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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

TRISHA TEPERSON, on behalf of herself and all others similarly situated,

Plaintiff,

v.

NOGIN, INC., a Delaware Corporation, JUSTICE BRAND HOLDINGS, LLC, a New York Limited Liability Company, BLUESTAR ALLIANCE LLC, a New York Limited Liability Company, B. RILEY SECURITIES, INC., a Delaware Corporation, and B. RILEY PRINCIPAL INVESTMENTS, LLC, a Delaware Limited Liability Company, and DOES 1- 50, inclusive,

Defendants.

Case No. 37-2023-00041084-CU-NP-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: February 21, 2025
Time: 1:30 p.m.
Judge: Hon. Cynthia A. Freeland
Dept: N-27

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I. INTRODUCTION

On November 1, 2024, the Honorable Cynthia A. Freeland preliminarily approved the Settlement[1] as fair, adequate, and reasonable. Plaintiff now brings this motion for attorneys' fees, inclusive of costs, seeking $600,000 for a Settlement conferring a benefit estimated to be $7,390,975. This amount was part of a negotiated Settlement, is unopposed, and equates to 8.1% of the Class's ***direct*** benefit—well below the 25% benchmark typically recognized by California courts in this context. As described in Plaintiff's preliminary approval motion (ROA No. 73) and agreed by the Court, Plaintiff achieved an outstanding Class Settlement in this false discount pricing consumer class action resulting in the distribution of $12.50 Merchandise Certificates directly and automatically to *all* Class Members who do not opt out of the Class Settlement. Approximately 591,278 Class Members will *automatically* receive a $12.50 Merchandise Certificate. The Merchandise Certificates of this Settlement provide a real economic benefit, allowing consumers to purchase items listed on the Redemption Website, where at least one-third of the products listed can be purchased without having to pay anything out of pocket. (See SA § 1.21(h).) Additionally, the Settlement protects consumer rights by deterring retailers from engaging in similar misconduct.

Following agreement on the material terms of the Settlement, the Parties negotiated Class Counsels' attorneys' fees and costs of $600,000[2] and the named Plaintiff's Individual Settlement Award in the amount of $2,500 to be paid subject to Court approval. (See SA, §§ 2.3–2.4; Declaration of Todd D. Carpenter ("Carpenter Decl."), in support, filed concurrently herewith, ¶ 10.) Plaintiff now respectfully requests the Court award $600,000 in attorneys' fees and costs, and Individual Settlement Award of $2,500 to Plaintiff for her commitment in serving as Class representative.

II. SUMMARY OF CLASS COUNSEL'S WORK

Prior to the commencement of litigation on February 16, 2023, Plaintiff's Counsel performed an investigation into the pricing practices of shopjustice.com, an online retailer of teen and tween girls apparel. Plaintiff's Counsel retained and deployed a preeminent computer programmer and data expert to construct a data collection software application that monitored, on a daily basis, the e-commerce website's

[1] All capitalized terms, unless otherwise defined, have the same definition as those terms in the Settlement Agreement and Release (ROA No. 75, Ex. 1) ("SA" or "Settlement").

[2] This amount is to be paid in three separate installments $200,000 with the final installment being reduced by the amount Settlement Party Nogin Commerce pays the notice administrator. (See SA § 2.4.)

pricing practices for every product offered for sale in the 12 months preceding the filing of the Federal Court Action. (Carpenter Decl. at ¶ 3.) The process used to obtain the original and sale price for products on shopjustice.com leveraged an open-source software library which is used for software test automation. (*Ibid*.) Plaintiff's expert developed a proprietary application utilizing the library that initiated a web browser, loaded the URL (shopjustice.com), then inspected the content of the page, isolating each of the links to the product. (*Ibid.*) The application crawled through each link, loading the pages one at a time and ultimately spanning the entire website. (*Ibid.*) The application was designed to mimic what a search engine like Google does when it indexes a website. (*Ibid.*) Once it loads each page, the application sought out each of the products that were on sale. (*Ibid.*) When it identified a product on sale, the application would record all the information about that product—*e.g.*, price, sale, date, URL—and take a screenshot of the product. (*Ibid.*) The application would also take a screenshot of the entire webpage, top to bottom, for verification that the data was not made up or tampered with in any way. (*Ibid.*) This application was run twice a day, every day, on three different servers in different geographic locations around the country. (*Ibid.*) This data was later aggregated into a single database where a timeline of the sale price for each product could be established. (*Ibid.*) The data was collected from March 2022 through the filing of the Complaint. (*Ibid.*) Technical adjustments were made to the application following the filing of the lawsuit to ensure that the data collection would continue, uninterrupted. (*Ibid.*)

