SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

RICHARD MCCALL and ABRAHAM LIBMAN, individually and on behalf of all others similarly situated, Plaintiffs, v. HERCULES CORP., Defendant.	Index No. 66810/2021 Motion Seq. No. 002

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

Dated: May 13, 2022

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INTRODUCTION

The class action settlement between Plaintiffs Richard McCall and Abraham Libman ("Plaintiffs") and Defendant Hercules Corp. ("Hercules" or "Defendant"), if finally approved, resolves Plaintiffs' and the Class' claims against Hercules under New York General Business Law ("GBL") § 349 and unjust enrichment. The settlement of up to $2,362,500 – under which Defendant has agreed to pay approved class member claims, and to separately pay notice and administration costs, incentive awards of the Plaintiffs, and attorneys' fees, costs, and expenses to Class Counsel – represents an excellent result for the Settlement Class. Equally important, the Agreement also provides meaningful prospective relief as, on July 13, 2021, Defendant eliminated the $5 processing and handling fee it previously charged to collect unused Laundry Card balances, and, as part of the Settlement, has agreed not to reinstate any fee for the recovery of unused funds on a Laundry Card. The elimination of the processing and handling fee has a monetary value of more than $3.7 million and counting, and, in Plaintiffs' view, essentially represents a total victory for Plaintiffs. Simply put, Plaintiffs sued Hercules alleging that its $5 processing and handling fee to recover unused Laundry Card balances was unlawful. As a result of this Settlement that fee no longer exists and will not be reinstated.

Obtaining this exceptional relief came with significant risks. There is very little case law regarding fees to collect unused balances of pre-paid cards, and the case law that does exist is not unanimously in Plaintiffs' favor. *See, e.g.*, *Kovacevic v. Intellitix, Inc.*, 60 Misc.3d 1211(A), at *3-5 (Sup. Ct. Richmond Cnty. 2018) (granting motion to dismiss similar case concerning $5 refund fee). Nonetheless, Class Counsel took this case on contingency despite a significant risk that Plaintiffs, the Settlement Class, and thereby Class Counsel, would receive nothing. Rather than put Hercules' arguments to the test and risk everything, Plaintiffs and Class Counsel achieved meaningful, immediate relief for the Settlement Class.

In light of this exceptional result, Plaintiffs respectfully request pursuant to CPLR 909 that the Court approve attorneys' fees, costs, and expenses of one-third of the Settlement Fund, or $787,500, as well as Named Plaintiff Enhancement Awards of $5,000 for each Plaintiff for their service as class representatives. Critically, the attorneys' fees, costs, and expenses, as well as the Enhancement Awards, will be paid by Defendant in addition to (and not from) the relief made available to the Settlement Class. Thus, approving these awards will not derogate from the payments or relief to any other Settlement Class Member.

Moreover, Class Counsel's fee request does not account for the value of the prospective relief provided by the settlement. When accounting for the prospective relief to date, Class Counsel's fee request equates to approximately **13%** of the Settlement Fund, and the prospective relief will benefit Class Members for years to come. New York courts routinely grant requests for one-third or more of the fund in class action settlements. *Milton v. Bells Nurses Registry & Employment Agency, Inc.*, 2015 WL 9271692, at *5 (Sup. Ct. Kings Cnty. Dec. 21, 2015) (collecting cases and noting that 33.3% is "consistent with the norms of class litigation in this circuit"); *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 same).

For these reasons, and as explained further below, the Court should approve the requested fee and Named Plaintiff Enhancement Awards.

FACTUAL AND PROCEDURAL BACKGROUND

A brief summary of Plaintiffs' allegations, 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 Named Plaintiff Enhancement Awards.

A. Plaintiffs' Allegations

Plaintiffs allege that Defendant violated GBL § 349 by misrepresenting the value of its reloadable cash cards designed for use with laundry machines that are provided by and serviced by Defendant ("Laundry Cards") by setting the reload amounts and laundry machine prices such that the Laundry Cards were guaranteed to have a remainder balance, and then charging consumers a $5 processing and handling fee to collect the unused balance, without clearly and conspicuously disclosing that fee. Plaintiffs allege that Defendant's violation of a separate statute, GBL § 396-i, provides further evidence that Defendant's conduct constitutes a violation of GBL § 349.

