UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SVETLANA SHOLOPA and MILICA MILOSEVIC, on behalf of themselves and all others similarly situated, Plaintiffs, v. TURK HAVA YOLLARI A.O. (d/b/a Turkish Airlines, a foreign corporation), and TURKISH AIRLINES, INC., a New York Corporation Defendants.	Case No. 1:20-cv-03294-ALC Hon. Andrew L. Carter

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

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Plaintiffs Svetlana Sholopa and Milica Milosevic ("Plaintiffs"), by and through their undersigned counsel, Bursor & Fisher, P.A. and Liddle Sheets Coulson P.C. ("Class Counsel"), respectfully submit this memorandum in support of Plaintiffs' Motion for Award of Attorneys' Fees, Costs and Expenses and Incentive Awards.

INTRODUCTION

Plaintiffs represent a Settlement Class of all United States residents who purchased airline tickets from Defendants Turk Hava Yollari A.O. (d/b/a Turkish Airlines) and Turkish Airlines, Inc. (collectively, "Turkish" or "Defendants") for travel on a Turkish flight scheduled to operate to, from, or within the United States during the Class Period,[1] but whose flights were cancelled due to the COVID-19 pandemic. Plaintiffs allege Turkish failed to provide Plaintiffs and other Settlement Class members with refunds for their canceled flights. *See generally* Consolidated Class Action Complaint ("CAC").

Turkish was not alone: virtually every domestic and international airline was sued over their failure to provide customers with refunds for pandemic-related cancelled flights. Many of these other lawsuits did not make it off the tarmac. *See*, *e.g.*, *Daversa-Evdyriadis v. Norwegian Air Shuttle ASA*, 2020 WL 5625740, at *6 (C.D. Cal. Sep. 17, 2020) (MTD granted). A few survived the pleadings, but even those were trimmed to focus only on interest damages stemming from the delay in issuing refunds. *Maree v. Deutsche Lufthansa AG*, 2021 WL 267853, at *6 (C.D. Cal. Jan 26, 2021). And, three years after the onset of the COVID-19 pandemic, not one COVID-19 related flight refund case has resulted in a court granting a contested class certification motion.

[1] All capitalized terms are defined as they are in the Settlement Agreement ("Settlement" or "Agreement"), which is attached as Exhibit 1 to the Declaration of Yeremey O. Krivoshey (the "Krivoshey Decl.").

Because of Plaintiffs' and Class Counsel's laudable efforts—and with the assistance of the Honorable Wayne R. Andersen (Ret.), formerly a district judge for the Northern District of Illinois and now with JAMS—the parties have reached a Class Action Settlement (that provides tremendous relief for Settlement Class Members. In fact, Settlement Class Members in this case are set to receive virtually all, if not more, of what they could hope to achieve *at trial*. The Settlement—preliminarily approved by this Court on April 4, 2023—provides that Settlement Class Members who have already received a refund for their flights (the "Refunded Claimants") may elect to receive $10 in cash or a $45 voucher that can be used on any Turkish flight. Settlement ¶ III.A. The $10 cash payments and $45 vouchers are capped at $1 million. *Id*. § III.B. Settlement Class Members who have not to date received a refund from Turkish (the "Nonrefunded Claimants") may submit a claim for a *full* refund, *plus* one percent (1%) of their unused ticket price, or in the case of partially used tickets, one percent (1%) of the price of the unused flight segment. *Id*. ¶ III.D.2. $13,011,083.92 remains due and owing to these Settlement Class Members, in addition to $130,119.84 in interest under the Settlement, for a total of $13,141,194.76. *See* Krivoshey Decl. ¶ 18. The availability of the full refunds plus interest is not capped in the Settlement, and any attorneys' fees and costs, incentive awards, and notice and administration costs are to be *paid separately and in addition to* the relief to the Refunded and Nonrefunded Claimants. Settlement ¶¶ III.C.1-C.4. Thus, the Settlement makes roughly $14.1 million in benefits available to Class Members, with any awards of attorneys' fees and costs, incentive awards, and notice and administration costs paid separately. Krivoshey Decl. ¶ 20.

