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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

THOMAS ALLEGRA, YESENIA ARIZA, MARIANA ELISE EMMERT, STUART ROGOFF, GRACELYNN TENAGLIA, and MELISSA VERRASTRO, individually and on behalf of others similarly situated, Plaintiffs, v. LUXOTTICA RETAIL NORTH AMERICA d/b/a LensCrafters, Defendant.	**MEMORANDUM OF LAW IN SUPPORT OF (1) PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT; (2) CLASS COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES, COSTS, AND EXPENSES, AND (3) SERVICE AWARDS TO CLASS REPRESENTATIVES** CASE NO. 1:17-cv-05216-PKC-LB

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INTRODUCTION

The Court preliminarily approved classwide resolution of this action on September 20, 2023, finding that, subject to adequate notice and a fairness hearing, the Settlement was fair and reasonable. Based on those findings, the Court ordered the dissemination of notice to a nationwide Settlement Class of all individuals living in the United States who purchased prescription eyeglasses from LensCrafters after being fitted with AccuFit from September 5, 2013, to September 20, 2023 (the "Settlement Class"). Notice was sent directly to the class, based on LensCrafters' internal records, via email or by paper mail where necessary.

With that notice delivered, Plaintiffs now formally request that the Court grant final approval of the Settlement, and direct that the Settlement proceeds be distributed to the class. Additionally, Plaintiffs respectfully move for an order awarding them: (1) reasonable attorneys' fees of $11,500,000, an amount less than *one-third* of the value of the $39 million settlement reached in this case; (2) reimbursement of reasonable litigation expenses totaling $ 2,686,778.13; (3) reimbursement of reasonable class certification notice costs totaling $ 959,493.91; and (4) for $8,000 service awards to each named plaintiff in the Second Amended Consolidated Complaint ("SACC"). Defendant LensCrafters does not oppose this motion.

Under the Settlement, LensCrafters has agreed to pay $39 million into a non-reversionary, common fund as monetary relief for the Settlement Class.[1] The Settlement fully resolves this litigation, stemming from Plaintiffs' allegations that LensCrafters deceptively marketed its AccuFit Digital Measuring System, and resolves the claims brought by the Plaintiffs and the Settlement Class.

[1] $5,500,000 of this amount has been deposited into an escrow account and is earning interest for the benefit of the Settlement Class. The remaining $33,500,000 will be paid into the escrow account within ten calendar days of an order from this Court granting final approval of the settlement.

Following the dissemination of notice to the Settlement Class and as of the date of this filing, not a single Settlement Class Member has lodged a formal objection to the Settlement. Since preliminary approval, 205,485 Settlement Class members have submitted claims for 364,611 pairs of prescription eyeglasses, with only 39 class members opting out of the settlement. As of the date of this filing, class members should expect to receive at least $50 per pair of eyeglasses. The Settlement Administrator is continuing to send out reminder email notices, which will further increase claims numbers. The high number of claims filed, and the low number of opt-outs, further supports the reasonableness of the Settlement. The proceeds in this litigation will be distributed through electronic means, or physical check where no valid email is available, on a *pro rata* basis for each set of eyeglasses purchased—up to $50.00 per pair, subject to a second distribution if there is a remainder in the fund.

As detailed more fully in the accompanying Declaration of Geoffrey Graber ("Graber Decl.") and summarized below, the Settlement was reached after more than six years of hard-fought litigation, including complex motions practice, intensive fact and expert discovery, and prolonged mediation and settlement discussions. Counsel vigorously prosecuted this action without any compensation and on a fully contingent basis. The litigation risks were high from the outset of the litigation, and each stage of the case brought new challenges. Notwithstanding the risks and challenges, Plaintiffs' Counsel achieved an excellent result for the class.

Plaintiffs respectfully submit that the Settlement is an excellent outcome and recovery for the Settlement Class. The Settlement is fair, reasonable, and adequate, satisfies all the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure, and warrants final approval by the Court. Plaintiffs seek the Court's entry of an order providing for final approval of the Settlement and instructing that the proceeds be disbursed to the Settlement Class.

Moreover, the fee, expense, and service award requests are fair and reasonable and should be approved. They are consistent with awards in major, lengthy consumer class action settlements which, as here, provide for a non-reversionary, multi-million dollar all cash common fund to redress harmed class members. Courts in this Circuit award fees using the "percentage of the fund" approach because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). Courts have long acknowledged the importance of incentivizing class counsel to pursue the largest possible recoveries. Indeed, "Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature." *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014) (collecting cases).

The relevant factors under *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000), strongly support the requested fee. Counsel expended more than six years and over 15,000 hours of attorney and staff labor advancing the class's best interests. This involved complex motion practice, intensive fact and expert discovery, and prolonged mediation and settlement discussions. The results were far from assured. The litigation presented a host of complex legal questions, such as proving the materiality of LensCrafters' AccuFit misrepresentations on a class-wide basis and the viability of Plaintiffs' damages model. At the time of settlement, a motion for summary judgment and a motion to exclude Plaintiffs' experts were pending, and the Parties were weeks away from trial, which presented unknown risks for the class. Counsel settled the matter with a

strong sense of the strength and risks of the case, and skillfully achieved an excellent result for class members consisting of a non-reversionary, multi-million dollar all-cash fund.

The requested fee is reasonable compared to the overall value of the Settlement. Plaintiffs seek *less* than a third of the overall common fund, which is standard for complex class action litigation with large common fund settlements. *See e.g., In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 n.34, (E.D.N.Y. 2003), aff'd, 396 F.3d 96, (2d Cir. 2005) (fees determined based on overall common fund, before deducting for costs); *Hart v. RCI Hosp. Holdings, Inc.*, 2015 WL 5577713, at *17-18 (S.D.N.Y. Sept. 22, 2015) (awarding approximately 33% of the overall common fund before expenses, and noting that "circuit precedent supports taking the gross monetary settlement into account when calculating the percentage of the fund."); *City of Providence*, 2014 WL 1883494 at *12 (same) (collecting cases); *In re Blech Sec. Litig.*, 2002 WL 31720381, at *1 (S.D.N.Y. Dec. 4, 2002) (same).

Finally, the requested expenses are also reasonable and were essential for the successful prosecution of this Action. Similarly, the Plaintiffs' Service Awards are standard and provide critical recognition of the class representatives' time investment, sacrifice, and commitment to the class over six years.

BACKGROUND

I. HISTORY OF THE LITIGATION

The Parties have reached an agreement to resolve this long-running and contentious litigation that provides $39 million in immediate monetary relief to all LensCrafters' customers, living in the United States, who Plaintiffs allege were injured as a result of LensCrafters' allegedly deceptive marketing campaign of its AccuFit Digital Measuring System.

A. Initiation of the Action

Prior to filing this action, Plaintiffs' Counsel conducted a lengthy investigation into whistleblower allegations that LensCrafters had engaged in a multi-year false marketing campaign regarding its AccuFit device. Graber Decl. ¶ 23. The whistleblowers alleged that LensCrafters' claims that the AccuFit technology measured pupillary distance to 0.1mm and improved vision by five times were unfounded. *Id*. Counsel also found and interviewed numerous experts in the optical and manufacturing sectors, who confirmed that LensCrafters' claims about the benefits of AccuFit's precision were not plausible. *Id*.

Following their investigation, Plaintiffs Yesenia Ariza and David Soukup,[2] New York residents, filed the first class action complaint against LensCrafters for alleged misrepresentations regarding AccuFit on September 5, 2017 in this Court. *See* ECF No. 1. The same day, similar class actions were filed in the Northern District of California and the Southern District of Florida. These actions were transferred and related to the New York action, and on December 8, 2017, all three actions were consolidated. On December 12, 2017, and January 5, 2018, Plaintiffs filed the Consolidated Complaint and First Amended Consolidated Complaint, respectively, against LensCrafters. ECF Nos. 27, 30.

LensCrafters sought permission from the Court to file a Motion to Dismiss, which Plaintiffs' Counsel successfully opposed on the basis of the strength of Plaintiffs' claims and pre-suit investigation. *See* ECF Nos. 28, 29, 34, 36, 41. The Court noted at the hearing on the matter that LensCrafters was unlikely to prevail on a Motion to Dismiss, and dissuaded filing such a motion. February 8, 2018, Hr'g Tr. at 3. LensCrafters ultimately elected not to file a Motion to Dismiss.

[2] Soukup, along with another named plaintiff Amy Harloff, was voluntarily dismissed on October 17, 2018.

Plaintiffs filed the operative Second Amended Consolidated Complaint ("SACC") on September 21, 2018, seeking damages and injunctive relief, and asserting claims on behalf of themselves and a California Class, Florida Class, and New York Class. ECF No. 50. Plaintiffs alleged, inter alia, claims under New York, California and Florida consumer protection laws, as well claims under New York, California and Florida common law. LensCrafters filed an answer. ECF No. 66.

