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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

MARION WILLIAMS, on behalf of himself and all others similarly situated,

Plaintiff,

v.

UDEMY, INC., a Delaware limited liability company, and DOES 1- 50, inclusive,

Defendants.

Case No. 37-2023-00003666-CU-BT-NC

[E-FILE]

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND PROVISIONAL CLASS CERTIFICATION

Date: April 21, 2023
Time: 1:30 P.M.
Judge: Robert P. Dahlquist
Dept: N-29

Reservation No.: 2945340

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I. INTRODUCTION

Plaintiff achieved an outstanding Settlement[1] in this false discount pricing consumer class action against Defendant Udemy, Inc. ("Udemy" or "Defendant"), an online education provider. In connection with the Settlement, Udemy has agreed to distribute a cash benefit consisting of a $4.00 refund for each online course purchased at a discount with a reference to an original/comparison price. Class Members who make a claim may receive up to a total of $40. This benefit is estimated to be $2,500,000 worth of refunds. These refunds provide a real economic benefit by giving consumers who may have overpaid for Udemy's online educational courses financial relief. This Settlement also protects consumer rights by effectively deterring retailers who may be engaged in violations of state and federal law.

Plaintiff now brings this unopposed motion, seeking an order from the Court to: (1) preliminarily approve the Settlement Agreement; (2) provisionally certify the Class for Settlement purposes; (3) preliminarily approve the form, manner, and content of the proposed Notice to the Class; (4) conditionally appoint named Plaintiff as Class Representative for Settlement purposes; (5) conditionally appoint Lynch Carpenter, LLP and Keller Postman LLC as Class Counsel for Settlement purposes; (6) set the date and time of the Fairness Hearing; and (7) stay all proceedings in the action until final approval of the Settlement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Udemy is an e-commerce website that sells online educational courses, ranging from computer programming and graphic design courses to personal development courses such as relationship building and career development courses. Udemy's library of courses more than 200,000 courses in 75 languages.[2] Prior to the commencement of this litigation, Plaintiff's Counsel conducted an investigation of Udemy's pricing practices and analyzed the relevant legal issues in regard to the claims asserted in the Complaint and Udemy's potential defenses. The investigation involved tracking and cataloging items listed for sale at Defendant's website, Udemy.com. The investigation revealed that Defendant

[1] All capitalized terms have the same meaning as set forth in the Settlement Agreement and Release ("SA" or "Settlement Agreement"), filed concurrently herewith as Exhibit 1 to the Declaration of Todd D. Carpenter in support ("Carpenter Decl.").

[2] Udemy About Us, Udemy, Inc. at https://about.udemy.com/?locale=en-us, last accessed Feb. 5, 2023.

appeared often to discount its products by setting an "original" price and a corresponding "sale" price. Thus, Udemy's pricing practices purportedly induced consumers to believe that the courses were once sold at the "original" price from which the stated discount and corresponding sale prices were derived. According to Plaintiff's investigation, many of the courses appeared to be "discounted" for a period in excess of the time allowed under California's False Advertising Law ("FAL")[3] and the Federal Trade Commission Act, although Udemy disputes the results of this investigation and believes that its conduct was at all times compliant with state and federal law.[4]

Based on the investigation, on August 23, 2021, Marion Williams, through Plaintiff's Counsel, filed a putative class action against Udemy in the United States District Court for the Northern District of California, Case No. 3:21-cv-06489-EMC (the "Federal Court Action"), asserting false advertising claims under California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (the "UCL"), the FAL, and the California Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* (the "CLRA"). From January 6, 2022, through December 12, 2022, the Parties engaged in settlement discussions, including three mediation sessions, two facilitated by JAMS Mediator Robert Meyer on January 28, 2022, and March 18, 2022, with a third mediation session facilitated by JAMS Mediator Shirish Gupta on December 12, 2022. As a result of these mediation meetings, the Parties were able to reach a prospective settlement on a Class-wide basis. In the following months, the Parties heavily negotiated the details of the Settlement Agreement, and the Parties ultimately reached the Settlement Agreement currently before this Court.

III. LEGAL STANDARD

Class action settlements are subject to a two-step approval process. First, the Court makes a preliminary evaluation of the fairness of the settlement. If the Court determines that the settlement appears to be fair, adequate, and reasonable, then it should order that notice be given to the class members of a formal final settlement hearing. At that formal hearing, evidence may be presented in support of and in opposition to the settlement. The federal Manual for Complex Litigation, Second ("MCL 2d"), summarizes the preliminary approval criteria as follows:

[3] Cal. Bus. & Prof. Code §§ 17500, *et seq.*

[4] 15 U.S.C. §§ 45(a)(1) and 52(a); 16 C.F.R. §§ 233.1(a) and (b).

> If the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.

(MCL 2d § 30.44.)

Preliminary approval does not require that the Court answer the ultimate question—*i.e.*, whether the proposed settlement is "fair, adequate and reasonable." (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1146-47.) That determination is made only after notice of the settlement has been given to the members of the settlement class and after they have been given the opportunity to comment on its proposed terms. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794.)

Instead, for preliminary approval purposes, the settlement need only be deemed by the Court to be "within the range" that the Court would ultimately approve. Here, Plaintiff submits that this proposed Settlement is indeed "fair, reasonable, and adequate" in all respects, and compares favorably to similar California consumer cases.