In light of this exceptional result, Plaintiffs respectfully request pursuant to Federal Rule of Civil Procedure 23(h) that the Court approve an award of attorneys' fees, costs, and expenses of $900,000 (approximately 6.38% of the value of the Settlement), and incentive awards of $3,500

to each Plaintiff for their service as class representatives. For these reasons, and as explained further below, this Court should approve the requested fees, costs, expenses, and incentive awards.

FACTUAL AND PROCEDURAL BACKGROUND

On April 27, 2020, Plaintiff Sholopa, through her counsel, Bursor & Fisher, P.A., filed a putative class action in the United States District Court for the Southern District of New York against Turkish for, *inter alia*, breach of contract, alleging that Turkish failed to refund Plaintiff Sholopa and similarly situated passengers for her cancelled flight in violation of Turkish's General Conditions of Carriage ("GCC") (ECF No. 1). A day later, Plaintiff Milosevic, through her counsel, Liddle Sheets Coulson, P.C., filed a putative class action against Turkish alleging the same claims. *Milosevic v. Turk Hava Yollari A.O., Inc., et al.*, Case No. 1:20-cv-03328, ECF No. 1 (S.D.N.Y. Apr. 28, 2020). On May 20, 2020, Plaintiff Sholopa filed a Notice of Related Case stating that the instant action was related to Plaintiff Milosevic's action (ECF No. 6). On June 29, 2020, this Court deemed the two cases to be related, and on October 23, 2020, Plaintiffs filed a Consolidated Class Action Complaint ("CAC") against Turkish (ECF No. 37). On November 13, 2020, Turkish filed a Motion to Dismiss the CCAC (ECF No. 38). Briefing on this motion was completed on January 8, 2021 (ECF Nos. 43, 44). On March 31, 2022, the Court denied Turkish's Motion to Dismiss in its entirety (ECF No. 57). The Court thereafter set a status conference for April 12, 2022 (ECF No. 58).

On April 8, 2022, in preparation for the status conference, counsel for the Parties met and conferred pursuant to Fed. R. Civ. P. 26(f). Krivoshey Decl. ¶ 9. The Parties discussed interest in a class-wide resolution of this action. *Id*. At the status conference, the Parties informed the Court that they intended to pursue settlement negotiations with the assistance of a private mediator. *Id.*; *see also* ECF No. 60. In advance of the mediation, the Parties prepared mediation statements that

were provided to Judge Andersen. *Id*. ¶ 10. The Parties also exchanged information relevant to their claims and defenses, including (i) the number of passengers whose flights had been cancelled by Turkish as a result of the COVID-19 pandemic, (ii) the amount of money that Turkish had refunded in either cash or vouchers for flights that were cancelled as a result of the COVID-19 pandemic, (iii) the amount of money Turkish had not refunded for flights that were cancelled as a result of the COVID-19 pandemic, (iv) the amount of money in vouchers that had been claimed by passengers whose flights were refunded, and (v) Plaintiffs' attempts to contact Turkish to request a refund. *Id*. ¶ 11. This is largely the same information that would have been produced had the case proceeded to formal discovery. *Id*. Accordingly, the Parties were sufficiently informed at the time of the mediation of the strengths and weaknesses of their respective positions, the size of the putative class, and the damages at issue to negotiate a reasonable settlement. *Id*.

On August 9, 2022, the Parties attended a full-day mediation with the Honorable Wayne R. Andersen of JAMS. *Id*. ¶ 12. While the Parties did not completely resolve the matter at the mediation, the Parties continued to negotiate a settlement in good faith and with the assistance of Judge Andersen. *Id*. By the end of September 2022, the Parties had come to an agreement on all material terms, and executed a term sheet for a nationwide class settlement on November 3, 2022. *Id*.

