UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JACOB SILVER, on behalf of himself and all others similarly situated,

Plaintiff,

v.

LIVEWATCH SECURITY, LLC d/b/a BRINKS HOME SECURITY f/k/a BOLSTER LLC d/b/a SAFEMART; MONITRONICS INTERNATIONAL, INC. d/b/a BRINKS HOME SECURITY,

Defendants.

Case No. 2:20-cv-02478-JS-AYS

MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD

JUDGE JOANNA SEYBERT
MAGISTRATE JUDGE ANNE SHIELDS

JURY DEMANDED HEREON

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I. INTRODUCTION

In this class action, Plaintiff Jacob Silver alleges that Defendants LiveWatch Security, LLC and Monitronics International, Inc. charged 4,908 customers for an add-on, alarm-monitoring service called ASAPer after the service was discontinued. As a result of the lawsuit, Defendants stopped charging Settlement Class Members[1] for the service, and processed nearly $150,000 in mid-litigation refunds. The Settlement negotiated by Class Counsel does even more, establishing a $395,000 Gross Settlement Fund that will provide real monetary relief to the Settlement Class. Settlement Class Members who do not exclude themselves from the Settlement will receive a cash payment of approximately $45 without having to submit a claim form.

Defendants strenuously deny all allegations of wrongdoing and have zealously defended their handling of the apparent "billing error" that resulted in customers being charged for the service after it was discontinued. In the face of this vigorous defense, Plaintiff and his counsel have achieved an exceptional result that offers nearly all Settlement Class Members their full measure of damages as calculated by Class Counsel.

The Settlement—which was reached with the assistance of a private mediator (Richard Byrne of National Arbitration and Mediation)—is the result of sustained effort by experienced and knowledgeable Class Counsel. Class Counsel seek an award of one-third of the common fund, $131,666, as payment for both their attorneys' fees and their litigation expenses—an amount that is well below Class Counsel's lodestar. The attorneys' fees and costs sought are reasonable given the time Class Counsel devoted to the case, the risks they faced to meet steadfast opposition to class certification, liability, and damages, and the outstanding result

[1] Unless otherwise noted, capitalized terms have the same meaning as defined in the Settlement Agreement.

achieved for the Settlement Class. Class Counsel also seek approval of a Service Award in the amount of $10,000 to Plaintiff, who stepped up to protect the rights of thousands of other consumers and who actively participated in the litigation from its inception.

The requested attorneys' fees and costs and the Service Award to Plaintiff are reasonable and consistent with the Second Circuit's requirements for approving fee requests in class action settlements.

II. STATEMENT OF FACTS

A. The Settlement represents an outstanding result for the Settlement Class.

The Settlement requires Defendants to pay $395,000 into a Qualified Gross Settlement Fund. ECF No. 47-1 (Settlement Agreement) § 15(b). The Gross Settlement Fund will be used to pay Cash Awards to all Settlement Class Members, Settlement administration costs, and the attorneys' fees and litigation costs and Service Award to Plaintiff approved by the Court. *Id*. §§ 15(a), 16. Unless they exclude themselves from the Settlement, Settlement Class Members will receive a payment of approximately $45 from the Settlement Fund. ECF No. 47 (Declaration of Beth E. Terrell in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement) ¶ 13. The Cash Awards offered by the Settlement add to $144,266 in refunds issued by Defendants to Settlement Class Members after this lawsuit was filed. *Id*. ¶ 10.

Settlement Class Members do not need to submit a claim form to receive a payment. Cash Award checks will be mailed to each member of the Settlement Class. Settlement Agreement § 15(d). Settlement Class Members have until June 7, 2022, to object to the Settlement or opt-out of the Settlement Class. *See* ECF No. 51 (Preliminary Approval Order) ¶ 28. If any amounts remain in the Settlement Fund as a result of uncashed checks, the Settlement Administrator will be paid up to $2,000 for preparing and serving Defendants' CAFA

notices, and the remainder will be distributed *cy pres* to the Public Justice Foundation. ECF No. 47 ¶ 17; Settlement Agreement §§ 18, 34. None of the Settlement funds will revert to Defendants. ECF No. 47 ¶ 13.

B. This action involved considerable risk.

Class Counsel agreed to prosecute this matter on a contingent-fee basis. Declaration of Beth E. Terrell in Support of Class Counsel's Motion for Attorneys' Fees and Costs and for Service Award to the Class Representative (Terrell Decl.) ¶ 16; Declaration of Daniel A Schlanger in Support of Class Counsel's Motion for Attorneys' Fees and Costs and for Service Award to the Class Representative (Schlanger Decl.) ¶ 41–42. As a result, they shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment, all while devoting effort to this case that otherwise could have been spent on other matters. *Id*.

