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2. Proposed Notice Plan .... Motion Ex. 2

3. Plaintiff's Counsel's Resumes .... Motion Ex. 3

I. INTRODUCTION

Blair Douglass submits this Memorandum in Support of Plaintiff's Motion to Certify the Class for Settlement Purposes and for Preliminary Approval of the Class Action Settlement Agreement ("Motion"). The Agreement[1] resolves this action against Optavia LLC. It is fair and reasonable, and provides substantial benefits to the class, and avoids the delay, risk, and expense of litigation. It is on par with agreements this District approved in *Murphy v. Eyebobs, LLC*, No. 1:21-cv-00017, Doc. 49 (W.D. Pa. Feb. 9, 2022) ("*Eyebobs*") and *Murphy v. Charles Tyrwhitt, Inc.*, No. 1:20-cv-00056, Doc. 47 (W.D. Pa. Feb. 16, 2022) ("*Charles Tyrwhitt*"), and which the District of Massachusetts preliminarily approved in *Giannaros v Poly-Wood, LLC*, No. 1:21-cv-10351-WGY, Doc. 28 (D. Mass. May 25, 2022). Plaintiff requests the Court grant the Motion.

II. HISTORY OF THE DISPUTE

In June 2021, Plaintiff attempted to access Defendant's online store located at https://www.optavia.com/ ("Website"). (Doc. 1 at ¶ 45.) Plaintiff could not access the store because it was not compatible with screen reader auxiliary aids, which Plaintiff uses to access digital content because he is blind.[2] (*Id.*) Plaintiff contacted Defendant to explore a prelitigation solution that would ensure Defendant's store becomes accessible in the future. (*Id*. at ¶ 46.)

Plaintiff eventually filed a class action complaint on April 21, 2022. The complaint seeks declaratory and injunctive relief, asserting Defendant does not have, and has never had, adequate policies and practices to cause its \ store to be accessible to blind individuals, in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq*. ("ADA"). (Doc. 1.)

The parties have worked since June 2021 to resolve the matter as a class action.

[1] The proposed Agreement is attached to Plaintiff's motion as Exhibit 1.
[2] Plaintiff use the term "blind" in its broadest sense to include all persons who have a vision-related disability that requires alternative methods to access digital content, like a text message or website.

III. SUMMARY OF THE AGREEMENT

Plaintiff brought this action to ensure blind individuals have equal access to online goods, programs, and services that Defendant makes available on the Website. The relief afforded by the Agreement achieves that goal, and more. A description of the key provisions follows.

A. Key Terms Used in the Agreement

"Website" means the store located at https://www.optavia.com/. *Id.* § 2.48. "Digital Properties" include the Website, Defendant's "Mobile App," any "New Websites and Mobile Apps" and any "Subsequently Acquired Website and Mobile Apps." *Id.* § 2.17.

"Settlement Class or Settlement Class Members" means "a national class including all Blind or Visually Disabled individuals who use screen reader auxiliary aids to navigate digital content and who have accessed, attempted to access, or been deterred from attempting to access, or who may access, attempt to access, or be deterred from attempting to access, the Website from the United States." *Id.* § 2.41.

The Agreement defines "Accessible" with reference to the Web Content Accessibility Guidelines ("WCAG") 2.1. *Id* §§ 2.6 (Accessible) and 2.47 (WCAG 2.1). The WCAG standards are based on four general principles—that digital content be perceivable, operable, understandable, and robust. The U.S. Department of Justice ("DOJ") relies on WCAG to resolve enforcement actions akin to Plaintiff's complaint.[3] So too does National Federation of the Blind ("NFB").[4]

[3] *See* DOJ, *Justice Department Secures Agreement with Rite Aid Corporation to Make Its Online COVID-19 Vaccine Registration Portal Accessible to Individuals with Disabilities*, Nov. 1, 2021, available at https://www.justice.gov/opa/pr/justice-department-secures-agreement-rite-aid-corporation-make-its-online-covid-19-vaccine (last accessed May 10, 2022).

[4] *See* Settlement Between Penn State University and National Federation of the Blind, U.S. Department of Education, Office for Civil Rights (OCR) #03-11-2020, §§ III-V, available at https://accessibility.psu.edu/nfbpsusettlement/ (last accessed May 10, 2022).

agreement was judicially approved—in *Lucas v. Kmart Corporation*, No. 1:99-cv-01923 (D. Col.), as well as the agreements approved in *Eyebobs*, *Charles Tyrwhitt*, and *Poly-Wood.*

In *Lucas*, various plaintiffs who each used a wheelchair or scooter for mobility alleged they were denied full and equal enjoyment of Kmart's goods and services because Kmart failed to maintain unobstructed aisles, parking spaces, restrooms, fitting rooms, checkout lanes, and more. After seven years of litigation, the district court approved a settlement agreement resolving the Plaintiff's claims. *See* Order Certifying Class, Approving Settlement Agreement and Enjoining the Filing or Pursuit of Related Claims, *Lucas*, Doc. 235 (D. Col. July 7, 2006). The settlement agreement allowed Kmart up to seven-and-a-half years to remediate its stores nationwide, during which time the court was to retain jurisdiction. *Lucas*, Doc. 235 at 26.