On December 20, 2022, the Parties entered into a Settlement Agreement and Release, which sets forth the terms and conditions of the proposed Settlement and the dismissal of the Litigation against Turkish with prejudice. Krivoshey Decl. Ex. 1. That same day, Plaintiffs filed a motion for preliminary approval of the Settlement (ECF No. 75).

On April 4, 2023, the Court granted preliminary approval of the Settlement (ECF No. 86). On April 19, 2023, the Court extended the Settlement deadlines to allow Turkish to compile Class

Member data so that notice could be provided to the Settlement Class (ECF No. 88). During and since that time, Class Counsel has worked with the Settlement Administrator, JND Legal Administration ("JND"), to administer the Notice Plan. *Id.* ¶¶ 14-15, 31.

SUMMARY OF THE SETTLEMENT

Class Counsel's efforts resulted in an outstanding settlement. The Settlement provides approximately $14.1 million in value to all Settlement Class Members. Krivoshey Decl. ¶ 20.

First, for the Nonrefunded Claimants, the Settlement provides that they shall have the ability to claim a full refund for any canceled flight, as well as 1% of their ticket price (i.e., a 101% refund). Settlement ¶ III.D. The total value of this portion of the Settlement is $13,141,194.76. Krivoshey Decl. ¶ 17. The valid claims of Nonrefunded Claimants will not be capped in any way by the Settlement. Settlement ¶ III.C.1. Class Counsel estimates the average payment to these Settlement Class Members to be approximately $292.77. Krivoshey Decl. ¶ 18. This portion of the Settlement—$13.1 million—meets if not exceeds what these Settlement Class Members would have procured at trial (full refunds) and thus represents at least 100% of Turkish's potential exposure at trial. *Id*.

Second, the Settlement provides that Defendants shall pay up to $1 million for the Refunded Claimants. Settlement ¶ III.A. The Refunded Claimants shall have the option to submit a Claim Form providing for either (i) the Cash Option: $10 per person; or (ii) the Voucher Option: a Voucher for future travel in the amount of $45 USD. Settlement ¶ III.A. This portion of the Settlement represents an 80% recovery, even with the Settlement Cap. Krivoshey Decl. ¶ 19.

Subject to approval by the Court, Turkish has agreed to pay Class Counsel reasonable attorneys' fees and to reimburse expenses in this action. Settlement ¶ IX.A. Class Counsel has agreed to petition the Court for no more than $900,000 in attorneys' fees, costs, and expenses. *Id*.

In recognition for their efforts on behalf of the Settlement Class, Turkish has agreed that Plaintiffs may receive, subject to Court approval, incentive awards of $3,500 each as appropriate compensation for their time and effort serving as Class Representatives and as parties to the Litigation. Settlement ¶ IX.H. Any attorneys' fees, costs, and expenses, incentive awards, and notice and administration costs shall be paid separately from the monetary value of all cash awards paid to Class Members. *Id.* ¶ IX.B.

ARGUMENT

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

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). Here, Class Counsel's fee request of $900,000, which represents approximately 6.38% of the $14.1 million value of the Settlement, is reasonable considering the relief provided to the Settlement Class.[2] Settlement ¶ V.C; Krivoshey Decl. ¶ 20. This percentage is well below the one-third benchmark used in this Circuit under the percentage-of-the-recovery method—which the Court

[2] The requested fee award also encompasses unreimbursed litigation expenses. Settlement ¶ V.C. Reasonable litigation-related expenses are customarily awarded in class action settlements 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."). Here, Class Counsel spent $18,673.09 in costs and expenses prosecuting this matter. Krivoshey Decl. ¶ 46; *see also id.* Exs. 4-5 (itemized list of Class Counsel's costs and expenses). These expenses consist primarily of mediation fees and travel expenses for hearings, as well as other reasonably necessary expenses such as filing fees, e-discovery costs, transcript costs, and so forth. Krivoshey Decl. ¶¶ 44-46; *see also id.* Exs. 4-5. Because these expenses were reasonably necessary and not excessive, they should be allowed in full. *See* Krivoshey Decl. ¶¶ 44-46.

should employ—and should be approved as such. Alternatively, the requested Attorneys' Fees and Expenses award is reasonable under the lodestar method.