IV. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

A. Settlement Negotiations

Following the commencement of the litigation, the Parties engaged in arm's-length negotiations, including three mediation sessions with JAMS mediators Robert Meyer and Shirish Gupta. (Carpenter Decl. ¶ 10.) In the context of mediating the matter, the Parties engaged in informal discovery, such as obtaining the estimated class size, the types of contact information Defendant had for the Class, and Defendant's sales data and course pricing data. (*Id.* at ¶ 8.) Plaintiff's and Defendant's Counsel also discussed issues such as the makeup of Udemy's online course inventory, the manner they are distributed to individuals and through enterprise accounts, as well as feasible settlement structures utilized in recent comparable sale discount settlements in order to facilitate Plaintiff in formulating his initial demand.

Each aspect of the Settlement Agreement was heavily negotiated, including the establishment of cash refund values commensurate with the pricing point for thousands of online courses available at

Udemy, the Notice plan, including the language of the Full and Email Settlement Notices, as well as the intricacies of any proof of Eligible Course Purchase requirements (confirmation via checkbox and declaration under penalty of perjury) for Class Members seeking cash refunds. (Carpenter Decl. ¶ 13-14.) Importantly, the Parties did not discuss or negotiate proposed Class Counsel attorneys' fees and costs, or Plaintiff's proposed Individual Settlement Award until *after* agreeing on all material terms of the Settlement Agreement for the Class. (*Id.*) The Parties subsequently negotiated, drafted, and executed the Settlement Agreement currently before the Court. The Parties are confident that the terms of the Settlement are fair, adequate, and reasonable.

B. The Settlement Agreement

1. The Proposed Settlement Class and Class Period

The Parties request that the Court certify the following Settlement Class under Section 382 of the Code of Civil Procedure and Rule 3.769 of the California Rules of Court. The proposed Settlement Class is defined as follows:

> All persons in the United States who, during the Class Period, purchased one or more products at a discount in connection with a reference price promotion. Excluded from the Class are Udemy's Counsel, Udemy's officers and directors, and the judge presiding over the Action.

The Class Period is defined as through two provisions as follows:

The term "**Class Period**" means from August 23, 2017 until the Date of Settlement.

The term "**Date of Settlement**" means the date of entry of the Order Granting Preliminary Approval of the Settlement.

2. The Benefit to Class Members is Substantial and Would Not Have Been Achieved Absent Class Counsel's Experience with Mass Arbitrations

Class Members will be required to submit a valid, timely Claim Form to receive a $4.00 cash refund per course (up to ten total courses for a maximum refund of $40). (SA Art. III, Sec. C(2).)

This Settlement provides direct relief for the Class Members who make a claim in the form of cash, as opposed to exclusively in-kind benefits such as vouchers or coupons. Settlement awards will be paid by written check sent by first class mail or, upon the Administrator's election, certain forms of electronic payments that are reputable and secure. (*Id.* at Art. III, Sec. C(3)(a).) Importantly, none of

the value of this Settlement will revert to the Defendant. (*Ibid.*) If any funds remain after claims have been administered, they will be converted to credits and redistributed to Class Members who made a claim. (*Id.* at Art. III, Sec. C(3)(d).) Checks will be valid for 120 days from the date the check is issued – any checks that are returned as undeliverable or remain uncashed for more than 120 days after the date of mailing will be paid as *cy pres* to the National Consumer Law Center. (*Id.* at Art. III, Sec. C(3)(a).)

Furthermore, this class action Settlement and the outstanding result would not have been achieved absent the experience and preparedness of Lynch Carpenter and Keller Postman to arbitrate thousands of individual claims against Udemy if necessary to do so. Indeed, consumers who purchased Udemy's educational courses online were likely subject to Udemy's Terms and Conditions, which required customers to waive their rights to bring a class action lawsuit and also bring the claims that are the subject of this Settlement exclusively in the arbitration context. Had it not been for the joint efforts of Lynch Carpenter and Keller Postman, Class Members would have been forced to litigate individual claims in arbitration, which no Class Member would likely have done on their own, and no counsel would have agreed to the representation. In short, nobody would have obtained the relief that was achieved here on a class-wide basis.

3. Cost of Notice and Administration Costs, Attorneys' Fees and Expenses and Plaintiff's Incentive Award

Defendant will bear the costs of administering Notice to the Class, pay Class Counsel's attorneys' fees, costs, and Plaintiff's Individual Settlement Award. (SA Art. III, Sec. C(1), D(1), E(1).) In connection with final approval, Plaintiff will apply for an Individual Settlement Award of $2,500, and Class Counsel will apply for an award of attorneys' fees and costs not to exceed $1,000,000. (*Id.* at Sec. E(1)(a), (c).) Defendant has agreed not to object to Class Counsel's request for attorney fees and costs. (*Ibid.*) Unless otherwise ordered by the Court, Defendant via the Settlement Administrator will issue payment, subject to the approval of the Court, for the Plaintiffs Individual Settlement Award within thirty (30) days of the Effective Date of Settlement, and the Court approved award of attorney's fees and costs within ten (10) days of the Effective Date of Settlement. (*Id.* at Sec. E(1)(a), (c).)

