UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOLLY WINSTON, on behalf of herself and all others similarly situated, Plaintiff, v. PEACOCK TV LLC, Defendant.	Civil Action No.: 1:23-cv-08191-ALC Hon. Andrew L. Carter, Jr.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Dated: July 11, 2024

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

In this putative class action, Plaintiff Holly Winston ("Plaintiff") alleges that Defendant Peacock TV LLC ("Defendant" or "Peacock") has failed to comply with California's Automatic Renewal Law ("ARL"), Cal. Bus. & Prof. Code §§ 17600, *et seq*., which imposes detailed information, notice, and consent requirements on businesses that make automatic renewal or continuous service offers to California consumers. Plaintiff now moves for preliminary approval of the class action settlement in this case. The Settlement Agreement (hereafter, the "Settlement") and its exhibits are attached as Exhibit 1 to the concurrently-filed Declaration of Neal J. Deckant ("Deckant Decl.").

The settlement at hand consists of an all-cash, non-reversionary "common fund" in the amount of $3,742,637.14 (the "Settlement Fund"). *See* Deckant Decl., Ex. 1 ("Settlement Agreement"), Definitions ¶ 1.39. Settlement Class Members who submit a timely and valid claim will receive a *pro rata* portion of the $3,742,637.14 Settlement Fund, following the deduction of notice and claims administration costs, attorneys' fees and expenses, and a class representative incentive payment. *Id.* ¶¶ 2.1(a)-(b), 8.1, 8.3. Plaintiff seeks to represent a class comprised of "all Persons who, from September 15, 2019, to and through February 27, 2024, enrolled in an automatically renewing Peacock Subscription directly through Peacock using a California billing address, and who were charged and paid Renewal Fees in connection with such subscription(s)" (the "Settlement Class"). *Id*. ¶ 1.37.

Defendant vigorously denies the allegations, and continued litigation poses risks to Plaintiff and the class whom she seeks to represent. Absent settlement, the parties would engage in costly discovery, and Defendant would oppose class certification, move for summary

judgment, litigate the case at trial, and appeal any victory for Class Members. Victory for the Defendant at any one of those steps would deprive putative class members of any relief.

The parties conducted a full-day mediation session on March 11, 2024 with Judge Diane M. Welsh (Ret.) of JAMS, and conducted months of follow-up settlement discussions as they formulated the Settlement Agreement. These efforts resulted in a settlement that provides substantial monetary benefits to the proposed Class. This is an outstanding recovery, particularly taking into account the risks to Plaintiff and putative class members going forward. Despite these risks, the Settlement Agreement provides over **$3 million** in cash to Class Members.

The Court should have no hesitation finding that the Settlement falls within the range of possible approval. For the reasons set forth below, the settlement is fair and reasonable, and warrants preliminary approval. Defendant does not oppose this motion. Accordingly, Plaintiff respectfully requests that the Court (1) grant preliminary approval of the proposed Settlement; (2) conditionally certify the settlement class under Fed. R. Civ. P. 23(b)(3) in connection with the settlement process; (3) appoint Bursor & Fisher, P.A. and Gucovschi Rozenshteyn, PLLC as Class Counsel; (4) appoint Plaintiff Winston as the Class Representative for the Settlement Class; (5) approve the Notice Plan described in the Settlement and direct its distribution; and (6) schedule a hearing for final approval.

FACTUAL AND PROCEDURAL BACKGROUND

A. California's Automatic Renewal Law

On December 1, 2010, the California Legislature enacted the Automatic Renewal Law ("ARL") under California Senate Bill 340 with the intent to "end the practice of ongoing charging of consumer credit or debit cards or third-party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service." *See* Class Action Complaint (Dkt. 1) ("Complaint") ¶ 28 (citing statement of

legislative intent). The ARL's core requirements are that: (1) businesses must clearly and conspicuously disclose automatic renewal terms of any offer, as defined by the statute; (2) they must obtain a consumer's affirmative consent; and (3) they must provide consumers with an acknowledgment containing the terms of the automatically renewing offer and cancellation information. *See id.* ¶ 29.

