UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THOMAS ALLEGRA, YESENIA ARIZA, MARIANA ELISE EMMERT, STUART ROGOFF, GRACELYNN TENAGLIA, and MELISSA VERRASTRO, individually and on behalf of others similarly situated,

Plaintiffs,

- against -

LUXOTTICA RETAIL NORTH AMERICA d/b/a LensCrafters,

Defendant.

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MEMORANDUM & ORDER
17-CV-5216 (PKC) (LB)

PAMELA K. CHEN, United States District Judge:

Plaintiffs Thomas Allegra, Yesenia Ariza, Mariana Elise Emmert, Stuart Rogoff, Gracelynn Tenaglia, and Melissa Verrastro ("Named Plaintiffs" or "Class Representatives"), individually and on behalf of others similarly situated (collectively, "Plaintiffs"), bring this lawsuit against Defendant Luxottica Retail North America d/b/a LensCrafters ("Defendant" or "LensCrafters"), alleging false and misleading statements by LensCrafters about its AccuFit system, which induced customers to purchase and/or caused them to overpay for LensCrafters' prescription eyeglasses in violation of California, Florida, and New York law. Before the Court is Plaintiffs' combined motion for final approval of class settlement, service awards to class representatives, and class counsel's application for an award of attorneys' fees, costs, and expenses. For the reasons that follow, Plaintiffs' motions are granted in full. The Court separately issues its final approval order simultaneously with the issuance of this Memorandum and Order.

BACKGROUND

I. Factual Background

The Court assumes the parties' familiarity with the facts alleged in this matter, summarized in the Court's January 5, 2022, Memorandum and Order, which granted Plaintiffs' motion to certify the class at issue in this settlement. *See Allegra v. Luxottica Retail N. Am.*, 341 F.R.D. 373, 388–90 (E.D.N.Y. 2022).

II. Procedural Background

On September 5, 2017, Plaintiffs filed this putative class action in the Eastern District of New York, along with similar actions in the Northern District of California and the Southern District of Florida. (Dkt. 1 at 21; Dkt 26 at 3.) The Court consolidated the cases on December 8, 2017. (12/8/2017 Docket Order.) On February 2, 2018, Plaintiffs' attorneys were appointed as interim class counsel ("Class Counsel"). (2/2/2018 Docket Order.) On September 21, 2018, Plaintiffs filed their Second Amended Consolidated Complaint ("SACC"), the operative complaint in this case. (SACC, Dkt. 50.) Defendant answered on October 30, 2018. (Dkt. 66 at 22.)

The parties engaged in extensive discovery. In nearly two years of fact discovery, Plaintiffs conducted 15 fact witness depositions, including three Federal Rule of Civil Procedure ("Rule") 30(b)(6) depositions of Defendant's representatives, and Defendant deposed all six Named Plaintiffs in this case, two of Plaintiffs' witnesses, and two family members of Named Plaintiffs. (Dkt. 356 at 6.) During expert discovery, Plaintiffs proffered seven expert witnesses, and Defendant proffered eight, all of whom were deposed and each of whom submitted an expert report. (*Id.* at 6–7.) The parties also submitted extensive and voluminous class certification, *Daubert*, and summary judgment briefing. (Dkts. 237–42, 245–53.)

On December 13, 2021, the Court issued a 155-page opinion granting in part and denying in part Plaintiffs' motion for class certification and resolving the *Daubert* motions for the purposes

of class certification.[1] (Dkt. 272 (the "Class Certification Order").) After the Class Certification Order was published, the Court held a conference to discuss the possibility of mediation, the class notice plan, and motions for summary judgment, and to set a pretrial plan. (*See* 2/8/2022 Docket Order.) At that conference, on February 16, 2022, the Court "advised Defendant that its proposed summary judgment motion would likely be summarily denied, given the Court having already resolved substantially the same issues when the Court granted Plaintiff's class certification motion," but the Court permitted the parties to brief the "discrete, legal issues of (1) relevant statutes of limitations and (2) whether unjust enrichment claims are duplicative of certain statutory claims." (2/16/2022 Minute Entry.)

On April 14, 2022, on stipulation of the parties, the Court granted summary judgment on Plaintiffs' New York unjust enrichment claim and changed the commencement of the New York and California classes from September 5, 2013, to exactly one year later. (Dkt. 281 at 1–2; 4/4/2022 Docket Order.) On June 14, 2022, the Court held a hearing regarding Defendant's partial summary judgment motion and denied summary judgment with respect to Plaintiffs' Florida unjust enrichment claim, but granted summary judgment with respect to all of Plaintiffs' California equitable claims. (6/14/2022 Minute Entry.) The Court also set a briefing schedule for any "further summary judgment or *Daubert* motions," and set July 10, 2023, as the beginning of jury selection for a trial that was to last four weeks. (*Id.*) Defendant filed another partial motion for

[1] That decision denied Plaintiffs' request for class certification under Rule 23(b)(2), but granted Plaintiffs' motion "under Rule 23(b)(3) with respect to claims under New York General Business Law §§ 349, 350; the Florida Deceptive and Unfair Trade Practices Act; California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act; and for Unjust Enrichment," although it "denie[d] Plaintiffs' request for class certification under Rule 23(b)(3) with respect to the fraudulent omissions claim." (Dkt. 272 at 155.)

summary judgment, which Plaintiffs opposed, and both parties filed renewed *Daubert* motions. (Dkts. 319–27.)

While the parties continued to engage in settlement negotiations, they filed proposed jury instructions, exhibit lists, witness lists, and motions *in limine* in advance of the anticipated trial. (*See* Dkts. 329–341; Dkt. 343 at 1.) Then, on June 15, 2023, the parties notified the Court that they had finalized a settlement—ultimately creating a $39 million settlement fund (the "Settlement Fund") for class members' benefit—and the Court vacated all trial deadlines. (Dkt. 344; 6/16/2023 Docket Order; Dkt. 349-2.) Plaintiffs moved for preliminary approval of the class settlement and appointment of Class Counsel, and after a hearing, on September 20, 2023, the Court granted Plaintiffs' motions. (Dkt. 352.)

After notice of the settlement was distributed to the class, on January 12, 2024, Plaintiffs moved for final approval of the settlement, service awards to the Named Plaintiffs, and attorneys' fees, costs, and expenses. (Dkt. 355 at 1.) The Court held a final approval hearing (the "Final Approval Hearing") on February 26, 2024. (2/26/2024 Minute Entry.)

