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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES**

12 YEVGENIYA GRANINA, on Behalf of Herself)
13 and All Others Similarly Situated,)
14 Plaintiff,)
15 v.)
16 EDDIE BAUER, LLC and DOES 1 through)
17 100, inclusive,)
18 Defendants.)
19 _____)

Case No.: BC569111

CLASS ACTION

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF FINAL APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: April 23, 2018
Time: 9:00 a.m.
Dept: 323
Judge: Hon. Elihu M. Berle

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1 **I. INTRODUCTION**

2 On December 15, 2017, the Court granted preliminary approval of the Amended
3 Settlement Agreement and Release (“Agreement”) in this action.¹ Plaintiff Yevgeniya Granina
4 hereby seeks final approval of the Settlement. The Settlement was reached after extensive arm’s-
5 length negotiations spanning over a period of many months, including a full day mediation
6 session supervised by California Supreme Court Justice Edward A. Panelli (Ret.) at JAMS. The
7 Settlement is fair, adequate and reasonable and should be approved.

8 As set forth in further detail below, Plaintiff and Class Counsel successfully negotiated a
9 \$300,000 non-reversionary common fund settlement on behalf of California consumers who
10 allege that their telephone calls were secretly recorded by Defendant Eddie Bauer, LLC (“Eddie
11 Bauer” or “Defendant”) in violation of California’s Invasion of Privacy Act, California Penal
12 Code § 630, *et seq.* (the “Privacy Act”). Moreover, under the settlement, any unpaid or uncashed
13 funds will revert to the Class for *cy pres* distribution with: (1) 50% being distributed to the
14 Alliance for Children’s Rights which is a 501(c)(3) non-profit child advocacy organization; (2)
15 25% of such funds being distributed to the California State Treasury for deposit in the Trial
16 Court Improvement and Modernization Funds; and (3) 25% of such funds being distributed to the
17 California State Treasury for deposit into the Equal Access Fund of the Judicial Branch. The
18 terms of the settlement compare favorably with settlements reached in other class actions
19 alleging violations of the Privacy Act.

20 The settlement also provides non-monetary relief which benefits the public generally. As
21 a result of this lawsuit, Eddie Bauer has agreed to a change in its business practices. Specifically,
22 Eddie Bauer re-implemented an automatic verbal notice that informs callers at the outset of the
23 call that the call may be monitored and recorded.

24 The settlement enjoys the overwhelming and unanimous support of the Class – a factor
25 that California courts have emphasized should be considered when assessing whether a
26 settlement is “fair, reasonable and adequate.” The 70-day response period for filing any
27 objections to, or requests for exclusions from, the Settlement will end on March 22, 2018. After
28

¹All capitalized terms herein have the same meaning as set forth in the Agreement.

1 implementing the Court approved Notice Plan which included direct mailings of the full Class
2 Notice via E-Mail and U.S. Mail to 15,551 Class Members, publication of the Class Notice on
3 the Settlement Website, an online banner advertising campaign geo-targeted to California
4 markets, and allowing Class Members to weigh in, and as of the date of this filing, there have
5 been *no* objections received. Moreover, only 17 Class Members requested exclusion from the
6 Settlement.²

7 Due to the extremely low number of exclusion requests and absence of any objections,
8 which weigh heavily in favor of settlement approval, and for other reasons set forth herein, the
9 Court should grant final approval of the Settlement. A proposed Final Approval Order and
10 Judgment are filed concurrently.³

11 **II. SUMMARY OF THE LITIGATION**

12 **A. Factual Background And Procedural History**

13 Plaintiff Yevgeniya Granina commenced this lawsuit on January 12, 2015 by filing a
14 Complaint in the Los Angeles Superior Court. The Complaint was originally brought against
15 Eddie Bauer based on violations of California Penal Code §632.7 of the Privacy Act for
16 recording telephone calls without consent where at least one of the parties was using a cellular or
17 cordless telephone.

18 On June 29, 2015, Eddie Bauer demurred to the Complaint and also moved to strike the
19 damages allegations from the Complaint. The Court sustained the demurrer, but granted leave to
20 file an amended complaint. The Court denied as moot the motion to strike. On December 31,
21 2015, Plaintiff filed a First Amended Complaint for violation of Penal Code §632 for all calls
22 involving landline, cellular and cordless telephones. On February 2, 2016, Eddie Bauer
23 answered the First Amended Complaint by asserting specific denials and numerous affirmative
24

25 ² These figures represent the total number of objections and exclusion requests received by the
26 Claims Administrator through February 12, 2018. *See* Declaration of Andrew Perry of Kurtzman
27 Carson Consultants (“KCC”) in Support of Class Notice and Claims Administration Costs, filed
28 concurrently herewith. The Claims Administrator will submit a Supplemental Declaration to the
Court regarding the Class Notice and claims submitted by April 9, 2018, as directed in the
Court’s December 15, 2017 Preliminary Approval Order.

³ Defendant does not oppose this Motion.

1 defenses and filed a motion to strike the request for damages under Penal Code §637.2. The
2 Court denied the motion to strike on August 9, 2016.

