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Attorneys for Plaintiffs and the Classes

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

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

Plaintiffs,

-against-

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

Defendants.

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

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
MOTION FOR FINAL
APPROVAL OF SETTLEMENT**

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INTRODUCTION¹

The Court should approve the Settlement as it is simply the best resolution available and its benefits far exceed any benefit that the classes could receive after a successful trial. The Settlement was only achieved after more than eight-and-a-half years of vigorous and hard fought litigation and extensive settlement negotiations with the substantial assistance of Magistrate Judge Netburn and multiple in-person conferences with this Court. Defendants adamantly denied liability and fought Plaintiffs at every step of the litigation, for years, before the parties initiated settlement discussions, the negotiations of which lasted several months.

Plaintiffs and their counsel carefully studied and reviewed all of the facts, law, and practical consequences of continued litigation, as well as the significant hurdles in achieving a more favorable outcome for the Classes through further litigation. Aside from the financial situation of Defendants, before accepting the Mediator's proposal, Plaintiffs and Class Counsel also took great care in considering the chances of prevailing on their claims—in particular, the inherent difficulty in proving common law fraud on a class-based level. As of the date of this filing, and with two months still remaining until the claims submission deadline, 6,313 Class Members have already submitted their claims (over 4.1% of Class Members). The monetary value already procured for the class calculated today based on those who have already submitted

¹ All terms are defined as they were defined in the Motion for Preliminary Approval (Dkt. No. 257-1), though some terms are redefined for the Court's convenience.

their claims, would have a value of more than \$7,590,800. This Settlement is in the best interests of the Classes and should be approved.

ARGUMENT

I. THE SETTLEMENT

The terms of the Settlement Agreement (the “Agreement” or the “Settlement,” Dkt. No. 257-2) are summarized here and in detail below:

(1) Customer Pledge and New Contract. IJL will add a customer pledge to its website and modify its contracts to include a commitment to honor the client’s specified preferences for matches for the three most complained about match characteristics – those regarding age, religion, and parental status (Settlement Agreement ¶ 2.05 (Dkt. No. 257-2); Short-Form Notice, pp. 1-2 (Dkt. No. 257-3); Long-Form Notice, pp. 1, 7-8 (Dkt. No. 257-4)), making it easier for individuals, future classes, or government lawyers to seek relief if IJL violates its contractual commitments;

(2) Vouchers. Members of both the New York Class (who are members of the National Class, but also have claims under New York’s consumer fraud statute) and the National Class who do not opt out and who submit valid Claims Forms will receive vouchers entitling them to receive one or two free dates arranged by IJL, with each voucher valued at \$450, and not requiring class members to pay anything (Settlement Agreement § 2.04 (Dkt. No. 257-2); Short-Form Notice, pp. 1-2 (Dkt. No. 257-3); Long-Form Notice, pp. 7-8 (Dkt. No. 257-4));

(3) Monetary Fund. A \$4.75 million fund will be created to cover costs and awards, and all members of the New York Class who do not opt out will receive an award of \$100 (Settlement Agreement § 2.03 (Dkt. No. 257-2), Short-Form Notice, pp. 1-2 (Dkt. No. 257-3); Long-Form Notice, pp. 7-8, 11 (Dkt. No. 257-4));

(4) Release. Members of the Class who do not timely opt out release IJL and the Released Parties (Settlement Agreement § 1.16 (Dkt. No. 257-2)) from any claims related to or arising from contracts between members of the Class and IJL or claims arising from the facts that form the basis of this action (Settlement Agreement § 5.02 (Dkt. No. 257-2); Short-Form Notice, pp. 1-2 (Dkt. No. 257-3); Long-Form Notice, pp. 9-10, 12 (Dkt. No. 257-4));

(5) Attorney's Fees, Expenses, and Service Awards. Class Counsel has applied for an award of attorney's fees and expenses, respectfully reserves the right to seek additional fees following the final distribution, and has moved for a service fee of \$10,000 for each Plaintiff (Dkt. Nos. 279, 282, 283, 283-1, 283-1); and

(6) Claims Administration. Class Counsel and IJL have agreed to engage the services of Heffler Claims Group (the "Claims Administrator") to handle the administration of benefits (Settlement Agreement § 2.01 (Dkt. No. 257-2); Short-Form Notice, p. 1 (Dkt. No. 257-3); Long-Form Notice, p. 13 (Dkt. No. 257-4)).

