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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

CARMEN ANDREWS, LAURIE MUNNING, CARON COLADONATO, and MICHAEL PALLAGROSI, on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE GAP, INC.; GAP (APPAREL), LLC; GAP INTERNATIONAL SALES, INC.; BANANA REPUBLIC, LLC; and BANANA REPUBLIC (APPAREL), LLC, Defendants.	Case No. CGC-18-567237 **PLAINTIFFS' NOTICE OF MOTION AND UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS** **Reservation No. 09091011-04** Hearing Date: October 11, 2019 Time: 9:30am Dept: 302 Judge: Hon. Richard B. Ulmer, Jr.

TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that, on October 11, 2019, at 9:30 a.m., or as soon thereafter as counsel can be heard, in Department 302 of the San Francisco Superior Court, located at 400 McAllister Street, San Francisco, California 94102, Plaintiffs Carmen Andrews, Laurie Munning, Caron Coladonato and Michael Pallagrosi (collectively, the "Plaintiffs" or "Named Plaintiffs") will and hereby do move for an Order by which the Court would approve as

reasonable the payment from Defendants The Gap, Inc., Gap (Apparel), LLC, Gap International Sales, Inc., Banana Republic, LLC, and Banana Republic (Apparel), LLC (collectively, the "Defendants") to Plaintiffs' counsel the sum of Two Million Nine Hundred Seventy Thousand Dollars (USD$2,970,000.00) in combined attorneys' fees and costs and an Order by which Defendants are obligated, joint and severally, to pay said attorneys' fees and costs to Plaintiffs' counsel pursuant to Section 2.5(b) of the Agreement Of Settlement And Release deemed executed on January 30, 2019.

This motion for attorneys' fees and costs is brought under, without limitation, Rule 3.769 of the California Rules of Court and is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the supporting Declarations of Stephen P. DeNittis (attached to which are the Declarations of Joseph A. Osefchen and Shane T. Price), Ross H. Schmierer, Daniel M. Hattis and Todd M. Friedman, the records and files in this action, and upon such further and additional papers and argument as may be presented herein.

Dated: September 9, 2019

HATTIS LAW

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs Carmen Andrews, Laurie Munning, Caron Coladonato and Michael Pallagrosi (collectively, the "Plaintiffs" or "Named Plaintiffs") respectfully request that this Court approve as reasonable and order Defendants The Gap, Inc., Gap (Apparel), LLC, Gap International Sales, Inc., Banana Republic, LLC, and Banana Republic (Apparel), LLC (collectively, the "Defendants") to pay, jointly and severally, to Plaintiffs' counsel the sum of Two Million Nine Hundred Seventy Thousand Dollars (USD$2,970,000.00) in combined attorneys' fees and costs pursuant to Section 2.5(b) of the Agreement Of Settlement And Release.

Plaintiffs' counsel have worked exceedingly hard over the last three and a half years, litigating four separate cases against Defendants spread out over several states which are being resolved by the proposed settlement. Counsel have obtained an excellent result for the class, achieving relief worth in excess of $100 million. Plaintiffs' counsel now seek final approval of a negotiated, combined award of attorneys' fees and costs of $2,970,000.00—an amount which is only a tiny fraction compared to the value of relief obtained and an amount which is substantially less than the raw lodestar of the Plaintiffs' attorneys.[1]

II. PROCEDURAL AND FACTUAL HISTORY

As the Court is aware, the present action attempts to resolve in this consolidated proceeding four separate class actions against Defendants, which were filed in California and New Jersey, the eldest of which is over three years old. Each of these actions alleged similar claims and sought similar relief for similar classes.

First, each complaint alleged that, for every item offered for sale in the Gap Factory and Banana Republic Factory stores or their websites (generally, "Factory"), Defendants create and list an arbitrary, fake "base" or "reference" price that purports to be the item's original, former or regular price at which the item is customarily or was previously sold. Plaintiffs have alleged that this practice is false and misleading because most, if not all, Gap Factory and Banana Republic Factory items are never sold or offered for sale at their listed base prices, and no items are ever

[1] In Section 2.5(b) of the Settlement Agreement, the Defendants agreed not to oppose a fee request of $2,970,000. Hence, this Motion should be unopposed.

consistently sold or offered for sale at their listed base prices. Rather, Defendants' Factory items are regularly sold and offered for sale at prices that are far lower than their purported base prices.

