UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:20-CV-20836-BLOOM/Louis

AARON FRUITSTONE, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CLASS ACTION

SPARTAN RACE, INC., a Delaware Corporation,

Defendant.

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF THE SETTLEMENT CLASS

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INTRODUCTION

The Parties respectfully present for preliminary approval a proposed nationwide class settlement (the "Settlement") which, upon final approval, will fully resolve this action and provide substantial benefits to almost one million Spartan racers who are members of the Settlement Class.[1] The proposed Settlement was reached after a year of hard-fought, contentious litigation and a protracted mediation under the supervision of Michael Young, an experienced and highly qualified mediator approved by the Court on November 5, 2020 [D.E. 81]. Over the course of two months, the Parties participated in a full day Zoom mediation followed by numerous Zoom and telephonic mediation sessions and separate negotiations between the Parties. These arm's length negotiations, which stalled at several points, continued after the class certification hearing and ultimately culminated with the proposed Settlement.

As explained more fully below, the Settlement achieves a very favorable result for the Settlement Class Members, affording immediate economic benefits to compensate them for prior Racer Insurance Fee payments. These Settlement benefits avoid the delay of continued litigation and have a value that likely exceeds the amounts that would be recoverable on behalf of the class members through successful prosecution of this action through trial and the inevitable resulting appeal.[2] The Settlement also provides significant injunctive relief curing the allegedly deceptive and misleading representations and omissions regarding the Racer Insurance Fee. The Settlement requires Spartan to rename the charge as an "Administrative, Insurance and Management Fee," provide specified disclosures concerning the nature of this charge on its website and clearly inform prospective racers that the fee is not a direct pass-through of insurance costs but may instead generate revenues for Spartan.

As the Court is aware, this case does not involve consumer goods or services that are alleged to be worthless or inherently defective, Plaintiff does not contest the quality or value of the Spartan races themselves, nor does Plaintiff allege that Spartan failed to provide the benefits promised to race participants. Indeed, the Spartan racers are generally satisfied with their racing experience as many of them have participated in multiple races in the past and are likely to

[1] Unless otherwise noted, capitalized terms have the same meaning as the corresponding defined terms in the Stipulation of Settlement dated January 22, 2021 (the "Settlement Agreement").

[2] Plaintiff has retained a forensic accountant, Soneet Kapila, who will provide expert testimony concerning the estimated value of the Settlement benefits in connection with Plaintiff's motion for final approval of the Settlement.

participate in future races once the COVID 19 pandemic has abated. For that very reason, the injunctive relief provided by the Settlement likely will benefit the Settlement Class Members as well as future Spartan racers. Accordingly, Plaintiff respectfully requests the Court enter the proposed Order granting preliminary approval of the Settlement, attached as **Exhibit 1**, preliminarily certifying a nationwide class for settlement purposes, and approving notice.

I. FACTUAL BACKGROUND

A. THE MEDIATION PROCESS

Plaintiff initiated this action against Defendant, Spartan Race, Inc. ("Spartan"), almost a year ago, on February 26, 2020. On April 13, 2020, Plaintiff filed the operative Amended Complaint [ECF No. 15] alleging that Spartan's representations regarding the "Racer Insurance Fee," objectively construed, would lead a reasonable consumer to believe that this mandatory, non-refundable $14 charge is used solely to purchase insurance on behalf of the race registrant. The Amended Complaint alleges that, in reality, and unknown to consumers, Spartan uses the Racer Insurance Fees to defray administrative expenses and as a hidden profit center for Spartan. *Id.*, ¶¶ 20–21. Plaintiff alleges that Spartan's representations regarding the Racer Insurance Fee were deceptive and the class members suffered damage. The Amended Complaint asserts claims for violations of the Massachusetts Consumer Protection Law, Massachusetts General Laws, Chapter 93A, et seq., and the Florida Deceptive and Unfair Trade Practices Act, §§ 501.201, et seq., Florida Statutes.

Spartan filed a Motion to Transfer this case to Massachusetts and an alternative Motion to Dismiss. After extensive briefing and oral argument, the Court denied Spartan's transfer motion, as well as Spartan's Motion to Dismiss. The parties thereafter engaged in extensive discovery, exchanging hundreds of thousands of pages of documents and data, conducting several depositions and participating in multiple hearings on discovery disputes before Magistrate Judge Lauren Louis.

Plaintiff filed his Motion for Class Certification on September 3, 2020, [ECF No. 58], which was fully briefed as of December 23, 2020. [ECF Nos. 63–65, 72–73, 95]. On October 13, 2020, the Court granted Spartan's prior counsel's motion for leave to withdraw [ECF Nos. 71, 75] and on October 29, 2020, Spartan's successor counsel entered their notice of appearance. [ECF No. 77]. The parties thereafter moved to stay these proceedings in deference to a private mediation before Michael D. Young, an experienced and highly regarded mediator with the New York office of JAMS. [ECF Nos. 79, 81]. Declaration of Michael D. Young dated January 27, 2021 ("Young

Decl.") (attached as **Exhibit 2**). In addition to counsel for the parties, outside coverage counsel for Travelers and Chubb, the two insurance carriers providing potential coverage to Spartan for the claims asserted in the action, participated actively throughout the mediation. Young Decl., ¶ 8. The mediation was hard-fought and protracted, extending over a two-month period during which the parties participated in a full-day mediation session and multiple Zoom and telephonic follow on mediation sessions. *See, e.g.,* Young Decl. Over the course of the mediation, the parties held numerous telephone and Zoom calls with Mr. Young and, as the negotiations progressed, the parties sought and obtained several extensions of the stay allowing them to continue their negotiations. *See id.*; *see also* [ECF Nos. 83–85, 87–88].

At several points during the mediation, the parties reached a near impasse as counsel for Plaintiff pressed for enhanced settlement benefits to maximize the recovery for the putative class members. Spartan, for its part, emphasized that its insurers were asserting coverage defenses and that Spartan currently lacks the financial resources necessary to satisfy the claims asserted should Plaintiff fully prevail at trial. Young Decl., ¶ 9. Spartan therefore consistently maintained throughout the mediation process that its precarious financial condition precluded it from making any meaningful monetary contribution to any class settlement. *Id.*

Despite their best efforts, the parties informed the Court on December 22, 2020 that they had been unable to reach a mutually satisfactory settlement and the Court lifted the stay and reset the class certification hearing. [ECF Nos. 89–90]. On December 29, 2020, the Court heard oral argument on Plaintiff's Motion for Class Certification, [ECF No. 97] at which the Court inquired about the status of the settlement negotiations. Counsel informed the Court that although their prior efforts had not achieved a settlement agreement, the parties had left open the door for further negotiations. After the class certification hearing, the parties continued settlement negotiations in the ongoing mediation with Mr. Young. After many weekend and late-night calls and Zoom conferences, Mr. Young made a mediator's proposal, based upon all of the relevant circumstances, which the parties accepted. Young Decl., ¶ 11.

Commenting on the mediation process, mediator Young attests that "[t]he proposed Settlement is the product of hard-fought arm's length negotiations … conducted by extremely knowledgeable counsel having extensive experience in complex class actions, who were highly knowledgeable concerning the claims and defenses asserted in the Action. The caliber of the representation of both sides was, in my experience, exemplary." *Id.* ¶ 5.

B. The Proposed Settlement

The Settlement is memorialized in the Settlement Agreement, which is attached as **Exhibit 3.** As explained below, the Settlement will provide Settlement Class Members with immediate economic benefits without the ensuing risks of class certification, litigation and appeals. The Settlement achieves a favorable result for the Settlement Class Members, particularly given Spartan's current precarious financial condition caused by the ongoing COVID-19 pandemic.

The proposed Settlement allows all Settlement Class Members to choose either: (a) a free, four (4) month membership to the Spartan+ Membership Program (described in detail below), or (b) a $5 electronic Voucher for each Racer Insurance Fee paid by the Settlement Class Member (up to a maximum of 4 electronic Vouchers). Importantly, Settlement Class Members need not submit ***any claim form or participate in any claims process*** to receive these settlement benefits. Moreover, Spartan has agreed to significant injunctive relief, including renaming the "Racer Insurance Fee" to the "Administrative, Insurance, and Management Fee" and providing disclosures concerning the administrative and other costs defrayed by the charges and that the mandatory fee may provide a source of additional revenues for Spartan. Notice of the Settlement will be disseminated by Spartan through direct emails to the Settlement Class Members and the establishment of a settlement website by Plaintiff's counsel. Spartan maintains current email addresses for the Settlement Class Members.

Plaintiff's counsel unequivocally endorse the Settlement and recommend approval by the Court. Plaintiff's counsel were well-positioned to negotiate the Settlement terms. The proposed Co-Lead Counsel, The Moskowitz Law Firm PLLC and Bonnett, Fairbourn, Friedman & Balint are nationally recognized preeminent class action litigators with extensive experience in complex consumer cases. Further, the extensive discovery and motion practice conducted in the action, coupled with counsel's ongoing investigation, positioned Plaintiff's counsel to assess and evaluate the strengths and risks associated with Plaintiff's claims and Spartan's defenses as well as the costs and risks associated with continued litigation. Plaintiff's counsel were keenly aware, based on financial documentation provided by Spartan, that the company had a greatly diminished ability to withstand a judgment for the full relief sought given the effects of the ongoing COVID-19 pandemic on its business. Given the immediate and substantial benefits the Settlement will provide to all Settlement Class Members, Plaintiffs respectfully submit that the Settlement is unquestionably "within the range of reasonableness" and that preliminary approval is warranted.

II. THE SETTLEMENT TERMS AND AGREEMENT

A. *The Proposed Settlement Class*

> All individuals in the United States who during the Class Period, based on Spartan's records, paid a $14 "Racer Insurance Fee" or "Insurance Fee" in connection with an event organized and sponsored by Spartan. Excluded from the Class are (a) Defendant's board members and executive level officers; (b) the federal district and magistrate judges assigned to this Action and their staff, and (c) individuals who submit a valid, timely exclusion/opt-out request.

Ex. 2, ¶ II.A.3.

B. *Settlement Relief*

This proposed Settlement substantially fulfills the main objectives of this action and affords beneficial relief to the Settlement Class Members that certainly falls "within the range of potential recovery" through successful litigation of the claims asserted in this action. Although Spartan does not admit any fault or liability in the Settlement, Spartan has agreed to provide substantial relief to be distributed according to the Settlement Agreement. As described more fully below, each Class Member will be entitled to elect to receive either: (a) one four-month free membership to the "Spartan+ Membership Program," or (b) one $5 electronic Voucher per each paid registration during the Class Period, up to a maximum of four (4) total electronic Vouchers per Class Member.

Plaintiff and his counsel estimate that the value of the Settlement relief made available to Settlement Class Members, exclusive of the valuable injunctive relief, is similar (if not more) to relief that Class Members might receive, if they were able to certify this case nationwide over Spartan's objections and obtain a favorable jury verdict.[3] As noted above, forensic accountant Soneet Kapila will submit an expert declaration estimating the specific value of the Settlement benefits in connection with Plaintiff's motion for final approval of the Settlement. In addition, the Settlement Class Members stand to benefit from the important injunctive relief described below. The Court should therefore find such relief to be within the "range of reasonableness",[4] especially

[3] This estimate is based on the retail value of the free four-month membership in the Spartan + Membership Program, which is available at the election of the Settlement Class Members and as the default benefit if a Settlement Class Member does not affirmatively elect the Electronic Voucher(s).

[4] To warrant preliminary approval, a proposed class settlement should offer a recovery that "falls within th[e] range of reasonableness," which need not be "the most favorable possible result of litigation." *Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 338 (W.D. Pa. 1997), *aff'd*, 166 F3d 581 (3d Cir. 1999). Here, the Settlement relief offered is roughly the same amount which could be won at trial (apart from multiple damages), and sufficient to warrant preliminary approval of the

given the risks of success on the merits of Plaintiff's claims.

1. The Spartan+ Membership Program (the "Program")

Each Class member who elects to receive the Program (or simply does not indicate any selection after receiving the email notice) will be provided with a free four-month subscription to the Spartan+ Program. Ex. 2, ¶ III.A. Many similar fitness applications, such as Peloton and Apple, have been met by consumers with great success. In fact, there was a 27% increase in the use of fitness apps last year. See https://www.emarketer.com/content/number-of-health-fitness-app-users-increased-27-last-year, https://apps.apple.com/us/app/spartan-fit/id1504574501. Spartan has long offered a fitness app called SpartanFit™, but the Spartan+ Membership provides much more substance, content and benefits. https://apps.apple.com/us/app/spartan-fit/id1504574501.[5] Spartan currently offers, at a price of $79.99 per year, access to just its SpartanFit™ application.

This new Spartan+ Program subscription provides significant value to each Settlement Class Member in that it includes: (1) the "highest" level of access to all available video, audio, and other digital fitness content; (2) provides free shipping and handling for any merchandise ordered by the Class Member from Spartan's website; (3) provides 20% off all online merchandise purchases; (4) allows free photo downloads after events; and (5) access to other "members only" premium content on Spartan's website. *Id*. ***The retail cost of this membership program to the public is $85.00 per year, so the four-month free membership has a value to each Settlement Class Member of $28*** (1/3 of $85). *Id*. Settlement Class Members are not required to provide any credit card to initiate the Program subscription and subscriptions will automatically terminate at the end of four months unless the Class Member affirmatively chooses to extend it. *Id*.

Settlement given that since 1995, class action settlements typically "have recovered between 5.5% and 6.2% of the class member's estimated losses." *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001); *see also Parsons v. Brighthouse Networks, LLC*, No. 2:09-cv-267, 2015 WL 13629647, at *3 (N.D. Ala. Feb. 5, 2015) (noting that a class settlement recovery of between 13% to 20% is "frequently found … to be fair and adequate"); *In re Newbridge Networks Sec. Litig.*, No. 94-cv-1678, 1998 WL 765724, at *2 (D.D.C. 1998) ("[A]n agreement that secures roughly six to twelve percent of a potential trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted range of reasonableness."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011) (9% class recovery "is still within the range of reasonableness").

[5] Many companies offer a variety of fitness apps. https://apps.apple.com/us/app/spartan-fit/id1504574501. Mr. Kapila will provide an expert declaration in support of Final Approval discussing the value of the Spartan+ Membership and the $5 electronic vouchers.

2. Electronic Vouchers for Free Purchase of Spartan Merchandise

As an alternative to the four-month free subscription to the Program, each Class Member may elect to receive one $5.00 electronic Voucher per each event for which they paid a full registration fee during the Class Period, up to a total of four (4) electronic Vouchers (for a combined value of $20.00). Ex. 2, ¶ III.B. Each electronic Voucher shall entitle the class member to a $5.00 credit towards the purchase of any non-discounted merchandise on Spartan's website. *Id*. There are currently many non-discounted merchandise items available for sale on the Spartan website for $5.00 or less, and Spartan has no intention of removing said items as a result of this Settlement. *Id*. Electronic Vouchers are fully transferable to friends and family and each Voucher will be valid for ***two (2) years*** from the date of issuance. *Id*. Spartan currently sells Spartan Gift Cards in various dollar amounts that are utilized in a similar manner as the electronic Vouchers.

3. Election of Benefits

The Class Notice will further inform each Class Member that they shall have sixty (60) days from the date the Class Notice email is sent to make their selection, otherwise the default relief will be the free four-month subscription to the Program. *Id*.

4. Injunctive Relief to the Settlement Class

Plaintiff's main reason for bringing this litigation was so Spartan provides full and adequate disclosures regarding the $14 "Racer Insurance Fee". In addition to providing all Class Members with the relief described above, Spartan also agrees to the following injunctive relief, starting on the Effective Date, that will directly benefit all current and future Spartan consumers:

- Spartan will not describe in writing or abbreviate the at-issue fee as a "Racer Insurance Fee," "Racer Insur. Fee," "Insurance Fee," "Insur. Fee," or similar nomenclature. Spartan specifically retains the right to describe the at-issue fee an "Administrative, Insurance, and Management Fee," "AIM Fee," or "Admin Fee" during the online event registration process or elsewhere.
- Spartan will add the following language to current and future marketing and sales materials, FAQs, relevant website screens in the registration process, and screen indicators or selectors that describe or are adjacent to the at-issue fee: "The Administrative, Insurance, and Management Fee covers a number of different costs involved in Spartan events, including administrative and management costs, insurance costs and expenses for related risk management and safety measures. This fee is not a direct pass-through of third-party costs to the racer and may include revenues to Spartan."
- Spartan agrees that it will not represent, directly or indirectly, that 100% (or all) of the "Administrative, Insurance, and Management Fee" is paid to an insurance provider or other third-party.

Ex. 2, ¶ III.C

Accordingly, there is no question that with the value of both the monetary and injunctive relief, the Settlement is "within the range of reasonableness" and warrants preliminary approval, especially in light of the risks attendant to continued litigation of these claims.

C. *Class Notice*

Class notice will be efficiently disseminated directly to Settlement Class Members through direct email at the email addresses maintained by Spartan. The Class Notice will be in substantially the form attached to the Settlement Agreement as Exhibit A, if approved by the Court. Ex. 2, section IV. The notice will be sent within twenty-eight (28) days of the entry of the Preliminary Approval Order. *Id.* Plaintiff's counsel will also establish a website on which Settlement Class members may review the Settlement Agreement and its exhibits. *Id.* To provide the proposed class with even more notice, Spartan will also provide a second email to Class Members no later than 10 days after the Effective Date informing them that, depending on the Class Member's selection, the Voucher(s) will be deposited into their account shortly or their membership in the Program is ready to be activated and they can now register and begin using the Program. *Id*. Settlement Class Members may opt out or object by following the prescribed process. *Id.*; *see also id.*, section V.

Due to the fact that Spartan's records contain all information sufficient to identify and directly contact the members of the Settlement Class and that ***there is no Claim Form or Claims Process,*** to save the substantial costs of administration by a third party, Spartan will primarily administer the Settlement in good faith and will absorb that cost and with the participation and oversight of Class Counsel. If Spartan's records conflict with information submitted by a claimant, counsel for both Parties shall in good faith attempt to resolve the conflict as they have done throughout the pendency of this matter.

D. *Class Counsel's Fees and Expenses and Named Plaintiff's Case Contribution Award*

The Parties stipulate in the Settlement Agreement that The Moskowitz Law Firm PLLC and Bonnett, Fairbourn, Friedman & Balint, P.C. will serve as Class Counsel. Ex. 2, ¶ II.A.4. Collectively, Class Counsel's application for attorneys' fees and expenses for all of the law firms involved, including Brown, Readdick, Bumgartner, Carter, Strickland & Watkins, LLP, as well as a service award for the named Plaintiff of up to $10,000.00 (subject to Court approval), shall not exceed $2,300,000.[6] *Id*., section VIII. The Court may consider whether to approve these awards

[6] *See* Section VI, *infra.* Any award of attorneys' fees and costs will be paid by Spartan's insurance carriers as part of the Settlement. The amount in costs and attorneys' fees that Class Counsel will

separate and apart from its analysis of the fairness, reasonableness, and adequacy of the Settlement.

E. *Final Approval and Objections*

Class members may object to the Settlement no later than twenty-one (21) days before the originally scheduled date of the Fairness Hearing, or on such other date as may be ordered by the Court. Ex. 2, section V. The Motion for Attorneys' Fees shall be filed within thirty-five (35) days before the originally scheduled date of the Fairness Hearing, *Id.*, section VIII.A, and the Parties shall respond to any objections no later than 10 days prior to the Fairness Hearing *Id*., section V.

IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT

Settlement "has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient use of judicial resources, and achieve the speedy resolution of justice[.]" *Turner v. Gen. Elec. Co.*, No. 2:05-CV-186-FTM-99DNF, 2006 WL 2620275, at *2 (M.D. Fla. Sept. 13, 2006). For these reasons, "[p]ublic policy strongly favors the pretrial settlement of class action lawsuits." *In re U.S. Oil & Gas Litig.,* 967 F.2d 489, 493 (11th Cir.1992). "Approval of a class action settlement is a two-step process." *Fresco v. Auto Data Direct, Inc.*, No. 03-cv-61063, 2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007). Preliminary approval is the first step, requiring the Court to "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Id.* In the second step, after notice to the class and time and opportunity for absent class members to object or otherwise be heard, the court considers whether to grant final approval. *Smith v. Wm. Wrigley Jr. Co.*, No. 09–60646–CIV, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010). Under Rule 23(e), in weighing a grant of preliminary approval, district courts must determine whether "giving notice is justified by the parties' showing that 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." Fed. R. Civ. P. 23(e)(1)(B)(i–ii) (emphasis added). *Id*.

The amended Rule 23(e)(2) requires courts to consider 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;

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request from the Court at Final Approval ($2.3 million) is justified, either under the "percentage of the fund" method or the "lodestar analysis", as will be explained in greater detail in Class Counsel's Motion for Costs and Attorneys' Fees.

ii. the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
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); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019).

Further, the standard for preliminary approval of a class action settlement ***is not high***—a proposed settlement should be preliminarily approved if it falls "within the range of possible approval" or if there is "probable cause" to notify the class of the proposed settlement and "to hold a full-scale hearing on its fairness[.]" *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (citation omitted). Applying this standard and the new standard of Rule 23, this settlement is an excellent one by any measure and should be preliminarily approved.

A. The Settlement Is the Product of Good Faith, Informed, and Arm's-Length Negotiations among Experienced Counsel.

At the preliminary approval stage, district courts consider whether the proposed settlement appears to be "'the result of informed, good-faith, arms'-length negotiation between the parties and their capable and experienced counsel' and not 'the result of collusion[.]'" *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1341 (S.D. Fla. 2011). The settlement terms in this case are the product of significant give and take by the settling parties and were negotiated at arm's length. Young Decl. ¶ 5. The parties participated in mediation sessions with Michael Young, Esq., a well-respected mediator with significant experience resolving complex suits. Mr. Young and the Parties participated in mediation sessions throughout November and December 2020. *Id*. The very fact of Mr. Young's involvement weighs in favor of preliminary approval. *See, e.g., Poertner v. The Gillette Co.,* 618 Fed. Appx. 624, 630 (11th Cir. 2015) (settlement achieved only after engaging in extensive arms-length negotiations moderated by an experienced mediator belies any suggestion of collusion).

The parties' extensive negotiations were also informed by considerable investigation, formal and informal discovery by Plaintiff's counsel, and the motion practice before the Court. *See Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1316–17 (S.D. Fla. 2005) (approving settlement over objection and concluding that class counsel had sufficient information to evaluate

fairness of the settlement based on informal discovery); *Francisco v. Numismatic Guaranty Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, at *11 (S.D. Fla. Jan. 31, 2008) (same); *Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir. 1977) (affirming that class counsel had sufficient information to evaluate the settlement despite "very little formal discovery [being] conducted and … no voluminous record in the case"); *In re Jiffy Lube Securities Litig.*, 927 F.2d 155 (4th Cir. 1991) (affirming that plaintiffs were sufficiently informed about the strength of the case as a result of evidence obtained through informal discovery). Documents were formally and informally produced in this litigation and have been carefully reviewed by Class Counsel. In advance of and during the mediation, Spartan provided Plaintiff and Class Counsel with additional information concerning this Action.

B. The Settlement Falls Squarely within the Range of Reasonableness.

As a result of this mediation process, the Settlement Agreement provides considerable relief to the Settlement Class and falls well within the range of possible approval. Under Rule 23(e)(2)(C), the relevant inquiry is whether the proposed settlement affords relief that "'falls within th[e] range of reasonableness, [and] not whether it is the most favorable possible result of litigation.'" *McWhorter v. Ocwen Loan Servicing, LLC*, 2019 WL 9171207 *10 (N.D. Ala. Aug. 1, 2019) (quoting *Lazy Oil Co. v. Witco Corp*., 95 F. Supp. 2d 290, 338 (W.D. Pa. 1997), *aff'd*, 166 F.3d 581 (3d Cir. 1999) (citation and internal quotation marks omitted)); *Grant*, 2019 WL 367648, at *6; *accord Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P*., 212 F.R.D. 400, 409–10 (E.D. Wis. 2002) (Because "[t]he determination of whether a settlement is reasonable is not susceptible to mathematical equation yielding a particularized sum … [,] [t]he mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement.").

As described above, this Settlement provides significant benefits to the Settlement Class Members, while avoiding costly individual litigation. The Settlement further provides significant injunctive relief that fully addresses the claims. The Settlement is unquestionably within the range of reasonableness.

1. Settlement Relief

The Settlement Agreement provides significant monetary benefits. All Settlement Class Members are eligible for either the default option of a free, four-month subscription to the Program or the Vouchers for up to four races they registered for. This represents a significant recovery for

Class Members. Moreover, the agreed-to injunctive relief ensures that the alleged violations will be cured going forward. Federal courts hold that settlements providing the class with a percentage of the recovery sought in litigation are reasonable in light of the attendant risks of litigation. *See, e.g., Johnson v. Brennan*, No. 10-cv-4712, 2011 WL 4357376 (S.D.N.Y. Sept. 16, 2011) ("[T]here 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."); *see also Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542–43 (S.D. Fla. 1988) (approving recovery of $.20 per share where desired recovery was $3.50 a share because "the fact that a proposed settlement amounts to only a fraction of the possible recovery does not mean the settlement is inadequate or unfair"); *Fisher Bros., Inc. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985) (approving settlement providing recovery of 0.2% of sales). "Moreover, when settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable[.]" *Johnson*, 2011 WL 4357376, at *12.

Highlighting the value of the Settlement's benefits to the Settlement Class is Judge Gold's opinion finally approving a class settlement in *David v. Am. Suzuki Motor Corp.*, No. 08-cv-22278, 2010 WL 1628362 (S.D. Fla. Apr. 15, 2010), a case involving Suzuki motorcycles allegedly prone to catastrophic frame failure. In that settlement, Suzuki agreed to provide class members (1) either a $500 credit towards a new motorcycle purchase or a $40 credit towards parts, accessories, or service for existing motorcycle, (2) an extension of the frame warranty to 10 years, and (3) an agreement to arbitrate with class members for potential monetary awards for alleged damages to frames. *Id.*, *2. Judge Gold rejected objections to the settlement finding that automatic enrollment in a warranty extension would be valued on the retail price of the relief in the open market and was not premised on a class member's future purchase from defendant. *Id.*, *7.

Courts around the country have approved class action settlements with similar non-cash directly paid settlement benefits, correctly concluding that they are not "coupon settlements." *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 1:17-MD-2800-TWT, 2020 WL 256132 (N.D. Ga. Mar. 17, 2020) (finally approving settlement with relief including an option to select free credit monitoring and identity protection services, granting a requested fee of $77.5 million, finding that it constituted "less than 1% [of the value of the other non-monetary benefits available to the class] when the retail value of the credit monitoring services already claimed by class

members is included"); *see also In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934 (9th Cir. 2015) (affirming final approval of a settlement providing $12 gift cards to 1.2 million claimants and concluding the settlement was not a "coupon settlement" within the meaning of CAFA); *Johnson v. Ashley Furniture Industries, Inc.*, No. 13cv2445 BTM(DHB), 2016 WL 866957 (S.D. Cal. Mar. 7, 2016) (finally approving a class action settlement where defendant would automatically distribute $25 merchandise vouchers to all known class members and to all unknown class members who submitted claim forms, concluding the settlement was not a "coupon" settlement under CAFA because, "class members have choices as to what they may purchase with the voucher and may purchase an entire product as opposed to just reducing the purchase price"); *Glaberson v. Comcast Corp.*, No. 03-6604, 2015 WL 5582251 (E.D. Pa. 2015) (finally approving a settlement where current subscribers could choose either (1) a onetime credit of $15 off their bill or (2) credits from a selection of Comcast services, which were valued at their retail value); *Dupler v. Costco Wholesale Corp.,* 705 F. Supp. 2d 231 (E.D. N.Y. 2010) (finally approving class action settlement providing class members benefits of 1 to 2 free months of Costco membership in exchange for settling claims that Costco improperly calculated renewed memberships, valuing the free memberships as a "$38.8 million direct economic benefit to the class" and approving as reasonable the requested fee award of $5,380,000, which amounted to 14% of the value of the settlement and which would be paid separately from the settlement benefits); *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971 (N.D. Cal. Nov. 16, 2007) (finally approving a settlement including relief of either a free credit report worth $5 or two months of free credit monitoring worth $9.95 a month, concluding it was not a coupon settlement "because it does not require class members to spend money in order to realize the settlement benefit," even though the relief was not transferable).

Plaintiff and the Settlement Class faced significant hurdles in litigating their claims to resolution, including overcoming Defendants' defenses, including the potential denial of class certification of these claims and potential defeat at trial. Despite these challenges, as a result of the Settlement, each Settlement Class Member stands to recover benefits estimated to be worth twice the amount of the Racer Insurance Fees paid, or twice the amount they would be entitled to at trial (without factoring in potential multiple damages). The Settlement's monetary recovery alone falls well within the range of reasonableness.

C. The Settlement Saves the Settlement Class from Considerable Litigation Hurdles.

Any evaluation of the Settlement benefits must be tempered by the recognition that any compromise involves concessions by the Parties. Indeed, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Civil Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982) (citations omitted). Had litigation continued, Plaintiff and Settlement Class Members would have risked not prevailing on their claims, having to proceed to a jury trial and/or risk the uncertainty of appeals. Additionally, the Settlement provides relief to the Settlement Class much more quickly.

D. Class Counsel Believes the Settlement Is Reasonable.

Significant weight should be attributed to the belief of experienced counsel that the negotiated Settlement is in the best interest of the class. *See In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 666 (D. Minn. 1974) (recommendation of experienced counsel is entitled to great weight); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) ("The views of the parties to the settlement must … be considered."). Class Counsel has been appointed Lead or Co-Lead Class Counsel in over 75 state and federal class actions representing plaintiffs against insurance companies, mortgage companies, cruise lines, consumer product sellers, and spearheaded the litigation and resolution of over 30 nationwide class actions for homeowners against the major mortgage providers in the country. Based on this experience, and decades more with class action lawsuits, it is Class Counsel's informed opinion that, given the uncertainty and expense of pursuing these claims through trial, the settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class.

E. No Additional Agreements Required to Be Identified.

There are no agreements required to be identified under Rule 23(e)(3).

V. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

"It is well established that a class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue." *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654,659 (S.D. Fla. 2011) (brackets in original). "In deciding whether to provisionally certify a settlement class, a court must consider the same factors that it would consider in connection with a proposed litigation class," save manageability, "since the settlement, if approved, would obviate the need for a trial." *Id.*

A. The Settlement Class Meets the Four Requirements of Rule 23(a).

The policies underlying the class action rule dictate that Rule 23(a) should be liberally construed. *See Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 323 (S.D. Fla. 1996). Plaintiff satisfies all four requirements of Rule 23 (a) as set forth below.

