UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIBEL MOSES, on behalf of herself and all others similarly situated, Plaintiff, v. THE NEW YORK TIMES COMPANY, d/b/a *The New York Times*. Defendant.	Civil Action No.: 1:20-cv-04658-RA Hon. Judge Ronnie Abrams

OPPOSITION AND RESPONSE TO OBJECTIONS, AND REPLY IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND INCENTIVE AWARD

Dated: September 20, 2024

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INTRODUCTION

As detailed in Plaintiff Maribel Moses's ("Plaintiff") Motion for Final Approval of Class Action Settlement filed contemporaneously herewith, the reaction of Class Members to the Settlement has been overwhelmingly positive. Of the approximately 876,607 total Settlement Class Members, only **two** individuals (or approximately 0.00023% of the Class) have submitted objections. One of these objections—the objection from Rahel Smith ("Smith"), filed on July 30, 2024—consists of a one-page personal statement that fails to cite to legal authority or include any factual or legal bases in support of her argument, and it should therefore be overruled in its entirety. *See* Dkt. 84 ("Smith Obj.").

The other objection was filed on August 19, 2024 by Eric Alan Isaacson. *See* Dkt. 85 ("Isaacson Obj."). Plaintiff strongly urges this Court to overrule Isaacson's Objection on three primary grounds. First, Isaacson's position that Plaintiff lacks Article III standing to seek injunctive relief is both baseless and irrelevant because the present settlement does not contemplate injunctive relief as consideration therefore; the settlement is rather an all-cash "common fund," a structure which is frequently approved in this District. Second, Isaacson concedes that Plaintiff has Article III standing to seek monetary damages in this lawsuit, which is sufficient to confer Article III standing on the settlement class at this stage of the litigation. Regardless, all members of the Settlement Class have Article III standing because they paid for the NYT Subscriptions at issue, which are subject to ARL violations. Third, the substantive fairness factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), favor final approval of the class action settlement. Thus, Isaacson's objections should also be overruled in its entirety.[1]

[1] As Isaacson incorporates Smith's objection into his own, Smith's challenges are substantively addressed herein. Plaintiff respectfully requests the Court overrule Smith's objection in whole.

ARGUMENT

I. ISAACSON IGNORED THE COURT-APPROVED NOTICE AND MISCALCULATED THE PER-CLASS MEMBER RELIEF AVAILABLE UNDER THE SETTLEMENT

As a preliminary matter, Isaacson insists that "the $2,375,000 Settlement delivers remarkably little" because it "yields a recovery of only $2.71 per class member." Isaacson Obj. at 3. He repeats this claim throughout his Objection—at pages 3, 4, 11, 12, 15, 18, 22, and 24—as support for nearly every challenge he has raised herein. The problem, however, is that Isaacson's estimate is wildly off the mark. As is explained below, Class Counsel currently estimates that each of the more than claimants will receive approximately $20 from the net common fund if the Settlement is approved. Thus, each Class Member who has submitted a valid claim will receive approximately 630% more cash from the Settlement than Isaacson has estimated.

Evidently, Isaacson arrived at the erroneous $2.71 figure by dividing the *gross* Settlement Fund by the *total* number of potential Settlement Class Members. *See* Isaacson Obj. at 3 ("Dividing the $2,375,000 fund by 876,600 class members yields a recovery of only $2.71 per class member."). Isaacson's miscalculation is grounded in a misconstruction of the payment terms found in the court-approved notice that he received by email on July 20, 2024. *See* Dkt. 85-1 ("Isaacson Decl.") ¶¶ 16-18.[2] Indeed, the email notice—which is attached to the Isaacson

[2] *See* Order Granting Preliminary Approval, Dkt. 79, ¶ 9 ("The Court approves, as to form, content, and distribution, the Notice Plan set forth in the Settlement Agreement, including … the Notice Plan and all forms of Notice to the Settlement Class …, and finds that such Notice is reasonable and the best notice practicable under the circumstances, and that the Notice complies fully with the requirements of the Federal Rules of Civil Procedure. The Court also finds that the Notice constitutes valid, due and sufficient notice to all persons entitled thereto, and meets the requirements of Due Process. The Court further finds that the Notice is reasonably calculated to under all circumstances, reasonably apprise members of the Settlement Class of the pendency of this action, the terms of the Settlement Agreement, and the right to object to the settlement and to exclude themselves from the Settlement Class. In addition, the Court finds that no notice other than that specifically identified in the Settlement Agreement is necessary in this Action.").

Declaration as Exhibit C—explained in clear and simple terms how per-class member relief would be determined.[3]

That is, under the terms of the Settlement, Class Members who submit a timely claim form—and only those Class Members—will receive a *pro rata* portion of the net Settlement Fund, which is $2,375,000, less notice and claims administration costs, attorneys' fees and expenses, and the class representative incentive payment. *See* Settlement ¶¶ 2.1(a), 5.1, 5.7, 8.1, 8.3. To date, the claims administrator has received 64,540 claims. *See* Declaration of Ryan Bahry Regarding Settlement Administration ("Bahry Decl.") ¶ 24. Thus, to determine per-class member relief, Isaacson should have divided the **net** settlement fund—approximately $1,398,333.34 (assuming attorneys' fees and an incentive award are granted in the amounts requested, and subject to change based on final notice and claims administration costs)—by the number of class members who submitted cash claims—64,540. Instead, he divided the **gross** fund ($2,375,000) by the total number of **all** possible class members (876,607), whether or not they submitted a valid cash claim. *But see* Isaacson Decl., Ex. C (Email Notice) ("To receive a payment, you must submit a timely and complete Claim Form by mail or online, submitted or postmarked no later than August 19, 2022.").

