UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JULIANNE HEIGL, individually and on behalf of all others similarly situated, Plaintiff, v. WASTE MANAGEMENT OF NEW YORK, LLC, Defendant.	Civil Action No. 1:19-cv-05487-WFK-ST

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

Dated: October 23, 2020

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Class Counsel

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES

INTRODUCTION

The class action settlement between Plaintiff Julianne Heigl ("Plaintiff") and Defendant Waste Management of New York, LLC ("Waste Management" or "Defendant"), if finally approved, resolves Plaintiff's and the Class' claims against Waste Management under New York General Business Law ("GBL") § 399-zzz. The settlement – preliminarily approved by this Court on August 27, 2020 – creates a non-reversionary $2,700,000 settlement fund from which Settlement Class Members with Active Waste Management Accounts ("Active WMA") will automatically receive *pro rata* credits to their WMA. These class members account for approximately 75% of the total fees collected. In other words, no claim form will be necessary for the majority of class members. The remaining class members – those with Closed Waste Management Accounts ("Closed WMA") – will receive a *pro rata* cash payment after submitting a claim. The $2.7 million settlement fund is significant, as discovery showed that Waste Management had only collected approximately $3.2 million in the challenged fees. Thus, the fund represents approximately **84%** of the actual damages at issue. And equally important, as part of the settlement, Waste Management has agreed not to reinstate the Administrative Charge unless GBL § 399-zzz is amended, repealed, ruled unconstitutional, or otherwise invalidated. This prospective relief will save the Settlement Class more than $1.6 million per year in savings from Administrative Charges for years to come.

Obtaining this exceptional relief came with significant risks. No court has ever issued an opinion interpreting GBL § 399-zzz, and thus, the scope of the statute is in dispute. Specifically, as of the date of this filing, four courts are considering motions to dismiss GBL § 399-zzz claims based on statutory construction arguments. *See Santoro v. State Farm Mutual Automobile Insurance Company*, Case No. 7:19-cv-09782-CS (S.D.N.Y.); *Herzog v. Farmers Group, Inc., et al.*, Case No. 7:19-cv-09097-PMH (S.D.N.Y.); *Rosenberg v. Triborough Bridge and Tunnel*

Authority d/b/a MTA Bridges and Tunnels, Case No. 1:19-cv-10478-ALC (S.D.N.Y.); *Manship v. TD Bank, N.A.*, Case No. 1:20-cv-00329-GTS-DJS (N.D.N.Y.). Moreover, Waste Management raised an affirmative defense that the statute violates the First Amendment based on the Supreme Court's decision in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), which found that a similar statute, GBL § 518, regulated speech and therefore must overcome *Central Hudson* scrutiny. That same issue is pending in *Manship*.

In sum, Class Counsel took this case on contingency despite a significant risk that Plaintiff, the Settlement Class, and thereby Class Counsel, would receive nothing. Rather than put Waste Management's arguments to the test and risk everything, Plaintiff and Class Counsel achieved meaningful, immediate relief for the Settlement Class.

In light of this exceptional result, 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 $900,000, as well as an incentive award of $5,000 for Plaintiff for her service as class representative. Moreover, Class Counsel's fee request does not account for the value of the prospective relief provided by the settlement. When accounting for just one year of prospective relief, Class Counsel's fee request equates to approximately **20%** of the gross settlement fund. "Courts in this Circuit have routinely granted requests for one-third or more of the fund in cases with settlement funds similar to or substantially larger than this one." *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *7 (E.D.N.Y. Nov. 20, 2012) (citing cases); *see also Hayes v. Harmony Gold Min. Co.*, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding "attorneys' fees in the amount of one third" of a $9 million settlement fund), *aff'd* 509 F. App'x 21, 23-24 (2d Cir. 2013) (affirming fee award, and noting that "the prospect of a percentage fee award from a common fund settlement, as here, aligns the interests of class counsel with those of the class").

