury brands to a larger pool of consumers. (TAC ¶¶ 8-9.) Outlet stores have become increasingly popular among shoppers who seek luxury products without the hefty price tag. (TAC ¶¶ 8-11.)

Unlike other outlet stores, however, the products sold at Neiman Marcus Last Call have never been sold or intended to sell at Neiman Marcus' flagship luxury stores. (TAC ¶ 16.) Instead, lower quality products are manufactured directly for sale at Neiman Marcus Last Call and sold at a price specifically determined for that purpose. (TAC ¶¶ 16-17.) Despite this, Neiman Marcus includes a significantly higher "Compared to" price on its Last Call product price tags that suggest that the product has been discounted or is otherwise comparable to luxury products at the "Compared to" price point. (TAC ¶¶ 14-18.) The "Compared to" price listed on the price tag is completely arbitrary and does not reference any specific good or product sold by Neiman Marcus. (TAC ¶ 16.) This practice, combined with the name and branding of the Neiman Marcus Last Call stores, deceives consumers into thinking that they are purchasing discounted Neiman Marcus luxury products in accordance with the traditional model of retail outlet stores. (TAC ¶¶ 15-21.) Plaintiff, one of such consumers, purchased at least two products based on her belief that these products were formerly sold at a traditional Neiman Marcus flagship retail store at the "Compared to" price on the price tag. (TAC ¶¶ 1, 15.)

C. Terms of the Settlement Agreement

On April 18, 2018, the parties fully executed a settlement agreement ("Settlement Agreement") resolving Plaintiff's claims. (Decl. Joshua A. Fields in Supp. Mot. ("Fields Decl.") Ex. A ("SA"), ECF No. 111-3.) The Settlement Agreement proposes certification of a Settlement Class under Federal Rule of Civil Procedure ("Rule") 23(b)(2) and (3) consisting of:

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> all natural persons who purchased one or more products advertised with a "Compared to" price, where such purchase was made from August 7, 2010 through the date of the [Preliminary][1] Approval Order, at any of Neiman's Last Call stores in California or on Last Call's e-commerce website if the purchaser provided a California billing address.

(Mot. 2.) The Settlement Agreement provides for Neiman Marcus to pay a Gross Settlement Amount of $2,900,000 to be held in a Qualified Settlement Fund ("QSF"). (SA § 3.2.) The Net Settlement Fund, to be distributed among the Settlement Class, consists of the Gross Settlement Fund less the Claims Administrator Fees and Expenses, the Settlement Class Counsel Fees, the Settlement Class Representative Payment, and costs. (SA § 3.4.) The Settlement Class Counsel Fees may not exceed thirty (30) percent of the Gross Settlement Amount (i.e., $870,000) and the Settlement Class Representative Payment may not exceed $5,000. (SA § 3.4.)

The Claims Administrator shall send an e-mail notice to all Known Class Members for whom the Defendant has valid e-mail addresses in its databases. (SA § 5.1(a).) For Known Class Members without valid e-mail addresses, and for whom Defendant has a physical address, the Claims Administrator shall send a Post-Card Notice via U.S. mail. (SA § 5.1(b).) All other class members will be provided with notice via printed publication and maintenance of a settlement website. (SA § 5.2.) Each notice will provide Settlement Class Members with instructions regarding how they can elect to participate, op-out or object, the deadline to submit their Claim Form, and the date set by the Court for the Final Approval Hearing. (SA § 5.) All relevant forms can be downloaded and submitted at the settlement website. (SA § 5.2(b).)

Each Authorized Claimant who submits a valid Claim Form shall be assigned points based on the purchase price of their items and whether proof of purchase is provided. (SA § 3.5.) The entire Net Settlement Fund will be allocated proportionally among claimants based on the number of points assigned to each claimant. (SA § 3.2.) No reversionary interest exists to Neiman Marcus as to any amount of the Net Settlement Fund; any funds remaining due to uncashed checks shall be payed to Public Counsel, the *cy pres* beneficiary. (SA § 3.5(d).) Finally, Neiman Marcus agrees to post signage in its California Last Call stores, as well as on its website, disclosing information about its "Compared To" pricing practices to consumers. (SA § 4.1-2.) Neiman Marcus also agrees to hold at least one employee training session for the purpose of reviewing its pricing policies. (SA § 4.3.)