B. Plaintiff's Allegations

Defendant Peacock TV LLC is a video streaming service that, among other things, markets, advertises, and sells paid "Premium" and "Premium Plus" subscription plans for products and services under the Peacock TV brand name (the "Peacock Subscriptions"). *Id.* ¶¶ 1-2. Plaintiff alleges that when consumers sign up for a Peacock Subscription through the Peacock Website or App, Defendant enrolls consumers in an automatically renewing subscription that results in recurring monthly or annual charges to the consumer's payment method. *Id.* ¶ 1. Plaintiff further alleges that Defendant engages in this autorenewal scheme without first providing California consumers the requisite disclosures and authorizations required under the ARL. *Id.* Furthermore, Plaintiff alleges that every violation of the ARL constitutes an "unlawful" practice under the UCL and FAL. *Id.* ¶¶ 8, 65; *see also id.* ¶¶ 83-96, 103-111. Plaintiff also brought claims against Defendant for conversion, unjust enrichment / restitution, negligent misrepresentation, and fraud. *Id.* ¶¶ 8, 65, 97-102, 112-116, 117-124, and 125-129.

Plaintiff filed her class action lawsuit on September 15, 2023. After Plaintiff filed her Complaint, the Parties engaged in a Rule 26(f) planning conference and a Rule 16 scheduling conference. Then, on November 13, 2023, Defendant filed a Letter Motion for Extension of Time to File an Answer, requesting, with Plaintiff's consent, an extension of Peacock's November 27, 2023 deadline to respond to Plaintiff's complaint up to and including January 8,

2024. *See* Dkt. 8. This Court granted Defendant's request on November 21, 2023. *See* Dkt 9. Shortly thereafter, the parties agreed to mediate their claims.

C. The Mediation

From the outset of the case, the Parties engaged in direct communications regarding early resolution as required by Fed. R. Civ. P. 26, which ultimately led to a mediation before Judge Diane M. Welsh (Ret.), an experienced neutral affiliated with JAMS, on March 11, 2024. *See* Deckant Decl. ¶ 6. In the months leading up to the mediation, the Parties were in regular communication with each other and with Judge Welsh, as the Parties sought to crystallize the disputed issues, produce focused information and data, and narrow potential frameworks for resolution. *Id.* Prior to the mediation, the Parties exchanged briefing on the key facts, legal issues, litigation risks, and potential settlement structures, and the Parties supplemented that briefing with emails and telephonic correspondence to clarify their positions. *Id.* Further, during this period and in connection with the mediation proceeding, the Parties exchanged informal discovery, including on issues such as the size and scope of the putative class. *Id.* This information was sufficient for the Parties to assess the strengths and weakness of the claims and defenses and their relative negotiating positions. *Id.*

The mediation was conducted by Zoom, lasted a full day, and involved intense negotiations by skilled counsel, with numerous offers and counter-offers being made with Judge Welsh serving as an intermediary. *Id.* ¶ 7. The Parties engaged in good faith negotiations, which at all times were at arms' length, and which culminated in an agreement to settle the case. *Id.* At the end of their mediation, the parties executed a binding settlement term sheet and continued to negotiate the terms of the Settlement Agreement, resulting in additional months of follow-up settlement discussions. The Settlement Agreement was finally signed on July 5, 2024. *Id.* ¶ 8.

TERMS OF THE SETTLEMENT

The key terms of the Settlement are briefly summarized as follows:

A. Class Definition

The "Settlement Class" or "Settlement Class Members" is defined as:

> [A]ll Persons who, from September 15, 2019, to and through February 27, 2024, enrolled in an automatically renewing Peacock Subscription directly through Peacock using a California billing address, and who were charged and paid Renewal Fees in connection with such subscription(s).

Settlement ¶ 1.37.

B. Monetary Relief

The Settlement consists of a non-reversionary, **all-cash** "common fund" in the amount of $3,742,637.14, which will be used to pay all approved claims by class members, notice and administration expenses, a Court-approved incentive award to Plaintiff, and attorneys' fees to proposed Class Counsel to the extent awarded by the Court. *Id.* ¶ 1.39.

C. Injunctive Relief

In connection with the settlement, Defendant has agreed to revise the presentation and wording of the automatic renewal terms in its mobile and desktop platforms to be consistent with Cal. Bus. & Prof. Code § 17602(a)(1)-(3). Specifically, Defendant agrees to present to California subscribers on the checkout page for any Peacock Subscription that will automatically renew, the automatic renewal offer terms associated with such subscription (including cancellation policy) in a clear and conspicuous manner before the subscription or purchasing agreement and in visual proximity to the request for consent to the offer, as required by Cal. Bus. & Prof. Code § 17602(a)(1). Defendant also agrees to obtain affirmative consent to the agreement containing the automatic renewal terms in a manner that complies with the ARL under Cal. Bus. & Prof. Code § 17602(a)(2). Furthermore, Defendant agrees to disclose to

subscribers with California billing addresses, in a manner that substantially complies with the ARL under Cal. Bus. & Prof. Code § 17602(a)(3), the automatic renewal terms, cancellation policy, and information regarding how to cancel in an acknowledgment email that is capable of being retained by consumers.

