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| DOCKET NO.: FST-CV21-6054676-S | : | SUPERIOR COURT |
| SARAH KENT, and ALISON PACTONG, individually and on behalf of all other similarly situated, | : | JUDICIAL DISTRICT OF |
| Plaintiff, | : | STAMFORD/NORWALK |
| VS. | : | AT STAMFORD |
| WOMEN'S HEALTH USA, INC., IN VITRO SCIENCES, LLC, CENTER FOR ADVANCED REPRODUCTIVE SERVICES, P.C., and REPRODUCTIVE MEDICINE ASSOCIATES OF CONNECTICUT, P.C., | : | |
| Defendants. | : | OCTOBER 17, 2022 |

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPPOSED MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND PROPOSED PLAN OF DISTRIBUTION OF SETTLEMENT FUND**

## INTRODUCTION

Plaintiffs Sarah Kent and Alison Pactong ("Plaintiffs"), on behalf of a Settlement Class of natural persons that paid for assisted reproductive technology ("ART") services from Center for Advanced Reproductive Services, P.C. ("CARS"), and Reproductive Medicine Associates of Connecticut, P.C. ("RMACT") between January 1, 2004 and July 19, 2022, have reached a settlement with CARS, RMACT, In Vitro Sciences, LLC ("IVS") and Women's Health USA, Inc. ("WHUSA") (collectively, "Defendants"). Under the terms of the proposed settlement, Defendants will make a non-reversionary payment of $2,850,000 ("Settlement Fund") to the Settlement Class. In addition to seeking final approval of the settlement, Plaintiffs seek authorization by the Court to distribute the Settlement Fund to members of the Settlement Class ("Class Members").

For the reasons set forth herein, Plaintiffs respectfully submit that the proposed settlement is fair, reasonable, and adequate, and should be approved by the Court. Settlement Class Counsel also

request that the Court approve the plan for distribution of the Settlement Fund. Proposed Orders and Final Judgments agreed to by Plaintiffs and the Defendants, and a proposed order approving the proposed plan for distribution, will be submitted to the Court prior to the Fairness Hearing.

## I. BACKGROUND

Plaintiffs allege that Defendants engaged in an anticompetitive scheme from 2004 to 2021, which resulted in them and all other Class Members paying artificially inflated prices for ART services. In particular, Plaintiffs allege that Defendant IVS jointly negotiated reimbursement rates that both Defendants CARS and RMACT would receive from insurance companies for the ART services they offered, thus ensuring the two otherwise-competitors would not compete on price and other competitively significant terms. As a direct result, Plaintiffs allege that they and all other Class Members paid more for ART services in Connecticut than they would have paid in a competitive market. Defendants deny the allegations and maintain that they have agreed to settle this action to avoid the burden and expense of prolonged litigation.

On May 27, 2022, Plaintiffs reached a settlement with the Defendants to resolve their claims for $2,850,000.[1] On July 19, 2022, the Court entered an order ("Preliminary Approval and Notice Order"): (1) preliminarily approving the settlement; (2) certifying the proposed Settlement Class; (3) appointing Plaintiffs as Class Representatives and their counsel as Settlement Class Counsel; (4) approving the form and manner of the notice plan and authorizing notice to the proposed Settlement Class; (5) directing Defendants to provide the Settlement Administrator with the requisite information to effectuate class notice; and (6) scheduling a Fairness Hearing to consider final approval of the settlement and setting various related deadlines. (*See* Order Granting

[1] *See* Settlement Agreement, which was attached as Exhibit A to the Memorandum in Support of Motion for Preliminary Approval (Docket Entry 116.00).

Plaintiffs' Motion for Preliminary Approval of Proposed Settlement, Certification of a Settlement Class, and Approval of Notice Plan (Docket Entry 117.02).)

Pursuant to the Preliminary Approval and Notice Order, on September 2, 2022, 19,063 copies of the Summary Notice of Proposed Settlement and Hearing on Settlement Approval and Related Matters (the "Summary Notice") were mailed, postage prepaid, to all potential members of the proposed Settlement Class. Further, the Summary Notice directed recipients to the settlement website to obtain additional information, including the full Notice.[2]

The deadline for submission of objections to the proposed settlements, the proposed plan of distribution, the requests for an award of attorneys' fees, litigation costs and expenses and service awards to the Class Representatives, and for requests for exclusion from the Settlement Classes, is November 16, 2022. To date, there has been only one request for exclusion and there have been no objections. (*See* Affidavit of Jonathan M. Jagher in Support of Plaintiffs' Unopposed Motion for Final Approval of Proposed Settlement and Proposed Plan of Distribution of Settlement Fund and Plaintiffs' Motion for Award of Attorneys' Fees, Costs and Expenses and for Class Representative Service Awards ("Jagher Aff.") at ¶15.) Prior to the Fairness Hearing, Settlement Class Counsel will file with the Court a reply brief in support of final approval, which will include a report on any objections and opt-outs, after the applicable deadlines have passed.

## II. TERMS OF THE SETTLEMENT AGREEMENT

The Settlement Agreement contains the following key terms and provisions.

### A. Settlement Class Definition

The Court certified for settlement purposes only, the following Settlement Class: "All natural persons that purchased or paid for, in whole or in part, assisted reproductive technology

[2] The Summary Notice and Notice are attached hereto as Exhibits A and B, respectively.

("ART") services from Center for Advanced Reproductive Services, P.C. ("CARS") or Reproductive Medicine Associates of Connecticut P.C. ("RMACT") from January 1, 2004 through [July 19, 2022]. Specifically excluded from this Settlement Class are Defendants' officers, directors, and employees; all counsel of record; and the Court, Court personnel, and members of their immediate families." (*See* Order Granting Plaintiffs' Motion for Preliminary Approval of Proposed Settlement, Certification of a Settlement Class, and Approval of Notice Plan (Docket Entry 117.02) at ¶1.)

**B. Monetary Relief**

Defendants agreed to pay $2,850,000 to the Settlement Class to resolve Plaintiffs' claims.

**C. Release**

In exchange for the settlement payment, the settlement provides that Releasees (*i.e.*, Defendants) "shall be completely released, acquitted, and forever discharged from any and all claims, demands, actions, suits, causes of action under any federal, state or local law of any jurisdiction in the United States, that Releasors [members of the proposed Settlement Class], or each of them, ever had, now has, or hereafter can, shall, or may ever have, that now exist or may exist in the future arising out of any conduct alleged in the Class Action Complaint or any act or omission of the Releasees (or any of them), concerning Defendants' alleged participation in a conspiracy to artificially raise, fix, maintain, or stabilize prices for ART services and/or to allocate geographic markets for ART services in Connecticut from January 1, 2004 through [July 19, 2022]."

**D. Attorneys' Fees, Costs, and Service Awards**

Settlement Class Counsel will submit a separate motion for attorneys' fees and costs, and service awards for the Class Representatives. Settlement Class Counsel will not seek a fee of more

than one-third of the Settlement Fund and that the requested service awards shall not exceed $10,000 per Class Representative.

Plaintiffs believe that the proposed settlement is fair, reasonable, and adequate to the Settlement Class. The Settlement Agreement was executed only after extensive arm's-length negotiations between experienced and sophisticated counsel. It is the result of good faith negotiations, after factual investigation and legal analysis by experienced counsel and is based on the attorneys' full understanding of the strengths and weaknesses of their respective positions. Plaintiffs respectfully submit that the proposed settlement merits final approval.