Second, each complaint also alleged that Defendants perpetually advertised and offered their Factory website and store merchandise for sale at purported discounts or "sale" prices, which Defendants represented to be reduced or discounted by a specified percentage or dollar amount off the items' assigned base or reference prices. Plaintiffs have alleged that this practice is also false and misleading because the advertised discount percentages and "sale" prices did not represent an actual discount or "sale," as the items were never sold or offered for sale at their listed base prices, but rather were consistently offered for sale—and sold—at the purportedly discounted sale prices.

Plaintiffs in these actions alleged that Defendants intentionally implemented these policies to increase their own sales and profit by making their customers believe—albeit falsely—that they were getting a "good deal" on Factory merchandise when in fact they were not. Through these acts, Plaintiffs in the four actions alleged, *inter alia*, that Defendants violated federal, California, and New Jersey state pricing regulations, as well as the following consumer protection statutes: California's Business & Professions Code § 17200, *et seq*. ("UCL"); California's Business & Professions Code § 17500, *et seq*. ("FAL"); California's Consumers' Legal Remedies Act, California Civil Code § 1750, *et seq*. ("CLRA"); California's Business and Professions Code § 17501; the New Jersey Consumer Fraud Act, *N.J.S.A*. § 56:8-1, *et seq*. ("NJCFA"); the New Jersey Truth in Consumer Contract, Warranty, and Notice Act, *N.J.S.A*. § 56:12-14, *et seq*. ("TCCWNA"); and Florida's Deceptive and Unfair Trade Practices Act, §§ 501.201-.213 ("FDUTPA"). Plaintiffs also allege that Defendants are liable under various common law theories such as breach of contract and breach of express warranty.

For the convenience of the Court, the claims and procedural history of the four actions are summarized below and are detailed in the Declaration of Stephen P. DeNittis ("DeNittis Decl.") in Paragraphs 19 to 23.

1. The *Munning* Action. On May 25, 2016, Plaintiff Laurie Munning filed a class action lawsuit in the San Francisco Superior Court on behalf of a class of all U.S. citizens who

purchased an item from Defendants' online Gap Factory or Banana Republic Factory websites from May 24, 2010, to the present. The action was removed to federal court, where a motion to dismiss was granted in part and denied in part, a First Amended Complaint was filed, and a second motion to dismiss was granted in part and denied in part. On November 2, 2018, the parties stipulated to a dismissal without prejudice as part of this global settlement. *See* DeNittis Decl., ¶ 19.

2. The *Coladonato* Action. On October 9, 2017, Plaintiff Caron Coladonato filed a class action for injunctive relief in the New Jersey Superior Court, Camden County, on behalf of a class of all New Jersey citizens who purchased an item from a Gap Factory or Banana Republic Factory retail store in New Jersey from October 9, 2011, to the present. The action was removed to federal court, withstood a motion a remand, and, on October 20, 2018, was voluntarily dismissed without prejudice as part of this global settlement. *See* DeNittis Decl., ¶ 20.

3. The *Pallagrosi* Action. On October 13, 2017, Plaintiff Michael Pallagrosi filed a class action lawsuit in the U.S. District Court for the Northern District of California on behalf of a class of all persons who purchased an item from a Gap Factory or Banana Republic Factory retail store in the United States from October 9, 2011, to the present. The parties fully briefed a motion to dismiss which the Court had not decided when, on October 20, 2018, the plaintiff voluntarily dismissed the action without prejudice as part of this global settlement. *See* DeNittis Decl., ¶ 21.

4. The *Andrews* Action. On June 13, 2018, Plaintiff Carmen Andrews filed this class action lawsuit in the San Francisco Superior Court on behalf of all California citizens who purchased an item from a Gap Factory or Gap Outlet retail store in California from June 13, 2014, and the present. Defendants filed a demurrer in this action, to which the Plaintiff responded by filing a First Amended Complaint. *See* DeNittis Decl., ¶ 22.

Ultimately, the parties to all four civil actions agreed to settle their claims and defenses within the context of one global settlement to be submitted for approval as part of this *Andrews* action. DeNittis Decl., ¶ 23.

