SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of SYSCO METRO, NY, LLC and PARKING SURVIVAL EXPERTS d/b/a parkingticket.com, on their own behalf and on behalf of all others similarly situated, Petitioners, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and for Other Legal and Equitable Relief, -against- THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF FINANCE COMMERCIAL ADJUDICATIONS UNIT a/k/a ADJUDICATION DIVISION, and JACQUES JIHA, Individually and as New York City Commissioner of Finance, Respondents.	Index No. 101637/2015 Justice Lucy Billings

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ORDER GRANTING (1) FINAL APPROVAL OF THE PROPOSED CLASS ACTION SETTLEMENT; AND (2) AN AWARD OF ATTORNEYS' FEES AND EXPENSES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

Petitioner Sysco Metro, NY, LLC ("Sysco" or "Petitioner"), respectfully submits this Memorandum of Law in support of its Motion for Final Approval of the Proposed Class Action Settlement (the "Settlement"). Petitioner seeks an order pursuant to Article 9 of the New York Civil Practice Law and Rules ("CPLR") granting: (1) final approval of the proposed Settlement, and (2) approving an award of attorneys' fees and expenses.

PRELIMINARY STATEMENT

After over seven years of hard-fought litigation, Petitioner obtained a $2,450,000 all cash settlement (the "Settlement Amount"). The Settlement is an excellent result for the Class, providing a significant and certain recovery in a case that presented numerous hurdles and risks. The Settlement is, in all respects, substantively fair, reasonable, and adequate.

Executed on March 3, 2023, and entered on March 27, 2023, the Court granted Petitioner's unopposed motion for preliminary approval of the settlement of this class action, provisional certification of the petitioner class, and appointment of counsel for the class, and notice to the class pursuant to the order and Notice Program (the "Preliminary Approval Order"). NYSCEF No. 25. On April 14, 2023, this Court granted the Parties' Stipulation and Order extending, among other things, the Settlement Class Members' time to file a Claim Form, and object to or opt-out of the Settlement.[1] NYSCEF No. 27.

Since then, the Class has been provided with notice in the form and manner approved by the Court. (*See* Affidavit of Scott M. Fenwick ("Fenwick Aff.", Exhibit A) and Affidavit of Jeanne C. Finnegan ("Finnegan Aff.", Exhibit B), submitted simultaneously herewith.) Although the period to object or opt-out of the Settlement has not passed, as of the filing of this motion, no Class

[1] All capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Stipulation and Agreement of Settlement (the "Settlement") entered into on May 2, 2022, and filed with this Court on September 23, 2022. NYSCEF No. 16.

Member has objected or asked to be excluded from the Settlement. The lack of objections by the Class supports the reasonableness of the Settlement.

Petitioners' Counsel's work to date has been without compensation, and fees have been wholly contingent on the results obtained. Petitioner's Counsel requests that the Court approve a fee and expense award consisting of attorneys' fees of thirty-three percent (33%) of the Settlement Amount (after payment of Administrative Costs), plus an amount of up to $300,000 for the reimbursement of attorneys' costs and expenses, and the payment to Kroll Settlement Administrator ("Kroll") for Administrative Costs, including all taxes relating to the Settlement Fund.).

BACKGROUND OF THE LITIGATION[2]

I. NATURE OF THE ACTION AND LITIGATION HISTORY

This Action was brought on behalf of Petitioner Sysco and the Class[3] as defined in the Preliminary Approval Order. NYSCEF No. 25 at 4. The Petition was filed as an Article 78 and declaratory judgment action challenging the Respondents' upholding of (a) Body Type Summonses, and (b) summonses issued for lift gate violations in which the body type was described as tractors rather than trailers (the "Lift Gate Summons"). NYSCEF No. 12 at 2.

The Supreme Court granted the Petition insofar as it challenged the Body Type Summonses and held that those summonses were in violation of VTL § 238(2) but denied the Petition insofar as it challenged the Lift Gate Summonses and dismissed all other claims for relief, (the "Merits

[2] Petitioner incorporates by reference Petitioner's Memorandum of Law in Support of Petitioner's Motion for Preliminary Approval of the Proposed Settlement, (the "Motion for Preliminary Approval"). NYSCEF No. 12.

[3] All Persons who are registered owner or lessor of a Tractor that was issued a parking summons from the City of New York during the period of January 1, 2014, to May 2, 2022, that contains a description of the vehicle body type on the summons as something other than a Tractor and the Tractor is not enrolled in a Reduced Fine Program.