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[1] While the Settlement Agreement actually states "Final Approval Order," the parties agreed for logistical purposes to modify the Settlement Agreement to end the class period on the date of the Preliminary Approval Order. (*See* Mot. 2. n. 4.)

II. DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 23(e) ("Rule 23(e)") provides that "[t]he claims, issues, or defenses of a . . . class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). "Approval under [Rule] 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 525 (C.D. Cal. 2004). The Ninth Circuit has held that there is a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992) (citations omitted); *see also Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976) (stating that "there is an overriding public interest in settling and quieting litigation," and this "is particularly true in class action suits") (footnote omitted). The Court must evaluate the adequacy of the Settlement Agreement in light of Rule 23(e). *See id.* "Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the 'universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable.'" *Class Plaintiffs,* 955 F.2d at 1276 (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983)).

Because the purpose of this Order is to adjudicate Plaintiff's Motion for Preliminary Approval of Class Action Settlement, "the court will only determine whether a proposed class action settlement deserves preliminary approval and lay the ground work for a future fairness hearing." *Alberto v. GMRI, Inc.,* 252 F.R.D. 652, 659 (E.D. Cal. 2008) (quoting *DIRECTV*, 221 F.R.D. at 525) (internal quotation marks and original formatting omitted). "At the fairness hearing, after notice is given to putative class members, the court will entertain any of their objections to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement." *Alberto,* 252 F.R.D. at 659 (citation omitted). "Following the fairness hearing, the court will make a final determination as to whether the parties should be allowed to settle the class action pursuant to the terms agreed upon." *Id.* (citing *DIRECTV, Inc.*, 221 F.R.D. at 525). Overall, "[t]he initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." *Officers for Justice*, 688 F.2d at 625.

B. Class Certification

"In order to approve a class action settlement, a district court must first make a finding that a class can be certified." *Vasquez v. Coast Valley Roofing, Inc.,* 266 F.R.D. 482, 485-86 (E.D. Cal. 2010) (citing *Molski v. Gleich*, 318 F.3d 937, 943, 946-50 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.,* 603 F.3d 571, 617 (9th Cir. 2010)). A party seeking class certification must demonstrate the following prerequisites: "(1) numerosity of plaintiffs; (2) common

questions of law or fact predominate; (3) the named plaintiff's claims and defenses are typical; and (4) the named plaintiff can adequately protect the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992) (citing Fed. R. Civ. P. 23(a)).

After satisfying the four prerequisites of numerosity, commonality, typicality, and adequacy, a party must also demonstrate either: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; or (2) the defendant has treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. Fed. R. Civ. P. 23(b)(1–3).

Here, the proposed class is: "all natural persons who purchased one or more products advertised with a 'Compared to' price, where such purchase was made from August 7, 2010 through the date of the Preliminary Approval Order, at any of Neiman's Last Call stores in California or on Last Call's e-commerce website if the purchaser provided a California billing address." (Mot. 2.) The Settlement Class excludes "officers and directors of Defendant and its corporate parents, subsidiaries, affiliates, or any entity in which Defendant has a controlling interest, and the legal representatives, successors, or assignees of any such excluded persons or entities and . . . the Court." (SA § aa.)

1. Requirements under Rule 23(a)

a. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). "The numerosity requirement ensures that the class action device is used only where it would be inequitable and impracticable to require every member of the class to be joined individually." *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 548 (N.D. Cal. 2007). There is no numerical cutoff to determine whether a class is sufficiently numerous, though as a general rule, "classes of 20 are too small, class of 20-40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." *Gen. Tel. Co. of the Nw., Inc., v. EEOC*, 446 U.S. 318, 330 (1980).

Here, the parties have identified 457,016 known Settlement Class members. (Fields Decl. ¶ 3.) This number of plaintiffs would be practically impossible to join in one action. The numerosity requirement is thus easily satisfied.

b. Commonality

"To show commonality, [p]laintiffs must demonstrate that there are questions of fact and law that are common to the class." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). However, not every question of law or fact must be common to class; rather, "all that Rule 23(a)(2) requires is a single significant question of law or fact." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 53 (2014) (internal quotation marks and citations omitted); *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (characterizing commonality as a "limited burden" and stating that it "only requires a single significant question of law or fact"). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 564 U.S. at 350 (citation omitted) (internal quotation marks omitted).

