IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DR. LOUIS L. SOBOL, M.D., a Michigan resident, individually and as the representative of a class of similarly-situated persons, Plaintiff, v. IMPRIMIS PHARMACEUTICALS, INC., Defendant.	Case No. 16-cv-14339 Judge Nancy G. Edmunds Mag. Judge Elizabeth A. Stafford

PLAINTIFF'S COMBINED MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT AND FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

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STATEMENT OF THE ISSUES

1. Whether the settlement is fair, reasonable, and adequate.

2. Whether the incentive award to Plaintiff for serving as the named plaintiff is fair and reasonable.

3. Whether the agreed attorney's fee to Class Counsel of one third of the Settlement Fund plus expenses is fair, reasonable, and within the market rate for contingent fee, consumer class actions of this sort.

CONTROLLING AUTHORITY

- Federal Rule of Civil Procedure 23
- *Int'l Union, United Auto, Aerospace and Implement Workers of America v. General Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007)
- *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974)
- *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980)
- *Blum v. Stenson*, 465 U.S. 886 (1984)

Plaintiff, Dr. Louis L. Sobol, M.D. ("Plaintiff"), on behalf of himself and the settlement class of similarly-situated persons ("Settlement Class" or "Class"), requests that the Court enter an order finally approving the parties' Settlement Agreement ("Settlement" or "Agreement.")

INTRODUCTION

The Court preliminarily approved this settlement after a hearing on March 13, 2019, and directed that the absent class members be notified. Notice was sent to the class members by fax, and by mail to class members to whom fax notice was unsuccessful. No class member has filed an objection.[1] Further, notice was sent to the attorneys general of the U.S. and all fifty states and the District of Columbia. (Doc. 89). None of them have objected. No class members elected to opt out. Affidavit of Christopher Walsh, Exhibit A at ¶ 11. Because the settlement is fair, reasonable, and adequate, the Court should approve it.

I. Preliminary approval and dissemination of notice.

On March 13, 2019, after considering the Settlement Agreement and plan of notice, the Court entered an order preliminarily approving the settlement and approving the class notice ("Preliminary Approval Order."). Doc. 87. In accordance with the Preliminary Approval Order, the parties caused the class

[1] The deadline for objections is July 15, 2019. Plaintiff will file a supplement following that date.

notice to be sent on April 10, 2019. Affidavit of Christopher Walsh. Exhibit A, ¶¶ 6-8. Out of 4,271 members of the Class, none objected to the Settlement or chose to be excluded. *Id*. at ¶¶ 11-12.

II. Background and summary of settlement.

Plaintiff's Class Action Complaint alleges that defendant Imprimis Pharmaceuticals, Inc. ("Defendant") faxed unsolicited advertisements to Plaintiff and others in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"). The action seeks statutory damages. Based upon discovery and computer analysis of fax transmission records, Plaintiff alleged that Defendant's form advertisements were successfully sent by fax 10,835 times to the 2,961 persons in the settlement class.

As discussed in the motion for preliminary approval, this case has been hard fought and required skilled and specialized lawyering. During the litigation, this Court and the parties have tackled complex issues within the context of the TCPA and Rule 23, Plaintiff pieced together documents regarding numerous fax broadcasts originating with two fax broadcasters. Through third-party discovery and discovery of Defendant, including a successful motion to compel, Plaintiff assembled the data necessary for his expert to determine who got which fax templates and when. Moreover, through both written and oral discovery (three depositions of Imprimis employees), Plaintiff was able to test Defendant's consent

defense and determine its strengths and weaknesses. The settlement class contains the persons for whom Defendant's consent defense was weakest. Plaintiff also successfully argued to the Court that Defendant should not be entitled to belatedly raise a personal jurisdiction defense against absent class members.

As discussed in the motion for preliminary approval, the key terms of the Agreement are as follows:

a. Certification of a Settlement Class. The Parties have stipulated to certification of a Rule 23 (b) (3) "Settlement Class" defined as: "All Persons that were successfully sent one or more alleged advertisements by facsimile from Imprimis Pharmaceuticals, Inc., on July 29, 2016, August 31, 2016, September 6, 2016, or November 16, 2016 ("the Faxes") in broadcasts by Openfax, excluding (a) any Person who first ordered an Imprimis prescription between September 1, 2015, and the date the first facsimile advertisement was sent to that person, and (b) any Person who acknowledges providing express permission to receive facsimile advertisements from Defendant." Excluded from the Settlement Class are Imprimis Pharmaceuticals, Inc., any of its parents, subsidiaries, affiliates or controlled persons, and its officers, directors, partners, members, agents, servants, and employees of any kind, the immediate family members of such persons, Class Counsel's partners, associates, and employees, and their

immediate family members, and the Court and its employees and staff. Doc. 84-1, ¶ 1.38. The Court preliminarily certified the settlement class. Doc. 87, ¶ 2.

