UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRYAN HANLEY, *an individual on behalf of himself and all others similarly situated*, Plaintiff, v. TAMPA BAY SPORTS AND ENTERTAINMENT LLC, *a Delaware limited liability company*, Defendant.	CASE NO. 8:19-CV-00550-CEH-CPT

MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE'S SERVICE AWARD

Plaintiff Bryan Hanley, through undersigned Class Counsel and pursuant to Federal Rules of Civil Procedure 23(h) and 54(d), moves for attorneys' fees, costs and a service award.[1]

I. INTRODUCTION

The Class Action Settlement between Plaintiff Bryan Hanley and Defendant Tampa Bay Sports and Entertainment LLC ("Defendant" or "TBSE"), if finally approved, resolves the claims of Plaintiff and more than 180,000 Settlement Class Members against all parties in this Action under the Telephone Consumer Protection Act ("TCPA"). The Settlement creates a $2,250,000 cash fund and provides prospective relief in the form of changes to TBSE's future text marketing practices. All Settlement Class Members who submit a short and simple one-page claim form will receive a pro rata cash payment.

[1] Unless otherwise noted, all capitalized terms have the same meaning as ascribed to them in the Settlement Agreement. ECF No. 78-1.

The Settlement was obtained after nearly a year of contentious litigation, during which time Class Counsel expended substantial attorney hours and incurred significant out of pocket costs despite the significant risk that no recovery would be obtained and where Defendant and its able counsel vigorously defended the case at every stage. Class Counsel respectfully submits that the $2.25 million Settlement represents an excellent result for the Settlement Class and moves for an award of attorneys' fees of thirty-five percent (35.00%) of the total Settlement Fund, for reasonable costs actually incurred, and a $10,000 service award to Class Representative Bryan Hanley. This request is within presumptive standards prevalent in the Eleventh Circuit.

As detailed below, Class Counsel's requested fee represents the established market fee for contingent legal services in complex class action litigation, and is consistent with recent fee awards to class counsel in similar TCPA cases. The reasonableness of Class Counsel's request is further confirmed by various additional factors that District Courts in the Eleventh Circuit consider in awarding fees, such as the risks presented by the case, the quality and amount of work performed by Class Counsel, and the results achieved on behalf of the Settlement Class.

II. BACKGROUND

a. The Settlement

The terms and conditions of the Settlement are set forth in the executed Settlement Agreement. ECF No. 78-1. The cornerstone of the Settlement is the substantial, concrete monetary relief it provides to Settlement Class Members. The Settlement Agreement consists of a $2,250,000 Settlement Fund to which the Settlement Class Members can look to for relief. The first $1,400,000 of the Settlement Fund is entirely non-reversionary, with the maximum distribution to the Class depending on Settlement Class participation and the number of Approved Claims actually submitted. In addition, the Settlement Agreement mandates that TBSE institute

TCPA compliance training to key managers responsible for text communications to consumers, thus promoting best practices and providing continuing relief to the class.

On January 7, 2020, the Court entered an Order Certifying Settlement Class and Preliminarily Approving Class Action Settlement, finding, *inter alia*, that the Court has jurisdiction, that the proposed Settlement Class meets the requirements of Rule 23, that the Settlement is reasonable and the result of informed, good-faith, arm's length negotiations and not the product of collusion, and that the proposed Notice program satisfies due process. ECF No. 82.

b. The Quality and Amount of Work Performed by Class Counsel

1. The pre-suit investigation.

Class Counsel expended significant time and energy on this case even before the Class Action Complaint was filed. Class Counsel investigated the extent to which TBSE set up advertisement copyright asking consumers to enter for chances to win free hockey tickets (as in the Plaintiff's case) or other promotional items. As Class Counsel discovered, none of these advertisements contained any disclosures that participation would lead to receiving further automated marketing contents. But that is precisely what TBSE did: after participating to receive free hockey tickets, Plaintiff began to receive marketing text messages on a nearly daily basis, inundating his phone with more than a dozen telemarketing messages in just a few weeks.

Before filing suit, Class Counsel spent substantial time studying TBSE's marketing tactics, including data reflected on-air, the internet, and on social media. Only after insuring the good faith basis of the Plaintiff's claims did Class Counsel file the Complaint.

