UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIOBHAN MORROW and ASHLEY GENNOCK, on behalf of themselves and all others similarly situated, Plaintiffs, v. ANN INC., a Delaware corporation, Defendant.	Civil Action No. 16-cv-3340(JPO)(SN)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

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Plaintiffs Siobhan Morrow and Ashley Gennock ("Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully move for Final Approval of the Settlement Agreement and Release ("Settlement" or "Agreement"), (ECF No. 60 Ex.1.)

I. INTRODUCTION

On December 14, 2017, this Court granted preliminary approval to the proposed settlement and authorized the issuance of notice to the Settlement Class. *See* Preliminary Approval Order, (ECF No. 62.) A settlement administrator, Kurtzman Carson Consultants LLC ("KCC") was retained to effectuate the notice plan according to the terms set forth in the preliminary approval order. *See* Declaration of Lana Lucchesi ("Lucchesi Decl.") ¶2. Consistent with the Court's Order, KCC completed the Notice Plan on January 19, 2018, which included mail and email notice to approximately 7.3 million class members as well as establishing a case-specific website and toll-free number. *See id.* ¶¶7-8. Although the deadline to object or request exclusion from the Settlement has not passed, to date, only one member of the Settlement Class Member has opted out and no member has objected the Settlement. *See id.*¶12-13.

The proposed Settlement[1] will resolve all claims against ANN Inc. and those of its affiliates and subsidiaries that own, operate, control, and/or lease Ann Taylor Factory or LOFT Outlet stores, including, but not limited to, Ann Taylor Retail, Inc. and Ann Taylor, Inc. ("ANN"), and provides for ANN to establish a Settlement Fund valued at $6,100,000 and significant changes in ANN's pricing and labeling practices. The Settlement is an excellent result for members of the Settlement Class as it provides substantial relief for the Settlement Class in the form of cash of a voucher to purchase merchandise. Moreover, the terms of the Settlement are well within the range of reasonableness and consistent with applicable case law. Therefore, the Settlement provides an

[1] All capitalized terms used herein have the same meanings as those used in the Settlement Agreement.

immediate and significant recovery for the proposed Settlement Class in the face of substantial challenges to any recovery after continued litigation, trial, and appeals. Furthermore, the Settlement was negotiated by lawyers experienced in complex litigation through exhaustive arm's-length negotiations. Accordingly, Plaintiffs respectfully move for final approval and submit this Memorandum of Law in support of the proposed Settlement.

II. STATEMENT OF FACTS

A. Factual Background

Plaintiffs brought claims on behalf of themselves and all others similarly situated seeking monetary damages, restitution, and declaratory relief based on ANN's alleged deceptive and misleading labeling and marketing of Merchandise sold at its Ann Taylor Factory and LOFT Outlet stores (the "Outlet Stores"). Specifically, Plaintiffs allege that ANN's labeling of its Merchandise at its Outlet Stores misrepresent that its Outlet Store products were originally or regularly sold at much higher prices, and that Outlet Store products were once sold at Ann Taylor and LOFT retail stores (the "Retail Stores"). Such alleged conduct deceives customers into believing they are purchasing products that were formerly sold or offered at a higher price at the Retail Stores and are now significantly cheaper at the Outlet Stores. Plaintiffs allege that the represented regular or original prices were not the prevailing retail prices within three months immediately preceding the publication of the advertised former prices, as required by California law. Plaintiffs further allege that ANN's practices violate California's False Advertising Law, Unfair Competition Law, and Consumers Legal Remedies Act; Pennsylvania's Unfair Trade Practices & Consumer Protection Law; the consumer protection laws of several states; and that ANN was unjustly enriched by its actions.

B. Procedural History

On May 5, 2016, Plaintiffs filed a complaint seeking monetary damages, restitution, and declaratory relief from ANN and Ascena Retail Group. (ECF No. 1.) On June 24, 2016, ANN filed a motion to dismiss the complaint. (ECF No. 18.) On July 15, 2016, Plaintiffs filed their first amended complaint ("FAC"). (ECF No. 23.) On July 19, 2016, Plaintiffs voluntarily dismissed all claims against Ascena Retail Group. (ECF No. 26.) On August 15, 2016, ANN moved to dismiss the FAC for lack of subject matter jurisdiction and for failure to state a claim. (ECF No. 29.) On January 24, 2017, the Court denied ANN's motion to dismiss the FAC. (ECF No. 34.) On February 14, 2017, ANN filed its answer to the FAC. (ECF No. 36.)

