

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 9:19-cv-80090-BLOOM/Reinhart**

JOEL MEDGEBOW, individually  
and on behalf of all others  
similarly situated

Plaintiff,

vs.

CHECKERS DRIVE-IN RESTAURANTS  
INC.,

Defendant.

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**PLAINTIFF’S APPLICATION FOR SERVICE AWARD,  
ATTORNEYS’ FEES, AND COSTS**

Plaintiff Joel Medgebow initiated this action against Checkers Drive-In Restaurants, Inc. (“Checkers” or “Defendant”) for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), claiming that he was sent unauthorized marketing text messages. The parties negotiated a settlement on behalf of Plaintiff and a class of approximately 7,693 consumers who were sent text messages from Checkers after revoking their consent. On May 28, 2019, the Court granted Preliminary Approval to the Settlement, directed that notice be provided to the Settlement Class, and established a deadline for the filing of Plaintiff’s Application for Service Award, Attorney’s Fees, and Costs. Pursuant to the Settlement Agreement and Order Granting Preliminary Approval, Plaintiff and Class Counsel hereby submit their Application for Service Award, Attorney’s Fees, and Costs 14 days in advance of the Claim Submission and Objection deadline.

**I. INTRODUCTION**

Between approximately January 28, 2018 and January 27, 2019, Plaintiff and each Settlement Class Member revoked their consent to receive text messages from Checkers [DE 8, para. 2]. Thereafter, during the same approximately one-year period, Checkers sent or caused to be sent text messages to Plaintiff and Settlement Class Members, marketing and advertising

Checkers' business, despite the revocation of consent that Plaintiff and each Settlement Class Member had expressed. *Id.*

The settlement reached provides compensation for the post-revocation text messages that were sent by Checkers to Plaintiff and Settlement Class Members. The Agreement was negotiated over the course of a full day mediation, conducted by a well-respected mediator Jeffrey Grubman of JAMS, as well as several hard-fought pre- and post-mediation negotiation sessions.

Plaintiff and Class Counsel believe that the claims asserted in the Action have merit. However, taking into account the risks of continued litigation, as well as the delays and uncertainties inherent in such litigation and any subsequent appeal, Plaintiff and Class Counsel believe that it is desirable that the Action be fully and finally settled pursuant to the terms and conditions set forth in the Agreement. Plaintiff and Class Counsel have concluded that it is in the best interests of the class to settle the Action.

The Agreement provides for a Settlement Fund in the amount of \$3,461,850.00, from which Defendant is required to pay up to \$450.00 to Settlement Class members who submit a valid Claim, and potential awards of attorneys' fees and costs and a Service Award to the named Plaintiff, as well as injunctive relief.

Plaintiff and Class Counsel now hereby submit their Application for Service Award, Attorney's Fees, and Costs.

## **II. SUMMARY OF THE SETTLEMENT**

The settlement terms are detailed in the Agreement. *See* Settlement Agreement [DE 15-1]. The following is a summary of its material terms.

### **A. The Settlement Class**

The Settlement Class is defined as:

All persons in the United States (i) identified in the Settlement Class List (ii) who between January 28, 2018 and the date of preliminary approval (the "Class Period"), attempted to unsubscribe from receiving text messages from Checkers' short code 88001, by texting "stop," "cancel," "unsubscribe," "end," "quit," "optout," "opt out," "remove," "cancelar," "arret," or "arrette" and were subsequently sent text message advertisements or promotions from Checkers to their cellular telephone and did not re-subscribe to receive text messages.

Agreement at I.GG.

**B. Monetary Relief**

The settlement requires Defendant to make available up to \$3,461,850.00 for the benefit of the Settlement Class. In order to receive a portion of the Settlement Fund, Settlement Class members are required to complete a Claim Form. Claim Forms were mailed by U.S. Mail (and e-mailed if e-mail was provided by a Settlement Class Member) to each Settlement Class member and are available at the Settlement Website. Each Settlement Class member who timely submits a valid Claim Form shall receive a Claim Settlement Payment in the amount of \$450.00, subject to a pro rata distribution. The Claim Submission deadline is not until August 13, 2019.

**C. Class Release**

In exchange for the benefits conferred by the settlement, all Settlement Class Members will be deemed to have released Defendant from claims related to the subject matter of the Action. The detailed release language is found in Section V of the Agreement.