A. Injunctive Relief: Ensuring IJL Publicly Meets its Commitments.

IJL will modify its contracts to include a specific, public commitment not previously included in any contracts or promotional materials to honor client preferences related to age, religion, and parental status when providing matches to members. (Settlement Agreement § 2.05(b) (Dkt. No. 257-2).) Inappropriate matching of these important characteristics was the most common complaint communicated to Class Counsel by IJL's customers, with many customers complaining that IJL arranged dates between individuals who had characteristics directly contrary to their expressed preferences, in particular age, religion, and parental status. (Third Amended Complaint, Dkt. No. 169, ¶ 15.) Under the terms of the Settlement, IJL will also add a pledge to its website detailing its commitments concerning the nature of the services it will provide, pledging to "honor your preferences for age, religion, and parental status as we personally select your matches." (Settlement Agreement § 2.05(a) (Dkt. No. 257-2).) This commitment will also be set forth in all new client agreements. (Settlement Agreement § 2.05(b) (Dkt. No. 257-2); Short-Form Notice, pp. 1-2 (Dkt. No. 257-3); Long-Form Notice, pp. 1, 7-8 (Dkt. No. 257-4).) The inclusion of this public pledge and specific commitment

in contracts will make IJL far more vulnerable to suit or regulation by government lawyers than they have been before. Simply put, because of this change, if IJL violates these commitments, it will be very easy for a class member or attorney general to bring a claim against the company to seek relief and bring about compliance with IJL's new contractual duties.

B. Voucher Relief: Providing Dates Worth Millions of Dollars to Class Members and Transferees.

All members of both the New York Class and the National Class who do not opt out and who submit valid Claims Forms will receive vouchers entitling them to receive one free date arranged by IJL. If the voucher is redeemed at the following locations (where the kinds of dates provided are slightly different than the norm), the voucher holder will receive two dates: Austin/San Antonio, Cleveland (including Akron, Canton, Massillon, and Youngstown), Houston, Milwaukee (including Madison, Marquette, and Wausau), and Seattle (including Bellevue). (Settlement Agreement § 2.04 (Dkt. No. 257-2).) Each voucher has an estimated value of \$450, yielding a benefit to the 153,649 class members of potentially \$69 million. The value of vouchers for the 6,313 National Class Members who have thus redeemed claims is \$2,840,850. This amount added to the Monetary Fund yields a value to the Class, thus far, and without even looking at the value of injunctive relief, of \$7,590,850. The vouchers will be transferable on a one-time basis to non-class members who sign a membership contract with IJL or who already have a membership contract. Neither National Class members nor any of these transferees who already have an IJL membership will need to pay

anything to obtain the benefit of these vouchers. The dates will be arranged in the ordinary manner of IJL's services subject to the modifications set forth in the Settlement.

C. The Settlement Fund: Paying All Costs of the Settlement and Litigation, and Providing Direct Payments to the New York Class.

The Settlement creates a \$4.75 million Monetary Fund which covers awards to members of the New York Class, the cost of settlement administration, any Court-approved service payments, and any Court-approved attorney's fees and expenses. (Settlement Agreement § 2.02 (Dkt. No. 257-2).) All members of the New York Class who do not opt out will receive an award of \$100, to be paid no later than 60 days following final approval of the Settlement Agreement ("Final Approval"). (Settlement Agreement §§ 1.06-1.07 (Dkt. No. 257-2).)

Following final distributions to members of the Class and the Plaintiffs, final payment to the Claims Administrator, and initial payment to Class Counsel, Class Counsel also respectfully reserves the right to move for an additional award of fees based both on continuing work in the action since December 31, 2015 (the end for determining the lodestar fees included in the fee application made on March 25, 2016), as well as for the eight-and-a-half years of service to the Classes leading up to December 31, 2015. As of the filing of this action, Class Counsel had already devoted over 750 hours in the first three months of this year, in managing the settlement, including having approximately 170 calls with Class Members from February 25 through the date of this filing. The current fee application seeks no lodestar multiplier, notwithstanding the great risk which Class Counsel undertook during nearly a decade of investigation

and litigation which entailed bringing the action to the verge of trial. Any amount remaining in the Monetary Fund following any fee award to Class Counsel, if any, will be distributed as a charitable donation to a 501(c)(3) certified charity as agreed upon by the Parties.