2. The Class Action Complaint and Defendant's responses.

In response to the Complaint, on April 29, 2019, Defendant simultaneously filed three motions: (1) TBSE's Motion to Stay Proceedings, (2) TBSE's Motion to Dismiss, and (3) TBSE's

Motion to Strike Class Allegations. ECF Nos. 14, 15, 17. Plaintiff opposed what he considered Defendant's effort to obtain an indefinite stay. ECF No. 23. Before Plaintiff could respond to Defendant's Motions to Dismiss and to Strike the Class Allegations, however, Defendant also filed a Motion for Stay of Discovery and, alternatively, for Phased Discovery. ECF Nos. 23, 25. Ultimately, Plaintiff responded to all of Defendant's motions. ECF Nos. 27-28, 39. And shortly thereafter, on June 3, 2019, Plaintiff moved to certify a class under Rule 23 and to appoint his counsel at CAREY RODRIGUEZ MILIAN GONYA LLP, as class counsel. ECF No. 29.

On June 25, 2019, this Court ordered the Parties to appear before the Court on July 10, 2019 for a Preliminary Pretrial Conference and for a hearing on Defendant's Motions to Stay Proceedings and to Stay Discovery and for Phased Discovery. ECF Nos. 40-41.

Before the Parties appeared for the hearing, the United States acknowledged the basis for Defendant's Motion to Dismiss: that the federal statute that Plaintiff was suing under, the TCPA, was alleged to be unconstitutional. ECF No. 42. According to TBSE, the TCPA unconstitutionally discriminates on the basis of speech contents by exempting various agents of the U.S. government from its provisions and because there is no compelling government interest in policing communications typically sent through text messages. In addition, TBSE asserted it could not readily determine what dialing equipment would fall within the TCPA's prohibition against use of an automatic telephone dialing system, thus making the law void for vagueness. In light of TBSE's positions, the United States argued in support of the TCPA's constitutionality, noting that Congress made extensive findings about the law's purpose of protecting consumer privacy, an interest it asserted the United States Supreme Court considered compelling. ECF No. 60-1. Also, before the Parties were due to appear before the Court, Defendant responded to Plaintiff's motion for class certification with a 30-page opposition brief containing 10,000 pages of materials, and 17 exhibits,

including an expert report. ECF No. 48. Among the declarations submitted by Defendant were declarations from putative class members purporting to state that they enjoyed receiving the text messages and felt unharmed by virtue of having received them. Plaintiff immediately sought leave to submit a reply in further supporting class certification. ECF No. 49.

On July 10, 2019, the Parties appeared before the Court for a Preliminary Trial Conference. The Court ordered the Parties to confer further and to submit an amended Case Management Report. *See* ECF No. 50. Arguments were also held on Defendant's Motion to Stay Proceedings and to Stay and Phased Discovery. Defendant's motions were denied. Plaintiff's motion for leave to submit a reply in support of his motion for class certification was granted. *See* ECF Nos. 50, 51.

Following the July 10, 2019 hearing, Plaintiff submitted his reply in further support of his motion to certify a class. ECF No. 55. Through the reply, Plaintiff addressed Defendant's positions and proposed an amended class definition that addressed some of Defendant's objections to class certification. Thereafter, Defendant sought leave to file a sur-reply to Plaintiff's motion for class certification, which the Court granted. ECF Nos. 57, 60. In the sur-reply, Defendant argued that Plaintiff prejudicially moved the goalpost by changing his proposed class definition in his reply brief. ECF No. 62. Plaintiff then sought and obtained leave to submit a sur-sur-reply on class certification issues and why class certification was appropriate. ECF Nos. 67-68, 70.

3. Transitioning towards settlement discussions.

During this time, the Parties were not only busy briefing the constitutionality of the TCPA and whether this action was properly litigated as a class action, but were also engaged in direct communications, and as part of their obligations under Fed. R. Civ. P. 26, discussing the prospect of resolution. Those discussions eventually led to an agreement between the Parties to engage in formal mediation, which the Parties agreed would take place before Jay Cohen, who is a neutral

with substantial experience mediating consumer class actions, including class actions alleging violation of the TCPA. The Parties ultimately agreed to attend mediation at the offices of Defendant's counsel on September 23, 2019. ECF No. 58. While the mediation efforts were ultimately unsuccessful, they set the stage for continued and more in-depth discussions for settlement. ECF No. 74.

