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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MONICA RAEL and ALYSSA
HEDRICK, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

THE CHILDREN’S PLACE, INC., a
Delaware corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: 16-cv-370-GPC-LL

ORDER:

**(1) APPROVING MODIFIED CLASS
ACTION SETTLEMENT, WITH
AWARD OF ATTORNEY’S FEES TO
BE BIFURCATED; AND**

**(2) DENYING PLAINTIFF’S
MOTION FOR ATTORNEY’S FEES
WITHOUT PREJUDICE**

[ECF Nos. 73, 91]

Before the Court is Plaintiff’s Unopposed Motion for Attorneys’ Fees, Costs and Incentive Award (“Motion for Attorney’s Fees”), and Motion for Final Approval of Class Action Settlement. (ECF Nos. 73, 91.) In an Order issued on October 23, 2020 (“First Final Settlement Order”), (ECF No. 105,) the Court deferred ruling on the two Motions, and directed the parties to file Supplemental Briefs and corresponding Replies. (ECF Nos. 132, 133, 135, 137, 138.) Having considered the entire case record, the Court

1 **APPROVES** the modified class action settlement agreement and **DENIES without**
2 **prejudice** Plaintiff’s Motion for Attorney’s Fees, with the attorney’s fees award to be
3 decided after the value of the class recovery is determined.

4 **I. BACKGROUND**

5 **A. The Claims**

6 On February 11, 2016, Plaintiff Monica Rael brought suit on behalf of herself and
7 all others similarly situated against Defendant The Children’s Place, Inc. (“TCP” or
8 “Defendant”). (Compl., ECF No. 1.) Plaintiff Rael amended the complaint three times
9 and added a second Named Plaintiff, Alyssa Hendrick (collectively, “Plaintiffs” or
10 “Named Plaintiffs”). (Am. Compl., ECF No. 9; 2d Am. Compl., ECF No. 19; Mot.
11 Leave File 3d Am. Compl. Ex. B, ECF No. 37-2.) On November 22, 2017, Plaintiffs
12 filed the operative Third Amended Complaint (“TAC”) alleging three causes of actions
13 for violations of: (1) California’s Unfair Competition Law, Cal. Bus. & Prof. Code §
14 17200 *et seq.*; (2) California’s False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et*
15 *seq.*; and (3) California’s Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*
16 (TAC ¶¶ 51–78, ECF No. 37-2.) Plaintiffs’ three causes of action stem from the
17 allegation that Defendant advertises children’s clothing with discounted prices from false
18 original prices to deceive customers as to the real value of their goods, thus unlawfully
19 driving sales. (*Id.*, ¶¶ 1–9.)

20 **B. Settlement Agreement**

21 **1. The Proposed Class**

22 Plaintiffs seek certification of a nationwide class including “[a]ll individuals in the
23 United States who, from February 11, 2012 through the date the Court enters the
24 preliminary approval order, purchased any product bearing a discount at one of The
25 Children’s Place retail or outlet stores” (the “Class”). (*Id.*, ¶ 43; *see also* Decl. Todd D.
26 Carpenter (“2019 Carpenter Decl.”) Ex. 1 (Settlement Agreement, or “SA”), at § 1.8,
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1 ECF No. 60-2.) “Defendant, Defendant’s counsel, Defendant’s officers, directors, and
2 employees, and the judge presiding over the action” are to be excluded. (SA § 1.8, ECF
3 No. 60-2.)

4 Plaintiffs further divide the Class into three Tiers. (*Id.*, § 2.1.) “Tier 1 Authorized
5 Claimants” include individuals whose qualifying purchases total less than \$50, or any
6 individuals who do not submit proof of their purchases. (*Id.*, § 2.1(a).) “Tier 2
7 Authorized Claimants” include individuals whose qualifying purchases total \$50.01 to
8 \$150. (*Id.*, § 2.1(b).) “Tier 3 Authorized Claimants” include individuals whose
9 qualifying purchases total more than \$150. (*Id.*, § 2.1(c).) Tier 2 and Tier 3 Claimants
10 are required to submit proof of their purchases. (*Id.*, § 2.1(a) to (b).) Tier 1 Claimants
11 get one voucher, Tier 2 Claimants get two vouchers, and Tier 3 Claimants get three
12 vouchers. (*Id.*, § 2.2.)

13 **2. The Voucher Fund**

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

23 To obtain a voucher, Class Members must comply with the Claims Procedure
24 detailed in the Settlement Agreement. (*Id.*, §§ 3.6–3.10.) The Procedure permits Class
25 Members to file a claim with the Claims Administrator, object to the Settlement
26 Agreement, or request to be excluded from the Class. (*Id.*) Class Members must perform
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1 these actions on or before the response deadline, which would initially be set at 120
 2 calendar days after the entry of this Order. (*Id.*, §§ 1.28, 3.6.) Class Members may also
 3 request to appear at the Fairness Hearing. (*Id.*, § 3.9(c)). In addition to collecting
 4 biographical information, the Claim Form asks Claimants to select their Tier, note their
 5 purchases and any available proof, choose which voucher to obtain, and provide an e-
 6 mail address for electronic delivery. (*Id.* Ex. E (Claim Form)).

7 As noted, the number of vouchers each Claimant receives will be equal to the Tier
 8 number. (*Id.*, § 2.2.) If there are timely claims to more than 800,000 vouchers in the first
 9 round of distribution, the Fund will only distribute dollar-based vouchers, and the value
 10 of those vouchers will be calculated on a pro rata basis. (*Id.*, § 2.4) In subsequent rounds
 11 of distribution, Claimants receive vouchers according to the selections made in their
 12 Claim Forms. (*Id.*, § 2.3(a) to (b).) Again, if there are fewer vouchers left in the Voucher
 13 Fund than are timely claimed in any subsequent round of distribution, the Fund will then
 14 disburse only dollar-value vouchers at a pro-rated value. (*Id.*, § 2.3(c).)

15 Vouchers disbursed through subsequent rounds from the Fund are to have different
 16 “expiry” period. (*Id.*, § 2.3(d)). More specifically, the periods of expiry for each “round”
 17 of Voucher distribution shall be successive (i.e., if the Vouchers to be distributed in the
 18 first “round” are valid between January 1, 2021 and June 30, 2021, those that are part of
 19 the second “round” would be valid from July 1, 2021 until December 31, 2021). (*Id.*)

20 **3. Nullifications, Modifications, and Governing Law**

21 Section 4.2 of the Settlement Agreement provides as follows:

22 4.2 Effect of Agreement if Settlement Is Not Approved. This Settlement
 23 Agreement was entered into only for the purpose of Settlement. In the event
 24 . . . the Court conditions its approval of either the Preliminary Approval
 25 Order or the Final Order and Judgment on any modifications of this
 26 Settlement Agreement that are not acceptable to all Parties, or if the Court
 27 does not approve the Settlement or enter the Final Order and Judgment, or if
 28 the Final Settlement Date does not occur for any reason, then this Agreement

1 shall be deemed null and void *ab initio* and the Parties shall be deemed
2 restored to their respective positions *status quo ante*, and as if this
3 Agreement was never executed.

4 (*Id.*, § 4.2.)

5 In terms of modifying and/or amending the Settlement Agreement, Section 5.12
6 governs: “No amendment, change, or modification of this Settlement Agreement or any
7 part thereof shall be valid unless in writing signed by the Parties or their counsel.” (*Id.*, §
8 5.12.) The parties to the Settlement Agreement have also agreed to have California law
9 govern the interpretation of the Settlement Agreement. (*Id.*, § 5.13.)

10 **C. Awards to Counsel and Named Plaintiffs**

11 The Settlement Agreement permits the Named Plaintiffs and Class Counsel to
12 recover fees independent of the Voucher Fund. Each Named Plaintiff may recover an
13 “Individual Settlement Award” of \$2,500 or less, subject to the Court’s approval. (*Id.*, §
14 2.6.) Class Counsel may seek up to \$1,080,000 in costs and fees (total), subject to the
15 Court’s approval. (*Id.*, § 2.7.) If the Court awards less than that maximum amount in
16 fees and costs to Class Counsel, the difference between the actual award and \$1,080,000
17 will go to the Voucher Fund or, if certain criteria are met, become a *cy pres* distribution
18 to the National Consumer Law Center. (*Id.*, § 2.8.) A *cy pres* distribution requires three
19 precedent conditions per the settlement agreement: “[i] the Court awards less than
20 \$1,080,000 in attorneys’ fees and costs, [ii] the Court rules that the Vouchers to be
21 distributed under this paragraph are not to be distributed along with the Voucher Fund
22 under Paragraph 2.5, and [iii] it would be economically or administratively infeasible to
23 do a separate distribution of Vouchers in addition to the distribution under under [sic]
24 Paragraph 2.5.” (*Id.*) Unless the Court orders a different timetable, attorney’s fees will
25 be paid 10 days after both the final settlement date and class counsels’ delivery of the
26 relevant Form W-9 to TCP. (*Id.*, § 2.7.)