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

FACTUAL AND PROCEDURAL BACKGROUND

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

A. GBL § 399-zzz

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

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

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

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

B. Plaintiff's Allegations

Defendant provides residential waste management services, including garbage collection and disposal in New York. Plaintiff alleges that Defendant charges a $6.50 fee in order for its customers to receive a paper billing statement and/or pay by United States mail. Compl. ¶ 1. Plaintiff alleges that this conduct violates GBL § 399-zzz. *Id.* ¶ 4. Plaintiff furthers allege that because every violation of GBL § 399-zzz is a "deceptive act and practice" under GBL § 349, Defendant has violated GBL § 349 as well. *Id.* ¶ 11. Plaintiff accordingly sought "to enjoin the unlawful acts and practices described . . . to recover [her] actual damages or fifty dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees." *Id.* ¶ 27.

C. The Litigation And Work Performed To Benefit The Class

Beginning in March 2019, Class Counsel commenced a pre-suit investigation of companies' violations of GBL § 399-zzz, including Waste Management. *See* Declaration of Philip L. Fraietta ("Fraietta Decl.") ¶ 3. Because no court had ever issued an opinion interpreting the statute, particularly the distinction between charging a consumer "an additional rate or fee or a differential in the rate or fee associated with payment on an account when the consumer chooses to pay by United States mail or receive a paper billing statement," (which is prohibited by the statute) versus "offering consumers a credit or other incentive to elect a specific payment or billing option" (which is permitted by the statute), 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 GBL § 399-zzz. *Id.* Moreover, Class Counsel was aware that Waste Management would probably raise a First Amendment challenge to GBL § 399-zzz in light of First Amendment challenges having been made to GBL § 518, a similar statute that prohibits a "seller in any sales transaction" from "impos[ing] a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." *Id.*

¶ 4 (citing *Expressions Hair Design*, 137 S. Ct. at 1150-52 (concluding that GBL § 518 regulated speech and remanding to the Second Circuit to consider whether the statute was in violation of the First Amendment)). Thus, Class Counsel performed extensive legal research regarding the application of the First Amendment to similar statutes across the country. Fraietta Decl. ¶ 4.

Despite these litigation risks, on August 30, 2019, Plaintiff, through counsel, sent a letter to Defendant alleging that it violated GBL § 399-zzz by charging her a $6.50 Administrative Charge in order for her to receive a paper billing statement and/or pay by United States mail. *Id.* ¶ 5. On September 17, 2019, Defendant responded to Plaintiff's letter by denying that it violated GBL § 399-zzz, but agreeing to suspend collection of the Administrative Charge from Ms. Heigl and similarly situated residential customers in New York pending further review. *Id.* ¶ 6.

On September 27, 2019, Plaintiff filed her Class Action Complaint in the United States District Court for the Eastern District of New York. *Id.* ¶ 7. On December 4, 2019, Defendant filed an Answer to Plaintiff's Complaint denying the allegations generally and asserting 18 affirmative defenses. *Id.* ¶ 8. Thereafter, the Court held an initial scheduling conference pursuant to Fed. R. Civ. P. 16 and the Parties engaged in substantial written and document discovery on the merits of the case, which included the production and review of hundreds of pages of documents, the provision of key information through interrogatories, and several meet-and-confer teleconferences. *Id.* ¶ 9. Additionally, on April 28, 2020, Defendant filed an Amended Answer which added two additional affirmative defenses, including that GBL § 399-zzz is an unconstitutional violation on commercial speech, in violation of the First Amendment. *Id.* ¶ 10.

From the outset of the case, the Parties engaged in direct communications, and as part of their obligations under Fed. R. Civ. P. 26, discussed the prospect of resolution. *Id.* ¶ 11. To that

end, on February 4, 2020, Plaintiff made a written settlement demand on Defendant. *Id.* In preparing the settlement demand, Class Counsel devoted substantial time to researching the viability of different class-wide settlement structures under the relevant Second Circuit case law. *Id.* ¶ 12. The Parties then engaged in months of arms'-length settlement negotiations and, on July 16, 2020, reached an agreement and executed a term sheet. *Id.* ¶ 13.

After reaching an agreement in principle on the settlement, Class Counsel worked extensively with defense counsel to finalize and memorialize the agreement into a formal Class Action Settlement Agreement, including proposed class notice documents. *Id.* ¶ 18. That process included multiple rounds of redlines and phone calls to discuss proposed edits. *Id.* After finalizing and executing the Class Action Settlement Agreement, Class Counsel prepared Plaintiff's Motion For Preliminary Approval, which was filed on August 13, 2020, and Class Counsel prepared for and participated in the August 27, 2020 hearing on the preliminary approval motion. *Id.* ¶¶ 19-20. The Court preliminarily approved the Settlement on August 27, 2020. *Id.* ¶ 21 (citing ECF No. 27).

SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class by delivering immediate cash to approximately 89,310 Waste Management residential subscription customers with a New York mailing address who from September 27, 2016 to and through August 27, 2020 were charged and paid Defendant's Administrative Charge. *Id.* ¶ 14. The Settlement creates a $2,700,000 Settlement Fund, from which class members with an Active WMA will automatically receive a *pro rata* credit to their account. *Id.* ¶¶ 14-15; *see also id.* Ex. A, Class Action Settlement Agreement ("Agreement") ¶ 2.1(a). These class members account for approximately 75% of the total fees collected. *Id.* ¶ 14. The remaining class members with a Closed WMAs who submit claims will receive a *pro rata* payment from the Settlement Fund in

the form of a check. *Id.* ¶ 16; Agreement ¶ 2.1(b). Additionally, Defendant has agreed not to reinstate the Administrative Charge unless GBL § 399-zzz is amended, repealed, ruled unconstitutional, or otherwise invalidated. *Id.* ¶ 17; Agreement ¶ 2.2(a).

ARGUMENT

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

The requested attorneys' fees, costs, and expenses award of $900,000, representing one-third of the Settlement Fund, is reasonable and merits approval. Under Federal Rule of Civil Procedure 23(h), courts may award "reasonable attorney's fees and nontaxable costs that are authorized by law or the parties' agreement." Fed. R. Civ. P. 23(h).[1] Here, the Settlement Agreement between the Parties provides that Class Counsel may petition the Court for an award up to one-third of the Settlement Fund. Agreement ¶ 8.1.

In 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) (holding that "the decision as to the appropriate method [is left] to 'the district court, which is intimately familiar with the nuances of the case'") (quoting *Goldberger*, 209 F.3d at 48). "[T]he trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund

[1] The requested fee award also encompasses unreimbursed litigation costs and expenses. Agreement ¶ 8.1. Reasonable litigation-related costs and expenses are customarily awarded in class action cases and include costs such as document preparation and travel. *See*, *e.g.*, *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) ("Class Counsel's unreimbursed expenses, including court and process server fees, postage and courier fees, transportation, working meals, photocopies, electronic research, expert fees, and Plaintiffs' share of the mediator's fees, are reasonable and were incidental and necessary to the representation of the class."). Thus, included in the requested fee award, Class Counsel respectfully seeks reimbursement of $1,280 for out-of-pocket costs and expenses in these standard categories. *See* Fraietta Decl. ¶ 34, Ex. C.

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

> As so often happens with simple nostrums, experience with the lodestar method proved vexing. Our district courts found it created a temptation for lawyers to run up the number of hours for which they could be paid. For the same reason, the lodestar created an unanticipated disincentive to early settlements. But the primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. There was an inevitable waste of judicial resources.

Goldberger, 209 F.3d at 48-49. Other courts in this Circuit have also been critical of the lodestar method, and have noted that "courts in the Second Circuit no longer use the 'lodestar' method for computing attorneys' fees" in fee-shifting cases. *GB ex rel NB v. Tuxedo Union Free School Dist.*, 894 F. Supp. 2d 415, 427 (S.D.N.Y. 2012) (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182 (2d Cir. 2008)).

Moreover, "Courts in this Circuit have routinely granted requests for one-third or more of the fund in cases with settlement funds similar to or substantially larger than this one." *Massiah*, 2012 WL 5874655, at *7 (citing cases); *see also Hayes v. Harmony Gold Min. Co.*, 2011 WL

