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 UNOPPOSED MOTION FOR ATTORNEY'S FEES, COSTS, EXPENSES, AND INCENTIVE AWARD

Dated: September 20, 2024

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

The Class Action Settlement Agreement (the "Settlement Agreement" or "Settlement") between Plaintiff Holly Winston ("Plaintiff" or the "Class Representative") and Defendant Peacock TV LLC ("Defendant" or "Peacock") (together with Plaintiff, the "Parties"), if finally approved, resolves Plaintiff's and the Class Members' claims against Peacock stemming from alleged violations of California's Automatic Renewal Law ("ARL"), Cal. Bus. & Prof. Code §§ 17600, *et seq*. On August 1, 2024, the Court granted preliminary approval to the Settlement, which consists of an all-cash, non-reversionary "common fund" in the amount of $3,742,637.14 (the "Settlement Fund"). *See* Order Granting Preliminary Approval (Dkt. 28); *see also* Declaration of Neal J. Deckant ("Deckant Decl."), Ex. 1 ("Settlement Agreement") ¶ 1.39.[1]

Under the terms of the Settlement, Peacock will establish a non-reversionary Settlement Fund in the amount of $3,742,637.14, which will be used to pay all approved claims by Class Members, notice and administration expenses, a Court-approved incentive award to Plaintiff, and attorneys' fees to Class Counsel. *See id*. ¶¶ 1.39, 2.1(a)-(b). Settlement Class Members who submit a timely and valid claim will receive a *pro rata* portion of the Settlement Fund, following the deduction of notice and claims administration costs, attorneys' fees and expenses, and a class representative incentive payment. *See id.* ¶¶ 1.13, 1.14, 1.20, 1.35, 1.39, 2.1(a)-(b), 5.8, 8.1, 8.3.

And equally important, as part of the settlement, Peacock has agreed to provide automatic renewal terms on its checkout pages in a manner that is consistent with the requirements of the ARL. Specifically, Peacock agrees to present to California subscribers on the checkout page for any Peacock Subscription that will automatically renew, the automatic renewal offer terms

[1] All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement. *See* Deckant Decl. Ex. 1.

associated with such subscription (including cancellation policy) in a clear and conspicuous manner before the subscription or purchasing agreement and in visual proximity to the request for consent to the offer. Defendant will also obtain affirmative consent to the agreement containing the automatic renewal terms in a manner that complies with the ARL. Defendant further agrees to disclose to subscribers with a California billing address, in a manner that substantially complies with the ARL, how to cancel in an acknowledgment email that is capable of being retained by consumers. *See id*. ¶ 2.2.

Obtaining this exceptional relief came with significant risks. As of the date Plaintiff filed her Complaint against Defendant in this matter, there was little, if any, binding authority interpreting the ARL's requirements of "visual proximity" and "affirmative consent" under Section 17602(a) of the ARL (neither of which are defined by statute), or case law applying the gift provision under Section 17603 of the ARL or the good faith safe harbor provision under Section 17604(b) of the ARL. Thus, the scope of the statute was in dispute. Moreover, only one court had issued an opinion on a contested class certification motion based on ARL violations, *see Robinson v. OnStar, LLC*, 2020 WL 364221 (S.D. Cal. Jan. 22, 2020), and only one ARL case has progressed through summary judgment, *see Ingalls v. Spotify USA, Inc.*, 2017 WL 3021037 (N.D. Cal. Jul. 17, 2017). As a result, in pursuing class-wide relief based on Defendant's alleged ARL violations, Plaintiff endured significant risk and battled through hard-fought litigation involving complex factual investigation into Peacock's disclosure practices and dispositive motion practice on novel legal issues.

In light of these risks, when the Parties thought that there was a potential for resolution, they sought the assistance of a well-respected mediator. That is, rather than put Peacock's arguments to the test at the class certification and summary judgment stages, Plaintiff elected to

achieve meaningful, immediate relief for her fellow Class Members. The instant settlement was only reached in connection with Judge Diane M. Welsh (Ret.) of JAMS after a full-day mediation session on March 11, 2024 and months of follow-up settlement discussions. Thus, obtaining the exceptional settlement relief did not come easily.