B. Two Years of Extensive and Contentious Discovery

The discovery process was long and arduous. Both Parties filed numerous motions to compel and LensCrafters produced close to 70,000 pages of documents. Graber Decl. ¶ 36. Plaintiffs conducted 15 fact depositions (including three 30(b)(6) depositions), and LensCrafters deposed all six named Plaintiffs in this case, Plaintiffs' two "confidential witnesses," and two named plaintiffs' family members. Fact discovery spanned nearly two years. Plaintiffs' Counsel filed numerous motions to compel to advance discovery and class members' claims. These included, for instance, motions to compel LensCrafters to search for and produce manufacturing-related documents; documents identifying class members and their purchases; internal financial documents; documents improperly withheld based on privilege; AccuFit revenue and sales documents; and to provide additional custodians and search terms, among many others. *See e.g.*, ECF Nos. 167; 120; 101; 69; 74. Many of these motions were granted by Magistrate Judge Mann and propelled the case forward.

The Parties also conducted extensive expert discovery. Plaintiffs submitted voluminous, multi-thousand page expert reports from their seven expert witnesses, as did LensCrafters with its eight experts. Graber Decl. ¶ 41. Plaintiffs' experts included Dan Riall, an experienced mechanical engineer with specialization in optical manufacturing and lens fabrication; Keith Walter, a professor of Ophthalmology with expertise in corneal and refractive surgery; Charles Cowan, an

expert in statistics; and Robert Schiff, who specializes in FDA medical device regulations. Plaintiffs also hired three damage experts, who performed complex analysis regarding the impact of LensCrafters' misrepresentations on the eyeglass market. These included Sarah Butler, of National Economic Research Associates, Inc. ("NERA"), who specializes in economic conjoint analysis and Richard Eichmann, also of NERA, who specialized in market simulations and economic analysis. *Id*. ¶ 41 n.2 (citing to expert reports). Each of Plaintiffs' and Defendant's experts were deposed, for a total of fifteen expert depositions. *Id*. ¶ 41.

C. Class Certification and Daubert Briefing

On October 29, 2020, the Parties filed briefing involving Plaintiffs' Motion for Class Certification and the Parties' *Daubert* challenges. ECF Nos. 237-250. These papers consisted of over 300 pages of briefing with thousands of pages of supporting exhibits. LensCrafters also filed a sur-reply in further opposition to Plaintiffs' Motion for Class Certification. ECF No. 253.

On December 13, 2021, the Court issued a 155-page decision granting in part and denying in part Plaintiffs' Motion for Class Certification and resolving the Parties' initial *Daubert* challenges for class certification purposes. ECF No. 272. The Court granted Plaintiffs' request for class certification under Rule 23(b)(3) with respect to claims under the NY General Business Law §§ 349, 350 ("NY GBL Claims"); the Florida Deceptive and Unfair Practices Act ("FDUTPA claim"); California's Unfair Competition Law ("UCL Claim"), False Advertising Law ("FAL Claim"), and Consumer Legal Remedies Act ("CLRA Claim"); and for unjust enrichment under California, Florida, and New York law. *Id.* On December 27, 2021, LensCrafters filed a petition to the Second Circuit under Fed. R. Civ. P. 23(f) seeking leave to appeal the Court's class certification order; on March 24, 2022, the Second Circuit denied LensCrafters' petition for an appeal.

D. Summary Judgment Briefing

On May 13, 2022, the Parties filed their respective papers regarding LensCrafters' Motion for Partial Summary Judgment.[3] ECF Nos. 288-290. The Court denied the Motion for Partial Summary Judgement with respect to the Florida unjust enrichment claim and granted the motion with respect to the UCL Claim, FAL Claim, CLRA Claim seeking equitable relief, and unjust enrichment claim under California law. As a result, only the NY GBL Claims, FDUTPA Claim, CLRA Claim seeking legal relief, and unjust enrichment claim under Florida law remained for trial.

Following the Parties' service of motion papers over the course of several months, on March 3, 2023, LensCrafters filed its Motion for Summary Judgement seeking summary judgment on all the remaining claims along with their renewed *Daubert* motions and oppositions to Plaintiffs' renewed *Daubert* motions. Plaintiffs filed their Opposition to LensCrafters' Motion for Summary Judgement and their renewed *Daubert* motions and oppositions to LensCrafters' renewed *Daubert* motions. ECF Nos. 319-327.

E. Trial Preparation

Following Summary Judgment and *Daubert* briefing, the Parties began preparations for trial, which was scheduled to begin July 10, 2023 and to last four weeks. As of the settlement date, Plaintiffs were thoroughly engaged in trial preparation. Graber Decl. ¶ 49. The Parties provided a joint submission of competing jury instructions and verdict forms, after numerous meet and confers and exchanging drafts over many weeks. *Id*. The Parties also drafted several motions *in limine* regarding complex evidentiary issues. Plaintiff's counsel prepared witnesses for trial in person and over zoom, compiled and submitted witness lists and exhibit lists for trial, designated

[3] Plaintiffs withdrew their unjust enrichment claim under New York law prior, on April 1, 2022,

deposition transcripts and prepared trial logistics. *Id*. Plaintiffs also conducted focus groups and mock juries to assess the strength of the case at trial. *Id*. ¶45.

II. MEDIATION AND SETTLEMENT

A. Settlement Negotiations

Over the course of more than a year, the Parties engaged in settlement negotiations supervised by Judge Daniel Weinstein (ret.) and Ambassador David Carden, of JAMS, including two full-day mediation sessions held on April 12, 2022 and September 28, 2022. Graber Decl. ¶ 45. The settlement negotiations were intensive and contentious. No agreement was reached at mediation, but the Parties continued to negotiate in the following months. *Id*. Even after the Parties preliminarily agreed on the dollar amount of the Settlement, they continued to negotiate the specifics of the Settlement for an additional four weeks.

Once an agreement was reached, the Parties prepared a formal settlement agreement and retained the services of an experienced administrator, Kroll Settlement Administration, LLC ("Kroll"). Kroll Decl. ¶ 2. With Kroll's assistance, the Parties developed and implemented a notice and funds-distribution plan. *Id.* ¶ 3; Graber Decl. ¶ 52.

B. Overview of the Settlement

On June 15, 2023, the Parties informed the Court that a settlement in principle had been reached. ECF No. 344. Following a status conference, on July 31, 2023, Plaintiffs filed an unopposed motion seeking preliminary approval of the Settlement and an order that class notice should be disseminated. ECF No. 349. On September 20, 2023, the Court granted the motion, finding that the Settlement was fair and reasonable. ECF No. 352. Based on those findings, the Court ordered the dissemination of notice to a nationwide Settlement Class. *Id*.

The Settlement Class consists of all U.S. residents who, from September 5, 2013 to September 20, 2023, purchased prescription eyeglasses in the United States from LensCrafters

after being fitted with LensCrafters' AccuFit Digital Measuring System. Ex. 1 and Graber Decl. ¶ 8. The Settlement establishes a $39 million non-reversionary, common fund. *Id*. ¶ 10. The Settlement contemplates that all class members who submit a claim will receive a pro-rata share of the Net Settlement Fund. *Id*. ¶ 11. Each member who submits a claim is eligible to receive up to $50 for each pair of eyeglasses purchased from LensCrafters, subject to a *pro rata* reduction. *Id*. The fund will also cover all settlement-administration and class-notice costs, attorneys' fees and litigation-cost reimbursements, as well as Plaintiffs' Service Awards. *Id.* ¶ 14.

Since the preliminary approval order, Kroll and the Parties have established a website, toll-free number, email and mailing address, and disseminated class notice. Kroll Decl. ¶¶ 6-12. Notice was sent to the 18.7 million members of the Settlement Class, via email and direct mail, and, as of January 10, 2024, 205,485 members had submitted a claim for 364,611 pairs of eyeglasses. *Id.* ¶¶ 5, 10-12, 16. Class members have until January 29, 2024 to opt out via regular mail. *Id*. ¶ 18. To date, only 39 class members have opted out. *Id*. ¶ 19. The Settlement Fund is a non-reversionary fund, meaning LensCrafters will not be entitled to retain any part of the Settlement Fund for any reason. Graber Decl. Ex. 1.

As part of the Settlement, Plaintiffs and the Settlement Class agree to dismiss this litigation with prejudice and agree to release certain claims against LensCrafters and its related Parties.[4] The release in the settlement agreement covers only those claims that were "alleged or asserted in the Action, or that arise out of or relate directly or indirectly in any manner whatsoever to facts alleged or that could have been alleged or asserted in the Action." Graber Decl. Ex. 1 ¶ 12.3; *See generally Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (release is appropriate if its scope is no broader than what could have been pled based on the facts alleged during the litigation); *Wal-Mart,*

[4] The released parties are defined in the Settlement Agreement at 4.

396 F. 3d at 106-07 ("[p]laintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief").

C. The Dissemination of Notice to the Settlement Class

The Notice previously approved by the Court included widespread email and direct mail notice, as well as a comprehensive settlement website. LensCrafters compiled the entire Settlement Class list based on a review of its internal records, which were provided to Kroll on July 27, 2023. Kroll Decl. ¶ 5. The list includes individual's names, direct mailing addresses, e-mail addresses and the number of prescription eyeglasses purchased from LensCrafters during the class period. *Id*.