D. Releases

Members of the Classes who do not timely opt out release IJL and the Released Parties, as defined in the Settlement, from initiating, asserting, or prosecuting any claims related to or arising from the same nucleus of operative facts that form the basis of this action. (Settlement Agreement § 5.02 (Dkt. No. 257-2); Short-Form Notice, p. 1 (Dkt. No. 257-3); Long-Form Notice, pp. 9-10, 12 (Dkt. No. 257-4).)

II. CLASS NOTICE HAS BEEN DISSEMINATED.

The notice program approved by the Court and administered by Heffler Claims Group LLC (“Heffler”) was a resounding success considering the class period, which in many states dates back to 2002. As of April 14, 2016, 6,313 Claim Forms have been received, amounting to more than 4.1% of the estimated 153,649 thousand-member Class. (Heffler Decl. ¶ 18.) Such claim redemption percentage would be considered successful even for the entire redemption period in consumer fraud actions. This extensive Notice Program included: (1) sending direct email notice to 115,341 Class Members identified through Defendants’ records; (2) sending direct mail notice to an additional 33,505 potential Class Members identified through Defendants’ records; (3) nationwide publication of the publication notice in the *LA Times*; (4) the creation of a toll-free number for additional information; and (5) maintenance of a Settlement

website enabling Class Members to view the long form notice, relevant court filings – including Class Counsel’s application for attorney’s fees and service awards – and other information about the Settlement, and submit claim forms directly online. (Heffler Decl. ¶¶ 6-12, 15.) The class notice has been adequately disseminated.

III. THE COURT SHOULD GRANT THE FINAL APPROVAL OF THE SETTLEMENT WHICH IS THE BEST ONE POSSIBLE FOR THE CLASS.

Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *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.”) (internal quotation marks and citation omitted); *see also* 4 *Newberg on Class Actions* § 11.41 (4th Ed. 2002) (citing cases). The *Manual for Complex Litigation* (Fourth) (2004) § 21.63 describes a three-step procedure for approval of class action settlements:

(1) Preliminary approval of the proposed settlement at an informal hearing; (2) Dissemination of mailed and/or published notice of the settlement to all affected class members; and (3) A “formal fairness hearing” or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

This procedure, used by courts in the Second Circuit, and endorsed by class action commentator Professor Newberg, safeguards class members’ due process rights and enables the court to fulfill its role as the guardian of class interests. 4 *Newberg* § 11.25. The first two steps in this process have occurred. With this Motion, Plaintiffs

respectfully request that the Court take the third and final step in the process by granting final approval of the settlement.

A. The Settlement Is Fair, Reasonable, and Adequate, and the Best Recovery Possible Given IJL's Financial Condition.

The proposed Settlement meets the requirements for approval, as it is fair, reasonable, and adequate under the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). The *Grinnell* factors are:

- (1) The complexity, expense and likely duration of the litigation;
- (2) The reaction of the class to the settlement;
- (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.

Charron v. Pinnacle Group N.Y. LLC, 874 F. Supp. 2d 179, 196 (S.D.N.Y. 2012).

Based on evidence and IJL's representations concerning IJL's financial situation throughout settlement negotiations, it is plain that trial would likely result in no recovery whatsoever for the Classes. Simply stated, after trial IJL would very likely have had no money, gone out of business, and Class Counsel would have had to proceed in bankruptcy court in risky litigation attempting to obtain moneys from IJL's sophisticated owners. A trial judgment of any size almost certainly would not result in a better result for the Classes than the proposed Settlement. Class Members would get nothing of value whatsoever after years of litigation, and other companies sued in class

actions and counsel representing plaintiffs in class actions would see a precedent against the public interest here: companies sued for consumer fraud would see that resisting settlement when a company is in financial difficulties could be the wise choice, and class action counsel would have a disincentive ever to sue any companies whose financials they did not have at all times. This Settlement and a fair attorney's fee award instead sets the opposite precedent, encouraging companies to settle and class counsel to keep prosecuting class actions until a fair settlement can be achieved.

