IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

REBECCA ASHACK, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CALIBER HOME LOANS, INC.,

Defendant.

NO. 1:15-cv-01069-JMS-DML

JURY TRIAL DEMANDED

Honorable Jane E. Magnus-Stinson

PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, COSTS AND SERVICE AWARDS

TABLE OF CONTENTS

Page No.

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. Class Counsel has obtained an excellent result for the Settlement Class 2

B. The action involved considerable risk 3

C. Class Counsel thoroughly and efficiently investigated the class claims 4

III. THE SEVENTH CIRCUIT STANDARD FOR COMMON FUND SETTLEMENTS 5

IV. ARGUMENT 7

A. Class Counsel's requested fee award of 30% of the fund is reasonable 7

1. The requested fee is presumptively reasonable 7

2. The requested fee reflects the "market rate" for legal services in a TCPA case 8

a. Class counsel's fee request is consistent with its contingency fee agreement 9

b. Class Counsel's fee request is consistent with fees awarded in similar TCPA class actions 9

3. Other factors support Class Counsel's fee request 11

a. Risk of nonpayment supports the requested fee 11

b. Class Counsel's performance supports the requested fee 14

c. The amount of work by Class Counsel supports the requested fee 15

d. The stakes of the case support the requested fee 16

B. Class Counsel are entitled to reimbursement for their out-of-pocket costs 16

C. The service award to the Class Representative should be approved 17

V. CONCLUSION 18

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

Americana Art China, Co. v. Foxfire Printing & Packaging, Inc.,
743 F.3d 243, 247 (7th Cir. 2014) 5

Birchmeier v. Caribbean Cruise Line, Inc.,
302 F.R.D. 240 (N.D. Ill. 2014) 13

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980) 5, 16, 17

Cook v. Niedert,
142 F.3d 1004 (7th Cir. 1998) 17

Craftwood Lumber Co. v. Interline Brands,
No. 11-cv-4462, 2015 WL 2147679 (N.D. Ill. May 6, 2015) 10

Estrada v. iYogi, Inc.,
No. 2:13–01989 WBS CKD, 2015 WL 5895942 (E.D. Cal. Oct. 6, 2015) 14

Florin v. Nationsbank of Ga., N.A.,
34 F.3d 560 (7th Cir. 1994) 6

Franklin v. Wells Fargo Bank, N.A.,
Case No. 14cv2349-MMA (BGS), 2016 WL 402249 (S.D. Cal. Jan. 29, 2016) 14

Gaskill v. Gordon,
942 F. Supp. 382 (N.D. Ill. 1996) 6

Gaskill v. Gordon,
160 F.3d 361 (7th Cir. 1998) 9

Gehrich v. Chase Bank USA, N.A.,
316 F.R.D. 215 (N.D. Ill. 2016) 14

Green v. DirecTV, Inc.,
10 C 117, 2010 WL 4628734 (N.D. Ill. Nov. 8, 2010) 13, 14

Heekin v. Anthem, Inc.,
05-cv-01908-TWP-TAB, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) 17

Ikuseghan v. Multicare Health Sys.,
No. C14-5539 BHS, 2016 WL 4363198 (W.D. Wash. Aug. 16, 2016) 11

In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.,
792 F. Supp. 2d 1028 (N.D. Ill. 2011) 13

In re Capital One TCPA Litig.,
80 F. Supp. 3d 781 (N.D. Ill. 2015) 6, 8, 9, 10, 14

In re Cont'l Ill. Sec. Litig.,
962 F.2d 566 (7th Cir. 1992) 6, 7

In re Ready-Mixed Concrete Antitrust Litig.,
No. 1:05-CV-00979-SEB, 2010 WL 3282591 (S.D. Ind. Aug. 17, 2010) 6

In re Synthroid Mkt. Litig.,
264 F.3d 712 (7th Cir. 2001) 5, 9, 17

In re: Synthroid Mktg. Litig.,
325 F.3d 974 (7th Cir. 2003) 10

Jamison v. First Credit Servs.,
290 F.R.D. 92 (N.D. Ill. 2013)... 13

Kirchoff v. Flynn,
786 F.2d 320 (7th Cir. 1986) 9

Kolinek v. Walgreen Co.,
311 F.R.D. 483 (N.D. Ill. 2015)... 6, 8, 9, 10, 14

Manouchehri v. Styles for Less, Inc.,
Case No. 14cv2521 NLS, 2016 WL 3387473 (S.D. Cal. June 20, 2016)...................... 14

Michaelson v. CBE Grp., Inc.,
No. 13-cv-50228, 2015 WL 24490938 (N.D. Ill. May 21, 2015)................................. 12

