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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

STEPHANIE ABERL, DIANA VASQUEZ, and SHANNON CUSTER on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ASHLEY GLOBAL RETAIL, LLC, a Delaware limited liability company

Defendants.

Case No. 37-2023-00011536-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: January 19, 2024
Time: 1:30 P.M.
Judge: Cynthia A. Freeland
Dept: N-27

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I. INTRODUCTION

On August 25, 2023, the Honorable Cynthia A. Freeland preliminarily approved the Settlement[1] as fair, adequate, and reasonable. Plaintiffs now bring this motion for attorney fees and litigation expenses, seeking $700,000. This amount was part of a negotiated Settlement and is unopposed. As described in Plaintiffs' amended preliminary approval motion (ROA Nos. 27-30), and agreed by the Court, Plaintiffs achieved a favorable Class Settlement in this false discount pricing consumer class action requiring Ashley Global Retail, LLC, ("Defendant" or "Ashley"), owner and operator of corporate owned Ashely Retail stores,[2] and ashleyfurniture.com, to distribute to the Class a benefit of $30.00 Vouchers to each Class Member who makes a valid claim. Some 5,043,876 Class Members will receive direct notice of this settlement via unique email addresses maintained by Defendant. Many of these Class Members are online purchasers who would have been subject to an arbitration clause and without this Settlement or Class Counsel's efforts, would not have a claim or be in a position to receive any relief. The Vouchers of this Settlement provide a real economic benefit, because at any one time there are 420-660 items for sale at $30 or less at Ashley, meaning Class Members would not be required to pay out of pocket for those items.[3]

Following agreement on the material terms of the Settlement, the Parties negotiated Class Counsels' attorneys' fees and costs of $700,000 and the named Plaintiffs' Individual Settlement Awards in the amount of $2,500 for each named Plaintiff to be paid by Defendant subject to Court approval, in addition to Notice costs. (See Settlement Agreement ("SA"), §§ 2.4-2.5); Declaration of Todd D. Carpenter ("Carpenter Decl."), in support, filed concurrently herewith, ¶ 7.) Plaintiffs now respectfully

[1] All capitalized terms, unless otherwise defined, have the same definition as those terms in the Settlement Agreement and Release (ROA No. 29, Ex. 1).

[2] As in connection with the Motion for Preliminary Approval, when stores are referred to as "corporate owned" herein, that references locations owned and operated by Ashley, or its subsidiaries, excluding those owned by Stoneledge Furniture, LLC ("Stoneledge") in California. While Ashley and its subsidiary own and operate brick and mortar retail stores (enterprise stores), there are unaffiliated retail stores that are independently owned by third-party companies that license the Ashley brand.

[3] Plaintiffs' Counsel's pre-suit investigation as well as a review of Ashley's website at the time of filing this fee motion demonstrates that at any one time there are between 420-660 items for sale at $30 or less. These items include wall art, faux plants, doormats, vases, candle holders, decorative objects, planters, pillows, sheet sets, mattress protectors, clothes hangers, closet organizers and hooks, drawer organizers, bathroom linens, bathroom accessories, desk lamps, and others. (See https://www.ashleyfurniture.com.)

requests the Court award $700,000 in attorneys' fees and costs, and Individual Settlement Awards of $2,500 to each of the Plaintiffs for their commitment in serving as class representatives.

II. SUMMARY OF CLASS COUNSEL'S WORK

Prior to the commencement of litigation on April 13, 2022, Class Counsel spent sixteen months investigating Plaintiff Stephanie Aberl's claims, including extensive and daily or near-daily gathering of pricing data from Defendant's e-commerce store, ashleyfurniture.com. (Carpenter Decl., ¶¶ 2, 3.) Specifically, Class Counsel tracked and catalogued numerous items listed for sale on Defendant's website. (See *id.* at ¶ 2.) Class Counsel further commissioned in-store investigations in multiple states. (See *ibid.*)

Class Counsel's investigation appeared to reveal that Defendant offered its products for sale online at a discount off an "original" or "regular" price for extended periods of time. (See *id.* at ¶ 3.) Specifically, Class Counsel further interpreted the data to show that investigated products were "discounted" against the "Original" price for a length of time that exceeded the time allowed under various laws. Defendant disagrees with our conclusions. (See *ibid.*)

Class Counsel also analyzed the relevant legal issues in regard to the claims asserted and Ashley's potential defenses. 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. (See *id.* at ¶¶ 6-7.)

