

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

DANIEL PULLER, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

LEGENDS OWO, LLC,

Defendant.

Civil Action No. 1:24-cv-00209-RA

Hon. Ronnie Abrams

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR
ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARD**

Dated: December 27, 2024

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INTRODUCTION

The class action settlement between Plaintiff Daniel Puller (“Plaintiff”) and Defendant Legends OWO, LLC (“Defendant”), if finally approved, resolves Plaintiff’s and the Class’s claims against Defendant under New York Arts & Cultural Affairs Law (“ACAL”) § 25.07(4). Defendant collected \$1,025,000 in allegedly unlawful processing fees. And the resulting Class Action Settlement (the “Settlement”) – preliminarily approved by this Court on July 10, 2024 – creates a \$975,000 non-reversionary cash Settlement Fund which will be used to pay all approved claims by class members, notice and administration expenses, a Court-approved service award to Plaintiff, and attorneys’ fees, costs, and expenses to Class Counsel. Each Settlement Class Member who submits a simple Claim Form will receive a *pro rata* cash payment as a percentage of the total amount of fees he or she paid to Defendant during the class period. And, just as important, the Settlement also provides meaningful prospective relief aimed at the challenged conduct, as Defendant acknowledges that it has changed the purchase flow for tickets on its website to display the processing fee that was the subject of this litigation in a manner that complies with ACAL § 25.07(4).

Obtaining this exceptional relief came with significant risks. ACAL § 25.07(4) has never been litigated to judgment, and thus, the scope of the statute is in dispute. At the time of the settlement, Defendant’s motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) was pending, with no binding precedent, and the existing case law was not uniformly in Plaintiff’s favor. Even if Plaintiff overcame that hurdle, he would still need to move for class certification, and likely have had to overcome a summary judgment motion, which would have re-raised issues of Article III standing, the voluntary payment doctrine, and the legality of the challenged fees considering ACAL § 25.29. An adverse decision – whether on the motion to dismiss, class certification, summary judgment, or at a later stage of the case – could have resulted in the

Settlement Class receiving nothing. Rather than put Defendant's arguments to the test and risk everything, Plaintiff and Class Counsel negotiated meaningful relief for the Class.

In light of this exceptional result, Plaintiff respectfully requests, pursuant to Federal Rule of Civil Procedure 23(h) and ACAL § 25.33, that the Court approve attorneys' fees, costs, and expenses of one-third of the settlement fund, or \$325,000, as well as a service award of \$5,000 for Plaintiff for his service as class representative. Courts in this Circuit routinely approve fee requests for one-third of a settlement fund, including in similarly sized ACAL class action cases. *See, e.g., Norcross v. Tishman Speyer Properties, L.P.*, Case No. 1:23-cv-11153-JPO, ECF No. 36 at ¶ 14 (S.D.N.Y. Aug. 16, 2024) (awarding attorneys' fees, costs, and expenses of one-third of the settlement fund in \$1,100,000 ACAL class action settlement); *Charles v. Color Factory, LLC*, Case No. 1:24-cv-00322-JSR, ECF No. 48 at ¶ 14 (awarding attorneys' fees, costs, and expenses of one-third of the settlement fund in \$714,705.68 ACAL class action settlement); *Hayes v. Harmony Gold Min. Co.*, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding "attorneys' fees in the amount of one third" of a \$9 million settlement fund), *aff'd* 509 F. App'x 21, 23-24 (2d Cir. 2013) (affirming fee award, and noting that "the prospect of a percentage fee award from a common fund settlement, as here, aligns the interests of class counsel with those of the class").

For these reasons, and as explained further below, this Court should approve the requested fee and service awards.

FACTUAL AND PROCEDURAL BACKGROUND

A brief summary of ACAL § 25.07(4), the litigation performed by Class Counsel for the Settlement Class's benefit, and the beneficial terms of the Settlement provide necessary context to the reasonableness of the requested fee and service awards.

