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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MEGAN TAYLOR, individually and on behalf of all  
others similarly situated,  
  
Plaintiff,  
  
v.  
  
SHUTTERFLY, INC., and DOES 1-50,  
  
Defendants.

CASE NO. 5:18-cv-00266-BLF

**~~PROPOSED~~ ORDER GRANTING  
FINAL APPROVAL OF CLASS ACTION  
SETTLEMENT**

**AS MODIFIED BY THE COURT**

Plaintiff Megan Taylor (“Plaintiff” or “Class Representative”) has moved the Court for final approval of a proposed class action settlement with Defendant Shutterfly, Inc. (“Shutterfly” or “Defendant”), the terms and conditions of which are set forth in the Settlement Agreement filed with the Court on August 20, 2021 (“Settlement Agreement”) (Dkt. 98-2). For the reasons described more fully below, the Court GRANTS final approval of the Settlement. All capitalized terms used in this Order have the meaning as defined in the Settlement Agreement.

**PROCEDURAL HISTORY**

This case concerns Defendant Shutterfly, Inc.’s (“Shutterfly” or “Defendant”) advertising and selling of deals on Groupon.com that were sold between June 1, 2015 to April 30, 2018 (the “Class Period”) for a price paid (“Paid Value”) which could be redeemed at a greater dollar value (“Promotional Value”) towards a purchase on Shutterfly’s website within a set period of time (the “Shutterfly General Spend Groupons”). For example, the Groupon “\$20 for \$40 to Spend at Shutterfly” had a Paid Value of \$20 and a Promotional Value of \$40. The procedural history is summarized in the Order Granting Motion for Preliminary Approval of Class Settlement (the “Preliminary Approval Order”) (Dkt. 99.)

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## SUMMARY OF SETTLEMENT TERMS

Under the Settlement Agreement, Defendant is stipulating to add the following disclosures to the terms and conditions of any Shutterfly General Spend Groupons offered for sale ninety (90) days after the Effective Date (unless such fact is untrue for the particular Shutterfly General Spend Groupon being offered): (i) “By purchasing this offer you will obtain a promotional code for use at the Shutterfly website.” (ii) “When you redeem the Groupon at Shutterfly, you cannot use any other Shutterfly promotional code on the same order to obtain additional discounts. Instead, you must pay the undiscounted price.” And (iii) “When you redeem the Groupon at Shutterfly, you [also] cannot use any Shutterfly free shipping code on the same order. Instead, you must pay for shipping.”

The terms of the Settlement are summarized in the proposed Long Form Notice to Class Members, which is attached as Exhibit B1 to the Settlement Agreement. Under the proposed settlement, Class Members who purchased a Shutterfly General Spend Groupon that was never redeemed are entitled to a Shipping Code for free shipping on a future purchase on the Shutterfly Website and a Promotional Code worth 110% of the original Promotional Value of the Shutterfly General Spend Groupon purchased. Class Members who redeemed a Shutterfly General Spend Groupon are entitled to a Shipping Code for free shipping on a future purchase on the Shutterfly Website and a Promotional Code worth 20% of the original Promotional Value of the Shutterfly General Spend Groupon or at their option, a Cash Refund equal to 10% of the Promotional Value of the Groupon, plus 50% of the amount the Class Member paid Shutterfly for shipping in connection with the order in which the Groupon was redeemed. Cash Refunds are available only to Class Members who file claims according to the instructions in the Long Form Notice, but the Shipping Code and Promotional Codes will be distributed to Class Members automatically without the need for a claim.

## NOTICE AND SETTLEMENT ADMINISTRATION

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The Settlement Agreement is being administered by a well-known, independent claims administrator, Angeion Group, LLC (“Angeion”). Following the Court’s Preliminary Approval Order, Angeion established the Settlement Website at [www.shutterflypromosettlement.com](http://www.shutterflypromosettlement.com),

1 which contained the Class Notice, including the procedures for Class Members to submit claims  
2 or exclude themselves, a contact information page that includes address and telephone numbers  
3 for the Claim Administrator and the parties, the Settlement Agreement, the Preliminary Approval  
4 Order, online and printable versions of the Claim Form and the opt out forms, and answers to  
5 frequently asked questions. (Dkt. 101 ¶ 18.) In addition, the papers in support of final approval  
6 and Plaintiff’s application for Attorneys’ Fees and Expenses and Incentive Award were placed on  
7 the Settlement Website after they were filed. (Id.) The Claim Administrator also operated a toll-  
8 free number for Class Member inquiries. (Id. ¶ 19.)

9 Class Notice was provided via direct notice which referred Class Members to the  
10 Settlement Website. (Id. ¶¶ 11-18.) In particular, Class Notice was provided via: (1) direct Email  
11 Notice to those Class Members for whom an email address was available; (2) direct Postcard  
12 Notice mailed to those Class Members for whom a physical mailing address was available but a  
13 valid email address was not available; and (3) publication on a Settlement Website. Id.

14 In total, the Claim Administrator is estimated to have delivered more than 225,000 notices  
15 via mail and email. (Id. ¶¶ 11-17.) In particular, on September 10, 2021, the Claim Administrator  
16 caused E-Mail Notice to be sent to the 96,177 Class Members with valid email addresses. (Id. ¶  
17 11.) On September 11, 2021, Angeion caused Postcard Notice to be mailed to the 1,051 Class  
18 Members who did not have a valid email address but had a mailing address. (Id. ¶ 12.) On  
19 September 23, 2021, Angeion caused Postcard notice to be mailed to 708 Class Members to whom  
20 E-Mail Notice had bounced back as undeliverable. (Id. ¶¶ 13-14.)

21 Class Members were given until November 9, 2021 to object to or exclude themselves  
22 from the proposed Settlement. A total of 2,444 Claims were received by the Claim Administrator.  
23 (Id. ¶ 21.) Of these, 2,425 Claims were deemed valid. (Id.) Cash Refunds will paid totaling  
24 \$39,740.02. (Id.) In addition to the 2,425 Class Members that submitted valid Claim Forms for a  
25 cash refund, 63,098 additional Redeemer Class Members will receive Benefits Notice providing  
26 them with promotional codes worth a total of \$815,730.00 and free shipping codes. (Id.) An  
27 additional 30,420 Non-Redeemer Class Members will receive Benefits Notice providing them  
28 promotional codes worth a total of \$1,656,165.50 and free shipping codes. (Id.) There are also

1 2,183 Both Class Members that will receive Benefits Notice providing them with promotional  
2 codes worth a total of \$163,323.00 and free shipping codes. (Id.)

### 3 ANALYSIS

#### 4 A. JURISDICTION

5 This court has jurisdiction under 28 U.S.C. § 1332(d)(2).

#### 6 B. CERTIFICATION OF THE CLASS

7 A class action is maintainable only if it meets the four requirements of Rule 23(a):

- 8 (1) the class is so numerous that joinder of all members is  
9 impracticable;
- 10 (2) there are questions of law or fact common to the class;
- 11 (3) the claims or defenses of the representative parties are typical  
12 of the claims or defenses of the class; and
- 13 (4) the representative parties will fairly and adequately protect the  
interests of the class.

14 Fed. R. Civ. P. 23(a). In addition to satisfying the Rule 23(a) requirements, “parties seeking class  
15 certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).” *Amchem*  
16 *Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Plaintiff seeks certification under Rule  
17 23(b)(3), Prelim. App. Mot., ECF No. 94 at 17–19, which requires that (1) “questions of law or  
18 fact common to class members predominate over any questions affecting only individual  
19 members” and (2) “a class action is superior to other available methods for fairly and efficiently  
20 adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

21 When it granted preliminary approval of this class action settlement, this Court concluded  
22 that these requirements were satisfied. *See* ECF No. 99 ¶ 3. The Court is not aware of any facts  
23 that undermine that conclusion, but reviews briefly each of the Rule 23 requirements again.

