UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOLLY WINSTON, on behalf of herself and all others similarly situated, Plaintiff, v. PEACOCK TV LLC, Defendant.	Civil Action No.: 1:23-cv-08191-ALC Hon. Andrew L. Carter, Jr.

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Dated: October 31, 2024

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INTRODUCTION

On August 1, 2024, this Court preliminarily approved the Class Action Settlement between Plaintiff Holly Winston ("Plaintiff") and Defendant Peacock TV LLC ("Defendant" or "Peacock"), and directed that notice be sent to the Settlement Class. *See* Dkt. 28. The settlement administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), has begun implementing the Court-approved notice plan, and, as of October 29, 2024, notice has reached more than 95% of the Settlement Class. *See* Declaration of Neal J. Deckant in Support of Plaintiff's Motion for Final Approval of Class Action Settlement ("Deckant Decl.") ¶ 30. Thus far, the reaction from the Class has been overwhelmingly positive. Specifically, of the approximately 2,533,582 Settlement Class Members, to date, only 7 have submitted requests to be excluded, and there have been **no** objections.[1] *See id.*[2] The lack of any objection at this time demonstrates that the Settlement has the support and approval of the Class.[3]

The Settlement was reached after months of settlement negotiations between the parties, including a full-day private mediation session on March 11, 2024 with Judge Diane M. Welsh (Ret.), an experienced neutral affiliated with JAMS, as well as months of follow-up negotiations as the parties formulated the Settlement Agreement. *See* Deckant Decl. ¶¶ 10-15. These efforts resulted in a settlement that provides substantial monetary benefits to the proposed Class.

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[1] The deadline to object or opt-out of the Settlement is November 13, 2024. *See* Dkt. 30.

[2] Class Counsel intends to file a declaration from Epiq regarding settlement administration on or around November 14, 2024, once notice is complete and the claims, objection, and exclusion deadline has passed. In the meantime, Class Counsel has been informed by Epiq as to the facts asserted herein regarding direct notice and the number of claims, objections, and requests for exclusion submitted to date. *See* Deckant Decl. ¶ 29.

[3] *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86–87 (2d Cir. 2001); *Schutter v. Tarena Int'l, Inc.*, 2024 WL 4118465, at *10 (E.D.N.Y. Sept. 9, 2024); *Sow v. City of New York*, 2024 WL 964595, at *2 (S.D.N.Y. Mar. 5, 2024).

Specifically, the Settlement consists of an all-cash, non-reversionary "common fund" in the amount of $3,742,637.14 (the "Settlement Fund"). *See id*., Ex. 1 ("Settlement Agreement"), Definitions ¶ 1.39. Settlement Class Members who submit a timely and valid claim will receive a *pro rata* portion of the $3,742,637.14 Settlement Fund, following the deduction of notice and claims administration costs, attorneys' fees and expenses, and a class representative incentive payment. *See id.* ¶¶ 2.1(a)-(b), 8.1, 8.3. In all, this is an excellent deal. The Court should have no hesitation in granting final approval.

FACTUAL AND PROCEDURAL BACKGROUND, AND SETTLEMENT TERMS

The factual and procedural background of this matter, including the key terms of the Settlement Agreement, are discussed at pages 2-6 of Plaintiff's motion for preliminary approval, *see* Dkt. 25; at ¶¶ 4-19 of the Declaration of Neal J. Deckant in support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award, *see* Dkt. 34; and at ¶¶ 3-19 of the Declaration of Neal J. Deckant in Support of Plaintiff's Motion for Final Approval of Class Action Settlement ("Deckant Decl."), filed contemporaneously herewith.

ARGUMENT

I. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

The Court's Preliminary Approval Order provisionally certified a class for settlement purposes defined as: "[a]ll Persons who, from September 15, 2019, to and through February 27, 2024, enrolled in an automatically renewing Peacock Subscription directly through Peacock using a California billing address, and who were charged and paid Renewal Fee(s) in connection with such subscription(s)" (the "Settlement Class"). Dkt. 28 at 3.

Under Federal Rule of Civil Procedure 23, a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). *See Amchem Prods.,*

Inc. v. Windsor, 521 U.S. 591, 620 (1997). Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the Court to find that:

> [Q]uestions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3). In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in evaluating class certification. *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (internal citation omitted).

The Court should now grant final certification because the Settlement Class meets all of the requirements of Rule 23(a) and Rule 23(b)(3).

A. Numerosity

Numerosity is satisfied when the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, the Settlement Class easily satisfies Rule 23's numerosity requirement. According to Defendant's records, the Settlement Class is comprised of over 2.5 million persons. *See* Deckant Decl. ¶ 27. Since there is no question that joinder of all members of the Settlement Class would be impractical, numerosity is satisfied.

