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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**CHRISTINE RODRIGUEZ, SANDRA
BURGA, KAREN MALAK, JAMES
TORTORA, LISA BRUNO, JANEEN
CAMERON, KAREN McBRIDE,
ANDREW WOOLF, and BRAD
BERKOWITZ, individually, and for all
others similarly situated,**

Plaintiffs,

-against-

**IT'S JUST LUNCH INTERNATIONAL,
IT'S JUST LUNCH, INC., HARRY and
SALLY, INC, RIVERSIDE COMPANY,
LOREN SCHLACHET, IJL NEW YORK
CITY FRANCHISE, IJL ORANGE
COUNTY FRANCHISE, IJL CHICAGO
FRANCHISE, IJL PALM BEACH
FRANCHISE, IJL DENVER FRANCHISE,
IJL AUSTIN FRANCHISE, IJL LOS
ANGELES-CENTURY CITY FRANCHISE,
and DOES 1-136,**

Defendants.

Case No.: 07-CV-9227 (SHS)(SN)

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
MOTION FOR FEES**

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PRELIMINARY STATEMENT¹

Over a period of more than twelve years, Class Counsel Balestriere Fariello (“Class Counsel”) has successfully prosecuted this action. After years of negotiation and after the case was ready for trial, Class Counsel has now obtained the best possible settlement for the Class Members. The Court should approve Class Counsel’s application for attorneys’ fees, costs, and expenses in the amount of \$1,500,000, \$58,827.65 of which constitutes reimbursement of expenses incurred throughout the duration of this matter (the “Fee”). The Court should also approve a service award for each class representative in the amount of \$12,000.

Had Class Counsel not obtained the settlement and, instead, the action proceeded to trial, it is very likely that Class Members would have received nothing given the dire financial condition of all Defendants (collectively, “IJL”). It was only due to Magistrate Judge Netburn’s guidance and Class Counsel’s creativity that a settlement which provides Class Members substantial value while allowing IJL to continue to provide an in-demand service. It is due only to the credibility of Class Counsel’s promise that it would continue to prosecute the action through to trial and into IJL’s bankruptcy that a settlement involving money – funded by IJL’s owners – was able to be obtained at all.

Class Counsel’s Fee, in the amount of \$1,500,000, is well under a half of what Class Counsel actually billed – at significant risk of never receiving any compensation – for more than twelve years. Since first investigating IJL in summer 2007, Class Counsel has

¹ All terms are as defined in Plaintiffs’ Motion for Preliminary Approval dated June 27, 2019, unless otherwise defined.

devoted has devoted over 10,100 hours of service generating over \$4,200,000 in fees for the zealous prosecution of this case.

The Fee represents under 2% of the estimated \$77 million created by the Settlement Agreement (the “Agreement” or the “Settlement,” Dkt. No. 445-1, attached to the Declaration of John G. Balestriere in Support of Plaintiffs’ Motion for Attorneys’ Fees, dated November 12, 2019 (the “Balestriere Decl.”) as Exhibit A).^{2 3} This amount is equal to far less than half of the lodestar of legal services provided to the Class in the over one hundred forty seven months since investigation began, including more than twelve years of active litigation. Even if, for example, only 10,000 current clients of IJL (just 6% of a class of over 161,000) use the voucher, then the vouchers, which will not cost Class Members anything and which will not result in any profit to IJL, will be worth \$4,500,000. Combined with the \$4,750,000 fund as referenced in paragraph 2.02 of the Agreement (the “Monetary Fund”), the Fee would be well under 20% of the further valuable non-injunctive relief value obtained by the efforts of the Class Counsel. (Balestriere Decl. ¶ 9.)

The Fee is reasonable under both the lodestar and percentage-of-recovery methods. Class Counsel seeks reimbursement of \$58,827.65 in costs and expenses incurred during this matter, a particularly small amount for a class action that lasted more than a decade, involved dispositive motions, nearly two dozen depositions around the country, and litigation both in the District Court and the Court of Appeals.

² This figure is \$12 million higher than the figure in the Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Settlement (Dkt. No. 443), reflecting updated numbers.

³ All exhibits referenced herein are attached to the Balestriere Decl. unless otherwise noted, and are referred to herein as “Ex.”

The Court should also approve service fees in the amount of \$12,000 for each of the named plaintiffs, all of whom shared the personal and intimate details of their lives in helping advance this case, all of whom have been fully involved and deposed in the case, and all of whom have been devoted to this class action for far longer than a typical class representative. Their significant efforts over the years included a settlement process that took a half-year and involved a mediation before Magistrate Judge Sarah Netburn. Class Counsel respectfully requests that the Court order the attorneys' fees, reimbursement of expenses, and service awards sought in this motion.