A. ACAL § 25.07(4)

Effective August 29, 2022, New York enacted Arts & Cultural Affairs Law § 25.07(4), which provides that:

Every operator or operator’s agent of a place of entertainment ... shall disclose the total cost of the ticket, inclusive of all ancillary fees that must be paid in order to purchase the ticket, and disclose in a clear and conspicuous manner the portion of the ticket price stated in dollars that represents a service charge, or any other fee or surcharge to the purchase. Such disclosure of the total cost and fees shall be displayed in the ticket listing prior to the ticket being selected for purchase. ... The price of the ticket shall not increase during the purchase process.

Id. (emphasis added).

The ACAL provides a private right of action to “any person who has been injured by reason of violation of” its provisions. ACAL § 25.33.

B. Plaintiff’s Allegations

Defendant owns and operates One World Observatory, an observation deck at One World Trade Center in New York City. *See* Complaint (ECF No. 1) (“*Compl.*”) ¶ 8. Plaintiff alleges that when consumers purchase admission tickets to One World Observatory on Defendant’s Website, they are “quoted a fee-less price, only to be ambushed by a \$5.00 ‘processing fee’ at checkout after clicking through the various screens required to make a purchase.” *Id.* ¶ 1; *see also id.* ¶¶ 9-15 and Figures 1-8-C. Plaintiff alleges that this conduct violates ACAL § 25.07(4) because Defendant failed to “disclose the ‘total cost of a ticket, inclusive of all ancillary fees that must be paid in order to purchase the ticket’ after a ticket is selected,” because Defendant “increase[ed] the price of their tickets during the purchase process,” and because Defendant failed to “disclose in a clear a conspicuous manner the portion of the ticket price stated in dollars that represents a service charge, or any other fee or surcharge of the purchaser.” *Id.* ¶¶ 28-30. Plaintiff purchased tickets to One World Observatory and paid the processing fee in connection with that purchase during the class period. *Id.* ¶ 32.

C. The Litigation And Work Performed To Benefit The Class

Plaintiff filed this case on January 10, 2024. ECF No. 1. On March 8, 2024, Defendant responded to the Complaint by filing a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF No. 13. On April 19, 2024, Plaintiff opposed Defendant's motion to dismiss (ECF No. 24), and on May 10, 2024, Defendant filed a reply in further support of the motion to dismiss. ECF No. 31.

On April 10, 2024, Defendant filed a request to stay discovery pending the Court's decision on Defendant's motion to dismiss. ECF No. 20. On April 19, 2024, Plaintiff filed a response opposing Defendant's request to stay discovery. ECF No. 26. On May 2, 2024, the Court issued an order denying Defendant's request to stay discovery. ECF No. 29.

After the Court's order, the Parties engaged in formal discovery, including the exchange of written discovery and document productions. *See* Declaration of Philip L. Fraietta In Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award ("Fraietta Decl.") ¶ 7.

After analyzing the discovery, counsel for the Parties engaged in numerous telephone calls to discuss settlement, and on August 3, 2024, the Parties reached agreement on all material terms of a class action settlement and executed a term sheet. Fraietta Decl. ¶ 19. On August 6, 2024, the Parties wrote to inform the Court that they reached an agreement in principle to resolve the matter on a class-wide basis. ECF No. 35. On August 7, 2024, the Court granted the Parties' application, directing Plaintiff to file a motion for preliminary approval on or before September 20, 2024. ECF No. 36. In the weeks following, a Settlement Administrator was engaged and the Parties, in consultation with the Settlement Administrator on matters of notice and claims administration, negotiated the full-form Settlement. Fraietta Decl. ¶ 13 and Ex. 1. The Court preliminarily approved the Settlement on November 6, 2024. ECF No. 43.

SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class by delivering cash to approximately 108,000 individuals who purchased electronic tickets and paid a fee to gain entrance to Defendant’s One World Observatory from Defendant’s Website from August 29, 2022, through and including August 1, 2024. Fraietta Decl. ¶ 12. The Settlement creates a \$975,000 non-reversionary cash Settlement Fund, from which each Settlement Class Member who submits a simple Claim Form will receive a *pro rata* cash payment as a percentage of the total amount of fees he or she paid to Defendant during the class period. Settlement ¶¶ 1.38, 1.41, 2.1(b). The Settlement also provides meaningful prospective relief aimed at the challenged conduct, as Defendant acknowledges that it has changed the purchase flow for tickets on its website to display the processing fee that was the subject of this litigation in a manner that complies with ACAL § 25.07(4). *Id.* ¶ 2.2.