b. The Class Representative and Class Counsel. The Court preliminarily appointed Plaintiff as the Class Representative and Plaintiff's attorneys (Bock, Hatch, Lewis & Oppenheim, LLC and Shenkan Injury Lawyers, LLC) as Class Counsel. *Id.*, ¶ 4.

c. Settlement Fund. Defendant has made available a settlement fund of $1,450,000 (the "Settlement Fund") to pay Class members (including Plaintiff) who timely submit a Proof of Claim form a pro rata share of the Settlement Fund ($1,450,000 divided by 10,835 = $133.83), a service award payment to Plaintiff for serving as the Class Representative, attorney's fees to Class Counsel, and expenses not to exceed $53,500.00 to Class Counsel. Defendant is entitled to keep all unclaimed funds in the Settlement Fund. Doc. 84-1, ¶ 1.8.

d. Claims.

(i) Claim Form. A person must identify himself/herself/itself as the owner/holder/user of one or more of the involved fax numbers at the time of the fax transmissions covered by the settlement to claim relief from the Settlement Fund. The class notice includes a simple,

one-page claim form for submitting such claims for payment. The Claim Form is the fourth page of the Notice (Exhibits A and B to the Settlement Agreement). On the Claim Form, a person must affirm that one or more of its fax numbers (identified in Defendant's fax broadcaster's records as having been sent one or more advertisements) was that person's fax number at the time and that they do not affirmatively remember providing express permission to Defendant or affirmatively remember purchasing products for the first time during the time between Defendant's purchase of TAG Pharmacy (and the target list for the faxes in the settlement class period) and the date of the person's fax, potentially triggering a sales call seeking consent.

A person submitting an approved Claim Form will be mailed a payment of the lesser of $133.83 per fax that was sent to that fax number (per the records produced in the Litigation) or a pro rata share of the Settlement Fund after the other required payments are subtracted. That figure may also increase if persons believed to be members of the class remove themselves from the class through affirmatively responding to one or both of the consent and purchase-during-the-key-time-period-questions.

A successful claimant (1) need not possess any copy of any of the faxes at issue, (2) need not remember receiving any fax, and (3) need not know anything about Defendant. Rather, the claimant must merely identify himself/herself/itself as a member of the Settlement Class by verifying ownership of one or more targeted fax numbers at the relevant time, answer a question about whether he/she/it purchased anything from Imprimis during the time between Defendant's purchase of TAG Pharmacy (and the target list for the faxes in the settlement class period) and the date of the person's fax, and answer a question about whether he/she/it gave prior express permission to receive advertising faxes from Defendant. *Id.*, ¶¶ 1.2, 1.22, 2.1 and Exhibit B thereto.

(ii) Settlement Administrator. KCC LLC is the "Settlement Administrator." KCC issued the class notice, is maintaining the settlement website, is assisting class members in completing and submitting forms, is receiving the claim forms, and will provide a list of approved and rejected claims to counsel for the parties. *Id.*, ¶ 1.36; Doc. 87, ¶ 6.

e. Release. The Settlement Class will release all claims that were brought or which could have been brought in this action about Defendant's

advertisements sent by fax on July 29, 2016, August 31, 2016, September 6, 2016, or November 16, 2016, but not any claim pertaining to the facsimiles sent at other times. Doc. 84-1, ¶¶ 1.14, 1.32-1.34, 1.42, 3.1-3.2.

f. Attorney's Fees and Costs and Class Representative Award. As indicated in the class notice, Class Counsel applies to the Court to approve an award of attorney's fees equal to one-third of the Settlement Fund ($483,333.33), plus reasonable out-of-pocket expenses not to exceed $54,000.00, including the cost of settlement administration. Class Counsel also asks the Court to approve an award of $15,000 from the Settlement Fund to plaintiff Dr. Louis A. Sobol, M.D. for serving as the Class Representative. *Id.*, ¶¶ 1.19-1.21, 8.1, 8.3.

III. The Settlement Class was appropriately notified about the settlement.

Rule 23 (e) (1) requires, "The court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Under federal law, notice of the settlement must satisfy due process. *Maher v. Zapata Corp.*, 714 F.2d 436, 450-453 (5th Cir. 1983); *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 (3d Cir. 1983). The Court is vested with wide discretion both as to the manner in which notice is given and the form that notice is to take. 7B Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1797.6 (3d ed. 2005). Here, in compliance with the Court's Orders, Plaintiff caused the notice to be sent

by facsimile and, where facsimile would not work, then by U.S. Mail (after consultation of the national Change of Address Database). Exhibit A.

The content of the parties' notice complied with Rule 23 (c) (2) (B), which requires that the notice "must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23 (c) (3)." The class notice stated all of those things. Exhibit A, Ex. 1.