6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding "attorneys' fees in the amount of one third" of a $9 million settlement fund), *aff'd* 509 F. App'x 21, 23-24 (2d Cir. 2013) (affirming fee award, and noting that "the prospect of a percentage fee award from a common fund settlement, as here, aligns the interests of class counsel with those of the class"); *Patterson v. Premier Constr. Co.*, Case No. 1:15-cv-00662-ST at ECF No. 56 (E.D.N.Y. Dec. 28, 2017) (awarding fees of "33.3% of the settlement fund"); *Khait v. Whirlpool Corp.*, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9.25 million settlement fund); *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *6–7 (E.D.N.Y. Feb. 18, 2011) (awarding one-third of $7.675 million settlement fund); *In re Nigeria Charter Flights Litig.*, 2011 WL 7945548, at *4 (E.D.N.Y. Aug. 25, 2011) (awarding fees of "approximately 34 percent of the common fund of $5.7 million"); *In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y.2009) (awarding one-third of the $510 million net settlement fund); *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *20 (S.D.N.Y. May 9, 2014) (awarding 33% of $15 million settlement fund); *Clark v. Ecolab, Inc.*, 2010 WL 1948198, at *8-9 (S.D.N.Y. May 11, 2010) (awarding one-third of $6 million settlement fund). Indeed, as courts in this District have noted, fee requests for one-third of common funds "reasonably approximate[] the market for the services rendered," because they represent what "reasonably paying clients typically pay … pursuant to contingency retainer agreements." *In re Nigeria Charter Flights Litig.*, 2011 WL 7945548, at *4 (citing *Arbor Hill*, 522 F.3d 182).

Furthermore, "[i]n calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of both the monetary and non-monetary benefits conferred on the Class." *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015) (citing cases). The Federal Judicial Center provides that "it is appropriate to base a percentage fee on the value of injunctive relief through objective criteria,"

where, as here, "'an injunction against an overcharge may be valued at the amount of the overcharge multiplied by the number of people likely to be exposed to the overcharge in the near future.'" *Id.* (citing Federal Judicial Center, A Pocket Guide for Judges, at 34-35 (3d ed. 2010)). Here, there were approximately 62,357 active Waste Management residential customers in New York at the time of settlement. *See* Fraietta Decl. ¶ 17. Thus, but for the injunction, these customers would have incurred the $6.50 Administrative Charge on every billing statement going forward. Even assuming quarterly billing, that equates to more than $1.6 million per year. *Id.*

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. In contrast, the lodestar approach is more often applied in federal fee-shifting cases, particularly civil rights actions. *See*, *e.g.*, *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010). As Judge Cote has stated, the percentage method is preferred for several reasons:

> First, it relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions. Second, it decreases plaintiff lawyers' incentive to run up the number of billable hours for which they would be compensated by the lodestar method. And finally, it decreases the incentive to delay settlement because the fee for the plaintiffs' attorneys does not increase with delay.

Varljen v. H.J. Meyers & Co., Inc., 2000 WL 1683656, at *5 (S.D.N.Y. Nov. 8, 2000) (internal citations omitted); *see also In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *16 (S.D.N.Y. July 27, 2007) ("From a public policy perspective, the percentage method is the most efficient means of compensating the work of class action attorneys. It does

not waste judicial resources analyzing thousands of hours of work, where counsel obtained a superior result.").

Under the circumstances of this case – wherein Class Counsel received an exceptional result for the Settlement Class – the Second Circuit prefers the percentage method. *See Wal-Mart Stores, Inc.*, 396 F.3d at 121 (noting that the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation"). In contrast, "the lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in gimlet-eyed review of line-item fee audits." *Id.* at 121 (quotation omitted).

B. The Reasonableness Of The Requested Fees Is Supported By This Circuit's Six-Factor *Goldberger* Test

The Second Circuit has articulated six factors that should be considered when determining the reasonableness of a requested percentage to award as attorneys' fees: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation…; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50. These factors support Class Counsel's fee request.

1. Time And Labor Expended By Counsel

Class Counsel has been working on this case since March 2019, when it began investigating companies' violations of GBL § 399-zzz. *See* Fraietta Decl. ¶ 3. The theory of liability was novel. No court had ever issued an opinion interpreting the statute, and the Supreme Court had deemed a similar provision of the GBL a regulation on speech. *Id.* ¶¶ 3-4. Thus, Class Counsel's investigation was extensive and involved in-depth research into Defendant's billing practices, textual analysis of the statute, the legislative history of GBL § 399-

zzz, and the application of the First Amendment to similar statutes across the country. *Id.* Class Counsel also: (i) spoke with interested potential class members, (ii) drafted an initial demand letter and the complaint, (iii) engaged in substantial written and document discovery on the merits of the case, including the production and review of hundreds of pages of documents and the provision of key information through interrogatories, and (iv) conducted meet-and-confer teleconferences with defense counsel. *Id.* ¶¶ 5-10.