4. Notice Process

Under the terms of the Settlement Agreement, Plaintiff will select a reputable vendor to serve as the Settlement Administrator. (SA Art. III, Sec. D(1).) The Settlement Administrator will provide Notice on behalf of Defendant via Email Settlement Notice, and a Settlement Website (*Id.* at Sec. G.) Defendant will bear costs of Notice. A description of the Notice plan is discussed in greater detail in Section V below.

5. Claims Procedure

The Claims Period begins after the entry of the Preliminary Approval Order and ends 60 days after the initial Email Settlement Notice, Class Members must submit valid Claim Forms via U.S. Mail or electronically on the Settlement Website. (SA Art. III, Sec. A(10), C(2).) Claim Forms will be substantially similar to **Exhibit A** to the Settlement Agreement.

6. Right to be Excluded from the Settlement

Class Members may opt out of the Class and not be bound by this Settlement Agreement. To make this election, Class Members must complete and submit an Exclusion Form 60 days following the date of the Settlement Notice emailed by the Settlement Administrator. (SA Art. III, Sec. A(10), C(2).) The Exclusion Form must be submitted to the Settlement Administrator by mail or online through the Administration Website. (*Id.* at Sec. L(1).)

7. Right to Object to the Settlement

Alternatively, a Class Member may object to the Settlement if he or she wants to be included in the Class but wishes to inform the Court that he or she does not approve of all or some of the Settlement terms. Such Class Member must file a written objection and/or a Notice of Intention to Appear with the Court, no later than twenty (20) calendar days prior to the Fairness Hearing, with copies delivered to Udemy's Counsel and Class Counsel, that includes: (1) the case name and number of the action; (2) the Class Member's full name, address, and telephone number; and (3) the words "Notice of Objection" or "Formal Objection." (SA Art. III, Sec. K.)

V. THE PROPOSED CLASS NOTICE SHOULD BE APPROVED

The trial court has broad discretion regarding how Notice is given to Class Members. (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 57.) "The standard is whether the notice has a reasonable

chance of reaching a substantial percentage of the class members." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 251 (internal quotations and citations omitted).) The content of the Notice "must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members." (*Ibid.*) California Rules of Court, rule 3.776(d) and (e) mandate that the Notice contain, among other things, a brief explanation of the action, including the Parties' basic contentions; a statement that the Court will exclude the member from the Class if the member so requests by a specified date; the procedures for Class Members to follow in requesting exclusion from the Class; and a statement that the Judgment will bind all members who do not request exclusion. The purpose of a Class Notice is to give members "sufficient information to allow each class member to decide whether to accept the benefit he or she would receive under the settlement, or to opt out and pursue his or her own claim . . . No more than that [is] required." (*Chavez,* 162 Cal.App.4th at 56.)

The Settlement Administrator will provide the Class with Notice in accordance with the following terms:

Administration Website. The Settlement Administrator will post the Full Settlement Notice on the Administration Website specifically created for the Settlement of this action. (SA Art. III, Sec. G(2).). The Full Settlement Notice will be the substantial equivalent of the Settlement Notice and Exclusion form. (*Ibid.*) The Settlement Administrator will provide an internet website for a period of exactly sixty (60) days from the date of the Email Settlement Notice (*Ibid.*)

Email Settlement Notice. For those Class Members for whom Udemy has a valid email address, Udemy will send an Email Settlement Notice to such Class Members through the Settlement Administrator. (SA Art. I, Sec (A)(8), Art. III, Sec. G(1) & (L)(1).) Defendant shall provide to the Settlement Administrator email addresses of the Class Members within fourteen (14) calendar days of the Preliminary Approval of the Settlement Agreement. (*Ibid.*) The Email Settlement Notice will be substantially similar to the form attached as **Exhibit C** to the Settlement Agreement and will provide the web address of the Settlement Website as well as the Exclusion Form. (*Ibid.*) Defendant, through the Settlement Administrator, will provide the Email Notice within thirty (30) calendar days after entry of the Preliminary Approval Order. (*Ibid.*)

The above methods of Notice accomplish the requirements under the law because they aggregately: (1) summarize the claims alleged in the Complaint; (2) explain the terms of the Settlement and the benefits each Class Member is to receive through the Settlement; (3) explain the Class Member's legal options, including the right to be excluded from, or object to, the Settlement and the timeframe for doing so; (4) explain the consequences of being bound by a judgment if failing to exclude from the Settlement; and (5) provide contact information for inquiries. (See, e.g., *Chavez, supra,* 162 Cal.App.4th at 57 (summary notice directing the class member seeking more information to a website with a more detailed notice, and providing hyperlinks to that website, was a perfectly acceptable manner of notice).) The Parties are confident that these methods cumulatively provide a strong chance of effecting Notice of the Settlement to a substantial number of Class Members. (See, e.g., *Wershba*, *supra,* 91 Cal.App.4th at 251 (approving method where website posted a notice for over thirty days and notice was mailed or emailed directly to class members).) In light of the amount of customer contact information within Defendant's control, this constitutes the best Notice practicable under the circumstances.

VI. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

A. The Standard for Preliminary Approval of a Class Action Settlement

The law favors settlements. (*Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1382.) This is particularly true in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. However, a class action may not be dismissed, compromised, or settled without the Court's approval. (Cal. Rules of Court, rule 3.769(a).) The California Rules of Court set forth the procedures for Court approval of a class action settlement: (1) the Court preliminarily approves the settlement; (2) class members receive notice as directed by the Court; and (3) the Court conducts a final approval hearing to inquire into the fairness of the proposed settlement. (See Cal. Rules of Court, rule 3.769(c), (e)-(g).)