A. The Percentage Method Should Be Used To Calculate Fees

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). However, "[t]he trend in the Second Circuit is to use the percentage of the fund method … as it directly aligns the interests of the class and its counsel, mimics the compensation system actually used by individual clients to compensate their attorneys, provides a powerful incentive for the efficient prosecution and early resolution of litigation, and preserves judicial resources." *Monzon v. 103W77 Partners, LLC*, 2015 WL 993038, at *2 (S.D.N.Y. Mar. 5, 2015). "In fact, the 'trend' of using the percentage of the fund method to compensate plaintiffs' 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); *see also GB ex rel NB v. Tuxedo Union Free School Dist.*, 894 F. Supp. 2d 415, 427 (S.D.N.Y. 2012) (noting "courts in the Second Circuit no longer use the 'lodestar' method for computing attorneys' fees" in fee-shifting cases) (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182 (2d Cir. 2008)).

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, over a decade ago, the Second Circuit 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; *see also 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 'creative a disincentive to early settlement' … is appropriate.") (citing *McDaniel*, 595 F.3d at 418); *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 Court should employ the percentage-of-the-recovery method.

B. The Reasonableness Of The Requested Fees Under The Percentage-Of-The-Fund Method 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. A review of these factors supports Class Counsel's fee request.

1. Time And Labor Expended By Counsel

Since Class Counsel began investigating this matter on or about April 2020, Counsel has devoted 443.3 hours to the successful pursuit of this matter. Krivoshey Decl. ¶ 30; *see also id.* Exs. 2-3 (billing records for Bursor & Fisher and Liddle Sheets Coulson). Class Counsel's dedication to this matter and expenditure of substantial time, effort, and resources has brought this complex litigation to a successful resolution.

Class Counsel's work included, *inter alia*:

i. identifying and investigation Plaintiffs' potential claims and that of the Settlement Class pre-suit, and aggressively pursuing those claims;

ii. drafting the initial Complaint, First Amended Complaint, and Consolidated Complaint;

iii. briefing and defeating Defendants' Motion to Dismiss;

iv. meeting and conferring with defense counsel regarding discovery and a case management schedule, and drafting a Fed. R. Civ. P. 26(f) report;

v. attending a Fed. R. Civ. P. 16 conference;

vi. holding numerous calls with defense counsel regarding settlement;

vii. drafting a mediation statement, participating in a full-day mediation with the Honorable Wayne Andersen of JAMS on August 9, 2022, and continuing to discuss settlement over the next several months with the assistance of Judge Andersen;

viii. successfully moving for Preliminary Approval of the Settlement; and

ix. communicating with the Claims Administrator regarding implementation of the Notice Plan and sorting out issues with the class data.

See Krivoshey Decl. ¶¶ 4-17.

Further, Class Counsel's work in this litigation is far from over. On the contrary, Class Counsel will commit significant ongoing time and resources to this litigation, specifically related to administering the Settlement and responding to class member inquiries concerning the claims process. Krivoshey Decl. ¶ 42. Based on Class Counsel's experience in other cases, this ongoing work will likely involve approximately 50-75 total additional hours. *Id*. This additional work should be accounted for as well. *See Roberts v. TJX Companies, Inc.*, 2016 WL 8677312, at *13 (D. Mass. Sept. 30, 2016) (awarding one-third and noting that class counsel has "already committed, and anticipate continuing to commit, additional time to the administration of the claims."). Thus, this factor favors the fee request.