Decision"). 59 Misc. 3d 727, 69 N.Y.S.3d 778 (N.Y. Sup. Ct. 2017). The Court's Merits Decision was affirmed on appeal on January 10, 2019, by the Appellate Division, First Department. 168 A.D.3 459, 92 N.Y.S.3d 4 (1st Dep't 2019). NYSCEF No. 12 at 2. *See also*, NYSCEF No. 15 ¶2, Affirmation of Lawrence P. Eagel in Support of Petitioner's Motion for Preliminary Approval of Proposed Settlement.

After the affirmance of the Merits Decision, Sysco moved class certification. In a Decision and Order entered on July 9, 2019, the Court denied, without prejudice, Petitioner's motion and found that Sysco failed to adequately support its motion with evidence demonstrating that it was committed to undertaking the responsibilities of a class representative, and its attorneys' competence and experience in class actions, (the "Class Certification Order"). NYSCEF No. 12 at 2; NYSCEF No. 15 at ¶3.

After addressing the deficiencies found in the Class Certification Order, Petitioner moved again for class certification on January 9, 2020, as well as for permission to file an amended petition and add additional potential class members as petitioners (the "Proposed Intervening Petitioners") (together, Second Class Certification Motion). On June 26, 2020, Respondents opposed Petitioners' motion and Petitioner and the Proposed Intervening Petitioners filed their Reply on September 17, 2020, in further support of their motion for leave to amend the petition and for class certification. No decision was issued on this motion. NYSCEF No. 12 at 3; NYSCEF No. 15 at ¶5.

Following the affirmance of the Merits Decision and beginning in May 2019, Respondent made payments to Sysco Metro of $862,705, on account of the Body Type Summonses that were the subject of the Merits Decision. After certain months without receiving payment, on November 19, 2019, Petitioner filed a motion to compel Respondents to, among other things, pay the amounts

owed and sought penalties, interest, and damages on account of its claims in excess of $550,000.00. NYSCEF No. 12 at 3-4. (*See also* NYSCEF No. 14 at ¶¶ 18-20, Affirmation of Bryan D. Glass, Esq. in Support of Petitioner's motion for Preliminary Approval of Proposed Settlement) On February 13, 2020, Respondent opposed the motion for contempt arguing, inter alia, there was no entitlement to interest and penalties and no damages for willful violation of the Court's Orders. *Id.*

Shortly after the Second Class Certification Motion was fully briefed, the Parties began settlement discussions with the aid and assistance of the Court. Included in those settlement discussions were the individual claims that Sysco had asserted by way of a contempt motion arising out of Respondents' alleged failure to make timely and complete payments to Sysco following the affirmance of the Court's Merits Decision on an earlier awarded judgment on Sysco's claims. Respondent was unwilling to resolve either claim unless both the class claims and the motion for contempt were resolved simultaneously. NYSCEF No. 12 at 4.

With the assistance of the Court, the Parties reached tentative agreement in December 2020, five years after the filing of this Action, on the principal terms of a settlement that would resolve the pending litigation, and the pending motion for contempt filed by Sysco. NYSCEF No. 15 at ¶6.

At that time, the Parties could not agree upon the Class Period and the distribution of the Settlement Fund. The Parties reached agreement as to the applicable percentages after substantial negotiations, again with the assistance of the Court at additional settlement conferences. NYSCEF No. 12 at 5-6; NYSCEF No. 15 at ¶7.

On May 2, 2022, the Parties finally reached an agreement as to all the terms of the Settlement. NYSCEF No. 15 at 8.

II. THE SETTLEMENT

A. The Settlement Terms

The Settlement provides a total of up to $2,450,000 less attorneys' fees, costs and administrative expenses to pay claims to Settlement Class Members who were the registered owner or lessor of a tractor and received a parking summons from the City during the period from January 1, 2014, to May 2, 2022, [NYSCEF No. 25 at ¶ 5; NYSCEF No. 12 at 5] that contained a description of the vehicle body type as something other than a tractor ("Body Type Summons") and were not enrolled in a Reduced Fine Program.

Settlement Class Members who submit Approved Claims shall be paid in tiers, according to the allocation methods set forth below, subject to paragraph 4.2 of the Settlement:

> (a) for every Body Type Summons for which the Responsible Person Pursued All Administrative Remedies and received or is entitled to receive a 100% refund (i.e., the refund is not pro-rated pursuant to paragraph 5.1(a)), the summons will be marked as dismissed and the amount due will be $0.00;
>
> (b) for all other Body Type Summonses for which a fine and/or penalty had been paid and an Approved Claim is filed, the amount of the fine and/or penalty paid will be reduced by the amount of any actual refund on such summons and the amount due for such summons will be $0.00, but the summons will not be marked as dismissed; and
>
> (c) for all other Body Type Summonses for which the fine and/or penalty had not been paid or was partially paid and an Approved Claim is filed, the amount of the fine and/or penalty and the amount due will be reduced to reflect the amount of refund that would be due with respect to such summons under this agreement, i.e., 30% reduction, or 20% reduction, and the summons will not be marked as dismissed.