STATEMENT OF FACTS

I. SOURCE FOR PAYMENT OF FEES AND COSTS

Attorneys' fees, expenses, and administrative costs will be paid by IJL from the Monetary Fund. The total amount sought for attorneys' fees, costs, and expenses which Class Counsel seeks does not exceed the actual attorneys' fees and expenses incurred by Class Counsel, as Class Counsel seeks a lodestar multiplier of less than 0.35, thus receiving no benefit for the risk it has faced from the litigation or the years Class Counsel has gone and continues to go without compensation.

II. SUMMARY OF BENEFITS CONFERRED ON THE CLASS BY THE SETTLEMENT

Significant Value Created by the Settlement Agreement

The Agreement creates significant value for Class Members as well as future clients of IJL, justifying the Fee. Given the changes IJL has agreed to make under the Settlement, the vouchers and payments available to the National Class Members, and the

payments to New York Class Members, the Settlement has a value of more than \$77 million exclusive of the injunctive relief it provides. This is based on an estimated class size of 161,937 with \$4.75 million of the Settlement taking the form of a non-reversionary cash fund. The vouchers available to Class Members, which are transferable to non-class members, have an estimated value of more than \$72 million, based on the estimated class size and a value per voucher of \$450. All National Class Members who do not opt out will have a choice between a voucher or a payment between \$14.44 and a maximum amount in an undetermined amount depending on the number of members who submit claim forms for a cash settlement payment. Additionally, each of the New York Class Members who have not opted out of the settlement and who has timely submitted a claim form will receive an additional \$200 payment.

The Poor Financial Condition of IJL

Given the poor financial condition of IJL—as disclosed confidentially, supported by documentation, during settlement discussions and mediation—had the Class Members proceeded to trial, what limited funds IJL had would likely have been devoted to defense of the action. (Balestriere Decl. ¶ 12.) Put another way, a trial judgment of any size would represent a Pyrrhic victory, with IJL likely declaring bankruptcy, the Class Members receiving no money and no vouchers, and with IJL laying off its employees.

IJL Makes a Commitment to Honor Client Preferences

The settlement brings about key changes in the way IJL does its business. IJL will modify its contracts to include a commitment to honor significant client preferences related to age, religion, and parental status when providing matches to its customers.

(Settlement Agreement, Ex. A ¶ 2.05.) This is a significant commitment, memorialized in the IJL contract and on its website, which ensures all future IJL members will have what Class Members have repeatedly told Class Counsel is the most important feature they want: a match of a specific age range, a specific religious status, and parental status. (Balestriere Decl. ¶ 37.) None of this would have been possible but for Class Counsel litigating this action from early investigation to the verge of trial.

The end result is that IJL is making corporate changes which benefit Class Members, IJL will survive and continue to provide a service to the public and pay its employees, all while providing a settlement worth tens of millions to Class Members.

Money or Vouchers to the National Class, Money to the New York Class

Upon submission of the claims form—the link to which was distributed with the Class Notice described in paragraphs 3.02 through 3.05 of the Settlement—each National Class Member who has not opted-out will be entitled to receive either a monetary award in a minimum amount of \$14.44 and a maximum amount in an undetermined amount depending on the number of members who submit claim forms for a cash payment, or one voucher redeemable for one date, or two dates in certain cities, arranged by IJL in the manner of its ordinary services and in compliance with the provisions of the Agreement concerning modification of services. The vouchers may be transferred to any non-Class Member who joins IJL. Thus, anyone who is already an IJL member will receive the date without making any further payment to IJL and non-IJL members will receive a 25% discount on IJL membership and a free date. Additionally, New York Class Members who do not opt out will receive \$200 from the Monetary Fund no later than 60 days

following Final Approval, which will automatically be sent to the member's address of record.

The Settlement is the Best Possible Outcome for the Class

The terms in the Settlement Agreement are more favorable to the Class Members than if Class Counsel had pursued only monetary awards. The \$4.75 million to be paid by IJL would not have been available after a trial given IJL's financial situation. Even if it were, and the \$4.75 million was split up among the 161,937 members of the National Class—and subtracting the anticipated costs of \$250,000 for administration and the \$428,000 which the New York Class shall receive—Class Members would only receive about \$25.14 each. (Balestriere Decl. ¶ 10.) Even taking out the administration and New York Class payments results in \$29.33 per class member, less than 2% of the \$1,500 cost of membership many Class members paid. (Balestriere Decl. ¶ 11.) Class Counsel obtained the best possible Settlement. The Court should approve the Fee.

