IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH J. SILVER, et al.	:	**CIVIL ACTION**
v.	:	**Case No. 10-cv-2326-MMB**
L.A. FITNESS INTERNATIONAL, LLC	:	
JOSHUA VAUGHN	:	
v.	:	**Case No. 11-cv-2644-MMB**
L.A. FITNESS INTERNATIONAL, LLC	:	
AMALIA SIBLE	:	
v.	:	**Case No. 13-cv-0255-MMB**
L.A. FITNESS INTERNATIONAL, LLC	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. PRELIMINARY STATEMENT

Plaintiffs Kenneth J. Silver, Joshua Vaughn, Lori C. Bohn, Sharon N. Lockett, Justin P. Bronzell, and Amalia Sible ("Plaintiffs") respectfully submit this memorandum in support of their motion for final approval of the settlement of this class action (the "Settlement"). The terms of the Settlement are set forth in the National Class Action Settlement and Release, dated March 6, 2013 (the "Stipulation"),[1] which was attached as Exhibit 1 to Plaintiffs' March 6, 2013 motion for preliminary approval of the Settlement.

The Settlement resolves the claims for breach of contract and violations of state consumer protection statutes alleged against L.A. Fitness International, LLC ("LAF", "Defendant" or the "Company") on behalf of all individuals who cancelled their Monthly Dues Membership Agreement with LAF during the Class Period of May 18, 2006 to January 1, 2013.

As is more fully set forth herein, the Settlement, which the Court preliminarily approved on March 12, 2013 (ECF No. 80), satisfies Federal Rule of Civil Procedure 23, and is fair, reasonable and adequate, and therefore, should be granted final approval.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Description of Litigation

1. The Parties and Plaintiffs' Claims

Plaintiffs brought this class action law suit against LAF on behalf of all persons in the United States who are former members of LAF and who allegedly incurred additional monthly billing charges after they properly submitted requests to cancel their Monthly Dues Membership Agreements with LAF, and on behalf of all persons who were subject to the allegedly misleading contract provisions and practices described below.

LAF is a privately-owned company, with its headquarters in Irvine, California. It owns

[1] Unless otherwise defined herein, capitalized terms used herein are defined in the Stipulation.

and operates over 500 fitness clubs in 28 states across the United States. One of the membership options available for new members is a Monthly Dues Membership, whereby members are charged a one-time initiation fee plus their first and last months' dues up front, and then they are electronically charged dues for each month that they are members of the club. In order to cancel a membership, the contracts require members to mail a written notice of cancellation to LAF's P.O. Box in Irvine, California. Any form of mailing is permitted by the contract.

Plaintiffs were members of LAF and had entered into Monthly Dues Membership Agreements with LAF. As alleged, after using the clubs for some time, each of the Plaintiffs sent LAF a notice to cancel their respective memberships, but, in breach of their agreements, LAF failed to timely cancel their memberships, and, instead, LAF continued to electronically bill their accounts for months after their notices were mailed in, thereby causing them damages.

Plaintiffs also allege that LAF violated various state consumer protection statutes by using an inherently misleading Monthly Dues Membership Agreement. More specifically, Plaintiffs contend that the language in older versions of the Monthly Dues Membership Agreement stated that only 20 or 30 days advance notice is required to cancel a membership, when in actuality, at least 50 or 60 days advance notice is needed to cancel a membership and to get the benefit of the last month's dues which are paid up front.

2. Procedural Background

Plaintiffs and their counsel have developed an in-depth understanding of the strengths and weaknesses of the claims, as well as the viability of the defenses put forward by Defendant, through motion practice, discovery, and mediation.

Plaintiffs filed their initial complaint on May 18, 2010, and later filed a first amended complaint on June 24, 2010, a second amended complaint on January 1, 2011, and a third

amended complaint on October 12, 2011.[2] The third amended complaint included Plaintiff Vaughn's claims. LAF filed extensive motions to dismiss the first amended complaint on July 29, 2010 and the second amended complaint on February 28, 2011, a motion to strike allegations and claims in the third amended complaint on November 4, 2011, and all motions were fully briefed. On November 22, 2010, the Court denied as moot LAF's motion to dismiss the first amended complaint. In a lengthy Opinion dated September 12, 2011, the Court granted in part and denied in part LA Fitness' motion to dismiss the second amended complaint, substantially upholding Plaintiffs' claims for breach of contract and certain allegations for violation of Florida and Washington consumer protection statutes. On December 21, 2011, the Court denied LAF's motion to strike allegations and claims in the third amended complaint.

Discovery in the case began in January 2012, and Plaintiffs served discovery requests on LAF. Thereafter, Plaintiffs vigorously pursued, over LAF's objections, the discovery required to prosecute this action, including filing a motion to compel certain discovery on May 4, 2012. Plaintiffs took four depositions, including the depositions of senior LAF officers primarily responsible for creating and implementing LAF's cancellation procedures. Defendant deposed all but one of the Plaintiffs. Plaintiffs also reviewed tens of thousands of pages of LAF's internal documents and extensive electronic data, including approximately 500,000 entries from LAF's Member Notes customer database, which recorded all customer activity, including correspondence, complaints, and cancellations.

As part of their investigation, Plaintiffs also contacted dozens of former LAF employees

[2] The complaint in *Sible v. L.A. Fitness International, LLC*, No. 13-cv-0255-MMB, was filed on October 17, 2012, in the United States District Court for the Eastern District of Texas and the case was transferred to the United States District Court for the Eastern District of Pennsylvania on January 14, 2013, by Order of the Honorable Richard A. Schell. The complaint in *Vaughn v. L.A. Fitness International, LLC*, No. 8-11-cv-457, was filed in the United States District Court for the Middle District of Florida on March 3, 2011, and was transferred to the United States District Court for the Eastern District of Pennsylvania on April 4, 2011, by order of the Honorable Susan C. Bucklew.

responsible for administering LAF's cancellation procedures and conducted interviews of several such formers employees. Some of these former LAF employees were identified from LAF's initial disclosures served pursuant to Federal Rule of Civil Procedure 26(a)(1). Plaintiffs also engaged an investigation firm to identify additional former LAF employees. The information gleaned from these interviews helped Plaintiffs identify and clarify certain issues relevant to their claims. Finally, to estimate the scope of LAF alleged breaches for all members of the Class, Plaintiffs engaged a statistical expert to assist in the extrapolation of cancellation and complaint data extracted from Member Notes produced by LAF.

On November 12, 2012, , the parties participated in a full-day mediation before retired United States District Court Judge Layn Phillips. They exchanged detailed mediation briefs, and Plaintiffs' Counsel presented a thirty minute PowerPoint presentation. Through this mediation, and through subsequent negotiations, the parties reached the proposed Settlement, which provides substantial monetary, non-monetary, and therapeutic benefits that Plaintiffs and Class Counsel believe is fair, reasonable, and adequate, and is in the best interests of Plaintiffs and the Settlement Class Members.