NYSCEF No. 16 at ¶ 4.2.

In addition, whether or not Respondents' internal STARS database, which maintains the official records concerning the status of the summonses issued by the City of New York, marks the Body Type Summons as dismissed shall depend on the extent that the Settlement Class

Member pursued the administrative remedies available and whether the refunds are prorated pursuant to Section 5.1(a) of the Settlement.

For the reasons set forth above and below, Petitioner's motion should be granted.

ARGUMENT

I. THE CLAIMS ADMINISTRATOR PROVIDED PROPER NOTICE

The Preliminary Approval Order held, among other things, that the Notice Program is the best practicable under the circumstances. NYSCEF No. 25 at ¶ 12. The Notice and Notice Program constitute sufficient notice to all persons entitled to Notice and satisfy all applicable requirements of law including, but not limited to, N.Y. C.P.L.R. §§ 901 and 902 and constitutional requirements of due process." *Id*. The Court allowed for the distribution of the Notice. NYSCEF No. 25 at ¶ 12.

On May 3, 2023, Kroll Settlement Administration ("Kroll") mailed Postcard Notice to all potential class members identified in the City's internal STARS database. (*See* Fenwick Aff.) On May 19, 2023, Kroll began a media campaign and published the Notice of Settlement by issuing a press release and placing advertisements in social media platforms (*i.e*., Facebook) and search engines (*i.e*., Google). (*See* Finnegan Aff.)

As of June 20, 2023, Kroll has (1) sent 27,737 Notices by regular U.S. first-class mail to Class Members, (2) conducted 3,293 trace searches to locate Class Members based upon undeliverable notice, (3) will remail 777 Notices by regular U.S. first-class mail based upon results of trace searches, (4) published a settlement website (www.nyctractorticketsettlement.com) with online claim filing capability and on which the Notice and other Court documents were posted, (5) established a toll-free information line, by which Settlement Class Members are able to call 24/7 for more information about the Settlement, including, but not limited to, requesting copies of the

Notices and claim form, and (6) published the Notice of Settlement by placing an advertisement in social media, search engines, and a general public newspaper.

Given the broad reach of the Notice, and the comprehensive information provided to the Class, the requirements of due process and N.Y. C.P.L.R §904 has been easily met.

II. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Under N.Y. C.P.L.R. § 908, the Court must approve settlements of class actions. To grant final approval of a settlement, the Court must determine whether the proposed settlement "is fair, reasonable and adequate" *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 70, 808 N.Y.S.2d 766, 772 (2d Dep't 2006); *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 683 N.Y.S.2d 179, 188 (1st Dep't 1998). As the statute does not define criteria for class-action settlement approval, New York state courts regularly "look[] to federal case law for guidance" when evaluating class action settlements, in recognition that the two statutory schemes are similar. *Fiala v. Metro. Life Ins. Co., Inc.*, 899 N.Y.S.2d 531, 537-38 (Sup. Ct. N.Y. Cnty. 2010) (collecting cases); *see also City of NY v. Maul*, 14 N.Y.3d 499, 510, 929 N.E.2d 366, 903 N.Y.S.2d 304, 311 (2010) (federal Rule 23 jurisprudence is "helpful in analyzing CPLR 90").

A. The Settlement Is Fair, Reasonable, and Adequate

In determining whether to approve a class action settlement, courts examine "the fairness of the settlement, its adequacy, its reasonableness and the best interests of the class members." (*Sanchez v GFE Broadway-Brooklyn LLC*, Index No. 156045-2019, 2021 N.Y. Misc. LEXIS 5493, at *4, (Sup. Ct. N.Y. Cnty. Oct. 19, 2021) citing *Fiala*, 899 N.Y.S.2d at 537). Relevant factors in determining whether a settlement is fair, reasonable, and adequate include "the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact." *Sanchez*, 2021 N.Y. Misc. LEXIS 5493, at *4 citing *In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154,

160, 553 N.Y.S.2d 138 (1st Dep't 1990) (citations omitted). A court should also "balance[e] the value of [a proposed] settlement against the present value of the anticipated recovery following a trial on the merits, discount[ing] for the inherent risks of litigation." *Fiala*, 899 N.Y.S.2d at 607 (citation omitted).

New York courts analyze both the investigation performed as to the merits of an action as well as the presence of bona fide settlement negotiations. *See*, *e.g.*, *Willson v. N.Y. Life Ins. Co.*, Index No. 127804/1994, 1995 N.Y. Misc. LEXIS 652, at *83 (Sup. Ct., N.Y. Cnty. Nov. 8, 1995) (settlement approved where "negotiations were extensive, lengthy and conducted at arm's length" and Petitioners "had ample opportunity to review the strengths and weaknesses of their case, through extensive discovery"); *see also Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005) ("Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement.").

