COMMONWEALTH OF KENTUCKY
HENDERSON CIRCUIT COURT
CIVIL ACTION NO. 2023-CI-00358

DAVID WHITING,
on behalf of himself and all others similarly situated, PLAINTIFF,

v.

(Electronically Filed)

YELLOW SOCIAL INTERACTIVE LTD., DEFENDANT.

CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND COSTS RELATED TO THE CLASS ACTION SETTLEMENT AGREEMENT AND REQUEST FOR FEE AWARD TO CLASS REPRESENTATIVE

Class Counsel respectfully submit this Application for Attorneys' Fees and Costs Related to the Class Action Settlement Agreement and Request for Fee Award to Class Representative ("Class Counsel Application"), and in support thereof state as follows:

I. INTRODUCTION AND PROCEDURAL HISTORY

1. This is a proposed statewide Kentucky class action settlement. Plaintiff David Whiting ("Plaintiff") has been appointed as class representative on behalf of all similarly situated persons. Plaintiff alleges that Defendant owns and operates a video game development company, among which are popular virtual casino games on www.pulszbingo.com, and/or via the Pulsz Fun Slots & Casino app, (the "Games" or "Casino Games") that constitute illegal gambling under Kentucky state law. The details of procedural history and the claims asserted are set forth in the Memorandum of Law in Support of Joint Motion for Preliminary Approval of Class Settlement, Class Certification for Settlement Purposes, Appointment of Class Representative, and Appointment of Class Counsel (the "Preliminary Approval Memo.") filed on July 14, 2023.[1]

[1] Both the Preliminary Approval Memo and forthcoming Final Approval Memorandum (to be filed on or before November 27, 2023) are incorporated by reference herein.

2. After several months of arm's-length negotiations – including a mediation session facilitated by Niki Mendoza, Esq. of Phillips ADR ("Phillips ADR") – Plaintiff and Defendant reached a class-wide settlement, which was executed on July 5, 2023.

3. On July 14, 2023, the parties filed the Joint Motion for Preliminary Approval of Class Action Settlement, Class Certification for Settlement Purposes, Appointment of Class Representative, and Appointment of Class Counsel (the "Preliminary Approval Motion"). After hearing the Preliminary Approval Motion, this Court granted preliminary approval on August 14, 2023. The Court's Order appointed Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel and Plaintiff David Whiting as Class Representative.

4. Plaintiff and Class Counsel have achieved an outstanding result in this case: a $1.32 million non-reversionary, common fund settlement, a value irrespective of additional meaningful injunctive relief. *See* Preliminary Approval Memo. at 5. The $1.32 million fund represents approximately 25 percent of the alleged actual damages in this matter.

5. The settlement payment checks Class Members will receive are significant, impactful, and immediate. Indeed, under the Settlement allocation structure, Class Members stand to recover substantial portions of the amounts spent on Defendant's Games, ranging from approximately 10% (at the low end) to 60% (at the high end). Furthermore, the Settlement requires Defendant to implement meaningful prospective relief, including providing addiction-related resources within their social casino games and creating and honoring a comprehensive self-exclusion policy.

6. The Settlement follows a recently approved settlement of litigation alleging that similar games constituted illegal gambling under Kentucky law. *See Armstead v. VGW Malta Ltd. and VGW Luckyland, Inc.*, Case No. 22-CI-00553 (Henderson Cir. Ct.) ($11.75 million non-

reversionary common fund settlement, approximately 23% of actual damages) (the "VGW Settlement").[2] The Settlement here is also directly in line with, and proportionate to, other recent settlements challenging similar virtual casino games that have been finally approved involving nearly identical allegations under Washington law: *Kater v. Churchill Downs*, Case No. 15-cv-00612, ECF No. 222 (W.D. Wash. Feb. 11, 2021), *Wilson v. Huuuge, Inc.*, Case No. 18-cv-05276, ECF No. 140 (W.D. Wash. Feb. 11, 2021), *Wilson v. Playtika, Ltd.*, Case No. 18-cv-05277, ECF No. 164 (W.D. Wash. Feb. 11, 2021), *Reed v. Light & Wonder, Inc.*, Case No. 18-cv-000565-RSL, ECF No. 197 (W.D. Wash. Aug. 12, 2022), *Healthcote, et al. v. SpinX Games Limited, et al.*, Case No. 20-cv-01310, ECF No. 81 (W.D. Wash. Dec. 1, 2022), *Ferrando et al. v. Zynga Inc.*, Case No. 22-cv-00214, ECF No. 63 (W.D. Wash. Dec. 1, 2022), and *Benson et al. v. DoubleDown Interactive, LLC et al.*, Case No. 18-cv-00525, ECF No. 549 (W.D. Wash. June 1, 2023) (collectively, the "Washington Cases").

7. Class Counsel seek an award of attorneys' fees, costs, and expenses in the amount of $440,000.00 (which is equal to one-third of the $1.32 million Settlement Fund). *See* Preliminary Approval Memo. at 10. In addition, this application seeks a service award of $5,000.00 to the Class Representative. *Id*. Defendant does not oppose either request.

8. As explained further below, the requested awards would fairly compensate Class Counsel and the Class Representative for the result they achieved, and this motion should be granted.

II. EVIDENCE IN SUPPORT OF CLASS COUNSEL'S APPLICATION

9. Class Counsel incorporate by reference herein the Preliminary Approval Motion, the Preliminary Approval Memo., and all exhibits attached thereto. In addition, Class Counsel ask

[2] Attached hereto as Exhibit 2.

the Court to take judicial notice of the entirety of the case file for the activities that have occurred during the course of this proceeding as an additional basis for the award of fees in this case.

10. Class Counsel additionally submits the Affidavit of Alec M. Leslie ("Leslie Affidavit"), attached hereto as **Exhibit 1**.

III. CLASS COUNSEL'S FEE REQUEST IS REASONABLE UNDER THE PERCENTAGE OF THE BENEFIT METHOD

A. Legal Standards

11. Under CR 23.08, the trial court in a certified class action is to approve or award "reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." *Coll. Ret. Equities Fund, Corp. v. Rink*, No. 2012-CA-002050-MR, 2015 WL 226112, at *4 (Ky. App. Jan. 16, 2015). "It is well-settled that the circuit court has discretion to determine the 'appropriate method for calculating attorneys' fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.'" *Id*. (quoting *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). CR 23.08(3) provides that when a trial court awards fees in a class action, it must find the facts and state its legal conclusion under CR 52.01. *Id*. at *7. "Furthermore, when awarding fees in class actions, the trial court must also explain its 'reasons for adopting a particular methodology.'" *Id*. (quoting *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009)).

12. Courts "awarding fees in class actions use two methods, lodestar and percentage-of-fund. The lodestar method sets a fee by multiplying the reasonable hours expended by the reasonable hourly rate. In the percentage-of-fund method, the fee is expressed as a percentage of a set or fixed 'common fund,' whether the fund is obtained by judgment or settlement." *Id*. at *10–11.

13. "Federal Courts within Kentucky and the Sixth Circuit universally recognize that

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'the percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund awarded.'" *Id.* at *6 (quoting *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006)).

14. "Courts in the Sixth Circuit evaluate the reasonableness of a requested fee percentage award using six factors: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *New England Health Care Emps. Pension Fund*, 234 F.R.D. at 634.

15. Performing a lodestar cross-check is optional when using the percentage of the fund method in Kentucky. *See Coll. Ret. Equities Fund, Corp*, 2015 WL 226112, at *8 (Upholding 33 percent percentage of the fund award where circuit court did not perform a lodestar cross-check).

16. "KRS 412.070 provides that attorneys' fees are to be paid 'out of the funds recovered *before distribution.*'" *Id*. at *19. (quoting KRS 412.070 (emphasis in original)). "[T]he statute recognizes the practical reality that a common fund attorney fee under KRS 412.070 should be measured before determining payment to individual claimants. Indeed, this interpretation of KRS 412.070 is entirely consistent with United States Supreme Court precedent." *Id*.

17. Absentee class members are of no consequence in calculating attorney's fees.

> In *Boeing*, the United States Supreme Court held that attorneys fees were appropriately determined as a percentage of the entire amount obtained for the class even though some class members failed to make claims for their individual damages. '[Absentee class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.' *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81, (1980). Because

> all class members receive a benefit with this type of settlement (including class members who choose not to take advantage of it) a majority of courts have awarded attorneys' fees based upon the amount that would be recovered if every class member makes a claim, regardless of whether the claims are filed.

Id. at *19-20.

B. The Court Should Apply the "Percentage of the Fund" Method to Calculate Fees

18. Here, the "percentage of the fund" method is the superior method for evaluating the fee request. In *Rawlings*, the Sixth Circuit observed that the recent trend has been towards application of a percentage-of-the-fund method in common fund cases. *Rawlings*, 9 F.3d at 516–517; *see also In re Cardizem DC Antitrust Litigation*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) ("[T]he Sixth Circuit have indicated their preference for the percentage-of-the-fund method in common fund cases.") (collecting cases). Similarly, in *In re Cardizem DC Antitrust Litigation*, the district court observed that:

> The lodestar method should arguably be avoided in situations where such a common fund exists because it does not adequately acknowledge (1) the result achieved or (2) the special skill of the attorney(s) in obtaining that result. Courts and commentators have been skeptical of applying the formula in common fund cases.... [M]any courts have strayed from using lodestar in common fund cases and moved towards the percentage of the fund method which allows for a more accurate approximation of a reasonable award for fees.

218 F.R.D. at 532 (quoting *Fournier v. PFS Investments, Inc.*, 997 F. Supp. 828, 832–33 (E.D. Mich. 1998)).

19. Similarly, the loadstar method was criticized by the Eastern District of Michigan in *In re F&M Distribs. Inc. Sec. Litig.*, where the court stated both that (1) "the lodestar method is too cumbersome and time-consuming of the resources of the Court"; and (2) "more importantly, the 'percentage of the fund' approach more accurately reflects the result achieved." No. 95-CV-

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71778-DT, 1999 U.S. Dist. LEXIS 11090, at *8 (E.D. Mich. June 29, 1999) (internal quotes and citations omitted); *see also In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) (agreeing with *F M Distribs. Inc.* and noting "[t]his Court's decision to apply the percentage-of-the-fund method is consistent with the majority trend, and, more importantly, is reasonable under the circumstances presented here.").

20. For these reasons, the Court should apply the percentage-of-the-fund method which is consistent with the majority trend. *See New England Health Care Emps. Pension Fund*, 234 F.R.D. at 633. Because the fee requested is reasonable under the standards articulated, no lodestar cross-check is necessary, and the court need not devote its recourses to such a "cumbersome and time-consuming" evaluation. *See F&M Distribs. Inc. Sec. Litig.* 1999 U.S. Dist. LEXIS 11090, *8; *see also Coll. Ret. Equities Fund, Corp*, 2015 WL 226112, at *8 (upholding 33 percent percentage of the fund award where circuit court did not perform a lodestar cross-check). This is consistent with the VGW Settlement and the Washington Cases, each of which utilized the percentage of the fund method to assess attorney's fees. *See generally* VGW Settlement and Washington Cases.

C. The Attorneys' Fees Sought by Class Counsel are Reasonable Under the "Percentage of the Fund" Method

21. Here, Class Counsel seek attorneys' fees in the amount of 33 percent of the common fund. "Federal Courts within Kentucky and the Sixth Circuit universally recognize that 'the percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund awarded.'" *Id*. at *18 (quoting *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006)).[3] Thus, the amount sought is well within

[3] Kentucky courts often look to Federal Rule of Civil Procedure 23 and the federal case law interpreting it as guidance for interpreting Kentucky's counterpart, Kentucky Rule of Civil

the range typically awarded and is thus presumptively reasonable.

22. The reasonableness of the attorneys' fees sought is further supported by the fact the common fund is based on a 25% recovery of the monies spent in Defendant's Games that are the subject of this litigation—a number that exceeds the VGW Settlement (23%) and is in line with numerous similar cases brought under Washington law. *See* Preliminary Approval Memo. at 2. In addition, Class Counsel worked diligently on this action against a sophisticated corporate defendant represented by talented and well-respected counsel, with no guarantee at any point of any recovery. The reasonableness is thus further supported by "the complexity of the case and the effectiveness of class counsel." *See Coll. Ret. Equities Fund, Corp*., 2015 WL 226112, at *8.

23. In terms of the specific amount requested here, the private market would easily support a fee higher than the 33% that Class Counsel request. In non-class litigation, 33.33% contingency fees are typical. Although no such market truly exists for class actions, there are meaningful comparisons to be had in other areas of law. For example, sophisticated business clients who serve as named plaintiffs in class actions commonly agree to pay fees of 33 percent or greater to their counsel. *See, e.g., In re U.S. Foodservice, Inc. Pricing Litigation*, Case No. 3:07-md-1894 (AWT), ECF No. 510-1 at 20–21 (D. Conn. Aug. 29, 2014) [4] (business plaintiffs agreed to fee award as high as 40%). Similar rates prevail in antitrust class actions where businesses participate as plaintiffs. *See, e.g., King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-

Procedure 23. *See* 6 Kurt A. Phillips, Jr., David V. Kramer and David W. Burleigh, *Kentucky Practice – Rules of Civil Procedure Annotated*, CR 23.02 (6th ed. 2005) ("Kentucky courts customarily rely on federal case law when interpreting a Kentucky rule of procedure that is similar to its federal counterpart. Such is the case with CR 23.01 and FRCP 23(a)."); *see also Bellarmine College v. Hornung*, 662 S.W.2d 847 (Ky. App. 1983) (relying on federal case law on FRCP 23 to interpret Kentucky Rule of Civil Procedure 23); *Lamar v. Office of Sheriff*, 669 S.W.2d 27 (Ky. App. 1984) (relying on federal case law on FRCP 23 to interpret Kentucky Rule of Civil Procedure 23).

[4] Attached hereto as Exhibit 3.

1797-MSG, ECF No. 870 at 1–2; (E.D. Pa. Oct. 15, 2015)[5] (noting that courts "have routinely granted a fee award of 33%" in Hatch-Waxman antitrust cases). The same is true for pharmaceutical cases, where a 33% fee "heavily dominate[s]" the market and "the average [is] 32.85 percent." Brian T. Fitzpatrick, A Fiduciary Judge's Guide to Awarding Fees in Class Actions, 89 FORDHAM L. REV 1151, 1161 (2021). And in patent cases, where plaintiffs agreed to pay their lawyers using a flat contingent fee, "the mean rate [is] 38.6% of the recovery." David L. Schwartz, The Rise of Contingent Fee Representation in Patent Litigation, 64 ALA. L. REV. 335, 360 (2012).

24. As Justices Brennan and Marshall observed in their concurring opinion in *Blum v. Stenson*, 465 U.S. 886 (1984): "In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." 465 U.S. at 902 n.19; *see also In re Prudential-Bache Energy Income Partnerships Sec. Litig.*, 1994 U.S. Dist. LEXIS 6621, at *4 (E.D. La. May 18, 1994) ("Were this not a class action, attorney's fees would range between 30% and 40%, the percentages commonly contracted for in contingency cases."). The Court of Appeals of Kentucky has upheld a trial court's finding that a fee awarding one-third of the common fund value was reasonable. *See Coll. Ret. Equities Fund, Corp.*, 2015 WL 226112, at *7 ("Given the varying amounts of attorneys' fees awarded in similar types of class action litigation, we cannot say that an award of one-third of the constructive common fund was erroneous.").

25. Comparison to judicially approved fees can also be useful, and that comparison supports Class Counsel's request here as well. Class Counsel's request for 33% of the Settlement Fund falls below the relevant market rate, meaning a market analysis supports the requested award.

[5] Attached hereto as Exhibit 4.

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i. Class Counsel Achieved Extraordinary Results for the Class

26. The number one factor Kentucky and Sixth Circuit courts consider in evaluating the reasonableness of a requested fee percentage award is the "the value of the benefit rendered to the plaintiff class[.]" *See New England Health Care Emps. Pension Fund*, 234 F.R.D. 627, 634; *see also Dick v. Sprint Commc'ns Co. L.P.*, 297 F.R.D. 283, 299 (W.D. Ky. 2014) ("The first *Ramey* factor requires the Court to assess the benefit of the settlement to the class. Courts in this circuit regard this element as the most important of the *Ramey* factors."). Here, the result achieved by Class Counsel is nothing short of extraordinary.

27. In this action, Plaintiff alleged that Defendant owns and operates the Games, and that the Games constitute illegal gambling under Kentucky state law. The Settlement establishes a $1.32 million non-reversionary common fund from which Class Members may make claims to receive substantial reimbursement for monies spent on Defendant's Games. The plan of allocation is structured in tiers so that Class Members who spent more money on the applications are entitled to commensurately recoup more money. Further, all claims will likely be subject to *pro rata* upward adjustment. Thus, by way of example, Settlement Class Members in the highest category of Lifetime Spending Amounts are slated to recover the majority, *i.e.*, more than half, of their losses.

28. Based on information provided by Defendant prior to executing the settlement, the cash common fund represents approximately 25% of the Settlement Class's potential actual damages. This percentage recovery exceeds that of the VGW Settlement (23%) and is in line with those achieved in the Washington Cases, despite that those cases were often settled after *years* of litigation. *See generally* Washington Cases. Even more remarkably, none of the Washington Cases were settled until after the Ninth Circuit issued a binding opinion holding that virtual casino

games like the Games at issue here constitute illegal gambling under Washington law. *See Kater v. Churchill Downs Inc.*, 886 F.3d 784, 785 (9th Cir. 2018). No such analogous holding can be found in either Kentucky or the Sixth Circuit, yet Class Counsel achieved an analogous recovery to the Washington Cases all the same.

29. The monetary component of this Settlement is the primary relief provided to the Settlement Class, and it is the only component of the Settlement that Class Counsel ask to be compensated for directly. That said, the non-monetary benefits that Class Counsel achieved for the Class in this litigation are significant and meaningful, and they further justify the appropriateness of the requested fee award here.

30. Specifically, the Settlement requires Defendant to maintain resources relating to video game behavior disorders that are accessible within the Games. Defendant will maintain a webpage on the Games sites that (1) encourages responsible gameplay; (2) describes what video game behavior disorders are; (3) provides or links to resources relating to video game behavior disorders; and (4) includes a link to Defendant's self-exclusion policy. Settlement Agreement § 2.2(a). Defendant will maintain a policy, and will make commercially reasonable efforts to enforce that policy, such that customer service representatives will provide the same information to any player who contacts them and references or exhibits video game behavior disorders, and will face no adverse employment consequences for providing players with this information. *Id.*

31. In addition, under the Settlement, Defendant will publish on its websites a voluntary self-exclusion policy pursuant to which players may terminate their ability to purchase virtual coins in the Games or close their Game accounts entirely. That policy will provide that, when a player self-excludes by specifying the relevant User ID, Defendant will use commercially reasonable efforts to implement the player's request with respect to all account(s) associated with

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those User ID(s). Defendant will retain discretion as to the particular method by which players may self-exclude; for example, Defendant may permit players to self-exclude by contacting Defendant's customer support, completing a form on Defendant's website, or any other reasonably accessible means. Defendant shall use commercially reasonable efforts to prevent any circumvention of the player's request, including by creation of a new account in either Game, from any account-related identifiers that are commercially and technically feasible, using commercially reasonable efforts, to be associated with the excluded account. After a self-exclusion request is addressed in full by Defendant, Defendant will not remove these restrictions for the period identified in the self-exclusion policy at the time the self-exclusion is requested. *Id.* § 2.2(b).

32. Finally, under the Settlement, Defendant will maintain their recent changes (implemented after receipt of Plaintiff's initiation of dispute resolution proceedings) to game mechanics for the Games to ensure that players who run out of sufficient virtual coins are able to continue to play games within the Game suites without needing to purchase additional virtual coins or to wait until they would have otherwise received free additional virtual coins in the ordinary course. Specifically, players who run out of coins will be able to continue to play at least one game within the Game suites. *Id.* § 2.2(c). These injunctive components provide meaningful and valuable relief to the class beyond the monetary relief provided to class members, and further warrant the requested fee.

ii. Class Counsel Provided Quality Work in a Complex Case

33. Federal Courts, including in the Sixth Circuit, consider the "complexity of the litigation in evaluating the reasonableness of a requested fee percentage award. *See, e.g. New England Health Care Emps. Pension Fund*, 234 F.R.D. at 634 (W.D. Ky. 2006). Here, Class Counsel provided quality work in a case with complex and novel legal issues.

34. This action was originally filed on June 16, 2023, in Henderson Circuit Court. However, the case actually began months earlier. Prior to initiating the action, Class Counsel undertook extensive efforts investigating and evaluating the claims against Defendant. Eventually, in October 2022, Plaintiff initiated dispute resolution proceedings pursuant to the YSI Terms & Conditions. *See* Prelim. Approval Memo. at 3.

35. Class Counsel was contacted by defense counsel soon thereafter. Given the extensive roadmap laid out in VGW and in prior similar cases in the Western District of Washington (*see* Prelim Approval Memo at 2), the Parties discussed the possibility of an early mediation through which the Parties could share their respective positions. *Id.*

36. During the period leading up to the mediation, Defendant provided Class Counsel with transactional data for virtual coin purchases made by the Settlement Class; the Parties exchanged multiple rounds of voluminous briefing on the core facts, legal issues, litigation risks, and potential settlement structures; and the Parties supplemented that briefing with extensive telephonic correspondence, mediated and shuttled by the Phillips ADR team, clarifying each other's positions in advance of the mediation. *Id.* at 4. On April 6, 2023, following the mediation session, Ms. Mendoza made a mediator's proposal to settle the case in principle, which both Parties accepted. *Id.*

37. Throughout these negotiations, Defendant was represented by prominent and well-respected counsel, another factor weighing in favor of the requested fee award. *See, e.g.*, *New England Health Care Emps. Pension Fund*, 234 F.R.D. at 634 (W.D. Ky. 2006).

38. During the settlement negotiations, the parties detailed their positions on the novel and challenging issues raised in this case. Settlement negotiations ultimately culminated in the terms memorialized in the Settlement Agreement.

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39. In sum, this case required a significant amount of skilled legal work. The Settlement Agreement was not arrived at until after Class Counsel had (1) conducted an extensive and comprehensive pre-suit investigation relating to the events and transactions underlying Plaintiff's claims prior to filing the Complaint; (2) thoroughly researched the law and facts pertinent to Plaintiff's claims and the defenses raised by Defendant, and assessed the risks of prevailing on each of the respective claims on pre-trial motions and at trial; (3) conducted discovery; (4) exchanged voluminous briefing in advance of the Parties' mediation; (5) thoroughly evaluated the risks of ongoing litigation; and (6) participated in a full-day mediation session.

40. Further yet, Class Counsel relied on their previous experience and innumerable man-hours in other class action litigation involving similar "illegal gambling" allegations. *See, e.g.*, *In Re: Apple Inc. App Store Simulated Casino-Style Games Litig.*, Case No. 5:21-cv-02777-EJD, ECF No. 77, at 5 (N.D. Cal. Sept. 23, 2021) [6] (Order Granting Appointment of Interim Lead Counsel); *Croft v. SpinX Games Limited, et al.*, Case No. 2:20-cv-01310-RSM, ECF No. 60, at ¶ 4 (W.D. Wash. Mar. 24, 2022) [7] (appointing Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel); *Armstead v. VGW Malta Ltd. and VGW Luckyland, Inc.*, Case No. 22-CI-00553 (Cir. Ct. Henderson Cnty.) (appointing Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel); Leslie Affidavit ¶ 5; *see also In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *13 (approving attorneys' fees where class counsel "performed significant factual investigation prior to bringing th[is] action[] . . . participated in protracted negotiations[,] and filed several pleadings"); *Armstead v. VGW Malta Ltd. and VGW Luckyland, Inc.*, Case No. 22-CI-00553 (Henderson Cir. Ct.) (approving attorneys' fees and

[6] Attached hereto as Exhibit 5.
[7] Attached hereto as Exhibit 6.

expenses, finding them "reasonable in light of the multi-factor test used to evaluate fee awards in the Sixth Circuit."). The work performed by Class Counsel in this case represents the highest caliber of legal work and strongly supports their requested fee award. Leslie Affidavit ¶ 6.

iii. Plaintiff's Claims Carried Substantial Risk

41. The primary goal of Class Counsel and the named Plaintiff was to obtain, by settlement or judgment, the best overall common benefit for the Class at the earliest reasonable time. The reality of complex litigation against defendants represented by formidable counsel was an anticipated obstacle that Class Counsel considered and sought to overcome from the beginning. The results obtained by Class Counsel through the Settlement Agreement owe more to the strategy employed and quality of the work product than sheer time and labor. The mere expenditure of time and labor does not necessarily move a complex action such as this towards certification, judgment or settlement. The Court is in the superior position to assess whether the strategy undertaken by Class Counsel was reasonable and necessary under the circumstances of the case.

42. This action involved complex, novel and difficult legal issues related to various underlying causes of action and class certification. Throughout the case, Defendant maintained that Plaintiff's substantive and class allegations were wholly without merit. In short, the facts of the case, the legal issues involved and Defendant's aggressive posture in asserting its defenses presented a risk that Plaintiff would fail to establish liability and/or legal damages.

43. While there is a large body of Washington and Ninth Circuit caselaw on point (*see generally,* Washington Cases), to Class Counsel's knowledge, there is no analogous Kentucky caselaw. *See* Leslie Affidavit ¶ 12. Further, Courts interpreting the gambling laws of Maryland, Illinois, Michigan, and California have held that such games *are* legal and do not constitute

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gambling. *See, e.g., Mason v. Machine Zone, Inc.*, 140 F. Supp. 3d 457 (D. Md. 2015), *aff'd* 851 F.3d 315 (4th Cir. 2017) (interpreting California and Maryland law); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (interpreting Illinois law); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016) (interpreting California, Illinois and Michigan law); *Ristic v. Machine Zone, Inc.*, No. 15-cv-8996, 2016 WL 4987943 (N.D. Ill. Sept. 19, 2016) (interpreting Illinois law). While Class Counsel is confident in the claims alleged and believe that Kentucky law much more closely tracks Washington law than Maryland, Illinois, and California, it is entirely possible that a Kentucky court could have sided with Defendant and the majority of courts to consider this issue, leaving Plaintiff, Class Members, and Class Counsel empty-handed. Leslie Affidavit ¶ 12.

44. Even if Plaintiff had prevailed on the gambling issue, Defendant had numerous additional defenses available, any one of which could have been fatal to Plaintiff's claims. *See* Leslie Affidavit ¶ 13. Specifically, Defendant's Terms and Conditions for the Games contained an agreement to resolve any Disputes through final and binding arbitration, a limitation of liability clause, a waiver of Plaintiff's right to participate in a class and/or representative action, and a forum selection clause requiring application of New York, rather than Kentucky, law. *Id.* Had a Court found any one of these terms applicable to Plaintiff, it would have barred recovery for the class entirely. *Id.*

45. It has been the experience of Class Counsel that plaintiffs in complex class actions have to prevail on essentially all substantive and procedural issues in order to succeed. *See* Leslie Affidavit ¶ 14. A defendant, on the other hand, only has to prevail on any one, be it stopping class certification, reversing class certification, or undermining substantive claims on legal or factual grounds. *Id.* Class Counsel expended the necessary time and labor required to prosecute this

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action to a favorable conclusion. *Id.*

46. Defendant is a large and extremely lucrative gaming company. Class Counsel anticipated the case would be vigorously defended. In fact, Defendant retained very competent, aggressive, and well-respected counsel. *See New England Health Care Emps. Pension Fund*, 234 F.R.D. at 634 (listing "the professional skill and standing of counsel involved on both sides" as a factor in determining class counsel fee award).

47. Class Counsel worked entirely on contingency, advancing both their time and required costs and expenses. Leslie Affidavit ¶ 19. If Defendant had won this case, through any number of avenues, Class Counsel would not have been compensated at all.

48. When Class Counsel undertakes major litigation, such as this litigation, it necessarily limits Class Counsel's ability to undertake other complex litigation. During the course of this action, Class Counsel devoted significant manpower and resources. Class Counsel had to make this commitment at the outset without knowing how long the case would take or if it would ever resolve. Therefore, Class Counsel's willingness to prosecute this action on a contingent fee basis necessitated advancing and diverting the costs, manpower and resources expended on this action from other cases. Although Plaintiff ultimately believed he would prevail on the novel and difficult questions at issue in this case, at the outset Class Counsel undertook the case knowing that these novel and difficult questions would be an obstacle at every step of the litigation.

49. Under the circumstances, there were substantial risks that Plaintiff would be unable to certify the Class, unable to establish liability and would recover nothing. And even if Plaintiff and Class Counsel had been able to prevail at trial, they still faced the daunting prospect of affirming any verdict on post-trial motions in this Court and later on appeal. Leslie Affidavit ¶ 15. That process would potentially have taken years and involved tremendous risk that a hard-fought

victory could be lost. *Id.* There can be no doubt that Class Counsel faced daunting risks in this case that more than justify the fee award sought by Class Counsel. *See, e.g., F&M Distribs. Inc. Sec. Litig.* 1999 U.S. Dist. LEXIS 11090, at *16 ("As the preceding discussion has explained, the attorneys have achieved an excellent result in a case that was factually, legally, and logistically difficult. Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee, as does the realization that they undertook this case on a contingent fee basis, which required them to fund all of the significant litigation costs while facing the risk of a rejection [of] their clients' claims on the merits.").

iv. Class Counsel Handled This Case on a Contingent Basis and Bore the Financial Burden

50. "[C]ontingency fee arrangements indicate that there is a certain degree of risk in obtaining a recovery." *In re Telectronics Pacing Systems, Inc.*, 137 F.Supp.2d 1029, 1043 (S.D. Ohio 2001). Where, as here, "Class counsel spent considerable time on [a] case at the risk of receiving no compensation… this factor supports the reasonableness of the requested attorneys' fees." *Dick v. Sprint Commc'ns Co. L.P.*, 297 F.R.D. 283, 300 (W.D. Ky. 2014). To date, Class Counsel has worked for over a year with no payment, and no guarantee of payment.

51. Courts have long recognized that attorneys' contingent risk is an important factor in determining the fee award and may justify awarding a premium over an attorneys' normal hourly rates. *See, e.g. id., see also In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299–1300 (9th Cir. 1994) ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases . . . [I]f this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing."); *McKeen-Chaplin v. Provident*

Savings Bank, FSB, 2018 WL 3474472, at *2 (E.D. Cal. July 19, 2018) ("Counsel has not received payment for the vast majority of its time spent on this case . . . and took on significant financial risk by taking on this action on a contingency fee basis."); *In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 396–98 (S.D.N.Y. 1999) ("No one expects a lawyer whose compensation is contingent on the success of his services to charge, when successful, as little as he would charge a client who in advance of the litigation has agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee dependent solely on the reasonable amount of time expended.").

52. Further, if the case had advanced through class certification, Class Counsel's expenses would have increased many-fold, and Class Counsel would have been required to advance these expenses potentially for several years to litigate this action through judgment and appeals.

53. In sum, in the face of the obstacles referred to above, with a case asserting claims predicated on complex legal and factual issues that were opposed by highly skilled and experienced defense counsel, Class Counsel succeeded in securing a remarkable recovery for the Class. Plaintiff submits that the requested attorneys' fees and costs are fair and reasonable when considered under applicable legal standards.

D. The Reaction of the Class to Date Confirms that the Requested Fee is Reasonable

54. The Settlement Agreement provided for an exceedingly robust notice program. *See* Settlement Agreement § 4. The Notice (which is also available on the settlement website) advised Class Members that Class Counsel would apply for a fee, cost, and expense award of up to $1,320,000.00. *Id., see also id.* Exs. B-D. To date, no objections have been submitted, and not a single Class Member has requested exclusion from the settlement. Leslie Affidavit ¶ 22. The lack of any objections is itself important evidence that the requested fees are fair. *See Ressler v.*

Jacobson, 149 F.R.D. 651, 656 (M.D. Fla. 1992) (noting that the lack of objections is "strong evidence of the propriety and acceptability" of fee request); *see also In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 533 (E.D. Pa. 1990).

IV. THE REQUESTED INCENTIVE AWARD FOR PLAINTIFF IS REASONABLE

55. It is well settled that a class representative may be awarded an incentive award. As the Sixth Circuit has noted, "when [as here] a class-action litigation has created a communal pool of funds to be distributed to the class members, courts have approved incentive awards to be drawn out of that common pool." *Hadix v. Johnson*, 322 F.3d 895, 898 (6th Cir. 2003); *see also, e.g.*, *Pelzer v. Vassalle*, 655 F. App'x 352, 361 (6th Cir. 2016) (approving incentive award payments that were 53 times what claiming class members would receive).

56. In general, courts look to the following factors to determine if an incentive award is appropriate: "(1) the action taken by the Class Representatives to protect the interests of the Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives in pursuing the litigation." *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2010 WL 3341200, at *12 (W.D. Ky. Aug. 23, 2010) (quoting *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250 (S.D. Ohio 1991)). Courts of the Sixth Circuit also recognize that service awards "encourage members of a class to become class representatives and reward their efforts taken on behalf of the class." *In re Automotive Parts Antitrust Litig.*, 2020 WL 5653257, at *5 (E.D. Mich. Sept. 23, 2020).

57. Here, the $5,000.00 incentive award for the proposed Class Representative is appropriate. *See, e.g.*, *F&M Distribs. Inc. Sec. Litig.* 1999 U.S. Dist. LEXIS 11090, at *20

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(approving $7,500.00 incentive award); *see also Armstead v. VGW Malta Ltd. and VGW Luckyland, Inc.*, Case No. 22-CI-00553 (Henderson Cir. Ct.) (approving $7,000.00 incentive award in an analogous settlement). The incentive award is relatively small (considering the total size of the settlement) and corresponds directly to the effort put forth by the Class Representative in securing the terms of the Settlement Agreement. Moreover, the Settlement Agreement provides for a fair allocation of relief to all the members of the Settlement Class consistent with the allocation method described in the Settlement Agreement. *See* Settlement Agreement Ex. E. There are no sub-classes of Class Members that are treated any differently. Thus, aside from the incentive award, the Class Representative is treated in the exact same manner as any other Class Members.

