SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

STEVEN DOVAL, MELISSA CUELLO, and CEANA CUELLO, individually and on behalf of all others similarly situated, Plaintiffs, v. FAIRLEIGH DICKINSON UNIVERSITY, Defendant.	Case No. BER-L-004966-20

PLAINTIFFS' NOTICE OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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PLEASE TAKE NOTICE that the undersigned will apply to the above named Court located at Bergen County Justice Center, 10 Main Street, Floor 4, Hackensack, New Jersey 07601, on May 6, 2024, at 9:00 am or as soon thereafter as counsel may be heard, for an Order Granting Plaintiffs' Motion for Preliminary Approval of the Settlement, pursuant to *R.* 4:32-1 and *R.* 4:32-2 of the Rules Governing the Courts of the State of New Jersey.

Counsel will rely upon the annexed Declaration and brief in support of its motion. Pursuant to *R.* 1:6-2(d), the undersigned requests oral argument on this motion. Pursuant to *R.* 1:6-2(c), this matter is not scheduled for trial or calendar call. A proposed form of Order is annexed hereto.

Dated: April 16, 2024

Respectfully submitted,

By: */s/ Philip L. Fraietta*

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SUPERIOR COURT OF NEW JERSEY
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STEVEN DOVAL, MELISSA CUELLO, and CEANA CUELLO, individually and on behalf of all others similarly situated, Plaintiffs, v. FAIRLEIGH DICKINSON UNIVERSITY, Defendant.	Case No. BER-L-004966-20 Civil Action

[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT, CERTIFYING SETTLEMENT CLASS, APPOINTING CLASS REPRESENTATIVES, APPOINTING CLASS COUNSEL, AND APPROVING NOTICE PLAN

WHEREAS, a class action is pending before the Court entitled *Doval et al. v. Fairleigh Dickinson University*, Docket No. BER-L-004966-20; and

WHEREAS, Plaintiffs Steven Doval, Melissa Cuello, and Ceana Cuello and Defendant Fairleigh Dickinson University (together, the "Parties") have entered into a Class Action Settlement Agreement, which, together with the exhibits attached thereto, sets forth the terms and conditions for a proposed settlement and dismissal of the Action with prejudice as to Defendant upon the terms and conditions set forth therein (the "Settlement Agreement"), and the Court having read and considered the Settlement Agreement and exhibits attached thereto;

This matter coming before the Court upon the agreement of the parties, good cause being shown, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:

1. Terms and phrases in this Order shall have the same meaning as ascribed to them in the Settlement Agreement.

2. The Parties have moved the Court for an order approving the settlement of the Action in accordance with the Settlement Agreement, which, together with the documents incorporated therein, sets forth the terms and conditions for a proposed settlement and dismissal of the Action with prejudice, and the Court having read and considered the Settlement Agreement and having heard the parties and being fully advised in the premises, hereby preliminarily approves the Settlement Agreement in its entirety subject to the Final Approval Hearing referred to in paragraph 5 of this Order.

3. This Court finds that it has jurisdiction over the subject matter of this action and over all Parties to the Action.

4. The Court finds that, subject to the Final Approval Hearing, the Settlement Agreement is fair, reasonable, and adequate, within the range of possible approval, and in the best interests of the Settlement Class set forth below. The Court further finds that the Settlement Agreement substantially fulfills the purposes and objectives of the class action, and provides substantial relief to the Settlement Class without the risks, burdens, costs, or delay associated with continued litigation, trial, and/or appeal. The Court also finds that the Settlement Agreement (a) is the result of arm's-length negotiations between experienced class action attorneys; (b) is sufficient to warrant notice of the settlement and the Final Approval Hearing to be disseminated to the Settlement Class; (c) meets all applicable requirements of law, including New Jersey Court Rule 4:32-1; and (d) is not a finding or admission of liability by the Defendant or any other person, nor a finding of the validity of any claims asserted in the Action or of any wrongdoing or any violation of law.

Final Approval Hearing

5. The Final Approval Hearing shall be held before this Court on

________________, at ______,[*no earlier than 90 calendar days after the Notice Date*] at the Superior Court of New Jersey, Bergen County, 10 Main Street, Hackensack, New Jersey, 07601, to determine (a) whether the proposed settlement of the Action on the terms and conditions provided for in the Settlement Agreement is fair, reasonable, and adequate and should be given final approval by the Court; (b) whether a judgment and order of dismissal with prejudice should be entered; (c) whether to approve the payment of attorneys' fees, costs, and expenses to Class Counsel; and (d) whether to approve the payment of an incentive award to the Class Representatives. The Court may adjourn the Final Approval Hearing without further notice to members of the Settlement Class.

6. Class Counsel shall file papers in support of their Fee Award and Class Representatives' Incentive Award (collectively, the "Fee Petition") with the Court on or before _________ [*suggested date of 46 days after the Notice Date (i.e., at least 14 days before the Objection/Exclusion Deadline)*.] Defendant may, but is not required to, file a response to Class Counsel's Fee Petition with the Court on or before __________ [*suggested date of 21 days before Final Approval hearing.*] Class Counsel may file a reply in support of their Fee Petition with the Court on or before _________ [*suggested date of 14 days before Final Approval hearing.*]

7. Papers in support of final approval of the Settlement Agreement and any supplementation to the Fee Petition shall be filed with the Court on or before _________ [*suggested date of 14 days before Final Approval hearing.*]

Certification of the Settlement Class

8. For purposes of settlement only: (a) Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A., Antonio Vozzolo of Vozzolo LLC, and Ronald A. Marron of Law Offices

of Ronald A. Marron, APLC are appointed Class Counsel for the Settlement Class; and (b) Steven Doval, Melissa Cuello, and Ceana Cuello are named Class Representatives. The Court finds that these attorneys are competent and capable of exercising the responsibilities of Class Counsel and that Plaintiffs Doval, Cuello, and Cuello will adequately protect the interests of the Settlement Class defined below.

9. For purposes of settlement only, the Court conditionally certifies the following Settlement Class as defined in the Settlement Agreement:

> [A]ll people who paid Defendant Spring 2020 Semester tuition and fees or who benefitted from the payment, and whose tuition and fees have not been refunded.

10. The Court finds, subject to the Final Approval Hearing referred to in Paragraph 5, that the Settlement Agreement is fundamentally fair, adequate, and reasonable, and, solely within the context of and for the purposes of settlement only, that the Settlement Class satisfies the requirements of New Jersey Court Rule 4:32-1, specifically, that: the Settlement Class is so numerous that joinder of all members is impracticable; there are questions of fact and law common to the Settlement Class; the claims of the Class Representatives are typical of the claims of the members of the Settlement Class; the Class Representatives and Class Counsel will fairly and adequately protect the interests of the members of the Settlement Class; common questions of law or fact predominate over questions affecting individual members; and a class action is a superior method for fairly and efficiently adjudicating the Action.

11. If the Settlement Agreement does not receive the Court's final approval, or if final approval is reversed on appeal, or if the Settlement Agreement is terminated or otherwise fails to become effective, the Court's grant of class certification shall be vacated, and the Class Representatives will once again bear the burden of establishing the propriety of class

certification. In such case, neither the certification of the Settlement Class for settlement purposes, nor any other act relating to the negotiation or execution of the Settlement Agreement shall be considered as a factor in connection with any class certification issue(s).

Notice and Administration

12. The Court approves, as to form, content, and distribution, the Notice Plan set forth in the Settlement Agreement, including all forms of Notice to the Settlement Class as set forth in the Settlement Agreement and Exhibits A through D thereto (the "Notice Forms"). The Notice Plan shall be commenced by _______________ [*suggested date of 21 days after entry of this Order, in accordance with §§ 6.2 and 6.3 of the Settlement Agreement*] as outlined in Section 6 of the Settlement Agreement. The Court finds that such Notice is the best notice practicable under the circumstances, and that the Notice complies fully with the requirements of New Jersey Court Rule 4:32-2. The Court also finds that the Notice constitutes valid, due and sufficient notice to all persons entitled thereto, and meets the requirements of Due Process. The Court further finds that the Notice is reasonably calculated to, under all circumstances, reasonably apprise members of the Settlement Class of the pendency of this action, the terms of the Settlement Agreement, and the right to object to the settlement and to exclude themselves from the Settlement Class. In addition, the Court finds that no notice other than that specifically identified in the Settlement Agreement is necessary in this Action. The Parties, by agreement, may revise the Notice Forms in ways that are not material, or in ways that are appropriate to update those documents for purposes of accuracy or formatting.

13. The Court approves the request for the appointment of RG2 Claims Administration LLC as Settlement Administrator of the Settlement Agreement.

14. Pursuant to the Settlement Agreement, the Settlement Administrator is directed to

publish the Notice Forms on the Settlement Website and to send direct notice via U.S. Mail and email, in accordance with the Notice Plan called for by the Settlement Agreement. The Settlement Administrator shall also maintain the Settlement Website to provide full information about the Settlement.

15. This Order shall constitute a "judicial order" within the meaning of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g and 34 C.F.R. § 99.31(a)(9), sufficient to compel Fairleigh Dickinson University to provide the Out-of-Pocket Fees information to the Settlement Administrator for purposes of administering the Settlement Agreement. The Court further rules that the Notice Plan outlined in Section V of the Settlement Agreement and the Notice Forms constitute a reasonable effort, per New Jersey Court Rule 4-32(e), to notify eligible students (or their parents) of this order sufficiently in advance of disclosure to allow the student (or parent) an opportunity to seek protective action, including filing a motion to quash with this Court.

Requests for Exclusion from Class

16. Any person falling within the definition of the Settlement Class may, upon valid and timely request, exclude themselves or "opt out" from the Class. Any such person may do so if, on or before the Objection/Exclusion Deadline, which the Court orders to be set as 60 days after the Notice Date, they comply with the exclusion procedures set forth in the Settlement Agreement and Notice. Any members of the Class so excluded shall neither be bound by the terms of the Settlement Agreement nor entitled to any of its benefits.

17. Any members of the Settlement Class who elect to exclude themselves or "opt out" of the Settlement Agreement must file a written request with the Settlement Administrator, received or postmarked no later than the Objection/Exclusion Deadline. The request for

exclusion must comply with the exclusion procedures set forth in the Settlement Agreement and Notice and include the Settlement Class member's name and address, a signature, the name and number of the case, and a statement that he or she wishes to be excluded from the Settlement Class for the purposes of this Settlement. Each request for exclusion must be submitted individually. So called "mass" or "class" opt-outs shall not be allowed.

18. Individuals who opt out of the Class relinquish all rights to benefits under the Settlement Agreement and will not release their claims. However, members of the Settlement Class who fail to submit a valid and timely request for exclusion shall be bound by all terms of the Settlement Agreement and the Final Judgment, regardless of whether they have requested exclusion from the Settlement Agreement.

Appearances and Objections

19. At least twenty-one (21) calendar days before the Final Approval Hearing, any person who falls within the definition of the Settlement Class and who does not request exclusion from the Class may enter an appearance in the Action, at their own expense, individually or through counsel of their own choice. Any Settlement Class Member who does not enter an appearance will be represented by Class Counsel.

20. Any members of the Settlement Class who have not timely filed a request for exclusion may object to the fairness, reasonableness, or adequacy of the Settlement Agreement or to a Final Judgment being entered dismissing the Action with prejudice in accordance with the terms of the Settlement Agreement, or to the attorneys' fees and expense reimbursement sought by Class Counsel in the amounts specified in the Notice, or to the award to the Class Representatives as set forth in the Notice and Settlement Agreement. At least fourteen (14) days prior to the Objection/Exclusion Deadline, papers supporting the Fee Award shall be filed with

the court and posted to the settlement website. Members of the Class may object on their own, or may do so through separate counsel at their own expense.

21. To object, members of the Class must sign and file a written objection no later than on or before the Objection/Exclusion Deadline, which the Court orders to be set as 60 days after the Notice Date. To be valid, the objection must comply with the objection procedures set forth in the Settlement Agreement and Notice. Specifically, the objection must contain a caption or title that identifies it as "Objection to Class Settlement in *Doval v. Fairleigh Dickinson*," contact and address information for the objecting Settlement Class Member, documents sufficient to establish the person's standing as a Settlement Class Member (such as, for example, the person's Fairleigh Dickinson University Spring 2020 fee invoice), the facts supporting the objection, and the legal grounds on which the objection is based, the name and contact information of any and all attorneys representing, advising, or in any way assisting him or her in connection with the preparation or submission of the objection or who may profit from the pursuit of the objection (the "Objecting Attorneys"), and a statement indicating whether he or she intends to appear at the Final Approval Hearing (either personally or through counsel who files an appearance with the Court in accordance with New Jersey Superior Court Local Rules). If a Settlement Class Member or any of the Objecting Attorneys has objected to any class action settlement where the objector or the Objecting Attorneys asked for or received any payment in exchange for dismissal of the objection, or any related appeal, without any modification to the settlement, then the objection must include a statement identifying each such case by full case caption. Class Counsel and Defendant's Counsel may petition the Court for discovery of any objector to determine whether the objector has standing as a Settlement Class Member.

22. Members of the Class who fail to file and serve timely written objections in

compliance with the requirements of this paragraph and the Settlement Agreement shall be deemed to have waived any objections and shall be foreclosed from making any objections (whether by appeal or otherwise) to the Settlement Agreement or to any of the subjects listed in paragraph 5, above, *i.e.* (a) whether the proposed settlement of the Action on the terms and conditions provided for in the Settlement Agreement is fair, reasonable, and adequate and should be given final approval by the Court; (b) whether a judgment and order of dismissal with prejudice should be entered; (c) whether to approve the payment of attorneys' fees and expenses to Class Counsel; and (d) whether to approve the payment of an incentive award to the Class Representatives.

23. To be valid, objections by persons represented by counsel must be filed electronically on the docket. Pro se objectors may mail their objects to the Court, Honorable Nicholas Ostuni, 10 Main Street, Floor 4, Hackensack, New Jersey 07601, with a copy also sent to Class Counsel (Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A., 1330 Avenue of the Americas, New York, New York, 10019, Antonio Vozzolo, 345 Route 17 South, Upper Saddle River, New Jersey 07458, and Ronald A. Marron, 651 Arroyo Drive, San Diego, California 92103; and Defendant's Counsel Angelo Stio, 301 Carnegie Center, Suite 400, Princeton, New Jersey 08540.

Further Matters

24. All further proceedings in the Action are ordered stayed until Final Judgment or termination of the Settlement Agreement, whichever occurs earlier, except for those matters necessary to obtain and/or effectuate final approval of the Settlement Agreement.

25. Members of the Settlement Class shall be bound by all determinations and judgments concerning the Settlement Agreement and Final Approval of same, whether favorable

or unfavorable.

26. The Court retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement Agreement. The Court may approve the Settlement Agreement, with such modifications as may be agreed to by the Parties, if appropriate, without further notice to the Class.

27. Any Settlement Class Member who does not timely and validly request exclusion from the Class pursuant to Paragraphs 16-18 hereto: (a) shall be bound by the provisions of the Settlement Agreement and all proceedings, determinations, orders and judgments in the Action relating thereto, including, without limitation, the Final Judgment, and the Releases provided for therein, whether favorable or unfavorable to the Class; and (b) shall forever be barred and enjoined from directly or indirectly filing, commencing, instituting, prosecuting, maintaining, or intervening in any action, suit, cause of action, arbitration, claim, demand, or other proceeding in any jurisdiction, whether in the United States or elsewhere, on their own behalf or in a representative capacity, that is based upon or arises out of any or all of the Released Claims against any of the Defendant and the other Released Parties, as more fully described in the Settlement Agreement.

28. Pursuant to this Order:

a. The Notice Plan shall be commenced by _______________ [*suggested date of 21 days after entry of this Order*] as outlined in Section 5.1 of the Settlement Agreement;

b. Class Counsel shall file papers in support of their Fee Award and Class Representatives' Incentive Awards (collectively, the "Fee Petition") with the Court on or before _________ [*suggested date of 46 days after the Notice*

Date (i.e., at least 14 days before the Objection/Exclusion Deadline).] Defendant may, but is not required to, file a response to Class Counsel's Fee Petition with the Court on or before __________ [*suggested date of 21 days before Final Approval hearing.*] Class Counsel may file a reply in support of their Fee Petition with the Court on or before _________ [*suggested date of 14 days before Final Approval hearing.*];

c. Objections shall be filed in accordance with Paragraph 21 of this Order on or before _________ [*suggested date of 60 days after the Notice Date.*];

d. Requests for Exclusion shall be submitted in accordance with Paragraph 17 of this Order on or before _________ [*suggested date of 60 days after the Notice Date.*];

e. Papers in support of final approval of the Settlement Agreement and any supplementation to the Fee Petition shall be filed with the Court on or before _________ [*suggested date of 14 days before Final Approval hearing.*];

f. The Final Approval Hearing shall be held before this Court on ________________, at ______. [*no earlier than 90 days after the Notice Date*] at the Superior Court of New Jersey, Bergen County, 10 Main Street, Floor 4, Hackensack, New Jersey 07601.

g. The Claim Deadline shall be ___________ [*no later than 45 days after the Final Approval Hearing*].

IT IS SO ORDERED, this ______ day of _______________, 2024.

____
The Honorable Nicholas Ostuni, J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

STEVEN DOVAL, MELISSA CUELLO, and CEANA CUELLO, individually and on behalf of all others similarly situated, Plaintiffs, v. FAIRLEIGH DICKINSON UNIVERSITY, Defendant.	Case No. BER-L-004966-20

DECLARATION OF PHILIP L. FRAIETTA IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

I, Philip L. Fraietta, hereby declare as follows:

1. I am a partner at Bursor & Fisher, P.A., counsel of record for Plaintiffs in this action. I am an attorney at law licensed to practice in the State New Jersey, and I am a member of the bar of this Court. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, I could and would testify competently thereto.

2. I make this declaration in support of Plaintiffs' motion for preliminary approval of the class action settlement filed herewith.

3. Attached hereto as **Exhibit 1** is a true and correct copy of the Parties' Class Action Settlement Agreement. Attached as **Exhibits B-D** to the Settlement agreement are the Proposed Class Notices.

The Litigation And Settlement History

4. On August 25, 2020, Plaintiffs Steven Doval, Melissa Cuello and Ceana Cuello filed a putative class action complaint alleging that FDU breached a contract with its students and

should have refunded tuition and fees for a portion of the Spring 2020 academic semester after FDU ceased to hold in-person classroom instruction and moved to a remote learning format.

5. In response to the Complaint, on October 29, 2020, FDU filed a motion to dismiss.

6. On December 4, 2020, Plaintiffs filed their opposition to Defendant's motion to dismiss.

7. On February 5, 2021, following oral argument, the Court denied Defendant's motion to dismiss.

8. Following the Order, on February 19, 2021, Defendant filed an answer to the Complaint, denying the allegations and asserting 24 affirmative defenses.

9. The Parties engaged in significant formal discovery, including propounding and responding to requests for the production of documents and interrogatories. FDU produced approximately 4,788 pages of documents for Plaintiffs' review and Plaintiffs produced 27 pages of documents for FDU's review.

10. During the discovery phase, Plaintiffs' Counsel and counsel for FDU initiated settlement discussions to reach a potential resolution of the litigation. On June 3, 2022, the Parties requested a stay of all case management deadlines to allow the Parties to focus their efforts on facilitating a potential resolution.

11. On May 25, 2022 and February 15, 2023, the Parties participated in full-day mediation sessions before a third-party neutral, Hon. Frank A. Buczynski, Jr. (Ret.) in an attempt to resolve this action.

12. In advance of the mediation sessions, the Parties exchanged formal and informal discovery, including discovery related to the class size and total out-of-pocket amount paid for in-person tuition and fees for the Spring Semester 2020. The parties also exchanged mediation

statements, airing their respective legal arguments and theories on potential damages. FDU also provided financial records detailing tuition and fees collected for the Spring Semester 2020. Class Counsel also spoke with potential merits and damages experts concerning the strengths and weakness of the case, as well as the strengths and weaknesses of FDU's arguments and defenses. Given that this information was the same or largely similar to discovery that would be produced in formal discovery related to class certification and summary judgment, the Parties were able to sufficiently assess the strengths and weaknesses of their cases prior to mediation.

13. Both mediation sessions proved unsuccessful; however, the Parties maintained an open dialogue regarding resolution and, in the ensuing months, the Parties continued their settlement dialogue directly.

14. The Parties reached agreement and finalized the settlement though several weeks of additional vigorous, arm's-length negotiations and other extensive communications. Plaintiffs and Defendant reached an agreement that creates a $1,500,000.00 settlement fund, which will be used to pay all approved claims by class members, notice and administration expenses, Court-approved incentive awards to Plaintiffs, and attorneys' fees to proposed Class Counsel to the extent awarded by the Court.

15. Pursuant to the terms of the Proposed Settlement, Settlement Class Members (which consist of approximately 8100 current and former FDU students and others who paid FDU Spring 2020 Semester tuition and fees) who submit a valid claim form will receive a *pro rata* cash payment, not to exceed $155.00, as a percentage of the total amount of tuition and fees he or she paid to FDU for the Spring Semester 2020 (less any outstanding balance from the Spring 2020 term still owed to Defendant as reflected on the Class Member's account with FDU).

Factors Supporting Final Approval

16. The Settlement is the result of extensive arm's length negotiations among the Parties and their highly experienced counsel. The Settlement provides significant and immediate monetary benefits considering all of the attendant risks and delays of litigation. Prior to reaching resolution, proposed Class Counsel thoroughly investigated the case, and in doing so, gathered ample information to assess the strengths and weaknesses of the Parties' positions. Having weighed the likelihood of success and the inherent risks and expense of litigation, Plaintiffs strongly believe that the proposed settlement is "fair, reasonable, and adequate" as required by Rule 4:32-2(e).

17. The Parties agreed to the terms of the Settlement through experienced counsel who possessed all the information necessary to evaluate the case, determine all the contours of the proposed class, and reach a fair and reasonable compromise after negotiating the terms of the Settlement at arm's length and with the assistance of a neutral mediator.

18. Apart from the Settlement Agreement itself, there are no additional agreements between the parties.

19. Plaintiffs and proposed Class Counsel recognize that despite their belief in the strength of Plaintiffs' claims, and Plaintiffs' and the Class's ability to ultimately secure a favorable judgment at trial, the expense, duration, and complexity of protracted litigation would be substantial and the outcome of trial uncertain.

20. Plaintiffs and proposed Class Counsel are also mindful that absent a settlement, the success of Defendant's various defenses in this case could deprive the Plaintiffs and Settlement Class Members of any potential relief whatsoever. Defendant is represented by highly experienced attorneys who have made clear that absent a settlement, they are prepared to continue their

vigorous defense of this case. Plaintiffs and proposed Class Counsel are also aware that Defendant would continue to challenge liability as well as assert a number of defenses, including that it did not make a contractual promise for in-person educational services. Defendant would have also vigorously contested the certification of a litigation class. Looking beyond trial, Plaintiff is aware that Defendant could appeal the merits of any adverse decision. Thus, there was a significant risk of delay in achieving final resolution of this matter, along with the risk of obtaining no recovery at all.

21. Thus, the Settlement secures a more proximate and more certainty monetary benefit to the Class than continued litigation. Plaintiffs and proposed Class Counsel believe that the relief provided by the settlement weighs heavily in favor of a finding that the settlement is fair, reasonable, and adequate, and well within the range of approval.

22. My firm, Bursor & Fisher, P.A., has significant experience in litigating class actions of similar size, scope, and complexity to the instant action. (*See* Firm Resume of Bursor & Fisher, P.A., a true and accurate copy of which is attached hereto as **Exhibit 2**). My firm has also been recognized by courts across the country for its expertise and skilled and effective representation. *See*, *e.g.*, Exhibit 2; *see also Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five class action jury trials since 2008."); *In re Welspun Litigation*, Case No. 16-cv-06792-RJS (S.D.N.Y. January 26, 2017) (appointing Bursor & Fisher interim lead counsel to represent a proposed nationwide class of purchasers of mislabeled Welspun Egyptian cotton bedding products). My firm has zealously

represented the interests of the Class and committed substantial resources to the resolution of the class claims.

23. Attached hereto as **Exhibits 3 and 4** respectively are true and correct copies of the firm resumes of Vozzolo LLC and Law Offices of Ronald A. Marron, APLC.

24. Vozzolo LLC is a civil litigation firm with offices in New York and New Jersey. The firm focuses on complex litigation, including consumer protection class actions, as well as securities and shareholder derivative litigation. The firm litigates cases throughout the country, including in both federal and state courts. The firm's attorneys are experienced in, and thoroughly familiar with, all aspects of class action litigation, including the underlying substantive law, the substance and procedure of class certification, and trial. In numerous high-profile matters, Vozzolo LLC's founder, Antonio Vozzolo, has played a principal or lead role establishing new law, obtaining groundbreaking rulings, and securing substantial recoveries for his clients.

25. Before creating the firm in 2016, Mr. Vozzolo was a partner at Faruqi & Faruqi, LLP, one of the country's leading securities litigation firms, serving in various capacities, including Chair of the firm's Consumer Litigation Department, and Chair of the firm's Securities Litigation Department. Over his 20-year career, Mr. Vozzolo has recovered hundreds of millions of dollars and other significant remedial benefits on behalf of consumers and investors. In *Thomas v. Global Vision Products*, Case No. RG-03091195 (California Superior Ct., Alameda Cty.), Mr. Vozzolo served as co-lead counsel in a consumer class action lawsuit against Global Vision Products, Inc., the manufacturer of the Avacor hair restoration product and its officers, directors and spokespersons, in connection with the false and misleading advertising claims regarding the Avacor product. In January 2008, a jury in the first trial returned a verdict of almost $37 million against two of the creators of the product. In November 2009, another jury awarded plaintiff and

the class more than $50 million in a separate trial against two other company directors and officers. This jury award represented the largest consumer class action jury award in California in 2009 (according to VerdictSearch, a legal trade publication).

26. Mr. Vozzolo has considerable leadership experience in complex litigation, serving as lead or co-lead counsel in at least 19 putative consumer class action cases since 2011, including: *In re: Michaels Stores Pin Pad Litig.*, Case No. 1:11-CV-03350 CPK (N.D. Ill. June 8, 2011); *In re Haier Freezer Consumer Litig.*, No. C11-02911 (N.D. Cal. Aug. 17, 2011); *Loreto v. Coast Cutlery Co.*, No. 11-3977 (D.N.J. Sep. 8, 2011); *Astiana v. Kashi Co.*, No. 3:11-cv-01967-H BGS (S.D. Cal. Sept. 28, 2011); *Rodriguez v. CitiMortgage, Inc.*, No. 1:11-cv-04718 (S.D.N.Y. Nov. 14, 2011); *Avram v. Samsung Elecs. Am., Inc.*, No. 11-6973 (D.N.J. Jan 3, 2012); *Rossi v. Procter & Gamble Co.*, No. 11-7238 (D.N.J. Jan. 31, 2012); *Dzielak v. Whirlpool Corp.*, No. 2:12-cv-0089 (D.N.J. Feb. 21, 2012); *Jovel et al., v. i-Health, Inc.*, No 1:12-cv-05614 (E.D.N.Y. March 27, 2012); *Dei Rossi v. Whirlpool Corp.*, No. 12-125 (E.D. Cal. Apr. 19, 2012); *In re Scotts EZ Seed Litig.*, No. 7:12-cv-4727 (VB) (S.D.N.Y. Sept. 19, 2012); *Forcellati et al., v Hyland's, Inc. et al.,* No. CV 12-1983-GHK (C.D. Cal. Nov. 8, 2012); *In re Sinus Buster Prods. Consumer Litig.,* No. 12-2429 (E.D.N.Y. Dec. 17, 2012); *In re 5-Hour ENERGY Mktg. and Sales Practice Litig.,* No. 13-ml-2438 (C.D. Cal. Nov. 8, 2013); *Potzner v. Tommie Copper Inc., et al.,* No. 7:15-cv-03183 (S.D.N.Y. Jan. 4, 2016); *Inocencio, et al. v. Telebrands Corp.,* No. BER-L 4378-16 (N.J. Super. Ct. 2016); *Robbins, et al. v. Gencor Nutrients, Inc., et al.,* No. 16AC-CC00366 (Cir. Ct., Cole County, *Missouri* 2016); *Liptai v. Spectrum Brands Holdings Inc., et al.,* Case No. 2018CV000321 (Cir. Ct., Dane County, Wisconsin 2018); *Fried v. JPMorgan Chase & Co., et al.*, No. 2:15-cv-02512 (D.N.J. March 28, 2019); and *Jimenez, et al. v. Artsana USA, Inc.*, No. 21-cv-7933 (S.D.N.Y., 2023).

27. The Law Offices of Ronald A. Marron is a recognized class action and complex litigation firm based in San Diego, California, representing clients across the nation in both state and Federal courts. Founded in 1996 with an emphasis on consumer and securities fraud, the firm has expanded its practice to include complex cases such as electronic privacy, medical privacy, data breaches, banking regulations, antitrust, automatic renewals, Telephone Consumer Protection Act, Government Environmental Law Litigation, and false and misleading advertising and labeling. The firm has skillfully litigated hundreds of lawsuits on behalf of consumers harmed by companies under various consumer laws, winning monetary and injunctive relief for classes of consumers. Additional information on the Firm's recent successes is contained in the Marron Firm Resume attached as Exhibit 4.

28. Based on Class Counsel's experience litigating similar consumer class actions, Class Counsel is of the opinion that the Settlement is fair, reasonable, and adequate.

29. As discussed above and throughout Plaintiff's Motion for Preliminary Approval of Class Action Settlement, the Settlement reached in this case was the product of negotiations conducted at arms' length by experienced counsel representing adversarial parties, and there is absolutely no evidence of fraud or collusion.

30. Class Counsel have advanced and will continue to advance and fully protect the common interests of all members of the Settlement Class. Class Counsel conducted a full and thorough investigation of the claims, has zealously represented the interests of the Class, and committed substantial resources to resolving the class claims. Accordingly, R. 4:32-1(a)(4) is satisfied and Class Counsel warrant appointment under R. 4:32-2(g)(1)(C).

31. The Plaintiffs have not displayed any conflicts with members of the Settlement Class. Throughout the pendency of this action, Steven Doval, Melissa Cuello, and Ceana Cuello, the

proposed Class Representatives, have adequately and vigorously represented their fellow Class Members. They have spent significant time assisting their counsel, detailing their experiences with FDU during the Spring 2020 Semester, providing information regarding Defendant's policies and practices, providing pertinent documents, and assisting in settlement negotiations. Plaintiffs were prepared to testify at deposition and trial, if necessary. And they were actively consulted during the settlement process.

32. My firm is unaware of any individual actions that have been instituted by Class Members.

33. Attached hereto as **Exhibit 5** is a true and correct copy of the opinion from *Cerbo v. Ford of Englewood,* 2006 WL 177586 (Law. Div. Jan. 25, 2006).

34. Attached hereto as **Exhibit 6** is a true and correct copy of the opinion from *Curiale v. Lenox Group, Inc.,* 2008 WL 4899474 (E.D. Pa. Nov. 14, 2008).

35. Attached hereto as **Exhibit 7** is a true and correct copy of the opinion from *Educ. Station Day Care Ctr., Inc. v. Yellow Book USA, Inc.,* 2007 N.J. Super. Unpub. LEXIS 1607 (N.J. Super. Ct. App. Div. May 1, 2007).

36. Attached hereto as **Exhibit 8** is a true and correct copy of the opinion from *Faber v. Cornell Univ.,* 2023 U.S. Dist. LEXIS 148833 (N.D.N.Y. Aug. 24, 2023).

37. Attached hereto as **Exhibit 9** is a true and correct copy of the opinion from *Gurriere v. Bloomfield Condo. Assocs.,* 2015 WL 10172760 (N.J. Super. Ch., Essex County Aug. 28, 2015).

38. Attached hereto as **Exhibit 10** is a true and correct copy of the opinion from *In re Hemispherx Biopharma, Inc.,* 2011 U.S. Dist. LEXIS 172214 (E.D. Pa. Feb. 11, 2011).

39. Attached hereto as **Exhibit 11** is a true and correct copy of the opinion from *Miranda v. Xavier Univ.,* 2023 U.S. Dist. LEXIS 178072 (S.D. Ohio Oct. 3, 2023).

40. Attached hereto as **Exhibit 12** is a true and correct copy of the opinion from *Saini v. BMW of N. Am., L.L.C.,* 2015 WL 2448846 (D.N.J. May 21, 2015).

41. Attached hereto as **Exhibit 13** is a true and correct copy of the opinion from *Singelton v. First Student Management LLC,* 2014 WL 3865853 (D.N.J. Aug. 6, 2014).

42. Attached hereto as **Exhibit 14** is a true and correct copy of the opinion from *Skeen v. BMW of N. Am., L.L.C.,* 2016 WL 4033969 (D.N.J. Jul. 26, 2016).

43. The parties have engaged RG2 Claims Administration LLC as Settlement/Claims administrator to provide notification and claims administration services in this matter. RG2 is a competent and experienced claims administration firm and has been approved by many courts to administer class action settlements. A true and correct copy of RG2's Curriculum Vitae is attached hereto as **Exhibit 15**.

I declare under penalty of perjury that the above and foregoing is true and accurate.

Executed on April 16, 2024, in New York, New York.

/s Philip L. Fraietta
Philip L. Fraietta

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

STEVEN DOVAL, MELISSA CUELLO, and CEANA CUELLO, individually and on behalf of all others similarly situated, Plaintiffs, v. FAIRLEIGH DICKINSON UNIVERSITY, Defendant.	Case No. BER-L-004966-20

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs Steven Doval, Melissa Cuello, and Ceana Cuello (collectively, "Plaintiffs"), on behalf of themselves and all others similarly situated, seek the Court's approval of the Settlement Agreement reached with defendant Fairleigh Dickinson University ("FDU" or "Defendant") (collectively, the "Parties"). Plaintiffs' operative complaint alleges claims against FDU for breach of contract to provide an in-person educational experience when it transitioned Spring Semester 2020 classes to remote learning in light of the COVID-19 pandemic.

The Parties have negotiated an exceptional agreement that delivers immediate relief to Settlement Class Members.[1] Specifically, Defendant has agreed to pay $1,500,000.00 into a Settlement Fund which will be used to, *inter alia*, provide Settlement Class Members with a *pro rata* Cash Award not to exceed a total of $155.00 per student. On a dollar-per-student basis, this Settlement falls squarely within the range established by previous, similar settlements that have been preliminarily and finally approved in the COVID-19 tuition and fee refund context. *See, e.g., Fittipaldi v. Monmouth Univ.*, No. 3:20-cv-05526 (D.N.J.) ($1.3MM common fund); *Choi v. Brown University*, No. 1:20-cv-00191 (D.R.I., 2022) ($1.5MM common fund); *Wright v. S. New Hampshire Univ.*, No. 1:20-cv-00609 (D.N.H.) ($1.25MM common fund); *Martin v. Lindenwood Univ.*, No. 4:20-cv-01128 (E.D. Mo.) ($1.65MM common fund).

The proposed Settlement is fair, reasonable, and falls within the range of possible approval. The Settlement is the product of arm's-length negotiations between experienced attorneys familiar with the legal and factual issues of this case and all Settlement Class Members are treated fairly under the terms of the Settlement. Accordingly, Plaintiffs respectfully submit

[1] Capitalized terms used and not otherwise defined herein have the definitions set forth in the Class Action Settlement Agreement and Release ("Settlement" or "Settlement Agreement"), attached as Exhibit 1 to the Declaration of Philip L. Fraietta in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Fraietta Decl.").

that preliminary approval of the Settlement is appropriate and submit for the Court's review a copy of the Settlement Agreement. Fraietta Decl., Ex. 1. Also submitted herewith is a proposed Order Granting Preliminary Approval of Class Settlement (the "Preliminary Approval Order"). Entry of the proposed PreliminaryApproval Order will: (1) grant preliminary approval of the Settlement; (2) conditionally certify the Class; (3) designate Plaintiffs as Class Representatives and appoint Philip L. Fraietta and Alec Leslie of Bursor & Fisher, P.A., Antonio Vozzolo of Vozzolo LLC, and Ronald A. Marron of the Law Offices of Ronald A. Marron, APLC as Class Counsel; (4) establish procedures for giving notice to members of the Settlement Class; (5) approve forms of notice to Settlement Class Members; (6) mandate procedures and deadlines for class exclusion requests and objections; and (7) set a date, time and place for a final approval hearing.

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 25, 2020, Steven Doval, Melissa Cuello and Ceana Cuello filed a putative class action complaint in the Superior Court of New Jersey – Bergen Civil Division. The complaint alleges that FDU breached a contract with its students and should have refunded tuition and fees for a portion of the Spring 2020 academic semester after FDU ceased to hold in-person classroom instruction and moved to a remote learning format in order to comply with Governor Murphy's order requiring all New Jersey institutions of higher education to cease in-person instruction to reduce the spread of COVID-19. *See generally* Complaint. Based on FDU's decision to transition to remote learning, Plaintiffs asserted claims on behalf of themselves and others similarly situated for breach of contract, unjust enrichment, conversion, and for money had and received. *See id*.

In response to the complaint, on October 29, 2020, Defendant filed a Motion to Dismiss arguing among other points, that the Complaint alleges impermissible educational malpractice claims and failed to identify any promise to provide in person instruction or any duty owed by

FDU to provide a refund to students. On December 4, 2020, Plaintiffs filed their opposition to Defendant's motion to dismiss. On February 5, 2021, following oral argument, the Court denied Defendant's motion to dismiss. Following the Order, on February 19, 2021, Defendant filed an answer to the Complaint, denying the allegations and asserting 24 affirmative defenses.

The Parties engaged in significant formal discovery, including propounding and responding to requests for the production of documents and interrogatories. FDU produced approximately 4,788 pages of documents for Plaintiffs' review and Plaintiffs produced 27 pages of documents for FDU's review. During the discovery phase, Plaintiffs' Counsel and counsel for FDU initiated settlement discussions to resolve the litigation, and on June 3, 2022, the Parties requested a brief stay of all case management deadlines to allow the Parties to focus their efforts on facilitating a potential resolution.

On May 25, 2022 and February 15, 2023, the Parties participated in full-day mediation sessions before a third-party neutral, Hon. Frank A. Buczynski, Jr. (Ret.) in an attempt to resolve this action. Though both mediation sessions proved unsuccessful, the Parties maintained an open dialogue regarding resolution. In the ensuing months, the Parties continued their settlement dialogue directly. After extensive, vigorous discussions and arm's-length negotiations, and numerous exchanges of information and settlement proposals, the Parties were able to reach an agreement to resolve the Action, which Plaintiffs and their Counsel believe is fair, reasonable and adequate, and in the best interests of Plaintiffs and Settlement Class Members.

III. THE TERMS OF THE PROPOSED SETTLEMENT

A. The Settlement Class

The proposed Settlement Class consists of all people who paid Defendant Spring 2020 Semester tuition and fees or who benefitted from the payment, and whose tuition and fees have

not been refunded. Excluded from the Settlement Class are: (a) all students who were enrolled entirely in an on-line program during the Spring 2020 Semester, (b) all students whose gift, aid (not including loans) or scholarships, regardless of source, equaled or exceeded the cost of tuition and fees for the Spring 2020 Semester, (c) persons who timely and properly exclude themselves from the Class, and (e) the Court, the Court's immediate family, and Court staff. Settlement § 2.37.

B. Benefits To Settlement Class Members

Under the terms of the Settlement, Defendant will establish a Settlement Fund of $1,500,000.00. *Id.* § 3.1. Payments from the Settlement Fund will be made to Settlement Class Members who submit a valid Claim Form in a *pro rata* amount not to exceed a total of $155.00 per student in attendance. *Id*. Defendant will fund the distribution of payments to Settlement Class Members within 50 days after the Effective Date. *See id.*

C. Release of Claims

The Settlement Agreement provides for the release of all claims against the Released Parties regarding FDU's actions or decisions in respect to the Spring 2020 academic term, including ceasing physically in-person, on-campus education and services and transitioning to a remote format for the Spring 2020 academic term, including but not limited to all claims that were brought or could have been brought in the Action. *See id.* § 2.31; *see also id.* § IV.

D. Payment Of Attorneys' Fees And Expenses

Defendant agrees that Class Counsel may apply for an award of attorneys' fees, costs, and expenses from the Settlement Fund not to exceed one-third (33.3%) of the Settlement Fund (or five hundred thousand dollars ($500,000.00)). *See id.* § 10.1. Payment of the Fee and Expense Award shall be made from the Settlement Fund and should the Court award less than the amount sought by Class Counsel, the difference in the amount sought and the amount ultimately awarded

shall remain in the Settlement Fund. *Id*.

E. Compensation For The Class Representatives

Defendant also agrees that the Class Representatives may apply for an incentive award from the Settlement Fund, in addition to any settlement payment as a result of an Approved Claim pursuant to the Settlement, and in recognition of their efforts on behalf of the Settlement Class, in the amount of not more than five thousand dollars ($5,000.00) each. *See id.* § 10.3. Should the Court award less than this amount, the difference in the amount sought and the amount ultimately awarded shall remain in the Settlement Fund. *Id*. The Class Representatives' agreement to the Settlement is not conditioned on the possibility of receiving monetary payment. *Id*.

F. Notice And Administration

The Settlement Fund will be used to pay the cost of Settlement Administration Expenses, which includes providing Notice and all costs of administering the Settlement. *Id.* § 2.38. Pending this Court's approval, the Notice Plan consists of a direct notice by email to Settlement Class Members, with direct notice by mail to those Class Members who do not receive the email notice. *Id.* § 5.1. Defendant will provide the Settlement Administrator with Settlement Class Members' contact information for the purpose of giving notice. *Id*. The form of the proposed notices, subject to this Court's approval and/or modification, are attached to the Settlement Agreement as Exhibits B-C. The Notice program is designed to provide the Settlement Class with important information regarding the Settlement and their rights, including the right to be excluded from, comment upon, and/or object to the Settlement Agreement or any of its terms. Settlement § 5.2. The Notice will also advise the Settlement Class of their ability to seek to quash the ordered disclosure of their Out-of-Pocket Tuition and Fees to the Settlement Administrator. *Id*. In addition to direct notice, the Settlement Administrator shall establish and maintain a Settlement Website with the long form

Notice attached to the Settlement as Exhibit D and a Toll-Free IVR phone number with script recordings of information about the Settlement. *See id*. § 5.1(d)-(e).

IV. ARGUMENT

A. The Settlement Should Be Approved As Fair, Reasonable, And Adequate

The Settlement Agreement should be approved by this Court. The Settlement is the result of extensive arm's length negotiations among the Parties and their highly experienced counsel. The Settlement provides significant and immediate monetary benefits considering all of the attendant risks and delays of litigation. Prior to reaching resolution, proposed Class Counsel thoroughly investigated the case, and in doing so, gathered ample information to assess the strengths and weaknesses of the Parties' positions. Having weighed the likelihood of success and the inherent risks and expense of litigation, Plaintiffs strongly believe that the proposed Settlement is "fair, reasonable, and adequate" as required by Rule 4:32-2(e). Fraietta Decl. ¶ 28.

1. The Standard For Granting Preliminary Approval Of The Settlement

New Jersey has a strong public policy favoring the settlement of lawsuits. *Honeywell v. Bubb*, 130 N.J. Super. 130, 136 (App. Div. 1974) (holding that, "barring fraud or other compelling circumstances, our courts strongly favor the policy that the settlement of litigation be attained and agreements thereby reached, be honored."). This is particularly true in class actions and other complex litigation. *See, e.g., Educ. Station Day Care Ctr., Inc. v. Yellow Book USA, Inc.*, 2007 N.J. Super. Unpub. LEXIS 1607, at *13 (N.J. Super. Ct. App. Div. May 1, 2007) (quoting *In re Gen. Motors Corp. Pick-upTruck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 784 (3d Cir. 1995), ("the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"), *cert. denied*, 516 U.S. 824 (1995)). Indeed, there is an overriding public interest in settling litigation. *See Nolan v. Lee Ho*,

120 N.J. 465, 472 (1990) ("Settlement of litigation ranks high in our public policy.") (citing *Jannarone v. W.T. Co.,* 65 N.J. Super. 472 (App. Div. 1961)).

The approval of a class action settlement occurs in five stages:

> First, the court must make a preliminary determination that the proposed settlement has sufficient apparent merit to justify scheduling a hearing to review its terms. Second, a formal notice approved by the court must be given to all members of the class and others who may have an interest in the settlement. Third, sufficient time must be allowed class members and other interested parties to prepare documentary material and/or oral testimony in opposition to the proposed settlement. Fourth, a hearing must be held. Fifth, the court must reach a conclusion, based upon adequate findings of fact, that the settlement is "fair and reasonable" to the members of the class.

Morris Cty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 369 (Law. Div. 1984); *accord Gurriere v. Bloomfield Condo. Assocs*., 2015 WL 10172760, at *67-69 (N.J.Super.Ch., Essex County Aug. 28, 2015) (cited for procedural purposes only).

The Motion before the Court seeks preliminary approval of the Settlement and approval of the Notice. Thus, the issue before the Court is whether to make a "preliminary determination that the proposed settlement has sufficient apparent merit to justify scheduling a hearing to review its terms" and thus to direct that notice of the same be given to the Class. *Morris County Fair Hous. Council*, 197 N.J. Super. at 369; *see also Educ. Station DayCare Ctr. Inc.*, 2007 N.J. Super. Unpub. LEXIS 1607, at *13; MANUAL FOR COMPLEX LITIGATION (FOURTH), § 13.14, at 172-73, § 21.632, at 321 (Fed. Jud. Ctr. 2004) ("Manual Fourth") ("The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and [] direct[s] the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.").

Under Rule 4:32-2(e)(1)(C), the court "may approval a settlement...that would bind class members only after a hearing and on finding that the settlement...is fair, reasonable, and adequate." In analyzing whether a proposed class settlement is "fair and reasonable," New Jersey courts have

looked to a list of factors set forth by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).[2] *See Sutter v. Horizon Blue Cross Blue Shield of N.J.*, 406 N.J. Super. 86 (App. Div. 2009); *Strougo v. Ocean Shore Holding Co.*, 457 N.J. Super. 138, 159 (2017). Those factors include the (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the abilityof the defendant(s) to withstand a greater judgment; (8) the range of reasonableness of thesettlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Girsh*, 521 F.2d at 157. The *Girsh* factors "are a guide and the absence of one or more does not automatically render the settlement unfair." *In re Am. Family Enters.*, 256 B.R. 377, 418 (D.N.J.2000); *Gurriere*, 2015 WL 10172760, at *69. Consideration of the requirements for final approval at the preliminary approval stage help to identify any issues that could impede final approval. *Singleton v. First Student Management LLC*, No. 13-1744 (JEI/JS), 2014 WL 3865853, at *5 (D.N.J. Aug. 6, 2014). However, the "the standard for preliminary approval is far less demanding." *Gates v. Rohm & Haas Co.,* 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008); *see also Curiale v. Lenox Group, Inc.*, No. 07-1432, 2008 WL 4899474, at *26-27 n.4 (E.D. Pa. Nov. 14, 2008) (same).[3]

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[2] "There is only limited discussion in New Jersey case law of the procedures to be followed in presenting proposed settlements of class actions for judicial approval and of the standards to be applied in determining whether approval should be given." *Morris Cty. Fair Hous. Morris County Fair Hous. Council*, 197 N.J. Super. at 369, 484 A.2d 1302 (citations omitted). Because "R. 4:32-4 was taken from and is identical to Fed. R. Civ. P. 23(e) ... it is appropriate to seek guidance in federal case law in determining the procedures and standards for approval of settlements of representative actions." *Id.*

[3] In addition to the *Girsh* factors, the Third Circuit encourages district courts to consider additional factors (the "*Prudential* Factors"), such as the recommendation of experienced counsel, "the degree of direct benefit provided to the class," including "the size of the individual awards compared to claimants' estimated damages." *Krell v. Prudential Ins. Co. of Am.* ("*Prudential*"), 148 F.3d 283, 323 (3d Cir. 1998); *accord Skeen v. BMW of N. Am., L.L.C.*, 2016 WL 4033969 (D.N.J., 2016).

All of the relevant factors weigh in favor of the settlement proposed here. The Settlement is fair, adequate, and reasonable. Therefore, this Court should preliminarily approve the Settlement and provisionally certify a Settlement Class.

2. Complexity, Expense, And Likely Duration Of The Litigation

By reaching a favorable settlement prior to dispositive motions or trial, Plaintiffs seek to avoid significant expense and delay, and instead ensure recovery for the class. Most class actions are inherently complex and settlement avoids costs, delays and a multitude of other problems associated with them. *See, e.g., Educ. Station Day Care Ctr. Inc.,* 2007 N.J. Super. Unpub. LEXIS 1607, at *13 ("[I]n class actions and other complex cases . . . substantial judicial resources can be conserved by avoiding formal litigation.") (internal citation omitted). Courts have consistently held that avoiding the trial of a class action, which "would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court . . . clearly counsels in favor of settlement." *Prudential*, 148 F.3d at 318; *see also Morris Cty. Fair Hous. Council*, 197 N.J. Super. at 372 (settlement serves to "save the parties litigation expenses" and "conserve judicial resources").

The first factor weighs heavily in favor of approval of the settlement. Here, significant time, effort, and expense would be incurred to brief complex substantive motions (including a motion to certify the class), resolve discovery disputes and dispositive motions, prepare for and complete trial, and submit post-trial submissions. Even if the Class were to recover a larger judgment after trial, which is far from certain, the additional delay, through summary judgment, trial, post-trial motions, and appeals, would deny the Class any recovery for years. *See Miranda v. Xavier Univ.*, No. 1:20-cv-539, 2023 U.S. Dist. LEXIS 178072, at *11 (S.D. Ohio Oct. 3, 2023)

(noting "there would likely be intense dispute over …[university's] liability, and any damages" for suspending on-campus activity; "Thus, without settlement, the parties would likely expend significant time and money litigating this case through class certification, dispositive motions, trial, and appeal. This factor weighs in favor of [settlement] approval."). This Settlement secures a substantial and certain benefit for the Class in this consumer class action, undiminished by significant expenses, and without the delay, risk, and uncertainty of continued litigation.

3. The Settlement Is The Product Of Informed, Arm's Length Negotiations

"Although not a *Girsh* factor, [the arm's length nature of negotiations by experienced counsel] weighs strongly in favor of approving the Proposed Settlement." *In re Hemispherx Biopharma, Inc.*, No. 09-5262, 2011 U.S. Dist. LEXIS 172214, at *19-20 (E.D. Pa. Feb. 11, 2011). "Additionally, a court should attribute significant weight to the belief of experienced counsel that settlement is in the best interests of the class." *Id.* Here, the Settlement Agreement was the result of extensive arm's length negotiations between the Parties, in addition to two full day mediation sessions before a neutral third party. Fraietta Decl., ¶ 29. Plaintiffs were represented in the settlement negotiations by counsel who have considerable experience in complex class actions, and who are well-versed in the legal and factual issues relevant to class action litigation. *See id*. ¶¶ 22-27. Defendant was similarly represented by counsel with extensive experience defending class actions and complex litigation matters. During these negotiations, the Parties vigorously advocated their respective clients' positions, and the Parties were prepared to litigate the case fully if no settlement was reached. *Id.* ¶ 20. The Parties' extensive arm's length negotiations, between experienced counsel, fully support a finding that the proposed settlement is fair.

4. The Factual Record Was Well Developed Through Independent Investigation

As the Complaint filed by Plaintiffs demonstrates, proposed Class Counsel thoroughly

investigated and analyzed the legal claims and factual allegations. *Id.* ¶ 4. During the litigation and through mediation, the Parties exchanged sufficient information to engage in informed negotiations. *Id.* ¶ 12. As a result, proposed Class Counsel was well-positioned to evaluate the strengths and weaknesses of the case and the appropriate basis upon which to settle it. The record developed in the course of reaching an agreement to settle claims of the Plaintiffs and the Class provides sufficient information for this Court to determine that the proposed Settlement is fair.

5. Risks of Establishing Liability, Damages, And Maintaining The Class Action Through Trial

The fourth, fifth and sixth *Girsh* factors (risks of establishing liability, damages and maintaining the class action through trial) are appropriately considered together for purposes of preliminary approval. *Singleton*, 2014 WL 3865853, at *6. The risks of establishing liability should be considered to "examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *In re Cendant Corp. Litig.*, 264 F.3d 201, 237 (3d Cir. 2001) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 814 (3d Cir. 1995)). "The inquiry requires a balancing of the likelihood of success if 'the case were taken to trial against the benefits of immediate settlement.'" *In re Safety Components Int'l*, 166 F. Supp. 2d 72, 89 (D.N.J. 2001) (quoting *Prudential*, 148 F.3d at 319). Plaintiffs and proposed Class Counsel are confident in the strength of their case, but also pragmatic in their awareness of the risks inherent to litigation and the various defenses available to FDU.

If this case were to be litigated further, the next steps would entail extensive motion practice, costly and time-consuming discovery and depositions, including expert depositions, followed by contested motions for class certification and summary judgment. Plaintiffs' reliance on expert testimony to establish liability and damages as well as "a jury's acceptance of expert

testimony is far from certain regardless of the expert's credentials." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 539 (D.N.J. 1997); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744 (S.D.N.Y. 1985) ("In this 'battle of the experts' it is virtually impossible to predict with any certainty which testimony would be credited . . . .").

These efforts would be costly and time consuming for the Parties and the Court, and create risk that a litigation class might not be certified, or could be decertified, and/or that there could be no recovery for the class at all. *See, e.g.*, *Faber v. Cornell Univ.*, No. 3:20-CV-00467 (MAD/ML), 2023 U.S. Dist. LEXIS 148833, at *14-15 (N.D.N.Y. Aug. 24, 2023) (noting uncertainties favor settlement in COVID refund litigation that "involves novel claims, include no trial verdict, and has resulted in a mixed bag of results during pre-trial litigation"). If FDU were to prevail at the class certification or summary judgment stages, then it could reduce recoverable damages or eliminate them altogether. Furthermore, there is a substantial risk of losing inherent in any jury trial. Even if Plaintiffs did prevail, any recovery could be delayed for years by an appeal. The Settlement, however, provides certainty and a monetary benefit to the Class in a timely fashion that minimizes any significant commitment of future resources by the Parties and the Court.

Considering Plaintiffs' chances of ultimate success on the merits, the time and expense involved in litigating the case to conclusion, and the inherent risks of litigation, the Parties believe that the Settlement Agreement is fair and reasonable under all the facts and circumstances.

6. Counsel Are Experienced In Similar Litigation

Recommendations of experienced counsel are entitled to great weight in evaluating a proposed settlement in a class action. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. at 543. "[S]ignificant weight" should be given "to the belief of experienced counsel that settlement is in the best interest of the class, so long as the Court is satisfied that the settlement

is the product of good faith, arm's-length negotiations." *In re Am. Family Enters.*, 256 B.R. at 421 (internal quotation marks and citation omitted); *see also Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 414 (E.D. Pa. 2010) (citation omitted); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 255 (D.N.J. 2000) (citation omitted). Proposed Class Counsel is particularly experienced in the litigation, certification, trial, and settlement of class action cases like the instant action. In negotiating this settlement, proposed Class Counsel had the benefit of years of relevant experience and a familiarity with the facts of this case and the substantive case law at issue.

7. The Ability of The Defendant To Withstand A Greater Judgment

Courts in New Jersey have repeatedly held that "even if Defendant could afford a greater amount, this fact provides no basis for rejecting an otherwise reasonable settlement." *Saini v. BMW of N. Am., L.L.C.,* No. 12-6105 (CCC), 2015 WL 2448846, at *11 (D.N.J. May 21, 2015); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1302 (D.N.J. 1995) (concluding the settlement was fair, adequate, and reasonable despite finding defendant could withstand greater judgment). Because the proposed settlement is otherwise fair, adequate, and reasonable, this factor should be considered neutral.

8. The Settlement Provides Substantial Relief For Class Members And Is Well Within The Range Of Reasonableness in Light of the Possible Recovery and Attendant Risks of Litigation

"The last two *Girsh* factors evaluate [the] … reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004). In conducting this evaluation, the Court should keep in mind "that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits

of the litigation." *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 484-85 (D.N.J. 2012) (alteration in original) (internal quotations and citation omitted). "The settlement of a class action may be appropriate even where the settlement is only a fraction of the ultimate total exposure…." *Singleton*, 2014 WL 3865853, at *7.

Here, the settlement is fair, reasonable, and represents an excellent result for the proposed Class. As further explained in the Settlement Agreement, the Settlement will provide a pro-rata payment of up to $155.00 to each Settlement Class Member who submits a valid claim. The Settlement provides for the creation of a common Settlement Fund of up to $1,500,000.00 to cover payments to Settlement Class Members and all expenses associated with the litigation, as well as reasonable attorneys' fees and incentive awards. Notably, this settlement value is in line with other COVID-19 tuition refund settlements. *See, e.g., Fittipaldi v. Monmouth Univ.*, No. 3:20-cv-05526, (D.N.J.) (approving $1.3MM common fund); *Choi v. Brown University*, No. 1:20-cv-00191, (D.R.I.) (approving $1.5MM common fund).

Without class litigation, Settlement Class Members would not have been in a position to achieve these benefits through individual lawsuits. The significant monetary recovery, as well as the substantial risks of continued litigation, weighs in favor of a finding the Settlement fair, reasonable, and adequate.

B. Provisional Certification Of The Settlement Class Is Appropriate

For settlement purposes only, the Parties and their counsel request that the Court provisionally certify the Settlement Class defined above. At this point in the approval process, provisional certification permits the issuance of notice of the proposed settlement to inform Settlement Class Members of the existence and terms of the proposed settlement, their right to be heard on its fairness, their right to opt out, and the date, time, and place of the formal fairness hearing. *See* Manual Fourth, §§ 21.632-3.

New Jersey courts generally certify a class unless there is a clear showing that certification is inappropriate. *Delgozzo v. Kenny*, 266 N.J. Super. 169, 179-80, 628 A.2d 1080, 1086 (Super. Ct. App. Div. 1993) ("New Jersey courts …have consistently held that the class action rule should be liberally construed. . . . Indeed, a class action should be permitted unless there is a clear showing that it is inappropriate or improper." (citations and internal quotations omitted). Thus, courts should be slow to hold that an action cannot proceed as a class action. *Riley v. New Raid Carpet Ctr.,* 61 N.J. 218, 227-28 (1972). The Court need not make a preliminary determination of the merits of underlying claims when deciding whether to certify a class. *Delgozzo*, 266 N.J. Super. at 180-81 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974)). Moreover, the court's examination of issues underlying a certification motion should be "less penetrating" than "a motion for summary judgment or at trial." *In re Cadillac V8-64 Class Action*, 93 N.J. 412, 425 (1983). "Unitary adjudication through class litigation furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among numerous, similarly-situated litigants." *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 104 (2007).

This case focuses on FDU's common conduct in breaching its contract with students for an in-person educational experience for Spring Semester 2020. For the reasons below, this case is well suited for class treatment and the Class meets the requirements of Rule 4:32-1(a)-(b).

1. The Requirements of R. 4:32-1(a) Are Satisfied.

Rule 4:32-1(a) of the New Jersey Rules of Court generally requires for class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representativeparties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"In order to determine whether the requirements for class action maintainability have

been met, inquiry beyond the pleadings must be made because 'a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" *Cerbo v. Ford of Englewood*, 2006 WL 177586, at *5 (Law Div. Jan. 25, 2006) (*quoting Castano v. American Tobacco Co.*, 84F.3d 734,744 (5th Cir. 1996)). As set forth below, it is within the Court's discretion to certify the Settlement Class.

a) Numerosity

Rule 4:32-1(a)'s first requirement, numerosity, is satisfied where "the class is so numerous that joinder of all members is impractical." R. 4:32-1(a). For purposes of numerosity, "impracticable" does not mean impossible, only that common sense suggests that it would be difficult or inconvenient to join all Class Members. *See Prudential*, 962 F. Supp. at 510; *see also Stewart v. Abraha*m, 275 F.3d 220, 226-27 (3d Cir. 2001) (numerosity requirement satisfied "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40") (citation omitted); *Grant v. Sullivan*, 131 F.R.D. 436, 446 (M.D. Pa. 1990) (observing that courts have certified classes with as few as 14 persons).

Here, the Class includes thousands of persons who paid FDU Spring 2020 tuition and fees for in-person educational services and did not receive a refund. Fraietta Decl. ¶ 15; Ex. 1. Given the number and geographic distribution of the Settlement Class Members, joinder of all Settlement Class Members would be impracticable, and the proposed Settlement Class easily satisfies *Rule* 4:32-1(a)'s numerosity requirement.

b) Commonality

Rule 4:32-1(a)(2) requires that there be "questions of law or fact common to the class." Not all questions of law or fact raised need be in common; rather, the commonality requirement is easily satisfied by the existence of one significant common questionof law or fact.

See Delgozzo v. Kenny, 266 N.J. Super. at 185 (holding "a single common question is sufficient."); *see also Neal ex rel. Kanter v. Case*y, 43 F.3d 48, 56 (3d Cir. 1994) (commonality requirement not demanding because it may be satisfied by a single common issue). In the context of consumer class actions, a class asserting claims based on a common course of conduct satisfies the commonality requirement even where the Class Members are exposed to different misrepresentations at different times. *Prudential,* 962 F. Supp. at 511-514.

Commonality is met "[w]hen the party opposing the class has engaged in a course of conduct that affects a group of persons and gives rise to a cause of action' resulting in all of the members sharing at least one of the elements of that cause of action." *Cerbo*, at *6 (internal quotation marks and citation omitted); *see also Chiang v. Veneman*, 385 F.3d 256, 265 (3d Cir. 2004) (the commonality requirement "is not a high bar" and is satisfied '"if the named plaintiffs share at least one question of law or fact with the grievances of the prospective class'") (citation omitted). As a result, the commonality requirement may be satisfied upon a showing that the claims of the potential Class Members share at least one question of fact or law. *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 425 (1983).

Here, Settlement Class Members share numerous common questions that target the same alleged misconduct, including: (a) whether FDU accepted money from Settlement Class Members in exchange for the promise to provide services; (b) whether FDU breached materially identical contracts with its students and deprived Settlement Class Members of benefits and services for which they contracted; (c) whether Settlement Class Members are entitled to a refund for that portion of the tuition and fees that were contracted for services that FDU did not provide (d) whether FDU has unlawfully converted money from Plaintiffs and Settlement Class Members; and (e) whether FDU is liable to Plaintiffs and Settlement Class Members for unjust enrichment. *See,*

e.g., Wright v. S. N.H. Univ., 565 F. Supp. 3d 193, 202 (D.N.H. 2021) (commonality "easily cleared" where university canceled in-person classes and "each class member's share of the settlement proceeds will be calculated according to the same formula").

c) Typicality

Rule 4:32-1(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class and seeks to ensure that the interests of the named plaintiffs align with those of the class. To satisfy this requirement, the "claims of the representatives must 'have the essential characteristics common to the claim of the class.'" *In re Cadillac V8-6-4 Class Action*, 93 N.J. at 425 (quoting 3B *Moore's Federal Practice* 23.06-2 (1982)). Stated otherwise, "typicality" requires a "harmony of interest between the class action representatives and the class members, so that the class representatives by furthering their own goals are also furthering the goals of the class." *Goasdone v. Am. Cyanamid Corp.*, 354 N.J. Super. 519, 530 (Law Div. 2002). Typicality does not require that all Settlement Class Members share identical claims. *Id.* Rather, the typicality requirement is permissive: representative claims are "typical" if they are reasonably co-extensive with those of absent class members. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 183- 84 (3d Cir. 2001); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 141 (3d Cir. 1998). '"Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.'" *Barnes*, 161 F.3d at 141 (citation omitted). Where plaintiffs allege they suffered the same harm as a result of the same conduct that injured class members, typicality is satisfied. *See In re Cadillac V8-6-4 Class Action*, 93 N.J. at 425.

Here, the claims of the named Plaintiffs are typical of those of the Settlement Class

Members. Like Settlement Class Members, Plaintiffs' claims arise out of FDU's failure to provide in person educational services, experiences, opportunities, and other related experiences for which Plaintiffs paid tuition and fees. Supported by the same legal theories, Plaintiffs and all Settlement Class Members share claims based on the same alleged course of conduct: FDU's failure to provide services for which they were contracted, and failure to issue a refund for services not rendered. Plaintiffs and all Settlement Class Members have been injured in the same manner by this conduct. Accordingly, Plaintiffs' claims are typical of the other Settlement Class Members' claims, and the typicality requirement of Rule 4:32-1(a)(3) is satisfied.

d) Adequacy

Rule 4:32-1(a)(4) requires that the representative parties will "fairly and adequately protect the interests of the class." The adequacy standard is satisfied where: (1) "the interest of the named representatives(s)...[is] coextensive with the interest of the other members of the class", and (2) the named representatives "will vigorously prosecute or defend that interest, and this will usually require the assistance of responsible and able counsel." *Gallano v. Running*, 139 N.J. Super. 239, 246 (Law Div. 1976) (citation omitted); *see also Delgozzo*, 266 N.J. Super. at 188 ("[T]he plaintiff must not have interests that are antagonistic to those of the class."); *see also Goasdone*, 354 N.J. Super. at 530. Plaintiffs satisfy both prongs of the adequacy requirement.

First, Plaintiffs' claims are co-extensive with those of the Settlement Class. Plaintiffs and each Settlement Class Member have an identical interest in establishing FDUs liability. Plaintiffs and each Settlement Class Members have been injured in the same manner. Plaintiffs assert the same legal claims and theories as those of Settlement Class Members. Plaintiffs seek the identical relief that would be sought by all members of the Settlement Class. There is no conflict between Plaintiffs' claims and those of the proposed Settlement Class; indeed, Plaintiffs are each in the best

position to represent such claims since they alleged that they have actually incurred damages as a result of FDU's conduct. Each named Plaintiff has assumed the responsibility of representing the Settlement Class and stands ready to represent the class at trial if necessary. Plaintiffs are prepared to continue to diligently pursue this action in cooperation with counsel. Fraietta Decl. ¶ 31. Plaintiffs have taken seriously their obligations to the Settlement Class and should be appointed as Class Representatives.[4]

Second, proposed Class Counsel are highly experienced in complex class actions and are qualified to represent the Settlement Class. *See* Fraietta Decl., ¶¶ 22-27; Fraietta Decl., Exs. 2-4. In pursing this litigation, Plaintiffs and their counsel have worked diligently to prosecute this case and to reach a fair settlement for the Settlement Class. Class Counsel have advanced and will continue to advance and fully protect the common interests of all members of the Settlement Class. *See* Fraietta Decl., ¶ 30. Accordingly, R. 4:32-1(a)(4) is satisfied. For the same reasons, the Court should appoint proposed Class Counsel as Class Counsel under Rule 4:32-2(g). All three firms have substantial experience in successfully prosecuting class actions throughout the country. Fraietta Decl., ¶¶ 22-27; Fraietta Decl., Exs. 2-4. Class Counsel conducted a full and thorough investigation of the claims, has zealously represented the interests of the Class, and committed substantial resources to resolving the class claims. *Id.*; *see* Rule 4:32-2(g)(1)(C) ("In appointing class counsel, the court must consider: (i) the work counsel has done in identifying or investigating potential claims…; (ii) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted…; (iii) counsel's knowledge of the applicable law, and (iv) the resources counsel will commit to representing the class.").

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[4] With respect to the named Plaintiffs—the representatives of the class—New Jersey courts presume that the fair and adequate representation requirement is met. Accordingly, the burden rests on the party that would resist class certification to prove a failure to meet the fair and adequate representation requirement. *See, e.g., Delgozzo,* 266 N.J. Super. at 188.

2. The Requirements of Rule 4:32-1(b)(3) Are Satisfied

To certify a class under Rule 4:32-1(b)(3), the Court must find that questions of law or fact common to Class Members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *See Cerbo* at *9.

The proposed Settlement Class is well-suited for certification under Rule 4:32-1(b)(3) because questions common to the Settlement Class Members predominate over questions affecting only individual Settlement Class Members, and the class action device provides the best method for the fair and efficient resolution of the Settlement Class Members' claims against FDU. Finally, when addressing the propriety of Settlement Class certification, courts take into account the fact that a trial will be unnecessary and that manageability, therefore, is not an issue. *See Amchem Prods.v. Windsor*, 521 U.S. 591, 620 (1997).

a) Common Questions Predominate.

A class action is appropriate under Rule 4:32-1(b)(3) if questions of law or fact common to Settlement Class Members predominate over any questions affecting only individual members. *In re Cadillac V8-6-4 Class Action*, 461 A.2d 736, 742 (N.J. 1983). There is no requirement "that all issues be identical among class members or that each class member be affected in precisely the same manner." *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.,* 192 N.J. 372, 383 (2007); *Iliadis*, 191 N.J. at 108-09 (same). "Predominance" also does not require that the number of common issues be greater than the number of individual issues. *Carroll v. Cellco P'ship*, 313 N.J. Super. 488, 499 (App. Div. 1998) ("Predominance is not, however, determined by adding up the number of common and individual issues and determining which is greater."). Instead, courts look to determine whether the "core"

of the case concerns common issues of law and fact relating to liability. *In re Cadillac V8-6-4 Class Action*, 93 N.J. at 435; *see also Prudential*, 148 F.3d at 314.

As discussed above, the same common questions relevant to the Rule 4:32-1(a)(2) analysis predominate, because determining whether FDU breached a contract to provide students with an in-person education, and was unjustly enriched, are core questions common to each Class Member's claims. Moreover, the conduct alleged is common to all Class Members. Accordingly, there is a "common nucleus of operative facts" in this case such that common issues predominate. *In re Cadillac*, 93 N.J. at 431; *Miranda v. Xavier Univ.*, 2023 U.S. Dist. LEXIS 178072, at *7-8 (predominance satisfied where liability would "not rise or fall on the individualized conduct of a class member but on [university's] conduct of stopping in-person and on-site instruction").

b) Class Treatment Is Superior to Alternative Methods Of Adjudication

Under Rule 4:32-1(b)(3), the following factors are relevant to finding a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy": (A) the class members' interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members ofthe class; (C) whether it is desirable to concentrate litigation of claims in this forum; and (D) the manageability of a class action. As only a settlement class is at issue, "manageability of a trial is not a consideration." *Cerbo* at *10. (citations omitted). Further, class certification is superior where individual claims are small or modest. *See In re Cadillac V8-6-4*, 93 N.J. at 424; *see also Kronisch v. Howard Sav. Inst.*, 335 A.2d 587, 596 (Ch. Div. 1975) ("Having in mind the minimal financial stake of the individual members of the plaintiff class, their separate interest in conducting the suit must be regarded as altogether remote."), remanded sub nom. *Kronisch II,* 363 A.2d 376, 379 (App. Div. 1976) *to Kronisch III*, 382 A.2d 64 (Ch. Div.

1977), a*ff'd in part, rev'd in part, Kronisch IV*, 392 A.2d 178 (App. Div. 1978); *see also Varacallo v. Mass. Mut. Life Ins. Co*., N.J. Super. 31, 45 (App. Div. 2000). Further, the notion that New Jersey's class action rule should be liberally construed has particular force where consumers are attempting to redress a common legal grievance under circumstances that would make individual actions uneconomical to pursue. *See Lusky v. Capasso Bros*., 118 N.J. Super. 369, 372-73 (App. Div. 1972) (class action superior to individual small claims and should be permitted unless a clear showing it is improper); *see also Riley v. New Rapids Carpet Cente*r, 61 N.J. 218, 225 (1972) (noting that class certifications should be granted unless "clearly infeasible"); *Delgozzo*, 266 N.J. Super. at 179; *Gallano*, 139 N.J. Super. at 244; *Strawn v. Canuso*, 140 N.J. 43, 68 (1995) ("[A] class action is the superior method for adjudication of consumer-fraud claims. . .")

Class treatment here will facilitate the favorable resolution of all Settlement Class Members' claims. Given the large numbers of Settlement Class Members and the multitude of common issues present, the class device is also the most efficient and fair means of adjudicating these claims. Class treatment in the settlement context is superior to multiple individual suits or piecemeal litigation because it greatly conserves judicial resources and promotes consistency and efficiency of adjudication. Because the claims are being certified for purposes of settlement, there are no issues with manageability, and resolution of many claims in one action is far superior to individual lawsuits and promotes consistency, efficiency of adjudication, and a certain resolution.

In addition, each Class Member's claim, individually, is of relatively low value. As a practical matter, absent the use of the class action device, it would be too costly and inefficient for any individual plaintiff to finance a lawsuit asserting such claims through trial and appeal. For these reasons, the superiority requirement is satisfied. *Faber v. Cornell Univ.*, 2023 U.S. Dist. LEXIS 148833, at *11 (noting relatively small potential recovery for students).

C. The Court Should Approve The Proposed Notice Plan

Rule 4:32-2(e) provides that "[t]he court shall direct notice in a reasonable manner to all class members who would be bound by a proposed settlement[.]" In actions involving classes certified pursuant to Rule 4:32-1(b)(3), Class Members must receive "the best notice practicable under the circumstances, consistent with due process of law." R. 4:32-2(b)(2). Further, "notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mehling v. N.Y. Life Ins. Co.*, 246 F.R.D. 467, 477 (E.D. Pa. 2007) (internal quotation marks and citations omitted). If a class is certified pursuant to Rule 4:32-1(b)(3), notice shall advise in concise, clear and easily understood language (a) the nature of the action; (b) the definition of the class certified; (c) the class claims, issues or defenses; (d) that a class member may enter an appearance through counsel if the member so desires; (e) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and (f) the binding effect of a class judgment on Class Members. R. 4:32-2(b)(2). The notice requirement is rooted in due process considerations, *see Phillips Petrol.Co. v. Shutt*s, 472 U.S. 797, 812, 105 S. Ct. 2965 (1985), but the actual "mechanics of the notice process are left to the discretion of the court ...[.]" *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975).

The notice plan provided under the Settlement provides for the best practicable notice to Settlement Class Members, as all Settlement Class Members will receive direct notice via U.S. email or mail. *See* Settlement § 5.1. The Settlement Administrator will also establish and maintain a Settlement Website and a toll-free telephone number. *See id*. The notices attached as Exhibits B-D to the Settlement Agreement provide all pertinent information and fully inform the Class Members of this litigation, the Settlement, including Class Counsel's intent to request attorneys'

fees, expenses, and incentive awards for Plaintiffs, and what actions they may take. The language of the proposed Notices and accompanying Claim Form are plain and easily understood, providing neutral and objective information about the nature of the Settlement and enough objective information to fairly evaluate the Settlement terms.

D. Scheduling A Final Approval Hearing

The Parties request that the Court schedule a final fairness hearing, after notice has been sent to the Class Members, at which the Court may hear all evidence and argument necessary to make its settlement evaluation. Proponents of the Settlement may explain the terms and conditions of the Settlement and offer argument in support of final approval. In addition, Settlement Class Members, or their counsel, may be heard in support of or in opposition to the Settlement Agreement. The Court will determine after the final approval hearing whether the Settlement should be approved, and whether to enter a final order and judgment.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the relief requested herein. A proposed Order granting preliminary approval, provisionally certifying the Settlement Class, designating Plaintiffs as Class Representatives, appointing Class Counsel, approving the forms of notice, and setting deadlines related to class notice and final approval, is submitted herewith.

Dated: April 16, 2024

Respectfully submitted,

By: *<u>/s/ Philip L. Fraietta</u>*

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Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

STEVEN DOVAL, MELISSA CUELLO, and CEANA CUELLO, individually and on behalf of all others similarly situated, Plaintiffs, v. FAIRLEIGH DICKINSON UNIVERSITY, Defendant.	Case No. BER-L-004966-20

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that, on April 16, 2024, true and correct copies of the foregoing documents were filed and served on all parties of record via the Court's Electronic Case Filing system: (1) Plaintiffs' Notice of Motion for Preliminary Approval of Class Action Settlement, (2) Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, (3) the Certification of Philip L. Fraietta and exhibits attached thereto, (4) the Proposed Order Granting Preliminary Approval of Class Action Settlement Agreement, Certifying Settlement Class, Appointing Class Representative, Appointing Class Counsel, and Approving Notice Plan, and (5) this Certificate of Service.

By: *_/s/ Philip L. Fraietta_*
Philip L. Fraietta

EXHIBIT 1

CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE

This Class Action Settlement Agreement and Release ("Agreement" or "Settlement Agreement") is entered into on this ____ day of March, 2024, by and among Plaintiffs, Steven Doval, Melissa Cuello, and Ceana Cuello (collectively, "Plaintiffs" and/or "Class Representatives"), on behalf of themselves, individually, and the Settlement Class (as defined herein), on the one hand, and Fairleigh Dickinson University ("Defendant" or "FDU"), on the other hand. The Plaintiffs and the Defendant are collectively referred to herein as the "Parties."

I. RECITALS

1.1 **WHEREAS**, on August 25, 2020, Plaintiffs Steven Doval[1], Melissa Cuello, and Ceana Cuello filed the above-captioned putative class action complaint in the Superior Court of New Jersey, Bergen Vicinage (the "Action").

1.2 **WHEREAS**, the Complaint filed in the Action alleged that FDU should have refunded tuition and fees to certain individuals for a portion of the Spring 2020 academic semester, after FDU transitioned to a remote learning format in order to comply with Governor Murphy's executive order requiring all New Jersey institutions of higher education to cease in-person instruction to reduce the spread of COVID-19.

1.3 **WHEREAS,** based on FDU's decision to transition to remote learning, Plaintiffs have asserted claims on behalf of themselves and have sought to assert claims on behalf of others similarly situated for breach of contract, unjust enrichment, conversion, and for money had and received.

1.4 **WHEREAS**, on October 29, 2020, Defendant filed a motion to dismiss, arguing among other points, that the Complaint alleges impermissible educational malpractice claims,

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[1] On May 18, 2020, Plaintiff Steven Doval filed an action in the United States District Court for the District of New Jersey. That matter was voluntarily dismissed on August 24, 2020.

and that the Complaint failed to identify any promise to provide in person instruction or any duty owed by FDU to provide a refund to students.

1.5 **WHEREAS**, on December 4, 2020, Plaintiffs filed their opposition to Defendant's motion to dismiss.

1.6 **WHEREAS**, on February 5, 2021, following oral argument, the Court denied Defendant's motion to dismiss.

1.7 **WHEREAS**, on February 19, 2021, Defendant filed an answer to the Complaint, denying the allegations and asserting 24 affirmative defenses.

1.8 **WHEREAS**, the Parties have engaged in formal discovery, including propounding and responding to requests for the production of documents and interrogatories.

1.9 **WHEREAS,** in discovery FDU produced approximately 4,788 pages of documents for Plaintiffs' review and Plaintiffs produced 27 pages of documents for FDU's review.

1.10 **WHEREAS**, during the discovery phase, Plaintiffs' Counsel and counsel for FDU initiated settlement discussions to resolve the litigation.

1.11 **WHEREAS**, on June 1, 2022, the Parties requested a brief stay of all case management deadlines to allow the Parties to focus their efforts on facilitating a potential resolution.

1.12 **WHEREAS**, on May 25, 2022 and February 15, 2023, the Parties participated in full-day mediation sessions before a third-party neutral, Hon. Frank A. Buczynski, Jr. (Ret.) in an attempt to resolve this action.

1.13 **WHEREAS,** although the two (2) mediation sessions were unsuccessful, the Parties maintained an open dialogue regarding potential resolution.

1.14 **WHEREAS**, in the ensuing months, the Parties continued their settlement dialogue directly.

1.15 **WHEREAS**, after extensive, vigorous discussions and arm's-length negotiations, and numerous exchanges of information and settlement proposals, the Parties were able to reach an agreement to resolve the Action, which Plaintiffs and their Counsel believe provides benefits to the Settlement Class, is fair, reasonable and adequate, and is in the best interests of Plaintiffs and Settlement Class Members.

1.16 **WHEREAS,** Plaintiffs believe that the claims asserted in the Action against Defendant have merit and that they would have prevailed at class certification, summary judgment, and/or trial.

1.17 **WHEREAS,** Defendant believes the claims asserted in the Action lack merit.

1.18 **WHEREAS,** Plaintiffs and Class Counsel recognize that Defendant has raised factual and legal defenses that present a risk that Plaintiffs may not prevail and they also recognize the expense and delay associated with continued prosecution of the Action against Defendant through class certification, summary judgment, trial, and any subsequent appeals.

1.19 **WHEREAS,** Plaintiffs and Class Counsel also have taken into account the uncertain outcome and risks of litigation, especially in complex class actions, as well as the difficulties inherent in such litigation, and believe it is desirable that the Released Claims, as further defined herein, be fully and finally compromised, settled, and resolved with prejudice.

1.20 **WHEREAS,** based on their evaluation, Class Counsel has concluded that the terms and conditions of this Agreement are fair, reasonable, and adequate to the Settlement Class, and that it is in the best interests of the Settlement Class to settle the claims raised in the Action pursuant to the terms and provisions of this Agreement.

1.21 **WHEREAS**, at all times, Defendant has denied and continues to deny any wrongdoing whatsoever and has denied and continues to deny that it committed, or threatened or attempted to commit, any wrongful act or violation of law or duty alleged in the Action, and maintained its opposition to certification of a litigation class.

1.22 **WHEREAS,** given the uncertainty and risks inherent in any litigation, the desire to avoid the expenditure of further legal fees and costs, the benefits that the class members will receive from a negotiated settlement, and Defendant's commitment to providing a quality and affordable personalized education experience for all students, Defendant has concluded it is desirable and beneficial that the Action be fully and finally settled and terminated in the manner and upon the terms and conditions set forth in this Agreement.

1.23 **WHEREAS,** this Agreement is a compromise, and the Agreement, any related documents, and any negotiations resulting in it shall not be construed as or deemed to be evidence of or an admission or concession of liability or wrongdoing on the part of Defendant, or any of the Released Parties (defined below), with respect to any claim of any fault or liability or wrongdoing or damage whatsoever or with respect to the certifiability of a litigation class.

1.24 **WHEREAS**, this Agreement is intended by the Parties to fully, finally and forever resolve, discharge, and settle the Released Claims (as defined herein), upon and subject to the terms and conditions of this Agreement.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiffs, the Settlement Class, and each of them, and Defendant, by and through its undersigned counsel that, subject to final approval of the Court after preliminary approval as provided for in this Settlement Agreement, in consideration of the benefits flowing to the Parties from the Agreement set forth herein, that the Action and the Released Claims shall be finally and

fully compromised, settled, and released, and the Action shall be dismissed with prejudice, upon and subject to the terms and conditions of this Agreement.

II. DEFINITIONS

As used in this Settlement Agreement, the following capitalized terms have the meanings specified below. Unless otherwise indicated, defined terms include the plural as well as the singular.

2.1 "Action" means the class action lawsuit titled *Steven Doval, et al., v. Fairleigh Dickinson University*, Docket No. BER-L-004966-20, pending in the Superior Court of New Jersey, Law Division, Bergen County.

2.2 "Alternate Judgment" means a form of final judgment that may be entered by the Court herein but in a form other than the form of Judgment provided for in this Agreement and where none of the Parties elects to terminate this Settlement by reason of such variance.

2.3 "Approved Claim" means a Claim Form submitted by a Settlement Class Member (defined below) that: (a) is submitted timely and in accordance with the directions on the Claim Form and the provisions of the Settlement Agreement; (b) is fully and truthfully completed by a Settlement Class Member with all of the information requested in the Claim Form; (c) is signed by the Settlement Class Member, physically or electronically; and (d) is approved by the Settlement Administrator pursuant to the provisions of this Agreement.

2.4 "Cash Award(s)" means the pro rata portion of cash compensation in an amount up to $155.00 payable by the Settlement Administrator from funds provided by Defendant, that each Settlement Class Member who has timely submitted a claim and has not opted-out of the Settlement shall be entitled to receive.

2.5 "Claimant" means any Class Member who seeks a Cash Award payment by submitting a Claim Form pursuant to this Settlement Agreement.

2.6 "Claim Form" means the document substantially in the form attached hereto as Exhibit A, to be completed and submitted by Settlement Class Members who wish to file a claim seeking to recover the Cash Award described in this Settlement Agreement. The Claim Form, which shall be available in electronic and paper format in the manner described below, may be modified by the Court in the Preliminary Approval Order, or to meet the requirements of the Settlement Administrator.

2.7 "Claim Deadline" means the date by which all Claim Forms must be postmarked or received to be considered timely and shall be set as a date no later than forty-five (45) days after the Final Approval Hearing. The Claims Deadline shall be clearly set forth in the Preliminary Approval Order as well as in the Notice and the Claim Form.

2.8 "Class Counsel" means Philip L. Fraietta and Alec Leslie of Bursor & Fisher, P.A., Antonio Vozzolo of Vozzolo LLC, and Ronald A Marron of the Law Offices of Ronald A. Marron, APLC.

2.9 "Class Representatives" means the named Plaintiffs in this Action, Steven Doval, Melissa Cuello, and Ceana Cuello.

2.10 "Court" means the Superior Court of New Jersey, Law Division, Bergen County.

2.11 "Defendant" means FDU.

2.12 "Defendant's Counsel" means Angelo A. Stio III of Troutman Pepper Hamilton Sanders, LLP.

2.13 "Effective Date" or means the date ten (10) business days after which all of the events and conditions specified in Paragraph 11.1 have been met and have occurred.

2.14 "Escrow Account" means the separate, interest-bearing escrow account to be established by the Settlement Administrator under terms acceptable to all Parties at a depository institution insured by the Federal Deposit Insurance Corporation. The Settlement Fund shall be

deposited by Defendant into the Escrow Account in accordance with the terms of this Agreement and the money in the Escrow Account shall be invested in the following types of accounts and/or instruments and no other: (i) demand deposit accounts and/or (ii) time deposit accounts and certificates of deposit, in either case with maturities of forty-five (45) days or less. The costs of establishing and maintaining the Escrow Account shall be paid from the Settlement Fund.

2.15 "Fee and Expense Award(s)" means the amount of attorneys' fees and reimbursement of costs and expenses awarded by the Court to Class Counsel, which will be paid out of the Settlement Fund.

2.16 "Final" means one business day following the latest of the following events: (i) the date upon which the time expires for filing or noticing any appeal of the Court's Final Judgment approving the Settlement Agreement; (ii) if there is an appeal or appeals, the date of completion, in a manner that finally affirms and leaves in place the Final Judgment without any material modification, of all proceedings arising out of the appeal or appeals (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for review and/or *certiorari*, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand); or (iii) the date of final dismissal of any appeal or the final dismissal of any proceeding on *certiorari*.

2.17 "Final Approval Hearing" or "Fairness Hearing" means the hearing before the Court where the Parties will request the Final Judgment to be entered by the Court approving the Settlement Agreement, the Fee and Expense Award, and the Incentive Awards to the Class Representatives.

2.18 "Final Approval Order" means the Court order that approves this Settlement Agreement and makes such other final rulings as are contemplated by this Settlement Agreement.

2.19 "Final Judgment" means the Final Judgment and Order to be entered by the Court approving the Agreement after the Final Approval Hearing.

2.20 "Incentive Award(s)" means any payment to be made to the Class Representatives as set forth in this Settlement Agreement, subject to the approval of the Court, in recognition for the named Plaintiffs' time and effort in prosecuting the Action and shall be paid out of the Settlement Fund.

2.21 "Notice" or "Class Notice" means the Court-approved form of notice of this proposed Settlement Agreement, which is to be sent to the Settlement Class substantially in the manner set forth in this Agreement[2], which is consistent with the requirements of New Jersey Court Rule 4:32-2(e)(1)(B) and due process, and is substantially in the forms attached hereto as Exhibits "B", "C", and "D," informing them of, among other things, the (i) preliminary approval of the Settlement; (ii) scheduling of the Final Approval Hearing; (iii) opportunity to submit a claim; (iv) opportunity to submit an objection; and (v) opportunity to request exclusion.

2.22 "Notice Date" means the date by which the Notice set forth in Paragraph 5.1 is complete, which shall be no later than twenty-eight (28) days after Preliminary Approval.

2.23 "Objection" is the written communication that a Settlement Class Member may file with the Court in order to object to this Settlement Agreement as provided for in § VI of this Settlement Agreement.

2.24 "Objection/Exclusion Deadline" means the date by which a written objection to this Settlement Agreement or a request for exclusion submitted by a Person within the Settlement Class must be made, which shall be designated as a date no later than sixty (60) calendar days after the Notice Date and no sooner than fourteen (14) calendar days after papers supporting the

[2] Notice, however, may be modified as necessary to comply with the provisions of any order of Preliminary Approval entered by the Court.

Fee and Expense Award are filed with the Court and posted to the settlement website listed in Paragraph 5.1(d), or such other date as ordered by the Court.

2.25 "Out-of-Pocket Tuition and Fees" means (1) the total amount of tuition and fees paid to FDU by or on behalf of a Settlement Class Member, discounted by any reduction in tuition, and (2) minus any unpaid balances related to the Spring 2020 term as reflected on the Settlement Class Member's account with FDU. Out-of-Pocket Tuition and Fees does not include any payments for parking and/or room and board, including meal plans that were paid to FDU during the Spring 2020 Semester.

2.26 "Parties" means the Plaintiffs and Defendant.

2.27 "Person" means, without limitation, any individual, corporation, partnership, limited partnership, limited liability company, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity and their spouses, heirs, affiliates, parents, predecessors, successors, representatives, or assigns, subsidiaries, insurers, and their past, present and future directors, officers, shareholders, members, faculty, employees, agents, and attorneys both individually and in their capacities as directors, officers, shareholders, members, employees, agents, and attorneys. "Person" is not intended to include any governmental agencies or governmental actors, including, without limitation, any state Attorney General office.

2.28 "Plaintiffs" means Steven Doval, Melissa Cuello, and Ceana Cuello, and the Settlement Class Members.

2.29 "Preliminary Approval" means the Court has entered an order certifying the Settlement Class for settlement purposes, preliminarily approving the terms and conditions of this Settlement Agreement, including the manner of providing and content of Notice to Settlement Class Members.

2.30 "Preliminary Approval Order" means the Court's Order preliminarily approving the Settlement Agreement, certifying the Settlement Class for settlement purposes, and approving the Settlement Notice Plan.

2.31 "Released Claims" means any and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, claims, demands, charges, complaints, liabilities, rights, causes of action, suits, obligations, liens, judgments, contracts or agreements, extra contractual claims, damages, punitive, exemplary or multiplied damages, injunctive relief, declaratory relief, equitable relief, expenses, costs, attorneys' fees and or obligations (including "Unknown Claims," as defined below), and all other legal responsibilities in any form or nature, whether in law or in equity, accrued or un-accrued, direct, individual or representative, of every nature and description whatsoever, whether based on state, local or federal statute, ordinance, regulation, or claim at common law or in equity, or any other law, rule or regulation, whether past, present or future, known or unknown, asserted or unasserted, against the Released Parties, including but not limited to, any of them, arising out of any facts, transactions, events, matters, occurrences, acts, disclosures, statements, representations, omissions, claims, liabilities, or failures to act regarding FDU's actions or decisions in respect to the Spring 2020 academic term, including ceasing physically in-person, on-campus education and services and transitioning to a remote format for the Spring 2020 academic term, including but not limited to all claims that were brought or could have been brought in the Action relating to any and all Releasing Parties.

2.32 "Released Parties" means Defendant, FDU, as well as any and all of its respective current, former, and future heirs, executors, estates, administrators, predecessors, successors, assigns, parent companies, subsidiaries, licensors, licensees, associates, affiliates, divisions, related corporate entities, employers, agents, consultants, independent contractors, insurers, and

all of their respective current, future, and former employees, directors, trustees, faculty, staff, administrators, board members, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, insurers, underwriters, shareholders, lenders, auditors, investment advisors, legal representatives, successors in interest, assigns and companies, firms, agents, executors, trusts, corporations, customers, and all third party service providers or entities identified as FDU's agents and/or independent contractors in this Action.

2.33 "Releasing Parties" means Plaintiffs, those Settlement Class Members who do not timely opt out of the Settlement Class, and all of their respective present or past heirs, executors, family members, lenders, funders, payors, estates, administrators, predecessors, successors, assigns, parent companies, subsidiaries, associates, affiliates, employers, employees, agents, consultants, independent contractors, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, underwriters, shareholders, lenders, auditors, investment advisors, legal representatives, successors in interest, assigns and companies, firms, trusts, limited liability companies, partnerships and corporations.

2.34 "Request for Exclusion" means the written communication that must be sent to the Settlement Administrator and postmarked on or before the Objection/Exclusion Deadline by a Settlement Class Member who wishes to be excluded from the Settlement Class.

2.35 "Settlement Administration Expenses" means the expenses incurred by the Settlement Administrator in providing Notice, responding to inquiries from members of the Settlement Class, receiving information, mailing checks, and related services, paying taxes and tax expenses related to the Settlement Fund (including all federal, state or local taxes of any kind and interest or penalties thereon, as well as expenses incurred in connection with determining the amount of and paying any taxes owed and expenses related to any tax attorneys and accountants).

2.36 "Settlement Administrator" means RG/2 Claims Administration, LLC, or such other reputable administration company that has been selected by Plaintiffs and is reasonably acceptable to Defendant, and approved by the Court to perform the duties set forth in this Agreement, including but not limited to serving as escrow agent for the Settlement Fund, overseeing the distribution of Notice, handling all approved payments out of the Settlement Fund, and handling the determination, payment and filing of forms related to all federal, state and/or local taxes of any kind (including any interest or penalties thereon) that may be owed on any income earned by the Settlement Fund. Class Counsel's assent to this Agreement shall constitute consent on behalf of each and every member of the Settlement Class as defined herein to disclose to Class Counsel and the Settlement Administrator all information required by the Settlement Administrator to perform the duties and functions ascribed to it herein, consistent with the written consent provisions of the Federal Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

2.37 "Settlement Class Members," "Class Members," "Class," or "Settlement Class" means all people who paid Defendant Spring 2020 Semester tuition and fees or who benefitted from the payment, and whose tuition and fees have not been refunded. Excluded from the Settlement Class will be: (a) all students who were enrolled entirely in an on-line program during the Spring 2020 Semester, (b) all students whose gift, aid (not including loans) or scholarships, regardless of source, equaled or exceeded the cost of tuition and fees for the Spring 2020 Semester, (c) persons who timely and properly exclude themselves from the Class as provided herein, and (d) the Court, the Court's immediate family, and Court staff.

2.38 "Settlement Fund" means the fund that shall be established by or on behalf of Defendant in the total amount of up to one million five hundred thousand dollars ($1,500,000.00 USD) to be deposited into the Escrow Account, according to the schedule set forth herein, plus

all interest earned thereon. From the Settlement Fund, the Settlement Administrator shall pay all Cash Awards to Settlement Class Members, Settlement Administration Expenses, any Incentive Awards to the Class Representatives, any Fee and Expense Award to Class Counsel, and any other costs, fees or expenses approved by the Court. The Settlement Fund shall be kept in the Escrow Account with permissions granted to the Settlement Administrator to access said funds until such time as the listed payments are made. The Settlement Fund includes all interest that shall accrue on the sums deposited in the Escrow Account. The Settlement Administrator shall be responsible for all tax filings with respect to any earnings on the Settlement Fund and the payment of all taxes that may be due on such earnings. The Settlement Fund shall be used to satisfy Defendant's monetary obligations under this Agreement. The payment of the sums into the Settlement Fund by Defendant fully discharges the Defendant and the other Released Parties' financial obligations (if any) in connection with the Settlement, meaning that no Released Party shall have any other obligation to make any payment into the Escrow Account or to any Class Member, or any other Person, under this Agreement. In no event shall the total monetary obligation with respect to this Agreement on behalf of Defendant exceed one million five hundred thousand dollars ($1,500,000.00 USD).

2.39 "Settlement Notice Plan" or "Notice Plan" means the Settlement Administrator's plan to disseminate Class Notice to Settlement Class Members, as described in § V below.

2.40 "Settlement Website" means a website operated and maintained by the Settlement Administrator solely for purposes of making available to the Settlement Class Members the Class Notice, documents, information, and online claims submission process referenced in § V, below.

2.41 "Spring 2020 Semester" means the Spring 2020 academic semester at FDU, which commenced on or about January 4, 2020, and concluded on May 18, 2020.

2.42 "Unknown Claims" means claims that could have been raised in the Action and that any or all of the Releasing Parties do not know or suspect to exist, which, if known by him or her, might affect his or her agreement to release the Released Parties or the Released Claims or might affect his or her decision to agree, object or not to object to the Settlement. Upon the Effective Date, the Releasing Parties shall be deemed to have, and shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of § 1542 of the California Civil Code, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Upon the Effective Date, the Releasing Parties also shall be deemed to have, and shall have, waived any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, or the law of any jurisdiction outside of the United States, which is similar, comparable or equivalent to § 1542 of the California Civil Code. The Releasing Parties acknowledge that they may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this release, but that it is their intention to finally and forever settle and release the Released Claims, notwithstanding any Unknown Claims they may have, as that term is defined in this Paragraph.

III. SETTLEMENT CONSIDERATION AND RELIEF

3.1 **Payments to Settlement Class Members.** In full, complete, and final settlement and satisfaction of the Action and all Released Claims, and subject to all of the terms, conditions, and provisions of this Settlement Agreement, FDU agrees to provide the following consideration to Settlement Class Members who submit a valid and timely Claim Form to the Settlement Administrator:

(a) Defendant shall within thirty (30) days following the date of Final Judgment pay or cause to be paid into the Escrow Account the amount of the Settlement Fund (up to $1,500,000.00), specified in Paragraph 2.38 of this Agreement less: (i) any amounts previously invoiced and paid to the Settlement Administrator in accordance with §§ V and VII.

(b) The Settlement Fund shall be applied to pay in full and in order: (i) any necessary taxes and tax expenses; (ii) all other Settlement Administration Expenses, including costs of providing notice to the Class Members and processing claims; (iii) any Fee and Expense Award made by the Court to Class Counsel; (iv) any class representative Incentive Awards approved by the Court to the Class Representatives; and (v) payments to Claimants who have filed a valid claim and any others as allowed by this Agreement and to be approved by the Court.

(c) Each Settlement Class Member seeking to receive a payment from the Settlement Fund in a pro rata amount not to exceed a total of $155.00 per student in attendance, shall complete and submit a Claim Form to the Settlement Administrator on or before the Claims Deadline. The Claim Form shall require the Settlement Class Member to state the Settlement Class Member's name, affirm that the Settlement Class Member paid Defendant Out-Of-Pocket Tuition and Fees (that is, payments to Defendant exclusive of gift aid (not including loans), regardless of source) an amount up to $155.00, and affirm that either (i) no other individual paid tuition and fees on the Settlement Class Members behalf during the Spring 2020 Semester for which reimbursement is being sought; or (ii) no other Settlement Class Member will submit a claim relating to the specific student in attendance. The Settlement Class Member shall verify the information on the Claim Form with a statement that the information is true and correct to the best of the Settlement Class Member's information, knowledge, and belief.

(d) Payments to all Settlement Class Members who submit a valid, timely Claim Form shall be made within fifty (50) days after the Effective Date.

(e) All Cash Awards issued to Settlement Class Members via check will state on the face of the check that funds not cashed within one hundred eighty (180) days after the date of issuance shall revert to the Defendant and be used for scholarships for the benefit of students in financial need, as a *cy pres*. Checks shall be sent to Defendant's last known or available address of record for each Class Member (or any updated address identified by the Settlement Administrator in connection with issuing Notice) and shall be valid for one hundred eighty (180) days. In the event that the Settlement Fund is not exhausted by submitted Claims or Cash Awards, Settlement Administration Expenses, Fee and Expense Awards, and Incentive Awards, the remainder of the Settlement Fund shall revert to Defendant and be used for scholarships to benefit students in need, as a *cy pres*.

(f) Plaintiffs understand and agree that Plaintiffs and Settlement Class Members would not receive the monies and/or benefits specified in this Agreement, except for Plaintiffs' execution of this Agreement and the fulfillment of the promises contained herein.

IV. RELEASE

4.1 The obligations incurred pursuant to this Settlement Agreement shall be a full and final disposition of the Action and any and all Released Claims, as against all Released Parties.

4.2 Upon the Effective Date, the Releasing Parties, and each of them, shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Released Parties, and each of them.