B. The Litigation And Work Performed To Benefit The Class

Beginning in January 2021, Class Counsel commenced a pre-suit investigation of Defendant's alleged conduct. *See* Affirmation of Philip L. Fraietta ("Fraietta Aff.") ¶ 4. Because no court had ever issued an opinion interpreting Laundry Cards that were not marketed as gift cards as falling under the purview of GBL § 396-i, Class Counsel's investigation was extensive, novel, and involved in-depth research into Defendant's business practices, textual analysis of the statute, and the legislative history of GBL § 396-i. *Id.* Thus, Class Counsel performed extensive legal research regarding the viability of bringing a GBL § 349 partially premised on a violation of GBL § 396-i. *Id*.

On January 29, 2021, Plaintiff Libman filed a putative class action in the United States District Court for the Southern District of New York. *Id.* ¶ 5. On April 13, 2021, after Plaintiff Libman amended his federal complaint twice, Defendant filed a letter seeking a pre-motion conference regarding its anticipated motion to dismiss. *Id.* ¶ 6. On May 27, 2021, the federal court conducted a pre-motion conference and dissuaded Defendant from filing a motion to dismiss. *Id.* ¶ 7.

On August 16, 2021, Defendant filed an Answer to the operative Second Amended Complaint in the federal court, wherein it asserted 12 affirmative defenses, including that Plaintiff Libman and the putative class lacked Article III standing. *Id.* ¶ 8. During that time, the Parties also exchanged written and document discovery, including on issues such as the size and scope of the putative class, which allowed them to competently assess their relative negotiating positions. Indeed, Defendant produced and Class Counsel reviewed thousands of transaction records pertaining to the Laundry Cards. This information was sufficient to assess the strengths and weaknesses of the claims and defenses. *Id.* ¶ 9.

From the outset of the case, the Parties engaged in settlement discussions and, to that end, agreed to participate in a private mediation. *Id.* ¶ 10. In advance of this mediation, the Parties exchanged lengthy, detailed mediation statements, airing their respective legal arguments and theories on potential damages. *Id.* ¶ 11. Class Counsel also consulted with a damages expert to assist in that analysis. *Id.* On November 16, 2021, the Parties conducted a full-day mediation before The Honorable Wayne R. Andersen (Ret.), formerly of the Northern District of Illinois and now with JAMS Chicago, an experienced and well-regarded class action mediator. *Id.* ¶ 12. At the conclusion of the mediation, the Parties reached an agreement on all material terms of a class action settlement and executed a term sheet. *Id.* ¶ 13.

On November 16, 2021, Plaintiff Libman and Hercules stipulated to voluntarily dismiss the federal action without prejudice, and on November 23, 2021, Plaintiff Libman re-filed his case in the Supreme Court of the State of New York, County of Westchester, adding Richard McCall as a Plaintiff. *Id.* ¶ 14. Thereafter, Defendant produced and Class Counsel reviewed confirmatory discovery regarding the size and scope of the putative class. *Id.* ¶ 15.

Class Counsel then worked extensively with defense counsel to finalize and memorialize the agreement into a formal Class Action Settlement Agreement, including proposed class notice

documents. *Id.* ¶ 16. 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 January 5, 2022. *Id.* ¶ 17. The Court preliminarily approved the Settlement on March 9, 2022. *Id.* ¶ 18, Ex. B.

SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the class by delivering relief to approximately 757,500 Hercules customers who possessed and used a Hercules Laundry Card after January 1, 2017 and stopped using their Hercules Laundry Card prior to July 13, 2021 and no longer possess their Hercules Laundry Card. *Id.* ¶ 15. The Settlement makes up to $2,362,500 available to pay approved class member claims (the "Settlement Sum"), and to separately pay notice and administration costs, enhancement awards to the Plaintiffs, and attorneys' fees, costs, and expenses to Class Counsel. *Id.* ¶ 19; *see also id.* Ex. A, Class Action Settlement Agreement ("Agreement") ¶ 2.1(a). Additionally, Defendant has eliminated the $5 processing and handling fee to collect unused Laundry Card balances, and, as part of the Settlement, has agreed not to reinstate any fee for the recovery of unused funds on a Laundry Card. *Id.* ¶ 20; Agreement ¶ 2.8.