1. The Settlement Class Is Ascertainable and Sufficiently Numerous.

The Settlement Class is an ascertainable one. A class is ascertainable if "the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way," such that identifying class members will be "a manageable process that does not require much, if any, individual inquiry." *Karhu v. Vital Pharm., Inc*., 621 F. App'x 945, 946 (11th Cir. 2015). Here, the proposed definition of the Settlement Class is based on objective criteria, all of which are determinable from Spartan's business records. Individual, subjective inquiries to identify who may be a member of the Settlement Class are unnecessary. *See Bohannan v. Innovak Int'l, Inc.*, 318 F.R.D. 525, 530 (M.D. Ala. 2016) (proposed class was ascertainable where membership in the class was based on objective criteria and the defendant's data could be used to easily identify the putative class members). The Settlement Class also satisfies the numerosity requirement of Rule 23(a)(1). The Settlement Class is comprised of approximately one million individuals who paid a Racer Insurance Fee to Spartan between February 26, 2016 and December 31, 2020, inclusive. *Cox v. Am. Cast Iron Pip Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

2. Questions of Law and Fact Are Common to All Settlement Class Members.

The commonality requirement of Rule 23(a)(2) is also satisfied for purposes of settlement. To satisfy Rule 23(a)(2), there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is met when the claims of all class members "depend upon a common contention," with "even a single common question" sufficing. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 359 (2011) (citation omitted); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009) (commonality of claims "requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members" (internal citations omitted)). Every key issue in the Action stems from the same alleged course of conduct: Defendants making various representations regarding and charging Settlement Class Members a mandatory, nonrefundable $14 Racer Insurance Fee when registering for a Spartan event. There are many issues raised in this Action that are common to each Settlement Class Member, including, among other things: (a) whether Spartan's description of the "Racer Insurance Fee" is deceptive,

unfair, false and misleading; (b) whether Spartan retains any portion of the mandatory "Racer Insurance Fee"; (c) whether Spartan engaged in unfair and deceptive practices by collecting and retaining any portion of the "Racer Insurance Fee;" (d) whether Spartan's representations are objectively likely to mislead reasonable consumers to believe that the amount of the $14 "Racer Insurance Fee" is commensurate with the cost to Spartan of providing the accident medical insurance coverage; (e) whether Spartan's practices in charging the "Racer Insurance Fee" violate M.G.L. Chapter 93A; and (f) whether Spartan's practices in charging the "Racer Insurance Fee" violates FDUTPA. Thus, for purposes of settlement only, Rule 23(a)'s commonality requirement is satisfied. *See In re Terazosin Hydrochloride,* 220 F.R.D. 672, 687 (S.D. Fla. 2004) (commonality prerequisite readily met where "[d]efendants have engaged in a standardized course of conduct that affects all class members"); *Agan v. Katzman & Korr, P.A.,* 222 F.R.D. 692, 697 (S.D. Fla. 2004).

3. Plaintiff's Claims Are Typical of Those of the Settlement Class.

The Settlement Class also satisfies the typicality requirement of Rule 23(a)(3). The test of typicality is "whether other members [of the class] have the same or similar injury, whether the action is based on conduct which is not unique to the named class plaintiffs, and whether other class members have been injured by the same course of conduct." *In re Checking Account Overdraft Litig*., 307 F.R.D. 630, 641 (S.D. Fla. 2015) (quoting *Hanon v. Dataprods. Corp*., 976 F.2d 497, 508 (9th Cir. 1992)). The typicality requirement "may be satisfied even though varying fact patterns support the claims or defenses of individual class members, or there is a disparity in the damages claimed by the representative parties and the other members of the class," *In re Domestic Air Transp. Antitrust Litig*., 137 F.R.D. 677, 698 (N.D. Ga. 1991), so long as the claims or defenses of the class and class representatives "arise from the same events, practice, or conduct and are based on the same legal theories," *Navelski v. Int'l Paper Co.*, 244 F. Supp. 3d 1275, 1306 (N.D. Fla. 2017) (citing *Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1337 (11th Cir. 1984)). Here, Plaintiff alleges that he is situated identically with respect to every other Settlement Class Member. Plaintiff has alleged that he suffered the same injuries as every other Settlement Class Member because they arise from Spartan's uniform course of conduct, which injured Plaintiff when he paid the Racer Insurance Fee after being exposed to Spartan's consistent messaging which gave the net impression that the Racer Insurance Fee was a pass-through charge. For purposes of class settlement, this is sufficient to satisfy Rule 23(a)'s typicality requirement.

Wright v. Circuit City Stores, Inc., 201 F.R.D. 526, 539 (N.D. Ala. 2001) ("Typicality is satisfied where the claims of the class representatives arise from the same broad course of conduct [as] the other class members and are based on the same legal theory."); *accord Ouadani v. Dynamex Operations E., LLC*, 405 F. Supp. 3d 149, 162–63 (D. Mass. 2019) (citing *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 310 (D. Mass. 2004) (finding typicality requirement satisfied where class claims arose from "the same policies and wrongful conduct of the Defendant, and [we]re based on the same legal theories").

4. Plaintiff and Their Counsel Are Adequate Representatives.

To satisfy Rule 23(a)(4), the representative parties must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is satisfied when the class representatives have (1) no interests antagonistic to the rest of the class and (2) counsel who are "qualified, experienced, and generally able to conduct the proposed litigation." *Cheney*, 213 F.R.D. at 495. "Adequate representation is presumed in the absence of contrary evidence." *Association for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 464 (S.D. Fla. 2002).

a. Plaintiff Does Not Have Interests Antagonistic to Settlement Class Members.

Adequacy exists where a class representative shares common interests with the class and seeks the same type of relief for himself and the settlement class members. *See Tefel v. Reno*, 972 F. Supp. 608, 617 (S.D. Fla. 1997); *Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 600 (S.D. Fla. 1991). Here, Plaintiff has no interests antagonistic to those held by the Settlement Class. The class definition includes only those who were subject to Defendant's conduct. Ex. 2 ¶ II.A.3. All class members were allegedly treated in the same manner. *Id.*

b. Settlement Class Counsel Are Qualified and Experienced.

The attorneys who seek to represent the Settlement Class in this case are highly qualified to serve as Class Counsel, have been investigating these claims for months, and have served as lead and co-lead counsel in some of the largest class actions in the country, as well as insurance-related complex cases. The law firms that Plaintiff seeks to name as Class Counsel in this action are The Moskowitz Law Firm, PLLC and Bonnett, Fairbourn, Friedman & Balint, P.C. Class Counsel has successfully prosecuted numerous insurance and consumer class actions and are well respected in the community that they serve. A copy of Class Counsels' Firm Resumes are attached

hereto as **Composite Exhibit 4**.

B. The Settlement Class Meets the Requirements of Rule 23(b)(3).

In addition to meeting all four of Rule 23(a)'s prerequisites for certification, a proposed class of claims seeking monetary relief also must satisfy Rule 23(b)(3)'s additional requirements—predominance and superiority. As detailed below, both the predominance and superiority requirements of Rule 23(b)(3) are satisfied.

While Rule 23(a)(2) asks whether there are issues common to the class, Rule 23(b)(3) asks whether those common issues predominate over "issues that are subject only to individualized proof." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997). Rule 23(b)(3)'s predominance requirement tests "whether [the] proposed class[] [is] sufficiently cohesive to warrant adjudication by representation." *Carriulo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016) (citing *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997)). Whether common issues predominate depends on "the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Here, as detailed above, the elements of the Settlement Class Members' claims present common factual and legal questions. For the purposes of settlement, the Court finds that these common issues of law and fact predominate over any individualized issues. *See, e.g.*, *Carriuolo*, 823 F.3d at 985 ("In this case, the district court found the predominance requirement to be satisfied by an essential question common to each class member: whether the inaccurate Monroney sticker provided by General Motors constituted a misrepresentation prohibited by FDUTPA."), *Turner Greenberg Assocs. v. Pathman*, 885 So. 2d 1008, 1009 (Fla. Dist. Ct. App. 2004) (affirming class certification and holding that "an appropriate measure of damages is the undisclosed profit").

Rule 23(b)(3) also asks whether the class action device is "superior to other available methods for fairly and efficiently adjudicating the controversy." For purposes of an opt-out class settlement, the Court concludes that the class action device is superior to other methods of resolving the issues in this Action given there is no negative value to each Plaintiff's claims, given the ability of Settlement Class Members to opt out, "given the large number of claims, the relatively small amount of damages available to each individual, and given the desirability of consistently adjudicating the claims…." *Roundtree v. Bush Ross, P.A.*, 304 F.R.D. 644, 663 (M.D. Fla. 2015). Accordingly, for purposes of considering, approving, and effectuating the Settlement and to fairly and adequately protect the interests of all concerned as to

all claims set forth in the Operative Complaint, the Court should certify the Settlement Class.

VI. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE

Federal Rule of Civil Procedure 23(e)(1) provides that the "court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Class notice should be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Parties' proposed notice plan readily meets this standard. The Settlement provides that Spartan shall distribute Class Notice via email directly to all identifiable class members no more than twenty-eight (28) days after entry of the Preliminary Approval Order. Ex. 2, section IV. The Settlement also provides for a website through which Settlement Class Members can acquire information about the Settlement and the Settlement benefits. *Id.*

VII. THE COURT SHOULD APPOINT THE MOSKOWITZ LAW FIRM AND BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C. AS CLASS COUNSEL

The Parties have defined Class Counsel to include The Moskowitz Law Firm, PLLC and Bonnett, Fairbourn, Friedman & Balint, P.C. Ex. 2, ¶ II.A.4. Plaintiff and the undersigned now move the Court to appoint these firms as Class Counsel. Undersigned counsel have significant experience litigating these cases, as well as other nationwide class actions.

VIII. THE COURT SHOULD PRELIMINARILY ENJOIN PARALLEL PROCEEDINGS

Finally, the Court should enter an order preliminarily enjoining all Settlement Class Members who do not execute and timely file a Request for Exclusion from the Settlement Class from filing, prosecuting, maintaining or continuing litigation in federal or state court based on or related to the claims or facts alleged in this action. This type of injunctive relief is commonly granted in preliminary approvals of class action settlements pursuant to the All-Writs Act.

The All-Writs Act authorizes the Court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act empowers the Court to enjoin "conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to its natural conclusion." *In re Am. Online Spin-Off Accounts Litig.*, No. CV 03-6971-RSWL, 2005 WL 5747463, at *4 (C.D. Cal. May 9, 2005) (quoting *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978). All individual actions that may be brought by Settlement Class Members

who do not opt out should therefore be enjoined pending the Court's determination whether to finally approve the proposed Settlement Agreement.

IX. NOTICE REGARDING INCENTIVE AWARD

Plaintiff hereby acknowledges that a panel of the United States Court of Appeals for the Eleventh Circuit issued a ruling in *Johnson v. NPAS Solutions*, *LLC*, No. 18-12344, 2020 WL 5553312 (11th Cir. Sept. 17, 2020). In *NPAS*, the Eleventh Circuit held that all service awards for class action representatives are impermissible.[7] Based upon this ruling, Plaintiff hereby represents and agrees that a service award cannot be approved for Plaintiff, unless the ruling in *NPAS* prohibiting service awards is reversed, vacated, or overruled. Should that not occur prior to Plaintiff's deadline specified in the Stipulation for requesting a service award, Plaintiff respectfully submits that this Court could still approve the Settlement Agreement and all of its terms, but also deny approval of specifically a service award and retain "jurisdiction for the limited purpose of revisiting the denial of service awards if the Eleventh Circuit holds a rehearing *en banc* in *Johnson v. NPAS Sols., LLC* and reverses its decision," or another Eleventh Circuit decision overrules *NPAS*. *See Metzler, et al. v. Medical Management International, Inc., et al*., 2020 WL 5994537 (M.D. Fla. October 9, 2020) (reserving jurisdiction to award service awards if *NPAS* is reversed). Class Counsel could then "move for reconsideration upon such a reversal" up to and including the date the Fund payment (as defined in the Settlement Agreement) is due to be paid.[8] *Id*.

X. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

Should the Court grant this Motion, Plaintiff will file his motion for final approval of the settlement on a date set by the Court. Plaintiff requests that the Court schedule the Final Approval Hearing no less than 90 days after entry of the order preliminarily approving the settlement.

CONCLUSION

Plaintiff respectfully requests the Court grant preliminary approval of the Settlement.

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[7] ***NPAS will not become binding precedent*** until issuance of the mandate (appellees' petition for rehearing en banc is pending in *NPAS* and the Eleventh Circuit stayed issuance of the mandate). *See Janicijevic v. Bahamas Paradise Cruise Line Vessels*, No. 20-cv-23220-BLOOM/Louis, ECF No 41 (S.D. Fla. Jan. 7, 2021); *see also Key Enters. of Del., Inc. v. Venice Hosp.,* 9 F.3d 893, 898 (11th Cir. 1993) ("[B]ecause the panel's mandate had not issued, the panel's decision was never the 'law of the case.'"); *see also* Fed R. App. P. 41(c), 1998 Adv. Comm. Note ("A court of appeals' judgment or order is not final until issuance of the mandate[.]")).

[8] Exhibit A to the Settlement Agreement, the Class Notice at ¶ 17, discloses this procedure to all Settlement Class Members.

Dated: January 28, 2021

Respectfully Submitted,

By:*/s/Adam M. Moskowitz*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed on January 28, 2021, with the Court via CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/ Adam M. Moskowitz
Adam M. Moskowitz, Esq.
Florida Bar No. 984280

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:20-CV-20836-BLOOM/Louis

AARON FRUITSTONE, on behalf of himself and others similarly situated,

Plaintiff,

v.

SPARTAN RACE, INC.,

Defendant.
_____/

[PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONALLY CERTIFYING A CLASS FOR SETTLEMENT PURPOSES, DIRECTING THE ISSUANCE OF CLASS NOTICE, AND SCHEDULING A FINAL APPROVAL HEARING

The Parties and their respective counsel have entered into a Stipulation of Settlement and Release (the "Agreement"), which, with its incorporated exhibits, sets forth the terms of the Parties' agreement to settle and dismiss this litigation on a class-action basis ("Settlement"), subject to the Court's approval. On January 28, 2021, Plaintiff Aaron Fruitstone filed a motion for preliminary approval of his Settlement (ECF No. __) with Defendant Spartan Race, Inc. ("Spartan"). The Court has reviewed Plaintiff's motion for preliminary approval, the Settlement,[1] and the pleadings filed to date in this matter to determine whether the proposed Settlement Class should be preliminarily approved. Having fully considered the Parties' motions, and the arguments offered by counsel, **IT IS HEREBY ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:**

1. Plaintiff's motion for preliminary approval of the Settlement is **GRANTED**.

[1] The definitions in Section II of the Agreement are hereby incorporated as though fully set forth in this Order, and capitalized terms shall have the meanings attributed to them in the Agreement.

2. **Partial Stay of this Action**. All non-settlement-related proceedings in the Action are hereby stayed and suspended until further order of the Court.

3. **Jurisdiction**. The Court finds that it has subject matter jurisdiction over this Action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1332(d)(2)(A), including jurisdiction to approve and enforce the Settlement and all orders and decrees that have been entered or which may be entered pursuant thereto. The Court also finds that it has personal jurisdiction over the Parties and, for purposes of consideration of the proposed Settlement, over each of the members of the Settlement Class defined below, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and that venue is proper in this District pursuant to 28 U.S.C. § 1391.

4. **Conditional Class Certification for Settlement Purposes Only**. The Court is presented with a proposed settlement prior to a decision on class certification, and must therefore determine whether the proposed Settlement Class satisfies the requirements for class certification under Federal Rule of Civil Procedure 23, albeit for purposes of settlement. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–21 (1997). "In deciding whether to provisionally certify a settlement class, a court must consider the same factors that it would consider in connection with a proposed litigation class—*i.e.*, all Rule 23(a) factors and at least one subsection of Rule 23(b) must be satisfied—except that the Court need not consider the manageability of a potential trial, since the settlement, if approved, would obviate the need for a trial." *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 659 (S.D. Fla. 2011). The Court must also be satisfied that the proposed class "is adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012). The Court conditionally finds and concludes, for settlement purposes only, that:

a. The Settlement Class is an ascertainable one. A class is ascertainable if "the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way," such that identifying class members will be "a manageable process that does not require much, if any, individual inquiry." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015). Here, the proposed definition of the Settlement Class is based on objective criteria, all of which are determinable from Spartan's business records. Individual, subjective inquiries to identify who may be a member of the Settlement Class are unnecessary. *See Bohannan v. Innovak Int'l, Inc.*, 318 F.R.D. 525, 530 (M.D. Ala. 2016) (proposed class was

ascertainable where membership in the class was based on objective criteria and the defendant's data could be used to easily identify the putative class members).

b. The Settlement Class also satisfies the numerosity requirement of Rule 23(a)(1). The Settlement Class is comprised of approximately one million individuals who paid a "Racer Insurance Fee" or "Insurance Fee" to Spartan between February 26, 2016 and December 31, 2020, inclusive. *Cox v. Am. Cast Iron Pip Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("[W]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.").

c. The commonality requirement of Rule 23(a)(2) is also satisfied for purposes of settlement. To satisfy Rule 23(a)(2), there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is met when the claims of all class members "depend upon a common contention," with "even a single common question" sufficing. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 359 (2011) (citation omitted); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009) (commonality of claims "requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members" (internal citations omitted)). The key issues in the Action stem from the same alleged course of conduct: Defendant making various representations regarding and charging Settlement Class Members a mandatory, nonrefundable $14 "Racer Insurance Fee" or "Insurance Fee" when registering for a Spartan Race event. There are issues raised in this Action that are common to each Settlement Class Member, including, among other things: (a) whether Spartan's description of the "Racer Insurance Fee" is deceptive, unfair, false and misleading; (b) whether Spartan retains any portion of the "Racer Insurance Fee"; (c) whether Spartan engaged in unfair and deceptive practices by collecting and retaining any portion of the "Racer Insurance Fee"; (d) whether Spartan's representations are objectively likely to mislead reasonable consumers to believe that the $14 "Racer Insurance Fee" is a direct pass-through charge, *i.e*. equal to the cost to Spartan of providing the accident medical insurance coverage; (e) whether Spartan's practices in charging the "Racer Insurance Fee" violate M.G.L. Chapter 93A; (f) whether Spartan's practices in charging the "Racer Insurance Fee" violate the FDUTPA; (g) whether Plaintiff and Class members have sustained monetary loss and the proper measure of that loss; (h) whether Plaintiff and Class members are entitled to injunctive relief; (i) whether Plaintiff and Class members are entitled to declaratory relief; and (j) whether Plaintiff and Class members are entitled to consequential

damages, punitive damages, statutory damages, disgorgement, and/or other legal or equitable appropriate remedies as a result of Spartan's conduct. As a result, for purposes of settlement only, Rule 23(a)'s commonality requirement is satisfied. *See In re Terazosin Hydrochloride,* 220 F.R.D. 672, 687 (S.D. Fla. 2004) (commonality prerequisite is readily met where "[d]efendants have engaged in a standardized course of conduct that affects all class members"); *Agan v. Katzman & Korr, P.A.,* 222 F.R.D. 692, 697 (S.D. Fla. 2004).

d. The Settlement Class also satisfies the typicality requirement of Rule 23(a)(3). The test of typicality is "whether other members [of the class] have the same or similar injury, whether the action is based on conduct which is not unique to the named class plaintiffs, and whether other class members have been injured by the same course of conduct." *In re Checking Account Overdraft Litig*., 307 F.R.D. 630, 641 (S.D. Fla. 2015) (quoting *Hanon v. Dataprods. Corp*., 976 F.2d 497, 508 (9th Cir. 1992)). The typicality requirement "may be satisfied even though varying fact patterns support the claims or defenses of individual class members, or there is a disparity in the damages claimed by the representative parties and the other members of the class," *In re Domestic Air Transp. Antitrust Litig*., 137 F.R.D. 677, 698 (N.D. Ga. 1991), so long as the claims or defenses of the class and class representatives "arise from the same events, practice, or conduct and are based on the same legal theories," *Navelski v. Int'l Paper Co.*, 244 F. Supp. 3d 1275, 1306 (N.D. Fla. 2017) (citing *Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1337 (11th Cir. 1984)). Here, Plaintiff alleges that he is situated identically with respect to every other Settlement Class Member. Plaintiff has alleged that he suffered the same injuries as every other Settlement Class Member because they arise from Spartan's alleged uniform course of conduct, which Plaintiff contends injured him when he paid the Racer Insurance Fee after being exposed to Spartan's messaging which gave him the net impression that the Racer Insurance Fee was a pass-through charge. For purposes of class settlement, this is sufficient to satisfy Rule 23(a)'s typicality requirement. *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 539 (N.D. Ala. 2001) ("Typicality is satisfied where the claims of the class representatives arise from the same broad course of conduct [as] the other class members and are based on the same legal theory."); *accord Ouadani v. Dynamex Operations E., LLC*, 405 F. Supp. 3d 149, 162–63 (D. Mass. 2019) (citing *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 310 (D. Mass. 2004) (finding typicality requirement satisfied where class claims arose from "the same policies and wrongful conduct of the Defendant, and [we]re based on the same legal theories").

e. Plaintiff is an adequate representative of the Settlement Class under Rule 23(a)(4). Plaintiff has standing (*see* Motion for Preliminary Approval ECF No. ___ at 16–17), is a member of the Settlement Class he seeks to represent, and the Court is aware of no antagonistic interests that exist between Plaintiff and the Settlement Class Members. The Court is also satisfied that Class Counsel have the qualifications and experience necessary to undertake this litigation and serve as counsel for the Settlement Class. *See, e.g.*, *Feller, et al. v. Transamerica Life Ins. Co.*, No. 16-cv-01378-CAS (C.D. Cal.) (appointed Plaintiffs' counsel in a finally approved $195 million life insurance settlement); *Belanger v. RoundPoint Mortgage Servicing Corporation, et al.*, Case No. 1:17-cv-23307 (S.D. Fla.) (appointed Plaintiffs' counsel as class counsel and finally approved class action settlement regarding force placed property insurance); *Checa Chong v. New Penn Financial, LLC, d/b/a Shellpoint Mortgage Servicing*, No. 9:18-cv-80948-ROSENBERG/REINHART, ECF No. 50 (S.D. Fla. Sept. 13, 2019) (same); *Quarashi v. M&T Bank Corp*, No. 3:17-cv-6675, ECF No. 83 (D.N.J. June 24, 2019); *Smith v. Specialized Loan Servicing, LLC, et al.*, No. 3:17-cv-06668, ECF No. 68 (D.N.J. Apr. 1, 2019) (same); *Rickert v. Caliber Home Loans, Inc., et al.*, No. 3:17-cv-06677 (D.N.J. Apr. 1, 2019) (same).

f. In addition to meeting all four of Rule 23(a)'s prerequisites for certification, a proposed class seeking monetary relief also must satisfy Rule 23(b)(3)'s additional requirements—predominance and superiority. As detailed below, both the predominance and superiority requirements of Rule 23(b)(3) are satisfied.

i. While Rule 23(a)(2) asks whether there are issues common to the class, Rule 23(b)(3) asks whether those common issues predominate over "issues that are subject only to individualized proof." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997). Rule 23(b)(3)'s predominance requirement tests "whether [the] proposed class[] [is] sufficiently cohesive to warrant adjudication by representation." *Carriulo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016) (citing *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997)). Whether common issues predominate depends on "the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Here, as detailed above, the elements of the Settlement Class Members' claims present common factual and legal questions. For the purposes of settlement, the Court finds that these common issues of law and fact predominate over individualized issues. *See, e.g.*, *Carriuolo*, 823 F.3d at 985 ("In this case, the district court found the predominance requirement to be satisfied by an essential question common

to each class member: whether the inaccurate Monroney sticker provided by General Motors constituted a misrepresentation prohibited by FDUTPA."); *Zamber v. American Airlines, Inc.*, 282 F. Supp. 3d 1289, 1300 (S.D. Fla. 2017); *see also Morgan v. Public Storage*, No. 14-cv-21559, 2015 WL 11233111, at *1 (S.D. Fla. Aug. 17, 2015) ("FDUTPA claims exist where the alleged deceptive practice is defendant's misrepresentation of why a fee is being charged and where the money for the fee is being transferred."); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 340 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015) ("The core questions in this case—whether Vibram's advertising was false or misleading, whether its conduct violated the causes of action identified in Bezdek's amended complaint, and whether the class members suffered injury and are entitled to damages as a result of this conduct—are common to all class members"); *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. Dist. Ct. App. 2000) ("[D]amages are sufficiently shown by the fact that the passenger parted with money for what should have been a 'pass-through' port charge, but the cruise line kept the money."); *Turner Greenberg Assocs. v. Pathman*, 885 So. 2d 1008, 1009 (Fla. Dist. Ct. App. 2004) (affirming class certification and holding that "an appropriate measure of damages is the undisclosed profit").

ii. Rule 23(b)(3) also asks whether the class action device is "superior to other available methods for fairly and efficiently adjudicating the controversy." For purposes of an opt-out class settlement, the Court concludes that the class action device is superior to other methods of resolving the issues in this Action given there is no negative value to each of Plaintiff's claims, given the ability of Settlement Class Members to opt out, "given the large number of claims, the relatively small amount of damages available to each individual, and given the desirability of consistently adjudicating the claims…." *Roundtree v. Bush Ross, P.A.*, 304 F.R.D. 644, 663 (M.D. Fla. 2015). And because Plaintiff seeks class certification for settlement purposes, the Court need not inquire into whether this Action, if tried, would present intractable management problems. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Carriuolo*, 823 F.3d at 988; *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 242 (2d Cir. 2012) ("[M]anageability concerns do not stand in the way of certifying a settlement class.").

5. Accordingly, for purposes of considering, approving, and effectuating the Settlement and to fairly and adequately protect the interests of all concerned with regard to all claims set forth in the Operative Complaint, the following class (the "Settlement Class") is conditionally certified for settlement purposes only:

All individuals in the United States who during the Class Period, based on Spartan's records, paid a $14 "Racer Insurance Fee" or "Insurance Fee" in connection with any race organized and sponsored by Spartan. Excluded from the Class are (a) Defendant's board members and executive level officers; (b) the federal district and magistrate judges assigned to this Action, along with their court staff; and (c) individuals who submit a valid, timely exclusion/opt-out request.

6. **Appointment of Class Representatives and Class Counsel**. The Court hereby appoints Plaintiff Aaron Fruitstone as the representative of the conditionally certified Settlement Class. The Court further designates and appoints The Moskowitz Law Firm, PLLC, and Bonnett, Fairbourn, Friedman & Balint, P.C., who the Court finds are experienced and adequate counsel, as the legal counsel for the Settlement Class ("Class Counsel"). Class Counsel are authorized to represent Plaintiff and the Settlement Class Members, to enter into and seek approval of the Settlement on behalf of the Settlement Class, and to bind Plaintiff, all other Settlement Class Members, and themselves to the duties and obligations contained in the Settlement, subject to the final approval of the Settlement by the Court.

7. **Preliminary Settlement Approval**. The Court finds, subject to the Fairness Hearing, that the Settlement is sufficiently fair, reasonable, and adequate that it falls within the range of possible approval, and it is in the best interests of the Settlement Class that they be given the opportunity to be heard regarding the Settlement and the opportunity to exclude themselves from the proposed Settlement Class. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 (2004).

Further, the Settlement meets the standards for preliminary approval in the new amendments to Rule 23. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019). The amended Rule 23(e)(2) requires courts to consider 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, if required;

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); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., 330 F.R.D. at 29. Further, providing notice to the Settlement Class Members is justified by the showing that the Court likely will be able to approve the proposed Settlement under Rule 23(e)(2).

The Court further finds that the Settlement substantially fulfills the purposes and objectives of the Action, and offers beneficial relief to the Settlement Class that falls within the range of potential recovery in successful litigation of the claims asserted in this Action pursuant to the Massachusetts Consumer Protection Law, Massachusetts General Laws, Chapter 93A, *et seq*., and the Florida Deceptive and Unfair Trade Practices Act, §§ 501.201, *et seq*., Florida Statutes. Although Spartan does not admit any fault or liability in the Settlement, Spartan agreed to provide substantial relief to be distributed according to the Settlement Agreement. As described more fully below, each Class Member will be entitled to elect to receive either (a) one four-month free membership to the "Spartan+ Membership Program," or (b) one Voucher per each paid registration during the Class Period, up to a maximum of four (4) total Vouchers per Class Member. Plaintiff and Class Counsel estimate that the value of the Settlement relief to Settlement Class Members, exclusive of the valuable prospective relief, exceeds the total "Racer Insurance Fee" revenues paid by the Class. In addition, the Class will benefit from the Injunctive Relief described below. At this stage, the Court finds such relief to be within the range of reasonableness,[2] especially given the risks of success on the merits of Plaintiff's claims.

[2] To warrant preliminary approval, a proposed class settlement should offer a recovery that "falls within th[e] range of reasonableness," which need not be "the most favorable possible result of litigation." *Lazy Oil Co. v. Wotco Corp*., 95 F. Supp. 2d 290, 338 (W.D. Pa. 1997), *aff'd*, 166 F3d 581 (3d Cir. 1999). Here, the monetary value of the relief offered by the Settlement exceeds ***100%*** of the Settlement Class's losses and potential recovery (apart from multiple damages), and sufficient to warrant preliminary approval of the Settlement given that since 1995, class action settlements typically "have recovered between 5.5% and 6.2% of the class member's estimated losses." *In re Rite Aid Corp. Sec. Litig*., 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001); *see also Parsons*

A. The Spartan+ Membership Program

Each Class member who elects to receive membership in the Spartan+ Membership Program (the "Program"), will be provided with a free four-month subscription to the Program. This Program subscription will include: (1) the "highest" level of access to all available video, audio, and other digital content; (2) a 20% discount and free shipping and handling for any merchandise purchased by the Class Member from Spartan's website; and (3) free event photo downloads and access to other "members only" premium content on Spartan's website. The normal cost of the Program is $85.00 per year. Class Members will not be required to provide a credit card to initiate the four-month Program subscription. Subscriptions will automatically terminate at the end of four months, unless the Class Member affirmatively chooses to extend their subscription beyond the complimentary four-month period.

B. Electronic Vouchers for Spartan Merchandise

As an alternative to the four-month free subscription to the Program, each Class Member may elect to receive a $5.00 electronic Voucher. Should the Class Member elect to receive an electronic Voucher, they will receive one electronic Voucher per each event for which they paid a "Racer Insurance Fee" or "Insurance Fee" during the Class Period, up to a total of four (4) Vouchers maximum (for a combined value of $20.00). No Class Member or other person may receive or redeem more than four (4) Vouchers. Each Voucher shall entitle the owner to a $5.00 credit towards the purchase of any non-discounted merchandise on Spartan's website. There are currently many non-discounted merchandise items available for sale on the Spartan website, and Spartan has no intention of removing said items as a result of this Settlement. Vouchers cannot be combined with any promotion, discount, or coupon.

Up to four (4) Vouchers may be "stacked" (*i.e.*, combined for use in a single transaction) towards the purchase of any non-discounted merchandise. Vouchers are transferable. However,

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v. Brighthouse Networks, LLC, No. 2:09-cv-267, 2015 WL 13629647, at *3 (N.D. Ala. Feb. 5, 2015) (noting that a class settlement recovery of between 13% to 20% is "frequently found … to be fair and adequate"); *In re Newbridge Networks Sec. Litig.*, No. 94-cv-1678, 1998 WL 765724, at *2 (D.D.C. 1998) ("[A]n agreement that secures roughly six to twelve percent of a potential trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted range of reasonableness."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011) (9% class recovery "is still within the range of reasonableness").

the non-discounted merchandise and four-Voucher stacking limitations also apply to recipients of transferred Vouchers. Each Voucher will be valid for two (2) years from the date of issuance, at which time the Voucher will expire.

C. Election of Benefit

The Class Notice will further inform each Class Member that they shall have sixty (60) days from the date the Class Notice email is sent to make their selection, otherwise the default relief shall be the free four-month subscription to the Program.

D. Injunctive Relief to the Settlement Class

In addition to providing all Class Members the relief described above, Spartan also agrees to the following injunctive relief, starting on the Effective Date, that will directly benefit all current and future Spartan consumers:

- Spartan will not describe in writing or abbreviate the at-issue fee as a "Racer Insurance Fee," "Racer Insur. Fee," "Insurance Fee," "Insur. Fee," or similar nomenclature. Spartan specifically retains the right to describe the at-issue fee as an "Administrative, Insurance, and Management Fee," "AIM Fee," or "Admin Fee" during the online event registration process or elsewhere.
- Spartan will add the following language to current and future marketing and sales materials, FAQs, relevant website screens in the registration process, and screen indicators or selectors that describe or are adjacent to the at-issue fee: "The Administrative, Insurance, and Management Fee covers a number of different costs involved in Spartan events, including administrative and management costs, insurance costs and expenses for related risk management and safety measures. This fee is not a direct pass-through of third-party costs to the racer and may include revenues to Spartan."
- Spartan agrees that it will not represent, directly or indirectly, that 100% (or all) of the "Administrative, Insurance, and Management Fee" is paid to an insurance provider or other third-party.

