

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF PENNSYLVANIA**

BLAIR DOUGLASS, on behalf of himself and  
all others similarly situated,

Plaintiff,

v.

MONDELÉZ GLOBAL LLC,

Defendant.

Civil Action No. 2:22-cv-00875-WSH

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR  
ATTORNEYS' FEES AND INCENTIVE AWARD**

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Plaintiff Blair Douglass, by and through undersigned counsel, submits this Memorandum In Support Of Plaintiff’s Motion For Attorneys’ Fees And Incentive Award.

## I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(h), 42 U.S.C. § 12205, 28 C.F.R. § 36.505, and the Agreement,<sup>1</sup> Plaintiff respectfully moves the Court for an order awarding attorneys’ fees in the amount of \$73,500 to Class Counsel and an incentive award in the amount of \$1,500 to Plaintiff.

Plaintiff successfully litigated this case against Defendant Mondelēz Global LLC for alleged violations of the ADA. Defendant has agreed to implement policies and practices that are similar to, or exceed, the obligations contained in every settlement resolving digital accessibility claims of which Plaintiff’s counsel are aware—including the agreements finally approved in *Murphy v. Eyebobs, LLC*, No. 1:21-cv-00017, Doc. 49 (W.D. Pa. Feb. 9, 2022) (“*Eyebobs*”), *Murphy v. Charles Tyrwhitt, Inc.*, No. 1:20-cv-00056, Doc. 47 (W.D. Pa. Feb. 16, 2022) (“*Charles Tyrwhitt*”), *Giannaros v. Poly-Wood, LLC*, No. 1:21-cv-10351, Doc. 45 (D. Mass. Oct. 27, 2022) (“*Poly-Wood*”), *Murphy v. The Hundreds Is Huge, Inc.*, No. 1:21-cv-00204, Doc. 41 (W.D. Pa. Nov. 17, 2022) (“*The Hundreds*”), and *Douglass v. Optavia LLC*, No. 2:22-cv-00594, Doc. 38 (W.D. Pa. Jan. 23, 2023) (“*Optavia*”), and preliminarily approved in *Murphy v. Le Sportsac, Inc.*, No. 1:22-cv-00058, Doc. 45 (W.D. Pa. Jan. 24, 2023) (“*Le Sportsac*”) and *Douglass v. P.C. Richard & Son, LLC*, No. 2:22-cv-00399, Doc. 46 (W.D. Pa. Mar. 16, 2023) (“*P.C. Richard*”). As a result of these binding commitments, the Settlement Class Members will be able to access Defendant’s online stores, which Plaintiff alleges were not equally available to them when he commenced this litigation.

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<sup>1</sup> Unless otherwise defined herein, capitalized terms have the meaning set forth in the Agreement, which is available at Doc. 12-1.

Plaintiff's request for fees and an incentive award is reasonable for the following reasons:

1. This is an excellent settlement providing benefits comparable to those obtained by the Department of Justice and National Federation of the Blind in other landmark proceedings expanding access to ecommerce to individuals with disabilities, and by private plaintiffs in *Eyebobs*, *Charles Tyrwhitt*, *Poly-Wood*, *The Hundreds*, *Optavia*, *P.C. Richard*, and *Le Sportsac*;
2. The request for \$73,500.00 in fees and a \$1,500.00 incentive award for Plaintiff did not compromise Defendant's remedial obligations under the Agreement;
3. The Agreement obligates Class Counsel to oversee Defendant's compliance and to assist Settlement Class Members who encounter barriers during remediation;
4. The Agreement was reached after years of negotiations, during which attorneys Kevin Tucker, Kevin Abramowicz, Chandler Steiger, and Stephanie Moore secured a "just, speedy, and inexpensive determination," consistent with Fed. R. Civ. P. 1; and
5. The requested attorneys' fees are less than Class Counsel's lodestar to date, not to mention the work Class Counsel is obligated to perform in the future.

The Court preliminarily approved the Agreement on April 13, 2023, (Doc. 16), and scheduled a final fairness hearing for September 19, 2023, (*id.*, ¶ 13). As set forth below, the attorneys' fees and incentive award are fair and reasonable and should be approved by the Court.

