UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

BLAIR DOUGLASS, on behalf of himself and all others similarly situated,

Plaintiff,

v.

iFIT INC.,

Defendant.

Civil Action No. 2:23-cv-00917-MJH

MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION TO CERTIFY CLASS FOR SETTLEMENT PURPOSES AND FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Blair Douglass submits this Memorandum in Support of his Unopposed Motion to Certify Class for Settlement Purposes and for Preliminary Approval of Class Action Settlement. The Agreement[1] is fair and reasonable, provides substantial benefits to the class, and avoids the delay, risk, and cost of litigation. It is on par with similar agreements approved in *Murphy v. The Hundreds Is Huge, Inc.*, No. 1:21-cv-00204, 2022 U.S. Dist. LEXIS 211942 (W.D. Pa. Nov. 17, 2022) (Lanzillo, J.), *Murphy v. Eyebobs, LLC*, No. 1:21-cv-00017, Doc. 49 (W.D. Pa. Feb. 9, 2022) (Lanzillo, J.), *Murphy v. Charles Tyrwhitt, Inc.*, No. 1:20-cv-00056, Doc. 47 (W.D. Pa. Feb. 16, 2022) (Baxter, J.), *Douglass v. Optavia LLC*, No. 2:22-cv-00594, Doc. 38 (W.D. Pa. Jan. 23, 2023) (Wiegand, J.), *Douglass v. P.C. Richard & Son, LLC*, No. 2:22-cv-00399, Doc. 55 (W.D. Pa. June 27, 2023) (Kelly, J.), *Murphy v. Le Sportsac, Inc.*, No. 1:22-cv-00058, Doc. 57 (W.D. Pa. July 6, 2023) (Lanzillo, J.), *Douglass v. Mondelēz Global LLC*, No. 2:22-cv-00875, Doc. 26 (W.D. Pa. Sept. 19, 2023) (Hardy, J.), and *Giannaros v. Poly-Wood, LLC*, No. 1:21-cv-10351, Doc. 45 (D. Mass. Oct. 27, 2022). The Court should grant Douglass's motion.

II. HISTORY OF THE LITIGATION

In July 2020, Douglass attempted to access iFIT's online store, located at https://www.nordictrack.com/. (Doc. 1, ¶¶ 25-26, 46.) Douglass could not access the online store because it was not compatible with screen reader auxiliary aids, which Douglass uses to access digital content because he is blind. (*Id.*, ¶¶ 21, 39, 45-46.) Consistent with public policy encouraging the resolution of "dispute[s] informally by means of a letter[,]" *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1208 (9th Cir. 2006), which "pre-litigation solutions [are] clearly, the most expedient and cost-effective means of resolving" website

[1] The proposed Agreement and long-form notice are attached to Douglass's motion as Exhibit 1.

accessibility claims, *Sipe v. Am. Casino & Ent. Properties, LLC*, No. 2:16-cv-00124, 2016 U.S. Dist. LEXIS 53147, at *11 (W.D. Pa. Apr. 20, 2016) (Schwab, J.), Douglass's counsel contacted iFIT in 2020 to discuss its inaccessible online stores. Since then, the parties have worked to resolve Douglass's claims so that he, and millions of other blind Americans can shop at iFIT's online stores, including https://www.nordictrack.com/, https://www.proform.com/, https://freemotionfitness.com/, and https://www.ifit.com/. In May 2023, Douglass filed a complaint under Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181, *et seq*. ("ADA"). (Doc. 1.) The parties now seek to resolve this case on a class basis.

III. SUMMARY OF THE AGREEMENT

Douglass brought this action to ensure that blind individuals have equal access to iFIT's goods and services. The Agreement achieves that goal, and more.

A. Key Terms

The Agreement defines "Digital Properties" as not only the websites listed above, but also iFIT's "Mobile App," "New Websites and Mobile Apps," and "Subsequently Acquired Websites and Mobile Apps." (Ex. 1, § 2.16.)

"Settlement Class" or "Settlement Class Members" means "all Blind or Visually Disabled persons who have accessed, attempted to access, or been deterred from attempting to access, or who will access, attempt to access, or be deterred from accessing the Digital Properties from the United States." (Ex. 1, § 2.38.)