58. Defendant does not object to $5,000.00 being awarded to the Class Representative. The Notice (which is also available on the settlement website) advised Class Members that Class Counsel would apply for an incentive award of up to $5,000.00 for the Class Representative. To date, no objections have been submitted, and not a single Class Member has asked to be excluded from the class. Leslie Affidavit ¶ 22.

59. Moreover, the requested amount of $5,000.00 for Plaintiff reflects his significant involvement and dedication to the case. Indeed, Mr. Whiting consulted with Class Counsel throughout the investigation, filing, prosecution and settlement of this litigation. Leslie Affidavit ¶ 23. As such, David Whiting was actively involved in the litigation and devoted substantial time and effort to the case. *Id.* Mr. Whiting was prepared to "go the distance" in this litigation to continue to represent the Class and fight to obtain significant relief on their behalf. *Id.* His actions and dedication played a significant role in this case and helped achieve the exceptional settlement that will benefit thousands of class members. Leslie Affidavit ¶ 23-24. Accordingly, a $5,000.00

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incentive award for Plaintiff David Whiting is fair and reasonable.

V. CONCLUSION

60. Based upon the foregoing, it is apparent that the attorneys' fees and expenses requested by Class Counsel is fair, reasonable, and fully supported by law applied to a percentage of the common fund benefit available to the Class. Additionally, the incentive award requested for the Class Representative is fair, reasonable and well supported.

WHEREFORE, Class Counsel requests that this Application be granted; that Class Counsel be awarded $440,000.00 in attorneys' fees, expenses, and costs; and the Class Representative, David Whiting, be awarded $5,000.00 as an incentive award.

Respectfully submitted,

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Counsel for Plaintiff and the Putative Class

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CERTIFICATE OF SERVICE

I certify that on November 3, 2023, the above and foregoing document was filed electronically with the Court's electronic filing system. Notice of this filing will be sent to the following attorneys of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Joseph H. Langerak
Joseph H. Langerak

EXHIBIT 1

COMMONWEALTH OF KENTUCKY
HENDERSON CIRCUIT COURT
CIVIL ACTION NO. 2023-CI-00358

DAVID WHITING,
on behalf of himself and all others similarly situated, PLAINTIFF,

v.

YELLOW SOCIAL INTERACTIVR LTD., DEFENDANT.

AFFIDAVIT OF ALEC M. LESLIE IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND EXPENSES AND ISSUANCE OF INCENTIVE AWARD

Affiant, Alec M. Leslie, being first duly sworn, hereby declares as follows:

1. I am an attorney at law licensed to practice in the State of New York, and I have been admitted to practice *pro hac vice* in this action. I am a Partner with Bursor & Fisher, P.A., Class Counsel in this action. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, could and would competently testify thereto under oath.

2. I submit this Declaration in support of Class Counsel's Application for Attorneys' Fees and Costs Related to the Class Action Settlement Agreement and Request for Fee Award to Class Representative.

3. Attached hereto as **Exhibit A** is a true and correct copy of the Parties' Class Action Settlement Agreement, and the exhibits attached thereto.

4. This case required a significant amount of skilled legal work. The Settlement Agreement was not arrived at until after Class Counsel had (1) conducted an extensive and comprehensive pre-suit investigation relating to the events and transactions underlying Plaintiff's claims prior to filing the Complaint; (2) thoroughly researched the law and facts pertinent to Plaintiff's claims and the defenses raised by Defendant, and assessed the risks of prevailing on each of the respective claims on pre-trial motions and at trial; (3) conducted discovery; (4)

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exchanged voluminous briefing in advance of the Parties' mediation; (5) thoroughly evaluated the risks of ongoing litigation; and (6) participated in a full-day mediation session.

5. In working on this case, my colleagues and I relied on our previous experience and innumerable man-hours in other class action litigation involving similar "illegal gambling" allegations. *See, e.g., In Re: Apple Inc. App Store Simulated Casino-Style Games Litig.*, Case No. 5:21-cv-02777-EJD, ECF No. 77, at 5 (N.D. Cal. Sept. 23, 2021) (Order Granting Appointment of Interim Lead Counsel); *Croft v. SpinX Games Limited*, *et al.*, Case No. 20-cv-01310-RSM, ECF No. 60, at ¶ 4 (W.D. Wash. Mar. 24, 2022) (appointing Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel); *Armstead v. VGW Malta Ltd. and VGW Luckyland, Inc.*, Case No. 22-CI-00553 (Henderson Cir. Ct.) (appointing Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel).

6. I believe the work performed by Class Counsel in this case represents the highest caliber of legal work and strongly supports their requested fee award.

7. After Defendant received Plaintiff's initial demand pursuant to Defendant's terms and conditions, the parties discussed the prospect of resolution at an early juncture.

8. Those discussions eventually led to an agreement between the Parties to engage in mediation, which the Parties agreed would take place before Niki Mendoza, Esq., who is a neutral affiliated with Phillips ADR Enterprises ("Phillips ADR"). In the weeks leading up to the mediation, the Parties were in regular communication with each other and with the Phillips ADR team, as the Parties sought to crystallize the disputed issues, produce focal information and data, and narrow down potential frameworks for resolution.

9. During this period, Defendant provided Class Counsel with transactional data for virtual chip purchases made by the Settlement Class; the Parties exchanged multiple rounds of voluminous briefing on the core facts, legal issues, litigation risks, and potential settlement structures; and the Parties supplemented that briefing with extensive telephonic correspondence, mediated and shuttled by the Phillips ADR team, clarifying each other's positions in advance of the mediation.

10. On April 6, 2023, following a full-day mediation session, Ms. Mendoza made a mediator's proposal to settle the case in principle, which both Parties accepted.

11. Working within the guideposts of prior analogous settlements under Washington law, the Parties were able to negotiate and execute a term sheet memorializing their agreement at the conclusion of the mediation. Every step leading up to and throughout the mediation session was hard-fought and adversarial.

12. While there is a large body of Washington and Ninth Circuit caselaw on point, to Class Counsel's knowledge, there is no analogous Kentucky caselaw. While Class Counsel is confident in the claims alleged and believe that Kentucky law much more closely tracks Washington law than Maryland, Illinois, and California, it is entirely possible that a Kentucky court could have sided with Defendant and the majority of courts to consider this issue, leaving Plaintiff, Class Members and Class Counsel empty-handed.

13. Even if Plaintiff had prevailed on his challenge of the legality of virtual casino games, Defendant had numerous additional defenses available, any one of which could have been fatal to Plaintiff's claims. Specifically, Defendant's Terms and Conditions for the Games contained an agreement to resolve any Disputes through final and binding arbitration, a limitation of liability clause, a waiver of Plaintiff's right to participate in a class and/or representative action, and a forum selection clause requiring application of New York, rather than Kentucky, law. Had a Court found any one of these terms applicable to Plaintiff, it would have barred recovery for the class entirely.

14. It has been my experience that plaintiffs in complex class actions have to prevail on essentially all substantive and procedural issues in order to succeed. A defendant, on the other hand, only has to prevail on any one, be it stopping class certification, reversing class certification, or undermining substantive claims on legal or factual grounds. In my opinion, Class Counsel expended the necessary time and labor required to prosecute this action to a favorable conclusion.

15. Even if Plaintiff and Class Counsel had been able to prevail at trial, they still faced the daunting prospect of affirming any verdict on post-trial motions in this Court and later on appeal. That process would potentially have taken years and involved tremendous risk that a hard-fought victory could be lost.

16. On August 14, 2023, the Court granted preliminary approval of the settlement, and issued the order attached as **Exhibit B.**

17. Since the Court granted preliminary approval, my firm has worked closely with the Settlement Administrator Artificial Intelligence Class Solutions ("AICS"), to carry out the Court-ordered notice plan.

18. My firm has also fielded calls from Settlement Class Members and assisted them with their inquiries and with filing claims.

19. My firm worked on this case entirely on contingency, advancing both my firm's time and required litigation costs and expenses.

20. To date, my firm and our local counsel, Stoll Keenon Ogden, PLLC, have also expended $10,650.15 in out-of-pocket costs and expenses in connection with the prosecution of this case. Attached as **Exhibit C** are itemized lists of those costs and expenses. These costs and expenses are reflected in the records of our firms, and were necessary to prosecute this litigation. These expenses include mediation fees, filing fees, and other related litigation expenses. These expenses were necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred. The fee award sought by Class Counsel is inclusive of these costs.

21. I estimate that my firm will incur an additional 50-75 hours of future work in connection with the preparation of Plaintiff's Motion for Final Approval, the fairness hearing, coordinating with AICS, monitoring settlement administration, and responding to Settlement Class Member inquiries.

22. I have received, and will continue to receive, weekly reports from AICS regarding the status of notice and claims in this action. To date, no objections to the settlement have been submitted, and not a single Class Member has requested exclusion from the settlement.

23. Plaintiff David Whiting was significantly involved and dedicated to this case. Plaintiff Whiting consulted with Class Counsel throughout the investigation, filing, prosecution and settlement of this litigation. As such, Mr. Whiting was actively involved in the litigation and devoted substantial time and effort to the case. Mr. Whiting was prepared to "go the distance" in this litigation to continue to represent the Class and fight to obtain significant relief on their behalf. His actions and dedication played a significant role in this case and helped achieve the exceptional settlement that will benefit thousands upon thousands of class members.

24. I am therefore of the opinion that Mr. Whiting's active involvement in this case was critical to its ultimate resolution. He took his role as class representative seriously, devoting significant amounts of time and effort to protecting the interests of the class. Without his willingness to assume the risks and responsibilities of serving as class representative, I do not believe such a strong result could have been achieved.

I declare under penalty of perjury under the laws of the United States and the Commonwealth of Kentucky that the foregoing is true and correct. Executed on November 3, 2023 at New York, New York.

Further, Affiant sayeth naught.

[REMAINDER OF THE PAGE INTENTIONALLY LEFT BLANK, SIGNATURE PAGE TO FOLLOW]

Alec M. Leslie

State of New York }
}
County of New York }

Subscribed and sworn before me by Alec M. Leslie on this 2 day of November, 2023.

My Commission expires: March 16, 2024

MAX S. ROBERTS
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02RO6405855
Qualified in New York County
Commission Expires March 16, 2024

Notary Public, State of New York

EXHIBIT A

COMMONWEALTH OF KENTUCKY
HENDERSON COUNTY CIRCUIT COURT

DAVID WHITING, individually and on behalf of all others similarly situated, Plaintiff, v. YELLOW SOCIAL INTERACTIVE LTD., Defendant.	Case No. 2023-CI-00358

CLASS ACTION SETTLEMENT AGREEMENT

This Agreement ("Agreement" or "Settlement Agreement") is entered into by and among (i) Plaintiff, David Whiting ("Plaintiff"); (ii) the Settlement Class (as defined herein); and (iii) Defendant, Yellow Social Interactive Ltd. ("Defendant" or "YSI"). The Settlement Class and Plaintiff are collectively referred to as the "Plaintiffs" unless otherwise noted. The Plaintiff and YSI are collectively referred to herein as the "Parties." This Agreement is intended by the Parties to fully, finally and forever resolve, discharge, and settle the Released Claims (as defined herein), upon and subject to the terms and conditions of this Agreement, and subject to the final approval of the Court.

RECITALS

A. On September 28, 2022, Plaintiff, through his counsel, sent a demand letter to YSI alleging that its Platforms (defined below) fall within the definition of an illegal gambling game and that players can recover their losses under Kentucky law, setting forth claims for violations of Ky. Rev. Stat. § 372.020, based on Plaintiff's use of and purchases of virtual items in YSI's Platforms.

2. On October 11, 2022, YSI filed a demand for arbitration against Plaintiff with the

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American Arbitration Association (the "AAA") seeking declaratory relief that YSI's Platforms do not constitute illegal gambling under Kentucky law (the "Arbitration").

3. Over the next several months, counsel for the Parties had numerous telephone calls and discussed the prospect of resolution.

4. Those discussions eventually led to an agreement between the Parties to stay the arbitration proceedings and engage in mediation, which the Parties agreed would take place before the Niki Mendoza, Esq., a neutral affiliated with Phillips ADR Enterprises ("Phillips ADR").

5. In the weeks leading up to the mediation, the Parties were in regular communication with each other and with Phillips ADR, as the Parties sought to crystallize the disputed issues, produce focal information and data, and narrow potential frameworks for resolution.

6. During this period and in connection with the mediation proceedings, YSI provided Class Counsel with transaction data for virtual coin purchases made by the Settlement Class; the Parties exchanged briefing on the key facts, legal issues, litigation risks, and potential settlement structures; and the Parties supplemented that briefing with extensive telephonic correspondence, mediated by Phillips ADR, in order to clarify the Parties' positions in advance of the mediation.

7. On April 6, 2023, the Parties participated in a mediation before Ms. Mendoza. At the conclusion of the mediation, Ms. Mendoza made a mediator's proposal to settle the case, which all Parties accepted. The Parties then executed a binding term sheet to settle the case on a class action basis.

8. On June 16, 2023, Plaintiff filed a putative class action complaint against YSI in the Henderson County Circuit Court, Case No. 2023-CI-00358.

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9. Plaintiff and Class Counsel have conducted a comprehensive examination of the law and facts regarding the claims against YSI, and the potential defenses available. Plaintiff believes that the claims asserted in the Action against YSI have merit and that Plaintiff would have prevailed at summary judgment and/or trial. Nonetheless, Plaintiff and Class Counsel recognize that YSI has raised factual and legal defenses that present a risk that Plaintiff may not prevail. Plaintiff and Class Counsel also recognize the expense and delay associated with continued prosecution of the Action against YSI through class certification, summary judgment, trial, and any subsequent appeals. Plaintiff and Class Counsel also have taken into account the uncertain outcome and risks of litigation, especially in complex class actions, as well as the difficulties inherent in such litigation. Therefore, Plaintiff believes it is desirable that the Released Claims be fully and finally compromised, settled, and resolved with prejudice. Based on its evaluation, Class Counsel has concluded that the terms and conditions of this Agreement are fair, reasonable, and adequate to the Settlement Class, and that it is in the best interests of the Settlement Class to settle the claims raised in the Action pursuant to the terms and provisions of this Agreement.

10. At all times, YSI has denied and continues to deny any wrongdoing and liability and denies all material allegations in the Action. Specifically, YSI denies that the Platforms constitute or constituted illegal gambling, and it opposes certification of a litigation class. YSI is prepared to continue its vigorous defense. Nonetheless, taking into account the uncertainty and risks inherent in a motion to dismiss, class certification, summary judgment, and trial, YSI has concluded that continuing to defend the Action would be burdensome and expensive. YSI has further concluded that it is desirable and beneficial that the Action be fully and finally settled and terminated in the manner and upon the terms and conditions set forth in this Agreement. This Agreement is a compromise, and the Agreement, any related documents, and any negotiations

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resulting in it shall not be construed as or deemed to be evidence of or an admission or concession of liability or wrongdoing on the part of YSI, or any of the Released Parties (defined below), with respect to any claim of any fault or liability or wrongdoing or damage whatsoever or with respect to the certifiability of a litigation class.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiff, the Settlement Class, and each of them, and YSI, by and through its undersigned counsel that, subject to final approval of the Court after a hearing or hearings as provided for in this Settlement Agreement, in consideration of the benefits flowing to the Parties from the Agreement set forth herein, that the Action and the Released Claims shall be finally and fully compromised, settled, and released, and the Action shall be dismissed with prejudice, upon and subject to the terms and conditions of this Agreement.

AGREEMENT

1. DEFINITIONS.

As used in this Settlement Agreement, the following terms have the meanings specified below:

1.1 "Action" means the Arbitration and the case captioned *Whiting v. Yellow Social Interactive Ltd.*, Case No. 2023-CI-00358, pending in the Henderson County Circuit Court.

1.2 "Approved Claim" means a Claim Form submitted by a Settlement Class Member that: (a) is submitted timely and in accordance with the directions on the Claim Form and the provisions of the Settlement Agreement; (b) is fully and truthfully completed by a Settlement Class Member with all of the information requested in the Claim Form; (c) is signed by the Settlement Class Member, physically or electronically; and (d) is approved by the Settlement Administrator pursuant to the provisions of this Agreement.

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1.3 "Claim Form" means the document substantially in the form attached hereto as Exhibit A, as approved by the Court. The Claim Form, to be completed by Settlement Class Members who wish to file a Claim for a payment, shall be available in electronic and paper format in the manner described below.

1.4 "Claims Deadline" means the date by which all Claim Forms must be postmarked or received to be considered timely and shall be set as a date no later than fifty-six (56) days after the Final Approval Hearing. The Claims Deadline shall be clearly set forth in the Preliminary Approval Order as well as in the Notice and the Claim Form.

1.5 "Class Counsel" means Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A.

1.6 "Class Representative" means the named Plaintiff in this Action, David Whiting.

1.7 "Court" means the Henderson County Circuit Court, the Honorable Karen L. Wilson presiding, or any judge who shall succeed her as the Judge in this Action.

1.8 "Defendant" means Yellow Social Interactive Ltd.

1.9 "Defendant's Counsel" means Duane Morris LLP.

1.10 "Effective Date" means the date ten (10) days after which all of the events and conditions specified in Paragraph 9.1 have been met and have occurred.

1.11 "Escrow Account" means the separate, interest-bearing escrow account to be established by the Settlement Administrator under terms acceptable to all Parties at a depository institution insured by the Federal Deposit Insurance Corporation. The Settlement Fund shall be deposited by YSI into the Escrow Account in accordance with the terms of this Agreement and the money in the Escrow Account shall be invested in the following types of accounts and/or instruments and no other: (i) demand deposit accounts and/or (ii) time deposit accounts and

certificates of deposit, in either case with maturities of forty-five (45) days or less. The costs of establishing and maintaining the Escrow Account shall be paid from the Settlement Fund.

1.12 "**Fee Award**" means the amount of attorneys' fees, costs, and expenses awarded by the Court to Class Counsel, which will be paid out of the Settlement Fund.

1.13 **"Final"** means one business day following the latest of the following events: (i) the date upon which the time expires for filing or noticing any appeal of the Court's Final Judgment approving the Settlement Agreement; (ii) if there is an appeal or appeals, other than an appeal or appeals solely with respect to the Fee Award, the date of completion, in a manner that finally affirms and leaves in place the Final Judgment without any material modification, of all proceedings arising out of the appeal or appeals (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for review and/or *certiorari*, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand); or (iii) the date of final dismissal of any appeal or the final dismissal of any proceeding on *certiorari,* leaving the Final Judgment intact in all material respects.

1.14 **"Final Approval Hearing"** means the hearing before the Court where the Parties will request the Final Judgment to be entered by the Court approving the Settlement Agreement, the Fee Award, and the incentive award to the Class Representative.

1.15 **"Final Judgment"** means the Final Judgment and Order to be entered by the Court approving the Agreement after the Final Approval Hearing.

1.16 **"Net Settlement Fund"** means the Settlement Fund, plus any interest or investment income earned on the Settlement Fund, less any Fee Award, incentive award of the Class Representative, taxes, and Settlement Administration Expenses.

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1.17 "Notice" means the notice of this proposed Class Action Settlement Agreement and Final Approval Hearing, which is to be sent to the Settlement Class substantially in the manner set forth in this Agreement, is consistent with the requirements of Due Process, Rule 23, and is substantially in the form of Exhibits B, C, and D hereto.

1.18 "Notice Date" means the date by which the direct Email Notice set forth in Paragraph 4.1(a) is complete, which shall be no later than twenty-eight (28) days after Preliminary Approval.

1.19 "Objection/Exclusion Deadline" means the date by which a written objection to this Settlement Agreement or a request for exclusion submitted by a Person within the Settlement Class must be made, which shall be designated as a date no later than forty-five (45) days after the Notice Date and no sooner than fourteen (14) days after papers supporting the Fee Award are filed with the Court and posted to the settlement website listed in Paragraph 4.1(d), or such other date as ordered by the Court.

1.20 "Person" shall mean, without limitation, any individual, corporation, partnership, limited partnership, limited liability company, association, joint stock company, estate, legal representative, trust, unincorporated association, and any business or legal entity and their spouses, heirs, predecessors, successors, representatives, or assigns.

1.21 "Plaintiffs" means David Whiting and the Settlement Class Members.

1.22 "Platforms" means all games, services and related agreements provided to the public through the URLs www.Pulsz.com and www.Pulszbingo.com.

1.23 "Player ID" means the unique identifier assigned by YSI to a person who has an account or log-in with either Platform.

1.24 "Preliminary Approval" means the Court's certification of the Settlement Class for settlement purposes, preliminary approval of this Settlement Agreement, and approval of the form and manner of the Notice.

1.25 "Preliminary Approval Order" means the order preliminarily approving the Settlement Agreement, certifying the Settlement Class for settlement purposes, and directing notice thereof to the Settlement Class, which will be agreed upon by the Parties and submitted to the Court in conjunction with Plaintiff's motion for preliminary approval of the Agreement.

1.26 "Released Claims" means any and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, claims, demands, liabilities, rights, causes of action, contracts or agreements, extra contractual claims, damages, punitive, exemplary or multiplied damages, expenses, costs, attorneys' fees and or obligations (including "Unknown Claims," as defined below), whether in law or in equity, accrued or unaccrued, direct, individual or representative, of every nature and description whatsoever, whether based on the Kentucky or other state, federal, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States against the Released Parties, or any of them, arising out of any facts, transactions, events, matters, occurrences, acts, disclosures, statements, representations, omissions, or failures to act relating to the operation of the Platforms in any respect including, but not limited to, all sales of virtual coins on the Platforms, all revenue derived by the Platforms, the manner and methods of operation of all games and promotions on the Platforms, claims that the Platforms are illegal gambling games, that virtual coins in the Platforms are "something of value," that any aspects of the Platforms render the Platforms unlawful, deceptive, or unfair, that YSI has been unjustly enriched by operation of the Platforms, and all claims that were brought or could have been brought in the Action relating to any and all Releasing Parties. For the avoidance of doubt, this

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release: (i) includes claims potentially subject to arbitration agreements; and (ii) does not extend to other platforms owned and/or operated by YSI and/or the Released Parties.

1.27 "Released Parties" means Yellow Social Interactive Ltd., as well as any and all of its parents, subsidiaries, divisions, corporate affiliates, predecessors, successors, and any of its respective present and former officers, directors, owners, shareholders, insurers, agents, affiliates, representatives, employees, and assigns, specifically including but not limited to internet service providers, advertisers and payment processors supporting or assisting the Platforms, directly or indirectly.

1.28 "Releasing Parties" means Plaintiffs, those Settlement Class Members who do not timely opt out of the Settlement Class, and all of their respective past, present, and future heirs; children; spouses; beneficiaries; conservators; executors; estates; administrators; assigns; agents; consultants; independent contractors; insurers; attorneys; accountants; financial and other advisors; investment bankers; underwriters; lenders; and any other representatives of any of these persons and entities.

1.29 "Relevant Spending Amount" means the total amount of money a Settlement Class Member, while located in the Commonwealth of Kentucky, spent within www.Pulsz.com from October 2, 2020 to November 3, 2022 in amounts of $5.00 or more within a 24-hour period or within www.Pulszbingo.com from July 20, 2022 to February 9, 2023 in amounts of $5.00 or more within a 24-hour period..

1.30 "Settlement Administration Expenses" means the expenses incurred by the Settlement Administrator in providing Notice, processing claims, responding to inquiries from members of the Settlement Class, distributing funds for Approved Claims, and related services, paying taxes and tax expenses related to the Settlement Fund (including all federal, state or local taxes of any kind and interest or penalties thereon, as well as expenses incurred in connection

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with determining the amount of and paying any taxes owed and expenses related to any tax attorneys and accountants), as well as all expenses related to the resolution of any disputed claims (as described below in paragraph 5.4), and all expenses, excluding the fees and expenses of Class Counsel and Defendant's Counsel, related to any work required by the Court to confirm that Notice is consistent with Due Process and Rule 23.

1.31 "Settlement Administrator" means Artificial Intelligence Class Solutions, or such other reputable administration company that has been selected by Plaintiff, subject to YSI's right of veto (such right not to be unreasonably exercised) and Court approval, and shall oversee the administrator's administration of the settlement, including but not limited to serving as Escrow Agent for the Settlement Fund, overseeing the distribution of Notice, as well as the processing and payment of Approved Claims to the Settlement Class as set forth in this Agreement, handing all approved payments out of the Settlement Fund, and handling the determination, payment and filing of forms related to all federal, state and/or local taxes of any kind (including any interest or penalties thereon) that may be owed on any income earned by the Settlement Fund.

1.32 "Settlement Class" means all individuals who, in Kentucky (as reasonably determined by billing address information, IP address information, or other information furnished by YSI), spent $5.00 or more within a 24-hour period on www.Pulsz.com from October 2, 2020, to November 3, 2022 or on www.Pulszbingo.com from July 20, 2022, to February 9, 2023. Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this Action and members of their families; (2) YSI, YSI's subsidiaries, parent companies, successors, predecessors, and any entity in which the YSI or its parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3)

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persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded persons.

1.33 "Settlement Class Member" means a Person who falls within the definition of the Settlement Class as set forth above and who has not submitted a valid request for exclusion.

1.34 "Settlement Fund" means the non-reversionary cash fund that shall be established by YSI in the total amount of one million three hundred and twenty thousand dollars ($1,320,000.00 USD) to be deposited into the Escrow Account, according to the schedule set forth herein, plus all interest earned thereon. From the Settlement Fund, the Settlement Administrator shall pay all Approved Claims made by Settlement Class Members, Settlement Administration Expenses, any incentive award to the Class Representative, any Fee Award to Class Counsel, taxes, and any other costs, fees, or expenses approved by the Court. The Settlement Fund shall be kept in the Escrow Account with permissions granted to the Settlement Administrator to access said funds until such time as the listed payments are made. The Settlement Fund includes all interest that shall accrue on the sums deposited in the Escrow Account. The Settlement Administrator shall be responsible for all tax filings with respect to any earnings on the Settlement Fund and the payment of all taxes that may be due on such earnings. The Settlement Fund represents the total extent of YSI's monetary obligations under this Agreement. The payment of the amount of the Settlement Fund by YSI fully discharges YSI and the other Released Parties' financial obligations (if any) in connection with the Settlement, meaning that no Released Party shall have any other obligation to make any payment into the Escrow Account or to any Settlement Class Member, or any other Person, under this Agreement. In no event shall YSI's total monetary obligation with respect to this Agreement exceed one million three hundred and twenty thousand dollars ($1,320,000.00 USD).

1.35 "Settlement Payment(s)" means the payments from the Net Settlement Fund to be made to Settlement Class Members with Approved Claims according to the plan of allocation attached as Exhibit E (the "Plan of Allocation").

1.36 "Settlement Website" means the website to be created, launched, and maintained by the Settlement Administrator which shall allow for the electronic submission of Claim Forms and shall provide access to relevant case documents including the Notice, information about the submission of Claim Forms, and other relevant documents. The Settlement Website shall also advise the Settlement Class of the total value of the Settlement Fund and give Settlement Class Members the ability to estimate their Settlement Payment. The Settlement Website shall remain accessible at least thirty (30) days after the Effective Date.

1.37 "Unknown Claims" means claims that could have been raised in the Action and that any or all of the Releasing Parties do not know or suspect to exist, which, if known by him or her, might affect his or her agreement to release the Released Parties or the Released Claims or might affect his or her decision to agree, object or not to object to the Settlement or to seek exclusion from the Settlement Class. Upon the Effective Date, the Releasing Parties shall be deemed to have, and shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of § 1542 of the California Civil Code (if applicable), which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Upon the Effective Date, the Releasing Parties also shall be deemed to have, and shall have, waived any and all provisions, rights and benefits conferred by any law of any state or territory

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of the United States, or principle of common law, or the law of any jurisdiction outside of the United States, which is similar, comparable or equivalent to § 1542 of the California Civil Code. The Releasing Parties acknowledge that they may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this release, but that it is their intention to finally and forever settle and release the Released Claims, notwithstanding any Unknown Claims they may have, as that term is defined in this Paragraph.

2. SETTLEMENT RELIEF.

2.1 Payments to Settlement Class Members.

(a) YSI shall pay or cause to be paid into the Escrow Account the amount of the Settlement Fund ($1,320,000.00), specified in Section 1.34 of this Agreement, within ten (10) days after entry of the Final Judgment.

(b) Settlement Class Members shall have until the Claims Deadline to submit a Claim Form. Each Settlement Class Member with an Approved Claim shall be entitled to a Settlement Payment from the Net Settlement Fund, calculated by the Settlement Administrator, by check or electronic payment.

(c) The Settlement Payment will be determined according to the Plan of Allocation attached as Exhibit E.

(d) If the total Approved Claims do not exhaust the Net Settlement Fund under the baseline marginal recovery percentages in the Plan of Allocation, the marginal recovery percentages will be increased pro rata so that the Settlement Payments will exhaust or leave only *de minimis* funds in the Net Settlement Fund.

(e) Within thirty (30) days after the Claims Deadline, the Settlement Administrator shall determine proration of amounts due to Settlement Class Members from the Settlement Fund.

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(f) Within the later of sixty (60) days after the Claims Deadline or the date on which the Final Judgment becomes Final, the Settlement Administrator shall pay from the Settlement Fund all Approved Claims by check or electronic payment, provided, however, that the default payment method will be check, unless a Settlement Class Member elects for an electronic payment.

(g) All cash payments issued to Settlement Class Members via check will state on the face of the check that it will expire and become null and void unless cashed within one hundred eighty (180) days after the date of issuance.

(h) In the event that an electronic deposit to a Settlement Class Member is unable to be processed, the Settlement Administrator shall attempt to contact the Settlement Class Member within thirty (30) days to correct the problem.

(i) To the extent that a check issued to a Settlement Class Member is not cashed within one hundred eighty (180) days after the date of issuance, or an electronic deposit is unable to be processed one hundred eighty (180) days after the first attempt, such funds shall remain in the Net Settlement Fund and shall be apportioned *pro rata* to participating Settlement Class Members in a second distribution, if practicable. To the extent that any second distribution is impracticable, or that any second-distribution funds remain in the Net Settlement Fund after an additional one hundred and eighty (180) calendar days, such funds shall, subject to Court approval, revert to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees pursuant to Supreme Court Rule 3.830(20).

(j) No amount paid by Defendants into the Escrow Account shall revert to Defendants unless the Settlement is terminated in accordance with Section 6.

2.2 Prospective Measures. In connection with this Settlement and within fifty-six (56) days after the Preliminary Approval Order, YSI shall take the following steps:

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(a) YSI will maintain a webpage on the Platforms that (1) encourages responsible gameplay; (2) describes what video game behavior disorders are; (3) provides or links to resources relating to video game behavior disorders; and (4) includes a link to YSI's self-exclusion policy. YSI will maintain a policy, and will make commercially reasonable efforts to enforce that policy, such that customer service representatives will provide the same information to any player who contacts them and references or exhibits video game behavior disorders, and will face no adverse employment consequences for providing players with this information.

(b) YSI shall publish on its website a voluntary self-exclusion policy in which players may terminate their ability to purchase virtual coins on the Platforms or close their Platform accounts entirely. That policy shall provide that, when a player self-excludes by specifying the relevant Player ID, YSI shall use commercially reasonable efforts to implement the player's request with respect to all account(s) associated with those Player ID(s). YSI shall retain discretion as to the particular method by which players may self-exclude; for example, YSI may permit players to self-exclude by contacting YSI customer support, completing a form on YSI's website, or any other reasonably accessible means. YSI shall use commercially reasonable efforts to prevent any circumvention of the player's request, including by creation of a new account in either Platform, from any account-related identifiers that are commercially and technically feasible, using commercially reasonable efforts, to be associated with the excluded account. After a self-exclusion request is addressed in full by YSI, YSI shall not remove these restrictions for the period identified in the self-exclusion policy at the time the self-exclusion is requested.

(c) YSI will maintain its recent changes to the game mechanics for the Platforms to ensure that players who run out of sufficient virtual coins are able to continue to play games on the Platforms without needing to purchase additional virtual coins or wait until

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they would have otherwise received free additional virtual coins in the ordinary course. Specifically, players who run out of coins will be able to continue to play at least one game within the Platform in which they have established an account.

3. RELEASES.

3.1 The obligations incurred pursuant to this Settlement Agreement shall be a full and final disposition of the Action and any and all Released Claims, as against all Released Parties.

3.2 Upon the Effective Date, the Releasing Parties, and each of them, shall be deemed to have, and by operation of the Final Judgment shall have, finally, fully, and forever released, relinquished, and discharged all Released Claims against the Released Parties and each of them.

3.3 Upon the Effective Date, the Released Parties, and each of them, further shall by operation of the Final Judgment have, fully, finally, and forever released, relinquished, and discharged all claims against Plaintiff, the Settlement Class, and Class Counsel that arise out of or relate in any way to the commencement, prosecution, settlement, or resolution of the Action, except for claims to enforce the terms of the Settlement.

3.4 Plaintiffs and all Settlement Class Members stipulate that, with the changes delineated in Section 2.2 above, virtual coins in the Platforms are gameplay enhancements, not "something of value" as defined by Ky. Rev. Stat. Ann. § 528.010(11). As long as those prospective measures or their equivalent remain implemented in the Platforms as described, Settlement Class Members are estopped from contending that virtual coins on the Platforms are "something of value" under current Kentucky law, or that aspects of the Platforms are unlawful, deceptive or unfair and, for the avoidance of doubt, the release will include but will not be limited to (1) claims potentially subject to arbitration agreements; and (2) claims for amounts spent on in-game purchases within the Platforms that are attributable to payment processing fees.

4. NOTICE TO THE CLASS.

4.1 The Notice Plan shall consist of the following:

(a) *Settlement Class List*. To effectuate the Notice Plan, YSI shall provide Class Counsel and the Settlement Administrator with a "Class List" which shall include all Settlement Class Member contact information reasonably available to YSI, including names, email addresses, and mailing addresses, as well as Relevant Spending Amount, for each Settlement Class Member.