## II. RELEVANT TERMS OF THE SETTLEMENT AGREEMENT<sup>2</sup>

Pursuant to the Agreement, Defendant has agreed to pay the following:

**20.1. [Incentive Award to Named Plaintiff.]** Subject to Court approval, Mondelēz Global LLC shall pay Named Plaintiff an incentive award in the amount of One Thousand Five Hundred Dollars and Zero Cents (\$1,500.00).

**23.1. [Attorneys' Fees and Costs up to the Date of Final Approval.]** Subject to Court approval, Mondelēz Global LLC shall pay Named Plaintiff's reasonable attorneys' fees and Costs incurred in connection with this matter in an amount not to exceed Seventy-Three Thousand Five Hundred Dollars and Zero Cents (\$73,500.00) or such lesser amount as may be awarded by the Court. . . .

(Doc. 12-1, §§ 20.1, 23.1.)

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<sup>2</sup> For a more detailed summary of the Agreement, *see* Doc. 13 at pp. 2-8, Doc. 21 at pp. 2-5.

### **III. CLASS COUNSEL’S REQUESTED FEES ARE FAIR AND REASONABLE AND SHOULD BE APPROVED**

#### **A. Plaintiff Is The Prevailing Party**

The ADA provides that a court may allow the prevailing party to recover “a reasonable attorney’s fee, including litigation expenses, and costs[.]” 42 U.S.C. § 12205. Under statutes with fee-shifting provisions, “it is well settled that a prevailing [party] should recover an award of attorney’s fees absent special circumstances.” *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 163 (3d Cir. 2002); accord *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 232 (3d Cir. 2008). A plaintiff is a “prevailing party” if “they succeed on any significant issue in litigation which achieves some of the benefit the [plaintiff] sought in bringing suit.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). “To ‘succeed’ . . . , a party must achieve a court-ordered change in the legal relationship between the plaintiff and the defendant.” *People Against Police Violence*, 520 F.3d at 232 (quotation marks and citations omitted).

When a court approves a settlement agreement and retains jurisdiction to enforce its terms, there is a judicially-sanctioned material alteration in the legal relationship of the parties sufficient to confer prevailing party status on the plaintiff under fee-shifting statutes, such as the ADA. *Truesdell*, 290 F.3d at 164-65; *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 853 (3d Cir. 2006), *cert. denied*, 549 U.S. 881 (2006); *Arc of Del. v. Meconi*, No. 02-cv-00255, 2005 U.S. Dist. LEXIS 39039, at \*7-12 (D. Del. June 13, 2005); *Witcher v. Phila. Hous. Auth.*, No. 01-cv-00585, 2002 U.S. Dist. LEXIS 16262, at \*4-6 (E.D. Pa. Aug. 19, 2002).

The settlement obtained by Plaintiff meets this standard. The binding and enforceable agreement that resolves this case materially alters the legal relationship between Plaintiff and Defendant. The Agreement obligates Defendant to take concrete steps to benefit Plaintiff and other consumers who use screen reader auxiliary aids to shop online. There is no evidence that Defendant

would have taken these actions absent this litigation. The Agreement also embodies the type of judicial involvement necessary to confer prevailing party status on Plaintiff. The Agreement must be approved and adopted by the Court, (Doc. 12-1, §§ 3, 26), and cannot be amended “unless [such amendment] is pursuant to Court Order,” (*id.*, § 31). In addition, the Agreement states that the Court will retain jurisdiction for enforcement purposes. (*Id.*, § 26.) Accordingly, Plaintiff has achieved a judicially-sanctioned, material alteration in the relationship between the parties, as required to recover attorneys’ fees in this case.

#### **B. Plaintiff’s Lodestar Is Reasonable**

In statutory fee-shifting cases, the party seeking fees bears the burden of proving its request is reasonable, which it can do by “submit[ting] evidence supporting the hours worked and [the] rates claimed.” *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). “A court determines an attorney’s lodestar award by multiplying the number of hours he or she reasonably worked on a client’s case by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer.”<sup>3</sup> *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *see also Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). Fee awards in complex civil rights cases are “governed by the same standards which prevail in other types of equally complex Federal litigation[.]” *Hensley*, 461 U.S. at 430 n.4 (comparing complex civil rights case with complex antitrust litigation for purposes of awarding attorneys’ fees).

