IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| TOMEKA BARROW and ANTHONY DIAZ, Individually and On Behalf of All Others Similarly Situated,<br><br>Plaintiffs,<br><br>v.<br><br>JPMORGAN CHASE BANK, N.A.,<br><br>Defendant. | * | Civil Action File No.<br><br>1:16-cv-03577-AT |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS AND SERVICE AWARDS**

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## I. INTRODUCTION

Plaintiffs Tomeka Barrow ("Barrow") and Anthony Diaz ("Diaz") (together, the "Plaintiffs"), respectfully submit this memorandum in support of their motion for attorneys' fees, litigation costs and services awards in this action under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et. seq*. ("TCPA").

Plaintiffs seek approval of a request for a combined award of attorneys' fees and litigation expenses of 30% of the settlement fund, and a service award of $5,000 to each of the two named Plaintiffs, to be paid from the settlement fund of $2,250,000 ("Settlement Fund").

The request for attorneys' fees, costs and services awards is in line with Sections III.I and III.J of the Settlement Agreement ("Agreement"), filed at Dkt. No. 57-3, which permits a request for attorneys' fees up to 30% of the Settlement Fund and a separate request for litigation expenses up to $40,000.

## II. PROCEDURAL HISTORY SINCE PRELIMINARY APPROVAL

The proposed class action settlement was preliminarily approved on March 17, 2018. Dkt. No. 60. The deadline for settlement class members to file a claim, object or request exclusion from the settlement will pass on August 13, 2018. *Id*. at p. 10. The present fee petition was ordered to be filed by July 14, 2018. *Id*. at p. 10. A fairness hearing has been scheduled for November 1, 2018. *Id*. at p. 11. Plaintiffs file this fee petition, on July 13, 2018, at least thirty (30) days prior to the deadline

to object to the settlement, in line with the requirements of the Class Action Fairness Act. *Mercury Interactive Corp. Sec. Litig. v. Mercury Interactive Corp.,* 618 F.3d 988, 993 (9th Cir. 2010).

## III. THE COURT SHOULD GRANT PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES, LITIGATION COSTS AND SERVICE AWARD

The Settlement requires J.P. Morgan Chase Bank, N.A. ("JPMC") to fund a non-reversionary cash Settlement Fund of $2,250,000. Agr. § III.C.1; Dkt. No. 57-1, p. 4. Each Settlement Class Member who submits a simple claim form online or by mail will receive a cash award. Dkt. No. 57-1, p. 8. Under no circumstances will any amount of the Settlement Fund revert to JPMC. Agr. § III.C.1.

The amount of each cash award is the claiming Settlement Class Member's *pro rata* share of the Settlement Fund. Agr. § III.F.2. Although it is not possible to know the precise amount of the cash awards until all claims have been submitted and verified, Class Counsel, based on their experience in similar TCPA class actions, conservatively estimated at the time of preliminary approval that each cash award would be approximately $101, based on an estimated 5% claims rate. Dkt. No. 57-1, p. 16. As of July 9, 2018, the claims rate is 8.04%, meaning it is now estimated that each claiming class member will received approximately $65. *See* Declaration of Jason A. Ibey ("Ibey Decl."), ¶ 24, filed herewith

After settlement payments are made, and if uncashed checks permit a second *pro rata* distribution equal to or greater than $10 per qualifying claimant, the Settlement Administrator will make a second *pro rata* distribution to Settlement Class Members who cashed settlement checks. Agr. § III.G.2. Only if a second distribution is not made, or if checks remain uncashed after the second distribution, will the uncashed amount be distributed as *cy pres* award if approved by the Court. Dkt. No. 57-1, pp. 11-12; Agr. § III.G.3.

Plaintiffs' request for 30% of the Settlement Fund as attorneys' fees and litigation expenses combined, and a service award of $5,000 to each of the two named Plaintiffs, is appropriate and should be granted.

### A. Plaintiffs' Request for 30% of the Settlement Fund as Attorneys' Fee and Costs Combined Is Reasonable

"Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval. Fed.R.Civ.P. 23(e)." *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991). In this circuit, attorneys' fees awarded from a common fund based upon a reasonable percentage of the fund established for the benefit of the class. *Id*. at 774. The percentage applies to the total fund created, even where the actual payout following the claims process is lower. *Waters v. Int'l Precious Metals Corp.,* 190 F.3d 1291, 1295-96 (11th Cir. 1999); *see also*,

*Williams v. MGM-Pathe Commc'ns Co.,* 129 F.3d 1026, 1027 (9th Cir. 1997) (discussed in *Waters;* approving a fee percentage on the $4.5 million fund although the payout was $10,000).

