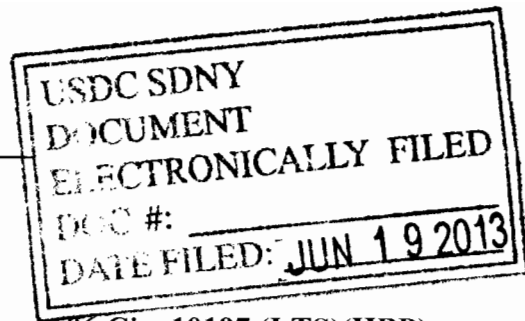


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SUSAN DULING, MARGARET ANDERSON, and  
LAKEYA SEWER, on behalf of themselves and all  
others similarly situated,

Plaintiffs,

-against-

GRISTEDE'S OPERATING CORP.; RED APPLE  
GROUP, INC., D/B/A/ GRISTEDE'S; GRISTEDE'S  
FOOD INC.; GRISTEDE'S DELIVERY SERVICE,  
INC.; GRISTEDE'S FOODS NY, INC.; GRISTEDE'S  
NY, LLC; NAMDOR, INC.; and JOHN CATSIMATIDIS,

Defendants.

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**[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR CERTIFICATION  
OF THE SETTLEMENT CLASS, FINAL APPROVAL OF THE  
CLASS ACTION SETTLEMENT, AND CLASS REPRESENTATIVE  
SERVICE AWARDS AND INDIVIDUAL AWARDS**

Plaintiffs Susan Duling, Margaret Anderson, and Lakeya Sewer and the class are current and former female non-managerial employees who worked in Gristede's supermarkets in New York City. Plaintiffs allege that Gristede's Operating Corp.; Red Apple Group, d/b/a/ Gristede's; Gristede's Foods, Inc.; Gristede's Delivery Service Inc.; Gristede's Foods NY, Inc.; Gristede's NY, LLC; and Namdor, Inc. (collectively, with John Catsimatidis, "Defendants" or "Gristede's") have engaged in class-wide gender discrimination with respect to hiring, promotion, compensation, and other terms and conditions of employment.

On October 23, 2006, Plaintiff Anderson filed a class action complaint, alleging disparate treatment and disparate impact claims against Defendants under Title VII of the Civil Rights Act of 1964 ("Title VII"), the New York State Human Rights Law ("NYSHRL"), and the New York

City Human Rights Law (“NYCHRL”). She subsequently filed two amended complaints, adding Plaintiffs Duling and Sewer (together the “Named Plaintiffs”).

The lawsuit alleges that Defendants violated Title VII, the NYSHRL, and the NYCHRL by steering women who had applied for work at Gristede’s supermarkets into part-time cashier jobs – with little or no prospect for transfers or promotions into management-track positions. It also alleges that women were denied promotions in favor of men and were paid less than them. Plaintiff Sewer also brought an individual claim of discrimination based on her gender and pregnancy and a claim for interference with her rights under the Family & Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.* In a separate action, class member Jenneil-Adams Hargrett brought an individual claim in New York State Supreme Court for gender and pregnancy discrimination and retaliation. Collectively, all three matters constitute the “Action” for purposes of this Order.

After almost two years of discovery and significant discovery motion practice, Plaintiffs moved for class certification on January 30, 2009. ECF No. 58. On March 8, 2010, the Court certified the following class under Fed. R. Civ. P. 23(b)(2): all current and former female Gristede’s employees who worked for Gristede’s at any time between November 2, 2004 and the date of final judgment. *See* ECF No. 127.

Gristede’s has reviewed the claims in detail and believes them to be without merit and denies any wrongdoing or liability in this matter. Nevertheless, Gristede’s values its reputation as a responsible company and employer, and it has worked with Plaintiffs and their counsel in order to implement new policies and practices, settle this matter and avoid the burden and expense of further litigation.

