UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIDAL SOLER and COREY STEWART, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

FRESH DIRECT, LLC, and FRESH DIRECT HOLDINGS, INC.,

Defendants.

20 Civ. 3431 (AT)

ORDER

ANALISA TORRES, United States District Judge:

Plaintiffs Vidal Soler and Corey Stewart bring this action individually and on behalf of others who received conditional offers of employment from Defendants Fresh Direct, LLC and Fresh Direct Holdings, Inc. (collectively, "Fresh Direct"), claiming that Fresh Direct unlawfully discriminated against Plaintiffs based on their criminal conviction records, in violation of the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.*, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and Article 23-A of the New York State Correction Law, N.Y. Correct. Law § 750 *et seq.* Compl. ¶ 1, 4–6, 76–85, ECF No. 1.

Having reached a settlement (the "Settlement"), Settlement, ECF No. 72-1, Plaintiffs request that the Court: (1) preliminarily approve the Settlement; (2) conditionally certify the proposed settlement class under Federal Rules of Civil Procedure 23(b)(2) and (3); (3) appoint Plaintiffs' counsel, Outten & Golden LLP ("O&G"), as class counsel; (4) approve and direct the distribution of the proposed notice of settlement and claim form (collectively, the "Notice"), Notice, ECF No. 71-2; (5) enjoin class members from pursuing released claims

against Fresh Direct; and (6) schedule a fairness hearing. Pls. Mem. at 2, ECF No. 70. For the reasons stated below, the motion is GRANTED.

BACKGROUND

Plaintiffs applied for employment positions with Fresh Direct and received conditional offers of employment pending successful background checks. Compl. ¶¶ 42–43, 51–54. Fresh Direct then terminated Plaintiffs or denied them employment because of the criminal histories disclosed in their background checks. *Id.* ¶¶ 44–45, 55–56. Fresh Direct did not ask Plaintiffs for evidence of rehabilitation before evaluating their applications pursuant to the Article 23-A factors.[1] Compl. ¶¶ 48–49, 57–58. Plaintiffs allege that Fresh Direct's internal policies and practices improperly over- and under-weigh certain Article 23-A factors and do not affirmatively solicit relevant information from employment applicants before evaluating the factors. *Id.* ¶¶ 31–36.

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[1] Article 23-A requires that when taking any adverse action on the basis of a criminal record, an employer shall consider the following factors:

> (1) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
>
> (2) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
>
> (3) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
>
> (4) The time which has elapsed since the occurrence of the criminal offense or offenses.
>
> (5) The age of the person at the time of occurrence of the criminal offense or offenses.
>
> (6) The seriousness of the offense or offenses.
>
> (7) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
>
> (8) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

N.Y. Correct. Law § 753.

On May 1, 2020, Plaintiffs filed the class action complaint. Compl. The parties engaged in three full-day mediations with Stephen P. Sonnenberg, a "well-respected mediator" with experience involving employment law disputes, on January 26, April 15, and May 12, 2021. McNerney Decl. ¶¶ 18–19, ECF No. 71. In advance of the first mediation scheduled on January 26, 2021, the parties produced meaningful discovery. *Id.* ¶¶ 15–16. The parties finalized the Settlement and fully executed it on May 4, 2022. *Id.* ¶ 22; *see* Settlement at 27. The same day, Plaintiffs filed an unopposed motion for preliminary approval of the Settlement, conditional certification of the settlement class, appointment of class counsel, and approval of the Notice. ECF No. 69.[2]

DISCUSSION

I. Legal Standard

Federal Rule of Civil Procedure 23(e) requires judicial approval for any class action settlement. A class action settlement approval procedure typically occurs in two stages: (1) preliminary approval, where "prior to notice to the class, a court makes a preliminary evaluation of fairness," and (2) final approval, where "notice of a hearing is given to the class members, [and] class members and settling parties are provided the opportunity to be heard on the question of final court approval." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 27 (E.D.N.Y. 2019) (alteration in original) (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 Civ. 5450, 2016 WL 7625708, at *2 (S.D.N.Y. Dec. 21, 2016)); *see also* Fed. R. Civ. P. 23(e). Even at the preliminary approval stage, the