Class Counsel expended considerable time and labor on the settlement process as well. First, Class Counsel thoroughly analyzed the discovery produced by Defendant and researched the viability of different class-wide settlement structures under the relevant Second Circuit case law to formulate an informed settlement demand. *Id.* ¶¶ 11-12. Then, on February 4, 2020, Plaintiff, through Class Counsel, made a written settlement demand on Defendant. *Id.* ¶ 11. Next, Class Counsel engaged in months of arms'-length settlement negotiations with defense counsel, and, on July 16, 2020, reached an agreement and executed a term sheet. *Id.* ¶ 13. Then, Class Counsel worked extensively with defense counsel to finalize and memorialize the agreement into a formal Class Action Settlement Agreement, including proposed class notice documents. *Id.* ¶ 18. That process included multiple rounds of redlines and phone calls to discuss proposed edits. *Id.* Thereafter, Class Counsel prepared Plaintiff's Motion for Preliminary Approval, and prepared for and participated in the August 27, 2020 hearing on that motion. *Id.* ¶¶ 18-19. Finally, since preliminary approval was granted on August 27, 2020, Class Counsel has worked with the Settlement Administrator, Heffler Claims Group ("Heffler"), to: (i) carry out the Court-ordered notice plan; and (ii) monitor the settlement claims on a weekly basis. *Id.* ¶¶ 28-29. Class Counsel has also fielded calls from Settlement Class Members and, where applicable, assisted them with filing claims. *Id.* ¶ 29.

Thus, the work performed by Class Counsel to date has been comprehensive, complex,

and wide ranging. This factor supports the requested fee award.

2. Magnitude And Complexity Of The Litigation

"[C]lass actions have a well deserved reputation as being most complex." *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (internal citation and quotations omitted). This case was no exception, particularly because of its novelty. This case involved a statute – GBL § 399-zzz – that has never been litigated before. Briefing would have required both an examination of the statute's text using traditional canons of statutory interpretation and a review of the statute's legislative history. Specifically, the Parties would have argued over whether Waste Management was charging "an additional rate or fee or a differential in the rate or fee associated with payment on an account when the consumer chooses to pay by United States mail or receive a paper billing statement," (which is prohibited by the statute) versus "offering consumers a credit or other incentive to elect a specific payment or billing option" (which is permitted by the statute). Neither the statute nor caselaw defines these terms, and so Class Counsel would have been required to craft its arguments from scratch. Indeed, as of the date of this filing, four courts are considering motions to dismiss GBL § 399-zzz claims based on statutory construction arguments. *See Santoro v. State Farm Mutual Automobile Insurance Company*, Case No. 7:19-cv-09782-CS (S.D.N.Y.); *Herzog v. Farmers Group, Inc., et al.*, Case No. 7:19-cv-09097-PMH (S.D.N.Y.); *Rosenberg v. Triborough Bridge and Tunnel Authority d/b/a MTA Bridges and Tunnels*, Case No. 1:19-cv-10478-ALC (S.D.N.Y.); *Manship v. TD Bank, N.A.*, Case No. 1:20-cv-00329-GTS-DJS (N.D.N.Y.). Moreover, Waste Management raised an affirmative defense that the statute violates the First Amendment based on the Supreme Court's decision in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), which found that a similar statute, GBL § 518, regulated speech and therefore must overcome *Central Hudson* scrutiny. That issue is pending in

Manship. Thus, because this case involved novel and complex legal questions under GBL § 399-zzz – its application to Defendant's practices and defining the scope of what it means to charge a "rate or fee" under the statute without any guidance, as well as its constitutionality under the First Amendment – the magnitude and complexity of the litigation further supports the requested fee award.

3. The Risk Of Litigation

This factor recognizes the risk of non-payment in cases prosecuted on a contingency basis where claims are not successful, which can justify higher fees. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) (noting risk of non-payment in cases brought on contingency basis). "It is well settled that class actions are notoriously complex and difficult to litigate." *Shapiro v. JPMorgan Chase 7 Co.*, 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) (internal citation omitted).