Pearson v. NBTY, Inc.,
772 F.3d 778 (2014).. 7, 8

Redman v. RadioShack Corp.,
768 F.3d 662 (7th Cir. 2014) 7, 8

Retsky Family Ltd. P'ship v. Price Waterhouse, LLP,
Case No. 97 C 7694, 2001 WL 1568856 (N.D. Ill. Dec. 10, 2001)................................. 9

Saf-T-Gard Int'l, Inc. v. Vanguard Energy Servs., LLC,
No. 12 C 3671, 2012 WL 6106714 (N.D. Ill. Dec. 6, 2012) 13

Silverman v. Motorola Sols., Inc.,
739 F.3d 956 (7th Cir. 2013) 8

Soppet v. Enhanced Recovery Co., LLC,
679 F.3d 637 (7th Cir. 2012) 12

Sutton v. Bernard,
504 F.3d 688 (7th Cir. 2007) 5, 11, 14

Taubenfeld v. AON Corp.,
415 F.3d 597 (7th Cir. 2005) 8, 9

Wilkins v. HSBC,
No. 14 D 190, 2015 WL 890566 (N.D. Ill. Feb. 27, 2015)... 11

Williams v. Rohm & Haas Pension Plan,
No. 4:04-CV-0078-SEB-WGH, 2010 WL 4723725 (S.D. Ind. Nov. 12, 2010)............. 17

Williams v. Rohm & Haas Pension Plan,
658 F.3d 629 (7th Cir. 2011) 15

Wright v. Nationstar Mortg. LLC,
No. 14 C 10457, 2016 WL 4505169 (N.D. Ill. Aug. 29, 2016)............................ 7, 10, 14

I. INTRODUCTION

On January 24, 2017, this Court preliminarily approved a proposed class action settlement ("Settlement") between Plaintiff Rebecca Ashack, individually and behalf of all others similarly situated, and Caliber Home Loans, Inc. ("Caliber"). The Settlement requires Caliber to pay $2,895,000 into a common fund for the benefit of the approximately 244,685 Settlement Class members. Settlement Class members have until April 24, 2017 to submit their claim forms, object, or be excluded from or opt out of the Class. As of Friday March 24, the Settlement Administrator had received 22,199 claims or 9.7% of the Settlement Class. If the claims period closed today, each claimant would receive approximately $80.

This excellent settlement was the result of sustained efforts of experienced and knowledgeable Class Counsel; efforts taken at great financial risk. To compensate them for their efforts, Class Counsel seek $783,000, which equals 30% of the common fund after settlement administration expenses are deducted. Class Counsel also seek an award of $30,000 to reimburse them for the out-of-pocket costs they incurred prosecuting and settling this litigation. The requested fee is within the market price for contingent legal fees in complex litigation, and is reasonable and appropriate given the attorneys' fees awarded in similar cases, the risks presented by this case, the quality and amount of work performed by Class Counsel, the high stakes presented, and the result achieved.

Class Counsel also respectfully request that the Court award a modest incentive award to the named Plaintiff, Rebecca Ashack, in the amount of $4,500. The requested fees, costs, and incentive awards are reasonable and in line with the Seventh Circuit's requirements for approval. For these reasons, Class Counsel's motion should be granted.

II. STATEMENT OF FACTS

A. Class Counsel has obtained an excellent result for the Settlement Class.

The Settlement Agreement provides that Caliber will pay $2,895,000 into a Settlement Fund from which all Class members will have the opportunity to make a claim. Dkt. No. 82-1 ("Settlement Agreement") § IV(1). The amount of each Class member's cash payment will be based on a pro rata distribution and will depend on the number of valid and timely claims. *Id*. § IV(2). In their motion for preliminary approval, Class Counsel estimated awards in the range of $70 and $100 after deductions for the requested attorneys' fees and costs, the requested service awards to the named Plaintiff, and notice and claims administration costs. Dkt. No. 82 ¶ 10.

Settlement Class members must submit a claim form. Settlement Agreement §§ VIII(1)-(2). The claims administrator will mail a postcard that can be signed and returned. *Id*. § VII(3)(a). Settlement Class members also may submit claim forms electronically on a Settlement Website. *Id*. § VII(3)(b). Regardless of the method by which they submit their claims, Settlement Class members only need to sign the claim form certifying that the information is correct. *Id*. Ex. A. Class members will have until April 24, 2017 to submit their claim forms, object to the Settlement, or be excluded from or opt out of the Class. *See* Dkt. No. 85. As of Friday March 24, 2017, the Settlement Administrator had received 22,199 claims, which amounts to 9.7% of the Settlement Class. Declaration of Jennifer Rust Murray ("Murray Decl.") ¶ 2.