The decision to approve or reject a proposed settlement agreement lies within the Court's sound discretion. (See *Wershba*, *supra,* 91 Cal.App.4th at 239–40.) The preliminary approval assessment does not require the trial court to answer any ultimate question on the issues of fact and law that underlie the parties' dispute. (*Id*.; *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1807.) However, "the

court must at least satisfy itself that the class settlement is within the ballpark of reasonableness." (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 133 (internal citations omitted).) In doing so, the court should assess whether the Settlement is "fair, adequate, and reasonable." (*Dunk*, *supra,* 48 Cal.App.4th at 1801.) In making this determination, "the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba*, *supra,* 91 Cal.App.4th at 245.)

Examples of such factors are "the strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and view of counsel . . ." (*Dunk*, *supra,* 48 Cal.App.4th at 1801 (setting forth a non-exhaustive list of factors of the court's consideration at final approval) (citation omitted).) While conducting this analysis, the Court should give "[due] regard to what is otherwise a private consensual agreement between the parties." (*Wershba*, *supra,* 91 Cal.App.4th at 245.) The inquiry must be limited "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." (*Id*. (citation and internal quotation marks omitted).) The Court should grant preliminary approval if there are no "grounds to doubt its fairness or other obvious deficiencies . . . and [the settlement] appears to fall within the range of possible approval." (Manual for Complex Litig. (Third) § 30.41 (1995); see *Dunk*, *supra,* 48 Cal.App.4th at 1802.)

Additionally, "[a] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Dunk*, *supra,* 48 Cal.App.4th at 1802 (citing Newberg & Conte, Newberg on Class Actions (3d ed. 1992) § 11:41, pp. 11–91).)

As shown below, the Settlement Agreement meets these standards and should be approved.

B. The Settlement is Fair, Adequate and Reasonable

1. The Settlement is a Product of Serious, Arms-Length Negotiation

The Settlement Agreement is the result of arm's-length negotiations between counsel who are experienced in consumer class actions, including false discount sales litigation. (Carpenter Decl. ¶¶ 6-11, 18.) There is no evidence that this Settlement was founded on collusion or fraud. Rather, the agreement was reached after hosting informal settlement discussions that evaluated the strengths and weaknesses of the case, informal discovery, and multiple mediation sessions facilitated by highly experienced and well-respected mediators.

2. The Settlement Value is Within an Acceptable Range, Especially Considering the Risk, Expense, Complexity and Likely Duration of Further Litigation

A Settlement Amount of $4,000,000 represents a fair, adequate, and reasonable Settlement. (SA Art. I, Sec. A(11).) The Settlement will be paid out in cash to Class Members who make a claim. Thus, Class Members who make a claim to an award under the Settlement are not confined to spending their Settlement funds at the Defendant's e-commerce website. (SA Art. III, Sec. C.) In addition, there is in-kind relief to supplement if the claims do not exhaust the Settlement funds available. Any remaining funds left after the claims have been administered will be divided pro-rata among the Class Members who make a claim and provided as a credit, usable on Udemy.com. The credits are good for at least 3 years and may be used to purchase the courses that Udemy offers. Finally, because this Settlement provides dual components of cash and in-kind relief that exhaust the entirety of the Settlement funds, the Settlement Agreement does not allow for any of the value of this settlement to revert back to Defendant. (*Ibid.*)

While the cash and in-kind relief provide significant purchasing power, the benefit must be tempered with the difficulty Plaintiff would face proving liability and damages at trial. "Even if plaintiff were to prevail at trial, there is a very real risk that plaintiff could recover nothing." (*Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 314 F.R.D. 312, 326; see e.g., *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 802 (declining to award restitution because plaintiffs failed to establish a price/value differential despite prevailing on liability under the UCL and FAL); *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 ("The fact that a proposed settlement may only amount

to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.") (internal quotation marks omitted).)

In advance of mediation, Lynch Carpenter, LLP retained a prominent economic damages expert to perform multiple regression analyses using the data collected concerning Udemy's pricing practices and the various features of the courses identified. (Carpenter Decl. ¶ 9.) A preliminary analysis of the data provided suggested to Plaintiff's Counsel that consumers paid a price premium because of the alleged misconduct. (*Ibid*.) Previous analysis on similar cases with these facts yielded damages in the range of 8% to 25% of the average purchase price. (*Ibid*.) The average price of a course sold by Udemy is $11.00 per course and thus the range of damages under similar models would be $0.88 to $2.75. However, in terms of relief, Class Members will be receiving $4.00 per Eligible Course Purchase which is relief up to and in some cases exceeding 400% of their actual damages for each course claimed. Therefore, the value of the Settlement is within an acceptable and appropriate range.