On October 26, 2023 Kroll sent out email notices to all 12,315,899 class members with a known email address. Kroll Decl. ¶ 10 The next day, Kroll began sending out postcard notices via mail to individuals without a known valid email address, and it completed delivery to all these class members by November 3, 2023. *Id*. ¶ 11. On December 11, 2023, Kroll sent out 1,870,345 postcard notices to the individuals whose email notices were returned to Kroll as undeliverable, and for whom LensCrafters had address records. *Id*. ¶ 12. For the 19,991 Class Members whose mailing notices were returned with a forwarding address, Kroll re-mailed all the notices to the updated address. Kroll Decl. ¶13. For class members whose mailing notices were returned as undeliverable, Kroll is in the process of using skip tracing techniques to locate an updated mailing address and will re-mail those notices to the updated address. *Id*. ¶ 14. Kroll launched the live settlement website on October 26, 2023, which through January 10, 2024, had received 1,452,386 visits. *Id*. ¶ 8. It also established a 24-hour toll free telephone line where callers can obtain automated and interactive information, which through January 10, 2024, had received 25,835 calls to its automated system and 1,547 calls to live operators. *Id*. ¶ 7. Kroll also established an email address and mailing address where it could receive correspondence. *Id*. ¶¶ 6, 9. Kroll has received

8,391 emails and 562 pieces of postal correspondence from members of the Settlement class, and exercised due diligence to respond as fulsomely and timely as possible. *Id*. Kroll sent reminder email notices on December 11, 2023. *Id*. Kroll will continue to send reminder notices leading up to and following the Final Approval hearing.

D. The Settlement Class's Response to the Settlement

The response from the Settlement Class to the Settlement has been positive. There are approximately 18.7 million members in the Settlement Class. Kroll Decl. ¶ 5. As of January 10, 2023, 205,485 members of the Settlement Class (approximately 1.1 percent of the Settlement Class) have submitted a claim for 364,611 pairs of eyeglasses, while only 39 members have requested to be excluded from the settlement. Kroll Decl. ¶¶ 16, 19. Class members have until 30 days after the entry of the Final Approval Order to submit their claims. No member of the Settlement Class has objected to the settlement.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval of any compromise or settlement of a class action. *See* Fed. R. Civ. P. 23(e). A class action settlement should be approved if the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). As the Second Circuit has noted, there is a "strong judicial policy in favor of settlements, particularly in the class action context." *See Wal-Mart*, 396 F.3d at 116.

Rule 23(e)(2), as amended on December 1, 2018, enumerates the factors that the Court should consider when determining whether a proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Rule requires the Court to assess whether:

> (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 processing 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). Factors (A) and (B) are "procedural in nature" while (C) and (D) "guide the substantive review of a proposed settlement." *Moses v. New York Times Co.,* 79 F.4th 235, 242-243 (2nd Cir. 2023). In addition to the factors identified in Rule 23(e)(2), the Second Circuit has instructed district courts to consider the additional *Grinnell* factors when analyzing the substantive fairness of the settlement. *Moses*, 79 F.4th at 242-244 (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). The *Grinnell* factors include:

> (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.

Grinnell, 495 F.2d at 463. Though the factors in *Grinnell* and Rule 23(e)(2) largely overlap, Rule 23(e)(2) requires the Court to expressly consider the adequacy of the relief provided to the class and the equitable treatment of class members. *Moses,* 79 F.4th at 244. The fairness of any attorneys' fee or incentive award should be considered in tandem with the terms of the settlement. *Id.*

As the Advisory Committee Notes to the 2018 amendments instruct, the four factors identified in Rule 23(e)(2) do not "displace" factors adopted by the Court of Appeals. Fed. R. Civ P. 23 (e)(2) (Advisory Committee Notes, 2018 Amendments). Rather, they focus the court and the parties' attention on the "core concerns of procedure and substance" to guide the Court in deciding

whether to approve the settlement. *Id.* As such, Plaintiff will discuss the fairness, reasonableness, and adequacy of the Settlement in relation to the four factors identified in Rule 23(e)(2), but will also discuss the application of the relevant, non-duplicative *Grinnell* factors. *See Christine Asia Co. v. Yun Ma*, 2019 WL 5257534, at *9 (S.D.N.Y. Oct. 16, 2019) ("The Court understands the new Rule 23(e) factors to add to, rather than displace, the *Grinne[ll]* factors.")

As discussed below, both the *Grinnell* and Rule 23(e)(2) factors strongly support approval of the Settlement in this case.

A. Lead Plaintiffs and Class Counsel Have Adequately Represented the Settlement Class

In determining whether to approve a class-action settlement, courts consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. Pr. 23(e)(2)(A). To demonstrate adequacy, Plaintiffs must show "that: (1) the class representatives do not have conflicting interests with other class members; and (2) class counsel is qualified, experienced and generally able to conduct the litigation." *Flores v. CGI Inc.*, 2022 WL 13804077, at *4 (S.D.N.Y. Oct. 21, 2022); *see also Soler v. Fresh Direct, LLC*, 2023 WL 2492977, at *3 (S.D.N.Y. Mar. 14, 2023) ("Determination of adequacy typically entails inquiry 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.") (internal quotations omitted). Plaintiffs and Class Counsel have adequately represented the Settlement Class here.

No fundamental conflict exists between Plaintiffs and members of the proposed Settlement Class. Plaintiffs hold the same damages claims as the members of the Settlement Class that they seek to represent, and all claim to have paid the same price premium for their LensCrafters eyeglasses due to the alleged misrepresentations LensCrafters made with respect to AccuFit. As

the Court rightly held in its previous Order on Class Certification, the named Plaintiffs interests are not "antagonistic" to the interests of the other class members, they have fulfilled their duties as class representatives, and have proven that they are adequate representatives of the class. ECF No. 274 at 31. The fact that the Settlement Class is nationwide does not render the Plaintiffs inadequate. *Kurtz v. Kimberly-Clark Corp.*, No. 14-cv-1142, ECF No. 471 at 10-12 (E.D.N.Y. June 12, 2023).

Plaintiffs have also effectively represented the interests of the proposed Settlement Class by selecting qualified Class Counsel, regularly communicating with Class Counsel regarding developments in the litigation, preparing for and attending depositions, communicating with Class Counsel regarding the terms of the Settlement, and approving those terms. Graber Decl. ¶ 58.

Additionally, Plaintiffs and Class Counsel have adequately represented the Settlement Class in both the vigorous prosecution of this Action for over six years—which included defending multiple dispositive motions, succeeding in certifying three state classes, conducting extensive expert work and discovery, and successfully obtaining and reviewing thousands of documents—and in the negotiation and achievement of the Settlement. And, as this Court previously held, Class Counsel has demonstrated its experience in successfully prosecuting complex consumer protection class actions. ECF No. 274 at 31-35. Therefore, the adequacy of representation requirement is satisfied. Neither Plaintiffs nor Class Counsel have any interests antagonistic to those of the proposed Settlement Class.

B. The Settlement Was Reached After Arm's Length Negotiations Assisted by an Experienced Mediator after Substantial Discovery

In weighing approval of the Settlement, the Court must consider whether the settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Courts have traditionally considered

other related circumstances in determining the settlement's "procedural" fairness, including (i) counsel's understanding of the strengths and weaknesses of the case based on factors such as "the stage of the proceedings and the amount of discovery completed"[5]; (ii) the absence of any indicia of collusion[6]; and (iii) the involvement of a mediator.[7] Moreover, "'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997). All of these considerations strongly support approval of the Settlement here pursuant to Rule 23(e)(2)(B) and under the third *Grinnell* factor: "the stage of the proceedings and the amount of discovery completed." *Grinnell*, 495 F.2d at 463.

The Settlement demonstrates all the hallmarks of an arm's length agreement by well-informed counsel. Both Parties' counsel had extensive knowledge of the case record, resulting from over six years of hard-fought litigation. Graber Decl. ¶¶ 49, 52. At the time of the settlement, both Parties were preparing for a trial, in a case where discovery had spanned nearly two years and included the production of close to seventy thousand pages of documents, 40 depositions, and expert reports from fifteen expert witnesses. *Id.* ¶¶ 31-33, 36-38, 40, 43, 45, 49-50. There are also no indicia that Plaintiffs and LensCrafters colluded in the Settlement. The Parties' settlement negotiations themselves were contentious and took place periodically over more than a year. *Id.* ¶¶ 45, 49. Even after the Parties preliminarily agreed on the dollar amount of the Settlement, they continued to negotiate the specifics of the Settlement for an additional four weeks. *Id.* ¶ 52.

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[5] *Grinnell*, 495 F.2d at 463 (third factor).

[6] *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) ("the absence of any indication of collusion, the protracted settlement negotiations, the ability and experience of plaintiffs' counsel,[and] the extensive discovery preceding settlement . . . are important indicia of the propriety of settlement negotiations.")

[7] *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a mediator's involvement "helps to ensure that the proceedings were free of collusion and undue pressure").

To assist in the process, the Parties' engaged an independent mediator, Judge Daniel Weinstein (ret.) and Ambassador David Carden, of JAMS, which further ensures that negotiations were non-collusive and conducted at arm's length. *See, e.g. In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 576 (S.D.N.Y. 2008) (noting that the use of Judge Weinstein to mediate the settlement negotiations, "strongly supports a finding that they were conducted at arm's-length and without conclusion."); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) (noting the use of Judge Weinstein to mediate the settlement supported a finding that it was negotiated at arm's-length); *Sanders v. CJS Sols. Grp., LLC*, 2018 WL 1116017, at *2 (S.D.N.Y. Feb. 28, 2018) ("[T]he settlement was negotiated for at arm's length with the assistance of an independent mediator, which reinforces the non-collusive nature of the settlement.").