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<sup>3</sup> “In statutory fee cases, it is well settled in this circuit that . . . the district court may not award less in fees than requested unless the opposing party makes specific objections to the fee request.” *United States v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 211 (3d Cir. 2000).



Class Counsel have spent a total of 185.8 hours prosecuting Plaintiff's claim through today's date. (Declaration of Kevin Tucker ("Tucker Decl."), ¶ 16.)<sup>4</sup> When applied to Class Counsel's hourly rates, Plaintiff's lodestar is \$87,535.00. (*Id.*, ¶ 17.) Plaintiff seeks \$73,500.00 as a prevailing party attorneys' fee, which amounts to 83.97% of Class Counsel's lodestar to date. (*Id.*, ¶ 18.)

**1. Class Counsel spent a reasonable number of hours prosecuting Plaintiff's claim**

So far, Class Counsel have spent a total of 185.8 hours prosecuting Plaintiff's claim. (Tucker Decl., ¶ 16.) Though the docket is shorter than some cases, this action has involved a thoughtful commitment of time by Class Counsel, and this work is ongoing. Class Counsel committed a reasonable amount of time necessary to obtain the results achieved in light of the complexity of the digital access barriers existing across multiple digital platforms, including on mobile devices and personal computers. Class Counsel expended only as much time as was necessary to fully protect the interests of the class and to litigate and settle this matter.

What's more, although Plaintiff is not seeking fees beyond \$73,500.00 for work performed through the end of the Agreement Term, he is entitled to reasonable fees for monitoring Defendant's compliance with the settlement. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559 (1986), *supplemented*, 483 U.S. 711 (1987) (finding post-judgment monitoring is compensable activity for which counsel is entitled to a reasonable fee); *People Against Police Violence*, 520 F.3d at 235 (same). The Agreement obligates Class Counsel to monitor Defendant's Digital Properties and compliance with the Agreement and to assist Settlement Class Members should they encounter access barriers during the Agreement Term.

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<sup>4</sup> See Exhibit A to Plaintiff's Motion For Attorneys' Fees And Incentive Award.

Although Plaintiff does not request additional fees for this future work, these forward-looking obligations further demonstrate that the requested fee is reasonable and should be approved.

## 2. Class Counsel's hourly rates are reasonable

The Court “should assess the experience and skill of the prevailing party’s attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Maldonado*, 256 F.3d at 184.

Class Counsel submits the following hourly rates for the Court’s consideration:

<b>Attorney</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2023</b>
Kevin Tucker	\$575	\$575	\$600	\$600
Kevin Abramowicz	\$575	\$575	\$600	\$600
Chandler Steiger	—	\$350	\$400	\$425
Stephanie Moore	—	\$350	\$400	\$425

These rates are reasonable given the prevailing rates for ADA class action attorneys practicing in the Erie and Pittsburgh divisions of the Western District of Pennsylvania. To this end, the Western District of Pennsylvania has approved several fee motions filed in class cases brought under Title III in recent years. These approval orders confirm Class Counsel’s requested hourly rates are consistent with established rates in Title III class actions brought in the Western District of Pennsylvania.

- *Douglass v. Optavia LLC*, No. 2:22-cv-00594 (Pittsburgh) was a Title III class action concerning digital accessibility. Judge Wiegand approved Class Counsel’s hourly rates, which ranged from \$350 to \$400 for attorneys Steiger and Moore, and from \$575 to \$600 for attorneys Tucker and Abramowicz. *See* Doc. 39 at p. 2 (order granting attorneys’ fees).
- *Murphy v. The Hundreds Is Huge, Inc.*, No. 1:21-cv-00204 (Erie) was a Title III class action concerning digital accessibility. Judge Lanzillo approved Class Counsel’s hourly rates, which ranged from \$350 to \$400 for attorneys Steiger and Moore, and from \$575 to \$600 for attorneys Tucker and Abramowicz. *See* Doc. 42 at p. 2 (order granting attorneys’ fees).
- *Murphy v. Eyebobs, LLC*, No. 1:21-cv-00017 (Erie) was a Title III class action concerning digital accessibility. Judge Lanzillo approved Class Counsel’s hourly rates,

including \$350 for attorneys Steiger and Moore, and \$575 for attorneys Tucker and Abramowicz. *See* Doc. 50 at p. 2 (order granting attorneys' fees).