The common benefit doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *In re Domestic Air Transp. Antitrust Litig*., 148 F.R.D. 297, 349 (N.D. Ga. 1993), quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

The Eleventh Circuit, in *Camden I*, provided non-exclusive guidelines for courts to consider in determining a reasonable fee award in common fund cases. The court held that the oft-applied factors from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), are appropriate for common fund cases, and it added other relevant guidelines. Together, the factors for district courts within the Eleventh Circuit to consider are as follows: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (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 client; (12) awards in similar cases; (13) the time required to reach a settlement; (14) whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel; (15) any non-monetary benefits conferred upon the class by the settlement; (16) the economics involved in prosecuting a class action; and (17) any additional factors unique to the particular case. *Camden I*, 946 F.2d at 772, 775.

District courts are not required to evaluate each and every factor. Instead, "[t]he district court's reasoning should identify all factors upon which it relied and explain how each factor affected its selection of the percentage of the fund awarded as fees." *Id*; *see also In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1359 (S.D. Fla. 2011) ("These factors are merely guidelines[.]"). An award here of 30% of the Settlement Fund as attorneys, representing $675,000, is reasonable based on the relevant factors discussed in detail below.

**1. Time, labor and skill required**

Class Counsel worked diligently to obtain the substantial, all-cash, non-reversionary Settlement Fund for the Settlement Class. The litigation against JPMC, starting with the *Diaz* action, has been ongoing since April 20, 2016. The *Barrow* action was filed on September 23, 2016. It took more than a year to obtain the discovery needed to negotiate a settlement through two mediation sessions (one

in Chicago, Illinois and the other in Los Angeles, California), and requiring the assistance of an economic and financial consulting and expert testimony firm.

When considering the time spent on both this action to date, and the prior *Diaz* action, Class Counsel incurred over 351 hours (which does not include the time incurred by paralegals and other attorneys for Plaintiffs in this matter who are not serving as class counsel), and additional time will be required through the final approval hearing and in overseeing settlement award distribution and any *cy pres* distribution of unclaimed funds. Declaration of Abbas Kazerounian ("Kazerounian Decl."), ¶¶ 48-49; Declaration of Joshua B. Swigart ("Swigart Decl."), ¶ 12; Ibey Decl., ¶ 23.

Substantial familiarity with the TCPA, including agency rulings and emerging case law, is needed to successfully prosecute TCPA actions on a putative class basis, especially following the FCC's 2015 ruling on the TCPA in *Rules & Regulations Implementing the TCP Act of 1991 et al*., 30 FCC Rcd 7961 (F.C.C. July 10, 2015), which was recently overturned in part by *ACA Int'l v. FCC*, No. 15-1211, 2018 U.S. App. LEXIS 6535 (D.C.Cir. Mar. 16, 2018).

Awareness or prior class action settlements in different jurisdictions is also important in TCPA cases, and Class Counsel have considerable experience negotiating TCPA settlements nationwide. *See* Kazerounian Decl., ¶ 17; Swigart Decl., ¶¶ 8-9; Ibey Decl., ¶¶ 15-16. Hyde & Swigart and Kazerouni Law Group, APC served as co-class counsel in a prior finally approved TCPA settlement in this

District in *Markos v. Wells Fargo Bank, N.A.*[1] As explained below (page 14), Class Counsel have substantial experience in consumer class action litigation, especially under the TCPA, and put forward that their skill was key in reaching the sizeable monetary settlement with a national bank.

Class Counsel here have achieved substantial results for the Settlement Class in the most efficient manner possible, after sufficient time and discovery to evaluate the strengths and weaknesses of the TCPA claims. This swift and successful conclusion supports an upward deviation from the benchmark. *See Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001); *Domestic Air Transport*, 148 F.R.D. at 352.