3 On September 29, 2016, Eddie Bauer filed a Petition for Writ of Mandate (“Writ
4 Petition”) with the Court of Appeal challenging the Order on the motion to strike. On October 11,
5 2016, Plaintiff filed a Preliminary Opposition to the Writ Petition. On October 13, 2016, the
6 Court of Appeal summarily denied the Writ Petition. *Eddie Bauer, LLC v. Superior Court,*
7 California Court, Second Appellate District, Division Two, Case No. B277987.

8 Eddie Bauer owns and operates clothing retail stores throughout the U.S. as well as a
9 major direct order center which sells clothing through its call centers. On December 4, 2014, and
10 thereafter on December 10, 2014, Plaintiff placed telephone calls to Eddie Bauer from her home
11 in California. Plaintiff called Eddie Bauer’s toll-free telephone number at 1-800-426-8020, listed
12 on Eddie Bauer’s website. During the call on December 4, 2014, Plaintiff obtained information
13 about merchandise and made a purchase with a live representative of Defendant. During the
14 subsequent call on December 10, 2014, Plaintiff confirmed details of the merchandise order with
15 a live representative of Defendant. During these inbound telephone calls with Defendant,
16 Plaintiff revealed sensitive, private, and confidential financial information, including but not
17 limited to her first and last name, full residential address, telephone number, credit card number,
18 expiration date, and email address. At no point during these communications was Plaintiff ever
19 informed that her communications were being recorded. At no point during the communications
20 did Plaintiff give her consent for the telephone communications to be recorded because she was
21 entirely unaware that Defendant was engaged in that practice.

22 **B. Discovery**

23 In terms of discovery, Plaintiff engaged in extensive informal and formal discovery,
24 propounding and reviewing responses to interrogatories, request for production of documents,
25 and request for admissions, and reviewing documents and data related to liability and damages.
26 The Parties met and conferred over a period of several months regarding the sufficiency of the
27 written responses and production of responsive documents. Specifically, Defendant has
28 produced documents concerning, *inter alia*, (1) the adoption, implementation, and enforcement

1 of Defendant's policies and procedures regarding the recording and monitoring of inbound
2 telephone calls with persons in California; (2) the call technology manuals and policies;
3 (3) training manuals, work shop materials, call scripts, and protocols relating to the call centers;
4 (4) the approximate class size during the Class Period; (5) the reasons and uses for recording
5 telephone calls; (6) the extent (if any) to which Defendant notified persons in California that their
6 telephone calls would be recorded and/or monitored; (7) the retention of the audio recordings of
7 telephone calls with persons in California, screen captures, and other data; and (8) Defendant's
8 compliance, or lack thereof, with the requirements of California Penal Code § 630, *et seq.* In
9 addition, Plaintiff's deposition was taken and she responded to extensive written discovery.

10 In addition to the above categories, Plaintiff also served discovery directed to Eddie
11 Bauer which requested information concerning, *inter alia*, (1) the names and contact information
12 of putative class members, and (2) non-content detail for each telephone call, including the class
13 members' telephone numbers, and the date, time, and duration of the subject call.

14 In anticipation of the mediation with Justice Edward Panelli, a well-respected and
15 experienced mediator at JAMS, where the within settlement was reached, Defendant provided
16 additional information and documentation for the class period to enable meaningful settlement
17 negotiations. The information and documentation discovered as a result of these efforts, have
18 allowed Class Counsel to understand the full breadth of actions taken by Defendant relative to
19 the Privacy Act and the risks involved in further litigation. Prior to the mediation, the Parties
20 submitted confidential mediation briefs which focused on the key legal and factual issues and
21 clarified the relative strengths and weaknesses of the Parties' positions. During the mediation on
22 May 10, 2017, counsel for the Parties and Justice Panelli explored fully the facts of the case,
23 Plaintiff's claims and Defendant's defenses. The settlement negotiations concluded successfully
24 and the Parties executed a Settlement Term Sheet with respect to the proposed settlement terms.
25 Thereafter, the Parties continued to vigorously negotiate and finalize all of the settlement terms
26 and drafted the formal settlement documents, including the exhibits to the Settlement which
27 spanned over a period of many months. On December 15, 2017, the Court preliminarily approved
28 the Settlement.

1 **III. THE SETTLEMENT**

2 **A. Summary of the Settlement Terms**

3 The Court conditionally certified for settlement purposes, a Class consisting of all persons
4 in California who, during the period from July 1, 2014 through January 13, 2015, inclusive, while
5 physically located in California, called and spoke with a representative of Defendant and did not
6 consent to the call being recorded. (Agreement 1(f)).

7 **B. Settlement Consideration to the Class**

8 **1. Cash Benefit to Class Members**

9 Defendant has agreed to pay \$300,000 to be placed into a trust account established by the
10 Claims Administrator (the \$300,000 shall be the non-reversionary “Common Fund”).
11 (Agreement 2.1, 2.2). Defendant already paid \$50,000 to the Claims Administrator which was
12 placed into the account within thirty (30) days following the Court order granting preliminary
13 approval of the Settlement. Defendant will pay the remaining \$250,000 of the Common Fund to
14 the Claims Administrator no later than the thirty (30) days following the Effective Date.
15 (Agreement 2.1, 2.2). After settlement administration expenses⁴, attorneys’ fees and costs, and a
16 service payment to the Class Representative are deducted from the Common Fund, each
17 participating Class Member who submits a timely and valid claim will receive a one-time
18 distribution payment which is equal to the Individual Settlement Amount, by way of a check
19 (*i.e.*, a payment equal to the Net Settlement Amount divided by the number of participating Class
20 Members). (Agreement 1(u), 2.3, 2.4).