ARGUMENT

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

This case is complex with the added class action procedural issues overlaying the underlying litigation. It has unquestionably been litigated efficiently and with no duplication. The work performed was legal work related to the litigation and to the settlement. All tasks were pursued with one goal in mind: what was in the best interests of the Class.

"In testing the reasonableness of the negotiated fee, [courts] first look[] to the percentage

of the recovery approach." *Michels v. Phoenix Home Life Mut. Ins.*, 1997 WL 1161145, at *31 (Sup. Ct. N.Y. Cnty. Jan. 7, 1997). "Federal courts around the country, including federal district courts in New York, are turning away from the lodestar/multiplier approach and are returning to the percentage of the recovery approach." *Id.* (citing cases).[1]

"[T]he 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, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). Furthermore, "[t]he lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours." *Lopez v. The Dinex Group, LLC*, 2015 WL 5882842, at *5 (Sup. Ct. N.Y. Cnty. Oct. 06, 2015); *see also Matter of Karp*, 145 A.D.2d 208, 216 (1st Dep't 1989) ("To base a fee solely on hours worked is to penalize the experienced and skillful lawyer who can perform the services in substantially less time than the inexperienced one."). 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 v. Integrated Resources, Inc., 209 F.3d 43, 48-49 (2d Cir. 2000). Other federal courts in New York 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-

[1] "New York's courts have recognized that its class action statute is similar to the federal statute and have looked to federal case law for guidance." *Fiala*, 899 N.Y.S.2d at 537 (citing cases); *Colt Indus. Shareholder Litig. v. Colt Indus. Inc.*, 77 N.Y.2d 185, 194 (1991) ("New York's class action statute has much in common with Federal Rule 23.").

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, New York courts "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); *Milton,* 2015 WL 9271692, at *5 (collecting cases and noting that 33.3% is "consistent with the norms of class litigation in this circuit"); *Josephs v. United Hebrew of New Rochelle Certified Home Health Agency, Inc. d/b/a United Hebrew Geriatric Center*, Index No. 50926/2019, NYSCEF No. 28 (Sup. Ct. Westchester Cnty. June 9, 2020) (Walker, J.) (awarding one-third of $2.1 million settlement fund in attorneys' fees); *Contreras v. Dania Marina, Inc. d/b/a Marina Del Rey Caterers*, Index No. 54536/2018, NYSCEF No. 54 (Sup. Ct. Westchester Cnty. Oct. 3, 2019) (Walsh, J.) (awarding one-third of the settlement fund in attorneys' fees); *Lopez*, 2015 WL 5882842, *6 ("[O]ne-third of the settlement fund as attorney's fees … is well within the range of reasonableness and within the percentage regularly approved in class action[s]"); *Ryan v. Volume Services America, Inc.*, 2013 WL 12147011, at *4 (Sup. Ct. N.Y. Cnty. Mar. 07, 2013) (same); *Fernandez v. Legends Hospitality, LLC*, 2015 WL 3932897, at *5 (Sup. Ct. N.Y. Cnty. June 22, 2015) (same); *Mancia v. HSBC Securities (USA) Inc.*, 2016 WL 833232, at *4 (Sup. Ct. N.Y. Cnty. Feb. 19, 2016) (same); *see also Hayes*, 2011 WL 6019219, at *1 (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); *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 $5.7 million settlement fund"); *Heigl v. Waste Management of New York, LLC*, No. 19-cv-05487, at ECF No. 35 (E.D.N.Y. May 20, 2021) (awarding fees of one-third of a $2.7 million settlement fund in a case alleging an unlawful fee); *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); *Davis v. J.P. Morgan Chase & Co., Inc.*, 827 F. Supp. 2d 172, 184-86 (W.D.N.Y. 2011) (awarding one-third of a $42 million settlement fund). Indeed, as courts have noted, fee requests for one-third of settlement 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).