ARGUMENT

I. THE REQUESTED ATTORNEYS’ FEES ARE REASONABLE AND SHOULD BE APPROVED

The requested fee award of \$325,000, representing one-third of the Settlement Fund, is reasonable and merits approval. Under Federal Rule of Civil Procedure 23(h), courts may award “reasonable attorney’s fees and nontaxable costs that are authorized by law or the parties’ agreement.” Fed. R. Civ. P. 23(h). The ACAL provides for the same. *See* ACAL § 25.33. Here, the Settlement Agreement between the Parties provides that Class Counsel may petition the Court for an award up to one-third of the Settlement Fund. Agreement ¶ 8.1.¹

¹ The requested fee award also encompasses unreimbursed litigation costs and expenses. Agreement ¶ 8.1. Reasonable litigation-related costs and expenses are customarily awarded in class action cases and include costs such as filing fees, process server fees, and courier fees. *See, e.g., Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) (“Class Counsel’s unreimbursed expenses, including court and process server fees, postage and courier fees, transportation, working meals, photocopies, electronic research, expert fees, and

In settlement fund cases such as this one, courts in the Second Circuit apply one of two fee calculation methods – the “percentage of the fund” method or the “lodestar” method. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). The Court has discretion in choosing which method to employ. *See McDaniel v. County of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (holding that “the decision as to the appropriate method [is left] to ‘the district court, which is intimately familiar with the nuances of the case’”) (quoting *Goldberger*, 209 F.3d at 48). “[T]he trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases.” *In re Beacon Assocs. Litig.*, 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013). In fact, the “trend” of using the percentage of the fund method to compensate class counsel is now “firmly entrenched in the jurisprudence of this Circuit.” *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 388 (S.D.N.Y. 2013). As the Second Circuit has stated, the percentage method “directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). “In contrast, the ‘lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in gimlet-eyed review of line-item fee audits.’” *Id.* (quoting *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002)). Indeed, the Second Circuit has described difficulties with the lodestar method:

As so often happens with simple nostrums, experience with the lodestar method proved vexing. Our district courts found it created a temptation for lawyers to run up the number of hours for which they could be paid. For the same reason, the lodestar created an unanticipated disincentive to

Plaintiffs’ share of the mediator’s fees, are reasonable and were incidental and necessary to the representation of the class.”). Thus, included in the requested fee award, Class Counsel respectfully seeks reimbursement of \$1,170.00 for out-of-pocket costs and expenses in these standard categories. *See Fraietta Decl.* ¶ 23, Ex. 3.

early settlements. But the primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. There was an inevitable waste of judicial resources.

Goldberger, 209 F.3d at 48-49. As a result, “courts in the Second Circuit no longer use the ‘lodestar’ method for computing attorneys’ fees” in fee-shifting cases. *GB ex rel NB v. Tuxedo Union Free School Dist.*, 894 F. Supp. 2d 415, 427 (S.D.N.Y. 2012) (citing *Arbor Hill Concerned Citizens Neighborhood Assn v. County of Albany*, 522 F.3d 182 (2d Cir. 2008)).

Moreover, Courts in this Circuit routinely approve fee requests for one-third of a settlement fund. *See Hayes v. Harmony Gold Min. Co.*, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding “attorneys’ fees in the amount of one third” of a \$9 million settlement fund), *aff’d* 509 F. App’x 21, 23-24 (2d Cir. 2013) (affirming fee award, and noting that “the prospect of a percentage fee award from a common fund settlement, as here, aligns the interests of class counsel with those of the class”); *Gruber v. Gilbertson*, 647 F. Supp. 3d 100, 127 (S.D.N.Y. 2022) (Rakoff, J.) (awarding one-third of \$4.649 million settlement fund); *Silverstein v. AllianceBernstein, L.P.*, 2013 WL 7122612, at *9 (S.D.N.Y. Dec. 20, 2013) (awarding one-third of \$2.98 million settlement fund and noting that one-third is “consistent with the norms of class litigation in this circuit”); *In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y.2009) (awarding one-third of the \$510 million net settlement fund); *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *20 (S.D.N.Y. May 9, 2014) (awarding 33% of \$15 million settlement fund); *Khait v. Whirlpool Corp.*, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of \$9.25 million settlement fund); *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *6–7 (E.D.N.Y. Feb. 18, 2011) (awarding one-third of \$7.675 million settlement fund); *Clark v. Ecolab, Inc.*, 2010 WL 1948198, at *8–9 (S.D.N.Y. May 11, 2010) (awarding one-third of \$6 million settlement fund); Fraietta Decl., Ex. 15 (*Taylor v. Trusted Media Brands, Inc.*, Case No. 16-cv-01812-KMK Hearing Tr. at 17:21-22, (S.D.N.Y. Feb. 1,

