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

ANTHONY HAMOND MURPHY, BLAIR DOUGLASS, Plaintiffs vs. CHARLES TYRWHITT, INC., Defendant	)	Case No. 1:20-cv-00056 (Erie) SUSAN PARADISE BAXTER UNITED STATES DISTRICT JUDGE RICHARD A. LANZILLO UNITED STATES MAGISTRATE JUDGE REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION TO CERTIFY CLASS FOR SETTLEMENT PURPOSES AND TO APPROVE PROPOSED CLASS ACTION SETTLEMENT ECF NO. 19

I. Recommendation

In their Amended Complaint, Anthony Hammond Murphy and Blair Douglass, individually and on behalf of similarly situated individuals, assert putative class action claims against Defendant Charles Tyrwhitt, Inc. (Tyrwhitt), a men's clothing company. *See* ECF No. 18. Plaintiffs are visually impaired and use screen reader auxiliary aids to access digital information. They allege that Tyrwhitt failed to make its online store accessible to visually impaired persons through its website and other digital properties. *Id.* This, the Plaintiffs claim, violates the effective communications and equal access requirements of Title III of the American with Disabilities Act (ADA), 42 U.S.C. § 12181-12189. *Id.* This case was referred to the undersigned for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1).

Presently before the Court is Plaintiffs' unopposed Motion to Certify Class for Settlement Purposes and for Preliminary Approval of Class Action Settlement pursuant to Fed. R. Civ. P. Rule

23(e). ECF No. 19. For the reasons discussed below, it is respectfully recommended that the Court GRANT the Plaintiffs' motion.

II. Procedural Background

Plaintiff Anthony Hammond Murphy, acting individually, commenced this action on March 18, 2020. ECF No. 1. His Complaint alleged that Tyrwhitt did not have adequate corporate policies and practices reasonably calculated to cause the website for its online store, https://www.ctshirts.com/us (Website), to be fully accessible to blind or visually disabled individuals, in violation of the ADA. *Id.* On July 23, 2020, the current Plaintiffs filed an Amended Complaint asserting claims on their own behalf and on behalf of a putative class of similarly situated, visually impaired individuals who have attempted to patronize Tyrwhitt's online store using the Website, and who intend to do so again in the future. ECF No. 18.

During the four months between the filing of the original Complaint and the Amended Complaint, the parties engaged in settlement discussions. Three days after the filing of the Amended Complaint, the Plaintiffs filed their Motion to Certify Class and for Preliminary Approval of Class Action Settlement. ECF No. 19. The undersigned conducted a hearing on the motion on November 23, 2020. ECF No. 29. This Report and Recommendation separately addresses each request for relief presented by Plaintiffs' motion.

III. Motion to Certify Class for Settlement Purposes

Plaintiffs seek certification of a nationwide class of all blind and visually impaired individuals who use screen readers and other auxiliary aids to navigate Tyrwhitt's webpage and online content but have been deterred from doing so. Motions to certify a class are governed by Rule 23(a) and (b) of the Federal Rules of Civil Procedure. Rule 23(a) sets forth four threshold requirements for class certification, each of which must be met: (1) the class is so numerous that joinder of class members is impracticable (numerosity); (2) there are questions of law or fact common to the class

(commonality); (3) the claims or defenses of the class representatives are typical of those of the class (typicality); and (4) the class representatives will fairly and adequately protect the interests of the class (adequacy). *See, e.g.*, *Rittle v. Premium Receivables, LLC*, 2018 WL 6599114, at *2 (M.D. Pa. Oct. 15, 2018), *report and recommendation adopted*, 2018 WL 6178175 (M.D. Pa. Nov. 27, 2018).

To certify a class, a court must also find that one of the following requirements, set forth in Rule 23(b), are met: (1) that prosecution of separate actions risks either inconsistent adjudications, which would establish incompatible standards of conduct for the defendant, or would as a practical matter be dispositive of the interests of others; (2) that defendants have acted or refused to act on grounds generally applicable to the class; or (3) that there are common questions of law or fact that predominate over any individual class member's questions and that a class action is superior to other methods of adjudication.

The United States Supreme Court has made it clear that plaintiffs must not merely plead the existence of the Rule 23 requirements but prove them. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). As a result, district courts must perform a "rigorous" analysis to determine whether the Rule 23(a) prerequisites are satisfied. *Id.* at 351 (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

The Plaintiffs seek the certification of a class of

> All blind or visually disabled individuals who use screen reader auxiliary aids to navigate content and who have accessed, attempted to access, or been deterred from attempting to access, or who will access, attempt to access, or be deterred from accessing the Website [https://www.ctshirts.com/us] from the United States.

ECF No. 19-1, ¶ 2.34. With this proposed class in mind, the Court will first address each of the Rule 23(a) requirements.