4. Class Counsel continue to zealously pursue Class claims.

After mediation, Plaintiff sought leave to submit an Amended Class Action Complaint that added several of Defendant's corporate affiliates and employees who were alleged to have been directly involved in sending the offending marketing text messages. ECF Nos. 72, 72-1. In addition, Plaintiff's proposed Amended Class Action Complaint sought to allege claims for intrusion upon seclusion and to obtain civil remedies for violations of criminal wiretap laws. These claims were significant as amendment would have eliminated the possibility of Defendant obtaining dismissal of the entire action solely on the argument that no automatic telephone dialing system or "ATDS" was utilized; a popular and sometime effective defense. *See, e.g., DeNova v. OCwen Loan Servicing*, No. 8:17-cv-2204-T-23AAS, 2019 WL 4635552, at *3-4 (M.D. Fla. Sept. 24, 2019); *see also Glasser v. Hilton Grand Vacations, LLC*, 948 F. 3d 1301 (11th Cir. 2020).

Shortly thereafter, the Plaintiff also moved to compel Defendant to produce additional documents in response to his First Set of Requests for Production. ECF No. 73.

5. Class Counsel Overcame Substantial Defenses and Hurdles to Achieve This Settlement.

Class Counsel expended substantial effort confronting serious litigation risks in achieving this Settlement on behalf of the Settlement Class Members, especially given Defendant's wide range of potential defenses and seemingly unlimited defense resources.

Throughout this litigation, until the Settlement was reached, Class counsel continued to face numerous obstacles and risks to recovery. These risks included whether the TCPA would be struck down as unconstitutional, whether a proposed class could ever be certified, and whether Defendant properly obtained Plaintiff's and putative class members' consent. In addition, whether Defendants' texting technology constituted an automatic telephone dialing system under the TCPA remained hotly contested and could have disposed of Plaintiff's claims.

A negative decision on any of these issues could have eliminated Defendants' liability to the Class. But despite these significant known hurdles and risks to recovery, Class Counsel continued to throw its resources and time behind Plaintiff's action and vigorously litigated this case on the Class' behalf.

6. Class Counsel's request for fees and costs and for a service award.

By way of this Motion, Class Counsel now seek an award of attorneys' fees of $787,500.00 (35.00% of the Settlement Fund), to recover actually incurred costs of $21,827.47, and to award $10,000 to Plaintiff and Class Representative Bryan Hanley in recognition of his service to the Settlement Class and without him this recovery would not have been possible.

III. THE REQUESTED FEE AND COSTS AWARD IS REASONABLE

The Settlement creates a $2.25 million cash Settlement Fund. In the Eleventh Circuit, "[i]t is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to an allowance of attorneys' fees based upon the benefit obtained." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (citing *Camden I Condo Ass'n v. Dunkle*, 946 F. 2d 768, 771 (11th Cir. 1991); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). Using the "percentage of recovery" method to award attorneys' fees "is consistent with the dictates of the Eleventh Circuit." *Reyes, et al. v. AT&T Mobility Services, LLC*,

No. 10-20837-CIV-MGC (S.D. Fla. June 21, 2013) (ECF No. 196 at 6) (citing *Camden I*, 946 F.2d at 771); *In re Sunbeam Sec. Litig.,* 176 F. Supp. 2d 1323, 1333 (S.D. Fla. 2001)).

"The percentage applies to the total benefits provided, even where the actual payments to the class following a claims process is lower." *Hall v. Bank of Am., N.A.*, No. 12-22700, 2014 WL 7184039, at *9 (S.D. Fla. Dec. 17, 2014); *see also Montoya v. PNC Bank, N.A.*, No. 14-20474, 2016 WL 1529902, *23 (S.D. Fla. Apr. 14, 2016) ("the valuation of counsel's fee should be based on the opportunity created for the Settlement Class … [a]nd counsel should not be penalized for class members' failure to take advantage of such a settlement").