In New York, "courts grant significant weight to the judgment of experienced counsel in determining the fairness of a class action settlement" and examine whether "the parties negotiated at arm's-length and engaged in a vigorous back and forth of their respective positions." *Bickerton v. Charles Rose*, Index No. 650780/2012, 2013 N.Y. Misc. LEXIS 2762, at *4 (Sup. Ct. N.Y. Cnty. June 28, 2013); *see also Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-05669 (BMC), 2012 U.S. Dist. LEXIS 166383, at *6 (E.D.N.Y. Nov. 20, 2012) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery").

B. The Settlement Is Procedurally Fair: Petitioner and Petitioner's Counsel Adequately Represented the Class and Engaged in Arm's-Length Negotiations with Respondents

This case involves a bona fide dispute that was litigated in an adversarial manner prior to reaching settlement. The Proposed Settlement Agreement was the product of lengthy and hotly contested negotiations following motion practice, a substantive decision on the underlying merits of the Body Type Summonses Claim and an appeal of that decision, and numerous Court settlement conferences between Petitioners' Counsel and Respondents' counsel, in which the various issues were raised and discussed. NYSCEF No. 12 at 13.

The Parties appeared remotely for settlement conferences with Justice Billings at least five times, many times for several hours, to address the numerous contested issues. The Settlement Amounts represent the maximum amount Respondent was prepared to offer to resolve these claims without further litigation. *Id.*

As explained above and explained in more detail in the Motion for Preliminary Approval, Respondent was unwilling to settle the Class claims unless all of Sysco's claims were resolved. At the time of the settlement negotiations, the motion for contempt was fully briefed and was submitted to the Court. Calculations of late penalties and interests continue to accrue and compound. Petitioners have accepted Respondents' proposal, and agree to withdraw their pending motion for contempt, with prejudice, in exchange of an amount of $400,000.00 to settle the contempt motion, substantially less than the amount Petitioner would be entitled, if the Court were to grant the motion to compel. NYSCEF No. 12 at 13-14

The Settlement creates a cash Settlement Fund of $2.45 million that, after payment of the expense of administration and any award of attorneys' fees and expenses, will be distributed to Settlement Class Members who have Approved Claims in accordance with the allocation set forth above.

C. The Settlement Is Substantively Fair: The Relief Provided to the Settlement Class Is Adequate and Equitable Under the Factors Considered by New York State Courts and the Second Circuit

The Proposed Settlement Agreement eliminates numerous risks of continued litigation including, (a) risks as to whether the Court will certify a class, (ii) risks regarding whether parties who did not exhaust their administrative remedies could recover at all; and (iii) risks as to the calculation of recoverable. NYSCEF No. 12 at 12.

In evaluating a class action settlement, New York state courts generally consider the following factors: the Petitioner's likelihood of success if the litigation proceeds, the nature of the factual and legal issues at stake, the reaction of class members to the settlement, the judgment of counsel, the presence of good-faith bargaining, and the balance between class members' settlement recovery and what they could recover at trial and the risks of litigation. *See Klein*, 28 A.D.3d at 73.

Federal courts in the Second Circuit generally consider nine similar factors set forth in *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). The *Grinnell* factors are (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the Respondents to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recover; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

All factors under New York law, as well as the federal *Grinnell* factors, are satisfied by the Parties' Settlement in this matter.

Litigation through trial would be complex, expensive, and long and would include additional discovery, extensive motion briefing, and a complex trial. The Settlement avoids this delay and expenditure of judicial resources and provides substantial recovery for Settlement Class Members in a prompt fashion. Therefore, this factor weighs in favor of approval.

The response to the Settlement has been positive. There have been zero (0) requests for exclusion and zero (0) objections to the Settlement. The "favorable reception by the Class also constitutes strong evidence of the fairness of the proposed settlement and supports judicial approval." *Lopez v. Dinex Grp., LLC*, Index No. 155706/2014, 2015 N.Y. Misc. LEXIS 3657, at *6 (Sup. Ct. N.Y. Cnty. Oct. 6, 2015). Thus, this factor weighs strongly in favor of approval.

Under the federal *Grinnell* factors, the proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004). "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [,but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000). Here, "based on the discovery, [Petitioners] had an opportunity to review the strengths and weaknesses of their case." *Lasker v. Kanas*, Index No. 0103557/2006, 2007 N.Y. Misc. LEXIS 9269, at *20-21 (Sup. Ct. N.Y. Cnty. Sept. 26, 2007).