The parties reached a settlement in May 2012, involving a Settlement Fund of \$1,450,000 (\$500,000 in the form of fully redeemable Gristede’s store gift cards) and corrective measures.

On November 15, 2012 (the “Preliminary Approval Date”), the Court entered an Order preliminarily approving the settlement, conditionally certifying the settlement class, and authorizing notice to be issued to class members (the “Preliminary Approval Order”). ECF No. 170.

On December 11, 2012, a third-party claims administrator (the “Claims Administrator”) sent a Court-approved settlement notice (“Notice”) to all class members informing them of their right to opt out of or object to the settlement and their right to submit a claim form to obtain a monetary recovery. No class members objected to the terms of the settlement and only one class member has requested to be excluded. Approximately 666 class members submitted timely claim forms.

On March 1, 2013, Plaintiffs moved for Final Certification of Settlement Class and Final Approval of Class Action Settlement (“Motion for Final Approval”). The same day, Plaintiffs also moved for Approval of Class Representative Service Awards and Individual Awards (“Motion for Service Awards”).

The Court held a fairness hearing on March 15, 2013. Having considered the Motion for Final Approval, the Motion for Service Awards, the arguments presented at the March 15, 2013 fairness hearing, and the complete record in this matter, for good cause shown,

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

**CERTIFICATION OF THE SETTLEMENT CLASS**

1. The Court certifies the following class, under Federal Rule of Civil Procedure 23(e), for settlement purposes only: all women who worked for Gristede’s for at least 90 days in one or more of its stores in New York at any time between November 2, 2004 and November 15, 2012.

2. Plaintiffs meet all of the requirements for class certification under Fed. R. Civ. P. 23(a) and 23(b)(2) and (3) for the reasons stated in the Preliminary Approval Order, which the Court hereby incorporates into this Order.

### **APPROVAL OF THE SETTLEMENT AGREEMENT**

3. The Court hereby grants the Motion for Final Approval and finally approves the settlement, the terms of which are set forth in the Term Sheet agreed to by the parties, which is Exhibit B to the Declaration of Rachel Bien in Support of Preliminary Approval, ECF No. 166-2, and which terms are set forth below.

4. The Court finds that the Term Sheet is the result of extensive, arm's length negotiations by counsel well-versed in the prosecution of employment class actions. *See Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86, 99 (S.D.N.Y. 2010); *Capsolas v. Pasta Res., Inc.*, No. 10 Civ. 5595, 2012 WL 1656920, at \*1 (S.D.N.Y. May 9, 2012).

5. The settlement is procedurally and substantively fair, reasonable, adequate, and is not a product of collusion. *See Fed. R. Civ. P. 23(e)*; *Reyes v. Altamarea Group LLC*, No. 10-6451, 2011 WL 4599822, at \*4 (S.D.N.Y. Aug. 16, 2011); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462-63 (2d Cir. 1974).

### **ALLOCATION FORMULA**

6. The Court approves the following allocation formula agreed to by the parties: payments will be based on the number of weeks worked by each class member with each week counting as 1 point.

7. A "Qualified Settlement Class Member" is a Settlement Class Member who has submitted a claim form and who did not request exclusion from the settlement.

8. Each Qualified Settlement Class Member will receive a proportionate amount of the settlement fund based upon the amount of time they worked for Gristede's. Individual settlement amounts will consist of a monetary settlement amount and/or a gift card amount. The allocation between monetary payment and gift card may differ from person to person, but that will not change Qualified Settlement Class Members' overall proportionate share of the settlement fund which shall be determined without regard to whether they receive a monetary payment or gift cards or both. The Claims Administrator will determine each Qualified Class Member's proportionate share of the settlement fund and proportion of monetary payment to gift cards with the goal of having the proportion of monetary payment to gift cards be as similar as possible for each person (i.e., each gets the same proportion of monetary payment and gift cards). In general, Class Members who are eligible for gift cards will receive approximately 60% of their award as a monetary award and 40% in gift cards. To determine each Qualified Settlement Class Member's proportionate share of the settlement fund, each will be allocated one (1) point for each week worked for Defendants. With respect to the number of weeks worked, the Claims Administrator will rely on Defendants' records, which will be presumed to be accurate, unless good cause is shown why, in a particular case, they are not accurate.

