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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
06/30/2023 at 12:44:00 PM
Clerk of the Superior Court
By Veronica Navarro,Deputy Clerk

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 ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD

Date: July 28, 2023
Time: 1:30 P.M.
Judge: Robert P. Dahlquist
Dept: N-29

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I. INTRODUCTION

On April 21, 2023, the Honorable Robert P. Dahlquist preliminarily approved the Settlement[1] as fair, adequate, and reasonable. Plaintiff now brings this motion for attorney fees, seeking 25% of a $4,000,000 common fund Settlement achieved by Plaintiff, a percentage that is customarily recognized by California courts as appropriate in this context. This amount was part of a negotiated Settlement and is unopposed. As described in Plaintiff's preliminary approval motion (ROA Nos. 10-12, 16), and agreed by the Court, Plaintiff achieved an outstanding Class Settlement in this false discount pricing consumer class action requiring Udemy, Inc. ("Defendant" or "Udemy"), an online provider of education courses, to distribute to the Class a benefit of $4.00 cash per online course purchased in conjunction with a reference price promotion.[2] And to the extent there are Settlement funds remaining after all claims have been processed, the remaining funds will be distributed equally among Class Members who made claims as an account credit, available for use for 3 years. As of the latest reports provided to Class Counsel in advance of the filing of this attorneys' fees motion, 100,295 claims have been received at an average of 4.36 courses claimed. Accordingly, the total number of courses claimed is 437,452, meaning $1,907,291 will constitute the floor that is to be paid out in cash to Class Members. A further estimated $872,709 in account credits will be distributed amongst claimants on a pro-rata basis ensuring that all funds in this Settlement are distributed to Class Members and there is no reversion back to Udemy. The cash portion of this Settlement provides a real economic benefit, allowing consumers to purchase whatever they want, whenever they wish to do so. Additionally, Class Members will likely enjoy some portion of their recovery as in-kind relief that they may freely use to purchase courses. On average, Class Members have historically purchased multiple courses from Udemy and, thus, it is likely they will make productive use of the in-kind portion of their class benefit.

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[1] All capitalized terms, unless otherwise defined, have the same definition as those terms in the Settlement Agreement and Release (ROA No. 12, Ex. 1).

[2] As of June 22, 2023, Claims Administrator, *Postlethwaite & Netterville, APAC* ("P&N"), has provided data indicating that approximately 6,871,966 Class Members have received direct notice of the Settlement via email notice advising them of the opportunity to receive up to $40.00 cash upon making a claim. Udemy initially provided 7,513,167 unique email addresses to P&N for the provision of direct notice. Of these, P&N has been able to confirm that it has reached 6,871,966 addressees equating to 91.5% of the email addresses Defendant has in its possession.

Following agreement on the material terms of the Settlement, the Parties negotiated Class Counsels' attorneys' fees and costs of $1,000,000 and the named Plaintiff's Individual Settlement Award in the amount of $2,500 to be paid by Defendant subject to Court approval, in addition to Notice costs. (SA, §§ E(1)(a)-(c)); Declaration of Todd D. Carpenter ("Carpenter Decl."), in support, filed concurrently herewith, ¶ 7.) Plaintiff now respectfully requests the Court award $1,000,000 in attorneys' fees and costs, and Individual Settlement Award of $2,500 to Plaintiff for his commitment in serving as Class Representative.

II. SUMMARY OF CLASS COUNSEL'S WORK

For several months prior to the commencement of litigation on August 23, 2021, Class Counsel spent substantial time investigating Plaintiff's claims, including extensive and daily or near-daily gathering of pricing data from Defendant's e-commerce store, Udemy.com. (Carpenter Decl., ¶¶ 2, 3.) Specifically, Class Counsel tracked and catalogued numerous items listed for sale on Defendant's website. (*Id.*, ¶ 2) The investigation revealed that Defendant continuously discounted its products by setting an "Original" price, a "Sale" price, and a "% off"" (final discount) price for well over 90 days at a time. (*Id.*, ¶ 3.) Thus, Class Counsel believes the investigation revealed Udemy's "Original" prices were false and used exclusively to induce consumers to believe that the merchandise was once sold at the "Original" price from which the false discount and corresponding sale prices were derived. Class Counsel further interpreted the data to show that t investigated products were "discounted" against the "Original" price for a length of time, that exceeded the time allowed under California's False Advertising Law ("FAL") and the Federal Trade Commission Act ("FCTA"). Class Counsel also analyzed the relevant legal issues in regard to the claims asserted and Udemy's potential defenses. As part of this analysis, Class Counsel retained an economist to develop and support the damages alleged by Plaintiff. (Carpenter Decl., ¶ 5.) This investigative work was critical to Class Counsel's understanding of Defendant's conduct and the formation of the legal theories advanced by Plaintiff as they related to associated damages models.