Given the exceptional relief obtained by the Parties, Plaintiff respectfully requests, 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 $1,247,545.71, as well as an incentive award of $5,000 for Plaintiff for her service as class representative. First, Courts in this Circuit routinely approve fee requests for up to 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); *see also Davidson v. Cnty. of Nassau*, 2023 WL 5200223, at *10-11 (E.D.N.Y. Aug. 14, 2023) ("'[I]t is very common to seek 33% contingency fees in cases with funds of less than $10 million.'") (citation omitted). Further, as the Second Circuit recently held, "clear precedent [in this Circuit] … permits district courts to approve fair and appropriate incentive awards to class representatives." *Moses v. New York Times Co.*, 79 F.4th 235, 253 (2d Cir. 2023) (citations omitted). Indeed, "Courts in this District have regularly approved service awards for individual representative plaintiffs ranging from $1,000 to $10,000." *Reyes v. Summit Health Mgmt., LLC*, 2024 WL 472841, at *6 n.5 (S.D.N.Y. Feb. 6, 2024) (collecting cases). "Other courts have suggested an even broader range of $2,500 to $85,000." *Id*. at *6 n.5 (citation omitted). In any case, "[h]ere, it is sufficient to note that the proposed award for [Plaintiff] is within either range." *Id*.

As such, this Court should approve the requested fee and incentive awards.

FACTUAL AND PROCEDURAL BACKGROUND

A brief summary of California's ARL, the litigation performed by Class Counsel for the Settlement Class's benefit, and the beneficial terms of the Settlement provide necessary context to the reasonableness of the requested fee and incentive awards. These issues are discussed in greater depth in the accompanying Declaration of Neal J. Deckant (the "Deckant Decl.").

A. California's Automatic Renewal Law

On December 1, 2010, the California Legislature enacted the Automatic Renewal Law ("ARL") under California Senate Bill 340 with the intent to "end the practice of ongoing charging of consumer credit or debit cards or third-party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service." *See* Complaint (Dkt. 1) ("Compl.") ¶ 28. The ARL's core requirements are that: (1) businesses must clearly and conspicuously disclose automatic renewal terms of any offer, as defined by the statute; (2) they must obtain a consumer's affirmative consent; and (3) they must provide consumers with an acknowledgment containing the terms of the automatically renewing offer and cancellation information. *See id*. ¶ 29. Private citizens in California may enforce ARL violations as predicate claims under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq*. *See* Compl. ¶¶ 65, 83-96. Additionally, ARL violations may constitute acts of false advertising in violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq*., *see* Compl. ¶¶ 65, 103-111, and may also constitute violations of other California statutes and common laws. *See id*. ¶¶ 8, 65.

B. Plaintiff's Allegations

Defendant is an American video streaming service that, among other things, markets, advertises, and sells paid "Premium" and "Premium Plus" subscription plans for its TV and

media products and services under the Peacock brand name (collectively, the "Peacock Subscriptions" or "Peacock TV"). Compl. ¶¶ 1-2. Plaintiff alleges that Defendant automatically renewed Class Members' Peacock subscriptions in violation of the ARL. *Id.* ¶ 1. Specifically, Plaintiff alleges that when consumers sign up for an Peacock Subscription through the Peacock Website or App, Defendant actually enrolls consumers in an automatically renewing subscription that results in monthly or annual charges to the consumer's payment method, without first providing California consumers the requisite disclosures and authorizations required under the ARL. *See id*. Furthermore, Plaintiff alleges that every violation of the ARL constitutes an "unlawful" practice under the UCL. *See id*. ¶¶ 65, 86-87. And because Defendant's ARL violations involve misrepresentations and/or omissions of material fact, Plaintiff contends Defendant also violated the FAL. *See id*. ¶¶ 65, 103-111. On that basis, Plaintiff also brought common law claims against Defendant for conversion, unjust enrichment / restitution, negligent misrepresentation, and fraud. *See id*. ¶¶ 8, 65; *see also id*. ¶¶ 97-102 (conversion), 112-116 (unjust enrichment / restitution), 117-124 (negligent misrepresentation), 125-129 (fraud).