1 **D. The Claims Process**

2 In the January 28, 2020 Order granting preliminary approval of the settlement, the
3 Court approved a tri-part notice structure, hereafter referred to as the “Notice Plan.”
4 (ECF No. 69 at 25–26.)

5 Plaintiffs reported the results from their notice via the declaration of the Settlement
6 Administrator, KCC Class Action Services, LLC’s (“KCC”) employee, Mr. Jay Geraci,
7 which he completed on June 26, 2020. (*See* Decl. Jay Geraci, ECF No. 91-4.)

8 Mr. Geraci reports that, on February 18, 2020, KCC received from Defendant a list
9 of 12,589,376 records identified as the Class List. (*Id.*, ¶ 7.) After cleansing the list for
10 errors and spam, the list produced 11,622,488 unique e-mail addresses. (*Id.*) Beginning
11 on March 25, 2020 and ending on March 31, 2020 KCC caused the Email Notice to be
12 sent to the 11,622,488 unique e-mails in the Class List. (*Id.*, ¶ 8.) 10,409,099 emails
13 were sent without a bounce or failure notification. (*Id.*, ¶ 9.) Between May 21, 2020 and
14 ending on May 26, 2020, KCC sent a second round of e-mails and e-mails were delivered
15 successfully. (*Id.*, ¶ 10.)

16 In addition to e-mail notice, KCC also caused the Summary Notice to be published
17 in the April 8, April 15, April 22, and April 29, 2020 national editions of USA Today.
18 (*Id.*, ¶ 11.) KCC also caused 311,236,411 impressions to appear on both mobile and
19 desktop devices from March 31, 2020 through May 15, 2020 advertising the settlement.
20 (*Id.*, ¶ 12.) Lastly, on March 25, 2020, KCC established a website
21 “www.raeltcpricingsettlement.com” dedicated to this matter to provide information to
22 the Class Members and to answer frequently asked questions, which contained all the
23 documents relevant to the settlement (e.g., E-mail Notice, Long Form Notice in English
24 and Spanish, Summary Notice, and Claim Form in English and Spanish). (*Id.*, ¶ 13.) As
25 of the date of Mr. Geraci’s declaration, the website had received 492,758 visits. (*Id.*)
26 KCC supported the claims process and website with a toll-free telephone number (1-844-
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1 799-1633) with interactive voice responses in English or Spanish for potential Class
2 Members to call and obtain information about the Settlement, request a Notice Packet in
3 English or Spanish, and to leave a voice message. (*Id.*, ¶ 14.)

4 As of June 26, 2020,¹ KCC had received 101,350 timely-filed claim forms. (*Id.*, ¶
5 15.) It was a total of 49,929 Tier 1 claims, 32,985 Tier 2 claims, and 18,436 Tier 3
6 claims. (*Id.*) These claims represent 171,207 Vouchers in total. (*Id.*) KCC received 10
7 timely requests for exclusion. (*Id.*, ¶ 16.) KCC also received three objections. (*Id.*, ¶
8 17.) Execution costs of the notice and claims process, as of June 26, 2020, had totaled
9 \$653,724.45. (*Id.*, ¶ 18.)

10 **E. Procedural Background**

11 On November 22, 2017, Plaintiffs filed an Unopposed Motion for Preliminary
12 Approval of Settlement and Provisional Class Certification. (ECF No. 36.) The Court
13 heard that Motion on February 8, 2018. (Min. Entry, ECF No. 42.) On April 2, 2018, the
14 Court stayed proceedings pending the Ninth Circuit's decision on the petitions for
15 rehearing *en banc* in *In re Hyundai & Kia Fuel Economy Litigation*, 881 F.3d 679 (9th
16 Cir. 2018). (Order Granting Stay, ECF No. 48.) Thereafter, the Court denied Plaintiffs'
17 Motion on June 8, 2018 as moot. (Order Denying Moot, ECF No. 49.)

18 On June 17, 2019, the Court lifted the stay. (Order Granting Ex Parte Mot. Lift
19 Stay, ECF No. 57.) Then, on October 31, 2019, Plaintiffs filed an Amended Motion for
20 Preliminary Approval of Settlement and Provisional Class Certification. (ECF No. 60).
21 On November 22, 2019, TCP filed a Notice of Non-Opposition. (ECF No. 61.)

22 On December 6, 2019, the Court held a second hearing on Plaintiffs' Unopposed
23 Motion. (Min. Order, ECF No. 63; *see also* Tr. Mot. Hearing, ECF No. 104.). The Court
24 then ordered the Parties to supplement the record with factual support for their assertions
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27 ¹ The deadline to file claims was May 30, 2020.

1 at the hearing. (Order, ECF No. 65.) On January 3, 2020, the Parties filed three
2 documents complying with the Court’s order: (1) a Declaration by Class Counsel Todd
3 Carpenter dated January 3, 2020, (Decl. Todd Carpenter (“2020 Carpenter Decl.”), ECF
4 No. 66); (2) Plaintiffs’ Supplemental Briefing, (ECF No. 67); and (3) the Declaration of
5 Vipul Jain, a TCP employee, (Decl. Vipul Jain (“Jain Decl.”), ECF No. 68.) On January
6 28, 2020, the Court entered an Order that granted preliminary approval of class action
7 settlement. (ECF No. 69.)

8 On April 30, 2020, Plaintiffs filed the Motion for Attorney’s Fees. (ECF No. 73.)
9 Thereafter, on July 1, 2020, Plaintiffs filed their Motion for Final Approval of Class
10 Action Settlement. (ECF No. 91.) On June 30, 2020, TCP expressed its support for the
11 settlement by filing a Statement of Non-Opposition. (*See* ECF No. 88.) On July 16,
12 2020, Objector Anna St. John filed a Response to the motion for final settlement. (ECF
13 No. 97.) On July 22, 2020, Plaintiffs filed a Reply. (ECF No. 99.)

14 The Court received objections on the record from three class members. First, on
15 May 29, 2020, Objector Anna St. John responded to Plaintiffs’ Motion for Attorney’s
16 Fees and objected to the settlement in the same filing. (Formal Obj., ECF No. 75.)
17 Plaintiffs responded to the St. John Objection on June 30, 2020. (Pls.’ Opp’n, ECF No.
18 87.) Objector St. John filed a Reply on July 10, 2020. (ECF No. 94.) Also, on May 31,
19 2020, Objectors Elaine Dougan and Charlie Gabertan concurrently filed their Objection
20 Brief with the Court.² (ECF No. 82.) Plaintiffs responded to the Dougan-Gabertan (“D-
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23 ² Ms. Dougan’s objection was untimely because it was postmarked on June 1, 2020, one
24 day after the cut-off required by this Court’s January 29, 2020 Order. (ECF No. 91-1 at
25 23.) However, it is undisputed that Mr. Gabertan’s objection is timely as it was
26 postmarked on May 30, 2020. (*Id.*) Hence, because the two objectors’ arguments
27 “overlap almost completely,” (Obj. Br. 4 n.1, ECF No. 82,) the Court considers the
28 arguments as set forth in their joint brief.

1 G”) Objection in their Motion for Final Approval. (*See* Mem. 17–18, ECF No. 91-1.)
2 TCP responded to the D-G Objection in their notice of non-opposition. (Def.’s Statement
3 Non-Opposition 21–24, ECF No. 88.) On July 17, 2020, Objectors Dougan and Gabertan
4 filed a Reply. (ECF No. 98.) On July 22, 2020, Plaintiffs filed a Reply to the Motion for
5 Final Approval. (ECF No. 99.) A hearing on the final approval motion and attorney’s
6 fee motion was held on July 30, 2020. (Min. Order, ECF No. 103.)

7 On October 23, 2020, the First Final Settlement Order deferred ruling on Plaintiffs’
8 Motion for Attorney’s Fees and Motion for Final Approval of Class Settlement. (ECF
9 No. 105.) The Court declined to approve the settlement over concerns relating to (1) the
10 disproportionate distribution of the payment to class counsel, and (2) the scope of release
11 under the Settlement Agreement being overbroad. (*See id.* at 16–21.) The Court also
12 withheld awarding attorney’s fees (in which Plaintiffs’ counsel requested \$1.08 million).
13 The Court concluded that the vouchers to be awarded pursuant to the Settlement
14 Agreement constituted “coupons” under the Class Action Fairness Act, in which case the
15 Court must delay awarding attorney’s fees until the true amount of recovery is
16 determined for the vouchers. (*See id.* at 22–29.)

