UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIZABETH RUSSETT, BETH CALABRESE, and JAN BULLARD, individually and on behalf of all others similarly situated, Plaintiffs, v. THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant.	Civil Action No. 7:19-cv-07414-KMK

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND INCENTIVE AWARDS

Dated: July 20, 2020

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Class Counsel

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INTRODUCTION

The class action settlement between Plaintiffs Elizabeth Russett, Beth Calabrese, and Jan Bullard (collectively, "Plaintiffs") and Defendant The Northwestern Mutual Life Insurance Company ("Northwestern" or "Defendant"), if finally approved, resolves Plaintiff's and the Class' claims against Northwestern under New York General Business Law ("GBL") § 399-zzz. The settlement – preliminarily approved by this Court on May 20, 2020 – creates a $595,000 settlement fund from which over 90% of class members – those with Active Insurance Services Accounts ("Active ISA") – will automatically receive *pro rata* credits to their ISA. In other words, no claim form will be necessary for almost all class members. The remaining class members – those with Closed Insurance Services Accounts ("Closed ISA") – will receive a *pro rata* cash payment after submitting a claim.

Obtaining this exceptional relief came with significant risks. In particular, GBL § 399-zzz has never been litigated, and thus, the scope of the statute is in dispute. Rather than put Northwestern's arguments to the test and risk everything, Plaintiffs elected to achieve meaningful, immediate relief for their fellow class members.

Moreover, the settlement was not reached until the Parties participated in a mediation with a well-respected mediator at JAMS, former United States District Judge Wayne R. Andersen (of the U.S. District Court for the Northern District of Illinois). And, while the Parties did not achieve settlement at the mediation, it opened the door to further settlement discussions over several months that eventually proved fruitful.

In light of this exceptional result, Plaintiffs respectfully request pursuant to Federal Rule of Civil Procedure 23(h) that the Court approve attorneys' fees, costs, and expenses of one-third of the settlement fund, or $198,333.33, as well as an incentive award of $5,000 for each Plaintiff for their services as class representatives. 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").

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

FACTUAL AND PROCEDURAL BACKGROUND

A brief summary of GBL § 399-zzz, the litigation performed by Class Counsel for the Settlement Class' benefit, and the beneficial terms of the Settlement provide necessary context to the reasonableness of the requested fee and incentive awards.

A. GBL § 399-zzz

Effective April 18, 2011, the New York Legislature enacted GBL § 399-zzz. The New York Legislature found "paper billing and payment fees unfairly impact consumers that do not have Internet access in their homes, as well as those that are uncomfortable using the Internet, including many senior citizens and those concerned about personal privacy." *See* Complaint (ECF No. 1) ("Compl.") Ex. A. Further, "[p]aper billing and payment fees disproportionately affect low-income consumers, who are less likely to have access to the Internet." *Id*. As such, GBL § 399-zzz provides that:

> Subject to federal law and regulation, no person, partnership, corporation, association or other business entity shall charge a consumer an additional rate or fee or a differential in the rate or fee associated with payment on an account when the consumer chooses to pay by United States mail or receive a paper billing statement.

GBL § 399-zzz(1). The statute allows corporations to "offer[] consumers a credit or other incentive to elect a specific payment or billing option." *Id*.

"Every violation of [GBL § 399-zzz] shall be deemed a deceptive act and practice subject to enforcement under article twenty-two-A of this chapter," i.e., GBL § 349. GBL § 399-zzz(2). GBL § 349 entitles "any person who has been injured by reason of any violation of this section . . . to recover his actual damages or fifty dollars, whichever is greater." GBL § 349(h).