Just as the Agreement provides here, the court in *Lucas* enjoined a nationwide ADA class from asserting or pursuing released claims during the remediation period. The court explained:

> The Court believes that it is particularly appropriate to issue an injunction in this case because the settlement has a term of approximately seven and a half years during which the Court will continue to retain jurisdiction. Therefore, because the Court finds that it would aid in the protection of its jurisdiction and is necessary in order to effectuate this settlement, the Court hereby permanently enjoins members of the Nationwide Class [ ] from asserting or pursuing…[c]laims seeking injunctive relief relating in any way to the accessibility of Kmart stores to persons who use wheelchairs or scooters under Title III of the Americans with Disabilities Act, Cal. Code Regs., Title 24[.]

Lucas, Doc. 235 at 27.

Like *Lucas*, the Court should enjoin the pursuit of released claims in conflicting litigation upon final approval because doing so is "necessary or appropriate in aid of [its] respective jurisdiction[ ]" and "serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements that 'prevent relitigation of settled questions at the core of

Ins. Co. of Am., 511 U.S. 375 (1994). Ex. 1, §§ 28.2, 37. However, before submitting any matter to the Court, the Agreement requires that the Parties attempt to resolve disputes through meet-and-confer negotiations, *id.* § 23.1., and, if unsuccessful, mediation. *Id.* § 23.2.

G. Incentive Award for the Plaintiff

Defendant agreed to pay Plaintiff an incentive award of One Thousand Dollars ($1,000.00), subject to the Court's approval. *Id.* § 21.1. This is consistent with prior practice in this District. *See Eyebobs*, No. 1:21-cv-00017, Doc. 50 at ¶ 5 (awarding Plaintiff $1,000.00 incentive award); *Charles Tyrwhitt*, No. 1:20-cv-00056, Doc. 47 at 4 (same); Order Granting Motion for Final Approval of Class Action Settlement, *Flynn v. Concord Hospitality Enterprises Company*, Doc. 41, No. 2:17-cv-01618 (W.D. Pa.) (J. Lenihan) (awarding Plaintiff a $1,500.00 in a class action settlement resolving ADA claims concerning hotel's inaccessible shuttle service).

H. Attorneys' Fees and Costs

Defendant agrees to not oppose Plaintiff's motion for attorneys' fees in the amount of (a) Forty-Five Thousand Dollars ($45,000.00) for work through the Agreement Term, (b) Fifteen Thousand Dollars ($15,000.00) for work during the First Extended Agreement Term, if applicable, and (c) Fifteen Thousand Dollars ($15,000.00) for work during the Second Extended Agreement Term, if applicable. Ex. 1, § 25. Although a fee petition will detail his fees and costs, Plaintiff notes this request is consistent with the fees approved in *Eyebobs* and *Charles Tyrwhitt*, where undersigned were also appointed class counsel. *See Eyebobs*, No. 1:21-cv-00017, Doc. 50 at ¶ 3 (awarding $44,000.00 in fees and $15,000.00 per extension); *Charles Tyrwhitt*, No. 1:20-cv-00056, Doc. 48 at ¶ 1 (awarding $43,000.00 in fees and $15,000.00 per extension);

IV. LEGAL STANDARD

Fed. R. Civ. P. 23(e) "provides that 'claims ... of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised

only with the court's approval.'" *Ward v. Flagship Credit Acceptance LLC*, No. 2:17-cv-02069, 2020 U.S. Dist. LEXIS 25612, at *10-11 (E.D. Pa. Feb. 13, 2020). "[P]reliminary approval is not simply a judicial 'rubber stamp' of the parties' agreement." *In re NFL Players' Concussion Injury Litig*., 961 F. Supp. 2d 708, 714 (E.D. Pa. 2014) (quoting *In re Inter-Op Hip Prosthesis Liab. Litig*., 204 F.R.D. 330, 338 (N.D. Ohio 2001)). "Judicial review must be exacting and thorough. The task is demanding because the adversariness of litigation is often lost after the agreement to settle.'" *Id.* at 714-15 (quoting Manual for Complex Litigation (Fourth) § 21.61 (2004)). "In cases such as this, where settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously, we require district courts to be even 'more scrupulous than usual' when examining the fairness of the proposed settlement." *Id*. at 715 (quoting *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 534 (3d Cir. 2004) ("*In re Warfarin*")).

