UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIBEL MOSES, individually and on behalf of 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

DEFENDANT THE NEW YORK TIMES COMPANY'S MEMORANDUM OF LAW IN RESPONSE TO OBJECTION AND IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Defendant The New York Times Company ("NYT") submits this memorandum in response to the objection filed by Eric Alan Isaacson (Dkt. 85) (the "Objection"), and in support of final approval of the class action settlement in this matter, and states as follows:

I. INTRODUCTION

After substantial arm's-length negotiations on multiple occasions, informal discovery, and a Second Circuit appeal, Plaintiff Maribel Moses ("Plaintiff") and NYT have reached a settlement that is fair and reasonable. (*See generally* Dkt. 78, Plaintiff's Memorandum of Law in Support of her Motion for Preliminary Approval of Class Action Settlement ("Preliminary Approval Memorandum").) However, a *Times* subscriber named Eric Alan Isaacson ("Isaacson") has again filed an Objection to the Court's final approval of this settlement, baselessly asserting: (1) Plaintiff does not have Article III standing sufficient to represent the settlement class; (2) the resulting settlement is not substantively fair under Second Circuit precedent; and (3) the attorneys' fees and incentive payment to Plaintiff are inappropriate in light of the class settlement. NYT takes no position on the attorneys' fees and incentive payment to Plaintiff, other than to state that the Objection provides no valid reason for this Court to decline to approve the settlement. However, NYT 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 settlement does not contemplate injunctive relief as consideration therefor, nor would there be any ground for injunctive relief whether in further litigation or settlement;

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; and

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, as further set forth by Plaintiff in her Preliminary Approval Memorandum.

II. FACTUAL BACKGROUND

A. NYT's Motion to Dismiss and the First Settlement

Plaintiff filed the original Class Action Complaint and Demand for Jury Trial (Dkt. 1) in this action on June 17, 2020. NYT moved to dismiss this complaint (Dkt. 16; *see also* Dkt. 17; Dkt. 18; Dkt. 19), and Plaintiff, in response, filed the First Amended Class Action Complaint and Demand for Jury Trial ("FAC") (Dkt. 22) on August 31, 2020. Plaintiff alleges, individually and on behalf of a putative class, that NYT automatically renewed her subscription plan in violation of California's Automatic Renewal Law, Cal. Bus. & Prof. Code §§ 17600, *et seq.* ("ARL").[1] (Dkt. 22, ¶ 1.) Specifically, she alleges that "[h]ad [NYT] complied with the ARL by adequately disclosing the terms associated with her NYT Subscription purchase, [Plaintiff] would have been able to read and review the auto renewal terms prior to purchase, and she would have not subscribed to *The New York Times* or she would have cancelled her NYT Subscription earlier, *i.e.*, prior to the expiration of the initial subscription period." (*Id.* at ¶ 60.)

The FAC seeks for Plaintiff to represent a putative class of "[a]ll persons in California who, within the applicable statute of limitations period, up to and including the date of final judgment in this action, incurred renewal fee(s) in connection with Defendant's subscription offerings to The

[1] To be clear, at all times, NYT has denied and continues to deny the merits of Plaintiff's allegations in the FAC and any wrongdoing, wrongful act, or violation of law or duty, and has opposed and continues to oppose certification of a litigation class. (*See* Dkt. 77, Ex. 1, ¶ T.) For purposes of final approval of the Settlement Agreement, however, NYT understands that, at this preliminary pleadings stage of the litigation, the Court "must accept as true all of the [factual] allegations contained in a complaint." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although NYT maintains that there are serious risks for Plaintiff on the merits of her claims, "[i]n reviewing a settlement, the Court's role is primarily in protecting the class members, not protecting defendants from settling claims as they see fit." *Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250, 268 (E.D.N.Y. 2009).

New York Times." (*Id.* at ¶ 62.) Because the ARL does not contain its own private right of action, Plaintiff asserts various California statutory and common law claims: the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL"); the Consumers Legal Remedies Act, Cal. Bus. & Prof. Code §§ 1750 *et seq.* ("CLRA"); the False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.* ("FAL"); and common law conversion, unjust enrichment, negligent misrepresentation, and fraud claims—all of which are premised on violations of the ARL. (*Id.* at ¶¶ 73-128.)