On March 6, 2013, Plaintiffs filed their unopposed motion for preliminary approval of the Settlement, which the Court granted on March 12, 2013. *See* Dkt. No. 80 ("Preliminary Approval Order"). On March 20, 2013, the Court ordered that a hearing shall be held on September 19, 2013 to consider the fairness of the Settlement. *See* Dkt. No. 81. Thereafter, the Claims Administrator distributed the Court approved Summary Notice to the Class, in accordance with the Preliminary Approval Order. The Claims Administrator also served notice of the Settlement to appropriate state and federal officials pursuant to the Class Action Fairness Act ("CAFA") at 28 U.S.C. § 1715. Despite the issuance of approximately 3.3 million notices, only one objection

to the Settlement has been filed.[3] As discussed below in section III.E., the sole objection to the Settlement is meritless and should be denied.

B. Terms of the Settlement

1. The Settlement Benefits

As described below, the Settlement provides a substantial benefit for all Class Members, with a user-friendly claims' process, and recovery of up to 100% of damages for certain Class Members who possess meaningful proof of cancellation.

a. The Settlement Class

The proposed Settlement Class consists of all individuals who cancelled their Monthly Dues Membership Agreement with L.A. Fitness during the Class Period of May 18, 2006 to January 1, 2013. The Settlement Class excludes persons who entered into a Monthly Dues Membership Agreement in California (which was the subject of an earlier class action settlement as described in the footnote below). The Settlement Class also excludes Class members who are part of the New Jersey Class Action Settlement.[4]

Under the Settlement, all members of the Settlement Class are entitled to receive a fully transferable 45-Day Club Access Pass to L.A. Fitness gyms (which has a monetary value of approximately $45).[5] The Settlement Class members have been able to easily obtain their

[3] A second objection was made by Analiza Burns, which may not have been filed with the Court. Her complaint made against LAF related to her personal training contract, which is not part of this case. Plaintiffs' Counsel Eric Lechtzin explained to Ms. Burns that her complaint was not at issue in this case. Ms. Burn advised Mr. Lechtzin that she will withdraw her objection to the Settlement. *See* Affidavit of Kenneth Jue ("Jue Aff."), filed concurrently herewith, ¶ 3-5, 12.

[4] Persons who entered into their Monthly Dues Membership Agreements in California are excluded from the Settlement Class as a result of the settlement of a prior action in the Superior Court of California for the County of Los Angeles, *Williams v. L.A. Fitness International, LLC*, Case No. BC385623. Persons who entered into their Monthly Dues Membership Agreements in New Jersey are excluded from the Settlement Class as a result of the proposed settlement of an action pending in the United States District Court for the District of New Jersey, *Martina v. L.A. Fitness International, LLC*, No. 2:12-cv-02063-WHW-MCA.

[5] LAF Monthly Dues Memberships run from $30 to $35 per month, or approximately $1 per day.

Access Pass by using an access code provided in the Summary Notice of LA Fitness Class Action Settlement (the "Summary Notice") and logging on to a Settlement Website to sign up for a 45-day membership. The 45-Day Club Access Pass entitles the Settlement Class member, or any other individual to whom the Settlement Class member transfers the pass before it is first used, to access any LAF health club facility (except Signature Club locations) for a period of 45 consecutive days as if the bearer of the pass were a member, and without the payment of any dues. The Settlement Class members are permitted to submit their claims for the 45-Day Club Access Pass until May 11, 2014 (one year after the date of the Notice).

b. Subclass A

Subclass A consists of all Settlement Class Members: (a) who entered into a Monthly Dues Membership Agreement with L.A. Fitness in any state other than California, Pennsylvania or New Jersey during the Subclass "A" Period[6] for their respective state, and (b) who paid for an additional month of dues via an Electronic Fund Transfer or Credit Card charge (not including the application of prepaid last month dues) after L.A. Fitness received and processed a Notice of Cancellation; and (c) this payment of an additional month of dues was not subsequently refunded.[7] Members of Subclass A were entitled to submit a Claim for a cash payment equal to 1/3 of the additional one month of dues they paid after LAF received the Subclass A member's

[6] The Subclass A Period for each state is as follows: **Florida**: March 4, 2007 to January 1, 2013; **Washington**: October 12, 2007 to January 1, 2013; **Texas**: October 17, 2010 to January 1, 2013; **Michigan and Minnesota:** January 1, 2007 to January 1, 2013; **Massachusetts:** January 1, 2009 to January 1, 2013; **Connecticut, District of Columbia; Illinois, Maryland, New York, and Wisconsin:** January 1, 2010 to January 1, 2013; **Georgia, Indiana, Kentucky, Ohio, and Virginia**: January 1, 2011 to January 1, 2013; **Arizona and Oregon:** January 1, 2012 to January 1, 2013.

[7] Persons who entered into their Monthly Dues Membership Agreements in California or New Jersey are excluded from Subclass A as a result of the *Williams* and *Martina* settlements, as described above. Persons who entered into their Monthly Dues Membership Agreements in Pennsylvania are excluded from Subclass A as a result of the Court's September 12, 2011 decision granting Defendant's motion to dismiss all claims that L.A. Fitness' cancellation procedures violated Pennsylvania's consumer protection statutes.

written notice of cancellation if that payment was not subsequently refunded by LAF. Members of Subclass A had the option to choose either this cash payment or the 45-Day Club Access Pass mentioned above. The deadline for claims for the Subclass "A" cash payment was August 9, 2013.

c. Subclass B

Subclass B consists of all Settlement Class Members: (a) who cancelled their Monthly Dues Membership Agreement with LAF and (b) who claim that LAF did not timely process their Notice of Cancellation resulting in additional charges for Monthly Dues that were not subsequently refunded. In addition to the 45-Day Club Access Pass mentioned above, members of Subclass B who submitted a valid Claim are entitled to receive a cash payment. The amount of the cash payment to the Subclass B member is based on the form of proof such member submitted with their Claim to demonstrate that LAF did not timely process their Notice of Cancellation.

For example, Subclass B members with written proof of mailing a cancellation request to LAF (i.e., a certified or registered mail receipt signed by an LAF agent, or a FedEx, DHL, USPS or UPS tracking number that indicates such receipt), are entitled to receive a monetary cash payment equivalent to 100% of all dues paid and collected after the date of mailing of the cancellation notice for up to one year after the mailing, less any refunds already provided.

Members of Subclass B who do not have written proof of mailing, but (1) who have proof of printing or receiving a cancellation form (based on LAF's records), (2) who notified LAF that their membership was not properly cancelled (either directly to LAF or through a governmental agency or the Better Business Bureau), and (3) who did not use LAF's clubs more than 60 days after printing or receiving the cancellation form, were entitled to submit a Claim to

receive a cash payment equivalent to fifty percent (50%) of all dues paid and collected more than sixty (60) days after the date of the printing of the Notice of Cancellation form for up to one year after the printing (not including the application of pre-paid last month dues), less any refunds already provided.