21 **2. Cy Pres Distribution of Settlement Amount Remainder**

22 In the event that any portion of the Settlement Amount remains unclaimed, or any check
23 issued remains uncashed for more than 180 days after issuance, then such unclaimed or uncashed
24 funds will revert to the Class for *cy pres* distribution as follows: (1) 50% being distributed to the
25 Alliance for Children’s Rights which is a 501(c)(3) non-profit child advocacy organization;

26 _____
27 ⁴ The Claims Administrator’s responsibilities are on-going as claims are being processed. The
28 Claims Administrator’s total costs incurred through January 2018 are \$18,634.98. As KCC
estimated on November 1, 2017, it is currently anticipated that the total costs for completion of
the administration will be between \$39,193 and \$39,784. *See* Declaration of Andrew Perry of
KCC In Support of Class Notice and Claims Administration Costs, filed concurrently herewith.

1 (2) 25% of such funds being distributed to the California State Treasury for deposit in the Trial
2 Court Improvement and Modernization Funds; and (3) 25% of such funds being distributed to the
3 California State Treasury for deposit into the Equal Access Fund of the Judicial Branch. Any *cy*
4 *pres* funds distributed to the Alliance for Children’s Rights will be used for child advocacy
5 programs within the meaning of California Code of Civil Procedure § 384(b). (Agreement 11).
6 The Parties carefully selected these organizations in compliance with the requirements of
7 California Code of Civil Procedure § 384(b).⁵

8 **3. Defendant’s Change In Practice And Compliance With The Privacy Act**

9 The Settlement also provides for a change in Eddie Bauer’s business practices. Eddie
10 Bauer agrees, that in response to this Action, it has re-implemented an automated verbal notice
11 that informs persons calling it at the outset of the call that the call maybe monitored and
12 recorded. (Agreement 3).

13 **4. Payment of Attorneys’ Fees and Costs to Class Counsel and Incentive Award**
14 **To Class Representative**

15 Pursuant to the Parties’ Agreement, Defendant has agreed that Class Counsel may apply
16 to the Court for an award of attorneys’ fees in an amount not to exceed 33 1/3% of the Common
17 Fund (\$100,000), plus actual out-of-pocket costs of no more than \$20,000, subject to Court
18 approval. (Agreement 2.6).

19 As set forth in Plaintiff’s Motion for an Award of Attorneys’ Fees, Reimbursement of
20 Expenses, and an Award of Incentive Fees, filed concurrently herewith, Plaintiff seeks a total fee
21 award of \$100,000 and \$17,415.20 in expenses. The amount of the attorneys’ fees and expenses
22 was negotiated at arm’s-length with the assistance of Justice Panelli and only *after* agreement
23 was reached on all material terms relating to Class compensation and change in business
24 practices. (Agreement 2.6(a)).

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28 ⁵ See also, Declaration of Zev B. Zysman In Support of Unopposed Motion for Preliminary
Approval, ¶ 13, Exhibit “1” which attaches a true and copy of the Declaration of Laurie Rubiner
in support of written proposal from the Alliance for Children’s Rights filed on November 16,
2017.

1 Moreover, Defendants have agreed to pay a modest incentive award in the amount of
2 \$5,000 from the Common Fund to the Class Representative, as provided by the Agreement, in
3 light of her willingness to devote the time and energy to prosecuting this litigation and in
4 representing the Class. (Agreement 3.5).

5 Significantly, as of the date of this filing, *no* Class Member has objected to the requested
6 fees and expenses or incentive award which was fully disclosed in the Class Notice.

7 **IV. BENEFITS OF THE PROPOSED SETTLEMENT**

8 The litigation has been hard-fought from the outset, with Defendant filing a demurrer and
9 motion to strike at the outset of the case, and a Petition for Writ of Mandate with the Court of
10 Appeal challenging the Order on the motion to strike. Thereafter, the Parties engaged in
11 extensive discovery practice. Defendant, which is represented by a national law firm with a
12 wealth of experience defending consumer class action litigation, gave every indication that it
13 would battle Class Counsel through class certification, discovery, and, in all likelihood, would
14 file a motion for summary judgment. Should the matter have continued to trial, Defendant was
15 prepared to put on extensive testimony to demonstrate, *inter alia*, that telephone calls to
16 Defendant could not give rise to an objectively reasonable expectation that the calls would not be
17 recorded, and thus do not implicate the Privacy Act; that customers consented to the recording,
18 either expressly or impliedly, and that, even in the event liability were established, the amount of
19 statutory damages under Penal Code § 637.2 was constitutionally excessive in light of the fact
20 that none of the unlawfully recorded phone calls resulted in any actual damages or economic
21 harm and that an award of aggregated statutory damages would violate the Excessive Fines and
22 Due Process provisions of the U.S. and/or California Constitutions.