If any amounts remain in the Settlement Fund as a result of uncashed checks, those funds will be directed to the National Consumer Law Center. Settlement Agreement § IV(3). Not one penny of the Fund will revert to Caliber. The Settlement achieved by Class Counsel therefore provides exceptional monetary relief.

B. The action involved considerable risk.

In 2015, Class Counsel undertook representation of this matter on a pure contingency-fee basis. Murray Decl. ¶ 16. As a result, they shouldered the risk of expending substantial costs and time in litigating the action without any monetary gain in the event of an adverse judgment, all while devoting time to this case that otherwise could have been spent on other matters. *Id*.

The primary risk that Plaintiff faced was that they could lose on the merits. Murray Decl. ¶ 17. Caliber maintains that class members are not entitled to recover because they consented to be contacted on their cell phones in a variety of ways, including by providing their cell phone numbers on loan applications. *Id.* Caliber further maintains that Plaintiff will not be able to prove on a class-wide basis that class members revoked their consent because Caliber did not track consent systematically. *Id.* Caliber asserts that class members often would tell Caliber not to call them but then ask Caliber to reopen communications so that Caliber could help them pursue loss mitigation options, such as a loan modification or short sale. *Id.* Plaintiff believes she ultimately would have prevailed on these issues. However, if the trier of fact agreed with Caliber, she risked recovering nothing.

Another risk Plaintiff faced going forward is that this Court would decline to certify this case as a class action. Murray Decl. ¶ 18. Caliber maintains that class members provided consent in a variety of ways, necessitating file-by-file review that would preclude class certification. Caliber asserts that it does not track whether class members consented or revoked consent in any of its business databases. Plaintiff, on the other hand, believes that the issue of consent is capable of class-wide resolution based on Caliber's own call data. Even if a class were eventually certified, and Plaintiff succeeded in bringing the case to verdict, Caliber would likely appeal. *Id.* Assuming Plaintiff prevailed on appeal, they still would need to affirmatively act to collect on

any judgment, including the inherent risk that Caliber would file bankruptcy in the face of a much larger judgment. *Id.*

C. Class Counsel thoroughly and efficiently investigated the class claims.

The parties have actively litigated this action for a year-and-a-half. Murray Decl. ¶ 19. Plaintiff propounded written discovery requests targeting Caliber's policies and practices, and the calling data necessary to identify the class and establish the scope of the violations. *Id*. Caliber produced nearly five thousand pages of documents, including dialer handbooks and company policies and procedures. *Id*. Caliber also produced calling records that identify the dates and phone numbers to which Caliber made calls. *Id.*

After she received Caliber's documents, Plaintiff took three depositions pursuant to Federal Rule of Civil Procedure 30(b)(6). Murray Decl. ¶ 20. Through these depositions, Plaintiff learned about Caliber's TCPA compliance policies and practices and about the computer systems that Caliber used to track information regarding telephone calls to its customers. *Id.* Plaintiff also retained an expert witness who analyzed Caliber's calling records to identify the calls that Caliber placed to cell phones. *Id*. Once Plaintiff's expert had identified cell phones, Plaintiff sought additional electronic data from Caliber that Plaintiff believed would indicate whether the class member had consented to the call or revoked consent. *Id.* Her expert then analyzed that information. Plaintiff also responded to Caliber's written discovery requests, sat for a deposition, and was ready and willing to testify at trial. *Id*.

As a result of their extensive discovery efforts, by the time the parties commenced settlement negotiations, they understood the strength and weaknesses of their claims and defenses and the extent of class wide damages. Murray Decl. ¶ 21. The parties mediated with Bruce Friedman of Judicial Arbitration and Mediation Services, Inc. ("JAMS") on August 26,

2016. *Id*. During that full-day mediation session, Caliber agreed to pay $2,875,000 to resolve the case. *Id*.

Following mediation, Caliber commenced the process of assembling a "class list;" that is, a list containing the names and addresses of all potential Settlement Class members. Murray Decl. ¶ 22. While doing so, Caliber learned that the Settlement Class included approximately 36,158 additional class members. Caliber also learned that it did not have names and addresses for some of the Settlement Class members. *Id*. The parties re-opened settlement negotiations. Caliber ultimately agreed to pay an additional $20,000 to account for the additional Settlement Class members. *Id*.

III. THE SEVENTH CIRCUIT STANDARD FOR COMMON FUND SETTLEMENTS

The Seventh Circuit and other federal courts have long recognized that when counsel's efforts result in the creation of a common fund that benefits plaintiffs and unnamed class members, counsel have a right to be compensated from that fund for their successful efforts in creating it. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("lawyer who recovers a common fund … is entitled to a reasonable attorneys' fee from the fund as a whole"); *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) ("the attorneys for the class petition the court for compensation from the settlement or common fund created for the class's benefit"). The goal is to award counsel "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mkt. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") (collecting cases).