Indeed, when determining the denominator for purposes of awarding counsels' fees in a common fund context, "no case has held that a district court must consider only the actual payout in determining attorneys' fees." *Carter v. Forjas Taurus, S.A.*, 701 Fed. Appx. 759, 767 (11th Cir. 2017) (citing *Waters v. Int'l Precious Metals Corp.*, 190 F. 3d 1291, 1295 (11th Cir. 1999)). Moreover, various federal appellate courts have ruled that it is an abuse of discretion to base fee awards only on the class members' claims made rather than a percentage of the entire fund available to the class. *See Williams v. MGM-Pathe Comm's. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (reversing district court for basing fee award only on claimed portion of common fund); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F. 3d 423, 437 (2d Cir. 2007) (same);

As set forth more fully below, a Fee Award of thirty-five percent (35.00%) of the $2.25 million Settlement Fund is fully warranted here, both under a percentage of the common Settlement Fund analysis, and pursuant to the *Johnson* factors that district courts in the Eleventh Circuit consider in confirming reasonableness. *See Camden I*, 946 F.2d at 774-775.

a. The Requested Fee Amount is Reasonable as a Percentage of the Total Settlement

Although "[t]here is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee," *In re Sunbeam: Securities Litigation*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774), an award of about one-third of the common fund is "consistent with the trend in this Circuit." *Reyes*, No. 10-20837-CIV-MGC (ECF No. 196 at 6). Attorneys' fee awards in the one-third range, however, do not represent an upper limit. Rather, the Eleventh Circuit has stated instead that "an upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded." *Camden I*, 946 F. 2d at 774-75; *see also David v. Am. Suzuki Motor Corp.*, No. 08-cv-22278, 2010 WL 1628362, at *8 n. 15 (S.D. Fla. April 15, 2010) (noting customary fee as "20%-50% of the common fund's value").

The reasonableness of the requested Fee is further confirmed by the reasoning of the district court in *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015), a thorough opinion that analyzes dozens of TCPA class settlements throughout the country and concludes that, based on a risk adjusted fee structure, a fee award of 36% for the first $10 million of the common fund is reasonable in a TCPA case. Thirty-five percent of the $2.25 million Settlement Fund in this case is well within the structure of reasonableness articulated by *In re Capital One. See also Kolinek v. Walgreen Co.*, No. 13 C 4806, 2015 WL 7450759, at *17 (N.D. Ill. Nov. 23, 2015) (awarding 36% of the settlement as attorneys' fees).

In awarding a fee, the Court must consider the totality of benefits which Class Counsel's efforts have afforded the class. Here, in addition to substantial monetary relief, the Settlement includes meaningful and immediate non-monetary benefits to the Settlement Class. The Settlement requires that TBSE institute extensive TCPA compliance training to its marketing employees, which will protect the Settlement Class as well as the general public from future unsolicited text

messages. *See, e.g., Faught v. Am. Home Shield Corp*., 668 F.3d 1233, 1244-1245 (11th Cir. 2011) (cost and fee award reasonable in part because "the $1.5 million payment is designed to compensate the class counsel for the non-monetary benefits they achieved for the class."). Indeed, many TCPA settlements do not include any form of injunctive relief; a benefit which provides ongoing future relief to the Class and to the public.

In light of the exceptional monetary and non-monetary benefits obtained for the Settlement Class, Class Counsel respectfully asks the Court to approve attorneys' fees of $787,500.00, which is thirty-five percent of the common fund and is fully consistent with the trend in this Circuit of awarding fees of approximately one-third the common fund to class counsel. *See David*, 2010 WL 1628362, at *8 n. 15 (S.D. Fla. April 15, 2010) (noting "20%-50%" range).

b. The *Johnson* Factors Confirm the Reasonableness of the Requested Fee

The additional factors that district courts of the Eleventh Circuit consider under *Johnson v. Georgia Highway Expr., Inc*., 488 F. 2d 714 (5th Cir. 1974) further support the reasonableness of the requested fee. *See Camden I*, 946 F. 2d at 775.[2] The "*Johnson* factors" are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney; (5) the customary fee; (6) whether the fee is contingent; (7) the time limitations imposed; (8) the amount involved and results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 772.

Each of these factors confirms the reasonableness of Class Counsel's requested Fee Award.

[2] "As a Fifth Circuit decision issued before October 1, 1981, the decision is binding precedent in the Eleventh Circuit." *Stein v. Buccaneers Ltd. P'ship*, 772 F. 3d 698, 704 (11th Cir. 2014).

1. The time and labor required, preclusion from other employment, and the time limits imposed justify the fee amount.

The first, fourth and seventh *Johnson* factors – the time and labor, preclusion of other employment, and time limitations imposed – each heavily support the reasonableness of Class Counsel's fee request.