Based on the above investigation, on August 23, 2021, Marion Williams, through Class 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 ultimately reached the Settlement Agreement currently before this Court.

Prior to mediation, Class Counsel prepared an extensive confidential mediation brief, representing the culmination of Class Counsel's pre- and post-litigation investigative work, including information related to Plaintiff's purchases, Class data from Defendant, Defendant's widespread pricing practices, and expert analysis thereof. During this time, Class Counsel worked closely with their expert to develop the damages model alleged against Defendant. Following settlement in principle, Class Counsel drafted the substantive terms of the Settlement and Notice plan and engaged in further negotiation over the structure of the Settlement Agreement. (Carpenter Decl., ¶ 7.) Only after reaching agreement on the material terms of the Settlement, the Parties negotiated an agreement on attorneys' fees, costs and an incentive award that Udemy will pay separate and apart from its payment to the Class. (Carpenter Decl., ¶ 8.)

III. III. SUMMARY OF SETTLEMENT TERMS

On April 21, 2023, this Court preliminarily approved the Settlement, for the following Class:

> All persons who resided in the United States and purchased a course or courses from Defendant at a discount based on a Reference Price Promotion during the period of August 23, 2017 through and including the Date of Settlement.

(SA, Art. II., § B(1).) Excluded from the Class is Udemy's Counsel, Udemy's officers and directors, and the judge presiding over the Action.

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, § 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, § 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, § C(3)(a).)

IV. FEE AWARD STANDARDS

A. The Provision For Payment of Attorneys' Fees and Costs In The Settlement Agreement Is Appropriate And Should Be Enforced

The United States Supreme Court in *Evans v. Jeff D* (1986) 475 U.S. 717, 738 n.30, held that the parties to a class action may negotiate not only the settlement of the action itself, but also the payment of attorney fees. The Supreme Court in *Hensley v. Eckerhart* further held that negotiated, agreed-upon attorney fee provisions are the ideal towards which the parties should strive: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 437.) The Court stressed that the trial court "has a responsibility to encourage agreement" on fees. (*Blum v. Stenson* (1984) 465 U.S. 886, 902 n.19.)

Here, the requested fee of $1,000,000 was negotiated during adversarial bargaining by Class Counsel after the substantive terms of the Settlement had been negotiated. (Carpenter Decl., ¶ 8.) The fee fairly reflects the marketplace value of Class Counsel's services. As the United States Supreme Court instructed:

> Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior.

(*Deposit Guar. Nat'l Bank v. Roper* (1980) 445 U.S. 326, 338.)

Additionally, the Settlement releases Defendant from all claims that were alleged in the action, including violations of the CLRA, Cal. Civ. Code § 1750, *et seq.*, which entitle Class Counsel to recover attorneys' fees and costs as the prevailing party. (See Cal. Civ. Code § 1780(e) ("The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section").) While the CLRA does not define "prevailing plaintiff," the trend is toward a "pragmatic approach" that determines prevailing party status "based on which party succeeded on a practical level." (*Graciano v. Robinson Ford Sales* (2006) 144 Cal.App.4th 140, 150.) Based upon the preliminarily approved

Settlement, securing $4,000,000 in cash, most of which will be delivered as a Class benefit, Plaintiff qualifies as the "prevailing party" under the CLRA and is therefore entitled to fees pursuant to that statute. Additionally, attorneys' fees may be awarded here under the substantial benefit doctrine and/or the private attorney general doctrine pursuant to Cal. Code Civ. Proc. § 1021.5.[3]

B. Applicable Fee Award Standards

California state "[c]ourts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier and the percentage of recovery method." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254. See also *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1809 (recognizing that the percentage method is appropriate where "the amount was a 'certain or easily calculable sum of money'") (internal citations omitted).) The key advantage of the percentage method, applicable here, is that it focuses on the benefit conferred on the Class resulting from the efforts of counsel. (*Lealao v. Beneficial California, Inc.*, (2000) 82 Cal.App.4th 19, 48 (percentage of benefit method is result-oriented rather than process oriented).) Many federal courts, including the Ninth Circuit, have also developed a preference for using the percentage method. (See *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir.1990) 904 F.2d 1301, 1311; *In re Hydroxycut Mktg. & Sales Practices Litig.* (S.D. Cal. Nov. 18, 2014) No. 09-2087 BTM(KSC), 2014 U.S. Dist. LEXIS 162106, at *188-89 (utilizing percentage-of-recovery method where settlement value was based in part on free product option).)

