

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Scott Biddick, Individually and on Behalf	:	
of All Others Similarly Situated,	:	Case No. 1:20-cv-08091
	:	
Plaintiff,	:	Judge Vernon S. Broderick
	:	
v.	:	
	:	
Lumondi, Inc.,	:	
	:	
Defendant.	:	

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT, PRELIMINARY CERTIFICATION
OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE PLAN**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND.....	3
III. SETTLEMENT TERMS.....	5
A. Proposed Settlement Class.....	5
B. Relief Provided to the Class.....	6
C. Release	8
D. Attorneys’ Fee, Cost, and Service Award.....	9
E. The Notice Plan.....	10
F. Opt Outs, Objections, and Claims Administration.....	12
IV. ARGUMENT.....	15
A. The Court Should Preliminarily Approve the Settlement.....	15
B. Legal Standard.....	15
C. The Settlement Agreement is Procedurally Fair.....	17
D. The Settlement is Substantively Fair.....	18
1. The complexity, expense, and likely duration of the litigation.....	18
2. The reaction of the class to the settlement.....	20
3. The stage of the proceedings and the amount of discovery completed	20
4. The risks of establishing liability and damages.....	21
5. The risk of maintaining class action status through trial.....	21
6. The ability of Defendant to withstand greater judgment.....	22

	<u>Page</u>
7. The range of reasonableness of the settlement in light of the best possible recovery in light of all the attendant risks of litigation.....	22
E. The Court Should Preliminarily Certify the Settlement Class.....	23
1. The Settlement Class meets all prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure.....	23
a. Numerosity.....	24
b. Commonality.....	24
c. Typicality.....	24
d. Adequacy of representation.....	25
2. The Settlement Class meets the requirements of Rule 23(B).....	26
a. Common legal and factual questions predominate in this action	26
b. A class action is the superior means to adjudicate Plaintiff's claims.....	27
F. The Court Should Approve the Proposed Notice Plan.....	28
V. CONCLUSION.....	30

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Amchem Prods. v. Windsor</i> , 521 U.S. 591 (1997).....	26,27
<i>Augustin v. Jablonsky (In re Nassau County Strip Search Cases)</i> , 461 F.3d 219 (2d Cir. 2006).....	26,27
<i>Banyai v. Mazur</i> , No. 00 Civ. 9806, 2007 U.S. Dist. LEXIS 22342 (S.D.N.Y. Mar. 27, 2007).....	21
<i>Bodon v. Domino’s Pizza, LLC</i> , No. 09-CV-2941, 2015 U.S. Dist. LEXIS 17358 (E.D.N.Y. Jan. 16, 2015).....	23
<i>Charron v. Wiener</i> , 731 F.3d 241 (2d Cir. 2013).....	16,18,25
<i>D’Amato v. Deutsche Bank</i> , 236 F.3d 78 (2d Cir. 2001)	17
<i>Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974).....	18
<i>Dupler v. Costco Wholesale Corp.</i> , 705 F. Supp. 2d 231 (E.D.N.Y. 2010).....	18
<i>Fogarazzo v. Lehman Bros.</i> , 232 F.R.D. 176 (S.D.N.Y. 2005)	25
<i>Gen. Tel. Co. of the Southwest v. Falcon</i> , 457 U.S. 147 (1982)	22
<i>Hadel v. Gaucho, LLC</i> , No. 15 Civ. 3706, 2016 U.S. Dist. LEXIS 33085 (S.D.N.Y. Mar. 14, 2016)	16
<i>Hall v. Prosource Techs., LLC</i> , No. 14-CV-2502, 2016 U.S. Dist. LEXIS 53791 (E.D.N.Y. Apr. 11, 2016).....	17
<i>Handschu v. Special Services Div.</i> , 787 F.2d 828 (2d Cir. 1986)	29

	<u>Page</u>
<i>In re IMAX Securities Litigation</i> , 283 F.R.D. 178 (S.D.N.Y. 2012).....	20
<i>In re Nissan Radiator</i> , No. 10 CV 7493, 2013 U.S. Dist. LEXIS 116720 (S.D.N.Y. May 30, 2013)	25
<i>In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.</i> , 986 F. Supp. 2d 207 (E.D.N.Y. 2013)	20
<i>In re Sinus Buster Prods. Consumer Litig.</i> , No. 12 -CV-2429, 2014 U.S. Dist. LEXIS 158415 (E.D.N.Y. Nov. 10, 2014).....	22
<i>In re Sony SXRDRear Projection Television Class Action Litig.</i> , No. 06-cv-5173 (RPP), 2008 WL 1956267 (S.D.N.Y. May 1, 2008).....	20
<i>Kelen v. World Fin. Network Nat. Bank</i> , 295 F.R.D. 87 (S.D.N.Y. 2013).....	24
<i>Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.</i> , No. 15-CV-1113 (VAB), 2016 WL 6542707 (D. Conn. Nov. 3, 2016).....	20
<i>Manley v. Midan Rest. Inc.</i> , No. 14 Civ. 1693, 2016 U.S. Dist. LEXIS 43571 (S.D.N.Y. Mar. 30, 2016)	16-18,20
<i>Marisol A. by Forbes v. Giuliani</i> , 126 F.3d 372 (2d Cir. 1997).....	25
<i>McReynolds v. Richards-Cantave</i> , 588 F.3d 790 (2d Cir. 2009)	16-18
<i>Meredith Corp. v. SESAC, LLC</i> , 87 F. Supp. 3d 650 (S.D.N.Y. 2015)	18,20,27
<i>Mills v. Capital One, N.A.</i> , No. 14 Civ 1937, 2015 U.S. Dist. LEXIS 133530 (S.D.N.Y. Sept. 30, 2015).....	22
<i>Robidoux v. Celani</i> , 987 F.2d 931 (2d Cir. 1993).....	25
<i>Sykes v. Mel S. Harris & Assocs. LLC</i> , 780 F.3d 70 (2d Cir. 2015).....	24

	<u>Page</u>
<i>Tart v. Lions Gate Entm't Corp.</i> , No. 14-CV-8004, 2015 U.S. Dist. LEXIS 139266 (S.D.N.Y. Oct. 13, 2015).....	16,27,28
<i>Vargas v. Capital One Fin. Advisors</i> , 2014 U.S. App. LEXIS 4689 (2d Cir. 2014).....	29
<i>Viafara v. MCIZ Corp.</i> , No. 12 Civ 7452, 2014 U.S. Dist. LEXIS 60695 (S.D.N.Y. Apr. 30, 2014).....	22
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011).....	24
<i>Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.</i> , 396 F.3d 96 (2d Cir. 2005).....	16,22,28,29
<i>Willix v. Healthfirst, Inc.</i> , No. 07 Civ. 1143, 2011 U.S. Dist. LEXIS 21102 (E.D.N.Y. Feb. 18, 2011)	21
<i>Zeltser v. Merrill Lynch & Co.</i> , No. 13 Civ. 1531, 2014 U.S. Dist. LEXIS 135635 (S.D.N.Y. Sep. 23, 2014).....	21,28

Statutes & Rules

Fed . R. Civ. P. 23(a).....	24
Fed . R. Civ. P. 23(a)(1).....	24
Fed . R. Civ. P. 23(a)(2).....	24
Fed . R. Civ. P. 23(a)(2).....	24
Fed . R. Civ. P. 23(a)(4).....	25
Fed . R. Civ. P. 23(b)(3).....	26
Fed . R. Civ. P. 23(c)(2)(B).....	29
Fed . R. Civ. P. 23(e)(2).....	15

Other Authorities

MANUAL FOR COMPLEX LITIGATION (Third) § 30.42 (1995).....	16
MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.312 (2004).....	28

Plaintiff Scott Biddick (“Plaintiff”), individually and on behalf of all others similarly situated, respectfully submits this memorandum of law in support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan.