**2. Difficulty of legal and factual questions and "undesirability" of the case**

The requested fee award is warranted where there are "complex issues requiring experience and skill on the part of Class Counsel." *In re Bayou Sorrel Class Action*, 2006 U.S. Dist. LEXIS 80924, 2006 WL 3230771, at *4 (W.D.La. 2006). Difficult issues can contribute to the undesirability of a case. *See* 2006 U.S. Dist. LEXIS 80924, at *6 (finding undesirability due in part to issues such as "problems of proof, problems of causation, and a host of other complex issues"); *see also, Waters v. Cook's Pest Control, Inc.*, 2012 U.S. Dist. LEXIS

[1] *See Markos v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01156-LMM, 2016 U.S. Dist. LEXIS 123541, *5 (N.D.Ga. Sep. 7, 2016), and *Markos v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01156-LMM (N.D.Ga. Jan. 30, 2017).

99129, at *18 (N.D.Ala. July 17, 2012) (finding undesirability due to complex discovery issues, along with "the expense and time involved in prosecuting such litigation on a contingent basis, with no guarantee or high likelihood of recovery").

In particular, this action presented a great challenge to Plaintiffs' counsel because it involves alleged oral revocation of consent as opposed to a cleaner lack of consent case where individuals had never provided their telephone numbers to defendant, or were the defendant did not have any policy to document revocation of consent. It is far more difficult to obtain class certification of a revocation class where the defendant is likely to argue that determining oral revocation is too individualized and therefore does not satisfy the predominance requirement under Rule 23(b)(3), especially where JPMC here had a policy to document revocation of consent (*see* Dkt. No. 57-7, ¶ 14). *See also*, *Nece v. Quicken Loans, Inc.*, No. 8:16-cv-2605-T-23-CPT, 2018 U.S. Dist. LEXIS 31346, at *8-9 (M.D.Fla. Feb. 27, 2018) (opining that the named plaintiff's revocation claim involved "several 'unique' or idiosyncratic facts (including the phrasing of Nece's comments and Nece's repeated submissions) [that] contribute to the determination whether Quicken stopped calling Nece within a reasonable time.")

Few similar TCPA cases have been certified on a contested motion. *See e.g.*, *Abdeljalil v. GE Capital Corp*., 306 F.R.D. 303, 306 (S.D. Cal. 2015) (certifying

TCPA class action, based on a proposed keyword search, involving claims that the defendant continued placing automated calls to wrong parties after it was on notice of calling wrong parties). Notably, one court has opined that "the average TCPA case carries a 43% chance of success," *Amadeck v. Capital One Fin. Corp. (In re Capital OneTel. Consumer Prot. Act Litig.)*, 2015 U.S. Dist. LEXIS 17120, *59 (N.D. Ill. Feb. 12, 2015). "[C]ounsel should be rewarded for taking on a case from which other law firms shrunk." *Torres v. Bank of Am. (In re Checking Account)*, 830 F.Supp.2d 1330, 1364 (S.D. Fla. 2011). The present case is more complex than on average.

JPMC could contend that "prior express consent" can be given whenever a customer provides a cell phone number to the defendant as a contact number. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (hereinafter "2008 Declaratory Ruling") (declaring that cell phone numbers must be "provided during the transaction that resulted in the debt owed"). Although Plaintiffs take a narrower view of "transaction," if the Court adopted JPMC's view, the amount of recoverable damages could be reduced significantly or eliminated altogether.

Finally, there is always a risk of losing a jury trial. Even if Plaintiffs had prevailed at trial, any recovery would likely be delayed for years by an appeal.

Class Counsel believe that they would have a reasonable chance of prevailing based on a methodology to search the business records electronically, but success was by no means assured. The consent and revocation issues presented an acute and case-dispositive risk that the Class would receive nothing. Despite the risks of recovering nothing for the Class Members, Plaintiffs' counsel here procured a $2,250,000 all-cash settlement, with no reversion.

### 3. Contingency fee and customary fee

The contingent nature of fees in this case should be given substantial consideration in assessing the requested fee award. *See Behrens v. Wometco Enters., Inc*., 118 F.R.D. 534, 548 (S.D. Fla. 1988), aff'd, 899 F.2d 21 (11th Cir. 1990) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees."); *see also, Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), *cert. dismissed sub nom., Ledbetter v. Jones*, 453 U.S. 950, 102 S. Ct. 27, 69 L. Ed. 2d 1033 (1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result").