The Agreement defines "Accessible" with reference to the Web Content Accessibility Guidelines ("WCAG") 2.1. (Ex. 1, §§ 2.1, 2.43.) WCAG is based on four 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 Douglass's claims.[2] So, too, does the National Federation of the Blind ("NFB").[3]

"Agreement Term" means the time from the date of "Final Approval" through 3 years from the date of "Final Approval." (Ex. 1, §§ 2.9, 2.18, 2.20, 3.)

B. Content Covered

While the complaint concerns Douglass's inability to access iFIT's websites, the Agreement obligates iFIT to make all its Digital Properties Accessible. The breadth of this commitment demonstrates one way in which the Agreement grants more than adequate relief.

The Agreement extends to "Third-Party Content," or content that is developed by an entity outside of iFIT or its contractors. (Ex. 1, § 2.42.) iFIT shall use commercially reasonable efforts to ensure Third-Party Content is Accessible if it is necessary for Blind and Visually Disabled persons to complete a purchase or utilize a virtual assistant. (Ex. 1, § 5.1.) If iFIT cannot obtain Accessible Third-Party Content, then it must show that making the Third Party-Content Accessible would fundamentally alter the Digital Properties, or cause an undue burden. (Ex. 1, § 5.3.)

C. Remediation Timeline

iFIT must ensure the U.S. portions of its websites are Accessible by the end of the Agreement Term, (Ex. 1, § 4.1), and meet other benchmarks along the way, including:

Time from Effective Date	Benchmark	Section(s) of the Agreement
3 Months	Designate the Accessibility Coordinator	6.1
6 Months	Retain the Accessibility Consultant	7.1

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

[3] Settlement Between Penn State University and NFB, U.S. Dep't of Ed., Docket No. 03-11-2020, §§ III-V, https://accessibility.psu.edu/nfbpsusettlement/ (last accessed Nov. 9, 2023).

10 Months	Complete the Accessibility Audit	8.1
12 Months	Complete Accessibility Training	9.1
12 Months	Add invisible anchor text to the header of the homepage directing screen reader users to the Accessibility Page	10.2
18 Months	Modify bug fix policies, practices, and procedures to include the elimination of Accessibility related bugs	11.1
18 Months	Train two Customer Service Personnel to prioritize calls from Blind or Visually Disabled persons	12.1
Second and Third Years	Provide refresher Accessibility training	9.3
Second and Third Years	Perform Annual QA Monitoring to evaluate whether the Digital Properties are Accessible	13.1

The Agreement includes other obligations to which iFIT must adhere immediately:

Time from Effective Date	Benchmark	Section(s) of the Agreement
Immediately	Ensure New Websites and Mobile Apps are Accessible upon release	4.2
Immediately	Ensure Subsequently Acquired Websites and Mobile Apps are Accessible before the end of the Agreement Term or within 12 months of iFIT's acquisition of the Website or Mobile App, whichever is later	4.3
Immediately	Request that vendors provide Third-Party Content that is Accessible in any new, renewed, or renegotiated contract with a vendor of Third-Party Content	5.2
Immediately	Provide Accessibility training to all newly-hired iFIT Personnel within 90 days of the date they begin their employment	9.2

D. Enjoining Settlement Class Members From Asserting Released Claims

The Agreement requires Douglass to ask the Court to enjoin Settlement Class Members from bringing any "Released Injunctive Claims," (Ex. 1, § 24.1), which include:

> any and all claims, rights, demands, charges, complaints, actions, suits and causes of action, whether known or unknown, suspected or unsuspected, accrued or unaccrued, for injunctive, declaratory, or non-monetary relief, based on the Accessibility of the Digital Properties to Blind and Visually Disabled persons, including any injunctive, declaratory, or non-monetary claims under: (i) the ADA; and/or (ii) any similar or related state or local statutory, administrative, regulatory or code provisions.

(Ex. 1, § 2.36.)

This request is consistent with the agreements approved in *The Hundreds*, 2022 U.S. Dist. LEXIS 211942, at *14-15, *42, *Eyebobs* (Doc. 49 at Ex. A, §§ 2.35, 28.1), *Charles Tyrwhitt* (Doc. 47-1 at §§ 2.32, 26.1), *Optavia* (Doc. 12-1 at §§ 2.38, 28.1), *P.C. Richard* (Doc. 55 at Ex. A, §§ 2.41, 29.1), *Le Sportsac* (Doc. 36-1 at §§ 2.33, 28.1), *Mondelēz* (Doc. 26 at Ex. A, §§ 2.34, 26.1), and *Poly-Wood* (Doc. 45 at Ex. A, §§ 2.32, 25.1).