I. INTRODUCTION

Plaintiff Biddick filed this action on his own behalf and on behalf of all consumers who purchased Luminox watches distributed in the U.S. by Defendant Lumondi, Inc (“Luminox” or “Defendant”). Marketed to military service members, scuba divers, first responders, athletes and “rugged outdoorsmen” seeking “extreme performance” from their timepieces, the key feature that sets Luminox watches apart from the competition is a self-powered illumination system that utilizes tiny micro gas light tubes to create ultimate visibility in complete darkness, under any conditions. However, Plaintiff alleges that Luminox watches contain a defect that causes their watch faces to fog when worn outdoors in either cold (below 40 degrees Fahrenheit) or hot (above 90 degrees Fahrenheit) temperatures (the “Fogging Defect”). Plaintiff’s complaint asserts various warranty and consumer fraud claims on behalf of a nationwide class of Luminox purchasers. Lumondi filed an answer vehemently denying Plaintiff’s allegations and asserted various defenses, including, among others, that: (i) the Watches are not defective in any respect; (ii) the Watches were tested and qualified to be advertised as represented; (iii) Lumondi did not fail to disclose any material defect in the Watches; and (iv) it is customary for the watches to show fogging when exposed to an extreme temperature decrease, but the fog should dissipate within 20 minutes after the watch is returned to room temperature.

Recognizing the risks and costs of ongoing litigation, Plaintiff and Defendant engaged in extensive arm’s-length settlement negotiations with the assistance of a respected third-party

mediator the Honorable Judge James Holderman (Ret.) of JAMS on May 4, 2021. The parties were not able to resolve the dispute at the mediation, but with the aid of the mediator the parties continued to engage in extensive settlement discussions thereafter. After nearly five months of hard-fought negotiations, the parties have finalized an agreement to fully resolve the dispute. The details of the proposed settlement are set forth in the Class Action Settlement Agreement and Release (“Settlement Agreement”), attached as Exhibit 1 to the Declaration of Jeffrey S. Goldenberg in Support of Preliminary Approval (“Goldenberg Decl.”).

Under the proposed settlement, Class Members will receive a 12-month limited warranty extension on their Luminox watches covered by this Settlement. Importantly, the 12-month warranty extension does not begin to run until this Settlement becomes final. In addition, Class Members who make two qualifying warranty claims under the Extended Warranty shall be entitled to receive a new replacement Luminox Watch if the Extended Warranty service is unsuccessful.

The proposed settlement was reached when the parties understood the strengths and weaknesses of their respective positions, having engaged in informal discovery and sharing of information regarding the design, development, and testing of the watches and numerous arm’s-length settlement negotiations, including months of mediation efforts and discussions under the direction and guidance of Judge Holderman.

Plaintiff requests that the Court grant preliminary approval of the proposed Settlement so that notice may be provided to the Class. Given the benefits available to Class Members, the risks in establishing Defendant’s liability, proving damages, and certifying a contested nationwide class, and the length of time and the costs that would be required to complete the litigation through trial and appeals, Plaintiff respectfully submits that the proposed settlement is fair, adequate,

reasonable, and in the best interests of the Class Members. A proposed Order granting preliminary approval is attached as Exhibit 2 to the Goldenberg Decl.

II. FACTUAL BACKGROUND

On September 30, 2020, Plaintiff Scott Biddick commenced this action by filing the Class Action Complaint [ECF No. 1] challenging the marketing and sale of Luminox watches. Plaintiff alleges, among other things, that (i) Defendant represented, advertised, and marketed the watches as designed to be durable and tough for military service members, scuba divers, first responders, athletes, and “rugged outdoorsmen” seeking “extreme performance;” (ii) the representations, advertising, and marketing statements were false and misleading because the watches are actually poorly-suited for “rugged outdoorsmen” because they contain a defect that causes their faces to fog when worn outdoors in air temperatures below approximately 40 degrees Fahrenheit or above approximately 90 degrees Fahrenheit; and (iii) Plaintiff and all other consumers who purchased the watches have suffered damages because had they known the truth they would not have purchased the watches or would have paid less for them.

Based on these allegations, Plaintiff asserts claims for: (a) Violation of New York General Business Law, Deceptive Acts and Practices, N.Y. Gen. Bus. Law § 349 (“NYGBL”); (b) Breach of Express Warranty – Magnuson Moss Warranty Act; (c) Breach Express Warranty; (d) Violation of California’s Consumer Legal Remedies Act, California Civil Code § 1750 et seq.; (e) Violation of California’s Unfair Competition Law, California Business & Professions Code § 17200 et seq.; (f) Breach of Implied Warranty of Merchantability; and (g) Breach of Implied Warranty of Fitness for a Particular Purpose. The Class Action Complaint seeks certification of a nationwide class of purchasers of the watches.

Lumondi denies the allegations in the Lawsuit and asserts numerous defenses to Plaintiff's claims, including that: (i) the watches are not defective in any respect; (ii) the watches were tested and qualified to be advertised as represented; (iii) Lumondi did not fail to disclose any material defect in the watches; (iv) Plaintiff's and the putative class's exclusive remedy for any defective watches is the Limited Warranty; (v) Lumondi fully complied with the Limited Warranty for the watches; (vi) Plaintiff fails to allege sufficient facts in the Class Action Complaint to state any valid claims against Lumondi; (vii) Plaintiff and the putative class did not suffer any losses or actual injury whatsoever; and (viii) it is customary for the watches to show fogging when exposed to an extreme temperature decrease, but the fog should dissipate within 20 minutes after the watch is returned to room temperature.

On May 19, 2021, the parties engaged in private mediation before the Honorable Judge James Holderman (Ret.) of JAMS. See Declaration of Jeffrey Goldenberg ("Goldenberg Decl."), ¶5. The parties made substantial progress but were not able to fully resolve the dispute at the mediation. *Id.*, ¶6. From May through July, the parties continued to engage in extensive settlement discussions with the aid of the mediator. *Id.*, ¶7. The parties reached a settlement in principle on July 12, 2021 and entered into a written Memorandum of Understanding signed by the parties' counsel. *Id.*, ¶8. On July 16, 2021, the parties informed the Court that they had reached a settlement in principal to resolve this matter on a class-wide basis. *Id.*, ¶9.