## III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

### A. The Governing Standards

Class actions may not be settled, compromised, or dismissed without court approval. Practice Book § 9-9(c)(1). The standard for obtaining court approval is that the settlement must be "fair, reasonable, and adequate" (*id*. at § 9-9(c)(1)(C)), which is identical to the standard found in Rule 23(e)(2) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23(e)(2) (approval of a proposed class action settlement requires a "finding that it is fair, reasonable, and adequate"). Because most of the sections of Connecticut's Practice Book relating to class actions are patterned after Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"), Connecticut courts look to Rule 23 and federal case law interpreting it for guidance in deciding class-related issues. *See Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 322-23, 880 A.2d 106, 114 (2005) ("Because our class certification requirements are similar to those embodied in [R]ule 23 of the Federal Rules of Civil Procedure, and our jurisprudence governing class actions is relatively undeveloped, we look to federal case law for guidance in construing the provisions of Practice Book §§ 9-78 and 9-8"); *Rivera v. Veterans Mem'l Med. Ctr.*, 262 Conn. 730, 737, 818 A.2d 731, 736 (2003) ("We note at

the outset that our class action jurisprudence is sparse … Our class action requirements, however, are similar to those applied in the federal courts. … Thus, we look to federal case law for guidance in construing our class certification requirements").

Courts have broad discretion in deciding whether to approve a class action settlement. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 273 (2d Cir. 2006). In exercising this discretion, courts give considerable weight and deference to the views of experienced counsel as to the merits of an arm's-length settlement. *In re CitiGroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013); *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000) (settlements based on arm's-length negotiations conducted by experienced counsel knowledgeable in complex class litigation enjoy a presumption of fairness); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Wal-Mart"*). Moreover, such determinations should be made in light of the "strong judicial policy in favor of settlements, particularly in the class action context," *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998), and will only be disturbed "when there is a clear showing that the District Court abused its discretion." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). *See also* 4 *Newberg on Class Actions* § 11.41 (4th ed. 2002) (collecting cases establishing that federal courts favor settlement of class action litigation).

Recognizing that a class action settlement represents an exercise of judgment by the negotiating parties, courts have consistently held that a judge "should neither substitute [his or her] judgment for that of the parties who negotiated the settlement, nor conduct a mini-trial on the merits of the action." *Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8331 (CM)(MHD), 11 Civ. 7961 (CM), 2014 WL 1224666, at *7 (Mar. 24, 2014 S.D.N.Y.) Due to the uncertainties and risks inherent in any litigation, courts take a common-sense approach and approve class action

settlements if they fall within a "range of reasonableness." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); see also *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 324 (3d Cir. 2011) (class action settlement "is a compromise, a yielding of the highest hopes in exchange for certainty and resolution") (quoting *In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig*, 55 F.3d 768, 806 (3d Cir. 1995).

**B. The Proposed Settlements are Fair, Reasonable, and Adequate**

Fed. R. Civ. P. 23(e)(2) provides that a court may approve a settlement that would bind class members only after a hearing and on finding that the settlement is "fair, reasonable, and adequate." *Accord In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 27 (E.D.N.Y. 2019) ("*Payment Card Litig.*"). The 2018 amendments to Rule 23(e) set forth a list of factors for a court to consider before approving a proposed settlement. The factors are whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Historically, courts in the Second Circuit have considered factors comparable to those in Rule 23(e)(2) in determining whether a settlement should be approved. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) ('*Grinnell'*), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). The *Grinnell* factors are:

> (l) 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.

*Grinnell*, 495 F.2d at 463 (citations omitted). Not every factor must weigh in favor of settlement, "rather the court should consider the totality of these factors in light of the particular circumstances." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) (citations and internal quotations omitted). As discussed below, consideration of the Rule 23(e)(2) and *Grinnell* factors confirms the Settlements are fair, reasonable, and adequate, and warrant final approval.

### 1. The Rule 23(e)(2) and Overlapping *Grinnell* Factors Support Final Approval of the Settlement

#### a. The Class Representatives and Settlement Class Counsel Have Adequately Represented the Settlement Classes and the Settlements Were Reached at Arm's Length

The first two factors of Rule 23(e)(2) (*i.e.*, sub-sections (A) and (B)) — adequate representation by the class representatives and class counsel and whether the settlements were reached at arm's length — focus on the conduct of the litigation and settlement negotiations. Relevant considerations may include the experience and expertise of plaintiffs' counsel, the quantum of information available to counsel negotiating the settlements, the stage of the litigation and amount of discovery taken, the pendency of other litigation concerning the subject matter, the

length of the negotiations, whether a mediator or other neutral facilitator was used, the manner of negotiation, whether attorney's fees were negotiated with defendants and, if so, how they were negotiated and their amount, and other factors that may demonstrate the fairness of the negotiations. *See* Fed. R. Civ. P. 23 Advisory Committee Note.

Under any of the factors to be considered, Plaintiffs and Settlement Class Counsel have adequately represented the proposed Settlement Class regarding the settlement and the litigation in general. Plaintiffs' interests are the same as all other Class Members, and Settlement Class Counsel are experienced litigators with significant experience in prosecuting and resolving complex, multi-defendant, antitrust cases, both in Connecticut and throughout the United States.[3] This expertise was demonstrated by the comprehensive legal and factual investigation of the claims in this case, which led to the initiation of the litigation and, ultimately, a favorable settlement.

Moreover, the negotiations that led to the settlement here were conducted at arm's length and took months to complete. It is well-settled that such a settlement is afforded an initial presumption of fairness. *See Springer v. Code Rebel Corp.*, Case No. 16-cv-3492, 2018 WL 1773137, at *3 (S.D.N.Y. April 10, 2018) (settlement entitled to presumption of being fair, reasonable, and adequate because it was negotiated at arm's length by experienced counsel); see also *Wal-Mart*, 396 F.3d at 116 (settlements reached by experienced counsel that result from arm's-length negotiations are entitled to deference from the court); *Dick v. Sprint Commc'ns*, 297 F.R.D. 283, 296 (W.D. Ky. 2014) ("Giving substantial weight to the recommendations of experienced attorneys, who have engaged in arms-length settlement negotiations, is appropriate....") (quotations omitted).

[3] *See* Firm Resumes of Freed Kanner London & Millen LLC and Aeton Law Partners, attached as Exhibit A to the Jagher Affidavit.

Although there has been no formal discovery in this action, Settlement Class Counsel demanded and received confidential information from Defendants regarding the volume of affected commerce and other aggregated data relevant to determining the estimated overcharge to the Settlement Class.[4] Based on this information, and their initial investigation, Settlement Class Counsel believe that the proposed settlement is fair, reasonable, and in the best interests of the Settlement Class. *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) (quoting *PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (great weight accorded to recommendations of counsel most knowledgeable about facts of the case); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008).

Because the proposed settlement was negotiated at arm's length by experienced counsel knowledgeable about the facts and the law, consideration of these factors fully supports final approval of the settlements.[5]

**b. The Relief Provided to the Settlement Class is Adequate**

The courts in the Second Circuit recognize that the law favors settlement of class action lawsuits. *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d at 138 (2d Cir. 1998). Generally, in evaluating a proposed class action settlement, the court does "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). There

[4] While that presumption is arguably stronger where the settlement is reached after discovery is completed, a lack of formal discovery does not preclude approval of a settlement. *Springer*, 2018 WL 1773137, *4 (finding settlement fair, reasonable, and adequate for purposes of final approval despite lack of formal discovery because of thorough investigation and research before complaint filed), *citing Plummer v. Chem. Bank*, 668 F.2d654, 660 (2d Cir. 1982). *See also In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 350 (N.D. Ill. 2010) approving class settlement negotiated prior to formal discovery where counsel conducted a significant amount of informal discovery).