2018)) (“*TMBI* Hearing Tr.”) (“As I said, it’s one-third. That’s typically approved by other courts.”). Indeed, as courts in this Circuit have noted, fee requests for one-third of common funds represent what “reasonable, paying client[s] ... typically pay ... of their recoveries under private retainer agreements.” *Reyes v. Altamarea Grp.*, 2011 WL 4599822, at *8 (S.D.N.Y. Aug. 16, 2011) (citing *Arbor Hill*, 522 F.3d 182); *see also Silverstein*, 2013 WL 7122612, at *9.

A. The Percentage Method Should Be Used To Calculate Fees

As mentioned *supra*, the “trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases.” *In re Beacon Assocs. Litig.*, 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013). Indeed, the percentage method was used to calculate fees in the only other ACAL class action settlements to reach the final approval stage to date. *See Norcross*, Case No. 1:23-cv-11153-JPO, ECF No. 36 at ¶ 14 (awarding attorneys’ fees, costs, and expenses of one-third of the settlement fund in ACAL class action settlement); *Charles*, Case No. 1:24-cv-00322-JSR, ECF No. 48 at ¶ 14 (same). In contrast, the lodestar approach is more often applied in federal fee-shifting cases, particularly civil rights actions. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010). As Judge Cote has stated, the percentage method is preferred for several reasons:

First, it relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions. Second, it decreases plaintiff lawyers’ incentive to run up the number of billable hours for which they would be compensated by the lodestar method. And finally, it decreases the incentive to delay settlement because the fee for the plaintiffs’ attorneys does not increase with delay.

Varljen v. H.J. Meyers & Co., Inc., 2000 WL 1683656, at *5 (S.D.N.Y. Nov. 8, 2000) (internal citations omitted); *see also In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *16 (S.D.N.Y. July 27, 2007) (“From a public policy perspective, the percentage

method is the most efficient means of compensating the work of class action attorneys. It does not waste judicial resources analyzing thousands of hours of work, where counsel obtained a superior result.”).

Under the circumstances of this case – wherein Class Counsel received an exceptional result for the Settlement Class – the Second Circuit prefers the percentage method. *See Wal-Mart Stores, Inc.*, 396 F.3d at 121 (noting that the percentage method “directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation”). In contrast, “the lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in gimlet-eyed review of line-item fee audits.” *Id.* at 121 (quotation omitted).

B. The Reasonableness Of The Requested Fees Is Supported By This Circuit’s Six-Factor *Goldberger* Test

The Second Circuit has articulated six factors that should be considered when determining the reasonableness of a requested percentage to award as attorneys’ fees: “(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.” *Goldberger*, 209 F.3d at 50. These factors support Class Counsel’s fee request.

1. Time And Labor Expended By Counsel

Class Counsel first began working on this case by investigating potential violations of the newly-enacted ACAL § 25.07(4). *See Fraietta Decl.* ¶ 3. The theory of liability was novel. No case had ever been brought under ACAL § 25.07(4), nor had any court issued an opinion interpreting the statute. *Id.* Thus, Class Counsel’s investigation was extensive and involved in-depth research into the legislative history of ACAL § 25.07(4), issues pertaining to statutory

interpretation under New York law, as well as factual research regarding Defendant's website and implementation of processing fees. *Id.* Class Counsel also spoke with interested potential class members, drafted the Complaint, briefed a motion to dismiss and a motion to stay discovery, conducted formal and informal discovery, and engaged in numerous conferences to discuss settlement. *Id.* ¶¶ 3-9. And because of the novelty of ACAL § 25.07(4), almost all of this work was done *de novo*.