II. Class Notice Costs, and Attorney's Fees and Expenses

As part of the settlement relief, Spartan will provide Class Notice to the Class Members pursuant to Section IV of the Stipulation. The Insurers, on behalf of Spartan, will pay any reasonable attorneys' fees and expenses and Plaintiff Service Award that are awarded by the Court in this Action, as further described in Section VIII of the Stipulation. Specifically, Class Counsel intends to request approval of attorneys' fees and costs not to exceed $2.29 million. The Parties agree that Plaintiff may apply for a service award to be paid by Insurers for Spartan. Specifically, Plaintiff intends to request approval of a service award in the amount of $10,000.00 in accordance with the applicable Eleventh Circuit law. Spartan will not oppose the request for Class Counsel's attorneys' fees and expenses and Plaintiff's service award in these amounts, *provided* that the total of all payments sought from or made by Spartan and the Insurers cumulatively under this Stipulation (including but not limited to payments for attorneys' fees, costs and expenses of Class Counsel, and the Plaintiff's service award) does not exceed $2.3 million.

Last year, a panel of the United States Court of Appeals for the Eleventh Circuit issued an opinion holding that case contribution awards for class representatives were impermissible. *Johnson v. NPAS Solutions*, *LLC*, 2020 WL 5553312 (11th Cir. 2020). In light of this opinion, the Court preliminarily approves the incentive award for purposes of the issuance of the Class Notice but at final approval will consider whether to deny the request without prejudice and reserve jurisdiction to reconsider the issue of a case contribution award if *NPAS* is not reversed, vacated, or overruled. Defendant agrees not to oppose applications for Attorneys' Fees and Expenses and Case Contribution Award that do not exceed the foregoing amounts.

These factors all strongly favor the Settlement's preliminary approval. The Court also finds that the Settlement (a) is the result of serious, informed, non-collusive, arm's length negotiations involving experienced counsel informed and familiar with the legal and factual issues of the Action and reached through protracted mediation sessions with the assistance of independent mediator Michael Young of JAMS; (b) is sufficient to warrant notice of the Settlement and the Fairness Hearing to the Settlement Class Members; (c) meets all applicable requirements of law, including Federal Rule of Civil Procedure 23, and the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715; (d) offers a full and fair remediation to the Settlement Class Members; (e) the Class Representative and Class Counsel have adequately represented the class; and (e) is not a finding or admission of liability of Defendant. Accordingly, the Court grants preliminary approval of the

Settlement under Federal Rule of Civil Procedure 23(e), subject to further consideration at the Fairness Hearing after notice to the Settlement Class Members.

8. **No Additional Agreements Required to Be Identified**: The Court has confirmed that there are no agreements required to be identified under Rule 23(e)(3).

9. **Fairness Hearing**. A Fairness Hearing shall be held before this Court on _____, 2021, beginning at __:__ a.m./p.m., in Courtroom __ of the _____ _____, to determine whether (a) the Settlement is fair, reasonable, and adequate such that the Settlement should be granted final approval by the Court; (b) the certification of the Settlement Class should be made final for settlement purposes pursuant to Federal Rule of Civil Procedure 23; (c) whether Attorneys' Fees and Expenses should be awarded by the Court to Class Counsel, and in what amount, pursuant to Federal Rule of Civil Procedure 23(h); (d) whether a Service Award should be approved by the Court to Plaintiff, and in what amount; and (e) whether a Final Order and Judgment should be entered, and this Action thereby dismissed with prejudice, pursuant to the terms of the Agreement. The Court may adjourn or reschedule the Fairness Hearing without further notice to the Settlement Class Members.

10. **Further Submissions by the Parties**. Any application by Class Counsel for Attorneys' Fees and Expenses and for Service Awards to the Plaintiffs shall be filed with the Court no later than fourteen (14) days before the Objection/Exclusion Deadline. The Parties shall promptly post any such application to the Settlement Website after its filing with the Court. All other submissions of the Parties in support of the proposed Settlement, or in response to any objections submitted by Settlement Class Members, shall be filed no later than ten (10) days before the Fairness Hearing. The Parties are directed to file a list reflecting all requests for exclusion it has received from Settlement Class Members with the Court no later than ten (10) days before the Fairness Hearing.

11. **Administration**. The Court authorizes and directs the Parties to establish the means necessary to administer the proposed Settlement, and implement the class notification process in accordance with the terms of the Settlement.

12. **Notice to the Settlement Class**. The Court approves, as to both form and content, the Class Notice attached to the Settlement, as well as the proposed methodology for distributing

that notice to the Settlement Class Members as set forth in Section IV of the Settlement. Accordingly,

a. The Court orders Spartan, within twenty-eight (28) days following entry of this Preliminary Approval Order and subject to the requirements of this Preliminary Approval Order and the Settlement, to cause the Class Notice to be emailed to the Settlement Class Members identified in Spartan's records.

b. Following the entry of this Preliminary Approval Order and prior to the mailing of notice to the Settlement Class Members, the Parties are permitted by mutual agreement to make changes in the font, format, and content of the Class Notice provided that the changes do not materially alter the substance of that notice. Any material substantive changes to those notices must be approved by the Court.

c. Class Counsel shall establish an internet website to inform Settlement Class Members of the terms of the Agreement, their rights, dates and deadlines, and related information. The Settlement Website shall include, in .pdf format, materials agreed upon by the Parties and/or required by the Court, and should be operational and live by the date of the emailing of the Class Notice. At this time, the Court orders that the Settlement Website include the following: (i) the Operative Complaint; (ii) the Settlement, and its exhibits; (iii) a copy of this Preliminary Approval Order; (iv) the Class Notice; and (v) a disclosure, on the Settlement Website's "home page," of the deadlines for Settlement Class Members to seek exclusion from the Settlement Class, to object to the Settlement, as well as the date, time and location of the Fairness Hearing.

d. No later than ten (10) days before the date of the Fairness Hearing, the Parties, shall file with the Court a declaration or declarations, verifying compliance with the aforementioned class-wide notice procedures.

13. **Findings Concerning the Notice Program**. The Court finds and concludes that the form, content, and method of giving notice to the Settlement Class as described in this Preliminary Approval Order: (a) will constitute the best practicable notice under the circumstances; (b) is reasonably calculated, under the circumstances to apprise Settlement Class Members of the pendency of this Action, the terms of the proposed Settlement, and of their rights under and with respect to the proposed Settlement (including, without limitation, their right to object to or seek exclusion from the proposed Settlement); (c) is reasonable and constitutes due, adequate, and sufficient notice to all Settlement Class Members and other persons entitled to

receive notice; and (d) satisfies all applicable requirements of law, including, but not limited to, 28 U.S.C. § 1715, Federal Rule of Civil Procedure 23(c), and the United States Constitution (including the Due Process Clause). The Court further finds that the Class Notice is written in simple terminology, and is readily understandable.

14. **Cost Obligations for the Notice Program**. All Costs of Administration, including those associated with providing notice to the Settlement Class as well as in administering the terms of the Settlement, shall be paid by Spartan as set forth in the Settlement. In the event the Settlement is not approved by the Court, or otherwise fails to become effective, neither Plaintiff, nor Class Counsel, nor the Settlement Class Members shall have any obligation to Defendant for such costs and expenses.

15. **Communications with Settlement Class Members**. The Court authorizes Spartan to communicate with Settlement Class Members, potential Settlement Class Members, and to otherwise engage in any other communications within the normal course of Defendant's business and as provided in the Agreement. However, Spartan is ordered to refer any inquiries by Settlement Class Members or Potential Settlement Class Members about the Settlement to Class Counsel.

16. **Preliminary Injunction.** To protect the Court's jurisdiction and ability to determine whether the Settlement should be finally approved, pending such decision all potential Settlement Class Members are hereby preliminarily enjoined (i) from directly or indirectly filing, commencing, participating in, or prosecuting (as class members or otherwise) any lawsuit in any jurisdiction asserting on their own behalf claims that would be Released Claims if this Settlement is finally approved, unless and until they timely exclude themselves from the Settlement Class as specified in the this Order and in the Agreement and its exhibits; and (ii) regardless of whether they opt out, potential Settlement Class Members are further preliminarily enjoined from directly or indirectly filing, prosecuting, commencing, or receiving proceeds from (as class members or otherwise) any separate purported class action asserting, on behalf of any Settlement Class Members who have not opted out from this Settlement Class, any claims that would be Released Claims if this Settlement receives final approval and becomes effective.

17. **Exclusion ("Opting Out") from the Settlement Class**. Any Settlement Class Member who wishes to be excluded from the Settlement Class must submit a written request for exclusion to Spartan, mailed sufficiently in advance to be received by Spartan by the

Objection/Exclusion Deadline. A request for exclusion must comply with the requirements set forth in Section V.B of the Stipulation and clearly indicate the name, address, email address, and telephone number of the Person seeking exclusion, a statement that the Person wishes to be "excluded from the Settlement Class," contain a caption or title that identifies it as "Request for Exclusion in *Fruitstone v. Spartan Race Inc.,* (case number 1:20-cv-20836-BB)," and the date and signature of such Person or, in the case of a Person in the Settlement Class who is deceased or incapacitated, the signature of the legally authorized representative of such Person.

18. Any Settlement Class Member who timely requests exclusion consistent with these procedures shall not: (a) be bound by a final judgment approving the Settlement; (b) be entitled to any relief under the Settlement; (c) gain any rights by virtue of the Settlement; or (d) be entitled to object to any aspect of the Settlement.

19. Settlement Class Members who do not exclude themselves from the Settlement Class in full compliance with the requirements and deadlines of this Preliminary Approval Order shall be deemed to have forever consented to the exercise of personal jurisdiction by this Court and shall have waived their right to be excluded from the Settlement Class and from the Settlement, and shall thereafter be bound by all subsequent proceedings, orders, and judgments in this Action, including but not limited to the Release contained in the Settlement, regardless of whether they have requested exclusion from the Settlement Class (but failed to strictly comply with the procedures set forth herein) and even if they have litigation pending or subsequently initiate litigation against Defendant relating to the claims and transactions released in the Action.

20. **Objections and Appearances**. Any Settlement Class Member (or counsel hired at any Settlement Class Member's own expense) who does not properly and timely exclude himself or herself from the Settlement Class, and who complies with the requirements of this paragraph and the procedures specified in the Class Notice, may object to any aspect or effect of the proposed Settlement.

a. Any Settlement Class Member who has not filed a timely and proper written request for exclusion and who wishes to object to the fairness, reasonableness, or adequacy of the Settlement, or to the certification of the Settlement Class, or to the award of Attorneys' Fees and Expenses, or to the Service Award, or to any other aspect or effect of the Settlement, or to the Court's jurisdiction, must file a written statement of objection with the Court no later than the Objection/Exclusion Deadline.

b. An objection must be in writing under penalty of perjury, and must include: (1) the full name, address, telephone number, the signature of the objector (the objector's counsel's signature is not sufficient) and a statement the information provided is true and correct; (2) the specific reasons for the objector's objection to the Settlement, and a detailed statement of the legal basis for such objections; (3) the identity of all witnesses, including the witnesses' name and address, and a summary of such witnesses' proposed testimony who the objector may call to testify at the Final Approval Hearing; (4) documents sufficient to demonstrate the objector's standing (that he/she is, in fact, a Class Member) must be attached to the Objection; (5) the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior such objections that were issued by the trial and appellate courts in each listed case; and (6) a statement whether the objector and/or his/her attorney(s) intend(s) to appear at the Final Approval Hearing. Any attorney of an objecting Potential Settlement Class Member who intends to appear at the Final Approval Hearing must enter a written Notice of Appearance of Counsel with the Clerk of the Court no later than the date set by the Court in its Preliminary Approval Order and shall include the full caption and case number of each previous class action case in which such counsel has represented an objector.

c. To file a written statement of objection, an objector must mail it to the Clerk of the Court sufficiently in advance that it is received by the Clerk of the Court on or before the Objection/Exclusion Deadline, or the objector may file it in person on or before the Objection/Exclusion Deadline at any location of the United States District Court for the Southern District of Florida, except that any objection made by a Settlement Class Member represented by his or her own counsel must be filed through the Court's Case Management/Electronic Case Filing (CM/ECF) system.

d. Any Settlement Class Member who fails to comply strictly with the provisions in this Preliminary Approval Order for the submission of written statements of objection shall waive any and all objections to the Settlement, its terms, or the procedures for its approval and shall waive and forfeit any and all rights he or she may have to appear separately and/or to object, and will be deemed to have consented to the exercise of personal jurisdiction by the Court, consented to the Settlement, consented to be part of the Settlement Class, and consented to be

bound by all the terms of the Settlement, this Preliminary Approval Order, and by all proceedings, orders, and judgments that have been entered or may be entered in the Action, including, but not limited to, the Release described in the Settlement. However, any Settlement Class Member who submits a timely and valid written statement of objection shall, unless he or she is subsequently excluded from the Settlement Class by order of the Court, remain a Settlement Class Member and be entitled to all of the benefits, obligations, and terms of the Settlement in the event the Settlement is given final approval and the Final Settlement Date is reached.

21. **Termination of Settlement**. This Preliminary Approval Order, including the conditional class certification contained in this Preliminary Approval Order, shall become null and void and shall be without prejudice to the rights of the Parties or Settlement Class Members, all of whom shall be restored to their respective positions existing immediately before this Court entered this Preliminary Approval Order, if the Settlement: (a) is not finally approved by the Court, (b) does not become final pursuant to the terms of the Settlement; (c) is terminated in accordance with the Settlement; or (d) does not become effective for any other reason.

22. **Use of this Preliminary Approval Order**. In the event the Settlement does not reach the Final Settlement Date or is terminated in accordance with the terms of the Settlement, then: (a) the Settlement and the Agreement, and the Court's Orders, including this Preliminary Approval Order, relating to the Settlement shall be vacated and shall be null and void, shall have no further force or effect with respect to with respect to any Party in this Action, and shall not be used or referred to in any other proceeding by any person for any purpose whatsoever; (b) the conditional certification of the Settlement Class pursuant to this Preliminary Approval Order shall be vacated automatically, without prejudice to any Party or Settlement Class Member to any legal argument that any of them might have asserted but for the Settlement, and this Action will revert to the status that existed before the Settlement's execution date; (c) this Action shall proceed pursuant to further orders of this Court; and (d) nothing contained in the Settlement, or in the Parties' settlement discussions, negotiations, or submissions (including any declaration or brief filed in support of the preliminary or final approval of the Settlement), or in this Preliminary Approval Order or in any other rulings regarding class certification for settlement purposes, shall be construed or used as an admission, concession, or declaration by or against any Party of any fault, wrongdoing, breach or liability in this Action or in any other lawsuit or proceeding, or be admissible into evidence for any purpose in the Action or any other proceeding by any person for

any purpose whatsoever. This paragraph shall survive termination of the Settlement and shall remain applicable to the Parties and the Settlement Class Members whether or not they submit a written request for exclusion.

23. **Continuing Jurisdiction**. This Court shall maintain continuing exclusive jurisdiction over these settlement proceedings to consider all further applications arising out of or connected with the Settlement or this Preliminary Approval Order, and to assure the effectuation of the Settlement for the benefit of the Settlement Class.

IT IS SO ORDERED this _____ day of _____, 2021.

THE HONORABLE BETH BLOOM
United States District Judge

Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:20-CV-20836-BLOOM/Louis

AARON FRUITSTONE, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CLASS ACTION

SPARTAN RACE, INC., a Delaware Corporation,

Defendant.

CONFIDENTIAL DECLARATION OF MICHAEL D. YOUNG

— REDACTED VERSION —

I, Michael D. Young, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My name is Michael D. Young. I am over the age of 18 and I am competent to give testimony. The statements contained in this declaration are based upon my own personal knowledge and are true and correct. As the mediator overseeing the ADR process in this litigation (the Mediation"), which was conducted through numerous Zoom meetings and telephone conferences with counsel, I am intimately familiar with the negotiations that resulted in the proposed class settlement (the "Settlement") that will be presented to the Court for preliminary and final approval in the above- captioned case (the "Action"). I provide this Declaration in support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of the Settlement Class.

I. BACKGROUND AND EXPERIENCE

2. Since joining JAMS as a full-time neutral in 1989, I have conducted approximately 2,000 complex or multi-party mediations and arbitrations in over thirty states (as well as in Puerto Rico) and abroad (such as in Rome, Madrid and Zurich), including approximately 300 arbitrations, appraisals or other binding dispute resolution proceedings.

3. I have mediated and arbitrated all types of disputes, and currently focus my practice on the mediation and arbitration of cross-border commercial cases and insurance coverage matters. I have been recognized by various publications and members of the legal community as one of the most highly skilled and widely respected mediators and arbitrators in the United States. Specifically, in each edition during 2016–2020, *Chambers and Partners* has identified me as one of the seven mediators in the United States recognized in Band One. *Chambers* has noted my "deft, subtle handling of mediations…" and that I am recognized as a "very talented yet very humble" mediator who "enjoys a strong reputation for [my] expert understanding of complex insurance and

class action disputes, as well as a wide range of other matters." In addition, *Best Lawyers* selected me as "Mediator of the Year" for New York City for 2018–2019 and "Arbitrator of the Year" for New York City for 2020–2021. I have also been, since 2014, recognized in both the *International Who's Who in Commercial Mediation* (stating that I "receive[] praise internationally as a standout practitioner," and am "recognized for [my] conciliatory and diplomatic approach to disputes") and in the *International Who's Who in Insurance and Reinsurance*. Finally, I am an elected fellow of the College of Commercial Arbitrators.

4. In addition to serving on the JAMS and JAMS International mediation and arbitration panels, I am a member of the CPR International Institute for Conflict Prevention and Resolution Panel of Distinguished Neutrals and of the panels of the Beijing Arbitration Commission, Singapore International Mediation Center, Afghanistan Centre for Commercial Dispute Resolution, and of the Center for Arbitration and Dispute Resolution in Israel. I have arbitrated matters under the rules of most major arbitral institutions, including the ICC and ICDR.

II. THE MEDIATED SETTLEMENT NEGOTIATIONS

5. The proposed Settlement is the product of hard-fought arm's length negotiations which took place directly under my supervision, throughout November and December 2020 and into January 2021. These negotiations were conducted by extremely knowledgeable counsel having extensive experience in complex class actions, who were highly knowledgeable concerning the claims and defenses asserted in the Action. The caliber of the representation of both sides was, in my experience, exemplary.

6. The Parties retained me to mediate this dispute on November 11, 2020. On November 23, 2020, I received Plaintiff's Confidential Mediation Brief and Class Action Demand, along with Plaintiff's class certification briefing and related filings. On November 24, 2020, I

received Defendant's Confidential Mediation Brief, along with Defendant's class certification briefing and related filings. The briefing and materials provided to me by the Parties were extensive, thorough and persuasively well-written. It is fair to say that the Parties both presented highly developed and well-supported legal arguments, supported by extensive factual and evidentiary submissions. Prior to the Mediation sessions, Defendant provided Plaintiff's counsel with extensive documentation and confirmatory data and responded to probing questions critical to the Parties' respective analysis and evaluation of the merits and risks associated with Plaintiff's claims and Defendant's defenses.

7. The Mediation consisted of multiple telephonic and Zoom sessions between the Parties' counsel and me (in both joint and break-out discussions) including a full-day Zoom mediation session on December 1, 2020. Additionally, I facilitated extensive separate discussions between the Parties over the course of the Mediation. The Parties discussed, debated and assessed the risks to both sides based on the discovery and motion practice in the Action.

8. In addition to the Parties to the litigation, outside coverage counsel representing Travelers and Chubb, the two insurance carriers providing potential coverage to Spartan for the claims asserted in the Action, participated actively throughout the Mediation. [redacted]

9. Over the course of the Mediation, Spartan asserted that [redacted]. Spartan provided [redacted]

[redacted] Spartan, however, agreed to provide other, very substantial benefits to members of the proposed Settlement Class which are tailored to the claims alleged by Plaintiffs and in many respects provide benefits having an estimated monetary value in excess of the damages allegedly sustained by the race participants who paid the contested Insurance Fee. The Parties spent weeks investigating those alternative potential settlement benefits, and I had a number of conversations directly with the CFO and General Counsel of Spartan, as well as many conversations with all counsel and with representatives for both insurance carriers.

10. The Parties did not reach a Settlement prior to the December 29th hearing on Plaintiffs' Motion for Class Certification, but agreed not to declare an impasse and to keep the lines of communication open for continued negotiations.

11. After the class certification hearing, [redacted] the Parties decided to continue with our Mediation. After additional weekend and late-night emails, calls and Zoom conferences, I made a supplementary Mediator's Proposal based upon one that I had previously made and based upon all of the relevant circumstances.

12. The Parties considered my proposal and all decided to accept it. As noted above, in my opinion, the value of the Settlement benefits negotiated in this case are not only substantial, but possibly exceed the recoveries that could be obtained should Plaintiff succeed in obtaining class certification and a favorable jury trial verdict upheld after likely protracted appeals. Under the proposed Settlement, each Class Member will be entitled to elect to receive either one four-month free membership to the "Spartan+ Membership Program," or one $5 Voucher per each paid registration during the Class Period, up to a maximum of four (4) total Vouchers per Settlement Class Member. The Parties agreed to provide the class with email notification of the relief and all members of the proposed class will by default be deemed to have selected four (4) free months of the "Spartan+ Membership Program," even if they do not make an election in response to the email notice.

13. During the course of the Mediation, it was evident that injunctive relief was a core remedy sought by Plaintiff and would be a critically important component of any negotiated settlement. Thus, in addition to the other settlement benefits, the proposed Settlement requires Spartan to provide all future race participants with accurate information regarding what was formerly titled the "Racer Insurance Fee," namely that (1) any such fee includes other Administrative Costs (as explained by Spartan in other sections of the Spartan website) and (2) Spartan may realize revenues from these charges. In addition, Spartan has agreed to rename the fee as the "Administrative, Insurance and Management Fee" to more clearly reflect that is covers a number of different costs involved in Spartan events, including administrative and management costs, insurance costs and expenses for related risk management and safety measures. The agreed-upon additional disclosures will also explain that the fee is not a direct pass-through of third-party costs, including insurance premiums.

14. After the Parties agreed to the material economic relief and other benefits for the Settlement Class, they continued discussions with the insurers in an effort to maximize the amount the carriers would contribute to the Settlement in light of their asserted coverage defenses. After protracted negotiations, the insurance carriers ultimately agreed to collectively contribute a total of $2.3 million, which I can attest is the most they would agree to pay as part of the Settlement [redacted] Class Counsel have agreed to seek approval from the Court for an award in that amount to be used for attorneys' fees and expenses, and for a service award to Plaintiff (subject to the state of the law on the issue in the Eleventh Circuit), which amount, I believe, is supported by the value of the settlement benefits attained and, I am told, Plaintiff's counsel's lodestar and expenses generated in the case.

15. In my opinion, the settlement negotiations in this case resulted in a resolution that is not only fair, adequate, and reasonable for Settlement Class Members under all of the circumstances. It is also clearly the result of difficult, non-collusive negotiations that were conducted at arm's length by very skilled, well-informed lawyers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28 day of January, 2021.

Michael D. Young

Exhibit 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

AARON FRUITSTONE, on behalf of himself and all others similarly situated,

Plaintiff,

Case No.: 1:20-cv-20836-BB

v.

SPARTAN RACE INC., a Delaware Corporation

Defendant.

STIPULATION OF SETTLEMENT

This Stipulation of Settlement is entered into by Plaintiff Aaron Fruitstone, on behalf of himself and each of the Class Members, and Defendant Spartan Race, Inc.

I. RECITALS

A. In February 2020, Plaintiff filed a class action complaint in the Southern District of Florida against Spartan. Plaintiff filed an amended complaint in April 2020, alleging that Spartan's "Racer Insurance Fee" was misleading and an "unfair and deceptive self-enrichment scheme" in violation of the Florida Deceptive and Unfair Trade Practices Act and the Massachusetts Consumer Protection Law and a basis for a cause of action for unjust enrichment.

B. The Action proceeded amidst the ongoing COVID-19 pandemic. A considerable amount of discovery occurred in a relatively short period of time. Both parties served and answered interrogatories, sent requests for production of documents and produced documents in response, and deposed various witnesses. Discovery confirmed approximately one million Class Members and a total of approximately two million registrations.

C. In September 2020, Plaintiff filed a motion for class certification, and the Parties filed briefs and evidence in connection with that motion. On December 29, 2020, the Court held a hearing on the motion for class certification, but has not issued a ruling.

D. Starting on December 1, 2020, the Parties participated in mediation with Mediator Michael Young. The mediation process continued for more than a month with, almost daily telephone/Zoom calls and emails.

E. Spartan has denied and continues to deny each and all of the claims and contentions alleged by Plaintiff and any liability or wrongdoing with respect thereto.

II. DEFINITIONS

A. As used in this Stipulation and all Exhibits hereto, the following capitalized terms

have the meanings specified below:

1. "Action" means the case captioned *Aaron Fruitstone v. Spartan Race Inc.*, filed February 26, 2020, in the United States District Court for the Southern District of Florida, and assigned Case No. 1:20-cv-20836-BB.

2. "Chubb" means ACE American Insurance Company, which issued Policy No. C28216610 004 to Spartan.

3. "Class" or "Class Members" means all individuals in the United States who during the Class Period, based on Spartan's records, paid a $14 "Racer Insurance Fee" or "Insurance Fee" in connection with any race organized and sponsored by Spartan. Excluded from the Class are (a) Defendant's board members and executive level officers; (b) the District and Magistrate judges assigned to this Action and their court staff; and (c) individuals who submit a valid, timely exclusion/opt-out request.

4. "Class Counsel" means:

Adam M. Moskowitz Howard M. Bushman Joseph M. Kaye The Moskowitz Law Firm 2 Alhambra Plaza #601 Miami, FL 33134	Andrew S. Friedman Francis Balint Bonnett, Fairbourn, Friedman & Balint, P.C. 2325 E. Camelback Road, Suite 300 Phoenix, AZ 85016

5. "Class Notice" means the "Notice of Class Action Settlement" discussed in Section IV of this Stipulation and substantially in the form attached as Exhibit A.

6. "Class Period" means the time period from February 26, 2016 to December 31, 2020 (inclusive of both dates).

7. "Court" means the United States District Court for the Southern District of Florida, Miami Division, in which this Action is pending.

8. "Defendant" or "Spartan" means Spartan Race, Inc.

9. "Defendant's Counsel" means:

Evan S. Nadel
Victor Mustelier
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
44 Montgomery Street, 36th Floor
San Francisco, CA 94104

10. "Effective Date" means the date on which all conditions of the Settlement have been satisfied, as provided in Section VII.

11. "Final Approval Hearing" means the hearing to be held by the Court to consider and determine whether the proposed settlement of the Action, as contained in this Stipulation, should be approved as fair, reasonable, and adequate, and whether the Final Order and Judgment approving the Settlement should be entered. The Final Approval Hearing shall be held no earlier than ninety (90) days after the date of entry of the Preliminary Approval Order

12. "Final Order and Judgment" means the order and judgment entered by the Court:

i. giving final approval to the terms of this Stipulation as fair, adequate and reasonable;

ii. providing for the orderly performance and enforcement of the terms and conditions of the Stipulation;

iii. discharging the Released Parties of and from all further liability for the Released Claims to the Releasing Parties;

iv. permanently barring and enjoining the Releasing Parties from instituting, filing, commencing, prosecuting, maintaining, continuing to prosecute, directly or indirectly, as an individual or collectively, representatively, derivatively, or on behalf of them, or in any other capacity of any kind

whatsoever, any action in any state court, any federal court, or in any other tribunal, forum, or proceeding of any kind, against the Released Parties that asserts any Released Claims; and

v. entering a Final Order and Judgment that is consistent with this Stipulation and substantially in the form attached as Exhibit B.

13. "Insurers" means Chubb and Travelers.

14. "Objection/Exclusion Deadline" means the date by which any written objection to this Settlement must be filed with the Court and any request for exclusion by a Potential Settlement Class Member must be received by Spartan, which shall be designated as a date twenty-one (21) days before the originally scheduled date of the Final Approval Hearing (if the Final Approval Hearing is continued, the deadline runs from the first scheduled Final Approval Hearing), or on such other date as may be ordered by the Court.

15. "Parties" means Plaintiff and Defendant, and "Party" means either Plaintiff or Defendant.

16. "Plaintiff" means Aaron Fruitstone.

17. "Potential Settlement Class Members" mean Persons who fall within this Stipulation's definition of the Class.

18. "Preliminary Approval Order" means the proposed order preliminarily approving the Settlement and substantially in the form attached as Exhibit C.

19. "Program" means Spartan's Spartan+ Membership Program that will be available to consumers in 2021 for the anticipated regular price of $85.00 per year.

20. "Release" means the release set forth in §VI of this Stipulation.

21. "Released Claims" means any and all actions, claims, demands, rights, suits, debts, and causes of action of whatever kind or nature against the Released Parties, including damages, costs, expenses, penalties, equitable relief, injunctions, and attorneys' fees, known or unknown, suspected or unsuspected, in law or in equity that arise out of or relate to the factual allegations and claims asserted in this case individually and/or on a class wide basis.

22. "Released Party" or "Released Parties" means Defendant, including its predecessors and successors in interest, and each of the foregoing's subsidiaries, divisions, departments, affiliates, parents, partners, members, managers and affiliated individuals and entities, any and all of its past and present officers, directors, stockholders, agents, employees, attorneys, insurers, representatives, legal predecessors, successors, heirs, and assigns.

23. "Releasing Parties" means Plaintiff and the Class Members.

24. "Settlement Class Members" mean Persons who fall within the definition of the Class, who do not timely and properly exclude themselves from the Settlement Class as provided in this Stipulation, and who otherwise are not excluded by specific order of the Court from the Class.

25. "Stipulation of Settlement," "Settlement" and/or "Stipulation" means this executed Stipulation of Settlement.

26. "Travelers" means Travelers Casualty and Surety Company of America, which issued Policy No. 106681097 to Spartan.

27. "Voucher" means a $5.00 credit towards the purchase of non-discounted merchandise on Spartan's website.

B. All references herein to sections, paragraphs, and exhibits refer to sections, paragraphs and exhibits of and to this Stipulation, unless expressly stated otherwise.

III. SETTLEMENT RELIEF: The Membership/Voucher/Injunction Program

As described more fully below, each Class Member will be entitled to elect to receive either (a) one four-month free membership to the "Spartan+ Membership Program," or (b) one Voucher per each paid registration during the Class Period, up to a maximum of four (4) total Vouchers per Class Member. In addition, the Class will benefit from the Injunctive Relief described below.

A. The Spartan+ Membership Program

Spartan currently offers, at a price of $79.99 per year, access to its SpartanFit™ application. Prior to this lawsuit being settled, Spartan intended to create and offer for sale a Spartan+ Membership Program (the "Program"), which would provide access to an enhanced version of all of the video, audio, and digital content that is currently available via the SpartanFit Application, plus updated and advanced content, such as on-line classes, videos and other tools to assist with Spartan's programs and lifestyle. Independent of this Settlement, Spartan intends to charge consumers $85.00 per year for the Program. Spartan intends to make the Program available to the public by March 2021.