[2] When Plaintiffs filed the motion on May 4, 2022, Soler had not elected to sign the Settlement. *See* Pls. Mem. at 1 n.1; ECF No. 71-1; ECF No. 72. Three months later, on August 4, 2022, Soler signed the Settlement and agreed to participate fully in the Settlement. *See* Settlement at 27; ECF No. 72.

court's role in reviewing the proposed settlement "is demanding because the adversariness of litigation is often lost after the agreement to settle." *Zink v. First Niagara Bank, N.A.*, 155 F. Supp. 3d 297, 308 (W.D.N.Y. 2016) (citation omitted). A district court must consider whether the court "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." *In re Payment Card*, 330 F.R.D. at 28 (emphasis omitted) (quoting Fed. R. Civ. P. 23(e)(1)(B)).

II. Likelihood of Approval Under Rule 23(e)(2)

At the preliminary approval stage, a court must assess "whether it is 'likely' it will be able to finally approve the settlement after notice, an objection period, and a fairness hearing." 4 *Newberg and Rubenstein on Class Actions* § 13:10 (6th ed.) (citation omitted). To approve a proposed settlement, a court must find "that it is fair, reasonable, and adequate" after considering four factors: (1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members. Fed. R. Civ. P. 23(e)(2) & advisory committee's note to 2003 amendment; *see In re GSE Bonds Antitrust Litig.* 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019).[3]

A. Adequacy of Representation

Rule 23(e)(2)(A) requires a court to find that "the class representatives and class counsel have adequately represented the class" before preliminarily approving a settlement.

[3] Before the 2018 amendments to Rule 23, courts in the Second Circuit considered whether a settlement was "fair, reasonable, and adequate" under the nine factors outlined in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds by Goldberg v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). The advisory committee notes to the 2018 amendments indicate that the four new Rule 23 factors were not intended to displace the *Grinnell* factors, but to focus courts on the "core concerns of procedure and substance." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment.

"Determination of adequacy typically 'entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced[,] and able to conduct the litigation.'" *In re GSE Bonds*, 414 F. Supp. 3d at 692 (quoting *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007)).

Here, Plaintiffs do not have interests that are antagonistic to or at odds with those of putative class members. *See, e.g.*, *Capsolas v. Pasta Res., Inc.*, No. 10 Civ. 5595, 2012 WL 1656920, at *2 (S.D.N.Y. May 9, 2012). Plaintiffs' experiences were substantially the same as that of all other class members, and Plaintiffs have the same interest in remedying Fresh Direct's alleged discrimination. Further, O&G has demonstrated that it is qualified, experienced, and able to conduct the litigation. O&G did substantial work identifying, investigating, litigating, and settling Plaintiffs' and the class members' claims, has years of experience prosecuting and settling criminal history discrimination cases, and is well-versed in employment law and class action law. *See* McNerney Decl. ¶¶ 4–8; *see, e.g.*, *Campos v. Goode*, No. 10 Civ. 224, 2010 WL 5508100, at *2 (S.D.N.Y. Nov. 29, 2010). Therefore, the adequacy of representation factor weighs in favor of approval.

B. Arm's-Length Negotiations

Rule 23(e)(2)(B) requires a court to consider procedural fairness and whether "the proposal was negotiated at arm's length." "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quotation marks and citation omitted). "Further, a

mediator's involvement in settlement negotiations can help demonstrate their fairness." *In re GSE Bonds*, 414 F. Supp. 3d at 693.

This factor also weighs in favor of approval. The parties engaged in three full-day mediations, over the course of five months, before an experienced and respected mediator. McNerney Decl. ¶¶ 18–19. The parties also engaged in meaningful discovery: Fresh Direct produced class member data, including applicant criminal history information, corporate training documents, its background check policy, and applicant files for Plaintiffs; and Plaintiffs produced information regarding their employment histories and wage information. *Id.* ¶ 16. The Court finds that the Settlement is the result of months of arm's-length, good faith negotiations between experienced counsel and before a respected mediator.