"In a claims-made settlement, attorneys' fees should be based on the gross settlement amount, regardless of the number of claims actually made, because every putative class member could have claimed a portion of the fund if they wished to do so." *Lopez*, 2015 WL 5882842, at *6; *see also Behzadi v. International Creative Mgmt Partners, LLC*, 2015 WL 4210906, *2 (S.D.N.Y. July 9, 2015) ("Awarding attorneys' fees based on a percentage of the settlement amount rather than the amount paid is proper."); *Alleyne v. Time Moving & Storage, Inc.*, 264 F.R.D. 41, 59 (E.D.N.Y. 2010) (approving one third of total settlement fund, stating that "the proper number against which attorneys' fees are measured is the amount of the entire fund created by the efforts of counsel, not the amount actually claimed or collected by the class."); *Masters v. Wilhelmina Model Agency. Inc.*, 473 F.3d 423. 437 (2d Cir. 2007) ("An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available.").

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 are approximately 757,500 Hercules customers in the Settlement class. *See* Fraietta Aff. ¶ 15. But for the injunction, these customers would have incurred the $5 processing and handling fee on every card that a customer wished to obtain a balance from. Thus, the injunctive relief is worth up to $3,787,500, and counting each time a new Laundry Card is purchased.

A. The Percentage Method Should Be Used To Calculate Fees

As mentioned *supra*, the trend in New York courts "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 Lopez*, 2015 WL 5882842, at *5 ("The lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours.").

Under the circumstances of this case – wherein Class Counsel received an exceptional result for the Settlement Class – New York courts prefer 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 [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." *Id.* at 121.

B. Plaintiffs' Request For Approval Of Reimbursement Of Litigation Expenses And Attorneys' Fees Is Fair And Reasonable And Should Be Granted

Plaintiffs respectfully submit that Class Counsels' request for $787,500.00, or one-third of the Settlement Sum, in attorneys' fees and reimbursement of expenses for the successful prosecution and resolution of this class action should also be approved by the Court. Like the Settlement, the amount of this inclusive fee and expense request was negotiated at arms-length and those fee and expense negotiations were not commenced until after all the material terms of the Settlement had been agreed to. Maximizing the benefit to the Class was therefore Class Counsels' paramount consideration. Class Counsels' efforts to date during litigation have been without compensation of any kind, and receipt of any attorneys' fee or reimbursement of expenses has been wholly contingent upon the result achieved. For these and the other reasons set forth below, Plaintiffs respectfully submit that the expenses and attorneys' fees sought meet

the applicable legal standards and, considering the contingency risk undertaken and the result achieved, should be approved.

CPLR 909 permits courts to award attorneys' fees in class action litigation. In order to assess a reasonable fee, a court should consider:

> [T]he risks of the litigation, whether counsel had the benefit of a prior judgment, standing at bar of counsel for the plaintiffs and defendants, the magnitude and complexity of the litigation, responsibility undertaken, the amount recovered, the knowledge the court has of the case's history and the work done by counsel prior to trial, and what it would be reasonable for counsel to charge a victorious plaintiff.

Milton, 2015 WL 9271692, at *7 (*citing Fiala v. Metro. Life Ins. Co.*, 899 N.Y.S.2d 531, 610 (Sup. Ct. N.Y. Cnty. 2010)). Each of these factors supports approval of Class Counsel's fee and expense request here.

1. 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).