Finally, all other members of Subclass B (who do not fall into the above categories) who submitted a Claim verifying that they mailed a cancellation request that was not processed, will receive a fully transferable 60-Day Club Access Pass, instead of the 45-Day Club Access Pass mentioned above. This Access Pass will entitle the Subclass B member, or any other individual to whom the Subclass B member transfers the pass before it is first used, to access any LA Fitness' health club facility (except Signature Club locations) for a period of 60 consecutive days as if the bearer of the pass were a member, and without the payment of any dues. This Access Pass has a monetary value of approximately $60.

The deadline for claims for the Subclass "B" cash payment or 60-Day Club Access Pass was August 9, 2013.

d. Therapeutic Relief

In addition, pursuant to the proposed Settlement, L.A. Fitness will revise its Monthly Dues Membership Agreement to clearly state that any form of written notice of cancellation is permitted, and that the notice should include sufficient information to identify the member so as to ensure effective processing. The Monthly Dues Membership Agreement will recommend that the notice include the member's full name, barcode number, address, telephone number and email address. Plaintiffs believe this will resolve the alleged prior problem of L.A. Fitness not having sufficient information to process cancellation requests. Also, the Long Form Notice advised Settlement Class Members that L.A. Fitness' current cancellation policy (certain aspects of which were instituted after this lawsuit was filed) includes: (i) permitting members to cancel

in-person at their local gyms; (ii) providing members with a written receipt for cancellations that are processed at local gyms; and (iii) providing members who cancel their monthly memberships by way of a written notice mailed to the company's Irvine, California P.O. Box an emailed receipt of cancellation if the members' email address is available. Plaintiffs believe this current cancellation policy will ensure that customers obtain proof of their cancellations and eliminate circumstances where LAF asserts that it did not receive a customer's mailed cancellation request.[8]

e. Other Relief

Pursuant to the Settlement, LAF has agreed to pay all costs and expenses of notice of the Settlement to the Settlement Class Members and of the processing and administration of the Settlement Class Members' claims.

Class Counsel submit that the Settlement satisfies Rule 23 and is fair, reasonable, and adequate, and therefore, should be granted final approval.

III. LEGAL ARGUMENT

A. Standard of Review for Final Settlement Approval and Class Certification for Settlement Purposes

Plaintiffs move under Rule 23 for final approval of the Settlement and certification of a class and subclasses for settlement purposes only ("Settlement Classes"). As discussed in detail below, final approval of a class action settlement involves two fundamental inquiries. First, the Court must determine whether a class can be certified under Rule 23(a) and at least one prong of Rule 23(b). *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). The second inquiry is whether the proposed settlement appears "fair, reasonable and adequate." Fed. R. Civ. P. 23(e); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004). In determining

[8] The parties understand and agree that LAF may change its current cancellations policies at any time and the Settlement Agreement does not in way limit its right to do so.

whether to approve a settlement, the Third Circuit has noted that "there is an overriding public interest in settling class action litigation, and it should therefore be encouraged." *Id.* at 535; *see also In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("GM Trucks") ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (noting Third Circuit's policy of "encouraging settlement of complex litigation that otherwise could linger for years"); *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 299 (3d Cir. 2005) ("'all Federal Circuits recognize the utility of … settlement classes' as a means to facilitate the settlement of complex nationwide class actions"). In light of this public policy in favor of settlements generally and because this Settlement meets the Rule 23 requirements and the factors for determining whether a settlement is fair, reasonable and adequate, as identified in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the Settlement should be approved and the Settlement Class certified.

B. Class Certification Should Be Granted for Settlement Purposes Under Rule 23

Class certification under Rule 23 has two primary components. First, the party seeking class certification must first establish the four requirements of Rule 23(a): "(1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." *Warfarin Sodium*, 391 F.3d at 527. Second, the Court must find that the class fits within one of the three categories of class actions set forth in Rule 23(b). *Cmty. Bank*, 418 F.3d at 302. In the present case, Plaintiffs seek certification under Rule

23(b)(3), "the customary vehicle for damage actions." *Id.* Rule 23(b)(3) requires that common questions "'predominate over any questions affecting only individual members'" and that class resolution be "'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem*, 521 U.S. at 592-93.

In analyzing whether the proposed Class meets these requirements, the district court may take the proposed settlement into consideration. *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions)*, 148 F.3d 283, 308 (3d Cir. 1998); *Cmty. Bank*, 418 F.3d at 300. In this respect, there is one material difference between the certification of litigation classes and settlement classes:

> Confronted with a request for settlement-only class certification, 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.

Amchem, 521 U.S. at 620 (internal citation omitted); *Cmty. Bank*, 418 F.3d at 309. "The difference is key." *Warfarin Sodium*, 391 F.3d at 529. For example, the Third Circuit has explained that:

> In certification of litigation classes for claims arising under the laws of the fifty states, [the Third Circuit has] noted that the district court must determine whether variations in state laws present the types of insuperable obstacles which render class action litigation unmanageable … However, when dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class.

Id. As discussed below, all the Rule 23 requirements are met.

1. The Rule 23(a) Factors Are Met

a. Numerosity

The Class is sufficiently numerous because the number and diverse location of putative class members is such that it is impractical to join all of the Class Members in one lawsuit. *See Prudential*, 148 F.3d 283, 309 (3d Cir. 1998). In determining whether a proposed class meets

the numerosity requirement, "a court may accept common sense assumptions." *In re Cephalon Sec. Litig.*, No. 96-0633, 1998 U.S. Dist. LEXIS 12321, *5 (E.D. Pa. 1998). To date, almost 42,000 Class Members have submitted claims under the Settlement. *See* Jue Aff., ¶ 9. Given this data, the number of class members far exceeds that which would be necessary to satisfy the numerosity requirement. *See Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (numerosity requirement satisfied "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40").

b. Commonality

"Rule 23(a)(2)'s commonality element requires that the proposed class members share at least one question of fact or law in common with each other." *Warfarin Sodium*, 391 F.3d at 527-28. "Because the [commonality] requirement may be satisfied by a single common issue, it is easily met." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). Here, the Settlement Class Members share many common issues of law and fact. It is alleged that LAF routinely failed to cancel Class Members' Monthly Dues Membership Agreements upon Class Members submitting cancellation requests, and that LAF's Monthly Dues Membership Agreements were misleading and violated state consumer protection statutes. Thus, questions of law and fact common to all Settlement Class Members include, *inter alia*:

- Whether LAF's conduct constituted a breach of the Monthly Dues Membership Agreement;
- Whether LAF's Monthly Dues Membership Agreement was materially misleading, and, as a result, whether LAF violated state consumer protection statutes; and
- Whether Plaintiffs and Class members sustained damages from LAF's alleged breach of contract and statutory violations, and if so, what is the proper measure of those damages.