17 Subsequently, the Court held four status conferences. On November 19, 2020,
18 Objector Gabertan filed a Further Status Conference Report, in which he stated
19 “Negotiations Have Succeeded.” Specifically, Objector Gabertan informed that
20 Plaintiffs, Defendant, and himself “agreed to re-word the definition of ‘Class Released
21 Claims’ in Paragraph 1.10 of the Settlement Agreement to carve out claims,” where if the
22 Court approves the language, he would withdraw his Objections to the Settlement
23 Agreement. (ECF No. 113.) At a November 20, 2020 status hearing, the following
24 exchange occurred:

25 The Court: Since our last hearing, on October 30, the Court has
26 received a document . . . and it states that the parties have
27 successfully negotiated a, I guess, modification in the

1 settlement agreement which carves out the claims that are
2 pending in the federal district court in the state of
3 Washington. It seems at this point, as to that issue, we
4 are in a position to move forward So let me inquire,
5 Mr. Carpenter [Plaintiffs’ counsel], where do things stand
6 at this time on the matter of attorney fees?

6 Mr. Carpenter: I think Your Honor has accurately described the
7 procedural posture. And with respect to attorney fees,
8 Ms. Doolin and I had exchanged some brief proposals on
9 how to proceed. I think we are generally on the same
10 page.

10 (Tr. Case Management Conference 3–4, ECF No. 136.)

11 However, on December 11, 2020, Plaintiffs filed a Status Conference Report,
12 claiming that “it would be inappropriate to modify the Class release provision without re-
13 noticing the entire Class of the narrowed scope of the Class release.” (ECF No. 116.)
14 And on February 8, 2021, Plaintiffs informed the Court that they are withdrawing from
15 the Settlement Agreement altogether, claiming that its terms permit them to do so. (Pls.’
16 Status Conference Report, ECF No. 129.)

17 At the fourth status conference on February 9, 2021, the Court directed parties to
18 submit briefs and corresponding replies on whether the Settlement Agreement may be
19 approved (despite Plaintiffs’ claims to withdraw), with the attorney’s fees under the
20 Settlement Agreement to be bifurcated and determined later. The parties filed their
21 Supplemental Briefs and Replies. (ECF Nos. 132, 133, 135, 137, 138.) At a hearing held
22 on March 29, 2021, the Court found that the agreed modifications to the release
23 provisions were appropriate and approved the class settlement.

24 **II. LEGAL STANDARD**

25 “[I]n the context of a case in which the parties reach a settlement agreement prior
26 to class certification, courts must peruse the proposed compromise to ratify both the
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1 propriety of the certification and the fairness of the settlement. *Staton v. Boeing Co.*, 327
2 F.3d 938, 952 (9th Cir. 2003).

3 **A. Class Certification**

4 Class certification is governed by Federal Rule of Civil Procedure (“Rule”) 23.
5 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). Under Rule 23(a), the party
6 seeking certification must demonstrate that “(1) the class is so numerous that joinder of
7 all members is impracticable; (2) there are questions of law or fact common to the class;
8 (3) the claims or defenses of the representative parties are typical of the claims or
9 defenses of the class; and (4) the representative parties will fairly and adequately protect
10 the interests of the class.” Fed. R. Civ. P. 23.

11 **B. Adequacy of the Settlement**

12 Before approving a settlement, the court must find that “the settlement . . . is fair,
13 reasonable, and adequate.” Fed. R. Civ. P. 23(e)(1)(C). Review of a proposed settlement
14 generally proceeds in two stages, a hearing on preliminary approval and a final fairness
15 hearing. *True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052, 1062 (C.D. Cal.
16 2010); Fed. Judicial Ctr., *Manual for Complex Litig.*, § 21.632 (4th ed. 2004).

17 At the preliminary approval stage, the Court must review the parties’ proposed
18 settlement to determine whether the settlement is within the permissible “range of
19 possible of approval” and thus, whether the notice and the scheduling of the formal
20 fairness hearing is appropriate. *Hofmann v. Dutch LLC*, 317 F.R.D. 566, 574 (S.D. Cal.
21 2016). At the final approval stage, the court takes a closer look at the proposed
22 settlement, taking into consideration objections and any other further developments in
23 order to make a final fairness determination. *True*, 749 F. Supp. 2d at 1063.

24 A settlement is not judged against only the amount that might have been recovered
25 had the plaintiff prevailed at trial; nor must the settlement provide full recovery of the

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1 damages sought to be fair and reasonable. *Linney v. Cellular Alaska P'ship*, 151 F.3d
2 1234, 1242 (9th Cir. 1998).

3 To fulfill its duty, the Court must evaluate “whether a proposed settlement is
4 fundamentally fair, adequate, and reasonable.” *Staton*, 327 F.3d at 952 (internal
5 quotation marks and citations omitted). Courts should consider some or all of the
6 following factors in determining if a settlement is fair: “the strength of the plaintiffs’
7 case; the risk, expense, complexity, and likely duration of further litigation; the risk of
8 maintaining class action status throughout the trial; the amount offered in settlement; the
9 extent of discovery completed and the stage of the proceedings; the experience and views
10 of counsel; the presence of a governmental participant; and the reaction of the class
11 members to the proposed settlement.” *Hanlon*, 150 F.3d at 1027; *Staton*, 327 F.3d at
12 959. In evaluating a proposed settlement, “[i]t is the settlement taken as a whole, rather
13 than the individual component parts, that must be examined for overall fairness.” *Hanlon*
14 *v. Chrysler Corp.*, 150 F.3d at 1026. The court “does not have the ability to delete,
15 modify, or substitute certain provisions,” and “[t]he settlement must stand or fall in its
16 entirety.” *Id.*

17 **III. DISCUSSION**

18 **A. Merits of Class Certification**

19 In its Order granting preliminary approval of the proposed settlement, the Court
20 found conditionally that, for settlement purposes, the prerequisites for a class action
21 under Rules 23(a) and (b)(3) had been met in that: (1) the number of settlement class
22 members is so numerous that joinder of all members thereof is impracticable; (2) there
23 are questions of law and fact common to the settlement class; (3) the claims of the
24 Plaintiffs are typical of the claims of the settlement class they seek to represent for
25 purposes of settlement; (4) the Plaintiffs have fairly and adequately represented the
26 interests of the settlement class and will continue to do so, and the Plaintiffs have retained
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1 experienced counsel to represent them; (5) for purposes of settlement, the questions of
2 law and fact common to the settlement class members predominate over any questions
3 affecting any individual settlement class member; and (6) for purposes of settlement, a
4 class action is superior to the other available methods for the fair and efficient
5 adjudication of the controversy. (ECF No. 69 at 8–13.)

6 The objectors do not challenge the Court’s preliminary findings as to the class
7 certification requirements and the Court again concludes that the facts presented satisfy
8 the requirements for a class action under Rules 23(a) and (b)(3).³

9 **B. Adequacy of Settlement**

10 **1. Strength of Plaintiffs’ Case Versus Risks, Expense, and Duration**

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

15 Plaintiffs’ claims are based on a “years-long investigation into The Children’s
16 Place’s sale discounting practices” across multiple jurisdictions which they contend
17 shows “pervasive” violations of California law through false advertising pricing
18 information. (Mem. 5, ECF No. 60-1.) Plaintiffs’ damages expert, Christian Tregillis,
19 provided a detailed report opining on potential methodologies to compute damages.
20 Plaintiffs’ investigation revealed that the median purchase price for retail goods at the
21 Children’s Place, Inc. was approximately \$6.00 to \$6.80. Mr. Tregillis estimated that the
22 potential total damage on a per-item basis as a result of the alleged false-reference pricing

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26 ³ The Court incorporates by reference the Rule 23(a) and (b)(3) analysis set out at pages
27 8–13 of the January 28, 2020 Order. (*See* ECF No. 69 at 8–13.)

1 scheme was approximately 10% of the actual retail purchase price, or \$0.60 to \$0.68 on a
2 per-item basis were Plaintiffs to prevail at trial.

3 On the other hand, TCP counsel argues that there is a significant risk that the class
4 will be unable to recover any amount in restitution under California law. (Def.'s
5 Statement Non-Opposition 10, ECF No. 88.) That is because Plaintiffs are required to
6 establish damages by proving the amount of overpayment produced by the false
7 advertising which is an issue subject to great dispute. Class Counsel acknowledges that
8 the "state of the law regarding the appropriate method for calculating damages or
9 restitution in these types of false pricing cases is in flux." (See Mem. 13, ECF No. 60-1.)
10 Hence, it may be possible that years from now the class would succeed on the merits only
11 to "recover nothing" in damages. *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 326 (C.D.
12 Cal. 2016); see also *Chowning v. Kohl's Dep't Stores, Inc.*, No. CV-15-08673-
13 RGK(SPX), 2016 WL 1072129, at *1 (C.D. Cal. Mar. 15, 2016) (granting defendants
14 summary judgment in a suit based on allegations of deceptive pricing because the
15 plaintiffs "failed to demonstrate a viable measure of restitution"), *aff'd*, 735 F. App'x 924
16 (9th Cir. 2018), *amended on denial of reh'g*, 733 F. App'x 404 (9th Cir. 2018), and *aff'd*,
17 733 F. App'x 404 (9th Cir. 2018); *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 795
18 (2015) (discussing in detail the complexity of estimating damages in cases where the
19 harm arises from deceptive advertising).