24 Under Rule 23(a), the Court concludes that joinder would be impracticable where  
25 approximately 110,000 Shutterfly General Spend Groupons were sold to Class Members.  
26 Weisbrot Decl., ECF No. 94-2 ¶ 14; *see Rannis v. Recchia*, 380 Fed.Appx. 646, 651 (9th Cir.  
27 2010) (“In general, courts find the numerosity requirement satisfied when a class includes at least  
28 40 members.”). The commonality requirement is met because key issues in the case are the same

1 for all class members, including: (1) whether Defendant’s marketing and advertising materials  
2 were likely to deceive reasonable consumers; (2) whether Class Members were harmed by  
3 Defendant’s misleading advertising and omissions; (3) whether Class Members are entitled to  
4 injunctive and other equitable relief and, if so, what is the nature of such relief; and (4) whether  
5 Class Members are entitled to payment of restitution or damages plus interest thereon. The claims  
6 of the class representative are typical of those of the Settlement Class, as she was deceived by  
7 Defendant’s misleading advertising of the Shutterfly General Spend Groupons and she suffered  
8 the same injury as the rest of the Class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th  
9 Cir. 1998) (typicality requires that the claims of the class representatives are “reasonably co-  
10 extensive with those of absent class members”). Finally, to determine Plaintiff’s adequacy, the  
11 Court must resolve two questions: (1) does the named Plaintiff or her counsel have any conflicts  
12 of interest with other class members and (2) will the named Plaintiff and her counsel prosecute the  
13 action vigorously on behalf of the class? *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th  
14 Cir. 2011) (internal citations omitted). There is no evidence of any conflict of interest that would  
15 preclude Plaintiff from acting as a class representative or her counsel from acting as Class  
16 Counsel. Nor is there evidence that Class Counsel has failed to vigorously litigate this action on  
17 behalf of the class.

18 Now turning to Rule 23(b)(3), the “predominance inquiry tests whether proposed classes  
19 are sufficiently cohesive to warrant adjudication by representation.” *Amchem*, 521 U.S. at 623.  
20 The common questions in this case— (1) whether Defendant’s marketing and advertising  
21 materials were likely to deceive reasonable consumers; (2) whether Class Members were harmed  
22 by Defendant’s misleading advertising and omissions; (3) whether Class Members are entitled to  
23 injunctive and other equitable relief and, if so, what is the nature of such relief; and (4) whether  
24 Class Members are entitled to payment of restitution or damages plus interest thereon—  
25 predominate over individual questions among the class members. The Rule 23(b)(3) superiority  
26 inquiry looks to alternative methods of adjudication and whether maintenance of a class action  
27 would be fair and efficient. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234–35 (9th Cir  
28 1996). The Court finds that superiority is satisfied here because: (1) prosecuting or defending

1 separate actions at this stage would be impractical and inefficient; and (2) to the parties'  
2 knowledge, there is no other litigation concerning this controversy. *See* Prelim. App. Mot., ECF  
3 No. 94 at 19.

4 The Court finds that the prerequisites of Rule 23 have been satisfied for certification of the  
5 Class for settlement purposes because: Class Members are so numerous that joinder of all  
6 members is impracticable; there are questions of law and fact common to the Class; the claims and  
7 defenses of the Class Representative are typical of the claims and defenses of the Class she  
8 represents; the Class Representative has fairly and adequately protected the interests of the Class  
9 with regard to the claims of the Class she represents; common questions of law and fact  
10 predominate over questions affecting only individual Class Members, rendering the Class  
11 sufficiently cohesive to warrant a class settlement; and the certification of the Class is superior to  
12 individual litigation and/or settlement as a method for the fair and efficient resolution of this  
13 matter.

14 For purposes of the Settlement and this Final Approval Order and Judgment, the Court  
15 hereby finally certifies the following Class: All United States residents who, in the United States,  
16 during the Class Period, either (i) purchased a Shutterfly General Spend Groupon that was never  
17 redeemed; or, (ii) redeemed a Shutterfly General Spend Groupon. For avoidance of doubt, the  
18 Class includes purchasers of each of the following Shutterfly General Spend Groupons: GP4W,  
19 GP7C, GP7D, GP7E, GP7F, GP7G, GP7H, GP7T, GP7U, GP7V, GP7W, GP7X, GP7Y, GP7Z,  
20 GP8A, GP9A, GP9B, GP9C, GP9D, GP9E, GP9F, GP9G, GP9H, GP9J, GP9L, GP9N, GP9P,  
21 GPAG, GPAH, GPAL, GPAM, GPAN, GPAP, GPAQ, GPAR, GPAS, GPAT, GPA7, GPA8,  
22 GPA9, GPBA, GPBB, GPBV, GPBW, GPBX, GPBY, GPBZ, GPB8, GPB9, GPCA, GPCB,  
23 GPCC, GPCU, GPCV, GPCW, GPDA, GPDB, GPDC, GPDD, GPDE, GPDF, GPDG, GPDH,  
24 GPDJ, GPDQ, GPDR, GPDS, GPDT, and GPDU.

25 Excluded from the Class are (a) the undersigned judge and any member of her immediate  
26 family; (b) the Honorable Magistrate Virginia K. DeMarchi and any member of her immediate  
27 family; (c) any government entity; (d) Honorable Richard Kramer (Ret'd) and any member of his  
28 immediate family; (e) Defendant; (f) any entity in which Defendant has a controlling interest; (g)

1 any of Defendant’s parents, affiliates, and officers, directors, employees, legal representatives,  
2 heirs, successors, or assigns; and (h) all persons who have filed a timely Request for Exclusion to  
3 opt out of the Class.

4 For the purpose of this Settlement, the Court hereby finally approves Plaintiff as the Class  
5 Representative and the law firm of Gutride Safier LLP as Class Counsel.

### 6 **C. NOTICE AND CLAIMS ADMINISTRATION**

7 The Notice Plan provided notice to Class Members directly. The Court reaffirms the  
8 finding it made in the order granting preliminary approval that the notice plan provided the best  
9 practicable notice to the members of the class and satisfied the requirements of due process. The  
10 Court also finds, based on the evidence described above, that notice reached all Class Members  
11 for whom a valid email or mailing address was available through a reasonable search. This notice  
12 comports with due process. *See, e.g., Ellison v. Madden, Ltd.*, No. CV115935PSGAGR, 2013  
13 U.S. Dist. LEXIS 202269, at \*3 (C.D. Cal. May 7, 2013) (approving a notice plan reaching  
14 77%); *In re: Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, No. 1:08-WP-65000,  
15 2016 U.S. Dist. LEXIS 130467, at \*9 (N.D. Ohio Sept. 23, 2016) (approving notice plan reaching  
16 approximately 77.5 percent of class members).  
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### 19 **D. FINAL APPROVAL OF SETTLEMENT**

20 A court may approve a proposed class action settlement of a certified class only “after a  
21 hearing and on finding that it is fair, reasonable, and adequate after considering whether: (a) the  
22 class representatives and class counsel have adequately represented the class; (b) the proposal was  
23 negotiated at arm’s length; (c) the relief provided for the class is adequate, taking into account: (i)  
24 the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of  
25 distributing relief to the class, including the method of processing class-member claims; (iii) the  
26 terms of any proposed award of attorney’s fees, including timing of payment; and (iv) any  
27 agreement required to be identified under Rule 23(e)(3); and (d) the proposal treats Class  
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1 Members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2). In reviewing the proposed  
2 settlement, the Court need not address whether the settlement is ideal or the best outcome, but  
3 only whether the settlement is fair, free of collusion, and consistent with plaintiff’s fiduciary  
4 obligations to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d at 1027.