Additionally, Counsel strongly believe that the Settlement is in the best interest of the Settlement Class. Counsel are among the most highly experienced firms in the country in litigating complex consumer class actions. Exs. 9, 10 (firm resumes). Cohen Milstein is widely recognized as among the top plaintiffs' class action firms in the country, having led multiple complex cases to successful conclusions. The opinions of experienced and informed counsel supporting settlement are entitled to considerable weight. *See, e.g.*, *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 662 (S.D.N.Y. 2015) (finding settlement procedurally fair where due to experienced counsel and extensive discovery, "counsel on both sides were well-situated to thoughtfully assess the potential outcomes of the case and the likelihoods of each occurring").

In short, the Settlement was the product of extensive and hard-fought litigation occurring alongside equally hard-fought negotiations. Accordingly, this factor weighs in favor of Court approval of the proposed Settlement.

C. The Settlement Provides Relief to the Settlement Class that is Fair, Reasonable, and Adequate under Rule 23(e)(2)(C) and the overlapping *Grinnell* Factors

In determining whether the Settlement is "fair, reasonable, and adequate," the Court must consider the factors outlined in Rule 23(e)(2)(C): (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 processing 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). The Rule 23(e)(2)(C) considerations largely encompass at least six of the nine factors of the traditional *Grinnell* analysis. *See Grinnell*, 495 F.2d at 463. In particular: "(1) the complexity, expense and likely duration of the litigation; . . . (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; . . . (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." *Id.* Importantly, "not every factor must weigh in favor of the settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 431 (S.D.N.Y. 2016).

When considering the reasonableness of the Settlement, the relief actually provided "to class members is a central concern." Fed. R. Civ. P. 23(e)(2)(C), advisory committee's notes. Under the Settlement, each class member is entitled to up to $50.00 per pair of glasses, based on a *pro rata* share. Based on the claims in this case to date, each class member would expect to receive approximately $50 for each pair of eyeglasses purchased, after taking into account all requested fees and expenses and the expected notice costs — a substantial recovery compared to what they could have received had Plaintiffs succeeded at trial—and that's assuming the class member

belonged to one of three certified state classes. *See* Graber Decl. ¶ 13 (Plaintiffs' damage expert estimated a $23.28 overcharge per pair of eyeglasses). Settlement Class members from non-certified states would be ineligible to recover damages even if the Plaintiffs were successful at trial. For these reasons, and the reasons set forth below, each of the relevant factors under Rule 23(e)(2)(C) and overlapping *Grinnell* factors support final approval of the Settlement.

1. The Settlement Is Adequate, Taking into Account the Costs and Risks of Further Litigation

"In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation." *In re Top Tankers, Inc. Sec. Litig.*, 2008 WL 2944620, at *4 (S.D.N.Y. July 31, 2008) (quoting *Grinnell*, 495 F.2d at 463). The likelihood that further litigation of this case would be protracted and risky is high and supports approval of the Settlement. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012). Final approval of the Settlement ensures a certain recovery of $39 million in cash for the Settlement Class, whereas continuing to litigate the Action would present numerous, significant risks and delay any recovery to the Settlement Class.

LensCrafters' Motion for Summary Judgement and *Daubert* motions were pending before the Court at the time of Settlement. Should Plaintiffs have failed to prevail on any of those motions, the case may have effectively ended, or at minimum, would have been substantially diminished. It would be difficult, if not impossible, to establish damages and liability without the testimony of Plaintiffs' experts. Further, in the event that the Court denied LensCrafters' Motion for Summary Judgment and *Daubert* motions, Plaintiffs would still face the risk of a jury trial. Even at trial, Defendant could seek to decertify the class. *See Bellifemine v. Sanofi- Aventis U.S. LLC*, 2010 WL 3119374, at *4 (S.D.N.Y. Aug. 6, 2010) ("There is no assurance of obtaining class certification

through trial, because a court can re-evaluate the appropriateness of certification at anytime during the proceedings.").

The outcome of a trial involving complex facts and untested legal theories is invariably unpredictable. In any complex case, "[t]here is a substantial risk that the plaintiff might not be able to establish liability at all and, even assuming a favorable jury verdict, if the matter is fully litigated and appealed, any recovery would be years away." *Cardiology Assocs., P.C. v. Nat'l Intergroup, Inc.*, 1987 WL 7030, at *3 (S.D.N.Y. Feb. 13, 1987). Based on the claims rate as of the date of this filing, each class member who submitted a claim would receive approximately $50 per pair of eyeglasses, more than the $23.28 in damages estimated by Plaintiffs' damage expert. Graber Decl. ¶ 12-13. Additionally, the Settlement Class is a nationwide class that includes persons who do not reside in the three states certified by the Court – persons who would have been entitled to nothing absent this settlement. Accordantly, this factor supports granting final approval.

2. The Settlement Provides for an Effective Distribution of the Proceeds to the Class

The procedures for processing Settlement Class Members' claims and distributing the proceeds of the Settlement to eligible claimants were agreed to by the Parties, with the assistance of an experienced Settlement Administrator, Kroll. Notice was sent to Settlement Class Members based on the available contact information in LensCrafters' possession. Based on that data, Kroll, identified a list of 18,651,344 Settlement Class Members and distributed Notice to each Settlement Class Member based on the most recent contact information available. Kroll Decl. ¶ 5. Along with the Notice, each Settlement Class Member received a unique Class Member ID code, which helps prevent fraudulent claims. Kroll Decl. ¶17. If the Settlement receives final approval, the Net Settlement Fund will be distributed to Settlement Class Members who submit eligible Claim Forms with the required documentation, either receipts or a sworn statement.

Kroll, an independent company with extensive experience handling consumer class action administration, will review and process the claims under Class Counsel's supervision, crosschecking the submissions with the unique Claim ID code each member should have received when Notice was sent out. Kroll Decl. ¶¶ 2, 17. If a Settlement Class Member is unable to locate their Claim ID, claimants may contact Kroll who will crosscheck the claim with records provided by LensCrafters. Kroll Decl. ¶ 17. Additionally, each claimant will have an opportunity to contact Kroll if there is a need to cure any deficiencies in their claims. Kroll Decl. ¶¶ 6-9. After all claims are processed, Kroll will send claimants their *pro rata* share of the Net Settlement Fund upon approval of the Court through electronic deposit, prepaid debit card, or paper check. Kroll Decl. Ex. H. at 42.

Importantly, the Settlement is not a claims-made settlement. If the Settlement is approved, under no circumstances will LensCrafters have a right to the return of any portion of the Settlement. This type of claims process is consistent with how claims are typically done in consumer class actions where individual class members contact information is available from the records of the defendant. *See, e.g.*, *In re Vitamin C*, 2012 WL 5289514, at *2 (approving notice plan that included direct mail for individuals for whom Defendant had an address); *In re Prudential Sec. Inc. Ltd. P'ship Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (approving individual notice to class members "whose address could reasonably be located"); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 167–69 (2d Cir. 1987) (approving letter notice to reasonably identifiable class members).

3. The Terms of the Proposed Award of Attorneys' Fees Also Support Settlement Approval

As detailed more fully below, the relief provided by the Settlement is adequate when the proposed award of attorneys' fees is taken into account. In analyzing the "substantive fairness of

a proposed settlement, 'the district court is required to review both the terms of the settlement and any fee award encompassed in a settlement agreement' in tandem." *Moses*, 79 F.4th at 244 (quoting *Fresno Cnty. Emps.' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 72 (2d Cir. 2019)). This review "'provides a backstop that prevents unscrupulous counsel from quickly settling a class's claims to cut a check.'" *Id.* (quoting *Fresno Cnty. Emps.' Ret. Ass'n*, 925 F.3d at 72).

The attorney fee award requested here is $11.5 million, approximately 29 percent of the settlement fund, or less than one third, of the gross settlement amount requested after more than six years of litigation. One third of the gross settlement amount is a standard amount for a settlement this size, where a common fund is established, and typically such requests are considered reasonable and are routinely awarded.[8] This request is in stark contrast to *Moses*, where the Second Circuit addressed final approval in the context of a fee request constituting roughly 76% of the settlement fund. *Moses*, 79 F.4th at 246.

Reviewing the fee award request through a lodestar cross-check also supports a finding that the fee is reasonable when considered in conjunction with the relief granted to the class. Plaintiffs' Counsel spent 15,015.65 hours litigating this action, producing a total lodestar of $10,314,663.50 based on attorney and a paraprofessional's hourly rates. As explained in more detail below, the hourly rates used to calculate the lodestar are in line with market rates for lawyers of similar quality litigating similar cases. *See e.g, In re Wells Fargo & Co. Sec. Litig.*, Case No. 1:20-cv-04494-JLR-SN (S.D.N.Y. Sept. 8, 2023), ECF No. 206 (Graber Decl. Ex. 2) (approving Cohen Milstein's hourly rates). The fee award requested by Class Counsel only amounts to a multiplier of 1.1, which is well within the norm, if not on the low-end of fee awards. *See e.g., In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *16 (S.D.N.Y. July 21, 2020). ("In

[8] *See infra,* note 9.

complex litigation, lodestar multipliers between 2 and 5 are commonly awarded, and fee awards resulting in multipliers as high as 6 have also been approved."); *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 64-5 (E.D.N.Y. 2018) (approving a "modest" lodestar multiplier of 1.58, and finding this is in the low range of multipliers for complex consumer class actions) (collecting cases).