20 In agreeing to the instant settlement, the Parties recognize the challenges in
21 continuing to litigate this matter, including, that "the expense, delay, risks and
22 uncertainties associated with continued prosecution. . . could take several more years to
23 litigate." (2019 Carpenter Decl. ¶ 18, ECF No. 60-2.) The Objectors do not dispute the
24 open questions regarding damages or that there would be significant risks and
25 uncertainties associated with continued litigation. Ultimately, the identified risks in this
26 case weigh heavily in determining that the proposed settlement is fair.

1 **2. Amount Offered in the Settlement**

2 **a. Proposed Settlement as a Coupon Settlement**

3 The Class Action Fairness Act (“CAFA”) includes specific requirements with
4 respect to the approval of a “coupon settlement.” As to the fairness of the recovery by
5 class members, CAFA requires that before a district court may approve a “coupon
6 settlement,” it must “determine whether, and mak[e] a written finding that, the settlement
7 is fair, reasonable, and adequate for class members.” 28 U.S.C. § 1712(e). Although the
8 “fair, reasonable, and adequate” language used in § 1712(e) is identical to the language
9 relating to settlement approval contained in Rule 23(e)(2), several courts have read §
10 1712(e) as imposing a heightened level of scrutiny in reviewing such settlements. *See,*
11 *e.g., Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006);
12 *True*, 749 F. Supp. 2d at 1062.

13 It has been observed that there are three primary concerns with coupon settlements,
14 that is, “they often do not provide meaningful compensation to class members; they often
15 fail to disgorge ill-gotten gains from the defendant; and they often require class members
16 to do future business with the defendant in order to receive compensation.” *Figueroa v.*
17 *Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007).

18 Here, it is undisputed that a portion of the settlement provides an option of
19 receiving 25% off coupons on purchases up to \$100. As to this part of the settlement, §
20 1712(e) unquestionably applies. With respect to the \$6 voucher, the objectors assert that
21 this amount, too, constitutes a coupon recovery. The Court will address this argument in
22 more detail in the attorney’s fee award discussion below. However, *assuming arguendo*
23 that this is true, CAFA does not prohibit a coupon settlement if it is otherwise “fair,
24 reasonable, and adequate.” Here, the Court finds that the proposed settlement is “fair,
25 reasonable and adequate” with respect to the class members’ recovery.

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1 First, the Court concludes that the \$6 vouchers provide Class Members with
2 meaningful compensation and adequate purchasing power given the low prices common
3 to much of Defendant's inventory. As is now clear, the first round of distribution from
4 the Fund will have only about 170K vouchers, so each Claimant is guaranteed at least \$6
5 in value if they elected the \$6 voucher. (Geraci Decl. ¶ 15, ECF No. 91-4.) The Court
6 also determines that the total amount in the Voucher Fund—approximately \$5.4 million
7 dollars—is adequate. Given that the potential total damage on a per-item basis as a result
8 of the alleged false-reference pricing scheme was approximately 10% of the actual retail
9 purchase price, or \$0.60 to \$0.68 on a per-item basis, the benefit to the Class Members is
10 equal to recovery for the purchase of approximately 10 items. Similarly, for those class
11 members who opt for 25% off a purchase of \$100, the value amount of the recovery is up
12 to \$25.

13 Second, TCP incurs a \$6 financial loss in profit per redeemed voucher which
14 adversely impacts TCP's bottom line.

15 Third, through either voucher option, an aggrieved class member is required to do
16 future business with the alleged malefactor which raises one of the concerns that exist
17 with coupon settlements.

18 Ultimately, "one must ask whether the value of relief in the aggregate is a
19 reasonable approximation of the value of plaintiffs' claim." *See In re Mexico Money*
20 *Transfer Litigation*, 267 F.3d 743, 748–49 (7th Cir. 2001) (Easterbrook, J.) (approving a
21 coupon settlement which was likely to provide only 10% net value of the face value of
22 the coupons). The Court is satisfied that Defendant will be held accountable in an
23 appreciable measure for their alleged unfair and misleading conduct and that Class
24 Members will receive appreciable benefits by the resolution of this case.

25 Thus, after balancing the strengths and risk factors identified above, the Court
26 finds that the value of the proposed relief which will be received by the class is fair,
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1 adequate, and reasonable. Notwithstanding the identified shortcomings of the settlement,
2 the Court concludes that the proposed settlement constitutes a fair compromise given the
3 surrounding questions regarding the calculation of damages at trial, (2019 Carpenter
4 Decl. ¶ 18, ECF No. 60-2; Mem. 13, ECF No. 60-1,) and the limited damages that stem
5 from each sale, (2019 Carpenter Decl. Ex. 2 (Tregillis Report) at ¶ 58, ECF No. 60-2
6 (finding that damages would be equal to a “10% discount” on the price of each qualifying
7 purchase).)

8 **3. Extent of Investigation and Discovery, and Stage of Litigation**

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

15 The Settlement, however, is informed by Plaintiffs’ thorough investigation. Class
16 Counsel engaged in the multi-district, “years-long” investigation undertaken to assess
17 Plaintiffs’ claims and the class claims. (TAC ¶ 22–40, ECF No. 37-2; Mem. 5, ECF No.
18 60-1.) During this investigation, counsel photographed and compared “price tags and
19 retail discount signage in the Defendant’s retail and outlet stores throughout California as
20 well as select stores in” eight other states. (2020 Carpenter Decl. ¶ 2, ECF No. 66.)
21 Plaintiffs reinitiated the investigation over the 2019 holiday season to corroborate their
22 findings. (*Id.*, ¶ 3.)

23 In addition, the Parties met over two full-day mediation sessions conducted by the
24 Honorable Edward A. Infante of JAMS, Inc. on December 8, 2016 and April 19, 2017,
25 and subsequently negotiated, drafted, and executed the instant Agreement. (Mem. 6–7,

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1 ECF No. 60-1; 2019 Carpenter Decl. Ex. 2 (Tregillis Report), ECF No. 60-2.) These
2 collective efforts are enough to satisfy this factor.

3 **4. Reaction of Class Members**

4 Plaintiffs argue that the reaction of Class Members has been decidedly positive
5 given that (1) KCC received 101,330 timely-filed Claim Forms, and (2) only 10 of
6 10,409,099 email recipients successfully contacted by KCC requested to be excluded
7 from the settlement. (Mem. 16, ECF No. 91-1.) KCC received three timely objections as
8 per the established procedures and Plaintiff’s counsel received eleven misdirected
9 objections of which only three were briefed in any way, and the remainder “curiously . . .
10 were virtually identical in format and language.”⁴ (*Id.* at 16–17.)

11 In view of the small number of objections in comparison to the number of timely
12 filed claim forms, the Court finds that the reaction to the proposed settlement is
13 overwhelmingly positive.

14 **5. Presence of a Governmental Participant**

15 No governmental entity participated in this Action or has filed any objection to the
16 settlement terms or sought to participate. (*Id.* at 16.)

17 **6. Heightened Scrutiny for Signs of Collusion**

18 A settlement agreement is not fundamentally fair under Rule 23(e)(2) if it is “the
19 product of collusion among the negotiating parties.” *In re Mego Fin. Corp. Sec. Litig.*,
20 213 F.3d 454, 458 (9th Cir. 2000), *as amended* (June 19, 2000) (citation omitted). The
21 “[C]ourt’s role in the class action settlement process is to protect the rights of those not
22 involved in negotiating the settlement, generally the unnamed class members.” *In re*
23 *Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (quotations omitted); *see also*
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26 ⁴ The Court has not addressed the untimely and misdirected objections because they were
27 not submitted to the Administrator in a timely manner. (ECF No. 91-3 at 2-12.)

1 *Officers for Justice*, 688 F.2d at 624 (collecting cases). Where a settlement is agreed
2 upon prior to certification, there is a “greater potential for a breach of fiduciary duty
3 owed the class during settlement.” *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d
4 935, 946 (9th Cir. 2011). Consequently, the Court applies greater scrutiny and considers
5 whether the Settlement Agreement is “the product of collusion among the negotiating
6 parties.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 458.

7 “This more exacting review is warranted to ensure that class representatives and
8 their counsel do not secure a disproportionate benefit at the expense of the unnamed
9 plaintiffs who class counsel had a duty to represent.” *Roes, 1-2 v. SFBSC Mgmt., LLC*,
10 944 F.3d 1035, 1049 (9th Cir. 2019) (quotations omitted). Most commonly, these unjust
11 benefits take the form of (1) a “disproportionate distribution of the settlement” to Class
12 Counsel; (2) “a ‘clear sailing’ arrangement (i.e., an arrangement where defendant will not
13 object to a certain fee request by class counsel)”; or (3) “a reverter that returns unclaimed
14 fees to the defendant.” *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). Another
15 indication of collusion is an overbroad release of claims, wherein claims that are not
16 within the “identical factual predicate” of the claims alleged in the complaint are
17 released. *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010). Under this test, the
18 released claims must “arise from the same common nucleus of operative fact” as those
19 alleged in the complaint. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir.
20 1992). The Court, moreover, “must be guided by the actual written agreement and
21 release” and not counsel’s representations on the matter. *See Kakani v. Oracle Corp.*,
22 No. C 06-06493-WHA, 2007 WL 1793774, at *2 (N.D. Cal. June 19, 2007).