C. Adequacy of Relief

Rule 23(e)(2)(C) requires a court to examine whether relief 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)." This inquiry overlaps with the *Grinnell* factors, which the Court shall consider alongside the Rule 23(e)(2)(C) factors. *See* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment ("The goal of this amendment is not to displace [the *Grinnell* factors], but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.").

First, the Settlement would avoid significant costs, risks, and delay, ensuring timely relief for class members. *See* Fed. R. Civ. P. 23(e)(2)(C)(i); *Grinnell*, 495 F.2d at 463 (factors include:

"(1) the complexity, expense and likely duration of the litigation; . . . [and] (3) the stage of the proceedings and the amount of discovery completed"); *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). The parties have already engaged in substantial and meaningful discovery, *see* McNerney Decl. ¶¶ 16–17, are well equipped to evaluate the strengths and weaknesses of their arguments, and "had an adequate appreciation of the merits of the case before negotiating," *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (citation omitted). However, this case is also complex, with approximately 778 class members, McNerney Decl. ¶ 24, and assessing liability and damages would require significant more factual discovery, which would prolong litigation. If litigation were to continue, Fresh Direct would assert several fact-intensive defenses, including that Plaintiffs' employment applications were denied because they falsified their criminal histories and that Fresh Direct conducted a case-by-case analysis of each applicant's criminal history pursuant to the NYSHRL and NYCHRL. Pls. Mem. at 10–11.

Further, Plaintiffs would encounter real risks to establishing liability, damages, and maintaining the class action through trial. *See Grinnell*, 495 F.2d at 463 (factors include: "(4) the risks of establishing liability; (5) the risks of establishing damages; [and] (6) the risks of maintaining the class action through the trial"). Plaintiffs' legal theory is novel and relatively untested by courts, and estimating damages for each class members would be challenging, likely requiring some form of individualized hearing for each of the 778 class members. McNerney Decl. ¶ 27; Pls. Mem. at 13–14; *see, e.g.*, *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361, 371–76 (1977). And, lastly, Plaintiffs would encounter risks to obtaining class certification. Fresh Direct would likely argue that individualized questions relating to the

application process and damages would predominate over common questions about whether Fresh Direct properly applied the Article 23-A factors to each application. Pls. Mem. at 14.

Second, Plaintiffs' proposed method of distributing relief to the class is effective, *see* Fed. R. Civ. P. 23(e)(2)(C)(ii), and would ensure "the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund," *In re Credit Default Swaps Antitrust Litig.*, No. 13 MD 2476, 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 26, 2016). The Settlement provides monetary compensation for every class member from a gross settlement fund of $900,000, which would amount to approximately $1,156 per class member (which will likely be larger because any uncashed checks from the settlement fund will be redistributed to participating class members if feasible). Settlement § 1(X); Pls. Mem. at 4. To recover, class members must fill out a claim form, which is also designed to facilitate participation through a website via a QR code. Pls. Mem. at 16.

Third, the Settlement's proposed award of attorney's fees is not unreasonable. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). Under the Settlement, class counsel will request Court approval for attorney's fees in the amount of $300,000, or one-third of the gross settlement amount. Settlement § 9.1(A). Courts in this district have approved similar attorney's fees of approximately one-third from class settlement funds, which is "well within the applicable range of reasonable percentage fund awards." *In re DDAPV Direct Purchaser Antitrust Litig.*, No. 05 Civ. 2237, 2011 WL 12627961, at *4 (S.D.N.Y. Nov. 28, 2011). Therefore, class counsel's request for an award of one-third of the gross settlement amount will not weigh against preliminary approval.

Fourth, the parties have not identified any "agreement required to be identified under Rule 23(e)(3)" that warrants the Court's consideration at this stage. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv).