One of the major risks Plaintiff faced was related to damages. Although Defendants have a substantial number of customers, the cost of the service was low, just $2.95 a month plus taxes, and the number of affected subscribers was unknown. Terrell Decl. ¶ 11. As it turns out, just under 5,000 of the more than one million customers served by Defendants were affected. *See* https://brinkshome.com/about-us (Defendants provide "cutting-edge products and alarm monitoring services to more than 1 million customers"); Terrell Decl. ¶ 12. In addition, after this case was filed, Defendants issued two sets of refunds to Settlement Class Members. *Id*. Defendants argued that the refunds mooted Plaintiff's claims and that the proposed class would therefore be unable to prevail on a breach of contract claim—the only claim alleged on behalf of the national class. *See* ECF No. 21; Terrell Decl. ¶ 12. Although Plaintiff contends that these

arguments lack merit, Plaintiff and the Settlement Class would recover nothing if Defendants were to prevail on this issue. Terrell Decl. ¶ 12.

Class certification presented another risk. Defendants have consistently maintained that individualized issues among class members would preclude certification. ECF No. 29 (Answer to First Amended Complaint) ¶ 103. While Class Counsel are confident in the strength of Plaintiff's case, if the Court sided with Defendants, the Court might have declined to certify the proposed classes, foreclosing any relief to the Settlement Class. Terrell Decl. ¶ 13. Even if a class were eventually certified and Plaintiff succeeded in bringing the case to verdict, Defendants would likely file an appeal, resulting in additional risk and delay. *Id*.

C. Class Counsel thoroughly and efficiently prosecuted this action.

Plaintiff filed this action on June 3, 2020. ECF No. 1. Shortly afterwards, the parties began early settlement discussions, including production of informal class discovery. ECF No. 47 ¶ 12. When those informal discussions failed to resolve the matter, the parties attended a settlement conference before Magistrate Judge Shields. ECF No. 19. The settlement conference did not resolve the case, and the parties actively litigated this action into July 2021. Terrell Decl. ¶ 14. Plaintiff propounded multiple sets of discovery requests seeking information and documents relating to the proposed Classes, the ASAPer service, and the decision to deactivate it. *Id*. The parties then spent several months working through an array of discovery disputes and data issues, including detailed meet and confer letters and hours of telephonic discovery conferences. *Id*. Defendants ultimately produced thousands of pages of documents and tens of thousands of rows of account data. *Id*. Class Counsel spent significant time and effort reviewing and analyzing interrelated spreadsheets of billing and account data, requesting additional information, and calculating Settlement Class Members damages. *Id*.

Plaintiff also engaged in motion practice. In December 2020, after some initial discovery regarding the customers charged for ASAPer, Plaintiff moved to amend his complaint to add, among other things, a nationwide class. ECF Nos. 20, 23. Defendants filed a preconference letter opposing the amendment and outlining some of their defenses, ECF No. 21, but the Court ultimately granted leave to amend the operative First Amended Complaint.

As a result of the motion practice and extensive discovery, by the time the parties recommenced settlement negotiations with the assistance of a private mediator, Class Counsel had a good understanding of the strengths and weaknesses of the claims and defenses in this case, and a detailed analysis of the size of the proposed Classes and the extent of class-wide damages. Terrell Decl. ¶ 15. The parties attended a full-day mediation with Richard Byrne of National Arbitration and Mediation, a well-respected mediator with more than 25 years of experience mediating complex cases, on September 30, 2021. Terrell Decl. ¶ 15; *see also* https://www.namadr.com/neutrals-bio/richard-p-byrne-esq/. After hours of discussion, the parties reached a settlement in principle when Mr. Byrne made a mediator's proposal that both parties accepted. Terrell Decl. ¶ 15. After several weeks of additional negotiation and analysis of account-level data, the parties reached agreement on the terms of the Settlement Agreement and the scope of the Settlement Class. *Id.*

III. CLASS COUNSEL'S ATTORNEY'S FEES AND COSTS SHOULD BE APPROVED

Class Counsel requests that the Court approve an award of attorneys' fees and costs equal to 33.33% of the Settlement Fund.[2] This request is more than reasonable based on the factors courts consider when awarding fees as a percentage of a settlement fund. *See Goldberger v.*

[2] Class Counsel is not seeking a separate award of litigation costs.

Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000). A lodestar crosscheck confirms that an award of $131,666 is reasonable. Class Counsel achieved an excellent result for the class, and request an award that is approximately 54% *less* than their collective lodestar. Terrell Decl. ¶¶ 18, 21, Ex. 1; Schlanger Decl. ¶¶ 48–60, Ex. E.

A. The percentage method is appropriate here.

It is well established that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Goldberger,* 209 F.3d at 47 ("[W]here an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury . . . the attorneys whose efforts created the fund are entitled to a reasonable fee—set by the court—to be taken from the fund."). Although "both the lodestar and the percentage of the fund methods are available to district judges in calculating attorneys' fees in common fund cases," *Goldberger*, 209 F.3d at 50, "the trend in this Circuit is toward the percentage method," *Walmart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). *See also In re PPDAI Grp. Inc. Sec. Litig.*, No. 18-CV-6716 (TAM), 2022 WL 198491, at *14 (E.D.N.Y. Jan. 21, 2022) (noting that the percentage method is still "the trend in this Circuit"). Courts have preferred the percentage method for several reasons.

First, the percentage method "directly aligns the interests of the class and its counsel" because it provides an incentive for attorneys to resolve the case efficiently and to create the largest common fund. *Wal-Mart Stores*, 396 F.3d at 121 (internal quotation marks omitted); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2001) (finding "the lodestar method does not reward early settlement" and that "class counsel should [not] necessarily receive a lesser fee for settling a case quickly"). Indeed, using the percentage method in this case

will benefit the Settlement Class because an award of one-third of the Settlement Fund is less than Class Counsel's lodestar. *See Bryant v. Potbelly Sandwich Works,* LLC, No. 1:17-cv-07638 (CM) (HBP), 2020 WL 563804, at *7 (S.D.N.Y. Feb. 4, 2020) ("Where a percentage fee . . . represents a negative multiplier to the total lodestar, there is no real danger of overcompensation." (cleaned up) (quoting *In re Initial Pub Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009)).

Second, the percentage method "provides a powerful incentive" to avoid wasteful litigation to increase billable hours, and encourages "the efficient prosecution and early resolution of litigation." *Walmart*, 396 F.3d at 121 (citations omitted); *Savoie v. Merchants Bank*, 166 F.3d 456, 460-61 (2d Cir. 1999) ("It has been noted that once the fee is set as a percentage of the fund, the plaintiffs' lawyers have no incentive to run up the number of billable hours for which they would be compensated under the lodestar method."); *see also Asare v. Change Grp. of N.Y., Inc.*, No. 12 Civ. 3371(CM), 2013 WL 6144764, at *17 (S.D.N.Y. Nov. 18, 2013) (explaining that the percentage method discourages "running up" billable hours and "decreases the incentive to delay settlement" (citation and quotation marks omitted)).

Third, the percentage method is closely aligned with market practices because it "mimics the compensation system actually used by individual clients to compensate their attorneys." *In re Sumitomo Copper Litig*., 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999); *see also Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) ("[T]he percentage method is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients.").

Finally, awarding a percentage of the fund preserves judicial resources because it "relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions." *Savoie*, 166 F.3d at 461 n.4; *see also Wal-Mart*, 396 F.3d at 121 (noting that the lodestar method "compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits" (citation omitted)); *Strougo*, 258 F. Supp. 2d at 261 (noting "the needless complications and dubious merits of the loadstar approach").

District courts in the Second Circuit routinely award attorneys' fees equal to one-third of the settlement fund. *See Mouskengeshcaie v. Eltman, Eltman & Cooper, P.C.*, 14 CV 7539 (MKB) (CLP), 2020 WL 5995978, at *7-8 (E.D.N.Y. Apr. 21, 2020), *report and recommendation adopted*, 2020 WL 5995650 (E.D.N.Y. Oct. 8, 2020) (awarding 32% of the fund and observing that percentage was "reasonable in relationship to the settlement"); *Guevoura Fund Ltd. v. Sillerman*, Nos. 1:15-cv-07192-CM, 1:18-cv-09784, 2019 WL 6889901, at *15 (S.D.N.Y. Dec. 18, 2019) (awarding one-third of a $6.75 million dollar settlement); *Suarez v. Rosa Mexicano Brands Inc.*, No. 16 Civ. 5464 (GWG), 2018 WL 1801319, at *1 (S.D.N.Y. Apr. 13, 2018) (approving a fee award of 33.3% of $3.6 million settlement fund); *Zorrilla v. Carlson Rests., Inc.*, No. 14 Civ. 2740 (AT), 2018 WL 1737139, at *2 (S.D.N.Y. Apr. 9, 2018) (approving fee award equal to one-third of $19.1 million settlement fund); *In re Marsh ERISA Litig.,* 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (awarding one-third of the recovery); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar,* No. 06 CIV.4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding over 30% and noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452(RLE), 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (an award of one third of the settlement fund "is