III. LITIGATION HISTORY AND EFFORTS OF CLASS COUNSEL TO DATE

A. Efforts of Class Counsel Through First Motion for Fees

On March 25, 2016, Class Counsel submitted its First Motion for Attorneys' Fees after receiving Preliminary Approval of its Settlement Agreement on January 25, 2016. (Dkt. Nos. 257, 258, 279, 282, 283.) In the interests of brevity, the Court is respectfully directed to Plaintiffs' First Motion for Attorneys' Fees for the full discussion of Class Counsel's colossal efforts through March 28, 2016. (Dkt. Nos. 282, 283.) Such efforts included Class Counsel's investigation and interviews of company insiders prior to filing, its obtaining training manuals from IJL insiders as well as documents from the New York

Attorney General's investigation. (Dkt. No. 283 ¶¶ 22, 59.) Class Counsel further participated in 19 multistate depositions and a contentious years-long discovery process. (*Id.* ¶¶ 31–32.) Class Counsel also litigated multiple motions to dismiss, amended plaintiffs' complaint, litigated three separate motions for summary judgment, prevailed on IJL's motion for reconsideration of IJL's motion for summary judgment, successfully moved for intervention thus preserving the claims of the New York Class, and obtained class certification of both the New York Class and the National Class. (*Id.* ¶ 37.) Finally, Class Counsel engaged in supervised settlement negotiations for eight months and worked through settlement and notice concerns with the Court and IJL for over a year, and worked with the Claims administrator to create a notice plan. (*Id.* ¶¶ 54–58.)

B. Efforts of Class Counsel Following First Motion for Fees

After Class Counsel's first motion for fees was filed on March 25, 2016, Class Counsel sought final approval of its settlement. (Dkt. Nos. 318, 319.) Class Counsel's motion for final approval and motion for fees were denied on March 10, 2017. (Dkt. No. 342.) Thereafter, Class Counsel returned to its diligent litigation strategy and prepared for trial. Class Counsel moved for joinder of The Riverside Company, IJL's parent company and now funder of the Settlement, as defendant. (Dkt. No. 348.) Class Counsel filed a motion and reply brief and attended oral argument of the motion. (Dkt. Nos. 348, 359, 364.) After Class Counsel's motion for joinder was denied, Class Counsel began its pre-trial preparations and submissions including letters documenting the Class's damages, and a motion in limine. (Dkt. Nos. 366, 379, 383.)

Thereafter, IJL moved to decertify both the National Class and the New York Class. (Dkt. No. 386.) Class Counsel successfully opposed IJL's motion after oral argument and maintained both classes. (Dkt. Nos. 395, 402, 405.) Had Class Counsel not successfully opposed IJL's motion, the entire case would have failed, nearly eleven years after its commencement.

Thereafter, Class Counsel once again ramped up its preparations for trial. A pre-trial conference was held with Class Counsel in attendance, and a pre-trial schedule set. (Dkt. No. 415.) Class Counsel also attended and meaningfully negotiated the present settlement at a settlement conference held before Magistrate Judge Sarah Netburn. (Dkt. No. 422.) Based on the efforts of Class Counsel and the instruction of Judge Netburn, the settlement conference resulted in the Settlement now before the Court. After months of negotiation, Class Counsel filed its second Motion for Preliminary Approval of Settlement. (Dkt. No. 442.) On September 11, 2019, the Court issued an Order granting Plaintiffs' Motion for Preliminary Approval of Settlement, finding that the terms of the proposed settlement were "within the range of reasonableness of a settlement that ultimately could be granted approval by the Court at the end of the final Fairness Hearing." (Dkt. No. 446.) Class Counsel has now coordinated with the claims administrator and provided notice to the class of the proposed settlement.

Over the course of representation, Class Counsel has devoted over 10,100 hours of service generating over \$4,200,000 in fees for the zealous prosecution of this case. (Balestriere Decl. ¶¶ 19, 26.) Over the course of over twelve years, Class Counsel has written 50 letters to the Court, litigated 45 motions, attended more than 20 Court

conferences, and successfully negotiated two proposed settlements. (Balestriere Decl. ¶¶ 19, 25.) The present Settlement represents the optimal result that could be achieved for the Classes, and based on its representation of the Classes, over the course of over twelve years, Class Counsel has earned its Fee. (Balestriere Decl. ¶ 19.)

ARGUMENT

IV. CLASS COUNSEL’S REQUESTED FEE IS REASONABLE AND SHOULD BE APPROVED

A. Legal Standard

Class Counsel requests a reasonable fee based on the results obtained for the Classes and the length and complexity of the litigation. When “an attorney succeeds” in creating a common fund “from which members of a class are compensated for a common injury,” that attorney is “entitled to a reasonable fee – set by the court – to be taken from the fund.” *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (citations omitted). Courts use the lodestar and the percentage-of-recovery methods to calculate attorneys’ fees in such cases. *Id.* at 50. Courts also still consider “traditional criteria” in deciding whether an attorneys’ fee is reasonable in the context of a common fund, including, “(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.” *Id.* at 50 (quoting *In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989)). Under any applicable standard, Class Counsel deserves the Fee it seeks here.