V. NOTICE TO THE CLASS

5.1 The Notice Plan shall consist of the following:

(a) *Settlement Class List*. No later than twenty-eight (28) calendar days from the execution of this Settlement Agreement, Defendant shall produce an electronic list from its records that includes the names, last known U.S. Mail addresses, and email addresses, to the

extent available, belonging to Persons within the Settlement Class. This electronic document shall be called the "Class List," and shall be provided to the Settlement Administrator for the purpose of giving notice to the Settlement Class Members and shall not be used for any other purpose. No later than five (5) business days after the Objection/Exclusion Deadline, Defendant will provide to the Settlement Administrator a list of the total amount of Out-of-Pocket Tuition and Fees paid by or on behalf of each Settlement Class Member for the Spring 2020 Semester.

(b) *Direct Notice via Email.* No later than twenty-one (21) calendar days from entry of the Preliminary Approval Order, the Settlement Administrator shall send Notice via email substantially in the form attached as Exhibit B to all Settlement Class Members for whom a valid email address is in the Class List. An additional e-mail will be sent within 30 days of the initial e-mail notice. To ensure a high degree of deliverability of the email notice and to avoid spam filters, the Claims Administrator must utilize industry-recognized best practices and comply with the Can-Spam Act. The Email Notice shall have a hyperlink that Class Member recipients may click and be taken to a landing page on the Settlement Website, prepopulated with Class Member data, if practicable. In the event transmission of email notice results in any "bounce-backs," the Settlement Administrator shall, if possible, correct any issues that may have caused the "bounce-back" to occur and make a second attempt to re-send the email notice.

(c) *Direct Notice via U.S. Mail.* No later than the twenty-eight (28) calendar days from entry of the Preliminary Approval Order, the Settlement Administrator shall send notice substantially in the form attached as Exhibit C via First Class U.S. Mail to all Settlement Class Members who did not receive an email pursuant to Paragraph 5.1(b), above. In addition to the notice required by the Court, the Parties may jointly agree to provide additional notice to the members of the Settlement Class. For any Notice that is returned by the Postal Service as undeliverable, the Settlement Administrator shall re-mail the notice to the forwarding address, if

any, provided by the Postal Service or—if no forwarding address is provided on the returned mail—shall re-mail the notice after performing a "skip trace."

(d) *Settlement Website.* Within ten (10) business days from entry of the Preliminary Approval Order, the Settlement Administrator shall establish and maintain a Settlement Website, that shall provide Settlement Class Members with the ability to update their mailing addresses and will: (i) notify the Settlement Class of their rights to opt out or exclude themselves from the Settlement Class; (ii) notify the Settlement Class of their right to object to this Agreement; (iii) notify the Settlement Class that no further notice will be provided to them that the Settlement has been approved; (iv) inform the Settlement Class that they should monitor the Settlement Website for further developments; (v) inform the Settlement Class of their right to attend the Final Approval Hearing conducted by the Court; (vi) include any required notice of any motion(s) made by Class Counsel for any Attorneys' Fee and Expense Award or Incentive Awards (when available); (vii) include a copy of this Agreement, the Preliminary Approval Order, the Claim Form, and the Notice substantially in the form attached hereto as Exhibit D; (viii) include copies of the material documents that are filed publicly with the Court in connection with the Settlement or any other pertinent case documents; (ix) state the means by which Settlement Class Members may communicate with the Claims Administrator (including but not limited to the Claims Administrator's business name, address, a toll-free telephone number, and e-mail address); (x) contain a set of Frequently Asked Questions and corresponding answers, (xi) provide instructions on how to submit a Claim Form (both electronically and by mail); and (xi) include any other information or materials that may be required by the Court and/or agreed to by the Parties. The Claims Administrator shall secure a URL for the Settlement Website selected and approved by the Parties. The Settlement Website shall remain active for 90 calendar days after the Settlement Effective Date.

(e) *Toll-Free Interactive Voice Response ("IVR").* On or before the Notice Date, the Settlement Administrator shall establish a Toll-Free IVR phone number with script recordings of information about this Settlement, including information about the Claim Form, utilizing the relevant portions of the language contained in the Notice and Claim Form. The phone number shall remain open and accessible through the Claim Deadline. The Settlement Administrator shall make reasonable provision for Class Counsel to be promptly advised of recorded messages left on the phone number by potential Settlement Class Members concerning the Action and/or this Settlement, so that Class Counsel may timely and accurately respond to such inquiries; provided however, the Settlement Administrator shall review the recorded messages before providing them to Class Counsel, and if one or more of the messages requests a blank Claim Form or other similar administrative assistance only, then the Settlement Administrator shall handle such administrative request(s), but the Settlement Administrator shall provide all other messages to Class Counsel for any further response to the Settlement Class Member.

5.2 The Notice shall advise the Settlement Class of their rights, including the right to be excluded from, comment upon, and/or object to the Settlement Agreement or any of its terms. The Notice shall also advise the Settlement Class of their ability to seek to quash the ordered disclosure of their Out-of-Pocket Tuition and Fees to the Settlement Administrator. The Notice shall specify that any objection to the Settlement Agreement, and any papers submitted in support of said objection, shall be considered by the Court at the Final Approval Hearing only if, on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice, the Person making the objection files notice of an intention to do so and at the same time (a) files copies of such papers he or she proposes to be submitted at the Final Approval Hearing with the Clerk of the Court, or alternatively, if the objection is from a Class Member represented by counsel, files any objection through the Court's electronic filing

system, and (b) sends copies of such papers by mail, hand, or overnight delivery service to the Settlement Administrator, with copies to Class Counsel and Defendant's Counsel.

VI. EXCLUSIONS AND OBJECTIONS

6.1 Class Members shall have the right to object to the Court's granting final approval to this Agreement. To be considered, any objection must be made in writing, must be filed with the Court, must be mailed or delivered to the Settlement Administrator at the address provided in the Notice, with copies to Class Counsel and Defense Counsel, received no later than the Objection/Exclusion Deadline, and must include the following: (i) the name of the Action; (ii) the objector's full name, address and telephone number; (iii) the basis upon which the objector claims to be a Class Member (iv) a written statement of all legal and factual grounds for the objection, including copies of any documents relied upon; (v) the name and contact information of any and all attorneys representing, advising, or in any way assisting the objector in connection with the objection ("Objecting Attorneys"); (vi) a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; (vii) the identity of any counsel who will appear at the Final Approval Hearing on the objector's behalf; (viii) a list of any witnesses the objector wishes to call to testify, or any documents or exhibits the objector or the objector's counsel may use, at the Final Approval Hearing; (ix) the number of class actions in which the objector or his or her counsel have filed an objection in the last five (5) years; and (x) the objector's signature. If a Settlement Class Member or any of the Objecting Attorneys has objected to any class action settlement where the objector or the Objecting Attorneys asked for or received any payment in exchange for dismissal of the objection, or any related appeal, without any modification to the settlement, then the objection must include a statement identifying each such case by full case caption and amount of payment received. Any Class Member who fails to file a timely written objection and notice of his or her

intent to appear at the Final Approval Hearing pursuant to this Paragraph (6.1) or as detailed in the Notice shall not be permitted to object to the Settlement at the Final Approval Hearing and shall be foreclosed from seeking any review of the Settlement by appeal or other means.

6.2 Any Party shall have the right to respond to any objection by filing a response with the Court and serving a copy on the objector (or counsel for the objector) and counsel for the other Parties no later than three (3) days before the Fairness Hearing.

6.3 A Settlement Class Member may request to be excluded from the Settlement Class by sending a written request postmarked on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice. To exercise the right to be excluded, a Person in the Settlement Class must timely send a written request for exclusion to the Settlement Administrator providing their name and address, a signature, the name and number of the case, and a statement that they wish to be excluded from the Settlement Class for purposes of this Settlement. A request to be excluded that does not include all of this information, or that is sent to an address other than that designated in the Notice, or that is not postmarked within the time specified, shall be invalid, and the Person(s) serving such a request shall be a member(s) of the Settlement Class and shall be bound as a Settlement Class Member by this Agreement, if approved. Any member of the Settlement Class who validly elects to be excluded from this Agreement shall not: (i) be bound by any orders or the Final Judgment; (ii) be entitled to relief under this Settlement Agreement; (iii) gain any rights by virtue of this Agreement; or (iv) be entitled to object to any aspect of this Agreement. The request for exclusion must be personally signed by each Person requesting exclusion. So-called "mass" or "class" opt-outs shall not be allowed. To be valid, a request for exclusion must be postmarked or received by the date specified in the Notice.

6.4 Within five (5) business days after the Objection/Exclusion Deadline, the Settlement Administrator shall provide to Defense Counsel and Class Counsel a list of all Persons who opted out by requesting exclusion pursuant to § VI. Any Party shall have the right to challenge the timeliness and validity of any request for exclusion. The Court shall determine whether any contested request is timely and valid.

6.5 The Final Approval Hearing shall be no earlier than ninety (90) calendar days after the Notice Plan described in Paragraph 5.1 is provided.

6.6 Any Settlement Class Member who does not, in accordance with the terms and conditions of this Agreement, seek exclusion from the Settlement Class will be bound by all of the terms of this Agreement, including the terms of the Final Judgment to be entered in the Action and the Releases provided for in the Agreement, and will be barred from bringing any action against any of the Released Parties concerning the Released Claims.

VII. SETTLEMENT ADMINISTRATION

7.1 The Settlement Administrator shall, under the supervision of the Court, administer the relief provided by this Settlement Agreement in a rational, responsive, cost effective, and timely manner. The Settlement Administrator shall maintain reasonably detailed records of its activities under this Agreement. The Settlement Administrator shall maintain all such records as are required by applicable law in accordance with its normal business practices and such records will be made available to Class Counsel and Defendant's Counsel upon request. The Settlement Administrator shall also provide reports and other information to the Court as the Court may require. The Settlement Administrator shall provide Class Counsel and Defendant's Counsel with regular reports at weekly intervals containing information concerning Notice, administration, and implementation of the Settlement Agreement. Should the Court request, the Parties shall submit a timely report to the Court summarizing the work performed by the

Settlement Administrator, including a report of all amounts from the Settlement Fund paid to Settlement Class Members. Without limiting the foregoing, the Settlement Administrator shall:

(a) Forward to Defendant's Counsel, with copies to Class Counsel, all original documents and other materials received in connection with the administration of the Settlement, and all copies thereof, within thirty (30) days after the Objection/Exclusion Deadline;

(b) Provide Class Counsel and Defendant's Counsel with drafts of all administration related documents, including but not limited to Notices, follow-up class notices or communications with Settlement Class Members, telephone scripts, website postings or language or other communications with the Settlement Class, at least five (5) business days before the Settlement Administrator is required to or intends to publish or use such communications, unless Class Counsel and Defendant's Counsel agree to waive this requirement in writing on a case by case basis; and

(c) Receive requests to be excluded from the Settlement Class and other requests and promptly provide to Class Counsel and Defendant's Counsel copies thereof. If the Settlement Administrator receives any exclusion forms or other requests after the deadline for the submission of such forms and requests, the Settlement Administrator shall promptly provide copies thereof to Class Counsel and Defendant's Counsel.

7.2 In the exercise of its duties outlined in this Agreement, the Settlement Administrator shall have the right to reasonably request additional information from Class Counsel or any Settlement Class Member.

7.3 Defendant, the Released Parties, and Defendant's Counsel shall have no responsibility for, interest in, or liability whatsoever with respect to: (i) any act, omission, or determination by Class Counsel, or the Settlement Administrator, or any of their respective designees or agents, in connection with the administration of the Settlement or otherwise; (ii) the

management, investment, or distribution of the Settlement Fund; (iii) the allocation of Settlement Funds to Settlement Class Members or the implementation, administration, or interpretation thereof; (iv) the determination, administration, calculation, or payment of any claims asserted against the Settlement Fund; (v) any losses suffered by, or fluctuations in value of, the Settlement Fund; or (vi) the payment or withholding of any taxes, tax expenses, or costs incurred in connection with the taxation of the Settlement Fund or the filing of any federal, state, or local returns.

7.4 All taxes and tax expenses shall be paid out of the Settlement Fund, and shall be timely paid by the Settlement Administrator pursuant to this Agreement and without further order of the Court. Any tax returns prepared for the Settlement Fund (as well as the election set forth therein) shall be consistent with this Agreement and in all events shall reflect that all taxes on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided herein. The Released Parties shall have no responsibility or liability for the acts or omissions of the Settlement Administrator or its agents with respect to the payment of taxes or tax expenses.

7.5 The Settlement Administrator shall protect the privacy of any personally identifiable information it receives in the course of administering the duties provided by this Agreement, and it shall comply with all laws regarding data privacy protection and data security.

7.6 All disputes relating to the Settlement Administrator's ability and need to perform its duties shall be referred to the Court, if necessary, which will have continuing jurisdiction over the terms and conditions of this Agreement, until all payments and obligations contemplated by the Agreement have been fully carried out.

VIII. TERMINATION OF SETTLEMENT

8.1 Subject to Paragraphs 11.1-11.3 below, Defendant or the Class Representatives on behalf of the Settlement Class, shall have the right to terminate this Agreement by providing written notice of the election to do so ("Termination Notice") to all other Parties hereto within twenty-one (21) days of any of the following events: (i) the Court's refusal to grant Preliminary Approval of this Agreement in any material respect[3]; (ii) the Court's refusal to grant final approval of this Agreement in any material respect; (iii) the Court's refusal to enter the Final Judgment in this Action in any material respect; (iv) the date upon which the Final Judgment is modified or reversed in any material respect by the Appellate Division or the Supreme Court of New Jersey; or (v) the date upon which an Alternate Judgment, as defined in Paragraphs 2.2 and 11.1(d) of this Agreement is modified or reversed in any material respect by the Court of Appeals or the Supreme Court.

8.2 If more than three hundred (300) members of the Settlement Class opt out or request exclusion from the Settlement Class in accordance with Paragraph 6.3, Defendant shall have the option, in its sole discretion, to void this Agreement by providing written notice of the election to do so ("Opt Out Termination Notice") to all other Parties hereto within twenty-one (21) days of the Objection/Exclusion Deadline.

8.3 Defendant shall bear all reasonable and necessary costs incurred in connection with the implementation of this Class Action Settlement Agreement up until its termination. Neither the Class Representatives nor Class Counsel shall be responsible for any such settlement-related costs.

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[3] Without limitation any alteration to the following provisions would be considered material: Sections 2.31, 2.32, 2.33, 2.38, 3.1, 4.1, 4.2, 6.3, 8.1, and 8.2.

8.4 In the event that this Agreement is not approved by the Court or the settlement set forth in this Stipulation is terminated or fails to become effective in accordance with its terms, any reasonable costs associated with the Class Action Settlement Administrator or administration incurred prior to that time will be paid by FDU.

IX. CERTIFICATION OF THE SETTLEMENT CLASS, PRELIMINARY APPROVAL ORDER, AND FINAL APPROVAL ORDER

9.1 The Parties agree, for settlement purposes only (and without any finding or admission of any wrongdoing or fault by Defendant) that the Settlement Class shall be certified and proceed as a class action under New Jersey Court Rule 4:32, with a class consisting of all Settlement Class Members, and with Plaintiffs as Class Representatives and with Class Counsel as counsel for the Settlement Class Members.

9.2 The Parties acknowledge that (a) any certification of the Settlement Class as set forth in this Agreement, including certification of the Settlement Class for settlement purposes in the context of Preliminary Approval, shall not be deemed a concession that certification of a litigation class is appropriate, or that the Settlement Class definition would be appropriate for a litigation class, nor would Defendant be precluded from challenging class certification in further proceedings in the Action or in any other action if the Settlement Agreement is not finalized or finally approved; (b) if the Settlement Agreement is not finally approved by the Court for any reason whatsoever, then any certification of the Settlement Class will be void, the Parties and the Action shall be restored to the status quo ante, and no doctrine of waiver, estoppel or preclusion will be asserted in any litigated certification proceedings in the Action or in any other action; and (c) no agreements made by or entered into by Defendant in connection with the Settlement may be used by Plaintiffs, any person in the Settlement Class, or any other person to establish any of

the elements of class certification in any litigated certification proceedings, whether in the Action or any other judicial proceeding.

9.3 Promptly after the execution of this Settlement Agreement, Class Counsel shall submit this Agreement together with its Exhibits to the Court and shall move the Court for Preliminary Approval of the settlement set forth in this Agreement; certification of the Settlement Class for settlement purposes only; appointment of Class Counsel and the Class Representatives; and entry of a Preliminary Approval Order, which order shall set a Final Approval Hearing date and approve the Notice for dissemination substantially in the form of Exhibits B, C, and D hereto. The Preliminary Approval Order shall also authorize the Parties, without further approval from the Court, to agree to and adopt such amendments, modifications and expansions of the Settlement Agreement and its implementing documents (including all exhibits to this Agreement) so long as they are consistent in all material respects with the terms of the Settlement Agreement and do not limit or impair the rights of the Settlement Class or materially expand the obligations of Defendant.

9.4 At the time of the submission of this Agreement to the Court as described above, Class Counsel shall request that, after Notice is given, the Court hold a Final Approval Hearing and approve the settlement of the Action as set forth herein.

9.5 After Notice is given, the Parties shall request and seek to obtain from the Court a Final Judgment, which will (among other things):

(a) find that the Court has personal jurisdiction over all Settlement Class Members and that the Court has subject matter jurisdiction to approve the Agreement, including all exhibits thereto;

(b) approve the Settlement Agreement and the proposed settlement as fair, reasonable, and adequate as to, and in the best interests of, the Settlement Class Members, for

purposes of New Jersey Court Rule 4:32-2(e)(1)(C); direct the Parties and their counsel to implement and consummate the Agreement according to its terms and provisions; and declare the Agreement to be binding on, and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiffs and Releasing Parties;

(c) find that the Notice implemented pursuant to the Agreement (1) constitutes the best practicable notice under the circumstances; (2) constitutes notice that is reasonably calculated, under the circumstances, to apprise the Settlement Class of the pendency of the Action, their right to object to or exclude themselves from the proposed Agreement, and to appear at the Final Approval Hearing; (3) is reasonable and constitutes due, adequate, and sufficient notice to all persons entitled to receive notice; and (4) complied with all laws and applicable legal requirements, including but not limited to, New Jersey Court Rule 4:32-2(e)(1)(B) and due process;

(d) find that the Class Representatives and Class Counsel adequately represent the Settlement Class for purposes of entering into and implementing the Agreement;

(e) dismiss the Action (including all individual claims and Settlement Class Claims presented thereby) on the merits and with prejudice, without fees or costs to any party except as provided in the Settlement Agreement;

(f) incorporate the Release set forth above, make the Release effective as of the date of the Effective Date, and forever discharge the Released Parties as set forth herein;

(g) permanently bar and enjoin all Settlement Class Members who have not been properly excluded from the Settlement Class from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any lawsuit or other action in any jurisdiction based on the Released Claims;

(h) without affecting the finality of the Final Judgment for purposes of appeal, retain jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement and the Final Judgment, and for any other necessary purpose; and

(i) incorporate any other provisions, as the Court deems necessary and just.

X. CLASS COUNSEL'S ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES; INCENTIVE AWARDS

10.1 Defendant agrees that Class Counsel may apply for an award of attorneys' fees, costs, and expenses from the Settlement Fund not to exceed one-third (33.3%) of the Settlement Fund (or five hundred thousand dollars ($500,000.00)). Payment of the Fee and Expense Award shall be made from the Settlement Fund and should the Court award less than the amount sought by Class Counsel, the difference in the amount sought and the amount ultimately awarded pursuant to this Paragraph shall remain in the Settlement Fund.

10.2 The Fee and Expense Award shall be payable by the Settlement Administrator within thirty (30) days after entry of the Court's Final Judgment, subject to Class Counsel each executing a stipulated Undertaking Regarding Attorneys' Fees and Costs (an "Undertaking") substantially in the form attached hereto as Exhibit E, and providing all payment routing information and tax I.D. numbers for Class Counsel. Each Undertaking shall be substantively identical to the stipulated undertaking approved by the Court in *Taylor v. Trusted Media Brands, Inc.*, S.D.N.Y., Case No. 16-cv-01812-KMK (Dkt. No. 70-1, Ex. E). Payment of the Fee and Expense Award shall be made from the Settlement Fund by wire transfer to Class Counsel, in accordance with wire instructions to be provided by Bursor & Fisher, P.A., and completion of necessary forms, including but not limited to W-9 forms. Notwithstanding the foregoing, if for any reason the Final Judgment is reversed or rendered void as a result of an appeal(s) then Class

Counsel shall return such funds to the Defendant. Additionally, should any parties to an Undertaking dissolve, merge, declare bankruptcy, become insolvent, or cease to exist prior to the final payment to Class Members, those parties shall execute a new undertaking guaranteeing repayment of funds within fourteen (14) calendar days of such an occurrence.

10.3 Defendant agrees that the Class Representatives may apply for an incentive award from the Settlement Fund, in addition to any settlement payment as a result of an Approved Claim pursuant to this Agreement, and in recognition of their efforts on behalf of the Settlement Class, in the amount of not more than five thousand dollars ($5,000.00 USD) each. Should the Court award less than this amount, the difference in the amount sought and the amount ultimately awarded pursuant to this Paragraph shall remain in the Settlement Fund. Class Representatives understand and acknowledge that they may receive no monetary payment, and their agreement to the Settlement is not conditioned on the possibility of receiving monetary payment. Such award shall be paid from the Settlement Fund (in the form of a check to the Class Representatives that is sent care of Class Counsel), within five (5) business days after the Effective Date.

XI. CONDITIONS OF SETTLEMENT, EFFECT OF DISAPPROVAL, CANCELLATION OR TERMINATION

11.1 The Effective Date of this Settlement Agreement shall not occur unless and until each of the following events occurs and shall be (10) business days after the date upon which the last (in time) of the following events occurs:

(a) The Parties and their counsel have executed this Agreement;

(b) The Court has entered the Preliminary Approval Order;

(c) The Court has entered the Final Approval Order and has entered the Final Judgment, or a judgment consistent with this Agreement in all material respects; and

(d) The Final Judgment has become Final, as defined above, or, in the event that the Court enters an Alternate Judgment, such Alternate Judgment becomes Final.

11.2 If some or all of the conditions specified in Paragraph 11.1 are not met, or in the event that this Agreement is not approved by the Court, or the settlement set forth in this Agreement is terminated or fails to become effective in accordance with its terms, then this Settlement Agreement shall be canceled and terminated subject to Paragraph 8.1 unless Class Counsel and Defendant's Counsel mutually agree in writing to proceed with this Agreement. If any Party is in material breach of the terms hereof, any other Party, provided that it is in substantial compliance with the terms of this Agreement, may terminate this Agreement on notice to all of the Parties. Notwithstanding anything herein, the Parties agree that the Court's failure to approve, in whole or in part, the attorneys' fees payment to Class Counsel and/or the incentive award set forth in § X above shall not prevent the Agreement from becoming effective, nor shall it be grounds for termination.

11.3 If this Agreement is terminated or fails to become effective for the reasons set forth in Paragraphs 8.1-8.2 or 11.1-11.2 above, the Parties shall be restored to their respective positions in the Action as of the date of the signing of this Agreement. In such event, any Final Judgment or other order entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*, and the Parties shall be returned to the *status quo ante* with respect to the Action as if this Agreement had never been entered into. Within five (5) business days after written notification of termination as provided in this Agreement is sent to the other Parties, the Settlement Fund (including accrued interest thereon), less any Settlement Administration costs actually incurred, paid or payable and less any taxes and tax expenses paid, due or owing, shall be refunded by the Settlement Administrator to Defendant, based upon written instructions provided by Defendant's Counsel. In the event that the Final Settlement

Order and Judgment or any part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, Class Counsel shall, within thirty (30) days repay to Defendant, based upon written instructions provided by Defendant's Counsel, the full amount of the attorneys' fees and costs paid to Class Counsel from the Settlement Fund, including any accrued interest. In the event the attorney fees and costs awarded by the Court or any part of them are vacated, modified, reversed, or rendered void as a result of an appeal, Class Counsel shall within thirty (30) days repay to Defendant, based upon written instructions provided by Defendant's Counsel, the attorneys' fees and costs paid to Class Counsel and/or Class Representatives from the Settlement Fund, in the amount vacated or modified, including any accrued interest.

11.4 Nothing shall prevent the Class Representatives and/or FDU from appealing or seeking other appropriate relief from an appellate court with respect to any denial by the Court of Final Approval of the Settlement.

XII. MISCELLANEOUS PROVISIONS.

12.1 The Parties (a) acknowledge that it is their intent to consummate this Settlement Agreement; and (b) agree, subject to their fiduciary and other legal obligations, to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Agreement, to exercise their reasonable best efforts to accomplish the foregoing terms and conditions of this Agreement, to secure final approval, and to defend the Final Judgment through any and all appeals. Class Counsel and Defendant's Counsel agree to cooperate with one another in seeking Court approval of the Settlement Agreement, entry of the Preliminary Approval Order, and the Final Judgment, and promptly to agree upon and execute all such other documentation as may be reasonably required to obtain final approval of the Agreement.

12.2 The Parties intend this Settlement Agreement to be a final and complete resolution of all disputes between them with respect to the Released Claims by Plaintiffs, the Settlement Class and each or any of them, on the one hand, against the Released Parties, and each or any of the Released Parties, on the other hand. Accordingly, the Parties agree not to assert in any forum that the Action was brought by Plaintiffs or defended by Defendant, or each or any of them, in bad faith or without a reasonable basis.

12.3 The Parties have relied upon the advice and representation of counsel, selected by them, concerning their respective legal liability for the claims hereby released. The Parties have read and understand fully the above and foregoing agreement and have been fully advised as to the legal effect thereof by counsel of their own selection and intend to be legally bound by the same.

12.4 Whether or not the Effective Date occurs or the Settlement Agreement is terminated, neither this Agreement nor the settlement contained herein or any term, provision or definition therein, nor any act or communication performed or document executed in the course of negotiating, implementing or seeking approval pursuant to or in furtherance of this Agreement or the settlement:

(a) is, may be deemed, or shall be used, offered or received in any civil, criminal or administrative proceeding in any court, administrative agency, arbitral proceeding or other tribunal against the Released Parties, or each or any of them, as an admission, concession or evidence of, the validity of any Released Claims, the truth of any fact alleged by the Plaintiffs, the deficiency of any defense that has been or could have been asserted in the Action, the violation of any law or statute, the definition or scope of any term or provision, the reasonableness of the settlement amount or the Fee and Expense Award, or of any alleged wrongdoing, liability, negligence, or fault of the Released Parties, or any of them. Defendant,

while continuing to deny all allegations of wrongdoing and disclaiming all liability with respect to all claims, considers it desirable to resolve the action on the terms stated herein to avoid further expense, inconvenience, and burden, and therefore has determined that this settlement on the terms set forth herein is in Defendant's best interests;

(b) is, may be deemed, or shall be used, offered or received against any Released Party, as an admission, concession or evidence of any fault, misrepresentation or omission with respect to any statement or written document approved or made by the Released Parties, or any of them;

(c) is, may be deemed, or shall be used, offered or received against the Released Parties, or each or any of them, as an admission or concession with respect to any liability, negligence, fault or wrongdoing as against any Released Parties, or supporting the certification of a litigation class, in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. However, the settlement, this Agreement, and any acts performed and/or documents executed in furtherance of or pursuant to this Agreement and/or Settlement may be used in any proceedings as may be necessary to effectuate the provisions of this Agreement. Further, if this Settlement Agreement is approved by the Court, any Party or any of the Released Parties may file this Agreement and/or the Final Judgment in any action that may be brought against such Party or Parties in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim;

(d) is, may be deemed, or shall be construed against Plaintiffs, the Settlement Class, the Releasing Parties, or each or any of them, or against the Released Parties, or each or any of them, as an admission or concession that the consideration to be given hereunder

represents an amount equal to, less than or greater than that amount that could have or would have been recovered after trial; and

(e) is, may be deemed, or shall be construed as or received in evidence as an admission or concession against Plaintiffs, the Settlement Class, the Releasing Parties, or each and any of them, or against the Released Parties, or each or any of them, that any of Plaintiffs' claims are with or without merit or that damages recoverable in the Action would have exceeded or would have been less than any particular amount.

12.5 No person or entity shall have any claim against the Class Representatives, Class Counsel, the Settlement Administrator or any other agent designated by Class Counsel, or the Released Parties and/or their counsel, arising from distributions made substantially in accordance with this Agreement. The Parties and their respective counsel, and all other Released Parties shall have no liability whatsoever for the investment or distribution of the Settlement Fund or the determination, administration, calculation, or payment of any claim or nonperformance of the Settlement Administrator, the payment or withholding of taxes (including interest and penalties) owed by the Settlement Fund, or any losses incurred in connection therewith.

12.6 The headings used herein are used for the purpose of convenience only and are not meant to have legal effect.

12.7 The waiver by one Party of any breach of this Agreement by any other Party shall not be deemed as a waiver of any other prior or subsequent breaches of this Agreement.

12.8 All of the Exhibits to this Agreement are material and integral parts thereof and are fully incorporated herein by this reference.

12.9 This Agreement and its Exhibits set forth the entire agreement and understanding of the Parties with respect to the matters set forth herein, and supersede all prior negotiations, agreements, arrangements and undertakings with respect to the matters set forth herein. No

representations, warranties or inducements have been made to any Party concerning this Settlement Agreement or its Exhibits other than the representations, warranties and covenants contained and memorialized in such documents. This Agreement may be amended or modified only by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest. Amendments and modifications may be made without additional notice to the Settlement Class unless such notice is required by the Court.

12.10 Except as otherwise provided herein, each Party shall bear its own costs.

12.11 Plaintiffs represent and warrant that they have not assigned any claim or right or interest therein as against the Released Parties to any other Person or Party and that they are fully entitled to release the same. Plaintiffs further represent and warrant that they have not filed, caused to be filed, or presently are a party to any claim against Defendant, except the Action, which will be dismissed with Prejudice pursuant to the terms of this Agreement. Plaintiffs agree to seek approval of this Agreement and dismissal of this Action with prejudice in its entirety as outlined in this Agreement.

12.12 The Parties agree that any public statement related to the settlement shall be substantially in the form attached hereto as Exhibit F. Unless otherwise agreed in writing, the parties shall limit public comment on the Settlement to the fact that there has been an amicable settlement, and in doing so may refer to the Settlement Agreement, Settlement Website, Notices, or may otherwise refer to and make representations in accordance with the Notice Plan. This Paragraph does not preclude Class Counsel from advising any Settlement Class Member.

12.13 Each counsel or other Person executing this Settlement Agreement, any of its Exhibits, or any related settlement documents on behalf of any Party hereto, hereby warrants and represents that such Person has the full authority to do so and has the authority to take

appropriate action required or permitted to be taken pursuant to the Agreement to effectuate its terms.

12.14 This Agreement may be executed in one or more counterparts. Signature by digital means, facsimile, or in PDF format will constitute sufficient execution of this Agreement. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of original executed counterparts shall be filed with the Court if the Court so requests.

12.15 This Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the Parties hereto and the Released Parties.

12.16 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of this Agreement, and all Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Agreement.

12.17 This Settlement Agreement shall be governed by and construed in accordance with the substantive laws of the State of New Jersey without giving effect to its conflict of laws provisions.

12.18 The Parties reserve the right, subject to the Court's approval, to agree to any reasonable extensions of time that might be necessary to carry out any of the provisions of this Settlement Agreement.

12.19 Plaintiffs and Class Counsel shall continue to treat as confidential all financial and class-related materials provided to Class Counsel as part of the Parties' Settlement. Upon dismissal of this action, Plaintiffs and Class Counsel shall permanently delete from their files and/or return to Defendant's counsel any confidential files produced by Defendant in this Action. Provided, however, that nothing herein shall preclude Plaintiffs and Class Counsel from

describing those materials in public Court filings necessary to obtain Court approval of the Settlement.

12.20 This Agreement is deemed to have been prepared by counsel for all Parties, as a result of arm's-length negotiations among the Parties. Because all Parties have contributed substantially and materially to the preparation of this Agreement, it shall not be construed more strictly against one Party than another.

12.21 Once the Parties and their counsel execute this Agreement, the Court will resolve any and all disputes that arise as to the interpretation or enforcement of this Agreement.

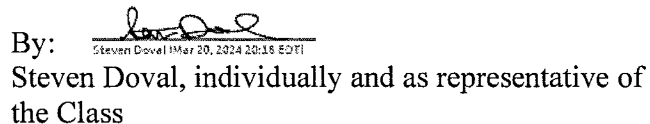
12.22 Where this Agreement requires notice to the Parties, such notice shall be sent to the undersigned counsel: Philip L. Fraietta, Bursor & Fisher, P.A., 1330 Avenue of the Americas, New York, NY 10019; Angelo Stio III, Troutman Pepper Hamilton Sanders, LLP, 301 Carnegie Center, Suite 400, Princeton, New Jersey 08543.

THE SIGNATORIES HAVE CAREFULLY READ THIS ENTIRE AGREEMENT WHICH CONTAINS RELEASES ON BEHALF OF THE PLAINTIFFS AND THE SETTLEMENT CLASS, THE PARTIES HAVE BEEN REPRESENTED BY COUNSEL THROUGHOUT THE NEGOTIATION OF THIS AGREEMENT, AND HAVE CONSULTED WITH THEIR ATTORNEYS BEFORE SIGNING THIS AGREEMENT. THE PARTIES FULLY UNDERSTAND THE FINAL AND BINDING EFFECT OF THIS AGREEMENT. THE ONLY PROMISES OR REPRESENTATIONS MADE TO ANY SIGNATORY ABOUT THIS AGREEMENT ARE CONTAINED IN THIS AGREEMENT.

HAVING ELECTED TO EXECUTE THIS AGREEMENT WHICH CONTAINS RELEASES ON BEHALF OF PLAINTIFFS AND THE SETTLEMENT CLASS TO FULFILL THE PROMISES SET FORTH HEREIN, AND TO RECEIVE THEREBY THE SETTLEMENT SUMS AND BENEFITS SET FORTH ABOVE, PLAINTIFFS, PERSONALLY AND ON BEHALF OF THE SETTLEMENT CLASS, FREELY AND KNOWINGLY AND AFTER DUE CONSIDERATION, ENTER INTO THIS AGREEMENT INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS AS IDENTIFIED IN THIS AGREEMENT AGAINST RELEASED PARTIES. THE PARTIES ARE SIGNING THIS AGREEMENT VOLUNTARILY AND KNOWINGLY.

IT IS SO AGREED TO BY THE PARTIES:

Dated: March 20, 2024 **Steven Doval**



By: ____________________
Steven Doval, individually and as representative of the Class

Dated: ____________ **Melissa Cuello**

By:____________________________
Melissa Cuello, individually and as representative of the Class

Dated: ____________ **Ceana Cuello**

By:____________________________
Ceana Cuello, individually and as representative of the Class

Dated: ____________ **Fairleigh Dickenson University**

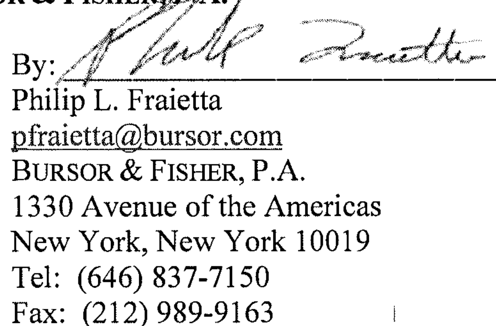
By:____________________________

Name: _________________________

Title: __________________________

IT IS SO STIPULATED BY COUNSEL:

Dated: March 21, 2024 **BURSOR & FISHER, P.A.**



By: ____________________________
Philip L. Fraietta
pfraietta@bursor.com
BURSOR & FISHER, P.A.
1330 Avenue of the Americas
New York, New York 10019
Tel: (646) 837-7150
Fax: (212) 989-9163

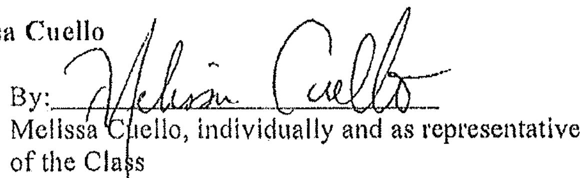
Dated: **VOZZOLO LLC**

By: ____________________________

By:______________________________
Steven Doval, individually and as representative of the Class

Dated: 3/21/24

Melissa Cuello



By:______________________________
Melissa Cuello, individually and as representative of the Class

Dated: ____________

Ceana Cuello

By:______________________________
Ceana Cuello, individually and as representative of the Class

Dated: ____________

Fairleigh Dickenson University

By:______________________________

Name: ___________________________

Title: ___________________________

IT IS SO STIPULATED BY COUNSEL:

Dated: ____________

BURSOR & FISHER, P.A.

By: ______________________________
Philip L. Fraietta
pfraietta@bursor.com
BURSOR & FISHER, P.A.
1330 Avenue of the Americas
New York, New York 10019
Tel: (646) 837-7150
Fax: (212) 989-9163

Dated: ____________

VOZZOLO LLC

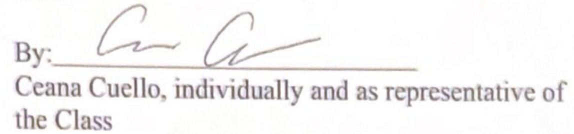
By: ______________________________

By:____________________________
Steven Doval, individually and as representative of the Class

Dated: ____________ **Melissa Cuello**

By:____________________________
Melissa Cuello, individually and as representative of the Class

Dated: 3/28/24 **Ceana Cuello**

By: 
Ceana Cuello, individually and as representative of the Class

Dated: ____________ **Fairleigh Dickenson University**

By:____________________________

Name: ________________________

Title: _________________________

IT IS SO STIPULATED BY COUNSEL:

Dated: ____________ **BURSOR & FISHER, P.A.**

By: ____________________________
Philip L. Fraietta
pfraietta@bursor.com
BURSOR & FISHER, P.A.
1330 Avenue of the Americas
New York, New York 10019
Tel: (646) 837-7150
Fax: (212) 989-9163

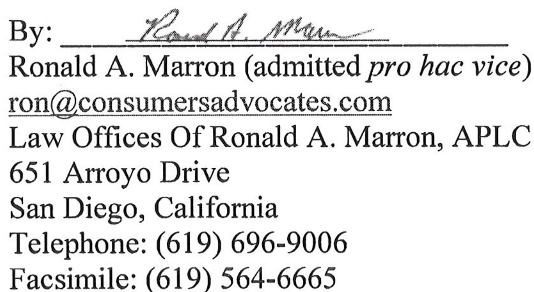
Dated: ____________ **VOZZOLO LLC**

By: ____________________________

Antonio Vozzolo
avozzolo@vozzolo.com
Vozzolo LLC
345 Route 17 South
Upper Saddle River, New Jersey 074578
Tel: (201) 630-8820
Fax: (201) 604-8400

Dated:

LAW OFFICES OF RONALD A. MARRON, APLC



By: ____________________________

Ronald A. Marron (admitted *pro hac vice*)
ron@consumersadvocates.com
Law Offices Of Ronald A. Marron, APLC
651 Arroyo Drive
San Diego, California
Telephone: (619) 696-9006
Facsimile: (619) 564-6665

Attorneys for Class Representatives and the Settlement Class

Dated: 4/3/24

TROUTMAN PEPPER HAMILTON SANDERS LLP

By: ____________________________

Angelo Stio III
angelo.stio@troutman.com

TROUTMAN PEPPER HAMILTON SANDERS LLP
301 Carnegie Center, Suite 400
Princeton, New Jersey 08543
Tel: (609) 951-4125

Attorney for Defendant Fairleigh Dickinson University

By:______________________________
Steven Doval, individually and as representative of the Class

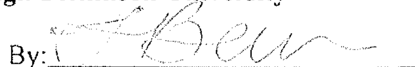
Dated: ____________ **Melissa Cuello**

By:______________________________
Melissa Cuello, individually and as representative of the Class

Dated: ____________ **Ceana Cuello**

By:______________________________
Ceana Cuello, individually and as representative of the Class

Dated: 4/3/24 **Fairleigh Dickinson University**

By: 

Name: Frank Barra

Title: Senior Vice President & Chief Financial Officer

IT IS SO STIPULATED BY COUNSEL:

Dated: ____________ **BURSOR & FISHER, P.A.**

By: ______________________________
Philip L. Fraietta
pfraietta@bursor.com
BURSOR & FISHER, P.A.
1330 Avenue of the Americas
New York, New York 10019
Tel: (646) 837-7150
Fax: (212) 989-9163

Dated: 3-20-2024 **VOZZOLO LLC**

By:

By:____________________________
Steven Doval, individually and as representative of the Class

Dated: ____________ **Melissa Cuello**

By:____________________________
Melissa Cuello, individually and as representative of the Class

Dated: ____________ **Ceana Cuello**

By:____________________________
Ceana Cuello, individually and as representative of the Class

Dated: ____________ **Fairleigh Dickenson University**

By:____________________________

Name: _________________________

Title: __________________________

IT IS SO STIPULATED BY COUNSEL:

Dated: ____________ **BURSOR & FISHER, P.A.**

By: ____________________________
Philip L. Fraietta
pfraietta@bursor.com
BURSOR & FISHER, P.A.
1330 Avenue of the Americas
New York, New York 10019
Tel: (646) 837-7150
Fax: (212) 989-9163

Dated: 3-20-2024 **VOZZOLO LLC**

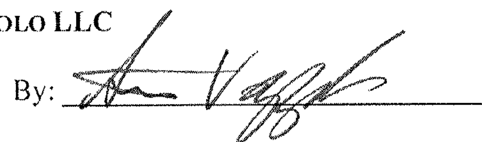
By: 

EXHIBIT A

Fairleigh Dickinson University Settlement Electronic Claim Form

CLAIM FORM AND INSTRUCTIONS

In order for you to qualify to receive a payment related to *Doval, et al. v. Fairleigh Dickinson University*, Docket No. BER-L-004966-20, as described in the Notice of this Settlement (the "Class Notice"), you must file a Claim Form, as set forth below, to process your claim.

Your claim will only be considered upon compliance with all of the following conditions:

1. Please review the Notice of Proposed Class Action Settlement (the "Notice") and have the Notice with you when you complete your Claim Form. A copy of the Notice is available at www.fdusettlement.com.
2. You must select a method of payment as identified below.
3. You must sign this Claim Form.
4. By signing and submitting this Claim Form, you are certifying under penalty of perjury that you were a student at Fairleigh Dickinson University ("FDU") and/or you paid tuition or fees to FDU for the Spring 2020 Semester that have not been refunded.
5. In order for you to receive a cash payment as part of this Settlement, you must complete and submit the form below by no later than __________, 2024.
6. Your failure to complete and submit the Claim Form by _________, 2024 will preclude you from receiving any payment in this Settlement.

ELECTION OF PAYMENT METHOD

Please choose one of the following:

☐ **OPTION ONE: RECEIVE ELECTRONIC PAYMENT**

Confirm your email address below and an email will be sent from noreply@XXXX.com to the email address you provided on this Election Form, prompting you to elect your method of payment. Venmo or PayPal will be available, or you can elect to receive a check. Please ensure you have provided a current and complete email address. If you do not provide a current and valid email address, the Settlement Administrator will attempt to mail you a check to the address on file per Fairleigh Dickinson University's records.

☐ **OPTION TWO: RECEIVE CASH PAYMENT BY CHECK**

If you need to update your name or address to receive a paper check, provide the information below. It is your responsibility to notify the Claims Administrator of any changes to your contact information after the submission of your Claim Form.

I, ____, state as follows:
(PRINT FIRST AND LAST NAME)

____
Current Address

______________________________ ________ ____________
Current City State Zip Code

______________________________ ______________________________
Telephone Number (Day) Telephone Number (Night)

____
Email Address

SIGNATURE **DATE**

ACCURATE CLAIMS PROCESSING TAKES TIME. THANK YOU FOR YOUR PATIENCE.

Reminder Checklist:

1. Please select a method of payment;
2. Please sign the above Claim Form;
3. Keep print or screenshot copy of your completed Claim Form for your records;
4. If you move or your name changes, please send your new address, new name or updated contact information to the Claim Administrator via the Settlement Website, mail, or by calling the Claims Administrator's toll-free telephone number, listed in the Notice.

EXHIBIT B

From: SettlementAdminstrator@fdusettlement.com
To: JonQClassMember@domain.com
Re: Legal Notice of Class Action Settlement (FDU)

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT
Doval, et al., v. Fairleigh Dickinson University, Case No. BER-L-004966-20
(Superior Court of New Jersey Law Division Bergen County)

You are receiving this notice because records show that you paid tuition or fees (excluding Room and Board) to Fairleigh Dickinson University ("FDU") for the Spring 2020 Semester and you may be eligible for a settlement payment under the terms of a recent class action settlement.

A court has directed that this Notice be emailed to you. This is not a solicitation from a lawyer

A proposed settlement has been reached in a class action lawsuit against FDU, the defendant in a matter pending in the Superior Court of New Jersey, Law Division Bergen County ("Action"). Plaintiffs Steven Doval, Melissa Cuello, and Ceana Cuello allege that FDU breached a contract with its students to provide in-person instruction and on-campus educational services for the Spring 2020 Semester by transitioning to remote learning and services environment in March 2020 in accordance with New Jersey Governor Murphy's Executive Order without issuing tuition and fee refunds. FDU denies all allegations of wrongdoing and liability and no Court has made any finding of liability or wrongdoing by FDU. However, in order to support its students and their families and to resolve the matter, but without admitting any wrongdoing, FDU has agreed to establish a Settlement Fund to resolve all claims in the Action (the "Settlement").

Am I a Class Member? FDU's records indicate you may be a Class Member. Class Members are people who paid FDU Spring 2020 Semester tuition and fees or who benefitted from the payment, and whose tuition and fees have not been refunded.

What Can I Get? Class Members who submit a timely and valid Claim Form will receive a cash benefit as set forth below. A Settlement Fund of $1,500,000.00 has been established to pay all claims to the Settlement Class, together with notice and administration expenses, approved attorneys' fees and costs, and incentive awards. If you are entitled to relief, you will receive a *pro rata* share of the Settlement Fund, in an amount not to exceed $155.00, which *pro rata* share will be based on the total out-of-pocket amount of tuition and fees (excluding Room and Board) you paid for the Spring 2020 Semester (less any outstanding balance from the Spring 2020 term still owed to FDU).

YOU MUST SUBMIT A TIMELY, VALID CLAIM FORM TO RECEIVE A PAYMENT UNDER THE SETTLEMENT.

CLICK HERE TO SUBMIT A CLAIM

How Do I Get a Payment? All Class Members must submit a timely, valid Claim Form postmarked or received by [**Claim Deadline**] to receive a payment under the Settlement. Your

payment will come by check to the residential address on file with FDU. You may visit the Settlement Website at www.fdusettlement.com to update your mailing address or obtain and submit a Claim Form. You can also obtain a Claim Form by contacting the Settlement Administrator at the phone or address below. FDU has provided the Settlement Administrator with a list of the Class Members and their contact information. Also, the Court has issued an order permitting FDU, under the Family Educational Rights and Privacy Act ("FERPA"), to disclose to the Settlement Administrator, the Spring 2020 Semester out-of-pocket amount for each Class Member. FDU will release that information no later than five (5) business days after [objection/exclusion deadline]. On or before [objection/exclusion deadline], you as a Class Member have the option to request that the Court quash its order requiring such disclosure as to your information.

What are My Other Options? You may exclude yourself from the Class by sending a letter to the Settlement Administrator postmarked or received no later than [**objection/exclusion deadline**]. If you exclude yourself, you cannot get a settlement payment, but you keep any rights you may have to sue the FDU over the legal issues in the lawsuit. If you do not exclude yourself, you may object to the Settlement if you choose to do so. You and/or your lawyer have the right to appear before the Court and/or object to the proposed settlement. Your written objection must be filed no later than [**objection/exclusion deadline**]. Specific instructions about how to object to, or exclude yourself from, the Settlement are available at [www.fdusettlement.com]. If you do nothing, and the Court approves the Settlement, you will be bound by all of the Court's orders and judgments. In addition, your claims relating to the alleged breach of contract, unjust enrichment, conversion, and money had and received causes of action asserted in this case or which could have been brought in this case based upon the facts alleged regarding the Spring 2020 Semester will be released.

Who Represents Me? The Court has appointed Philip L. Fraietta of Bursor & Fisher, P.A., Antonio Vozzolo of Vozzolo LLC, and Ronald A Marron of the Law Offices of Ronald A. Marron, APLC to represent the class. These attorneys are called Class Counsel. You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your expense.

When Will the Court Consider the Proposed Settlement? The Court will hold the Final Approval Hearing at **_____ .m.** on [date] at the Superior Court of New Jersey, Law Division, Bergen County, 10 Main St., Hackensack, New Jersey 07601. This hearing may be adjourned to a different date or may ultimately be conducted remotely. Please check the Settlement Website at [www.fdusettlement.com] for updates. At that hearing, the Court will: hear any objections concerning the fairness of the settlement; determine the fairness of the settlement; decide whether to approve Class Counsel's request for attorneys' fees, costs, and expenses; and decide whether to award the Class Representatives $5,000 each from the Settlement Fund for their services in helping to bring and settle this case. FDU does not object to Class Counsel seeking reasonable attorneys' fees, costs, and expenses from the Settlement Fund in an amount to be determined by the Court. Class Counsel will seek no more than one-third (33.3%) of the Settlement Fund (or Five Hundred Thousand Dollars ($500,000.00)), but the Court may Award less than this amount.

To File a Claim or to Get More Information, including a more detailed Notice, Claim Form, a copy of the Settlement Agreement and other documents, go to www.fdusettlement.com, contact the Settlement Administrator at 1-___-___-____ or FDU Settlement Administrator, [postal address and email address], or call Class Counsel at 1-646-837-7150.

By order of the Superior Court of New Jersey Law Division Bergen County

EXHIBIT C

COURT AUTHORIZED NOTICE OF CLASS ACTION AND PROPOSED SETTLEMENT

FDU'S RECORDS INDICATE YOU ARE A PERSON WHO MAY HAVE PAID FAIRLEIGH DICKINSON UNIVERSITY SPRING 2020 SEMESTER TUITION AND FEES OR WHO BENEFITTED FROM THE PAYMENT, AND WHOSE TUITION AND FEES HAVE NOT BEEN REFUNDED, AND MAY BE ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT.

FDU Settlement
Settlement Administrator
P.O. Box 0000
City, ST 00000-0000

Postal Service: Please do not mark barcode

XXX—«ClaimID» «MailRec»

«First1» «Last1»
«C/O»
«Addr1» «Addr2»
«City», «St» «Zip» «Country»

By Order of the Court Dated: [date]

FDU SETTLEMENT

A settlement has been reached in a class action lawsuit claiming that Defendant, Fairleigh Dickinson University ("FDU"), breached a contract with its students to provide physically in-person instruction and on-campus educational services for the Spring 2020 Semester by transitioning to remote learning and services environment in March 2020 in accordance with New Jersey Governor Murphy's Executive Order without issuing tuition and fee refunds (except for Room and Board). FDU denies all allegations of wrongdoing and liability. FDU denies all allegations of wrongdoing and liability. There has been no finding of liability by any Court. However, in order to support its students and to resolve the matter, but without admitting any wrongdoing, FDU has agreed to establish a Settlement Fund to resolve all claims in the Action (the "Settlement"). The Court has preliminarily approved the Settlement.

Am I a Class Member? FDU's records reflect you may be a Class Member. Class Members are people who paid Defendant Spring 2020 Semester tuition and fees or who benefitted from the payment, and whose tuition and fees have not been refunded.

What Can I Get? If approved by the Court, a Settlement Fund of $1,500,000.00 has been established to pay all claims to the Settlement Class, together with notice and administration expenses, approved attorneys' fees and costs, and incentive awards. If you are entitled to relief, you must complete a valid, timely Claim Form in order to receive a pro rata share of the Settlement Fund, up to $155.00, which pro rata share will be based on the total out-of-pocket amount of tuition and fees paid for the Spring 2020 Semester (except for Room and Board) (less any outstanding balance from the Spring 2020 term still owed to FDU).

How Do I Get a Payment? All Class Members must submit a timely, valid Claim Form postmarked or received by [Claim Deadline] to receive a payment under the Settlement. Your payment will come by check to the residential address on file with FDU. You may visit the Settlement Website at www.fdusettlement.com to update your mailing address or obtain and submit a Claim Form. You can also obtain a Claim Form by contacting the Settlement Administrator at the phone or address below. FDU has provided the Settlement Administrator with a list of the Class Members and their contact information. Also, the Court has issued an order permitting FDU, under the Family Educational Rights and Privacy Act ("FERPA"), to disclose to the Settlement Administrator, the Spring 2020 Semester out-of-pocket expenses and fees (excluding Room and Board) for each Class Member. FDU will release that information no later than five (5) business days after [objection/exclusion deadline]. On or before [objection/exclusion deadline], you as a Class Member have the option to request that the Court quash its order requiring such disclosure as to your information.

What are My Other Options? You may exclude yourself from the Class by sending a letter to the settlement administrator postmarked or received no later than [objection/exclusion deadline]. If you exclude yourself, you cannot get a settlement payment, but you keep any rights you may have to sue the FDU over the legal issues in the lawsuit. If you do not exclude yourself, you may object to the Settlement if you choose to do so. You and/or your lawyer have the right to appear before the Court and/or object to the proposed settlement. Your written objection must be filed no later than [objection/exclusion deadline]. Specific instructions about how to object to, or exclude yourself from, the Settlement are available at [www.fdusettlement.com]. If you do nothing, and the Court approves the Settlement, you will be bound by all of the Court's orders and judgments. In addition, your claims relating to the alleged breach of contract, unjust enrichment, conversion, and money had and received causes of action asserted in this case or which could have been brought in this case based upon the facts alleged regarding the Spring 2020 Semester will be released.

Who Represents Me? The Court has appointed Philip L. Fraietta of Bursor & Fisher, P.A., Antonio Vozzolo of Vozzolo LLC, and Ronald A Marron of the Law Offices of Ronald A. Marron, APLC to represent the class. These attorneys are called Class Counsel. You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your expense.

When Will the Court Consider the Proposed Settlement? The Court will hold the Final Approval Hearing at _____ _.m. on [date] at the Superior Court of New Jersey, Law Division, Bergen County, 10 Main St., Hackensack, New Jersey 07601. This hearing may be adjourned to a different date or may ultimately be conducted remotely. Please check the Settlement Website for updates. At that hearing, the Court will: hear any objections concerning the fairness of the settlement; determine the fairness of the settlement; decide whether to approve Class Counsel's request for attorneys' fees, costs, and expenses; and decide whether to award the Class Representatives $5,000 each from the Settlement Fund for their services in helping to bring and settle this case. FDU does not object to Class Counsel seeking reasonable attorneys' fees, costs, and expenses from the Settlement Fund in an amount to be determined by the Court. Class Counsel will seek no more than one-third (33.3%) of the Settlement Fund (or Five Hundred Thousand Dollars ($500,000.00)), but the Court may Award less than this amount.

To File a Claim or to Get More Information, including a more detailed Notice, Claim Form, a copy of the Settlement Agreement and other documents, go to www.fdusettlement.com, contact the settlement administrator at 1-___-___-____ or FDU Settlement Administrator, [postal address and email address], or call Class Counsel at 1-646-837-7150.

FDU Settlement Administrator
c/o [Settlement Administrator]
PO Box 0000
City, ST 00000-0000

XXX

EXHIBIT D

SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY
Doval, et al., v. Fairleigh Dickinson University, Case No. BER-L-004966-20

IF YOU ARE A PERSON WHO PAID FDU SPRING 2020 SEMESTER TUITION AND FEES OR WHO BENEFITTED FROM THE PAYMENT, AND WHOSE TUITION AND FEES HAVE NOT BEEN REFUNDED, YOU MAY BE ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT.

The Superior Court of New Jersey Law Division Bergen County has preliminarily approved a class action settlement that may affect your legal rights.

A court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

- A Settlement has been reached in a class action lawsuit against Fairleigh Dickinson University ("FDU" or "Defendant"). The class action lawsuit involves whether FDU breached a contract with its students to provide physically in-person instruction and on-campus educational services for the Spring 2020 Semester by transitioning to remote learning and services environment in March 2020 without issuing tuition and fee refunds. FDU denies all allegations of wrongdoing and liability. There has been no finding of liability by any Court. However, in order to support its students and their families and to resolve the matter, but without admitting any wrongdoing, FDU has agreed to establish a Settlement Fund to resolve all claims in the Action (the "Settlement").

- You are included if you are a person who paid FDU Spring 2020 Semester tuition and fees or who benefitted from the payment, and whose tuition and fees have not been refunded. Those included in the Settlement will be eligible to receive a *pro rata* (meaning proportional) share of the Settlement Fund, up to $155.00, which will be based on the total out-of-pocket amount of tuition and fees paid for the Spring 2020 Semester (less any outstanding balance from the Spring 2020 term still owed to FDU).

- **TO RECEIVE PAYMENT UNDER THE SETTLEMENT, YOU MUST SUBMIT A TIMELY AND VALID CLAIM FORM.**

- **Read this notice carefully. Your rights are affected whether you act, or don't act.**

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
DO NOTHING	If you do nothing, you will receive no payment under the Settlement. You will also give up your rights to sue FDU about the claims in this case.
SUBMIT A VALID CLAIM FORM BY [DATE]	This is the only way to receive a payment under the Settlement. Claim Forms must be postmarked or received by [**Claim Deadline**].

EXCLUDE YOURSELF BY [DATE]	If you opt out of the Settlement, you will receive no benefits, but you will retain any rights you currently have to sue FDU about the claims in this case. Any request for exclusion must be postmarked or received by [**exclusion deadline**].
OBJECT BY [DATE]	If you wish, you may write to the Court explaining why you don't like the Settlement. Any objection must be filed and copies received by [**objection deadline**].
GO TO THE HEARING ON [DATE]	You may ask to speak in Court about your opinion of the Settlement. Your notice of appearance must be filed and copies received by [**objection deadline**].

These rights and options—**and the deadlines to exercise them**—are explained in this Notice.

BASIC INFORMATION

1. Why was this Notice issued?

A Court authorized this notice because you have a right to know about a proposed Settlement of this class action lawsuit and about all of your options before the Court decides whether to give final approval to the Settlement. This Notice explains the lawsuit, the Settlement, and your legal rights.

If you received a Notice by email or mail, it is because records obtained in this case indicate that you were a student at Fairleigh Dickinson University ("FDU") and/or you paid tuition or fees to FDU for the Spring 2020 Semester. As a result, you may be a Settlement Class Member (see Section 5 below for details).

The Honorable Mary F. Thurber of the Superior Court of New Jersey, Law Division, Bergen County, is overseeing this case. The case is called *Doval, et al., v. Fairleigh Dickinson University*, Case No. BER-L-004966-20. The people who sued are called the Plaintiffs. The Defendant is FDU.

2. What is a class action?

In a class action, one or more people called class representatives (in this case, Steven Doval, Melissa Cuello, and Ceana Cuello) sue on behalf of a group or a "class" of people who have similar claims. In a class action, the court resolves the issues for all class members, except for those who exclude themselves from the Class.

3. What is this lawsuit about?

This lawsuit claims that Defendant breached a contract with its students to provide physically in-person instruction and on-campus educational services for the Spring

2020 Semester by transitioning to remote learning and services environment in March 2020 without issuing tuition and fee refunds. FDU denies it violated any law or legally enforceable commitment or promise. The Court has not determined who is right. Rather, the Parties have agreed to settle the lawsuit to avoid the uncertainties and expenses associated with ongoing litigation.

4. Why is there a Settlement?

The Court has not decided whether the Plaintiffs or FDU should win this case. Instead, both sides agreed to a Settlement. That way, they avoid the uncertainties and expenses associated with ongoing litigation, and the Class Members will get compensation and avoid the uncertainty of getting no payment if the matter proceeded to trial and a Court found FDU is not liable for the claims.

WHO'S INCLUDED IN THE SETTLEMENT?

5. How do I know if I am in the Settlement Class?

The Court decided that everyone who fits the following description is a member of the **Settlement Class**:

> All people who paid FDU Spring 2020 Semester tuition and fees or who benefitted from the payment, and whose tuition and fees have not been refunded.
>
> Excluded from the Settlement Class will be: (a) all students who were enrolled entirely in an on-line program at the beginning of the Spring 2020 Semester, (b) all students whose gift, aid or scholarship, regardless of source, equaled or exceeded the cost of tuition and fees for the Spring 2020 Semester, (c) persons who timely and properly exclude themselves from the Class as provided in the Settlement, and (e) the Court, the Court's immediate family, and Court staff.

THE SETTLEMENT BENEFITS

6. What does the Settlement provide?

Monetary Relief: A Settlement Fund has been created totaling $1,500,000.00. Only Class Members who complete and submit a timely and valid Claim Form postmarked or received by [**Claim Deadline**] may receive monetary benefits (*see* Question 7). In addition to Class Member payments, the cost to administer the Settlement, the cost to inform people about the Settlement, attorneys' fees and expenses (inclusive of litigation costs), and an award to each of the Class Representatives will also come out of this fund (*see* Question 12).

A detailed description of the settlement benefits can be found in the Settlement Agreement, a copy of which is accessible on the Settlement Website by clicking here. [insert hyperlink]
SUBMITTING A TIMELY, VALID CLAIM FORM IS THE ONLY WAY TO GET A PAYMENT AS PART OF THIS SETTLEMENT

7. How much will my payment be?

Each Class Member who submits a valid and timely Claim Form and who does not opt out of participating in the settlement will receive a proportionate share of the Settlement Fund, in an amount not to exceed $155.00, which will be based on the out-of-pocket amount of tuition and fees paid by or for the Class Member for the Spring 2020 Semester (less any outstanding balance from the Spring 2020 term still owed to Defendant). Out-of-Pocket Tuition and Fees is defined in Section 2.25 of the Settlement Agreement.

8. When will I get my payment?

The hearing to consider the fairness of the settlement is scheduled for [Final Approval Hearing Date]. If the Court approves the settlement, eligible Class Members will receive their payment within 50 days after the Effective Date of the Settlement, which is no sooner than 10 business days after the Settlement has been finally approved and/or after any appeals process is complete. The payment will be made in the form of a check and all checks will expire and become void 180 days after they are issued.

HOW TO GET BENEFITS

9. How do I get a payment?

TO BE ELIGIBLE TO RECEIVE A PAYMENT FROM THE SETTLEMENT, YOU MUST COMPLETE AND SUBMIT A TIMELY AND VALID CLAIM FORM. If you are a Class Member and you want to get a payment, you must submit a timely and valid Claim Form postmarked or received no later than [**Claim Deadline**].

You can complete and submit your Claim Form online at the Settlement Website, www.fdusettlement.com. The Claim Form can be downloaded from the Settlement Website, as well. You can request a Claim Form to be sent to you by sending a written request to the Settlement Administrator by mail or by email.

MAIL: *Doval, et al., v. Fairleigh Dickinson University*, c/o XXXX Settlement Administration, P.O. Box XXXX, [ADDRESS]

EMAIL: claims@fdusettlement.com

Your payment will come by check to the residential address on file with FDU. If you have changed addresses or are planning to change addresses prior to [insert date 50 days plus 10 business days after final approval hearing date], please click here [insert hyperlink] to complete and submit a change of address form on the Settlement Website or visit www.fdusettlement.com.
IF YOU DO NOT SUBMIT A VALID CLAIM FORM BY THE DEADLINE, YOU WILL NOT RECEIVE A PAYMENT.

REMAINING IN THE SETTLEMENT

10. What am I giving up if I stay in the Class?

If the Settlement becomes final, you will give up your right to sue FDU and other Released Parties for the claims being resolved by this Settlement. The specific claims you are giving up against FDU and other Released Parties are described in the Settlement Agreement. You will be "releasing" FDU and certain of its affiliates, trustees, faculty, employees and representatives as described in Section 2.32 of the Settlement Agreement. Unless you exclude yourself (*see* Question 13), you are "releasing" the claims, regardless of whether you submit a Claim Form or not. The Settlement Agreement is available through the "court documents" link on the website www.fdusettlement.com.

The Settlement Agreement describes the released claims with specific descriptions, so read it carefully. If you have any questions you can talk to the lawyers listed in Question 11 for free or you can, of course, talk to your own lawyer if you have questions about what this means.

THE LAWYERS REPRESENTING YOU

11. Do I have a lawyer in the case?

The Court has appointed Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A., Antonio Vozzolo of Vozzolo LLC, and Ronald A. Marron of the Law Offices of Ronald A. Marron, APLC to be the attorneys representing the Settlement Class. They are called "Class Counsel." They believe, after conducting an extensive investigation, that the Settlement Agreement is fair, reasonable, and in the best interests of the Settlement Class. You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your expense.

12. How will the lawyers be paid?

The Defendant has agreed that Class Counsel's attorneys' fees, expenses and costs may be paid out of the Settlement Fund in an amount to be determined by the Court. The fee petition will seek no more than one-third (33.3%) of the Settlement Fund or five hundred thousand dollars ($500,000.00), inclusive of reimbursement of their costs and expenses (not including the administrative costs of settlement or notice). Under the Settlement Agreement, any amount awarded to Class Counsel for fees, expenses and costs will be paid out of the Settlement Fund.

Class Counsel will also request an incentive award of $5,000 each from the Settlement Fund for their services in helping to bring and resolve this case.

The amounts to be awarded as attorneys' fees, reimbursement of costs and expenses, and incentive awards must be approved by the Court.

EXCLUDING YOURSELF FROM THE SETTLEMENT

13. How do I get out of the Settlement?

To exclude yourself from the Settlement, you must submit a request for exclusion postmarked or received by 11:59 p.m. EST on [objection/exclusion deadline]. Requests for exclusion may be submitted either on the Settlement Website (via the online form accessible here [insert hyperlink]) or by mailing or otherwise delivering a letter (or request for exclusion) stating that you want to be excluded from the *Doval, et al., v. Fairleigh Dickinson University*, Case No. BER-L-004966-20 settlement. Your letter or request for exclusion must also include your name, your address, your signature, the name and number of this case, and a statement that you wish to be excluded. If you choose to submit a request for exclusion by mail, you must mail or deliver your exclusion request, postmarked no later than [objection/exclusion deadline], to the following address:

FDU Settlement
0000 Street
City, ST 00000

14. If I don't exclude myself, can I sue the Defendant for the same thing later?

No. Unless you exclude yourself, you give up any right to sue FDU for the claims being resolved by this Settlement.

15. If I exclude myself, can I get anything from this Settlement?

No. If you exclude yourself, you will not receive any payment from the Settlement Fund.

16. What information is needed from me to participate in the Settlement?

Settlement Class Members must submit a valid, timely Claim Form to receive a *pro rata* share of the Settlement Fund, in an amount up to $155.00. FDU has provided the Settlement Administrator with a list of the Class Members and their contact information. Also, the Court has issued an order permitting FDU, under the Family Educational Rights and Privacy Act ("FERPA"), to disclose to the Settlement Administrator the Spring 2020 Semester Out-of-Pocket Tuition and Fees for each Class Member as defined in Section 2.25 of the Settlement Agreement. FDU will release that information no later than five (5) days after [objection/exclusion deadline]. On or before [objection/exclusion deadline], you as a Class Member have the option to request that the Court quash its order requiring such disclosure as to your information.

OBJECTING TO THE SETTLEMENT

17. How do I object to the Settlement?

If you are a Class Member, and you have not elected to exclude yourself from the Settlement by opting out, you can object to the Settlement if you don't like any part of it. You can give reasons why you think the Court should not approve it. The Court will consider your views. To object, you must file with the Court a letter or brief stating that you object to the Settlement in *Doval, et al., v. Fairleigh Dickinson University,* Case No. BER-L-004966-20 and identify all your reasons for your objections (including citations and supporting evidence) and attach any materials you rely on for your objections. Your letter or brief must also include your full name, your address, your telephone number, the basis upon which you claim to be a Class Member, the name and contact information of any and all attorneys representing, advising, or in any way assisting you in connection with your objection, a statement confirming whether you intend to personally appear and/or testify at the Final Approval Hearing, the identity of any counsel who will appear at the Final Approval Hearing on your behalf, a list of any witnesses you wish to call to testify, or any documents or exhibits you or your counsel may use, at the Final Approval Hearing, the number of class actions in which you or your attorneys have filed an objection in the last five (5) years, and your signature. If you, or an attorney assisting you with your objection, have ever objected to any class action settlement where you or the objecting attorney has asked for or received payment in exchange for dismissal of the objection (or any related appeal) without modification to the settlement, you must include a statement in your objection identifying each such case by full case caption and amount of payment received. In addition to filing your objection, you must also mail or deliver a copy of your letter or brief to the Settlement Administrator, Class Counsel and Defendant's Counsel listed below, received no later than [objection deadline].

Class Counsel will file with the Court and post on the settlement website its request for attorneys' fees by [two weeks prior to objection deadline].

If you want to appear and speak at the Final Approval Hearing to object to the Settlement, with or without a lawyer (explained below in answer to Question Number 20), you must say so in your letter or brief. File the objection with the Court (or mail the objection to the Court) and mail a copy of the objection to the Settlement Administrator, Class Counsel and Defendant's Counsel, at the addresses below, received no later than **[objection deadline].**

Court	Class Counsel
Clerk of the Court Superior Court of New Jersey, Law Division, Bergen County 10 Main Street Hackensack, NJ 07601 OR The Court's eCourts Civil filing system	Philip L. Fraietta Alec M. Leslie Bursor & Fisher P.A. 1330 Avenue of the Americas New York, NY 10019
Settlement Administrator	**Defendant's Counsel**
FDU Settlement Administrator Attn: Objections P.O. Box 0000 City, ST 00000	Angelo Stio III Troutman, Pepper, Hamilton, Sanders, LLP 301 Carnegie Center Suite 400 Princeton, NJ 08543

18. What's the difference between objecting and excluding myself from the Settlement?

Objecting simply means telling the Court that you don't like something about the Settlement. You can object only if you stay in the Class. Excluding yourself from the Class is telling the Court that you don't want to be part of the Class and thus do not want to receive any benefits from the Settlement. If you exclude yourself, you have no basis to object because the case no longer affects you.

THE COURT'S FINAL APPROVAL HEARING

19. When and where will the Court decide whether to approve the Settlement?

The Court will hold the Final Approval Hearing at ______ _.m. on [date] at Superior Court of New Jersey, Law Division, Bergen County, 10 Main Street, Hackensack, New Jersey 07601. The purpose of the hearing will be for the Court to determine whether to approve the Settlement as fair, reasonable, adequate, and in the best interests of the

Class; to consider Class Counsel's request for attorneys' fees and expenses; and to consider the request for incentive awards to the Class Representatives. At that hearing, the Court will be available to hear any objections and arguments concerning the fairness of the Settlement.

The hearing may be postponed to a different date or time without notice, so it is a good idea to check for updates by visiting the Settlement Website at www.fdusettlement.com or calling (800) 000-0000. No further notice will be provided if the Settlement has been approved, so monitor the Settlement Website for further developments. If, however, you timely objected to the Settlement and advised the Court that you intend to appear and speak at the Final Approval Hearing, you will receive notice of any change in the date of the Final Approval Hearing.

20. Do I have to come to the hearing?

No. Class Counsel will answer any questions the Court may have. But you are welcome to come at your own expense. If you send an objection or comment, you don't have to come to Court to talk about it. As long as you filed and mailed your written objection on time, the Court will consider it. You may also pay another lawyer to attend, but it's not required.

21. May I speak at the hearing?

Yes, as long as you do not exclude yourself from the Settlement, you may ask the Court for permission to speak at the Fairness Hearing. This is called making an appearance. You can also have your own lawyer appear in court and speak for you (instead of Class Counsel), but you will have to pay for the lawyer yourself.

If you want yourself or your own lawyer to participate or speak for you in the lawsuit, you must file with the Court a Notice of Appearance titled "Notice of Intent to Appear in *Doval, et al., v. Fairleigh Dickinson University,* Case No. BER-L-004966-20." It must include a statement that you or your lawyer wish to appear at the Fairness Hearing, your name, address, telephone number and signature, as well as the name and address of your lawyer, if one is appearing for you. If you submit an objection (see Question 17 above) and would like to speak about the objection at the Court's Fairness Hearing, you, both your Notice of Appearance and your letter or brief objecting to the settlement should include that information.

Your objection and/or notice of intent to appear must be filed with the Court and received at the addresses listed in Question 17 no later than [**objection deadline**].

GETTING MORE INFORMATION

22. Where do I get more information?

This Notice summarizes the Settlement. More details are in the Settlement Agreement. You can get a copy of the Settlement Agreement at www.fdusettlement.com. You may also write with questions to FDU Settlement, P.O. Box 0000, City, ST 00000. You can call the Settlement Administrator at (800) 000-0000 or Class Counsel at (646) 837-7150, if you have any questions. Before doing so, however, please read this full Notice carefully. You may also find additional information elsewhere on the case website www.fdusettlement.com.

EXHIBIT E

STEVEN DOVAL, MELISSA CUELLO, and CEANA CUELLO, individually and on behalf of all others similarly situated, Plaintiffs, v. FAIRLEIGH DICKINSON UNIVERSITY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY Case No. BER-L-004966-20

STIPULATION REGARDING UNDERTAKING RE: ATTORNEYS' FEES AND COSTS

Plaintiffs Steven Doval, Melissa Cuello, and Ceana Cuello ("Plaintiffs") and Defendant Fairleigh Dickinson University ("FDU") (collectively, "the Parties"), by and through and including their undersigned counsel, stipulate and agree as follows:

WHEREAS, Class Counsel Philip L. Fraietta of Bursor & Fisher, P.A., Antonio Vozzolo of Vozzolo LLC, and Ronald A Marron of the Law Offices of Ronald A. Marron, APLC and their respective law firms desire to give an undertaking (the "Undertaking") for repayment of their award of attorney fees and costs, approved by the Court, and

WHEREAS, the Parties agree that this Undertaking is in the interests of all Parties and in service of judicial economy and efficiency.

NOW, THEREFORE, the undersigned Class Counsel, on behalf of themselves and as the authorized agent for their respective law firms, hereby submit themselves and their law firms and their members to the continued jurisdiction of the Court for the purpose of enforcing the provisions of this Undertaking.

Capitalized terms used herein without definition have the meanings given to them in the Settlement Agreement.

By receiving any payments pursuant to the Settlement Agreement, Bursor & Fisher, P.A., Vozzolo LLC, and the Law Offices of Ronald A. Marron, APLC, and its shareholders, members, and/or partners consent and submit to the continued jurisdiction of the Superior Court of New Jersey, Law Division, Bergen County for the adjudication and enforcement of and any and all disputes relating to or arising out of Class Counsel's reimbursement obligation set forth herein and in the Settlement Agreement. The Final Settlement Order and Judgment shall state that the Court retains jurisdiction over such disputes.

In the event that the Final Settlement Order and Judgment or any part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, Class Counsel shall, within thirty (30) days repay to FDU, based upon written instructions provided by FDU's Counsel, the full amount of the attorneys' fees and costs paid to Class Counsel from the Settlement Fund, including any accrued interest.

In the event the attorney fees and costs awarded by the Court or any part of them are vacated, modified, reversed, or rendered void as a result of an appeal, Class Counsel shall within thirty (30) days repay to FDU, based upon written instructions provided by FDU's Counsel, the attorneys' fees and costs paid to Class Counsel and/or Representative Plaintiffs from the Settlement Fund in the amount vacated or modified, including any accrued interest.

This Undertaking and all obligations set forth herein shall expire upon finality of all direct appeals of the Final Settlement Order and Judgment.

In the event Class Counsel fails to repay to FDU any attorneys' fees and costs that are owed to it pursuant to this Undertaking, the Court shall, upon application of FDU, and notice to Class Counsel, summarily issue orders, including but not limited to judgments and attachment orders against each of Class Counsel, and may make appropriate fines for sanctions and contempt of court.

The undersigned stipulate, warrant, and represent that they have both actual and apparent authority to enter into this stipulation, agreement, and undertaking on behalf of their law firms, Bursor & Fisher, P.A., Vozzolo LLC, and the Law Offices of Ronald A. Marron, APLC respectively.

This Undertaking may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. Signatures by facsimile shall be as effective as original signatures.

The undersigned declare under penalty of perjury under the laws of the United States that they have read and understand the foregoing and that it is true and correct.

IT IS SO STIPULATED THROUGH COUNSEL OF RECORD:

DATED: ___, 2024

BURSOR & FISHER, P.A.

____

By: Philip L. Fraietta, individually and
on behalf of Bursor & Fisher, P.A.
Attorneys for Plaintiffs

VOZZOLO LLC

____

By: Antonio Vozzolo, individually and
on behalf of Vozzolo LLC

Attorneys for Plaintiffs

LAW OFFICES OF RONALD A. MARRON, APLC

____
By: Ronald A. Marron, individually and
on behalf of Law Offices of Ronald A. Marron, APLC
Attorneys for Plaintiffs

DATED: ___, 2024

TROUTMAN PEPPER HAMILTON SANDERS LLP

____
By: Angelo Stio III
Attorneys for Defendant Fairleigh Dickinson University

EXHIBIT F

PUBLIC STATEMENT

Fairleigh Dickinson University has agreed to settle a class action lawsuit filed by a parent and student who sought to recover a refund of a portion of the tuition and fees they paid during the spring 2020 semester after the University transitioned to remote learning in order to comply with Governor Murphy's order requiring all New Jersey institutions of higher education to cease in-person instruction to reduce the spread of COVID-19. The settlement is without any admission of liability or wrongdoing by Fairleigh Dickinson University, but is being entered into in order to avoid the expense, risk, and uncertainty associated with continued litigation and to enable Fairleigh Dickinson University to continue to advance its commitment to providing a quality and affordable personalized education experience for all students.

In the lawsuit, the plaintiffs claimed that they were entitled to a refund of tuition and fees paid for the spring 2020 semester. Fairleigh Dickinson University denied the plaintiffs' allegations claiming that all its actions in providing a virtual educational environment were lawful, made in good faith, and enabled students to complete their education without interruption.

Under the settlement, Fairleigh Dickinson University will create a $1.5 million fund that will be used to reimburse students and parents for up to $155 in tuition and fees paid during the spring 2020 semester. The parties agreed that any undistributed amounts from the settlement fund will be used to establish a scholarship fund at Fairleigh Dickinson University that will be used to benefit students with unmet financial needs.

EXHIBIT 2

www.bursor.com

701 BRICKELL AVENUE
MIAMI, FL 33131

1330 AVENUE OF THE AMERICAS
NEW YORK, NY 10019

1990 NORTH CALIFORNIA BLVD.
WALNUT CREEK, CA 94596

FIRM RESUME

With offices in Florida, New York, and California, BURSOR & FISHER lawyers have represented both plaintiffs and defendants in state and federal courts throughout the country.

The lawyers at our firm have an active civil trial practice, having won multi-million-dollar verdicts or recoveries in six of six class action jury trials since 2008. Our most recent class action trial victory came in May 2019 in *Perez v. Rash Curtis & Associates*, in which Mr. Bursor served as lead trial counsel and won a $267 million jury verdict against a debt collector found to have violated the Telephone Consumer Protection Act. During the pendency of the defendant's appeal, the case settled for $75.6 million, the largest settlement in the history of the Telephone Consumer Protection Act.

In August 2013 in *Ayyad v. Sprint Spectrum L.P.*, in which Mr. Bursor served as lead trial counsel, we won a jury verdict defeating Sprint's $1.06 billion counterclaim and securing the class's recovery of more than $275 million in cash and debt relief.

In *Thomas v. Global Vision Products, Inc. (II)*, we obtained a $50 million jury verdict in favor of a certified class of 150,000 purchasers of the Avacor Hair Regrowth System. The legal trade publication VerdictSearch reported that this was the second largest jury verdict in California in 2009, and the largest in any class action.

The lawyers at our firm have an active class action practice and have won numerous appointments as class counsel to represent millions of class members, including customers of Honda, Verizon Wireless, AT&T Wireless, Sprint, Haier America, and Michaels Stores as well as purchasers of Avacor™, Hydroxycut, and Sensa™ products. Bursor & Fisher lawyers have been court-appointed Class Counsel or Interim Class Counsel in:

1. *O'Brien v. LG Electronics USA, Inc.* (D.N.J. Dec. 16, 2010) to represent a certified nationwide class of purchasers of LG French-door refrigerators,
2. *Ramundo v. Michaels Stores, Inc.* (N.D. Ill. June 8, 2011) to represent a certified nationwide class of consumers who made in-store purchases at Michaels Stores using a debit or credit card and had their private financial information stolen as a result,
3. *In re Haier Freezer Consumer Litig.* (N.D. Cal. Aug. 17, 2011) to represent a certified class of purchasers of mislabeled freezers from Haier America Trading, LLC,
4. *Rodriguez v. CitiMortgage, Inc.* (S.D.N.Y. Nov. 14, 2011) to represent a certified nationwide class of military personnel against CitiMortgage for illegal foreclosures,

5. *Rossi v. The Procter & Gamble Co.* (D.N.J. Jan. 31, 2012) to represent a certified nationwide class of purchasers of Crest Sensitivity Treatment & Protection toothpaste,
6. *Dzielak v. Whirlpool Corp. et al.* (D.N.J. Feb. 21, 2012) to represent a proposed nationwide class of purchasers of mislabeled Maytag Centennial washing machines from Whirlpool Corp., Sears, and other retailers,
7. *In re Sensa Weight Loss Litig.* (N.D. Cal. Mar. 2, 2012) to represent a certified nationwide class of purchasers of Sensa weight loss products,
8. *In re Sinus Buster Products Consumer Litig.* (E.D.N.Y. Dec. 17, 2012) to represent a certified nationwide class of purchasers,
9. *Ebin v. Kangadis Food Inc.* (S.D.N.Y. Feb. 25, 2014) to represent a certified nationwide class of purchasers of Capatriti 100% Pure Olive Oil,
10. *Forcellati v. Hyland's, Inc.* (C.D. Cal. Apr. 9, 2014) to represent a certified nationwide class of purchasers of children's homeopathic cold and flu remedies,
11. *Ebin v. Kangadis Family Management LLC, et al.* (S.D.N.Y. Sept. 18, 2014) to represent a certified nationwide class of purchasers of Capatriti 100% Pure Olive Oil,
12. *In re Scotts EZ Seed Litig.* (S.D.N.Y. Jan. 26, 2015) to represent a certified class of purchasers of Scotts Turf Builder EZ Seed,
13. *Dei Rossi v. Whirlpool Corp.*, *et al.* (E.D. Cal. Apr. 28, 2015) to represent a certified class of purchasers of mislabeled KitchenAid refrigerators from Whirlpool Corp., Best Buy, and other retailers,
14. *Hendricks v. StarKist Co.* (N.D. Cal. July 23, 2015) to represent a certified nationwide class of purchasers of StarKist tuna products,
15. *In re NVIDIA GTX 970 Graphics Card Litig.* (N.D. Cal. May 8, 2015) to represent a proposed nationwide class of purchasers of NVIDIA GTX 970 graphics cards,
16. *Melgar v. Zicam LLC, et al.* (E.D. Cal. March 30, 2016) to represent a certified ten-jurisdiction class of purchasers of Zicam Pre-Cold products,
17. *In re Trader Joe's Tuna Litigation* (C.D. Cal. December 21, 2016) to represent purchaser of allegedly underfilled Trader Joe's canned tuna.
18. *In re Welspun Litigation* (S.D.N.Y. January 26, 2017) to represent a proposed nationwide class of purchasers of Welspun Egyptian cotton bedding products,
19. *Retta v. Millennium Products, Inc.* (C.D. Cal. January 31, 2017) to represent a certified nationwide class of Millennium kombucha beverages,
20. *Moeller v. American Media, Inc.*, (E.D. Mich. June 8, 2017) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,
21. *Hart v. BHH, LLC* (S.D.N.Y. July 7, 2017) to represent a nationwide class of purchasers of Bell & Howell ultrasonic pest repellers,
22. *McMillion v. Rash Curtis & Associates* (N.D. Cal. September 6, 2017) to represent a certified nationwide class of individuals who received calls from Rash Curtis & Associates,

23. *Lucero v. Solarcity Corp.* (N.D. Cal. September 15, 2017) to represent a certified nationwide class of individuals who received telemarketing calls from Solarcity Corp.,
24. *Taylor v. Trusted Media Brands, Inc.* (S.D.N.Y. Oct. 17, 2017) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,
25. *Gasser v. Kiss My Face, LLC* (N.D. Cal. Oct. 23, 2017) to represent a proposed nationwide class of purchasers of cosmetic products,
26. *Gastelum v. Frontier California Inc.* (S.F. Superior Court February 21, 2018) to represent a certified California class of Frontier landline telephone customers who were charged late fees,
27. *Williams v. Facebook, Inc.* (N.D. Cal. June 26, 2018) to represent a proposed nationwide class of Facebook users for alleged privacy violations,
28. *Ruppel v. Consumers Union of United States, Inc.* (S.D.N.Y. July 27, 2018) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,
29. *Bayol v. Health-Ade* (N.D. Cal. August 23, 2018) to represent a proposed nationwide class of Health-Ade kombucha beverage purchasers,
30. *West v. California Service Bureau* (N.D. Cal. September 12, 2018) to represent a certified nationwide class of individuals who received calls from California Service Bureau,
31. *Gregorio v. Premier Nutrition Corporation* (S.D.N.Y. Sept. 14, 2018) to represent a nationwide class of purchasers of protein shake products,
32. *Moeller v. Advance Magazine Publishers, Inc. d/b/a Condé Nast* (S.D.N.Y. Oct. 24, 2018) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,
33. *Bakov v. Consolidated World Travel Inc. d/b/a Holiday Cruise Line* (N.D. Ill. Mar. 21, 2019) to represent a certified class of individuals who received calls from Holiday Cruise Line,
34. *Martinelli v. Johnson & Johnson* (E.D. Cal. March 29, 2019) to represent a certified class of purchasers of Benecol spreads labeled with the representation "No Trans Fat,"
35. *Edwards v. Hearst Communications, Inc.* (S.D.N.Y. April 24, 2019) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,
36. *Galvan v. Smashburger* (C.D. Cal. June 25, 2019) to represent a proposed class of purchasers of Smashburger's "Triple Double" burger,
37. *Kokoszki v. Playboy Enterprises, Inc.* (E.D. Mich. Feb. 7, 2020) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,
38. *Russett v. The Northwestern Mutual Life Insurance Co.* (S.D.N.Y. May 28, 2020) to represent a class of insurance policyholders that were allegedly charged unlawful paper billing fees,
39. *In re: Metformin Marketing and Sales Practices Litigation* (D.N.J. June 3, 2020) to represent a proposed nationwide class of purchasers of generic diabetes medications that were contaminated with a cancer-causing carcinogen,

40. *Hill v. Spirit Airlines, Inc.* (S.D. Fla. July 21, 2020) to represent a proposed nationwide class of passengers whose flights were cancelled by Spirit Airlines due to the novel coronavirus, COVID-19, and whose tickets were not refunded,
41. *Kramer v. Alterra Mountain Co.* (D. Colo. July 31, 2020) to represent a proposed nationwide class of purchasers to recoup the unused value of their Ikon ski passes after Alterra suspended operations at its ski resorts due to the novel coronavirus, COVID-19,
42. *Qureshi v. American University* (D.D.C. July 31, 2020) to represent a proposed nationwide class of students for tuition and fee refunds after their classes were moved online by American University due to the novel coronavirus, COVID-19,
43. *Hufford v. Maxim Inc.* (S.D.N.Y. Aug. 13, 2020) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,
44. *Desai v. Carnegie Mellon University* (W.D. Pa. Aug. 26, 2020) to represent a proposed nationwide class of students for tuition and fee refunds after their classes were moved online by Carnegie Mellon University due to the novel coronavirus, COVID-19,
45. *Heigl v. Waste Management of New York, LLC* (E.D.N.Y. Aug. 27, 2020) to represent a class of waste collection customers that were allegedly charged unlawful paper billing fees,
46. *Stellato v. Hofstra University* (E.D.N.Y. Sept. 18, 2020) to represent a proposed nationwide class of students for tuition and fee refunds after their classes were moved online by Hofstra University due to the novel coronavirus, COVID-19,
47. *Kaupelis v. Harbor Freight Tools USA, Inc.* (C.D. Cal. Sept. 23, 2020), to represent consumers who purchased defective chainsaws,
48. *Soo v. Lorex Corporation* (N.D. Cal. Sept. 23, 2020), to represent consumers whose security cameras were intentionally rendered non-functional by manufacturer,
49. *Miranda v. Golden Entertainment (NV), Inc.* (D. Nev. Dec. 17, 2020), to represent consumers and employees whose personal information was exposed in a data breach,
50. *Benbow v. SmileDirectClub, Inc.* (Cir. Ct. Cook Cnty. Feb. 4, 2021), to represent a certified nationwide class of individuals who received text messages from SmileDirectClub, in alleged violation of the Telephone Consumer Protection Act,
51. *Suren v. DSV Solutions, LLC* (Cir. Ct. DuPage Cnty. Apr. 8, 2021), to represent a certified class of employees who used a fingerprint clock-in system, in alleged violation of the Illinois Biometric Information Privacy Act,
52. *De Lacour v. Colgate-Palmolive Co.* (S.D.N.Y. Apr. 23, 2021), to represent a certified class of consumers who purchased allegedly “natural” Tom’s of Maine products,
53. *Wright v. Southern New Hampshire University* (D.N.H. Apr. 26, 2021), to represent a certified nationwide class of students for tuition and fee refunds after their classes were moved online by Southern New Hampshire University due to the novel coronavirus, COVID-19,

54. *Sahlin v. Hospital Housekeeping Systems, LLC* (Cir. Ct. Williamson Cnty. May 21, 2021), to represent a certified class of employees who used a fingerprint clock-in system, in alleged violation of the Illinois Biometric Information Privacy Act,
55. *Landreth v. Verano Holdings LLC, et al.* (Cir. Ct. Cook Cnty. June 2, 2021), to represent a certified class of employees who used a fingerprint clock-in system, in alleged violation of the Illinois Biometric Information Privacy Act.
56. *Rocchio v. Rutgers, The State University of New Jersey*, (Sup. Ct., Middlesex Cnty. October 27, 201), to represent a certified nationwide class of students for fee refunds after their classes were moved online by Rutgers due to the novel coronavirus, COVID-19,
57. *Malone v. Western Digital Corp.*, (N.D. Cal. Dec. 22, 2021), to represent a class of consumers who purchased hard drives that were allegedly deceptively advertised,
58. *Jenkins v. Charles Industries, LLC*, (Cir. Ct. DuPage Cnty. Dec. 21, 2021) to represent a certified class of employees who used a fingerprint clock-in system, in alleged violation of the Illinois Biometric Information Privacy Act,
59. *Frederick v. Examsoft Worldwide, Inc.*, (Cir. Ct. DuPage Cnty. Jan. 6, 2022) to represent a certified class of exam takers who used virtual exam proctoring software, in alleged violation of the Illinois Biometric Information Privacy Act,
60. *Isaacson v. Liqui-Box Flexibles, LLC, et al.*, (Cir. Ct. Will Cnty. Jan. 18, 2022) to represent a certified class of employees who used a fingerprint clock-in system, in alleged violation of the Illinois Biometric Information Privacy Act,
61. *Goldstein et al. v. Henkel Corp.*, (D. Conn. Mar. 3, 2022) to represent a proposed class of purchasers of Right Guard-brand antiperspirants that were allegedly contaminated with benzene,
62. *McCall v. Hercules Corp.*, (N.Y. Sup. Ct., Westchester Cnty. Mar. 14, 2022) to represent a certified class of who laundry card purchasers who were allegedly subjected to deceptive practices by being denied cash refunds,
63. *Lewis v. Trident Manufacturing, Inc.*, (Cir. Ct. Kane Cnty. Mar. 16, 2022) to represent a certified class of workers who used a fingerprint clock-in system, in alleged violation of the Illinois Biometric Information Privacy Act,
64. *Croft v. Spinx Games Limited, et al.*, (W.D. Wash. Mar. 31, 2022) to represent a certified class of Washington residents who lost money playing mobile applications games that allegedly constituted illegal gambling under Washington law,
65. *Fischer v. Instant Checkmate LLC*, (N.D. Ill. Mar. 31, 2022) to represent a certified class of Illinois residents whose identities were allegedly used without their consent in alleged violation of the Illinois Right of Publicity Act,
66. *Rivera v. Google LLC*, (Cir. Ct. Cook Cnty. Apr. 25, 2022) to represent a certified class of Illinois residents who appeared in a photograph in Google Photos, in alleged violation of the Illinois Biometric Information Privacy Act,
67. *Loftus v. Outside Integrated Media, LLC*, (E.D. Mich. May 5, 2022) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,

68. *D'Amario v. The University of Tampa*, (S.D.N.Y. June 3, 2022) to represent a certified nationwide class of students for tuition and fee refunds after their classes were moved online by The University of Tampa due to the novel coronavirus, COVID-19,
69. *Fittipaldi v. Monmouth University*, (D.N.J. Sept. 22, 2022) to represent a certified nationwide class of students for tuition and fee refunds after their classes were moved online by Monmouth University due to the novel coronavirus, COVID-19,
70. *Armstead v. VGW Malta Ltd. et al.* (Cir. Ct. Henderson Cnty. Oct. 3, 2022) to present a certified class of Kentucky residents who lost money playing mobile applications games that allegedly constituted illegal gambling under Kentucky law,
71. *Cruz v. The Connor Group, A Real Estate Investment Firm, LLC*, (N.D. Ill. Oct. 26, 2022) to represent a certified class of workers who used a fingerprint clock-in system, in alleged violation of the Illinois Biometric Information Privacy Act;
72. *Delcid et al. v. TCP HOT Acquisitions LLC et al.* (S.D.N.Y. Oct. 28, 2022) to represent a certified nationwide class of purchasers of Sure and Brut-brand antiperspirants that were allegedly contaminated with benzene,
73. *Kain v. The Economist Newspaper NA, Inc.* (E.D. Mich. Dec. 15, 2022) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,
74. *Strano v. Kiplinger Washington Editors, Inc.* (E.D. Mich. Jan. 6, 2023) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act,
75. *Moeller v. The Week Publications, Inc.* (E.D. Mich. Jan. 6, 2023) to represent a class of magazine subscribers under the Michigan Preservation of Personal Privacy Act.
76. *Ambrose v. Boston Globe Media Partners, LLC* (D. Mass. May 25, 2023) to represent a class of newspaper subscribers who were also Facebook users under the Video Privacy Protection Act.
77. *In re: Apple Data Privacy Litigation*, (N.D. Cal. July 5, 2023) to represent a putative nationwide class of all persons who turned off permissions for data tracking and whose mobile app activity was still tracked on iPhone mobile devices.

SCOTT A. BURSOR

Mr. Bursor has an active civil trial practice, having won multi-million verdicts or recoveries in six of six civil jury trials since 2008. Mr. Bursor's most recent victory came in May 2019 in *Perez v. Rash Curtis & Associates*, in which Mr. Bursor served as lead trial counsel and won a $267 million jury verdict against a debt collector for violations of the Telephone Consumer Protection Act (TCPA).

In *Ayyad v. Sprint Spectrum L.P.* (2013), where Mr. Bursor served as lead trial counsel, the jury returned a verdict defeating Sprint's $1.06 billion counterclaim and securing the class's recovery of more than $275 million in cash and debt relief.

In *Thomas v. Global Vision Products, Inc.* (2009), the jury returned a $50 million verdict in favor of the plaintiff and class represented by Mr. Bursor. The legal trade publication VerdictSearch reported that this was the second largest jury verdict in California in 2009.

Class actions are rarely tried to verdict. Other than Mr. Bursor and his partner Mr. Fisher, we know of no lawyer that has tried more than one class action to a jury. Mr. Bursor's perfect record of six wins in six class action jury trials, with recoveries ranging from $21 million to $299 million, is unmatched by any other lawyer. Each of these victories was hard-fought against top trial lawyers from the biggest law firms in the United States.

Mr. Bursor graduated from the University of Texas Law School in 1996. He served as Articles Editor of the Texas Law Review, and was a member of the Board of Advocates and Order of the Coif. Prior to starting his own practice, Mr. Bursor was a litigation associate at a large New York based law firm where he represented telecommunications, pharmaceutical, and technology companies in commercial litigation.

Mr. Bursor is a member of the state bars of New York, Florida, and California, as well as the bars of the United States Court of Appeals for the Second, Third, Fourth, Sixth, Ninth and Eleventh Circuits, and the bars of the United States District Courts for the Southern and Eastern Districts of New York, the Northern, Central, Southern and Eastern Districts of California, the Southern and Middle Districts of Florida, and the Eastern District of Michigan.

Representative Cases

Mr. Bursor was appointed lead or co-lead class counsel to the largest, 2nd largest, and 3rd largest classes ever certified. Mr. Bursor has represented classes including more than 160 million class members, roughly 1 of every 2 Americans. Listed below are recent cases that are representative of Mr. Bursor's practice:

Mr. Bursor negotiated and obtained court-approval for two landmark settlements in *Nguyen v. Verizon Wireless* and *Zill v. Sprint Spectrum* (the largest and 2nd largest classes ever certified). These settlements required Verizon and Sprint to open their wireless networks to third-party devices and applications. These settlements are believed to be the most significant legal development affecting the telecommunications industry since 1968, when the FCC's Carterfone decision similarly opened up AT&T's wireline telephone network.

Mr. Bursor was the lead trial lawyer in *Ayyad v. Sprint Spectrum, L.P.* representing a class of approximately 2 million California consumers who were charged an early termination fee under a Sprint cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. After a five-week combined bench-and-jury trial, the jury returned a verdict in June 2008 and the Court issued a Statement of Decision in December 2008 awarding the plaintiffs $299 million in cash and debt cancellation. Mr. Bursor served as lead trial counsel for this class again in 2013 during a month-long jury trial in which Sprint asserted a $1.06 billion counterclaim against the class. Mr. Bursor secured a verdict awarding Sprint only $18.4 million, the exact amount calculated by the class's damages expert. This award was less than 2% of the damages Sprint sought, less than 6% of the amount of the illegal termination fees Sprint charged to class

members. In December 2016, after more than 13 years of litigation, the case was settled for $304 million, including $79 million in cash payments plus $225 million in debt cancellation.

Mr. Bursor was the lead trial lawyer in *White v. Cellco Partnership d/b/a Verizon Wireless* representing a class of approximately 1.4 million California consumers who were charged an early termination fee under a Verizon cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. In July 2008, after Mr. Bursor presented plaintiffs' case-in-chief, rested, then cross-examined Verizon's principal trial witness, Verizon agreed to settle the case for a $21 million cash payment and an injunction restricting Verizon's ability to impose early termination fees in future subscriber agreements.

Mr. Bursor was the lead trial lawyer in *Thomas v. Global Visions Products Inc.* Mr. Bursor represented a class of approximately 150,000 California consumers who had purchased the Avacor® hair regrowth system. In January 2008, after a four-week combined bench-and-jury trial. Mr. Bursor obtained a $37 million verdict for the class, which the Court later increased to $40 million.

Mr. Bursor was appointed class counsel and was elected chair of the Official Creditors' Committee in *In re Nutraquest Inc.*, a Chapter 11 bankruptcy case before Chief Judge Garrett E. Brown, Jr. (D.N.J.) involving 390 ephedra-related personal injury and/or wrongful death claims, two consumer class actions, four enforcement actions by governmental agencies, and multiple adversary proceedings related to the Chapter 11 case. Working closely with counsel for all parties and with two mediators, Judge Nicholas Politan (Ret.) and Judge Marina Corodemus (Ret.), the committee chaired by Mr. Bursor was able to settle or otherwise resolve every claim and reach a fully consensual Chapter 11 plan of reorganization, which Chief Judge Brown approved in late 2006. This settlement included a $12.8 million recovery to a nationwide class of consumers who alleged they were defrauded in connection with the purchase of Xenadrine® dietary supplement products.

Mr. Bursor was the lead trial lawyer in *In re: Pacific Bell Late Fee Litigation*. After filing the first class action challenging Pac Bell's late fees in April 2010, winning a contested motion to certify a statewide California class in January 2012, and defeating Pac Bell's motion for summary judgment in February 2013, Mr. Bursor obtained final approval of the $38 million class settlement. The settlement, which Mr. Bursor negotiated the night before opening statements were scheduled to commence, included a $20 million cash payment to provide refunds to California customers who paid late fees on their Pac Bell wireline telephone accounts, and an injunction that reduced other late fee charges by $18.6 million.