V. ARGUMENT

Under Rule 23(e), the claims of a class proposed to be certified for settlement purposes may only be settled with the Court's approval. Fed. R. Civ. P. 23(e). Before approving a class settlement where the putative class has not yet been certified, the Court must determine whether: (a) the class should be certified for settlement purposes; (b) the settlement is "fair, reasonable, and adequate"; and (c) the notice and notice plan satisfy due process. *Id*. The instant settlement satisfies all of these requirements.

A. The Court Should Certify the Class for Settlement Purposes.

Plaintiff seeks the certification of the following Settlement Class:

> [A] national class including all Blind or Visually Disabled individuals who use screen reader auxiliary aids to navigate digital content and who have accessed, attempted to access, or been deterred from attempting to access, or who will access, attempt to access, or be deterred from attempting to access, the Website from the United States.

Ex. 1, § 2.41. As defined, the proposed Settlement Class meets the conditions set forth in Rule 23(a) and Rule 23(b)(2).

1. Plaintiff Satisfies the Requirements of Rule 23(a).

(a) Numerosity

The Court must determine that the proposed class "is so numerous that joinder of all members is impracticable." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182 (3d Cir. 2001); Fed. R. Civ. P. 23(a)(1). Impracticality does not mean impossibility; it means class certification is proper in light of the difficulty of joining all members of the putative class. *Cureton v. Nat'l Collegiate Athletic Assn.*, No. 2:99-cv-01222, 1999 WL 447313, at *5 (E.D. Pa. July 1, 1999). The inquiry is focused on judicial economy. *See Phila. Elec. Co. v. Anaconda Amer. Brass Co.*, 43 F.R.D. 452, 463 (E. D. Pa. 1968) ("I see no necessity for encumbering the judicial process with 25 lawsuits, if one will do."). While there is no precise standard, a class of more than 40 people presumptively satisfies the Rule. *See Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2010). Both general knowledge and common-sense assumptions may be applied to the numerosity determination. *Snider v. Upjohn Co*., 115 F.R.D. 536, 539 (E.D. Pa. 1987).

The numerosity requirement is satisfied here, based on common sense and available data regarding the number of visually impaired individuals in the United States, and the number of individuals who use the internet. First, U.S. Census data from 2010 shows that of the 241.7 million adult-population aged 15 and older, "[a]bout 8.1 million people (3.3 percent) had difficulty seeing, including 2.0 million people who were blind or unable to see." *See* Matthew W. Brault, U.S. Department of Commerce, Economics and Statistics Administration, *Americans With Disabilities: 2010* (July 2012), 6, available at https://www2.census.gov/library/publications/2012/demo/p70-131.pdf (last accessed May 25, 2022). Second, according to Pew Research Center, 90% of U.S. adults use the internet. Pew Research Center, *Internet/Broadband Fact Sheet*, available at

https://www.pewresearch.org/internet/fact-sheet/internet-broadband/ (last accessed May 25, 2022). Combining this data shows approximately 7.3 million U.S. adults who have difficulty seeing, and 1.8 million U.S. adults who are blind, use the internet.

Defendant's Website is available anywhere in the United States. Therefore, at any given time, any number of the 7.3 million and 1.8 million members of the public who have difficulty seeing, or are blind, respectively, and who access the internet, may seek to shop in Defendant's store. In light of the number of visually disabled internet users who may access Defendant's online store, the numerosity requirement is satisfied here. *See Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (extrapolating from evidence that there are over 175,000 wheelchair users in California that the number of persons affected by the public accommodation violations at defendant's 70 theatres was in the thousands).

Courts have found identical classes to satisfy Rule 23(a)'s numerosity requirement in *Eyebobs* and *Charles Tyrwhitt*. *See Eyebobs*, No. 1:21-cv-00017, Doc. 36 at 4 (W.D. Pa. Oct. 6, 2021); *Charles Tyrwhitt*, No. 1:20-cv-00056, Doc. 30 at 4 (W.D. Pa. Nov. 25, 2020), *report and recommendation adopted by* Doc. 32 (W.D. Pa. Jan. 4, 2021). This Court should too.

(b) Commonality

Rule 23(a)(2)'s commonality requirement requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In cases seeking injunctive relief, "[t]he commonality requirements will be satisfied if the named Plaintiff share at least one question of fact or law with the grievances of the prospective class … Because the requirement may be satisfied by a single common issue, it is easily met." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). Further, "because they do not also involve an individualized inquiry for the determination of damage awards, injunctive actions by their very nature often present common questions satisfying Rule 23(a)(2)." *Id.* at 57 (citations omitted).