consistent with the norms of class litigation in this circuit" (collecting cases)); *Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 188–89 (W.D.N.Y. 2005) (awarding 38.26%); *Strougo*, 258 F. Supp. 2d at 262 (33.33%); *In re Lloyd's Am. Trust Fund Litig*., No. 96 CIV.1262 RWS, 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002), *aff'd sub nom. Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) ("In this district alone, there are scores of . . . cases where fees . . . were awarded in the range of 33.3 percent of the settlement fund."); *Maley v. Del Global Tech. Corp*., 186 F. Supp. 2d 358, 370–71 (S.D.N.Y. 2002) (awarding 33.33%; noting "modest multiplier of 4.65 [was] fair and reasonable"); *Becher v. Long Island Lighting Co*., 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (33.33%); *In re Crazy Eddie Sec. Litig*., 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (33.8%).

B. The *Goldberger* factors support an award of one-third of the common fund.

In determining the reasonableness of a requested fee award, courts consider the following six factors set forth by the Second Circuit in *Goldberger*: (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 the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50.

1. Class Counsel's time and labor.

Class Counsel have worked on this case for nearly two years, and the time they dedicated to this case supports their requested fee. Class Counsel have submitted billing records showing that they dedicated over 632 hours to this case, which represents $283,263.47 at Class Counsel's regular hourly rates. *See* Terrell Decl. ¶¶ 18, 21, Ex. 1; Schlanger Decl. ¶¶ 49–57, Ex. E. Much of this time was spent pursuing documents and data from Defendants, reviewing thousands of pages of documents, and conducting an exhaustive analysis of account-level data for more than

10,000 accounts to establish liability and calculate damages. Terrell Decl. ¶¶ 14, 21–23; Schlanger Decl. ¶¶ 31, 48. Class Counsel effectively and efficiently obtained the information they needed to assess the strengths and weaknesses of the claims and defenses in this case. *Id*.

The work on this case is far from complete. Still to be done, and not included in the count of hours listed above, are the final approval motion and hearing, responding to any Settlement Class Member objections or inquiries, and supervising the settlement administrator's distribution of the Settlement Fund. Terrell Decl. ¶ 25; Schlanger Decl. ¶ 58. All of this represents an extraordinary commitment to a case where recovery was far from certain. Because of these efforts, this factor supports the requested fee award.

2. The litigation's magnitude and complexity.

The second *Goldberger* factor, which addresses "the magnitude and complexities of the litigation," also supports approval of the requested fee. *Goldberger*, 209 F.3d at 50; *see also Story v. SEFCU*, No. 1:18-CV-764 (MAD/DJS), 2021 WL 736962, at *13 (N.D.N.Y. Feb. 24, 2021) (noting that "[m]ost class actions are inherently complex and settlement avoids the costs, delays, and multitudes of other problems associated with them"). This class action involves a nationwide Settlement Class of nearly 5,000 consumers. Litigating this case required a complex analysis of account-level billing and refund data for more than 10,000 consumers. Terrell Decl. ¶¶ 22–23, Schlanger Decl. ¶¶ 31, 48. Defendants produced an array of interrelated spreadsheets containing data stored in different formats across multiple systems, which made the data more difficult to reconcile. Terrell Decl. ¶ 23. Class Counsel spent significant time and effort synthesizing and analyzing account data to identify Settlement Class Members, evaluate the strength of their claims, and calculate their damages. *Id*.

If the litigation had not settled, Class Counsel would have faced additional obstacles as Defendants continued to mount a vigorous defense, both to the appropriateness of class certification and at trial, which would require substantial fact and, likely, expert testimony regarding Defendants billing systems and the operation of the ASAPer service. *See Fleisher v. Phoenix Life Ins. Co*., No. 11-CV-8405 (CM), 2015 WL 10847814, at *20 (S.D.N.Y. Sept. 9, 2015) (awarding fees of one-third of cash component of settlement due, in part, to the complexity of issues that required expert analysis). Class Counsel were willing to take on these challenges, but are confident the settlement they achieved is in the best interest of the Settlement Class because it offers near-complete relief without the risk and delay of continued litigation.