23 **a. Disproportionate Distribution of the Settlement**

24 In this case, the Court is not required to award any specific sum of attorney fees to
25 Class Counsel. Instead, the Court maintains the discretion to determine the
26 reasonableness of the attorney fees compared to the value of the settlement to Class
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1 Members. However, the settlement still creates the potential for a disproportionate
2 distribution of the settlement to Class Counsel. This issue is addressed in greater detail
3 below in the discussion regarding attorney fees.

4 **b. Clear Sailing Provision**

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

16 **c. Reverter**

17 Here, if the Court does not award full fees and costs to Class Counsel, the
18 Settlement Agreement requires that the amount by which the fees were reduced be made
19 available to the Class Members as additional vouchers. (*Id.*) The absence of a clause
20 reverting unawarded attorney fees to the Defendant mitigates the fear that the Settlement
21 Agreement is the product of collusion between Defendant and Class Counsel. *Cf. In re*
22 *Bluetooth*, 654 F.3d at 947 (citing *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th
23 Cir. 2004) (Posner, J.)) (noting that the reversion of unpaid fees to the defendant may
24 signal collusion).

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1 As noted above, any unpaid attorney fees do not revert to Defendant. Further,
2 there is no reversion of settlement vouchers that are not redeemed. They are either
3 awarded to Class Members or to a designated *cy pres*.

4 **d. Release**

5 The objectors D-G have an ongoing class action under the Washington
6 Commercial Electronic Mail Act (“CEMA”) (which punishes deceitful advertising done
7 by e-mail). (Obj. Br. 13–14, ECF No. 82.) CEMA does not regulate in-store signs or
8 price tags, the form of communication challenged here. Under the original Settlement
9 Agreement addressed in the First Final Settlement Order, the Class agreed to release TCP
10 from all claims they have against it. (SA § 2.11, ECF No. 60-2.) This included all “Class
11 Released Claims,” i.e. all claims “arising out of or relating to any of the acts, omissions
12 or other conduct that have or could have been alleged or otherwise referred to in the
13 Complaint.” (*Id.*, § 1.10.) Class Members also agreed to waive all “Unknown Claims.”
14 (*Id.*, §§ 1.31, 2.11.) Under this provision, Class Members waived the protection of
15 California Civil Code § 1542 and thereby relinquished claims which they do “not know
16 or suspect to exist . . . at the time of executing the release and that, if known . . . would
17 have materially affected . . . settlement.” Cal. Civ. Code § 1542; (*cf.* SA § 1.31, ECF No.
18 60-2.) As with the known claims, the release language encompassing “Unknown
19 Claims” was “limited to a universe of claims ‘arising out of or relating to any of the acts,
20 omissions or other conduct that have or could have been alleged or otherwise referred to
21 in the Complaint’” (Mem. 18, ECF No. 60-1 (quoting SA § 1.10, ECF No. 60-2).)
22 The Named Plaintiffs likewise released Defendant from future liability. (SA § 2.12, ECF
23 No. 60-2.) Defendant, moreover, admitted no wrongdoing and affirmatively denied
24 “each of the claims and contentions alleged by Plaintiffs in the Action.” (*Id.*, § 2.13.)

25 In the First Final Settlement Order, the Court found that the originally proposed
26 release was overbroad in several ways. First, the types of filings applicable were very
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1 broad: “all manner of action, causes of action, claims, demands, rights, suits, obligations,
2 debts, contracts, agreements, promises, liabilities, damages, charges, penalties, losses,
3 costs, expenses, and attorneys’ fees, of any nature whatsoever” (*Id.*, § 1.10.) Also, it
4 included claims “known and unknown.” (*Id.*) Such claims, moreover, need not have
5 arisen here; all that was necessary was that the claims “may have aris[en] out of or
6 relating to any of the acts, omissions or other conduct that have or could have been
7 alleged or otherwise referred to in the Complaint.” (*Id.*)

8 Under the original release, even the language which should tie the release to the
9 instant case was ambiguous insofar as it failed to exclude other types of deceptive
10 practices, including e-mail communications. (Obj. Br. 12, ECF No. 82.) Washington
11 state consumer law illustrates how the objectors were misled differently than the class at
12 issue here, and how their Washington statute is intended to cover other forms of conduct
13 and carries different elements and remedies. (*Id.* at 16–19.) Thus, because the release
14 was broad enough to cover liability under the Washington suit, and thus presumably other
15 suits with materially different facts than those alleged here, the Court found the original
16 Settlement Agreement too broad. *See Hesse*, 598 F.3d at 590 (explaining the identical
17 factual predicate test); *cf. Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749
18 (9th Cir. 2006) (affirming dismissal of a class action against credit card companies
19 predicated on the same price-fixing predicate and injury as claims settled in an earlier
20 class action, even though the subsequent suit “posit[ed] a different theory of anti-
21 competitive conduct”); *Class Plaintiffs*, 955 F.2d at 1286–91 (affirming approval of a
22 settlement relating to certain bond defaults that released claims by an identical class of
23 plaintiffs in a pending case that related to the same bond defaults).

24 The Court thus concluded that the breadth of the instant waiver was an “obvious
25 deficiency” and required the Parties to meet to find a mutually agreeable, narrower

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1 provision. *Christensen v. Hillyard, Inc.*, Case No. 13–cv–04389 NC, 2014 WL 3749523,
2 at *3 (N.D. Cal. July 30, 2014).

3 Following the First Final Settlement Order, the parties reached an agreement to
4 modify the scope of the release and the objectors would withdraw their objections. (*See*
5 Further Status Conference Report 1–2, ECF No. 113 (presenting proposed revision and
6 redline).) The parties struck the phrases “all manner of action,” “known or unknown,”
7 and “which they have or may have.” Further, the provision releasing Defendant’s alleged
8 deceptive practices is now revised so that it guides the readers to claims arising out of
9 “consumer protection statutes or false advertising statutes,” rather than just the practice of
10 “advertisement” writ-large. As a final assurance measure, the parties added an entirely
11 new paragraph to make sure that the lawsuit over CEMA is not part of the modified
12 Settlement Agreement’s release. Indeed, Objector Gabertan, the party that initially
13 contested the Settlement Agreement, expressed his satisfaction over the modified scope
14 of release. (*See* Further Status Conference Report 3, ECF No. 113 (“If the Court
15 approves this language, Objector Charlie Gabertan withdraws his Objection and confirms
16 that he will not appeal the Court’s Final Approval Order.”).)

17 But afterwards, Plaintiffs informed the Court that under Section 4.2 of the
18 Settlement Agreement, they were entitled to back out of the Settlement. According to
19 Plaintiffs, the Settlement Agreement is null and void because the Court conditioned its
20 approval of the settlement on issues that not all parties have agreed on; to the extent that
21 an agreement was reached, it was not in writing and signed by the parties, therefore
22 inapposite. (*See* Pls.’ Suppl. Br. 1–4, ECF No. 135.)

23 The email exchanges indicated the following. On November 18, 2020 at 1:38 PM,
24 Defendant’s counsel sent an email to Plaintiffs’ counsel, which provided the full text of
25 the proposed modification to the section of the Settlement Agreement discussing release,
26 with redline changes flagging the modified language. (Reply Decl. Paul Karl Lukacs Ex.
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1 A, ECF No. 137; Def.’s Reply Exs. A, B, ECF Nos. 138-2, 138-3.) At 2:39 PM,
2 Plaintiffs’ counsel replied, in which the email stated, “Yes - good.” The reply email ends
3 with: “Thanks, Todd.” (Def.’s Reply Ex. A, ECF No. 138-2.)

4 About an hour later, at 3:35 PM, Defendant’s counsel sent an email to Objector
5 Gabertan’s counsel, with Plaintiffs’ counsel cc’d. The email stated: “TCP and Plaintiffs
6 will agree to your proposed additional language for the release clause. . . . Please confirm
7 that this satisfies your clients’ objection. Please also confirm that, if this language is
8 approved by the Court, your client will not appeal the Court’s Final Approval Order.”
9 (Def.’s Reply Ex. B, ECF No. 138-3.)

10 “Plaintiffs initially agreed to proceed with the proposed modification to the scope
11 of release.” (Pls.’ Status Conference Report 4, ECF No. 116.) It is true that under the
12 terms in the Settlement Agreement, all modifications must be “in writing signed by the
13 Parties or their counsel.” (SA § 5.12, ECF No. 60-2.) However, the email exchange
14 records presented by Defendant and Objector Gabertan (in which Plaintiffs confirmed
15 their veracity), in addition to Plaintiffs’ prior representations to the Court, demonstrate
16 that such “writing signed” existed or that Plaintiffs waived the requirements expressed in
17 Section 5.12.