A. Numerosity

Numerosity requires that "the class ... be 'so numerous that joinder of all members is impracticable.'" *Id.* (quoting Fed. R. Civ. P. 23(a)(1)). Courts will presume that numerosity is met if "the potential number of plaintiffs exceeds 40." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Here, the record establishes that the proposed class significantly exceeds 40 individuals. The Plaintiffs point out that approximately 8.1 million people aged 15 or older in the United States (3.3 percent) have difficulty seeing, including 2.0 million people who are blind or unable to see. ECF No. 20, p. 23 (citation omitted). Research also reveals that more than ninety percent of adults in the United States use the internet. Id. (citation omitted). Based upon these statistics, the Plaintiffs extrapolate that approximately 7.3 million adults who have difficulty seeing and 1.8 million adults who are blind can be expected to use the internet. They further assert that any number of these individuals may access Tyrwhitt's online store. Id., p. 24. Based on this record, the Plaintiffs have satisfied the numerosity requirement for class certification.

B. Commonality

"A putative class satisfies Rule 23(a)'s commonality requirement if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Rodriguez v. Nat'l City Bank,* 726 F.3d 372, 382 (3d Cir. 2013) (internal quotation marks omitted). The Third Circuit has found this requirement is "easily met" because a single issue of fact or law will suffice. *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). In fact, "class members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice." *Id.* (citing *Hassine*, 846 F.2d at 177–78). "Moreover, because they do not also involve an individualized inquiry for the determination of damage awards, injunctive actions 'by their very nature often present common questions satisfying Rule 23(a)(2).'" *Id.* at 57 (quoting 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane,

Federal Practice and Procedure Civil § 1763, at 201 (2d ed. 1986)). *See also Thakker v. Doll*, 2020 WL 5737507, at *4 (M.D. Pa. Sept. 24, 2020).

The Plaintiffs identify two principal common questions: first, "whether they have been, are being and/or will be denied full and equal access to the Defendant's website without proper accommodation; and second, "what actions are required under the law to ensure Defendant's online store is accessible to the Plaintiffs" and the purported class members. *Id.*, p. 25. Because each question "is central" and can be resolved across the class "in one stroke," the Plaintiffs have satisfied the commonality requirement. *Norman v. Trans Union, LLC*, 2020 WL 4735538, at *30 (E.D. Pa. Aug. 14, 2020) (quoting *Dukes*, 564 U.S. at 350, 131 S. Ct. 2541).

C. Typicality

Rule 23(a) also requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *Balestra v. Cloud With Me Ltd.*, 2020 WL 4370392, at *3 (W.D. Pa. July 2, 2020), *report and recommendation adopted*, 2020 WL 4368153 (W.D. Pa. July 30, 2020) (citing *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016) (quotation omitted)). Here, the Plaintiffs allege that the Defendant violated their rights and those of each class member under the ADA by failing to make its online retail site accessible to persons with visual impairments. ECF No. 20, p. 25. The class description and the nature of the website accessibility claims support a finding that the representative Plaintiffs' claims are typical of those of the class. *See, e.g.*, *Balestra,* 2020 WL 4370392, at *3. Thus, the typicality requirement has been satisfied.

D. Adequacy

Finally, Rule 23 requires that the representative parties fairly and adequately protect the interests of the entire class. Fed. R. Civ. P. 23(a)(4). This is a two-pronged inquiry: (1) whether the representatives' interests are antagonistic to those of the class; and (2) whether the attorneys for the class representatives are capable of and qualified to represent the entire class. *See Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006); *Baby Neal,* 43 F.3d at 55. The representative Plaintiffs assert that they and the putative class members share entirely common interests in this case and that they have a strong motivation to establish liability or achieve a settlement that benefits the class. The Court has identified no conflicts between the interests of the representative Plaintiffs and those of the putative class members or any basis to believe that the representative Plaintiffs' interests are in any way antagonistic to those of the class. Indeed, their interests appear to be entirely aligned.

As to the adequacy of representation by proposed class counsel, the Court has reviewed the professional biographies of and other record materials concerning Attorneys Kevin W. Tucker, Kevin Abramowicz, and Lawrence H. Fisher of the East End Trial Group of Pittsburgh, Pennsylvania, whom Plaintiffs have retained to protect the interests of the proposed class. Each of these attorneys has relevant experience and has made numerous contributions to several class actions throughout their careers. *See* ECF No. 19-2. Their diligent and effective representation in this action to date and during the parties' extensive settlement negotiations further confirm that they can effectively represent the class and are committed to doing so.

Based on the above, the Court finds that Anthony Hammond Murphy and Blair Douglas will fairly and adequately represent the class as representative Plaintiffs and that their proposed class counsel will fairly and adequately protect the interests of the class and provide capable legal representation. The adequacy requirement of Rule 23(a) is satisfied.

Now that the Court has found that the Rule 23(a) prerequisites are met, it must examine the requirements of Rule 23(b).

E. Rule 23(b)(2) Certification

Under Rule 23(b), if the putative class has satisfied all the elements under Rule 23(a), the class may be certified as a Rule 23(b)(2) class and/or a 23(b)(3) class. *See Slamon v. Carrizo (Marcellus) LLC*, 2020 WL 2525961, at *14 (M.D. Pa. May 18, 2020). Here, Plaintiffs are proceeding under Rule 23(b)(2). To certify a class under Rule 23(b)(2), the party opposing the class must have "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Final injunctive relief or corresponding declaratory relief must be "appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against a defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. *See Dukes*, 564 U.S. at 360-361 (internal citations and quotation marks omitted)(emphasis in original).

