

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

JARRETT JENKINS, EMMOT STEELE, FRANCES
ROYAL, DANAI EWAN, and CHARMAINE WHYTE,
on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

NATIONAL GRID USA SERVICE COMPANY, INC.,
KEYSPAN GAS EAST CORPORATION, NIAGARA
MOHAWK POWER CORPORATION, and THE
BROOKLYN UNION GAS COMPANY,

Defendants.

Case No. 15-cv-1219

Hon. Joanna Seybert, U.S.D.J.

Hon. Arlene R. Lindsay, U.S.M.J.

**PLAINTIFFS' AND CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS'
FEES, REIMBURSEMENT OF LITIGATION EXPENSES,
AND PLAINTIFF SERVICE AWARDS**

PLEASE TAKE NOTICE that pursuant to Fed. R. Civ. P. 23(e) and (h), Plaintiffs Jarrett Jenkins, Emmot Steele, Frances Royal, Danai Ewan, Charmaine Whyte (collectively and with Kristen MacKenzie¹, "Plaintiffs") and Lieff Cabraser Heimann & Bernstein, LLP and Tusa P.C. ("Class Counsel") will move the Court, before the Honorable Joanna Seybert, at the United States District Courthouse for the Eastern District of New York, located at 100 Federal Plaza, Central Islip, New York 11722, on June 10, 2022, at 10:00 a.m., for an order granting this motion which seeks: (1) an attorneys' fees award to Class Counsel of \$12,705,000 comprising one-third of the Settlement Fund and representing a negligible 1.1 multiplier on the actual lodestar Class Counsel expended over seven years ; (2) reimbursement of Class Counsel's actual

¹ Ms. MacKenzie is a plaintiff in the related action *MacKenzie v. National Grid USA Serv. Co., Inc.*, E.D.N.Y. 19 Civ. 1916. As explained below, if the Settlement is approved, Ms. MacKenzie will be joined to this action and her separate case will be dismissed with prejudice.

out-of-pocket litigation expenses they advanced over those years of \$1,052,082.51; and (3) service awards to Plaintiffs totaling \$55,000 (\$10,000 to each Plaintiff except Ms. MacKenzie, who requests \$5,000).

This motion is supported by the accompanying *Memorandum of Law* and the Joint Declaration of Class Counsel Douglas I. Cuthbertson and Joseph S. Tusa (“Joint Decl.”) filed herewith, the argument of counsel, all papers and records on file in this matter, including those filed in support of Plaintiffs’ preliminary approval motion (*see* Dkts. 732-35), and such other matters as the Court may consider.

As discussed in the accompanying *Memorandum of Law*, the requested relief is reasonable because, among other reasons: (1) the requested fee is an appropriate percentage of the non-reversionary monetary fund recovered for the Settlement Class, consistent with fees approved in similar cases and supported by a lodestar crosscheck showing a negligible multiplier; (2) the Settlement Class obtained substantial additional non-monetary benefits (i.e., significant business practice changes) which have not been included in calculating the fee; (3) all of the requested expenses were reasonably and necessarily incurred during the prosecution of this case; and (4) the requested service awards are reasonable and justified given the Class Representatives’ efforts on behalf of the Settlement Class.

Dated: April 12, 2022

Respectfully submitted,

By: /s/ Douglas I. Cuthbertson
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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' AND CLASS COUNSEL'S
MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF
LITIGATION EXPENSES, AND PLAINTIFF SERVICE AWARDS**

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I. INTRODUCTION

Over the course of the last seven years, Class Counsel engaged in exhaustive and vigorously contested litigation against National Grid² on behalf of persons robo-called by the company and their vendors in this proposed class action over alleged violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, et seq. That litigation has included — among other things — seven motions to dismiss, 38 depositions, a disputed class certification motion, dozens of discovery motions, expert discovery, and the review and analysis of hundreds of gigabytes of data. In undertaking that work on a purely contingent basis, Class Counsel advanced \$1,052,082.51 in out-of-pocket litigation expenses, and so far devoted approximately 22,000 hours for a lodestar of \$11,799,970.50. The result of that effort is the proposed class action settlement the Court preliminarily approved on November 8, 2021. *See* Dkt. 736. Class Counsel believe that this Settlement—including a \$38.5 million non-reversionary cash settlement fund and comprehensive TCPA compliance practice changes by National Grid—represents an outstanding result for the Settlement Class. *See* Dkt. 732 (Plaintiffs’ preliminary approval brief).

Class Counsel seek a fee award of \$12,705,000 (*i.e.*, one-third of the \$38.5 million common Settlement Fund), reimbursement of \$1,052,082.51 in reasonable and actual litigation expenses, and service awards of \$10,000 for Plaintiffs Jenkins, Steele, Royal, Ewan, and Whyte and \$5,000 for Plaintiff MacKenzie. Plaintiffs and Class Counsel respectfully request that the Court grant their motion.

² National Grid USA Service Company, Inc., KeySpan Gas East Corporation, Niagara Mohawk Power Corporation and The Brooklyn Union Gas Company are defendants in this action and, with Massachusetts Electric Company, the Narragansett Electric Company, Boston Gas Company, and Nantucket Electric Company, are collectively referred to herein as “National Grid” or “Defendants.”

II. THE TCPA SETTLEMENT ACHIEVED IS EXCEPTIONAL.

A. National Grid’s Payment of a \$38.5 Million Into A Non-Reversionary Common Settlement Fund Is One of the Top TCPA Settlements on Record.

To settle the classwide TCPA claims in this long-standing action, National Grid agreed to pay \$38.5 million cash into a common settlement fund, none of which will revert to National Grid. *See* Dkt. 733-1 (the “Settlement” or “Settlement Agreement”), ¶ 2.34. This cash payment is by far the highest TCPA settlement to date in the Second Circuit and (per Class Counsel’s research) the sixth largest settlement in the history of the TCPA.³ Class Counsel achieved this outcome in the face of substantial litigation risks and uncertainties, including after the Supreme Court’s April 1, 2021 decision in *Facebook, Inc. v. Duguid*, which narrowed the application of the TCPA. *See* 141 S. Ct. 1163 (2021). Class Counsel estimates that the cash value of the Settlement will allow for payments of between \$50 and \$150 for each claiming Settlement Class Member,⁴ depending on the number of valid claims submitted.⁵ Such payments also compare favorably to those in similar TCPA class cases. *See* Section IV.A.I below.

B. National Grid Will Implement Comprehensive and Meaningful Business Practice Changes to Ensure It Complies with the TCPA.

The Settlement also requires National Grid to implement numerous business practice changes to stop the alleged TCPA violations that are the subject of this lawsuit. These far-reaching changes to National Grid’s policies and procedures—which are a result of this

³ The only larger TCPA settlements include: (1) *Aranda v. Caribbean Cruise Line, Inc.*, 12 Civ. 4069 (N.D. Ill.) (\$76 million); (2) *Perez v. Rash Curtis & Associates*, 16 Civ. 3396 (N.D. Cal.) (\$75.6 million payment after a jury verdict); (3) *In re Capital One TCPA Litigation*, 12 Civ. 10064 (N.D. Ill.) (\$75.5 million); (4) *Hageman v. AT&T Mobility LLC*, 13 Civ. 50 (D. MT.) (\$45 million); (5) *Michael Wilkins, v. HSBC Bank Nevada, N.A.*, 14 Civ. 190 (N.D. Ill.) (\$39,975,000).

⁴ Capitalized terms are defined in the Settlement Agreement. *See* Section II (“Definitions”).

⁵ Settlement Class Members may submit claims until May 12, 2022. *See* Dkt. 736 (Preliminary Approval Order), ¶ 39 (describing the relevant deadlines). Class Counsel will submit a declaration from the Claims Administrator disclosing the total number of valid claims and the estimated pro rata payment for each class member accompanying Plaintiffs’ motion for final approval of the Settlement.

litigation—provide substantial additional benefit to the Settlement Class and National Grid customers by helping prevent the robo-calls at the heart of this litigation in the future. If the Settlement is finally approved, National Grid will:

- (1) ask new customers and existing customers updating their phone numbers whether National Grid may use Automated Collection Calls to contact them and will mark its customer system to ensure that National Grid and its vendors comply with customers' wishes, *see* Settlement Agreement, ¶¶ 4.06(a)(i)-(iii) & (b);
- (2) no longer make Automated Collection Calls after a customer indicates that she does not consent to Automated Collection Calls or after National Grid is told that it called the wrong number, *id.*, ¶¶ 4.06(a)(iv)-(vi) & (c);
- (3) notify its debt collection agents of wrong numbers or those lacking consent for Automated Collection Calls, and require them to not robo-call those numbers, *id.*, ¶ 4.06(e)(i);
- (4) require its debt collection agents to report back to National Grid any wrong numbers or revocations of consent to prevent future robo-calls to those numbers, *id.*, ¶ 4.06(e)(ii);
- (5) modify all agreements with its debt collection agents to reflect these changes and new requirements, *id.*, ¶ (4.06)(e)(iii);
- (6) require all outgoing prerecorded messages to comply with New York General Business Law (“GBL”) § 399-p, *id.*, ¶ 4.06(f);
- (7) develop written TCPA compliance and training procedures, *id.*, ¶ 4.06(g); and
- (8) undertake an independent TCPA compliance review, *id.*, ¶ 4.05.

These changes will ensure that millions of National Grid utility customers—whether or not they make a claim in this Settlement—have meaningful opportunities throughout the life

cycle of their relationship with National Grid to prevent the kinds of intrusive, automated calls to cellular phones that the TCPA is designed to stop, and to know that National Grid and its vendors will consistently and systematically honor their privacy and comply with the law.

III. BACKGROUND

Plaintiffs and Class Counsel spent more than seven years vigorously prosecuting this class action, facing significant hurdles at each stage of the litigation and overcoming these obstacles through significant effort and experience. To date, Class Counsel has worked over 21,973.60 hours (with a lodestar of \$11,799,970.50)⁶ to advance this case to a successful resolution and have spent \$1,052,082.51 in actual costs (the majority of which comprise expert and deposition expenses) with no guarantee of recovery. Joint Decl. ¶¶ 34-40

As described further below, and as detailed in Class Counsel's joint declaration filed in support of Plaintiffs' preliminary approval motion (*see* Dkt. 733 ("Joint PA Decl.")), Class Counsel litigated seven motions to dismiss filed by National Grid, a class certification motion, three separate *Daubert* motions, and National Grid's summary judgment requests. *Id.*, ¶¶ 35-54, 89-107. Discovery in this case was long and difficult, requiring laborious document and data analysis, more than three dozen depositions, over 75 sets of party discovery requests and Rule 45 subpoenas, as well as litigating and arguing dozens of discovery motions against both National Grid and its third-party debt collection agencies. Joint Decl. ¶ 12. These discovery efforts required Court assistance at nearly every turn in order to compel National Grid and numerous third parties to produce the voluminous call data and related electronic records necessary to prove Plaintiffs' claims, as well as data and metadata necessary to defeat National Grid's prior

⁶ Those amounts exclude, among other things: (i) entries entered by timekeepers who recorded a *de minimis* amount of time and (ii) although permitted, time spent in preparation of this motion. *See* Joint Decl., ¶ 39. The time records also do not include lodestar accrued after March 25, 2022, which will include time spent supervising the claims and notice program, preparing the final approval motion, and monitoring implementation of the injunctive relief. *See id.*, ¶ 39; Settlement, ¶¶ 4.05, 4.08).

express consent defense. *Id.*, ¶ 13. In total, Class Counsel presented oral argument in more than 20 hearings and conferences before Judges Brown and Lindsay. *See* Joint PA Decl., ¶ 9.