1. Litigation Through Trial Would Be Lengthy, Complex, and Costly.

The Settlement Agreement obviates the need for lengthy and complex trial and post-judgment proceedings. As noted by this Court, "class actions have a well-deserved reputation as being most complex" *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (internal quotation marks and citation omitted). The Settlement provides fair and expedient closure.

2. The Reaction of the Classes Has Been Positive.

As of April 14, 2016, the Class Members have submitted a total of 6,313 timely claims. (Heffler Decl. ¶ 18.) The claims deadline is June 25, 2016, and to date, with still two months to go, the claims submissions have been in the hundreds every week, including 644 in the week preceding April 11. (Heffler Status Report, dated Apr. 12, 2016, attached to the Declaration of John G. Balestriere ("Balestriere Decl.") as Exhibit A.)

The opt-out period is now over as of April 11, 2016. Forty-one Class Members objected to the settlement and only 175 requested to opt out, amounting to 0.11% of the

total number of Class Members. (Heffler Decl. ¶ 13.) These favorable numbers weigh heavily in favor of the Settlement, especially in light of the fact that many “objections” simply rehash the Class Members’ awful experiences with IJL. *See D’Amato v. Deutsche Bank*, 236 F.3d 78, 86–87 (2d Cir. 2001) (where 27,883 notices were sent to class members, but only 72 class members requested exclusion from the settlement and only 18 class members objected, court stated that “this small number of objections weigh[s] in favor of the settlement”). The positive reaction from the Classes, with a proportionately low objection and opt-out rate, weighs strongly in favor of the Settlement.

3. After More Than Eight Years of Investigation and Litigation, Discovery Is Complete, Allowing the Parties to Resolve the Case With a Full Understanding of the Issues.

The Settlement was negotiated with a full understanding of the facts and issues of this action, far more than in the usual class action settlement. When evaluating the third *Grinnel* factor, “[t]he pertinent question is ‘whether counsel had an adequate appreciation of the merits of the case before negotiating.’” *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 620 (S.D.N.Y. 2012). Class Counsel filed successful objections to Magistrate Judge Fox’s rulings on the motion to dismiss and the motion to intervene as part of Class Counsel’s successful efforts, moving Plaintiffs’ complaint through the pleadings stage, getting past two motions to dismiss, as well as a motion, cross-motion, and supplemental cross-motion for summary judgment—litigated over the course of nearly three years from May, 2010 through April, 2013—to preserve the New York Class claims and the fraud claim that allows IJL customers nationwide to obtain relief. (Plaintiffs’ Motion for Preliminary Approval of the Settlement, Dkt. Nos. 257-1

("Plaintiffs' MPA"), 15.) In addition to many months of litigating multiple motions, the Parties completed 19 depositions and are in possession of voluminous documents produced during discovery. (Plaintiffs' MPA, 15.) Class Counsel fully understands the strengths and weaknesses of the Class Action, as well as the probability and scope of a potential recovery at trial, and negotiated the Settlement accordingly. The third *Grinnell* factor weighs in favor of final approval.

4. Plaintiffs Face a Real Risk of No Recovery at All if the Action Proceeds.

Although Plaintiffs believe their case is strong, it is subject to considerable risk, and the Settlement Agreement should be approved as it mitigates this risk. As noted by this Court, "[l]itigation inherently involves risks," (*In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), *aff'd sub nom. In re PaineWebber Inc. Ltd. Partnerships Litig.*, 117 F.3d 721 (2d Cir. 1997)), so "[o]ne purpose of a settlement is to avoid the uncertainty of a trial on the merits." *McMahon v. Olivier Cheng Catering and Events, LLC*, 08-CIV-8713 (PGG), 2010 WL 2399328, at *5 (S.D.N.Y. Mar. 3, 2010). The resolution of liability issues, trial, the determination of damages, the inevitable appeals process, and, in this matter, judgment enforcement, are inherently uncertain in terms of duration and outcome. The Settlement avoids these uncertainties while providing real value to the Classes. The fourth and fifth *Grinnell* factors weigh in favor of preliminary approval.