Class Counsel expended considerable time and labor on the settlement process as well. First, Class Counsel analyzed the formal and informal discovery produced by Defendant prior to making any settlement demand. *Id.* ¶¶ 6-7. Then, Class Counsel engaged in a number of conferences with defense counsel to discuss the strengths and weaknesses of the case and negotiate the instant Settlement. *Id.* ¶ 8.

Thus, the work performed by Class Counsel to date has been comprehensive and wide ranging. This factor supports the requested fee award.

2. Magnitude And Complexity Of The Litigation

“[C]lass actions have a well deserved reputation as being most complex.” *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (internal citation and quotations omitted). This case was no exception, particularly because of its novelty. This case involved a statute – ACAL § 25.07(4) – that has never been litigated before. First, Plaintiff had to overcome a motion to dismiss arguing that he lacked standing and that his claim was barred by the voluntary payment doctrine. *See Fraietta Decl.* ¶ 5 (citing ECF No. 23). Then Plaintiff conducted discovery and moved for class certification. *Id.* ¶¶ 7-10. And even if that motion was granted, he would have faced a summary judgment motion arguing, among other things: (i) Plaintiff lacked Article III standing; (ii) Plaintiff's claims were barred by the voluntary payment doctrine; and (iii) Defendant's fees were permitted under ACAL § 25.29, and therefore are not

unlawful as Plaintiff alleged. *Id.* ¶ 22. The Court deferred all of these arguments at the motion to dismiss stage, so success was far from certain. *Id.* Thus, because this case involved novel and complex legal questions under ACAL § 25.07(4), the magnitude and complexity of the litigation further supports the requested fee award.

3. The Risk Of Litigation

This factor recognizes the risk of non-payment in cases prosecuted on a contingency basis where claims are not successful, which can justify higher fees. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) (“There was significant risk of non-payment in this case, and Plaintiffs’ Counsel should be rewarded for having borne and successfully overcome that risk.”); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) (noting risk of non-payment in cases brought on contingency basis). “It is well settled that class actions are notoriously complex and difficult to litigate.” *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) (internal citation omitted).

“The risks of litigation for Plaintiffs, furthermore, are substantial, as the case involved novel legal issues.” *In re Am. Int’l Grp., Inc. Sec. Litig.*, 2013 WL 12324362, at *4 (S.D.N.Y. Apr. 10, 2013). Class Counsel took this case on contingency under a statute and legal theory that no other lawyer had pursued. When Plaintiff embarked on this litigation, he faced a barren desert of precedent. No court had interpreted ACAL § 25.07(4), and Class Counsel needed to shadowbox and imagine what Defendant’s arguments may be prior to filing the action. Even now, ACAL § 25.07(4) has not yet been interpreted by any binding authority. Simply put, success on the legal issues presented by this case was far from certain. Fraietta Decl. ¶ 15. Indeed, Class Counsel faced the palpable risk that the Court would have found, at summary judgment, that Plaintiff lacked standing, that his claim was barred by the voluntary payment doctrine, or that the processing fees at issue were authorized by ACAL § 25.29. *Id.*; *see also*

Curanaj v. Tao Group, Inc., Index No. 56152/2024, NYSCEF No. 36 (Sup. Ct. Westchester Cnty. July 25, 2024) (granting motion to dismiss ACAL § 25.07(4) case on similar arguments); *Frias v. City Winery New York, LLC*, Index No. 651284/2024, NYSCEF No. 31 (Sup. Ct. New York Cnty. June 17, 2024) (same). This risk was exacerbated by the fact that Defendant retained highly qualified defense counsel who presented well-argued defenses in motion papers and in conferences with the Court and Class Counsel. Fraietta Decl. ¶ 15. Nonetheless, Class Counsel embarked on an investigation of Defendant’s practices, engaged in motion practice and discovery, and participated in weeks of discussions with the defense counsel to try and resolve the action. *Id.* ¶¶ 3-9. Class Counsel fronted this investment of time and resources, despite the significant risk of nonpayment inherent in this case. *Id.*

The fact that Class Counsel undertook this representation, despite the significant risk of nonpayment, supports the requested fee award.