Rule 23(a)(2)'s commonality requirement is satisfied here. There are numerous factual and legal issues common to Plaintiff and the Settlement Class Members, including whether they have been, are being, and/or will be denied full and equal access to, and use and enjoyment of, Defendant's online store due to Defendant's alleged failure to make it fully and equally accessible and useable by people who use screen reader auxiliary aids to access digital content. Additionally, what actions are required under the law to ensure Defendant's online store is accessible to Plaintiff and the Settlement Class Members is common to Plaintiff and the Settlement Class Members. The requirements of Rule 23(a)(2) is satisfied in this case. *Baby Neal*, 43 F.3d at 62 (finding the class action clearly presented common factual and legal issues under the applicable standard).

This District found identical classes to satisfy Rule 23(a)(2)'s commonality requirement in *Eyebobs* and *Charles Tyrwhitt*. *See Eyebobs*, No. 1:21-cv-00017, Doc. 36 at 4 (W.D. Pa. Oct. 6, 2021); *Charles Tyrwhitt*, No. 1:20-cv-00056, Doc. 30 at 4 (W.D. Pa. Nov. 25, 2020), *report and recommendation adopted by* Doc. 32 (W.D. Pa. Jan. 4, 2021). This Court should too.

(c) Typicality

Rule 23(a)(3)'s typicality requirement "entails an inquiry [into] whether the named Plaintiff's individual circumstances are markedly different or … the legal theory upon which the claims are based differs from that upon which the claims of the other class members will perforce be based." *Baby Neal*, 43 F.3d at 57-58 (citations omitted). "Actions requesting declaratory and injunctive relief to remedy the conduct directed at the class clearly fit this mold." *Id*. at 58.

Plaintiff satisfies the typicality requirement in this case. Plaintiff's claims are typical of those of the Settlement Class Members since both sets of claims arise from the same practices and are based on the same legal theories: that Defendant failed to makes its online store accessible to individuals with disabilities. *See Id.*; *see also Stewart*, 275 F.3d at 228. Because the claims are "framed as a violative practice" and seek to remedy injuries linked to this practice, they "occupy

the same position of centrality for all class members." *Baby Neal*, 43 F.3d at 63. The typicality requirement of Rule 23(a)(3) is satisfied.

This District found identical classes to satisfy Rule 23(a)(3)'s typicality requirement in *Eyebobs* and *Charles Tyrwhitt*. *See Eyebobs*, No. 1:21-cv-00017, Doc. 36 at 5 (W.D. Pa. Oct. 6, 2021); *Charles Tyrwhitt*, No. 1:20-cv-00056, Doc. 30 at 5 (W.D. Pa. Nov. 25, 2020), *report and recommendation adopted by* Doc. 32 (W.D. Pa. Jan. 4, 2021). This Court should too.

(d) Adequacy

A class representative must demonstrate he or she will "fairly and adequately protect the interests of the class." Fed R. Civ. P. 23(a)(4). This requirement is satisfied where the named plaintiff's interests are not antagonistic to the prospective class members, and counsel for the named Plaintiff is experienced and qualified to conduct the litigation. *Baby Neal*, 43 F.3d at 55.

Plaintiff satisfied the adequacy requirement: Plaintiff will protect the interest of the class; and Plaintiff's counsel are experienced litigators who are well-versed in class litigation and the law of disability discrimination.

First, Plaintiff will fairly and adequately protect the interests of the Class. He has no adverse or antagonistic interests to the Class: Plaintiff and the Class share the same injuries and seek the same relief—access to Defendant's store. *See Metts v. Houstoun*, No. 2:97-cv-04123, 1997 WL 688804, at *4 (E.D. Pa. 1997) (quoting *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988)) ("Because the plaintiff seeks the same injunctive relief as all members of the class, the court 'can find no potential for conflict between the claims of the complainants and those of the class as a whole.'"). What's more, this District has found Plaintiff to have adequately represented a similar nationwide class of blind consumers. *See Charles Tyrwhitt*, No. 1:20-cv-00056, Doc. 47 at 3.

Second, Plaintiff has retained experienced and competent counsel who fairly and adequately protected the interests of the proposed class throughout the litigation and during the

negotiation of the Agreement.[5] Counsel have experience litigating class actions, generally, and prosecuting Title III ADA claims, specifically. Judges Lanzillo and Paradise Baxter have each found attorneys Tucker and Abramowicz to have adequately represented similar classes. *See Eyebobs*, No. 1:21-cv-00017, Doc. 49 at 3; *Charles Tyrwhitt*, No. 1:20-cv-00056, Doc. 47 at 3.

Plaintiff and his counsel satisfy Rule 23(a)(4)'s adequacy requirement.