The same novelty that made this case complex also presented a substantial risk of non-payment for Class Counsel. As GBL § 396-i had been so rarely interpreted by any court, success on the legal issues presented by this case was far from certain. Fraietta Aff. ¶¶ 4, 24. This risk was exacerbated by the fact that Defendant retained highly qualified defense counsel who raised

many potential defenses. *Id.* ¶¶ 8, 24. Indeed, because Defendant stopped charging the processing and handling fee on July 13, 2021, it could have argued that all Group B class members suffered no injury at all, thereby essentially gutting the majority of the case and depriving those class members of any recovery whatsoever. *Id.* ¶ 24. Moreover, any allegation that Defendant engaged in deceptive conduct is vigorously disputed. *Id.* 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.* ¶¶ 4-16. Class Counsel fronted this investment of time and resources, despite the significant risk of nonpayment inherent in this case. *Id.* ¶¶ 29-32.

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

2. Whether Counsel Had the Benefit of a Prior Judgment

There are few other cases interpreting GBL § 396-i, and none that had found it applied as broadly as the instant case. Indeed, instead of relying on a prior judgment, Class Counsel took on the associated risk of filing this class action on a full contingency basis. This action and the instant Settlement provided a substantial benefit to hundreds of thousands of Hercules' customers in New York and elsewhere.

3. Standing at Bar of Counsel for the Plaintiffs and Defendant

Class action litigation presents unique challenges and – by achieving a meaningful settlement over alleged violations of an untested statute – Class Counsel proved that they have the ability and resources to litigate this case zealously and effectively.

Class Counsel are well-respected attorneys with significant experience litigating consumer class actions of similar size, scope, and complexity. Fraietta Aff. ¶¶ 38-41. Moreover, Class Counsel has been recognized by courts across the country for its expertise. *See* Firm

Resume, Fraietta Aff. Ex. M; *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 Williams v. Reckitt Benckiser LLC*, 2022 WL 1176959 (S.D. Fla. Mar. 17, 2022) ("The quality of Class Counsel and their achievement in this case is equally shown by the strength of their opponents, Perkins Coie LLP …, who are excellent defense firms.").

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.

4. The 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). This case was no exception. Hercules' business practices impacted hundreds of thousands of customers in New York and elsewhere and presented many novel and complex issues. While Plaintiffs believe that

[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.

their claims are strong, they are not without risk. For example, any allegation that Hercules engaged in deceptive conduct with its customers is vigorously disputed. The Settlement eliminates these risks and will provide substantial recovery for the Class without the risk and delay of continued litigation.

The computation of damages was also complex. Plaintiffs' principal claim is that Hercules' acts and omissions in connection with its processing and handling fees constituted unjust enrichment and violated GBL § 349, partially as evidenced by its violation of GBL § 396-i. To so prove, Class Counsel and their expert had to analyze customers' transaction histories and determine a valuation of their injuries. Defendant vehemently denies all allegations that its practices were in any way improper. This factor therefore also supports Court approval of the requested attorneys' fee and expense award.

5. The Case History and the Responsibility Undertaken by Class Counsel

As discussed in Point I, above, Class Counsel's activities included, but were not limited to: conducting an extensive pre-filing investigation of Plaintiffs and Class Members' claims and damages and vigorously prosecuting those claims. Class Counsel engaged in extensive litigation including Hercules' anticipated motion to dismiss; and extensive fact discovery, which included a review of tens of thousands of accounts and other documents. Fraietta Aff. ¶¶ 4-16.

Significant efforts were also necessary in connection with the protracted settlement negotiations which took place. *Id.* ¶¶ 9-15. Further, in connection with the settlement negotiations, Class Counsel worked with expert to determine the damages suffered by the Class. *Id.* ¶ 11.

Class Counsel also negotiated a comprehensive settlement agreement and prepared a motion for preliminary approval of the Settlement. *Id.* ¶¶ 16-17. Since reaching the Settlement, Class Counsel have also responded to inquiries from numerous Class Members and coordinated

the settlement process with the Claims Administrator. *Id.* ¶¶ 26-27. Class Counsel anticipates expending additional time administering the Settlement after final approval. *Id.* ¶ 30.

Thus, the work performed by Class Counsel to date has been comprehensive, complex, and wide ranging. This factor supports the requested fee award.