DISCUSSION

I. Final Approval of Class Settlement

A. Legal Standards

Rule 23(e) requires judicial approval of any class action settlement. *See* Fed. R. Civ. P. 23(e). A class action settlement should be approved "only after a hearing and only on finding that it is fair, reasonable, and adequate," after considering four mandatory factors:

> (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).

Rule 23(e)'s four mandatory factors were introduced when Rule 23 was amended in 2018. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 27–28 (E.D.N.Y. 2019). Prior to the amendments, courts in the Second Circuit had assessed a class action settlement's fairness using the *Grinnell* 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 trial; (7) the ability of the defendants to withstand 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.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974) (citations omitted).

Since the amendments to Rule 23, courts have understood Rule 23 as "add[ing] to, rather than displac[ing], the *Grinnell* factors." *In re Payment Card*, 330 F.R.D. at 29; *see Moses v. N.Y. Times Co.*, 79 F.4th 235, 243 (2d Cir. 2023). Although courts must now "*expressly* consider" the two factors under Rule 23(e)(2)(C)–(D)—the adequacy of relief provided to a class and the equitable treatment of class members—courts may consider the *Grinnell* factors as well. *Moses*, 79 F.4th at 243–44 (emphasis added) (noting that the two factors under Rule 23(e)(2)(A)–(B) are considered to be procedural in contrast to the substantive factors under Rule 23(e)(2)(C)–(D));

Kurtz v. Kimberly-Clark Corp., No. 14-CV-1142 (PKC), 2024 WL 184375, at *3 (E.D.N.Y. Jan. 17, 2024), *appeal filed*, No. 24-454 (2d Cir. 2024).

B. Application

1. Procedural Fairness Under Rule 23(e)(2)(A)–(B)

a. The Class Representatives and Class Counsel Have Adequately Represented the Class

To satisfy Rule 23(e)'s adequacy requirement, "[p]laintiffs must meet two standards—that 'class counsel . . . be qualified, experienced[,] and generally able to conduct the litigation,' and that 'the class members . . . not have interests that are antagonistic to one another.'" *Balestra v. ATBCOIN LLC*, No. 17-CV-10001 (VSB), 2022 WL 950953, at *4 (S.D.N.Y. Mar. 29, 2022) (quoting *In re Drexel Burnham Lambert Grp.*, 960 F.2d 285, 291 (2d Cir. 1992)). As a result, "district courts must make sure that the members of the class possess the same interests, and that no fundamental conflicts exist among the members." *See Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013).

Here, Class Counsel are qualified and capable of litigating this matter. The two firms representing Plaintiffs—Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") and Gordon & Partners—have successfully litigated dozens of consumer class actions in recent decades. (Decl. of Geoffrey Graber ("Graber Decl.") Ex. 9, Dkt. 356-1 at 3–4 (listing consumer protection class actions with favorable outcomes achieved by Cohen Milstein); Graber Decl. Ex. 10, Dkt. 356-1 at 1–7 (listing class action cases litigated by Gordon & Partners).) Lead counsel in this matter, attorney Geoffrey Graber of Cohen Milstein, was admitted to the bar in 2000 and specializes in consumer class action litigation. (Graber Decl., Dkt. 356-1 ¶ 17; Graber Decl. Ex. 9, Dkt. 356-1 at 11.) The lead attorney from Gordon & Partners, Steven Calamusa, has been a partner since

2004 and frequently handles consumer class actions and multidistrict litigations. (Graber Decl. Ex. 10, Dkt. 356-1 at 1–2.)

Further, in this matter specifically, Class Counsel, as referenced above, have:

- filed several complex pleadings;
- conducted intensive discovery, including review of close to 70,000 pages of production over nearly two years;
- 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, and opposing Defendant's motion for summary judgment, among numerous other motions.

(Mem. of Law Supp. Pls.' Mot. for Final Approval of Class Settlement, Dkt. 356 ("Mem."), Dkt. 356 at 31.) Beyond these tasks, Class Counsel engaged in intensive trial preparation over several months, which included running a mock jury with focus groups, submitting proposed jury instructions, verdict forms, and motions *in limine*, preparing witnesses for trial, filing witness lists and exhibit lists, designating deposition transcripts, and preparing trial logistics. (*Id.*)

Based on Class Counsel's credentials, experience, and activity in this matter, summarized above, the Court finds that Class Counsel is qualified, experienced, and generally able to conduct this litigation. *See In re N. Dynasty Mins. Ltd. Sec. Litig.*, No. 20-CV-5917 (TAM), 2023 WL 5511513, at *6 (E.D.N.Y. Aug. 24, 2023) (finding counsel qualified and experienced where counsel had prior class action experience and undertook extensive efforts to investigate and substantiate plaintiffs' allegations).

And further, the class members do not have interests that are antagonistic to one another. The Class Representatives, who purchased eyeglasses from LensCrafters after being fitted with AccuFit—just like ordinary class members—are seeking to recover for LensCrafters' alleged misconduct. Their interests, therefore, are aligned with the class and no fundamental conflicts exist; they share the common objective of maximizing their recovery. This factor, consequently, points in favor of approving the settlement.

b. The Proposal Was Negotiated at Arm's Length[2]

A court may find that a settlement reached by counsel after negotiations assisted by an experienced mediator was negotiated at arm's length. *See, e.g.*, *D'Angelo v. Hunter Bus. Sch., Inc.*, No. 21-CV-3334 (JMW), 2023 WL 4838156, at *7 (E.D.N.Y. July 28, 2023) (finding settlement was at arm's length when it was reached by counsel on their own after a full day of mediation with an experienced neutral mediator); *Rosi v. Aclaris Therapeutics, Inc.*, Nos. 19-CV-7118 (LJL), 19-CV-8284 (LJL), 2021 WL 5847420, at *4 (S.D.N.Y. Dec. 9, 2021) (same). Here, starting in 2022, the parties engaged in settlement negotiations over the course of more than a year, supervised by JAMS mediators Judge Daniel Weinstein (ret.) and Ambassador David Carden, including two full-day mediation sessions held months apart. (Mem. 9.) Although no agreement was reached at the mediation, the parties continued to negotiate in the following months, and finally agreed on the settlement. (*Id.*) Given the duration of negotiations, the parties' assistance by two experienced, neutral mediators, the two full-day mediation sessions, and the continued negotiations for months after the mediation sessions, the Court finds that the settlement was

[2] The Court does not presume that the settlement is fair, reasonable, and adequate solely because it was reached through arm's-length negotiation. *See Moses*, 79 F.4th at 243 (holding that district court erred when it did so).

negotiated at arm's length. *See D'Angelo*, 2023 WL 4838156, at *7; *Rosi*, 2021 WL 5847420, at *4. Therefore, this factor points in favor of approving the settlement.