(b) The Settlement Administrator shall keep the Class List and all personal information obtained therefrom, including the identity, mailing, and email addresses of all persons, strictly confidential. To prepare the Class List for potential Settlement Payments, the Settlement Administrator shall (1) first, attach to each unique and identifiable person all of his/her associated Platform accounts (*e.g.*, by Player ID); (2) second, use Claim Forms to supplement, amend, verify, adjust, and audit the foregoing data, as necessary; (3) third, calculate the total Relevant Spending Amount for each unique and identifiable person; and (4) fourth, categorize each unique and identifiable person according to the appropriate Relevant Spending Amount levels identified in the Plan of Allocation. The Class List may not be used by the Settlement Administrator for any purpose other than advising specific individual Settlement Class Members of their rights, distributing Settlement Payments, and otherwise effectuating the terms of the Settlement Agreement or the duties arising thereunder, including the provision of Notice of the Settlement.

4.2 Notice Plan. The Notice Plan shall consist of the following:

(a) *Direct Notice.* No later than the Notice Date, the Settlement Administrator shall send Notice via email substantially in the form attached as Exhibit B, along with an electronic link to the Claim Form, to all Settlement Class Members for whom a valid email address is available in the Class List. In the event transmission of email notice results in any "bounce-

backs," the Settlement Administrator shall, where reasonable: (i) correct any issues that may have caused the "bounce-back" to occur and make a second attempt to re-send the email notice, and (ii) send Notice substantially in the form attached as Exhibit C via First Class U.S. Mail. The Settlement Administrator shall also, where practicable, send Notice substantially in the form attached as Exhibit C via First Class U.S. Mail to all Settlement Class Members with a Relevant Spending Amount greater than $100.00, provided an associated U.S. Mail address is contained in the Class List.

(b) *Update Addresses*. Prior to mailing any Notice, the Settlement Administrator will update the U.S. mail addresses of persons on the Class List using the National Change of Address database and other available resources deemed suitable by the Settlement Administrator. The Settlement Administrator shall take all reasonable steps to obtain the correct address of any Settlement Class members for whom Notice is returned by the U.S. Postal Service as undeliverable and shall attempt re-mailings.

(c) *Reminder Notice.* Both thirty (30) days prior to the Claims Deadline and seven (7) days prior to the Claims Deadline, the Settlement Administrator shall again send Notice via email substantially in the form attached as Exhibit B (with minor, non-material modifications to indicate that it is a reminder email rather than an initial notice), along with an electronic link to the Claim Form, to all Settlement Class Members for whom a valid email address is available in the Class List.

(d) *Settlement Website.* Within seven (7) days from entry of the Preliminary Approval Order, Notice shall be provided on a website at www.pulszplatformssettlement.com, which shall be obtained, administered and maintained by the Settlement Administrator and shall include the ability to file Claim Forms on-line, provided that such Claim Forms, if signed electronically, will be binding for purposes of applicable law and contain a statement to that

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effect. The Notice provided on the Settlement Website shall be substantially in the form of Exhibit D hereto. The Settlement Website will also advise the Settlement Class of the total value of the Settlement Fund and provide Settlement Class Members the ability to approximate their Settlement Payments.

(e) *Digital Publication Notice*. The Settlement Administrator will supplement the direct notice program with a digital publication notice program that will deliver more than one million (1,000,000) impressions to likely Settlement Class Members. The digital publication notice campaign will be targeted, to the extent reasonably possible, to the Commonwealth of Kentucky, will run for at least one month, and will contain active hyperlinks to the Settlement Website. The final digital notice advertisements, and the overall digital publication notice program to be used, shall be subject to the final approval of YSI, which approval shall not be unreasonably withheld.

(f) *Contact from Class Counsel.* Class Counsel, in their capacity as counsel to Settlement Class Members, may from time to time contact Settlement Class Members to provide information about the Settlement Agreement and to answer any questions Settlement Class Members may have about the Settlement Agreement.

4.3 The Notice shall advise the Settlement Class of their rights, including the right to be excluded from, comment upon, and/or object to the Settlement Agreement or any of its terms. The Notice shall specify that any objection to the Settlement Agreement, and any papers submitted in support of said objection, shall be considered by the Court at the Final Approval Hearing only if, on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice, the Person making the objection files notice of an intention to do so and at the same time (a) files copies of such papers he or she proposes to be submitted at the Final Approval Hearing, and (b) sends copies of such papers by mail, hand, or overnight delivery

service to Class Counsel and Defendant's Counsel. A Class Member represented by counsel *must* timely file any objection through the Court's electronic filing system.

4.4 Any Settlement Class Member who intends to object to this Agreement must present on a timely basis the objection in writing, which must be personally signed by the objector, and must include: (1) the objector's name and address; (2) any Player ID(s); (3) an explanation of the basis upon which the objector claims to be a Settlement Class Member, including any email address(es) associated with the Platforms; (4) all grounds for the objection, stated with specificity, including all citations to legal authority and evidence supporting the objection; (5) all documents or writings that the Settlement Class Member desires the Court to consider; (6) the name and contact information of any and all attorneys representing, advising, or in any way assisting the objector in connection with the preparation or submission of the objection or who may profit from the pursuit of the objection (the "Objecting Attorneys"); and (7) a statement indicating whether the objector intends to appear at the Final Approval Hearing (either personally or through counsel who must file an appearance with the Court in accordance with the Local Rules). All written objections must be filed with, or otherwise received by the Court, and emailed or delivered to Class Counsel and Defendant's Counsel, no later than the Objection/Exclusion Deadline. Any Settlement Class Member who fails to timely file or submit a written objection with the Court and notice of his or her intent to appear at the Final Approval Hearing in accordance with the terms of this Section and as detailed in the Notice, and at the same time provide copies to designated counsel for the Parties, shall not be permitted to object to this Settlement Agreement or appear at the Final Approval Hearing, and shall be foreclosed from seeking any review of this Settlement by appeal or other means and shall be deemed to have waived his or her objections and be forever barred from making any such objections in the Action or any other action or proceeding.

4.5 If a Settlement Class Member or any of the Objecting Attorneys has objected to any class action settlement where the objector or the Objecting Attorneys asked for or received any payment in exchange for dismissal of the objection, or any related appeal, without any modification to the settlement, then the objection must include a statement identifying each such case by full case caption and amount of payment received.

4.6 A Class Member may request to be excluded from the Settlement Class by sending a timely written request postmarked on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice. To exercise the right to be excluded, a Person in the Settlement Class must timely send a written request for exclusion, physically signed by the individual seeking exclusion, to the Settlement Administrator providing his/her name and address, any Player ID(s) and any email address(es) associated with the Platforms, the name and number of the case, "*David Whiting v. Yellow Social Interactive Ltd.*, No. 2023-CI-00358 (Cir. Ct. Henderson Cnty.)" and a statement that he or she wishes to be excluded from the Settlement Class for purposes of this Settlement. A request to be excluded that does not include all of this information, or that is sent to an address other than that designated in the Notice, or that is not postmarked within the time specified, shall be invalid, and the Person(s) serving such a request shall be a member(s) of the Settlement Class and shall be bound as a Settlement Class Member by this Agreement, if approved. Any member of the Settlement Class who validly elects to be excluded from this Agreement shall not: (i) be bound by any orders or the Final Judgment; (ii) be entitled to relief under this Settlement Agreement; (iii) gain any rights by virtue of this Agreement; or (iv) be entitled to object to any aspect of this Agreement. The request for exclusion must be personally signed by each Person requesting exclusion. So-called "mass" or "class" opt-outs shall not be allowed. To be valid, a request for exclusion must be postmarked or received by the date specified in the Notice.

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4.7 The Final Approval Hearing shall be no earlier than ninety (90) days after the Notice described in Paragraph 4.2(a) is provided.

4.8 Any Settlement Class Member who does not, in accordance with the terms and conditions of this Agreement, seek exclusion from the Settlement Class or timely file a valid Claim Form shall not be entitled to receive any payment or benefits pursuant to this Agreement, but will otherwise be bound by all of the terms of this Agreement, including the terms of the Final Judgment to be entered in the Action and the Releases provided for in the Agreement, and will be barred from bringing any action against any of the Released Parties concerning the Released Claims.

5. SETTLEMENT ADMINISTRATION.

5.1 The Settlement Administrator shall, under the supervision of the Court, administer the relief provided by this Settlement Agreement by processing Claim Forms in a rational, responsive, cost effective, and timely manner. The Settlement Administrator shall maintain reasonably detailed records of its activities under this Agreement. The Settlement Administrator shall maintain all such records as are required by applicable law in accordance with its normal business practices and such records will be made available to Class Counsel and Defendants' Counsel upon request. The Settlement Administrator shall also provide reports and other information to the Court as the Court may require. The Settlement Administrator shall provide Class Counsel and Defendants' Counsel with information concerning Notice, administration, and implementation of the Settlement Agreement. Should the Court request, the Parties shall submit a timely report to the Court summarizing the work performed by the Settlement Administrator, including a post-distribution accounting of all amounts from the Settlement Fund paid to Settlement Class Members, the number and value of checks not cashed, the number and value of

electronic payments unprocessed, and the amount distributed to any *cy pres* recipient. Without limiting the foregoing, the Settlement Administrator shall:

(a) Receive requests to be excluded from the Settlement Class and promptly provide Class Counsel and Defendant's Counsel copies thereof. If the Settlement Administrator receives any exclusion forms after the deadline for the submission of such forms, the Settlement Administrator shall promptly provide copies thereof to Class Counsel and Defendant's Counsel;

(b) Provide Class Counsel and Defendant's Counsel with drafts of all administration related documents, including but not limited to follow-up class notices or communications with Settlement Class Members, telephone scripts, website postings or language or other communications with the Settlement Class, at least five (5) business days before the Settlement Administrator is required to or intends to publish or use such communications, unless Class Counsel and Defendant's Counsel agree to waive this requirement in writing on a document-by-document basis;

(c) Provide weekly reports to Class Counsel and Defendant's Counsel regarding the number of Claim Forms received, the amount of the Settlement Payments associated with those Claim Forms, and the categorization and description of Claims Form rejected, in whole or in part, by the Settlement Administrator; and

(d) Make available for inspection by Class Counsel or Defendant's Counsel the Claim Forms received by the Settlement Administrator at any time upon reasonable notice.

5.2 The Claims Administrator shall distribute the Settlement Payments according to the provisions enumerated in Section 2.1.

5.3 The Claims Administrator shall be obliged to employ reasonable procedures to screen claims for abuse or fraud and deny Claim Forms where there is evidence of abuse or fraud, including by cross-referencing Approved Claims with the Class List. The Settlement

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Administrator shall determine whether a Claim Form submitted by a Settlement Class Member is an Approved Claim and shall reject Claim Forms that fail to (a) comply with the instructions on the Claim Form or the terms of this Agreement, or (b) provide full and complete information as requested on the Claim Form. In the event a person submits a timely Claim Form by the Claims Deadline but the Claim Form is not otherwise complete, then the Settlement Administrator shall give such person reasonable opportunity to provide any requested missing information, which information must be received by the Settlement Administrator no later than twenty-eight (28) calendar days after the Claims Deadline. In the event the Settlement Administrator receives such information more than twenty-eight (28) calendar days after the Claims Deadline, then any such claim shall be denied. The Settlement Administrator may contact any person who has submitted a Claim Form to obtain additional information necessary to verify the Claim Form.

5.4 Class Counsel and Defendant's Counsel shall both have the right to challenge the Settlement Administrator's acceptance or rejection of any particular Claim Form or the amount proposed to be paid on account of any particular Settlement Class Member's claim. The Settlement Administrator shall follow any joint decisions of Class Counsel and Defendants' Counsel as to the validity or amount of any disputed claim. Where Class Counsel and Defendants' Counsel disagree, the Settlement Administrator will finally resolve the dispute and the claim will be treated in the manner designated by the Settlement Administrator.

5.5 In the exercise of its duties outlined in this Agreement, the Settlement Administrator shall have the right to reasonably request additional information from the Parties or any Settlement Class Member.

5.6 All taxes and tax expenses shall be paid out of the Settlement Fund, and shall be timely paid by the Settlement Administrator pursuant to this Agreement and without further order of the Court. Any tax returns prepared for the Settlement Fund (as well as the election set

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forth therein) shall be consistent with this Agreement and in all events shall reflect that all taxes on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided herein. The Released Parties shall have no responsibility or liability for the acts or omissions of the Settlement Administrator or its agents with respect to the payment of taxes or tax expenses.

6. TERMINATION OF SETTLEMENT.

6.1 Each Party additionally shall have the right, but not the obligation, to terminate the Settlement Agreement if 5% or more of the members of the Settlement Class exclude themselves from the Settlement. Notification of intent to terminate the Settlement Agreement must be provided with ten (10) calendar days after the *earlier* of: (1) the date the Parties agree in good faith that they have received a final tabulation from the Settlement Administrator of the objections and requests for exclusion timely received by the Objection/Exclusion Deadline, or (2) the date the Parties receive sufficient evidence from the Settlement Administrator to establish beyond a reasonable doubt that the threshold for a Section 6.1 Termination Notice has been or will be met. For example, if the Settlement Administrator – after the Objection/Exclusion Deadline – notifies the Parties that there were no objections and just a single opt-out, that evidence would be sufficient to establish beyond a reasonable doubt that no threshold for a Section 6.1 Termination Notice has been or will be met. If this Settlement Agreement is terminated, it will be deemed null and void *ab initio*.

6.2 Subject to Paragraphs 9.1-9.3 below, Defendant or the Class Representative on behalf of the Settlement Class, shall have the right to terminate this Agreement by providing written notice of the election to do so ("Termination Notice") to all other Parties hereto within twenty-one (21) days of any of the following events: (i) the Court's refusal to grant Preliminary Approval of this Agreement in any material respect; (ii) the Court's refusal to grant final

approval of this Agreement in any material respect; (iii) the Court's refusal to enter the Final Judgment in this Action in any material respect; (iv) the date upon which the Final Judgment is modified or reversed in any material respect by the Kentucky Court of Appeals, Kentucky Supreme Court or any federal court.

6.3 In the event of termination pursuant to Section 6, Class Counsel shall cause the prompt return of the Settlement Fund in full to YSI, including any interest accrued while in the Escrow Account, minus one-half (50%) of any amounts reasonably incurred by the Settlement Administrator until the date of termination, and Class Counsel shall be responsible for the other one-half (50%) of any amounts reasonably incurred by the Settlement Administrator until the date of termination.

6.4 Confirmatory Discovery. YSI has represented that in-Platform virtual coin purchases from Kentucky-based players who spent $5.00 or more within 24 hours on www.Pulsz.com from October 2, 2020 to November 3, 2022 and on www.Pulszbingo.com from July 20, 2022 to February 9, 2023 are less than or equal to $5,272,369.02.00. Simultaneous with the execution of this Agreement, YSI has provided a declaration, from a person with sufficient knowledge, of YSI's best estimate attesting to the amount of in-Platform virtual coin purchases from Kentucky-based players who spent $5.00 or more within 24 hours on www.Pulsz.com from October 2, 2020 to November 3, 2022 and on www.Pulszbingo.com from July 20, 2022 to February 9, 2023. In the event that the declaration shows that amount exceeds $5,272,369.02.00 by more than two percent (2%), the Parties further agree that they shall execute an amended settlement agreement that adjusts the amount of the Settlement Fund proportionally to the increase in amount to account for this error.

7. PRELIMINARY APPROVAL ORDER AND FINAL APPROVAL ORDER.

7.1 Promptly after the execution of this Settlement Agreement, Class Counsel shall submit this Agreement together with its Exhibits to the Court and shall move the Court for Preliminary Approval of the settlement set forth in this Agreement; preliminary certification of the Settlement Class for settlement purposes only; preliminary appointment of Class Counsel to represent the class; preliminary appointment of David Whiting as the Class Representative of the Settlement Class; and entry of a Preliminary Approval Order, which order shall set a Final Approval Hearing date and approve the form and contents of the Notice and Claim Forms for dissemination substantially in the form of Exhibits A, B, C, and D hereto. The Preliminary Approval Order shall also authorize the Parties, without further approval from the Court, to agree to and adopt such amendments, modifications and expansions of the Settlement Agreement and its implementing documents (including all exhibits to this Agreement) so long as they are consistent in all material respects with the terms of the Settlement Agreement and do not limit or impair the rights of the Settlement Class or materially expand the obligations of YSI.

7.2 At the time of the submission of this Agreement to the Court as described above, Class Counsel shall request that, after Notice is given, the Court hold a Final Approval Hearing where the Court will review comments and/or objections regarding the Settlement, consider its fairness, reasonableness and adequacy, consider the application for any Fee Award and incentive awards to the Class Representative, and consider whether the Court shall issue a Final Judgment approving this Agreement and dismissing the Action with prejudice.

7.3 After Notice is given, the Parties shall request and seek to obtain from the Court a Final Judgment, which will:

(a) find that the Court has personal jurisdiction over all Settlement Class Members and that the Court has subject matter jurisdiction to approve the Agreement, including all exhibits thereto;

(b) approve the Settlement Agreement and the proposed settlement as fair, reasonable, and adequate as to, and in the best interests of, the Settlement Class Members; direct the Parties and their counsel to implement and consummate the Agreement according to its terms and provisions; and declare the Agreement to be binding on, and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiffs and Releasing Parties with respect to the Released Claims;

(c) find that the Notice implemented pursuant to the Agreement (1) constitutes the best practicable notice under the circumstances; (2) constitutes notice that is reasonably calculated, under the circumstances, to apprise the Settlement Class of the pendency of the Action, their right to object to or exclude themselves from the proposed Agreement, and to appear at the Final Approval Hearing; (3) is reasonable and constitutes due, adequate, and sufficient notice to all persons entitled to receive notice; and (4) meets all applicable requirements of the Kentucky Rules of Civil Procedure, the Due Process Clause of the United States and Kentucky Constitutions, and the rules of the Court;

(d) find that the Class Representative and Class Counsel adequately represent the Settlement Class for purposes of entering into and implementing the Agreement;

(e) dismiss the Action (including all individual claims and Settlement Class Claims presented thereby) on the merits and with prejudice, without fees or costs to any party except as provided in the Settlement Agreement;

(f) incorporate the Release set forth above, make the Release effective as of the date of the Effective Date, and forever discharge the Released Parties as set forth herein;

(g) permanently bar and enjoin all Settlement Class Members who have not been properly excluded from the Settlement Class from filing, commencing, prosecuting,

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intervening in, or participating (as class members or otherwise) in, any lawsuit or other action in any jurisdiction based on the Released Claims;

(h) without affecting the finality of the Final Judgment for purposes of appeal, retain jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement and the Final Judgment, and for any other necessary purpose; and

(i) incorporate any other provisions as necessary or appropriate to effectuate the terms and conditions of the Settlement Agreement.

7.4 The Parties shall, in good faith, cooperate, assist, and undertake all reasonable actions and steps in order to accomplish these required events on the schedule set by the Court, subject to the terms of this Settlement Agreement.

8. CLASS COUNSEL'S ATTORNEYS' FEES, COSTS, AND EXPENSES; INCENTIVE AWARD.

8.1 Pursuant to Ky. R. Civ. P. 23.08, YSI agrees that Class Counsel shall be entitled to an award of reasonable attorneys' fees and costs out of the Settlement Fund in an amount determined by the Court as the Fee Award. Settlement Class Counsel agrees, with no consideration from YSI, to limit their request for attorneys' fees and unreimbursed costs to one-third of the Settlement Fund (i.e., $440,000.00). Payment of any Fee Award shall be made from the Settlement Fund and should the Court award less than the amount sought by Class Counsel, the difference in the amount sought and the amount ultimately awarded pursuant to this Paragraph shall remain in the Settlement Fund for distribution to eligible Settlement Class Members.

8.2 The Fee Award shall be payable by the Settlement Administrator within fifteen (15) days after entry of the Court's Final Judgment, subject to Class Counsel executing the

Undertaking Regarding Attorneys' Fees and Costs (the "Undertaking") attached hereto as Exhibit F, and providing all payment routing information and tax I.D. numbers for Class Counsel. Payment of the Fee Award shall be made from the Settlement Fund by wire transfer pursuant to instructions provided by Bursor & Fisher, P.A., and completion of necessary forms, including but not limited to W-9 forms. Notwithstanding the foregoing, if for any reason the Final Judgment is reversed or rendered void as a result of an appeal(s) or otherwise does not become Final, then Class Counsel shall return such funds to YSI. Additionally, should any parties to the Undertaking dissolve, merge, declare bankruptcy, become insolvent, or cease to exist prior to the final payment to Class Members, those parties shall execute a new undertaking guaranteeing repayment of funds within fourteen (14) days of such an occurrence.

8.3 Class Counsel intends to file a motion for Court approval of an incentive award to the Class Representative, to be paid from the Settlement Fund, in addition to any funds the Class Representative stands to otherwise receive from the Settlement. With no consideration having been given or received for this limitation, David Whiting will seek no more than $5,000 as an incentive award. Should the Court award less than this amount, the difference in the amount sought and the amount ultimately awarded pursuant to this Paragraph shall remain in the Settlement Fund for distribution to eligible Settlement Class Members. Such award shall be paid from the Settlement Fund (in the form of a check to the Class Representative that is sent care of Class Counsel), within thirty (30) business days after entry of the Final Judgment if there have been no objections to the Settlement Agreement, and, if there have been such objections, within thirty (30) business days after the Effective Date

9. CONDITIONS OF SETTLEMENT, EFFECT OF DISAPPROVAL, CANCELLATION OR TERMINATION.

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9.1 The Effective Date of this Settlement Agreement shall not occur unless and until each of the following events occurs and shall be the date upon which the last (in time) of the following events occurs:

(a) The Parties and their counsel have executed this Agreement;

(b) The Court has entered the Preliminary Approval Order;

(c) The Court has entered an order finally approving the Agreement, following Notice to the Settlement Class and a Final Approval Hearing, as provided in the Kentucky Rules of Civil Procedure, and has entered the Final Judgment, or a judgment consistent with this Agreement in all material respects;

(d) YSI has funded the Settlement Fund; and

(e) The Final Judgment has become Final, as defined above.

9.2 If some or all of the conditions specified in Section 9.1 are not met, or in the event that this Agreement is not approved by the Court, or the settlement set forth in this Agreement is terminated or fails to become effective in accordance with its terms, the parties agree that the settlement is null and void and Whiting shall dismiss any suit filed and the parties will proceed with arbitration, which shall be held in abeyance pending entry of Final Judgment., unless Class Counsel and Defendant's Counsel mutually agree in writing to proceed with this Agreement or a modified agreement. If any Party is in material breach of the terms hereof, any other Party, provided that it is in substantial compliance with the terms of this Agreement, may terminate this Agreement on notice to all of the Settling Parties. Notwithstanding anything herein, the Parties agree that if the Court fails to approve, in whole or in part, the attorneys' fees payment to Class Counsel and/or the incentive award set forth in Section 8 above shall not prevent the Agreement from becoming effective, nor shall it be grounds for termination.

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9.3 If this Agreement is terminated or fails to become effective for the reasons set forth above, and unless Class Counsel and Defendant's Counsel mutually agree in writing to proceed with this Agreement, the Parties shall be restored to their respective positions in the Action as of the date of the signing of this Agreement. In such event, any Final Judgment or other order entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*, and the Parties shall be returned to the *status quo ante* with respect to the Action as if this Agreement had never been entered into. Within five (5) business days after written notification of termination as provided in this Agreement is sent to the other Parties, the Settlement Fund (including accrued interest thereon), less one-half (50%) of any amounts reasonably incurred by the Settlement Administrator until the date of termination (including costs and any taxes and tax expenses paid, due or owing), shall be refunded by the Settlement Administrator to YSI, based upon written instructions provided by Defendant's Counsel. In the event that the Final Judgment or any part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, Class Counsel shall, within thirty (30) days repay to YSI, based upon written instructions provided by Defendant's Counsel, the full amount of the Fee Award paid to Class Counsel from the Settlement Fund, including any accrued interest. In the event the Fee Award awarded by the Court or any part of them are vacated, modified, reversed, or rendered void as a result of an appeal, Class Counsel shall within thirty (30) days repay to YSI, based upon written instructions provided by Defendant's Counsel, the attorneys' fees and costs paid to Class Counsel and/or Class Representative from the Settlement Fund, in the amount vacated or modified, including any accrued interest.

10. CONFIDENTIALITY AND PUBLIC STATEMENTS

10.1 Except as otherwise agreed by Class Counsel and Defendant's Counsel in writing and/or as required by legal disclosure obligations, all terms of this Agreement will remain confidential and subject to Rule 408 of the Kentucky Rules of Evidence until presented to the Court along with Plaintiff's motion for preliminary approval.

11. MISCELLANEOUS PROVISIONS.

11.1 The Parties (a) acknowledge that it is their intent to consummate this Settlement Agreement; and (b) agree, subject to their fiduciary and other legal obligations, to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Agreement, to exercise their reasonable best efforts to accomplish the foregoing terms and conditions of this Agreement, to secure final approval, and to defend the Final Judgment through any and all appeals. Class Counsel and Defendant's Counsel agree to cooperate with one another in seeking Court approval of the Settlement Agreement, entry of the Preliminary Approval Order, and the Final Judgment, and promptly to agree upon and execute all such other documentation as may be reasonably required to obtain final approval of the Agreement.

11.2 The Parties intend this Settlement Agreement to be a final and complete resolution of all disputes between them with respect to the Released Claims by Plaintiff, the Settlement Class and each or any of them, on the one hand, against the Released Parties, and each or any of the Released Parties, on the other hand. Accordingly, the Parties agree not to assert in any forum that the Action was brought by Plaintiff or defended by YSI, or each or any of them, in bad faith or without a reasonable basis.

11.3 The Parties have relied upon the advice and representation of counsel, selected by them, concerning the claims hereby released. The Parties have read and fully understand the Settlement Agreement and have been fully advised as to the legal effect hereof by counsel of their own selection and intend to be legally bound by the same.

11.4 Whether or not the Effective Date occurs or the Settlement Agreement is terminated, neither this Agreement nor the settlement contained herein or any term, provision or definition therein, nor any act or communication performed or document executed in the course of negotiating, implementing or seeking approval pursuant to or in furtherance of this Agreement or the settlement:

(a) is, may be deemed, or shall be used, offered or received in any civil, criminal or administrative proceeding in any court, administrative agency, arbitral proceeding or other tribunal against the Released Parties, or each or any of them, as an admission, concession, waiver, or evidence of, the validity of any Released Claims, the truth of any fact alleged by the Plaintiffs, the deficiency of any defense that has been or could have been asserted in the Action, the violation of any law or statute, the definition or scope of any term or provision, the reasonableness of the settlement amount or the Fee Award, the right to demand that any claim proceed to arbitration or of any alleged wrongdoing, liability, negligence, or fault of the Released Parties, or any of them;

(b) is, may be deemed, or shall be used, offered or received against any Released Party, as an admission, concession or evidence of any fault, misrepresentation or omission with respect to any statement or written document approved or made by the Released Parties, or any of them;

(c) is, may be deemed, or shall be used, offered or received against the Released Parties, or each or any of them, as an admission or concession with respect to any liability, negligence, fault or wrongdoing or statutory meaning as against any Released Parties, or supporting the certification of a litigation class, in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. However, the settlement, this Agreement, and any acts performed and/or documents executed in furtherance of or pursuant to

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this Agreement and/or Settlement may be used in any proceedings as may be necessary to effectuate the provisions of this Agreement. Further, if this Settlement Agreement is approved by the Court, any Party or any of the Released Parties may file this Agreement and/or the Final Judgment in any action that may be brought against such Party or Parties in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim;

(d) is, may be deemed, or shall be construed against Plaintiff, the Settlement Class, the Releasing Parties, or each or any of them, or against the Released Parties, or each or any of them, as an admission or concession that the consideration to be given hereunder represents an amount equal to, less than or greater than that amount that could have or would have been recovered after trial; and

(e) is, may be deemed, or shall be construed as or received in evidence as an admission or concession against Plaintiff, the Settlement Class, the Releasing Parties, or each and any of them, or against the Released Parties, or each or any of them, that any of Plaintiff's claims are with or without merit or that damages recoverable in the Action would have exceeded or would have been less than any particular amount.

(f) The Parties acknowledge and agree that any Party may request that the Court appoint a Settlement Special Master. Each Party explicitly reserves the right to oppose any such request. Any fees earned or costs incurred by any such Settlement Special Master shall be paid exclusively from the Settlement Fund.

11.5 The Parties acknowledge that (a) any certification of the Settlement Class as set forth in this Agreement, including certification of the Settlement Class for settlement purposes in the context of Preliminary Approval, shall not be deemed a concession that certification of a

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litigation class is appropriate, nor that the Settlement Class definition would be appropriate for a litigation class, nor would YSI be precluded from challenging class certification in further proceedings in the Action or in any other action if the Settlement Agreement is not finalized or finally approved; (b) if the Settlement Agreement is not finally approved by the Court for any reason whatsoever, then any certification of the Settlement Class will be void, the Parties and the Action shall be restored to the status quo ante, and no doctrine of waiver, estoppel or preclusion will be asserted in any litigated certification proceedings in the Action or in any other action; and (c) no agreements made by or entered into by YSI in connection with the Settlement may be used by Plaintiff, any person in the Settlement Class, or any other person to establish any of the elements of class certification in any litigated certification proceedings, whether in the Action or any other judicial proceeding.

11.6. No person or entity shall have any claim against the Class Representative, Class Counsel, the Settlement Administrator or any other agent designated by Class Counsel, or the Released Parties and/or their counsel, arising from distributions made substantially in accordance with this Agreement. The Parties and their respective counsel, and all other Released Parties shall have no liability whatsoever for the investment or distribution of the Settlement Fund or the determination, administration, calculation, or payment of any claim or nonperformance of the Settlement Administrator, the payment or withholding of taxes (including interest and penalties) owed by the Settlement Fund, or any losses incurred in connection therewith. The Parties acknowledge and agree that no opinion concerning the tax consequences of the proposed Settlement to Settlement Class Members is given or will be given by the Parties, nor are any representations or warranties in this regard made by virtue of this Settlement Agreement. Each Settlement Class Member's tax obligations, and the determination thereof, are the sole responsibility of the Settlement Class Member, and it is understood that the tax consequences

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may vary depending on the particular circumstances of each individual Settlement Class Member.

11.7. All proceedings with respect to the administration, processing and determination of Claims and the determination of all controversies relating thereto, including disputed questions of law and fact with respect to the validity of Claims, shall be subject to the jurisdiction of the Court.

11.8 The headings used herein are used for the purpose of convenience only and are not meant to have legal effect.

11.9 The waiver by one Party of any breach of this Agreement by any other Party shall not be deemed as a waiver of any other prior or subsequent breaches of this Agreement.

11.10 All of the Exhibits to this Agreement are material and integral parts thereof and are fully incorporated herein by this reference.

11.11 This Agreement and its Exhibits set forth the entire agreement and understanding of the Parties with respect to the matters set forth herein, and supersede all prior negotiations, agreements, arrangements and undertakings with respect to the matters set forth herein. No representations, warranties or inducements have been made to any Party concerning this Settlement Agreement or its Exhibits other than the representations, warranties and covenants contained and memorialized in such documents. This Agreement may be amended or modified only by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest.

11.12 Except as otherwise provided herein, each Party shall bear its own costs and attorneys' fees incurred in any way related to the Action.

11.13 Plaintiff represents and warrants that he has not assigned any claim or right or interest therein as against the Released Parties to any other Person or Party and that he is fully entitled to release the same.

11.14 Each counsel or other Person executing this Settlement Agreement, any of its Exhibits, or any related settlement documents on behalf of any Party hereto, hereby warrants and represents that such Person has the full authority to do so and has the authority to take appropriate action required or permitted to be taken pursuant to the Agreement to effectuate its terms.

11.15 This Agreement may be executed in one or more counterparts. Signature by digital means, facsimile, or in PDF format will constitute sufficient execution of this Agreement. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of original executed counterparts shall be filed with the Court if the Court so requests.

11.16 This Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the Parties hereto and the Released Parties.

11.17 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of this Agreement, and all Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Agreement.

11.18 This Settlement Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Kentucky.

11.19 This Agreement is deemed to have been prepared by counsel for all Parties, as a result of arm's-length negotiations among the Parties. Because all Parties have contributed

substantially and materially to the preparation of this Agreement, it shall not be construed more strictly against one Party than another.

11.20 Where this Agreement requires notice to the Parties, such notice shall be sent to the undersigned counsel: For Plaintiff: Philip L. Fraietta, Bursor & Fisher, P.A., 1330 Avenue of the Americas, 32nd Floor, New York, NY 10019. For Defendant: William M. Gantz, Duane Morris LLP, 100 High Street, Suite 2400, Boston, MA 02110.

11.21 All time periods and dates described in this Agreement are subject to the Court's approval. These time periods and dates may be changed by the Court or by the Parties' written agreement without notice to the Settlement Class. The Parties reserve the right, subject to the Court's approval, to make any reasonable extensions of time that might be necessary to carry out any provision of this Agreement.

11.22 YSI shall be given an opportunity to review and provide comments to Plaintiff's preliminary approval and final approval briefs, and Plaintiff shall consider in good faith all such comments.

[SIGNATURES BEGIN ON FOLLOWING PAGE]

IT IS SO AGREED TO BY THE PARTIES:

Dated: Jul 3, 2023

DAVID WHITING

By: David whiting (Jul 3, 2023 13:45 CDT)
David Whiting, individually and as representative of the Class

Dated: _____

YELLOW SOCIAL INTERACTIVE LTD.

By: _____

Name:
Title:

IT IS SO STIPULATED BY COUNSEL:

Dated: July 3, 2023

BURSOR & FISHER, P.A.