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[3] Under the private attorney general doctrine, attorneys' fees are awarded in cases that enforce rights affecting public policies. (See *California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 741 ("The fundamental objective of section 1021.5 is to encourage suits effectuating a strong public policy by awarding substantial attorney's fees to those who successfully bring such suits.").) Successful litigants are entitled to fees when they have: (1) enforced an important right affecting the public interest; (2) conferred a significant benefit on the public or a large class of persons; and (3) imposed a financial burden on the plaintiff out of proportion to his individual stake. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142.) These criteria are easily met here. (See *Beasley v. Wells Fargo* (1991) 235 Cal.App.3d 1407, 1418 (Consumer protection litigation has "long been judicially recognized to be vital to the public interest.") (internal citations omitted); *Graham v. Daimler Chrysler Corp.* (2004) 34 Cal.4th 553, 561 (only 1,000 subject vehicles sold to California consumers satisfied the "large persons" requirement of Section 1021.5); *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal. 3d 917, 941 (The "financial burden" criterion is met when "the cost of the claimant's legal victory transcends his or her personal interest, that is, when the necessity of pursuing the lawsuit placed a burden on the plaintiff out of proportion to his or her individual stake in the matter."). See also *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 703 (enforcement of California consumer protection laws as an important right affecting the public interest); *Hinojos v. Kohl's Corp.* (9th Cir. 2013) 718 F.3d 1098, 1101, 1107 (declaring unequivocally "price advertisements matter.").)

C. The Percentage Method Is the Appropriate Method for Calculating Fees in This Case

When a common fund is created for a Class benefit, Class Counsel may also request attorneys' fees based on a percentage of that fund: "[W]hen a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34 ("*Serrano III*").) The common fund doctrine is "based on the commonsense notion that the 'one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs.'" (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 397 (citation omitted).) The Supreme Court routinely awards attorney fees based on a percentage of the recovery. (See *Camden I Condo. Assn., Inc. v. Dunkle* (11th Cir. 1991) 946 F.2d 768, 773 (citing Supreme Court cases computing fees based on a percentage of the common fund).) The California Supreme Court in *Laffitte v. Robert Half Int'l Inc.* specifically addressed and held that trial courts could properly use a "percentage of the fund" method for calculating attorney's fees in a class action case:

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation []—convince us the percentage method is a valuable tool that should not be denied our trial courts.

(*Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 503 (internal citations omitted).)

Further, in quantifying the value of Settlement consideration, courts generally calculate the full amount available under the Settlement, regardless of whether all Class Members claim their payment. (*Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81 (1980); *Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (district court abused its discretion by calculating fees as one-third of the class members' claims rather than one-third of entire settlement fund).)

V. **THE REQUESTED FEE AWARD IS APPROPRIATE, FAIR AND REASONABLE UNDER THE PERCENTAGE METHOD**

Here, direct cash payments will be sent automatically to Class Members who made a claim upon approval of the Settlement. The Class benefit is $4,000,000 on which 100,295 Class Members have made claims to date, meaning the cash floor of the funds that will be delivered to Class Members is $1,907,291, just half-way through the Notice period. Additionally, Class Members who made a claim will also enjoy some portion of their recovery in account credit for an extended use period of 3 years. Plaintiff's requested fee award therefore represents approximately **25% of the common fund made available**, equivalent to the Ninth Circuit's "benchmark" of 25% of the total recovery. (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1047.)

The requested fee award is also fair and reasonable given Class Counsel's efforts in this case under the percentage method. The Parties negotiated the agreed-upon fees and costs only after negotiating and agreeing to all other material terms of the Settlement. (See, e.g., *Manual for Complex Litigation* (4th ed. 2004) at ¶ 21.7 ("Separate negotiation of the class settlement before an agreement on fees is generally preferable.").) By deferring the fee negotiation until that time, Class Counsel aligned their interests with the interests of the Class, and Defendant had every incentive to negotiate as low a fee as possible to decrease its overall costs. (See *Lealao*, 82 Cal.App.4th at 33 ("The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery.").) The resulting agreed-upon fee award, which was proposed by both Mediators Robert A. Meyer, and Shirish Gupta was the product of a non-collusive adversarial negotiation considering Class Counsel's prior and future efforts and the excellent results achieved. In agreeing to pay $1,000,000 in the aggregate for attorney's fees and costs, Defendant also considered the possibility that Class Counsel might apply for and receive a ***much*** larger award, especially in view of the significant direct Class benefit and/or in the event of any objection or appeal of the Settlement, which would necessarily lead to additional protracted litigation and efforts by Class Counsel to defend the Settlement. Rather than take these risks, Defendant agreed to pay the requested award subject to Court approval.