Further, the claim form for this settlement was a 1-page, easy to read and understand form. *Id.* Each Settlement Class member merely had to provide their contact information, verify use or ownership of the subject telephone number during the class period, answer a question about whether he/she/it purchased anything from Imprimis during the time between Defendant's purchase of TAG Pharmacy (and the target list for the faxes in the settlement class period) and the date of the person's fax, and answer a question about whether he/she/it gave prior express permission to receive advertising faxes from Defendant. *Id.*

The Settlement Class members did not have to provide a copy of a received junk fax or attest to remembering receiving one. Instead, they merely needed to identify themselves as a member of the class by stating their ownership/use of the telephone number in question at the time of Defendant's faxing (and not exclude themselves by affirmatively attesting to having provided consent or purchasing products during the period such a purchase could have led to a consent request).

ARGUMENT

I. The Court should approve the Settlement.

A. Standard for judicial evaluation and approval.

A court should approve a settlement if the settlement "is fair, reasonable, and adequate." Fed. R. Civ. P. 23 (e) (1) (C); *Int'l Union, United Auto, Aerospace and Implement Workers of America v. General Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). It is well-established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation.").

"[A] presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.42 (1995). *See also Stanspec Corp. v. Jelco, Inc.*, 464 F.2d 1184, 1187 (10th

Cir. 1972) ("The law actively encourages compromise and settlement of disputes.").

B. Factors to be considered in determining whether a settlement is fair, reasonable, and adequate.

Courts typically consider the following factors in evaluating a class action settlement: "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and the class representatives; (6) the reaction of absent class members; and (7) the public interest." *Brent*, 2011 WL 3862363 at *12, *citing Int'l Union,* 497 F.3d at 632.

New Federal Rule 23 (e) (2), which went into effect December 1, 2018, enumerates similar factors: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other. Here, all of these factors show the settlement should be approved.

1. The proposal was negotiated at arm's length and there is no risk of fraud or collusion.

"Settlement negotiations that are conducted at arm's length and in good faith demonstrate that a settlement is not the product of collusion." *Retsky Family Ltd. Partnership v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, * 2 (N.D. Ill. Dec. 10, 2001). Here, the settlement record proves that the Settlement is not the product of collusion. Settlement was reached only after discovery on both the merits and Defendant's ability to pay, after a mediation with a professional mediator, and after extensive negotiation of terms. The Settlement resulted from arms-length negotiations between experienced counsel with an understanding of the strengths and weaknesses of their respective positions in this case. There is no indication that this Settlement was the product of collusion.

2. The relief for the class is adequate, taking into account the relief to the class and the complexity, expense and likely duration of the litigation.

Class actions have a well-deserved reputation for complexity. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 315 (N.D. Ga. 1993) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). There is no exception here. It was the subject of a hard fought motion for class certification. Had the litigation continued, there likely would have been one or more motions for summary judgment, possibly trial, and appeal. This Settlement permits the recipients of the faxes to obtain cash payments of the *pro rata* share of the Settlement Fund

($133.83 per fax) without the risks and costs of further litigation. The Settlement awards relief based on the value of each class member's claim, which is an equitable way to treat the class members.

To avoid the risk and uncertainty of this litigation, Defendant has agreed to make available a Settlement Fund to pay the portion of that judgment for which there is likely no insurance coverage. As discussed below, the attorney's fees sought are reasonable and in line with those awarded in similar approved settlements and there is nothing unusual about the timing of payment. Further, the fees are substantially less than the value of time expended. Due to the risks and expenses involved in litigating this action, and the costs of pursuing appeals, reaching this Settlement is a fair, reasonable, and adequate result for the Class.

3. The amount of discovery.

The parties engaged in extensive discovery, including of Defendant's insurance coverage and limited ability to pay a potential judgment, to allow them to make a fully informed decision prior to agreeing to the settlement terms. Therefore, the stage of proceedings and amount of discovery supports final approval.

4. Likelihood of success on the merits.

As discussed above, while Plaintiff believes he is likely to succeed on the merits, TCPA class action jurisprudence generally, and the issues in this case

specifically, reveal "simple" to be an unfair characterization. Absent settlement, this case does not necessarily result in a judgment for the class, trebled damages, or collection from Defendant or its insurer. And, even if it might, there are significant delays in forcing Defendant to pay. A fair, reasonable, and adequate settlement avoids risk and delay. *See, e.g., Leonhardt v. ArvinMeritor, Inc.*, 581 F. Supp. 2d 818, 834 (E.D. Mich. 2008) ("class members would bear the risk that continued litigation will leave them with nothing because of loss and, in some cases, also because of delay").