Based on the above investigation, on April 13, 2022, Stephanie Aberl, through Class Counsel, filed a putative class action against an Ashley affiliate in the United States District Court for the Southern District of California, Case No. 3:22-cv-00505-JLS-NLS (the "Federal Court Action"), asserting false advertising claims under California's Unfair Competition Law, Business and Professions Code section 17200 et seq. (the "UCL"), the FAL, and the California Consumer Legal Remedies Act, Civil Code section 1750 et seq. (the "CLRA"). The defendant filed a Motion to Compel Arbitration on July 11, 2022, as Plaintiff Aberl was purportedly subject to an arbitration provision in connection with her online purchase. The court granted the motion to compel arbitration on August 12, 2022.

As of the time the Motion to Compel Arbitration was pending, Lynch Carpenter was co-counsel with the law firm Keller Postman. Keller Postman partnered with Lynch Carpenter to assist with prosecution of the matter through litigation of individual arbitrations if necessary. The Keller Postman

firm ultimately had to withdraw from the matter on August 11, 2022. This left the Lynch Carpenter firm to prosecute any individual arbitrations at scale. As a result, the Lynch Carpenter firm further built out their mass arbitration capacities for this case which were already in process, albeit at an accelerated pace. (See Carpenter Decl., ¶ 3.)

Prior to the commencement of the arbitration proceedings, the Parties agreed to explore resolution of the matter through mediation. On November 21, 2022, they engaged in a full-day mediation session, facilitated by JAMS Mediator Hon. Edward A. Infante (Ret.) This mediation session resulted in the Parties reaching a prospective settlement on a Class-wide basis. Only after reaching an agreement on the material terms of the Settlement, the Parties negotiated an agreement on attorneys' fees, costs and an incentive award that Ashley will pay separate and apart from its payment to the Class. (See *id.* at ¶ 8.)

In connection with this 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, Defendant's pricing practices, and expert analysis thereof. Class Counsel also retained an economist to develop and support the damages alleged by Plaintiff. (See id. at ¶ 5.) During this time, Class Counsel worked closely with their expert to develop the damages model alleged against Defendant. Following settlement in principle, the Parties heavily negotiated the details of the Settlement Agreement. 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.) Thereafter, Class Counsel filed the Action in this Court and immediately filed their Motion for Preliminary Approval of a Class Action Settlement on March 23, 2023. (See ROA Nos. 10-13.)

After this Action was filed in this Court pursuant to the Settlement, plaintiff's counsel in *Ryan Cornateanu v. Stoneledge Furniture LLC*, No. 21STCV09403 (Cal. Super. Ct.), a putative class action pending in Los Angeles County Superior Court against an Ashley subsidiary, Stoneledge, indicated his client would object to the Settlement in the Action to the extent there was overlap in the putative classes. Plaintiff Cornateanu moved to certify a class of persons in California who purchased products from Stoneledge's brick-and-mortar stores there at certain discounted prices between March 2018 and March 27, 2022. On May 22, 2023, Class Counsel, along with the parties to the *Cornateanu* action, attended a full-day mediation in an effort to achieve a global settlement. The mediation was not successful. The day

after this mediation, Cornateanu's counsel filed a Judicial Council Coordination Proceeding in an attempt to coordinate the Action with their case. (See *Stoneledge Furniture Discount Cases*, JCCP No. 5289 (L.A. Super. Ct.).)