As relief, Plaintiffs request a mandatory injunction to require Tyrwhitt to (1) modify its website and other digital properties to remove barriers they allegedly present to access by blind and visually impaired visitors to Tyrwhitt's online store, and (2) revise its policies and practices concerning such access. ECF No. 18, ¶ 65. They also seek a declaratory judgment concerning Tyrwhitt's failure to comply with the requirements of the ADA regarding accessibility to its digital properties. This requested relief invokes a single, common remedy for all class members: equal and

full access to Tyrwhitt's online store. That is, Plaintiffs' claim for injunctive relief satisfies Rule 23(b)(2) because Tyrwhitt's website affects all members of the class, and thus the class as a whole shares the same interest in obtaining the injunctive relief provided by the settlement — prospective changes to Tyrwhitt's website. *See, e.g.*, *Foster v. City of Pittsburgh*, 2015 WL 11112431, at *3 (W.D. Pa. Nov. 18, 2015).

The Plaintiffs also request nominal damages and payment of costs and attorneys' fees, including costs associated with monitoring Tyrwhitt's compliance. These ancillary remedies do not defeat certification under Rule 23(b)(2). *See, e.g.*, *George v. Baltimore City Public Sch.*, 117 F.R.D. 368, 372 (D. Md. 1987) (holding that a request for ancillary money damages in a *Hudson* action does not preclude class certification under Rule 23(b)(2)); *Hunter v. City of Philadelphia*, 1999 WL 181388, at *4 (E.D. Pa. Jan. 29, 1999). Certification of the proposed class under Rule 23(b)(2) is not precluded when the settlement provides for counsel fees and reimbursement of the costs of issuing the required notice to the putative class since the primary relief provided is injunctive and the challenged conduct of the defendants is such that injunctive relief would be appropriate. *See Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d at 251 (class action maintainable under Rule 23(b)(2) even though monetary relief is sought as well as injunctive relief). Therefore, the Court should find that, for purposes of the anticipated settlement, the proposed class can be properly certified under Rule 23(b)(2). *See Callahan v. Commonwealth Land Title Ins. Co.*, 1990 WL 168273, at *6 (E.D. Pa. Oct. 29, 1990).

In summary, the requirements of Rule 23(a) and Rule 23(b)(2) are satisfied and class certification is appropriate. Accordingly, the Plaintiffs' request for class certification should be granted.

IV. The Court Should Approve the Proposed Settlement

The Plaintiffs also move this Court for preliminary approval of their Proposed Settlement Agreement, a copy of which they have attached to their motion. *See* ECF No. 19-1. What follows is a brief summary of its material terms.

A. The Proposed Settlement

The Proposed Settlement Agreement is a comprehensive, 23-page document executed by "Named Plaintiffs, individually and on behalf of the Settlement Class" and representatives on behalf of Tyrwhitt. *Id.*, ¶ 1. The Proposed Settlement commits Tyrwhitt to ensuring "blind or visually disabled individuals full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations provided by and through its Digital Properties…" *Id.*, ¶ 4. This commitment includes ensuring that "the U.S. portion of the Website is Accessible" within thirty-six months of the Effective Date of the Settlement Agreement. *Id.*, ¶ 4.1. Tyrwhitt's "Digital Properties" are its "Website, New Websites, Mobile Apps," and "Subsequently Acquired Websites and Mobile Apps," as those terms are defined in the Settlement Agreement. *Id.*, ¶ 1.2. The parties have agreed that the criteria for determining Tyrwhitt's compliance with its accessibility commitments will be "the Web Content Accessibility Guidelines 2.1, including WAI-ARIA and/or BBC Mobile Accessibility Standards and Guidelines." *Id.*, ¶¶ 2.1, 2.38. During the hearing on the pending motion, counsel for the parties agreed that these Guidelines represent the "state of the art" or "gold standard" for website accessibility for the visually impaired.

In addition, the Proposed Settlement commits Tyrwhitt to several changes in policy, procedure and personnel to promote accessibility of its Digital Properties. These changes include (1) Tyrwhitt's appointment of an "Accessibility Coordinator," (2) the performance of an Accessibility Audit of its Website, (3) Tyrwhitt's adoption of an Accessibility Policy Statement, (4) Tyrwhitt's implementation of an Accessibility Strategy, (5) Tyrwhitt's providing of Accessibility

Training, and (6) Tyrwhitt's retention of an "Accessibility Consultant" to "assist Charles Tyrwhitt to conduct an Accessibility Audit of the Website; (b) advise Charles Tyrwhitt on how to make the Website Accessible; (c) verify that the Website is Accessible by the end of the Agreement Term; (d) ensure any New Websites and Mobile Apps, and any Subsequently Acquired Websites and Mobile Apps, are Accessible; and (e) ensure any Third Party Content that may be required to be Accessible is Accessible." *See id.*, ¶¶ 6-15. Each of Tyrwhitt's commitments is subject to specific time periods for compliance following the Effective Date of the Settlement Agreement. *Id.* Overall compliance is to occur within three years of the Effective Date of the Settlement Agreement. If compliance does not occur within this initial term, the Settlement Agreement provides for a term extension to four years and, if necessary, to five years to ensure compliance. *Id.*, ¶ 16. The Settlement Agreement also provides for monitoring of Tyrwhitt's compliance with its commitments, annual reporting, and dispute resolution procedures. *Id.*, ¶¶ 17, 20-21. The Settlement Agreement further provides for an "Incentive Award" in the amount of $1,000 to be paid to each of the Representative Plaintiffs and the payment of specified attorney's fees and costs to class counsel, subject to court approval. *Id.*, ¶¶ 19, 22-23.