B. Because It Is Difficult to Value the Significant Injunctive Relief Obtained as Part of the Settlement, the Court Should Follow the Lodestar Method in Approving Class Counsel's Attorneys' Fees

Class Counsel has earned substantial injunctive relief—solving the key problem Class members complained of and making a better company for the future—but it is difficult to attribute a specific value to such relief which by itself warrants Class Counsel receiving its lodestar fees. Because “the value of injunctive relief is difficult to quantify, its value is also easily manipulable.” *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 387 (S.D.N.Y. 2005) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003)) (awarding class counsel fees in the “upper end (30%) of the Settlement Value commonly awarded under the percentage method” in an attempt to approximate value of structural changes in a settlement). The Class Action Fairness Act of 2005 “permits the use of ‘a lodestar with a multiplier method’ in awarding fees where injunctive relief is obtained.” *Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 432 (S.D.N.Y. 2007) (emphasis added) (quoting 28 U.S.C. § 1712(b)(2)) (denying use of lodestar because no injunctive relief was sought). The Supreme Court has recognized that in situations regarding injunctive relief, a lodestar model is better suited than a contingent fee model since it is difficult to value injunctive relief. *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992).

The lodestar approach is an accepted method of fee calculation in the Second Circuit. *Goldberger*, 209 F.3d at 50 (“[w]e choose to follow our own precedents, which clearly establish that the lodestar approach is an accepted but not exclusive methodology in common fund cases”). Even if the Firm only provided Class Members with the injunctive relief it earned here—without consideration of the monetary payments to the

New York Class; without consideration of the monetary payment option for the National Class; without consideration of the voucher option for the National Class, which have a potential value in the tens of millions; without consideration of the hundreds of hours devoted to addressing Class Members' questions and concerns; and without the atypical investigation that Class Counsel conducted both before and after filing the first pleading—Class counsel would still deserve its lodestar fees.

C. The *Goldberger* Factors All Support Class Counsel's Fee Request

The six *Goldberger* factors favor approval of Class Counsel's Fee. Class Counsel prosecuted this action for more than twelve years after an initial months-long investigation. The litigation was complex and Class Counsel undertook significant risks in prosecuting this action. Class Counsel has obtained excellent results for the Classes, the Fee is reasonable in relation to the settlement, public policy favors approval of the Fee, and the Fee is reasonable under both lodestar and percentage of recovery analyses. Class Counsel's fee application should be approved.

1. Class Counsel Spent Thousands of Hours over Twelve Years

Class Counsel's work to date has been exhaustive. Since 2007, Class Counsel has reviewed and analyzed document productions by IJL totaling several thousand pages; maintained a growing database of over 330 IJL customers potentially affected by this litigation (who still seek counsel and direction from Class Counsel regularly); conducted an in-depth investigation of the corporate structure of IJL, including promulgating discovery demands on IJL's majority investors; litigated the action to the verge of trial;

and, after nearly eight months of negotiations, successfully arrived at a settlement. (Balestriere Decl. ¶¶ 18, 25.)

Class Counsel is in regular communication with over 330 current and former IJL customers. (Balestriere Decl. ¶ 32.) These customers contacted Class Counsel after learning about the class action through the press, from friends and family, or from other sources. (Balestriere Decl. ¶ 33.) Class Counsel conducts a basic intake when contacted by such customers, gathering contact information, information about their experiences with IJL, and answering any questions concerning the status of the class action or its claims. (Balestriere Decl. ¶ 34.) At their request, Class Counsel then adds these individuals to an electronic mailing list, which is used to provide regular updates to potential class members. (Balestriere Decl. ¶ 35.) Class Counsel's dedication to this action weighs in favor of approval of the Fee.

2. The Litigation Involved Complex Legal Issues, Multiple Dispositive Motions, and More Than 161,000 Class Members

The magnitude and complexities of this case support awarding the Fee. *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331(CM)(MHD), 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) (finding this factor supported the \$18 million fee request where class counsel had to “research[] and evaluate[] novel and complex claims and areas of law”). This lengthy litigation was complex, involving interviews with former employees and customers, out-of-state depositions, and a nation-wide fraud.

Class Counsel also faced complex legal issues. For example, in 2010 it became necessary for Class Representative Brad Berkowitz to intervene as a named plaintiff. IJL

raised a timeliness defense to Berkowitz's intervention, arguing, in part, that no named plaintiff ever had a live claim. IJL's timeliness defense was only defeated after Class Counsel argued for the application of *American Pipe* tolling, a factor initially discounted in the Report and Recommendation made by Magistrate Judge Fox. *Rodriguez v. It's Just Lunch, Intern.*, No. 07 Civ. 9227(SHS), 2013 WL 1749590, at *3 (S.D.N.Y. Apr. 23, 2013), *appeal withdrawn* (July 11, 2013) ("This miscalculation stems from Judge Fox's reluctance to consider the effect of so-called *American Pipe* tolling.") (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

Class Counsel also had to defend against two motions to dismiss (Dkt. Nos. 33, 59), prosecute both New York specific and national claims, locate defendants in multiple states in order to affect service of process, conduct an extensive investigation into IJL's business practices, litigate summary judgment proceedings that lasted from May 19, 2010, until May 30, 2013, join IJL's parent company, and defeat a motion to decertify the Classes. (Dkt. Nos. 101, 107, 179, 283, 348, 386.) The complexities and magnitude of this action weigh in favor of approval of the requested fee.