As stated above, Plaintiff's fee request is in line with the traditionally acceptable thresholds recognized by the Ninth Circuit and California state courts. California courts have been expressly authorized to award fees as "to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." (*Lealao*, 82 Cal.App.4th at 50.) Indeed, the U.S. Supreme Court consistently looks to the marketplace as a guide to determining reasonable fees, including contingency fee arrangements. (*Missouri v. Jenkins* (1989) 491 U.S. 274, 285.) In defining a reasonable fee, the court should mimic the marketplace for cases involving a significant contingent risk, such as this one, and emphasize the unique reliance of our legal system on private litigants to enforce substantive provisions of law in class actions such that attorneys providing these benefits should be paid an award equal to the amount negotiated in private bargaining that takes place in the legal marketplace. (*Deposit Guar. Nat'l Bank*, 445 U.S. at 338.)

Accordingly, numerous California state and federal courts have awarded percentage fees of up to 40% or more in common fund cases:

- *Adauto v. Door Components, Inc.*, Los Angeles Superior Court No. BC469230 (July 1, 2013) (Judge Lee Edmon awarded attorney's fees equal to 40% of the settlement fund, *plus costs*);
- *Albrecht v. Rite Aid Corp.*, San Diego Superior Court No. 729129 (Judge Haden awarded attorney's fees equal to 35% of the settlement fund, *plus costs*);
- *Ayala v. Denbeste Manufacturing, Inc.*, Kern County Superior Court No. S-1500-CV-275248 (Feb. 7, 2013) (awarded attorney's fees equal to approximately 40% of the settlement funds, *plus costs*);
- *Crandall v. U-Haul International,* Los Angeles Superior Court No. BC 178775, (Judge Czuleger awarded plaintiffs' counsel attorney's fees equal to 40% of the settlement fund);
- *Erlandsen v. FlexCare, LLC, et al.*., Santa Barbara Superior Court No. 1390595 (awarding 40% of the settlement funds);
- *Birch v. Office Depot, Inc.* (S.D. Cal. Sep. 28, 2007) No. 06 CV 1690, 2007 U.S. Dist. LEXIS 102747 (awarding a 40% fee on a $16 million wage and hour class action); and
- *Rippee v. Boston Mkt. Corp.* (S.D. Cal. Oct. 10, 2006) No. 05cv1360 BTM, 2006 U.S. Dist. LEXIS 101136 (awarding a 40% fee on a $3.75 million wage and hour class action).

Here, while the fee request represents substantially less than these judicially accepted percentages, the ultimate inquiry is whether the end result is reasonable. (*Powers v. Eichen* (9th Cir. 2000) 229 F.3d 1249, 1258.) In determining whether the award is reasonable, the Ninth Circuit directs courts to consider

several factors, including: (1) the results achieved; (2) the risk of litigation; (3) the skill required; (4) the quality of work; and (5) the contingent nature of the fee and the financial burden. (*Vizcaino*, 290 F.3d at 1048-50.) Applied here, each of these factors supports approval of the fee request.

A. Class Counsel Achieved Excellent Results for the Class

Class counsel achieved exceptional results in this case. The Parties reached an arms-length Settlement with the assistance of an experienced mediator after extensive investigation of Plaintiff's claims and (informal) discovery of Defendant's sales data, leading to the Settlement worth $4,000,000 in cash. Defendant denied liability, Plaintiff's ability to certify the Class, and whether Class Counsel could administer a mass arbitration campaign. Continued litigation presented Plaintiff with substantial legal risks of certifying the Class, proving liability, presenting a viable damages model, and defeating any appeals relating thereto. In the face of these significant challenges, Plaintiff secured real and valuable benefits for the Class, as discussed in Section III above. Even if the case were successfully tried as a class action, the regression analysis of Class-wide damages could likely yield a diminution in value (*i.e.*, damages) attributed to Defendant's false advertising of much less than the average claim of 4.36 courses per Class Member ($17.60). Furthermore, unlike settlements that are exclusively in-kind, here Class Members may spend their recovery wherever they wish as opposed to exclusively with Defendant. Additionally, as a practical matter, the costs of *individual* litigation would undoubtedly eclipse any individual recovery, making a class action the only viable means of achieving redress for harmed consumers. Thus, the Settlement provides Class Members with prompt, high-value benefits prior to trial, avoiding the risks of attendant to providing liability and damages.