B. Plaintiffs' Allegations

Defendant is a financial services company and one of the biggest life insurance providers in the United States. Plaintiffs allege that Defendant charges a $1.00 fee to all policyowners who send their scheduled monthly payment by paper check, but that Defendant does not charge this fee to policyowners who pay their bills electronically. Compl. ¶ 1. Plaintiffs allege that this conduct violates GBL § 399-zzz. *Id.* ¶ 2. Plaintiffs further allege that because every violation of GBL § 399-zzz is a "deceptive act and practice" under GBL § 349, Defendant has violated GBL § 349 as well. *Id.* ¶ 11. Plaintiffs accordingly sought "to enjoin the unlawful acts and practices described . . . to recover their actual damages or fifty dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees." *Id.* ¶ 26.

C. The Litigation And Work Performed To Benefit The Class

On June 3, 2019, Plaintiff Bullard, through counsel, sent a letter to Defendant alleging that it violated New York General Business Law ("GBL") § 399-zzz by charging her a $1.00 Service Charge in order for her to pay her monthly premium by check. *See* Declaration of Philip L. Fraietta ("Fraietta Decl.") ¶ 4. On June 17, 2019, Defendant responded to Plaintiff Bullard's letter by denying that it violated GBL § 399-zzz. *Id.* ¶ 5. On August 8, 2019, Plaintiffs filed their Class Action Complaint in the United States District Court for the Southern District of New York. *Id.* ¶ 6.

From the outset of the case, the Parties engaged in direct communications, and as part of their obligations under Fed. R. Civ. P. 26, discussed the prospect of early resolution. Before

Defendant responded to the Complaint, the Parties agreed to participate in a mediation with former United States District Judge Wayne R. Andersen (of the U.S. District Court for the Northern District of Illinois), who is a neutral mediator affiliated with JAMS Chicago. Fraietta Decl. ¶ 7. In advance of this mediation, the Parties exchanged informal discovery, including the fees collected by the Defendant during the class period, which at the time was $522,227.00. Fraietta Decl. ¶ 9. Given that this information was the same or largely similar to discovery that would be produced in formal discovery related to class certification and summary judgment, the Parties were able to sufficiently assess the strengths and weaknesses of their cases. *Id*. The parties also exchanged lengthy, detailed mediation statements, airing their respective legal arguments. *Id.* ¶ 10.

On December 18, 2019, the Parties participated in a full-day mediation before Judge Andersen. Fraietta Decl. ¶ 11. Although the Parties were unable to reach an agreement that day, they continued settlement discussions over the course of the next several months and eventually reached an agreement. *Id.* ¶¶ 11-12. The Court preliminarily approved the Settlement on May 28, 2020. *Id.* ¶ 19 (citing ECF No. 36).

SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class by delivering immediate cash to approximately 24,000 persons with a New York mailing address who from June 21, 2016 to and through May 28, 2020 were charged by Northwestern an additional rate or fee or a differential in the rate or fee based on the method by which they chose to make payments. Fraietta Decl. ¶ 13. The Settlement creates a $595,000 Settlement Fund, from which class members with an Active ISA will automatically receive a *pro rata* credit to their account. *Id.* ¶¶ 13-14; *see also* Fraietta Decl. Ex. A, Class Action Settlement Agreement ("Agreement") ¶ 2.1(a). These class members account for more than 90% of the total fees collected. Fraietta

Decl. ¶ 14. The remaining class members with a Closed ISA who submit claims will receive a *pro rata* payment from the Net Settlement Fund in the form of a check. *Id.* ¶ 15; Agreement ¶ 2.1(b).

ARGUMENT

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

The requested fee award of $198,333.33, 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).[1] 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.