9. To calculate each Qualified Settlement Class Member's settlement award:

- a. Add all points for Qualified Settlement Class Members together to obtain the "Total Denominator;"
- b. Divide the number of points for each Qualified Settlement Class Member by the Total Denominator to obtain each Qualified Settlement Class Member's portion of the Net Settlement Class Award (the Net Settlement Class Award is \$1,450,000 minus Court-approved payments of \$50,000 to

Jenneil Adams-Hargrett and \$20,000 to Lakeya Sewer, Court-approved service awards of between \$5,000 and \$10,000 to Susan Duling, Margaret Anderson, and Lakeya Sewer, the Claims Administrator's fees, all employment taxes on the settlement payments to be made; and \$30,000 for a reserve fund to cover any additional Compliance Monitor fees above the \$20,000 amount that shall be borne by Defendants, and for any unidentified class members who come forward);

- c. Multiply each Qualified Settlement Class Member's portion of the Net Settlement Class Award by the Net Settlement Class Award to determine each Qualified Settlement Class Member's "Settlement Award."

10. For Qualified Settlement Class Members who reside in New York, a portion of their Settlement Award will be provided in gift cards. The gift cards will be issued in denominations of \$500, \$1,000, \$1,500, and \$2,500 (or in any other bunched (i.e. not individual) amount the Claims Administrator deems necessary to make the distributions with the approval of the parties). For any Qualified Settlement Class Member whose settlement amount cannot be fully paid using one of or a combination of those denominations, a monetary payment will be used to provide the additional amount (with the goal of not having to issue any gift cards in individual, different amounts).

#### **UNIDENTIFIED POTENTIAL CLASS MEMBERS**

11. If any individuals come forward who claim to be class members who have not been identified by Defendants on the class-list submitted to the Claims Administrator in December of 2012, and they wish to participate in and are eligible to participate in the settlement, and all settlement fund monies have not yet been fully exhausted, these previously

unidentified individuals will be added to the participating class and receive payments hereunder as if they had they been listed on the class-list and will become part of this settlement.

**COMPLIANCE WITH CORRECTIVE MEASURES**

12. The Court approves the corrective measures agreed to by the parties. Such relief shall prohibit the steering of female employees into certain positions, including the formerly cashier position; contain hiring and promotion goals for female store employees and applicants set by the Compliance Monitor as set forth in paragraph 14 below; the posting, electronically, through open hire, or otherwise, of all store job openings and job requirements, including with respect to store management positions; maintaining job descriptions that do not discriminate in purpose or effect against female employees; appropriate management and cross-training programs and a commitment to make good faith efforts to maximize female participation in all such programs with the goal of having at least approximately a 50% female participation rate; appropriate human resources oversight of Gristede's hiring and promotion policies and practices; establish a monitoring mechanism with respect to the above goals and obligations set by the Compliance Monitor as set forth in paragraph 14 below; and a dispute resolution mechanism established by the Compliance Monitor as set forth in paragraph 14 below, to address and resolve any disputes that arise between the parties during the settlement term.

13. The provisions of the corrective measures contained herein shall remain in effect for four (4) years from the date of this Order. The corrective measures provision shall expire without further action by the parties at midnight on the fourth anniversary of this Order. The parties may agree in writing to extend the term of the corrective measures for good cause.