C. The Litigation History And Work Performed To Benefit The Class

Beginning in August 2023, Class Counsel commenced a pre-suit investigation of media companies' violations of the ARL, including Defendant. *See* Deckant Decl. ¶ 4. Because very few courts had issued an opinion interpreting the statute – in particular, no court had definitively identified the distinction between obtaining a consumer's "*ordinary* consent" (which is required for the formation of all agreements) versus "*affirmative* consent" (which is a heightened form of consent that is required, but not defined, by the ARL), interpreted the term "visual proximity" (another undefined requirement of the ARL), or applied the gift provision under Section 17603 of the ARL – Class Counsel's investigation was extensive, novel, and involved in-depth research

into Defendant's billing practices, textual analysis of the statute, and the legislative history of the ARL. *See id.* ¶¶ 4-7. Moreover, Class Counsel was aware that Defendant would likely challenge liability by arguing that they achieved a level of compliance sufficient to qualify for a purported "good faith safe harbor" under Section 17604(b) of the ARL. *See id.* ¶ 7. Thus, Class Counsel performed extensive legal research regarding the application of safe harbor provisions under similar statutes in California and across the country. *See id.*

Despite these litigation risks, on September 15, 2023, Plaintiff, through counsel, filed her class action lawsuit against Defendant in the United States District Court for the Southern District of New York, alleging violations of the UCL, FAL, and various California common laws by charging her renewal fees in connection with the Peacock TV's streaming service. *See id*. ¶ 8. After Plaintiff filed her Complaint, the Parties engaged in a Rule 26(f) planning conference and a Rule 16 scheduling conference. Then, on November 13, 2023, Defendant filed a Letter Motion for Extension of Time to File an Answer, requesting, with Plaintiff's consent, an extension of Peacock's November 27, 2023 deadline to respond to Plaintiff's complaint up to and including January 8, 2024. *See* Dkt. 8. This Court granted Defendant's request on November 21, 2023. *See* Dkt 9. Shortly thereafter, the parties agreed to mediate their claims.

D. The Mediation

From the outset of the case, the Parties engaged in direct communications regarding early resolution as required by Fed. R. Civ. P. 26, which ultimately led to a mediation before Judge Diane M. Welsh (Ret.), an experienced neutral affiliated with JAMS, on March 11, 2024. *See* Deckant Decl. ¶¶ 10, 14. In the months leading up to the mediation, the Parties were in regular communication with each other and with Judge Welsh, as the Parties sought to crystallize the disputed issues, produce focused information and data, and narrow potential frameworks for

resolution. *See id.* ¶ 11. Prior to the mediation, the Parties exchanged briefing on the key facts, legal issues, litigation risks, and potential settlement structures, and the Parties supplemented that briefing with emails and telephonic correspondence to clarify their positions. *See id.* Further, during this period and in connection with the mediation proceeding, the Parties exchanged informal discovery, including on issues such as the size and scope of the putative class. *See id*. This information was sufficient for the Parties to assess the strengths and weakness of the claims and defenses and their relative negotiating positions. *See id.*

The mediation was conducted by Zoom, lasted a full day, and involved intense negotiations by skilled counsel, with numerous offers and counter-offers made with Judge Welsh serving as an intermediary. *Id*. ¶ 14. The Parties engaged in good faith negotiations, which at all times were at arms' length, and which culminated in an agreement to settle the case. *Id*. At the end of the mediation, the parties executed a binding settlement term sheet and continued to negotiate the terms of the Settlement, resulting in additional months of follow-up settlement discussions. *Id*. The Settlement Agreement was finally signed on July 5, 2024. *Id*. ¶ 15.

SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class by delivering immediate cash to the approximately 3.6 million 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 Fees in connection with such subscription(s). *See* Deckant Decl. ¶¶ 11, 16; Settlement ¶¶ 1.37, 1.38.

The Settlement consists of a non-reversionary, **all-cash** "common fund" in the amount of $3,742,637.14, which will be used to pay all approved claims by class members, notice and administration expenses, a Court-approved incentive award to Plaintiff, and attorneys' fees to

proposed Class Counsel to the extent awarded by the Court (the "Settlement Fund"). *See* Settlement ¶ 1.39. Settlement Class Members wishing to receive cash must submit a valid Claim Form to the Settlement Administrator by the Claims Deadline. *See id.* ¶ 2.1(b). 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 the class representative incentive payment. *See id.* ¶¶ 2.1(a)-(b), 5.1, 5.7, 8.1, 8.3.