While Plaintiff is confident in the merits of his case, the state of the law regarding the appropriate method for calculating damages or restitution in these type of false pricing cases is in flux. Indeed, it bears emphasis that this Settlement was finalized following the Ninth Circuit decision in *Chowning v. Kohl's Dep't Stores, Inc.*, finding that monetary relief may not be available in pricing cases where the amount paid by a plaintiff does not exceed the actual value of the items purchased. (*Chowning v. Kohl's Dep't Stores, Inc*. (C.D. Cal. Mar. 15, 2016, No. CV1508673RGKSPX) 2016 WL 1072129, at *13, *aff'd* (9th Cir. 2018) 735 Fed.Appx 924, *amended on denial of reh'g* (9th Cir. 2018) 733 Fed.Appx 404, and *aff'd* (9th Cir. 2018) 733 Fed.Appx 404.) There, the Ninth Circuit rejected all of the measures of monetary relief put forth by the plaintiffs and affirmed summary judgment in the defendant's favor. (*Chowning v. Kohl's Dep't Stores, Inc*. (9th Cir. 2018) 735 Fed.Appx 924, *amended on denial of reh'g* (9th Cir. 2018) 733 Fed.Appx 404.) But even before *Chowning*, several courts granted summary judgment in favor of defendants in pricing cases, consistently rejecting the plaintiffs' proposed models for measuring restitution and damages. (See, e.g., *Stathakos v. Columbia Sportswear Co.* (N.D. Cal. May 11, 2017, No. 15-CV-04543-YGR) 2017 WL 1957063, at *1 (granting summary judgment in favor of defendants with regard to plaintiffs' three proposed measures of restitution);

accord *Jacobo v. Ross Stores, Inc.* (C.D. Cal. Aug. 2, 2017, No. CV-15-04701-MWF-AGR) 2017 WL 3382053, at *6, *vacated* (C.D. Cal. Sept. 4, 2018, No. 15-CV-04701-MWF-AGR) 2018 WL 7918055.)

Simply put, *Chowning* may have drastically reduced the potential value of this alleged false discount pricing case. That is, regardless of Plaintiff's success in proving Defendant's liability for deceptive pricing, Class Members could still potentially walk away without any monetary relief. Thus, the $4 per course benefit negotiated in the Settlement provides the Class a "guaranteed, fixed, immediate, and substantial recovery," especially when compared to the real uncertainties involved in continued litigation, and is therefore well within the range of possible judicial approval. (See *Spann II*, *supra,* 314 F.R.D. at 327.) Plaintiff also recognizes the expense and delay associated with continued prosecution of this case through certification, trial, and subsequent appeal(s), which could take several more years with no guarantee of success.

Accordingly, a $4 per course cash recovery provides Class Members a substantial amount of usable value that can be used now. (See *Chavez*, *supra,* 162 Cal.App.4th at 55 (determining that a six-dollar benefit provided by the settlement—a free DVD rental—directly addressed the harm alleged in the complaint).) Similar California deceptive pricing class settlements have been recently approved in state court and held to be fair, adequate, and reasonable. (See e.g., *Petkevicius v. Lamps Plus Inc.* (Super. Ct. S.D. County, No. 37-2019-00020667-CU-MC-CTL) (approving class settlement where $20 vouchers were directly distributed to Lamps Plus customers); *Olmedo v. PVH Retail Stores LLC* (Super. Ct. S.D. County, No. 37-2019-00003250-CU-MC-CTL) (approving class settlement where $10 merchandise certificates were directly distributed to Tommy Hilfiger outlet customers); *Rael v. RTW Retailwinds Inc.* (Super. Ct. S.D. County, No. 37-2019-00003850-CU-MC-CTL) (approving class settlement where $7.50 Vouchers were directly distributed to New York and Co. customers); *Courtney Dennis v. Ralph Lauren Corp., et al.* (Super. Ct. S.D. County, No. 37-2018-58462-CU-MC-CTL) (approving class settlement where $10 merchandise certificates were directly distributed to Ralph Lauren outlet store customers); *Maria Ramos v. PVH Corp.* (Super. Ct. Sac. County, No. 34-2018-234829-CU-NP-GDS, Oct. 3, 2018) (approving class settlement where class members could receive up to three $6.50 merchandise certificates for use at Van Heusen stores); *Adam Press, et al. v. J. Crew Group, Inc., et al.* (Super. Ct. Ventura County, No. 56-2018-00512503-CU-BT-VTA, Aug. 21, 2018) (approving class settlement where

members could receive up to two $8 vouchers for use at J. Crew stores and approving distribution directly to class members for whom defendant maintained an email address).)

Moreover, attorneys' fees and costs, as well as Plaintiff's Individual Settlement Award, and the costs of Notice, are all borne separately by Defendant—making the effective value of the Settlement well over the estimated $2,500,000. All this sufficiently compensates the Class as well as deters businesses from engaging in unlawful pricing practices.

3. The Settlement Has No Obvious Defects and the Release Is Not Overly Broad

"Beyond the value of the settlement, courts have rejected preliminary approval when the proposed settlement contains obvious substantive defects such as . . . overly broad releases of liability." (Newberg on Class Actions (5th ed. 2014) § 13:15, at p. 326.) Class Members who do not timely exclude themselves from the Settlement will be deemed to have released Defendant from claims related to the instant action. (SA Art. III, Sec. I, L(1).) Although these provisions release both known and unknown "Released Claims," the Release, including the release of Unknown Claims, is limited to a universe of claims which "arise out of or are in any way connected with the Reference Price Promotions" that were the subject matter of the Complaint. (*Id.* at Sec. I(4).) In other words, the Release is limited to the scope of this litigation and does not intrude upon any separate primary rights of the Class. (See, e.g.*, Spann II, supra,* 314 F.R.D. at 327–28 ("With this understanding of the release, *i.e.*, that it does not apply to claims other than those related to the subject matter of the litigation, the court finds that the release adequately balances fairness to absent class members and recovery for plaintiffs with defendants' business interest in ending this litigation with finality."); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2009) 670 F. Supp. 2d 1114, 1126 ("These released claims appropriately track the breadth of Plaintiffs' allegations in the action and the settlement does not release unrelated claims that class members may have against defendants.").) Accordingly, the Settlement has no obvious defects and is not overly broad.