Prior to reaching a settlement and entering into this Agreement, the parties engaged in months of arm's-length settlement negotiations and mediation efforts and discussions under the direction and guidance of Judge Holderman and conducted informal discovery and sharing of information regarding the design, development, and testing of the watches. *Id.*, ¶10. The Parties have now reached an agreement providing for a resolution of all claims that have been or could

have been brought in the lawsuit against Defendant. In addition, the Parties have reached agreement as to the amount of attorneys' fees and expenses Class Counsel may receive under the Settlement (\$202,500) and the amount to be paid to the named Plaintiff as a service award (\$5,000), subject to Court approval.

Plaintiff and Class Counsel believe the Settlement is fair, adequate, reasonable, and in the best interests of the Class Members, taking into account the benefits provided to the Class Members, the risks of continued litigation and possible trial and appeals, and the length of time and the costs that would be required to complete the litigation. *Id.*, ¶12. The parties agreed on the benefits to the Settlement Class as described in the Settlement Agreement before negotiating attorneys' fees and expenses and the payment of a Service Award to the named Plaintiff. *Id.*, ¶13.

Plaintiff and Class Counsel acknowledge and agree that this settlement constitutes a compromise of disputed claims and that it is their desire and intention that the lawsuit be settled and dismissed, on the merits and with prejudice, and that the released claims be finally and fully settled and dismissed, subject to and according to the terms and conditions set forth in the Settlement Agreement.

III. SETTLEMENT TERMS

A. Proposed Settlement Class

The proposed Class is defined as:

All consumers nationwide who purchased (or received as a gift) one or more Luminox Watch Series 3000/3900, 3050/3950, 3120, 3150, 3160, 3180, 3190, 3250, 3500, 3510, 3580, 3590, 3600, 3610, 3800, 3810, 7050, 7060, 7200, or 7250 that contained an original Lumondi Warranty Card (the "Original Warranty") at the time of purchase on or after June 1, 2018 through the date of preliminary approval by the Court. Excluded from the Class is Defendant and its officers, directors, and employees; Class Counsel and their partners, associates, lawyers, and employees; and the judicial officers and their immediate family members and associated Court staff assigned to this case.

¶3.9.¹

B. Relief Provided to the Class

Under the Settlement Agreement, Class Members are entitled to two different settlement benefits:

Benefit 1: Extended Limited Warranty Benefit.

First, Class Members will receive a 12-month limited warranty extension on their Luminox watches covered by the Settlement (“Extended Warranty”). *See generally* ¶6.1. The Extended Warranty begins to run from the Effective Date of the proposed Settlement or the end of their Original Warranty, whichever date is later, and is limited to cover the Fogging Issues as defined by the Settlement Agreement. *Id.* Each Class Member will receive this Extended Warranty regardless of whether the Original Warranty has expired or is still valid as of the Effective Date. *Id.* Class Members who do not opt out of the proposed Settlement will receive the Extended Warranty. ¶6.2. To file a Valid Claim under the Extended Warranty, a Class Member must present either: (1) an original or clearly legible copy of a valid, fully completed Official Lumondi Warranty Card; or (2) a legible, itemized receipt or copy of a receipt from a Lumondi Authorized Dealer, as listed on the Settlement Website. If neither is available, then the Class Member may submit a certification under oath: (1) that the watch was purchased from a Lumondi Authorized Dealer, as listed on the Settlement Website; (2) provide the identity of the Lumondi Authorized Dealer, if known; and (3) provide the approximate date of purchase or receipt. The Class Member must also comply with the on-line warranty claim process and requirements; certify under oath that he or she is not aware of any physical damage to the Luminox Watch and that he or she has experienced multiple Fogging Issues, defined as fogging of the inside of the watch crystal after the watch has

¹ All references to “¶” refer to the corresponding paragraph of the Settlement Agreement.

been exposed to a significant temperature decrease to below approximately 40 degrees Fahrenheit or exposed to temperatures above approximately 90 degrees Fahrenheit, and which persists for more than 20 minutes after the watch is returned to room temperature; include a photo of the Luminox Watch showing at least one qualifying Fogging Issue; and initiate the claim prior to the end of the Extended Warranty period. ¶6.3.

The following conditions are not covered by the Extended Warranty and do not constitute a Valid Claim: (1) normal wear and tear (or aging) of band, case, crystal, bezel, crown, push buttons, battery, or plating of metal components; (2) damage caused by tampering with, misuse or abuse; (3) damage to the watch case or movement caused by water entering the watch due to improper use or handling; (4) defects or damage resulting from battery replacement, service or repairs performed by non-authorized Lumondi service or repair centers; (5) a watch not obtained from an Lumondi Authorized Dealer as listed on the Settlement Website. ¶6.4. If an exclusion is found, the Lumondi Authorized Service Center will document the condition and will contact the claimant regarding next steps, which may include repair at the claimant's expense based on a repair quote provided by the Lumondi Authorized Service Center or return of the Luminox Watch with no further action. *Id.*

For each valid Extended Limited Warranty Benefit Claim, the Lumondi Authorized Service Center will perform Extended Warranty Service, which shall include drying the watch, as necessary, performing an ISO condensation test and ensuring proper functioning of all seals and gaskets and replacing any seals and gaskets as needed. ¶6.5. Through the claims process, Claimants will pay for postage and handling for sending the Luminox Watch to the Lumondi Authorized Service Center but will be reimbursed by Lumondi if the Claim is a Valid Claim. ¶6.6. Reimbursement for postage under this section shall be at the actual cost of the postage and shall

not include any mark up. ¶6.7. Defendant will pay for postage and handling for sending the Luminox Watch back to the Claimant from the Lumondi Authorized Service Center, regardless of whether the Claim is a Valid Claim. ¶6.8.

Benefit 2: Replacement Watch Benefit.

Class Members who make two qualifying warranty claims under the Extended Warranty shall be entitled to receive a new replacement Luminox Watch if the Extended Warranty Service is unsuccessful. ¶6.9 An unsuccessful Extended Warranty Service means that the Luminox Watch that was serviced twice under the Extended Warranty benefit later exhibits the visible moisture and/or Fogging Issue no later than the expiration of the Extended Warranty or 90 days following the second Extended Warranty Service, whichever is later. ¶6.10. The Replacement Watch shall be limited to the same model and color as the original Luminox Watch to be replaced (“Replacement Watch”). ¶6.11. If the same model and color as the original Luminox Watch to be replaced is not available, Lumondi shall provide the Class Member with a substantially comparable Luminox Watch. ¶6.11. “Substantially Comparable” means a Luminox with similar design, color, features, and price as the Class Member’s original Luminox Watch. ¶6.12. Lumondi’s “Original Limited Warranty” terms shall apply to any Replacement Watch provided pursuant to the proposed Settlement. ¶6.13. To qualify for the Replacement Luminox Watch benefit, the Class Member must return the original Luminox Watch to the Lumondi Authorized Service Center listed on the Settlement Website. ¶6.14. Upon receipt of the original Luminox Watch returned pursuant to this section, Lumondi shall provide the Class Member with the Replacement Luminox Watch within a reasonable period of time not to exceed 30 days from the date of receipt by the Lumondi Authorized Service Center of the original Luminox watch. ¶6.14.