Furthermore, in connection with the settlement, Defendant has agreed to revise the presentation and wording of the automatic renewal terms in its mobile and desktop platforms to be consistent with Cal. Bus. & Prof. Code § 17602(a)(1)-(3). Specifically, Defendant agrees to present to California subscribers on the checkout page for any Peacock Subscription that will automatically renew, the automatic renewal offer terms associated with such subscription (including cancellation policy) in a clear and conspicuous manner before the subscription or purchasing agreement and in visual proximity to the request for consent to the offer, as required by Cal. Bus. & Prof. Code § 17602(a)(1). Defendant also agrees to obtain affirmative consent to the agreement containing the automatic renewal terms in a manner that complies with the ARL under Cal. Bus. & Prof. Code § 17602(a)(2). Furthermore, Defendant agrees to disclose to subscribers with California billing addresses, in a manner that substantially complies with the ARL under Cal. Bus. & Prof. Code § 17602(a)(3), the automatic renewal terms, cancellation policy, and information regarding how to cancel in an acknowledgment email that is capable of being retained by consumers. This prospective relief will benefit Class Members for years to come. *See* Settlement ¶ 2.2.

ARGUMENT

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

The requested award is for attorneys' fees, costs, and expenses of $1,247,545.71, which represents one-third of the total Settlement Fund, is reasonable and should be approved in full.

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).[2] Here, the Settlement Agreement between the Parties provides that Class Counsel may petition the Court for an award of "attorneys' fees, costs, and expenses not to exceed one third of the Settlement Fund," and states that "Defendant agrees to take no position on, directly or indirectly, Class Counsel's petition for attorneys' fees, costs, and expenses if limited to this amount." Settlement ¶ 8.1.

In common 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); *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

[2] The requested fee award also encompasses unreimbursed litigation costs and expenses. *See Settlement* ¶ 8.1. Reasonable litigation expenses are customarily awarded in class actions 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 $9,554.57 for out-of-pocket costs and expenses in these standard categories. *See* Deckant Decl. ¶ 33; *see also id.* Ex. 3 (itemized expenses through 9/17/24).

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 "trend" 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); *accord Lea v. Tal Educ. Grp.*, 2021 WL 5578665, at *11 (S.D.N.Y. Nov. 30, 2021) (same). "In contrast, the 'lodestar [method] 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.'" *Wal-Mart Stores*, 396 F.3d at 121 (citation omitted). 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 [method] created an unanticipated disincentive to early settlements. But the primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. There was an inevitable waste of judicial resources.

Goldberger, 209 F.3d at 48-49. As Judge Karas noted, "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* Deckant Decl. Ex. 4, 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, "[c]ourts in this Circuit have routinely granted requests for one-third or more

of the fund." *Solis v. OrthoNet LLC*, 2021 WL 2678651, at *4 (S.D.N.Y. Jun. 30, 2021) (collecting cases); *Mateer v. Peloton Interactive, Inc.*, 2024 WL 1055009, at *1 (S.D.N.Y. Feb. 9, 2024) ("[E]mpirical evidence indicates that the median percentage of the settlement amount awarded as attorneys' fees in [] class actions is approximately 33%. … The award here aligns with the median percentage of 33% because $833,250 is approximately 33% of the gross settlement fund amount of $2,500,000.") (footnote omitted); *Hezi v. Celsius Holdings, Inc.*, 2023 WL 2786820, at *5 (S.D.N.Y. Apr. 5, 2023) (awarding "one-third or 33% of the $7.8 million common fund, which is consistent with fee awards in other similar settlements approved in this District"); *Lea*, 2021 WL 5578665, at *13 (awarding "attorneys' fees in the amount of 33 1/3%" of a $7.5 million settlement fund); *Guevoura Fund Ltd. v. Sillerman*, 2019 WL 6889901, at *15 (S.D.N.Y. Dec. 18, 2019) (awarding attorneys' fees equal to 33.33% of the settlement fund: "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit"); *Springer v. Code Rebel Corp.*, 2018 WL 1773137, at *5 (S.D.N.Y. Apr. 10, 2018) (granting "attorneys' fee award of one-third of the $1,000,000 cash settlement, plus accrued interest"); *Hayes v. Harmony Gold Min. Co.*, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011), *aff'd* 509 F. App'x 21, 23-24 (2d Cir. 2013).