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

[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 document preparation and travel. *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 $10,822.07 for out-of-pocket costs and expenses in these standard categories. *See* Fraietta Decl. ¶ 28, Ex. C.

cases." *In re Beacon Assocs. Litig.*, 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013). In fact, the "trend" of using the percentage of the fund method to compensate class counsel is now "firmly entrenched in the jurisprudence of this Circuit." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 388 (S.D.N.Y. 2013). As the Second Circuit has stated, the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). "In contrast, the 'lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in gimlet-eyed review of line-item fee audits.'" *Id.* (quoting *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002)). Indeed, the Second Circuit has described difficulties with the lodestar method:

> As so often happens with simple nostrums, experience with the lodestar method proved vexing. Our district courts found it created a temptation for lawyers to run up the number of hours for which they could be paid. For the same reason, the lodestar created an unanticipated disincentive to 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. This Court has also been critical of the lodestar method, and has noted that "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 Ass'n v. County of Albany*, 522 F.3d 182 (2d Cir. 2008)); *see also* Fraietta Decl. Ex. L, 1/31/18 *Trusted Media Brands* Final Approval Hearing Transcript ("*TMBI* Hearing Tr.") at 16:18-19 ("Now, the lodestar method is not supposed to be used for computing attorneys' fees.").

Moreover, Courts in this Circuit routinely approve fee requests for one-third of a settlement fund. *See TMBI* Hearing Tr. at 17:21-22 ("As I said, it's one-third. That's typically

approved by other courts."); *see also 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"); *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). 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). Further, the percentage should be "awarded on the basis of the total funds made available, whether claimed or not." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (calculating fee award "on the basis of the total funds made available, … *i.e.*, as if it were a common settlement fund" (internal quotations omitted)).

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, this Court has previously approved Class Counsel's request for attorneys' fees equal to one-third

of a settlement fund. *Taylor v. Trusted Media Brands, Inc.*, Case No. 7:16-cv-01812, ECF No. 87 ¶ 14 (S.D.N.Y. Feb. 1, 2018) (granting fee award of $2,741,392.50, equal to one-third of $8.225 million settlement fund); *Ruppel v. Consumers Union of United States, Inc.*, No. 7:16-cv-02444, ECF No. 111 ¶ 14 (S.D.N.Y. Dec. 4, 2018) (granting fee award of $5,458,333.33, equal to one-third of $16.375 million settlement fund).

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 has been working on this case since May 2019, when it began investigating insurance companies' violations of GBL § 399-zzz. *See* Fraietta Decl. ¶ 3. The theory of liability was novel. No case had ever been brought against an insurance company under GBL § 399-zzz, nor had any court issued an opinion interpreting the statute. *Id.* Thus, Class Counsel's investigation was extensive and involved in-depth research into a number of insurance industry practices and the legislative history of GBL § 399-zzz. *Id.* Class Counsel also spoke with interested potential class members, drafted an initial demand letter and the complaint, conducted meet-and-confer teleconferences with defense counsel, and reviewed informal discovery produced by Northwestern to aid in settlement discussions. *Id.* ¶¶ 4-12. This informal discovery involved largely the same information that would have been produced in formal discovery related to issues of class certification and summary judgment. *Id.* ¶ 9.

Class Counsel expended considerable time and labor on the settlement process as well. First, Class Counsel thoroughly analyzed the informal discovery produced by Defendant prior to the mediation, which was largely the same as what would have been produced in formal

discovery. *Id.* ¶ 9. Then, on December 18, 2019, Class Counsel participated in a full-day mediation with Judge Andersen. *Id.* ¶ 11. In preparation for that mediation, Class Counsel prepared a detailed mediation statement outlining the strength of the Plaintiff's case in order to help evaluate any potential settlement, in addition to a draft class settlement term sheet. *Id.* ¶ 10. Class Counsel also reviewed Defendant's mediation statement to evaluate the veracity of Defendant's arguments. *Id*. Finally, over the next few weeks, Class Counsel continued to negotiate with Defendant's counsel and ultimately reached the instant Settlement. *Id.* ¶ 12.