**D. Settlement Notice**

The Notice Program was designed to provide the best notice practicable and was tailored to use the information Defendant had available about Settlement Class members. The Notice Program was reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, the terms of the settlement, Class Counsel's Attorneys' Fee application and request for Service Award for Plaintiff, and their rights to opt-out of the Settlement Class or object to the Settlement. *See* Declaration of Joshua Eggatz ("Eggatz Decl."), attached as **Exhibit A**, at ¶ 2. The Notices and Notice Program constituted sufficient notice to all persons entitled to notice, and satisfied all applicable requirements of law including, but not limited to, Federal Rule of Civil Procedure 23 and the constitutional requirement of due process.

**E. Service Award**

Class Counsel are entitled to petition for a Service Award of \$5,000 for the Class Representative. Agreement at II.D2. If the Court approves it, the Service Award will be paid from the Settlement Fund. *Id.* The Service Award will compensate Class Representative for his time and effort in the Action, and for the risks he undertook in prosecuting the Action against Defendant.

**F. Attorneys' Fees and Costs**

Class Counsel are entitled to petition for attorneys' fees of up to thirty percent (30%) of the Settlement Fund, plus expenses not to exceed Fifteen Thousand Dollars (\$15,000.00), to be paid by Checkers from the Settlement Fund. Agreement, II.D.1. The Parties negotiated and reached

final agreement regarding fees and costs only after agreeing on all other material terms of the Settlement. Eggnatz Decl. ¶ 3.

### III. APPLICATION FOR SERVICE AWARD

Pursuant to the settlement, Class Counsel respectfully request a Service Award for the Class Representative in the amount of \$5,000. Service awards “compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). “[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action.” *David v. American Suzuki Motor Corp.*, 2010 WL 1628362, at \*6 (S.D. Fla. Apr. 15, 2010).

Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives. *See, e.g., Stallworth v. Monsanto Co.*, No. PCA 73-45. 198) U.S. Dist. LEXIS 12858, at \*20-21 (N.D. Fla. June 26, 1980) (approving service awards ranging from \$10,000 to \$20,000 to four named plaintiffs); *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (collecting cases and approving incentive awards of \$5,000 per class representative); *David v. Am. Suzuki Motor Corp.*, No. 08-cv-22278, 2010 WL 628362, \*6 (S.D. Fla. Apr. 15, 2010) (approving an incentive award of \$5,000 for a class representative, in addition to a new motorcycle); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding class representatives \$300,000 each, explaining that “the magnitude of the relief the Class Representatives obtained on behalf of the class warrants a substantial incentive award.”); *Spicer v. Chicago Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from \$5,000 to \$100,000, and awarding \$10,000 to each named plaintiff).

The relevant factors include: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation. *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). These factors, as applied to this Action, demonstrate the reasonableness of the requested Service Award to Plaintiff. Plaintiff provided assistance that enabled Class Counsel to successfully prosecute the Action including submitting to interviews with Class Counsel, reviewing all material filings, including approving the Agreement, and maintaining regular contact with Class Counsel throughout the litigation, mediation, and post-

mediation negotiation process. Plaintiff was also prepared to devote additional time to deposition and to be available for trial, if necessary. The end result of his efforts, coupled with those of Class Counsel, provided a substantial benefit to the Settlement Class. In so doing, Plaintiff was integral to forming the theory of the case and litigating it through settlement. Eggnatz Decl. ¶ 13.

#### **IV. APPLICATION FOR ATTORNEYS' FEES AND EXPENSES**

Pursuant to the Agreement and the Notices, and consistent with recognized class action practice and procedure, Class Counsel respectfully request an award of attorneys' fees equal to thirty percent (30%) of the Settlement Fund (ie: \$1,038,555.00), plus expenses in the amount of \$3,708.97. Class Counsel and Defendant negotiated and reached agreement regarding attorneys' fees and costs only after reaching agreement on all other material settlement terms. The requested fee is within the range of reason under the factors listed in *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). For the reasons detailed herein, Class Counsel submit that the requested fee is appropriate, fair and reasonable and respectfully requests that it be approved by the Court.

##### **A. The Law Awards Class Counsel Fees from the Settlement Fund Created Through Their Efforts.**

It is well established that when a representative party has conferred a benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Checking Overdraft Litig.*, 830 F. Supp. 2d at 1358. Here, Class Counsel is entitled to an allowance of attorneys' fees based upon the benefit obtained." *Id.* The "common benefit" theory permits a court to award attorney's fees even if there no common fund. *See In re Lifelock, Inc., Mkr. & Sales Practices Litig.*, 2010 WL 3715138, at \*8 (D. Ariz. Aug. 31, 2010).