5. Discovery, Investigation and Motion Practice.

Plaintiffs' Counsel performed a prodigious amount of work in the prosecution of Plaintiffs' claims in each of these four actions. Indeed, prior to even filing the *Munning* Action in early 2016, Counsel had thoroughly researched the applicable law and, significantly, had conducted an extensive investigation regarding Defendants' pricing practices. *See* DeNittis Decl., ¶ 34. This investigation included multiple visits to several of Defendants' Factory stores to monitor, document, and record photographic evidence of Defendants' in-store advertising, discounting, pricing, and sales practices. *Id*.

As part of Plaintiffs' investigation, Plaintiffs' counsel developed – at a cost of over $55,000 – a sophisticated, proprietary computer tracking mechanism that extracted and compiled, on a daily basis, pricing and other information directly from the Gap Factory and Banana Republic Factory websites. *See* Declaration of Daniel Hattis, ¶¶ 9, 21. The goal of this system was to lessen Plaintiffs' dependence on discovery produced by Defendants—and the inevitable discovery disputes this would entail—and to enable Plaintiffs to prove the pricing practices alleged with data gathered directly by Plaintiffs' counsel. Specifically, relevant information was saved for each product sold by Defendants, every day, in the same "HTML" format in which Gap Factory and Banana Republic Factory posts on its website, with a screenshot taken of each page from which data was gathered. Hattis Decl., ¶ 10. Pricing data was then extracted and stored in a readily accessible format which allows linking the pricing data with both the related screen shot and HTML files. *Id*. The data collected by Plaintiffs' counsel includes the daily pricing information for approximately 45,657 Gap Factory and Banana Republic Factory products, for an aggregate total of at least 4,936,414 daily product offerings since February 10, 2016. *Id*. The data and screenshots comprise dozens of terabytes of data. Hattis Decl., ¶ 11. These millions of records were compiled and organized for analysis by Plaintiffs' counsel and were used as a basis for Plaintiffs' claims regarding Defendants' pricing and discount practices and to create historical pricing charts included in the complaint. *Id*.

After filing the actions, Plaintiffs' Counsel continued to monitor Defendants' sales practices in and on their Factory stores and websites, and moreover performed additional factual

and legal investigation regarding numerous issues that arose during litigation, such as the various arguments and affirmative defenses raised by Defendants in response to Plaintiffs' claims and the sundry new legal opinions and caselaw issued by state and federal courts addressing issues related to those raised in Plaintiffs' Complaint. DeNittis Decl., ¶ 36. Plaintiffs' counsel also devoted significant time to motion practice in three of the four actions, including briefing and arguing two motions to dismiss in the *Munning* action, briefing and arguing one motion to dismiss in the *Pallagrosi* action, and briefing a motion to remand in the *Coladonato* action. *Id*., ¶ 37. Counsel further filed an Amended Complaint in the *Munning* action. *Id*., ¶ 38.

Plaintiffs' counsel also engaged in substantial written fact discovery – both informal and formal – in their prosecution of these four cases. DeNittis Decl., ¶ 39. For example, in the *Munning* and *Pallagrosi* actions alone, Plaintiffs produced over 40 terabytes of data – the equivalent of 3 million pages – to Defendants. *Id.* This data included not only documents related to Plaintiffs and their purchasing histories, but also the documents collected by Plaintiffs' Counsel relating to Defendants' pricing practices and sales histories for every Factory store item. *Id*. Defendants, for their part, produced approximately 60 gigabytes of data (over 300,000 pages of documents) to Plaintiffs. DeNittis Decl., ¶ 40. This data included documents detailing Defendants' online and in-store advertising, discounting, pricing, and sales practices, as well as information relating to the number and dollar value of Factory store and website sales throughout the United States. *Id*. In addition, these productions were a massive undertaking for Plaintiffs' Counsel to review and sort for purposes of the production as well as for purposes of preparing to litigate the case for trial. The Parties, of course, also performed a thorough review of these documents in preparation for depositions and further litigation and trial. *Id*. at ¶ 41.

Additionally, Plaintiffs' Counsel met and consulted with multiple experts, including retail practices and sales expert Chuck Polin of Sandler and Associates, and damages expert Brian J. Bergmark of Torrey Partners, an economic and accounting services firm, to assist with: (i) providing a practical understanding of common, lawful pricing practices and developing an expert theory of liability; and (ii) creating damages and restitution models for each of these actions. DeNittis Decl., ¶ 42.