Like *The Hundreds*, *Eyebobs*, *Charles Tyrwhitt*, *Optavia*, *P.C. Richard*, *Le Sportsac*, *Mondelēz*, and *Poly-Wood*, the Court should enjoin the pursuit of released claims upon final approval since doing so is "necessary or appropriate in aid of [its] 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 a class action." *In re Prudential Ins. Co. Of Am. Sales Practice Litig.*, 261 F.3d 355, 365-66 (3d Cir. 2001) (quotations and citations omitted).

E. Additional Obligations

1. Accessibility Training

iFIT is required to coordinate Accessibility Training so that all iFIT Personnel are trained in methods designed to ensure the Digital Properties are and remain Accessible. (Ex. 1, § 9.1.)

2. iFIT's Reporting Obligations

To ensure iFIT's compliance, the Agreement requires periodic reporting by iFIT to Class Counsel. Below is a summary of these reporting obligations.

Information	Deadline	Section(s) of the Agreement
Annual Report	Within 30 days of the Effective Date's anniversary	2.10
iFIT's designation of Accessibility Coordinator	Within 3 months of Effective Date	6.1
iFIT's selection of Accessibility Consultant	Within 6 months of Effective Date	7.1
Accessibility Consultant's Letter of Accessibility	Before the end of the Agreement Term	7.2
Changes to Accessibility Consultant	Prior to any change	7.3
Results of Accessibility Audit	To be included as exhibit to First Annual Report	8.3
Accessibility training materials	To be included as exhibit to the Annual Report	9.4
Confirmation of header links to Accessibility Statement	To be included in Annual Report	10.5
Confirmation of Modified Bug Fix Priority Policies	To be included as exhibit to Second Annual Report	11.3
Customer Service Personnel training materials	To be included as exhibit to Second Annual Report	12.4
Results of QA Monitoring	To be included as exhibit to the Second Annual Report and each subsequent report	13.3

3. Douglass's Compliance Monitoring Obligations

Douglass is entitled to visit the Digital Properties at any time, without notice to iFIT, for the purpose of evaluating iFIT's compliance with the Agreement. (Ex. 1, § 15.)

4. Enforcement And Dispute Resolution

The parties will request the Court dismiss this action with prejudice, but retain jurisdiction to enforce the Agreement pursuant to *Kokkonen v. Guardian Life Ins. Co. Of Am.*, 511 U.S. 375 (1994). (Ex. 1, § 24.2.) The parties must attempt to resolve disputes through meet-and-confer negotiations and mediation before submitting any future dispute to the Court. (Ex. 1, § 18.)

F. Incentive Award For Douglass

If approved, iFIT will pay an incentive award of $1,500.00 to Douglass. (Ex. 1, § 19.1.) *Compare Douglass v. Mondelēz Global LLC.*, No. 2:22-cv-00875, Doc. 27, ¶ 5 (W.D. Pa. Sept. 19, 2023) (approving $1,500.00 incentive award to plaintiff).

G. Attorneys' Fees And Costs

If approved, iFIT will pay Douglass's fees and costs in the amount of $53,500.00. (Ex. 1, § 20.1.) A forthcoming fee petition will provide an overview of Douglass's fees.

IV. LEGAL STANDARD

"The claims . . . of a certified class—or a class proposed to be certified for purposes of settlement—may be settled . . . only with the court's approval," which can be granted "only on finding that [the proposed settlement] is fair, reasonable, and adequate[.]" Fed. R. Civ. P. 23(e). "Judicial review must be exacting and thorough . . . because the adversariness of litigation is often lost after the agreement to settle." *In re NFL Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 714-15 (E.D. Pa. 2014). (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, . . . courts [must] 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)).

V. ARGUMENT

To approve a class settlement, a court must find that: (A) the class should be certified for settlement purposes; (B) the settlement is fair, reasonable, and adequate; and (C) the notice and notice plan meet due process requirements. The Court should grant Douglass's request for class certification and preliminary approval.