Applying the *pro rata* formula described in the Court-approved notice, Class Counsel estimates that each of the more than 60,000 Class Members will receive approximately $20 from the net Settlement Fund if final approval is granted. Thus, under the proper formula, *actual* per class member relief is about 630% higher than Isaacson's erroneous estimate of $2.71.

[3] *See* Isaacson Decl., Ex. C ("A Settlement Fund of $2,375,000 has been established to pay all valid claims submitted by the Settlement Class, together with notice and administration expenses, approved attorneys' fees and costs, and an incentive award. If you are entitled to relief, you may submit a claim to receive a *pro rata* share of the Settlement Fund[.] … [T]he final amount you receive will also depend on the number of valid claims submitted.") (emphasis added).

Isaacson's bad formula yielded bad results. Yet, in reliance on this erroneous figure, Isaacson has asserted, *inter alia*, that the "[s]ettlement delivers remarkably little" (Isaacson Obj. at 3) and that "the per-Class Member recovery … is pathetic" and "miserable" (*id*.), and has repeatedly impugned the efforts, competence, and ethics of both Class Counsel and Plaintiff in this case, among other insults and accusations.[4] These assertions are as meritless as the bad math upon which they are based. For this reason alone, the Isaacson Objection should be overruled in full.

II. ISAACSON'S ARTICLE III STANDING CHALLENGES ARE BASELESS AND UNPERSUASIVE

Isaacson argues that Plaintiff is not an adequate class representative as required by Fed. R. Civ. P. 23(e)(2)(A) because she lacks the requisite Article III standing to pursue injunctive relief and monetary damages on behalf of the Class. *See* Isaacson Obj. at 5-8. As explained in detail below, Isaacson's objections are wholly without merit.

A. Isaacson's Objection To Plaintiff's Article III Standing For Injunctive Relief Is Meritless Because Injunctive Relief Is Not Consideration Under The Settlement

First, according to Isaacson, Plaintiff "plainly lacks Article III standing for prospective injunctive relief" because she "no longer subscribes to the NYT" and "faces no impending risk of injury from continuing automatic subscription renewals." Isaacson Obj. at 6. However, Isaacson misunderstands the Settlement Agreement. *See* Dkt. 85 at 6. The Settlement Agreement does not contemplate, nor does it purport to effectuate, *any injunctive relief* by NYT. *See generally* Dkt. 77, Ex. 1. The Settlement exclusively seeks certification of a Rule 23(b)(3)

[4] *See, e.g.*, *id*. at 18 ("Class Counsel's attempt to grab one-third of … a fund that recovers only $2.71 each for the [members] of the class … raises a strong inference that this Settlement is driven primarily by Class Counsel's desire to benefit themselves … at the expense of an adequate recovery for the Class."); *id*. at 22 ("'[T]he quality of representation' has been poor, with Class Counsel producing first a wholly deficient coupon settlement, and now a settlement at $2.71 per class member, while concealing what the real potential recovery might be."); Isaacson Obj. at 24 ("The settlement in this case too is of remarkably low value—just $2.71 per class member. Yet Moses seeks an incentive award of $5,000, which is 1,845 times the $2.71 relief she obtained for the rest of the class. That is unconscionable.").

damages settlement class. *See* Dkt. 78 at 22; Dkt. 77 at 91 (Proposed Final Order) ¶ 2.

To be sure, although the Settlement discusses "Practice Changes" at paragraph 2.2, Defendant did not implement those changes in connection with, or in response to, the renewed settlement agreement currently under review. Rather, as Isaacson has acknowledged, Defendant had already fully implemented these practice changes prior to entering into the renewed Settlement Agreement. *See* Isaacson Obj. at 6 ("Seeking attorney's fees, Class Counsel add that 'Defendant has already implemented meaningful prospective relief that will benefit Class Members for years to come.' Class Counsel's fee declaration attests that 'Defendant has already revised the presentation and wording of the automatic renewal terms in its mobile and desktop platforms and in its direct mail offers to be consistent with the requirements of the ARL[.]'") (emphasis added, internal citations omitted); Settlement ¶ 2.2 ("Defendant already has revised the presentation and wording of the automatic renewal terms on the checkout pages ….").

Thus, while Isaacson characterizes these practice changes as injunctive relief, that is not accurate. Paragraph 2.2 simply describes the past actions Defendant has voluntarily taken to bring its NYT Subscription program into compliance with the ARL, but no forward-looking relief is promised or contemplated by the renewed Settlement Agreement. In other words, the practices changes are not offered as consideration for the settlement itself. Thus, Plaintiff need not have standing to pursue an injunctive relief for purposes of settlement approval here.[5]

In sum, Isaacson's arguments against certification of an injunctive relief Class should be overruled because they have no applicability to the actual Settlement before the Court.