2. Substantial Fairness Under Rule 23(e)(2)(C)–(D)

a. The Relief Provided for the Class is Adequate

To assess this factor, the Court considers: (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, if required; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). Fed. R. Civ. P. 23(e)(2)(C). "'[T]he 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)). Taking into account these factors, the Court finds that the relief provided for the class is adequate, for the reasons explained below.

(1) Costs, Risks, and Delay of Trial and Appeal

This case, which has lasted for approximately seven years, was far along at the time a settlement was reached. A motion for summary judgment and *Daubert* motions were pending, and the parties were weeks away from trial. (Mem. 3, 8.) Although the advanced stage of the case diminishes the parties' remaining costs, trial (and any appeal) is not without risks. In fact, "that the parties evaluated and briefed [summary judgment] . . . enabled counsel for the [p]arties to have adequately evaluated and considered the strengths and weaknesses of their respective positions." *Delcid v. TCP Hot Acquisition LLC*, No. 21-CV-9569 (DLC), 2023 WL 3159598, at *2 (S.D.N.Y. Apr. 28, 2023). Here, the parties entered into their settlement fully informed of the risks they would otherwise face, achieving "relief without the delay, risk, and uncertainty of trial and

continued litigation." *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 312 (S.D.N.Y. 2020). Thus, this factor points in favor of approving the settlement.

(2) Effectiveness of Proposed Method of Distributing Relief to the Class

This factor requires a court to look at "the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *In re Payment Card*, 330 F.R.D. at 40 (quoting Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment). "To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized—namely, it must be fair and adequate . . . . An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id.* (alteration in original) (quoting *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005)). While the plan of distribution must be fair, it "need not be perfect." *See id.* (quoting *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05-CV-10240, 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007)).

Here, the method for processing settlement class members' claims and distributing the Settlement Fund (the "Plan of Allocation") appears to be fair and adequate. The Plan of Allocation was developed with the assistance of an experienced claims administrator (the "Claims Administrator" or "Kroll"). (Mem. 9; Graber Decl., Dkt. 356-1 ¶ 52.) Pursuant to the settlement, the Claims Administrator will process the claims and, if approved, electronically transfer or mail authorized claimants their *pro rata* share of the Settlement Fund. (*See* Decl. of Scott M. Fenwick, Dkt. 359-1 ("Second Supp. Kroll Decl.") ¶ 5; Mem. 2.) Courts have found *pro rata* allocations to be reasonable. *See In re Namenda*, 462 F. Supp. 3d at 316; *In re Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 135 (S.D.N.Y. 2008). Further, the Plan of Allocation in this case was

described in detail in the notice that was sent to each potential class member, (*see* Dkt. 349-2 at ECF 47, 51–54),[3] and no class member has objected to that plan.[4] Based on these considerations, the settlement appears to be an effective form of distributing relief, and this factor weighs in favor of granting final approval.

(3) Terms of Proposed Award of Attorneys' Fees, Including Timing of Payment

Courts must "tak[e] into account . . . the terms of any proposed award of attorney's fees" prior to approving a settlement. *Moses*, 79 F.4th at 256 (citing Fed. R. Civ. P. 23(e)(2)(C)(iii)). For the reasons stated below, *infra* Section III.B.1, the Court grants in full Plaintiffs' motion for attorneys' fees. Here, however, the Court addresses the relationship between the terms of that award and the settlement as a whole.[5]

In this case, the settlement agreement provides that Class Counsel may apply for "attorneys' fees of up to 33 and 1/3% of the Settlement Fund, for reimbursement of reasonable expenses, for Class Representative Service Awards not to exceed $10,000 per Class Representative, and for costs of Notice and settlement administration, to be paid from the Settlement Fund." (Graber Decl. Ex. 1, Dkt. 356-1 ¶ 4.1.) To that end, Class Counsel seek

[3] Citations to "ECF" refer to the pagination generated by the Court's CM/ECF docketing system and not the document's internal pagination.

[4] One class member filed a letter "objecting" to Plaintiffs' claims, but not objecting to the terms of the settlement. (*See* Dkt. 357 at 1–2.) That class member did not seek to appear—and did not appear—at the Final Approval Hearing. (*Id.* at 2.)

[5] As in *Moses*, because all of the fees, expenses, and recovery to the class members come from the same settlement fund, the requested attorneys' fees are intimately intertwined with the settlement fund. "Indeed, there is effectively an inverse correlation between the amount of attorneys' fees . . . and the cash available for *pro rata* distribution to class members . . . ." *Moses*, 79 F.4th at 246. "The district court [is] obligated to take these intertwined fees into account prior to approving the settlement, and [would] err[] . . . [by] treat[ing] the appropriateness of the awards as a separate matter, divorced from the overall evaluation of the fairness of the settlement." *Id.*

attorneys' fees of $11,500,000—approximately 29% of the $39 million Settlement Fund—plus litigation expenses of $2,686,778.13 and class notice costs of $959,493.91.[6] (Mem. 1, 22.) Even bearing in mind that an award will diminish the Settlement Fund, *see Moses*, 79 F.4th at 246, the Court finds Plaintiffs' request for attorneys' fees, comprising approximately 29% of the Settlement Fund, to be reasonable. *See In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 496–97 (S.D.N.Y. 2017) (collecting cases where courts granted fee awards of approximately 30–33.3% of the total value of the settlement); *Fleisher v. Phoenix Life Ins. Co.*, Nos. 11-CV-8405 (CM), 14-CV-8714 (CM), 2015 WL 10847814, at *16 & n.11 (S.D.N.Y. Sept. 9, 2015) (same).