Beginning in early 2017, the Parties entered into settlement discussions and exchanged certain sales and marketing data. On April 27, 2017, the parties' attended an all-day mediation before Magistrate Netburn. Thereafter, with the ongoing assistance and under the supervision of Magistrate Judge Netburn, on May 26, 2017, the Parties reported to the Court that they had agreed in principle to a settlement of the action on a classwide basis. The parties began drafting the formal terms and conditions of the Settlement and a term sheet was signed on October 12, 2017. Thereafter, the parties began drafting the terms of the Settlement, notice plan and plan of allocation and on December 12, 2017, the Parties fully executed the Settlement and filed Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class. ECF No. 59. On December 14, 2017, this Court granted preliminary approval of the Settlement. (ECF No. 62).

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

"The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals." 4 NEWBERG ON CLASS ACTIONS §13:44 (5th ed.). Final approval or the Settlement is appropriate here because it is procedurally and substantively fair, adequate and reasonable. *See* Fed. R. Civ. P. 23(e)(2). Fed. R. Civ. P. 23(e) requires that any compromise of claims brought on a class basis be subject to judicial review and approval. Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has found that a "'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).[2]

Importantly, courts and public policy considerations favor settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. "The compromise of complex litigation is encouraged by courts and favored by public policy," and is particularly encouraged for the compromise of class actions. *Id.* At 117 (internal quotations omitted). If the settlement was achieved through arm's-length negotiations by experienced counsel, "[a]bsent fraud or collusion… [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Guippone v. BH S&B Holdings LLC*, No. 09 Civ. 01029 (CM), 2016 WL 5811888 (S.D.N.Y. Sep. 23, 2016)

[2] Unless otherwise noted, citations are omitted and emphasis is added.

A. The Settlement Is Procedurally Fair as the Product of Good Faith, Informed, Arm's-Length Negotiations

"Where a settlement is the 'product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation,' the negotiation enjoys a 'presumption of fairness.'" *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009). The Settlement in this case is the result of intensive, arm's-length negotiations between experienced attorneys familiar with class litigation. Declaration of Joseph P. Guglielmo and Gary F. Lynch (ECF No. 61 ("Joint Decl.") ¶ 26.) As detailed above, Class Counsel conducted a thorough investigation and analysis of Plaintiffs' claims and engaged in informal, but meaningful, discovery with ANN. (*Id.* ¶ 27.) Class Counsel was well positioned to evaluate the strengths and weaknesses of Plaintiffs' claims, and the appropriate basis upon which to settle them. (*Id.*) Furthermore, the settlement negotiations of the Parties were held under the supervision of Magistrate Judge Netburn. (*Id.* ¶ 28.) *See also McBean v. City of N.Y.*, 228 F.R.D. 487, 494 (S.D.N.Y. 2005) (supervision of a magistrate judge is an important factor in determining that negotiations were free of collusion).

B. The Settlement Is Substantively Fair, Reasonable, and Adequate

The Second Circuit has identified nine factors the courts should examine when considering whether to finally approve a proposed class settlement (the "*Grinnell* factors"):

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds*

by Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000). This list of factors is not a checklist; that is, not every factor must weigh in favor of approval. Rather, a court considers "the totality of these factors in light of the particular circumstances" in making its ultimate determination of approval. *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012). For each of the Settlements, the *Grinnell* factors weigh in favor of final approval.

1. Complexity, Expense, and Likely Duration of the Litigation

With approximately seven million potential Class Member in the proposed Settlement Class, this case qualifies as complex. Given the relatively small value of the claim of each member of the Settlement Class, individual cases would be impracticable. (Joint Decl. ¶ 30.) Although the Parties already have devoted considerable time and expense to litigating this matter, further litigation without settlement would necessarily result in additional expense and delay. (*Id.*)

Further discovery and pre-trial litigation, trial, and the inevitable appeals will be time-consuming with the outcome far from certain. Regardless of the outcome of the class certification motion, the losing party would likely have sought review pursuant to Rule 23(f). This process would have delayed resolving the litigation with respect to Settling Defendants. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 222 n.13 (E.D.N.Y. 2013), *rev'd and vacated on other grounds*, 827 F.3d 223 (2d Cir. 2016) ("*Interchange*") (noting a 20-month delay between class certification order and affirmance by the Second Circuit in *In re Visa Check/Mastermoney Antitrust Litigation*). The case would then likely proceed to contested motions for summary judgment and a lengthy trial on the merits. Moreover, if the litigation continued, the Parties would retain experts to perform data analyses and to present those analyses in expert reports, at depositions, and at trial (Joint Decl. ¶ 31).