6. The Amount Recovered

Class Counsel's work has led to the creation of a substantial recovery on behalf of the Class. The Settlement provides for up to $2,362,500 to pay approved class member claims. This includes relief for approximately 757,500 class members. This settlement benefits all persons who were Hercules customers and who possessed and used a Hercules Laundry Card after January 1, 2017 and stopped using their Hercules Laundry Card prior to July 13, 2021 and no longer possess their Hercules Laundry Card and, as discussed herein, provides them a substantial percentage of the maximum recovery they could hope to recover after trial and a successful appeal. The Agreement also provides valuable injunctive relief as Defendant eliminated the $5 processing and handling fee it previously charged to collect unused Laundry Card balances, and, as part of the Settlement, has agreed not to reinstate any fee for the recovery of unused funds on a Laundry Card. This injunctive relief can modestly be priced at $3,787,500 and counting meaning the total Settlement Value is at least $6,150,000. The Settlement is clearly an excellent result.

7. What It Would Be Reasonable for Counsel To Charge A Victorious Plaintiff

Under CPLR 909, "[i]f a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees … based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount

awarded from the opponent of the class."[3] Here, the Settlement provides that Class Counsel may petition the Court for an award up to one-third, or $787,500, of the Settlement Fund. Agreement ¶ 3.1. The "Fee Award" also includes all costs and expenses incurred by Class Counsel. As mentioned above, New York courts routinely approve fee requests for one-third of a common fund. *See* cases cited in Argument § I, *supra*. 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 $3.7 million and counting. *See* Argument § I, *supra*. Thus, Class Counsel's fee request equates to approximately 13% of the gross settlement fund, when accounting for the prospective relief to date.

Public policy also favors Class Counsels' requested fee. "Consumer class actions . . . have value to society . . . both as deterrents to unlawful behavior . . . and as private law enforcement regimes that free public sector resources. If we are to encourage these positive societal effects, class counsel must be adequately compensated." *Gascho v Glob. Fitness Holdings, LLC*, 822 F3d 269, 287 (6th Cir. 2016); *see also* William B. Rubenstein*, On What A "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2168 (2004) ("[Class counsel's] clients are not just the class members, but the public and the class members; their goal is not just compensation, but deterrence and compensation."); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of*

[3] The requested fee award also encompasses unreimbursed litigation costs and expenses. Agreement ¶ 3.1. Reasonable litigation-related costs and expenses are customarily awarded in class action cases and include costs such as document preparation and travel. *See*, *e.g.*, *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) ("Class Counsel's unreimbursed expenses, including court and process server fees, postage and courier fees, transportation, working meals, photocopies, electronic research, expert fees, and Plaintiffs' share of the mediator's fees, are reasonable and were incidental and necessary to the representation of the class."). Thus, included in the requested fee award, Class Counsel respectfully seeks reimbursement of $10,646.28 for out-of-pocket costs and expenses in these standard categories. *See* Fraietta Aff. ¶ 32, Ex. D.

Entrepreneurial Lawyers, 155 U. PA. L. REV. 103, 106 (2006) ("[T]he deterrence of corporate wrongdoing is what we can and should expect from class actions."); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 724-25 (2006) ("By enabling litigation, the class action has the structural consequence of dividing law enforcement among public agencies and private attorneys general and of shifting a significant amount of that enforcement to the private sector."). Indeed, "many courts have recognized that generous fee awards … serve the dual purpose of encouraging plaintiffs' attorneys to act as private attorneys general and discouraging wrongdoing." *Michels*, 1997 WL 1161145, at *31.

This factor therefore 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.").

The hourly billing rate to be applied is the hourly rate that is normally charged in the community in which the reviewing court sits, *i.e.*, the "market rate." *See E. Ramapo Cent. Sch. Dist. v. New York Sch. Ins. Reciprocal*, 199 A.D.3d 881, 888 (2d Dep't 2021) ("An attorney's 'reasonable hourly rate should be based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented.'") (citing *Getty Petroleum Corp. v. G.M. Triple S. Corp.*, 187 A.D.2d 483, 483-84 (2d Dep't 1992)); *Orser v. Wholesale Fuel Distributors-CT, LLC*, 65 Misc. 3d 449, 454-55 (Sup. Ct. Greene Cnty. 2018) ("[T]he Court may consider the rates awarded in other cases in the relevant jurisdiction (here the Northern District of New York)"), *aff'd*, 173 A.D.3d 1519 (3d Dep't 2019). 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 Aff. ¶¶ 33-37 (citing cases).