[5] For this reason, Class Counsel's estimate as to total settlement value—as well as their request for attorneys' fees as a percentage thereof—is based purely on the amount of cash in the settlement fund, and not the value of the Isaacson's so-called "injunctive relief."

B. Isaacson Concedes That Plaintiff Has Article III Standing To Seek Monetary Relief, Which Precludes Any Argument That Article III Standing Is Not Satisfied For Passive Members Of The Settlement Class

Next, although Isaacson concedes that Ms. "Moses has Article III standing to seek monetary relief for past harms," he nevertheless contends that Plaintiff "has failed to ensure that the Class is defined to include only those NYT subscribers who also have suffered the concrete injury that is required for Article III standing." Isaacson Obj. at 7. Isaacson insists that this is "problematic" in light of United States Supreme Court precedent holding that "'[e]very class member must have Article III standing in order to recover individual damages. ….'" *Id*. (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)). And, according to Isaacson, "this case likely includes more than a few California subscribers who suffered no Article III injury." *Id*. at 8. As support, Isaacson points to Class Member Rahel Smith's objection stating that she found NYT's "auto-renewal for a service like a subscription is not unexpected …," *id*. at 8 (internal quotations omitted) (quoting Dkt. 84:1), as well as "[t]wo more class members['] … objections to the prior proposed settlement." *Id*. (emphasis added) (citing Dkt. 49-1:1 and 49-2:1).

In other words, Isaacson contends that these three class members have not been injured by NYT's unlawful conduct, and that Plaintiff is therefore an inadequate class representative—not because *Plaintiff* lacks Article III standing to seek monetary relief, but because there are *unnamed members* of the Class who lack such standing. *See id*. at 8 ("[A]s to standing for monetary relief, she and Class Counsel have failed to limit the Class to subscribers who have suffered a concrete injury. These Article III problems preclude any finding that the class has been adequately represented."). This argument is dead on arrival.

First, Isaacson's assertion that the presence of uninjured individuals in the class precludes class certification is simply incorrect. To start, Isaacson's citations do not support his

characterization of the law on this point. For instance, Isaacson quotes *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006), an earlier Second Circuit case, as support for the proposition that "no class may be certified that contains members lacking Article III standing." Isaacson Obj. at 7 (internal quotation marks omitted).[6] But as the Second Circuit explained in *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022), "*Denney* was decided before the Supreme Court in [*Frank v. Gaos*, 586 U.S. 485 (2019)] clarified the minimal requirement for standing in class actions." *Hyland*, 48 F.4th at 118 n.1, *cert. denied sub nom. Yeatman v. Hyland*, 143 S. Ct. 1747 (2023), *and cert. denied sub nom. Carson v. Hyland*, 143 S. Ct. 1747 (2023). "And, in any event, [the Second Circuit] acknowledged in *Denney*"—and again in more recent cases, including *Hyland*, among others—"that '**[o]nce it is ascertained that there is a named plaintiff with the requisite standing, [ ] there is no requirement that the members of the class also proffer such evidence**.'" *Id*. (emphasis added) (citing, *inter alia*, *Denney*, 443 F.3d at 263-64). The Second Circuit explicitly recognized: "**We do not require that each member of a class submit evidence of personal standing**." *Denney*, 443 F.3d at 26 (emphasis added); *accord Barrows v. Becerra*, 24 F.4th 116, 128 (2d Cir. 2022) (same).[7] Moreover, the Second Circuit in *Hyland* re-affirmed a longstanding principle regarding standing in class action lawsuits: "'**In a class action, once standing is established for a named plaintiff, standing is established for the entire class**.'" *Hyland*, 48 F.4th at 118 (emphasis added, citations omitted) (quoting *Amador*

[6] *Denney* is the sole Second Circuit case that Isaacson cites in support of his Article III challenge concerning monetary damages and uninjured class members. *See* Isaacson Obj. at 7 & n.4. But, as explained herein, Isaacson's reliance on *Denney* is misplaced.

[7] Likewise, "Circuit Courts in other circuits have also accepted that class certification does not require proof that all class members are injured." *In re Restasis*, 335 F.R.D. at 16 (collecting cases); *see also, e.g.*, *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 307–08 (5th Cir. 2009); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014).

v. Andrews, 655 F.3d 89, 99 (2d Cir. 2011)).[8]

Isaacson also relies on *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), for the proposition that "[e]very class member must have Article III standing in order to recover individual damages," Isaacson Obj. at 7 (internal quotation marks omitted) (quoting *TransUnion*, 594 U.S. at 424), but that is not what *TransUnion* holds. Rather, the Supreme Court in *TransUnion* expressly held open the question "whether every class member must demonstrate standing before a court certifies a class." *TransUnion*, 594 U.S. at 431 n.4 ("We do not here address the distinct question whether every class member must demonstrate standing before a court certifies a class."). Thus, *TransUnion* does not categorically prohibit certification of classes containing uninjured members, as Isaacson suggests. *See* Isaacson Obj. at 7.