B. Commonality

Rule 23(a)(2) requires that a plaintiff establish that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This commonality requirement is met "if

plaintiffs' grievances share a common question of law or of fact." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007). Although the claims need not be identical, they must share common questions of fact or law. *See Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. & N.J.*, 698 F.2d 150, 153-54 (2d Cir. 1983). Courts construe the commonality requirement liberally. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 181 (W.D.N.Y. 2005) (citing *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198-99 (S.D.N.Y. 1992)). Thus, "a single common issue of law will satisfy the commonality requirement." *Michalow v. E. Coast Restoration & Consulting Corp.*, 2011 WL 6942023, at *3 (E.D.N.Y. Nov. 17, 2011). A common issue of law will be found if Plaintiff can "identify some unifying thread among the members' claims." *Monaco v. Stone*, 187 F.R.D. 50, 61 (E.D.N.Y. 1999).

Here, there are common questions of law and fact that will generate common answers apt to drive the resolution of the litigation. Specifically, Plaintiff alleges that Defendant made identical misrepresentations and omissions regarding the terms of payment for and cancellation of the Peacock Subscriptions, *see* Dkt. 1 ("Compl.") ¶¶ 5-6, 45-54, 57-61, 119, 127, and also that it "uniformly fail[ed] to obtain any form of consent … before charging consumers' Payment Methods on a recurring basis." *Id*. ¶ 45; *id*. ¶¶ 55-56. Among others, common questions include: (1) whether Peacock failed to disclose the automatic renewal offer terms in a clear and conspicuous manner and in visual proximity to the request for consent to the offer; (2) whether Peacock failed to obtain consumers' affirmative consent to the automatic renewal offer terms; and (3) whether Peacock failed to provide an adequate acknowledgement containing the automatic renewal offer terms and information on how to cancel. *See id*. ¶ 76.

Resolution of these common questions requires evaluation of the scope of a single

statute: California's Automatic Renewal Law ("ARL"), Cal. Bus. & Prof. Code §§ 17600, *et seq*. If Defendant violated the statute, then every Settlement Class Members' right shave been violated in the exact same manner, in which case each Class Member is entitled to a full refund of all subscription fees incurred during the Class Period. Thus, actual damages can be precisely calculated for each Settlement Class Member. *See id*. ¶ 16; *see also Pichardo v. Carmine's Broadway Feast Inc.*, 2016 WL 5338551, at *3 (S.D.N.Y. Sept. 26, 2016) ("Courts considering similar claims of unlawful payment policies routinely certify classes based on evidence of a common policy."). Thus, the commonality requirement is satisfied.

C. Typicality

To establish typicality, Rule 23(a)(3) requires that "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol*, 126 F.3d at 376 (internal quotations omitted). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993) (emphasis added). Courts evaluate typicality "with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Trinidad v. Breakaway Courier Sys., Inc.*, 2007 WL 103073, at *6 (S.D.N.Y. Jan. 12, 2007) (citation omitted).

Here, Plaintiff alleges that Defendant's practice of charging renewal fees for its Peacock Subscriptions – without first providing the complete statutorily-required disclosures regarding the applicable automatic renewal offer terms or obtaining consumers' affirmative consent to the transaction – violated the ARL and other California statutes. *See* Compl. ¶¶ 1-8. Moreover,

Defendant's automatic renewal process is done in the exact same manner and was directed at, or affected, both Plaintiff and the members of the putative class in the same exact way. *See id*. ¶¶ 45-65. Accordingly, by pursuing her own claims in this matter, Plaintiff will necessarily advance the interests of the Settlement Class, and typicality is therefore satisfied. *See, e.g.*, *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 565-66 (S.D.N.Y. 2014) (holding that the typicality requirement was satisfied where "the lead plaintiffs' and other class members' claims ar[o]se out of the same course of conduct by the defendant and [were] based on the same legal theories"); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 405-406 (S.D.N.Y. 2015) (same).

D. Adequacy

Adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Generally, adequacy of representation entails inquiry as to whether: (1) the plaintiff's interests are antagonistic to the interest of other members of the class and (2) the plaintiff's attorneys are qualified, experienced, and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000); *see also Toure v. Cent. Parking Sys.*, 2007 WL 2872455, at *7 (S.D.N.Y. Sept. 28, 2007) (quoting *Denney v. Deutsche Bank AG,* 443 F.3d 253, 268 (2d Cir. 2006)); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 30 (E.D.N.Y. 2019). "'[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.'" *Dziennik v. Sealift, Inc.*, 2007 WL 1580080, at *65 (E.D.N.Y. May 29, 2007) (quoting *Martens v. Smith Barney Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998)).

In this case, Plaintiff – like each and every Settlement Class Member – is a purchaser of one of Defendant's Peacock Subscriptions that was automatically renewed by Defendant. *See* Compl. ¶¶ 30-43. Thus, Plaintiff and the Settlement Class Members have the exact same interest

in recovering the damages to which they are entitled. As such, Plaintiff does not have any interest antagonistic to those of the proposed Settlement Class. Plaintiff was also extensively involved in the litigation and settlement of this case. *See* Declaration of Holly Winston in support of Plaintiff's Motion for Final Approval of Class Action Settlement and Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award ("Winston Decl."), Dkt. 33 ¶¶ 3-7.