3. The Litigation Bore Substantial Risks Both on the Merits and to Class Counsel

Class Counsel commenced this action despite significant risks. The risk of litigation is generally given great weight in evaluating the reasonableness of a fee award. *Goldberger*, 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement.")

(quoting *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 236 (2d Cir. 1987)). The risk incurred by Class Counsel weighs in favor of approval of the Fee.

i. Class Counsel Bore the Risk of Establishing Liability in a Class Action Law Suit

Class Counsel undertook this action aware of the difficulty of establishing liability. Class action lawsuits are inherently complex and especially risky. *Shapiro*, 2014 WL 1224666, at *21 (“It is well settled that class actions are notoriously complex and difficult to litigate”). To this date, Class Counsel still cannot be certain of establishing liability on Plaintiffs’ claims. IJL continues to vigorously dispute liability – as they have done for more than twelve years – and Plaintiffs admittedly face risk by bringing a fraud claim on a class-wide basis. Reliance, a necessary element of fraud, is inherently difficult to prove, and especially difficult in the class action context. *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir. 2002). The risks that Class Counsel willingly accepted weigh in favor of approval of the Fee.

ii. Class Counsel Bore the Risks of a Twelve Year Long Litigation Without Interim Compensation

Class Counsel took significant risks by prosecuting this years-long class action. Class Counsel undertook this matter on a contingent basis. Class Members were not asked to pay Class Counsel’s attorneys’ fees or others costs, unlike counsel for IJL, which was compensated throughout the litigation. Class Counsel is not an established class action firm, but, instead, was barely more than two years old when this dispute began, with only three staff members at the time. (Balestriere Decl. ¶ 4.) Class Counsel has received no compensation or reimbursement of costs whatsoever for the last twelve years

of this litigation, and success was never guaranteed. Both the litigation risks and the financial risks assumed by Class Counsel were enormous. As this Court has observed, “[t]here are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever” *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (quoting *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007)). The simple age of this matter shows the magnitude of risk Class Counsel undertook.

Class Counsel’s litigation risk is “measured as of when the case is filed”, not “based upon the hindsight” available once the “actual results in the case” are known. *Goldberger*, 209 F.3d at 55; *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d. Cir. 1985). In initiating this action, Class Counsel—again, in late 2007 a firm with only three staff members—knew it might never receive compensation for its work and understood the risks of bringing a fraud claim on a class-wide basis against a prominent international company. Class Counsel risked never getting beyond the class certification stage and proceeded anyway. The risk to Class Counsel favors approval of the Fee.

4. The Classes Were Represented by Reputable and Skilled Counsel

Class Counsel has extensive experience representing clients in complex litigation, and is highly reputable and skilled. One of the two primary senior lawyers on the matter, John Balestriere, “is an experienced litigator who would generally command a high billing rate.” *Sanchez v. MTV Networks*, No. 10 Civ. 7854(TPG), 2012 WL 2094047, at *3 (S.D.N.Y. June 11, 2012) *aff’d*, 525 F. App’x 4 (2d Cir. 2013). The other primary senior

lawyer, Jon L. Norinsberg, is an experienced litigation attorney as Judge Robert W. Sweet noted in approving him as co-lead class counsel in another class action law suit. *Stinson v. City of N.Y.*, 282 F.R.D. 360, 371 (S.D.N.Y. 2012) (Norinsberg is “competent and experienced in federal class action and federal civil rights litigation”).

Furthermore, the quality of legal representation is best measured by the result obtained (*Goldberger*, 209 F.3d at 55), and Class Counsel achieved the best settlement possible, securing an amount greater than what could have been obtained at trial. Additionally, the settlement Class Counsel negotiated ensures that Class Members will receive relatively quick relief after enduring well more than a decade of litigation, which also attests to the quality of Class Counsel’s representation, as an “indication of the quality of the result achieved is the fact that the Settlement will provide compensation to the [victims] expeditiously.” *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Both the result achieved and the Class Counsel’s extensive experience in complex civil litigation show that the Classes received a superb quality of representation over the past twelve years in this case.