A. The Court Should Certify The Class For Settlement Purposes

Douglass seeks certification of the following Settlement Class:

> [A]ll Blind or Visually Disabled persons who have accessed, attempted to access, or been deterred from attempting to access, or who will access, attempt to access, or be deterred from accessing the Digital Properties from the United States.

(Ex. 1, § 2.38.) The Settlement Class meets the requirements of Rule 23(a) and Rule 23(b)(2).

1. Douglass Satisfies The Requirements Of Rule 23(a)

(i) Numerosity

The Court must find "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Impracticability does not mean impossibility; it means certification is proper when joinder would be difficult. *Cureton v. NCAA*, No. 97-cv-00131, 1999 U.S. Dist. LEXIS 9706, at *15 (E.D. Pa. July 1, 1999). The inquiry focuses on judicial economy. *See Phila. Elec. Co. v. Anaconda Am. 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, 40 class members are typically sufficient. *See Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Courts may invoke their general knowledge and "common sense assumptions" to determine numerosity. *See Snider v. Upjohn Co*., 115 F.R.D. 536, 539 (E.D. Pa. 1987).

The numerosity requirement is satisfied upon review of available data regarding the number of individuals in the U.S. with a visual disability and who use the internet. First, U.S. Census Bureau data from 2010 shows that, of the 241.7 million individuals aged 15 and older, "[a]bout 8.1 million people . . . had difficulty seeing, including 2.0 million people who were blind or unable to see." Matthew W. Brault, *Americans With Disabilities: 2010*, U.S. Census Bureau (July 2012), https://www2.census.gov/library/publications/2012/demo/p70-131.pdf. Second, about 93% of U.S. adults use the internet. *Internet/Broadband Fact Sheet*, Pew Research Center (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/. Taken

together, about 7.5 million U.S. adults who have difficulty seeing, including about 1.8 million U.S. adults who are blind, use the internet. Because iFIT's Digital Properties are publicly available in the U.S., at any given time, any number of the 7.5 million members of the public who have difficulty seeing and use the internet may seek to access iFIT's online stores. Considering the number of visually disabled internet users, the numerosity requirement is met. *See Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (extrapolating from evidence of existence of over 175,000 wheelchair users that thousands of disabled individuals were affected by access violations at defendant's theatres).

Courts found that identical classes satisfied the numerosity requirement in *The Hundreds*, 2022 U.S. Dist. LEXIS 211942, at *4, *Eyebobs* (Doc. 49 at p. 3), *Charles Tyrwhitt* (Doc. 47 at p. 3), *Optavia* (Doc. 38 at p. 3), *Le Sportsac* (Doc. 57 at p. 3), *P.C. Richard* (Doc. 55 at p. 3), *Mondelēz* (Doc. 26 at p. 3), and *Poly-Wood* (Doc. 45 at p. 2). This Court should too.

(ii) Commonality

The Court must find "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 requirement will be satisfied if the named plaintiffs 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).

The commonality requirement is satisfied. There are numerous issues common to Douglass and the Settlement Class, like: whether they have been, are being, or will be denied full and equal access to, and use and enjoyment of, iFIT's online stores, and what actions are required to ensure iFIT's online stores are made Accessible. The commonality requirement is met.

Courts found that identical classes satisfied the commonality requirement in *The Hundreds*, 2022 U.S. Dist. LEXIS 211942, at *4, *Eyebobs* (Doc. 49 at p. 3), *Charles Tyrwhitt* (Doc. 47 at p.

3), *Optavia* (Doc. 38 at p. 3), *Le Sportsac* (Doc. 57 at p. 3), *P.C. Richard* (Doc. 55 at p. 3), *Mondelēz* (Doc. 26 at p. 3), and *Poly-Wood* (Doc. 45 at p. 2). This Court should too.

(iii) Typicality

The Court must find Douglass's claims are typical of the class members' claims. Fed. R. Civ. P. 23(a)(3). "Typicality 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 other class members will be based.'" *Baby Neal*, 43 F.3d at 57-58. "[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims. . . . Actions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold." *Id*. at 58.

The typicality requirement is satisfied. Douglass's claims are typical of the Class Members' claims since they all arise from the same practices and are based on the same legal theory: that iFIT failed to make its online stores accessible to individuals who have a visual disability. *Id*.; *see also Stewart*, 275 F.3d at 227-28. Because the claims in this case 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 is met.