In consideration of the foregoing commitments by Tyrwhitt, the Representative Plaintiffs and all Settlement Class Members will release Tyrwhitt from any and all claims for injunctive, declaratory and non-monetary relief based on the Accessibility of the Digital Properties and be enjoined from asserting any such claims. *Id.*, ¶¶ 2.23, 2.32, 29.

B. Notice

The Notice Plaintiffs propose to issue to potential class members accurately summarizes all material terms of the Settlement Agreement. *See* ECF No. 19-3. The Notice will be provided through a third-party administrator or equivalent vendor, who will provide written notice via multiple media, including a link at the top of Tyrwhitt's website home page. ECF No. 19-1, ¶25.

Screen-reading applications will recognize this link and alert the user to its information before proceeding to any other part of the website. *Id.* Any visually impaired individuals who wishes to purchase a Tyrwhitt product will be notified of the class settlement and a link will be provided, connecting them to further information, including the right to object. Tyrwhitt's social media platforms will also carry a screen reader recognizable link to the website summarizing the terms of the settlement. *Id.* Thus, the Settlement Agreement contemplates notice across each electronic means that Tyrwhitt utilizes. In addition, Tyrwhitt will request that the National Federation for the Blind and American Council of the Blind publish a link to the stipulated class action settlement notice in their respective electronic newsletters. *Id.*, ¶ 25.4.

C. Rule 23(e) Review

Rule 23(e) of the Federal Rules of Civil Procedure mandates court approval of a class action settlement:

> The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the Court's approval.

The Rule further requires a court to review the proposed settlement to ensure that the rights of the participating as well absent class members are not prejudiced or otherwise put in jeopardy by the settlement.[1] Fed. R. Civ. P. 23(e); *see also In re Asbestos School Litig.*, 1990 WL 18761 (E.D. Pa. Feb. 20, 1990); *Sherin v. Gould*, 679 F. Supp. 473, 475 (E.D. Pa.1987) (quoting *William v. First Nat'l Bank*, 216 U.S. 582, 595 (1910)). So while protecting rights of the class members is essential, it has also been recognized that any apprehension in settling should be tempered by the long-standing policy favoring such agreements. *Callahan v. Commonwealth Land Title Ins. Co.*, 1990 WL 168273, at *6 (E.D. Pa. Oct. 29, 1990) (citations omitted).

[1] Rule 23(e)(2) mandates a hearing on the request to approve the proposed settlement. Such a proceeding was conducted on November 23, 2020. *See* ECF No. 29.

D. The Court Should Apply a Presumption of Fairness to the Proposed Settlement

Courts initially apply a presumption of fairness in reviewing a class settlement when: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016), *as amended* (May 2, 2016) (citing *In re Cendant*, 264 F.3d at 232 n. 18)). This presumption applies even when, as here, "the settlement negotiations preceded the actual certification of the class ...." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). These requirements have been met here and the presumption of fairness should apply to the proposed settlement.

The Proposed Settlement resulted from arm's-length negotiations between experienced and capable counsel after reasonable investigation. The parties relate that their settlement negotiations commenced shortly after the filing of the initial Complaint and proceeded over a period of months thereafter. ECF No. 20, p. 32. The representative Plaintiffs and Tyrwhitt agreed to the proposed settlement with the assistance of counsel who possess significant class action and complex litigation experience. The parties do not anticipate objections to the settlement, and the Court tends to agree as it appears that the proposed settlement terms are at least as favorable to class members as they could have achieved had the case been prosecuted successfully through trial.

Given the many undisputed facts, this case did not require a protracted period of discovery. Instead, the parties' investigation prompted almost immediate discussions of settlement following the filing of the original Complaint. The parties' investigation included "multiple rounds of in-person reviews" regarding the accessibility of Tyrwhitt's online store before the filing of the initial Complaint. ECF No. 20, p. 33. Additional analysis of Tyrwhitt's website was conducted in May 2020, before East End Trial Group LLC was retained, and again in June and July of 2020, prior to the filing of the Amended Complaint. *Id.* Thus, although no formal discovery was conducted,

enough "informal discovery" occurred to satisfy this prong of the presumption analysis. *See, e.g.*, *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 436, *as amended* (May 2, 2016) (concluding that informal discovery was sufficient class counsel to assess the value of the class' claims and negotiate a settlement that provides fair compensation). *See also In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 267 (E.D. Pa. 2012) (applying presumption in part because, "although no formal discovery was conducted ..., [class counsel] conducted informal discovery, including, *inter alia*, independently investigating the merits"). Thus, the presumption of fairness should attach to the proposed settlement.