L. TIMOTHY FISHER

L. Timothy Fisher has an active practice in consumer class actions and complex business litigation and has also successfully handled a large number of civil appeals.

Mr. Fisher has been actively involved in numerous cases that resulted in multi-million dollar recoveries for consumers and investors. Mr. Fisher has handled cases involving a wide range of issues including nutritional labeling, health care, telecommunications, corporate

governance, unfair business practices and consumer fraud. With his partner Scott A. Bursor, Mr. Fisher has tried five class action jury trials, all of which produced successful results. In *Thomas v. Global Vision Products*, Mr. Fisher obtained a jury award of $50,024,611 — the largest class action award in California in 2009 and the second-largest jury award of any kind. In 2019, Mr. Fisher served as trial counsel with Mr. Bursor in *Perez. v. Rash Curtis & Associates*, where the jury returned a verdict for $267 million in statutory damages under the Telephone Consumer Protection Act.

Mr. Fisher was admitted to the State Bar of California in 1997. He is also a member of the bars of the United States Court of Appeals for the Ninth Circuit, the United States District Courts for the Northern, Central, Southern and Eastern Districts of California, the Northern District of Illinois, the Eastern District of Michigan, and the Eastern District of Missouri. Mr. Fisher taught appellate advocacy at John F. Kennedy University School of Law in 2003 and 2004. In 2010, he contributed jury instructions, a verdict form and comments to the consumer protection chapter of Justice Elizabeth A. Baron's *California Civil Jury Instruction Companion Handbook* (West 2010). In January 2014, Chief Judge Claudia Wilken of the United States District Court for the Northern District of California appointed Mr. Fisher to a four-year term as a member of the Court's Standing Committee on Professional Conduct.

Mr. Fisher received his Juris Doctor from Boalt Hall at the University of California at Berkeley in 1997. While in law school, he was an active member of the Moot Court Board and participated in moot court competitions throughout the United States. In 1994, Mr. Fisher received an award for Best Oral Argument in the first-year moot court competition.

In 1992, Mr. Fisher graduated with highest honors from the University of California at Berkeley and received a degree in political science. Prior to graduation, he authored an honors thesis for Professor Bruce Cain entitled "The Role of Minorities on the Los Angeles City Council." He is also a member of Phi Beta Kappa.

Representative Cases

Thomas v. Global Vision Products, Inc. (Alameda County Superior Court). Mr. Fisher litigated claims against Global Vision Products, Inc. and other individuals in connection with the sale and marketing of a purported hair loss remedy known as Avacor. The case lasted more than seven years and involved two trials. The first trial resulted in a verdict for plaintiff and the class in the amount of $40,000,000. The second trial resulted in a jury verdict of $50,024,611, which led to a $30 million settlement for the class.

In re Cellphone Termination Fee Cases - Handset Locking Actions (Alameda County Superior Court). Mr. Fisher actively worked on five coordinated cases challenging the secret locking of cell phone handsets by major wireless carriers to prevent consumers from activating them on competitive carriers' systems. Settlements have been approved in all five cases on terms that require the cell phone carriers to disclose their handset locks to consumers and to provide unlocking codes nationwide on reasonable terms and conditions. The settlements fundamentally changed the landscape for cell phone consumers regarding the locking and unlocking of cell phone handsets.

In re Cellphone Termination Fee Cases - Early Termination Fee Cases (Alameda County Superior Court and Federal Communications Commission). In separate cases that are a part of the same coordinated litigation as the Handset Locking Actions, Mr. Fisher actively worked on claims challenging the validity under California law of early termination fees imposed by national cell phone carriers. In one of those cases, against Verizon Wireless, a nationwide settlement was reached after three weeks of trial in the amount of $21 million. In a second case, which was tried to verdict, the Court held after trial that the $73 million of flat early termination fees that Sprint had collected from California consumers over an eight-year period were void and unenforceable.

Selected Published Decisions

Melgar v. Zicam LLC, 2016 WL 1267870 (E.D. Cal. Mar. 30, 2016) (certifying 10-jurisdiction class of purchasers of cold remedies, denying motion for summary judgment, and denying motions to exclude plaintiff's expert witnesses).

Salazar v. Honest Tea, Inc., 2015 WL 7017050 (E.D. Cal. Nov. 12. 2015) (denying motion for summary judgment).

Dei Rossi v. Whirlpool Corp., 2015 WL 1932484 (E.D. Cal. Apr. 27, 2015) (certifying California class of purchasers of refrigerators that were mislabeled as Energy Star qualified).

Bayol v. Zipcar, Inc., 78 F.Supp.3d 1252 (N.D. Cal. 2015) (denying motion to dismiss claims alleging unlawful late fees under California Civil Code § 1671).

Forcellati v. Hyland's, Inc., 2015 WL 9685557 (C.D. Cal. Jan. 12, 2015) (denying motion for summary judgment in case alleging false advertising of homeopathic cold and flu remedies for children).

Bayol v. Zipcar, Inc., 2014 WL 4793935 (N.D. Cal. Sept. 25, 2014) (denying motion to transfer venue pursuant to a forum selection clause).

Forcellati v. Hyland's Inc., 2014 WL 1410264 (C.D. Cal. Apr. 9, 2014) (certifying nationwide class of purchasers of homeopathic cold and flu remedies for children).

Hendricks v. StarKist Co., 30 F.Supp.3d 917 (N.D. Cal. 2014) (denying motion to dismiss in case alleging underfilling of 5-ounce cans of tuna).

Dei Rossi v. Whirlpool Corp., 2013 WL 5781673 (E.D. Cal. October 25, 2013) (denying motion to dismiss in case alleging that certain KitchenAid refrigerators were misrepresented as Energy Star qualified).

Forcellati v. Hyland's Inc., 876 F.Supp.2d 1155 (C.D. Cal. 2012) (denying motion to dismiss complaint alleging false advertising regarding homeopathic cold and flu remedies for children).

Clerkin v. MyLife.com, 2011 WL 3809912 (N.D. Cal. August 29, 2011) (denying defendants' motion to dismiss in case alleging false and misleading advertising by a social networking company).

In re Cellphone Termination Fee Cases, 186 Cal.App.4th 1380 (2010) (affirming order approving $21 million class action settlement).

Gatton v. T-Mobile USA, Inc., 152 Cal.App.4th 571 (2007) (affirming order denying motion to compel arbitration).

Selected Class Settlements

Melgar v. Zicam (Eastern District of California) - $16 million class settlement of claims alleging cold medicine was ineffective.

Gastelum v. Frontier California Inc. (San Francisco Superior Court) - $10.9 million class action settlement of claims alleging that a residential landline service provider charged unlawful late fees.

West v. California Service Bureau, Inc. (Northern District of California) - $4.1 million class settlement of claims under the Telephone Consumer Protection Act.

Gregorio v. Premier Nutrition Corp. (Southern District of New York) - $9 million class settlement of false advertising claims against protein shake manufacturer.

Morris v. SolarCity Corp. (Northern District of California) - $15 million class settlement of claims under the Telephone Consumer Protection Act.

Retta v. Millennium Products, Inc. (Central District of California) - $8.25 million settlement to resolve claims of bottled tea purchasers for alleged false advertising.

Forcellati v. Hyland's (Central District of California) – nationwide class action settlement providing full refunds to purchasers of homeopathic cold and flu remedies for children.

Dei Rossi v. Whirlpool (Eastern District of California) – class action settlement providing $55 cash payments to purchasers of certain KitchenAid refrigerators that allegedly mislabeled as Energy Star qualified.

In Re NVIDIA GTX 970 Graphics Chip Litigation (Northern District of California) - $4.5 million class action settlement of claims alleging that a computer graphics card was sold with false and misleading representations concerning its specifications and performance.

Hendricks v. StarKist Co. (Northern District of California) – $12 million class action settlement of claims alleging that 5-ounce cans of tuna were underfilled.

In re Zakskorn v. American Honda Motor Co. Honda (Eastern District of California) – nationwide settlement providing for brake pad replacement and reimbursement of out-of-pocket expenses in case alleging defective brake pads on Honda Civic vehicles manufactured between 2006 and 2011.

Correa v. Sensa Products, LLC (Los Angeles Superior Court) - $9 million settlement on behalf of purchasers of the Sensa weight loss product.

In re Pacific Bell Late Fee Litigation (Contra Costa County Superior Court) - $38.6 million settlement on behalf of Pac Bell customers who paid an allegedly unlawful late payment charge.

In re Haier Freezer Consumer Litigation (Northern District of California) - $4 million settlement, which provided for cash payments of between $50 and $325.80 to class members who purchased the Haier HNCM070E chest freezer.

Thomas v. Global Vision Products, Inc. (Alameda County Superior Court) - $30 million settlement on behalf of a class of purchasers of a hair loss remedy.

Guyette v. Viacom, Inc. (Alameda County Superior Court) - $13 million settlement for a class of cable television subscribers who alleged that the defendant had improperly failed to share certain tax refunds with its subscribers.

JOSEPH I. MARCHESE

Joseph I. Marchese is a Partner with Bursor & Fisher, P.A. Joe focuses his practice on consumer class actions, employment law disputes, and commercial litigation. He has represented corporate and individual clients in a wide array of civil litigation, and has substantial trial and appellate experience.

Joe has diverse experience in litigating and resolving consumer class actions involving claims of mislabeling, false or misleading advertising, privacy violations, data breach claims, and violations of the Servicemembers Civil Relief Act.

Joe also has significant experience in multidistrict litigation proceedings. Recently, he served on the Plaintiffs' Executive Committee in *In Re: Blue Buffalo Company, Ltd. Marketing And Sales Practices Litigation*, MDL No. 2562, which resulted in a $32 million consumer class settlement. Currently, he serves on the Plaintiffs' Steering Committee for Economic Reimbursement in *In Re: Valsartan Products Liability Litigation*, MDL. No. 2875.

Joe is admitted to the State Bar of New York and is a member of the bars of the United States District Courts for the Southern District of New York, the Eastern District of New York, and the Eastern District of Michigan, as well as the United States Court of Appeals for the Second Circuit.

Joe graduated from Boston University School of Law in 2002 where he was a member of The Public Interest Law Journal. In 1998, Joe graduated with honors from Bucknell University.

Selected Published Decisions:

Boelter v. Hearst Communications, Inc., 269 F. Supp. 3d 172 (S.D.N.Y. Sept. 7, 2017), granting plaintiff's motion for partial summary judgment on state privacy law violations in putative class action.

Boelter v. Hearst Communications, Inc., 192 F. Supp. 3d 427 (S.D.N.Y. June 17, 2016), denying publisher's motion to dismiss its subscriber's allegations of state privacy law violations in putative class action.

In re Scotts EZ Seed Litigation, 304 F.R.D. 397 (S.D.N.Y. 2015), granting class certification of false advertising and other claims brought by New York and California purchasers of grass seed product.

Ebin v. Kangadis Food Inc., 297 F.R.D. 561 (S.D.N.Y. 2014), granting nationwide class certification of false advertising and other claims brought by purchasers of purported "100% Pure Olive Oil" product.

In re Michaels Stores Pin Pad Litigation, 830 F. Supp. 2d 518 (N.D. Ill. 2011), denying retailer's motion to dismiss its customers' state law consumer protection and privacy claims in data breach putative class action.

Selected Class Settlements:

Edwards v. Mid-Hudson Valley Federal Credit Union, Case No. 22-cv-00562-TJM-CFH (N.D.N.Y. 2023) – final approval granted for $2.2 million class settlement to resolve claims that an upstate New York credit union was unlawfully charging overdraft fees on accounts with sufficient funds.

Edwards v. Hearst Communications, Inc., Case No. 15-cv-09279-AT (S.D.N.Y. 2019) – final approval granted for $50 million class settlement to resolve claims of magazine subscribers for alleged statutory privacy violations.

Moeller v. Advance Magazine Publishers, Inc. d/b/a Condé Nast, Case No. 15-cv-05671-NRB (S.D.N.Y. 2019) – final approval granted for $13.75 million class settlement to resolve claims of magazine subscribers for alleged statutory privacy violations.

In *re Scotts EZ Seed Litigation*, Case No. 12-cv-4727-VB (S.D.N.Y. 2018) – final approval granted for $47 million class settlement to resolve false advertising claims of purchasers of combination grass seed product.

In Re: Blue Buffalo Marketing And Sales Practices Litigation, Case No. 14-MD-2562-RWS (E.D. Mo. 2016) – final approval granted for $32 million class settlement to resolve claims of pet owners for alleged false advertising of pet foods.

Rodriguez v. Citimortgage, Inc., Case No. 11-cv-4718-PGG (S.D.N.Y. 2015) – final approval granted for $38 million class settlement to resolve claims of military servicemembers for alleged foreclosure violations of the Servicemembers Civil Relief Act, where each class member was entitled to $116,785 plus lost equity in the foreclosed property and interest thereon.

O'Brien v. LG Electronics USA, Inc., et al., Case No. 10-cv-3733-DMC (D.N.J. 2011) – final approval granted for $23 million class settlement to resolve claims of Energy Star refrigerator purchasers for alleged false advertising of the appliances' Energy Star qualification.

SARAH N. WESTCOT

Sarah N. Westcot is the Managing Partner of Bursor & Fisher's Miami office. She focuses her practice on consumer class actions, complex business litigation, and mass torts.

She has represented clients in a wide array of civil litigation, and has substantial trial and appellate experience. Sarah served as trial counsel in *Ayyad v. Sprint Spectrum L.P.*, where

Bursor & Fisher won a jury verdict defeating Sprint's $1.06 billion counterclaim and securing the class's recovery of more than $275 million in cash and debt relief.

Sarah also has significant experience in high-profile, multi-district litigations. She currently serves on the Plaintiffs' Steering Committee in *In re Zantac (Ranitidine) Products Liability Litigation,* MDL No. 2924 (S.D. Florida). She also serves on the Plaintiffs' Executive Committee in *In re Apple Inc. App Store Simulated Casino-Style Games Litigation,* MDL No. 2985 (N.D. Cal.) and *In Re: Google Play Store Simulated Casino-Style Games Litigation*, MDL No. 3001 (N.D. Cal.).

Sarah is admitted to the State Bars of California and Florida, and is a member of the bars of the United States District Courts for the Northern, Central, Southern, and Eastern Districts of California, the United States District Courts for the Southern and Middle Districts of Florida, and the bars of the United States Courts of Appeals for the Second, Eighth, and Ninth Circuits.

Sarah received her Juris Doctor from the University of Notre Dame Law School in 2009. During law school, she was a law clerk with the Cook County State's Attorney's Office in Chicago and the Santa Clara County District Attorney's Office in San Jose, CA, gaining early trial experience in both roles. She graduated with honors from the University of Florida in 2005.

Sarah is a member of The National Trial Lawyers Top 100 Civil Plaintiff Lawyers, and was selected to The National Trial Lawyers Top 40 Under 40 Civil Plaintiff Lawyers for 2022.

JOSHUA D. ARISOHN

Joshua D. Arisohn is a Partner with Bursor & Fisher, P.A. Josh has litigated precedent-setting cases in the areas of consumer class actions and terrorism. He participated in the first ever trial to take place under the Anti-Terrorism Act, a statute that affords U.S. citizens the right to assert federal claims for injuries arising out of acts of international terrorism. Josh's practice continues to focus on terrorism-related matters as well as class actions.

Josh is admitted to the State Bar of New York and is a member of the bars of the United States District Courts for the Southern District of New York, the Eastern District of New York, the District Court for the District of Columbia, and the United States Courts of Appeals for the Second and Ninth Circuits.

Josh previously practiced at Dewey & LeBoeuf LLP and DLA Piper LLP. He graduated from Columbia University School of Law in 2006, where he was a Harlan Fiske Stone Scholar, and received his B.A. from Cornell University in 2002. Josh has been honored as a 2015, 2016 and 2017 Super Lawyer Rising Star.

Selected Published Decisions:

Fields v. Syrian Arab Republic, Civil Case No. 18-1437 (RJL), entering a judgment of approximately $850 million in favor of the family members of victims of terrorist attacks carried out by ISIS with the material support of Syria.

Farwell v. Google LLC, 2022 WL 1568361 (C.D. Ill. Mar. 31, 2022), denying social media defendant's motion to dismiss BIPA claims brought on behalf of Illinois school students using Google's Workspace for Education platform on laptop computers.

Weiman v. Miami University, Case No. 2020-00614JD (Oh. Ct. Claims), certifying a class of students alleging a breach of contract based on their school's failure to provide a full semester of in-person classes.

Smith v. The Ohio State University, Case No. 2020-00321JD (Oh. Ct. Claims), certifying a class of students alleging a breach of contract based on their school's failure to provide a full semester of in-person classes.

Waitt v. Kent State University, Case No. 2020-00392JD (Oh. Ct. Claims), certifying a class of students alleging a breach of contract based on their school's failure to provide a full semester of in-person classes.

Duke v. Ohio University, Case No. 2021-00036JD (Oh. Ct. Claims), certifying a class of students alleging a breach of contract based on their school's failure to provide a full semester of in-person classes.

Keba v. Bowling Green State University, Case No. 2020-00639JD (Oh. Ct. Claims), certifying a class of students alleging a breach of contract based on their school's failure to provide a full semester of in-person classes.

Kirkbride v. The Kroger Co., Case No. 2:21-cv-00022-ALM-EPD, denying motion to dismiss claims based on the allegation that defendant overstated its usual and customary prices and thereby overcharged customers for generic drugs.

Selected Class Settlements:

Morris v. SolarCity Corp., Case No. 3:15-cv-05107-RS (N.D. Cal.) - final approval granted for $15 million class settlement to resolve claims under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*

Marquez v. Google LLC, Case No. 2021-CH-1460 (Cir. Ct. Cook Cnty. 2022) – final approval granted for $100 million class settlement to resolve alleged BIPA violations of Illinois residents appearing in photos on the Google Photos platform.

NEAL J. DECKANT

Neal J. Deckant is a Partner with Bursor & Fisher, P.A., where he serves as the firm's Head of Information & e-Discovery. Neal focuses his practice on complex business litigation and consumer class actions. Prior to joining Bursor & Fisher, Neal counseled low-income homeowners facing foreclosure in East Boston.

Neal is admitted to the State Bars of California and New York, and is a member of the bars of the United States District Court for the Northern District of California, the United States

District Court for the Eastern District of California, the United States District Court for the Central District of California, the United States District Court for the Southern District of California, the United States District Court for the Southern District of New York, the United States District Court for the Eastern District of New York, and the bars of the United States Courts of Appeals for the Second and Ninth Circuits.

Neal received his Juris Doctor from Boston University School of Law in 2011, graduating cum laude with two Dean's Awards. During law school, Neal served as a Senior Articles Editor for the Review of Banking and Financial Law, where he authored two published articles about securitization reforms, both of which were cited by the New York Court of Appeals, the highest court in the state. Neal was also awarded Best Oral Argument in his moot court section, and he served as a Research Assistant for his Securities Regulation professor. Neal has also been honored as a 2014, 2015, 2016, and 2017 Super Lawyers Rising Star. In 2007, Neal graduated with Honors from Brown University with a dual major in East Asian Studies and Philosophy.

Selected Published Decisions:

Martinelli v. Johnson & Johnson, 2019 WL 1429653 (N.D. Cal. Mar. 29, 2019), granting class certification of false advertising and other claims brought by purchasers of Benecol spreads labeled with the representation "No Trans Fats."

Dzielak v. Whirlpool Corp., 2017 WL 6513347 (D.N.J. Dec. 20, 2017), granting class certification of consumer protection claims brought by purchasers of Maytag Centennial washing machines marked with the "Energy Star" logo.

Duran v. Obesity Research Institute, LLC, 204 Cal. Rptr. 3d 896 (Cal. Ct. App. 2016), reversing and remanding final approval of a class action settlement on appeal, regarding allegedly mislabeled dietary supplements, in connection with a meritorious objection.

Marchuk v. Faruqi & Faruqi, LLP, et al., 100 F. Supp. 3d 302 (S.D.N.Y. 2015), granting individual and law firm defendants' motion for judgment as a matter of law on plaintiff's claims for retaliation and defamation, as well as for all claims against law firm partners, Nadeem and Lubna Faruqi.

Ebin v. Kangadis Food Inc., 297 F.R.D. 561 (S.D.N.Y. 2014), granting nationwide class certification of false advertising and other claims brought by purchasers of purported "100% Pure Olive Oil" product.

Ebin v. Kangadis Food Inc., 2014 WL 737878 (S.D.N.Y. Feb. 25, 2014), denying distributor's motion for summary judgment against nationwide class of purchasers of purported "100% Pure Olive Oil" product.

Selected Class Settlements:

In Re NVIDIA GTX 970 Graphics Chip Litigation, Case No. 15-cv-00760-PJH (N.D. Cal. Dec. 7, 2016) – final approval granted for $4.5 million class action settlement to resolve claims that a

computer graphics card was allegedly sold with false and misleading representations concerning its specifications and performance.

Hendricks v. StarKist Co., 2016 WL 5462423 (N.D. Cal. Sept. 29, 2016) – final approval granted for $12 million class action settlement to resolve claims that 5-ounce cans of tuna were allegedly underfilled.

In re: Kangadis Food Inc., Case No. 8-14-72649 (Bankr. E.D.N.Y. Dec. 17, 2014) – class action claims resolved for $2 million as part of a Chapter 11 plan of reorganization, after a corporate defendant filed for bankruptcy, following claims that its olive oil was allegedly sold with false and misleading representations.

Selected Publications:

Neal Deckant, *X. Reforms of Collateralized Debt Obligations: Enforcement, Accounting and Regulatory Proposals*, 29 Rev. Banking & Fin. L. 79 (2009) (cited in *Quadrant Structured Products Co., Ltd. v. Vertin*, 16 N.E.3d 1165, 1169 n.8 (N.Y. 2014)).

Neal Deckant, *Criticisms of Collateralized Debt Obligations in the Wake of the Goldman Sachs Scandal*, 30 Rev. Banking & Fin. L. 407 (2010) (cited in *Quadrant Structured Products Co., Ltd. v. Vertin*, 16 N.E.3d 1165, 1169 n.8 (N.Y. 2014); *Lyon Village Venetia, LLC v. CSE Mortgage LLC*, 2016 WL 476694, at *1 n.1 (Md. Ct. Spec. App. Feb. 4, 2016); Ivan Ascher, Portfolio Society: On the Capitalist Mode of Prediction, at 141, 153, 175 (Zone Books / The MIT Press 2016); Devon J. Steinmeyer, *Does State National Bank of Big Spring v. Geithner Stand a Fighting Chance?*, 89 Chi.-Kent. L. Rev. 471, 473 n.13 (2014)).

YITZCHAK KOPEL

Yitzchak Kopel is a Partner with Bursor & Fisher, P.A. Yitz focuses his practice on consumer class actions and complex business litigation. He has represented corporate and individual clients before federal and state courts, as well as in arbitration proceedings.

Yitz has substantial experience in successfully litigating and resolving consumer class actions involving claims of consumer fraud, data breaches, and violations of the telephone consumer protection act. Since 2014, Yitz has obtained class certification on behalf of his clients five times, three of which were certified as nationwide class actions. Bursor & Fisher was appointed as class counsel to represent the certified classes in each of the cases.

Yitz is admitted to the State Bars of New York and New Jersey, the bar of the United States Court of Appeals for the Second, Eleventh, and Ninth Circuits, and the bars of the United States District Courts for the Southern District of New York, Eastern District of New York, Eastern District of Missouri, Eastern District of Wisconsin, Northern District of Illinois, and District of New Jersey.

Yitz received his Juris Doctorate from Brooklyn Law School in 2012, graduating *cum laude* with two Dean's Awards. During law school, Yitz served as an Articles Editor for the

Brooklyn Law Review and worked as a Law Clerk at Shearman & Sterling. In 2009, Yitz graduated *cum laude* from Queens College with a B.A. in Accounting.

<u>Selected Published Decisions:</u>

Bassaw v. United Industries Corp., 482 F.Supp.3d 80, 2020 WL 5117916 (S.D.N.Y. Aug. 31, 2020), denying motion to dismiss claims in putative class action concerning insect foggers.

Poppiti v. United Industries Corp., 2020 WL 1433642 (E.D. Mo. Mar. 24, 2020), denying motion to dismiss claims in putative class action concerning citronella candles.

Bakov v. Consolidated World Travel, Inc., 2019 WL 6699188 (N.D. Ill. Dec. 9, 2019), granting summary judgment on behalf of certified class in robocall class action.

Krumm v. Kittrich Corp., 2019 WL 6876059 (E.D. Mo. Dec. 17, 2019), denying motion to dismiss claims in putative class action concerning mosquito repellent.

Crespo v. S.C. Johnson & Son, Inc., 394 F. Supp. 3d 260 (S.D.N.Y. 2019), denying defendant's motion to dismiss fraud and consumer protection claims in putative class action regarding Raid insect fogger.

Bakov v. Consolidated World Travel, Inc., 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019), certifying a class of persons who received robocalls in the state of Illinois.

Bourbia v. S.C. Johnson & Son, Inc., 375 F. Supp. 3d 454 (S.D.N.Y. 2019), denying defendant's motion to dismiss fraud and consumer protection claims in putative class action regarding mosquito repellent.

Hart v. BHH, LLC, 323 F. Supp. 3d 560 (S.D.N.Y. 2018), denying defendants' motion for summary judgment in certified class action involving the sale of ultrasonic pest repellers.

Hart v. BHH, LLC, 2018 WL 3471813 (S.D.N.Y. July 19, 2018), denying defendants' motion to exclude plaintiffs' expert in certified class action involving the sale of ultrasonic pest repellers.

Penrose v. Buffalo Trace Distillery, Inc., 2018 WL 2334983 (E.D. Mo. Feb. 5, 2018), denying bourbon producers' motion to dismiss fraud and consumer protection claims in putative class action.

West v. California Service Bureau, Inc., 323 F.R.D. 295 (N.D. Cal. 2017), certifying a nationwide class of "wrong-number" robocall recipients.

Hart v. BHH, LLC, 2017 WL 2912519 (S.D.N.Y. July 7, 2017), certifying nationwide class of purchasers of ultrasonic pest repellers.

Browning v. Unilever United States, Inc., 2017 WL 7660643 (C.D. Cal. Apr. 26, 2017), denying motion to dismiss fraud and warranty claims in putative class action concerning facial scrub product.

Brenner v. Procter & Gamble Co., 2016 WL 8192946 (C.D. Cal. Oct. 20, 2016), denying motion to dismiss warranty and consumer protection claims in putative class action concerning baby wipes.

Hewlett v. Consolidated World Travel, Inc., 2016 WL 4466536 (E.D. Cal. Aug. 23, 2016), denying telemarketer's motion to dismiss TCPA claims in putative class action.

Bailey v. KIND, LLC, 2016 WL 3456981 (C.D. Cal. June 16, 2016), denying motion to dismiss fraud and warranty claims in putative class action concerning snack bars.

Hart v. BHH, LLC, 2016 WL 2642228 (S.D.N.Y. May 5, 2016) denying motion to dismiss warranty and consumer protection claims in putative class action concerning ultrasonic pest repellers.

Marchuk v. Faruqi & Faruqi, LLP, et al., 100 F. Supp. 3d 302 (S.D.N.Y. 2015), granting clients' motion for judgment as a matter of law on claims for retaliation and defamation in employment action.

In re Scotts EZ Seed Litigation, 304 F.R.D. 397 (S.D.N.Y. 2015), granting class certification of false advertising and other claims brought by New York and California purchasers of grass seed product.

Brady v. Basic Research, L.L.C., 101 F. Supp. 3d 217 (E.D.N.Y. 2015), denying diet pill manufacturers' motion to dismiss its purchasers' allegations for breach of express warranty in putative class action.

Ward v. TheLadders.com, Inc., 3 F. Supp. 3d 151 (S.D.N.Y. 2014), denying online job board's motion to dismiss its subscribers' allegations of consumer protection law violations in putative class action.

Ebin v. Kangadis Food Inc., 297 F.R.D. 561 (S.D.N.Y. 2014), granting nationwide class certification of false advertising and other claims brought by purchasers of purported "100% Pure Olive Oil" product.

Ebin v. Kangadis Food Inc., 2014 WL 737878 (S.D.N.Y. Feb. 25, 2014), denying distributor's motion for summary judgment against nationwide class of purchasers of purported "100% Pure Olive Oil" product.

Selected Class Settlements:

Hart v. BHH, LLC, Case No. 1:15-cv-04804 (S.D.N.Y. Sept. 22, 2020), resolving class action claims regarding ultrasonic pest repellers.

In re: Kangadis Food Inc., Case No. 8-14-72649 (Bankr. E.D.N.Y. Dec. 17, 2014), resolving class action claims for $2 million as part of a Chapter 11 plan of reorganization, after a corporate defendant filed for bankruptcy following the certification of nationwide claims alleging that its olive oil was sold with false and misleading representations.

West v. California Service Bureau, Case No. 4:16-cv-03124-YGR (N.D. Cal. Jan. 23, 2019), resolving class action claims against debt-collector for wrong-number robocalls for $4.1 million.

PHILIP L. FRAIETTA

Philip L. Fraietta is a Partner with Bursor & Fisher, P.A. Phil focuses his practice on data privacy, complex business litigation, consumer class actions, and employment law disputes. Phil has been named a "Rising Star" in the New York Metro Area by Super Lawyers® every year since 2019.

Phil has significant experience in litigating consumer class actions, particularly those involving privacy claims under statutes such as the Michigan Preservation of Personal Privacy Act, the Illinois Biometric Information Privacy Act, and Right of Publicity statutes. Since 2016, Phil has recovered over $100 million for class members in privacy class action settlements. In addition to privacy claims, Phil has significant experience in litigating and settling class action claims involving false or misleading advertising.

Phil is admitted to the State Bars of New York, New Jersey, Illinois, and Michigan, the bars of the United States District Courts for the Southern District of New York, the Eastern District of New York, the Western District of New York, the Northern District of New York, the District of New Jersey, the Eastern District of Michigan, the Western District of Michigan, the Northern District of Illinois, the Central District of Illinois, and the United States Court of Appeals for the Second, Third, and Ninth Circuits. Phil was a Summer Associate with Bursor & Fisher prior to joining the firm.

Phil received his Juris Doctor from Fordham University School of Law in 2014, graduating cum laude. During law school, Phil served as an Articles & Notes Editor for the Fordham Law Review, and published two articles. In 2011, Phil graduated cum laude from Fordham University with a B.A. in Economics.

Selected Published Decisions:

Fischer v. Instant Checkmate LLC, 2022 WL 971479 (N.D. Ill. Mar. 31, 2022), certifying class of Illinois residents for alleged violations of Illinois' Right of Publicity Act by background reporting website.

Kolebuck-Utz v. Whitepages Inc., 2021 WL 157219 (W.D. Wash. Apr. 22, 2021), denying defendant's motion to dismiss for alleged violations of Ohio's Right to Publicity Law.

Bergeron v. Rochester Institute of Technology, 2020 WL 7486682 (W.D.N.Y. Dec. 18, 2020), denying university's motion to dismiss for failure to refund tuition and fees for the Spring 2020 semester in light of the COVID-19 pandemic.

Porter v. NBTY, Inc., 2019 WL 5694312 (N.D. Ill. Nov. 4, 2019), denying supplement manufacturer's motion for summary judgment on consumers' allegations of false advertising relating to whey protein content.

Boelter v. Hearst Communications, Inc., 269 F. Supp. 3d 172 (S.D.N.Y. 2017), granting plaintiff's motion for partial summary judgment on state privacy law violations in putative class action.

Selected Class Settlements:

Edwards v. Hearst Communications, Inc., Case No. 15-cv-09279-AT (S.D.N.Y. 2019) – final approval granted for $50 million class settlement to resolve claims of magazine subscribers for alleged statutory privacy violations.

Ruppel v. Consumers Union of United States, Inc., Case No. 16-cv-02444-KMK (S.D.N.Y. 2018) – final approval granted for $16.375 million class settlement to resolve claims of magazine subscribers for alleged statutory privacy violations.

Moeller v. Advance Magazine Publishers, Inc. d/b/a Condé Nast, Case No. 15-cv-05671-NRB (S.D.N.Y. 2019) – final approval granted for $13.75 million class settlement to resolve claims of magazine subscribers for alleged statutory privacy violations.

Benbow v. SmileDirectClub, LLC, Case No. 2020-CH-07269 (Cir. Ct. Cook Cnty. 2021) – final approval granted for $11.5 million class settlement to resolve claims for alleged TCPA violations.

Gregorio v. Premier Nutrition Corp., Case No. 17-cv-05987-AT (S.D.N.Y. 2019) – final approval granted for $9 million class settlement to resolve claims of protein shake purchasers for alleged false advertising.

Taylor v. Trusted Media Brands, Inc., Case No. 16-cv-01812-KMK (S.D.N.Y. 2018) – final approval granted for $8.225 million class settlement to resolve claims of magazine subscribers for alleged statutory privacy violations.

Moeller v. American Media, Inc., Case No. 16-cv-11367-JEL (E.D. Mich. 2017) – final approval granted for $7.6 million class settlement to resolve claims of magazine subscribers for alleged statutory privacy violations.

Rocchio v. Rutgers, The State University of New Jersey, Case No. MID-L-003039-20 (Sup. Ct. Middlesex Cnty. 2022) – final approval granted for $5 million class settlement to resolve claims for failure to refund mandatory fees for the Spring 2020 semester in light of the COVID-19 pandemic.

Heigl v. Waste Management of New York, LLC, Case No. 19-cv-05487-WFK-ST (E.D.N.Y. 2021) – final approval granted for $2.7 million class settlement to resolve claims for charging allegedly unlawful fees pertaining to paper billing.

Frederick v. Examsoft Worldwide, Inc., Case No. 2021L001116 (Cir. Ct. DuPage Cnty. 2022) – final approval granted for $2.25 million class settlement to resolve claims for alleged BIPA violations.

ALEC M. LESLIE

Alec Leslie is a Partner with Bursor & Fisher, P.A. He focuses his practice on consumer class actions, employment law disputes, and complex business litigation.

Alec is admitted to the State Bar of New York and is a member of the bar of the United States District Courts for the Southern and Eastern Districts of New York. Alec was a Summer Associate with Bursor & Fisher prior to joining the firm.

Alec received his Juris Doctor from Brooklyn Law School in 2016, graduating *cum laude*. During law school, Alec served as an Articles Editor for Brooklyn Law Review. In addition, Alec served as an intern to the Honorable James C. Francis for the Southern District of New York and the Honorable Vincent Del Giudice, Supreme Court, Kings County. Alec graduated from the University of Colorado with a B.A. in Philosophy in 2012.

Selected Class Settlements:

Gregorio v. Premier Nutrition Corp., Case No. 17-cv-05987-AT (S.D.N.Y. 2019) – final approval granted for class settlement to resolve claims of protein shake purchasers for alleged false advertising.

Wright v. Southern New Hampshire Univ., Case No. 1:20-cv-00609-LM (D.N.H. 2021) – final approval granted for class settlement to resolve claims over COVID-19 tuition and fee refunds to students.

Mendoza et al. v. United Industries Corp., Case No. 21PH-CV00670 (Phelps Cnty. Mo. 2021) – final approval granted for class settlement to resolve false advertising claims on insect repellent products.

Kaupelis v. Harbor Freight Tools USA, Inc., Case No. 8:19-cv-01203-JVS-DFM (C.D. Cal. 2021) – final approval granted for class settlement involving allegedly defective and dangerous chainsaws.

Rocchio v. Rutgers Univ., Case No. MID-L-003039-20 (Middlesex Cnty. N.J. 2021) – final approval granted for class settlement to resolve claims over COVID-19 fee refunds to students.

Malone v. Western Digital Corporation, Case No. 5:20-cv-03584-NC (N.D. Cal.) – final approval granted for class settlement to resolve false advertising claims on hard drive products.

Frederick et al. v. ExamSoft Worldwide, Inc., Case No. 2021L001116 (DuPage Cnty. Ill. 2021) – final approval granted for class settlement to resolve claims over alleged BIPA violations with respect to exam proctoring software.

STEPHEN BECK

Stephen is an Associate with Bursor & Fisher, P.A. Stephen focuses his practice on complex civil litigation and class actions.

Stephen is admitted to the State Bar of Florida and is a member of the bars of the United States District Courts for the Southern and Middle Districts of Florida.

Stephen received his Juris Doctor from the University of Miami School of Law in 2018. During law school, Stephen received an Honors distinction in the Litigation Skills Program and was awarded the Honorable Theodore Klein Memorial Scholarship for excellence in written and oral advocacy. Stephen also received the CALI Award in Legislation for earning the highest grade on the final examination. Stephen graduated from the University of North Florida with a B.A. in Philosophy in 2015.

STEFAN BOGDANOVICH

Stefan Bogdanovich is an Associate with Bursor & Fisher, P.A. Stefan litigates complex civil and class actions typically involving privacy, intellectual property, entertainment, and false advertising law.

Prior to working at Bursor & Fisher, Stefan practiced at two national law firms in Los Angeles. He helped represent various companies in false advertising and IP infringement cases, media companies in defamation cases, and motion picture producers in royalty disputes. He also advised corporations and public figures on complying with various privacy and advertising laws and regulations.

Stefan is admitted to the State Bar of California and all of the California Federal District Courts. He is also a Certified Information Privacy Professional.

Stefan received his Juris Doctor from the University of Southern California Gould School of Law in 2018, where he was a member of the Hale Moot Court Honors Program and the Trial Team. He received the highest grade in his class in three subjects, including First Amendment Law.

BRITTANY SCOTT

Brittany Scott is an Associate with Bursor & Fisher, P.A. Brittany focuses her practice on data privacy, complex civil litigation, and consumer class actions. Brittany was an intern with Bursor & Fisher prior to joining the firm.

Brittany has substantial experience litigating consumer class actions, including those involving data privacy claims under statutes such as the Illinois Biometric Information Privacy Act, the Fair Credit Reporting Act, and the Michigan Preservation of Personal Privacy Act. In addition to data privacy claims, Brittany has significant experience in litigating class action claims involving false and misleading advertising.

Brittany is admitted the State Bar of California and is a member of the bars of the United States District Courts for the Northern, Central, Southern, and Eastern Districts of California, the Eastern District of Wisconsin, the Northern District of Illinois, the Ninth Circuit Court of Appeals, the Seventh Circuit Court of Appeals, and Second Circuit Court of Appeals.

Brittany received her Juris Doctor from the University of California, Hastings College of the Law in 2019, graduating cum laude. During law school, Brittany was a member of the Constitutional Law Quarterly, for which she was the Executive Notes Editor. Brittany published a note in the Constitutional Law Quarterly entitled "Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract." Brittany also served as a judicial extern to the Honorable Andrew Y.S. Cheng for the San Francisco Superior Court. In 2016, Brittany graduated from the University of California Berkeley with a B.A. in Political Science.

Selected Class Settlements:

Morrissey v. Tula Life, Inc., Case No. 2021L0000646 (Cir. Ct. DuPage Cnty. 2021) – final approval granted for $4 million class settlement to resolve claims of cosmetics purchasers for alleged false advertising.

Clarke et al. v. Lemonade Inc., Case No. 2022LA000308 (Cir. Ct. DuPage Cnty. 2022) – final approval granted for $4 million class settlement to resolve claims for alleged BIPA violations.

Whitlock v. Jabil Inc., Case No. 2021CH00626 (Cir. Ct. Cook Cnty. 2022) – final approval granted for $995,000 class settlement to resolve claims for alleged BIPA violations.

MAX S. ROBERTS

Max Roberts is an Associate in Bursor & Fisher's New York office. Max focuses his practice on class actions concerning data privacy and consumer protection. Max was a Summer Associate with Bursor & Fisher prior to joining the firm and is now Co-Chair of the firm's Appellate Practice Group.

In 2023, Max was named "Rising Star" in the New York Metro Area by Super Lawyers®.

Max received his Juris Doctor from Fordham University School of Law in 2019, graduating *cum laude.* During law school, Max was a member of Fordham's Moot Court Board, the Brennan Moore Trial Advocates, and the Fordham Urban Law Journal, for which he published a note entitled *Weaning Drug Manufacturers Off Their Painkiller: Creating an Exception to the Learned Intermediary Doctrine in Light of the Opioid Crisis*. In addition, Max served as an intern to the Honorable Vincent L. Briccetti of the Southern District of New York and the Fordham Criminal Defense Clinic. Max graduated from Johns Hopkins University in 2015 with a B.A. in Political Science.

Outside of the law, Max is an avid triathlete.

Selected Published Decisions:

Jackson v. Amazon.com, Inc., 65 F.4th 1093 (9th Cir. 2023), affirming district court's denial of motion to compel arbitration. Max personally argued the appeal before the Ninth Circuit, which can be viewed here.

Javier v. Assurance IQ, LLC, 2022 WL 1744107 (9th Cir. May 31, 2022), reversing district court and holding that Section 631 of the California Invasion of Privacy Act requires prior consent to wiretapping. Max personally argued the appeal before the Ninth Circuit, which can be viewed here.

Mora v. J&M Plating, Inc., 213 N.E.3d 942 (Ill. App. Ct. 2d Dist. 2022), reversing circuit court and holding that Section 15(a) of Illinois' Biometric Information Privacy Act requires an entity to establish a retention and deletion schedule for biometric data at the first moment of possession. Max personally argued the appeal before the Second District, which can be listened to here.

James v. Walt Disney Co., --- F. Supp. 3d ---, 2023 WL 7392285 (N.D. Cal. Nov. 8, 2023), largely denying motion dismiss alleged violations of California and Pennsylvania wiretapping statutes.

Yockey v. Salesforce, Inc., 2023 WL 5519323 (N.D. Cal. Aug. 25, 2023), denying in part motion dismiss alleged violations of California and Pennsylvania wiretapping statutes.

Cristostomo v. New Balance Athletics, Inc., 647 F. Supp. 3d 1 (D. Mass. 2022), denying motion to dismiss and motion to strike class allegations in case involving sneakers marketed as "Made in the USA."

Carroll v. Myriad Genetics, Inc., 2022 WL 16860013 (N.D. Cal. Nov. 9, 2022), denying in part motion to dismiss in case involving non-invasive prenatal testing product.

Louth v. NFL Enterprises LLC, 2022 WL 4130866 (D.R.I. Sept. 12, 2022), denying motion to dismiss alleged violations of the Video Privacy Protection Act.

Soo v. Lorex Corp., 2020 WL 5408117 (N.D. Cal. Sept. 9, 2020), denying defendants' motion to compel arbitration and denying in part motion dismiss consumer protection claims in putative class action concerning security cameras.

Selected Class Settlements:

Sholopa v. Turk Hava Yollari A.O. (d/b/a Turkish Airlines), Case No. 1:20-cv-3294-ALC (S.D.N.Y. 2023) – final approval granted for $14.1 million class settlement to resolve claims of

passengers whose flights with Turkish Airlines were cancelled due to COVID-19 and who did not receive refunds.

Payero v. Mattress Firm, Inc., Case No. 7:21-cv-3061-VB (S.D.N.Y. 2023) – final approval granted for $4.9 million class settlement to resolve claims of consumers who purchased allegedly defective bed frames.

Miranda v. Golden Entertainment (NV), Inc., Case No. 2:20-cv-534-AT (D. Nev. 2021) – final approval granted for class settlement valued at over $4.5 million to resolve claims of customers and employees of casino company stemming from data breach.

Malone v. Western Digital Corp., Case No. 5:20-cv-3584-NC (N.D. Cal. 2021) – final approval granted for class settlement valued at $5.7 million to resolve claims of hard drive purchasers for alleged false advertised.

Frederick v. ExamSoft Worldwide, Inc., Case No. 2021-L-001116 (18th Judicial Circuit Court DuPage County, Illinois 2021) – final approval granted for $2.25 million class settlement to resolve claims of Illinois students for alleged violations of the Illinois Biometric Information Privacy Act.

<u>Bar Admissions</u>

- New York State
- Southern District of New York
- Eastern District of New York
- Northern District of New York
- Northern District of Illinois
- Central District of Illinois
- Eastern District of Michigan
- District of Colorado
- Third Circuit Court of appeals
- Seventh Circuit Court of Appeals
- Ninth Circuit Court of Appeals

JULIA K. VENDITTI

Julia Venditti is an Associate with Bursor & Fisher, P.A. Julia focuses her practice on complex civil litigation and class actions. Julia was a Summer Associate with Bursor & Fisher prior to joining the firm.

Julia is admitted to the State Bar of California and is a member of the bars of the United States District Courts for the Northern, Eastern, Central, and Southern Districts of California.

Julia received her Juris Doctor in 2020 from the University of California, Hastings College of the Law, where she graduated *cum laude* with two CALI Awards for the highest grade in her Evidence and California Community Property classes. During law school, Julia was a member of the UC Hastings Moot Court team and competed at the Evans Constitutional Law Moot Court Competition, where she finished as a national quarterfinalist and received a best brief award. Julia was also inducted into the UC Hastings Honors Society and was awarded Best Brief and an Honorable Mention for Best Oral Argument in her First-Year Moot Court section. In addition, Julia served as a Research Assistant for her Constitutional Law professor, as a Teaching Assistant for Legal Writing & Research, and as a Law Clerk at the San Francisco Public Defender's Office. In 2017, Julia graduated *magna cum laude* from Baruch College/CUNY, Weissman School of Arts and Sciences, with a B.A. in Political Science.

JULIAN DIAMOND

Julian Diamond is an Associate with Bursor & Fisher, P.A. Julian focuses his practice on privacy law and class actions. Julian was a Summer Associate with Bursor & Fisher prior to joining the firm.

Julian received his Juris Doctor from Columbia Law School, where he was a Harlan Fiske Stone Scholar. During law school, Julian was Articles Editor for the Columbia Journal of Environmental Law. Prior to law school, Julian worked in education. Julian graduated from California State University, Fullerton with a B.A. in History and a single subject social science teaching credential.

MATTHEW GIRARDI

Matt Girardi is an Associate with Bursor & Fisher, P.A. Matt focuses his practice on complex civil litigation and class actions, and has focused specifically on consumer class actions involving product defects, financial misconduct, false advertising, and privacy violations. Matt was a Summer Associate with Bursor & Fisher prior to joining the firm.

Matt is admitted to the State Bar of New York, and is a member of the bars of the United States District Courts for the Southern District of New York, the Eastern District of New York, and the Eastern District of Michigan

Matt received his Juris Doctor from Columbia Law School in 2020, where he was a Harlan Fiske Stone Scholar. During law school, Matt was the Commentary Editor for the Columbia Journal of Tax Law, and represented fledgling businesses for Columbia's Entrepreneurship and Community Development Clinic. In addition, Matt worked as an Honors Intern in the Division of Enforcement at the U.S. Securities and Exchange Commission. Prior to

law school, Matt graduated from Brown University in 2016 with a B.A. in Economics, and worked as a Paralegal Specialist at the U.S. Department of Justice in the Antitrust Division.

JENNA GAVENMAN

Jenna Gavenman is an Associate with Bursor & Fisher, P.A. Jenna focuses her practice on complex civil litigation and consumer class actions. Jenna was a Summer Associate and a part-time intern with Bursor & Fisher prior to joining the firm as a full-time Associate in September 2022.

Jenna is admitted to the State Bar of California and is a member of the bars of the United States District Courts for the Northern, Eastern, Central, and Southern Districts of California.

Jenna received her Juris Doctor in 2022 from the University of California, Hastings College of the Law (now named UC Law SF). During law school, she was awarded an Honorable Mention for Best Oral Argument in her First-Year Moot Court section. Jenna also participated in both the Medical Legal Partnership for Seniors (MLPS) and the Lawyering for Children Practicum at Legal Services for Children—two of UC Hastings's nationally renowned clinical programs. Jenna was awarded the Clinic Award for Outstanding Performance in MLPS for her contributions to the clinic. In addition, Jenna volunteered with her law school's Legal Advice and Referral Clinic and as a LevelBar Mentor.

In 2018, Jenna graduated *cum laude* from Villanova University with a B.A. in Sociology and Spanish (double major). Jenna was a Division I athlete, competing on the Villanova Women's Water Polo varsity team for four consecutive years.

EMILY HORNE

Emily Horne is an Associate with Bursor & Fisher, P.A. Emily focuses her practice on complex civil litigation and consumer class actions. Emily was a Summer Associate with Bursor & Fisher prior to joining the firm.

Emily is admitted to the State Bar of California.

Emily received her Juris Doctor from the University of California, Hastings College of the Law in 2022 (now UC, Law SF). During law school, Emily served as Editor-in-Chief for the UC Hastings Communications and Entertainment Law Journal, and she competed on the Moot Court team. Emily also served as a judicial extern in the Northern District of California and as a Teaching Assistant for Legal Writing & Research. In 2015, Emily graduated from Scripps College with a B.A. in Sociology.

IRA ROSENBERG

Ira Rosenberg is an Associate with Bursor & Fisher, P.A. Ira focuses his practice on complex civil litigation and class actions.

Ira received his Juris Doctor in 2022 from Columbia Law School. During law school, Ira served as a Student Honors Legal Intern with Division of Enforcement at the U.S. Securities and Exchange Commission. Ira also interned during law school in the Criminal Division at the United States Attorney's Office for the Southern District of New York and with the Investor Protection Bureau at the Office of the New York State Attorney General. Ira graduated in 2018 from Beth Medrash Govoha with a B.A. in Talmudic Studies.

LUKE SIRONSKI-WHITE

Luke Sironski-White is an Associate with Bursor & Fisher, P.A., focusing on complex civil litigation and consumer class actions. Luke joined the firm as a full-time Associate in August 2022.

Luke is admitted to the State Bar of California and is a member of the bars of the United States District Courts for the Northern, Eastern, Central, and Southern Districts of California.

Luke received his Juris Doctor in 2022 from the University of California, Berkeley School of Law. During law school, Luke was on the board of the Consumer Advocacy and Protection Society (CAPS), edited for the Berkeley Journal of Employment and Labor Law, and volunteered with the Prisoner Advocacy Network.

In 2017, Luke graduated from the University of Chicago with a B.A. in Anthropology. Before entering the field of law Luke was a professional photographer and filmmaker.

JONATHAN L. WOLLOCH

Jonathan L. Wolloch is an Associate with Bursor & Fisher, P.A. Jonathan focuses his practice on complex civil litigation and class actions. Jonathan was a Summer Associate with Bursor & Fisher prior to joining the firm.

Jonathan is admitted to the State Bar of Florida and the bars of the United States District Courts for the Southern and Middle Districts of Florida.

Jonathan received his Juris Doctor from the University of Miami School of Law in 2022, graduating magna cum laude. During law school, Jonathan served as a judicial intern to the Honorable Beth Bloom for the Southern District of Florida. He received two CALI Awards for earning the highest grade in his Trusts & Estates and Substantive Criminal Law courses, and he was elected to the Order of the Coif. Jonathan was also selected for participation in a semester long externship at the Florida Supreme Court, where he served as a judicial extern to the Honorable John D. Couriel. In 2018, Jonathan graduated from the University of Michigan with a B.A. in Political Science.

INES DIAZ

Ines Diaz is an Associate with Bursor & Fisher, P.A. Ines focuses her practice on complex civil litigation and class actions.

Ines is admitted to the State Bar of California.

Ines received her Juris Doctor in 2023 from the University of California, Berkeley School of Law. During law school, Ines served as an Executive Editor of the California Law Review. She also served as an intern with the East Bay Community Law Center's Immigration Clinic and as a Fellow of the Berkeley Law Academic Skills Program. Additionally, Ines served as an instructor with the University of California, Berkeley Extension, Legal Studies Global Access Program where she taught legal writing to international law students. In 2021, Ines was selected for a summer externship at the California Supreme Court where she served as a judicial extern for the Honorable Mariano-Florentino Cuéllar.

CAROLINE C. DONOVAN

Caroline C. Donovan is an Associate with Bursor & Fisher, P.A. Caroline focuses her practice on complex civil litigation, data protection, mass arbitration, and class actions. Caroline interned with Bursor & Fisher during her third year of law school before joining full time in Fall 2023.

Caroline is admitted to the State Bar of New York.

Caroline received her Juris Doctor in 2023 from Brooklyn Law School. During law school, Caroline was a member of the Moot Court Honor Society Trial Division, where she was chosen to serve as a National Team Member. Caroline competed and coached in numerous competitions across the country, and placed second at regionals in AAJ's national competition in both her second and third year of law school. Caroline was also the President of the Art Law Association, and the Treasurer of the Labor and Employment Law Association.

During law school, Caroline was a judicial intern for Judge Kenneth W. Chu of the National Labor Relations Board. She also interned at the United States Attorney's Office in the Eastern District of New York, as well as a securities class action firm.

JOSHUA B. GLATT

Joshua Glatt is an Associate with Bursor & Fisher, P.A. Joshua focuses his practice on complex civil litigation and consumer class actions. Joshua was a Summer Associate with Bursor & Fisher prior to joining the firm as an Associate.

Joshua earned his Juris Doctor from the University of California College of the Law, San Francisco (formerly U.C. Hastings). While there, he received a CALI Award for earning the highest grade in Constitutional Law II and served on the executive boards of the Jewish Law Students Association and the American Constitution Society. Prior to law school, Joshua graduated *summa cum laude* from the Walter Cronkite School of Journalism and Mass Communication at Arizona State University in 2016 and earned a master's degree from the University of Southern California in 2018.

JOSHUA R. WILNER

Joshua Wilner is an Associate with Bursor & Fisher, P.A. Joshua focuses his practice on complex civil litigation, data privacy, consumer protection, and class actions. Joshua was a Summer Associate at Bursor & Fisher prior to joining the firm full time in Fall 2023.

Joshua is admitted to the State Bar of California.

Joshua received his Juris Doctor in 2023 from Berkeley Law. During law school, he received the American Jurisprudence Award for Constitutional Law.

During law school, Joshua served on the board of the Berkeley Journal of Employment and Labor Law. Joshua also interned at Disability Rights California, Legal Aid at Work, and a private firm that worked closely with the ACLU of Northern California to enforce the California Racial Justice Act. In 2022 and 2023, Joshua worked as a research assistant for Professor Abbye Atkinson.

VICTORIA ZHOU

Victoria Zhou is an Associate in Bursor & Fisher's New York office. Victoria focuses her practice on class actions concerning data privacy and consumer protection.

Victoria is admitted to the State Bar of New York.

Victoria received her Juris Doctor from Fordham Law School in 2023. During law school, Victoria served as an Associate Editor of the Moot Court Board and competed in multiple mock trial competitions as a member of the Brendan Moore Trial Advocates. In addition, Victoria served as a judicial extern to Chief Judge Mark A. Barnett of the United States Court of International Trade. In 2019, Victoria graduated *magna cum laude* from Fei Tian College with a B.F.A. in Classical Dance.

KYLE D. GORDON

Kyle Gordon is a Law Clerk with Bursor & Fisher, P.A. who is interested in data privacy and consumer class actions. Kyle was a Summer Associate prior to joining the firm

Kyle passed the July 2023 New York State Bar Examination and will be applying to the State Bar of New York.

Kyle received his Juris Doctor from Columbia Law School in 2023, where he was a Harlan Fiske Stone Scholar. During law school, Kyle was a Staff Editor for the Columbia Science and Technology Law Review. In 2020, Kyle graduated *summa cum laude* from New York University with a B.A. in Politics and became a member of Phi Beta Kappa. Prior to law school, Kyle interned in the Clerk's Office of the United States District Court for the District of Columbia.

EXHIBIT 3

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FIRM RESUME

Vozzolo LLC is a civil litigation firm with offices in New York and New Jersey. The firm focuses on complex litigation, including consumer protection class actions, as well as securities and shareholder derivative litigation. The firm litigates cases throughout the country, including both federal and state courts. The firm's attorneys are experienced in, and thoroughly familiar with, all aspects of class action litigation, including the underlying substantive law, the substance and procedure of class certification, and trial. In numerous high-profile matters, Vozzolo LLC's founder, Antonio Vozzolo, has played a principal or lead role establishing new law, obtaining groundbreaking rulings and securing substantial recoveries for his clients.

ANTONIO VOZZOLO

Antonio Vozzolo is a civil litigator and trial lawyer who focuses on complex litigation, class actions and consumer protection. Before creating the firm in 2016, Mr. Vozzolo was a partner at Faruqi & Faruqi, LLP, one of the country's leading securities litigation firms, serving in various capacities including: Chair of the firm's Consumer Litigation Department, and Chair of the firm's Securities Litigation Department. There, he represented aggrieved individuals, consumers and investors in a wide variety of contexts, including consumer protection and securities litigation, as well as shareholder derivative, merger and transactional litigation. Over his 20-year career, Mr. Vozzolo has recovered hundreds of millions of dollars and other significant remedial benefits on behalf of consumers and investors.

In Fried v. JPMorgan Chase & Co., et al., No. 2:15-cv-02512 (D.N.J. April 8, 2015), Vozzolo LLC represented a nationwide class of customers of defendant arising out of the improper collection of Private Mortgage Insurance ("PMI") on residential mortgage transactions in violation of the

Homeowners Protection Act of 1998, 12 U.S.C. § 4901 ("HPA"). A settlement was obtained, providing class members with a total benefit valued at $19.5 million in monetary and injunctive relief.

In *Bates v. Kashi Co., et al.*, Case No. 11-CV-1967-H BGS (S.D. Cal. 2011), Mr. Vozzolo served as co-lead counsel, securing a $5.0 million settlement fund on behalf of California consumers who purchased Kashi products that were deceptively labeled as "nothing artificial" and "all natural." The settlement provided class members with a full refund of the purchase price in addition to requiring Kashi to modify its labeling and advertising to remove "All Natural" and "Nothing Artificial" from certain products. As noted by Judge Marilyn L. Huff in approving the settlement, "Plaintiffs' counsel has extensive experience acting as class counsel in consumer class action cases, including cases involving false advertising claims."

Moreover, in *Thomas v. Global Vision Products*, Case No. RG-03091195 (California Superior Ct., Alameda Cty.), Mr. Vozzolo served as co-lead counsel in a consumer class action lawsuit against Global Vision Products, Inc., the manufacturer of the Avacor hair restoration product and its officers, directors and spokespersons, in connection with the false and misleading advertising claims regarding the Avacor product. Though the company had declared bankruptcy in 2007, Mr. Vozzolo, along with his co-counsel, successfully prosecuted two trials to obtain relief for the class of Avacor purchasers. In January 2008, a jury in the first trial returned a verdict of almost $37 million against two of the creators of the product. In November 2009, another jury awarded plaintiff and the class more than $50 million in a separate trial against two other company directors and officers. This jury award represented the largest consumer class action jury award in California in 2009 (according to VerdictSearch, a legal trade publication).

In *In re Purchase Pro Inc. Securities Litig.*, Master File No. CV-S-01-0483-JLQ (D. Nev. 2001), Mr. Vozzolo served as co-lead counsel for the class, securing a $24.2 million settlement fund in a case involving federal securities fraud litigation. As noted by Senior Judge Justin L. Quackenbush

in approving the settlement, "I feel that counsel for plaintiffs evidenced that they were and are skilled in the field of securities litigation."

More recently, in *Jovel v. I-Health, Inc.*, Case No. 12-CV-5614 MDG (E.D.N.Y. 2012), Mr. Vozzolo served as counsel in a consumer class action challenging the marketing of certain brain health supplements. A settlement was obtained, providing class members with a cash refund of up to the actual purchase price. As noted by Judge Marilyn D. Go in approving the settlement, "Mr. Vozzolo [and co-lead counsel] are attorneys with substantial experience litigating consumer class action, and are associated with firms specializing in class actions." Similarly, in *Potzner v. Tommie Copper Inc., et al.*, No. 7:15-cv-03183 (S.D.N.Y. Jan. 4, 2016), Judge Analisa Torres noted that "plaintiffs' counsel has substantial experience in successfully litigating consumer class actions."

Below is a non-exhaustive list of settlements where Mr. Vozzolo served as lead or co-lead counsel:

- *Fried v. JPMorgan Chase & Co., et al.,* No. 2:15-cv-02512 (D.N.J. April 8, 2015). Vozzolo LLC represented a nationwide class of customers of defendant arising out of the improper collection of Private Mortgage Insurance ("PMI") on residential mortgage transactions. A settlement was obtained, providing class members with a settlement valued at $19.5 million in monetary and injunctive relief.

- *Liptai v. Spectrum Brands Holdings, Inc., et al.,* No. 2018cv000321 (Dane County, WI 2018). Vozzolo LLC represented a nationwide class of purchasers of defendants' small kitchen appliances. A settlement was obtained, providing class members with a cash refunds of up to $4.00.

- *Robbins, et al. v. Gencor Nutrients, Inc., et al.*, No. 16AC-CC00366 (Cir. Ct. Cole County, Missouri 2016). Vozzolo LLC represented a nationwide class of purchasers of defendants' testosterone boosting supplements. A settlement was obtained, providing class members with a cash refunds of up to $14.52.

- *Potzner v. Tommie Copper Inc., et al*., No. 7:15-cv-03183 (S.D.N.Y. Jan. 4, 2016). Vozzolo LLC represented a nationwide class of purchasers of defendants' "copper-infused" or "zinc-infused" compression apparel. A settlement fund was obtained, providing class members with a cash refunds of up to $10.00.

- *Inocencio, et al. v. Telebrands Corp.*, No. BER-L 4378-16 (N.J. Super. Ct. 2016). Vozzolo LLC represented a proposed nationwide class of consumers who purchased certain "Pocket

Hose" brand of expandable garden hoses. A settlement was obtained, providing full relief to class members, including cash refunds of up to $50.00.

- *Forcellati et al., v Hyland's, Inc. et al.,* No. CV 12-1983-GHK (C.D. Cal. Nov. 8, 2012). Mr. Vozzolo represented a certified nationwide class of purchasers of children's homeopathic cold and flu remedies. A settlement was obtained, providing class members with cash refunds of up to the full purchase price.

- *Dei Rossi v. Whirlpool Corp.,* No. 12-125 (E.D. Cal. Apr. 19, 2012). Mr. Vozzolo represented a certified class of consumers who purchased certain KitchenAid refrigerators marketed as Energy Star qualified when they were not. A settlement was obtained, providing class members with cash payments of $55.00 to recoup the excess energy costs of their appliances.

- *In re Sinus Buster Products Consumer Litig.,* Case No. 1:12-cv-02429-ADS-AKT (E.D.N.Y. 2012). Mr. Vozzolo represented a nationwide class of purchasers of assorted cold, flu and sinus products. A settlement was obtained, providing class members with a cash refund up to $10.00 and requiring defendant to discontinue the marketing and sale of certain products.

- In *Rodriguez v. Citimortgage, Inc.*, Case No. 11-cv-4718-PGG (S.D.N.Y. 2015). Mr. Vozzolo represented a nationwide class military servicemembers related to foreclosure violations of the Servicemembers Civil Relief Act. A $38 million class settlement was obtained, where each class member was entitled to $116,785 plus lost equity in the foreclosed property and interest thereon.

- *In re: Haier Freezer Consumer Litig*., Case No. 5:11-CV-02911-EJD (N.D. Cal. 2011). Mr. Vozzolo represented a nationwide class of consumers who purchased certain model freezers, which were sold in violation of the federal standard for maximum energy consumption. A settlement was obtained, valued at $4 million, providing class members with cash payments of between $50.00 and $325.80.

- *Loreto v. Coast Cutlery Co*., Case No. 11-3977 SDW-MCA (D.N.J. 2011). Mr. Vozzolo represented a proposed nationwide class of people who purchased stainless steel knives and multi-tools that were of a lesser quality than advertised. A settlement was obtained, providing class members with a full refund of the purchase price.

- *Rossi v Procter & Gamble Company.*, Case No. 11-7238 (D.N.J. 2011). Mr. Vozzolo represented a nationwide class of consumers who purchased deceptively marketed "Crest Sensitivity" toothpaste. A settlement was obtained, providing class members with a full refund of the purchase price.

- *In re: Michaels Stores Pin Pad Litig*., Case No. 1:11-CV-03350 CPK (N.D. Ill. 2011). Mr. Vozzolo represented a nationwide class of persons against Michaels Stores, Inc. for failing to secure and safeguard customers' personal financial data. A settlement was obtained, which provided class members with monetary relief for unreimbursed out-of-pocket losses

incurred in connection with the data breach, as well as up to four years of credit monitoring services.

- *In re: HP Power-Plug Litigation*, Case No. 06-1221 (N.D. Cal. 2006). Mr. Vozzolo represented a proposed nationwide class of consumers who purchased defective laptops manufactured by defendant. A settlement was obtained, which provided full relief to class members, including, among other benefits, a cash payment of up to $650.00 per class member, or in the alternative, a repair free-of-charge and new limited warranties accompanying repaired laptops.

- *Delre v. Hewlett-Packard Co.*, C.A. No. 3232-02 (N.J. Super. Ct. 2002). Mr. Vozzolo represented a proposed nationwide class of consumers (approximately 170,000 members) who purchased, HP dvd-100i dvd-writers ("HP 100i") based on misrepresentations regarding the write-once ("DVD+R") capabilities of the HP 100i and the compatibility of DVD+RW disks written by HP 100i with DVD players and other optical storage devices. A settlement was obtained, which provided full relief to class members, including among other benefits, the replacement of the defective HP 100i with its more current, second generation DVD writer, the HP 200i, and/or refunds of the $99.00 it had charged some consumers to upgrade from the HP 100i to the HP 200i prior to the settlement.

In addition, Mr. Vozzolo, has considerable leadership experience in complex litigation, serving as lead or co-lead counsel in at least 19 putative consumer class action cases since 2011, including:

- *In re: Michaels Stores Pin Pad Litig.,* Case No. 1:11-CV-03350 CPK (N.D. Ill. June 8, 2011)

- *In re Haier Freezer Consumer Litig.,* No. C11-02911 (N.D. Cal. Aug. 17, 2011)

- *Loreto v. Coast Cutlery Co*., No. 11-3977 (D.N.J. Sep. 8, 2011)

- *Astiana v. Kashi Co.*, No. 3:11-cv-01967-H BGS (S.D. Cal. Sept. 28, 2011)

- *Rodriguez v. CitiMortgage, Inc.*, No. 1:11-cv-04718 (S.D.N.Y. Nov. 14, 2011)

- *Avram v. Samsung Elecs. Am., Inc.,* No. 11-6973 (D.N.J. Jan 3, 2012)

- *Rossi v. Procter & Gamble Co.,* No. 11-7238 (D.N.J. Jan. 31, 2012)

- *Dzielak v. Whirlpool Corp.,* No. 2:12-cv-0089 (D.N.J. Feb. 21, 2012)

- *Dei Rossi v. Whirlpool Corp.,* No. 12-125 (E.D. Cal. Apr. 19, 2012)

- *In re Scotts EZ Seed Litig*., No. 7:12-cv-4727 (VB) (S.D.N.Y. Sept. 19, 2012)

- *Forcellati et al., v Hyland's, Inc. et al.,* No. CV 12-1983-GHK (C.D. Cal. Nov. 8, 2012)

- *In re Sinus Buster Prods. Consumer Litig.,* No. 12-2429 (E.D.N.Y. Dec. 17, 2012)
- *In re 5-Hour ENERGY Mktg. and Sales Practice Litig.,* No. 13-ml-2438 (C.D. Cal. Nov. 8, 2013)
- *Fried v. JPMorgan Chase & Co., et al.,* No. 2:15-cv-02512 (D.N.J. April 8, 2015)
- *Potzner v. Tommie Copper Inc., et al.,* No. 7:15-cv-03183 (S.D.N.Y. April 22, 2015)
- *Inocencio, et al. v. Telebrands Corp.*, No. BER-L 4378-16 (N.J. Super. Ct. 2016)
- *Robbins, et al. v. Gencor Nutrients, Inc., et al.*, No. 16AC-CC00366 (Cir. Ct. Cole County, Missouri 2016)
- *Liptai v. Spectrum Brands Holdings, Inc., et al.,* No. 2018cv000321 (Dane County, WI 2018).
- *Buffington v. Progressive Advanced Insurance Co.*, No. 20-cv-07408 (S.D.N.Y. Aug. 23, 2022)

Mr. Vozzolo is also experienced in the substance and procedure of class certification, obtaining class certification in the following contested consumer class actions:

- *Buffington v. Progressive Advanced Insurance Co.*, No. 20-cv-07408 (S.D.N.Y. Aug. 23, 2022)
- *Dei Rossi v. Whirlpool Corp*., No. 2:12-cv-125 (E.D. Cal. Apr. 28, 2015)
- *Forcellati v. Hyland's, Inc.*, No. CV 2:12-cv-1983-GHK (C.D. Cal. Apr. 9, 2014)
- *In re Scotts EZ Seed Litig.*, No. 7:12-cv-04727 (S.D.N.Y. Jan. 26, 2015)
- *Dzielak v. Whirlpool Corp., et al.,* No. 12-CIV-0089 SRC-MAS (D.N.J. Feb. 12, 2012)
- *Astiana v. Kashi Co.*, No. 3:11-cv-01967-H BGS (S.D. Cal. July 30, 2013)
- *Thomas v. Global Vision Products, Inc., et al*., No. RG03-091195 (Cal. Super. Ct. Alameda Cnty. 2003)

In recognition of his outstanding work on behalf of clients, Mr. Vozzolo has been regularly sought out to comment on important consumer protection matters. For example, Mr. Vozzolo was quoted in a *New York Times* article related to recent proposed legislation attempting to ban consumer

class actions related to the Energy Star program. Matthew L. Wald, *Whirlpool Wants Congress to Ban Class-Action Suits Tied to Energy Star Program,* Energy & Environment, NY TIMES, July 20, 2014, *available at* http://www.nytimes.com/2014/07/21/business/energy-environment/whirlpool-wants-congress-to-ban-class-action-suits-tied-to-energy-star-program.html. More recently, Mr. Vozzolo was invited to participate in the September 21, 2015 Federal Trade Commission Panel on Homeopathic Medicine & Advertising to discuss the legal and regulatory implications of the advertising and marketing claims made by manufacturers of homeopathic products.[1]

Mr. Vozzolo graduated, *cum laude*, from Fairleigh Dickinson University in 1992 with a Bachelor of Science (B.Sc.), where he was on the Dean's List, and with a Masters in Business Administration (M.B.A.) in 1995. He is a graduate of Brooklyn Law School (1998). Mr. Vozzolo served as an intern to the Honorable Ira Gammerman of the New York Supreme Court and the New York Stock Exchange while attending law school.

He is a member of the bars of the State of New York, the State of New Jersey, the United States District Court for the District of New Jersey, the United States District Court for the Southern District of New York, the United States District Court for the Eastern District of New York, the United States Court of Appeals for the Second Circuit, the United States Court of Appeals for the Sixth Circuit, the United States Court of Appeals for the Ninth Circuit, and the United States Court of Appeals for the Eleventh Circuit.

[1] *See* https://www.ftc.gov/system/files/documents/videos/homeopathic-medicine-advertising-part-2/ftc_homeopathic_medicine_and_advertising_workshop_-_transcript_segment_2.pdf.

ATTORNEY PROFILE-OF COUNSEL & ASSOCIATES

ANDREA CLISURA (Associate)

Andrea Clisura is experienced in complex litigation, commercial litigation, civil rights litigation, and consumer protection class action litigation. Prior to joining Vozzolo LLC, Ms. Clisura was a Staff Attorney for Disability Rights New York ("DRNY"), the Protection and Advocacy system in the State of New York. At DRNY, she represented clients with intellectual and developmental disabilities fighting discriminatory practices, including through putative class action litigation. She was lead attorney for DRNY in *Disability Rights New York, et al. v. The State of New York, et al.*, Case No. 17-cv-6965 (E.D.N.Y.), ongoing litigation asserting claims against the New York State Office for People with Developmental Disabilities for the failure to timely transition hundreds of former students from residential schools throughout New York and in neighboring states into community placements. She also represented a client in an action to terminate the restrictive guardianship of her person and property under Article 17-A of the New York Surrogate's Court Procedure Act, a case which went to trial in Nassau County Surrogate's Court and subsequently settled.

Previously, Ms. Clisura was an associate at boutique law firms in New York focusing on consumer class action litigation. As an associate at Levi & Korsinsky, LLP, Ms. Clisura identified and developed claims against Sony Mobile Communications (U.S.A.), Inc. and Sony Electronics, Inc. for deceptive advertising of Xperia smartphones and tablets as "waterproof." The action was settled on behalf of a nationwide class and resulted in relief for consumers, including warranty extensions, changes to marketing materials, and individual monetary relief ranging from $250 to $340. *Landes, et al. v. Sony Mobile Communications (U.S.A.), Inc., et al.*, Case No. 17-cv-2264 (E.D.N.Y. Dec. 1, 2017). She also worked as part of the teams leading multi-district litigation in *In Re: Intel Corp. CPU Marketing, Sales Practices and Products Liability Litigation*, 3:18-md-2828-SI, MDL No. 2828 (D.

Oregon), relating to certain security vulnerabilities in Intel Corporation's microprocessors, and *In Re: 100% Grated Parmesan Cheese Marketing and Sales Practices Litigation*, Case No. 16-cv-5802, MDL No. 2705 (N.D. Ill.), consolidating multiple class-action lawsuits alleging various manufacturers misleadingly market their products as "100%" grated parmesan cheese. At Faruqi & Faruqi, LLP, in a contested class action, Ms. Clisura was part of a team of attorneys that achieved nationwide certification of a class of purchasers of children's homeopathic cold and flu remedies in *Forcellati et al., v Hyland's, Inc. et al.,* No. 12-cv-1983-GHK (C.D. Cal. Nov. 8, 2012). Ultimately, a settlement was obtained, providing class members with cash refunds of up to the full purchase price of the products. Ms. Clisura was also part of the team in *Dei Rossi v. Whirlpool Corp.,* No. 12-125 (E.D. Cal. Apr. 19, 2012), which won a contested motion for class certification of a class of consumers who purchased certain KitchenAid refrigerators marketed as Energy Star qualified when they were not. A settlement was obtained, providing class members with cash payments of $55.00 to recoup the excess energy costs of their appliances.

Ms. Clisura is a member of the State Bars of New York and New Jersey and a member of the bars of the United States District Court for the Southern District of New York, the United States District Court for the Eastern District of New York, and the United States District Court for the District of New Jersey. Ms. Clisura received her Juris Doctor from Brooklyn Law School, *magna cum laude* (2011). While attending Brooklyn Law School, Ms. Clisura served as an Associate Managing Editor of the Journal of Law and Policy and was a member of the Moot Court Honor Society, Appellate Advocacy Division. Her note, "None of Their Business: The Need for Another Alternative to New York's Bail Bond Business," was published in Brooklyn Law School's Journal of Law and Policy. Ms. Clisura also gained experience in law school as an intern to the Honorable David G. Trager of the U.S. District Court for the Eastern District of New York and as a summer law intern with the U.S. Department of Justice, Antitrust Division, and a New York Legal Services office engaged in

foreclosure defense. Ms. Clisura earned a Bachelor of Arts in Metropolitan Studies and Sociology from New York University, *magna cum laude* (2005).

EXHIBIT 4

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Firm Resume

FIRM OVERVIEW

The Law Offices of Ronald A. Marron is a recognized class action and complex litigation firm based out of San Diego, California, representing clients across the nation. Founded in 1996 with an emphasis in consumer and securities fraud, the firm has expanded its practice to include complex cases such as electronic privacy, banking regulations, antitrust, automatic renewals, Telephone Consumer Protection Act and Government Environmental Law Litigation. The firm has skillfully litigated hundreds of lawsuits and arbitrations against investment advisors and stockbrokers, such as Morgan Stanley, LPL Financial, Merrill Lynch, Banc of America Securities, and Citigroup, who placed clients into unsuitable investments, failed to diversify, and who violated the Securities Act of 1933 and/or 1934. Aptly and competently prepared to represent its clients, the firm has taken on cases against the likes of Shell Oil, Citigroup, Wells Fargo, Union Bank of California, American Express Advisors, Morgan Stanley and Merrill Lynch. Since 2004, the firm has devoted most of its practice to the area of false and misleading labeling of Consumer Products and food, drug and over-the-counter products, as well as seeking to protect consumers from unauthorized and unsolicited telephone calls, SMS or text messages to cellular phones from corporations under the Telephone Consumer Protection Act, and prosecuting data breach and privacy cases . The firm employs four attorneys, whose qualifications are discussed in brief below.

THE MARRON FIRM'S ATTORNEYS:

Ronald A. Marron, Founder

As the founder of the Law Offices of Ronald A. Marron, APLC, Mr. Marron has been practicing law for 26 years. He was a member of the United States Marine Corps from 1984 to 1990 (Active Duty 1984-1988, Reserves 1988-1990) and thereafter received a B.S. in Finance from the University of Southern California (USC) in 1991. While attending Southwestern University School of Law (1992-1994), he interned at the California Department of Corporations with emphasis in consumer complaints and fraud investigations; and studied Bio-Chemistry at the University of Southern California and was a member of the Trojan Chemistry Club. Mr. Marron has extensive experience in class actions and other complex litigation and has obtained hundreds of millions of dollars on behalf of consumers as lead counsel. Mr. Marron has represented plaintiffs victimized in TCPA cases, Consumer Fraud, Antitrust, Broker-Dealer Liability, Ponzi schemes, shareholder derivative suits, and securities fraud cases.

Mr. Marron has assisted two United States Senate Subcommittees and their staff in investigations of financial fraud, plus the Senate Subcommittee on Aging relating to annuity sales practices by agents using proceeds from reverse mortgages. Mr. Marron's clients have testified before the United States Senate Subcommittee on Investigations relating to abusive sales practices alleged in a complaint he filed against All-Tech Investment Group. The hearings resulted in federal legislation that: (a) raised

the minimum capital requirements, and (b) required written risk disclosure signed by consumer. The civil action resulted in return of client funds and attorneys' fees pursuant to the private attorney general statute and/or Consumers Legal Remedies Act. Mr. Marron conducted the legal research and co-wrote the brief that resulted in the largest punitive damages award (500%) in NASD history for aggrieved investors against Dean Witter Reynolds in securities arbitration. Mr. Marron's opinion on deferred annuity sales practices targeting the elderly has often been sought by major financial news organizations and publications such as Forbes, the Wall Street Journal, the Kiplinger's Retirement Report, CNN, and FOX News affiliates. In addition, he has devoted significant energy and time educating seniors and senior citizen service providers, legislators, and various non-profits (including Elder Law & Advocacy) about deferred annuity sales practices targeting the elderly. Mr. Marron had numerous speaking engagements at FAST (Fiduciary Abuse Specialist Team), which is an organization devoted to the detection of, prevention, and prosecution of elder financial abuse; Adult Protective Services; and Elder Law & Advocacy, a non-profit dedicated to assisting seniors who have been the victims of financial fraud. He has litigated hundreds of lawsuits and arbitrations against major corporations, such as Shell Oil, Citigroup, Wells Fargo, Morgan Stanley, and Merrill Lynch. In recent years, Mr. Marron has devoted almost all of his practice to the area of TCPA and Privacy Violations, false and misleading labeling of food, dietary supplements, and over-the-counter products. He is a member in good standing of the State Bar of California; the United States District Courts for the Eastern, Southern and Northern Districts of New York; the United States District Courts for the Central, Eastern, Northern, and Southern Districts of California; the United States District Court for the Eastern District of Michigan; the United States District Court for the Eastern and Western Districts of Wisconsin; the United States District Court of Colorado; the United States District Court for the Eastern District of Arkansas; the United States Court of Appeals for the Ninth Circuit; and the Supreme Court of the United States.

Alexis M. Wood, Senior Associate

Ms. Wood graduated *cum laude* from California Western School of Law in 2009, where she was the recipient of the Dean's Merit Scholarship for Ethnic & Cultural Diversity and also Creative Problem Solving Scholarships. In addition, during law school, Ms. Wood was the President of the Elder, Child, and Family Law Society, and participated in the study abroad program on international and comparative human rights law in Galway, Ireland. Ms. Wood interned for the Alternate Public Defender during law school, and also held a judicial externship with the San Diego Superior Court. Upon graduation, Ms. Wood obtained her Nevada Bar license and worked at the law firm Alverson Taylor Mortensen & Sanders in Las Vegas, Nevada where she specialized in medical malpractice. Ms. Wood then obtained her license to practice law in California in 2010 and worked at the bankruptcy firm Pite Duncan, LLP in San Diego, California, in which she represented financial institutions in bankruptcy proceedings. She additionally worked for the national law firm Gordon & Rees, LLP as an associate attorney in the professional liability defense and tort & product liability practice groups. From 2016 to 2019, Ms. Wood was also selected to the California Super Lawyers Rising Star list (general category)—a research-driven, peer influenced rating service of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. No more than 2.5% of the lawyers in the state were selected for the Rising Stars list. Ms. Wood joined the Law Office of Ronald Marron in September of 2012 and has dedicated her practice to consumer advocacy. Ms. Wood is also a foster youth advocate with Voices for Children. She is a member in good standing of the State Bar of California; the State Bar of Nevada; the United States District Courts for the Central, Eastern, Northern, and Southern Districts of California; the United States District Court of Nevada; the United States District Court for the Eastern and Western Districts of

Wisconsin; the United States District Court of Colorado; the United States Court for the Eastern District of Arkansas; and the United States Court of Appeals for the Ninth Circuit.

Kas L. Gallucci, Senior Associate
Ms. Gallucci graduated *cum laude* from California Western School of Law in 2012, where she ranked in the top 12% of her graduating class and was listed on the Dean's Honor List for four terms. During law school, Ms. Gallucci received the highest grade in her Legal Skills and Advanced Legal Research classes. She also participated in the Capitals of Europe Summer Study Abroad Program, where the Honorable Samuel A. Alito, Jr. was a Distinguished Guest Jurist. Ms. Gallucci has worked for the firm since 2009 and has over 10 years of experience in consumer fraud cases, including prosecuting violations of the Telephone Consumer Protection Act and data breach/privacy cases. Ms. Gallucci also regularly assists with the firm's food, drug, and cosmetic cases. She is a member in good standing of the State Bar of California; the United States District Courts for the Central, Eastern, Northern, and Southern Districts of California; the United States District Court for the Eastern District of Michigan; the United States District Court for the Eastern and Western Districts of Wisconsin; the United States District Court for New Mexico; the United States District Court of Colorado; the United States Court for the Eastern District of Arkansas; and the United States Court of Appeals for the Ninth Circuit.

Lilach Halperin, Associate
Ms. Halperin graduated *cum laude* from the University of San Diego School of Law in 2018. During law school, Ms. Halperin held a judicial externship with the San Diego Superior Court and volunteered for numerous pro bono clinics, including the USD Entrepreneurship Clinic, the USD State Sales and Use Tax Clinic, and the San Diego Clean Slate Clinic. In addition, Ms. Halperin was the Chair of the USD Pro Bono Legal Advocates Consumer Affairs Clinic, where she worked with the Legal Aid Society of San Diego to assist indigent clients with lawsuits in consumer protection law. Ms. Halperin has worked for the Law Offices of Ronald A. Marron since 2018 and primarily handles consumer fraud cases for the firm, including the areas of false and misleading labeling of consumer products. She is a member of good standing of the State Bar of California; the United States District Courts for the Central, Eastern, Northern and Southern Districts of California; and the Western District of Wisconsin.

Support Staff
The Marron Firm also employs a number of knowledgeable and experienced support staff, including paralegals and legal assistants.

EXAMPLES OF MARRON FIRM'S SUCCESSES ON BEHALF OF CONSUMERS

In Re UKG Cybersecurity Litigation, Case No. 3:22-cv-00346-SI (N.D. Cal)
On June 2, 2023, the Honorable Susan Illston granted preliminary approval to a class action settlement which included a Nationwide class of approximately 7 million employees whose data was stored on UKG, Inc's KPC environment during a December 2021 cyberattack. The settlement conferred $7,000,000 in benefits to the class, including a non-reversionary cash fund of $5,500,000, and security hardening measures which cost $1,500,000. Final Approval was granted on November 22, 2023.

Mirzoyan et al. v. The Hershey Company, Case No. CGC-20-583659 (San Francisco Sup. Ct.)
On March 30, 2023, the Honorable Andrew Y.S. Cheng granted class certification of a California injunctive relief class, appointing the Law Offices of Ronald A. Marron as class counsel. On August 2, 2023, the Honorable Samuel K. Feng granted final approval of a class settlement for injunctive relief.

Robbins et al v. Plushcare, Inc. et al, Case No. 3:21-cv-03444-MMC (N.D. Cal)
On July 21, 2023, the Honorable Maxine M. Chesney granted final approval to a class action settlement of $3,700,000.00 for all persons who enrolled in an automatically renewing monthly subscription with PlushCare during the Class Period. The settlement provided approximately 3.5 months of renewal subscription fees to approximately 332,547 class members with a 9.4% claims rate. Alexis M. Wood and Kas L. Gallucci were appointed as class counsel.

Sanchez v. Allianze Life Insurance Company of North America, Case No. BC594715 (Los Angeles Sup. Ct.)
On December 14, 2022, the Honorable Maren E. Nelson granted final approval to a class action settlement for breach of contract and declaratory relief with respect to annuities sold to the plaintiffs by defendants in which the Law Offices of Ronald A. Marron was appointed as co-lead class counsel along with Gianelli & Morris.

In Re: T-Mobile Customer Data Security Breach Litigation, Case No. 4:21-MD-03019-BCW (W.D. MO.)
On July 26, 2022, the Honorable Brian C. Wimes of the United States District Court for the Western District of Missouri granted preliminary approval of one of the largest data breach class actions which consisted of a Settlement Class of 76.6 million U.S. residents to which a $350 million non-reversion settlement fund was created for the benefit of the class in addition to at least $150 million for data security and related technology. The court appointed Alexis Wood of the Law Offices of Ronald A Marron as Liaison Counsel in this litigation. Final approval was granted on June 29, 2023.

Fox v. Iowa Health System, No. 3:18-cv-00327-JDP (W.D. Wiscon.)
On March 4, 2021, the Honorable James D. Pederson granted final approval to a class action settlement regarding two data breaches of a healthcare system's patient and employees personal and private information. The Settlement provided for substantial monetary and injunctive relief. *Fox v. Iowa Health Sys.*, No. 3:18-CV-00327-JDP, 2021 WL 826741 (W.D. Wis. Mar. 4, 2021).

Young v. Neurobrands, LLC, No. 4:18-cv-05907-JSW (N.D. Cal.)
Plaintiffs alleged that certain Neurobrands products falsely state "no artificial [] flavors" when they in fact contain the artificial flavoring agent, malic acid. On October 15, 2020, the Honorable Jeffrey S. White granted class certification of a California Rule 23(b)(2) class, appointing the Marron Firm as class counsel. *Young v. Neurobrands, LLC*, No. 4:18-cv-05907-JSW, 2020 WL 11762212 (N.D. Cal. Oct. 15, 2020). On October 8, 2021, the Court granted final approval of the settlement. Dkt. *Young v. Neurobrands, LLC*, No. 4:18-CV-05907-JSW, 2021 WL 4784252 (N.D. Cal. Oct. 8, 2021).

Randolph v. Amazon.com LLC, No. 37-2017-00011078-CU-OE-CTL (San Diego Sup. Ct.)
Plaintiffs alleged that Defendants Amazon Logistics, Inc. and Amazon.com failed to comply with wage and hour laws with respect to persons who delivered packages to Amazon customers in California. On October 5, 2020, the Honorable Ronald L. Styn preliminarily approved the settlement

to which the Law Offices of Ronald A. Marron served as co-lead class counsel. ROA 184. On July 4, 2021, the Honorable Keri Katz granted final approval of class action and PAGA representative action settlement which settled for $3,200,000.00. ROA 210.

McSwain v. Axos Bank, No. 37-2019-00015784-CU-BC-CTL (San Diego Sup. Ct.)
Plaintiff alleged that Axos Bank failed to pay a minimum of 2% simple interest on homeowners' impound escrow accounts as required by California law. Axos filed a demurrer arguing that Plaintiff's state law claims are preempted under the federal Homeowners' Loan Act, 12 U.S.C. §§ 1461, *et seq*. and the Law Offices of Ronald A. Marron successfully opposed the demurrer. ROA 36. On July 22, 2020, a class action settlement was preliminarily approved by the Court (ROA 58), and on November 25, 2020 the court granted final approval of the Settlement (ROA 81).

Romero v. Securus Technologies, Inc. No. 3:16-cv-01283 (JM) (S.D. Cal.)
Plaintiffs alleged that Securus Technologies illegally recorded telephone conversations between inmates and their counsel. On November 21, 2018, the Honorable Jeffrey Miller granted class certification in part, appointing the Law Offices of Ronald A. Marron as co-lead class counsel. Dkt. No. 141. On June 16, 2020, the class action settlement was preliminary approved by the Court, and on November 19, 2020, the Court granted final approval of the Settlement. Dkt. No. 184.

Hilsley v. Ocean Spray Cranberries, Inc., No. 3:17-cv-02335(GPC) (S.D. Cal.)
A nationwide class of consumers brought this suit against Ocean Spray Cranberries, Inc. and Arnold Worldwide LLC for violations of California's Consumer Legal Remedies Act. Plaintiff alleges that certain Ocean Spray products falsely state "no artificial flavors" when they in fact contain the artificial flavoring agent, malic acid. On November 29, 2018, the Honorable Gonzalo P. Curiel granted class certification, appointing Ronald A. Marron, Michael Houchin, and Lilach Halperin of the Marron Firm as class counsel. Dkt. No. 83. On July 3, 2019, Judge Curiel denied Defendant's Motion for Summary Judgment (Dkt. No. 193) and on July 10, 2019 denied Defendant's Motion to Decertify the Class (Dkt. No. 196). On January 31, 2020, the Honorable Judge Gonzalo P. Curiel granted Plaintiff's Motion for Preliminary Approval of Class Action Settlement, and on August 3, 2020 the Court granted final approval of the settlement. Dkt. No. 259.

Graves v. United Industries Corp., No. 2:17-cv-06983-CAS-SK (C.D. Cal.)
On February 24, 2020, the Honorable Christiana A. Snyder granted final approval a nation-wide class action settlement concerning United Industries Corporation's Spectracide® Weed and Grass Killer Concentrate Products. Dkt. No. 87. The Plaintiffs alleged that the Spectracide® Concentrate Products were labeled as making more solution than the products were capable of making when mixed for certain weed control purposes. The Law Offices of Ronald A. Marron served as Class Counsel. The settlement created a $2.5 million dollar common fund in addition to injunctive relief in the form of labeling changes. Judge Snyder noted that the Law Offices of Ronald A. Marron had "vigorously represented the Class" and has "extensive experience in consumer class action litigation." *Graves v. United Indus. Corp.*, No. 2:17-cv-06983-CAS-SK, 2020 WL 953210, at *5, (C.D. Cal. Feb. 24, 2020).

Esparza v. Smartpay Leasing, Inc., No. 3:17-cv-03421-WHA (N.D. Cal.)
On January 28, 2020, the Honorable William Alsup granted final approval a nation-wide certified class action settlement. The class included individuals who were texted on behalf of the defendant, using its vendor Twilio, Inc.'s platform after texting the word "STOP", between September 29, 2015

to June 13, 2017. Ronald A. Marron, Alexis M. Wood and Kas L. Gallucci of the Law Offices of Ronald A. Marron served as class counsel. The settlement created a $8.67 million dollar common fund. *See Esparza v. Smartpay Leasing, Inc.*, No. 3:17-cv-03421-WHA, 2020 WL 465865, at *2 (N.D. Cal. Jan. 28, 2020), judgment entered, 2020 WL 465863 (N.D. Cal.).

Busch v. Bluestem Brands, Inc., No. 16-cv-0644(WMW/HB) (D. Minn.)
On October 11, 2019, the Honorable Judge Wilhelmina M. Wright granted final approval of a nationwide TCPA class action settlement where Ronald A. Marron, Alexis M. Wood and Kas L. Gallucci served as co-lead class counsel. The settlement created a $5.25 million common fund. *See Busch v. Bluestem Brands, Inc.,* No. 0:16-cv-00644-WMW-HB, 2019 WL 5092952, at *1 (D. Minn. Oct. 11, 2019).

Woodard, et al. v. Labrada, et al., Case No. 5:16-cv-00189-JGB-SP (C.D. Cal.)
On October 7, 2019, the Honorable Jesus G. Bernal granted final approval of a settlement between Plaintiffs and Defendant Naturex, Inc. for monetary and injunctive relief and the Law Offices of Ronald A. Marron served as co-lead class counsel. *See* Dkt. No. 321.

Medina v. Enhanced Recovery Company, LLC, No. 15-CV-14342-MARTINEZ-MAYNARD (S.D. Fla.)
On September 12, 2019, the Honorable Judge Jose E. Martinez granted final approval of a nationwide TCPA class action settlement and the Law Offices of Ronald A. Marron served as co-lead class counsel. Dkt. No. 131. The settlement created a $1.45 million common fund.

Littlejohn v. Ferrara Candy Company, No. 3:18-cv-0658-AJB-WVG (S.D. Cal.)
On June 17, 2019, the Honorable Anthony J. Battaglia granted final approval of a nationwide CLRA class action settlement stating "Class Counsel has fully and competently prosecuted all causes of action, claims, theories of liability, and remedies reasonably available to the Class Members." *Littlejohn v. Ferrara Candy Co.,* No. 3:18-cv-0658-AJB-WVG, 2019 WL 2514720, at *3 (S.D. Cal. June 17, 2019).

Rwomwijhu v. SMX, LLC, No. BC634518 (L.A. Supr. Ct.)
On January 11, 2019, the Honorable Carolyn B. Kuhl granted final approval of case brought pursuant to under California's Private Attorneys General Act where the Law Offices of Ronald A. Marron served as co-lead class counsel.

Jackson v. Lang Pharma Nutrition, Inc., No. 37-2017-00028196-CU-BC-CTL (S.D. Supr. Ct.)
On December 20, 2018, the Honorable Joel R. Wohlfeil of the California Superior Court granted final approval to a nationwide labeling case settlement involving Co-q10 dietary supplements where the Law Offices of Ronald A. Marron served as class counsel. The settlement created a fund in the amount of $1,306,000 for which class members could elect to obtain cash or product vouchers.

Simms v. ExactTarget, LLC, No. 1-14-cv-00737-WTL-DKL (S.D. Ind.)
On October 19, 2018, the Honorable William T. Lawrence granted final approval of a nationwide TCPA class action settlement where the Law Offices of Ronald A. Marron served as class counsel. Dkt. No. 178. The settlement created a $6.25 million common fund.

Mancini v. The Western and Southern Life Insurance Company, et al., No. 16-cv-2830-LAB (WVG) (S.D. Cal)
On September 18, 2018, the Honorable Larry Alan Burns granted final approval of settlement in the amount of $477,500 to resolve claims under California's Private Attorneys General Act. Dkt. No. 51.

Gonzales v. Starside Security & Investigation*,* No. 37-2015-00036423-CU-OE-CTL (S.D. Supr. Ct.)
On September 7, 2018, the Honorable Gregory W. Pollack granted final approval of a wage and hour class action settlement and where the Law Offices of Ronald A. Marron served as class counsel. ROA 303.

Mollicone v. Universal Handicraft, No. 1:17-cv-21468-RNS (S.D. Fla.)
On August 10, 2018, the Honorable Robert N. Scola, Jr. granted final approval of class action settlement regarding false advertising claims of Adore cosmetics products marketed as containing a plant stem cell formula where in which the Law Offices of Ronald A. Marron served as class counsel. Dkt. No. 131. In his Preliminary Approval Order, Judge Scola stated that the Marron Firm is "experienced and competent in the prosecution of complex class action litigation." Dkt. No. 120.

Mason v. M3 Financial Services, Inc., No. 1:15-cv-04194 (N.D. Ill.)
On June 29, 2018, the Honorable Andrea R. Wood granted final approval of a nationwide TCPA class action settlement in the amount of $600,000 in which the Law Offices of Ronald A. Marron served as co-lead class counsel. Dkt. No. 71.

Potzner v. Tommie Copper, Inc., No. 7:15-cv-03183-AT-LMS (S.D. N.Y.)
On May 4, 2018, the Honorable Analisa Torres granted final approval of a false advertising class settlement in the amount $700,000. Dkt. No. 129. This case involves allegations of false and deceptive advertising and endorser liability for copper fabric compression clothing. On January 4, 2016, the Honorable Analisa Torres appointed the Marron firm as Interim Lead Class Counsel over the opposition and challenge of other plaintiffs' counsel, noting that the Marron firm's "detailed" complaint was "more specifically pleaded, . . . assert[ing] a more comprehensive set of theories . . . [and was] more factually developed." *Potzner v. Tommie Copper Inc.*, No. 7:15-cv-03183-AT-LMS, 2016 WL 304746, at *1 (S.D.N.Y. Jan. 4, 2016). Judge Torres also noted that Mr. Marron and his firm's attorneys had "substantial experience litigating complex consumer class actions, are familiar with the applicable law, and have the resources necessary to represent the class." *Id.*

Gutierrez-Rodriguez v. R.M. Galicia, Inc.*,* No. 3:16-cv-00182-H-BLM (S.D. Cal.)
On March 26, 2018, the Honorable Marilyn Huff granted final approval of a nationwide TCPA class action settlement which provided monetary relief in the amount of $1,500,000, in addition to significant injunctive relief. Dkt. 67. The Law Offices of Ronald A. Marron served as class counsel. *Gutierrez-Rodriguez v. R.M. Galicia, Inc.,* No. 16-CV-00182-H-BLM, 2018 WL 1470198, at *2 (S.D. Cal. Mar. 26, 2018).

Thornton v. NCO Financial Systems*,* No. 16-CH-5780 (Cook County, Ill)
On October 31, 2017, the Honorable Tomas R. Allen of the Circuit Court of Cook County, Illinois, granted final approval to a nationwide TCPA class which created a common fund in the amount of $8,000,000 and also provided for injunctive relief. The Law Offices of Ronald A. Marron served as

co-lead class counsel.

Allen v. Similasan Corp., No. 12-cv-376 BAS (JLB) (S.D. Cal.)
A California class of consumers alleging false and deceptive advertising of six homeopathic drugs was certified by the Honorable Cynthia A. Bashant on March 30, 2015, with the Court noting that the firm was experienced and competent to prosecute the matter on behalf of the Class. Judge Bashant denied summary judgment on the class' claims that the drug products were not effective, as advertised, and certified claims under California's Consumers Legal Remedies Act, Unfair Competition Law, False Advertising Law, breach of express and implied warranty, and violation of the federal Magnuson-Moss Warranty Act. Dkt. No. 143. On August 17, 2017, final approval was granted.

Elkind v. Revlon Consumer Products Corporation*,* No. 14-cv-2484(JS)(AKT) (E.D.N.Y.)
On September 5, 2017, the Honorable A. Kathleen Tomlinson granted final approval of a nationwide false advertising class action settlement which challenged Revlon's advertising of its "Age Defying with DNA Advantage" line of cosmetics in the amount of $900,000, and significant injunctive relief. Dkt. No. 131. The Law Offices of Ronald A. Marron served as co-lead class counsel. Dkt. No. 120.

Sanders v. R.B.S. Citizen, N.A.*,* No. 3:13-cv-03136-BAS-RBB (S.D. Cal.)
On January 27, 2017 the Honorable Cynthia A. Bashant granted final approval of a nationwide TCPA class action settlement in the amount of $4,551,267.50. *Sanders v. R.B.S. Citizen, N.A.,* No. 13-CV-03136-BAS (RBB), 2017 WL 406165 (S.D. Cal. Jan. 25, 2017). On July 1, 2016, the Honorable Cynthia A. Bashant certified a nationwide class, for settlement purposes, of over one million persons receiving cell phone calls from Citizens made with an alleged automatic telephone dialing system. Dkt. No. 107. The Court appointed the Law Offices of Ronald A. Marron as class counsel, noting they have "significant experience in handling class actions." *Id.*

In re Leaf123 (Augustine v. Natrol), No. 14-114466 (U.S. Bankr. Ct. for the Dist. of Del.)
This action involved allegations of false and deceptive advertising of Senna Leaf tea products as dietary aids. Plaintiff alleged Senna Leaf is nothing more than a stimulant laxative which does not aid diets but hinders them. After a strong showing in the district court, and pursuant to other actions against the defendant manufacturer, the defendant filed for bankruptcy. The Marron Firm followed defendant to the federal bankruptcy court and retained bankruptcy counsel to assist. After a full day mediation before a retired federal jurist, and months of follow up negotiations, a settlement was reached. On August 7, 2015, in In re Leaf123 (adversary proceeding of *Augustine v. Natrol*), the Honorable Brendan L. Shannon approved an injunctive relief-only settlement, finding it "fair, reasonable and adequate."