Courts found that identical classes satisfied the typicality requirement in *The Hundreds*, 2022 U.S. Dist. LEXIS 211942, at *4, *Eyebobs* (Doc. 49 at p. 3), *Charles Tyrwhitt* (Doc. 47 at p. 3), *Optavia* (Doc. 38 at p. 3), *Le Sportsac* (Doc. 57 at p. 3), *P.C. Richard* (Doc. 55 at p. 3), *Mondelēz* (Doc. 26 at p. 3), and *Poly-Wood* (Doc. 45 at p. 2). This Court should too.

(iv) Adequacy

The Court must find "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is met where the plaintiff's

interests are not antagonistic to the class members' interests, and counsel for the plaintiff is experienced and qualified to conduct the litigation. *Baby Neal*, 43 F.3d at 55.

First, Douglass will protect the interests of the class. He has no adverse or antagonistic interests and shares the same injuries and seeks the same relief—access to iFIT's online stores. *Metts v. Houstoun*, No. 97-cv-04123, 1997 U.S. Dist. LEXIS 16737, at *11 (E.D. Pa. Oct. 24, 1997) (quoting *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988)) ("Because the plaintiffs seek 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.'").

Second, Douglass retained competent and experienced counsel who protected the interests of the class throughout the litigation and the negotiation of the Agreement.[4] Courts have found attorneys Tucker, Abramowicz, Steiger, and Moore adequately represented similar classes in *The Hundreds*, 2022 U.S. Dist. LEXIS 211942, at *4-5 (Tucker, Abramowicz, Steiger, and Moore), *Eyebobs* (Doc. 49 at p. 3 (Tucker and Abramowicz)), *Charles Tyrwhitt* (Doc. 47 at p. 3 (Tucker and Abramowicz)), *Optavia* (Doc. 38 at p. 3 (Tucker and Abramowicz)), *Le Sportsac* (Doc. 57 at p. 3 (Tucker, Abramowicz, Steiger, and Moore)), *P.C. Richard* (Doc. 55 at p. 3 (Tucker, Abramowicz, Steiger, and Moore)), *Mondelēz* (Doc. 26 at p. 3 (Tucker, Abramowicz, Steiger, and Moore)),and *Poly-Wood* (Doc. 45 at p. 2 (Tucker and Abramowicz)).

The adequacy requirement is satisfied. Douglass will protect the interests of the class, and his counsel are well-versed in class litigation and disability discrimination.

2. Douglass Satisfies The Requirements Of Rule 23(b)(2)

Douglass 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 met and "the party opposing the class

[4] Douglass's counsel's resumes are attached to Douglass's motion as Exhibit 3.

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 named plaintiff "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). Rule 23(b)(2) class actions "frequently [serve] as the vehicle for civil rights actions and other institutional reform cases[.]" *Baby Neal*, 43 F.3d at 58-59. Such is the case here.

Certification under Rule 23(b)(2) is appropriate. This case concerns a single, common contention: that iFIT failed to provide sufficient access to blind consumers. By failing to develop and maintain online stores that are compatible with screen reader software, iFIT acted or refused to act on grounds generally applicable to the Settlement Class. The injunctive relief sought—iFIT's agreement to modify its policies and practices—will benefit the Settlement Class as a whole. Courts certified similar Rule 23(b)(2) classes in *The Hundreds*, 2022 U.S. Dist. LEXIS 211942, at *4, *Eyebobs* (Doc. 49 at p. 3), *Charles Tyrwhitt* (Doc. 47 at p. 3), *Optavia* (Doc. 38 at p. 3), *Le Sportsac* (Doc. 57 at p. 3), *P.C. Richard* (Doc. 55 at p. 3), *Mondelēz* (Doc. 26 at p. 3), and *Poly-Wood* (Doc. 45 at p. 2). This Court should too.

B. The Agreement Is Fair, Reasonable, And Adequate, And Should Be Preliminarily Approved

A class action can be settled only with court approval based on a finding that the settlement is "fair, reasonable, and adequate[.]" Fed. R. Civ. P. 23(e). The fairness inquiry "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)).