3. The risks of litigation.

Courts have viewed the risk of litigation as "perhaps the foremost factor" in setting an award of attorneys' fees. *Okla. Firefighters Pension and Ret. Sys. v. Lexmark Int'l, Inc.*, 17cv5543, 2021 WL 76328 at *6 (S.D.N.Y. Jan. 7, 2021) (alterations omitted) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974)). "A lawyer whose compensation is contingent on services can be expected to receive more than she would receive if she were charging an hourly rate." *Banyai v. Mazur*, No. 00 Civ. 9806, 2008 WL 5110912, at *4 (S.D.N.Y. Dec. 2, 2008) (citing *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981)). Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and to receive a fee only if there was a recovery. *See* Terrell Decl. ¶ 16; Schlanger Decl. ¶¶ 41–42. Class Counsel invested considerable time and effort prosecuting this action. *See* Terrell Decl. ¶ 14, 18, 22–23, Ex. 1; Schlanger Decl. ¶¶ 31, 43, 48, 52–53, Ex. E. Class Counsel diligently pursued and reviewed Defendants records, and meticulously analyzed account-level data to identify class members and calculate their damages. *See* Terrell Decl. ¶ 14–15, 23–24;

Schlanger Decl. ¶¶ 31, 48. "Despite the most vigorous and competent of efforts," their success was "never guaranteed." *Grinnell Corp.*, 495 F.2d at 471. Nearly two years have passed since this case was filed, and Class Counsel have not yet received any payment for their work.

This litigation also presented specific risks to recovery for the class. Defendants have consistently maintained that Plaintiff's claims are not suitable for class certification. Given this case involves a single service governed by standardized contracts and Defendants maintain electronically stored account data, Plaintiff disagrees. Terrell Decl. ¶ 13. Nonetheless, if Defendants could show that an individualized review of each class members' account would be required to determine liability or establish damages, a court could decline to certify Plaintiff's claims. *See, e.g., Boucher v. First Am. Title Ins. Co.*, No. C10-199RAJ, 2012 WL 3023316, at *8 (W.D. Wash. Jul 24, 2012) (denying class certification where "proving or disproving each class member's claim depends on a file-by-file review of class members' transactions").

Even if their motion to certify the class was successful, Plaintiff faced a future motion for summary judgment because Defendants contend that the class cannot establish its damages. If Plaintiff could overcome this hurdle and succeed in bringing the case to verdict, Defendants would likely appeal, which "could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself." *Maley*, 186 F. Supp. 2d at 372 (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 748 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986)).

For these reasons, this factor also supports Class Counsel's request for attorneys' fees.

4. Quality of the representation.

"The critical element in determining the appropriate fee to be awarded class counsel out of a common fund is the result obtained for the Class through the efforts of such counsel."

Maley, 186 F. Supp. 2d at 373. Class Counsel are experienced class action litigators who have successfully prosecuted numerous complex consumer cases. *See* Terrell Decl. ¶¶ 3–8; Schlanger Decl. ¶¶ 11–13, 28–29, 44, Exs. B–D. Terrell Marshall has represented scores of classes and recovered hundreds of millions of dollars for consumers. Terrell Decl. ¶¶ 2, 8. Ms. Terrell currently serves as Co-Chair of PLI's Consumer Financial Services Institute and frequently presents on the impact financial practices have on consumers. Terrell Decl. ¶ 3

Mr. Schlanger also focuses his practice on representing consumers, has been certified as class counsel in numerous consumer protection matters, and has dedicated his legal practice to ensuring that consumers have access to financial justice. Schlanger Decl. ¶¶ 11–13, 28–29, 36–39, Ex. A. Mr. Schlanger is a frequent CLE panelist and speaker on consumer issues, has served on a wide variety of consumer protection related bar committees, and currently serves on the National Association of Consumer Advocates Issues Committee. *Id.* ¶¶ 15–27.

Class Counsel efficiently applied their skills and experience to obtain excellent relief for the Class. Each Settlement Class Member will receive an equal share of approximately $233,364 which is the estimated amount of the Settlement Fund that will be allocated to Settlement Class Members after any court-awarded attorneys' fees and litigation costs, administration costs, and service award are deducted. Each Settlement Class Member will receive approximately $45. *See* ECF No. 46 (Motion for Preliminary Approval) at 12; ECF No. 47, ¶ 13.