D. Release

In exchange for the relief described above, Defendant and each of its related and affiliated entities and all "Released Parties" as defined at ¶ 1.32 of the Settlement will receive a full release of all claims arising out of or related to or arising from Defendant's automatic renewal and/or continuous service programs in California from September 15, 2019, to and through February 27, 2024. *See id.* ¶¶ 3.1-3.3 for full release language.

E. Notice And Administration Expenses

The Settlement Fund will be used to pay the cost of sending the Notice set forth in the Agreement and any other notice as required by the Court, as well as all other costs of administration of the Settlement. *See id.* ¶¶ 1.35, 1.39, 5.8.

F. Incentive Award

In recognition for her efforts on behalf of the Settlement Class, Peacock has agreed that Plaintiff Winston may receive, subject to Court approval, an incentive award of $5,000 from the Settlement Fund, as appropriate compensation for her time and effort serving as Class Representative and as a party to the Action. *See id.* ¶ 8.3.

G. Attorneys' Fees And Expenses

Peacock has agreed that the Settlement Fund may also be used to pay Class Counsel reasonable attorneys' fees and to reimburse expenses in this Action, subject to Court approval, of an amount "not to exceed one-third of the Settlement Fund" (*i.e.*, $1,247,545.71). *See id.* ¶ 8.1.

ARGUMENT

I. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

The law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context"); *see also Newberg on Class Actions* § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). The approval of a proposed class action settlement is left to the discretion of the trial court. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995).

Preliminary approval requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties. *Newberg* § 11.25. To grant preliminary approval, the court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980); *Newberg* § 11.25 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness … and appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members).

When considering the fairness of a proposed settlement, courts must "expressly consider two core factors when reviewing the substantive fairness of a settlement: the adequacy of relief provided to a class and the equitable treatment of class members." *Moses v. New York Times Co.*, 79 F.4th 235, 244 (2d Cir. 2023) (citing Fed. R. Civ. P. 23(e)(2)(C)-(D)). When evaluating the relief provided, "courts must 'tak[e] into account,' among other considerations, 'the terms of any proposed award of attorney's fees,'" such that "'both the terms of the settlement and any fee award encompassed in a settlement agreement [is reviewed]' in tandem." *Id.* (citing Fed. R. Civ. P. 23(e)(2)(C)(iii)); *Fresno Cnty. Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d

63, 72 (2d Cir. 2019)).

In evaluating a class action settlement, courts in the Second Circuit consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"). Although the Court's present task is to perform an "initial evaluation," *Newberg* § 11.25, it is useful for the Court to consider the criteria on which it will ultimately judge the settlement. The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

Courts should also consider the "four enumerated factors in the new [Federal Rule of Civil Procedure] Rule 23(e)(2), in addition to the nine *Grinnell* factors." *Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, 333 F.R.D. 314, 420 (S.D.N.Y. 2019). The Rule 23(e) factors are whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). "There is significant overlap between the Rule 23(e)(2) and *Grinnell* factors, which

complement, rather than displace each other." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2019 WL 6875472, at *14 (E.D.N.Y. Dec. 16, 2019).

A. The *Grinnell* Factors

1. Litigation Through Trial Would Be Complex, Costly, And Long (*Grinnell* Factor 1)

By reaching a favorable settlement prior to dispositive motions or trial, Plaintiff seeks to avoid significant expense and delay, and instead ensure recovery for the class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom., D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). Courts consistently have held that, unless the proposed settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with uncertain results. *TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 456 (2d Cir. 1982).

As noted, the Parties engaged in informal written discovery prior to their mediation on March 11, 2024, including the exchange of documents necessary to ascertain the size of the class in terms of subscribers during the relevant time period, as well as the amount in controversy. Had no settlement been reached, the next steps in the litigation would have been for Peacock to respond to Plaintiff's complaint, which would most likely have taken the form of a motion to dismiss, and resolution of any such challenge to the pleadings, followed by costly discovery, including depositions of the Parties and the substantial exchange of electronically stored information discovery and other written discovery. Next, the Court would have had to resolve contested motions summary judgment and class certification, which would be at minimum costly and time-consuming for the Parties and the Court and creates risk that a litigation class would not

be certified and/or that the Settlement Class would recover nothing at all. Even if Plaintiff prevailed, the Parties would still have to litigate the case at trial and through possible appeals.