By reaching a favorable settlement at this stage of the litigation, the Parties will avoid significant expense and delay and instead, provide immediate and tangible relief to the Settlement Class. (Joint Decl. ¶ 29.)

2. The Reaction of the Class to the Settlement

The Settlement Classes' early, positive response to the Notice demonstrates support for the Settlements. *Wal-Mart Stores, Inc.*, 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). While the deadline for Class Members to object or request exclusion has not yet passed, since the comprehensive notice program has been implemented by the Settlement Administrator, there have been no objections. Moreover, there have only been one request for exclusion out of a class approximately seven million putative Class Members. *See* Lucchesi Decl. ¶ 12.

3. The Stage of the Proceedings and Amount of Discovery

The Court must be satisfied that there exists "some evidentiary foundation" in support of the proposed Settlement. *Plummer v. Chem. Bank*, 668 F.2d 654, 659 (2d Cir. 1982). Accordingly, the factor is satisfied where the parties have "engaged in sufficient investigation of the facts to enable the Court to intelligently make an appraisal of the Settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000).

Here, Class Counsel conducted an in-depth factual investigation into the claims underlying the Action. (Joint Decl. ¶ 34.) Class Counsel interviewed Plaintiffs and conducted legal research into the claims, including determining the specific claims alleged in the complaint. (*Id.*) Plaintiffs obtained certain information relating to ANN's pricing practices in various locations to determine whether the pricing practices at issue were systematic and applied to all of the Merchandise sold in the Outlet Stores. (*Id.*) Plaintiffs further retained consultants to develop and support the damage claims alleged by Plaintiffs. (*Id.*) Further, Class Counsel obtained pricing data and other

information relating to ANN's marketing and sales practices. Plaintiffs' Counsel also engaged in lengthy settlement discussions, overseen by Magistrate Judge Netburn, in which the merits of the case were examined by both sides in detail, ultimately resulting in the Settlement, which was designed to fairly compensate Class Members and elicit behavioral changes from ANN to sharply reduce the likelihood that the challenged behavior will repeat. (*Id.* ¶ 35.) *See also Ballinger v. Advance Magazine Publishers, Inc.*, No. 13 Civ. 4036(HBP), 2014 WL 7495092, at *2 (S.D.N.Y. Dec. 29, 2014) (noting that although settling before depositions were taken, "[b]oth sides were sufficiently familiar with the facts to make an intelligent decision concerning the merits of the settlement"). Accordingly, the record provides sufficient information for this Court to determine that the Parties had adequate information about their claims.

4. The Risks of Establishing Liability and Damages

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. Plaintiffs have a strong case against ANN; however, winning a judgment would require significant factual development, and the result is by no means certain. (Joint Decl. ¶ 36.) ANN has denied, and continues to deny, that its practices violate the laws at issue in the suit and has asserted numerous defenses to the claims herein. (*Id.*) Likewise, in similar outlet litigation elsewhere, defendants have argued that the comparative discount pricing language contained on the price tags at issue would not lead a reasonable consumer to believe that the product in question was previously sold at a higher price. (*Id.*) As such, there could be no violations under state consumer protection statutes for making an unlawful price comparison. (*Id.*) The threshold issue of whether consumers would be deceived by such language was thus a significant obstacle Plaintiffs would have to overcome in order to move forward with the prosecution of their case. (*Id.*) In addition, there is the possibility that the Court would not certify a nationwide class here.