**COMPLIANCE MONITOR & DISPUTE RESOLUTION**

14. The Court hereby appoints Dr. Kathleen Lundquist of APT Metrics, Inc. as the Compliance Monitor (the “Compliance Monitor”). The Compliance Monitor shall resolve all disputes pertaining to the corrective measures. To the extent that there is a dispute over Defendant’s compliance with such corrective measures and the Compliance Monitor is unable to resolve such dispute, the Court shall retain jurisdiction to enforce this Order.

15. Dr. Kathleen Lundquist, Ph.D. is a nationally recognized organizational psychologist who testifies frequently as an expert witness in employment discrimination class-action lawsuits for both defendants and plaintiffs. Bien Decl. ¶ 19.

16. Dr. Lundquist is President of APT Metrics, Inc., a national firm that consults with Fortune 100 employers on the design and implementation of Human Resources processes. *Id.* ¶ 19. In consulting with clients, she recommends proactive measures to improve the fairness, validity, and legal defensibility of Human Resources processes before they are challenged. *Id.* ¶ 19.

17. Dr. Lundquist is familiar with Defendants’ operations and has already been retained by Defendants to create and implement various personnel policies, including hiring and promotion policies. Bien Decl. ¶ 19.

18. Dr. Lundquist’s duties shall include, but will not be limited to: developing, implementing, and enforcing hiring and promotion policies; reviewing Defendants’ efforts to comply with the corrective measures outlined in paragraph 12 above; reviewing Defendant’s semi-annual progress reports towards meeting its corrective measures obligations; reviewing Defendants’ exit questionnaires to ensure compliance with the corrective measures; attending semi-annual meetings with Defendants to discuss compliance with the corrective measures;



conferring with Defendants regarding any other policies, procedures, program, or any other item developed, implemented, maintained, or otherwise in existence as a result of the corrective measures herein; and resolving any disputes which arise between the parties concerning Defendants' implementation of the corrective measures.

19. In the event that Dr. Lundquist cannot serve as the Compliance Monitor, or for any reason must resign before her term expires, the parties shall meet to determine a replacement Compliance Monitor, and in the absence of an agreement may apply to the Court for the appointment of a replacement. Dr. Lundquist will be asked for her recommendation for a replacement and that recommendation will be entitled to significant weight.

**RELEASE OF CLAIMS BY NAMED PLAINTIFFS AND THE SETTLEMENT CLASS**

20. Scope of Release. Upon Gristede's full payment of all monies owed under the settlement, Gristede's shall be fully released and forever discharged from any and all Released Claims. This includes any and all individual and class-wide claims, demands, charges, complaints, rights and causes of action of any kind and nature whatsoever, and whether seeking monetary and/or equitable relief of any sort, which arose out of or are related to any conduct arising up to the Preliminary Approval Date. "Released Claims" means any and all claims, demands and causes of action of any kind or nature whatsoever, whether known or unknown, suspected or unsuspected, that were brought in the Action or which could have been brought in the Action or that are based on the same facts and circumstances as the claims brought in the Action and which arose at any time up to the Preliminary Approval Date, including, but not limited to, any claims under any Federal anti-discrimination statutes, the New York Human Rights Law, the New York City Human Rights Law, and/or any other law prohibiting gender discrimination, whether statutory, pursuant to local ordinance or at common law.

21. Release of Claims. Upon Gristede's full payment of all monies owed under the settlement, for and in consideration of the mutual promises, terms and conditions set forth in the parties' agreement, the sufficiency of which consideration the parties expressly acknowledged, Gristede's, its directors, officers, managers, agents, employees, attorneys, insurers, successors and/or assigns, and anyone acting in concert with or on behalf of them, and their respective pension, profit-sharing, savings and other employee benefit plans of whatsoever nature, and those plans' respective trustees and administrators (together the "Releasees"), are fully, finally and forever released and discharged of and from all Released Claims arising up to the Preliminary Approval Date.