5  
6 For the reasons further detailed below and discussed at the Final Approval hearing, the  
7 Court finds that the proposed settlement is fair and appropriate under the Rule 23(e)(2) factors.  
8 Plaintiff’s claims are based on the marketing and selling of the Shutterfly General Spend  
9 Groupons. There would be a battle of the experts regarding consumer understanding, materiality  
10 of the representations, and the computation of damages, if any. Proceeding to trial would have  
11 been costly; recovery was not guaranteed; and there was the possibility of protracted appeals.  
12 Counsel for both Parties were highly experienced and Plaintiff’s counsel provided a detailed  
13 declaration explaining why they supported the Settlement, and there is no factual basis to support  
14 any allegation of collusion or self-dealing.  
15

16  
17 **1. Class Representative and Class Counsel Have Adequately**  
18 **Represented the Class.**

19 In the Preliminary Approval Order, this Court found that the Class Representative and  
20 Class Counsel adequately represented the interests of the Class. This Court has seen no evidence  
21 to contradict my previous finding, and reconfirm it here. Class Counsel has vigorously prosecuted  
22 this action through discovery and formal mediation. Counsel therefore “possessed sufficient  
23 information to make an informed decision about settlement.” *Hefler*, 2018 U.S. Dist. LEXIS  
24 213045 \*18.  
25

26  
27 **2. The Settlement Was Negotiated at Arm’s Length.**

28 This Court finds that the Settlement is the product of serious, non-collusive, arms’ length



1 negotiations by experienced counsel with the assistance of a well-respected and experienced  
2 mediator, retired San Francisco Superior Court Judge Richard Kramer, at JAMS. *See, e.g., G. F. v.*  
3 *Contra Costa Cty.*, 2015 WL 4606078, at \*13 (N.D. Cal. July 30, 2015) (noting that “[t]he  
4 assistance of an experienced mediator in the settlement process confirms that the settlement is  
5 non-collusive”); *Hefler*, 2018 U.S. Dist. LEXIS 213045 \*19 (“[T]he Settlement was the product of  
6 arm’s length negotiations through two full-day mediation sessions and multiple follow-up calls  
7 supervised by former U.S. District Judge Layn Phillips.”). Further, before agreeing upon the terms  
8 of the Settlement, the Parties conducted factual investigation, which included document  
9 production, interrogatories, and informal discovery. The record was thus sufficiently developed  
10 that the Parties were fully informed as to the viability of the claims and able to adequately  
11 evaluate the strengths and weaknesses of their respective positions and risks to both sides if the  
12 case did not settle.

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15 The Court has independently and carefully reviewed the record for any signs of collusion  
16 and self-dealing, and finds that no collusion or self-dealing occurred. Specifically, the Court finds  
17 that Class Counsel did not compromise the claims of the Class in exchange for higher fees.

### 18 19 **3. The Relief to the Class is Adequate Recovery to the Class**

20 Although not articulated as a separate factor in Rule 23(e), “[t]he relief that the settlement  
21 is expected to provide to class members is a central concern.” Fed. R. Civ. P. 23(e)(2)(C)-(D)  
22 advisory committee’s note to 2018 amendment. “The Court therefore examines ‘the amount  
23 offered in settlement.’” *Hefler*, 2018 U.S. Dist. LEXIS 213045 \*18 (quoting *Hanlon*, 150 F.3d at  
24 1026).

#### 25 26 **a. Injunctive Relief**

27 “Injunctions are the primary form of relief available under the UCL to protect consumers  
28 from unfair business practices, while restitution is a form of ancillary relief.” *Kwikset v. Superior*

1 Court, 51 Cal. 4th 310, 337 (2011). The Settlement requires Defendant to change the  
2 representations it makes when it markets and advertises future Shutterfly General Spend Groupons  
3 beginning ninety (90) days after the Effective Date. The Parties bargained for and reached  
4 agreement that the Defendant would prominently state each of the following facts (unless such  
5 fact is untrue for the particular Shutterfly General Spend Groupon being offered): (i) “By  
6 purchasing this offer you will obtain a promotional code for use at the Shutterfly website.” (ii)  
7 “When you redeem the Groupon at Shutterfly, you cannot use any other Shutterfly promotional  
8 code on the same order to obtain additional discounts. Instead, you must pay the undiscounted  
9 price.” And (iii) “When you redeem the Groupon at Shutterfly, you [also] cannot use any  
10 Shutterfly free shipping code on the same order. Instead, you must pay for shipping.”  
11

12 It is appropriate for the Court, in assessing whether the class is benefited by the settlement,  
13 to take into account the injunctive relief obtained, even if the Court is unable to determine the  
14 exact monetary value of such relief. *See Kumar v. Salov*, 737 Fed. Appx. 341, 342 (2018)  
15 (affirming settlement approval based on findings that class counsel reached an “excellent result”  
16 for the class, including achieving the class’s non-monetary goal of “get[ting] the defendants to  
17 improve their practices”); *Allen v. Bedolla*, 787 F.3d 1218, 1225 (9th Cir. 2015) (citing *Bluetooth*)  
18 (“As a whole, the settlement appears to afford valuable relief, much by injunction, that will benefit  
19 the class”); *In re Ferrero Litig.*, 583 F. App’x 665, 668 (9th Cir. 2014) (“a court need not  
20 determine the ‘value’ of particular injunctive relief”); *Laguna v. Coverall N. Am., Inc.*, 753 F.3d  
21 918, 924 (9th Cir. 2014) (Ninth Circuit has “never required a district court to assign a monetary  
22 value to purely injunctive relief”), vacated on other grounds, 772 F.3d 608 (9th Cir. 2014); *cf.*  
23 *Allen* at 1225 (holding that district court could not award attorneys’ fees on a percentage-of-  
24 benefit basis unless it made findings about value of that relief); *Bluetooth*, 645 F.3d at 941  
25 (holding that lodestar-based award of fees is particularly “appropriate in class actions brought  
26 under fee-shifting statutes . . . where the relief sought—and obtained—is often primarily  
27  
28

1 injunctive in nature and thus not easily monetized, but where the legislature has authorized the  
2 award of fees to ensure compensation for counsel undertaking socially beneficial litigation.”). The  
3 settlement’s inclusion of injunctive relief can be considered as a class benefit even if the  
4 injunction benefits not just Class Members, but the general public. *See, e.g., In re TracFone*  
5 *Unlimited Service Plan Litigation*, 112 F. Supp. 3d 993, 1005 (N.D. Cal. 2015) (“The Court finds  
6 that the injunctive relief will have significant value for both class members and the general  
7 public.”).

8  
9 **b. Monetary Relief**

10 Defendant also agreed to provide monetary benefits to Class Members. Class Members  
11 who purchased a Shutterfly General Spend Groupon that was never redeemed will receive a  
12 Shipping Code for free shipping on a future purchase on the Shutterfly Website and a Promotional  
13 Code worth 110% of the original Promotional Value of the Shutterfly General Spend Groupon  
14 purchased. Class Members who redeemed a Shutterfly General Spend Groupon will receive a  
15 Shipping Code for free shipping on a future purchase on the Shutterfly Website and a Promotional  
16 Code worth 20% of the original Promotional Value of the Shutterfly General Spend Groupon  
17 unless they elected to file a Claim to receive a Cash Refund equal to 10% of the Promotional  
18 Value of the Groupon, plus 50% of the amount the Class Member paid Shutterfly for shipping in  
19 connection with the order in which the Groupon was redeemed. Cash Refunds are available only  
20 to Class Members who filed claims according to the instructions in the Long Form Notice. The  
21 Shipping Code and Promotional Codes will be distributed to Class Members automatically  
22 without the need for a claim.

23  
24  
25 Based on the record evidence and argument the parties submitted in connection with the  
26 Settlement, as well as the familiarity the Court has developed with this case, the Court finds that  
27 this monetary recovery is fair, reasonable and adequate, particularly given the overall claimed  
28 actual damages amount, risks of proceeding to trial, and the amount made available to claimants.

1                   **4. The Strength of Plaintiff’s Case and Risk of Continuing Litigation**

2                   No class had been certified prior to the Settlement. Plaintiff faced serious risk at the  
3 certification stage, and if she prevailed, at trial. Both class certification and trial likely would have  
4 required expert analysis to establish, among other things, that the marketing and advertising of the  
5 Shutterfly General Spend Groupon was misleading and material to consumer purchasing decisions  
6 and that the Class Members were damaged.

7                   **5. Effectiveness of Distribution Method**

8                   As noted above, the Court concludes that the distribution method and claims process is  
9 reasonable. All Class Members automatically receive benefits under the Settlement, without the  
10 need to file a Claim. Class Members who redeemed a Shutterfly General Spend Groupon had the  
11 opportunity to submit a Claim via a relatively simple claim form with basic questions about class  
12 membership.

13                   **6. The Terms of the Proposed Award of Attorneys’ Fees and Expenses.**

14                   As noted in section E below, the Court finds the proposed award of Attorneys’ Fees and  
15 Expenses is reasonable.

16                   **7. Other Agreements**

17                   The Court is required to consider “any agreements required to be identified under Rule  
18 23(e)(3).” The Parties have attested, and the Court finds, that there are no such agreements.