The quality of opposing counsel is also an important factor for the Court to consider when evaluating the quality of Class Counsel. *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002). In this matter, opposing counsel, partners Peter Shapiro and Bari Klein and their colleagues, were from the prominent defense firm Lewis Brisbois Bisgaard & Smith LLP. Lewis Brisbois, established in 1979, has over 1400 attorneys at 52 offices in 29 states. (Pages from Lewis Brisbois Website, Ex. B.) It is without doubt that Class Counsel is both experienced and reputable, and achieved an outstanding

settlement considering the high quality and extensive resources of IJL's counsel. In light of the quality of representation, the Fee should be approved.

5. The Fee is Reasonable in Light of the Settlement Amount

Class Counsel requests a reasonable fee in relation to the total value created by the Settlement. The Fee of \$1,500,000 is about 1.93% of the value created by the Settlement and less than 32% of the Monetary Fund putting it at the lower end of the range typically awarded for recoveries of this size. In fact, multiple courts in the Southern District have upheld fees in excess of 33% as "reasonable and consistent with the norms of class litigation in this circuit." *See, e.g., Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452(RLE), 2008 WL 782596 at * 5 (S.D.N.Y. Mar. 24, 2008) (holding that Class counsel's request for one-third of the Fund is reasonable and "consistent with the norms of class litigation in this circuit.") (citations omitted); *Capsolas v. Pasta Res., Inc.*, No. 10-cv-5595 (RLE), 2011 WL 4760910 at *8 (S.D.N.Y. Oct. 5, 2012) ("The Court hereby grants Plaintiffs' Motion for Attorneys' Fees and awards Class Counsel \$1,750,000, which is one-third of the settlement fund."); *Zeltser v. Merrill Lynch & Co. Inc.*, No. 13 Civ. 1531(FM), 2014 WL 4816134, at *1, 8 (S.D.N.Y. Sept. 23, 2014) (awarding one-third of \$6.9 million maximum settlement); *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548, 2012 WL 1320124, at *10-11 (S.D.N.Y. Apr. 16, 2012) (awarding one-third of \$2.35 million settlement); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270(PAC), 2009 WL 5851465, at *4-5 (S.D.N.Y. Mar. 31, 2009) (awarding 33% of \$3.265 million settlement); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840(JSR), 2007 WL 2049726, at *2-3 (S.D.N.Y. July 16, 2007) (approving a 30% fee of \$65.87 million settlement); *Strougo ex rel Braz. Equity Fund, Inc. v. Bassini*, 258

F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (“a fee of 33 1/3% of the settlement fund is reasonable.”) (collecting cases).

The reasonableness of Counsel’s proposed fee is further confirmed by taking into account the value of the vouchers. Even if, for example, only 10,000 current clients of IJL (just 6% of a class of over 161,000 use the voucher), then the vouchers, which will not cost Class Members anything and which will not result in any profit to IJL, will be worth \$4,500,000. Combined with the \$4,750,000 Monetary Fund, Class Counsel’s fee would be well under 20% of the monetary value of the settlement – in fact under 17% – in addition to far reaching injunctive relief value obtained by the efforts of the Class Counsel. (Balestriere Decl. ¶¶ 9, 19.) The Fee is reasonable in relation to the Settlement.

6. Public Policy Favors Approval of the Fee

Public policy considerations weigh in favor of approval of Class Counsel’s Fee. The Second Circuit has repeatedly recognized that “private attorneys should be encouraged” to undertake the “risks required to represent those who would” otherwise be unprotected. *Maley*, 186 F. Supp. 2d at 374. “There is also commendable sentiment” in giving lawyers “sufficient incentive” to bring class action suits that “serve the public interest.” *See Goldberger*, 209 F.3d at 51. This Court’s decision will send a message to class action plaintiff and defense attorneys. If the Court grants the fee application, class action lawyers will be encouraged to stick with a tough case, or one with a defendant who fights at every turn and never is willing to settle, for years knowing that if they achieve a good result they will be rewarded for it. Conversely, if the Court denies or reduces the Fee, it will deter other plaintiffs’ counsel from going the distance. Instead, it will encourage

other counsel to settle early and obtain less relief for their class, rather than incur greater risks in search for a better recovery.

Additionally, Class Counsel has achieved a settlement that benefits the public at large. Relevant factors in “evaluating attorney’s fees awards” include “(1) the amount of work done; (2) the risk incurred; (3) the difficulty or complexity of the case; (4) the benefit to the class, and (5) the benefit to the public.” *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 487 (S.D.N.Y. 1998) (emphasis added). The Settlement reforms the practices of a company offering an in-demand service by forcing it to guarantee that it will honor clients’ preferences both publicly and in its contracts, avoids forcing IJL into bankruptcy and endangering the livelihood of its employees, and provides valuable relief to the Class. The Fee is reasonable in light of public policy considerations.