Here, however, the settlement provides for the attorneys' fees, costs, and expenses, as well as the service awards, to be paid before the *pro rata* distribution to the class members. At least one district court in this circuit has held that "[t]here are sound reasons for courts to ensure that the class has been compensated *prior* to attorneys in class-action settlements," including that, "[c]ynically, money is the best way to keep lawyers engaged." *Hart v. BHH, LLC*, 334 F.R.D. 74, 77 (S.D.N.Y. 2020) (emphasis added). Given Class Counsel's vigorous prosecution of this matter, the Court has no concern about Class Counsel's continued engagement in this matter. At the same time, bearing in mind that there are "sound reasons" for the Court "to ensure that the class has been compensated prior to attorneys," *id.*, the Court finds that this factor points only slightly in favor of approval of the settlement.

(4) Any Agreement Required to Be Identified

Finally, Rule 23(e)(2)(C)(iv) mandates the Court to consider "any agreement required to be identified under Rule 23(e)(3)"; that is, "any agreement made in connection with the proposal."

[6] The Court addresses Class Counsel's request for costs and expenses separately. *See infra* Section III.B.2.

Fed. R. Civ. P. 23(e)(2)(C)(iv); *Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, 333 F.R.D. 314, 322 (S.D.N.Y. 2019). Here, there do not appear to be any separate agreements relevant to the settlement. However, the settlement agreement itself includes mutual releases by the parties. (Graber Decl. Ex. 1, Dkt. 356-1 § 12.) "Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief." *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F. 3d 96, 106–07 (2d Cir. 2005). In this case, the releases cover claims that were "alleged or asserted in [this] Action, or that arise out of or relate directly or indirectly in any manner whatsoever to facts alleged or asserted or that could have been alleged or asserted in [this] Action." (Graber Decl. Ex. 1, Dkt. 356-1 ¶ 12.1; *see also id.* ¶ 12.3.) The Court finds that this language is relatively tailored to "release [only] claims that were or could have been pled in exchange for settlement relief." *See Wal-Mart Stores, Inc.*, 396 F. 3d at 106–07. Given the scope of the releases, the Court finds that they support approval of the settlement.

b. The Proposal Treats Class Members Equitably Relative to Each Other

In evaluating this factor, courts weigh "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of [any] release may affect class members in different ways that bear on the apportionment of relief." *Moses*, 79 F.4th at 245 (quoting advisory committee's note to 2018 amendment). "*Pro rata* distribution schemes are sufficiently equitable and satisfy the requirements of Rule 23(e)(2)(D)." *Cymbalista v. JPMorgan Chase Bank, N.A.*, No. 20-CV-456 (RPK) (LB), 2021 WL 7906584, at *9 (E.D.N.Y. May 25, 2021). However, "the existence and extent of incentive payments is relevant to whether 'class members [are treated] equitably relative to each other.'" *Moses*, 79 F.4th at 245 (quoting Fed. R. Civ. P. 23(e)(2)(D)). Here, the settlement distributes funds on a *pro rata* basis to each class member who timely submits a valid claim. (Mem. 2.) The Court finds this

apportionment scheme to be sufficiently equitable in satisfaction of Rule 23(e)(2)(D). *See Cymbalista*, 2021 WL 7906584, at *9.

As for Plaintiffs' request for six awards of $8,000 each for the Class Representatives, (Mem. 1), the Court must consider whether these awards treat the Class Representatives equitably to ordinary class members.[7] *Moses*, 79 F.4th at 245 ("Rule 23(e)(2)(D) requires that class members be treated *equitably*, not identically."). Here, the proposed awards are equitable, as they are in line with, or even below, other awards that have been approved in comparable class actions. *See, e.g.*, *Belfiore v. Procter & Gamble Co.*, No. 14-CV-4090 (PKC), Dkt. 361 at 9 (E.D.N.Y. July 27, 2020) (awarding $10,000 to representative in approximately six-year consumer class action); *Yuzary v. HSBC Bank USA, N.A.*, No. 12-CV-3693 (PGG), 2013 WL 5492998 at *12 (awarding $10,000 to class representative in approximately one-year litigation); *Capsolas v. Pasta Res. Inc.*, No. 10-CV-5595 (RLE), 2012 WL 4760910, at *9 (S.D.N.Y. Oct. 5, 2012) (awarding $20,000 to one representative and $10,000 to other representatives in approximately two-year litigation). This factor, therefore, weighs in favor of approving the settlement.

3. Application of Remaining *Grinnell* Factors

Similar to the Rule 23(e) factors, the *Grinnell* factors largely weigh in favor of approving the parties' settlement.

a. Complexity, Expense, and Likely Duration of the Litigation

This factor largely overlaps with the first statutory factor under Rule 23(e)(2)(C)(i) ("Costs, Risks, and Delay of Trial and Appeal"), which points in favor of approving the settlement. *See supra* Section I.B.2.a.1.

[7] The Court considers whether these awards are reasonable as part of its consideration of Plaintiffs' motion for service awards. *Infra* Section II.

b. Reaction of the Class to the Settlement

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (citing *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001)). "Courts have found this factor to weigh in favor of approval where the majority of class members have not objected to or opted out of a settlement." *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 300 (E.D.N.Y. 2015) (quoting *In re Sinus Buster Prods. Consumer Litig.*, No. 12-CV-2429 (ADS) (AKT), 2014 WL 5819921, at *9 (E.D.N.Y. Nov. 10, 2024)). A few dissenters do not necessarily indicate a poorly received settlement. *See id.* at 300–01 (finding that three objections from a class of 4,000 members signaled a positive class response); *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010) ("Of the 11,800,514 class members, only 127 opted out and 24 objected. Such a small number of class members seeking exclusion or objecting indicates an overwhelmingly positive reaction of the class."); *Stinson v. City of New York*, 256 F. Supp. 3d 283, 288, 293 (S.D.N.Y. 2017) (concluding that for a settlement where more than 900,000 notices were sent, five objections and 30 exclusion requests represented an "overall low number" suggesting "general approval").