23 Although Plaintiff believes the claims are meritorious, each of these defense arguments
24 (and others) would have to be overcome in order for the class claims to prevail. Moreover, Class
25 Counsel would have had to incur substantial time and expense to match Defendant’s “expert for
26 expert” before a jury, to demonstrate both liability and damages, with no guarantee of a
27 successful outcome. By resolving the matter now, the Class will get a substantial benefit without
28 the risk of nonpayment or a judgment at trial being reversed on appeal.

1 **V. CLASS NOTICE, CLAIMS AND SETTLEMENT ADMINISTRATION**

2 The approved notice plan was developed to reach the maximum number of Class
3 Members practicable. Following this Court’s issuance of its order granting preliminary approval
4 of the settlement and approving the form of notice on December 15, 2017, multiple forms of
5 notice were provided to the Class. As the Court preliminarily determined, the method of
6 disseminating notice was the most reasonable notice under all of the circumstances, and it
7 comports with California law, including Rule 3.766(f) and 3.769 of the Rules of Court.

8 First, Defendant provided the Claims Administrator with a computerized list of records,
9 characterized as the Class List. *See* Perry Decl., filed concurrently herewith. ¶4. The Class List
10 contained name and mailing (postal and email) address information. Perry Decl. ¶4. The Claims
11 Administrator caused the postal addresses in the Class List to be updated using the National
12 Change of Address system (“NCOA”). Perry Decl. ¶4. The Claims Administrator then updated
13 these retrieved addresses. Perry Decl. ¶4. If an email address was included in the Class List, the
14 Claims Administrator sent the full Class Notice to that potential Class Member by email rather
15 than by regular mail. The Claims Administrator e-mailed 12,238 Class Notice Packets to Class
16 Members. Perry Decl. ¶5. The Claims Administrator mailed 3,352 full Class Notice Packets by
17 U.S. Mail to Class Members. Perry Decl. ¶6. If the email was reported to the Claims
18 Administrator as undeliverable (3,876 Email Notices bounced back as undeliverable), the Claims
19 Administrator promptly sent a full class Class Notice to that potential Class Member by regular
20 mail. Perry Decl. ¶8. With respect to those Class Members whose Class Notice by regular mail
21 was returned to the Claims Administrator as undeliverable, the Claims Administrator promptly
22 attempted to obtain an updated address, and if an address was obtained, the Claims Administrator
23 resent the Class Notice Packets to those updated addresses. Perry Decl. ¶9. To date, direct Class
24 Notice was successfully delivered to 15,551 Class Members. Perry Decl. ¶11.

25 Second, the Claims Administrator established an internet Settlement Website,
26 www.GraninaClassActionSettlement.com, where the full Class Notice, Claim Form, Settlement
27 Agreement, Motion for Attorneys’ Fees, Expenses and Incentive Award, and other documents

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1 were made available. Moreover, the Settlement Website allowed Class Members to file claims
2 online or download copies of the Claim Form and Class Notice. Perry Decl. ¶12.

3 Third, the Claims Administrator caused an online banner advertisement campaign to be
4 disseminated on the Google Display Network geo-targeted to California Adults 18+ and resulted
5 in 1,251,222 internet impressions to be delivered across mobile and desktop devices. Perry Decl.
6 ¶11.

7 Fourth, the Claims Administrator also established a toll-free phone number (1-866-653-
8 4618) for Class Members to call to answer questions regarding the Settlement and their claims.
9 Perry Decl. ¶13.

10 In addition, as described in more detail in Plaintiff’s Motion for an Award of Attorneys’
11 Fees, Reimbursement of Expenses, and an Award of Incentive Fees, filed contemporaneously
12 herewith, Plaintiff seeks a total fee award of \$100,000, plus actual out-of-pocket expenses in the
13 amount of \$17,415.20, and a service payment to Plaintiff of \$5,000, all payable from the
14 Common Fund. The motion is posted on the Settlement Website. As of the date of this filing, *no*
15 objection or opposition has been filed by any Class Member with respect to the fee and expense
16 request or incentive award.

17 The deadline for filing claims, objecting to the settlement, or opting out is March 22,
18 2018. As of February 12, 2018, the Claims Administrator has received 680 timely Claim Forms
19 to be processed. Perry Decl. ¶14. The Claims Administrator has received only 17 requests for
20 exclusions (“opt-outs”). Perry Decl. ¶15. Significantly, *not a single* Class Member has submitted
21 an objection to the Settlement. Perry Decl. ¶16; *See also* Declaration of Zev B. Zysman in
22 Support of Plaintiff’s Motion for Final Approval (“Zysman Decl.”), filed concurrently herewith,
23 ¶16.⁶

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27 ⁶ The Claims Administrator will submit a Supplemental Declaration to the Court regarding the
28 Class Notice and claims submitted by April 9, 2018, as directed in the Court’s December 15,
2017 Preliminary Approval Order.

1 **VI. THE SETTLEMENT MERITS FINAL APPROVAL**

2 The court’s inquiry on a motion for final approval of a class action settlement is whether
3 the settlement is “fair, adequate and reasonable.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th
4 1794, 1801 (1996). Although the Court has broad discretion in issuing a final determination that
5 a proposed class action settlement is fair, the Court should give due regard:

6 to what is otherwise a private consensual agreement between the parties. The
7 inquiry must be limited to the extent necessary to reach a reasoned judgment that
8 the agreement is not the product of fraud or overreaching by, or collusion
9 between, the negotiating parties, and that the settlement, taken as a whole, is fair,
reasonable and adequate to all concerned. Ultimately, the [trial] court’s
determination is nothing more than an amalgam of delicate balancing, gross
approximations and rough justice.