19                   **8. The Proposal Treats Class Members Equitably Relative to Each Other**

20                   All Class Members who submitted a Valid Claim are entitled to the same relief under the  
21 Settlement. All Class Members who did not submit a claim are entitled to the same relief under  
22 the Settlement.  
23

24                   **9. The Response of Class Members**

25                   Out of an estimated 98,000 Class Members, there were three (3) opt-outs and no  
26 objections. (Id. ¶ 10.) In comparison, there were 2,425 Valid Claims, according to the report of the  
27 Claim Administrator. (Id. ¶ 21.) This is an overwhelmingly positive response. *See Churchill*  
28 *Village, LLC v. General Electric*, 361 F.3d 566, 577 (9th Cir. 2004) (explaining that a court may

1 infer appropriately that a class action settlement is fair, adequate, and reasonable when few class  
2 members object to it); *Zepeda v. PayPal, Inc.*, 2017 WL 1113293, at \*16 (N.D. Cal. Mar. 24,  
3 2017) (holding “the indisputably low number of objections and opt-outs, standing alone, presents  
4 a sufficient basis upon which a court may conclude that the reaction to settlement by the class has  
5 been favorable); *Cruz v. Sky Chefs, Inc.*, 2014 WL 7247065, at \*5 (N.D. Cal. Dec. 19, 2014) (“A  
6 court may appropriately infer that a class action settlement is fair, adequate, and reasonable when  
7 few class members object to it.”); *see also, e.g., In re Carrier IQ, Inc., Consumer Privacy Litig.*,  
8 2016 WL 4474366, at \*4 (N.D. Cal. Aug. 25, 2016) (stating that, “[i]n an analysis of settlements  
9 where notice relied on media notice exclusively, the claims rate ranged between 0.002% and  
10 9.378%, **with a median rate of 0.023%**”) (emphasis added).

#### 11 **10. Costs of Administering the Settlement**

12 To date, the Claim Administrator has incurred \$26,753.45 in costs to administer the  
13 Settlement. (Id. ¶ 23.) The Claim Administrator estimates that it will incur approximately  
14 \$48,246.55 in additional costs to administer the Settlement through conclusion. (Id.) The Court  
15 finds that such amounts are reasonable.

#### 16 **E. ATTORNEYS’ FEES**

17 Class Counsel requests an award of \$350,000.00 in attorneys’ fees and expenses.  
18 Defendant does not oppose this request. *See, e.g., In re Volkswagen “Clean Diesel” Marketing,*  
19 *Sales Practices, and Products Liability Litigation*, 2017 WL 1047834, at \*4 (N.D. Cal., Mar. 17,  
20 2017 (“Volkswagen’s agreement not to oppose the application does not evidence collusion and  
21 was not obtained by Class Counsel to Class Members’ detriment.”) The record is undisputed that  
22 the settlement negotiation was overseen by an experienced mediator and that the attorneys’ fees  
23 and expenses requested do not diminish the amount of monetary relief available to Class  
24 Members. *See, e.g., G. F. v. Contra Costa Cty.*, 2015 WL 4606078, at \*13 (N.D. Cal. July 30,  
25 2015) (noting that “[t]he assistance of an experienced mediator in the settlement process confirms  
26 that the settlement is non-collusive”). Thus, the Court finds that the negotiations about fees, costs,  
27 and an incentive award could not have had any negative impact on the benefits made available to  
28 Class Members.

1 This Court is required to analyze an attorneys' fee request based on either (1) the  
2 "lodestar" method or (2) a percentage of the total benefit made available to the class, including  
3 costs, fees, and injunctive relief. *See e.g., Nwabueze v. AT&T, Inc.*, No. C 09-01529 SI, 2014 U.S.  
4 Dist. LEXIS 11766, at \*2-3 (N.D. Cal. Jan. 29, 2014); *Lopez v. Youngblood*, No. CV-F-07-0474  
5 DLB, 2011 U.S. Dist. LEXIS 99289, at \*11-12 (E.D. Cal. Sept. 2, 2011); *Browning v. Yahoo!*  
6 *Inc.*, No. C04-01463 HRL, 2007 U.S. Dist. LEXIS 86266, at \*13-14 (N.D. Cal. Nov. 16, 2007).  
7 The Court is not required to base attorney's fees based only on the amount paid to Class Members  
8 who submitted claims. *See Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026, 1027 (9th Cir.  
9 1997) ("We conclude that the district court abused its discretion by basing the fee on the class  
10 members' claims against the fund rather than on a percentage of the entire fund or on the  
11 lodestar."); *accord Ellsworth v. U.S. Bank, N.A.*, No. 3-12-cv-02506-LB, 2015 U.S. Dist. LEXIS  
12 191662, at \*4 (N.D. Cal. Sept. 24, 2015) ("precedent requires courts to award class counsel fees  
13 based on the total benefits being made available to class members rather than the actual amount  
14 that is ultimately claimed"); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 U.S.  
15 Dist. LEXIS 20725, at \*5 (N.D. Cal. Feb. 20, 2015) (same). The Court concludes that the lodestar  
16 approach is appropriate for this case, particularly since the primary form of relief is injunctive.

17 **1. Plaintiff's Fees Request is Reasonable Under the Lodestar Approach.**

18 Under the lodestar approach, "[t]he lodestar (or touchstone) is produced by multiplying the  
19 number of hours reasonably expended by counsel by a reasonable hourly rate." *Lealao v.*  
20 *Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000); *see also Kelly v. Wengler*, 822 F.3d  
21 1085, 1099 (9th Cir. 2016) ("[A] court calculates the lodestar figure by multiplying the number of  
22 hours reasonably expended on a case by a reasonable hourly rate. A reasonable hourly rate is  
23 ordinarily the 'prevailing market rate [] in the relevant community.'") (alteration in original)  
24 (internal citation omitted) (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010)).  
25 Once the court has fixed the lodestar, it may increase or decrease that amount by applying a  
26 positive or negative "multiplier to take into account a variety of other factors, including the quality  
27 of the representation, the novelty and complexity of the issues, the results obtained and the  
28 contingent risk presented." *Id.*; *see also Serrano v. Priest* ("*Serrano III*"), 20 Cal. 3d 25, 48-49

1 (1977); *Ramos v. Countrywide Home Loans, Inc.* 82 Cal. App. 4th 615, 622 (2000); *Beasley v.*  
2 *Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1418 (1991) (multipliers are used to compensate  
3 counsel for the risk of loss, and to encourage counsel to undertake actions that benefit the public  
4 interest). The Court should take into account the value of injunctive relief when assessing fees  
5 under the lodestar approach, but need not determine a specific monetary value associated with that  
6 relief. *See Hohenberg v. Drey (In re Ferrero Litig.)*, 583 F. App'x 665, 668 (9th Cir. 2014)  
7 (“Under the lodestar method, a court need not determine the ‘value’ of particular injunctive relief  
8 because fees are calculated through an assessment of time expended on the litigation . . . the  
9 injunctive relief in this case is meaningful and consistent with the relief requested in plaintiffs’  
10 complaint. . . The district court did not abuse its discretion in approving a settlement that  
11 compensated counsel under the lodestar method for procuring such relief.”); *Laguna v. Coverall*  
12 *N. Am., Inc.*, 753 F.3d 918, 924 (9th Cir. 2014) *vacated on other grounds*, 772 F.3d 608 (9th Cir.  
13 2014) (“[W]e have never required a district court to assign a monetary value to purely injunctive  
14 relief. To the contrary, we have stated that courts cannot ‘judge with confidence the value of the  
15 terms of a settlement agreement, especially one in which, as here, the settlement provides for  
16 injunctive relief.’”); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (a district court still  
17 “should consider the value of the injunctive relief as a ‘relevant circumstance’” in its fee  
18 determination).

19 Class Counsel has provided detailed declarations showing that it incurred a lodestar of  
20 \$656,154.00. The Court finds that the hours claimed were reasonably worked and that the rates  
21 charged are reasonable and commensurate with those charged by attorneys with similar experience  
22 who appear in this Court. The Court also finds that Plaintiff’s counsel represented their clients  
23 with skill and diligence and obtained an excellent result for the class, taking into account the  
24 possible outcomes at, and risks of proceeding to, trial.