[5] There was no negotiation of attorneys' fees. As noted above, a separate motion seeking an award of attorneys' fees and costs, and service awards will be filed.

are two reasons for this. First, the object of settlement is to avoid the determination of contested issues, so the approval process should not be converted into an abbreviated trial on the merits. Second, "[b]eing a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement." *In re Telectronics Pacing Sys. Inc.*, 137 F. Supp. 2d 985, 1008-09 (S.D. Ohio 2001) (citing *Manual for Complex Litig.* (Third) § 30.42). *See also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014) ("With respect to the settlement process, a class action settlement enjoys a strong 'presumption of fairness' where it is the product of arm's-length negotiations concluded by experienced, capable counsel after meaningful discovery.") (quoting *Wal-Mart,* 396 F.3d at 116). This is particularly true in the case of class actions. *Wal-Mart,* 396 F.3d at 116.

Defendants have agreed to pay the Settlement Class $2,850,000 to resolve the lawsuit. To determine whether this constitutes adequate relief for the proposed Settlement Class under Rule 23(e)(2)(C), the Court is directed to consider: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C).

**i. The costs, risks, and delay of trial and appeal**

Rule 23(e)(2)(C)(i) requires the Court to consider the "costs, risks, and delay of trial and appeal." This factor essentially subsumes the first (complexity, expense, and likely duration of litigation), fourth (risks of establishing liability), fifth (risks of establishing damages), and sixth (risks of maintaining class through trial) *Grinnell* factors. *Payment Card Litig.*, 330 F.R.D. at 36.

Settlement Class Counsel believe that the settlement is an excellent result. Weighing the settlements' benefits against the risks and costs of continued litigation tilts the scale toward approval. Plaintiffs are optimistic about the likelihood of ultimate success in this case, but success is not certain. Defendants are represented by highly experienced and competent counsel. They deny Plaintiffs' allegations of liability and damages and would vigorously oppose Plaintiffs' motions for class certification and assert numerous defenses. Plaintiffs believe the Defendants are prepared to defend this case through trial and appeal. Risk is inherent in any litigation, and this is particularly true with respect to class actions. So, while optimistic about the outcome of this litigation, Plaintiffs must acknowledge the risk that any or all Defendants could prevail with respect to certain legal or factual issues, which could reduce or eliminate any potential recovery. *Sullivan,* 667 F.3d at 324 (settlement represents a compromise that takes into account risks, expense and delay of further litigation); *Telectronics,* 137 F. Supp. 2d at 1013 (settlement avoids costs, delays, and multitude of other problems associated with complex class actions).

As the proposed settlement with the Defendants has not yet been finally approved, it is not appropriate to discuss with any specificity Settlement Class Counsel's analysis of the risks of litigation as Defendants could seek to use any such disclosures against Plaintiffs if the proposed settlement is not approved. Settlement Class Counsel believe that at this point it is sufficient to state that complex antitrust litigation of this scope has certain inherent risks that the settlement negates. Antitrust class actions have a well-deserved reputation for being "notoriously complex, protracted, and bitterly fought." *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989); *see also Wal-Mart*, 396 F.3d at 122 (2d Cir. 2005) ("[A]ntitrust cases, by their nature, are highly complex"); *Virgin Atl. Airways Ltd. v. Brit. Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2001) (noting "factual complexities of antitrust cases"). While Plaintiffs and their counsel

were and remain confident in their ability to successfully prosecute this case, the legal and factual issues are admittedly complex, and Defendants are represented by skilled and experienced counsel. Thus, even if this case resulted in a future recovery for the Settlement Class, it likely would follow a prolonged, hard-fought battle involving motions to dismiss, extensive fact and expert discovery, class certification, summary judgment motions, motions for reconsideration, and appeals, whereas approval of the proposed settlement will result in immediate, certain, and meaningful relief. *See Cardiology Assocs., P.C., Pension Plan Trust v. Nat'l Intergroup, Inc.*, 1987 WL 7030, at *3 (S.D.N.Y. Feb. 13, 1987) (if matter is fully litigated and appealed, any recovery would be years away). All the above factors support final approval of the proposed settlement.

**ii. The effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims, if required.**

Rule 23(e)(2)(C)(ii) requires courts to look at the proposed method of processing class member claims.[6] This case does not present any difficulties in identifying claimants or distributing settlement proceeds. Settlement Class Counsel presently intend to propose that the net settlement funds be distributed *pro rata* to approved claimants. Claims will be processed using a settlement claims administrator to review claim forms, to assist Settlement Class Counsel in making recommendations to the Court concerning the disposition of those claims, and to distribute approved claimants' pro-rata shares of the net settlement funds.

Generally, a plan of allocation that reimburses class members based on the type and extent of their injuries is a reasonable one. *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *Smith v. MCI Telecoms Corp.*, No. Civ. A. 87-2110-EEO, 1993 WL 142006, at *2 (D. Kan. April 28, 1993); 4 *Newberg on Class Actions*, § 12.35, at 350 (4th ed. 2002) (pro-

[6] There is no equivalent *Grinnell* factor.

rata allocation of a settlement fund is most common type of apportionment of class action settlement proceeds and "has been accepted and used in allocating and distributing settlement proceeds in many antitrust class actions"). This factor supports final approval.

**iii. The terms of any proposed award of attorneys' fees, including timing of payment.**

The notice sent out to potential Class Members disclosed that Settlement Class Counsel would be seeking an award of fees up to one-third of the Settlement Fund. As set forth more specifically in the fee and expense application, the fees sought by Settlement Class Counsel are reasonable, and are consistent with fee awards in the Second Circuit. Further, the Settlement Agreement provides that attorneys' fees shall be paid solely out of the Settlement Fund, subject to court approval, and that final approval of the settlement is not contingent on the outcome of any petition for attorneys' fees. Thus, this factor supports final approval.

**iv. There Are No Separate Agreements Relating to the Proposed Settlement**

The Settlement Agreement reflects all the agreements and understandings relating to the proposed settlement, and there is no separate agreement that would affect the settlement amount, the eligibility of class members to participate in the settlement or exclude themselves from it, or the treatment of class member claims. This factor is therefore neutral.

**c. The Settlement Treats Class Members Equitably Relative to Each Other**

The proposed settlement treats all Settlement Class members equitably by providing each of them with an opportunity to receive a pro-rata distribution from the Net Settlement Fund based on the amounts they actually paid for ART services from Defendants during the proposed class period. *See Perks v. Activehours, Inc.*, No. 5:19-CV-05543-BLF, 2021 WL 1146038, at *6 (N.D. Cal. Mar. 25, 2021) (finding pro rata distributions inherently equitable because they treat class

members fairly based on amount of potential damages); *Phillips v. Caliber Home Loans, Inc.*, No. 19-CV-2711 (WMW/LIB), 2022 WL 832085, at *4 (D. Minn. Mar. 21, 2022) (pro rata distribution based on amount of fees paid fair and equitable); *In re Merrill Lynch Tyco Research. Sec. Litig.*, 249 F.R.D. 124, 135 (S.D.N.Y. 2008) ("A plan of allocation that calls for the pro rata distribution of settlement proceeds on the basis of investment loss is presumptively reasonable"). Further, each Settlement Class member has the same right to object or to opt out; and each Settlement Class member gives the same release.

The Settlement Agreement contemplates that Settlement Class Counsel may seek a service award for the Class Representatives. Such awards are justified as an incentive and reward for the efforts that lead plaintiffs take on behalf of the class. *See Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 131-32 (awarding service awards to class representatives); *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016) ("[c]lass representatives may receive an incentive award in addition to their allocable share of the ultimate recovery"). Further, the Notice disclosed that Settlement Class Counsel may seek up to $10,000 as service awards for each of the Class Representatives. (*See* Exhibit B at pg. 5.) Notably, the settlement was provided to the Class Representatives for their review and approval without any discussion of a service award, which evinces that the prospect of such an award was not the reason they approved the settlement. *Hillson v. Kelly Servs. Inc.*, 2017 WL 279814, at *6 (E.D. Mich. 2017). Plaintiffs submit that this factor supports final approval.