Likewise, proposed Class Counsel – Bursor & Fisher, P.A. and Gucovschi Rozenshteyn, PLLC – have extensive experience in litigating class actions of similar size, scope, and complexity to the instant action. *See* Deckant Decl. ¶¶ 33-39; *see also id.* Ex. 2, Firm Resume of Bursor & Fisher, P.A.; *id.* Ex. 3, Firm Resume of Gucovschi Rozenshteyn, PLLC. Class Counsel regularly engages in major complex litigation involving consumer products, has the resources necessary to conduct litigation of this nature, and has frequently been appointed lead class counsel by courts throughout the country. *See, e.g.*, *Ebin*, 297 F.R.D. at 566 ("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 [six] class action jury trials since 2008."). Further, proposed Class Counsel has devoted substantial resources to the prosecution of this action by investigating Plaintiff's claims and that of the Settlement Class, aggressively pursuing those claims, conducting informal discovery, participating in a private mediation and ultimately, negotiating a favorable class action settlement. Deckant Decl. ¶¶ 4-9, 13-15, 18-19, 26, 28.

In sum, proposed Class Counsel have vigorously prosecuted this action and will continue to do so throughout its pendency. *See id.* Accordingly, since Plaintiff and Class Counsel have demonstrated their commitment to representing the Settlement Class and neither have interests antagonistic to the Settlement Class, the adequacy requirement is satisfied.

E. The Proposed Settlement Class Is Ascertainable

Though it does not appear in the text of Rule 23, courts in this Circuit have recognized an "implied requirement of ascertainability." *Ebin*, 297 F.R.D. at 566-67. "The ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish a membership with definitive boundaries." *In re Petrobas Sec.*, 862 F.3d 250, 264 (2d Cir. 2017). Here, the Settlement Class is defined as "[a]ll Persons who, from September 15, 2019, to and through February 27, 2024, enrolled in an automatically renewing Peacock Subscription directly through Peacock using a California billing address, and who were charged and paid Renewal Fee(s) in connection with such subscription(s)." Dkt. 28 at 3. This Class satisfies the ascertainability requirement as it is based on "objective criteria" that establish class membership with "definitive boundaries:" California residents who were charged by Defendant a renewal fee based on the type of Peacock Subscription in which they were enrolled.

F. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)

Rule 23(b)(3) requires that common questions "predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). As shown below, Plaintiff has met the Rule 23(b)(3) requirements.

1. <u>Common Questions Predominate</u>

Predominance requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, … predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001). The essential inquiry is whether "liability can be determined on a classwide basis, even when there are some individualized damage issues." *Id*. at 139. Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance

requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). Notably, Rule 23(b)(3) calls only for "a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

Here, Plaintiff brings claims under California's consumer protection laws and common laws based on allegations of Defendant's violation of a single statute, California's ARL. In other words, Plaintiff's allegations all center around Defendant's "automatic renewal scheme." Compl. ¶ 1. "Courts considering similar claims of unlawful payment policies routinely certify classes based on evidence of a common policy." *Pichardo*, 2016 WL 5338551, at *3; *see also Cassesse v. Washington Mutual, Inc.*, 255 F.R.D. 89, 98 (E.D.N.Y. 2008) (certifying a class of consumers who "who paid or will be demanded to pay prohibited fees"). Since Plaintiff alleges Defendant engaged in a common course of conduct, predominance is met.[4]

2. <u>A Class Action Is A Superior Mechanism</u>

Next, Rule 23(b)(3)'s superiority requirement examines whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). Rule 23(b)(3) sets forth a non-exclusive list of relevant factors, including whether individual class members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).[5] "Courts have found that the superiority

[4] Furthermore, that Plaintiff easily meets the Rule 23(a) criteria is a strong indicator that Rule 23(b)(3) is satisfied. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality").

[5] Another factor, whether the case would be manageable as a class action at trial, is not of consequence in the context of a proposed settlement. *See, e.g.*, *Amchem*, 521 U.S. at 620 ("[W]ith a request for settlement-only class certification, a [trial] court need not inquire whether

requirement is satisfied where [t]he potential class members are both significant in number and geographically dispersed[,] [and] [t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *13-14 (S.D.N.Y. Sept. 4, 2014). "Class adjudication … is superior to individual adjudication because it will conserve judicial resources and is more efficient for class members, particularly those who lack the resources to bring their claims individually." *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *4 (S.D.N.Y. Oct. 2, 2013).