Lastly, the Court considers the remaining *Grinnell* factors which speak to the adequacy of relief. *See Grinnell*, 495 F.2d at 463 (factors include: "(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").[4] The Court finds that although Fresh Direct may be able to withstand a greater judgment, this factor should be given less weight because the "ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9. The Court also finds that, after considering the best possible recovery and the possible recovery in light of all the attendant risks of litigation, the Settlement is fair and reasonable. *Cf. Times v. Target Corp.*, No. 18 Civ. 2993, 2019 WL 5616867, at *2 (S.D.N.Y. Oct. 29, 2019). In addition to providing monetary compensation in an amount of at least $1,156 per class member, Settlement § 1(X), the Settlement also requires Fresh Direct to completely reform its criminal history policy and practices—including hiring a consultant to implement programmatic reforms and imposing record-keeping obligations—thus benefiting future Fresh Direct employment applicants, Settlement § 10.5.

[4] The Court does not consider the second *Grinnell* factor, which requires the Court to evaluate the "reaction of the class to the settlement," *Grinnell*, 495 F.2d at 463, because consideration of this factor is premature at the preliminary approval stage. *In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Since no notice has been sent, consideration of this factor is premature.").

Therefore, the adequacy of relief factor weighs in favor of preliminary approval.

D. Equitable Treatment of Class Members

Lastly, Rule 23(e)(2)(C) requires a court to examine whether "the proposal treats class members equitably relative to each other." Under the terms of the Settlement, all class members would receive an equal share of the $900,000 gross settlement fund. Settlement § 1(X). As such, this factor also weighs in favor of preliminary approval.

Accordingly, the Court finds that after notice, an objection period, and a fairness hearing, it will likely be able to approve the Settlement under Rule 23(e)(2).

III. Likelihood of Class Certification

To preliminarily approve the Settlement, the Court must also find that it will likely be able to certify the class for purposes of judgment on the Settlement. *In re Payment Card.*, 330 F.R.D. at 28. As part of the Settlement, Fresh Direct has agreed not to oppose, for settlement purposes only, conditional certification under Rules 23(a) and 23(b)(3) of the following settlement class:

> [A]ll the persons who applied for employment to Fresh Direct in New York State during the Relevant Period, who received conditional offers of employment, and who disclosed criminal conviction histories and/or whose background checks revealed criminal conviction histories, which conditional offers were withdrawn for any reason, from January 1, 2015[,] through July 29, 2021.

Settlement § 1(I); Pl. Mem. at 5–6, 16. A court may certify a class for settlement purposes where the proposed settlement class meets the requirements for Rule 23(a) class certification, as well as one of the three subsections of Rule 23(b), in this case, Rule 23(b)(3). *In re GSE Bonds*, 414 F. Supp. 3d at 700.

A. Rule 23(a)

Rule 23(a)'s four threshold requirements are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. The Court finds that the settlement class is likely to meet each requirement for the present purpose of evaluating the Settlement.

First, the settlement class is sufficiently numerous. The parties estimate that there are approximately 778 class members, McNerney Decl. ¶ 24, and in the Second Circuit, "numerosity is presumed at a level of [forty] members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Second, the settlement class likely satisfies the commonality requirement because the class members are unified by common factual allegations and legal theories: all class members applied to work for Fresh Direct in New York, were offered conditional employment, underwent a background check, and were denied employment. Plaintiffs allege that Fresh Direct's internal policies and practices discriminated against the class members because of their criminal background, in violation of the NYCHRL, the NYSHRL, and Article 23-A. Compl. ¶ 6. This challenge to Fresh Direct's background check policy likely raises a common question to all class members. *See Times*, 2019 WL 5616867, at *1.

Third, the typicality requirement is likely satisfied because Plaintiffs' claims "arise[] from the same course of events" as the other class members—namely Fresh Direct's background check policies and practices—and "each class member makes similar legal arguments to prove [Fresh Direct's] liability." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992)). Plaintiffs and the other class members were all subject to the same employment application process, which Plaintiffs challenge as unlawful. And, any "minor variations in the fact patterns underlying

individual claims" do not defeat typicality. *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993).

Fourth, Plaintiffs and class counsel are likely to satisfy the adequacy requirement for substantially the same reasons discussed above. *See supra* § II(A).

B. Rule 23(b)(3)

Rule 23(b)(3) requires that common questions of law or fact not only be present, but also that they "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Court finds that the settlement class is also likely to meet the Rule 23(b)(3) predominance and superiority requirements for the purpose of evaluating the Settlement.