The Plaintiffs performed essential work that benefited the Settlement Class. Among other things, each Plaintiff assisted Class Counsel with their pre-filing investigation before joining the case, reviewed the pleadings, communicated with Class Counsel concerning the progress of the litigation, and participated in the settlement negotiation process. Joint Decl. ¶ 42. Moreover, Plaintiffs Jenkins, Steele, Royal, Ewan, and Whyte each responded to a large volume of discovery served by Defendants. *Id.*, ¶ 43. They each searched their records and produced many responsive documents, responded to interrogatories, and each gave many hours of deposition testimony. *Id.* Two of Plaintiffs' relatives (Plaintiff Whyte's mother and Plaintiff Jenkins' uncle) also provided deposition testimony in response to Defendants' subpoenas. *Id.*

Without these efforts by Plaintiffs and Class Counsel, there would be no Settlement, much less the remarkable package of \$38.5 million in compensation and significant business practice changes that will benefit the Settlement Class. The negotiating history of this Settlement confirms the value of Plaintiffs' and Class Counsel's work: despite repeated overtures from Class Counsel throughout the litigation, Defendants would not meaningfully negotiate a classwide settlement until 2021—after the class certification and *Daubert* motions were fully briefed—and Plaintiffs had assembled an extensive evidentiary record. *Id.*, ¶ 28.

A. Pre-Filing Investigation and Initial Litigation

For months before filing this action in March 2015, Class Counsel investigated the facts concerning Mr. Jenkins' individual and classwide claims against National Grid under the TCPA and GBL §399-p. That investigation included a review of his *pro se* individual lawsuit filed against NCO Financial Systems, Inc. ("NCO"), one of the debt collection agencies retained by National Grid. *See Jenkins v. NCO Fin. Sys., Inc.*, E.D.N.Y., 14 Civ. 4125. Mr. Jenkins asserted

numerous claims in that case, including violations of the TCPA by NCO for robo-calling his cellular telephone for National Grid, which was not a defendant in that action. Class Counsel assisted Mr. Jenkins in the resolution of that individual action. Joint Decl., ¶¶ 7-8.

B. Pleadings and Motions to Dismiss

Defendants vigorously attacked Plaintiffs' pleadings for several years. From April 30, 2015 to April 28, 2017, Defendants filed seven motions to dismiss attacking the sufficiency of Plaintiffs' TCPA and GBL claims, Plaintiffs' standing, and the Court's subject matter and personal jurisdiction. *See* Dkts. 80, 135, 159, 160, 161, 183, 230. Between December 2017 and December 2019, Defendants opposed Plaintiffs' efforts to amend the complaint to add Plaintiffs Ewan and Whyte,⁷ and later to add Plaintiff MacKenzie.⁸ *See* Dkts. 300, 542. While certain defendants were dismissed on jurisdictional grounds, and the GBL §399-p claim was dismissed on standing grounds, Class Counsel defeated Defendants' TCPA defenses at the heart of this litigation, and succeeded in adding Plaintiffs Ewan and Whyte to the case. *See* Dkts. 152, 222, 254, 434; 5/1/17 Electronic Order; 434 (Minute Order), 531-3 (8/21/18 H'rg. Tr.), 8/29/18 Electronic Order. The Court deferred decision on the joinder of Plaintiff MacKenzie until after deciding the pending class certification motion.⁹ *See* 11/15/19 & 12/03/19 Electronic Orders.

⁷ Given National Grid's opposition to Plaintiffs' motion to add Plaintiffs Ewan and Whyte, Plaintiffs Ewan and Whyte filed a separate, related action to preserve their statutes of limitations. *See Ewan, et. al. v. National Grid USA Serv. Co., Inc., et al.*, E.D.N.Y. 17 Civ. 7472. After granting their joinder motion, the Court closed the separately filed *Ewan* action. *See Ewan*, 8/21/18 Electronic Order.

⁸ Like with the *Ewan* action, Plaintiff MacKenzie filed a separate, related action to preserve her statute of limitations. *See MacKenzie. v. National Grid USA Serv. Co., Inc.*, E.D.N.Y. 19 Civ. 1916. Defendants have withdrawn their objection to joining Plaintiff MacKenzie as a plaintiff to this action pending achievement of the Effective Date. *See* Settlement Agreement ¶¶ 15.01-15.05. If the Settlement is approved, Ms. MacKenzie's separate case will be dismissed with prejudice. *Id.*

⁹ Plaintiffs' class certification motion and the parties' *Daubert* motions have been terminated without prejudice and subject to renewal pending the outcome of the settlement approval process. *See* 9/10/2021 Electronic Order.

C. The Enormous Scope and Contentious History of Discovery

Fact discovery in this case lasted over three years (over four years including expert discovery) and required many thousands of hours of work by Class Counsel. Joint Decl., ¶ 11. This unusually long and involved discovery process occurred for two principal reasons: (1) Class Counsel and their experts' need to request and carefully analyze vast quantities of highly relevant electronic data in various formats and from numerous sources and (2) ongoing disputes with Defendants over discovery issues, which required repeated court intervention. *Id.*, ¶ 13. In the end, Plaintiffs obtained hundreds of gigabytes of electronic data, propounded and compelled substantial written discovery (interrogatories and admissions), and took dozens of depositions. *Id.*, ¶ 14.

For example, for each of the over a dozen dialers used to make automated calls to Settlement Class Members, Defendants or their collection agents maintained extensive electronic logs showing important details about these collections robo-calls, such as the pre-recorded message used, the phone number called, and the date of the call. *Id.*, ¶ 15. Most of these records used shorthand or codes that required deposition testimony to decrypt. *Id.*, ¶ 16. To establish liability based on these call logs, Class Counsel took dozens of depositions and served dozens of interrogatories concerning their proper interpretation. *Id.*, ¶ 17.

Defendants' TCPA prior express consent affirmative defense also required substantial discovery. *Id.*, ¶ 18. Most of Defendants' purported evidence of prior express consent resides on massive electronic databases or is archived on paper and microfiche, which record hundreds of millions of interactions between National Grid and its customers, including do-not-call requests, wrong number complaints, incoming phone calls, in-person visits, service appointments, transmission of utility bills, and bill payments. *Id.*, ¶ 19. As with the call logs, these records necessitated interpretation by fact witnesses with knowledge of the relevant systems, some of

whom work for third parties based outside of the United States. *Id.*, ¶ 20. This required Class Counsel to explain, authenticate, and organize the relevant discovery through depositions taken throughout the United States and written discovery (admissions and interrogatories). *Id.*, ¶ 21.

In total, Class Counsel deposed 38 fact witnesses (three of whom sat for two separate depositions) and served more than two dozen sets of written discovery requests. *Id.*, ¶ 22. Moreover, Defendants and the third-parties rarely made document productions voluntarily. *Id.*, ¶ 21. Instead, obtaining the critical call logs and other pivotal discovery required over 100 telephonic meet and confers with outside counsel for Defendants and their collection agents and filing *dozens* of motions to compel. *See* Joint PA Decl., ¶¶ 89-91. Even still, there were disputes over whether Defendants fully-complied with the Court's production orders, necessitating additional motion practice. *See id.*, ¶ 91 (describing the history of these successful motions).

In June 2019, then-Magistrate Judge Brown described the painstaking discovery process as follows: “[W]e are turning over lots of stones, right? . . . [Y]ou talk about, you know, burning down the forest. We’ve deforested large areas, right. We really have.” Dkt. 571 (6/5/2019 H’rg Tr.) at 18:3-8; *see also id.* at 56:20-25 (The Court: “To whoever’s point I’ve, you know, again, allowed you to turn over a lot of stones, right? We’ve deforested massive strips. You have to have some idea. When I look at you and say well, we’ve got millions of callers in this section and that section, you know, we should be pretty close [to addressing class certification].”).

D. Class Certification, Expert Discovery, and Daubert Briefing

After Plaintiffs moved for class certification in July 2019, the parties engaged in expert discovery, additional class certification briefing, and *Daubert* motion briefing in tandem for more than 18 months. Joint Decl. ¶ 23. These motions and the related expert discovery required additional thousands of hours of work from Class Counsel. *Id.*

On July 31, 2019, Plaintiffs served their motion for class certification, supported by the expert report of Anya Verkhovskaya, and over 1,000 pages of supporting exhibits. *Id.*, ¶ 24. Ms. Verkhovskaya's report explained how common analyses can be used across all call logs to identify TCPA-violative calls made by Defendants and their agents. *Id.*

Defendants opposed class certification on January 17, 2020, supported by multiple employee witness declarations and two lengthy expert reports. *See* Dkt. 652. Defendants also served a motion to strike several opinions offered by Plaintiffs' expert. *See* Dkt. 676. In response, Plaintiffs served requests for admissions relating to the data analysis performed by Defendants' experts, filed and argued a motion to compel expert discovery (*see* Dkts. 602, 620, 628, 632, 641, 679), and deposed both experts. Joint Decl. ¶ 25.

On July 24, 2020, Plaintiffs served their reply in support of class certification and a motion to exclude certain opinions offered by Defendants' experts. *See* Dkts. 670 & 674. The reply attached a rebuttal report from Ms. Verkhovskaya and an expert report from Dr. DeLiang Wang, one of world's foremost experts on speech recognition and transcription technology. Joint Decl. ¶ 26. Dr. Wang and Ms. Verkhovskaya collectively explained how Defendants' voluminous store of recorded customer telephone calls can be efficiently and reliably analyzed for relevant evidence of prior express consent. *Id.*

On October 27, 2010, Defendants filed another *Daubert* motion attacking the opinions of Ms. Verkhovskaya and Dr. Wang, after deposing them, attaching two additional expert reports, which prompted further depositions by Plaintiffs. *Id.*, ¶ 27. Briefing on Defendants' final motion to exclude expert testimony concluded on February 2, 2021. *Id.*

E. The Settlement Negotiations

Throughout this litigation, Class Counsel raised the prospect of settlement with National Grid's counsel, sometimes at the suggestion of then-Magistrate Judge Brown. *Id.*, ¶ 28.

Defendants repeatedly declined Plaintiffs’ overtures, but finally agreed to mediate in early 2021, after class certification and related *Daubert* motions were fully briefed. *Id.*

The parties chose retired federal judge and experienced JAMS mediator, the Honorable Wayne R. Andersen. After submitting mediation statements, in May 2021 Judge Andersen held two all-day mediations by Zoom. *Id.*, ¶ 29. Although the Parties failed to reach a tentative settlement (*see* Dkt. 727), they continued to communicate with Judge Andersen, and mediated again on June 29, 2021, which also ended without resolution. *See* Joint PA Decl., ¶ 112. Over the following weeks, the parties continued to negotiate through Judge Andersen, and on July 20, 2021—with the judge’s substantial assistance—reached an agreement in principle. *Id.*, ¶ 113; Dkt. 729. Through early October 2021, the parties negotiated the details and drafted the Settlement Agreement and exhibits, participating in a final mediation with Judge Andersen on October 11 concerning two outstanding issues. *Id.*, ¶¶ 114-15. The parties resolved those outstanding issues with Judge Andersen’s assistance and thereafter completed their negotiations and executed the Settlement Agreement as of October 29, 2021. Class Counsel filed a motion for preliminary approval that day. *Id.*, ¶¶ 115-17; *see* Dkt. 732.

IV. ARGUMENT

The Settlement Agreement provides that Class Counsel may seek Court approval of an award of attorneys’ fees not exceeding one-third of the \$38.5 million common settlement fund and also reasonable costs and expenses incurred in investigating and litigating this action. *See* Settlement Agreement, ¶ 5.01. Rule 23(e)(2)(C)(iii) requires the Court to consider “the terms of any proposed award of attorneys’ fees, including timing of payment.” Rule 23(h) further provides that any fee awarded to Class Counsel must be approved by the Court.