The same novelty that made this case complex also presented a substantial risk of non-payment for Class Counsel. As GBL § 399-zzz has not been interpreted by any court, success on the legal issues presented by this case was far from certain. Fraietta Decl. ¶¶ 3-4, 24-26. Indeed, Class Counsel faced the palpable risk that Defendant's actions could be characterized as "offering consumers a credit or other incentive," or that GBL § 399-zzz could be held unconstitutional under the First Amendment, either of which would have nixed the case. This risk was exacerbated by the fact that Defendant retained highly qualified defense counsel who raised these potential defenses. *Id.* ¶¶ 8, 10. Nonetheless, Class Counsel embarked on a fact-intensive investigation of Defendant's practices, engaged in discovery, and spent months negotiating with defense counsel to try and resolve this case. *Id.* ¶¶ 3-13. Class Counsel fronted

this investment of time and resources, despite the significant risk of nonpayment inherent in this case. *Id.* ¶¶ 3-4, 24-26, 31, 33.

The fact that Class Counsel undertook this representation, despite the significant risk of nonpayment, supports the requested fee award.

4. The Quality Of Representation

Class action litigation presents unique challenges and – by achieving a meaningful settlement over purported violations of an untested statute – Class Counsel proved that they have the ability and resources to litigate this case zealously and effectively. In addition, Class Counsel are well-respected attorneys with significant experience litigating consumer class actions of similar size, scope, and complexity. Fraietta Decl. ¶¶ 38-43.

Moreover, Class Counsel has been recognized by courts across the country for its expertise. *See* Firm Resume, Fraietta Decl. Ex. L; *see also Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. 2014) (Rakoff, J.) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five class action jury trials since 2008.")[2]; *Williams v. Facebook, Inc.*, Case No. 3:18-cv-01881, ECF No. 51 (N.D. Cal June 26, 2018) (appointing Bursor & Fisher class counsel to represent a putative nationwide class of all persons who installed Facebook Messenger applications and granted Facebook permission to access their contact list).

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. *See Marsh ERISA*

[2] Bursor & Fisher has since won a sixth jury verdict in *Perez v. Rash Curtis & Associates*, Case No. 4:16-cv-03396-YGR (N.D. Cal.), for $267 million.

Litig., 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

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

5. The Requested Fee In Relation To The Settlement

Class Counsel seeks fees, costs, and expenses totaling one-third of the $2,700,000 settlement fund. As mentioned above, courts in this Circuit routinely approve fee requests for one-third of a common fund. *See* cases cited in Argument § I, *supra*. Moreover, the requested fees, costs, and expenses of one-third of the settlement fund is an equal percentage to that approved by this Judge Karas in the only other class settlement in a GBL § 399-zzz case. *See Russett v. The Northwestern Life Ins. Co.*, Case No. 7:19-cv-07414-KMK, ECF No. 51 at ¶ 14 (S.D.N.Y. Oct. 6, 2020). Furthermore, this percentage does not include the substantial prospective relief secured by the Settlement, which is properly considered. *See Fleisher*, 2015 WL 10847814, at *15 (citing cases). As explained *supra*, the prospective relief here equates to more than $1.6 million per year in savings from Administrative Charges. *See* Argument § I, *supra*. Thus, Class Counsel's fee request equates to approximately 20% of the gross settlement fund, when accounting for just one year of prospective relief. That figure falls to approximately 15% when accounting for two years, and approximately 12% when accounting for three years. This factor therefore supports the requested fee award.

6. Public Policy Considerations

The final *Goldberger* factor is public policy. "Skilled counsel must be incentivized to pursue complex and risky claims [that protect the public on a contingency basis]." *Shapiro*, 2014 WL 1224666, at *24. As such, reasonable fee awards must be provided in order to ensure that attorneys are incentivized to litigate class actions, which serve as private enforcement tools

to police defendants who engage in misconduct. *See id.* "Attorneys who fill the private attorney general role must be adequately compensated for their efforts," otherwise the public risks an absence of a "remedy because attorneys would be unwilling to take on the risk." *Massiah* , 2012 WL 5874655, at *7 (citing *Goldberger*, 209 F.3d at 51). Further, when individual class members seek a 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).