In common fund cases, unlike fee-shifting cases, courts have discretion to use one of two methods to determine whether counsel's request reflects the market rate for legal services: (1) percentage of the fund; or (2) lodestar plus a risk multiplier. *See, e.g., Americana Art China, Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014). However, courts in the

Seventh Circuit have found "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *see also In re Ready-Mixed Concrete Antitrust Litig*., No. 1:05-CV-00979-SEB, 2010 WL 3282591, at *2 (S.D. Ind. Aug. 17, 2010) ("the 'percentage of the fund' approach to determining reasonable attorneys' fees is favored by the Seventh Circuit is also the most accurate reflection in this case of the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time"); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) (noting it is easier to establish market based contingency fee percentages than to "hassle over every item or category of hours and expense and what multiple to fix and so forth"); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (percentage of the fund method "more likely to yield an accurate approximation of the market rate")*; Gaskill v. Gordon*, 942 F. Supp. 382, 386 (N.D. Ill. 1996) (percentage of fund method "provides a more effective way of determining whether the hours expended were reasonable."), *aff'd*, 160 F.3d 361 (7th Cir. 1998).

The percentage-of-recovery approach is particularly appropriate in consumer class actions because the custom is for counsel and plaintiff to "negotiate[] a fee arrangement based on a percentage of the recovery." *Capital One*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (applying percentage-of-recovery message in TCPA class action). "This is so because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis" which is something that consumer class members "likely would not be interested in doing." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493–94 (N.D. Ill. 2015).

The percentage-of-recovery method should be used here. Class Counsel and Plaintiff have created a $2,895,000 non-reversionary settlement fund that provides substantial value to Settlement Class Members. After deducting administration expenses capped at $285,000, the requested $783,000 in attorneys' fees (30% of the fund net administration expenses), $30,000 in requested litigation costs, and the $4,500 requested incentive award, $1,792,500 remains to be divided among Settlement Class Members who timely file claims. To date, the Settlement Administrator has received 22,199 claims. If the claims period closed today (and assuming all claims are valid), each claimant would receive approximately $80. Class Counsel expect this amount will decrease as claims come in during the final month of the claims period. Murray Decl. ¶ 23. Given the robust claims rate to date, the amount each claimant will receive may dip below the estimated $70–$100. However, the amount per class member still almost certainly will be in line with other TCPA cases. Applying the percentage-of-recovery approach is appropriate. *See, e.g., Wright v. Nationstar Mortg. LLC*, No. 14 C 10457, 2016 WL 4505169, at **8, 13 (N.D. Ill. Aug. 29, 2016) (applying percentage of the fund method to award class counsel 30% of the fund in TCPA case where each class member stood to receive approximately $45).

IV. ARGUMENT

A. Class Counsel's requested fee award of 30% of the fund is reasonable.

1. The requested fee is presumptively reasonable.

"The object in awarding a reasonable attorney's fee … is to give the lawyer what he would have gotten in the way of a fee in arm's length negotiation, had one been feasible." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). Generally speaking, the "ratio that is relevant … is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (2014) (quoting *Redman v. RadioShack Corp.*, 768 F.3d 662, 630 (7th Cir. 2014)). Although there is no hard-and-fast rule, in consumer class actions

in the Seventh Circuit, attorneys' fees awarded to class counsel "should not exceed a third or at most a half of the total." *Redman*, 768 F.3d at 631.

Here, Class Counsel seek fees equal to thirty percent of the $2,895,000 Settlement Fund or $783,000. If Class Counsel's requested fees are approved, the Settlement Class Members would receive $1,792,500 ($2,895,000 settlement fund - $783,000 attorneys' fees - $30,000 costs - $4,500 class representative award - $285,000 costs of administration). Thus, the "fee plus what the class members would receive" totals $2,575,500 ($1,792,500 + $783,000). Based on the ratio set forth in *Pearson* and *Redman* —fees to fees plus the value to class members—Class Counsel's request for fees constitutes 30% of the total settlement value, which is below the acceptable range of fee awards in the Seventh Circuit. Therefore, the requested fee is presumptively reasonable under *Pearson* and *Redman*.