A. Class Counsel’s Request for One-Third of the Settlement Fund in Attorneys’ Fees is Reasonable.

It is well-established that when a representative party confers a “substantial benefit on the members of an ascertainable class,” Class Counsel is entitled to fees based upon the benefit obtained. *Ramey v. Dist. 141, Int’l Ass’n of Machinists & Aerospace Workers*, 99 Civ. 4341, 2005 WL 8157424, at *2 (E.D.N.Y. Feb. 25, 2005) (citing *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970)). Similarly, where Class Counsel’s efforts lead to the creation of a common fund that benefits class members, like here, Class Counsel should be paid directly from that fund. *See Fresno Cty. Employees’ Ret. Ass’n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 68 (2d Cir. 2019) (“The common-fund doctrine is . . . rooted in the courts’ ‘historic power of equity to permit’ a person who secures a fund for the benefit of others to collect a fee directly from the fund.”) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 257 (1975) (citation omitted)) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

“Awards of fair attorneys’ fees from a common fund encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and therefore discourage future misconduct of a similar nature.” *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 356 (E.D.N.Y. 2010); *see also In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (fees awarded should serve as an “inducement for lawyers to make similar efforts in the future”).

1. The “Percentage of the Fund” Method Supports the Requested Fee.

In common fund cases like this one, “the Second Circuit favors awarding fees according to the ‘percentage of fund’ method.” *Cohan v. Columbia Sussex Mgmt.*, 12 Civ. 3203, 2018 WL 4861391, *2 (E.D.N.Y. Sept. 28, 2018) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)); *accord Pedro Enrique Quispe v. Stone & Tile Inc. & Lazer*

Mechelovitz, 20 Civ. 4682, 2022 WL 960926, at *5 (E.D.N.Y. Feb. 1, 2022) (citing *Gonzalez v. Citusa Park Ave., LLC*, 20 Civ. 2326, 2020 WL 8920703, at *2 (S.D.N.Y. Nov. 30, 2020)); *Pantelyat v. Bank of Am., N.A.*, 16 Civ. 8964, 2019 WL 402854, at *8 (S.D.N.Y. Jan. 31, 2019) (noting the “strong consensus—both in this Circuit and across the country—in favor of awarding attorneys’ fees in common fund cases as a percentage of the recovery.”) (citation omitted). This is also true in TCPA cases. *See Melito v. Am. Eagle Outfitters, Inc.*, 14 Civ. 2440, 2017 WL 3995619, at *17 n.22 (S.D.N.Y. Sept. 11, 2017) (The “TCPA is not a fee-shifting” statute and attorneys’ fees in a TCPA case should be awarded using the “percentage method.”).

Courts in this Circuit frequently find that requests for attorneys’ fees comprising approximately one-third of a class action’s settlement amount are reasonable. *See, e.g., Mikhlin v. Oasmia Pharm. AB*, 19 Civ. 4349, 2021 WL 1259559, at *7 (E.D.N.Y. Jan. 6, 2021) (noting that a fee of one-third of a settlement fund is common in the Second Circuit). The following are examples of other cases in this Circuit in which courts granted a fee award amounting to approximately one-third of the settlement fund:

- *Cates v. Trustees of Columbia Univ. in City of New York*, 16 Civ. 06524, 2021 WL 4847890, at *2 (S.D.N.Y. Oct. 18, 2021) (awarding one-third of \$13 million settlement fund plus litigation expenses)
- *Lea v. Tal Education Group*, 18 Civ. 5480, 2021 WL 5578665, at * 12-13 (S.D.N.Y. Nov. 30, 2021) (awarding one-third of \$7.5 million settlement amount plus costs)
- *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 18 Md. 2819, 2020 WL 6193857, at *5-6 (E.D.N.Y. Oct. 7, 2020) (awarding one-third of \$51.25 million settlement amount)
- *In re J.P. Morgan Stable Value Fund ERISA Litig.*, 12 Civ. 2548, 2019 WL 4734396, *2 (S.D.N.Y. Sept. 23, 2019) (awarding one-third of \$75 million settlement amount and \$1,468,795.86 in out-of-pocket litigation expenses and costs)
- *City of Providence v. Aeropostale, Inc.*, 11 Civ. 7132, 2014 WL 1883494, at *20 (S.D.N.Y. May 9, 2014) (awarding one-third of \$15 million settlement recovery plus litigation expenses)

- *Anwar v. Fairfield Greenwich Ltd.*, 09 Civ. 118, 2012 WL 1981505, at *3, 4 (S.D.N.Y. June 1, 2012) (awarding 33% of \$7.7 million settlement fund, which “is well within the percentage range that courts within the Second Circuit have awarded in other complex litigation” and reimbursement of plaintiffs’ counsel’s expenses)
- *In re Oxycontin Antitrust Litig.*, 04-md-1603-SHS, Dkt. 360 at 9 (S.D.N.Y. Jan. 25, 2011) (awarding one-third from a class settlement fund of \$16 million and reimbursing expenses incurred in prosecution of the lawsuit)
- *In re DDAVP Direct Purchaser Antitrust Litig.*, 05 Civ. 2237, 2011 WL 12627961, at *5 (S.D.N.Y. Nov. 28, 2011) (awarding one-third of \$20,250,00 settlement fund and reimbursement of expenses incurred in the prosecution of this lawsuit)
- *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146, 152 (S.D.N.Y. 2010) (awarding one-third of \$35 million settlement fund and \$1,270,915.40 in expenses advanced by Plaintiffs’ Counsel)
- *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 368 (S.D.N.Y. 2002) (awarding one-third of \$11.5 million fund and citing other cases that awarded one-third of a settlement fund and reimbursement of out-of-pocket costs and expenses)

Courts outside the Second Circuit often grant fee awards that comprise one-third of any TCPA class action settlement fund, including in TCPA cases similar in scope and complexity to this one. *See, e.g., Krakauer v. Dish Network, L.L.C.*, 14 Civ. 333, 2018 WL 6305785, at *7 (M.D.N.C. Dec. 3, 2018) (awarding one-third of \$61,342,800 (or \$20,447,600) and class counsel’s expenses in TCPA action); *Dakota Med., Inc. v. RehabCare Grp., Inc.*, 14 Civ. 02081, 2017 WL 4180497, at *6, 8, 9, 13 (E.D. Cal. Sept. 21, 2017) (awarding one-third of the \$25 million settlement fund (\$8,333,333) for attorneys’ fees as well as class counsel’s expenses in TCPA case); *Hooker v. Sirius XM Radio, Inc.*, 13 Civ. 003, 2017 WL 4484258, at *1, 9 (E.D. Va. May 11, 2017) (awarding 35% of a \$35 million fund (\$12.25 million) to Plaintiff’s counsel and expenses in TCPA class action); *Hageman v. AT&T Mobility LLC*, 13 Civ. 50, 2015 WL 9855925, at *6 (D. Mont. Feb. 11, 2015) (awarding one-third of a \$45 million common fund (\$15 million) in attorneys’ fees in TCPA class action).

Accordingly, Class Counsel's request of \$12,705,000—or one-third—of the \$38.5 million common settlement fund for attorneys' fees is consistent with awards granted in comparable cases, even without taking into account the significant non-monetary Settlement benefits achieved for the Settlement Class and all of National Grid's customers.

2. The Fee Request is Supported by the *Goldberger* Factors.

The Second Circuit requires district courts to measure the reasonableness of a requested fee percentage by analyzing the factors set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000), namely:

(1) the time and labor expended by counsel, (2) the magnitude and complexity of the litigation, (3) the risk of litigation, (4) the quality of representation, (5) the requested fee in relation to the settlement, and (6) public policy considerations.

An examination of each *Goldberger* factor supports the reasonableness of the requested fee here.

a. This Case Required Substantial Time and Effort.

Class Counsel spent a significant amount of time over seven years investigating, litigating, conducting discovery, and negotiating the Settlement. All of the time spent was on a contingent basis, without any guarantee of payment. Joint Decl., ¶ 38 (documenting over 21,973 hours of attorney time spent through March 25, 2022). Class Counsel's work included:

- their pre-suit investigation;
- briefing six motions to dismiss, Defendants' summary judgment motion requests, the motion for class certification, three *Daubert* motions, several procedural motions (*e.g.*, the motions for joinder of new Plaintiffs), and over two dozen discovery motions;
- preparing for and presenting oral argument in over twenty hearings before Judges Brown and Lindsay;
- propounding more than two dozen sets of written discovery requests on Defendants and approximately fifty Rule 45 subpoenas;
- deposing 35 fact witnesses and 3 expert witnesses;

- defending 5 Plaintiff depositions, 3 expert depositions, and 1 third-party deposition of Plaintiff Whyte's mother;
- over 100 telephonic meet and confer calls with counsel for Defendants or third parties responding to subpoenas;
- working with two experts to support Plaintiffs' motion for class certification;
- thousands of hours of analysis and review of hundreds of gigabytes of data, metadata, and documents produced by Defendants and third parties;
- engaging in an involved and extended settlement and mediation process; and
- facilitating the settlement approval procedure, including by procuring and working with the Claims Administrator on the claims and notice process.

The substantial time and labor that Class Counsel have devoted (and will continue to devote) to prosecuting and settling this action readily justify the requested fee. *See Melito*, 2017 WL 3995619, at *17 (first *Goldberger* factor favors requested fee in TCPA case where class counsel "amended the complaint several times, engaged in substantial motion practice, reviewed hundreds of thousands of pages of documents, and deposed several witnesses.").

b. The Complexity of the Case Supports the Fee Request.

Courts regularly find that a greater award is warranted where a case is complex. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award.").

In Class Counsel's experience, having prosecuted and settled dozens of TCPA class actions—including some of the largest TCPA settlements on record—this case has been the most complicated and difficult TCPA case to date, requiring an unusually high investment of professional time and effort. *See Joint Decl.*, ¶ 5. In large part, this is due to the substantial and protracted discovery in this action, along with the amount, location, and type of evidence. *See Joint PA Decl.*, ¶¶ 55-94 (describing discovery in this case). As just one example, Defendants and their collection agents used well over a dozen different dialers to make tens of millions of

robo-calls. Joint Decl., ¶ 15. Plaintiffs often had to file and prevail on motions to compel the call data generated by those dialers, and then assemble the evidence supporting the proper interpretation of the dialers' call logs. *Id.*, ¶¶ 17-20. This process required thousands of hours of attorney time, testimony from dozens of fact witnesses, and many thousands of hours of expert work. *Id.*, ¶ 16. The complexity of the discovery process alone favors the fee request. *See Melito*, 2017 WL 3995619, at *17 (non-straightforward TCPA discovery favors a substantial award).

Proceeding with this case as a class action also added significant additional complexity. *See Garland v. Cohen & Krassner*, 08 Civ. 4626, 2011 WL 6010211, at *7 (E.D.N.Y. Nov. 29, 2011) (“Given the complexity of any class action lawsuit . . . it is reasonable to assume that absent the instant Settlement, continued litigation would have required extensive time and expense.”). Class Counsel and their retained experts expended significant effort countering National Grid’s arguments that individualized consent issues should preclude class certification. *See* Joint Decl., ¶¶ 18-21, 26. These novel and complex issues concerning class certification also support the fee request. *See Melito*, 2017 WL 3995619, at *17 (“complex legal issues” including “whether issues of individualized consent precluded class certification” support the fee request in this TCPA class action).

c. The Risk of Non-Payment Was High.

Courts in the Second Circuit, including the *Goldberger* court itself, generally view the risks of the litigation, and the concomitant risk of non-payment to the attorneys, as the preeminent factor in assessing a reasonable percentage. *Goldberger*, 209 F.3d at 54 (“We have historically labeled the risk of success as ‘perhaps the foremost’ factor to be considered in determining whether to award an enhancement.”). When a class case like this one is litigated on contingency, the risk of non-payment should factor into the determination of an appropriate fee.