4. The Quality Of Representation

Class action litigation presents unique challenges and – by achieving a meaningful settlement over purported violations of an untested statute – Class Counsel proved that they have the ability and resources to litigate this case zealously and effectively. Indeed, Class Counsel negotiated a Settlement Fund that equals the amount of allegedly unlawful fees Defendant collected, without jeopardizing the Settlement Class’s recovery.

In addition, Class Counsel are well-respected attorneys with significant experience litigating consumer class actions of similar size, scope, and complexity. Fraietta Decl. ¶¶ 30-31. Indeed, Class Counsel has been recognized by courts across the country, including this Court, for its expertise. *See Firm Resume*, Fraietta Decl. Ex. 16; *see also Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) (Rakoff, J.) (“Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. ... The firm has been appointed class

counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five² class action jury trials since 2008.”); *In re Apple Data Privacy Litig.*, Case No. 5:22-cv-07069, ECF No. 104 (N.D. Cal. July 5, 2023) (appointing Bursor & Fisher, P.A. as co-lead Class Counsel in contested leadership application); *In re Sandisk SSDs Litig.*, 2023 WL 10367607, at *1 (N.D. Cal. Dec. 4, 2023) (“Bursor & Fisher, however, has had significant experience representing certified classes (and representing putative classes as interim class counsel)” and appointing its attorneys co-lead counsel in contested leadership application).

Furthermore, “[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs’ counsel’s performance.” *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. *See Marsh ERISA Litig.*, 265 F.R.D. at 148 (“The high quality of defense counsel opposing Plaintiffs’ efforts further proves the caliber of representation that was necessary to achieve the Settlement.”).

Class Counsel litigated this case efficiently, effectively, and civilly. The excellent result is a function of the high quality of that work, which supports the requested fee award.

5. The Requested Fee In Relation To The Settlement

Class Counsel seeks fees, costs, and expenses totaling one-third of the \$975,000 settlement fund. As mentioned above, courts in this Circuit routinely approve fee requests for one-third of a common fund. *See* cases cited in Argument § I, *supra*.

6. Public Policy Considerations

The final *Goldberger* factor is public policy. “Skilled counsel must be incentivized to pursue complex and risky claims [that protect the public on a contingency basis].” *Shapiro*,

² Bursor & Fisher has since won a sixth jury verdict in *Perez v. Rash Curtis & Associates*, Case No. 4:16-cv-03396-YGR (N.D. Cal.), for \$267 million.

2014 WL 1224666, at *24. As such, reasonable fee awards must be provided in order to ensure that attorneys are incentivized to litigate class actions, which serve as private enforcement tools to police defendants who engage in misconduct. *See id.* “Attorneys who fill the private attorney general role must be adequately compensated for their efforts,” otherwise the public risks an absence of a “remedy because attorneys would be unwilling to take on the risk.” *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *7 (E.D.N.Y. Nov. 20, 2012) (citing *Goldberger*, 209 F.3d at 51). Further, when individual class members seek a relatively small amount of damages, “economic reality dictates that [their] suit proceed as a class action or not at all.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

Society undoubtedly has a strong interest in incentivizing lawyers to bring complex litigation under ACAL § 25.07(4). Class action litigation is the most realistic means of safeguarding the interests of consumers against small ticketing fees. In fact, ACAL § 25.07(4) had never been enforced before this case was filed. Thus, the alternative to a class action in this case would have been no enforcement at all, and Defendant’s allegedly unlawful conduct would have continued unabated. This factor thus supports the requested fee award.

C. The Requested Attorneys’ Fees Are Also Reasonable Under An Optional Lodestar Cross-Check

An optional lodestar cross-check further supports the requested fee. Courts applying the lodestar method generally apply a multiplier to take into account the contingent nature of the fee, the risks of non-payment, the quality of representation, and the results achieved. *See Wal-Mart Stores, Inc.*, 396 F.3d at 121. Where the lodestar is “used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.” *Goldberger*, 209 F.3d at 50; *see also Cassese v. Williams*, 503 F. App’x 55, 59 (2d Cir. 2012) (noting the “need for exact [billing] records [is] not imperative” where the lodestar is used as a “mere cross-check”).