The common benefit doctrine is an exception to the general rule that each party must bear its own litigation costs. The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (internal citations omitted). The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. As a result, the Supreme Court, the Eleventh Circuit, and courts in this District have all recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the

fund as whole.” *Sunbeam*, 176 F. Supp. 2d at 1333. Courts recognize that appropriate fee awards in cases such as this encourage redress for wrongs caused to entire classes of persons and deter future misconduct of a similar nature.

In the Eleventh Circuit, class counsel are awarded a percentage of the funds obtained through a settlement. In *Camden I* – the controlling authority regarding attorneys’ fees in common-fund class actions – the Eleventh Circuit held that “the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this circuit, attorneys’ fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.” *Camden I*, 946 F.2d at 774; *see also Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 154762, at \*20 (S.D. Fla. Oct. 24, 2014) (Attorneys representing a class action are entitled to an attorneys’ fee based solely upon the total benefits obtained in or provided by a class settlement); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 695 (S.D. Fla. 2014) (noting that in a claims made situation, the attorneys’ fees in a class action are determined based upon the total fund, not just the actual payout to the class); *Carter v. Forjas*, 701 F. App’x 759, 766-67 (11th Cir. 2017) (same).

Furthermore, “[i]n the Eleventh Circuit . . . [a]ttorney’s representing a class action are entitled to an attorney’s fee based upon the total benefits obtained in or provided by a class settlement, regardless of the amounts eventually collected by the Class. *Hall v. Bank of America*, 2014 U.S. Dist. LEXIS 177155, at \*24 S.D. Fla. Dec. 17, 2014) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Id.* at \*22 (“A settlement’s fairness is judged by the opportunity created for the class members, not by how many submit claims.”); *Waters v. Int’l Precious Metals Corp.*, 190 F.3d 1291, 1295-96 (11th Cir. 1999) (“The attorney’s fees in a class action can be determined based upon the total fund, not just the actual payout to the class.”); *David v. Am. Suzuki Motor Corp.*, 2010 U.S. Dist. LEXIS146073 (S.D. Fla. Apr. 15, 2010) (settlement with ascertainable benefits may be treated as a common fund to which a percentage fee may be awarded).

The Court has discretion in determining the appropriate fee percentage. “There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case.” *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774).

The Eleventh Circuit has provided a set of factors the Court should use to determine a reasonable percentage to award as an attorney's fee to class counsel in class actions:

- (1) the time and labor required;
- (2) the novelty and difficulty of the relevant questions;
- (3) the skill required to properly carry out the legal services;
- (4) the preclusion of other employment by the attorney as a result of his acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the clients or the circumstances;
- (8) the results obtained, including the amount recovered for the Clients;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and the length of the professional relationship with the clients; and
- (12) fee awards in similar cases.

*Camden I*, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These 12 factors are guidelines and are not exclusive. "Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775). The Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Camden I*, 946 F.2d at 775. As applied, the *Camden I* factors support the requested fee.

**1. *The Claims Against Defendant Required Substantial Time and Labor.***

Prosecuting and settling these claims demanded considerable time and labor, making this fee request reasonable. Eggnatz Decl. ¶ 15, and Declaration of Seth Lehrman ("Lehrman Decl."), ¶ 2, attached as **Exhibit B**. Class Counsel devoted substantial time to investigating the claims against Defendant. Eggnatz Decl. ¶ 16 and Lehrman Decl., ¶ 3. Class Counsel also expended resources researching and developing the legal claims at issue. *Id.* ¶ 17 and Lehrman Decl., ¶ 4. Time and resources were also dedicated to conducting and reviewing pre- and post-mediation informal discovery and document review. *Id.* ¶ 18 and Lehrman Decl., ¶ 5.

Settlement negotiations consumed further time and resources. Eggnatz Decl. ¶ 19. The

mediation and post-mediation sessions required substantial preparation and time commitment. *Id.* Finally, significant time was devoted to negotiating and drafting of the Agreement and the preliminary approval process, and to all actions required thereafter pursuant to the preliminary approval order, including oversight of the notice plan to ensure proper implementation. *Id.* All of this work consumed a substantial amount of time. All told, Class Counsel's coordinated work paid dividends for the Settlement Class. Each of the above-described efforts was essential to achieving the Settlement before the Court. Eggnatz Decl. ¶ 20. The time and resources devoted to this Action readily justify the requested fee. Moreover, Class Counsel's work is not yet done. Class Counsel is prepared to devote all the necessary time and resources to ensure final approval of settlement, including handling any objections and appeals, to ensure that the Settlement Class obtains the benefits of the settlement. Eggnatz Decl. ¶ 21.