B. Class Counsel Assumed Significant Risks

The requested fee award is reasonable in light of the risks incurred by Class Counsel. From the outset, Plaintiff faced significant risks, including failure to certify the putative Class (or having it subsequently decertified) as well as in proving liability and/or damages. These risks are not merely hypothetical. (See, e.g.*, Chowning v. Kohl's Dept. Stores, Inc.* (9th Cir. 2018) 733 Fed. Appx. 404 (affirming summary judgment that rejected each of plaintiff's proposed measures of restitution in false discounting case). Given these considerations, Class Counsel incurred 100% of the risk, including all litigation costs, devoting their time and labor to identifying Defendant's wrongdoing, evaluating

Defendant's liability, analyzing potential legal theories, drafting the Complaint, engaging in significant research and investigation, and attending mediation. Class Counsel forewent other employment in order to devote the time necessary to pursue this litigation. (Carpenter Decl., ¶ 6.) Throughout this time, there was no assurance of success or compensation.

C. The Complexity of the Litigation and Class Counsel's Skill and Mass Arbitration Capability

Litigating this class action through trial would be time-consuming and expensive due to the complexities of proving liability and damages. For instance, Defendant would oppose Plaintiff's motion for class certification, the Parties would likely move for summary adjudication and would each retain numerous experts to analyze issues such as the effect of Defendant's pricing practices on consumers and the price premium attributable to Defendant's fictional discounts. To this end, Class Counsel retained an economics expert to review and determine the impact of Defendant's false reference prices on consumer behavior and to assess potential economic remedies. The expert identified several potential methodologies to measure the extent that Class Members were overcharged. Class Counsel analyzed these theories against recent case law rejecting restitution-based damages theories in similar false discount pricing cases. (See, e.g., *Chowning*, *supra*, 733 Fed. Appx. 404; *Stathakos v. Columbia Sportswear Company* (N.D. Cal. May 11, 2017) 2017 WL 1957063 (granting summary judgment and rejecting each of plaintiff's proposed measures of restitution).) By reaching this Settlement, the Parties avoided protracted litigation of these complex issues and significant expert fees.

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 that Class Counsel achieved in this case.

D. Class Counsel Provided High Quality Work

Class Counsel are experienced in complex class litigation (Carpenter Decl., ¶¶ 17-20), have a thorough understanding of the issues and risks presented by this type of case (false discount pricing), and through their skill and reputation, were able to obtain a Settlement that provides an outstanding result for the Class. The efficient manner of this result would not have been reasonably possible were it not for the experience and reputation of Class Counsel in this area of law. Class Counsel spent significant time, before and after commencing litigation, investigating Defendant's pricing practices, including working with economics expert to assess Defendant's liability and potential economic remedies. The Parties engaged in informal discovery and eventually participated in mediation with a highly regarded mediator, ultimately resulting in a mutually satisfactory Settlement and Notice plan providing an excellent benefit to the Class.

The high quality of the Plaintiff's opposition is a further testament to the quality of Plaintiff's representation. Defendant is a large corporation, represented by experienced counsel from a law firm with significant resources and skilled in class action defense. Lead defense counsel has a well-deserved reputation in class action litigation in general. Courts have repeatedly recognized that the caliber of opposing counsel should be taken into consideration. (See, e.g., *In re Marsh & McLennan Cos., Inc. Sec. Litig.* (S.D.N.Y. Dec. 23, 2009) No. 04 Cv. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *56 (reasonableness of fee was supported by fact that defendants "were represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations.").)

E. Class Counsel Took This Case on a Contingent Basis

"The risk that an attorney takes in the underlying public interest litigation has two components: the risk of not being a 'successful party,' i.e., not prevailing on the merits, and the risk of not establishing eligibility for an attorney fee award." (*Graham*, 34 Cal.4th at 583.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. Despite such a challenge, Class Counsel demonstrated to Defendant that it faced significant exposure, compelling it to enter into the Settlement Agreement and provide a significant benefit to the Class. (See *Downey Cares v. Downey Community Dev. Comm'n.* (1987) 196 Cal. App. 3d 983, 997 (enhanced fees in contingent fee cases recognize the delay in

receipt of full payment of fees); Posner, Economic Analysis of Law (4th ed. 1992) at 534, 567 ("A contingent fee must be higher than a fee for the same legal services paid as they are performed.").)