See Cates, 2021 WL 4847890, at *4-5 (“Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.”) (citing *In re Comverse Tech., Inc. Sec. Litig.*, 06 Civ. 1825, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010)); *In re Payment Card Intercharge Fee and Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 440-41 (E.D.N.Y. 2013) ([t]he most important *Goldberger* factor is often the case’s risk,” and that class counsel “should be rewarded . . . for achieving substantial value for the class” because “[i]f not for the attorneys’ willingness to endure for many years the risk that their extraordinary efforts would go uncompensated, the settlement would not exist.”); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 02 Civ. 3500, 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (“Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award.”).

Here, Class Counsel took this case on a strictly contingency fee basis, expending considerable time and resources over seven years despite significant risk that they might ultimately receive nothing for their efforts and commitment. Joint Decl., ¶ 34.

The substantial motion practice in this case to date, and the inevitable trial and appeals still ahead further demonstrate the risks taken by Class Counsel. While Plaintiffs largely defeated National Grid’s dismissal motions, Defendants succeeded in dismissing certain affiliate defendants and the classwide GBL § 399-p claims. *Id.*, ¶ 9. National Grid forcefully opposed Plaintiffs’ class certification motion, arguing for a narrower class (geographically) than is covered by the Settlement. *See* 9/10/2021 Electronic Order. Even assuming the Court grants the class certification motion, Plaintiffs must survive any Rule 23(f) appeals.

Despite the significant discovery Plaintiffs already conducted, substantial discovery remains, including discovery concerning National Grid’s Melita Dialer, as well as discovery

concerning archived call data that is not easy to collect and analyze. *Id.*, ¶ 30. Once fact discovery is closed, National Grid intends to file for summary judgment. *See* Dkt. 580 (June 19, 2019 letter in which National Grid maintained summary judgment was ripe). Defendants will likely argue that they should not be held liable for calls made by their collectors and also that existing TCPA settlements by certain collectors preclude liability in this action. *Id.*, ¶ 31. Further, National Grid will argue that the case should be limited to New York, and not include the New England class members that are part of the Settlement. *Id.*, ¶ 32. After summary judgment, Plaintiffs would still have to succeed in any trial and any subsequent appeals. *Id.*, ¶ 33. Leaving aside that resolution of the case was many years away and the Settlement secured a certain and immediate benefit for the Settlement Class, the risks of non-recovery are substantial and very real. *See Mikhlin*, 2021 WL 1259559, at *5 (discussing the burden the plaintiffs would face were the parties to engage in dispositive motion practice); *Weil v. Long Island Sav. Bank*, FSB, 188 F. Supp. 2d 258, 264 (E.D.N.Y. 2001) (“It is axiomatic that anything can happen at trial.”).

Moreover, when Class Counsel filed this case in March 2015, they faced serious risks of adverse changes in law curtailing the TCPA’s scope, which could have significantly diminished Class Counsel’s ability to obtain meaningful monetary relief and the wide-sweeping business practices achieved herein. During this time, powerful trade groups, including ACA International (a group that represents debt collectors) and gas and electric trade lobbyists petitioned the FCC asking for the agency to weaken the TCPA¹⁰ or mounted legal challenges, several of which

¹⁰ For example, one month before Plaintiff Jenkins filed the first complaint in this matter—Edison Electric Institute and American Gas Association petitioned the FCC for broad exceptions to TCPA liability to permit any robo-calls to utility “customers about their utility service at the number provided by the customer in connection with establishing or continuing their utility service do not violate the TCPA.” *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 31 F.C.C. Rcd. 9054,

concluded during the pendency of this case. *See ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F. 3d 687 (2018) (limiting TCPA's definition of an auto-dialer); *Duguid*, 141 S. Ct. 1163 (same).

All these risks demonstrate that Class Counsel's payment for their work in this case was far from certain. Accordingly, the risk of nonpayment strongly supports the fee request.

d. Class Counsel Provided High Quality, Dedicated Representation.

The quality of representation is measured by “the backgrounds of the lawyers involved in the lawsuit and the recovery obtained.” *Cohan*, 2018 WL 4861391, at *4; *see also Goldberger*, 209 F.3d at 55 (“[T]he quality of representation is best measured by results,” *which* are evaluated in light of “the recovery obtained and the backgrounds of the lawyers *involved* in the lawsuit.”). Here, despite the litigation risks and opposition from Defendants' experienced and able counsel, Class Counsel used their substantial experience litigating complex class actions—including significant expertise specifically in TCPA cases (*see* Dkt. 648 (Cuthbertson Decl. ISO Class Certification) ¶¶ 10-17 (describing Lieff Cabraser's extensive experience in TCPA cases)—to procure valuable benefits for the Settlement Class. The skill and quality of this legal representation further supports the fee request.

e. The Requested Percentage is in Line with Percentages Approved in Similar Cases.

In determining a reasonable fee, courts “look [] to other common fund settlements of a similar size, complexity and subject matter” for comparison purposes. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 05-md-1720, 2019 WL 6888488, at *19 (E.D.N.Y. Dec. 16, 2019). As discussed above in Section IV. A. I., the requested fee here is in line with fees awarded in this Circuit, as well as for similar TCPA cases outside this Circuit.

9058-59 (2016) (citing petition). Although this petition did not materially change TCPA liability for utilities, that result was far from clear when Class Counsel filed this case. *See id.* at 9065-9066.

Thus, Class Counsel’s request is reasonable and appropriate, particularly where, as here, the Settlement also includes significant business practice changes that will benefit the Settlement Class. *See* Section II. B. above (describing those changes).

f. Public Policy Supports the Requested Fee.

To incentivize experienced counsel to protect consumer privacy rights against a large and well-financed utility company, a fee award must represent a sufficient premium over the time value of the work invested to justify the economic risks faced. *See Goldberger*, 209 F.3d at 51 (“There is . . . commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.”); *In re Comverse Tech.*, 2010 WL 2653354, at *6 (“an improperly calibrated fee would provide a disincentive to future counsel to take risks and pursue large class settlements that [governmental agencies] cannot.”).

This case serves the important public policy of ensuring that National Grid, one of the largest utilities in the Northeast, does not make unwanted Automated Collection Calls to its customers’ cellular telephones. *In re Colgate-Palmolive ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) (noting that certain “types of common fund cases are based on laws reflecting important policy concerns — for example, the protection of consumers”).

As this Court has held:

The TCPA was enacted to address concerns that telemarketing can be an intrusive invasion of privacy. . . . Particularly, the statute was aimed at minimizing automated and pre-recorded calls to customers' homes. . . . The statute also prohibits the use of automatic telephone dialing systems and artificial or prerecorded voice messages to call pagers, cellular telephones, or other devices which charge the called party for the cost of the call without the prior express consent of the called party.

Dkt. 222 at 13. Because the Settlement furthers these important policy interests, public policy favors Class Counsel’s fee request.

3. A Lodestar Cross-check Confirms the Reasonableness of the Requested Fee.

In common fund cases, courts in the Second Circuit will generally use the lodestar-multiplier method “as a ‘cross check’ on the reasonableness of the requested percentage.” *Goldberger*, 209 F.3d at 50. When used as a cross-check, “the hours documented by counsel need not be exhaustively scrutinized by the district court.” *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 588 (S.D.N.Y. 2008) (citing *Goldberger*, 209 F.3d at 50); *see also Tanski v. AvalonBay Comtys., Inc.*, 15 Civ. 6260, 2020 WL 2733989, at *1 (E.D.N.Y. May 26, 2020) (“Because the lodestar is being used merely as a cross check it’s not necessary for the court to delve into each hour of work that was performed by counsel”).

As documented in the Joint Declaration submitted herewith, the total lodestar for Class Counsel is \$11,799,970.50. *See* Joint Decl. ¶ 38. To calculate their lodestar, Class Counsel multiplied the 21,973.60 hours they expended through March 25, 2022 by Class Counsel’s customary hourly billing rates of (i) \$585 to \$975 for partners; (ii) \$395 to \$505 for associates; (iii) \$415 for staff attorneys; (iv) \$250 to \$405 for paralegals; and (v) \$420 for litigation support specialists.¹¹ *See Joint Decl.* Exhibits A and B attached thereto. While “the court need not take into account the location of the attorneys’ offices or the venue of the case . . . [w]hen considering hourly rates for attorneys,” *see In re Metlife Demutualization Litig.*, 689 F. Supp. 2d at 358, these hourly rates are reasonable and typically charged by similarly well-qualified counsel in the Eastern and Southern Districts of New York. *See, e.g., Tal Education Group*, 2021 WL 5578665, at *12 (lodestar crosscheck using rates ranging from \$600 to \$995 for partners and

¹¹ These are Class Counsel’s current hourly rates. *See* Joint Decl., Exhibits A and B. Courts use “current rates” to calculate the lodestar figure to account for the delay in payment. *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (citing *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989)); *City of Providence*, 2014 WL 1883494, at *13 (applying current rates to the work done, “which has the approval of both the Second Circuit and the Supreme Court”).

\$500 to \$750 for associates, which “are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude.”); *Tanski*, 2020 WL 2733989, at *2 (lodestar cross-check using billable rates of between \$405 and \$790 for partners and \$270 to \$500 for associates); *Pirnik v. Fiat Chrysler et al.*, 15 Civ. 7199, Dkts. 361 & 369 (approving hourly rates partners of \$750 to \$950 and non-partner attorney rates of \$450 to \$600); *In re Platinum & Palladium Commodities Litig.*, 10 Civ. 3617, 2015 WL 4560206, at *3 (S.D.N.Y. July 7, 2015) (approving hourly billing rates ranging from \$250 to \$950); *City of Providence*, 2014 WL 1883494, at *13 (lodestar cross-check using hourly billing rates from \$640 to \$875 for partners, \$550 to \$725 for of counsels, and \$335 to \$665 for other attorneys).

The \$12,705,000 attorneys’ fee request yields a negligible “multiplier” of under 1.1 on Class Counsel’s current lodestar of \$11,799,970.50 as of March 25, 2022, a multiplier that will only decrease further through final approval and claims administration. *See* Joint Decl., ¶ 38. Courts regularly approve fee requests with similar lodestar multipliers. *See, e.g., Hart v. BHH, LLC*, 15 Civ. 4804, 2020 WL 5645984, at *11 (S.D.N.Y. Sept. 22, 2020) (awarding fees on 1.5 multiplier); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 14 Civ. 7126, 2018 WL 6250657, at *3 (S.D.N.Y. Nov. 29, 2018) (awarding over \$18 million in fees on a 1.41 multiplier); *Silverstein v. AllianceBernstein, L.P.*, 09 Civ. 5904, 2013 WL 7122612, at *9 (S.D.N.Y. Dec. 20, 2013) (“[T]he Court finds that the fee that Class Counsel seeks is reasonable and does not represent an exorbitant multiplier—indeed, there is no multiplier.”); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 376 (S.D.N.Y. 2013) (awarding 1.34 multiplier on fee of \$116.8 million from \$750 million fund); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 06-MD-1775, 2012 WL 3138596, at *5 (E.D.N.Y. Aug. 2, 2012) (awarding \$54 million fee request on “modest 1.11 multiplier of the lodestar.”). The trivial multiplier in this case, which may become a

negative multiplier before the case is concluded, is well below the range of multipliers regularly approved by courts in the Second Circuit pursuant to lodestar cross checks of percentage-of-fund awards. *See, e.g., Patti's Pitats, LLC v. Wells Fargo Merch. Servs., LLC*, 17 Civ. 04583, 2021 WL 5879167, at *5 (E.D.N.Y. July 22, 2021) (finding 4.26 to be within the range of acceptable multipliers in context of a lodestar cross-check); *Bekker v. Neuberger Berman Group 401(k) Plan Inv. Committee*, 504 F. Supp. 3d 265, 271 (S.D.N.Y. 2020) (finding 5.85 to be within the range of acceptable multipliers in context of a lodestar cross-check).¹²

Thus, the lodestar cross-check further confirms the reasonableness of the requested fee.