Plaintiffs' counsel took on this litigation against JPMC without any guarantee of payment for their work, doing so on a contingency fee basis. Kazerounian Decl., ¶ 51; Swigart Decl., ¶ 14. This applies to both the present action and the earlier *Diaz* action. Plaintiffs' counsel also incurred thousands of

dollars in costs prior to obtain a class settlement (Kazerounian Decl., ¶ 50; Swigart Decl., ¶ 13), which was an additional risk that merits an award of the requested fees and costs.

District courts within this Circuit have found that this type of risk can support a fee award of over 30% of the settlement fund. Here, Class Counsel request only 30% of the Settlement Funds as a combined award of attorney's fees and costs. *See Cook's Pest Control, Inc.*, 2012 U.S. Dist. LEXIS 99129, at *40 (finding that the risk factor supported a 35% fee award because Class Counsel "have spent more time on this case than they will be compensated for at their customary rates[,] … [and] there has been a real possibility that Class Counsel would not recover anything for the class").

Moreover, "in order to encourage 'private attorney general' class actions brought to enforce laws on behalf of persons with small individual losses, a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Columbus Drywall & Insulation v. Masco Corp.*, 2012 U.S. Dist. LEXIS 196030, at *5 (N.D. Ga. Oct. 26, 2012) (internal quotation marks and alterations omitted).

The usual fee charged in this Circuit and by Plaintiffs' counsel supports the desired award of fees and costs amounting to 30% of the Settlement Fund.

**4. Amount of settlement fund and results**

The settlement fund of $2,250,000, which was reached after two private mediations before experienced mediators (*see* Agr. § I.C), and benefiting approximately 242,359 settlement class members, is a success. It is now estimated that settlement class members would recover approximately $65, based upon on the current claims rate of 8.04%, which assumes that all claims submitted thus far are valid and there are no duplicative claims and no significant increase in claims through the claims filing deadline. *See* Ibey Decl., ¶ 24; *see also*, *id*. at ¶ 9.

It is significant that Class Counsel obtained a cash common fund, which is "a substantial, tangible, and real benefit for the Class." *Wolff v. Cash 4 Titles,* 2012 U.S. Dist. LEXIS 153786, at *10 (S.D. Fla. Sep. 26, 2012) ("Unlike cases in which attorneys for a class petitioned for a fee award after obtaining non-monetary relief for the class, such as in the form of 'coupons,' Class Counsel here created a wholly cash common fund."). Class Counsel have achieved a certain and worthwhile benefit for the class in lieu of protracted litigation. This Settlement provides direct, monetary benefits to Class Members who realistically would not have filed their own individual lawsuits because each Class Member's case would have been too small to bring on its own.

This estimated award here is higher than in many TCPA class settlements. *See e.g.*, *Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029-CIV, 2017 U.S. Dist.

LEXIS 217470, at *18 (S.D.Fla. Nov. 17, 2017) (finally approving "the Settlement Agreement [under the TCPA that] gave class members the option to choose either a $4.00 cash award or a $15.00 voucher to be used at Defendant's Naples Nissan dealership."); *Kolinek v. Walgreen Co*., 311 F.R.D. 483 (N.D. Ill. 2015) (finally approving TCPA settlement where the individual settlement award was approximately $30.00); *Amadek,* 80 F. Supp. 3d. at 787 (awarding $34.60 per claiming class member); *Arthur v. Sallie Mae, Inc*., 10-cv-0198-JLR (W.D. Wash.) (class members were to receive between $20 and $40 dollars per claim);[2] *Wojcik v. Buffalo Bills Inc*., No. 8:12-cv-02414-SDM-TBM (M.D. Florida August 25, 2014) (awarding a gift card valued at $57.50 to $75.00 for each class member[3]) [Previously filed in this case at Dkt. No. 57-4].

Class Counsel's pre-filing investigation and approach to mediation resulted in a relatively prompt Settlement, rather than after many years of costly litigation. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained.").

[2] *See Rose v. Bank of Am. Corp*., 2014 U.S. Dist. LEXIS 121641, *31 (N.D. Cal. 2014), referring to the amount per claim in the *Arthur* settlement.
[3] *See Knutson v. Schwan's Home Serv.,* 2014 U.S. Dist. LEXIS 99637, at *12 (S.D. Cal. July 14, 2014) (recognizing "[t]he tiered claim amounts [in *Wojcik*] ranged from merchandise debit cards in the amount of $57.50 to $75.00.").