Here, Plaintiff and Class Members have limited financial resources with which to prosecute individual actions, and Plaintiff is unaware of any individual lawsuits that have been filed by Class Members arising from the same allegations. But if any such claims were to be filed, employing the class device here will not only achieve economies of scale for Settlement Class Members, but will also conserve the resources of the judicial system and preserve public confidence in the integrity of the system by avoiding the expense of repetitive proceedings and preventing inconsistent adjudications of similar issues and claims. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). Thus, a class action is the most suitable mechanism to fairly, adequately, and efficiently resolve Settlement Class Members' claims in this case.

II. THE NOTICE PLAN COMPORTS WITH DUE PROCESS

Before final approval can be granted, due process and Rule 23 require that the notice provided to the Settlement Class is "the best notice that is practicable under the circumstances,

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the case, if tried, would present intractable management problems, for the proposal is that there be no trial."). Moreover, denying class certification on manageability grounds is "disfavored" and "should be the exception rather than the rule." *In re Visa*, 280 F.3d at 140 (internal quotation marks omitted).

including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "Such notice to class members need only be reasonably calculated under the circumstances to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at *12 (S.D.N.Y. Dec. 23, 2009). Notice must clearly state essential information regarding the settlement, including the nature of the action, terms of the settlement, and class members' options. *See* Fed. R. Civ. P. 23(c)(2)(B). At its core, all that notice must do is "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (citation omitted). "It is clear that for due process to be satisfied, not every class member need receive actual notice, as long as counsel 'acted reasonably in selecting means likely to inform persons affected.'" *In re Adelphia Commc'ns Corp. Sec. & Derivative Litigs.*, 271 F. App'x 41, 44 (2d Cir. 2008) (citation omitted). The Federal Judicial Center notes that a notice plan is reasonable if it reaches at least 70% of the class. *See* Fed. Judicial Ctr., *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* 3 (2010). The notice plan here easily meets these standards, given that, as of October 29, 2024, Epiq has provided direct notice to more than 95% of the Settlement Class. *See* Deckant Decl. ¶ 30.

At preliminary approval, the Court approved the Parties' proposed Notice Plan, finding it met the requirements of Rule 23 and due process. *See* Dkt. 28 ¶¶ 4-5. The Plan is now being carried out by professional settlement administrator, Epiq.[6] *See* Deckant Decl. ¶¶ 27-29.

[6] As noted, Class Counsel intends to file a declaration from Epiq regarding the dissemination of notice and claims administration on or about November 14, 2024, once notice is complete and the deadline to submit claims, objections, and requests for exclusion has passed. *See id*. ¶ 29.

Pursuant to the Settlement, Defendant provided Epiq with a list containing the names, email and/or mailing addresses, and status of a total of approximately 2.5 million potential Settlement Class Members. *See id*. ¶ 27. Epiq successfully delivered the Court-approved notice via email and/or postal mail to 2,409,089 Settlement Class Members. *See id*. ¶ 30. Accordingly, the Court-approved notice successfully reached 95.08% of the Settlement Class directly. *See id*.[7] These notices also directed Settlement Class Members to the Settlement Website, where they were able to submit claims online, access important court filings (including, *inter alia*, Plaintiff's fee petition), and view deadlines and answers to frequently asked questions. *See id*. Given the broad reach of the notice, and the comprehensive information such notice provided to Settlement Class Members, the requirements of due process and Rule 23 are easily met.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, AND SHOULD BE APPROVED BY THE COURT

Final approval of the Settlement is appropriate here because it is procedurally and substantively fair, adequate, and reasonable. *See* Fed. R. Civ. P. 23(e)(2).

To determine whether to approve a settlement, the Court must evaluate "four 'primary procedural considerations and substantive qualities that [] always matter" in determining "whether to approve [a settlement] proposal." *Moses v. The New York Times Co.*, 79 F.4th 235, 242 (2d Cir. 2023) (quoting Fed. R. Civ. P. 23(e)(2)). Those four considerations are whether: "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate … [and] (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). "The first two factors are procedural in nature and the latter two guide the substantive review of

[7] The appropriate state and federal officials were also notified, per CAFA, on July 19, 2024. *See* Deckant Decl. ¶ 31.

a proposed settlement." *Moses*, 79 F.4th at 242-43 (citation omitted).

Thus, in terms of procedural fairness, courts should consider whether "the class representatives and class counsel have adequately represented the class" and whether "the proposal was negotiated at arm's length[.]" Fed. R. Civ. P. 23(e)(2)(A)-(B).[8] And in terms of substantive fairness, courts must "expressly consider two core factors when reviewing the substantive fairness of a settlement: the adequacy of relief provided to a class and the equitable treatment of class members." *Moses*, 79 F.4th at 244 (citing Fed. R. Civ. P. 23(e)(2)(C)-(D)). When evaluating the relief provided, "courts must 'tak[e] into account,' among other considerations, 'the terms of any proposed award of attorney's fees,'" such that "'both the terms of the settlement and any fee award encompassed in a settlement agreement [is reviewed]' in tandem." *Id.* (citing, *inter alia*, Fed. R. Civ. P. 23(e)(2)(C)(iii))).