Thus, the work performed by Class Counsel to date has been comprehensive, complex, 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 – GBL § 399-zzz – that has never been litigated before. Briefing would have required both an examination of the statute's text using traditional canons of statutory interpretation and a review of the statute's legislative history. Specifically, the Parties would have argued over whether Northwestern was charging "an additional rate or fee or a differential in the rate or fee associated with payment on an account when the consumer chooses to pay by United States mail or receive a paper billing statement," (which is prohibited by the statute) versus "offering consumers a credit or other incentive to elect a specific payment or billing option" (which is permitted by the statute). Neither the statute nor caselaw defines these terms, and so Class Counsel would have been required to craft its arguments from scratch. Thus, because this case involved novel and complex legal questions under GBL § 399-zzz – its application to Defendant's practices and defining the scope of what it means to charge a "rate or

fee" under the statute without any guidance – 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 novelty of this case that made it complex also presented a substantial risk of non-payment for Class Counsel. As GBL § 399-zzz has not been interpreted by any court, success on the legal issues presented by this case was far from certain. Fraietta Decl. ¶¶ 3, 20-21. Indeed, Class Counsel faced the palpable risk that Northwestern's actions could be characterized as "offering consumers a credit or other incentive," thus nixing the case. This risk was exacerbated by the fact that Northwestern retained highly qualified defense counsel who presented well-argued defenses in their own mediation statement. *Id.* ¶ 21. Nonetheless, Class Counsel nonetheless embarked on a fact-intensive investigation of Northwestern's practices, engaged in informal discovery, and paid for and participated in a full-day mediation, as well as weeks of additional discussions with the defense counsel in order to try and resolve the action. *Id.* ¶¶ 3-12. Class Counsel fronted this investment of time and resources, despite the significant risk of nonpayment inherent in this case. *Id.* ¶¶ 3, 20.

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. In addition, Class Counsel are well-respected attorneys with significant experience litigating consumer class actions of similar size, scope, and complexity. Fraietta Decl. ¶¶ 34-38. Indeed, this Court has previously commended Class Counsel's work in representing class members and achieving a meaningful settlement. *Taylor*, ECF No. 87 ¶ 8 ("The Court finds that … Class Counsel adequately represented the Settlement Class for the purposes of litigating this matter and entering into and implementing the Settlement Agreement."); *Ruppel*, ECF No. 111 ¶ 8 (same).

Moreover, Class Counsel has been recognized by courts across the country for its expertise. *See* Firm Resume, Fraietta Decl. Ex. M; *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."); *Williams v. Facebook, Inc.*, Case No. 3:18-cv-01881, ECF No. 51 (N.D. Cal June 26, 2018) (appointing Bursor & Fisher class counsel to represent a putative nationwide class of all persons who installed Facebook Messenger applications and granted Facebook permission to access their contact list).

[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.

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

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

5. The Requested Fee In Relation To The Settlement

Class Counsel seeks fees, costs, and expenses totaling one-third of the $595,000 settlement fund. As mentioned above, courts in this Circuit routinely approve fee requests for one-third of a common fund. *See* cases cited in Argument § I, *supra*. The one-third award should be "awarded on the basis of the total funds made available, whether claimed or not." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (calculating fee award "on the basis of the total funds made available, … *i.e.*, as if it were a common settlement fund" (internal quotations omitted)).

Moreover, the requested fees, costs, and expenses of one-third of the settlement fund is an equal percentage to that approved by this Court in both *Taylor*, ECF No. 87 ¶ 14, and *Ruppel*, ECF No. 111 ¶ 14. This factor thus supports the requested fee award.