More specifically, Plaintiff is aware that Defendant would continue to assert a number of defenses on the merits, including that Plaintiff's allegations are insufficient under Fed. R. Civ. P. 8 and 12(b)(6) because Defendant purportedly provided all of the requisite pre-purchase disclosures under the ARL, presented them in a clear and conspicuous manner as defined under the ARL, and obtained Plaintiff's affirmative consent to the automatically renewing subscription. Defendant would also challenge Plaintiff's standing under Article III of the Constitution and California's consumer protection statutes, including Plaintiff's ability to show that Defendant's conduct caused Plaintiff economic injury. Plaintiff and Class Counsel are also aware that Defendant would oppose class certification vigorously, and Defendant would likely take the position that Plaintiff is not entitled to bring at least some of her claims on a class wide basis. Plaintiff and Class Counsel further understand that Defendant would prepare a competent defense at trial. Looking beyond trial, Plaintiff is also keenly aware of the fact that Peacock could appeal the merits of any adverse decision. Victory for the Defendant at any one of those steps would deprive putative class members of any relief. No matter what the outcome, absent settlement, this case would likely consume court resources for years.

The Settlement, on the other hand, permits a prompt resolution of this action on terms that are fair, reasonable, and adequate to the Class. Consequently, this *Grinnell* factor plainly weighs in favor of preliminary approval of the Settlement.

2. The Reaction Of The Class (*Grinnell* Factor 2)

Since Notice of the Settlement has not yet been issued to the Class, it is not possible to gauge the reaction of the Class at this time. *In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL

5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Since no notice has been sent, consideration of this factor is premature."). Plaintiff is unaware of any opposition to the present Settlement.

3. Discovery Has Advanced Far Enough To Allow The Parties To Responsibly Resolve The Case (*Grinnell* Factor 3)

"The pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating." *Torres v. Gristede's Oper. Corp.*, 2010 WL 5507892, at *5 (S.D.N.Y. Dec. 21, 2010). "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement … but an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176. Prior to mediation, the Parties conducted informal written discovery related to issues of class certification and the merits, including the exchange of detailed data regarding the scope and size of the Settlement Class. The Parties also exchanged briefing on the key facts, legal issues, litigation risks, and potential settlement structures, and they supplemented that briefing with extensive emails and telephonic correspondence in order to clarify their positions. *See* Deckant Decl. ¶ 6. This information was sufficient for the Parties to assess the strengths and weakness of the claims and defenses and their relative negotiating positions.

Further, Class Counsel's experience in similar matters, as well as the other efforts made by counsel on both sides, confirms that the Parties are sufficiently well apprised of the facts of this action, and the strengths and weaknesses of their respective cases. This *Grinnell* factor thus also weighs in favor of preliminary approval.

4. Plaintiff Would Face Real Risks If The Case Proceeded (*Grinnell* Factors 4 And 5)

Although Plaintiff's case is strong, it is not without risk. Defendant has made it clear that, if the litigation continues, it will file a Motion to Dismiss, move for summary judgment on various issues, and vigorously contest the certification of a litigation class. In weighing the risks

of certifying a class and establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d. at 177. In the context of this litigation, not only would Plaintiff and the Class face risks in overcoming Defendant's summary judgment motion and certifying a class, but also further litigation will only delay relief to the Class Members. The Settlement alleviates these risks and provides a substantial benefit to the Class in a timely fashion. These *Grinnel* factors thus favor preliminary approval.

5. Establishing A Class And Maintaining It Through Trial Would Not Be Simple (*Grinnell* Factor 6)

The risk of maintaining the class status through trial is also present. The Court has not yet certified the proposed Class, and the Parties anticipate that such a determination would be reached only after the pleadings are settled (*i.e.*, resolution on Defendant's forthcoming Motion to Dismiss), discovery is completed, and exhaustive class certification briefing is filed. Defendant would argue that individual questions preclude class certification, and also that a class action is not a superior method to resolve Plaintiff's claims. Should the Court certify the class, Defendant would also likely challenge certification through a Rule 23(f) petition, forcing additional rounds of briefing. Risk, expense, and delay permeate such a process. This factor weighs in favor of preliminary approval.

6. Defendant's Ability To Withstand A Greater Judgment (*Grinnell* Factor 7)

While Peacock could likely withstand a greater judgment, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005). Thus, this factor is neutral.

7. The Settlement Amount Reasonable In Light Of The Possible Recovery And The Attendant Risks Of Litigation (*Grinnell* Factors 8 And 9)

The determination of whether a settlement amount is reasonable "does not involve the use of a mathematical equation yielding a particularized sum." *Id.* "Instead, there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Id.* Because a settlement provides certain and immediate recovery, courts often approve settlements even where the benefits obtained as a result of the settlement are less than those originally sought. Per the Second Circuit in *Grinnell*, "[t]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." 495 F.2d at 455 n.2.