Through this Stipulation of Settlement, each Class member who elects to receive the Program will be provided with a free four-month subscription to the Program. This Program subscription will include: (1) the "highest" level of access to all available video, audio, and other digital content; (2) a 20% discount and free shipping and handling for any merchandise ordered by the Class Member from Spartan's website; and (3) free event photo downloads and access to other "members only" premium content on Spartan's website.

Class Members will not be required to provide a credit card to initiate their Program subscriptions but will need to activate their subscriptions after the Effective Date. Subscriptions will automatically terminate at the end of four months, unless the Class Member chooses affirmatively to extend their subscription beyond the complementary four-month period.

B. Vouchers for Spartan Merchandise

As an alternative to the four-month free subscription to the Program, each Class Member may elect to receive a $5.00 Voucher. Should the Class Member elect to receive a Voucher, they will receive one Voucher per each event for which they paid a "Racer Insurance Fee" or "Insurance Fee" during the Class Period, up to a total of four (4) Vouchers maximum (for a combined value of $20.00). No Class Member or other person may receive or redeem more than four (4) Vouchers. Each Voucher shall entitle the owner to a $5.00 credit towards the purchase of any non-discounted merchandise on Spartan's website. There are currently many non-discounted merchandise items available for sale on the Spartan website, and Spartan has no intention of removing said items as a result of this Settlement. Vouchers cannot be combined with any promotion, discount, or coupon.

Up to four (4) Vouchers may be "stacked" (*i.e.*, combined for use in a single transaction) towards the purchase of any such non-discounted merchandise. Vouchers are transferable. However, the non-discounted merchandise and four-Voucher stacking limitations also apply to recipients of transferred Vouchers. Each Voucher will be valid for two (2) years from the date of issuance, at which time the Voucher will expire.

C. Injunctive Relief to the Settlement Class

Plaintiff in the Action seeks injunctive relief requiring Spartan to provide all consumers with full and accurate information regarding the "Racer Insurance Fee", namely that it also includes other administrative costs (as explained by Spartan in other sections of the Spartan

website) and that Spartan may make a profit regarding such charges. In addition to providing all Class Members the relief described in Sections III. A and B, Spartan also agrees to the following, starting on the Effective Date, that will directly benefit all current and future Spartan consumers:

- Spartan will not describe in writing or abbreviate the at-issue fee as a "Racer Insurance Fee," "Racer Insur. Fee," "Insurance Fee," "Insur. Fee," or similar nomenclature. Spartan specifically retains the right to describe the at-issue fee an "Administrative, Insurance, and Management Fee," "AIM Fee," or "Admin Fee" during the online event registration process or elsewhere.
- Spartan will add the following language to current and future marketing and sales materials, FAQs, relevant website screens in the registration process, and screen indicators or selectors that describe or are adjacent to the at-issue fee: "The Administrative, Insurance, and Management Fee covers a number of different costs involved in Spartan events, including administrative and management costs, insurance costs and expenses for related risk management and safety measures. This fee is not a direct pass-through of third-party costs to the racer and may include revenues to Spartan."
- Spartan agrees that it will not represent, directly or indirectly, that 100% (or all) of the "Administrative, Insurance, and Management Fee" is paid to an insurance provider or other third-party.

D. Class Notice Costs, and Attorney's Fees and Expenses

As part of the settlement relief, Spartan will provide Class Notice to the Class Members pursuant to Section IV. The Insurers, on behalf of Spartan, will pay any reasonable attorneys' fees

and expenses and Plaintiff Service Award that are awarded by the Court in this Action, as further described in Section VIII below.

IV. NOTICE TO THE CLASS AND APPROPRIATE FEDERAL AND STATE OFFICIALS

A. Notice to Appropriate Federal and State Officials

Pursuant to the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715, within ten (10) days after this Stipulation is deemed filed with the Court, Spartan will provide notice of this Action and this Stipulation to the Attorney General of the United States; the Federal Trade Commission; and the Attorneys General of the States, Districts, Commonwealths and Territories in which Class Members are determined to reside based on the Class Members' mailing addresses as reflected in Spartan's business records.

B. Individual Notice to the Class

Subject to the requirements of the Preliminary Approval Order, no later than twenty-eight (28) days after entry of the Preliminary Approval Order, Spartan will send a Class Notice to each Class Member. The Class Notice in a form identical or similar to Exhibit A will be sent exclusively by email and will:

1. contain a short, plain statement of the background of the Action and the Settlement;
2. describe the settlement relief outlined in this Stipulation;
3. state that any relief to Class Members is contingent on the Court's final approval of the Settlement;
4. inform Class Members that attorneys' fees and expenses, and a service award for the named plaintiff, will be requested and, if approved by the Court, will be paid by

Spartan in addition to the relief described above in Section III (A)-(B);

5. inform Class Members that they may opt out of the Class by submitting a written opt out request by email to Spartan, which must be received by Spartan no later than the Objection/Exclusion Deadline;

6. inform Class Members that, if he or she desires, Class Members may object to the proposed Settlement by filing and serving a written statement of objections, which must be received no later than the Objection/Exclusion Deadline;

7. inform Class Members that any Class Member who has filed and served written objections to the proposed Settlement may, if he or she so requests, enter an appearance at the Final Approval Hearing either personally or through counsel;

8. inform Class Members that any Final Order and Judgment entered in the Action, whether favorable or unfavorable to the Class, shall include, and be binding on, all Class Members, even if they have objected to the proposed Settlement and even if they have any other claim, lawsuit or proceeding pending against Spartan;

9. describe the terms of the Release; and

10. contain reference and a hyperlink to a dedicated webpage housed on The Moskowitz Law Firm, PLLC website, which will include relevant documents and information regarding this Action.

The Class Notice email also will contain a link through which each Class Member can make a selection, subject to Court approval, of either (a) a free four-month subscription to the Program, or (b) one or more Vouchers, with a maximum of four (4) Vouchers per Class Member, as described above. The Class Notice will further inform each Class Member that they shall have sixty (60) days from the date the Class Notice email is sent to make their selection and if they do

not make a selection within that time period they shall be deemed to have selected the Program as their benefit. Class Members will also be informed that if they choose the Voucher(s), they will have two years to use the Voucher(s).

Not later than ten (10) days from the Effective Date, Spartan will send a second email to all Class Members informing them that, depending on the Class Member's selection, the Voucher(s) will be deposited into their account shortly or their membership in the Program will be activated once they complete the online Program enrollment on the Spartan website within thirty (30) days.

Spartan represents that, apart from a relatively small number of possible exceptions, at the time that each Class Member registered for a Spartan event, such Class Member provided Spartan with his or her name, email address, and billing address, and that Spartan currently has this information in its possession. Spartan cannot and does not guarantee that such user-provided data is the currently accurate contact information for each Class Member. Spartan will use this information to compile the list of Class Members to whom Class Notice will be sent and the email addresses to which Class Notice will be sent. Spartan will appoint at least one employee to oversee the process of compiling the list of Class Members. At least ten (10) days prior to the Final Approval Hearing, Spartan shall provide to Class Counsel a declaration confirming that the Notice program has been completed along with a list of persons who submitted timely valid requests for exclusion from the Class.

V. APPROVAL PROCEDURES AND RELATED PROVISIONS

A. Preliminary Approval

Promptly after execution of this Stipulation, the Parties shall submit this Stipulation to the Court and shall move for entry of a Preliminary Approval Order preliminarily approving this Stipulation and approving the form and manner of providing notice to the Class.

B. Objections, Notices to Appear, and Opt Outs

Opting Out of the Settlement. Any members of the Settlement Class who wish to exclude themselves from the Settlement Class shall advise Spartan on or before the Objection/Exclusion Deadline. The Class Notice shall contain information concerning how a person in the Settlement Class may opt-out of the Settlement (i.e., a request to be excluded from the Settlement Class) by mailing a Request for Exclusion by first-class mail, postage prepaid, and postmarked to the address of Spartan as specified in the Class Notice.

a. Such Request for Exclusion shall clearly indicate the name, address, email address, and telephone number of the Person seeking exclusion, the name and case number of the Action, a statement that the Person wishes to be excluded from the Class, and the date and signature of such Person or, in the case of a Person in the Settlement Class who is deceased or incapacitated, the signature of the legally authorized representative of such Person.

b. Any member of the Settlement Class who submits a valid and timely Request for Exclusion will not be a Class Member, will not receive any compensation under this Agreement, and will not be bound by the terms of this Agreement.

c. Any Class Member who wishes to appear at the Final Approval Hearing, either personally or through counsel, must file with the Court and serve on the Parties a Notice of Intent

to Appear. The Notice of Intent to Appear must include the Class Member's name and current address or other contact information, and state whether he or she will appear through his or her own counsel. The Notice of Intent to Appear must be filed with the Court and served on Class Counsel and Defendant's Counsel such that the Notice of Intent to Appear is actually received by counsel no later than the Objection/Exclusion Deadline.

C. Validity of Exclusion. The Request for Exclusion shall not be effective unless it is postmarked no later than the Objection/Exclusion Deadline, which date shall be stated in the Class Notice. No Person in the Settlement Class may submit a Request for Exclusion of or on behalf of any other Person in the Settlement Class. Requests for Exclusion that do not comply with this Section of this Agreement are invalid. Spartan shall share with Class Counsel copies of Requests for Exclusion and a report of the names and addresses of Persons whose Requests for Exclusion have been timely mailed. Plaintiff shall file the Requests for Exclusion with the Court in connection with Plaintiff's motion for a Final Approval Order and Judgment.

Spartan will also provide to Class Counsel a list of each Person who timely and validly opted out of the Settlement to be filed with the Court by Class Counsel twenty-one days prior to Final Approval. Any Person in the Settlement Class who does not properly and timely submit a Request for Exclusion of this Settlement Agreement on or before the Objection/Exclusion Deadline will be bound by all subsequent proceedings, orders and the Final Order and Judgment in this Action relating to this Settlement Agreement, even if he or she has pending, or subsequently initiates, litigation, arbitration or any other proceeding against Spartan relating to the Released Claims. Any Person in the Settlement Class who submits a valid and timely Request for Exclusion shall not be a Settlement Class Member, bound by this Agreement or the Final Approval Order

and Judgment, entitled to any Settlement Class Recovery, or otherwise gain any rights by virtue of this Agreement.

D. Objections. Any Settlement Class member who intends to object to the fairness of the Settlement must file a timely written objection with the Court by the Objection/Exclusion Deadline at his or her own expense, with a copy served on Class Counsel and Defendant's Counsel at the addresses provided in the Class Notice, which written objection must contain the following:

(a) the full name, address, telephone number, the signature of the objecting Class Member (the objector's counsel's signature is not sufficient) and a statement under penalty of perjury that the Class Member is a member of the Class and the information provided on the claim form is true and correct;

(b) the specific reasons for the objecting Class Member's objection to the Settlement, and a detailed statement of the legal basis for such objections;

(c) the identity of all witnesses, including the witnesses' name and address, and a summary of such witnesses' proposed testimony who the objecting Class Member may call to testify at the Final Approval Hearing;

(d) documents sufficient to demonstrate the objecting Class Member's standing (that they are, in fact, a member of the proposed class) must be attached to the Objection;

(e) the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior such objections that were issued by the trial and appellate courts in each listed case; and

(f) a statement whether the objecting Class Member and/or his/her attorney(s) intend to appear at the Final Approval Hearing. Any attorney of an objecting Class Member who intends to appear at the Final Approval Hearing must enter a written Notice of Appearance of Counsel with the Clerk of the Court no later than the date set by the Court in its Preliminary Approval Order and shall include the full caption and case number of each previous class action case in which such counsel has represented an objector.

Waiver of Objection. Any Class Member who does not file a timely written objection to the Settlement shall waive the right to object or to be heard at the Final Approval Hearing and shall be forever barred from making any objection to the Settlement or seeking review of the Settlement by appeal or other means. Any Class Member who does not file a timely written Objection to the Settlement will be bound by this Agreement and the Final Approval Order and Judgment, including the Release described in Section VI of this Agreement.

The Parties shall file responses to any objections to the Stipulation ten (10) days before the Final Approval Hearing.

VI. RELEASE AND WAIVER

A. Release

As of the Effective Date, Plaintiff and every Class Member, for his or herself, and for every Class Member's beneficiaries, executors, conservators, personal representatives, wards, heirs, predecessors, successors, and affiliates in consideration of the benefit set forth in this Stipulation, fully, finally, and forever release the Released Parties from all Released Claims.

B. Waiver

The Parties acknowledge that it is possible that unknown losses or claims exist or might exist or that present losses may have been underestimated in amount. As of the Effective Date,

Plaintiff and every Class Member are deemed to finally, fully, and forever expressly waive and relinquish any and all provisions, rights, and benefits with respect to the Released Claims.

Because the Class includes California citizens, the Parties expressly agree to waive any and all provisions, rights, and benefits of Section 1542 of the California Civil Code, and any and all similar provisions, rights, and benefits conferred by any law of any state or territory of the United States or principle of common law that is similar, comparable, or equivalent to Section 1542 of the California Civil Code, which provides:

> A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

Plaintiff and the Class Members are deemed to agree that the above waiver is an essential term of this Stipulation. Plaintiff and Class Members are also deemed to acknowledge and understand that they may later discover claims presently unknown or unsuspected, or facts in addition to or different from those which they now believe to be true with respect to the matters released in this Stipulation. Nevertheless, it is the intention of Plaintiff and Class Members to fully, finally, and forever settle and release the Released Claims with the Released Parties that exist, hereafter may exist, or might have existed.

VII. CONDITIONS OF SETTLEMENT, EFFECT OF DISAPPROVAL, CANCELLATION, OR TERMINATION

The Effective Date of this Stipulation shall be the first date after which all of the following events and conditions have been met or have occurred:

1. The Court has preliminarily approved this Stipulation;

2. The Court has entered the Final Order and Judgment; and

3. Unless the Parties otherwise agree in writing to waive all or any portion of the following provision, there has occurred: (i) in the event there is a properly and timely filed objection to entry of the Final Order and Judgment, the expiration (without the filing or noticing of an appeal) of the time to appeal from the Final Order and Judgment; (ii) the final dismissal of an appeal from the Final Order and Judgment; (iii) affirmance on appeal of the Final Order and Judgment in substantial form; (iv) if a ruling or decision is entered by an appellate court with respect to affirmance of the Final Order and Judgment, the time to petition for a writ of certiorari or review with respect to such ruling or decision has expired (without such petition being filed); or (v) if a petition for a writ of certiorari or review with respect to the Final Order and Judgment is filed, the petition has been denied or dismissed or, if granted, has resulted in affirmance of the Final Order and Judgment in substantial form.

If all of the conditions specified in this Section VII of the Stipulation are not met, then this Stipulation shall be cancelled and terminated unless Class Counsel and Defendant's Counsel mutually agree in writing to proceed with this Stipulation. If all of the conditions specified in Section VII of this Stipulation are met, but the number of Class Members requesting and obtaining exclusion under Section V(B) exceeds 15% of all Class Members, then any Party can cancel and terminate this Stipulation upon providing written notice of such election to all Parties.

In the event that this Stipulation is not approved by the Court, or the Settlement set forth in this Stipulation is terminated as described above or fails to become effective in accordance with the terms, the Parties shall be restored to their respective pre-settlement positions in the Action and this entire Stipulation shall become null and void. Further, all negotiations, proceedings, and documents prepared and statements made in connection with the Settlement shall be without prejudice to any Party and shall not be deemed or construed to be an admission or confession by

any Party or any fact, matter, or proposition of law, and if this Stipulation is not approved by the Court or the Settlement set forth in this Stipulation is terminated as set forth above in this Section or fails to become effective in accordance with its terms, no Party will subsequently refer to or attempt to offer into evidence such statements.

VIII. ATTORNEYS FEES AND EXPENSES, AND SERVICE AWARDS

A. Attorneys' Fees and Expenses

The Parties agree that Class Counsel may apply for an award of reasonable attorneys' fees and reimbursement of expenses to be paid by Spartan. Specifically, Class Counsel intends to request approval of attorneys' fees and costs not to exceed $2.3 million. Spartan will not oppose the request for attorneys' fees and expenses up to this amount, *provided* that Class Counsel comply with this Stipulation and *provided* that the total of all payments sought from or made by or on behalf of Spartan and the Insurers under this Stipulation (including but not limited to payments for attorneys' fees, costs and expenses of Class Counsel, and the Plaintiff's service award) does not exceed $2.3 million. Spartan acknowledges that the approximate maximum monetary value of the relief to the Class exceeds $28 million—calculated as one million Class Members multiplied by $28.00 (four (4) months of Program subscription times one-third of the planned annual subscription rate for other Spartan customers of $85.00 per year). Class Counsel shall file its Motion for an Attorneys' Fees and Expenses award no later than fourteen (14) days before the Objection/Exclusion Deadline.

The Settlement is not contingent on the Court's approval of the attorneys' fees and expenses requested by Class Counsel. Class Counsel shall allocate and distribute the award of attorneys' fees and expenses among Class Counsel.

Subject to the terms and conditions of this Stipulation and any order of the Court, the amount of Class Counsel's attorneys' fees and expenses approved by the Court shall be paid in full by the Insurers into an interest bearing escrow account at Class Counsel's direction, within fourteen (14) days of the Court granting Final Approval of the Settlement, irrespective of any appeals to Final Approval *provided that* Class Counsel have provided the Insurers with the information required below no later than fourteen (14) days before the Effective Date. The approved costs and fees will be wired to an interest bearing account selected by Class Counsel, and agreed to by the Parties and Spartan's Insurers, but none of such Funds will be released to any Party, only until and after the Effective Date. Class Counsel will provide the Insurers a W-9 prior to requesting any payment, and payments will be made by ACH deposit or wire transfer using the instructions provided by Class Counsel. For the avoidance of doubt, Spartan assumes no responsibility, as guarantor or otherwise, for the Insurers' payment of Class Counsel's attorneys' fees and expenses, which responsibility rests entirely with the Insurers, and Plaintiff and Class Counsel waive any claim against Spartan in the event of non-payment by the Insurers.

Plaintiff's Service Award

The Parties agree that Plaintiff may apply for a service award to be paid by Insurers for Spartan. Specifically, Plaintiff intends to request approval of a service award in the amount of $10,000.00 in accordance with the applicable Eleventh Circuit law. Spartan will not oppose the request for a service award in this amount, *provided* that the total of all payments sought from or made by Spartan and the Insurers cumulatively under this Stipulation (including but not limited to payments for attorneys' fees, costs and expenses of Class Counsel, and the Plaintiff's service award) does not exceed $2.3 million. The Settlement is not contingent on the Court's approval of any Plaintiff's service award requested by Class Counsel.

IX. MISCELLANEOUS PROVISIONS

A. Cooperation

The Parties hereto and their undersigned counsel agree to undertake their best efforts and mutually cooperate to promptly effectuate this Stipulation, and the terms of the Stipulation set forth herein, including taking all steps and efforts contemplated by this Stipulation and any other steps and efforts which may become necessary by order of the Court or otherwise. The Parties, their successors and assigns, and their attorneys also agree to implement the terms of this Stipulation in good faith and to use good faith in resolving any disputes that may arise in the implementation of the terms of this Stipulation.

B. Authorization

The undersigned counsel represent that they are fully authorized to execute and enter into the terms and conditions of this Stipulation on behalf of their respective clients.

C. Confidentiality and Non-Disparagement

The Parties, Class Counsel, and Defense Counsel each agree not to disclose the existence or terms of the Stipulation to any other person until such a time as this Stipulation is filed in the Action, absent the prior written consent of the other Parties. Plaintiff and Class Counsel agree that neither will publish or cause to be published, directly or indirectly, any press release or advertising or marketing materials regarding this Settlement, at any time. Plaintiff and Class Counsel further agree not to directly, or indirectly through third persons, entities and/or any other means, disparage Spartan or its officers, directors, shareholders, employees, independent contractors, agents, affiliates, subsidiaries or related entities, to any person, entity, or to the press. For purposes of this Section IX.C, "disparage" shall mean any negative statement, whether written or oral, which does

affect or which could be reasonably expected to adversely affect Spartan's business, income, or reputation, or the business, income or reputation of the its affiliates, subsidiaries, or related entities.

D. Entire Agreement

This Stipulation contains the entire agreement among the Parties hereto and supersedes any prior agreements, representations, communications, or understandings between them. No covenant, obligation, condition, representation, warranty, inducement, negotiation, or undertaking concerning any part or all of the subject matter of this agreement has been made or relied upon except as set forth expressly herein. Except for Section I, all terms of this Stipulation are contractual and not mere recitals and shall be construed as if drafted by all Parties. The terms of this Stipulation are and shall be binding upon each of the Parties, their agents, attorneys, employees, successors and assigns, and upon all other persons claiming any interest in the subject matter through any of the Parties, including any Class Member. Notwithstanding the above, the Parties contemplate that the exhibits to the Stipulation may be modified in nonmaterial ways as needed for settlement implementation by subsequent agreement of the Parties, or by the Court.

E. Computation of Time

All time periods set forth herein shall be computed in calendar days, unless otherwise provided. In computing any period of time prescribed or allowed by this Stipulation or by order of the Court, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in Court, a day in which weather or other conditions have made the Office of the Clerk of the Court inaccessible, in which event the period shall run until the end of the next day that is not one of the aforementioned days. As used in this subsection, "legal holiday" includes New Year's Day, Martin

Luther King, Jr.'s Birthday, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by the President or the Congress of the United States or the State of Florida.

F. Amendments in Writing

This Stipulation may not be changed, modified, or amended except in a writing signed by Class Counsel and Defendant's Counsel and, if required, approved by the Court. Amendments and modifications may be made without additional notice to the Class Members unless such notice is required by the Court.

G. No Admission of Liability

Neither this Stipulation, nor any act performed or document executed pursuant to or in furtherance of this Stipulation: (1) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of the Defendant; or (2) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of the Defendant in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal, except that Defendant may file this Stipulation or the Final Order and Judgment in any action that may be brought against any Released Party in order to enforce the terms of the Stipulation or Final Order and Judgment.

H. No Drafting Party

The Parties agree that the drafting of this Stipulation has been a mutual undertaking. The determination of the terms and conditions contained herein and the drafting of the provisions of the Stipulation have been by mutual understanding after negotiation, with consideration by, and participation of, the Parties hereto and their counsel.

I. Return or Destruction of Confidential Information

Within one year after the Effective Date or after cancellation or termination of this Stipulation pursuant to Section VII – or for some reasonable additional period of time based on a mutually agreed good cause – all Parties shall either destroy or return to the providing Party all documents, materials and other information marked Confidential or Highly Confidential by the providing Party that were received or exchanged in connection with this Stipulation, including lists of Class Members or any other materials reflecting or incorporating information that would reasonably be considered sensitive or private (including but not limited to names, physical and mailing addresses, phone numbers, e-mail addresses, and credit card information). The Parties and their counsel further agree that no information they receive pursuant to this Stipulation will be used for any purpose other than the administration and enforcement of the Stipulation.

J. Retain Jurisdiction

The Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of this Stipulation, and the Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Stipulation. The Stipulation shall be governed by the laws of the State of Florida.

K. Reasonable Extensions

Without further order of the Court, Plaintiff and Defendant may agree to reasonable extensions of time to carry out any provisions of this Stipulation, provided that such extensions are in a writing reflecting the consent of the Parties.

L. Execution Date

This Stipulation shall be deemed to have been executed upon the last date of execution by all of the undersigned.

M. Counterparts

This Stipulation may be executed in counterparts, each of which shall constitute an original. Facsimile signatures or signatures sent by email shall be treated as original signatures and shall be binding.

IN WITNESS THEREOF, the Parties hereto have caused this Stipulation to be executed by their duly authorized representatives.

SPARTAN RACE, INC.

Dated: January 27, 2021

By its authorized representative,

DocuSigned by:
BCD6B55F38DB440...
David Piperno, CFO

APPROVED AS TO FORM:

Dated: January 27, 2021

DocuSigned by:
Evan Nadel
1A5AE225B4D1436...
Evan S. Nadel
Florida Bar No. 165409
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO P.C.
44 Montgomery Street, 36th Floor
San Francisco, CA 94104
Telephone: (415) 432-6000
Facsimile: (415) 432-6001
enadel@mintz.com
Attorneys for Defendant Spartan Race, Inc.

PLAINTIFF AARON FRUITSTONE

Dated: January 28, 2021

Aaron Fruitstone

AARON FRUITSTONE AND THE CLASS

Dated: January 28, 2021

By his attorneys,

Adam M. Moskowitz
Florida Bar No. 984280
adam@moskowitz-law.com
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Telephone: (305) 740-1423

EXHIBIT A

NOTICE OF CLASS ACTION SETTLEMENT

Fruitstone v. Spartan Race, Inc., Case No. 1:20-cv-20836-BB. United States District Court for the Southern District of Florida

You are receiving this Notice because you were identified in Spartan Race, Inc.'s ("Spartan") records as an individual who participated in a race organized and sponsored by Spartan and who paid a $14 "Racer Insurance Fee" or "Insurance Fee." This Notice explains a proposed settlement in a class action under which Spartan has agreed to provide certain benefits to customers who paid such a fee. Spartan denies liability for the claims alleged in the class action but has agreed to the proposed settlement to avoid the distraction of continued litigation and to further its stated mission to promote an active lifestyle that will result in longer, healthier and happier lives for its customers through races and related programs, including the free four-month membership in the new Spartan+ program that is one of the benefits available under the proposed settlement.

A federal court authorized this notice. This is not a solicitation from a lawyer.

- If you are an individual in the United States who during the Class Period, based on Spartan's records, paid a $14 "Racer Insurance Fee" or "Insurance Fee" in connection with any race organized and sponsored by Spartan, you are entitled to the benefits of this settlement.

- This notice explains what the class action lawsuit is about, what the Settlement will be if it is approved by the Court, and what to do if you want to: (i) participate in the settlement; or (ii) object to the Settlement; or (iii) not participate in the Settlement and instead "opt out" of the class action. This notice also tells you how to get more information if you want it.

- You have a choice of benefits.
    - You may select a FREE four month membership in the Spartan+ Membership Program. ***See* Section 7** below for an explanation of the Program; OR
    - You may select a $5 Voucher to be used for any non-sale Spartan Merchandise on www.spartanrace.com for each time you paid a Racer Insurance Fee. ***See* Section 7** below for an explanation of the Vouchers.

CLICK HERE TO SELECT YOUR BENEFITS

[link to Spartan page to select the Program or Vouchers]

YOUR LEGAL RIGHTS ARE AFFECTED WHETHER YOU ACT OR DON'T ACT. PLEASE READ THIS NOTICE CAREFULLY, AND GET MORE INFORMATION IF YOU NEED IT. THE NOTICE WILL TELL YOU HOW TO GET THAT INFORMATION.

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION

1. WHY WAS THIS NOTICE SENT TO ME?

This Notice was sent to you because you are an individual in the United States who during the Class Period, based on Spartan's records, paid a $14 "Racer Insurance Fee" or "Insurance Fee" in connection with an event organized and sponsored by Spartan.

Excluded from the Class are (a) Defendant's board members and executive level officers; (b) the District and Magistrate judges assigned to this Action, along with persons within the third degree of relationship to them; and (c) individuals who submit a valid, timely exclusion/opt-out request.

The Class Period means the time period from February 26, 2016 to December 31, 2020 (inclusive of both dates).

The Court ordered this Notice to be sent to you because you have a right to know about the proposed Settlement of this class action lawsuit, which concerns an alleged failure to disclose how Spartan uses funds from the Racer Insurance Fee, and about your options, before the Court decides whether to approve the Settlement.

If the Court approves the Settlement, you will receive the benefits of the settlement outlined in Section 7. However, the benefits will not be issued until any objections or appeals are resolved.

2. WHAT IS THIS NOTICE?

This Notice is sent to potential settlement Class Members like you to explain the terms of the settlement and your options. The Notice also explains the lawsuit, the Settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them.

The Court in charge of the case is the United States District Court for the Southern District of Florida, and the case is called *Aaron Fruitstone v. Spartan Race Inc.*, Case No. 1:20-cv-20836-BB.

Plaintiff Aaron Fruitstone sued on behalf of you and all Class Members and is called the "Plaintiff." The company he sued, Spartan Race, Inc., is called the "Defendant."

3. WHAT IS THIS LAWSUIT ABOUT?

In this lawsuit, Plaintiff alleges that Spartan made profits by charging and retaining most of the monies collected from the $14 "Racer Insurance Fee." Plaintiff alleges that Spartan's conduct violated Florida's Deceptive and Unfair Trade Practices Act and the Massachusetts Consumer Protection Law, and provided a basis for a cause of action for unjust enrichment.

Spartan expressly denies Plaintiff's allegations and asserts that it has complied and does comply with the law. It also expressly denies that it did anything wrong. There has been no court decision on the merits of this case and no finding that Spartan committed any wrongdoing.

4. WHY IS THERE A SETTLEMENT?

Both sides have agreed to a Settlement to avoid the cost and risk of a trial and so that Class Members can receive benefits in exchange for releasing Defendant from liability. Although it admits no wrongdoing, Spartan prefers to direct its resources to giving value to consumers over squandering them on litigation.

SETTLEMENT CLASS MEMBERSHIP

5. WHO IS A SETTLEMENT CLASS MEMBER?·

To see if you will be affected by this class action, you first have to determine if you are a member of the Settlement Class. The "Settlement Class" includes:

> All individuals in the United States who during the Class Period, based on Spartan's records, paid a $14 "Racer Insurance Fee" or "Insurance Fee" in connection with any race organized and sponsored by Spartan.
>
> Excluded from the Class are (a) Defendant's board members and executive level officers; (b) the District and Magistrate judges assigned to this Action, along with their court staff; and (c) individuals who submit a valid, timely exclusion/opt-out request.

6. WHAT IF I AM NOT SURE WHETHER I AM INCLUDED IN THE SETTLEMENT CLASS?

If you are receiving this Notice, Spartan's records show that you are in the Settlement Class and entitled to benefits. To review the settlement documents filed in this case, you can visit the Settlement Website at www._____.com.

THE SETTLEMENT TERMS AND BENEFITS

7. WHAT ARE THE TERMS OF THE SETTLEMENT?

As described more fully below, each Class Member will be entitled to elect to receive either (a) one four-month free membership to the "Spartan+ Membership Program," or (b) oneVoucher per each paid registration during the Class Period, up to a maximum of four (4) total Vouchers per Class Member.

A. The Spartan+ Membership Program

Through this Stipulation of Settlement, each Class member who elects to receive the Spartan+ Membership Program (the "Program") will be provided with a free four-month subscription to the Program. This Program subscription will include: (1) the "highest" level of access to all available video, audio, and other digital content; (2) a 20% discount and free shipping and handling for any merchandise purchased by the Class Member from Spartan's website; and (3) free event photo downloads and access to other "members only" premium content on Spartan's website.

The normal cost of the Program is $85.00 per year.

You will not be required to provide a credit card to initiate the Program subscription. Subscriptions will automatically terminate at the end of four months, unless the you choose affirmatively to extend your subscription beyond the complimentary four-month period.

B. Voucher for Spartan Merchandise

As an alternative to the four-month free subscription to the Program, each Class Member may elect to receive a $5.00 Voucher for each event for which you paid a "Racer Insurance Fee" or "Insurance Fee" during the Class Period, up to a total of four (4) Vouchers maximum (for a combined value of $20.00).

Voucher Terms:

1. No Class Member or other person may receive or redeem more than four (4) Vouchers.

2. Each Voucher shall entitle the owner to a $5.00 credit towards the purchase of any non-discounted merchandise on Spartan's website.

3. Vouchers cannot be combined with any promotion, discount, or coupon.

4. Up to four (4) Vouchers may be "stacked" (*i.e.*, combined for use in a single transaction) towards the purchase of any non-discounted merchandise on Spartan's website. Vouchers are transferable.