To prevent any potential conflict between the two matters, the putative settlement class in this Action was revised to exclude the putative class in the *Cornateanu* matter. Shannon Custer, who purchased products from an Ashley company-owned store in Oregon, joined the Action in the First Amended Complaint as a named plaintiff in addition to Mses. Aberl and Vasquez.

Class Counsel filed written opposition to the JCCP petition and attended an in person hearing in Los Angeles to oppose. The Coordination Judge (Hon. David S. Cunningham III) denied the JCCP petition on the grounds that the putative classes no longer overlapped, and that this Action was settled in a posture for preliminary approval. This Court then granted preliminary approval of the Settlement on August 25, 2023.

III. SUMMARY OF SETTLEMENT TERMS

On August 25, 2023, this Court preliminarily approved the Settlement, for the following Class:

> All persons in the United States, who during the Class Period purchased one or more products at a price advertised as a discount from a regular or original price at one of Ashley's corporate owned stores (excluding Stoneledge brick and mortar stores in California) or from Ashley's e-commerce website ashleyfurniture.com, and who have not received a refund or credit for their purchase(s). Excluded from the class is Ashley's Counsel, Ashley's officers and directors, and the judge presiding over the Action.

(SA § 1.7.) The Class Period was approved as "online purchases made on ashleyfurniture.com between April 13, 2018, and March 31, 2022, and/or any purchase made in-store from an Ashley corporate-owned store between March 9, 2017, and March 31, 2022." (SA § 1.8.)

Class Members who make a timely and valid claim before the response deadline will receive Vouchers in the amount of $30. Moreover, the Vouchers do not require a minimum purchase and can be used at any Ashley corporate-owned store or online at ashleyfurniture.com. (See SA §§ 1.33, 2.1.) Lastly, the Vouchers are valid for 180 days and can freely be transferred to others. (See SA § 1.33.)

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, fn. 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,* 461 U.S. at 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, fn. 19.)

Here, the requested fee of $700,000 was negotiated during adversarial bargaining by Class Counsel after the substantive terms of the Settlement had been negotiated. (See 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, Civil Code section 1750 et seq., which entitle Class Counsel to recover attorneys' fees and costs as the prevailing party. (See Civ. Code, § 1780, subd. (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 $30 Vouchers for a retail store that sells hundreds of items priced below $30, 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 Code Civil Procedure section 1021.5.[4] Defendant does not agree with Plaintiffs' construction of these statutes.

B. Applicable Fee Award Methods

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 (hereafter *Wershba*); see also *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1809).

> The percentage method calculates the fee as a percentage share of a recovered common fund or the monetary value of plaintiffs' recovery. The lodestar method, or more accurately the lodestar-multiplier method, calculates the fee by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.

(*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 489 (hereafter *Laffitte*) [internal quotations omitted].) "The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved." (*Ibid*.) Regardless of what method is used to calculate attorneys' fees the ultimate goal is the award of a reasonable fee. (See *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557 [citing *Apple Computer, Inc. v.*

[4] 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. (See *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"].)

Superior Court (2005) 126 Cal.App.4th 1253, 1270].) The Lodestar-Multiplier Method Is the Appropriate Method for Calculating Fees in This Case.

The California Supreme Court has stated, "[t]he percentage-of-recovery method is generally favored in common fund cases." (*Laffitte*, 1 Cal. 5th at 494.) However, the court has not addressed whether or how the use of a percentage method may be applied when a constructive common fund is created by a defendant's agreement to pay claims made by class members. (See *id.* at p. 503 [citing *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 22-23, 28 (hereafter *Lealao*)].) California courts have generally held a percentage of the recovery method is impracticable and inappropriate in a case where there is no common fund. (See *Zucker v. Occidental Petroleum Corp.* (C.D. Cal. 1997) 968 F.Supp. 1396, 1400, *aff'd* (9th Cir. 1999) 192 F.3d 1323.) The percentage method should only be used when the recovery for the class was a "certain or easily calculable sum of money." (*Dunk*, 48 Cal. App. 4th at 1809 [finding the percentage method was improper because "the attorneys were not to be paid from the 'coupon fund,' but from a distinct amount not exceeding $1.5 million."]; see also *Lealao*, 82 Cal. App. 4th at 39.) Therefore, due to the lack of a common fund or a certain sum of money extracted for the benefit of class members in this case the lodestar-multiplier method is the appropriate method for calculating fees.