NYT moved to dismiss the FAC on September 21, 2020 (the "Motion to Dismiss"). (Dkt. 28; *see also* Dkt. 29; Dkt. 30; Dkt. 31.) NYT argued: (1) Plaintiff did not sufficiently allege a violation of the pre-purchase requirements of §§ 17602(a)(1) and (a)(2) of the ARL, or the mechanism of cancellation required by § 17602(b), because NYT's disclosures were sufficient under the ARL; (2) Plaintiff's claims for NYT's alleged post-purchase ARL violations failed, because, *inter alia*, Plaintiff lacks statutory standing to bring suit under the UCL, FAL, and CLRA based on NYT's purported failure to send a compliant acknowledgement; and (3) Plaintiff's common law conversion, unjust enrichment, fraud, and negligent misrepresentation claims were not plausibly alleged as a matter of law. (*See generally* Dkt. 29 at pp. 9-28.) Plaintiff filed her opposition to the Motion to Dismiss on October 29, 2020. (*See* Dkt. 32.)

As Plaintiff has set forth in her Preliminary Approval Memorandum and her Memorandum of Law in Support of her Motion for Attorney's Fees, Costs, Expenses, and Incentive Award (Dkt. 83), the parties first entered into a settlement agreement on March 31, 2021 (the "Original Agreement"). (*See id.* at ¶ 19.) The Original Agreement was approved in final form over the objection of, *inter alia*, Isaacson, on September 13, 2021. (*See* Dkt. 60.) The Motion to Dismiss

remains pending, and NYT's deadline to file a reply in support thereof has been stayed since November 16, 2020. (*See* Dkt. 34.)

B. Isaacson's Appeal and the Second Circuit Opinion

As Plaintiff has recounted, Isaacson appealed the Court's order granting final approval of the Original Agreement to the United States Court of Appeals for the Second Circuit ("Second Circuit"). (*See* Dkt. 63.) On August 17, 2023, the Second Circuit vacated and reversed the Court's order granting final approval of the Original Agreement on the grounds that the form of payment under the Original Agreement constituted "coupons" under the coupon settlement provisions of the Class Action Fairness Act ("CAFA"). *See generally Moses v. New York Times Co.*, 79 F.4th 235, 253 (2d Cir. 2023) (citing 28 U.S.C. § 1712). Therefore, the Second Circuit remanded the case for further proceedings. *See id.* at 257. Notably, the Second Circuit did not find that final approval of the Original Agreement was necessarily or categorically improper, much less that the settlement itself was unfair or otherwise deficient. *See generally Moses*, 79 F.4th 235. Further and moreover, the Second Circuit did not take issue with the Court's provisional certification of a settlement class. *See generally id.*

C. The Second Settlement Agreement and Isaacson's Objection

The parties entered into a second settlement agreement (the "Settlement Agreement") on April 17, 2024. (*See* Dkt. 78 at pp. 7-10; *see also* Dkt. 81, ¶¶ 26, 28-30, 33.) Pursuant to the terms of the Settlement Agreement, the class ("Settlement Class") consists of:

> [A]ll Persons who, from June 17, 2016, to and through May 12, 2021, enrolled in an automatically renewing NYT Subscription directly through NYT using a California billing and/or delivery address, and who were charged and paid an automatic renewal fee(s) in connection with such subscription. Excluded from the Settlement Class are: (1) any Judge or Magistrate presiding over this Action and members of their families; (2) Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest and their current or former officers, directors,

> agents, attorneys, and employees; (3) Persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any excluded Persons.[2]

(*See* Dkt. 77, Ex. 1, ¶ 1.35.) Plaintiff filed her Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement (Dkt. 76) and its supporting documents on April 18, 2024. (*See also* Dkt 77; Dkt 78.) The Court preliminarily approved the Settlement Agreement on June 6, 2024. (*See* Dkt. 79.) On August 19, 2024, Isaacson filed his Objection to the Settlement Agreement. (Dkt 85).[3]

III. ARGUMENT

This Court should overrule Isaacson's positions in his Objection. Plaintiff has sufficient Article III standing to represent the class at this stage of litigation and in this settlement, and the *Grinnell* factors overwhelmingly support approval. While NYT takes no position on the attorneys' fees and incentive payment to Plaintiff pursuant to Rule 23(e)(2), the overall settlement is fair, and neither the fees nor the incentive payment present any valid reason for this Court to decline to finally approve the parties' Agreement.