Even if Plaintiffs won a motion for class certification, they risk a jury finding against them as to the liability and/or damages sought. (*Id.*)

Class Counsel are experienced, realistic, and understand that the resolution of liability issues, the outcome of the trial, and the inevitable appeals process are inherently uncertain in terms of outcome and duration. (*Id.* ¶ 37.) A settlement of $6.1 million and the labeling and practice changes described above represent a significant recovery. (*Id.*)

In addition, "[p]roving damages in this action would have been extremely complicated and would almost certainly require significant expert testimony and analysis." *Park v. The Thomson Corp.*, No. 05 Civ. 2391 (WHP), 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008); Joint Decl. ¶ 38. Although Plaintiffs believe that expert testimony would provide evidence sufficient to establish the measure of damages in this case, it is possible that in the unavoidable "battle of experts" that a jury might disagree with the Class's expert, find Defendant's expert more persuasive, or agree with the Class's expert but award a reduced amount of damages to the Class. *See In re PaineWebber*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) (This issue would undoubtedly devolve into a battle of experts whose outcome cannot be accurately ascertained in advance.") Thus, Plaintiffs faced the risk of a non-monetary recovery for members of the Settlement Class even if they were able to establish ANN's liability. (*Id.*)

5. The Risks of Maintaining the Class Action Through Trial

The risks of maintaining this Action as a class action through trial provide additional support to Plaintiffs' position that the Settlement should be approved. ANN would likely have argued that individual issues predominate over common issues. (*Id.* ¶ 39.) Here, even assuming that Plaintiffs were successful in certifying a class, there is a risk that ANN would ask the Court to reconsider or amend the certification decision. *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8831 (CM), 2014 WL 1224666, at *11 & n.62 (S.D.N.Y. Mar. 24, 2014).

6. The Ability of Defendant to Withstand a Greater Judgment

Neither Plaintiffs nor their counsel have direct knowledge as to this factor. (Joint Decl. ¶ 42.) It is certainly possible that ANN could withstand a greater judgment for an amount significantly greater than the Settlement. (*Id.*) The Second Circuit, however, has held that this factor is not dispositive and need not affect the conclusion that the settlement is within the range of reasonableness. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001); *Jermyn v. Best Buy Stores, L.P.*, No. 08 CIV. 214 CM, 2012 WL 2505644, at *7 (S.D.N.Y. June 27, 2012) (factor is "typically relevant only where judgment may risk bankruptcy or 'severe economic hardship'").

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The last two *Grinnell* factors take into account "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart*, 396 F.3d at 119 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). With regard to these factors, the Court looks to "see whether the settlement 'falls below the lowest point in the range of reasonableness.'" *Ballinger*, 2014 WL 7495092, at *3 (quoting *In re Gache*, 164 F.3d 617 (2d Cir. 1988)). Determining whether a settlement is '"reasonable'. . . is not susceptible of a mathematical equation yielding a particularized sum." *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993).

The risks associated with litigation of this case are evident as other courts have refused to find that similar claims state a claim, or that certification would not be appropriate suggesting that liability is not certain. (Joint Decl. ¶ 43.) Given the difficulties in establishing liability and damages, Plaintiffs are unable to estimate with any certainty the best possible recovery for members of the Settlement Class at this stage of the litigation. (*Id.*) However, as stated above, establishing liability and damages would be a difficult and expensive task. (*Id.* ¶ 44.) Given the

risks and uncertainties of establishing liability and damages at trial, Plaintiffs believe that the Settlement, which includes a Settlement Fund with a value of $6.1 million – with the ability to choose the preferred method of relief – in addition to the benefit of significant practice changes, falls within the range of reasonableness and will prevent future damages based on the practices at issue in this action. (Joint Decl. ¶ 45.)

Moreover, the Settlement reached here compares favorably with settlements reached in similar actions challenging phantom discounts and misrepresentations regarding the provenance of Merchandise sold at outlet stores. *See, e.g.*, *Gattinella*, 2016 WL 690877 ($4.875 million settlement reached on behalf of 3.4 million identified class members); and *Russell v. Kohl's Department Stores, Inc.*, No. 5:15-cv-01143-RGK-SP, 2016 WL 6694958, at *4 (C.D. Cal. Apr. 11, 2016) ($6.15 million settlement reached on behalf of 8.82 million identified class members);. Given these facts, the Court should find that the Settlement falls within the range of reasonableness.