V. THE REQUESTED FEE AWARD IS APPROPRIATE, FAIR AND REASONABLE

Here, $30 Vouchers will be sent automatically to Class Members who made a claim upon approval of the Settlement. The requested fee award is fair and reasonable given Class Counsel's efforts in this case as discussed in section II above. 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, was the product of a non-collusive adversarial negotiation.

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 v. Roper*, *supra*, 445 U.S. at p. 338.)

The ultimate inquiry is whether the end result is reasonable. (See *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. (See *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1047 (hereafter Vizcaino).) Applied here, each of these factors supports approval of the fee request.

A. Class Counsel Achieved Favorable Results for the Class

Class counsel achieved favorable results in this case. The reality is that numerous Class Members were potentially subject to arbitration provisions between the arbitration agreement for resolution of disputes that Ashley maintained on its website, and similar requirements for those who participated in its customer rewards program. Class Members almost certainly would not have obtained any relief as part of a class action lawsuit, and upon bringing a claim, would simply have been compelled by Ashley to arbitration. Without the presence of skilled counsel positioned to carry out the threat of serial individual arbitration proceedings, no Class Member would have received any relief at all.

With the threat of mass arbitration proceedings looming, the Parties were able to reach an arms-length Settlement with the assistance of an experienced mediator with particular acumen in handling sale discount and false pricing cases, after extensive investigation of Plaintiff's claims and discovery of Defendant's sales data, leading to the Settlement. In the course of these highly contested settlement

proceedings, Defendant at all times denied liability, Plaintiff's ability to certify the Class, and whether Class Counsel could administer a mass arbitration campaign.

It is against this backdrop that 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 $30 for valid Class Member claims. Additionally, as a practical matter, the costs of *individual* litigation or arbitration 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, Plaintiffs 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, 405 [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 investigating Defendant's conduct, evaluating Defendant's liability, analyzing potential legal theories, drafting the Complaint, engaging in significant research and investigation, and attending mediation. Furthermore, at a Judicial Council Coordination Proceeding, Class Counsel successfully opposed efforts to coordinate the case on the grounds that the putative classes do not overlap due to the carve out in the Settlement Agreement, and the fact that the *Cornateanu* action is two years older than this Action but has not yet settled. (See ROA Nos. 32, 34-34, 42; see also *Stoneledge Furniture Discount Cases*, JCCP No. 5289 (L.A. Super. Ct.).) Moreover, Class Counsel forewent other employment in order to devote the time necessary to pursue this litigation. (See 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 discounts. To this end, Class Counsel retained an economics expert to review and determine the impact of Defendant's reference prices on consumer behavior and to assess potential economic remedies. The expert identified several potential methodologies to measure the extent that Class Members may have been 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 v. Kohl's Dept. Stores, Inc.*, *supra*, 733 Fed. Appx. at p. 405; *Stathakos v. Columbia Sportswear Company* (N.D. Cal. May 11, 2017, No. 15-CV-04543-YGR) 2017 WL 1957063, at *7-8 [granting summary judgment and rejecting each of plaintiff's proposed measures of restitution].)

Furthermore, after the Keller Postman firm withdrew from this matter, Lynch Carpenter was required to backfill the void created by their mass arbitration capacity and further develop systems currently in place to prosecute any individual arbitrations against Ashley, nationwide and at scale. (See Carpenter Decl., ¶ 3.)