10 *Dunk*, 48 Cal. App. 4th at 1801 (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d
11 615, 625 (9th Cir. 1982). The Court should not reach ““ultimate conclusions on the contested
12 issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of
13 outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual
14 settlements.”” *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135,
15 1145 (2000).

16 **A. The Settlement Is Presumed to Be Fair And Reasonable**

17 The Court’s analysis begins with a presumption that the Settlement is fair and reasonable
18 and should be approved:

19 A presumption of fairness exists where: (1) the settlement is reached through
20 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow
21 counsel and the court to act intelligently; (3) counsel is experienced in similar
litigation; and (4) the percentage of objectors is small.

22 *7 Eleven Owners*, 85 Cal. App. 4th at 1146, quoting *Dunk*, 48 Cal. App. 4th at 1801-02.

23 Here, all of those requirements are met. First, the proposed Settlement is the product of
24 arm’s-length, non-collusive negotiations, overseen by a well-respected independent mediator,
25 Justice Panelli, after an all-day mediation and other negotiations stretching over a period of many
26 months. Zysman Decl., ¶¶4-6, 19-20.

27 Second, the extensive investigation that was conducted before and following
28 commencement of the litigation, coupled with the formal and informal discovery, undertaken

1 during the time period in which these negotiations were occurring, was more than sufficient to
2 allow Class Counsel and the Court to assess the Settlement intelligently. Plaintiff believes she
3 discovered both the evidence needed to establish her *prima facie* case and the full range of
4 contentions advanced by Defendant. In that process, Defendant provided Plaintiff with
5 responsive information and documents relating to the approximate class size during the Class
6 Period, the reasons and uses for recording telephone calls, the extent (if any) to which Defendant
7 notified persons in California that their telephone calls would be recorded, and Defendant's
8 policies, procedures, and practices regarding the recording of inbound telephone calls with
9 persons in California. Based on these investigations, Plaintiff asserted that Defendant committed
10 a clear violation of California Penal Code § 630 *et seq.* in that as part of its policy and practice,
11 Defendant utilized certain computer hardware and software to execute a company-wide policy of
12 recording inbound telephone calls with consumers who spoke with a customer service
13 representative. Zysman Decl., ¶¶5-6.

14 Third, counsel on both sides have extensive experience in class action litigation which
15 enabled them to intelligently assess the risks of trial and the benefits of settlement.

16 Finally, Class Counsel believes that the success of this settlement is demonstrated by the
17 fact that, as of the date of this filing, *not a single* Class Member has submitted an objection to the
18 Settlement. Zysman Decl., ¶17.

19 In sum, under controlling precedent, every factor utilized by California courts strongly
20 supports the “presumption of fairness” that attaches to this Settlement.

21 **B. All of the Relevant Criteria Support Final Approval of the Settlement**

22 In deciding whether to grant final approval to a class action settlement, California courts
23 consider several factors, including: (1) the strength of the case; (2) the risk, expense, complexity
24 and likely duration of further litigation; (3) the risk of maintaining class action status through
25 trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage of the
26 proceedings; (6) the experience and views of Class Counsel; and (7) reaction of class members.
27 *See, e.g., Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 246 (2001). Applied to the present
28 case, all of the relevant criteria support final approval of the Settlement.

1 **1. The Strength of Plaintiff’s Claims Against Defendant**

2 As previously detailed in Plaintiff’s Motion for Preliminary Approval submitted on
3 November 16, 2017, and incorporated here by reference, Class Counsel believes that the claims
4 asserted against Defendant arising out of the Privacy Act are meritorious, and Class Counsel
5 were prepared to fully litigate the case, including through trial. Defendant, on the other hand,
6 did, and would have continued to, raise substantial legal and factual defenses to the class claims.
7 On the merits, Defendant has argued, *inter alia*, that telephone calls to Defendant could not give
8 rise to an objectively reasonable expectation that the calls would not be recorded, and thus do not
9 implicate the Privacy Act; that customers consented to the recording, either expressly or
10 impliedly; and that, even in the event liability were established, the amount of statutory damages
11 under Penal Code §637.2 are limited to \$5,000 per action and, if not, would be constitutionally
12 excessive in light of the fact that none of the unlawfully recorded calls resulted in any actual
13 damages or economic harm. Based on these arguments, Defendant contends Plaintiff would
14 potentially lose on the merits.