As described above, from the time Counsel commenced investigating this Action through execution of the Settlement in October 2019, Class Counsel was continuously engaged in contentious litigation against a well-capitalized professional sports franchise represented by sophisticated defense counsel. All told, Class Counsel expended more than 550 otherwise billable hours prosecuting this litigation. *See* Decl. David P. Milian at ¶ 9, attached as **Exhibit 1**.

Specifically, Class Counsel performed, *inter alia*, the following tasks, without compensation while simultaneously fronting significant out-of-pocket expense with no guarantee of recovery, to achieve the exceptional result that constitutes the Settlement:

- Conduct extensive pre-filing and post-filing investigations, legal research, and legal analysis regarding Plaintiffs' claims and the claims of the Settlement Class;
- Draft and file the Class Action Complaint (ECF No. 1);
- Oppose Defendant's Motion to Stay Proceedings (ECF No. 23);
- Oppose Defendant's Motion to Dismiss (ECF No. 28);
- Oppose Defendant's Motion to Strike Class Allegations (ECF No. 27);
- Move to Certify Class and Appoint Class Counsel (ECF No. 29);
- Oppose Defendant's Motion to Stay and/or Phase Discovery (ECF No. 39);
- Attend pretrial conference before Judge Charlene Honeywell (ECF No. 40);
- Attend hearing on Defendant's Motions to Stay and/or Phase Discovery and

to Stay Proceedings (ECF No. 41);

- Move for and obtain leave to submit Reply in Support of Motion to Certify Class and Appoint Class Counsel (ECF Nos. 49-51);
- Submit Reply Brief in Further Support of Motion to Certify Class and Appoint Class Counsel (ECF No. 55);
- Move for and obtain leave to submit Sur-Sur-Reply in Support of Motion to Certify Class and Appoint Class Counsel (ECF Nos. 67, 68);
- Defeat Defendant's Motions to Stay and/or Phase Discovery and to Stay Proceedings (ECF Nos. 50, 51);
- Submit numerous Notices of Supplemental Authority in Support of Motion to Certify Class and to Appoint Class Counsel (ECF Nos. 59, 66)
- Submit Notice of Supplemental Authority in Opposition to Defendant's Motion to Dismiss (ECF Nos. 36-37);
- Confer with opposing counsel to prepare and file Case Management Report and Amended Case Management Report (ECF Nos. 26, 54);
- Draft proposed Amended Complaint and move for leave to file same (ECF No. 72);
- Serve various targeted discovery requests upon Defendants and third parties;
- Move to overrule Defendant's objections to Plaintiff's first set of requests for production (ECF No. 73);
- Prepare for and attend in person mediation before Jay Cohen;
- Conduct extensive arm's length settlement negotiations that culminated in

a comprehensive settlement agreement and move for and obtain preliminary approval of settlement agreement (ECF No. 78);

- Obtain competing bids from nationally recognized settlement administration companies and negotiate final agreement with Angeion Group; and
- Coordinate with opposing counsel and Angeion Group to implement settlement agreement and notice plan.

Class Counsel anticipates that it will expend additional professional time in excess of 50 hours in this case following the filing of this Motion. Counsel will attend the Final Approval hearing on April 7, 2020 and, in the event final approval is granted, provide additional services including supervising aspects of the administration of the Settlement, answering Settlement Class Member questions, and helping resolve any issues that arise. (Decl. David P. Milian at ¶ 10).

In sum, Class Counsel has devoted, and will continue to devote, substantial time and resources to this matter that would otherwise have been spent on other matters. Accordingly, the amount of time and labor devoted to this case, which totals nearly about 550 hours and will likely total more than 600 hours before this case concludes, weighs in favor of finding Class Counsel's requested fee award reasonable. *See Yates v. Mobile Cnty. Pers. Bd.*, 719 F. 2d 1530, 1535 (11th Cir. 1983) ("The expenditure of 1,000 billable hours – and often in significant blocks of time – necessarily had some adverse impact upon the ability of counsel for plaintiff to accept other work, and this factor should raise the amount of the award."); *see also Stalcup v. Schlage Lock Co.*, 505 F. Supp.2d 704, 708 (D. Colo. 2007) (noting that "the *Johnson* court concluded that priority work that delays a lawyer's other work is entitled to a premium.").