By: _____
Philip L. Fraietta
pfraietta@bursor.com
Alec M. Leslie
aleslie@bursor.com
BURSOR & FISHER, P.A.
1330 Avenue of the Americas, 32nd Floor
New York, New York 10019
Tel: (646) 837-7150
Fax: (212) 989-9163

Attorneys for Class Representative and the Settlement Class

Dated: _____

DUANE MORRIS LLP

By: _____
William M. Gantz
bgantz@duanemorris.com
DUANE MORRIS LLP
100 High Street, Suite 2400
Boston, MA 02110
Tel: (857) 488-4234

Attorneys for Defendant Yellow Social Interactive Ltd.

IT IS SO AGREED TO BY THE PARTIES:

Dated: _____

DAVID WHITING

By: _____
David Whiting, individually and as representative of the Class

Dated: June 30, 2023

YELLOW SOCIAL INTERACTIVE LTD.

By: _____

Name: PAUL FOSTER
Title: DIRECTOR

IT IS SO STIPULATED BY COUNSEL:

Dated: _____

BURSOR & FISHER, P.A.

By: _____
Philip L. Fraietta
pfraietta@bursor.com
Alec M. Leslie
aleslie@bursor.com
BURSOR & FISHER, P.A.
1330 Avenue of the Americas, 32nd Floor
New York, New York 10019
Tel: (646) 837-7150
Fax: (212) 989-9163

Attorneys for Class Representative and the Settlement Class

Dated: July 3, 2023

DUANE MORRIS LLP

By: _____
William M. Gantz
bgantz@duanemorris.com
DUANE MORRIS LLP
100 High Street, Suite 2400
Boston, MA 02110
Tel: (857) 488-4234

Attorneys for Defendant Yellow Social Interactive Ltd.

EXHIBIT A

YSI PLATFORMS SETTLEMENT CLAIM FORM

THIS CLAIM FORM MUST BE SUBMITTED ONLINE OR POSTMARKED BY [CLAIMS DEADLINE]. THE CLAIM FORM MUST BE SIGNED AND MEET ALL CONDITIONS OF THE SETTLEMENT AGREEMENT.

The Settlement Administrator will review your Claim Form. If accepted, you will receive a share of the Settlement Fund. This process takes time, please be patient. If you have any questions, or would like to estimate your share of the Settlement Fund, visit: [claims website].

Instructions: Fill out each section of this form and sign where indicated.

First Name	**Last Name**	
Street Address		
City	**State**	**ZIP Code**
Email Address		**Phone Number**
www.Pulsz.com and/or www.Pulszbingo.com Player ID(s) (if known)		
All email addresses associated with www.Pulsz.com and/or www.Pulszbingo.com accounts.		

Settlement Class Member Affirmation: By submitting this Claim Form you affirm under penalty of perjury that, to the best of your knowledge, the Player ID(s) and the email address(es) listed above are yours.

Signature: _____ Date: _____/ _____/ _____

Select Payment Method: Select **ONE** box for how you would like to receive payment and provide the requested information.

Check **Mailing Address:**	Venmo® **Email Address:**	PayPal® **Email Address:**

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EXHIBIT B

From: Notice@classactionadmin.com
To: JonQClassMember@domain.com
Re: Legal Notice of Class Action Settlement

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT
Whiting v. Yellow Social Interactive Ltd., Case No. 2023-CI-00358
(Commonwealth of Kentucky, Henderson County Circuit Court)

If you played games on www.Pulsz.com or www.Pulszbingo.com you may be part of a class action settlement

A court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

This notice is to inform you of the settlement of a class action lawsuit against Yellow Social Interactive Ltd. ("YSI"), alleging claims based on the sale of virtual coins on www.Pulsz.com and www.Pulszbingo.com. YSI denies all claims and that it violated any law, but has agreed to the settlement to avoid the uncertainties and expenses associated with continuing the case.

Am I a Class Member? Our records indicate you may be a Settlement Class Member. Settlement Class Members are persons who spent $5.00 or more within a 24-hour period on www.Pulsz.com from October 2, 2020, to November 3, 2022, and/or on www.Pulszbingo.com from July 20, 2022, to February 9, 2023 (collectively, the "Platforms"), while located in the Commonwealth of Kentucky.

What Can I Get? If approved by the Court, YSI will establish a Settlement Fund of $1,320,000 to pay all valid claims submitted by the Settlement Class, together with notice and administration expenses as well as any attorneys' fees, costs, and incentive award to the Class Representative awarded by the Court. If you are entitled to relief, you may submit a claim to receive a share of the Settlement Fund. Your share will depend on, among other things, (1) the total dollar amount of in-game purchases you made while playing on the Platforms, with those who spent more money receiving a higher percentage back, and (2) how many Settlement Class Members submit claims. You can find more information, and estimate your share of the Settlement Fund, at [**website**].

How Do I Get a Payment? To receive a payment, you must submit a timely and complete Claim Form by mail or online, submitted or postmarked **no later than [claims deadline]**. You can submit the claim form online at www.URL, or by clicking [here.] You may also request a paper claim form and mail it to [address].

What are My Other Options? You may exclude yourself from the Class by sending a letter to the settlement administrator no later than [**objection/exclusion deadline**]. If you exclude yourself, you cannot get a settlement payment, but you keep any rights you may have to sue YSI over the legal issues in the lawsuit. You and/or your lawyer have the right to appear before the Court and/or object to the proposed settlement. Your written objection must be filed no later than [**objection/exclusion deadline**]. Specific instructions about how to object to, or exclude yourself from, the Settlement are available at [website]. If you file a claim or do nothing, and the Court approves the Settlement, you will be bound by all of the Court's orders and judgments. In addition,

your claims relating to the allegations in this case against YSI and any other Released Parties will be released.

Who Represents Me? The Court has appointed Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. to represent the class. These attorneys are called "Class Counsel." You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your expense. Plaintiff David Whiting is a Settlement Class Member and the Court appointed him as "Class Representative."

When Will the Court Consider the Proposed Settlement? The Court will hold the Final Approval Hearing at _____ **.m.** on [date] in [TBD]. At that hearing, the Court will: hear any objections concerning the fairness of the settlement; determine the fairness of the settlement; decide whether to approve Class Counsel's request for attorneys' fees and costs; and decide whether to award the Class Representative $5,000 from the Settlement Fund for his services in helping to bring and settle this case. Class Counsel will be paid from the Settlement Fund in an amount to be determined and awarded by the Court. Class Counsel will seek no more than one-third of the Settlement Fund in attorneys' fees, costs, and expenses, but the Court may award less than this amount.

How Do I Get More Information? For more information, including a more detailed Notice, Claim Form, a copy of the Settlement Agreement and other documents, go to [website], contact the settlement administrator at 1-___-___-____ or YSI Settlement Administrator, [address], or call Class Counsel at 1-646-837-7150.

EXHIBIT C

COURT AUTHORIZED NOTICE OF CLASS ACTION AND PROPOSED SETTLEMENT

If you played on www.Pulsz.com, and/or www.Pulszbingo.com, you may be part of a class action settlement.

YSI Platforms Settlement
Settlement Administrator
P.O. Box 0000
City, ST 00000-0000

||||||||||||||||||||||
Postal Service: Please do not mark barcode

XXX—«ClaimID» «MailRec»

«First1» «Last1»
«C/O»
«Addr1» «Addr2»
«City», «St» «Zip» «Country»

By Order of the Court Dated: [date]

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A settlement has been reached in a class action lawsuit against Yellow Social Interactive Ltd., ("YSI"), alleging claims under Kentucky state law based on the sale of virtual coins on www.Pulsz.com and www.Pulszbingo.com. YSI denies all claims and that it violated the law, but has agreed to the settlement to avoid the uncertainties and expenses associated with continuing the case**.**

Am I a Class Member? Our records indicate you may be a Settlement Class Member. Settlement Class Members are persons who spent $5.00 or more within a 24-hour period on www.Pulsz.com from October 2, 2020, to November 3, 2022, and/or on www.Pulszbingo.com from July 20, 2022, to February 9, 2023 (collectively, the "Platforms") , while located in the Commonwealth of Kentucky.

What Can I Get? If approved by the Court, YSI will establish a Settlement Fund of $1,320,000 to pay all valid claims submitted by the Settlement Class, together with notice and administration expenses as well as any attorneys' fees, costs, and incentive award to the Class Representative awarded by the Court. If you are entitled to relief, you may submit a claim to receive a share of the Settlement Fund. Your share will depend on, among other things, (1) the total dollar amount of in-game purchases you made while playing on the Platforms, with those who spent more money receiving a higher percentage back, and (2) how many Settlement Class Members submit claims. You can find more information, and estimate your share of the Settlement Fund, at [**website**].

How Do I Get a Payment? To receive a payment, you must submit a timely and complete Claim Form by mail or online, submitted or postmarked **no later than [claims deadline]**. You can submit the claim form online at www.URL, or by clicking [here.] You may also request a paper claim form and mail it to [address].

What are My Other Options? You may exclude yourself from the Class by sending a letter to the settlement administrator no later than [**objection/exclusion deadline**]. If you exclude yourself, you cannot get a settlement payment, but you keep any rights you may have to sue the YSI over the legal issues in the lawsuit. You and/or your lawyer have the right to appear before the Court and/or object to the proposed settlement. Your written objection must be filed no later than [**objection/exclusion deadline**]. Specific instructions about how to object to, or exclude yourself from, the Settlement are available at [website]. If you file a claim or do nothing, and the Court approves the Settlement, you will be bound by all of the Court's orders and judgments. In addition, your claims relating to the allegations in this case against YSI and any other Released Parties will be released.

Who Represents Me? The Court has appointed Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. to represent the class. These attorneys are called "Class Counsel." You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your expense. Plaintiff David Whiting is a Settlement Class Member and the Court appointed him as "Class Representative."

When Will the Court Consider the Proposed Settlement? The Court will hold the Final Approval Hearing at _____ **.m.** on [date] in [TBD]. At that hearing, the Court will: hear any objections concerning the fairness of the settlement; determine the fairness of the settlement; decide whether to approve Class Counsel's request for attorneys' fees and costs; and decide whether to award the Class Representative $5,000 from the Settlement Fund for his services in helping to bring and settle this case. Class Counsel will be paid from the Settlement Fund in an amount to be determined and awarded by the Court. Class Counsel will seek no more than one-third of the Settlement Fund in attorneys' fees, costs, and expenses, but the Court may award less than this amount.

How Do I Get More Information? For more information, including a more detailed Notice, Claim Form, a copy of the Settlement Agreement and other documents, go to [website], contact the settlement administrator at 1-___-___-____ or YSI Settlement Administrator, [address], or call Class Counsel at 1-646-837-7150.

_____
_____
_____

YSI Platforms Settlement Administrator
c/o [Settlement Administrator]
PO Box 0000
City, ST 00000-0000

XXX

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EXHIBIT D

HENDERSON COUNTY CIRCUIT COURT
Whiting v. Yellow Social Interactive, Ltd., Case No. 2023-CI-00358

If you played games on www.Pulsz.com or www.Pulszbingo.com you may be part of a class action settlement.
A court authorized this notice. You are not being sued. This is not a solicitation from a lawyer.

- A Settlement has been reached in a class action lawsuit against Yellow Social Interactive Ltd. ("YSI"), alleging claims based on the sale of virtual coins on www.Pulsz.com and www.Pulszbingo.com. YSI denies all claims and that it violated any law, but has agreed to the settlement to avoid the uncertainties and expenses associated with continuing the case.

- You are a Settlement Class Member if you spent $5.00 or more within a 24-hour period on www.Pulsz.com from October 2, 2020, to November 3, 2022, and/or on www.Pulszbingo.com from July 20, 2022, to February 9, 2023 (collectively, the "Platforms"), while located in the Commonwealth of Kentucky.

- Those who file timely and properly completed claims will be eligible to receive a share of the Settlement Fund. Your share will be depend on, among other things, (1) the total dollar amount of in-game purchases you made while playing on the Platforms, with those who spent more money receiving a higher percentage back, and (2) how many Settlement Class Members submit claims.

- Read this notice carefully. Your legal rights are affected whether you act, or don't act.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
SUBMIT A CLAIM FORM	This is the only way to receive a payment.
EXCLUDE YOURSELF	You will receive no benefits, but you will retain any rights you currently have to sue YSI about the claims in this case.
OBJECT	Write to the Court explaining why you don't like the Settlement.
GO TO THE HEARING	Ask to speak in Court about your opinion of the Settlement.
DO NOTHING	You won't get a share of the Settlement benefits and will give up your rights to sue YSI about the claims in this case.

These rights and options—**and the deadlines to exercise them**—are explained in this Notice.

BASIC INFORMATION

1. Why was this Notice issued?

QUESTIONS? CALL 1-800-000-0000 TOLL FREE, OR VISIT [WEBSITE]

A Court authorized this notice because you have a right to know about a proposed Settlement of this class action lawsuit and about all of your options, before the Court decides whether to give final approval to the Settlement. This Notice explains the lawsuit, the Settlement, and your legal rights.

The Honorable Karen L. Wilson of the Henderson County Circuit Court, Commonwealth of Kentucky, is overseeing this case. The case is called *Whiting v. Yellow Social Interactive, Ltd.*, Case No. 2023-CI-00358. The person who sued is called the Plaintiff. The Defendant is Yellow Social Interactive Ltd.

2. What is a class action?

In a class action, one or more people called class representatives (in this case, David Whiting) sue on behalf of a group or a "class" of people who have similar claims. In a class action, the court resolves the issues for all class members, except for those who exclude themselves from the Class.

3. What is this lawsuit about?

The lawsuit claims that Defendant violated Kentucky's gambling laws through the sale of virtual coins on www.Pulsz.com and www.Pulszbingo.com. YSI denies all claims and that it violated any law.

4. Why is there a Settlement?

The Court has not decided whether the Plaintiff or YSI should win this case. Instead, both sides agreed to a Settlement. That way, they avoid the uncertainties and expenses associated with ongoing litigation, and Class Members will get compensation sooner rather than, if at all, after the completion of a trial.

More information about the Settlement and the lawsuit are available in the "Important Documents" section of the settlement website or by visiting the office of the Henderson County Circuit Court Clerk, 5 N. Main Street, Henderson, KY 42420, between 8:00 a.m. and 4:30 p.m., Monday through Friday, excluding Court holidays.

WHO'S INCLUDED IN THE SETTLEMENT?

5. How do I know if I am in the Settlement Class?

The Court decided that everyone who fits the following description is a member of the **Settlement Class**:

All individuals who, in Kentucky (as reasonably determined by billing address information, IP address information, or other information furnished by YSI), spent $5.00 or more within a 24-hour period on www.Pulsz.com from October 2, 2020, to

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November 3, 2022, and/or on www.Pulszbingo.com from July 20, 2022, to February 9, 2023.

THE SETTLEMENT BENEFITS

6. What does the Settlement provide?

Monetary Relief: If approved by the Court, YSI will establish a Settlement Fund totaling $1,320,000. Settlement Class Member payments, as well as the cost to administer the Settlement, the cost to inform people about the Settlement, any attorneys' fees and costs awarded by the Court, and any incentive award to the Class Representative approved by the Court will also come out of this fund (*see* Question 13).

***Prospective Relief*:** YSI has also agreed to take or maintain measures designed to address video game behavior disorders, including providing self-service resources to players, providing for voluntary self-exclusion, and implementing in-game mechanics to ensure that players who run out of sufficient virtual coins will be able to continue to play the games without waiting an unreasonable amount of time.

A detailed description of the settlement benefits can be found in the Settlement Agreement. [insert hyperlink]

7. How much will my payment be?

If you are member of the Settlement Class you may submit a Claim Form to receive a portion of the Settlement Fund. The exact amount of your payment can't be determined at this time, but you can get an estimate by visiting the settlement website. The amount of your payment will depend on, among other things, (1) the total dollar amount of in-game purchases you made while playing on the Platforms, with those who spent more money receiving a higher percentage back, and (2) how many Settlement Class Members submit claims. If you would like more information about how Settlement Payments are determined, visit [**website**].

8. When will I get my payment?

You should receive a check or electronic payment from the Settlement Administrator within 90 days after the Settlement has been finally approved and/or any appeals process is complete. The hearing to consider the final approval of the Settlement is scheduled for [Fairness Hearing Date]. If you elect to receive your payment via check, please keep in mind that checks will expire and become void 180 days after they are issued. If appropriate, funds remaining from the initial round of uncashed checks, or electronic payments that cannot be processed, may be used for a second distribution to Settlement Class Members and/or may be donated to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees.

HOW TO GET BENEFITS

9. How do I get a payment?

If you are a Class Member and you want to get a payment, you must complete and submit a Claim Form by **[Claims Deadline]**. Claim Forms can be found and submitted online or you may have received a Claim Form in the mail (and which you can then submit by mail). To submit a Claim Form on-line or to request a paper copy, go to [WEBSITE] or call toll free, 1-800-000-0000.

We encourage you to submit your claim electronically. Not only is it easy and secure, but it is completely free and takes only minutes.

REMAINING IN THE SETTLEMENT

10. What am I giving up if I stay in the Class?

If the Settlement becomes final, you will give up your right to sue YSI and other Released Parties for the claims being resolved by this Settlement. The specific claims you are giving up against YSI are described in the Settlement Agreement. You will be "releasing" YSI and certain of its affiliates, employees and representatives as described in Section 1.27 of the Settlement Agreement. Unless you exclude yourself (*see* Question 14), you are "releasing" the claims, regardless of whether you submit a claim or not. The Settlement Agreement is available through the "court documents" link on the website.

The Settlement Agreement describes the released claims with specific descriptions, so read it carefully. If you have any questions you can talk to the lawyers listed in Question 12 for free or you can, of course, talk to your own lawyer if you have questions about what this means.

11. What happens if I do nothing at all?

If you do nothing, you won't get any benefits from this Settlement. But, unless you exclude yourself, you won't be able to start a lawsuit or be part of any other lawsuit against YSI for the claims being resolved by this Settlement.

THE LAWYERS REPRESENTING YOU

12. Do I have a lawyer in the case?

The Court has appointed two lawyers at the firm Bursor & Fisher, P.A. to be the attorneys representing the Settlement Class. Those lawyers – Philip L. Fraietta and Alec M. Leslie – are called "Class Counsel." They are experienced in handling similar

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class action cases. More information about these lawyers, their law firm, and their experience is available at www.bursor.com. They believe, after conducting an extensive investigation, that the Settlement Agreement is fair, reasonable, and in the best interests of the Settlement Class. You will not be charged for these lawyers. If you want to be represented by your own lawyer in this case, you may hire one at your expense.

13. How will the lawyers be paid?

Class Counsel attorneys' fees, costs, and expenses will be paid from the Settlement Fund in an amount to be determined and awarded by the Court. The fee petition will seek no more than one-third of the Settlement Fund in attorneys' fees, costs, and expenses. The Court may award less than this amount.

Subject to approval by the Court, the Class Representative may be paid an Incentive Award from the Settlement Fund for helping to bring and settle the case. The Class Representative will ask for $5,000 as an incentive award.

EXCLUDING YOURSELF FROM THE SETTLEMENT

14. How do I get out of the Settlement?

To exclude yourself from the Settlement, you must mail or otherwise deliver a letter (or request for exclusion) stating that you want to be excluded from the "*Whiting v. Yellow Social Interactive Ltd.*, Case No. 2023-CI-00358 settlement." Your letter or request for exclusion must also include your name, all Player ID(s), your address, and any email address(es) associated with your www.Pulsz.com and/or www.Pulszbingo.com account, your signature, the name and number of this case, and a statement that you wish to be excluded. You must mail or deliver your exclusion request no later than **[objection/exclusion deadline]** to:

YSI Games Settlement
0000 Street
City, ST 00000

15. If I don't exclude myself, can I sue the Defendant for the same thing later?

No. Unless you exclude yourself, you give up any right to sue YSI for the claims being resolved by this Settlement.

16. If I exclude myself, can I get anything from this Settlement?

No. If you exclude yourself, you should not submit a Claim Form to ask for benefits because you won't receive any.

OBJECTING TO THE SETTLEMENT

17. How do I object to the Settlement?

If you are a Class Member, you can object to the Settlement if you don't like any part of it. You can give reasons why you think the Court should not approve it. The Court will consider your views. To object, you must file with the Court a letter or brief stating that you object to the Settlement in *Whiting v. Yellow Social Interactive Ltd.*, Case No. 2023-CI-00358 and identify all your reasons for your objections (including citations and supporting evidence) and attach any materials you rely on for your objections. Your letter or brief must also include your name, all Player ID(s), your address, the basis upon which the objector claims to be a Settlement Class Member, including any email address(es) associated with your www.Pulsz.com and/or www.Pulszbingo.com account, the name and contact information of any and all attorneys representing, advising, or in any way assisting you in connection with your objection, and your signature. If you, or an attorney assisting you with your objection, have ever objected to any class action settlement where you or the objecting attorney has asked for or received payment in exchange for dismissal of the objection (or any related appeal) without modification to the settlement, you must include a statement in your objection identifying each such case by full case caption. You must also mail or deliver a copy of your letter or brief to Class Counsel and Defendant's Counsel listed below.

Class Counsel will file with the Court and post on this website its request for attorneys' fees, costs, and expenses by [two weeks prior to objection deadline].

If you want to appear and speak at the Final Approval Hearing to object to the Settlement, with or without a lawyer (explained below in answer to Question Number 21), you must say so in your letter or brief. File the objection with the Court and mail a copy to these two different places postmarked no later than **[objection deadline].**

Court	Class Counsel	Defendant's Counsel
The Honorable Karen L. Wilson Commonwealth of Kentucky Henderson Circuit Court 5 N Main Street Henderson, KY 42420	Philip L. Fraietta Alec M. Leslie Bursor & Fisher PA 1330 Avenue of the Americas, 32nd Floor New York, NY 10019	William M. Gantz Duane Morris LLP 100 High Street, Suite 2400 Boston, MA 02110

18. What's the difference between objecting and excluding myself from the Settlement?

Objecting simply means telling the Court that you don't like something about the Settlement. You can object only if you stay in the Class. Excluding yourself from the

Class is telling the Court that you don't want to be part of the Class. If you exclude yourself, you have no basis to object because the case no longer affects you.

THE COURT'S FINAL APPROVAL HEARING

19. When and where will the Court decide whether to approve the Settlement?

The Court will hold the Final Approval Hearing at [time] on **Month 00, 2023** in [TBD]. The purpose of the hearing will be for the Court to determine whether to approve the Settlement as fair, reasonable, adequate, and in the best interests of the Class; to consider the Class Counsel's request for attorneys' fees and expenses; and to consider the request for an incentive award to the Class Representative. At that hearing, the Court will be available to hear any objections and arguments concerning the fairness of the Settlement.

The hearing may be postponed to a different date or time without notice, so it is a good idea to check [website] or call 1-800-000-0000. If, however, you timely objected to the Settlement and advised the Court that you intend to appear and speak at the Final Approval Hearing, you will receive notice of any change in the date of such Final Approval Hearing.

20. Do I have to come to the hearing?

No. Class Counsel will answer any questions the Court may have. But, you are welcome to come at your own expense. If you send an objection or comment, you don't have to come to Court to talk about it. As long as you filed and mailed your written objection on time, the Court will consider it. You may also pay another lawyer to attend, but it's not required.

21. May I speak at the hearing?

Yes. You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must include in your letter or brief objecting to the settlement a statement saying that it is your "Notice of Intent to Appear in *Whiting v. Yellow Social Interactive Ltd.*, Case No. 2023-CI-00358." It must include your name, address, telephone number and signature as well as the name and address of your lawyer, if one is appearing for you. Your objection and notice of intent to appear must be filed with the Court and postmarked no later than [**objection deadline**], and be sent to the addresses listed in Question 17.

GETTING MORE INFORMATION

22. Where do I get more information?

This Notice summarizes the Settlement. More details are in the Settlement Agreement. You can

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get a copy of the Settlement Agreement at [website]. You may also write with questions to YSI Platforms Settlement, P.O. Box 0000, City, ST 00000. You can call the Settlement Administrator at 1-800-000-0000 or Class Counsel at 1-646-837-7150, if you have any questions. Before doing so, however, please read this full Notice carefully. You may also find additional information elsewhere on the case website.

QUESTIONS? CALL 1-800-000-0000 TOLL FREE, OR VISIT [WEBSITE]

EXHIBIT E

PLAN OF ALLOCATION

Each Settlement Payment will be comprised of (1) a Base Payment Amount, (2) *plus* a Supplemental Payment Amount, (3) *minus* the Settlement Class Member's share of any Fee Award, incentive awards to the Class Representative, and Settlement Administration Expenses.

1. Base Payment Amounts.

Base Payment Amounts will be calculated by applying an escalating marginal recovery formula to the Settlement Class Member's Relevant Spending Amount. No Settlement Class Member will receive more than his or her Relevant Spending Amount.

Settlement Class Members who submit a valid claim will be subject to an escalating marginal recovery formula based on the percentages described in Figure 1 below.

Figure 1

Spend ($)	Marginal Rate (%)
5.00-1,000	10
1,000.01-10,000	17.5
10,000.01-100,000	30
100,000.01+	60

By way of example, an individual with a Relevant Spending Amount of $40,000 will be entitled to a Base Payment Amount of $8,273.12, calculated as: ((10% of their first $1,000 in spending [$100]) + (17.5% of their next $9,000 in spending ([$1,575)]) + (30% of their next $30,000 in spending [$9,000])) * (1 – (75% * 30%)). Settlement Class Members will have the ability to opt to receive an electronic payment via Venmo or PayPal, provided, however, that the default payment method will be check.

2. Proration.

In the event the sum of all Base Payment Amounts for Settlement Class members who submit a valid claim exceed the total amounts available for distribution in the Settlement Fund,

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each individual's Base Payment Amount will be reduced proportionately. Proration of amounts due to Settlement Class Members from the Settlement Fund will be determined 30 days after the deadline for Settlement Class Members to file claims. *Pro rata* payments to Settlement Class Members shall be made within 60 days of the deadline for Settlement Class Members to file claims.

3. Supplemental Payment Amounts.

In the event there are available amounts remaining in the Settlement Fund after calculation of all Base Payment Amounts for Settlement Class members who have submitted a valid claim, Supplemental Payment Amounts will be calculated on a *pro rata* basis. Upon the close of the claims period, the sum of all unallocated amounts in the Settlement Fund (minus any amounts necessary to cover costs and fees) will be considered the Supplemental Payment Fund. The Supplemental Payment Fund will be apportioned *pro rata* to each Settlement Class Member who submitted a valid claim, based on the participating Settlement Class Member's Base Payment Amount. All payment amounts are subject to the deductions described in Section (3).

Regardless of Settlement Class Member participation rates, the sum of Base Payment Amounts and Supplemental Payment Amounts will equal the amounts available for distribution from the Settlement Fund.

3. Fee Award, Incentive Awards, and Settlement Administration Expenses.

Settlement Payment Amounts will be a Settlement Class Member's Base Payment Amount plus any Supplemental Payment Amount, minus that Settlement Class Member's share of any Fee Award, Incentive Awards and Settlement Administration Expenses, anticipated not to exceed one-third (cumulatively) of the Settlement Fund.

EXHIBIT F

COMMONWEALTH OF KENTUCKY
HENDERSON COUNTY CIRCUIT COURT

DAVID WHITING, individually and on behalf of all others similarly situated, Plaintiff, v. YELLOW SOCIAL INTERACTIVE LTD., Defendant.	Case No. 2023-CI-00358

STIPULATION REGARDING UNDERTAKING RE: ATTORNEYS' FEES AND COSTS

Plaintiff David Whiting and Defendant Yellow Social Interactive Ltd. ("Defendant") (collectively, "the Parties"), by and through and including their undersigned counsel, stipulate and agree as follows:

WHEREAS, Class Counsel's law firm Bursor & Fisher P.A. (the "Firm") desires to give an undertaking (the "Undertaking") for repayment of their award of attorney fees and costs, approved by the Court, and

WHEREAS, the Parties agree that this Undertaking is in the interests of all Parties and in service of judicial economy and efficiency.

NOW, THEREFORE, the undersigned, as agent for the Firm, hereby submits the Firm to the jurisdiction of the Court for the purpose of enforcing the provisions of this Undertaking.

Capitalized terms used herein without definition have the meanings given to them in the Settlement Agreement.

By receiving any payments pursuant to the Settlement Agreement, the Firm and its shareholders, members, and/or partners submit to the jurisdiction of the Henderson County Circuit Court, Commonwealth of Kentucky, for the enforcement of and any and all disputes

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relating to or arising out of the reimbursement obligation set forth herein and the Settlement Agreement.

In the event that the Final Judgment or any part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, the Firm shall, within thirty (30) days repay to Defendant, based upon written instructions provided by Defendant's Counsel, the full amount of the attorneys' fees and costs paid to the Firm from the Settlement Fund, including any accrued interest.

In the event the attorney fees and costs awarded by the Court or any part of them are vacated, modified, reversed, or rendered void as a result of an appeal, the Firm shall within thirty (30) days repay to Defendant, based upon written instructions provided by Defendant's Counsel, the attorneys' fees and costs paid to the Firm and/or Representative Plaintiff from the Settlement Fund in the amount vacated or modified, including any accrued interest.

This Undertaking and all obligations set forth herein shall expire upon finality of all direct appeals of the Final Settlement Order and Judgment.

In the event the Firm fails to repay to Defendant any of attorneys' fees and costs that are owed to it pursuant to this Undertaking, the Court shall, upon application of Defendant, and notice to the Firm, summarily issue orders, including but not limited to judgments and attachment orders against the Firm, and may make appropriate findings for sanctions for contempt of court.

The undersigned stipulates, warrants, and represents that he has both actual and apparent authority to enter into this stipulation, agreement, and undertaking on behalf of the Firm.

This Undertaking may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. Signatures by facsimile shall be as effective as original signatures.

The undersigned declare under penalty of perjury under the laws of the United States that they have read and understand the foregoing and that it is true and correct.

IT IS SO STIPULATED THROUGH COUNSEL OF RECORD:

DATED: July 3, 2023

BURSOR & FISHER, P.A.

By: Philip L. Fraietta on behalf of Bursor & Fisher, P.A.
Attorneys for Plaintiff David Whiting

DATED: Jul 5, 2023

DUANE MORRIS LLP

William Gantz
William Gantz (Jul 5, 2023 15:44 CDT)

By: William M. Gantz
Attorneys for Defendant Yellow Social Interactive Ltd.

EXHIBIT B

COMMONWEALTH OF KENTUCKY
HENDERSON CIRCUIT COURT
CIVIL ACTION NO. 2023-CI-00358

DAVID WHITING,
on behalf of himself and all others similarly situated, PLAINTIFF,

v.

YELLOW SOCIAL INTERACTIVE LTD., DEFENDANT.

PRELIMINARY ORDER APPROVING CLASS ACTION SETTLEMENT, CERTIFYING THE CLASS FOR SETTLEMENT PURPOSES, APPROVING NOTICE PLAN, APPOINTING CLASS REPRESENTATIVE, AND APPOINTING CLASS COUNSEL

WHEREAS, the above-captioned matter came before this Court upon the Parties' Joint Motion for Preliminary Approval of Class Action Settlement. Based upon the memoranda, exhibits, and all the files and proceedings herein, the Court finds as follows:

1. The Court grants preliminary approval of the Settlement based upon the terms set forth in the Settlement Agreement.

2. The settlement terms set forth in the Settlement Agreement appear to be fair, adequate and reasonable to the Settlement Class, and the Court preliminarily approves the terms of the Settlement Agreement, including:

a. The creation of a Settlement Fund of $1,320,000.00 should the Court ultimately grant final approval;

b. An Incentive Award, which shall not exceed $5,000 for Plaintiff David Whiting;

c. Attorneys' fees, costs, and expenses to Class Counsel, which shall not exceed one-third of the Settlement Fund; and

d. Reasonable settlement administration expenses to be drawn from the Settlement Fund.

3. The Court grants the Parties' request for certification of the following KY CR 23 Settlement Class for the sole and limited purpose of implementing the terms of the Settlement Agreement, subject to this Court's final approval:

> All individuals who, in Kentucky (as reasonably determined by billing address information, IP address information, or other information furnished by YSI), spent $5.00 or more within a 24-hour period on www.Pulsz.com from October 2, 2020 to November 3, 2022 and www.Pulszbingo.com from July 20, 2022 to February 9, 2023.[1]

4. The Court preliminarily appoints Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel, and Plaintiff David Whiting as Settlement Class Representative.

5. This Court approves, as to form and content, the notice of proposed class action settlement (the "Notice"), in substantially the form attached to the Settlement Agreement as Exhibits B, C and D. The Court approves the procedure for Settlement Class Members to opt out of, or object to, the Settlement as set forth in the Settlement Agreement Notice.

6. The Court directs the mailing of the Settlement Class Notice by email and/or First-Class U.S. mail to the Settlement Class Members in accordance with the schedule set forth below. The Court finds the dates selected for the mailing and distribution of the Notice, as set forth below, meet the requirements of due process and provide the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

[1] Excluded from the Settlement Class (1) any Judge or Magistrate presiding over this Action and members of their families; (2) Defendants, Defendants' subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded persons.