15 Moreover, Plaintiff faced risks that class certification would not have been granted. In
16 the call recording context, two federal district courts have denied motions for class certification,
17 and two panels of the California Court of Appeal have affirmed trial court orders denying class
18 certification. *See e.g., Quesada v. Bank of America Investment Svcs.*, 2013 U.S. Dist. LEXIS
19 32588 (N.D. Cal. Feb. 19, 2013); *Torres v. Nutrisystem, Inc.*, 2013 U.S. Dist. LEXIS 66444
20 (C.D. Cal. Apr. 8, 2013); *Hataishi v. First American Home Buyers Prot. Corp.*, 223 Cal. App.
21 4th 1454 (2014); *Kight v. CashCall, Inc.*, 231 Cal. App. 4th 112 (2014). Nevertheless, Plaintiff
22 believes that she would have prevailed on class certification and the fact that class certification
23 has been granted in other cases based on a failure to disclose that telephone calls were being
24 recorded supports Plaintiff’s position about the propriety of class certification. *See, e.g.,*
25 *Greenberg v. E-Trade Financial Corp.*, L.A. Superior Court, Case No. BC360152 (Feb. 7, 2008);
26 *Thomasson v. GC Services, Ltd Partnership*, 2011 WL 1339063 (S.D. Cal. 2011); *Ades v. Omni*
27 *Hotels Management Corp.*, 2014 U.S. Dist. LEXIS 129689 (C.D. Cal. Sept. 8, 2014).

1 However, Courts have discretion when it comes to determining whether or not to certify a class
2 and Defendant would have vigorously contested a motion for class certification. Defendant
3 would have argued that a proper class of consumers is not ascertainable; that individual issues
4 predominate over common issues; and that a class action would not be superior because, an
5 award of aggregated statutory damages would be disproportionate to the harm.

6 Regardless of who might prevail on these issues at trial, the settlement approval process is
7 not an appropriate time for the court to engage in a mini-trial of the merits. Indeed, “the merits
8 of the underlying class claims are not a basis for upsetting the settlement of a class action; the
9 *operative word is ‘settlement.’*” *7-Eleven*, 85 Cal. App. 4th at 1150 (emphasis added). It is
10 simply “not appropriate for the Court to attempt to settle these questions of law and fact: [T]he
11 settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits.”
12 *In re Immune Response Secs. Litigation*, 497 F. Supp. 2d 1166, 1172 (S.D. Cal 2007).

13 2. **The Risk, Expense, Complexity and Likely Duration of Litigation** 14 **Favor Final Approval**

15 To assess the fairness, adequacy and reasonableness of a class action settlement, the
16 Court must weigh the immediacy and certainty of the settlement benefits against the risks
17 inherent in continued litigation. *See, e.g., Dunk*, 48 Cal. App. 4th at 1801-02.

18 This factor supports final approval, because the Settlement provides actual monetary
19 relief in the form of a non-reversionary Common Fund in the amount of \$300,000, with any
20 unclaimed or uncashed funds reverting for *cy pres* distribution, while avoiding legal and factual
21 hurdles that otherwise may have prevented them from obtaining any recovery from Defendant at
22 all. Furthermore, the Settlement provides important injunctive relief which benefits the public
23 generally in terms of Eddie Bauer making modifications to its recording policies and practices to
24 ensure compliance with the Privacy Act which supports final approval of the Settlement.

25 Indeed, the monetary and non-monetary value of the Settlement to Class Members
26 represents a fair compromise given the litigation risks and uncertainties presented by continued
27 litigation. Defendant asserted and would have continued to assert legal and factual grounds to
28 defend against this action. Additionally, Defendant adamantly disputes Plaintiff’s ability to

1 certify a class and prove liability to the class for their call recording practices. Specifically,
2 Defendant argues that numerous individualized issues exist, including which callers called their
3 toll-free number, the callers' residency, their location at the time of the call, whether a particular
4 call was recorded, whether the caller received notice of recording prior to the class period, and
5 whether the caller consented to the recording. While Plaintiff and her Counsel disagree and
6 believe that the claims can be successfully proved on a class-wide basis through a combination of
7 company records testimony, expert witnesses, and representative class member testimony, they
8 recognize that such procedures raise complicated proof issues and commensurate risks.
9 Defendant also raised numerous defenses to the merits of the claims, arguing, for example, that
10 the Privacy Act exempts call recording conducted for "service observing" purposes, and a class-
11 wide damage award would violate the Due Process Clause. Accordingly, there is a risk that the
12 Court could deny class certification or, following initial certification, subsequently decertify the
13 class based on unanticipated issues or manageability concerns. Were a class not certified, it is
14 unlikely that many Class Members would maintain an individual action.

15 Moreover, while Class Counsel believes that Plaintiff has a strong case as to liability,
16 Class Counsel recognize that a finding of liability is never assured. Even if liability were
17 established at trial, Plaintiff also faced the risk that she would not be able to prove damages. The
18 amount of statutory relief recoverable would have been subject to rigorous attack by Defendant.⁷
19 Like the determination of liability, determination of damages is a complicated and uncertain
20 process, and typically involves conflicting expert opinions. The typical "battle of experts" would
21 have occurred in which the magnitude and even the existence of statutory damages would have

22
23 ⁷ Pursuant to California Penal Code § 637.2, a person injured by a Privacy Act violation is
24 entitled to *either* a statutory damage amount of \$5,000 or three times the amount of his or her
25 actual damages. Defendant has argued that the statutory damage amount of \$5,000 per violation
26 is unconstitutionally excessive given that Plaintiff has not alleged any quantifiable out-of-pocket
27 losses. *See, e.g., Starbucks v. Superior Court*, 168 Cal. App. 4th 1436 (2008) (interpreting the
28 Labor Code statutory damage provision at issue in that case to require proof of actual injury).
Moreover, Defendant also has argued that the rule of lenity prohibits the aggregation of damages
under the Privacy Act. *See Hale v. Morgan*, 22 Cal.3d 388, 405 (1978) ("[The California
Supreme Court has looked with disfavor on ever-mounting penalties and ha[s] narrowly
construed the statutes which either require them or permit them."). As such, Plaintiff faced a
serious risk that no court would ever award the full amount of statutory damages available under
Penal Code § 637.2.