Here, Settlement Class Members who submit a valid Claim Form will be eligible to obtain a *pro rata* share of the non-reversionary, all-cash $3,742,637.14 Settlement Fund, following the deduction of notice and claims administration costs, attorneys' fees and expenses, and the class representative incentive payment. In addition, Defendant has agreed to revise the presentation and wording of the automatic renewal terms in its mobile and desktop platforms to be consistent with Cal. Bus. & Prof. Code § 17602(a)(1)-(3), and to pay the costs of notice and administration as well as reasonable attorneys' fees and costs for Class Counsel from the all-in fund established by the Settlement. Settlement ¶¶ 1.39, 2.1-2.2. Weighing the benefits of the Settlement against the risks associated with proceeding in litigation and in collecting on any judgment, the Settlement is more than reasonable. Moreover, when a settlement assures immediate payment of substantial amounts to class members, and does not "sacrific[e] 'speculative payment of a hypothetically larger amount years down the road,'" it is reasonable

under this factor. *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008). As such, these factors weigh in favor of approval.

B. The Rule 23(e)(2) Factors

1. The Class Representative And Class Counsel Have Adequately Represented The Class (Rule 23(e)(2)(A)

"Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 30 (E.D.N.Y. 2019). Here, "plaintiff's interests are aligned with other class members' interests because [she] suffered the same injuries:" paying a fee to Defendant due to its automatic renewal scheme. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019). "Because of these injuries, plaintiff[] ha[s] an interest in vigorously pursuing the claims of the class." *Id.* Further, numerous other courts in this Circuit have previously found that Plaintiff's attorneys adequately meet the obligations and responsibilities of Class Counsel. *See* Deckant Decl. Ex. 2, Firm Resume of Bursor & Fisher, P.A.; *id.* Ex. 3, Firm Resume of Gucovschi Rozenshteyn, PLLC. This factor thus favors preliminary approval.

2. The Settlement Was Negotiated At Arm's Length

Counsel for Plaintiff and counsel for Defendant are experienced in class action litigation and engaged in protracted settlement discussions and reached this settlement with the assistance of an experienced neutral, Judge Diane M. Welsh (Ret.), who is an experienced class action mediator affiliated with JAMS. Accordingly, this Rule 23(e)(2) factor has been met.

3. The Settlement Provides Adequate Relief To The Class

Whether relief is adequate takes into account "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Rule 23(e)(2)(C)(i-iv). As to "the costs, risks, and delay of trial and appeal," this factor "subsumes several *Grinnell* factors … including: (i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial. *In re Payment Card Interchange*, 330 F.R.D. at 36. As noted above, the Settlement has met each of these *Grinnell* factors. *See supra*. As to "any agreement required to be identified by Rule 23(e)(3)" or "any agreement made in connection with the proposal," *In re GSE Bonds*, 414 F. Supp. 3d at 696, no such agreement exists in this case other than the Settlement.

As to "the effectiveness of any proposed method of distributing relief to the class," "[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re Payment Card Interchange*, 330 F.R.D. at 40. Here, under the terms of the Settlement, Settlement Class Members who submit a timely claim form will receive a *pro rata* portion of the $3,742,637.14 Settlement Fund, following the deduction of notice and claims administration costs, attorneys' fees and expenses, and the class representative's incentive payment. Settlement ¶¶ 1.39, 2.1(a), 5.1, 5.8, 8.1, 8.3. This plan was proposed by experienced and competent counsel on both sides with the assistance of an experienced neutral and ensures "the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re GSE Bonds*, 414 F. Supp. 3d at 695.

As to "the terms of any proposed award of attorney's fees," Plaintiff's counsel will apply for attorneys' fees, costs, and expenses "not to exceed one-third" of the Settlement Fund, which amounts to no more than $1,247,545.71. Settlement ¶ 8.1. This is a reasonable request, as courts in this Circuit routinely approve fee requests in the amount of one-third of a common fund. *See, e.g., Hayes v. Harmony Gold Min. Co.*, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding "attorneys' fees in the amount of one third" of a $9 million settlement fund), *aff'd* 509 F. App'x 21, 23-24 (2d Cir. 2013) (affirming fee award, and noting "the prospect of a percentage fee award from a common fund settlement, as here, aligns the interests of class counsel with those of the class"); *Khait v. Whirlpool Corp.*, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9 million settlement fund); *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *6-7 (E.D.N.Y. Feb. 18, 2011) (awarding 33% of $7.7 million settlement fund). As courts in this Circuit have noted, fee requests for up to one-third of common funds represent what "reasonable, paying client[s] … typically pay … of their recoveries under private retainer agreements." *Reyes v. Altamarea Grp.*, 2011 WL 4599822, at *8 (S.D.N.Y. Aug. 16, 2011). As such, this factor weighs in favor of approval.