Society undoubtedly has a strong interest in incentivizing lawyers to bring complex litigation under GBL § 399-zzz. Class action litigation is the most realistic means of safeguarding the interests of "low-income consumers" who are "disproportionately affect[ed]" by paper billing fees, and "those that are uncomfortable using the Internet, including many senior citizens and those concerned about personal privacy." Compl. Ex. A. In fact, GBL § 399-zzz had never been enforced in the almost ten years it has been effective. Thus, the alternative to a class action in this case would have been no enforcement at all, and Defendant's allegedly unlawful conduct would have continued unabated. This factor thus supports the requested fee award.

C. The Requested Attorneys' Fees Are Also Reasonable Under A Lodestar Cross-Check

A lodestar cross-check further supports the requested fee. Courts applying the lodestar method generally apply a multiplier to take into account the contingent nature of the fee, the risks of non-payment, the quality of representation, and the results achieved. *See Wal-Mart Stores, Inc.*, 396 F.3d at 121. Where the lodestar is "used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50; *see also Cassese v. Williams*, 503 F. App'x 55, 59 (2d Cir. 2012) (noting the "need for exact [billing] records [is] not imperative" where the lodestar is used as a "mere cross-check").

To calculate lodestar, counsel's reasonable hours expended on the litigation are multiplied by counsel's reasonable rates. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Parker v. Time Warner Entertainment Co., L.P.*, 631 F. Supp. 2d 242, 264 (E.D.N.Y. 2009). The resulting figure may be adjusted at the court's discretion by a multiplier, taking into account various equitable factors. *See Parker*, 631 F. Supp. 2d at 264; *Shapiro*, 2014 WL 1224666, at *24 ("Additionally, under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors.") (internal quotations and citations omitted); *Milstein v. Huck*, 600 F. Supp. 254, 257 (E.D.N.Y. 1984) ("An increase in a fee award is appropriate in situations, such as this one, where an action is prosecuted solely on a contingent fee basis and counsel, faced with a large case containing complex and novel legal issues, successfully recovers a substantial benefit to the class.").

The hourly billing rate to be applied is the hourly rate that is normally charged in the District in which the reviewing court sits, *i.e.*, the "market rate." *See Blum*, 465 U.S. at 895; *see also Simmons v. New York City Transit Auth.*, 575 F.3d 170, 174 (2d Cir. 2009). However, "[t]he court may apply an out-of-district rate (or some other rate, based on … 'case-specific variables') if, in calculating the presumptively reasonable fee, it is clear that a reasonable, paying client would have paid those higher rates." *Simmons*, 575 F.3d at 174 (quotations omitted). Here, the hourly rates used by Class Counsel are comparable to rates charged by attorneys with similar experience, skill, and reputation, for similar services in the New York legal market. *See* Fraietta Decl. ¶¶ 35-38; *see also Dover v. British Airways, PLC*, Case No. 12-cv-05567-RJD-CLP, at ECF No. 321 (E.D.N.Y. Oct. 9, 2018) (approving partner rates up to $875); *Pearlman v. Cablevision Systems Corp.*, 2019 WL 3974358, at *4 (E.D.N.Y. Aug. 20, 2019) (approving

partner rates up to $875 and noting that courts in the Eastern District have approved "a lodestar based on billable rates of between $405 and $790 for partners and $270 to $500 for associates.").

The hours worked, lodestar fee, and expenses for Class Counsel are set forth in the declaration of Mr. Fraietta, submitted herewith. These records confirm Class Counsel's efficient billing. For example, Class Counsel staffed the case lightly to avoid duplicative work. Thus, even under the optional lodestar cross check, Class Counsel's requested fees are reasonable given the unique circumstances of this case. Specifically:

- The settlement fund accounts for approximately 84% of the potential actual damages;
- The settlement includes meaningful prospective relief, which will save Class Members millions of dollars in Administrative Charges in the years to come;
- Class Members will receive a substantial amount of money quickly, and the majority of class members will receive such payment automatically without the need for a claim process;
- The litigation was conducted and the settlement was obtained in an efficient manner, by experienced and qualified counsel;
- The case involved complex and novel legal issues and factual theories, which involved significant litigation risks; and
- Class Counsel devised a litigation and settlement strategy that factored in the complex and uncertain nature of the case.