The Parties' settlement discussions originally contemplated a period of confirmatory discovery that would allow counsel to confirm information Respondents had provided to Petitioner regarding the potential size of the Class that might be certified if the case was fully litigated, and if exhaustion of remedies was or was not required. That procedure was modified so that rather than finalize the settlement and make it conditional on confirmatory discovery, the parties worked towards providing the information to Petitioner's counsel and allowing Petitioner's Counsel to

review that data prior to finalizing a settlement agreement. NYSCEF No. 12 at 6-7. *See also* NYSCEF No. 15 at ¶ 11. Petitioner's Counsel spent substantial time analyzing and reviewing the data provided by Respondent concerning over 1.4 million summonses issued during the period from January 1, 2014, through approximately July 13, 2020 (the "Summons Data"). In its analyses, Petitioner was able to identify a considerable number of summonses for which the DMV Body Type is a Tractor and the Summons Body Type is something other than Tractor and to what extent, if any, the recipient had challenged the summons, exhausted all administrative remedies and paid fines. NYSCEF No. 12 at 6-7. *See also* NYSCEF No. 15 at ¶ 12

These potential damages figures are highly speculative because there was no way of knowing how many of the summonses in question were actually written to a tractor. Petitioner's counsel considered that it was likely that the true number of Body Type Tickets in this group was a small fraction of these amounts. NYSCEF No. 12 at 6-7. *See also* NYSCEF No. 15 at ¶ 13

Here, the risk of establishing liability and damages further weighs in favor of final approval. A trial on the merits would involve risks because this Court would have to rule on Petitioner's fully briefed motion to compel and Second Class Certification Motion. Moreover, the Court would have to determine, *inter alia,* (i) whether Class members were prohibited from challenging an administrative determination without first exhausting all administrative remedies, and (ii) whether the exhaustion of remedies is excused with respect to Body Type Summons, when the governmental entity's policy renders any contest or appeal futile and when the issue to be determined is one of law, not of individual facts. NYSCEF No. 12 at 6; NYSCEF No. 15 at ¶ 12.

The risk of establishing a class and maintaining the class status through trial is also present. This Court denied Petitioners first class certification motion and is yet to issue an order with respect to Petitioner's highly contested Second Class Certification Motion. An order granting

or denying the Second Certification Motion would be subject to risk through trial of potential interlocutory appeal or decertification by Respondents. Settlement eliminates the risk, expense, and delay inherent in this process. *Massiah*, 2012 U.S. Dist. LEXIS 166383, at *5.

An examination of the adequacy of a settlement "requires 'balancing the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." *Fiala*, 899 N.Y.S.2d at 607. This determination "does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank*, 228 F.R.D. at 186 (quoting *Austrian*, 80 F. Supp. 2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement — a range which recognized the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert denied*, 409 U.S. 1039 (1972)). These factors favor final approval.

Without the Settlement, there is a very real risk that the Class will receive lesser relief or nothing at all. The immediate benefits presented by the Settlement, particularly when viewed in the context of the risks, costs, delay and uncertainties of further proceedings, weigh heavily in favor of final approval.

Every class action involves uncertainty on the merits. Settlement resolves that inherent uncertainty; for this reason, settlements are strongly favored by the courts, particularly in class actions such as this one. *Willix v. Healthfirst, Inc*., No. 07 Civ. 1143 (ENV)(RER), 2011 U.S. Dist. LEXIS 21102, at *11 (E.D.N.Y. Feb. 18, 2011) ("The settlement eliminates th[e] uncertainty" of the risk presented by "the fact-intensive nature of [Petitioners'] claims and [Respondents'] affirmative defenses"); *In re Citigroup Inc. Sec. Litig*., 965 F. Supp. 2d 369, 380 (S.D.N.Y. 2013) (referencing "general judicial policy favoring settlement"). While Petitioner has amassed

compelling evidence to prove its claims, establishing damages at trial is by no means certain. Ultimately, any judgment in the Action would likely present significant legal questions, which the losing party would likely appeal, adding further cost, risk and delay to these proceedings. Thus, the Settlement is adequate in light of the expenses and uncertainties of continued litigation.

Courts have long recognized that "essential to analyzing a settlement's fairness is 'the need to compare the terms of the compromise with the likely rewards of litigation.'" *See id*. at 384. The question for the Court is not whether the Settlement represents the highest recovery possible, but whether it represents a reasonable one in light of the many uncertainties the class faces. *Id*. Even considered independently, the monetary recovery provided in the Settlement is still substantial considering the likely recovery in the Action. Petitioner faces significant risks in proving damages were the case to continue, and this issue has far from a guaranteed outcome.

The Settlement is thus well within the range of reasonableness, given the risks and delay of continued litigation measured against any potential recovery here.

For all of the foregoing reasons, and for each of the reasons set forth in the Court's Preliminary Approval Order, the Court should find that the Settlement is fair, adequate and reasonable, and in Settlement Class Members' best interests.