IV. Notice to the Class Comported with Rule 23 and Due Process

Notice to the Class satisfied Rule 23 and due process. Rule 23(c)(2)(B) requires the "best notice practicable under the circumstances[,] including individual notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–75 (1974). Rule 23(e)(1) requires that notice must be "reasonable," *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 114. Neither individual nor actual notice to every class member is required; instead, "class counsel [need only] act[] reasonably in selecting means likely to inform the persons affected." *Jermyn* 2010 WL 5187746 at *3 (citing *Weigner v. The City of N.Y.*, 852 F.2d 646, 649 (2d Cir. 1988)); *see also In re Adelphia Commc'ns Corp. Sec. & Derivatives Litig.*, 271 F. App'x 41, 44 (2d Cir. 2008). As

explained below, the approved notice program satisfies these requirements.

1. Description of the Notice to Settlement Class and Claims Process

A. Notice Plan

The Parties have jointly selected KCC to implement the Notice Plan and serve as the Settlement Administrator. The Court approved KCC as Settlement Administrator in its Preliminary Approval Order. (ECF No. 62). The Notice Plan in this Settlement is designed to provide the best notice practicable. (Joint Decl. ¶¶ 15-18.) The Notice Plan, which consists of email and direct mail notification, is reasonably calculated under the circumstances to inform members of the Settlement Class of a description of the material terms of the Settlement, date by which persons in the Settlement Class may exclude themselves from or "opt-out" of the Settlement Class, date by which persons in the Settlement Class may object to the Settlement, and date upon which the Final Approval Hearing will occur. (Agreement § 5.1(b) and Exhibits B-E thereto.) The Class Notice and Notice Plan therefore satisfy all applicable requirements of law, including, but not limited to, Fed. R. Civ. P. 23 and the constitutional requirement of due process.

B. Settlement Administration

ANN agrees to pay an amount up to, but not to exceed $500,000 towards the cost of notice and claims administration. (Agreement §§ 2.20 & 4.1(a).) Should this contribution to the Notice Fund prove insufficient, any remaining costs of notice and administration may be paid via any undistributed sums remaining in the Cash Fund and any award of Attorneys' Fees and Expenses. (*Id.* §§ 4.5(b)(i) & 5.1(a).)

C. Claims Process

To be eligible to participate in the Settlement, Settlement Class Members will be required to submit a Claim Form stating that they are members of the Settlement Class and purchased ANN's Merchandise during the Class Period at a discount from the regular or original price. A

copy of the Claim Form is attached to the Settlement Agreement as Exhibit A. Class Members seeking cash will have to identify the date and store location of at least one purchase. Settlement Class Members shall return the Claim Form to the address identified on the Claim Form.

Once the forms are submitted, the Settlement Administrator will be responsible for reviewing the forms for completeness. (Agreement § 4.2(f).) If a Claim Form is invalid or incomplete, the Settlement Administrator will attempt to cure the defect, including by follow-up with the Claimant. (*Id.* § 4.2(g).) If the defect cannot be cured, the Settlement Administrator will reject the claim. (*Id.* & § 4.2(a).) All Claim Forms must be submitted online or postmarked on or prior to the end of the Claim Period. (*Id.* §§ 2.7, 4.2(b) & (c)(ix).)

D. Distribution Plan

Within 60 days of the Effective Date, Settlement Class Members submitting valid Claim Forms will be entitled, at their election, to $5.00 in cash or $12.00 in a Voucher to purchase Merchandise at the Outlet Stores. (*Id.* § 4.4.) If, after paying all valid claims for cash, value remains in the Cash Fund, such additional funds may be used to pay for any notice and administration costs that exceed the value of the Notice Fund. (*Id.* § 4.5(b)(i).) If additional value remains in the Cash Fund, it will be used to increase eligible Settlement Class Members' claimed relief for cash on a *pro rata* basis. (*Id.* § 4.5(b)(ii).) If distributing all valid claims for Vouchers results in a distribution of less than 425,000 Vouchers, an additional $12.00 Voucher will be issued to each Settlement Class Member, who submitted a valid claim for a Voucher in the order those claims were received, on a first come first served basis, with the process repeating until 425,000 Vouchers have been distributed. (*Id.* § 4.5(c).) If the total amount of the timely, valid, and approved claims submitted by Settlement Class Members exceeds the amount of the Settlement Fund, each eligible Settlement Class Member's initial claim amount, for either monetary amounts claimed or Vouchers claimed, shall be proportionately reduced on a *pro rata* basis based on the number of affected accounts,