In light of these common questions of fact and law, commonality is satisfied. *See, e.g.*, *Rosen v. Fidelity Fixed Income Trust*, 169 F.R.D. 295, 298 (E.D. Pa. 1995) ("Commonality exists when proposed class members challenge the same conduct of the defendants.").

c. Typicality

In considering typicality under Rule 23(a)(3), the court must determine whether "'the named plaintiffs[']' 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 perforce be based.'" *Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 184 (3d Cir. 2001). Typicality does not require that all class members share identical claims. *Id.* So long as "the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is usually established regardless of factual differences." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001); *Barnes v. Am. Tobacco, Inc.*, 161 F.3d 127, 141 (3d Cir. 1998).

Here, the Plaintiffs' claims are typical of the claims of the Settlement Classes because the proof Plaintiffs will need to prevail on their claims that LAF Monthly Dues Membership Agreement was misleading will prove the claims of the Settlement Classes, i.e., that the contracts' 20-day and 30-day notice periods do not accurately advise customers of the proper amount of time needed for a customer to receive the benefit of the last month's prepaid dues. Also, Plaintiffs' contract claims are based on standard written contracts used by all Class members, and LAF's uniform pattern and practice of failing to process its customers' cancellation notices and continuing to bill their accounts. Plaintiffs would rely on common proof to establish LAF uniform practice, including, *inter alia*: LAF's training manuals, policy statements, and emails among upper management. Accordingly, Plaintiffs' claims are typical of the claims of the Class within the meaning of Rule 23(a)(3).

d. Adequacy

Under Rule 23(a)(4), "adequacy of the class representative is dependent on satisfying two factors: 1) that the plaintiffs' attorney is competent to conduct a class action; and 2) that the class representatives do not have interests antagonistic to the interests of the class." *In re Resource Am. Sec. Litig*., 202 F.R.D. 177, 187 (E.D. Pa. 2001). Here, both prongs of the adequacy requirement of Rule 23(a)(4) are satisfied. First, there are no conflicts of interest between Plaintiffs and the Settlement Classes. As stated above, Plaintiffs, like the members of the Settlement Classes, were damaged as a result of Defendant's alleged failure to timely cancel their Monthly Dues Membership Agreements, and by the alleged misleading nature of the Monthly Dues Membership Agreements, and Plaintiffs will have to prove the same wrongdoing as the absent Class Members in order to establish Defendant's liability. Second, Plaintiffs have retained attorneys that are highly qualified, experienced and able to conduct this litigation. The law firm of Berger & Montague, P.C. has extensive experience litigating complex class actions.[9] Given the lack of conflict and the retention of highly experienced and competent counsel, Plaintiffs are adequate Class representatives.

2. The Rule 23(b)(3) Factors Are Met

a. Predominance

"[T]he focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 298 (3d Cir. 2011). In addition, common issues need only "constitute a 'significant part" of the individual cases." *In re Chiang*, 385 F.3d 256, 273 (3d Cir. 2004). "The presence of individual questions as to [each

[9] *See* Declaration of Michael T. Fantini in Support of Plaintiffs' Motion for (1) Final Approval of Class Action Settlement and (2) Plaintiffs' Counsel's Application for an Award of Attorneys' Fees and Expenses and Incentive Payments for Plaintiffs ("Fantini Decl."), ¶ 4.

class member] does not mean that the common questions of law and fact do not predominate over questions affecting individual members as required by Rule 23(b)(3)." *Id.*

Here, the common questions relating to liability – whether LAF breached its Monthly Dues Membership Agreements by failing to timely cancel Plaintiffs' and the Class' memberships upon notice of cancellation, and whether the Monthly Dues Membership Agreements were misleading – predominate over any questions individual as to members of the class. All of Plaintiffs' claims are based on standard contract forms, and Plaintiffs will prove their claims by relying on LAF's own internal documents. Plaintiffs' breach of contract claim is based on LAF's alleged uniform pattern and practice of failing to process its customers' cancellation notices and continuing to bill their accounts. In the context of a class action alleging a breach of contract, where "plaintiffs' claims center on whether the conduct of the defendant conformed to the promises or implicit promises made in the documents upon which plaintiffs raise their claims," common issues will predominate. *Friedman v. Lansdale Parking Auth.*, 1993 U.S. Dist. LEXIS 12019 at *22. (E.D. Pa. 1993).

b. Superiority

The following factors are relevant to the superiority inquiry:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the likely difficulties in managing a class action.

Warfarin Sodium, 391 F.3d at 528, 530; *Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141, 149 (3d Cir. 2008) (*accord*).

Applying these factors in *Warfarin Sodium*, the Third Circuit held that the superiority requirement was satisfied in light of the "potentially large number of class members … including

some 2 million consumers and potentially thousands of TPPs." 391 F.3d at 534. Individual consumer class members had little interest in "individually controlling the prosecution or defense of separate actions," because each consumer had a very small claim in relation to the cost of prosecuting a lawsuit. *Id.* Thus, from the consumers' standpoint, a class action facilitated spreading of the litigation costs among the numerous injured parties and encouraged the private enforcement of the statutes. *Id.* The relatively small number of individual lawsuits pending against the defendant indicated that there was a lack of interest in individual prosecution of claims. *Id*. In *Prudential*, the Third Circuit cited the same factors, as well as the avoidance of "a potentially great strain on judicial resources." 148 F.3d at 316.

The reasoning of these cases is directly applicable here. Here, there are over 40,000 Class Members that have submitted claims under the Settlement and, absent class treatment, the members of the Settlement Classes would never have their day in court because individual suits would be cost-prohibitive, given the relatively small amounts at stake (damages likely range from approximately $35 to a few hundred dollars). As the Supreme Court explained in *Amchem*:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

521 U.S. at 617. Even if this were not the case, thousands upon thousands of individual trials would impose a massive burden on the Court's resources. By contrast, this Settlement makes manageability concerns irrelevant because "the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

In short, this case meets all the requirements for the certification of a settlement class under Rule 23(a) and (b)(3).

C. The Proposed Settlement Is Fair, Reasonable and Adequate, Meriting Final Court Approval Under the Girsh Factors

In this Circuit, the fairness of a settlement is determined by consideration of the nine factors articulated in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir.1975). These factors are: (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. *Id.*

In appraising the fairness of a proposed settlement, the opinion of experienced counsel is entitled to considerable weight. *See Daniel B. v. O'Bannon*, 633 F. Supp. 919, 926 (E.D. Pa. 1986); *Fisher Bros. v. Cambridge-Lee Industries, Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985) ("Although the court must independently evaluate the proposed settlement, the professional judgment of counsel involved in the litigation is entitled to significant weight.").

A settlement was reached here after: (1) Plaintiffs' Counsel conducted an extensive investigation of the facts underlying the claims; (2) the parties briefed, and the Court decided, Defendant's motions to dismiss and motion to strike Plaintiffs' complaints; (3) Plaintiffs and Defendant served and responded to discovery requests; (4) Plaintiffs' Counsel reviewed thousands of documents produced by Defendant and nearly 500,000 entries concerning customers' cancellations and complaints from LAF's "Member Notes" customer database; (5) Plaintiffs deposed four senior LAF employees responsible for LAF's cancellation policies and practices; (6) Defendant deposed all but one of the Plaintiffs; (7) Plaintiffs engaged a statistical

expert to estimate the total damage to the Settlement Classes from the wrongful acts alleged by Plaintiffs; and (8) the parties engaged in mediation with the assistance of a well-respected former federal district court judge. Thus, the parties have had the opportunity to evaluate carefully the strengths and weaknesses of their claims and have concluded that the Settlement is fair.