In addition, courts must also "evaluate the substantive fairness … of a settlement according to the factors set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 22, 2012). The nine *Grinnell* factors include: "(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 trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Id*. (quoting *Grinnell*, 495 F.2d

[8] The Second Circuit held in *Moses* that "Rule 23(e)(2) prohibits courts from [simply] applying a *presumption* of fairness to a settlement agreement based on its negotiation at arm's length." *Moses*, 79 F.4th at 243 (italics added).

at 463). Of note, "[t]here is significant overlap between the Rule 23(e)(2) and *Grinnell* factors, which complement, rather than displace each other." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *14 (E.D.N.Y. Dec. 16, 2019). Further, in reviewing and approving a settlement, "a court need not conclude that all of the *Grinnell* factors weigh in favor of a settlement;" rather, courts "should consider the totality of these factors in light of the particular circumstances." *Id*. at (emphasis added).

A. The *Grinnell* Factors

1. Litigation Through Trial Would Be Complex, Costly, And Long (*Grinnell* Factor 1)

By reaching a favorable settlement prior to dispositive motions or trial, Plaintiff seeks to avoid significant expense and delay, and instead ensure recovery for the class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.,* 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom., D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). Courts consistently have held that, unless the proposed settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with uncertain results. *TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 456 (2d Cir. 1982).

As noted, the Parties engaged in informal written discovery prior to their mediation on March 11, 2024, including the exchange of documents necessary to ascertain the size of the class in terms of subscribers during the relevant time period, as well as the amount in controversy. Had no settlement been reached, the next steps in the litigation would have been for Peacock to respond to Plaintiff's complaint, which would most likely have taken the form of a motion to dismiss, and resolution of any such challenge to the pleadings, followed by costly discovery,

including depositions of the Parties and the substantial exchange of electronically stored information discovery and other written discovery. Next, the Court would have had to resolve contested motions summary judgment and class certification, which would be at minimum costly and time-consuming for the Parties and the Court and creates risk that a litigation class would not be certified and/or that the Settlement Class would recover nothing at all. Even if Plaintiff prevailed, the Parties would still have to litigate the case at trial and through possible appeals.

More specifically, Plaintiff is aware that Defendant would continue to assert a number of defenses on the merits, including that Plaintiff's allegations are insufficient under Fed. R. Civ. P. 8 and 12(b)(6), including because, Defendant would argue, it purportedly provided all of the requisite pre-purchase disclosures under the ARL, presented them in a clear and conspicuous manner as defined under the ARL, and obtained Plaintiff's affirmative consent to the automatically renewing subscription. Plaintiff and Class Counsel are also aware that Defendant would oppose class certification vigorously, and Defendant would likely take the position that Plaintiff is not entitled to bring at least some of her claims on a class wide basis. Plaintiff and Class Counsel further understand that Defendant would prepare a competent defense at trial. Looking beyond trial, Plaintiff is also keenly aware of the fact that Peacock could appeal the merits of any adverse decision. Victory for the Defendant at any one of those steps would deprive putative class members of any relief. No matter what the outcome, absent settlement, this case would likely consume court resources for years.

The Settlement, on the other hand, permits a prompt resolution of this action on terms that are fair, reasonable, and adequate to the Class. This result will be accomplished years earlier than if the case proceeded to judgment through trial and/or appeals, and provides certainty. Consequently, this *Grinnell* factor plainly weighs in favor of final approval of the Settlement.

2. The Reaction Of The Class (*Grinnell* Factor 2)

With the second *Grinnell* factor, the Court judges "the reaction of the class to the settlement." *In re Vitamin C*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). "It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 333 (E.D.N.Y. 2010) (internal quotation marks omitted). This "significant" factor weighs heavily in favor of final approval.

Here, the reaction of the Class Members to the Settlement has been overwhelmingly positive. Class Notice has been provided to the Settlement Class Members in accordance with the requirements of Rule 23(c)(2)(B) and the Preliminary Approval Order, Dkt. 28 ¶¶ 4-5, and thus far direct notice has reached more than 95% of the Settlement Class. *See* Deckant Decl. ¶ 30. To date, only 7 Class Members have opted out, and there have been **no** objections. *See id*. Additionally, as of October 29, 2024, Epiq has received a total of 40,010 Claim Forms for *pro rata* cash payments from the Settlement Fund, representing a current claims rate of approximately 1.6%. *See id*. Moreover, in addition to distribution of the Court-approved notices, between October 31, 2024, and November 1, 2024, Epiq will—at the Parties' direction—send a follow-up e-mail to the more than 2 million Class Members who have not yet submitted a claim to receive cash from the Settlement Fund, reminding them of the upcoming Claims Deadline and containing a link to the Settlement Website's online claim form (the "Reminder E-mail Notice"), to ensure that any Class Member who wanted to submit a cash claim is afforded ample opportunity to do so. *See id*. ¶ 32. Thus, Class Counsel expects that the claims rate will increase between now and the Claims Deadline on November 13, 2024.