5. You may transfer the Voucher to family or friends. However, the non-discounted merchandise and four-Voucher stacking limitations also apply to recipients of transferred Vouchers.

6. Each Voucher will be valid for two (2) years from the date of issuance, at which time the Voucher will expire.

C. Spartan has also agreed to change its business practices by adding the following language to current and future marketing and sales materials, FAQs, relevant website screens in the registration process, and screen indicators or selectors that describe or are adjacent to the at-issue fee: "The Administrative, Insurance, and Management Fee covers a number of different costs involved in Spartan events, including administrative and management costs, insurance costs and expenses for related risk management and safety measures. This fee is not a direct pass-through of third-party costs to the racer and may include revenues to Spartan." The full changes to the business practices can be viewed on the **Settlement Ageement [*HYPER-LINK*]**.

8. HOW DO I RECEIVE THE BENEFITS?

CLICK HERE TO SELECT YOUR BENEFITS
[link would take class member to their Spartan page to select the Program or** Vouchers **and amount of** Vouchers**]

NOTE that if you do not select your benefit within 60 days of receiving this Notice, you will be deemed to have selected the Spartan+ Program for four months and will receive

information to enroll after the Effective Date of the Settlement (See Section 9). The Effective Date is the date the settlement is approved and all appeals have been exhausted.

9. WHEN WOULD I RECEIVE MY BENEFITS?

The Court will hold a hearing on _____, 20___ to determine whether to approve the Settlement. If the Court approves the Settlement, there may be appeals after that. It is always uncertain when any appeals, if filed, will be resolved. Benefits will be activated after the Settlement becomes final and effective, which means after all appeals have been resolved. Please be patient.

Please check the Settlement Website, www._____.com for updates on this matter and the Effective Date.

10. WHAT AM I GIVING UP TO BE PART OF THE SETTLEMENT CLASS?

Unless you exclude yourself from the Settlement Class, you will remain in the Settlement Class. That means you cannot sue, continue to sue, or be part of any other lawsuit against Defendant about the issues that were or could have been raised in this case. It also means that all of the Court's orders concerning the Settlement Class will apply to you and legally bind you, including the Releases described in detail in Section 15 of the Settlement Agreement. The Releases describe the legal claims that you give up if this Settlement is approved and you do not exclude yourself. Please carefully read the Releases in the Settlement Agreement.

11. WHAT HAPPENS IF I DO NOTHING?

If you do nothing as a Settlement Class Member, you will be deemed to have selected the Spartan+ Program for free for four months as your benefit. But, unless you exclude yourself from the Settlement, you will not be able to start a lawsuit or continue with a lawsuit against Defendant about the legal issues that were or could have been raised in this case, ever again.

EXCLUDING YOURSELF FROM THE SETTLEMENT

12. HOW DO I GET OUT OF THE SETTLEMENT?

If you are within the definition of the Settlement Class (see Answer #5), you are automatically a member of the Settlement Class. However, you can exclude yourself, or "opt-out" of the Settlement Class, if you do not wish to participate. This means you will receive no benefits as part of this Settlement.

You cannot ask to be excluded over the phone or on the internet. To exclude yourself, you must mail a written request for exclusion to Spartan and that Request for Exclusion must clearly indicate the name, address, email address, and telephone number of the Person seeking exclusion, the name and case number of the Action, a statement that the Person wishes to be excluded from the Class, and the date and signature of such Person or, in the case of a Person in the Settlement Class who is deceased or incapacitated, the signature of the legally authorized representative of such Person. You cannot "opt out" of the Settlement on behalf of other members of the Settlement Class.

13. WHAT IF I DO NOT OPT OUT OF THE SETTLEMENT?

Any member of the Settlement Class who does not opt out of the Settlement in the manner and by the deadline described above will be part of the Settlement Class, will be bound by all Orders and proceedings in this action, and will give up the right to sue any of the Defendant for the claims that this Settlement resolves. If you want to opt out, you must take timely affirmative written action

even if you have filed a separate action against the Defendant or are a putative class member in any other class action filed against the Defendant. If you have a pending lawsuit, please contact your lawyer in that lawsuit immediately. Remember, the exclusion deadline is _____.

14. IF I EXCLUDE MYSELF, CAN I RECEIVE BENEFITS FROM THIS SETTLEMENT?

No. If you exclude yourself from the Settlement Class, you will not be entitled to any benefits. But, you may sue or continue to sue Defendant individually, or you may be part of a different lawsuit against Defendant.

OBJECTING TO THE SETTLEMENT

15. HOW CAN I OBJECT TO THE SETTLEMENT?

You may object to or comment on all or part of the proposed Settlement if you are a Settlement Class Member and do not opt out of the Settlement. To do so, you (or your attorney at your expense) must submit a valid objection.

To be valid, your objection must be in writing, personally signed by you, and must include the information and documents required by the **Preliminary Approval Order [HYPER LINK]** (click on the link to review a copy of the Order). Failure to provide ALL required information may be grounds to have your objection stricken.

Your objection must be filed with the Clerk of Court, with copies mailed to counsel for all of the parties identified below, postmarked no later than _____:

CLERK OF THE COURT	**CLASS COUNSEL**
Clerk of the United States District Court for the Southern District of Florida 400 North Miami Avenue 8th Floor Miami, FL 33128	Adam M. Moskowitz The Moskowitz Law Firm, PLLC 2 Alhambra Plaza Suite 601 Coral Gables, FL 33134
COUNSEL FOR DEFENDANT	
Evan S. Nadel Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. 44 Montgomery Street, 36th Floor San Francisco, CA 94104	

THE LAWYERS REPRESENTING YOU

16. DO I HAVE A LAWYER IN THIS CASE?

The Court appointed the following lawyers to represent you and all other Settlement Class Members. Together, these lawyers are called Class Counsel. You will not be charged any money to pay for these lawyers.

Adam M. Moskowitz
Howard M. Bushman
Joseph M. Kaye
The Moskowitz Law Firm
2 Alhambra Plaza #601
Miami, FL 33134

Andrew S. Friedman
Francis Balint
Bonnett, Fairbourn, Friedman &
Balint, P.C.
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016

17. HOW WILL THE CLASS COUNSEL LAWYERS BE PAID?

Class Counsel will ask the Court for attorneys' fees and expenses for all counsel up to $2,290,000, and a case contribution award of $10,000.00 paid to Plaintiff Aaron Fruitstone for his time and effort in the matter. The Court may award less than these amounts.

Defendant has agreed not to oppose the applications by Class Counsel for attorneys' fees and expenses or the case contribution award to Plaintiff that do not exceed those amounts.

A panel of the United States Court of Appeals for the Eleventh Circuit issued an opinion holding that case contribution awards for class representatives were impermissible. *Johnson v. NPAS Solutions*, *LLC*, 2020 WL 5553312 (11th Cir. 2020). In light of this opinion, the Parties have agreed that the Court may approve all of the terms of the settlement, while also denying the request for a case contribution award, but Class Counsel can request the Court reserve jurisdiction to reconsider the issue of a case contribution award if *NPAS* is reversed, vacated, or overruled. Class Counsel will file with the Court their request for attorneys' fees and expenses and any request for service awards on or before _____, 2021, which will then be posted on www._____.com.

THE COURT'S FINAL APPROVAL HEARING

18. WHEN AND WHERE WILL THE COURT DECIDE WHETHER TO APPROVE THE SETTLEMENT?

The Court will hold a hearing about the Settlement at __ :00 .m. on _____, in Courtroom 10-2 at the Wilkie D. Ferguson, Jr., United States Courthouse, 400 North Miami Avenue, Miami, FL 33128. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate, and Class Counsel's applications for attorneys' fees and expenses and case contribution award to the Plaintiff. If there are valid and timely objections, the Court will consider them.

The Court may listen to people who have properly asked in writing beforehand to speak at the hearing. After the hearing, the Court will decide whether to approve the Settlement. It is unknown how long this decision will take.

19. AS A SETTLEMENT CLASS MEMBER, MAY I SPEAK AT THE HEARING?

You cannot speak at the hearing if you have excluded yourself from the Settlement Class. However, if you are a member of the Settlement Class, you may ask the Court for permission for you or your attorney to speak at the hearing. To do so, you must file with the Clerk of the Court and serve on all counsel for the parties (at the addresses identified above in Answer #16) a notice of intention to appear at the hearing. The notice of intention to appear must include the case name and number; your name, address, telephone number, and signature, and, if represented by counsel, their contact information; and copies of any papers, exhibits, or other evidence that you intend to

present to the Court in connection with the hearing. The notice of intention to appear must be filed with the Clerk of Court and served on all counsel no later than _____, 2021.

If you do not file a notice of intention to appear by this deadline and/or follow the requirements in the Settlement Agreement and this Notice, you will not be entitled to appear at the hearing to raise any objections.

GETTING MORE INFORMATION

20. WHERE CAN I GET MORE DETAILS ABOUT THE SETTLEMENT?

This notice summarizes the lawsuit and Settlement. More details are in the Settlement Agreement, which is available on the Settlement Website at www._____.com. You may also contact Class Counsel, identified in Answer 17 above.

Date: _____

PLEASE DO NOT CALL OR WRITE THE COURT, THE JUDGE OR HER STAFF, FOR INFORMATION OR ADVICE ABOUT THE SETTLEMENT

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:20-CV-20836-BLOOM/Louis

AARON FRUITSTONE, on behalf of himself and others similarly situated,

Plaintiff,

v.

SPARTAN RACE, INC.,

Defendant.
_____/

[PROPOSED] ORDER GRANTING FINAL APPROVAL TO CLASS ACTION SETTLEMENT AND ENTERING FINAL JUDGMENT

The claims of Settling Plaintiff Aaron Fruitstone, on behalf of himself and all Settlement Class Members, and Defendant Spartan Race, Inc., have been settled pursuant to the Stipulation of Settlement dated January 22, 2021 (the "Settlement Agreement"). On _____, 2021, the Court granted preliminary approval of the proposed class action settlement set forth in the Settlement Agreement and provisionally certified the Settlement Class for settlement purposes only [ECF No. ___].

On _____, 2021, the Court held a duly noticed Final Approval Hearing to consider: (1) whether the terms and conditions of the Settlement Agreement are fair, reasonable and adequate; (2) whether Judgment should be entered dismissing the Settling Plaintiff's claims on the merits and with prejudice, including the claims of Settlement Class Members; and (3) whether and in what amount to award Attorneys' Fees and Expenses to Class Counsel and a Service Award to the Settling Plaintiff.

THEREFORE, IT IS HEREBY **ORDERED**, **ADJUDGED** AND **DECREED** that:

1. The terms and conditions in the Settlement Agreement are hereby incorporated as though fully set forth in this Judgment, and unless otherwise indicated, capitalized terms in this Judgment shall have the meanings attributed to them in the Settlement Agreement.

2. The Court has personal jurisdiction over Settling Plaintiff, the Defendant, and Settlement Class Members, venue is proper, the Court has subject-matter jurisdiction to approve the Settlement Agreement, including all Exhibits thereto, and the Court has jurisdiction to enter this Judgment. Without in any way affecting the finality of this Judgment, this Court hereby retains jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement and of this Judgment, and for any other necessary purpose, including, but not limited to, enforcement of the Releases contained in the Settlement Agreement and entry of such further orders as may be necessary or appropriate in administering and implementing the terms and provisions of the Settlement.

3. The Settlement was negotiated at arm's length by experienced counsel who were fully informed of the facts and circumstances of this litigation and of the strengths and weaknesses of their respective positions. The Settlement was reached after the Parties had engaged in extensive litigation, mediation and negotiations. Counsel for the Parties were therefore well-positioned to evaluate the benefits of the Settlement, taking into account the expense, risk and uncertainty of protracted litigation with respect to numerous difficult questions of fact and law.

4. The Court finds that the prerequisites for a class action under Fed. R. Civ. P. 23(a) and 23(b) have been satisfied for settlement purposes for the Settlement Class in that: (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the

claims of Settling Plaintiff are typical of the claims of the Settlement Class Members he seeks to represent; (d) Settling Plaintiff and Class Counsel have and will continue to fairly and adequately represent the interests of the Settlement Class Members for purposes of the Settlement; (e) the questions of law and fact common to Settlement Class Members predominate over any questions affecting any individual Settlement Class Member; (f) the Settlement Class is reasonably ascertainable; and (g) a class action is superior to the other available methods for the fair and efficient adjudication of the controversy. Accordingly, and pursuant to Fed. R. Civ. P. 23, this Court hereby finally certifies the Settlement Class.

5. Pursuant to Fed. R. Civ. P. 23, the Court hereby finally certifies the Settlement Class for settlement purposes only, as identified in the Settlement Agreement, which shall consist of the following:

> All individuals in the United States who during the Class Period, based on Spartan's records, paid a $14 "Racer Insurance Fee" or "Insurance Fee" in connection with any race organized and sponsored by Spartan. Excluded from the Class are (a) Defendant's board members and executive level officers; (b) the federal district and magistrate judges assigned to this Action, along with their court staff; and (c) individuals who submit a valid, timely exclusion/opt-out request.

6. The Court finally designates the law firms of The Moskowitz Law Firm, PLLC, and Bonnett, Fairbourn, Friedman & Balint, P.C. as Class Counsel for the Settlement Class.

7. The Court finally designates Settling Plaintiff Aaron Fruitstone as the Settlement Class representative.

8. The Court makes the following findings with respect to Class Notice to the Settlement Class:

8.1. The Court finds that the direct distribution of the Class Notice and the creation of the Settlement Website for Class Member information, all as provided for in the Settlement Agreement and the Preliminary Approval Order, (i) constituted the best practicable

notice under the circumstances that was reasonably calculated, under the circumstances, to apprise Noticed Class Members of the Settlement, their right to object or to exclude themselves from the Settlement, and their right to appear at the Final Approval Hearing; (ii) were reasonable and constituted due, adequate and sufficient notice to all persons entitled to be provided with notice; and (iii) complied fully with the requirements of Fed. R. Civ. P. 23, the United States Constitution, the Rules of this Court, and any other applicable law.

8.2. Class Counsel has filed with the Court a declaration from _____. _____, attesting that the Class Notice was emailed to Noticed Class Members on _____, and the Settlement Website was established on _____. Adequate Class Notice was given to the Noticed Class Members in compliance with the Settlement Agreement and the Preliminary Approval Order.

9. Persons who wished to be excluded from the Settlement Class were provided an opportunity to request exclusion as described in the Class Notice and on the Settlement Website. The Court finds that the individual interests of the ____ persons who timely sought exclusion from the Settlement Class are preserved and that no person was precluded from being excluded from the Settlement Class if he or she so desired. Those persons who timely and properly excluded themselves from the Settlement Class are identified in the attached Exhibit 1.

10. Defendant has complied with all notice obligations under the Class Action Fairness Act, 28 U.S.C. §§ 1715, et seq., in connection with the proposed Settlement.

11. [description of objections, if any]. The Court finds that the objections to the Settlement do not establish that the proposed Settlement is unfair, unreasonable, inadequate, or should otherwise not be approved, and are hereby overruled.

12. By failing to timely file and serve an objection in writing to the Settlement

Agreement, to the entry of this Judgment, to Class Counsel's application for fees, costs, and expenses, or to the Service Award to the Settling Plaintiff, in accordance with the procedure set forth in the Notice and mandated in the Preliminary Approval Order, Settlement Class Members are deemed to have waived any such objection through any appeal, collateral attack, or otherwise.

13. The terms and provisions of the Settlement Agreement, including all Exhibits attached thereto, have been entered into in good faith and, pursuant to Fed. R. Civ. P. 23(e), are hereby fully and finally approved as fair, reasonable, adequate as to, and in the best interests of, Settlement Class Members. The Court hereby enters judgment approving and adopting the Settlement and the Settlement Agreement, fully and finally terminating all Released Claims of all Releasing Persons in this Litigation against the Released Parties, on the merits and with prejudice.

15. The terms of the Settlement Agreement, including all Exhibits thereto, and of this Judgment, shall be forever binding on, and shall have res judicata and preclusive effect in and on, all claims and pending and future lawsuits maintained by Settling Plaintiff and each Settlement Class Member, as well as each of their respective spouses, family members, executors, representatives, administrators, guardians, wards, heirs, attorneys-in-fact, estates, bankruptcy estates, bankruptcy trustees, successors, predecessors, joint tenants, tenants in common, tenants by the entirety, co-mortgagors, co-obligors, co-debtors, attorneys, agents and assigns, and all those who claim through them or who assert claims (or could assert claims) on their behalf, and all other Releasing Persons.

16. The Release, which is set forth in Section VI of the Settlement Agreement, is expressly incorporated herein in all respects and is effective as of the entry of this Judgment. Each of the Released Parties is forever released, relinquished, and discharged by each Releasing Person, including all Settlement Class Members, from all Released Claims (as that term is defined below

and in the Settlement Agreement).

16.1. The definitions in the Settlement Agreement are incorporated in and are part of this Judgment.

16.2 Each Releasing Party shall, by operation of this Judgment, be deemed to have released any and all actions, claims, demands, rights, suits, debts, and causes of action of whatever kind or nature against the Released Parties, including damages, costs, expenses, penalties, equitable relief, injunctions, and attorneys' fees, known or unknown, suspected or unsuspected, in law or in equity that arise out of or relate to the factual allegations and claims asserted in this case individually and/or on a class wide basis.

16.3 In agreeing to the foregoing Release, Settling Plaintiff, for himself and on behalf of Settlement Class Members, shall be deemed to have acknowledged that unknown losses or claims could possibly exist and that any present losses may have been underestimated in amount or severity. Settling Plaintiff or any Settlement Class Member may hereafter discover facts other than or different from those that he/she knows or believes to be true with respect to the subject matter of the Released Claims or the law applicable to such claims may change. Nonetheless, Settling Plaintiff and each Settlement Class Member shall be deemed to have irrevocably waived and fully, finally and forever settled and released any known or unknown, suspected or unsuspected, asserted or unasserted, liquidated or unliquidated, contingent or non-contingent, claims with respect to all Released Claims. Further, Settling Plaintiff and each Settlement Class Member shall be bound by this Agreement, including by the Releases, and all of their claims in the Action asserted against Defendants shall be dismissed with prejudice and released, without regard to subsequent discovery of different or additional facts or subsequent changes in the law, and regardless of whether unknown losses or claims exist or whether present losses may have been

underestimated in amount or severity, and even if they never received the Mail Notice of the Settlement, did not otherwise have knowledge of the Settlement, or never received Claim Settlement Relief. The Settling Parties shall be deemed to have acknowledged that the foregoing Releases were bargained for and are a material element of the Settlement Agreement.

16.4. Released Claims do not apply to new claims arising after the close of the Settlement Class Period based on conduct that took place after the close of the Settlement Period. Nothing in the Order shall be deemed a release of any Settlement Class Member's respective rights and obligations for such post-Settlement Claims.

16.5. Settling Plaintiff and Class Counsel have represented and warranted that there are no outstanding liens or claims against the Action, and Settling Plaintiff and Class Counsel will be solely responsible for satisfying any liens or claims asserted against the Action.

16.6 Settling Plaintiff and each Settlement Class Member shall be deemed to agree and acknowledge that the foregoing Releases were bargained for and are a material element of the Settlement Agreement.

16.7 The Releases do not affect the rights of Noticed Class Members who timely and properly submitted a Request for Exclusion.

16.8 The Settlement Agreement shall be the exclusive remedy for all Settlement Class Members with regards to the Released Claims.

17. Neither the Settlement Agreement, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein, nor this Judgment, nor any of its terms and provisions shall be:

17.1. Offered by any person or received against any of the Released Parties as evidence or construed as or deemed to be evidence of any presumption, concession, or admission

by any Released Party of the truth of the facts alleged by any person or the validity of any claim that has been or could have been asserted in the Litigation or in any litigation against any Released Party, or other judicial or administrative proceeding, or the deficiency of any defense that has been or could have been asserted in the Action or in any litigation against any Released Party, or of any liability, negligence, fault or wrongdoing of any Released Party;

17.2. Offered by any person or received against any of the Released Parties as evidence of a presumption, concession, or admission of any fault, misrepresentation, or omission with respect to any statement or written document approved or made by any of the Released Parties or of any other wrongdoing by any of the Released Parties;

17.3 Offered by any person or received against any of the Released Parties as evidence of a presumption, concession, or admission with respect to any liability, negligence, breach, fault, omission, or wrongdoing in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal;

17.4 Offered or received in evidence in any action or proceeding against any of the Released Parties in any court, administrative agency, or other tribunal for any purpose whatsoever, other than to enforce or otherwise effectuate the Settlement Agreement (or any agreement or order relating thereto), including the Releases or this Judgment.

18. In the event that the Effective Date does not occur, this Judgment shall automatically be rendered null and void and shall be vacated and, in such event, all orders entered and releases delivered in connection herewith shall be null and void, and the Parties will be restored to their positions as _____.

19. This Judgment and the Settlement Agreement (including the Exhibits thereto) may be filed in any action against or by any Released Party in order to support any argument, defense

or counterclaim, including, without limitation, those based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion, issue preclusion, or similar defense or counterclaim.

20. Settling Plaintiff and all Settlement Class Members and their respective spouses, family members, executors, representatives, administrators, guardians, wards, heirs, attorneys-in-fact, estates, bankruptcy estates, bankruptcy trustees, successors, predecessors, joint tenants, tenants in common, tenants by the entirety, co-mortgagors, co-obligors, co-debtors, attorneys, agents and assigns, and all those who claim through them or who assert claims (or could assert claims) on their behalf, have released the Released Claims as against the Released Parties, and are, from this day forward, hereby permanently barred and enjoined from directly or indirectly (a) filing, commencing, prosecuting, maintaining (including claims or actions already filed), intervening in, defending, or participating in (as parties, class members or otherwise) any action in any jurisdiction before any court or tribunal based on, arising from, or relating to any of the Released Claims or the facts and circumstances relating thereto, against any of the Released Parties; or (b) organizing any Settlement Class Members, or soliciting the participation of any Settlement Class Members, for purposes of pursuing any action (including by seeking to amend a pending complaint to include class allegations, or seeking class certification in a pending action) in any jurisdiction before any court or tribunal based on or relating to any of the Released Claims or the facts and circumstances relating thereto. Any person in violation of this injunction may be subject to sanctions, including payment of reasonable attorneys' fees incurred in seeking enforcement of the injunction. The foregoing injunction is issued in order to protect the continuing jurisdiction of the Court and to effectuate and implement the Settlement Agreement and this Judgment.

21. Settlement Class Members shall promptly dismiss with prejudice all claims, actions, or proceedings that have been brought by any Settlement Class Member in any jurisdiction that are based on Released Claims pursuant to the Settlement Agreement and this Judgment, and that are enjoined pursuant to this Judgment.

22. The claims of Settling Plaintiff, individually and on behalf of the Settlement Class, including all individual claims and class claims presented herein, are hereby dismissed on the merits and with prejudice against Defendants without fees (including attorneys' fees) or costs to any party except as otherwise provided in this Judgment.

23. Settling Parties are hereby directed to implement and consummate the Settlement according to its terms and provisions, as may be modified by Orders of this Court. Without further order of the Court, Settling Parties may agree to reasonably necessary extensions of time to carry out any of the provisions of the Settlement Agreement, as may be modified by the Preliminary Approval Order or this Judgment.

24. Pursuant to Rule 54(b), the Court hereby enters Judgment as described herein and expressly determines that there is no just reason for delay. Without impacting the finality of this Judgment, the Court shall retain jurisdiction over the construction, interpretation, consummation, implementation, and enforcement of the Settlement Agreement and this Judgment, including jurisdiction to enter such further orders as may be necessary or appropriate.

DONE and **ORDERED** in Miami, Florida, this _____ day of _____, 2021.

_____

THE HONORABLE BETH BLOOM
UNITED STATES DISTRICT JUDGE

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:20-CV-20836-BLOOM/Louis

AARON FRUITSTONE, on behalf of himself and others similarly situated,

Plaintiff,

v.

SPARTAN RACE, INC.,

Defendant.
_____/

[PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONALLY CERTIFYING A CLASS FOR SETTLEMENT PURPOSES, DIRECTING THE ISSUANCE OF CLASS NOTICE, AND SCHEDULING A FINAL APPROVAL HEARING

The Parties and their respective counsel have entered into a Stipulation of Settlement and Release (the "Agreement"), which, with its incorporated exhibits, sets forth the terms of the Parties' agreement to settle and dismiss this litigation on a class-action basis ("Settlement"), subject to the Court's approval. On January 28, 2021, Plaintiff Aaron Fruitstone filed a motion for preliminary approval of his Settlement (ECF No. __) with Defendant Spartan Race, Inc. ("Spartan"). The Court has reviewed Plaintiff's motion for preliminary approval, the Settlement,[1] and the pleadings filed to date in this matter to determine whether the proposed Settlement Class should be preliminarily approved. Having fully considered the Parties' motions, and the arguments offered by counsel, **IT IS HEREBY ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:**

1. Plaintiff's motion for preliminary approval of the Settlement is **GRANTED**.

[1] The definitions in Section II of the Agreement are hereby incorporated as though fully set forth in this Order, and capitalized terms shall have the meanings attributed to them in the Agreement.

2. **Partial Stay of this Action**. All non-settlement-related proceedings in the Action are hereby stayed and suspended until further order of the Court.

3. **Jurisdiction**. The Court finds that it has subject matter jurisdiction over this Action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1332(d)(2)(A), including jurisdiction to approve and enforce the Settlement and all orders and decrees that have been entered or which may be entered pursuant thereto. The Court also finds that it has personal jurisdiction over the Parties and, for purposes of consideration of the proposed Settlement, over each of the members of the Settlement Class defined below, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and that venue is proper in this District pursuant to 28 U.S.C. § 1391.

4. **Conditional Class Certification for Settlement Purposes Only**. The Court is presented with a proposed settlement prior to a decision on class certification, and must therefore determine whether the proposed Settlement Class satisfies the requirements for class certification under Federal Rule of Civil Procedure 23, albeit for purposes of settlement. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–21 (1997). "In deciding whether to provisionally certify a settlement class, a court must consider the same factors that it would consider in connection with a proposed litigation class—*i.e.*, all Rule 23(a) factors and at least one subsection of Rule 23(b) must be satisfied—except that the Court need not consider the manageability of a potential trial, since the settlement, if approved, would obviate the need for a trial." *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 659 (S.D. Fla. 2011). The Court must also be satisfied that the proposed class "is adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012). The Court conditionally finds and concludes, for settlement purposes only, that:

a. The Settlement Class is an ascertainable one. A class is ascertainable if "the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way," such that identifying class members will be "a manageable process that does not require much, if any, individual inquiry." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015). Here, the proposed definition of the Settlement Class is based on objective criteria, all of which are determinable from Spartan's business records. Individual, subjective inquiries to identify who may be a member of the Settlement Class are unnecessary. *See Bohannan v. Innovak Int'l, Inc.*, 318 F.R.D. 525, 530 (M.D. Ala. 2016) (proposed class was

ascertainable where membership in the class was based on objective criteria and the defendant's data could be used to easily identify the putative class members).

b. The Settlement Class also satisfies the numerosity requirement of Rule 23(a)(1). The Settlement Class is comprised of approximately one million individuals who paid a "Racer Insurance Fee" or "Insurance Fee" to Spartan between February 26, 2016 and December 31, 2020, inclusive. *Cox v. Am. Cast Iron Pip Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("[W]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.").

c. The commonality requirement of Rule 23(a)(2) is also satisfied for purposes of settlement. To satisfy Rule 23(a)(2), there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is met when the claims of all class members "depend upon a common contention," with "even a single common question" sufficing. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 359 (2011) (citation omitted); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009) (commonality of claims "requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members" (internal citations omitted)). The key issues in the Action stem from the same alleged course of conduct: Defendant making various representations regarding and charging Settlement Class Members a mandatory, nonrefundable $14 "Racer Insurance Fee" or "Insurance Fee" when registering for a Spartan Race event. There are issues raised in this Action that are common to each Settlement Class Member, including, among other things: (a) whether Spartan's description of the "Racer Insurance Fee" is deceptive, unfair, false and misleading; (b) whether Spartan retains any portion of the "Racer Insurance Fee"; (c) whether Spartan engaged in unfair and deceptive practices by collecting and retaining any portion of the "Racer Insurance Fee"; (d) whether Spartan's representations are objectively likely to mislead reasonable consumers to believe that the $14 "Racer Insurance Fee" is a direct pass-through charge, *i.e*. equal to the cost to Spartan of providing the accident medical insurance coverage; (e) whether Spartan's practices in charging the "Racer Insurance Fee" violate M.G.L. Chapter 93A; (f) whether Spartan's practices in charging the "Racer Insurance Fee" violate the FDUTPA; (g) whether Plaintiff and Class members have sustained monetary loss and the proper measure of that loss; (h) whether Plaintiff and Class members are entitled to injunctive relief; (i) whether Plaintiff and Class members are entitled to declaratory relief; and (j) whether Plaintiff and Class members are entitled to consequential

damages, punitive damages, statutory damages, disgorgement, and/or other legal or equitable appropriate remedies as a result of Spartan's conduct. As a result, for purposes of settlement only, Rule 23(a)'s commonality requirement is satisfied. *See In re Terazosin Hydrochloride,* 220 F.R.D. 672, 687 (S.D. Fla. 2004) (commonality prerequisite is readily met where "[d]efendants have engaged in a standardized course of conduct that affects all class members"); *Agan v. Katzman & Korr, P.A.,* 222 F.R.D. 692, 697 (S.D. Fla. 2004).

d. The Settlement Class also satisfies the typicality requirement of Rule 23(a)(3). The test of typicality is "whether other members [of the class] have the same or similar injury, whether the action is based on conduct which is not unique to the named class plaintiffs, and whether other class members have been injured by the same course of conduct." *In re Checking Account Overdraft Litig*., 307 F.R.D. 630, 641 (S.D. Fla. 2015) (quoting *Hanon v. Dataprods. Corp*., 976 F.2d 497, 508 (9th Cir. 1992)). The typicality requirement "may be satisfied even though varying fact patterns support the claims or defenses of individual class members, or there is a disparity in the damages claimed by the representative parties and the other members of the class," *In re Domestic Air Transp. Antitrust Litig*., 137 F.R.D. 677, 698 (N.D. Ga. 1991), so long as the claims or defenses of the class and class representatives "arise from the same events, practice, or conduct and are based on the same legal theories," *Navelski v. Int'l Paper Co.*, 244 F. Supp. 3d 1275, 1306 (N.D. Fla. 2017) (citing *Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1337 (11th Cir. 1984)). Here, Plaintiff alleges that he is situated identically with respect to every other Settlement Class Member. Plaintiff has alleged that he suffered the same injuries as every other Settlement Class Member because they arise from Spartan's alleged uniform course of conduct, which Plaintiff contends injured him when he paid the Racer Insurance Fee after being exposed to Spartan's messaging which gave him the net impression that the Racer Insurance Fee was a pass-through charge. For purposes of class settlement, this is sufficient to satisfy Rule 23(a)'s typicality requirement. *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 539 (N.D. Ala. 2001) ("Typicality is satisfied where the claims of the class representatives arise from the same broad course of conduct [as] the other class members and are based on the same legal theory."); *accord Ouadani v. Dynamex Operations E., LLC*, 405 F. Supp. 3d 149, 162–63 (D. Mass. 2019) (citing *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 310 (D. Mass. 2004) (finding typicality requirement satisfied where class claims arose from "the same policies and wrongful conduct of the Defendant, and [we]re based on the same legal theories").

e. Plaintiff is an adequate representative of the Settlement Class under Rule 23(a)(4). Plaintiff has standing (*see* Motion for Preliminary Approval ECF No. ___ at 16–17), is a member of the Settlement Class he seeks to represent, and the Court is aware of no antagonistic interests that exist between Plaintiff and the Settlement Class Members. The Court is also satisfied that Class Counsel have the qualifications and experience necessary to undertake this litigation and serve as counsel for the Settlement Class. *See, e.g.*, *Feller, et al. v. Transamerica Life Ins. Co.*, No. 16-cv-01378-CAS (C.D. Cal.) (appointed Plaintiffs' counsel in a finally approved $195 million life insurance settlement); *Belanger v. RoundPoint Mortgage Servicing Corporation, et al.*, Case No. 1:17-cv-23307 (S.D. Fla.) (appointed Plaintiffs' counsel as class counsel and finally approved class action settlement regarding force placed property insurance); *Checa Chong v. New Penn Financial, LLC, d/b/a Shellpoint Mortgage Servicing*, No. 9:18-cv-80948-ROSENBERG/REINHART, ECF No. 50 (S.D. Fla. Sept. 13, 2019) (same); *Quarashi v. M&T Bank Corp*, No. 3:17-cv-6675, ECF No. 83 (D.N.J. June 24, 2019); *Smith v. Specialized Loan Servicing, LLC, et al.*, No. 3:17-cv-06668, ECF No. 68 (D.N.J. Apr. 1, 2019) (same); *Rickert v. Caliber Home Loans, Inc., et al.*, No. 3:17-cv-06677 (D.N.J. Apr. 1, 2019) (same).

f. In addition to meeting all four of Rule 23(a)'s prerequisites for certification, a proposed class seeking monetary relief also must satisfy Rule 23(b)(3)'s additional requirements—predominance and superiority. As detailed below, both the predominance and superiority requirements of Rule 23(b)(3) are satisfied.

i. While Rule 23(a)(2) asks whether there are issues common to the class, Rule 23(b)(3) asks whether those common issues predominate over "issues that are subject only to individualized proof." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997). Rule 23(b)(3)'s predominance requirement tests "whether [the] proposed class[] [is] sufficiently cohesive to warrant adjudication by representation." *Carriulo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016) (citing *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997)). Whether common issues predominate depends on "the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Here, as detailed above, the elements of the Settlement Class Members' claims present common factual and legal questions. For the purposes of settlement, the Court finds that these common issues of law and fact predominate over individualized issues. *See, e.g.*, *Carriuolo*, 823 F.3d at 985 ("In this case, the district court found the predominance requirement to be satisfied by an essential question common

to each class member: whether the inaccurate Monroney sticker provided by General Motors constituted a misrepresentation prohibited by FDUTPA."); *Zamber v. American Airlines, Inc.*, 282 F. Supp. 3d 1289, 1300 (S.D. Fla. 2017); *see also Morgan v. Public Storage*, No. 14-cv-21559, 2015 WL 11233111, at *1 (S.D. Fla. Aug. 17, 2015) ("FDUTPA claims exist where the alleged deceptive practice is defendant's misrepresentation of why a fee is being charged and where the money for the fee is being transferred."); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 340 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015) ("The core questions in this case—whether Vibram's advertising was false or misleading, whether its conduct violated the causes of action identified in Bezdek's amended complaint, and whether the class members suffered injury and are entitled to damages as a result of this conduct—are common to all class members"); *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. Dist. Ct. App. 2000) ("[D]amages are sufficiently shown by the fact that the passenger parted with money for what should have been a 'pass-through' port charge, but the cruise line kept the money."); *Turner Greenberg Assocs. v. Pathman*, 885 So. 2d 1008, 1009 (Fla. Dist. Ct. App. 2004) (affirming class certification and holding that "an appropriate measure of damages is the undisclosed profit").

ii. Rule 23(b)(3) also asks whether the class action device is "superior to other available methods for fairly and efficiently adjudicating the controversy." For purposes of an opt-out class settlement, the Court concludes that the class action device is superior to other methods of resolving the issues in this Action given there is no negative value to each of Plaintiff's claims, given the ability of Settlement Class Members to opt out, "given the large number of claims, the relatively small amount of damages available to each individual, and given the desirability of consistently adjudicating the claims…." *Roundtree v. Bush Ross, P.A.*, 304 F.R.D. 644, 663 (M.D. Fla. 2015). And because Plaintiff seeks class certification for settlement purposes, the Court need not inquire into whether this Action, if tried, would present intractable management problems. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Carriuolo*, 823 F.3d at 988; *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 242 (2d Cir. 2012) ("[M]anageability concerns do not stand in the way of certifying a settlement class.").