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); *see also Pantelyat v. Bank of Am., N.A.*, 2019 WL 402854, at *8 (S.D.N.Y. Jan. 31, 2019) ("In light of the 'strong consensus—both in this Circuit and across the country—in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery,' the Court applies the percentage-of-

the-fund method to this case ….") (internal citations omitted). In contrast, the lodestar approach is more often applied in federal fee-shifting cases, particularly in 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) (citations omitted); *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *16 (S.D.N.Y. Jul. 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*, 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"); *see also Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *9 (S.D.N.Y. Sept. 29, 2022) ("[W]here counsel has created a common fund, attorneys' fees are properly determined on a percentage-of-recovery basis. The Second Circuit has approved this method.") (citations 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 August 2023, when it began investigating Defendant's violations of the ARL. *See* Deckant Decl. ¶ 4. The theory of liability was relatively novel. *See id.* ¶¶ 4-7. As of the date Plaintiff filed her Complaint against Defendant in this matter, there was little, if any, binding authority interpreting the ARL's requirements of "visual proximity" and "affirmative consent" under Section 17602(a) (neither of which are defined by statute), the gift provision under Section 17603 of the ARL, or the good faith safe harbor provision under Section 17604(b) of the ARL. *See id*. ¶¶ 6-7. Moreover, as already discussed, the developed case law regarding the ARL is sparse. *See id*. ¶¶ 4-6. Thus, the scope of the statute was, and remains, in dispute. *See id* ¶¶ 4-7. As a result, Class Counsel's investigation was extensive and involved in-depth research into, among other things, industry practices regarding automatic renewal offers, Defendant's billing practices, the legislative history of the ARL, the assertion of predicate claims for ARL violations under California's consumer protection statutes, application of the ARL's "gift" provision under Section 17603, application of the ARL's purported "safe harbor" provision under Section 17604 (and other similar statutes), and the requirements of statutory standing under California law. *See id*. Class Counsel also spoke with interested potential class members, drafted the complaint, and conducted meet-and-confer teleconferences with defense counsel, among other things. *See id*. ¶¶ 8-14, 28.

Class Counsel expended considerable time and labor on the settlement process as well.[3] First, Class Counsel thoroughly analyzed the informal discovery produced by Defendant to aid in settlement discussions prior to the mediation, which involved largely the same information that would have been produced in written discovery related to issues of class certification and summary judgment. *See id*. ¶ 11. Class Counsel also prepared for, attended, and participated in a full-day mediation session with Judge Diane M. Welsh (Ret.), an experienced neutral affiliated with JAMS, on March 11, 2024, which ultimately resulted in the Settlement Agreement now at issue. *See id*. ¶¶ 10-15. In preparation for mediation, and in order to help the Parties and Mediator evaluate any potential resolution of the Action, Class Counsel prepared detailed mediation statements outlining the strength of the Plaintiff's case, in addition to proposed class action settlement term sheets and charts comparing the instant case with other ARL cases that had settled. *See id*. ¶¶ 11-13. Class Counsel also reviewed Defendant's mediation statements to evaluate the veracity of Defendant's arguments. *See id*. ¶ 13. Also, in preparing to make settlement demands, Class Counsel devoted substantial time to researching the viability of different class-wide settlement structures under the relevant Second Circuit case law. *See id.* ¶ 12. Next, over the several-month period following the mediation, Class Counsel worked extensively with defense counsel to finalize and memorialize the settlement agreements into formal Class Action Settlement Agreement, including proposed class notice documents. *See id*. ¶ 15. With respect to each settlement agreement, that process included multiple rounds of redlines and phone calls to discuss proposed edits. *See id*.

Thereafter, Class Counsel prepared and filed Plaintiff's Motions for Preliminary

[3] The hours worked and expenses for Class Counsel are set forth in the declaration of Mr. Deckant, submitted herewith. *See id.* ¶¶ 29-31, 33; *id.*, Exs. 2-3.