D. The Fee Is Reasonable Under Both the Lodestar and Percentage-of-Recovery Methods

1. The Lodestar Method: the Hourly Rates and Fees Were Reasonable in This More than Twelve-Year Old Action

Class Counsel’s Fee is reasonable under both the lodestar and percentage-of-recovery methods. The lodestar method, ascertains “the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate.” *Goldberger*, 209 F.3d at 47. Such amount may then be increased, at the discretion of the court, “by applying a multiplier based on ‘other less objective factors,’ such as the risk of the litigation and the performance of the attorneys.” *Id.* (internal citations omitted). The time and labor expended by Class Counsel entitles it to the Fee. Class Counsel has been diligently pursuing this litigation since 2007. Class Counsel spent thousands of hours

developing Plaintiffs' and the Classes' case against IJL. During this time, Class Counsel lawyers and staff have devoted over 10,100 hours of service generating over \$4,200,000 in fees for the zealous prosecution of this case. (Balestriere Decl. ¶¶ 19, 26.) The hours spent by Class Counsel on this litigation were calculated from daily time records consistently and contemporaneously maintained by Class Counsel lawyers and staff throughout the entirety of this litigation. (Affidavit of Marc Natale, dated Nov. 11, 2019, Ex. C; Balestriere Decl. ¶ 27.) All time spent on this litigation was necessary and was not duplicative. (Balestriere Decl. ¶ 29.) The lodestar was calculated by multiplying Class Counsel's hours by their current hourly rates, except that of John Balestriere, whose rate was calculated at his prior rate of \$690 per hour as such rate has been approved by another Southern District Judge. (Balestriere Decl. ¶ 30.)

The use of current as opposed to historical rates compensates for inflation and delay in payment. *Missouri v. Jenkins*, 491 U.S. 274, 282–84 (1989); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 589 n.10 (S.D.N.Y. 2008). In addition, Class Counsel's rates reflect the competitive market rates for national cases involving complex litigation as well as the reputation, experience, and success of the lawyers and firms involved. *Id.* at 589 n.11, 590 n.13.

Class Counsel's lodestar is reasonable. Indeed, a fee greater than the lodestar would also be reasonable. Courts routinely award large fees when attorneys have invested a substantial amount of time and effort on a wholly contingent basis, thereby assuming considerable risk. *See Shapiro*, 2014 WL 1224666, at *24. In such cases, "[c]ourts regularly award lodestar multipliers from 2 to 6 times lodestar." *Morris v. Affinity Health*

Plan, Inc., 859 F. Supp. 2d 611, 623 (S.D.N.Y. 2012). Some courts have awarded multipliers as high as eight or even more. *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013). “Lodestar multipliers of nearly 5 have been deemed ‘common’ by courts in this District.” *In re EHCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 Civ. 10240(CM), 2007 WL 2230177, at *17 n.7 (S.D.N.Y. July 27, 2007). Nevertheless, Class Counsel does not seek a lodestar increase at all, in fact its requested fee has an effective lodestar multiplier of less than .35. The lodestar method adequately demonstrates the reasonableness of the Fee.

2. The Percentage-of-Recovery Method: the Fee Request Is Reasonable Based on the More Than \$72 Million Voucher Settlement and the \$4.75 Million Cash Recovery

The percentage-of-recovery approach confirms that the Fee is reasonable. Under this method, “[t]he court sets” a “percentage of the recovery” as the fee; in determining “what percentage to award, courts have looked to the same” factors used to determine the “multiplier for the lodestar.” *Goldberger*, 209 F.3d at 47 (citation omitted). Even 5% of the total value achieved for the Classes – more than double the Fee – is at the lower end of the range typically awarded for non-“megafund” settlements. *See Board of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 Civ. 686(SAS), 2012 WL 2064907 at *2 (S.D.N.Y. June 7, 2012) (the court awarded a 25% fee); *see also Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming an award of a 30% fee); *Telik*, 576 F. Supp. 2d at 578 n.8, 595 (awarding a 25% fee and collecting multiple decisions awarding fees of 30 percent or higher). The Fee is reasonable pursuant to the percentage-of-recovery method.

V. CLASS COUNSEL'S EXPENSE REIMBURSEMENT REQUEST SHOULD BE APPROVED AS REASONABLE

Class Counsel requests a reimbursement of \$27,483.82 in taxable expenses and \$31,343.83 in other reasonable expenses, totaling \$58,827.65 as part of its award of attorneys' fees. (Balestriere Decl. ¶ 41.) These expenses include deposition expenses, travel expenses, and costs for services of process. "Courts typically allow counsel to recover their reasonable out-of-pocket expenses", even when those litigations are much shorter than twelve years. *Beckman*, 293 F.R.D. at 482. The expenses advanced by Class Counsel were reasonable and necessary to the litigation and should be reimbursed. Even "sizable" cost reimbursement requests are routinely approved where "Class Counsel have submitted" itemized declarations as to expenses, and such expenses are "of the type for which reimbursement is generally granted." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 272 (S.D.N.Y. 2012) (approving reimbursement of more than \$2,000,00 in expenses). Standard reimbursements include "computer research fees, copying costs, postage, court fees, travel expenses, and professional fees paid to counsels' damages expert and accountant." *In re Merrill Lynch Tyco Res. Sec. Litig.*, 249 F.R.D. 124, 144 (S.D.N.Y. 2008). Additional categories of fees routinely reimbursed include, "investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review." *In re Global Crossing*, 225 F.R.D. at 468.