5. Accordingly, for purposes of considering, approving, and effectuating the Settlement and to fairly and adequately protect the interests of all concerned with regard to all claims set forth in the Operative Complaint, the following class (the "Settlement Class") is conditionally certified for settlement purposes only:

All individuals in the United States who during the Class Period, based on Spartan's records, paid a $14 "Racer Insurance Fee" or "Insurance Fee" in connection with any race organized and sponsored by Spartan. Excluded from the Class are (a) Defendant's board members and executive level officers; (b) the federal district and magistrate judges assigned to this Action, along with their court staff; and (c) individuals who submit a valid, timely exclusion/opt-out request.

6. **Appointment of Class Representatives and Class Counsel**. The Court hereby appoints Plaintiff Aaron Fruitstone as the representative of the conditionally certified Settlement Class. The Court further designates and appoints The Moskowitz Law Firm, PLLC, and Bonnett, Fairbourn, Friedman & Balint, P.C., who the Court finds are experienced and adequate counsel, as the legal counsel for the Settlement Class ("Class Counsel"). Class Counsel are authorized to represent Plaintiff and the Settlement Class Members, to enter into and seek approval of the Settlement on behalf of the Settlement Class, and to bind Plaintiff, all other Settlement Class Members, and themselves to the duties and obligations contained in the Settlement, subject to the final approval of the Settlement by the Court.

7. **Preliminary Settlement Approval**. The Court finds, subject to the Fairness Hearing, that the Settlement is sufficiently fair, reasonable, and adequate that it falls within the range of possible approval, and it is in the best interests of the Settlement Class that they be given the opportunity to be heard regarding the Settlement and the opportunity to exclude themselves from the proposed Settlement Class. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 (2004).

Further, the Settlement meets the standards for preliminary approval in the new amendments to Rule 23. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019). The amended Rule 23(e)(2) requires courts to consider 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, if required;

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); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., 330 F.R.D. at 29. Further, providing notice to the Settlement Class Members is justified by the showing that the Court likely will be able to approve the proposed Settlement under Rule 23(e)(2).

The Court further finds that the Settlement substantially fulfills the purposes and objectives of the Action, and offers beneficial relief to the Settlement Class that falls within the range of potential recovery in successful litigation of the claims asserted in this Action pursuant to the Massachusetts Consumer Protection Law, Massachusetts General Laws, Chapter 93A, *et seq*., and the Florida Deceptive and Unfair Trade Practices Act, §§ 501.201, *et seq*., Florida Statutes. Although Spartan does not admit any fault or liability in the Settlement, Spartan agreed to provide substantial relief to be distributed according to the Settlement Agreement. As described more fully below, each Class Member will be entitled to elect to receive either (a) one four-month free membership to the "Spartan+ Membership Program," or (b) one Voucher per each paid registration during the Class Period, up to a maximum of four (4) total Vouchers per Class Member. Plaintiff and Class Counsel estimate that the value of the Settlement relief to Settlement Class Members, exclusive of the valuable prospective relief, exceeds the total "Racer Insurance Fee" revenues paid by the Class. In addition, the Class will benefit from the Injunctive Relief described below. At this stage, the Court finds such relief to be within the range of reasonableness,[2] especially given the risks of success on the merits of Plaintiff's claims.

[2] To warrant preliminary approval, a proposed class settlement should offer a recovery that "falls within th[e] range of reasonableness," which need not be "the most favorable possible result of litigation." *Lazy Oil Co. v. Wotco Corp*., 95 F. Supp. 2d 290, 338 (W.D. Pa. 1997), *aff'd*, 166 F3d 581 (3d Cir. 1999). Here, the monetary value of the relief offered by the Settlement exceeds ***100%*** of the Settlement Class's losses and potential recovery (apart from multiple damages), and sufficient to warrant preliminary approval of the Settlement given that since 1995, class action settlements typically "have recovered between 5.5% and 6.2% of the class member's estimated losses." *In re Rite Aid Corp. Sec. Litig*., 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001); *see also Parsons*

A. The Spartan+ Membership Program

Each Class member who elects to receive membership in the Spartan+ Membership Program (the "Program"), will be provided with a free four-month subscription to the Program. This Program subscription will include: (1) the "highest" level of access to all available video, audio, and other digital content; (2) a 20% discount and free shipping and handling for any merchandise purchased by the Class Member from Spartan's website; and (3) free event photo downloads and access to other "members only" premium content on Spartan's website. The normal cost of the Program is $85.00 per year. Class Members will not be required to provide a credit card to initiate the four-month Program subscription. Subscriptions will automatically terminate at the end of four months, unless the Class Member affirmatively chooses to extend their subscription beyond the complimentary four-month period.

B. Electronic Vouchers for Spartan Merchandise

As an alternative to the four-month free subscription to the Program, each Class Member may elect to receive a $5.00 electronic Voucher. Should the Class Member elect to receive an electronic Voucher, they will receive one electronic Voucher per each event for which they paid a "Racer Insurance Fee" or "Insurance Fee" during the Class Period, up to a total of four (4) Vouchers maximum (for a combined value of $20.00). No Class Member or other person may receive or redeem more than four (4) Vouchers. Each Voucher shall entitle the owner to a $5.00 credit towards the purchase of any non-discounted merchandise on Spartan's website. There are currently many non-discounted merchandise items available for sale on the Spartan website, and Spartan has no intention of removing said items as a result of this Settlement. Vouchers cannot be combined with any promotion, discount, or coupon.

Up to four (4) Vouchers may be "stacked" (*i.e.*, combined for use in a single transaction) towards the purchase of any non-discounted merchandise. Vouchers are transferable. However,

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v. Brighthouse Networks, LLC, No. 2:09-cv-267, 2015 WL 13629647, at *3 (N.D. Ala. Feb. 5, 2015) (noting that a class settlement recovery of between 13% to 20% is "frequently found … to be fair and adequate"); *In re Newbridge Networks Sec. Litig.*, No. 94-cv-1678, 1998 WL 765724, at *2 (D.D.C. 1998) ("[A]n agreement that secures roughly six to twelve percent of a potential trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted range of reasonableness."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011) (9% class recovery "is still within the range of reasonableness").

the non-discounted merchandise and four-Voucher stacking limitations also apply to recipients of transferred Vouchers. Each Voucher will be valid for two (2) years from the date of issuance, at which time the Voucher will expire.

C. Election of Benefit

The Class Notice will further inform each Class Member that they shall have sixty (60) days from the date the Class Notice email is sent to make their selection, otherwise the default relief shall be the free four-month subscription to the Program.

D. Injunctive Relief to the Settlement Class

In addition to providing all Class Members the relief described above, Spartan also agrees to the following injunctive relief, starting on the Effective Date, that will directly benefit all current and future Spartan consumers:

- Spartan will not describe in writing or abbreviate the at-issue fee as a "Racer Insurance Fee," "Racer Insur. Fee," "Insurance Fee," "Insur. Fee," or similar nomenclature. Spartan specifically retains the right to describe the at-issue fee as an "Administrative, Insurance, and Management Fee," "AIM Fee," or "Admin Fee" during the online event registration process or elsewhere.
- Spartan will add the following language to current and future marketing and sales materials, FAQs, relevant website screens in the registration process, and screen indicators or selectors that describe or are adjacent to the at-issue fee: "The Administrative, Insurance, and Management Fee covers a number of different costs involved in Spartan events, including administrative and management costs, insurance costs and expenses for related risk management and safety measures. This fee is not a direct pass-through of third-party costs to the racer and may include revenues to Spartan."
- Spartan agrees that it will not represent, directly or indirectly, that 100% (or all) of the "Administrative, Insurance, and Management Fee" is paid to an insurance provider or other third-party.

II. Class Notice Costs, and Attorney's Fees and Expenses

As part of the settlement relief, Spartan will provide Class Notice to the Class Members pursuant to Section IV of the Stipulation. The Insurers, on behalf of Spartan, will pay any reasonable attorneys' fees and expenses and Plaintiff Service Award that are awarded by the Court in this Action, as further described in Section VIII of the Stipulation. Specifically, Class Counsel intends to request approval of attorneys' fees and costs not to exceed $2.29 million. The Parties agree that Plaintiff may apply for a service award to be paid by Insurers for Spartan. Specifically, Plaintiff intends to request approval of a service award in the amount of $10,000.00 in accordance with the applicable Eleventh Circuit law. Spartan will not oppose the request for Class Counsel's attorneys' fees and expenses and Plaintiff's service award in these amounts, *provided* that the total of all payments sought from or made by Spartan and the Insurers cumulatively under this Stipulation (including but not limited to payments for attorneys' fees, costs and expenses of Class Counsel, and the Plaintiff's service award) does not exceed $2.3 million.

Last year, a panel of the United States Court of Appeals for the Eleventh Circuit issued an opinion holding that case contribution awards for class representatives were impermissible. *Johnson v. NPAS Solutions*, *LLC*, 2020 WL 5553312 (11th Cir. 2020). In light of this opinion, the Court preliminarily approves the incentive award for purposes of the issuance of the Class Notice but at final approval will consider whether to deny the request without prejudice and reserve jurisdiction to reconsider the issue of a case contribution award if *NPAS* is not reversed, vacated, or overruled. Defendant agrees not to oppose applications for Attorneys' Fees and Expenses and Case Contribution Award that do not exceed the foregoing amounts.

These factors all strongly favor the Settlement's preliminary approval. The Court also finds that the Settlement (a) is the result of serious, informed, non-collusive, arm's length negotiations involving experienced counsel informed and familiar with the legal and factual issues of the Action and reached through protracted mediation sessions with the assistance of independent mediator Michael Young of JAMS; (b) is sufficient to warrant notice of the Settlement and the Fairness Hearing to the Settlement Class Members; (c) meets all applicable requirements of law, including Federal Rule of Civil Procedure 23, and the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715; (d) offers a full and fair remediation to the Settlement Class Members; (e) the Class Representative and Class Counsel have adequately represented the class; and (e) is not a finding or admission of liability of Defendant. Accordingly, the Court grants preliminary approval of the

Settlement under Federal Rule of Civil Procedure 23(e), subject to further consideration at the Fairness Hearing after notice to the Settlement Class Members.

8. **No Additional Agreements Required to Be Identified**: The Court has confirmed that there are no agreements required to be identified under Rule 23(e)(3).

9. **Fairness Hearing**. A Fairness Hearing shall be held before this Court on _____, 2021, beginning at __:__ a.m./p.m., in Courtroom __ of the _____ _____, to determine whether (a) the Settlement is fair, reasonable, and adequate such that the Settlement should be granted final approval by the Court; (b) the certification of the Settlement Class should be made final for settlement purposes pursuant to Federal Rule of Civil Procedure 23; (c) whether Attorneys' Fees and Expenses should be awarded by the Court to Class Counsel, and in what amount, pursuant to Federal Rule of Civil Procedure 23(h); (d) whether a Service Award should be approved by the Court to Plaintiff, and in what amount; and (e) whether a Final Order and Judgment should be entered, and this Action thereby dismissed with prejudice, pursuant to the terms of the Agreement. The Court may adjourn or reschedule the Fairness Hearing without further notice to the Settlement Class Members.

10. **Further Submissions by the Parties**. Any application by Class Counsel for Attorneys' Fees and Expenses and for Service Awards to the Plaintiffs shall be filed with the Court no later than fourteen (14) days before the Objection/Exclusion Deadline. The Parties shall promptly post any such application to the Settlement Website after its filing with the Court. All other submissions of the Parties in support of the proposed Settlement, or in response to any objections submitted by Settlement Class Members, shall be filed no later than ten (10) days before the Fairness Hearing. The Parties are directed to file a list reflecting all requests for exclusion it has received from Settlement Class Members with the Court no later than ten (10) days before the Fairness Hearing.

11. **Administration**. The Court authorizes and directs the Parties to establish the means necessary to administer the proposed Settlement, and implement the class notification process in accordance with the terms of the Settlement.

12. **Notice to the Settlement Class**. The Court approves, as to both form and content, the Class Notice attached to the Settlement, as well as the proposed methodology for distributing

that notice to the Settlement Class Members as set forth in Section IV of the Settlement. Accordingly,

a. The Court orders Spartan, within twenty-eight (28) days following entry of this Preliminary Approval Order and subject to the requirements of this Preliminary Approval Order and the Settlement, to cause the Class Notice to be emailed to the Settlement Class Members identified in Spartan's records.

b. Following the entry of this Preliminary Approval Order and prior to the mailing of notice to the Settlement Class Members, the Parties are permitted by mutual agreement to make changes in the font, format, and content of the Class Notice provided that the changes do not materially alter the substance of that notice. Any material substantive changes to those notices must be approved by the Court.

c. Class Counsel shall establish an internet website to inform Settlement Class Members of the terms of the Agreement, their rights, dates and deadlines, and related information. The Settlement Website shall include, in .pdf format, materials agreed upon by the Parties and/or required by the Court, and should be operational and live by the date of the emailing of the Class Notice. At this time, the Court orders that the Settlement Website include the following: (i) the Operative Complaint; (ii) the Settlement, and its exhibits; (iii) a copy of this Preliminary Approval Order; (iv) the Class Notice; and (v) a disclosure, on the Settlement Website's "home page," of the deadlines for Settlement Class Members to seek exclusion from the Settlement Class, to object to the Settlement, as well as the date, time and location of the Fairness Hearing.

d. No later than ten (10) days before the date of the Fairness Hearing, the Parties, shall file with the Court a declaration or declarations, verifying compliance with the aforementioned class-wide notice procedures.

13. **Findings Concerning the Notice Program**. The Court finds and concludes that the form, content, and method of giving notice to the Settlement Class as described in this Preliminary Approval Order: (a) will constitute the best practicable notice under the circumstances; (b) is reasonably calculated, under the circumstances to apprise Settlement Class Members of the pendency of this Action, the terms of the proposed Settlement, and of their rights under and with respect to the proposed Settlement (including, without limitation, their right to object to or seek exclusion from the proposed Settlement); (c) is reasonable and constitutes due, adequate, and sufficient notice to all Settlement Class Members and other persons entitled to

receive notice; and (d) satisfies all applicable requirements of law, including, but not limited to, 28 U.S.C. § 1715, Federal Rule of Civil Procedure 23(c), and the United States Constitution (including the Due Process Clause). The Court further finds that the Class Notice is written in simple terminology, and is readily understandable.

14. **Cost Obligations for the Notice Program**. All Costs of Administration, including those associated with providing notice to the Settlement Class as well as in administering the terms of the Settlement, shall be paid by Spartan as set forth in the Settlement. In the event the Settlement is not approved by the Court, or otherwise fails to become effective, neither Plaintiff, nor Class Counsel, nor the Settlement Class Members shall have any obligation to Defendant for such costs and expenses.

15. **Communications with Settlement Class Members**. The Court authorizes Spartan to communicate with Settlement Class Members, potential Settlement Class Members, and to otherwise engage in any other communications within the normal course of Defendant's business and as provided in the Agreement. However, Spartan is ordered to refer any inquiries by Settlement Class Members or Potential Settlement Class Members about the Settlement to Class Counsel.

16. **Preliminary Injunction.** To protect the Court's jurisdiction and ability to determine whether the Settlement should be finally approved, pending such decision all potential Settlement Class Members are hereby preliminarily enjoined (i) from directly or indirectly filing, commencing, participating in, or prosecuting (as class members or otherwise) any lawsuit in any jurisdiction asserting on their own behalf claims that would be Released Claims if this Settlement is finally approved, unless and until they timely exclude themselves from the Settlement Class as specified in the this Order and in the Agreement and its exhibits; and (ii) regardless of whether they opt out, potential Settlement Class Members are further preliminarily enjoined from directly or indirectly filing, prosecuting, commencing, or receiving proceeds from (as class members or otherwise) any separate purported class action asserting, on behalf of any Settlement Class Members who have not opted out from this Settlement Class, any claims that would be Released Claims if this Settlement receives final approval and becomes effective.

17. **Exclusion ("Opting Out") from the Settlement Class**. Any Settlement Class Member who wishes to be excluded from the Settlement Class must submit a written request for exclusion to Spartan, mailed sufficiently in advance to be received by Spartan by the

Objection/Exclusion Deadline. A request for exclusion must comply with the requirements set forth in Section V.B of the Stipulation and clearly indicate the name, address, email address, and telephone number of the Person seeking exclusion, a statement that the Person wishes to be "excluded from the Settlement Class," contain a caption or title that identifies it as "Request for Exclusion in *Fruitstone v. Spartan Race Inc.,* (case number 1:20-cv-20836-BB)," and the date and signature of such Person or, in the case of a Person in the Settlement Class who is deceased or incapacitated, the signature of the legally authorized representative of such Person.

18. Any Settlement Class Member who timely requests exclusion consistent with these procedures shall not: (a) be bound by a final judgment approving the Settlement; (b) be entitled to any relief under the Settlement; (c) gain any rights by virtue of the Settlement; or (d) be entitled to object to any aspect of the Settlement.

19. Settlement Class Members who do not exclude themselves from the Settlement Class in full compliance with the requirements and deadlines of this Preliminary Approval Order shall be deemed to have forever consented to the exercise of personal jurisdiction by this Court and shall have waived their right to be excluded from the Settlement Class and from the Settlement, and shall thereafter be bound by all subsequent proceedings, orders, and judgments in this Action, including but not limited to the Release contained in the Settlement, regardless of whether they have requested exclusion from the Settlement Class (but failed to strictly comply with the procedures set forth herein) and even if they have litigation pending or subsequently initiate litigation against Defendant relating to the claims and transactions released in the Action.

20. **Objections and Appearances**. Any Settlement Class Member (or counsel hired at any Settlement Class Member's own expense) who does not properly and timely exclude himself or herself from the Settlement Class, and who complies with the requirements of this paragraph and the procedures specified in the Class Notice, may object to any aspect or effect of the proposed Settlement.

a. Any Settlement Class Member who has not filed a timely and proper written request for exclusion and who wishes to object to the fairness, reasonableness, or adequacy of the Settlement, or to the certification of the Settlement Class, or to the award of Attorneys' Fees and Expenses, or to the Service Award, or to any other aspect or effect of the Settlement, or to the Court's jurisdiction, must file a written statement of objection with the Court no later than the Objection/Exclusion Deadline.

b. An objection must be in writing under penalty of perjury, and must include: (1) the full name, address, telephone number, the signature of the objector (the objector's counsel's signature is not sufficient) and a statement the information provided is true and correct; (2) the specific reasons for the objector's objection to the Settlement, and a detailed statement of the legal basis for such objections; (3) the identity of all witnesses, including the witnesses' name and address, and a summary of such witnesses' proposed testimony who the objector may call to testify at the Final Approval Hearing; (4) documents sufficient to demonstrate the objector's standing (that he/she is, in fact, a Class Member) must be attached to the Objection; (5) the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior such objections that were issued by the trial and appellate courts in each listed case; and (6) a statement whether the objector and/or his/her attorney(s) intend(s) to appear at the Final Approval Hearing. Any attorney of an objecting Potential Settlement Class Member who intends to appear at the Final Approval Hearing must enter a written Notice of Appearance of Counsel with the Clerk of the Court no later than the date set by the Court in its Preliminary Approval Order and shall include the full caption and case number of each previous class action case in which such counsel has represented an objector.

c. To file a written statement of objection, an objector must mail it to the Clerk of the Court sufficiently in advance that it is received by the Clerk of the Court on or before the Objection/Exclusion Deadline, or the objector may file it in person on or before the Objection/Exclusion Deadline at any location of the United States District Court for the Southern District of Florida, except that any objection made by a Settlement Class Member represented by his or her own counsel must be filed through the Court's Case Management/Electronic Case Filing (CM/ECF) system.

d. Any Settlement Class Member who fails to comply strictly with the provisions in this Preliminary Approval Order for the submission of written statements of objection shall waive any and all objections to the Settlement, its terms, or the procedures for its approval and shall waive and forfeit any and all rights he or she may have to appear separately and/or to object, and will be deemed to have consented to the exercise of personal jurisdiction by the Court, consented to the Settlement, consented to be part of the Settlement Class, and consented to be

bound by all the terms of the Settlement, this Preliminary Approval Order, and by all proceedings, orders, and judgments that have been entered or may be entered in the Action, including, but not limited to, the Release described in the Settlement. However, any Settlement Class Member who submits a timely and valid written statement of objection shall, unless he or she is subsequently excluded from the Settlement Class by order of the Court, remain a Settlement Class Member and be entitled to all of the benefits, obligations, and terms of the Settlement in the event the Settlement is given final approval and the Final Settlement Date is reached.

21. **Termination of Settlement**. This Preliminary Approval Order, including the conditional class certification contained in this Preliminary Approval Order, shall become null and void and shall be without prejudice to the rights of the Parties or Settlement Class Members, all of whom shall be restored to their respective positions existing immediately before this Court entered this Preliminary Approval Order, if the Settlement: (a) is not finally approved by the Court, (b) does not become final pursuant to the terms of the Settlement; (c) is terminated in accordance with the Settlement; or (d) does not become effective for any other reason.

22. **Use of this Preliminary Approval Order**. In the event the Settlement does not reach the Final Settlement Date or is terminated in accordance with the terms of the Settlement, then: (a) the Settlement and the Agreement, and the Court's Orders, including this Preliminary Approval Order, relating to the Settlement shall be vacated and shall be null and void, shall have no further force or effect with respect to with respect to any Party in this Action, and shall not be used or referred to in any other proceeding by any person for any purpose whatsoever; (b) the conditional certification of the Settlement Class pursuant to this Preliminary Approval Order shall be vacated automatically, without prejudice to any Party or Settlement Class Member to any legal argument that any of them might have asserted but for the Settlement, and this Action will revert to the status that existed before the Settlement's execution date; (c) this Action shall proceed pursuant to further orders of this Court; and (d) nothing contained in the Settlement, or in the Parties' settlement discussions, negotiations, or submissions (including any declaration or brief filed in support of the preliminary or final approval of the Settlement), or in this Preliminary Approval Order or in any other rulings regarding class certification for settlement purposes, shall be construed or used as an admission, concession, or declaration by or against any Party of any fault, wrongdoing, breach or liability in this Action or in any other lawsuit or proceeding, or be admissible into evidence for any purpose in the Action or any other proceeding by any person for

any purpose whatsoever. This paragraph shall survive termination of the Settlement and shall remain applicable to the Parties and the Settlement Class Members whether or not they submit a written request for exclusion.

23. **Continuing Jurisdiction**. This Court shall maintain continuing exclusive jurisdiction over these settlement proceedings to consider all further applications arising out of or connected with the Settlement or this Preliminary Approval Order, and to assure the effectuation of the Settlement for the benefit of the Settlement Class.

IT IS SO ORDERED this _____ day of _____, 2021.

THE HONORABLE BETH BLOOM
United States District Judge

Composite Exhibit 4

THE MOSKOWITZ LAW FIRM

For more than 25 years, the lawyers at The Moskowitz Law Firm, PLLC ("The Moskowitz Law Firm") have successfully litigated significant class action and complex commercial cases involving the rights of consumers, investors, and businesses. The Firm and its attorneys consistently rank among the most highly regarded litigation attorneys locally and on the national stage — according to clients, judges, opponents, and professional journals — for effectiveness in and out of the courtroom.

Adam Moskowitz. Mr. Moskowitz is the Founder and Managing Partner of The Moskowitz Law Firm and is experienced in all forms of class action claims, including civil conspiracy claims under the Racketeering Influenced and Corrupt Organizations ("RICO") Act. Mr. Moskowitz serves and has served as Lead Counsel in some of the largest class action cases in Florida and nationwide. Mr. Moskowitz has been an Adjunct Professor at the University of Miami School of Law teaching Class Action Litigation for over 26 years. Adam has received numerous awards for his results including the "Most Effective Lawyer Award" for his work in litigating and resolving numerous nationwide force-placed insurance cases. Mr. Moskowitz filed one of the first class action lawsuits regarding these practices and has since spearheaded class action litigation in over 32 nationwide class actions brought against the largest banks or mortgage servicers and the force-placed insurers across the country, reaching 30 settlements to date totaling over $4.2 billion dollars for the proposed nationwide classes of over 5.3 million homeowners.[1]

[1] *See for example Williams v. Wells Fargo Bank, N.A.*, No. 11-cv-21233 (S.D. Fla.) (final approval granted); *Saccoccio v. JPMorgan Chase Bank N.A.*, No. 13-cv-21107 (S.D. Fla.) (final approval granted); *Diaz v. HSBC Bank (USA), N.A.*, No. 13-cv-21104 (S.D. Fla.) (final approval granted); *Fladell v. Wells Fargo Bank, N.A.*, No. 13-cv-60721 (S.D. Fla.) (final approval granted); *Hamilton v. SunTrust Mortg., Inc.*, No. 13-cv-60749 (S.D. Fla.) (final approval granted); *Hall v. Bank of Am., N.A.*, No. 12-cv-22700 (S.D. Fla.) (final approval granted); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-cv-60649 (S.D. Fla.) (final approval granted); *Braynen v. Nationstar Mortg.*, LLC, No. 14-cv-20726 (S.D. Fla.) (final approval granted); *Wilson v. Everbank*, N.A., No. 14-cv-22264 (S.D. Fla.) (final approval granted); *Montoya v. PNC Bank, N.A.*, No. 14-cv-20474 (S.D. Fla.) (final approval granted); *Almanzar v. Select Portfolio Servicing*, No. 14-cv-22586 (S.D. Fla.) (final approval granted); *Jackson v. U.S. Bank, N.A.*, No. 14-cv-21252 (S.D. Fla.) (final approval granted); *Circeo-Loudon v. Green Tree Servicing, LLC*, No. 14-cv-21384 (S.D. Fla.); *Beber v. Branch Banking & Trust Co*., No. 15-cv-23294 (S.D. Fla.) (final approval granted); *Ziwczyn v. Regions Bank, No.* 15-cv-24558 (S.D. Fla.) (final approval granted); *McNeil v. Selene Finance, LP*, No. 16-cv-22930 (S.D. Fla.); *McNeil v. Loancare, LLC*, No. 16-cv-20830 (S.D. Fla.) (final approval granted) (final approval granted); *Edwards v. Seterus, Inc.*, No. 15-cv-23107 (S.D. Fla.) (final approval granted); *Cooper v. PennyMac Loan Servicing*, LLC, No. 16-cv-20413 (S.D. Fla.) (final approval granted). *Strickland, et al. v. Carrington Mortgage Services, LLC, et al*., 16-cv-

Prior to filing the FPI class actions, Adam Moskowitz served as Co-Lead Counsel in one of the largest MDLs, *In re: Managed Care Litigation*, MDL No. 1334. The MDL was finalized about 6 years ago and was actively litigated for about 7 years. Plaintiffs brought suit against the seven largest managed care providers on behalf of approximately 600,000 physicians alleging that these defendants engaged in a civil conspiracy in violation of the RICO Act. Adam Moskowitz worked almost all of his time assisting the Co-Lead team with every aspect of the case, including taking and defending depositions, coordinating with co-counsel, working with scientists, drafting pleadings, and helping with settlement efforts. Through this litigation before Judge Moreno, plaintiffs were able to revise the manner in which managed care is conducted with physicians throughout the country, and obtained almost a billion dollars in monetary relief. To date, this is the only certified nationwide RICO class action to be upheld by the Eleventh Circuit Court of Appeal.