A. Isaacson's Arguments Against Plaintiff's Article III Standing Are Baseless and Unpersuasive.

Isaacson's arguments ignore the terms of the Settlement Agreement, as well as the relevant case law. His Article III objections are not well founded and should be overruled.

[2] For purposes of this paragraph only, defined terms have the meanings ascribed to them in the Settlement Agreement (Dkt. 77, Ex. 1).

[3] Additionally, on July 30, 2024, purported class member Rahel Smith ("Smith") filed an "objection to the case" (Dkt. 84). As Isaacson incorporates Smith's grievances into his own Objection, the issues raised by Smith are substantively addressed herein. NYT respectfully requests the Court overrule Smith's objection in whole.

1. Isaacson's Objection to Plaintiff's Article III Standing for Injunctive Relief Is Without Any Basis Because Injunctive Relief Is Not Consideration for the Settlement.

Isaacson misunderstands the Settlement Agreement. (*See* Dkt. 85 at p. 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) damages settlement class. (*See* ECF No. 78, p. 22 (seeking approval only of a Rule 23(b)(3) class); ECF No. 77, p. 91, Proposed Final Order, ¶ 2 (ordering certification of a Rule 23(b)(3) damages class, without mention of a Rule 23(b)(2) injunctive class).)

Indeed, the Settlement Agreement contemplates "Payment to Settlement Class Members" and "Practice Changes," making clear that the "Practice Changes" *have already been implemented* and are not offered as consideration for the settlement itself. (*See id.* at ¶ 2.2 ("Defendant *already has revised* the presentation and wording of the automatic renewal terms . . . . Defendant *also now provides* consumers who submit an order for a new automatically renewing subscription with an . . . acknowledgment . . . that includes the automatic renewal terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer[.]") (emphasis added).) Isaacson's arguments against certification of an injunctive relief settlement class have no applicability to the actual Settlement Agreement before the Court. (*See generally id.*)

2. Isaacson Concedes that Plaintiff Has Article III Standing to Seek Monetary Relief, Which Precludes Any Argument that Article III Standing Is Not Satisfied for the Settlement Class.

For purposes of Article III standing, a named plaintiff's well-pled allegations of standing suffice to "confer standing on the entire class." *Hyland v. Navient Corp.*, 48 F.4th 110, 118 (2d Cir. 2022). Isaacson concedes that Plaintiff "has Article III standing to seek monetary relief for past harms" (*i.e.*, all that is at issue here), but he goes on to invent a burden purportedly placed

upon Plaintiff for purposes of a settlement class 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." (Dkt. 85 at p. 7 ("[N]o class may be certified that contains members lacking Article III standing.") (quoting *Denney v. Deutsche Bank*, 443 F.3d 253, 264 (2d Cir. 2006)).) But this misreads the relevant precedent.

Isaacson's concocted standard is derived from the Second Circuit's holding in *Denney*; however, *Denney* was decided before the United States Supreme Court's decision in *Frank v. Gaos*, 586 U.S. 485 (2019), which held, in the context of a cy pres-only class settlement, that federal courts lack jurisdiction for Article III purposes only where "*no named plaintiff* has standing." *Gaos*, 586 U.S. at 492 (emphasis added); *see Hyland*, 48 F.4th at 118 n.1. In any event, the *Denney* court itself clarified 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." *Denney*, 443 F.3d at 263-64 (quoting *PBA Local No. 38 v. Woodbridge Police Dep't*, 134 F.R.D. 96, 100 (D.N.J. 1991)); *see also Hyland*, 48 F.4th at 118 n.1; 1 Newberg and Rubenstein on Class Actions § 2:3 ("While [*Denney*] did contain that sentence [cited by Isaacson], it was embedded in a paragraph that also stated, . . . [in an explanatory parenthetical] that: '[P]assive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.'"). Isaacson has not pointed to any authority supporting his contention that Plaintiff must put forth evidence at this stage that every individual member of the Settlement Class has standing.[4]