Members of the proposed Settlement Class putative class members have several questions of law and fact in common; most notably, (1) whether Defendant's pricing practices were unlawful, unfair, or fraudulent; (2) whether Defendant's pricing practices would deceive a reasonable consumer into believing that its products were previously sold at a Neiman Marcus flagship store or other store in the area at or above the "Compared to" price; and (3) whether Defendant's alleged misrepresentations are material. Because the class members' claims all derive from the same allegedly fraudulent business practice, the requirement of commonality is satisfied.

c. Typicality

Typicality requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Under Rule 23(a)(3)'s "permissive standards, representative claims are typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)(quotation marks omitted). Typicality tests whether putative class members "have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis*, 657 F.3d at 984 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). "Typicality refers to the nature of the claim or defense of the class representative, and not the specific facts from which it arose or the relief was sought." *Id.* The purpose of this requirement "is to assure that the interest of the named representative aligns with the interest of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (internal quotation marks omitted).

Like the members of the porposed Settlement Class, Plaintiff purchased products advertised with a "Compared to" price at a California Last Call store. As Plaintiff's stated claims are representative

of the proposed class, the Court finds that the typicality requirement has been satisfied.

d. Adequacy

Rule 23(a)(4) permits certification of a class action if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit applies a two-prong test to determine whether representation meets this standard: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis*, 657 F.3d at 985 (quoting *Hanlon*, 150 F.3d at 1020). Moreover, "Named Plaintiffs themselves must be entitled to seek injunctive relief if they are to represent a class seeking such relief." *Franco-Gonzales v. Napolitano*, No. CV 10-02211 DMG (DTBx), 2011 WL 11705815, at *13 (C.D. Cal. Nov. 21, 2011) (citing *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999)).

Plaintiff states that no relevant conflicts of interest exist and that she and her counsel "have already vigorously prosecuted the Action on behalf of the Settlement Class, including filing and service of the lawsuit, serving initial disclosures, opposing multiple motions to dismiss, prevailing on a Ninth Circuit appeal, propounding significant written discovery, analyzing materials Neiman provided, moving for class certification, engaging in settlement discussions, and moving the action forward to resolution." (Mot. 8-9.) Plaintiff has also demonstrated that her retained counsel has decades of experience in complex class action litigation, including consumer litigation. (*See* Fields Decl. ¶ 2, Ex. B.) There is little reason to doubt that Plaintiff and her counsel will fairly and adequately protect the interests of the class.

2. Rule 23(b) Requirements

"In addition to fulfilling the four prongs of Rule 23(a), the proposed class must also meet at least one of the three requirements listed in Rule 23(b)." *Spann v. J.C. Penney Corp.*, 307 F.R.D. 514 (C.D. Cal. 2015) (citing *Dukes*, 564 U.S. at 345). Where a plaintiff seeks certification under Rule 23(b)(2), she must demonstrate that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory relief warranted—the notion that the conduct is such that it can be enjoined or declared only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

By contrast, where a plaintiff seeks certification under Rule 23(b)(3), the court must find "that questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Here, Plaintiff seeks

certification under both Rule 23(b)(2) and 23(b)(3).

a. Plaintiff has Satisfied Rule 23(b)(2)

Rule 23(b)(2) is satisfied because the agreed-to injunctive relief– in-store and online disclosure by Neiman Marcus regarding the significance of the "Compared to" prices– would necessarily apply on a class-wide basis.

b. Plaintiff has Satisfied Rule 23(b)(3)

i. Predominance

Under Rule 23(b)(3), Plaintiffs must demonstrate that common questions of law or fact predominate over any questions affecting only individual members. *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 622-23 (1997). Though there is substantial overlap between [the Rule 23(a)(2) commonality test and the Rule 23(b)(3) predominance test], the Rule 23(b)(3) test is far more demanding[.]" *Wolin*, 617 F.3d at 1172 (internal quotation marks omitted). The "focus is on the relationship between the common and individual issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (internal quotation marks omitted). "[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (internal quotation marks omitted).