The presumptive fairness of the Settlement is supported by the fact that counsel for the parties entered into arms-length negotiations with the aid of a mediator, retired United States District Court Judge Layn R. Phillips. *See In re Cendant Corp. Litig.*, 264 F. 3d 201, 232-33, n. 18 (3d Cir. 2001). Thus, there is no doubt that this Settlement is entitled to the presumption of fairness.

When examined under the applicable criteria, it is clear that the Settlement is not only fair, adequate and reasonable, but an outstanding result for the Settlement Classes. As in any complex litigation, success is not a foregone conclusion and there are serious questions as to whether a positive outcome – let alone a more favorable result – could have been obtained after trial and the inevitable post-trial motions and appeals. Balanced against the real possibility of no recovery at all, the proposed Settlement achieves an immediate and substantial recovery for the Settlement Classes.

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

The first Girsh factor "captures 'the probable costs, in both time and money, of continued litigation.'" *In re Cendant Corp. Litig.*, 264 F.3d 201, 233 (3d Cir. 2001). This factor undoubtedly weighs in favor of settlement. In *Warfarin Sodium*, the parties already had litigated the case for three years. 391 F.3d at 537. Nevertheless, the court concluded that the first *Girsh* factor was satisfied:

> We agree with the District Court's conclusion that this factor favors settlement because continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal

> questions, and ultimately a complicated, lengthy trial. Moreover, it was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class. In a class action of this magnitude, which seeks to provide recovery for Coumadin consumers and TPPs nationwide, the time and expense leading up to trial would have been significant.

Id. at 536.

In this case, the path from this stage of the litigation to a final judgment is likely to be equally long. This case has been pending for over three years. In the absence of the Settlement, this case would have necessitated complex, expensive and lengthy litigation against Defendant. Defendant intended to defend this litigation vigorously, as shown by the assertions in its motions to dismiss and motion to strike and its efforts to limit discovery by Plaintiffs. If the litigation continued, the parties would be required to draft and research comprehensive class certification briefs, and be required to participate in a lengthy evidentiary hearing concerning class certification with live witnesses. Assuming the Court certified a litigation class; Plaintiffs would still face the uncertainty and delay of a likely Fed. R. Civ. P. 23(f) interlocutory appeal, as well as the possibility that the class could be decertified before trial.

Even with a litigation class certified, the parties would then engage in full blown merits and expert discovery, including more document production and depositions, followed by summary judgment motions and trial. Continued litigation would assume a substantial likelihood that Plaintiffs and the Settlement Classes might not recover more than the Settlement. The Settlement secures for the Settlement Classes an immediate benefit undiminished by further litigation expenses, without the delay, risk and uncertainty of continued litigation. Thus, the likely prospect of continued protracted litigation militates strongly in favor of approving the proposed Settlement as in the best interest of the Class.

2. The Reaction of the Class to the Settlement

The second *Girsh* factor "attempts to gauge whether members of the class support the

settlement." *Prudential*, 148 F.3d at 318. While 41,813 claims have been received as of today's date, only 114 Settlement Class Members have requested exclusion from the Class. *See* Jue Aff., ¶¶ 9, 11. Further, only one objection to the Settlement has been filed with the Court, which, as discussed below in section III.E., should be denied. *See* Jue Aff., ¶ 12. The deadline either to request exclusion from the Settlement or to file an objection to the Settlement was August 9, 2013. Preliminary Approval Order at ¶¶ 16, 18.[10]

Under *Girsh*, such a small number of negative responses favors approval of a class action settlement agreement. *See Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 n.15 (3d Cir. 1993) (silence is "tacit consent" to settlement). "The Third Circuit has looked to the number of objectors from the class as an indication of the reaction of the class." *In re CertainTeed Corp. Roofing Shingle Products Liab. Litig*., 269 F.R.D. 468, 485 (E.D. Pa 2010) (*citing In re Cendant*, 264 F.3d at 234-35). A "paucity of protestors . . . militates in favor of the settlement." *See Bell Atl*., 2 F.3d at 1314; *see also Stoetzner v. United State Steel Corp*., 897 F.2d 115, 119 (3d Cir. 1990) (objections by 29 members of a class comprised of 281 "strongly favors settlement"); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 537 (D. N.J. 1997) (small number of negative responses to settlement favors approval); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995) (100 objections out of 30,000 class members weighs in favor of settlement).

The lack of any meaningful negative response to the Settlement evinces the quality and value of the Settlement.

[10]In addition, notice of the Settlement was provided to appropriate state and federal officials pursuant to the Class Action Fairness Act ("CAFA"). To date, no state or federal officials have raised any substantive objection to the Settlement.

3. The Stage of Proceedings and the 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.'" *Cendant*, 264 F.3d at 235 (quoting GM Trucks, 55 F.3d at 813). The discovery considered by the court includes both "formal" and "informal" discovery received from the defendant, third-parties and experts. See, e.g., *Prudential*, 148 F.3d at 319 (witness interviews); *Cendant*, 264 F.3d at 235 (public filings); *Warfarin Sodium*, 391 F.3d at 537 (consultation with experts).

Here, the stage of the proceedings is a factor in favor of Settlement. Plaintiffs' Counsel conducted an extensive investigation of the facts underlying the claims. This is not a situation where Plaintiffs' Counsel has conducted only a cursory investigation or has otherwise failed to seriously consider the ramifications of settlement.

Defendant filed two motions to dismiss and a motion to strike Plaintiffs' Complaint, which were extensively briefed, and which provided the parties with a strong basis to assess the strengths and weaknesses of their respective cases and their positions on liability and damages. After the Court granted, in part, and denied, in part, Defendant's motion to dismiss and denied its motion to strike Plaintiffs' Third Amended Complaint, the parties exchanged Rule 26 initial disclosure statements, served discovery requests and exchanged documents. In particular, Plaintiffs' Counsel had the opportunity to review the most critical documents in the litigation, which Defendants produced prior to the mediation – approximately 20,000 pages of documents constituting: (1) hundreds of consumer complaints to LAF, the Better Business Bureau, and state regulatory agencies; and (2) internal LAF correspondence including internal emails, training manuals, policy statements, and other documents concerning the Company's cancellation policies and procedures and customer complaints, as well as approximately 500,000 entries from

LAF's Member Notes database concerning member complaints and cancellations. Plaintiffs' Counsel also deposed four key LAF employees with primary responsibility for creating and implementing cancellation policies, processing cancellation requests, and responding to customer complaints. Defendants also deposed all but one of the Plaintiffs.