5. Opinion of experienced Class Counsel and the Class Representative.

Plaintiff and his counsel concluded that the terms and conditions of this Settlement are fair, reasonable, adequate, and in the best interests of the Class as a means of resolving this litigation. Class Counsel have substantial experience litigating class actions, particularly TCPA claims. They have been appointed class counsel in dozens of cases. *See, e.g., American Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, Case No. 09-cv-1162 (W.D. Mich. July 24, 2012), *affirmed by* 757 F.3d 540 (6th Cir. 2014); *Jackson's Five Star Catering, Inc. v. Beason*, Case No. 10-CV-10010 (E.D. Mich.); *Compressors Engineering Corp. v. Thomas*, Case No. 10-CV-10059 (E.D. Mich. Apr. 20, 2011); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, 1:10-CV-253, 2012 WL 4127824 (W.D. Mich. Sept. 19, 2012); *Imhoff Inv., Inc. v. Sammichaels, Inc.*, 10-10996, 2012 WL 4815090 (E.D. Mich. Oct. 1,

2012); *Exclusively Cats Veterinary Hospital v. Anesthetic Vaporizer Services, Inc.*, 10-10620, 2010 WL 5439737 (E.D. Mich. Dec. 27, 2010); *Siding and Insulation Co. v. Beachwood Hair Clinic, Inc.*, 279 F.R.D. 442 (N.D. Ohio 2012); *City Select Auto Sales, Inc. v. David Randall Assocs., Inc.*, 296 F.R.D. 299 (D. N.J. 2013); *A & L Indus., Inc. v. P. Cipollini, Inc.*, 12-07598, 2013 WL 5503303 (D. N.J. 2013); *CE Design v. Cy's Crab House North, Inc., et al.*, 259 F.R.D. 135 (N.D. Ill. 2009), *app. denied* (Sept. 9, 2009); *CE Design, Ltd. v. King Architectural Metals, Inc.*, No. 09 C 2057, 2010 WL 5146641, *6 (N.D. Ill. Dec. 13, 2010), *reversed on other grounds, CE Design, Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723-24 (7th Cir. 2011; *G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 07 CV 5953, 2009 WL 2581324 (N.D. Ill. Aug. 20, 2009); *G.M. Sign, Inc. v. Group C. Comm'n, Inc.*, 08 CV 4521, 2010 WL 744262 (N.D. Ill., Feb. 25, 2010); *Green v. Service Master On Location Services Corp.*, No. 07 C 4705, 2009 WL 1810769 (N.D. Ill., June 22, 2009); *Hinman v. M & M Rentals*, 545 F. Supp. 2d 802 (N.D. Ill. 2008), *app. denied* (June 17, 2008); *Paldo Sign v. Topsail*, No. 08 C 5959, 2010 WL 4931001 (N.D. Ill. Nov. 29, 2010); *Targin Sign Systems, Inc. v. Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D. Ill. 2010).

Under these circumstances, the Court should give favorable weight to Class Counsel's opinions about the settlement.

6. The reaction of absent class members.

A low rate of opt-outs or opposition reflect favorably on a settlement. *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1020-21 (N.D. Ill. 2001) (high acceptance rate "is strong circumstantial evidence in favor of the settlements"). Here, the Class members overwhelmingly support the settlement. This is evidenced by the fact that no Class member has objected to the settlement and no class member chose to be excluded. Exhibit A. *See Mangone v. First USA Bank*, 206 F.R.D. 222 (S.D. Ill. Feb. 2, 2001) (low opt-out and objection statistic showed that approximately 99.99% of the class elected to take part in the settlement); *Schlensky v. Dorsey*, 574 F.2d 131, 148 (3d Cir. 1978); *In re SmithKline Beecham Corp. Sec. Litig*., 751 F. Supp. 525, 530 (E.D. Pa. 1990); *Hispanics United of DuPage County v. Village of Addison, Illinois*, 988 F. Supp. 1130, 1169 (N.D. Ill. 1997) (settlement fair where only a small number of class members objected); *In re Austrian and German Bank Holocaust Litig*., 80 F. Supp. 2d 163, 175 (S.D.N.Y. 2000) (a small number of objectors is "indicative of the adequacy of the settlement"); *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 141 (W.D. Ky. 1992) ("small number of objectors is a good indication of the fairness of the settlement").

7. The public interest.

Courts have held that a settlement of class action litigation serves the public interest. *Int'l Union, United Auto., Aerospace, and Agr. Implement Workers of America v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007). Based upon the foregoing, as well as upon the judgment of experienced class counsel, Plaintiff requests that the Court approve the proposed Settlement.

II. Attorneys' fees and expenses from the Settlement Fund are fair, reasonable, and appropriate.

Under the terms of the Agreement, Defendant will pay Class Counsel one-third of the Settlement Fund ($483,333.33) as attorneys' fees, plus their out-of-pocket litigation expenses of $ (plus the cost of travel to the final approval hearing). Defendant does not object to Plaintiff's requests for these amounts. *Id.*

The attorneys undertook the case on a contingency basis and made a fund of money available to pay the Settlement Class. It is well recognized that the attorneys' contingent risk is an important factor in determining the fee award. *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974). It is well-settled that the attorneys who create a benefit for class members are entitled to compensation for their services. *Brent,* 2011 WL 3862363 at *19. The Court should approve this agreement, to which no one objects.