5. Maintaining the Classes Through Trial Would Be Risky.

The Settlement should receive final approval as the Plaintiffs risk decertification of the class action if they go to trial. *In re Top Tankers, Inc. Sec. Litig.*, 06 CIV. 13761 (CM), 2008 WL 2944620, at *8 (S.D.N.Y. July 31, 2008) (“courts may exercise their discretion to re-evaluate the appropriateness of class certification at any time”). At trial, Plaintiffs’ fraud claim could present a challenge to maintaining the certified Classes, as demonstrating fraud on a class-wide basis is an inherently risky endeavor and would require a demonstration of reliance. (Plaintiffs’ MPA, 12.) Given the uniform misrepresentations that underlie Plaintiffs’ allegations, Class Counsel believes that ultimately the Classes would be maintained, but recognizes that such an outcome is far from certain. The risks of maintaining certification through trial weighs in favor of final approval.

6. The Settlement Secures a Recovery Many Times Greater Than What Could Be Obtained in the Bankruptcy or Other Enforcement Proceedings that Would Follow Trial.

The Settlement Agreement secures the best possible recovery for the Classes and is based on a commitment by IJL, with its owner, to pay a large sum and provide other consideration, whereas trial would likely result in pursuing IJL and its owner with, at best, uncertain prospects for recovery, and with the significant likelihood of no recovery at all. Based on the evidence and IJL’s representations and documents it provided to support such representations, a judgment at trial would undoubtedly require Class Counsel to commence enforcement proceedings, including in bankruptcy court. Such a risk strongly favors resolution through settlement. *In re EVCI Career Colleges Holding*

Corp. Sec. Litig., 05-CV-10240 (CM), 2007 WL 2230177, at *8 (S.D.N.Y. July 27, 2007) (“[t]he risk that a successful prosecution will result in the bankruptcy of the defendant strongly weighs in favor of approval of a settlement”). Instead IJL has agreed to assure its clients publicly that it will adhere to a new pledge on its website and adopt a new contract provision, has agreed to pay a substantial amount of money, totaling \$4.75 million, and has agreed to distribute vouchers to all Class Members. Continued litigation would undoubtedly be risky, and the possibility of successfully recovering a judgment against IJL greater than what the Settlement provides is remote.

IV. THE COURT SHOULD APPROVE AMERICAN CONSUMER COUNCIL AS THE RECIPIENT OF ANY FUNDS THAT REMAIN IN THE MONETARY FUND AS ITS GOALS ARE RELATED TO THE PURPOSE OF THIS LAWSUIT.

The Parties respectfully request that the Court approve American Consumer Council (“ACC”) as the residual recipient of any funds that remain in the Monetary Fund after the final distribution. ACC is a non-profit membership organization, founded in 1987 and dedicated to consumer education, advocacy, and financial literacy. (ACC Bylaws § 1.4, available at www.americanconsumercouncil.org/pdfs/bylaws.pdf, last accessed on April 15, 2016). ACC supports economic growth by encouraging the sale and use of safe, reliable products and services to consumers. As a public charity, ACC is a tax-exempt organization and is eligible to receive tax-deductible charitable contributions.²

² <https://apps.irs.gov/app/eos/pub78Search.do?ein1=33-0718596&names=&city=&state=All...&country=US&deductibility=all&dispatchMethod=searchCharities&submitName=Search> (last accessed on April 15, 2016).

This Court has broad discretion and equitable powers to permit the use of *cy pres* principles. *Plotz v. NYAT Maint. Corp.*, No. 98 Civ. 8860, 2006 WL 298427, at * 1 (S.D.N.Y. Feb. 6, 2006) (citing *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999)). A *cy pres* donation is appropriate, where, as here, “residual class funds remain after class members were provided with an opportunity to deposit and claim their distribution.” *Reyes v. Buddha-Bar NYC*, No. 08 Civ. 2494, 2010 WL 2545859, at *1 (S.D.N.Y. June 18, 2010) (citing *Plotz*, 2006 WL 298427, at *1). A plaintiff is entitled to deference in its selection of *cy pres* recipient because only plaintiffs and their counsel can determine the objectives of their own lawsuit and what is in the interest of the class they represent. *See Plotz*, 2006 WL 298427, at *2 (“The distribution preference of class counsel should be entitled to deference when the designated recipient is a legitimate and appropriate organization.”); *Reyes*, 2010 WL 2545859, at *1 (“Class Counsel is in the best position to determine the purpose of the lawsuit and to select organizations whose purposes are consistent with it.”).