In total, through September 30, 2020, Class Counsel billed 267.4 hours, which, utilizing their hourly rates at the time the work was performed, amounts to a lodestar of $154,332.50. Fraietta Decl. ¶ 31. Therefore, the requested fee award reflects a 5.8 times multiplier on Class Counsel's regular hourly rates, which is within the range of reasonableness. "Courts regularly award lodestar multipliers from two to six times the lodestar," and sometimes higher. *Garcia v. Pancho Villa's of Huntington Village, Inc.*, 2012 WL 5305694, at *8 (E.D.N.Y. Oct. 4, 2012); *see also Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 483 (S.D.N.Y. 2013) (approving 6.3

lodestar multiplier); *Yuzary*, 2013 WL 5492998, at *11 (approving 7.6 lodestar multiplier); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (approving lodestar multiplier of "just over 6"); *Perez v. Rash Curtis & Associates*, 2020 WL 1904533, at *21 (N.D. Cal. Apr. 17, 2020) (approving lodestar multiplier ranging from 13.42 to 18.15) (citing cases).

Moreover, as courts in this Circuit and elsewhere have noted, a high multiplier "should not result in penalizing plaintiffs' counsel for achieving an early settlement, particularly where, as here, the settlement amount was substantial." *Beckman*, 293 F.R.D. at 482; *Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) ("In this case, where the parties were able to settle relatively early and before any depositions occurred … the Court finds that the percentage method, which avoids the lodestar method's potential to 'create a disincentive to early settlement' … is appropriate.") (citing *McDaniel*, 595 F.3d at 418); *see also Perez*, 2020 WL 1904533, at *21 ("The benefit obtained for the class is an extraordinary result, while there was and still is significant risk of nonpayment for class counsel. Moreover, the general quality of the representation and the complexity and novelty of the issues presented weigh in favor of a higher lodestar multiplier.").

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

2399328, at *8 (S.D.N.Y. Mar. 3, 2010)).

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

II. THE REQUESTED INCENTIVE 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. *Massiah*, 2012 WL 5874655, at *8.

Here, the participation of Plaintiff was critical to the ultimate success of the case. *See* Fraietta Decl. ¶¶ 44-46. Ms. Heigl spent approximately 40 hours protecting the interests of the class through her involvement in this case. *See* Declaration of Julianne Heigl ("Heigl Decl.") ¶ 10. Ms. Heigl assisted Class Counsel in investigating her claims by detailing her account history and the Administrative Charges associated therewith, explaining her relationship as a customer of Waste Management, and the Administrative Charges she paid, supplying supporting documentation, and aiding in drafting the Complaint. *Id.* ¶¶ 3-4. During the course of this litigation, Ms. Heigl kept in regular contact with her lawyers to receive updates on the progress of the case and to discuss strategy. *Id.* ¶ 5. Further, Ms. Heigl coordinated with her lawyers to search for documents that Defendant requested in formal discovery, such as copies of her billing statements, and assisted in preparing responses to Defendant's interrogatories. *Id.* ¶ 6. Moreover, Ms. Heigl was prepared to testify at deposition and trial, if necessary. *Id.* Finally, Ms. Heigl was actively consulted during the settlement process. *Id.* ¶ 7.

On these facts, the $5,000 incentive payment is fair and reasonable. Indeed, the *Russett*

Court approved $5,000 incentive awards on similar facts. *Russett v. The Northwestern Life Ins. Co.*, Case No. 7:19-cv-07414-KMK, ECF No. 51 at ¶ 15 (S.D.N.Y. Oct. 6, 2020). Thus, the incentive awards are warranted.

Moreover, the requested $5,000 is well within the range of incentive awards approved by courts in this Circuit. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 131 (S.D.N.Y. Oct. 22, 2009) (approving incentive awards of $5,000 each); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (noting case law supports payments of between $2,500 and $85,000). Finally, the requested incentive award is approximately 0.18% of the Settlement Fund, which is similar to other cases. *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 131 (S.D.N.Y. Oct. 22, 2009) (approving incentive award of approximately 0.1% of the settlement fund).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court (1) approve attorneys' fees, costs, and expenses in the amount of one-third of the settlement fund, or $900,000.00, (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: October 23, 2020

Respectfully submitted,

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