In her Complaint, Plaintiff asserts the following causes of action: (1) violations of the FAL; (2) violations of the UCL; and (3) violations of the CLRA. (*See generally* Compl.) Relief under the UCL and FAL is available "without individualized proof of deception, reliance and injury" so long as it is proved that "members of the public are likely to be deceived." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011). While the question of whether "members of the public are likely to be deceived" would in many cases suggest predominance, this may not always be true– such as when there is "no cohesion among the members because they were exposed to quite disparate information from various representatives of the defendant." *Id.* Unlike the UCL or FAL, the CLRA requires each class member to have an actual injury caused by the unlawful practice. *Id.* at 1022. However, a class-wide inference of reliance and causation may be established if the plaintiff is able to demonstrate that "material misrepresentations have been made to the entire class[.]" *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009).

Here, the representations made to consumers are displayed on Neiman Marcus Last Call price tags and the Neiman Marcus Last Call website, appearing in a uniform manner to all online and in-store shoppers. Thus, the question of whether "members of the public are likely to be deceived" by these displays would be common to all members of the Settlement Class. Furthermore, the requirement of actual injury under the CLRA can be circumvented by a demonstration that the

misrepresentations are "material"– a question that would also be common to the class. The Court thus finds that, for the purposes of a certifying a class for settlement, the predominance requirement has been satisfied.

ii. Superiority

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy. Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin*, 617 F.3d at 1175–76 (citation and internal quotation marks omitted). In cases in which plaintiffs seek to recover relatively small sums and the disparity between litigation costs and the recovery sought may render plaintiffs unable to proceed individually, "[c]lass actions may permit the plaintiffs to pool claims which would be uneconomical to bring individually." *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir.), *cert. denied*, 534 U.S. 973, 122 S. Ct. 395 (2001) (further finding that "[i]f plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover") (internal quotation marks and alteration omitted).

Here, each putative class member's claim for damages would be based on the price of an item or items he or she was deceived into purchasing at a Neiman Marcus Last Call store, a relatively small amount when considering the cost of bringing litigation. Because of these small sums, litigation costs render individual prosecution of such claims prohibitive. *Spann*, 307 F.R.D. at 532 (citing *Ortega*, 300 F.R.D. at 430; *Chavez*, 268 F.R.D. at 379 ("[T]he court determines that the class action is superior to maintaining individual claims for a small amount of damages[.]")). Moreover, the class size includes hundreds of thousands of people, a number that would invariably hobble the Court's docket should individual litigation proceed. Finally, any Settlement Class Member who wishes to control his or her own litigation may decide not to opt into the class. *See* Fed. R. Civ. P. 23(c)(2)(b)(v). Accordingly, the Court finds that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

C. Notice to Settlement Class Members

When a class is conditionally certified pursuant to Rule 23(b)(3), Rule 23(c)(2) requires the Court to direct to Settlement Class Members the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(A). The notice must "clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the

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member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner of requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B).

The Settlement Agreement requires that the Claims Administrator send an e-mail notice to all Known Class Members for whom the Defendant has a valid e-mail address, and a Post-Card Notice to the Known Class Members who do not have an e-mail address but have a physical address in Defendant's database. (SA § 5.1.) The parties have obtained the e-mail addresses of 177,619 Settlement Class Members.[2] (Fields Decl. ¶ 3.) All unknown class members will be provided with a Summary Publication Notice via a printed publication identified by the expert Claims Administrator as providing adequate notice to potential class members. (SA § 5.2.) Each notice will provide Settlement Class Members with instructions regarding how they can elect to participate, op-out or object, the deadline to submit their Claim Form, and the date set by the Court for the Final Approval Hearing. (SA § 5.) All relevant forms can be downloaded and submitted at a settlement website maintained by the Claims Administrator. (SA § 5.2(b).)

The Court finds that the proposed Notice Plan constitutes the best notice practicable under the circumstances given the large number of Settlement Class Members. *See Keirsey v. eBay, Inc.*, 2014 U.S. Dist. LEXIS 20684, at *3 (N.D. Cal. Feb. 14. 2014) (finding that individual notice through e-mail, or first class mail in situations where e-mail is not successful, is "clearly the 'best notice practicable'" where the names and e-mail addresses of Settlement Class Members are easily ascertainable.) The Court has read the proposed long-form notice and finds that it contains sufficient information to comply with Rule 23(c)(2)(B). In particular, the long-form notice sets forth the nature of the action, the definition of the Class, the terms and provisions of the Settlement Agreement, the value of the Net Settlement Fund, the anticipated amount of attorney's fees as well as how those fees will be paid, the date, time, and place of the Final Approval hearing, that the Settlement Class Members may enter in appearance through an attorney if desired, and the procedure and deadlines for electing not to participate in the Settlement. The summary notices describe the terms of the settlement "to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1252 (9th Cir. 1980)). Thus, the Court finds that the notice requirements of Rule 23(c)(2) have been satisfied.