To the contrary, in other recent cases the "[t]he Supreme Court … [has] recognized that the existence of uninjured plaintiffs does not bar class certification." *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 335 F.R.D. 1, 16 (E.D.N.Y. 2020) (emphasis added); *see also, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 451-52 (2016) (affirming certification of a class under the Fair Labor Standards Act containing over 200

[8] *See also id*. ("[I]n the context of a class action, 'only one named plaintiff need have standing with respect to each claim[.]' … 'Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court; there is no further, separate 'class action standing' requirement.' … [Here, a]t least six of the named plaintiffs [has the requisite Article III standing to pursue claims against Defendant]. That is enough to confer standing on the entire class.") (emphasis added, citations omitted); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005) ("The named class plaintiffs 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'") (citations omitted, emphasis added); *Comer v. Cisneros*, 37 F.3d 775, 788 (2d Cir. 1994); *Staley v. FSR Int'l Hotel Inc.*, 2024 WL 3534450, at *3 (S.D.N.Y. July 25, 2024) ("[F]ollowing the Second Circuit's lead [in *Denney*], this Court may certify the proposed classes if at least one named plaintiff has standing."); *Hines v. Equifax Information Services LLC*, 2024 WL 4132333, at *1 (E.D.N.Y. Sep. 10, 2024) ("While '[e]very class member must have Article III standing in order to recover individual damages,' a plaintiff is not required to show that each class member has standing before a class can be certified.") (citing *TransUnion*, 594 U.S. at 431).

uninjured class members); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014) (noting predominance would still be satisfied if a class contained uninjured class members).

Likewise, "**[t]here is no requirement in the Second Circuit that *all* putative class members be injured**." *City of Philadelphia v. Bank of Am. Corp.*, 2023 WL 6160534, at *8 (S.D.N.Y. Sept. 21, 2023) (italics in original; bolding added for emphasis); *see also, e.g.*, *Seijas v. Republic of Argentina*, 606 F.3d 53, 56-58 (2d Cir. 2010) (affirming certification of eight classes of holders of defaulted Argentine bonds, expressing no concern that summary judgment briefing revealed that "[c]omplicated questions existed [ ] as to which bondholders were class members and as to how much each class member could recover"); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 91 (2d Cir. 2015) (concluding that the possibility of uninjured plaintiffs did not defeat predominance "given the myriad common issues" in the case); *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 95-97 (2d Cir. 2007) (reversing district court's denial of class certification and remanding with instructions to reconsider whether plaintiffs had satisfied Rule 23(b)'s predominance requirement even though the Court indicated that "[m]ore than ninety percent of" (and thus not all) class members were injured).

"Consistent with this precedent, district courts in this Circuit have certified classes that likely or certainly contained uninjured class members." *In re Restasis*, 335 F.R.D. at 16 (collecting cases).[9] "There is, in short, no support for [Isaacson's] contention that the mere existence of uninjured class members in this putative class compels denial of [Plaintiff's] motion" for final approval of the settlement and fee petition. *Id*.

Second, "[t]he Supreme Court and Second Circuit … have never suggested that a certain

[9] *See also, e.g.*, *Dial Corp. v. News Corp.*, 314 F.R.D. 108, 120 (S.D.N.Y. 2015); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *44–45 (E.D.N.Y. Oct. 15, 2014), *adopted*, 2015 WL 5093503 (E.D.N.Y. July 10, 2015); *In re Elec. Books Antitrust Litig.*, 2014 WL 1282293, at *22 (S.D.N.Y. 2014); *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 166–67 (S.D.N.Y. 2000).

percentage or number of uninjured plaintiffs would automatically bar class certification." *In re Restasis*, 335 F.R.D. at 17-18. Further, "[d]istrict courts in this and other Circuits have held that a class may be certified so long as a *de minimis* number of class members were uninjured or, conversely, virtually all class members were injured," *id*. (internal quotation marks omitted, collecting cases), but they have not come up with any "bright-line definition of 'de minimis' in this context[.]" *City of Philadelphia*, 2023 WL 6160534, at *8. Instead, different courts have applied different limits to cases under various facts and circumstances. Most recently, one court in this district suggested that "the consensus of what qualifies as 'de minimis' hovers around 5% to 6%[.]" *Id*. (citing *In re Restasis*, 335 F.R.D. at 17 (collecting cases)).

Regardless, even if Isaacson is correct that a mere 4 out of the 876,607 total class members—just **0.00046% of the Settlement Class**—lack injury in this case (he is not, as explained below), that amount clearly falls within the boundaries of "de minimis." *See, e.g.*, *In re Restasis*, 335 F.R.D. at 23 (finding *de minimis* number of class members in light of evidence that up to **5.7%** of class members lack injury-in-fact); *City of Philadelphia*, 2023 WL 6160534, at *8 (S.D.N.Y. Sept. 21, 2023) ("Although there is no bright-line definition of 'de minimis' in this context, Dr. Schwert's estimate that **less than 2%** of VRDOs never had an inflated rate clearly falls within its boundaries.") (emphasis added).