1 been hotly disputed. The reaction of the fact finder to such complex expert testimony is highly
2 unpredictable. Expert testimony about damages would be based on certain assumptions, and on
3 the presentation of damages models, any one of which could be rejected by a jury as speculative
4 or unreliable.

5 These risks must be considered in assessing the fairness of the settlement, which is
6 guaranteed against a result that would leave the Class without any recovery from Defendant, or
7 with less than what Plaintiff achieved in the Settlement. Because the Settlement provides
8 immediate and substantial injunctive and monetary relief, without the attendant risks of
9 continued litigation, it warrants this Court's approval.

10 **3. The Risk Of Maintaining Class Action Status Through Trial**

11 Although Class Counsel believe that certification of the class is warranted, certification
12 was by no means certain. Defendant would have vigorously contested every element of
13 Plaintiff's case, including Plaintiff's ability to show that class certification is warranted, whether
14 liability can be established, and whether Plaintiff could prove damages on a class-wide basis.
15 There was the very real risk that this litigation could result in no recovery at all.

16 **4. The Relief Provided In The Settlement**

17 Given the strength of Plaintiff's case, the risk, expense, complexity and duration of
18 further litigation, the proposed Settlement is fair. Plaintiff has negotiated a settlement that
19 confers actual benefits to the Class and realizes Plaintiff's ultimate goals: (1) to change
20 Defendant's business practices regarding the recording of telephone calls so that they comply
21 with the law; and (2) to compensate each Class Member for statutory violations of California
22 Penal Code §630, *et seq.*

23 Defendant's cash payment of \$300,000 into a non-reversionary Common Fund will
24 provide a very fair and reasonable recovery under the circumstances. Class Counsel are familiar
25 with several other class action settlements approved by California state and federal courts which
26 allege similar privacy-related violations under Penal Code §630, *et seq.* on behalf of California
27 consumers. Based on the available information in this case, Class Counsel believes that there are
28 approximately 15,500 identifiable potential Class Members. Using that information, the value of

1 the instant non-reversionary Common Fund is comparable, if not superior, with the “net
2 settlement value”⁸ of other settlements for which information is available on a per class member
3 basis:

- 4 a) *Batmanghelich v. Sirius XM Radio, Inc.*, United States District Court, Central
5 District of California, Case No. 09-9190-VBF – 3,500,000 potential class
6 members settled for \$7,000,000 (approximately \$2.00 per class member);
- 7 b) *Greenberg v. E-Trade Financial Corporation*, Los Angeles Superior Court, Case
8 No. BC360152 – 1,400,000 class members settled for \$5,625,000 (\$4.02 per class
9 member);
- 10 c) *Marenco v. Visa*, United States District Court, Central District of California, Case
11 No. 10-08022-DMG – 648,000 potential class members settled for \$13,000,000
12 (\$20.00 per class member);
- 13 d) *Cohorst v. BRE Properties*, United States District Court, Southern District of
14 California, Case No. 10-02666-JM – 1,170,000 million potential class members
15 settled for \$3,500,000 (\$2.99 per class member); and
- 16 e) *Skuro v. BMW, ATX*, United States District Court, Central District of California,
17 Case No. 10-8672-GW – 43,000 potential class members settled for \$300,000
18 (\$6.98 per class member or, alternatively, a six month extension of the BMW
19 Assist basic safety plan valued by the parties at \$100).

20 Moreover, in the event that any portion of the Common Fund remains unclaimed, or any
21 check paid to a Class Member remains uncashed for more than 90 days after issuance, then such
22 unclaimed or uncashed funds will revert for *cy pres* distribution as follows: 1) 50% being
23 distributed to the Alliance for Children’s Rights which is a 501(c)(3) non-profit child advocacy
24 organization; (2) 25% of such funds being distributed to the California State Treasury for deposit
25 in the Trial Court Improvement and Modernization Funds; and (3) 25% of such funds being
26

27 ⁸ By “net settlement value,” Plaintiff is referring to the Common Fund after deduction for
28 attorneys’ fees/costs, claim administration fees/costs, and service payment to the Class
Representative.

1 distributed to the California State Treasury for deposit into the Equal Access Fund of the Judicial
2 Branch. Any *cy pres* funds distributed to the Alliance for Children’s Rights will be used for
3 child advocacy programs within the meaning of California Code of Civil Procedure § 384(b).

4 In sum, the proposed Settlement will provide meaningful and clearly defined monetary
5 and injunctive relief to the Class and others in place of the uncertainty of continued litigation and
6 trial. The monetary relief is infinitely better than “the range of possible results further litigation
7 might have produced, including no class certification and/or zero or minimal recovery of
8 damages by class members.” *Chavez v. Netflix, Inc.*, 162 Cal. App.4th 43, 75 (2008). Given the
9 uncertainty and substantial expense of going forward with trial against Defendant, it is the
10 informed opinion of Plaintiff’s experienced counsel that the proposed Settlement is well within
11 the range of settlements that are fair, reasonable, and adequate and warrants judicial approval.