18 Specifically, the email response by Plaintiffs’ counsel—which expressed “Yes -
19 good” to the modification and includes the signature line “Thanks, Todd,” (Def.’s Reply
20 Ex. A, ECF No. 138-2)—satisfies Section 5.12’s requirement that the amendment be in
21 “writing signed by the Parties or their counsel.” Plaintiffs have not provided case law for
22 the Court to think otherwise. “A record or signature may not be denied legal effect or
23 enforceability solely because it is in electronic form.” *Ruiz v. Moss Bros. Auto Grp.*, 232
24 Cal. App. 4th 836, 843 (2014) (quoting Cal. Civ. Code § 1633.7(a)). In fact, courts have
25 consistently interpreted California law to determine that emails may qualify as signed
26 writing. *See, e.g., Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (Fed. Cir. 2005) (citing
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1 California Supreme Court precedent on typed names at the end of telegrams); *Piveg, Inc.*
2 *v. Gen. Star Indem. Co.*, 193 F. Supp. 3d 1138, 1146 (S.D. Cal. 2016) (“Further, ‘under
3 California law, several [emails] may collectively constitute a memorandum that satisfies
4 the statute of frauds.’” (alteration in original) (citations omitted)), *aff’d*, 710 F. App’x 776
5 (9th Cir. 2018).

6 Even if the email exchanges at-issue do not constitute a signed writing, Plaintiffs’
7 counsel waived this condition by and through his conduct. “[P]arties may, by their
8 conduct, waive [a no oral modification] provision where evidence shows that was their
9 intent.” *Wind Dancer Prod. Grp. v. Walt Disney Pictures*, 10 Cal. App. 5th 56, 78 (2017)
10 (second alteration in original) (quotations omitted) (citing *Biren v. Equality Emergency*
11 *Medical Group, Inc.*, 102 Cal. App. 4th 125, 141 (2002)). “The waiver may be either
12 express, based on the words of the waiving party, or implied, based on conduct indicating
13 an intent to relinquish the right.” *Id.*

14 Here, the following shows it was the intent of Plaintiffs’ counsel to waive the
15 requirements in Section 5.12. First, after Plaintiffs’ counsel’s “Yes - good” email,
16 Defendant’s counsel submitted the modified version of the Settlement Agreement to
17 Objector Gabertan’s counsel, and the email stated: “TCP [Defendant] and Plaintiffs will
18 agree to your proposed additional language for the release clause.” (Def.’s Reply Ex. B,
19 ECF No. 138-3.) In the email, Plaintiffs’ counsel was cc’d, and he did not object nor
20 insist the new draft be memorialized in signed writing. (*See id.*) Second, when Objector
21 Gabertan thereafter filed his Further Status Conference Report prior to the second status
22 hearing, informing that the parties have agreed to the modified release, (*see* ECF No. 113
23 at 2,) again Plaintiffs did not file any objection or opposition. Third and finally, the
24 Court directly inquired Plaintiffs’ counsel at the November 20, 2020 hearing, in which
25 the Court commented, “the parties have successfully negotiated a, I guess, modification
26 in the settlement agreement which carves out the claims that are pending in the federal
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1 district court in the state of Washington.” Plaintiffs’ counsel responded: “I think Your
2 Honor has accurately described the procedural posture.” (Tr. Case Management
3 Conference 3–4, ECF No. 136.)

4 Either by existence of an actual signed writing or waiver of the requirement, the
5 modifications to the release are enforceable as having been agreed upon in compliance
6 with the terms of the Settlement Agreement which means that Section 4.2’s conditions
7 for nullifying the agreement were not triggered. Plaintiffs presented case law on how the
8 text of settlement agreements bind the Court. *Officers for Just. v. Civ. Serv. Comm’n of*
9 *City & Cnty. of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982) (“Neither the district
10 court nor this court is empowered to rewrite the settlement agreed upon by the parties.”).
11 Plaintiffs are masters of their own case,⁵ and as masters they agreed to the modification
12 of the settlement agreement.

13 Having determined that Plaintiffs may not unilaterally void the Settlement
14 Agreement because the conditions justifying so have not been met, the Court now finds
15 that the scope of release is appropriate. The Court **APPROVES** the modified Settlement
16 Agreement.

17 **e. Awards to Named Plaintiffs**

18 Also, there is no indication that the awards to the Named Plaintiffs here are the
19 result of collusion or special treatment contrary to the Class’s interest. Awards to Named
20 Plaintiffs are “fairly typical” in class action settlements. *Rodriguez v. W. Publ’g Corp.*,
21 563 F.3d 948, 958 (9th Cir. 2009). They properly compensate Named Plaintiffs for the
22 additional duties required of them to bring forward the litigation and execute a settlement.
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25 ⁵ While Plaintiffs cited to *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir.
26 1988) for their position, it is not convincing since *Emrich* is discussing the plaintiff’s
27 prerogative in the context of removal jurisdiction.

1 *Id.* at 958–59. Here, the awards are reasonable. *Cf. In re M.L. Stern Overtime Litig.*, No.
2 07-CV-0118-BTM, 2009 WL 995864, at *1 (S.D. Cal. Apr. 13, 2009) (granting
3 preliminary approval of an agreement allotting \$15,000 in fees for each Named Plaintiff
4 from a fund of \$945,960). After all, the Named Plaintiffs have served in their role since
5 2016 and have made themselves available to confer with Class Counsel and for
6 discovery, as needed. (2019 Carpenter Decl. ¶ 16, ECF No. 60-2.)

7 * * *

8 Consequently, the Court finds that the modified Settlement Agreement does not
9 reveal collusion. While the First Final Settlement Order initially expressed concerns for
10 the scope of release being overly broad, these concerns have been addressed by the
11 parties’ agreed-upon modification, which the Court approves.

12 **C. Notice to Class**

13 Rule 23(c)(2) requires the “best notice practicable under the circumstances” and
14 permits notice to be served by “United States mail, electronic means, or other appropriate
15 means.” The Notice Plan must clearly and concisely state in plain, easily understood
16 language:

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

22 *Rinky Dink Inc v. Elec. Merch. Sys. Inc.*, No. C13-1347-JCC, 2015 WL 11234156, at *7
23 (W.D. Wash. Dec. 11, 2015) (quotations omitted); *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944
24 F.3d 1035, 1048 (9th Cir. 2019). The Ninth Circuit has found that a Notice Plan is
25 satisfactory if it “alert[s] those with adverse viewpoints to investigate and to come

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1 forward and be heard.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th
2 Cir. 2015).

3 In the Order granting preliminary approval of the settlement, the Court approved a
4 tri-part notice structure, hereafter referred to as the Notice Plan. (ECF No. 69 at 25–26.)
5 The notice structure was implemented as detailed above and spelled out in the declaration
6 of a KCC employee, Mr. Jay Geraci. (*See Geraci Decl.*, ECF No. 91-4.) As TCP makes
7 clear, both the process and the contents of the notice plan are adequate. (Def.’s Statement
8 Non-Opposition 14, ECF No. 88.) Lastly, none of the Objectors contest notice, though
9 Plaintiffs briefed the issue. (Mem. 19, ECF No. 91-1.)

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

20 The notices and Settlement Website contained all of the information necessary to
21 adequately inform interested Class Members how to engage with the Settlement,
22 including: (1) information on the meaning and nature of the Class; (2) the basic terms and
23 provisions of the proposed settlement; (3) the costs and fees to be paid out of the
24 Settlement Fund; (4) the procedures and deadlines for submitting Claim Forms,
25 objections, and/or requests for exclusion; and (5) the date, time and place of the fairness

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1 hearing. (See SA Exs. B to E (Full Notice, E-Mail Notice, Online Media Notice, and
2 Claim Form), ECF No. 60-2.)

3 As part of the modified Settlement Agreement, TCP has agreed to re-notice the
4 class and notify class members that the release has been altered so as to carve out the
5 Washington class action litigation from the terms of the Settlement Agreement. Given
6 that the modifications inure to the benefit of class members in the State of Washington,
7 there is a question whether notice regarding the release is required. See, e.g., *Shaffer v.*
8 *Cont'l Cas. Co.*, 362 F. App'x 627, 631 (9th Cir. 2010) (“Although changes were made
9 to the release after potential class members received the notice, the changes did not
10 render the notice inadequate because they narrowed the scope of the release.”). However,
11 out of an abundance of caution, the Court will direct the Defendant to arrange for
12 supplemental notice as directed below.

13 As such, the Court concludes that the Notice Plan implemented provided the best
14 possible notice under the circumstances of the original settlement and the modifications
15 to the release.