25 Class counsel requests a fee award of \$350,000.00, which equals approximately 51% of its  
26 lodestar. Thus, far from any “upward” multiplier, Class Counsel’s requested fee actually results in  
27 a “negative” (more accurately, a “fractional”) multiplier of 0.51. The fact that Plaintiff’s counsel  
28 are seeking substantially less in fees than they reasonably incurred further demonstrates the

1 reasonably of the fee award. *See, e.g., Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D.  
2 673, 690-91 (N.D. Cal. 2016) (holding fractional lodestar multiplier to be indication of  
3 reasonableness of fee request); *Johnson v. Triple Leaf Tea Inc.*, No. 3-14-cv-01570-MMC, 2015  
4 U.S. Dist. LEXIS 170800, at \*6 (N.D. Cal. Nov. 16, 2015) (finding where “Class Counsel’s  
5 lodestar exceeded the negotiated award” to be “well within the range courts have allowed in the  
6 Ninth Circuit”); *Lusby v. GameStop Inc.*, No. C12-03783 HRL, 2015 U.S. Dist. LEXIS 42637, at  
7 \*4 (N.D. Cal. Mar. 31, 2015) (“Class Counsel’s lodestar . . . result[s] in a negative multiplier of  
8 approximately .54. This is below the range found reasonable by other courts in California.”);  
9 *Covillo v. Specialtys Café*, No. C-11-00594 DMR, 2014 U.S. Dist. LEXIS 29837, at \*7 (N.D. Cal.  
10 Mar. 6, 2014) (“Plaintiffs’ requested fee award is approximately 65% of the lodestar, which means  
11 that the requested fee award results in a so-called negative multiplier, suggesting that the  
12 percentage of the fund is reasonable and fair.”); *Walsh v. Kindred Healthcare*, No. C 11-00050  
13 JSW, 2013 U.S. Dist. LEXIS 176319, at \*3 (N.D. Cal. Dec. 16, 2013) (“The Court concludes that,  
14 on the facts of this case, the lodestar is reasonable, especially in light of the fact that Class Counsel  
15 have applied a negative multiplier, and seek an award that is less than their base lodestar.”);  
16 *Wehlage v. Evergreen at Arvin LLC*, No. 4:10-CV-05839-CW, 2012 U.S. Dist. LEXIS 144152, at  
17 \*1 (N.D. Cal. Oct. 4, 2012) (“Class Counsel do not seek a multiplier on their lodestar, and in fact  
18 the requested fee is a negative multiplier (-.79). The Court finds that this award is appropriate  
19 here.”); *Lymburner v. U.S. Fin. Funding, Inc.*, No. C-08-00325 EDL, 2012 U.S. Dist. LEXIS  
20 14752, at \*6 (N.D. Cal. Feb. 7, 2012) (“[T]he negative multiplier in this case supports the  
21 reasonableness of the fee request.”); *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW,  
22 2007 U.S. Dist. LEXIS 88886, at \*16 (N.D. Cal. Nov. 26, 2007) (“Even if the court accepted the  
23 unadjusted lodestar from plaintiffs’ counsel (\$922,884.75), the correlating multiplier of 0.74  
24 would still reflect a negative multiplier, further suggesting that the requested percentage based fee  
25 is fair and reasonable.”).

## 26 **2. The Court is Not Obligated to “Cross-Check” Plaintiffs’ Counsel’s Lodestar.**

27 The Court is not required to perform a percentage based cross-check and finds it  
28 inappropriate to do so here as the value of a permanent injunction is difficult to value monetarily.



1 *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir. 2016) (holding that if  
2 “classwide benefits are not easily monetized, a cross-check is entirely discretionary,” and the  
3 district court may make its award based entirely on the lodestar).

4 A recent Ninth Circuit decision, *Chambers v. Whirlpool Corp.*, 980 F.3d 645 (9th Cir.  
5 2020) (“*Whirlpool*”), provides that where 28 U.S.C § 1712 (of the Class Action Fairness Act  
6 (“CAFA”)) applies to a settlement—i.e., where “coupons” are made available in a settlement—a  
7 court must apply a lodestar “cross-check,” or in the alternative, articulate why it is not feasible in a  
8 particular case. *Id.*, at \*26. Because the settlement in this case is not a “coupon settlement,”  
9 section 1712 of CAFA and, by extension, *Whirlpool* do not apply. However, even if this  
10 settlement were to be deemed a “mixed” coupon settlement, the Court finds that the application of  
11 the lodestar methodology without the necessity of a cross-check is appropriate because, as  
12 articulated below, it is infeasible.

13 **3. This is not a Coupon Settlement, or Merely a “Mixed” Settlement Under 28 U.S.C**  
14 **§ 1712.**

15 The Ninth Circuit has established three factors to determine whether a settlement is a coupon  
16 settlement under 28 U.S.C. § 1712 of the Class Action Fairness Act (“CAFA”): (i) “whether class  
17 members have ‘to hand over more of their own money before they can take advantage of’ a  
18 credit”; (ii) “whether the credit is valid only ‘for select products or services’”; and (iii) “how much  
19 flexibility the credit provides, including whether it expires or is freely transferrable.” *In re*  
20 *Easysaver Rewards Litig.*, 906 F.3d 747, 762 (9th Cir. 2018) (citing *In re Online DVD-Rental*  
21 *Antitrust Litig.*, 779 F.3d 934, 951 (9th Cir. 2015)).

22 Here, each of the factors support the conclusion that the Promotional Codes are not  
23 “coupons” within the meaning of CAFA. The Shipping Codes are likely “coupons” within the  
24 meaning of CAFA, which would make this, at most, a “mixed” settlement under CAFA. However,  
25 there are two additional factors here which indicate the inapplicability of CAFA. First, persons  
26 who redeemed their Groupons are not limited to Promotional and Shipping Codes; they may  
27 obtain cash refunds. Second, while persons who did not redeem their Groupons are entitled only to  
28 Promotion and Shipping Codes, they are automatically being provided a more valuable version of

1 the exact item they purchased. To put it another way, the original purchase of a Groupon that  
2 Class Members made was itself a purchase of a “coupon,” and under the settlement they are  
3 getting a better coupon than they originally purchased. The coupon provisions of CAFA were  
4 designed to require more scrutiny of settlements that provided only a “coupon” towards a further  
5 purchase, instead of remedying the underlying issue that led to the litigation. Here the more  
6 valuable “coupon” does address the underlying allegation that the original coupon (i.e. Groupon)  
7 had less value than purchasers would have understood.

8 **a. The Promotional Codes are not “Coupons” Within the Meaning of CAFA**

9 Regarding the first factor, the Promotional Codes do not provide discounted products; they  
10 can be used to purchase products from Shutterfly’s website and do not require Class Members to  
11 make any additional purchases. Thus, the Promotional Codes are not “coupons” under CAFA. *See*  
12 *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1075 (C.D. Cal. 2010); *see also Chaikin v.*  
13 *Lululemon USA Inc.*, No. 3:12-CV-02481-GPC-MDD, 2014 U.S. Dist. LEXIS 35258, at \*7 (S.D.  
14 Cal. Mar. 14, 2014) (settlement providing \$25 “credit vouchers” redeemable at Lululemon stores  
15 that “require[d] no additional purchase” was not a coupon settlement); *Foos*, 2013 U.S. Dist.  
16 LEXIS 136918, at \*7-\*8 (settlement providing \$15 voucher for Ann Taylor merchandise with no  
17 minimum purchase required was not a coupon settlement); *Morey v. Louis Vuitton N. Am. Inc.*,  
18 No. 11cv1517 WQH (BLM), 2014 U.S. Dist. LEXIS 3331, at \*17 (S.D. Cal. Jan. 10, 2014)  
19 (settlement providing \$41 “Merchandise Certificate” redeemable at Louis Vuitton retail stores was  
20 not coupon settlement); *Tchoboian v. FedEx Office & Print Servs., Inc.*, No. SA CV 10-01009  
21 JAK (MLGx), 2014 U.S. Dist. LEXIS 184376, at \*6 (C.D. Cal. Mar 25, 2014) (“[C]ourts have  
22 distinguished between ‘coupons,’ which provide ‘discounts on merchandise or services offered by  
23 the defendant,’ and ‘vouchers,’ which provide ‘free merchandise or services.’”).