Finally, in connection with the two private mediation sessions noted below, the Parties exchanged additional informal discovery geared specifically toward helping them understand the size and scope of the potential Classes and the damages allegedly suffered by Class Members. Each Party moreover drafted comprehensive mediation memoranda, which enabled them to identify and evaluate the strength and weaknesses of their claims, as well as the prospects for settlement. DeNittis Decl., ¶ 43.

6. Mediation and Settlement.

Over the course of more than one year, the Parties participated in two formal, day-long, private mediation sessions in these Actions and conducted numerous rounds of informal but intense settlement discussions which culminated in the Settlement Agreement. *See* DeNittis Decl., ¶¶ 44-47.

7. Preliminary Approval.

On July 9, 2019, this Court entered an Amended Preliminary Approval Order which preliminarily approved the proposed class action settlement.[2] Among other things, the Court directed that Plaintiffs' counsel submit their fee petition in this matter on September 9, 2019, and their brief in support of final approval of the proposed settlement by September 26, 2019.

III. LEGAL DISCUSSION

A. THE REQUESTED FEE IS REASONABLE IN LIGHT OF ALL OF THE CIRCUMSTANCES.

Fees And Costs Do Not Come Out Of Class Relief. The requested award of fees and costs in the case at bar, if approved, will be paid separately by Defendant and will not come out of the relief won for the class. As such, that award will not reduce the value of the relief which the class will receive by one iota. Conversely, failure to approve the requested award of fees and costs will not increase the value of the relief won for the class members. Instead, it would simply mean that Defendant would receive a windfall and would be able to keep some of the money Defendant has voluntarily agreed to pay as fees and costs.

[2] At the Preliminary Approval stage, the Court directed Counsel to submit a supplemental brief addressing attorneys fees and costs, among other things, in order to do a preliminary analysis of the attorney fee and cost request. The Court analyzed Counsels' request at that time and found that the attorney fees and costs sought were reasonable.

No Collusion. There was clearly no collusion between Plaintiffs' and Defendants' counsel over the amount of the proposed award of fees and costs or any other issue in this case. Indeed, this settlement came about only after three years of very contentious litigation that spanned four different actions and several states, and involved a number of highly contested motions. Like every other aspect of the proposed settlement, the agreement of the parties as to the amount of fees and costs to be paid was the product of contentious, arms-length bargaining by highly experienced counsel.

Fees Were Negotiated After Substantive Terms. Most importantly, the negotiation over attorneys' fees took place only after the substantive relief for the class had already been negotiated and agreed upon. Hattis Decl., ¶ 28. Pursuant to class counsel's usual practice – which is the preferred practice recommended by the Manual for Complex Litigation and the case law – Plaintiffs' counsel refused to discuss attorneys' fees until after an agreement on the substantive relief for the class was reached. *Id.* Once agreement on the substantive relief for the class was reached, class counsel offered to simply submit the proposed settlement to the Court for approval and rely on the Court to determine the appropriate fees and costs. *Id.* Defendants declined that proposal and the parties then engaged in additional arms-length bargaining over fees and costs.

During this second round of arms-length negotiations, Defendants had every incentive to try to minimize the amount Defendants would pay in fees and costs. The relief for the class had already been fixed and agreed upon. Defendants thus had no incentive to try to "tempt" Plaintiffs' counsel with an overly generous fee award and Defendant had no motive to want to "overpay" Plaintiffs' counsel. As a result of this second round of negotiations, Defendants agreed to pay a combined award of attorneys' fees and litigation costs of $2.97 million; an amount which is less than the raw, unadjusted lodestar of Plaintiffs' counsel in the four cases which comprise this settlement.

Given the above-referenced facts, there is only one reason why Defendants agreed to pay the agreed-upon amount in fees and costs. Defendants believed that, without such an agreement on fees, the Court might well order Defendants to pay Plaintiffs' counsel a higher award of fees and costs. Thus, by agreeing on a fixed amount for fees and costs, Defendant sought to cap its

liability and avoid the risk that the Court would order Defendant to pay more for fees and costs.

