

1 David R. Shoop (220576)
david.shoop@shooplaw.com

2 Thomas S. Alch (136860)
thomas.alch@shooplaw.com

3 **SHOOP, A PROFESSIONAL CORPORATION**

9701 Wilshire Blvd., Suite 950

4 Beverly Hills, CA 90212

5 Tel: (310) 620-9533

Fax: (310) 620-6330

6 Janine L. Pollack

7 pollackj@thesultzerlawgroup.com

8 Michael Liskow (243899)

liskowm@thesultzerlawgroup.com

9 **THE SULTZER LAW GROUP P.C.**

270 Madison Avenue, Suite 1800

10 New York, NY 10016

11 Tel: (212) 969-7810

Fax: (888) 749-7747

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 FOR THE COUNTY OF SAN DIEGO

14 KUSHROO KHAVARIAN, on behalf of)
15 himself and all others similarly situated,)
16 individuals,)

17 Plaintiff,)

18 vs.)

19 JEROME'S FURNITURE WAREHOUSE,)
20 and DOES 1-100, inclusive,)

21 Defendant.)

NO.: 37-2018-00065353-CU-BT-CTL

Date: September 27, 2019

Time: 1:30 PM

Dept. C-72

Judge: Hon. Timothy Taylor

Date Action Filed: Dec. 27, 2018

Trial Date: None Set

22 **PLAINTIFF'S SUPPLEMENTAL**
23 **MEMORANDUM OF POINTS AND**
24 **AUTHORITIES IN SUPPORT OF**
25 **UNOPPOSED MOTION FOR**
26 **PRELIMINARY APPROVAL OF**
27 **CLASS ACTION SETTLEMENT,**
28 **PROVISIONAL CERTIFICATION**
OF SETTLEMENT CLASS, AND
APPROVAL OF NOTICE
PROGRAM

1 **I. INTRODUCTION**

2 On September 3, 2019, the Court issued its tentative ruling denying Plaintiff Kushroo
 3 Khavarian’s (“Plaintiff”) Unopposed Motion for Preliminary Approval of Class Action Settlement
 4 (“Tentative Ruling” on the “Motion”). The Court based its Tentative Ruling on what it viewed as a
 5 lack of information and data on certain specific issues including, among other things, the cost of
 6 administering the settlement and the accuracy and scope of Defendant Jerome’s Furniture, Inc.’s
 7 (“Defendant”) records of Settlement Class Members’¹ current address and other contact information
 8 to be used in notifying the class of the settlement. *See* Tentative Ruling at 5. The Court held that
 9 “[a]bsent more information about the likely penetration of the class notice and the expected
 10 participation of the class, the court is concerned that this settlement does not pass constitutional
 11 muster in terms of due process.” *Id.* On September 6, 2019, the Court held a hearing where it
 12 permitted Plaintiff to address the Court’s concerns raised in its Tentative Ruling. Deciding not to
 13 adopt its Tentative Ruling after hearing argument, the Court then ordered that the parties would be
 14 permitted to submit this supplemental memorandum in support of the Motion to provide additional
 15 information on the proposed settlement for the record.

16 **II. ARGUMENT**

17 **A. Amended Class Definition**

18 Per discussions with the Court at the hearing on the Motion, the parties have agreed to
 19 modify the Settlement Class Definition to exclude institutional buyers (who would not be entitled

22 ¹ Any terms not otherwise defined herein have the same meaning as in the Amended
 23 Settlement Agreement and Release dated September 20, 2019 (the “Amended Settlement
 24 Agreement”), annexed as Exhibit 1 to the September 20, 2019 Supplemental Declaration of Janine
 25 L. Pollack in Support of Plaintiff’s Unopposed Motion for Preliminary Approval of Class Action
 Settlement, Provisional Certification of Settlement Class, and Approval of Notice Program
 (“Supp. Pollack Decl”).