2. <u>The requested fee reflects the "market rate" for legal services in a TCPA case.</u>

A fee award should "approximate the market rate that prevails between willing buyers and willing sellers of legal services." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) (citations omitted). To determine the market price, courts consider "actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions." *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005). However, in TCPA cases, data from fees determined before litigation commences or pursuant to a court-supervised "auction" is virtually non-existent. *Capital One*, 80 F. Supp. 3d at 796–97. Thus, in TCPA cases, district courts generally consider whether the requested fee is consistent with plaintiff and counsel's retainer agreement and with fees awarded at the end of similar class actions. *See Kolinek*, 311 F.R.D. at 493–94 (citing *Taubenfeld*, 415 F.3d at 600).

a. *Class counsel's fee request is consistent with its contingency fee agreement.*

The first factor courts consider when determining the market rate for fees is whether the plaintiff has an actual agreement with class counsel regarding payment of attorneys' fees. *Capital One*, 80 F. Supp. 3d at 796 (citing *Synthroid I*, 264 F.3d at 719). In this Circuit, it is customary for counsel to negotiate *ex ante* a contingency agreement in the range of 30–40%. *See Gaskill v. Gordon*, 160 F.3d 361, 362–63 (7th Cir. 1998) (noting that typical contingency fees are between 33% and 40% and affirming award of 38%); *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (observing that "40% is the customary fee in tort litigation" and noting, with approval, contract providing for one-third contingent fee if litigation settled prior to trial); *Retsky Family Ltd. P'ship v. Price Waterhouse, LLP*, Case No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (recognizing that a customary contingent fee is "between 33 1/3% and 40%" and awarding counsel one-third of the common fund).

Class Counsel's retainer agreement with Plaintiff provides for the contingency fee of 40% of the net amount recovered, which is well in-line with Seventh Circuit custom. *See* Declaration of Ryan Frasher ("Frasher Decl.") ¶ 21. Class Counsel seek 30% of the net award, which is substantially less than the amount they negotiated with Plaintiff *ex ante*. This factor favors approving Class Counsel's fee request.

b. *Class Counsel's fee request is consistent with fees awarded in similar TCPA class actions.*

"As the Seventh Circuit has held, attorney's fee awards in analogous class action settlements shed light on the market rate for legal services in similar cases." *Kolinek*, 311 F.R.D. at 493–94 (citing *Taubenfeld*, 415 F.3d at 600). In 2015, the Honorable James F. Holderman (ret.) performed an extensive analysis using data compiled from seventy-two post-2010 TCPA class action settlements to determine the appropriate market rate for attorney fee awards in

common-fund TCPA settlements. *Capital One*, 80 F. Supp. 3d at 798–804. Judge Holderman concluded that the market rate in a typical TCPA class action is a sliding-scale fee that is calculated based on a percentage of the common fund recovery achieved for the benefit of the settlement class. *Id.* at 804, n. 16; *see also In re: Synthroid Mktg. Litig.*, 325 F.3d 974, 979 (7th Cir. 2003) ("*Synthroid II*") (awarding class counsel 30% of the first $10 million of recovery in a common fund case that then decreases because the market rate percentage of recovery "likely falls as the stakes increase"). After scrutinizing data from the seventy-two TCPA cases, Judge Holderman determined that the market rate (or sliding scale) for the award of fees in TCPA class actions, prior to accounting for the risks associated with a particular case, is as follows:

Recovery	**Fee Percentage (excluding risk adjustment)**
First $10 million	30%
Next $10 million	25%
$20–45 million	20%
Excess above $45 million	15%

Capital One, 80 F. Supp. 3d at 804, n. 13 (citing *Synthroid II*, 325 F.3d at 979).

Judge Holderman's sliding scale has since been adopted by other courts in other TCPA cases in this Circuit and elsewhere. *See, e.g., Wright*, 2016 WL 4505169, at *14 (agreeing that the "baseline rate in TCPA cases is 30% of the first $10 million of recovery"); *Kolinek*, 311 F.R.D. at 501–02 (awarding attorneys' fees equal to 36% of the settlement fund less administrative costs and the incentive award and noting that Judge Holderman's analysis had its origins in Seventh Circuit precedent); *Craftwood Lumber Co. v. Interline Brands*, No. 11-cv-4462, 2015 WL 2147679, at *4 (N.D. Ill. May 6, 2015) (adopting Judge Holderman's sliding

scale); *Wilkins v. HSBC*, No. 14 D 190, 2015 WL 890566, at *11 (N.D. Ill. Feb. 27, 2015) (adopting sliding scale and awarding class counsel 30% of the first $10 million); *Ikuseghan v. Multicare Health Sys.*, No. C14-5539 BHS, 2016 WL 4363198, at *2 (W.D. Wash. Aug. 16, 2016) (awarding class counsel $750,000 in fees plus $26,986.90 from a settlement fund totaling $2,500,000 and favorably citing and discussing Judge Holderman's analysis in *Capital One*).