C. Release

Class Members who do not timely and validly exclude themselves from the Settlement forever release and discharge the Released Parties² from any and all claims, actions, causes of action, counterclaims, demands (including, without limitation, demands for arbitration), actions, suits, causes of action, allegations of wrongdoing, liabilities, rights, demands, suits, debts, liens, contracts, agreements, offsets or liabilities, including but not limited to tort claims, claims for breach of contract, breach of the duty of good faith and fair dealing, breach of statutory duties, actual or constructive fraud, misrepresentations, fraudulent inducement, statutory and consumer fraud, breach of fiduciary duty, unfair business or trade practices, restitution, rescission, compensatory and punitive damages, injunctive or declaratory relief, attorneys' fees, interests, costs, penalties and any other claims, whether known or unknown, alleged or not alleged in the Litigation, suspected or unsuspected, contingent or matured, under federal law, state law, common law, or local law, which the Named Plaintiffs and/or any Settlement Class Member had, have, or may in the future have, with respect to any conduct, act, omissions, facts, matters, transactions or oral or written statements or occurrences relating to or arising out of the Fogging Issue, as asserted, or as could have been asserted in the Litigation or any other proceedings, and that are based on the same factual predicate asserted in the Class Action Complaint filed in the Litigation, including via the use of a class action procedural device by the Named Plaintiffs and/or Settlement Class Members whether at law or equity, against Defendant and all of the Releasees for injunctive relief, declaratory relief, and economic injury or damages. ¶11.1. Notwithstanding the forgoing, the Release does not include claims for personal injury/ injuries. *Id.*

D. Attorneys' Fee, Cost, and Service Award

² "Released Parties" is defined by the Settlement Agreement to include Lumondi, Inc., its parent corporations, affiliates, direct and indirect subsidiaries, predecessors, successors, assigns, and anyone acting on their behalf., as well as their past, present, and future officers, directors, board members, agents, representatives, servants, employees, attorneys, and insurers. ¶3.39

Lumondi has agreed to pay, subject to Court approval, Attorneys' Fees and Expenses of up to a maximum of two hundred and two thousand, five hundred dollars (\$202,500). ¶10.2. The Parties negotiated and reached agreement on the Attorneys' Fees and Expenses only after reaching agreement on all other material terms of Settlement in this matter. *Id.* Subject to approval by the Court, Defendant will also pay the Named Plaintiff a Service Award of \$5,000 as compensation for his time and effort associated with his participation in this Lawsuit and assisting Plaintiff's Counsel in preparing and bringing the Lawsuit. ¶9.2.

Defendant shall pay the award of Attorneys' Fees and Expenses and Service Award as determined by the Court, within ten (10) business days following the Effective Date or following the entry of a final, non-appealable order relating to the Attorneys' Fees and Expenses and Service Award, whichever is later. ¶¶9.3; 10.5.

E. The Notice Plan

Under the proposed Notice Plan, Defendant will provide the proposed Notice Administrator, Kroll Settlement Administration, with electronic data containing the contact information Defendant has for Class Members within thirty (30) days of the entry of the Preliminary Approval Order. ¶7.4. The Notice Administrator shall begin disseminating notice to every Class Member who reasonably can be identified within sixty days (60) of entry of the Preliminary Approval Order. ¶7.3. To the extent practicable, the Notice Administrator will send notice by electronic mail to every Class Member whose email address or other electronic contact information is known or readily identifiable. *Id.* A copy of the proposed Email Notice is attached as Exhibit 3 to Goldenberg Decl. If the Notice Administrator can identify more email addresses or other electronic contact information for Class Members by performing an email address lookup or similar exercise, the Notice Administrator shall do so. ¶7.3.

For all other Class Members for whom no email address is available but for whom a U.S. mailing address is available or can be reasonably identified, the Notice Administrator shall send or cause to be sent a copy of the Settlement Notice by U.S. mail. *Id.* A copy of the proposed Mail Notice is attached as Exhibit 4 to the Goldenberg Decl. The Notice Administrator will forward Notices that are returned by the U.S. Postal Service or electronically with a forwarding address to the Class Member. ¶7.3. For Notices returned as undeliverable, the Notice Administrator shall make reasonable effort to determine a proper electronic mail address, other electronic contact information, or mailing address, and re-send the Settlement Notice. *Id.* All costs related to this process shall be included in the Administration and Notice Expenses. *Id.* A copy of the Full Notice is attached as Exhibit 5 to the Goldenberg Decl. and will be available on the settlement website. The Full Notice will also provide the basis to create the content for the Frequently Asked Questions section of the settlement website.

Additionally, within ten (10) days of the entry of the Preliminary Approval Order, Defendant will provide Class Counsel contact information for the top five (5) retail sellers of Luminox Watches for the years 2018, 2019, 2020, and 2021. ¶7.5.³ Class Counsel or counsel for Defendant will then issue subpoenas, as necessary, to these retailers to obtain name, address, and email information for the sole purpose of issuing class notice of this Settlement. *Id.* All information obtained through these subpoenas must remain confidential and shall be subject to strict access restrictions and may only be provided to Class Counsel and to the Notice Administrator. *Id.* Retail sellers of Luminox Watches who receive a subpoena may choose to send or email the Class Notice directly to its customers rather than provide the contact information to

³ As soon as practicable, but no later than ten (10) days after Plaintiffs file this Agreement in the Court, Defendant or the Notice Administrator shall serve a CAFA Notice of the Settlement as required by the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715 (“CAFA Notice”). ¶7.8. No later than the latest Claims Deadline, the Notice Administrator shall file with the Court a declaration of compliance with this Notice Plan. ¶7.9.

the Notice Administrator or Class Counsel and may seek reimbursement from the Notice Administrator for the reasonable cost of postage to do so. ¶7.5.

To facilitate the efficient administration of this Settlement, and to promote the provision of benefits pursuant to this Settlement, the Notice Administrator will establish a Settlement Website that enables Class Members to read the Settlement Notice and FAQs and important case documents (e.g. Settlement Agreement, Order Granting Preliminary Approval) and obtain updates on the status of the Settlement. ¶7.7. The Settlement website will be maintained for no less than 33 months following the Effective Date. ¶7.8.

The Settlement Notice, Settlement Website, and FAQs will provide information sufficient to inform Class Members of: (a) the essential terms of this Agreement; (b) appropriate means for obtaining additional information regarding the Agreement and the Lawsuit; (c) appropriate information about the procedure for objecting to or excluding themselves from the Settlement, if they should wish to do so; and (d) appropriate means for and information about submitting a claim for the Extended Limited Warranty Benefit and the Replacement Watch Benefit pursuant to the Settlement. ¶7.9.