2. Magnitude And Complexity Of The Litigation

The complex nature of this litigation further favors the requested fee award. "[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) (cleaned up); *see also Shapiro v. JPMorgan Chase 7 Co.*, 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) ("It is well settled that class actions are notoriously complex and difficult to litigate.") (cleaned up). Indeed, as Judge McMahon has observed, "[t]he federal courts have established that a standard fee in complex class

action cases … where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit," and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez v. Novartis Pharm. Corp*., 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010).

Through more than three years of litigation, Class Counsel (i) conducted extensive pre-suit investigation into Turkish's refund practices (or lack thereof) during the COVID-19 pandemic; (ii) drafted the initial Complaint, First Amended Complaint, and Consolidated Class Action Complaint; (iii) briefed and prevailed on Defendants' Motion to Dismiss; (iv) reviewed extensive discovery produced both prior to and after Plaintiffs executed the Settlement; (v) attended a full-day mediation with the Honorable Wayne Andersen (Ret.) of JAMS; (vi) negotiated the Settlement; (vii) successfully moved for preliminary approval; and (viii) managed the dissemination of notice and the claims process. Krivoshey Decl. ¶¶ 4-17.

As discussed above, Plaintiffs also successfully litigated a motion to dismiss which was a hard-won victory. This lawsuit is one of the few actions against airlines stemming from COVID-19-related flight cancellations to get off the ground unscathed (*i.e.*, without a complete dismissal or a reduction in damages from full refunds to interest on the delay in issuing a refund). The next steps in the litigation would presumably have been depositions of the Parties, substantial electronically stored information discovery, and contested motions for summary judgment and class certification, creating a risk that a litigation class would not be certified and/or that the Settlement Class would recover nothing at all. Krivoshey Decl. ¶¶ 26-29. The work performed by Class Counsel in this complex litigation represents the highest caliber of legal work and strongly supports the requested fee.

3. The Risk Of Litigation

To date, Class Counsel has worked for three years with no payment, and no guarantee of payment absent a successful outcome. That in itself presented considerable risk. This factor recognizes the risk of non-payment in cases prosecuted on a contingency basis where claims are not successful, which can justify higher fees. *See*, *e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) (noting risk of non-payment in cases brought on contingency basis).

"Here, while Plaintiffs and Class Counsel believe that they would prevail on their claims asserted against [Turkish], they also recognize the risks and uncertainties inherent in pursuing the action through class certification, summary judgment, trial, and appeal." *Lowe v. NBT Bank, N.A.*, 2022 WL 4621433, at *8 (N.D.N.Y. Sept. 30, 2022). In particular, Plaintiffs would face "[t]he risk of obtaining … class certification and maintaining [it] through trial," which "would likely require extensive discovery and briefing." *Beckman v. KeyBank*, 293 F.R.D. 467, 475 (S.D.N.Y. 2013). Indeed, in presiding over another COVID-19 airline cancellation case, a judge opined that "the existence of condition precedents may raise individual determinations as to whether each class member provided sufficient proof to be entitled to a refund." *Maree v. Deutsche Lufthansa AG*, 2023 WL 2563914, at *10 (C.D. Cal. Feb. 13, 2023). And "[e]ven assuming that the Court granted certification, there is always the risk of decertification after the close of discovery." *Lowe*, 2022 WL 4621433, at *8; *see also Flores v. CGI Inc.*, 2022 WL 13804077, at *8 (S.D.N.Y. Oct. 21, 2022) ("The risks attendant to certifying a class and defending any decertification motion supports approval of the settlement."). Approval of the Settlement obviates the "[r]isk, expense, and delay" of further litigation, and thus supports preliminary approval. *Lowe*, 2022 WL 4621433, at *8.