Judge Holderman's extensive analysis of similar TCPA settlement shows that Class Counsel's request for 30% is in line with settlements in similar cases. Class Counsel's request reflects the "market rate" for a fee award in a TCPA settlement and should be approved.

3. Other factors support Class Counsel's fee request.

Judge Holderman's opinion in *Capital One* established the baseline market rate for fee awards in TCPA class actions in the Seventh Circuit. Other factors support applying that rate here. The Seventh Circuit has held that the market price for legal fees "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Sutton*, 504 F.3d at 693 (quotation and internal marks omitted). Each factor supports Class Counsel's requested fee.

a. *Risk of nonpayment supports the requested fee.*

Prosecution of this action has involved significant financial risk. Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and knowing that they would only receive a fee if there was a recovery. Murray Decl. ¶¶ 16, 31; Saeed Decl. ¶¶ 21-23; Frasher Decl. ¶ 25. Class Counsel litigated this case aggressively for over a year before participating in mediation. Murray Decl. ¶ 21. Even then, the prospect of settlement was uncertain when, in the process of compiling the class list, Caliber learned that the Settlement Class included approximately 36,158 additional class members. *Id.* ¶ 22. Caliber also learned

that it did not have names and addresses for some of the Settlement Class members. *Id*. This required Plaintiff to re-open settlement negotiations. Plaintiff agreed to settle only after Caliber agreed to pay an additional $20,000 to account for the additional Settlement Class members. *Id*.

The risk of further protracted litigation—and ultimately of no recovery at all—was particularly high in this case, given various defenses potentially available to Caliber. The factual defense of consent loomed large, as Caliber argues that many or most Class Members provided their cell phone numbers to Caliber. *See, e.g., Michaelson v. CBE Grp., Inc.*, No. 13-cv-50228, 2015 WL 24490938, at *4 (N.D. Ill. May 21, 2015) ("Giving a creditor a cell phone number during the transaction that resulted in the debt owed is considered to be giving the creditor prior express consent to contact the cell phone subscriber at that number regarding the debt. *See Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 643 (7th Cir. 2012) (citing, *In re Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559 ¶¶ 9, 10 (Jan. 4, 2008)."). Indeed, Judge Holderman awarded class counsel in *Capital One* a "risk premium" based, in part, on his view that consent issues posed a risk to class recovery. *See In re Capital One*, 80 F. Supp. 3d at 805 (noting risks posed by fact that "[s]ome customers provided Capital One with their cell phone numbers as their primary contact numbers, arguably waiving any right not to receive debt-collection calls on their cell phone from Capital One"). Plaintiff believes that Caliber's consent defense will fail because she and other class members revoked any consent they provided, but Caliber maintains that Plaintiff will not be able to prove that they revoked consent given that (1) they often revoked consent verbally during calls with Caliber and (2) Caliber does not retain evidence of revocation in its databases. If Caliber proves its defense at summary judgment or trial, Plaintiff and class members would recover nothing.

Second, Plaintiff faces hurdles at class certification. Courts are divided as to whether consent issues predominate over common questions in TCPA cases, depending on the circumstances of the case. *Compare Jamison v. First Credit Servs*., 290 F.R.D. 92, 107 (N.D. Ill. 2013) (finding issues of consent to predominate in TCPA action); *with Saf-T-Gard Int'l, Inc. v. Vanguard Energy Servs., LLC,* No. 12 C 3671, 2012 WL 6106714, at *6 (N.D. Ill. Dec. 6, 2012) (certifying a class in a TCPA action and finding that no evidence supported the view that issues of consent would be individualized) and *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 253 (N.D. Ill. 2014) (same).

Third, there is the risk of losing a jury trial. And, even if Plaintiff did prevail, any recovery could be delayed for years by an appeal. Any potential statutory recovery in this case would likely be impossible to recover due in part to the fact that Caliber would have every incentive to litigate appeals of any such judgment as far as possible over many years. The Settlement provides substantial relief to Class Members without further delay.