F. Opt Outs, Objections, and Claims Administration

Class Members may opt out of the Settlement by submitting an Opt-Out Request to the Notice Administrator that is postmarked no later than sixty (60) days following the Notice Date (or one hundred and fifty (150) days after entry of the Preliminary Approval Order). ¶8.6. To be valid, an Opt-Out Request must contain the name, address, email address, telephone number, and serial number(s) of the Class Member's Watch(es), and must state, "I wish to be excluded from the Settlement Class in *Biddick v. Lumondi, Inc.*, Case No. 1:20-cv-08091," or contain substantially similar clear and unambiguous language. ¶8.6. Each Class Member seeking

exclusion from the Settlement must personally sign the Opt-Out Request, and no Opt-Out Request may be signed electronically. *Id.* No Class Member may opt out by a request signed by an actual or purported agent or attorney acting on behalf of a Class Member or group of Class Members. *Id.* No Opt-Out Request may be made on behalf of a group of Class Members. *Id.* Class Members who timely submit a valid, personally signed Opt-Out Request will have no further role in this Settlement and will not be bound by the Settlement; accordingly, such Class Members will not be permitted to assert an objection to the Settlement or this Agreement and will receive no benefits under the Settlement. *Id.*

Alternatively, Class Members may object to the Settlement by filing with the Court an objection submitted no later than sixty (60) days following the Notice Date (or one hundred and fifty (150) days after entry of the Preliminary Approval Order). ¶8.7. Only Class Members who have not submitted an Opt-Out Request to the Notice Administrator may object to the Settlement. *Id.* The filing date of any written objection will be the exclusive means for determining the timeliness of an objection. *Id.* The Settlement Notice, the FAQs, and the Preliminary Approval Order will set forth the procedures for submitting an objection. *Id.* A written objection must state: (a) the full name, address, telephone number, and email address of the objector; (b) the serial number(s) for the objector's Watch(es); (c) a clear written statement as to the date of purchase of the Watch(es) and the retailer from which the Watch(es) were purchased; (d) a clear written statement of all grounds for the objection accompanied by any legal support for such objection; (e) copies of any papers, briefs, or other documents on which the objection is based; (f) a list of all cases in which the objector and/or objector's counsel had filed or in any way participated in—financially or otherwise—an objection to a class action settlement in the preceding five years; (g) the name, address, email address, and telephone number of all attorneys representing the objector;

(h) a statement indicating whether the objector and/or the objector's counsel intends to appear at the Fairness Hearing, and, if so, a list of all persons, if any, who will be called to testify in support of the objection; and (i) the objector's signature. *Id.* Class Members who fail to make objections in the manner specified in, and in full compliance with, this Section will be deemed to have waived any objections and will be foreclosed from making any objection to the Settlement or this Agreement (whether by appeal, collateral proceeding, or otherwise). *Id.* A Class Member who files an objection may also file a notice of intent to appear at the Fairness Hearing, if the objector wishes to appear at the Fairness Hearing. *Id.*

The Notice will direct Class Members to the Settlement Website and to Defendant's website where a link will be provided to electronically file Extended Warranty Claims and Replacement Watch Claims. Extended Warranty Claims and Replacement Watch Claims shall be filed and processed utilizing Reverse Logic software (or an otherwise comparable software program) and shall allow Class Members to upload photos and other documentation as necessary to support their claims. ¶8.1. Defendant will provide a Notice of Claim Denial, in a timely fashion, to any Person who has not submitted a Valid Claim and will identify the reason(s) the Person has not submitted a Valid Claim. ¶8.2. The Notice of Claim Denial will also notify such Persons that they have the right to have Class Counsel review whether they submitted a Valid Claim. *Id.* Defendant will copy Class Counsel on all Notice of Claim Denial correspondence. *Id.* Class Counsel may dispute any Notice of Claim Denial on behalf of any Class Member within thirty (30) days of receipt of the Notice of Claim Denial. Class Counsel may also audit Claim Denials to ascertain Defendant's compliance with the Settlement Agreement. *Id.*

Any Person receiving a Notice of Claim Denial that his, her, or its Claim is not a Valid Claim who wishes to contest such denial must, within thirty (30) calendar days of the date of

mailing or transmission of Notice of Claim Denial, submit to Defendant and Class Counsel a statement of the reasons contesting the grounds for the rejection of his, her, or its claim or provide any missing or supplemental information necessary to perfect the claim. ¶8.3. If a Person provides this required statement and the dispute about whether the Person has submitted a Valid Claim cannot otherwise be resolved, Class Counsel and Defendant shall promptly present the issue for review by a mutually selected independent third-party adjudicator. *Id.* The independent third-party adjudicator shall issue a decision to Class Counsel and to Defendant within thirty (30) days of receiving the submission. *Id.* The independent third-party adjudicator's decision shall be final and non-appealable. *Id.*

IV. ARGUMENT

A. The Court Should Preliminarily Approve the Settlement

Class Counsel have worked hard to reach a fair, reasonable, and adequate settlement. Plaintiff and Class Counsel believe their claims are strong and are optimistic about obtaining class certification and succeeding on the merits. However, significant expense and risk attend the continued prosecution of the claims through trial and any appeals. In negotiating and evaluating the Settlement, Plaintiff and Class Counsel have taken these costs and uncertainties into account, as well as the risks and delays inherent in complex class action litigation. Class Counsel believe the proposed Settlement provides significant relief to the Settlement Class members and is fair, reasonable, adequate, and in the best interests of the Settlement Class.

B. Legal Standard

Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, a court may approve a class action settlement “only . . . on finding that [the settlement agreement] is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). The “fair, reasonable, and adequate” standard effectively

requires parties to show that a settlement agreement is both procedurally and substantively fair. *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013).

The Second Circuit Court of Appeals has recognized a “strong judicial policy in favor of settlements, particularly in the class action context.” *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (“*Visa*”). “The compromise of complex litigation is encouraged by the courts and favored by public policy.” *Visa*, 396 F.3d at 117 (citation omitted); *see also Hadel v. Gaucho, LLC*, No. 15 Civ. 3706, 2016 U.S. Dist. LEXIS 33085, at *4 (S.D.N.Y. Mar. 14, 2016) (“Courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere.”). A “presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.” *Visa*, 396 F.3d at 116 (quoting MANUAL FOR COMPLEX LITIGATION (Third) § 30.42 (1995)).

“Preliminary approval is the first step in the settlement of a class action whereby the court ‘must preliminarily determine whether notice of the proposed settlement . . . should be given to class members in such a manner as the court directs, and an evidentiary hearing scheduled to determine the fairness and adequacy of settlement.’” *Manley v. Midan Rest. Inc.*, No. 14 Civ. 1693, 2016 U.S. Dist. LEXIS 43571, at *21 (S.D.N.Y. Mar. 30, 2016) (citations omitted). “To grant preliminary approval, the court need only find that there is ‘probable cause’ to submit the [settlement] to class members and hold a full-scale hearing as to its fairness.” *Id.* (citations and quotations omitted); *accord Tart v. Lions Gate Entm’t Corp.*, No. 14-CV-8004, 2015 U.S. Dist. LEXIS 139266 (S.D.N.Y. Oct. 13, 2015). “If the proposed settlement appears to fall within the

range of possible approval, the court should order that the class members receive notice of the settlement.” *Manley*, 2016 U.S. Dist. LEXIS 43571, at *8 (citation omitted). This settlement is both procedurally and substantively fair and falls well within the range of possible approval.