such that the aggregate value of the cash payments or Voucher amounts does not exceed the value of the Cash Fund or the Voucher Fund, respectively, provided, however, that if the amount of the cash payment to each Settlement Class Member after *pro rata* reduction is less than $5.00, then each Settlement Class Member claiming cash shall receive a Voucher before any other Settlement Class member receives a second Voucher. (*Id.*) Settlement Class Members will be able to combine or stack two of the Vouchers to purchase ANN's Merchandise. (*Id.* § 2.35.) The Vouchers are fully transferrable and expire one year from the date they are issued. (*Id.*)

2. Notice Was the Best Practicable Under the Circumstances

Pursuant to the Court's Order authorizing notice (ECF No. 62), KCC, the Court-appointed Settlement Administrator, provided individual notice via mail and email to approximately 7.3 million Settlement Class Members. *See* Declaration Of Lana Lucchesi. ¶¶ 3-9. Additionally, KCC will create and maintain a case-specific website and post relevant documents including the Long Form Notice, Settlement Agreement and Preliminary Approval Order. *Id.* at 11. As of January 19,, 2018, a total of 6,585,928 Claim Packets have been disseminated to potential members of the Settlement Classes. *Id.* at 7-8. KCC emailed the Email Notice to each of the 5,490,436 valid email address on the Class Member List. KCC mailed the Postcard Notice to each of the 1,095,492 persons where an email dress was not available or could not be located, but a postal mailing address was available. *Id.* Through this comprehensive process, the entire population of potential Class Members who could be identified through reasonable effort have been sent individual notice. This multi-faceted approach of direct mail and email notice, and a dedicated settlement website, telephone helpline, and email address constitutes "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Such multi-faceted notice programs are routinely approved. *See, e.g., In re Vitamin C*, No. 06-MD-1738, 2012 WL 5289514, at *8 (E.D.N.Y Oct.

23, 2012) ("The notice was also distributed widely, through the internet, print publications, and targeted mailings. . . . the distribution of the class notice was adequate.").

3. The Notice "Fairly Apprised" Potential Class Members of the Settlements and Their Options

The contents of a class notice must (1) "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings" and (2) be written as to "be understood by the average class member." *Wal-Mart*, 396 F.3d at 114 (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)). "There are no rigid rules to determine whether a settlement notice satisfies constitutional or Rule 23(e) requirements. . . ."; however, courts typically consider (a) "whether there has been a succinct description of the substance of the action and the parties' positions"; (b) "whether the parties, class counsel, and class representatives have been identified"; (c) "whether the relief sought has been indicated"; (d) "whether the risks of being a class member, including the risk of being bound by the judgment have been explained"; (e) "whether the procedures and deadlines for opting out have been clearly explained"; and (f) "whether class members have been informed of their right to appear in the action through counsel." *In re Vitamin C*, 2012 WL 5289514, at *8. The Summary Notice contains all the information required by Rule 23(c)(2)(B), including a plain language explanation of (i) the nature of the case, the claims and defenses, the class definition, the background of the Settlements, and how the Settlement Fund will be allocated upon final approval; (ii) the right to opt out of the Settlement Classes, to object to the Settlements, and to appear at the Final Fairness Hearing, as well as the processes and deadlines for doing so; and (iii) the binding effect of judgment on those who do not exclude themselves from the Settlement Classes, and the effect of final approval. The Summary Notice also contains other information, such as Lead

Counsel's intent to request attorneys' fees and expense reimbursement. It prominently features contact information for the Claims Administrator and Lead Counsel, which Class Members can use, and have used, to obtain other information. The Summary Notice provides recipients with information on how to submit a Claim Form to potentially receive a distribution from the Settlement Fund. "[T]hese notices provide[] sufficient information for [c]lass [m]embers to understand the [s]ettlement and their options." *Sykes v. Harris*, 09 Civ. 8486 (DC), 2016 WL 3030156, at *10 (S.D.N.Y. May 24, 2016).