- *Murphy v. Charles Tyrwhitt, Inc.*, No. 1:20-cv-00056 (Erie) was a Title III class action concerning digital accessibility. Judge Baxter approved attorneys Tucker and Abramowicz's hourly rate of \$575. *See* Doc. 42 at p. 10 (brief in support of motion for attorneys' fees) and Doc. 48 (order granting attorneys' fees).

Class Counsel are experienced and competent litigators who protected the interests of the class throughout the litigation and during the negotiation of the Agreement. Class Counsel have experience litigating class actions, generally, and prosecuting Title III ADA claims, specifically. Courts have found attorneys Tucker, Abramowicz, Steiger, and Moore adequately represented similar classes in: *Eyebobs* (Doc. 49, p. 3 (Tucker and Abramowicz)); *Charles Tyrwhitt* (Doc. 47, p. 3 (same)); *Poly-Wood* (Doc. 45, p. 2 (same)); *The Hundreds* (Doc. 41, p. 3 (Tucker, Abramowicz, Steiger, and Moore)); *Optavia* (Doc. 38, p. 3 (same)); *P.C. Richard* (Doc. 46, p. 2 (same)); and *Le Sportsac* (Doc. 45, p. 2 (same)). Courts have also found East End Trial Group to have adequately represented the classes in: *Butela v. Midland Credit Mgmt. Inc.*, 341 F.R.D. 581, 598 (W.D. Pa. 2022); *Haston v. Phillips & Cohen Assocs. Ltd.*, No. 2:20-cv-01069, Doc. 58 at ¶ 12(d) (W.D. Pa. May 17, 2022); and *Howard v. LVNV Funding, LLC*, No. 3:19-cv-00093, 2023 U.S. Dist. LEXIS 52294, at \*18-21 (W.D. Pa. Mar. 22, 2023).

Considering the prevailing rates for Title III class litigation in the Western District of Pennsylvania, the rates at which Class Counsel have been approved previously, and the experience of Class Counsel, the hourly rates described above are reasonable. The requested fees are reasonable and should be approved.

### **C. Plaintiff Is Entitled To Reasonable Fees And Costs For Future Work**

Plaintiff is entitled to reasonable fees for monitoring Defendant's compliance with the Agreement. *Del. Valley Citizens' Council for Clean Air*, 478 U.S. at 559; *People Against Police Violence*, 520 F.3d at 235; Judgment Approving Class Action Settlement, *Heinzl v. Cracker Barrel*

*Old Country Store, Inc.*, No. 2:14-cv-01455, Doc. 172, ¶ 11 (W.D. Pa. Aug. 10, 2017) (finding defendant’s agreement “to pay \$830,000.00 for class counsel’s reasonable fees, future monitoring fees and allowable costs” to be “fair and reasonable”).

Class Counsel will monitor Defendant’s online stores to ensure Defendant complies with the Agreement and will assist Settlement Class Members should they encounter barriers during the Agreement Term. Below is a summary of these ongoing obligations.

<b>Time from Effective Date</b>	<b>Class Counsel’s Obligation</b>	<b>Section of Settlement Agreement</b>
3 months	Confirm Defendant has designated an Accessibility Coordination Team	6.1
6 months	Review Defendant’s selection of an Accessibility Consultant	7.1
9 months	Review Defendant’s Accessibility Statement	10.3
12 months	Confirm Defendant has posted the Accessibility Statement on the Websites	10.4
On receipt of the first Annual Report	Review results of the initial Accessibility Audit	8.3
18 months	Review Defendant’s Accessibility Strategy	9.3
18 months	Confirm Defendant has posted an invisible link to the Accessibility Statement at the beginning of the Websites	10.5
On receipt of the Annual Report	Review the Annual Report	21.1
On receipt of the Annual Report	Review Third-Party Content that Defendant cannot confirm is Accessible	5.3
On receipt of the Annual Report	Review the Status Report	7.4
On receipt of the Annual Report	Review accessibility training materials	11.5
On receipt of the Annual Report	Review results of the semi-annual automated accessibility audits	14.2
On receipt of the Annual Report	Review results of the annual end-user accessibility testing	15.2