Here, after the Court preliminarily approved the settlement on September 20, 2023, settlement materials were mailed or emailed to 18,651,344 potential settlement class members. (*See* Decl. of Scott M. Fenwick, Dkt. 356-2 ¶¶ 5, 10–12.) As of January 29, 2024—the deadline to object—only one person had filed an "objection," (Dkt. 357 at 1–2), and as of May 13, 2024, 160 timely requests for exclusion had been received, (Decl. of Scott M. Fenwick, Dkt. 371-1 ("Fifth Supp. Kroll Decl.") ¶¶ 4–5). As for claims made, as of February 16, 2024, 8,771 claim forms were submitted by mail and 255,766 claims were filed electronically through the settlement

website, collectively representing claims for 476,612 pairs of glasses, (Second Supp. Kroll Decl. ¶ 5), and by May 13, 2024, a total of 15,393 claim forms had been received by mail, and a total of 273,051 claim forms had been received electronically, collectively representing claims for 554,586 pairs of glasses, (Fifth Supp. Kroll Decl. ¶ 3). The settlement provides for additional claim forms to be submitted within 30 days after entry of the Final Approval Order. (Graber Decl. Ex. 1 ¶ 11.1.)

Based on the above, the reaction to the settlement has been predominantly positive. Of approximately 18.7 million class members, only one individual filed a purported "objection"—which did not itself object to the terms of the settlement or request exclusion, but instead disagreed with Plaintiffs' claims—and only 160 opt-outs, as compared to almost 300,000 claim forms, were received. Thus, this factor supports approval of the settlement.

c. Stage of Proceedings and Amount of Discovery

When considering the third *Grinnell* factor, courts "focus[] on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *Fleisher*, 2015 WL 10847814, at *7 (alteration in original) (quoting *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 177 (S.D.N.Y. 2014)). Here, as discussed, this case started approximately seven years ago and was at a very advanced stage by the time it settled. The parties were weeks away from trial with successive summary judgment and expert motions pending. (Mem. 3.) Prior to then, there was significant motion practice, and discovery had lasted two years. (*Id.* at 31.) The parties' extensive litigation—including the completion of discovery—enabled counsel to fully consider the strengths and weaknesses of their cases, and to enter into a settlement agreement with those strengths and weaknesses in mind. *See Fleisher*, 2015 WL 10847814, at *8 (approving settlement where "Class

Counsel had the benefit of extensive discovery and expert analysis with which to make an intelligent, informed appraisal of [claims and defenses] . . . , and the likelihood of obtaining a larger recovery for the Class if this litigation continued"); *Delcid*, 2023 WL 3159598, at *3 (similar). Thus, this factor points decidedly in favor of approving the settlement.

d. Risk of Establishing Liability and Damages and Maintaining the Class Action Through Trial

"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.*, No. 06-CV-13761 (CM), 2008 WL 2944620, at *4 (S.D.N.Y. July 31, 2008) (citing *Grinnell*, 495 F.2d at 463).

Here, final approval of the settlement ensures a recovery of $39 million in cash for a Settlement Fund, whereas continuing to litigate would present significant risks and delay recovery—if any—to the settlement class, particularly given that Defendant's motion for summary judgment and the parties' *Daubert* motions were pending at the time of settlement. An adverse decision on any of those motions could have substantially weakened or effectively ended Plaintiffs' claims. (*See* Mem. 19.) For example, it would have been difficult, if not impossible, for Plaintiffs to establish damages and liability without expert testimony. (*Id.*) Moreover, even if the case were to proceed, Plaintiffs would still face the risks inherent to a jury trial, in addition to the risk that Defendant could seek to decertify the class at trial. *See Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07-CV-2207 (JGK), 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.").

Given that further litigation would be protracted,[8] risky, and costly, this factor supports approval of the settlement. *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 334 (E.D.N.Y. 2010) ("The risks of establishing liability and risks of establishing damages favor the proposed Settlement. The risk that plaintiffs would fail to establish liability or damages was high."); *id.* at 339 ("Likely delay, and uncertain prospects of recovery even if plaintiffs should prevail at trial, weigh in favor of settlement rather than maintaining the action through trial."); *see also In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC), 2012 WL 5289514, at *5 (E.D.N.Y. Oct. 23, 2012) (noting that risks at trial and post-trial suggested that settlement was fair).

e. Ability of Defendant to Withstand a Greater Judgment

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*, 462 F. Supp. 3d at 314. Where plaintiffs do not contend that defendants could not withstand a greater judgment, this factor drops out. *Id.* at 315. Regardless, the mere fact that a defendant "is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997)). Here, Plaintiffs do not argue that Defendant could not withstand a greater judgment. (*See generally* Mem.) This factor therefore drops out, or, is neutral.

f. Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

"[T]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and

[8] The trial was expected to last four weeks. (*See* 6/14/2022 Minute Entry.)

costs necessarily inherent in taking any litigation to completion." *Wal-Mart Stores, Inc.*, 396 F.3d at 119 (alteration in original) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). The mere "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." *Grinnell*, 495 F.2d at 455.

Here, the proposed settlement allows the class to recoup $39 million for their alleged harm, minus attorneys' fees, litigation costs, and any other expenses. Factoring in those deductions, the current expected recovery per claim is approximately $34.85—exceeding the $23.28 estimate that Plaintiffs' own damages expert had provided.[9] (Dkt. 359 at 2; Mem. 20.) Although it is likely that the expected recovery per claim will decrease by some amount—since claims can be submitted up to 30 days after the Final Approval Order—the Court is reassured by numerous periodic updates provided by the Claims Administrator that the number of additional claims likely to be made after final approval of the settlement will not appreciably diminish each claim's *pro rata* value. *See Bryant v. Potbelly Sandwich Works, LLC*, No. 17-CV-7638 (CM) (HBP), 2020 WL 563804, at *5 (S.D.N.Y. Feb. 4, 2020) (approving class action settlement where claimants were to receive between 45%–170% or between 13%–47% of the likely damages amounts, depending on certain calculations of the projected recovery). Given the remaining risks and uncertainties in this litigation, and the overall favorable recovery to members of the class, this factor strongly favors settlement approval.

[9] The Court reached this number by subtracting $11,500,000 for requested attorneys' fees, $48,000 for Class Representative service awards, $2,686,778.13 for costs and expenses, $959,493.91 for class certification notice costs, and $4,477,859.01 for settlement administration costs from the $39 million Settlement Fund and dividing that number by the most recently reported number of claims, 554,586. (*See* Fifth Supp. Kroll Decl. ¶ 3 (stating number of claims made); Dkt. 368 at ¶ 3 (stating settlement administration costs); Dkt. 356-1 at ECF 29–30 (stating amounts to be deducted from Settlement Fund prior to class payments).)