E. An Analysis of the *Girsh* factors further supports the fairness of the proposed settlement.

Despite the attachment of the presumption of fairness, a class action settlement may not be approved under Rule 23(e) without a determination by the Court that the proposed settlement is "fair, reasonable and adequate." *See In re Cendant*, 264 F.3d at 231; *see also* Fed. R. Civ. P. 23(e)(1)(A). The Third Circuit has on several occasions stressed the importance of the reasonableness and fairness of a class action settlement, noting that "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members." *In re General Motors*, 55 F.3d at 785 (citations and quotations omitted); *see also Amchem*, 521 U.S. at 623, 117 S. Ct. 2231 (noting that the Rule 23(e) inquiry "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise") (citations omitted). Indeed, in cases such as this, where settlement negotiations precede class certification and approval for settlement and certification is sought simultaneously, the Third Circuit requires district courts to be even "more scrupulous than usual" when examining the fairness of the proposed settlement. *See In re General Motors*, 55 F.3d at 805. This heightened standard is intended to ensure that class counsel has engaged in sustained advocacy throughout the proceedings, particularly in settlement negotiations,

and has protected the interests of all class members. *See In re Prudential Ins. Co.*, 148 F.3d at 317. *See also Beneli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 101 (D.N.J. 2018).

In *Girsh v. Jepson*, 521 F.2d 153 (3d Cir.1975), the Court of Appeals for the Third Circuit identified the following factors to be considered in determining whether a proposed class action settlement agreement is fair, adequate and reasonable:

1. The complexity, expense and likely duration of the litigation;
2. The reaction of the class to the settlement;
3. The stage of the proceedings and the amount of discovery completed;
4. The risks of establishing liability;
5. The risks of establishing damages;
6. The risk of maintaining the class action through the trial;
7. The ability of the defendants to withstand a greater judgment;
8. The range of reasonableness of the settlement in light of the best possible recovery; and
9. The range of reasonableness of the settlement fund to a possible recovery in light of all the possible attendant risks of litigation.

521 F.2d at 157 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974)).[2]

The Court's role in evaluating a proposed settlement is limited. Although the Court may either approve or disapprove the settlement, it may not rewrite it. *Harris,* 654 F. Supp. at 1049. *See also Callahan*, 1990 WL 168273, at *6–7. The "nine-factor [*Girsh*] test requires this Court to conduct

[2] The *Girsh* factors stem from two primary concerns: (1) class members may not be adequately represented or (2) class interests may not be adequately protected. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 319 (3d Cir.2011) (explaining that " 'trial judges bear the important responsibility of protecting absent class members,' and must be 'assur[ed] that the settlement represents adequate compensation for the release of the class claims'" (quoting *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 349 (3d Cir. 2010)). Indeed, Federal Rule of Civil Procedure 23 specifically requires that "a class action cannot be settled without the approval of the court and a determination that the proposed settlement is fair, reasonable and adequate." *Kraus v. PA Fit II, LLC*, 155 F. Supp. 3d 516, 524 (E.D. Pa. 2016) (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998)).

both 'a substantive inquiry into the terms of the settlement relative to the likely rewards of litigation' and 'a procedural inquiry into the negotiation process.' " *Prudential I*, 962 F. Supp. at 534 (quoting *General Motors*, 55 F.3d at 796). As discussed below, not all of these factors apply to this case because the Plaintiffs are seeking injunctive relief under Rule 23(b)(2). *See, e.g.*, *Williams v. City of Philadelphia,* 2016 WL 3258377, at *3 n.2 (E.D. Pa. June 13, 2016).

Further, this *Girsh* list is not exhaustive. The Third Circuit explained that "since *Girsh* was decided in 1975, there has been a sea-change in the nature of class actions, especially with respect to mass torts." *Prudential II*, 148 F.3d at 323. Thus, it charged "district courts [to] consider other potentially relevant and appropriate factors." *In re AT & T*, 455 F.3d at 165. The following factors were provided as a non-limiting list of examples:

> the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved-or likely to be achieved-for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Prudential II, 148 F.3d at 323; *In re* AT & T, 455 F.3d at 165. Additionally, the Court of Appeals noted in *Warfarin II* that the settlement of class actions is preferred to protracted litigation:

> [T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged. *See General Motors*, 55 F.3d at 784 ("the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"); *In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (noting that the court encourages settlement of complex litigation "that otherwise could linger for years").

Warfarin II, 391 F.3d at 535. After carefully weighing the *Girsh* factors along with the relevant additional factors discussed in *Prudential II,* the Court finds that the proposed Settlement Agreement is fair, reasonable, and adequate. The settlement, as proposed here, satisfies the *Girsh* factors as well as the applicable *Prudential* considerations.