**2. *The Issues Involved Were Novel and Difficult, and Required the Skill of Highly Talented Attorneys.***

"[P]rosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. U.S.*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). The quality of Class Counsel's legal work conferred a substantial benefit on the Settlement Class in the face of significant litigation obstacles. Class Counsel's work required the acquisition and analysis of a significant amount of factual and legal information.

In any given case, the skill of legal counsel should be commensurate with the novelty and complexity of the issues, as well as the skill of the opposing counsel. Litigation of this Action required counsel trained in class action law and procedure as well as the specialized issues presented here, such as analyzing class certification issues and litigating the novel issue of whether the software used to make the calls was an ATDS, as defined by the TCPA. Class Counsel possess these attributes, and their participation added value to the representation of this Settlement Class. Eggnatz Decl. ¶ 22. The Action involved complex and novel challenges, which Class Counsel met at every juncture. *Id.* Indeed, the outcome was made possible by Class Counsel's extensive experience in litigating class actions of similar size, scope, and complexity to the instant action. Class Counsel regularly engage in complex litigation involving consumer issues, and all have been class counsel in numerous consumer class action cases. *See* Firm Declarations and Resumes [DE 15-2], [DE 15-3].

In evaluating the quality of representation by Class Counsel, the Court should also consider opposing counsel. *See Camden I*, 946 F.2d at 772 n.3; *Ressler*, 149 F.R.D. at 654; *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.”). Throughout the litigation, Defendant was represented by extremely capable counsel. They were worthy, highly competent adversaries. Eggnatz Decl. ¶ 23; *Walco Invs. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) (stating that “[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results”).

### 3. *Class Counsel Achieved a Significant and Successful Result.*

Given the significant litigation risks Class Counsel faced, the Settlement represents a successful result. Rather than facing years of costly and uncertain litigation, each Settlement Class Member is entitled to claim a cash benefit of \$450.00. Eggnatz Decl. ¶ 24. Given the ranges of typical individual recovery to settlement class members in other TCPA cases, the settlement benefit to Class Members here is significant.<sup>1</sup> This factor weighs heavily in favor of approving the fee and cost amount.

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1. The majority of the approved TCPA class action settlements that provided cash or merchandise to class members less than \$100. *See e.g. Spillman v. RPM Pizza, LLC*, Case No. 3:10-cv-00349 (M.D. Louisiana)(DE 244, 245)(\$15 recovery per claimant); *Desai v. ADT Security Systems*, Case No. 1:11-cv-01925 (N.D. Illinois)(DE 240, 243) (\$47 recovery per claimant); *Garret, et al. v. Sharps Compliance, Inc.*, Case No. 1:10-cv-04030 (N.D. Illinois)(DE 74) (\$28.13 recovery per claimant); *Paldo Sign and Display Company v. Topsail Sportswear*, Case No. 1:08-cv-05959 (N.D. Illinois)(DE 116) (\$42 recovery per fax); *Adams v. AllianceOne Receivables Management, Inc.*, 3:08-cv-00248 (S.D. California) (\$40 recovery per claimant)(DE 116, 137); *Agne v. Papa John’s International, et al.*, 2:10-cv-01139 (W.D. Washington)(DE 389) (\$50 recovery plus \$13 merchandise per claimant); *Bellows v. NCO Financial Systems, Inc.*, 3:07-cv-01413 (S.D. California)(DE 38 at 6) (\$70 recovery per claimant); *Clark v. Payless ShoeSource, Inc.*, 2:09-cv-00915 (W.D. Wash.)(DE 61 at 3; 72) (\$10 merchandise certificate per claimant); *Cabbage v. The Talbots, Inc. et al.*, 2:09-cv-00911 (W.D. Wash.)(DE 114, ¶ 11) (\$40 or \$80 merchandise certificate per claimant); *Hovila v. Tween Brands, Inc.*, 2:09-cv-00491 (W.D. Wash.)(DE 12, ¶ 12) (\$20 or \$45 merchandise certificate); *In re Jiffy Lube International, Inc. Text Spam Litig.*, 3:11-MD-02261 (S.D. Cal.)(DEs 90-1 at 7-8; 97) (\$15); *Kazemi v. Payless ShoeSource, Inc. et al.*, 3:09-cv-05142 (N.D. Cal.)(DE 94, ¶ 10) (\$15 merchandise certificate); *Kwan v. Clearwire Corp.*, 2:09-cv-01392 (W.D. Wash.)(DEs 201) (\$53 per call); *Lemieux v. Global Credit & Collection Corp.*, 3:08-cv-01012 (S.D. Cal.)(DE 46, at 4) (\$70 recovery per claimant); *Malta v. Freddie Mac & Wells Fargo Home Mortgage*, 3:10-cv-01290 (S.D. Cal.)(DE 91 at 5) (\$85 recovery per claimant); *Sarabi v. Weltman, Weinberg & Reis Co.*, 3:10-cv-01777 (S.D. Cal.)(DE 42 at 6) (48 recovery per claimant); *Steinfeld, et al. v. Discover Financial Services, et al.*, 3:12-cv-01118 (N.D. Cal.)(DE 65 at 17) (\$47 recovery per claimant); and *Wojcik v. Buffalo Bills, Inc.*, 8:12-cv-02414 (M.D. Fla.)(DE 77 at 5) (\$58-\$75 recovery per claimant).