Simply put, this was not a settlement quickly reached for a fast paycheck—as the Second Circuit warned against in *Moses*. This case was vigorously litigated for over six years, and the fee requested by Plaintiffs' Counsel is a standard request in class action settlements where the settlement agreement includes a non-reversionary common fund.

4. The Parties Have No Other Agreements Pertaining to the Settlement

The Court also must evaluate any agreement made in connection with the proposed settlement. See Fed. R. Civ. P. 23(e)(2)(C)(iv), (e)(3). Here, the settlement agreement before the Court is the only extant agreement. Graber Decl. ¶ 9.

D. The Settlement Treats Class Members Equitably Relative to Each Other

The final Rule 23(e)(2) factor turns on whether the proposed settlement "treats class members equally relative to each other." Fed. R. Civ. P. 23(e)(2)(D). "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2)(D), advisory committee's notes.

The proposed Settlement treats members of the Settlement Class equitably relative to each other. As discussed below, pursuant to the Plan of Allocation, eligible claimants, who submit the Claim Form with the required documentation, will be entitled to receive their *pro rata* share of the recovery based on the number of eyeglasses they purchased from LensCrafters. As Plaintiffs'

experts calculated damages per pair of glasses, class members will receive damages proportional to any damages they might have been able to recover at trial based on the number of glasses they purchased.

E. The Remaining *Grinnell* Factors Also Weigh in Favor of Granting Final Approval

The remaining two *Grinnell* factors, (1) the reaction of the class to the settlement and (2) the ability of the defendants to withstand a greater judgment, both also support an order granting final approval.

1. The Reaction of the Class to the Settlement Supports Final Approval of the Settlement

The reaction of the class to the Settlement is a factor set forth in *Grinnell* that courts consider, although it is not included in Rule 23(e)(2). *See, e.g., In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012); *FLAG Telecom,* 2010 WL 4537550, at *16. A "favorable reception by the class constitutes strong evidence that a proposed settlement is fair." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013) (internal quotations omitted) (quoting *Grinnell*, 495 F.2d at 462). With a large class size, including an extensive notice campaign, some objections are to be expected, but where the number of objectors is small, that supports a finding of the adequacy of the settlement. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *16 (E.D.N.Y., Dec. 16, 2019) (quoting *Wal-Mart*, 396 F.3d at 118).

The deadline to submit objections or to opt out is January 29, 2024 and February 5, 2024 respectively. As of January 10, 2024, Class members have made claims for 364,611 pairs of eyeglasses, there have been 39 exclusions and no objections. The low number opt-outs and no objectors, weighs strongly in favor of final approval. *Wright v. Stern*, 553 F. Supp. 2d 337, 345

(S.D.N.Y. 2008) ("[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication that the proposed settlement is fair, reasonable, and adequate," despite thirteen objections and three opt-outs out of 3500 class members). Moreover, the overall claims rate is within the acceptable range, particularly because it is non-reversionary and there are many months still left in the claims period. *See e.g., In re Zoom Video Commc'ns, Inc. Priv. Litig.*, 2022 WL 1593389, at *8 (N.D. Cal. April 21, 2022) (finding a one percent claims rate was reasonable, particularly because "the settlement is also non-reversionary, mitigating any risk that the one percent claim participation rate was intentionally engineered."); *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 214-215 (W.D. Mo. 2017), aff'd, 896 F.3d 900 (8th Cir. 2018) (collecting cases that approved settlements with less than one percent claims rates).

2. The Defendant's Ability to Withstand a Greater Judgment Does Not Prevent Final Approval of the Settlement

While courts consider the ability of the defendant to withstand a greater judgment than that secured in the settlement in analyzing the fairness of a settlement, it does not generally indicate that a settlement is unreasonable or inadequate when the remaining factors weigh in favor of settlement. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). This factor is "typically relevant only when a settlement is less than what it might otherwise be but for the fact that the defendant's financial circumstances do not permit a greater settlement." *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 314 (S.D.N.Y. 2020). This factor is usually "neutral" unless the defendant is suffering financial difficulties. *Id.* at 314-15. Even if LensCrafters could withstand a judgment that exceeds the relief provided by the settlement here, courts generally do not find this to be an impediment to settlement. *In re Vitamin C*, 2012 WL 5289514, at *6; *see also Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012) ("A defendant's ability to withstand a greater judgment, standing alone, does not suggest

that the settlement is unfair.") (citation and quotation marks omitted). For LensCrafters, a $39 million settlement is not an insignificant sum. Accordingly, this factor does not impede the Court's ability to grant preliminary approval of this settlement, which otherwise readily satisfies the Rule 23(e)(2) final approval standard that it be fair, reasonable, and adequate.

II. NOTICE TO THE SETTLEMENT CLASS SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice to the Settlement Class satisfies the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Notice also satisfied Rule 23(e)(1) and due process, which require only that notice of a settlement be "reasonable"—*i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 113-114.

In this case, the Notice Plan was prepared with the aid of an experienced Settlement Administrator, Kroll, who began distributing widespread email and direct mail notice on October 27, 2023, as well as setting up a comprehensive settlement website. See Kroll Decl. ¶ 8, 10-11. Notice was disseminated to the Settlement Class based on information in LensCrafters' records on each individual class member—including mailing addresses and email addresses. See *id*. ¶ 5. After receiving the information from LensCrafters' records, Kroll conducted its own investigation to obtain up-to-date information for each class member. *Id*. As of January 10, 2024, Kroll had disseminated notice to nearly all Settlement Class members, over 18.6 million individuals, via email or physical mailing based on the most up to date contact information available. *Id*. ¶ 10-14.

Both the substance of the Notice and the method of dissemination to the Settlement Class satisfies Rule 23(c)(2)(B) and Rule 23(e)(1). The long and short form notices, included all the

information required by Rule 23(c)(2)(B), including (i) the nature of the action; (ii) the definition of the class that is being certified; (iii) the class claims, issues, or defenses; (iv) the basic terms of the Agreement; (v) that a class member may enter an appearance through an attorney if the member so desires; (vi) that the Court will exclude from the class any member who requests exclusion; (vii) the time and manner for requesting exclusion; (viii) the binding effect of a class judgment on members and the terms of the releases; (ix) the claim filing process and a description of the Distribution of the Net Settlement Fund; and (x) the requests for an award of attorneys' fees, reimbursement of costs and Service Awards to the Class Representatives. Exs. E, F, G to Kroll Decl. The Notice further directs Settlement Class members to the case website and provides contact information for the Settlement Administrator. *Id*.

Courts have routinely approved similar notice plans involving both direct email/mail notices and a settlement website. *See, e.g.*, *Vitamin C*, 2012 WL 5289514, at *2 (approving notice plan that included direct mail and a settlement website); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *3 (E.D.N.Y. Sept. 25, 2009) (approving notice plan that included direct mail); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448 (S.D.N.Y. 2004)(approving notice plan that included direct mail and a settlement website); *see also In re Prudential Sec. Inc. Ltd. P'ship Litig.*, 164 F.R.D. at 368 (approving individual notice to class members "whose address could reasonably be located"); *Agent Orange,* 818 F.2d at 167–69 (approving letter notice to reasonably identifiable class members). Accordingly, Plaintiffs respectfully request that the Court approve the proposed form and plan of dissemination of notice.

III. CERTIFICATION OF THE SETTLEMENT CLASS IS WARRANTED

In reaching the Settlement, the Parties have stipulated to the certification of the Settlement Class. As set forth in Plaintiffs' motion for preliminary approval of the Settlement, in certifying a Settlement Class, where the Court has previously certified a class, the Court need only consider

any changes to the certified class. ECF No. 349, at 20. The only differences between the certified three state sub-classes and the Settlement Class is: the time period of the Settlement is expanded to begin at September 5, 2013 for the entire class, and the scope of the class covers a nationwide class under New York law—rather than three separate sub-classes under separate New York, California, and Florida state laws. *Id*. As more fully laid out in Plaintiffs motion for preliminary approval of the Settlement, the Settlement Class satisfies all the requirements of Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. *See* ECF No. 349, at 21-29. None of the facts regarding certification of the Settlement Class have changed since Plaintiffs filed the motion for preliminary approval, and there have been no objections to certification of the class as of the date of this filing. Accordingly, Plaintiffs respectfully request that the Court certify the Settlement Class under Rule 23(a) and (b)(3) for the reasons set forth in their earlier motion. *See id.*

IV. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE GRANTED

"[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." Fed. R. Civ. P. 23(h). Courts in this district have held that the reasonableness of attorneys' fees must also be considered in tandem with the overall fairness of the settlement under Rule 23(e)(2), which was amended in 2018 to include consideration of "any proposed award of attorney's fees" when determining the adequacy of class relief. Fed. R. Civ. P. 23(e)(2)(C)(iii); *Moses*, 79 F. 4th at 243. "Courts evaluating the fairness, reasonableness, and adequacy of a proposed settlement must consider the four factors outlined in Rule 23(e)(2) holistically, taking into account – among other substantive considerations stated in the rule – the proposed attorneys' fees and incentive awards," in addition to considering the *Grinnell* factors. *Id.*

Plaintiffs' Counsel requests that the Court approve a fee award of $11,500,000, an amount *less* than one-third of the settlement amount reached. Counsel's fee request satisfies all applicable legal and factual requirements and is fully justified in the circumstances of this case. Counsel's efforts over more than six years of litigation have gone uncompensated and the fees have been entirely contingent on the result achieved.