**5. Class counsels' experience**

Class Counsel and other attorneys who worked on the case have considerable experience prosecuting consumer class actions, including TCPA class actions, thus favoring an award of the requested fee. *See* Kazerounian Decl., ¶¶ 15-21; Swigart Decl., ¶¶ 8-9; Ibey Decl., ¶¶ 10-17. *See Gevaerts v. TD Bank*, No. 1:14-CV-20744-RLR, 2015 U.S. Dist. LEXIS 150354, 2015 WL 6751061, at *12 (S.D. Fla. Nov. 5, 2015) ("In the private marketplace, counsel of exceptional skill commands a significant premium. So too should it here."). *See Allapattah Servs. v. Exxon Corp.,* 454 F.Supp.2d 1185, 1209 (S.D. Fla. 2006) ("Courts in this circuit routinely emphasis this factor in calculating percentage fee awards.").

Mr. Kazerounian, Mr. Swigart and Mr. Ibey have served as class counsel in other TCPA class action cases. *See* Kazerounian Decl., ¶ 17; Swigart Decl., ¶ 9; Ibey Decl., ¶¶ 15-16. Mr. Kazerounian has spoken on the TCPA at several professional events, is an adjunct professor at CWSL where he teaches a course touching on the TCPA and other consumer matters, and argued before the Ninth Circuit Court of Appeal on the meaning of an ATDS under the TCPA. Kazerounian Decl., ¶¶ 20 and 22. Mr. Swigart has spoken at a professional event on TCPA discovery issues. *See* Swigart Decl., ¶ 10.r. Mr. Ibey has written a published article on the TCPA. Ibey Decl., ¶ 21.

**6. Relationship between counsel and clients**

This is the first time that Mr. Diaz and Ms. Barrow have been represented by Class Counsel. Kazerounian Decl., ¶ 14; Swigart Decl., ¶ 7; Ibey Decl., ¶ 2. Class Counsel thus did not have the benefit of knowing how well they would be able to work with the named Plaintiffs, which was a risk to Class Counsel. Both Plaintiffs, however, have worked diligently and cooperatively with their counsel and helped to reach this significant monetary class settlement, as noted below when addressing the request for a service award for each of the two Class Representatives.

**7. Similar awards**

In a class action, "[a] fee of 31 and 1/3% to Class Counsel is well within the range of customary fees." *Allapattah Servs.,* 454 F. Supp. 2d at 1209; *see also*, *Pinto v. Princess Cruise Lines*, 513 F. Supp. 2d 1334, 1342 (S.D. Fla. 2007) ("The 30% fee requested in this case is thus well in line with the bulk of the fee awards in class action litigation.").

Several district courts have approved a fee award of 30% or higher in class actions. *See e.g.*, *Torres v. Bank of Am. (In re Checking Account)*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (awarding fees of 30% of the fund); *Morgan v. Pub. Storage*, No. 14-cv-21559, 2016 U.S. Dist. LEXIS 54937, at *30-31 (S.D. Fla. Mar. 9, 2016) (approving a fee award of $1,650,000, representing 33% of the $5,000,000 Settlement Fund based on the *Camden I* guidelines); *McLendon v. PSC Recovery Sys*., No. 1:06-CV-1770-CAP, 2009 U.S. Dist. LEXIS 136999, at *12

(N.D. Ga. June 2, 2009) (awarding fees of $1,333,333.33 (thirty-three and one-third percent (33.33%) of the $4,000,000.00 fund); *Wreyford v. Citizens for Transp. Mobility, Inc*., No. 1:12-cv-2524-JFK, 2014 U.S. Dist. LEXIS 188522, at *5 (N.D. Ga. Oct. 16, 2014) (awarding 33 1/3 of the $325,000 settlement fund as attorneys' fees); *In re Pediatric Servs. of Am.*, No. 1-99-CV-0670, 2002 U.S. Dist. LEXIS 29486, at *9 (N.D.Ga. Mar. 15, 2002) (awarding 33 1/3 % of $ 3.2 million settlement fund plus interest and expenses). *See also*, *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp*., No. 2:10-CV-02847, 2015 WL 5626414, at *1-2 (N.D. Ala. Sept. 14, 2015) (awarding 30%, plus costs).