Approval. *See id*. ¶ 18. Preliminary approval of the renewed Settlement Agreement now at issue was granted on August 1, 2024. *See id*. ¶ 19; *see also generally*, Order Granting Preliminary Approval (Dkt. 28). Since then, Class Counsel has worked with the Settlement Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), *see* Settlement ¶ 1.36, to: (i) carry out the Court-ordered notice plan; and (ii) monitor the settlement claims on a weekly basis. *See* Deckant Decl. ¶¶ 25-28. Class Counsel has also spent a significant amount of time working with Epiq to diligently troubleshoot and resolve unexpected issues that have arisen in connection with dissemination of notice. After the Court granted preliminary approval, Epiq began disseminating notice consistent with the terms of the Court's Preliminary Approval Order, *see* Dkt. 28 at 4, and the Settlement Agreement, *see* Settlement ¶ 4.1. Subsequently, Class Counsel worked diligently with Epiq on class notice, involving through numerous conference calls and email exchanges with Epiq and counsel for Defendant, among other things. *See id*. Class Counsel has also fielded calls and responded to emails from Settlement Class Members and, where requested, assisted them with filing claims. *See* Deckant Decl. ¶ 28.

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) (citation and quotation marks omitted); *see also Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) ("It is well settled that class actions are notoriously complex and difficult to litigate.") (internal citation omitted). This case was no exception, particularly because of its relative novelty. *See* Deckant Decl. ¶¶ 4-7. Specifically, this case involved a

statute – California's ARL – that is in its nascent stages of litigation. *See id.* Briefing the relevant issues required both an examination of the statute's text using traditional canons of statutory interpretation and a review of the statute's legislative history. For example, the Parties would have likely argued over whether various of Peacock TV's Checkout Page disclosures were presented in "visual proximity" to the request for consent on that page, and whether Defendant obtained Plaintiff's and Class Members' "affirmative consent" despite the fact that the Checkout Page for the Peacock Subscriptions contained no checkbox or other mechanism that requires consumers to expressly manifest their assent to the automatic renewal offer terms associated with Subscriptions. Similarly, the Parties have opposing views as to whether Defendant's Peacock TV Subscriptions qualify as "goods, wares, merchandise, or products" and are therefore subject to the gift provision under Section 17603 of the ARL, which in turn would give rise to disputes amongst the Parties concerning the proper measure of classwide damages. *See* Deckant Decl. ¶ 5. Moreover, Defendant would likely challenge Plaintiff's ability to establish statutory standing on her own behalf and/or on behalf of the putative Class. *See id.* ¶ 7.

Thus, the magnitude and complexity of the litigation support 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).

Here, Plaintiff's request for one-third of the Settlement in attorney's fees is justified given, *inter alia*, that the novelty of this case that made it complex presented a substantial risk of non-payment for Class Counsel. *See* Deckant Decl. ¶¶ 4-7, 21-23. As there are few binding decisions interpreting the ARL, success on the legal issues presented by this case was far from certain. *See id*. ¶¶ 4-6, 22. For instance, as noted above, Class Counsel faced the palpable risk that Peacock TV's actions could be characterized as sufficient to qualify for the purported good faith "safe harbor" under Section 17604(b) of the ARL. *See id*. ¶¶ 7, 22. This risk was exacerbated by the fact that Peacock TV retained highly qualified defense counsel who presented well-argued defenses in its mediation statements, as discussed below. *See id*. ¶¶ 13, 20, 22. Nonetheless, Class Counsel embarked on a fact-intensive investigation of Peacock's practices, engaged in informal discovery, and paid for and participated in a full-day mediation session, as well as months of additional discussions with the defense counsel in order to try and resolve the action. *See id*. ¶¶ 4-7, 10-15. Class Counsel went out-of-pocket as to this investment of time and resources, despite the significant risk of nonpayment. *See id*. ¶¶ 4-5, 11, 30.

Thus, "'[f]rom the outset, [Class Counsel] understood they were embarking on a complex, expensive, and likely lengthy litigation with no guarantee of ever being compensated ….'" *In re N. Dynasty Mins. Ltd. Sec. Litig.*, 2024 WL 308242, at *15 (E.D.N.Y. Jan. 26, 2024) (citation omitted). The fact that Class Counsel undertook this representation, despite the significant risk of nonpayment, supports the requested fee award. *See, e.g.*, *Lea*, 2021 WL 5578665, at *12; *Solis*, 2021 WL 2678651, at *3.