4. The Plan of Distribution Should Be Granted Final Approval

To secure final approval, a plan of distribution "must meet the standards by which the settlement is scrutinized − namely, it must be fair and adequate. A plan need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel. A principal goal of a plan of distribution must be the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re Credit Default Swaps Antitrust Litig.*, No. 13-MD-2478 (DLC), 2016 WL 2731524, at *9 (S.D.N.Y Apr. 26, 2016). The Plan of Distribution satisfies these requirements. The proposed plan of allocation provides for a simple distribution of the Settlement Fund to members of the Settlement Class who submit a valid Claim Form, a copy of which is attached to the Settlement Agreement as Exhibit A. Valid Claimants will receive, at their election, either $5.00 in cash or at least one Merchandise Voucher worth $12.00. Any residual amounts in the Cash or Voucher Funds will be distributed pro rata to valid Claimants, as specified in the Settlement. No portion of the Cash Fund will revert back to ANN. (Agreement § 4.5(c).) Courts have approved similar plans of distribution in consumer protection cases. *See, e.g., States of New York and Maryland v. Nintendo of America, Inc.*, 775 F.Supp. 676, 681 (S.D.N.Y.1991) (approving a settlement awarding each class member

a five dollar coupon); *Reibstein v. Rite Aid Corp.*, 761 F.Supp.2d 241, 255–56 (E.D.Pa. 2011) (approving settlement where class members were allocated $20 Rite Aid gift cards with "actual cash value," that will be mailed to "(mostly) regular customers, have no expiration date, are freely transferrable, and can be used for literally thousands of products for which ordinary consumers.."); *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149, WL 8150856, at *2, *4–16 (C.D.Cal. Jul. 21, 2008) (approving a settlement and attorneys' fees award that provides class members with gift cards to Victoria's Secret); *Schwartz v. Intimacy in New York*, No. 13-cv-5735 (PGG), 2015 WL 13630777, at *3 (S.D.N.Y. Sep. 16, 2015) (settlement of FACTA claim approved where class members would receive a $50 gift card); *Jermyn v. Best Buy Stores,L.P.*, No. 08 CIV. 214, 2012 WL 2505644, at *3-4 (S.D.N.Y. June 27, 2012) (approving settlement involving policy changes reagrding Best Buy's Price Match Policy).

The Plan of Distribution is fair and adequate. It emphasizes (i) administrative efficiency; (ii) the preservation of the Settlement Fund; and (iii) appropriate compensation to Class Members. It warrants the Court's final approval. *See, e.g., Russell* at *4 (approving settlement in which defendant agreed to implement pricing policy changes and class members would receive their share of the monetary component of the settlement in the form of a gift card to be used at Kohl's); *Katz v. ABP Corp.*, No. 12-CV-04173 (ENV), 2014 WL 4966052 (E.D.N.Y. Oct. 3, 2014) (approving settlement involving election of cash or voucher.)

V. CLASS CERTIFICATION FOR SETTLMENT PURPOSES IS APPROPRIATE

The Court's Preliminary Approval Order provisionally certified a class for settlement purposes of:

> All persons identified in ANN's business records as of April 18, 2017, who, from May 5, 2012 to May 4, 2016, purchased one or more items from Defendant's Ann Taylor Factory or LOFT Outlet Stores offered at a discount from a regular or original price.

(the "Settlement Class"), ECF No. 62, ¶ 5.

To proceed with the Settlement, the Court must certify the Settlement Class pursuant to Rule 23(a)-(b). *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). Rule 23(a) requires that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Rule 23(b) requires the Court to find that "questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

"[T]he Second Circuit has directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 504 (S.D.N.Y. 1996). Plaintiffs must show "by a preponderance of the evidence that each of Rule 23's requirements has been met." *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010). In meeting this burden, Plaintiffs do not need to have "a protracted mini-trial of substantial portions of the underlying litigation" (*In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)), but the Court must still conduct a "rigorous analysis" to ensure that the requirements of Rule 23 are satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). "Doubts concerning the propriety of class certification should be resolved in favor of class certification." *Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 174 (S.D.N.Y. 2014) (citing *Levitt v. J.P. Morgan Secs., Inc.*, 710 F.3d 454, 464 (2d Cir. 2013)).

A. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Courts presume numerosity such that joinder is

impracticable where the class exceeds 40 members." *Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152, 162 (S.D.N.Y. 2014) (Oetken, J.). Numerosity is satisfied here because ANN's business records identify approximately seven million members in the Settlement Class. *See* Lucchesi Decl. ¶ 4.

B. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common" to the proposed classes. Fed. R. Civ. P. 23(a)(2). For purposes of this Rule, "'[e]ven a single question'" will do. *Dukes*, 564 U.S. at 369. This "common contention, moreover, must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. Commonality is satisfied even though individual circumstances differ, so long as class members' "injuries derive from a unitary course of conduct." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

Here, the commonality requirement is readily satisfied. Plaintiffs and members of the Settlement Class all bring claims arising from ANN's labeling and marketing of Merchandise that it sells at its company-owned Outlet Stores. (Joint Decl. ¶ 48.) Specifically, Plaintiffs and members of the Settlement Class claim that the manner in which ANN labels its Merchandise deceived them into believing they were purchasing products at a discounted price. (*Id.*) Accordingly, the common questions are whether ANN used false price representations and falsely advertised price discounts on its Merchandise sold at its Outlet Stores, and whether such representations constitute a violation of state consumer protection statutes and common law. These questions will be determined on a class-wide basis without regard for evidence pertaining to individual class members. *See In re Platinum & Palladium Commodities Litig.*, No. 10cv3617, 2014 WL 3500655, at *9 (S.D.N.Y. July 15, 2014).

C. Typicality

Rule 23(a)(3) requires that the claims of the proposed class representatives be typical of the claims of the other class members they seek to represent. Fed. R. Civ. P. 23(a)(3). Typicality is satisfied when "each class member makes similar legal arguments to prove the defendant's liability." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). Where the "same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

Plaintiffs' claims are typical of the members of the Settlement Class' claims because they were subjected to the same advertising and marketing practices by ANN, claim to have suffered from the same injuries, and because they will benefit equally from the relief provided by the Settlement. (Joint Decl. ¶ 48.) *See also Indergit v. Rite Aid Corp.*, 293 F.R.D. 632, 652 (S.D.N.Y. 2013) ("'When the same unlawful conduct was directed at or affected both the named plaintiff and the prospective class, typicality is usually met.'").

D. Adequacy

Rule 23(a)(4) requires that the class representative "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement entails an inquiry into whether "'1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009).

As set forth above, Plaintiffs' interests are coextensive with, and not antagonistic to, the interests of members of the Settlement Class because Plaintiffs and members of the Settlement

Class have the same interest in the relief afforded by the Settlement. (Joint Decl. ¶50.) Plaintiffs and members of the Settlement Class do not have divergent interests. (*Id.*) Further, Plaintiffs are represented by qualified and competent counsel who have extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. (*Id.*) This Court has already found that Class Counsel are qualified, experienced, and able to conduct the litigation. (ECF No. 62, ¶ 7).

E. Predominance

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002). Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean*, 228 F.R.D. at 502.

Plaintiffs readily satisfy the Rule 23(b)(3) predominance requirement because liability questions common to all members of the Settlement Class substantially outweigh any possible issues that are individual to each member of the Settlement Class. (Joint Decl. ¶ 50.) As stated above, the central issue in this litigation is whether ANN engaged in a policy and practice of misrepresenting the existence, nature, and amount of price discounts on products manufactured exclusively for its Outlet Stores. Because ANN's policies and practices are uniform and applied to all members of the Settlement Class, questions regarding the legality of those policies "are about

the most perfect questions for class treatment." *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y. 2007); *see also Brown v. Kelly*, 609 F.3d 467, 484 (2d Cir. 2010) ("[W]here plaintiffs were allegedly aggrieved by a single policy of the defendants, and there is strong commonality of the violation and the harm, this is precisely the type of situation for which the class action device is suited."); *In re U.S. Foodserv. Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013).

F. Superiority

The superiority requirement of Rule 23(b)(3) mandates a finding that the "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. 23(b)(3). As the Supreme Court has noted, the "superiority" (and predominance) requirement was added to the Federal Rules by the Advisory Committee "to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem*, 521 U.S. at 615. This is certainly the case here.

Class adjudication of this case is superior to individual adjudication because it would be highly inefficient to require other Class Members to file separate cases to obtain the relief that Plaintiffs and Class Counsel have already secured on their behalf.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court grant final approval to the Settlement Agreement, certify the Settlement Class, and enter the Final Approval Order.

DATED: February 5, 2018

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

/s/ Gary F. Lynch
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