In TCPA cases in particular, courts have awarded 30% or more of the settlement fund as fees. *See e.g., Schwyhart v. AmSher Collection Servs.*, No. 2:15-cv-01175-JEO, 2017 U.S. Dist. LEXIS 39559, at *9 (N.D.Ala. Mar. 16, 2017) (awarding one-third of the Settlement Fund in a TCPA class action); *James v. JP Morgan Chase Bank, N.A.*, No. 15-cv-2424, 2017 WL 2472499, at *1 (M.D. Fla. June 5, 2017) (approving attorneys' fee award reflecting 30% when "[e]ach claimant will receive approximately $81"); *Kolinek v. Walgreen Co*., 311 F.R.D. 483, 502-03 (N.D. Ill. 2015) (36% fee award in TCPA class action); *Lees v. Anthem Ins. Cos.*, No. 4:13cv1411, 2015 U.S. Dist. LEXIS 74902, 2015 WL 3645208, at *4 (E.D. Mo. June 10, 2015) (34% award in TCPA class action); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (33% award in TCPA class action). Last year, Judge Leigh Martin May

awarded fees and expenses of $4,925,249 in a TCPA settlement, representing 30% of the non-reversionary cash settlement fund of $16,417,496.70. *See Markos*, No. 1:15-cv-01156-LMM, 2017 U.S. Dist. LEXIS 17546 at *9.

Consequently, an combined award here of 30% of the Settlement Fund as attorneys' fees and costs in this TCPA class action settlement is reasonable and not uncommon in this Circuit.

**8. Reaction of settlement class members**

As of July 9, 2018, the settlement administrator reports to Class Counsel that nearly 21,000 claims have been received, 31 people have requested exclusion and there are no objections. Ibey Decl., ¶ 9. *See Ingram*, 200 F.R.D. at 696 (no objection to the fee award in the settlement agreement which was filed so that the requested 30% fee award was approved by the court). This favors approval of the requested fee award.

**9. Non-monetary benefits: Deterrent effect**

Although the Agreement does not provide for injunctive relief (JPMC already has a policy in place to document revocation of consent), Settlement Class Members will likely benefit from the deterrent effect of this TCPA settlement by increasing incentive to document and honor oral revocation requests. *See Lo v. Oxnard European Motors, LLC*, 2012 WL 1932283, *5 (S.D. Cal., May 29, 2012); *see also, Texas v. American Blast Fax, Inc.*, 121 F. Supp. 2d 1085, 1090 (W.D.

Tex. 2000) (noting the TCPA's statutory damages provision designed to address and deter the overall public harm caused by such conduct).

This Settlement also creates an incentive for other businesses to comply with the TCPA, which benefits the Settlement Class Members, consumers in general, as well as compliant competitive businesses. *See generally*, David R. Hodas, *Enforcement of Environmental Law in A Triangular Federal System: Can Three Not Be A Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 Md. L. Rev. 1552, 1657 (1995) ("[A]llowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance.").

**10. Unique factors**

A substantial risk faced by Plaintiffs and Plaintiffs' counsel here concerned the state of the law with regard to use of an "automatic telephone dialing system" (ATDS), 47 U.S.C. § 227(a)(1), to place the calls at issue, *see id*. at § 227(b)(1)(A)(iii). This action was settled on a class basis in February of 2018, prior to issuance of the ruling from the D.C. Circuit in *ACA Int'l v. FCC*, No. 15-1211, 2018 U.S. App. LEXIS 6535 (D.C.Cir. Mar. 16, 2018), which overturned the FCC's 2015 interpretation of the capacity required to be ATDS, decided on consolidated appeal pursuant to 28 U.S.C. § 2344 of the Hobbs Act. That decision has created considerable debate with regard to its meaning and impact on TCPA

pending litigation, which will need to be resolved by the courts through on-going litigation throughout the nation.[4] Settlement here before that decision was issued helped avoid a significant settlement risk that the dialers used by JPMC might not be an ATDS following *ACA International*. If the dialers used by JPMC were determined not to be an ATDS, Plaintiffs would have no cause of action for autodialed calls under 47 U.S.C. § 227(b)(1)(A)(iii).