4. The Settlement Does Not Grant Preferential Treatment

The relief provided in the Settlement Agreement will benefit all Class Members equally. The Settlement Agreement does not grant preferential treatment to Plaintiff or certain Class Members in any way. Payments to all Class Members are determined under the same methodology. Counsel

believes that the Settlement Agreement's distribution is fair, reasonable, and appropriately reflects the circumstances in this case.

The Settlement Agreement authorizes Plaintiff Marion Williams to seek an Individual Settlement Award in an amount not greater than $2,500 for his service to the Class. (SA Art. III, Sec. E(1)(a).)[5] Importantly, this award is to be paid separate and apart from the Class award and is subject to the approval of the Court. (*Ibid.*) Thus, the Settlement does not grant any preferential treatment.

5. The Stage of the Proceedings is Sufficiently Advanced to Warrant Approval

The stage of the proceedings at which this Settlement was reached weighs in favor of approval. Prior to the commencement of the litigation, Class Counsel conducted a thorough investigation into Defendant's pricing practices before the initial complaint was filed in the Federal Court Action on August 23, 2021. (Carpenter Decl. ¶¶ 3-4.) Then, utilizing the information from the investigation and supplementing it with information Defendant's Counsel provided in advance of mediation, Plaintiff's Counsel was able to analyze damages and assess the likelihood of presenting a viable damages model at trial.

Based on the foregoing, Plaintiff's and Defendant's Counsel are of the opinion that the Settlement is fair, reasonable, and adequate, and is in the best interests of all Class Members in light of all known facts and circumstances, including the risk of a significant delay, the challenges posed by Plaintiff's burdens of proof, the factual and legal defenses asserted by Defendant, and numerous potential appellate issues.

[5] Plaintiff's Individual Settlement Award was not predicated on the existence of any special treatment. (Carpenter Decl. ¶ 15.) The basis for such award is purely to compensate Plaintiff for his efforts in initiating the case, staying abreast of all aspects of the case, and fairly and adequately protecting the interests of the absent Class Members. This amount is reasonable considering its miniscule proportion to the overall Settlement Fund. (See, e.g., *Spann II*, *supra,* 314 F.R.D. at 328-329 (approving a $10,000 plaintiff incentive award which made up only 0.02% of the total $50 million settlement fund); *In re Online DVD-Rental*, *supra,* 779 F.3d at 947–48 (approving nine plaintiff incentive awards of $5,000 which made up only 0.17% of the total settlement fund); Cf. *Staton v. Boeing Co* (9th Cir, 2003) 327 F.3d 938 (reversing approval of incentive awards that made up roughly 6% of potential $14.8 million settlement fund).)

VII. THE PROPOSED CLASS SHOULD BE PROVISIONALLY CERTIFIED FOR SETTLEMENT

Class actions are historically favored in California as an important tool for protecting consumer rights. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434 ("Courts have long acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system."); *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 659 n.8 ("California courts have recognized that the consumer class action is an essential tool for the protection of consumers …").) This is particularly true in actions, such as this case, where individual Class Member damages are relatively small and would not be economical to bring on an individual basis (sometimes known as "negative equity" claims). But whether a class should be certified in a particular case is at the discretion of the trial court. (*Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal. 4th 1004, 1022.)

California Code of Civil Procedure § 382 permits class certification when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Cal. Code Civ. Proc. § 382.) "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker, supra,* 53 Cal. 4th at 1021.) A well-defined community of interest requires: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Id.*

Defendant does not dispute that these requirements may be satisfied in this case for purposes of Settlement. Therefore, the Court may conditionally certify the following Settlement Class:

> All persons in the United States, who, during the Class Period, purchased one or more products at a discount from Udemy's e-commerce website Udemy.com, and who have not received a refund or credit for their purchase(s). Excluded from the Class are Udemy's Counsel, Udemy's officers and directors, and the judge presiding over the Action.

A. The Proposed Settlement Class is Ascertainable and Numerous

A class must be sufficiently ascertainable to give its members notice that they will be bound by any judgment. (*Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 713.) A class is ascertainable "if it

identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1533 (quoting *Estrada v. FedEx Ground Package Sys., Inc.* (2007) 154 Cal.App.4th 1, 14).)

The proposed Class here is ascertainable. The Class definition identifies the Class Members in simple and objective terms and the list of excluded persons is also simple and objective. Class Members can thus readily identify themselves from the description of the Class. These individuals are also ascertainable because they can be identified and determined through an examination of Defendant's business records. Defendant's counsel approximates that Defendant maintains valid email and/or mailing addresses for at least 7,000,000 Class Members. Therefore, the proposed Class is also sufficiently numerous.