Numerous courts have held that, where – as here – an agreement on attorney's fees was reached only after substantive relief for the class was agreed upon, this factor weighs in favor of a finding that the negotiated fee amount is reasonable, especially if it is being paid separately by the defendant. *See DeHoyos v. Allstate Corp*., 240 F.R.D. 269, 322 (W.D. Tex. 2007) ("courts are authorized to award attorneys' fees and expenses where all parties have agreed to the amount, subject to court approval, particularly where the amount is in addition and separate from the defendant's settlement with the class."); *Ingram v. Coca-Cola Co*., 200 F.R.D. 685, 695 (N.D. Ga. 2001) (holding in a class action fee petition "the Court should give substantial weight to a negotiated fee amount, assuming that it represents the parties' best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees."); *Elkins v. Equitable Life Ins. Co*., Civil Action No. 96-296-CIV-T-17B, 1998 U.S. Dist. LEXIS 1557, at *99 (M.D. Fla. Jan. 27, 1998) (citations omitted):

> The Court finds that the fee negotiations in this case were conducted at arm's-length, and only after all material terms of the settlement had been agreed upon. Because the previously negotiated settlement structure provided that the fee awarded would be paid by Equitable of Iowa, separate and apart from any recovery to the Class, Equitable of Iowa had a particular incentive to bargain strenuously to keep the fee as low as possible. There is absolutely no evidence in this case that the settlement was in any way collusive. Under these circumstances, the Court gives great weight to the negotiated fee in considering the fee request.

B. NOT ONE OF THE 24 MILLION CLASS MEMBERS HAS OBJECTED TO THE PROPOSED AWARD OF ATTORNEYS' FEES AND COSTS

In the case at bar, notice has been distributed to the over 24 million class members in the manner previously approved by the Court. Despite clear instructions in that notice, informing class members of the fee request and how to object to it, not a single class member has objected to, or expressed any opposition to, the amount of the proposed award of fees and costs.[3]

The lack of any objections to the requested award of fees and costs supports approval of

[3] Indeed, only one class member out of 24 million has objected to any aspect of the settlement at all (an extremely low objection rate that is practically unheard of in a class this size). That lone objection is without merit and will be addressed in class counsel's up-coming brief in support of final approval of the settlement as a whole. It should be noted, however, that this lone objection had nothing to do with the issue of attorney's fees or costs.

the requested award of fees and costs. *See Concepcion v. DFS Grp., L.P.*, San Francisco Superior Court Case No. CGC-15-548698, 2017 Cal. Super. LEXIS 7754, *2-*3 (May 11, 2017) (DeNittis Decl., Exhibit A): "The Settlement Class Members' support for the results achieved by Class Counsel is demonstrated by the absence of any objection to either the Settlement or to Class Counsel's request for fees, both of which were described clearly in the notices disseminated to the Settlement Class".

See also Singer v. Becton Dickinson & Co., No. 08-CV-821-IEG (BLM), 2010 U.S. Dist. LEXIS 53416, 2010 WL 2196104, at *9 (S.D. Cal. June 1, 2010) (noting that 33.33% fee request was warranted "in light of the fact that not a single class member objected to Plaintiff's counsel's" request); *Nunez v. BAE Sys. San Diego Ship Repair Inc.*, 292 F. Supp. 3d 1018, 1056 (S.D. Cal. 2017) ("This near-unanimous class approval and absence of fee-specific objections also weighs in favor of settlement.").

C. THE REQUESTED AWARD IS REASONABLE UNDER THE LODESTAR METHOD

1. The Requested Award is Substantially Less Than the Unadjusted Lodestar and Costs Incurred.

It is submitted that, in the case at bar, the issue of the dollar value of the relief obtained for the class and/or the issue of how many class members will ultimately claim their share of that relief are largely irrelevant to the determination of attorneys' fees under California law. This is because the claims brought on behalf of the proposed class in this matter include statutory claims which provide for fee-shifting. *See, e.g.,* Cal.Civ.Code Section 1780(d) ("The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section."). *See also* Cal.Civ.Code Section 1794(d).

Indeed, it is black letter law in California state court that the primary method of calculating and awarding attorney's fees in cases brought under fee shifting statutes is not the value of the benefit achieved, or the amount of that benefit which is claimed by class members, but rather the lodestar method. *See, e.g., Syers Props. III, Inc. v. Rankin*, 226 Cal. App. 4th 691, 698 (2014) (holding that the California Supreme Court opinion in *Ketchum v. Moses* "reaffirmed the primacy of the lodestar method for all fee-shifting statutes"); *Ketchum v. Moses*, 24 Cal. 4th

1122, 1135 (2001) ("When the Legislature has determined that the lodestar adjustment approach is not appropriate, it has expressly so stated."); *PLCM Grp., Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000) ("California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award.'"). *See also* Pearl, California Attorney Fee Awards,[4] § 11.2, p. 289 (noting that the California Supreme Court had "reaffirmed the primacy of the lodestar method for all fee-shifting statutes").