#### **DISSEMINATION OF NOTICE AND CLAIM FORMS**

22. Pursuant to the Preliminary Approval Order, the Notice was sent by first-class mail to each class member at his or her last known address (with re-mailing of returned Notices for which new addresses could be located). The Court finds that the Notice fairly and adequately advised class members of the terms of the settlement, as well as their ability to opt out of or to object to the settlement, and to appear at the fairness hearing conducted on March 15, 2013. Class members were provided with the best notice practicable under the circumstances.

23. The Court further finds that the Notice and its distribution comported with all constitutional requirements, including those of due process.

24. The Court confirms Kurtzman Carson Consultants LLC as the Claims Administrator.

#### **AWARD OF ATTORNEYS' FEES AND COSTS**

25. On November 15, 2012, the Court appointed Outten & Golden LLP as Class Counsel because they met all of the requirements of Fed. R. Civ. P. 23(g).

26. The parties have agreed, as reflected in the Term Sheet and in this Order, that Class Counsel are entitled to an award of attorneys' fees, costs, and expenses in addition to the Settlement Fund in an amount to be agreed upon by the parties or determined by the Court.

27. The parties shall meet and confer in an attempt to negotiate in good faith an award of Class Counsel's attorneys' fees and costs. If they cannot reach agreement within 60 days of the date of this Order, the parties agree to choose a mutually acceptable mediator and to submit the issue of attorneys' fees and costs to the mediator with the mediation required to take place within 120 days of the date of this Order. If an agreement cannot be reached in mediation, Plaintiffs may file a motion for fees and costs within 30 days of providing written notice that mediation has failed. Defendants will have 45 days to respond to any such motion and Plaintiffs shall have 30 days for any reply to Defendants' submission. Within 5 days of the date of this Order, Plaintiffs shall provide Defendants with a copy of Class Counsel's contemporaneously recorded fee and cost records to assist the parties in attempting to resolve the issue of attorneys' fees and costs, pursuant to an appropriate agreement, to be negotiated by the parties and "so ordered" by the Court, that will protect any confidential and/or privileged information in these records.

28. If the parties cannot reach an agreement regarding Class Counsel's attorneys' fees, costs, and expenses and Plaintiffs move for Attorneys' Fees, Costs, and Expenses, Defendants reserve all rights, defenses and objections to the fullest extent possible with respect to such motion, except with respect to Plaintiffs' right to receive an award of attorneys' fees, costs, and expenses.

**SERVICE AND INDIVIDUAL AWARDS TO PLAINTIFFS**

29. The Court finds reasonable service awards of \$5,000 each for class

representatives Lakeya Sewer and Margaret Anderson and \$10,000 for class representative Susan Duling. These amounts shall be paid from the settlement fund.

30. Service awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a named plaintiff, and any other burdens sustained by the plaintiffs. *Reyes*, 2011 WL 4599822, at \*9.

31. The Court finds reasonable payments of \$50,000 to Jenneil Adams-Hargrett and \$20,000 to Lakeya Sewer in settlement of all of their individual claims of pregnancy discrimination, Family Medical Leave Act, and/or retaliation, including the full settlement and discontinuance of Ms. Adams-Hargrett's New York State Supreme Court action.

#### **SETTLEMENT FUND**

32. Gristede's agrees to transmit to the Claims Administrator the following monetary settlement payments within 30 days of this Order but in no event earlier than April 26, 2013:

- a. \$500,000 in gift cards, which shall be redeemable at all Gristede's stores in New York and which may be used to purchase all products sold in such stores. The gift cards shall be available for all purposes, shall expire two years after they are issued, and shall be transferrable to all family members and domestic partners; and
- b. \$950,000, less the employer's share of taxes on the wage portion of Qualified Settlement Class Members' awards to be calculated by the Claims Administrator and less the Claims Administrator's fees.

33. If this Order was not entered on or before May 1, 2013, Gristedes may make the payment under Paragraph 32.b on or before September 15, 2013.