Class Counsel interpreted the data to show that the investigated products were "discounted" against the "original" price for a length of time that exceeded the time permitted under California's False Advertising Law ("FAL"),[3] California's Unfair Competition Law ("UCL"),[4] California's Consumer Legal Remedies Act ("CLRA"),[5] and the Federal Trade Commission Act ("FTCA").[6] (Carpenter Decl. at ¶¶ 4-5.) This investigative work was critical to Class Counsel's understanding of Defendants' conduct and the formation of the legal theories advanced by Plaintiff.

On February 16, 2023, Plaintiff Trisha Teperson filed a putative class action lawsuit against Nogin in the United States District Court for the Central District of California, entitled *Trisha Teperson v.*

[3] Bus. & Prof. Code, § 17500 et seq.
[4] Bus. & Prof. Code, § 17200 et seq.
[5] Civ. Code, § 1750 et seq.
[6] 15 U.S.C. §§ 45(a)(1), 52(a); see also 16 C.F.R. § 233.1(a), (b).

Nogin, Inc., No. 8:23-cv-00281-DOC-DFM (C.D. Cal.). The Federal Court Action asserted claims for false and/or deceptive advertising relating to Nogin's advertisement of discounts on shopjustice.com. The case was assigned to the Honorable Judge David O. Carter.

Following the inception of the Federal Court Action, Plaintiff's Counsel continued investigating the pricing practices on shopjustice.com. The Parties together analyzed the relevant legal issues and engaged in negotiations, eventually reaching the point where they agreed to attend private mediation to explore settlement. (Carpenter Decl. ¶ 7.) In that context, the Parties exchanged information about the extent of online sales, and the number of class members the Defendants had contact information for and could provide a direct benefit to, all of which impacted the analysis of the strengths and weaknesses of the case. (*Ibid*.) Plaintiff's and Defendants' counsel also discussed issues such as the composition of the Justice brand's product inventory and feasible settlement structures utilized in recent comparable sale discount settlements to facilitate Plaintiff in formulating her settlement demand. (*Ibid*.)

The Parties engaged in arm's-length negotiations, including a full-day mediation session with JAMS Mediator Hon. Edward A. Infante on September 5, 2023, who has substantial experience mediating consumer class actions. (Carpenter Decl. ¶ 8.) At the close of the mediation, and after exchanging numerous proposals, the Parties reached a tentative Class-wide settlement. (*Ibid.*)

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 Defendants, and Defendants' widespread pricing practices. 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. (See Carpenter Decl. at ¶ 9.) 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 Defendants will pay separately and apart from their payment to the Class. (See *id*. at ¶ 10.) The Federal Court Action was dismissed without prejudice on September 6, 2023, upon notice that Plaintiff and Nogin had reached a settlement agreement. Pursuant to the Settlement Agreement, Plaintiff filed the dismissed claims in the Superior Court of California.

Thereafter, on November 22, 2023, Nogin disclosed in its 10-Q filing with the Securities Exchange Commission that it planned to file a voluntary petition for bankruptcy and entered into a promissory note with B. Riley Securities, Inc., and a restructuring support agreement with B. Riley Principal Investments, LLC. Nogin communicated none of this to Class Counsel. On the same day, Nogin, Inc. filed an Answer to the state court complaint contemplated by the Settlement Agreement, which meant that Plaintiff would have to seek leave to amend the complaint to add the entities acquiring Nogin, Inc. (See ROA Nos. 40, 48.) On December 22, 2023, Plaintiff moved for leave to amend, which was granted on January 19, 2024. On January 19, 2024, the first amended state court complaint was filed, adding additional defendants. (See ROA No. 49) On March 28, 2024, the Bankruptcy Court approved the sale of Nogin's reorganized equity interests in Nogin Commerce to Nogin Holdings LLC, pursuant to the Plan. Nogin Holdings then closed, and the Plan became effective.[7] After further *substantial* negotiation with Nogin's Counsel and counsel for the four other newly added Parties, the Parties were ultimately able to negotiate the remaining details of the Settlement Agreement. The Settlement Agreement was thus drafted as somewhat of an extension of the formal settlement agreement contemplated by Plaintiff and Nogin following with the assistance of the JAMS Mediator Hon. Edward A. Infante on September 5, 2023—*i.e.*, prior to Nogin's bankruptcy. On October 4, 2024, Plaintiff's Counsel filed a motion seeking preliminary approval of the Settlement Agreement, which this Court granted on November 1, 2024. (ROA No. 81.)