* * *

For the reasons explained above, the vast majority of the Rule 23 and *Grinnell* factors indicate that the parties' settlement is fair, reasonable, and adequate. Based on these considerations, the Court grants Plaintiffs' motion for final approval of the settlement.

II. Class Representative Service Awards

Plaintiffs additionally seek awards of $8,000 for each of six Class Representatives, for a total of $48,000. (Mem. 1.) The Court holds that in the context of this case, the requested awards are fair and appropriate, and the Court grants Plaintiffs' request.

A. Legal Standards

To compensate class representatives who have incurred significant personal risk in representing a class, a district court may, in its discretion, "approve fair and appropriate incentive awards to class representatives." *See Moses*, 79 F.4th at 253 (citing *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019)); *see also Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016). When evaluating whether to approve service awards to class representatives, a court considers "the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and, of course, the ultimate recovery." *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997); *Kurtz*, 2024 WL 184375, at *4 (same) (quoting *Roberts*, 979 F. Supp. at 200). Although courts should "reject incentive awards that are excessive compared to the service provided by the class representative or that are unfair to the absent class members," *Moses*, 79 F.4th at 245, courts have approved individual awards ranging "from $2,500 to $85,000," *Dial Corp.*, 317 F.R.D. at 439.

B. Application

Here, the proposed awards of $8,000 are fair, reasonable, and appropriate based on the following considerations:

Personal risk. Although the Class Representatives did not face any particularly heightened individual risk, all Class Representatives sacrificed their time and privacy, and endured the stress of litigation, all to represent the best interests of the class and vindicate their rights. (Mem. 43.)

Time and effort. Each Class Representative has contributed at least 100 hours, and in some cases as much as 200 hours, to litigating this matter over the last seven years. All six Class Representatives met repeatedly with Plaintiffs' counsel; reviewed all versions of the complaint; assisted with responding to requests for production and interrogatories; preserved their documents and searched them as needed; prepared for and sat for all-day depositions; provided input on settlement offers; and prepared for trial testimony. (Graber Decl., Dkt. 356-1 ¶ 58.)

Any other burdens. In some cases, Class Representatives endured particularly intrusive discovery, including producing family members for depositions. One Class Representative's non-English speaking, elderly grandmother was deposed, which required a translator for both preparation and the deposition. Another Class Representative's partner was deposed. (*Id.*)

The ultimate recovery. Lastly, the service awards represent approximately 0.1% of the total Settlement Fund. (Mem. 43); *In Re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 131 (S.D.N.Y. 2009) (noting that incentive awards of approximately 0.1% of the total fund are the norm) (citing *Roberts*, 979 F. Supp. at 189). These service awards are therefore in line with, or even below, other awards that have been approved. *Belfiore*, No. 14-CV-4090 (PKC), Dkt. 361 at 9 (awarding $10,000 to representative in approximately six-year litigation); *Yuzary*,

2013 WL 5492998 at *12 (awarding $10,000 to each representative in approximately one-year litigation); *Capsolas*, 2012 WL 4760910, at *9 (awarding $20,000 award to one representative and $10,000 awards to other representatives in approximately two-year litigation).

The considerations above support approval of Plaintiffs' service award request. The Court, therefore, grants Plaintiffs' motion to award six $8,000 service awards, one to each of the six Named Plaintiffs.

III. Attorneys' Fees, Costs, and Expenses

Finally, Plaintiffs move for an award of $11.5 million in attorneys' fees, $2,686,778.13 in litigation costs and expenses, and class certification notice costs of $959,493.91. (Mem. 28–41.) For the reasons set forth below, Plaintiffs' motion is granted in full.

A. Legal Standards

A court may "award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The court, however, must "ensure that the interests of the class members are not subordinated to the interests of . . . class counsel," *Maywalt v. Parker & Parsley Petrol. Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995), in order to "serve as a guardian of the rights of absent class members," *McDaniel v. County of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (quoting *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977)).

To that end, attorneys must submit contemporaneous time records to support their fee applications. *See, e.g.*, *Bay Park Ctr. for Nursing & Rehab. LLC v. Philipson*, 659 F. Supp. 3d 312, 319 (E.D.N.Y. 2023) (citing *N.Y. State Ass'n for Retarded Child., Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983)). Those records "should specify, for each attorney, the date, the hours expended, and the nature of the work done." *Id.* (quoting same). "Descriptions of work recollected in tranquility days or weeks later will not do." *Id.* (quoting *Handschu v. Special Servs. Div.*, 727 F. Supp. 2d 239, 249 (S.D.N.Y. 2010)). "The contemporaneous time records requirement is

strictly enforced[.]" *Id.* (alteration in original) (quoting *Valentine v. Aetna Life Ins. Co.*, No. 14-CV-1752 (JFB), 2016 WL 4544036, at *7 (E.D.N.Y. Aug. 31, 2016)).

When determining whether counsel's fee request is reasonable, "[t]he Court retains discretion to use 'either the lodestar [method] or [the] percentage of the recovery method[.]'" *In re Tenaris S.A. Sec. Litig.*, No. 18-CV-7059 (KAM) (SJB), 2024 WL 1719632, at *5 (E.D.N.Y. Apr. 22, 2024) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 45 (2d Cir. 2000)). "The trend in the Second Circuit is toward the percentage method . . . which spares the court and the parties the cumbersome, enervating, and often surrealistic process of lodestar computation." *Id.* (alteration in original) (quoting *In re Visa/Mastermony Antitrust Litig.*, 297 F. Supp. 3d 503, 520–21 (E.D.N.Y. 2003)). "However, '[t]he Second Circuit encourages the practice of performing a lodestar 'cross-check' on the reasonableness of a fee award based on the percentage approach.'" *Id.* (alteration in original) (quoting *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *17). Finally, the Court gives controlling consideration to the *Goldberger* factors: "(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 the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 40 (alteration in original) (quoting *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989)). The Court also considers "the relief actually delivered to the class" as a "significant factor." *See Moses*, 79 F.4th at 244 (quoting Fed. R. Civ. P. 23(e)(3) advisory committee's note to 2018 amendment).

As for costs and expenses, "[c]ourts may reimburse counsel for expenses reasonably and necessarily incurred in litigating a class action." *Kurtz*, 2024 WL 184375, at *13 (alteration in original) (quoting *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB),

2016 WL 6542707, at *18 (D. Conn. Nov. 3, 2016)). Courts within this circuit commonly grant expense requests "[w]hen the 'lion's share' . . . reflects the typical costs of complex litigation such as 'experts and consultants, trial consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses[.]'" *Pa. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 27 (S.D.N.Y. 2016) (quoting *In re Visa*, 297 F. Supp. 3d at 525).