C. The Settlement Agreement is Procedurally Fair

To demonstrate a settlement’s procedural fairness, a party must show “that the settlement resulted from ‘arm’s-length negotiations and that plaintiffs’ counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class’s interests.” *D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted); *accord McReynolds*, 588 F.3d at 804; *see also Hall v. Prosource Techs., LLC*, No. 14-CV-2502, 2016 U.S. Dist. LEXIS 53791, at *18 (E.D.N.Y. Apr. 11, 2016).

First, the negotiations were conducted at arms’ length over a period of many months. *See Goldenberg Decl.*, ¶10. The parties participated in a mediation session with JAMS mediator Hon. James Holderman (Ret.) and eventually reached an agreement in principle. *Id.* at ¶¶5-8. The negotiations were hard fought, and counsel for all parties participated vigorously with competing agendas. *Id.*, ¶11.

Second, the discussions were undertaken by counsel who are well versed in complex litigation and, more specifically, consumer class actions. *Id.* at ¶14. Experienced lawyers from across the nation advocated for the interests of the Settlement Class throughout negotiations, utilizing their combined experience of several decades litigating consumer class actions to ensure the proposed settlement serves the best interests of the Settlement Class. *Id.* at ¶15.

Third, Plaintiff and Class Counsel thoroughly evaluated the merits of the claims and defenses, the likelihood the Court would certify the litigation for class treatment, and the likelihood of success at trial and upon appeal. *Id.* at ¶16. As a result of this analysis, Class Counsel obtained

an understanding of the strengths and weaknesses of the litigation. For the foregoing reasons, the Settlement Agreement is procedurally fair.

D. The Settlement is Substantively Fair.

To demonstrate the substantive fairness of a settlement agreement, a party must satisfy the factors the Second Circuit set forth in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (“*Grinnell*”); *Charron*, 731 F.3d at 247. The Grinnell factors are:

(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 risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

McReynolds, 588 F.3d at 804 (quoting *Grinnell*, 495 F.2d at 463). The *Grinnell* factors are used to evaluate settlements at the final approval stage, and guide courts at the preliminary approval stage, at which Plaintiffs have a lower burden. Here, the *Grinnell* factors overwhelmingly favor preliminary approval of the Settlement Agreement.

1. The complexity, expense, and likely duration of the litigation

“The greater the ‘complexity, expense and likely duration of the litigation,’ the stronger the basis for approving a settlement.” *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015) (citations omitted). Consumer class action lawsuits by their very nature are complex, expensive, and lengthy. *See, e.g., Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010); *see also Manley*, 2016 U.S. Dist. LEXIS 43571, at *9 (“Most class actions are inherently complex[.]”). Should the Court decline to approve the proposed settlement, the continuing litigation would be costly, complex, and time-consuming.

There would undoubtedly be a contested class certification motion. Defendant would likely argue that damages could not be calculated on a class-wide basis, that most watches did not experience the Fogging Defect, that differences in state law would preclude a multi-state class, and that the question of whether individual injuries were fairly traceable to the Defendant would predominate over class-wide issues. Class issues involving damages would likely generate expert discovery and Daubert motions as well. Although Plaintiff is confident in his ultimate success in certifying a class, a positive ruling would no doubt be challenged by a decertification motion and/or appeal.

Plaintiff expects there would likely be a lengthy and expensive battle of the experts about whether Luminox watches are defective; whether Defendant had an adequate basis for its representations regarding the tough, durable, and rugged design and performance of Luminox watches such that the watches are ideal for outdoor activities; whether Defendant concealed or omitted a fogging defect; whether Defendant's actions constitute a breach of warranty; whether Defendant's actions and omissions violated applicable state laws; and whether, and to what extent, Plaintiff and Class Members have been damaged by Defendant's actions and omissions and the proper measure of damages. Each step towards trial would be subject to Defendant's vigorous opposition and possible interlocutory appeal. Even if the case were to proceed to judgment on the merits, any final judgment would likely be appealed, which would take significant time and resources.

Moreover, Defendant would be expected to offer substantial defenses at trial concerning the applicability of various statutory and common law claims, including arguments that the watches are not defective; that they were tested and qualified to be advertised as they were; that Plaintiff's and the putative class's exclusive remedy for any defective watches is the Limited

Warranty; and that Defendant fully complied with the Limited Warranty for the watches. Although Plaintiff believes he would ultimately prevail, “litigation of this matter . . . through trial would be complex, costly and long.” *Manley*, 2016 U.S. Dist. LEXIS 43571, at *9 (citation omitted). “The settlement eliminates [the] costs and risks” associated with further litigation. *Meredith Corp.*, 87 F. Supp. 3d at 663. For all of these reasons, this factor weighs strongly in favor of preliminary approval.

2. The reaction of the class to the settlement

It is premature to address the reaction of the Settlement Class at the preliminary approval stage where no data is yet available.

3. The stage of the proceedings and the amount of discovery completed

The third *Grinnell* factor considers “whether Class Plaintiffs had sufficient information on the merits of the case to enter into a settlement agreement . . . and whether the Court has sufficient information to evaluate such a settlement.” *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013) (citations omitted).

In order to meet this requirement, “formal discovery need not have necessarily been undertaken yet by the parties.” *In re IMAX Securities Litigation*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012) (citing *In re Sony SXRDRear Projection Television Class Action Litig.*, No. 06-cv-5173 (RPP), 2008 WL 1956267 (S.D.N.Y. May 1, 2008)). It is appropriate for Plaintiffs to enter into a settlement after “Class Counsel [has] conducted extensive investigation into the facts, circumstances, and legal issues associated with this case....” *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707, at *9 (D. Conn. Nov. 3, 2016).

Here, in addition to conducting extensive legal research and into the merits of the case (and likelihood of protracted litigation), the parties have engaged in informal settlement discovery,

exchanged mediation briefs, exchanged detailed sales, manufacturing, and warranty data, and mediated before the Judge James Holderman (Ret.). Goldenberg Decl., ¶17. This factor therefore weighs in favor of approval of the settlement.

4. The risks of establishing liability and damages

“Litigation inherently involves risks.” *Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143, 2011 U.S. Dist. LEXIS 21102, at *11 (E.D.N.Y. Feb. 18, 2011) (citation omitted). “[I]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome.” *Banyai v. Mazur*, No. 00 Civ. 9806, 2007 U.S. Dist. LEXIS 22342, at *30 (S.D.N.Y. Mar. 27, 2007) (citation omitted); accord *Zeltser v. Merrill Lynch & Co.*, No. 13 Civ. 1531, 2014 U.S. Dist. LEXIS 135635, at *14 (S.D.N.Y. Sep. 23, 2014).

Plaintiff recognizes that, as with any litigation, uncertainties exist. Defendant continues to deny Plaintiff’s allegations, and should this matter proceed, Plaintiff expects Defendant will vigorously defend itself on the merits, at each stage of litigation and likely on appeal.

Most fundamentally, while Plaintiff believes that Defendant knowingly marketed defective goods, a jury might not agree. In addition, Plaintiff anticipates a zealous “battle of the experts” regarding the existence of a defect and the calculations of damages. For these reasons, although Plaintiff is confident in the merits of his case, the risks of establishing liability and damages strongly support preliminary approval.