Additionally, a fee amount negotiated between plaintiffs and defendants may be used to determine the reasonableness of a requested fee award. *Ingram*, 200 F.R.D. at 694-95. Pursuant to the Agreement, Class Counsel may request up to 30% of the Settlement Fund, although "JPMC reserves the right to oppose such a motion." [Agr. § III.I.] Class Counsel represent that the settlement negotiations that produced that Agreement were impartial and held at arms' length, after two mediations before experienced mediators (the Honorable Morton Denlow (Ret.), and Bruce Friedman, Esq. of JAMS), and that the attorneys' fees and litigation

[4] For example, in *Swaney v. Regions Bank*, No. 2:13-cv-00544-JHE, 2018 U.S. Dist. LEXIS 85217 (N.D.Ala. May 22, 2018), the court held that *ACA International* did not overturn autodialer rulings by the FCC prior to 2015, and relied on the FCC's 2003 ruling to hold that a dialer was an automatic telephone dialing system (47 U.S.C. § 227(a)(1)) where it had the capacity to dial numbers without human intervention. Contrarily, the court in *Herrick v. GoDaddy.com LLC*, No. CV-16-00254-PHX-DJH, 2018 U.S. Dist. LEXIS 83744 (D.Ariz. May 14, 2018), declined to consider FCC rulings prior to 2015 on the meaning of an automatic telephone dialing system, and found sufficient human intervention for the dialing system there to not be autodialer under the TCPA.

costs were negotiated only after the relief for the Settlement Class members was agreed upon. Kazerounian Decl., ¶ 12.

Thus, the relevant factors favor approval of an award of combined fees and expenses of 30% of the Settlement Fund. This Circuit follows the percentage of the fund approach without the need for a lodestar cross-check. *See Camden I Condominium Ass'n,* 946 F.2d at 774 ("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.").

### B. Plaintiffs' Request for Reimbursement of Litigation Expenses from the Settlement Fund Is Reasonable

Class Counsel are entitled to reimbursement of out-of-pocket costs advanced for the Class. *See, e.g.*, *In re Domestic Air Transp.*, 148 F.R.D. at 306; Rubenstein, Newberg on Class Actions § 16:1 (5th ed. 2016). Class Counsel may recover the taxable costs recoverable by any prevailing party, *see* Fed. R. Civ. P. 54(d)(1), and also "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). *See Gevaerts*, 2015 U.S. Dist. LEXIS 150354, 2015 WL 6751061, at *14 (awarding costs and expenses for, *inter alia*, "fees for experts, photocopies, travel, online research, translation services, mediator fees, and document review and coding expenses").

Class Counsel here request a combined attorneys' fee and expense award of 30% of the Settlement Fund, and note that the Agreement provides that Class

Counsel may request up to $40,000 in litigation expenses. [Agr. § III.I.] Plaintiffs' attorneys provide herewith sworn declarations for litigation costs to date of $30,118.67.[5] Kazerounian Decl., ¶ 50; Swigart Decl., ¶ 13. *See Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029-CIV, 2017 U.S. Dist. LEXIS 217470, at *42 (S.D.Fla. Nov. 17, 2017) ("given the specificity with which Plaintiff's counsel itemized the costs, the reasonableness of the costs, and Defendant's willingness to pay that amount, the Court awards Plaintiff's counsel costs in the amount of $15,184.91.") The costs requested were reasonably incurred in the prosecution and settlement of this action. *See Waters v. International Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999). Additionally, Counsel for Plaintiffs have lost the use of this money for one or more years when considering the prior *Diaz* action filed on April 20, 2016), which costs were advanced on behalf of a putative class.

### C. Plaintiffs' Request for A Service Award of $5,000 from the Settlement Fund Is Reasonable

"'[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.'" *Allapattah Servs., Inc.,* 454 F. Supp. 2d at 1218-19 (quoting *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga.

[5] Costs will increase through final approval to attend the fairness hearing and to address any objections that may be filed. *See* Kazerounian Decl., ¶ 49. Plaintiffs intend to submit a supplemental fee petition prior to the final approval hearing.