"[W]hether 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 Actions*, 148 F.3d 283, 299 (3d Cir. 1998) ("*Prudential*").

1. The Agreement Is Presumptively Fair

Courts "apply an initial presumption of fairness in reviewing a class settlement when: '(1) the negotiations occurred at arms 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.

(i) Negotiations Occurred At Arms' Length

The parties devoted years to resolving Douglass's claims, ultimately reaching a resolution that is comparable to the settlements approved in *The Hundreds*, *Eyebobs*, *Charles Tyrwhitt*, *Optavia*, *P.C. Richard*, *Le Sportsac*, *Mondelēz*, and *Poly-Wood*. Negotiation of the Agreement was conducted without regard to the payment of fees and costs. 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).

(ii) Robust Discovery Was Not Required Because The Accessibility Of iFIT's Website Was Obtained Independently

Douglass and his legal team conducted multiple rounds of end-user reviews to determine whether iFIT's websites are accessible. Douglass does not require additional discovery to determine whether the websites are accessible—they're not—or whether iFIT's current policies and practices are sufficient—they're not. While discovery would have generated greater fees, it would not have secured better relief. As described herein, the injunctive relief Douglass secured exceeds or is comparable to the relief contained in every publicly available settlement resolving digital accessibility claims of which Douglass's counsel are aware, including in *The Hundreds*,

Eyebobs, *Charles Tyrwhitt*, *Optavia*, *P.C. Richard*, *Le Sportsac*, *Mondelēz*, and *Poly-Wood*.

(iii) Douglass And His Counsel Are Experienced In Similar Litigation

Douglass retained experienced and competent counsel who fairly and adequately protected the interests of the Settlement Class throughout the litigation and during the negotiation of the Agreement. Douglass's counsel have many years of experience prosecuting class and civil rights litigation, generally, and digital accessibility claims, in particular.

(iv) Given The Terms, Douglass Does Not Anticipate Objections

Douglass does not anticipate objections from Settlement Class. The Agreement exceeds or is comparable to the settlements in *The Hundreds*, *Eyebobs*, *Charles Tyrwhitt*, *Optavia*, *P.C. Richard*, *Le Sportsac*, *Mondelēz*, and *Poly-Wood*. *See The Hundreds*, 2022 U.S. Dist. LEXIS 211942, at *6-48, *Eyebobs* (Doc. 49 at Ex. A); *Charles Tyrwhitt* (Doc. 47-1); *Optavia* (Doc. 12-1); *P.C. Richard* (Doc. 55 at Ex. A); *Le Sportsac* (Doc. 36-1); *Mondelēz* (Doc. 26 at Ex. A); and *Poly-Wood* (Doc. 45 at Ex. A). Because no objections were filed to those agreements, Douglass does not anticipate any objections to the Agreement here.

2. The *Girsh* And *Prudential* Factors Favor Preliminary Approval

In *Girsh v. Jepson*, the Third Circuit supplied nine factors to be considered when assessing the fairness of a proposed class settlement:

> (1) the complexity, expense and likely duration of the litigation[;] (2) the reaction of the class to the settlement[;] (3) the stage of the proceedings and the amount of discovery completed[;] (4) the risks of establishing liability[;] (5) the risks of establishing damages[;] (6) the risks of maintaining the class action through the trial[;] (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery[;] [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

521 F.2d 153, 156-57 (3d Cir. 1975). The settling parties must prove that "the *Girsh* factors weigh

in favor of approval of the settlement." *In re Pet Food Prods. Liability Litig.*, 629 F.3d 333, 350 (3d Cir. 2010). "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:

> [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).

(i) Complexity, Expense, And Likely Duration Of Litigation

"The first [*Girsh*] 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. A roadmap exists for what litigation could look like. A Rule 26(f) Report filed in another digital accessibility case identified the defendant's intention to conduct discovery into the plaintiff's disability, his motivation for accessing the store, his attempts to access the same, and his intention to return in the future, as well as the plaintiff's intention to conduct discovery into the defendant's policies and practices. *Murphy v. Mast Gen. Store, Inc.*, No. 1:20-cv-00079, Doc. 14 (W.D. Pa. June 22, 2020). The

parties anticipated written discovery, depositions, expert reports, and cross-motions for summary judgment. *Id*. None of this would yield a better result than what the Agreement accomplishes. There is no more relief Douglass could obtain that justifies continued litigation.