On receipt of the Annual Report	Upon Class Counsel's request, meet-and-confer with Defendant concerning the Annual Report	21.2
On receipt of the Annual Report	Review accessibility- and Agreement-related questions, comments, complaints, and concerns received by Defendant, and commence meet-and-confer process if necessary	13.3, 17.2
Ongoing during the Agreement Term	Test the Digital Properties to evaluate Defendant's compliance with the Agreement	17.1
Ongoing during the Agreement Term	Notify Defendant if a Settlement Class Member contacts Class Counsel about a dispute concerning the Agreement	22.1.2
Ongoing during the Agreement Term	Meet-and-confer with Defendant concerning a Settlement Class Member's dispute concerning the Agreement	22.1.4
Ongoing during the Agreement Term	Submit a Settlement Class Member's dispute concerning the Agreement to mediation, if the meet-and-confer process fails	22.2.1
Ongoing during the Agreement Term	Submit a Settlement Class Member's dispute concerning the Agreement to the Court, if the meet-and-confer process and mediation fails	22.3.1

The Agreement also includes many deadlines during the Agreement Term by which Class Counsel must complete various tasks, other obligations that occur annually, and potentially unlimited representation of Settlement Class Members during the Agreement Term, including during informal meet-and-confers with defense counsel, at mediation, and before the Court.

**D. The *Johnson* Factors Support Plaintiff's Request For Fees**

"After a district court determines the lodestar, its discretion comes into play and it can adjust the fee for a variety of reasons." *Pub. Interest Research Grp. of N.J., Inc. v. Windall*, 51 F.3d 1179, 1185 (3d Cir. 1995). Factors commonly considered in determining whether to adjust the lodestar include:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill required to perform the legal service properly;
- (4) the preclusion of alternative employment;
- (5) the customary fee for similar work;
- (6) the nature of the fee payment arrangement;
- (7) time limitations imposed by the client or

circumstances; (8) the amount involved and results obtained; (9) the experience, reputation and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the attorney-client relationship; and (12) fee awards in similar cases.

*Id.* at 1185 n.8.<sup>5</sup> These factors confirm Plaintiff’s request for \$73,500.00 in attorneys’ fees, which is 83.97% of Class Counsel’s aggregate lodestar to date, is reasonable and should be approved.

### **1. The time and labor required**

Although this case was not extensively litigated, Class Counsel spent considerable time and energy crafting a thoughtful resolution that (a) resolves the Settlement Class Members’ claims, (b) is not an undue burden for Defendant and does not require Defendant to fundamentally alter its ecommerce stores, and (c) has survived scrutiny from leading disability rights organizations, like the National Federation of the Blind and numerous others, who have been notified of the Agreement but have not yet filed objections. Since the Agreement is similar to the settlements finally approved in *Eyebobs*, *Charles Tyrwhitt*, *Poly-Wood*, *The Hundreds*, and *Optavia*, the time Class Counsel devoted to the Agreement and shepherding it through the approval process was fair and reasonable, and supports the requested fees.

### **2. The novelty and difficulty of the questions**

While many website accessibility cases have been litigated in this District, the defense bar regularly contends that the ADA does not extend to digital spaces, like Defendant’s online stores. *See, e.g.*, Defendant’s Motion to Certify and to Stay Action, *Douglass v. Hedley & Bennett, Inc.*, No. 2:21-cv-01165, Doc. 51, ¶ 1 (W.D. Pa. Oct. 27, 2021) (“Does Title III of the [ADA] . . . apply to the website of a wholly online business without any physical locations?”); *but see Murphy v. Bob Cochran Motors, Inc.*, No. 1:19-cv-00239, 2020 U.S. Dist. LEXIS 139887, at \*20 n.5 (W.D. Pa. Aug. 4, 2020), *adopted by, motion denied by, objection overruled by* 2020 U.S. Dist. LEXIS

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<sup>5</sup> *See Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

177593 (W.D. Pa. Sept. 28, 2020) (“*Bob Cochran*”) (“Construing ‘public accommodation’ as [being] limited to physical facilities seems antiquated in light of the expansion and prevalence of the internet and e-commerce.”). Given the legal uncertainty surrounding Plaintiff’s claim, this factor supports the reasonableness of Class Counsel’s requested fees.