A. The Court should approve Defendant's agreement to pay Class Counsel a percentage of the Settlement Fund as attorney's fees.

It is well settled that the attorneys who create a benefit for class members are entitled to compensation for their services. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The U.S. Supreme Court has noted that in settlement fund cases, such as this one, "a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). *See also US Airways, Inc. v. McCutchen*, 133 S.Ct. 1537, 1545 (2013) (discussing *Boeing* rule and describing it as one "designed to prevent freeloading").

"This Court has 'recognized consistently' that someone 'who recovers a common fund for the benefit of persons other than himself' is due 'a reasonable attorney's fee from the fund as whole.'" *McCutchen*, 133 S.Ct. at 1550, *quoting Boeing*, 444 U.S. at 478. Moreover, the percentage of the fund method in a common fund settlement is appropriate as it "enhances efficiency" and "it better approximates the workings of the marketplace." *In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig*., 56 F.3d 295, 307 (1st Cir. 1995).

"[T]he Sixth Circuit has observed a 'trend towards adoption of a percentage of the fund method in [common fund] cases.'" *Stanley v. U.S. Steel Co*., 2009 WL 4646647 at *1 (E.D. Mich. Dec. 8, 2009), *quoting Rawlings v. Prudential–Bach Props., Inc.*, 9 F.3d 513, 515 (6th Cir. 1993); *In re Sulzer Orthopedics, Inc.*, 398

F.3d 778, 780 (6th Cir. 2005).[2] "Particularly, where counsel's efforts create a substantial common fund for the benefit of the class, they are entitled to payment from the fund based on a percentage of that fund." *Id.*, *citing Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 909 (S.D. Ohio 2001); *Basile v. Merrill Lynch, Pierce, Fenner, & Smith, Inc*., 640 F. Supp. 697 (S.D. Ohio 1986).

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[2] This District Court also favors the percentage of the fund method. "This method of awarding attorneys' fees is preferred in this District because it conserves judicial resources and aligns the interests of class counsel and the class members." *In re Automotive Parts Antitrust Litig.*, Case No. 12-md-2311, 2017 WL 3525415 at *2 (E.D. Mich. July 10, 2017) (Battani, J.), *citing Rawlings*, 9 F.3d at 515; *In re Packaged Ice Antitrust Litig*., No. 08-md-01952, 2011 WL 6209188 at *17 (E.D. Mich. Dec. 13, 2011) (Borman, J.); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig*., 248 F.R.D. 483, 502 (E.D. Mich. 2008) (Rosen, J.). *See also Underwood v. Carpenters Pension Trust Fund—Detroit and Vicinity*, Case No. 13-cv-14464, 2017 WL 655622 at *12 (E.D. Mich. Feb. 17, 2017) (Michelson, J.) (applying percentage); *New York State Teachers' Retirement Sys. v. General Motors Co.*, 315 F.R.D. 226, 243 (E.D. Mich. 2016) (same; lodestar method "provides incentives for overbilling and the avoidance of early settlement."), *quoting Rawlings*, 9 F.3d at 517; *Cason –Merenda v. VHS of Michigan, Inc.*, Case No. 06-cv-15601, 2016 WL 944901 at *1 (E.D. Mich. Jan. 29, 2016) (applying percentage; "recent trend has been towards application of the percentage of the fund") (Rosen, J.); *In re Prandin Direct Purchaser Antitrust Litig.*, Case No. 10-cv-12141, 2015 WL 1396473 at *4 (E.D. Mich. Jan. 20, 2015) ("lodestar method is cumbersome; the percentage-of-the-fund approach more accurately reflects the result achieved; and the percentage-of-the-fund approach has the virtue of reducing the incentive for plaintiffs' attorneys to over-litigate or 'churn' cases.") (Cohn, J.); *Allan v. Realcomp II, Ltd.*, Case No. 10-cv-14046, 2014 WL 12656718 at *2 (E.D. Mich. Sep. 4, 2014) ("The Sixth Circuit has held that the percentage of the fund has been the preferred method for common fund cases, where there is a single pool of money and each class member is entitled to a share.") (internal quotation omitted) (Murphy, J.).

The advantages of the percentage of the fund method are that: "it is easy to calculate; it establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation." *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016), *cert. denied sub nom. Blackman v. Gascho*, 137 S. Ct. 1065 (2017), and *cert. denied sub nom. Zik v. Gascho*, 137 S. Ct. 1065 (2017).

"Use of the percentage method also decreases the burden imposed on the Court by eliminating a full-blown, detailed and time consuming lodestar analysis while assuring that the beneficiaries do not experience undue delay in receiving their share of the settlement." *Stanley*, 2009 WL 4646647 at *1, *citing In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989); MANUAL FOR COMPLEX LITIGATION, FOURTH § 14.121 (2004).