(ii) Reaction Of Class To Settlement

"The second *Girsh* factor attempts to gauge whether members of the class support the settlement." *In re NFL Players Concussion Injury Litig*., 821 F.3d at 438. As already explained, *see* Section (V)(B)(1)(iv) *supra*, the injunctive relief obtained in the Agreement exceeds or is comparable to the obligations contained in every publicly available settlement resolving digital accessibility claims of which Douglass's counsel are aware. It is unlikely the Agreement will draw criticism from advocates or the Settlement Class.

(iii) Stage Of Proceedings And Amount Of Discovery Completed

"The third *Girsh* factor captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re NFL Players Concussion Injury Litig*., 821 F.3d at 438-39. Douglass's counsel have prosecuted similar claims since 2016. Douglass has filed such claims since 2020. Douglass and his team visited iFIT's online stores and developed firsthand knowledge of their access barriers. From that knowledge and experience, Douglass and his counsel appreciated the merits of the case and the relief available. Because the Agreement achieves the relief Douglass would request at trial, the Court should not draw a negative inference from the parties' early resolution.

(iv) 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. These factors favor settlement because Douglass cannot anticipate achieving more relief at trial than secured in the Agreement. iFIT might raise various affirmative defenses, including that it has no obligations under the ADA to make its online stores accessible. Given the Agreement's relief and iFIT's defenses, these factors weigh in favor of settlement.

(v) Risks Of Maintaining Class Action Through Trial

The sixth *Girsh* factor is essentially "toothless" in a settlement class since "a district court need not inquire whether the case, if tried, would present intractable management problems[,] . . . for the proposal is that there be no trial." *In re NFL Players Concussion Injury Litig*., 821 F.3d at 440. In any event, this factor weighs in favor of settlement because Douglass has no adverse interests to those of the class, and is unlikely to develop any such interests.

(vi) Ability Of iFIT To Withstand Greater Judgment

"The seventh *Girsh* factor is most relevant when the defendant's professed inability to pay is used to justify the amount of the settlement." *In re NFL Players Concussion Injury Litig*., 821 F.3d at 440. This factor is less relevant here, as Douglass seeks only injunctive relief. Still, the Agreement cuts no corners in outlining iFIT's future accessibility policies and practices. It obligates iFIT to ensure that the U.S. portions of all the Digital Properties are Accessible, designate an internal Accessibility Coordinator, retain an external Accessibility Consultant, provide accessibility training and refresher training, conduct both automated and end-user accessibility testing, and more. No greater judgment is reasonably available.

(vii) Range Of Reasonableness Of Settlement In Light Of Best Possible Recovery And All Attendant Risks Of Litigation

"In evaluating the eighth and ninth *Girsh* factors, [courts] ask whether the settlement represents a good value for a weak case or a poor value for a strong case." *In re NFL Players*

Concussion Injury Litig., 821 F.3d at 440. "The[se] factors test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Id.* The Agreement represents good value for any case. If Douglass were successful at trial, he would be entitled only to the relief the Court deemed appropriate. In making a request for such relief, Douglass would direct the Court to the settlements achieved in analogous cases, *see* Section (V)(B)(1)(iv) *supra*, which the Agreement tracks already. The eighth and ninth *Girsh* factors weigh in favor of preliminary approval.

(viii) *Prudential* Factors

While many of the *Prudential* factors are irrelevant to actions seeking injunctive relief, those that are relevant here weigh in favor of approval. The third *Prudential* factor compares the "results achieved by the settlement for individual class . . . members and the results achieved—or likely to be achieved—for other claimants[.]" *Prudential*, 148 F.3d at 323. No other claimant is likely to achieve better relief than the Agreement provides. The fifth *Prudential* factor considers "whether any provisions for attorneys' fees are reasonable[.]" *Id*. A forthcoming fee petition will offer an overview of Douglass's fees. Since the petition remains subject to the Court's approval, this factor does not weigh against settlement.