Courts routinely approve *cy pres* designations where the purpose of the organization is related to the purpose of the lawsuit. *See In re Publ'n Paper Antitrust Litig.*, Nos. 04 MD 1631, 05 Civ. 1267; 05 Civ. 1339, 05 Civ. 1358, 05 Civ. 1381. 2009 WL 2351724, at *2 (D. Conn. July 30, 2009) (“Because the plaintiffs’ claims here are based on antitrust injury, the next best use for the settlement funds is to disburse those funds to charitable institutions designed to guard against antitrust injury and protect consumers.”); *Johnson v. Brennan*, No. 10-CV-4712 CM, 2012 WL 6584019, at *1 (S.D.N.Y. Dec. 12, 2012) (designating as *cy pres* recipient organization whose “advocacy work on

behalf of workers, which includes the litigation of wage and hour claims on behalf of restaurant workers, is closely related to the purpose of this lawsuit"); *Plotz v. NYAT Maint. Corp.*, No. 98 CIV. 8860(RLE), 2006 WL 298427, at *2 (S.D.N.Y. Feb. 6, 2006) (designation of workers-rights organizations as *cy pres* beneficiaries in wage and hour class action was proper and appropriate because organizations' missions were aligned and closely related to the objectives underlying the litigation); *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1041 (9th Cir. 2011) ("non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance" are appropriate *cy pres* beneficiaries in a case brought by internet users challenging "purportedly unlawful advertising campaign that exploited users' outgoing e-mail messages."). The Court should approve ACC as the residual *cy pres* recipient.

V. THE COURT SHOULD GRANT FINAL APPROVAL OF CLASS COUNSEL'S APPLICATION FOR FEES, COSTS, AND CLASS REPRESENTATIVE AWARDS.

A. Class Counsel's Requested Fee is Reasonable and Should Be Approved.

Class Counsel's application for the award of attorney's fees and reimbursement of costs, service awards, and approval of payment of administrative costs (Dkt. Nos. 279, 282-283 ("Motion for Fees")) is reasonable and should be approved. The attorney's fees in the amount of \$3,583,703.50 represent the lodestar amount based on hourly rates that this Court has already held as reasonable, without any enhancement, and only through December 31, 2015. This amount is equal to the value of legal services provided to the Classes in the over one hundred months since initial investigation began, including eight-and-a-half years of active litigation as if Class Counsel had been paid

during the last decade when it of course it has not been. The proposed fee is reasonable under both lodestar and percentage-of-recovery analyses, presently representing 47% of the current, and increasing, monetary value of the Class, with such percentage declining every week as more Class Members redeem claims forms. The fee application should be approved.

1. Class Counsel Has Provided Quality Representation to the Classes For Nearly a Decade.

Class Counsel has provided high quality and dedicated representation to the Classes over nearly nine years of this action. Three attorneys and three non-attorney legal analysts comprise over 75% of the hours billed to this action over the years, and the three attorneys together account for nearly 50% of the hours billed. (Declaration of John G. Balestriere in Support of the Motion for Fees, Dkt. No. 283 (“Balestriere Motion for Fees Decl.”) ¶ 77.) The Court should grant final approval of the Settlement and Class Counsel’s Motion for Fees.

a. Class Counsel Has Extensive Experience.

Class Counsel has extensive experience representing clients in complex litigation, including class actions, and is highly reputable and skilled. The three attorneys who accounted for nearly half of all hours spent on the action are John G. Balestriere, Jon L. Norinsberg, and Stefan Savic. (Balestriere Decl. ¶ 3; Balestriere Motion for Fees Decl. ¶ 77.) Balestriere, one of the two primary senior lawyers on the matter, “is an experienced litigator who would generally command a high billing rate.” *Sanchez v. MTV Networks*, 2012 WL 2094047, at *3 (S.D.N.Y. June 11, 2012) *aff’d*, 525 F. App’x 4 (2d