Given the excellent direct notice rate, and the fact that there were **no** objections and few requests for exclusion to the Settlement leave no question that the Class Members view the

Settlement favorably, which weighs heavily in favor of final approval. *See, e.g., Wal-Mart Stores*, 396 F.3d at 118 ("On the whole, the class appears to be overwhelmingly in favor of the Settlement. Only eighteen class members out of five million objected to the Settlement. 'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.' … [H]ere, the absence of substantial opposition is indicative of class approval[.]") (citations omitted).[9]

Consequently, this *Grinnell* factor weighs in favor of final approval of the Settlement.

3. Discovery Has Advanced Far Enough To Allow The Parties To Responsibly Resolve The Case (*Grinnell* Factor 3)

"The pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating." *Torres v. Gristede's Oper. Corp.*, 2010 WL 5507892, at *5 (S.D.N.Y. Dec. 21, 2010). "[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*, 80 F. Supp. 2d at 176. Prior to mediation, the Parties conducted informal written discovery related to issues of class certification and the merits, including the exchange of detailed data regarding the scope and size of the

[9] *See also*, *e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86–87 (2d Cir. 2001) ("For example, the district court noted that, of the 27,883 notices sent to [class members], seventy-two persons requested exclusion from the settlement and that it had received eighteen written objections and comments. The District Court properly concluded that this small number of objections weighed in favor of the settlement.") (citations omitted); *Schutter v. Tarena Int'l, Inc.*, 2024 WL 4118465, at *10 (E.D.N.Y. Sept. 9, 2024) ("The Claims Administrator has not received any objections to this date. Thus, the Court finds that the [settlement], overall, has been well-received. … Accordingly, given the low number of exclusions and no objections, th[e second *Grinnell*] factor generally favors the Settlement.") (citations omitted); *Sow v. City of New York*, 2024 WL 964595, at *2 (S.D.N.Y. Mar. 5, 2024) ("Even '[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.' 'The fact that the vast majority of class members neither objected to nor opted out is a strong indication of fairness.'") (citations omitted) (citing, *inter alia*, *Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *3 (S.D.N.Y. Sept. 29, 2022)).

Settlement Class. The Parties also exchanged briefing on the key facts, legal issues, litigation risks, and potential settlement structures, and they supplemented that briefing with extensive emails and telephonic correspondence in order to clarify their positions. *See* Deckant Decl. ¶¶ 11, 13. This information was sufficient for the Parties to assess the strengths and weakness of the claims and defenses and their relative negotiating positions.

Further, Class Counsel's experience in similar matters, as well as the other efforts made by counsel on both sides, confirms that the Parties are sufficiently well apprised of the facts of this action, and the strengths and weaknesses of their respective cases. This *Grinnell* factor thus also weighs in favor of preliminary approval. *See, e.g.*, *D'Amato*, 236 F.3d at 87 ("[T]he district court properly recognized that, although no formal discovery had taken place, the parties had engaged in an extensive exchange of documents and other information. Thus, the 'stage of proceedings' factor also weighed in favor of settlement approval.") (internal citation omitted).

4. Plaintiff Faces Continued Litigation Risks Related To Establishing Liability And Damages, And To Obtaining And Maintaining A Certified Class Through Trial (*Grinnell* Factors 4, 5, and 6)

"The fourth, fifth, and sixth *Grinnell* factors all relate to continued litigation risks," *i.e.*, the risks of establishing liability, damages, and maintaining the class action through trial. *In re Vitamin C*, 2012 WL 5289514, at *5. "Litigation inherently involves risks." *Willix v. Healthfirst, Inc*., 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011). "One purpose of a settlement is to avoid the uncertainty of a trial on the merits." *Id*. In weighing the risks of certifying a class and establishing liability and damages, the Court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian*, 80 F. Supp. 2d. at 177. In weighing the risks of certifying a class and establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *Id*.

Here, although Plaintiff's case is strong, it is not without risk. Defendant has made it clear that, if the litigation continues, it will file a Motion to Dismiss, move for summary judgment on various issues, and vigorously contest the certification of a litigation class. Further, the Court has not yet certified the proposed Class, and the parties anticipate that such a determination would be reached only after a decision on Defendant's Motion to Dismiss is reached, discovery is completed, and exhaustive, contested class certification briefing is filed. Defendant would argue that individual questions preclude class certification, *e.g.*, based on the claim that the Class includes uninjured members who were not harmed as a result of Defendant's alleged ARL violations. Defendant would also likely argue that a class action is not a superior method to resolve Plaintiff's claims, and that a class trial would not be manageable. Moreover, even if class certification were ultimately granted, the risk of maintaining the class status through trial is also present. Indeed, should the Court certify the Class pursuant to a contested motion, Defendant would likely challenge certification through a Rule 23(f) petition and subsequently move to decertify, forcing additional rounds of briefing.