Finally, the parties participated in a full-day mediation before retired federal Judge Layn Phillips on November 12, 2012. The facts and analysis developed for and at that mediation, including the parties' exchange of lengthy and detailed mediation statements, which included arguments and analyses of class certification issues, clearly support the Settlement.[11]

4. Risks of Establishing Liability

"By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *GM Trucks*, 55 F.3d at 814.

Plaintiffs' Counsel believes that Plaintiffs have a reasonably strong liability case against Defendant. Nevertheless, Plaintiffs recognize that a finding of liability is by no means certain. In fact, Defendant denied and continues to deny that it breached Plaintiffs' and the Settlement Classes' Monthly Dues Membership Agreements, and that the Monthly Dues Membership Agreements violated any consumer protection statutes. In assessing the Settlement, the Court

[11] *See, e.g.*, *Meijer, Inc. v. 3M*, No. 04-5871, 2006 U.S. Dist. LEXIS 56744, at *46 (E.D. Pa. Aug. 14, 2006) (parties had "an adequate appreciation of the merits" of case at time settlement negotiated where: Class Counsel, *inter alia*, reviewed hundreds of thousands of pages of documents and depositions and consulted extensively with economic expert; and parties engaged in mediation, including exchange of mediation statements regarding merits of respective positions in order to inform and facilitate negotiations); *In re Cell Pathways, Inc.*, 01-CV-1l89, 2002 U.S. Dist. LEXIS 18359, at *14 (E.D. Pa. Sept. 23, 2002) (finding that Class counsel conducted adequate review where they reviewed thousands of documents and conducted interviews); *Goldsmith v. Tech. Solutions Co.*, No. 92 C 4374, 1995 U.S. Dist. LEXIS 15093, at *15 (N.D. Ill. Oct. 10, 1995) (noting that plaintiffs' counsel's endorsement of the settlement "bears particularly significant weight" where counsel reviewed thousands of pages of documents, took several depositions, and worked closely with accounting and damages experts in evaluating the claims and estimating the potential recovery).

should balance the benefits afforded the Settlement Classes, including the immediacy and certainty of a recovery against the continuing risk of establishing liability and damages through litigation. *Prudential*, 148 F.3d at 317. While Plaintiffs' Counsel believes there would be sufficient evidence to support their claims, the complexities and uncertainties of this litigation clearly warrant approval of the Settlement.

Among the risks if this litigation continued, is the possibility that the Court or jury would find that Plaintiffs' evidence does not establish that they provided LAF notice of their intention to cancel their Monthly Dues Membership Agreements, as required by such agreements. Indeed, Defendant's representatives have testified that LAF had a system in place to process all cancellation notices it received at its post office box in Irvine, California, and Defendant represented that it processed approximately 3,000 cancellations per day during the relevant period, thereby making any alleged unprocessed cancellation requests seem nominal. In light of this, a jury may not be persuaded that Plaintiffs followed proper cancellation procedures absent a certified mail receipt, or other similar documentary evidence.

Plaintiffs also face the risk that a jury would find that Defendant's Monthly Dues Membership are not misleading, but rather adequately describe the procedures for cancelling a membership and the amount of notice a customer must give to obtain the benefit of the customer's prepaid last month's dues. In such event, Plaintiffs would be unable to prove Defendant's liability for Plaintiffs' claims for violations of state consumer protection statutes. Moreover, even if a jury determined that the Monthly Dues Membership Agreements are misleading, the Court may determine that Plaintiffs are required to demonstrate reliance on the misleading language. A jury could find that Plaintiffs' failed to show such reliance.

All of these issues present hotly-contested jury questions, the resolution of which is uncertain and costly to all parties. These serious risks of continued litigation confirm that the Settlement is fair, reasonable and adequate and in the best interest of the Settlement Classes Class.

5. Risks of Establishing Damages

"Like the fourth factor, 'this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.'" *Cendant*, 264 F.3d at 238. The court looks at the potential damage award if the case were taken to trial against the benefits of immediate settlement. *Prudential*, 148 F.3d at 319.

If Plaintiffs were successful in proving liability on their claims for breach of contract and for violations of consumer protection statutes, the measure of damages for Plaintiffs would be largely formulaic based on the number of months they were charged fees after their memberships should have been cancelled (in the case of their breach of contract claims) or based on one month's membership dues (in the case of their claims for violation of consumer protection statutes). However, questions would remain as to the proper calculation of damages, including whether Plaintiffs continued to use LAF gyms after their memberships should have been cancelled, and if such gym use prohibits Plaintiffs from recovering damages, whether Plaintiffs received any refunds from LAF, whether acceptance of a partial refund constitutes a waiver of claims for additional damages, and whether Plaintiffs failed to mitigate their damages by failing to monitor their electronic billing and/or failing to make timely complaints to LAF. These issues would be magnified when trying to establish damages on a class wide basis.

The possibility that Plaintiffs could not establish a reliable measure of damages is a substantial hurdle that supports the Settlement.

6. Risks of Maintaining Class Action Status Through Trial

Because the prospects for obtaining certification "have a great impact on the range of recovery one can expect to reap from the [class] action," *see GM Trucks*, 55 F.3d at 817, the court must measure the likelihood of obtaining and maintaining a certified class if the action were to proceed to trial. *See Girsh*, 521 F.2d at 157. "Class certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2008). While this case is appropriate for class action treatment, regardless of any settlement, it is undeniable that given the Third Circuit's requisite rigorous class certification analysis, class certification for settlement purposes removes some of the hurdles upon which some courts have denied certification of a litigation class.

For example, manageability is not a concern with settlement classes. *Amchem*, 521 U.S. at 620; *Cmty. Bank*, 418 F.3d at 309. Differences in state law that often complicate the certification of a nationwide litigation class, see, e.g., *In re LifeUSA Holding*, 242 F.3d 136, 147 n.11 (3d Cir. 2001), are "irrelevant to certification of a settlement class." *Warfarin Sodium*, 391 F.3d at 529.

Moreover, "[w]hat the district court giveth, the district court may taketh away: the court may decertify or modify a class at any time during the litigation should the class prove to be unmanageable." *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 116 (E.D. Pa. 2005) (*citing In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 631 (E.D. Pa. 2004) (*citing In re School Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir. 1986)); *see also Rendler v. Gambone Bros. Dev. Co.*, 182 F.R.D. 152, 160 (E.D. Pa. 1998) (class certification is always conditional and subject to reconsideration by court).

Even if this action had been certified, there would always be the risk that the Court would reconsider or modify its decision at any time before final judgment. *See* Fed. R. Civ. P. 23(c)(l)(C); *see also In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 537 (3d Cir. 2004) ("A district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable"); *In re Ravisent Techs., Inc. Sec. Litig*., NO. 00-CV-1014, 2005 U.S. Dist. LEXIS 6680, at *31 (E.D. Pa. Apr. 19, 2005) ("[d]efendants might also seek to decertify the class prior to trial").