Johnson v. Triple Leaf Tea, Inc., No. 3:14-cv-01570-MMC (N.D. Cal.)
An injunctive relief class action settlement, requiring manufacturer of senna leaf diet teas to re-label their products and remove ingredients based on alleged consumer confusion and harm, was filed in April 2014. The Marron firmed served as class counsel and the Honorable Maxine M. Chesney, Senior U.S. District Court Judge granted final approval to a classwide settlement on November 16, 2015. *Johnson v. Triple Leaf Tea Inc*., No. 3:14-CV-01570-MMC, 2015 WL 8943150, at *3, *5 (N.D. Cal. Nov. 16, 2015) ("Class Counsel has fully and competently prosecuted all causes of action, claims, theories of liability, and remedies reasonably available to the Class Members. The Court hereby affirms its appointment of the Law Offices of Ronald A. Marron, APLC as Class Counsel . .

. . Class Counsel and Defendant's counsel are highly experienced civil litigation attorneys with specialized knowledge in food and drug labeling issues, and complex class action litigation generally.”).

Perry v. Truong Giang Corp., Case No. BC58568 (L.A. Supr. Ct.)
Plaintiff alleged defendant’s Senna Leaf teas, advertised as diet aids, were falsely or misleadingly advertised to consumers. After an all-day mediation, a class wide settlement was reached. In granting final approval to the settlement on August 5, 2015, the Honorable Kenneth Freeman noted that class counsel’s hourly rates were “reasonable” and stated the Marron Firm’s lawyers used skill in securing the positive results achieved on behalf of the class. The court also noted “this case involved difficult legal issues because federal and state laws governing dietary supplements are a gray area, . . . the attorneys displayed skill in researching and settling this case, which provides a benefit not only to Class Members but to the public at large . . . .”

Carr v. Tadin, Inc., No. 3:12-cv-03040-JLS-JMA (S.D. Cal.)
An injunctive relief class action settlement, requiring manufacturer of diet teas and other health supplements to re-label their products to avoid alleged consumer confusion, was filed in January 2014 before the Honorable Janis L. Sammartino. The Marron Firm was appointed as class counsel. *Carr v. Tadin, Inc.*, No. 12-CV-3040 JLS JMA, 2014 WL 7497152 (S.D. Cal. Apr. 18, 2014), *amended in part,* No. 12-CV-3040 JLS JMA, 2014 WL 7499453 (S.D. Cal. May 2, 2014). The classwide settlement was granted final approval on December 5, 2014. *Carr v. Tadin, Inc.*, 51 F. Supp. 3d 970 (S.D. Cal. 2014).

Gallucci v. Boiron, Inc., No. 3:11-cv-2039-JAH (S.D. Cal.)
The firm was class counsel for consumers of homeopathic drug products in an action against Boiron, Inc., the largest foreign manufacturer of homeopathic products in the United States, involving allegations that Boiron’s labeling and advertising were false and misleading. We obtained a nationwide settlement for the class which provided injunctive relief and restitution from a common fund of $5 million. *Gallucci v. Boiron, Inc.*, No. 11CV2039 JAH NLS, 2012 WL 5359485 (S.D. Cal. Oct. 31, 2012), *aff'd sub nom. Gallucci v. Gonzales*, 603 F. App'x 533 (9th Cir. 2015). The settlement was upheld by the Ninth Circuit on February 21, 2015. The case also set an industry standard for homeopathic drug labeling. *See* www.homeopathicpharmacy.org/pdf/press/AAHP_Advertising_ Guidelines.pdf.

Red v. Kraft Foods Global, Inc., No. 2:10-1028-GW (C.D. Cal)
The firm represented consumers in a class action against one of the world’s largest food companies and was appointed lead counsel in a consolidated putative class action. The action has resulted in a permanent injunction barring the use of deceptive health claims on Nabisco packaged foods containing artificial trans fat. Dkt. No. 260. The Court has also granted an interim award of attorneys’ fees. Dkt. No. 301.

Mason v. Heel, Inc., No. 3:12-cv-3056-GPC-KSC (S.D. Cal.)
Plaintiff alleged false and deceptive advertising of over-the-counter homeopathic drugs. On October 31, 2013, the Honorable Gonzalo P. Curiel granted preliminary approval to a nationwide class settlement of $1 million in monetary relief for the class plus four significant forms of injunctive relief. Final approval was granted on March 13, 2014. *See Mason v. Heel, Inc.,* 3:12-CV-03056-GPC, 2014 WL 1664271 (S.D. Cal. Mar. 13, 2014).

Clark v. National Western Life Insurance Co., No. BC321681 (L.A. Co. Super. Ct.)
Class action involving allegations of elder financial abuse and fraud. After litigating the case for well over six years, including Mr. Marron being appointed co-lead class counsel, the case resulted in a settlement of approximately $25 million for consumers.

In re Quaker Oats Labeling Litig., No. 5:10-cv-00502-RS (N.D. Cal.)
False and deceptive advertising case concerning Instant Oats, Chewy Granola Bars and Oatmeal To Go products, including use of partially hydrogenated vegetable oil while also representing the products as healthy snacks. An injunctive relief class action settlement was granted preliminary approval on February 12, 2014, with my firm being appointed Class Counsel. Dkt. No. 180. On July 29, 2014, the court granted the final approval of the settlement. *In re Quaker Oats Labeling Litig.*, No. 5:10-cv-00502-RS, 2014 WL 12616763 (N.D. Cal. July 29, 2014).

Nigh v. Humphreys Pharmacal, Inc., No. 3:12-cv-02714-MMA-DHB (S.D. Cal.)
Case involving allegations of false and deceptive advertising of homeopathic over-the-counter drugs as effective when they allegedly were not. On October 23, 2013, a global settlement was granted final approved by the Honorable Michael M. Anello, involving a common fund of $1.4 million plus five significant forms of injunctive relief for consumers. *Nigh v. Humphreys Pharmacal, Inc.*, No. 3:12-cv-02714-MMA-DHB, 2013 WL 5995382 (S.D. Cal. Oct. 23, 2013).

Burton v. Ganeden Biotech, Inc., No. 3:11-cv-01471-W-NLS (S.D. Cal.)
Action alleging false and deceptive advertising of a dietary probiotic supplement. The Marron Firm settled the case for $900,000 in a common fund plus injunctive relief in the form of labeling changes. Final approval was granted on October 4, 2012. Dkt. No. 52.

Hohenberg v. Ferrero U.S.A., Inc., No. 3:11-CV-00205-H-CAB (S.D. Cal.)
This case involved false and deceptive advertising of sugary food product as a healthy breakfast food for children. After successfully defeating a motion to dismiss, *Hohenberg*, 2011 U.S. Dist. LEXIS 38471, at *6 (S.D. Cal. Mar. 22, 2011), the Honorable Marilyn Huff certified a class on November 15, 2011, resulting in a published decision, *In re Ferrero Litig.*, 278 F.R.D. 552 (S.D. Cal. 2011). A final settlement consisting of injunctive relief labeling and marketing changes, plus a $550,000 common fund for monetary relief to the class was finally approved on July 9, 2012. Dkt. No. 127.

In re Qunol CoQ10 Liquid Labeling Litigation, No. 8:11-cv-173-DOC (C.D. Cal.)
This case involved false and deceptive consumer advertising of a dietary supplement. The Marron Firm was appointed class counsel and successfully defeated defendants' motion to decertify the class following the Ninth Circuit's decision in *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012). *See Bruno v. Eckhart Corp.*, 280 F.R.D. 540 (C.D. Cal. 2012); *see also Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524 (C.D. Cal. 2011). The case settled on the eve of trial (originally scheduled for October 2, 2012) for cash payments to the class and injunctive relief.

Iorio v. Asset Marketing Systems, Inc., No. 3:05-cv-00633-JLS-CAB (S.D. Cal.)
This action involved allegations of elder financial abuse and fraud. Mr. Marron was appointed class counsel on August 24, 2006 and the Court certified a class on July 25, 2006. After nearly six years of intensive litigation, including "challenges to the pleadings, class certification, class decertification, summary judgment,…motion to modify the class definition, motion to strike various

remedies in the prayer for relief, and motion to decertify the Class' punitive damages claim," plus three petitions to the Ninth Circuit, attempting to challenge the Rule 23(f) class certification, a settlement valued at $110 million was reached and approved on March 3, 2011. Dkt. No. 480. In granting final approval to the settlement, the Court noted that class counsel were "highly experienced trial lawyers with specialized knowledge in insurance and annuity litigation, and complex class action litigation generally" and "capable of properly assessing the risks, expenses, and duration of continued litigation, including at trial and on appeal." *Id.* at 7:18-22.

Martinez v. Toll Brothers, No. 09-cv-00937-CDJ (E.D. Penn.)
Shareholder derivative case alleging breach of fiduciary duty, corporate waste, unjust enrichment and insider trading, filed derivatively on behalf of Toll Brothers and against individual corporate officers. Under a joint prosecution agreement, this action was litigated along with other consolidated and related actions against Toll Brothers in a case styled ***Pfeiffer v. Toll Brothers***, No. 4140-VCL in the Delaware Chancery Court. After extensive litigation, the case settled in September 2012 for $16.25 million in reimbursement to the corporation.

Peterman v. North American Co. for Life & Health Insurance, No. BC357194, (L.A. Co. Super. Ct.), involved allegations of elder financial abuse. This case was litigated for over four years and achieved a settlement of approximately $60 million for consumers.

Vaccarino v. Midland Nat'l Life Ins. Co., No. 2:11-cv-05858-CAS (MANx) (C.D. Cal.)
This action involved allegations of elder financial abuse and fraud. On June 17, 2013, the Honorable Christina A. Snyder appointed the Marron Firm as Class Counsel, and on February 3, 2014, the Court certified a class of annuities purchasers under various theories of relief, including breach of contract and the UCL. On September 22, 2014, the court granted final approval to a class action settlement that achieved a settlement of approximately $5.55 million for consumers, including *cy pres* relief to the Congress of California Seniors. Dkt. No. 419.

OTHER NOTABLE CASES

In re Santa Fe Natural Tobacco Company Marketing & Sales Practices Litig., No. 1:16-md-02695-JB-LF (D.N.M.)
On May 24, 2016, Ronald A. Marron was appointed to the Executive Committee in a multidistrict litigation labeling case. Dkt. No. 24. On September 1, 2023, class certification was granted in part.

Henderson v. The J.M. Smucker Company, No. 2:10-cv-4524-GHK (C.D. Cal.)
This action was the catalyst forcing the defendant to reformulate a children's frozen food production to remove trans-fat. On June 19, 2013, the Honorable George H. King held the firm's client was a prevailing Private Attorney General and entitled to her costs and attorneys' fees. Dkt. No. 268.

APPELLATE CASES

Littlejohn v. Ferrara Candy Company, Inc., Case No. 19-55805 (9th Cir.)
The Marron Firm was appointed by the district court as class counsel for a settlement class involving purchasers of SweeTARTS candy products that are labeling as containing "No Artificial Flavors" The plaintiff alleged that the "No Artificial Flavors" claim is false and misleding because the SweeTARTS products are made with an artificial flavoring ingredient. The district court approved

a nationwide class action settlement that provided valuable injunctive relief by requiring the defendant to remove the "No Artificial Flavors" labeling claim. An objector appealed the district court's approval of the settlement. On June 30, 2020, the Ninth Circuit fully affirmed the district court's approval of the settlement holding that the "SweeTARTS purchasers tend to be repeat buyers who would derive value from the Settlement's injunctive relief upon each future purchase of SweeTARTS." *Littlejohn v. Ferrara Candy Company, Inc.*, ---Fed. Appx.---, 2020 WL 3536531, at *2 (9th Cir. June 30, 2020).

Shyriaa Henderson v. United States Aid Funds, Inc., Case No. 17-55373 (9th Cir.)
On March 22, 2019, the Ninth Circuit reversed the District Court's order granting summary judgment in favor of Defendant, and remanded for further proceedings in a class action where debt collectors acting on behalf of defendant were in violation of the TCPA. The Ninth Circuit found that a reasonable jury could hold Defendant vicariously liable for the alleged TCPA violations by debt collectors. *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068 (9th Cir. 2019).

John Sandoval v. Pharmacare US, Inc., Case No. 16-56301 (9th Cir.)
On April 5, 2016, the Ninth Circuit reversed, in part, the District Court's order granting summary judgment in a false advertising class action concerning an aphrodisiac dietary supplement called "IntenseX" The Marron Firm successfully argued that statements on the intensex.com website showed that the defendant failed to obtain approval of IntenseX as an OTC aphrodisiac drug, thus creating a basis for liability under California's Unfair Competition Law. *Sandoval v. PharmaCare US, Inc.*, 730 Fed.Appx. 417 (9th Cir. 2018).

Reid v. Johnson & Johnson, Case No. 12-56726 (9th Cir.)
On March 13, 2015, the Ninth Circuit reversed, in part, the District Court's order granting the defendant's motion to dismiss in a false advertising class action concerning Benecol spread that was allegedly falsely advertised as containing "No Trans Fat." The Marron Firm successfully argued that the plaintiff's claims are not preempted by the Federal Food, Drug, and Cosmetics Act. *Reid v. Johnson & Johnson*, 780 F.3d 952, 964 (9th Cir. 2015).

EXHIBIT 5

2006 WL 177586
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Law Division.

Maryann CERBO, et al., Plaintiffs,
v.
FORD OF ENGLEWOOD, INC., et al., Defendants.

No. BER–L–2871–03, BER–L–2925–03, BER–L–2936–03, BER–L–2937–03, BER–L–2939–03, BER–L–2954–03, BER–L–2976–03.
|
Jan. 26, 2006.

Synopsis
Background: Purchasers and lessees of motor vehicles brought class action alleging common-law fraud, civil conspiracy, and violations of the Consumer Fraud Act by automotive retailers acting in concert to overcharge for title and registration costs and documentary preparation fees. Parties moved for approval of settlement.

Holdings: The Superior Court, Law Division, Bergen County, Jonathan H. Harris, J., held that:

notice of proposed class action settlement to potential class members satisfied due process requirements as the best notice practicable;

proposed class satisfied elements of numerosity, commonality, typicality, and adequacy of representation in support of class certification;

common issues predominated over individual claims;

class action was superior to individual actions;

proposed settlement was fair and reasonable;

reasonable attorney fees were $5,113,507.

Motion granted.

Attorneys and Law Firms

Donald Caminiti (Breslin and Breslin, P.A. attorneys) and Donald S. MacLachlan and Phillip S. Tarr (MacLachlan Law Offices, LLC, attorneys) argued the cause for plaintiffs.

Marvin J. Brauth, Jeffrey J. Brookner, and Jason H. Kislin (Wilentz, Goldman & Spitzer, P.A., attorneys) argued the cause for defendants Acme Motors, Inc.; Albert & Jack, Inc.; Barnes Chevrolet, Inc.; Bellavia Chevrolet Geo Buick; Berlin Chrysler, Inc.; Burke Brothers, Inc.; Burke Chevrolet, Buick, Pontiac, Cadillac, GMC, Inc.; Burlington Volkswagen, Inc.; Cherry Hill Nissan; Coleman Auto Group, Inc.; Coleman Buick Pontiac GMC, Inc.; Coleman Chrysler Jeep, Inc.; Crane Chevrolet; D'Amico Lincoln Mercury, Inc.; Ed Carney Ford, Inc.; Freehold Dodge, Inc.; Freehold Ford, Inc.; Freehold Subaru, LLC; Fullerton Chrysler Plymouth Corp.; Gardner Chevrolet Oldsmobile & Cadillac; George Wall Lincoln Mercury, Inc.; Haldeman Ford; Haldeman Ford of Hightstown, LLC; Haldeman Nissan, Inc.; Hamilton Chrysler, Inc.; Hamilton Mazda Volkswagen, Inc.; Hart Buick Co.; Intercar, Inc.; Irwin Lincoln Mercury Sales & Service Co., Inc.; J.M.K. Auto Sales, Inc.; J.R. Roof, Inc.; Johnson Dodge–Chrysler–Jeep, Inc.; Kemper Pontiac Cadillac, Inc.; Kevil Chevrolet; Kundert Motors, Inc.; LaFlam Chrysler, Inc.; Liberty Subaru; Liccardi Ford, Inc.; Liccardi Lincoln Mercury, LLC; Liccardi Motors, Inc.; Lucas Chevrolet Geo, Inc.; Lucas Motor Co.; M. Schwartz & Sons, Inc.; Maple Shade Motor Corporation; Maywood Motors; Meadowland Ford Truck Sales, Inc.; Medford Ford, Inc.; Middlesex Foreign Cars, Inc.; Midstate Motor Car Corp.; Multi–Chevrolet, Inc.; Park Avenue Motor Corp.; Paul's Motor Sales & Service, Inc.; Perry–Egan Chevrolet, Inc.; Point Pleasant Ford; R & S Jaguar, LP; Rassas Pontiac, Inc.; Ray Catena Imports, Inc.; Ray Catena Infiniti, Inc.; Ray Catena Motor Car Corp.; Ray Catena of Monmouth, Inc.; Remick Enterprises, Inc.; Royal Chevrolet, Inc.; Saturn of GreenBrook, LLC; Saturn of Union, Inc.; Scott Motor Coach Sales, Inc.; Spirit South, Inc.; Sussex Imports; Tenafly Ford; Thomas Lincoln Mercury, Inc.; Town & country Motors, Inc.; Wayne Motors, Inc.; Weisleder, Inc.; and Wood–Eichler Motor Company, Inc.

Kenneth Thomson (Manning, Caliendo & Thompson, attorneys) submitted a letter brief on behalf of defendants Sea View Auto Corporation, Sea Breeze Ford, and Magarino Ford Mercury Daewoo.

Donald M. Onorato submitted a letter brief on behalf of defendants All American Ford, Inc. and All American Izuzu, Inc.

Robert S. Stickley (Saltz Polisher P.C., attorneys) submitted a letter brief on behalf of defendants Agresta Pontiac Buick GMC, Inc.; Agresta Cadillac Chevrolet;

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Borough Chrysler Jeep; Chass Winner, Inc.; Family Ford, Inc.; Freehold Pontiac Buick GMC; Gentilini Ford, Inc.; Glen Motors; Jim Curley Pontiac Buick Truck, Inc.; Kindle Ford; Lenihan Oldsmobile, Inc.; Leonard Toyota, Inc.; Liberty Automotive; Nitti Subaru, Inc.; Perrine Buick–Pontiac–GMC–Hummer; Riegler Dodge, Inc.; Riverview Ford of Pennsville, Inc.; Surf R.V. and Auto Center, Inc.; Toyota of Runnemede; and Triboro Pontiac, Inc.

Jeffrey M Chebot (Whiteman, Bankes & Chebot, LLC, attorneys) submitted a letter brief on behalf of defendants Beacon Chevrolet–Oldsmobile, Inc. and Asplundh Buick/Pontiac–GMC, Inc.

Paul S. Doherty, III (Hartmann, Doherty & Rosa, LLC, attorneys) submitted a letter brief on behalf of defendant Sifford Pontiac–GMC, Inc.

Jason M. Schoenberg (Bressler, Amery & Ross, P.C., attorneys) submitted a letter brief on behalf of defendants Butler Chrysler–Plymouth; Coast Buick–Pontiac–GMC Truck; Lilac Motor Corp.; Demassi Pontiac, Inc.; Larson Ford–Suzuki, Inc.; Maroon Automotive Group; Saturn of Ramsey; Saturn of Route 23; Royal Pontiac & Royal Pontiac–Buick–GMC; Shrewsbury Motors, Inc., and Tally's Sales & Service, Inc.

John S. Fetten (Pollock, Montgomery & Chapin, P.C., attorneys) submitted a letter brief on behalf of defendants Route 23 Auto Mall LLC; Paramus Auto Mall LLC; Hawthorne Auto Sales; Reinertsen Motors, Inc.; DML Motors, Inc.; Long Motor Company, Inc.; Pistilli Ford, Inc .; Vann Dodge Chrysler LLC; and Greenbrook Pontiac GMC, Inc.

John J. Breslin, III (Breslin, Auty & Preziosi, attorneys) submitted a letter brief on behalf of defendant Mahwah Sales & Service, Inc.

Elliot J. Wiesner (Elliot J. Wiesner, P.C., attorneys) submitted a letter brief on behalf of defendant Capital Chevrolet, Inc.

Garen Meguerian (Garen Meguerian, Attorney at Law, LLC, attorneys) submitted a letter brief on behalf of defendants Richardson Imports; Richardson Automotive; Liberty Automotive; Burns Kull, Inc.; Burns Pontiac–GMC Truck, Inc.; L.K. Auto Sales, Inc.; RK Chevrolet, Inc.; and Kull Auto Sales, Inc.

Thomas M. Barron (Barron, Baker & Posternock, L.L.P., attorneys) submitted a letter brief on behalf of defendants Trend Motors, Ltd and Trend Motors Volkswagen, Ltd.

Gene R. Mariano (Parker McCay P.A., attorneys) submitted a letter brief on behalf of defendants Miller Ford Sales and Miller Subaru Oldsmobile Corp.

Marc Harlan Herman (Hill Wallack, attorneys) submitted a letter brief on behalf of defendants Capitol City Ford, Downs Ford, and James Toyota/Hummer.

Philip A. Tortoreti (Tortoreti, Tomes & Callahan, attorneys) submitted a letter brief on behalf of defendant Preakness Chevrolet.

Carmen Saginario Jr. (Capehart Scatchard, attorneys) submitted a letter brief on behalf of defendants Chapman Ford Sales, Inc.; Dodge City, Inc.; Muller Automotive, Inc.; Nulin Auto Sales, Inc.; Matt Blatt, Inc.; Millennium, Inc.; Mark Anthony Chevrolet, Inc.; and Town Ford, Inc.

David M. Epstein (Epstein & Gilberti, LLC, attorneys) submitted a letter brief on behalf of defendants DiFeo Imports Partnership; Englewood Saturn Partnership; North Jersey Manhattan Saturn Partnership; Saturn of Paramus, Salerno*Duane Infiniti, L.L.C.; Salerno Duane of Sussex, Inc.; Jim Salerno Pontiac Buick GMC Truck, Inc.; Salerno Duane, Inc.; and Saturn of Morristown.

William F. Johnson, Jr. (Johnson, Murphy, Hubner, McKeon, Wubbenhorst, Bucco & Appelt, P.C., attorneys) submitted a letter brief on behalf of defendants Brogan Cadillac Co., Brogan Cadillac Corp., and Brogan Cadillac Buick, Inc.

Perry A. Pittenger (Schiller & Pittenger, attorneys) submitted a letter brief on behalf of defendants Autoland of Englewood; Bell Imports, Ltd.; Bell Management Sussex, Inc.; Bell Motor Cars, Inc.; Bell Motors, Inc.; Bennett Chevrolet, Inc.; Bob Novick Chevrolet, Inc.; Buhler & Bitter, Inc.; Buhler Dodge, Inc.; C.L.F. Northern Jersey Auto Sales, Inc.; Chrysler of Paramus, Inc.; Circle Dodge, Inc.; Circle Infiniti, Inc.; Circle Infiniti, Inc.; Clinton Acura, Inc.; Colonial Motors, Inc.; Crown Cadillac Oldsmobile, Inc. Crystal Motors; D & C Chevrolet Co.; DeFelice Chevrolet, Inc.; Denville Nissan, Inc.; DiFeo Buick, Pontiac, GMC Truck Partnership; Dodge of Paramus, Inc.; East Brunswick Vehicle Sales, Inc.; East Coast Automotive, Inc.; Edison Motor Cars, Inc.; Fisher Chevrolet Oldsmobile, Inc.; Fisher Nissan, Inc.; Ford World, LLC; Frystock Sales & Service Corp.; Global Motors, Corp.; H & D Linden Motors, Inc.; Hilltop Nissan, Inc.; Hyundai Motors of Morris County; J & S Ford, Inc.; Land Rover of Woodbridge, Inc.; Loman Auto Group, Inc.; Loman Ford, Inc.; Lynnes Infinity, Inc.; Lynnes Nissan City, Inc.; Lynnes Nissan West, Inc.; Lynnes Suburu, Inc.; Mauro Motors, Inc.; Maxon Hyundai, Inc.; Maxon Mazda, Inc.; McGuire Auto Group; McGuire Cadillac, Inc.; Mont Motors, Inc.; Morris County Auto Sales; Morristown Motors, Inc.; New Brunswick Edison Recreational Vehicles, Inc.; Nissan World, L.L.C.; O'Brien Imports,

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Inc.; Open Road of Edison, Inc.; PAC Automotive, L.L.C.; Parkway Ford, Inc.; Paul Miller, Inc.; Paul Miller Performances, LLC; Phillipsburg Easton Honda, Inc.; Ramsey Auto Mall, Inc.; Rittenhouse Kerr Ford, Inc.; Rittenhouse Lincoln Mercury, Inc.; Royal Cadillac, Inc.; Ryan Motor Corp.; Ryan Motors of Morristown, Inc.; Ryan Motors of Passaic, Inc.; Sea Coast Chevrolet Oldsmobile, Inc.; Sea Coast Motors, Inc.; Stadium Chrysler Jeep; Stadium Ford, L.L.C. Stateline Ford, Inc.; Sussex County Imports, L.L.C.; Tenafly Chrysler Jeep, Inc.; Towne Motors, Inc.; Westwood Chevrolet, L.L.C.; Windsor Automotive, Inc.; Woodbridge Dodge; Woodbridge Lincoln Mercury; and Wyckoff Chrysler.

Salvatore A. Giampiccolo, (McElroy, Deutsch, Mulvaney & Carpenter, L.L.P., attorneys) submitted a letter brief on behalf of defendants Hudson Auto Sales, Inc.; Freehold Auto Sales, Inc.; Freehold Chrysler Jeep Inc.; Freehold Automotive Unlimited; Route 22 Automobiles, Inc.; Route 22 Auto Sales, Inc.; and Route 22 Nissan, Inc.

Alain Leibman (Greenbaum, Rowe, Smith & Davis LLP, attorneys) submitted a letter brief on behalf of defendants Auerbach Chevrolet Corp.; Beyer Brothers Corp.; Bisson Motor Sales, Inc.; Bridgewater Vehicle Sales, Inc.; Caldwell Toyota; Clairmont Cadillac Corp.; Compass Dodge; Douglas Motors Corporation; Douglas Buick Corp.; Elite Ford, Inc.; Elite Isuzu, Inc.; Elite Oldsmobile, Inc.; Gold Coast Motors, Inc.; Joe Heidt Motors Corp.; Lucas Ocean Motor Car Corp.; Main Auto Sales, Inc.; Mullane Ford, Inc.; Scott Picon Ltd, Inc.; Smith Motor Company, Inc.; south Shore Auto World of Mays Landing; Vince Auto Sales, Inc.; VIP Cycle and Sport Center, Inc.; Woodbridge Auto Sales; World Auto Group, Inc.; and World Imported Motor Cars, Inc.

HARRIS, J.

I. INTRODUCTION

***1** In this statutory and common law fraud action, a class of approximately 2.7 million purchasers and lessees of motor vehicles alleges that, among other things, all of the automotive retailers in New Jersey acted in concert to cheat consumers by overcharging for title and registration costs and documentary preparation fees primarily in violation of the New Jersey Consumer Fraud Act (N.J.S.A. 56:8–1 to –20) (NJCFA). After more than two years of litigation, almost 400 defendants have agreed to accept plaintiffs' offer to settle, leaving only a handful of remaining defendants still in the fray. Essentially, the settling defendants have promised 1) to refund on a dollar-for-dollar basis all objectively verifiable overcharges, 2) to provide consumers with transferable coupons for $100–off on a motor vehicle acquisition, 3) to grant 10%-off coupons for parts and service to a limited group of particularly aggrieved class members, and 4) to refrain from engaging in certain conduct claimed by plaintiffs to constitute unfair business practices. The settling parties seek a final declaration that his matter shall proceed as a class action. R. 4:32–2. They also seek approval of the settlement. R. 4:32–4. Finally, plaintiffs' attorneys seek between $8,889,523.50 and $9,500,000.00 in attorneys fees (to be paid by the settling defendants) for their efforts in successfully prosecuting the case.

II. BACKGROUND

The gravamen of plaintiffs' April 17, 2003, complaint stems from their belief that all defendants, in concert, have systematically and illegally overcharged New Jersey consumers for registration, title, and document service fees in connection with the purchase or lease of motor vehicles. They seek remedies for numerous related alleged violations of the NJCFA, common law fraud, and civil conspiracy.

An "Amended Class Action Complaint and Demand for Jury Trial" was filed on May 5, 2003, which sought remedies under the same theories of liability as the original complaint. In more than twenty separate motions, the dispositions of which are memorialized in an order dated May 3, 2005, I determined that some of plaintiffs' claims were adequately pled and that plaintiffs had stated certain claims for which relief may be granted. Other claims were dismissed without prejudice. R. 4:6–2(e). On May 3, 2005, plaintiffs filed a "2nd Amended Class Action Complaint and Demand for Jury Trial" as a result of the court allowing the plaintiffs to add more plaintiffs and to specifically allege alter ego, economic linkage, and other juridical linkage theories of liability. Plaintiffs were also granted leave to amend their pleadings to allege more thoroughly common law fraud, and conspiracy to commit common law fraud.

On January 29, 2004, I entered an order establishing an elective mechanism for alternative dispute resolution (ADR process). Although the procedure proved initially unsuccessful, the ADR process enlisted 537 defendants, even though the vast majority had not yet filed answers or other responsive pleadings. To assist all parties, a trade association comprised of many (but not all) of the defendants—the New Jersey Coalition of Automotive

Retailers, Inc. (NJCAR)—participated in the ADR process.[1]

***2** Notwithstanding the best efforts of all concerned, this ADR process did not result in a resolution of the instant dispute. At the expiration of the initial ADR process, I entered an order dated October 27, 2004, that began a concentrated effort to manage the case. This included setting aggressive deadlines for service of process, mandating expedited discovery exchange, and deploying other pretrial processes.

As the instant action was percolating, several similar putative class actions were commenced in other vicinages across the state by persons who are not plaintiffs in the instant matter,[2] creating the phenomenon known as overlapping or dueling class actions. See Geoffrey P. Miller, *Overlapping Class Actions,* 71 *N.Y.U. L.Rev.* 514, 516 (1996). Some actions were commenced before the instant action and some afterward. Although the theories of liability in those actions are not identical to the theories here, the predominant theme of those cases is virtually the same. For the most part, those actions involve a single plaintiff or allied plaintiffs against a single defendant or a small group of affiliated defendants.

Eventually, however, as the parties here refined their positions and began to understand the subtleties, costs, and risks of participation in the instant litigation, renewed settlement efforts were undertaken. On January 18, 2005, plaintiffs tendered a settlement offer that was accepted by almost 400 defendants before the offer expired.

The essential terms of the settlement provide for four distinct areas of relief. First, all members of the class—defined as "all persons who, while residing in the State of New Jersey, purchased or leased a new or used motor vehicle (except that fleet sales and certain vehicles exceeding 18,000 pounds may be excluded) from any of the settling dealerships during their applicable class period"—who complete and transmit a claim form to Poorman–Douglas Corporation (Poorman–Douglas), the court-designated settlement administrator, are eligible for a cash refund of all amounts the class member was overcharged for registration and title fees. Since not every class member was overcharged, Poorman–Douglas will audit each class member's transaction and if it determines that, in fact, the class member was overcharged, the class member will be entitled to full restitution of all overcharges, to be paid by the offending defendant. Second, any class members who become eligible for a refund of $35.01 or more, will additionally be entitled to receive automatically a non-transferable Parts or Service Discount Certificate entitling the class member to a 10%-off discount in the purchase of parts or service for a period of one year from the date of mailing of the Parts or Service Discount Certificate. Third, every class member will receive a transferable Sale or Lease Discount Certificate entitling the class member to $100–off of any sale or lease of a new or used motor vehicle for a period of two years from the date the settlement is approved by the court. Finally, as prospective injunctive relief, each settling defendant will charge documentary fees only in amounts reasonably related to the value of the benefit of the services to the consumer, will disclose that the documentary fees are service fees established by the settling defendant that cover costs, will disclose that the fee includes some optional services that may be performed by the consumer, and will disclose that title and registration fees may be estimated and that the settling dealership will refund any overcharge to customers in the ordinary course of business.

***3** The terms of the settlement were contained in a *Notice of Proposed Class Action Settlement and Fairness Hearing* sent to individual members of the class in September 2005, and thereafter published in several newspapers and other media outlets. Poorman–Douglas, working with the parties and utilizing data obtained from the New Jersey Motor Vehicle Commission, identified and notified 2,731,285 potential class members of the terms of the settlement, the request for attorneys' fees by plaintiffs' attorneys, and the date of the Fairness Hearing. As of December 19, 2005, over 306,000 claim forms from class members had been received by Poorman–Douglas. Using statistical sampling techniques, Poorman–Douglas estimates that as of January 3, 2006, the class-wide average overcharge of title and registration charges is $19.30. As of December 19, 2005, Poorman Douglas had received approximately 500 requests for exclusion from the class. As of the date of the Fairness Hearing, there were 24 written objections to the settlement .[3] No one appeared in person at the Fairness Hearing to object.

III. DISCUSSION

A. The Law

Notwithstanding the general judicial indulgence and encouragement of settlements, any settlement of a class action requires court approval. *R.* 4:32–4. This rule, modeled after a prior version of *Fed.R.Civ.P.* 23(e), has not received extensive treatment in our reported opinions. Its most extensive exegeses, albeit brief, are found in two informative opinions authored by Judge Skillman. The first, a representative—albeit non-class—action is entitled

Morris Cty. Fair Hous. Council v. Boonton Tp., 197 *N.J.Super.* 359, 484 A.2d 1302 (Law Div.1984), *aff'd* 209 *N.J.Super.* 108, 506 A.2d 1284 (App. Div.1986. The second, an unconventional complex consumer fraud class action commenced as a counterclaim, is entitled *Chattin v. Cape May Greene, Inc.,* 216 *N.J.Super.* 618, 524 A.2d 841 (App.Div.), *certif. denied,* 107 *N.J.* 148, 526 A.2d 209 (1987). Both opinions reflect considerable reliance upon federal law, largely because *R.* 4:32–4 has its source in the federal rule. Indeed, it is common for New Jersey courts to refer to congruent federal law when interpreting New Jersey's class action rules. *Morris Cty. Fair Hous. Council v. Boonton Tp., supra,* 197 *N.J.Super.* at 369, 484 A.2d 1302 ("[I]t is appropriate to seek guidance in federal case law in determining the procedures and standards for approval of settlements of representative actions[.]"); *Goasdone v. American Cyanamid Corp.,* 354 *N.J.Super.* 519, 528, 808 A.2d 159 (Law Div.2003)(since New Jersey has no reported decision on certification of a medical monitoring class, federal case law lends important guidance); *Delgozzo v. Kenny,* 266 *N.J.Super.* 169, 185, 628 A.2d 1080 (App.Div.1993)(referring to federal law to parse commonality requirement of *R.* 4:32–1(a)(2)); *In re Cadillac V8–6–4 Class Action,* 93 *N.J.* 412, 424, 461 A.2d 736 (recognizing New Jersey's class action rule "is modeled after *Rule* 23(a) and (b) of the Federal Rules of Civil Procedure."); *Riley v. New Rapids Carpet Ctr.,* 61 *N.J.* 218, 226, 294 A.2d 7 (1972) ("[o]ur class-action rule, *R.* 4:32, is a replica of *Rule* 23 of the Federal Rules of Civil Procedure as amended in 1966."); *Muise v. GPU, Inc.,* 371 *N.J.Super.* 13, 31, 851 A.2d 799 (App.Div.2004)("[c]onstruction of the federal rule may be considered helpful, if not persuasive, authority"). Accordingly, where appropriate, I will refer to federal cases that provide guidance and insight to areas of class action law that are not fully illuminated by New Jersey precedent.

B. The Notice

***4** In order to ensure that the dictates of due process are observed, notice to class members must be given. *R.* 4:32–4 provides that:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Adequate notice of a proposed settlement that will fix the rights of class members who do not opt-out and forever bar them from seeking further relief on their causes of actions is required not only by the rules of civil procedure, but also by the constitutional mandate of due process. *See Phillips Petroleum Co. v. Shutts,* 472 *U.S.* 797, 811–12, 105 *S.Ct.* 2965, 86 *L. Ed.2d* 628 (1985); *Kyriazi v. Western Elec. Co.,* 647 *F.2d* 388, 395 (3d Cir.1981). In order to satisfy due process, notice to class members must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 *U.S.* 306, 314–15, 70 *S.Ct.* 652, 94 *L. Ed.* 865 (1950). It is most appropriate to determine the adequacy of notice before an inquiry is conducted into the merits of the settlement. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 148 *F.3d* 283, 326–28 (3d Cir.1998). In *R.* 4:32–1(b)(3) actions, class members must receive "the best notice practicable under the circumstances, consistent with due process of law." *R.* 4:32–2(b).

The settling parties sent the best notice practicable to class members. In September 2005, over 7.3 million notices were mailed to potential class members. Extensive efforts were made to follow-up where mailed notices were returned as undeliverable. The source of the information that identified potential class members—the New Jersey Motor Vehicle Commission—appears comprehensive and more likely complete than that gleaned just from settling defendants' business records. In addition, the settling parties caused publication of a satisfactory short form notice of the settlement in the Sunday editions of fifteen New Jersey newspapers with a combined circulation of over three million readers. Moreover, the short form notice of settlement appeared in a regional edition of Parade Magazine supplied as a weekend supplement in 47 newspapers in five states. The settling parties established an internet-based website, www.njautosettlement.com, which provides comprehensive information to anyone interested in the action.

Furthermore, the substance of the notice was adequate. It clearly communicated its purpose, the nature of the action, class membership criteria, the recovery sought, the nature of the settlement, the attorneys' fees sought, and notice of the Fairness Hearing. The notice provides that any potential class members who do not wish to be included in the settlement must submit a written request to be excluded. The dates for submitting claims, exclusion requests, and opposition to the settlement were clearly indicated. Such notice meets the requirements of due process and *R.* 4:32–4.

C. The Class

***5** The parties seek final certification of a settlement class pursuant to *R.* 4:32–1(a) and *R.* 4:32–1(b)(3). In order to determine whether the requirements for class action maintainability have been met, inquiry beyond the pleadings must be made because "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. American Tobacco Co.,* 84 *F.3d* 734, 744 (5th Cir.1996); *accord, Carroll v. Cellco Partnership,* 313 *N.J.Super.* 488, 495, 713 A.2d 509 (App.Div.1998).

A trial court should not certify a class until it has been determined, through rigorous analysis, that all the prerequisites of the rule governing class actions have been satisfied. As a first hurdle, as noted, a class is appropriate for certification only if it meets the four prerequisites of a class action set out in R. 4:32–1(a). Under this rule, one or more members of a class may sue or be sued as representative parties on behalf of all, only if (1) the class is so numerous that joinder of all members is impracticable (numerosity), (2) there are questions of law or fact common to the class (commonality), (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality), and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy).

1. Numerosity

To begin, *R.* 4:32–1(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." This requirement does not demand that joinder be impossible, but rather that joinder would be extremely difficult or inconvenient. *See Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.,* 149 *F.R.D.* 65, 73–74 (D.N.J.1993) (impracticability does not mean impossibility, but rather that the difficulty or inconvenience of joining all members calls for class certification). Whether joinder of all of the class members would be impracticable depends upon the circumstances surrounding the case and not merely on the number of class members. *See General Tel. Co. of the Northwest v. E.E.O.C.,* 446 *U.S.* 318, 329, 100 *S.Ct.* 1698, 64 *L.Ed.2d* 319 (1980) (numerosity requires examination of specific facts of each case and imposes no absolute numerical limitations). See also *Liberty Lincoln Mercury,* 149 *F.R.D.* at 73 (number is not, by itself, determinative). While no minimum number of class members is required, "generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong ... has been met." *Stewart v. Abraham,* 275 *F.3d* 220, 226–27 (3d Cir.2001). A class of 81 property owners seeking money damages was found to be sufficient to meet the numerosity requirement. *Saldana v. City of Camden,* 252 *N.J.Super.* 188, 193, 599 A.2d 582 (App.Div.1991). In order to satisfy the numerosity requirement "[p]recise enumeration of the members of a class is not necessary." *Zinberg v. Washington Bancorp, Inc.,* 138 *F.R.D.* 397, 405 (D.N.J.1990); *see also In re Cadillac, supra,* 93 *N.J.* at 425, 461 A.2d 736.

***6** Joinder of all class members is impracticable in this case. As of the Fairness Hearing, there were over 2.7 million class members identified within the class definition. I conclude that plaintiffs have more than enough to satisfy the numerosity requirement of *R.* 4:32–1(a)(1).

2. Commonality

Rule 4:32–1(a)(2) requires that there be questions of law or fact common to the class, "although not all questions of law or fact raised need be in common." *Weiss v. York Hospital,* 745 *F .2d* 786, 808–809 (3d Cir.1984), *cert. denied,* 470 *U.S.* 1060, 105 *S.Ct.* 1777, 84 *L.Ed.2d* 836 (citing 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1763, at 603 (1972)). Where class members' factual circumstances are materially identical and the "questions of law raised by the plaintiff are applicable to each [class] member," the commonality requirement is satisfied. *Weiss v. York Hospital, supra,* 745 *F.2d* at 809 (citations omitted). Further, the commonality requirement is met "[w]hen the party opposing the class has engaged in a course of conduct that affects a group of persons and gives rise to a cause of action," resulting in all of the members sharing at least one of the elements of that cause of action. *Newberg Class Actions,* § 3.10 (3d ed.1992). Common questions arise "from a 'common nucleus of operative facts' regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *In re Asbestos School Litig.,* 104 *F.R.D.* 422, 429 (E.D.Pa.1984), *aff'd in part, vacated in part sub nom.; In re School Asbestos Litig.,* 789 *F .2d* 996 (3d Cir.1986), *cert. denied,* 479 *U.S.* 852, 107 *S.Ct.* 182, 93 L.Ed.2d 117, 35 *Ed. Law Rep.* 30 (1986). "A common nucleus of operative fact[s] is typically found [when] defendants have engaged in standardized conduct toward members of the proposed class." *In re Life USA Holdings Inc. Ins. Litig.,* 190 F.R.D. 359, 366 (E.D.Pa.2000); *Kugler v. Romain,* 58 *N.J.* 522, 279 A.2d 640 (1971). It should be kept in mind, however, that "commonality becomes obscured when the probable unique issues of liability, causation, and damages in each case are considered, requiring individualized treatment at trial." *Saldana v. City of Camden, supra,* 252 *N.J.Super.* at 197, 599 A.2d 582.

The conduct at issue includes the defendants' actions during individual acquisition transactions for new and used motor vehicles and their alleged conduct as a group of conspirators. Plaintiffs allege not only concerted consumer fraud by all defendants, but as for individual automotive retailers, plaintiffs assert that their conduct vis-à-vis all consumers was the product of unfair and unconscionable business practices. This uniform conduct militates in favor of finding a common core of operative facts and circumstances and satisfies the requirement of commonality.

3. Typicality

***7** *Rule* 4:32–1(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." "When the same unlawful conduct was directed at or affected both the named plaintiff and the members of the putative class, the typicality requirement is usually met, irrespective of varying fact patterns that may underlie individual claims." *Cannon v. Cherry Hill Toyota, Inc.,* 184 *F.R.D.* 540, 544 (D.N.J.1999). In order to meet the typicality requirement, a plaintiff must show that her "injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff ." *In re Am. Med. Sys. Inc.,* 75 *F.3d* 1069, 1082 (6th Cir.1996) (quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions,* § 3:76 (4th ed.2002). The court must ask whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members to assure that the absentees' interests will be fairly represented. *Baby Neal v. Casey,* 43 *F.3d* 48, 57 (3d Cir.1994). By ensuring that the class representative's claims are similar to those of the class, the typicality requirement, like commonality, promotes efficient case management and fair representation. Yet, despite this similarity, the commonality and typicality requirements serve distinct functions. The commonality requirement tests the sufficiency of the class claim. *See Hassine v. Jeffes,* 846 *F.2d* 169, 177 n. 4 (3d Cir.1988). The typicality requirement focuses on the relation between the representative party and the class as a whole. *Id.* The New Jersey Supreme Court has stated that "[t]he claims of the representatives 'must have the essential characteristics common to the claims of the class." ' *In re Cadillac, supra,* 93 *N.J.* at 425, 461 A.2d 736 (quoting 3B Moore's Federal Practice ¶ 23.06–2 (1982)).

A central issue in the instant case, claimed to be shared by plaintiffs and the members of the proposed class alike, is whether defendants' conduct amounted to deceptive business practices under New Jersey law. The claims asserted and the defenses that would be arrayed against plaintiffs are typical of those that would be asserted for and against the class. Those claims arise from the same nucleus of alleged facts: defendants overcharged consumers for title, registration, and documentary preparation costs. Typicality exists.

4. Adequacy of Representation

The binding effect of all class action decrees raises significant due process questions that are directly relevant to *R.* 4:32–1(a)(4). If absent class members are to be conclusively bound by the result of an action prosecuted or defended by a party alleged to represent their interests, basic notions of fairness and justice demand that the representation they receive be adequate. The adequacy requirement mandates an inquiry into the zeal and competence of the representatives' counsel and the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees. The adequacy inquiry also "serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent." *See Amchem Prods., Inc. v. Windsor,* 521 *U.S.* 591, 625, 117 *S.Ct.* 2231, 138 *L.Ed.2d* 689 (1997). Furthermore, because absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times. Differences between the named plaintiffs and absent class members render the named plaintiffs inadequate representatives only where those differences create conflicts between the named plaintiffs' and the absent class members' interests.

***8** One accepting employment as counsel in a class action does not become a class representative through simple operation of the free enterprise system; rather, both the class determination and designation of counsel as class representative comes from judicial determinations, and the attorneys so benefited serve in something of a position of public trust, and they share with the court the burden of protecting the class action device against public apprehensions that it encourages strike suits and excessive attorney fees. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.,* 481 *F.2d* 1045 (2d Cir.1973), on remand, *certiorari denied* 414 *U.S.* 1092, 94 *S.Ct.* 722, 38 *L. Ed.2d* 549. To determine whether the proposed class satisfies *R.* 4:32–1(a)(4), I must evaluate the adequacy of class counsel. Factors such as counsel's experience with class actions,

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knowledge of the subject matter at issue in the case, and the resources of counsel are relevant to this determination. *Haley v. Medtronic, Inc.,* 169 *F.R.D.* 643, 650 (C.D.Cal.1996); *In re Prudential Secs.,* 163 *F.R.D.* 200, 208 (S.D.N.Y.1995). Additionally, the court is under an obligation to evaluate carefully the legitimacy of the named plaintiffs' plea that they are proper class representatives. Thus, the Supreme Court has admonished federal district courts that they are to 'stop, look, and listen' before certifying a class, *Kremens v. Bartley,* 431 *U.S* . 119, 135, 97 *S.Ct.* 1709, 1718, 52 *L. Ed.2d* 184 (1977). The adequacy of representation issue is of critical importance in all class actions and the court is under an obligation to pay careful attention to the *R.* 4:32–1(a)(4) prerequisite in every case. *Vervaecke v. Chiles, Heider & Co.,* 578 *F.2d* 713, 719 (8th Cir.1978). Finally, it should be noted that plaintiffs have the burden of establishing that a case is certifiable as a class action and that, as class representatives, the named plaintiffs meet all of the *R.* 4:32–1 requirements. In order properly to represent absent members of a class, counsel for named parties who seek to be class representatives must be more than merely attorneys admitted to practice before the particular court hearing the case; they must have sufficient experience and training to satisfy the trial court that they will be strenuous advocates for the class, and their conduct will be evidence of their capability adequately to represent the class. The requirement that the attorneys for class representatives be experienced is intended to mean that they be experienced in the type of litigation involved. *Carpenter v. Hall,* 311 F.Supp. 1099 (S.D.Tex.1970).

Generally, "[a]dequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class ." *Wetzel v. Liberty Mutual Insurance Co.,* 508 *F.2d* 239, 247 (3d Cir.), *cert. denied,* 421 *U.S.* 1011, 95 *S.Ct.* 2415, 44 *L.Ed.2d* 679 (1975). The proposed class here satisfies the standards of *R.* 4:32–1(a)(4). From my review of the record presented, plaintiffs' attorneys appear to be qualified and experienced to conduct this litigation. I perceive no interests antagonistic to those of the potential class and no conflicts are apparent on the record. Moreover, the plaintiffs are adequate representatives for all members of the class who reside in this state. The adequacy requirement is satisfied.

5. Rule 4:32–1(b)(3)

***9** The parties seek certification under *R.* 4:32–1(b)(3), requiring that "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to any other available methods for the fair and efficient adjudication of the controversy." *R.* 4:32–1(b)(3).

a. Predominance

The issue of predominance under *R.* 4:32–1(b)(3) focuses on "whether the potential class, including absent class members, seeks to remedy a common legal grievance." *In re Cadillac, supra,* 93 *N.J.* at 431, 461 A.2d 736; *see also Delgozzo v. Kenny, supra,* 266 *N.J.Super.* at 189, 628 A.2d 1080. In order to meet the predominance requirement of *R.* 4:32–1(b)(3) plaintiffs must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof. In other words, just because the legal issues involved may be common between class members does not mean that the proof required to establish these same issues is sufficiently similar to warrant class representation and treatment.

Therefore, the predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Moore v. Paine Webber, Inc.,* 306 *F.3d* 1247, 1252 (2d Cir.2002). The predominance requirement is far more demanding than the commonality requirement. *See Amchem Prods., Inc. v. Windsor,* 521 *U.S.* 591, 623–24, 117 *S.Ct.* 2231, 138 *L.Ed.2d* 689 (1997). Because *R.* 4:32–1(b)(3) requires that common issues predominate, class certification may be denied where common issues of law are not present or where resolving the claims for relief would require individualized inquiries. *See, e.g., Lewis Tree Serv., Inc. v. Lucent Techs. Inc.,* 211 *F.R.D.* 228, 235 (S.D.N.Y.2002) ("At a basic level, a nationwide class action in which plaintiffs raise claims of fraud would require the application of the law of at least fifty jurisdictions and would make class certification inappropriate."); *In re Methyl Tertiary Butyl Ether* ("MTBE"), 209 *F.R.D.* 323, 350 (S.D.N.Y.2002) (finding no predominance given plaintiffs' allegation that MTBE contamination occurred "over many years across four states indirectly caused by twenty defendants in conjunction with innumerable third parties who released the contaminant into the environment"). "The critical consideration is whether there is a 'common nucleus of operative facts." ' *Carroll v. Cellco Partnership, supra,* 313 *N.J.Super.* at 499, 713 A.2d 509.

In this case, predominance is present. Not only will the same universe of legal principles apply—that is, the law of

the state of New Jersey due to the geographical limit of the class definition—but the actions of the defendants are discrete, perhaps similar, if not uniform, and confined to a distinct area of their operations. Whether the title, registration, and documentary preparation fees imposed by defendants constitutes an unfair business practice under the circumstances is the focus of the evidence that will be presented to the trier of fact. This will involve a cohesive set of proofs that lends itself to class action treatment.

b. Superiority

***10** *Rule* 4:32–1(b)(3) requires that a class action be a superior method for the adjudication of a controversy. Implicit in this requirement is an identification of the relevant factual and legal issues underlying the request for class certification. *In re Cadillac, supra,* 93 *N.J.* at 426, 461 A.2d 736. The mere identification of those issues, however, is less penetrating than their subsequent evaluation on a motion for summary judgment or at trial. *Id.* Certification of a class action should not be denied because of the merits underlying the theory on which the action is predicated. *Olive v. Graceland Sales Corp.,* 61 *N.J.* 182, 189, 293 A.2d 658 (1974). "Nonetheless, even the identification of the issues to determine the suitability of an action for certification requires some preliminary analysis." *In re Cadillac, supra,* 93 *N.J.* at 426, 461 A.2d 736 (citing Miller, *An Overview of Federal Class Actions: Past, Present and Future* 51 (1977)). Thus, the court must engage in a cursory analysis of plaintiffs' claims to determine whether class certification represents a superior form of dispute resolution for the statutory and common law fraud claims.

In evaluating the superiority of a class action, the court should inquire as to the class members' interest in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; whether it is desirable to concentrate litigation of claims in this forum; and the manageability of a class action. As only a settlement class is at issue, manageability of a trial is not a consideration. *In re Ikon Office Solutions, Inc. Sec. Litig.,* 194 *F.R.D.* 166, 178, n. 14. (E.D.Pa.2000) (citing *Amchem Prods. Inc. v. Windsor,* 521 *U.S* . 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)).

Consideration of the enumerated factors leads to the conclusion that the class action is superior to other forms of suit. Although 500 persons have requested exclusion from the class, there has been little individual interest in pursuing individual claims. Rather, where there are similar suits, they are styled as class actions directed against targeted defendants. Of the few class members have objected to the settlement, none has expressly objected to class certification. Furthermore, while damage estimates collectively reach into the millions of dollars, an average individual's damages—even if trebled—would likely not exceed $100. Finally, by concentrating the litigation in this forum will likely save judicial resources. An analysis of the superiority factors commends a finding that the class should be certified.

D. The Settlement

It is worthwhile to acknowledge that settlement of litigation holds a lofty position in the pantheon of public policy. *Lahue v. Pio Costa,* 263 N.J.Super. 575, 623 A.2d 775 (App.Div.), *certif. denied,* 134 N.J. 477, 634 A.2d 524 (1993); *Pascarella v. Bruck, supra,* 190 N.J.Super. at 125, 462 A.2d 186; *Bistricer v. Bistricer, supra,* 231 N.J.Super. at 147, 555 A.2d 45; *Department of the Pub. Advocate v. Board of Pub. Util.,* 206 N.J.Super. 523, 528, 503 A.2d 331 (App.Div.1985); *Jannarone v. W .T. Co.,* 65 N.J.Super. 472, 476–77, 168 A.2d 72 (App.Div.), *certif. denied sub. nom. Jannarone v. Calamoneri,* 35 N.J. 61, 171 A.2d 147 (1961). The settlement of lawsuits is favored not because of the salutary consequence of relieving overburdened judicial and administrative calendars but because of the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way that is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible. It follows that any action that would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general should not be countenanced.

***11** *Rule* 4:32–4 imposes upon the trial judge the duty of protecting absentees, which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims. *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 *F.3d* 768, 805 (3d Cir.1995). The Third Circuit has noted that in deciding the fairness of a proposed settlement, "the evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.* at 806 (citations omitted). At the same time, it has been noted that cases such as this, where the parties simultaneously seek certification and settlement approval,

require courts to be even more scrupulous than usual when they examine the fairness of the proposed settlement. *In re Prudential Ins. Co. of Am. Sales Practice,* supra, 148 *F.3d* at 317 (citing *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 *F.3d* at 805). This heightened standard is designed to ensure that class counsel has demonstrated "sustained advocacy" throughout the course of the proceedings and has protected the interests of all class members. *Id.* at 317.

The hallmark of any settlement to be approved by the court must provide assurances that the settlement "is fair and reasonable to the members of the class." *Chattin v. Cape May Greene, Inc.,* 216 N.J.Super. at 627, 524 A.2d 841. In today's day and age, however, more than this is required. Legal commentators and judges have documented well-publicized and sometimes notorious abuses of class action settlements. *See In re Cendant Corp. Litig.,* 182 *F.R.D.* 144, 150 (D.N.J.1998) ("It is no insult to the judiciary to admit that a court's expertise is rarely at its most formidable in the evaluation of counsel fees[.]"); *In re Oracle Sec. Litig.,* 136 *F.R.D.* 639, 645 (N.D.Cal.1991) ("Class counsel's fee application is presented to the court with the enthusiastic endorsement, or at least acquiescence, of the lawyers on both sides of the litigation, a situation virtually designed to conceal any problems with the settlement not in the interests of the lawyers to disclose."); *Kamilewicz v. Bank of Boston Corp.,* 100 *F.3d* 1348, 1352 (7th Cir.1996) (Easterbrook, J., dissenting) ("The court can't vindicate the class's rights because the friendly presentation means that it lacks essential information."); James Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action,* 46 *S. Tex. L.Rev.* 391, 412 (2004) ("The class action abuse problem has hit critical mass."); Rhonda Wasserman, *Dueling Class Actions,* 80 *B.U. L.Rev.* 461, 470 (2000)(noting the problems that plague dueling class actions: duplication of effort, waste of judicial resources, inordinate pressure on class counsel to settle and difficult preclusion problems.); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 *Colum. L.Rev.* 1343 (1995); see also Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement,* 82 *Va. L.Rev.* 1051 (1996) (noting prevalence of collusive settlements); John Leubsdorf, *Co-opting the Class Action,* 80 *Cornell L.Rev.* 1222 (1995) (analyzing how defendants can manipulate class actions). Thus, in order to give more than lip service to the fairness and adequacy standard, it is imperative that the court also assure itself that the settlement is "fair, adequate, and reasonable, and not the product of collusion." *Joel A. v. Guiliani,* 218 *F.3d* 132, 138 (2d Cir.2000). To do this requires a framework, one that is readily found in several federal sources. For example, the *Manual for Complex Litigation, Fourth* lists the following non-exclusive factors for judges to consider when reviewing an application to approve a class action settlement:

> ***12** 1. the advantages of the proposed settlement versus the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;
>
> 2. the probable time, duration, and cost of trial;
>
> 3. the probability that the class claims, issues, or defenses could be maintained through trial on a class basis;
>
> 4. the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other factors that bear on the probable outcome of a trial on the merits;
>
> 5. the extent of participation in the settlement negotiations by class members or class representatives, and by a judge, a magistrate judge, or a special master;
>
> 6. the number and force of objections by class members;
>
> 7. the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under above paragraph 1 or 4;
>
> 8. the effect of the settlement on other pending actions;
>
> 9. similar claims by other classes and subclasses and their probable outcome;
>
> 10. the comparison of the results achieved for individual class or subclass members by the settlement or compromise and the results achieved or likely to be achieved for other claimants pressing similar claims;
>
> 11. whether class or subclass members have the right to request exclusion from the settlement, and, if so, the number exercising that right;
>
> 12. the reasonableness of any provisions for attorney fees, including agreements on the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;
>
> 13. the fairness and reasonableness of the procedure for processing individual claims under the settlement;

14. whether another court has rejected a substantially similar settlement for a similar class; and

15. the apparent intrinsic fairness of the settlement terms.

In determining the weight accorded these and other factors, courts have examined whether

• other courts have rejected similar settlements for competing or overlapping classes;

• the named plaintiffs are the only class members to receive monetary relief or are to receive relief that is disproportionately large (differentials are not necessarily improper, but may call for judicial scrutiny);

• the settlement amount is much less than the estimated damages incurred by members of the class as indicated by preliminary discovery or other objective measures, including settlements or verdicts in individual cases;

• the settlement was completed at an early stage of the litigation without substantial discovery and with significant uncertainties remaining;

• nonmonetary relief, such as coupons or discounts, is unlikely to have much, if any, market or other value to the class;

***13** • significant components of the settlement provide illusory benefits because of strict eligibility conditions;

• some defendants have incentives to restrict payment of claims because they may reclaim residual funds;

• major claims or types of relief sought in the complaint have been omitted from the settlement;

• particular segments of the class are treated significantly differently from others;

• claimants who are not members of the class (e.g., opt outs) or objectors receive better settlements than the class to resolve similar claims against the same defendants;

• attorney fees are so high in relation to the actual or probable class recovery that they suggest a strong possibility of collusion;

• defendants appear to have selected, without court involvement, a negotiator from among a number of plaintiffs' counsel; and

• a significant number of class members raise apparently cogent objections to the settlement. (The court should interpret the number of objectors in light of the individual monetary stakes involved in the litigation. When the recovery for each class member is small, the paucity of objections may reflect apathy rather than satisfaction. When the recovery for each class member is high enough to support individual litigation, the percentage of class members who object may be an accurate measure of the class' sentiments toward the settlement. However, an apparently high number of objections may reflect an organized campaign, rather than the sentiments of the class at large. A similar phenomenon is the organized opt-out campaign.) § 21.662 *Manual for Complex Litigation, Fourth* 316–318 (footnotes omitted).

These factors are similar to those regularly utilized in the Second and Third Circuits for over thirty years, *see City of Detroit v. Grinnell Corp.,* 495 *F.2d* 448, 463 (2d Cir.1974); *In re Elan Securities Litigation,* 385 *F.Supp.2d* 363, 368 (S.D.N.Y.2005); *Girsh v. Jepson,* 521 *F.2d* 153, 156 (3d Cir.1975); *Varacallo v. Mass. Mut. Life Ins. Co.,* 226 *F.R.D.* 207, 235 (D.N.J.2005), and commend themselves for use in this jurisdiction and in this case in particular.

1. Advantages of Settlement over Probable Outcome at Trial

In evaluating the risks of establishing liability and damages, it is appropriate to survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were take to trial against the benefits of immediate settlement. *In re Prudential Ins. Co. of Am. Sales Practices Litig ., supra,* 148 *F.3d* at 319. However, the court should avoid conducting a "mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel[.]" *In re Ikon Office Solutions, Inc. Sec. Litig ., supra,* 194 *F.R.D.* at 181 (citation omitted).

This case is a complex amalgam of fraud, consumer fraud, and conspiracy theories. To succeed on its claims, the class must establish that each defendant engaged in fraudulent conduct, or at best, unfair business practices. Additionally, if the conspiracy claims are not mere makeweight or window dressing, the class would have to prove concerted action by members of an industry that thrives on competition in a cutthroat market. Regardless of the strength of the case class counsel might present at trial, victory in litigation is never guaranteed and here a successful outcome on all proffered theories is dubious at best. A jury could place considerable weight upon the

credibility and testimony of defendants and other witnesses, some of whom are well-respected businesspersons, who would undoubtedly deny all aspects of knowledge of a fraud and conspiracy. Such risks as to liability strongly weigh in favor of the settlement.

***14** In addition, the class would have to overcome damage defenses that defendants would assert. As is often the case, the parties would likely engage in a battle of experts on the question of valuation, the outcome of which would be unpredictable. Settlement is favored because it eliminates these inherent, unavoidable litigation risks.

2. Probable Time, Duration, and Cost of Trial

This factor is intended to capture the probable costs, in both time and money, of continued litigation through trial. *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 *F.3d* at 812. Although the parties have already expended enormous sums to enable them to reach this settlement, much more would be necessary to conclude this dispute under the auspices of a jury. Although the discovery period expired long ago, if the settlement had not been advanced I would have reopened and extended the discovery period to allow a vast array of pre-trial processes to occur, including hundreds of depositions of representatives of the defendants. In addition, there are over 100 plaintiffs who would likely have been deposed. Moreover, the parties undoubtedly would have engaged the services of opinion-rendering witnesses, incurring the expense of hiring, preparation, transportation, and deposition of these expert witnesses.

After this costly and lengthy discovery, it is likely that the parties would have engaged in extensive motion practice, consisting of, at a minimum, motions for summary judgment and evidentiary in limine applications. The costs associated with prosecuting and defending these motions would have diminished the recovery of the class, depleted the resources of defendants, and presented the court with thorny legal, evidential, and factual issues to resolve.

Finally, trial of the liability issues alone—especially the conspiracy claim—would have involved substantial attorney and expert time, the introduction of voluminous documentary and deposition evidence, vigorously contested motions, and the considerable expenditure of judicial resources. The damages calculation at trial, including an allocation for so many defendants, would involve time-consuming and complex economic analyses, straining the patience of even the most engaged jurors. All of these expenses would impose a significant burden on any recovery obtained for the class if plaintiffs were even ultimately successful. A result that avoids an unnecessary and unwarranted expenditure of time and resources benefits everyone. *Computron Software, Inc., Sec. Litig.,* 6 *F.Supp.2d* 313, 317 (D.N.J.1998).

3. Probability of Maintaining the Class Action Through Trial

"The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action." *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 *F.3d* at 817. While decertification is always a possibility in any class action, the parties do not identify any particular issue or circumstance in this case that might lead to a particular risk of decertification. On the other hand, the unusual nature of 100 plaintiffs' claims relating to concerted action against *all* 400 defendants might portend problems of maintaining a class on that issue. Consideration of this factor weighs only slightly in favor the settlement.

4. Maturity of the Underlying Substantive Issues

***15** This factor evaluates, among other things, the novelty of the class theories of liability and assesses the probable outcome of those theories at trial. In this action, where plaintiffs assert traditional statutory consumer and common law fraud theories, there is but a small likelihood that legal issues will be paramount at trial. Instead, the hotly contested factual disputes, especially those that revolve around the conspiracy allegations, will be the engine that drives the litigation. That having been said, plaintiffs would still have to deal with the recent Appellate Division decision on documentary preparation fees, *Gross v. TJH Auto. Co., L.L.C.,* 380 *N.J.Super.* 176, 881 A.2d 760 (App.Div.2005), that affirmed the dismissal of a putative class action with claims similar to the instant class. Thus, this factor neither favors nor militates against the fairness of the settlement.

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5. Nature of Settlement Negotiations

The settling parties have trumpeted the arms-length manner in which the settlement was reached. Starting out as wary adversaries, they embraced a court-imposed alternate dispute resolution process and spent nine months working under the stewardship of a retired member of the judiciary. During this process, the parties' negotiating teams were largely kept apart from one another as a negotiation strategy, and when they were brought together, fireworks ensued, and not the good kind. Anger, frustration, and misunderstandings were all part of the process; the mediator shouldered an almost-impossible task. Then, after I terminated the settlement process and ordered the parties to devote their resources to the litigational processes, lines of communication broke down even further. Miraculously, however, an ember of settlement remained aglow, because in a few short months thereafter, the parties were able, notwithstanding some strident motion practice in the interim, to forge the instant settlement.

Given the judicial oversight of the process together with the long involvement of the neutral mediator during the settlement negotiations lends support to the parties' claim that they bargained as adversaries and at arms length. This backs the settlement. I have no sense that there was collusion among the parties that results in unfairness to the class.

6. Number and Force of Objections by Class Members

This factor is a very significant factor in assessing the fairness of the settlement. Since court approval is a substitute for the usual right of litigants to determine their own best interests, the reaction of class members is a significant element that I must consider. Courts construe class members' failure to object to proposed settlement terms as evidence that the settlement is fair and reasonable. *See Fickinger v. C.I. Planning Corp.,* 646 *F.Supp.* 622, 631 (E.D.Pa.1986) ("Unanimous approval of the proposed settlement by the class members is entitled to nearly dispositive weight."). However, courts must be cautious about "inferring support from a small number of objectors to a sophisticated settlement." *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 *F.3d* at 812. This is particularly true in large consumer fraud class action cases, as many consumers may have such small amounts at stake that it is imprudent to invest the time and resources to contest a settlement. To date, there have been only twenty-four objections lodged, including one objection by a non-class member.[4] This is an inconsequential number and does not militate toward derailing the settlement. *Bell Atl. Corp. v. Bolger,* 2 *F.3d* 1304, 1313 n. 15 (3d Cir.1993) (finding that 30 objectors in a class of 1.1 million is an "infinitesimal number").

***16** In terms of the substance of the objections, they include many duplicative arguments, and they may be fairly summarized as follows:

- The settlement is unfair to those consumers who no longer live in New Jersey and are not likely to acquire a motor vehicle or obtain service at one of the defendant dealerships in the next two years.
- The settlement is unfair because it obligates class members to redeem their $100–off coupons with the dealer who "tacitly admits dishonesty."
- The settlement is unfair to those consumers whose buying habits do not coincide with the two-year period for redemption of the $100–off coupons.
- The settlement is unfair because the attorneys' fees are disproportionate to the benefits to be received by individual class members.
- The settlement is unfair because it is the product of a "legal shakedown" and encourages a litigious society.
- The settlement is unfair because confidential Motor Vehicle Commission records were used to identify class members.
- The settlement is unfair to class members who purchased multiple vehicles, thereby entitling them to multiple $100–off coupons, but no more than one coupon may be used per transaction in the ensuing two years.

For the most part, the objections focus almost exclusively on discrete components of the settlement. Most only complain about the limited utility of the $100–off coupons and ignore the other benefits in the settlement, including the dollar-for-dollar refund to qualified claimants. They also ignore the free transferability of the coupons and the potential that an informal, internet-based market may emerge to instill further value in the coupons. Finally, although the objectors probably could not know this, due to the competitive nature of the industry, defendants are already cross honoring and accepting $100–off coupons issued for other defendant dealerships, and this is occurring even before the coupons become effective! I am satisfied that although many of the objections are heart-felt and articulate, they do not present a convincing case to reject the settlement. The thunderous silence from the vast majority of class members is an overwhelming indication

that the settlement is fair and adequate. It need not be perfect in order to be approved.

7. Ability of the Parties to Pay, Collect, or Enforce the Settlement

This factor does not favor settlement because the evidence is unclear concerning the true cost of the settlement to each defendant. Frankly, when allocated to the 397 defendants, the individualized cost of the settlement is likely to be a mere annoyance to most of them. Although there is a broad spectrum of defendants, ranging from one-store dealerships to highway dealerships controlling a dozen or more stores, the parties could do no more than provide a speculative opinion about the overall value of the settlement. That opinion did not analyze the costs of the settlement to the separate defendants and no factual evidence was presented that would assist me in determining whether there would be a significant risk of nonpayment of the settlement by any individual or group of defendants.

8. Effect of Settlement on Pending Actions

***17** It appears that several other putative class actions have been commenced in New Jersey by class members, and some by non-class members that seek similar relief to that sought in this action. I predict that this settlement will obviate those other class actions by class members, thereby conserving the resources of those parties and judicial resources in those vicinages. This favors settlement here. By this prediction, I am not authoritatively determining the effect of this settlement for preclusion purposes, and I leave those knotty decisions to judges in the other cases if the issue arises.

9. Similar Claims by Other Classes

The parties have credibly advised me that several similar class actions against individual defendant dealerships have been settled and approved in other vicinages. More importantly, it has been represented that those settlements are similar in nature and scope with this one. This favors approval of the settlement here.

10. Comparison of Results Achieved by Individual Class Members

This factor neither favors nor disfavors settlement because the parties have not brought the results of such individual claims to my attention.

11. Exclusion Requests

In a class of over 2.7 million New Jersey residents, only approximately 500 exercised their right to opt-out of the settlement. This is less than 1/50th of 1%, a miniscule and insignificant number. This factor favors the settlement.

12. Reasonableness of Attorneys' Fees

The attorneys in this case seek approval—pursuant to the settlement terms—of a *minimum* of $7,146,000 in attorneys' fees, computed upon the simple arithmetic of multiplying $18,000 per defendant times the 397 defendants who accepted the settlement terms. However, based upon the more fine-tuned and complex formula for the payment of attorneys' fees contained in the settlement that ties attorneys fees to the size of the specific defendant and the number and nature of the claims against a specific defendant, that minimum has been recalculated to be $8,889,523.50. The attorneys for the class candidly acknowledge that after all of the claims of class members are audited, their attorneys' fees may approach $9.5 million.

The attorneys' fees sought are in excess of the actual time value of the work done. In other words, the simple expedient of multiplying the actual hours of work expended to date times the hourly rate of the attorney or paralegal yields a lodestar fee, as of the end of December 2005, in the amount of $2,575,588.[5] Although this lodestar has already been enlarged due to the attorneys' preparation and attendance at the Fairness Hearing, and will continue to increase even if the settlement is approved as they engage in oversight activities related to the settlement, the amount of the ultimate lodestar is the subject of mere conjecture. The requested attorneys' fees of $9.5 million reflect a multiplier of 3.69 times the lodestar.[6]

For reasons that will be outlined in detail later in this opinion, I conclude that the requested attorneys' fees are unreasonable. Instead, I will award the amount of $5,113,507. Since the award will not be paid by or charged to individual class members, and will be borne entirely by

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the defendants, even this generous amount of attorneys fees does not militate against the settlement. Moreover, because the attorneys fees were negotiated *after* the terms of the settlement that strictly applied to the class were completed, there is little evidence of collusion or conflict of interest on the part of the class attorneys. Finally, even the exorbitant agreement for the payment by defendants of $9.5 million in attorneys' fees does not fairly imply that the plaintiffs' attorneys were colluding with the defendants. In short, the settlement is not subject to scuttling just because the requested attorneys fees' are so high.

13. Claims Processing

***18** Over 306,000 claims have been lodged with the settlement administrator for determination whether the individual claimants are entitled to a dollar-for-dollar refund of overcharges and the bonus 10%-off coupon for egregious overcharges in excess of $35. The settlement administrator appears competent and well equipped to process expeditiously the claims and has set up lines of communication with defendants to obtain information and to audit claims. Although the settlement administrator is not a true neutral (not having been independently selected by the court), it nevertheless is in a position to treat the claims of class members appropriately and fairly. This circumstance tends to favor the settlement.

14. Other Actions

This factor explores whether other courts have already rejected substantially similar settlements for similar classes. There is no evidence that any court has rejected a settlement akin to this one, given the scope and breadth of this case. On the other hand, several related actions of more modest scale have successfully navigated the settlement approval process on terms similar to the instant settlement. This favors settlement here.

15. Intrinsic Fairness of the Settlement

By almost any standard, plaintiffs embarked upon an overly ambitious, almost quixotic, quest to obtain remedies for consumers for purported violations of the NJCFA and for common law fraud. They also threw in claims of conspiracy for good measure, knowing that proof of concerted action would be extremely difficult to come by. Even with the public's acknowledged skepticism of the business practices of automotive dealerships, plaintiffs faced formidable obstacles in arriving at a satisfactory resolution of their grievances. If the plaintiffs were able to obtain class certification in a contested environment, resist the inevitable dispositive motions of defendants, survive the crucible of the trial, and obtain the best possible result from a jury, the result would likely resemble this settlement. The only material difference would be the imposition of treble damages pursuant to the NJCFA, and the elimination of the two species of coupons. If the average overcharge is approximately $19 to $20 per class member, as the preliminary data suggest, the individual recovery to class members might, in fact, be less than this settlement, especially for those class members who are able to take advantage of the $100–off coupon. Thus, I see nothing that commends a rejection of the settlement in favor of casting class members' fates to the wind by going to trial. The four main elements of the settlement—dollar-for-dollar refunds for overcharges, $100–off coupons, 10%-off coupons, and injunctive relief—present a powerful array of relief that cannot be rationally challenged. It is easy to nitpick and second-guess discrete elements of the settlement, and to take cheap shots at the attorneys' fees, but in the end, the settlement stands tall on its own two feet. This factor favors settlement.

16. Miscellaneous Factors[7]

***19** The two most substantial components of the miscellaneous group of factors that are relevant to this case are an analysis of the stage of the litigation when the action settled, and an analysis of whether the nonmonetary relief—coupons or discounts—is likely to have much if any market or other value to the class. As for the former, a settlement should not be approved if the parties do not have an adequate appreciation of the merits of the case. Consequently, the type and amount of discovery, formal or informal, that has occurred since the inception of the action are relevant to the propriety of the settlement. However, the fact that this case settled before class certification was decided and before the lion's share of formal discovery was completed should not mask the fact that plaintiffs' attorneys had obtained voluminous discovery data through the processes of the alternate dispute resolution mechanism. Although the parties were still far apart in terms of supplying discrete data relating to individual consumers or a sampling of random data of dealer transactions, plaintiffs' counsel enjoyed a welter of information. I am satisfied that the parties reached this settlement only after plaintiffs' counsel engaged in careful and extensive research, investigation, and analysis of the facts and circumstances surrounding the conduct of

defendants' business practices. I conclude that class counsel have a sufficient basis upon which to assess the strengths and weaknesses of the claims and the terms of the settlement.

The question of the true value of the coupon and discount components of the settlement stands upon somewhat less firm ground, but it is not so uneasy so as to undermine the settlement. I have grave doubts that the value assigned by plaintiffs' expert witness to the coupon, discount, and injunctive relief elements of the settlement is anything more than a prohibited net opinion. I will discuss my concerns in much greater detail in my analysis of the application for attorneys' fees. Suffice to say that I am satisfied that these components of the settlement have some important value, but the quantification of that value into a meaningful number is illusory. Nevertheless, any reservations about true value are outweighed by the overall strengths of the settlement under the totality of the circumstances. For all of the reasons heretofore expressed, I am thoroughly convinced that the factors favoring settlement substantially outweigh those few factors that counsel against the settlement. Accordingly, I approve the settlement as fair, reasonable, and adequate.

E. The Attorneys' Fees

Plaintiffs' attorneys seek the court's approval of the formulaic terms of the settlement that would enable them to reap approximately $9.5 million in attorneys' fees. The notice to class members advised that a minimum of $7,146,000.00 in fees would be sought. At the Fairness Hearing, the attorneys' fees were then calculated to be $8,889,523.50 pursuant to the formula in the settlement. When all of the claims of class members are determined, plaintiffs' attorneys believe that they will be entitled to the $9.5 million.

***20** The settlement agreement links defendants' obligation to contribute to plaintiffs' attorneys fees according to a formula based upon the level of business activity of a defendant dealership and its level of compliance with good business practices. As and for attorneys fees, individual settling defendants agreed to pay plaintiffs' attorneys $2.50 per vehicle sold or leased during the applicable class period, plus $0.50 per vehicle sold or leased during the applicable class period if the settling dealership's average overcharge for title and registration fees equals $35.01 or more. Notwithstanding this two-part formula, each settling defendant agreed to pay a minimum $18,000. Thus, since there are 397 settling defendants, the minimum attorneys' fees that plaintiffs' attorneys will reap is $7,146,000. The settling defendants do not object to the payment of these attorneys fees as required by the settlement agreement. Accordingly, this "clear sailing" agreement requires even greater scrutiny by the court. *See In re Fine Paper Antitrust Litig.,* 751 *F.2d* 562, 583 (3d Cir.1984); *Weinberger v. Great N. Nekoosa Corp.,* 925 *F.2d* 518, 519 (1st Cir.1991) (In the case of a "clear sailing" agreement (i.e., where the party paying the fees agrees not to contest the court-awarded amount as long as it does not exceed a negotiated ceiling), "rather than merely rubber-stamping the request, the court should scrutinize it to ensure that the fees awarded are fair and reasonable.").

I start my analysis with consideration of the position of class members, even though the attorneys' fees will not diminish the benefits of the settlement. The most passionate statements in the few objections that were received addressed the subject of attorneys' fees. I quote a few excerpts to illustrate the tenor of some of the objectors' fury:

- Yes, I object. $100 Discount Certificate? Give me a break! How many consumers will actually use this? What a joke. Meanwhile the plaintiff attorneys walk off with $7 million dollars! This case should have been thrown out or at least deny such a ridiculous settlement to go through. You give the appearance of protecting the consumer but really the purpose of this action is to make the plaintiff attorneys rich. All the dealerships will do is pass on litigation costs and cost of the settlement to consumers anyway.

- I object to this type of legal shakedown. The auto dealership industry is highly competitive. Particularly since the advent of the internet, the buyer has tremendous leverage to get good pricing. I was able to negotiate good pricing with both dealers—a price that included the cost of registration. I do not need a class action lawyer to extract anything further from the dealerships; my transactions were arms length, and I was not cheated.

- Is it any wonder that the general public has such low regard for the legal system and views class action lawyers as abusing the system for their own enrichment at the expense of the victims that they supposedly represent?

***21** • The approval of such costs would do nothing but to further encourage a litigious society and attorneys who reap a windfall preying on individuals and businesses.

- You want to give me a certificate for $100.00, BUT ONLY IF I wish to buy a car from the same dealer who

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allegedly cheated me in the first place, plus a few dollars in cash, maybe, but you are prepared to give the attorneys $7,146,000.

It is a joke, right?

Glad to see the legal profession continuing to sticking together to screw the public.

• The settlement reflects the Court being flimflammed into furthering and promoting this pattern of abuse of the system.

• This proposed settlement constitutes a manifest denial of justice to all of the plaintiffs in general and to myself and my wife specifically. This proposed settlement is embarrassing to me as a Trial attorney and is outrageous to my wife and myself as consumers.

• This is just one more example of class actions in which no one but the lawyers gains any significant benefit and the lawyers themselves profit handsomely.

These comments mirror concerns that are found elsewhere, including in scholarly circles. *See Issues—Class Actions,* http:// www.instituteforlegalreform.com/issues (last visited on January 17, 2006) (giving examples of class action lawsuits that allegedly resulted in minimal benefits to class members, but million-dollar fees for their lawyers); *Class Actions: The New Ethical Frontier,* Lawrence W. Schonbrun, http:// www.manhattaninstitute.org/html/cjm_30.htm (last visited on January 17, 2006) (noting that one reason class actions are under attack is because of lawyer abuses); *Protecting Consumer Interests in Class Actions,* Steven B. Hantler and Robert E. Norton, 18 *Geo. J. Legal Ethics* 1343 (Fall, 2005) (discussing negative attributes of coupon settlements). It is no wonder, then, that the determination of attorneys' fees as part of a class action settlement is fraught with discomfort.

In ruling on a motion for award of attorneys' fees, I have two goals. The court seeks to protect the interests of class members by acting as a fiduciary for the class. *In re Cendant Corp. Litig.,* 264 *F.3d* 201, 231 (3d Cir.2001). The court's fiduciary role arises from a recognition that there is a potential economic conflict of interest between class members, who seek to maximize recovery from a settlement, and lawyers, who seek to maximize fees. The United States Court of Appeals for the Third Circuit has explained that the "divergence in [class members' and class counsel's] financial incentives ... creates the 'danger ... that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees." ' *In re Cendant Corp. Prides Litig.,* 243 *F.3d* 722, 730 (3d Cir.2001) (quoting *In re General Motors Corp. Pick–Up Truck Fuel Tank Prod. Liab. Litig.,* 55 *F.3d* 768, 820 (3d Cir.1995)). Consequently, "the danger inherent in the relationship among the class, class counsel, and defendants 'generates an especially acute need for close judicial scrutiny of fee arrangements' in class action settlements." ' *Id.* (quoting *In re General Motors Corp. Pick–Up Truck Fuel Tank Prod. Liab. Litig., supra,* 55 *F.3d* at 820).

***22** In examining an application for an award of attorneys' fees from a common fund, the Court also seeks to protect the public interest and, with it, the integrity of the judicial system:

> For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding "windfall fees" and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in *Trustees v. Greenough,* [105 *U.S.* 527, 26 *L. Ed.* 1157 (1881)], when it advised that fee awards under the equitable fund doctrine were proper only "if made with moderation and a jealous regard to the rights of those who are interested in the fund."
>
> > *City of Detroit v. Grinnell Corp.,* 495 *F.2d* 448, 469 (2d Cir.1974) (quoting *Trustees v. Greenough,* 105 *U.S.* 527, 536, 26 *L. Ed.* 1157 (1881)), abrogated on different grounds by *Goldberger v. Integrated Resources, Inc.,* 209 *F.3d* 43 (2d Cir.2000)).

Keeping these two goals in mind, I am bound to review thoroughly and with the eye of a skeptical client the attorneys' fee application for fairness.

1. The Incollingo Case

There appears to be only one reported decision in New Jersey that directly deals with the method of setting attorneys fees in connection with a common fund class action settlement. *Incollingo v. Canuso,* 297 *N.J.Super.* 57, 687 A.2d 778 (App.Div.1997). The opinion is noteworthy because it does not examine the extensive body of federal law that has emerged relating to attorneys' fees in common fund cases. Indeed, it ignores federal precedent and treats the matter as if it were solely a fee application pursuant to a fee-shifting statute[8] subject to *Rendine v. Pantzer,* 141 *N.J.* 292, 661 A.2d 1202 (1995). *See Incollingo v. Canuso, supra,* 297 *N.J.Super.* at 63, 687 A.2d 778.

In *Incollingo,* the total attorneys' fees of $925,000.00 plus costs of approximately $150,000.00 were to be deducted

from the settlement common fund created by the total cash recovery of $2,975,000.00 (plus coupons with a face value of $231,000). The method espoused by the court requires that the trial judge first determine the lodestar amount. Next, I am obligated to reduce the lodestar if it includes unreasonable charges or because the level of success is limited compared to the relief sought. *Id.* at 63, 687 A.2d 778. Then I must ascertain whether the hourly rates for the attorneys performing the work are reasonable. Finally, I must determine whether to increase the lodestar to "consider whether to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent upon a successful outcome." *Id.* (citing *Rendine v. Pantzer, supra,* 141 *N.J.* at 337, 661 A.2d 1202).

This methodology is at odds with the majority view of how to award attorneys' fees in common fund class actions, and is not advocated by plaintiffs' attorneys. Courts typically use the percentage of recovery method in common fund class actions, as that method is "generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure." ' *In re Rite Aid corp. Sec. Litig.,* 396 F.3d 294, 300 (quoting *In re Prudential Ins. Co. of Am. Sales Practice, supra,* 148 *F.3d* at 333.) When a court uses the percentage of recovery method, it "first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case." *In re Cendant Corp. Litig.,* 264 F.3d 201, 256 (3d Cir.2001). This is mirrored in the *Manual for Complex Litigation, Fourth,* which states:

> ***23** Historically, attorney fees were awarded from a common fund based on a percentage of that fund. After a period of experimentation with the lodestar method (based on the number of hours reasonably expended multiplied by the applicable market rate for the lawyer's services), the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases. The only court of appeals that has not explicitly adopted the percentage method seems to allow considerable flexibility in approving combined percentage and lodestar approaches.
>
> § 14.121 *Manual for Complex Litigation, Fourth* 187 (footnotes omitted).

Thus, even though *Incollingo* may not be in the mainstream of modern class action jurisprudence, I may neither ignore, nor disobey its mandate. I further note that the instant case is not a pure common fund situation where the percentage method ordinarily holds sway. Thus, as instructed by *Incollingo,* I will view plaintiffs' requested attorneys' fees under the lens of *Rendine.*

A. Determine the Lodestar

As of December 21, 2005, the billing records of MacLachlan Law Offices LLC show that commencing in April 2002, several attorneys and support staff, billing at different rates ranging from $145/hour to $400/hour, logged 6,371 hours in this case. The requested lodestar is $1,825,787, reflecting a blended hourly rate of slightly more than $285/hour. The billing records of Breslin & Breslin, P.A., as of December 29, 2005, disclose a blended hourly rate for its 2,111 hours of approximately $350/hour. The requested lodestar is the sum of the two law firms' work product, $2,572,587, reflecting an aggregate average hourly rate of $303.30. I have scoured these records in vain to find an unreasonable charge, churning, or any other reason to adjust the lodestar downward. The average hourly rate—the blended rate—is commensurate with the palpable skill and resolve exhibited by plaintiffs' attorneys during this litigation. Moreover, there is no principled reason to adjust the lodestar downward because of a purported lack of success as compared to the original relief sought. Since qualifying class members will obtain dollar-for-dollar refunds, together with the other benefits (including prospective injunctive relief) provided by the defendants, it would be wholly inaccurate to characterize the settlement as either incomplete or unsatisfactory. To the contrary, plaintiffs' counsel obtained some valuable benefits in a litigational environment that defendants made decidedly unfriendly.

B. Lodestar Adjustment

This process calls for the most difficult analysis because here I am asked to increase the lodestar by a factor of 369% to reflect the $9.5 million request for legal fees under the settlement agreement.[9] I cannot conceive of any reasonable way, under the *Rendine* iteration, that the lodestar could be adjusted by such a whopping factor.

The element that will move the lodestar is primarily the risk of nonpayment where the compensation is entirely or substantially contingent on a successful outcome. In *Rendine,* the New Jersey Supreme Court noted that in the usual fee-shifting case, the contingency enhancement should be between five and fifty-percent of the lodestar. In

fact, exercising its original jurisdiction in *Rendine,* the New Jersey Supreme Court increased the lodestar by 33%. *Id.* at 345, 661 A.2d 1202.

***24** Although perhaps somewhat inapposite because they are common fund cases decided under federal law, the following examples demonstrate lodestar multipliers less than the 3.69 sought in this case:

Case	***Multiplier***	***Amount of Fees***
In re Aetna, Inc. Sec. Litig. No. MDL–1219, 2001 WL 20928 (E.D.Pa. 4 Jan. 2001)	3.60	$ 24.3 million
Cullen v. Whitman Medical Corp., 197 F.R.D. 136 (E.D.Pa.2000)	2.04	$ 2.4 million
In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166 (E.D.Pa.2000)	2.70	$ 33.5 million
In re Sumitomo Copper Litig.,	2.50	$ 32 million

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74 F.Supp.2d 393 (S.D.N.Y.1999)		
Kurzweil v. Phillip Morris Co., No. 94–2373, 1999 WL 1076105 (S.D.N.Y. 30 Nov.1999)	2.46	$ 37.1 million
Local 56, United Food & Commercial Workers Union v. Campbell Soup Co., 954 F.Supp. 1000 (D.N.J. 1997)	2.39	$ 3 million

See *In re Safety Components Int'l, Inc.*, 166 *F.Supp.2d* 72, 104 (D.N.J.2001)

I conclude that the appropriate enhancement to the lodestar under the *Rendine* methodology, and generous by its standards, is a factor of approximately 1.98. This reflects a blended hourly rate of $600, a handsome compensation by any standard. Moreover, it adequately compensates plaintiffs' counsel for the risks inherent in pursuing this action. Although it may unfairly be argued that this results in a windfall to the settling dealerships, more is to be lost by further enflaming public passion regarding attorneys' putative greed than allowing the dealerships to retain a small portion of the bargained-for attorneys' fees. Thus, I award plaintiffs' attorneys a fee of $5,089,200, plus

expenses of $24,307, for a total award (to be paid by defendants under an adjusted methodology to be worked out by the parties) in the amount of $5,113,507.

In light of this result, and recognizing that *Incollingo* may not be the sole controlling precedent, I will crosscheck the result using principles derived from federal jurisprudence in common fund class action settlement cases.[10] Ironically, this is exactly backwards to the federal scheme, which first computes a percentage of recovery as the basis for the attorneys' fees, and then crosschecks the result with the lodestar method.

The methodology that I will employ is that of the United States Court of Appeals for the Third Circuit, not just because New Jersey is part of the Third Circuit, but because the most mature and well-developed analyses of attorneys' fees has emerged from that court. It is said that the 1985 recommendation of a Third Circuit task force[11] was one of the driving forces that spurred the percentage method to gain favor. § II(B)(2)(a), *Awarding Attorneys' Fees and Managing Fee Litigation, Second,* Alan Hirsch and Diane Sheehey (Federal Judicial Center 2005) at 72. The D.C. and Eleventh Circuits require the percentage method. The First, Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have stated that the district court may use either the percentage method or the lodestar method. The Seventh Circuit has indicated that the percentage method is preferred. The Ninth Circuit has suggested that the percentage method is particularly appropriate when there are multiple claims and it would be difficult to determine what hours were expended on the claims that produced the fund. The Ninth Circuit also suggested that the lodestar is preferable when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors. The Fifth Circuit has not explicitly adopted the percentage method, but seems to allow a combined percentage and lodestar approach. *Id.* at 72–73, 687 A.2d 778.

***25** In this action, the plaintiffs' attorneys have urged that I follow the Third Circuit's methodology as outlined in *Gunter v. Ridgewood Energy Corp., 223 F.3d* 190 (3d Cir.2000). Notwithstanding plaintiffs' attorneys' concession that the instant case is not a perfect common fund case due to the coupons and the prospective injunctive relief, I accept their invitation because *Gunter* represents an appropriate methodology that may be readily deployed in the instant case that is functionally a common fund situation.

2. The Gunter Case

Gunter sets forth the analysis for determining the reasonableness of a percentage fee award. The court stated in common fund cases, a trial court should first consider several factors in setting a fee award. Those factors include:

> (1) the size of the fund created and the number of person benefited; (2) the presence or absence of substantial objections by members of the class to the ... fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.
>
> *Gunter v. Ridgewood Energy Corp., supra,* 223 *F.3d* at 195 ((citing *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 *F.3d* at 336–340; and *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 F.3d at 819–22).

The court also instructed that a court should "cross-check the percentage award at which [it] arrive[s] against the 'lodestar' award method, which is normally employed in statutory fee-award cases." *Id.* These factors "need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Gunter v. Ridgewood Energy Corp., supra,* 223 *F.3d* at 195 n. 1.

A. Size of Fund and Number of Persons Benefited

Generally speaking, as the size of the settlement fund increases, the percentage award decreases. *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 *F.3d* at 339; *Cullen v. Whitman Med. Corp.,* 197 *F.R.D.* 136, 148 (E.D.Pa.2000). The basis for the inverse relationship is the belief that at some point the size of the recovery is attributable to the size of the class and has no direct relationship with the efforts of counsel. *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 F.3d at 339.

Plaintiffs' expert witness, Professor Issacharoff, expressed an opinion that the common fund, exclusive of the speculative and uncomputed value of the prospective injunctive relief,[12] should be viewed with a value of $56.7 million. This amount consists of the following components:

***26** The expert noted that all of the administrative costs associated with giving notice of the settlement to class members and the processing of claims is an additional

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benefit that should add approximately $3 million to the value of the settlement.[13] This figure was not contained in the expert's initial opinion, but a representative of Poorman–Douglas testified to the probable expenditure of this amount, all funded by the settling defendants. It is appropriate to add these expenses to the value of the settlement, as they are expenses that the members of the class will not have to incur.

I find that the valuation of the settlement at $59.7 million is fundamentally flawed due to the unpersuasive nature of the proofs regarding its largest component (comprising almost two-thirds of the settlement's value), the $100–off coupons. The basis for assigning a value of $40 million to these coupons is based upon the expert's analysis that starts with the face amount (not face *value*) of $270 million (computed by multiplying the number of class members receiving the coupons (2.7 million) times the face amount of the coupon ($100)). Although the coupons are freely transferable and may some day find their way into an informal market fostered by the internet, no statistical evidence was presented to demonstrate the potential rate of use, the likely discount demanded by the market, or the consuming patterns of car buyers and lessees in the relevant market. Instead, the opinion of value may be distilled into one uninformative sentence, almost without rhyme or reason, "[a]ccordingly, I will assume a conservative 15% use rate, yielding a value of approximately $40 million." The immediate unanswered questions that come to mind include, why is 15% a *conservative* rate; what are the facts—statistical or otherwise—that undergird the assumption of *any* use rate; what objective methodology, derived from treatises, journals, or experience was employed to derive the opinion of value? It is one thing for plaintiffs' expert, an eminent legal scholar, to opine on the legal principles that are appropriate for setting reasonable attorneys fees; it is quite another endeavor for even a professor steeped in the law and economic school of jurisprudence to render an opinion of value of coupon usage in the highly competitive, consumer driven market of new and used motor vehicle sales and leases. I reject the expert's opinion of value of the $100–off coupon component of the settlement as being without a factual basis to support it and displaying "the total absence in [plaintiff's expert's] testimony of reference to any text book, treatise, standard, custom or recognized practice, other than his personal view." *Kaplan v. Skoloff & Wolf, P.C., supra,* 339 *N.J.Super.* at 103, 770 A.2d 1258 (quoting *Taylor v. DeLosso,* 319 *N.J.Super.* 174, 182, 725 A.2d 51 (App.Div.1999).

Thus, I am left with the following: a settlement with a tangible value to the class of $19.7 million plus an intangible value of between zero and $80 million. The only principled way to consider the attorneys' fees request now is to focus on the tangible and give little meaningful weight to the speculative intangible value. On the other hand, I will neither ignore, nor lose sight of these benefits that class counsel obtained, even if I cannot assign an objective value to them.

***27** Ironically, as noted earlier, as the size of recovery diminishes, federal precedent holds that the percentage award increases. *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 *F.3d* at 339. The requested attorneys' fees of $9.5 million represent an incredible 48% of the tangible recovered benefits. The federal inverse relationship rule cannot be stretched this far to award what would be almost half of the tangible benefits as attorneys fees. Thus, this first *Gunter* factor strongly favors reduction of the requested attorneys' fees.

B. Presence or Absence of Substantial Objections

The second *Gunter* factor assays the quality and quantity of objections by class members to the settlement terms and to the fees requested by their counsel. Although there were less than one dozen objections lodged against the attorneys' fees, the most inflammatory statements relating to this case were found in that small group. Most of the objections appeared to be merely emotional venting by class members, with very little understanding of the overall benefits achieved in the settlement to the class. The majority of objections directed against the attorneys' fees addressed the unrealistic comparison of the benefit to the individual class member with the aggregate of the fee request. To be fair, such objections should reflect upon the fact that no benefits to individual class members will be diminished by the award of attorneys' fees, and simple arithmetic results in an allocation of only about $3.50 per class member for the attorneys' fees.[14] This factor favors the award of the requested attorneys' fees.

C. Skill and Efficiency of Attorneys Involved

A goal of the percentage fee-award is to ensure that competent counsel continue to undertake risky, novel, and complex litigation that serves the public interest. The experience and expertise of plaintiffs' attorneys supports the requested award. All counsel conducted themselves thus far in a professional and expert manner throughout this case. They deftly handled the agonizingly long mediation process and were able to preserve a substantial portion of their clients' claims in the face of fierce motion practice

once the initial settlement efforts were unfruitful. Just the sheer number of defendants who have enlisted in this settlement militates in favor of finding that plaintiffs' attorneys ably represented the interests of their clients. The fact that not all defendants have settled, and even that some defendants continue to engage plaintiffs in a battle royal does not detract from the fact that plaintiffs' counsel created a settlement that promotes a just result and furthers economic activity.

D. Complexity and Duration of the Litigation

For the most part, the complexity of this case was self-created by plaintiffs' attorneys. By this I mean that the scope of this action against all automotive dealerships in New Jersey far exceeds the ordinary number of defendants in private consumer fraud actions. Nevertheless, even in the face of a multiplicity of initially hostile adversaries and their defenses, plaintiffs' attorneys hewed to a strategy from which they derived adequate discovery and still produced a settlement offer that was accepted by the vast majority of the defendants. This was accomplished in the face of several obstacles needed to be overcome in order to establish liability. There undoubtedly would have been hundreds of dispositive motions to defend; class maintainability was never conceded until the settlement and remained hotly contested; and proof of the necessary elements of the theories of liability remains elusive. Although much of the lodestar was generated by the efforts of class counsel to keep plaintiffs' complaint afloat in the choppy waters of defendants' onslaught, a good portion of the investment of time was devoted to settlement efforts. This factor tends to favor approval of the fee application.

E. Risk of Nonpayment

***28** Given the nature of the defenses being arrayed against them before the settlement, there was a significant risk of nonpayment. Notwithstanding their confidence in their cause, plaintiffs recognize that they faced potentially insurmountable barriers in establishing liability and damages in this case. As I have already discussed in analyzing the fairness of the settlement, it is entirely probable that plaintiffs' theories of liability that revolve around the documentary preparation costs would not be sustained. The conspiracy claims likewise would be extremely difficult to prove. This factor weighs in favor of approval of the fee.

F. Amount of Time Devoted by Counsel

Plaintiffs' attorneys had expended 8,482 hours on this action as of the end of December 2005. This amount of attorney time is disproportionate to the request for $9.5 million in fees, especially where the tangible benefits to the class are less than $20 million. I find that the amount of time devoted to this case weighs against the percentage of recovery requested as a fee in this case.