To calculate lodestar, counsel’s reasonable hours expended on the litigation are multiplied by counsel’s reasonable rates. *See Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Parker v. Time Warner Entertainment Co., L.P.*, 631 F. Supp. 2d 242, 264 (E.D.N.Y. 2009). The resulting figure may be adjusted at the court’s discretion by a multiplier, taking into account various equitable factors. *See Parker*, 631 F. Supp. 2d at 264; *Shapiro*, 2014 WL 1224666, at *24 (“Additionally, under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors.”) (internal quotations and citations omitted); *Milstein v. Huck*, 600 F. Supp. 254, 257 (E.D.N.Y. 1984) (“An increase in a fee award is appropriate in situations, such as this one, where an action is prosecuted solely on a contingent fee basis and counsel, faced with a large case containing complex and novel legal issues, successfully recovers a substantial benefit to the class.”).

The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, *i.e.*, the “market rate.” *See Blum*, 465 U.S. at 895; *see also Luciano v. Olsten Corp.*, 109 F.3d 111, 115-116 (2d Cir. 1997) (“The ‘lodestar’ figure should be ‘in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation’”) (alteration in original and citation omitted). Here, the hourly rates used by Class Counsel are reasonable compared to rates charged by attorneys with similar experience, skill, and reputation, for similar services in the New York legal market. *See Fraietta Decl.* ¶¶ 23-27.³

³ The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (recognizing “an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise”); *LeBlanc-Sternberg v. Fletcher*, 143 F. 3d 748, 764 (2d Cir. 1998) (“The lodestar should be based on ‘prevailing market

The hours worked, lodestar fee, and expenses for Class Counsel are set forth in the declaration of Mr. Fraietta, submitted herewith. In total, through August 13, 2024, Class Counsel billed 110.1 hours, which at their hourly rates amounts to a lodestar of \$60,422.50. Fraietta Decl. ¶¶ 20-21; Ex. 2. Counsel also incurred \$1,170 in expenses. *Id.* ¶ 23. Therefore, the requested fee award reflects an approximately 5.3 times multiplier on Class Counsel’s regular hourly rates, which is well within the range of reasonableness under the circumstances of this case. “Courts routinely award lodestar multipliers between two to six.” *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (citation omitted). And the 5.3 multiplier here is less than what another court awarded in a similarly-sized \$1.1 million ACAL § 25.07(4) class action settlement. *Tishman Speyer Properties, L.P.*, Case No. 1:23-cv-11153-JPO, ECF No. 36 at ¶ 14 (S.D.N.Y. Aug. 16, 2024) (awarding multiplier of 8.12 in ACAL §25.07(4) case). As *Beckman* notes: “Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.” 293 F.R.D. at 481 (collecting cases and awarding “approximately 6.3 times” the lodestar); *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) (“the lodestar sought by Class Counsel, approximately 7.6 times, falls within the range granted by courts... While this multiplier is near the higher end of the range of multipliers that courts have allowed, this should not result in penalizing plaintiffs’ counsel for achieving an early settlement, particular where, as here, the settlement amount is substantial.”); Fraietta Decl., Ex. 15 (*TMBI* Hearing Tr. at 18:4-12 (approving a “pretty healthy multiplier [of] about 11.7” because that “should not result in penalizing plaintiff’s counsel for achieving an early settlement, particular whereas here the settlement amount was substantial.”) (quoting *Beckman*, 293 F.R.D. at 482); *Winston v. Peacock TV LLC*, Case No. 1:23-cv-08191-

rates’ ... and current rates, rather than historical rates, should be applied in order to compensate for the delay in payment.”) (citation omitted).

ALC, ECF No. 47 at ¶ 16 (S.D.N.Y. Nov. 12, 2024) (awarding a 6.89 multiplier); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) (McMahon, J.) (“In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court.”).