For these reasons, the requested fee award is eminently reasonable under the percentage method.

VI. LODESTAR/MULTIPLIER CROSS-CHECK SUPPORTS THE FEE AWARD

Courts may "cross-check" the proposed fee award against the counsel's lodestar to ensure its reasonableness. (*Vizcaino*, 290 F.3d at 1050.) The goal of both the lodestar and percentage of the recovery methodologies is the determination of a reasonable fee that is consistent with market rates. California courts also use the lodestar multiplier method to award fees in a class action settlement. (See, e.g., *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33; *Serrano III*, 20 Cal.3d at 48; *Lealao*, 82 Cal.App.4th at 49-50.) The method begins with a calculation of time spent and reasonable hourly compensation of each attorney and paralegal who worked on the case. (*Wershba*, 91 Cal.App.4th at 254.) To compensate counsel for risk, quality, and result, courts commonly apply a "multiplier" to the lodestar. (*Id.*) The hourly rates used must be based on the hourly rates charged by private attorneys of comparable experience, expertise, and reputation for comparable work. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 640.) Additionally, the lodestar should include out-of-pocket expenses of the type normally billed by an attorney to a fee-paying client. (*Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1166.) It should also include time spent on the fee application itself. (*Serrano*, 32 Cal.3d at 632-38.) Class Counsel's rates here reflect the current market rates by attorneys of comparable experience, skill, and reputation for comparable work. (Carpenter Decl., ¶¶ 17-18.)

The requested fee award, inclusive of costs, of $1,000,000 is fair and reasonable given Class Counsel's collective actual fee lodestar of $537,263 and costs of $69,502.09 with a very modest multiplier of just under 1.65 (1.64808). (See Carpenter Decl., ¶¶ 9-14.) The Lynch Carpenter firm spent a total of 474.44 hours in partner and associate time (not including additional prospective time to be spent attending and preparing for the final approval hearing) plus 98.7 hours of paralegal time and $66,780.07 in costs in the investigation and prosecution of this matter, and expect to spend an additional time not included through the conclusion of the case. (*Id.*, at ¶ 9-10.) Partner level attorneys at Lynch Carpenter, LLP, expended a total of 228.14 hours on the case to date, and expect to expend an additional 3.2 hours relating to the Fairness Hearing. (*Id.*) The rate for complex class action litigation is $995 per partner hour. (*Id.*,

¶¶ 9-10.) Associate attorneys spent a total of 243.1 hours on the case at an hourly rate of $450. (*Id.*.) The hourly rates for these attorneys are reasonable for consumer class action attorneys with similar experience and have been approved by various California State and Federal Courts. (*Id*., ¶¶ 17-18.)

The Keller Postman firm spent a total of 231.5 hours in partner and associate time and $2,722.02 in costs in the investigation and prosecution of this matter. Partner level attorneys at Keller Postman expended 4.3 hours on this matter to date while the associates at the firm spent 227.2 hours. The Keller Postman lawyers will spend an additional 2.1 hours in preparation for and attendance at the fairness hearing. The rate for complex class action litigation at Keller Postman is $1,000 per hour and for associates is $775 per hour.(*Id*., at ¶ 13-14.)

A. Class Counsel's Hourly Rates are Reasonable

The reasonable market value of the attorneys' services sets the standard measure of a reasonable hourly rate. (See *Ketchum,* 24 Cal.4th 1122.) Courts determine the reasonable market value by examining whether the rates are "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." (*Children's Hosp. & Med. Ctr. v. Bonta* (2002) 97 Cal.App.4th 740, 783.) Rates awarded to Class Counsel in previous actions and rates awarded to other attorneys practicing complex class action litigation in California are appropriate guides for establishing reasonable market rates. (*Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 904. See e.g., *Carr v. Tadin, Inc.* (S.D. Cal. 2014) 51 F.Supp.3d 970, 978–80 (awarding rates of $650 for partner and $335-375 for associates in 2014 consumer class action); *Hazlin v. Botanical Labs, Inc.* (S.D. Cal. May 20, 2015) No. 13cv0618-KSC, 2015 WL 11237634, at *7 (approving rate of $750 in 2015 consumer class action).)