Thus, in the context of this litigation, Plaintiff and the Class face risks in overcoming Defendant's anticipated forthcoming motions to dismiss and for summary judgment, in certifying a class and keeping it certified, and in ultimately proving their claims at trial. *See* Deckant Decl. ¶¶ 4-7, 21-23. Moreover, further litigation will only delay relief to the Class Members. Indeed, risk, expense, and delay would permeate the case. *See id*. The Settlement alleviates these risks, and provides a substantial benefit to the Class in a timely fashion. *See id*. ¶¶ 21-23; *see also*, *e.g.*, *Stinson v. City of New York*, 256 F. Supp. 3d 283, 290–91 (S.D.N.Y. 2017) ("Delay in approving the Settlement delays the Settlement's many positive provisions and prevents the tens of thousands of wronged Class members who are already claimants from receiving just

compensation from the … Class Fund. Delay also prolongs the period before the [defendant] is required to implement changes to [its unlawful program.] … Approval permits these substantive remedies and valuable reforms to begin.") (internal citations omitted). Consequently, *Grinnell* factors 4, 5, and 6 weigh in favor of final approval of the Settlement.

5. Defendant's Ability To Withstand A Greater Judgment (*Grinnell* Factor 7)

While Peacock could likely withstand a greater judgment, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank*, 228 F.R.D. at 186; *see also D'Amato*, 236 F.3d at 86 ("[T]his factor, standing alone, does not suggest that the settlement is unfair."). Thus, at worst, this factor is neutral.

6. The Settlement Amount Is Reasonable In Light Of The Possible Recovery And The Attendant Risks Of Litigation (*Grinnell* Factors 8 And 9)

"'The determination of whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum.'" *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 219 (S.D.N.Y. 2015) (citation omitted). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes 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.* Because a settlement provides certain and immediate recovery, courts often approve settlements even where the benefits obtained as a result of the settlement are less than those originally sought. Per the Second Circuit in *Grinnell*, "[t]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2.

Here, Settlement Class Members who submit a valid Claim Form will be eligible to obtain a *pro rata* share of the non-reversionary, all-cash $3,742,637.14 Settlement Fund,

following the deduction of notice and claims administration costs, attorneys' fees and expenses, and the class representative incentive payment. In addition, Defendant has agreed to revise the presentation and wording of the automatic renewal terms in its platforms to be consistent with the ARL, and to pay the costs of notice and administration as well as reasonable attorneys' fees and costs for Class Counsel from the all-in fund established by the Settlement. *See* Settlement ¶¶ 1.39, 2.1-2.2. Furthermore, courts in this District have found settlements that "represent[] a fraction of the best possible recovery" to be reasonable and "not 'grossly inadequate[]'" where the "settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing 'speculative payment of a hypothetically larger amount years down the road.'" *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008). And here, assuming final approval is granted at the Court's earliest opportunity (and no appeal of the order granting final approval is filed), then *pro rata* cash payments from the Net Settlement Fund could be mailed to Class Members in the form of a check who submitted Approved Claims as soon as February 19, 2025. *See* Settlement ¶¶ 1.12, 1.15, 2.1(b), 9.1. Thus, granting final approval of the settlement would "assure[] immediate payment to class members." *Gillian*, 2008 WL 782596, at *5. When a settlement assures immediate payment of substantial amounts to class members, and does not "sacrific[e] 'speculative payment of a hypothetically larger amount years down the road,'" it is reasonable under this factor. *Id*.

In sum, weighing the benefits of the Settlement against the risks associated with proceeding in litigation and in collecting on any judgment, the Settlement is more than reasonable.[10] As such, these *Grinnell* factors weigh in favor of final approval.

[10] This is especially true given that Second Circuit courts have routinely approved class settlements that recovered a lesser percentage of total damages under otherwise similar circumstances in terms of procedural posture and risk. *See, e.g.*, *Raniere*, 310 F.R.D. at 219

B. The Rule 23(e)(2) Factors

1. The Class Representative And Class Counsel Have Adequately Represented The Class (Rule 23(e)(2)(A))

"Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *In re Payment Card*, 330 F.R.D. at 30. Here, "plaintiff's interests are aligned with other class members' interests because [she] suffered the same injuries:" paying a fee to Defendant due to its automatic renewal scheme. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019). "Because of these injuries, [P]laintiff[] ha[s] an interest in vigorously pursuing the claims of the class." *Id.* Further, numerous other courts, including in this Circuit, have previously found that Plaintiff's attorneys adequately meet the obligations and responsibilities of Class Counsel. *See* Deckant Decl., Exs. 2-3. This Rule 23(e)(2) factor thus favors preliminary approval.