12 **5. The Extent Of Discovery Completed And The Stage Of Proceedings**

13 The Settlement was reached after Class Counsel had engaged in sufficient investigation
14 and discovery. Class Counsel’s investigation and discovery included:

- 15 • Investigation and drafting of class action complaint and amended
16 complaint, which included researching of the applicable law with
17 respect to the claims asserted therein and potential defenses
18 thereto.
- 19 • Drafting and serving class certification and merits discovery,
20 including interrogatories, requests for production of documents,
21 and requests for admissions.
- 22 • Reviewing written discovery responses/amended responses and
23 documents formally produced by Defendant, and otherwise
24 obtained through their investigation.
- 25 • Meeting and conferring with defense counsel over the scope and
26 sufficiency of the written responses and production of responsive
27 documents.
- 28 • Drafting and serving discovery directed to Eddie Bauer which
requested information concerning: (1) the names and contact
information of putative class members, and (2) non-content detail
for each telephone call, including the class members’ telephone
numbers, and the date, time, and duration of the subject call.
- Reviewing information and documentation provided by Defendant
regarding, *inter alia*, the call technology manuals and policies,
training manuals, work shop materials, call scripts, and protocols
relating to the call centers; information regarding the approximate

1 size of the Class during the Class Period; data relating to the
2 inbound calls that were recorded with persons in California during
3 the Class Period; and Defendant's policies and procedures relating
4 to the recording of telephone calls.

- 5 • Reviewing information and documentation provided by Defendant
6 concerning proposed changes in Defendant's corporate policies
7 and practices relative to the recording of telephone calls with
8 California consumers.
- 9 • Researching viability of preserving cell site location information
10 vis-a-vis cellular communication carriers, including Verizon,
11 AT&T, T-Mobile, and Sprint.
- 12 • Consulting with potential privacy rights experts and IT specialists;
- 13 • Drafting PMK deposition notices regarding class certification
14 issues; purpose(s) for which Defendant recorded telephone calls
15 with California consumers; policy directives relevant to the
16 recording of telephone calls in California; call technology
17 employed by Defendant's at call centers.
- 18 • Preparing and defending Plaintiff's deposition.
- 19 • Researching and drafting class certification motion and supporting
20 exhibits (withheld filing motion following tentative agreement to
21 settle).
- 22 • Engaging in numerous discussions with defense counsel,
23 including meetings regarding the legal and factual bases for
24 Plaintiff's claims and Defendant's defenses.

25 By the time the Agreement was executed, both parties had more than adequate
26 information to assess the strengths and weaknesses of their respective cases, and Class Counsel
27 in particular had sufficient grasp of the legal and factual issues in the litigation to make a
28 thorough appraisal of the adequacy of the settlement to provide meaningful relief to the
Settlement Class. Zysman Decl., ¶¶ 5-6.

29 **6. The Experience and Views of Counsel Favor Final Approval**

30 Experienced counsel for both sides have recommended approval of this settlement as fair,
31 reasonable and adequate, and in the best interest of the Class as a whole. Class Counsel are well-
32 experienced in class action and consumer litigation. Endorsements by qualified and well-
33 informed counsel that a settlement as fair, reasonable and adequate is entitled to significant
34 weight. *See Dunk*, 48 Cal. App.4th at 1802. Moreover, the Parties participated in a full day

1 mediation overseen by Justice Panelli, which ultimately led to this settlement.

2 **7. Class Members' Reaction Favors Final Approval**

3 The reaction of the Class is a key factor and further supports approving the Settlement.
4 A court may appropriately infer that a class action settlement is fair, adequate and reasonable
5 when few class members object to it. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, (9th Cir.
6 1977). Here, the reaction of the Class has been overwhelmingly favorable and unanimous. In
7 response to the widespread Notice Plan, Class Counsel are advised that, as of the date of this
8 filing, a mere seventeen Class Members out of more than 15,500 who received actual direct mail
9 or email notice have elected to exclude themselves from the Settlement and *not a single*
10 objection was received. (See Declaration of Andrew Perry of KCC In Support of Class Notice
11 and Claims Administration Costs submitted herewith at ¶¶10, 15-16.)

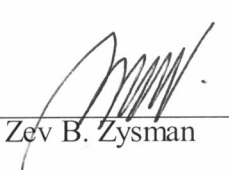
12 Given the lack of any objection and the extremely low opt-out percentage considering the
13 high number of Class Members receiving direct notice, this Court can and should approve the
14 Settlement.

15 **VII. CONCLUSION**

16 For these reasons, Plaintiff respectfully requests that this Court enter the Final Order
17 Approving Class Action Settlement and Judgment, thereby giving final approval to the
18 Settlement Agreement and Awarding Attorneys' Fees and an Incentive Award as requested in
19 Plaintiff's Motion for Attorneys' Fees and Expenses, Claims Administration Costs, and Incentive
20 Award concurrently submitted to this Court.

21
22 DATED: February 13, 2018

LAW OFFICES OF ZEV B. ZYSMAN
A Professional Corporation

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26 
Zev B. Zysman

27 *Attorneys for Plaintiff and the*
28 *Settlement Class*