Court have consistently recognized that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This common fund doctrine is based on the inherent powers of the federal court to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id*. In common fund cases such as this, courts in this district may "use either the lodestar method or a method based on the percentage of the settlement fund, though 'the trend in the Second Circuit is to utilize the percentage method.'" *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Pracs. Litig.*, 2013 WL 12353998, at *1 (E.D.N.Y. Nov. 8, 2013); *Goldberger*, 209 F.3d at 50; *Vitamin C*, 2012 WL 5289514, at * 9 (same).

In the Second Circuit, around one-third of the gross settlement amount is typical, particularly for complex, large class actions. The proposed fee is set as the numerator and the fund size is set as the denominator, where the fund size is the gross fund size—the entire settlement amount *before* costs are subtracted. *See In re Visa Check/Mastermoney*, 297 F. Supp. 2d at 525 n.34 (disagreeing with an objector's assertion that the judge "should award attorneys' fees calculated on the net recovery to the Class, excluding costs and expenses."); *Hart*, 2015 WL 5577713, at *18 (awarding approximately 33% of the overall common fund before expenses, and noting that "circuit precedent supports taking the gross monetary settlement into account when

calculating the percentage of the fund."); *City of Providence*, 2014 WL 1883494 at *12 (same) (collecting cases); *In re Blech Sec. Litig.*, 2002 WL 31720381, at *1 (same); *see also*, *In re Top Tankers, Inc. Sec. Litig.*, 2008 WL 2944620, at *13 n. 9 ("Empirical studies show that, regardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."); *Strougo v. Bassini*, 258 F.Supp.2d 254, 262 (S.D.N.Y.2003) ("a fee of 33 1/3% of the settlement fund is reasonable") (collecting cases); *City of Providence*, 2014 WL 1883494 at *12 (same) (collecting cases); *Velez v. Novartis Pharms. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010), ("District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater."); *Nichols v. Noom, Inc.*, 2022 WL 2705354 at *10 (S.D.N.Y. July 12, 2022) (Awarding attorney fee awards of 1/3 of a $56 million cash fund settlement in part because "a fee equal to one-third of a settlement fund is routinely approved in this Circuit.").[9] Here, Plaintiffs' Counsel seeks twenty-nine percent of the settlement fund, or less than a third of the total settlement amount reached.

Even when the percentage method is chosen, "the lodestar remains useful as a baseline." *Goldberger*, 209 F.3d at 50 (internal citations omitted); *In re Vitamin C*, 2012 WL 5289514 at * 9. Even where the lodestar serves as "a 'cross check' on the reasonableness of the requested percentage," however, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50. The fee award requested here is not disproportionate to lodestar. The multiplier requested is small, only 1.1 times the total lodestar Plaintiffs' Counsel has invested in the case. Such multipliers are routinely granted.[10]

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[9] *See infra*, note 13.

[10] *See* section III(v)(1) below, citing *Signet*, 2020 WL 4196468, at *16 ("In complex litigation, lodestar multipliers between 2 and 5 are commonly awarded, and fee awards resulting in multipliers as high as 6 have also been approved."); *Godson*, 328 F.R.D. at 65 (approving a "modest" lodestar multiplier of 1.58,

Regardless of the method used, the Second Circuit asks if the fee meets the multifactor test set out in *Goldberg*er, which considers "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50. All factors support a finding that the requested fee is reasonable here.

A. Counsel's Investment of Time and Labor Favors the Request

Counsel's significant investment of time and labor on behalf of the class supports the requested award. Collectively, Plaintiffs' Counsel dedicated 15,015.65 hours to this case.[11] During this time, Plaintiffs' Counsel filed several complex pleadings; conducted intensive discovery for nearly two years, reviewing close to seventy thousand pages of production; defended 17 depositions; deposed 25 individuals; briefed numerous discovery motions, including at least 16 motions to compel; worked with seven experts to develop expert reports; and engaged in extensive motion practice including Class Certification, two rounds of *Daubert* briefing, the Opposition to Summary Judgment, and numerous other motions. Counsel also engaged in intensive trial preparations over several months, including running a mock jury and focus groups, submitting proposed jury instructions and verdict forms, submitting motions *in limine*, preparing witnesses for trial, filing witness lists and exhibit lists, designating deposition transcripts, and preparing trial

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and finding this is in the low range of multipliers for complex consumer class actions)(collecting cases); *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d at 590 ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts.... Accordingly, a 1.6x multiplier is well within the range of reasonableness."); *Yuzary v. HSBC Bank USA, N.A*, 2013 WL 5492998 at *10 (S.D.N.Y. Oct. 2, 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.") (collecting cases) (internal citations omitted).

[11] This compilation of hours omits any individual who worked less than 50 hours total on the litigation. Graber Decl. ¶ 17.

logistics. *See* Graber Decl. ¶49. Counsel invested this time on a contingent basis for the entirety of the litigation.

Furthermore, Counsel will continue to expend efforts on finalizing the settlement and overseeing the claims process. Graber Decl. ¶54; *see In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 2015 WL 6971424, at *10 (S.D.N.Y. Nov. 9, 2015) (considering class counsel's future efforts to oversee the claims process in awarding a 33% fee); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at * 15 (D.N.J. Nov. 9, 2005) (observing that class counsel would "likely incur hundreds of additional hours in connection with administering the settlement, without prospect for further fees").

B. The Litigation Has Been Complex and Lengthy

The complexity and length of this litigation supports the award of the fee. As described above, this litigation involved complex, intensive discovery and motion practice over six years. *See e.g.*, ECF No. 361 at 9; *Belfiore v. The Procter & Gamble Co.*, No. 2:14-cv-04090 (E.D.N.Y. July 27, 2020) (J. Chen) (Approving the fee request for a consumer class action, considering in part that the litigation had spanned six years), ECF No. 358-1 at 27; *Sykes v. Harris*, 2016 WL 3030156, at *16 (S.D.N.Y. May 24, 2016) (approving attorney's fees, finding in part that six years of contentious litigation supported the award).

Plaintiffs' theories of liability and damages were based on complex legal theories, including a price premium damage theory which required expert conjoint analysis to show the price premium LensCrafters overcharged consumers because of its misrepresentations. Plaintiffs' theories of liability also had to be supported by complex scientific analysis demonstrating that LensCrafters' machines were not capable of manufacturing to 0.5mm pupillary distance, and scientific analysis that, in any case, human vision would not be improved by 0.5mm measurements. In total, Plaintiffs worked with seven experts on complex damage theories, the Federal Drug

Administration's (FDA) medical devices regulations applicability to AccuFit, human ophthalmology, and eyeglass manufacturing. Over the course of a two-year discovery period, approximately seventy thousand pages of documents were produced, and Plaintiffs' counsel defended 17 depositions, deposed 25 individuals and briefed numerous discovery motions, including at least 16 motions to compel. The case involved complex motion practice, as detailed in the factual background section above. At the time of settlement, both LensCrafters' Motion for Summary Judgment and Daubert motions were pending before the Court, which could have effectively ended the case if granted.

This is not a case in which "unscrupulous counsel [] quickly settl[ed] a class's claims to cut a check." *Moses.*, 79 F.4th at 244. Unlike in *Moses*, where litigation had lasted less than a year, *id*., at 239, here extensive and contentious litigation extended for over six years until just before trial. Counsel also engaged in lengthy, protracted settlement and mediation sessions over the course of more than a year. Graber Decl. ¶ 49, 52. Through the extensive discovery and motion practice in this case, "'counsel were well informed of the merits of the claims by the time the Settlement was reached.'" *Godson*, 328 F.R.D. at 53 (*quoting In re AOL Time Warner ERISA Litig.*, 2006 WL 2789862, at *5 (S.D.N.Y. Sept. 27, 2006.)) Class counsel settled the litigation with a keen awareness of the potential outcomes of the litigation.

C. The Uncertainty of the Outcome of Litigation Favors the Award

The risk of the litigation strongly favors the award. This is considered "one of the most important Goldberger factors." *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (citing *In re Bristol–Myers Squibb Sec. Litig.*, 361 F.Supp.2d 229, 233 (S.D.N.Y.2005). Courts recognize that class actions in particular are risky. *In re Comverse Tech.*, 2010 WL 2653354, at *5 ("little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.") (quotations and citations omitted); *Meredith Corp.*

v. SESAC, LLC, 87 F. Supp. 3d at 669 (Class action suits "have a well-deserved reputation as being most complex.").