III. THE REQUESTED ATTORNEYS' FEES AND EXPENSES ARE REASONABLE

CPLR § 909 permits an award of attorneys' fees to class counsel. Class Counsel request that the Court approve an award of attorneys' fees and expenses consisting of thirty-three (33%) percent of the Settlement Fund (less Administrative Costs) in attorneys fees' and up to $ $300,000 in actual expenses (including Court costs). This is well within the range typically awarded to class counsel in class-action fee applications.

The requested fee and expense award is consistent with awards in similar actions in this Court and throughout the country and is fully supported by Petitioner. The amount requested is warranted given the significant relief obtained and risks Petitioner's Counsel faced in bringing and prosecuting the Action. Since fee awards are designed to encourage counsel to achieve the best possible result for the class, the amount requested in this case is warranted, given the significant result obtained and the obstacles and risks to the Class.

Class Counsel's effort, for all the reasons explained above, was substantial, as was the time invested. Class Counsel and support staff devoted a total of 1,996.10 hours to this litigation, with a total lodestar of $1,201,656.25 at their currently applicable hourly rates as set for in the chart below.[4]

Firm	Hours	Lodestar	Expenses
Bragar Eagel & Squire, P.C	1,157.50	$858,631.25	$1,726.53
Edelstein & Grossman	77.60	$27,160.00	$0
Glass, Harlow & Hogrogian, LLP	474.00	$173,800.00	$586.75
Joan Lebow, P.C.	287.00	$142,065.00	$0
Total	1,996.10	$1,201,656.25	$2,313.28

A. The Request for an Award of Attorney's Fees Should Be Granted

Class Counsel requests thirty-three (33%) percent of attorneys' fees to be distributed from the Settlement Fund. A Court may calculate reasonable attorneys' fees by either the lodestar method (multiplying the hours reasonably billed by a reasonable hourly rate) or based on a

[4] *See* accompanying affirmations of Lawrence P. Eagel, Jonathan I. Edelstein, Bryan D. Glass, and Joan M. Lebow.

percentage of the recovery. *Fiala*, 899 N.Y.S.2d at 540. Where a settlement establishes a common fund, the percentage method is often preferable because "the lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys and incentive to raise their fees by billing more hours." *Cox v. Microsoft Corp.*, 26 Misc. 3d 1220(A) 4, 907 N.Y.S.2d 436 (Sup. Ct. N.Y. Cnty. 2007).

In the Second Circuit, the trend is to use the percentage-of-recovery method for class counsel fee awards in common fund cases, and one-third has been held to be a "fair and reasonable" award. *Stefaniak v. HSBC Bank USA, N.A.*, No. 1:05-CV-720 S, 2008 U.S. Dist. LEXIS 53872, at 9 (W.D.N.Y. June 28, 2008). In class settlement funds like this one, courts prefer to award fees as a share of the fund. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261-62 (S.D.N.Y. 2003) (collecting cases); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 483-85 (S.D.N.Y. 1998) (collecting cases).

The proposed fee award for Class Counsel is well within the range of reasonableness. *See, e.g.*, *deMunecas v. Bold Food LLC,* No. 09 Civ. 00440 (DAB), 2010 U.S. Dist. LEXIS 87644, at *22-23 (S.D.N.Y. Aug. 23, 2010) ("Class Counsel's request for 33% of the Fund [exclusive of costs] is reasonable under the circumstances of this case and is 'consistent with the norms of class litigation in this circuit.'"); A one-third award of the settlement proceeds is considered typical and reasonable. *See Alleyne v. Time Moving & Storage Inc.*, 264 F.R.D. 41, 59 (E.D.N.Y. 2010) (acknowledging one-third recovery by a class counsel ordinarily reasonable, and awarding the same); *In re Crazy Eddie Sec. Litig*., 824 F. Supp. 320, 327 (E.D.N.Y. 1993) (awarding $14.2 million in attorneys' fees representing approximately 33.8% of the $42 million settlement fund plus $2 million in disbursements).

"The attorneys' fees requested were entirely contingent upon success. Class Counsel risked time and effort and advanced costs and expenses, with no ultimate guarantee of compensation." *Stefaniak*, 2008 U.S. Dist. LEXIS 53872, at *10; *see also Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452 (RLE), 2008 U.S. Dist. LEXIS 23016, at *15 (S.D.N.Y. Mar. 24, 2008) (court found the one-third award to be reasonable without engaging in a lodestar cross-check, stating that an award of one-third "is consistent with the norms of class litigation in this circuit"); *Strougo*, 258 F. Supp. 2d at 262 (finding reasonable an award of one-third the common fund valued at over $1.5 million); *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2002 U.S. Dist. LEXIS 23170, at *5 (S.D.N.Y. Nov. 27, 2002) (the court approved a one-third attorneys' fees award stating that it was consistent with awards in similar cases); *Adair v. Bristol Tech. Sys*., No. 97 Civ. 5874 (RWS), 1999 U.S. Dist. LEXIS 17627, at *7-9 (S.D.N.Y. Nov. 12, 1999) (court noted the trend towards applying the percentage method and found one-third award reasonable and consistent with percentage awards in recent decisions); *Frank*, 228 F.R.D. at 189 (court granted a fee request of 40%, recognizing that it is "[t]he trend in the Second Circuit," and "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of the litigation)." *Id.* at 188 (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 121 (2d Cir. 2005)). Class Counsel submits that the award of a fee of one-third of the Settlement Amount is fully warranted.