B. The Expense Request is Reasonable.

Class Counsel requests the reimbursement of \$1,052,082.51 in reasonable litigation expenses. *See* Joint Decl. ¶ 40 and Exhibits A and B attached thereto. These expenses are actual out-of-pocket expenses incurred to prosecute and settle this case, the bulk of which comprises necessary fees for Class Counsel's experts, followed by deposition-related costs (e.g., transcripts, court reporters, and travel), database fees for housing and processing the electronic data at issue in this case, legal research fees, and mediation costs. *See id.*

Class Counsel's expenses were necessary to the successful prosecution of this case, are routinely reimbursed from common funds, and are "of the type normally billed by attorneys to paying clients *Guevoura Fund Ltd. v. Sillerman*, 15-7192, 2019 WL 6889901, at *22 (S.D.N.Y. Dec. 19, 2018); *see also In re Colgate-Palmolive*, 36 F. Supp. 3d at 353 ("[c]ourts routinely award" reimbursement for experts); *Yang v. Focus Media Holding Ltd.*, 11 Civ. 9051, 2014 WL

¹² *Accord, Cohan*, 2018 WL 4861391, at *5 (noting that courts regularly approve multipliers of up to 6 times lodestar); *In re Colgate-Palmolive*, 36 F. Supp. 3d at 347 (approving an award with a multiplier of 5.2 on the lodestar).

4401280, at *19 (S.D.N.Y. Sept. 4, 2014) (finding computer research, photocopying, postage, meals, and court filing fees “necessary for Lead counsel to successfully prosecute this case”).

C. Service Awards for the Class Representatives Are Appropriate.

Service awards “are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs.” *Cohan*, 2018 WL 4861391, at *6 (quotation omitted); *see also Hall v. ProSource Tech., LLC*, 14 Civ. 2502, 2016 WL 1555128, *9 (E.D.N.Y. Apr. 11, 2016) (“Courts regularly grant requests for service awards in class actions ‘to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs.’”) (quotation omitted).

Here, the Class Representatives collectively communicated with Class Counsel on over 200 occasions in person, by telephone, or email in connection with their collection of documents for investigation and litigation, review of the pleadings, discussion of litigation developments, and settlement negotiations. Joint Decl. ¶ 42. Moreover, they also responded to numerous interrogatories, searched for and produced many documents (including their private tax returns), and gave several hours of deposition testimony. *Id.*, ¶ 43

Class Counsel respectfully request service awards of \$10,000 for Plaintiffs Jenkins, Steele, Royal, Ewan, and Whyte, and an award of \$5000 for Plaintiff MacKenzie. The different awards account for the additional efforts Plaintiffs Jenkins, Steele, Royal, Ewan, and Whyte made during the discovery process.¹³ But for the efforts of the six Plaintiffs, other Settlement

¹³ Defendants never served Plaintiff MacKenzie with any discovery requests, in light of the Court’s Order effectively staying that case until the Court decided the Class Certification motion in the *Jenkins* matter. *See* 11/15/2019 and 12/3/2019 Electronic Orders.

Class Members would have received nothing. The requested service awards should be approved. *See Patti's Pitats, LLC*, 2021 WL 5879167, at *5 (approving \$15,000 and \$10,000 service awards); *Kindle v. Dejana*, 308 F. Supp. 3d 698, 717 (E.D.N.Y. 2018) (approving \$10,000 service award and collecting cases that granted service awards in that amount); *Cohan*, 2018 WL 4861391, at *6 (approving \$10,000 service awards); *Khait v. Whirlpool Corp.*, 06 Civ. 6381, 2010 WL 2025106, *9 (E.D.N.Y. Jan. 20, 2010) (approving service awards of \$10,000 and over).

V. CONCLUSION

For the foregoing reasons, the requested fee award of \$12,705,000 (*i.e.*, one-third of the \$38.5 million common settlement fund), reimbursement of \$1,052,082.51 in costs/expenses, and the requested service awards of \$10,000 for Plaintiffs Jenkins, Steele, Royal, Ewan, and Whyte and \$5,000 for Plaintiff MacKenzie, are reasonable and appropriate under the applicable standards and the circumstances of this case, and should be approved.

Dated: April 12, 2022

Respectfully submitted,

By: /s/ Douglas Cuthbertson
Douglas I. Cuthbertson

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***Attorneys for Plaintiffs and
Proposed Class Counsel***

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

JARRETT JENKINS, EMMOT STEELE, FRANCES
ROYAL, DANAI EWAN, and CHARMAINE WHYTE,
on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

NATIONAL GRID USA SERVICE COMPANY, INC.,
KEYSPAN GAS EAST CORPORATION, NIAGARA
MOHAWK POWER CORPORATION, and THE
BROOKLYN UNION GAS COMPANY,

Defendants.

Case No. 15-cv-1219

Hon. Joanna Seybert, U.S.D.J.
Hon. Arlene R. Lindsay, U.S.M.J.

**JOINT DECLARATION OF CLASS COUNSEL IN SUPPORT OF PLAINTIFFS' AND
CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF
LITIGATION EXPENSES, AND PLAINTIFF SERVICE AWARDS**

Joseph Tusa of Tusa P.C. and Douglas I. Cuthbertson of Lieff Cabraser Heimann &
Bernstein, LLP ("LCHB"), counsel for Plaintiffs and the Settlement Class¹ in this action ("Class
Counsel"), declare as follows:

1. We are counsel for Plaintiffs and Settlement Class in the above-referenced matter
and submit this Joint Declaration in support of Class Counsel's motion seeking (1) an attorneys'
fees award to Class Counsel of \$12,705,000 comprising one-third of the Settlement Fund;
(2) reimbursement of Class Counsel's reasonable litigation expenses of \$1,052,082.51; and
(3) service awards to Plaintiffs totaling \$55,000 (\$10,000 to each Plaintiff except
Ms. MacKenzie, who requests \$5,000). We have personal knowledge of the facts set forth in this
declaration and could testify competently to them if called upon to do so.

¹ Capitalized terms are defined in the Settlement Agreement. See Section II ("Definitions").

2. This Joint Declaration supplements the joint declaration submitted by Class Counsel in support of Plaintiffs' motion for preliminary approval of the parties' *Class Action Settlement and Release* (the "Settlement" or "Settlement Agreement"). See Dkt. 733-1.

II. CLASS COUNSEL'S EXPERIENCE

3. The background and experience of Class Counsel is fully described in the declarations attached hereto as Exhibits A and B, and also set forth in Class Counsel's declaration submitted in support of Plaintiffs' preliminary approval motion. See Dkt. 733, ¶¶ 126-32.

4. Class Counsel are extensively qualified to litigate this case given their experience working on consumer class actions generally and, more specifically, on TCPA cases, where LCHB has served as co-lead counsel in a series of groundbreaking nationwide TCPA class actions, including complex TCPA class action litigation of similar size, scope, and complexity to the instant case. LCHB has successfully litigated and resolved dozens of such actions including, like this one, some of the largest TCPA settlements to date. See, e.g., *Capital One Telephone Consumer Protection Act Litig.*, Master Docket 12 Civ. 0064 (N.D. Ill.) (\$75,455,098.74 TCPA class settlement approved on February 12, 2015); *Rose v. Bank of Am. Corp.*, 11-cv-02390-EJD (N.D. Cal.) and *Duke v. Bank of Am., N.A.*, 12 Civ. 04009 (N.D. Cal.) (\$32,083,905 class TCPA settlement approved on August 29, 2014); *Wilkins v. HSBC Bank Nevada, N.A.*, 14 Civ. 190 (N.D. Ill.) (\$39,975,000 TCPA settlement approved on February 27, 2015); *Buchanan v. Sirius XM Radio, Inc.*, 17 Civ. 00728 (N.D. Tex.) (approving TCPA class settlement with \$25 million common fund and non-monetary relief worth approximately \$6.5 million). See also Dkt. 733 (Joint PA Decl.), ¶ 130 (describing other TCPA cases prosecuted by LCHB).

III. HISTORY OF THE LITIGATION

5. In Class Counsel's experience, having prosecuted and settled dozens of TCPA class actions—including some of the largest TCPA settlements on record—this case has been the most complicated and difficult TCPA case, requiring an unusually high investment of professional time and effort.

A. Pre-Filing Investigation and Initial Litigation

6. For months before filing this action in March 2015, Class Counsel investigated the facts concerning Mr. Jenkins' individual and classwide claims against National Grid under the TCPA and New York General Business Law ("GBL") §399-p. That investigation included a review of his *pro se* individual lawsuit filed against NCO Financial Systems, Inc. ("NCO"), one of the debt collection agencies retained by National Grid.

7. Mr. Jenkins asserted numerous claims in his individual case, including violations of the TCPA by NCO for robo-calling his cellular telephone for National Grid, which was not a defendant in that action.

8. Class Counsel assisted Mr. Jenkins in the resolution of that individual action.

B. Defendants' Motions to Dismiss

9. While Plaintiffs largely defeated National Grid's numerous dismissal motions and arguments premised upon the TCPA, Defendants succeeded in dismissing certain affiliate defendants and the GBL § 399-p claims.

C. The Enormous Scope and Contentious History of Discovery

10. In total, Class Counsel presented oral argument in more than 20 hearings and conferences before Judges Brown and Lindsay.

11. Fact discovery in this case lasted over three years (over four years including expert discovery) and required many thousands of hours of work by Class Counsel.

12. Discovery in this case was long and difficult, requiring laborious document and data analysis, more than three dozen depositions, over 75 sets of party discovery requests and Rule 45 subpoenas, as well as litigating and arguing dozens of discovery motions against both National Grid and its third-party debt collection agencies.

13. This unusually long and involved discovery process occurred for two principal reasons: (1) Class Counsel and their experts' need to request and carefully review and analyze vast quantities of highly relevant electronic data and metadata in various formats and from numerous sources and (2) ongoing disputes with Defendants over discovery issues, which required repeated court intervention. Indeed, these discovery efforts required Court assistance at nearly every turn in order to compel National Grid and numerous third parties to produce the voluminous call data and related electronic records necessary to prove Plaintiffs' claims, as well as data and metadata necessary to defeat National Grid's prior express consent defense.

14. In the end, Plaintiffs obtained hundreds of gigabytes of data in discovery, substantial written discovery in response to Plaintiffs' request for interrogatory responses and requests for admissions and took dozens of party and non-party depositions throughout the United States.

15. For example, for each of the over a dozen dialers used to make automated calls to Settlement Class Members, Defendants or their collection agents maintained extensive electronic logs showing important details about these collections robo-calls, such as the pre-recorded message used, the phone number called, and the date of the call.

16. Most of these records used shorthand or codes that required deposition testimony to decrypt and thousands of hours of expert time.

17. To establish liability based on these call logs, Class Counsel took dozens of depositions and served dozens of interrogatories concerning their proper interpretation.

18. Defendants' TCPA prior express consent affirmative defense also required substantial discovery.

19. Most of Defendants' purported evidence of prior express consent resides on massive electronic databases or is archived on paper and microfiche, which record hundreds of millions of interactions between National Grid and its customers, including do-not-call requests, wrong number complaints, incoming phone calls, in-person visits, service appointments, transmission of utility bills, and bill payments.

20. As with the call logs, these records necessitated interpretation by fact witnesses with knowledge of the relevant systems, some of whom work for third parties based outside of the United States.

21. This required Class Counsel to explain, authenticate, and organize the taken throughout the United States and written discovery (admissions and interrogatories).

22. In total, Class Counsel deposed 38 fact witnesses (three of whom sat for two separate depositions) and served more than two dozen sets of written discovery requests.