G. Awards in Similar Cases

This factor requires the court to compare the percentage of recovery requested as a fee in this case against the percentage of recovery in other common fund cases in which the percentage of recovery method, rather than the lodestar method, was used. *In re Cendant Corp. Prides Litig., supra,* 243 *F.3d* at 737. In *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043 (9th Cir.2002), the court surveyed percentage based attorneys' fee awards in thirty-four common fund cases. The awards included in the survey ranged from 2.8% to 40% of the common fund. *Id.* at 1052–54. Eighteen of the thirty-four cases analyzed by the Ninth Circuit involved settlements of $100 million or more. Attorneys' fees of 30% of the common fund were awarded in only three of those cases. Percentage based fees of 25% or more were awarded in nine of the eighteen megafund cases surveyed. *Id.* The *Vizcaino* court affirmed a fee award of 28% of a common fund of approximately $97 million. *Id.* at 1052. The Third Circuit examined the percentage based fee awards in eighteen megafund cases in *re Cendant Corp. Prides Litig., supra,* 243 *F.3d* at 737–38. The "attorneys' fee awards ranged from 2.8% to 36% of the common fund in those cases." *Id.* at 738. Percentage based fees of 30% or more were awarded in only three of the cases reviewed by the Third Circuit. *Id.* The fee award was more than 25% of the common fund in five of the eighteen cases. *Id.* Attorneys' fees of 25% of the common fund of $ 126.6 million were awarded to plaintiffs' counsel in *In re Rite Aid.* *In re Rite Aid Sec. Litig.,* 362 F.Supp.2d 587 (E.D.Pa.2005). See also *In re Combustion, Inc.,* 968 *F.Supp.* 1116, 1136 (W.D.La.1997) (setting a maximum cap reserve for attorneys fees of 36% of common fund of $ 127 million); *In re Ikon Office Solutions, Inc. Sec. Litig., supra,* 194 *F.R.D.* at 192–196 (awarding attorneys' fees of 30% of common fund (less costs) of $108 million with an excess of 45,000 attorney hours).

***29** Professor Issacharoff opines that "[o]verall in class

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actions, fee awards range from 20%–40%, average around 33%, and hold constant at around 33% even when recoveries are very large." I find that a percentage of the settlement benefits requested as an attorneys' fee in this case is supportable, but to be applied only to that which may be objectively verified and not to the intangible and elusive components of the settlement—the $100–off coupons and injunctive relief.

Having exhaustively reviewed the *Gunter* factors, I conclude that they do not support plaintiffs' request for an award of $9.5 million, representing 48% of the tangible settlement fund. Instead, a fee based upon the percentage method of 25% ($4,925,000) is more appropriate, and yields an attorneys' fee slightly less than using the *Incollingo* method. This confirms that the attorneys' fee shall be $5,113,507[15] (including costs and expenses).

IV. CONCLUSION

For the reasons set forth above, I grant the motion to approve the settlement. Furthermore, notwithstanding defendants' generosity in agreeing to fund plaintiffs' attorneys' fees, the requested award is not reasonable. Instead, I will approve attorneys' fees and costs for plaintiffs' attorneys in the total amount of $5,113,507. I request that plaintiffs' attorneys prepare the interlocutory order memorializing this decision and circulate it among all counsel and file it with the court as soon as possible pursuant to R. 4:42–1(c).

All Citations

Not Reported in A.2d, 2006 WL 177586

Footnotes

1 To be clear, NJCAR is not a party to this action although most of its constituent members appear to be parties. NJCAR has endorsed the proposed settlement, and its President James Appleton testified in support of the settlement at a Fairness Hearing on January 3, 2006.

2 See "Car–Dealer Class Actions: Coupons for Clients, Big Bucks for Lawyers," 178 N.J.L.J. 477 (2004)(http://www.law.com/jsp/article.jsp? id=1099217133803, 687 A.2d 778, last visited January 24, 2006).

3 Signed written objections were received from: Stephen Zeleny, John F. Leonard, Scott Nuttall, Andrew W. Horacek, Carol Johns, Thomas B. Carney, Harvey Sobel, Steven G. Maurer, Phil Bradford, Auggie Cipollini, Elaine B. Espey, Dorothy Davies, Jesse E. Davies, Alan Lesh, H. William Devitt, Estate of James A. Graham, Al Kerecman, Felice R. Loffredo, Craig Scher, Cheryl A. Rivera, Charles T. Eckel, Lynda Eckel, and Thomas L. McClintock. One anonymous objection (handwritten on a yellow post-it note attached to the *Notice of Proposed Class Action Settlement and Fairness Hearing*), addressed to me, simply stated: " "Hon." Jonathan N. Harris: You're an Asshole."

4 The class definition limits class members to New Jersey residents. Objector Craig Scher, represented by counsel, is a resident of New York. Thus, he is a member neither of the class entitled to object, nor subject to preclusion of his action if the settlement is approved.

5 As of December 29, 2005, the firm of Breslin & Breslin, P.A. invested $746,800.00 in legal fees (plus $23,262.83 in expenses) in this action. As of December 21, 2005, the firm of MacLachlan Law Offices, LLC invested $1,825,787.19 in legal fees (plus $1,045.06 in expenses) in this action.

6 The multiplier is 2.77 if the attorneys' fee award is the requested minimum of $7.146 million.

7 See pages 33–34 of this opinion for a list of miscellaneous factors that may be addressed by a court in its determination whether a

class action settlement is fair, adequate, and reasonable.

8 Statutory awards are generally calculated using the lodestar method (number of hours reasonably spent on the litigation multiplied by the hourly rate, enhanced in some circumstances by a multiplier), subject to any applicable statutory ceiling on the hourly rate. § 21.71 *Manual for Complex Litigation,Fourth* 334–335. Common fund awards are generally based upon a percentage of the common fund the class action has produced.

9 It would take a lodestar enhancement of 277% to reach the *minimum* attorneys fee recoverable under the parties' settlement agreement.

10 This crosscheck will *not* consider the effect upon the award of attorneys' fees of the Class Action Fairness Act of 2005, which, among other things, links attorneys' fees in coupon settlements to the value of coupons that are actually redeemed and ignores the face amount of the coupons as a whole. 28 *U.S.C.A.* 1712(a).

11 *Court Awarded Attorney Fees: Report of the Third Circuit Task Force,* reprinted in 108 *F.R.D.* 237 (1985).

12 Almost as an afterthought, and without any analysis of present value, Professor Issacharoff suggested at the Fairness Hearing that the value of the injunctive relief could be as much as $40 million. I reject this postscript because it is a classic net opinion, bereft of the measured reasons and rationale that must necessarily support any expert opinion. *See Kaplan v. Skoloff & Wolf, P.C.,* 339 *N.J.Super.* 97, 102–04, 770 A.2d 1258 (App.Div.2001) (holding that attorney's opinion of the reasonableness of a settlement was an inadmissible net opinion because the attorney failed to offer any evidential support for his conclusion other than his personal view and experience).

Dollar-for-dollar refunds:	$6,000,000.
10%-Off coupons for Service and Parts:	$1,200,000.
$100–Off coupons for acquisition of vehicle:	$40,000,000.
Attorneys fee request:	*$9,500,000.*
TOTAL:	$56,700,000.

13 If I were to add the administrative costs and the posited value of the injunctive relief to the rest of the expert's opinion, the value of the settlement would approach $100 million, making it subject to a "megafund" analysis where "application of a normal range of fee awards from a common fund may result in a fee that is unreasonably large as a compensation for the benefits conferred." Alba Conte, Attorney Fee Awards § 2.09 (2d ed.1993). Indeed, "in final fee awards in cases involving very substantial fund recoveries, courts have recognized the economies of scale inherent in class action recoveries and have awarded fees on a straight percentage basis that

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fall below the usual range of fund fee awards." *Id.*

14 The allocated amount is simply the mathematical result of dividing the potential *maximum* fee of $9.5 million by 2.7 million class members. The allocated amount is only about $2.65 per class member if the *minimum* requested fee of $7.146 million were to be awarded.

15 Actually, this attorneys' fee represents a 33% award on the tangible benefits enjoyed by the class of $15.3 million (recomputed), exactly the average percentage opined by Professor Issacharoff.

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EXHIBIT 6

2008 WL 4899474
Only the Westlaw citation is currently available.
United States District Court,
E.D. Pennsylvania.

Amanda CURIALE
v.
LENOX GROUP, INC., and Does 1-10.

Civil Action No. 07-1432.
|
Nov. 14, 2008.

Attorneys and Law Firms

Edward W. Ciolko, Gerald D. Wells, III, Joseph H. Meltzer, Joseph A. Weeden, Schiffin Barroway Topaz & Kessler, LLP, Radnor, PA, Gary F. Lynch, Carlson Lynch Ltd, New Castle, PA, for Amanda Curiale.

Wilson M. Brown, III, Susan M. Kennedy, Drinker Biddle and Reath L.L.P., Philadelphia, PA, for Lenox Group, Inc., and Does 1-10.

MEMORANDUM & ORDER

SURRICK, District Judge.

***1** Presently before the Court are the parties' Joint Motion and Memorandum in Support of Preliminary Approval of Class Action Settlement (Doc. Nos.22, 23). For the following reasons, the parties' Joint Motion (Doc. No. 22) will be granted.

I. BACKGROUND

A. The Complaint

On April 10, 2007, Plaintiff Amanda Curiale ("Plaintiff") brought the instant action on behalf of herself and other putative class members. Plaintiff alleges that Defendant Lenox Group, Inc. ("Defendant") and Does 1 through 10 violated the Fair and Accurate Credit Transaction Act ("FACTA"), 15 U.S.C. §§ 1681 *et seq.* Specifically, Plaintiff alleges that Defendant violated § 1681 c(g) (1), which provides that:

> [N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last five digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

The civil penalties for "willful noncompliance" with § 1681 c(g) are set forth in § 1681n(a), which provides:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of-
>
> (1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
>
> ...
>
> (2) such amount of punitive damages as the court may allow; and
>
> (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n(a). Plaintiff's Complaint does not claim that she or any purported class members suffered actual monetary injury as a result of Defendant's alleged failure to comply with FACTA.

On July 16, 2007, Defendant filed an answer to the Complaint, and the parties thereafter requested mediation. On September 20, 2007, the Honorable Diane Welsh conducted an all-day mediation session. (Joint Mot. ¶ 1.) Counsel for the parties, including Defendant's Assistant General Counsel, attended the mediation. (Pls.' Resp. 1.) At that time, following "arms-length negotiations," the parties reached an agreement to settle the claims in dispute. (Joint Mot. ¶ 1.) On or about December 5, 2007, the parties formally executed a Class Action Settlement Agreement (the "Settlement Agreement").

B. The Settlement Agreement

The parties agreed, for settlement purposes only, to the certification of the following class:

> All persons who received electronically printed receipts

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> at the point of sale or transaction from a retail store location operated by Lenox, in a transaction occurring between December 4, 2006 and April 19, 2007, wherein the receipt displayed (1) more than the last five digits of the person's credit card or debit card number, and/or (2) the expiration date of the person's credit card number.

***2** (Settlement Agreement ¶ 1. 3.)

The Settlement Agreement has four basic terms. First, Defendant agreed to enter into a consent decree pursuant to which it will remain in full compliance with FACTA's truncation requirements. (*Id.* ¶ 2.1.3.) Second, Defendant agreed to provide Participating Class Members with a Settlement Relief Voucher permitting the member to elect one of three relief options: (a) $5.00 off any purchase at Defendant's stores; (b) a free bud vase with a retail value of $10.00; or (c) $25.00 off a purchase at Defendant's stores of $150.00 or more.[1] (*Id.* ¶ 2.1.1.) Third, Defendant agreed to donate $5,000.00 to a charity of its choosing, subject to approval of class counsel. (*Id.* ¶ 2.1.2.) Fourth, Defendant agreed not to object to the Court's awarding of $115,000.00 in attorney fees and up to $5,000.00 in allowable litigation costs and expenses. (*Id.* ¶ 2.6.1.) In exchange for those promises, Plaintiff agreed to release Defendant from all liability and to dismiss all claims with prejudice. (*See id.* ¶ IV.)

In the Settlement Agreement, Defendant admits no wrongdoing and denies all claims as to liability and damages.[2] (*Id.* ¶ I.) Indeed, Defendant expressly "den[ies] all of the claims and contentions alleged by [Plaintiff]." (*Id.* ¶ III.) While admitting no underlying liability, Defendant executed the Settlement Agreement after "tak[ing] into account the uncertainty and risks inherent in any litigation, especially in multi-party cases like this Litigation." (*Id.*) Defendant "concluded ... that it [was] desirable that the Litigation be fully and finally settled," (*id.*), and thus "negotiated in good faith" (*id.* ¶ 2.9.5) with class counsel to reach the Settlement Agreement in the interest of avoiding "protracted and costly litigation" that could arise if the matter continued (*id.* ¶ III).

One uncertainty and risk inherent to the litigation was the possibility that Congress would amend FACTA to eliminate Plaintiff's cause of action. Legislation that would accomplish just that had been introduced in the United States House of Representatives over a month before the parties executed the Settlement Agreement. *See* H.R. 4008, 110th Congress (1st Sess. Oct. 30, 2008). The purpose of that legislation, titled the Credit and Debit Card Receipt Clarification Act (the "Clarification Act"), was to "limit[ ] abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers" by redefining "willful noncompliance" under FACTA. *Id.* The Clarification Act provides, in pertinent part, that:

> [A]ny person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and [June 3, 2008] but otherwise complied with the requirements of section 605(g) for such receipt shall not be in willful noncompliance with section 605(g) by reason of printing such expiration date on the receipt.

***3** P.L. 110-241 § 3(a). The amendment eliminates a private cause of action based solely on failing to truncate the expiration date. This is, of course, the claim that Plaintiff has asserted in her Complaint. In addition, Congress provided that the Clarification Act:

> shall apply to any action, other than an action which has become final, that is brought for a violation of 605(g) of the Fair Credit Reporting Act to which such amendment applies without regard to whether such action is brought before or after the date of the enactment of this Act.

P.L. 110-241 § 3(b). Thus, the Clarification Act provides retroactive immunity for businesses like Defendant. Congress enacted the Clarification Act on June 3, 2008. *See* P.L. 110-241, 122 Stat. 1566.

The parties were undoubtedly aware of the possibility that Congress would enact the pending legislation when they negotiated the Settlement Agreement, which they "reached voluntarily after consultation with competent legal counsel." (Agreement ¶ 2.9.5.) Although the parties conditioned the Settlement Agreement on the Court certifying a settlement class and granting preliminary and final approval of the proposed class settlement, the parties did not condition the Settlement Agreement on the enactment of the pending legislation. Instead, the parties expressed their intent to consummate the Settlement Agreement while the status of the legislation was unknown. Paragraph 2.9.4 of the Settlement Agreement provides that the parties:

> (a) acknowledge it is their intent to consummate this agreement; and (b) agree to cooperate to the extent reasonably necessary to effect and implement all terms and conditions of the Settlement Agreement and to exercise their best efforts to accomplish the foregoing terms and conditions of the Settlement Agreement.

On December 14, 2007, the parties submitted the instant Motion for Preliminary Approval of Class Action Settlement. (Doc. No. 22.) On April 17, 2008, while that Motion was pending, the parties submitted additional support for their motion through a Joint Notice of Supplemental Authority. (Doc. No. 24.) The Joint Notice includes a list of cases within the Third Circuit that "were settled on terms analogous to those in the proposed

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settlement." (*Id.*)

C. Defendant's Suggestion of Mootness

On June 18, 2008, Defendant reversed course and filed a Suggestion of Mootness. (Doc. No. 25.) Defendant's Suggestion of Mootness asks the Court to "deny the parties' request for preliminary approval of a settlement class as moot and [to] dismiss th[e] action with prejudice." (*Id.* at 5.) The reason for Defendant's change of heart was Congress's June 3, 2008 enactment of the Clarification Act, the legislation that was pending in Congress when the parties executed the Settlement Agreement. Defendant contends that the Clarification Act renders moot the parties' Joint Motion for Preliminary Approval of Class Action Settlement, since the cause of action underlying Plaintiffs' Complaint is no longer cognizable under FACTA.

II. LEGAL STANDARD

***4** Pursuant to Federal Rule of Civil Procedure 23, "the court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Fed.R.Civ.P. 23(e)(1)(A). Final approval of a class action settlement requires the district court to determine whether "the settlement is fair, adequate, and reasonable." *Stoetzner v. U.S. Steel Corp.,* 897 F.2d 115,118 (3d Cir.1990) (*citing Walsh v. Great Atl. and Pac. Tea Co., Inc.,* 726 F.2d 956, 965 (3d Cir.1983)); *see also In re Cendant Corp. Litig.,* 264 F.3d 201, 231 (3d Cir.2001). Prior to granting final approval, however, we must first decide whether preliminary approval should be granted. The Manual for Complex Litigation describes this process:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties.... The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the ... proposed settlement, and date of the fairness hearing.

Moore's Federal Practice, Manual For Complex Litigation (Fourth) § 21.632 (2004).

"In evaluating a settlement for preliminary approval, the court need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute." *Thomas v. NCO Fin. Sys.,* No. 00-5118, 2002 WL 1773035, at *5 (E.D.Pa. July 31, 2002) (*quoting Detroit v. Grinnell Corp.,* 495 F.2d 448, 456 (2d Cir.1974)). Instead, the court must determine whether "the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and whether it appears to fall within the range of possible approval...." *Id.* (*citing In re Prudential Sec. Inc. Ltd. P'ship Litig.,* 163 F.R.D. 200, 209 (S.D.N.Y.1995); Moore's Federal Practice, Manual for Complex Litigation (Third) § 30.41 (1995)). This analysis often focuses on whether the settlement is the product of "arms-length negotiations." *See, e.g., Thomas,* 2002 WL 1773035, at *5; *Tenuto v. Transworld Sys., Inc.,* No. 99-4228, 2001 WL 1347235, at *1 (E.D.Pa. Oct.31, 2001).

III. DISCUSSION

We consider the Joint Motion for Preliminary Approval of Class Action Settlement in the context of FACTA's Clarification Act and Defendant's Suggestion of Mootness. We will first consider the general enforceability of the Settlement Agreement. Next, we will consider the effect of the Clarification Act on the Settlement Agreement. Finally, we will evaluate the Settlement Agreement for preliminary approval.

A. Enforceability of the Settlement Agreement

***5** A voluntary settlement agreement may be binding upon the parties, irrespective of whether it was made in the presence of the Court, and even in the absence of a writing. *Green v. Lewis & Co.,* 436 F.2d 389, 390 (3d Cir.1970) (citations omitted); *see also D.R. by M.R. v. East Brunswick Bd. of Educ.,* 109 F.3d 896, 901 (3d Cir.1997) (holding that a settlement agreement is binding despite the fact that it resulted from mediation instead of litigation); *Good v. The Pa. R.R. Co.,* 384 F.2d 989, 990 (3d Cir.1967) (holding that a settlement agreement, entered into by duly authorized counsel, was "valid and binding despite the absence of any writing or formality"). Courts consider settlement agreements to be binding contracts. *See In re Columbia Gas Sys., Inc.,* 50 F.3d 233, 238 (3d Cir.1995) ("In a non-bankruptcy context, we have treated a

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settlement agreement as a contract."). Ordinary principles of contract law govern settlement agreements. *See Cendant,* 233 F.3d at 193 (noting that "basic contract principles do indeed apply to settlement agreements").

There is a strong judicial policy in favor of the voluntary settlement agreements. *See Pennwalt Corp. v. Plough,* 676 F.2d 77, 79-80 (3d. Cir.1982) (holding that voluntary settlement agreements are "specifically enforceable and broadly interpreted"). Indeed, "[v]oluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should." *Id.* at 80; *see also D.R. by M.R.,* 109 F.3d at 901 ("Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by courts.").

"The law favors settlement particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab.,* 55 F.3d 768, 784 (3d Cir.1995) (citations omitted). In addition to conservation of judicial resources, "[t]he parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial." *Id.* (*citing First Commodity Corp. of Boston Customer Accts. Litig.,* 119 F.R.D. 301, 306-07 (D.Mass.1987)). "These economic gains multiply when settlement also avoids the costs of litigating class status-often a complex litigation within itself." *Id.*

There is no doubt that the Settlement Agreement entered into here is binding and enforceable under general principles of contract interpretation. The parties executed the Settlement Agreement through capable and experienced counsel following mediation with a well-respected and experienced mediator. The parties acknowledge in the Settlement Agreement that they negotiated in good faith and at arm's length. The parties acknowledge that they consulted with competent counsel before they executed the Settlement Agreement. The parties further acknowledge that their respective counsel assisted them in reaching the Settlement Agreement, the terms of which "are contractual." (Settlement Agreement ¶ 2.9.16.) The Settlement Agreement sets forth material terms and the details of the parties' performance and expectations. In short, the Settlement Agreement is a binding contract.

B. Effect of the Clarification Act on the Settlement Agreement

***6** There can also be no doubt that the Clarification Act eliminates the cause of action underlying Plaintiff's Complaint, and that the Clarification Act applies retroactively to encompass Plaintiff's FACTA claim. *See* P.L. 110-241 § 3(b) (noting that the amendment applies to any action "other than an action which has become final"). The dispute here is not whether the Clarification Act eliminates Plaintiffs' underlying claims, but rather whether the Clarification Act moots the Settlement Agreement that the parties executed when the legislation was still pending in Congress. We conclude that it does not.

A recent bankruptcy case from the Eastern District of Pennsylvania is instructive. *See In re Frascella Enter., Inc.,* No. 06-10322, 2008 WL 2051115, at *10 (Bankr.E.D.Pa. May 8, 2008) (Sigmund, J.). In *Frascella,* the defendant sought to avoid its contractual obligations under a class action settlement agreement after an intervening change in law created a legal landscape more favorable to the defense. *Id.* at *9. The court held that "a favorable change in the law does not afford a settling party a chance to repudiate an otherwise valid settlement to which it is contractually bound." *Id.* (*citing Coltec Indus. Inc, v. Hobgood,* 280 F.3d 252, 273 (3d Cir.2002)). The court offered the following rationale:

> [I]t makes no sense that the costly and time consuming class approval process could be initiated and the Defendants could pull out at any time for no reason. Plaintiffs cite two cases that bring this point home. In *Allen v. Alabama State Board of Education,* 612 F.Supp. 1046 (M.D.Ala.1986) [*rev'd on other grounds,* 816 F.2d 575 (11th Cir.1987)], the defendants repudiated a written class settlement agreement contending that the absence of Rule 23 approval meant the agreement was not yet binding. While recognizing the procedural steps to final approval had yet to occur (preliminary approval, class notice and fairness hearing), the court nonetheless concluded that before embarking on that "expensive and time-consuming" process, "[i]t is essential that ... the court and the parties have some assurance that the settlement is binding on the name[d] parties. *Id.* at 1054. Even closer to the facts *sub judice, Ramirez v. DeCoster,142* F.Supp.2d 104 (D.Me.2006) involved a mediated class settlement which, during continuing negotiations of the formal written settlement agreement, was abandoned by the defendants when some favorable court rulings made them rethink their willingness to settle. The court, applying basic contract principles, found that all material terms had been agreed to and the negotiation over the document was "a scrivening exercise, with good faith obligations attached." *Id.* at 114. While it observed that the settlement might not

ultimately succeed based on Rule 23 class action requirements still to be met, the agreement was nonetheless contractually enforceable. *Id.* at 116; *see also Main Line Theatres v. Paramount Film Distrib. Corp.,* 298 F.2d 801, 804 (3d Cir.1962) (neither party was free to repudiate the agreement during the period required to accomplish a condition of the settlement); *McClure v. Township of Exeter,* No. 05-5846, 2006 WL 2794173, at *3 (E.D.Pa. Sep.26, 2006) (contract is enforceable conditioned on the implied condition precedent-formal ratification by the Township and is not subject to unilateral recision pending that event).

***7** *Frascella,* 2008 WL 2051115, at *10.

The Court of Appeals for the Ninth Circuit considered a similar problem in *In re Syncor ERISA Lit.,* 516 F.3d 1095 (9th Cir.2008). In *Syncor,* the defendants filed a motion for summary judgment and thereafter participated in mediation. *Id.* at 1099. While the defendants' motion for summary judgment was pending, the parties continued to engage in settlement negotiations and ultimately executed a proposed settlement agreement. *Id.* The proposed agreement stated that "Court approval is a condition of this settlement." *Id.* The parties notified the court that they "signed a term sheet and have begun the process of formally documenting the settlement," and also submitted a joint stipulation and proposed order asking the court not to rule on the pending summary judgment motion. *Id.* Unbeknownst to the parties, the court had already signed an order granting the defendants' motion for summary judgment. *Id.* The district court denied as moot the parties' proposed order regarding settlement. *Id.* Plaintiffs filed a motion to set aside the judgment and for preliminary approval of the settlement, which the district court denied. *Id.* On appeal, the Ninth Circuit reversed, "conclud[ing] that the district court abused its discretion by entering the final judgments and by refusing to vacate the final judgments." *Id.* at 1103. The court noted that "the requirement that the district court approve a class action settlement does not affect the binding nature of the parties' agreement." *Id.* at 1100 (*citing Collins v. Thompson,* 679 F.2d 168, 172 (9th Cir.1982) ("Judicial approval of a [class action settlement] is clearly a condition subsequent, and should not affect the legality of the formation of the proposed [settlement] as between the negotiating parties.")). The court observed that:

> [a]t the time of the settlement, Defendants knew they had dispositive motions pending and chose the certainty of settlement rather than the gamble of a ruling on their motions. Thus, Defendants chose to forego the chance that the district court would grant summary judgment in their favor.

Id. The case was remanded to the district court with instructions "to review the settlement agreement pursuant to Rule 23(e)." *Id.* at 1103.

The Court of Appeals for the Eighth Circuit similarly enforced a settlement agreement in *Sheng v. Starkey Labs., Inc.,* 117 F.3d 1081, 1083 (8th Cir.1997).[3] In *Sheng,* the district court signed an order granting the defendant's motion for summary judgment and mailed copies of the order to counsel. *Id.* at 1082. The court's order was not immediately entered in the docket, and the clerk of court did not enter judgment. *Id.* A few days later, before the clerk entered the order on the docket and before counsel received the order in the mail, the parties met for a settlement conference. *Id.* The parties-unaware of the court's order granting summary judgment-reached a settlement agreement and informed the court that the case was settled. *Id.* The court then rescinded the order granting summary judgment and directed the clerk not to enter the order or judgment in the docket. The next day, the court dismissed the case "on the ground that it had been settled." *Id.* Thereafter, the parties received in the mail the court's orders that granted, and then rescinded, summary judgment in the defendant's favor. *Id.* at 1082-83. The defendant filed a Rule 60(b) motion seeking to vacate the order that dismissed the case on settlement grounds. *Id.* at 1083. In support of its motion, the defendant alleged that the parties did not agree on all material terms of the agreement and that the agreement was based on mutual mistake. *Id.* The court denied the Rule 60(b) motion, and on appeal the Eighth Circuit remanded the case for an evidentiary hearing to determine whether the parties had agreed on all essential terms of the agreement. *Id.* The district court, on remand, found that the parties had reached agreement on all essential terms, but held that the contract was unenforceable because it was based on both parties' mistaken assumption that summary judgment had not been granted. *Id.* Accordingly, the district court rescinded its dismissal order and reinstated the summary judgment order in defendant's favor. Another appeal followed.

***8** On appeal, the Eighth Circuit reversed and held that the defendant was bound by the settlement agreement notwithstanding the court's summary judgment ruling on the merits. *Id.* The court stated that, "Rule 60(b) does not allow district courts to indulge a party's discontent over the effects of [the party's] bargain." *Id.* (internal quotation omitted). Specifically, the court noted that "[the defendant] knew it had a dispositive motion pending, and yet chose the certainty of settlement rather than the gamble of a ruling on its motion." *Id.* at 1084. Because the parties had entered into a binding settlement, the *Sheng* court held that the district court abused its discretion in granting the defendant's Rule 60(b) motion and remanded the case "for entry of judgment dismissing the action based on the settlement agreement." *Id.*

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In this case, we find nothing in the Clarification Act that would moot the parties' Settlement Agreement, just as the summary judgment rulings in *Syncor* and *Sheng* did not moot the settlement agreements there. The fact that the Settlement Agreement is a class action settlement governed by Rule 23 does not affect the enforceability of the Settlement Agreement as a binding contract. The parties executed the Settlement Agreement with the understanding that intervening events could affect their interests in the litigation. Indeed, the Clarification Act was pending in Congress when the parties negotiated the Settlement Agreement at arm's length and with the assistance of counsel. The Settlement Agreement simply hedged the parties' bets, reflecting their choice of "the certainty of settlement [over] the gamble" of legislative action. *See Sheng,* 117 F.3d at 1084. That Congress ultimately enacted the legislation does not allow Defendant to avoid the Settlement Agreement it executed in good faith with Plaintiff. *See, e.g., Dunlap v. Chicago Osteopathic Hosp.,* No. 92-3813, 1995 WL 94876, at *1 (7th Cir. Mar.7, 1995) (unpublished opinion) (affirming district court's refusal to set aside a valid settlement agreement where subsequent change in law would make it easier for the plaintiff to "prove her case").

Moreover, it is of no consequence that FACTA, as amended, no longer recognizes the claims underlying Plaintiff's Complaint. The Settlement Agreement is a contract that exists independently from the Complaint. This contract expressly disavows Defendant's FACTA liability. (*See* Settlement Agreement ¶ 2.9.5.) Thus, whether Defendant faces FACTA liability is irrelevant to our consideration of the Settlement Agreement for preliminary approval. There is nothing in the Settlement Agreement that conditions its enforceability on the enactment of the pending legislation. Final court approval is the Settlement Agreement's only condition. We will not permit Defendant to avoid its independent contractual obligations simply because the law evolved in a way favorable to Defendant's position in the underlying lawsuit.

***9** Defendant relies on *Ehrheart v. Verizon Wireless,* No. 07-1165, 2008 U.S. Dist. LEXIS 47224 (W.D. Pa. June 13, 2008), in support of its position that the settlement should be set aside. In setting aside a settlement in circumstances factually similar to those here, the court in *Ehrheart* primarily relied upon the Tenth Circuit decision in *Biodiversity Associates v. Cables,* 357 F.3d 1152, 1169-70 (10th Cir.2004). *Biodiversity* is inapposite. In *Biodiversity,* the Tenth Circuit was considering the effect of narrow legislation on a settlement agreement executed by the Forest Service with various environmental groups. *Id.* at 1156. The legislation was a rider to an appropriations bill that enacted the terms of the parties' settlement agreement. *Id.* However, the rider required the Forest Service to take a variety of actions that violated the settlement agreement and explicitly prohibited judicial review of those actions. *Id.* at 1160. The rider specifically referred to the settlement agreement and stated that the agreement should continue in effect to the extent it was not preempted by the rider. *Id.* at 1159. The *Biodiversity* court upheld Congress' authority (a) to override a settlement agreement affecting federal lands, and (b) to limit judicial authority to consider actions by the Forest Service that might violate the settlement agreement. *See id.* at 1172.

Here, by contrast, the Clarification Act "is a clarifying amendment which merely eliminates a cause of action based solely on a person's failure to truncate expiration dates from credit and debit card receipts, and which does not purport to limit parties' ability to negotiate binding settlement agreements or judicial authority to enforce such settlements of FACTA claims made before the effective date of the amendments." *Colella v. Univ. of Pittsburgh,* 569 F.Supp.2d 525, 533 (W.D.Pa.2008) (discussing the Clarification Act and reaching same conclusion). The Clarification Act has no effect on the binding Settlement Agreement executed by the parties while the legislation was pending. Like the court in *Colella,* we find *Ehrheart* unpersuasive. *See id.* at 531 n. 2 (noting disagreement with *Ehrheart* and enforcing settlement agreement); *see also Hughes v. InMotion Entm't,* No. 07-1299, 2008 WL 3889725, at *6 n. 1 (W.D.Pa. Aug.18, 2008).

C. Evaluation of the Settlement Agreement for Preliminary Approval

Having concluded that the parties executed a valid Settlement Agreement, and having determined that the Clarification Act does not moot the Settlement Agreement, we turn now to the joint Motion for Preliminary Approval of the Class Action Settlement.

The preliminary approval determination requires us to consider, inter alia, whether "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Linerboard Antitrust Litig.,* 292 F.Supp.2d 631, 638 (E.D.Pa.2003) (*citing In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.,* 55 F.3d 768, 785-86 (3d Cir.1995)).[4]

***10** The proposed settlement here provides for payment by Defendant to the putative settlement class members pursuant to one of three options: (a) $5.00 off of any purchase; or (b) a free bud vase, with a retail value of

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$10.00; or (c) $25.00 off a purchase of $150.00 or more. (Settlement Agreement ¶ 2. 1. 1.) The number of vouchers available is capped at the number of card transactions during the Class Period. (*Id.* ¶ 2.9.1.) In addition, the proposed settlement provides for payment by Defendant of $5,000.00 to a charity selected by Defendant and subject to class counsels' approval. (*Id.* ¶ 2.1.2.) The proposed settlement also requires the parties to enter into a proposed consent decree "pursuant to which [Defendant] will agree to continue to abide by the truncation requirements of FACTA, as amended." (*Id.* ¶ 2.1.3.) Finally, the proposed settlement provides for payment by Defendant to class counsel of "$115,000.00 for attorney fees and up to $5,000 for all allowable Litigation costs and expenses," (*id.* ¶ 2.6.1.), and $2,500.00 to the named class representative (*id.* ¶ 2.7.1).

We find that the terms of the settlement are fair, reasonable, and adequate given the nature of the disputed claims and the absence of actual injury. There is no doubt that the parties negotiated at "arm's length" to reach the Settlement Agreement. (*See* Joint Mot. ¶ 1.) Moreover, discovery was sufficient given Defendant's acknowledgment "that between December 4, 2006 and April 19, 2007, its stores were using Point of Sale Equipment that was not programmed to suppress the expiration dates from the receipts that were presented to their customers who made purchases with a creditor debit card," and that as a result, "353,000 customers were presented with receipts" that violated FACTA. (Doc. No. 23 at 2.) The issue remaining for discovery is Defendant's willfulness, and the parties have represented to us that they are introducing "[e]vidence illustrative of Defendant's compliance efforts" in support of final approval of the proposed settlement. (Doc. No. 23 at 2.) In addition, the proponents of the Settlement Agreement, counsel for the settling parties, are experienced in class action and similar litigation. No class members have filed objections to the settlement at this time. Finally, the terms of the settlement here are similar to the terms of settlements reached in other FACTA class actions that have been approved by courts in this Circuit. *See e.g., Smith v. Grayling Corp.,* No. 07-1905, 2008 WL 3861286, at *1 (E.D.Pa. Aug.20, 2008) (Savage, J.) (granting final approval of FACTA settlement providing for $7.00 vouchers and $3,000 .00 to plaintiffs' class representative); *Ehrheart v. Pfaltzgraff Factory Stores, Inc.,* No. 07-1433 (E.D.Pa. June 5, 2008) (Padova, J.) (granting final approval of FACTA settlement providing for payment options of a free mug or dinner plate valued at $8.00, or a coupon for $10.00 off a $25.00 purchase; attorneys' fees of $112,500 .00 to the plaintiffs' class counsel; and $2,500.00 to the plaintiffs' class representative); *Curiale v. Hershey Entm't & Resorts Co.,* No. 07-0651 (M.D.Pa. May 21, 2008) (Kane, J.) (granting final approval of FACTA settlement providing for $8.33 voucher or $8.00 coupon; attorneys' fees of $105,000.00; a donation of $5,000.00 to charity; and $2,000.00 to plaintiffs' class representative); *Carusone v. Joe's Crab Shack Holdings, Inc.,* No. 07-0320 (W.D.Pa. May 28, 2008) (Lenihan, J.) (granting final approval of FACTA settlement providing for two $4.00 coupons; a donation of $5,000.00 to charity; attorneys' fees; and $2,500.00 to plaintiffs' class representative); *Long v. Joseph-Beth Group, Inc.,* No. 07-0433 (W.D.Pa. May 27, 2008) (Cercone, J.) (granting final approval of FACTA settlement providing for $5.00 coupon).

***11** We see no reason at this juncture to question the fairness, reasonableness, and adequacy of the settlement, which was reached after extensive arm's length negotiation between very experienced and competent counsel and facilitated by a respected retired jurist. Under all the circumstances, we conclude that preliminary approval of this settlement is appropriate.

IV. CONCLUSION

For all of these reasons, the Joint Motion to Approve Settlement Agreement will be granted.

An appropriate Order follows.

PRELIMINARY APPROVAL ORDER

AND NOW, this *14th* day of *November,* 2008, it appearing that the parties to the above-captioned action have entered into a Class Action Settlement Agreement (the "Settlement Agreement") that, together with the exhibits thereto, sets forth the terms and conditions for a proposed settlement of the claims alleged in the Class Action Complaint ("Complaint"), and the Court having read and considered the parties' Settlement Agreement and the accompanying exhibits, the Court finds as follows:

1. All defined terms contained herein shall have the same meanings as set forth in the Settlement Agreement executed by the Settling Parties and filed with this Court.

2. The Class Representative and the Lenox Releasees, through their counsel of record in the Litigation, have reached an agreement to settle all claims in the litigation.

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3. The Court preliminarily concludes that, for the purposes of approving this settlement only and for no other purpose and with no other effect on the Litigation should the proposed Settlement Agreement not ultimately be approved or should the Effective Date not occur, the proposed Rule 23 Class appears to meet the requirements for certification under Federal Rule of Civil Procedure 23:(a) the proposed class is ascertainable and so numerous that joinder of all members of the class is impracticable; (b) there are questions of law or fact common to the proposed Class, and there is a well-defined community of interest among members of the proposed Class with respect to the subject matter of the Litigation; (c) the claims of Class Representative Amanda Curiale are typical of the claims of the members of the proposed Class; (d) Class Representative Amanda Curiale will fairly and adequately protect the interests of the Members of the Class; (e) a class action is superior to other available methods for an efficient adjudication of this controversy; (f) the counsel of record for the Class Representative are qualified to serve as counsel for the Class Representative in their own capacities as well as their representative capacities and for the Class; and (g) common issues will likely predominate over individual issues.

4. The moving parties also have presented to the Court for review a Class Action Settlement Agreement ("Settlement Agreement"). The Agreement proposes a Settlement that is within the range of reasonableness and meets the requirements for preliminary approval.

***12** 5. The moving parties have presented to the Court for review a plan to provide notice to the proposed Class of the terms of the settlement and the various options the Class has, including, among other things, the option for Class Members to opt-out of the class action; the option to be represented by counsel of their choosing and to object to the proposed settlement; and/or the option to become a Participating Claimant. The notice will be published consistent with the Settlement Agreement. The notice proposed by the Settling Parties is the best practicable under the circumstances, consistent with Federal Rule of Civil Procedure 23(c) (2)(B).

Accordingly, it is ORDERED as follows:

1. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Class Action Settlement Agreement is preliminarily approved.

2. This action is preliminarily certified as a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of all persons who received electronically printed receipts at the point of sale or transaction from a retail store location operated by Lenox, in a transaction occurring between December 4, 2006 and April 19, 2007, wherein the receipt displayed (1) more than the last five digits of the person's credit card or debit card number, and/or (2) the expiration date of the person's credit card number.

3. Notice of the proposed settlement and the rights of Class Members to opt in and/or out of the settlement and/or to become a Participating Claimant shall be given by issuance of publication notice consistent with the terms of the Agreement by November 24, 2008.

4. A hearing shall be held before this Court on January 23, 2009, at 2:00 p.m. in Courtroom 8A to consider whether the settlement should be given final approval by the Court:

(a) Written objections by Class Members to the proposed settlement will be considered if received by Class Counsel on or before the Notice Response deadline.

(b) At the Settlement Hearing, Class Members may be heard orally in support of or, if they have timely submitted written objections, in opposition to the settlement.

(c) Class Counsel and counsel for the Lenox Releasees should be prepared at the hearing to respond to objections filed by Class Members and to provide other information as appropriate, bearing on whether or not the settlement should be approved.

5. In the event that the Effective Date occurs, all Class Members will be deemed to have forever released and discharged the Released Claims. In the event that the Effective Date does not occur for any reason whatsoever, the Settlement Agreement shall be deemed null and void and shall have no effect whatsoever.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 4899474

Footnotes

1 The Settlement Agreement, ¶ 2.1.1, values the bud vase at $10 .00. The parties' Joint Memorandum of Law in Support of the Joint Motion (Doc. No. 23) values the bud vase at $15.00. We will accept the $10.00 valuation in the parties' Settlement Agreement as controlling. A $15.00 valuation would not change our analysis.

2 Defendant acknowledges that between December 4, 2006 and April 19, 2007, its stores used Point of Sale Equipment that was not programmed to suppress credit cards' expiration dates from the receipts presented to the putative class members. (Doc. No. 23 at 2 .) Defendant asserts that it did not "willfully" violate FACTA's truncation requirements and that, in fact, it took specific steps calculated to comply fully with the statute. (*Id.*) The parties stated their intention to introduce evidence illustrative of Defendant's compliance efforts in support of final approval of the proposed settlement. (*Id.*)

3 Since *Sheng* was not a class action, court approval was not required.

4 The Court of Appeals for the Third Circuit has adopted a nine-factor test to help district courts structure their final decisions to approve settlements as fair, reasonable, and adequate as required by Rule 23(e). *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 317 (3d Cir.1998) (*citing Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir.1975)). Those factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Girsh,* 521 F.2d at 157. At the preliminary approval stage, however, we need not address all of these factors, as "the standard for preliminary approval is far less demanding." *Gates v. Rohm & Haas Co.,* 248 F.R.D. 434,444 n. 7 (E.D.Pa.2008).

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EXHIBIT 7

User Name: Eleanor Grasso
Date and Time: Wednesday, April 10, 2024 9:46:00AM EDT
Job Number: 221595007

Document (1)

1. *Education Station Day Care Ctr. Inc. v. Yellow Book USA, Inc., 2007 N.J. Super. Unpub. LEXIS 1607*
   Client/Matter: -None-

Cited
As of: April 10, 2024 1:46 PM Z

Education Station Day Care Ctr. Inc. v. Yellow Book USA, Inc.

Superior Court of New Jersey, Appellate Division

March 27, 2007, Argued; May 1, 2007, Decided

DOCKET NO. A-1653-05T1, A-1834-05T1, A-1693-05T1

Reporter
2007 N.J. Super. Unpub. LEXIS 1607 *; 2007 WL 1245971

THE EDUCATION STATION DAY CARE CENTER INC., Plaintiff-Respondent, v. YELLOW BOOK USA, INC., Defendant-Respondent. THE EDUCATION STATION DAY CARE CENTER INC., Plaintiff-Appellant, v. YELLOW BOOK USA, INC., Defendant-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Bergen County, L-13657-04.

Core Terms

settlement, attorney's fees, class member, lodestar, customers, advertising, objectors, class action, counsel fees, enhancement, parties, proposed settlement, expenses, voucher, settlement agreement, former customer, negotiated, percent, fee-shifting, calculating, maximum, billed, cases, costs, hourly rate, trial court, subscribers, mediation, approve, notice

Counsel: Randall S. Ford and Lillian Young, appellants, Pro se, in A-1653-05T1.

John J. Pentz of the Massachusetts bar, admitted pro hac vice, argued the cause for appellants, Hansen Stierberger Downard Melenbrink & Schroeder, Tri-County Abstract Inc., Connie Pentz Realty Co., and John J. Pentz, Jr. in A-1834-05T1 (Smith & Stein and Mr. Pentz, attorneys; Mr. Pentz and David M. Nieporent, on the brief).

Michael S. Stein argued the cause for appellant, The Education Station Day Care Center Inc. in A-1693-05T1 (Pashman Stein, attorneys; John T. Whipple, on the brief).

Pashman Stein, attorneys for respondent, The Education Station Day Care Center Inc. in A-1653-05T1 (John T. Whipple, on the brief).

Davis Wright Tremaine and McCusker, Anselmi, Rosen, Carvelli & Walsh, attorneys for respondent, Yellow Book USA, Inc. in A-1653-05T1 (Bruce S. Rosen, of counsel; Robert D. Balin and Bruce Lamka, of the Washington bar, admitted pro hac vice, on the brief).

Oren S. Giskan (Giskan, Solotaroff & Anderson) of the New York bar, admitted pro hac vice, argued the cause for respondent, The Education Station Day Care Center Inc. **[*2]** in A-1834-05T1 (Pashman Stein and Mr. Giskan, attorneys; John T. Whipple, on the brief).

Robert D. Balin argued the cause for respondent Yellow Book USA, Inc. in A-1834-05T1 (Davis Wright Tremaine and McCusker, Anselmi, Rosen, Carvelli & Walsh, attorneys; Bruce S. Rosen, of counsel; Mr. Balin and Bruce Lamka, of the Washington bar, admitted pro hac vice, on the brief).

Robert D. Balin argued the cause for respondent, Yellow Book USA, Inc. in A-1693-05T1 (Davis Wright Tremaine and McCusker, Anselmi, Rosen, Carvelli & Walsh, attorneys; Bruce S. Rosen, of counsel; Mr. Balin and Bruce Lamka, of the Washington State bar, admitted pro hac vice, on the brief).

Judges: Before Judges Coburn, Axelrad and R.B. Coleman.

Opinion

PER CURIAM

These consolidated appeals arise out of a court approved settlement of a certified class action for false advertising against defendant, Yellow Book USA, Inc. One group of objectors challenges the fairness of the settlement and the other group of objectors challenges

the sufficiency of notice. Plaintiff, Education Station Day Care Centers, Inc. (Education Station), challenges the methodology and quantum of the counsel fee approved by the court. We affirm as to the objectors' appeals. **[*3]** As to plaintiff's appeal, we affirm in part and exercise original jurisdiction and modify in part.

In November 2004, Education Station, an advertiser in Yellow Page directories, filed this class action litigation, alleging that Yellow Book made false representations in its advertisements and sales presentations concerning the usage of its telephone directories during the period from May 2002 through July 2004. Plaintiff alleged that as a result of Yellow Book's claims of superior usage, class members paid more than they should have for their Yellow Book advertisements, and sought damages under the Consumer Fraud Act (CFA), *N.J.S.A. 56:8-1 to -106*, and similar statutes in all other states nationwide, and also pled companion common law claims. At the time plaintiff commenced this lawsuit, several other putative class actions were pending against Yellow Book in other jurisdictions.

In January and February 2005, the parties participated in mediated settlement discussions, with the Hon. Geoffrey Gaulkin, P.J.A.D. (Ret.) presiding, and after four days a settlement was reached. The proposed settlement provided relief for a class of 529,087 Yellow Book customers, consisting of 391,525 current **[*4]** customers and 137,562 former customers. Current customers were eligible for a fully transferable credit voucher for future advertising purchases, with a fourteen-month expiration period, valued between $ 48 to $ 720, depending on the amount of advertising purchased by the customer during the class period. Former customers were eligible for the same credit vouchers as current customers toward future Yellow Book advertising, or had the option of receiving a lower cash payment of between $ 22 to $ 265, depending on the amount of advertising purchased by the customer during the class period. Yellow Book also agreed to pay all administrative costs, including costs associated with notice to the settlement class. The parties estimated the total potential value of the proposed settlement, excluding administrative costs and counsel fees and costs at between $ 65,709,220 and $ 71,900,000, depending on whether credit or cash options were chosen.

Following an agreement on the substantive terms of the settlement, the parties, with the assistance of the mediator, negotiated attorneys' fees to be paid to plaintiff's counsel. The agreement was that Yellow Book would pay attorneys' fees separate and **[*5]** apart from any relief provided to the class so that the fees would not decrease the value of the settlement to the class members. On April 28, 2005, the parties executed a Settlement Agreement pending the court's approval as required by *Rule 4:32-2(e)*. As part of the Settlement Agreement, Representative Plaintiffs' Counsel agreed to "apply to the Court for an award of attorneys' fees and litigation expenses not to exceed $ 5,000,000" and Yellow Book "agreed to pay, subject to Court approval, the sum of $ 5,000,000 to Representative Plaintiffs' Counsel for their attorneys' fees and expenses in connection with the Action and the Litigation." Paragraph IX(A).

On May l3, 2005, the trial court entered a preliminary approval order incorporating the terms of the agreement and scheduling the final approval hearing. The court specifically found the requirements under *Rule* 4:32 were provisionally met and the manner of notice described in the agreement was valid and sufficient. As of the fairness hearing on August 26, 2005, in excess of ninety-six percent of the class members had been contacted. According to plaintiff's counsel, with four weeks remaining in the claims period, about 81,000 people **[*6]** (15% of the class) had filed claims. Thirteen members filed objections. Counsel for Yellow Book represented that 65,000 current customers had made claims for their advertising credits totaling over $ 11.2 million. Counsel recounted that the parties "painstakingly negotiated" the settlement over the four days of mediation, which resulted in "major compromises on both sides."

Plaintiff's counsel touted the benefit that each class member received from the settlement without the risk and delay of trial, explaining that its economist predicted that if plaintiffs were successful at trial, their maximum possible damages would be that class members paid eleven percent more for their advertising as a result of Yellow Book's misleading campaign. The settlement agreement, however, provided each class member with a range of fifty to seventy to eighty percent of that amount, which was a tremendous result considering the average nine to twelve percent recovery of maximum possible damages in a typical class action settlement. Plaintiff's counsel also explained the rationale for negotiating the cash option solely for former customers was that such customers could have gone out of business, moved out **[*7]** of state or, for whatever reason, did not want to advertise in Yellow Book and would have no need for a credit voucher. Credit vouchers, however, were a viable option for current

customers in view of Yellow Book's seventy percent customer retention rate.

Appellant John Pentz and counsel for an objector who did not appeal presented their views. Pentz primarily argued that the class should have only included the class members who relied upon the misleading advertising campaign. He also argued the court should not apply a multiplier in determining attorneys' fees and the excess funds between the court-awarded fee and the agreed-upon maximum should be distributed to the class. Furthermore, Pentz suggested that, due to the inherent linkage between the parties' settlement for the class award and the attorneys' fees, the court should require the parties in a class action to resettle the class award after settling the amount of attorneys' fees. The court reviewed submissions by objectors who were unable to appear, including appellants Ford and Young.

The court certified the class under *Rule 4:32-1(a)* and *(b)*, and approved the terms of the settlement as "fair and reasonable [and] adequate under **[*8]** the totality of the circumstances" pursuant to *Rule 4:32-2*. The court recited the factors it took into consideration, including: (1) the inclusiveness of the meaningful class members within the time period; (2) the risk of trial; (3) the substantial recovery provided by the settlement considering the maximum possible recovery provided by the economist; (4) the flexible redemption period for class members to exercise their vouchers once received; (5) the ability for class members to opt out; and (6) the increased value of the voucher as opposed to a current cash payment, particularly in view of the likelihood the current customers would exercise that voucher for future advertising.

On October 24, 2005, after reviewing the parties' arguments and itemized fees submitted by class counsel, the court issued a written decision regarding plaintiff's attorneys' fees and expenses. The court recited the history of the case and the terms of the parties' proposed settlement and noted the representation of Yellow Book's counsel at the fairness hearing that "the attorneys' fees and expenses were negotiated not with a finite amount, but with a cap or maximum of $ 5,000,000 to be paid by Yellow Book," **[*9]** the provision in the proposed Settlement Order and Judgment for the maximum amount of attorneys' fees, and the objectors' position that such award was not justified. The court, citing *Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 248 (D.N.J. 2005)*, explained that its obligation as part of a fairness determination in a class action settlement was to thoroughly analyze a fee application and assess a reasonable fee and expenses within its discretion in accordance with the appropriate methodology. It further recited the two primary methods for calculating attorneys' fees, the lodestar method, noting this method is more typically applied in statutory fee-shifting cases, and the percentage of recovery method. The court concluded that the lodestar amount, i.e., the legal fees as billed for the six law firms totaling $ 1,060,266, was an appropriate attorneys' fee award, plus costs and disbursements of $ 33,909.87, as opposed to the $ 5 million requested. On October 24, 2005, the court entered a Settlement Order and Judgment confirming the Settlement Agreement and approving payment of $ 1,094,175.87 to Representative Plaintiffs' Counsel as attorneys' fees and expenses to be paid by **[*10]** Yellow Book as provided in the Settlement Agreement. These appeals ensued.

In appeal No. A-1834-05T1, objectors, Hanzen Stierberger Downard Melenbrink & Schroeder, Tri-County Abstract Inc., Connie Pentz Realty Co., and John J. Pentz, Jr. ("Pentz" objectors) assert the following arguments: (1) the court abused its discretion in approving the settlement because it discriminates unfairly between similarly situated class members; (2) attorneys' fees may not exceed one-and-one half times class counsel's reasonable lodestar; and (3) the difference between the $ 5 million fund set aside for payment of attorneys' fees and the amount actually awarded should be treated as class funds.

In appeal No. A-1653-05T1, objectors Randal Ford and Lillian Young argue that since individuals who signed Yellow Book contracts on behalf of companies that were plaintiffs in the class action were not included as class members and did not receive individual notice of the proposed settlement, the judgment approving the settlement should be reversed.

In appeal No. A-1693-05T1, plaintiff Education Station asserts the following arguments: (1) the trial court should only have reviewed the record and class counsel's fee **[*11]** request for taint or conflict, and if there was none, approved the $ 5 million fee; (2) the Appellate Division should exercise original jurisdiction and set the fee; and (3) even if analyzed under the majority view in awarding common fund class action counsel fees, the $ 5 million fee was fair and reasonable.

We first address the objectors' challenges to the overall settlement and then address the counsel fee award. The Pentz objectors argue that the settlement agreement

discriminates between similarly situated class members, in that former customers may elect a cash payment and current customers can only use a credit voucher for future advertising. They contend such distinction arbitrarily prefers one group of plaintiffs over another, which is inimical to the very principle of class advocacy. They suggest we disapprove the settlement as structured by the parties, citing Parker v. Time Warner Entm't Co., L.P., 239 F.R.D. 318 (E.D.N.Y. 2007), as persuasive authority for the proposition that treating current and former customers is *de facto* unfair differential treatment of similarly situated class members. The Pentz objectors propose that the settlement should be amended to remove the **[*12]** disparity by providing the current customers with the cash option, and that such amendment would have little effect on Yellow Book's ultimate payout because the current customers who are satisfied with Yellow Book would choose the higher-valued vouchers.

We are not persuaded by these arguments. A trial court's task in reviewing a class action settlement is to determine whether it is fair, reasonable, and adequate to the class as a whole. R. 4:32-2(e)(1)(A); Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 627, 524 A.2d 841 (App. Div. l987). The trial court's role is to approve or reject the proposed settlement in its entirety, not to revise or amend particular provisions. *See* City of Paterson v. Paterson Gen. Hospital, 104 N.J. Super. 472, 250 A.2d 427 (App. Div.), *aff'd*, 53 N.J. 421, 251 A.2d 131 (1969). "[T]he court's function [is] to determine the reasonableness of the agreement, not to renegotiate the terms of the settlement." Tabaac v. Atlantic City, 174 N.J. Super. 519, 524, 417 A.2d 56 (Law Div. l980). The issue is the reasonableness of the settlement as written, "not whether one could conceive of a better settlement." In re Cendant Sec. Litig., 109 F. Supp. 2d 235, 255 (D.N.J. 2000).

On appeal, the trial court's decision to **[*13]** approve a proposed class settlement is reviewed for abuse of discretion. Chattin, 216 N.J. Super. at 628; In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 527 (3d Cir. 2004)(standard of review is abuse of discretion, and approval of class settlement must be affirmed absent clearly erroneous finding of fact or misinterpretation or misapplication of law). Deference to the trial court's approval of a complex class action settlement is particularly appropriate given courts' endorsement of the policy of encouraging the settlement of litigation. *See* 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002); In re General Motors Corp. Pick-Up Truck Prod. Liab. Litig., 55 F.3d 768, 784 (3d Cir. l995) ("[t]he law favors settlement, particularly in class action and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation); Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. l977) ("[p]articularly in class action suits, there is an overriding public interest in favor of settlement").

The Pentz objectors point to no abuse of discretion that would justify overturning the settlement. They merely challenge a single feature, contending **[*14]** that current customers like themselves are provided with less valuable benefits because they are not offered the cash option available to former customers and, thus, that portion of the settlement is unfair and should be reformed. Their reliance on Parker is misplaced. *Parker* involved a class action suit regarding Time Warner's disclosure and sale of its cable subscribers' personal identification information in violation of state and federal privacy laws. The proposed settlement provided benefits to class members who could be identified from a sales database. Under the settlement, current subscribers ("Category I") received credit for free movies or other service and former subscribers who were still living in Time Warner's service area ("Category II") received a credit for a month of free service with no installation fee. Parker, 239 F.R.D. at 326. Employing the "range of reasonableness standard," the court found these in-kind, non-cash credits to be substantially fair and adequate means of compensation for the class claims at issue. The court, however, declined to approve the settlement agreement for two other reasons, one being the disparate and unfair treatment of "Category III" **[*15]** members, former subscribers who no longer lived in the cable company's service area, who were only given the right, within 120 days, to transfer either benefit available to a current or former subscriber to a person living in the area serviced by Time Warner. [1] The court found that merely providing this group of customers, which represented a significant number of members, with a credit that they did not even have the option of using themselves, was not a sufficient benefit of the settlement. Of significant concern was that the parties failed to offer any difference between the three categories of claimants that would justify providing the

[1] The other reason was that the settlement deprived a large number of class members, apparently a majority of the total class, of any remedy. The "Category IV" members, who were not listed in the sales database that the parties used to determine settlement benefits, would be releasing their claims against Time Warner and receiving nothing in return. There were other databases from which additional plaintiffs could be identified.

former subscribers who had moved out of the area with only the "mere right to transfer their benefit to someone else." *Id. at 340*.

Entirely **[*16]** consistent with the case law, and recognized by the court in *Parker*, a class settlement can offer different benefits to differently situated class members, so long as it offers fair and adequate compensation to the class as a whole. There was more than adequate explanation given in the present case as to why the settlement provided two separate awards to the class, and the parties explained the rationale in detail for compromising different award options due to distinguishing needs of current and former customers, making the cash option available only to the latter. Moreover, the Pentz objectors' assertion that providing settlement credits to current customers is inadequate because they are no more likely to purchase future advertising in Yellow Book than former customers is belied by the undisputed fact in the record of Yellow Book's seventy-percent customer retention rate. As such, the settlement credit may even be better than a cash rebate for this vast majority of current customers who have an ongoing, recurring business relationship with Yellow Book. The trial court was satisfied there was ample evidence in the record of distributional fairness, equal treatment among class members, **[*17]** and an overall fair, reasonable and adequate settlement to the class, and we discern no basis to second-guess that decision.

The Ford and Young objectors argue that individuals such as themselves who signed Yellow Book contracts on behalf of companies that were plaintiffs in the class action should have been included as class members and given notice because they are co-obligors on the contract, thereby incurring joint liability. This argument is without sufficient merit to warrant discussion. *R. 2:11-3(e)(1)(E)*. These individuals signed contracts as authorized representatives of companies, not on their own behalf. They arranged for the payment of advertising to Yellow Book from their respective companies and did not draw from their own accounts in making the payment. They are not class members and, as such, were never entitled to notice of the proposed settlement.

We turn now to the counsel fee award. Plaintiff contends the parties agreed that Yellow Book would pay $ 5 million in attorneys' fees to plaintiff's counsel separate from the relief to the class members, and the trial court's sole function was to ascertain that the counsel fee settlement was reached as a result of arms-length **[*18]** negotiations, with the assistance of a highly-respected mediator, following an agreement on the substantive terms of the class settlement, and was free of taint or collusion. According to plaintiff, consistent with our courts' deference to parties' agreements absent taint or conflict, if the court was satisfied there were no such impediments, it should have approved the $ 5 million fee.

We have no doubt as to the integrity of the mediation process but disagree that the court's scope of review should have been as narrow as suggested by plaintiff. "[A] thorough judicial review of fee applications is required in all class action settlements." *In re General Motors Corp., supra, 55 F.3d at 819*. It is apparent from the comments of Yellow Book's counsel at the fairness hearing and the language of the proposed Settlement Agreement that attorneys' fees and expenses were negotiated with the knowledge that Yellow Book could be required to pay up to $ 5 million, depending upon what the court determined was a reasonable fee under acceptable standards for fee approvals. For example, in addition to the aforementioned provision in the Settlement Agreement referencing the "not to exceed $ 5,000,000" **[*19]** language and "court approval" of the amount, the agreement contains several provisions acknowledging the court will determine whether the attorneys' fees and expenses requested by Representative Plaintiffs' counsel are "reasonable." The Agreement also contemplates the court may award less than the $ 5 million requested, providing in P IX(B) that installments of "$ 2,500,000 will be paid, *or in the event the Court awards some lesser amount*, half of that less amount will be paid . . . "(emphasis added) and in P X(F) that "no order of the Court awarding Representative Plaintiffs' Counsel attorneys' fees and expense in an amount less than the amount agreed to in P IX(A) . . . shall constitute grounds for cancellation or termination of the Settlement Agreement."

The court explained that of the two primary methods for calculating attorneys' fees, the percentage of recovery method and the lodestar method, the lodestar method is more typically applied in statutory fee-shifting cases, and that the alternate method may be used to cross-check the reasonableness of the fee. The court then analyzed the itemized breakdown of attorneys' fees, totaling $ 1,060,266, from each of the six law firms comprising **[*20]** Plaintiffs' Representative counsel whose hourly rates descended from the highest at $ 550 per hour for retired Supreme Court Justice Gary S. Stein. The court found the hourly rates were "current, prevailing hourly market rates considering [plaintiff's]

skill and proficiency" exhibited in its submissions and oral arguments and the rates, including former Justice Stein's, were "not disproportionate considering the vastness, preparedness and expertise necessary for this type of Settlement." The court elaborated:

> The litigation itself required considerable resources in order to argue and prepare the issues involved for early resolution. It is unquestioned that this matter required preparation for litigation as well as for Settlement. Without that preparation, defense counsel would not have considered such a Settlement offer. Further, the Court observed the skill of competent counsel during the Fairness Hearing and also recognizes that the papers submitted are commensurate with the skill represented.

The court further noted that the "miniscule amount of objections filed [thirteen] compared to the amount of Class members [529,000] is an additional, persuasive basis to determine that the fees **[*21]** as billed are fair and reasonable." The court concluded that the amount of actual time billed was "fundamentally unchallenged by any meritorious objection" and there was nothing before the court that "substantiate[d] any reduction of time billed on a belief of fabrication, exaggeration or claim of unnecessary hours billed." Thus, citing *Rendine v. Pantzer, 141 N.J. 292, 337, 661 A.2d 1202 (1995)*, the court found the hourly rates and the amount of hours billed were "realistic, fair, reasonable and unchallenged by any meritorious defense." The court then approved a counsel fee award in the amount of the lodestar plus actual costs, totaling $ 1,094,175.87, stating it was a fair and reasonable fee for the class action settlement.

Contrary to plaintiff's argument on appeal, the *Rendine* lodestar analysis was the appropriate method for calculating counsel fees in this fee-shifting CFA action. *See In re General Motors Corp., supra, 55 F.3d at 821* ("Courts generally regard the lodestar method, which uses the number of hours reasonably expended as its starting point, as the appropriate method in statutory fee shifting cases."). Under specific statutory enactments, courts are authorized to award a "reasonable" **[*22]** attorneys' fee to the prevailing party. *R. 4:42-9(a)(8)*; *Rendine, supra, 141 N.J. at 322*. *See also R.M. v. Supreme Court of New Jersey, 190 N.J. 1, 9, 918 A.2d 7 (2007)*. The CFA expressly provides that a prevailing plaintiff is entitled to reasonable attorneys' fees, filing fees, and costs. *N.J.S.A. 56:8-19*; *Wanetick v. Gateway Mitsubishi, 163 N.J. 484, 490, 750 A.2d 79 (2000)*. The first step in calculating a fee award under a fee-shifting statute is to determine the "lodestar," which is arrived at by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Rendine, supra, 141 N.J. at 334-35*. The determination of the lodestar amount is the "most significant element in the award of a reasonable fee" because it requires the trial court to "evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application." *Id. at 335*. Here, the court found both the hours expended and the hourly rates reasonable. No challenges were made on appeal to those findings.

The Court also instructed in *Rendine*, that after determining the appropriate lodestar amount, the trial court should "consider whether **[*23]** to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." *Id. at 337*. As the Court recognized, "[b]oth as a matter of economic reality and simple fairness . . . a counsel fee awarded under a fee-shifting statute cannot be 'reasonable' unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed." *Id. at 338*. The Court also held that an additional enhancement may be justified in certain circumstances based on the likelihood of success, "[w]hen the result achieved in such a case is significant and of broad public interest . . . ." *Id. at 341* (quoting *Pennsylvania v. Delaware Citizens' Council for Clean Air, 483 U.S. 711, 751, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987))*. Ordinarily, contingency enhancements in fee-shifting cases should range between five and fifty-percent of the lodestar fee; "with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." *Id. at 343*. The **[*24]** Court instructed, however, that such enhancements should never exceed onehundred percent of the lodestar, and enhancements of that magnitude will be appropriate only in a rare and exceptional case. *Ibid.*

Although the court applied the *Rendine* methodology in calculating plaintiff's counsel fee, the court ceased its analysis after calculating the lodestar amount, did not award any enhancement, and provided no explanation as to why it did not give what *Rendine* describes as the ordinary enhancement in a fee-shifting case. We are satisfied the record is sufficiently complete to permit us to perform the second step of the *Rendine* analysis in the exercise of our original jurisdiction. *R. 2:10-5*. We affirm the lodestar counsel fee determination but

conclude that plaintiff's counsel is entitled to an enhancement to the lodestar billed fees. This class action was taken on a contingent fee basis, with substantial risks to plaintiff's counsel. Moreover, based on plaintiff's economist's assessment of maximum possible damages recoverable if successful at trial, plaintiff's counsel achieved an excellent result for the class members without the risk, delay and additional expenses of a trial. Plaintiff's **[*25]** counsel also deserves an enhancement for resolving the matter expeditiously through mediation rather than increasing the lodestar through protracted litigation, and for not seeking a fee against the class, which could have been based on a percentage of recovery. We therefore conclude that plaintiff's counsel is entitled to an enhancement of thirty-five percent of the lodestar ($ 371,093) to be added to the counsel fee award entered by the trial court.

We reject the Pentz objectors' argument that the difference between the requested $ 5 million and the approved counsel fee should be added to the class award. This argument ignores the purpose of negotiating attorneys' fees only after the terms of the substantive settlement are reached, i.e., avoiding the subject of fees from improperly influencing the settlement. Indeed, the class settlement amount and the attorneys' fees are two separate and distinct funds. The settlement was negotiated prior to the fee agreement, and it is not the court's role to renegotiate the terms of the settlement. *See* *Tabaac, supra, 174 N.J. Super. at 524*.

Appeal Nos. A-1834-05T1 and A-1653-05T1 are affirmed. We remand Appeal No. A-1693-05T1 for entry of an appropriate **[*26]** order consistent with this opinion.

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EXHIBIT 8

User Name: Eleanor Grasso
Date and Time: Wednesday, April 10, 2024 9:47:00AM EDT
Job Number: 221595095

Document (1)

1. *Faber v. Cornell Univ., 2023 U.S. Dist. LEXIS 148833*
   Client/Matter: -None-

Neutral
As of: April 10, 2024 1:47 PM Z

Faber v. Cornell Univ.

United States District Court for the Northern District of New York

August 24, 2023, Decided; August 24, 2023, Filed

3:20-CV-00467 (MAD/ML)

Reporter

2023 U.S. Dist. LEXIS 148833 *; 2023 WL 5452598

ALEC FABER, individually and on behalf of all others similarly situated; and AHNAF RAHMAN, individually and on behalf of others similarly situated, Plaintiffs, vs. CORNELL UNIVERSITY, Defendant.

Core Terms

settlement, class action, class member, parties, class certification, final approval, Spring, enrolled, semester, refund, factors, campus, risks

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Judges: Mae **[*2]** A. D'Agostino, United States District Judge.

Opinion by: Mae A. D'Agostino

Opinion

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On April 23, 2020, Plaintiffs[1] filed this diversity class action against Defendant Cornell University ("Defendant" or "Cornell") alleging breach of contract, unjust enrichment, and conversion under New York State law. *See* Dkt. No. 1. Following consolidation, Plaintiffs amended the complaint with additional claims under *N.Y. Gen. Bus. L. §§ 349* and *350*. *See* Dkt. No. 33. On October 3, 2022, Plaintiffs filed a motion seeking class certification and appointment of class representatives and counsel. *See* Dkt. No. 132. Thereafter, on March 6, 2023, Plaintiffs filed the instant motion unopposed, which seeks preliminary approval of class settlement and a final approval hearing, as well as

[1] Plaintiffs are individual students residing outside the State of New York. *See* Dkt. No. 33 at ¶¶ 9-11. Plaintiffs consolidated this action with cases Nos. 20-CV-00467 (MAD/ML) and 20-CV-00592 (MAD/ML) on October 13, 2020. *See* Dkt. No. 32. A consolidated amended complaint followed on October 27, 2020. *See* Dkt. No. 33.

renewing the requests for class certification and representative appointment. *See* Dkt. No. 156. For the reasons and authorities set forth below, the motion is granted.[2]

II. BACKGROUND

Defendant is a private university located in Ithaca, New York, with more than 24,000 enrolled students. Dkt. No. 33 at ¶¶ 6-7. During the 2019-2020 academic year, Defendant's spring semester began on January 21, 2020, and was scheduled to conclude **[*3]** on or about May 16, 2020, with commencement ceremonies on May 24, 2020. *See id.* at ¶¶ 36-37. On March 13, 2020, Defendant announced "that it was suspending all classes effective immediately" in light of the global COVID-19 pandemic. *Id.* at ¶¶ 39-40. Defendant announced further that "all undergraduate and most professional students were required to leave campus no later than March 29, 2020," and further "strongly encouraged" students to leave campus "as soon as possible." *Id.* at ¶ 40.

Following the announcements, "Defendant continued to offer some level of academic instruction via online classes[.]" Dkt. No. 33 at ¶ 45. Students began requesting refunds for tuition and fees related to the "benefits of on-campus enrollment," including "[a]ccess to facilities such as libraries, laboratories, computer labs, and study rooms," and "the myriad activities offered by campus life[.]" *Id.* at ¶¶ 45-46. However, Defendant refused to pay the refunds as requested. *See id.* at ¶ 47.

At some point prior to the instant action, Defendant announced that it would "offer a pro-rated refund on room and board fees." Dkt. No. 33 at ¶ 50. However, Plaintiffs understood that Defendant intended "to calculate this **[*4]** refund from a pro-rated date of March 29, 2020 rather than March 13, 2020 (the date students were directed to leave campus)." *Id.* Plaintiffs brought this action seeking "a pro-rated refund of the tuition and fees they paid for the Spring 2020 semester from when [Defendant] stopped providing in-person classes and switched to remote online learning." *Id.* at ¶ 53.

After three years of contested litigation, the parties have "engaged in significant motion practice, multiple mediations, and substantial discovery." *See* Dkt. No. 156-2 at ¶ 16. For instance, on August 18, 2021, the parties participated in a mediation session, as ordered by the Court. *See id.* at ¶ 25. The session was not successful. *See id.* After engaging in further discovery, the parties participated in a second mediation on June 9, 2022. *See id.* The second session was also unsuccessful. *See id.* Following Plaintiffs' motion for class certification, the parties discussed Defendant's "intent to file a motion for summary judgment with the Court," prompting additional settlement discussions. *See id.* at ¶ 26. After agreeing on proposed terms, the parties prepared a written agreement ("Settlement Agreement"), and executed same on **[*5]** March 6, 2023. *See id.* at ¶ 27.

At its core, the Settlement Agreement sets forth a monetary amount of $3,000,000.00, which is "for the direct benefit of the Settlement Class as any remaining funds after distribution will be put into a Student Access Fund for providing assistance to Cornell students who need financial assistance, including enrolled members of the Settlement Class." Dkt. No. 156-2 at ¶ 30. Moreover, the amount "will be used to pay all settlement awards, attorneys' fees, notice, and administrative costs." *Id.* According to the Settlement Agreement, the fee award "is subject to this Court's approval and will serve to compensate for the time, risk and expense Class Counsel incurred pursuing claims on Settlement Class's behalf." *Id.* at ¶ 33.

III. DISCUSSION

A. Class Certification

"Before approving a class settlement agreement, a district court must first determine whether the requirements for class certification in *Rule 23(a)* and *(b)* have been satisfied." *In re Am. Int'l Grp., Inc. Sec. Litig. (In re AIG), 689 F.3d 229, 238 (2d Cir. 2012)*. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems" precluding a finding of predominance under *Rule 23(b)(3)*. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*; *see also* *In re AIG, 689 F.3d at 242* ("[M]anageability **[*6]** concerns do not stand in the way of certifying a settlement class"). "But other

[2] Following the issuance of this Memorandum-Decision and Order, the Court will issue a separate Order outlining the settlement procedures, as stipulated to by the parties in the proposed Settlement Agreement and proposed Order affixed thereto. *See* Dkt. Nos. 156-3 & 156-5.

specifications of the Rule — those designed to protect absentees by blocking unwarranted or overbroad class definitions — demand undiluted, even heightened, attention in the settlement context." *Amchem, 521 U.S. at 620*.

1. Rule 23(a)

Rule 23(a) requires that "(1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representatives parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)*. A class action may be maintained if the requirements of *Rule 23(a)* are satisfied and, as relevant here, "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. In the Second Circuit, "'*Rule 23* is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility' in deciding whether to grant certification." *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 237 F.R.D. 26, 31 (E.D.N.Y. 2006)* (quoting *Marisol A. v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1997)*).

Herein, the Court **[*7]** finds that the proposed class meets all requirements for certification under *Fed. R. Civ. P. 23(a)*. As an initial matter, according to the Settlement Agreement, the class includes the following:

> [A]ll students enrolled in a degree-bearing Cornell program for the Spring 2020 semester, with the exception of: (i) any person who withdrew from Cornell on or before March 1, 2020; (ii) any person enrolled for the Spring 2020 semester solely in a program that, at the beginning of the Spring 2020 semester, was to be delivered as an online program; (iii) any person who executes and files a proper and timely opt-out request to be excluded from the Settlement Class; and (iv) the legal representatives, successors or assigns of any such excluded person.

Dkt. No. 156-3 at 9-10. As such, *Rule 23(a)(1)* is satisfied because the size of the class consists of 24,000 members, and thus joinder would be impracticable. *See* Dkt. No. 156-2 at ¶ 50; *Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473 (2d Cir. 1995)* (stating that "numerosity is presumed at a level of 40 members") (citation omitted).

As to *Rule 23(a)(2)*'s commonality standard, the Supreme Court has ruled that a question is common where it is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is **[*8]** central to the validity of each one of the claims in one stroke," and where "the class members have suffered the same injury." *Wal-Mart Stores, 564 U.S. at 349-50*. The Second Circuit has also noted that "[w]here the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Johnson v. Nextel Comm. Inc., 780 F.3d 128, 137 (2d Cir. 2015)*. Based on the current record, the Court finds that all class members are students sharing common questions of fact and law concerning alleged injuries from Defendant's decision to "suspend[] all classes effective immediately" during its spring 2020 semester . Dkt. No. 33 at ¶¶ 39-40.

Furthermore, the typicality standard set forth in *Rule 23(a)(3)* is satisfied

> when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability. . . . [M]inor variations in the fact patterns underlying [the] individual's claims do not preclude a finding of typicality. By contrast, unique defenses that threaten to become the focus of the litigation may preclude such a finding.

Sykes v. Mel Harris and Assoc., LLC, 285 F.R.D. 279, 287 (S.D.N.Y. 2012) (internal quotation marks and citations omitted). At this stage, it is undisputed that each proposed class member "enrolled as on-campus students **[*9]** of Cornell, registered for in-person class, paid money in exchange for in-person education and access to on-campus facilities and services that were denied when Cornell closed its campus in Spring 2020." Dkt. No. 156-1 at 26 (citing Dkt. No. 156-2 at ¶ 15). The Court finds that there are no unique defenses or legal theories that would preclude a finding of typicality in light of the factual allegations herein. Accordingly, the *Rule 23(a)(3)* standard is satisfied.

Finally, the proposed class meets the "adequacy of representation" requirement set forth in *Rule 23(a)(4)*. To determine adequacy, the Court must inquire as to whether "1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct

the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp., 222 F.3d 52, 60 (2d Cir. 2000)*. After carefully reviewing the record at-bar, the Court finds that there is no indication that Plaintiffs' interests would be at odds with those of the proposed class members. Furthermore, counsel for Plaintiffs assert that, prior to commencing suit, counsel "spent many hours investigating the claims of several potential plaintiffs" and "interviewed a number of students and . . . gather[ed] information about **[*10]** [Defendant's] conduct and its impact upon consumers." *Id.* at ¶ 18. Additionally, counsel "also expended significant resources researching and developing the legal claims at issue." *Id.* at ¶ 19. Counsel further represents having "experience in understanding the damages at issue, what information is critical in determining class membership, and what data is necessary to calculate each Settlement Class Member's respective damages." *Id.* As such, the Court finds that Class Counsel, Lynch Carpenter, LLP, Poulin Wiley Anastopoulo, LLC, Cherundolo Law Firm, PLLC, and Toptani Law, PLLC, together are qualified, experienced, and competent in class action litigation. *See* Dkt. Nos. 156-8, 156-9, & 156-10.

2. Rule 23(b)

In addition to *Rule 23(a)*'s requirements, *Rule 23(b)(3)* permits class status if

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature **[*11]** of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undersirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Herein, the Court finds that the common questions predominate over any individual member's questions and that a class action is superior to other methods of adjudicating this controversy. Importantly, the Court finds that, because other members of the class will have little interest in prosecuting separate actions and, for any members who may be so inclined, the potential individual recovery is relatively small in comparison to the cost of litigation. The Court has based this determination on its own judicial experience, the factual allegations at-bar, and the representations in the joint declaration from counsel. *See* Dkt. No. 156-2. Furthermore, as far as the Court is aware, the only other actions separate from the instant proceeding are No. 20-CV-471 (MAD/ML) and 20-CV-592 (MAD/ML), which were consolidated with the instant action nearly three years ago. *See* Dkt. No. 32.

Finally, in factoring the difficulties in managing complex **[*12]** class litigation, the Court has carefully reviewed the parties' proposed notice and distribution plans relative to the 24,000 class members. *See* Dkt. Nos. 156-4, 156-6, & 156-13. Notably, the parties have retained KCC Class Action Services, LLC ("KCC"), "a leading class action administration firm that provides comprehensive class action services, including claims administration, legal notification, email and postal mailing campaign implementation, website design, call center support, class member data management, check and voucher disbursements, tax reporting, settlement fund escrow reporting, and other related services[.]" Dkt. No. 156-13 at ¶ 2. Based on the above-discussed factors, the Court finds that class certification in this matter is appropriate.

B. Likelihood of Approval

"In weighing a grant of preliminary approval, district courts must determine whether 'giving notice is justified by the parties' showing that the court *will likely be able to*: (i) approve the proposal under *Rule 23(e)(2)*; and (ii) certify the class for purposes of judgment on the proposal.'" *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 330 F.R.D. 11, 28 (E.D.N.Y. 2019)* (quoting *Fed. R. Civ. P. 23(e)(1)(B)(i-ii)*) (emphasis in original). Although the factors set forth in *Rule 23(e)(2)* apply to final approval, courts "look[] to them to determine **[*13]** whether it will likely grant final approval based on the information currently before the Court." *Id.* *Rule 23(e)(2)* provides that a court may approve a class action settlement if "it is fair, reasonable, and adequate" after considering the following:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of process class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under *Rule 23(e)(3)*; and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Courts in the Second Circuit also analyze the framework set forth in *City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974)*, *abrogated on other grounds by* *Goldberger v. Integrated Res. Inc., 209 F.3d 43 (2d Cir. 2000)*, "in tandem with *Rule 23*" to determine whether a class settlement is substantively fair and warrants final approval. *In re Namenda Direct Purchaser Antitrust Litig., 462 F. Supp. 3d 307, 309 (S.D.N.Y. 2020)* (citing *Grinnell, 495 F.2d at 463*). The *Grinnell* factors include (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage **[*14]** of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See* *Grinnell, 495 F.2d at 463*.

In this case, the proposed settlement appears fundamentally fair in light of the record currently before the Court. As noted jointly by the parties, the instant matter represents "a genre of cases involving students seeking partial refunds of tuition and mandatory fees brought against universities throughout the country which involves novel claims, include no trial verdict, and has resulted in a mixed bag of results during pre-trial litigation." Dkt. No. 156-1 at ¶ 18. The parties have represented to the Court that the anticipated costs of further motion practice, coupled with the extent of completed discovery, "would be substantial," and that, in any event, there are inherent uncertainties **[*15]** relative to any potential rulings in this case. *Id.* And according to the joint declaration of counsel, "[t]here are currently no objections to the Settlement[.]" *Id.* at 19.

Given the scope of the monetary relief sought, and the size of the proposed class, as well as all factors discussed throughout this Memorandum-Decision and Order, the Court finds that, subject to a final approval hearing, the Settlement Agreement is in accordance with *Rule 23*'s requirements.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions, the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant Cornell University's unopposed motion (Dkt. No. 156) seeking preliminary approval of proposed class action settlement; provisional certification, for purposes of settlement only, of settlement class; preliminary appointment of settlement class representatives; preliminary appointment of class counsel; approval of proposed settlement procedure and schedule; and approval of proposed notice to class members and hearing on final approval, is **GRANTED**; and the Court further

ORDERS that the Final Approval Hearing shall be held before this Court on **October [*16] 25, 2023 at 12:00 p.m.**, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12207, to determine whether the Settlement Agreement should be fully, finally, and unconditionally approved, including the fairness, reasonableness, and adequacy of the proposed settlement; and the Court further

ORDERS that the parties and their counsel shall adhere to the settlement procedures set forth in the Order granting preliminary approval of the class action, which will be issued subsequently and separately from this Memorandum-Decision and Order; and the Court further

ORDERS that the Clerk shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: August 24, 2023

Albany, New York

/s/ Mae A. D'Agostino

Mae A. D'Agostino

U.S. District Judge

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EXHIBIT 9

2015 WL 10172760 (N.J.Super.Ch.) (Trial Order)
Superior Court of New Jersey, Chancery Division.
General Equity
Essex County

Christine GURRIERE, et al., on Behalf of themselves and all others Similarly situated, Plaintiff,
v.
BLOOMFIELD CONDOMINIUM ASSOCIATES, LLC, Bloomfield Associates, Alex Bistricer, David Bistricer, Elsa Bistricer, Brookdale Gardens Condominium Association, Inc., Bloomfield Management Company, Defendants.

No. ESX-C-101-15.
August 28, 2015.

Opinion

Laurence H. Olive, Esq., for plaintiffs.

Philip R. Sellinger, Esq. & Aaron Van Nostrand, Esq. (Greenberg Traurig, LLP), for defendants Bloomfield Condominium Associates, LLC, Bloomfield Associates, Alex Bistricer, David Bistricer, Morris Bistricer, Elsa Bistricer and Bloomfield Management Company.

E. Richard Kennedy, Esq. (Kennedy, Wronko, Kennedy), for defendant Brookedale Gardens Condominium Association, Inc.

Dennis J. Drasco, Esq. (Lum, Drasco and Positan), Special Fiscal Agent.

David B. Katz, Judge.

FACTUAL BACKGROUND

***1** The present application in the above matter is intended to resolve a complex litigation that has spanned at least 15 years. Indeed, the underlying case, Docket No. ESX-C-143-00, is the oldest case in Essex County, New Jersey.

In the instant matter, the parties, after years of extensive litigation and negotiation, agreed among themselves to settle the underlying case by way of a class action settlement. As such, the parties filed the present class action complaint under Docket No. ESX-C-141-15 for the purpose of settlement only.

The Court is now being asked to grant final approval of a proposed class action settlement on behalf of themselves and a class of all current and former non-sponsor unit owners ("Class Members") at Brookdale Gardens Condominium Complex ("Brookdale Gardens"), located at 935 Broad Street in Bloomfield, New Jersey. The putative class, consisting of 75 Class Members, was certified and the proposed settlement agreement was preliminarily approved on May 6, 2015 following a hearing. Of the 75 Class Members, 59 unit owners are class representatives.

The Court conducted a lengthy final approval hearing on July 20, 2015. Two experts testified at the hearing and were available for cross-examination. The objecting Class Members were given an opportunity to verbally place their objections on the record at the hearing, and four objectors elected to do so. They too were subjected to cross-examination.

Briefly, and as will be discussed at length below, the proposed settlement provides that, in consideration for dismissing the lawsuit and releasing Defendants from the claims alleged therein, each Class Member who currently owns a unit or units at Brookdale Gardens may convey its unit(s) to Bloomfield Condominium Associates, LLC, the developer of Brookdale Gardens

(the "Sponsor") in exchange for a specific amount set forth in the agreement. The specified amount is based on the number of rooms in the particular unit.[1] Significantly, and at issue, the proposed settlement also provides that upon final approval, control over the Board and the Association will vest in the Sponsor, and the Sponsor will not be obligated to sell any additional units in Brookdale Gardens.

The terms of the proposed settlement reflect a compromise on various issues in the instant litigation, which has been ongoing for the past 15 years and which is characterized by a complex, contentious and protracted history. The Court has been advised that the instant litigation is the oldest pending case in Essex County. For purposes of context and completeness, the Court will provide a brief overview of the substantive issues of the underlying suit as well as the significant procedural events that led to the instant proposed class action settlement.

On August 28, 1987, a Public Offering Statement ("POS") was issued for a 400-unit development known as Brookdale Gardens. Originally, an entity known as River Broad Corporation planned to convert the development into a condominium pursuant to *N.J.S.A.* 46:8B-1. The POS contained several terms relating to governance of the condominium. At some point, Brookdale Gardens was sold to Defendant Bloomfield Condominium Associates, LLC, whose members consist of Defendants Alex Bistricer, David Bistricer, Morris Bistricer and Elsa Bistricer.[2] The conversion of Brookdale Gardens began on January 12, 1989 with the filing of a Master Deed establishing the condominium. Defendant Brookdale Gardens Condominium Association, Inc. (the "Association"), a non-profit corporation, governs Brookdale Gardens and is responsible for the administration, management, and operation of the complex. The Association was to be governed by an elected Board of Trustees ("the Board").

***2** The POS set forth a detailed plan for the governance of Brookdale Gardens as required by *N.J.S.A.* 46:8B-12.1. Specifically, in the event that 25% of the units are sold, non-sponsor unit owners shall elect no less than 25% of the Board of Trustees. In the event that 50% of the units are sold, no less than 40% of the members of the Board of Trustees shall be elected by non-sponsor unit owners. Finally, in the event that 75% of the units are sold, non-sponsor unit owners may elect the entire Board of Trustees, except that the Sponsor may retain one member on the Board of Trustees as long as any units remain unsold in the regular course of business.

At all relevant times, Bloomfield Condominium Associates has owned 310 out of the 392 units in the condominium, roughly 80%, with the balance being sold to third parties acquiring their units from the Sponsor. Thus, Bloomfield Condominium Associates had complete control of the Board of Trustees since its inception because it did not convey 25% or more of the units. Through its control of the Board, Bloomfield Condominium Associates hired Bloomfield Management Company, a company owned by the Bistricers, to manage and operate the complex. Bloomfield Management Company was later removed by a Special Fiscal Agent appointed by the Court to oversee the finances and operation of Brookdale Gardens. Bloomfield Management Company is no longer in existence.

In addition to the POS, the New Jersey Condominium Act ("Condominium Act") or ("the Act") itself contains provisions requiring turnover of board control to non-sponsor unit owners in certain circumstances. The relevant statute, *N.J.S.A.* 46:8B-12.1 sets forth the same governance scheme as provided by the POS, but also provides in pertinent part that "when some units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration." *N.J.S.A.* 46:8B-12.1(a).

On April 24, 2000, 34 non-sponsor unit owners filed a Complaint and Order to Show Cause under Docket No. C-143-00, alleging that Bloomfield Condominium Associates violated multiple provisions of the Condominium Act, as well as claims based on negligence, breach of contract and fraud. Specifically, the Plaintiffs alleged that the Association was not being operated in their best interest and that the property was in a state of disrepair. This case was related to two earlier cases initiated by non-sponsor unit owners against Bloomfield Associates, Bloomfield Condominium Associates, and the Bistricers filed in 1990 and 1995.[3]

After unsuccessfully attempting mediation on several occasions, the parties continued litigation over several years. On February 16, 2007, the Court appointed Dennis Drasco, Esq., of Lum Drasco and Positan, as Special Fiscal Agent ("SFA") for the Association. Mr. Drasco was appointed to facilitate litigation to which the Association was a party, as well as to report to the Court any improprieties found in the operations and financial affairs of the Association and to take any other actions deemed appropriate. The SFA recommended the removal of Bloomfield Management Company and the appointment of a professional management firm to operate, manage and maintain the condominium.

***3** After several years of ongoing litigation, on July 6, 2012, the Court granted Plaintiffs' motion for partial summary judgment, thus granting them control of the Board of the Trustees of the Association. The main thrust of Plaintiffs' motion was that after selling units to Plaintiffs, Defendants intentionally failed to offer any additional units for sale to the public in the ordinary course of business for the previous 20 years in order to maintain control over the Board. In support of its allegation that Defendants failed to offer units for sale in the ordinary course of business, Plaintiffs offered evidence that individuals made many offers to purchase units from the sponsor which went ignored. Those individuals alleged that they eventually purchased their units from non-sponsor unit owners.

Plaintiffs asserted that Defendants also executed a blanket mortgage on sponsor-owned units in contravention of the Condominium Act, making it impossible for Plaintiffs to sell their units. Specifically, Plaintiffs claimed that the *N.J.S.A.* 46:8B-23 prohibits blanket mortgages unless individual unit owners can obtain releases of their particular units from the mortgage upon payment to the mortgagee of their respective proportionate share of the then outstanding balance of unpaid principal, accrued interest and any other charges then due and unpaid.

Plaintiffs also argued that under Defendants' improper control, the complex had fallen out of compliance with various municipal code requirements and suffered numerous Bureau of Housing Inspection violations. Plaintiffs also alleged that Defendants failed to properly maintain the property and refused to raise the maintenance fees because they would have had to pay 80% of those fees by virtue of their ownership of the units, and that Defendants did not properly reserve funds for maintenance and upkeep.

In resolving Plaintiffs' summary judgment motion, the Court held that after selling some units, Defendants intentionally took action that prevented the sale of additional units in the ordinary course of business, and as such, Plaintiffs were entitled to elect all members of the board pursuant to *N.J.S.A.* 46:8B-12.1(a). In reaching its decision, the Court set forth many sources that indicated that "the overriding legislative concern was to address problems associated with continued developer control over condominium complexes long after some units were sold." July 6, 2012 Opinion, at p. 14. The Court found that the blanket mortgage executed on approximately 80% of the units in the complex made it impossible for Defendants to sell sponsor-owned units in the ordinary course of business. Because the Sponsor would not sell its units, the non-sponsor unit owners were deprived of any control over the condominium, contrary to the legislature's intent in enacting the Condominium Act. In order to effectuate the legislative goal to allow non-sponsor unit owners to play a meaningful role in the governance of their condominiums, the Court divested the Sponsor of all voting rights until they conveyed ownership of additional units such that non-sponsor unit owners would own 75% of all units. In other words, Plaintiffs were given full control over the Board of Trustees by the Court's July 6, 2012 decision. The non-Sponsor unit owners were elected to serve as members of the Board in December 2012 for the first time since the creation of the condominium in 1989.[4]

Plaintiffs then filed another summary judgment motion on April 24, 2013. There were several significant aspects to this motion. First, Plaintiffs were concerned that Defendants were still able to technically "control" the Condominium complex, notwithstanding the Court's order of July 6, 2012. Second, Plaintiffs sought to compel Defendants to sell their units so that the complex would returned to Condominium-like development, with more than the 20% private ownership so that Plaintiffs could eventually have a market for the sale of their units. Third, Plaintiffs sought an Order precluding the Sponsor from continual rental of its units.

***4** With respect to the issue that the Sponsor may retain "control" despite the Court's July 6, 2012 Order, Plaintiffs reasoned that the Condominium's bylaws set forth a number of actions that require a two-thirds majority vote of all "members" who are voting, which the Master Deed defines as the owner or co-owner of a unit. Plaintiffs feared that Defendants could still frustrate their attempts to pass proposals requiring a two-thirds majority because 51% of the members must be present before a meeting can be held and a vote can be taken. Because the Bylaws define "member" only as owner or co-owner of a unit, arguably, according to Plaintiffs, even a member without voting rights (such as the Sponsor) "counts" for the purposes of the percentage of members needed to hold a meeting. In light of Plaintiffs concerns over the potential frustration of the remedy fashioned by the Court in July 2012, the Court held that meetings may be held so long as 51% of the *non-sponsor unit owners* are present. *See* August 30, 2013 Order.

While the Court did craft a remedy to prevent the Sponsor from frustrating the divestiture of its voting rights, it denied the principal other relief requested by Plaintiffs. Specifically, the Court refused to enter a mandatory injunction compelling the Sponsor to sell the units it owns because such relief would require an inappropriate level of court supervision. Finally, the Court

refused to enjoin Defendants from leasing any of its remaining units because the Master Deed contained no restrictions upon the leasing of any Unit and the Condominium Act required those types of restrictions to be specified in the Master Deed. *Id*.

Litigation remained ongoing for several months following the August 30, 2013 Order. On October 29, 2013, the Association filed a motion for leave to amend its Answer to Plaintiffs' Fourth Amended Complaint and intervene as Plaintiff in the action or file a cross-claim against the Sponsor. The Association argued that its Answer to the first three Complaints denied Plaintiffs' allegations against the Sponsor, its Co-Defendant, because at that time the Association was controlled by the Sponsor. Because the Sponsor was stripped of that control by virtue of the Court's July 2012 Order, the Association, then controlled by non-Sponsor unit owners, wished to support Plaintiffs' allegations against the Sponsor and assert claims of its own against the Sponsor. Thus, the Association alleged violations of the New Jersey Condominium Act, the Planned Real Estate Development Full Disclosure Act, and the Consumer Fraud Act. The Court granted the Association's request to amend its Answer to the Fourth Amended Complaint and to assert a Cross Claim against the Sponsor on December 19, 2013.

On February 11, 2014, the Sponsor filed a motion to dismiss the Association's Cross-Claims against the Sponsor, arguing that the Association failed to adequately plead any cause of action under the Consumer Fraud Act, the Condominium Act and the Planned Real Estate Development Full Disclosure Act. The motion hearing took place on March 20, 2014, at which time the Court granted the Association permission to amend the Cross-Claim. The Association filed a Second Amended Cross-Claim on April 5, 2014, and Defendant's motion to dismiss the Second Amended Cross-Claim was denied on May 2, 2014. Defendants thereafter filed an Answer denying all allegation in the Second Amended Cross-Claim.

The parties then continued in active mediation. The parties agreed amongst themselves that a fair resolution of the lawsuit would be for the non-sponsor unit owners to be bought out at above market rates, with control of the complex returning to the Defendants. The parties agreed amongst themselves that those settlement parameters were obtainable through a class action. As such, the Plaintiffs filed a class action complaint on May 1, 2015 under Docket No. C-101-15. The Court conducted an extensive preliminary approval hearing on May 4, 2015 and entered an Order on May 6, 2015 preliminarily approving the proposed class action settlement and directing that notice of the settlement in the form proposed by the parties be sent to all Class Members as set forth in the Settlement Agreement. In accordance with the Court's May 6, 2015 Order, the Class Notice was mailed to all 75 Class Members via first class mail. On May 11, 2015 the Class Notice was also placed under the doors of all 41 Class Members currently residing at Brookdale Gardens. On June 13, 2015 through June 16, 2015 the Class Notice was published in the Newark Star Ledger.

TERMS OF THE PROPOSED CLASS ACTION SETTLEMENT

Procedural Terms

***5** The Settlement Agreement provides several options for Class Members regarding their participation in the proposed settlement. In order to avail themselves of the settlement benefits (i.e., be bought out by the Sponsor), Class Members were required to submit a claim form by July 3, 2015. Class Members who leased any of their units to tenants were directed to submit copies of any leases with their claim forms. If the outstanding term of any lease exceeds a year or if the lease is more than 10% below certain monthly rent amounts, the claim may be rejected. The specific threshold rent amounts set forth in the proposed settlement are (1) $1,430 for 5 rooms; (2) $1,250 for 4 rooms; (3) $1,220 for 3.5 rooms; and (4) $1,010 for 2.5 rooms.

Class Members who submit a claim form will, if the settlement is approved, each receive a notice advising that the Class Member has six months to find alternate housing, and once the Class Member has found alternate housing, the Class Member will have 60 days to close on the sale of their unit in Brookdale Gardens to the Sponsor.

Class Members who wished to "opt-out" so as not to participate in the settlement, and preserve only their right to pursue damage claims based on an alleged diminution of value of their units due to Defendants' conduct, were required to submit an opt-out form by June 11, 2015. Any Class Member who neither submitted a claim nor submitted a formal opt-out letter in accordance with the settlement terms waives his or her right to convey his or her unit to the Sponsor, but will be bound by all other terms of the settlement. The proposed settlement also gave Class Members an opportunity to object to the terms of the settlement by sending a letter to all attorneys and filing that letter with the Clerk of Court by June 11, 2015. Those who submitted an

affirmative opt-out letter were not permitted to object because by opting out they were no longer a party to the settlement. In other words, only those who submitted claim forms or did nothing were afforded an opportunity to object.

Substantive Terms

The settlement agreement is 46 pages long and contains 30 provisions, with many provisions containing subparts. The Court will elaborate only on those provisions that are at issue in the final approval hearing.

Pursuant to the proposed settlement, Class Members who timely submit a claim form will be entitled to receive the following amount for each unit owned by that Class Member upon conveyance to the Sponsor: (1) $127,500 per unit for a 2.5 room unit; (2) $136,500 per unit for a 3.5 room unit; (3) $141,500 per unit for a 4 room unit; (4) $170,000 per unit for a 5 room unit; (5) $5,000 per unit for each garage unit; and (6) $105,000 for unit 84A. The settlement agreement provides that the Sponsor will pay the fee for obtaining the certificate of occupancy and the realty transfer fee associated with the conveyance, with the Class Member being responsible for performing all repairs required by the Township for issuance of a certificate of occupancy.

Also at issue are those provisions that change the governance of Brookdale Gardens. Section 1(b)(i) provides that control of Brookdale Gardens, the Association and the Board shall be turned over to the Sponsor, with the governance structure reverting to the structure in place immediately prior to the July 6, 2012 Order, with the Sponsor having the right to appoint each member of the Board of the Association. As such, any remaining non-sponsor unit owners will have no representation on the Board, and all Class Members, as well as those who opt out of the class and remain in the complex, will have no right to object to the Sponsor's control of the Board. Section 1(b)(ii) provides that the Sponsor has no obligation to sell any of their units at Brookdale Gardens. Should the Sponsor decide to sell any of its units, it must comply with the progressive statutory turnover of control to non-sponsor unit owners provided by *N.J.S.A.* 46:8B-21.

***6** In its many submissions to the Court, the Sponsor represents that while any remaining unit owners may not challenge the Sponsor's control of the Association in and of itself, they may challenge any acts that are contrary to the Condominium Act. The Sponsor asserts that the release in the proposed Settlement Agreement only applies to claims based on acts or omissions of the Sponsor that predate the Settlement Agreement such that Class Members reserve their right to sue the Sponsor for any future improper or unlawful acts. In other words, should the Sponsor fail to properly maintain the community areas of the condominium, the remaining unit owners may sue for those violations. In addition, those who opt-out will be able to maintain an action for any alleged diminution in value of their unit(s) due to Defendant's prior conduct relative to their control of Brookdale Gardens. Significantly, the opt-outs do not preserve their right to sue over the Sponsor's current control over the complex.

CLASS REACTION TO SETTLEMENT

Out of the 75 total Class Members, 41 submitted claims, 18 objected[5], and two opted out. Of the 18 objections, 11 are "form" objections in that they are identical. Each objection challenges the amount of the settlement benefits and/or the turnover of control to the sponsor. The Court will identify each of those objections and provide a brief overview of the substance of each one.

1. Zef Lulgjuraj

Mr. Lulgjuraj owns Units 38D, 3D and 39C, residing in 38D and renting 3D and 39D to tenants. All three units owned by Mr. Lulgjuraj are five rooms and have been valued at $170,000 by the settlement agreement. Mr. Lulgjuraj also owns garages 28 and 46 which have been valued at $5,000 each. Mr. Lulgjuraj asserts that if he sold his units to the Sponsor in accordance with the settlement, he would not receive fair value in exchange. Mr. Lulgjuraj attaches an appraisal report performed in February

2015 by a licensed real estate appraiser which appraises unit 3D at $178,000.