This class action Settlement and the outstanding result would not have been achieved absent the experience and preparedness of Lynch Carpenter to arbitrate thousands of individual claims against Ashley if necessary to do so. Indeed, consumers who purchased Ashley's products online were likely subject to Ashley'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 efforts of Lynch Carpenter, and the threat of mass arbitration, 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 (See Carpenter Decl., ¶¶ 13-16), 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 an exchange of sales data and product information 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)), 5178546, at * 19, [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. THE LODESTAR CALCULATION AND MULTIPLIER ARE REASONABLE

The lodestar method begins with a calculation of time spent and reasonable hourly compensation of each attorney and paralegal who worked on the case. (See *Wershba*, 91 Cal. App. 4th at 254.) To compensate counsel for risk, quality, and result, courts commonly apply a "multiplier" to the lodestar. (See *ibid*.) 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 (hereafter *Serrano*).) Additionally, the lodestar should include out-of-pocket expenses of the type normally billed by an attorney to a fee-paying client. (See *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1166.) It should also include time spent on the fee application itself. (See *Serrano*, 32 Cal. 3d at 632–638.) Class Counsel's rates here reflect the current market rates by attorneys of comparable experience, skill, and reputation for comparable work. (See Carpenter Decl., ¶¶ 13-14.)

The requested fee award, inclusive of costs, of $700,000 is fair and reasonable given Class Counsel's collective actual fee lodestar of $543,229.00 and costs of $97,304.48 with a very modest multiplier of just below 1.3 (1.32978). (See Carpenter Decl., ¶¶ 9-10.) The Lynch Carpenter firm spent a total of 566 hours in partner and associate time (not including additional prospective time to be spent attending and preparing for the final approval hearing) plus 181.2 hours of paralegal time in the investigation and prosecution of this matter, and expect to spend an additional time not included through the conclusion of the case. (See *id*. at ¶ 9-10.) Partner level attorneys at Lynch Carpenter, LLP, expended a total of 299.7 hours on the case to date, and expect to expend an additional 3.5 hours relating to the Fairness Hearing. (See *ibid.*) The rate for complex class action litigation is $995 per partner hour. (See *id*. at ¶¶ 9-10.) Associate attorneys spent a total of 266.3 hours on the case at an hourly rate of $450. (See *ibid.*) 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. (See *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 v. Moses* (2001) 24 Cal.4th 1122, 1136 (hereafter *Ketchum*).) 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. (See *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, 978-980 [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]; *Mount v. Wells Fargo Bank, N.A.* (Cal. Ct. App., Feb. 10, 2016, No. B260585) 2016 WL 537604 [Hourly rates ranging from $300 to $1,100 were reasonable in a 2016 consumer class action case]*; In re Vitamin Cases* (Cal. Super. Ct., Apr. 12, 2004, No. 301803) 2004 WL 5137597 [finding a $1,000 per hour rate reasonable in a 2004 consumer class action case]; *Computer Service Tax Cases* (Cal. Ct. App., Dec. 10, 2014, No. A139445) 2014 WL 6972268 [A rate of $650 to $825 per hour for attorneys who had more than 25 years of litigation experience and had served as lead counsel in seven consumer class actions was reasonable].)

Class Counsel specializes in mass arbitration and complex consumer class actions and regularly litigates cases in federal and state courts. (See Carpenter Decl., ¶¶ 13-16.) Moreover, their lodestars are calculated using rates that have been accepted in other class action cases. (*See ibid.*)

B. Class Counsel's Hours are Reasonable

Class Counsel must demonstrate that their hours were reasonable and necessary to the litigation. (See *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. (See *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. (See *Webb v. Board of Educ.* (1985) 471 U.S. 234, 243, 250 ["Most obvious examples are the drafting of the initial pleading and the work associated with *the development of the theory of the case*."] [emphasis added].) Here, Class Counsel had spent considerable time, including legal research and

collaboration with other firms and attorneys, building out a mass arbitration apparatus and corresponding risk that contributed to reaching Settlement in this case. Lastly, the fee award also includes time spent to prepare and litigate the attorneys' fee claim. (See *Serrano,* 32 Cal.3d at p. 639.)