16 **D. Attorney’s Fees**

17 Objector Anna St. John asserted that the Court cannot award Plaintiffs’ counsel
18 fees in the amount of \$1,080,000 until the vouchers have been redeemed because the
19 vouchers are coupons within the meaning of CAFA. (Formal Obj., ECF No. 75.) She
20 cited three cases in support of this position: *Hadley v. Kellogg Sales Company*, No. 16-
21 CV-04955-LHK, 2020 WL 836673, at *9 (N.D. Cal. Feb. 20, 2020); *McKnight v. Uber*
22 *Technologies, Inc.*, No. 14-cv-05615-JST, 2019 WL 3804676, at *3 (N.D. Cal. Aug. 13,
23 2019); *Rougvie v. Ascena Retail Group, Inc.*, No. 15-724, 2016 WL 4111320, at *27
24 (E.D. Pa. July 29, 2016).

25 Plaintiffs responded that the option to select between a voucher and coupon does
26 not make CAFA applicable, (Pls.’ Opp’n 5, ECF No. 87,) and cited two district court
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1 opinions for that proposition. *See Foos v. Ann, Inc.*, No. 11-CV-2794-L, 2013 WL
2 5352969, at *3 (S.D. Cal. Sept. 24, 2013) (option of receiving a coupon instead of
3 obtaining a voucher does not require the class action to be deemed a coupon settlement as
4 described in 28 U.S.C. § 1712”); *Seebrook v. Children’s Place Retail Stores, Inc.*, No. C
5 11–837 CW, 2013 WL 6326487, at *1-2 (N.D. Cal. Dec. 4, 2013).

6 On January 28, 2020, the Court granted Plaintiffs’ Unopposed Motion for
7 Preliminary Approval of the Settlement Agreement, (ECF No. 60-1.) In the Order, the
8 Court found that the 25% vouchers offered as an option were coupons within the meaning
9 of *In re Online DVD*. (ECF No. 69 at 15.) However, relying on *Foos v. Ann, Inc.*, No.
10 11-CV-2794-L, 2013 WL 5352969, at *3 (S.D. Cal. Sept. 24, 2013), the Court concluded
11 that this finding did not require a finding that the settlement was a coupon settlement
12 under CAFA. (*Id.* (“Although the class members here have the option of receiving a
13 coupon instead of obtaining a voucher, the Court has not found any case law to suggest
14 that such an option requires the class action to be deemed a coupon settlement as
15 described in 28 U.S.C. § 1712.”)) Ultimately, the Court held that the Settlement
16 Agreement did not call for a distribution of coupons within the meaning of the Class
17 Action Fairness Act of 2005, 28 U.S.C. § 1711 *et seq.* *See generally In re Online DVD*,
18 779 F.3d 934 (9th Cir. 2015).

19 Given that the motion for preliminary approval was made without objection by
20 TCP under the terms of the clear sailing provision, the deficiencies in the proposed
21 settlement were not subjected to the adversarial process that would normally inform the
22 Court. As to the \$6 credit voucher, with the benefit of the challenges raised by the
23 objectors, the Court finds that the restrictions on the use of the voucher raise the real
24 possibility that a large number of vouchers will go unused and that an attorney’s fee
25 award based upon the face value of the vouchers will create a windfall for the Plaintiffs’
26 attorneys compared to the actual benefits received by the class members. Accordingly,
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1 the Court **DENIES without prejudice** Plaintiffs’ Motion for Attorney’s Fees and instead
2 bifurcates the issue.

3 **1. The Settlement as a Coupon Settlement**

4 Objector St. John asserts that CAFA applies to this settlement because the class
5 members must choose between two benefits, the \$6 voucher or the 25% voucher, and the
6 Court has determined that the latter voucher is a coupon. (Formal Obj., ECF No. 75.)
7 She contends that the instant vouchers present a significant risk that the vast majority of
8 the 800,000 vouchers will expire unused after the 6-month period redemption period and
9 thus less than 5% of the actual benefit to the Class will be realized while a much higher
10 amount will be paid directly to counsel. (*Id.* at 1.) Plaintiffs, in contrast, maintain that
11 the \$6 vouchers option is an alternative to cash and is not a coupon settlement. (Mem.
12 Att’y’s Fees 2, ECF No. 73-1.)

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

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

5 Congress did not define the term “coupon” when promulgating CAFA. *In re*
6 *Online DVD*, 779 F.3d at 950. However, the Ninth Circuit has since fashioned a three-
7 part test to identify coupons: “(1) whether Class Members have to ‘hand over more of
8 their own money before they can take advantage of’ a credit, (2) whether the credit is
9 valid only ‘for select products or services,’ and (3) how much flexibility the credit
10 provides, including whether it expires or is freely transferrable.” *In re Easysaver*
11 *Rewards Litig.*, 906 F.3d 747, 755 (9th Cir. 2018) (citing *In re Online DVD*, 779 F.3d at
12 951), *cert. denied sub nom. Perryman v. Romero*, 139 S. Ct. 2744 (2019). Applying
13 these factors in *In re Online DVD*, the Ninth Circuit found that a \$12 gift card to Walmart
14 was not a coupon because the “class member need not spend any of his or her own
15 money” to make another Walmart purchase. *In re Online DVD*, 779 F.3d at 951. Such
16 gift cards, moreover, were transferable, did not expire, and could be used to purchase
17 “one of many different types of products” sold for \$12 or less. *Id.* at 951–52. In
18 addition, consumers could opt to receive \$12 in cash instead of a \$12 gift card. *Id.* at
19 941.

20 **a. The 25% Off Coupon**

21 In its Order preliminarily approving the class settlement, the Court relied on *Foos*
22 and concluded that the option to utilize the voucher as a coupon did not transform the
23 settlement into a coupon settlement. (ECF No. 69 at 15 n. 4.) While the coupon option
24 would not render the entire settlement a coupon settlement, the Court does find that, at
25 minimum, 28 U.S.C. § 1712 applies to that portion of the vouchers that are used as 25%
26 off coupons. That is because CAFA requires district courts to consider the value of only
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1 those coupons “that were actually redeemed” when calculating the relief awarded to a
2 class. *In re Online DVD*, 779 F.3d at 950; *see also* 28 U.S.C. § 1712(a). The Court will
3 be unable to determine what the value of the “actually redeemed coupons” will be until
4 the expiration date for the 25% off coupons is reached.

5 This conclusion corresponds to the view that “[s]ettlements partially based on
6 coupons are reviewed under the Act requiring we apply a lodestar with multiplier to the
7 non-coupon recovery and a percentage of the common fund paid based on the value of
8 the redeemed coupons.” *Rougvie v. Ascena Retail Grp., Inc.*, No. CV 15-724, 2016 WL
9 4111320, at *25 (E.D. Pa. July 29, 2016). Doing so ensures that class counsel benefit
10 only from coupons that provide actual relief to the class, lessening the incentive to seek
11 an award of coupons that class members have little interest in using—either because they
12 might not want to conduct more business with defendants, or because the coupons are too
13 small to make it worth their while. *In re Easysaver Rewards Litig.*, 906 F.3d at 755.

14 **b. The \$6 Voucher**

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

25 Defendant likewise asserts that, as of December 18, 2019, TCP had “several
26 hundred thousand items, totaling more than 20 million units, available in its stores and
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1 online for less than \$6. These items include tops, bottoms, sleepwear, shoes, bags,
2 jewelry, and other accessories in baby, toddle, girls and boys.” (Jain Decl. ¶ 3, ECF No.
3 68.) Thus, as to the first prong of the test, the instant facts differ from those present in
4 coupon settlements. *See, e.g., In re Easysaver.*, 906 F.3d at 757 (“Defendants only claim
5 to sell ‘15–25 products’ for under \$20. And that meager list does not even account for
6 shipping charges.”); *Seegert*, 377 F. Supp. 3d at 1132 (“Of the 62,000 products, only
7 about 5,800 of them are under \$ 18” voucher limit); *Linneman v. Vita-Mix Corp.*, 394 F.
8 Supp. 3d 771, 780 (S.D. Ohio 2019) (“It is undisputed that Class Members will have to
9 spend money . . . as Vita-Mix containers and blenders . . . exceed the \$70 Gift Card” with
10 prices starting at “\$144.95”). The Court finds that this factor weighs in favor of a finding
11 that the \$6 vouchers are not coupons.

12 Second, the Court must consider whether the vouchers are valid only “for select
13 products or services” or “the vouchers are applicable to a wide variety of products.” *In re*
14 *Online DVD*, 779 F.3d at 951. Here, TCP operates 961 stores in the United States,
15 Canada, and Puerto Rico” and an “online store at www.childrendsplace.com.” *Compare*
16 *In re Easysaver*, 906 F.3d at 757, *with* (Jain Decl. ¶¶ 2–3, ECF No. 68 at 2,) *and* (2019
17 Carpenter Decl. Ex. 2 (Tregillis Report) at 3 n.4, ECF No. 60-2.) Plaintiffs argue that the
18 second *Online DVD* factor (diversity and necessity of products) also supports a no-
19 coupon finding because TCP is a sufficiently large retailer and TCP’s products are
20 required for everyday life. (Pls.’ Opp’n 10–16, ECF No. 87.) Further, in contrast to the
21 minimal “inventory” available at the flower and chocolate store operated by defendant in
22 *In re Easysaver*, TCP is a sufficiently large retailer—even if not a “giant” one like
23 Walmart—to avoid restricting a consumer to a “meager list” of goods for purchase. *In re*
24 *Easysaver*, 906 F.3d at 757.