Mr. Lulgjuraj attaches MLS listings of similar units within a five mile radius of Brookdale Gardens, many of which list for well over the amount offered under the settlement agreement.

Mr. Lulgjuraj argues that the Sponsor should buy the units at a higher price because the Sponsor will be able to rent the units for well over the $l, 800/month Mr. Lulgjuraj currently charges his tenants. Mr. Lulgjuraj also claims that he has spent approximately $30,000 in renovations for each of the units he owns. As such, Mr. Lulgjuraj proposes an increase of at least $30,000 for each unit, and an increase of $2,000 for each garage. That is, Mr. Lulgjuraj would like to receive $200,000 for each of his units and $7,000 for each garage.

2. Valentina Gumenyuk and Oleg Korzyukov

Ms. Gumenyuk and Mr. Korzyukov purchased Unit 74A, a four room unit, in October 2014 while the instant lawsuit was ongoing. Their first objection to the settlement agreement is that they would be unable to buy a comparable unit in the same area for the amount of money offered by the settlement agreement. They also object to the Sponsor having total control over the Association and Board as well as the non-Sponsor unit owners having no control despite paying association fees and taxes.

3. Therese Anglin

Ms. Anglin reports that she has owned Unit 87A since February 1989, which comprises of 4 rooms. Ms. Anglin takes issue with the fact that the sale price offered by the settlement is “across the board” for all class members and does not account for improvements that some owners have made to their units. Ms. Anglin claims that she has installed new windows, replaced the entire kitchen, including appliances, installed a new hardwood floor in the living room due to damage from a steam leak, replaced the toilet and sink in the bathroom, renovated two hallway closets into one large closet, installed crown molding in the living room, and planted a garden. Ms. Anglin argues that she should receive a higher price for her Unit based on these improvements because they will save the Sponsor time and money and allow them to obtain a higher rent once it assumes ownership over her unit. In addition to submitting her written objection, Ms. Anglin testified at the fairness hearing about the value of improvements made to certain units.

4. Linda Grotenstein and Jessica Grotenstein

***7** The Grotensteins report that they purchased unit 14D in December 2007 for $188,000. The Grotensteins allege that the Sponsor will likely sell the property for millions of dollars for development once it regains control. To bolster their theory regarding the Sponsor’s intentions, the Grotensteins attach several judicial decisions involving the Bistricers as defendants in cases where they allegedly acted wrongfully in certain real estate or finance transactions. The Grotenstein’s also attach articles portraying David Bistricer as the “worst city landlord” in Brooklyn and noting his presence of then-Public Advocate Bill de Blasio’s Worst Landlord Watchlist.

In light of the profit the Sponsor stands to gain through its alleged plans to sell the entire property, the Grotensteins assert that in exchange for the sale of their unit, they should receive fair market value as established in other condominium communities in and around Bloomfield. Like many of the other objectors, the Grotensteins have submitted listings in Bloomfield currently on the market to illustrate the alleged discrepancy between the sale price under the settlement agreement and the fair market value.

In addition to submitting a written objection, Linda Grotenstein testified at the fairness hearing regarding her improvements and her concerns about the Sponsor regaining control over the condominium.

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5. Kathleen Karcher

Ms. Karcher disagrees with the settlement offer for two reasons. First, she argues that the prices being offered for the units under the settlement agreement are less than current selling prices of similar units in less desirable locations. Specifically, Ms. Karcher asserts that: a 2.5 room unit, offered for $127,500 under the settlement agreement sells for between $135,000 and $149,000; a 3.5 room unit, offered for $136,500 under the settlement agreement, sells for between $149,000 and $169,000; a 4 room unit, offered for $141,500 under the settlement agreement, sells for between $169,000 and $239,000; and that a 5 room unit, offered for $170,000 under the settlement agreement, sells for between $195,000 and $245,000. Ms. Karcher argues that not only are the comparable units offered for higher sales prices, but such comparable units are in much less desirable locations than Brookdale Gardens. Ms. Karcher also argues that garages should be valued higher than $5,000, which Ms. Karcher asserts was the original purchase price in 1989, because they are currently in high demand due to limited parking.

In addition to the alleged disparities between the prices offered under the settlement and the asking prices for comparable units, Ms. Karcher also objects to the governance structure proposed under the settlement. Particularly, Ms. Karcher asserts that the Sponsor's main objective is "to maxim[ize] rental income at the expense of proper management and maintenance." As such, Ms. Karcher alleges that all improvements made by the non-Sponsor unit owners when they regained control of the Board will be undone. Specifically, Ms. Karcher claims that "the living conditions will quickly become unhealthy and unsanitary for everyone who lives in this complex" because the Sponsor will fail to pay for maintenance. In light of these concerns, Ms. Karcher proposes that the Board should be equally comprised of both Sponsor and non-Sponsor unit owners, notwithstanding that non-sponsor unit owners will be the smallest minority if the settlement is approved.

The following individuals submitted identical objections to Ms. Karcher's objection, which were submitted together with Ms. Karcher's objections: Malgorzata Jaroszczyk[6], Joseph Spera, Jr.[7], Michael Gatton, Shahid Liaqat, Michael Cucolo, Fabian Araujo, Patricia Dunn, Bella Broberg, John Lauvo III, Gloria Rafiq, Gustavo Villafuerte, Yolanta Lubinska, Santiago R. Vinueza and Tim Kelly. These "form" objections echo Ms. Karcher's concerns, namely that the purchase price offered under the settlement is lower than the current multiple listing prices for comparable sized units within a five mile radius of Brookdale Gardens, and that the Sponsor should not have sole control over the Board. These objections parrot Ms. Karcher's fear that the Sponsor will erase the progress and improvements made to the condominium achieved when the non-Sponsor unit owners regained control of the Board.

EXPERT RESPONSES TO THE PROPOSED CLASS ACTION SETTLEMENT

***8** Defendants submitted two expert reports to address the two principal concerns raised by the objections, namely the sale price for the units and the turnover of control over the Board to the Sponsor. These experts testified at the fairness hearing and were available for cross-examination.

Jon P. Brody, President of Appraisal Consultants Corporation, prepared an analysis addressing the reasonableness of the Sponsor's offered purchase price for the units. Mr. Brody is a state certified General Appraiser and is a Senior Residential Appraiser, Counselor of Real Estate and Member of the Appraisal Institute. In his report, Mr. Brody explains that he inspected the exterior of Brookdale Gardens and researched sales of comparable individual units in Bloomfield taking place between 2010 through 2015. Mr. Brody concludes that overall, the settlement agreement values exceed the overall average sales price per square foot.

Mr. Brody specifically addressed the appraisal report submitted by Mr. Lulgjuraj and testified that the report actually further supports that the settlement amounts are more than fair market value. Mr. Lulgjuraj's appraiser's report values one of his units at $178,000, and the settlement values his unit at $170,000. Mr. Brody explains that, in a typical transaction, the seller would be responsible for a brokerage free, traditionally 5%. As such, the seller would net only $169,100 in a typical sale at a $178,000 sale price.

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As to the assertion by some Class Members that the settlement value did not take into consideration certain improvements made to particular units, Mr. Brody acknowledged that no one unit was perfectly comparable to any Class Member's unit. However, Mr. Brody explained that his pool of sales data included a diverse range of units that included both units that had been improved and upgraded as well as older units with no upgrades. As such, on average, his analysis reflected the breakdown of units at Brookdale Gardens.

As to the multiple listings submitted with many of the objection letters, Mr. Brody asserts that multiple listings are not evidence of a market value transaction.

Defendants' other expert, J. David Ramsey, Esq., addressed the objections regarding the return of control of the governing board of the Association to the appointees of the Sponsor. Mr. Ramsey is an attorney with Becker & Poliakoff, LLP and specializes in condominium law. Mr. Ramsey concludes that Class Members may waive the statutory provision under the Condominium Act which requires the Sponsor to sell units in the ordinary course of business and the right to contest the Sponsor's control, because courts have held that statutory rights, albeit under other legislative acts, may be waived if the waiver is clear and explicit. Mr. Ramsey asserts that no case in New Jersey has addressed a waiver of rights under the New Jersey Condominium Act, but cites *Scully v. Tillery*, 456 *Mass.* 758 (2010), a case out of the Supreme Court of Massachusetts, for the proposition that provisions of the Condominium Act may be waived.

At the fairness hearing, Mr. Ramsey testified that the Condominium Act is an enabling statue rather than a remedial statute. In other words, the purpose of the Condominium Act is to set forth the parameters for establishing a condominium, but does not contain provisions intended to address wrongdoing or impropriety of the developer with regard to the Act. With this concept of the Condominium Act, Mr. Ramsey explained that the provision turning control over to the non-sponsor unit owners when the Sponsor fails to sell additional units is an optional provision. That is, according to Mr. Ramsey, the statute does not automatically transfer control to non-sponsor unit owners. Instead, the non-sponsor unit owners must choose whether they wish to control the Board or simply leave the Sponsor in control despite its failure to sell additional units. According to Mr. Ramsey, this elective turnover of control distinguishes New Jersey's Condominium Act from the Uniform Act, under which control automatically reverts to the non-sponsor unit owners in the event the Sponsor fails to offer additional units for sale. Mr. Ramsey opined that by accepting the settlement agreement, the Class Members are declining to exercise their statutory "option" to seize control back from the Sponsor. Thus, in Mr. Ramsey's opinion, the Class Members are in reality not "waiving" any statutory provisions, but are instead choosing a course of action permitted under the statute. In either event, according to Mr. Ramsey, voluntarily returning control to the Sponsor is not against the public policy of this state.

***9** Mr. Ramsey also points out that under the settlement agreement, the Sponsor only maintains its control over the condominium unless and until it sells sufficient units to trigger the statutory gradual transfer of control of the governing board. In other words, while the Sponsor is not *obligated* to sell any additional units, if it chooses to do so, it must comply with the statutory provisions of *N.J.S.A.* 46:8B-12.1.

As noted, Class Members were given the opportunity to cross-examine both experts.

DISCUSSION

I. Laws and Regulations Governing Condominiums

Brookdale Gardens is a condominium complex. In New Jersey, the creation and operation of condominiums are primarily governed by the Condominium Act, *N.J.S.A.* 46:8B-1 *et seq.*[8] The term "condominium" is defined under the Condominium Act as a form of ownership of real property under a master deed providing for ownership by one or more owners of units of improvements together with an undivided interest in the common elements appurtenant to each unit. *N.J.S.A.* 46:8B-3(h). A unit owner therefore "has a fee simple title to and enjoys exclusive ownership of his or her individual unit while retaining an undivided interest as a tenant in common in the facilities used by all of the other unit owners." *Fox v. Kings Grant Maint. Ass'n*, 167 *N.J.* 208, 219 (1999) (citing *Siller v. Hartz Mountain Assoc.*, 93 *N.J.* 370, 375, *cert. denied*, 464 *U.S.* 961 (1983)).

A. Creation of Condominiums

The Condominium Act provides that a condominium is created and established by "recording in the office of the county recording officer of the county wherein the land is located a master deed". *N.J.S.A.* 46:8B-8. Among other things, the master deed must include by-laws, the voting rights of unit members, and the name of the association. *N.J.S.A.* 46:8B-9. The master deed must also include "such other provisions, not inconsistent with this act, as may be desired but not limited to restrictions or limitations upon the use, occupancy, transfer, leasing or other disposition of any unit (provided any such restriction or limitation shall be otherwise permitted by law) and limitations upon the use of common elements." *N.J.S.A.* 46:8B-9(m). The Act provides that the association may be either a corporation or other business entity recognized in New Jersey, and "shall be responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners." *N.J.S.A.* 46:8B-12.

The Planned Real Estate Development Full Disclosure Act ("PREDFDA"), *N.J.S.A.* 45:22A-21 *et seq.*, places additional requirements on a developer who seeks to construct a condominium or convert an existing form of real estate into a planned development, as is expressly made applicable to condominiums. *N.J.S.A.* 45:22A-23(h). Pursuant to PREDFDA, a developer of a condominium project may not offer or dispose of any interest in the project until the project is registered with the Division of Codes and Standards of the State Department of Community Affairs. *N.J.S.A.* 45:22A-26(a)(1); *N.J.A.C.* 5:26-2.1; *N.J.S.A.* 45:22A-24.

The PREDFDA also requires that a developer submit for approval along with the registration application a public offering statement or prospectus, describing the characteristics of the development. *N.J.S.A.* 45:22A-28. The purpose of the public offering statement is to disclose fully and accurately exactly what is being sold, and to state to prospective purchasers "all unusual or material circumstances or features" of the development. *N.J.S.A.* 45:22A-28(a). The statute also directs the developer to clearly and understandably set forth the "totality of rights, privileges, obligations and restrictions, comprehended under the proposed plan of development." *N.J.S.A.* 45:22A-28(d). Where a developer seeks to convert property into a condominium, the developer must serve upon all tenants in the building being converted a copy of the proposed public offering statement simultaneously with the filing of an application for registration with the Department of Community Affairs. *N.J.A.C.* 5:26-9.3(a). Further, the developer may not dispose of any lot, parcel, unit or interest in a planned real estate development without providing the purchaser with a current public offering statement on or before the contract date. *N.J.A.C.* 5:26-4.1(a).

***10** The Public Offering Statement ("POS") for Brookdale Gardens was issued in August 1987. At that time, the sponsor was River Broad Corporation. Among other things, the POS advised prospective unit purchasers that control of the condominium would gradually turn over to the Sponsor depending on the amount of units owned and sold by the Sponsor. Specifically, it provided that in the event that 25% of the units are sold, non-sponsor unit owners shall elect no less than 25% of the Board of Trustees. In the event that 50% of the units are sold, no less than 40%) of the members of the Board of Trustees shall be elected by non-sponsor unit owners. Finally, in the event that 75% of the units are sold, non-sponsor unit owners may elect the entire Board of Trustees, except that the Sponsor may retain one member on the Board of Trustees as long as any units remain unsold in the regular course of business.

B. Governance of Condominiums

The Condominium Act sets forth a comprehensive governance scheme for condominiums and their associations. The Condominium Act provides for the creation of a condominium association which "shall be responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners." *N.J.S.A.* 46:8B-12.

The association is charged with the maintenance of the common elements and the "assessment and collection of funds for common expenses and the payment thereof," along with various other duties set forth in *N.J.S.A.* 46:8B-14(6). The condominium association carries out these functions through its elected officers and governing board. *N.J.S.A.* 46:8B-12.1 sets forth a comprehensive system for the composition of the Board, designed to "prevent a developer from having lingering control over an association." *Fox*, 167 *N.J.* at 221. The control of the association's governing body is initially vested in the Sponsor, but the Condominium Act mandates a gradual relinquishment of this control at a rate based on sales of the units. Under *N.J.S.A.*

46:8B-12.1(a):

[w]hen unit owners other than the developer own 25% or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect not less than 25% of the members of the governing board or other form of administration of the association. Unit owners other than the developer shall be entitled to elect not less than 40% of the members of the governing board or other form of administration upon the conveyance of 50% of the units in a condominium. Unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration upon the conveyance of 75% of the units in a condominium. *However, when some of the units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration.*

Notwithstanding any of the provisions of subsection a of this section, the developer shall be entitled to elect at least one member of the governing board or other form of administration of an association *as long as the developer holds for sale in the ordinary course of business one or more units in a condominium operated by the association.*

N.J.S.A. 46:8B-12.1(a) (emphasis added). By way of this provision, "the [Condominium Act] phases out the developer's representation on the association's governing board". *Fox*, 167 *N.J.* at 221. The Condominium Act also prohibits developers from entering into long-term employment, service or maintenance contracts before unit owners take control of the association's board. *N.J.S.A.* 46:8B-12.1. These provisions demonstrate the Legislature's intent to "ensure that the *unit owners*—not the developer—exercise control over their condominium boards, and by extension their common elements." *Fox*, 167 *N.J.* at 225 (emphasis in original). As stated by the Supreme Court of New Jersey, "in a condominium unit, the unit owners' interests take precedence over any outside interest, [and] any governance scheme that conflicts with the recognition of that interest is inconsistent with and in violation of the [Condominium] Act." *Id.* at 227. As discussed above, the Court therefore ordered that non-sponsor unit owners were entitled to elect all members of the governing board in accordance with *N.J.S.A.* 46:8B-12.1(a) due to the fact that the Sponsor prevented the sale of additional units. *See* July 6, 2012 Opinion.

***11** Under the proposed settlement agreement, the Sponsor must buy out any unit owner who wishes to sell its unit(s), as many owners claimed they were "stuck" in Brookdale Gardens because the Sponsor's control diminished the value of their units and because no banks would provide financing for a purchase in Brookdale Gardens due to the fact that 80% of the units were owned by the Sponsor. However, as a *quid-pro-quo* for the right to be bought out, the Class Members agree to essentially vacate the Court's July 6, 2012 Order by allowing the Sponsor to maintain full control over the Board, despite its failure to offer any additional units for sale in contravention of *N.J.S.A.* 46:8B-12.1. Thus, the Court is faced with the significant legal questions of whether the Condominium Act's progressive governance scheme is waivable such that Class Members and future owners may lawfully agree to subject themselves to the full control of the Sponsor despite the Sponor's failure to sell units.

Neither the Appellate Division nor the Supreme Court of this state have ruled on the threshold issue of whether the provisions of the Condominium Act are waivable. However, in *Amir v. D'Agostino*, 328 *N.J. Super.* 141 (Law Div. 1998), the court suggested that a waiver of the statutory provisions of the Condominium Act was possible. In *Amir*, the court held that where a condominium developer elected to impose certain use restrictions, it was mandatory to include those restrictions in the master deed in accordance with *N.J.S.A.* 46:8B-09. *Id.* at 151. Because the master deed failed to set forth the restrictions, the court held they were unenforceable against the other units. *Id.*

After deciding that the restrictions were not enforceable, the court analyzed whether the defendants, by enjoying the benefits extended by the deeds, nevertheless waived the statutory protection to have the restrictions placed in the master deed and were thus estopped from resisting the effort to enforce them. *Id.* at 159-60. The court explained that for waiver to apply, the "plaintiff would have to show that the [defendants] knew that there was a statutory protection available and then elected to waive it." *Id.* at 160. In other words, a waiver of the Condominium Act, like that of other statutory provisions, would have to be knowing and voluntary. *See e.g.*, *Knorr v. Smeal*, 178 *N.J.* 169, 177 (2003) ("An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights.") While the court in *Amir* ultimately found that the plaintiff made no such showing, it suggested that such a waiver was at least possible.

Here, based on the notice distributed to the class, the Court finds that the Class Members knew there was a statutory protection available and elected to waive it. Further, the statutory provision relating to the Sponsor's control of the complex was the basis of several motions and court decisions in the earlier stages of this case. For example, the Court's July 6, 2012 and August 30,

2013 Opinions were decided on the basis of *N.J.S.A.* 46:8B-12.1(a), which entitles non-Sponsor unit owners to maintain control of the complex under certain circumstances. Thus, the parties to this case are familiar with the statutory protection ensuring them representation on the Board in the event the Sponsor sells units, and have voluntarily given up that protection by agreeing to be part of the settlement.

As to those Class Members that were not parties to the litigation before it became a class action, they received notice upon preliminary approval of the settlement advising them that by accepting the settlement, they are giving up their legal right to challenge the changes to the governance structure at Brookdale. *See* Notice, p. 5.

As to future owners, the Court is satisfied that they may be bound by the control provisions of the settlement, so long as the Master Deed is amended to clearly advise prospective purchasers that per the instant settlement agreement, the Sponsor maintains full control of the complex. However, at the same time, if the Sponsor elects to sell at least 25% of the Units, then the progressive control provision of *N.J.S.A.* 46:8B-12.1(a) is triggered. In *Amir*, the court held that where a condominium developer elected to impose certain use restrictions, it was mandatory to include those restrictions in the master deed in accordance with *N.J.S.A.* 46:8B-09. *Amir*, 328 *N.J.Super.* at 151. Because the master deed failed to set forth the restrictions in that case, the court held they were unenforceable against the other units. *Id.*

***12** The Court finds the concepts illustrated and alluded to in *Amir* are applicable to this case. That is, a master deed must refer to any limitation or alteration of the rights and obligations of a unit owner. So long as the master deed provides notice of the provision, any party purchasing that unit is bound by it. The Court finds no reasoned basis to treat a restriction on use and occupancy of a unit differently than a restriction on a unit owner's participation in governance of the complex. Moreover, *N.J.S.A.* 46:8B-9(m) appears to be a "catch all" by providing that the master deed must include "such other provisions, not inconsistent with this act, *as may be desired* ". *Id.* (emphasis added). The statute does not limit the types of "provisions" that "may be desired" by a Sponsor except for requiring that they not be inconsistent with the Condominium Act.[9] Presumably then, the Sponsor may modify the governance of the complex as long as it places a provision to that effect in the master deed, and such a provision is not inconsistent with the Condominium Act. Under *N.J.S.A.* 46:8B-11, "[t]he master deed may be amended or supplemented in the manner set forth therein."

The Court finds that, based on an analysis of the precise language used in *N.J.S.A.* 46:8B-12.1(a), it is not inconsistent with the Condominium Act in and of itself, without challenge by the unit owners, to vest control of the Association in the Sponsor notwithstanding its failure to offer for sale any of its units in the complex. That is, while the Court previously held in its July 6, 2012 Opinion that control of the Association should equitably be turned over to the Plaintiffs based on their challenge to the Sponsor's failure to offer units for sale, it does not necessarily follow that the Sponsor's failure to offer units *automatically* results in a violation of the statute unless challenged by the non-Sponsor unit owners. *N.J.S.A.* 46:8B-12.1(a) provides, in relevant part, that "when some units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be *entitled* to elect all of the members of the governing board or other form of administration." *Id.* (emphasis added). Significantly, *N.J.S.A.* 46:8B-12.1(a) does *not* provide that the unit owners *shall* elect all the members of the Board when the Sponsor fails to offer units for sale in the ordinary course of business. The Legislature's placement of "be entitled to" after "shall" suggests that the transfer of control to non-sponsor unit owners does not happen automatically, and that the non-sponsor unit owners must voluntarily elect to exercise their entitlement to elect the members of the Board. Thus, the class members who accept the modified deed detailing the Sponsor's exclusive control over the complex are in essence exercising their right not to elect members of the Board consistent with the Condominium Act.

Further supporting this interpretation is the Uniform Condominium Act.[10] Section 3-103 of the Uniform Condominium Act relates to the Association's control of a condominium complex and the manner in which the Board members are elected. Subsection (d) of that provision relates to the phasing out of Sponsor control and provides in relevant part that "a period of [Sponsor] control terminates no later than the earlier of: (i) [60] days after conveyance of [75] percent of the units which may be created to unit owners other than a [Sponsor]; (ii) [2] years after all [Sponsors] have ceased to offer units for sale in the ordinary course of business; or (iii) [2] years after any development right to add new units was last exercised." Uniform Condominium Act § 3-103. Notably absent from this provision is the "shall be *entitled*" language found in *N.J.S.A.* 46:8B-12.1, which suggests that the shift of control from the Sponsor to the unit owners occurs automatically under the Uniform Condominium Act. New Jersey has not adopted the Condominium Act, suggesting that the Legislature prefers to retain the "shall be entitled" language enacted in its Condominium Act. Thus, because it is not inconsistent with the Condominium Act to allow the Sponsor to control to Board, the Court finds that as long as the Sponsor amends the Master Deed of Brookdale

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Gardens to reflect the changes to its governance structure, Class Members who currently own a unit in Brookdale and future purchasers of a unit may be bound by those changes.

***13** The Court must also resolve whether unit owners who affirmatively opt out of the proposed settlement agreement, and thus elect to remain in Brookdale Gardens and not submit a claim under the settlement, may nevertheless be bound to the governance provisions of the settlement agreement. The Court has undertaken extensive research on this issue and has found that, under certain unique circumstances, courts have found it appropriate to bind opt-outs to limited provisions of the settlement agreement. For example, the Third Circuit has approved a settlement where class members were given an opportunity to opt-out after the initial opt-out period expired based on factors such as, by way of example, a concern that there would be no funds left in the settlement trust to pay their claims.[11] *See In re Diet Drugs Prods. Liab. Litig.*, 275 *F.3d* 34 (3d Cir. 2001); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 369 *F.3d* 293, 317 (3d Cir. 2004). Those who exercised this "back-end" opt-out right were not given the same unlimited right to sue the defendant in the tort system as were the initial opt-outs. Instead, those who exercised the back-end opt-out right were restricted from seeking certain types of relief, such as punitive, exemplary, or multiple damages. *See Diet Drugs II*, 369 *F.3d* at 296. The Third Circuit characterized the treatment of the back-end opt-outs as follows:

The settlement approved and supervised by the District Court in this case is a landmark effort to reconcile the rights of millions of individual plaintiffs with the efficiencies and fairness of a class-based settlement. Critical to this effort was the allowance of downstream opt-outs, so that potential class members were not faced with an all-or-nothing decision at the threshold. To make this allowance meaningful, the settlement had to protect Wyeth against its largest fear, potentially ruinous punitive damage awards. At the same time, it had to allow intermediate opt-out plaintiffs to have a fair chance to litigate their claims and obtain those damages that were expressly preserved.

Id. at 318. Professor Rhonda Wasserman, who published a scholarly article particularly on the restrictions placed upon opt-outs in the series of cases generated from the above diet drug litigation, explained that "it is fair to say that the entire settlement was predicated on the class action court's ability to bind those who declined to opt out initially by the restrictions built into the Settlement Agreement." Wasserman, 49 *Wm. & Mary L. Rev.*, at 410 (2007).

The Court finds that the instant matter presents similarly unique circumstances that justify and warrant limiting those who opt-out from asserting claims against the Sponsor regarding its exclusive control over the Board after the effective date of the settlement. In other words, the opt-outs in this case, while permitted to pursue their initial claims for diminution of value against the Sponsor, are not given the same unlimited ability to sue that an opt-out typically has. Specifically, opt-outs will be limitedly bound to only those provisions regarding control of the complex returning to the Sponsor. The instant settlement agreement can be characterized as a herculean effort to reconcile a case that has been pending in the Superior Court for *at least* 15 years with barely any progress as to a settlement agreement, until now. Crucial and integral to this settlement agreement was the Sponsor's ability to maintain exclusive control over the Board in exchange for its obligation to buy out any unit owners who wished to leave Brookdale Gardens.

Without this provision and the concomitant assurance its control would not be challenged, the Sponsor would be unwilling to make such a commitment. In other words, obtaining full control over the Board is the foundation and lynchpin of the settlement agreement. If the two opt-outs were given free rein to challenge this provision, which is the product of extensive and lengthy negotiation, the Sponsor would not receive the benefit of the bargain in agreeing to the settlement. Thus, like the defendant in the diet drugs litigation, in providing the opt-outs with the ability to litigate their initial claims and receive damages, the Sponsor seeks to protect itself against "its largest fear," which is the loss of control over the Board of the complex. In order to strike this balance, the settlement agreement removes only one type of claim the opt-outs may bring against the Sponsor, while allowing them to preserve any and all other claims.

***14** In addition, the opt-outs are receiving a benefit which justifies the limited restriction on the right to challenge control of the complex. By concluding the instant litigation, which otherwise does not have an end in sight, the Association, and thus the unit owners, will no longer have to devote funds to the litigation. Thus, in light of the unique, complex, and long-contested circumstances and issues in this case, the Court finds it fair and reasonable to place certain restrictions on the claims the opt-outs may pursue against the Sponsor.

Finally, an additional rationale exists for the limited restrictions on the opt-outs to challenge the control provision. Specifically, the settlement agreement, as a whole, based on the various competing interests and the inherent difficulties in otherwise

achieving justice for the Class Members, is fair and equitable. The Court's equitable powers are warranted to limitedly bind the opt-outs to the control provisions, as the Court has "broad discretionary power to adapt equitable remedies to the particular circumstances of a given case." *Marioni v. Roxy Garments Delivery Co.*, 417 *N.J. Super.* 269, 275 (App. Div. 2010). Indeed: Equitable remedies 'are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules, which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex regulations of all the parties.'

Sears, Roebuck & Co. v. Camp, 124 *N.J. Eq.* 403, 411-12 (1938) (*quoting* Pomeroy's Equity Jurisprudence, sec. 109). In light of the unique circumstances of the instant matter and the Court's broad equitable powers to shape an appropriate remedy tailored to such circumstances, the Court finds it fair, reasonable and equitable to limit those who opt-out from contesting the Sponsor's control over the Board granted by the settlement agreement.

Class Action Law

In addition to the Condominium Act and the PREDFDA, the Court must also consider class action jurisprudence, as the matter has been converted into a class action. A class action is a litigation device that "permits one or more individuals to act as plaintiff or plaintiffs in representing the interests of a larger group of persons with similar claims." *Lee v. Carter-Reed Co., LLC*, 203 *N.J.* 496, 517 (2010). Class actions are a means through which many litigants with similar claims who otherwise would not have the resources to seek legal redress through the judicial system can band together against a "corporate entity that wields enormous economic power." *Id.* at 518. For this and other reasons, class actions are looked upon favorably by courts in New Jersey. "Unitary adjudication through class litigation furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among numerous, similarly-situated litigants." *Iliadis v. Wal-Mart Stores, Inc.*, 191 *N.J.* 88, 104 (2007). The end result of a class action is that "[m]embers of the represented class are bound by the results of the litigation, for better or worse, unless they opt out of the class-action lawsuit." *Lee*, 203 *N.J.* at 518 n.9.

The class action device in New Jersey is authorized by New Jersey Court Rule 4:32-1 and -2, which set forth the requirements for maintaining a class action. While courts in New Jersey have held that the class action rule should be liberally construed in favor of certifying a class action, parties seeking to proceed as a class must nevertheless meet certain requirements. Specifically, plaintiffs requesting to proceed as a class action must establish the threshold requirements of numerosity, commonality, typicality and adequacy of representation set forth in *R.* 4:32-1(a). Once the threshold requirements have been met, plaintiffs also must satisfy one of the three alternative requirements set forth in *R.* 4:32-1(b). Before approving a class action settlement, a court must first determine whether the requirements of *R.* 4:32-1(a) and (b) have been satisfied. *In re Pet Food Prods. Liab. Litig.*, 629 *F.3d* 333, 341 (3d Cir. 2010).[12] When deciding certification, the court must not make a preliminary decision on the merits of the claim. *Delgozzo v. Kenny*, 266 *N.J. Super.* 169, 180-81 (App. Div. 1993).

I. Requirements of 4:32-1 (a) and (b)

A. *R.* 4:32-1(a)

1. Numerosity

***15** *Rule* 4:32-1(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." In the instant matter, there are 75 putative class members. "There is no precise number that distinguishes between a class that satisfies the condition of numerosity and one that does not." *Fink v. Ricoh Corp.*, 365 *N.J. Super.* 520, 557 (Law Div. 2003). In *Saldana v. City of Camden*, 252 *N.J. Super.* 188, 193 (App. Div. 1991), the court found that a class comprised of 81 property owners seeking relief against a city for property damage caused by failure to implement a policy regarding City-owned abandoned buildings was "sufficiently large" to meet the numerosity requirement. The Court finds that the putative class of 75 members

meets the numerosity requirement.

2. Commonality

Rule 4:32-1(a)(2) requires that there be "questions of law or fact common to the class." New Jersey has followed the approach under the Federal Rule which holds that " 'a single common question is sufficient." ' *Delgozzo*, 266 *N.J. Super.* at 185 (quoting *In re Asbestos School Litigation*, 104 *F.R.D.* 422, 429 (E.D.Pa.1984), *aff'd in part and vacated in part sub nom, In re School Asbestos Litigation*, 789 *F.2d* 996 (3d Cir.), *cert. den*., 479 *U.S.* 852 (1986)).

Plaintiffs have put forth questions of both law and fact that are common to all proposed class members. That is, Plaintiffs present the legitimate factual question of whether the actions of the Sponsor caused a diminution of value in condominium units in Brookdale Gardens and whether the Sponsor's ownership of 80% of the units in Brookdale Gardens prohibits non-sponsor unit owners from selling their units. Plaintiffs also present the legal question of whether the Sponsor is required to sell units in the ordinary course of business under the Condominium Act. Both of these questions are common to all proposed class members and thus the Court is satisfied that Plaintiffs have met the commonality requirement.

3. Typicality

The claims of a putative class representative are typical if they "have the essential characteristics common to the claims of the class." *In re Cadillac V8-6-4 Class Action*, 93 *N.J.* 412, 425 (1983) (quoting 3B James W. Moore et al., *Moore's Federal Practice* § 23.06-2 (2d ed. 1982)). The purpose behind the typicality requirement is "to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Barnes v. Am. Tobacco Co.,* 161 *F.3d* 127, 141 (3d Cir. 1998); *see also Goasdone v. Am. Cyanamid Corp.*, 354 *N.J. Super.* 519, 530 (Law Div. 2002) ("The expectation is a harmony of interest between the class action representatives and the class members, so that the class representatives by furthering their own goals are also furthering the goals of the class.") At the same time, "'typical' is not identical." *Osgood v. Harrah's Entm't, Inc.*, 202 *F.R.D.* 115, 124 (D.N.J. 2001) (quoting *Eisenberg v. Gagnon*, 766 *F.2d* 770, 786 (3d Cir. 1985), *cert. denied sub nom.*, *Weinstein v. Eisenberg*, 474 *U.S.* 946 (1985)). Thus, "factual differences … 'will not render a claim atypical if the claims arises from the same event or practice or course of conduct that gives rise to the claims of the class members" '. *Id.* (quoting *Baby Neal For and By Kanter v. Casey*, 43 *F.3d* 48, 58 (3d Cir. 1994)).

The Court finds that the Plaintiffs' claims are typical and aligned with the interests of the rest of the class. Specifically, the claims of the Plaintiffs and of the class arise from the same alleged wrongful course of conduct by the Sponsor, i.e., failing to sell additional units in the complex and improperly managing and maintaining the complex while in control thereof. While Plaintiffs and Class Members may have bought their respective units at different times, and for different prices, and with different conditions, they all seek to challenge the legality of the Sponsor's decision not to sell any additional units in the complex on the grounds that such conduct violated the Condominium Act, prevented unit owners from selling their units, and caused units to decrease in value. Thus, Plaintiffs' claims "have the essential characteristics common to the claims of the class" and thus satisfy the typicality requirement. *In re Cadillac*, *supra,* 93 *N.J.* at 425.

4. Adequacy of Representation

***16** *Rule* 4:32-1(a)(4) mandates that "the representative parties will fairly and adequately protect the interests of the class." *R.* 4:32-1(a)(4). New Jersey has followed the Federal approach to determining adequacy in representation by requiring two factors be established: " '(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." ' *Delgozzo*, 266 *N.J. Super.* at 188 (quoting *In re Asbestos Sch. Litig.*, 104 *F.R.D.* 422, 430 (E.D. Pa. 1984)).

As to the adequacy of counsel, the Plaintiffs are represented by Laurence H. Olive, Esq. Mr. Olive has represented Plaintiffs for the past 15 years in this matter and is therefore highly familiar and experienced regarding the particular facts of the case, including its strengths and weaknesses, and is also familiar with Plaintiffs' complaints, concerns and desired outcomes. Mr. Olive is being assisted by Arthur C. Hopkins, Jr., Esq. It is clear that Mr. Olive is fully able and competent in conducting the proposed litigation, as he has obtained favorable outcomes for Plaintiffs in the past, namely the July 6, 2012 Order. The Association, which is aligned with Plaintiffs, is represented by E. Richard Kennedy, Esq., an attorney with Kennedy Wronko and Kennedy and who has approximately 40 years' experience in all aspects of condominium management and control.

As to the alignment of interests between the Plaintiffs and the proposed class members, the Court finds that Plaintiffs' interests are identical, not antagonistic, to those of the proposed class members. Plaintiffs are similarly situated to the proposed class members in that they seek to prove that their units diminished in value as a direct result of the Sponsor's alleged wrongful conduct. The Court has not been made aware of any reason why the proposed class members could possibly be disadvantaged by Plaintiffs attempt to show that their units have decreased in value as a result of the Sponsor's conduct and that they have been unable to sell their units for the same reason. For example, there is no reason why the proposed class members would have a more difficult time showing that the value of their units diminished by reason of Plaintiffs' attempt to prove same.

The Court acknowledges that the objectors' argument that the settlement price per unit fails to take into account improvements made to the unit could possibly be viewed as a weakness in the adequacy of representation. In other words, because some of the Plaintiffs may not have made improvements to their units, they do not have the incentive to advocate for a higher sale price per unit. However, the Court does not, on balance and considering the entirety of the settlement, find it problematic that some of the Plaintiffs may have made improvements to their units, while others may not have, because the interests of the class representative and the absentee class members need not be identical. *Moore's Federal Practice* § 23.25[2][b][i] (Matthew Bender 3d Ed.). Instead, "the named plaintiff need only be an 'adequate' representative." *Id.*

Because there is no foreseeable conflict of interest and Plaintiffs and proposed class members share the same goal, the Court finds that the Plaintiffs' interests are not antagonistic to those of the proposed class members.

B. R. 4:32-1(b)

A class action is maintainable only if it falls within at least one of the following three categories authorized by *R.* 4:32-1(b):
***17** (1) the prosecution of separate actions by or against individual members of the class would create a risk either of:

(A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and

(D) the difficulties likely to be encountered in the management of a class action.

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The parties have relied on (b)(3) to certify the class. That is, the parties assert that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Members of a class certified under (b)(3) are afforded the opportunity to "opt-out" of the class. Members of a (b)(3) class "are automatically included and remain so unless they make a timely election to opt-out." *Sperling v. Hoffmann-La Roche, Inc.*, 24 *F.3d* 463, 470 (3d Cir. 1994). Thus, a class member who does not come forward to opt-out is bound by any final judgment or settlement, even if that class member did nothing affirmative to "opt in." *See Wetzel v. Liberty Mut. Ins. Co.*, 508 *F.2d* 239, 250 (3d Cir. 1975) (explaining that all members of a (b)(3) class who have not opted out, as well as all members of a (b)(2) class, are "bound by the res judicata effect of the judgment.").

Plaintiffs seeking to certify a class under (b)(3) must show that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *R.* 4:32-1(b)(3). Thus, under (b)(3), plaintiffs must demonstrate two separate requirements: (1) "predominance" of the common issues and (2) the "superiority" of a class action over other available trial techniques.

***18** In analyzing the predominance requirement, the court must "weigh the common issues against the individual issues." *Goasdone*, 354 *N.J.Super.* at 539. The court must also conduct a "close analysis of the facts and law." *In re Cadillac*, 93 *N.J.* at 434. The predominance prong does not require that all class members have identical issues, but instead requires a "common nucleus of facts." *Id.* (citing *Saldana v. City of Camden*, 252 *N.J. Super.* 188, 197 (App.Div.1991)). The presence of individual issues does not preclude certification under (b)(3), and class members need not be affected "in precisely the same manner." *Iliadis*, 191 *N.J.* at 108-09.

In *Iliadis*, the Court found that the plaintiffs satisfied the predominance requirement. The proposed class in *Iliadis*, current and former employees of defendant Wal-Mart, alleged that defendant regularly denied its employees earned rest and meal breaks in contravention of its corporate policies. Based on this alleged conduct, the plaintiffs asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of the Wage and Hour Law. The trial court found that the plaintiffs did not satisfy the predominance requirement based on the individual issues raised by Wal-Mart, and the appellate court affirmed.

In reversing the judgment of the appellate court, the Court explained that "[t]he core of the present dispute is whether Wal-Mart engaged in a systematic and widespread practice of disregarding its contractual, statutory, and regulatory obligations." *Id.* at 111. The Court found that the presence of some individual issues, such as whether particular employees voluntarily missed rest and meal breaks, how much time was worked off-the-clock, and whether and the amount of damages suffered, did not preclude class certification. *Id.* at 112.

As in *Iliadis*, Defendants in this class action are alleged to have disregarded a statutory obligation to the detriment of the class. Specifically, the common factual and legal thread is whether the Sponsor acted wrongfully in failing to sell its units and in its management and governance of the complex. The class members also have in common the alleged detriment arising from this course of conduct, which is that they have been unable to sell their units and the units have diminished in value. It has been held that "in cases where it is alleged that the defendant… engaged in a common course of conduct, courts have found that conduct to satisfy the commonality and predominance requirements." *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 *F.R.D.* 207, 231 (D.N.J. 2005). The Court acknowledges that the units owned by each class member may vary in price, which affects the potential amount of damages suffered by each class member. However, "[t]he need to make individual determinations on the question of damages will not necessarily defeat (b)(3) certification." *Goasdone*, 354 *N.J.Super.* at 539 (citing *Delgozzo*, 266 *N.J.Super.* at 190). Further, courts are far more inclined to find that common issues predominate over individual issues in the context of a proposed settlement. *Sullivan v. DB Invs., Inc.*, 667 *F.3d* 273, 304 (3d Cir. 2011).

Indeed, "[e]ven mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement" despite the generally wide variation in damages. *Amchem Prods. v. Windsor*, 521 *U.S.* 591 (1997). The proposed class in this case is far more cohesive than that in *Amchem*, where the Court found that the class did not satisfy the predominance requirement. In that case, the U. S. Supreme Court held that the proposed settlement class consisting of asbestos victims failed to meet the predominance requirement because the proposed class members were exposed to the different asbestos products of over twenty companies during a variety of different activities. *Id.* at 597. In contrast, the proposed class in this case does not involve such wide variation in each class member's particular circumstances, as the alleged harm

stems from specific prolonged conduct of a particular actor, the Sponsor. Thus, the Court finds that Plaintiffs have established that common questions of law and fact predominate over individual questions.

***19** In order to certify the class under (b)(3), the court must also find that the class-action vehicle is superior to other methods of adjudication. The court rule identifies the following factors to consider in deciding whether a class action is the superior method:

(A)the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B)the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C)the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and

(D)the difficulties likely to be encountered in the management of a class action.

R. 4:32-2(b)(3)(A)-(D).

However, "[i]n settlement situations, the superiority requirement arguably translates into the question whether the settlement is a more desirable outcome for the class than individualized litigation, and may assure that the settlement has not grossly undervalued plaintiffs' interests." In *re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 *F.3d* 768, 796 (3d Cir. 1995). Further, "a [ ] court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem*, 521 *U.S.* at 620.

The proposed settlement allows unit owners to sell their units to the Sponsor for an amount set forth by the settlement agreement. Specifically, the settlement offers the following: (1) $127,500 per unit for a 2.5 room unit; (2) $136,500 per unit for a 3.5 room unit; (3) $141,500 per unit for a 4 room unit; (4) $170,000 per unit for a 5 room unit; (5) $5,000 per unit for each garage unit; and (6) $105,000 for unit 84A. The Association's expert, Jon Brody, submitted a report and testified at the fairness hearing that not only are the settlement offers reasonable, but they are in fact above fair market value. The Court deems him credible. He was not impeached. Mr. Brody testified in a straightforward and understandable manner. Mr. Brody reached his conclusion by researching sales of other individual condominium units in the same municipality between 2012 through 2015 and finding that, on average, the settlement values proposed by the Sponsor are "significantly higher than the average price per square foot for condominium sales in Bloomfield." Brody Report, p. 7.

Several class members raised concerns that the settlement values are unfairly low in light of certain improvements and renovations made in particular units. Mr. Brody specifically addressed this issue in his report:

[L]ike the sales within the subject development, the sales considered in the other developments ranged, from a physical standpoint in the same manner as the settlement group that is, some had been improved/upgraded while others were older with no upgrades. By employing the large population of sales data we included all types of sales, upgraded and not upgraded, and on average, the settlement prices still exceeded the highest comparable square foot values, which included upgraded units.

Brody Report, p. 19. In addition to his report, Mr. Brody testified at the fairness hearing that the settlement values for *unimproved* units still exceeded the sale price of a comparable unit with upgrades. As noted, the Court credits the expert opinion of Mr. Brody, an active licensed real estate appraiser with decades of experience, and finds that the settlement does not grossly undervalue Plaintiffs' interests. Thus, the plaintiffs have satisfied both the predominance and superiority requirements for class certification under (b)(3).

II. Settlement Approval Factors

***20** Settlements of class actions are treated differently than traditional settlements. While an individual action can typically be settled without involvement of the court, *Pascarella v. Bruck*, 190 *N.J. Super.* 118, 124 (App. Div. 1983), *Rule* 4:32-4 provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed

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dismissal or compromise shall be given to all members of the class in such manner as the court directs." Rule 4:32-4.

The approval of a class action settlement occurs in five stages. First, the proposed settlement is presented to the court so that it can make a preliminary determination whether the proposed agreement has merit to justify further consideration. *Morris Cnty. Fair Hous. Council v. Boonton Twp.*, 197 *N.J. Super.* 359, 369 (Law Div. 1984). This Court completed the preliminary approval proceeding and entered an Order preliminarily approving the proposed class action settlement on May 4, 2015.

Second, assuming the court preliminarily approves the proposed class action settlement, a court-approved settlement notice must be distributed to class members advising them of the general terms of the settlement, their right to object and the date and location of the final approval hearing. *Id.* Mr. Van Nostrand has certified that the Court-approved notice was properly disseminated to all class members describing the settlement terms and advising Class Members of their options vis-a-vis the settlement. Thus, step two has been completed.

Third, a sufficient period of time is provided to allow Class Members and other interested parties to prepare and submit objections and other materials related to the proposed settlement. Id The Class Members were given over two months to submit their objections and comments, and the Court has received 18 objections.

Fourth, after receiving objections, the Court conducts a "fairness hearing." *Id.* The fairness hearing in this matter was held on July 20, 2015. Finally, the court must determine whether the settlement is "fair and reasonable" to the members of the class as a whole. *Id.* "A settlement of a class action may be approved even in the face of a majority vote by members of the class to disapprove the settlement." *Chattin v. Cape May Greene*, 216 *N.J. Super.* 618, 627 (App. Div. 1987). In analyzing whether a proposed class settlement is "fair and reasonable," New Jersey courts have adopted a list of factors set forth by the Third Circuit in *Girsh v. Jepson*, 521 *F.2d* 153, 157 (3d Cir. 1975). *See Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, 406 *N.J. Super.* 86 (App. Div. 2009). Those factors are:

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the class to the settlement;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh, 521 *F.2d* at 157. The *Girsh* factors "are a guide and the absence of one or more does not automatically render the settlement unfair." *In re American Family Enters.*, 256 *B.R.* 377, 418 (D.N.J. 2000).

***21** The proponents of the settlement bear the burden of proving that the factors weigh in favor of approval. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 *F.3d* 768, 785 (3d Cir. 1995). While a fairness hearing is not a plenary trial, a court has discretion to determine the nature and extent of the hearing required to determine whether a proposed settlement is "fair and reasonable." *Morris Cnty. Fair Hous. Council*, 197 *N.J. Super.* at 370. When the parties offer an independent evaluation of a settlement proposal, "'[t]he Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.'" *Id.* (quoting *Armstrong v. Bd. of Sch. Dirs.*, 616 *F.2d* 305, 315 (7th Cir. 1980)). In *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, 406 *N.J. Super.* 86 (App. Div. 2009), the court held that the trial court erred by denying certain objectors' requests to cross-examine the plaintiffs' economic expert who provided valuation of the settlement. *Id.* at 102. The court

explained that the court would be better able to examine whether the settlement was fair and reasonable if the expert's report were tested by cross-examination. As such, the court remanded for a "testimonial fairness hearing." *Id.* Here, all witnesses were subjected to cross-examination.

The Court will examine each of the "fair and reasonable" factors separately and determine whether the proposed settlement agreement satisfies each factor.

1. Complexity, Expense and Likely Duration of the Litigation

As stated throughout this Opinion, this litigation has been ongoing for 15 years without any final resolution. As such, Plaintiffs have been in a state of uncertainty with regard to their legal rights for well over a decade and have not yet been able to obtain full relief for the alleged wrongful conduct of Defendants. Obviously, proceeding with further litigation would prolong the already protracted period Plaintiffs have had to wait to resolve their claims and would further delay any potential relief to which they are entitled. At trial, Plaintiffs would have the difficult task of proving that the value of their units in Brookdale Gardens decreased as a direct result of the Sponsor's allegedly wrongful control over the complex and failure to sell additional units, and not as a result of some other factor or factors. Plaintiffs would also have to show that the Sponsor's conduct was the direct cause of their inability to sell their units to third parties. In order to prove this, Plaintiffs would likely have to introduce experts and Defendants would likely do the same to rebut Plaintiffs' assertion. The retention of experts by both sides and the extensive and exhaustive discovery would make the trial extremely costly and both sides have presumably already expended large sums throughout the 15 years of this litigation separate and apart from trial. Aside from the likely expense, proving these points would be difficult given the number of Plaintiffs involved and the varying circumstances of each Plaintiff. In addition, it is significant to note that the parties have not even commenced discovery as to damages. At a minimum, in addition to the expense, the parties are facing significant delays due to the inevitable motion practice that would be involved with damages discovery.

Plaintiffs would also have to show that Defendants had a statutory obligation under the Condominium Act to sell units. While the Court previously ruled that Defendants violated the Condominium Act by remaining in control of the complex while not selling any additional units, it did not necessarily hold that Defendants have an affirmative obligation to sell units. That is, Defendants could conceivably not sell units without violating the statute so long as the Sponsor did not attempt to maintain control. However, this legal issue has not yet been decided by any appellate court in New Jersey and thus the Plaintiffs would have to persuade the Court to adopt their interpretation of the statute. Given the complexity of the legal and factual issues in the case, the Court is satisfied that the trial would neither be a short nor inexpensive one. As such, the Court finds that this *Girsh* factor weighs strongly in favor of approving the settlement.

2. Reaction of the Class to the Settlement

***22** "This factor attempts to gauge whether members of the class support the settlement." *Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions)*, 148 *F.3d* 283, 318 (3d Cir. 1998). Only two out of the total 75 class members opted not to convey their units to the Sponsor and to remain in the complex. Out of the 41 class members who submitted claims, 18 objected. In other words, the number of non-objecting claimants exceeds the number of objectors. Of the 18 objections, 11 appear to be "form" or boilerplate objections in that they are wholly identical and do not contain any individualized concerns.[13] The form objections put forth two concerns: (1) inadequacy of the purchase prices offered for the units and (2) the Sponsor's control over the complex. "[A]n apparently high number of objections may reflect an organized campaign, rather than the sentiments of the class at large." *Manual for Complex Litig.* § 21.631, p. 318 (4th ed.). The relatively low number of objections, combined with the fact that more than half of the objections were not written personally by class members, suggests that the Class Members generally support the terms of the proposed settlement. Further, in light of the fact that the class members have been given an opportunity to hear the testimony of the experts and pose questions to the experts, it is possible that there may even be less objections after the 30 day period following approval of the settlement should the Court approve it. Thus, this *Girsh* factor weighs in favor of approving the settlement.

3. Stage of the Proceedings and Amount of Discovery Completed

The third *Girsh* factor " 'captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." ' *In re Cendant Corp. Litig.*, 264 *F.3d* 201, 235 (3d Cir. 2001) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 *F.3d* 768, 813 (3d Cir. 1995)). The instant case has been pending in Essex County for a decade and a half and the parties have engaged in numerous motions, some dispositive. As such, "this is most certainly not a case that is settling in the early stages of litigation." *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 *F.R.D.* 207, 238 (D.N.J. 2005). Through the various motions filed throughout the years this case has been pending, the Court is satisfied that counsel has most certainly gained an adequate understanding of the merits of the case such that they were able to fairly decide to settle the matter.

4. Risks of Establishing Liability

A court considers this factor in order to "examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *GM Trucks*, 55 *F.3d* at 814. Where there is a high risk of establishing liability, this factor cuts in favor of settlement. In this case, in order to establish liability of the Sponsor, the Plaintiffs will have to prove that their alleged inability to sell their units and alleged diminution in value of their units were caused by the Sponsor's conduct and not some other factor, such as general market fluctuations or decline in the housing market as a whole. In other words, Plaintiffs must prove by more than mere speculation that the Sponsor's conduct caused them tangible harm.

Plaintiffs must also establish that if the Sponsor acted in violation of applicable statutes and regulations governing the complex, the proper remedy is to force the Sponsor to purchase the non-Sponsor-owned units. However, in its August 30, 2013 Order, the Court denied Plaintiffs' request for an Order forcing the Sponsor to sell its units, holding that ordering a sale of the units "would require an unwieldy level of court supervision." August 30, 2013 Order, p. 10. In light of that decision and the lack of clarity or precedent on the proper remedy for a violation of the Condominium Act and related statutes and regulations, the Court finds that Plaintiffs would encounter a significant risk in achieving its desired outcome. As such, this *Girsh* factor weighs in favor of settlement.

5. Risks of Establishing Damages

"Like the previous factor, this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 *F.3d* 768, 816 (3d Cir. 1995). In this case, the class would be required to prove not only that the conduct of the Sponsor diminished the value of the units in the complex, but would have to ascertain the dollar amount by which the units on average decreased in value. This would require expert evaluation and testimony and would involve experts from both Plaintiffs and Defendants. As such, the Court finds that the risks and burden of establishing damages in this particular case is significant.

6. Risks of Maintaining the Class Action Through the Trial

***23** New Jersey Court Rule 4:32-2 has been construed to give trial courts discretion to decertify a class after entering a certification order. The court can decertify a class if it finds that "the criteria for and goals of class certification are no longer being met." *Muise v. GPU, Inc.*, 371 *N.J. Super.* 13, 34 (App. Div. 2004). A high risk of decertification supports approval of a settlement agreement. The Court has not been made aware of any reason why it would potentially decertify or modify the class. However, in *Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions)*, 148 *F.3d* 283, 321 (3d Cir. 1998), the Third Circuit held that this factor adds little to the consideration of the fairness of the settlement in light of the U.S. Supreme Court's holding in *Amchem* that courts need not inquire into manageability where request for

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certification is for settlement-only purposes. *Id.* at 321. Thus, in a case such as this, where a class is approved for settlement purposes only, this factor is of "negligible importance" in deciding whether to approve a class action settlement. *Weber v. Gov't Emples. Ins. Co.*, 262 *F.R.D.* 431, 446 (D.N.J. 2009). Thus, although there is no apparent risk of decertification, the court assigns this factor little weight based on the Third Circuit's holding in *Prudential*. *See* *Erie Cnty. Retirees Ass'n v. Cnty. of Erie*, 192 *F. Supp. 2d* 369, 375-76 (W.D. Pa. 2002).

7. Ability of Defendants to Withstand Greater Judgment

This factor examines whether the defendants could withstand a judgment for an amount significantly greater than the Settlement *In re Cendant Corp. Litig.*, 264 *F.3d* 201, 240 (3d Cir. 2001). The Court has not been presented with any of Defendants' financial information, and thus it is unable to make an informed determination of whether Defendants could withstand greater judgment. For example, in *In re Safety Components Int'l*, 166 *F. Supp. 2d* 72, 91 (D.N.J. 2001), the Court was made aware that Defendants previously filed for Chapter 11 Bankruptcy and that the D&O policy which would fund the settlement may refuse to pay under the policy. *Id.* at 91. Because of this lack of information, this factor weighs neither for nor against settlement. *See* In *re Cendant Corp. Litig.*, 264 *F.3d* at 240.

8. Range of Reasonableness of the Settlement in Light of Best Possible Recovery

After 15 years of contentious litigation, the parties have finally reached an agreement that benefits both the Class Members and the Sponsor. The settlement agreement allows class members to convey their units to the Sponsor for a fixed sum upon submitting a claim under the settlement agreement. In exchange for the Sponsor's obligation to purchase those units, the settlement agreement transfers exclusive and total control over the Board to the Sponsor, notwithstanding the Court's July 6, 2012 Order awarding control over the Board to the non-Sponsor unit owners. Class members who remain in the complex and opt not to sell their units to the Sponsor are barred from contesting the fact of the Sponsor's complete control over the Board, but are permitted to contest specific actions taken by the Sponsor in exercising that control. If, however, the Sponsor sells at least 25% of the units, then the Condominium Act's (and Public Offering Statement's) gradual turnover of control provisions are triggered, and the non-Sponsor unit owners may elect some members of the Board.

The Court finds that the remedy offered under the settlement agreement is appropriate, fair and reasonable in light of the specific issues in the case. Specifically, the crux of this case is that the non-Sponsor unit owners at Brookdale Gardens have been unable to sell their units because banks will not offer financing due to the blanket mortgage and the fact that the Sponsor owns 80% of the complex, and therefore they claim that, for lack of a better term, they are "stuck" in Brookdale Gardens. Moreover, the non-Sponsor unit owners claim that the value of their units has diminished due to the Sponsor's alleged mismanagement of the complex over the years. Thus, the settlement agreement allows non-Sponsor unit owners to finally sell their units and leave the complex, as well as receive fair market value for their units.

***24** Many objectors contested on the grounds that all units of the same size were given a universal offer despite any improvements or upgrades. Mr. Brody concluded that the settlement values are above market value, even for those units with improvements, based on his comparison of purchase prices of comparable units in the same locality. As explained in detail above, Mr. Brody's analysis took into account units without any upgrades and improvements, as well as units that have been upgraded and improved such that the average purchase price for comparable units consisted of a population of both upgraded and non-upgraded units, similar to the population at Brookdale Gardens. In other words, while units of the same size are purchased at a fixed price, that price reflects any improvements or upgrades because it was derived by comparing units with such upgrades.

At the fairness hearing, some objectors suggested that the Sponsor make individualized offers for each unit to take into account renovations and improvements. While this may be the *ideal* solution, it is neither efficient nor practical. One of the main advantages of a class action is that there is one universal recovery that is dispersed to class members, eliminating the need for individual trials on each claim. Were the sponsor to individually appraise each unit, the process would be cumbersome, as the unit owners would likely obtain their own independent appraisal of their unit which conflicts with that of the Sponsor. This

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process would further prolong the already 15-year-long lawsuit and further postpone relief to Plaintiffs.

Many objectors also took issue with the Sponsor's exclusive control over the Board under the settlement agreement, arguing that when the Sponsor was previously in control before the Court's July 5, 2012 Order, the complex fell into disrepair and was grievously mismanaged. It took the parties over 15 years to reach a settlement which they both deemed beneficial to their respective positions. The turnover of control to the Sponsor operates as a *quid pro quo* and an incentive for the Sponsor's agreement to buy out any unit owners who wish to leave the complex. Even assuming the Sponsor poorly runs the Board and manages the complex, nothing precludes the class members remaining in the complex from instituting a lawsuit to address any alleged improper or inadequate actions by the Sponsor. The class members are only precluded from bringing their *past* claims for damages under the existing lawsuit, and from claiming that the Sponsor's control over the Board is itself wrongful.

Moreover, the Sponsor loses its exclusive control over the Board if it decides to convey at least 25% of its units to non-Sponsors. In other words, the Sponsor's total and exclusive control over the Board is not indefinite and is still limited by the Condominium Act and the Public Offering Statement. The only provision of the Condominium Act/POS that is being "waived" is that the Sponsor must relinquish control over the Board if it fails to sell its units. In light of the fact that non-Sponsor unit owners can still contest the Sponsor's actions on the Board and may still regain control over the Board, the Court finds this provision of the settlement a reasonable *quid-pro-quo* for the Sponsor's obligation to buy out non-Sponsor unit owners.

This provision is also fair to *future* purchasers of the units in the complex because the Master Deed will be amended to specify that the Sponsor has exclusive control over the Board even if it does not sell any additional units. Thus, future purchasers will be on notice to this governance scheme prior to purchasing a unit, and as to future owners, the Sponsor will be bound by *N.J.S.A.* 46:8B-12.1 when at least 25% of the units are sold.

9. Range of Reasonableness in Light of Attendant Risks of Litigation

As discussed above, damages will be difficult to establish which is evidenced by the fact that the litigation has been ongoing for 15 years due to the hotly contested issues involved. Continuing with the litigation would require the parties to expend a tremendous amount of resources above and beyond what has already been invested, all without any guarantee of success for either party. For the class members especially, the settlement agreement allows them to convey their unit without selling it on the open market, which often involves a broker and other additional frustrations and contingencies. If the class members instead went to trial, they would not only have to prove that the Sponsor's conduct directly caused a diminution in value to their units, but also prove the *amount* of that diminution. By way of the settlement, the class members can receive above fair market value for their unit without having to present expert testimony or the like.

***25** Another aspect of the settlement which demonstrates its reasonableness is the fact that class members are not precluded from bringing a subsequent action contesting action taken by the Board as controlled by the Sponsor. That is, while class members are precluded from challenging the Sponsor's control of the Board in and of itself, nothing in the proposed settlement prevents class members from alleging that certain actions taken by the Board are improper or unlawful.

The Court finds that the settlement is therefore reasonable in light of the attendant risks of litigation.

CONCLUSION

In light of the above analysis, the Court finds that the Condominium Act allows the Class Members to waive the gradual governance provisions of the Condominium Act and submit to the Sponsor's full control over the Board despite not selling any additional units. The Court also finds that the settlement is fair and reasonable in all aspects considering the equities of the litigation, and thus approves of the final settlement pursuant to *Rule* 4:32-4.

SO ORDERED.

Dated: August 28, 2015

Hon. David B. Katz, P.J.F.P.[14]

Footnotes

1 Units at Brookdale Gardens consist of 2.5 rooms, 3.5 rooms, 4 rooms or 5 rooms. The settlement monies are as follows: $127,500; $136,500; $141,500 and $170,000, respectively. Any unit that has a garage will receive an extra $5,000.

2 The partnership previously operated under the name Bloomfield Associates. Bloomfield Associates stopped doing business and was replaced by Defendant Bloomfield Condominium Associates, LLC.

3 The Docket Numbers of those cases were C-200-90 and C-21-95, respectively. Those complaints, however, were not made available to the Court, and the parties at times have argued that the matters were consolidated and that the instant case is related to the earlier filings. As such, the parties have represented that the issues at Brookdale Gardens date back to 1990, some 25 years ago.

4 The July 6, 2012 Order was a significant partial and temporary victory for the Plaintiffs. Because the Plaintiffs had asserted causes of action against the Defendant Association, the Association subsequently amended its pleadings to assert direct claims against the Defendants.

5 As explained below, the Court originally received 19 objections but it was later determined that one of those objections was received in error.

6 The Court is unable to ascertain the correct spelling of this class member's name, as her name is handwritten on the objection form and is somewhat illegible.

7 On July 17, 2015, the Court was advised of an e-mail exchange between Mr. Van Nostrand, attorney for the Sponsor, and Martha M. Spera, Mr. Spera's wife, in which Martha Spera denied that she or her husband never intended to object to the settlement, and confirmed that they had in fact submitted a signed claim form agreeing to sell their unit.

8 The Condominium Act became effective January 7, 1970. The predecessor to the Condominium Act was the Horizontal Property Act, *N.J.S.A.* 46:8A-1.

9 Similarly, *N.J.S.A.* 46:2B-7 provides that "[a]ny agreement contrary to the provisions of this act shall be void."

10 As of 2003, the Uniform Condominium Act had been adopted by Alabama, Arizona, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia and Washington. The District of Columbia, Louisiana, Michigan and Wisconsin have enacted fragmented portions of the Uniform Condominium Act. *Powell on Real Property* § 54A.02

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11 This unique type of opt-out was referred to by the district court and Third Circuit as a "downstream" or "back-end" opt-out right, which connotes a delayed or second opportunity to opt-out. *See* Rhonda Wasserman, *The Curious Complications with Back-end Opt-out Rights*, 49 *Wm. & Mary L. Rev.*, 373, 377 (2007).

12 Because New Jersey's class action rule is modeled after Federal Rule of Civil Procedure 23, New Jersey courts often use federal precedent as guidance for class action issues. *See Delgozzo v. Kenny*, 266 *N.J.Super.* 169, 189 (App. Div. 1993). However, New Jersey courts have interpreted *R.* 4:32-1 more liberally than the federal rule, often holding that a class *must* be certified unless there is a "clear showing that it is improper or inappropriate." *Gross v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 303 *N.J. Super.* 336, 341 (Law Div. 1997).

13 An additional three objectors submitted form objections as well as a separate individual objection.

14 The undersigned has continued to preside over this matter subsequent to appointment as Presiding Judge of the Family Part.

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EXHIBIT 10

User Name: Eleanor Grasso

Date and Time: Wednesday, April 10, 2024 9:48:00AM EDT

Job Number: 221595134

Document (1)

1. *In re Hemispherx Biopharma, Inc., 2011 U.S. Dist. LEXIS 172214*

   Client/Matter: -None-

Neutral
As of: April 10, 2024 1:48 PM Z

In re Hemispherx Biopharma, Inc.

United States District Court for the Eastern District of Pennsylvania

February 11, 2011, Decided; February 14, 2011, Filed

CIVIL ACTION NO. 09-5262

Reporter
2011 U.S. Dist. LEXIS 172214 *

In re HEMISPHERX BIOPHARMA, INC., SEC. LITIG.

Core Terms

settlement, class member, class action, notice, approving, district court, Parties, fee award, proposed settlement, expenses, damages, factors, Certification, negotiated, lodestar, Reimbursement, cases, risks, settlement fund, percentage-of-recovery, Predominance, Courts, common stock, stock, class period, experienced, mediation, packet, arm's, weigh

Counsel: **[*1]** For HEMISPHERX BIOPHARMA, INC. SECURITIES LITIGATION, IN RE: BARBARA A. PODELL, BERGER MONTAGUE PC, PHILADELPHIA, PA.

For JAMES REID, Individually and on Behalf of All Others Similarly Situated, Plaintiff: BARBARA A. PODELL, SHERRIE R. SAVETT, LEAD ATTORNEYS, BERGER MONTAGUE PC, PHILADELPHIA, PA; DEBORAH R. GROSS, LEAD ATTORNEY, KAUFMAN, COREN & RESS, PC, PHILADELPHIA, PA; JEFFREY A. BERENS, ROBERT J. DYER, III, LEAD ATTORNEYS, DYER & BERENS LLP, DENVER, CO; MARC S. HENZEL, LEAD ATTORNEY, LAW OFFICES OF MARC S. HENZEL, MERION STATION, PA; ERIC LECHTZIN, Edelson Lechtzin LLP, Newtown, PA.

For HEMISPHERX BIOPHARMA, INC., WILLIAM A. CARTER, Defendants: GAY BARLOW PARKS RAINVILLE, DAILEY LLP, PHILADELPHIA, PA; JOSEPH W. JESIOLOWSKI, CONRAD O'BRIEN PC, WEST TOWER CENTRE SQUARE, PHILADELPHIA, PA; MICHELE CRIMALDI ZARYCHTA, ROBERT L. HICKOK, PEPPER HAMILTON LLP, PHILADELPHIA, PA; THOMAS T. WATKINSON, II, SCHNADER HARRISON SEGAL & LEWIS LLP, PHILADELPHIA, PA; WILLIAM A. LIESS, STEVE HARVEY LAW, PHILADELPHIA, PA.

For DAVID R. STRAYER, also known as, DAVID J. STRAYER, Defendant: GAY BARLOW PARKS RAINVILLE, LEAD ATTORNEY, DAILEY LLP, PHILADELPHIA, PA; ROBERT L. HICKOK, LEAD ATTORNEY, MICHELE CRIMALDI **[*2]** ZARYCHTA, PEPPER HAMILTON LLP, PHILADELPHIA, PA; JOSEPH W. JESIOLOWSKI, CONRAD O'BRIEN PC, WEST TOWER CENTRE SQUARE, PHILADELPHIA, PA; THOMAS T. WATKINSON, II, SCHNADER HARRISON SEGAL & LEWIS LLP, PHILADELPHIA, PA; WILLIAM A. LIESS, STEVE HARVEY LAW, PHILADELPHIA, PA.

For ANTHONY DESILVA, Movant: DEBORAH R. GROSS, LEAD ATTORNEY, KAUFMAN, COREN & RESS, PC, PHILADELPHIA, PA.

For AMGAD RIZK, MINA RIZK, RAYMOND A. PRITCHETT, Movants: DEBORAH R. GROSS, KAUFMAN, COREN & RESS, PC, PHILADELPHIA, PA.

Judges: Paul S. Diamond, J.

Opinion by: Paul S. Diamond

Opinion

ORDER

This is a consolidated class action brought on behalf of all persons who purchased the common stock of Hemispherx Biopharma, Inc. between February 18, 2009 and December 1, 2009. The Consolidated Class Action Complaint, filed on March 1, 2010, included claims against Hemispherx; Hemispherx's CEO and Board Chairman, William A. Carter; and Hemispherx's Medical Director, David R. Strayer for making untrue statements of material facts in violation of *§ 10(b)* of the Exchange Act. The Complaint also included claims for joint and several liability against Carter and Strayer for the acts of their subordinates under *§ 20(a)* of the Exchange Act. (*Doc. No. 28.*)

The Parties have reached **[*3]** a settlement.

Before me are Lead Plaintiff's Motions for Final Certification of the Settlement Class (*Doc. No. 75*) and for Final Approval of Class Action Settlement, Plan of Allocation of Settlement Proceeds, and Award of Attorneys' Fees and Reimbursement of Expenses (*Doc. No. 69.*) For the following reasons, I will grant these Motions.

I. BACKGROUND

Hemispherx is a Philadelphia-based pharmaceutical company that developed Ampligen, an experimental drug for the treatment of chronic fatigue syndrome. As alleged, Hemispherx filed a New Drug Application in 2007 seeking FDA approval for Ampligen. The Agency was expected to announce its decision in February 2009. (*Id. at ¶4.*) Because no drug therapy then existed for the treatment of CFS, Hemispherx had high hopes that once FDA-approved, Ampligen would generate significant profits. (*Id. at ¶44.*) During this time, Hemispherx's financial condition was desperate. It was paying some of the salaries and fees due to its Board of Directors, employees, and consultants in stock, and by March 2009 it had accumulated a deficit of more than $200 million. (*Id. at ¶¶6, 41.*) According to the Complaint, by the Spring of 2009, Hemispherx was at risk of failing **[*4]** unless it raised money through a public stock offering fueled by the understanding that the FDA would approve the Ampligen application without difficulty or delay. (*Id.*)

The FDA delayed its action on Ampligen beyond the expected February 2009 announcement date, noting to Hemispherx deficiencies in the application and giving Defendants an opportunity to correct those deficiencies. Defendants thus knew that the FDA's delayed decision on the Ampligen application might not be favorable. (*Id. at ¶5.*) Defendants nonetheless falsely stated in February and May 2009 press releases that the FDA's delay was attributable to the Agency's heavy workload and that Hemispherx had already submitted all the requested information. (*Id. at ¶9.*) Defendant Strayer allegedly made similar misrepresentations at a medical conference in March 2009, as did Defendant Carter during a March 2009 conference call with securities analysts and investors. (*Id. at ¶¶51-52.*)

In November 2009, Hemispherx issued a press release giving the first indication that its Ampligen application might be in difficulty. The Company disclosed that as of August 2009, there were several outstanding FDA information requests, and that Hemispherx **[*5]** planned to submit additional data in November and December. (*Id. at ¶11.*) Within two days of this disclosure, the price of Hemispherx common stock dropped 15.04%. (*Id. at ¶12.*) On December 1, 2009, Hemispherx issued a press release stating that the FDA would not approve the Ampligen application primarily because supporting studies "did not provide evidence of the efficacy of Ampligen." (*Id. at ¶ 13.*) The following day, the price of Hemispherx common stock plunged over 40%. (*Id. at ¶14.*)

Lead Plaintiff alleges that the Defendants intentionally defrauded investors to raise badly needed funds by artificially inflating the price of Hemispherx stock through their false and misleading statements. (*Id. at passim.*)

On March 12, 2010, Defendants filed a Motion to Dismiss the Consolidated Class Action Complaint. (*Doc. No. 29.*) I denied their Motion and issued a Case Management Order. (*Doc. Nos. 37 and 39.*) The Parties subsequently mediated the matter before retired Magistrate Judge Diane M. Welsh, and informed me on August 17, 2010 that they had reached a settlement in principle. (*Doc. No. 58.*) On September 24, 2010, the Parties submitted a Joint Motion for Preliminary Approval of Settlement, **[*6]** Preliminary Certification of the Class, and Approval of Notice to the Class. (*Doc. No. 62.*) I granted the Parties' Motion and held a combined Class Certification and Settlement Fairness Hearing on January 20, 2011.

II. CLASS CERTIFICATION

On October 20, 2010, I preliminarily certified the Class to enable Lead Plaintiff to issue Notice to the Class of the Proposed Settlement. (*Doc. No. 65.*) I will now finally certify the Class because I find that the requirements of Rule 23(a) and (b) are met.

A. Rule 23(a)

Rule 23(a) establishes the prerequisites to class certification: (a) numerosity, (b) commonality, (c) typicality, and (d) adequacy of representation. The "central inquiry" where a class seeks certification for settlement purposes only is the adequacy of representation, and I have paid particular attention to that issue. *In re Cmty. Bank of N. Va., 418 F.3d 277, 300 (3d Cir. 2005)*.

A class must be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. The Class here consists of all persons purchasing or acquiring Hemispherx common stock from February 18, 2009 to December 1, 2009. During this period, there were more than 7 million shares of common stock outstanding. (*See Doc. No. 62 at 12.*) Lead Plaintiff reasonably believes that the Class consists of hundreds, and perhaps **[*7]** thousands, of members. (*See id.*) The Class is sufficiently numerous.

There must also exist "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. Here, the Class Members hold legally identical claims premised on the same conduct. Thus, there is a common question of law or fact. See *In re Prudential Ins. Co. of Am. Sales Pracs. Litig., 148 F.3d 283, 310 (3d Cir. 1998)* ("Commonality exists when proposed class members challenge the same conduct of the defendants.").

"[T]he claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." *Fed. R. Civ. Proc. 23(a)(3)*. This requirement overlaps with commonality and does not require that all putative class members share identical claims. *Cmty. Bank, 418 F.3d at 303*. Defendants' alleged misconduct is identical with respect to all Class Members, and Defendants have not raised any defenses unique to the Lead Plaintiff. Typicality is thus met.

Finally, the class representative must "fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. "This requirement encompasses two distinct inquiries designed to protect the interests of absentee class members: 'it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees,' and it tests the qualifications of the counsel to represent the class." *Cmty. Bank, 418 F.3d at 303* (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 800 (3d Cir. 1995)*). The Third Circuit **[*8]** has explained that

> concern with class counsel's representation extends to their negotiation of the settlement. "Courts examining settlement classes have emphasized the special need to assure that class counsel: (1) possessed adequate experience; (2) vigorously prosecuted the action; and (3) acted at arm's length from the defendant."

Cmty. Bank, 418 F.3d at 307 (quoting *Gen. Motors, 55 F.3d at 801*). The Parties have credibly shown that Lead Plaintiff has no conflicts of interest with the Class. (*See Doc. No. 62 at 14.*) I also agree that Lead Plaintiff's counsel "are highly qualified, experienced and able to conduct this litigation." (*See id.*) Finally, the Settlement reached here was the fruit of extensive arm's-length negotiation before a retired Magistrate Judge. (*See id. at 7.*) Accordingly, I conclude that the requirements of *Rule 23(a)* are met.

B. *Rule 23(b)(3)*

Rule 23(b)(3) allows certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The *Rule 23(b)(3)* inquiry, then, breaks down to predominance and superiority. Predominance "tests whether the class is sufficiently cohesive **[*9]** to warrant adjudication by representation." *In re LifeUSA Holding Inc., 242 F.3d 136, 144 (3d Cir. 2001)*. Superiority "asks a district court 'to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *Cmty. Bank, 418 F.3d at 309* (quoting *Georgine v. Amchem Prods., Inc., 83 F.3d 610, 632 (3d Cir. 1996)*, *aff'd*, *521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*.

1. Predominance

Courts have often recognized that *10b-5* securities litigation is particularly suited to the class action. Common issues predominate where securities dealers purportedly defraud investors through a uniform scheme. See *Hoxworth v. Blinder, Robinson, & Co., 980 F.2d 912, 924 (3d Cir. 1992)*. The rare exception may occur, for example, where stockholders' claims are based on unique oral misrepresentations from brokers, thus requiring particularized proof. See *Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 186 (3d Cir. 2001)*.

Here, common issues predominate: Defendants' alleged misrepresentations in Hemispherx's press releases, in Strayer's presentation, and in Carter's conference call were the same with regard to all Class Members. See *Amchem Prods., 521 U.S. at 625* ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."); see also *Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975)* ("Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common

sense approach that the class is united by a common **[*10]** interest in determining whether a defendant's course of conduct is, in its broad outlines, actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit.").

2. Superiority

The class action is often a superior vehicle for securities litigation because potential plaintiffs are unlikely to bring individual claims to recover small damage amounts. See *Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985)*; see also *Marsden v. Select Med. Group, 246 F.R.D. 480, 489 (E.D. Pa. 2007)*. The interest in avoiding duplicative litigation also favors the class action in these circumstances, where the defendant's alleged fraudulent conduct was the same with respect to all class members. See *In re Sadia, S.A. Sec. Litig., 269 F.R.D. 298, 2010 WL 2884737 at *17 (S.D.N.Y. 2010)*. Similarly, judicial economy underscores the desirability of a class action where the only factual differences in the class members' claims is the amount and time frame of each member's securities purchase—distinctions that have no bearing on the propiety of the defendant's conduct or the class's overall potential for recovery.

All these factors weigh strongly in favor of a finding of superiority here. For these reasons, I find that the Class to be certified also satisfies *Rule 23(b)*, and certification is warranted.

III. SETTLEMENT

Under the Proposed Settlement, Defendants **[*11]** agree to deposit $3.6 million in an escrow account in exchange for the Class's relinquishment of all claims arising from the conduct underlying this litigation. (*Doc. No. 62 at 17.*) All claimants must submit a signed Proof of Claim and Release, supported by proof of acquisition of Hemispherx stock during the Class Period. Co-Lead Counsel, as Claims Administrator, may reject Proofs of Claim that do not meet submission requirements, and Claimants may contest such a rejection by requesting the Court's review. Defendants may not recover undisbursed monies: any balance remaining in the Settlement Fund a year after the initial distribution will also be distributed to Authorized Claimants. The $3.6 million amount represents 5.2% of the maximum possible recovery of $68.6 million, and a 6.7% recovery of a more realistic damages assessment of $53.6 million. (*Doc. No. 67 at 20.*)

In finally approving a class settlement agreement, I must determine that the agreement is fair under *Rule 23(e)*. See *In re Ins. Brokerage Antitrust Lit., 579 F.3d 241, 257 (3d Cir. 2009)*. That Rule requires the district court to (1) "direct notice in a reasonable manner to all class members who would be bound by the proposal," and (2) approve the proposal "only after a hearing and on finding that **[*12]** it is fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(1)-(2)*.

In determining the fairness of a proposed settlement agreement, the district court has "wide discretion," providing it considers the following factors:

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975); *Shlensky v. Dorsey, 574 F.2d 131, 147 (3d Cir. 1978)*.

I will approve the Proposed Settlement because I find that the notice provided to the Class satisfied the requirements of *Rule 23* and the Settlement itself is fair.

A. Notice

Before certifying a class for settlement purposes only, the district court must require notice that satisfies *Rule 23(c)(2)* and *23(e)* requirements. See **[*13]** *Bradburn Parent Teacher Store, Inc. v. 3M (Minn. Mining and Mfg. Co.), 513 F.Supp.2d 322, 328 (E.D. Pa. 2007)*. *Rule 23(b)(3)* requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Fed. R. Civ. P. 23(c)(2)(B)*. In addition, once a settlement is proposed, "the court must direct notice in a reasonable manner to all class members who would be bound by the proposal." *Fed. R. Civ. P. 23(e)(1)*.

The notice given to potential Class Members satisfies *Rule 23*. The Lead Plaintiff mailed a copy of the notice packet to all persons who purchased or acquired Hemispherx common stock during the Class Period. (*Doc. No. 67 at 22.*) Additionally, a summary of the notice packet was published: in the PR Newswire on November 16, 2010 and November 19, 2010; in the BusinessWire on November 24, 2010; and in the MarketWire on November 29, 2010. (*Id.*) The notice packet advised Class Members of the Settlement terms, the procedure for filing objections, the place and time of the Settlement Fairness Hearing, the procedure for opting out of the Class, the Plan of Allocation, and Lead Counsel's fee application. Accordingly, the notice provided to Class Members was adequate. See *In re Amer. Business Fin. Servs. Inc. Noteholders Litig., 2008 U.S. Dist. LEXIS 95437, 2008 WL 4974782, at *10-11 (E.D. Pa. Nov. 21, 2008)* (approving identical notice scheme in similar securities class action).

B. Settlement Fairness

During the **[*14]** January 20, 2011 hearing, Lead Counsel made a presentation on the fairness of the Proposed Settlement. The Parties also submitted lengthy briefs in which they addressed fairness. (*Doc. Nos. 62, 64, 70, 72.*) Upon consideration of Lead Counsel's presentation, the Parties' filings, and my own analysis of the *Girsh* factors, I find that the Proposed Settlement in this case is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(2)*.

1. The Complexity, Expense, and Duration of This Litigation

Courts have repeatedly held that in securities class actions, these factors weigh in favor of settlement. See, e.g., *In re Ravisent Techs. Inc. Sec. Litig., 2005 U.S. Dist. LEXIS 6680, at *24-25 (E.D. Pa. April 18, 2005)*. This is a complex matter, involving scientific and medical issues and the FDA's review process. Absent a settlement, resolution would necessitate a lengthy jury trial, with inevitable appeals. After years of such expensive litigation, there is no assurance that economically distressed Hemispherx would still be in existence or sufficiently solvent to pay a substantial sum to the Class—assuming the Class prevails.

2. The Reaction of the Class to the Settlement

I have received only two, identical objection letters, apparently submitted by two members of the same family. (*Doc. Nos. 76, 77.*) This constitutes a very **[*15]** small percentage of the Class, given that 46,000 copies of the Notice were mailed to potential Class Members. "[O]ne indication of the fairness of a settlement is the lack of or small number of objections." *Hammon v. Barry, 752 F. Supp. 1087, 1093 (D.D.C. 1990)*; see also *Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1313-14 n.15 (3d Cir. 1993)* (small number of objectors demonstrates implicit consent of the class to settlement and supports approval of settlement).

Under the Private Securities Litigation Reform Act of 1995, parties to a proposed securities class action settlement must disclose the amount of the settlement on an average per share basis. *15 U.S.C. § 78u-4(a)(7)(A)*. The two objectors complain that this figure, $0.027 per share, is too low in light of their actual damages. The $0.027 figure does not, however, represent the actual expected recovery, because it includes non-compensable "in-and-out" transactions and undamaged shares. (*Doc. No. 73 at 2.*) The amount each Class Member will actually receive per compensable share is $0.61-5.1% of the maximum possible recovery. (*Doc. No. 73 at 9.*) Moreover, there will be a second distribution of funds remaining after the first claims period has ended. The Parties' experts estimate that with this second distribution, each claiming Class Member will receive 13.7%-16% of the maximum **[*16]** possible recovery. (*Id.*)

The objectors did not appear at the Fairness Hearing to discuss or explain their complaints. Having nonetheless carefully considered the objections, I find that they do not impugn the fairness of the Proposed Settlement. Cf. *Amer. Bus. Fin. Servs., 2008 U.S. Dist. LEXIS 95437, 2008 WL 4974782, at *6-7* (only 32 written objections and 7 verbal comments raising concern over the 2.5% damages recovery weighed in favor of approval where notice was sent to over 29,000 class members).

3. The Stage of the Proceedings and the Discovery Completed

I apply this factor to determine "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant Corp. Litig., 264 F.3d 201, 235 (3d Cir. 2001)*. Here, the extensive investigation conducted by Co-Lead Counsel included reviewing all the Company's public statements concerning its attempts to obtain FDA approval for Ampligen, the

Company's filings with the SEC, and other relevant documents. The Parties exchanged discovery in connection with the Defendants' Motion to Dismiss, including 20,000 pages of documents constituting the Company's communications with the FDA concerning Ampligen. (*Doc. No. 37.*) In these circumstances, I am satisfied that Counsel were sufficiently apprised of this case's merits before they began their mediation **[*17]** before Judge Welsh.

4. The Risks of Establishing Liability and Damages

Lead Plaintiff notes that a jury's finding of liability is not certain in this case: "Defendants denied and continue to deny that they issued false and misleading statements or that they acted with intent to defraud." (*Doc. No. 67 at 12.*) Indeed, "[e]stablishing materiality in any securities claim involves a complex undertaking of fact and law." *In re PNC Fin. Servs. Grp., Inc., Sec. Litig., 440 F. Supp. 2d 421, 434-35 (W.D. Pa. 2006)*. Defendants have most vigorously argued that Lead Plaintiff will be unable to establish the requisite scienter to establish securities fraud. (*Doc. No. 67 at 13.*) Indeed, Lead Plaintiff apparently has only circumstantial evidence of scienter. (*Id.*)

Lead Plaintiff would also have difficulty proving damages and loss causation. Damages in a *§ 10(b)* action are measured by "the difference between the purchase price and the 'true value' of the security [i.e., its value absent fraud] at the time of purchase." *Semerenko v. Cendant Corp., 223 F.3d 165, 184 (3d Cir. 2000)*. This is often a difficult analysis to make or understand—requiring expert assistance—involving highly complex valuation models.

5. The Risks of Maintaining the Class Action Through Trial

"What the district court giveth, the district court may taketh away: the court may decertify or **[*18]** modify a class at any time during the litigation should the class prove to be unmanageable." *Perry v. FleetBoston Fin. Corp., 229 F.R.D. 105, 116 (E.D. Pa. 2005)*. That risk is certainly present here.

6. Whether the Settlement Is Reasonable in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The settlement amount will afford the Class a significant recovery. It represents 5.2% of the maximum possible verdict—a percentage recovery that falls squarely within the range of reasonableness approved in other securities class action settlements. See, e.g., *Amer. Bus. Fin. Servs., 2008 U.S. Dist. LEXIS 95437, 2008 WL 4974782, at *7* (approving settlement that provided 2.5% recovery of damages); *In re Ikon Office Solutions, Inc., Sec. Litig., 194 F.R.D. 166, 184 (E.D. Pa. 2000)* (approving settlement that provided 5.2% recovery of best possible amount for common stockholders and 8.7% recovery for convertible preferred stockholders); *In re Gulf Oil/Cities Serv. Tender Offer Litig., 142 F.R.D. 588, 596 (S.D.N.Y. 1992)* (approving settlement that provided $0.48 per share out of potential recovery of $30 per share); see also *Detroit v. Grinnell, 495 F.2d 448, 455 n.2 (2d Cir. 1974)* ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved."). As I have discussed, the settlement amount represents a 6.7% recovery of a more realistic $53.6 million verdict. (*See Doc. No. 67 at 20.*)

There are risks **[*19]** to the Class in proceeding to trial. The jury could return a defense verdict. Even if the Class is successful at trial, it could lose on appeal. See, e.g., *Robbins v. Koger Props., 129 F.3d 617 (11th Cir. 1997)* (Court overturned $81 million jury verdict on loss causation grounds and ordered entire case dismissed); *Backman v. Polaroid Corp., 910 F.2d 10 (1st Cir. 1990)* (Court reversed $38 million jury verdict after ten years of litigation). Finally, as I stated earlier, there is no assurance that Hemispherx will able to withstand a multimillion judgment or will even be in existence at the conclusion of litigation.

7. Arm's Length Negotiations and Experienced Counsel

Although not a Girsh factor, this weighs strongly in favor of approving the Proposed Settlement. The Parties reached agreement through arm's length mediation before a retired Magistrate Judge. Counsel have a wealth of experience litigating class actions. As one court noted in similar circumstances: "[T]he fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable." *In re Indep. Energy Holdings PLC, 2003 U.S. Dist. LEXIS 17090, 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003)*. Additionally, a court

"should attribute significant weight to the belief of experienced counsel that settlement is in the **[*20]** best interests of the class." *Austin v. Penn. Dep't of Corr., 876 F. Supp. 1437, 1472 (E.D. Pa. 1995).*

The manner in which this Settlement was reached thus further shows that it is reasonable and fair.

For all these reasons, I will approve the Proposed Settlement.

IV. PLAN OF ALLOCATION

"Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Ikon Office Solutions, Inc., Sec. Litig., 194 F.R.D. 166, 184 (E.D. Pa. 2000).* "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." Id.

Here, the Plan of Allocation provides for recovery based on the strength of each Class Member's claim. For example, whether a Class Member sold his or her Hemispherx shares during the Class Period or held onto them will affect the damages allegedly suffered. Accordingly, the Parties considered the sales date in their Plan of Allocation, as they did other factors, such as whether the Class Member engaged in a short sale or whether the Hemispherx shares were bought through the exercise of an option. (*See Doc. No. 62-4 at 16.*) Courts regularly approve allocation plans that distribute funds according to the relative strengths **[*21]** and weakness of class members' claims. See, e.g., *Careccio v. BMW of N. Amer. LLC, No. 08-cv-2619, 2010 U.S. Dist. LEXIS 42063, 2010 WL 1752347, at *2-3, 6 (D.N.J. Apr. 29, 2010)* (individual class member recovery for purchasing faulty tires was based, in part, on the miles traveled on the tires); *In re Schering-Plough Corp. Secs. Litig., No. 01-cv-0829, 2009 U.S. Dist. LEXIS 121173, 2009 WL 5218066, at *5 (D.N.J. Dec. 31, 2009)* (approving plan of allocation that "compensate[d] for losses of class members based upon the date the stock was purchased and whether the stock was sold during the class period or held through the end of the class period"). Because the Plan of Allocation has a rational basis and was developed by experienced Class Counsel in conjunction with a damages expert, I find that the Plan of Allocation is reasonable. See *2009 U.S. Dist. LEXIS 121173, [WL] at *5*.

V. APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

Co-Lead Counsel request attorneys' fees comprising 29% of the Settlement Amount, or $1,044,000, plus reimbursement of $25,858.90 in expenses, plus interest. (*Doc. No. 68.*) It is well settled that attorneys litigating common fund matters are entitled to a fee from the fund as a whole. See *Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980)*. The Third Circuit has repeatedly approved a "percentage-of-recovery method" for awarding fees in common-fund securities fraud cases. See, e.g., *In re AT&T Corp., 455 F.3d 160, 164 (3d Cir. 2006)* ("In common fund cases such **[*22]** as this one, the percentage-of-recovery method is generally favored . . . ."). In considering a percentage-of-recovery amount, the "district court should consider the Gunter factors, the Prudential factors, and any other factors that are useful and relevant with respect to the particular facts of the case." *Id. at 166*. "The fee award reasonableness factors need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest." Id. Under Gunter, district courts may consider:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter, 223 F.3d at 195 n.1. Prudential adds:

> (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage **[*23]** fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative" terms of settlement.

AT&T, 455 F.3d at 165 (citing *In re Prudential Ins. Co. of Amer., 148 F.3d 283, 338-40 (3d Cir. 1998))*. The factors are guidelines for district courts to use in analyzing fee awards; the district court need not analyze every factor. See *AT&T, 455 F.3d at 166-75* (affirming district court approval of fee award where district court

only generally analyzed award under its Girsh settlement approval analysis).

A. The Size and Nature of the Common Fund Created and the Number of Persons Benefited by the Settlement

The Settlement Fund totals $3,600,000 plus interest—a substantial and certain recovery, avoiding the expense, delay, and uncertainty of continued litigation. Forty-six thousand notice packets were mailed to identifiable Class Members. The number of persons recovering in this Settlement is likely to be in the thousands.

B. Presence or Absence of Substantial Objections

The 46,000 notice packets mailed to potential Class Members included Co-Lead Counsel's requested fee award of 29%. The miniscule number of objections here—only two—supports the reasonableness of the proposed award. See *Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 148-49 (E.D. Pa. 2000)* (requested fee award was reasonable where **[*24]** there was only one objector from over 5200 class members).

C. The Skill and Efficiency of Co-Lead Counsel

The Third Circuit has explained that the percentage-of-recovery method of awarding fees is intended to ensure "that competent counsel continue to undertake risky, complex, and novel litigation." Gunter, 223 F.3d at 198. Here, Co-Lead Counsel have decades of success litigating securities class actions. (*See generally Doc. No. 72-4, 72-5.*) The benefits Counsel have obtained for the Class attest to their experience and ability. See *Cullen, 197 F.R.D. at 149* ("[T]he single clearest factor reflecting the quality of class counsels' services to the class are the results obtained."). The competence of Co-Lead Counsel in this case weighs in favor of their requested fee award.

D. The Complexity and Duration of the Litigation, Risk of Non-Payment, and Amount of Time Devoted to the Case

Co-Lead Counsel have vigorously prosecuted their case for over eleven months, engaging in significant discovery and defeating Defendants' substantial Motion to Dismiss. Co-Lead Counsel undertook this litigation on contingency, assuming the risk that they would recover nothing. Finally, Counsel spent a substantial amount of time—almost 3,000 hours—litigating **[*25]** this matter. (*Doc. No. 68 at 15.*)

E. Awards in Similar Cases and in Non-Class Litigation

A 29% fee award is consistent with those granted in similar cases. See, e.g., *In re Sterling Fin. Corp. Sec. Class Action, No. 07-2171, 2009 U.S. Dist. LEXIS 83224, at *15 (E.D. Pa. Sept. 10, 2009)* (30% fee award); *In re ATI Techs., Inc. Sec. Litig., No. 01-2541, 2003 U.S. Dist. LEXIS 7062, at *5 (E.D. Pa. Apr. 28, 2003)* (30% fee award); *In re Cell Pathways, Inc., Sec. Litig. II, No. 01-1189, 2002 U.S. Dist. LEXIS 18359, at *43 (E.D. Pa. Sept. 23, 2002)*.

Prudential asks courts to consider fee arrangements that were negotiated in private contingent fee agreements. *148 F.3d at 338-40*. Fees of 30% or more are common. See, e.g., *In re U.S. Bioscience Sec. Litig., 155 F.R.D. 116, 119 (E.D. Pa. 1994)* (30% would likely have been the negotiated fee award in a private securities action); *Ikon, 194 F.R.D. at 194* (plaintiffs' counsel in private contingency fee cases routinely negotiate 30-40% fee arrangements).

F. Lodestar Cross-Check

The Third Circuit advises district courts to test the percentage-of-recovery fee award proposal against the lodestar figure. See *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)*; see also Manual for Complex Litigation (Fourth) § 14.122 (2004) ("The lodestar is at least useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant."). Courts divide the percentage-of-recovery fee award by the lodestar figure to compute the so-called lodestar "multiplier." See, e.g., *Ikon, 194 F.R.D. at 195*.

The lodestar **[*26]** amount here, as credibly determined by Counsel, is $1,557,539.50, based on the 2,969 hours their firms spent on the case. (*Doc. No. 68 at 18-19.*) The proposed percentage-of-recovery fee total—$1,044,000—divided by the lodestar figure is .67, representing a negative multiplier. This compares favorably to settlements commonly approved where the

lodestar multiplier is two or higher. See, e.g., *Ikon*, *194 F.R.D. at 195* (approving a fee award that is 2.7 times the lodestar).

G. Reimbursement of Expenses

Co-Lead Counsel requests reimbursement for expenses in the amount of $25,858.90. (*Doc. No. 68 at 21*.) According to Counsel's affidavit, the expenses include the cost of a damages expert, printing, Lexis and Westlaw research, modest travel costs, mediation fees, and postage. (*Doc. No. 74 at 31*.) I find these expenses to be reasonable. See *Cullen, 197 F.R.D. at 151* (approving similar expenses in class action settlement).

For the foregoing reasons, I will approve Co-Lead Counsel's request for fee award and reimbursement of expenses.

AND NOW, this 11th day of February, 2011, it is **ORDERED** that:

1. Lead Plaintiff's Motion for Final Certification of the Settlement Class (*Doc. No. 75*) is **GRANTED**;

2. Lead Plaintiff's Motion for Approval for Final Approval **[*27]** of Class Action Settlement and Plan of Allocation of Settlement Proceeds and Award of Attorneys' Fees and Reimbursement of Expenses (*Doc. No. 69*) is **GRANTED**;

3. Co-Lead Counsel shall receive interest on the Fee Award amount and the Reimbursement of Expenses amount from the date the Settlement Fund was created to the date of payment at the same rate that interest accrued on the Settlement Fund;

4. The Settlement embodied in the Parties' Stipulation and Agreement of Settlement (*Doc. No. 62-1*) is approved in all respects, including the releases and barring of claims as set forth in that document, and the Parties are directed to effectuate settlement pursuant to that Stipulation;

5. The Court reserves jurisdiction over all further proceedings arising out of this Action including proceedings concerning the administration, consummation, and enforcement of this Settlement;

6. The Court finds that during the course of the Action, the Parties and their Counsel at all times complied with the requirements of *Rule 11 of the Federal Rules of Civil Procedure*;

7. The Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation without further order of Court;

8. All Settlement Class Members not listed on Exhibit **[*28]** 1 enumerating those persons who properly elected to exclude themselves according to the procedures set forth in the Preliminary Approval Order (*Doc. No. 65*) are bound by this Judgment;

9. There is no just reason for delay in the entry of this Judgment and immediate entry by the Clerk of Court is directed pursuant to *Rule 54(b) of the Federal Rules of Civil Procedure*;

10. This Action is **DISMISSED without costs and with prejudice**; and

11. The Clerk shall mark this case **CLOSED** for statistical purposes.

IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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EXHIBIT 11

User Name: Eleanor Grasso
Date and Time: Wednesday, April 10, 2024 9:48:00AM EDT
Job Number: 221595173

Document (1)

1. *Miranda v. Xavier Univ., 2023 U.S. Dist. LEXIS 178072*
   Client/Matter: -None-

Neutral
As of: April 10, 2024 1:48 PM Z

Miranda v. Xavier Univ.

United States District Court for the Southern District of Ohio, Western Division

October 3, 2023, Decided; October 3, 2023, Filed

Case No. 1:20-cv-539

Reporter
2023 U.S. Dist. LEXIS 178072 *; 2023 WL 6443122

XIMENA MIRANDA, Plaintiff, vs. XAVIER UNIVERSITY, Defendant.

Prior History: *Miranda v. Xavier Univ., 594 F. Supp. 3d 961, 2022 U.S. Dist. LEXIS 54977, 2022 WL 899668 (S.D. Ohio, Mar. 28, 2022)*

Core Terms

settlement, class member, notice, class action, parties, expenses, settlement agreement, class representative, discovery, attorney's fees, final approval, lodestar, factors, approving, semesters, certification, collusion, weighs, common fund, due process, in-person, mediation, spring and summer, district court, prosecuting, benefits, enrolled, tuition, Courts, awards

Counsel: **[*1]** For Ximena Miranda, On behalf of herself and those similarly situated, Plaintiff: Joseph Michael Lyon, LEAD ATTORNEY, The Lyon Firm, Cincinnati, OH; Terence Richard Coates, LEAD ATTORNEY, Wilbert Benjamin Markovits, Markovits, Stock & DeMarco, LLC, Cincinnati, OH.

For Xavier University, Defendant: Aaron Mark Herzig, Medora Akers, LEAD ATTORNEYS, Taft Stettinius & Hollister LLP, Cincinnati, OH; Russell S Sayre, LEAD ATTORNEY, Taft Stettinius & Hollister - 1, Cincinnati, OH.

Judges: Timothy S. Black, United States District Judge.

Opinion by: Timothy S. Black

Opinion

ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT AND PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARD

This civil case is before the Court on Plaintiff's unopposed motion for final approval of the class action settlement (Doc. 32) and Plaintiff's motion for attorneys' fees, expenses, and class representative service award (Doc. 29).

I. BACKGROUND

On July 10, 2020, Plaintiff Ximena Miranda initiated this class action lawsuit against Defendant Xavier University on behalf of herself and other students participating in the College of Nursing's Accelerated Bachelor of Science in **[*2]** Nursing program. (Doc. 1). The gist of Plaintiff's allegations was that Xavier deprived her and other ABSN students of certain promised benefits, such as simulation labs and clinical experiences, when Xavier stopped in-person curriculum during the COVID-19 pandemic, yet, nevertheless collected and kept fees related to those services. From this, Plaintiff's operative amended complaint asserted claims for breach-of-contract, unjust enrichment, promissory estoppel, and violation of the Ohio Consumer Sales Practices Act. (Doc. 11). In response to the complaint, Xavier filed a motion to dismiss, which motion the Court granted in part and denied in part. (Doc. 13, 19). The following claims remained: (1) Plaintiff's breach of contract claim related to tuition and professional liability insurance fees; (2) Plaintiff's unjust enrichment claim; and (3) Plaintiff's promissory estoppel claim. (Doc. 19).