B. Application

1. Attorneys' Fees

Whether an attorneys' fee award is reasonable is within the discretion of the court. *Black v. Nunwood, Inc.*, No. 13-CV-7207 (GHW), 2015 WL 1958917 at *4 (S.D.N.Y. Apr. 30, 2015) (collecting cases). In its discretion, a court "may award attorneys' fees" calculated under either the "percentage of the fund" or "lodestar" methods. *McDaniel*, 595 F.3d at 417 (quoting *Wal-Mart Stores, Inc.*, 396 F.3d at 121) (collecting cases). However, regardless of which method is chosen, the court should continue to be guided by the factors laid out in the Second Circuit's decision in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

a. Percentage-of-Fund Method

"Under the percentage approach, there is no general rule as to what percentage of a common fund may reasonably be awarded as attorneys['] fees." *In re Med. X-Ray Film Antitrust Litig.*, No. 93-CV-5904 (CPS), 1998 WL 661515, at *7 (E.D.N.Y. Aug. 7, 1998). However, "[d]istrict courts within the Second Circuit routinely approve attorneys' fees awards of one third or 33 1/3% as reasonable." *In re Tenaris S.A. Sec. Litig.*, 2024 WL 1719632, at *10 (collecting cases awarding approximately 33 1/3% in fees); *see In re Priceline.com, Inc., Sec. Litig.*, No. 00-CV-1884 (AVC), 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (collecting cases approving attorneys' fees of between 25 to 33 1/3% of settlement fund); *de la Cruz v. Manhattan Parking*

Grp. LLC, No. 20-CV-977 (BCM), 2022 WL 3155399, at *4 (S.D.N.Y. Aug. 8, 2022) (noting that settlements within the Second Circuit generally award fees in "a range from 15% to 33%" (quoting *Espinal v. Victor's Café 52nd Street, Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019)).

Here, Plaintiffs request reimbursement for attorneys' fees amounting to $11.5 million, which is approximately 29.5% of the $39 million settlement fund.[10] Ample authority within this circuit holds that fees of up to 33 1/3% of a settlement fund are reasonable. *See, e.g.*, *In re Tenaris*, 2024 WL 1719632, at *10; *In re Priceline.com*, 2007 WL 2115592, at *5; *see also Willix v. Healthfirst, Inc.*, No. 07-CV-1143 (ENV), 2011 WL 754862, at *6 (E.D.N.Y. Feb. 18, 2011) (holding that attorneys' fees of 33 1/3% of settlement fund were fair and reasonable); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-MD-2819 (NG), 2020 WL 6193857, at *5–6 (E.D.N.Y. Oct. 7, 2020) (approving attorneys' fee award of one-third of settlement fund). "The fact that the fees requested here are comparable to fees that courts have found reasonable even when taken out of a common fund weighs in favor of the reasonableness of the fees." *Cohan v. Columbia Sussex Mgmt., LLC*, No. 12-CV-3203 (AKT), 2018 WL 4861391, at *2 (E.D.N.Y. Sept. 28, 2018) (approving fee request of approximately 30% of settlement fund). In light of this authority, the Court finds that Plaintiffs' request, as a percentage of the settlement fund, is fair and reasonable.

b. Lodestar Method

Under the lodestar method, which the Court may use as a "cross-check" on the reasonableness of the requested percentage, "the district court scrutinizes the fee petition to

[10] Although Plaintiffs' brief refers to the percentage as "twenty-nine percent," (Mem. 30), the $11.5 million sum is actually 29.49% of the $39 million settlement fund.

ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate." *Goldberger*, 209 F.3d at 47, 50 (citing *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999)). "Typically, a multiplier is applied to the lodestar figure to account for the risks associated with a contingency-based class action." *Tenaris*, 2024 WL 1719632, at *5. The multiplier "is calculated by dividing the fee award by the lodestar." *Mateer v. Peloton Interactive, Inc.*, No. 22-CV-740 (LGS), 2024 WL 1055009, at *2 (S.D.N.Y. Feb. 9, 2024) (citing *James v. China Grill Mgmt., Inc.*, No. 18-CV-455 (LGS), 2019 WL 1915298, at *3 (S.D.N.Y. Apr. 30, 2019)).

"To support the calculation of the lodestar, 'counsel must submit evidence providing a factual basis for the award in the form of contemporaneous billing records documenting, for each attorney, the date, the hours expended, and the nature of the work done.'" *Mateer*, 2024 WL 1055009, at *2 (quoting *Uribe v. Prestige Car Care of NY Inc.*, No. 23-CV-1853 (LGS), 2023 WL 5917550, at *1 (S.D.N.Y. Aug. 9, 2023)).

Here, Class Counsel request an award of attorneys' fees of $11.5 million, (Mem. 29), for hours worked amounting to $10,314,663.50 billed at counsel's current rates, (Graber Decl., Dkt. 356-1 ¶ 17), increased by a multiplier of approximately 1.1, (Mem. at 22). This multiplier is "well within the norm, if not on the [low end]," of multipliers approved regularly within this circuit. (*Id.*); *see Bienenfeld v. Bosco, Bisignano & Mascolo*, 531 F. App'x 158, 160 (2d Cir. 2013) (summary order) (affirming district court's use of 1.25 multiplier); *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 134 (2d Cir. 2008) ("We have little doubt that . . . a 2.04 lodestar multiplier, is toward the lower end of reasonable fee awards."); *see also Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 726 (2d Cir. 2023) (noting that courts may use "lodestar comparators . . . to avoid picking numbers arbitrarily").

However, after receiving Class Counsel's initial attorneys' fees application, the Court raised a concern about Class Counsel's use of current hourly rates because of the possibility that it could overstate the lodestar calculation given the long duration of the case and the likelihood that Class Counsel's rates had increased over the years. *See Kurtz*, 2024 WL 184375, at *13 (raising same concern in context of class action settlement). Accordingly, after Plaintiffs filed their motion, the Court requested that Class Counsel submit "the historic billing rates for each individual contained in the billing records [initially] submitted." (5/8/2024 Docket Order.)