D. Class Certification, Expert Discovery, and *Daubert* Briefing

23. After Plaintiffs moved for class certification in July 2019, the parties engaged in expert discovery, additional class certification briefing, and *Daubert* motion briefing in tandem for more than 18 months. These motions and the related expert discovery required additional thousands of hours of work from Class Counsel.

24. On July 31, 2019, Plaintiffs served their motion for class certification, supported by the expert report of Anya Verkhovskaya, and over 1,000 pages of supporting exhibits. Ms.

Verkhovskaya's report explained how common analyses can be used across all call logs to identify TCPA-violative calls made by Defendants and their agents.

25. In response to Defendants' motion to strike several opinions offered by Plaintiffs' expert in support of Plaintiffs' class certification motion, Plaintiffs served requests for admissions relating to the data analysis performed by Defendants' experts, filed and argued a motion to compel expert discovery (*see* Dkts. 602, 620, 628, 632, 641, 679), and deposed both experts.

26. On July 24, 2020, Plaintiffs served their reply in support of class certification and a motion to exclude certain opinions offered by Defendants' experts. *See* Dkts. 670 & 674. The reply attached a rebuttal report from Ms. Verkhovskaya and an expert report from Dr. DeLiang Wang, one of world's foremost experts on speech recognition and transcription technology. Dr. Wang and Ms. Verkhovskaya collectively explained how Defendants' voluminous store of recorded customer telephone calls can be efficiently and reliably analyzed for relevant evidence of prior express consent. Plaintiffs had to expend significant, additional effort countering these arguments.

27. On October 27, 2010, Defendants filed another *Daubert* motion attacking Ms. Verkhovskaya and Dr. Wang, after deposing them, attaching two additional expert reports, which prompted further depositions by Plaintiffs. Briefing on Defendants' final motion to exclude expert testimony concluded on February 2, 2021

E. The Settlement Negotiations

28. Throughout this litigation, Class Counsel repeatedly raised the prospect of settlement with National Grid's counsel, sometimes at the suggestion of then-Magistrate Judge Brown. Defendants repeatedly declined Plaintiffs' overtures, but finally agreed to mediate in

early 2021, after class certification and related *Daubert* motions were fully briefed and Plaintiffs had assembled an extensive evidentiary record.

29. The parties chose retired federal judge and experienced JAMS mediator, the Honorable Wayne R. Andersen. After submitting mediation statements, in May 2021 Judge Andersen held two all-day mediations by Zoom. Although the Parties failed to reach a tentative settlement (*see* Dkt. 727), they continued to communicate with Judge Andersen, and mediated again on June 29, 2021, which also ended without resolution. *See* Joint PA Decl., ¶ 112. Over the following weeks, the parties continued to negotiate through Judge Andersen, and on July 20, 2021—with the judge’s substantial assistance—reached an agreement in principle. *Id.*, ¶ 113; Dkt. 729. Through early October 2021, the parties negotiated the details and drafted the Settlement Agreement and exhibits, participating in a final mediation with Judge Andersen on October 11 concerning two outstanding issues. *Id.*, ¶¶ 114-15. The parties resolved those outstanding issues with Judge Andersen’s assistance and thereafter completed their negotiations and executed the Settlement Agreement as of October 29, 2021. Class Counsel filed a motion for preliminary approval that day. *Id.*, ¶¶ 115-17; *see* Dkt. 732.

IV. ADDITIONAL WORK THAT REMAINS IN THE CASE IF THE SETTLEMENT IS NOT APPROVED

30. Despite the significant discovery Plaintiffs already conducted, substantial discovery remains, including discovery concerning National Grid’s Melita Dialer, as well as discovery concerning archived call data that is not easy to collect and analyze. But for the Settlement, Plaintiffs will be required to re-file their motion for class certification, which has been opposed by Defendants. Assuming that motion for granted, it could be expected that Defendants would petition this Court and the Second Circuit for an immediate appeal under Fed.

R. Civ. P. 23(f). It is also likely Defendants would file motions to decertify any certified class(es) after the completion of discovery and/or summary judgment motions.

31. Also but for the Settlement, Defendants have told the Court they intend to file for summary judgment. Among other arguments, Defendants and likely to argue that: (1) Plaintiffs individually do not possess valid TCPA claims; (2) that any claims should be permitted only of class members residing in New York, to the exclusion of National Grid's current and former utility customers in New England; (3) that prior express consent shields them from TCPA liability; (4) that they should not be held liable for calls made by their agent debt collectors; and (5) that TCPA settlements by certain collectors preclude liability in this action.

32. National Grid will also likely argue that the case should be limited to New York, and not include the New England class members that are part of the Settlement.

33. If Plaintiffs and any certified classes prevail at summary judgment, they would still have to succeed at trial and any subsequent appeals.

V. ATTORNEYS' FEES, EXPENSES, AND PLAINTIFFS' SERVICE AWARDS

34. As permitted by the Settlement Agreement, Class Counsel have moved the Court for an award of attorneys' in a total amount of one-third of the Settlement Fund, or \$12,705,000. All of Class Counsel's significant time and resources spent on this matter were performed on a contingent basis, without any guarantee of payment.

35. Class Counsel have also moved the Court for reimbursement out-of-pocket expenses of \$1,052,082.51, which Class Counsel advanced with no guarantee of recovery.

36. Lastly, Plaintiffs and Class Counsel request approval to pay Plaintiffs service awards of \$10,000 for Plaintiffs Jenkins, Steele, Royal, Ewan, and Whyte, and an award of \$5000 for Plaintiff MacKenzie. The different awards account for the additional efforts Plaintiffs Jenkins, Steele, Royal, Ewan, and Whyte made during the discovery process.

37. All Court-approved payments of attorneys' fees, reimbursement of expenses and Plaintiff Service awards will be paid from the \$38.5 million common Settlement Fund.

A. Class Counsel's Collective Lodestar

38. As confirmed by the attached individual firm declarations, Class Counsel expended a total of **21,973.60** hours in this litigation through March 25, 2022, with a total lodestar of **\$11,799,970.50** as follows:²

Firm:	Lodestar:	Hours Expended:
TUSA P.C.	\$3,316,300.00	5479.8
LCHB	\$8,483,670.50	16,493.8
Totals:	\$11,799,970.50	21,973.60

39. These amounts exclude, among other things: (i) entries entered by timekeepers who recorded a *de minimis* amount of time and (ii) although permitted, time spent in preparation of this motion.

B. Class Counsel's Collective Out-of-Pocket Expenses

40. As confirmed by the attached individual firm declarations, Class Counsel have collectively incurred a total of **\$1,052,082.51** based on the following:

Expense Category	Amount
Books/Subscriptions	\$43.31
Conference Room Rental Fees	\$327.00
Computer Research	\$35,770.74
Deposition/Transcripts	\$94,370.55
Electronic Database	\$45,978.80
Experts/Consultants	\$672,962.57
Fax	\$48.00
Federal Express/Messenger/Postage	\$7,495.65
Filing and Court Fees	\$2,130.55

² Not included in Class Counsel's lodestar are the hours that will be expended by Class Counsel after March 25, 2022, including the briefing in connection with final Settlement approval, responding to inquiries from Settlement Class Members and any objections to the Settlement attendance at the Final Approval Hearing scheduled for June 10, 2022, and the time that will be expended by Class Counsel after the Final Approval Hearing in connection with the administration and implementation of the Settlement if it is approved.

Expense Category	Amount
In-House Copies	\$1,034.60
Mediation Expenses	\$35,200.00
Other Charges	\$783.00
Outside Copy Service	\$4,182.12
Postage	\$1,320.47
Print	\$68,265.60
Process Service	\$6,425.30
Storage Charges	\$2,398.60
Supplies	\$1,576.92
Telephone	\$12,666.83
Travel/Meals	\$59,041.90
Witness Fees	\$60.00
Total:	\$1,052,082.51

C. Service Awards to Representative Plaintiffs

41. The six Plaintiffs serving as Class Representatives have worked closely with Class Counsel throughout this litigation.

42. The Plaintiffs performed essential work in this action that benefited the Settlement Class. Among other things, each Plaintiff assisted Class Counsel with their pre-filing investigation before joining the case, reviewed the pleadings, communicated with Class Counsel concerning the progress of the litigation to discuss developments in the case, and participated in the settlement negotiation process. Class Counsel estimate that the Plaintiffs collectively communicated with Class Counsel on over 200 occasions in person, by telephone, email and text.

43. Plaintiffs Jenkins, Steele, Royal, Ewan, and Whyte each responded to a large volume of discovery served by Defendants. They each searched their records and produced many responsive documents, responded to interrogatories, and each gave many hours of deposition testimony. Two of Plaintiffs' relatives (Plaintiff Whyte's mother and Plaintiff Jenkins' uncle) also provided deposition testimony in response to Defendants' subpoenas.

44. For their time and efforts, which have resulted in a \$38.5 million Settlement Fund and significant business practice changes designed to avoid future violations of the TCPA, Class Counsel are requesting that Plaintiffs Jenkins, Steele, Royal, Ewan, and Whyte be awarded service awards of \$10,000 each, and that Plaintiff MacKenzie be awarded \$5,000.

Pursuant to 28 U.S.C. §1746, we declare under penalty of perjury that the foregoing is true and correct to the best of our knowledge, information and belief based on the evidence and other materials cited in support.

Executed this 12th day of April, 2022 in Southold, New York, and Brooklyn, New York.

/s/ Douglas I. Cuthbertson

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***Attorneys for Plaintiffs and Proposed Class
Counsel***

EXHIBIT A

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

JARRETT JENKINS, EMMOT STEELE, FRANCES
ROYAL, DANAI EWAN, and CHARMAINE WHYTE,
on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

NATIONAL GRID USA SERVICE COMPANY, INC.,
KEYSPAN GAS EAST CORPORATION, NIAGARA
MOHAWK POWER CORPORATION, and THE
BROOKLYN UNION GAS COMPANY,

Defendants.

Case No. 15-cv-1219

Hon. Joanna Seybert, U.S.D.J.

Hon. Arlene R. Lindsay, U.S.M.J.

**DECLARATION OF DOUGLAS I. CUTHBERTSON IN SUPPORT OF PLAINTIFFS’
AND CLASS COUNSEL’S MOTION FOR ATTORNEYS’ FEES, REIMBURSEMENT
OF LITIGATION EXPENSES, AND PLAINTIFF SERVICE AWARDS**

I, Douglas I. Cuthbertson, an attorney for Plaintiffs and Court-appointed Class Counsel,
hereby declare as follows:

1. I am a member in good standing of the New York State Bar. I am a partner at the law firm of Lieff Cabraser Heimann & Bernstein, LLP (“LCHB”) and one of the attorneys serving as Class Counsel in this case. I respectfully submit this declaration in support of Plaintiffs’ and Class Counsel’s Motion for Attorneys’ Fees, Reimbursement of Litigation Expenses, and Plaintiff Service Awards.

2. I have been actively involved in all aspects of the investigation and prosecution of this case and the Parties’ settlement negotiations. I have personal knowledge of the facts set forth in this declaration, and could and would testify competently to them if called upon to do so.

I. Background and Experience

3. LCHB is one of the oldest, largest, most respected, and most successful law firms in the country representing plaintiffs in class actions, and brings to the table a wealth of class action experience. LCHB has been repeatedly recognized over the years as one of the top plaintiffs' law firms in the country, including by The National Law Journal and The American Lawyer. A copy of LCHB's firm resume, which describes the firm's experience in class action and other complex litigation, can be found at www.lieffcabraser.com/pdf/Lieff_Cabraser_Firm_Resume.pdf, and is not attached hereto given its length.