Class Counsel attained this success "in the face of tenacious opposition by a highly capable adversary." *Hart v. RCI Hosp. Holdings, Inc.*, No. 09 CIV. 3043 PAE, 2015 WL 5577713, at *16 (S.D.N.Y. Sept. 22, 2015). Class Counsel faced a defense mounted by a large, international corporation represented by sophisticated attorneys. Defendant's counsel, Furman Kornfeld & Brennan, is a reputable firm with significant litigation experience. *See, e.g.*,

http://www.fkblaw.com/practice-areas/ (explaining that "Furman Kornfeld & Brennan LLP has extensive trial counsel and appellate advocacy experience"). The challenge of litigating against formidable opposing counsel only serves to highlight the victory Class Counsel has achieved by negotiating a substantial settlement for the Settlement Class. This factor also favors granting the requested fees.

5. The fee is reasonable in relation to the Settlement.

Class Counsel's request for one-third of the fund is "fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in this Circuit and elsewhere." *In re Marsh ERISA Litig.,* 265 F.R.D. at 149 (awarding $11,665,500 fee out of $35 million settlement fund); *see* additional cases cited in Section A, *supra*, pp. 8–9. Class Counsel's efforts resulted in a non-reversionary common fund of $395,000 that will provide near-complete relief to nearly 5,000 consumers without requiring them to file a claim. Despite the numerous risks that continued litigation would have presented, the amount of the recovery is substantial, particularly considering the nearly $150,000 in refunds Defendants issued after this case was filed.

As Plaintiff emphasized in his motion for preliminary approval, this is an excellent recovery given the risks faced by the Settlement Class and the considerable time and effort that would still be required to successfully litigate this case through trial and an inevitable appeal. *See* Mtn for Preliminary Approval, ECF No. 46 at 20–22.

This factor weighs in favor of granting the requested fees.

6. Public policy considerations.

Public policy considerations also weigh in favor of granting Class Counsel's requested fees. In rendering awards of attorneys' fees, "the Second Circuit and courts in this district also

have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation." *In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-CV-2548 (VSB), 2019 WL 4734396, at *3 (S.D.N.Y. Sept. 23, 2019) (alteration omitted) (quoting *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (1999)). When individuals' damages are small, "it [is] less likely that, without the benefit of class representation, they would be willing to incur the financial costs and hardships of separate litigations, which would certainly exceed their recoveries manifold." *Frank,* 228 F.R.D. at 181. Thus, "Counsel's fees should reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Bekker v. Neuberger Berman Grp. 401(k) Plan Comm.*, 504 F. Supp. 3d 265, 270–271 (S.D.N.Y. 2020); *see also Goldberger*, 209 F.3d at 51 (observing attorneys' fees provide a means of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest" (citing *In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989))). This is especially true with a class action because "tightening class certification standards means more risk and less reward for plaintiffs' lawyers." Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1285-86 (2012).

Awarding Class Counsel their requested fee also furthers the policies behind New York's General Business Law §§ 349 and 350, which are "intended to empower consumers; to even the playing field in their disputes with better funded and superiorly situated fraudulent businesses." *Teller v. Bill Hayes, Ltd.*, 630 N.Y.S.2d 769, 774 (N.Y. App. Div. 1995); *see also Beslity v. Manhattan Honda, a Div. of Dah Chong Hong Trading Corp.*, 467 N.Y.S.2d 471, (N.Y. App. Div. 1983) ("[A]uthorizing private actions, providing for a minimum damage recovery and

permitting attorney's fees will encourage private enforcement of these consumer protection statues, add a strong deterrent against deceptive business practices and supplement the activities of the Attorney General in the prosecution of consumer fraud complaints" (citations omitted)). Plaintiff filed this lawsuit to seek relief on behalf of all other consumers who were charged for ASAPer when the service was non-functional. Because Settlement Class Members' individual damages are low—the cost of the service was only $2.95 per month plus tax—the expense of litigating separate claims would dwarf their potential recovery. A class action was the only feasible means to challenge the conduct and enforce the statutes. The broad relief achieved here was only possible due to Plaintiff and Class Counsel's willingness to assume the risk and pursue the claims for the Settlement Class.