Plaintiff believes she could have prevailed on these issues, but success was by no means assured. Litigating these issues would have risked recovering nothing for the Class, and would have required significant additional expenditure of time, money, and resources for which Class counsel would not be compensated should they lose on summary judgment or fail to certify a class. *See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1035–35 (N.D. Ill. 2011) (finding class counsel incurred significant risk of nonpayment where, among other reasons, class counsel would have to overcome case dispositive defenses and certify a class); *Jamison*, 290 F.R.D. at 102–09 (denying class certification in part because a class-wide determination of consent would require "a series of mini-trials"); *Green v. DirecTV, Inc.*, 10 C

117, 2010 WL 4628734, at *5 (N.D. Ill. Nov. 8, 2010) (granting summary judgment against TCPA plaintiff).

b. *Class Counsel's performance supports the requested fee.*

Second, the requested fee award reasonably reflects the "market price" given the quality of Class Counsel's performance. *See Sutton*, 504 F.3d at 693. Despite the challenges listed above, by applying their skill and experience, Class Counsel negotiated a Settlement that requires Caliber to pay $2,895,000 into a Settlement Fund out of which all eligible Class Members will receive a pro rata share following payments for class notice and settlement administration, and any attorneys' fees and service awards approved by the Court. The claims rate to date has been decidedly robust; with one month remaining in the claims period, the Settlement Administrator already has received 22,199 claims, which amounts to a 9.7% claims rate. Even if the high claims rate, Plaintiff estimates claimants will receive awards in line with in other TCPA settlements. *See Wright*, 2016 WL 4505169 at *8–9 (approving TCPA settlement where each claimant receive $45); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) (approving settlement where recovery per claimant was $52.50); *Capital One*, 80 F. Supp. 3d at 789 (granting final approval where each class member would be awarded $39.66); *Kolinek*, 311 F.R.D. at 493–94 ($30); *Manouchehri v. Styles for Less, Inc.*, Case No. 14cv2521 NLS, 2016 WL 3387473, at *2, 5 (S.D. Cal. June 20, 2016) (preliminarily approving settlement where class members could choose to receive either a $10 cash award or a $15 voucher); *Franklin v. Wells Fargo Bank, N.A.*, Case No. 14cv2349-MMA (BGS), 2016 WL 402249 (S.D. Cal. Jan. 29, 2016) (approving settlement class members received approximately $71.16); *Estrada v. iYogi, Inc.,* No. 2:13–01989 WBS CKD, 2015 WL 5895942, at *7 (E.D. Cal. Oct. 6, 2015) (granting preliminary approval to TCPA settlement where class members estimated to

receive $40). This excellent result and the positive reaction from the Settlement Class supports settlement approval.

c. *The amount of work by Class Counsel supports the requested fee.*

Class Counsel have submitted detailed declarations in support of this motion showing that they dedicated over 750 hours to this case before it settled approximately two years after it was filed. Murray Decl. ¶¶ 27-28; Saeed Decl. ¶ 28; Frasher Decl. ¶ 22. The bulk of this time was spent pursuing data and documents from Caliber, reviewing that information, and expertly analyzing it to establish the class claims. Murray Decl. ¶¶ 19-20. Class Counsel also took three Fed. R. Civ. P. 30(b)(6) depositions through which they gained a crucial understanding of Caliber's telephone calling policies and practices, the electronic systems it uses to track telephone calls to class members, and its policies and procedures for tracking any consent it has to call class members. *Id.* Armed with this information, Class Counsel were able to work efficiently and effectively with their expert to determine the number of individuals who received calls from Caliber without their consent or after they revoked consent. *Id.* Overall, Class counsel's efforts have been substantial and the amount of work supports the requested fee.

The Seventh Circuit does not require district courts to conduct a lodestar cross-check. *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (a lodestar check "is not an issue of required methodology"). However, courts often consider lodestar data before assessing fees. *See id.* (finding no abuse of discretion in ERISA case where district court considered lodestar data before finding that a pure percentage fee approach best replicated the market for ERISA class action attorneys). Accordingly, Class Counsel provides its lodestar information here.

Class Counsel's total lodestar is $267,744. For purposes of calculating this lodestar, Class Counsel carefully reviewed their time records to eliminate duplicative work. They also used

reasonable hourly rates, which were set based on a variety of factors, including, among others: the experience, skill and sophistication required for the types of legal services typically performed; the rates customarily charged in the markets where legal services are typically performed; and the experience, reputation and ability of the attorneys and staff members. Murray Decl. ¶¶ 26, 29-30; Frasher Decl. ¶¶ 20, 23.

Class Counsel acknowledge that their fee request exceeds their lodestar. However, their requested "multiplier" of 2.92 is reasonable especially in light of the fact that Class Counsel requests the market rate for fees in Seventh Circuit TCPA common fund settlements.

d. *The stakes of the case support the requested fee.*

This action involves hundreds of thousands of Class Members who allegedly received harassing, unlawful calls from Caliber. Although the TCPA provides for statutory damages, for most Class Members, the cost and risk of individual litigation is too daunting, and the costs to successfully prosecute even an individual action are so high, that a class action is realistically the only way that they would receive any relief. Those who wish to pursue such litigation can, of course, opt out of the class settlement. In light of the high number of class members who likely would not have received any relief without the assistance of Class counsel, the requested fee is reasonable.