#### 4. *The Claims Presented Serious Risk.*

The Settlement is particularly noteworthy given the combined litigation risks. Eggnatz Decl. ¶ 25. As discussed, Defendant raised substantial and meritorious defenses. Specifically, Defendant contends that it did not transmit any text messages through the use of an ATDS. Defendant provided evidence that while the messaging platform used *stored* numbers, it does not *randomly or sequentially* generate numbers and dial those numbers. Based on these facts, Plaintiff faced a rising tide of case law suggesting that the platform it used is not an ATDS. *See, e.g., Johnson v. Yahoo!, Inc.*, 346 F. Supp. 3d 1159, 1162 (N.D. Ill. 2018) (“Curated lists developed without random or sequential number generation capacity fall outside the statute’s scope.”); *ACA Int’l v. Fed. Commc’ns Comm’n*, 885 F.3d 687, 702 (D.C. Cir. 2018) (“[D]ialing random or sequential numbers’ cannot simply mean dialing from a set list of numbers in random or other sequential order . . . .”). Defendant further contends that a platform that requires human intervention like the platform at issue here does, is not an ATDS. *See, e.g., Ramos v. Hopele of Fort Lauderdale, LLC*, 334 F. Supp. 3d 1262, 1275 (S.D. Fla. 2018)

The “litigation risks” factor under *Camden I* also requires consideration that Class Counsel took on the case while knowing that it may have yielded no recovery at all. *Sunbeam*, 176 F. Supp. 2d at 1336. Further, “[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them.” *Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988).

Prosecuting the Action was risky from the outset. Eggnatz Decl. ¶ 26. Defendant was confident in their opposition to Plaintiff’s claims. The settlement obtained is substantial given the complexity of the litigation and the significant risks and barriers that loomed in the absence of settlement. Any of these risks could easily have impeded, if not altogether derailed, Plaintiff’s and the Settlement Class’ successful prosecution of these claims. The Settlement Fund is also significant given Defendant’s limited financial resources. *See* Eggnatz Decl. in Supp. Preliminary Approval [DE 15-3, at ¶ 9]

The recovery achieved by this Settlement must be measured against the fact that any recovery by Plaintiff and Settlement Class Members through continued litigation could only have been achieved if: (i) Plaintiff was able to establish class certification; (ii) Plaintiff was able to establish liability and damages at trial; and (ii) the final judgment was affirmed on appeal. The Settlement is an extremely fair and reasonable recovery for the Settlement Class in light of

Defendant's defenses, and the challenging and unpredictable path of litigation Plaintiff and the class would have faced absent the Settlement. Eggnatz Decl. ¶ 27.

**5. *Class Counsel Assumed Considerable Risk to Pursue This Action on a Pure Contingency Basis.***

The ability to recover costs and fees in this case has always been contingent on a successful outcome and substantial recovery. The TCPA does not provide for an award of attorney fees to a prevailing plaintiff. The only way to recover a fee is to be part of a recovery. In undertaking to prosecute this case on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Eggnatz Decl. ¶ 28. That risk warrants an appropriate fee. Indeed, “[a] contingency fee arrangement often justifies an increase in the award of attorney’s fees.” *Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens*, 118 F.R.D. at 548).

Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee. Eggnatz Decl. ¶ 29. There is inherent risk faced by Class Counsel in accepting and prosecuting the Action on a contingency fee basis. Class Counsel remain completely uncompensated for the time invested in the Action thus far, in addition to the expenses we advanced. Eggnatz Decl. ¶ 30.