Mr. Moskowitz has been appointed Lead and Co-Lead counsel in numerous other state and federal class actions, including resolving one of the nation's largest consumer class actions, *LiPuma vs. American Express*, No. 04-cv-20314 (S.D. Fla.). In *Pain Clinic et al. v. Allscripts Healthcare Solutions, Inc.*, 12-49371 (Fla 11th Cir. Ct. 2012), Mr. Moskowitz reached a nationwide settlement against Allscripts Healthcare Solution on behalf of thousands of small physician practices regarding the sale and marketing of defective electronic healthcare software. Mr. Moskowitz has also served as Lead, Co-lead or as part of Plaintiffs' counsel in various nationwide class actions including *In re: Marine Hose Antitrust Litigation*, No. 08-MDL-1888-Graham/Turnoff (S.D. Fla.); *Natchitoches Parrish Hospital v. Tyco (In re Sharps Containers)*, No. 05-cv- 12024 (D. Mass.) (serving as co-lead counsel in a nationwide antitrust class action on behalf of direct purchasers of containers for the disposal of sharp medical instruments); *Texas Grain Storage Inc. v. Monsanto Co.*, No. 5:2007-cv-00673 (W.D. Texas) (serving as co-lead counsel with Bruce Gerstein in a nationwide antitrust class action on behalf of direct purchasers of genetically modified seeds); *In re: Hypodermic Products Antitrust Litigation*, MDL No. 1730, No. 05-cv-1602 (JLL/CCC) (D. N.J.) (Linares, J.) (obtaining final approval of a nationwide settlement of an antitrust class action on behalf of direct purchasers of needle products); *In re: Mushroom Direct Purchase Antitrust Litigation*, No. 06-cv-00620l (E.D. Pa.) (representing direct purchasers of fresh agaricus mushrooms sold in the United States east of the Rocky Mountains in antitrust class action); *Miller v. Dyadic International*, No. 07-cv-80948 (S.D. Fla.) (consolidated securities fraud class action against biotech company arising out of material misstatements and omissions regarding financial improprieties of its subsidiaries in violation of federal securities laws); *In re: Herbal Supplements Marketing and Sales Practices Litigation*, 1:15-cv-05070 (N.D. Ill.) (serving on Plaintiffs' Lead Counsel Committee in multidistrict litigation regarding misleading labelling of herbal supplements sold at Target, Walgreens and Walmart stores); *Louisiana Wholesale v. Becton*

25237 (S.D. Fla.) (final approval granted for three separate settlements); *Quarashi et al v. Caliber Home Loans Inc. et al.;* 16-9245 (D.N.J.) (final approval granted).

Dickinson, et al., No. 05-cv-01602 (D.N.J.); and *Bruhl v. Price Waterhouse Coopers, International, et al.*, No. 03-cv-23044 (S.D. Fla.).

Currently, in *In re Transamerica COI Litigation*, Case No. 2:16-cv-01378-CAS-AJW (C.D. Cal.), Mr. Moskowitz was appointed as Co-Lead counsel and reached a nationwide settlement for a certified class of nationwide consumers who purchased life insurance policies from Transamerica Life Insurance Company—a subsidiary of Aegon—one of the world's largest providers of life insurance, pension solutions and asset management products. That nationwide settlement was finally approved by U.S. District Judge Christina A. Snyder in February 2019 and resulted in recovering a gross Settlement Common Fund of over $100 million, as well as extremely valuable injunctive relief for the nationwide class. Mr. Moskowitz also personally resolved the sole objection to the settlement with the objector's counsel who brought separate "copycat" Transamerica COI class actions in Iowa. Further, in *In re Fieldturf Multi District Litigation*, Case No. 3:17-md-02779-MAS-TJB (D.N.J.), U.S. District Judge Michael A. Shipp recently appointed Mr. Moskowitz as Co-Lead counsel for all of the plaintiffs after numerous class actions brought against Fieldturf were consolidated in the District of New Jersey earlier last year. The claims were brought on behalf of municipalities related to the marketing and sale of allegedly defective artificial fields. Adam is currently lead and co-lead counsel in numerous other class actions currently pending in state and federal courts across the country.

Mr. Moskowitz's practice also encompasses various other complex commercial litigation matters, arbitrations before FINRA and numerous jury trials. Adam obtained one of the largest jury verdicts in Miami-Dade County (over $100 million dollars) in a jury trial against a global agricultural company on behalf of growers from the United States and Costa Rica. Adam has also served as chairperson in numerous NASD securities arbitrations, and actively participates in local and national seminars and panels, lectures across the country regarding class action litigation, and has published numerous articles on class action practices and settlements.[2] Mr. Moskowitz has actively served on numerous state and national class action organizations, including being appointed to the Duke Law Center for Judicial Studies Advisory Council and serves as the Topics Coordinator. The Council brings together all federal judges, experienced plaintiffs' and defense attorneys, and academics to develop practical solutions to legal issues by way of rule changes, best practices, guidelines, and principles. The Council conducts numerous national seminars each year, attended by hundreds of class action practitioners and federal and state judges. One such seminar was the "National Townhall Meeting Developing a Useful Framework to Address Alcohol Abuse, Drug Addiction, and Anxiety/Depression Among Bench, Bar, and Related Professionals," which included many great speakers (39 Panelists for 8 Panels), including many federal judges. Adam is married to his wife Jessica and has three children, Serafina, Michael and Samantha and is very active with his children's school Temple Beth Am in Miami, Florida. Attached are two personal

[2] *See, e.g., The Right Way to Calculate Attorneys' Fees in Class Actions*, December 4, 2015, available at http://www.law360.com/articles/733534/the-right-way-to-calculate-atty-fees-in-class-actions.

articles about Adam Moskowitz, including one regarding his family being named "Family of the Year" for their synagogue this past year, based mainly on the great dedication and pro bono service by his wife to his children's school.

Howard Bushman. Howard Bushman is a Partner at The Moskowitz Law Firm and a seasoned litigator with over 18 years of experience prosecuting nationwide class actions and mass tort litigation. Mr. Bushman is a central figure in litigating the lender placed insurance class actions listed in Footnote 1. Further, Mr. Bushman has effectively litigated the following class actions: *Kenneth F. Hackett & Associates, Inc. v. GE Capital Information Technology Solutions, Inc. et al.,* Case No.: 10-20715-CIV-ALTONAGA/BROWN (S.D. Fla.) (multi-million dollar settlement on behalf of a nationwide class of copier lessees whom were overcharged for their monthly payments); *Aarons et al. v. BMW of North America, LLC*, Case No. 2:11-cv-07667-PSG (S.D.Cal.) (multi-million dollar settlement on behalf of a nationwide class of owners of defective Mini-Cooper vehicles); *Lockwood et al. v. Certegy Check Services, Inc.*, Case No.: 8:07-CV-01657-SDM-MSS (M.D. Fla.) (nationwide data breach action resulting in a settlement valued at over $75 million dollars; *Brenda Singer v. WWF Operating Company*, Case No.: 13-CV-21232 (S.D. Fla. 2013) (nationwide litigation regarding alleged deceptive marketing of evaporated cane juice; successfully settled nationwide class action over deceptive labeling of evaporated cane juice); *In Re: Countrywide Financial Corp. Customer Data Security Breach Litigation*, Case No. 3:08-MD-01998-TBR (WDKY) (class action on behalf of over 17 million consumers, achieved a settlement valued at over $300 million dollars); *Eugene Francis v. Serono Laboratories, Inc., et al.* ("Serostim"), Case No. 06-10613 PBS (U.S. District Court of Mass.) ($24 million cash settlement in a nationwide class action litigation against multiple entities regarding the deceptive and illegal marketing, sales and promotional activities for the AIDS wasting prescription drug Serostim); *In Re: Guidant Corp. Implantable Defibrillators Products Liability Litigation*, MDL No. 1708 (U.S. District of Minnesota) ($245 million dollar settlement for patients in this nationwide mass tort class action regarding the sale of defective cardiac defibrillators and pacemakers); *In Re: Zicam Cold Remedy Marketing, Sales Practices and Products Liability Litigation*, MDL No. 2096 (mass tort involving over $15 million settlement).

Mr. Bushman has extensive experience litigating antitrust matters throughout the state of Florida as well. *See In re: Photochromic Lens Antitrust Litigation*, MDL No. 2173, No. 8:10–md–02173–T–27EA (M.D. Fla.) (nationwide indirect purchaser antitrust class action on behalf of purchasers of photochromic lenses); *In re Florida Cement and Concrete Antitrust Litigation (Indirect Purchaser Action)*, No. 09-23493-CIV-Altonaga/Brown (S.D. Fla.) (statewide indirect purchaser antitrust class action on behalf of purchasers of cement); *Anna Vichreva v. Cabot Corporation, et al.*, No. 03-27724-CA-27 (Fla. 11th Jud. Cir. Ct.) (litigated and obtained the largest per-consumer Carbon Black state court antitrust class action settlement in the country).

As passionate for the law as he is for giving back to the local community, Howard recently received the Eleventh Judicial Circuit and Miami-Dade County Bar Associations' Put Something Back Pro Bono Service Award.

Adam Schwartzbaum. Adam Schwartzbaum is a Senior Associate at The Moskowitz Law Firm, where he plays an important role in managing all aspects of the Firm's class action litigation practice. Adam's responsibilities include case analysis and development, trial court litigation, and appellate work.

Adam successfully litigated and settled *Rollo v. Universal Property & Casualty Insurance Co.*, No. 2017-027720-CA-01 (Fla. 11th Jud. Cir. Complex Bus. Div.), a class action which held the largest private insurance company in Florida accountable for its systemic failure to pay statutory interest on late-paid settlement payments. Adam also represented several certified classes of investors in litigation concerning the $300+ million bankruptcy, *In re 1 Global Capital LLC*, No. 18-19121 (Bankr. S.D. Fla.). Working in concert with the Debtors' Special Counsel, Adam helped to litigate and settle claims with many of the Debtors' professionals and sales agents in both state and federal court. Adam has also played an important role in many successful class actions litigated by The Moskowitz Law Firm, including *In re Transamerica COI Litigation*, Case No. 2:16-cv-01378-CAS-AJW (C.D. Cal.) (cash settlement valued over $100 million, including significant prospective relief for life insurance policyholders).

Prior to joining The Moskowitz Law Firm, Mr. Schwartzbaum was an associate at Weiss Serota Helfman Cole & Bierman, a large regional law firm well known for representing local governments. As an associate in the litigation department, Mr. Schwartzbaum represented an array of private and municipal clients, at the trial and appellate levels, in state and federal court. In several instances, Mr. Schwartzbaum won significant trial victories and then succeeded in upholding them on appeal. For example, in *SDE Media, LLC v. City of Doral*, Case No. 3D16-2008 (Fla. 11th Jud. Cir.), Mr. Schwartzbaum second-chaired a trial that resulted in the trial court issuing a nineteen-page order finding in the City's favor. On appeal, Mr. Schwartzbaum authored the answer brief, and the Third District Court of Appeal issued a per curiam affirmance. *SDE Media, LLC v. City of Doral*, 228 So. 3d 567 (Fla. 2017). Similarly, in *Brock v. Ochs*, Case No. 2D16-705 (Fla. 20th Jud. Cir.), Mr. Schwartzbaum helped obtain summary judgment for the Collier County Manager in a major dispute with the County Clerk regarding the scope of the County Manager's purchasing power under the Florida Constitution. On appeal, Mr. Schwartzbaum authored the answer brief, and the Second District Court of Appeal affirmed per curiam. *Brock v. Ochs*, 203 So. 3d 164 (Fla. 2d DCA 2016). Mr. Schwartzbaum achieved similar success in federal court. For example, in *Edwards CDS, LLC v. City of Delray Beach*, No. 16-15693 (S.D. Fla.), Mr. Schwartzbaum authored a motion to dismiss that resulted in an order dismissing $25 million in federal constitutional claims with prejudice. On appeal, Mr. Schwartzbaum authored the answer brief, and the Eleventh Circuit Court of Appeals issued a written opinion affirming

the dismissal. *Edwards CDS, LLC v. City of Delray Beach*, 699 Fed. App'x 885 (11th Cir. 2017). As a result, Mr. Schwartzbaum helped the City achieve a very favorable settlement. Other significant appellate victories include *D'Agastino v. City of Miami*, 220 So. 3d 410 (Fla. 2017) (upholding constitutionality of City of Miami's Civilian Investigative Panel); *City of Homestead v. Foust*, 2018 WL 575620 (Fla. 1st DCA 2018) (reversing order of Judge of Compensation Claims after determining, in issue of first impression, that JCC incorrectly interpreted a statute); *City of Cooper City v. Joliff*, 227 So. 3d 633 (Fla. 4th DCA 2017) (reversing a multi-million dollar summary judgment for plaintiffs in a class action alleging a special assessment was unconstitutional and instructing trial court to enter judgment for the City).

Mr. Schwartzbaum's career began in the litigation department of a large international law firm, White & Case, where he provided research and writing support on complex commercial disputes and in significant appellate matters in both state and federal court. Adam served on the trial team in *Dacra Development v Corp. v. Colombo*, Consolidated Case Nos. 11-17338 & 10-47846, successfully defending a prominent real estate developer from a multimillion dollar lawsuit and helping secure a $2 million verdict on the defendant's counterclaim. Adam also represented the City of Dania Beach in a dispute over the expansion of the Fort Lauderdale-Hollywood International Airport, ultimately helping to secure a landmark settlement on behalf of over 850 homeowners impacted by the development. Adam also made vital contributions to several notable appellate victories, including *North Carillon, LLC v. CRC 603, LLC*, 135 So. 3d 274 (Fla. 2014) (obtaining a reversal of an opinion that incorrectly interpreted provision of Florida's condominium law concerning statute governing placing of deposits into escrow), *Sargeant v. Al-Saleh*, 137 So. 3d 432 (Fla. 4th DCA 2014) (establishing new Florida law concerning trial court's jurisdiction to compel turn over of foreign assets), and *200 Leslie Condominium Association, Inc. v. QBE Insurance Corp.*, 616 Fed. App'x 936 (11th Cir. 2015) (affirming judgment in favor of insurer following a bench trial).

Mr. Schwartzbaum is an active contributor to the South Florida community and a leader in several prominent organizations. He is a Member of the Board of Directors of Nu Deco Ensemble, Miami's 21st Century genre-bending orchestra. Mr. Schwartzbaum sits on the Board of Directors of Temple Menorah in Miami Beach, the Board of the South Florida Israel Bonds Young Investor Society, and on the Board of the South Florida Lawyer's Chapter of the American Constitution Society. Adam previously served on American Jewish Committee's Global ACCESS Board and as a Member of the Democratic Executive Committee, the governing body of the Miami-Dade County Democratic Party. Mr. Schwartzbaum also serves as J-Street's District Coordinator for Congresswoman Federica Wilson. In addition, Mr. Schwartzbaum is the Founder and Team Captain for Jewish Community Service's Miami Marathon and Half Marathon Team which raises funds for The Blue Card, an organization benefiting indigent Holocaust Survivors.

***Joseph Kaye*.** Joseph is an Associate Attorney at The Moskowitz Law Firm, whose practice focuses on multi-state consumer class action litigation, complex commercial litigation and multidistrict litigation. His experience involving a broad range of disputes, including force-placed insurance class action litigation, health insurance, products liability, and federal antitrust litigation matters, allows him to serve as a valuable asset in representing a number of the Firm's clients.

In a putative Florida statewide class action representing skilled nursing facilities seeking to recover statutory interest owed by insurers on late paid Medicaid Long Term Care Program claims, Joseph was instrumental in effectively briefing and arguing against a motion by one defendant insurer to compel individual arbitration of one of the plaintiff's claims. Joseph then co-authored the answer brief on appeal to the Third District Court of Appeal, which resulted in a written opinion upholding the trial court's order and favorably expanding the law on arbitration in Florida for parties seeking to litigate their claims in a court of law. *See Coventry Health Care of Florida, Inc. v. Crosswinds Rehab, Inc., LLC*, 259 So. 3d 306 (Fla. 3d DCA 2018).

Prior to joining The Moskowitz Law Firm, Joseph was an Associate Attorney at Stok Folk + Kon, a full-service law firm serving South Florida, where he represented businesses and individuals in a range of disputes involving breach of contract, commercial transactions, fraud, business torts, deceptive and unfair trade practices, intellectual property, probate, guardianship and trust litigation, at both the trial and appellate court levels, as well as in arbitration. For example, Joseph successfully represented the plaintiffs in *Oded Meltzer, et al. v. NMS Capital Group LLC, et al.*, Case No. 1:17-cv-23068-UU (S.D. Fla.), where plaintiffs sought a declaratory judgment that plaintiffs were not bound to an arbitration agreement they entered into as representatives of their business entities, as well as an injunction enjoining defendants from joining the plaintiffs as parties to arbitration of a multi-million-dollar dispute with those business entities. Joseph obtained a preliminary injunction on the papers without a hearing, which caused the defendants to stipulate to entry of a final judgment and permanent injunction. Further, Joseph authored the answer brief and litigated an appeal in *Yehezkel Nissenbaum, et al. v. AIM Recovery Services, Inc.*, Case No. 3D15-1000 (Fla. 3d DCA 2015), which resulted in the Third District Court of Appeal issuing a *per curiam* affirmance upholding a final judgment exceeding $125,000.000. Similarly, in *Dantro LLP, et al. v. In rem Dantro Fund, et al.*, Case No. 12-ca-001643 (Fla. 20th Jud. Cir.), after obtaining a final summary judgment entitling plaintiff limited liability partnerships to recover $90,000.00 from the Court Registry after it was stolen by their former managing partner, Joseph successfully sought an order entitling plaintiffs to recover their attorneys' fees and costs in maintaining the action against the former managing partner in his individual capacity as the real party in interest because he entered an appearance and sought to obtain the stolen funds for himself, purportedly on behalf of the dissolved partnerships. Joseph argued and won the motion before the trial court, then successfully defended the order on appeal to the Second District Court of Appeal. *See Edward Adkins v. Dantro LLP, et al.*, Case No. 2D16-4751 (Fla. 2d DCA 2017).

A life-long Florida native, Joseph attained a Bachelor's degree in Creative Writing from Florida State University (B.A., 2012) and a Juris Doctorate degree from the University of Miami

School of Law (J.D., *magna cum laude*, 2015). While at the University of Miami, Joseph was a member of the Race and Social Justice Law Review, served as Dean's Fellow for the Contracts and Elements courses, earned the Dean's Certificate of Achievement in Evidence and Elements courses, received honors in litigation skills, and was on the Dean's List multiple times.

Joseph also gained invaluable experience as a judicial intern for the Honorable Magistrate Judge Jonathan Goodman in the United States District Court for the Southern District of Florida, where he researched and drafted bench memoranda and reports and recommendations, and learned a great deal about the inner workings of the federal court system through observing mediations and courtroom proceedings, and discussing litigation strategies with Judge Goodman and his clerks. While in law school, Joseph was also a certified legal intern for the Miami-Dade State Attorney's Office, Misdemeanor Domestic Violence Division, where he successfully argued motions and took live testimony on the record in open court, including Williams Rule motions, motions to revoke bond, motions to modify stay away orders and excited utterance motions, conducted victim and witness interviews, participated in arraignment, sounding and trial calendars, and assisted in *voir dire*.

***Barbara Lewis*.** Barbara is an Associate Attorney at The Moskowitz Law Firm. Most of her practice has focused on representing consumers in multi-state class action litigation, complex commercial litigation and multidistrict litigation. She handles a broad range of disputes, including force-placed insurance litigation and complex nationwide litigation relating to health insurance, products liability, false advertising, fraudulent business practices, and other consumer issues. Her fluency in Spanish makes her a valued source to the firm's Hispanic and multicultural clients in South Florida. She has authored various publications including *Amending Rule 23: Modernizing Class Notice and Debunking Bad-Faith Objectors*, published by the Federal Litigation Section of the Federal Bar Association (SideBAR) in Spring 2017, and *Lawsuits Target Hiden Fees, Pass-Through Charges*, published by the Daily Business Review in July 2016.

Barbara also briefly worked at Clarke Silverglate, P.A. where her practice consisted of litigating employment law and general commercial matters. She defended employers against a variety of discrimination and wrongful termination lawsuits in federal and state court. She was instrumental in authoring and arguing various discovery motions against the plaintiff in a contentious sexual harassment dispute which led to a successful mediation. Barbara also represented insurance companies nationwide in a variety of breach of contract actions. In this capacity, she briefed and successfully obtained summary judgment in *Dwyer v. Globe Life and Accident Insurance Company*, Case No. 2:19-cv-14071 (S.D. Fla.), where the plaintiff demanded accidental death insurance benefits on behalf of an insured who had overdosed on illegal drugs. The court's opinion not only clarified existing Florida insurance law, but also created new Florida law on accidental death coverage.

Barbara was born in Cuba but has been a long time Miami resident. She obtained her Bachelor's degree with honors in Government from the University of Virginia in 2012, and her Juris Doctorate degree *cum laude* from the University of Miami School of Law in 2015. While

at the University of Miami, Barbara earned the CALI Excellence for the Future Award and Dean's Certificate of Achievement, awarded to the highest scoring student in the class, in her Legal Communication and Research courses. She interned at the Investor Rights Clinic, where she represented under-served investors in securities arbitration claims against their brokers before the Financial Industry Regulatory Authority (FINRA). She was also a member of the school's International Moot Court Program and earned Second Place in the Moot Madrid competition, an international commercial arbitration competition that is conducted entirely in Spanish.

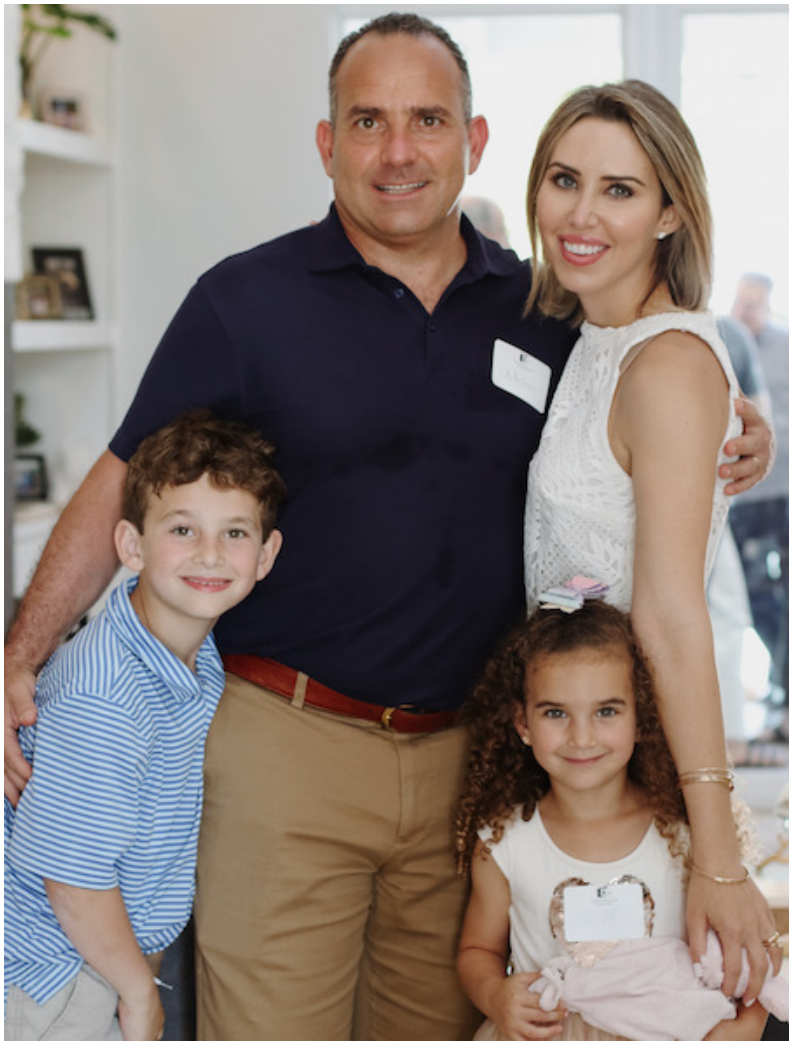
The Moskowitz Law Firm, PLLC

The Moskowitz Law Firm focuses only on large-scale class actions and complex commercial litigation, typically against parties represented by larger, premier law firms. Its attorneys have played a leading role in significant class actions and complex litigation across the country that have made a real difference in the world and on behalf of consumers across the country. With deep roots in the local Miami community, the attorneys at The Moskowitz Law Firm have been avid supporters of several non-profit and education related organizations for over two decades, earning the good will of colleagues, clients and neighbors. After teaching Class Action Litigation at the University of Miami for over 26 years, in 2016, Adam Moskowitz, along with his other co-counsel in the force placed cases, organized the University of Miami Class Action Conference, and annual event which included Class Action Panels with various federal judges, state attorney generals and numerous plaintiff and defense counsel and awards scholarships to students interested in class action litigation.

2019 'Family of the Year'

We Salute the Moskowitz Family, honored as the Committee of 100's 2019 'Family of the Year'

Each year, Temple Beth Am is proud to recognize an outstanding family of volunteers. Congratulations to the ***Moskowitz Family*** — **Jessica**, **Adam, Serafina, Michael** and **Samantha** — who were honored on March 10, 2019 as recipients of the ***Committee of 100's 2019 "Family of the Year" Award***, for their continued participation in our Temple community and their ongoing commitment to congregational leadership.



Jessica's TBAM journey began almost a decade ago in the Tot Shabbat and Mommy and Me programs, with the oldest of her three Temple Beth Am Day School students **Serafina**. She has been involved as a lay leader in the Temple Beth Am Day School for several years, including being a room parent, and for two years was Co-Chair of the Day School Annual Auction (2017 and 2018). Jessica is a member of the Day School Board, and is now Co-President of **PATIO** (Parent and Teacher Involvement Organization). She previously chaired the Grandparents & Special Friends Day Committee, served as Vice

President of the Elementary School on the PATIO Board and is currently enrolled in Temple Beth Am's *Atideynu* leadership training program.

Adam, founding partner of **The Moskowitz Law Firm**, is in his 26th year on the faculty at the University of Miami School of Law teaching Class Action Litigation, and donates his salary back to the school for student scholarships. He helped establish the annual Class Action Forum at the UM School of Law. Last year, Adam helped organize a new group of parent volunteers to launch the inaugural Day School Chanukah Games on December 21, 2018 — ***watch video***. All 230 elementary school students participated in 12 physical and mental activities, and Opening and Closing Ceremonies. Adam is active in the Alexander Muss High School in Israel program, having been a student and then a *Madrich* (counselor). He is passionate about Israel and works tirelessly in behalf of AIPAC in Washington, DC. A member of the "Beyond the Curve" Capital Campaign Committee, he proudly coaches his daughter's 3rd grade Beth Am Basketball League team and is a frequent guest reader in his childrens' classrooms.

Serafina *(pictured at right)* is a third grader at Temple Beth Am Day School where she began her studies in Early Childhood in Junior Pre-Nursery. She enjoys art, tennis, Beth Am Basketball League, spending time with her friends and setting out on her own path in life.

Michael, a first grader at Temple Beth Am Day School who also began here in the Early Childhood, also loves playing tennis at Coral Oaks, basketball and spending time with friends and family in Miami and North Carolina.

In Fall 2019, **Samantha**, a Pre-K student, will find her way across the quad to Kindergarten. Eager to learn to read and write, her spunky personality comes shining through, especially during After School U's Hip Hop.

(Family Photo by Anastasia Murphy — ***Stasia Shoots)***

DAILY BUSINESS REVIEW

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National Class Action Litigator Opens Up About Stress, Quitting Drinking

by Celia Ampel

Adam Moskowitz realized a few years ago that he needed to make a change.

One of the top federal class action lawyers in the country, Moskowitz has led enormous cases including force-placed insurance litigation that recovered more than $5 billion for homeowners who alleged their mortgage servicers took kickbacks from insurers.

But with huge victories came a lot of stress — and he wasn't handling it well.

"As the cases became more stressful and they became larger and I was traveling a lot more, I found myself getting more unhealthy," said Moskowitz, who was leading the class action practice at Kozyak Tropin & Throckmorton in Coral Gables. "A lot of the lifestyles of lawyers involve drinking and involve celebration. When you win a big case, you open champagne."

Drinking became his go-to method for relieving stress, and while it wasn't affecting his work, he felt he was on a "path to destruction." Moskowitz realized something had to give.

"Having a beautiful wife and having three kids made me really analyze my situation," he said. "I looked around and there were terrible things happening to people. People were committing suicide that I knew."

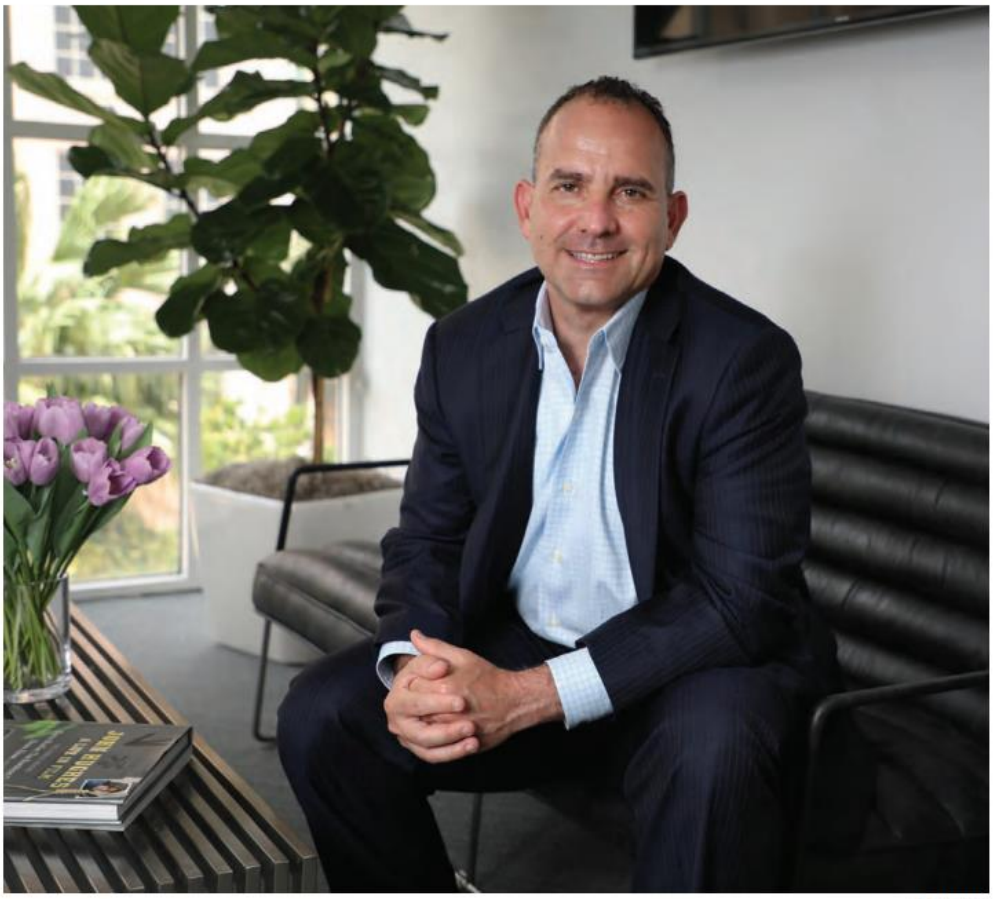
A lot of lawyers deal with mental health issues but don't feel they can talk about them, he said. The issue has become a focus of the Florida Bar, particularly after the suicide of powerhouse litigator Ervin Gonzalez last year.

"You're fighting people so often that they're looking for any weakness in you, and you don't want to admit, maybe, that you have a problem," Moskowitz said. "Or you don't want to seek help from those people that you're probably around the most because of this competition and how vicious our industry can be."