4. The Settlement Treats All Class Members Equally

This Rule 23(e)(2) factor discusses "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *In re Payment Card Interchange*, 330 F.R.D. at 47. Here, the Settlement distributes cash relief on a *pro rata* basis, which has been found by courts in this Circuit to be equitable. *See id.*; *see also, e.g., Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) (finding that a *pro rata* distribution plan "appears to treat the class members equitably … and has the benefit

of simplicity"). Thus, this Rule 23(e)(2) factor is weighs in favor of approval.[1]

* * *

Because the Settlement is, on its face, "'fair, adequate, and reasonable, and not a product of collusion,'" *Frank*, 228 F.R.D. at 184 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138-39 (2d Cir. 2000)), the Court should grant preliminary approval.

II. CONDITIONAL CERTIFICATION OF THE RULE 23 CLASS IS APPROPRIATE

Plaintiff respectfully requests that the Court conditionally certify the Settlement Class solely for purposes of effectuating the settlement. *See Newberg* § 11.27 ("When the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only."); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989) ("It is appropriate for the parties to a class action suit to negotiate a proposed settlement of the action prior to certification of the class."), *aff'd in part, rev'd in part on other grounds*, 907 F.2d 1295 (2d Cir. 1990). The Court should determine that the proposed Settlement Class satisfies the requirements of both Rule 23(a) and at least one of the subsections of Rule 23(b), and provisionally certify the settlement class, appoint Plaintiff's counsel as Class Counsel, and

[1] Additionally, the Second Circuit has found that "the existence and extent of incentive payments is relevant to whether 'class members [are treated] equitably relative to each other.'" *Moses v. New York Times*, 79 F.4th 235, 245 235 (2d Cir. 2023) (quoting Fed. R. Civ. P. 23(e)(2)(D)) ("[T]he equitable-treatment requirement protects the interests of class representatives who play an active role in the litigation … [while] [a]t the same time, the rule requires that courts reject incentive awards that are excessive compared to the service provided by the class representative ….'). Here, the requested $5,000 incentive award comprises a mere 0.13% of the $3,742,637.14 Settlement Fund and will have a *de minimis* impact on class member recovery. Additionally, another court in this District has already specifically found that a $5,000 incentive award like that requested here was appropriate in connection with another settlement under California's ARL, and the Second Circuit declined to modify or vacate the $5,000 incentive award on appeal. *See id.* at 253-56.

appoint Plaintiff as the Class Representative. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Newberg* § 11:27.

Under Rule 23(a), a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that:

> (1) [T]he class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Rule 23(b)(3) requires the court to find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

A. Numerosity

Numerosity is satisfied when the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, the proposed Settlement Class includes approximately 3.6 million persons. Deckant Decl. ¶ 6.

B. Commonality

Commonality is satisfied when the claims depend on a common contention, the resolution of which will bring a class-wide resolution of the claims. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011). Although the claims need not be identical, they must share common questions of fact or law. *Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. &*

N.J., 698 F.2d 150, 153-54 (2d Cir. 1983); *Savino v. Computer Credit, Inc.*, 173 F.R.D. 346, 352 (E.D.N.Y. 1997), *aff'd in part, rev'd in part on other grounds*, 164 F.3d 81 (2d Cir. 1998). There must be a "unifying thread" among the claims to warrant class certification. *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986). Courts construe the commonality requirement liberally. *Frank*, 228 F.R.D. at 181 (citing *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198-99 (S.D.N.Y. 1992)).

Here, there are common questions of law and fact that will generate common answers apt to drive the resolution of the litigation. Plaintiff alleges that Defendant made identical misrepresentations and omissions regarding the terms of payment for and cancellation of the Peacock Subscriptions, *see* Compl. ¶¶ 5-6, 45-54, 57-61, 119, 127, and also that it "uniformly fail[ed] to obtain any form of consent … before charging consumers' Payment Methods on a recurring basis." *Id*. ¶ 45; *see also id*. ¶¶ 55-56. Among others, common questions include: (1) whether Peacock failed to disclose the automatic renewal offer terms in a clear and conspicuous manner and in visual proximity to the request for consent to the offer; (2) whether Peacock failed to obtain consumers' affirmative consent to the automatic renewal offer terms; and (3) whether Peacock failed to provide an acknowledgement, capable of being retained by the consumer, that contained the automatic renewal offer terms and information on how to cancel. *See id*. ¶ 76. "Courts considering similar claims of unlawful payment policies routinely certify classes based on evidence of a common policy." *Pichardo v. Carmine's Broadway Feast Inc.*, 2016 WL 5338551, at *3 (S.D.N.Y. Sept. 26, 2016).