24 Regarding the second factor, the Promotional Codes can be redeemed toward most products  
25 and services offered by Shutterfly. The only excluded products are the same products that were  
26 excluded from the Shutterfly General Spend Groupons Class Members initially purchased.

27 Regarding the third factor, Promotional Codes are not “coupons” because they do not expire,  
28 can be used at any time, and are freely transferrable. *See c.f., Chaikin*, 2014 U.S. Dist. LEXIS

1 35258, at \*3 (approving a class action settlement offering vouchers that expire within six months);  
2 *Foos*, 2013 U.S. Dist. LEXIS 136918, at \*3 (same); *Davis v. Cole Haan, Inc.*, No. C-11-01826-  
3 JSW, 2013 U.S. Dist. LEXIS 151813, at \*3 (N.D. Cal. Oct. 21, 2013) (finding a class action  
4 settlement was a coupon settlement, in part, because of “significant limitations” including that  
5 “the vouchers expire after six months”).

6  
7 **b. This is Not a “Coupon” Settlement Because the Majority of the Class Can Obtain**  
8 **Cash Instead of the Promotional and Shipping Codes, and the Remainder Is Getting**  
9 **Relief That Directly Remedies the Underlying Alleged Harm.**

10 In *Whirlpool*, class members did not receive anything unless they filed a claim; they were  
11 required to file a claim to receive a coupon. Most *Whirlpool* class members could only claim a  
12 coupon; they were ineligible to receive any cash compensation. Only 4% of filed claims  
13 potentially involved cash. *See Whirlpool*, 980 F.3d at \*10 (stating “put another way, only 4% of  
14 the 133,040 filed claims—at most—could potentially involve cash reimbursement.”) By contrast,  
15 here Cash Refunds are available to 69% of the Class (those who redeemed Shutterfly General  
16 Spend Groupons).

17 Although Class Members who redeemed their Groupons and do nothing will automatically  
18 receive a Promotional Code and Shipping Code, this default provision does not change the  
19 analysis. *See Williamson v. McAfee, Inc.*, No. 5:14-cv-00158-EJD, 2017 U.S. Dist. LEXIS 15838  
20 (N.D. Cal. Feb. 3, 2017) (settlement was “not a coupon settlement, since class members had the  
21 option to receive cash instead of value certificates, even though they received certificates by  
22 default.”); *See Foos v. Ann, Inc.*, No. 11cv2794 L (MDD), 2013 U.S. Dist. LEXIS 136918, at \*7-  
23 \*8 (S.D. Cal. Sept. 23, 2013) (“having a coupon option does not necessarily transform a class  
24 action settlement into a coupon settlement under CAFA”).

25 For the remaining Class Members (those who did not redeem), they will receive a free  
26 Shipping Code and Promotional Code worth 110% of the Promotional Value of their expired  
27 Groupon. However, the Court concludes that benefits are directly compensatory to the alleged  
28 underlying harm: Plaintiffs alleged that the original advertising of the Shutterfly General Spend  
Groupon was misleading because the Groupon could not be used with free shipping codes and  
could not be combined with other offers. The Settlement addresses both issues: it provides

1 consumers free shipping *and* a higher dollar amount towards their purchase than originally  
2 promised.

3  
4 **c. As At Most a “Mixed” Coupon/Non-Coupon Settlement, the Lodestar-Based Fee Is  
Appropriate Without Need For A Cross-Check.**

5 Alternatively, this settlement can be deemed to be a “mixed” settlement because it  
6 “involv[es] coupon and non-coupon relief” under 1712(c). *See In re HP Inkjet Printer Litig.*, 716  
7 F.3d 1173, 1184-85 (9th Cir. 2013) (holding section 1712(c) applies where a settlement provides  
8 both coupons and other relief, such as equitable relief). Under § 1712(c), the percentage-of-  
9 redemption-value method applies only to the portion of fees *attributable to obtaining the coupon*  
10 *relief*. 28 U.S.C. § 1712(c)(1) (stating that fees “based upon a portion of the recovery of the  
11 coupons shall be calculated in accordance with subsection (a),” which sets forth the percentage-of-  
12 redemption-value methodology). But the remaining portion of fees attributable to “non-coupon  
13 relief” is calculated under § 1712(b) as a reasonable lodestar amount times any appropriate  
14 multiplier. *See* 28 U.S.C. § 1712(b) (stating that where “a portion of the recovery of the coupons is  
15 not used to determine the attorney’s fees,” it “shall be based upon the amount of time class  
16 counsel reasonably expended”). In short, the total fee award for “mixed” settlements under §  
17 1712(c) is the sum of: (i) “a reasonable contingency fee based on the actual redemption value of  
18 the coupons” (§ 1712(a)); and (ii) “a reasonable lodestar amount to compensate class counsel for  
19 any non-coupon relief obtained” (§ 1712(b)). *In re HP Inkjet Printer Litig.*, 716 at 1184-85 .

20 In *In re Easysaver Rewards Litigation*, the Ninth Circuit explained that a district court in  
21 “mixed” settlements may opt to use the “lodestar approach provided that it does so without  
22 reference to the dollar value of [the coupon relief].” 906 F.3d at 759. Here, Class Counsel has not  
23 sought *any* fees based on a percentage of dollar value of coupons, and only bases its request on the  
24 lodestar. Further, Class Counsel’s request of \$350,000 for combined fees and costs (equating to  
25 approximately \$339,546.78 in fees and \$10,453.22 in expenses), comes in well *below* the fee  
26 amount of \$656,154.00 calculated using the lodestar method. Thus, far from any “upward”  
27 multiplier, Class Counsel’s requested fee results in a fractional multiplier of .51; in other words,  
28 Class Counsel has effectively “written off” over 360 hours expended on this litigation. *See, e.g.*,

1 *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 690-91 (N.D. Cal. 2016) (holding  
2 negative lodestar multiplier to be indication of reasonableness of fee request); *Johnson v. Triple*  
3 *Leaf Tea Inc.*, No. 3:14-cv-01570-MMC, 2015 U.S. Dist. LEXIS 170800 at \*6 (N.D. Cal. Nov.  
4 16, 2015) (finding where “Class Counsel’s lodestar exceeded the negotiated award” to be “well  
5 within the range courts have allowed in the Ninth Circuit”); *Lusby v. GameStop Inc.*, No. C12-  
6 03783 HRL, 2015 U.S. Dist. LEXIS 42637 at \*4 (N.D. Cal. Mar. 31, 2015) (“Class  
7 Counsel’s lodestar . . . result[s] in a negative multiplier of approximately .54. This is below the  
8 range found reasonable by other courts in California.”); *Covillo v. Specialtys Café*, No. C-11-  
9 00594-DMR, 2014 U.S. Dist. LEXIS 29837 at \*7 (N.D. Cal. Mar. 6, 2014) (“Plaintiffs’ requested  
10 fee award is approximately 65% of the lodestar, which means that the requested fee award results  
11 in a so-called negative multiplier, suggesting that the percentage of the fund is reasonable and  
12 fair.”)

13 The Court is satisfied that only a very small number of the hours worked in this litigation—  
14 and far fewer than the over 350 hours that are being written off—are attributable to the Shipping  
15 Code component of the Settlement. (Dkt. 94-1 ¶ 48.) The bulk of the fees incurred in this litigation  
16 are attributable to preventing Defendant from enforcing the arbitration agreement. (Id.) Plaintiff  
17 succeeded in invalidating that agreement and should be compensated for the time spent doing so.  
18 Plaintiff also succeeded in leading Defendant to change its practices with regard to its advertising  
19 of Shutterfly General Spend Groupons and to agree in settlement to improved disclosures. Finally,  
20 Plaintiff succeeded in obtaining Promotional Codes for all Class Members and Cash Benefits for  
21 any Class Member who submitted a simple claim form—a claim form that is simpler than would  
22 likely be required in a post-trial claim process for a smaller refund. The Shipping Codes, i.e., the  
23 coupon provision of the settlement, is just icing on the cake, for those who Class Members do not  
24 want to file a claim. It would be incongruent to reduce Plaintiff’s Counsel’s fee award because it  
25 negotiated for, and obtained, an additional automatic benefit for Class Members who decided not  
26 to make a claim, a benefit that is greater than could be obtained at trial.