Regarding the "'percentage of the award' method," the court stated in *Frank*:

> Under the percentage method, the court awards counsel a percentage of the award received by the Plaintiffs. To calculate the percentage, the court considers the effort expended and risks undertaken by plaintiffs' counsel and the results of those efforts, including the value of the benefits obtained for the class.

Frank, 228 F.R.D. at 188 (citations omitted).

B. The Second Circuit's Goldberger Factors Also Weigh in Favor of Granting Approval of Petitioner's Counsel's Attorneys' Fees

In evaluating attorneys' fees, the Second Circuit are also guided by the six factors articulated in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000), which are:

(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 (quotations omitted).

Class Counsel has devoted a substantial amount of time investigating, litigating, and resolving this complex case. As described above, Class Counsel engaged in substantive litigation covering seven years of motion practice, discovery, and various contested negotiations with the intervention of the Court that led to the Settlement. Thus, the work performed by Class Counsel to date has been comprehensive, complex, and wide ranging. This factor supports a substantial fee award.

"[C]lass actions have a well deserved reputation as being most complex." *NASDAQ*, 187 F.R.D. at 477 (internal citation and quotations omitted). "Courts of this Circuit have recognized the risk of litigation to be perhaps the foremost factor to be considered in determining the award of appropriate attorneys' fees." *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 U.S. Dist. LEXIS 9144, at *30 (S.D.N.Y. Jan. 31, 2007) (internal quotations omitted) (quoting *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 374 (S.D.N.Y. 2005)). This litigation was no exception, as it has been pending for nearly eight years and has involved complex factual issues of fact and law.

As discussed above, Class Counsel faced significant risks in proving class-wide impact and damages. *See Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) ("Class counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated."); *Goldberger*, 209 F.3d at 54. In this case, Class Counsel's requested fee award is well below Class Counsel's collective loadstar of $1,201,656.25.

"To determine the 'quality of the representation,' courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Taft*, 2007 U.S. Dist. LEXIS 9144, at *31 (citing *In re Global Crossing & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004)). Here, Petitioner's Counsel's management of the litigation in a disciplined and pragmatic fashion confirms that this litigation was ably prosecuted for the benefit of the Class. The litigation required considerable skill and experience to successfully conclude. Petitioner's Counsel was retained by Petitioner based on their firms' experience, expertise, and willingness to expend the time necessary to effectively litigate this case.

Indeed, the Preliminary Approval Order also found that "based on the work Class Counsel has done in identifying, investigating, and prosecuting the claims in the action; one or more Class Counsel's experience in handling class actions, other complex litigation claims of the type in this Action. Class Counsel has and will fairly and adequately represent the interests of the Class. NYSCEF No. 25 at 4.

Additionally, where, as here, each Class member stands to recover a relatively small amount of money, courts generally presume that class members do not have an interest in individually controlling the litigation. *See Dowd v. All. Mortg. Co*., 21 Misc. 3d 1112(A), at 4 (Sup. Ct. Suffolk Cnty. 2008) ("[A]s a result of the small amount of money involved in the claims of the members individually, it is inconceivable that any member of the Class would have an

interest in controlling the litigation on their own."). In these cases, New York courts have repeatedly found that prosecuting separate actions is impractical, given the relatively small amount of damages each class member stands to recover when compared to the cost of bringing an individual case. *E.g.*, *Williams v Air Serv Corp.*, 121 A.D.3d 441, 442 (1st Dep't 2014) (difference in litigation costs and the modest damages to be recovered by each individual employee make individual litigation impractical); *Stecko v RLI Ins. Co.*, 121 A.D.3d 542, 543 (1st Dep't 2014) ("damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court") (quoting *Nawrocki v Proto Constr. & Dev. Corp.*, 82 A.D.3d 534, 536, 919 N.Y.S.2d 11 (1st Dep't 2011)). In light of the legal, procedural, and factual complexities of this case, there is no doubt that this is an extremely favorable settlement for Class Members. The fact that these amounts are available to Class Members without the uncertainty of trial or appeal, qualifies the results of this Settlement as excellent under any reasonable assessment. !