D. Fairness, Adequacy, and Reasonableness of the Settlement Agreement

[2] Plaintiff has not indicated the number of Known Settlement Class Members for whom a physical address has been ascertained. The Court is interested in learning this number, as well as an estimate of the number of unknown class members, prior to the final approval hearing.

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"Having determined that class treatment appears to be warranted, the court must now address whether the terms of the parties' settlement appear fair, adequate, and reasonable." *Alberto,* 252 F.R.D. at 664; *see also Class Plaintiffs,* 955 F.2d at 1276. In assessing whether a class action settlement agreement is fair, adequate, and reasonable, courts look at several factors, including:

> [T]he strength of the 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) (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). "Given that some of these factors cannot be fully assessed until the court conducts its fairness hearing, 'a full fairness analysis is unnecessary at th[e preliminary approval] stage.'" *Alberto,* 252 F.R.D. at 665 (quoting *West v. Circle K Stores, Inc.*, No. Civ. S-04-0438 WBS GGH, 2006 WL 1652598, at *9 (E.D. Cal. June 13, 2006)). However, where "'a settlement agreement is negotiated *prior* to formal class certification, consideration of these eight . . . factors alone is' insufficient. In these cases, courts must show . . . also that the settlement did not result from collusion among the parties." *Bellinghausen v. Tractor Supply Co.*("*Bellinghausen*"), 306 F.R.D. 245, 254 (N.D. Cal. 2015) (internal citations omitted) (citing *In re Bluetooth Headset Products Liability Litig.* ("*Bluetooth*"), 654 F.3d 935, 942, 947 (9th Cir. 2011)). In seeking to determine whether a settlement agreement resulted from collusion among the parties, courts look for the presence of the following indicators:

> (1) when class counsel receives a disproportionate distribution of the settlement, or when the class receives no monetary distribution but counsel is amply awarded[;]
> (2) when the parties negotiate a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds without objection by the defendant (which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class[;] and
> (3) when the parties arrange for fees not awarded to revert to defendants rather than to be added to the class fund.

Id. (citing *Bluetooth*, 654 F.3d at 947.) The Court examines the *Hanlon* factors, keeping in mind the aforementioned indicia of collusion.

1. The Settlement is Fair, Adequate, and Reasonable

"At th[e] preliminary approval stage, the [C]ourt . . . need only 'determine whether the proposed settlement is within the range of possible approval.'" *Alberto*, 252 F.R.D. at 666 (quoting *Gautreux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982)). Thus, at this stage, the Court "is only concerned with 'whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys.'" *Id.* (quoting *West*, 2006 WL 1652598 at *11). "Settlements are afforded a presumption of fairness if (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *Franco v. Ruiz Food Prods., Inc.*, No. 1:10-cv-2354-SJO, 2012 WL 5941801, at *10 (citation omitted); *see also In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1080-81 (N.D. Cal. 2007).

Plaintiff asserts that several large disputed issues remain in the case, including whether the issues of deception and reliance can appropriately be resolved on a classwide basis, and the proper model for calculating damages. (Mot. 11-13.) The uncertainty regarding the merits of the case has already been demonstrated by a Ninth Circuit reversal during the earlier stages. Moreover, the damages model proffered by Plaintiff would require each claimant to return the purchased item to Neiman Marcus for a full refund, a rather onerous undertaking that may reduce the number of valid claimants. (Mot. 13.) Thus, even though the gross settlement amount of $2,900,000, divided among the claimants, may result in a damages award that is a fraction of the purchase price, the certainty of this award offers substantial advantages over proceeding with litigation. (Mot. 14-15.) Plaintiff also points out that the parties have completed significant discovery, that class counsel agrees that the recovery is substantial, and the negotiations occurred at arms' length. (Mot. 15-18.) The Court finds that these factors indicate that the proposed settlement is "within the range of possible approval."[3]