In addition, this lawsuit was among the initial wave of lawsuits against airlines seeking refunds for cancelled flights due to the COVID-19 pandemic. While these lawsuits in theory rested on archaic and well-founded principles of contract law, their application to the unprecedented circumstances of the COVID-19 pandemic was entirely novel. That application saw minimal success, as discussed in the introduction. *See*, *e.g.*, *Daversa-Evdyriadis*, 2020 WL 5625740, at *6 (MTD granted). Only a few survived the pleadings, and some of those were trimmed to focus on interest damages stemming from the delay in issuing refunds. *Maree*, 2021 WL 267853, at *6. To Class Counsel's knowledge, after more than three years of litigation, *not one* COVID-19 related flight refund case has resulted in a court granting a contested class certification motion. Krivoshey Decl. ¶ 24. In other words, Class Counsel expended substantial time and money to prosecute a class action suit with no guarantee of compensation or reimbursement of its expenses, and where few firms other than Class Counsel have actually secured relief for passengers.

Further, Turkish is represented by highly skilled and well-paid lawyers from Norton Rose Fulbright US LLP. These lawyers vigorously represented their client, challenged Plaintiffs' claims, and sought to obtain a defense verdict and deprive the Settlement Class of any recovery. Krivoshey Decl. ¶ 23; *see also In re Warner Commc'ns Sec. Litig.,* 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work.")

In sum, given the serious risks Plaintiffs would have faced at class certification and beyond, the novelty of the claims pursued here, the minimal success similar lawsuits have seen, and the sophisticated opposing counsel representing Turkish, Class Counsel's fee request is more than justified.

4. The Quality Of Representation

Class action litigation presents unique challenges and, by achieving an exceptional

settlement, Class Counsel proved that they have the ability and resources to litigate this case zealously and effectively. Class Counsel has been recognized by courts across the country for its expertise, including this Court. *See* Krivoshey Decl. Exs. 2-3 (Firm Resumes of Bursor & Fisher and Liddle Sheets Coulson); *see also Mogull v. Pete and Gerry's Organics, LLC*, 2022 WL 4661454, at *2 (S.D.N.Y. Sept. 30, 2022) (Briccetti, J.) ("Bursor & Fisher … has represented other plaintiffs in more than one hundred class action lawsuits, including several consumer class actions that proceeded to jury trials in which Bursor & Fisher achieved favorable results for the plaintiffs."); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 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 [now six] class action jury trials since 2008."); *McKnight v. Uber Techs., Inc.*, 2017 WL 3427985, at *8 (N.D. Cal. Aug. 7, 2017) (appointing Nicholas Coulson as class counsel).

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 Demutalization 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 highly experienced defense counsel. *See In re Marsh ERISA 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 attorneys' fees, costs, and expenses of $900,000. "District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez*, 2010 WL

4877852, at *21. Further, under Second Circuit precedent, Class Counsel's fees must be measured against the relief *made available* to Class Members, not the relief actually claimed. *Masters v. Wilhelmia 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, whether claimed or not."). This applies to both common fund settlement and claims made settlements. *See, e.g.*, *Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 5 (2d Cir. 2013) (calculating fee award "'on the basis of the total funds made available' … *i.e.*, as if it were a common settlement fund" (quoting *Masters*, 473 F.3d at 437)); *Zink v. First Niagara Bank, N.A.*, 2016 WL 7473278, at *7-8 (W.D.N.Y. Dec. 29, 2016) (finding "the weight of authority" holds that attorneys' fees should be based on the amount made available, not the amount actually claimed).

Here, the requested attorney's fees, costs, and expenses ($900,000) represent approximately 6.38% of the cash value of the Settlement (~$14.1 million), well below the Second Circuit's benchmark for fees. *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *16 (S.D.N.Y. Sept. 9, 2015) ("[T]he requested fee represents less than 10% of the total gross value of the Settlement, which is *far below* the mainstream of percentage awards in this Circuit.") (emphasis in original). Class Counsel's fees are also being paid separately from and in addition to any relief due to Settlement Class Members and will therefore not derogate in any way from the relief provided to the Settlement Class. Settlement ¶ IX.B. This factor thus 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 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 v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *7 (E.D.N.Y. Nov. 20, 2012) (citing *Goldberger*, 209 F.3d at 51). Thus, society undoubtedly has a strong interest in incentivizing lawyers to bring complex litigation that is necessary to protect consumer rights, particularly where it is unlikely that the Class Members will pursue litigation on their own for economic or personal reasons.