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Event	Proposed Deadline
Settlement Administrator to disseminate class notice pursuant to Settlement Agreement § 4.2 (a)	No later than twenty-eight (28) days after entry of Preliminary Approval Order
Settlement Administrator to send Reminder Notice via email	Both thirty (30) days prior to the Claims Deadline and seven (7) days prior to the Claims Deadline
Settlement Administrator to provide Notice on the settlement website	No later than seven (7) days after entry of Preliminary Approval

7. The Court appoints Artificial Intelligence Class Solutions as the Settlement Administrator.

8. The Court adopts the following additional dates and deadlines:

a. The deadline for Settlement Class Members to submit claims shall be January 8, 2024, which is no fewer than fifty-six (56) days following the Final Approval Hearing.

b. Any Settlement Class Member wishing to be excluded from the Settlement Class shall have until October 26, 2023 to do so, which is no more than 45 days after the dissemination of the class notice and claims forms but no sooner than 14 days after Class Counsel submits papers supporting a Fee Award.

c. Any Settlement Class Member wishing to object to the terms of the Settlement Agreement shall have until October 26, 2023 to do so, which is no more than 45 days after the dissemination of the class notice and claims forms but no sooner than 14 days after Class Counsel submits papers supporting a Fee Award.

d. Class Counsel shall file a memorandum of points and authorities in support of their motion for approval of attorneys' fees, costs, and expenses no later than October 12, 2023 (*suggested date 14 days prior to the Objection/Exclusion Deadline*).

e. Settlement Class Counsel shall file a memorandum of points and authorities in support of the final approval of the Settlement Agreement no later than October 30, 2023, fourteen (14) prior to the Final Approval Hearing.

f. A final settlement approval fairness hearing on the question of whether the proposed Settlement Agreement, attorneys' fees to Class Counsel, and the Settlement Class Representative's Incentive Award should be finally approved as fair, reasonable and adequate as to the members of the Settlement Class is scheduled for November 13, 2023 at 1:00 p.m. local time.

SO ORDERED this 1st day of August, 2023.

HON. KAREN L. WILSON
Henderson County Chief Circuit Judge

ENTERED 8-15-2023
C. GREGORY SUTTON, CLERK
BY Teri Baker D.C.

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EXHIBIT C

Bursor & Fisher, P.A. - Pulsz Casino Expenses

$7,500.00	Mediation Fees
$172.65	Catering & Meal Expenses
$1,689.91	Travel & Lodging Expenses
$9,362.56	**Total Pulsz Casino Expenses**

Mediation Fees

DATE	MATTER	AMOUNT	DESCRIPTION
2023.03.23	Pulsz Casino	$7,500.00	Phillips ADR Enterprises, P.C.
		$7,500.00	**Total Mediation Fees**

Catering & Meal Expenses

DATE	MATTER	AMOUNT	DESCRIPTION
2023.04.07	Pulsz Casino	$5.46	Uber Eats
2023.04.07	Pulsz Casino	$27.31	Uber Eats
2023.08.04	Pulsz Casino	$12.68	Ernest Klein & Co.
2023.08.07	Pulsz Casino	$32.24	Uber Eats
2023.08.15	Pulsz Casino	$22.59	Peephole Bar & Grill
2023.08.15	Pulsz Casino	$55.59	Uber Eats
2023.08.16	Pulsz Casino	$16.78	Chilis
		$172.65	**Total Catering & Meal Expenses**

Travel & Lodging Expenses

DATE	MATTER	AMOUNT	DESCRIPTION
2023.08.01	Pulsz Casino	$59.46	Expedia
2023.08.01	Pulsz Casino	$277.38	Expedia
2023.08.01	Pulsz Casino	$31.96	Uber Trip
2023.08.02	Pulsz Casino	$637.80	Delta
2023.08.14	Pulsz Casino	$84.93	Delta
2023.08.14	Pulsz Casino	$29.00	Delta
2023.08.15	Pulsz Casino	$31.79	Speedway
2023.08.16	Pulsz Casino	$28.76	Hyatt Hotels
2023.08.16	Pulsz Casino	$49.93	Uber Trip
2023.08.18	Pulsz Casino	$240.00	Delta
2023.09.29	Pulsz Casino	$218.90	United Airlines
		$1,689.91	**Total Travel & Lodging Expenses**

Pulsz SKO Expenses

4112538	129231.178070	042		301.79
06/16/2023	Filing Fees	042		301.79
	Henderson County			
4115631	129231.178070	002		7.00
07/17/2023	Duplicating Charges	002		7.00
4115632	129231.178070	002		13.10
07/17/2023	Duplicating Charges	002		13.10
4117112	129231.178070	042		317.75
07/14/2023	Filing Fees	042		317.75
	Kentucky Bar Association - Pro Hac fee (Philip Fraietta)			
4117113	129231.178070	042		317.75
07/14/2023	Filing Fees	042		317.75
	Kentucky Bar Association - Pro Hac fee (Alec Leslie)			
4117114	129231.178070	042		317.75
07/14/2023	Filing Fees	042		317.75
	Kentucky Bar Association - Pro Hac fee (Julian Diamond)			
4118659	129231.178070	003		12.45
07/17/2023	Mailing Expenses	003		12.45
	Postage			

TOTAL: $1,287.59

4890-2649-2557, v. 1

EXHIBIT 2

COMMONWEALTH OF KENTUCKY
HENDERSON CIRCUIT COURT
CIVIL ACTION NO. 22-CI-00553

AMY JO ARMSTEAD,
on behalf of herself and all others similarly situated, PLAINTIFF,

v.

VGW MALTA LTD, and
VGW LUCKYLAND INC., DEFENDANTS

ORDER GRANTING FINAL APPROVAL OF SETTLEMENT, APPROVING FEES AND EXPENSES AND DIRECTING ENTRY OF FINAL JUDGMENT AND DISMISSAL WITH PREJUDICE

Plaintiff Amy Jo Armstead ("Plaintiff") and Defendants VGW Malta LTD and VTW Luckyland Inc. ("Defendants") jointly moved the court for final approval of the proposed Class Action Settlement Agreement. Additionally, Class Counsel has petitioned for an award of fees and expenses, and for an incentive award for Plaintiff.

On October 3, 2022, this Court entered the Preliminary Approval Order in the Action, preliminarily approving the terms of the class action settlement as set forth in the Settlement Agreement. On January 9, 2023, this Court conducted a Fairness Hearing to: (a) determine whether this Action should be finally certified as a class action for settlement purposes pursuant to Rule 23.02(c) of the Kentucky Rules of Civil Procedure; (b) determine whether the proposed settlement and the terms and conditions of the Settlement Agreement are fair, reasonable, and adequate and should be finally approved by the Court; (c) determine whether final judgment should be entered in the action pursuant to the Settlement Agreement; (d) entertain any objections of the members of the Settlement Class and any other affected person(s) as to the certification of the Settlement Class, the proposed settlement, or any other matter related thereto; (e) consider Class Counsel's

petition for an award of attorneys' fees and reimbursement of expenses; and (f) rule on any other matter pertaining to the proposed settlement.

The Court determines that the notices provided to the Settlement Class fully complied with all requirements of due process, Rule 23 of the Kentucky Rules of Civil Procedure, and the notice provisions approved by this Court in the Preliminary Approval Order, and are sufficient to confer upon this Court personal jurisdiction over the Settlement Class. Members of the Settlement Class were notified of the hearing to address the fairness of the proposed settlement to the Settlement Class and were given an opportunity to appear and to voice objections to the class certification for settlement purposes and/or the settlement. The Court also received and considered arguments and evidence from the attorneys for the respective parties in connection with the proposed compromise and settlement of the Action and the award of Class Counsel's attorneys' fees and expenses and Class Representative's incentive award, and gave all persons requesting to be heard an opportunity to be heard in accordance with the procedure set forth in the Preliminary Approval Order. Based on the oral and written argument and evidence presented in connection with the motions, the Court makes the following findings of fact:

A. The Settlement Class preliminarily certified by order of this Court for settlement purposes only is appropriate for certification in the context of the Settlement Agreement and is hereby finally certified under Rule 23.02(c) of the Kentucky Rules of Civil Procedure. The Court makes no findings regarding whether the Settlement Class would be appropriate for class certification in the absence of the proposed settlement.

1. The Settlement Class is so numerous that joinder of all members is impracticable.

2. There are questions of law and fact common to the Settlement Class. The Settlement Class asserts claims against Defendants in connection with their purchase and use of virtual currency in Defendant's Chumba Casino and Luckyland Slots games (the Games").

3. The claims of the Class Representative are typical of the claims of the Settlement Class. The Class Representative, like all members of the Settlement Class, alleges monetary damages in connection with her purchase and use of virtual currency in the Games, which she contends constitute illegal gambling under Kentucky state law.

4. The Class Representative has fairly and adequately represented and protected the interests of the Settlement Class. The Class Representative asserts typical claims and has common interests with the unnamed members of the Settlement Class in seeking redress for alleged monetary damages arising from her purchase and use of virtual currency in the Games, which she contends constitute illegal gambling under Kentucky state law. In addition, the Class Representative has vigorously prosecuted the interests of the Settlement Class through well-qualified counsel experienced in similar class action litigation, including during negotiations of the Settlement Agreement and its presentation to the Court.

5. Having taken into consideration the matters listed in Rule 23.02(c)(i)–(iv), the Court finds that in the context of the proposed class settlement, common issues related to alleged damages incurred by the Class Representative and the Settlement Class from Defendant's practice of owning and operating the Games predominate over questions affecting individual members of the Settlement Class. Accordingly, in the context of the Settlement Agreement, questions of law and fact common to the members of the Settlement

Class predominate over any questions affecting only individual members. Furthermore, in the context of the settlement, a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

B. The consideration to be given to members of the Settlement Class under the terms of the Settlement Agreement is reasonable considering the strengths and weaknesses of the claims of the Settlement Class.

C. The Settlement Agreement is fair, adequate, and reasonable and in the best interests of the Settlement Class.

D. The Settlement Class has at all times, including during the negotiation of the Settlement Agreement and its presentation to the Court, been represented by competent counsel. Class Counsel has recommended to the Court that the Settlement Agreement be approved. Class Counsel has exercised skill and experience in representing the Settlement Class, and their work has resulted in a substantial benefit to the Settlement Class. The Settlement Agreement provides for the payment of up to $3,525,000.00 to Class Counsel for attorneys' fees and costs, and Class Counsel has applied for an award of fees and costs of $3,525,000.00. The Court has considered Class Counsel's application for attorneys' fees and costs and hereby enters supplemental findings of fact and conclusions of law pertaining to Class Counsel's application. Class Counsel's fees and expenses shall be paid from the Settlement Fund pursuant to the Settlement Agreement.

E. Notice of the Settlement Agreement has been emailed, mailed, and published in accordance with this Court's Preliminary Order Approving Class Action Settlement and the notice plan contained therein. The notice given in the manner specified in that Order provided the best notice practicable under the circumstances and was reasonably calculated to communicate actual notice of the litigation and the proposed settlement to members of the Settlement Class, including

to apprise Settlement Class Members of the pendency of this Action, their right to object to the Settlement or exclude themselves from the Settlement Class, and to appear at the Final Approval Hearing. The Court finds that the notice that has been given is consistent with and satisfies the due process rights of the entire Settlement Class and any other applicable law.

F. The Court finds that the Settlement Agreement was the result of arm's length negotiation, was entered into in good faith by the Parties, and was not the product of fraud or collusion.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. **Settlement Terms.** The capitalized terms used in this Final Approval Order have the same meaning as those defined in the Settlement Agreement, unless otherwise stated.

2. **Jurisdiction.** The Court has jurisdiction over the Parties, the subject matter of the dispute, and all Settlement Class Members.

3. **Class Certification.** The Court reaffirms its prior certification of the Settlement Class in its Preliminary Approval Order, and this action is hereby finally certified as a class action for settlement purposes only on behalf of a class consisting of:

> All individuals who, in Kentucky (as reasonably determined by billing address information, IP address information, or other information furnished by VGW), spent $5.00 or more within a 24-hour period on Chumba Casino or Luckyland Slots, from March 17, 2017, through March 17, 2022.[1]

4. **Class Representative.** Amy Jo Armstead is appointed Class Representative of the class finally certified herein.

[1] Excluded from the Settlement Class (1) any Judge or Magistrate presiding over this Action and members of their families; (2) Defendants, Defendants' subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded persons.

5. **Class Notice.** The Settlement Administrator completed delivery of Class Notice according to the terms of the Agreement, as preliminarily approved by the Court. The Class Notice given by the Settlement Administrator to the Class was the best practicable notice under the circumstances and was reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Action, their right to object to the Settlement or exclude themselves from the Settlement Class, and to appear at the Final Approval Hearing. The Class Notice and the means of disseminating the same, as prescribed by the Agreement, was appropriate and reasonable and constituted due, adequate, and sufficient notice to all persons entitled to notice. The Class Notice and the means of disseminating the same satisfied all applicable requirements of the Federal Rules of Civil Procedure, constitutional due process, and any other applicable law.

6. **Settlement Approval.** After considering the factors governing the propriety of judicial approval of the proposed class settlement under Rule 23.05 and other applicable law, the Settlement Agreement and the terms of which are incorporated herein by reference, the Court hereby grants final approval to the Settlement and finds that the Settlement is, in all respects, fair, reasonable, and adequate, and in the best interests of the Settlement Class. The Court finds that the Settlement is within the authority of the Parties and the result of extensive, arm's-length negotiations. The Parties are directed to proceed with the Settlement procedures specified under the terms of the Settlement Agreement and the Court's order regarding final claims determinations, including payment and prospective relief.

7. **Objections or Exclusions from the Settlement Class.** Class Members were given a fair and reasonable opportunity to object to the settlement. No members of the Class have requested to be excluded from the Class and the Settlement. No objections have been brought to the Court's attention. This Order is thus binding on all Class Members and has res judicata and

preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Class Members with respect to the Released Claims as defined in the Settlement Agreement.

8. **No Admission.** Neither this Final Order and Judgment nor the fact or substance of the Settlement Agreement shall be considered a concession or admission by or against Defendants or any other related party, nor shall they be used against Defendants or any other released party or third party as an admission, waiver, or indication with respect to any claim, defense, or assertion or denial of wrongdoing or legal liability.

9. **Dismissal with Prejudice.** Pursuant to the terms of the Settlement, the action (including all individual claims and class claims) is hereby dismissed with prejudice on the merits, without costs or attorney's fees to any Party except as provided under the terms of the Settlement Agreement, and this Final Order and Judgment.

10. **Releases.** This Order incorporates the Releases set forth in the Settlement Agreement and makes them effective as of the Effective Date. All Settlement Class Members who have not properly sought exclusion from the Settlement Class are hereby permanently barred and enjoined from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any lawsuit or other action in any jurisdiction based on the Released Claims, as set forth in the Settlement Agreement.

11. **Attorneys' Fees and Expenses.** The Court has considered Class Counsel's Application for Attorneys' Fees and Costs Related to the Class Action Settlement Agreement And Request for Fee Award to Class Representative, as well as the supporting declarations, and adjudges that the payment of attorneys' fees, costs, and expenses in the amount of $3,525,000 is reasonable in light of the multi-factor test used to evaluate fee awards in the Sixth Circuit. *See Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Gen. Motors Corp.*,

497 F.3d 615, 631 (6th Cir. 2007) ("*Int'l Union*"). This award includes Class Counsel's unreimbursed litigation expenses. Such payment shall be made pursuant to and in the manner provided by the terms of the Settlement Agreement.

12. **Incentive Award.** The Court has considered Class Counsel's Application for Attorneys' Fees and Costs Related to the Class Action Settlement Agreement And Request for Fee Award to Class Representative, as well as the supporting declarations, and adjudges that the payment of a service award in the amount of $7,000.00 to Ms. Armstead to compensate her for her efforts and commitment on behalf of the Settlement Class, is fair, reasonable, and justified under the circumstances of this case. Such payment shall be made pursuant to and in the manner provided by the terms of the Settlement Agreement

13. **Continuing Jurisdiction.** Without affecting the finality of the Final Judgment for purposes of appeal, the Court retains continuing and exclusive jurisdiction over the Parties and all matters relating to the Settlement Agreement, including the administration, interpretation, construction, effectuation, enforcement, and consummation of the Settlement and this Order. Similarly, any dispute concerning the aggregate amount or allocation of Class Counsel's fee and expense award shall be subject to the exclusive jurisdiction of this Court and shall be a separate and severable matter from all other matters in this final judgment and the finality and fairness of the Settlement Agreement with the Settlement Class.

14. **Finality.** Any appeal of the Class Counsel attorney's fees and expense award shall be severed from this final judgment and shall not affect the finality of this judgment as to the Settlement Agreement and release of the Settlement Class's claims against the Released Parties.

15. **Final Judgment.** Final judgment is hereby entered dismissing with prejudice the claims of Plaintiff and the members of the Settlement Class against Defendants. Because there is

no just reason for delay, the Court hereby directs the entry of a final judgment on the dismissed claims pursuant to Rule 54 of the Kentucky Rules of Civil Procedure. All members of the Settlement Class certified in this Order are bound by the Release in Paragraph 3 of the Settlement Agreement, and are hereby permanently enjoined and restrained from filing or prosecuting any Released Claim against any of the Released Parties as defined in the Settlement Agreement. This Order is a final judgment and is in all respects a final and appealable order, there being no just case for delay. Plaintiff, Defendants, and the Claims Administrator are directed to provide the benefits of the Settlement Agreement to the Settlement Class as provided for in the Settlement Agreement, and in accordance with the notice plan published and mailed to the Settlement Class.

16. To the extent that the claims process as provided for in the Settlement Agreement is exhausted and residual funds remain beyond those specifically directed to be returned to Defendant pursuant to the Settlement Agreement, the residual funds shall be disbursed to the Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees pursuant to Supreme Court Rule 3.830(20). Such funds are to be allocated to the Kentucky Civil Legal Aid Organizations based upon the current poverty formula established by the Legal Services Corporation to support activities and programs that promote access to the civil justice system for low-income residents of Kentucky.

17. The Settlement Fund shall be a Qualified Settlement Fund as described in Internal Revenue Code § 468B and Treasury Regulation § 1.468B-1 established by order of this Court, and shall remain subject to the jurisdiction of this Court. Where applicable and in the best interests of the Class Members, the Settlement Fund is authorized to effect qualified assignments of any resulting structured settlement liability within the meaning of Section 130(c) of the Internal Revenue Code.

18. Except as expressly stated otherwise in this Final Order, the Preliminary Approval Order, or the Settlement Agreement, all costs shall be borne by the party incurring them.

SO ORDERED this 9th day of January, 2023

HON. KAREN L. WILSON
Henderson County Chief Circuit Judge

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ENTERED 1-10-2023
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EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In re U.S. Foodservice, Inc. Pricing Litigation	Case No. 3:07-md-1894 (AWT)
This Document Relates To: All Matters	

MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF FEES AND EXPENSES FROM THE COMMON FUND AND FOR AWARD OF INCENTIVE AND REIMBURSEMENT PAYMENT TO CLASS REPRESENTATIVES

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INTRODUCTION

Over the past eight years, Class Counsel have vigorously pursued the claims of the Class without any guarantee that they would ever see a penny in return for the tens of thousands of hours of hard work they invested, or the millions of dollars in expenses they advanced. The risk that Class Counsel assumed for the benefit of the Class in this complex RICO case was immense. The U.S. District Court for the Southern District of New York in 2009 summarized well the dismal probability of success faced by Class Counsel pursuing a RICO case:

> [T]he statistical record indicates that **in 98 percent of the RICO appellate cases surveyed**, which do not include RICO actions dismissed by the district courts but not appealed, **plaintiffs and counsel invested extensive time and energies in litigation only to come away with a total loss**.
>
> . . .
>
> Ironically, the attractions that explain the magnetlike pull which induces plaintiffs into filing RICO charges also generate counter-forces that repel them. In the final analysis, these pluses and minuses point to some reasons why the incidence of favorable judgments for RICO plaintiffs is so "**stunningly awful**."[1]

Now that that Class Counsel's labor and risk-taking have resulted in a tremendous benefit to the Class in the form of a $297 million common fund settlement, Class Counsel asks that the Court award fair compensation for the enormous risk they bore and excellent services they rendered for the Class. Class Counsel respectfully request a fee award of one third of the total settlement, plus reimbursement of expenses of $7,941,358.41.

As discussed below and in the accompanying expert declarations of Professors Charles Silver, Geoffrey Miller, and Alexandra Lahav, Class Counsel's request for a fee of one third of the common fund settlement is well within the range of reasonableness under the factors set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), and under either the percentage-of-the-fund or lodestar methods approved by the Second Circuit.

[1] *Gross v. Waywell*, 628 F. Supp. 2d 475, 479-81 (S.D.N.Y. 2009) (emphasis added).

BACKGROUND

When the Court conducts its final fairness hearing on the settlement between Plaintiffs and Defendant U.S. Foodservice, Inc. ("USF") and Koninklijke Ahold N.V. ("Ahold"), Class Counsel will have been working on this case for nearly a decade.[2] In late 2005, Class Counsel began investigating whether Plaintiffs Waterbury Hospital, Frankie's Franchise Systems, Inc. ("Frankie's"), and Cason, Inc. ("Cason") (collectively, the "Connecticut Plaintiffs") had sufficient basis to bring claims against USF for its pricing practices under its cost-plus contracts. [Decl. ¶¶ 5-9.][3] Having found adequate evidence to make claims against USF, the Connecticut Plaintiffs filed a class-action complaint against USF on October 19, 2006 in the U.S. District Court for the District of Connecticut, alleging that between 1998 and 2005, USF caused six companies known as "Value Added Service Providers" ("VASPs") to be erected as middlemen in an unlawful pricing scheme that violated the federal Racketeer Influenced Corrupt Organizations Act ("RICO") and breached USF's contracts with its cost-plus customers. *Id.*

During the year that followed, counsel for Catholic Healthcare West ("CHW") and Thomas & King ("T&K") conducted their own pre-filing investigations, and filed class action complaints with similar allegations against USF in the Northern District of California and the Southern District of Illinois, respectively. [Decl. ¶¶ 5-8.] The claims were consolidated for pretrial proceedings before this Court and Plaintiffs filed a joint consolidated amended complaint

[2] Amended Pretrial Order No. 1 named the following firms as lead class counsel: Drubner, Hartley & Hellman LLC (f/k/a Drubner, Hartley & O'Connor, LLC); Whatley & Kallas, LLC, and Akin Gump Strauss Hauer & Feld LLP (collectively, "Class Counsel"). In August 2008, the lead attorneys at Akin Gump moved to Hunton & Williams LLP, resulting in Hunton & Williams also becoming lead counsel.

[3] Citations herein to "Decl." refer to the accompanying Joint Declaration of Richard L. Wyatt, Jr., James E. Hartley, R. Lawrence Macon, and Joe R. Whatley in Support of Class Counsel's Motion for Award of Fees and Expenses From the Common Fund and for Award of Incentive and Reimbursement Payment to Class Representatives.

on June 30, 2008.[4] *In re U.S. Foodservice, Inc. Pricing Litig.* 528 F. Supp. 2d 1370, 1371 (J.P.M.L. 2007); Dkt. No. 45; [Decl. ¶¶ 10-11]. Shortly thereafter, USF and its former parent company, Ahold, filed a motion to dismiss Plaintiffs' claims. Dkt. No. 53. Class Counsel opposed the motions, and on December 15, 2009, the Court dismissed the claims against Ahold but denied in part USF's motion for dismissal, allowing Plaintiffs to continue their suit against USF on RICO and breach of contract claims. [Decl. ¶¶ 14-15]; Dkt. No. 121.[5]

While the motion to dismiss was pending, the parties commenced extensive discovery, as described in Decl. ¶¶ 9, 16, and 17. Plaintiffs moved for class certification on July 31, 2009. Dkt. No. 216. After several rounds of briefing and expert submissions, the final evidentiary record on class certification contained over 405 pages of argument, 170 exhibits, and 13 supporting declarations. [Decl. ¶¶ 16-17.]

On November 29, 2011, this Court certified a class of "any person in the United States who purchased products from USF pursuant to an arrangement that defined a sale price in terms of a cost component plus a markup ('cost-plus contract') and for which USF used a VASP transaction to calculate the cost component." Dkt. No. 218.

Almost immediately thereafter, USF filed a petition under Federal Rule of Civil Procedure 23(f) to appeal the Court's certification decision to the U.S. Court of Appeals for the Second Circuit. *In re U.S. Foodservice, Inc. Pricing Litig.*, Case No. 11-5193, Dkt. No. 1 (2d Cir. Dec. 14, 2011) (hereinafter, "23(f) Petition"). Class Counsel vehemently opposed USF's position, but the Second Circuit granted the appeal. [Decl. ¶ 18.] Aware of the statistically high likelihood that the Second Circuit could overturn this Court's class certification decision once

[4]The Connecticut Plaintiffs, Thomas & King, Inc, and Catholic Healthcare West are collectively referred to hereinafter as "Plaintiffs."

[5] The claims against Ahold were dismissed for lack of personal jurisdiction. The Court also found that Plaintiffs had sufficiently alleged their RICO and breach of contract claims against USF, but granted USF's request to strike allegations referencing an earlier accounting fraud that was publicly disclosed by Ahold in 2003.

the 23(f) was granted, Class Counsel spent considerable effort preparing briefs in opposition to USF's appeal during the summer and fall of 2012. *Id.* After extensive preparation for oral argument, Class Counsel appeared before the Second Circuit on May 29, 2013 and successfully defended this Court's certification decision. [Decl. ¶¶ 19-20.]

In a final effort to obtain reversal of this Court's ruling on class certification, USF filed a petition for a writ of certiorari to the United States Supreme Court on January 21, 2014. *See* Petition for Writ of Certiorari, *US Foods, Inc. v. Catholic Healthcare West*, Case No. 18-873 (filed Jan. 21, 2014) (hereinafter, "Certiorari Petition"). Class Counsel worked diligently drafting a compelling opposition to USF's petition, and on April 28th of this year, the Supreme Court denied USF's petition. [Decl. ¶ 20]; Petition Denied, *US Foods, Inc.*, Case No. 18-873 (Apr. 28, 2014). Shortly thereafter, the parties reached a mediated settlement of $297 million. [Decl. ¶¶ 24-28.]

To prepare for mediation, Class Counsel prepared summary-judgment-style briefing at the request of the Honorable Layn R. Phillips, who served as the mediator during the parties' May 19-20, 2014 mediation. [Decl. ¶¶ 24-26.] After two days of intense negotiation, the parties agreed to the principal terms of the settlement agreement that was preliminarily approved by the Court on July 14, 2014. [Decl. ¶ 27-28]; Dkt. No. 508.

None of these successes on behalf of the Class would have been possible without Class Counsel's relentless pursuit of costly discovery (both formal and informal) during the entire period between filing and settlement. As is described at length in Class Counsel's Joint Declaration, Class Counsel began its discovery efforts well before filing Plaintiffs' claims by conducting a thorough pre-filing investigation. [Decl. ¶¶ 5-7.] That investigation made it possible for Class Counsel to articulate Plaintiffs' claims with particularity in their initial and

consolidated class-action complaints. [Decl. ¶ 8.] It also put Plaintiffs in a position to commence meaningful and targeted collection of class discovery immediately after filing their initial complaint, which included written discovery requests, document reviews, and depositions of corporate representatives and expert witnesses. [Decl. ¶¶ 9, 37-45.] In total, Class Counsel issued four rounds of discovery requests, served 32 third-party subpoenas for documents and depositions, took 37 depositions, conducted many informal interviews, reviewed millions of pages of electronic and hard-copy documents, analyzed billions of lines of data, hired and consulted with data and accounting experts, and responded to USF's discovery requests to Plaintiffs. [Decl. ¶¶ 30-77.]

When USF, which was represented by able counsel from one of the largest law firms in the world, fought Plaintiffs' discovery demands (which was often), Class Counsel did not relent. Often this meant that Class Counsel met-and-conferred or otherwise communicated with USF's counsel weekly over discovery issues and met regularly in New York with Parajudicial Officer James R. Hawkins. [Decl. ¶¶ 40, 59-60, 65, 72, 74-75.] In addition, Class Counsel regularly pursued informal and non-party avenues of discovering information to fill gaps in USF's productions or to prove that USF was falling short on its obligations to produce discovery. [Decl. ¶¶ 41-43, 53, 68.] Finally, when all other avenues were exhausted, Class Counsel made motions to compel discovery from USF. [Decl. ¶¶ 75-77.] As of the date the parties reached the settlement agreement, Class Counsel had filed nine discovery motions on behalf of the class. Of those, five were decided in Plaintiffs' favor, and four remained pending resolution. [Decl. ¶ 77.]

Now, having achieved an excellent result for the Class, Class Counsel respectfully requests that the Court grant an attorneys' fee award of one third of the total settlement fund, plus a reimbursement of the $7,941,358.41 that Class Counsel advanced on behalf of the Class.

Class Counsel performed a total of 93,589 hours of work from the case's inception. [Decl. ¶ 78.] This results in a combined lodestar of $44,419,419.25, and a modest lodestar multiplier of approximately 2.23. *Id.* For the reasons outlined below and as in the accompanying expert reports of Professors Silver, Miller, and Lahav, Class Counsel's request for a fee of one third of the common fund settlement is well within the range of reasonableness under either the percentage or lodestar methods approved by the Second Circuit in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). An award of one third of the settlement fund would fairly compensate Class Counsel for their many years of time and effort spent litigating on behalf of the Class and for the titanic risk they personally assumed for the direct benefit of their clients and the Class.

Additionally, Class Counsel respectfully recommends and requests that the Court award $40,000 in incentive and reimbursement payments to each of the four Class representatives ($160,000 total) and $20,000 to Class member Lizard's Thicket of South Carolina, as each of them provided valuable benefit to their fellow Class members through their active participation and assistance of Class Counsel in the prosecution of this case. [Decl. ¶¶ 83-88.]

ARGUMENT

I. An Award to Class Counsel of One-Third of the Common Fund is Warranted Under the *Goldberger* Factors and Reasonable Under Both the Lodestar and Percentage-of-the-Fund Methods Approved By the Second Circuit.

"If attorneys' efforts create or preserve a fund or benefit for others in addition to their own clients, the court is empowered to award fees from the fund."[6] Rule 23(h) of the Federal Rules of Civil Procedure requires that courts award fees that are "reasonable," and the Second

[6] Manual on Complex Litigation, Fourth, §14.11(2014) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trs. of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882)).

Circuit has approved both the lodestar and percentage-of-the-fund methods as reasonable methods of calculating attorneys' fees in common fund cases. In an attempt to balance efficiencies and fairness, the Second Circuit has expressed a preference for the percentage method, as it minimizes the burden on the district courts, and has held that lodestar figures are a useful "cross-check" on the percentage calculation. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); *see also In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 136 (S.D.N.Y. 2008) ("The trend in the Second Circuit, however, has been to express attorneys' fees as a percentage of the total settlement, rather than to use the lodestar method to arrive at a reasonable fee.").

Regardless of which method is used, "district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: '(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" *Goldberger,* 209 F.3d at 50. Here, analysis of each of these "*Goldberger* factors" squarely supports Class Counsel's fee request.

A. Class Counsel Devoted Substantial Expense and Personnel and Almost a Decade of Time to Thoroughly Investigating and Vigorously Pursuing the Class Claims.

The first *Goldberger* factor requires that the Court consider whether the attorneys' fees are reasonable in light of the amount of time and labor Class Counsel expended pursuing Plaintiffs' claims. As outlined in Class Counsel's Joint Declaration, Class Counsel have invested extensive time and labor (more than 93,000 hours) on behalf of the Class. [Decl. ¶ 78.] Not only did Class Counsel spend *many* hours on this litigation, they spent those hours efficiently, as is demonstrated by comparing their time with the time USF's highly-skilled counsel—whose efficiency was surely being closely monitored by its client—spent.

In response to the Court's April 23, 2013 Order to Show Cause, USF's counsel White & Case reported that by April 29, 2013, it had already spent 114,000 hours litigating this complex case.[7] In contrast, Class Counsel has spent only 93,589 (or almost 20% fewer) hours *in total* on this case, through and including mediation in late May 2014.[8]

While class action litigation is often lengthy and hard-fought, this case was extraordinary both in its duration and contentiousness. For example, this case has been pending almost twice as long as the average class action.[9] The strong and unrelenting defensive positions adopted by USF and Ahold for *years* made it strikingly difficult for Class Counsel to gain access to crucial evidence and often required class counsel to engage in painstaking efforts to locate alternative sources of proof. [Decl. ¶¶ 41-43, 53, 61, 65.] *See generally* Miller Report ¶¶ 16-18. Though some of these issues have been briefed in Plaintiffs' motions to compel discovery, *e.g.,* Dkt. Nos. 294, 297, 299, 300, a few examples here serve to highlight the amount of effort Class Counsel had to expend to collect evidence in support of Plaintiffs' claims.

1. USF's refusal to produce materials from the accounting fraud.

After the Court struck Plaintiffs' allegations related to the government's investigation of USF's accounting fraud, USF adamantly maintained throughout the majority of this case that it would not search for or produce the materials collected during that massive investigation because they were irrelevant to Plaintiffs' claims. *See, e.g.*, Dkt. No. 121, at 51; [Decl. ¶ 40.] Although USF's accounting irregularities involved legal issues distinct from the RICO scheme alleged by Plaintiffs in this case, there was substantial overlap in the factual materials related to both

[7] Dkt. No. 363, at 4,

[8] In addition to the 114,000 hours spent by White & Case through May 2013, USF retained Quinn Emanuel Urquhart & Sullivan LLP in 2014. Both White & Case and Quinn Emanuel were heavily involved in litigating against and mediating with Plaintiffs between May 2013 and May 2014.

[9] This case has been pending for 2,860 days, whereas an average class action claim is settled or otherwise resolved within 1,196 days. Report of Professor Charles Silver (hereinafter, "Silver Report"), at 37.

claims.[10] Even after the Court's 2007 ruling compelling the production of some of those government investigation materials, USF continued to resist production and remained steadfast in its position that the material was irrelevant. *Id.* As a result, Class Counsel had to expend significant time and resources in an attempt to piece this material together from other sources, including third-party subpoenas and the cultivation of non-party informants. [Decl. ¶¶ 41, 53, 61.] Finally, after Class Counsel spent years reviewing third-party productions and felt that there were sufficient grounds to support a second motion to compel production of this material, they moved the Court for relief. [Decl. ¶ 75.] On May 10, 2013, the Court ordered USF to produce a complete set of the indices it maintained of the materials collected and produced during the government investigation, and it further ordered USF to give Plaintiffs access to any of the materials that Plaintiffs identified as relevant on the indices. Dkt. No. 410, at 4.