The Sixth Circuit recently clarified that fees are appropriately based on the entire fund made available. *See Gascho*, 822 F.3d at 282-86 ("the Supreme Court's position, as well as our own [is] that making claims available to all class members provides them with a benefit"), discussing *Boeing*. In *Boeing*, the Supreme Court stated that the right of absentee class members "to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Boeing*, 444 U.S. at 479

"[T]he criteria are satisfied when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump–sum judgment recovered on his behalf." *Id. See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) ("The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not."); 4 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 14:6, p. 570 (4th ed. 2002) ("*Boeing* settled the issue … by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed"). The fee award is thus based upon the entire fund available to be claimed, even when the entire fund is not claimed by class members and the unclaimed remainder reverts to the defendant. *Id.*

B. The requested fee is within the market rate for this type of case.

As discussed, the agreement calls for a one-third fee. That percentage falls within the approved range in class actions generally. *See Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 503 (E.D.Mich.2000) (approving fees of 33% of the settlement fund); *Johnson v. Midwest Logistics Systems, Ltd.*, No. 11-cv-1061, 2013 WL 2295880 (S.D. Ohio May 24, 2013) (same); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass., 2005) (same); *In re Telectronics Pacing Sys.*,

137 F. Supp. 2d 985, 1046 (S.D. Ohio 2001) ("the range of reasonableness has been designated as between twenty to fifty percent of the common fund"); *In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 217 (S.D. Ohio 1997), *rev'd on other grounds*, 24 Fed. Appx. 520 (6th Cir.2001) ("[t]ypically, the percentage awarded ranges from 20 to 50 percent of the common fund"); *In re Cincinnati Gas & Elec.*, 643 F. Supp. 148, 150 (S.D. Ohio 1986); *In re Cincinnati Microwave*, No. C–1–95–905 (30% plus expenses); *Howes v. Atkins*, 668 F. Supp. 1021 (E.D.Ky.1987) (40%); *Adams v. Standard Knitting Mills, Inc.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 96,377, 1978 U.S. Dist. LEXIS 20317 (E.D. Tenn. Jan. 6, 1978) (35.8%); *Bennett v. Roark Capital Group, Inc.*, Case No. 2:09-cv-00421, 2011 WL 1703447 at *2 (D. Maine, 2011) (33% of fund "reflects a fee that is customary."); *Taubenfeld v. Aon Corp.*, 415 F.3d 597 (7th Cir. 2005) (approving award of fees equal to 30% of $7.25 million settlement plus $111,054.06 in expenses and citing with approval a submission showing thirteen cases in the Northern District with awards of 30-39% of common funds in class actions*); Gaskill v. Gordon*, 160 F.3d 361 (7th Cir. 1998) (awarding 38% of the fund as fees). *See also* ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 13:80 (4th ed. Updated June 2008). "When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund." *Gaskill*, 160 F.3d at 363 (7th Cir. 1998) (affirming award of 38% of $20 million).

Moreover, that percentage falls within the market rate of TCPA cases. *See Bridging Communities, Inc. v. Top Flite Financial, Inc.*, Case No. 09-cv-14971 (E.D. Mich. May 22, 2019) (Cohn, J.) (Doc. 140) (awarding one third of fund plus one third of future insurance recovery); *Avio, Inc. v. Alfoccino, Inc.*, Case No. 10-CV-10221 (E.D. Mich. Jan. 18, 2018) (Roberts, J.) (Doc. 180) (awarding one third of fund); *Rusgo and DePanicis, Inc. v. Walter J. Svenkesen Insurance Agency, Inc.*, Case No. 16-cv-12966 (E.D. Mich. September 19, 2017) (Parker, J.) (Doc. 32) (same); *Imhoff Investment, LLC v. Sammichaels, Inc.*, Case No. 10-cv-10996 (E.D. Mich. Nov. 2, 2016) (Battani, J.) (Doc. 120) (same); *Jackson's Five Star Catering, Inc. v. Beason*, Case No. 10-cv-10010 (E.D. Mich. Apr. 5, 2015) (Tarnow, J.) (same); *American Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, Case No. 09-cv-1162 (W.D. Mich. Mar. 1, 2016) (Doc. 278) (same); *Avio Inc. v. Creative Office Solutions, Inc.*, 10-cv-10622 (E.D. Mich. Dec. 10, 2012) (Roberts, J.) (Doc. 31) (same); *Van Sweden Jewelers, Inc. v. 101 VT, Inc*., Case No. 10-CV-253 (W.D. Mich. July 30, 2015) (Doc. 245) (same); *Sandusky Wellness Center, LLC v. Wagner Wellness, Inc.*, Case No. 12-cv-2257 (N.D. Ohio Feb. 9, 2016) (Doc. 73) (same); *Sandusky Wellness Center v. Heel, Inc*., Case No. 12-CV-1470 (N.D. Ohio Apr. 25, 2014) (Doc. 95) (same); *Hawk Valley v. Taylor*, Case No. 10-CV-804 (E.D. Pa. Aug. 6, 2015) (Doc. 193) (same); *The Savanna Group, Inc. v. Trynex, Inc*., Case No. 10-CV-7995 (N.D. Ill. Mar. 4, 2014) (same); *Sawyer v. Atlas*

Heating & Sheet Metal Works, Inc., Case No. 10-CV-331 (E.D. Wis. July 19, 2013) (35% fee).