Under the lodestar method, the initial fee is calculated by multiplying the number of hours expended by counsel by counsel's reasonable hourly rate.[5] *Wershba v. Apple Comput., Inc*., 91 Cal. App. 4th 224, 254 (2001). As set forth in greater detail in the supporting declarations, Plaintiffs' counsel are highly experienced attorneys who have thus far expended a minimum of 5,610.4 attorney's hours and $163,062.77 in costs in the three and a half years they have been prosecuting the claims in the matters that comprise the current case. As further set forth in greater detail in those declarations, if compensated for those attorneys hours at the hourly rates previously approved by numerous federal and state courts for Plaintiffs' counsel in prior class actions,[6] the current unadjusted attorney lodestar of Plaintiffs' counsel in this matter would be at least $3,124,338.00—more than what is being requested as a combined award of fees and costs. *See* Declarations of Stephen P. DeNittis, Daniel M. Hattis, Ross H. Schmierer, Todd M. Friedman, Joseph A. Osefchen (See Exhibit B of Stephen DeNittis Declaration) and Shane Prince (See Exhibit C of Stephen DeNittis Declaration).

For the convenience of the Court, the relevant information contained in these attorney declarations is summarized in Chart A, below.

[4] This treatise was recognized in *Chacon v. Litke*, 181 Cal. App. 4th 1234, 1259 (2010) as a "leading treatise on attorney fees" in California.

[5] Information regarding counsel's experience and approved historical rates are contained in the accompany declarations.

[6] For example, Mr. DeNittis has participated in over 175 certified class actions in state and federal court in the last 20 years, serving in most such cases as either lead or co-lead counsel. DeNittis Decl., ¶ 12.

CHART A

Name	[1]	[2]	[3]	[4]	[5]	[6]	[7]	[8]	[9]	Current Hours	Hourly Rate	Current Lodestar
ATTORNEYS												
Stephen P. DeNittis	224.0	580.0	78.0	112.0	324.0	155.0	23.0	76.0	32.0	1,604.0	$550.00	$882,200.00
Joseph Osefchen	28.0	425.0	221.0	0.0	121.0	143.0	21.0	23.0	0.0	982.0	$550.00	$540,100.00
Shane Prince	136.0	840.0	32.0	0.0	65.0	54.0	4.1	65.0	43.0	1,239.1	$525.00	$650,527.50
Joseph D'Aversa	0.0	321.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	321.0	$425.00	$136,425.00
Ross Schmierer	122.0	425.0	52.0	45.0	165.0	31.0	0.0	21.0	0.0	861.0	$600.00	$538,125.00
Ross Schmierer (PAS)	0.0	41.7	35.8	3.7	4.6	6.2	0.0	8.1	0.0	100.1	$600.00	$62,562.50
Joanne Wilcomes	0.0	4.5	53.7	0.0	0.0	0.0	0.0	0.2	0.0	58.4	$400.00	$23,360.00
Todd Friedman	0.0	0.0	0.0	0.0	0.0	0.0	0.0	70.0	0.0	70.0	$695.00	$48,650.00
Daniel Hattis	0.0	306.2	0.0	35.0	0.0	12.0	0.0	5.0	0.0	358.2	$650.00	$232,843.00
Paul Karl Lukacs	0.0	0.0	0.0	0.0	0.0	0.0	0.0	16.6	0.0	16.6	$575.00	$9,545.00
TOTAL ATTORNEYS	**510.0**	**2,943.4**	**472.5**	**195.7**	**679.6**	**401.2**	**48.1**	**284.9**	**75.0**	**5,610.4**		**$3,124,338.00**
PARALEGALS												
Dawn Farley	4.0	123.0	32.0	0.0	0.0	0.0	0.0	32.0	0.0	191.0	$100.00	$19,100.00
Jessica Bianchi	8.0	143.0	43.0	0.0	0.0	0.0	0.0	65.0	0.0	259.0	$100.00	$25,900.00
Amber Horn	0.0	16.1	43.7	0.0	0.0	0.0	0.0	27.1	0.0	86.9	$100.00	$8,690.00
TOTAL PARALEGALS	**12.0**	**282.1**	**118.7**	**0.0**	**0.0**	**0.0**	**0.0**	**124.1**	**0.0**	**536.9**	**$100.00**	**$53,690.00**
TOTALS:	**522.0**	**3,225.5**	**591.2**	**195.7**	**679.6**	**401.2**	**48.1**	**409.0**	**75.0**	**6,147.3**		**$3,178,028.00**