The parties then proceeded to informal discovery, which discovery identified 494 Class Members who participated in 816 spring and summer 2020 semesters as part of Xavier's ABSN program. (Doc. 27-3 at ¶ 5). In December 2020, the parties then mediated the case before retired United States Magistrate **[*3]** Judge Morton Denlow. (*Id.* at ¶ 7.) At the mediation, the parties reached a settlement in principle. (*Id.*) After finalizing settlement terms, Plaintiff filed her unopposed motion

for preliminary approval of class action settlement. (Doc. 27; *see also* Doc. 27-2, Settlement Agreement). On June 20, 2023, the Court granted the motion. (Doc. 28). Notice was sent to class members. (Doc. 32-3). And, on October 3, 2023, the Court held a fairness hearing to consider final approval of the settlement.

II. ANALYSIS

A. The Settlement Class is appropriate for *Rule 23* certification.

"The benefits of a settlement can be realized only through the final certification of a settlement class." *Rikos v. Proctor & Gamble Co., No. 1:11-CV-226, 2018 U.S. Dist. LEXIS 72722, 2018 WL 2009681, at *4 (S.D. Ohio Apr. 30, 2018)*. The Court maintains broad discretion in deciding whether to certify a class.

Here, Plaintiff seeks final certification of the following Settlement Class:

> Individuals identified on the Xavier Settlement Class List who were enrolled as a student in Xavier University's College of Nursing Accelerated Bachelor of Science in Nursing Program in any city in Ohio who paid tuition and fees to Xavier during the Spring 2020 and Summer 2020 semesters. Excluded from the Settlement Class are: (1) the judge and court personnel overseeing this **[*4]** Litigation; (2) the Defendant, its subsidiaries, successors, predecessors, and any entity in which the Defendant has a controlling interest and its current or former officers, directors, and employees; and (3) Settlement Class Members who submit a valid Request for Exclusion on or before the Opt-Out Deadline.

1. Numerosity

Rule 23(a)(1) requires a plaintiff to demonstrate that "the class is so numerous that joinder of all members is impracticable." While no specific number of class members is required to maintain a class action, "[w]hen class size reaches substantial proportions ... the impracticability requirement is usually satisfied by the numbers alone." *In re Am. Med. Sys. Inc., 75 F.3d 1069, 1079 (6th Cir. 1996)* (citation omitted). Roughly 500 potential class members were identified, satisfying the numerosity requirement.

2. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." Commonality does not require "the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Zehentbauer Fam. Land, LP v. Chesapeake Expl., L.L.C., 935 F.3d 496, 503 (6th Cir. 2019)* (quoting *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*). Indeed, one common question of law or fact may satisfy this requirement. *Pansiera v. Home City Ice Co., 341 F.R.D. 223, 232 (S.D. Ohio 2022)*.

Here, Plaintiff's and the Class Members' claims all turn on common questions **[*5]** of law and fact. Namely, Plaintiff's and the Class Members' claims rely on Xavier's advertisements, promotional materials, and syllabi promising or suggesting that in-personal clinical education was material to the students' enrollment in Xavier's ABSN program. Accordingly, commonality is satisfied.

3. Typicality

Rule 23(a)(3) provides that "the claims or defenses of the representative parties [shall be] typical of the claims or defenses of the class." The typicality element is designed to assess "whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Sprague v. General Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998)*. A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if the named plaintiff's claims are based on the same legal theory. *In re Am. Med. Sys., Inc., 75 F.3d at 1082*.

Here, Plaintiff's and the Class Members' claims arises from the same conduct and are based on the same legal theory: whether Xavier breached its promises to ABSN students when Xavier cancelled in-person and on-side curriculum without providing any tuition refunds. Accordingly, **[*6]** the typicality element is satisfied.

4. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interest of the class." The Sixth Circuit has counseled that there are two criteria for determining this element: (1) the representatives must have common interests with the unnamed class members, and (2) it must appear that the representatives will vigorously prosecute the class action through qualified counsel. *See* Senter v. Gen. Motors Corp., 532 F.2d 511, 524-25 (6th Cir. 1976) (citation omitted).

Here, adequacy of representation is met. Plaintiff and the Class Members possess the same interest and suffered the same injury: each of them were ABSN students during the spring and summer 2020 semesters who were allegedly injured by Xavier's failure to provide in-person curriculum and hands-on training. Moreover, Plaintiffs are represented by extremely qualified counsel with extensive experience prosecuting class actions. (*See* Doc. 27-3 at ¶¶ 3-4).

5. Rule 23(b)

Not only must the four prerequisites of Rule 23(a) be met before a class can be certified, but "the party seeking certification must also demonstrate that it falls within at least one of the subcategories of Rule 23(b)." In re Am. Med. Sys., 75 F.3d at 1079. Plaintiff argues that the class falls within Rule 23(b)(3), which states **[*7]** a class action may be maintained if:

> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
> (A) the class members' interest in individually controlling the prosecuting or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Here, common questions predominate over questions affecting only individual members. The predominating common issues shared by Plaintiff and each class member are whether Plaintiff and Class Members received the full benefit and value of Xavier's representations when Xavier changed to an online curriculum, and whether Xavier is liable as a result. The resolution of these questions does not rise or fall on the individualized conduct of a class member **[*8]** but on Xavier's conduct of stopping in-person and on-site instruction during the spring and fall 2020 semesters.

Further, the Court finds that, given the difficulties that would be inherent in managing a class as large as the Settlement Class, certification is the most efficient, and the superior, means to adjudicate the claims at issue.

Accordingly, for the foregoing reasons, the Court **GRANTS** Plaintiff's request for final certification of the Settlement Class and certifies the settlement class.

B. Notice Program

For a class certified under Rule 23(b)(3), notice must satisfy Rule 23(c)(2). To satisfy Rule 23(c)(2), notice to class members must be "practicable under the circumstances," including providing "individual notice to all members who can be identified through reasonable effort." Indeed, the ultimate objective of notice requirements is to satisfy due process. To comport with the requirements of due process, notice must be "reasonably calculated to reach interested parties." Fidel v. Farley, 534 F.3d 508, 514 (6th Cir. 2008) (citations omitted). "Due process does not, however, require actual notice to each party intended to be bound by the adjudication of a representative action." *Id.*

Here, the Court approved the notice procedures when preliminarily approving the settlement **[*9]** agreement. (Doc. 28; *see also* Doc. 29-4 (Plaintiff's expert opinion submitted in support of proposed notice)). The notices described the terms of the Settlement, including the request for attorneys' fees and class representative award, the date of the final fairness hearing, and how to object. (Doc. 27-2 at 18-28). Direct notice was first sent to 494 class members via email, and 489 Class Members opened the notice email within 10 days of receipt. (Doc. 32-3 at ¶ 6). Of the five who did not open the email within 10 days, direct was notice was sent via regular mail, and no mail was returned undeliverable. (*Id.* at ¶¶ 7-8). Finally, a settlement website was established, providing the Class Members with information on the proposed settlement and class action.

Considering the notice procedures, nearly all, if not all, Class Members received notice, and the Court finds that the notice issued to class members satisfied (if not exceeded) the requirements of the federal rules and due process.

C. The Settlement Agreement is approved.

Final approval of the proposed settlement is warranted if the Court finds the terms of the settlement are "fair, reasonable, and adequate." *Granada Inv., Inc. v. DWG Corp., 962 F.2d 1203, 1205-06 (6th Cir. 1992)*. When deciding whether **[*10]** a settlement should receive final approval, the Court considers several factors:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C., 636 F.3d 235, 244 (6th Cir. 2011) (quoting *UAW v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007)*). *See also* *Fed. R. Civ. P. 23(e)(2)*. The Court "enjoys wide discretion in assessing the weight and applicability of these factors." *Granada, 962 F.2d at 1205-06*. Finally, in considering these factors, the task of the court "is not to decide whether one side is right or even whether one side has the better of these arguments...The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement." *UAW, 497 F.3d at 632*.

1. Risk of Fraud or Collusion

Courts generally presume the absence of fraud or collusion unless proven otherwise. *See* *In re Telectronics Pacing Sys., Inc., 137 F. Supp. 2d 985, 1016 (S.D. Ohio 2001)* ("Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement unless evidence to the contrary is offered."); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig., 248 F.R.D. 483, 501 (E.D. Mich. 2008)* ("Without evidence to the contrary, the court may presume that settlement negotiations were conducted **[*11]** in good faith and that the resulting agreements were reached without collusion.").

Here, the settlement was the result of arm's-length negotiations conducted by experienced counsel for both parties and in front of an experienced mediator. Accordingly, the Court concludes that the settlement was reached in good faith and does not present the risk of fraud or collusion.

2. Complexity, Expense, and Duration of the Litigation

"Generally speaking, most class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them." *In re Telectronics, 137 F. Supp. 2d at 1013* (quotation omitted). Although the specific facts underlying this action may not have been complex—all Class Members were enrolled as ABSN students and received online instruction instead of in-person instruction during the spring and summer 2020 semesters—there would likely be intense dispute over the application of those facts—Xavier's alleged liability, and any damages resulting therefrom. Thus, without settlement, the parties would likely expend significant time and money litigating this case through class certification, dispositive motions, trial, and appeal. This factor weighs in favor of approval.

3. Amount [*12] of discovery

The parties engaged in pre-suit and informal discovery before mediating the case, including discovering the potential class members and ABSN enrollment information for the spring and summer 2020 semesters. (Doc. 27-3 at ¶ 7). Although it does not appear fact discovery was exceedingly extensive, "the absence of formal discovery is not unusual or problematic, so long as the parties and the court have adequate information in order to evaluate the relative positions of the parties." *UAW v. Gen. Motors Corp., No. 05-CV-73991-DT, 2006 U.S. Dist. LEXIS 14890, 2006 WL 891151, at *19 (E.D. Mich. Mar. 31, 2006)* (collecting cases); *see also* *Levell v. Monsanto Rsch. Corp., 191 F.R.D. 543, 557 (S.D. Ohio 2000)* ("Counsel's reliance upon informal discovery does not preclude approval of the proposed Settlement."). Moreover, in addition to fact discovery, the parties researched and considered the legal arguments presented and settlements in similar COVID-19 tuition class action cases to help the parties evaluate their respective positions. (Doc. 27-3 at ¶ 8). Thus, the Court concludes that the discovery conducted in this case was sufficient.

4. Likelihood of Success on the Merits

The settlement provides relief to Class Members and eliminates the risks that they would otherwise bear if this litigation were to continue. Although Plaintiff believes that she would ultimately prevail **[*13]** on these issues, there is an inherent risk of litigation and trial. Indeed, some of Plaintiffs claims were dismissed by the Court in the early stages. Thus, by agreeing to the settlement, risks are eliminated, and Class Members are guaranteed to receive an excellent recovery now, rather than possibly receiving a recovery years from now (or not receiving any recovery ever). This factor weighs in favor of approval.

5. Opinion of Counsel & Representatives

The Class Representative approves the Settlement Agreement. (Doc. 29-1). Class Counsel also believes the settlement is fair, reasonable, and adequate. (Doc. 27-3 at ¶ 17). Further, the competency and experience of Class Counsel is not in dispute. This factor weighs in favor of approval.

6. Reaction of Absent Class Members

The class's reaction strongly supports approving the settlement. Out of about 494 Class Members, none rejected, objected, or excluded themselves from the settlement. This factor weighs in favor of approval.

7. Public interest

"[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial **[*14]** resources." *In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 530 (E.D. Mich. 2003)* (quoting *Granada, 962 F.2d at 1205*); *see also* *In re Nationwide Fin. Servs. Litig., No. 2:08-cv-00249, 2009 U.S. Dist. LEXIS 126962, 2009 WL 8747486, at *8 (S.D. Ohio Aug. 19, 2009)* ("[T]here is certainly a public interest in settlement of disputed claims that require substantial federal judicial resources to supervise and resolve."). This case is no exception, and this factor weighs in favor of approval.

Accordingly, considering the foregoing, all factors weigh in favor of approving the settlement. The Court finds that the settlement is fair, reasonable, and adequate. The settlement is approved.

D. Class Counsel are entitled to their requested fee.

Class Counsel requests an order approving $250,000 in attorneys' fees. District courts may award reasonable attorneys' fees and expenses from the settlement of a class action under Rules 54(d)(2) and 23(h). When assessing the reasonableness of a fee petition, district courts engage in a two-part analysis. *See* *In re Cardinal Health Inc. Sec. Litig., 528 F.Supp.2d 752, 760 (S.D. Ohio 2007)*. First, the district court determines the method for calculating fees: either the percentage of the fund approach or the lodestar approach. *Id.* (citation omitted). Second, the court must analyze the six *Ramey* factors. *Id.* (citing *Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1196 (6th Cir. 1974)*).

1. The Court Adopts the Percentage Approach.

In the Sixth Circuit, district courts have the discretion to determine the appropriate method for calculating attorneys' fees considering **[*15]** the unique characteristics of class actions in general, as well as the particular circumstances of the actual cases pending before the Court, using either the percentage or lodestar approach. *Id. at 761*. Here, the Court uses the percentage approach given the common fund nature of the settlement.

Moreover, the Court finds that Class Counsel's request for one-third of the common fund to be reasonable; it is well within the range of fees typically approved by Courts in the Sixth Circuit. *See* *In re Broadwing, Inc. ERISA Litig., 252 F.R.D. 369, 380-81 (S.D. Ohio 2006)* ("Attorneys fees awards typically range from 20 to 50 percent of the common fund") (collecting cases); *In re Telectronics, 137 F. Supp. 2d at 1029* ("the range of reasonableness ... has been designated as between twenty to fifty percent of the common fund"); *In re S. Ohio Corr. Facility, 173 F.R.D. 205, 217 (S.D. Ohio 1997)*, *rev'd on other grounds*, *24 Fed. Appx. 520 (6th Cir. 2001)* ("[t]ypically, the percentage awarded ranges from 20 to 50 percent of the common fund").

2. Ramey *Factors*

In reviewing the reasonableness of the requested fee award, the Sixth Circuit requires district courts to consider six factors, known as the *Ramey* factors: (1) the value of the benefits rendered to the class; (2) society's stake in rewarding attorneys who produce such

benefits in order to maintain an incentive to others; (3) whether the services were undertaken on a contingent **[*16]** fee basis; (4) the value of the services on an hourly basis (the lodestar cross-check); (5) the complexity of the litigation; and (6) the professional skill and standing of counsel on both sides. *Ramey, 508 F.2d at 1196*. After review, the Court concludes that all factors weigh in favor of the reasonableness of the fee award.

a. Value of the benefits

Class Counsel's work resulted in a benefit of $750,000 to the class. The benefit provides significant tangible relief to Class Members now and eliminates the risk and uncertainty parties would otherwise incur if this litigation were to continue. Indeed, discovery revealed that there were 494 Class Members who participated in 816 spring and summer 2020 semesters as ABSN students. And, as Class Counsel explained at the fairness hearing, assuming the Court approved all requested distributions (which the Court does, as explained herein), the payout for each semester would be roughly $550. Finally, the fact that there are 494 Class Members, no opt-outs, and no objectors demonstrates that Class Members recognize the substantial benefit of the Settlement.

b. Society's stake

There is a benefit to society in ensuring that small claimants may pool their claims and resources, **[*17]** and attorneys who take on class action cases enable this. *See* *Moore v. Aerotek, Inc., Case No. 2:15-cv-2701, 2:15-cv-1066, 2017 U.S. Dist. LEXIS 102621, 2017 WL 2838148, at *8 (S.D. Ohio June 30, 2017)* (citation omitted). Here, Class Counsel's efforts resulted in a tangible reward for the Class Members. Many of the Class Members would not have been able or willing to pursue their claim individually, and many would likely not even be aware they had a claim against Defendant. *Id.* Society has a stake in rewarding attorneys who achieve a result that the individual class members probably could not obtain on their own. *Id.* (citation omitted).

c. Contingent Fee Services

Despite the risks associated with prosecuting this case, Class Counsel litigated this matter on a wholly contingent basis with no guarantee of recovery over a period of more than three years. (Doc. 29-1 at ¶ 4).

d. Lodestar Cross-Check

Conducting a lodestar cross-check is optional; however, the lodestar method also supports Class Counsel's fee request. Under the lodestar calculation, the Court multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate. *See* *Gascho v. Global Fitness Holdings, LLC, 822 F.3d 269, 279 (6th Cir. 2016)* (citation omitted). The Court then has the discretion to enhance the lodestar with a separate multiplier that can serve to account for the risk an attorney assumes in undertaking **[*18]** a case, the quality of the attorney's work product, and the public benefit achieved. *Id. at 279, 280*.

Here, up to the date of filing their motion for attorneys' fees, Class Counsel expended 686.20 total hours on this case which, at their customary billing rates, provides a cumulative lodestar of $330,353.30, more than the requested fee. (Doc. 29-1 at ¶ 6). Dividing the amount requested ($250,000) by the lodestar results in a negative multiplier of .75, which demonstrates that the fee sought is reasonable.

e. Complexity of the Litigation

As already discussed, the litigation was complex, and resolving the merits of litigation through dispositive motions, trial, or appeal would have been risky, costly, and time consuming. *See* Sec. C(2), (3), *supra*.

f. Skill of Counsel

Finally, the Class and Defendant are represented by highly experienced counsel. There is no dispute that all counsel are highly qualified and have substantial experience in federal courts and class action litigation.

Accordingly, considering all the factors, the Court determines the fees requested are reasonable, and **GRANTS** Class Counsel's request for fees in the amount of $250,000.

E. Class Counsel is entitled to reimbursement of expenses.

Under the common **[*19]** fund doctrine, Class Counsel are entitled to reimbursement of all reasonable out-of-pocket expenses and costs incurred in the prosecution of claims and in obtaining settlement. *See* *In re Cardizem, 218 F.R.D. at 535*. Expense awards are customary when litigants have created a common settlement fund for the benefit of a class. *Id.* (quotation omitted).

Pursuant to the Settlement Agreement, Class Counsel could seek up to $13,000 in expenses. Here, Class

Counsel requests $12,747.75 in litigation expenses that have been incurred prosecuting this case. These related to mediation, filing fees, and copy costs. The largest expense incurred related to the services of the parties' mediator, totaling $10,876.52 of the expenses. Upon review, Class Counsel's expenses were reasonable and necessary in connection with litigating and resolving this case and are therefore reimbursable.

Accordingly, the Court **GRANTS** Class Counsel's request for $12,747.75 in expenses.

F. The Court approves the administrative and notice expenses.

The Settlement Agreement contemplates that settlement administrative fees will be disbursed from the common fund. (Doc. 27-2 at 7, ¶ 47). Class Counsel requests that the Court approve a disbursement of $33,300 (minus **[*20]** amounts already paid) to Settlement Services, Inc. ("SSI"). After Class Counsel received multiple bids, SSI was retained to provide settlement administrative services, including managing the notice procedure to Class Members, payments to Class Members, and other administrative services. (Doc. 27-3 at ¶ 9). The Court finds SSI's fees to be reasonable for the administration of the Settlement Agreement and notice. Accordingly, the Court **GRANTS** Class Counsel's request for a disbursement to $33,300 (minus amounts already paid) in administrative and notice expenses.

G. Plaintiff is entitled to a service award.

Finally, Plaintiff requests that the Court approve a $5,000 service award. "Courts typically authorize contribution (or 'incentive' awards) to class representatives for their often extensive involvement with a lawsuit." *Rikos, 2018 U.S. Dist. LEXIS 72722, 2018 WL 2009681, at *10*. "Such compensation to named plaintiffs is typically justified where the named plaintiffs expend time and effort beyond that of the other class members in assisting class counsel with the litigation, such as by actively reviewing the case and advising counsel in the prosecution of the case." *Id.*

Here, Plaintiff stayed informed throughout the litigation. (Doc. 29-1 at **[*21]** ¶¶ 8-9; Doc. 29-2). She was involved in settlement negotiations, approved of the settlement demand sent to Xavier and final settlement amount, and remained engaged throughout the litigation. (*Id.*) Accordingly, the Court **GRANTS** Plaintiff's request for a service award of $5,000.

III. CONCLUSION

Based upon the foregoing, Plaintiff's unposed motion for final approval of the class action settlement (Doc. 32) and Plaintiff's motion for attorneys' fees, expenses, and class representative service award (Doc. 29) are **GRANTED**. Accordingly:

1. Pursuant to *Fed. R. Civ. P. 23(a)* and *(b)(3)*, for settlement purposes, the Court certifies the following Settlement Class:

> Individuals identified on the Xavier Settlement Class List who were enrolled as a student in Xavier University's College of Nursing Accelerated Bachelor of Science in Nursing Program in any city in Ohio who paid tuition and fees to Xavier during the Spring 2020 and Summer 2020 semesters. Excluded from the Settlement Class are: (1) the judge and court personnel overseeing this Litigation; (2) the Defendant, its subsidiaries, successors, predecessors, and any entity in which the Defendant has a controlling interest and its current or former officers, directors, and **[*22]** employees; and (3) Settlement Class Members who submit a valid Request for Exclusion on or before the Opt-Out Deadline.

2. Pursuant to *Fed. R. Civ. P. 23(c)(3)*, all such persons who satisfy the Settlement Class definition above are members of the Settlement Class. Because no member of the Settlement Class opted out of the Settlement, all Settlement Class Members are bound by this Final Approval Order.

3. The Court grants final approval to its appointment of Ximena Miranda as Class Representative. The Court finds that the Class Representative is similarly situated to absent Class Members, is typical of the Class, and is an adequate Class Representative, and that Class Counsel and the Class Representative have fairly and adequately represented the Class.

4. The Court grants final approval to its appointment of Class Counsel as provided in the Preliminary Approval Order (Doc. 28), appointing Terence R. Coates, W.B. Markovits, Dylan J. Gould, and Justin C. Walker of Markovits, Stock, & DeMarco, LLC, and Joseph M. Lyon of The Lyon Firm as Class Counsel. Class Counsel have extensive experience handling class action cases and have thoroughly represented the Class's interests in

this case.

5. The Court's Preliminary **[*23]** Approval Order approved the Short Form Notice, Long Form Notice, and found the distribution and publishing of the various notices as proposed met the requirements of *Fed. R. Civ. P. 23* and due process, and was the best notice practicable under the circumstances, constituting due and sufficient notice to all persons entitled to notice. The Court finds that the distribution of the Notices has been achieved pursuant to the Preliminary Approval Order and the Settlement Agreement, and that the Notice to Class Members complied with *Fed. R. Civ. P. 23*, due process, and any other applicable law.

6. Pursuant to *Fed. R. Civ. P. 23(e)(2)*, the Court finds that the Settlement Agreement (Doc. 27-2) is fair, reasonable, and adequate, as expressed further herein. The Court also finds the Settlement Agreement was entered into in good faith, at arm's length, and without collusion.

7. The Court **APPROVES** the distribution and allocation of the Settlement Fund pursuant to the Settlement Agreement.

8. The Court **AWARDS** Class Counsel $250,000 in attorneys' fees, which is 1/3 of the $750,000 settlement fund, and reimbursement of expenses of $12,747.75 to be paid according to the terms of the Settlement Agreement. These amounts of fees and expenses are fair and reasonable. **[*24]**

9. The Court **AWARDS** the Class Representative, Ximena Miranda, $5,000 to be paid according to the terms of the Settlement Agreement. The award is justified based on her service to the Class.

10. Nothing in the Settlement Agreement, the Final Approval Order, Judgment, or the fact of the settlement constitutes any admission by any of the parties of any liability, wrongdoing, or violation of law, damages or lack thereof, or of the validity or invalidity of any claim or defense asserted in the action.

11. The Court **DISMISSES WITH PREJUDICE** all claims of the Settlement Class Members against Xavier in this action, without costs and fees except as explicitly provided for in the Settlement Agreement.

12. Without affecting the finality of the Judgment, the Court reserves jurisdiction over the implementation, administration, and enforcement of the Judgment and the Settlement Agreement, and all matters ancillary thereto.

13. The Clerk shall enter judgment accordingly, whereupon this case is **TERMINATED** on the docket of this Court.

IT IS SO ORDERED.

Date: 10/3/2023

/s/ Timothy S. Black

Timothy S. Black

United States District Judge

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EXHIBIT 12

2015 WL 2448846
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

Sanjay SAINI, Individually And On Behalf of All Other Similarly Situated Residents, Plaintiff,
v.
BMW OF NORTH AMERICA, LLC, Defendant.

Civil Action No. 12–6105(CCC).
|
Signed May 21, 2015.

Attorneys and Law Firms

Bruce Daniel Greenberg, Lite Depalma Greenberg, LLC, Newark, NJ, for Plaintiff.

Christopher J. Dalton, Rosemary Joan Bruno, Buchanan, Ingersoll & Rooney, PC, Newark, NJ, for Defendant.

OPINION

CECCHI, District Judge.

***1** This matter comes before the Court upon the Motion of Plaintiff Sanjay Saini ("Plaintiff") for Final Approval of a Class Action Settlement Agreement [ECF No. 28] and Plaintiff's Motion for Attorneys' Fees and Costs [ECF No. 29]. Defendant BMW of North America, LLC ("Defendant") does not oppose either motion. The Court conducted a fairness hearing on March 12, 2015. Having considered the arguments by all the parties to this matter, the Court sets forth its findings below.[1]

I. *BACKGROUND*

A. Litigation History

This action commenced on September 28, 2012 when Plaintiff filed a class action complaint alleging Defendant violated the New Jersey Consumer Fraud Act as well as other state contract law claims. Plaintiff alleged that Defendant maintained a corporate policy of failing to provide warranty coverage for demonstration vehicles sold by BMW dealers as "new," thereby depriving Class Members of valuable warranty coverage. Plaintiff sought money damages, injunctive relief barring Defendant from selling demonstration vehicles as "new," and attorneys' fees and costs. (Compl., ECF No. 1).

On October 6, 2014, the Court issued an order conditionally certifying a settlement class of initial purchasers of BMW Sales Demonstration ("sales demo") vehicles or BMW Aftersales Mobility Program ("service demo") vehicles, approved the form and manner of notice proposed by the parties, appointed settlement class counsel, and appointed Plaintiff Saini as settlement class representative [ECF No. 26]. On February 3, 2015, the Plaintiff submitted a Motion for Final Approval of the Settlement Agreement [ECF No. 28] and a Motion for Attorneys' Fees [ECF No. 29]. Both motions are unopposed.

B. Settlement Agreement

1. Terms

The Settlement Class consists of over 104,000 initial purchasers of BMW sales demo or service demo vehicles within the United States between September 28, 2006 and October 6, 2014 where (1) the vehicles were identified as "new" in the sales contract and (2) the purchasers were not informed that the vehicle was a sales or service demo vehicle whose warranty had commenced prior to the date the customer purchased the Class Vehicle. As part of its obligations under the Settlement Agreement, BMW NA will extend the length of its warranty at least an additional three months and will reimburse original purchasers of Class Vehicles whose warranty already expired for repair costs that would otherwise have been covered by BMW NA's new vehicles warranty. The reimbursement will cover repairs that occurred within three months of the warranty's expiration. In exchange for payment of this sum, Defendant will receive a waiver and release of all claims that were or could have been asserted based on the alleged facts in the complaint. A Class Member must demonstrate through appropriate proof that (1) he or she was the original purchaser of a BMW vehicle, (2) the purchase was made on or after September 28, 2006, (3) the vehicle was identified in the contract of sale as "new," and

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(4) the purchaser was not informed that the vehicle was a sales or service demo vehicle whose warranty had previously commenced.[2]

2. Notice Plan

***2** Kurtzman Carson Consultants ("KCC") was responsible for administering the settlement notice plan. On November 25, 2014, BMW NA provided KCC with a list containing the names and address of 198,872 potential Class Members (the "Class List"). (*See* Declaration of Phil Cooper ("Cooper Decl.") at ¶ 7). After removing duplicates and accounting for supplemental records provided by BMW NA, the Class List contained names and addresses of approximately 104,702 individuals. *Id.* at ¶ 11. KCC electronically sent Claims Forms to over 99,600 unique email addresses and mailed nearly 5,000 Claims Forms through the United States Postal Service via first class mail. *Id.* at 8–10.

KCC developed and administered a settlement website, which became operational on December 5, 2014 and is still available to Class Members to download and print a Claim Form to submit by mail. *Id.* at ¶ 13. KCC also established a toll-free phone line for Class Members to call with questions or to request mailed copies of the Notice and Claim Form. *Id.* at 15. As of January 29, 2015, the website has received 7,211 visitors and KCC has logged 354 calls to the toll-free line. *Id.* at ¶ 14–16.

3. Attorney Fees, Expenses, and Incentive Awards

Plaintiff requests an Order directing BMW NA to pay $600,000 to Class Counsel for the payment of attorneys' fees and reimbursement of expenses as part of the Settlement Agreement. (Pl.'s Br. in Supp. at 1, ECF No. 29–1). This payment, if ordered by the Court, would be paid directly by BMW NA and would not affect the compensation received by any Class Member. *Id.* Defendant does not oppose this motion.

II. *CLASS CERTIFICATION*

Rule 23 of the Federal Rules of Civil Procedure requires the Court to engage in a twostep analysis to determine whether to certify a class action for settlement purposes. First, the Court must determine if Plaintiffs have satisfied the prerequisites for maintaining a class action as set forth in Rule 23(a). If Plaintiffs can satisfy these prerequisites, the Court must then determine whether the requirements of Rule 23(b) are met. *See* Fed.R.Civ.P. 23(a) advisory committee's note. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. R. Civ. Proc. 23(b)(3) (D), for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Rule 23(a) provides that Class Members may maintain a class action as representatives of a class if they show that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (d) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a).

A. Rule 23(a) Factors

1. Numerosity

***3** Courts will ordinarily discharge the prerequisite of numerosity if "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1); *see also Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir.1998). Plaintiffs "need not precisely enumerate the potential size of the proposed class, nor [are] plaintiff[s] required to demonstrate that joinder would be impossible." *Cannon v. Cherry Hill Toyota, Inc.,* 184 F.R.D. 540, 543 (D.N.J.1999) (citation omitted). "[G]enerally if the named plaintiff demonstrates the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham,* 275 F.3d 220, 226–27 (3d Cir.2001) (citation omitted).

Numerosity is easily satisfied here because there were over 104,000 potential class members and KCC mailed or emailed Claim Forms to all of them. (Cooper Decl. at ¶ 8–10).

B. Commonality

Plaintiffs must demonstrate that there are questions of fact or law common to the class to satisfy the commonality requirement. Fed.R.Civ.P. 23(a)(2). The Supreme Court

recently clarified the standard, emphasizing that a plaintiff must show that Class Members "have suffered the same injury," not merely a violation of the same law. *Wal–Mart Stores. Inc. v. Dukes,* ––U.S. ––, ––, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). Furthermore, the Court noted that commonality is satisfied where common questions "generate common *answers* apt to drive the resolution of the litigation." *Id.* at 2551 (citation omitted) (emphasis in original); *see also Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 299 (3d Cir.2011). The claims of Class Members "must depend upon a common contention .... [which] must be of such a nature that it is capable of classwide resolution-which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart,* 131 S.Ct. at 2551. Still, "commonality does not require an identity of claims or facts among Class Members[;]" rather, "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 183 (3d Cir.2001) (citation omitted).

Several common question of law and fact exist in this case, including whether BMW NA had a policy of directing BMW dealers not to disclose a vehicle's demo status, thereby shortening the term of warranty coverage available to Plaintiff and Class Members. This alleged conduct gives rise to whether BMW NA breached its promise to provide four (4) years of Ultimate Warranty coverage for all "new" BMW vehicles or unjustly enriches BMW NA. These questions of law and fact are common to all Class Members, and therefore commonality is satisfied.

C. Typicality

***4** Rule 23(a)(3) requires that a representative plaintiff's claims be "typical of the claims ... of the class. The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Barnes v. Am. Tobacco Co.,* 161 F.3d 127, 141 (3d Cir.1998) (citation omitted). As with numerosity, the Third Circuit has "set a low threshold for satisfying" typicality, stating that "[i]f the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established ....“ *Newton,* 259 F.3d at 183–84; *see also Baby Neal v. Casey,* 43 F.3d 48, 58 (3d Cir.1994). The typicality requirement "does not mandate that all putative class members share identical claims." 259 F.3d at 184 (citation omitted); *see also Hassine v. Jeffes.* 846 F.2d 169, 176–77 (3d Cir.1988).

Here, the claims made by named Plaintiff Saini and those made on behalf of the other Class Members arise out of the same alleged conduct by Defendant—namely, BMW NA's alleged policy of failing to provide four years of Ultimate Warranty coverage per its contractual covenant for demonstration vehicles sold by BMW dealers as "new." Consequently, the named Plaintiff's claims are typical of those brought by the Class Members at large. *See, e.g., In re Pet Food Prods. Liab. Litig.,* 629 F.3d 333, 342 (3d Cir.2010) (affirming the District Court's certification of the settlement class where "the claims of the class representatives [were] aligned with those of the Class Members since the claims of the representatives ar[o]se out of the same conduct and core facts"); *Grasty v. Amalgamated Clothing & Textile Workers Union.* 828 F.2d 123, 130 (3d Cir.1987) (holding that the District Court did not abuse its discretion in finding the typicality requirement met because the claims brought by the named plaintiffs and those brought on behalf of the class "stem from a single course of conduct"). Thus, typicality is also satisfied.

D. Adequacy of Representation

Finally, the Court must consider adequacy of representation both as to the named Plaintiff and the Class Counsel under Rules 23(a) and (g). The class representatives should "fairly and adequately protect the interests of the class." *Georgine v. Amchem Prods., Inc.,* 83 F.3d 610, 630 (3d Cir.1996). Such class representatives must not have interests antagonistic to those of the class. *Id.* In order to find "antagonism between [the named] plaintiff[s'] objectives and the objectives of the [class]," there would need to be a "legally cognizable conflict of interest" between the two groups. *Jordan v. Commonwealth Fin. Sys., Inc.,* 237 F.R.D. 132, 139 (E.D.Pa.2006). In fact, courts have found that a conflict will not be sufficient to defeat a class action "unless the conflict is apparent, imminent, and on an issue at the very heart of the suit." *In re Flat Glass Antitrust Litig.,* 191 F.R.D. 472, 482 (W.D.Pa.1999) (quoting *In re NASDAQ Market–Makers Antitrust Litig.,* 169 F.R.D. 493, 514 (S.D.N.Y.1996)).

***5** Here, there is no indication that Plaintiff Saini's interests are antagonistic to those of the class. Plaintiff Saini purchased one of the Class Vehicles subject to the Settlement Agreement and was allegedly injured in the same manner based on BMW NA's purported policy. (Pl.'s

Br. in Supp. at 16). Thus, it appears Plaintiff Saini has ample incentive to represent the class. Consequently, the adequacy requirement has been met.

Class Counsel and their respective law firms have extensive experience litigating complex class actions and obtaining class action settlements. (*See* Declaration of Bruce Greenberg ("Greenberg Decl.")). Thus, the Court finds that Class Counsel has the qualifications, experience, and ability to conduct the litigation.

With this last requirement satisfied, it is clear that the Settlement Class in this case has demonstrated compliance with the elements of Rules 23(a) and (g).

E. Rule 23(b)(3) Factors

The Court must next address the question of whether the class comports with the requirements of Rule 23(b). Under 23(b)(3), the Court must find both that "the questions of law or fact common to Class Members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). As explained below, the class action in this case readily meets these requirements of predominance and superiority.

1. Questions of Law and Fact Common to the Class Predominate

To satisfy the predominance requirement, parties must do more than merely demonstrate a "common interest in a fair compromise;" instead, they must provide evidence that the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *see also Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 297 (3d Cir.2011) (noting that the predominance requirement is "more stringent" than the Rule 23(a) commonality requirement). The Third Circuit has repeatedly held that predominance exists where proof of liability depends on the conduct of the defendant. *See Sullivan,* 667 F.3d at 298–301 (reaffirming the Third Circuit precedent supporting this holding). "[V]ariations in state law do not necessarily defeat predominance[ ] and ... concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class." *Id.* at 297.

Here, there are several common questions of law and fact that predominate over any questions that may affect individual Class Members including whether BMW NA had a policy of treating Class Vehicles as demos for the purpose of warranty calculation even though they were sold by BMW dealers as "new." This question is subject to "generalized proof," and is "common to all class members." *See In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.,* No. 3:08–MD–1998, MDL No.1998, 2009 U.S. Dist. LEXIS 119870, at *26 (W.D.Ky. Dec. 22, 2009) ("the proof required [must focus] on Defendant's conduct, not on the conduct of individual class members."). Evidence in the record supports the conclusion that common questions predominate over individual questions particular to any putative Class Member. Consequently, the predominance requirement is satisfied.

2. A Class Action is Superior to Other Available Methods

***6** To demonstrate that a class action is "superior to other available methods" for bringing suit in a given case, the Court must "balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *Georgine v. Amchem Prods., Inc.,* 83 F.3d 610, 632 (3d Cir.1996) (citing *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 757 (3d Cir.1974) (en banc)). One consideration is the economic burden Class Members would bear in bringing suits on a case-by-case basis. Class actions have been held to be especially appropriate where "it would be economically infeasible for [individual Class Members] to proceed individually." *Step henson v. Bell Atl. Corp.,* 177 F.R.D. 279, 289 (D.N.J.1997). Another consideration is judicial economy. In a situation where individual cases would each "require[ ] weeks or months" to litigate, would result in "needless duplication of effort" by all parties and the Court, and would raise the very real "possibility of conflicting outcomes," the balance may weigh "heavily in favor of the class action." *In re Corrugated Container Antitrust Litig.,* 80 F.R.D. 244, 252–53 (S.D.Tex.1978); *see also Klav v. Humana, Inc.,* 382 F.3d 1241, 1270 (11th Cir.2004) (finding a class action to be the superior method because it would be costly and inefficient to "forc[e] individual plaintiffs to repeatedly prove the same facts and make the same legal arguments before different courts"), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008); *Sollenbarger v. Mountain States Tel. & Tel. Co.,* 121 F.R.D. 417, 436 (D.N.M.1988) (finding that, in contrast to

the multiple lawsuits that members of a class would have to file individually, "[t]he efficacy of resolving all plaintiffs' claims in a single proceeding is beyond discussion").

To litigate the individual claims of even a fraction of the potential Class Members would place a heavy burden on the judicial system and require unnecessary duplication of effort by all parties. It would not be economically feasible for the Class Members to seek individual redress. The litigation of all claims in one action is far more desirable than numerous, separate actions and therefore the superiority requirement is met.

III. *FAIRNESS OF THE CLASS ACTION SETTLEMENT*

Under Federal Rule of Civil Procedure 23(e), approval of a class settlement is warranted only if the settlement is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). Acting as a fiduciary responsible for protecting the rights of absent Class Members, the Court is required to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *In re Cendant Corp. Litig.,* 264 F.3d 201, 231 (3d Cir.2001) (quoting *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 785 (3d Cir.1995)). This determination rests within the sound discretion of the Court. *Girsh v. Jepson,* 521 F.2d 153, 156 (3d Cir.1975). In *Girsh,* the Third Circuit identified nine factors to be utilized in the approval determination. Id at 157. These factors include:

> ***7** (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. (internal quotation marks, alterations, and citation omitted).

Additionally, a presumption of fairness exists where a settlement was the product of arm's-length negotiations, discovery is sufficient, the settlement proponents are experienced in similar matters, and there are few objectors. *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 535 (3d Cir.2004). Finally, settlement of litigation is especially favored by courts in the class action setting. "The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re Gen. Motors.* 55 F.3d at 784; *see also In re Warfarin Sodium Antitrust Litig.,* 391 F.3d at 535 (explaining that "there is an overriding public interest in settling class action litigation, and it should therefore be encouraged").

Turning to each of the *Girsh* factors, the Court finds as follows:

A. Complexity, Expense, and Likely Duration of the Litigation

The first factor, the complexity, expense, and likely duration of the litigation, is considered to evaluate "the probable costs, in both time and money, of continued litigation." *In re Cendant Corp.,* 264 F.3d at 233 (quoting *In re Gen. Motors,* 55 F.3d at 812).

The instant litigation was commenced in 2012 and the duration of this action would only be further delayed absent approval of the settlement. Indeed, significant time, effort, and expense would be incurred to resolve discovery disputes, brief complex dispositive motions and a motion to certify the class, prepare for and complete trial, submit post-trial submissions, and pursue likely appeals. By reaching a settlement, the parties have avoided the significant expenses connected with these steps. Lastly, the settlement provides immediate and substantial benefits for the settlement class, including full warranty coverage three (3) months beyond what Class Members would have received had they bought a "new" vehicle that had not been previously used as a sales or service demo.

As a result, this factor weighs in favor of approval of the Settlement. *See In re Warfarim Sodium Antitrust Litig.,* 391 F.3d at 535–36 (finding that the first *Girsh* factor weighed in favor of settlement because "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial").

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B. Reaction of the Class to the Settlement

***8** This second factor "attempts to gauge whether members of the class support the settlement." *In re Lucent Techs., Inc., Sec. Litig.,* 307 F.Supp.2d 633, 643 (D.N.J.2004) (internal quotation marks and citation omitted). The Third Circuit has found that "[t]he vast disparity between the number of potential Class Members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement." *In re Cendant Corp.,* 264 F.3d at 235.

In December 2014 notice was sent directly to more than 104,000 potential Class Members. As of March 5, 2015, only thirteen members elected to exercise their opt-out rights. (ECF No. 33, 33–1). In addition, only one written objection to the Settlement was received, filed by Mr. Royce De Rohan Barondes. (ECF No. 31). These numbers amount to miniscule fractions of the Settlement Class. *See In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 305 (3d Cir.2005) ("such a low level of objection is a 'rare phenomenon" ') (citation omitted). The paucity of negative feedback in the face of an extensive notice plan leads the Court to conclude that the Settlement Class generally and overwhelmingly approves of the Settlement. *See Varacallo v. Mass. Mutual Life Ins. Co.,* 226 F.R.D. 207, 237–38 (D.N.J.2005) (finding "extremely low" level of exclusion and objection requests indicative of class approval of the settlement).

1. Sole Objection to the Adequacy of Relief Does Not Show the Settlement Is Unfair, Unreasonable, or Inadequate

Mr. Barondes objects to the settlement because (1) class notice was allegedly "not delivered on a timely basis," (2) he received "inadequate information" in response to his email request to the Administrator, (3) the settlement is unfavorable because it forecloses on potential punitive or multiple damages, and (4) the settlement is ambiguous with regard to whether Class Members are releasing claims against individual BMW dealerships. (ECF No. 31, at ¶ 1–4). With respect to the timeliness of the notice Mr. Barondes received, the record indicates KCC caused noticed to be sent to Mr. Barondes on January 6, 2015 via first class mail. (*See* Cooper Decl., ¶¶ 4–5). The deadline for Class Members to respond to the notice was February 3, 2015, which was the date Mr. Barondes filed his objection with this Court. Thus, it appears Mr. Barondes received notice and timely filed his objection. Even if notice to Mr. Barondes was untimely, it would not necessarily constitute grounds for denying final approval. "Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *Serio v. Wachovia Sec., LLC,* 06–4681, 2009 WL 900167, at *8 (D.N.J. Mar.31, 2009) ("Class counsel acted reasonably in implementing the notice regime, as detailed in the affidavit of the Claims Administrator attached to Plaintiffs' motion.... Whether or not Mr. Ryan received actual notice is not dispositive of this issue."). Because the parties utilized an individual notice program comprising e-mail, postal mail, and personalized skip tracing, due process and Rule 23 have been satisfied.

***9** Next, Mr. Barondes objects on the grounds that he received inadequate information in response to his email request to the Administrator. (ECF No. 31, ¶ 2). In that request, Mr. Barondes asked for copies of the pleadings and certain document "evidence." *Id.* However, Class Members are not entitled to copies of all court documents and discovery. *See Gold Strike Stamp Co. v. Christensen,* 436 F.2d 791, 799 (10th Cir.1970) (Rule 23 does not require Class Notice to include "all the various causes of actions, theories of recovery and defenses alleged in the complaints and answers"); *Robertson v. Nat'l Basketball Ass'n,* 72 F.R.D. 64, 70–71 (S.D.N.Y.1976) ("There is no requirement that every objector be allowed to have discovery concerning the settlement itself so that he can personally assure its reasonableness."), *aff'd,* 556 F.2d 682 (2d Cir.1977). Here, the notice sent to Mr. Barondes and all Class Members accurately described the claims and defenses in the Action, and directed Class Members to the Court's docket if they wished to review the pleadings in more detail. Due process and Rule 23 do not entitle to Mr. Barondes to anything more.

Mr. Barondes claims the additional information he requests is relevant to his assessment of the availability of punitive damages and, therefore, his evaluation of the Settlement. (ECF No. 31, ¶ 3). However, the mere possibility of punitive or multiple damages is not an appropriate measure of the Settlement's reasonableness. *See In re Am. Family Enters.,* 256 B.R. 377, 425 (D.N.J.2000) ("However, single damages, not treble or punitive damages, are the appropriate yardstick by which the fairness of a proposed class action settlement should be measured."). Here, the Settlement entities Class Members to full warranty coverage plus an additional three months, as well as 100% reimbursement for out-of-pocket expenses that would have otherwise been covered by warranty. (*See* ECF No. 28–1, at 23, 28–29). In essence, Class Members are made "whole" plus three additional months of warranty coverage with none of the delay, risk, and uncertainty of continued litigation. The "appropriate yardstick"—single damages—confirms this Settlement should be approved.

Lastly, Mr. Barondes argues that the Settlement is ambiguous with regard to whether Class Members are releasing claims against BMW dealerships. (ECF No. 31, ¶ 4). However, the Court notes that the long-form Notice posted on the Settlement website expressly states that "the claims released by Class Members are all claims that could arise out of BMW NA's and/or BMW Center's sale of Sales Demonstration and/or Aftersales Mobility Program vehicles as 'new.' " Thus, it appears that the Settlement release is clear and unambiguous with respect to BMW dealerships. In sum, the lone objection raised by Mr. Barondes is without merit and does not alter the Court's finding that the Settlement Agreement is fair, adequate and reasonable.

C. The Stage of the Proceedings and the Amount of Discovery Completed

***10** The Court should consider the stage of the proceedings and the amount of discovery completed in order to evaluate the degree of case development that Class Counsel have accomplished prior to settlement. "Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant Corp.,* 264 F.3d at 235 (quoting *In re Gen. Motors,* 55 F.3d at 813). "Generally, post-discovery settlements are viewed as more likely to reflect the true value of a claim as discovery allows both sides to gain an appreciation of the potential liability and the likelihood of success." *In re Auto. Refinishing Paint Antitrust Litig.,* 617 F.Supp.2d 336, 342 (E.D.Pa.2007) (citing *Bell Atl. Corp. v. Bolger,* 2 F.3d 1304, 1314 (3d Cir.1993)).

The Court notes that this case has been litigated for over two years and the parties participated in productive, good-faith mediation before Judge Hughes. By that time, Class Counsel had conducted their pre-suit investigation and had briefed their opposition to Defendant's motion to dismiss. During mediation, the parties engaged in informal discovery regarding BMW sales demos. Mediation culminated with a full-day session before Judge Hughes, and the settlement was the result of extensive arm's-length negotiations between experienced counsel. The Court concludes that class counsel had a thorough appreciation of the merits of the case prior to settlement. Accordingly, this factor weighs in favor of approval.

D. Risks of Establishing Liability

The risks of establishing liability should be considered to "examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *In re Cendant Corp.,* 264 F.3d at 237 (quoting *In re Gen. Motors,* 55 F.3d at 814). "The inquiry requires a balancing of the likelihood of success if 'the case were taken to trial against the benefits of immediate settlement." ' *In re Safety Components Int'l, Inc. Sec. Litig.,* 166 F.Supp.2d 72, 89 (D.N.J.2001) (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 319 (3d Cir.1998)).

Class Counsel have outlined several risks to establishing liability, as exemplified by BMW NA's motion to dismiss where it contested (1) whether Plaintiff stated a claim under the New Jersey Consumer Fraud Act, for breach of contract, or for unjust enrichment, (2) whether Plaintiff could obtain a declaratory judgment, and (3) whether Plaintiff's complaint could proceed under Fed. R. Civ. P. 23. *See* ECF No. **7.** In contrast, the settlement provides immediate and certain recovery for the Class Members. All Class Members who filed a claim form by the deadline will receive a benefit in the form of extended warranty coverage and reimbursement of expenses. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 317 (3d Cir.1998) (noting how "settlement provide[s] class members the opportunity to file claims immediately after court approval of the settlement, rather than waiting through what no doubt would be protracted litigation."). In light of the uncertainty of success for both sides in this litigation and the certain, immediate benefit provided by the settlement, the Court concludes that this factor weighs in favor of approval.

E. Risks of Establishing Damages

***11** This factor, like the factor before it, "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant Corp.,* 264 F.3d at 238 (quoting *In re Gen. Motors,* 55 F.3d at 816). Here, it is likely damages would have been aggressively contested through discovery, summary judgment, and trial, invariably leading to a "battle of the experts" before the jury. This would create tremendous uncertainty as to what damages amount, if any, a jury would award. *See In re Cendant Corp. Litig.,* 264 F.3d 201, 239 (3d Cir.2001) ("establishing damages at trial would lead to a 'battle of the experts,' with each side presenting its figure to the jury and with no guarantee whom the jury would believe"). Accordingly, the Court agrees that

significant risks exist in establishing both liability and damages and concludes that this factor weighs strongly in favor of approval.

F. Risks of Maintaining Class Action Status Through Trial

The Court also finds that the sixth factor, the risk of maintaining class action status through trial, weighs in favor of approval of the Settlement. "Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d at 537 (internal quotation marks and citation omitted). If the litigation were to continue there is a risk that BMW NA would raise issues concerning class certification and whether individual issues predominate over common issues. (*See* Def.'s Motion to Dismiss, ECF No. 7). Thus, because there are significant risks in obtaining and maintaining class certification, this factor weighs in favor of approval.

G. The Settling Defendant's Ability to Withstand a Greater Judgment

In *Cendant,* the Third Circuit interpreted the seventh factor as concerning "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." 264 F.3d at 240. The Court notes that even if Defendant could afford a greater amount, this fact provides no basis for rejecting an otherwise reasonable settlement. *Hegab v. Family Dollar Stores, Inc.,* No. CIV.A. 11–1206(CCC), 2015 WL 1021130, at *8 (D.N.J. Mar.9, 2015). Thus, the Court is satisfied that the settlement is fair, reasonable, and adequate, despite the possibility that Defendant could pay a greater sum. *See, e.g., In re Auto. Refinishing Paint Antitrust Litig.,* 617 F.Supp.2d at 344 (finding the settlement figure fair, reasonable, and adequate despite defendants' ability to withstand greater judgment, in light of the substantial benefits provided to Class Members); *In re Cendant Corp. Sec. Litig.,* 109 F.Supp.2d 235, 262–63 (D.N.J.2000), *aff'd, In re Cendant Corp.,* 264 F.3d 201 (approving settlement despite lack of evidence of defendant's ability to withstand greater judgment); *Weiss v. Mercedes–Benz of N. Am., Inc.,* 899 F.Supp. 1297, 1302–03 (D.N.J.1995) (concluding the settlement was fair, adequate, and reasonable despite finding defendant could withstand greater judgment).

***12** Class Members will receive substantial benefits from the settlement, including warranty coverage that gives them the full benefit of their original bargain plus an additional three months of warranty coverage. Any ability of Defendant to withstand a greater judgment is outweighed by the risk that Plaintiff would not be able to achieve a greater recovery at trial. In addition, as discussed above, there are significant risks to establishing liability and damages. *See Yong Soon Oh v. AT & T Corp.,* 225 F.R.D. 142, 150–51 (D.N.J.2004) (finding the difficulties plaintiffs would have in certifying the class and proving damages at trial "diminish[es] the importance of this factor").

In light of these considerations, the Court concludes that this factor weighs in favor of approval.

H. The Range of Reasonableness of the Settlement Fund in Light of the Best

Possible Recovery and the Attendant Risks of Litigation

The eighth and ninth factors, concerning the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation, weigh in favor of settlement.

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved. The percentage recovery, rather must represent a material percentage recovery to plaintiff in light of all the risks considered under *Girsh.*

In re Cendant Corp. Sec. Litig., 109 F.Supp.2d 235, 263 (D.N.J.2000) (internal quotation marks and citation omitted). Plaintiff argues that, given the size of the Settlement Class, the potential benefits available to class members, and the risks in proving liability and damages and in obtaining class certification, the settlement is, fair, adequate and reasonable. (Pl.'s Br. in Supp. at 29). The Court agrees with the parties and finds that these factors weigh in favor of approval.

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I. Summary of *Girsh* Factors

In conclusion, the Court holds that the nine *Girsh* factors overwhelmingly weigh in favor of approval. The Settlement Agreement was reached after arm's-length negotiations between experienced counsel and after completion of a full day of mediation. Therefore, the Court concludes that the settlement represents a fair, reasonable, and adequate result for the settlement class considering the substantial risks Plaintiff faces and the immediate benefits provided by the settlement. *See Reibstein v. Rite Aid Corp.,* 761 F.Supp.2d 241, 255–56 (E.D.Pa.2011).

IV. *NOTICE*

"In the class action context, the district court obtains personal jurisdiction over the absentee Class Members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class." *In re Prudential.* 148 F.3d at 306 (citation omitted). Under Federal Rule of Civil Procedure 23(c), notice must be disseminated by "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2)(B); *See also Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 175–76, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (finding that Rule 23(c) includes an "unambiguous requirement" that "individual notice must be provided to those Class Members who are identifiable through reasonable effort").

***13** Additionally, in this case, where a settlement class has been conditionally certified under Rule 23(b)(3) and a proposed settlement conditionally approved, proper notice must meet the requirements of Federal Rules of Civil Procedure 23(c)(2)(B) and 23(e). *Larson v. Sprint Nextel Corp.,* No. 07–5325(JLL), 2009 WL 1228443, at *2 (D.N.J. Apr.30, 2009). 23(c)(2)(B) compliant notice must inform Class Members of: (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) the Class Members' right to retain an attorney; (5) the Class Members' right to exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on Class Members under Rule 23(c)(3). Fed.R.Civ.P. 23(c)(2)(B)(i)-(vii). Rule 23(e) notice must contain a summary of the litigation sufficient "to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions,* 177 F.R.D. 216, 231 (D.N.J.1997) (citation omitted).

As explained above, KCC—the Settlement Administrator—sent the Court-approved Class Notice to over 99,600 Class Members via e-mail and nearly 5,000 Class Members via First Class mail. *See* Cooper Decl. at ¶ 8. KCC established a dedicated website, www.sainivbmwsettlement.com (https://eclaim.kccllc.net/caclaimforms/bws/home.aspx), which provides the Settlement Notice and other pertinent documents, including the Claim Form and the Settlement Agreement, "frequently asked questions" with contact information should potential Class Members have additional inquiries, a link to a copy of the Settlement Agreement and Preliminary Approval Order, as well as information on how to submit a Claim form or an objection and how to opt out of the Settlement Agreement. *Id.* at ¶ 12, Additionally, KCC established a tollfree telephone number that Class Members have been able to use if they have questions about the Settlement or need assistance completing their Claim Forms. *Id.* at ¶ 15.

The Court finds that the parties complied with the requirements set forth by Rules 23(c)(2)(B) and 23(e). The notice plan was thorough and included all of the essential elements necessary to properly apprise absent settlement Class Members of their rights. The written notice included: (1) direct notice of the Settlement Agreement; (2) full description of their rights and obligations under the Settlement Agreement; and (3) resources to ask questions and, to the extent necessary, receive assistance in submitting Claim Forms. *See In re Ikon Office Solutions, Inc.,* 194 F.R.D. 166, 174 (E.D.Pa.2000) ("In order to satisfy due process, notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection") (internal quotations omitted).

***14** In conclusion, the Court finds that the notice fully complied with the requirements of Rules 23(c)(2)(B) and 23(e).

V. *ATTORNEY FEES, EXPENSES, AND INCENTIVE AWARDS*

Class counsel filed an unopposed motion for an award of attorney fees and expenses in the amount of $600,000. (ECF No. 29). The Court has considered the parties' written submissions and the oral arguments made during the fairness hearing. For the reasons that follow, the Court will grant the requested attorney fees and reimbursement of expenses.

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A. Standard for Judicial Approval of Fees

Fed.R.Civ.P. 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." The awarding of fees is within the discretion of the Court, so long as the Court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly erroneous. *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 727 (3d Cir.2001).

Notwithstanding this deferential standard, a district court is required to clearly articulate the reasons that support its fee determination. *Reibstein v. Rite Aid Corp.,* 761 F.Supp.2d 241, 359 (E.D.Pa.2011); *In re Rite Aid,* 396 F.3d at 301. "In a class action settlement, the court must thoroughly analyze an application for attorneys' fees, even where the parties have consented to the fee award." *Varacallo v. Mass. Mutual Life Ins. Co.,* 226 F.R.D. 207, 248 (D.N.J.2005).

"Relevant law evidences two basic methods for evaluating the reasonableness of a particular attorneys' fee request—the lodestar approach and the percentage-of-recovery approach." *Id.* (internal quotation marks and citation omitted). The lodestar method is generally applied in statutory fee shifting cases and "is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." *In re Cendant Corp.,* 243 F.3d at 732 (internal quotation marks and citation omitted). The lodestar is also preferable where "the nature of the settlement evades the precise evaluation needed for the percentage of recovery method." *In re Gen. Motors,* 55 F.3d at 821; *see also In re Rite Aid,* 396 F.3d at 300. The percentage-of-recovery method is preferred in common fund cases, as courts have determined "that Class Members would be unjustly enriched if they did not adequately compensate counsel responsible for generating the fund." *Varacallo.* 226 F.R.D. at 249 (internal quotation marks and citation omitted). The Court has discretion to decide which method to employ. *Charles v. Goodyear Tire & Rubber Co.,* 976 F.Supp. 321, 324 (D.N.J.1997). "While either the lodestar or percentage-of-recovery method should ordinarily serve as the primary basis for determining the fee, the Third Circuit has instructed that it is sensible to use the alternative method to double check the reasonableness of the fee." *Varacallo,* 226 F.R.D. at 249 (internal quotation marks and citation omitted).

***15** Plaintiff argues, and the Court agrees, that the lode-star method is appropriate here because (1) there is no common fund and (2) the nature of the relief provided—providing additional warranty coverage moving forward—evades the precision required to use the percentage of recovery method.

B. Lodestar Multiplier Reasonableness

Under the lodestar method, the Court multiplies the hourly rates of the attorneys by the number of hours spent on the matter to get a lodestar amount. *See Gunter,* 223 F.3d at 190. The lodestar amount is designed to represent how much revenue the attorneys would have collected had the attorneys billed their client on an hourly basis. The lodestar multiplier is then obtained by dividing the proposed fee award by the lodestar amount. *In re Insurance Brokerage Antitrust Litig.,* 579 F.3d 241, 280 (3d Cir.2009); *see also Milliron v. T–Mobile USA. Inc.,* No. 08–4149, 2009 U.S. Dist. LEXIS 101201, at *41, 2009 WL 3345762 (D.N.J. Sept. 10, 2009). If the lodestar multiplier is greater than "1" then the proposed fee award is more than the amount the attorneys would have collected through hourly billing.

The first step in calculating the lodestar amount is determining the appropriate hourly rate, based on the attorneys' usual billing rate and the "prevailing market rates" in the relevant community. *See In re Schering–Plough/Merck Merger Litig.,* 2010 U.S. Dist. LEXIS 29121, at *54 (citations omitted). The second step is to assess whether the amount of billable time was reasonably expended. *Id.* "Time expended is considered 'reasonable' if the work performed was 'useful and of a type ordinarily necessary to secure the final result obtained from the litigation.' " *Id.* at *54–55 (quoting *Public Interest Research Group of N.J., Inc. v. Windall,* 51 F.3d 1179, 1188 (3d Cir.1995). The law firm of Finkelstein & Krinsk LLP ("F & K") billed 1,040.2 hours with an average hourly billing rate of approximately $421.73 yielding a lodestar amount of $438,682.50. *See* Krinsk Decl., Ex. A. F & K's total expenses are $21,979.49. *Id.* The law firm of Lite DePalma Greenberg, LLC ("Lite DePalma") billed 163.1 hours at an average billing rate of approximately $540.31 yielding a lodestar amount of $88,125.00. *See* Greenberg Decl., Ex. B. Lite DePalma's total expenses are $868.73. *Id.,* Ex. C. The combined lodestar amount for Class Counsel is $526,807.50 as well as $22,848.22 in unreimbursed expenses.[3] The lodestar multiplier in this case with fees only, obtained by dividing $600,000 by $526,807.50, is approximately 1.13. The lodestar amount including fees and expenses is approximately 1.09.

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First, the hourly billable rates of Class Counsel used to calculate these lodestar values are consistent with the hourly rates approved by this Court in complex class action litigation matters. *See, e.g. In re Merck & Co. Vytorin ERISA Litig.,* No. 08–CV–285 (DMC), 2010 U.S. Disk LEXIS 12344, at *45, 2010 WL 547613 (D.N.J. Feb. 9, 2010) (approving rates between $250 and $850 per hour); *In re Schering–Plough/Merck Merger Litig.,* 2010 U.S. Dist. LEXIS 29121, at *57 (stating that "an overall hourly lodestar non-weighted average ranging from $465.68 to $681.15 is not unreasonable in light of similar rates charged in the market ...."). The Court concludes that the average hourly billing rates submitted by Class Counsel are within the normal range for cases of similar complexity and subject matter.

***16** Next, Courts routinely find in complex class action cases that a lodestar multiplier between one and four is fair and reasonable. *See Boone v. City of Phila.,* 668 F.Supp.2d 693, 714 (E.D.Pa.2009). The Third Circuit recently noted that it has "approved a multiple of 2.99 in a relatively simple case." *Milliron,* 423 F. App'x at 135 (citing *In re Cendant Corp. Prides Litig.,* 243 F.3d at 742). *See also Henderson,* 2013 U.S. Dist. LEXIS 46291, at *48–55 (approving lodestar multiplier of 1.13 for fees and 1.09 for fees and expenses because these multipliers are "within the range found to be to be acceptable by the Third Circuit and this Court" (citations omitted)); *In re Schering–Plough Corp. Enhance ERISA Litig.,* No. 08–1432(DMC) (JAD), 2012 U.S. Dist. LEXIS 75213, at *22, 2012 WL 1964451 (D.N.J. May 31, 2012) (stating that a multiplier of 1.6 "is an amount commonly approved by courts of this Circuit"); *McCoy v. Health Net. Inc.,* 569 F.Supp.2d 448, 479 (D.N.J.2008) (finding a lodestar multiplier of approximately 2.3 to be reasonable). Given this general framework, the Court finds that the lodestar multipliers of approximately 1.13 with fees only and 1.09 with fees and expenses is reasonable and appropriate.

C. Percentage–of–Recovery Method Cross–Check

The Third Circuit has recommended that district courts perform a "cross-check" of a fee award. *Reibstein v. Rite Aid, Corp.,* 761 F.Supp.2d 241, 260 (E.D.Pa.2011) (citing *In re GMC,* 55 F.3d at 821). After adopting the lodestar method to award attorneys' fees in a class action settlement, a district court should cross-check the proposed fee award using the percentage of recovery method. *See Henderson,* 2013 U.S. Dist. LEXIS 46291, at *48–55. The purpose of performing the cross-check is "to insure that plaintiffs' lawyers are not receiving an excessive fee at their clients' expense." *Gunter,* 223 F.3d at 199.

The Third Circuit has identified a non-exhaustive list of factors that a district court should consider in its percentage of recovery analysis:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

In re Rite Aid, 396 F.3d at 301 (quoting *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n. 1 (3d Cir.2000)). The district court need not apply these *Gunter* fee award factors in a formulaic way. Certain factors may be afforded more weight than others. *Id.* at 301. The district court should engage in a robust assessment of these factors. *Id.* at 302; see *also Gunter.* 223 F.3d at 196 (vacating district court's ruling because the fee-award issue was resolved in a "cursory and conclusory" fashion).

***17** The Court finds that the totality of the *Gunter* factors weighs strongly in favor of approval of the fee award. Given the similarity and overlap of the *Gunter* and *Girsh* factors, the Court incorporates by reference the reasons given for approval of the Settlement Agreement. The Court will now discuss additional reasons that support approval of attorney fees in this matter.

1. The Size of the Fund Created and the Number of Persons Benefitted

The Court notes that the present Settlement Agreement does not create a class fund, and therefore only an approximation of the total compensation that will be provided to Class Members can be calculated. However, it appears that the Settlement Agreement in this case provides substantial relief to the Class Members. As discussed above, there are in excess of 104,000 Class Vehicles and settlement notice has been sent to in excess of 99,600 unique e-mail addresses and more than 4,800 postal addresses via first class mail. According to Plaintiff's damages expert, the retail price of three months of comparable aftermarket extended warranty coverage is between $263.43 and 316.80 per vehicle. (*See* Declaration of Matthew E. Pohl ("Pohl Decl."), ¶ 10). When multiplied by the number of eligible class vehicles, the aggregate value to the Class Members of extended warranty coverage alone is between $12.2 and 12.8 million, and this excludes reimbursement of out of pocket expenses for any Class

Members that were denied warranty coverage. *Id.* at ¶ 22. Given the minimum possible total settlement value, as well as the number of Class Members entitled to benefits and the gross amount per person, this factor weighs in favor of approval. *See* *Boeing Co. v. Van Gemert,* 444 U.S. 472, 480, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (the right of class members "to share the harvest of the lawsuit upon proof of their identity ... is a benefit in the fund created by the efforts of the class representative and their counsel").

2. Presence or Absence of Substantial Objections by Members of the Class to Settlement Terms and/or Fees Requested by Counsel

The lack of objections by settlement Class Members to the fees requested by class counsel strongly supports approval. As noted above, notice was sent directly to over 104,000 potential Class Members and only thirteen (13) potential Class Members have opted out of the Settlement Agreement. Additionally, there was only one objection to the Settlement Agreement, and as discussed in detail above, none of the issues raised by Mr. Barondes were related to the present Motion for Attorneys' Fees and Expenses. *See* *Varacallo v. Mass. Mutual Life Ins. Co.,* 226 F.R.D. 207, 237–38 (D.N.J.2005) (finding exclusion and objection requests of .06% and .003%, respectively, "extremely low" and indicative of class approval of the settlement). As such, this factor weighs in favor of approval. *See* *In re Lucent Techs., Inc., Sec. Litig.,* 327 F.Supp.2d 426, 435 (D.N.J.2004) (finding that this factor weighed in favor of approval where only nine of nearly three million potential Class Members objected to the fee application).

3. Skill and Efficiency of Attorneys

***18** As discussed in the section on class certification, class counsel are experienced in litigating and settling consumer class actions. Class counsel obtained substantial benefits for the Class Members-despite vigorous defense by Defendant's counsel—a consideration that further evidences class counsels' competence. Thus, this factor also weighs in favor of approval of the fee award.

4. The Complexity and Duration of the Litigation

As explained in the discussion of the *Girsh* factors, this case has been litigated for over two years and involves uncertain legal issues. The parties reached the Settlement Agreement after intense mediation and arm's-length settlement negotiations. Thus, this factor weighs in favor of approval.

5. The Risk of Non–Payment

Class counsel undertook this action on a contingent fee basis, assuming a substantial risk that they might not be compensated for their efforts. (Pl.'s Br. in Supp. at 1.) Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees. *See* *In re Prudential–Bache Energy Income P'ships Sec. Litig .,* 1994 U.S. Dist. LEXIS 6621, at *16, 1994 WL 202394 (E.D.La. May 18, 1994) ("Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable."). This Court observed that "Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees." 282 F.R.D. 92, 122 (D.N.J.2012) (citations omitted). Class counsel invested substantial effort and resources to obtain this favorable settlement. Accordingly, this factor weighs in favor of approval.

6. The Amount of Time Devoted to the Litigation

Class counsel reports over 1,200 hours of contingent work on this case for the past three years. (Pl.'s Br. in Supp. at 20.) Based on the amount of time expended on this matter, this factor weighs in favor of approval.

7. Awards in Similar Cases

The Court must also take into consideration amounts awarded in similar actions when approving attorney fees. Specifically, the Court must: (1) compare the actual award requested to other awards in comparable settlements; and (2) ensure that the award is consistent with what an attorney would have received if the fee were negotiated on the open market. *See, e.g.,* *In re Remeron Direct Purchaser Antitrust Litig.,* 2005 U.S. Dist. LEXIS 27013, *42–46, 2005 WL 3008808 (D .N.J. Nov. 9, 2005).

A review of similar cases demonstrates that the fee request presently before the court is reasonable. *See, e.g.,*

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Henderson, 2013 U.S. Dist. LEXIS 46291, at *40–58 (finding $3,000,000 in attorneys' fees was fair and reasonable where class action settlement provided warranty extensions and reimbursements to Class Members in connection with alleged defects in automobiles' transmission systems); *McGee v. Cont'l tire N. Am.,* No. 06–6234(GEB), 2009 U.S. Dist. LEXIS 17199, 2009 WL 539893 (D.N.J. Mar. 4, 2009) (concluding $2,274,983.70 in fees and expenses representing a lodestar multiplier of 2.6 was appropriate in a consumer class action); *O'Keefe v. Mercedes–Benz USA, LLC.* 214 F.R.D. at 304 (stating $4,896,783.00 in fees was justified in class action involving allegedly defectively designed rear lift-gate latch). Thus, courts routinely grant similar awards of attorneys' fees and expenses in similar cases.

***19** The second part of this analysis addresses whether the requested fee is consistent with a privately negotiated contingent fee in the marketplace. "The percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee [that] would be negotiated if the lawyer were offering his or her services in the private marketplace." *In re Remeron Direct Purchaser Antitrust Litig.,* 2005 U.S. Dist. LEXIS 27013, *44–45, 2005 WL 3008808. "The object ... is to give the lawyer what he would have gotten in the way of a fee in an arm's-length negotiation, had one been feasible." *In re Cont'l Ill. Sec. Litig.,* 962 F.2d 566, 572 (7th Cir.1992); *see also In re Synthroid Mktg. Litig.,* 264 F.3d 712, 718 (7th Cir.2001) ("[W]hen deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."). To determine the market price for an attorney's services, the Court should look to evidence of negotiated fee arrangements in comparable litigation. *In re Cont'l Ill. Sec. Litig.,* 962 F.2d at 573 (stating that the judge must try to simulate the market "by obtaining evidence about the terms of retention in similar suits, suits that only differ because, since they are not class actions, the market fixes the terms"). As explained more fully above, class counsel used standard hourly rates to calculate the lodestar amount. (*See* Krinsk Decl., Ex. A; Greenberg Decl., Ex. B) These hourly billable rates are consistent with hourly rates routinely approved by this Court in complex class action litigation. *See In re Merck & Co.,* 2010 U.S. Dist. LEXIS 12344 at *45, 2010 WL 547613; *McGee,* 2009 U.S. Dist. LEXIS 17199 at *50, 2009 WL 539893.

In sum, for all the reasons stated above, the Court concludes that the requested fee by class counsel is fair and reasonable under the lodestar method. The Court will approve class counsel's application for attorney fees of $600,000.

D. Expenses

Class Counsel also seek reimbursement of $22,848.22 in litigation expenses to be paid from the $600,000 attorney fee and expense award. (Pl.'s Br. in Supp. at 7.) "Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Safety Components Int'l, Inc.,* 166 F.Supp.2d at 108 (citing *Abrams v. Lightolier Inc.,* 50 F.3d 1204, 1225 (3d Cir.1995)). Class counsel contends that these expenses reflect costs expended for the purposes of litigating this action, including costs associated with travel, expert and consultant fees, and mediation. (*See* Krinsk Decl., Ex. A) The Court finds that the expenses were adequately documented and reasonably and appropriately incurred in the litigation of the case. *See In re Datatec Sys. Sec. Litig.,* 2007 U.S. Dist. LEXIS 87428, at *27, 2007 WL 4225828 (D.N.J. Nov. 28, 2007).

E. Summary of Attorney Fees and Expenses Award Analysis

***20** For the foregoing reasons, the Court grants the application of class counsel for an award of attorneys' fees and reimbursement of expenses.

VI. *CONCLUSION*

Because the named Plaintiff has satisfied all of the requirements of Fed.R.Civ.P. 23, this Court certifies the class for purposes of this Settlement and approves the Settlement Agreement. The Court also grants the application of Class Counsel for attorney fees and reimbursement of expenses. An appropriate Order accompanies this Opinion.

All Citations

Not Reported in F.Supp.3d, 2015 WL 2448846

Footnotes

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1 The Court considers any arguments not presented by the parties to be waived. *See Brenner v. Local 514, United Bhd. of Carpenters & Joiners,* 927 F.2d 1283, 1298 (3d Cir.1991) ("It is well established that failure to raise an issue in the district court constitutes a waiver of the argument.").

2 To receive extended warranty coverage, a Class Member must also provide adequate proof that his or her vehicle is within 51 month/55,000 miles for sale demos or 48 months/50,000 miles for service demos as of the date the Claim Form is submitted. Additionally, to receive reimbursement of past expenses, a Class Member must demonstrate that he or she incurred out-of-pocket expenses for repair costs that would otherwise have been covered by BMW NA's new vehicle warranty within 54 months/55,000 miles for sales demos or 51 months/50,000 miles for service demos.

3 This reported time does not include any of the billable time after January, 2015, and therefore does not account for the work performed by Class Counsel subsequent to that date, or for the future work that will be associated with claims and settlement administration. (Pl.'s Br in Supp. at 12.)

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EXHIBIT 13

2014 WL 3865853
Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Theresa SINGLETON, et al., Plaintiffs,
v.
FIRST STUDENT MANAGEMENT LLC,
et al., Defendants.

Civil Action No. 13–1744 (JEI/JS).
|
Signed Aug. 6, 2014.

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OPINION

IRENAS, Senior District Judge.

***1** This is a collective and class action case arising under Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–19, and the New Jersey Wage and Hour Law ("NJWHL"), N.J.S.A. 34:ll–56a.[1] The Plaintiffs assert that Defendants failed to adequately pay Plaintiffs a portion of their wages starting in early 2011. (Compl.¶ 215)

Presently before the Court is the parties' joint motion for provisional certification of the settlement class, and preliminary approval of the collective and class action settlement agreement. For the reasons stated below, provisional certification and preliminary approval will be granted.

I. Factual Background

First Student Management LLC and First Student, Inc. (collectively, "First Student" or "Defendants"), provide bus service to various schools in the Southern New Jersey area and offer charter services throughout the region. Defendants employ bus drivers and aides, who are responsible for transporting students to local municipal schools and extracurricular activities. The Plaintiffs in this matter are comprised of drivers and aides from Lawnside, Berlin, Delran, Cologne, Chatham and Burlington yards in New Jersey. (Compl.¶ 214)

Beginning in March 2011, Plaintiffs contend that Defendants failed to pay straight time and overtime wages.[2] (Compl.¶ 224) Specifically, Plaintiffs assert that various tasks, such as pre-trip inspections, occurring before the initiation of the Zonar system,[3] were not properly compensated. (Compl.¶ 247–62) Similarly, upon returning from their bus route and disengaging the Zonar system, Plaintiffs allege they were not compensated properly for post-trip inspections and other post-trip tasks. (*Id.*)

Plaintiffs filed their original complaint in this Court on March 21, 2013. (Dkt. No. 1) In the following months, additional individuals filed Consent to Join Forms, and an Amended Complaint was filed on July 18, 2013. (Dkt. No. 38)

II. Proposed Settlement Agreement

Following extensive negotiations, the parties come before the Court with a proposed settlement agreement for preliminary approval. The proposed settlement agreement is the product of three full days of in-person mediation with Hon. Joel B. Rosen, U.S.M.J. (Ret.), between February and April 2014. (Br. in Supp. at 2–3) According to the parties, the settlement is a result of substantial discovery on both sides, and the product of several months of adversarial negotiations. (*Id.*)

The proposed settlement agreement provides that First Student will pay a maximum of $1.6 million to settle this action. (*Id.*) Half of the amount will be considered unpaid wages, and the other half considered damages. (*Id.*) The settlement will be administered as a common fund paid through a third-party settlement claims administrator, and the administrator will calculate individual settlement awards subject to a proposed formula described *infra.* (*Id.*) As the parties confirmed at the joint motion hearing, the costs of the administrator, as well as the mediation sessions with Judge Rosen, will be borne by the Defendants and will not be subtracted from the maximum settlement amount. (*Id.*)

***2** The parties estimate that approximately 1,455 drivers and aides at the six facilities identified will be eligible for

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settlement awards as part of the NJWHL action and FLSA collective action class. (*Id.*) These class members will receive notice of the suit and settlement via registered mail. (*Id.*) Each class member who returns a claim form and does not opt-out of the settlement will receive payment based on the formula explained below.[4] (Br. in Supp.4) These proposed forms are included as Exhibit C in the parties' joint motion for settlement approval.

Plaintiffs' counsel seeks a fee award of $462,000,[5] covering all legal fees and expenses, which the Defendants do not oppose. (Br. in Supp. at 4) The legal fees and costs will be subtracted from the $1.6 million settlement fund before calculation of individual settlement awards. (*Id.*) As Plaintiffs' counsel confirmed at the motion hearing, no additional funds will be taken out of the settlement fund for any subsequent legal fees or costs.

To calculate an individual Plaintiff's settlement award, the claim administrator will use a formula that begins with the maximum settlement amount ($1.6 million). (*Id.*) The administrator will subtract the Plaintiffs' attorneys' fees and costs ($462,000), and then subtract the Defendants' estimated portion of taxes on the wage half of the settlement. (*Id.*) The new estimated revised maximum gross settlement amount will then be divided by the total workdays worked by all members of the class. The result of this division is an estimated dollar amount to be allocated for each workday. (Ex. A) The administrator will then calculate the final award to each class member by multiplying the dollar amount for each workday times the number of workdays that each class member actually worked (indicated on the claim forms that class members submit to the administrator). (*Id.*)

III. Legal Analysis

The Plaintiffs pursue four claims against Defendants. Count 1 seeks recovery under the Fair Labor Standards Act ("FLSA"), 29 U.S .C. §§ 201–19, for a failure to pay straight time wages. (Compl.¶ 239) Count 2 seeks recovery for overtime wages, also under FLSA. (*Id.*) The Plaintiffs seek this recovery as part of a collective action, pursuant to § 216(b). (Compl.¶ 240) Count 3 seeks recovery of straight time wages under the New Jersey Wage and Hour Law ("NJWHL"), N.J.S.A. 34:11–56a, and Count 4 seeks recovery of overtime wages under the NJWHL. (Compl.¶ 242) The Plaintiffs seek class action certification pursuant to Federal Rule of Civil Procedure Rule 23 for Counts 3 & 4. (Compl.¶ 243)

The parties now seek certification of both the class and FLSA collective action, and request this Court's preliminary approval of their proposed settlement.

A. Collective Action Certification

Under the FLSA, § 216(b) allows an employee to bring suit against his employer "for and on behalf of himself or themselves and other employees similarly situated." This provision enables a named plaintiff to represent a class of similarly situated employees in a "collective action," similar to class actions governed under Rule 23. *Id.* Unlike class action suits, any employee wishing to join a FLSA collective action must file a written consent to join in the action and be bound by the collective action judgment. *Id.*

***3** The typical FLSA certification process occurs in two stages: a preliminary certification at the outset of a case, and a final certification at the close of discovery. *Camesi v. Univ. of Pittsburgh Med. Ctr.,* 724 F.3d 239, 242–43 (3d Cir.2013); *Zavala v. Wal–Mart Stores, Inc.,* 691 F.3d 527, 535–37 (3d Cir.2012). Preliminary certification imposes a "fairly lenient standard" to demonstrate that the proposed opt-in plaintiffs are similarly situated. *Zavala,* 691 F.3d at 536 n. 4. On final certification, courts determine whether the plaintiff and opt-in plaintiffs are similarly situated by considering all relevant circumstances, including but not limited to:

> Whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment. Plaintiffs may also be found dissimilar based on the existence of individualized defenses.... This list is not exhaustive, and many relevant factors have been identified. *See* 45C Am.Jur.2d *Job Discrimination* § 2184 (listing 14 factors to be considered in determining whether proposed collective action plaintiffs are "similarly situated" under the ADEA).

Id. at 536–37.

Here, the parties' briefing focuses only on the certification of a Rule 23 class and fails to address the FLSA collective action standard. Nonetheless, there is no dispute that the opt-in plaintiffs, bus drivers and aides at the Lawnside, Berlin, Delran, Cologne, Chatham and Burlington yards in New Jersey between March 21, 2011 through December 31, 2013, satisfy the FLSA collective-action standard. These individuals held similar positions in the same locations, and they advance identical claims concerning their unpaid straight time and overtime wages. (Compl.¶

186) As a result, the Court will grant preliminary certification of the collective action.[6]

B. Class Action Certification

Claims 3 & 4 concern claims for straight time and overtime wages under the NJWHL. The parties seek Rule 23 certification of a parallel class to their FLSA claims, covering "all individuals employed by First Student at the Lawnside, Burlington, Berlin, Delran, Chatham, or Cologne facilities as a Driver or Aide at any time from March 21, 2011 to December 31, 2013." (Compl.¶ 241)

To obtain class action certification, plaintiffs must establish that all four prerequisites of Rule 23(a) and at least one part of Rule 23(b) are met. *See, e.g., Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, ––––, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011); *Carrera v. Bayer Corp.,* 727 F.3d 300, 306 (3d Cir.2013). Thus, a plaintiff must first establish numerosity, commonality of questions of law or fact, typicality, and the adequacy of the representative parties. *See* Fed. R. Civ. P. 23(a). Next, Rule 23(b)(3) requires a plaintiff to establish "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The parties stipulate that the Plaintiffs' proposed class satisfies these requirements.

***4** Rule 23(a)(1) provides that a class action may be maintained only if "the class is so numerous that joinder of all members is impracticable." The numerosity requirement of Rule 23(a)(1) does not require joinder to be impossible. "To meet the numerosity requirement, class representatives must demonstrate only that 'common sense' suggests that it would be difficult or inconvenient to join all class members." *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 962 F.Supp. 450, 510 (D.N.J.1997) (citing *Lerch v. Citizens First Bancorp. Inc.,* 144 F.R.D. 247, 250 (D.N.J.1992)).

The parties agree, for the purposes of the settlement agreement, that the class members can be readily and easily ascertained. Certifying a class action would more efficiently adjudicate these similar claims and concentrate these very similar claims in one single forum. The class contains 1,455 members. In light of the significant class size, the Court finds that Rule 23(a)(1) is satisfied.

The commonality requirement under Rule 23(a)(2) requires a showing that "there are questions of law or fact common to the class." Fed.R.Civ. P. 23(a)(2). In the instant case, the class consists solely of drivers and aides who have worked or are currently working at the Defendant's Lawnside, Berlin, Delran, Cologne, Chatham or Burlington yards. The policies used by First Student to calculate hours and wages with respect to each employee's pre-and postdriving activities are uniform for every employee. Thus the commonality requirement is also met.

Typicality requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R.Civ.P. 23(a)(3). In the present case, Plaintiffs have typical claims as all other class members. They all allege the exact same type of injury allegedly suffered as a result of the Defendants' conduct: underpayment for the work performed before and after the activation and deactivation of the Zonar system.

Rule 23 also requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The named Plaintiffs and their counsel have engaged in extensive discovery and vigorous arms-length negotiations to this point. This discovery and adversarial negotiation demonstrates that the representative parties and their counsel adequately represent the proposed class.

Finally, Plaintiffs must also demonstrate that the action is maintainable under Rule 23(b)(3). Class certification under this provision must satisfy the "twin requirements" of predominance and superiority. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, LLC,* 259 F.3d 154, 186 (3d Cir.2001).

Predominance requires that common issues predominate over issues affecting only individual class members. *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 528 (3d Cir.2004). The inquiry therefore "focuses on whether the efficiencies gained in resolving these common issues together are outweighed by the individual issues presented for adjudication." *Cannon v. Cherry Hill Toyota, Inc.,* 184 F.R.D. 540, 545 (D.N.J.1999).

***5** Here, the Plaintiffs allege that all class members employed by Defendants were deprived of their wages for time worked before and after Zonar system activation and deactivation. All class members were subject to the same time-keeping policies and were in turn not properly compensated. The Court finds that there are common issues of fact that predominate over the class.

The Court also finds that a class action is the superior method of adjudicating the dispute. When class certification is sought under Rule 23(b)(3), the Court must also find "that a class action is superior to other available

methods for fairly and effectively adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Court must "balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *Georgine v. Amchem Prods.,* 83 F.3d 610, 632 (3d Cir.1996).

The Court finds that the class members' lack of financial wherewithal and the modest nature of the claims render a class action superior to alternative methods of adjudication. The Plaintiffs are bus drivers and aides, and lack experience with civil suits. The Plaintiffs' individual claims are for relatively small amounts, not likely to exceed a few thousand dollars each. The small size of the claim makes it highly unlikely that an individual Plaintiff would have the time, resources, or interest to pursue his or her claims individually. Therefore, class action would be the best way to proceed and the Court finds that Plaintiffs satisfy the superiority element and the class is certified under Rule 23.

In light of the satisfaction of Rule 23, the Court will grant provisional certification to the following class: "all individuals employed by First Student at the Lawnside, Burlington, Berlin, Delran, Chatham, or Cologne facilities as a driver or aide at any time from March 21, 2011 to December 31, 2013."

C. Preliminary Class Action Settlement Approval

The parties also seek Court approval of their class action settlement agreement. The process for approving a preliminary settlement offer is less formal than final approval; it is not binding and may be conducted informally. *Jones v. Commerce Bancorp, Inc.,* No. 05–5600, 2007 U.S. Dist. LEXIS 52144, at *2,2007 WL 2085357 (D.N.J. July 16, 2007). The purpose of having a preliminary stage is to ensure that there are no obvious deficiencies in the settlement that would preclude final approval. *Id.*

While the issue of final settlement approval is not presently before the Court, it is important to consider the final approval factors during this stage so as to identify any potential issues that could impede the offer's completion. These factors, initially described in *Girsh v. Jepson,* 521 F.2d 153 (3d Cir.1975), include the following:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

***6** *Girsh,* 521 F.2d at 157. Analysis of each factor weighs in favor of preliminary approval.

First, there is little doubt regarding the factual and legal complexity of this case. The substantial factual questions about time worked, the acquisition of such data from GPS records and the Plaintiffs' counsel's independent investigation demonstrates substantial factual complexity. In sum, this factor weighs in favor of preliminary approval.

At the preliminary review stage, the actual reaction of the proposed class remains unknown. However, Plaintiffs' counsel represent that since informing the opt-in Plaintiffs of the preliminary settlement terms in April, class members have supported the settlement terms. Plaintiffs' counsel also asserted at the motion hearing that they do not expect anyone to object to the settlement.

Turning to the third factor, the parties engaged in three full days of in-person negotiations, numerous telephone conferences, and exchanged large volumes of data. Both sides worked with their own experts to analyze GPS data and other digital records. This substantial discovery up to this point weighs in favor of approval.

The fourth, fifth, and sixth *Girsh* factors consider the risks of establishing liability, damages, and maintaining the class action through the trial, and may appropriately be analyzed together for purposes of preliminary approval. The parties have highlighted substantial risks to pursuing litigation, including:

- The possible difficulty in demonstrating liability for unpaid wages for activities prior to logging into the Zonar GPS system;

- The possible difficulty in demonstrating liability due to the potential legal designation of bus drivers as common carriers under the NJWHL and FLSA;

- The difficulty in establishing exact damages figures for any unpaid working time, which may be complicated by the different amount of time it takes individual Plaintiffs to accomplish individual tasks, or distinguishing any de *minimis* uncompensated time from valid, compensable tasks;

- The inherent risks in maintaining a class exceeding

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1,000 individuals through trial concerning off-the-clock wage claims.

In sum, the parties have demonstrated significant uncertainties and risks in continuing this litigation that lean in favor of approving settlement at this time.

The Defendants ability to withstand a greater judgment is unknown. The parties do not provide substantial information concerning this inquiry aside from rightfully indicating that a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174, 186 (W.D.N.Y.2005) (citation omitted); *see also In re Cendant Corp. Sec. Litig.,* 109 F.Supp.2d 235, 244 (D.N.J.2000). Though this is an accurate characterization, the parties omit any additional information concerning the Defendants' financial wherewithal. This omission does not strongly weigh against preliminary approval.

***7** The final two *Girsh* factors concern the range of reasonableness of the proposed settlement in light of both the best possible outcome, and the attendant risks of litigation. This proposed settlement is appropriate in light of the best possible outcome. During the motion hearing, Plaintiffs indicated their estimate of the best possible outcome for the class was between $3.2 and $3.6 million. When attorney fees are included, the proposed settlement amount is about 40% of the Plaintiffs' estimate. The settlement of a class action may be appropriate even where the settlement is only a fraction of the ultimate total exposure should the case be decided at trial. *See Lenahan v. Sears, Roebuck & Co.,* No. 02–0045, 2006 U.S. Dist. LEXIS 60307, at *48 (D.N.J. July 10, 2006) (approving a $15 million settlement when maximum exposure at trial may have been as high as $104 million because of the uncertainty of the final disposition of a trial). The Court finds the settlement amount reasonable in light of the attendant risks of litigation.

The Court has performed a preliminary analysis under the *Girsh* factors and finds that this analysis weighs in favor of preliminary approval of the parties' settlement agreement.

D. Preliminary FLSA Settlement Approval

Congress enacted FLSA for the purpose of protecting all covered workers from substandard wages and oppressive working hours. *Barrentine v. Arkansas–Best Freight Sys.,* 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981); *See also* 29 U.S.C. § 202(a). Congress designed the FLSA to ensure that each employee covered by the Act would receive "[a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Barrentine,* 450 U.S. at 739 (internal citations and quotations omitted). Under § 216(b), an employer who violates § 206 or § 207 is liable to the affected employee or employees for unpaid minimum or overtime compensation, and for an additional equal amount as liquidated damages. 29 U.S.C. § 216(b). FLSA recognizes that "due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 706–7, 65 S.Ct. 895, 89 L.Ed. 1296 (1945).

In light of the purpose behind FLSA, claims brought under the Act may be settled or compromised by either: (1) the Secretary of the Department of Labor supervising payments to employees under § 216(c); or (2) a district court approves the settlement pursuant to 29 U.S.C § 216(b). *In re Chickie's & Pete's Wage & Hour Litig.,* No. 12–6820, 2014 U.S. Dist. LEXIS 30366, at *6,2014 WL 911718 (E.D.Pa. March 7, 2014) (citing *Cuttic v. CrozerChester Med. Ctr.,* 868 F.Supp.2d 464, 466 (E.D.Pa.2012)).

In the latter scenario, the Court must scrutinize the agreement for reasonableness and fairness. *See In re Chickie's & Pete's,* 2014 U.S. Dist. LEXIS 30366, at *6,2014 WL 911718. Courts within the Third Circuit have adopted the standard set forth in *Lynn's Food Stores, Inc. v. U.S.,* 679 F.2d 1350 (11th Cir.1982) and generally proceed in two steps. *See e.g. Cuttic,* 868 F.Supp.2d 464 (applying *Lynn's Food Stores* framework); *Morales v. PepsiCo, Inc.,* Civ. A. No. 11–6275, 2012 U.S. Dist. LEXIS 35284,2012 WL 870752 (D.N.J. Mar. 14, 2012); *Brumley v. Camin Cargo Control, Inc.,* Civ. A. No. 08–1798, 2012 U.S. Dist. LEXIS 11702 (D.N.J. Jan 30, 2012); *Bredbenner v. Liberty Travel, Inc.,* Civ. A. No. 09–905, 2011 U.S. Dist. LEXIS 38663,2011 WL 1344745 (D.N.J. April 8, 2011).

***8** First, the court will consider whether the agreement is fair and reasonable to the plaintiff-employees. *Lynn's Food Stores,* 679 F.2d at 1353. This step involves an analysis under the Girsh factors, identical to Rule 23 class action analysis.[7] The Court will also look to whether the settlement resolves a bona fide dispute and will scrutinize the release of claims provision. *See Brumley,* 2012 U.S. Dist. LEXIS 40599, at *17. Once the settlement is found to be fair and reasonable, the Court proceeds to the second step to determine whether the agreement furthers the purpose of the FLSA. *Id.* Finally, the Court will analyze the reasonableness of attorneys' fees under § 216(b). *Id.*

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As described *supra,* review of the *Girsh* factors weighs in favor of approval. Thus, the Court concludes the proposed settlement is reasonable for FLSA approval purposes.

Next, the Court will look to whether the settlement agreement resolves a bona fide dispute. A proposed settlement agreement resolves a bona fide dispute where it "reflect[s] a reasonable compromise over issues, such as FLSA coverage or computation of back wages, that are actually in dispute" and is not a "mere waiver of statutory rights brought about by an employer's overreaching." *Lynn's Food Stores,* 679 F.2d at 1354.

Here, the terms of the settlement agreement deal specifically with the resolution of a bona fide dispute over back wages. The Plaintiffs' claims for wages concern the work performed by employees before and after Zonar activation and deactivation, the hours spent conducting pre-and posttrip inspections, and the reasons justifying the employees' right to the disputed wages. The parties have submitted details of the nature of the disputes resolved by the settlement agreement and have demonstrated that the settlement is specific to the claims made by Plaintiffs. As the formula described above shows, Plaintiffs will be apportioned their individual share of the settlement in accordance with the number of hours worked during the claims period. (Br. in Supp. at 4) Therefore, the Court is assured as to the bona fides of the dispute.

Next, the Court turns to the release of claims provision to ensure its reasonableness. While workers seeking to recover back pay may be willing to waive unknown claims in order to access wrongfully withheld wages as soon as possible, "a pervasive release in an FLSA settlement [that] confers an uncompensated, unevaluated, and unfair benefit on the employer should be examined closely." *Brumley,* 2012 U.S. Dist. LEXIS 40599 at *25 (quoting *Hogan v. Allstate Beverage Co., Inc.,* 821 F.Supp.2d 1274, 1284 (M.D.Ala.2011)).

In this case, the Claim Form provided to each class member contains a release, which provides, in pertinent part,

> [Class members] hereby forever completely settle, compromise, release and discharge Defendants ... from any and all past and present matters ... of any kind whatsoever, that are based upon, related to, or arise out of or reasonably could have arisen out of the facts, acts, transactions, occurrences, events or omissions alleged in the Litigation or by reasons of the negotiations leading to this settlement agreement, even if presently unknown and/or unasserted....

***9** (Ex. A at 36–37) The Court finds this language, while broad, to be appropriate. The release is written to limit any and all future claims related to the specific litigation, and does not incorporate any FLSA claims or other wage issues the Plaintiffs may allege subsequent to the final approval of a settlement.

The second step of FLSA approval analysis requires the Court to determine whether the agreement furthers or "impermissibly frustrates" the implementation of the FLSA in the workplace. *Brumley,* 2012 U.S. Dist. LEXIS 40599 at *13; *Dees v. Hydradry, Inc.,* 706 F.Supp.2d 1227, 1241 (M.D.Fla.2010). The Court should approve the compromise only if the compromise is reasonable to the employee and furthers implementation of the FLSA in the workplace. *Brown v. TrueBlue, Inc.,* 2013 U.S. Dist. LEXIS 137349 at *3,2013 WL 5408575 (M.D.Pa. Sept. 24, 2013) (finding settlement agreement frustrated the implementation of the FLSA when it required the plaintiffs to keep the terms of the settlement confidential or risk forfeiting their awards).

The parties proposed settlement agreement does not contain a confidentiality provision. Additionally, far from frustrating the FLSA, the settlement actually furthers it. The Claim Form indicates that the defendants have set up methods to address potential wage issues. The parties represent that going forward, employees will be instructed to accurately report all working time, carefully review time records and paychecks, and notify Human Resources or their supervisor of any discrepancies. (Ex. A at 72) The Defendants have also established a compliance hotline and appointed compliance officers to follow up on discrepancies not addressed by Human Resources or Supervisors. (*Id.*)

Such a result is consistent with the purpose of the FLSA, which is meant to protect workers from employment agreements that may not work out in their best interests but that, because of lack of bargaining power, they have no choice but to accept. *See* 29 U.S .C. § 202 (congressional finding and declaration of policy); *Brooklyn Sav. Bank,* 324 U.S. at 796 ("The statue was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency...."). As a result, the substantive settlement terms meet with preliminary approval for FLSA purposes.

Finally, under § 216(b), the Court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). In FLSA cases, judicial approval of attorneys' fees is necessary "to assure both that counsel is compensated adequately and that no conflict of interest taints the amount the wronged employee

recovers under a settlement agreement." *Brumley,* 2012 U.S. Dist. LEXIS 40599 at *29 (quoting *Silva v. Miller,* 307 F. App'x 349, 351 (11th Cir.2009)).

***10** In a FLSA case, both the lodestar formula and the percentage-of-recovery method have been used in evaluating the reasonableness of attorneys' fees. *Compare Loughner v. Univ. of Pittsburgh,* 260 F.3d 173, 177 (3d Cir.2011) (using lodestar formula), *with, Brumley,* 2012 U.S. Dist. LEXIS 40599 at *9 (using percentage-of-recovery method). To determine what is reasonable under the lodestar formula "requires multiplying the number of hours reasonably expended by a reasonable hourly rate." *Loughner,* 260 F.3d at 177. The percentage-of-recovery method, on the other hand, allows a district court judge to award attorneys' fees as a percentage of the total fund recovered. *In re Gen. Motors Corp. Pick–Up Fuel Tank Products Liab. Litig.,* 55 F.3d 768, 822 (3d Cir.1995). Fee awards under this method have ranged from 19 percent to 45 percent of the settlement fund. Id; *See also Brumley,* 2012 U.S. Dist. LEXIS 40599 at *12 (collecting cases where attorneys' fees around 30 percent of settlement funds were found reasonable).

Plaintiffs request that the Court award attorneys' fees in the amount of $462,000 to be subtracted from the maximum gross settlement amount. The Court does not have enough information to complete the full lodestar analysis at the preliminary approval stage, however, the Court finds that this litigation has been ongoing since at least March 2013, the parties have exchanged extensive amounts of data during discovery, and that data has been analyzed by experts on both sides.[8] Additionally, the parties met for three full days of in-person negotiations and held multiple teleconferences in an effort to resolve this matter. Such extensive activities over the course of nearly 18 months weighs in favor of approval.

Moreover, under the percentage-of-recovery method, the amount requested represents less than 29 percent of the total recovery by Plaintiffs—well within the range of 30 percent previously identified as reasonable. The length of the litigation and volume of discovery and data analysis, combined with the fees being a reasonable percentage of the total recovery, favor a finding that $462,000 in attorneys' fees is reasonable here. Accordingly, the Court finds attorneys' fees and costs reasonable.

In view of the foregoing, this Court finds preliminary approval of the FLSA settlement agreement appropriate.

IV. Conclusion

Based on the foregoing, the Court will grant the parties' certification of both the class and FLSA collective action. The Court also grants preliminary approval of their proposed settlement. The Final Fairness Hearing shall be held on Tuesday, October 14, 2014 at 3:00 p.m. in Courtroom 1, Mitchell H. Cohen Building and U.S. Courthouse, Camden, New Jersey. An appropriate Order accompanies this Opinion.

All Citations

Not Reported in F.Supp.3d, 2014 WL 3865853

Footnotes

1 The Court exercises federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The Court also exercises supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

2 Straight time involves wages earned for hours worked up to 40 hours per week. Overtime wages are those earned in excess of 40 hours per week.

3 The Zonar system conducts pre-trip inspections and tracks bus movements via the Global Positioning Satellite ("GPS") network.