### **3. The skill required to perform the legal service properly**

Many lawyers have filed similar cases, but few have as much experience and success as Class Counsel. In addition to their experience litigating class actions generally, the attorneys at East End Trial Group have litigated Title III digital accessibility claims since 2016, helping to secure landmark decisions across the country confirming public accommodations have a legal obligation to make digital content fully and equally accessible to everyone. *See, e.g., Gniewkowski v. Lettuce Entertain You Enters., Inc.*, 251 F. Supp. 3d 908 (W.D. Pa. 2017); *Access Now, Inc. v. Otter Prods., LLC*, 280 F. Supp. 3d 287 (D. Mass. 2017); *Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-00116, 2017 U.S. Dist. LEXIS 185112 (D.N.H. Nov. 8, 2017).

Part of Class Counsel’s success in litigating this case is a result of understanding how screen readers work and how digital barriers affect blind consumers in the real world. This is why Plaintiff’s complaint describes the alleged barriers on Defendant’s online stores with plain language and illustrations, instead of a computer audit without explanation or, worse still, unexplained conclusions. In Class Counsel’s experience, describing an online store’s barriers in this manner is critical to getting the parties, their counsel, and the court on the same page, so focus can turn to remediation and expanding a company’s market reach to millions of blind consumers who use screen readers to shop. In light of the unique intersection of Class Counsel’s litigation experience and thoughtful approach, it is no surprise that the Agreement reached is similar to the settlements approved in *Eyebobs*, *Charles Tyrwhitt*, *Poly-Wood*, *The Hundreds*, *Optavia*, *P.C. Richard*, and *Le Sportsac*. This factor supports the reasonableness of the requested fees.

**4. The preclusion of alternative employment**

Work on one case means preclusion of work on a different matter. Class Counsel have several class actions and other cases pending in this District, state court, and on appeal. Each case requires significant skill, attention, and work. Deciding to pursue this case as a class action—knowing the lodestar would likely exceed the fees requested—required a decision by Class Counsel to put time and money on the line, to the exclusion of other work. This factor supports the reasonableness of the requested fees.

**5. The customary fee for similar work and whether the fee is fixed or contingent**

The customary fee in an ADA case is the reasonable fee set forth in 42 U.S.C. § 12205 and 28 C.F.R. § 36.505, or Plaintiff’s lodestar. In this case, and in similar cases filed under the ADA, only injunctive relief is available. Damages are not available under the ADA. Therefore, in most cases, it is not feasible for a client to pay a lawyer an hourly rate to prosecute an ADA case, and compensation is entirely contingent on a successful outcome affording “prevailing party” status. Plaintiff’s counsel, in this and similar cases, are paid only when the plaintiff and the class prevail. This factor supports the reasonableness of the requested fees.

**6. Time limitations posed by the client or circumstances**

Every day that Defendant’s online stores remain incompatible with screen reader auxiliary aids is another day in which Settlement Class Members are denied full and equal access to Defendant’s goods and services. These “closed doors,” and those of other retailers, limit Settlement Class Members to a fraction of an increasingly digital marketplace that is freely available to consumers who do not require modest accommodations to shop online. The time is now to make this marketplace accessible to all consumers, and the work of Class Counsel is a meaningful step in that direction. These circumstances support the requested fees.



### **7. The amount involved and the results obtained**

Compensatory damages are not available under Title III. Instead, Plaintiff is entitled only to injunctive relief, including “an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities[.]” 42 U.S.C. § 12188(a)(2). As previously explained, the Agreement achieved by Plaintiff and Class Counsel provides injunctive relief comparable to that obtained in *Eyebobs*, *Charles Tyrwhitt*, *Poly-Wood*, *The Hundreds*, *Optavia*, *P.C. Richard*, and *Le Sportsac*. Commenting on the settlement agreement reached in *Charles Tyrwhitt*, which the Agreement here closely tracks, one judge recognized the court was “hard-pressed to see that much of anything is being left on the table that these absent class members, if they were to litigate on their own, . . . could potentially obtain that is not being provided through the current [settlement].” Preliminary Approval Hr’g Tr., *Murphy v. Charles Tyrwhitt, Inc.*, No. 1:20-cv-00056, Doc. 35, p. 12 (W.D. Pa. Feb. 12, 2021). By all accounts, the recovery here is as strong as any that a private individual has achieved, and supports the requested fees.