C. The Proposed Notice And Notice Plan Satisfy The Requirements Of Rule 23(e) And Due Process

"The court must direct notice [of a proposed class settlement] in a reasonable manner to all class members who would be bound by the proposal[.]" Fed. R. Civ. P. 23(e). Unlike those under Rule 23(b)(3), class actions certified under Rule 23(b)(2) contain "no rigid rules to determine whether a settlement notice to class members satisfies constitutional and Rule 23(e) requirements." William B. Rubenstein, 3 *Newberg on Class Actions* § 8:15 (6th ed. 2022); Fed. R. Civ. P. 23(c)(2). "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." *Kaplan v. Chertoff*, No. 06-cv-05304, 2008 U.S. Dist. LEXIS 5082, at *39 (E.D. Pa. Jan. 24, 2008) (alterations omitted) (quoting *Walsh*, 726 F.2d at 962-63); *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 litigation, defines the class, explains the settlement's general terms, provides information on the fairness hearing, describes how class members can file objections, states where complete information can be located, and provides contact information. *Kaplan*, 2008 U.S. Dist. LEXIS 5082, at *36-37, *41 (citing *Prudential*, 148 F.3d at 327 n.86); *see also In re Baby Prods. Antitrust Litig*., 708 F.3d at 180; *In re Processed Egg Prods. Antitrust Litig*., 302 F.R.D. 339, 354 (E.D. Pa. 2014); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liability Litig.*, 226 F.R.D. 498, 517-18 (E.D. Pa. 2005).

The parties agreed on a form of notice and notice plan that are targeted to members of the visually disabled community and satisfy Rule 23. The Long-Form Notice describes the litigation, defines the Settlement Class, explains the Agreement's terms, provides information on the fairness hearing, describes the objection process, states where more information is located, and provides contact information so Settlement Class Members can contact Class Counsel with questions.[5]

The Agreement provides for notice to be distributed where the Settlement Class is most likely to discover it: online.[6] iFIT shall create a settlement website within 21 days of the Court's entry of a Preliminary Approval Order. (Ex. 1, § 23.1.) The settlement website will include an accessible version of the Agreement's Long-Form Notice, and other important documents, like

[5] The proposed Long-Form Notice is attached to the proposed Agreement as Exhibit 1.
[6] The proposed notice plan is attached to Douglass's motion as Exhibit 2.

Douglass's complaint and preliminary approval papers. (Ex. 1, § 23.1.1.) iFIT shall add invisible anchor text to the header of its websites and mobile applications that link to the Settlement Website to ensure that individuals who use screen reader auxiliary aids will encounter the link. (Ex. 1, § 23.1.2.) The link will notify blind visitors to "Click [the link] to view our ADA Class Action Settlement Notice regarding our commitment to ensure iFIT's websites and mobile applications are accessible." (*Id*.) The Agreement also requires that Douglass's counsel to contact at least 11 enumerated vision-related advocacy organizations throughout the United States to notify them of the Agreement and to request these organizations notify their members of the Agreement. (Ex. 1, § 23.2.)

This notice plan is like that approved in *The Hundreds*, 2022 U.S. Dist. LEXIS 211942, at *3-4, *Eyebobs* (Doc. 49 at p. 2), *Charles Tyrwhitt* (Doc. 47 at p. 2), *Optavia* (Doc. 38 at p. 2), *Le Sportsac* (Doc. 57), *P.C. Richard* (Doc. 55 at pp. 2-3), *Mondelēz* (Doc. 26 at p. 2), and *Poly-Wood* (Doc. 45 at p. 3). For example, in *Mondelēz*, defendant created a settlement website and notified 10 vision-related advocacy organizations. *Mondelēz*, Doc. 26, at Ex. A, ¶ 25. By also requiring that iFIT publish the links described above, the Agreement ensures that even more class members will receive notice in this case. The Court should approve the notice and notice plan.

VI. CONCLUSION

For the foregoing reasons, Douglass requests that the Court certify the class for settlement purposes and preliminarily approve the proposed settlement. Douglass also requests that the Court schedule a fairness hearing on final settlement approval as the Court's calendar permits.

Respectfully submitted,

Dated: November 10, 2023

/s/ Kevin W. Tucker

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CERTIFICATE OF SERVICE

I hereby certify that, on November 10, 2023, a true and correct copy of the foregoing document was filed and served by way of the Court's CM/ECF system on all counsel of record.

Dated: November 10, 2023

/s/ Kevin W. Tucker

Kevin W. Tucker