Class Counsel specialize in complex consumer class actions and regularly litigate cases in federal and state courts. (Carpenter Decl., ¶¶ 17-20.) Moreover, their lodestars are calculated using rates that have been accepted in other class action cases. (*Id.*)

B. Class Counsel's Hours are Reasonable

Class Counsel must demonstrate that their hours were reasonable and necessary to the litigation. (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1320.) Hours are reasonable if they were "reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter. (*Hensley*,

461 U.S. at 431.) In addition to time spent during litigation, reasonable hours include time spent before the Action was filed, including to interview clients, investigate facts and the law, and prepare the initial pleadings. (*Webb v. Board of Educ.* (1985) 471 U.S. 234.) The fee award also includes time spent to prepare and litigate the attorneys' fee claim. (*Serrano,* 32 Cal.3d at 639.)

C. The Requested Multiplier is Reasonable

Once the lodestar is calculated, it may be enhanced with a multiplier. (*Wershba*, 91 Cal.App.4th at 254.) The objective of any multiplier is to provide lawyers involved in public interest litigation with a financial incentive. (*Ketchum*, 24 Cal.4th at 1123.) "If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing." (*In re Washington Public Power Supply System Sec. Litig.* (9th Cir. 1994) 19 F.3d 1291, 1300.) Only when courts properly compensate experienced counsel for successful results can they assure the continuing effectiveness of class actions. To accomplish this objective, the fee award must be large enough "to entice counsel to undertake difficult public interest cases." (*San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 755.) The fee requested here represents a multiplier of approximately 1.65—an amount well within the accepted range for class action cases. (See, e.g., *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 60 (multiplier of 2.5); *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558 (multiplier of 1.75); *Sutter Health Insured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (multiplier of 2.52).)

When determining a multiplier, courts should consider all factors relevant to a given case. (*Serrano III*, 20 Cal.3d at 49.) Here, this case supports the public interest outlined in California's consumer protection laws and federal regulations regarding deceptive and misleading price discount advertising. The Settlement effectively provides a significant financial benefit to Class Members and creates a real deterrence against future violations. This result alone justifies the requested multiplier. However, courts also consider additional factors, such as (1) the novelty and difficulty of the questions involved; (2) the skills displayed by Class Counsel and the results obtained; and (3) the contingent nature of the fee award. (*Ketchum*, 24 Cal.4th at 1132.) These factors, addressed below, also support the requested multiplier.

1. The Novelty and Difficulty of the Questions Involved

This case presented novel and difficult questions regarding liability under California's consumer protection laws and federal regulations regarding transparency in discount price advertising. Plaintiff's allegations presented difficult and novel legal issues related to proving liability, damages and remedial measures to address the alleged harm. At trial, or alternatively, in thousands of individual arbitrations, Plaintiff would be tasked with proving that Defendant's price advertisements were deceptive and material inducements to consumers' purchasing decision(s), as well as presenting a viable damages model to calculate the amount customers were overcharged as a result of that deception, all of which would require significant expert testimony and expense. (See Section V.C., *supra*.)

2. The Skills Displayed by Class Counsel and the Exceptional Results Obtained

Class Counsel, Lynch Carpenter, LLP, and Keller Postman LLC specialize in complex class actions and regularly litigate cases in California federal and state courts. (Carpenter Decl., ¶¶ 9-21.) Historically, Class Counsel has achieved excellent results for millions of consumers in contested consumer class actions. The Keller Postman firm's specific expertise in mass arbitration presented a meaningful threat if Defendant continued to compel potential claimants into an arbitration setting. Equipped with this significant background, Class Counsel worked together efficiently and effectively toward a satisfactory and reasonable resolution of the matter. Class Counsel investigated the case, assessed its value, and weighed the risks and uncertainties arising from protracted litigation against the certain benefits of the preliminarily approved Settlement. (See Sections V.A. and V.D., *supra*.)

3. The Contingent Nature of the Fee Award Warrants the Requested Multiplier

"[A] contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable." (*Rader v. Thrasher* (1962) 57 Cal. 2d 244, 253 (citations omitted).) Class Counsel assumed substantial risk in agreeing to litigate this case on a pure contingency basis, including loss of time spent investigating and litigating the case as well as costs incurred. With no guarantee of success, the contingent nature of this action heavily supports the application of a positive multiplier, as is consistent with California Supreme Court precedence:

> Under our precedents, the unadorned lodestar reflects the general local hourly rate for a *fee-bearing case*; it does *not* include any compensation for contingent risk … The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that

> the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes premium for the risk of nonpayment or delay in payment of attorney's fees.