5. The risk of maintaining class action status through trial

The litigation settled before rulings on class certification, and the current certification is for settlement purposes only. ¶4.1. As discussed above, in addition to the challenges inherent in certifying a potential class spanning multiple states, Plaintiff must proffer a suitable mechanism for calculating class-wide damages. While Plaintiff believes he could establish the existence of

such a mechanism to the Court’s satisfaction, this proposed settlement eliminates the unavoidable risk that he cannot. Furthermore, even if the Court were to certify a litigation class, the certification would not be set in stone. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982) (“Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.”). Given the risks, this factor weighs in favor of preliminary approval. *See, e.g., Mills v. Capital One, N.A.*, No. 14 Civ 1937, 2015 U.S. Dist. LEXIS 133530, at *10-11 (S.D.N.Y. Sept. 30, 2015).

6. The ability of Defendant to withstand greater judgment

“Courts have recognized that a [defendant’s] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the settlement.” *In re Sinus Buster Prods. Consumer Litig.*, No. 12 -CV-2429, 2014 U.S. Dist. LEXIS 158415, at *25 (E.D.N.Y. Nov. 10, 2014) (citations omitted). A “defendant’s ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair.” *Viafara v. MCIZ Corp.*, No. 12 Civ 7452, 2014 U.S. Dist. LEXIS 60695, at *21 (S.D.N.Y. Apr. 30, 2014) (citation omitted). Although Defendant may be able to withstand a greater judgment than the current Settlement, the agreed-to Settlement is fair and adequate when weighing the likelihood of success and overall monetary value of Class Member’s individual damages should the litigation proceed to trial. For these reasons, this factor is neutral

7. The range of reasonableness of the settlement in light of the best possible recovery and in light of all the attendant risks of litigation

“There is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion[.]” *Visa*, 396 F.3d at 119 (citation omitted). “In other words, the question for the Court is not whether the settlement represents the

highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces[.]” *Bodon v. Domino’s Pizza, LLC*, No. 09-CV-2941, 2015 U.S. Dist. LEXIS 17358, at *18 (E.D.N.Y. Jan. 16, 2015) (citation omitted).

Here, the relief for which the Settlement Agreement provides is within the range of reasonableness, especially in light of the best possible recovery and all the attendant risks of litigation. The gravamen of the litigation is that Defendant sold defective watches in need of repair and refused to acknowledge any defect. The Extended Limited Warranty and Replacement Watch benefits provided by the proposed settlement will provide substantial relief to Class Members – including the possibility of a new replacement watch.

While Plaintiff believes his claims are strong, continuation of this litigation poses significant risks. Although ongoing litigation may not result in an increased benefit to the Settlement Class, it would lead to substantial delay and additional expenditures of resources by both parties and the Court. Taking into account the risks and benefits Plaintiff has outlined above, the Settlement falls within the “range of reasonableness.” Thus, collectively and independently, the *Grinnell* factors warrant the conclusion that the Settlement Agreement is fair, adequate, and reasonable

E. The Court Should Preliminarily Certify the Settlement Class

As set forth below, the proposed Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3).

1. The Settlement Class meets all prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure

Rule 23(a) has four prerequisites for certification of a class: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequate representation. Fed. R. Civ. P. 23(a). The Settlement Class meets each prerequisite of Rule 23(a).

a. Numerosity

Under Rule 23(a)(1), plaintiffs must show that the proposed class is “so numerous that joinder of all [its] members is impracticable.” Fed. R. Civ. P. 23(a)(1). In the Second Circuit, “a proposed class of more than forty members presumptively satisfies the numerosity requirement . . .” *Kelen v. World Fin. Network Nat. Bank*, 295 F.R.D. 87, 92 (S.D.N.Y. 2013) (collecting cases). Here, the Settlement Class is estimated to include approximately 62,000 consumers. Goldenberg Decl., ¶18. Accordingly, numerosity is satisfied.

b. Commonality

Under Rule 23(a)(2), plaintiffs must show that “questions of law or fact common to the [proposed] class” exist. Fed. R. Civ. P. 23(a)(2). Commonality requires that the proposed class members’ claims all centrally “depend upon a common contention,” which “must be of such a nature that it is capable of class wide resolution,” meaning that “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “[F]or purposes of Rule 23(a)(2) even a single common question will do[.]” *Id.* at 359 (citations omitted). Plaintiffs need only show that their injuries stemmed from Defendant’s “unitary course of conduct.” *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 85 (2d Cir. 2015). Here, common questions include, but are not limited to, whether Luminox watches are defective and whether Defendant had an adequate basis for its representations regarding the tough, durable, and rugged design and performance of Luminox watches such that the watches are ideal for outdoor activities. Thus, commonality is satisfied

c. Typicality

Under Rule 23(a)(3), Plaintiff must show that the proposed class representatives’ claims “are typical of the [class]’ claims.” Fed. R. Civ. P. 23(a)(3). Plaintiff must show that “the same

unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented.” *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993). “[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative’s claims.” *In re Nissan Radiator*, No. 10 CV 7493, 2013 U.S. Dist. LEXIS 116720, at *53 (S.D.N.Y. May 30, 2013); *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) (“The typicality requirement is not demanding.”). Here, typicality is met because the same allegedly unlawful conduct by Defendant was directed at, or affected, Plaintiff and the members of the proposed Settlement Class. *Robidoux*, 987 F.2d at 936–37. Plaintiff alleges that he and all members of the Settlement Class purchased defective watches that render them either worthless or worth substantially less than the price paid to purchase them. In addition, Plaintiff asserts that Defendant’s alleged conduct that gave rise to these claims (i.e. delivering defective watches, making false claims with respect to the watches, and breaching warranties respecting the watches) is the same for all Class Members. Typicality requires nothing more.

d. Adequacy of representation

Under Rule 23(a)(4), Plaintiff must show that the proposed class representatives will “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Plaintiff must demonstrate that: (1) the class representatives do not have conflicting interests with other class members; and (2) class counsel is “qualified, experienced and generally able to conduct the litigation.” *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997).

To satisfy the first requirement, Plaintiff must show that “the members of the class possess the same interests” and that “no fundamental conflicts exist” between a class’s representative(s) and its members. *Charron*, 731 F.3d at 249. Here, Plaintiff possesses the same interests as the proposed Settlement Class Members because Plaintiff and the Settlement Class Members who

experienced the fogging issue were all allegedly injured in the same manner in that they received a defective watch that Defendant refused to acknowledge was defective.

With respect to the second requirement, Plaintiff has retained counsel competent and experienced in complex class action litigation (including product defect class action litigation), and Plaintiff is committed to prosecute this action vigorously. Counsel have invested considerable time and resources into the prosecution of the Litigation and possess a long and proven track record of the successful prosecution of consumer class actions, including numerous appointments as class counsel. *See* Goldenberg Decl., ¶24.