1 to damages under the Song-Beverly Act) and anyone who has already received a full refund for all
2 Products.² Accordingly, Section 1.27 of the Settlement Agreement has been amended as follows:

3 “Settlement Class” means all purchasers of the Products from Jerome’s from December 27,
4 2014 through the Claims Deadline. The Settlement Class specifically excludes: (i) Jerome’s
5 and its officers and directors; (ii) all Settlement Class Members who timely and validly
6 request exclusion from the Settlement Class; (iii) the Judge assigned to evaluate the fairness
7 of this settlement; ~~and~~ (iv) the attorneys representing the Parties in the Litigation; (v)
8 **institutional purchasers of the Products; and (vi) anyone who is otherwise a member
of the Settlement Class but has already, as of the Claims Deadline, received a full
refund for all Products purchased from Jerome’s from December 27, 2014 through the
Claims Deadline.**

9 *See* Supp. Pollack Decl., Ex. 1 (Amended Settlement Agreement). The parties have further amended
10 the notice materials, proposed preliminary approval order and proposed final approval order to
11 reflect these modifications. *See id.*³

12 **B. Additional Information on the Size of the Settlement Class, the Anticipated**
13 **Penetration of the Notice Program and the Anticipated Participation of**
14 **Settlement Class**

15 Defendant’s Counsel has informed Plaintiff’s Counsel that there are 16,439 members of the
16 Settlement Class. *See* Supp. Pollack Declaration, ¶ 4. These Settlement Class Members purchased
17 \$19,248,832.52 of Products which does not include sales tax, with \$707,906.68 of those sales having
18 been refunded, leaving \$18,540,925.84. *See id.*, ¶ 5.

19 The Claims Administrator anticipates that the Notice Program will be able to directly reach
20 almost the entire Settlement Class by mail, and provide additional second direct notice by email to
21 the great majority of the Settlement Class. *See* September 20, 2019 Supplemental Declaration of
22 Richard W. Simmons of Analytics Consulting LLC in Support of Proposed Notice Program (“Supp.
23 Simmons Decl.,” attached as Exhibit 2 to the Supp. Pollack Decl.), ¶ 3. Defendant’s Counsel has

24 ² To the extent any Settlement Class Member has only been partially refunded for their
25 Product as of the Claims Deadline, they would still be eligible for a pro-rated settlement payment
based on the amount of their purchases that has not yet been refunded.

26 ³ The Parties also submit an amended Exhibit E to the Amended Settlement Agreement,
27 the list of Products, which corrects a minor typographical error in the version originally submitted.
See Supp. Pollack Decl., Ex. 1.

1 informed Plaintiff's Counsel that Defendant maintains records of the Settlement Class Members
2 which include the mailing addresses of each of the 16,439 Settlement Class Members. *See* Supp.
3 Pollack Decl., ¶ 6. The Claims Administrator will use its expertise to update all Settlement Class
4 Members' mailing addresses using the National Change of Address database ("NCOA")⁴ and other
5 technologies. *See* August 8, 2019 Declaration of Richard W. Simmons of Analytics Consulting
6 LLC in Support of Proposed Notice Program ("Simmons Decl."), ¶ 17. After sending notice to
7 these mailing addresses, if any are returned as undeliverable by mail or email, the Claims
8 Administrator will take various steps in an attempt to re-send the Notice to an appropriate address.
9 *See id.*, ¶ 19.

10 Defendant's Counsel has also informed Plaintiff's Counsel that Defendant maintains emails
11 for 87.5% of the Settlement Class Members. *See* Supp. Pollack Decl., ¶ 7. The Claims
12 Administrator will provide notice by email to each of these email addresses. *See* Supp. Simmons
13 Decl., ¶ 3(b). In designing the email notice the Claims Administrator will take various steps to
14 increase the likelihood that the emails will be opened and viewed, and not blocked by spam filters.
15 *See* Simmons Decl., ¶ 20. In the event that any of the emails "bounce back," the Claims
16 Administrator will make a second attempt at delivering the email notice. *See id.* In light of the
17 multiple forms of direct notice being provided to almost every Settlement Class Member, the highly
18 experienced Claims Administrator has attested that it "expect[s] to successfully deliver the Notice
19 to virtually all of the Settlement Class," *Id.*, ¶ 30, and has reiterated that view in the Supplemental
20 Simmons Declaration. *See id.*, ¶ 4.

21 In its Tentative Ruling the Court also raised concerns about the expected participation of the
22 Settlement Class. *See id.* at 5. The "Claims Rate" of a consumer class action is inherently difficult
23 to predict, with a range of possible factors going into the ultimate level of participation. Courts take
24

25 ⁴ The NCOA database contains records of all permanent change of address submissions
26 received by USPS in the past four years. *See* Simmons Decl., ¶ 17 n. 4. Accordingly, any
27 requested changes of address will be captured for the majority of the class period, which begins
December 27, 2014. *See* Settlement Agreement, § 1.27.