If one starts with the raw attorney lodestar of $3,124,338.00 and then adds the $53,690 in paralegal hours and the $163,062.77 in litigation costs expended so far, Plaintiffs' counsel currently have a combined lodestar and costs of $3,341,090.77. That is $371,090.77 more than the combined award of fees and costs of $2,970,000 which Defendants have agreed to pay under the settlement and which Plaintiffs have agreed to accept. In short, Plaintiffs' request for attorney's fees and costs is reasonable because it is substantially less than their current, unadjusted lodestar plus costs.

2. The Reasonableness of the Requested Combined Award of Fees and Costs is Highlighted by the Fact that Plaintiffs' Counsel Would Likely be Entitled to a Multiplier of the Raw Lodestar in this Case

But for the fact that Plaintiffs' have agreed to accept a smaller fee as part of the settlement, it is submitted that Plaintiffs' counsel might have been entitled to an upward adjustment of their raw lodestar. *See PLCM Grp., Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000)

("The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided.").

The factors relating to such an upward adjustment of the lodestar in California state court include "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001).

It is submitted that these factors are present in the case at bar. The representation provided by Plaintiffs' counsel was entirely contingent. The Plaintiffs were charged no fees whatsoever during the three years of litigation and counsel advanced all costs, which totaled well over $150,000—all with no guarantee of any recovery. As the Court is aware from the voluminous briefing during preliminary approval of the proposed settlement, the issues in this case are difficult, complex and sometimes novel issues which required a great deal of work to be performed at a high caliber. DeNittis Decl., ¶¶ 19-23 (detailing motion work).

Plaintiffs and Defendants conducted substantial written discovery over the three-year period. DeNittis Decl., ¶¶ 39-41. Plaintiffs' counsel also conducted an extensive review of the publicly available information relating to Defendants, their pricing and advertising policies and sales practices. Plaintiffs' counsel also developed – at a cost of more than $55,000 – a sophisticated, proprietary computer tracking mechanism that extracted and compiled, on a daily basis, pricing and other information directly from the Gap Factory and Banana Republic Factory websites. *See* Hattis Decl., ¶¶ 9, 21.

Based on the foregoing, it is submitted that Plaintiff's counsel worked exceedingly hard in these matters and, if the parties had not been able to reach agreement on a proposed award of fees and costs, Plaintiff would likely have been entitled to a multiplier in a contested fee petition.

The amount of any such multiplier could been anywhere from double to four times the raw, unadjusted lodestar. *See Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 255 (2001) ("Multipliers can range from 2 to 4 or even higher."); *Chavez v. Netflix Inc.,* 162 Cal. App. 4th 43, 67 (2008) (approving 2.5 multiplier).

Indeed, even a relatively modest enhancement of 1.42 (the multiplier approved in *Wershba*, *supra*) in the case at bar would have resulted in an attorney lodestar of $4,436,559.96—without accounting for costs. This figure is substantially higher than the fee in the Settlement Agreement and highlights the reasonableness of the award.

D. ALTERNATIVELY, UNDER ANY CONCEIVABLE VALUATION OF THE SETTLEMENT, THE AWARD OF FEES AND COSTS SOUGHT IS MODEST WHEN COMPARED TO THE VALUE OF THE RELIEF OBTAINED FOR THE CLASS

While the lodestar method represents the primary method by which counsel fees in class actions are determined in California cases brought under fee-shifting claims, the use of the so-called "percentage of recovery" method has been endorsed by California courts as a "cross-check" on the lodestar fee and a basis for calculating an enhancement of the lodestar. *See e.g. Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 502 (2016) (holding that a "cross-check" based on a percentage of the recovery "helps to determine a reasonable fee because a percentage-of-the-benefit analysis 'provides a credible measure of the market value of the legal services provided'").