Here, public policy considerations also favor Class Counsel's fee request. Even amidst the COVID-19 pandemic, the Department of Transportation emphasized "U.S. and foreign airlines remain obligated to provide a prompt refund to passengers for flights to, within, or from the United States when the carrier cancels the passenger's scheduled flight or makes a significant schedule change and the passenger chooses not to accept the alternative offered by the carrier." CAC ¶ 6 (emphasis removed).[3] Class Counsel has secured exactly that relief, providing for full refunds plus interest for Settlement Class Members who have not received one and whose flights were cancelled due to COVID-19, and for what are essentially interest payments for Settlement Class Members who received delayed refunds. Public policy clearly supports Class Counsel's fee request given they secured the relief the DOT requires airlines to provide.

II. 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

[3] *See also* DEP'T OF TRANSP., U.S DEPARTMENT OF TRANSPORTATION ISSUES ENFORCEMENT NOTICE CLARIFYING AIR CARRIER REFUND REQUIREMENTS, GIVEN THE IMPACT OF COVID-19 (Apr. 3, 2020), https://www.transportation.gov/briefing-room/us-department-transportation-issues-enforcement-notice-clarifying-air-carrier-refund.

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 ("[U]nder 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.") (cleaned up).

The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, *i.e.*, the "market rate." *See Blum*, 465 U.S. at 895; *see also Luciano v. Olsten Corp.*, 109 F.3d 111, 115-116 (2d Cir. 1997) ("The 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation'") (alteration in original and citation 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* Krivoshey Decl. ¶¶ 47-50.[4]

[4] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274,

The hours worked, lodestar, and expenses for Class Counsel are set forth in the Krivoshey Declaration, submitted herewith. These records confirm Class Counsel's efficient billing, by, for example, striving to assign as much work as possible to more junior lawyers or paralegals who bill at lower hourly rates in order to minimize the fees for the Class. *See* Krivoshey Decl. Exs. 2-3. Thus, even under the optional lodestar cross check, Class Counsel's requested fees are reasonable given the unique circumstances of this case. Specifically:

- Class Counsel obtained an excellent Settlement, which will result in class members receiving a substantial amount of money.
- 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 (*see* Argument § I.B.3, *supra*).
- Class Counsel devised a litigation and settlement strategy that factored in the complex and uncertain nature of the case.

In total, through June 29, 2023, Class County has devoted 443.3 hours to prosecuting this litigation. *See* Krivoshey Decl. ¶ 40. Class Counsel's aggregate lodestar is $266,987.50, with a blended hourly rate of $602.27, which other courts have found reasonable. *Id.*; *see also Perez v. Rash Curtis & Associates*, 2020 WL 1904533, at *20 (N.D. Cal. Apr. 17, 2020) (concluding Bursor & Fisher's "blended rate of $634.48 is within the reasonable range of rates"). Therefore, the requested fee award represents a multiplier of approximately 3.37, which is well within the accepted range in this Circuit. *See Asare v. Change Grp. of N.Y., Inc.*, 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *In re*

283-84 (1989) (recognizing "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise"); *LeBlanc-Sternberg v. Fletcher,* 143 F. 3d 748, 764 (2d Cir. 1998) ("The lodestar should be based on 'prevailing market rates' … and current rates, rather than historical rates, should be applied in order to compensate for the delay in payment.") (citation omitted).