4. The Quality Of Representation

Class action litigation presents unique challenges and, by achieving a meaningful settlement over purported violations of a relatively 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. *See* Deckant Decl. ¶¶ 36, 38-42. Indeed, other judges in this District have previously commended Class Counsel's work in representing class members and achieving a meaningful settlement. *See, e.g.*, *Taylor v. Trusted Media Brands, Inc.*, No. 7:16-cv-01812, Dkt. 87 ¶ 8 (S.D.N.Y. 2018) ("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."); *Russett, et al. v. The Northwestern Mutual Life Insurance Company*, No. 7:19-cv-07414-KMK, Dkt. 51 ¶ 8 (S.D.N.Y. 2020) (same); *Gregorio v. Premier Nutrition Corp.*, No. 17-cv-05987-AT, Dkt. 101 ¶ 9 (S.D.N.Y. 2019) (same); *Edwards v. Hearst Communications, Inc.*, No. 1:15-cv-09279, Dkt. 314 ¶ 8 (S.D.N.Y. 2019) (same); *Ruppel v. Northwestern Mutual Life Insurance Co.*, No. 7:19-cv-07414-KMK, Dkt. 111 ¶ 8 (S.D.N.Y. 2018) (same). Moreover, Class Counsel has been recognized by courts across the country for its expertise litigating Rule 23 class action claims. *See* Deckant Decl. ¶ 40; *see also id.* Ex. 5, Firm Resume of Bursor & Fisher, P.A.

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). As noted above, Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. Class Counsel has litigated this case efficiently and effectively. The excellent result is a function of the high quality of that work, which supports the requested fee award. *See Solis*, 2021 WL 2678651, at *3 ("'Quality of representation is best measured by results.' Plaintiffs received a

considerable settlement sum in light of the risks posed by Plaintiffs' claims. … [This result] demonstrates the quality of counsel's representation.") (citations omitted).

5. The Requested Fee In Relation To The Settlement

Class Counsel seeks fees, costs, and expenses totaling one-third of the $3,368,373.42 all-cash settlement fund. As mentioned above, courts in this Circuit routinely approve fee requests for one-third of a common fund. *See* cases cited *supra*. "Here, the percentage requested, 33%, is in line with what other judges have awarded in this [D]istrict[.]" *Solis*, 2021 WL 2678651, at *2 (collecting cases). This factor thus supports approval of the requested fee award.

6. Public Policy Considerations

The final *Goldberger* factor concerns 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*.; *see also Lea*, 2021 WL 5578665, at *13 ("'[P]ublic policy favors the award of reasonable attorneys' fees in class action settlements.' Courts in this Circuit have recognized the importance of private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis.") (internal citation omitted). "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 relatively small

amounts of damages, "economic reality dictates that [their] suit proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

California undoubtedly has a strong interest in incentivizing lawyers to bring complex litigation under the ARL. *See, e.g.*, *Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1071 (S.D. Cal. 2018) ("The purpose of the ARL is to protect consumers from unwittingly consenting to automatic renewals or subscription orders.") (citation omitted); *Kissel v. Code 42 Software, Inc.*, 2016 WL 7647691, at *4-5 (C.D. Cal. Apr. 14, 2016) ("[T]he ARL was clearly enacted to protect consumers from 'the oppressive use of superior bargaining power' when entering into subscription or purchasing agreements.") (citation omitted); *see also* Cal. Bus. & Prof. Code § 17600 (statement of legislative intent). Class action litigation is the most realistic means of safeguarding the interests of low-income consumers who are disproportionately affected by renewal fees. The alternative to a class action in this case would have been no enforcement at all, and Peacock TV's allegedly unlawful conduct would have continued unabated. Accordingly, this factor thus supports the requested fee award.