2. Plaintiff Satisfies the Requirements of Rule 23(b)(2).

Plaintiff asserts claims for injunctive relief under Rule 23(b)(2). A class may be certified under Rule 23(b)(2) if the prerequisites of Rule 23(a) are satisfied and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Because the relief sought in a Rule 23(b)(2) class action is cohesive in nature, a class representative can, as a matter of due process, bind all absent class members by a judgment. *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 963 (3d Cir 1983). Classes certified under Rule 23(b)(2) "frequently serve as the vehicle for civil rights actions and other institutional reform cases." *Hawkins ex rel. Hawkins v. Comm'r of N.H. Dep't of Health & Human Servs.*, No. 1:99-cv-00143, 2004 U.S. Dist. LEXIS 807, at *11-12 (D.N.H. Jan. 23, 2004). Such is the case here.

This case concerns a single, common contention: Defendant failed to provide equal, effective, and full access to its store for people who are blind and use screen reader auxiliary aids to access digital information. By failing to develop and maintain an ecommerce platform compatible with screen reader software, Defendant acted or refused to act on grounds generally applicable to the Class. The injunctive relief Plaintiff seeks—Defendant's agreement to modify its policies and practices going forward—is sought to benefit, and clearly will benefit, the entire Class.

[5] Plaintiff's Counsels' resumes are attached as Exhibit 2 to Plaintiff's Motion.

Certification under Rule 23(b)(2) is appropriate. *See Eyebobs*, No. 1:21-cv-00017, Doc. 37 (W.D. Pa. Oct. 6, 2021) (granting preliminary approval of settlement between blind consumers and online retailer); *Charles Tyrwhitt*, No 1:20-cv-00056, Doc. 30 (W.D. Pa. Nov. 25, 2020), *report and recommendation adopted by* Doc. 32 (W.D. Pa. Jan. 4, 2021) (same); *Poly-Wood*, No. 1:21-cv-10351, Doc. 28 (D. Mass. May 25, 2022); *Flynn v. Concord Hospitality Enterprises Company*, No. 2:17-cv-01618-LPL, Doc. 23 (W.D. Pa. July 10, 2018) (order preliminarily approving settlement between hotel operator and class of wheelchair dependent travelers challenging the operator's inaccessible shuttle services).

Because the requirements of Rule 23(a) and Rule 23(b)(2) are satisfied, Plaintiff requests the Court certify the Settlement Class for settlement purposes, appoint Plaintiff as class representative, and appoint Plaintiff's counsel as Class Counsel.[6]

B. The Agreement is Fair, Reasonable, and Adequate and Should be Preliminarily Approved.

A class action cannot be settled without the court determining the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). The fairness inquiry under Rule 23(e) "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)) (internal quotation marks omitted).

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent*

[6] Ascertainability is not required for certification of a Rule 23(b)(2) class action seeking only injunctive and declaratory relief. *Shelton v. Bledsoe*, 775 F.3d 554, 555-563 (3d Cir. 2015).

Actions, 148 F.3d 283, 299 (3d Cir. 1998) ("*Prudential*") (internal quotation marks omitted). Courts "bear[] the important responsibility of protecting absent class members, 'which is executed by the court's assuring that the settlement represents adequate compensation for the release of the class claims.'" *In re NFL Players Concussion Injury Litig*., 821 F.3d at 436 (quoting *In re Pet Food Prods.*, 629 F.3d 333, 349 (3d Cir. 2010)). "In cases of settlement classes, where district courts are certifying a class and approving a settlement in tandem, they should be 'even "more scrupulous than usual" when examining the fairness of the proposed settlement.'" *Id*. (quoting *In re Warfarin*, 391 F.3d at 534 (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995))).

1. The Agreement Is Presumptively Fair.

Courts in the Third Circuit "apply an initial presumption of fairness in reviewing a class settlement when: '(1) the negotiations occurred at arms [sic] length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *In re NFL Players Concussion Injury Litig*., 821 F.3d at 436 (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 n.8 (3d Cir. 2001)).

(a) The Negotiations Occurred at Arm's Length.

The parties devoted months to proactively resolving Plaintiff's claims. Plaintiff's counsel have drawn upon their experience resolving similar claims to achieve a resolution that meets or exceeds the obligations contained in every publicly available settlement resolving digital accessibility claims of which Plaintiff's counsel are aware, and is on par with the settlements approved in *Eyebobs*, *Charles Tyrwhitt*, and *Poly-Wood*. Moreover, negotiation of the material terms of the Agreement was conducted without regard to the payment of Plaintiff's attorneys' fees and costs. In other words, Plaintiff did not bargain away the right to pursue injunctive relief for greater fees—as is demonstrated by the comprehensive obligations the Agreement provides. The

Court should not "intrude overly on the parties' hard-fought bargain." *In re Google Inc. Cookie Placement Consumer Privacy Litig*., 934 F.3d 316, 326 (3d Cir. 2019).