2001)). The requested award is consistent with awards in other TCPA settlements. *See Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (collecting cases and approving $25,000 service award to TCPA class representative); *see also Godshall v. Franklin Mint Co.*, No. 01-CV-6539, 2004 U.S. Dist. LEXIS 23976, 2004 WL 2745890, at *6 (E.D. Pa. Dec. 1, 2004) (granting special award of $20,000 to each named plaintiff for their work as class representatives); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *18-19 (E.D. Pa. June 2, 2004) (awarding $25,000 for each of the five class representatives); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 124-125 (S.D.N.Y. 2001) (approving an award of $10,000 for lead plaintiff); *In re Residential Doors Antitrust Litig.*, MDL 1039, 1998 U.S. Dist. LEXIS 4292, 1998 WL 151804, at *11 (E.D. Pa. Apr. 2, 1998) (awarding an incentive of $10,000 to each of the four class representatives).

The Court should approve an award of $5,000 each to compensate the two Class Representatives for their important efforts on behalf of the Settlement Class. The Class Representatives assisted with the initial investigation and approved the complaint filings, served discovery (Mr. Diaz also responded to discovery requests), remained in contact with counsel regarding the progress of litigation, reviewed and approved the Agreement, and submitted a declaration in

support of the motion for preliminary approval. Declaration of Anthony Diaz ("Diaz Decl."), ¶ 6; Declaration of Tomeka Barrow ("Barrow Decl."), ¶ 6. *See Grant v. Capital Mgmt. Servs., L.P.*, 2014 U.S. Dist. LEXIS 29836, at *21 (S.D.Cal. Mar. 5, 2014) (approving $5,000 incentive award in TCPA case where class members received injunction relief); *Opson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900, at *27-28 (N.D. Cal. Apr. 3, 2009) (awarding $5,000 incentive payment and finding that "in general, courts have found that $5,000 incentive payments are reasonable"); *Schwyhart v. AmSher Collection Servs., Inc.*, No. 15-cv-01175, 2017 U.S. Dist. LEXIS 39559, at *9 (N.D. Ala. Mar. 16, 2017) (approving a $10,000 incentive award in a TCPA action); *Martin v. Dun & Bradstreet, Inc.*, No. 12–cv–215, 2014 WL 9913504, at *3 (N.D. Ill. Jan. 16, 2014) (approving a $20,000 service award to a TCPA class representative); *Cross v. Wells Fargo Bank, N.A.,* 15-cv-01270-RWS (N.D. Ga. Feb. 10, 2017) (approving service award of $15,000 in TCPA case) [Exhibit A to Ibey Decl., ¶ 26].

The two Class Representatives undertook great risk in acting as a named Plaintiffs against a sophisticated defendant (a national bank) that could have pursued substantial costs should this putative class action not have settled and if the named Plaintiffs had not prevailed in their claims, much more so than if Plaintiffs only commenced suit for their individual claims. *See Bellinghausen v.*

*Tractor Supply Co.*, 306 F.R.D. 245, 267-68 (N.D. Cal. 2015) (approving $10,000 incentive award where "Plaintiff filed this lawsuit despite knowledge that if he lost, the court might have ordered him to pay Defendant's attorneys' fees and costs.").

Lastly, the Class Representatives sacrificed potentially larger individual recoveries to represent the Settlement Class Members. In particular, there is evidence that Plaintiff Diaz received at least 20 calls after he contends that he revoked any alleged consent on or about December 4, 2015 (Ibey Decl., ¶ 25), with a potential individual recovery of $30,000, were damages trebled based on a knowing or willful violation. 47 U.S.C. § 227(b)(3). Also, Plaintiff Barrow contends that at least 6 calls may be actionable post-revocation of any alleged consent on or about June 1, 2016 (Dkt. No. 19, ¶¶ 23-24), potentially resulting in an individual award of $9,000, if damages were trebled. Therefore, an award of $5,000 to each named Plaintiff for their efforts in this litigation against JPMC in representing the best interests of the Settlement Class Members is reasonable.

## IV. CONCLUSION

In sum, Plaintiffs respectfully request that the Court grant their motion for attorneys' fees, litigation expenses and service awards. A proposed order will be submitted with the to-be-filed motion for final approval of class action settlement, requesting both approval of this fee petition and final approval of the settlement.

Dated: July 13, 2018

Respectfully submitted,

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## L.R. 7.1(D) CERTIFICATION

I hereby certify that this filing has been prepared with one of the font and point selections approved by the Court in L.R. 5.1(C)—in this case, Times New Roman, 14-point font.

/s/ Abbas Kazerounian

**CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 2018, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all counsel of record.

/s/ Abbas Kazerounian