As shown by the very favorable Settlement of this matter achieved in the face of the difficult issues of law and fact, Petitioner's Counsel provided legal services with considerable skill. The services were rendered with efficiency. Petitioner's Counsel's experienced representation in this case was directly responsible for bringing about the positive Settlement and weighs in favor of granting the requested fees. Petitioner supports the Settlement and to date, there have been no objectors.

"As the size of the settlement fund increases, the percentage of the fund awarded as fees often decreases so as to prevent a windfall to plaintiffs' attorneys." *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 U.S. Dist. LEXIS 24890, at *25 (S.D.N.Y. Oct. 19, 2005). New York courts routinely award fee percentages around thirty-three percent in cases with

settlement funds substantially larger than this case. *Id.* (awarding 30% fee from a $10 million fund); *Maley*, 186 F. Supp. 2d at 370 (awarding 33⅓% fee on fund valued at $11.5 million).

Public policy weighs in favor of granting Petitioner's Counsel's requested fees. As outlined above, but for the work of Petitioner's Counsel and their willingness to bear the entire risk of bringing this litigation to fruition, Settlement Class Members likely would receive nothing on their claims. Fair compensation for attorneys who take on such litigation furthers the remedial purpose of consumer protection statutes.

C. The Request for an Award of Litigation Expenses Should Be Granted

Petitioners request that this Court award of up to $300,000 principally for the payment to Kroll for its administrative services, and additional out of pocket expenses totaling less than $5,000.00. This amount has been negotiated and Respondent has agreed to pay this amount without objection so long as it falls within the parameters of the Settlement. Section § 10.1 of the Settlement provides as follows:

> Settlement Class Counsel may file a Fee Application seeking an award of attorneys' fees of no more than thirty-three percent (33%) of the Settlement Fund (after payment of Administrative Costs) and reimbursement of reasonable Expenses incurred in connection with the Proceeding, inclusive of the cost of the Settlement Administrator, of no more than $300,000, which shall, if approved by the Court, be paid from the Settlement Fund. Respondents shall take no position with regard to any motion by Settlement Class Counsel for such award of attorney's fees and expenses. Respondents agree that they have no right to appeal the amount of any award of attorneys' fees and expenses so long as the amounts awarded do not exceed the above.,...

"Just as attorneys may recover reasonable attorneys' fees in a certified class action, they may also recover 'nontaxable costs.' . . . Costs may include items such as 'photocopying, travel, telephone costs, witness fees, long distance faxes, transcript requests necessary for post-trial motions and costs of necessary depositions." *Pearlman v. Cablevision Sys. Corp.*, No. CV 10-4992 (JS) (AKT), 2019 U.S. Dist. LEXIS 142222, at *24 (E.D.N.Y. Aug. 20, 2019) (collecting

cases). Compensable expenses broadly include "reasonable expenses normally charged to a fee paying client." *See generally* 5 Newberg and Rubenstein on Class Actions § 16:5 (5th ed.) (collecting cases). Class Counsel has incurred $2,313.28 in litigation expenses and charges with respect to prosecuting the Action. This amount includes, among other things, court fees, messengers, overnight delivery services, travel, office supplies, and photocopying. Such expenses are regularly awarded by courts. *See Pearlman*, 2019 U.S. Dist. LEXIS 142222, at *24-25 (approving request for expenses of over $264,000).

Petitioner's counsel retained the services of Kroll Settlement Administrator to administer the settlement, provide notice and process claims. Kroll has sent notice to potential class members, published notice in periodicals and worked on administering the claims process including the filing of proofs of claims. Prior to the settlement hearing, Petitioner will provide a further update of costs and expense actually incurred by Kroll through the date of hearing along with projected costs for claims processing and settlement administration.

CONCLUSION

For the reasons stated above, Petitioner respectfully asks that the Court (1) grant final approval of the proposed Settlement, and (2) approve the request for attorneys' fees and expenses.

Dated: June 26, 2023
New York, NY

BRAGAR EAGEL & SQUIRE, P.C.

By: */s/ Lawrence P. Eagel*

Lawrence P. Eagel
Raymond A. Bragar
810 Seventh Ave., Suite 620
New York, NY 10019
Tel: (212) 308-5888
Email: eagel@bespc.com
Email: bragar@bespc.com

EDELSTEIN & GROSSMAN
Jonathan Edelstein
501 Fifth Avenue
New York, NY 10017

GLASS, HARLOW & HOGROGIAN, LLP
Bryan D. Glass
85 Broad Street
New York, NY 10004

JOAN LEBOW, P.C.
Joan Lebow
233 South Wacker Dr., 70th Floor
Chicago, IL 60606

Settlement Class Counsel