III. SUMMARY OF SETTLEMENT TERMS

On November 1, 2024, this Court preliminarily approved the Settlement, for the following Class:

> All persons who, during the Class Period (April 1, 2021, to October 31, 2023), purchased at shopjustice.com one or more items that were not returned by, or on behalf of, the purchaser, or otherwise, and who also received direct notice of the settlement via email. Excluded from the Class is Nogin's Counsel, Nogin's officers and directors, and the judge presiding over the Action.

(SA §§ 1.7, 1.9; ROA NO. 81 ¶ 7.)

[7] As explained in SA, following Nogin's bankruptcy, "Nogin Commerce continues to operate in the ordinary course." (SA Recital M.) Despite Nogin Commerce not being a named Defendant in the state court first amended complaint (as Class Counsel was unaware of the entity's existence at the time), Nogin Commerce is a Party to the Settlement Agreement and is primarily responsible for payment of the Class benefit, Class Counsel's fee award, and Plaintiff's Individual Service Award. (See SA §§ 2.3, 2.4, 2.7, 2.11.)

The terms of the Settlement create only one tier of Class Members, all of whom will directly receive the Class benefit and are the only ones releasing claims. (See generally SA §§ 1.2, 1.7, 1.8, 1.10, 1.11, 1.21, 2.8.) Authorized Claimants will receive one (1) Merchandise Certificate via email valued at $12.50. (SA §§ 1.21, 2.2.) An Authorized Claimant is a Class Member who receives direct notice of the proposed Settlement via email and does not validly request exclusion from the Class and the proposed Settlement. (SA § 1.2.) Thus, every Class Member who receives Email Notice will receive a benefit and does not have to submit a claim. The Response Deadline is defined as no later than ninety (90) calendar days after entry of the Preliminary Approval Order, or sixty (60) calendar days after the issuance of the Class Notice, whichever is later. (SA § 1.29.) Nogin Commerce and/or the Claims Administrator may review any Merchandise Certificate used on the Merchandise Certificate Redemption Website to determine that the Merchandise Certificate is valid and has not expired and to prevent the use of duplicate, counterfeit and fraudulent Merchandise Certificates. (SA § 3.5.) The Merchandise Certificates are highly beneficial to Class Members as they can be used conveniently on the Redemption Website, are valid for one year, require no minimum purchase, and may be applied toward the purchase of any items that are on sale or otherwise discounted. (SA § 1.21.)

The Merchandise Certificates provide a real benefit to Class Members for use on the Justice-brand Redemption Website because the Settlement Agreement requires Nogin Commerce to use all commercially reasonable efforts available to ensure that at least one-third of the Justice-branded merchandise available on the Redemption Website will be priced at $12.50 or less. (SA § 1.21(h).) This variety of merchandise includes girls' apparel, accessories, and related items. Thus, Class Members "need not spend any of his or her own money and can choose from a variety of potential items to purchase." (*In re Online DVD-Rental Antitrust Litigation* (9th Cir. 2015) 779 F.3d 934, 951.)

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 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, fn. 19.)

Here, the requested fee award of $600,000, inclusive of litigation costs and notice administration costs,[8] was negotiated during adversarial bargaining by Class Counsel after the substantive terms of the Settlement had been negotiated. (See Carpenter Decl., ¶ 10.) 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 Defendants (and Nogin Commerce) 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 approximately $7,390,975 worth of Class benefit, which is available to Class Members ***without*** having to make a claim. 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 the Code of Civil Procedure section 1021.5.[9]

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[8] Pursuant to SA § 2.4, Nogin Commerce will deduct notice administration costs paid or payable by it from the third and final $200,000 installment payment.

[9] 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

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 (*Wershba*); 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 (*Lealao*) [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 WL 6473044, at *9 [utilizing percentage-of-recovery method where settlement value was based in part on free product option].)

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

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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"].)

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. (See *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 480-481; *Williams v. MGM-Pathe Communs. Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 [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, Class Members will receive an estimated direct benefit of at least $7,390,975 without any claims having to be made. Plaintiff's requested fee award, therefore, represents approximately 8% of the value of the direct Class benefit—well below the Ninth Circuit's "benchmark" of 25% of the total recovery. (See *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1047 (*Vizcaino*).)