B. Common Issues of Law and Fact Predominate

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.'" (*Brinker, supra,* 53 Cal. 4th at 1021; see also *Medrazo v. Honda of N. Hollywood* (2008) 166 Cal.App.4th 89, 99–100 ("Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate' . . . Individual issues do not render class certification inappropriate so long as such issues may effectively be managed.").) Indeed, the "existence of even one significant issue common to the class" is sufficient to warrant certification. (*Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.* (N.D. Cal. 2008) 249 F.R.D. 334, 346.) Predominance of common issues of law and fact does not require that the common issues be dispositive of the entire controversy or even that they be dispositive of all liability issues. (1 Newberg on Class Actions (3d ed. 1992) §§ 4.25, 4-82, 4-83.) The question of certification is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder, supra,* 23 Cal. 4th at 439–40.)

Plaintiff believes that there is a strong argument that common questions of law and fact exist and predominate over any individual questions here. Each question presents one fundamental common

contention that drives Class-wide resolution of this action: whether Defendant's alleged actions were misleading as a whole such that they were deceiving to a reasonable consumer. The determination of the truth of this contention could resolve an issue that is central to the validity of each of Plaintiff's claims in "one stroke." (*Walmart Stores, Inc. v. Dukes* (2011) 113 S. Ct. 2541, 2551.) Further, putative Class Members here suffered the same injury: each purchased merchandise from Udemy's e-commerce retail store subject to Defendant's price discounting practices. Thus, Class Members' claims involve the same alleged misrepresentations (i.e., an advertised discount from a fictitious "Original" price as applied to items with the same common characteristics.

Moreover, Class Members share several additional common questions of law and fact, including: (1) whether Defendant's discount pricing scheme violates the UCL, the FAL, and the CLRA; (2) whether Defendant used false "Original" prices and falsely advertised price discounts on online educational courses sold at Udemy.com; (3) whether Defendant's advertised "Original" prices were the prevailing market prices for the respective merchandise sold at Udemy e-commerce website during the three months preceding dissemination and/or publication of the "discount" advertisement; and (4) whether Class Members are entitled to damages and/or restitution and the proper measure of such loss. These common questions are likely susceptible to common proof, which will drive common answers for each Class Member. Thus, commonality and predominance are readily satisfied.

C. Plaintiff's Claims are Typical of the Class Claims

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375 (citations omitted).) A class representative's claims need only be "significantly similar" to the other members—not "identical." (See *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1347.)

Here, typicality is readily satisfied. In addition to presenting common questions, Plaintiff's claims are typical of Class Members' because Plaintiff's claims are based upon the same facts and the same legal and remedial theories. Plaintiff alleges that Defendant's conduct was uniform: Defendant represented to consumers that the items it offered for sale were discounted and/or valued significantly

higher than the prices at which they were being offered for sale. Beyond that, a Class Member's individual experience is irrelevant where, as here, the injury under the UCL, FAL, and CLRA is established by an objective test. (See *Bruno v. Queen Research Ins., LLC* (C.D. Cal. 2011) 280 F.R.D. 524, 534; see also *Stearns v. Ticketmaster Corp.* (9th Cir. 2011) 655 F.3d 1013, 1021-22 (discussing objective standards applicable to UCL and CLRA actions).) Because the same proof would suffice for Plaintiff's claims as it would for absent Class Members, Plaintiff's claims are typical of those of the proposed Class she seeks to represent.

D. Plaintiff and Counsel Will Adequately Protect the Class

Plaintiffs must demonstrate that they will adequately represent the Class in order to obtain certification. (*La Sala v. American Savs. & Loan Ass'n* (1971) 5 Cal. 3d 864, 871.) "When a plaintiff sues on behalf of a class, he assumes a fiduciary obligation to the members of the class, surrendering any right to compromise the group action in return for individual gain." (*Ibid.*) To be "adequate," the class representative must have counsel "qualified to conduct the proposed litigation" and no disabling conflict of interest. (*McGhee v. Bank of Am.* (1976) 60 Cal. App. 3d 442, 450.)

Plaintiff understands that his role as a Class representative is to remain informed regarding the litigation and assist Class Counsel in the interest of the Class. (Carpenter Decl. ¶ 16.) Plaintiff has stayed abreast of the proceedings thus far, and if necessary, would sit for a deposition and participate in discovery. (*Ibid*.) Plaintiff understands that he cannot have any legal conflicts with the Class and there is absolutely no evidence in the record that Plaintiff harbors any interest antagonistic to the interests of the Class. (*Ibid.*) Plaintiff also shares the common goal with the Class to pursue truthful advertising regarding retailers' discount pricing practices. (See *Hoffman v. Dutch LLC* (S.D. Cal. 2016) 317 F.R.D. 566, 574–75.) Plaintiff has demonstrated his willingness to serve this shared interest by commencing this litigation on behalf of the Class and actively participating in the prosecution and resolution of this case. Plaintiff effectively communicates with counsel, timely provides all requested documents, and have otherwise been meaningful participants.

Further, Lynch Carpenter and Keller Postman are experienced consumer class action and mass arbitration attorneys, have litigated many cases involving UCL, FAL, and CLRA class claims, and have

vigorously investigated and prosecuted this case since its inception. (Carpenter Decl. ¶ 18.) Therefore, the adequacy requirement is satisfied.