**2. The Remaining, Non-Overlapping *Grinnell* Factors Support Final Approval**

Consideration of the remaining *Grinnell* factors that do not overlap with Rule 23(e)(2) support final approval as well.

**a. The Reaction of the Settlement Class to the Settlement**

As described more specifically below, the Summary Notice was mailed to putative Class Members, and the Summary Notice directed recipients to obtain the Notice on the settlement website. (*See* Exhibit A, attached hereto.) The various forms of notice, which were prepared with the help of a leading expert in the form and content of notice, explain in clear and concise language, the legal options, and monetary benefits available to Class Members under the settlement. (*See* Declaration of Cameron R. Azari, Esq. on Notice Plan and Notices, which was attached to the Memorandum in Support of Motion for Preliminary Approval (Docket Entry 116.00), at ¶27.) While the deadline set by this Court for Class Members to object to or exclude themselves from the Settlement Class has not yet passed, to date, only one Class Member has requested exclusion and no Class Members have objected. (Jagher Aff. ¶ 15.) This is a significant factor weighing in favor of final approval. *See*, *e.g.*, *In re Bear Stearns Companies, Inc. Secs., Derivative, and ERISA Litig.*, 909 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2012); *Wal-Mart*, 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.").

**b. The Stage of the Proceedings**

While there has been no formal discovery in this action, Plaintiffs and Settlement Class Counsel "have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). The facts underlying this action first came to light as the result of an investigation by the Connecticut Attorney General. Settlement Class Counsel did their own investigation, conducted extensive factual and legal research, and filed the initial complaint after that investigation. Thereafter, the parties had a series of hard-fought settlement negotiations. In connection with those negotiations, Settlement Class Counsel

demanded and received confidential information from Defendants regarding the affected commerce and other considerations relevant to determining the estimated overcharge to the Settlement Class. Based on this information, and their initial investigation, Settlement Class Counsel believe that the proposed settlement is fair, reasonable, and in the best interests of the Settlement Class. *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) (quoting *PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (great weight accorded to recommendations of counsel most knowledgeable about facts of the case); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008). Accordingly, this factor favors final approval.

**c. The Ability of Defendants to Withstand a Greater Judgment**

While it is possible that Defendant could withstand a greater judgment, that is not a sufficient reason to decline granting final approval of the Settlements. *IMAX Sec. Litig.*, 283 F.R.D. at 191 ("[T]his factor, standing alone, is not sufficient to preclude a finding of substantive fairness where the other factors weigh heavily in favor of approving a settlement."). This is especially true where, as here, the settlement resulted from vigorous, arm's-length negotiations between highly skilled and experienced counsel and the attendant risks of continued litigation could lead to Plaintiffs and the Settlement Class receiving no compensation at all.

**d. Reasonableness of the Settlement in Light of Best Possible Recovery and Attendant Risks of Litigation**

The last two *Grinnell* factors consider "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart*, 396 F.3d at 119 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). In applying these factors, "[t]he adequacy of the amount achieved in settlement may not

be judged in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *IMAX Sec. Litig.*, 283 F.R.D. at 192 (quoting *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011)); *see also NASDAQ III*, 187 F.R.D. at 478 (exact amount of damages need not be determined for settlement approval). Thus, "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." *Grinnell*, 495 F.2d at 455 n.2, *see also IMAX Sec. Litig.*, 283 F.R.D. at 191 ("[T]he Second Circuit 'has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought.'" (quoting *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989))).

As discussed above, continuing this litigation against the Defendants would entail a prolonged, hard-fought battle involving motions to dismiss, extensive fact and expert discovery, class certification, summary judgment motions, motions for reconsideration, and appeals. While Plaintiffs remain confident about their case, a successful outcome is not guaranteed. The proposed settlement, however, provides certain and substantial relief in the form of a $2,850,000 cash payment to the Settlement Class, which negates any of the risks of continued litigation. *See In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d at 270 ("[T]he propriety of a given settlement amount is a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery (or reduced recovery)."). Thus, this factor supports final approval.

In sum, consideration of the Rule 23(e) and relevant *Grinnell* factors weigh strongly in favor of this Court granting final approval to the proposed settlement.

## IV. The Court Should Certify the Settlement Class

Sections 9-7 and 9-8 of the Practice Book set forth a two-step process for determining whether to certify a class. First, courts must determine whether four prerequisites are satisfied: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See* Practice Book § 9-7; *Collins*, 275 Conn. at 309, 880 A.2d at 114. If the first step is satisfied, courts must determine whether the requirements of Section 9-8 of the Practice Book – predominance and superiority – are satisfied. The foregoing requirements are like those embodied in Rule 23 of the Federal Rules of Civil Procedure. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). When certification of a settlement class is sought, "courts must take a liberal rather than restrictive approach." *Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. 153, 157-58 (E.D.N.Y. 2009). For the reasons set forth below, the proposed Settlement Class satisfies the requirements for certification of a settlement class.

### A. Plaintiffs Satisfy the Requirements of Practice Book § 9-7

#### 1. The Proposed Settlement Class is Sufficiently Numerous

There is no strict numerical test to satisfy the numerosity requirement, but Connecticut courts have certified classes with as few as eighty-one members, *Arduini v. Automobile Ins. Co. of Hartford*, 23 Conn. App. 585, 590 (1990), and numerosity is presumed in the Second Circuit where a class consists of 40 or more members. *See generally Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 90 (S.D.N.Y. 2009). Numerosity is easily met here as there are approximately 15,000 Class Members.

#### 2. There are Common Questions of Law and Fact

"The commonality requirement is met if the plaintiffs' grievances share a common question of law or fact. …whose resolution will affect all or a significant number of the putative class members." *Collins*, 275 Conn. at 323-24 (noting commonality threshold is not high). There

need only be a single question common to the class. *Id*. at 323; (accord *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137-38 (2d Cir. 2015) (quoting *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014)) (commonality met where same conduct by defendant gives rise to same kind of claims from all class members). Here, whether Defendants artificially inflated prices for ART services is an issue that is common to the claims of Plaintiffs and all other Class Members. Thus, the commonality requirement is met.

**3. Plaintiffs' Claims are Typical of the Claims of the Settlement Class**

"Typicality" is satisfied when each class member's claim arises from the same course of events, and each class member makes similar arguments to prove the defendant's liability. *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007) (citation and internal quotations omitted). The purpose of this requirement is to ensure that the class representatives' interests are aligned with those of the class. *Standard Petroleum Co. v. Faugno Acquisition, LLC*, 330 Conn. 40, 55 (2018). Notably, the "mere existence" of some individualized factual issues involving the class representatives' claim does not defeat typicality. *Id*. The typicality requirement is satisfied here because the same factual and legal elements are central to the claims of Plaintiffs and the Settlement Class. Plaintiffs, like all Class Members, paid artificially inflated prices for ART services from the Defendants.

**4. Plaintiffs Will Fairly and Adequately Protect the Interests of the Settlement Class**

The adequacy requirement is aimed at ensuring vigorous prosecution with no conflicts of interest. *See Collins*, 275 Conn. at 326 (adequacy requirement satisfied by demonstrating class representatives have common interests with unnamed class members and will vigorously prosecute matter through qualified counsel); *Atwood v. Intercept Pharms., Inc.*, 299 F.R.D. 414, 416-17 (S.D.N.Y. 2014) (quoting *Casper v. Song Jinan*, No. 12 Civ. 4202 (NRB), 2012 WL 3865267, at

*2 (S.D.N.Y 2012)) (adequacy requirement satisfied where there is no conflict between lead plaintiff and class members, lead plaintiff has sufficient interest in case to ensure vigorous advocacy, class counsel is qualified, experienced, and able to conduct litigation).