Moskowitz quit drinking and got back to old habits of running races and practicing yoga. The resulting mental clarity gave the 50-year-old the resolve to strike out on his own, leaving the firm he'd joined as a second-year associate in 1993. He still has working and personal relationships with his old partners at Kozyak Tropin, but that firm wasn't his dream.

"I want my own future," he said. "I want to create my own legacy and have my own traditions and really focus in on class actions."

Two months after founding the Moskowitz Law Firm with partner Howard Bushman, Moskowitz leads a firm with four attorneys, several support staff and an office in downtown Coral Gables. He admits he's scared, but mentors such as legendary Miami attorney Aaron Podhurst told him they were scared, too — and it all worked out.



J. ALBERT DIAZ

Coral Gables litigator Adam Moskowitz said he wants to help stoke honest conversations about stress and mental health in the legal profession.

ADAM MOSKOWITZ

Born: 1967, New York City

Spouse: Jessica Moskowitz

Children: Serafina, Michael, Samantha

Education: University of Miami, J.D., 1993; Syracuse University, B.A., 1989

Experience: Founding and managing partner, The Moskowitz Law Firm, 2018-present; Partner, associate and class action chairman, Kozyak Tropin & Throckmorton, 1993-2018; Associate, Friedman, Rodriguez, Ferraro & St. Louis, 1993

Moskowitz knows about perseverance, starting with his upbringing after his father left.

"My mom was amazing," he said. "With nothing, she moved to Miami with my sister and I, and she worked five jobs. Five jobs. She was a nurse. She was a receptionist. She was a hostess. She did summer jobs — she worked at my summer camp as the nurse so we could go for free."

Moskowitz said his mother also begged a private school to let him attend on a scholarship. From there he went to college, studied abroad in London and worked in Israel, all thanks to her.

BENLATE CASES

When he graduated from the University of Miami School of Law, he joined a five-attorney firm that sent him during his second week to speak with a grower whose claimed his plants were dying because of the DuPont Co. fungicide Benlate. The firm took about 70 similar cases.

"They said, 'Adam, you go handle them,' " Moskowitz said. " 'You go travel around the state of Florida to Apopka, to Dade City, to Plant City, to Tallahassee.' I was a first-year associate. I knew nothing. I was getting killed. … I was learning trial by fire."

But he broke the cases open during a trip to Costa Rica when he learned about Benlate studies done there that produced "horrible" results. In sworn interrogatories, DuPont said it had not done any testing in Costa Rica. Moskowitz's firm made a long-shot move and asked the judge to strike the pleadings and find against DuPont on liability — and she did.

The resulting settlements led to infighting over money and ethical issues among the partners, and the firm broke up. Moskowitz decided to take his cases with him to Kozyak Tropin. As a second-year associate, he negotiated a contract that would give him a percentage of the fees. Soon afterward, he did the openings and closings for a trial that led to a $130 million jury verdict against DuPont.

Forced-place insurance has been much of Moskowitz's focus for the past decade. He's also known for representing victims of Scott Rothstein's $1.2 billion Ponzi scheme and serving as lead counsel in a currency-conversion class action against American Express and securities litigation against Lancer Partners, among other cases.

At his new firm, he's leading class action litigation alleging life insurance companies are charging illegal rates to people near the end of their lives.

TAKE CARE

His career isn't not slowing down. But Moskowitz now understands the importance of taking care of himself. He's thrilled about organizing the kids' field day at his synagogue, quipping that these days, he'd rather make the Temple Beth Am Commentator than the front page of the Wall Street Journal.

Moskowitz hopes he can inspire even one attorney struggling with drinking or stress to do something about it.

"The tragedies are these people who commit suicide and they leave their children orphans," he said, beginning to choke up. "We had somebody in our school who died — her son is in our son's class. I can only imagine if my son grew up without a father. Maybe if that lawyer or that person says, 'Yeah, things are rough, but you know, Adam went through it, and he's a tougher person as a result of dealing with it. Maybe I'll go see somebody. Maybe I'll go talk to somebody.' "

Celia Ampel covers South Florida litigation. Contact her at campel@alm.com or on Twitter at @CeliaAmpel.

BONNETT FAIRBOURN FRIEDMAN & BALINT PC

ABOUT THE FIRM

Bonnett, Fairbourn, Friedman & Balint, P.C. is an AV rated firm of 19 lawyers. Our clients include many individuals and local businesses, as well as major national and international companies in a wide range of civil litigation in both federal and state courts.

The firm has developed a recognized practice in the area of complex commercial litigation, including major class actions and is widely regarded as the preeminent firm in Arizona representing plaintiffs in class action proceedings. Over the last twenty years, the firm has successfully handled more than 100 class action lawsuits. We have represented consumers and victims in a wide range of class action proceedings, including actions alleging antitrust claims, securities fraud, civil rights claims and consumer fraud.

Our antitrust practice includes the prosecution of class claims on behalf of direct purchasers of products as well as indirect purchaser claims. These antitrust cases include, among others, class actions against Microsoft, MasterCard, Apple Computer and sellers of products such as polyester and rubber chemicals, waste management services, financial products and other industries. In addition to our class action practice, the firm also has represented plaintiffs in individual litigation asserting antitrust claims, including Culligan International.

Bonnett, Fairbourn, Friedman & Balint has taken a leading role in numerous important actions on behalf of consumers and investors, and we have been responsible for many outstanding results that have yielded dozens of multi-million dollar recoveries for class members in Arizona and throughout the United States.

Bonnett, Fairbourn, Friedman & Balint, P.C.
2325 E. Camelback Road, Suite 300
Phoenix, Arizona 85016
Phone: (602) 274-1100
Toll Free Number: (800) 847-9094
Facsimile: (602) 274-1199

PRACTICE AREAS

CLASS ACTION

Bonnett, Fairbourn, Friedman & Balint represents consumers and investors in major class action cases in federal and state courts throughout the United States. Under the direction of Andrew S. Friedman, the firm's class action section represents plaintiff classes in the following areas:

Securities Fraud: Protects institutional shareholders and individual investors from corporate fraud and mismanagement.

Consumer Protection: Protects consumers from defective products and fraudulent marketing practices.

Antitrust: Protects individuals and businesses from price fixing, unfair business practices and other anticompetitive conduct.

Civil Rights and Employment: Protects employees and consumers against unfair practices and racial, age, gender, and other forms of discrimination.

Insurance and Health Care: Represents victims of fraud and unfair sales practices by life insurance companies and HMOs.

Tobacco: Seeks redress for fraudulent marketing of "Light" cigarettes as a less toxic version of "Full Flavor" varieties.

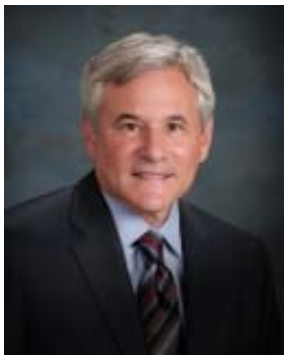
False Claims and Whistleblowers: Provides for awards to individuals who uncover false claims for payment submitted to the federal government.

SECURITIES

Bonnett, Fairbourn, Friedman & Balint has extensive experience in plaintiffs' class action securities cases in and out of the State of Arizona. Its attorneys have recovered substantial verdicts and settlements in various high-profile cases representing bondholders who have suffered significant losses due to the criminal activities of individuals in the securities and banking industries, including victimized investors in the Lincoln Savings scandal.

APPELLATE LITIGATION

Bonnett, Fairbourn, Friedman & Balint has extensive appellate experience at all levels of the state and federal court systems. Attorneys from the firm have appeared before the Arizona Court of Appeals, the Arizona Supreme Court, and numerous U.S. Circuit Courts. Decisions to appeal a matter are not made lightly by the firm; we carefully analyze the likelihood of a positive result for the client against the potential cost of an unfavorable outcome. Although we draw on the clerking and practical experience of many of our attorneys in making this analysis, a fully informed client is always an integral part of this process.



ANDREW S. FRIEDMAN heads the firm's class action, securities fraud, and consumer fraud practice groups. Mr. Friedman is admitted to the State Bar of Arizona and is admitted to practice before the U.S. District Court for the District of Arizona, U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court.

Mr. Friedman's practice is devoted primarily to litigation of major class action cases in federal and state courts in Arizona and throughout the United States. He has represented plaintiff classes in major consumer, securities fraud, antitrust, civil rights and insurance sales practices cases and other complex commercial litigation.

Securities Fraud

Mr. Friedman and other members of the firm served as Arizona counsel for the plaintiff class of investors in *In re American Continental Corp./Lincoln Savings and Loan Sec. Litig*., MDL 834 (D. Ariz.). Mr. Friedman was one of the team of lawyers who represented the class of investors who purchased debentures and/or stock in American Continental Corp., the parent company of the now-infamous Lincoln Savings & Loan. The suit charged Charles Keating, Jr., other corporate insiders, three major accounting firms, law firms and others with racketeering and violations of the securities laws. Plaintiffs' counsel actively participated in bankruptcy proceedings, multi-district litigation and, ultimately, a jury trial in Tucson, Arizona. Plaintiffs successfully recovered $240 million of the $288 million in losses sustained by the investors. After trial, the jury rendered verdicts exceeding $1 billion against Keating and other defendants.

Mr. Friedman also served, along with other members of the firm, on the court-appointed Executive Committee in the *Prudential Limited Partnerships Multi-District Litigation*, representing investors in limited partnerships sponsored by Prudential Securities. This action, which alleged racketeering and securities fraud claims on behalf of a nationwide class, resulted in a settlement providing more than $125 million in benefits to defrauded investors.

Mr. Friedman has served as plaintiffs' counsel in many other securities fraud class actions, including the following major cases: *Persky v. Pinnacle West Corp., et al.* (securities fraud class action - $35 million settlement); *Culligan International Company v. United Catalysts, Inc.* (Antitrust Action); *Sitgraves, et al. v. Allied Signal, Inc.*; *Stein v. Residential Resources, et al.* (Securities Fraud Class Action); *Gould v. Pinnacle West Corp., et al.*; *Shields v. Del Webb Corp., et al.* (Securities Fraud Class and Derivative Suit); *Hoexter v. Valley National Bank, et al.* (Securities Fraud Class Action); *Friedman, et al. v. Emerald Mortgage Investment Corporation, et al.* (Securities Fraud Class Action); *Marks, et al. v. Circle K* (Securities Fraud Class Action); *Krause v. Sierra Tucson, et al.* (Securities Fraud Class Action); *Braunstein, et al. v. Tucson Electric, et al.* (Derivative Suit); *Krause v. Sierra Pacific, et al.* (Securities Fraud Class Action); *Blinn v. Bech, et al.* (Securities Fraud Class Action); *Voss v. Cobra Industries, et al.* (Securities Fraud Class Action); *Hollywood Park Securities Litigation* (Securities Fraud Class Action); *In re America West Sec. Fraud Litig.* (Securities Fraud Class Action); *Orthologic Securities Fraud Litig.* (Securities Fraud Litigation); and *In re Vitamins Antitrust Litigation* (Antitrust Class Action).

Mr. Friedman also served as lead counsel in a number of class action cases seeking relief on behalf of investors victimized by fraudulent investment schemes, brought against professional defendants who allegedly substantially assisted in the fraud. Mr. Friedman served as co-lead counsel for investors in *Facciola, et al. v. Greenberg Traurig LLP, et al.,* a class action asserting claims against law firms and an auditor for allegedly aiding and abetting a Ponzi scheme leading to the collapse of Mortgages, Ltd.

After class certification was granted and at the conclusion of discovery, Plaintiffs secured settlements with the defendants totaling $89 million. At the conclusion of the case, the Hon. Frederick J. Martone observed:

> Class counsel were retained on a purely contingent basis in a complex case fraught with uncertainty. Counsel advanced litigation costs in excess of $1.5 million in order to prosecute this action, shouldering the risk of non-payment. Absent class counsels' willingness to advance these litigation costs, there likely would have been no common fund. Finally, counsel have demonstrated outstanding expertise, diligence, and professionalism at every stage of this litigation.

Mr. Friedman also served as lead counsel in *Gordon Noble, et al. v. Greenberg Traurig LLP, et al.,* a class action in the California Superior Court asserting claims on behalf of investors against law firms, auditors and a lender for their involvement in an alleged Ponzi scheme orchestrated by a hard money lender. After several years of hotly contested litigation, plaintiffs obtained settlements for the investor class members totaling $83 million.

Mr. Friedman and other members of the firm served as class counsel in *In re Apollo Group, Inc. Securities Litig.*, an open market securities fraud case seeking redress for allegedly false statements made by the Apollo Group, Inc. in publicly filed registration statements. After trial, the jury returned a verdict of $275 million for the Apollo shareholders, one of the largest jury verdicts ever obtained in a securities fraud case prosecuted through trial. At the conclusion of the trial, the presiding judge commented:

> [trial counsel] brought to this courtroom just extraordinary talent and preparation … [F]or the professionalism and the civility that you – and the integrity that you have all demonstrated and exuded throughout the handling of this case, it has just, I think, been very, very refreshing and rewarding to see that…[W]hat I have seen has just been truly exemplary.

Deceptive Marketing of Insurance Products

Mr. Friedman served as co-lead counsel for the certified nationwide plaintiff classes in *In re Conseco Life Insurance Company Cost of Ins. Litig.*, MDL 1610 (C.D. Cal.). The suit charged that Conseco breached the terms of life insurance policies owned by over 90,000 class members. After nearly two years of litigation against an entrenched adversary, the class recovered over $400 million in damages.

Mr. Friedman and the firm were key members of a team of lawyers that brought landmark cases against major life insurance companies challenging the deceptive manner in which life insurance products were marketed to consumers during the 1980's. The first of these cases, against New York Life Insurance Co., arose from events uncovered in Arizona and resulted in a ground-breaking settlement providing benefits to class members exceeding $250 million. This settlement has been praised by regulators and commentators as an innovative solution to sales practice abuses. Subsequently, Mr. Friedman and co-counsel for plaintiffs prosecuted class actions and secured settlements against a host of other major insurance companies, including settlements with *Prudential Life Insurance Company* (exceeding $2 billion), *Metropolitan Life Insurance Company* (exceeding $1 billion), *Manulife* (exceeding $500 million) and more than 20 other companies. Mr. Friedman was instrumental in the prosecution of these actions, was a member of the settlement negotiating team and briefed and argued class certification issues at the trial level and in the appellate courts.

Mr. Friedman served as co-lead counsel in a series of class actions against insurance companies challenging the sale of deferred annuities to senior citizens. These cases alleged RICO claims and other theories to obtain redress for allegedly false and misleading representations inducing elderly

purchasers to invest their life savings in illiquid and poorly performing annuity products. Mr. Friedman and co-counsel for plaintiffs prosecuted class actions and secured settlements benefitting thousands of elderly consumers, including settlements with *Allianz Life Insurance Company of North America* ($251 million), *American Equity Investment Life Insurance Company* ($129 million), *Midland National Life Insurance Company* ($80 million), as well as settlements with *Fidelity and Guaranty Life Insurance Company, National Western Life Insurance Company, Conseco Insurance Company; Jackson National Life Insurance Company,* and *American International Group, Inc.*

Universal Life Cost of Insurance Increases

Mr. Friedman served as co-lead counsel for the Plaintiff in *Yue v. Conseco Life Ins. Co.*, CV08-1506 and *Yue v. Conseco Life Ins. Co.,* CV11-9506, class actions challenging the legality of cost of insurance ("COI") increases imposed on universal life policies. These cases alleged that Conseco Insurance Company unlawfully increased the COI charges in violation of the provisions of the universal life policies allowing such increases based only on worsening mortality experience. The actions alleged that mortality has improved, not worsened over the years (because people are living longer). Conseco withdrew the COI increases during the pendency of the first case but then sought to impose a new increase shortly thereafter. Accordingly, the Plaintiff initiated a new action against Conseco challenging the new COI increase. The Court certified the proposed class of policyholders and issued an injunction halting the challenged increase. Plaintiff thereafter moved for summary judgment against Conseco. A settlement was ultimately reached which required Conseco to roll back the challenged COI increases, thereby providing settlement benefits to class members with a total projected value of $65 million.

Mr. Friedman served as co-lead counsel for the Plaintiffs in *Feller, et al. v. Transamerica Life Insurance Company*, a class action challenging increases to the monthly deduction rates ("MDR") imposed by Transamerica on various universal life policies. Plaintiffs alleged that the MDR increases implemented by Transamerica breached a uniform, express contractual term in the standardized Policies prohibiting MDR increases that recoup past losses. The district court certified a nationwide class of Policyholders and a California state law class of Policyholders. A settlement was ultimately reached which included a monetary payment to class members and a five-year moratorium on any future MDR increases. The monetary relief provided under the settlement totaled over $100 million.

Captive Reinsurance Transactions

Mr. Friedman represented plaintiffs in cases asserting that life insurance companies have offloaded insurance liabilities to affiliated captive reinsurance companies to weaken policy reserves and falsely inflate reported surplus. Plaintiffs alleged that the defendant insurance companies used these fraudulent practices to misrepresent their true financial condition to induce consumers to purchase annuities and other insurance products. These cases, which asserted claims under the federal anti-racketeering statutes, included *Ludwick v. Harbinger Group, et al.* and *Hudson v. Athene Annuity and Life Company, et al.*

Health Insurance

Mr. Friedman served as co-lead counsel representing health care providers in *In re Managed Care Litigation*, an MDL proceeding against major managed care companies seeking recovery for allegedly improper claims payment practices. Mr. Friedman represented the American Psychological Association, the American Podiatric Medical Society, the Florida Chiropractic Association and numerous individual providers in cases against Humana, Inc., CIGNA, numerous Blue Cross and Blue

Shield companies and other managed care companies. Mr. Friedman and his co-counsel secured settlements against CIGNA ($72 million) and Humana, Inc. ($20 million) in these MDL proceedings.

Mr. Friedman also is representing health care providers in proceedings against several major health care companies arising from the use of the Ingenix database to improperly reduce payments to patients, physicians and other providers. Defendants in these class action proceedings include Aetna, CIGNA and WellPoint, Inc. Mr. Friedman represents the New Jersey Psychological Association, the American Podiatric Medical Association, the California Chiropractic Association and the California Psychological Association, among other plaintiffs, in these actions.

Mr. Friedman also represented plaintiffs in class action proceedings in California against Blue Shield of California Life & Health Insurance Company for engaging in postclaims underwriting. Postclaims underwriting is a practice by which insurance companies fail to conduct underwriting before accepting insurance applications but seek to find grounds to rescind health insurance policies when a claim for payment is submitted by the patient or doctor.

Mr. Friedman currently represents plaintiffs in a class action against Magellan and Blue Shield of California for violation of ERISA arising out of defendants' denial or reduction in hours of Applied Behavior Analysis ("ABA") for the treatment of Autistic Spectrum Disorder ("ASD"). Plaintiffs allege that Defendants breached their fiduciary duties by adopting and utilizing medical necessity criteria and claims determination guidelines that are far more restrictive than those that are generally accepted medical practice for the treatment of ASD by the mental health community and the prevailing well-documented scientific research.

Civil Rights

Mr. Friedman and the firm, along with several other law firms, have represented African-American policy holders in class action proceedings against life insurance companies seeking relief under the Federal Civil Rights Act for racial discrimination in the sale and administration of life insurance policies. For many decades, life insurance companies routinely charged higher premiums to non-Caucasians for inferior life insurance policies. The first such action, against *American General Life & Accident Company*, resulted in a $250 million settlement providing benefits that included cash refunds, increased death benefits and reduced future premiums. Mr. Friedman and the firm also represent plaintiffs in similar race discrimination class actions against other life insurance companies, including *Metropolitan Life*, *Liberty National*, *American National*, *Monumental Life*, *Western & Southern Life* and *Jefferson-Pilot Life Insurance Company*.

Mr. Friedman served as lead or co-lead counsel in many other actions seeking to hold financial institutions responsible for racial discrimination against minorities. He served as co-lead counsel on behalf of proposed classes of African-American and Latino borrowers asserting claims against mortgage lenders for racial discrimination in violation of the Equal Credit Opportunity Act and the Fair Housing Act. The bank defendants in these actions, among others, include: *Countrywide Financial Corporation; Wells Fargo Bank, N.A.; GreenPoint Mortgage Funding, Inc.; GE Money Bank; First Franklin Financial Corp.; JP Morgan Chase & Chase Bank, U.S.A., N.A.; H&R Block, Inc.; IndyMac Bank, F.S.B.; HSBC Finance Co.,* and *Option One Mortgage Co.* Mr. Friedman also has represented Plaintiffs in cases challenging the use of credit scoring by insurance companies and lenders in a manner that adversely impacts minority consumers.

Data Breach Litigation

Mr. Friedman and other lawyers of the firm have represented consumers and health care patients in cases arising from cyber-attacks against companies resulting in the theft of personal information, including credit card and personal health information.

Mr. Friedman represented the Chapter 7 trustee for CardSystems Solutions, Inc. in two separate actions in the Pima County Superior Court. CardSystems was a major credit and debit card processor that collapsed into bankruptcy in 2006. CardSystems failed to properly encrypt credit card data and was the victim of a hacking intrusion resulting in the disclosure of confidential information and identity theft. The CardSystems security breach, which was the largest reported breach of personal data (exposing as many as 40 million credit cards), sparked a national scandal and hearings before the U.S. Senate. After obtaining a judgment against former officers of CardSystems in the amount of $7.5 million, Mr. Friedman represented the bankruptcy trustee in an action against the insurance company and ultimately secured a payment of $1.25 million.

Professional Associations

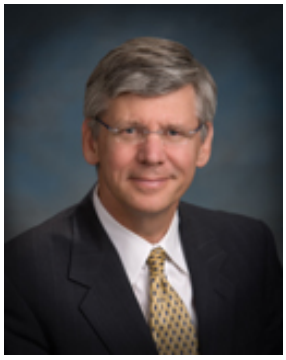
Mr. Friedman has lectured at numerous continuing legal education programs, including panel discussions and presentations on the Private Securities Litigation Reform Act (1996 Federal Bar Convention), prosecution of nationwide class actions in state courts (1996 ABA Annual Convention), litigation of life insurance market conduct cases (1997, 1999 and 2000 PLI conferences), class action best practices (2011 Arizona State Bar), consumer rights litigation (2008), the Arizona Securities Act (2013 Arizona State Bar), mediation of complex cases (2016 American Bar Association) and other litigation programs sponsored by the Practicing Law Institute, ALI-ABA, American Bar Association, National Academy of Elder Law Attorneys .

Mr. Friedman testified before the U.S. Congress in connection with proposed legislation to limit the rights of consumers in class action cases. He also has testified before the Arizona Legislature in connection with legislation on the Arizona Anti-Racketeering Act, the Arizona Securities Fraud Act and proposed legislation to limit the ability of consumers to obtain relief through class actions.

Mr. Friedman received his Bachelor of Arts Degree from the University of Rochester in 1975 (high distinction) and his Law Degree from Duke University School of Law in 1978 (Order of the Coif, high distinction). He serves as a Board member of Public Justice, a public interest organization and is also a member of the American Association of Justice and Consumer Attorneys of California. Mr. Friedman was a finalist for the Public Justice Trial Lawyer of the Year in 2008 and a finalist for the CAOC Consumer Attorney of the Year in 2009.

Mr. Friedman served as a Board member of the Public Justice Foundation and currently serves as a Board member of Public Citizen. Mr. Friedman has performed *pro bono* services on behalf of non-profit organizations, including the Jewish Children and Family Services and private litigants.

Mr. Friedman is a founding member of Bonnett, Fairbourn, Friedman & Balint.



FRANCIS J. BALINT, JR.'s practice focuses on consumer class action litigation, qui tam actions under the federal False Claims Act, insurance coverage and defense matters, and appellate work. He has represented clients in class litigation involving federal and state securities laws, deceptive insurance sales practices, and other consumer claims.

In particular, Mr. Balint served as counsel for the relator in *Todarello v. Beverly Enterprises*, (D. Ariz. & N.D. Cal.) a qui tam action which led to a recovery by the United States Government of $170 million. Successful appellate decisions include: *Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant*, Inc., 159 F.3d 358 (9th Cir. [Cal.] Oct. 14, 1998); *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. [Ariz.], Apr. 24, 1995); *Ranch 57 v. City of Yuma*, 152 Ariz. 218, 731 P.2d 113 (Ariz. App. Div. 1, Sept. 2, 1986).

Mr. Balint served as co-counsel for the Lead Plaintiffs and the investor class in the litigation arising out of the collapse of the Baptist Foundation of Arizona, the largest charitable institution fraud case in United States history. The recovery achieved for investors, after four years of highly adversarial litigation, exceeded $250 million.

Mr. Balint also served as co-counsel for the Lead Plaintiff, the Policemen's Annuity and Benefit Fund of Chicago, and a class of shareholders seeking relief under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. *In re Apollo Group, Inc.*, CV-04-2147-PHX-JAT (D. Ariz.) was one of only six such cases to have been taken to trial since the passage of the PSLRA. Lead Plaintiff successfully obtained a verdict of approximately $275 million for Apollo shareholders.

Other class action cases which Mr. Balint has litigated include *Cheatham v. ADT LLC* (Consumer Protection); *Harshbarger v. The Penn Mutual Life Insurance Company* (Policyholder Protection); *Bacchi v. Massachusetts Mutual Life Insurance Company* (Policyholder Protection); *The Apple iPod iTunes Anti-Trust Litigation* (Antitrust); *Facciola v. Greenberg Traurig* (Securities Fraud); *In Re: Prudential Insurance Company of America SGLI/VGLI Contract Litigation* (Policyholder Protection); *Yue v. Conseco Life Insurance Company* (Policyholder Protection); *Orthologic Securities Fraud Litigation*. (Securities Fraud); *In re Skymall* (Securities Fraud); *Rogers v. American Family* (Policyholder Protection).

Mr. Balint is a former President of the Arizona Association of Defense Counsel (1999-2000), a former member of its board of directors and former chairman of its Amicus Committee.

Mr. Balint has also represented individual clients in numerous disputes successfully resolved without the need for litigation, both as potential plaintiffs and potential defendants.

Mr. Balint received his Bachelor of Arts Degree with high distinction from the University of Virginia in 1979. He received his law degree in 1982 from the University of Virginia. Mr. Balint was admitted to the Bar in the Commonwealth of Virginia in 1982, the District of Columbia in 1982, the State of Arizona in 1983, and the Commonwealth of Massachusetts in 2010; he is admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Fourth, Fifth, Seventh, Ninth and Tenth Circuits, and the U.S. District Court for the District of Arizona, the District of Colorado, the Eastern District of Virginia, the Central District of Illinois and the District of Massachusetts.

Mr. Balint was a sole practitioner in Virginia for a short period of time before becoming associated with Evans, Kitchel & Jenkes, P.C., a large Phoenix law firm. In 1984, Mr. Balint became a founding member of Bonnett, Fairbourn, Friedman & Balint, P.C.

BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.

ATTORNEYS

WILLIAM G. FAIRBOURN, born Salt Lake City, Utah, April 21, 1947; admitted to bar, 1973, Arizona; Arizona Supreme Court; U.S. District Court, District of Arizona; United States Court of Appeals, Ninth Circuit. Education: University of Utah (B.S., 1970); Arizona State University (J.D., 1973). Member: Maricopa County Bar Association (Member, Board of Directors, 1984-1986); Arizona Association of Defense Counsel (Member, Board of Directors, 1981-1989; President, 1986); American Board of Trial Advocates (President Phoenix Chapter, 1994); Fellow, American College of Trial Lawyers.

ANDREW S. FRIEDMAN, born Plainfield, New Jersey, September 26, 1953; admitted to bar, 1978, Arizona; U.S. Court of Appeals, Ninth Circuit; U.S. District Court, District of Arizona; U.S. Supreme Court. Education: University of Rochester (B.A., with high distinction, 1975); Duke University (J.D., with high distinction, 1978). Order of the Coif. Member: State Bar Committee on Civil Practice and Procedure (1980-1984); State Bar Committee on Bench-Bar Relations (1991); State Bar Bankruptcy Section; National Association of Commercial Trial Attorneys (1991-present); American Bar Association, Trial Practice Committee, Subcommittees and Class and Derivative Actions.

FRANCIS J. BALINT, JR., born Pittsburgh, Pennsylvania, January 9, 1957; admitted to bar, 1982, Virginia and District of Columbia; 1983, Arizona; U.S. District Court, Districts of Arizona and Virginia; U.S. Court of Appeals, Fourth and Ninth Circuits; U.S. Supreme Court. Education: University of Virginia (B.A., with high distinction, 1979; J.D., 1982). Former President: Arizona Association of Defense Counsel (Member, Board of Directors 1988 - 2001).

VAN BUNCH, born Chattanooga, Tennessee, April 28, 1957; admitted to bar, 1984, Arizona; 2007, West Virginia; U.S. District Court, District of Arizona. Education: Vanderbilt University (B.A., 1979); University of Tennessee at Knoxville (J.D., with high honors, 1984). Order of the Coif.

MICHAEL N. WIDENER, born Mt. Ranier, Maryland, June 10, 1950; admitted to bar, 1983, Arizona and Tennessee; United States Supreme Court; U.S. Court of Appeals, Ninth Circuit; U.S. District Court, District of Arizona. Education: University of Virginia (B.A., with distinction, 1972); University of Illinois (M.S., 1974); University of Arizona (J.D., 1982). Articles Editor, *Arizona Law Review*, 1980-1982. Law Clerk to Hon. James Duke Cameron, Supreme Court of Arizona, 1982-1983. (Certified Specialist, Real Estate Law, Arizona Board of Legal Specialization). Adjunct Professor (Land Use and Water Law), Arizona Summit Law School; Zoning Adjustment Hearing Officer, City of Phoenix.

ROBERT J. SPURLOCK, born Janesville, Wisconsin, November 23, 1954; admitted to Arizona bar, 1984; U.S. District Court, District of Arizona. Education: University of Wisconsin-Madison (B.S., with honors, 1976), Arizona State University (J.D., 1984). Law Clerk to the Honorable D.L. Greer, Arizona Court of Appeals, 1984-1985; Member: Phoenix Association of Defense Counsel; Defense Research Institute; Arizona Association of Defense Counsel; American Bankruptcy Institute. Adjunct Professor, Sandra Day O'Connor School of Law, Arizona State University.

C. KEVIN DYKSTRA, born Phoenix, Arizona, March 30, 1964; admitted to Arizona bar, 1989; U.S. Court of Appeals, Ninth Circuit; U.S. District Court, District of Arizona. Education: Northern Arizona University (B.S., 1986); California Western School of Law (J.D., 1989). Director, Arizona Association of Defense Counsel.

ELAINE A. RYAN, born Emmetsburg, Iowa, June 15, 1963; admitted to Arizona bar, 1989; Texas bar, 2008; Kansas bar, 2010; Missouri bar, 2010; Washington bar, 2010; Colorado bar, 2011; Utah bar, 2011; Idaho bar, 2011; U.S. District Court, District of Arizona; U.S. District Court, District of Eastern Michigan; U.S. District Court, District of Idaho; U.S. District Court, Western District of Wisconsin; U.S. District Court, Northern District of Illinois. Education: University of Iowa (B.S., with distinction, 1986); Duke University (J.D., 1989).

ANDREW Q. EVERROAD, born Phoenix, Arizona, August 8, 1969; admitted to Arizona bar, 1995; U.S. District Court, District of Arizona. Education: University of Arizona (B.A., 1992); University of London – Bloomsburg, 1990; Arizona State University (J.D., 1995). Law Clerk to the Honorable Thomas C. Kleinschmidt, Arizona Court of Appeals, 1995-1996.

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