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 Nogin Commerce had every incentive to negotiate as low a fee as possible to decrease the overall costs. (See *Lealao*, *supra*, 82 Cal.App.4th at p. 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 considering Class Counsel's prior and future efforts and the excellent results achieved. In agreeing to pay $600,000 in the aggregate for attorneys' fees and costs, Defendants 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, Nogin Commerce 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*, *supra*, 82 Cal.App.4th at p. 50.) Indeed, the U.S. Supreme Court consistently looks to the marketplace as a guide to determining reasonable fees, including contingency fee arrangements. (See *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. (See *Deposit Guar. Nat'l Bank v. Roper*, *supra*, 445 U.S. at p. 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 attorneys' fees equaled 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. (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*, *supra*, 290 F.3d at pp. 1048-1050.) 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 negotiated discovery of Defendants' sales data, leading to the Settlement worth an estimated $7,390,975 in direct benefits to the Class. (See Carpenter Decl., ¶ 9.) Defendants denied liability and Plaintiff's ability to certify the Class. 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 addition to the ostensibly omnipresent risk that Nogin or another Defendant might file for bankruptcy at any point, which automatically stay the litigation regardless of its procedural posture). 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 Defendants' false advertising of *much less* than the estimated $7,390,975 Class benefit that was achieved in this Settlement. 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, 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 identifying Defendants' wrongdoing, evaluating Defendants' liability, analyzing potential legal theories, drafting and litigating the Federal Court Action complaints, as well as the state court Complaint and the First Amended Complaint, engaging in significant research and investigation, drafting and serving discovery, and attending mediation. Additionally, following Nogin, Inc.'s "surprise" bankruptcy, Class Counsel expended considerable time and resources researching and identifying the Defendants enumerated in the operative First Amended Complaint, and then negotiating with their counsel to determine if the prospective settlement could be rehabilitated. (See ROA Nos. 11, 75 at p. 4.) 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

Litigating this class action through trial would be time-consuming and expensive due to the complexities of proving liability and damages. For instance, Defendants 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 Defendants' pricing practices on consumers and the price premium attributable to Defendants' fictional discounts. To this end, Class Counsel retained experts to gauge the likelihood of demonstrating a feasible damages model in this case, including the examination of 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 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].) By reaching this Settlement, the Parties avoided protracted litigation of these complex issues and significant expert fees.

D. Class Counsel Provided High-Quality Work

Class Counsel are experienced in complex class litigation (see Carpenter Decl., ¶¶ 16-19), 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 Defendants' pricing practices. 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. Additionally, when it appeared that Nogin, Inc.'s Chapter 11 bankruptcy had shattered any hopes of Class recovery, Class Counsel undertook substantial efforts to identify, allege claims against, and then reopen negotiations and ultimately reach a settlement with, Nogin, Inc.'s successors-in-interest (*i.e.*, B. Riley Securities, Inc., and B. Riley Principal Investments, LLC) as well as other parties who reasonably appeared

responsible for the pricing practices on shopjustice.com (i.e., Justice Brand Holding LLC and Bluestar Alliance LLC).

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 v. Daimler Chrysler Corp.*, *supra*, 34 Cal.4th at p. 583.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. Despite such a challenge, Class Counsel demonstrated to Defendants that they faced significant exposure, compelling them 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. (See *Vizcaino*, *supra*, 290 F.3d at p. 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, 1132-1133 (*Ketchum*); *Serrano III*, *supra*, 20 Cal.3d at p. 48; *Lealao*, *supra*, 82 Cal.App.4th at pp. 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. (See *Wershba*, *supra*, 91 Cal.App.4th at p. 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 (*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*, *supra*, 32 Cal.3d at pp. 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., ¶¶ 12-13.)

The requested fee award, inclusive of costs and subject to a reduction for the cost of notice administration,[10] of $600,000 is fair and reasonable given Class Counsel's collective actual fee lodestar of $250,491.50 and costs of $27,578.55 with a multiplier just below 2.29 (2.2851). (See Carpenter Decl., ¶¶ 11-12.) The Lynch Carpenter firm spent a total of 308.3 hours in partner and associate time (not including additional prospective time to be spent attending and preparing for the Fairness Hearing) plus 98 hours of paralegal time and $27,578.55 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. (See *id*. at ¶ 12.) Partner-level attorneys at Lynch Carpenter, LLP, expended a total of 167.2 hours on the case to date, and expect to expend an additional 3.5 hours relating to the Fairness Hearing. (See *ibid.*) Associate attorneys spent a total of 141.1 hours on the case at an hourly rate of $450. (See *ibid.*) The rate for complex class action litigation is $995 per partner hour. (See *id*. at ¶¶ 11, 15-16.) 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 *ibid*.)