1 different views on what the “average” claims rate is for consumer class actions. *See, e.g., Couser*
2 *v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044 (S.D. Cal. 2015) (in TCPA case claims rate of 7.7%
3 “higher than average”); *Keil v. Lopez*, 862 F.3d 685, 697 (8th Cir. 2017) (“a claim rate as low as 3
4 percent is hardly unusual in consumer class actions and does not suggest unfairness.”) (citing
5 *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (citing evidence suggesting that
6 “consumer claim filing rates rarely exceed seven percent, even with the most extensive notice
7 campaigns”). In Plaintiff’s Counsel’s experience, a wide variety of factors can affect the ultimate
8 claims rate including, among others, (1) the type of notice provided to the class; (2) the amount of
9 the potential refund; and (3) whether the settlement received publicity. *See* Supp. Pollack Decl., ¶
10 8. In this case the parties anticipate a sizeable claims rate in light of the significant potential refund
11 available to Settlement Class Members, as well as the fact that direct notice will be provided to
12 “virtually all of the Settlement Class.” Simmons Decl., ¶ 30; Supp. Pollack Decl., ¶ 8. However,
13 at this point it is difficult for Plaintiff’s Counsel to make any representations to the Court regarding
14 the likely claims rate as it would be largely speculative. The Settlement Agreement sets the Claims
15 Deadline for 28 days before the Final Fairness Hearing, *see id.*, § 2.4, at which point the parties can
16 inform the Court of the number of potentially valid claims received.

17 **C. The Structure of the Settlement Fund, Projected Costs of Administration and**
18 **Anticipated Requested Attorneys’ Fees**

19 The Court expressed concern that the proposed resolution of this case “looks like a coupon
20 settlement which may involve few refund requests and the lawyers ending up with most of the
21 \$425,000.00.” Tentative Ruling at 5. As an initial matter, as discussed in Court this is not a “coupon
22 settlement” as defined in applicable jurisprudence. The gift cards Settlement Class members would
23 receive are able to be redeemed for cash, are fully transferable and will never expire – benefits that
24 have been deemed by courts to not be “coupons.” *See, e.g., In re Online DVD-Rental Antitrust*
25 *Litig.*, 779 F.3d 934, 949-52 (9th Cir. 2015) (affirming district court holding that store gift cards did
26 not constitute a coupon settlement because, *inter alia*, class members could choose between cash
27 payment or gift card of equal value, gift cards could be used on any item carried on retailer website,

1 gift cards were transferable and did not expire); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244,
2 1262 n.14 (C.D. Cal. 2016) (“the settlement in this case is not governed by [the Class Action
3 Fairness Act’s] provision regarding ‘coupon’ settlements, since class members have the option of
4 selecting either a cash payment or a store credit, both of equal value, and the store credits: do not
5 expire; may be used to purchase any product at a JCPenney store or its website; will maintain a
6 balance to be depleted on actual use; are transferable; are stackable; and may be used in connection
7 with any promotion or discount.”) (internal citations omitted); *Chavez v. Netflix, Inc.*, 162 Cal. App.
8 4th 43, 53-54 (2008) (rejecting objection that settlement was improper coupon settlement because,
9 *inter alia*, the class members were “not being offered a discount that requires them to make new
10 purchases.”).

11 Plaintiff also clarified at the hearing on the Motion that the value of the gift cards to be
12 provided to Settlement Class Members is be funded entirely and directly by Defendant separate and
13 apart from the \$425,000 Settlement Fund also funded by Defendant. There is no limit on the number
14 of gift cards that Defendant is required to provide to Settlement Class Members who make valid
15 claims, and each Settlement Class Member will receive a gift card valued at *no less* than either 12%
16 or 5% of the Purchase Price of their Products depending on which type of claim they elect to file.
17 *See* Settlement Agreement, § 2.2. In addition to the initial amount of the refunds paid directly by
18 Defendant without limitation, the value of each gift card will be further increased *pro rata* by any
19 monies remaining in the \$425,000 Settlement Fund after payment from the fund of (1) reasonable
20 attorneys’ fees and costs as approved and awarded by the Court; (2) the costs and expenses incurred
21 by the Claims Administrator; and (3) any Service Award awarded to Plaintiff. *See id.* § 2.3. So if
22 each of the 16,439 Settlement Class Members submitted a valid claim for a 12% refund of their
23 Products, Defendant would issue gift cards totaling \$2,224,911.10 plus tax, which amounts would
24 be increased *pro rata* by any remaining funds in the Settlement Fund.⁵