C. Typicality

Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (internal quotations omitted). "Minor

variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiff and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993). Courts evaluate typicality "with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Trinidad v. Breakaway Courier Sys., Inc.*, 2007 WL 103073, at *6 (S.D.N.Y. Jan. 12, 2007) (quoting *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996)).

Here, Plaintiff alleges that Defendant's practices violated the ARL and other California statutes because Defendant failed to fully comply with the ARL for each subscription. Compl. ¶¶ 1-8. It is Plaintiff's contention that Defendant's automatic renewal process is done in the exact same manner as to Plaintiff and the members of the putative class. *See* id. ¶¶ 45-65. Accordingly, by pursuing her own claims in this matter, Plaintiff will necessarily advance the interests of the Settlement Class, and typicality is therefore satisfied. *See, e.g.*, Deckant Decl. Ex. 4, NWM Hearing Tr. at 20:12-16 ("Here, I don't think there's any question about typicality. As I said, the claims all involve what Plaintiffs alleged to be the improper charging of fees for payments of premiums made by mail. So that seems pretty straightforward … therefore, typicality is satisfied."); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 565-66 (S.D.N.Y. 2014) (Rakoff, J.) (holding that the typicality requirement was satisfied where "the lead plaintiffs' and other class members' claims ar[o]se out of the same course of conduct by the defendant and [were] based on the same legal theories"); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 405-406 (S.D.N.Y. 2015) (Briccetti, J.) (same).

D. Adequacy Of The Named Plaintiff

"The adequacy requirement exists to ensure that the class representatives will 'have an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other class members.'" *Toure v. Cent. Parking Sys. of New York*, 2007 WL

2872455, at *7 (S.D.N.Y. Sept. 28, 2007) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)). "'[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.'" *Dziennik v. Sealift, Inc.*, 2007 WL 1580080, at *65 (E.D.N.Y. May 29, 2007) (quoting *Martens v. Smith Barney Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998)). In this case, Plaintiff – like each and every Settlement Class Member – is a purchaser of one of Defendant's Peacock Subscriptions who was automatically renewed by Defendant. FAC ¶¶ 30-43. Thus, Plaintiff and the Settlement Class Members have the exact same interest in recovering the damages to which they are entitled. As such, Plaintiff does not have any interest antagonistic to those of the proposed Settlement Class.

Likewise, proposed Class Counsel – Bursor & Fisher, P.A. and Gucovschi Rozenshteyn, PLLC – have extensive experience in litigating class actions of similar size, scope, and complexity to the instant action. Deckant Decl. ¶ 10; *see also id.* Ex. 2, Firm Resume of Bursor & Fisher, P.A.; *id.* Ex. 3, Firm Resume of Gucovschi Rozenshteyn, PLLC. Class Counsel regularly engages in major complex litigation involving consumer products, has the resources necessary to conduct litigation of this nature, and has frequently been appointed lead class counsel by courts throughout the country. *See, e.g.*, *Ebin*, 297 F.R.D. at 566 ("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 [six] class action jury trials since 2008."). Further, proposed Class Counsel has devoted substantial resources to the prosecution of this action by investigating Plaintiff's claims and that of the Settlement Class, aggressively pursuing those claims, conducting informal discovery, participating in a private mediation and ultimately, negotiating a favorable class action settlement. *See* Deckant Decl. ¶¶ 6-7.

E. The Proposed Settlement Class Satisfies Requirements Of Rule 23(b)(3)

Rule 23(b)(3) requires that common questions "predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Certification under Rule 23(b)(3) will allow class members to opt out of the settlement and preserve their right to seek damages independently. *Cf. Brown v. Title Ticor Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). This approach protects class members' due process rights. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999). As shown below, Plaintiff has met the Rule 23(b)(3) requirements.

1. Common Questions Predominate

Rule 23(b)(3)'s predominance requirement focuses on whether the defendant's liability is common enough to be resolved on a class basis, *Dukes*, 564 U.S. at 359, and whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). That Plaintiff easily meets the Rule 23(a) criteria is a strong indicator that Rule 23(b)(3) is satisfied. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality").