First, the Rule 23(b)(3) predominance requirement "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). The key inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001), *abrogated on other grounds by In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). Where plaintiffs are "unified by a common legal theory" and by common facts, predominance is satisfied. *See McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). Here, Plaintiffs' common issues—including whether Fresh Direct's employment policies and practices unlawfully discriminated against applicants with criminal histories—predominate over individual issues as

to each class member. *See, e.g.*, *Chen-Oster v. Goldman, Sachs & Co.*, 325 F.R.D. 55, 80–81 (S.D.N.Y. 2018).

Second, the Court also finds that "the class action device [is likely] superior to other methods available for a fair and efficient adjudication of th[is] controversy," *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968), because of the large size of the class, the fact that there are no other pending actions that challenge the at-issue claims, and the desirability of concentrating litigation in a single forum. *See* Fed. R. Civ. P. 23(b)(3). Because the class certification request is made in the context of settlement only, the Court need not address the issue of manageability. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Accordingly, pursuant to Rules 23(c) and (e), the Court certifies the settlement class for the purposes of settlement, notice, and award distribution only. Should the Settlement not receive final approval, be overturned on appeal, or otherwise not reach completion, the settlement class certification granted above shall be dissolved immediately upon notice to the parties, and this certification shall have no further effect in this case or in any other action. Plaintiffs will retain the right to seek class certification in the course of litigation, and Fresh Direct will retain the right to oppose class certification. Neither the fact of this certification for settlement purposes only, nor the findings made herein, may be used to support or oppose any party's position as to any future class certification decision in this case, nor shall they otherwise have any impact on such future decision.

IV. Appointment of Class Representatives and Class Counsel

For the reasons stated above, Plaintiffs Soler and Stewart are appointed as class representatives of the settlement class under Rule 23, and O&G is appointed as class counsel for the settlement class. *See supra* § II(A).

V. Notice Approval

Because the Court will likely approve the Settlement and certify the settlement class under Rule 23(e), "the court must direct notice in a reasonable manner to all class members who would be bound by the [Settlement]." Fed. R. Civ. P. 23(e)(1)(B). Where, as here, notice is to be provided to a settlement class that is proposed to be certified under Rule 23(b)(3), the Court "must direct to class members the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Notice may be made by "United States mail, electronic means, or other appropriate means." *Id.* "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart Stores, Inc.*, 396 F.3d at 113–14. The settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Id.* at 114 (quoting *Weinberger v. Kendrick,* 698 F.2d 61, 70 (2d Cir. 1982)).

Having reviewed the Notice, the Court concludes that it satisfies the reasonableness standard and complies with due process and Rule 23(c)(2)(B). *See* Notice. The Notice is written in plain language, organized clearly, and based on the Federal Judicial Center's model notices. Pls. Mem. at 22; *see Reyes v. Altamarea Grp., LLC*, No. 10 Civ. 6451, 2010 WL 5508296, at *2 (S.D.N.Y. Dec. 22, 2010). The Notice fairly, plainly, accurately, and reasonably informs class members of: (1) appropriate information about the nature of this litigation, the settlement class at issue, the identity of class counsel, and the essential terms of the Settlement, Notice at 2–5; (2) appropriate information about O&G's forthcoming application for attorney's fees and other payments that will be deducted from the settlement fund, *id.* 3–4; (3) appropriate information about how to participate in the Settlement, *id.* at 4; (4) appropriate information about the Court's

procedures for final approval of the Settlement, *id.* at 6; (5) appropriate information about how to challenge or opt-out of the Settlement, if they wish to do so, *id.* at 5–6; and (6) appropriate instructions as to how to obtain additional information regarding this litigation and the Settlement, *id.* at 5. The claim form asks for basic information and can also be accessed through a website via a QR code. Pls. Mem. at 16, 23.

Further, the proposed plan for distributing the Notice appears to be a reasonable method calculated to reach all class members who would be bound by the Settlement. The settlement administrator will mail the Notice to class members, create and administer a website, inform class members of the Settlement and website via text message, take reasonable steps to obtain correct addresses for class members whose notice is returned as undeliverable, attempt re-mailings for those class members, and send reminder notices by mail and text message. *See* Settlement § 4. The Court finds and concludes that the proposed plan for distributing the Notice will provide the best notice practicable under the circumstances, satisfies the notice requirements of Rule 23(e), and satisfies all other legal and due process requirements.