Here, Plaintiffs' interests are aligned with the other Class Members; there are no conflicts of interest. Moreover, as reflected by the meaningful relief provided by the proposed settlement, Plaintiffs, through Settlement Class Counsel, have vigorously pursued their claims. Regarding the adequacy of counsel, Settlement Class Counsel are experienced antitrust litigators with significant experience in prosecuting and resolving these types of cases. The adequacy of representation requirement is satisfied.

### B. Plaintiffs Satisfy the Requirements of Practice Book § 9-8

Practice Book section 9-8 provides that a court should certify a class if it "finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Practice Book § 9-8(3). Plaintiffs satisfy each of these requirements.

#### 1. Common Questions of Law or Fact Predominate

The predominance inquiry examines "whether the economies of class action certification can be achieved . . . without sacrificing procedural fairness or bringing about other undesirable results." *Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.*, 287 Conn. 208, 215 (2008). "Class-wide issues predominate if resolution of some of the legal or factual questions that qualify *each class member's case* as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."

*Standard Petroleum*, 330 Conn. at 60 (emphasis added) (quoting *Artie's Auto Body*, 287 Conn. at 215).

Predominance is a "comparative standard" that requires courts to "weigh the common issues that are subject to generalized proof against the issues requiring individualized proof in order to determine which predominate." *Standard Petroleum*, 330 Conn. at 61 (emphasis added) (quoting *Artie's Auto Body*, 287 Conn. at 216-17). To determine if common questions of law or fact predominate, courts should engage in a three-part inquiry.

> First, the court should review the elements of the causes of action that the plaintiffs seek to assert on behalf of the putative class …Second, the court should determine whether generalized evidence could be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to monetary or injunctive relief…Third, the court should weigh the common issues that are subject to generalized proof against the issues requiring proof in order to determine which predominate….

*Standard Petroleum*, 330 Conn. at 61 (quoting *Artie's Auto Body*, 287 Conn. at 217).

This case satisfies the predominance requirement. Plaintiffs allege a cause of action for violations of the Connecticut Antitrust Act, Conn. Gen. Stat. §§ 35-26 and 35-28, all arising out of the claim that Defendants artificially raised, fixed, maintained, or stabilized prices for ART services and allocated the geographic markets for ART services in Connecticut. Common issues may also predominate "when liability can be determined on a class-wide basis, even when there are some individualized damages issues."[7] *Macedonia Church v. Lancaster Hotel Ltd. P'Ship*, 270 F.R.D. 107, 121 (D. Conn. 2010). Plaintiffs "need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis." *Collins*, 275 Conn. at 330-

[7] Notably, through their proposed *pro rata* distribution, Plaintiffs have established a plan that addresses any differences in damages between Class Members. (*See* Exhibit A at pg. 1; Exhibit B at pgs 1, 4.)

31 (internal quotation marks omitted). Here, the claim would only require generalized evidence and common proof because Class Members did not individually negotiate with Defendants for the price of the ART services. The common questions of law at issue in the claims predominate over any other issue affecting individual members of the putative class.

**2. A Class Action is Superior to Other Methods of Adjudication**

There are several factors relevant to evaluating the superiority of a class action under section 9-8, including: (A) the class members' interests in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by a member of the class; (C) the desirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. *See* Practice Book § 9-8(3). The predominance and superiority requirements are intertwined; "If the predominance requirement is satisfied, courts will generally find that the class action is a superior mechanism even if it present[s] management difficulties." *Standard Petroleum*, 330 Conn. at 74 (internal quotations and citations omitted).

A class action is superior where class-wide litigation of common issues will reduce litigation costs and promote judicial efficiency. *See*, *e.g.*, *Grimes v. Housing Authority of the City of New Haven*, 242 Conn. 236, 244 (1997) (recognizing in certain situations class actions are superior to individual lawsuits because they "(1) promote judicial economy and efficiency; (2) protect defendants form inconsistent obligations; (3) protect the interests of absentee parties; and (4) provide access to judicial relief for small claimants"). Consideration of the factors enumerated in section 9-8(3)(A-D) confirms that a class action is the superior method for the fair and efficient adjudication of this case.

First, the damages suffered by each Class Member may not justify the cost of individual litigation, and the interests of any Class Member who may want to individually control the litigation should be given little weight. The benefits of aggregating the claims of the entire Settlement Class are therefore compelling, and clearly outweigh any speculative interests of individual Class Members in controlling the prosecution of separate actions.

Second, Settlement Class Counsel are not aware of any pending litigation in which the claims and damages at issue are being separately pursued.

Third, the desirability of concentrating the litigation of the claims in this forum also weighs in favor of certifying the Settlement Class. Given the common questions going to the heart of the claims, the benefit of a single forum is clear, and there are no countervailing considerations that weigh against adjudication of this action in this forum. Accordingly, this factor favors a finding of superiority.

Finally, the lack of difficulties that are likely to be encountered in the management of a class action confirms the superiority of having the claims resolved in a class action. It is unlikely that any difficulties will be encountered in the management of this action – particularly because a highly favorable settlement already has been obtained. The identities of all Class Members, and records concerning the services they received, are readily available through Defendants. Moreover, the resolution of common issues in one action will produce an efficient use of judicial resources and result in a single outcome, thereby eliminating confusion and promoting consistency.

In sum, all the relevant factors support the conclusions that a class action is the superior method for adjudicating Plaintiffs' claims.

## V. NOTICE WAS PROPER AND CONSISTENT WITH DUE PROCESS

Federal Rule of Civil Procedure 23 provides that, "upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3) [ ] the

court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). *See Wal-Mart*, 396 F.3d at 113, *cert. den. sub. nom.*, *Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044 (2005) (adequacy of class action settlement notice "measured by reasonableness"). Rule 23(e)(1) provides that a court must direct notice in a "reasonable manner" to all class members who would be bound by a proposed settlement. Rule 23(e) notice must contain a summary of the litigation sufficient "to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950); *see also Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995) (due process requires notice to fairly apprise class members of settlement terms and their options under the settlement). In addition, the "notice must clearly and concisely state in plain, easily understood language:" (1) the nature of the action; (2) the class definition; (3) the class claims, issues, or defenses; (4) that a class member may enter an appearance through counsel; (5) that the court will exclude from the class any member who requests 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). Fed. R. Civ. P. 23(c)(2)(B).

The notice plan approved by this Court and effectuated by the settlement administrator, Epiq, fully satisfied the due process principles articulated above. The Notice and Summary Notice set forth all information required by Rules 23(c)(2)(B) and 23(e)(1); they apprise members of the Settlement Class about the nature of the action, the class definition, the class claims, Class Members' right to object or opt-out, and the binding effect of a class judgment. The notices also fully disclosed that Settlement Class Counsel will seek an award of attorneys' fees and

reimbursement of litigation costs and expenses, and service awards for the Class Representatives from the Settlement Fund. Finally, the notices explained that Settlement Class Counsel will propose a pro-rata distribution of the Settlement Fund after payment of attorneys' fees, expenses and cost, service awards, and the cost of settlement administration.

Pursuant to the Preliminary Approval and Notice Order, on September 2, 2022, 19,063 copies of the Summary Notice were mailed, postage prepaid, to all potential Class Members identified by Defendants' records. (Jagher Aff. ¶ 14.) In addition to the information provided in the Summary Notice, recipients were directed to the settlement website to see the full Notice and other information relevant to the case.[8]

The content and method for dissemination of notice fulfill the requirements of Federal Rule of Civil Procedure 23 and due process.