[4] The cases Isaacson cites in support of this argument (*see* Dkt. 85 at pp. 7-8), are out-of-Circuit and readily distinguishable. *See, e.g.*, *Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 144 (3d Cir. 2023) (discussing standard for a showing of Article III standing at the *summary judgment stage*, without discussing any standing required for settling

Federal courts interpreting California's ARL have found that, at the pleadings stage, Article III standing is satisfied when the plaintiff alleges "monetary harm in the form of unlawfully retained subscriptions payments by [defendant]." *Johnson v. Pluralsight, LLC*, 728 F. App'x 674, 676 (9th Cir. 2018) (finding Article III standing at pleadings stage); *Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1070 (S.D. Cal. 2018) (citing *Rox v. Nestle Waters N. Am., Inc.*, No. 2:16-cv-04418-SVW-JEM, 2017 WL 132853, at *7-8 (C.D. Cal. Jan. 11, 2017)) (finding Article III standing at pleadings stage because plaintiff alleged that "all products received from Defendant in violation of the ARL constitute unconditional gifts" under § 17603 of the ARL; "when the Defendant collected money for that gift, it injured Plaintiff"); *Rutter v. Apple Inc.*, No. 21-CV-04077-HSG, 2022 WL 1443336, at *4 (N.D. Cal. May 6, 2022) (finding plaintiffs had met Article III standing requirements "by alleging that at least some plaintiffs lost money paying for varying levels of an iCloud subscription"). Plaintiff makes similar allegations here. *See, e.g.*, FAC ¶¶ 43, 59, 79 ("All products received from Defendant in violation of the ARL . . . constitute 'unconditional gifts.' [citation omitted.] As a direct and proximate result of Defendant's unlawful and/or unfair practices described herein, Defendant has received, and continues to hold, unlawfully obtained property and money belonging to Plaintiff and the Class in the form of payments made by Plaintiff and the Class for their NYT Subscriptions."). Federal courts also have found that Article III standing is satisfied in the context of a California ARL claim when the plaintiff alleges "he suffered an economic injury because he would not have made the initial payment or renewed the plan if he had been aware of the automatic renewal." *Morrell v. WW Int'l, Inc.*, 551 F. Supp. 3d. 173, 181 (S.D.N.Y. 2021) (holding that a plaintiff's "allegation that he suffered a real and

class members); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1263 (same); *Alig v. Rocket Mortg., LLC*, 52 F.4th 167, 168 (4th Cir. 2022) (same).

tangible economic harm satisfies the requirement that the harm be concrete, particularized, and actual" under Article III). Plaintiff also makes a similar allegation here, with respect to the entire class as defined. *See, e.g.*, FAC ¶ 83 ("Had Defendant complied with its disclosure obligations under the ARL, Plaintiff and members of the Class would not have purchased their NYT Subscriptions or would have cancelled their NYT Subscriptions prior to the renewal of the subscriptions, so as not to incur additional fees. Thus, Plaintiff and members of the Class were damaged and have suffered economic injuries as a direct and proximate result of Defendant's unlawful and/or unfair business practices."); *see also id.* at ¶¶ 101, 108. Article III standing is a case specific determination, and it is not necessary for this Court to conclude that standing would be satisfied in all ARL cases (a point NYT also does not concede) in order to overrule Isaacson's objections as to this case.

Generally, in order to satisfy the constitutional prerequisite of Article III standing at the pleadings stage, a plaintiff must allege "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Contrary to Isaacson's contentions, simply because the parties have reached a settlement on a classwide basis does not mean that standing must be established "by a preponderance of admissible evidence". (*See* Dkt. 85 at p. 5.) Instead, "[a] plaintiff must demonstrate standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" *Lujan*, 504 U.S. at 561.

For settlements reached at the pleadings stage (as is the case here), plausible allegations of injury on behalf of the named plaintiff are sufficient to confer Article III standing upon a settlement class. *See Hyland*, 48 F.4th at 118 ("Standing is satisfied so long as at least one named plaintiff

can demonstrate the requisite injury."); *Gaos*, 586 U.S. at 492 ("[F]ederal courts lack jurisdiction if no named plaintiff has standing."); *see also Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice[.]"). *Cf. TransUnion*, 594 U.S. at 431 ("[I]n a case like this that proceeds to trial, the specific facts set forth by the plaintiff to support standing 'must be supported adequately by the evidence adduced at trial.'"); *Lowell v. Lyft, Inc.*, No. 17 Civ. 6251 (PMH) (AEK), 2022 WL 19406561, at *4-5 (S.D.N.Y. Dec. 22, 2022) (where the parties had completed discovery, the court required "that Plaintiffs set forth evidence—and not mere allegations—in support of standing").