Although Plaintiffs believe a trial plan could have been developed to alleviate any manageability issues with respect to the proposed Class, proving damages for the members of the Settlement Classes may have required individual inquiries into, among other things, such Class Members' interactions with LAF, whether they received any refunds from LAF, and possibly their gym usage.

If a class could not be certified here, it would leave few, if any, class members with both the resources and financial incentive to pursue claims in their own behalf, with the practical result of no recovery by anyone. *See Carnegie v. Household Int'l., Inc*., 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.") (emphasis in original). The proposed Settlement provides a remedy now to all class members, rather than risking an uncertain result after years of expensive litigation. Thus, this factor weighs in favor of final approval.

7. Ability to Withstand Greater Judgment

The seventh *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *Cendant*, 264 F.3d at 240. It is likely that LAF could withstand a judgment greater than it is paying as a settlement here. However,

that does not, by itself, militate against final approval. *In Warfarin Sodium*, for example, the court stated that:

> Although the plaintiffs do not dispute that DuPont's total resources far exceed the settlement amount, the fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the consumer and TPP class members are entitled to under the theories of liability that existed at the time the settlement was reached. Here, the District Court concluded that DuPont's ability to pay a higher amount was irrelevant to determining the fairness of the settlement. We see no error here.

391 F.3d at 538; *see also GM Trucks*, 55 F.3d at 818 ("no error" in the district court's decision not to "attribute any significance" to defendant's ability to withstand a greater judgment); *In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 242 (E.D. Pa. 2009) (finding this factor neutral where the defendant, as a major corporation, could withstand greater judgment).

Here, the Settlement is a claims-made settlement and, for Class Members with the strongest proof that LAF breached their contracts (*i.e.*, those with a certified mail receipt or other similar proof of mailing a cancellation notice), LAF has agreed to pay 100% of their damages for up to one year after they gave their notice of cancellation, less any refunds already paid to such Class Members. Thus, for these Class Members, further litigation would not have resulted in a larger recovery. The remaining Class Members (those without proof that they gave notice of cancellation) face a strong possibility of being unable to prove their damages if this action proceeds.

In addition, LAF and its insurers are in a dispute about whether there is insurance coverage applicable to Plaintiffs' claims, and if so, to what extent such coverage applies. Thus, there is a risk that any judgment would not be satisfied by insurance. Accordingly, given the

circumstances, the proposed Settlement is the most the Settlement Classes could likely have received; no matter how skillfully Plaintiffs' Counsel had continued to conduct the litigation.

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

The last two *Girsh* factors are usually considered together. They ask "whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *Prudential*, 148 F.3d at 322; *see also Warfarin Sodium*, 391 F.3d at 538 (court should consider "whether the settlement represents a good value for a weak case or a poor value for a strong case"). As Judge Becker explained in *GM Trucks*, "[t]he evaluating court must ... guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." 55 F.3d at 806.

In addition, the determination of a "reasonable" settlement is not susceptible to a mathematical equation yielding a particularized sum. Rather, "in any case, there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). *See also Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 630 (E.D. Pa. 1986) (same). In assessing the Settlement, the Court should balance the benefits afforded the Settlement Classes, including the immediacy and certainty of a recovery, against the continuing risks of litigation.[12] As stated by the court in *Detroit v. Grinnell*:

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.... In fact, *there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery*.

[12] *Prudential*, 148 F.3d at 317; *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 579 (E.D. Pa. 2003) (finding immediate benefit of the settlement to class members weighed in favor of approving settlement in light of potential difficulties in proving liability plaintiff faced).

495 F.2d 448, 455 n.2 (2d Cir. 1974) (emphasis added).[13]

In light of the risks of establishing liability and damages at trial, Plaintiffs believe that this Settlement, which provides 100% cash recovery for Class Members with the strongest claims and a range of benefits for all Class Members, including up to 50% cash recovery for some Class Members, and at least a 45-Day Access Pass to LAF gyms (which is fully transferable and valued at $45) to all Class Members, falls within the range of reasonableness and is unquestionably better than the other possible alternatives – little or no recovery. Although a verdict in this case might possibly have been greater than the value of the Settlement, such verdict would still face the risk of being overturned on appeal.

The proposed Settlement gives the Settlement Classes the maximum amount available at the earliest possible time.

Thus, all of the relevant *Girsh* factors lead to the conclusion that the proposed Settlement is fair, reasonable and adequate and should be approved.

D. The Notice Program Satisfies Rule 23 and Due Process and Has Been Fully Implemented

To protect the rights of absent members of the Class, the Court must ensure that all Class Members who would be bound by a class settlement are provided the best practicable notice. *See* Fed. Rule Civ. P. 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

[13] *Accord Weinberger v. Kendrick*, 698 F.2d 61, 65 (2d Cir. 1982) (settlement which amounted to only a negligible percentage of the losses suffered by the class was affirmed); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456,463-64 (2d Cir. 1982); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992) (court approved settlement after determining that the settlement would provide "slightly more than 48 cents [per share]" out of the potential recovery of approximately $30 per share).

opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

Where a court preliminarily certifies a class and approves a proposed settlement, "proper notice must meet the requirements of [Rules] 23(c)(2)(B) and 23(e)." *In re Insurance Brokerage Antitrust Litig.*, 282 F.R.D. 92, 109 (D. N.J. 2012). Notice that is compliant with Rule 23(c)(2)(B) "must inform class members of: (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) the class member's right to retain an attorney; (5) the class member's right to exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on class members under Rule 23(c)(3)." *Id*.; Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii). Rule 23(e) notice must contain a summary of the litigation sufficient "to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 231 (D.N.J. 1997). As detailed above, the Settlement Class Members have received Notice of the Settlement in conformance with due process and Rules 23(c)(2)(B) and 23(e)(1).

The Notice Program that the Court initially and preliminarily approved on March 12, 2013, was fully implemented. The Claims Administrator sent 2,051,436 Summary Notices via email and 1,274,259 Summary Notices via U.S. mail to Class Members identified through LAF's records. *See* Jue Aff., ¶¶ 3-4. In addition, where the Claims Administrator received notice that the attempt to deliver the Summary notice via email and/or U.S. mail was unsuccessful, the Claims Administrator undertook substantial effort to identify a current U.S. mailing address and redeliver the Summary Notice. *Id.*, ¶¶ 4-5. Further, the notice and other relevant case documents and information were posted on the dedicated settlement website, www.usgymsettlement.com,

established by the Claims Administrator. *Id.*, ¶ 2. Additionally, the Settlement Website contains an electronic Claim Form to allow on-line submissions of claims as well as a Claim Form which can be downloaded, printed, and mailed to the Claims Administrator. *Id.*

This Notice Program has informed the Class Members fully of their rights and benefits under the Settlement. All required information has been fully and clearly presented to the Settlement Class Members. Accordingly, this direct email/mail notice is the best practicable notice under the circumstances, satisfying both due process and Rule 23. *See Esslinger v. HSBC Bank Nev., N.A.*, No. 10-3213, 2012 U.S. Dist. LEXIS 165773, at *18-19 (E.D. Pa. Nov. 19, 2012) (finding that email and postcard notice meet the requirements of Rule 23 and due process)*;* *Hanlon v. Palace Entm't Holdings, LLC*, 2012 U.S. Dist. LEXIS 364, at *16-17 (W.D. Pa. Jan. 3, 2012) (approving email notice to the class).