25 Objector St. John argues that the second *Online DVD* factor supports a finding that
26 the vouchers are coupons. (Formal Obj. 9–11, ECF No. 75.) TCP is limited to “baby,
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1 toddler, girls, and boys” clothing and thus is more like other retailers that are too small or
2 niche to be analogized to Walmart, such as Lamps Plus which sells “light bulbs, track
3 lights, and deck lights,” *Seegert*, 377 F. Supp. 3d at 1127; Art.com which sells “fine art,
4 posters and other home décor products,” *Knapp v. Art.com*, 283 F. Supp. 3d 823 (N.D.
5 Cal. 2017); Cole Haan which sells luxury men’s clothing, *Davis v. Cole Haan, Inc.*, No.
6 11-cv-01826-JSW, 2015 WL 7015328, at *4 (N.D. Cal. Nov. 12, 2015); and Lumber
7 Liquidators which offers flooring and items such as table and tile saws, thermostats,
8 countertops, staircase materials, tools, butcher blocks, cleaning supplies and thermostats.
9 *In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices*
10 *& Prods. Liab. Litig.*, 952 F.3d 471, 490 (4th Cir. 2020).

11 The Court notes that TCP offers products that its purchasers are likely to consider
12 necessary—children’s clothing. *Cf. Knapp*, 283 F. Supp. 3d at 837. While TCP’s
13 inventory is not as great as Walmart, it is more substantial than niche stores that sell
14 merchandise such as art supplies or lamps. The end result is the selection of products that
15 the \$6 vouchers may be applied to is not as strong as in *In re Online DVD* and will
16 impact the rate that the vouchers will be redeemed. Consequently, this factor weighs
17 slightly in favor of finding that the \$6 vouchers are coupons.

18 Third, the vouchers are subject to limitations which limit their flexibility. On one
19 hand, the vouchers are “transferrable,” “stackable with each other,” (SA § 1.32, ECF No.
20 60-2), and have no “blackout periods” and are applicable to “items that are on sale or
21 otherwise discounted.” (*Id.*) On the other hand, they expire in “6 months” and are not
22 “redeemable for cash.” (*Id.*); *see In re Easysaver*, 906 F.3d at 757–58 (relying in part the
23 lack of redeemability to find the credits were coupons); *Seegert*, 377 F. Supp. 3d at 1132
24 (same). In addition, the vouchers cannot be used in conjunction “with any other coupon
25 or promotional offer,” (SA § 1.32, ECF No. 60-2.)

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1 Plaintiffs' argument that a six-month window is appropriate "where Class
2 Members are purchasing products for growing children" does not fully assuage the
3 Court's concerns, (Suppl. Br. 5, ECF No. 67,) as "redemption periods usually are longer"
4 than six months. *Redman*, 768 F.3d at 630 (Posner, J.). At a minimum, courts have
5 differed as to whether six months is appropriate. *Compare Chaikin v. Lululemon USA*
6 *Inc.*, No. 3:12-CV-02481-GPC, 2014 WL 1245461, at *3 (S.D. Cal. Mar. 17, 2014)
7 (approving a class action settlement offering vouchers that expire within six months), *and*
8 *Foos*, 2013 WL 5352969, at *3 (same), *with In re HP Inkjet*, 716 F.3d at 1176 (noting
9 that Defendants' "e-credits" were "coupons" in part because they "expire six months after
10 issuance"), *and Cole Haan, Inc.*, 2013 WL 5718452, at *3 (finding that a class action
11 settlement was a coupon settlement, in part, because of "significant limitations" including
12 that "the vouchers expire after six months").

13 Flexibility in the redeeming of vouchers is an important factor in determining
14 whether a voucher acts as a coupon because greater limitations increase the likelihood
15 that the vouchers will not be used and will not benefit the class members. *See In re*
16 *Easysaver*, 906 F.3d at 755. Here, the identified limitations on the use of the vouchers
17 create a significant risk that a large number of vouchers will not be redeemed and will not
18 benefit the class which would then allow class counsel to disproportionately benefit from
19 an attorney's fee award based upon the face value of the vouchers and not the value
20 realized by the class.

21 In summary, while a Class Member may use the vouchers without spending more
22 of their own money, the vouchers apply to a much smaller universe of products compared
23 to a general merchandise big-box store such as Walmart, and the identified restrictions
24 reduce the flexibility of the vouchers as to require that the \$6 vouchers be treated as
25 coupons within the meaning of CAFA. *In re Online DVD*, 779 F.3d at 951. 28 U.S.C. §
26 1712 provides in pertinent part that "[i]f a proposed settlement in a class action provides
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1 for a recovery of coupons to a class member, the portion of any attorney’s fee award to
2 class counsel that is attributable to the award of the coupons shall be based on the value
3 to class members of the coupons that are redeemed.” Given the Court’s finding, final
4 approval and an award of attorney fees must be delayed until the true amount of recovery
5 is determined for the \$6 vouchers and 25% off coupons.

6 **2. Bifurcation**

7 The Court instead may “bifurcate” the issue of attorney’s fees so that the Court
8 will determine the appropriate fee award in the future once the modified Settlement
9 Agreement is executed and the class recovery amount has been determined. *See*
10 *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 661–62 (9th Cir. 2020) (discussing how the
11 court should “consider the coupon portion of the settlement” separately). The parties
12 have agreed to this method and the Court will proceed accordingly. (*See* Def.’s Mem. 3–
13 4, ECF No. 132; Obj. Gabertan’s Mem. 1, ECF No. 133; Pls.’ Suppl. Br. 2, ECF No. 135;
14 *see also* Tr. Case Management Conference 8–9, ECF No. 136.)

15 Accordingly, the Court **DENIES without prejudice** Plaintiffs’ Motion for
16 Attorney’s Fees. The underlying Motion is not something the Court may grant,
17 regardless of the Court approving a modified settlement, because the Court may award
18 attorney’s fees only after the class settlement’s value is determined. Here, it hinges on
19 “the true amount” that the settlement class recovers from the \$6 vouchers and the 25%
20 off coupons. (*See* 1st Final Settlement Order 22–29, ECF No. 105.) Once the recovery
21 amount is determined, Plaintiffs may file a new attorney’s fees motion.

22 **E. Scheduling Orders**

23 Having approved the modified Settlement Agreement, the Court also clarifies its
24 instruction to the parties on follow-up actions to take. First, Defendant shall file the
25 modified Settlement Agreement by April 2, 2021. Second, by April 7, 2021, Defendant
26 shall provide a copy of its proposed class notice to Plaintiffs’ counsel. If Plaintiffs and
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1 Defendant agree on the class notice's contents, they shall jointly file the proposed notice
2 for the Court's approval by April 14, 2021. Should any disagreements occur over the
3 contents of the class notice, Defendant may file a motion for class notice by April 16,
4 2021, in which Plaintiffs may file an opposition by April 19, 2021 and Defendant may
5 file a reply by April 21, 2021. And should such motion be filed, a telephonic hearing will
6 be scheduled for April 23, 2021 at 1:30 PM.

7 Finally, the Court reaffirms that a telephonic status conference is set for November
8 5, 2021 at 1:30 PM. Parties shall file a joint status report a week before.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court **APPROVES** the modified class action
11 settlement agreement and **DENIES without prejudice** Plaintiffs' Motion for Attorney's
12 Fees, ECF No. 73, with the attorney's fees to be determined later.

13 The Court further **ORDERS** the following:

- 14 (1) Defendant shall file the modified Settlement Agreement by April 2, 2021.
- 15 (2) Defendant shall provide a copy of the proposed class notice to Plaintiffs'
16 counsel by April 7, 2021, and if Plaintiffs and Defendant agree, they shall
17 file the proposed notice for the Court's approval by April 14, 2021.
- 18 (3) If Plaintiffs and Defendant disagree on the contents of the proposed class
19 notice, Defendant may file a motion on the issue by April 16, 2021, in which
20 Plaintiffs may file an opposition by April 19, 2021, Defendant may file a
21 reply by April 21, 2021, and a telephonic hearing will be scheduled for April
22 23, 2021 at 1:30 PM.
- 23 (4) A status conference is scheduled for November 5, 2021 at 1:30 PM. Parties

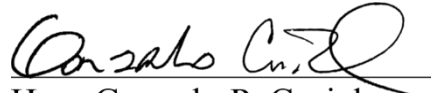
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1 shall file a joint status report a week before.

2 **IT IS SO ORDERED.**

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4 Dated: March 31, 2021


Hon. Gonzalo P. Curiel
United States District Judge

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