Accordingly, as Plaintiff's allegations of concrete injury are sufficient to confer Article III standing to Plaintiff individually, as Isaacson concedes, then those same allegations likewise confer the requisite Article III standing on the entire Settlement Class at this pre-discovery stage. *See, e.g.*, *Denney*, 443 F.3d at 263 ("We do not require that each member of a class submit evidence of personal standing."). All that the Court needs to consider at this stage of the litigation, under clear Second Circuit precedent, is whether Plaintiff has put forth allegations in the FAC sufficient to support Article III standing, a point that Isaacson *concedes in his Objection*.[5] (*See* Dkt. 85 at p. 7 ("Moses has Article III standing to seek monetary relief for past harms.").)

[5] NYT argued in its Motion to Dismiss that Plaintiff lacked *statutory standing* under various California consumer protection statutes (*see* Dkt. 29 at pp. 22-24). NYT's statutory standing argument was made pursuant to California state law interpreting the UCL, FAL, and CLRA, which require a showing of causation and reliance. *See Chulick-Perez v. CarMax Auto Superstores Cal., LLC*, 71 F. Supp. 3d 1145, 1149 (E.D. Cal. 2014) ("Plaintiff must adequately plead that she sustained an actual injury under the CLRA or the UCL, for a claim to proceed under either of these statutes."); *Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 856–57 (2008) ("Because Plaintiffs fail to allege they actually relied on false or misleading advertisements, they fail to adequately allege causation[.]"). On the other hand, Article III standing is conferred by the United States Constitution, is required only in federal courts, and requires a showing of causation, but not reliance. *See Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, 19 F.4th 58, 62 (2d Cir. 2021) (setting forth the requirements for Article III standing in the Second Circuit); *see also supra* p. 3.

NYT's statutory standing argument is premised on the fact that "Plaintiff has not adequately pled and cannot plead economic injury *solely* from the allegedly deficient post-purchase acknowledgment," (Dkt. 29 at p. 23 (emphasis added)), not that she has inadequately alleged any economic injury in the FAC *at all*. Therefore, to the extent NYT would continue to prosecute its argument that Plaintiff lacks statutory standing, the success of such an argument would not undercut the Court's ability to determine Plaintiff has Article III standing sufficient to overrule Isaacson's objection. *See, e.g.*, *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016) ("The

Moreover, the Settlement here defines the class as including only those subscribers who "were charged *and* paid an automatic renewal fee(s)." (Dkt. 77, Ex. 1, ¶ 1.35; emphasis added.) The Settlement claim process also makes compensation available only to those who make claims and affirm that they actually paid renewal fees. *Id* at Ex. A (Claim Form). The act of making a claim is an assertion of injury for which the claimant is seeking compensation. Even if this Court were obligated to address the Article III standing of all class members at the settlement stage of a damages-only settlement class settlement pre-motion to dismiss (which it is not), existing precedent finding that Article III standing for California ARL violations turns on the payment of subscription fees (which Isaacson ignores) amply supports the settlement here.

It would be antithetical to Rule 1 of the Federal Rules of Civil Procedure's mandate to "secure the just, speedy, and inexpensive determination of every action and proceeding" to require further evidence of that injury at the settlement stage—which would effectively require the parties to conduct full blown class certification discovery and for the Court to hold an extensive class certification hearing.

In any event, the only evidence before the Court is that there is one objector who, under Isaacson's view, potentially asserts she was not harmed. (*See* Dkt. 85 at p. 8 (recapping Smith's objection that an "auto-renewal for a service like a subscription is not unexpected" and that if she "had to actively re-renew, that would be something [they'd] likely find annoying, and extra work").)[6] If a subjective knowledge or preference for automatic renewal impacts whether or not

Supreme Court has recently clarified . . . that what has been called 'statutory standing' in fact is not a standing issue, but simply a question of whether the particular plaintiff 'has a cause of action under the statute'" and that "[t]his inquiry 'does not belong' to the family of standing inquiries, because 'the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case.'") (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014)).