F. The *Girsh* Factors

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

Under the first *Girsh* factor, courts must analyze "the probable costs, in both time and money, of continued litigation." *General Motors*, 55 F.3d at 812 (quoting *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir.1974)). This factor requires a balancing of the anticipated expense, complexity, and time of possibly achieving a more favorable result through litigation against the benefits of the Proposed Settlement. Where the expense, complexity and time-consuming nature of continuing the litigation are significant relative to the benefits of settlement, this factor favors settlement. *Prudential I*, 962 F. Supp. at 536.

The complexity and associated litigation risks of this case arise largely from the uncertainty regarding whether a website such as Tyrwhitt's is a "public accommodation" under Title III of the ADA. The Court of Appeals for the Third Circuit has held that places of public accommodation must be physical places. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cit. 1998) ("The plain meaning of Title III is that a public accommodation is a place...."); *Peoples v. Discover Fin. Servs., Inc.*, 387 Fed. Appx 179, 183 (3d Cit. 2010) ("Our court is among those that have taken the position that the term ['public accommodation'] is limited to physical accommodations."). However, neither *Ford* nor *Peoples* involved issues of website accessibility. Indeed, the Third Circuit has not specifically addressed whether a website, either standing alone or in association with a physical location, can be considered a public accommodation under the ADA. The Third Circuit has held, however, that a good or service provided by a public accommodation can be covered by the ADA, provided there is

"some nexus between the services or privileges denied and the physical place...." *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113,122 (3d Cit. 1998). Clouding the picture further, district courts within the Third Circuit have adopted different approaches to this issue. *Compare Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, 251 F. Supp 908 (W.D. Pa. 2017); *Suchenko v. ECCO USA, Inc.*, 2018 WL 3660117 (W.D. Pa. Aug. 2, 2018). *West v. DocuSign, Inc.*, 2019 WL 38443054 (W.D. Pa. August 28, 2019); *Suchenko v. ECCO USA, Inc.*, 2018 WL 3933514, at *3 (W.D. Pa. Aug. 16, 2018) (holding in actions by visually impaired plaintiffs that company websites available to the public are "public accommodations") with *Mahoney v. Herr Foods Inc.*, 2020 WL 1979153, *3 (E.D. Pa. Apr. 24, 2020); *Mahoney v. Bittrex Inc.*, 2020 WL 212010, *2 (ED. Pa. Jan. 14, 2013); *Tawam v. APCI Fed. Credit Union*, 2018 WL 3723367, at *6 (E.D. Pa. Aug. 6, 2018); *Walker v. Sam's Oyster House, LLC*, 2018 4466076, *2 (E.D. Pa. Sept. 18, 2018) (holding that a business' website -- on its own -- is not a "public accommodation," but may be considered such if it bears some nexus to a physical place or public accommodation).

Litigation here would have involved extensive motion practice, discovery, expert analysis and testimony and, given the state of relevant case law, the likelihood of significant appellate practice. Hence, the proposed settlement has allowed the Plaintiffs to achieve significant benefits for the class while avoiding the material expense and delay that would have been required to litigate their claims against Tyrwhitt. Had the Plaintiffs and Tyrwhitt proceeded with this litigation, both would have expended countess hours of attorney time and considerable expense while facing significant uncertainty concerning the outcome of the litigation. Such an undertaking "would not only further prolong the litigation but also reduce the value of any recovery to the class." *Warfarin* 391 F.3d at 536. Thus, this factor supports the proposed settlement.

2. The Reaction of the Class to the Settlement

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement." *Prudential II*, 148 F.3d at 318; *Warfarin II*, 391 F.3d at 536. In gauging support, courts look at the number of objectors as well as opt-outs. *See Prudential II*, 148 F.3d at 318; *Warfarin II*, 391 F.3d at 536. Courts also look to objectors' "vociferousness" and other factors to determine whether "class members possessed adequate interest and information to voice objections[.]" *General Motors*, 55 F.3d at 813.

Potential class members will have the opportunity to object to the settlement following notice. Based upon the benefits provided to the class under the Settlement Agreement, however, significant objections are not anticipated. As noted, the Settlement Agreement appears to provide relief to class members commensurate with the best outcome they could have hoped to achieve had they litigated the case to a conclusion.

3. The Stage of the Proceedings and the Amount of Discovery Completed

The third *Girsh* factor "captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir.2001) (quoting *General Motors*, 55 F.3d at 813). The parties have agreed to resolve their dispute at a relatively early stage in the litigation. Even so, proposed class counsel has engaged in extensive investigation and informal discovery, including firsthand review of the level of accessibility afforded by Tyrwhitt's website. *See* ECF No. 20, p. 37. This informal discovery and investigation coupled with class counsel's experience in litigating similar claims gives counsel an adequate understanding of the merits of the Plaintiffs' case. Based on counsel's grasp of the claims, obtained through pre-filing and post-filing investigations as well as proposed class counsel's

familiarity with such cases, the Court is satisfied that class counsel adequately appreciated the merits of the case before negotiating the settlement. This factor thus supports approval of the settlement.