2. The Settlement Class meets the requirements of Rule 23(b)

“In addition to satisfying Rule 23(a)’s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).” *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997). Plaintiff seeks certification under Rule 23(b)(3) which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members” and “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

a. *Common legal and factual questions predominate in this action*

“The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at 623 (citation omitted). The Second Circuit has held that “to meet the predominance requirement . . . a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof.” *Augustin v. Jablonsky (In re Nassau County Strip Search Cases)*, 461 F.3d 219, 227-28 (2d Cir. 2006) (citations omitted). In the context of a request for settlement-only class

certification, concerns about whether individual issues “would present intractable management problems” at trial drop out because “the proposal is that there be no trial.” *Amchem Prods.*, 521 U.S. at 620. As a result, “the predominance inquiry will sometimes be easier to satisfy in the settlement context.” *Tart*, 2015 U.S. Dist. LEXIS 139266, at *4 (citation omitted).

Here, for settlement purposes, the central common questions predominate over any questions that may affect individual Settlement Class Members. The central common questions include whether Luminox watches are defective; whether Defendant had an adequate basis for its representations; whether Defendant concealed or omitted the Fogging Issues; whether Defendant’s actions constitute a breach of warranty; whether Defendant’s actions and omissions violated applicable federal and state laws; whether Defendant’s action and omissions constitute fraud; and whether, and to what extent, Plaintiff and Class Members have been damaged by Defendant’s actions and omissions and the proper measure of damages. These issues are subject to “generalized proof” and “outweigh those issues that are subject to individualized proof.” *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28 (citation omitted). The Settlement Class meets the predominance requirement for settlement purposes.

b. A class action is the superior means to adjudicate Plaintiff’s claims

Rule 23(b)(3) also requires that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Here, the class action mechanism is superior to individual actions for numerous reasons. First, “[t]he potential class members are both significant in number and geographically dispersed” and “[t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions.” *Meredith Corp.*, 87 F. Supp. 3d at 661 (citation omitted).

Additionally, a class action is superior here because “it will conserve judicial resources” and “is more efficient for Class Members, particularly those who lack the resources to bring their claims individually.” *Zeltser*, 2014 U.S. Dist. LEXIS 135635, at *8 (citation omitted). As a result of the uncertainty of the cost to each class member of the potential exposure of their data, the expense and burden of litigation make it virtually impossible for the Settlement Class Members to seek redress on an individual basis. By contrast, in a class action, the cost of litigation is spread across the entire class, thereby making litigation and recovery economically viable. *See, e.g., Tart*, 2015 U.S. Dist. LEXIS 139266, at *5. “Employing the class device here will not only achieve economies of scale for Class Members, but will also conserve judicial resources and preserve public confidence in the integrity of the system by avoiding the waste and delay repetitive proceedings and preventing inconsistent adjudications.” *Zeltser*, 2014 U.S. Dist. LEXIS 135635, at *8-9 (citations omitted). For all of the foregoing reasons, a class action is superior to individual suits. The requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, and the Court should preliminarily certify the Settlement Class.

F. The Court Should Approve the Proposed Notice Plan

“Rule 23(e)(1)(B) requires the court to ‘direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise’ regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3).” *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 21.312 (2004). “The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness.” *Visa*, 396 F.3d at 113 (citations omitted). The Court has broad power over approving procedures to use for providing notice so long as the procedures are consistent with the standards of reasonableness imposed under the due process clauses in the U.S. Constitution.

Handschu v. Special Services Div., 787 F.2d 828, 833 (2d Cir. 1986) (“[T]he district court has virtually complete discretion as to the manner of giving notice to class members.”).

Courts “must direct to class members the best notice that is practicable under the circumstances.” *Vargas v. Capital One Fin. Advisors*, 2014 U.S. App. LEXIS 4689, at *26 (2d Cir. 2014) (summary order). Here, the proposed Notice Plan meets the requirements of due process and the Federal Rules of Civil Procedure. Rule 23(c)(2)(B) requires, and the Notices of Settlement provide, information, written in easy-to-understand plain language, regarding: “(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who request exclusions; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B). “There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must ‘fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.’” *Visa*, 396 F.3d at 114.

The proposed Notice Plan here involves direct notice through email and mail for those Class Members for whom contact information is available from Defendant, Saltzman’s Watches, and Defendant’s five largest retailers. ¶7.5; Declaration of Jeanne C. Finegan (“Finegan Decl.”), ¶27. In addition, the Notice Administrator will implement a supplemental digital notice program, as necessary, designed to reach Class Members, including those that may not receive direct notice. Finegan Decl., ¶¶13-30. The Notice Plan also includes the establishment of a Settlement Website that enables or facilitates Class Members to read the Settlement Notice and FAQs and important

case documents (e.g. Settlement Agreement, Order Granting Preliminary Approval); and obtain updates on the status of the Settlement and facilitate the filing of Extended Warranty Benefit claims and Replacement Watch Benefit claims. ¶7.6; Finegan Decl., ¶33. The Settlement website will be maintained for no less than 33 months following the Effective Date. ¶7.7.

Plaintiff's proposed Notice Plan is specifically designed to identify the Settlement Class; explain Class Members' rights and the benefits offered by the Settlement, the scope and impact of Released Claims, and the applicable deadlines for objecting and opting out. The Notice Plan also describes in detail the relief provided by the Settlement, plainly indicates the time and place of the Final Approval hearing, and details the attorneys' fees, costs and service award requested. As such, the settlement notice is adequate and comports with the requirement of Rule 23 and due process. Finegan Decl., ¶5.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court: (1) certify the Settlement Class and appoint Plaintiff as the class representative and his counsel as Class Counsel; (2) preliminarily approve the Settlement Agreement; (3) approve the Notice Plan; and (4) set a date and time for the Final Approval Hearing. A proposed Order granting this Motion (which includes a schedule through final approval) is attached as Exhibit 2 to the Goldenberg Decl.

Dated: November 22, 2021

Respectfully submitted,

By: /s/Jeffrey S. Goldenberg
Jeffrey S. Goldenberg (*pro hac vice*)
GOLDENBERG SCHNEIDER, LPA
4445 Lake Forest Drive, Suite 490
Cincinnati, Ohio 45242
Telephone: 513-345-8291
Fax: 513-345-8294
jgoldenberg@gs-legal.com

Todd S. Garber
Bradley F. Silverman
FINKELSTEIN, BLANKINSHIP,
FREI-PEARSON & GARBER, LLP
One North Broadway, Suite 900
White Plains, New York 10601
Telephone: 914-298-3281
Fax: 914-908-6709
tgarber@fbfglaw.com
bsilverman@fbfglaw.com

Sean K. Collins (*pro hac vice*)
LAW OFFICES OF SEAN K. COLLINS
184 High Street, Suite 503
Boston, Massachusetts 02110
Telephone: 855-693-9256
Fax: 617-227-2843
sean@neinsurancelaw.com

*Attorneys for the Plaintiff and Proposed
Settlement Class*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on November 22, 2021, via the Court Clerk's CM/ECF system, which will provide notice to all counsel of record.

/s/Jeffrey S. Goldenberg

Jeffrey S. Goldenberg