[6] The other two objections Isaacson points to were made to the first settlement, and were overruled by the Court and not appealed.

a class member suffered injury for Article III purposes, as Isaacson appears to suggest, then the need for such an individualized inquiry into the preferences and state of mind of each of the 800,000+ class members means that this case simply cannot proceed as a class action at all, and the class allegations should be struck or dismissed by the Court. *See Xuedan Wang v. Herat Corp.*, 617 F. App'x 35, 37-38 (2d Cir. 2015) (affirming denial of class certification where plaintiffs' claims would demand a "highly individualized inquiry" on a classwide basis); *see also, e.g.*, *Pelman v. McDonald's Corp.*, 272 F.R.D. 82, 94 (S.D.N.Y. 2010) (denying class certification where "individualized inquiries predominate"); *Vincent v. Money Store*, 304 F.R.D. 446, 460-61 (S.D.N.Y. 2015) (class certification must be denied where "common issues will predominate over individualized inquiries"). Proof as to standing, or lack thereof, could potentially develop down the road, and thus litigation risk over class certification is one that that the parties have appropriately considered in reaching this settlement. *See In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 781-82 (9th Cir. 2022) (holding that it is not a barrier to settlement that some class members may lack standing—in fact, the risk of an uncertain outcome, *i.e.*, that classwide standing could be disproven at trial, was properly "one of the factors that induced the parties to settle").

B. Contrary to Isaacson's Baseless Contentions, the *Grinnell* Factors Favor Approval of the Settlement.

As a general matter, Isaacson offers no supporting argument for his contention that the substantive fairness factors set forth in Rule 23(e)(2) and *Grinnell* "preclude settlement approval." (*See* Dkt. 85 at pp. 8-9.) He 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 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)). However, for the avoidance of doubt, it is clear that under scrutiny, Isaacson's Objection is without merit and should be overruled.

As set forth by Plaintiff in the Preliminary Approval Memorandum, in evaluating the substantive fairness of a class action settlement, courts in the Second Circuit consider the nine factors enumerated in *Grinnell*, which include: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463; *see also Moses*, 79 F.4th at 244 ("[W]e 'evaluate substantive fairness [by] considering the nine *Grinnell* factors.'") (quoting *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013)).[7]

[7] Courts also consider the requirements set forth in Federal Rule of Civil Procedure ("Rule") 23(e)(2), which largely overlap with the *Grinnell* factors, adding to *Grinnell* only the substantive considerations of "the adequacy of relief provided to a class and the equitable treatment of class members." *See Moses*, 79 F.4th at 244 (citing Fed. R. Civ. P. 23(e)(2)(C)-(D)). NYT takes no position as to these two substantive Rule 23(e)(2) factors, and therefore addresses herein Isaacson's Objection to the extent it relates to the *Grinnell* factors. (*Cf.* Dkt. 78 at pp. 19-21 (addressing Rule 23(e)(2)(C)-(D)).) Further, Isaacson does not explicitly take issue with the procedural Rule 23(e)(2) factors of Plaintiff's (and her counsel's) adequacy and the arm's-length nature of the negotiations (*see* Dkt. 85 at pp. 18-25);

1. If the Case Were to Continue Through Litigation, Such Efforts Would Be Complex, Costly, and Lengthy (Factor 1).

Isaacson's contention that this class action is not "difficult or complex" is patently false. 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.) As Plaintiff outlines in the Preliminary Approval Memorandum, the parties have engaged in 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 p. 13.) Isaacson is incorrect that the case turns on one "relatively simple question of law" (Dkt. 85 at p. 10)—in the FAC itself, Plaintiff has alleged at least 12 questions of law which she purports will be at issue in this litigation, much less the further issues that will arise as a part of NYT's affirmative defenses and the parties' arguments on summary judgment and class certification. (*See* Dkt. 22, ¶ 66; *see also* Dkt. 78 at pp. 13-14.) 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. 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. (*See* Dkt. 85 at p. 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 pp. 22-24.) Given the complexity, expense, and likely duration of the litigation were the case to continue, this factor

however, for the avoidance of doubt, NYT affirms Plaintiff's averments that these factors have been satisfied. (*See* Dkt. 78 at pp. 18-19.)

weighs in favor of approval of the Settlement Agreement, as set forth in the Preliminary Approval Memorandum. (*See id.* at pp. 12-14.)