Accordingly, the Notice is approved, the parties are authorized to retain a settlement administrator to implement the terms of the Settlement, and said settlement administrator is directed to distribute the Notice pursuant to the procedures outlined in § 4 of the Settlement.

VI. Injunction Against Future Claims

The Court enjoins all class members from filing, commencing, prosecuting, intervening, or participating in any lawsuit in any jurisdiction asserting released class claims against Fresh Direct on behalf of any class members. Settlement § 2(B). *See, e.g.*, *Swetz v. GSK Consumer Health*, No. 20 Civ. 4731, 2021 WL 5449932, at *5 (S.D.N.Y. Nov. 22, 2021).

VII. Procedures for Final Approval of the Settlement

A. Fairness Hearing

The Court hereby schedules, for **July 5, 2023**, at **1:30 p.m.**, a hearing to determine whether to grant final certification of the settlement class, and final approval of the Settlement and the plan of allocation. The hearing will proceed telephonically. At the time of the hearing, the parties are directed to dial (888) 398-2342 or (215) 861-0674, and enter access code 5598827. At the fairness hearing, the Court also will consider any petition that may be filed for the payment of attorney's fees and costs/expenses to class counsel, and any service payments to be made to Plaintiffs. Class counsel shall file their petition for an award of attorney's fees and reimbursement of costs/expenses and the petition for an award of service payments no later than fifteen days prior to the fairness hearing.

B. Deadline to Request Exclusion from the Settlement

Class members who wish to be excluded from the Settlement must submit a written and signed request to opt out to the settlement administrator. To be effective, such opt-out statements must be delivered to the administrator and postmarked by a date certain to be specified on the Notice, which will be sixty calendar days after the settlement administrator makes the initial mailing of the notice.

The settlement administrator shall stamp the postmark date of the opt-out statement on the original of each opt-out statement that it receives and shall serve copies of each statement on the parties not later than two business days after receipt thereof. The settlement administrator also shall, within five calendar days after the end of the opt-out period, provide the parties with (1) stamped copies of any opt-out statements, and (2) a final list of all opt-out statements. Also, within five calendar days after the end of the opt-out period, the settlement administrator (or

counsel for the parties) shall file with the Clerk of Court copies of any timely submitted opt-out statements with addresses redacted. The settlement administrator shall retain the stamped originals of all opt-out statements and originals of all envelopes accompanying opt-out statements in its files until such time as the settlement administrator is relieved of its duties and responsibilities under the Settlement.

C. Deadline for Filing Objections to Settlement

Class members who wish to present objections to the Settlement at the fairness hearing must first do so in writing. To be considered, such objections must be delivered to the settlement administrator and postmarked by a date certain, to be specified on the Notice, which shall be sixty calendar days after the initial mailing by the settlement administrator of such Notice.

The settlement administrator shall stamp the postmark date and the date received on the original and send copies of each objection to the parties by email and overnight delivery not later than two business days after receipt thereof. The settlement administrator shall also file the date-stamped originals of any and all objections with the Clerk of Court within ten calendar days after the end of the opt-in period.

D. Deadline for Filing Motion for Judgment and Final Approval

No later than fourteen days before the fairness hearing, the parties shall submit a joint motion for judgment and final approval of the Settlement.

E. Plaintiffs and Class Members' Release

If, at the fairness hearing, the Court grants final approval to the Settlement, Plaintiffs and each individual class member who does not timely opt out, will release claims, by operation of this Court's entry of the judgment and final approval, as described in the Settlement.

F. Qualification for Payment

Any class member who does not opt out will qualify for payment and will be sent a check containing his or her distribution of the Settlement after final approval of it.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion is GRANTED. The Clerk of Court is directed to terminate the motion at ECF No. 69.

SO ORDERED.

Dated: March 14, 2023
New York, New York

ANALISA TORRES
United States District Judge