## VI. THE PROPOSED PLAN FOR DISTRIBUTION OF THE SETTLEMENT FUND IS FAIR, REASONABLE, AND ADEQUATE AND MERITS APPROVAL

Approval of a settlement fund distribution in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the plan of distribution must be fair, reasonable, and adequate. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 326 (3d Cir. 2011). Generally, a plan of allocation that reimburses class members based on the type and extent of their injuries is a reasonable one. *Ikon Office Solutions,* 194 F.R.D. at 184; *MCI Telecoms Corp*., 1993 WL 142006, at *2; 4 *Newberg*, § 12.35, at 350 (pro-rata allocation of class action settlement fund is most common type of apportionment and has been widely accepted in many antitrust class actions"). An allocation formula need only have a reasonable, rational basis,

[8] Consistent with Paragraph 17 of the Preliminary Approval and Notice Order and Order 433230, a declaration or affidavit confirming that notice was disseminated to the Settlement Class in accordance with the Notice Order will be filed at least 10 days prior to the Fairness Hearing.

particularly if recommended by experienced and competent class counsel. As with other aspects of a settlement, the opinion of experienced and informed counsel is entitled to considerable weight. *In re American Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001).

The notices provided to Class Members describe the plan for the distribution of the settlement proceeds to Class Members who file timely and proper claim forms. The proposed distribution plan provides for the Settlement Fund, with accrued interest, to be allocated among approved claimants according to the respective amount they paid for ART services from Defendants, after payment of attorneys' fees, litigation and administration costs and expenses, and service awards for the Class Representatives.

The proposed plan for allocation and distribution is fair, reasonable, and adequate, and should receive final approval.[9]

## VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the proposed settlement, certify the Settlement Class for purposes of the settlements only, and approve the proposed plan for distribution of the Settlement Fund.

Dated: October 17, 2022

Respectfully submitted,

**THE PLAINTIFFS,**
**SARAH KENT and ALISON PACTONG, individually and on behalf of all others similarly situated,**

By: /s/ Jonathan M. Shapiro 419859
Jonathan M. Shapiro
Aeton Law Partners LLP
311 Centerpoint Drive

[9] Class Members may share in the distribution of the Settlement Fund by completing and timely submitting a Claim Form, which is available on the settlement website. Claim Forms can be submitted through the website or by mail. If by mail, the Claim Form must be **postmarked on or before January 4, 2023.**

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*Counsel for Plaintiffs and the Class*

**CERTIFICATION**

I hereby certify that a copy of the above was mailed or electronically delivered on this 17th day of October, 2022 to all counsel and pro se parties of record and that written consent for electronic delivery was received from all counsel and pro se parties of record who were electronically served including:

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/s/ Jonathan M. Shapiro 419859
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# Exhibit A

SETTLEMENT ADMINISTRATOR
P.O. BOX 2956
PORTLAND, OR 97208-2956

# If you purchased or paid for Assisted Reproductive Technology (ART) IVF services from Center for Advanced Reproductive Services, P.C. (CARS) or Reproductive Medicine Associates of Connecticut (RMACT) from January 1, 2004, through July 19, 2022, you may be entitled to benefits from a settlement.

A $2.85 million Settlement has been reached in a class action lawsuit against Women's Health USA, Inc.; In Vitro Sciences, LLC; Center for Advanced Reproductive Services, P.C. ("CARS"); and Reproductive Medicine Associates of Connecticut ("RMACT") (collectively "Defendants"). The Settlement is regarding Defendants' alleged conspiracy to artificially raise, fix, maintain, or stabilize prices for Assisted Reproductive Technology ("ART") IVF services and to allocate geographic markets for ART services, which resulted in restricted competition and artificially high prices in violation of the Connecticut Antitrust Act. Defendants deny they did anything wrong, but have decided to settle this action in order to avoid the burden and expense of litigation. The Court has not decided who is right.

**You received this notice because records indicate you may be a Settlement Class Member.** You are a Settlement Class Member if you purchased or paid for, in whole or in part, Assisted Reproductive Technology ("ART") services from the Center for Advanced Reproductive Services, P.C. ("CARS") or Reproductive Medicine Associates of Connecticut ("RMACT") from January 1, 2004, through July 19, 2022.

**How can I get a payment?** If you are a Settlement Class Member, you must submit a valid and timely Claim Form to receive a share of the Settlement Fund based on the amount you paid for ART services (IVF services) from CARS or RMACT during the relevant period. Settlement Class Members who file a valid, timely Claim Form will receive a pro rata share (a legal term that means proportional share based on the amount you paid for ART services relative to the total amounts paid by all other claiming Settlement Class Members) of the $2.85 million Settlement Fund as a cash payment, minus attorneys' fees, expenses, and costs, service awards, and the cost of settlement administration. Claim Forms can be submitted online at www.IVFSettlement.com or by mail. If by mail, the Claim Form must be **postmarked by January 4, 2023**. The quickest way to submit a claim is online. Claim Forms are also available by calling 1-855-675-2845.

**Your other options.** If you do not want to be legally bound by the Settlement and want to keep any right you may have to sue or continue to sue the Defendants on your own based on the claims raised in this Action or released by the Released Claims, then you must take steps to get out of the Settlement. This is called excluding yourself from or "opting out" of the Settlement. You must exclude yourself by **November 16, 2022**. If you do not exclude yourself, you may object to the Settlement by **November 16, 2022**. The Detailed Notice available at www.IVFSettlement.com explains how to exclude yourself or object.

The Court will hold a Final Fairness Hearing on **December 5, 2022, at 2:00 PM** before Judge Kenneth B. Povodator, remotely via Zoom. The date and time of the Final Fairness Hearing are subject to change. Any change will be posted at www.IVFSettlement.com.

At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate and decide whether to approve the Settlement, Class Counsel's application for attorneys' fees, expenses, and costs, Plaintiff Class Representative service awards, plus interest on such attorneys' fees, costs and expenses at the same rate and for the same period as earned by the Settlement Fund (until paid). If there are objections, the Court will consider them. The Court will also listen to people who have asked to speak at the hearing. You may appear at the hearing, yourself or through an attorney you hire, but you don't have to.

This Notice summarizes the proposed Settlement. Complete details are provided in the Settlement Agreement. The Settlement Agreement and other related documents are available at www.IVFSettlement.com or by calling 1-855-675-2845. You may also write to the Settlement Administrator at P.O. Box 2956, Portland, OR 97208-2956.

# Exhibit B

# If you purchased or paid for Assisted Reproductive Technology (ART) IVF services from Center for Advanced Reproductive Services, P.C. (CARS) or Reproductive Medicine Associates of Connecticut (RMACT) from January 1, 2004, through July 19, 2022, you may be entitled to benefits from a settlement.

*A state court has authorized this Notice. This is not a solicitation from a lawyer.*

- A $2.85 million Settlement has been reached in a class action lawsuit against Women's Health USA, Inc.; In Vitro Sciences, LLC; Center for Advanced Reproductive Services, P.C. ("CARS"); and Reproductive Medicine Associates of Connecticut ("RMACT") (collectively "Defendants"). The Settlement is regarding Defendants' alleged conspiracy to artificially raise, fix, maintain, or stabilize prices for Assisted Reproductive Technology ("ART") IVF services and to allocate geographic markets for ART services, which resulted in restricted competition and artificially high prices in violation of the Connecticut Antitrust Act. Defendants have decided to settle this action in order to avoid the burden and expense of litigation, and each maintains that their actions were lawful and did not result in higher prices.
- You are a "Settlement Class Member" if you purchased or paid for, in whole or in part, Assisted Reproductive Technology ("ART") services from the Center for Advanced Reproductive Services, P.C. ("CARS") or Reproductive Medicine Associates of Connecticut ("RMACT") from January 1, 2004, through July 19, 2022.
- Settlement Class Members may file a Claim Form to receive a percentage of out-of-pocket costs paid for ART services from CARS or RMACT. Settlement Class Members who file a valid, timely Claim Form will receive a pro rata share (a legal term that means proportional share based on the amount you paid for ART services relative to the total amounts paid by all other claiming Settlement Class Members) of the $2.85 million Settlement Fund, as a cash payment, minus attorneys' fees, expenses, and costs, service awards, and the cost of settlement administration.