(*Ketchum*, 24 Cal.4th at 1138. See also Section V.E., *supra*.)

4. Class Counsel's Efforts in Achieving an Expeditious Resolution Support Multiplier

Class Counsel secured an outstanding Settlement instead of engaging in additional years of protracted litigation through trial and certain appeal. Accordingly, the requested positive multiplier is warranted. "Considering that our Supreme Court has placed an extraordinarily high value on settlement, it would seem counsel should be rewarded, not punished, for helping to achieve that goal." (*Lealao*, 82 Cal.App.4th at 52 (internal citations omitted); *Bowling v. Pfizer, Inc.* (S.D. Ohio 1996) 922 F.Supp. 1261, 1282-1283 (Courts should reward attorney in case settled "in swift and efficient fashion").)

Class Counsel litigated this matter diligently and took on substantial risk in time, expense and opportunity cost. Accordingly, imposition of a modest multiplier as a cross-check against Plaintiff's eminently reasonable fee request as a percent-of-recovery is entirely appropriate and should be awarded.

VII. THE REQUESTED LITIGATION COSTS ARE REASONABLE

Out-of-pocket expenses are compensable under Cal. Code Civ. Proc. § 1021.5 if they would normally be billed to a fee-paying client. (See *Beasley*, 235 Cal.App.3d at 1419; Cal. Civ. Code. § 1780(d) (providing for costs to prevailing plaintiff in CLRA action).) Class Counsel's collective requested reimbursement of $69,502.09 in litigation costs incurred to date, which is included in the fee request of $1,000,000, is wholly reasonable. These expenses were necessary to conduct the litigation and are reasonable and modest in light of the benefit conferred on the Class. (Carpenter Decl., ¶¶ 6, 9, 12,) Costs include, *inter alia*, (1) mediation fees, (2) court filing fees, (3) service of process, (4) scanning, photocopying, printing, and extraneous office-related expenses (WAIVED), (5) expert costs, (6) and travel. (*Id*, ¶ 9.) These types of costs are typical to those billed by attorneys to fee-paying clients. (See *Beasley,* 235 Cal.App.3d at 1421.)

VIII. PLAINTIFF IS ENTITLED TO A REASONABLE INCENTIVE AWARD

Plaintiff requests a reasonable service award of $2,500. "Incentive awards are fairly typical in class action cases" and are "intended to compensate class representatives for work done on behalf of the class,

to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. See also *Munoz v. BCI Coca-Cola Bottling Co. of L.A.* (2010) 186 Cal.App.4th 399, 412 ("[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk that they have incurred in conferring a benefit on other members to the class.").) An incentive award is appropriate "if it is necessary to induce an individual to participate in the suit." (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1395.)

Here, Plaintiff maintained continued involvement in the litigation, including reviewing initial pleadings and continuously communicating with Class Counsel. In agreeing to serve as Class Representative, Plaintiff undertook substantial risks to her reputation in the public domain and thrust himself into active litigation to enforce an important right for the benefit of the general public. Moreover, Plaintiff risked potential judgment against himself if this case had been unsuccessful. In class action losses, class representatives are deemed the losing party liable for the prevailing party's costs. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1433–34.) Few individuals are willing to undertake that risk, particularly since courts have entered judgments against class representatives. (See *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 805–07 (upholding cost award in favor of defendant against class representative in her personal capacity in the amount of $764,552.73).) Lastly, the incentive award sought by Plaintiff is relatively low and implicitly reasonable by comparison to other consumer class action settlements. (See e.g., *Morey v. Louis Vuitton North America, Inc.* (S.D. Cal. Jan. 9, 2014) 2014 WL 109194 ($5,000 incentive award in Song-Beverly settlement); *Williams v. Costco Wholesa*le *Corp.* (S.D. Cal. July 7, 2010) 2010 WL 2721452, at *7 ($5,000 incentive award in antitrust case settled for $440,000); *Cellphone Termination Fee Cases,* 186 Cal.App.4th at 1393–94 ($10,000 incentive awards to each of the four class representatives).)

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IX. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's unopposed motion for attorneys' fees and costs in the amount of $1,000,000 and Individual Settlement Award to Plaintiff in the amount of $2,500.

Dated: June 30, 2023

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