The taxable expenditures made by Class Counsel during the prosecution of this action all fall within these categories. (See Itemized Taxable Expense Sheet for Class Counsel, November 8, 2019, Ex. F.) Other reasonable and necessary expenses likewise fall

into appropriate categories. (See Itemized Expense Sheet of Expenditures for Class Counsel, November 8, 2019, Ex. G.) The requested total expense reimbursement is equivalent to under \$470 per month over 127 months.

Class Counsel's requested reimbursement of expenses should be approved.

VI. THE REQUESTED SERVICE AWARDS FOR CLASS REPRESENTATIVES ARE REASONABLE AND SHOULD BE APPROVED

Class Counsel requests reasonable service awards for class representatives who have been involved in this action for years longer than typical class representatives. "Service awards are common in class action cases" and are routinely awarded "to compensate plaintiffs" for their "time and effort" "in assisting the prosecution" of the case, "the risks incurred . . . as a litigant," and "other burdens sustained" in litigation. *Beckman*, 293 F.R.D. at 483. Here, Class Representatives provided Class Counsel with the information necessary to pursue this case and willingly publicized details of their personal dating lives and their use of a dating service – an intimate detail that few people would willingly risk making public when this litigation commenced. Additionally, all Class Representatives have devoted a significant amount of time to the litigation over a period of at least eleven years for each Class Representative. Class Counsel corresponded monthly with all Class Representatives, sent them hundreds of emails, and held many in-person meetings, conference calls, and individual calls. (Dkt. No. 280 at 38.)

Under these circumstances, and especially in comparison to awards typically approved in other cases, the service awards of \$12,000 are modest and should be approved. See, e.g., *McReynolds v. Richards-Cantave*, 588 F.3d 790, 796 (2d Cir. 2009)

(affirming settlement under which three named plaintiffs received \$15,000 and four received \$10,000 while only injunctive relief and no damages were granted to the remainder of class members); *Beckman*, 293 F.R.D. at 483 (approving \$7,500 and \$5,000 service awards); *Morris*, 859 F. Supp. 2d at 624 (approving \$7,500 service award).

All of the class representatives have devoted significant time to the prosecution of this action. James Tortora and Janeen Cameron flew into New York for depositions. (Dkt. No. 283 ¶ 34.) Lisa Bruno and Brad Berkowitz appeared in-person for the all-day settlement negotiation mediated by Judge Netburn. (*Id.* ¶ 48.) James Tortora, Janeen Cameron, and Karen Malak-Rocush appeared by phone. (*Id.*) Notably, Berkowitz's involvement was crucial to this action. Berkowitz intervened after Rodriguez was dismissed from the action, thereby preserving the New York Class. (*Id.* ¶ 37.) The requested service fees are reasonable and should be approved.

VII. THE COURT SHOULD ALSO APPROVE PAYMENT OF ADMINISTRATIVE COSTS AND OTHER REASONABLY NECESSARY EXPENDITURES

Class Counsel also requests the Court's approval for payment of administrative costs and other reasonably necessary expenditures. The costs of administering the Settlement will be paid to Heffler from the Monetary Fund, and the final cost is anticipated to be \$250,000 and will be determined when all benefits have been distributed. (Balestriere Decl. ¶¶ 10, 22-23.) The cost of administering a common fund is routinely paid from the fund. *See In re Texaco, Inc. S'holder Litig.*, 20 F. Supp. 2d 577, 583 (S.D.N.Y. 1998) (The costs of suit, including attorneys' fees and the costs of administering the distribution plan were paid from the common fund.)

The Monetary Fund is expected to be sufficient to cover the costs of administration. These items are reasonably necessary costs of suit or settlement and should be approved for payment from the Monetary Fund. The requested costs are low for an action spanning over twelve years, and represent common and necessary expenses. Class Counsel's request for payment of expenditures and administrative costs should be approved.

CONCLUSION

The Court should award Class Counsel \$1,500,000 in attorneys' fees including \$58,827.65 for reimbursement of expenses incurred throughout the duration of this matter. The Court should likewise approve service awards in the amount of \$12,000 to each class representative, for a total of \$60,000. Lastly, the Court should approve (i) payments to third parties for claims administration, mediation, bank, and accounting services in connection with the original and revised settlements and (ii) reserves for the claims dispute resolution process. Class Counsel's fee application should be approved.

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New York, New York

Respectfully submitted,



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