After six years of fighting for this material, Class Counsel finally gained access to game-changing evidence such as (i) the computer hard drive of Tim Lee, the former USF Senior Vice President of Purchasing and one of the principal masterminds of the alleged VASP scheme, which was literally imaged on the day the accounting fraud was first uncovered, and (ii) the emails of Rasesh Patel, the former head of internal audit at USF. These materials, which contained strong evidence in support of Plaintiffs' liability claims, had been kept separate from the rest of USF's documents, and had not been produced to Plaintiffs. [Decl. ¶ 72] This evidence filled in gaps that were missing from USF's previous productions; substantially aided Plaintiffs in their effort to bring USF and Ahold to the settlement table; and allowed Plaintiffs to make a compelling evidentiary presentation to them when they arrived. While Class Counsel's

[10] For example, the same employees were involved with both the accounting irregularities and the VASP scheme. For several such employees, the government collected a complete copy of the contents of their email accounts during its investigation.

unrelenting pursuit of this discovery bore tremendous fruit, it came at a great cost to Class Counsel in terms of human and financial resources.

2. Ahold's refusal to participate in discovery.

From the outset, Ahold refused to participate in any discovery until the Court determined that it was subject to the Court's personal jurisdiction. Once dismissed for lack of personal jurisdiction, Ahold took advantage of its position as a foreign entity and refused to accept service of any third-party subpoena for relevant materials. [Decl. ¶ 40.] This created a serious barrier to relevant evidence because Ahold was USF's corporate parent during the class period and appeared to be maintaining possession, custody, and control over documents and materials that were unique and important to Plaintiffs' case, including information collected or created by USF and Ahold during the accounting fraud investigation discussed above. [Decl. ¶¶ 41, 72.]

USF protected these materials by, for example, objecting to the inclusion of Ahold in Plaintiffs' discovery requests to USF and by restricting its searches to documents in the possession of "U.S. Foods, Inc., a party named in this action." Dkt. No. 422, at 4 n.1. As a result of USF's and Ahold's coordinated defensive positions, Class Counsel expended substantial resources pursuing alternative avenues to acquire the materials in Ahold's possession, including making two applications for foreign discovery under the Hague Evidence Convention, serving third-party subpoenas to Ahold's American auditors and scouring Ahold's U.S. and Dutch public filings. Dkt. Nos. 249, 250.

On May 17, 2013, in compliance with the Court's Order compelling USF to produce unredacted copies of documents redacted for relevance, USF produced a complete copy of its Confidential Litigation Allocation Agreement ("CLAA") with Ahold, which included a "Litigation Assistance" section. This section made clear that Ahold was contractually obligated to cooperate in discovery if requested by USF. This valuable revelation (which, like the

government indices and other material discussed above, did not come cheaply or easily to Plaintiffs) was key to Plaintiffs' ability to unlock discovery from Ahold and to encourage Ahold to come to the settlement table. *See generally* Dkt. No. 422.

3. USF's incomplete sales and purchase order data.

From the outset, Plaintiffs' damages model contemplated tracing the exact amount of overcharge to each Class member by subtracting what the customer should have paid from what USF charged by running the transaction through the VASP. [Decl. ¶ 46.] Class Counsel, together with their damages expert Jack Damico, spent considerable time and resources early in the case developing the methodology by which the overcharges could be derived from the data USF produced prior to class certification briefing, which was limited to the purchase data of the named Plaintiffs. [Decl. ¶ 47.] Plaintiffs were able at the certification stage to persuade the Court that damages could be established on a class-wide basis as a result of their work with Mr. Damico. [Decl. ¶ 46-47.] Following class certification, and seemingly endless rounds of vigorously waged discovery battles with USF, USF finally produced what it represented to be a complete set of sales data in its possession, custody, and control.

Upon analysis, however, it became apparent that the data USF produced had been stitched together from many different data sets at USF that were the result of the many mergers and acquisitions that occurred at USF during the 90's and early 2000's. [Decl. ¶ 62.] During the period from 1998 to 2005, USF acquired several other distributors and was using at least five separate data systems to track sales and deliveries. *Id.* Each system used different coding, and Plaintiffs' experts spent hundreds of hours locating and constructing cross-referencing tables just to link the data back together. *Id.* Plaintiffs' efforts were further frustrated when USF revealed, many years into the litigation, that data for nearly half the class period had purportedly been overwritten and would never be produced. *Id.*

Because of the disarray of USF's data and the need to provide the most accurate accounting of USF's overcharges possible under the circumstances, Plaintiffs undertook the task of reverse engineering USF's data systems. To do this, Plaintiffs brought in experts in data analysis and forensic accounting, and met with numerous third-party witnesses and former employees to discover undisclosed sources of USF data. [Decl. ¶ 63.] Thousands of work hours of highly-skilled database experts, not to mention related attorney time, had to be devoted to this task, which was critical to Plaintiffs' ability to prove damages at trial on a class-wide basis.

USF did not make Plaintiffs' task easy. USF repeatedly produced data in ways that frustrated Plaintiffs' efforts. Rather than producing raw data in the format Plaintiffs requested, USF on many occasions omitted header information necessary to make sense of rows of otherwise nonsensical alphanumeric strings of data. [Decl. ¶¶ 62, 64.] Also, USF often made only partial productions, and on more than one occasion, USF was initially unable to locate certain data requested by Plaintiffs, and only located and produced it after Plaintiffs identified third parties who could direct USF to the location of its own data. [Decl. ¶ 65.]

In the end, as a result of tireless efforts, Class Counsel and the experts they retained were able to stitch together a sufficient amount of USF's data and finally run the conceptually simple model to calculate Plaintiffs' damages on a class-wide basis. [Decl. ¶ 66.] It was Class Counsel's efforts to solve the puzzle of USF's data that eventually established the hard numerical evidence of USF's alleged overcharges, which proved to be a critical component of the parties' settlement negotiations. To describe the task of reconstructing USF's sales data as herculean would be an understatement.

B. This Case Involves Unique and Highly Complex Issues of Law and Fact, and One of the Largest Nationwide RICO and Breach-of-Contract Classes Ever Certified.

To the best of Class Counsel's knowledge, this case consists of one of the largest nationwide breach-of-contract classes ever certified and one of the only nationwide RICO classes ever certified and upheld on appeal. USF itself characterized the nationwide class as "unprecedented" in a filing before the Second Circuit. *See* 23(f) Petition, at 1. In pursuing the Class's claims, Class Counsel undertook the formidable task and enormous responsibility of litigating on behalf of hundreds of thousands of customers across the country. [12]

Many of the claims and defenses at issue—particularly those related to Plaintiffs' breach of contract and the tolling issues related to USF's statute of limitations defense—required surveying law from all fifty states. Indeed, at the class-certification stage, Class Counsel conducted several costly and exhaustive surveys of state contract laws and limitations periods in order to demonstrate that it could pursue this case on a representative basis. *See* Dkt. No. 153, Exhs. 75 (fifty-state survey of UCC provisions governing "good faith" obligations), 87 (fifty-state survey of UCC provisions governing usage of trade evidence); Dkt. No. 213, Exh. A (fifty-state survey of equitable tolling of the statute of limitations for breach-of-contract claims based on fraudulent concealment).

Compounding the magnitude of the class size and claims at issue was the sprawling

[12] Courts and commentators widely acknowledge the difficulties inherent in obtaining certification of a multistate class action based on state-law claims. *See, e.g.*, *In re Vioxx Prods. Liability Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006) (remarking that "application of the laws of fifty-one jurisdictions to the claims of the proposed class creates problems for the typicality, adequacy, predominance, and superiority requirements of Rule 23" and therefore presents "significant hurdles to certification of a nationwide class") (collecting cases and law review articles); Rory Ryan, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*. 54 Baylor L. Rev. 467, 470 n.5 (2002) (citing 54 federal cases in support of the statement that "an overwhelming number of federal courts have denied certification of nationwide state-law class actions," and suggesting adoption of a per se rule against class actions involving the laws of all fifty states, as the possibility of certification is so small and the difficulties in management so great)); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 64 (1986).

nature of the VASP scheme itself. Plaintiffs' complaint alleged a large-scale nationwide conspiracy between USF and the VASP owners, which Plaintiffs alleged had its origins as far back as the mid-1990s and at its core played out over a seven-year period from 1998 to 2005. In pursuing the Class's claims, it was necessary for Class Counsel to understand and develop proof regarding USF's entire national distribution network, which expanded and changed dramatically during the course of the alleged RICO scheme. *Cf. In re Priceline.com Inc. Sec. Litig.*, 2007 WL 2115592, at *4 (D. Conn. July 20, 2007) ("The magnitude and complexity of this case are apparent from the more than six years of contentious discovery, intricate issues regarding proof of liability and loss and complex accounting issues."). Also at issue was the extent to which Netherlands-based Ahold knew about and was complicit in the scheme during the time it owned USF. The duration and scope of the alleged RICO scheme translated directly into work for Class Counsel, as it resulted in the processing of hundreds of millions of pages of relevant evidence and dozens of witnesses—both in the United States and abroad[13]—with first-hand knowledge of the VASPs' operations and shutdown.

1. Legal Complexity

Courts have found complexity where class counsel is required to "master… [a] new or novel area of the law." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 139 (S.D.N.Y. 2008) or "use . . . a particularly novel or complex skill," *Ling v. Cantley & Sedacca, L.L.P.*, 2006 WL 290477, at *2 (S.D.N.Y. Feb. 8, 2006). Unlike securities actions or products

[13] Because USF initially averred that it did not have possession or control of Ahold's documents, Plaintiffs researched the procedures for and ultimately filed two applications for issuance of letters of request to obtain documents and take depositions in the Netherlands pursuant to the Hague Evidence Convention. *See* Dkt. Nos. 249, 250. *Cf. In re Arakis Energy Corp. Sec. Litig.*, 2001 WL 1590512, at *11 (E.D.N.Y. Oct. 31, 2001) ("The research performed in the preparation and service of letters rogatory necessary in order to conduct discovery of witnesses and obtain documents from the VSE in Canada and the litigation relating to those letters rogatory were time consuming and difficult."). When the CLAA subsequently revealed in 2012 that USF had the ability to request that Ahold's documents and witnesses, Plaintiffs were compelled to supplement their Hague applications and seek costs and appropriate sanctions against USF. *See* Dkt. No. 422.

liability suits, which are intuitively and frequently susceptible to common proof, "complexity of issues is almost always present in cases involving RICO . . . ." *In re Adler, Coleman Clearing Corp.*, 270 B.R. 562, 566 (S.D.N.Y. 2001); *see also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (noting that, with regard to the complexity of the litigation, "[t]he RICO allegations alone raise such multifaceted issues of fact as whether a pattern exists and whether underlying predicate acts and a RICO injury can be established.") (citing *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 415 (S.D.N.Y. 1997)).[14]

This action was complex both in terms of the procedural requirements associated with class certification and the underlying substantive claims at issue. *See* Declaration of Professor Alexandra Lahav (hereinafter, "Lahav Report") ¶ 15. Plaintiffs devoted substantial time to navigating the "formidable intricacies" of civil RICO practice, *Gross v. Waywell*, 628 F. Supp. 2d 475, 479 (S.D.N.Y. 2009), and to staying apprised of the robust and evolving body of case law relevant to their RICO claims.[15] *See Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250, 271 (E.D.N.Y. 2009) (recognizing that "both class action cases and RICO claims give rise to unique complexities" and that class counsel "ha[d] to take additional time to develop knowledge of civil RICO practice"). Unlike in *Farinella*, in which the litigation "did not advance past the pleading stage and advanced straight to the negotiation of a settlement, obviating the need to fully develop proof of RICO's elements," 611 F. Supp. 2d at 271, Class Counsel in this case briefed and prevailed on a motion to dismiss, a motion for class certification, and several rounds of appellate

[14] For additional cases in which courts remarked that the underlying civil RICO claims were "legally and factually complex," *see McCoy v. HealthNet, Inc.*, 569 F. Supp. 2d 448, 476 (D.N.J. 2008) (awarding 32% of common fund); *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136 (D.N.J. 2013) (awarding 33.33% of common fund), and *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 389 (S.D.N.Y. 2005) (awarding 30% of common fund).

[15] For a discussion of these evolving legal principles, see *infra* p. 23 n.25.

review, all of which required Class Counsel to delve deeply into the complexities of their RICO claims and the elements of proof necessary to support them.

The litigation's complexity extended above and beyond that of the typical RICO case. USF itself argued before this Court, the Second Circuit, and the U.S. Supreme Court that this case presented myriad issues of first impression, including (1) the viability of a nationwide class on state-law claims under Rule 23(b)(3); (2) class-wide application of fraudulent concealment standards to contract claims; (3) the availability of contract-expectation, rather than out-of-pocket, damages for fraudulent conduct and RICO violations; and (4) the extent to which causation and reliance may be demonstrated through common proof outside the securities-fraud context. *See generally* Certiorari Petition, *supra* p. 4, *passim*; 23(f) Petition, supra p.3, at 1, 19-20. And in contrast to "cleaner" cases in which liability hinges upon one or two principal issues, USF tenaciously challenged Plaintiffs on almost every aspect of their RICO and breach-of-contract claims,[16] the governing law that applied,[17] and the viability of the nationwide class.[18] Compounding the difficulty of establishing their claims was the fact that, in light of USF's alleged concealment of the entire RICO scheme from its customers, Plaintiffs "faced the difficult task of proving their case almost exclusively through the testimony of [USF] employees and former employees, who could be considered hostile witnesses." *In re Veeco Instruments, Inc.*

[16] For example, USF challenged Plaintiffs as to what representations USF made to Plaintiffs; whether Plaintiffs relied on any representations by USF; whether customers were aware of USF's pricing practices; whether USF's pricing practices were consistent with industry standards; whether USF's contracts allowed it to receive rebates from the VASPs; whether USF offered the best prices for its products; whether USF was permitted to set its own prices on private-label products; whether the VASPs were "vendors" under USF's contracts; and whether USF took steps to conceal the VASP scheme.

[17] For example, USF raised questions as to whether RICO requires individual proof of plaintiffs' due diligence; whether expert testimony may be considered at class certification without first conducting a *Daubert* inquiry; and the above-mentioned alleged issues of first impression.

[18] For example, the parties disputed whether USF's representations, customers' reliance, proximate causation, damages, customer compliance with contractual prerequisites, and the commencement of the limitations period were individualized issues; whether extrinsic evidence concerning thousands of customers would be necessary; and the existence of several material variations in applicable state law.

Sec. Litig., 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007); *see also* Declaration of Professor Geoffrey P. Miller (hereinafter, "Miller Report") ¶ 63.

2. Factual Complexity

The confluence of the massive alleged RICO scheme and the many heated discovery disputes over the past eight years resulted in a high degree of complexity for Plaintiffs in understanding and establishing the underlying facts of this case. Professor Miller attested that this case is "one of the most challenging factual cases [he] ha[s] encountered in thirty years of research, practice, and analysis in the area of class action litigation." Miller Report ¶ 18.

Also in heated dispute in this litigation were industry standards governing product pricing and the use of third-party intermediaries. Under USF's theory of the case, Plaintiffs' complaint challenged a long-standing pricing practice that pervaded one of the nation's largest industries: wholesale food distribution. Even at the class certification stage, the parties presented survey evidence and experts to attest to industry standards and norms. Had the case proceeded to summary judgment and to trial, both parties would have been heavily dependent on surveys and expert testimony. This dependence on expert testimony, and confrontation of alleged industry standards, further compounded the expense and complexity of the case.

Finally, while it is well understood that "in class actions, the 'complexities of calculating damages increase geometrically,'" *In re PaineWebber*, 171 F.R.D. at 128, Plaintiffs confronted unique and tremendous obstacles in establishing damages in this case on a class-wide basis. Due in part to the time that had transpired since the VASPs' operation, in part to changes to USF's operating and computer systems during and since the VASPs' operation, and in part to USF's overwriting of sales data in the ordinary course of its business, Class Counsel worked closely with a highly experienced team of experts to reverse-engineer USF's data systems and to extrapolate damages estimates for missing time periods. *See supra* pp. 11-13; Decl. ¶¶ 62-66. *Cf.*

In re AOL Time Warner, Inc. Sec., 2006 WL 3057232, at *14 (S.D.N.Y. Oct. 25, 2006) (damages experts "relied on linear regression analyses and other esoterica that would challenge the interdisciplinary skills of the most mathematically proficient of lawyers"). Aggravating these practical complexities was the fact that the law governing calculation and proof of damages in class actions underwent significant developments precisely as Class Counsel was in the midst of developing and populating Plaintiffs' damages model. *See, e.g.*, *Comcast v. Behrend,* 133 S.Ct. 1426, 1437 (2013) (affirming that "individual damages calculations do not preclude class certification under Rule 23(b)(3)," but reversing certification of class because its proposed damages model was inadequate to show damages on a class-wide basis); Lahav Report ¶ 15.

C. Class Counsel Faced the Very Real Risk That They Would Never Be Compensated For Their Efforts On Behalf of the Class.

In determining the level of compensation for Class Counsel, the risk of the litigation, or the certainty of success at the time of filing, is of all the *Goldberger* factors "'perhaps the foremost' factor to be considered in determining whether to award an enhancement." 209 F.3d at 54. Importantly, this analysis must be done *without* the benefit of hindsight, but based upon the risks counsel faced at the outset. *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985). This "[r]isk falls along a spectrum, and should be accounted for accordingly." *In re Fine Host Corp. Sec. Litig.*, 2000 WL 33116538, at *4 (D. Conn. Nov. 8, 2000). This analysis is qualitative as well, and the amount of risk must be evaluated in conjunction with the reason for the risk, so cases that are risky simply because they lack merit should be compensated differently from those that present other types of risks. *Id.* Courts consider two primary types of risks: contingency risk, and the risk particular to the facts and claims alleged.

1. Contingency Risk

Contingency risk is the risk that a lawyer takes when he or she agrees to represent a client without payment unless the client prevails and recovers from the defendant. Under a traditional hourly billing arrangement, a lawyer is paid regularly by his or her client for services performed. In contrast, a lawyer who works under a contingent-fee arrangement must wait for the resolution of the matter, or may not ever receive payment if the plaintiff does not prevail. *See* Silver Report, at 1. Thus, courts consider contingency risk in order to compensate class counsel for taking on Plaintiffs case without payment, because, "as the Second Circuit has noted '[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.'" *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, 2012 WL 3589610, at *12 (D. Conn. Aug. 20, 2012) (citation omitted).

In evaluating contingency risk, courts weigh factors such as the length of time counsel has represented the class without payment, the amount of expenses advanced to the class, and the certainty of eventual payment.[19] Here, Class Counsel have represented Plaintiffs without payment since 2006 and have advanced nearly $8 million in expenses. As Professor Silver explains in his accompanying declaration, awarding attorneys' fees from the common fund has its roots in the laws of restitution and quasi-contract, which attempt to compensate a party who has bestowed a benefit upon another by assuming that the parties would have contracted for the service, if making a contract had been possible. Thus, the Court should evaluate the rate to

[19] *Farinella v. Paypal, Inc*., 611 F. Supp. 2d 250, 271 (E.D.N.Y. 2009) (noting that "This factor is intended to recognize the fact that cases taken on a contingent fee basis entail risk of non-payment for the attorneys that prosecute them, and it embodies an assumption that contingency work is entitled to greater compensation than non-contingency work," but finding that the high risk of the litigation was caused by the weak merits of the RICO claims and did not support an increased fee award).

which the parties would have agreed, if they had an opportunity to negotiate terms *ex ante*.[20] Usually, the best source for determining the rate to which the parties would have agreed is to consider prevailing market rates. *See* Silver Report, at 4-5.

Assuming that the market is functioning properly, it is sensible to assume that had the parties had a chance to negotiate terms prior to the representation, they would have followed the market. Additionally, the market based approach has the virtue of providing an objective analysis for fee awards. *See id.* at 8. As Professor Silver's research shows, plaintiffs hire counsel and seek to make fee arrangements that will best incentivize counsel to recover the largest award possible by aligning counsel's interests and their own. *Id.* at 9-14. Unsurprisingly, the market percentages to which plaintiffs agree depend on the level of risk in the case, and as the risk of losing increases, so do the percentages necessary to attract counsel to take the case. *Id.* at 14-15. Therefore, "contingent fees normally range from 25 percent to 40 percent in the personal injury representations, are often higher in mass tort contexts, and are higher still in medical malpractice cases, which are exceptionally risky." *Id.* at 15-16. In the limited instances where the percentages paid by business clients are known, percentages are fixed regardless of the size of recovery, and counsel is often paid one-third or more of the total. *Id.* at 17-26. Professor Lahav agrees, and opines that "given the risks associated with a RICO class action of this type, a one-third award is reasonable, and approximates what a sophisticated client would agree *ex ante* to pay for services rendered." Lahav Report ¶ 15.

Here, the Court need not rely only on suppositions about what the parties would have done *ex ante* because two of the lead Plaintiffs, CHW and T&K, each of which is a large and sophisticated entity that was represented by counsel in the negotiation of its fee agreement in this

[20] "It is well established that litigation risk must be measured as of when the case was filed." *Goldberger,* 209 F.3d at 55.

case,[21] *did* negotiate counsel's compensation at the beginning of the engagement. As discussed at pages 27-30 of Professor Silver's Report, and ¶¶ 65-67 of Professor Miller's Report, each expressly contemplated compensating counsel in this case at a rate of, or up to, 40% of any recovery that counsel could obtain.

Courts typically consider seriously the fee arrangements that class representatives made with class counsel when the litigation was initiated, as those agreements provide some of the strongest evidence of what rates arm's-length negotiations between counsel and client produce. *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990) ("[T]he best indicator of the 'reasonableness' of a contingency fee…is the contingency percentage actually negotiated between the attorney and the client, not an hourly rate determined under lodestar calculations."). In making the determination as to whether a given fee is reasonable, the court "must be mindful that 'a contingency fee is the freely negotiated expression both of a claimant's willingness to pay more than a particular hourly rate to secure effective representation, and of an attorney's willingness to take the case despite the risk of nonpayment.'" *Cataneo v. Colvin*, 2014 WL 2169732, at *2 (E.D.N.Y. May 23, 2014) (citations omitted).

2. General Litigation Risk

In addition to the inherent risk counsel faces by taking a case without any guarantee of payment, courts must consider the likelihood of success of the specific claims made by the plaintiffs. This risk includes any element of the claim that decreases the likelihood that there will be a recovery for the class, such as the likelihood that class counsel will be able to persuade a court to certify the plaintiff class, and if so, the chance that the class certification will be

[21] T&K, at the time this suit was filed, was one of the largest owners of Applebee's franchises in the United States and owned and operated eighty-eight Applebee's Neighborhood Grill & Bar restaurants and seven Carino's Italian Grill restaurants. [Decl. ¶ 84.] CHW is one of the largest hospital systems in the nation and the largest not-for-profit hospital provider in California. [Decl. ¶ 84.] For additional information about the sophistication of these representatives, see Silver, at 27-30.

overturned on appeal or later decertified because of new evidence.[22] Other risks include the likelihood that the claims will survive a motion to dismiss, summary judgment, and whether, after surpassing those hurdles, the plaintiffs will be likely to prevail at trial.[23] And even if victory is achieved at trial, plaintiffs still faces the risk of appeals and reversals on appeal. These risks must be evaluated in light of the specific type of claim and evidence available in a particular case. Heightened pleading standards, difficult-to-prove claims, and the availability of documentary evidence are all factors that can affect the level of risk plaintiffs' counsel face in bringing a class action suit.

To determine the level of litigation risk, courts consider the type of claim alleged and the frequency with which there is a recovery in that type of case. For example, courts have held that there is very little risk associated with bringing a securities claim because, "there appears to be no appreciable risk of non-recovery in securities class action, because virtually all cases are settled." *In re Fine Host Corp. Sec. Litig*., 2000 WL 33116538, at *5 (D. Conn. Nov. 8, 2000).[24] "[S]ecurities classes are arguably the easiest to have certified." Silver, at 30-31. In contrast, at the time this case was filed, there was very little precedent for the certification of classes under the RICO statute. In fact, most courts that have considered certification of a RICO class were hostile to the idea. Lahav Report ¶ 15 ("It was extraordinarily difficult to obtain class

[22] "Similarly, the class, and by extension Lead Counsel, faced substantial risks that they would not prevail if the parties litigated the action through trial and appeal." *In re Citigroup Inc. Sec. Litig*., 965 F. Supp. 2d 369, 399 (S.D.N.Y. 2013), *appeal withdrawn* (Dec. 23, 2013), *appeal withdrawn* (Jan. 14, 2014) (finding that while most securities cases face little risk of non-recovery, the circumstances in *Citigroup*, including the absence of prior government investigation, increased the risks to the class); *In re Sterling Foster & Co., Inc., Sec. Litig.*, 238 F. Supp. 2d 480, 488 (E.D.N.Y. 2002) (finding that risks that appear in "every contingency fee case" were not sufficient for increase counsel's fee award, and requiring that risk be particular to Plaintiffs' allegations).

[23] *See, e.g.*, *Berlinsky v. Alcatel Alsthom Compagnie Generale D'Electricite*, 970 F.Supp. 348, 352 (S.D.N.Y. 1997) (risk deemed high where defendant was foreign corporation).

[24] *See also In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig*., 2007 WL 313474 (S.D.N.Y. Feb. 1, 2007) ("There is generally only a very small risk of non-recovery in securities class litigation.").

certification in RICO cases in 2006 when this case was filed."); Silver Report, at 31-37, 37 ("But when it comes to class certification, this case was in a league of its own in terms of risk.").

A primary risk that Plaintiffs faced were the slim odds that most RICO plaintiffs face in prevailing on a motion to dismiss. At the time Plaintiffs filed, the law was unsettled as to whether the heightened pleading standards set forth in Rule 9(b) of the Federal Rules of Civil Procedure needed to be satisfied with respect to every element of a fraud-based RICO claim, *Rowe v. Bankers Life & Cas. Co.*, 2010 WL 3699928 (N.D. Ill. Sept. 13, 2010), and the District of Connecticut was among those that required plaintiffs to plead with particularity the facts demonstrating a defendant's violation of the RICO statute. The law remained unsettled in other ways too, as basic RICO doctrines were not clarified by the Supreme Court until well after Plaintiffs filed their claims. *See* Silver Report, at 39; Lahav Report ¶ 15.[25]

Furthermore, at the time Class Counsel filed the complaints in this case on behalf of the putative class, private civil RICO claims stood dismally low chances of succeeding. In the districts where the pre-consolidation complaints were filed, reported decisions between 2000 and 2006 showed that only 22% of RICO complaints survived motions to dismiss.[26] Thus, Plaintiffs faced extremely tough odds from the outset. As Judge Marrero noted in *Gross v. Waywell*:

[25] Legal principles that were unresolved at the time of filing---and that had enormous implications on the viability of Plaintiffs' claims---included (1) the degree to which a RICO enterprise needed to have an ascertainable structure beyond that inherent in the racketeering activity in which it engaged, *see Boyle v. United States*, 556 U.S. 938 (2009); (2) whether a RICO plaintiff needed to show first-person reliance on the defendant's alleged misrepresentations, *see Bridge v. Phoenix Bond & Indemn. Co.*, 553 U.S. 639 (2008); and (3) whether expert testimony may be considered at the certification stage without first conducting a *Daubert* inquiry, *see Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2554 (2011).

[26] To compile these results, Class Counsel ran two searches in the ThompsonReuters database, WestlawNext. Both searches were conducted within the citing references to 18 U.S. Code § 1961 and were filtered to identify cases decided in the District of Connecticut, Southern District of Illinois, and Northern District of California, within the date range of January 1, 2000 to December 31, 2006. Within those results, two additional keyword filters were applied: (1) "motion to dismiss," and (2) "summary judgment."

> Not surprisingly, RICO's enchantment, like the siren's song, has again drawn another crew of spellbound plaintiffs foundering against the rocks. This outcome should come as no surprise to any counsel versed in the formidable intricacies and pitfalls inherent in RICO litigation. These challenges bear out in the minimal rate of success plaintiffs have achieved in prosecuting RICO actions. A survey of 145 appellate decisions nationwide rendered from 1999 to 2001 in connection with RICO civil actions provides hard evidence of those failed expectations. It revealed that about 70 percent of the cases were finally disposed of on defendants' motions to dismiss or for summary judgment, and that in about 80 percent of those in which the appellate Court resolved a RICO issue the ruling was favorable to defendants. See Pamela H. Bucy, Private Justice, 76 S. Cal. L.Rev. 1, 22 (2002). Of the 9.6 percent of the suits in which plaintiffs obtained a favorable verdict after a jury trial, only 25 percent of the judgments were affirmed on appeal. See id. In consequence, plaintiffs achieved a final victory in only three of 145 cases —a or [sic] final success rate of a mere two percent.
>
> Framed another way, **the statistical record indicates that in 98 percent of the RICO appellate cases surveyed**, which do not include RICO actions dismissed by the district courts but not appealed, **plaintiffs and counsel invested extensive time and energies in litigation only to come away with a total loss**…
>
> To further examine this statistical record with more recent data, and also contrast it with a sample of RICO results at the district court level, this Court conducted a rough survey of the 145 cases filed in the Southern District of New York from 2004 through 2007 in which the complaints asserted civil RICO claims. The study revealed that of the 36 cases that to date have been resolved on the merits, **all resulted in judgments against the plaintiffs**. Thirty were dismissed on defendants' motions pursuant to Fed.R.Civ.P. 12(b)(6), three dismissed by the district court sua sponte for lack of merit, and three dismissed on summary judgment for the defendants. Only four of the 30 Rule 12(b)(6) dismissals were appealed and each was affirmed by Second Circuit. Two of the three dismissals on summary judgment were appealed and both were affirmed…
>
> Ironically, the attractions that explain the magnetlike pull which induces plaintiffs into filing RICO charges also generate counter-forces that repel them. In the final analysis, these pluses and minuses point to some reasons why the incidence of favorable judgments for RICO plaintiffs is so "**stunningly awful**."

Gross v. Waywell, 628 F.Supp.2d, 479-481 (2009) (emphasis added).

Moreover, litigation risk is not limited to risks associated with proving liability, but may extend to risks related to proof of damages. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998) ("In contrast to their confidence in the relative strength of their

evidence regarding liability, Class Counsel "candidly concede" that there are numerous and substantial risks regarding proof of substantial damages."). Here, Plaintiffs' damages model was theoretically quite simple, and accounted for the exact amount of damage to each class member. What Plaintiffs proposed was essentially arithmetic—subtract from the amount a customer actually paid for a product the amount it would have paid without the allegedly unlawful VASP markup. While simple in concept, Class Counsel understood that executing that analysis across USF's vast and inconsistent purchase tracking systems would be challenging. Without any inside information about USF's data systems at the time of filing, Plaintiffs took the risk that even if they could discover documentary evidence to prove USF's alleged VASP scheme, they might still be unable to sufficiently quantify Plaintiffs' damages on a class-wide basis given the state of USF's sales data.

In short, Plaintiffs' claims were fraught with risk of every type: this case was almost certain to last significantly longer and cost more to pursue than others because of the hidden, fact-intensive nature of the proof required; there was almost no precedent for certifying the Plaintiff class; federal RICO law was unsettled and evolving and courts were hostile to plaintiffs bringing claims thereunder; and there was no guarantee that Plaintiffs could quantify damages on a class-wide basis even if they could certify a class and prove liability. *See* Silver Report, at 39. In light of the significant time and expense outlaid and extreme risks faced, Class Counsel's request for attorneys' fees equal to one third of the settlement fund is reasonable, and on a broader level, an award of one third of the settlement fund is necessary if counsel are to be incentivized to take such meritorious, but uncertain, cases in the future.

D. Class Counsel Provided High-Quality Representation to the Class, As Demonstrated By the Excellent Result Achieved Against Formidable Opposing Counsel.

To evaluate the quality of the representation, the Second Circuit directs courts to measure "by results, and that such results may be calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement.'" *In re Fine Host Corp. Sec. Litig.*, MDL 1241, 2000 WL 33116538, at *4 (D. Conn. Nov. 8, 2000) (citations omitted). Here, Plaintiffs estimate that the settlement sum represents a significant portion of the recoverable damages. Dkt. No. 499-2.

Thus, the $297 million settlement fund is an exceptional result. The result is even more outstanding because "[u]nlike other cases where the class award consisted significantly of injunctive relief, stock, price rollbacks or hard-to-value coupons," Class Counsel negotiated for the Class to receive this entire settlement award in cash. *In re AOL Time Warner, Inc. Sec.*, 2006 WL 3057232, at *17 (S.D.N.Y. Oct. 25, 2006).

As set forth in the Class Counsel biographies contained in the attached Compendium of Individual Declarations, Class Counsel is highly experienced at prosecuting the types of claims at issue in this litigation. Furthermore, Professor Lahav, who has reviewed the class-certification briefing work of hundreds of firms as part of her academic studies has reviewed Class Counsel's pleadings and briefing in this case, and found that "the quality of attorney work product in class actions runs the gamut, from the very good to the quite bad, and the lawyers in this case are very good." Lahav Report ¶ 14.

Additionally, "[t]he quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Here, Class Counsel litigated against parties represented by two of the nation's preeminent firms, White & Case LLP and Quinn Emanuel Urguhart & Sullivan,

LLP. White & Case LLP is a premier international law firm and is regularly recognized for its talented litigation practice, receiving awards such as "Litigation Department of the Year" from the *Global Competition Review 2013* and "Leading Innovative Firm in Finance, Litigation, Corporate and Business Law" from *Financial Times US Innovative Lawyers 2012*.[27] Quinn Emmanuel is the largest firm "in the United States devoted solely to business litigation and arbitration" and was ranked the No. 1 firm in the country for General Commercial Litigation by Vault.com's 2014 rankings.[28] There is no question that the quality of counsel faced by Class Counsel was high.

E. A One-Third Fee Is Reasonable in Relation to the Settlement and Consistent With Fee Awards in the Second Circuit and Cases of Similar Size and Complexity.