2. **This Case Involved Difficult Issues; the Risk of Non-Payment and Not Prevailing on the Claims was Substantial**

The second, sixth, and tenth *Johnson* factors – the novelty and difficulty of the questions, whether the fee is contingent, and the "undesirability" of the case – also overwhelmingly support the requested fee award.

This case involved difficult and novel issues that presented a significant risk of nonpayment. For instance, when this case was filed and continuing throughout the pendency of the litigation, the question of whether Defendants' texting technology constituted an automatic telephone dialing system ("ATDS") under the TCPA and applicable FCC regulations and orders was contested and subject to pending, unpredictable procedural rulings from the FCC. *See* FCC Public Notice, *Consumer and Government Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, 2 (May 14, 2018) (questioning "how to interpret 'capacity' [in the ATDS definition] in light of the court's guidance"). In addition, District Court decisions within the Eleventh Circuit provided both sides with support for their respective positions concerning the defining characteristics of an ATDS. The uncertainty of the FCC's and the Courts' positions on this issue presented substantial risks to the Plaintiff and the Settlement Class Members' ability to obtain any recovery.[3]

In addition, Defendant asserted that most Class Members wanted to receive Defendant's text messages and that they complied with the TCPA. While Plaintiff believed its positions on these matters were meritorious, Defendant's arguments presented significant challenges to

[3] Since the Parties entered into the Settlement Agreement, however, the Eleventh Circuit did issue binding guidance on the definition of an "ATDS." *See Glasser v. Hilton Grand Vacations, LLC*, 948 F. 3d 1301 (11th Cir. 2020). And while this clarity may have been beneficial to Plaintiff and the Class, "the record of [*Glasser*] gives us no information about how random or sequential number generators work," and thus failing to eliminate all the doubts further surrounding autodial text TCPA actions *Id.* at *1316 (Martin, J., dissenting in part and concurring in part).

recovery. Finally, because the TCPA does not provide for an award of attorneys' fees to a prevailing plaintiff, Class Counsel's recovery of costs and fees in this case has always been contingent on a successful outcome and substantial recovery, even after overcoming numerous challenging and potentially death knelling hurdles.

Such a substantial risk of nonpayment in return for advancing all of the costs and fees weighs heavily in favor of finding Class Counsel's requested award reasonable. *See Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007) ("A determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high."); *In re Checking Acc't Overdraft Litig.*, 830 F. Supp. 2d at 1364 ("A contingency fee arrangement often justifies an increase in the award of attorney's fees."); *Francisco v. Numismatic Guar. Corp.*, No. 06-61677, 2007 U.S. Dist. LEXIS 96618 at *35 (S.D. Fla. Jan. 30, 2007) ("Attorneys' risk is perhaps the foremost factor in determining an appropriate fee award.")

The difficult and contingent nature of this case also establishes its undesirability. Very few lawyers are willing–or even able–to invest significant time and advance their own cash to prosecute a lawsuit that involves complicated and uncertain legal questions and a substantial risk of receiving no compensation. Indeed, no other law firm saw fit to bring an action against this Defendant for violations of the TCPA which strongly suggests no other lawyers believed the case was desirable. Although Class Counsel managed to achieve an excellent result for the Settlement Class, this outcome was anything but certain until the Settlement was reached. As such, the "undesirability" of this case is a factor that weighs heavily in favor of the reasonableness of the requested fee award. *See In re Checking Account Overdraft Litig*, 830 F. Supp. 2d at 1364

("'Undesirability' and relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit, not retroactively, with the benefit of hindsight.") (citing *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.* 540 F. 2d 102, 112 (3d Cir. 1976)).

3. **Class Counsel Achieved an Excellent Result for the Settlement Class**

The eighth *Johnson* factor focuses on the "monetary results achieved" for the Settlement Class. *See Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1202 (S.D. Fla. 2006).

The Settlement Agreement creates an all-cash Settlement Fund of $2,250,000.00. Each Settlement Class Member who submits a valid claim form[4] will receive a *pro rata* share of the distributed Settlement Fund, which is on the high end of the range of other TCPA settlements that have been granted final approval. *See In re Capital One*, 2015 WL 605203, at *5 (granting final approval to TCPA class action settlement where anticipated claimant recovery was $34.60); *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14-190, 2015 WL 890566, at *3 (N.D. Ill. Feb. 27, 2015) (granting final approval to TCPA class settlement where, assuming full claims rate, each class member would receive $2.95); *Bellows v. NCO Fin. Sys., Inc.*, No. 07-01413, 2008 WL 5458986, at *5 (S.D. Cal. Dec. 10, 2008) (recommending granting final approval to TCPA class settlement providing for claimant recovery of $70; approved at ECF No. 38).

