UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ZHARIA CHARLES, individually and on behalf of all others similarly situated, Plaintiff, v. COLOR FACTORY, LLC, Defendant.	Civil Action No. 1:24-cv-00322-JSR Hon. Jed S. Rakoff

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

Dated: August 30, 2024

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INTRODUCTION

The class action settlement between Plaintiff Zharia Charles ("Plaintiff") and Defendant Color Factory, 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 and retained $714,705.68. And the resulting Class Action Settlement (the "Settlement") – preliminarily approved by this Court on July 10, 2024 – creates a $714,705.68 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 proposed 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 "Taxes & Fees" that was the subject of this litigation when the ticket is first selected for purchase and will agree to comply with ACAL § 25.07(4), unless or until the statute is amended, repealed, or otherwise invalidated. Simply put, this is a remarkable result.

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. Specifically, Plaintiff had to overcome a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) – the first ever such motion decided under the statute – arguing, *inter alia*, that Plaintiff lacked Article III standing and that her claims were barred by the voluntary payment doctrine. *See* ECF No. 23. And at the time of settlement, Plaintiff's motion for class certification was pending. Even if Plaintiff overcame that hurdle, she would 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 – all arguments the Court deferred at the motion to dismiss stage. *See* ECF No. 23. An adverse decision – whether on 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 their fellow Class Members.

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 $238,235.22, as well as a service award of $5,000 for Plaintiff for her service as class representative. Courts in this Circuit routinely approve fee requests for one-third of a settlement fund. *See*, *e.g.*, *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"); *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 ACAL class action settlement).

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. Plaintiffs' Allegations

Defendant owns and operates Color Factory NYC, an alleged interactive art museum in New York City. *See* Complaint (ECF No. 1) ("Compl.") ¶ 9. Plaintiff alleges that when consumers purchase admission tickets to Color Factory NYC on Defendant's Website, they are "quoted a fee-less price, only to be ambushed by a non-delineated 'fee' – masked under the ambiguous category 'taxes & fees' – at checkout after clicking through the various screens required to make a purchase." *Id.* ¶ 1; *see also id.* ¶¶ 10-17 and Figures 1-6. 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 to the purchaser." *Id.* ¶¶ 30-32. Plaintiff purchased tickets to Color Factory NYC and paid fees in connection with that purchase during the class period. *Id.* ¶ 34.

C. The Litigation And Work Performed To Benefit The Class

Before filing this case, Class Counsel conducted a pre-suit investigation, which encompassed legal research regarding ACAL § 25.07(4), including its legislative history and case law interpreting similarly worded statutes in New York and elsewhere, as well as factual research regarding Defendants' website and implementation of "taxes and fees." *See* Declaration of Philip L. Fraietta In Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Service Award ("Fraietta Decl.") ¶ 3.

On January 16, 2024, Plaintiff filed her Class Action Complaint in the United States District Court for the Southern District of New York. *Id.* ¶ 4 (citing Complaint ("Compl.") ECF No. 1). The material allegations of the Complaint center on Defendant's alleged failure to disclose a non-delineated "fee" in connection with the purchase of tickets to its Color Factory NYC location prior to those tickets being selected for purchase, in alleged violation of New York Arts and Cultural Affairs Law ("ACAL") § 25.07(4). *See generally* Compl.

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. 15. On April 19, 2024, after full briefing and oral argument, the Court issued an Opinion and Order granting in part and denying in part Defendant's motion to dismiss. ECF Nos. 18, 20, and 23. On May 3, 2024, Defendant filed an Answer to the Complaint denying the allegations generally and asserting 17 affirmative defenses. ECF No. 26.

During and after the pleadings, the Parties engaged in formal discovery, which included the exchange of written discovery, document productions, and a Rule 30(b)(6) deposition of Defendant. Fraietta Decl. ¶ 7. The Parties also engaged in informal discovery as part of their settlement negotiations, which included the production of certain financial information by Defendant. *Id.* ¶ 8.

On June 3, 2024, Plaintiff filed a motion for class certification. ECF No. 27. Before and after Plaintiff filed her motion for class certification, counsel for the Parties engaged in numerous telephone calls to discuss settlement, and on June 8, 2024, the Parties reached agreement on all material terms of a class action settlement and executed a term sheet. Fraietta Decl. ¶ 11. The next business day, the Parties informed the Court of their settlement by phone, and the Court stayed all case deadlines and directed Plaintiff to file a motion for preliminary approval on or before July 1, 2024. ECF No. 33. 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 after a hearing on July 10, 2024. *Id.* ¶ 18 (citing ECF No. 38).

SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class by delivering cash to approximately 99,263 individuals who purchased electronic tickets and paid a fee to gain entrance to Defendant's Color Factory NYC from Defendant's Website from August 29, 2022, and through and including January 23, 2024. Fraietta Decl. ¶ 14. The Settlement creates a $714,705.68 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 "Taxes & Fees" that was the subject of this litigation when the ticket is first selected for purchase and will agree to comply with ACAL § 25.07(4), unless or until the statute is amended, repealed, or otherwise invalidated. *Id.* ¶ 2.2.

ARGUMENT

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

The requested fee award of $238,235.22, 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]

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.

[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 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 $5,504.99 for out-of-pocket costs and expenses in these standard categories. *See* Fraietta Decl. ¶ 30, Ex. 3.

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 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 Assan 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); *TMBI* Hearing Tr. at 17:21-22 ("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 (same).

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 settlement 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). 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 Defendants' website and implementation of processing fees. *Id.* Class Counsel also spoke with interested potential class members, drafted the Complaint, briefed, argued, and defeated a motion to dismiss, conducted formal and informal discovery, including deposition discovery, and filed a motion for class certification. *Id.* ¶¶ 4-10. 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 priors to making any settlement demand. *Id.* ¶¶ 7-9. 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.* ¶ 11.

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 she lacked standing and that her 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, she 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 7 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 Plaintiffs embarked on this litigation, they 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. ¶¶ 21-22. Indeed, Class Counsel faced the palpable risk that the Court would have found, at summary judgment, that Plaintiff lacked standing, that her 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). 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. *Id.* Nonetheless, Class Counsel nonetheless 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.* ¶¶ 4-11. 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 and retained, 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. ¶¶ 37-39. Indeed, Class Counsel has been recognized by courts across the country, including this Court, for its expertise. *See* Firm Resume, Fraietta Decl. Ex. 12; *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 five[2] 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.").

[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.

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 $714,705.68 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*, 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 comparable to rates charged by attorneys with similar experience, skill, and reputation, for similar services in the New York legal market. *See* Fraietta Decl. ¶¶ 31-35.[3]

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 158 hours, which at their hourly rates amounts to a lodestar of $103,542.50. Fraietta Decl. ¶¶ 27-28; Ex. 2.[4] Therefore, the requested fee award reflects an approximately 2.25 times multiplier on Class Counsel's regular hourly rates, which is well within the range of reasonableness under the circumstances of this case. *See Asare v. Change Grp. of N.Y., Inc.*, 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar.") *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."); *In re GSE Bonds Antitrust Litig.*, 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (Rakoff, J.) (noting that "a 4.09 multiplier is within the range of what has considered reasonable by courts").

Class Counsel's lodestar multiplier is also reasonable because it will decrease over time. *See* Fraietta Decl. ¶ 29. "[A]s class counsel is likely to expend significant effort in the future

[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 rates' … and current rates, rather than historical rates, should be applied in order to compensate for the delay in payment.") (citation omitted).

[4] These figures exclude Class Counsel's work on this fee application.

implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time." *Parker v. Jekyll & Hyde Entm't Holdings, LLC*, 2010 WL 532960, at *2 (S.D.N.Y. Fed. 9, 2010). Here, "[t]he fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, also supports their fee request." *Yuzary*, 2013 WL 5492998, at *11 (quoting *McMahon v. Olivier Cheng Catering & Events, LLC*, 2010 WL 2399328, at *8 (S.D.N.Y. Mar. 3, 2010)).

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 REFLECT 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, the participation of Plaintiff was critical to the ultimate success of the case. *See* Fraietta Decl. ¶¶ 40-42. Plaintiff assisted Class Counsel in investigating this action by detailing her ticket purchase and supplying supporting documentation, and aiding in drafting the Complaint. *See* Declaration of Zharia Charles In Support of Plaintiff's Motion for Final Approval of Class Action Settlement and Motion for Attorneys' Fees, Costs, Expenses, and Service Award ("Charles Decl.") ¶¶ 3-6. During the course of this litigation, Plaintiff kept in regular contact with her lawyers to receive updates on the progress of the case and to discuss

strategy. *Id.* ¶ 5. Further, Plaintiff produced documents, responded to interrogatories, and was prepared to testify at deposition and trial, if necessary. *Id.* ¶ 6. Finally, Plaintiff was actively consulted during the settlement process. *Id.* ¶ 7.

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); *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 $238,235.22, (2) grant Plaintiff a service award of $5,000 in recognition of her efforts on behalf of the Settlement Class, and (3) award such other and further relief as the Court deems reasonable and just.

Dated: August 30, 2024

Respectfully submitted,

By: *<u>/s/ Philip L. Fraietta</u>*
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