The hours worked, lodestar fee, and expenses for Class Counsel are set forth in the affirmation 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, and the majority of the work was performed by a junior associate attorney. Thus, even under the optional lodestar cross check, Class Counsel's requested fees are reasonable given the unique circumstances of this case. Specifically:

- The total settlement sum to pay approved claims accounts for approximately 62% of the potential actual damages;

- The settlement includes meaningful prospective relief, which will save Class Members millions of dollars in processing and handling fees in the years to come;
- 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 May 11, 2022, Class Counsel billed 343.4 hours, which, utilizing their hourly rates, amounts to a lodestar of $170,190.00. Fraietta Aff. ¶ 29. Therefore, the requested fee award reflects a 4.56 times multiplier on Class Counsel's regular hourly rates, which is within the range of reasonableness. "New York courts have observed that multipliers as high as 7.6 times the lodestar have been approved and that "in contingent litigation, 'lodestar multiples of over 4 are routinely awarded.'" *Milton*, 2015 WL 9271692, *6; *Lopez*, 2015 WL 5882842, *7 (same); *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"); *Heigl*, No. 19-cv-05487, at ECF No. 35 (E.D.N.Y. May 20, 2021) (approving 5.8 lodestar multiplier); *Perez*, 2020 WL 1904533, at *21 (approving lodestar multiplier ranging from 13.42 to 18.15) (citing cases).

Moreover, as courts in New York 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."); *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.

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. PLAINTIFFS' REQUESTED ENHANCEMENT AWARDS ARE FAIR AND REASONABLE AND SHOULD BE GRANTED

Under the Settlement, Hercules does not object to Named Plaintiff Enhancement Awards for Plaintiffs McCall and Libman in the amount of $5,000 each, as compensation for their efforts in bringing the Actions and achieving the benefits of the Settlement on behalf of the Settlement Class. Agreement ¶ 3.3.

It is common for courts to grant service awards in class action suits. Such awards "reward[] the named plaintiffs for the effort and inconvenience of consulting with counsel over the many years [a] case was active and for participating in discovery, including depositions." *Milton*, 2015 WL 9271692, *2-3 (citing *Cox v. Microsoft Corp.*, 26 Misc. 3d 1220(A), at *4 (Sup. Ct. N.Y. Cnty. 2007)).

Here, Plaintiffs made significant contributions to this litigation by bringing these lawsuits, providing counsel with relevant documents, actively participating in the litigation, and providing important information used to prosecute this action and to achieve the Settlement. Affidavit of Richard McCall ¶¶ 2-9; Affidavit of Abraham Libman ¶¶ 2-9. Additionally, Plaintiffs were prepared to sit through depositions. *See id.* ¶ 6; *Milton*, 2015 WL 9271692, *3 (recognizing the important role that plaintiffs play as the "primary source of information concerning the claim[,]" including by responding to counsel's questions and reviewing documents).

The requested Enhancement Award is also well within the range previously approved by the New York courts (*see, e.g.*, *Milton*, 2015 WL 9271692, *3 (awarding $8,000 Service Award and citing several decisions in which an Enhancement Award of $10,000 was awarded)). Given that the Named Plaintiffs' contributions of time and assistance to this litigation, the requested Enhancement Awards are reasonable, appropriate, and should be approved by the Court.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) approve attorneys' fees, costs, and expenses in the amount of one-third of the settlement sum, or $787,500.00, (2) grant Plaintiff McCall and Plaintiff Libman Enhancement Awards of $5,000 each in recognition of their efforts on behalf of the class, and (3) award such other and further relief as the Court deems reasonable and just.

Dated: May 13, 2022

Respectfully submitted,

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Dated: May 13, 2022

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