4 A member of the Rule 23 Settlement Class may opt-out by mailing a written, signed request for exclusion to the Claims Administrator expressing his or her desire to be excluded from the Rule 23 Settlement Class. (Ex. A)

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5 The Court notes that at the motion hearing the Parties stated the amount for legal fees was $468,000. The Parties brief and the settlement agreement consistently use $462,000 as the amount allocated for attorneys' fees and costs. For the purposes of the preliminary approval, the Court uses the $462,000 figure from the Parties' filing. If the Parties believe this is an error, they should file another motion with the Court.

6 Section 216(b) requires FLSA plaintiffs to affirmatively opt-in to a FLSA collective action. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). As discussed in the preliminary approval hearing, the parties contend that the return of the proposed Claim Form sufficiently opts a Plaintiff into the suit. In support, the parties point to specific language in the Claim Form that releases Defendants from any future FLSA claims within the March 2011 to December 2013 claims period. The Court accepts that the return of the Claim Form, with the clear release language described *infra,* satisfies the opt-in requirement.

7 While factors for evaluating the fairness of a settlement in an FLSA collective action have not been definitively set out by the Third Circuit, district courts in this Circuit have utilized the *Girsh* factors established for approving Rule 23 class action settlements. *See Brumley,* 2012 U.S. Dist. LEXIS 40599, at *14.

8 To engage in complete lodestar analysis for final settlement approval, the parties may need to supplement the information provided at this stage.

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EXHIBIT 14

2016 WL 4033969
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

Joshua SKEEN and Laurie Freeman, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
BMW OF NORTH AMERICA, LLC, a Delaware limited liability company; BMW (U.S.) Holding Corp., a Delaware corporation; and Bayerische Motorenwerk Aktiengesellschaft, a foreign corporation, Defendants.

Civ. No. 2:13-cv-1531-WHW-CLW
|
Signed 07/26/2016

Attorneys and Law Firms

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OPINION

Walls, Senior District Judge

***1** In this class action arising from alleged defects in the MINI Cooper, a line of vehicles produced by Defendants BMW of North America, LLC, BMW (U.S.) Holding Corp., and Bayerische Motorenwerk Aktiengesellschaft, Plaintiffs move for final approval of the settlement between Defendants and a nationwide class of vehicle owners and an award of attorneys' fees and expenses. Defendants do not oppose the motion for final settlement approval but oppose, in part, the motion for attorneys' fees. After conducting a fairness hearing on July 14, 2016, the Court grants final certification of the settlement class, approves the settlement, and grants in part Plaintiffs' motion for attorneys' fees and expenses.

FACTUAL AND PROCEDURAL HISTORY

I. The second amended complaint

A full factual and procedural background of this case is detailed in this Court's January 6, 2016 opinion and order granting preliminary approval of the settlement and is incorporated here. ECF No. 71. This case arises from claims regarding the MINI Cooper, a line of vehicles produced by Defendants. Plaintiffs are owners or lessees of MINI Coopers who allege that, at the time of purchase, their vehicles contained a latent defect in a part of the engine known as the "timing chain tensioner" which causes the part to fail prematurely, eventually requiring replacement of that part or even the entire engine. Second Amended Complaint, ECF No. 53 ¶¶ 6-7, 61. The cars at issue are "second generation" MINI Coopers with an N12 or N14 engine: the MINI Cooper R56 (Cooper Hardtop), 2007-2010 model years; the MINI Cooper R55 (MINI Clubman), 2008-2010 model years; and the MINI Cooper R57 (MINI Cooper Convertible), 2009-2010 model years. *Id.* at 2, ¶¶ 51-52. Plaintiffs allege that Defendants made various misrepresentations and omissions in relation to the sales and marketing of the vehicles. *Id.* ¶¶ 49-50, 57, 64-66.

Named Plaintiffs in this case include individuals from Georgia, Illinois, New Jersey, Minnesota, Arizona, Pennsylvania, Florida, New York, Texas, Tennessee, and Arkansas who purchased their vehicles between June 2007 and December 2011. *Id.* ¶¶ 15-41. In the second amended complaint, filed after this action was consolidated with another case dealing with similar subject matter, *Curran v. BMW of North America, LLC*, 2:13-cv-4625, *see* Order of Consolidation, ECF No. 36; and after the Court dismissed several federal and state law claims, *see* ECF No. 9; the named Plaintiffs bring claims on behalf of themselves and a nationwide class of individuals who leased or purchased the cars at issue. ECF No. 53 at 1. Alternatively, the Plaintiffs bring claims on behalf of themselves and twelve statewide classes of individuals who leased or purchased the cars at issue in Arizona, Arkansas, California, Florida, Georgia, Illinois, Minnesota, New Jersey, New York, Pennsylvania, Texas, and Tennessee. *Id.* Plaintiffs bring a total of eighteen causes of action, including claims for breach of express warranty, *Id.* ¶¶ 98-105, breach of implied warranty, *Id.* ¶¶ 106-119, and violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq.,

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Id. ¶¶ 132-38, on behalf of themselves and the entire nationwide class. Plaintiffs also bring state law claims on behalf of the twelve statewide classes. *Id.* ¶¶ 120-337.

***2** On April 17, 2014, Plaintiff Richard Kahn filed a putative class action against Defendants in the United States District Court for the Eastern District of New York dealing with similar subject matter. *Kahn v. BMW of North America, LLC*, 2:14-cv-02463-ADS-ARL. Plaintiff Kahn's action has not yet been consolidated with this one.

II. The N14 Class settlement agreement

On November 30, 2015, Plaintiffs filed an unopposed motion for preliminary approval of class settlement with respect to owners and lessees of vehicles with an N14 engine *only* (the "N14 Class"). ECF No. 70. On January 6, 2016, the Court granted preliminary approval, certifying the settling Class for purposes of settlement only and issuing instructions to begin notifying Class members. ECF No. 72. On July 14, 2016, the Court presided over a fairness hearing as required by Federal Rule of Civil Procedure 23(e). In the interim, 5,310 Class members submitted claims under the settlement, 23 class members objected to the settlement, and 123 opted out. P. Mot. Final Approval Settlement Agreement, Supp. Decl. Matthew J. McDermott in Support Supp. Mot. Approve Settlement ("Supp. McDermott Decl."), ECF No. 107-1 ¶¶ 13-18. No objections were raised at the fairness hearing.

A. The N14 Class

The settlement agreement defines the "N14 Class" and "N14 Vehicles" as:

> [a]ll persons or entities in the United States, the District of Columbia, and Puerto Rico who currently own or lease, or previously owned or leased, a model-year 2007 through 2009 MINI Cooper 'S' Hardtop (R56), a model-year 2008 through 2009 MINI Cooper 'S' Clubman (R55), or a model-year 2009 through 2010 MINI Cooper 'S' Convertible (R57) vehicle, manufactured at any time from start of production in November 2006 through July 2010.

Declaration Raymond P. Boucher, ECF No. 69-3 Ex. 1, Settlement Agreement and Release at 4 (the "N14 Class Vehicles" and the "N14 Class"). Named Plaintiffs who purchased only vehicles containing N12 engines are *not* included in the N14 Class. *Id.* at 2 n.1. Also excluded from the N14 Class are:

> Defendants, as well as Defendants' affiliates, employees, officers and directors, attorneys, agents, insurers, their-party providers of extended warranty/service contracts, franchised dealers, independent repair/service facilities, fleet owners and operators, rental companies and vehicles, the attorneys representing Defendants in this case, the Judges and Mediator to whom this case is assigned and their immediate family members, all persons who request exclusion from (opt-out of) the Settlement, vehicles deemed a total loss (other than vehicles whose engines failed or were damaged due to timing-chain tensioner and/or timing chain failure), vehicles whose true mileage is unknown, all persons who previously released any claims encompassed in this Settlement, and vehicles transported outside the United States.

Id. at 4-5.

B. The settlement terms

1. Relief for N14 Class members

If the Court grants final approval to the settlement agreement, Defendants agree to dismiss this action with prejudice with respect to *all* Plaintiffs, and N14 Class members "will be forever barred and enjoined from pursuing any claims" resolved by the settlement. *Id.* at 16, 31-33.

In consideration, Defendants have agreed to provide N14 Class members with four primary types of relief. First, N14 Class Vehicles will receive a warranty extension for the timing-chain tensioner and timing chain for seven years or 100,000 miles from the date when the vehicle was first placed into service, whichever comes first, subject to certain exceptions. *Id.* Second, N14 Class members who submit claims by the relevant deadlines are entitled to reimbursement for out-of-pocket expenses incurred before the effective settlement date for repair and/or replacement of the timing chain and/or timing-chain tensioner, subject to certain limitations. *Id.* at 17-18. Class members are entitled to 100% of costs incurred at authorized MINI dealers and up to $120 for timing-chain tensioners and $850 for timing chains repaired or replaced at independent service centers. *Id.* Third, N14 Class members who submit timely claims are entitled to reimbursement for up to $4,500 in out-of-pocket expenses incurred before the effective settlement date for repair and/or replacement of an engine because of timing-chain tensioner and/or timing

chain failure, subject to discounts based on mileage and the amount of time since their vehicle was first placed into service, as well as certain other limitations. *Id.* at 19-20. Finally, N14 Class members who submit timely claims are entitled to compensation of up to $2,250 if they had to sell their vehicle at a loss before the effective settlement date due to an unrepaired damaged or failed engine caused by timing-chain tensioner and/or timing chain failure, again subject to discounts based on mileage and the time since their vehicle was first placed into service, as well as certain other limitations. *Id.* at 21-22.

***3** The settlement requires N14 Class members to complete and submit a claim form, either online or by mailing a hard copy, providing information and documentation about their N14 Vehicle(s), routine maintenance, repairs, and sale. P. Mot. Final Approval Settlement Agreement, ECF No. 92 at 15; *see also* Notice and Claim Form, Decl. Matthew J. McDermott in Support Mot. Approve Settlement ("McDermott Declaration"), ECF No. 92-4 Ex. A. If the Court grants final approval to the settlement agreement, the Settlement Administrator will review each timely claim and initially decide whether to grant or deny each claim. ECF No. 92 at 15; ECF No. 92-4 Ex. A § K. Granted claims will be submitted to Defendants for final approval. ECF No. 92 at 15-16; Settlement Agreement and Release, ECF No. 69-3 Ex. 1 ¶ III.E.2. The Settlement Administrator will notify each Class member whose claim is denied, in whole or in part, of the reason for the denial and the steps the Class member may take to cure any deficiencies in his or her claim. ECF No. 92 at 15; ECF No. 69-3 Ex. 1 ¶ III.E.1. Class members who cannot cure the deficiencies may notify Class Counsel of their wish to appeal the denial, eventually submitting any dispute to an agreed-upon Special Master for a binding determination. ECF No. 92 at 16; ECF No. 69-3 Ex. 1 ¶ III.E.3.

2. Attorneys' fees and expenses

The Parties agreed that, if the Court grants final approval of the settlement agreement, Class Counsel may seek an award of up to $2,320,000 in fees and expenses. ECF No. 69-3 Ex. 1 ¶ VIII.B. Defendants will not object to an award of up to $1,820,000. *Id.* Class Counsel may also move for service awards of up to $4,000 for each of the Named Plaintiffs in the Class without objection from Defendants. *Id.* ¶ VIII.C. All attorneys' fees and expenses, service awards, and expenses incurred administering the settlement agreement shall be paid by Defendants in addition to, and will not reduce, any relief paid to Class members who submit valid claims. *Id.* ¶ VIII.A.

C. Notice to N14 Class members

In its order granting preliminary approval of the settlement agreement, this Court directed the parties to serve notice of the settlement on all N14 Class members by February 20, 2016, 45 days after the order, and set a deadline of June 20, 2016 for Class members to submit claims, request exclusion from the Class, or object to the settlement. ECF No. 72 at 2.

The Parties selected Class Action Administration LLC ("CAA") as the Claims Administrator for this settlement. ECF No. 92-4 ¶ 1; ECF No. 107-1 ¶ 1. CAA located records for 186,031 N14 Class members representing 80,224 N14 Class Vehicles. ECF No. 92-4 ¶ 4. Of these, 185,582 records had mailing addresses, and 111,893 had email addresses. *Id.*

CAA emailed notices of the settlement to addresses associated with 111,843 Class Vehicles on February 19, 2016 and 50 Class Vehicles on May 2, 2016. *Id.* ¶ 8. Delivery failed for 631 of these addresses, resulting in a success rate of over 94 percent. ECF No. 107-1 ¶ 4. Before February 19, 2016, CAA also established a website, www.TimingChainTensionerSettlement.com, containing information about the settlement and blank copies of the claim form for N14 Class members, ECF No. 92-4 ¶ 10, and a toll-free telephone number for Class members to seek information about the settlement. *Id.* ¶ 12. Telephone operators took 3,992 calls from Class members and other individuals between February 19, 2016 and July 6, 2016, and the website had 116,591 document downloads and page views during the same period. ECF No. 107-1 ¶¶ 6-9.

Because of a "communication error" between the Parties and CAA and delays obtaining Class member contact information from several state motor vehicle agencies, *see* Letter Request for Supplemental Notice Program, ECF No. 88 at 1, CAA mailed notices and claim forms to only 80,000 N14 Class members on February 19, 2016. ECF No. 92-4 ¶ 6. CAA mailed an additional 92,201 notice packets to Class members on February 26, 2016, 11,366 notice packets on March 23, 2016, 1,221 notice packets on May 2, 2016, and 794 notice packets on May 19, 2016, for a total of 185,582 notice packets mailed to Class members. *Id.* After multiple attempts, delivery failed for 6,581 of these addresses, resulting in a success rate of over 96 percent. ECF No. 107-1 ¶ 7.

At the request of the Parties, this Court extended the deadline for N14 Class members to submit claims to July 21, 2016 for Class members from Kansas, New Hampshire,

Oklahoma, and Pennsylvania; ECF No. 89 at 1-2; August 29, 2016 for Class members from Hawaii, *Id.* at 2; and July 1, 2016 for all other Class members, *Id.* at 2; and extended the deadline for all Class members to opt out of or object to the settlement to July 1, 2016. *Id.* at 1. CAA updated the settlement website to reflect the extended deadlines before June 20, 2016. ECF No. 107-1 ¶ 11. On June 20, 2016, CAA mailed supplemental notice postcards to a total of 13,141 Class members in Kansas, Oklahoma, New Hampshire, Pennsylvania, and Hawaii, and emailed a supplemental notice to all 111,893 email addresses on file. *Id.* ¶ 12.

D. N14 Class member claims, requests for exclusion, and objections

***4** According to Plaintiffs, as of July 6, 2006, a total of 5,310 N14 Class members have submitted claims under the settlement agreement, and 2,064 claims have been approved. The remaining claims are under review or are awaiting supplemental documentation from Class members. *Id.* ¶¶ 17-18. One hundred and twenty three Class members have opted out of the settlement, and 23 Class members have submitted objections to the settlement on various grounds. *Id.* at ¶¶ 13-16; *see* ECF Nos. 75, 77-85, 96-98, 100-01, 103-04, 106. The Court will address each of these objections individually in this opinion.

E. Motions for final approval of settlement and attorneys' fees

On May 19, 2016, Plaintiffs moved for an award of $2,320,000 in attorneys' fees and expenses for Class Counsel. ECF No. 86. Defendants filed a brief in opposition on June 16, 2016, arguing that the Court should award Class Counsel only $1,820,000 in attorneys' fees and expenses. ECF No. 90.

On June 20, 2016, Plaintiffs filed an unopposed motion seeking an order granting final certification of the N14 Class for settlement purposes, final approval of the settlement, and relief for N14 Class members under the terms of the settlement agreement. ECF No. 92. Plaintiffs filed a supplemental motion on July 7, 2016 containing updated information about Class member responses and discussing objections filed after June 20, 2016. ECF No. 107.

The Court held a fairness hearing regarding both issues as required by Federal Rule of Civil Procedure 23(e) on July 14, 2016.

DISCUSSION

Before granting approval of the settlement agreement, the Court must consider: (1) whether the N14 Class can be certified under Federal Rule of Civil Procedure 23; (2) whether notice to the Class was adequate; (3) whether the settlement is fair, reasonable, and adequate; and (4) whether Plaintiffs' proposed provision for attorneys' fees and costs is reasonable.

I. Final Class certification is appropriate

The Court earlier granted conditional N14 Class certification, and now "final settlement depends on the finding that the class met all the requisites of Rule 23." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig. ("GM Truck Prods.")*, 55 F.3d 768, 797 (3d Cir. 1995). Under Rule 23(a), the Court must find that (1) the Class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the Class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Class, and (4) the representative parties will fairly and adequately protect the interests of the Class. Fed. R. Civ. P. 23(a). Rule 23(b)(3), under which Plaintiffs seek class certification, additionally requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Plaintiffs bear the burden of demonstrating that Rule 23's requirements are met by a preponderance of the evidence, and the Court "must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 306 (3d Cir. 2008).

1. Numerosity

Rule 23(a)(1) requires that it be impracticable to join all class members, but there is "no minimum number of

members needed for a suit to proceed as a class action." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012). Though Rule 23(a)(1) "requires examination of the specific facts of each case," the numerosity requirement is generally met "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40." *Id.* (citations omitted). Here CAA identified 186,031 N14 Class members representing 80,224 N14 Class Vehicles. ECF No. 92-4. ¶ 4. The Court finds that the numerosity requirement is satisfied.

2. Commonality

***5** Under Rule 23(a)(2), the Named Plaintiffs must "share at least one question of law or fact with the grievances of the prospective class." *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001) (citations omitted). Class claims "must depend upon a common contention ... of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The commonality requirement is met here. Because, as Plaintiffs represented when seeking preliminary approval of the settlement, "[a]ll Class Vehicles had the allegedly defective timing chain tensioner installed," P. Mot. Preliminary Approval, ECF No. 70 at 21, "the claims of the Class Representatives and the Settlement Class are predicated on the core common issue as to whether Defendants are liable for the damages suffered" by Class members as a result of the defective part. *Id.*

3. Typicality

Under Rule 23(a)(3), the Named Plaintiffs' claims must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The typical inquiry is intended to assess ... whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Meal v. Casey*, 43 F.3d 48, 57-58 (3d Cir. 1994). "This investigation properly focuses on the similarity of the legal theory and legal claims; the similarity of the individual circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 597-98 (3d Cir. 2009).

Plaintiffs' claims, "for settlement purposes only," are identical to the N14 Class claims. ECF No. 70 at 22. Plaintiffs represent that "[a]ll Class Members assert that Defendants knowingly placed Class Vehicles containing the alleged defect into the stream of commerce and refused to honor its warranty obligations" and that "all Class Members assert the same or similar legal theories of liability against Defendants." *Id.* The Court finds that the typicality requirement is satisfied.

4. Adequacy of representation

The Court must determine whether "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court considers whether the Named Plaintiffs have "the ability and the incentive to represent the claims of the class vigorously, that [they have] obtained adequate counsel, and that there is no conflict between the [Named Plaintiffs'] claims and those asserted on behalf of the class." *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988). In this case, counsel is adequate. Plaintiffs claim that counsel are "exceedingly experienced and competent in complex litigation and have an established track record in litigating complex class action suits." ECF No. 70 at 22. As discussed, Plaintiffs' claims are also representative of those of all N14 Class members, and Plaintiffs "have no interests antagonistic to the class." *Id.* at 23. Though the Named Plaintiffs stand to recover payments of $4,000 each above the other consideration provided in the proposed settlement, thereby out-recovering other Class members, "this amount accords with the effort Plaintiff[s have] taken to purse the class' claims." *Weissman v. Gutworth*, 2015 WL 333465 at *4 (D.N.J. May 26, 2015) (Walls, J.). The Court finds that the adequacy requirement of Rule 23(a)(4) is satisfied.

5. Rule 23(b)(3)

Rule 23(b)(3) includes two requirements: that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The "predominance" requirement demands that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem v. Windsor*, 521 U.S. 591, 624 (1997). "[T]he focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the

defendant's conduct." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 298 (3d Cir. 2011).

***6** As explained, Plaintiffs alleged in their motion for preliminary approval that Defendants installed the defective timing chain tensioner in *all* N14 Class Vehicles. ECF No. 70 at 21. Because the claims of each N14 Class member — under federal and/or state law — proceed from this common factual nucleus, all of the claims uniformly turn on "(a) whether Defendants knew or should have known that the Class Vehicles contained the alleged defect when it placed them into the stream of commerce; (b) whether Defendants have a duty to honor its warranty on the Class Vehicles; and, (c) whether Defendants, in refusing to honor the Class Vehicles' warranty, violated applicable federal and state consumer protection laws." *Id.* at 24. The Court finds that these common questions of law or fact predominate over any questions affecting only individual class members.

The Rule 23(b)(3) superiority requirement "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Warfarin Sodium Antitrust Litig. ("Warfarin Sodium")*, 391 F.3d 516, 533-34 (3d Cir. 2004) (citations and quotations omitted). The Court looks at "(1) the interest of individual members of the classes in controlling the prosecution of the action, (2) the extent of litigation commenced elsewhere by class members, (3) the desirability of concentrating claims in a given forum, and (4) the management difficulties likely to be encountered in pursuing the class action." *Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141, 149-50 (3d Cir. 2008).

Considering these factors, the again Court finds that a class action is the superior method of adjudicating N14 Class members' claims. The class action "offers prompt relief to the class members and averts the undue costs they would incur in prosecuting their claims individually." *Weissman*, 2015 WL 333465 at *5. Out of the nearly 200,000 members of the N14 Class, over 5,000 submitted claims after receiving notice of the settlement. ECF No. 92 at 2. It is far more desirable to allow these Class members to obtain relief under the terms of the settlement in this district than to require them to file an additional 5,310 actions in courts across the country. And although Defendants admit that they faced some initial difficulties obtaining motor vehicle records and notifying Class members of the settlement, *see* ECF No. 88, the Court has no reason to doubt that "management difficulties" will prevent Defendants from processing Class members' claims.

Because the Court has found that the proposed class action satisfies the requirements of Rules 23(a) and (b), the Court will certify the Class defined in the parties' settlement agreement.

II. Class notice was proper

Members of a class certified under Rule 23(b)(3) must be provided with "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Due process requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re National Football League Players Concussion Injury Litig.*, 821 F.3d 410, 435 (3d Cir. 2016) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The notice must "clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B).

***7** The notice provided to N14 Class members met those requirements. It described the proposed settlement, its terms, and the nature of the claim filed on behalf of the Class. *See* 92-4 Ex. A. It also described Class members right to be excluded from the settlement, to object, and to be heard at the final fairness hearing. *Id.* at 1, 6, 7. The notice also advised Class members of the binding effect the settlement would have on individuals who did not opt out of the Class. *Id.* at 6. Though the hearing was rescheduled from its original date, *see* ECF No. 76, the notice informed Class members that "the date and time of the hearing are likely to change" and directed them to visit the settlement website or call the toll-free number for updated information. *Id.* at 7. Class members were also provided with email notice of the change in hearing date and claim submission deadlines. *See* ECF No. 107-1 ¶ 12.

Notice forms were emailed to 111,893 individuals and delivery failed for 631, for a 94 percent email success rate. ECF No. 107-1 ¶¶ 4-5. Notice forms were also mailed to 185,582 individuals, and 6,581 were returned as undeliverable, for a 96 percent success rate. *Id.* ¶¶ 3-3. The Court finds that the notice met the requirements of Fed. R. Civ. P. 23(c)(2)(B). *See*, e.g., *Weissman*, 2015 WL 3384592, at *4 (Class notice was proper where Defendants mailed notice forms with 86 percent success rate).

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III. The settlement is fair, reasonable, and adequate

A. Legal standard

District courts must review settlement terms in a class action and, "if the proposal would bind class members, the court may approve it only after a hearing and on rinding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The court "acts as a fiduciary, guarding the claims and rights of the absent class members." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010). The Third Circuit Court of Appeals identified nine factors that bear on this analysis in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975):

(1) the complexity and duration of the litigation;

(2) the reaction of the class to the settlement;

(3) the stage of the proceedings;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining a class action;

(7) the ability of the defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement in light of the best recovery; and

(9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

GM Truck Prods., 55 F.3d at 785-86 (citing *Girsh*, 521 F.3d at 157).

In addition to the *Girsh* factors, the Third Circuit encourages district courts to consider additional factors, such as the probable outcome of a trial on the merits, the probable outcome of claims by other classes, and the reasonability of any provisions for attorneys' fees. *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions ("Prudential")*, 148 F.3d 283, 323 (3d Cir. 1998). The "*Prudential* considerations are just that, prudential." *In re Baby Products Antitrust Litig. ("Baby Products")*, 708 F.3d 163, 174 (3d Cir. 2013). Finally, the Third Circuit has guided that an important consideration is "the degree of direct benefit provided to the class," including "the size of the individual awards compared to claimants' estimated damages." *Id.*

Though a district court must vigorously protect the interests of absent class members, it also owes deference to a settlement as the negotiated agreement of private parties. As the Third Circuit explained, "[s]ettlements are private contracts reflecting negotiated compromises. The role of a district court is not to determine whether the settlement is the fairest possible resolution [but only whether] the compromises reflected in the settlement ... are fair, reasonable and adequate when considered from the perspective of the class as a whole." *Id.* at 173-74 (citation omitted).

B. Analysis

***8** The Court finds that the *Girsh* factors and *Prudential* considerations weigh in favor of approving the settlement.

1. *Girsh* factor one: Complexity and duration of litigation

The first *Girsh* factor considers the complexity and likely duration of litigation without settlement. *GM Truck Prods.*, 55 F.3d at 785. This factor favors approving a settlement when resolution of the claims by trial would require "additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial." *Warfarin Sodium*, 391 F.3d at 536. The action here, which has been pending for over three years, would require the analysis of records from "hundreds of consumers," expert opinions on complex mechanical issues, and the resolution of claims under federal law and the laws of several different states. ECF No. 92 at 20-21. The first *Girsh* factor favors final approval of the settlement.

2. *Girsh* factor two: reaction of the Class

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement." *Prudential*, 148 F.3d at 318. Although the Third Circuit has warned that district courts should be "cautious about inferring support from a small number of objectors in a sophisticated settlement," *Warfarin Sodium*, 391 F.3d at 536 (quoting *GM Truck Prods.*, 55 F.3d at 812), courts typically "analyze this factor by counting the number of objectors

and weighing the vociferousness of their objections," as well as by counting the number of Class members who submit claims. *Martina v. L.A. Fitness Intern., LLC*, 2013 WL 5567157, at *5 (D.N.J. Oct. 8, 2013) (Walls, J.) (citing *Prudential*, 148 F.3d at 318; *GM Truck Prods.*, 55 F.3d at 812).

Of the 186,031 N14 Class members, 5,310 submitted claims, 123 opted out, and 23 submitted objections.[1] ECF No. 107-1 ¶¶ 13-18. The percentage of Class members who submitted a claim is small, a factor that this Court has previously held may "cancel[ ] out" a low objection rate. *Martina*, 2013 WL 5567157, at *5-6. As Plaintiffs point out, however, the low response rate in this case is perhaps expected: according to Defendants, the defect rate in Class Vehicles is "in the single digits," so the vast majority of Class members did not suffer harm and may have no reason to seek repair or replacement of their timing chains or timing chain tensioners. *Id.* at 21 n.9.

Twenty-three Class members, or approximately 0.01 percent of Class, objected to the settlement. Most of the objectors argue either that (a) the settlement's warranty extension is inadequate because it does not cover their vehicles, or (b) the requirement that Class members provide documentation of their vehicles' service history to receive repair reimbursements is unduly burdensome The Court considers the 23 Class member objections individually:

a. Objection of Kunal A. Mirchandani

***9** Class member Kunal A. Mirchandani submitted an objection on February 29, 2016, arguing that the settlement agreement puts an unreasonable burden on Class members to provide documentation of the service histories of their Class Vehicles. ECF No. 75. Mr. Mirchandani claims that the requirement that Class members document their Vehicles' maintenance and repair history to receive reimbursement is unfair to the owners of used vehicles, who may not have the previous owners' service records, as well as to individuals who "may simply have discarded the records." *Id.* at 2-3. Although Mr. Mirchandani acknowledges that Class members may submit an affidavit of service from a mechanic in lieu of other documentation, he argues that mechanics are unlikely to remember servicing vehicles and that requiring Class members to obtain multiple affidavits if multiple mechanics have serviced a Vehicle is unreasonable. *Id.* at 3-4.

The Court agrees with Plaintiffs that the settlement's documentation requirement is not unreasonable. Plaintiffs claim that, even if individual mechanics do not recall servicing individual vehicles, "most, if not all, mechanics have access to a database ... which would allow them to quickly and easily search the maintenance history of any given car that had service performed at that shop." ECF No. 92 at 22. The claims of 2,064 Class members have already been approved, demonstrating that the burden is not unduly onerous. ECF No. 107-1 ¶¶ 17-18. Finally, despite Mr. Mirchandani's claim that "Defendant is in a better position [than Class members] to research and review service records through its own dealership network," ECF No. 75 at 2, Plaintiffs claim that Defendants are *not* in a better position because they "do not have a central registry of dealer records or access to them." ECF No. 92 at 22.

b. Objection of Jody Williams

Class member Jody Williams filed an objection to the settlement agreement on March 10, 2016, arguing that the warranty extension provided by the settlement is too short and will not protect her 2007 MINI Cooper S hard top if it begins to "show signs of the timing chain problem in a year or two." ECF No. 77. Ms. Williams also states that she contacted her local MINI dealership to have her vehicle inspected, but that the dealership "won't even look at my vehicle unless it shows symptoms of the timing chain problem." *Id.* at 1.

Plaintiffs do not deny that the warranty on Ms. Williams's vehicle, the very first model year in the Class, has already expired even under the extended terms of the settlement. ECF No. 92 at 22-23. The Court agrees with Plaintiffs, however, that the Court's job is "not to determine whether the settlement is the *fairest possible* resolution." *Baby Products*, 708 F.3d at 173 (emphasis added). With regard to the amount of relief offered under the settlement and the Class members receiving that relief, "lines must be drawn somewhere." ECF No. 92 at 23 (quoting *Alin v. Honda Motor Co., Ltd.*, 2012 8751045, at *12 (D.N.J. Apr. 13, 2012) (finding that class settlement with auto manufacturer was reasonable where the "largest category of objections comes from customers whose cars were too old, or had too many miles to be eligible for recovery according to the lines drawn in the agreement)).

Ms. Williams does not convince the Court that the seven-year warranty provided by the settlement, though perhaps not the fairest possible resolution, is unreasonable. The limited warranty extension reflects the reality that cars decline in value over time. *See*, e.g., *In re Dispirito*, 371 B.R. 695, 701 n.6 (Bankr. D.N.J. 2007) ("Whether a vehicle is driven 30,000 miles a year, or only on Sundays

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by an elderly parent to go back and forth to church, there can be no dispute that a vehicle's value is likely to decrease daily."). A warranty extension need not be indefinite to be reasonable.

In any event, the settlement provides Ms. Williams with other forms of relief: as Plaintiffs point out, the settlement allows Class members to receive reimbursement for repairs and replacements on their timing chains and timing chain tensioners regardless of the age or mileage of the Class Vehicle, along with a graduated reimbursement for engine replacements. ECF No. 92 at 22. According to Plaintiffs, Ms. Williams and other Class members had notice of the alleged defects in their vehicles and were encouraged to seek free inspections and repairs long before the beginning of the claims period: Defendants instructed Class members to seek inspections of their vehicles in October 2013, informing them that any necessary timing chain and tensioner repairs would be done "at no cost" to the Class members, and MINI mechanics were instructed to provide inspections and repairs of the timing chain and timing chain tensioner free of charge. *Id.* at 22-23; *see also* Decl. Raymond P. Boucher in Support P. Mot. Attorneys' Fees, ECF No. 86-6 Ex. 1 (sample letter informing Class member that "your vehicle may have been fitted with a faulty chain tensioner which may lead to an insufficiently tightened timing chain," instructing Class member to "contact your authorized MINI dealer at your earliest convenience to arrange an appointment," and informing Class member that "the repair will be done at no cost to you"). That Ms. Williams's dealership allegedly refused to inspect her vehicle is troubling and may indicate non-compliance with the terms of the settlement agreement, but this does not affect the fairness, reasonability, or adequacy of the settlement itself.

c. Objection of Richard I. Ellenbogen

***10** Richard I. Ellenbogen filed an objection on March 11, 2016, arguing that the settlement is unreasonable because the extended warranty does not cover vehicles, like his, that fall outside the time limit but have low mileage and may display defects in the future. ECF No. 78. Mr. Ellenbogen seeks either an extension of the warranty to 75,000 miles without regard to the number of years or a complete recall repair of all Class Vehicles. *Id.* Plaintiffs note that Mr. Ellenbogen submitted a written request for exclusion on June 22, 2016. *See* ECF No. 107-1 Ex. C (opt-out list identifying Mr. Ellenbogen). Because Mr. Ellenbogen has requested exclusion from the N14 Class, he no longer has standing to object to the settlement. *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 110 (D.N.J. 2012) ("The case law does not suggest that a class member requesting exclusion from a settlement may nonetheless object to that settlement.")

d. Objection of Jerry D. Phillips

Jerry D. Phillips filed an objection to the settlement on March 11, 2016, arguing that the service record documentation requirement is "particularly onerous" for the same reasons mentioned by Mr. Mirchandani, that MINI should turn over any service records it possesses to Class Members, and that the warranty extension is insufficient for the same reasons mentioned by Ms. Williams and Mr. Ellenbogen. ECF No. 79. For the reasons discussed, none of these arguments renders the settlement unfair, unreasonable, or inadequate.[2]

e. Objection of Thomas Brischler

Thomas Brischler filed an objection on March 23, 2016, arguing again that the warranty extension is too short. ECF No. 80. Mr. Brischler acknowledges that, even though his vehicle does not fall under the extended warranty, he is eligible for reimbursement for timing chain and timing chain tensioner repairs or reimbursements, but states that he has not sought repairs because he will not be entitled to reimbursement if this Court rejects the settlement agreement. *Id.* at 1-2. Mr. Brischler seeks a warranty extension and an extension of the claims period after the effective settlement date. *Id.* at 2. Mr. Brischler is correct that the finality of the settlement depends on the Court's approval, but this is not reason for the Court to withhold its approval.

f. Objection of Anthony Mazzarella

Anthony Mazzarella filed an objection on April 8, 2016, arguing that his 2007 Base/Standard MINI Cooper, which is not a Class Vehicle, should be included in the N14 Class. ECF No. 81. As Plaintiffs argue, Mr. Mazzarella has no standing to make an objection on the basis of this vehicle because it is not a Class Vehicle. ECF No. 92 at 24.

g. Objection of Jenean C. Cordon

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Jenean C. Cordon filed an objection on April 12, 2016, arguing that the warranty should be extended to ten years after the in-service date. ECF No. 82. For the reasons discussed, the Court finds that this does not demonstrate the settlement agreement is unreasonable, unfair, or inadequate.

h. Objection of Oona Robinson

Oona Robinson filed an objection on April 15, 2015, arguing that the settlement should "compensate people fully for the financial impact incurred" as a result of the alleged defects. ECF No. 83. Ms. Robinson seeks a payment of $49,500, representing approximately $4,500 in repairs for her Class Vehicle over five years of ownership and $45,000 that she spent on a new car to replace her Class Vehicle. To repeat, Ms. Robinson is entitled, with limitations, to reimbursement for repairs and replacement of the timing chain, tensioner, and engine. *See* ECF No. 92. As to Ms. Robinson's request that Defendants be required to compensate Class members in full for the purchase of "replacement" vehicles, the Court finds that this would be unreasonable: not only, as Plaintiffs argue, does this argument "not take into account the nature of a settlement," which generally involves some sort of compromise, ECF No. 92 at 25, but it would provide a windfall to Class members whose replacement vehicles were more expensive than their Class Vehicles. This requirement would also ignore that, because vehicles decline in value with time and mileage, individuals are *always* likely to spend some amount of money when purchasing a new vehicle to replace an old one, even if the old vehicle is free of defects.

i. Objection of Gary Kaufman

***11** Gary Kaufman filed an objection on April 11, 2016, arguing that the warranty extension is inadequate because it does not cover his vehicle. ECF No. 84. It is unclear whether, at the time he filed the objection, Mr. Kaufman had taken his vehicle in for repairs or whether he had declined to repair it, believing that he would have to pay for engine repairs himself. *Id.* at 1. In any event, the Court repeats that Mr. Kaufman, like all Class Members, is eligible for reimbursement for part repairs and replacements made before the effective date of the settlement. *See* ECF No. 92 at 25.

j. Objection of LaTonya Curtis

LaTonya Curtis filed an objection on May 16, 2016, arguing that the general terms of the settlement are insufficient. ECF No. 85. Ms. Curtis is the owner of a 2010 MINI Cooper Clubman S, which is not an N14 Class Vehicle. Ms. Curtis lacks standing to challenge the settlement.

k. Objection of Timothy Fitzgerald

Timothy Fitzgerald submitted an objection to Defendants on June 3, 2016, arguing, for reasons already discussed, that the warranty extension is not long enough. ECF No. 92-5 Ex. 11. In the event the Court does not extend the warranty, Mr. Fitzgerald requests to be excluded from the N14 Class. *Id.* at 1. The Court grants this request.

l. Objection of James. M. Ward

On June 13, 2016, James M. Ward filed an objection to the settlement, arguing that the settlement should include compensation for Class members who sold their Class Vehicles at a loss *after* repairing the engine. ECF No. 97. Mr. Ward seeks compensation for "all or part of the $18,559.43" price at which he bought his Class Vehicle. *Id.* at 1. Again, this objection ignores the reality that even non-defective cars decline in value after their purchase. As discussed, Mr. Ward is also entitled to reimbursement for repairs and replacements made on his Class Vehicle.

m. Objection of Jamye C. Brown

On June 20, 2016, Jamye C. Brown filed an objection to the settlement agreement, arguing again that the extended warranty is too short and does not cover her Class Vehicle and that the engine repair provision is unreasonable. ECF No. 96. Ms. Brown states that, in response to MINI'**S** 2013 recall, she brought her vehicle to a "qualified Mini dealership," where the timing chain tensioner was repaired free of charge. *See id.* at 1, 5. Damage to the engine rendered the vehicle unusable, however, and Ms. Brown did not replace the engine because she would be entitled to reimbursement for only ten percent of the cost. *See id.* at 4, 5 (2009 model, 57,125 miles); ECF No. 92 at 13 (engine repair or replacement schedule).

Again, the Court agrees with Plaintiffs that the reimbursement schedule and warranty limitation reflect a need to "draw the line" somewhere and the reality that vehicles decline in value over time.

n. Objection of Gregory Munro

On June 20, 2016, Gregory Munro filed an objection to the settlement. ECF No. 98. Mr. Munro, a law professor, argues that (a) the warranty extension is not long enough to provide relief to owners of old or high mileage Class Vehicles under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, (b) there has been "inadequate discovery into the conduct of defendants" regarding the alleged defects and defendants' knowledge of the defects, and (c) the settlement does not include reimbursement for other expenses, including towing charges, travel expenses, and the cost of substitute vehicles, that might be available as "consequential damages" in a tort action. *Id.* at 1. Mr. Munro also argues that the settlement agreement "does not address" an allegedly defective oil system in the Class Vehicles "that may have been a substantial factor in the timing chain failures." *Id.* at 4-5.

***12** Mr. Munro is correct that the owners of Class Vehicles who repaired or replaced failed engines or who sold their vehicles at a loss when the vehicles had certain combinations of mileage and age, *see* ECF No. 92 at 13, 14, are not entitled to compensation for the engine repairs or sales under the terms of the settlement. ECF No. 98 at 2, 4. Mr. Munro claims this is unreasonable because the Magnuson-Moss Warranty Act "does not place mileage restrictions on the remedies for damages," so the settlement does not provide owners of high-mileage or older vehicles with the maximum award that they could collect under the statute. *Id.* at 2. Mr. Munro also argues that the settlement does not allow Class members to collect the "myriad consequential damages," such as towing and travel charges, that are sometimes available as tort remedies. *Id.* at 1. The Court repeats, however, that settlements need not provide maximum relief to be reasonable and fair. "Settlements are private contracts reflecting negotiated compromises," including the elimination of risk for both parties associated with litigation, and they need not be the "fairest possible resolution." *Baby Products*, 708 F.3d at 173. As the Court will explain, the eighth and ninth *Girsh* factors require the Court to weigh the "range of reasonableness of the settlement in light of the best recovery," against the "the range of reasonableness of the settlement in light of all the attendant risks of litigation." *GM Truck Prods.*, 55 F.3d at 785. The Court analyzes the fairness of the settlement in light of these factors, not simply by looking at the "best recovery" alone.

Mr. Munro also suggests that the settlement is unreasonable because the Parties did not engage in sufficient factual discovery. ECF No. 98 at 4. Mr. Munro claims that he submitted information about his vehicle to Class Counsel and was told that counsel would be "unable to provide any assistance." *Id.* As a result, he is "dubious about whether enough outreach" was performed "to allow any kind of a statistical analysis of the extent of the problem to advise the settlement." *Id.* The Court will not question the veracity of Plaintiffs' claim that "Plaintiffs' Counsel not only had the benefit of the input and service records from their approximately two dozen clients but also communicated with hundreds of consumers ... who had experienced the defect." ECF No. 69-3 ¶ 11. In any event, even if Class Counsel did not select Mr. Munro as a Named Plaintiff, Class Counsel *did* communicate with Mr. Munro and did receive information from him about his vehicle.

Mr. Munro also speculates that because "defendants made no responses to the discovery propounded to them and no depositions were taken," Plaintiffs had little factual basis for their settlement. ECF No. 98 at 4. As the Court will discuss in its analysis of *Girsh* factor three, however, other courts have found this amount of discovery adequate to support a settlement agreement.

Finally, Mr. Munro objects to the settlement because it does not require Defendants to disclose that the Class Vehicles featured an allegedly defective oil system, including dip sticks that are "difficult if not impossible to read." ECF No. 98 at 4. Mr. Munro claims this oil system "may have been a substantial factor in the timing chain failures." *Id.* This allegation seems to stem entirely from Mr. Munro's own experience seeking service for his own vehicle. *Id.* at 3-4. Plaintiffs' second amended complaint does not allege that the oil systems in any of the Class Vehicles were defective, and Plaintiffs deny receiving any notice of allegedly defective oil systems from the mechanic they retained as an expert in this cast. ECF No. 53; ECF No. 107 at 6. The Court will not require Defendants to make admissions about subjects that are not at issue in the case.

o. Objection of John Nemelka

John Nemelka filed an objection to the settlement date June 15, 2016, objecting to the caps on reimbursements for Class members whose timing chain or timing chain tensioners were repaired at independent service centers. ECF No. 100. Mr. Nemelka states that, in December 2015,

he had his Class Vehicle repaired at an independent service center, rather than at his local BMW dealership, to "save money." *Id.* at 1. The repair cost $1,778.45. *Id.* Mr. Nemelka correctly states that, had the repair been done at the BMW dealership, he would be entitled to a full reimbursement under the settlement terms. Because the repair was conducted by a third party, he is entitled to only $970.

To repeat, Defendants informed Class members of the alleged timing chain and tensioner defect in October 2014 and instructed them to seek repairs, free of charge (and subject to a full reimbursement), at authorized MINI service centers. *See* ECF No. 86-6 Ex. 1. Plaintiffs explain that Defendants required a cap on reimbursements for repairs from third-party service centers because they have no control over the prices charged at third-party centers. Particularly in light of the early disclosure about repairs at authorized MINI service centers, the Court finds that the cap on reimbursements for repairs at independent service centers is not unreasonable.

p. Objection of James Jones

***13** James Jones submitted an objection, dated June 19, 2016, that was filed in this Court on June 29, 2016. ECF No. 101. Mr. Jones objects to the settlement on three grounds: first, that the settlement does not provide relief for owners of Class Vehicles that have not yet displayed any defects; second, that the documentation requirement for reimbursement is unduly burdensome, especially for the owners of used Class Vehicles; and third, that the final approval hearing should not be held until the deadline to submit objections has expired.

The Court disagrees with Mr. Jones's first and second objections for the reasons already discussed; the settlement allows Class members to receive repairs and replacements of allegedly defective parts even if their vehicles have not displayed damage, and Class members are in a better position than Defendants to document their vehicles' histories. With regard to the third objection, the fairness hearing was held on July 14, 2016, after the July 1, 2016 deadline for N14 Class members to submit objections under the Court's supplemental notice program. *See* ECF No. 89.

q. Objection of Shirley M. Stipe-Zendle

Docket number 102, filed as an objection to the settlement on June 29, 2016, appears instead to be a claim for reimbursement for timing chain tensioner/timing chain repair or replacement submitted by Class member Shirley M. Stipe-Zendle. ECF No. 102. The document contains no objection to the settlement. Plaintiffs state that they have provided the document to the Claims Administrator for processing as a claim. ECF No. 107 at 7.

r. Objection of Julie A. Clifford

Julie Ann Clifford submitted an objection to the settlement that was filed on June 29, 2016. ECF No. 103. Ms. Clifford objects to the settlement on three grounds: (a) the documentation requirement for engine repair reimbursement unreasonably requires the servicing mechanic to acknowledge that the problems were caused by a defective timing chain, something that MINI has "every incentive not to confess," *Id.* at 1; (b) the total reimbursement amounts are unreasonably low; and (c) the claims period is unreasonably short.

Although it is true that Defendants could theoretically avoid having to reimburse any Class members for repairs made at MINI servicing centers by instructing mechanics not to attribute engine failure to timing chain or tensioner defects, Defendants' voluntary October 2014 acknowledgment that Class vehicles "may" have these defects suggests that this is unlikely. *See* ECF No. 86-6 Ex. 1. In any event, Class members whose claims are denied by the Settlement Administrator for lack of documentation may appeal the decision to a Special Master, giving them some recourse for unreasonable denials. ECF No. 92 at 16; ECF No. 69-3 Ex. 1 ¶ III.E.3.

For reasons discussed, the Court finds that the reimbursement amounts included in the settlement are not unreasonably low. In any event, Ms. Clifford states that her total cost of repairs to date is actually lower than the amount she is entitled to be reimbursed. ECF No. 103 at 2. Though she will not be reimbursed for incidental expenses, Ms. Clifford may receive a full reimbursement for the repairs and replacements she has paid for.

The Court disagrees that the claims period is unreasonably short. Under 28 U.S.C. § 1715(d), the Court may grant final approval of a proposed settlement as early as 90 days after notice is given to the appropriate federal official and state officials of each state in which class members reside. 28 U.S.C. § 1715(d). Although Plaintiffs initially requested a claims period of 90 days, *see* ECF No. 69-2 ¶ 8, the Court extended this period to 120 days following the Court's preliminary approval of the settlement. *See* ECF No. 72 at

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s. Objection of Donald Mann

***14** Donald Mann submitted a notice that was filed with this Court on June 29, 2016. ECF No. 104. Mr. Mann incorrectly appears to assume that the settlement "offers a reimbursement of $850 less a reduction for age and mileage" for timing chain repairs conducted at an authorized MINI service center and objects that the retail cost of a timing chain tensioner is less than the amount quoted to him by the service center to examine his Class Vehicle. *Id.* at 1. In any event, Mr. Mann states his intent to be excluded from the N14 Class for purposes of this settlement, so he has no standing to object to the settlement. *Id.*

t. Objection of Robin Mackey

Robin Mackey submitted an objection, dated July 1, 2016, that was filed in this Court on July 5, 2016. ECF No. 106. Mr. Mackey objects to the settlement's service history documentation requirement; arguing specifically that documentation of routine oil changes is irrelevant to the claims at issue. *Id.* The Court agrees with Plaintiffs and Defendants that documentation of the routine maintenance of Class Vehicles is relevant to claims of defects and damage in those vehicles, *see* ECF No. 107 at 7-8, and repeats that this documentation requirement is not unduly burdensome.

u. Objection of Kimberly Winkler

Kimberly Winkler submitted an objection, dated June 28, 2016, that was filed in this Court on July 5, 2016. ECF No. 106-1. Mr. Winkler describes a litany of problems with his Class Vehicle, including timing chain malfunctions, and seeks an extension of his warranty and reimbursement for out-of-pocket expenses and other costs. *Id.* at 2. Mr. Winkler does not object to anything specific about the terms of the settlement, and Plaintiffs point out that because his extended warranty does not expire until 2017, Mr. Winkler is already entitled to reimbursement for all past repairs. ECF No. 107 at 8.

v. Objection of Marika Hamilton

Marika Hamilton mailed an objection to counsel for Defendants on March 14, 2016. ECF No. 107-2 Ex. 11. Ms. Hamilton alleges damage to her Class Vehicle's timing chain tensioner — a repair or replacement for which she is entitled to full reimbursement under the settlement — but does not otherwise object to the settlement.

w. Objection of Susan Von Struensee

Susan Von Struensee submitted an objection to counsel for Defendants on June 22, 2016. ECF No. 107-2 Ex. 12. Ms. Von Struensee objects to the settlement on the grounds that (a) she did not receive notice of the settlement and (b) Class members are unreasonably required to submit documentation that they changed the oil in their Class Vehicles at least once every 2,000 miles, even though dealers only advise owners to seek oil changes every 15,000 or 10,000 miles. *Id.* at 1. With regard to the first objection, the Court repeats that CAA provided notice by mail to over 96% of Class members and by email to over 94%. 107-1 ¶¶ 4, 7. Plaintiffs explain that they discussed Ms. Struensee's second objection with her by phone and clarified that Class members seeking reimbursement are not required to submit documentation of oil changes every 2,000 miles. ECF No. 107 at 8; *see also* ECF No. 69-3 Ex. 1 Ex. B at 5 (Claim form, explaining that Class members must provide evidence of "regular oil changes (within 2,000 miles of recommended schedule)").

The 23 objectors make arguments that raise several legitimate *Girsh* factor considerations. Ultimately, however, because of the relatively small number of objections and exclusions compared with the total number of Class members, the reaction of the N14 Class to the settlement supports a finding of fairness.

3. *Girsh* factor three: State of proceedings and amount of discovery completed

***15** The third *Girsh* factor "captures the degree of case development that class counsel had accomplished prior to the settlement," so that the Court may "determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Warfarin Sodium*, 391 F.3d at 537.

Here, according to Plaintiffs, the Parties reached their settlement after (a) the Court ruled on a motion to dismiss

the first amended complaint, *see* ECF No. 39; (b) Plaintiffs filed a second amended complaint, ECF No. 53; (c) the Parties exchanged initial disclosures and discovery requests; and (d) the Parties engaged in a full-day mediation with the Honorable Theodore Katz (Ret.) and a settlement conference with Magistrate Judge Cathy L. Waldor. ECF No. 92 at 26. The Court finds that all Parties have an "adequate appreciation of the merits of the case," so this factors weighs in favor of settlement. *See Martina*, 2013 WL 5567157, at *6 (finding adequate appreciation of merits when parties "exchanged initial disclosures and arrived at the Settlement after negotiation before a retired federal judge.").

4. *Girsh* factors four and five: the risks of establishing liability and damages

The fourth and fifth *Girsh* factors require the Court to balance the Parties' relative likelihood of success in establishing liability and damages against the immediate benefits derived from a settlement. *See Prudential*, 148 F.3d at 319. The Court weighs these factors against the best and worst possible outcomes for Plaintiffs. *In re Cendant Corp. Litig.*, 264 F.3d 201, 237-39 (3d Cir. 2001).

Although Plaintiffs survived an initial motion to dismiss, *see* ECF No. 39, the Court has not yet ruled on the substantive issues underlying the litigation — namely, whether Defendants caused defective timing chain tensioners to be installed in the Class Vehicles and whether they are liable for damages. The Court lacks the factual record necessary to determine Plaintiffs' likelihood of success on the merits, but Plaintiffs claim that "all parties," including Defendants, "remain confident of their chance at prevailing at trial." ECF No. 92 at 26-27.

Plaintiffs state that their best possible outcome would likely involve "years of litigation," including an appeal to the Third Circuit after Plaintiffs received a favorable decision in this Court. *Id.* at 27. This would require "a very substantial expenditure in attorneys' fees and costs by both parties," but would likely "not result in an increased benefit to the Class." *Id.* Though it is difficult to accurately estimate Plaintiffs' likelihood of success in establishing either liability or damages, the Court finds that the fourth and fifth *Girsh* factors weigh in favor of approving the settlement.

5. *Girsh* factor six: the risks of maintaining a class action

The sixth *Girsh* factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial. A district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable." *Warfarin Sodium*, 391 F.3d at 537 (citing *Prudential*, 148 F.3d at 321). Because of this, the "specter of decertification makes settlement an appealing alternative." *O'Brien v. Brain Research Labs, LLC*, 2012 WL 3242365, at *18 (D.N.J. Aug. 9, 2012).

***16** Plaintiffs maintain — and the Court agrees, at this point — that this action could be properly maintained as a class action. ECF No. 92 at 27. Although Plaintiffs speculate that there are "myriad risks of maintaining class action status," including potential arguments Defendants may raise involving individualized issues, *Id.* at 28, the Court is not convinced that this factor weighs in favor of approving the settlement.

6. *Girsh* factor seven: the ability of Defendants to withstand a greater judgment

The seventh *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *In re Cendant*, 264 F.3d at 240. Still, the fact that a defendant "could afford to pay more does not mean that it is obligated to pay any more than what ... class members are entitled to under the theories of liability that existed at the time the settlement was reached." *Warfarin Sodium*, 391 F.3d. at 538. Here, as Plaintiffs state, "Defendants operate a successful, well-known, multi-national automobile business." ECF No. 28. Even if all 5,310 Class members who submitted claims were entitled to the maximum claim amounts for each type of repair, replacement, or sale, the total amount of the settlement would likely be insignificant when compared with Defendants' total revenues. This factor does not favor approval of the settlement.

7. *Girsh* factors eight and nine: the reasonableness of the settlement in light of the best recovery and all the attendant risks of litigation

The final two *Girsh* factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Warfarin Sodium*, 391 F.3d at 538

(citing *Prudential*, 148 F.3d at 322). The Court determines "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Id.* In cases where plaintiffs seek primarily monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *Id.* (quoting *Prudential*, 148 F.3d at 322).

In the second amended complaint, Plaintiffs seek, among other things, (a) an order requiring Defendants to notify Class members of the alleged timing chain tensioner defect and to repair the defect or reimburse Class members for the repairs; (b) an injunction requiring Defendants to stop refusing to repair the defect, at no charge; (c) an award to Plaintiffs and Class members of compensatory, exemplary, and/or statutory damages; and (d) an award of restitution. ECF No. 53 ¶ 338.

Although the settlement does not provide Class members with damages, it does provide Class members with much of the relief they seek: (a) notice of the alleged defect, provided at the expense of Defendants; (b) free repairs or full reimbursement for repairs of the timing chain and timing chain tensioner; (c) full or partial payment for engine repairs for some, but not all, Class Vehicles, as determined by vehicle mileage and age; (d) a warranty extension that provides an extended period of coverage for some, but not all, Class Vehicles, as determined by vehicle mileage and age; and (e) full or partial reimbursement for some, but not all, Class members who sold their un-repaired Class Vehicles at a loss, as determined by vehicle mileage and age. *See* ECF No. 69-3 Ex. A at 3-4.

***17** As the Court has discussed, several Class members object that the settlement provides fewer benefits to the owners of high-mileage or older Class Vehicles than to the owners of new, low-mileage vehicles. *See*, e.g., ECF Nos. 77-80, 82, 84, 92-5 Ex. 11, 96, 98. This is true, but the Court repeats that the line must be drawn somewhere. Because the value of vehicles decreases with age and mileage, *see Dispirito*, 371 B.R. at 701 n.6, the Court finds that the settlement is reasonable in light of Plaintiffs' original requests for relief and the not insubstantial chance that Plaintiffs would not prevail on all of their claims at trial. *Girsh* factors eight and nine weigh in favor of granting final approval to the settlement.

8. *Prudential* considerations

The *Prudential* considerations — the probable outcome of a trial on the merits, the probable outcome of claims by other classes, and the reasonability of any provisions for attorneys' fees — also weigh in favor of approving the settlement. 148 F.3d at 323. As discussed, the Court cannot estimate the probable outcome of a trial on the merits for the N14 Class or for the owners of N12 vehicles because it has not yet ruled on any dispositive issues, but both Parties represent that they "remain confident of their chance at prevailing at trial." ECF No. 92 at 26-27. As the Court will discuss, the attorneys' fees sought by Plaintiffs are reasonable. Most relevant for the *Prudential* consideration, Plaintiffs represent that the settlement is not limited by a fixed amount — the total amount Defendants pay will be determined by the claims submitted by Class members — and the fees and expenses awarded to Class Counsel, along with the incentive awards granted to the Named Plaintiffs, will not reduce the amount available for Class members. ECF No. 92 at 29.

The Court finds that the *Prudential* factors weigh in favor of approval of the settlement.

9. *Baby Prods*.: the degree of direct benefit provided to the class

The Court also considers the "degree of direct benefit provided to the class," including the "number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards." *Baby Prods.*, 708 F.3d at 174.

The Court repeats that 5,310 of 186,031 Class members have submitted claims. Though this is a relatively small percentage, but Plaintiffs and Defendants estimate that fewer than ten percent of Class Vehicles have actually exhibited the alleged defects, potentially explaining why many Class members did not submit claims. ECF No. 92 at 21. Of the 5,310 Class members who have submitted claims, all who submit sufficient documentation and are eligible for awards should receive rewards; the total amount paid by Defendants to Class members is not limited by a fixed fund amount, nor will the attorneys' fees and costs or awards granted to the Named Plaintiffs reduce the amount available to Class Members. ECF No. 92 at 29-30. This analysis favors approval of the settlement.

After considering all of the factors, the Court finds the proposed settlement fair, reasonable, and accurate.

IV. Attorneys' fees

In the settlement, Plaintiffs agree not to seek an award of attorneys' fees and expenses in an amount greater than $2,320,000, and Defendants agree not to object to an award of up to $1,820,000. ECF No 69-3 Ex. 1 ¶ VIII.B. The settlement also provides that Defendants will not oppose service awards of $4,000 each to the Named Plaintiffs serving as N14 Class Representatives. *Id.* VIII.C.

Plaintiffs now seek service awards for eighteen Named Plaintiffs and $2,320,000 in attorneys' fees and expenses. ECF No. 86. Defendants do not oppose the service awards but argue that the Court should award Plaintiffs only $1,820,000 in attorneys' fees and expenses. ECF No. 90. The Court now determines whether Plaintiffs' request is reasonable.

A. Legal standard

***18** Federal Rule of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorney's fees that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). A "thorough judicial review of fee applications is required in all class action settlements." *GM Truck Prods.*, 55 F.3d at 819. "Determining an appropriate award is not an exact science," and the "facts of each individual case drive the amount of any award." *In re AremisSoft Corp. Sec. Litig. ("AremisSoft")*, 210 F.R.D. 109, 128 (D.N.J. 2002).

The Third Circuit has established two methods for evaluating an award of attorneys' fees: the percentage-of-recovery method, which involves giving attorneys a portion of the total damages awarded to plaintiffs, and the lodestar method, which involves multiplying the number of hours reasonably worked on a case by the reasonable billing rate for the services. *Prudential*, 148 F.3d at 333; *In re Ins. Brokerage Antitrust Litig. ("Ins. Brokerage")*, 579 F.3d 241, 280 (3d Cir. 2009) (citing *In re Rite Aid Corp. Sec. Litig. ("Rite Aid")*, 396 F.3d 294, 302 (3d Cir. 2005)). The percentage-of-recovery method is generally favored in cases involving a common fund, while the lodestar method "is more commonly applied in statutory fee-shifting cases." *Prudential*, 148 F.3d at 333. The lodestar method may also be applied "in cases where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method." *Id.* (citing *GM Truck Prods.*, 55 F.3d at 821). The court should perform a "cross-check" by comparing the fee award calculated under the chosen method with the award calculated under the alternative method. *Ins. Brokerage*, 579 F.3d at 280 (citing *Rite Aid*, 396 F.3d at 300).

"The party seeking attorney's fees has the burden to prove that its request for attorney's fees is reasonable.' " *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). "In a statutory fee case, the parting opposing the fee award then has the burden to challenge ... the reasonableness of the requested fee." *Id.* (citing *Bell v. United Princeton Props., Inc.*, 884 F.2d 713 (3d Cir. 1989)).

B. Analysis

1. The Court applies the lodestar method of fee calculation

The Court agrees with all Parties that the lodestar method is the proper method of fee calculation for this matter. *See* ECF No. 86 at 17; ECF No. 90 at 1. Plaintiffs bring a cause of action on behalf of the entire N14 Class under the Magnuson-Moss Warranty Act, which provides for statutory fee-shifting. ECF No. 86 at 17 (citing 15 U.S.C. § 2301(d)(2) (allowing consumers to recover "a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have reasonably incurred by the plaintiff ....")). The lodestar method is also appropriate because the settlement award to N14 Class members also does not consist of a single, predetermined, common fund from which a percentage-of-recovery can be easily calculated. Instead, the settlement includes a "non-monetary" provision — the warranty extension — along with monetary awards that will not be calculated in the aggregate until all claim submission periods have ended and Defendants have processed the claims. ECF No. 86 at 18.

2. The lodestar calculation supports an award of between $1,917,673.40 and $2,320,000 in fees and expenses

***19** Plaintiffs seek attorneys' fees and expenses in the total amount of $2,320,000, which is 31.5 percent less than their lodestar calculation of $3,387,328.75. ECF No. 86 at 22.[3] Defendants do not argue that Class Counsel is entitled to less than the lodestar amount, but instead argue that

Plaintiffs' $3,387,328.75 lodestar calculation is itself incorrect, based on unreasonably high billing rates and insufficient documentation of the hours reportedly billed by Class Counsel. ECF No. 90 at 1.

The Court calculates the lodestar amount by multiplying the number of hours "reasonably worked" on a client's case by a "reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *Ins. Brokerage*, 579 F.3d at 280 (quoting *Rite Aid*, 396 F.3d at 302). "To examine the lodestar factor properly, a Court should make explicit findings about how much time counsel reasonably devoted to a given matter, and what a reasonable hourly fee would be for such services." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 199-200 (3d Cir. 2000) (citations omitted).

With regard to the hours worked by class counsel, the court may exclude from its calculation hours that are "not reasonably expended," such as hours attributable to over-staffing, hours that appear excessive in light of the experience and skill of the lawyers, and hours that are redundant or otherwise unnecessary, as well as hours that are not "adequately documented." *Norton v. Wilshire Credit Corp.*, 36 F. Supp. 2d 216, 219 (D.N.J. 1999) (Walls, J.) (citing *Hensley* at 433-34). Although a "fee petition should include 'some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations and the hours spent by various classes of attorneys, e.g., senior partners, junior partners, associates," *Rode*, 892 F.2d at 1190 (quoting *Lindy Bros. Builders, Inc. of Phila. v. American Radiatory & Standard Sanatory Corp.*, 487 F.2d 161, 167 (3d Cir. 1973)), "it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." *Id.*

To determine whether an attorney's billing rate is reasonable, a court "should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* (citations omitted).

Local Civil Rule 54.2, which governs attorneys' fee applications in "all actions in which a counsel fee is allowed by the Court or permitted by statute," requires counsel to submit affidavits or other documents along with their motion for attorneys' fees that set forth:

> ***20** (1) the nature of the services rendered, the amount of the estate or fund in court, if any, the responsibility assumed, the results obtained, any particular novelty or difficulty about the matter, and other factors pertinent to the evaluation of the services rendered;
>
> (2) a record of the dates of services rendered;
>
> (3) a description of the services rendered on each of such dates by each person of that firm including the identity of the person rendering the service and a brief description of that person's professional experience;
>
> (4) the time spent in the rendering of each of such services; and
>
> (5) the normal billing rate of said persons for the type of work performed.

L.Civ. R. 54.2(a). Local Civil Rule 54.2(c) permits district courts to order that plaintiffs need not provide one or more of the items in L. Civ. R. 54.2(a) in order to receive attorneys' fees.

"After arriving at this lodestar figure, the district court may, in certain circumstances, adjust the award upward or downward to reflect the particular circumstances of a given case." *Yong Soon Oh v. AT&T Corp.*, 225 F.R.D. 142, 146 (D.N.J. 2004). "All of these calculations should be reduced to writing." *Id.* Courts frequently apply a "lodestar multiplier," which "attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work" by increasing the attorneys' fee awarded beyond the lodestar amount. *Ins. Brokerage*, 579 F.3d at 280 (quoting *Rite Aid*, 396 F.3d at 305-06). This multiplier "need not fall within any pre-defined range, provided that the District Court's analysis justifies the reward." *Id.* (quoting *Rite Aid*, 396 F.3d at 307).

a. Class Counsel billable hour and rate submissions

Plaintiffs calculate a lodestar amount of $3,387,328.75 for 5,100.75 hours of time expended by attorneys and paralegals at nine Class Counsel law firms. ECF No. 86-6 ¶ 29. In support of this calculation, Plaintiffs submit signed declarations from supervising attorneys at each of the nine Class Counsel firms detailing (a) the billing rates for partners, associates, and paralegals at the firm; (b) the total hours billed by each individual; (c) the relevant experience of the firm and the billing attorneys; (d) a breakdown of the billable hours by each partner, associate, and paralegal into eleven general categories of work, and (e) a breakdown of expenses.[4] *See* ECF No. 86-6; Decl. Bryan L. Clobes in Support. P. Mot. Attorneys' Fees, ECF No. 86-2; Decl. David S. Markun in Support. P. Mot. Attorneys' Fees, ECF No. 86-3; Decl. Jeffery A. Koncius in Support. P. Mot. Attorneys' Fees, ECF No. 86-4; Decl. John A. Yanchunis

in Support. P. Mot. Attorneys' Fees, ECF No. 86-5; Decl. Tina Wolfson in Support. P. Mot. Attorneys' Fees, ECF No. 86-7; Decl. William J. Pinilis in Support. P. Mot. Attorneys' Fees, ECF No. 86-8.

Cafferty Clobes Meriwether & Sprengel LLP reports a total of 509.6 billable hours from eight attorneys and two paralegals with billing rates between $240 and $750 per hour, for a total lodestar amount of $335,975.00. ECF No. 86-2 ¶ 7 (listing billing rates and hours billed of individual attorneys and paralegals). The firm also reports litigation expenses of $9,626.66. *Id.* ¶ 11. Markun Zusman Freniere & Compton, LLP reports a total of 976.50 billable hours from eight attorneys and one paralegal with billing rates between $250 and $650 per hour, for a total lodestar amount of $574,325.00. ECF No. 86-3 ¶ 7. The firm also reports litigation expenses of $47,192.00. *Id.* ¶ 11. Kiesel Law LLP reports a total of 1,572.1 billable hours from ten attorneys and six paralegals with billing rates between $150 and $1,100 per hour, for a total lodestar amount of $756,859.50. ECF No. 86-4 ¶ 7. The firm also reports litigation expenses of $30,568.95. *Id.* ¶ 11. Morgan & Morgan, PA reports a total of 38.3 billable hours from one attorney with a billing rate of $900 per hour and 84.2 billable hours from one paralegal with a billing rate of $150 per hour, for a total lodestar amount of $47,100,000. ECF No. 86-5 ¶ 17. The firm also reports litigation expenses of $1,455.56. *Id.* Raymond Boucher, currently of the Law Office of Raymond Boucher, APC and Boucher, LLP, and formerly of Khorrami Boucher Sumner, LLP and Khorrami Boucher, LLP, reports (a) a total of 952.9 billable hours from one attorney at the Law Office of Raymond Boucher, APC at billing rates between $925 and $1,100 per hour, for a total lodestar amount of $1,039,947.50, ECF No. 86-6 ¶ 36, along with expenses of $7,100.12, *Id.* ¶ 37; (b) a total of 147.8 billable hours from four attorneys, one law clerk, and one paralegal at Boucher, LLP at billing rates between $185 and $750 per hour, for a total lodestar amount of $92,792.50, *Id.* ¶ 40, along with expenses of $16,601.82, *Id.* ¶ 41; and (c) a total of 269.2 billable hours from eight attorneys and one law clerk at Khorrami Boucher Sumner, LLP and/or Khorrami Boucher, LLP at billing rates between $185 and $625 per hour, for a total lodestar amount of $139,078.25, *Id.* ¶ 44, along with expenses of $17,003.15. *Id.* ¶ 45.[5] Ahdoot & Wolfson, PC reports a total of 349.2 billable hours from seven attorneys at billing rates between $415 and $810 per hour, for a total lodestar amount of $235,408.50. ECF No. 86-7 ¶ 7. The firm also reports litigation expenses of $3,303.86. *Id.* ¶ 11. PinilisHalpern, LLP reports a total of 193.90 billable hours from one attorney at a billing rate of $625 per hour, for a lodestar amount of $121,187.50. ECF No. 86-8 ¶ 7. The firm also reports litigation expenses of $516.27. *Id.* ¶ 11. The attorneys represent that Boucher, LLP, lead Class Counsel, reviewed time records from the other Class Counsel firms "for accuracy and removal or time that, although incurred, the lawyers determined in their discretion should not be included in this fee application." ECF No. 86-2 ¶ 6.

b. The Knapton Declaration

***21** Plaintiffs also submit a declaration from Gerald G. Knapton of the law firm Ropers, Majeski, Kohn & Bentley. Decl. Gerald G. Knapton in Support. P. Mot. Attorneys' Fees, ECF No. 86-9. Mr. Knapton declares that he is an expert on "the reasonableness and necessity of attorneys' fees," *Id.* ¶ 2, states that he interviewed Class Counsel attorneys and reviewed their timekeeping records, *Id.* ¶¶ 12, 16-23, and offers his expert opinion that both the combined Class Counsel lodestar calculation of $3,387,328.75, and the combined Class Counsel expense calculation of $133,358.39 are reasonable. *Id.* ¶ 11. Mr. Knapton claims that the total time of 5,100 hours "is similar to the range of hours [he has] seen in other class actions that are resolved without trial." *Id.* ¶ 17. Mr. Knapton notes that the average billing rate for the Class Counsel attorneys and paralegals is $664.15 per hour, which he states "appears to be in the range of what New Jersey Courts have found to be reasonable in other class action matters." *Id.* ¶ 28 (citing cases). Mr. Knapton also observes that Class Counsel's requested billing rates have been approved in the Northern and Central District of California, the Southern District of Florida, and California state courts. *Id.* ¶¶ 31-37.

Finally, Mr. Knapton compares the requested billing rates of Class Counsel attorneys with the "2015 Real Rate Report Snapshot" rates of the third quartile[6] of attorneys in similar positions at their firms (i.e., partner or associate), with similar levels of experience, in the same metropolitan areas.[7] *Id.* ¶¶ 43-49. Mr. Knapton also opines that class action lawyers who bill on a contingency basis are typically "awarded rates by courts at about 1.2 to 1.3 times the current, prevailing non-contingent rates because of the risk of contingency."[8] *Id.* ¶ 39.

Mr. Knapton reports that, of the 47 attorneys reporting billable hours in this matter, a total of 17 request billing rates higher than the relevant third-quartile 2015 Real Report Snapshot rates. *See id.* 48. Of the 17 billing at high rates, all but John Yanchunis of Morgan & Morgan ($900 per hour), Daniel Herrera of Cafferty Clobes Meriwether & Sprengel LLP ($600 per hour), and Kelly Tucker of Cafferty Clobes Meriwether & Sprengel LLP ($550 per hour) request billing rates lower than 1.3 times the relevant third-quartile 2015 Real Report Snapshot rates. *See id.*

Mr. Knapton gives his expert opinion that the "total reasonable & necessary lodestar is $3,387,328.75 based on 5,100.3 hours of time as reasonable and justified hourly rates," with a "reasonably expended and explained" number of hours that are "similar to what I have seen for other class action matters that settle before trial" and reported work that was "useful and of a type of ordinarily necessary to secure the final result obtained from the litigation." *Id.* ¶ 50.

c. The number of hours submitted by Plaintiffs is reasonable

The Court finds that Plaintiffs' submission of 5,100.75 billable hours is reasonable for a three year-old consumer class action involving claims under federal law and the laws of twelve separate states, though it accepts the number with hesitation. Plaintiffs' submissions meet the *Rode* standard, providing "fairly definite information as to the hours devoted to various general activities." *Rode*, 892 F.2d at 1190. As discussed, Plaintiffs provide a breakdown, by attorney and paralegal, of the hours spent engaging in eleven categories of legal work. *See*, e.g., ECF No. 86-2 Ex. 1. Plaintiffs also provide a chronological description of the work performed, collectively, by Class Counsel, including the investigation leading up to the drafting and filing of the first complaint, Plaintiffs' response to Defendants' motion to dismiss, the drafting of amended complaints, continued investigation and discovery, and the negotiations leading to this settlement. *See* ECF No. 86 at 7-10. However, Plaintiffs do not provide the specific dates of their services rendered, as required by L. Civ. R. 54.2(a)(c).

***22** Defendants argue, generally, that Plaintiffs' application for fees is insufficient because some courts within the Third Circuit have approved attorneys' fees based on more detailed documentation than Plaintiffs submit here, including itemized, hourly billing records for each attorney. ECF No. 90 at 3-4 (citing cases). Defendants argue specifically that the Court should not accept Plaintiffs' aggregate submission of 1,225.5 hours of billable work for "Analysis/Strategy/Meetings" without further documentation of the precise number of meetings, dates, times, individuals present, and descriptions of "what was actually *done*" at the meetings. ECF No. 90 at 6. The Court does not deny that Plaintiffs *could* submit further documentation, and Plaintiffs have offered to submit detailed time records for the Court's *in camera* review if so required. ECF No. 105 at 6. But "it is not necessary" for the Court to "know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney" in order to determine whether the number of hours billed was reasonable. *Rode*, 892 F.2d at 1190. In any event, as Plaintiffs suggest, "what was actually *done*" at these meetings likely includes protected attorney work product. ECF No. 105 at 9. The Court will not require Plaintiffs to submit further documentation of their meetings.

Defendants also suggest that the 679.1 total hours of "Research" reported by Plaintiffs is an unreasonable number because Class Counsel attorneys were already "presumably[ ] intimately familiar" with the relevant issues in this matter, reducing their need to conduct research. ECF No. 90 at 6-7. The Court agrees with Plaintiffs, however, that "[l]egal research is part of the job." ECF No. 105 at 9. Particularly in a multi-state class action involving federal and state law statutes, consolidated cases, a motion to dismiss, and an amended complaint, Class Counsel is expected to conduct a significant amount of legal research.

Given the lack of individual and task-based detail in Plaintiffs' billing summaries, the Court finds that Plaintiffs' submission of 5,100.75 billable hours is reasonable but accepts the number with some hesitation.

d. The billing rates submitted by Plaintiffs are high for the relevant community

To repeat, the average requested billing rate for Class Counsel attorneys is $664.15 per hour, ECF No. 86-9 ¶ 28, with individual rates (including for paralegals) ranging from $150 to $1,100 per hour. *See id.* ¶ 30. Partners request a mean rate of $745 per hour, while associates request a mean rate of $423 per hour. ECF No. 90 at 9-10. The Court determines whether these fees are reasonable by assessing the "experience and skill of the prevailing party's attorneys" and comparing "their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Rode*, 892 F.2d at 1190.

Courts in this district have approved a wide range of billing rates as reasonable, and both Plaintiffs and Defendants cite cases where courts confirmed fee rates similar to the ones they seek. *See*, e.g, ECF No. 105 at 10 (citing *In re Merck & Co. Vytorin ERISA Litig.*, 2010 WL 547613 (D.N.J. Feb. 9, 2010) (approving rates up to $835 per hour)); ECF No. 90 at 10 (citing, e.g., *Port Drivers Federation 18, Inc. v. All Saints*, 2011 WL 3610100, at *4 (D.N.J. Aug. 16, 2011) (reducing partner's billing rate from $595 to $475 per hour and citing cases approving a range of $250 to $400 per

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hour)). *See also* Saint v. BMW of North America, LLC, 2015 WL 2448846, at *15 (D.N.J. May 21, 2015) (approving average rates of $421.73 and $540.31 in class action against BMW for failure to provide warranties).

As discussed, Plaintiffs also argue, through the Knapton Declaration, that the requested billing rates for most Class Counsel attorneys are lower than the third-quartile rates in the geographic areas where the attorneys are located. *See* ECF No. 86-9 ¶ 48; ECF No. 86-9 Ex. 9 (Real Report Snapshot "High-Level Data Cuts" for U.S. cities). Under this analysis, the requested billing rates are reasonable.

Defendants, however, argue that a more appropriate comparison is between the requested billing rates and the 2015 Real Report Snapshot rates for partners and associates practicing "General Liability" law in New York and Philadelphia, the practice area and two cities that best correspond with the legal work in this matter and geographic location of this Court. ECF No. 90 at 8-9 (citing ECF No. 86-9 Ex. 7 (Real Report Snapshot "Practice Area Analysis: General Liability")). Defendants urge the Court to average the Real Report Snapshot rates for New York and Philadelphia partners and associates practicing "General Liability" law, arriving at mean and top-quartile partner rates of $425 and $609 per hour, respectively, and mean and top-quartile associate rates of $284 and $345 per hour, respectively. *Id.* at 10.

***23** The Court agrees with Defendants that the average Class Counsel billing rate of $664.15 is higher than the average rate approved by many recent courts in this district. Defendants do not calculate the effect their proposed mean and top-quartile "General Liability" rate adjustments would have on the lodestar. Using the Knapton Declaration's fee schedule, ECF No. 86-9 Ex. 2,[9] the Court calculates that Class Counsel partners billed a total of 3,542.1 hours; that the "associate class," including associates, law clerks, local counsel, and of-counsel attorneys, billed a total of 1,323.55 hours; and that paralegals billed a total of 234.7 hours. Adjusting all associate and partner billing rates to the mean and top-quartile rates proposed by Defendants would result in lodestars of $1,917,673.40 and $2,649,473.15, respectively. *Id.*

As discussed, the Court may apply a multiplier to the lodestar "to account for the contingent nature or risk involved in a particular case and the quality of the attorney's work." *Rite Aid*, 396 F.3d at 306. The multiplier "need not fall within any pre-defined range, provided that the District Court's analysis justifies the award," *Id.*, but courts "routinely find in complex class action cases that a lodestar multiplier between one and four is fair and reasonable." *Saint*, 2015 WL 244846, at *16 (approving multipliers of 1.09 and 1.13); *see also* Boone v. City of Philadelphia, 668 F. Supp. 2d 693, 714-15 (E.D. Pa. 2009) (approving multiplier of 2.3); McCoy v. Health Net, Inc., 569 F. Supp. 2d 448, 479 (D.N.J. 2008) (approving multiplier of 2.3). Because Plaintiffs report a total of $133,358.30 in expenses, ECF No. 86 at 2, the portion of the total $2,320,000 award attributable to attorneys' fees alone is $2,186,641.70. The lodestar multiplier for Defendants' proposed mean rate fee, obtained by dividing $2,186,641.70 by $1,917,673.40, would be approximately 1.14. This multiplier falls well within the range approved by courts in this Circuit for complex, multi-state cases such as this one.

3. The percentage cross-check supports an award in the lodestar range

Having determined a range of attorneys' fees under a lodestar analysis, the Court now cross-checks this analysis using the percentage-of-recovery method. *See* *Ins. Brokerage*, 579 F.3d at 280; *Saint*, 2015 WL 2448846, at *16 (performing percentage-of-recovery cross-check after adopting lodestar method to award attorneys' fees).

The Third Circuit has identified a non-exhaustive list of factors that a district court should consider in its percentage-of-recovery analysis:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Rite Aid, 396 F.3d at 301 (quoting *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)). The Court need not apply the *Gunter* factors in a formulaic way and may afford some factors more weight than the others. *Id.* at 302.

***24** The Court finds the *Gunter* factor to be especially relevant in this case. As discussed, the settlement agreement does not create a class fund of defined size, and the total benefit to N14 Class members will depend on the number and type of claims ultimately received and approved. Additionally, as discussed, the settlement agreement provides some Class Members with non-monetary benefits, including a warranty extension on their Class Vehicles. At the July 14, 2016 fairness hearing, Class Counsel stated that it could not give a precise value of the

settlement, and that even estimating an "approximate" value would be difficult. Counsel stated, however that a value of between $10 and $30 million would be a reasonable estimate. The Third Circuit has recognized that fee percentage-of-recovery fee awards commonly range from 19 percent to 45 percent of the settlement fund. *GM Truck Prods.*, 55 F.3d at 822. Using the rough $10-$30 million settlement estimate, a reasonable percentage-of-recovery fee in this case would be between $1,900,000 and $13,500,000. The fee award sought by counsel and the lodestars calculated under Defendants' proposed New York-Philadelphia mean and fourth-quartile billing rates all fall within this range.

For the second factor, the Court incorporates its *Girsh* analysis of Class member objections and notes that no Class members have objected to the proposed Class Counsel award. This factor weighs in favor of fee approval. The Court also finds that the third and fourth, and sixth *Gunter* factors weigh in favor of approving a fee award within the ranges sought by Plaintiffs and Defendants. As discussed, Class Counsel spent 5,100 hours over three years litigating this case, survived a motion to dismiss, and obtained a fair and reasonable settlement in a complex, multi-state consumer class action involving uncertain legal issues. The fifth *Gunter* factor — risk of nonpayment — weighs in favor of approving the award sought by Plaintiffs because Class Counsel undertook this case on a contingency basis and accepted the potential risk of non-payment. ECF No. 86 at 20-21. Finally, with regard to the sixth *Gunter* factor, the $2,230,000 award sought by Plaintiffs and Defendants' proposed lodestar calculations are similar to awards approved in similar cases. *See*, e.g, *Henderson v. Volvo Cars of N. Am., LLC*, 2013 WL 1192479, at *13 (D.N.J. Mar. 22, 2013) (approving award of $3,000,000 in attorneys' fees in class action providing class members with reimbursements and warranty extensions in connection with alleged defects in automobile transmission systems); *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 304 (E.D. Pa. 2003) (approving award of $4,896,783 in attorneys' fees in class action involving allegedly defective rear lift-gate hatch in automobiles).

4. The expenses sought by Plaintiffs are reasonable

In further support of their petition for a $2,320,000 award, Plaintiffs submit that Class Counsel incurred a total of $133,358.30 in expenses. ECF No. 86 at 2.[10] "Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Safety Components Int'l, Inc.*, 166 F. Supp. 2d 72, 108 (3d Cir. 2001) (citing *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)). Courts have held that photocopying expenses, telephone and facsimile charges, postage, and expert witness fees are all reasonably incurred in the prosecution of a large litigation. *See id.* (citing cases).

Plaintiffs submit expense reports through the Class Counsel declarations, breaking expenses down into categories such as "Filing/Misc. Fees," "Mediation Fees," "Postage," "Photocoyping," "Expert Fees," and "Transportation/Meals/Lodging." *See*, e.g., ECF No. 86-2 ¶ 11, Ex. 2 (Cafferty Clobes Meriwether & Sprengel, LLP Expense Report through March 21, 2016). Some firms provide itemized lists of individual expenses. *See*, e.g, ECF No. 86-3 Ex. 2 (Markun Zusman Frenier & Compton, LLP "Pre-bill" for Tom Monreal). Although Defendants challenge the level of detail provided by Plaintiffs and the necessity of some expenses, *see* ECF No. 90 at 11 (questioning, as example, Markun Zusman Frenier & Compton, LLP's request for reimbursement for travel, meals, and hotels for an "investigation" trip to Oregon because this matter does not involve claims under Oregon law),[11] the Court finds that Class Counsel's expenses are adequately documented, proper, and reasonable. The proposed expense amount supports the award Plaintiffs seek.

5. The Court approves an award of fees and expenses in the amount of $2,100,000

***25** As discussed, courts have approved a wide range of awards for attorneys' fees and expenses in cases similar to this one. This Court will award Plaintiffs a total of $2,100,000 in attorneys' fees and expenses. This award represents an attempt by the Court to reconcile Plaintiffs' proposed fee submissions with Defendants' objections to the amount of detail in Class Counsel's billing records, the high billing rates of Class Counsel attorneys relative to other attorneys working on similar matters in this community, the potential application of a modest lodestar multiplier, and the difficulty of estimating an accurate percentage-of-recovery calculation against which to cross-check the Parties' proposed lodestar calculations.

CONCLUSION

The Court finds that the proposed settlement between Plaintiffs and Defendants is fair, adequate, and reasonable. Plaintiffs' motion for final approval of the N14 Class

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settlement, final approval of Class Counsel, and certification of the N14 Class is granted. Plaintiffs' motion for an award of attorneys' fees and expenses is granted in part: Plaintiffs are awarded a total of $2,100,000 in attorneys' fees and expenses and service awards of $4,000 each for the eighteen Class Representatives is granted. An appropriate order follows.

All Citations

Not Reported in Fed. Supp., 2016 WL 4033969

Footnotes

1 Plaintiffs reference 20 total objections, excluding the objections of Richard Ellenbogen, ECF No. 78, Timothy Fitzgerald, ECF No. 92-5 Ex. 11, and Donald Mann, ECF No. 104, for lack of standing because the three opted out of the N14 Class; the objection of Shirley M. Stipe-Zendle, ECF No. 102, because objection is actually an erroneously filed claim; and the objection of Marika Hamilton, ECF No. 107-2 Ex. 11 for unknown reasons; and including objections from Gerald Maloney and Sarah H. Beeby that have not been filed on ECF or otherwise provided to the Court. ECF No. 107-1 Ex. B. The Court considers the 23 objections that have been filed with or otherwise provided to the Court.

2 Mr. Phillips also claims that "MINI sold their customers an engine containing parts that were 100% guaranteed to fail; the only thing uncertain was *when* it would fail." ECF No. 79 at 1 (emphasis in original). The Court's fairness analysis might be different if the failure of each Class Vehicle were guaranteed. As discussed, however, Plaintiffs acknowledge that the defect rate of the Class Vehicles is merely "in the single digits," so the engines in most Class Vehicles will *not* fail because of the defect at issue. ECF No. 92 at 21.

3 In their reply brief in further support of their motion for attorneys' fees, Plaintiffs submit that this sum has increased by an additional $113,606. ECF No. 105 at 1, 1 n.1 (citing *Norton v. Wilshire Credit Corp.*, 36 F. Supp. 2d 216, 219 (D.N.J. 1999)) ("Prevailing parties may also collect reasonable attorney's fees for time spent preparing the fee petition.") (citing *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 924-25 (3d Cir. 1985)). Because Defendants address the hours and billing rates reported in Plaintiffs' original motion, and because this calculation adequately supports the award Plaintiffs seek, the Court performs its analysis using the hours and billing rates reported in the original motion.

4 The firms break down their work into: (1) "Analysis/Strategy/Attorney Meetings," (2) "Case Management," (3) "Court Appearance," (4) "Discovery," (5) "Document Review," (6) "Experts — Work or Consult," (7) "Client Meeting," (8) "Research," (9) "Fact Investigation/Development," (10) "Pleadings/Motions," and (11) "Settlement." *See*, e.g., ECF No. 86-2 Ex. 1.

5 Due to a default judgment and court-appointed receivership in New York State Supreme Court against Khorrami Boucher Sumner Sanguinetti, LLP and/or Khorrami Boucher, LLP, Mr. Boucher seeks an award of only 68% of the lodestar amount for work performed by those firms. ECF No. 86-6 ¶ 46.

6 The third quartile is the quartile between the median billing rate and the highest 25 percent of billing rates. ECF No. 86-9 ¶ 44.

7 According to Mr. Knapton, the 2015 Real Rate Report Snapshot was created by TyMetrix/LegalVIEW by compiling anonymized data on over $9.8 billion in legal fees billed and paid between 2012 and 2014 and was published by the Wolters Kluwer Company. ECF No. 86-9 ¶ 43.

8 Although Mr. Knapton builds this contingency multiplier into his lodestar calculation, *see* ECF No. 86-9 ¶ 50, the "contingent nature or risk involved in a particular case" is a factor for the Court to consider in assessing the reasonability of a multiplier *after* calculating

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the lodestar amount. *Ins. Brokerage*, 579 F.3d at 280.

9 There are several discrepancies between the hours reported in the Class Counsel affidavits and the hours used by Mr. Knapton to calculate Plaintiffs' lodestar of 3,387,328.75. Most notably, John A. Yanchunis of Morgan & Morgan reports that he billed 38.3 hours at a rate of $900 per hour and that Teresa Ponder, a paralegal, billed 84.2 hours at a rate of $150, for a firm lodestar of $47,100. ECF No. 86-5 ¶ 17; ECF No. 86-5 Ex. B (time report). The Knapton Declaration calculates Plaintiffs' proposed lodestar and billable hour totals based on 96.5 hours from Mr. Yanchunis at $900 per hour and 32.7 hours from Ms. Ponder at $150 per hour, for a firm lodestar of $91,755. *See* ECF No. 96-9 Ex. 2.

10 Again, Plaintiffs indicate that this amount has increased by $15,549.32 since the filing of their motion for attorneys' fees and costs, *see* ECF No. 105 at 1, but the Court will perform its analysis using the $133,358.30 number in the original motion.

11 The Court observes that Markun Zusman Freniere & Compton, LLP maintains an office in Portland, Oregon. *See* ECF No. 86-3 Ex. 3 (overview of firm).

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EXHIBIT 15

SETTING A NEW STANDARD IN CLASS ACTION CLAIMS ADMINISTRATION

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Class Action Experience

High-Quality Service at Competitive Rates

RG/2 Claims seasoned professionals utilize their vast class action experience, tax and financial management resources to deliver high-quality service at competitive rates.

RG/2 Claims is a boutique class action claims administration firm with a nationwide presence founded by seasoned class action practitioners and highly credentialed tax professionals. Our leadership team has a collective 100 years' experience working in the field of class action litigation and settlement administration to leverage for the benefit of counsel. Our team of driven class action attorneys, *highly credentialed CPAs and forensic accountants* approach each matter with a personal goal to shepherd the settlement through the process from settlement negotiations through final approval. Our personal attention and care ensures that the administration is handled in a seamless matter that allows counsel to proceed with the knowledge and confidence that their settlement will receive the attention and care that they demand. In addition, our operations and IT personnel bring individualized innovations to each engagement, driving the notice and settlement administration to conclusion. We have the experience to handle large settlements with the personal attention and care expected from a boutique firm.

RG/2 Claims recognizes that cutting-edge technology is the key to efficient and reliable claim processing. Our IT Group, including an experienced web design team, enables RG/2 Claims to employ technologies used to enhance accuracy, efficiency and interaction of all participants in the claims process. Our approach focuses on analysis of case needs, development of solutions to maximize resources and reduce costs through accurate and efficient data collection and entry, and ongoing maintenance and support. Throughout the entire claims process, our goal is to (1) optimize completeness, accuracy and efficiency of the data management system, including online integration; (2) validate critical fields and data; and (3) track opt-outs and claimant responses. RG/2 Claims' proprietary database application provides a *single source for managing the entire claims administration process and expediting decision making and resource management*. From the initial mailing through distribution of settlement funds and reconciliation of distributed payments, RG/2 Claims' **CLEVerPay®** system centralizes data, facilitating information sharing and efficient communication.

Cutting-Edge Technology and Skilled Resources

The CLEVerPay® System: A proprietary and revolutionary application developed exclusively by RG/2 Claims.

At RG/2 Claims, we developed a proprietary and customizable database with the goal of providing single-source management throughout the claims administration process, expediting decision making and resource management.

From the initial mailing through distribution of settlement funds and reconciliation of payments, RG/2 Claims' CLEVerPay® system centralizes the entire process while providing information sharing and communications solutions.

Our CLEVerPay® system is a robust and user-friendly resource that can be easily customized to meet your administration and distribution needs. We recognize how essential it is for data to be clean, centralized and readily accessible. RG/2 Claims' CLEVerPay® system has the capacity to assimilate and analyze large amounts of raw data from multiple inputs, to convert that raw data into useful information and to distribute the useful information in a variety of formats.

The integration of these elements results in timely and accurate distribution of secure payments generated from RG/2 Claims' single-source CLEVerPay® system.

For more information, please visit our website to download our CLEVerPay® System Datasheet at: http://www.rg2claims.com/pdf/cleverPayDatasheet.pdf.

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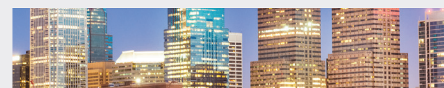

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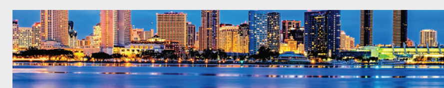

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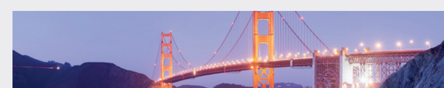

Full Life-Cycle Support for Your Class Action
With You Every Step of the Way

Whether engaged as a court-appointed settlement administrator, claims agent or disbursing agent, RG/2 Claims offers a complete range of claims, settlement administration and investment management services, including but not limited to:

PROFESSIONAL CASE MANAGEMENT CONSULTING

RG/2 Claims provides custom pre-settlement consultation and highly personalized attention throughout the life cycle of settlement administration. Each retention begins with an in-depth consultation concerning the specific needs of the case. Our professionals routinely and proactively identify administrative concerns and identify and propose solutions that avoid delay and remove unpredictability from the equation. We work through a coordinated approach involving a core of specialists that are intimately familiar with the case entrusted to our care. Our retentions result in effective and efficient solutions and greater peace of mind for busy lawyers.

NOTIFICATION PLANNING AND CAMPAIGNS

Whether routine or innovative, RG/2 Claims designs cost-effective and thorough notification plans that will suit your budget whether the settlement is national in scope or highly localized. RG/2 Claims guides you through the array of notice publication options at your disposal in a variety of media formats.

WEBSITE DESIGN

RG/2 Claims can assist in the design and hosting of a website specific to the client's needs to allow for document posting, as well as pertinent information and deadlines about the case. RG/2 Claims can also provide various options for claims filing, which includes an online portal that allows claimants to submit their claims and supporting documentation through the website.

CLAIMS PROCESSING

RG/2 Claims utilizes a proprietary and customizable database that provides a single-source management tool throughout the claims administration process, expediting decision making and resource management. RG/2 Claims' proprietary and sophisticated CLEVerPay® system centralizes the entire process while providing information sharing and communications solutions, from the initial mailing through distribution of settlement funds and reconciliation of payments.

DISTRIBUTION AND TAX SERVICES

RG/2 Claims' in-house tax, accounting and financial services professionals provide disbursement services, including management of checking, sweep, escrow and related cash accounts, as well as non-cash assets, such as credits, gift cards, warrants and stock certificates. RG/2 Claims' in-house CPAs provide a broad array of accounting services, including securing private letter rulings from the IRS regarding the tax reporting consequences of settlement payments, the preparation of settlement fund tax returns and the preparation and issuance of IRS Forms 1099 and W-2.

Range of Services

Offering Unparalleled Value

RG/2 offers a range of quality value-added services for your class action administration.

SECURITIES

RG/2 Claims' highly experienced team uses its various resources to locate beneficial holders of securities, including working with the Depository Trust Company and a proprietary list of nominee firms to identify and mail notices to the class. With RG/2 Claims' CLEVerPay system, claims are processed efficiently and accurately using our proprietary damage grid that calculates class member damages in accordance with a broad array of complex plans of allocation. Claims are automatically flagged through a validation process so RG/2 Claims can communicate with class members concerning their claims and can assist them in filing claims that are complete and properly documented. Once ready for distribution, RG/2 Claims conducts an audit of the claims to insure against calculation errors and possible fraudulent claims. Once the audit is completed, RG/2 Claims calculates distribution amounts for eligible class members in accordance with the plan of allocation and issues checks and any applicable tax documents. RG/2 Claims is also often called upon to act as the Escrow Agent for the Settlement Fund, investing the funds and filing all required tax returns.

ANTITRUST

Because of the high-dollar settlements involved in most antitrust cases and potential large recoveries on behalf of class members, RG/2 Claims understands the importance of accuracy and attention to detail for these cases. RG/2 Claims works with counsel to arrive at the best possible plan to provide notice to the class. With RG/2 Claims' CLEVerPay system, claims filed with a large volume of data, which is common in an antitrust case, can be quickly and easily uploaded into our database for proper auditing. Our highly-trained staff consults with counsel to apply an audit plan to process claims in an efficient manner while ensuring that all claims meet class guidelines. Once ready for distribution, RG/2 Claims calculates check amounts for eligible class members in accordance with the plan of allocation and will issue checks (including wire transfers for large distributions) as well as any necessary tax documents. RG/2 Claims is also available to act as the Escrow Agent for the Settlement Fund, investing the funds and filing all required tax returns.

EMPLOYMENT

With an experienced team of attorneys, CPAs, damage experts and settlement administrators, RG/2 Claims handles all aspects of complex employment settlements, including collective actions, FLSA, gender discrimination, wage-and-hour and, in particular, California state court class and PAGA settlements. RG/2 Claims utilizes technological solutions to securely receive and store class data, parse data for applicable employment information, personalize consents forms or claim forms, collect consents or claims electronically, calculate settlement amounts and make payments through our proprietary CLEVerPay system. Our proprietary database also allows for up-to-the-minute statistical reporting for returned mail, consents or claims received and exclusions submitted. Our CPAs concentrate on withholding and payroll issues and IRC section 468(B) compliance and reporting. Customizable case-specific websites allow for online notification and claims filing capabilities. With Spanish/English bilingual call center representatives on-staff, class members are provided immediate attention to their needs.

CONSUMER

RG/2 Claims handles a wide range of complex consumer matters with notice dissemination to millions of class members and with settlements involving cash, coupons, credits and gift cards. Our experienced claims administrators are available to provide guidance on media, notice and distribution plans that are compliant with the Class Action Fairness Act and the state federal rules governing notice, and that are most beneficial to the class. Our proprietary CLEVerPay system provides a secure and efficient way to track class member data, claims and payments. Integrated with our database, we can provide a user-friendly claims filing portal that will allow class members to complete a static claim form or log-in using user-specific credentials to view and submit a claim personalized just for that user. A similar online portal can be provided as a highly cost-effective method for distribution where the class member can log in to obtain coupons, vouchers or credits as their settlement award.

Effective administration requires proactive planning and precise execution. Before we undertake any matter, we work with you to develop a specific plan for the administration of your case. The service plan is comprehensive, complete and tailored to your specific needs.

RG/2 CLAIMS PROVIDES THE SERVICES SUMMARIZED BELOW:

- Technical consultation during formulation of settlement agreement, including data collection criteria and tax consequences
- Design and development of notice and administration plan, including claim form design and layout
- Claim form and notice printing and mailing services
- Dedicated claimant email address with monitoring and reply service
- Calculation and allocation of class member payments
- Claim form follow-up, including issuing notices to deficient and rejected claims
- Mail forwarding
- Claimant locator services
- Live phone support for claimant inquiries and requests
- Claim form processing
- Claim form review and audit
- Check printing and issuance
- Design and hosting of website access portals
- Online claim receipt confirmation portal
- Ongoing technical consultation throughout the life cycle of the case
- Check and claim form replacement upon request

WE ALSO PROVIDE THE FOLLOWING OPTIONAL SERVICES:

- Periodic status reporting
- Customized rapid reporting on demand
- Issue reminder postcards
- Consultation on damage analyses, calculation and valuation
- Interpretation of raw data to conform to plan of allocation
- Issue claim receipt notification postcards
- Online portal to provide claims forms, status and contact information
- Dedicated toll-free claimant assistance line
- Evaluation and determination of claimant disputes
- Opt-out/Objection processing
- Notice translation
- Integrated notice campaigns, including broadcast, print and e-campaigns
- Pre-paid claim return mail envelope service
- Web-based claim filing
- 24/7 call center support
- Damage measurement and development of an equitable plan of allocation

WE ALSO PROVIDE CALCULATION AND WITHHOLDING OF ALL REQUIRED FEDERAL AND STATE TAX PAYMENTS, INCLUDING:

- Individual class member payments
- Qualified Settlement Fund (QSF) tax filings
- Employment tax filings and remittance
- Generation and issuance of W-2s and 1099s
- Integrated reporting and remittance services, as well as client-friendly data reports for self-filing

Don't see the service you are looking for?
Ask us. We will make it happen.

FOR MORE INFORMATION, PLEASE CONTACT:

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WWW.RG2CLAIMS.COM

BOUTIQUE ADMINISTRATOR WITH WORLD-CLASS CAPABILITIES

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