Cir. 2013). Balestriere is a graduate of Columbia College and Yale Law School who has been practicing law since 1998, and spent many years as a prosecutor, including for the New York Attorney General's office, and has substantial investigative background. (Balestriere Decl. ¶ 5.) Balestriere was selected to the New York Metro Super Lawyers list in 2015. (Balestriere Decl. ¶ 6.) The other primary senior lawyer, Jon L. Norinsberg, whose hours comprise over 30% of total hours spent by Class Counsel (Balestriere Motion for Fees Decl. ¶ 77), has twenty-five years of civil litigation experience and has tried over one-hundred and fifty cases in his career. (Declaration of Jon L. Norinsberg ¶¶ 4, 11.) Judge Robert Sweet recently noted that Norinsberg is "competent and experienced in federal class action and federal civil rights litigation." *Stinson v. City of New York*, 282 F.R.D. 360, 371 (S.D.N.Y. 2012). In the fall of 2015, Norinsberg was recognized as one of the top civil rights litigators in New York by the New York Times. (Declaration of Jon L. Norinsberg ¶ 11.)

Stefan Savic, who over time dedicated over 750 hours, the third-most amount of hours to this action, was with Class Counsel as a non-attorney legal analyst at the inception of this action, between 2008 and 2010. (Balestriere Decl. ¶ 7; Balestriere Motion for Fees Decl. ¶ 77.) Since graduating from law school and returning to Class Counsel as a lawyer, Savic has spent the last two years litigating motions and pursuing the best possible settlement for the classes. (Balestriere Decl. ¶ 8.) Savic regularly practices in federal court at a billing rate higher than that billed in this action. (Balestriere Decl. ¶ 9.) Further, the hourly rates of \$690 and \$650 used for Balestriere and Norinsberg, respectively (Balestriere Motion for Fees Decl. ¶ 76), are far lower than

their current standard rates and are reasonable for use in calculating attorney's fees. (Balestriere Decl. ¶ 10.) Class Counsel is experienced and reputable, and this Court should grant final approval of the Settlement and Class Counsel's Motion for Fees.

b. Class Counsel Obtained the Best Settlement Possible, While Litigating Against IJL's Qualified Counsel.

Class Counsel achieved the best settlement possible, securing an amount greater than what could have been obtained at trial. Additionally, the Settlement Class Counsel negotiated ensures that Class Members will receive relatively quick relief after enduring years of litigation, which also attests to the quality of Class Counsel's representation, as an "indication of the quality of the result achieved is the fact that the Settlement will provide compensation to the [victims] expeditiously." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Further, the opposing counsel in this matter, partners Peter Shapiro and Bari Klein and their colleagues from the prominent firm Lewis Brisbois Bisgaard & Smith LLP, were and are highly qualified attorneys. Class Counsel achieved an outstanding settlement while negotiating with IJL's qualified counsel. Class Counsel's Motion for Fees should be approved.

B. Class Counsel's Requests for Expenses, Service Awards, and Costs of Administration Are Reasonable.

Class Counsel also seeks reimbursement of \$51,982.61 in costs and expenses incurred during this matter, a relatively small amount of expenses incurred in a matter which lasted most of a decade, involved dispositive motions, nearly two dozen depositions around the country, and litigation both in the District Court and the Court of Appeals. In addition, Class Counsel requests approval of service awards to the five

Class Representatives in the amount of \$10,000 each, for their atypically significant efforts over the years that involved sharing some of the most intimate aspects of their lives. This Court should approve Class Counsel's application for fees and reimbursement of costs and expenses, service awards for the five Class Representatives, and costs of administration.

CONCLUSION

The Settlement bluntly is fantastic under the circumstances, and that respectfully must be how this Court assesses this Settlement—not how Plaintiffs or Class Counsel or a public lawyer might wish the action to have been resolved, but how it could be resolved under the actual circumstances of very risky litigation involving a common law fraud claim, and where the Defendant has provided documents showing that it has nearly no money. If IJL had substantial funds then it might well have been worth the risk to proceed to trial—though there were concerns regarding reliance and other liability issues as noted—and obtain a judgment potentially in the many millions. Indeed, had that happened, Class Counsel would itself be seeking far higher fees which would have been easier to justify on a more straightforward percentage of the recovery basis. But IJL has few funds. And a trial would have resulted in years more litigation after what already took nearly a decade, with almost certainly nothing for the Class, nor fees for anyone, with IJL out of business, and the public without a service it clearly wants.

Class Counsel respectfully seeks approval of the Settlement.

Dated: April 15, 2016
New York, New York

Respectfully submitted,



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