Columbia University Tuition Refund Action, Case No. 20-cv-03208-JMF, ECF No. 115 at ¶ 10 (S.D.N.Y. Mar. 29, 2022) (approving attorneys' fees of one-third of $12.5 million common fund, representing 4.3 times multiplier on Class Counsel's regular hourly rates); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013) (approving attorneys' fees of 33% of a $4.9 million common fund, representing a 6.3 times multiplier on Class Counsel's regular hourly rates); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (approving attorneys' fees of $253,758,000, which reflected a "lodestar multiplier of just over 6").

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*, 2016 WL 1222347, at *3 ("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.").

As mentioned previously, while this lawsuit rested on well-established contract law principles, its application to the unprecedented circumstances of the COVID-19 pandemic was entirely novel, and many similar lawsuits were dismissed out of hand in court. *See*, *e.g.*, *Daversa-Evdyriadis v. Norwegian Air Shuttle ASA*, 2020 WL 5625740, at *6 (C.D. Cal. Sep. 17, 2020) (MTD granted). Others were trimmed to focus on interest damages stemming from the delay in issuing refunds. *Maree*, 2021 WL 267853, at *6 (C.D. Cal. Jan 26, 2021). And, three years after

the onset of the COVID-19 pandemic, to Class Counsel's knowledge, no court has certified a contested motion for class certification in any COVID-19 related flight refund case. Krivoshey Decl. ¶ 24.

Class Counsel's lodestar multiplier is also reasonable because it will decrease over time given the additional hours Class Counsel will likely spend on this litigation going forward. *See* Krivoshey Decl. ¶ 42. "[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 re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 746 F. App'x. 655, 659 (9th Cir. 2018) ("The district court did not err in including projected time in its lodestar cross-check; the court reasonably concluded that class counsel would, among other things, defend against appeals and assist in implementing the settlement."); *Perez*, 2020 WL 1904533, at *19-20 (concluding that expected future hours should be counted towards lodestar cross-check and applying same). Specifically, as noted above, Class Counsel expects to bill another 50-75 hours on this matter. Krivoshey Decl. ¶ 42. At Class Counsel's blended hourly rate, this would push Class Counsel's lodestar to between $297,101-$312,157.75. *Id*. This higher lodestar would reduce Class Counsel's requested multiplier to between 2.88-3.03.

In sum, Class Counsel's efforts in this case resulted in an exceptional settlement of a complex and uncertain case. Class Counsel should be rewarded for achieving this result.

III. THE REQUESTED INCENTIVE AWARD REFLECTS PLAINTIFFS' 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 Group, 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 Plaintiffs was critical to the ultimate success of the case. *See* Krivoshey Decl. ¶¶ 58-60. Plaintiffs spent significant time protecting the interests of the class through their involvement in this case. *Id*. Plaintiffs assisted Class Counsel in investigating their claims by providing information necessary to draft and file the Complaint, First Amended Complaint, and Consolidated Complaint. *Id*. During this litigation spanning three years, Plaintiffs kept in regular contact with their lawyers to receive updates on the progress of the case and to discuss strategy and settlement. *Id*.

On these facts, the $3,500 incentive payments to each Plaintiff—which are being paid "separate and apart from any relief provided to the Class" (Settlement ¶ V.A)—are appropriate considering the efforts made by Plaintiffs to protect the interests of the other Settlement Class members, the time and effort they expended pursuing this matter, and the substantial benefit they helped achieve for the other Settlement Class members. Further, the incentive awards are reasonable and equivalent to awards approved by other courts in this Circuit, and. *See*, *e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2018 WL 3863445, at *2 (S.D.N.Y. Aug. 14, 2018) (approving incentive awards of $25,000); *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 service awards of $3,500 each amount to 0.02% of the total value of the Settlement.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court (i) approve an award of attorneys' fees, costs, and expenses of $900,000; (ii) grant Plaintiffs incentive awards of $3,500 each in recognition of their efforts on behalf of the Class; and (iii) award such other and further relief as the Court deems reasonable and just.

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Respectfully submitted,

By: */s/ Max S. Roberts*
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