27 **d. Regardless, a Lodestar Cross-Check Is Not Feasible or Practical.**

28 In this case, a “cross-check” of the lodestar (against a theoretical amount of benefit

1 conferred) is not feasible or practical. Nearly all the litigation was driven by the dispute over the  
2 arbitration provision. The value of the injunctive relief obtained (and other changed practices)  
3 cannot be easily monetized, so a cross-check that focused only on the Cash Benefits, Promotional  
4 Codes, and the Shipping Codes made available or redeemed would severely undervalue the  
5 Settlement benefits. *See, e.g., Coles v. City of Oakland*, No. C03-2961 TEH, 2007 U.S. Dist.  
6 LEXIS 100533, at \*50 (N.D. Cal. Jan. 4, 2007) (holding that injunctive relief obtained served  
7 public interest and that attorneys who serve public interest should be rewarded with lodestar-based  
8 fee); *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1418 (1991) (multipliers are used to  
9 compensate counsel for the risk of loss, and to encourage counsel to undertake actions that benefit  
10 public interest); *Robertson v. Fleetwood Travel Trailers of California, Inc.*, 144 Cal.App.4th 785,  
11 820 (2006) (holding trial courts should calculate fee awards using the lodestar method “based on  
12 actual time expended, rather than a percentage of the recovery, so that pursuit of consumer  
13 warranty cases [is] economically feasible.”)

14 **e. The Catalyst Theory Would Support A Lodestar Award Even In The Absence of**  
15 **Any Settlement Relief.**

16 Finally, even if the parties had not settled but had gone to trial, and even if Plaintiff had lost  
17 at trial, Plaintiff and her counsel might still be entitled to the full requested fee award under the  
18 lodestar analysis for their work prior to trial invalidating the arbitration provision. *A fortiori*,  
19 they should not receive a lower fee having obtained additional relief for the class in settlement.

20 Section 1021.5 of the California Code of Civil Procedure authorizes a court (including a  
21 federal court) to award attorneys’ fees to a party who has achieved “the enforcement of an  
22 important right affecting the public interest.” *See id.*; *see also Klein v. City of Laguna Beach*, No.  
23 13-56973, 810 F.3d 693, 701 (9th Cir. Jan. 14, 2016) (“When California plaintiffs prevail in  
24 federal court on California claims, they may obtain attorneys’ fees under section 1021.5.”) (citing  
25 *Mangold v. Cal. Pub. Utils. Comm’n*, 67 F.3d 1470, 1478 (9th Cir.1995)). To be eligible for a fee  
26 award pursuant to C.C.P. § 1021.5, a party need not win at summary judgment or trial. Rather, as  
27 the California Supreme Court has explained:

28 The appropriate benchmarks in determining which party prevailed are (a) the  
situation immediately prior to the commencement of suit, and (b) the situation

1 today, and the role, if any, played by the litigation in effecting any changes between  
2 the two.  
3 *Maria P. v. Riles*, 43 Cal. 3d 1281, 1291 (1987) (internal citations omitted); accord *MacDonald v.*  
4 *Ford Motor Co.*, No. 13-CV-02988-JST, 2015 WL 6745408, at \*3 (N.D. Cal. Nov. 2, 2015).

5 A plaintiff who obtains changed practices, even during the litigation, meets the “prevailing  
6 party” standard. *See, e.g., Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782,  
7 790 (1989) (explaining that under certain statutes, a “prevailing party must be one who has  
8 succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at  
9 the conclusion of the litigation”). It is not even necessary for the plaintiff to obtain an injunction or  
10 similar judicially enforceable result, if she was the “catalyst” for the desired result. *See Tipton-*  
11 *Whittingham*, 316 F.3d at 1062, *certified question answered*, 34 Cal. 4th 604 (2004) (“California  
12 law continues to recognize the catalyst theory and does not require ‘a judicially recognized change  
13 in the legal relationship between the parties’ as a prerequisite for obtaining attorney fees under  
14 Code of Civil Procedure section 1021.5.”); *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553,  
15 560-61 (2004), *as modified* (Jan. 12, 2005) (same); accord *Skaff v. Meridien N. Am. Beverly Hills,*  
16 *LLC*, 506 F.3d 832, 844 (9th Cir. 2007).

17 Further, a lawsuit that primarily, or even entirely, achieves non-monetary benefits is still  
18 eligible for a full lodestar fee. As the California Supreme Court has explained, “By permitting  
19 prevailing [parties] to recover their attorney fees in addition to costs and expenses, our Legislature  
20 has provided injured consumers strong encouragement to seek legal redress in a situation in which  
21 a lawsuit might not otherwise have been economically feasible.” *Murillo v. Fleetwood*  
22 *Enterprises, Inc.*, 17 Cal.4th 985, 994 (1998); *see also Bluetooth*, 654 F.3d at 941 (holding that  
23 lodestar award appropriate when the relief obtained is “not easily monetized,” such as when  
24 injunctive relief is part of the settlement; *Camacho*, 523 F.3d at 978 (holding the lodestar figure is  
25 “presumptively a reasonable fee award.”)

26 **f. Reduction of the Fees Would Not Serve Class Member or Public Interests**

27 Finally, it is important to note that reduction of the fees would not benefit the Class; rather, it  
28 would exclusively enrich (and benefit) Defendant.

**F. LITIGATION COSTS**

1 Class counsel also are entitled to reimbursement of reasonable out-of-pocket expenses.  
2 Fed. R. Civ. P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that  
3 attorneys may recover reasonable expenses that would typically be billed to paying clients in non-  
4 contingency matters.); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995)  
5 (approving reasonable costs in class action settlement). Costs compensable under Rule 23(h)  
6 include “nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P.  
7 23(h).

8 Here, class counsel seeks reimbursement of \$10,616.33 in litigation expenses and provide  
9 records that document their claim. Dkt. 94-1 ¶ 49 and Ex. 3; Supplemental Declaration of Seth  
10 Safier in Support of Plaintiff’s Motion for Approval of Class Action Settlement ¶ 5.) The costs  
11 will be paid separately from amounts paid to Class Members who made Valid Claims and will not  
12 in any way reduce what is paid to them. No objection has been made to any cost item or amount  
13 and the submitted costs are reasonable. Accordingly, the Court finds that these submissions  
14 support an award \$10,616.33 in costs.

#### 15 **G. CLASS REPRESENTATIVE INCENTIVE AWARD**

16 The district court must evaluate named plaintiffs’ awards individually, using relevant  
17 factors including “the actions the plaintiff has taken to protect the interests of the class, the degree  
18 to which the class has benefitted from those actions, . . . [and] the amount of time and effort the  
19 plaintiff expended in pursuing the litigation.” *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir.  
20 2003). “Such awards are discretionary . . . and are intended to compensate class representatives for  
21 work done on behalf of the class, to make up for financial or reputational risk undertaken in  
22 bringing the action, and, sometimes, to recognize their willingness to act as a private attorney  
23 general.” *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009). The Ninth  
24 Circuit recently emphasized that district courts must “scrutiniz[e] all incentive awards to  
25 determine whether they destroy the adequacy of the class representatives.” *Radcliffe v. Experian*  
26 *Info. Solutions*, 715 F.3d 1157, 1163 (9th Cir. 2013). Here Plaintiff is seeking an Incentive Award  
27 of \$5,000.

28 Here, the Plaintiff came forward to represent the interests of thousands of others, with very



1 little personally to gain, as her individual alleged damages were very small. Plaintiff compiled  
2 documents and answered interrogatories in response to discovery requests, regularly corresponded  
3 with counsel telephonically and by email, traveled to and attended mediation, and took the  
4 substantial risk of litigation which, at a minimum, involves a risk of losing and paying the other  
5 side's costs. (Dkt. 94-1 ¶ 51.) Because false advertising laws depend, in part, on private  
6 enforcement, it is appropriate to give incentives to those who come forward with little to gain and  
7 at personal risk and who work to achieve a settlement that confers substantial benefits on others.  
8 Thus, the Court approves the \$5,000 incentive award for Plaintiff.