Here, Plaintiff's allegations all center around Defendant's "automatic renewal scheme." Compl. ¶ 1. "Courts considering similar claims of unlawful payment policies routinely certify classes based on evidence of a common policy." *Pichardo*, 2016 WL 5338551, at *3; *see also Cassesse v. Washington Mutual, Inc.*, 255 F.R.D. 89, 98 (E.D.N.Y. 2008) (certifying a class of consumers who "who paid or will be demanded to pay prohibited fees"). Since Plaintiff alleges Defendant engaged in a common course of conduct, predominance is met.

2. A Class Action Is A Superior Mechanism

Rule 23(b)(3)'s superiority requirement examines whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). Rule 23(b)(3) sets forth a non-exclusive list of relevant factors, including whether individual class members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).[2] Here, Plaintiff and the Class Members have limited financial resources with which to prosecute individual actions, and Plaintiff is unaware of any individual lawsuits that have been filed by Class Members arising from the same allegations. Employing the class device here will not only achieve economies of scale for Settlement Class Members but will also conserve the resources of the judicial system and preserve public confidence in the integrity of the system by avoiding the expense of repetitive proceedings and preventing inconsistent adjudications of similar issues and claims. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). A class action is the most suitable mechanism to fairly, adequately, and efficiently resolve the putative settlement class members' claims.

III. PLAINTIFF'S COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL

Under Rule 23, "a court that certifies a class must appoint counsel … [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this

[2] Another factor, whether the case would be manageable as a class action at trial, is not of consequence in the context of a proposed settlement. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a [trial] court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial[.]"). Moreover, denying class certification on manageability grounds is "disfavored" and "should be the exception rather than the rule." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124,140 (2d Cir. 2001) (internal quotation marks omitted).

determination, the Court considers proposed Class Counsel's: (1) work in identifying or investigating the potential claim, (2) experience in handling class actions, other complex litigation, and the types of claims asserted in the action, (3) knowledge of the applicable law, and (4) resources that it will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)–(iv). As discussed above, proposed Class Counsel has extensive experience in prosecuting consumer class actions in general. *See supra*. And as a result of their zealous efforts in this case, proposed Class Counsel has secured substantial monetary relief to the Settlement Class Members. *See supra*. The Court should appoint the firms of Bursor & Fisher, P.A. and Gucovschi Rozenshteyn, PLLC as Class Counsel. *See* Settlement ¶ 1.6.

IV. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

A. The Content Of The Proposed Class Notice Complies With Rule 23(c)(2)

Pursuant to Rule 23(c)(2)(B), the notice must provide:

> the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

The Notice will provide detailed information about the Settlement, including: (1) a comprehensive summary of its terms; (2) Class Counsel's intent to request attorneys' fees, reimbursement of expenses, and an incentive award for the Named Plaintiff; and (3) detailed information about the Released Claims. *See* Settlement ¶ 1.21, Exs. B-D. In addition, the Notice will provide information about the Fairness Hearing date, the right of Class Members to seek exclusion from the Class or to object to the proposed Settlement (as well as the deadlines and

procedure for doing so), and the procedure to receive additional information. *Id.* In short, the Notice Plan is intended to fully inform Class Members of the lawsuit, the proposed Settlement, and the information they need to make informed decisions about their rights. The very detailed information in this proposed notice goes well beyond the requirements of the Federal Rules. Indeed, courts have approved class notices even when they provided only general information about a settlement. *See, e.g.*, *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (class notice "need only describe the terms of the settlement generally").

B. Distribution Of The Class Notice Will Comply With Rule 23(c)(2)

The Parties have agreed upon a multi-part notice plan that easily satisfies the requirements of both Rule 23 and due process. First, the Parties will provide the Class List identifying individual subscribers to the Settlement Administrator. *See* Settlement ¶ 4.1(a). The Settlement Administrator will then send direct notice by email to all Settlement Class Members for whom a valid email address is identified in Defendant's records. *See id.* ¶ 4.1(b). The email will contain an electronic link to the online claim form. *See id.* Next, in the event that a valid email address is not available, the Settlement Administrator will send direct notice by First Class U.S. Mail to all the Settlement Class Members who did not receive an email. *See id.* ¶¶ 4.1(b)-(c). Further, the Settlement Administrator will establish a Settlement Website that shall contain the "long form notice," as well as access to important Court documents, upcoming deadlines, and the ability to file claim forms online. *See id.* ¶¶ 1.40, 4.1(d).

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant her Motion for Preliminary Approval of the Settlement.

Dated: July 11, 2024

Respectfully submitted,

BURSOR & FISHER, P.A.

By: */s/ Neal J. Deckant*
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