(b) Robust Discovery Was Not Required Because the Accessibility of Defendant's Website Was Obtained Independently.

Plaintiff and his legal team conducted multiple rounds of testing to determine whether Defendant's online store is fully and equally accessible to blind consumers. From these reviews, Plaintiff determined Defendant's store was not accessible to him and the Settlement Class. Plaintiff does not require additional discovery to determine whether this store is accessible—it's not—or whether Defendant's current policies and practices are sufficient—they're not. Importantly, while burdensome discovery into Defendant's people, policies, and practices would have generated greater fees for Plaintiff's Counsel, it would not have secured Plaintiff any better relief. As described herein, the relief Plaintiff achieved meets or exceeds the obligations contained in every publicly available settlement resolving digital accessibility claims of which Plaintiff's Counsel are aware, and is on par with the agreements approved in *Eyebobs*, *Charles Tyrwhitt*, and *Poly-Wood*.

(c) Plaintiff and Plaintiff's Counsel Are Experienced in Similar Litigation.

Plaintiff has retained experienced and competent counsel who fairly and adequately protected the interests of the class throughout the litigation and during the negotiation of the Agreement. Plaintiff's Counsel have many years of experience prosecuting class and civil rights litigation, generally, and Title III digital accessibility claims, in particular. Undersigned counsel are sufficiently experienced in similar litigation.

(d) Given the Terms, Plaintiff Does Not Anticipate Objectors.

The relief included in the Agreement is at least as comprehensive as every publicly available settlement resolving digital accessibility claims of which Plaintiff's counsel are aware,

> the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

521 F.2d 153, 157 (3d Cir. 1975) (internal quotation marks and ellipses omitted). "The settling parties bear the burden of proving that the *Girsh* factors weigh in favor of approval of the settlement." *In re Pet Food Prods*., 629 F.3d at 350. "A district court's findings under the *Girsh* test are those of fact. Unless clearly erroneous, they are upheld." *In re NFL Players Concussion Injury Litig*., 821 F.3d at 437.

Later, in *Prudential*, the Third Circuit held that because of a "sea-change in the nature of class actions," it might be useful to expand the *Girsh* factors to include some additional considerations too:

> [1] the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

148 F.3d at 323. "Unlike the *Girsh* factors, each of which the district court must consider before approving a class settlement, the *Prudential* considerations are just that, prudential." *In re Baby Prods. Antitrust Litig*., 708 F.3d 163, 174 (3d Cir. 2013).

(a) Complexity, Expense, and Likely Duration of Litigation

"The first factor captures the probable costs, in both time and money, of continued litigation." *In re NFL Players Concussion Injury Litig*., 821 F.3d at 437 (citing *In re Warfarin*, 391 F.3d at 535-36) (internal quotations omitted). A roadmap exists for what litigation might look like. A 26(f) Report filed in another digital accessibility case identifies the defendant's intention to

prosecuted similar claims since 2016. Plaintiff has filed such claims since 2020. Plaintiff and Plaintiff's Counsel visited Defendant's online store personally and developed firsthand knowledge of the access barriers that exist. From that knowledge, and their experience prosecuting similar claims, Plaintiff and Plaintiff's Counsel adequately appreciated the merits of their case and the available relief before filing suit or becoming engaged. Because the Agreement achieves the very relief Plaintiff would request in summary judgment or at trial, the Court should not draw any negative inference from the Parties' resolution at this early stage.

(d) Risks of Establishing Liability and Damages

"The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re NFL Players Concussion Injury Litig*., 821 F.3d at 439 (quoting *Prudential*, 148 F.3d at 319). These factors weigh in favor of settlement because Plaintiff cannot reasonably anticipate achieving more complete injunctive relief at trial than what the parties have agreed to in the Agreement. This position is stronger in light of the defenses Defendant might assert in dispositive motions or at trial, including that it has no obligations under the ADA to make its online store accessible to blind shoppers or that any further modifications to its online store would (a) not be readily achievable, (b) impose an undue burden, (c) fundamentally alter Defendant's business, or (d) be commercially unreasonable, which are affirmative defenses Defendant might demonstrate during litigation. In light of the Agreement's relief and Defendant's defenses, the fourth and fifth *Girsh* factors weigh in favor of settlement.

(e) Risks of Maintaining Class Action Through Trial

The Third Circuit has recognized this *Girsh* factor is "essentially toothless" in a proposed settlement class because "a district court need not inquire whether the case, if tried, would present

The Agreement represents good value for any case. If Plaintiff were successful at summary judgment or trial, he would be entitled to only the injunctive relief the Court deemed appropriate. In making such a request, Plaintiff would direct the Court to the relief achieved by the DOJ and NFB in analogous cases they prosecuted, like the agreements between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC; NFB and Penn State University; and the Youngstown State University Resolution Agreement, and the agreements approved in *Eyebobs*, *Charles Tyrwhitt*, and *Poly-Wood*—the same agreements which the Agreement tracks. Once again, because no difference between the Agreement and "best possible recovery" exists, the eighth and ninth *Girsh* factors weigh in favor of approving the settlement.