Moreover, the requested fee award here is consistent with a lodestar cross-check. In *Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005), the Sixth Circuit approved the district court's use of the current market rate rather than historical hourly rates to calculate the fee award to adjust for the delay in payment). The relevant market in specialized areas of law "may extend beyond the local geographic community." *Casey v. City of Cabool, Mo*., 12 F.3d 799, 805 (8th Cir. 1993) (explaining, in a civil rights case, that "[a] national market or a market for a particular legal specialization may provide the appropriate market.").

Ultimately, Plaintiff's attorneys have expended more than 1,900 total hours (through June 24, 2019) for a lodestar of $998,376.00:

Bock, Hatch, Lewis & Oppenheim:

Timekeeper	Hours	Hourly Rate	Lodestar
David M. Oppenheim (ATTY)	234.70	695.00	163,116.50
Erika V. Dopuch (ATTY)	10.10	300.00	3,030.00
John Orellana (ATTY)	89.80	310.00	27,838.00
Jonathan B. Piper (ATTY)	.50	730.00	365.00
Kimberly M. Watt (ATTY)	17.60	420.00	7,392.00
Mara Ann Baltabols (ATTY)	68.10	405.00	27,580.50
Michael J. Roman (ATTY)	83.70	325.00	27,202.50
Molly S Gantman (ATTY)	4.80	380.00	1,824.00
Phillip A. Bock (ATTY)	32.40	750.00	24,300.00
Robert M. Hatch (ATTY)	94.20	730.00	68,766.00
Tod A. Lewis (ATTY)	852.10	595.00	506,999.50

Caleb S. Frigerio (ATTY)	260.10	475.00	123,547.50
Douglass R. Nolan (PLG)	8.30	175.00	1,452.50
Eric Lemberg (PLG)	16.80	125.00	2,100.00
Fatima A. Abuzerr (PLG)	2.60	125.00	325.00
John P. Martin (PLG)	4.50	175.00	787.50
Law Clerk (PLG)	1.60	125.00	200.00
Marie Ang (PLG)	35.80	175.00	6,265.00
MeShellai B. McWilliams (PLG)	7.80	125.00	975.00
Neil A. Hynes (PLG)	16.70	160.00	2,672.00
Peter J. Hillgamyer (PLG)	11.60	125.00	1,450.00
Zachary T. Kerska (PLG)	1.50	125.00	187.50
Total BHLO Lodestar	**1,855.30**		**$998,376.00**

Shenkan Injury Lawyers

Timekeeper	Hours	Hourly Rate	Lodestar
Richard Shenkan (ATTY)	53.4	725.00	38,715
Total Lodestar	**1,908.70**		**$1,037,091.00**

Detailed time records will be made available for *in camera* inspection upon the Court's request, should it want to conduct a lodestar cross check.[3]

One federal judge wrote a lengthy opinion on a fee motion in *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Action*, Case No. MDL 2066, 2010 WL 5058454 (N.D. Ohio Dec. 6, 2010). In its analysis, that Court discussed the fact that it had examined 1,120 class settlements nationwide and found that "the courts' effective multipliers averaged ... 3.89 across all 1,120 cases." *Id.* at *4 n.28.

[3] This preserves the work product privilege in the event the settlement is not approved, or is reversed on appeal.

Here, counsel actually seeks less than 47% of their total lodestar, a multiplier of 0.466.

Most important, the Class Notice informed the Settlement Class about the attorneys' fees and none has objected. Courts have recognized the lack of objections from members of the class as an important factor in awarding fees. *See, e.g., In re Automotive Refinishing Paint Antitrust Litig*., MDL No. 1426, 2008 WL 63269, *4 (E.D. Pa. Jan. 3, 2008) ("A lack of objections demonstrate that the Class views the settlement as a success and finds the request for counsel fees to be reasonable.").

In *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), the U.S. Supreme Court held that negotiated, agreed-upon attorneys' fee provisions, such as the one here, are the "ideal" towards which the parties should strive: "A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." In *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), the court concluded that courts should not interfere in fee arrangements between settling class action parties when the defendant has agreed to pay the fees:

> [W]here . . . the amount of the fees is important to the party paying them, as well as the attorney recipient, its seems to the author of this opinion that an agreement 'not to oppose' an application for fees up to a point is essential to completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged. It is difficult to see how this could be left entirely to the courts for determination after the settlement. [761 F.2d at 905 n. 5].