2. There is No Evidence of Collusion Among the Parties

In addition, the Court finds that there is no evidence of collusion at this stage in the proceedings. Warning signs of collusion include: (1) reversion of unpaid funds to the defendant; (2) a "clear sailing" arrangement; and (3) unreasonably high attorneys' fees or incentive awards. *See Bluetooth,* 654 F.3d at 947. Here, no amount of the settlement fund will revert back to Defendant,

[3] Notwithstanding the Court's determination that the settlement amount appears reasonable, at least at this juncture, the Court is interested in hearing the parties' positions with respect to the following issues before the Final Approval Hearing: (1) the number of anticipated claimants; (2) whether the parties have calculated the mean and median awards for the anticipated number of claimants; (3) whether there is a need to audit Settlement Class Members' claims, and if so, what the audit system should look like; and (4) whether contingencies are required if there are an unusually low number of claimaints.

and thus there is no reversionary interest that would indicate collusion.

The Settlement Agreement does, however, provide that Settlement Class Counsel will have the right to file a motion for attorneys' fees from the Gross Settlement Amount of no more than thirty (30) percent of the Gross Settlement Amount (i.e., $870,000), and that Defendant will not oppose this motion. (SA § 3.3.) This type of arrangement is known as a "clear sailing agreement," and is one of the "more subtle signs that class counsel have allowed pursuit of their own-self interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947 (quoting *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000)). Indeed, "the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." *Id.* at 948 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991)). Moreover, although Plaintiff has not yet moved for an award of attorneys' fees and expenses, the Court notes that a 30% percentage-of-the-fund would be above a typical fee award in the Ninth Circuit. *See Six (6) Mexican Workers*, 904 F.2d at 1311 (stating that a 25 percent fee award typically serves as a benchmark in complex securities cases in the Ninth Circuit).

Notwithstanding the above, the Court does not find that the 30% "clear sailing agreement" at issue here necessarily requires that the Court disapprove of the Settlement Agreement and deny the Motion. Plaintiff has not yet specified the amount of attorneys' fees his counsel will ultimately seek, preventing the Court from determining whether such an award would be fair and reasonable at this juncture. Moreover, the Settlement Agreeement provides it is not conditioned in any way on the Court's approval of attorneys' fees and costs, suggesting collusion is less likely than in the case of a clear sailing agreement absent such a disclaimer. (SA § 3.3.) The Court shall make a final determination as to the reasonableness and fairness of the requested attorneys' fees as part of a motion for attorneys' fees and costs to be heard at the Final Approval Hearing. *See, e.g., Alberto,* 252 F.R.D. at 658. As part of this motion, Plaintiff should explain in detail the negotiation process that occurred in this case, and provide a "clear explanation of why the [ ] fee is justified and does not betray the class's interests," particularly given the existence of a clear sailing provision. *In re Bluetooth*, 654 F.3d at 949.

Finally, the Settlement Agreement provides for an incentive award to Plaintiff not exceed $5,000. Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit. *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013). "[D]istrict courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." *Id.* Where a "settlement agreement is negotiated prior to formal class certification . . ., there is an even greater potential for a breach of fiduciary duty owed the class." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Nevertheless, "[i]ncentive awards are fairly typical in class action cases" and are discretionary. *Rodriguez v. W. Pub. Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (emphasis removed). In the Ninth Circuit, a $5,000 incentive award is "presumptively reasonable." *See Bellinghausen*, 306 F.R.D.

at 266.

Here, where the amount of the award is fixed and not a sliding scale based on the amount recovered, the incentive agreement has not disjoined the financial interests of the Plaintiff from that of the class. *See Cf. Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). There is no evidence that the award to Plaintiff undermines the adequacy of her representation. Accordingly, and because the $5,000 award is "presumptively reasonable," the Court finds that the incentive award does not evidence collusion.

III. RULING

For the foregoing reasons, the Court **GRANTS** Plaintiff Linda Rubenstein's Motion for Preliminary Approval of Class Action Settlement. A Final Approval Hearing shall be held on October 1, 2018 @10:00 a.m.

IT IS SO ORDERED.