This case settled early in the litigation before a decision on Defendant’s motion to dismiss. But a higher multiplier “should not result in penalizing plaintiffs’ counsel for achieving an early settlement, particularly where, as here, the settlement amount was substantial.” *Beckman*, 293 F.R.D. at 482; *see also Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) (“In this case, where the parties were able to settle relatively early and before any depositions occurred ... the Court finds that the percentage method, which avoids the lodestar method’s potential to ‘create a disincentive to early settlement’ ... is appropriate.”) (citing *McDaniel*, 595 F.3d at 418). Class Counsel took this case on contingency under a statute and legal theory that no other lawyer had pursued. Class Counsel recognized that a substantial settlement could be achieved and pursued it accordingly. And Class Counsel succeeded, having negotiated a Settlement Fund that nearly equates the actual damages potentially available for the Settlement Class. The alternative to settlement would have been needless litigation which would burden the Court and jeopardize the Settlement Class’s recovery. Cases like this are exactly why the Second Circuit has moved away from the lodestar method more than two decades ago. *See, e.g., Savoie v. Merchants Bank*, 166 F.3d 456, 461 (2d Cir.1999) (“[T]he percentage-of-the-fund method also removes disincentives to prompt settlement, because plaintiffs’ counsel, whose fee does not increase with delay, have no reason to drag their feet.”). This Court should do the same. *See, e.g., Guippone v. BHS & B Holdings, LLC*, 2011 WL 5148650, at *8-9 (S.D.N.Y. Oct. 28, 2011) (approving one-third fee without performing a lodestar cross-check); *Gilliam v. Addicts Rehabilitation Center Fund*, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (same).

Class Counsel also leanly staffed this case. And because Class Counsel filed several

other cases under this same statute, the issues have been fresh in their minds, and enabled them to prosecute this case much more efficiently. As such, the lodestar cross-check inherently penalizes them for knowing the issues and not billing to re-learn the issues on each case.

In sum, Class Counsel's efforts in this case resulted in an exceptional recovery for the Settlement Class. Class Counsel should be rewarded for achieving this result.

II. THE REQUESTED SERVICE AWARD REFLECTS PLAINTIFF'S ACTIVE INVOLVEMENT IN THIS ACTION AND SHOULD BE APPROVED

“Incentive awards encourage class representatives to participate in class action lawsuits, which are designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries.” *Moses v. New York Times Co.*, 79 F.4th 235, 253 (2d Cir. 2023). “Such incentive awards often level the playing field and treat differently situated class representatives equitably relative to the class members who simply sit back until they are alerted to a settlement.” *Id.*

Here, Plaintiff's participation was critical to the ultimate success of the case. *See* Fraietta Decl. ¶¶ 33-35. Plaintiff assisted Class Counsel in investigating this action by detailing his ticket purchase, supplying supporting documentation, and aiding in drafting the Complaint. *See id.* During the course of this litigation, Plaintiff kept in regular contact with his lawyers to receive updates on the progress of the case and to discuss strategy. Finally, Plaintiff was actively consulted during the settlement process. *Id.*

On these facts, the \$5,000 service award is fair and reasonable. The requested \$5,000 is well within the range of service awards approved by other courts in this Circuit. *See, e.g., Norcross*, Case No. 1:23-cv-11153-JPO, ECF No. 36 at ¶ 15 (awarding \$5,000 service payment in ACAL class action settlement); *Charles*, Case No. 1:24-cv-00322-JSR, ECF No. 48 at ¶ 15 (same); *deMunecas v. Bold Food, LLC*, 2010 WL 3322580, at *10 (S.D.N.Y. Aug. 23, 2010)

(awarding \$5,000 service payments to class representatives from \$800,000 fund); *McMahon v. Olivier Cheng Catering and Events, LLC*, 2010 WL 2399328, at *8-9 (S.D.N.Y. Mar. 3, 2010) (awarding \$5,000 service payments to two class representatives from \$400,000 fund); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (noting case law supports payments of between \$2,500 and \$85,000).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court (1) approve attorneys' fees, costs, and expenses in the amount of one-third of the settlement fund, or \$325,000, (2) grant Plaintiff a service award of \$5,000 in recognition of his efforts on behalf of the Settlement Class, and (3) award such further relief as the Court deems reasonable and just.

Dated: December 27, 2024

Respectfully submitted,

By: /s/ Philip L. Fraietta
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