2. Isaacson Has No Grounds to Assert the Settlement Class Has Reacted, or Will React, Unfavorably to the Settlement Agreement (Factor 2).

The second *Grinnell* factor, the reaction of the class to the settlement, also favors approval, contrary to Isaacson's baseless assertions in his Objection. (*See* Dkt. 85 at pp. 10-14.) First, Isaacson again falsely claims that Rev. Jeffrey Spencer and Darren Tylor Krone objected to the Settlement Agreement—as set forth *supra*, this is not correct; those parties submitted objections only to the Original Agreement. (*See* Dkt. 49-1; Dkt 49-2; *see also supra* p. 4.)

Second, Isaacson attempts to convince the Court that the lack of objections to the Settlement Agreement somehow weighs against approval thereof.[8] (Dkt. 85 at pp. 11-12.) The opposite is true. The Second Circuit has recognized that, "[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (considering an objection percentage of 0.00036% to be "small").

Here, out of the entire Settlement Class, only *two individuals* raised objections to the Settlement Agreement—that represents 0.00022% of the Settlement Class.[9] (*See generally* Dkt.) In fact, in considering a slightly smaller settlement class, Judge Sweet noted that where only three objections were submitted out of 645,626 notices mailed (0.00045% of the class), such a ratio

[8] The one case Isaacson relies on primarily, *Gallego v. Northland Group Inc.*, 814 F.3d 123 (2d Cir. 2016), did not even deal with the *Grinnell* factors or Rule 23(e)(2). *Gallego*, 814 F.3d at 128-30. This case is plainly inapplicable to the Court's consideration herein. Further, his reliance on *In re Traffic Executive Association-Eastern Railroads*, 627 F.2d 631 (2d Cir. 1980), is even further misplaced; *In re Traffic Executive* dealt with problems of proof in a tariff litigation in which absentee class members would have had to undertake a substantially different and more tedious process to lodge objections with a court in the year 1980 than a member of the Settlement Class would have had to undertake in order to object in this case. *In re Traffic Exec. Ass'n-E. R.R.*, 627 F.2d at 634.

[9] Of note, there were three objections made to the Original Settlement, which this Court approved thereover. (*See* Dkt. 60.)

constituted "extremely limited" objection to the settlement. *See In re Facebook, Inc. IPO Sec. & Derivative Litig.*, MDL No. 12-2389, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015) ("Given the limited objections and otherwise 'unanimously positive' reaction of the class to the settlement, this factor leans in favor of settlement approval.").

It is hard to comprehend how here, where the Settlement Class comprises more than 876,000 persons and only *two* objections have been submitted, this factor could lean *against* approval of the Settlement Agreement—on the contrary, objection has certainly been "extremely limited" in light of the circumstances and size of the Settlement Class. *See, e.g.*, *id.*; *Wal-Mart Stores*, 396 F.3d at 118 ("[T]he absence of substantial opposition is indicative of class approval[.]"); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 410 (S.D.N.Y. 2018) (finding reaction "overwhelmingly positive" where, "[o]ut of more than 1.3 million potential class members who received Notice Packets, two objected"). The Court should find that this factor weighs in favor of final approval of the Settlement Agreement.

3. The Informal Discovery Effectuated Prior to the Mediations Has Provided the Parties with Sufficient Information to Responsibly Resolve the Case (Factor 3).

While Isaacson is correct that formal discovery has not been undertaken in this litigation, the parties have engaged in extensive informal written discovery prior to mediation. (*See* Dkt. 78 at p. 15.) As Plaintiff explains in the Preliminary Approval Memorandum, NYT has disclosed information regarding "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 [NYT's] current and historical Terms of Sale and Terms of Service, which recap the ARL terms and other relevant provisions related to subscriptions." (*Id.*) Isaacson's contentions that the parties have not done sufficient work to advance discovery prior to reaching the Settlement Agreement are

unfounded and divorced from reality. (*See* Dkt. 85 at pp. 14-15.) Courts in the Second Circuit regularly approve of class action settlements at the pleadings stage, wherein formal discovery has rarely begun. *See, e.g.*, *Hyland*, 48 F.4th at 115-16, 124 (affirming final approval of settlement agreement prior to the commencement of formal discovery). This factor plainly supports approval of the Settlement Agreement on a final basis. (*See* Dkt. 78 at p. 15.)