It is well established that courts analyzing this factor measure the risk "as of when the case is filed." *Goldberger*, 209 F. 3d at 55. At the time of filing this case, Plaintiffs knew only what their investigation taught them. Plaintiffs' Counsel had no "road-map," they were the only firms to file cases nationally against LensCrafters regarding the company's misrepresentations about AccuFit, and there were no government investigations regarding the same conduct. Graber Decl. ¶ 23-24; *see e.g., City of Providence*, 2014 WL 1883494 at *16 (awarding attorneys' fees where risk of litigation was high, in part because "there was no road-map for Lead Counsel to follow in this Action as no governmental agency investigated or brought action against Defendants.") There were high risks to establishing the materiality of misrepresentations and damages on a class-wide basis. It was extremely risky to embark on complex litigation against a deep-pocketed defendant on a contingent basis. Indeed, "[l]ead Counsel undertook this Action on a wholly contingent-fee basis, investing a substantial amount of time and money to prosecute the Action without a guarantee of compensation or even the recovery of expenses." *City of Providence*, 2014 WL 1883494 at *14. This represented a significant risk for which Courts have awarded compensation, "[b]ecause of the nature of a contingent practice where cases are predominantly complex lasting several years, not only do contingent litigation firms have to pay regular overhead, but they also must advance the expenses of the litigation." *Id*. As such, this factor supports the award.

D. Counsel Has Skillfully and Vigorously Represented the Class

In evaluating the quality of representation in class actions, courts in this Circuit "review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Comverse Tech.*, 2010 WL 2653354, at *6, citing *Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 141

(S.D.N.Y. 1998); see also *Goldberger*, 209 F.3d at 55; *In re Warner Commc'n Sec. Litig.*, 618 F. Supp. 735, 748-49 (S.D.N.Y. 1985).

Lead Counsel is one of the most highly experienced firms in the country in litigating complex consumer class actions. Graber Decl. Ex. 9. Over the course of more than six years of litigating this action, counsel prevailed on discovery motions, prevailed on class certification, and defended the class certification order in the Second Circuit.

Plaintiffs' counsel achieved an excellent result for the Class. The settlement, a non-reversionary common all-cash fund, ensures that none of the funds will return to the Defendant. The settlement also ensures that potential class members will be notified of their claims by providing notice to class members through email and regular mail and by providing multiple ways for Plaintiffs to obtain a cash payout, for instance, via mail service or online. Courts have recognized that non-reversionary cash settlements are a strong outcome for class members. *See e.g.*, *Strougo*, 258 F.Supp.2d at 262 (1.5 million dollar non-reversionary settlement approved where class members received 1$ per share); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 350 (D. Mass. 2015) (approving non-reversionary settlement fund, distributing $9 per class member pair of shoes in a consumer class action, where "the fund conferring a benefit on the class resulted from the efforts of the attorneys") (internal quotations omitted).

E. The Fee Request is Standard in Relation to the Settlement

1. The Requested Fee Is Less than One-Third of the Gross Settlement Amount

The proposed percentage of the common fund, twenty-nine percent, is less than the standard relative to the settlement. When using the percentage method, awarding a third of the gross settlement amount is typically considered reasonable and such fees are commonly awarded. *See In re Top Tankers, Inc.,* 2008 WL 2944620 at *13 n.9; *Strougo,* 258 F.Supp.2d at 262

(collecting cases); *City of Providence*, 2014 WL 1883494 at *12; *Velez*, 2010 WL 4877852, at *21; *Nichols*, 2022 WL 2705354 at *10.[12]

Moreover, the appropriateness of the fee percentage is assessed with reference to the total common fund – before deducting costs and expenses. *See e.g., Velez,* 2010 WL 4877852, at *21 ("The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit")*; City of Providence*, 2014 WL 1883494 at *12 (assessing percentage against entirety of the common fund) (collecting cases); *In re Visa Check/Mastermoney*, 297 F. Supp. 2d at 525 n.34 (disagreeing with an objector's assertion that the judge "should award attorneys' fees calculated on the net recovery to the Class, excluding costs and expenses.")

Here, Plaintiffs seek approximately 29 percent of the gross settlement amount, following six years of litigation pursued entirely on contingency. This is reasonable and entirely in line with settlements in complex, years-long consumer class actions with multi-million dollar settlements. This is not a case in which a disproportionate amount of the settlement fund is going to attorneys rather than to the class. *See Moses*, 79 F.4th at 246 (Finding the settlement agreement unfair in part because 76% of the settlement fund went to attorneys' fees).

Moreover, the fee request here is fair and reasonable in light of the overall recovery of the class. *Moses,* 79 F.4th at 244. As noted above, counsel fee request constitutes less than a third of the overall common fund. And ,based on the claims received to date each class member stands to

[12] *See also*, 5 NEWBERG ON CLASS ACTIONS § 15:73 (6th ed. 2023) (noting that a "33% figure provides some anchoring for the discussion of class action awards [to counsel]" and that "many courts have stated that … fee award in class actions average around one-third of the recovery."); *accord* Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUDIES, 27, 31, 33 (2004) (finding that courts consistently award 30–33% of the common fund).

recover more than he or she would have recovered if Plaintiffs had taken this case to trial. Graber Decl. ¶¶ 12-13.

2. A Lodestar Cross-check Confirms the Reasonableness of the Request

Even when using the percentage method, a lodestar cross-check can confirm the reasonableness of the fee request. *Goldberger*, 209 F. 3d at 50. The lodestar method, "is calculated by multiplying the number of hours expended on the entire litigation by a particular attorney by his or her current hourly rate. The hourly rate to be applied is the hourly rate that is normally charged in the community where counsel practices, i.e., the 'market rate.'" *Strougo*, 258 F.Supp.2d at 263.

Plaintiffs' counsel have spent 15,015 hours litigating this action, producing a total lodestar amount of $10,314,663.50 based on each attorney and paraprofessional's hourly rates. No attorneys are billed in excess of their standard hourly rates, which are in line with rates that are charged to (and paid by) hourly clients. Class Counsel's hourly rates are based on the market rates for lawyers of similar quality in the cities where Cohen Milstein is based and who are litigating matters of similar magnitude. Cohen Milstein counsel's partner rates range from $825 to $1,300and associate rates range from $525 to $740. Counsel's paraprofessional staff rates are approximately $365.

Cohen Milstein's rates have been consistently approved for the purposes of a lodestar cross-check. *See e.g., In re Wells Fargo & Co. Sec. Litig.*, Case No. 1:20-cv-04494-JLR-SN (S.D.N.Y. Sept. 8, 2023), ECF No. 206 (Graber Decl. Ex. 2); *Cosby v. KPMG LLP*, No. 3:16-cv-121-TAV-DCP, 2022 WL 4129703, at *2 (E.D. Tenn. July 12, 2022) (Graber Decl. Ex. 3); *Weiner v. Tivity Health, Inc.*, No. 17-cv-1469, (M.D. Tenn. Oct. 7, 2021), ECF No. 177 at 4 (Graber Decl. Ex. 4) (confirming the "reasonableness" of CMST's hourly fees and explaining that the "[t]he use of current (2021) rates is appropriate to 'compensate for the delay in payment during the pendency

of the litigation'"); *Plumbers & Pipefitters Nat'l Pension Fund v. Davis*, No. 1:16-cv-03591-GHW, (S.D.N.Y. Nov. 21, 2022), ECF No. 303 at 3 (Graber Decl. Ex. 5); *In re ITT Educ. Servs., Inc. Sec. Litig.*, No. 1:13-CV-01620,(S.D.N.Y. Mar. 8, 2016), ECF No. 94 at 2. (Graber Decl. Ex. 6); *In re Animation Workers Antitrust Litig.,* No. 5:14-cv-04062-LHK (N.D. Cal. June 5, 2017), ECF No. 402 at 16 (Graber Decl. Ex. 7). Gordon & Partners, which is based in multiple locations in Florida, bills $795 for partners, and $250 for paralegals, which are comparable rates to those in the legal community for similar services by attorneys of reasonably comparable skill, experience, and reputation. See *Hankinson v. R.T.G. Furniture Corp., d/b/a Rooms to Go, et al.*, Case No. 15-cv-81139 (S.D. Fla. December 15, 2017), ECF No. 213 at 6 (Graber Decl. Ex. 8) (approving attorneys' fees as reasonable, in part based on submitted rates).

Plaintiffs' lodestar compared to the requested fee is a multiplier of approximately 1.1, well *below* the typical multiplier awarded in significant common fund settlements. *See e.g*., *Signet*, 2020 WL 4196468, at *16 ("In complex litigation, lodestar multipliers between 2 and 5 are commonly awarded, and fee awards resulting in multipliers as high as 6 have also been approved."); *Godson*, 328 F.R.D. at 64-65 (approving a "modest" lodestar multiplier of 1.58, and finding this is in the low range of multipliers for complex consumer class actions) (collecting cases); *In re Telik*, 576 F.Supp.2d at 590 ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts.... Accordingly, a 1.6x multiplier is well within the range of reasonableness."); *Yuzary v. HSBC Bank USA, N.A*, 2013 WL 5492998 at *10 (S.D.N.Y. Oct. 2, 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.") (collecting cases) (internal citations omitted). Moreover, the multiplier "will diminish over time" as class counsel continues to expend significant time ensuring that the settlement funds are correctly distributed. *Yuzary*, 2013 WL 5492998 at *11.