4. Among the firm's other areas of practice, LCHB has extensive experience litigating Telephone Consumer Protection Act ("TCPA") class actions, and attorneys from the firm (including the attorneys prosecuting this action), have served as co-lead counsel in a number of ground-breaking TCPA class actions that are of similar size, scope, and complexity to the instant case. For example:

a. I, along with other attorneys from my firm and co-counsel, served as counsel in *In re Capital One Telephone Consumer Protection Act Litigation*, Master Docket No. 1:12-cv-10064 (N.D. Ill.). On February 12, 2015, the court approved a \$75,455,098.74 class settlement.

b. I, along with other attorneys from my firm and co-counsel, served as counsel in *Ossola v. American Express Co., et al.*, Case No. 1:13-CV-4836 (N.D. Ill.). On December 2, 2016, the court approved two separate class settlements of \$8.25 million and \$1 million each.

5. I, along with other attorneys from my firm and co-counsel, served as counsel in *Smith v. State Farm Mutual Auto. Ins. Co., et al.*, Case No. 1:13-cv-02018 (N.D. Ill.). On December 8, 2016, the court approved a \$7 million settlement.

6. I, along with other attorneys from my firm and co-counsel, served as counsel in *Bayat v. Bank of the West*, Case 3:13-cv-02376-EMC (N.D. Cal.). On April 15, 2015, the court approved a \$3,354,745.98 settlement

7. I, along with other attorneys from my firm and co-counsel, served as counsel in *Wannemacher v. Carrington Mortgage Services LLC*, Case No. 8:12-cv-02016-FMO-AN (C.D. Cal.). On December 22, 2014, the court approved a \$1.035 million settlement.

8. In addition to the foregoing, I currently serve as co-lead counsel in the following cases under the TCPA: *Brown v. DirecTV, LLC*, No. CV 13-1170 DMG (EX), 2019 WL 1434669 (C.D. Cal. Mar. 29, 2019) (certifying two nationwide classes); *Cordoba v. DirecTV, LLC*, 320 F.R.D. 582 (N.D. Ga. 2017) (certifying a nationwide TCPA DNC Registry class and a nationwide TCPA internal DNC list class).

9. The following are the primary LCHB attorneys who have worked on this case and their respective backgrounds:

a. Jonathan D. Selbin graduated from Harvard Law School in 1993. The chair emeritus of Lieff Cabraser's Economic Injury Product Defect Practice Group and member of the firm's Executive Committee, he litigates consumer protection and defective products class action lawsuits against many of the nation's most prominent corporations. Leading the Lieff Cabraser's TCPA group, Jonathan developed and implemented the legal strategy responsible for some of the largest settlements in the history of the TCPA.

b. Daniel M. Hutchinson graduated from the University of California, Berkeley, School of Law (Berkeley Law) in 2005. As a partner at LCHB, he has focused on representing plaintiffs in employment, financial fraud, and consumer protection litigation,

including dozens of class actions under the TCPA. In January 2021, he became the Chair of LCHB's Employment Practice Group.

c. Douglas I. Cuthbertson: I graduated from Fordham University School of Law in 2007. From 2007 through 2009, I served as a judicial law clerk to the Honorable Andrew J. Peck. From 2009 until 2012, I practiced at Debevoise & Plimpton, LLP, and have practiced law at LCHB since 2012, where I become a partner in 2016. At LCHB, I have successfully represented plaintiffs in financial and consumer fraud cases, including privacy and TCPA class actions.

d. John. T. Nicolaou graduated from Columbia Law School in 2012, where he was a Harlan Fisk Stone and James Kent scholar. From 2012 to 2017, he represented plaintiffs and defendants in antitrust, constitutional, breach-of-contract, and employment matters at Boies Schiller. In 2017, he joined LCHB as an associate, and since then he has worked on numerous consumer and securities class actions. He was promoted to partner in 2020.

e. Avery S. Halfon graduated cum laude from Harvard Law School in 2015, where he was the Editor-in-Chief of the Harvard Law & Policy Review. From 2015 to 2016, he represented plaintiffs in consumer protection actions and other cases at Cohen Milstein Sellers & Toll. From 2016 to 2017, he served as a Law Clerk to the Honorable Jane B. Stranch on the U.S. Court of Appeals for the Sixth Circuit. In 2017 he joined LCHB as an associate, and since then he has worked on numerous consumer class actions and other plaintiff-side litigation.

II. LCHB's Work in This Litigation

10. Along with co-Class Counsel Tusa P.C., LCHB extensively investigated the claims and facts prior to filing, consulted with Plaintiffs and prepared or jointly prepared all pleadings subsequent to the initial complaint. LCHB worked closely with Plaintiffs and Co-counsel throughout the litigation.

11. LCHB has been involved in virtually all aspects of this litigation. Among other things, LCHB: communicated frequently with Plaintiffs; worked on preparing all amended complaints; worked on Plaintiffs' oppositions to Defendants' motions to dismiss; prepared Plaintiffs' motion for class certification and the related *Daubert* motions, litigated the many discovery and procedural motions filed in the action; worked on and orchestrated Plaintiffs' discovery efforts, including taking and defending first party and third-party depositions throughout the United States; reviewed and analyzed Defendants', their collection agents' and other third parties' documents and written discovery responses; spearheaded and organized the collection and review of the core electronic data at issue in this case; worked with Plaintiffs' testifying experts; drafted and prepared Plaintiffs' mediation statement; led the mediation and follow-up negotiations; helped negotiate and draft the settlement agreement and exhibits thereto; worked with the Claims Administrator on notice and implementation issues; communicated with Settlement Class members; and helped draft all settlement approval papers.

12. With respect to the tasks performed by Class Counsel in this litigation, LCHB and our co-Class Counsel took every reasonable effort to avoid inefficiencies or duplication of work. Appropriate attorneys and staff were assigned to specific tasks based on their respective experience levels and skills, and work was allocated with clear instruction regarding who was responsible for each task.

13. The primary attorneys who worked on this case are myself, Jonathan Selbin, Daniel Hutchinson, John Nicolaou, Avery Halfon, and Scott Miloro.

14. My primary tasks in this case have included supervising the discovery process, including meeting and conferring with opposing counsel, drafting or editing discovery motions, reviewing discovery requests, and conducting oral argument before the Court. I have also taken

and defended several depositions. I have had responsibility for significant portions of the motion to dismiss, class certification and *Daubert* briefing, and worked with Plaintiffs' experts. I also have had a significant role in the settlement and mediation process, as well as the settlement approval and claim and notice administration phase of the case.

15. Mr. Selbin's and Mr. Hutchinson's primary tasks in this case have included supervising the other LCHB attorneys, strategizing on case strategy as well as all significant briefs and reviewing and editing the same, leading the settlement and mediation process, and participating in the settlement approval and claim and notice administration phase of the case.

16. Mr. Nicolau's primary tasks in this case have included drafting legal briefs, conducting a significant number of the depositions, drafting and responding to discovery requests, meeting and conferring with Defendants and third parties concerning discovery, appearing in court, including for oral argument concerning discovery, conducting document review and data analysis, working with Plaintiffs' experts, and participating in the settlement and mediation process, as well as the settlement approval and claim and notice administration phase of the case.

17. Mr. Halfon's primary tasks in this case have included drafting a number of briefs and handling third party discovery, including reviewing documents, meeting and conferring, and taking depositions.

18. Mr. Miloro's primary tasks in this case have included analyzing and organizing hundreds of millions of lines of data, including call logs produced by Defendants and third parties, and information about phone numbers provided by National Grid customers. Analysis of this information required studying tens of thousands of exemplar lines of data and creating dozens of .SQL tables and constructing .SQL queries to extract data. This work was critical to

evaluating the case, defining and identifying class members, working with Plaintiff's experts, and many aspects of offensive discovery, including taking and preparing for depositions.

19. Jenny Rudnick was the principal paralegal who has worked on this case. Ms. Rudnick's tasks in this case have included speaking with class members, managing LCHB's case file, and preparing case materials. The attorneys were supported at times by other paralegals or case clerks identified below.

20. LCHB litigation support specialists Richard Anthony, Renee Mukherji, Margie Calangian, Anthony Grant, and Fawad Rahimi also worked on this case. Their primary tasks included maintaining Plaintiffs' electronic document database for this case and assisting with drafting an electronically-stored information protocol.

III. LCHB Time and Expenses

21. During the time that this litigation has been pending, LCHB lawyers, paralegals, and staff have spent considerable time working on this litigation that could have been spent on other fee-generating matters.

22. The time that LCHB has spent on this litigation has been completely contingent on the outcome. LCHB has not been paid for any of its time spent on this litigation, nor has it been reimbursed for any of its expenses incurred in this litigation.

23. As of March 25, 2012 the attorneys and staff timekeepers at LCHB have billed more than **16493.10 hours**, for a total lodestar, during that time, of **\$8,483,261.00**. This information is derived directly from LCHB's time records, which are prepared contemporaneously and maintained by LCHB in the ordinary course of business. In reviewing its time records, LCHB exercised billing discretion to remove the time for all attorneys who worked fewer than 10 hours on this matter and several other entries. None of this excluded time is included in the above numbers, nor is the additional time that LCHB will have to spend

working on this matter going forward, including in connection with seeking final approval of the Settlement, communicating with Settlement Class Members, and on implementation efforts should the Settlement be approved.

24. Below is a summary listing each timekeeper for which LCHB is seeking compensation for legal services in connection with this litigation, the hours each individual has expended as of this writing, and the hourly rate at which compensation is sought for each individual.

NAME	TITLE	HOURLY RATE	TOTAL HOURS	TOTAL
Jonathan Selbin	Partner	\$975.00	103.60	\$101,010.00
Douglas Cuthbertson	Partner	\$665.00	3748.50	\$2,492,752.50
Daniel Hutchinson	Partner	\$750.00	347.00	\$260,250.00
John Nicolaou	Partner	\$585.00	583.00	\$341,055.00
Douglas Cuthbertson	Associate	\$490.00	147.40	\$72,226.00
Michael Decker	Associate	\$395.00	405.90	\$160,330.50
Avery Halfon	Associate	\$505.00	655.20	\$330,876.00
John Nicolaou	Associate	\$510.00	3992.70	\$2,036,277.00
Scott Miloro	Staff Attorney	\$415.00	4472.90	\$1,856,253.50
Peter Roos	Staff Attorney	\$415.00	62.20	\$25,813.00
Yun Swenson	Staff Attorney	\$415.00	150.00	\$62,250.00
Jane Balkoski	Paralegal/Clerk	\$360.00	37.60	\$13,536.00
Rami Bata	Paralegal/Clerk	\$370.00	11.90	\$4,403.00
Todd Carnam	Paralegal/Clerk	\$405.00	26.90	\$10,894.50
Christian Chan	Paralegal/Clerk	\$365.00	78.10	\$28,506.50
Jessica Kunikoff	Paralegal/Clerk	\$375.00	110.70	\$41,512.50
Tracy Lim	Paralegal/Clerk	\$405.00	11.00	\$4,455.00
Kristin Orsland	Paralegal/Clerk	\$405.00	24.60	\$9,963.00
Jennifer Rudnick	Paralegal/Clerk	\$405.00	599.00	\$242,595.00
Brian Troxel	Paralegal/Clerk	\$405.00	10.40	\$4,212.00
Richard Anthony	Litigation Support Specialists	\$420.00	175.10	\$73,542.00
Margie Calangian	Litigation Support Specialists	\$420.00	206.00	\$86,520.00
Anthony Grant	Litigation Support Specialists	\$420.00	279.50	\$117,390.00
Renee Mukherji	Litigation Support Specialists	\$420.00	19.10	\$8,022.00

NAME	TITLE	HOURLY RATE	TOTAL HOURS	TOTAL
Fawad Rahimi	Litigation Support Specialists	\$420.00	234.80	\$98,616.00
		TOTALS:	16493.10	\$8,483,261.00

25. Upon request by the Court, I will submit LCHB's contemporaneous billing records from this action *in camera*.

26. LCHB's customary rates, used for purposes of calculating the lodestar here, have been approved by federal courts in this District and elsewhere in this Circuit. *See, e.g., Patti's Pitas v. Wells Fargo Merchant Servs., LLC*, No. 1:17-cv-04583 (AKT) (E.D.N.Y. July 22, 2021) (awarding requested attorneys' fees); *Dover v. British Airways, PLC*, No. 12-cv-05567-RJD-CLP, Dkt. 321, 323 (E.D.N.Y. 2018) (same); *Calibuso v. Bank of America Corp.*, No. 10-cv-01413-PKC-AKT, Dkt. 202 (E.D.N.Y. Dec. 27, 2013) (same); *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2020 WL 7481292, at *3 n.3 (S.D.N.Y. Dec. 18, 2020); *In Re: The Bank of New York Mellon ADR FX Litigation*, No. 16- 00212, Dkt. No. 161 (S.D.N.Y. June 17, 2019) (awarding requested attorneys' fees as "fair and reasonable and consistent with awards in similar cases"); *In Re: Bank of New York Mellon Corp. Forex Transactions Litigation*, No. 12-MD-2335, Dkt. 637 (September 24, 2015) (awarding requested attorneys' fees).