4. Plaintiff Concedes that She Would Face Real Risks if the Case Proceeded to Trial as a Class Action (Factors 4, 5, and 6).

As Plaintiff explains in the Preliminary Approval Memorandum, the Settlement Agreement appropriately accounts for NYT's defenses on the merits—which Isaacson fails to even acknowledge, much less address. (*See* Dkt. 78 at p. 16.) NYT has a strong Motion to Dismiss that remains pending on the docket, and as evident from the briefing thereon, this is not a case where liability is clear. (*See* Dkt. 29.) Instead, Plaintiff faces substantial risk, and she therefore cannot be certain that this case could survive past the pleadings stage, much less through trial. (*See id.*) NYT has strong arguments that the screenshot included in Plaintiff's FAC showed that the automatic renewal terms were presented in a framed box, set off from other text, preceded by a bolded header, and appeared prior to and in visual proximity to the final "Purchase Subscription" button that needed to be pressed to complete the transaction. (*See generally id.*) NYT also has strong legal arguments as to the post-purchase deficiencies alleged by Plaintiff, which may have foreclosed Plaintiff's ability to base any statutory or common law liability on such post-purchase disclosures. (*See id.*) As a result, at the time the Settlement Agreement was reached, Plaintiff faced a not-insignificant risk that Plaintiff's and the Settlement Class's overall potential recovery could be entirely eliminated or seriously diminished. Isaacson's underdeveloped objection as to the adequacy of the settlement fails to account for any of these risks on the merits of the case. (*See*

Dkt. 85 at p. 15; *see also* Dkt. 78 at p. 16 ("The Settlement alleviates these risks, and provides a substantial benefit to the Class in a timely fashion.").)

As to the risks of maintaining the case as a class action through trial, Isaacson contradicts himself between Factors 4 and 5, on one hand, and Factor 6, on the other—arguing with respect to the former that Plaintiff's case is so strong that she should continue to trial, then with respect to the latter, that Plaintiff does not even have Article III standing to bring a case in the first place and could never certify a litigation class. (*See* Dkt. 85 at p. 15.) His flip-flopping demonstrates the inconsistencies with his arguments, and highlights the unsupported nature of his conclusory Objection as a whole. As Plaintiff explains in the Preliminary Approval Memorandum, this factor supports approval of the Settlement Agreement. (*See* Dkt. 78 at p. 16 ("Since the Settlement eliminates this risk, expense, and delay, this factor weighs in favor of preliminary approval.").)

5. NYT's Ability to Withstand a Greater Judgment, On its Own, Renders this Factor Neutral (Factor 7).

As Plaintiff sets forth in the Preliminary Approval Memorandum, while NYT could withstand a greater judgment, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005). Thus, at worst, this factor is neutral, and does not favor Isaacson's unsupported Objection on this ground. (*See* Dkt. 78 at p. 17.)

6. The Settlement Amount Is Reasonable in Light of the Possible Recovery and the Attendant Risks of Litigation (Factors 8 and 9).

NYT again relies upon the arguments Plaintiff set forth in the Preliminary Approval Memorandum, which demonstrate that the settlement amount is reasonable in light of the potential recovery and attendant risks of proceeding through litigation. (*See* Dkt. 78 at pp. 17-18.) 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." (*See* Dkt. 85 at

pp. 16-17.) However, in the Second Circuit under *Grinnell*, "[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; *see also Frank*, 228 F.R.D. at 186. 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.'" (*See* Dkt. 85 at pp. 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 Cos., Inc.*, 909 F. Supp. 2d at 264 (citing *In re Merrill Lynch & Co., Inc.*, 246 F.R.D. at 168). Therefore, this factor weighs in favor of approval of the Settlement Agreement, and the Court should overrule Isaacson's objection based on the *Grinnell* factors. (*See* Dkt. 78 at pp. 17-18.)

IV. CONCLUSION

For these reasons and those outlined in Plaintiff's Preliminary Approval Memorandum (Dkt. 78), NYT respectfully requests the Court overrule Isaacson's Objection as to final approval of the Settlement Agreement.

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Respectfully submitted,

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