C. Regardless, All Members Of The Settlement Class Have Article III Standing Because They Paid For The NYT Subscriptions At Issue, Which Are Subject To ARL Violations

As noted *supra*, absent Settlement Class members are not required to establish standing where, as here, the named Plaintiff meets the elements of Article III. *See Hyland*, 48 F.4th at 118 ("In a class action, once standing is established for a named plaintiff, standing is established for the entire class.") (citations and quotation marks omitted). Nevertheless, all Class Members here do have Article III standing because they paid for the NYT Subscriptions, which are subject

to ARL violations.

While Section 17602 of the ARL sets forth substantive notice and disclosure requirements applicable to "any business that makes an automatic renewal offer or continuous service offer to a consumer in [California]," Cal. Bus. & Prof. Code § 17602(a), Section 17603 of the ARL—the "unconditional gift" provision—announces the consequences of failure to comply with Section 17602. Section 17603 states:

> In any case in which a business sends any goods, wares, merchandise, or products to a consumer, under a continuous service agreement or automatic renewal of a purchase, without first obtaining the consumer's affirmative consent as described in Section 17602, the goods, wares, merchandise, or products shall for all purposes be deemed an **unconditional gift to the consumer, who may use or dispose of the same in any manner he or she sees fit without any obligation whatsoever on the consumer's part to the business, including, but not limited to, bearing the cost** of, or responsibility for, shipping any goods, wares, merchandise, or products to the business.

Cal. Bus. & Prof. Code § 17603 (emphasis added).

The ARL does not define "unconditional gift" as that phrase is used in Section 17603. However, the plain and ordinary meaning of the terms of Section 17603 leaves little doubt that it provides consumers with both a vested and an ownership interest capable of being restored in restitution. Indeed, under California law, a "gift" is defined as "a transfer of personal property, made voluntarily, and without consideration." Cal. Civ. Code § 1146. A "gift vests the donee [here, Plaintiff and Class Members] with the absolute property in the thing given[.]" *United States v. Allison*, 587 F. Supp. 3d 1015, 1022 (E.D. Cal. 2022) (quoting *Logan v. Ryan*, 68 Cal. App. 448, 455 (1924)) (quotation marks omitted, emphasis added). Furthermore, Section 17603's broad reach is underscored by the terms "for all purposes" and "without any obligation whatsoever," which are "unequivocal" and "not reasonably interpreted to mean the mandatory rule stated applies in some events and not in other events." *Doma Title of California, Inc. v.*

Superior Ct. of Fresno Cnty., 2022 WL 2315549, at *5 (Cal. Ct. App. June 28, 2022).

Putting all of that together, the meaning of Section 17603 is clear: where, as here, Defendant provides a consumer with access to the digital goods of an automatic renewal program and charges her Payment Method "without first obtaining the consumer's affirmative consent as described in Section 17602," Cal. Bus. & Prof. Code § 17603, the consumer obtains, by operation of law, a property interest in those goods that is "'unconditional,' 'absolute,' and 'not contingent.'" *Nat'l Rural Telecommunications Co-op. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1080 (C.D. Cal. 2003), *on reconsideration in part* (June 5, 2003). That is precisely what happened here: by operation of the ARL's unconditional gift provision, Plaintiff and Class Members acquired an ownership interest in the digital content of the NYT Subscriptions by virtue of Defendant's failure to provide the requisite disclosures as required under Section 17602 of the ARL. A gift is free to the recipient, and a business may not give consumers a gift and at the same time require payment for it. That is tantamount to theft.

Accordingly, regardless of their personal sentiments about the NYT Subscriptions, all Class Members were unlawfully charged monies for products they already owned. As a result, they lost money. Thus, all Class Members suffered Article III injury-in-fact as a result of Defendant's unlawful automatic renewal charges.

Courts applying the ARL have espoused similar interpretations of Section 17603. *See, e.g.*, *Roz v. Nestle Waters N. Am., Inc.*, 2017 WL 132853, at *7 (C.D. Cal. Jan. 11, 2017) ("The clear meaning of [Section 17603] is that when a business violates the requirements of [the ARL] when delivering a product to a consumer, that consumer has no obligation to pay the business for the product because it is deemed a gift. If indeed the Defendant violated [the ARL], … Plaintiffs were entitled to keep any products that were delivered as the result of the unlawful automatic

renewal plan, per § 17603. The statute specifically places no conditions on these gifts, meaning that the product is considered a gift whether or not the Plaintiffs can show they did not actually want the product. As a result, the Plaintiffs were entitled to keep the delivered water products and had no obligation to pay for them."); *Johnson v. Pluralsight, LLC*, 728 F. App'x 674, 676 n.1 & 677 (9th Cir. 2018) (holding that a consumer who purchased a subscription to digital content stated a claim under the URL on the theory that the defendant "unlawfully charged him for a subscription that should have been treated as an unconditional gift pursuant to section 17603"); *Uzair v. Google LLC*, 2019 WL 8640470, at *9 (Cal. Super. Feb. 04, 2019) ("Under the gift theory, plaintiff alleges both standing and economic loss, and need not allege reliance."); *see also Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1070 (S.D. Cal. 2018); *Morrell v. WW Int'l, Inc.*, 551 F. Supp. 3d 173, 187 (S.D.N.Y. 2021).