(h) *Prudential* Factors

While many of the *Prudential* factors are irrelevant to actions seeking injunctive relief, those factors that are relevant weigh in favor of settlement. The third *Prudential* factor compares the "results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants." *Prudential*, 148 F.3d at 323. As described above, no other claimant is likely to achieve better injunctive relief than the Agreement provides. The fifth *Prudential* factor considers "whether any provisions for attorneys' fees are reasonable." *Id*. The Agreement obliges Defendant not to oppose Plaintiff's motion for attorneys' fees and costs in the amount of Forty-Five Thousand Dollars ($45,000.00). A forthcoming fee petition will provide an overview of Plaintiff's fees and costs. Because the petition remains subject to the Court's review and modification or approval, this factor does not weigh against settlement.

C. The Proposed Notice Plan and Long-Form Notice Satisfy Rule 23(e) and the Requirements of Due Process

Rule 23(e) provides that "the court must direct notice [of the proposed settlement] in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P.

23(e). Unlike Rule 23(b)(3) settlement, actions certified under Rule 23(b)(2) contain "no rigid rules to determine whether a settlement notice to class members satisfies the constitutional and Rule 23(e) requirements." Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 8:15 (5th ed. 2013); *see* Fed. R. Civ. P. 23(c)(2)). In cases certified under Rule 23(b)(2), "the stringent requirement of Rule 23(c)(2) that members of the class receive the 'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts,' is inapplicable." *Kaplan v. Chertoff*, No. 2:06-cv-05304, 2008 U.S. Dist. LEXIS 5082, at *38-39 (E.D. Pa. Jan. 24, 2008) (citing *Walsh*, 726 F.2d at 962). "Rule 23(e) makes some form of post-settlement notice mandatory, although the form of notice is discretionary because Rule[23](b)(2) classes are cohesive in nature." *Id*. (citing *Wetzel v. Liberty 1Q2341`233. Ins. Co*., 508 F.2d 239, 240-50 (3d Cir. 1975)); *see also Kyriazi v. W. Elec. Co*., 647 F.2d 388, 393 (3d Cir. 1981) (same); *Mulder v. PCS Health Sys., Inc*., 216 F.R.D. 307, 318 (D.N.J. 2003) (same).

Courts in the Third Circuit have found notice to be adequate where it is "well-calculated to reach representative class members" and describes the nature of the litigation, defines the class, explains the settlement's general terms, provides information on the fairness hearing, describes how class members can file objections, describes where complete information can be located and provides contact information. *Kaplan*, 2008 U.S. Dist. LEXIS, at *36-37, 41 (citing *Prudential*, 148 F.3d at 327); *see also In re Baby*, 708 F.3d at 180; *In re Processed Egg Prod. Antitrust Litig*., 302 F.R.D. 339, 354 (E.D. Pa. 2014); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods*., 226 F.R.D. 498, 517-18 (E.D. Pa. 2005).

The Parties have agreed on a form of notice and methods to disseminate the notice that are specifically targeted to members of the visually-disabled community and that satisfy Rule 23.

The proposed Long-Form Notice defines the Settlement Class, explains the Agreement's terms, provides information on the fairness hearing, describes the objection period and how to file objections, describes where complete information can be located, and provides contact information so that Settlement Class Members can contact Class Counsel with questions.

The Agreement provides for Notice to be distributed as follows:

27.1. As soon as practicable, but no later than twenty-one (21) days after the Court's entry of a Preliminary Approval order, Optavia shall, at its expense:

27.1.1 Cause a stipulated class action settlement notice to be published on the Settlement Website operated by the stipulated class action settlement administrator and located at https://www.optaviaADAsettlement.com. The stipulated class action settlement administrator shall track the number of visitors to the settlement website and shall provide a declaration to Class Counsel no less than five (5) days before the fairness hearing.

27.1.2. Ensure the Settlement Website provides notice in the form of the Long-Form Notice accompanying the Agreement as Agreement Exhibit 1. The Settlement Website shall also include copies of Named Plaintiff's class action complaint, motion for preliminary approval of class action settlement and all documents filed in support of Named Plaintiff's motion for preliminary approval of class action settlement, and the Court's order granting preliminary approval as well as any accompanying memorandum. The Settlement Website, including the documents identified in this Section, shall be fully accessible by screen reader auxiliary aids

27.1.3. Add an invisible link at the beginning of the Website to direct consumers using screen readers to https://www.optaviaADAsettlement.com. The link shall include alternative text which reads "Click to view our ADA class action settlement notice."