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*, *supra*, 24 Cal.4th at p. 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. (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,

[10] Which are currently estimated to be approximately $40,000-$50,000 and will be deducted from the third and final installment payment by Nogin Commerce. (See SA § 2.4.)

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 complex consumer class actions and regularly litigate cases in federal and state courts. (See Carpenter Decl., ¶¶ 16-18.) Moreover, their lodestars are calculated using rates that have been accepted in other class action cases. (See *id.* ¶¶ 11, 18.)

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. (*Hensley v. Eckerhart*, *supra*, 461 U.S. at p. 431.) In addition to time spent during litigation, reasonable hours include time spent before the Action was filed, including interviewing clients, investigating facts and the law, and preparing 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 developing and prosecuting this case, as outlined more fully in the concurrently filed Carpenter Declaration. (See Carpenter Decl., ¶¶ 2-9.) This work ultimately culminated in the Settlement currently before the Court, which returns significant and meaningful value to California consumers. Lastly, the fee award also includes time spent to prepare and litigate the attorneys' fee claim. (See *Serrano*, *supra*, 32 Cal.3d at p. 639.)

C. The Requested Multiplier is Reasonable

Once the lodestar is calculated, it may be enhanced with a multiplier. (See *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 v. Occidental Petroleum Corp.* (C.D. Cal. 1997) 968 F.Supp. 1396, 1401 *aff'd* (9th Cir. 1999) 192 F.3d 1323.) 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 approximately 2.28, an amount 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]; *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 III*, *supra*, 20 Cal.3d at p. 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 provides a significant financial benefit to Class Members and represents a real and substantial deterrent against future consumer retail pricing law violations. This result alone justifies the modest multiplier requested. However, courts also consider the following additional factors in determining the reasonableness of the requested multiplier: (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—which admittedly overlap at least somewhat with the percentage-method-reasonableness factors addressed above in Section V—also fully support the requested multiplier of approximately 2.28.

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, Plaintiff would be tasked with proving that Defendants' 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, specializes in complex class actions and regularly litigate cases in California federal and state courts. (See Carpenter Decl., ¶¶ 16-18.) Historically, Class Counsel has achieved excellent results for millions of consumers in contested consumer class actions. Equipped with this significant background, Class Counsel worked 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*, *supra*, 24 Cal.4th at p. 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 likely appeal. Class Counsel also went above and beyond to revitalize the prospective settlement following Nogin, Inc.'s bankruptcy. 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 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 section 1021.5 of the Code of Civil Procedure if they would normally be billed to a fee-paying client. (See *Beasley v. Wells Fargo*, *supra*, 235 Cal.App.3d

at p. 1419; Civ. Code, § 1780, subd. (d) [providing for costs to prevailing plaintiff in CLRA action].) Class Counsel's collective requested reimbursement of $27,578.55 in litigation costs incurred to date, which is included in the fee request of $600,000, 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. (See Carpenter Decl., ¶11.) Costs include, *inter alia*, (1) court fees and service of process; (2) scanning, photocopying, printing and other related costs (waived); (3) expert consultants and data mining; (4) mediation (5) travel expenses. (See *ibid*.) These types of costs are typical to those billed by attorneys to fee-paying clients. (See *Beasley v. Wells Fargo*, *supra*, 235 Cal.App.3d at p. 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, 958-959; 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, 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 herself into active litigation to enforce an important right for the benefit of the general public. Moreover, Plaintiff risked potential judgment against herself if this case had been unsuccessful. In class action losses, class representatives are deemed the losing party liable for the prevailing party's costs. (See *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 Plaintiff is relatively low and implicitly reasonable by comparison to other consumer class action settlements. (See e.g., *Williams v. Costco Wholesa*le *Corp.* (S.D. Cal. July 7, 2010, No. 02CV2003 IEG(AJB)) 2010 WL 2721452, at *7 [$5,000 incentive award in antitrust case settled for $440,000]; *Cellphone Termination Fee Cases*, *supra*, 186 Cal.App.4th at p. 1393-1394 [$10,000 incentive awards to each of the four class representatives].)

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 $600,000 and Individual Settlement Award to Plaintiff in the amount of $2,500.

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