B. Class Counsel are entitled to reimbursement for their out-of-pocket costs.

Counsel who help to create a common fund are entitled to the litigation expenses they incurred in prosecuting the case "so that the burden is spread proportionally among those who have benefited." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

Class Counsel seek reimbursement of their out-of-pocket litigation expenses, totaling $30,000, primarily to cover expert expenses, filing fees, deposition costs, computerized legal research, travel, mediation fees, and administrative costs such as copying, mailing, and

messenger expenses. Murray Decl. ¶ 31; Saeed Decl. ¶ 31; Frasher Decl. ¶ 24. Class Counsel put forward these out-of-pocket costs without assurance that they would ever be repaid. *Id.* These out-of-pocket costs were necessary to secure the resolution of this litigation, and should be recouped.

C. The service award to the Class Representative should be approved.

Service awards (sometimes called "incentive awards") compensating named plaintiffs for work done on behalf of the class are routinely granted. Such awards encourage individual plaintiffs to undertake the responsibility of representative lawsuits. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (recognizing that "because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit"); *see also Synthroid I*, 264 F.3d at 722 ("Incentive awards are justified when necessary to induce individuals to become named representatives.").

The requested service award of $4,500 for the Class Representative is reasonable. The Class Representative worked with Class Counsel to investigate the case, was kept abreast of the proceedings through litigation and settlement, was deposed, and reviewed and approved the proposed settlement. Moreover, the modest amount requested here is substantially lower than awards approved by federal courts in Indiana and elsewhere. *See, e.g., Cook*, 142 F.3d at 1016 (affirming $25,000 service award to plaintiff); *Heekin v. Anthem, Inc.*, 05-cv-01908-TWP-TAB, 2012 WL 5878032 at *1 (S.D. Ind. Nov. 20, 2012) (approving $25,000 service award to lead class plaintiff over objection); *Williams v. Rohm & Haas Pension Plan*, No. 4:04-CV-0078-SEB-WGH, 2010 WL 4723725, at *2 (S.D. Ind. Nov. 12, 2010), *aff'd*, 658 F.3d 629 (7th Cir. 2011) (authorizing $5,000 incentive award to named plaintiff).

V. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant their motion and award Class Counsel attorneys' fees in the amount of $783,000 and reimburse expenses in the amount of $30,000. Class counsel further requests that the Court approve an incentive award in the amount of $4,500 to named plaintiff Rebecca Ashack.

Dated: March 27, 2017

Respectfully submitted,

TERRELL MARSHALL LAW GROUP PLLC

By: /s/Jennifer Rust Murray, *Admitted Pro Hac Vice*
Beth E. Terrell, *Admitted Pro Hac Vice*
Jennifer Rust Murray, *Admitted Pro Hac Vice*
Mary B. Reiten, *Admitted Pro Hac Vice*
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450
Email: bterrell@terrellmarshall.com
Email: jmurray@terrellmarshall.com
Email: mreiten@terrellmarshall.com

Ryan R. Frasher
THE FRASHER LAW FIRM, P.C.
155 East Market Street, Suite 450
Indianapolis, Indiana 46204
Telephone: (317) 634-5544
Facsimile: (317) 630-4824
Email: rfrasher@frasherlaw.com

Syed Ali Saeed
Jeff Neuenschwander, #27980-49
SAEED & LITTLE, LLP
1433 North Meridian Street, Suite 202
Indianapolis, Indiana 46202
Telephone: (317) 614-5741
Facsimile: (888) 422-3151
Email: ali@sllawfirm.com
Email: jeff@sllawfirm.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Jennifer Rust Murray, hereby certify that on March 27, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Michael H. Gottschlich, #22668-49
Edward M. Smid, #30134-49
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313
Facsimile: (317) 231-7433
Email: mgottschlich@btlaw.com
Email: edward.smid@btlaw.com

David T. Biderman, *Admitted Pro Hac Vice*
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Los Angeles, California 90067-1721
Telephone: (310) 788-9900
Facsimile: (310) 788-3399
Email: dbiderman@perkinscoie.com

Donna Strain, *Admitted Pro Hac Vice*
PERKINS COIE LLP
505 Howard Street, Suite 1000
San Francisco, California 94105
Telephone: (415) 344-7000
Facsimile: (415) 344-7050
Email: dstrain@perkinscoie.com

Attorneys for Defendant

DATED this 27th day of March, 2017.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/Jennifer Rust Murray
Jennifer Rust Murray, *Admitted Pro Hac Vice*
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450
Email: jmurray@terrellmarshall.com

Attorneys for Plaintiff