III. CONTRARY TO ISAACSON'S BASELESS CONTENTIONS, THE *GRINNELL* FACTORS FAVOR APPROVAL OF THE SETTLEMENT

Next, Isaacson argues that application of the nine factors set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)[10] "precludes approval of the Proposed Settlement." Isaacson Obj. at 8. That is meritless.

As an initial matter, Isaacson offers no supporting argument for his contention and instead relies upon: (a) his own baseless contentions that Plaintiff has not "demonstrated" that the Settlement Agreement is "fair, reasonable, and adequate;" (b) three conclusory objections of other purported Settlement Class members (two of whom objected to the Original Agreement—*not the current Settlement Agreement*); (c) recitations of his incorrect argument that Plaintiff lacks Article III standing to represent the Settlement Class; and (d) his complaint that the parties

[10] Second Circuit courts "'evaluate substantive fairness [by] considering the nine *Grinnell* factors.'" *Moses*, 79 F.4th at 244 (quoting *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013)); *see Grinnell*, 495 F.2d at 463 (setting forth nine substantive fairness factors).

have not "disclose[d] 'the best possible recovery'" as a part of the Settlement Agreement. *See id.* at pp. 5, 9-17. Objections of such a conclusory nature "are insufficient to weight against a finding that the proposed settlement is fair and reasonable, and can be overruled without engaging in a substantive analysis." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 264 (S.D.N.Y. 2012) (citing *In re Merrill Lynch & Co. Res. Reports Sec. Litig.*, 246 F.R.D. 156, 168 (S.D.N.Y. 2007)). Furthermore, Isaacson's challenges to each of the individual *Grinnell* are baseless and should be overruled.

As to the **first *Grinnell* factor**—the complexity, expense and likely duration of the litigation—Isaacson's contention that this class action is not "difficult or complex" is patently false. Isaacson Obj. at 10. Plaintiff has alleged seven causes of action under four California statutes and five theories of common law that have already led to over 55 pages in substantive briefing on the merits of those claims. *See* Dkt. 22; *see also* Dkt. 28; Dkt. 29; Dkt. 32. The parties have engaged in two rounds of informal written discovery, and anticipate, were the case to proceed, the need for substantial electronically stored information discovery and depositions of the parties and relevant third parties. *See* Dkt. 78 at 13. Isaacson is also incorrect that the case turns on one "relatively simple question of law," Isaacson Obj. at 10. In the FAC itself, Plaintiff has alleged at least 12 questions of law which she purports will be at issue in this litigation, and she anticipates that many further issues beyond would arise in connection with discovery, NYT's affirmative defenses, summary judgment, and class certification. *See* Dkt. 22 ¶ 66; *see also* Dkt. 78 at 13-14.[11] Finally, although Isaacson asserts that Article III standing "remains in doubt," Article III was not challenged in this case by NYT in its dismissal motion.

[11] Indeed, given the span of the class period, the multiple NYT services at issue, the numerous and varied format and content of disclosures over time across multitudes of platforms, as well as the varied format and content of post-purchase communications, discovery is likely to be complex, leading to numerous legal questions for the Court to decide.

See Dkt. 85 at 10. Rather, NYT called into doubt Plaintiff's *statutory standing* under California law as a part of its Motion to Dismiss. *See* Dkt. 29 at 22-24. Given the complexity, expense, and likely duration of the litigation were the case to continue, this factor weighs in favor of approval of the Settlement Agreement, as set forth in Plaintiff's contemporaneously-filed Motion for Final Approval, *see id.* at 14-16.

Isaacson's argument that the **second *Grinnell* factor**—the reaction of the class—"also precludes approval of the Settlement," Isaacson Obj. at 10, is equally unpersuasive. In support, Isaacson points to "For [sic] objections filed by Class Members … such as Rahel Smith, the Rev. Jeffrey Spencer, and Darren Tylor Krone." *Id*. However, Isaacson once again fails to mention that two of those objections—the Spencer and Krone Objections—were filed back in 2021, in relation to the *prior*, *now-vacated* settlement agreement. Neither Spencer nor Krone have objected to the renewed Settlement now at issue. It is therefore objectively inaccurate to say that there are four objections to the instant Settlement.

In fact, out of all 876,607 members of the Settlement Class, only ***two*** individuals—Isaacson and Smith—raised objections to the Settlement Agreement in this case. That represents just **0.00022%** of the Settlement Class. While Isaacson attempts to convince the Court that this is a significant number, and that the objections of two individuals evince the more than 870,000-person Class's overall negative reaction to the Settlement, *see* Isaacson Obj. at 10-11, courts in this Circuit routinely hold the opposite. For instance, the Second Circuit in *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), noted that "the class appears to be overwhelmingly in favor of the Settlement" where "[o]nly eighteen class members" objected to it. *Id*. at 118. As the Second Circuit recognized, "[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Id*.