In the case at bar, Plaintiffs' counsel submit that the in-kind settlement being offered to the class is actually worth between $144 million and $288 million because that is the cash value of the goods being offered to the class as part of this settlement, with no additional purchase required to take advantage of that benefit. Indeed, the vouchers being offered to the class are not percentage-off coupons at all, but rather represent an "in-kind" settlement (*i.e.* paying with goods instead of cash) which are more akin to a "gift card" which has a real cash value. *See Foos v. Ann, Inc.*, No. 11cv2794 L (MDD), 2013 U.S. Dist. LEXIS 136918, at *4-*6 (S.D. Cal. Sep. 23, 2013):

> The distinction between a coupon and a voucher is that a coupon is a discount on merchandise or services offered by the defendant and a voucher provides for free merchandise or services… A coupon requires a class member to purchase a product or services and pay the difference between the full price and the coupon discount…In contrast, a voucher is more like a gift card or cash where there is an actual cash value, is freely transferable and does not require class members to spend additional money in order to realize the benefits of the settlement. There is no heightened level of scrutiny requirement for vouchers.

Essentially, Defendants are piling up between $144 and $288 million worth of goods – all of which sell for $6 or less – and telling class members to take what they want in lieu of cash. The $2.97 million in fees and costs being sought would be the equivalent of less than 3% of such a recovery or less.[7] But even if the Court were to value the settlement at half that amount – $72 million – the award of fees and costs being sought would still only be the equivalent of 2.1-4.2% of that recovery. Likewise, if the settlement were valued at only $28.5 million – 1/5 of the face value of the in-kind vouchers being offered – the award of fees and costs being sought would still represent less than 10.49% of such a recovery. Finally, even if the settlement were valued at only $15 million – which is within the range of claims rates estimated by Claims Administrator Weisbrot – the award of fees and costs being sought would still be less than between 19.8-20% of such a recovery. Every one of these figures is well under the 21.8% figure which the First Appellate District in *Chavez v. Netflix, Inc.,* 162 Cal. App. 4th 43, 63 (2008), held was the "the low end" of the typical percentage-based fee paid in contingency cases.

IV. CONCLUSION

For the reasons stated, Plaintiffs respectfully request that the Court approve and order a payment by Defendants to Plaintiffs' counsel of $2,970,000 in attorney's fees and costs.

Dated: September 9, 2019

Respectfully submitted,

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[7] Obviously, the requested award of fees and costs will not actually reduce the value of the class relief by any amount, because Defendants have agreed to pay it separately.

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Attorneys for Named Plaintiffs and the Class

PROOF OF SERVICE
[C.C.P. § 1013a/Fed.R.Civ.P. 5]

I, PAUL KARL LUKACS, declare that:

I am over the age of 18 years, am not a party to this cause, and am an active member of the State Bar of California. My business address is Hattis & Lukacs, 1401 Twenty-First Street, Suite 400, Sacramento, CA 95811, and I am employed in the County of Sacramento.

On September 9, 2019, I caused to be served the following document(s), which are here set forth by the exact title:

PLAINTIFF'S NOTICE OF MOTION AND UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS (INCLUDING DECLARATIONS OF STEPHEN P. DENITTIS, JOSEPH A. OSEFCHEN, SHANE T. PRINCE, TODD M. FRIEDMAN, ROSS H. SCHMIERER AND DANIEL M. HATTIS)

PROPOSED ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

PLAINTIFFS' NOTICE OF PAYMENT OF COURT REPORTER FEE

I served said document by the following method:

[X] BY E-SERVICE (San Francisco Superior Court Local Rules 2.11(O), (P)): I served Adobe Acrobat-formatted copies of the above-designated document(s), on the date stated hereinabove, by accessing the website of One Legal (a court-approved e-filing service vendor for civil cases) (www.onelegal.com), logging into my law firm's account and instructing One Legal to e-file that day or the next court day said document(s) with the San Francisco Superior Court and to e-serve that day said document(s) upon certain recipients, those recipients being:

Joseph Duffy, Esq. (joseph.duffy@morganlewis.com)
Joseph Bias, Esq. (joseph.bias@morganlewis.com)

Counsel of Record for Defendants The Gap, Inc., Gap (Apparel), LLC, Gap International Sales, Inc., Banana Republic, LLC, and Banana Republic (Apparel), LLC

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct. Executed on September 9, 2019, at Sacramento, California.

PAUL KARL LUKACS