27. LCHB also has incurred and will incur un-reimbursed expenses in connection with the prosecution and resolution of this litigation. The following is a breakdown of the expenses for which LCHB seeks reimbursement in this matter:

Expense	Amount
Fax	\$48.00
In-House Copies	\$1,034.60
Postage	\$1,320.47
Print	\$68,265.60
Telephone	\$12,666.83
Books/Subscriptions	\$43.31
Computer Research	\$30,660.58

Expense	Amount
Deposition/Transcripts	\$94,200.55
Electronic Database	\$45,978.80
Experts/Consultants	\$672,169.00
Federal Express/Messenger	\$5,778.89
Filing Fees	\$1,596.55
Mediation Expenses	\$35,200.00
Other Charges	\$783.00
Outside Copy Service	\$4,182.12
Process Service	\$6,072.30
Storage Charges	\$2,398.60
Supplies	\$1,576.92
Travel/Meals	\$47,678.49
Witness Fees	\$60.00
Total Case Costs	\$1,031,714.61

28. Upon request by the Court, I will submit receipts documenting all of the above expenses *in camera*.

29. The foregoing expenses were incurred and will be incurred solely in connection with this litigation and are reflected in LCHB's books and records as maintained in the ordinary course of business. These books and records are prepared from invoices, receipts, expense vouchers, check records and other records, and are an accurate record of the expenses incurred in this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed at New York, New York, this 12th day of April, 2022.



Douglas I. Cuthbertson

EXHIBIT B

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK**

JARRETT JENKINS, EMMOT STEELE, FRANCES ROYAL, DANAI EWAN and CHARMAINE WHYTE on behalf of themselves and all others similarly situated, Plaintiffs, - against - NATIONAL GRID USA SERVICE COMPANY, INC., KEYSPAN GAS EAST CORPORATION, NIAGARA MOHAWK POWER CORPORATION, and THE BROOKLYN UNION GAS COMPANY, Defendants.	Case No. 15-cv-1219 Hon. Joanna Seybert, U.S.D.J. Hon. Arlene R. Lindsay, U.S.M.J.
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**DECLARATION OF JOSEPH S. TUSA IN SUPPORT OF PLAINTIFFS'
AND CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT
OF LITIGATION EXPENSES, AND PLAINTIFF SERVICE AWARDS**

Joseph S. Tusa, an attorney for Plaintiffs and Court-appointed Class Counsel, declares as follows:

1. I am a member in good standing of the bar of the United States District Court for the Eastern District of New York and a shareholder in the firm Tusa P.C., co-counsel for Plaintiffs in this lawsuit and Court-appointed Class Counsel for the Settlement Class.¹ I respectfully submit this declaration in support of Plaintiffs' and Class Counsel's *Motion for Attorneys' Fees, Reimbursement of Expenses, and Plaintiff Service Awards*.

2. I have been actively involved in all aspects of the investigation and prosecution of this case and the Parties' settlement negotiations. I am familiar with the factual matters discussed herein and could and would testify competently to them if called upon to do so.

Background and Experience

3. My firm and I possess extensive experience in litigating class action litigation for past

¹ All capitalized terms are defined in the accompanying *Class Action Settlement Agreement and Release*.

twenty-four years in the federal and state courts, since 2010 as the managing attorney of Tusa P.C. The firm resume of Tusa P.C. is annexed hereto as **Exhibit 1**, detailing the experience of the firm and the undersigned in litigating consumer class action litigations.

4. Prior to the founding Tusa P.C., beginning in 1996, I was employed as a shareholder and associate, respectively, in two other law firms whose practice was concentrated in consumer, shareholder and antitrust class action litigation in the federal and state courts.

5. I received my LL.M. in Corporate Law from the New York University School of Law in 1996, and my J.D. from the University of South Carolina School of Law in 1995.

6. Tusa P.C. or I have been appointed class counsel or settlement class counsel in the following consumer class actions:

- (a) *Jenkins v. National Grid USA Serv. Co. Inc.* E.D.N.Y. No. 15-cv-1219-JS-ARL;
- (b) *Cymbalista v. JPMorgan Chase Bank, N.A.*, E.D.N.Y. No. 20-cv-456-RPK-LB;
- (c). *Cleary v. American Airlines, Inc.*, N.D. Tex. 21-cv-00184-O
- (d). *Gunther v. Capital One, N.A.*, E.D.N.Y. No. 09-cv-2966-ADS-AKT;
- (f). *Cassese v. Washington Mut. Inc.*, E.D.N.Y. No. 05-cv-2724-ADS-ARL;
- (g). *McAnaney v. Astoria Fin. Corp.*, E.D.N.Y. No. 04-cv-1101-JFB-WDW
- (h). *Limpert v. Cambridge Credit Counseling Corp.*, E.D.N.Y. No. 03-cv-5986-TCP-WDW;
- (i). *Zimmermann v. Cambridge Credit Counseling Corp.*, D. Mass. No. 03-cv-30261-MAP;
- (j). *Valle v. Popular Community Bank f/k/a Banco Popular North America* N.Y. Sup. Ct. Index No. 653936/2012;
- (k). *Jones v. Genus Credit Mgt. Corp. f/k/a National Credit Counseling Servs.*, AAA No. 11-181-00295-05.

7. Prior to the formation of Tusa P.C., my firms were appointed class counsel or settlement class counsel in numerous other federal and state class action litigations.

Tusa P.C.'s Work in This Litigation

8. Along with co-Class Counsel Lief Cabraser Heinmann & Bernstein, LLP, Tusa P.C. extensively investigated the claims and facts prior to filing, consulted with Plaintiffs and prepared or jointly prepared the original *Class Action Complaint* and all subsequent pleadings. Tusa P.C. worked closely with Plaintiffs and our co-Class Counsel throughout the litigation.

9. Tusa P.C. has been involved in virtually all aspects of this litigation. Among other things, Tusa P.C.: communicated frequently with Plaintiffs; worked on preparing the original and amended Complaints; worked on Plaintiffs' opposition to Defendants' motions to dismiss; worked on preparing Plaintiffs' motion for class certification and the related *Daubert* motions, litigated the many discovery and procedure motions filed in the action; worked on Plaintiffs' discovery efforts, including taking and defending party and third-party depositions throughout the United States, reviewing and analyzing Defendants', their collection agents' and other third parties' documents and written discovery responses; helped prepare Plaintiffs' mediation statement; participated in the mediation and follow-up negotiations; helped negotiate and draft the settlement agreement and exhibits thereto; worked with the Claims Administrator on notice and implementation issues; communicated with Settlement Class members; and helping draft settlement approval papers.

10. With respect to the tasks performed by Class Counsel in this litigation, Tusa P.C. and our co-Class Counsel took every reasonable effort to avoid inefficiencies or duplication of work. Appropriate attorneys and staff were assigned to specific tasks based on their respective experience levels and skills, and work was allocated with clear instruction regarding who was responsible for each task.

11. I was the only attorney affiliated with Tusa P.C. that provided professional services this case. My qualifications are discussed in the Background and Experience section, above.

12. My primary tasks in this case have included the legal and factual investigation of Plaintiffs' and the classes' claims; communicating with Plaintiffs; coordinating litigation strategy with co-Class Counsel; drafting and editing pleadings and briefs; attending Court conferences and presenting argument on motions; participating in party and non-party depositions and related preparation, propounding, reviewing and analyzing Defendants and third-party discovery; attending the mediation; settlement negotiations and drafting the Settlement Agreement and exhibits thereto; and coordinating with co-Class Counsel, Defendants' counsel and the Claims Administrator on class notice and implementation matters.

13. On over one hundred fifty occasions, I communicated with the named Plaintiffs in person, by telephone, email or text in connection with their collection of documents for investigation and litigation, review of the pleadings, discussion of litigation developments, strategy, motion practice, settlement negotiations and settlement proceedings.

14. In addition, paralegal Devon Annabel has worked on this case. Ms. Annabel's tasks in included factual research, legal research, document review and analysis and proofing and editing of memoranda of law.

Tusa P.C. Time and Expenses

15. During the time that this litigation was investigated and pending, Tusa P.C. spent considerable time working on this litigation that could have been spent on other fee-generating matters.

16. The time that Tusa P.C. has spent on this litigation has been completely contingent on the outcome. Tusa P.C. has not been paid for any of its time spent on this litigation, nor has it been reimbursed for any of its expenses incurred in this litigation.

17. As of March 24, 2022, the attorneys and staff timekeepers at Tusa P.C. have billed **5,479.8 hours**, for a total lodestar, during that time, of **\$3,316,300.00**. This information is derived

directly from Tusa P.C. time records, which are prepared contemporaneously and maintained by Tusa P.C. in the ordinary course of business.

18. Below is a summary listing each timekeeper for which Tusa P.C. is seeking compensation for legal services in connection with this litigation, the hours each individual has expended as of this writing, and the hourly rate at which compensation is sought for each individual.

NAME	TITLE	HOURLY RATE	TOTAL HOURS	TOTAL
Joseph S. Tusa	Shareholder	\$750	3,891.5	\$2,918,625.00
Devon Annabel	Paralegal	\$250	1,588.3	\$397,675.00
TOTALS			5,479.8	\$3,316,300.00

19. All professionals who worked on this matter recorded their time contemporaneously with the work they performed. Upon request by the Court, I will submit my firm's contemporaneous billing records *in camera*.

20. Tusa P.C. also has incurred **\$20,367.90** in un-reimbursed expenses that were necessarily incurred in connection with the prosecution and resolution of this litigation. The following is a breakdown of the expenses for which Tusa P.C. seeks reimbursement in this matter:

Expense	Amount
Conference Room Rental Fees	\$327.00
Computer Research	\$5,110.16
Court Reporter Fees	\$170.00
Discovery Consultant and Litigation Support Fees	\$793.57
Filing and Court Fees	\$534.00
Meals	\$2,933.12
Postage and FedEx	\$1,716.76
Process Service Fees	\$353.00
Travel Expenses	\$8,430.29
Total Expenses	\$20,367.90

Upon request by the Court, receipts documenting all of the above expenses will be submitted *in camera*.

21. The foregoing expenses were incurred solely in connection with this litigation and are reflected in Tusa P.C.'s books and records as maintained in the ordinary course of business. These books and records are prepared from invoices, receipts, expense vouchers, check records and other records, and are an accurate record of the expenses incurred in this case.

22. The above expense numbers do not include certain internal costs that Tusa P.C. incurred but for which Tusa P.C. does not seek reimbursement, including telephone costs.

23. I declare under penalty of perjury the foregoing is true and correct.

Dated: Southold, New York
April 12, 2022

Respectfully submitted,

By: /s/ Joseph S. Tusa
Joseph S. Tusa

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