25 ⁵ The Settlement also provides valuable injunctive relief in the form of an agreement that
26 Defendant will discontinue selling any products containing bonded leather or similar substances
27 for five (5) years. *See* Settlement Agreement § 2.7. This litigation also was the partial cause of

1 Plaintiff has also negotiated a cap on the potential costs for notice and claims administration,
2 with the Claims Administrator agreeing that it will charge no more than \$45,000 (and it will
3 potentially be less than that). *See* Supp. Simmons Decl., ¶ 5. In the event that preliminary approval
4 of the Settlement is granted, Plaintiff will make a motion to the Court for an appropriate amount of
5 attorneys' fees and expenses from the Settlement Fund that will detail the bases for the requested
6 fees and expenses.

7 **III. CONCLUSION**

8 For the foregoing reasons, Plaintiff respectfully reiterates his request that the Court grant the
9 Motion and allow him to send Notice to the Settlement Class. Plaintiff is also prepared to provide
10 the Court with any additional information the Court seeks in order to assist it with ruling on the
11 Motion.

12 Dated: September 20, 2019

Respectfully submitted,

THE SULTZER LAW GROUP, P.C.

By: /s/ Janine L. Pollack
Janine L. Pollack
Michael Liskow (243899)

**SHOOP, A PROFESSIONAL
CORPORATION**
David R. Shoop (220576)

ACCESS LAWYERS GROUP
C. Mario Jaramillo (195343)

Counsel for Plaintiff and the Proposed Class

13
14
15
16
17
18
19
20
21
22
23
24
25
26 _____
27 Defendant having already largely discontinued the sale of the Products, *see id.*, another benefit
28 provided to the Settlement Class and the public.

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

3 I am employed in the County of Dutchess, State of New York. I am over the age of 18 and
4 not a party to the within action; my business address is: 85 Civic Center Plaza, Suite 200,
Poughkeepsie, New York 12601.

5 On September 20, 2019, I served the foregoing document described as Plaintiff's
6 Supplemental Memorandum of Points and Authorities In Support of Unopposed Motion for
7 Preliminary Approval Of Class Action Settlement, Provisional Certification Of Settlement Class,
And Approval Of Notice Program, as well as all documents described therein on the interested
8 parties as follows:

9 **BY MAIL**

10 I deposited such envelope in the mail at Poughkeepsie, New York. The
envelope was mailed with postage thereon fully prepaid.

11 As follows: I am "readily familiar" with the firm's practice of collection and
12 processing correspondence for mailing. Under that practice it would be deposited
13 with U. S. postal service on that same day with postage thereon fully prepaid at
14 Poughkeepsie, New York in the ordinary course of business. I am aware that on
motion of the party served, service is presumed invalid if postal cancellation date or
postage meter date is more than one day after date of deposit for mailing in affidavit.

15 **BY PERSONAL SERVICE**

16 I delivered such envelope by hand to the addressees at _____

17 **BY FACSIMILE**

18 I served such document(s) by fax to the fax number provided by each of the
parties in this litigation at Poughkeepsie, New York. I received a confirmation sheet
19 indicating said fax was transmitted completely.

20 X **BY EMAIL**

21 X I served such document(s) by email to the email address provided by each of the
parties in litigation set forth on the Service List.

22 Executed on September 20, 2019, at Poughkeepsie, New York.

23
24 X (State) I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

25 
26 Amanda Ciulla

Service List

1 2 3 4 5 6 7	Robert A. Cocchia Jae K. Park Dentons US LLP 4655 Executive Drive, Suite 700 San Diego, CA 92121 858 254 0710 robert.cocchia@dentons.com jae.park@dentons.com	Attorney for Defendant, JEROME'S FURNITURE WAREHOUSE
8 9 10 11 12	Thomas Alch thomas.alch@shooplaw.com SHOOP, A PROFESSIONAL LAW CORPORATION 9701 Wilshire Blvd Suite 950, Beverly Hills, CA 90212 Telephone: (310) 620-9533 Facsimile: (310) 620-6330	Attorney for Plaintiff, KUSHROO KHAVARIAN and the Class
13 14 15 16	C. Mario Jaramillo, Esq. cmj@access.law ACCESS LAWYERS GROUP 527 South Lake Avenue, Suite 200 Pasadena, CA 91101 Tel: (877) 360-3383 Fax: (866) 686-5590	Attorney for Plaintiff, KUSHROO KHAVARIAN and the Class