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 statutory 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 GBL § 399-zzz. Class action litigation is the most realistic means of safeguarding the interests of "low-income consumers" who are "disproportionately affect[ed]" by paper billing fees, and "those that are uncomfortable using the Internet, including many senior citizens and those concerned about personal privacy." Compl. Ex. A. In fact, GBL § 399-zzz has never been enforced in the almost ten years it has effective. Thus, the alternative to a class action in this case would have been no enforcement at all, and Northwestern'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 A Lodestar Cross-Check

A 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. ¶ 32.[3]

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

The hours worked, lodestar fee, and expenses for Class Counsel are set forth in the declaration of Mr. Fraietta, submitted herewith. In total, through July 7, 2020, Class Counsel billed 212.0 hours, which at their hourly rates amounts to a lodestar of $102,951.00. Fraietta Decl. ¶¶ 27-28. Therefore, the requested fee award reflects a 1.82 times multiplier on Class Counsel's regular hourly rates, which is well within the range of reasonableness. *Sewell v. Bovis Lend Lease, Inc.*, 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) ("Courts commonly award lodestar multipliers between two and six."); *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.").

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

Moreover, Class Counsel's requested fees are also reasonable given the unique circumstances of this case. Specifically:

- Class members will receive a substantial amount of money quickly, and 90% of class members will receive such payment automatically without the need for a claim process.

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

- The litigation was conducted and the settlement was obtained in an efficient manner, by experienced and qualified counsel.
- The case involved complex and novel legal issues and factual theories, which involved significant litigation risks.
- Class Counsel devised a litigation and settlement strategy that factored in the complex and uncertain nature of the case.

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

II. THE REQUESTED INCENTIVE AWARDS REFLECT PLAINTIFFS' ACTIVE INVOLVEMENT IN THIS ACTION AND SHOULD BE APPROVED

Incentive awards are common in class action cases and serve to "compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff[s]." *Reyes*, 2011 WL 4599822, at *9. Incentive awards fulfill the important purpose of compensating plaintiffs for the time they spend and the risks they take. *Massiah*, 2012 WL 5874655, at *8.

Here, the participation of Plaintiffs was critical to the ultimate success of the case. *See* Fraietta Decl. ¶¶ 39-41. Each Plaintiff spent approximately 30 hours protecting the interests of the class through their involvement in this case. *See* Declaration of Elizabeth Russett ("Russett Decl.") ¶ 10; Declaration of Beth Calabrese ("Calabrese Decl.") ¶ 10; Declaration of Jan Bullard ("Bullard Decl.") ¶ 10. Plaintiffs assisted Class Counsel in investigating their claims by detailing their account history and the Service Charges associated with therewith, explaining their relationship as a policy owner with Northwestern and supplying supporting documentation, and aiding in drafting the Complaint. Russett Decl. ¶¶ 3-4; Calabrese Decl. ¶¶ 3-4; Bullard Decl. ¶¶ 3-4. During the course of this litigation, Plaintiffs kept in regular contact with their lawyers to receive updates on the progress of the case and to discuss strategy. Russett Decl. ¶ 5; Calabrese Decl. ¶ 5; Bullard Decl. ¶ 5. Further, Plaintiffs preserved documents likely to be requested in

formal discovery and were prepared to testify at deposition and trial, if necessary. Russett Decl. ¶ 6; Calabrese Decl. ¶ 6; Bullard Decl. ¶ 6. Finally, Plaintiffs were actively consulted during the settlement process. Russett Decl. ¶ 7; Calabrese Decl. ¶ 7; Bullard Decl. ¶ 7.

On these facts, the $5,000 incentive payment is fair and reasonable. Indeed, this Court approved an incentive award of $5,000 for the Class Representative in *Taylor* where she also did not sit for a deposition and had spent approximately 30 hours protecting the interests of the class through her involvement in the case. *TMBI* Hearing Tr. at 15:10-19. Thus, the incentive awards are warranted.

Moreover, the requested $5,000 is well within the range of incentive awards approved by other courts in this Circuit. *See*, *e.g.*, *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, Plaintiffs respectfully requests that the Court (1) approve attorneys' fees, costs, and expenses in the amount of one-third of the settlement fund, or $198,333.33, (2) grant Plaintiffs an incentive award of $5,000 each in recognition of their efforts on behalf of the class, and (3) award such other and further relief as the Court deems reasonable and just.

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Respectfully submitted,

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