9 **H. COMPLIANCE WITH CLASS ACTION FAIRNESS ACT**

10 The record establishes that Defendant served the required notices under the Class Action  
11 Fairness Act of 2005, 28 U.S.C. § 1715, with the documentation required by 28 U.S.C. §  
12 1715(b)(1-8). (Dkt. 101 ¶¶ 7-8.)

13 **I. REQUIRED CHANGES TO DEFENDANT'S ADVERTISING**

14 As required by the Settlement Agreement, no later than ninety (90) days after the Effective  
15 Date of the Settlement Agreement, Shutterfly shall prominently state each of the following when  
16 advertising any Shutterfly General Spend Groupon for sale (unless such fact is untrue for the  
17 particular Shutterfly General Spend Groupon being offered):

18 (a) "By purchasing this offer you will obtain a promotional code for use  
19 at the Shutterfly website."

20 (b) "When you redeem the Groupon at Shutterfly, you cannot use any  
21 other Shutterfly promotional code on the same order to obtain additional discounts. Instead, you  
22 must pay the undiscounted price."

23 (c) "When you redeem the Groupon at Shutterfly, you [also] cannot use  
24 any Shutterfly free shipping code on the same order. Instead, you must pay for shipping."

25 These obligations shall remain in effect for two years from the date of this Order  
26 Nothing in this paragraph shall be interpreted to interfere with Defendant's obligations to comply  
27 with all applicable state and federal laws.  
28

1 **J. DISTRIBUTION OF SETTLEMENT BENEFITS AND PAYMENT OF**  
2 **ADMINISTRATIVE COSTS**

3 No later than 35 days after the Effective Date, the Claim Administrator shall distribute  
4 Shipping Codes and Promotional Codes to eligible Class Members by sending the Benefits Notice  
5 to Class Members in the form provided in Exhibit B-4 of the Settlement Agreement. No later than  
6 10 days after the Effective Date, Defendant shall pay the Claim Administrator the total amount  
7 necessary to pay all Cash Refunds, so that the Claim Administrator can distribute such Cash  
8 Refunds to eligible Class Members no later than 35 days after the Effective Date. Defendant shall  
9 also pay the Claim Administrator its reasonable costs and expenses in processing claims and  
10 administering the Settlement.

11 Upon completion of the implementation and administration of the Settlement, the Claim  
12 Administrator shall provide a declaration for filing with the Court containing the post-distribution  
13 information required by Local Rule 1 regarding Post-Distribution Accounting.

14 **K. RELEASES AND EFFECT OF THIS ORDER**

15 **1. Releases by Plaintiff and Class Members**

16 Upon the Effective Date, Class Representative and Class Members, including any person  
17 claiming derivative rights of the Class Representative or Class Member as such person's parent,  
18 child, heir, guardian, associate, co-owner, attorney, agent, administrator, executor, devisee,  
19 predecessor, successor, assignee, assigns, representative of any kind, shareholder, partner,  
20 director, employee or affiliate, shall have unconditionally, completely, and irrevocably released  
21 and discharged the Released Parties from the Released Claims. Upon the Effective Date, Class  
22 Representative and Class Members shall be forever barred from initiating, maintaining, or  
23 prosecuting any Released Claims against Released Parties. None of the Class Members releases  
24 claims to enforce the terms of the Settlement and none of the Class Members releases their rights  
25 to dispute or challenge, in any other proceeding, the validity or enforceability of any arbitration  
26 agreement that may exist between such Class Member and Defendant.

27 "Released Claims" means all claims that were, or could have been, asserted in the  
28 Litigation that arise out of or relate to (i) the allegations that the Shutterfly General Spend  
Groupon promotions were false, misleading or deceptive, (ii) the allegations that Shutterfly

1 committed breaches of contract or fraud in connection with the Shutterfly General Spend Groupon  
2 promotions, (iii) the allegations that Shutterfly is liable for damages or penalties for including  
3 and/or trying to enforce an unlawful or unenforceable arbitration agreement in its Terms of Use, or  
4 (iv) the allegations that Shutterfly engaged in unfair or unlawful business practices with respect to  
5 its General Spend Groupon promotions and/or the arbitration agreement in its Terms of Use. The  
6 Released Claims shall not release any Class Member's claims for personal injury against  
7 Defendant or the Released Parties or rights to enforce this Agreement.

8 **2. Additional Releases by Plaintiff**

9 In addition to the releases granted by Plaintiff in the prior section, upon the Effective Date,  
10 Plaintiff, her predecessors, successors, agents, assigns, attorneys and members of their families)  
11 on the one hand, and Released Parties on the other hand, shall have unconditionally, completely,  
12 and irrevocably released and forever discharged each other from and shall be forever barred from  
13 instituting, maintaining, or prosecuting any and all claims, liens, demands, actions, causes of  
14 action, rights, duties, obligations, damages or liabilities of any nature whatsoever, whether legal or  
15 equitable or otherwise, known or unknown, whether based upon any violation of any state or  
16 federal statute or common law or regulation or otherwise, that Plaintiff, on the one hand, and  
17 Released Parties, on the other hand, have had in the past, or now have, whether or not related to  
18 the Released Claims.

19 **3. Waiver of Provisions of California Civil Code § 1542**

20 By operation of this Order and Judgment, Plaintiff and Defendant shall with respect to the  
21 released claims set forth above in subsections 1 and 2, and Class Members shall with respect to  
22 the released claims set forth above in subsection 1, be deemed to have waived and relinquished, to  
23 the fullest extent permitted by law, the provisions, rights and benefits conferred by any law of any  
24 state of the United States, or principle of common law or otherwise, which is similar, comparable,  
25 or equivalent to section 1542 of the California Civil Code, which provides:

26 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR  
27 OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
28 FAVOR AT THE TIME OF EXECUTING THE RELEASE, AND THAT, IF KNOWN BY HIM

1 OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH  
2 THE DEBTOR OR RELEASED PARTY.

3 Plaintiff, Defendant and Class Members understand and acknowledge the significance of  
4 these waivers of California Civil Code section 1542 and any other applicable federal or state  
5 statute, case law, rule or regulation relating to limitations on releases.

6 **4. Other Effects of This Order**

7 No action taken by the Parties, either previously or in connection with the negotiations or  
8 proceedings connected with the Settlement Agreement, shall be deemed or construed to be an  
9 admission of the truth or falsity of any claims or defenses heretofore made or an acknowledgment  
10 or admission by any Party of any fault, liability or wrongdoing of any kind whatsoever to any  
11 other Party. Neither the Settlement Agreement nor any act performed or document executed  
12 pursuant to or in furtherance of the Settlement: (a) is or may be deemed to be or may be used as an  
13 admission of, or evidence of, the validity of any claim made by the Class Members or Class  
14 Counsel, or of any wrongdoing or liability of the persons or entities released under this Order and  
15 Judgment and the Settlement Agreement, or (b) is or may be deemed to be, or may be used as an  
16 admission of, or evidence of, any fault or omission of any of the persons or entities released under  
17 this Order and Judgment and the Settlement Agreement, in any proceeding in any court,  
18 administrative agency, or other tribunal. Defendant's agreement not to oppose the entry of this  
19 Order and Judgment shall not be construed as an admission or concession by Defendant that class  
20 certification was appropriate in the Litigation or would be appropriate in any other action.

21 Except as provided in this Order, Plaintiff shall take nothing against Defendant by his  
22 Complaint. This Order shall constitute a final judgment binding the Parties and Class Members  
23 with respect to this Litigation.

24 The Litigation is hereby dismissed on the merits and with prejudice and final judgment  
25 shall be entered thereon, as set forth in this Order.


26 Without affecting the finality of the judgment hereby entered, the Court reserves  
27 jurisdiction over the implementation of the Settlement Agreement. In the event the Effective Date  
28 does not occur in accordance with the terms of the Settlement Agreement, then this Order and any

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judgment entered thereon shall be rendered null and void and shall be vacated, and in such event, all orders and judgments entered and releases delivered in connection herewith shall be null and void and the Parties shall be returned to their respective positions ex ante.

Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any provisions of the Settlement Agreement.

Dated: December 7, 2021



Hon. Beth Labson Freeman  
U.S. District Judge