Accordingly, this factor weighs heavily in favor of finding the requested fee award reasonable.

4. **The Requested Fee is Consistent with Customary Fees Awarded in Similar Cases**

[4] *See Forcellati v. Hyland's, Inc.*, No. 12-1983, 2014 WL 1410264, at *6 (C.D. Cal. Apr. 9, 2014) ("'[T]he prevailing rule of thumb with respect to consumer class actions is [a claims rate of] 3–5 percent.'") (quoting *Ferrington v. McAfee, Inc.*, 2012 WL 1156399, at *4 (N.D. Cal. Apr. 6, 2012)).

The fifth and twelfth *Johnson* factors – the customary fee, and awards in similar cases – also support approval.

As previously discussed, an award of attorneys' fees to class counsel of one-third the common Settlement Fund is "consistent with the trend in this Circuit." *Reyes*, No. 10-20837-CIV-MGC (ECF No. 196); *see, e.g., id.* at 6. Attorneys' fee awards in the one-third range, however, do not represent an upper limit. Rather, the Eleventh Circuit has stated instead that "an upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded." *Camden I*, 946 F. 2d at 774-75; *see also David v. Am. Suzuki Motor Corp.*, No. 08-cv-22278, 2010 WL 1628362, at *8 n. 15 (S.D. Fla. April 15, 2010) (noting customary fee as "20%-50% of the common fund's value").

Class Counsel's requested fee award of 35% of the Settlement Fund is thus entirely consistent with the customary percentage of the common fund awarded to class counsel in the Eleventh Circuit, and with fees awarded in similar TCPA settlements in this District. Accordingly, the fifth and twelfth factors weigh in favor of finding Class Counsel's requested award reasonable.

5. **This Case Demanded a High Level of Skill**

The remaining *Johnson* factors – the skill required to perform the legal services properly and the experience, reputation, and ability of the attorneys – support the finding that the fees sought are reasonable.

As shown above, Class Counsel achieved a settlement that confers substantial monetary and non-monetary benefits to the Settlement Class Members despite the hard-fought litigation against sophisticated and well-financed Defendants represented by top-tier counsel who specialize in TCPA class action defense litigation. *See In re Sunbeam Sec. Litig.,* 176 F. Supp.2d at 1334 ("In assessing the quality of representation, courts have also looked to the quality of the opposition

the plaintiffs' attorneys faced."). Here, Defendant was represented by one of the biggest and most sophisticated defense firms in the world which touts extensive TCPA defense acumen. *See Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992) ("[I]n assessing quality, the Court has considered the quality of the *opposition* as well as the standing of Plaintiff's counsel.").

Notwithstanding the quality legal counsel defending this action, Class Counsel's high level of skill, determination, and experience litigating complex class action cases helped obtain the outstanding result for the Class. Class Counsel's history of having litigated complex matters, including under the TCPA, led it to successfully overcome these hurdles and navigate the Class to the Settlement. *See* Decl. David P. Milian at ¶¶ 4-7; Decl. Ruben Conitzer at ¶¶ 5-8, attached as **Exhibit 2**.

Each of the *Johnson* factors confirms the reasonableness of the requested fee award. Accordingly, Class Counsel respectfully request that the Court approve an attorneys' fees award of $787,500.00, which is 35% of the Settlement Fund.

IV. THE REQUESTED COSTS ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED ON BEHALF OF THE CLASS

Class Counsel also respectfully request that the Court approve reimbursement of the reasonable costs actually incurred in the prosecution of this action from the Settlement Fund, which amount to a total of $21,827.47. *See* Decl. David P. Milian at ¶ 11. These costs, which are separate and apart from the cost of notice and administration, were expended by Class Counsel for the benefit of the Settlement Class during the course of litigation with a substantial risk that the expenditures would never be recovered. Class Counsel request that these costs be reimbursed in full. *See* Fed. R. Civ. P. 23(h) (permits counsel to petition for nontaxable costs).