C. A lodestar cross check supports an award to Class Counsel of one-third of the fund.

The Second Circuit has encouraged courts to conduct a lodestar cross-check when assessing the reasonableness of a percentage fee award. *Goldberger*, 209 F.3d at 50. When the lodestar method is used as a "cross-check," the district court need not exhaustively scrutinize counsel's hours. *Id.*; *see also Beebe v. V&J Nat'l Enters., LLC*, 6:17-cv-06075 EAW, 2020 WL 2833009, at *9 (W.D.N.Y. Jun. 1, 2020) (explaining that when conducting a lodestar cross-check, "it is not necessary for the Court to reach a conclusion as to the reasonableness of [counsel's] hourly rates"). "Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." *Cates v. Tr. of Columbia Univ. in City of N.Y.*, No. 1:16-cv-06524-GBD, 2021 WL 4847890, at *2 (S.D.N.Y. Oct. 18, 2021). To calculate the lodestar, courts multiply an attorneys' reasonable hourly rate by the number of hours reasonably expended in pursuit of the litigation. *Fresno Cnty. Emps.' Ret. Assoc. v. Issacson/Weaver Family Trust*, 925 F.3d 63, 67, n.2 (2d Cir. 2019);

Goldberger, 209 F.3d at 47; *see also Luciano v. Olsten Corp*., 109 F.3d 111, 115 (2d Cir.1997) ("[t]he 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") (internal quotations omitted).

Here, a lodestar cross-check confirms the reasonableness of Class Counsel's requested fee. Class Counsel charge rates ranging from $375 for junior associates to $625 for senior partners, which fall within the range of prevailing rates in this District. *See, e.g., In re Hi-Crush Partners L.P. Sec. Litig*., No. 12-CIV-8557 CM, 2014 WL 7323417, at *14 (S.D.N.Y. Dec. 19, 2014) (approving billing rates ranging from $425 to $825 per hour for attorneys and collecting cases); *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth*., No. 76 CIV. 2125 (RWS), 2005 WL 736146, at *12 (S.D.N.Y. Mar. 31, 2005), *opinion amended on reconsideration*, No. 76 CIV.2125 RWS, 2005 WL 2175998 (S.D.N.Y. Sept. 9, 2005) (observing that "a recent billing survey made by the National Law Journal shows that senior partners in New York City charge as much as $750 per hour and junior partners charge as much as $490 per hour").

Class Counsel have submitted billing records showing that they collectively spent over 630 hours litigating and settling this matter. *See* Terrell Decl. ¶ 18, 21, Ex. 1; Schlanger Decl. ¶¶ 48–57, Ex. E. The hours worked by counsel on this case, which were performed on a pure contingency basis, result in a lodestar of approximately $283,263.47. Terrell Decl. ¶ 21, Ex. 1; Schlanger Decl. ¶¶ 51–57. The lodestar does not include time that was administrative in nature or that arguably could have been used more efficiently, and Class Counsel have excluded time for time keepers who spent fewer than four hours working on the case. Terrell Decl. ¶ 18; Schlanger Decl. ¶ 53. And Class Counsel have more work to complete on this case, including preparing for

and attending the final fairness hearing, answering Settlement Class Member questions, and working with the settlement administrator. Terrell Decl. ¶ 25; Schlanger Decl. ¶ 58.

"Under the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004); *see also Sillerman*, 2019 WL 6889901, at *18 ("Courts have continually recognized that, in instances where a lodestar analysis is . . . used as a 'cross check' for a percentage of recovery analysis, counsel may be entitled to a 'multiplier' of their lodestar rate."). "[M]ultipliers of between three and four times a successful plaintiff's counsel's lodestar have been routinely awarded in this Circuit." *Sillerman*, 2019 WL 6889901, at *18; *see also, e.g.*, *Bekker*, 504 F. Supp. 3d at 271 (approving multiplier of 5.85 and collecting cases). Here, however, Class Counsel's request for an award of $131,666 applies a negative multiplier of approximately 0.46 to their $283,263.47 lodestar, giving Settlement Class Members a larger share of the Settlement Fund. "Courts have repeatedly recognized that the reasonableness of [a] fee request under the percentage method is reinforced where, as here, 'the percentage fee would represent a negative multiplier of the lodestar.'" *Sillerman*, 2019 WL 6889901 at *18 (citation omitted) (finding an award of one-third of the settlement fund was reasonable where percentage fee reflected a negative lodestar multiplier); *see also Cates*, 2021 WL 4847890, at *2–3 (same); *Beebe*, 2020 WL 2833009, at *9 ("A negative multiplier 'militates very in favor of the reasonableness of the fee request, particularly in light of the fact that courts generally grant fees with positive multipliers to reflect the complexity and risks undertaken by class counsel.'" (citation omitted)).