E. The Sole Objection to the Settlement is Meritless and the Court Should Deny the Objection

The sole objection to the Settlement was filed by Daniel and Warren Sibley (the "Sibleys"). The Sibleys object to the form of notice, the adequacy of Plaintiffs as Class Representatives, and to Plaintiff's Counsel's request for attorneys' fees. We address the Sibleys' objection concerning notice and adequacy here, and address the objections to Plaintiffs' Counsel's request for attorneys' fees in the Memorandum of Law in Support of Plaintiffs' Counsel's Application for an Award of Attorneys' Fees and Expenses and Incentive Payments for Plaintiffs.

Daniel Sibley did not enter into a Monthly Dues Membership Agreement with LAF and is not a member of the Class or Subclasses here, and thus lacks standing to object. Warren Sibley did not experience any monthly billing after he cancelled his membership. Upon

information and belief, the Sibleys are represented by their brother, Texas attorney Gary Sibley, who is a serial objector to class action settlements. [14]

In any event, as described below, the Sibleys' objection mischaracterizes the Settlement Benefits and notice information and procedures, and the objection should be rejected.

1. Warren Sibley's Objections to the Settlement Notice are Factually Incorrect and Meritless

With respect Warren Sibley's ("Sibley") objections to the form of notice, Sibley makes two complaints. First, Sibley asserts his email notice did not include a Claim ID number, which he alleges made it impossible for him to file a claim. While the initial email notice blast sent by the Claims Administrator on May 10, 2013 failed to include Claim ID numbers for some Class members, the Claims Administrator made a second email blast on May 11, 2013 which included Claim ID numbers for all Class members. *See* Jue Aff., ¶ 4. According to the Claims' Administrator's records, Sibley received email notices through both email blasts. *Id.*, ¶ 12. Sibley also had approximately three months to contact the Claims Administrator with any questions regarding the claims process.[15] Accordingly, Sibley's objection with respect to Claim ID numbers is meritless.[16]

Sibley's – who received notice of the Settlement – second objection to the notice process is whether the emailed notice is likely to reach a substantial portion of class. Sibley incorrectly

[14] Gary Sibley regularly objects to class action settlements. *See, e.g, In Re Nutella Marketing and Sales Practices*,3:11-cv-01086 (D.N.J.) (Gary Sibley, among other objectors, appealed the court's final settlement approval and the Court imposed an appeal bond on the objectors, noting that the "objectors have not responded in any meaningful way to the Plaintiffs' contention that the appeal is meritless."); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 637 (5th Cir. 2012) (with Gary Sibley representing an objector-appellant, the court found that "appellants' claims lack merit*."); Shabaz v. Polo Ralph Lauren Corp.*, SA CV 07-1349, (C.D.Cal.) (court approved settlement over Gary Sibley's objection); *Blessing v. Sirius XM Radio, Inc.* 1:09-cv-10035 (S.D.N.Y.) (same); *In Re Bayer Corp. Combination Aspirin Products Marketing and Sales Practices Litigation*, 1:09-md-02023 (E.D.N.Y.) (court approved settlement over Gary Sibley's, as counsel, objection); *Kardonick v. JP Morgan*, No. 10-cv-23235-WMH (S.D. Fla.) (same).

[15] The parties have also agreed to extend the deadline for acceptance of claims until August 31, 2013 to account for any confusion regarding the claims process.

[16] In addition, Plaintiffs' Counsel Michael Fantini called the Sibleys on August 14, 2013 in order to offer to assist in submitting a claim. Sibley was not available, so Mr. Fantini left a message. Sibley never returned the call.

states that, "[u]nder the current notice plan, email communications will be attempted. To reach potential class members the notice plan essentially says if you are not in Defendant's database, or have changed your e-mail accounts, not further efforts will be made." In fact, the notice plan approved by the Court, and followed by the Claims Administrator, called for email notice to Class Members for whom LAF had an email address in its records and mailed notice to Class Members for whom LAF did not have an email address, but for whom LAF had a mailing address.

Pursuant to this plan, the Claim Administrator initially distributed 3,325,695 notices. *See* Jue Aff., ¶¶ 4-5. As a result of the initial distribution, the Claims Administrator received 512,478 emails returned as undeliverable and subsequently mailed notice to those Class Members via U.S. Mail. *Id.*, ¶ 4. Notices sent to 350,892 Class Members via US Mail were returned undeliverable, and the Claims Administrator, using a third party locator service, performed address searches for these Class Members. *Id.*, ¶ 5. Thereafter, the Claims Administrator mailed notice to 227,374 Class Members' updated addresses. *Id.* Accordingly, not only is Sibley's objection to the notice plan factually inaccurate, but the facts show that the Parties, through the Claims administrator, undertook significant efforts to ensure the Class received notice of this Settlement and delivered notice to a very high percentage of the Class.

2. Sibley's Objections to the Class Representatives is Factually Inaccurate and Meritless

Sibley incorrectly states that he was not told into which class the Plaintiffs fall. However, the complaints in this action were posted on the settlement website by the Claims Administrator. The complaints provide detailed descriptions of each Plaintiffs' experience with LAF. To the extent Sibley is attempting to assert that the Plaintiffs' interests were dissimilar from Class Members who would only be entitled to receive Access Passes under the Settlement,

Sibley is incorrect. Three of the Plaintiffs submitted claims for cash payments and three Plaintiffs submitted claims to receive Access Passes.

Sibley is also incorrect that the Settlement compels a Class Members receiving only LAF Access Passes to continue a relationship with LAF. As stated in the Notice, the LAF Access Passes are fully transferrable.[17] Thus, if a claimant does not wish to use an LAF club, he is free to transfer the pass to others. In addition, it should be noted that Sibley's objection is the only complaint made about the Access Passes, whereas 22,306 Class Members have submitted claims to receive Access Passes through the Settlement. *See* Jue Aff., ¶ 10.

As described above, the Settlement provides substantial benefits to the Class with relief allocated based on the strength of the Class Members' claims. As a result, the court should deny the Sibleys' meritless objections.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant the relief requested herein.

Dated: August 22, 2013

BERGER AND MONTAGUE, P.C.

By */s/ Eric Lechtzin*

Sherrie R. Savett
Michael T. Fantini
Eric Lechtzin
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875 4604

Counsel for Plaintiffs and the Proposed Class

[17] Sibley also complains that the size of the Class is not estimated. Plaintiffs are unable to discern how this is relevant to their adequacy as Class Representatives. Moreover, this objection ignores the fact that this is a claims-made settlement, for which benefits are not capped or diminished by the size of the class or the number of claims made.