F. Public Policy Favors Encouraging Class Actions

Courts "have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis . . . on behalf of those who otherwise could not afford to prosecute." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010) (internal quotation marks omitted). Similarly, Courts recognize that consumer class actions play a critical role in regulating the marketplace and protecting consumers from deception by corporations. *See e.g.*, *Seekamp v. It's Huge, Inc.*, 2014 WL 7272960, at *2 (N.D.N.Y. Dec. 18, 2014) ("[P]ublic policy militates in favor of the fee in light of the role that consumer protection class actions play in regulating the marketplace.")

Public policy considerations support the requested fee here. Rather than providing a windfall, the requested award serves the public policy goal of encouraging private enforcement of consumer protection laws, while fairly compensating those counsel who made a substantial commitment of time and resources on behalf of the class. Accordingly, the sixth Goldberger factor supports the requested fee award.

V. THE ATTORNEYS' COSTS AND EXPENSES ARE REASONABLE AND SHOULD BE AWARDED

It's well established that "counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class, and should therefore be reimbursed for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation." *Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *11 (S.D.N.Y. Sep. 29, 2022) (internal citations omitted); *see also FLAG Telecom*, 2010 WL 4537550, at *30 (same); *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *18 (S.D.N.Y. July 27, 2007) ("It is common for courts in the Second Circuit to grant expense requests in common fund cases as a matter of course.") (internal citations omitted);

Yuzary, 2013 WL 5492998 at *11 ("Courts typically allow counsel to recover their reasonable out-of-pocket expenses.") In a common fund case, compensable expenses include all "reasonable expenses normally charged to a fee paying clients." William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS §16:5 (5th ed. 2020) (collecting cases) ("It is common for courts in the Second Circuit to 'grant expense requests in common fund cases as a matter of course.'")

Counsel in this case incurred $2,686,778.13 in reasonable, unreimbursed expenses in connection with the prosecution of this action over the course of six years, exclusive of notice costs. Graber Decl. ¶ 41. The largest expenses incurred by far is for the retention of experts for 2,233,749.18, or more than 80% of all of Plaintiffs' litigation expenses. Lead Counsel consulted extensively with experts in the fields of damages, optical lens manufacturing, statistics, and FDA regulation. The experts retained were instrumental in Counsel's prosecution of the Action and in bringing about the favorable result achieved, and the benefits accrued to the class. Other expenses include on-line factual and legal research, court filing fees; e-discovery vendor costs[13], transcripts and videos of relevant proceedings. Counsel incurred these expenses in their dedicated pursuit of consumers' claims and they are the types of expenses that are necessarily incurred in litigation and routinely charged to clients.

These collective expenses were reasonably incurred and expended for the direct benefit of

[13] *See also Kindle v. Dejana*, 308 F. Supp. 3d 698, 716 (E.D.N.Y. 2018) (awarding reimbursement of expenses that included "fees for converting documents obtained in discovery into the proper format for Plaintiff's document database [and] fees for vendor hosting the document database"); *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) (approving reimbursement of $3.9 million in costs in addition to a fee award of one-third of the $34.9 million settlement where expenses included "document hosting services" and "sales data purchased from third parties"); *Castro v. Sanofi Pasteur Inc.*, 2017 WL 4776626, at *10 (D.N.J. Oct. 23, 2017) (approving reimbursement of $7.2 million in costs in addition to a fee award of one-third of the $61.5 million settlement where expenses included substantial charges for "hosting and managing the millions of pages of documents produced in discovery on a secure database" (internal quotation marks omitted)); *Hernandez v. Merrill Lynch & Co.*, 2013 WL 1209563, at *10 (S.D.N.Y. Mar. 21, 2013) (finding expenses for "document hosting and retrieval" to be reasonable).

the Class and should therefore be reimbursed. *See Yang v. Focus Media Holding Ltd*., 2014 WL 4401280, at *19 (S.D.N.Y. Sept. 4, 2014) (approving mediator fees, expert fees, computer research, photocopying, postage, meals, and court filing fees); *Yuzary*, 2013 WL 5492998 at *11 (Class Counsel's "unreimbursed expenses, including court and process server fees, postage and courier fees, transportation, working meals, photocopies, electronic research, expert fees, and Plaintiffs' share of the mediator's fees," were reimbursed because there were "incidental and necessary" to the representation of the class.)

Counsel also incurred $959,493.91 in costs for notification to the California, New York and Florida classes in connection with class certification. Graber Decl. ¶ 57 (table). Expenses such as notice costs are also a benefit to the class and reimbursable from the common fund. *See Levinson v. About.Com Inc.,* 2010 WL 4159490, at *3 (S.D.N.Y. Oct. 7, 2010) (finding class notice costs were incidental and necessary to the representation of the class and would be reimbursed); *Carlin v. DairyAmerica*, Inc., 380 F.Supp.3d 998, 1024 (E.D. Cal. 2019) (reimbursing notice costs as an expense incurred for the benefit of the class); *Steiner v. Hercules Inc.*, 835 F.Supp. 771, 794 (D. Del. 1993) (reimbursing notice costs because they were reasonable and necessary for the resolution of plaintiffs' case) *see also Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003) (including notice costs paid by the defendant in the value of the settlement when calculating the percentage of the fund recovery for Class counsel because "the post-settlement cost of providing notice to the class can reasonably be considered a benefit to the class.").

VI. THE REQUESTED CLASS REPRESENTATIVE SERVICE AWARDS SHOULD BE GRANTED

"[A]t the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." 5 NEWBERG ON CLASS ACTIONS § 17:1 (5th ed. 2020). These awards serve an important public policy purpose, as they "aim to compensate

class representatives for their service to the class and simultaneously serve to incentivize them to perform this function." *Id; see also Viafara v. MCIZ Corp.*, 2014 WL 1777438, *16 (S.D.N.Y. 2014) ("Service awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs."); *In re Marsh ERISA Litig.,* 265 F.R.D. at 150 ("Case law in [the Second Circuit] and other circuits fully supports compensating class representatives for their work on behalf of the class, which has benefited from their representation.").

The mandate that class members should be treated equitably relative to each other is "harmonious with, and promoted by, [] clear precedent that permits district courts to approve fair and appropriate incentive awards to class representatives." *Moses*, 79 F. 4th at 253. This is because "incentive awards often level the playing field and treat differently situated class representatives equitably relative to the class members who simply sit back until they are alerted to a settlement." *Id*. In this Circuit, courts have approved settlement awards within the range of $3,000 to $15,000. *In Re Currency Conversion Fee Antitrust Litig., 263 F.R.D. 110, 131* (S.D.N.Y. 2009) (noting that such range is typical, and that incentive awards of approximately 0.1% of the total fund are the norm) (collecting cases); *Belfiore*, No. 2:14-cv-04090, ECF No. 361 at 9 (Awarding $10,000 to class representative); *Yuzary*, 2013 WL 5492998 at *12 (Awarding $10,000 in service awards and noting that "service awards fulfill the important purpose of compensating plaintiffs for the time they spend and the risks they take."); *Capsolas v. Pasta Res. Inc*., 2012 WL 4760910, at *9

(S.D.N.Y. Oct. 5, 2012) (awarding $20,000 service award to one representative plaintiff, and $10,000 awards to remaining class representatives).[14]

The $8,000 award requested and agreed to in the Settlement Agreement here is well within the typical amounts granted to class representative for their service and serves an important public purpose of recognizing service to the class. Collectively, the service awards represent approximately 0.1% of the total fund. All six class representative dedicated six years of their life to this action, which included preparing for and sitting for depositions, locating and forwarding responsive documents, reviewing and responding to discovery, monitoring developments in the litigation including settlement discussions, preparing for trial, and regularly communicating with counsel. Graber Decl. ¶ 8. In some cases, class representatives had family members deposed. All the class representatives sacrificed their time, privacy, and underwent stress to serve the best interests of the class and vindicate their rights. They deserve to be recognized for this service.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request an order from the Court finding the Settlement to be fair, reasonable, and adequate, and granting final approval of the proposed Settlement. Additionally, Plaintiffs and Class Counsel respectfully request that the Court approve Plaintiffs' Motion and enter an order (1) awarding reasonable attorneys' fees of $11,500,000, an amount *less than* 33.33% of value of the settlement reached in this case; (2) reimbursement of reasonable costs and expenses totaling $2,686,778.13; (3) reimbursement of reasonable class

[14] *See also* 5 NEWBERG ON CLASS ACTIONS § 17:1 (5th ed. 2020) ("incentive awards are now paid in most class suits and average between $10,000 to $15,000 per class representative.); *Moses v. Apple Hosp. REIT, Inc*., 2018 WL 1513631, at *9 (E.D.N.Y. Mar. 27, 2018) (awarding $10,000 in service award to representative plaintiff); *Karic v. Major Auto. Co*. Inc., 2016 WL 1745037, at *7 (E.D.N.Y. April 27, 2016) (awarding $20,000 to each of 7 representative plaintiffs).

certification notice costs totaling $959,493.91; and (4) for $8,000 Service Awards to each named plaintiff in the Second Amended Consolidated Complaint ("SACC").

January 12, 2024

Respectfully submitted,

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