Class Counsel undertook this case on a contingency basis. Class Counsel have been litigating TCPA class actions and the resulting coverage actions since 2003, and have litigated other types of class actions for many more years. They faced risk of nonpayment, not only for their time, but also for their out-of-pocket costs. The Court should approve the agreement to pay them attorneys' fees of $483,333.33, plus expenses of $53,500.00[4] (Expenses, Exhibit B), because that amount is within the market rate for this type of case and it is otherwise fair and reasonable under the circumstances.

III. The agreed incentive award to Plaintiff is fair and proper.

Additionally, the Court should approve Defendant's agreement to pay $15,000 to Plaintiff from the Settlement Fund for serving as the Class Representative. A plaintiff willing and able to represent the class, sit for deposition, and devote time and attention to the case, is necessary for a class action to proceed and for the class to receive anything. Here, Plaintiff was the catalyst for the action being brought and for the Settlement Class's recovery. Plaintiff responded to discovery and sat for deposition. Plaintiff's efforts greatly benefited the Settlement Class.

Such awards are appropriate to reward class representatives who have pursued claims on behalf of the class. *Moulton v. U. S. Steel Corp.*, 581 F.3d 344,

[4] The total current expenses shown on Exhibit B plus the $24,906 owed to KCC exceed the agreed cap of $53,500.

351-52 (6th Cir. 2009); *In re Continental Illinois Securities Litig.*, 962 F.2d 566, 571-72 (7th Cir. 1992). "In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *See Cook v. Niedert, et al.*, 142 F.3d 1004, 1016 (7th Cir. 1998).

Courts routinely award such "incentive payments" to the persons who assume the special litigation burden of class representative and thereby benefit the entire class. *See Martin v. Trott Law, P.C.*, No. 15-12838, 2018 WL 4679626, at *2 (E.D. Mich. Sept. 28, 2018) (approving $5,000 incentive awards to each of three class members); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) (approving class incentive awards of $8,000, $9,000, and $14,000); *Cook*, 142 F.3d at 1016 (affirming $25,000 incentive award to class representative because "a named plaintiff is an essential ingredient of any class action, [and] an incentive award is appropriate if it is necessary to induce an individual to participate in the suit"); *In re Dun & Bradstreet Credit Services Customer Litigation*, 130 F.R.D. 366, 367 (S.D. Ohio 1990) (approving two incentive awards of $55,000 and three of $35,000 to five representatives).

In *In re Lupron*, the court noted that incentive awards serve an important function:

> Incentive awards serve an important function in promoting class action settlements, particularly where, as here, the named Plaintiff participated actively in the litigation. *Denny v. Jenkins & Gilchrist*, 2005 WL 388562, at *31 (S.D.N.Y. Feb. 18, 2005). Courts 'routinely approve incentive awards to compensate named Plaintiff for the service they provided and the risks they incurred during the course of the class action litigation.' *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2000). 'Because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit.' *In re Compact Disc*, 292 F. Supp. 2d at 189. [*In re Lupron Mktg. and Sales Practice Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833, at *7 (D. Mass. Aug. 17, 2005)]

Here, the Parties agreed to an incentive awards equal to those awarded in other TCPA cases. *See Rusgo and DePanicis, Inc. v. Walter J. Svenkesen Ins. Agency, Inc.*, Case No. 16-cv-12966 (E.D. Mich. Sept. 19, 2017) (Parker, J.) (ECF 32) ($15,000 award); *Imhoff Investment, LLC v. Sammichaels, Inc.*, Case No. 10-cv-10996 (E.D. Mich. Nov. 2, 2016) (Battani, J.) (ECF 120) ($15,000 award); *Jackson's Five Star Catering, Inc. v. Beason*, Case No. 10-cv-10010 (E.D. Mich. Apr. 5, 2015) (Tarnow, J.) ($15,000 award).

Class action suits conserve judicial and litigant resources. *GMAC Mtge. Corp. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992), *citing* C. Krislov, SCRUTINY OF THE BOUNTY: INCENTIVE AWARDS FOR PLAINTIFF IN CLASS LITIGATION, 78 Ill. B.J. 286 (June 1990). Class representatives assume the burdens of litigation that absent class members do not shoulder and do so without promise of a reward and with the risk that the litigation may not succeed. The Class

Representative in this case was no exception. But for his initiative and participation, the benefits available to the Class members would not have been realized. The Court should approve the agreement and award the requested amount.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that the Court approve the Settlement as fair, reasonable, and adequate, and enter the parties' proposed Final Approval Order.

Respectfully submitted,

s/ David M. Oppenheim
One of Plaintiff' attorneys

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CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on June 24, 2019, I electronically filed the foregoing using the Court's CM/ECF System, which will send notification of such filing to all counsel of record.

s/ David M. Oppenheim