E. The Superiority Requirement is Met

To certify a class, the Court must also determine that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. A class action is superior when it "both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (*Richmond v. Dart Indus.* (1981) 29 Cal. 3d 462, 469.) Allowing Plaintiff's claim to proceed as a class action will satisfy both these objectives. Because Plaintiff believes that the proof of Defendant's alleged violations is common to all Class Members, a class action will avoid repetitive and needless litigation of the same issue. Moreover, the potential damages for each Class Member are "relatively small." (*Daar*, *supra,* 67 Cal. 2d at 715 (where "defendant will retain the benefits from its alleged wrongs" without a class action, "[a] procedure that would permit the allegedly injured parties to recover … is to be preferred over the foregoing alternative.").) Additionally, in the Settlement context, manageability of the class action device is not a concern. (See *Spann II*, *supra,* 314 F.R.D. at 323 ("the other requirements of Rule 23(b)(3) such as the desirability or undesirability of concentrating the litigation of the claims in the particular forum and the likely difficulties in managing a class action, are rendered moot and irrelevant").)

Accordingly, the class action device is the superior method for efficiently adjudicating Plaintiffs' and the absent Class Members' claims and the proposed Class should be provisionally certified.

VIII. PLAINTIFF SHOULD BE APPOINTED CLASS REPRESENTATIVE AND HIS COUNSEL SHOULD BE APPOINTED CLASS COUNSEL FOR SETTLEMENT PURPOSES

Plaintiff requests that the Court designate Plaintiff Marion Williams as Class Representative to implement the terms of the Settlement. As detailed above, the Plaintiff will fairly and adequately represent and protect the interests of the Class.

Plaintiff also seeks to appoint Todd D. Carpenter of the law firm of Lynch Carpenter LLP and Warren Postman of the law firm of Keller Postman as Class Counsel. Class Counsel is highly

experienced and knowledgeable in complex consumer class action litigation and well-equipped to vigorously and efficiently represent the proposed Class. (Carpenter Decl. at ¶¶ 18-19.) Moreover, Class Counsel has expended substantial time and effort researching the viability of Plaintiff's theories of liability and damages and investigating Defendant's pricing scheme, including a thorough pre-suit investigation with online data collection from Defendant's e-commerce website, Udemy.com. (*Id* at ¶¶ 3-5.) Accordingly, the Court should appoint Todd D. Carpenter of Lynch Carpenter, LLP and Warren Postman of Keller Postman LLC as Counsel for the Class.

IX. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING AND STAY ALL PROCEEDINGS IN THIS ACTION

The last step in the approval process is the formal Fairness Hearing, whereby proponents of the Settlement may explain and describe its terms and conditions and offer argument in support of approval, and Class Members or their counsel may be heard in support of or in opposition to the Settlement. The Parties propose that the Court stay all other proceedings in this matter until final approval of the Settlement. The Parties propose that the Court schedule a hearing for final approval of the Settlement at the earliest available date. The parties further propose that Plaintiff's motion for attorneys' fees and costs shall also be heard at the final approval and Fairness Hearing.

X. THE PROPOSED SCHEDULE OF EVENTS

Based on the date of entry of the Preliminary Approval Order and the date the Court sets for the Final Fairness Hearing, the following represents certain Settlement-related dates:

Event	Timing
Hearing on Unopposed Motion for Preliminary Approval	April 21, 2023, at 1:30 P.M.
Last day for Defendant, through the Class Administrator, to send Email and/or Mail Notice, start operating Settlement Website, and issue Publication Notice	30 days after entry of Preliminary Approval Order
Last Day for Plaintiff to file fee petition	120 days after entry of Preliminary Approval Order
Last day for Class Members to file a claim, request exclusion or object to the Settlement	60 days after issuance of Class Notices
Last day for Parties to file brief in support of the Final Order and Judgment	10 days before Fairness Hearing

XI. ATTORNEYS' FEES

Plaintiffs' Counsel shall submit a separate motion for attorneys' fees and costs in the amount of no more than $1,000,000, representing approximately 25% of the estimated Settlement Fund Account ($4,000,000), within 90 days of the Court's entry of the Preliminary Approval Order. The requested amount will be supported by a summary accounting of Plaintiffs' Counsel's year-to-date billing and investigation costs tied to this case. The investigation of this matter included the near daily review of Defendant's pricing practices on Udemy.com for 24 months. (Carpenter Decl. ¶ 3.)

XII. CONCLUSION

Plaintiff respectfully submits that this proposed Settlement is fair, reasonable, adequate, and in the best interests of all Class Members. Plaintiff requests that the Court (1) grant preliminary approval of the proposed Settlement upon and in accordance with the terms as set forth in the Settlement Agreement attached to the Carpenter Declaration as Exhibit 1; (2) provisionally certify the Class for Settlement purposes; (3) conditionally appoint Todd D. Carpenter of Lynch Carpenter, LLP and warren Postman of Keller Postman LLC as Class Counsel for Settlement purposes; (4) conditionally appoint Plaintiff Marion Williams as Class Representative for Settlement purposes; (5) enter the proposed Preliminary Approval Order concurrently filed herewith, which order shall set a Fairness Hearing date; (6) preliminarily approve the form, manner, and content of the proposed Notice to the Class as set forth hereinabove (SA at Exhibits A–F); and (7) stay all proceedings in the action until final approval of the Settlement.

For the reasons set forth above, Plaintiff respectfully requests that the Court grant this Unopposed Motion for Preliminary Approval of Class Action Settlement and all related requests herein.

Dated: March 7, 2023

LYNCH CARPENTER, LLP

By: */s/Todd D. Carpenter*

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