(considering an objection percentage of 0.00036% to be "small").[12] Further, only 10 of the 876,607 Class Members requested exclusion from the Settlement. *See id*. ¶¶ 7, 19-22. "The fact that the vast majority of class members neither objected nor opted out is a strong indication of fairness." *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *4 (E.D.N.Y. 2012).

Additionally, as is reported in the contemporaneously-filed Bahry Declaration, as of September 13, 2024, JND has received a total of 64,540 Claim Forms for *pro rata* cash payments from the Settlement Fund. *See* Bahry Decl. ¶ 24.[13] That constitutes a claims rate of approximately 7.4%. By Isaacson's own admission, this claims rate is acceptable because it exceeds five percent. *See* Isaacson Obj. at 11 ("If fewer than five percent of the 876,000-some class members in this case (which is to say, fewer than 43,800 individuals) end up making claims, under [Second Circuit precedent] the reaction of the Class would weigh heavily against settlement approval.") (citation omitted). In addition, per a Federal Trade Commission ("FTC") report released in September 2019,[14] this claims rate falls squarely within the range of weighted mean and median claims rates reported in consumer class actions involving some form of direct notice (4% to 9%), and it exceeds the average claims rates in cases involving direct notice by

[12] *See also, e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d Cir. 2001) (holding that district court properly concluded that 18 objections from a class of 27,883 weighed in favor of settlement); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015) ("Objection to this settlement has been extremely limited. Of the 645,626 notices mailed, three objections have been submitted, … one of which provides no basis for objection. Three objections amounts to less than .0005% of the Class. Given the limited objections and otherwise 'unanimously positive' reaction of the class to the settlement, this factor leans in favor of settlement approval.") (internal citations omitted).

[13] It is not yet possible to report the total number of valid claims filed, as JND is currently "still in the process of receiving, reviewing, and validating Claim Form submissions." *Id*. However, for present purposes Plaintiff assumes the validity of these timely claims.

[14] The FTC report, which examined, *inter alia*, claims rates in 149 consumer class action settlements from seven claims administrators, is considered the largest study of its kind. *See* FTC, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns; An FTC Staff Report* (Sep. 2019), *available at* https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf.

either postcard or email, which range from 2% to 7%.[15]

As to the **third *Grinnell* factor**—"the stage of the proceedings and the amount of discovery completed"—while Isaacson is correct that "formal discovery" has not been undertaken in this litigation, Isaacson Obj. at 14, the Parties engaged in extensive *informal* written discovery prior to both mediation sessions in this case, the particulars of which are detailed in Plaintiff's Motion for Final Approval, *see id*. at 17-18, as well as in her earlier preliminary approval motion, *see* Dkt. 78 at 15.[16] As such, Isaacson's contention that the Parties have not done sufficient work to advance discovery prior to reaching the Settlement Agreement is unfounded and divorced from reality.[17]

As to the **fourth, fifth, and sixth *Grinnell* factors**—which concern the risks of establishing liability and damages, and of maintaining the class action through the trial—Plaintiff details in her contemporaneously filed final approval motion the various and substantial risks she would face if the Parties were to return to litigation. *See* Motion for Final Approval at 18-20. In

[15] *See id.* at 25 ("Claims Rates by Notice Method: … The weighted mean claims rate for all cases requiring a claims process was 4%, and the median was 9%. There are marked differences in the claims rates across notice methods. … Notice campaigns that use postcards had … median and weighted mean [claims rates] of about 6% to 7%. … [E]mail notice campaigns had … mean and median claims rates of 2% and 3%, respectively.").

[16] In particular, during this process the Parties exchanged confidential documents and information related to, *inter alia*, issues of class certification and summary judgment, including the scope and size of the class; representative web and mobile pay flow and check out pages, digital acknowledgment emails, and direct mail reply cards during the relevant showing the content and presentation of the ARL disclosures over time; and Defendant's current and historical Terms of Sale and Terms of Service, which recap the ARL terms and other relevant provisions related to subscriptions. *See* Declaration of Neal J. Deckant in Support of Plaintiff's Motion for Final Approval of Class Action Settlement ("Deckant Decl. ISO FA Motion") ¶ 15.

[17] Courts in the Second Circuit regularly approve of class action settlements at the pleadings stage, including in cases that settled prior to the commencement formal discovery. *See, e.g.*, *Hyland v. Navient Corp.*, 48 F.4th 110, 115-16, 124 (2d Cir. 2022) (affirming final approval of settlement agreement prior to the commencement of formal discovery); *D'Amato*, 236 F.3d at 87 ("[T]he district court properly recognized that, although no formal discovery had taken place, the parties had engaged in an extensive exchange of documents and other information. Thus, the 'stage of proceedings' factor also weighed in favor of settlement approval.") (internal citation omitted). Accordingly, the third *Grinnell* factor plainly supports final approval of the Settlement Agreement.

response, Isaacson fails to even acknowledge, much less address, the lion's share of these litigation risks, such as those concerning NYT's defenses on the merits. Instead, Isaacson baldly insists that the risks Plaintiff has identified are not, in fact, risks. Isaacson's argument on this point also repeats the same claim sprinkled throughout his Objection regarding per-class member relief under the Settlement—namely, that the Settlement resolves class members' claims for relief "for less than three dollars per class member." Isaacson Obj. at 15; *see also id*. at 3, 11, 18, 22, 24 (same erroneous assertion). That is patently false. As noted above, Class Counsel currently estimates that each of the more than claimants will receive approximately $20 from the common fund if the Settlement is approved. *See supra*.