Courts traditionally award plaintiffs' counsel fees in class actions based on either a reasonable percentage of the settlement fund (the "percentage of the fund method") or an assessment by the court of the market value of the work plaintiffs' attorneys performed (the "lodestar method"). The trend in the Second Circuit is to award attorneys' fees using the percentage of the fund calculation and compare that figure with counsel's lodestar figure as a "cross-check." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation") (citation omitted). Courts "typically apply a multiplier to the lodestar amount to recognize the risks of litigation and a continent fee," and "the performance of the

[27] White and Case LLP Firm Brochure, 2014, *available at* http://www.whitecase.com/about/.

[28] Quinn Emmanuel Trial Lawyers Home Page, *available at* http://www.quinnemanuel.com/; The 2015 Vault Law 100 Rankings Are Here!, *available at* http://www.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/the-2015-vault-law-100-rankings-are-here/.

attorneys." *Priceline*, 2007 WL 2115592, at *4-5 (quoting *In re Lloyd's American Trust Fund Litig.*, 2002 WL 31663577, at *26–28 (S.D.N.Y. Nov. 26, 2002)).

1. A Fee Award of One Third of the Common Settlement Fund is Standard in RICO Cases and Typical of Class-Action Settlements in the Second Circuit.

As set forth in exhaustive detail in the accompanying Reports by Professors Silver and Miller, and the academic studies cited therein, Class Counsel's request for one third of the settlement fund is in keeping with the fee awards to counsel in the Second Circuit and in cases across the country of similar size and complexity. *See* Miller Report ¶ 9; Silver Report at 26. Professor Miller cites a number of studies in which the average fee awards in the Second Circuit correspond closely with the requested one-third award. *See id.* ¶¶ 48-50.

Indeed, courts have awarded one-third fee awards in a number of large-value cases, particularly where the lodestar cross-check ensures that the award will not result in a "windfall" to counsel in light of the expenses incurred.[29] While awards of this percentage are less common in large securities settlements, *see, e.g. Carlson v. Xerox*, 596 F. Supp. 2d 400 (D. Conn. 2009), many courts have granted one-third fee awards in large civil RICO settlements in the past decade.[30] In addition, "Class Counsel's request for 33-1/3% of the Settlement Fund is typical in

[29] *See, e.g.*, *Heekin v. Anthem, Inc.*, 2012 WL 5472087, at *2 (S.D. Ind. Nov. 20, 2012) (awarding 33.33% of $90 million fund); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.30% of $586 million fund); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *4-16 (E.D. Pa. June 2, 2004) (awarding 33% of $202.5 million fund, representing 2.66 multiplier); *In re Buspirone Antitrust Litig.*, No. 01-md-1410 (S.D.N.Y. Apr. 11, 2003) (awarding 33% of common fund of $220 million); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839 (D.D.C. July 16, 2001) (awarding 34.6% of $365 million fund).

[30] *See In re Merck & Co. Inc. Vytorin ERISA Litig.*, 2010 WL 547613 (D.N.J. Feb. 9, 2010) (awarding 33.33% of $41 million settlement); *Burford v. Cargill, Inc.*, 2012 WL 5472118 (W.D. La. Nov. 8, 2012) (awarding 33.33% of $27.5 million settlement); *In re Ameriquest Mortg. Co. Mortg. Lending Prac. Litig.*, 589 F. Supp. 2d 987 (N.D. Cal. 2010) (awarding 33.3% of $22 million civil settlement); *Hall v. AT&T Mobility LLC*, 2010 WL 4053547 (D.N.J. Oct. 13, 2010) (awarding 33.33% of $18 million settlement); *Wolff v. Cash 4 Judgments*, 2012 WL 5289628 (S.D. Fla. Oct. 25, 2012) (awarding 33% of $14.5 million "total recovery to date"); *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136 (D.N.J. 2013) (awarding 33% of $10.5 million settlement).

class action settlements in the Second Circuit." *Macedonia Church v. Lancaster Hotel, LP*, 2011 WL 2360138, at *14 (D. Conn. June 9, 2011).[31]

Expounding upon principles cleaned in his analysis of relevant case law, Professor Miller concludes that four factors *specific to this case* strongly mitigate in favor of a one-third fee award. First, he concludes that the "scaling effect" is unnecessary here, as counsel is not looking to realize significant economies of scale. *See* Miller Report ¶¶ 59-60. Professor Miller also opines that the requested lodestar multiplier is below the norm, and a negative correlation exists between the lodestar multiplier and the percentage fee awarded, *id.* ¶ 61, and that the enormity of the risks inherent in this case warrant higher fee awards, *id.* ¶ 62-64.

Finally, Professor Miller states that the retainer agreements entered into by representative plaintiffs T&K and CHW are further proof that the requested one-third fee award is reasonable and consistent with prevailing market rates. *See id* ¶¶ 65-67; *accord* Silver Report, at 26-27. The retainer agreements specifically contemplate contingency fees of, or up to, 40% upon recovery. *See* Miller Report ¶ 65; *see also Kiefer v. Moran Foods, LLC*, 2014 WL 3882504, at *9 (D. Conn. Aug. 5, 2014) (noting that plaintiffs' retainer agreements supported class counsel's request for one-third of the settlement, and citing *McMahon v. Olivier Cheng Catering & Events, LLC*, 2010 WL 2399328, at *7 (S.D.N.Y. Mar. 3, 2010) and *Arbor Hill Concerned Citizens Neighborhood Assoc. v. Cnty. of Albany*, 493 F.3d 110, 111–12 (2d Cir. 2007) for the proposition

[31] *See also Central States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming award of 30% of $42.5 million settlement); *Calibuso v. Bank of Am. Corp.*, 299 F.R.D. 359, 363 (E.D.N.Y. 2014) (awarding 33% of $38.2 million settlement fund); *Davis v. J.P. Morgan Case & Co.*, 827 F. Supp. 2d 172, 178 (W.D.N.Y. 2011) (awarding 33.33% of $42 million settlement); *In re Initial Pub. Offering Sec. Litiq.*, 671 F. Supp. 2d at 516 (awarding 33.30% of $586 million fund); *In re Buspirone Antitrust Litig.*, No. 01-md-1410 (S.D.N.Y. Apr. 11, 2003) (awarding 33% of $220 million settlement). *See generally In re Telik, Inc. Sec. Litig.*, 576 F, Supp. 2d 570, 587 n.8 (S.D.N.Y. 2008) (collecting cases where the awards have been between thirty percent and one-third of the total settlement funds); *Collins v. Olin Corp.*, 2010 WL 1677764, at *6 (D. Conn. Apr. 21, 2010) ("A compensation of one third of the total fund is in line with the percentage fees awarded in similar class action suits.") (citing *Silverberg v. People's Bank*, 23 Fed. Appx. 46, 48 (2d Cir. 2001)).

that "reasonable, paying client[s] typically pay one-third of their recoveries under private retainer agreements").

2. Plaintiffs' Requested Lodestar Multiplier Falls Squarely Within the Range Frequently Approved by Courts in the Second Circuit.

"[W]here [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Goldberger*, 209 F.3d at 50; *see also In re Sturm, Ruger, & Co.*, 2012 WL 3589610, at *13 (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) (in performing lodestar cross-check calculation, "[t]he district courts may rely on summaries submitted by the attorneys and need not review actual billing records"). Class counsel has worked a total of 93,589 hours, for an aggregate lodestar of $44,419,419.25. [Decl. ¶ 78]. The requested one-third fee therefore represents a modest lodestar multiplier of approximately 2.23.

The time expended was reasonable in light of the many phases of litigation Class Counsel oversaw. *See* Miller Report ¶¶ 28-32. As a benchmark, the Court may look to the hours USF's counsel had spent as of May of 2013. At that time, "White & Case personnel ha[d] expended more than 114,000 hours on this matter … ." USF's Memorandum of Law in Response to the Court's April 23, 2013 Order to Show Cause, Dkt. No. 363, at 4. Thus, Class Counsel has spent approximately 20% fewer hours prosecuting the claims of the Class from inception to settlement than the defendants had spent defending against them *as of a year prior* to settlement.[32] Class Counsel also appropriately allocated attorney hours; its partner to non-partner time was in a reasonable ratio of approximately 1:3.6. Miller Report ¶ 32.

[32] This calculation does not take into account the work performed by Quinn Emanuel on behalf of USF, which would further highlight the efficiency with which Class Counsel prosecuted this case.

The hourly rates charged by Class Counsel also were standard in the relevant market of attorneys practicing in the field of complex financial litigation. *See* Miller Report ¶¶ 33-38; *see also Maldonado v. La Nueva Rampa, Inc.*, 2012 WL 1669341, at *12 (S.D.N.Y. May 14, 2012) (considering the "prevailing market rates 'for similar services by lawyers of reasonably comparable skill, experience and reputation" in awarding attorneys' fees pursuant to a default judgment). Class Counsel's baseline lodestar of $44,419,419.25 is therefore reasonable in light of the duration and complexity of this litigation and the prevailing market rates.

Where, as here, counsel has litigated a complex case under a contingency fee arrangement, counsel is entitled to a fee in excess of the lodestar. *See Detroit v. Grinnel Corp.*, 495 F.2d 448, 470 (2d Cir. 1974). In his study of federal class action settlements, Professor Miller found that substantial multipliers, ranging from 3.0-5.0, are common in the Second Circuit, *see id.* ¶ 41 (collecting cases), and that there is a pronounced positive relationship between the multiplier and the class recovery, *see id.* ¶¶ 44-45. Class Counsel's requested 2.23 multiplier is considerably less than the mean multiplier of 3.18 and median multiplier of 2.60 in class recoveries in excess of $175.5 million. *Id.* ¶ 44.[33] A review of relevant case law confirms that a lodestar multiplier of 2.23 is well within the range of multipliers approved in cases of this size by courts in the Second Circuit.[34]

Class Counsel's requested lodestar multiplier also is reasonable because Class Counsel continues and will continue to perform work on this matter until well after final approval is

[33] Professor Miller also states that a negative correlation exists between the lodestar multiplier and the percentage fee awarded. Miller Report ¶ 60. Because Plaintiffs' requested lodestar multiplier is below the norm in the Second Circuit, it is "appropriate and consistent with results in similar cases that the fee calculated as a percentage of the recovery should be above." *Id.* Professor Silver concers, stating that "a lodestar multiplier below 3 (or over 3, for that matter) can easily be justified in a case like this one." Silver Report, at 42.

[34] *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (citing *Welch v. Forbes, Inc. v. Cendant Corp.*, 243 F.3d 722, 742 (3d Cir. 2001) (surveying cases with recoveries over $100 million and finding lodestar multiplier of 1.35 to 2.99 common)); *In re Comverse Tech., Inc. Secs. Litig.*, 2010 WL 26533 (E.D.N.Y. June 24, 2010) (approving 2.78 lodestar multiplier in $116 million settlement); *In re Buspirone Antitrust Litig.*, No. 01-md-1410 (S.D.N.Y. Apr. 11, 2003) (approving 8.46 multiplier in $220 million settlement).

granted. Even without objections to the settlement or any appeals thereof, the current schedule in this case contemplates that distribution of settlement funds will occur in mid-2015. *See Kiefer v. Moran Foods, LLC*, 2014 WL 3882504, at *9 (D. Conn. Aug. 5, 2014) (citing *Parker v. Jekyll & Hyde Entm't Holdings, LLC*, 2010 WL 532960, at *2 (S.D.N.Y. Feb. 9, 2010)) ("[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."). As in *Kiefer*, 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." *Id.*

F. Class Counsel's Request is Grounded in Sound Public Policy.

Courts routinely recognize "the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis . . . on behalf of those who otherwise could not afford to prosecute." *In re Sturm, Ruger, & Co., Inc.*, 2012 WL 3589610, at *13 (D. Conn. Aug. 20, 2012) (citations omitted).[35] This is particularly true in "negative value" cases, such as this, in which the value of most of the class members' claims are less than the anticipated cost of litigating complex cases individually. *See Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 100. For this reason, court-awarded fees "must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future." *In re Initial Pub. Offering*, 671 F. Supp. 2d at 511 (citing *In re Visa Check/Master Money Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003). *See also Goldberger*, 209 F.3d at 51 (noting

[35] *See also AOL Time Warner*, 2006 WL 3057232, at *18 (remarking that a nine-figure attorney award would "galvanize the best of the class action bar into action" and simultaneously "have a deterrent effect on errant corporate leaders, [by] signaling that counsel will be well paid for their efforts"); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) ("In rendering awards of attorneys' fees, 'the Second Circuit and courts in this district also have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation.'").

the "commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest")).

These imperatives are heightened in RICO cases, which bring "to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequat[e]." *Rotella v. Wood*, 528 U.S. 549, 557 (2000). Indeed, the elements and predicate acts of a RICO claim ensure that actions brought thereunder target complex, organized, interstate activity that is more pervasive—and typically better obscured—than "a simple fraudulent scheme with few victims and narrow impacts." *Gross*, 628 F. Supp. 2d at 482; *see also U.S. Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 317 (4th Cir. 2010) (RICO "is a unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity."). Accordingly, a fee award equal to one third in a successful RICO class action is appropriate in order to encourage other attorneys to likewise serve as private attorneys general in enforcing the RICO statute in the future. *See Wolff*, 2012 WL 5290155, at *5 (recommending fee award of 33.3% in part to compensate class counsel "in a manner that will encourage other competent attorneys to . . . vigilantly enforce the RICO laws").

It is especially appropriate to approve a fee award of one third in this case, moreover, in light of the widespread commercial harm caused by USF's alleged scheme, and the extraordinary difficulty of detecting this type of scheme in which the very nature of the wrongdoing was designed to prevent it from being discovered by its purported victims. Public policy strongly favors rewarding Class Counsel for zealously litigating for eight years a hard-to-prove RICO case with a low chance of surviving dispositive motions; for pursuing the case past class certification and prevailing time and again on its motions and on appeal; and for ultimately securing a highly favorable $297 million settlement for the Class. Lahav Report ¶ 16.

In this case, moreover, Class Counsel not only served as "private attorneys general" in exposing and prosecuting USF's alleged VASP scheme, but it also spurred the Government to follow suit. Indeed, rather than piggybacking on a Government lawsuit, *cf. Carlson v. Xerox*, 596 F. Supp. 2d 400, 411-12 (D. Conn. 2009),[36] Class Counsel here led the way by filing a publicly available complaint on behalf of commercial customers that *preceded* a nearly identical complaint by the U.S. Attorney's Office for the Southern District of New York on behalf of a U.S. Government agency that was filed *over four years later*.[37] By that point, Class Counsel had already filed a consolidated amended complaint, survived a motion to dismiss, engaged in years of discovery, and filed numerous briefs and expert reports laying out their theory of the case in support of their motion for class certification. Ultimately, the U.S. Government was able to recover $30 million on the same essential set of facts first alleged in this case in 2006. *See* Stipulation and Order of Dismissal, *United States vs. U.S. Foodservice*, No. 10-cv-6782, Dkt. No. 2 (S.D.N.Y. Sept. 13, 2010). Similarly, numerous federal and state agencies began investigations into similar pricing practices by USF after the complaint in this case was filed and, in the process, reached out to Class Counsel seeking information. *See* [Decl. ¶ 11 n.3]; US

[36] The accounting treatment of VASP transactions also played a role in a much larger, multi-faceted accounting fraud scandal at USF and Ahold, which ultimately resulted in a massive earnings restatement, the criminal prosecution of numerous USF executives, and a $1.1 billion civil securities fraud settlement. While some of the factual elements of the accounting fraud scandal and corresponding evidence overlap, neither the government investigation nor the private securities fraud lawsuits focused on USF's use of the VASPs to defraud cost-plus customers (as opposed to how USF improperly accounted for them to allegedly defraud investors). Moreover, while Class Counsel ordinarily would have had access to some of the materials from the government investigation—and, indeed, the Court ordered USF to produce such materials to Plaintiffs early in the case, *see Waterbury Hospital v. U.S. Foodservice, Inc.*, No. 06-cv-1657, Dkt. No. 96, at 6-7 (D. Conn. Aug. 1, 2007)—USF refused to comply with the Order, and it required years of hard-fought litigation and significant opportunity costs incurred before Class Counsel was finally granted access to such materials, *see* Dkt. No. 410. Indeed, Class Counsel was not ultimately able to benefit from the government's work until very late in the case (*i.e.*, after the Class had already been certified and discovery was nearly complete) and, by that point, the theories of the case and supporting evidence had largely already been developed.

[37] *See also In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 441 (E.D.N.Y. 2014) (finding that "the plaintiffs did not piggyback on previous government action—indeed, the government piggybacked on their efforts") (citing *Wal-Mart*, 396 F.3d at 122).

Foods, Inc. Form S-1 Registration Statement, "We have been the subject of governmental investigations," at 18 (filed June 6, 2013 with U.S. Securities and Exchange Commission)

Moreover, the filing of the first complaint back in 2006 has served as a catalyst for change and greater pricing transparency in the foodservices industry in much the same way that the landmark *Fleming* trial brought change and greater transparency to the grocery and supermarket industry in the mid-1990s. For example, shortly after USF's $30 million settlement with the U.S. Government, certain U.S. Government customers (*e.g.*, the Department of the Army) changed the terms of their contracts with U.S. Foodservice and other food service providers to ensure pricing transparency and make it harder for suppliers to manipulate pricing in the way USF was alleged to have done using the purported VASP scheme. *See generally U.S. Foodservice, Inc. vs. United States*, 100 Fed. Cl. 659 (Oct. 12, 2011). Commercial customers have likewise demanded change and greater pricing transparency, including in connection with the Federal Trade Commission's review of the proposed merger between USF and Sysco. *See generally* Annie Gasparro, *Restaurants Fear Clout of a New Food Giant*, Wall St. Journal (Jan. 6, 2014).

It is thus not an understatement to suggest that the filing of the original complaint in this case in 2006 has served as a catalyst for change in pricing practices throughout the entire wholesale food supply industry and that the effect of the $297 million settlement secured by Class Counsel will ensure that that process of increasing transparency in pricing practices will continue into the future. This is the paradigm case for why RICO empowers private attorneys general to bring such actions and, as a matter of public policy, a one-third award is appropriate to ensure that the enforcement mechanism designed by Congress continues to be as successful in identifying fraud and bringing about positive change as it was in this case.

II. The Court Should Award Class Counsel Reimbursement of Expenses.

"It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class." *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998) (finding that "[a]ttorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients."). So long as the expenses requested are "incurred and customarily charged to their clients" and "incidental and necessary to the representation of those clients," courts award reimbursement of the expenses from the common fund. *In re Veeco Instruments Inc.*, 05 MDL 01695CM, 2007 WL 4115808, at *10. "Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *In re Arakis Energy Corp., Sec. Litig.*, 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001); *In re Payment Card*, 991 F. Supp. 2d at 448 (finding expenses of $27,037,716.97 to be "reasonable out-of-pocket expenses incurred over the course of litigating the case.").

Class Counsel's advancement of costs for expert witness, deposition reporters and transcripts, copying, travel, document management and review, research, and court-filings was necessary to the successful prosecution of plaintiffs' claims and should, in fairness, be repaid from the common fund. *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *11 (E.D.N.Y. Oct., 23, 2012) (awarding $2,562,549 in expenses incurred in the prosecution of the action which the court found to be "reasonable litigation expenses"). These categories are the same ones identified in Class Counsel's Joint Declaration and in the Compendium of Declarations. Further, Class Counsel's expenses are of the kind that are usually paid by clients in non-common-fund cases, including expert witness fees, duplication costs, travel expenses, document management and review costs, legal research, and filing and service fees. *See In re Global Crossing Secs. &*

ERISA Litig., 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred—which include investigative and expert witnesses, filing fees, service of process, travel, legal research, and document production and review—are the type for which 'the paying, arms' length market' reimburses attorneys. For this reason, they are properly chargeable to the Settlement fund.").

A. Expert Expenses

The largest portion of Class Counsel's expenses went to compensate forensic and accounting experts and consultants who were essential to Plaintiffs' mapping of USF's data systems and calculation of Plaintiffs' damages. Plaintiffs' first retained experts to develop a mathematical model to show that damages could be calculated on a class-wide basis. [Decl. ¶ 46.] Prior to certification, this model was designed based on a sample of USF's structured sales data. [Decl. ¶¶ 46-47.] As described in Section I.A.3, above, Plaintiffs and Class Counsel faced significant difficulty implementing the model once USF produced the entirety of its data. [Decl. ¶¶ 62-66.] First, Plaintiffs' experts spent thousands of hours stitching together USF's purchases from the VASPs and sales to cost-plus customers from USF's numerous and divergent data systems. *Id.* Second, when it became apparent that sales data was missing for large parts of the class period, Plaintiffs were required to find proxies for the data tracing contemplated by their original damages model. *Id.* To do that, Plaintiffs had to invest in the expertise of forensic accounts, who worked with the data analysts to develop cross checks of Plaintiffs' damages in USF's accounts payable data and financial statements.

B. Document Management and Review

Class Counsel's other large expenses are for document management costs and their use of contract attorneys to review documents collected and produced in response to USF's requests for production. Each of these expenses are "reasonable out-of-pocket expenses" incurred during the

course of the litigation. *In re Payment Card,* 991 F. Supp. 2d at 448. Class Counsel's document management and document review expenditures covered all the hosting fees for the massive collection of electronic documents produced and reviewed in this litigation. As of the Settlement in May 2014, Class Counsel was storing over six million pages of documents produced by USF, named plaintiffs, and third parties and billions of lines of data produced by USF and third parties. Class Counsel also employed contract attorneys during this case for limited projects. They are treating their contract attorneys as at-cost expenses and not as part of their lodestar calculation.

III. The Court Should Grant Incentive and Reimbursement Payments to the Four Lead Plaintiffs and to One Class Member that Provided Special Assistance to the Class.

Class Counsel respectfully recommends and requests that the Lead Plaintiffs and one Class member (Lizard's Thicket) be awarded incentive and reimbursement payments for resources they expended to the benefit of the entire Class. Incentive payments awards "are not uncommon in class action cases and are within the discretion of the court." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005). Indeed, Second Circuit courts "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *See In re Gilat Satellite Networks, Ltd.*, 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (citation omitted).

In granting such awards, courts in the Second Circuit should consider: the existence of special circumstances including the personal risk (if any) incurred by the plaintiff in becoming and continuing as a litigant; the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (*e.g.*, factual expertise); any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim;

and, of course, the ultimate recovery. *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 355 (S.D.N.Y. 2005), *aff'd in part, vacated in part on other grounds*, 443 F.3d 1253 (2d. Cir. 2006).

A. The Lead Plaintiffs

In this case, Lead Plaintiffs deserve reimbursement and incentive payments because they actively and effectively fulfilled their obligations as representatives of the Class, contributing their own time and money to support Class Counsel's investigation and development of this case, and to meet the discovery demands that were placed upon them by USF. [Decl. ¶¶ 82-85.]

The Lead Plaintiffs in this case are sophisticated business entities with many demands placed upon their limited resources.[38] Nonetheless, in support of this case and to the benefit of the entire Class, the Lead Plaintiffs: (1) met and conferred with Class Counsel on multiple occasions to provide documents, electronic data and information to support the factual development of the claims of the Class; (2) provided documents and electronic data in response to extensive discovery demands issued by USF; (3) prepared for depositions of their representatives under Fed. R. Civ. P. 30(b)(6); (4) made themselves available without hesitation to Class Counsel for consultation as factual issues emerged during discovery; and (5) conferred with Class Counsel concerning the settlement of this matter. [Decl. ¶¶ 83-84.]

In addition, Lead Plaintiff T&K was subjected to defending itself from attempted breach-of-contract cross-claim by USF, in which USF alleged that T&K had failed to meet certain contractual minimum-purchase requirements. [Decl. ¶ 84.] And T&K representative William Hilliard actively participated in the settlement negotiations conducted on May 19 and 20, 2014, traveling to and staying in New York at his own expense to support the Class and Class Counsel's efforts. *Id.* The Lead Plaintiffs did all of these things at their own expense and without any guarantee of reimbursement of the expenses they incurred or compensation for the

[38] *See, e.g.*, Silver Report, at 27-30; [Decl. ¶ 83.]

resources (human and otherwise) they devoted for the benefit of the Class. *Id.* For their efforts in support of the Class, Class Counsel respectfully recommend and request that each of the Lead Plaintiffs be awarded an incentive and reimbursement payment of $40,000.

Courts in this and other jurisdictions recognize the importance of compensating lead plaintiffs for their costs and expenses. *See, e.g.*, *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N. D. Ga. 2001) (approving incentive awards of $ 303,000, which were nearly eight times greater than the class payments); *In re Vitamin C*, 2012 WL 5289514, at *11 (approving incentive awards of $50,000 each to representative plaintiffs, "[i]n light of the size of the possible payments to class members, the length and complexity of this litigation, and the substantial efforts expended by [the representatives] on behalf of the class"); *Wright v. Stern*, 553 F. Supp. 2d 337 (S.D.N.Y. 2008) (approving awards of $50,000 to each of 11 named plaintiffs in an employment discrimination case that spanned a decade).

Courts may "consider the relationship between the requested incentive award and the amounts recovered by absent class members under the settlement." *Denney*, 230 F.R.D. at 355, and ["t]he amount of the incentive award is related to the personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit." *In re Vitamin C*, 2012 WL 5289514, at *11. The awards requested herein, which total $160,000, are modest, collectively constituting less than one-tenth of one percent of the Settlement Fund. *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741 (D.D.C. June 16, 2003) (approving incentive payments of $35,000 to class representatives where they amounted to 0.2% of the settlement fund) (citing *Dornberger v. Metropolitan Life Ins. Co.*, 203 F.R.D. 118, 143 (S.D.N.Y.2001)).

B. Lizard's Thicket

Although not a named plaintiff, the 15-restaurant chain Lizard's Thicket of South Carolina voluntarily rendered material support to the Class on a factual issue of critical importance in this case: evidence of oral cost-plus contracts. [Decl. ¶¶ 86-87.] For its service in support of the Class, Class Counsel respectfully proposes and requests an incentive and reimbursement payment of $20,000. *See* [Decl. ¶ 88]; *In re Hypodermic Prods. Antitrust Litig.*, 2007 WL 1959224 (D.N.J. March, 17, 2014) (awarding incentive payments to members of the plaintiff class that were not designated as class representatives, but provided evidence and consultation which substantially aided in the resolution of Plaintiffs' claims).

In support of this case and to the benefit of the entire Class, Robert "Bobby" Williams, the owner of Lizard's Thicket: (1) met and conferred with Class Counsel on multiple occasions to provide information to support the factual development of the claims of members of the Class who had oral (as compared to written) cost-plus arrangements with USF; (2) arranged for Class Counsel to interview and obtain testimony from the former USF sales representative who serviced Lizard's Thicket under its oral cost-plus agreement with USF; (3) made himself available without hesitation to Class Counsel for consultation as factual issues emerged during discovery; and (4) agreed to be put forward as a proposed Class Representative for customers with oral cost-plus contracts with USF in the event that this matter had not been settled on May 20, 2014. [Decl. ¶¶ 86-87.]

Lizard's Thicket did these things at its own expense and without any guarantee of reimbursement of the expenses incurred or compensation for the resources (human and otherwise) it devoted for the benefit of the Class. For Lizard's Thicket's efforts in support of the Class, Class Counsel respectfully recommend and request that Lizard's Thicket be awarded an

incentive and reimbursement payment of $20,000, which amounts to approximately one one-hundredth of one percent of the Settlement Amount.

CONCLUSION

For the reasons set forth herein, and in light of the excellent result achieved on behalf of the Class in this litigation, Class Counsel respectfully request that the Court award attorneys' fees in the amount of 33 and 1/3% of the settlement fund, reimbursement of $7,941,358.41 in litigation costs and expenses, and incentive and reimbursement awards of $40,000 each to the Lead Plaintiffs and $20,000 to Lizard's Thicket.

Dated: August 29, 2014

Respectfully,

By: */s/ Richard L. Wyatt, Jr.*

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EXHIBIT 4

MSG

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KING DRUG COMPANY OF FLORENCE, Inc., *et al.*, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **CEPHALON, INC., *et al.*, Defendants.**	**Master Docket No. 2:06-cv-01797-MSG** **Judge Mitchell S. Goldberg**

FILED
OCT 15 2015
MICHAEL E. KUNZ, Clerk
By Dep. Clerk

ORDER GRANTING FINAL JUDGMENT AND ORDER OF DISMISSAL APPROVING DIRECT PURCHASER CLASS SETTLEMENT AND DISMISSING DIRECT PURCHASER CLASS CLAIMS AGAINST THE CEPHALON DEFENDANTS

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in accordance with the terms of the Settlement Agreement between Defendants Cephalon, Inc., Teva Pharmaceutical Industries Ltd., Teva Pharmaceuticals USA, Inc., and Barr Pharmaceuticals, Inc. (collectively, the "Cephalon Defendants"), and Direct Purchaser Class Plaintiffs' Lead Counsel acting pursuant to the authority provided by the Court's Order dated August 18, 2009 (ECF No. 196), on behalf of Plaintiffs King Drug Co. of Florence, Inc. ("King Drug"), Rochester Drug Co-Operative, Inc. ("RDC"), Burlington Drug Company Inc. ("Burlington"), J.M. Smith Corp. d/b/a Smith Drug Co. ("Smith Drug"), Meijer, Inc. and Meijer Distribution, Inc. ("Meijer"), Stephen L. LaFrance Pharmacy d/b/a SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. ("SAJ" and together with King Drug, RDC, Burlington, Smith Drug, and Meijer, the "Plaintiffs"), and on behalf of the Direct Purchaser Class, dated April 17, 2015, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. This Final Judgment and Order of Dismissal hereby incorporates by reference the definitions in the Settlement Agreement among the Cephalon Defendants, Plaintiffs, and the Direct Purchaser Class, and all capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

2. On, July 27, 2015, this Court certified a class for purposes of settlement ("Direct Purchaser Class"):

> All persons or entities in the United States and its territories who purchased Provigil in any form directly from Cephalon at any time during the period from June 24, 2006 through August 31, 2012 (the "Class"). Excluded from the Class are Defendants, and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.
>
> Also excluded from the Class are: Rite Aid Corporation, Rite Aid HDQTRS. Corp., JCG (PJC) USA, LLC, Eckerd Corporation, Maxi Drug, Inc. d/b/a Brooks Pharmacy, and CVS Caremark Corporation, Walgreen Co., The Kroger Co., Safeway Inc., American Sales Co. Inc., HEB Grocery Company, LP, Supervalu, Inc., and Giant Eagle, Inc., and their officers, directors, management, employees, subsidiaries, or affiliates in their own right and as assignees from putative Direct Purchaser Class members as more fully described in Paragraph 10 of the Settlement Agreement ("Opt Out Plaintiffs").

3. The Court has appointed King Drug, RDC, Burlington, Smith Drug, Meijer, and SAJ as representatives of the Direct Purchaser Class (the "Class Representatives"). The Court has found that Lead Counsel, Liaison Counsel and the Executive Committee ("Class Counsel") have fairly and adequately represented the interests of the Direct Purchaser Class and satisfied the requirements of Fed. R. Civ. P. 23(g).

4. The Court has jurisdiction over these actions, each of the parties, and all members of the Direct Purchaser Class for all manifestations of this case, including this Settlement.

5. The notice of settlement (substantially in the form presented to this Court as Exhibit B to the Settlement Agreement) (the "Notice") directed to the members of the Class, constituted the best notice practicable under the circumstances. In making this determination, the Court finds

that the Notice provided for individual notice to all members of the Direct Purchaser Class who were identified through reasonable efforts. Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that the Notice provided Direct Purchaser Class members due and adequate notice of the Settlement, the Settlement Agreement, these proceedings, and the rights of Class members to opt-out of the Direct Purchaser Class and/or object to the Settlement.

6. Due and adequate notice of the proceedings having been given to the Direct Purchaser Class and a full opportunity having been offered to the Direct Purchaser Class to participate in the October 15, 2015 Fairness Hearing, it is hereby determined that all Direct Purchaser Class members are bound by this Order and Final Judgment.

7. In determining that the Settlement should be given final approval, the Court makes the following findings of fact and conclusions of law.

8. The Court has fully considered the *Girsch* factors and the *Prudential* factors and finds that, considered together, the factors overwhelmingly favor approval of the Settlement. *See Girsch v. Jepson*, 521 F. 2d 153 (3d Cir. 1975); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F. 3d 283 (3d Cir. 1998).

9. No class members have opted out of the Settlement or objected to any part of it, and class members who will be collectively entitled to approximately 96% of the monetary recovery here have submitted letters to the Court explicitly and affirmatively supporting the Settlement. Four of the named plaintiffs, outside counsel for the country's three largest pharmaceutical distributors and six other class members, collectively who made approximately 96% of the purchases at issue in this case, wrote to the Court to express their support for the Settlement. These class members are business entities which have participated in other, similar cases and possess the incentive and knowledge to assess the fairness, reasonableness and

adequacy of the Settlement. The overwhelming positive reaction of the class, which is a *Girsch* factor that is critical to the Court's fairness analysis, strongly supports the Court's conclusion that the Settlement is fair, reasonable and adequate.

10. The amount of the Settlement, plus interest accrued from August 6, 2015 (the date upon which the Cephalon Defendants deposited such amount into an escrow account held in trust by Morgan Stanley Smith Barney LLC that is earning interest for the benefit of the Direct Purchaser Class) confers a monetary benefit on the Direct Purchaser Class that is substantial.

11. Every issue in this highly complex antitrust case has been vigorously litigated for almost a decade. The litigation between the Direct Purchaser Class and the Cephalon Defendants is in an advanced stage, with all discovery having been completed and the parties having completed dispositive motion briefing, and was poised for trial at the time of the Settlement. Class Counsel thus had an adequate appreciation of the merits of the case.

12. Class Counsel faced significant risks in taking their claims against the Cephalon Defendants to trial, including the risk that a jury might not find in their favor on any of a number of issues and that any jury verdict could result in a lengthy post-trial motion and appellate process. By contrast, the Settlement provides the Direct Purchaser Class with immediate relief without the delay, risk and uncertainty of continued litigation.