II. THE REQUESTED INCENTIVE AWARD REFLECTS PLAINTIFF'S 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 v. Altamarea Grp., LLC*, 2011 WL 4599822, at *9 (S.D.N.Y. Aug. 16, 2011). Incentive awards fulfill the important purpose of compensating plaintiffs for the time they spend and the risks they take. *See Moses*, 79 F.4th at 253-54 ("Incentive awards encourage class representatives to participate in class action lawsuits[.] … Such incentive awards often level the playing field and treat differently situated class representatives equitably relative to the class

members who simply sit back until they are alerted to a settlement. Accordingly, … district courts are permitted to grant incentive awards.") (citations omitted, collecting cases).

Here, the participation of Plaintiff Holly Winston was critical to the ultimate success of the case. *See* Deckant Decl. ¶¶ 43-45. Ms. Winston spent "many dozens of hours" protecting the interests of the Class through her involvement in this case. *See* Declaration of Holly Winston ("Winston Decl.") ¶ 10. Plaintiff assisted Class Counsel in investigating her claims by, *inter alia*, detailing her Peacock Subscription account history and the automatic renewal charges that she paid in connection therewith; describing to Class Counsel her relationship as a subscriber with Defendant, the nature of the renewal charges associated with Peacock TV, her sign-up process and any associated disclosures, and a history of the charges she paid; supplying supporting documentation; and aiding in drafting the Complaint. *See id*. ¶¶ 3-4, 6. During the course of this litigation, Plaintiff kept in regular contact with her lawyers, conferring with them regularly by phone and e-mail to discuss the status of the case, case strategy, anticipated motions, forthcoming discovery issues, mediation, and the prospects of settlement. *See id*. ¶¶ 5, 7. Further, Plaintiff searched for and preserved documents likely to be requested in formal discovery and was prepared to testify at deposition and trial, if necessary. *See id*. ¶ 6. Finally, Plaintiff was actively consulted during the process of negotiating the settlement, and kept herself fully informed and involved regarding the parties' mediation and settlement efforts. *See id*. ¶ 7. She also carefully reviewed the Settlement Agreement and discussed the material terms with her attorneys prior to signing. *See id*. On these facts, the requested incentive payment of $5,000 is fair and reasonable. *See, e.g.*, Deckant Decl. Ex. 6, Preliminary Approval Hearing Transcript in *Russett,* No. 7:19-cv-07414 ("*NWM* Hearing Tr.").

Moreover, the requested $5,000 is well within the range of incentive awards approved by

other courts in this Circuit. *See Reyes*, 2024 WL 472841, at *6 n.5 ("Courts in this District have regularly approved service awards for individual representative plaintiffs ranging from $1,000 to $10,000. Other courts have suggested an even broader range of $2,500 to $85,000. Here, it is sufficient to note that the proposed award for [Plaintiff] is within either range.") (citations omitted, collecting cases); *Kurtz v. Kimberly-Clark Corp.*, 2024 WL 184375, at *4 (E.D.N.Y. Jan. 17, 2024) ("'Awards on an individualized basis have generally ranged from $2,500 to $85,000.'") (citation omitted); *Hart v. BHH, LLC*, 2020 WL 5645984, at *5 (S.D.N.Y. Sept. 22, 2020) (same); *see also, e.g.*, *Mateer v. Peloton Interactive, Inc.*, 2024 WL 1054983, at *2 (S.D.N.Y. Mar. 4, 2024) ("Service awards are granted as follows: $21,450 to Mateer, $21,450 to Johnson, and $9,000 to Branchcomb. These awards are reasonable and promote equity because they were determined based on the lead Plaintiffs' contributions …."); *Hezi v. Celsius Holdings, Inc.*, 2023 WL 2786820, at *6 (S.D.N.Y. Apr. 5, 2023) (approving service awards of $5,000 and $10,000); *Santos v. Nuve Miguel Corp.*, 2023 WL 2263207, at *3 (S.D.N.Y. Feb. 28, 2023) (approving a $10,000 service award).

Thus, the incentive award is warranted.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court: (1) approve attorneys' fees, costs, and expenses in the amount of $1,247,545.71 (*i.e.*, one-third of the all-cash settlement fund); (2) grant Plaintiff an incentive award of $5,000 in recognition of her efforts on behalf of the Class; and (3) award such other and further relief as the Court deems reasonable and just.

Dated: September 20, 2024

Respectfully submitted,

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By: */s/ Neal J. Deckant*
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