### **8. The experience, reputation, and ability of the attorneys**

This factor is largely subsumed in the evaluation of a reasonable rate for the attorneys’ services. As explained in Section III.B.2., *supra*, Class Counsel are well versed in class actions, complex litigation, and Title III, all of which are skills required to prosecute the class claims here. This factor supports the requested fees.

### **9. The “undesirability” of the case**

Class Counsel do not consider expanding the benefits of the internet to blind consumers to be “undesirable.” Despite the aspersions of some, Class Counsel take pride in representing Plaintiff as he performs his congressionally delegated duties as private attorney general.<sup>6</sup> Since the first

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<sup>6</sup> The DOJ recognizes that because it “cannot investigate every place of public accommodation” for ADA compliance, “[p]rivate plaintiffs play an important role in enforcing the ADA[.]”

web accessibility case filed in this district in 2015, the number of accessibility-specific consultants has grown rapidly, startups across the world have introduced tech-based solutions to make it easier for ecommerce stores to become accessible, and the DOJ has issued guidance concerning “the importance of web accessibility, barriers that inaccessible websites create for some people with disabilities, when the ADA requires web content to be accessible, tips on making web content accessible and other information and resources.”<sup>7</sup> Timing suggests these developments would not have occurred without private plaintiffs demanding access through litigation, and courts across the country repeatedly affirming that right. Because Class Counsel do not consider this case “undesirable,” this factor may not support fees above prevailing rates.

#### **10. The nature and length of the attorney-client relationship**

Class Counsel have represented Plaintiff for several years and have pursued claims on his behalf without any remuneration from him. Class Counsel can only commit time and resources to representing Plaintiff, thereby prompting businesses to implement sufficient digital accessibility policies and practices, if courts approve their fees when Plaintiff prevails. *See Hensley*, 461 U.S. at 445 (“All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.”). Thus, Class Counsel’s longstanding commitment to Plaintiff and Plaintiff’s long-term goal of an accessible digital marketplace support the requested fees.

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Statement of Interest of the United States of America, *Equal Rights Center v. Abercrombie & Fitch Co.*, No. 1:09-cv-03157, Doc. 38, p. 1 (D. Md. July 6, 2010).

<sup>7</sup> *Justice Department Issues Web Accessibility Guidance Under the Americans with Disabilities Act*, DOJ (Mar. 18, 2022), <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act>.

### 11. Fee awards in similar cases

The fees sought here are reasonable considering the relief obtained for the Settlement Class when compared to similar cases brought in this District. For example, courts in the Western District of Pennsylvania approved the following attorneys' fees in the Title III digital accessibility class cases cited above:

- \$47,500 plus \$15,000 per extended term in *Murphy v. The Hundreds Is Huge, Inc.*, No. 1:21-cv-00204, Doc. 42 at p. 2 (order granting attorneys' fees in case involving 1 website) (Lanzillo, J.);
- \$45,000 plus \$15,000 per extended term in *Douglass v. Optavia LLC*, No. 2:22-cv-00594, Doc. 39 at p. 2 (same) (Wiegand, J.);
- \$44,000 plus \$15,000 per extended term in *Murphy v. Eyebobs, LLC*, No. 1:21-cv-00017, Doc. 50 at p. 2 (same) (Lanzillo, J.); and
- \$43,000 plus \$15,000 per extended term in *Murphy v. Charles Tyrwhitt, Inc.*, No. 1:20-cv-00056, Doc. 48 at p. 2 (same) (Baxter, J.).