Courts typically allow counsel to recover their reasonable out of pocket expenses. Indeed,

courts normally grant expense requests in common fund cases as a matter of course. *See Dowdell v. City of Apopka*, 698 F. 2d 1181, 1191-92 (11th Cir. 1983) ("[W]ith the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988.").

The expenses categorized in the Declaration of David P. Milian, attached as **Exhibit 1**, reflect commonly reimbursed expenses. *See*, *e.g.*, *James v. JPMorgan Chase Bank, N.A.*, 2017 WL 2472499, *2 (M.D. Fla. June 5, 2017) (approving recovery of mediation, travel, and other expenses incurred in connection with the matter); *see also Wreyford v. Citizens for Transp. Mobility, Inc.*, 2014 WL 11860700, at *2 (N.D. Ga. Oct. 16, 2014) (approving recovery of litigation costs and expenses).

Each of these costs and expenses was necessarily and reasonably incurred to bring this case to a successful conclusion. Moreover, the costs and expenses only equate to less than 1% of the settlement fund. *See In re IMAX Secs. Litig.*, 2012 WL 3133476, at *6 (S.D.N.Y. Aug. 1, 2012) (listing cases approving costs and expenses totaling approximately 2% of the settlement funds). The Court should therefore approve the reimbursement of costs and expenses in the amount of $21,827.47.

V. THE REQUESTED SERVICE AWARD IS REASONABLE

Finally, Class Counsel respectfully request that the Court award a modest service award to Bryan Hanley, the named Plaintiff. Such awards are routinely approved by Courts to compensate named plaintiffs for their work on behalf of the class; to account for financial, personal, or reputational risks associated with litigation; and to encourage plaintiffs to step forward on behalf of unnamed class members in the future. *See Allapattah*, 454 F. Supp. 2d at 1218-19; *see also,*

e.g., *Schulte*, 805 F. Supp. 2d at 601-02 ("Class Representative's willingness to publically place their names on this suit and open themselves up to scrutiny and attention is certainly worth some remuneration.").

In this case, the requested service awards of $10,000.00 for the named Plaintiff, who has never before served as a plaintiff in a class action, is well justified and reasonable. In addition to lending his name to this matter, and thus subjecting himself to significant public attention, Plaintiff was actively engaged in this action. Among other things, he (1) provided information, including cellular telephone records and screenshots of his cellular telephone, to Class Counsel for preparing the complaint and other filings; (2) reviewed pleadings and filings; (3) communicated on a regular basis with Class Counsel to stay apprised of the progress of the litigation and settlement negotiations; and (4) reviewed and approved the Settlement Agreement. His dedication to this case is notable, particularly given the relatively small size of his personal financial stake. *See generally* Decl. Bryan Hanley, attached as **Exhibit 3**.

The amount requested here, $10,000.00, is substantially less than amounts frequently approved by federal courts in TCPA actions and other class cases. *See, e.g., Benzion v. Vivint, Inc.*, No. 12-61826 (S.D. Fla. Feb. 23, 2015) (ECF No. 201) (awarding $20,000 incentive award in TCPA class settlement); *Desai v. ADT Security Servs., Inc.*, No. 11-1925 (N.D. Ill. Feb. 27, 2013) (ECF No. 243) (awarding $30,000 incentive awards in TCPA class settlement); see *also Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218-19 (S.D. Fla. 2006) (collecting cases); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (awarding two incentive awards of $55,000 and three incentive awards of $35,000); *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27, 32 (E.D. Pa. 1985) (awarding incentive awards of $20,000 to each of two plaintiffs).

Accordingly, Class Counsel respectfully request that the Court approve a service award of $10,000.00 to Bryan Hanley, the named plaintiff.

VI. CONCLUSION

The Settlement before the Court is the product of a mix of highly-skilled lawyering, a willingness to risk time and money to go up against formidable defense counsel, and a determination to overcome substantial hurdles for absent Settlement Class Members. By all means, it represents an outstanding result for the Settlement Class. And in light of such an excellent result, Class Counsel respectfully requests that this Court award legal fees of 35% of the Settlement Fund, i.e., $787,500.00 as well as out of pocket costs in the amount of $21,827.47. Finally, Class Counsel requests a $10,000 service award to Bryan Hanley for his services as Class Representative.

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Respectfully submitted,

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