This is important because “[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.” *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp.2d 1334 at 1339 (S.D. Fla. 2007). Indeed, “[a] contingency fee arrangement often justifies an increase in the award of attorney’s fees.” *In re Checking Acc’t Overdraft Litig.*, 830 F. Supp.2d at 1364, quoting *In re Sunbeam Sec. Litig.*, 176 F. Supp.2d at 1335. Accordingly, some courts have observed that “[a]ttorneys’ risk is perhaps the foremost factor in determining an appropriate fee award.” *Francisco v. Numismatic Guar. Corp.*, No. 06-61677, 2007 U.S. Dist. LEXIS 96618 at \*35 (S.D. Fla. Jan. 30, 2007), citing *Pinto*, 513 F. Supp.2d at 1339. There can be no dispute that this case entailed substantial risk of nonpayment for Class Counsel.

**6. *The Requested Fee Comports with Fees Awarded in Similar Cases.***

Here, Counsel’s requested fee of 30% of the Settlement Fund is well within the range of fees typically awarded in similar cases. Eggnatz Decl. ¶ 31. In fact, numerous decisions within and

outside of the Southern District of Florida and the Eleventh Circuit have found that a 33.33% fee is well within the range of reason under the factors listed by the *Camden I*. See *Legg v. Laboratory Corp. of America*, 14-cv-61543-RLR, Dkt. 227, p.7 (S.D. Fla. Feb. 18, 2016) (FACTA case awarding one-third of gross recovery for attorneys' fees, plus expenses); *Gevaerts v. TD Bank, N.A.*, No. 11:14-cv-20744-RLR, 2015 U.S. Dist. LEXIS 150354, at \*27 (S.D. Fla. Nov. 5, 2015) (finding that a request for 30% of a \$20 million dollar fund is justified); *Wolff v. Cash 4 Titles*, No. 03-22778- CIV, 2012 WL 5290155, at \*5-6 (S.D. Fla. Sept. 26, 2012) ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one-third.") (citing Circuit case law and listing Southern and Middle District of Florida attorneys' fees awards).

Class Counsel's fee request also falls within the range of the private marketplace, where contingency fee arrangements often approach or equal forty percent of any recovery. See *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."); *RJR Nabisco, Inc. Sec. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 94, 268 (S.D.N.Y. 1992) ("[W]hat should govern [fee] awards is . . . what the market pays in similar cases"). And, "[i]n tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (Brennan, J., concurring).

Finally, Class Counsel's fee request also falls within the range of awards in TCPA cases within this Circuit and elsewhere. See *Gottlieb v. Citgo Petroleum Corp.*, No. 9:16-cv-81911, 2017 U.S. Dist. LEXIS 197382, at \*7 (S.D. Fla. Nov. 29, 2017) (granting fees and costs amounting to one-third of the \$8,000,000.00 settlement fund); *ABC Bartending School of Miami, Inc., v. American Chemicals & Equipment, Inc.*, No. 15-CV-23142-KMV (S.D. Fla. April 11, 2017) (granting fees and costs amounting to one-third of the \$1,550,000.00 settlement fund); *Guarisma v. ADCAHB Med. Coverages, Inc.*, Case No. 1:13-cv-21016 (S.D. Fla. June 24, 2015) (granting fees and costs amounting to one-third of the \$4,500,000.00 settlement fund).

Consequently, the attorneys' fee requested here, is appropriate and should be awarded.

#### **7. The Expense Request Is Appropriate.**

Class Counsel also request reimbursement for a total of \$3,708.97 in litigation costs. Eggatz Decl. ¶ 32 and Lehrman Decl., ¶ 7. This sum corresponds to certain actual out-of-pocket costs that Class Counsel necessarily incurred and paid in connection with the prosecution of the Action and the Settlement. *Id.* These costs consist of mediator's fees and expenses, and general

litigation costs, including court filing fees, service of process, and travel. *Id.* These out-of-pocket expenses were reasonably and necessarily incurred and paid in furtherance of the prosecution of this Action. *Id.*

## V. CONCLUSION

Plaintiff and Class Counsel respectfully request that this Court approve the requested Service Award in the amount of \$5,000, award Class Counsel attorneys' fees in the amount of 30% of the Settlement Fund (\$1,038,555.55), and award reimbursement of costs in the amount of \$3,708.97.

Dated: July 29, 2019

Respectfully submitted,

*/s/ Joshua H. Eggnatz*

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 29, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

*/s/ Joshua H. Eggnatz*

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