27.1.4 Post a link to the stipulated class action settlement notice on Optavia's social media accounts, including https://www.facebook.com/OPTAVIA, https://www.instagram.com/OPTAVIA/, and https://twitter.com/OPTAVIA_tweets. The post shall be in a form and substance of the language provided in Section 27.3 (it is agreed and understood that the exact language is subject to change) and shall tag and direct questions about the stipulated class action

settlement notice to Class Counsel at their accounts on each respective platform.

27.2. As soon as practicable, but no later than twenty-one (21) days after the Court's entry of a Preliminary Approval order, Class Counsel shall, at its expense, request that at least the following organizations publish notice in the form of Section 27.4 in their respective electronic newsletters and social media accounts such that the notice is sent out within sixty (60) days of Preliminary Approval: Achieva, American Council of the Blind, American Foundation for the Blind, Blinded American Veterans Foundation, Blinded Veterans Association, Foundation Fighting Blindness, Guide Dogs for the Blind, National Association of Blind Merchants, National Council on Disability, and National Federation of the Blind.

27.3. "OPTAVIA is committed to making all of our digital content accessible to our Coach and Client Community. OPTAVIA has entered into a Class Action settlement whereby it is committing to ADA compliance of its website to ensure that it is accessible to all those seeking Lifelong Transformation, One Healthy Habit at a Time. Please visit https://www.optaviaADAsettlement.com to learn more about Optavia's agreement to make its digital content accessible to screen reader users. Have questions? Contact East End Trial Group at [https://www.facebook.com/EastEndTrialGroup/ or https://www.instagram.com/eastendtrialgroup/ or https://twitter.com/eastendtrial].

27.4. "A proposed settlement has been reached that would resolve the class action lawsuit *Douglass v. Optavia LLC*, Case No. 2:22-cv-00594-CCW (W.D. Pa.). The lawsuit alleges that Optavia LLC violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.*, by failing to take the necessary steps to ensure its website does not discriminate against blind or visually disabled consumers who use screen reader auxiliary aids to access digital content. Under the settlement, Optavia LLC agrees to make its website, mobile app, and any new website or mobile app it develops or acquires accessible to screen reader users. For a more complete summary of the terms of the proposed settlement, please visit https://www.optaviaADAsettlement.com."

This method for providing notice is even more robust than that approved by the Northern District of California in *National Federation of the Blind v. Uber Technologies, Inc.*, No. 3:14-cv-04086-NC, Doc. 112 (N.D. Cal. July 13, 2016). In that case, the parties agreed:

> As soon as practicable, but no later than three (3) weeks / twenty-one (21) days after the Court's entry of a Preliminary Approval Order, Uber will pay the cost of publishing a stipulated class action settlement notice on a search-engine-optimized ("SEO") settlement website operated by a stipulated class action settlement administrator. Uber will pay the cost of the settlement administrator. After the settlement website is posted online, Uber will post a link to the settlement notice on its news blog (newsroom.uber.com) and https://www.facebook.com/uber within 30 days of the Preliminary Approval Order. Uber will further pay the cost, if any, of ensuring the notice is published in the electronic newsletters and Braille magazines of the National Federation of the Blind and the American Council of the Blind so notice is sent out within 60 days of the Preliminary Approval Order.

Proposed Agreement, *National Federation of the Blind*, Doc. 85-1 (N.D. Cal. Apr. 29, 2016).

Here, in addition to those channels the court approved in the *Uber* case, Defendant shall also post a link to the settlement website on its Website's homepage such that screen reader users may access it directly from Defendant's store. In all, these provisions meet or exceed the notice plans agreed to and approved in *Eyebobs*, *Charles Tyrwhitt*, and *Poly-Wood*. *See Eyebobs*, No. 1:21-cv-00017, Doc. 37 at ¶¶ 6-7 (W.D. Pa. Oct. 6, 2021); *Charles Tyrwhitt*, No. 1:20-cv-00056, Doc. 32 at ¶¶ 6-7 (W.D. Pa. Nov. 25, 2020), *report and recommendation adopted by* Doc. 32 (W.D. Pa. Jan. 4, 2021), and *Poly-Wood*, No. 1:21-cv-10351-WGY, ¶¶ 7-10 (D. Mass. May 25, 2022). The Court should approve the notice and notice plan in this case too.

VI. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court enter the Proposed Order granting preliminary approval of the proposed settlement. Plaintiff further requests that the Court schedule a fairness hearing on final settlement approval as the Court's calendar permits.

Dated: May 25, 2022

/s/ Kevin Tucker

Kevin Tucker (He/Him) (PA 312144)
Kevin J. Abramowicz (He/Him) (PA 320659)
Chandler Steiger (She/Her) (PA328891)