Adjusted to account for each attorney's rate at the time that attorney billed time on this matter, Class Counsel's fee request amounts to $7,850,587. Although this rate is significantly lower than Class Counsel's initial calculation of $10,314,663.50 based on current rates, the Court finds that the lodestar multiplier required to reach Class Counsel's fee request of $11.5 million—approximately 1.46—is still within the realm of a reasonable lodestar multiplier that courts in this circuit routinely approve. *See In re Canon U.S.A. Data Breach Litig.*, Nos. 20-CV-6239 (AMD) (SJB), 20-CV-6380 (AMD) (SJB), 21-CV-414 (AMD) (SJB), 2024 WL 3650611, at *8 (E.D.N.Y. Aug. 5, 2024) (noting that "a multiplier of 2 or lower would be 'at the lower end of the range of multipliers awarded by courts within the Second Circuit'" (quoting *In re Lloyd's Am. Tr. Fund Litig.*, No. 96-CV-1262 (RWS), 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002))). Furthermore, "contingency risk . . . must be considered in setting a reasonable fee." *Goldberger*, 209 F.3d at 53. "[A]n unenhanced lodestar fee does not account for the contingent risk that a lawyer may assume in taking on a case.'" *Fresno Cnty. Emps.' Ret. Ass'n*, 925 F.3d at 68; *accord In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB) (JO), 2019 WL 6888488, at *13 (E.D.N.Y. Dec. 16, 2019), *aff'd sub nom. Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704 (2d Cir. 2023). The Court, therefore, finds that Class

Counsel's request for $11.5 million in attorneys' fees is reasonable based on a lodestar cross-check, even taking into account Class Counsel's historic blended billing rates.

c. Reasonableness Under the *Goldberger* Factors

"Irrespective of which method is used, the '*Goldberger* factors' ultimately determine the reasonableness" of an attorney's fee award in a class action settlement. *Wal-Mart Stores, Inc.*, 396 F.3d at 121. These factors are: (1) counsel's time and labor; (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. Here, the *Goldberger* factors also support Class Counsel's request for attorneys' fees.

First, Class Counsel have expended significant time and labor in litigating this case, and second, this is a large-scale, complex litigation. As discussed at length above, Class Counsel have litigated this case for approximately seven years, and engaged in tremendous amounts of discovery, motion practice, and trial preparation during that time. *Supra* Section I.B.1.a. These factors support a reasonable award of attorneys' fees to Class Counsel.

Third, Class Counsel took on significant risk in choosing to litigate this matter on behalf of Plaintiffs. On top of the evidentiary risks inherent to Plaintiffs' claims, Class Counsel have also assumed the risks of continued litigation, which, as discussed above, were significant. *See supra* Section I.B.3.d. Having taken on the risk that Plaintiffs' case could have been dismissed or significantly hobbled at any stage, the risks presented by this litigation support the requested award of attorneys' fees to Class Counsel.

Fourth, "the favorable result reached on behalf of the Class" renders it "obvious that the members of the Class benefited from [C]ounsel proficient in consumer protection litigation," while avoiding the risk and uncertainty of trial and continued litigation. *Hallmark v. Cohen & Slamowitz, LLP*, 378 F. Supp. 3d 222, 234 (W.D.N.Y. 2019). Indeed, "[t]hat Class Counsel was able to

negotiate this [s]ettlement against a sophisticated company represented by highly capable counsel, while avoiding adverse rulings that could have reduced Plaintiffs' negotiating leverage, is a testament to the skill displayed by Class Counsel." *Hesse v. Godiva Chocolatier*, No. 19-CV-972 (LAP), 2022 U.S. Dist. LEXIS 72641, at *39 (S.D.N.Y. Apr. 20, 2022). Accordingly, the fourth *Goldberger* factor supports an award of the requested attorneys' fees. *See Kurtz*, 2024 WL 184375, at *17.

Fifth, the Court evaluates the reasonableness of the requested fee in relation to the settlement. As noted above, the requested award is well within the range of fees that courts within this circuit have found reasonable in relation to the settlement. *See supra* Section III.B.1.a–b. This factor therefore supports Class Counsel's request for attorneys' fees.

Sixth and finally, public policy considerations point in support of Class Counsel's request. By granting Class Counsel's request for reasonable attorneys' fees, the Court incentivizes other attorneys to take on matters that may be risky, but ultimately beneficial for a large class of plaintiffs. As a consequence, this factor supports Class Counsel's request.

2. Costs and Expenses

Class Counsel further request reimbursement for litigation costs and expenses in the amount of $2,686,778.13. (Mem. 39–41.) Counsel also seek class certification notice costs of $959,493.91. (*See* Dkt. 367-1 at 6.) In support, Class Counsel have submitted documentation of their incurred expenses, in the form of declarations, receipts, invoices, and other bills. (*See, e.g.*, Graber Decl., Dkt. 356-1; Dkts. 362-1–362-26.)

Although Class Counsel's costs and expenses are not insignificant, the Court finds that these costs and expenses were reasonable and necessary for Class Counsel to successfully prosecute this multi-state class action lawsuit—particularly in light of the expert-intensive theory

of the litigation—and thus should be reimbursed to Class Counsel. *See, e.g.*, *Yang v. Focus Media Holding Ltd.*, No. 11-CV-9051 (CM), 2014 WL 4401280, at *19 (S.D.N.Y. Sept. 4, 2014) (granting reimbursement of fees for mediator, expert witnesses, electronic research, photocopying, postage, meals, and court filing fees, given that such expenses are typical of those that law firms bill to their clients); *Tenaris*, 2024 WL 1719632, at *12 (granting reimbursement of expenses for expert witnesses, foreign attorney and investigator, mediator, legal research fees, filing fees, and costs associated with document review, where such expenses were summarized in a table reflecting each category of expenses and the amount paid). Counsel have adequately documented these expenses. *See Fisher v. SD Prot. Inc.*, 948 F.3d 593, 600 (2d Cir. 2020) ("The fee applicant must submit adequate documentation supporting the [request]."). Accordingly, Class Counsel's request for reimbursement of litigation costs and expenses of $2,686,778.13 and class certification notice costs of $959,493.91 is granted.

CONCLUSION

For the reasons set forth above, the Court grants Plaintiffs' motion for settlement approval, service awards, and attorneys' fees, costs, and expenses.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: September 27, 2024
Brooklyn, New York