Class Counsel achieved an outstanding result for the Settlement Class and seek a one-third, percentage fee that is below their lodestar and well-within the range awarded as reasonable

in this Circuit. Although Class Counsel incurred $8,025.97 in reimbursable litigation expenses,[3] they do not seek a separate award of costs from the Settlement Fund. Terrell Decl. ¶ 24; Schlanger Decl. ¶ 4, 52. A fee and cost award of one-third of the Settlement Fund is reasonable in light of the benefits Class Counsel achieved for the Settlement Class. Accordingly, Class Counsel respectfully ask the Court to award them attorneys' fees and costs in the amount of $131,666.

IV. A SERVICE AWARD SHOULD BE APPROVED FOR PLAINTIFF.

Consistent with the Settlement Agreement, Class Counsel request approval of a Service Award of $10,000 to Plaintiff Jacob Silver in recognition of his service to the Settlement Class. Settlement Agreement § 20. This award is reasonable given the significant contributions Plaintiff made to advance the prosecution and resolution of the lawsuit.

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 risk incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs." *Flores v. Anjost Corp.*, No. 11 Civ. 1531, (AT), 2014 WL 321831, at *10 (S.D.N.Y. Jan. 29, 2014) (collecting cases). Courts in this circuit and elsewhere have approved service awards ranging from $2,500 to $85,000. *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (approving a top award of $10,000 for lead plaintiff); *see also Cates*, 2021 WL 4847890, at *8 (approving $25,000 service awards); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *4 (S.D.N.Y. Nov. 29, 2018) (awarding $50,000 and

[3] "It is well established that counsel who obtain a common settlement fund for a class are entitled to the reimbursement of expenses that they advance to a class," *Meredith Corp. v. SESAC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015); *see also In re Marsh ERISA Litig.,* 265 F.R.D at 150 ("The expenses that may be reimbursed from the common fund encompass 'all reasonable' litigation-related expenses.").

$100,000 service awards); *Ferrick v. Spotify USA Inc.*, No.16-CV-8412 (AJN), 2018 WL 2324076, at *11 (S.D.N.Y. May 22, 2018) (awarding $25,000 service award), *appeal dismissed sub nom, Ferrick v. Diable*, No. 18-1702, 2018 WL 6431410 (2d Cir. Oct. 9, 2018); *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016) (approving service awards of $50,000); *Mills v. Capital One, N.A.*, No. 14 CIV, 1937 HBP, 2015 WL 5730008, at *17 (S.D.N.Y. Sept. 30, 2015) (awarding eight named plaintiffs service awards of $6,000 each and three opt-in plaintiffs $3,000 each); *Matheson v. T-Bone Rest., LLC*, No. 09 Civ. 4214, 2011 WL 6268216, at *9 (S.D.N.Y. 2011) (approving service award of $45,000); *Sheppard v. Consol. Edison Co. of New York*, No. 94-CV-0403(JG), 2002 WL 2003206, at *6 (E.D.N.Y. Aug. 1, 2002) (approving service awards ranging from $8,333 to $29,167).

Mr. Silver's services were instrumental to the initiation and prosecution of this action, and he expended considerable time and effort to assist Class Counsel with this case. Mr. Silver was meaningfully involved in this litigation at every stage. Mr. Silver assisted with Class Counsel's investigation, contributed to the Complaint, and provided feedback to Class Counsel throughout the proceedings. ECF No. 49 (Declaration of Jacob Silver) ¶¶ 14–20; Schlanger Decl. ¶¶ 62–64. Mr. Silver attended both the initial settlement conference and the mediation, stayed apprised of and involved in the litigation at all times, and was prepared to sit for deposition and testify at trial. *Id*. Mr. Silver has acted diligently with regard to his duties to the class. Schlanger Decl. ¶ 65. Accordingly, the Court should grant the requested service award. *Id*. ¶ 66.

Class Counsel acknowledge that the Eleventh Circuit ruled that service awards to class representatives violate Supreme Court decisions from the 1800s. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020). That is not the law in this Circuit. *See Melito v. Experian Marketing Sols.*, 923 F.3d 85, 96 (2d Cir. 2019), *cert. denied sub nom. Bowes v. Melito*, 140 S.

Ct. 677 (2019) (affirming award of incentive bonuses and finding the Supreme Court cases cited in *NPAS Solutions* to be "inapposite"). Because the service award requested here is reasonable and in line with other service awards in this Circuit, it should be approved.

V. CONCLUSION

For the reasons set forth above, Class Counsel respectfully requests that the Court grant their motion, and award attorneys' fees and costs in the amount of $131,666 and a Service Award in the amount of $10,000.

RESPECTFULLY SUBMITTED AND DATED this 25th day of April, 2022.

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