4. The Risks of Establishing Liability and Damages

"The fourth and fifth [*Girsh*] factors survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *In re Johnson & Johnson*, 900 F. Supp. 2d at 483 (internal quotations omitted). "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *General Motors*, 55 F.3d at 814. In making this assessment, however, "a court should not conduct a mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel." *In re Lucent Techs., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 644-45 (D.N.J. 2004) (internal quotations omitted). In complex cases, "[t]he risks surrounding a trial on the merits are always considerable." *Weiss v. Mercedes Benz of N. Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995). In applying these factors, "the Court need not delve into the intricacies of the merits of each side's arguments, but rather may 'give credence to the estimation of the probability of success proffered by [Class Counsel], who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'" *Glaberson v. Comcast Corp.*, 2015 WL 5582251, at *6 (E.D. Pa. Sept. 22, 2015) (quoting *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 115 (E.D. Pa. 2005) (citation omitted)).

As discussed above, the current state of the law regarding the application of Title III of the ADA presented significant risk to the Plaintiff class in this case. The complexity of this issue weighs heavily in favor of settlement. Against this risk and complexity, the Plaintiff class could not look forward to a potential recovery of monetary damages if they were to continue the litigation. *See, e.g.*, *Sowers v. Freightcar Am., Inc.*, 2008 WL 4949039, at *4 (W.D. Pa. Nov. 19, 2008). Individual awards of

money damages are not available in an action pursuant to Title III of the ADA. *Id.* Thus, the complexity of this case and uncertainty on both sides with respect to liability and damages weigh in favor of granting final approval of the settlement. *See, e.g.*, *Zanghi v. Freightcar Am., Inc.*, 2016 WL 223721, at *18 (W.D. Pa. Jan. 19, 2016).

5. The Risks of Maintaining a Class Action Through the Trial

"'Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action,' [the sixth *Girsh* factor] measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *Warfarin II,* 391 F.3d at 537 (quoting *General Motors*, 55 F.3d at 817). This factor also necessitates an inquiry into the future of this action, had it continued. *Id.* A class action's value is heavily dependent on the class certification, "because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits." *General Motors*, 55 F.3d at 817. Class certification is not an unalterable state, as a "district court always possesses the authority to decertify or modify a class that proves unmanageable." *Prudential II*, 148 F.3d at 321.

The size of the nationwide class here did not pose a problem for class certification purposes, as the class is recommended for certification for settlement, not litigation. However, if this Court were to certify the class for litigation purposes, a significant risk exists that intractable management problems would result due to the size and scope of the class. As in *Warfarin II*, "the significant risk that the class would be decertified if litigation proceeded weighs in favor of settlement." *Warfarin II,* 391 F.3d 537.

6. The Ability of Defendants to Withstand a Greater Judgment

The seventh *Girsh* factor asks, "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. This factor comes into

play where the parties relate "that they have settled for a below-value amount because of concerns over the defendant's ability to pay, or where a court is concerned that a settlement is unduly small in light of the misconduct alleged and the defendant's demonstrable ability to pay much more." *Rossini v. PNC Fin. Servs. Grp., Inc.*, 2020 WL 3481458, at *16 (W.D. Pa. June 26, 2020). But since this is a Rule 23(b)(2) class action for injunctive relief, the Court need not consider the ability of Tyrwhitt to withstand a greater judgment. *Williams v. City of Philadelphia*, 2016 WL 3258377, at *3 n.2 (E.D. Pa. June 13, 2016) (citing *Serventi v. Bucks Technical High Sch.*, 225 F.R.D. 159, 167 (E.D. Pa. 2004)) (noting that certain factors do not apply when class does not seek monetary damages).

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Recovery & The Range of Reasonableness of the Settlement Fund to a Possible Recovery in Light of All the Attendant Risks of Litigation

The final two *Girsh* factors are often analyzed together, as they are viewed as testing "two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Warfarin II*, 391 F.3d at 538 (quoting *Prudential II*, 148 F.3d at 322). As with the previous factor, these last two have a neutral application because the parties seek declaratory and injunctive relief. *See Sourovelis v. City of Philadelphia*, 2015 WL 12806512, at *5 (E.D. Pa. Nov. 4, 2015) (citing *Pastrana v. Lane*, 2012 WL 602141, at *5 (E.D. Pa. Feb. 24, 2012) (explaining that these factors are neutral where the "action was certified under Rule 23(b)(2) for injunctive relief").

Thus, the Court should conclude that the *Girsh* factors favor the approval of the Proposed Settlement as reasonable and fair to the class members.

G. The *Prudential* Considerations

In *Krell v. Prudential Ins. Co. of Am. (In re Prudential)*, the Third Circuit identified additional, non-exclusive factors ("*Prudential* factors") for courts to consider along with the *Girsh* factors in reviewing a proposed class action settlement. 148 F.3d 283, 323-24 (3d Cir. 1998). *See also Robinson*

v. Enhanced Recovery Co., 2020 WL 5554481, at *2 (E.D. Pa. Sept. 16, 2020). While the Court must make findings as to the *Girsh* factors, the *Prudential* factors are merely illustrative of additional factors that may be useful. *Williams v. Aramark Sports, LLC*, 2011 WL 4018205, at *7 (E.D. Pa. Sept. 9, 2011) (citing *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir.2010)). And as with some of the *Girsh* factors, many of the concerns identified in *Prudential* are irrelevant here because the proposed class seeks primarily injunctive relief. For example, the development of scientific knowledge does not bear on this case. *See, e.g.*, *Williams*, 2011 WL 4018205, at *7.