2. The Settlement Was Negotiated At Arm's Length (Rule 23(e)(2)(B))

Next, pursuant to Rule 23(e)(2)(B), the Court must consider whether the Settlement "was negotiated at arm's length[.]" Fed. R. Civ. P. 23(e)(2)(B); *see also Schutter*, 2024 WL 4118465, at *7 ("[T]he Court 'must pay close attention to the negotiating process, to ensure that the settlement resulted from arm's-length negotiations[.]'") (citation omitted); *In re GSE Bonds*, 414 F. Supp. 3d at 693 ("[A] mediator's involvement in settlement negotiations can help demonstrate their fairness."). Here, both counsel for Plaintiff and counsel for Defendant are experienced in class action litigation and engaged in protracted settlement discussions. *See* Deckant Decl. ¶¶

("The total recovery achieved by the Settlement Agreement amounts to 22.8% of [] total[damages]. … Given the relatively early stage of the litigation, the potential hurdles lying ahead for the plaintiffs, and the recent setback at the Second Circuit, a recovery figure of 22.8% seems within the bounds of reasonableness.") (citations omitted).

20, 22, 33-40. Moreover, the Parties engaged in protracted settlement discussions, and they reached this settlement with the assistance of an experienced neutral, Judge Diane M. Welsh (Ret.) of JAMS, via a full-day mediation on March 11, 2024. *See id.* ¶¶ 10-15. Accordingly, this Rule 23(e)(2) factor has been met.

3. The Settlement Provides Adequate Relief To The Class (Rule 23(e)(2)(C))

Whether relief is adequate takes into account "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C).

As to "the costs, risks, and delay of trial and appeal," this factor "subsumes several *Grinnell* factors … including: (i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial." *In re Payment Card*, 330 F.R.D. at 36. As noted above, the Settlement has met each of these *Grinnell* factors. *Supra* §§ III.A(1)-(6).

As to "the effectiveness of any proposed method of distributing relief to the class," "[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re Payment Card*, 330 F.R.D. at 40. Here, under the terms of the Settlement, Settlement Class Members who submit a timely claim form will receive a *pro rata* portion of the $3,742,637.14 Settlement Fund, following the deduction of notice and claims administration costs, attorneys' fees and expenses, and the class representative incentive payment. *See* Settlement ¶¶ 2.1(a)-(b), 8.1, 8.3. These class members will have one-hundred and eighty (180) days to cash their checks. *See id.* ¶ 2.1(e). This plan was proposed by

experienced, competent counsel with the assistance of an experienced neutral and ensures "the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re GSE Bonds*, 414 F. Supp. 3d at 695.

As to "the terms of any proposed award of attorney's fees," Plaintiff's counsel has applied for an award of attorneys' fees, costs, and expenses equal to one third of the Settlement Fund, which amounts to $1,247,545.71. *See* Dkt. 32; Settlement ¶ 8.1. This is a reasonable request, as courts in this Circuit routinely approve fee requests in the amount of one-third of a common fund.[11] Indeed, as courts in this Circuit have noted, fee requests for up to 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).

Finally, as to "any agreement required to be identified by Rule 23(e)(3)" or "any agreement made in connection with the proposal," *In re GSE Bonds*, 414 F. Supp. 3d at 696, no such agreement exists in this case, other than the Settlement Agreement. In light of the foregoing, the Settlement provides adequate relief to the Class as per Rule 23(e)(2)(C).

4. <u>The Settlement Treats All Class Members Equally (Rule 23(e)(2)(D))</u>

This Rule 23(e)(2) factor discusses "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief."

[11] *See*, *e.g.*, *Hayes v. Harmony Gold Min. Co.*, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding "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"); *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).

In re Payment Card, 330 F.R.D. at 47. Here, the Settlement distributes cash relief on a *pro rata* basis, which has been found by courts in this Circuit to be equitable. *See id.*; *see also, e.g.*, *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) (finding that a *pro rata* distribution plan "appears to treat the class members equitably … and has the benefit of simplicity"). Thus, this Rule 23(e)(2) factor is weighs in favor of approval.[12]

* * *

Because the Settlement is, on its face, "'fair, adequate, and reasonable, and not a product of collusion,'" *Frank*, 228 F.R.D. at 184 (quoting *Joel A. v. Giuliani,* 218 F.3d 132, 138-39 (2d Cir. 2000)), the Court should grant final approval.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant her Motion for Final Approval of the Settlement.

[12] Additionally, the Second Circuit has found that "the existence and extent of incentive payments is relevant to whether 'class members [are treated] equitably relative to each other.'" *Moses*, 79 F.4th at 245 (quoting Fed. R. Civ. P. 23(e)(2)(D)). Here, the requested $5,000 incentive award comprises a mere 0.13% of the $3,742,637.14 Settlement Fund and will have a *de minimis* impact on class member recovery. Additionally, another court in this District has already specifically found that a $5,000 incentive award like that requested here was appropriate in connection with another settlement under California's ARL, and the Second Circuit declined to modify or vacate the $5,000 incentive award on appeal. *See id.* at 253-56.

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Respectfully submitted,

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