Courts in this District also approved the following attorneys' fees in other Title III class actions:

- \$400,000 in *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278, Doc. 75 (motion for fees), Doc. 79 (minute entry indicating court found fees reasonable) (Lenihan, J.);
- \$385,000 in *Nocera v. Dollar General Corp.*, No. 2:18-cv-01222, Doc. 81 (motion for fees), Doc. 92 (order granting motion) (Stickman, J.);
- \$350,000 in *Dieter v. Aldi, Inc.*, No. 2:18-cv-00846, Doc. 61 (motion for fees), Doc. 64 (order granting motion) (Conti, J.); and
- \$118,500 in *Flynn v. Concord Hosp. Enters. Co.*, No. 2:17-cv-01618, Doc. 34 (motion for fees), Doc. 39 (order granting motion) (Lenihan, J.).

For the foregoing reasons, the *Johnson* factors support Plaintiff's request for \$73,500.00 in attorneys' fees in this case, which obligates Defendant to remedy 29 separate websites.

#### **IV. THE INCENTIVE AWARD IS REASONABLE AND SHOULD BE APPROVED**

Pursuant to the Agreement, Defendant agreed to pay Plaintiff a \$1,500.00 incentive award, subject to Court approval, for his efforts on behalf of the Settlement Class. (Doc. 12-1, § 20.1.) An incentive award for bringing and litigating this case on behalf of the class is permissible and promotes the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. *See, e.g.*, Manual for Complex Litigation (Fourth) § 21.62 n.971 (2004).

Here, but for Plaintiff's efforts, the class would have received nothing in the way of a judicially-approved, legally enforceable change in Defendant's accessibility policies and practices. Plaintiff has been an active participant in this action, even before it was filed. Plaintiff attempted to browse Defendant's online stores, where he encountered communication barriers that denied him full and equal access. Plaintiff compared his personal experience with the results of Class Counsel's own accessibility investigations and approved Class Counsel's filing of this action on his behalf. Plaintiff has reviewed the pleadings and the Agreement and is familiar with the lawsuit and his duties as class representative. (Tucker Decl., ¶ 12.)

Plaintiff's participation on behalf of the Settlement Class and the results Plaintiff achieved justify an incentive award of \$1,500.00, which is reasonable when compared to similar cases brought in this District. For example, judges in the Western District of Pennsylvania approved the following incentive awards in the Title III digital accessibility class cases cited above:

- **\$1,000** in *Douglass v. Optavia LLC*, No. 2:22-cv-00594, Doc. 39 at p. 3 (order granting attorneys' fees and incentive award in a case involved 1 website) (Wiegand, J.);
- **\$1,000** in *Murphy v. The Hundreds Is Huge, Inc.*, No. 1:21-cv-00204, Doc. 42 at p. 3 (same) (Lanzillo, J.);
- **\$1,000** in *Murphy v. Eyebobs, LLC*, No. 1:21-cv-00017, Doc. 50 at p. 3 (same) (Lanzillo, J.); and

- **\$1,000** in *Murphy v. Charles Tyrwhitt, Inc.*, No. 1:20-cv-00056, Doc. 48 at p. 2 (same) (Baxter, J.).

And, judges in this District approved the following incentive awards in other Title III cases:

- **\$5,000** in *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278, Doc. 76 at p. 6 (brief in support of motion for fees), Doc. 79 (minute entry indicating court found fees reasonable) (Lenihan, J.); and
- **\$5,000** in *Dieter v. Aldi, Inc.*, No. 2:18-cv-00846, Doc. 62 at p. 6 (brief in support of motion for fees), Doc. 64 (order granting fees) (Conti, J.).

Consistent with these cases, the \$1,500.00 incentive award that Defendant agreed to pay to Plaintiff for his efforts is fair and reasonable. The Court should approve the incentive award.

## V. CONCLUSION

For the foregoing reasons, the requested fees and incentive award are reasonable and more than justified by the work performed, and the results obtained, on behalf of the Settlement Class. Plaintiff respectfully requests that the Court award \$73,500.00 as attorneys' fees to Class Counsel and \$1,500.00 as an incentive award to Plaintiff.

Dated: June 6, 2023

*/s/ Chandler Steiger*

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**CERTIFICATE OF SERVICE**

I hereby certify that, on June 6, 2023, a true and correct copy of this document was filed through the Court's CM/ECF system, which sent notice of such filing to all counsel of record.

*/s/ Chandler Steiger*

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Chandler Steiger