**This Notice may affect your rights. Please read it carefully.**

| Your Legal Rights and Options | | Deadline |
|---|---|---|
| **SUBMIT A CLAIM FORM** | The only way to get money from the Settlement is to submit a Claim Form. | **January 4, 2023** |
| **EXCLUDE YOURSELF** | Get no Settlement benefits. Keep your right to file your own lawsuit against the Defendants about the legal claims in this case. | **November 16, 2022** |
| **OBJECT** | Tell the Court why you do not like the Settlement. You will still be bound by the Settlement if the Court approves it. | **November 16, 2022** |
| **DO NOTHING** | Get no Settlement benefits. Be bound by the Settlement. | |

- These rights and options—**and the deadlines to exercise them**—are explained in this Notice.
- The Court in charge of this case must still decide whether to approve the Settlement and the requested attorneys' fees, expenses, and costs. No Settlement benefits or payments will be provided unless the Court approves the Settlement and it becomes final.

## BASIC INFORMATION

### 1. Why is this Notice being provided?

A state court authorized this Notice because you have the right to know about the proposed Settlement of this class action lawsuit and about all of your rights and options before the Court decides whether to grant final approval to the Settlement. This Notice explains the lawsuit, the Settlement, your legal rights, what benefits are available, who is eligible for the benefits, and how to get them.

The Honorable Kenneth B. Povodator is overseeing this class action. The case is known as *Kent et al. v. Women's Health USA, Inc. et al.*, Case No. FST-CV-21-6054676-S (Superior Court Judicial District of Stamford/Norwalk) (the "Action"). The people who filed this lawsuit are called the "Plaintiffs" or "Plaintiff Class Representatives" and the companies sued, Women's Health USA, Inc.; In Vitro Sciences, LLC; Center for Advanced Reproductive Services, P.C. ("CARS"); and Reproductive Medicine Associates of Connecticut ("RMACT") are called the "Defendants."

### 2. What is this lawsuit about?

The Plaintiffs allege that they were injured as a result of Defendants' participation in a conspiracy to artificially raise, fix, maintain, or stabilize prices for Assisted Reproductive Technology ("ART") services and to allocate geographic markets for ART services, which resulted in restricted competition and artificially high prices in violation of the Connecticut Antitrust Act.

The Defendants deny any wrongdoing, and no court or other entity has made any judgment or other determination of any wrongdoing, or that any law has been violated. The Defendants deny these and all other claims made in the Action. By entering into the Settlement, the Defendants are not admitting any wrongdoing.

### 3. Why is the lawsuit a class action?

In a class action, Plaintiff Class Representatives sue on behalf of all people who have similar claims. Together, all these people are called a Settlement Class or Settlement Class Members. One court resolves the issues for all Settlement Class Members, except for those Settlement Class Members who timely exclude themselves (opt out) from the Settlement Class.

### 4. Why is there a Settlement?

The Plaintiffs and Defendants do not agree about the claims made in this Action. The Action has not gone to trial, and the Court has not decided in favor of the Plaintiffs or Defendants. Instead, the Plaintiffs and Defendants have agreed to settle the Action. Plaintiffs and the attorneys for the Settlement Class ("Class Counsel") believe the Settlement is best for all Settlement Class Members because of the Settlement benefits and, the risks and uncertainty associated with continued litigation, and the nature of the defenses raised by the Defendants.

## WHO IS INCLUDED IN THE SETTLEMENT?

### 5. How do I know if I am part of the Settlement?

You are a "Settlement Class Member" if you purchased or paid for, in whole or in part, Assisted Reproductive Technology ("ART") services from the Center for Advanced Reproductive Services, P.C. ("CARS") or Reproductive Medicine Associates of Connecticut ("RMACT") from January 1, 2004, through July 19, 2022.

### 6. Are there exceptions to being included in the Settlement?

Yes. Excluded from the Settlement Class are Defendants' officers, directors, and employees; all counsel of record; and the Court, Court personnel, and members of their immediate families.

## 7. What if I am still not sure whether I am part of the Settlement?

If you are still not sure whether you are a Settlement Class Member, you may go to the settlement website at IVFSettlement.com or call the Settlement Administrator's toll-free number at 1 (855) 675-2845.

### THE SETTLEMENT BENEFITS—WHAT YOU GET IF YOU QUALIFY

## 8. What does the Settlement provide?

If you are a Settlement Class Member, you must submit a valid and timely Claim Form to receive a share of the Settlement Fund based on the amount you paid for ART services (IVF services) from CARS or RMACT during the relevant period. Settlement Class Members who file a valid, timely Claim Form will receive a pro rata share (a legal term that means proportional share based on the amount you paid for ART services relative to the total amounts paid by all other claiming Settlement Class Members) of the $2.85 million Settlement Fund, as a cash payment, minus attorneys' fees, expenses, and costs, service awards, and the cost of settlement administration.

## 9. What am I giving up to receive Settlement benefits or stay in the Settlement Class?

Unless you exclude yourself (opt out), you are choosing to remain in the Settlement Class. If the Settlement is approved and becomes final, all Court orders will apply to you and legally bind you. You will not be able to sue, continue to sue, or be part of any other lawsuit against the Defendants and Releasees about the legal issues in this Action that are released by this Settlement. The specific rights you are giving up are called "Released Claims."

## 10. What are the Released Claims?

The Settlement Agreement in Section C, paragraph 17 describes the Release, in necessary legal terminology, so please read this section carefully. The Settlement Agreement is available at IVFSettlement.com or in the public Court records on file in this lawsuit. For questions regarding the Release or Released Claims and what the language in the Settlement Agreement means, you can also contact one of the lawyers listed in Question 14 for free, or you can talk to your own lawyer at your own expense.

### HOW TO GET BENEFITS FROM THE SETTLEMENT

## 11. How do I make a claim for Settlement benefits?

To submit a claim for a payment from the Settlement Fund for out-of-pocket costs paid, in whole or in part, for ART services from CARS or RMACT, you must submit a valid Claim Form to the Settlement Administrator by **January 4, 2023**. Claim Forms can be submitted online at IVFSettlement.com or by mail. If by mail, the Claim Form must be **postmarked** by **January 4, 2023**. The quickest way to submit a claim is online. Claim Forms are also available by calling 1 (855) 675-2845 or by writing to:

Settlement Administrator
P.O. Box 2956
Portland, OR 97208-2956

## 12. What happens if my contact information changes after I submit a claim?

If you change your mailing address or email address after you submit a Claim Form, it is your responsibility to inform the Settlement Administrator of your updated information. You may notify the Settlement Administrator of any changes by calling 1 (855) 675-2845 or by writing to:

Settlement Administrator
P.O. Box 2956
Portland, OR 97208-2956

## 13. When will I receive my Settlement benefits?

If you file a timely and valid Claim Form, payment will be provided by the Settlement Administrator after the Settlement is approved by the Court and becomes final.

It may take time for the Settlement to be approved and become final. Please be patient and check IVFSettlement.com for updates.