Here, the only relevant *Prudential* factor is the reasonableness of the attorneys' fees authorized in the Settlement Agreement. This factor weighs in favor of approval of the settlement. Considering the experience of counsel, the time they have devoted to litigation and settlement negotiations, and the quality of their work product, the counsel fees specified in the Settlement Agreement appear entirely reasonable. *Accord Williams v. City of Philadelphia*, 2011 WL 3471261, at *5 (E.D. Pa. Aug. 8, 2011).

V. Conclusion

Based on the foregoing, it is respectfully recommended that the Court enter an Order granting Plaintiffs' Motion to Certify the Class for Settlement Purposes and for Preliminary Approval of Class Action Settlement as follows:

1. This Order incorporates by reference the definitions in the parties' Settlement Agreement at ECF No. 19-1 and all terms defined therein have the same meaning in this Order as set forth in the Settlement Agreement.

2. Plaintiffs' Motion is granted. It appears to this Court on a preliminary basis that the Settlement Agreement satisfies the elements of Fed. R. Civ. P. 23 and is fair, adequate, and reasonable.

3. The proposed Settlement Class is hereby preliminarily certified pursuant to Fed. R. Civ. P. 23(a) and (b)(2) for purposes of settlement. The Settlement Class is defined as:

> All blind or visually disabled individuals who use screen reader auxiliary aids to navigate digital content and who have accessed, attempted to access, or been deterred from attempting to access, or who will access, attempt to access, or be deterred from accessing the Website from the United States.

4. The Court appoints and designates Plaintiffs Anthony Hammond Murphy and Blair Douglass as representatives of the Settlement Class.

5. The Court appoints and designates Kevin W. Tucker, Kevin J. Abramowicz, Lawrence H. Fisher and the law firm of East End Trial Group LLC as Class Counsel for the Settlement Class.

6. The Court finds that the Notice and Notice Plan attached as Exhibits 3 and 4 [ECF Nos. 19-3, 19-4] to the Motion meet the requirements for due process, the requirements of Rules 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure, and ensure Notice is well calculated to reach representative class members. The Notice and Notice Plan are hereby approved.

7. Within twenty-one (21) days of this Order ("Notice Deadline"), Defendant shall:

a. Cause the Notice to be published on a search-engine-optimized ("SEO") settlement website operated by a stipulated class action settlement administrator or similar entity;

b. Add invisible anchor text in the header of the Website's homepage which reads, "Click to view our ADA Class Action Settlement Notice" and which links to the Notice published by the stipulated class action settlement administrator or similar entity;

c. Post a link to the Notice on its social media accounts, including https://www.facebook.com/CharlesTyrwhitt, https://www.instagram.com/charlestyrwhitt/, and

https://twitter.com/ctshirts, which post shall also tag and direct questions about the Notice to Class Counsel at its accounts on each respective platform; and

d. Request that National Federation of the Blind and American Council of the Blind publish a link to the Notice in their respective electronic newsletters so notice is sent out within sixty (60) days of the Preliminary Approval.

8. Within ten (10) days prior to the Fairness Hearing, defined below, Defendant or Defendant's counsel shall file a declaration evidencing compliance with the notice provisions of this Order.

9. Within ten (10) days prior to the Fairness Hearing, defined below, Class Counsel shall file its motion for attorneys' fees and costs.

10. A hearing (the "Fairness Hearing") shall be held before this Court on _____, 2020 at _____ EST in the United States District Court for the Western District of Pennsylvania, located at 17 South Park Row, Erie, PA 16501, to determine whether the Settlement Agreement shall be granted final approval, and to address any related matters.

11. The Fairness Hearing may, from time to time and without further notice to the Settlement Class members (except those who have filed timely objections or entered appearances), be continued or adjourned by order of the Court.

12. Any Settlement Class Member may object to the Settlement Agreement by filing, within sixty (60) days after the Notice Deadline set by the Court, written objections with the Clerk of the Court. Only such objecting Settlement Class Members shall have the right, and only if they expressly seek it in their objection, to present objections orally at the Fairness Hearing. Responses

by Named Plaintiffs to any timely-filed objections shall be made no less than five (5) days before the Fairness Hearing.

13. Counsel for the parties are hereby authorized to utilize all reasonable procedures in connection with the administration of the Settlement Agreement which are not materially inconsistent with either this Order or the terms of the Settlement Agreement.

VI. Notice to the Parties

In accordance with the applicable provisions of the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) & (C), and Rule 72.D.2 of the Local Rules of Court, the Parties will have fourteen (14) days from the date of the service of this report and recommendation to file written objections thereto. The failure to file timely objections will constitute a waiver of appellate rights.

In the event that neither party objects to the conclusions reached in this Report and Recommendation, and desires a prompter certification of the class and approval of the proposed settlement, they may indicate their waiver of any objections hereto.

Submitted this 25th day of November, 2020.

RICHARD A. LANZILLO
United States Magistrate Judge