As to the **seventh *Grinnell* factor**—the ability of the defendants to withstand a greater judgment—Plaintiff explains in her final approval motion, *see id*. at 19-20, that while NYT could withstand a greater judgment, Second Circuit courts have repeatedly recognized that a defendant's "ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001).[18] Thus, at worst, this factor is neutral and does not favor Isaacson's unsupported Objection on this ground. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012) ("[A] court need not conclude that all of the *Grinnell* factors weigh in favor of the settlement. Instead a court 'should consider the totality of these factors in light of the particular circumstances.'") (citation omitted).

[18] *See D'Amato*, 236 F.3d at 86 (affirming district court order finally approving settlement despite "explicitly acknowledge[ing] [] the defendants' ability to withstand a higher judgment," and holding that the district court's "conclusion [to nevertheless grant final approval] cannot be considered an abuse of discretion, given that other *Grinnell* factors weigh heavily in favor of settlement"); *In re Painewebber Ltd. Partnerships Lit.*, 171 F.R.D. 104, 129 (S.D.N.Y.1997) ("[T]hat a defendant is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate.").

Finally, as to the **eighth and ninth *Grinnell* factors**—the range of reasonableness of the settlement fund in light of the best possible recovery, and in light of all the attendant risks of litigation—the arguments set forth in Plaintiff's Motion for Final Approval demonstrate that the settlement amount is reasonable in light of the potential recovery and attendant risks of proceeding through litigation. Isaacson cites to various decisions from other Circuits that have adopted different considerations with regard to the appropriate ratio of the settlement value to nebulous "potential recovery." Isaacson Obj. at 16-17. However, in the Second Circuit "[t]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential discovery," and it is not necessary to use "a mathematical equation yielding a particular sum" to determine reasonableness. *See Grinnell*, 495 F.2d at 455 n.2. Isaacson makes no substantive argument asserting that the settlement amount is somehow not reasonable—he instead puts forth an inaccurate standard unsupported in law that he alleges the parties have failed to meet requiring the parties to "disclose 'the best possible recovery.'" Isaacson Obj. at 16-17. Such conclusory allegations of inadequacy "are insufficient to weigh against a finding that the proposed settlement is fair and reasonable, and can be overruled without engaging in a substantive analysis." *In re Bear Stearns*, 909 F. Supp. 2d at 264 (citation omitted).

In any case, as noted, Class Counsel currently estimates that each of the more than claimants will receive approximately $20 from the net common fund. This amount exceeds or at least matches the monthly rates charged for the NYT Subscriptions. *See* Isaacson Decl. ¶ 15 (noting "subscription rate[s] of $4 per month beginning in April of 2020, … $17 a month in April of 2021, and [] $20 a month in May of 2023"). Those monthly rates are central to Plaintiff's theory of injury, which is based on loss of monies automatically withdrawn from

Plaintiff's and Class Members' Payment Methods by Defendant in connection with its automatic renewal scheme. To the extent Class Members' economic loss cuts off upon incurring their first monthly renewal charge (*e.g.*, where the charge alerts subscribers to the auto-renewal terms that NYT had failed to provide on the Checkout Page in violation of the ARL, such that these subscribers can no longer rely on, or be harmed by, NYT's omissions), and for Class Members whose NYT Subscriptions were only automatically renewed once and whose Payment Methods were only charged for one monthly renewal, the per Class Member relief will amount to 100% or more of the total damages suffered by each individual Class Member as a result of NYT's alleged ARL violations. Second Circuit courts have routinely approved class settlements that recovered a lesser percentage of total damages under otherwise similar circumstances in terms of procedural posture and risk. *See, e.g.*, *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 219 (S.D.N.Y. 2015) ("The total recovery achieved by the Settlement Agreement amounts to 22.8% of [] total[damages]. … Given the relatively early stage of the litigation, the potential hurdles lying ahead for the plaintiffs, and the recent setback at the Second Circuit, a recovery figure of 22.8% seems within the bounds of reasonableness.") (citations omitted). Thus, there is no question that the per class member recovery achieved here is "within the bounds of reasonableness." *Id*. Therefore, this factor weighs in favor of final approval, and the Court should overrule Isaacson's objection.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court overrule all objections to the Settlement and Fee Petition, and (1) approve attorneys' fees, costs, and expenses in the amount of 33% of the settlement fund, or $791,666.00; (2) grant Ms. Moses an incentive award of $5,000.00 in recognition of her efforts on behalf of the Class; and (3) award such other and further relief as the Court deems reasonable and just.

Dated: September 20, 2024

Respectfully submitted,

BURSOR & FISHER, P.A.

By: */s/ Neal J. Deckant*

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