**TAXATION OF AWARDS**

34. Before distribution, the Claims Administrator shall calculate and withhold from the portion of each Qualified Settlement Class Member's total gross award allocated to back and front pay all applicable taxes, including federal, state and local income tax withholding and FICA tax. The Claims Administrator shall report and remit such amounts to the Internal Revenue Service ("IRS") and/or other applicable tax authorities and to the payee under the payee's name and social security number on an IRS Form W-2. Payments treated as compensatory damages and prejudgment interest shall be made without withholding and shall be reported to the IRS and the payee, to the extent required by law, under the payee's name and social security number on an IRS Form 1099. The Service Awards pursuant to Paragraph 29 shall be made without withholding and shall be reported to the IRS and the payee under the payee's name and social security number on an IRS Form 1099.

35. The Settlement Claims Administrator shall also determine the employer's share of taxes associated with the front and back pay payments, including the employer's share of FICA and any federal and state unemployment tax due, and shall notify Gristede's of the amount.

36. Defendants shall promptly pay the employer's share of taxes on the wage portion of Qualified Settlement Class Members' settlement awards, the Claims Administrator's fees, and their portion of the Compliance Monitor's fees when due, but in no case shall these payments delay the mailing of Qualified Settlement Class Members' settlement awards.

37. The monetary settlement payments should be allocated accordingly: (i) 40 percent shall be allocated as non-wage compensatory damages; (ii) 40 percent shall be allocated as back and front pay; (iii) 20 percent shall be allocated as prejudgment interest.

38. Gristede's makes no representations and it is understood and agreed that Gristede's has made no representations as to the taxability of any payments, including payments to Settlement Class Members, and payments to the Class Representatives.

**ADDITIONAL PROVISIONS**

39. Any funds from individuals who opt out of the settlement and from uncashed checks (after 90 days from delivery to class members) will first be used toward the items set forth in Paragraph 41(b)-(e) below. If additional funds remain, after deducting the cost of the redistribution, they shall be split between Defendants and a redistribution to participating Qualified Settlement Class Members. There shall be no reversion to Defendants except as set forth herein. If any remaining amount is too small to warrant a redistribution (i.e., it would cost more with labor and costs to do a redistribution than the amount remaining), one half of the remaining amount will be returned to Defendants and one half will be donated to National Employment Law Project as a *cy pres* designee.

40. The "Effective Date" of the settlement shall be 31 days after the date of this Order if no party appeals. If a party appeals, the "Effective Date" of the settlement shall be the day after all appeals are finally resolved and no further right to appeal remains.

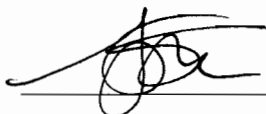
41. Unless paragraph 33 applies, within 15 days of the Effective Date, the claims administrator shall distribute the Settlement Fund by making the following payments in the order below (and if paragraph 33 applies, the distribution shall be made within 15 days of September 15, 2013):

- a. Paying individual awards of \$50,000 to Jenneil Adams-Hargrett and \$20,000 to Lakeya Sewer;
- b. Paying service awards of \$5,000 each to Lakeya Sewer and Margaret Anderson and \$10,000 to Susan Duling;

- c. Paying the Claims Administrator's fees;
- d. Paying the remainder of the fund to Qualified Settlement Class Members in accordance with the allocation plan described above;
- e. Setting aside \$30,000 in a fund for the Compliance Monitor's fees above those to be paid by Defendants as set forth in the Term Sheet (\$10,000 in each of the first two years of the settlement to be paid in accordance with this order), as needed.

42. The Court retains jurisdiction over this action for the purpose of enforcing the corrective measures, overseeing the distribution of the Settlement Fund, and to resolve any issues relating to Class Counsel's award of attorneys' fees and costs, including in the event that the parties are unable to reach an agreement. The parties shall abide by all terms of this Order.

It is so ORDERED this 19<sup>th</sup> day of June, 2013.



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Honorable Laura Taylor Swain  
United States District Judge