## THE LAWYERS REPRESENTING YOU

## 14. Do I have a lawyer in this case?

Yes, the Court has appointed Jonathan Jagher of Freed Kanner London & Millen LLC and Jonathan Shapiro of Aeton Law Partners LLP, as Class Counsel to represent you and the Settlement Class for the purposes of this Settlement. You may hire your own lawyer at your own cost and expense if you want someone other than Class Counsel to represent you in this Action. Class Counsel can be contacted at:

Jonathan Jagher
Freed Kanner London & Millen LLC
923 Fayette Street
Conshohocken, PA 19428

Jonathan Shapiro
Aeton Law Partners LLP
311 Centerpoint Drive
Middletown, CT 06457

## 15. How will Class Counsel be paid?

Class Counsel will file a motion asking the Court to award attorneys' fees up to 1/3 of the Settlement Fund, plus reimbursement of expenses and costs. They will also ask the Court to approve service awards not to exceed $10,000 per Plaintiff Class Representative for participating in this Action and for their efforts in achieving the Settlement. If awarded by the Court, attorneys' fees, expenses, and costs, Plaintiff Class Representative service awards, plus interest on such attorneys' fees, costs, and expenses at the same rate and for the same period as earned by the Settlement Fund (until paid) will be paid out of the Settlement Fund. The Court may award less than these amounts.

Class Counsel's application for attorneys' fees, expenses, and costs and service awards will be made available on the settlement website at IVFSettlement.com before the deadline for you to comment or object to the Settlement.

## OPTING OUT FROM THE SETTLEMENT

If you are a Settlement Class Member and want to keep any right you may have to sue or continue to sue the Defendants on your own based on the claims raised in this Action or released by the Released Claims, then you must take steps to get out of the Settlement. This is called excluding yourself from or "opting out" of the Settlement.

## 16. How do I get out of the Settlement?

To opt out of the Settlement, you must mail a written notice of intent to opt out. The written notice must be signed, include your name and address, and clearly state that you wish to be excluded from the Settlement Class.

The opt out request must be mailed to the Settlement Administrator, **postmarked** by **November 16, 2022**:

Settlement Administrator
P.O. Box 2956
Portland, OR 97208-2956

You cannot exclude yourself by telephone or by email.

## 17. If I opt out, can I get anything from the Settlement?

No. If you opt out, you are telling the Court you do not want to be part of the Settlement. You can only get Settlement benefits if you stay in the Settlement.

## 18. If I do not opt out, can I sue the Defendants for the same thing later?

No. Unless you opt out, you give up any right to sue the Defendants and Releasees for the claims this Settlement resolves. You must opt out of this Action to start or continue with your own lawsuit or be part of any other lawsuit against the Defendants or any of the Releasees. If you have a pending lawsuit, speak to your lawyer in that case immediately.

## OBJECTING TO THE SETTLEMENT

## 19. How do I tell the Court that I do not like the Settlement?

If you are a Settlement Class Member, you can tell the Court you do not agree with all or any part of the Settlement or requested attorneys' fees, expenses, and costs. You can also give reasons why you think the Court should not approve the Settlement or attorneys' fees, expenses, and costs. To object, you must file timely written notice as provided below no later than **November 16, 2022**, stating you object to the Settlement. The objection must include all the following additional information:

(1) Your full name and address;
(2) The case name and docket number, *Kent et al. v. Women's Health USA, Inc. et al.*, Case No. FST-CV-21-6054676-S (Superior Court Judicial District of Stamford/Norwalk) (the "Action");
(3) Information identifying you as a Settlement Class Member, including proof that you are a member of the Settlement Class (e.g., copy of your settlement notice or a statement explaining why you believe you are a Settlement Class Member);
(4) A written statement of all reasons for the objection, accompanied by any legal support for the objection you believe is applicable;
(5) The identity of any and all counsel representing you in connection with the objection;
(6) A statement whether you and/or your counsel will appear at the Final Fairness Hearing; and
(7) Your signature or the signature of your duly authorized attorney or other duly authorized representative (if any) representing you in connection with the objection.

To be timely, written notice of an objection in the appropriate form must be mailed to the Settlement Administrator, **postmarked** by **November 16, 2022**:

Settlement Administrator
P.O. Box 2956
Portland, OR 97208-2956

Any Settlement Class Member who fails to comply with the requirements for objecting waives and forfeits any and all rights they may have to appear separately and/or to object to the Settlement Agreement and will be bound by all the terms of the Settlement Agreement and by all proceedings, orders, and judgments in the Action.

## 20. What is the difference between objecting and asking to opt out?

Objecting is simply telling the Court you do not like something about the Settlement or requested attorneys' fees, expenses, and costs. You can object only if you stay in the Settlement Class (meaning you do not opt out of the Settlement). Opting out of the Settlement is telling the Court you do not want to be part of the Settlement Class or the Settlement. If you opt out, you cannot object to the Settlement.

## THE FINAL FAIRNESS HEARING

## 21. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Final Fairness Hearing on **December 5, 2022, at 2:00 p.m.** before Judge Kenneth B. Povodator, remotely via Zoom. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate and decide whether to approve the Settlement, Class Counsels' application for attorneys' fees, expenses, and costs, Plaintiff Class Representative service awards, plus interest on such attorneys' fees, costs and expenses at the same rate and for the same period as earned by the Settlement Fund (until paid). If there are objections, the Court will consider them. The Court will also listen to people who have asked to speak at the hearing.

Note: The date and time of the Final Fairness Hearing are subject to change. Any change will be posted at IVFSettlement.com.

## 22. Do I have to attend to the Final Fairness Hearing?

No. Class Counsel will answer any questions the Court may have. However, you are welcome to attend at your own expense. If you send an objection, you do not have to come to Court to speak about it. As long as you file or mail your written objection on time, the Court will consider it.

## 23. May I speak at the Final Fairness Hearing?

Yes, as long as you do not exclude yourself (opt out), you can (but do not have to) participate and speak for yourself in this Action and Settlement. This is called making an appearance. You also can have your own lawyer speak for you, but you will have to pay for the lawyer yourself.

If you want to appear, or if you want your own lawyer instead of Class Counsel to speak for you at the hearing, you must follow all of the procedures for objecting to the Settlement listed in Question 19 and specifically include a statement whether you and your counsel will appear at the Final Fairness Hearing.

### IF YOU DO NOTHING

## 24. What happens if I do nothing at all?

If you are a Settlement Class Member and you do nothing, you will not receive any Settlement benefits. You will give up rights explained in the "Opting Out from the Settlement" section of this Notice, including your right to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against the Defendants or any of the Releasees about the legal issues in this Action that are released by the Settlement Agreement relating to the Action.

### GETTING MORE INFORMATION

## 25. How do I get more information?

This Notice summarizes the proposed Settlement. Complete details are provided in the Settlement Agreement. The Settlement Agreement and other related documents are available at IVFSettlement.com, by calling 1 (855) 675-2845, or by writing to:

Settlement Administrator
P.O. Box 2956
Portland, OR 97208-2956

**PLEASE DO NOT TELEPHONE THE COURT OR THE COURT'S CLERK OFFICE REGARDING THIS NOTICE.**

**Attorney/Firm:** AETON LAW PARTNERS LLP (433168) **E-Mail:** nkb@aetonlaw.com 

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| | |
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| **Docket Number:** | FST-CV-21-6054676-S |
| **Case Name:** | KENT, SARAH v. WOMEN'S HEALTH USA, INC. Et Al |
| **Type of Transaction:** | Pleading/Motion/Other document |
| **Date Filed:** | Oct-17-2022 |
| **Motion/Pleading by:** | AETON LAW PARTNERS LLP (433168) |
| **Document Filed:** | 120.00 MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND PROPOSED PLAN OF DISTRIBUTION OF SETTLEMENT FUND |
| **Date and Time of Transaction:** | Monday, October 17, 2022 4:38:56 PM |

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