C. The Requested Multiplier is Reasonable

Once the lodestar is calculated, it may be enhanced with a multiplier. (*Wershba*, *supra*, 91 Cal.App.4th at p. 254.) The objective of any multiplier is to provide lawyers involved in public interest litigation with a financial incentive. (See *Ketchum*, *supra*, 24 Cal.4th at p. 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.) "Multipliers are often imposed to reflect counsel's risk in taking on such protracted litigation or its deserved reward from the benefits its extracts for the class." (*Zucker,* 968 F. Supp. at 1401.) 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.) "Multipliers can range from 2 to 4 or even higher." (*Wershba*, *supra*, 91 Cal.App.4th at p. 225; see also *Vizcaino*, *supra*, 290 F.3d at p. 1051, fn. 6 [finding that most approved class action settlements had multipliers in the 1.5 to 3 range].) The fee requested here represents a multiplier of 1.32978—an amount well within the accepted range for class action cases. (See *Ferrell v. Buckingham Property Management* (E.D. Cal., Jan. 25, 2022, No. 119CV00332JLTBAKEPG) 2022 WL 224025, at * 3 ["[C]ourts typically approve percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even higher, and 'the multiplier of 1.9 is comparable to multipliers used by the courts.'"]; *Cavazos v. Salas Concrete, Inc.* (E.D. Cal., July 25, 2022, No. 119CV00062DADEPG) 2022 WL 2918361, at *14 ("Multipliers in the 3–4 range are common in lodestar awards for lengthy and complex class action litigation.") (quoting *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 298); 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. (See *Serrano v. Priest* (1977) 20 Cal.3d 25, 49 (*Serrano III*).) 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. (See *Ketchum*, *supra*, 24 Cal.4th at p. 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 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, specialize in mass arbitration and complex class actions and regularly litigate cases in California federal and state courts. (Carpenter Decl., ¶¶ 9-17.) Historically, Class Counsel has achieved excellent results for millions of consumers in contested consumer class actions. Moreover, Lynch Carpenter's development of its mass arbitration capabilities 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. Lastly, Class Counsel also attended, and successfully opposed the effort to coordinate the cases—which is an excellent result as coordination would have delayed relief for the Class. (See ROA Nos 32, 34-37, 42.)

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

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*, *supra*, 82 Cal.App.4th at p. 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 Code of Civil Procedure section 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 $97,304.48 in litigation costs incurred to date, which is included in the fee request of $700,000, 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.) 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. (See *id* at ¶ 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. PLAINTIFFS ARE ENTITLED TO A REASONABLE INCENTIVE AWARD

Plaintiffs request 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, 958-959; 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, Plaintiffs maintained continued involvement in the litigation, including reviewing initial pleadings and continuously communicating with Class Counsel. In agreeing to serve as Class Representatives, Plaintiff undertook substantial risks to their reputation in the public domain and thrust themselves into active litigation to enforce an important right for the benefit of the general public.

Moreover, Plaintiffs risked potential judgment against themselves 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, 1433-1434.) 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, 805-807 [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 Plaintiffs 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 Wholesale Corp*. (S.D. Cal. July 7, 2010, No. 02CV2003 IEG(AJB) [$5,000 incentive award in antitrust case settled for $440,000); *Cellphone Termination Fee Cases,* 186 Cal.App.4th at 1393-1394 [$10,000 incentive awards to each of the four class representatives].)

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiff's unopposed motion for attorneys' fees and costs in the amount of $700,000 and Individual Settlement Award to Plaintiff in the amount of $2,500.

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