13. The Settlement of this Direct Purchaser Class Action was not the product of collusion between the Direct Purchaser Class Plaintiffs and the Cephalon Defendants or their respective counsel, but rather was the result of *bona fide* and arm's-length negotiations conducted in good faith between Direct Purchaser Class Counsel and counsel for the Cephalon Defendants, with the assistance of a mediator.

14. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement, and finds that the Settlement is, in all respects, fair, reasonable and

adequate to Direct Purchaser Class members. Accordingly, the Settlement shall be consummated in accordance with the terms and provisions of the Settlement Agreement.

15. The Court hereby approves the Plan of Allocation of the Settlement Fund as proposed by Class Counsel (the "Plan of Allocation"), which was summarized in the Notice of Proposed Settlement and is attached to Direct Purchaser Class Plaintiffs' Motion for Final Approval of Settlement, and directs Berdon Claims Administration LLC, the firm retained by Direct Purchaser Class Counsel as the Claims Administrator, to distribute the net Settlement Fund as provided in the Plan of Allocation.

16. All claims against the Cephalon Defendants in *King Drug Company of Florence, Inc., et al. v. Cephalon, Inc., et al.*, No. 2:06-cv-1797-MSG (E.D. Pa.), including by those members of the Direct Purchaser Class who have not timely excluded themselves from the Direct Purchaser Class, are hereby dismissed with prejudice, and without costs.

17. Upon the Settlement Agreement becoming final in accordance with paragraph 7 of the Settlement Agreement, Plaintiffs and the Direct Purchaser Class unconditionally, fully and finally release and forever discharge the Cephalon Defendants, any past, present, and future[1] parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, trustees, associates, attorneys and any of their legal representatives, or any other representatives thereof (and the predecessors, heirs, executors, administrators, successors and assigns of each of

[1] For the avoidance of doubt, Ranbaxy Laboratories, Ltd., Ranbaxy Pharmaceuticals, Inc., Mylan Laboratories, Inc., and/or Mylan Pharmaceuticals, Inc. are excluded from the definition of future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, trustees, associates, attorneys and any of their legal representatives, or any other representatives of the Cephalon Defendants released under this paragraph. Nothing in the Settlement Agreement dismisses or releases the claims of Plaintiffs and the Direct Purchaser Class against Ranbaxy Laboratories, Ltd., Ranbaxy Pharmaceuticals, Inc., Mylan Laboratories, Inc., and/or Mylan Pharmaceuticals, Inc.

the foregoing) (the "Released Parties") from any and all manner of claims, rights, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, known or unknown, suspected or unsuspected, fixed or contingent, including costs, expenses, penalties and attorneys' fees, accrued in whole or in part, in law or equity, that Plaintiffs or any member or members of the Direct Purchaser Class (including any of their past, present or future officers, directors, insurers, general or limited partners, divisions, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, joint ventures, subsidiaries, heirs, executors, administrators, predecessors, successors and assigns, acting in their capacity as such) (the "Releasors"), whether or not they object to the Settlement, ever had, now has, or hereafter can, shall or may have, directly, representatively, derivatively or in any other capacity, arising out of or relating in any way to: any claim that was alleged or could have been alleged in the Direct Purchaser Class Action prior to the date of the Settlement, including but not limited to:

(1) the alleged delayed entry of generic versions of Provigil (modafinil);

(2) conduct with respect to the procurement and enforcement of United States Reissue Patent Number 37,516 or United States Patent Number 5,618,845;

(3) any conduct relating to Nuvigil that was alleged in, could fairly be characterized as being alleged in, is related to an allegation made in, or could have been alleged in the Direct Purchaser Class Action, such as intending to convert market demand from Provigil to Nuvigil;

(4) the sale, marketing or distribution of Provigil or its generic equivalent, except as provided for in paragraph 19 herein (the "Released Claims").

Releasors hereby covenant and agree that each shall not sue or otherwise seek to establish or impose liability against any Released Party based, in whole or in part, on any of the Released

Claims. For the avoidance of doubt, the release provided herein applies, without limitation, to any conduct relating to the procurement, maintenance or enforcement of United States Reissue Patent Number 37,516 or United States Patent Number 5,618,845, including any commencement, maintenance, defense or other participation in litigation concerning any such patents, that was alleged in, could be fairly characterized as being alleged in, is related to an allegation made in, or could have been alleged in the Direct Purchaser Class Action.

18. In addition, Plaintiffs on behalf of themselves and all other Releasors, hereby expressly waive, release and forever discharge, upon the Settlement becoming final, any and all provisions, rights and benefits conferred by §1542 of the California Civil Code, which reads:

> Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Plaintiffs and members of the Direct Purchaser Class may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of this paragraph 18, but each Plaintiff and member of the Direct Purchaser Class hereby expressly waives and fully, finally and forever settles, releases and discharges, upon this Settlement becoming final, any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Plaintiff and member of the Direct Purchaser Class also hereby expressly waives and fully, finally and forever settles, releases and discharges any and all

claims it may have against any Released Party under § 17200, *et seq*., of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction, which claims are expressly incorporated into the definition of Released Claims.

19. The releases set forth in paragraphs 17 and 18 of this Order shall not release claims between Plaintiffs, members of the Direct Purchaser Class, and the Released Parties unrelated to the allegations in *King Drug Company of Florence, Inc., et al. v. Cephalon, Inc., et al.*, No. 2:06-cv-1797-MSG (E.D. Pa.), including claims under Article 2 of the Uniform Commercial Code (pertaining to Sales), the laws of negligence or product liability or implied warranty, breach of contract, breach of express warranty, or personal injury, or other claims unrelated to the allegations in *King Drug Company of Florence, Inc., et al. v. Cephalon, Inc., et al.*, No. 2:06-cv-1797-MSG (E.D. Pa.).

20. Class Counsel for the Direct Purchaser Class have moved for an award of attorneys' fees, reimbursement of expenses and incentive awards for the class representatives. Class Counsel request an award of attorneys' fees of 27.5% of the Settlement (including the interest accrued thereon), reimbursement of the reasonable costs and expenses incurred in the prosecution of this action in the amount of $3,581,091.19.00, and incentive awards totaling $500,000.00 collectively for the six named plaintiffs, and such motion has been on the docket and otherwise publicly available since September 17, 2015.

21. In awarding attorneys' fees, reimbursement of expenses and incentive awards for the class representatives, the Court makes the following findings of fact and conclusions of law.

22. The "percentage of the fund" method is the proper method for calculating attorneys' fees in common fund class actions in this Circuit. *See, e.g., In re Rite Aid Sec. Litig.*, 396 F. 3d 294, 305 (3d Cir. 2005).

23. The Court has fully considered the *Gunter* factors and the *Prudential* factors and finds that, considered together, the factors overwhelmingly favor granting Class Counsel's requested attorneys' fee, reimbursement of expenses and incentive awards for the class representatives. *See Gunter v. Ridgewood Energy Corp.*, 223 F. 2d 193 (2d Cir. 2000); *In re Prudential, supra.*

24. No class members have objected to any part of Class Counsel's requested 27.5% fee award, and class members who will be collectively entitled to approximately 96% of the monetary recovery here have submitted letters to the Court explicitly and affirmatively supporting Class Counsel's requested fee. Four of the named plaintiffs, outside counsel for the country's three largest pharmaceutical distributors and six other class members, collectively whom made approximately 96% of the purchases at issue in this case, wrote to the Court to express their support for Class Counsel's requested fee. These class members are business entities which have participated in other, similar cases and possess the incentive and knowledge to object to Class Counsel's requested fee. The overwhelming positive reaction of the class, which is a *Gunter* factor, strongly supports the Court's conclusion to grant Class Counsel's requested fee.

25. As noted above, the Settlement has conferred a monetary benefit on the Direct Purchaser Class that is substantial.

26. The Settlement here is directly attributable to the skill and efforts of Class Counsel, who are highly experienced in prosecuting these types of cases.

27. In prosecuting this action, Class Counsel have expended more than 59,000 hours of uncompensated time, and incurred substantial out of pocket expenses, with no guarantee of recovery. Class Counsel's hours were reasonably expended in this highly complex case that was vigorously litigated for almost a decade, and their time was expended at significant risk of non-payment.

28. Class Counsel's requested fee is lower than attorney fee awards in numerous other, Hatch-Waxman cases alleging delayed generic entry, where the courts in such cases have routinely granted a fee award of 33⅓%. Class Counsel's requested fee is also consistent with and/or lower than the fee that would have been negotiated had the case been subject to a private contingent fee agreement.

29. A 27.5% fee award would equate to a lodestar multiplier of approximately 4.12. Such a multiplier is within the range of those frequently awarded in common fund cases.

30. Upon consideration of Class Counsel's petition for fees, costs and expenses, Class Counsel are hereby awarded attorneys' fees totaling $140,800,000.00 (representing 27.5% of the Settlement Fund) and costs and expenses totaling $3,581,091.19, together with a proportionate share of the interest thereon from the date the funds are deposited in the Settlement Escrow Account until payment of such attorneys' fees, costs and expenses, at the rate earned by the Settlement Fund, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with paragraph 7 of the Settlement Agreement. Upon consideration of Class counsel's petition for incentive payments for Direct Purchaser Class Representatives, each of King Drug, RDC, Burlington, and Smith Drug are hereby awarded $100,000.00, and each of Meijer and SAJ are hereby awarded $50,000.00, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with paragraph 7 of the Settlement

Agreement. Garwin Gerstein & Fisher LLP shall allocate and distribute such attorneys' fees, costs and expenses among the various Class Counsel which have participated in this litigation. Garwin Gerstein & Fisher LLP shall allocate and distribute such incentive awards among the various Direct Purchaser Class Representatives which have participated in this litigation. The Released Parties (as defined in paragraph 14 of the Settlement Agreement) shall have no responsibility for, and no liability whatsoever with respect to, any payment or disbursement of attorneys' fees, expenses, costs or incentive awards among Class Counsel and/or Class Representatives, nor with respect to any allocation of attorneys' fees, expenses, costs or incentive awards to any other person or entity who may assert any claim thereto. The attorneys' fees, costs and expenses, and incentive awards authorized and approved by Final Judgment and Order shall be paid to Garwin Gerstein & Fisher LLP within five (5) business days after this Settlement becomes final pursuant to paragraph 7 of the Settlement Agreement or as soon thereafter as is practical and in accordance with the terms of the Settlement Agreement and the Escrow Agreement. The attorneys' fees, costs and expenses, and incentive award authorized and approved by this Final Judgment and Order shall constitute full and final satisfaction of any and all claims that Plaintiffs and any Direct Purchaser Class member, and their respective counsel, may have or assert for reimbursement of fees, costs, and expenses, and incentive awards, and Plaintiffs and members of the Direct Purchaser Class, and their respective counsel, shall not seek or demand payment of any fees and/or costs and/or expenses and/or incentive awards from any source other than the Settlement Fund, including the Cephalon Defendants.

31. The Court retains exclusive jurisdiction over the Settlement and the Settlement Agreement as described therein, including the administration and consummation of the Settlement, and over this Final Judgment and Order.

32. The Court finds that this Final Judgment and Order adjudicates all of the claims, rights and liabilities of the parties to the Settlement Agreement (including the members of the Direct Purchaser Class), and is final and shall be immediately appealable. Neither this Order nor the Settlement Agreement nor any other Settlement-related document shall constitute any evidence or admission by the Cephalon Defendants or any other Released Party on liability, any merits issue, or any class certification issue (including but not limited to whether a class can be certified for purposes of litigation or trial) in this or any other matter or proceeding, nor shall either the Settlement Agreement, this Order, or any other Settlement-related document be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement, the terms of this Order, or if offered by any released Party in responding to any action purporting to assert Released Claims.

IT IS SO ORDERED.

Dated: 10.15, 2015

The Honorable Mitchell S. Goldberg
United States District Judge
U.S. District Court for the
Eastern District of Pennsylvania

ENTERED
OCT 16 2015
CLERK OF COURT

EXHIBIT 5

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Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: APPLE INC. APP STORE SIMULATED CASINO-STYLE GAMES LITIGATION	Case No. 5:21-md-02985-EJD **AMENDED ~~[PROPOSED]~~ ORDER GRANTING UNOPPOSED MOTION FOR PRETRIAL CONSOLIDATION AND APPOINTMENT OF INTERIM LEAD COUNSEL AND PLAINTIFFS' EXECUTIVE COMMITTEE [DKT. 29]** Judge: Hon. Edward J. Davila
IN RE: GOOGLE PLAY STORE SIMULATED CASINO-STYLE GAMES LITIGATION	Case No. 5:21-md-03001-EJD **AMENDED ~~[PROPOSED]~~ ORDER GRANTING UNOPPOSED MOTION FOR PRETRIAL CONSOLIDATION AND APPOINTMENT OF INTERIM LEAD COUNSEL AND PLAINTIFFS' EXECUTIVE COMMITTEE [DKT. 9]** Judge: Hon. Edward J. Davila

KATHLEEN WILKINSON, NANCY URBANCZYK, and LAURA PERKINSON, Plaintiffs, v. FACEBOOK, INC., Defendant.	Case No. 5:21-cv-02777-EJD **AMENDED ~~[PROPOSED] ORDER~~ GRANTING UNOPPOSED MOTION FOR PRETRIAL CONSOLIDATION AND APPOINTMENT OF INTERIM LEAD COUNSEL AND PLAINTIFFS' EXECUTIVE COMMITTEE [DKT. 28]** Judge: Hon. Edward J. Davila

WHEREAS, the Court has received and considered the motion to consolidate for pretrial purposes the social casino cases against Defendants and appoint interim lead counsel and an executive committee submitted by various counsel for the Plaintiffs;

WHEREAS, the Court recognizes the need to appoint an interim lead counsel structure to coordinate litigation efficiently on behalf of all class members, and the importance of keeping time, expense reports, reasonable fees, and eliminating duplication of efforts;

Having reviewed all the submissions, the Court hereby finds as follows:

I. CONSOLIDATION

The district court may consolidate actions involving common questions of law and fact. Fed. R. Civ. P. 42(a)(2). In exercising the broad discretion to order consolidation, the court "weighs the saving of time and effort [that] consolidation would produce against any inconvenience, delay, or expense that it would cause." *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984). Consolidation may occur upon motion by a party or sua sponte. *See* 9A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2383 (3d ed. 2018).

The Court finds that within each set of actions—*i.e.*, the Facebook Actions, the Google Actions, and the Apple Actions—each case within the set presents substantially similar factual and legal issues to other cases within that set. There is no basis to find that consolidation of all actions in each particular set would cause inconvenience, delay, or expense, especially where all plaintiffs agree with the consolidation request. Accordingly, some consolidation is appropriate, and the motions to consolidate the actions for pretrial purposes pursuant to Rule 42(a)(2) are GRANTED to the extent that (i) the Facebook Actions are consolidated with each other, (ii) the Apple Actions are consolidated with each other, and (iii) the Google Actions are consolidated with each other. For the avoidance of doubt, no actions against one defendant are consolidated with any actions against another defendant.

//

II. APPOINTMENT OF INTERIM LEAD COUNSEL

This Order is intended to create a leadership structure for Plaintiffs' counsel in order to organize, simplify, and streamline the handling of these matters on behalf of all Plaintiffs, consistent with the fair administration of justice. Plaintiffs' counsel's proposal strives to eliminate duplication by assigning discrete tasks to the Executive Committee. The Court will also actively monitor the work of the Interim Lead Counsel and Executive Committee by holding regular case management conferences to inquire into all pending and completed tasks of members of the leadership group.

The Court further believes that this structure respects the notion of starting with a small team and growing as needed. The proposed number of attorneys is warranted in light of the projected size of the case, including the potential number of class members. Efficiency will be promoted by putting the entire team in place and defining each member's role at the outset of the case. Moreover, this structure includes a diversity of viewpoints (including in terms of gender, ethnicity, geographic diversity, and years of overall experience) that could prove instrumental in effectuating the best outcome for the Plaintiffs. Mr. Balabanian has demonstrated an ability to cooperate with a range of different interests that span across law firms, practice groups, geography, and gender and introduces smaller firms into the litigation experience. His pledge to communicate transparently and devise a cohesive working group is admirable and will prove a valuable resource in the course of the litigation.

Given Mr. Balabanian's assurances that the proposed structure is designed to secure an efficient and beneficial result for the Plaintiffs, the Court approves the proposed Interim Lead Counsel and Executive Committee structure. The Court notes that some of the proposed positions (such as Settlement Counsel) are forward-thinking but may not require immediate implementation. As described, the Court encourages Interim Lead Counsel and the Executive Committee to remain committed to efficiency. The Court reserves the right to modify the structure at any time.

A. Lead Counsel

The Court has considered the chief criteria that interim lead Plaintiffs' counsel should

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possess: (1) performance of work in identifying and investigating potential claims in this action; (2) knowledge and experience in handling complex litigation, including class actions; (3) knowledge of the applicable law; and (4) access to sufficient resources to prosecute the litigation in a timely manner. Fed. R. Civ. P. 23(g)(1)(A), (3). The Court has also considered counsel's willingness and ability to commit to a time-consuming process and to work cooperatively with others. *See* Fed. R. Civ. P. 23(g)(1)(B). Based on these factors, the Court hereby APPOINTS Rafey Balabanian of Edelson PC as Interim Lead Counsel in this action. The Court finds that Mr. Balabanian and his firm have extensive knowledge of and experience in prosecuting complex litigation and class actions, are both willing and able to commit to a time-consuming process of litigating this case, have shown the ability to work cooperatively with others by garnering the support of a great number of colleagues and fellow counsel in this MDL, and have access to sufficient resources to prosecute this litigation in a timely manner.

B. Plaintiffs' Executive Committee

Having reviewed motions and supporting materials, and finding that the proposed positions will advance judicial interests of efficiency and protect the interests of the proposed Classes, the Court hereby appoints the following individuals to the Plaintiffs' Executive Committee:

Head of Google Track	John Norris [Davis & Norris]
Head of Apple Track	Melissa Weiner [Pearson, Simon & Warshaw, LLP]
Head of Facebook Track	Sarah N. Westcot [Bursor & Fisher]
Law and Briefing Counsel	Todd Logan [Edelson PC]
Defensive Discovery Counsel	Jill Manning [Steyer Lowenthal]
Offensive Discovery and ESI Counsel	Cecily Shiel [Tousley Brain and Stephens]
Google Discovery Counsel	Theo Benjamin [Edelson PC]
Apple Discovery Counsel	Glenn Chappell [Tycko & Zavareei]
Facebook Discovery Counsel	Kristen Cardoso [Kopelowitz Ostrow P.A.]
App Maker Discovery and Claims Counsel	Christin Cho [Dovel & Luner]
Plaintiffs Vetting and Pleading Counsel	Hassan A. Zavareei [Tycko & Zavareei LLP]
Settlement Counsel	Jay Edelson [Edelson PC]

These appointments will last for the duration of the MDL proceeding, unless changed by Interim Lead Counsel or ordered by the Court. This Court looks to these counsel to undertake personal responsibility to perform the designated functions and reserves the discretion to replace

them, on their own request or on this Court's own motion, should they become unable to do so. The responsibilities of each member of the Executive Committee are detailed below.

III. COMPOSITION AND RESPONSIBILITIES OF INTERIM LEAD COUNSEL AND PLAINTIFFS' EXECUTIVE COMMITTEE

A. Responsibilities of Interim Lead Counsel

The Court hereby appoints Rafey S. Balabanian as Interim Lead Counsel. With an opportunity for input from the Chair, Plaintiffs' Interim Lead Counsel shall be responsible for determining the litigation strategy on behalf of all Plaintiffs, and for the conduct of the litigation on behalf of the Plaintiff Classes, including any trial or resolution. Plaintiffs' Interim Lead Counsel will attempt to reach consensus regarding major decisions with the Chair. To the extent that disagreements arise as to the direction of the case, and the Interim Lead Counsel and the Chair cannot reach a consensus, Plaintiffs' Interim Lead Counsel shall have the final decision-making authority. Plaintiffs' Interim Lead Counsel shall promote the orderly and efficient conduct of this litigation and avoid unnecessary duplication and unproductive efforts; act as spokesperson (either personally or by designee) for the Plaintiff Classes at pretrial conferences; and delegate work responsibilities to the Plaintiffs' Executive Committee or its Chair.

Plaintiffs' Interim Lead Counsel shall have authority to enter into stipulations (either personally or by designee) necessary for the conduct of the litigation with opposing counsel. No request for discovery, or other pretrial or trial proceedings shall be initiated or filed, and no dispositive motion or response to any dispositive motion shall be filed by any plaintiff, except through Plaintiffs' Interim Lead Counsel.

B. Executive Committee Chair

The Court hereby appoints Andrea Gold of Tycko & Zavareei LLP as the Chair of the Plaintiffs' Executive Committee (the "Chair") with the following duties:

a. The Chair shall confer with Plaintiffs' Interim Lead Counsel regarding litigation strategy on behalf of all Plaintiffs, and regarding the conduct of all litigation efforts on behalf of the Plaintiff classes, including any trial or resolution.

b. Following consultation with Interim Lead Counsel, the Chair shall delegate work responsibilities to other Plaintiffs' counsel in a fair and orderly manner. The Chair shall also monitor the activities of all Plaintiffs' counsel to assure that Plaintiffs' pretrial preparation is conducted effectively, efficiently, and economically; that schedules are met; and that unnecessary expenditures of time and expense are avoided.

c. The Chair shall be available and responsible for communications to and from this Court, including distributing orders and other directions from the Court to counsel, and for providing the local rules, standing orders, and guidelines of the U.S. District Court for the Northern District of California, and any other judge's rules and standing orders of the Court, to counsel as required by applicable Court rules.

d. The Chair shall be responsible for creating and maintaining a master service list of all parties and their respective counsel, and shall promptly advise the Court and Defendants' counsel of changes to Plaintiffs' Service List.

e. The Chair shall be responsible for ensuring that any updates and changes to the local rules, standing orders, and guidelines of this District or the Court are timely communicated to counsel as needed, working with the Executive Committee member(s) where it is appropriate and relevant to their responsibilities.

f. The Chair shall be responsible for distributing to counsel, as appropriate, Orders, notices, and correspondence from the Court, to the extent such documents are not electronically filed; and discovery, pleadings, correspondence, and other documents from Defendants' counsel that are not electronically filed.

g. The Chair shall be responsible for obtaining and maintaining time records for Plaintiffs' counsel, as well as preparing and submitting reports to the Court as

requested.

C. Head of the Google Track

The Court hereby appoints John Norris of Davis & Norris as Head of the Google Track. The Head of the Google Track shall be responsible for coordinating and, consistent with direction from Interim Lead Counsel, overseeing all litigation efforts related to claims against Google, including pleadings, offensive and defensive fact discovery, expert discovery, and motion practice. The Head of the Google Track shall be primarily responsible for day-to-day communications with counsel for Google and, in conjunction with Interim Lead Counsel and the Chair, for ensuring that the Executive Committee remains apprised of all relevant information provided by Google and Google's counsel.

D. Head of the Apple Track

The Court herby appoints Melissa Weiner of Pearson, Simon & Warshaw, LLP as Head of the Apple Track. The Head of the Apple Track shall be responsible for coordinating and, consistent with direction from Interim Lead Counsel, overseeing all litigation efforts related to claims against Apple, including pleadings, offensive and defensive fact discovery, expert discovery, and motion practice. The Head of the Apple Track shall be primarily responsible for day-to-day communications with counsel for Apple and, in conjunction with Interim Lead Counsel and the Chair, for ensuring that the Executive Committee remains apprised of all relevant information provided by Apple and Apple's counsel.

E. Head of the Facebook Track

The Court herby appoints Sarah N. Westcot of Bursor & Fisher as Head of the Facebook Track. The Head of Facebook Track shall be responsible for coordinating and, consistent with direction from Interim Lead Counsel, overseeing all litigation efforts related to claims against Facebook, including pleadings, offensive and defensive fact discovery, expert discovery, and motion practice. The Head of Facebook Track shall be primarily responsible for day-to-day communications with counsel for Facebook and, in conjunction with Interim Lead Counsel and

the Chair, for ensuring that the Executive Committee remains apprised of all relevant information provided by Facebook and Facebook's counsel.

F. Law and Briefing Counsel

The Court hereby appoints Todd Logan of Edelson PC as Law and Briefing Counsel. The Law and Briefing Counsel will be responsible for coordinating the research and preparation of all pleadings and motions and assisting in the preparation of oral arguments at any hearings. Law and Briefing Counsel will consider input from all Track chairs in the prosecution of these responsibilities.

G. Defensive Discovery Counsel

The Court hereby appoints Jill Manning of Steyer Lowenthal as Defensive Discovery Counsel. Defensive Discovery Counsel shall be responsible for coordinating all discovery obligations of Plaintiffs and the Classes consistent with the requirements of the Federal Rules of Civil Procedure, including the preservation of information, Rule 26 initial disclosures, responses to interrogatories, requests for production of documents, and request for admissions, and examination at depositions, as well as any motion practice related thereto. Defensive Discovery Counsel will consider input from all Track chairs in the prosecution of these responsibilities.

H. Offensive Discovery and ESI Counsel

The Court hereby appoints Cecily Shiel of Tousley Brain and Stephens as Offensive Discovery and ESI Counsel. Offensive Discovery and ESI Counsel shall be responsible for coordinating all discovery propounded on behalf of the Plaintiffs and the Classes consistent with the requirements of the Federal Rules of Civil Procedure, including the pursuit of information, Rule 26 initial disclosure negotiation, interrogatories, requests for production of documents, requests for admissions, depositions, and any motion practice related thereto. Offensive Discovery and ESI Counsel shall also be responsible for coordinating ESI practices in this case, including negotiations with Defendants concerning an e-discovery plan, developing an ESI protocol for this case, and ensuring that appropriate protective orders are in place to guard against any release of proprietary, confidential, or personal ESI. Offensive Discovery and ESI Counsel will assess ESI

needs and issues, implement appropriate ESI preservation procedures, identify custodians of potentially relevant ESI, and develop search terms for data searches. Offensive Discovery and ESI Counsel will also handle ESI processing tasks and shall ensure that responsive ESI is collected and produced in a cost-effective manner that preserves the integrity of that ESI and enables counsel to recognize and appropriately deal with evidentiary issues associated with the admissibility of electronically generated and stored evidence. Offensive Discovery and ESI Counsel will consider input from all Track chairs in the prosecution of these responsibilities.

I. Google Discovery Counsel

The Court hereby appoints Theo Benjamin of Edelson PC as Google Discovery Counsel. Google Discovery Counsel shall be responsible, together with Offensive Discovery and ESI Coordination Counsel, for coordinating discovery efforts related to all claims against Google. Google Discovery Counsel will inform and educate Offensive Discovery and ESI Counsel about the relevant legal and factual issues affecting discovery, including witnesses, key evidentiary issues, and any relevant risks associated with the discovery tasks at hand, and will work with the Interim Lead Counsel to select, retain, and consult with appropriate experts concerning device development issues.

J. Apple Discovery Counsel

The Court hereby appoints Glenn Chappell of Tycko & Zavareei as Apple Discovery Counsel. Apple Discovery Counsel shall be responsible, together with Offensive Discovery and ESI Coordination Counsel, for coordinating discovery efforts related to all claims against Apple. Apple Discovery Counsel will inform and educate Offensive Discovery and ESI Counsel about the relevant legal and factual issues affecting discovery, including witnesses, key evidentiary issues, and any relevant risks associated with the discovery tasks at hand, and will work with the Interim Lead Counsel to select, retain, and consult with appropriate experts concerning device development issues.

K. Facebook Discovery Counsel

The Court hereby appoints Kristen Cardoso of Kopelowitz Ostrow P.A as Facebook Discovery Counsel. Facebook Discovery Counsel shall be responsible, together with Offensive Discovery and ESI Coordination Counsel, for coordinating discovery efforts related to all claims against Facebook. Facebook Discovery Counsel will inform and educate Offensive Discovery and ESI Counsel about the relevant legal and factual issues affecting discovery, including witnesses, key evidentiary issues, and any relevant risks associated with the discovery tasks at hand, and will work with the Interim Lead Counsel to select, retain, and consult with appropriate experts concerning device development issues.

L. App Maker Discovery and Claims Counsel

The Court hereby appoints Christin Cho of Dovel & Luner as App Maker Discovery and Claims Counsel. App Maker Discovery and Claims Counsel shall be responsible for coordinating all third-party discovery propounded on behalf of the Plaintiffs and the Classes, consistent with the requirements of the Federal Rules of Civil Procedure and applicable local rules, including the pursuit of documents, depositions, and any motion practice related to third-party discovery. App Maker Discovery and Claims Counsel will coordinate third-party discovery with Offensive Discovery and ESI Counsel and Interim Lead Counsel to evaluate and develop procedures and a plan for discovery of third parties that is efficient, cost-effective, and non-duplicative. Additionally, App Maker Discovery and Claims Counsel shall coordinate with Interim Lead Counsel to determine whether and when to pursue certain actions directly against social casino app makers, potentially including actions in state and federal courts as well as claims in arbitral fora.

M. Plaintiffs Vetting and Pleading Counsel

The Court hereby appoints Hassan A. Zavareei of Tycko & Zavareei LLP as Plaintiffs Vetting and Pleading Counsel. Plaintiffs Vetting and Pleadings Counsel shall be responsible for coordinating all vetting of Plaintiffs as part of the development of consolidated amended pleadings, on behalf of Plaintiffs and the Classes. Plaintiffs Vetting and Pleadings Counsel will coordinate

with Law and Briefing Counsel and Interim Lead Counsel in connection with the vetting process and the preparation of the pleadings related thereto.

N. Settlement Counsel

The Court hereby appoints Jay Edelson of Edelson PC as Settlement Counsel. Settlement Counsel shall be responsible for coordinating efforts relating to relief, including both monetary and injunctive relief. Settlement Counsel's responsibilities shall include coordinating all settlement-related issues raised in discovery, expert disclosures, motions or trial, as well as assisting Interim Lead Counsel in representing the Plaintiff Classes in any arbitrations, mediations, and/or settlement conferences, consistent with the Court's ADR Local Rules and procedures.

IT IS SO ORDERED.

Dated: September 23, 2021

EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

EXHIBIT 6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM HEATHCOTE, individually and on behalf of all others similarly situated, Plaintiff, v. SPINX GAMES LIMITED, GRANDE GAMES LIMITED, and BEIJING BOLE TECHNOLOGY CO., LTD., Defendants.	Case No. 2:20-cv-01310-RSM ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT HON. RICARDO S. MARTINEZ

The above-captioned matter came before this Court upon Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement. Based upon the memoranda, exhibits, and all the files and proceedings herein, the Court finds as follows:

1. The Court grants preliminary approval of the Settlement based upon the terms set forth in the Settlement Agreement.

2. The settlement terms set forth in the Settlement Agreement appear to be fair, adequate and reasonable to the Settlement Class, and the Court preliminarily approves the terms of the Settlement Agreement, including:

a. A Settlement Fund of $3,500,000;

b. An Incentive Award, which shall not exceed $5,000 for Plaintiff Alma Sue Croft;

c. Attorneys' fees to Settlement Class Counsel, which shall not exceed 25% of the Settlement Fund, plus reimbursement of expenses; and

d. Reasonable settlement administration expenses.

3. The Court grants the Parties' request for certification of the following Rule 23 Settlement Class for the sole and limited purpose of implementing the terms of the Settlement Agreement, subject to this Court's final approval:

> All Persons who played the Applications on or before January 31, 2022, while located in the state of Washington.[1]

4. The Court preliminarily appoints Philip L. Fraietta and Alec M. Leslie of Bursor & Fisher, P.A. as Class Counsel, and Plaintiff Alma Sue Croft as Settlement Class Representative.

5. This Court approves, as to form and content, the notice of proposed class action settlement (the "Notice"), in substantially the form attached to the Settlement Agreement as Exhibits B, C and D. The Court approves the procedure for Settlement Class Members to opt out of, or object to, the Settlement as set forth in the Settlement Agreement Notice.

6. The Court directs the mailing of the Settlement Class Notice by email and/or First-Class U.S. mail to the Settlement Class Members in accordance with the schedule set forth below. The Court finds the dates selected for the mailing and distribution of the Notice, as set forth below, meet the requirements of due process and provide the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

Event	Deadline
Plaintiff to issue subpoena and rider to Platform Providers as described in the Agreement § 4.1.	No later than thirty (30) days of execution of Settlement Agreement
Defendant to provide completed Settlement Class List to Class Counsel and the Settlement Administrator	No later than fourteen (14) days after receiving the data per § 4.1 of the Settlement Agreement

[1] Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this Action and members of their families; (2) the Defendants, Defendants' subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded persons.

Settlement Administrator to provide Notice on the settlement website	No later than seven (7) days after entry of Preliminary Approval
Settlement Administrator to mail Notice via Email and/or First-Class U.S. Mail.	No later than sixty (60) days after entry of Preliminary Approval
Settlement Administrator to send Reminder Notice via email	No later than thirty (30) days prior to the Claims Deadline
Deadline to have postmarked and/or filed a written objection to this Settlement Agreement or a request for exclusion	No later than fifty-six (56) days following entry of the Final Approval Hearing

7. The Court appoints JND Legal Administration as the Settlement Administrator.

8. The Court adopts the following dates and deadlines:

9. The Claims Deadline is scheduled for **Monday, July 18, 2022**, fifty-six (56) days following the Notice Date.

10. Class Counsel shall file a memorandum of points and authorities in support of their motion for approval of attorneys' fees and litigation expenses no later than **Thursday, August 18, 2022**.

11. Settlement Class Counsel shall file a memorandum of points and authorities in support of the final approval of the Settlement Agreement no earlier than **Monday, August 8, 2022**, twenty-one (21) days following the Claims Deadline.

12. A final settlement approval fairness hearing on the question of whether the proposed Settlement, attorneys' fees to Settlement Class Counsel, and the Settlement Class Representative's Incentive Award should be finally approved as fair, reasonable and adequate as to the members of the Settlement Class is scheduled for **Thursday, September 8, 2022, at 9:00 a.m.** before the Court.

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DATED this 24th day of March, 2022.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE