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

BRIEF IN SUPPORT OF MOTION FOR FINAL APPROVAL AND RESPONSE TO OBJECTION

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I. INTRODUCTION

Plaintiff Rebecca Ashack ("Plaintiff") and Class Counsel achieved substantial relief for Settlement Class Members in the form of a settlement that requires Defendant Caliber Home Loans, Inc. ("Defendant" or "Caliber"), to pay $2,895,000 into a non-reversionary settlement fund. Caliber also has made changes to its dialing system to ensure that it abides by practices and procedures designed to prevent calls using an autodialer to cell phones.

The settlement is the product of disputed litigation, extensive discovery, a thorough evaluation of Plaintiff's claims and the risks of continued litigation, and contested settlement negotiations. Notice of the settlement has been sent and the claims, exclusion, and objection deadlines have passed. In total, 28,727 Settlement Class Members timely submitted claims for a cash payment. By contrast, just 46 exclusion requests were submitted (two of which were untimely), and one Settlement Class Members objected to the settlement.[1] The overwhelmingly positive reaction of the Class is evidence that the settlement is fair, reasonable, and adequate.

For the reasons set forth in this memorandum and in the papers previously submitted in support of approval, Plaintiff respectfully requests that the Court grant final approval to the settlement by: (1) approving the proposed Settlement Agreement as fair, adequate, and reasonable for the certified Settlement Class; (2) determining that adequate notice was provided to the Settlement Class; (3) approving payment to the claims administrator of $285,000; (4) approving Class Counsel's requested attorneys' fees of $783,000 and reimbursement of $30,000 in out-of-pocket litigation costs; (5) approving an award of $4,500 to Plaintiff Ashack for her

[1] The objection is invalid, however, because it was not filed with the Court. [Filing No. 93-6 (Supp. Murray Decl.) at 2.] Plaintiff nevertheless addresses the merits of the objection, which should not be allowed to deprive Settlement Class Members of the benefits they are entitled to receive under the settlement as set forth below.

service as the Class Representative; and (6) overruling the single invalid and unmeritorious objection.

II. AUTHORITY AND ARGUMENT

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (citing *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888–89 (7th Cir. 1985)). When faced with a motion for final approval of a class action settlement under Rule 23, a court's inquiry is whether the settlement is "lawful, fair, reasonable, and adequate." *Uhl v. Thoroughbred Tech. & Telecommunc'ns, Inc.*, 309 F.3d 978, 986 (7th Cir. 2009). A settlement is fair, adequate, and reasonable, and merits final approval, when "the interests of the class as a whole are better served by the settlement than by further litigation." *Manual for Complex Litigation* (Fourth) ("MCL 4th") § 21.61, at 480 (2010).

A. The settlement is the result of informed, arm's-length negotiations.

A proposed class settlement is presumptively fair when sufficient discovery has been provided and "the settlement is the product of arms-length negotiation, untainted by collusion." William B. Rubenstein, *Newberg on Class Actions* § 13:45 (5th ed. 2016). The settlement here satisfies this test.

As the Court recognized in its preliminary approval order, the settlement "resulted from arm's-length negotiations." [Filing No. 85 (Preliminary Approval Order) at 2.] The parties are represented by highly competent counsel who have years of experience litigating and settling complex class actions, including actions involving alleged violations of the TCPA. [*See* Filing No. 82 (Murray Decl.) at 4–12, 83 (Frasher Decl.) at 1–3, 84 (Saeed Decl.) at 1–6.] To reach this settlement, the parties engaged in mediation with Bruce Friedman of Judicial Arbitration and Mediation Services ("JAMS"), on August 26, 2016. [*See* Filing No. 82 (Murray Decl.) at 2.] The full-day mediation and subsequent additional negotiations culminated in a Settlement Agreement

that provides substantial benefits to the Settlement Class, including a non-reversionary payment by Caliber of $2,895,000 into a Settlement Fund that Plaintiff proposes be used to pay (1) Settlement Class Member claims in the amount of $1,792,500; (2) settlement administration expenses of $285,000; (3) a court-approved incentive award to Plaintiff Ashack in the amount of $4,500; and (4) court-approved attorneys' fees of $783,000 (30% of the Settlement Fund after deducting settlement administration expenses) and costs of $30,000. Caliber also has made changes to its dialing system to abide by certain practices and procedures designed to prevent calls using an automated dialer to cell phone numbers. [Filing No. 82-1 (Settlement Agreement) at 3, 8.] This is a substantial benefit to Settlement Class members because it ensures that the unlawful calls will stop.

The settlement is the result of a thorough investigation by the parties. 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. [Filing No. 82 (Murray Decl.) at 2.] Caliber produced nearly five thousand pages of documents, including policies and procedures, and Caliber also produced calling records. [*Id.*] In addition, Plaintiff took three Rule 30(b)(6) depositions, through which 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. [Filing No. 88 (Murray Decl. in support of fee petition) at 12.] 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.*] Plaintiff's 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*.] By the time settlement negotiations commenced, Plaintiff had a thorough understanding of the strength and weaknesses of Plaintiff's claims and Caliber's defenses and the extent of class wide damages. [Filing No. 82 (Murray Decl.) at 2.]

During the mediation process, the parties exchanged detailed written submissions setting forth their respective positions on various substantive issues. After the mediation, Caliber disclosed that the Settlement Class was larger than discovery had previously revealed. [*Id*. at 2–3.] As a result of this disclosure, the parties re-opened settlement negotiations and Caliber ultimately agreed to pay an additional $20,000 to account for the additional Settlement Class Members. [*Id*.] At all times the settlement discussions were arms-length and adversarial in nature. [*Id*.] In light of Class Counsel's extensive discovery efforts and their work negotiating fair relief for the Settlement Class, the settlement is entitled to a presumption of fairness.

B. Class members received the best notice practicable.

This Court has already determined that the notice program in this case meets the requirements of due process and applicable law, provides the best notice practicable under the circumstances, and constitutes due and sufficient notice to all individuals entitled thereto. [Filing No. 85 (Preliminary Approval Order) at 3.] This notice program has been implemented by independent claims administrator, Kurtzman Carson Consultants LLC ("KCC"). [*See generally* Filing No. 93-1 (Declaration of Steven J. Powell Regarding Notice Administration and Proof of CAFA Compliance).]

On February 23, 2017, KCC sent a Postcard Claim Form ("Postcard Notice") to 228,709 addresses. [*See* Filing No. 93-1 (Powell Decl.) at 2.) The Postcard Notice summarized the settlement, informed Settlement Class Members of key deadlines, including the deadline to submit claims, exclusion requests and/or objections, and referred Settlement Class Members to

the Settlement Website. [Filing No. 93-3 (Powell Decl., Ex. B).] KCC performed address updating using the United States Postal Service National Change of Address database before mailing, as set forth in the Settlement Agreement. [Filing No. 93-1 (Powell Decl.) at 2–3.]

After mailing the Postcard Notice, KCC received 12,249 notices returned as undeliverable. [Filing No. 93-1 (Powell Decl.) at 3.] KCC attempted to locate a valid mailing address by performing a "skip trace" and found 8,105 new addresses. [*Id.*] KCC immediately re-mailed notices to all Settlement Class Members for whom KCC obtained an updated address. [*Id.*] Of the 228,709 notices mailed, KCC estimates that 5,552 (less than 3%) have not reached their targets. [*Id.*]

KCC also established a toll-free number where Class Members were able to learn more about the Settlement, and a Settlement Website where Class Members were able to file a claim and obtain additional information and documents about the Settlement such as answers to Frequently Asked Questions, the Class Notice, the Claim Form, the Settlement Agreement, Preliminary Approval Order, and other important documents. [Filing No. 93-1 (Powell Decl.) at 3.] To date, the toll-free number has received 1,358, and the website has received 18,052 visitors. [*Id.*]

The postmark deadline for submitting a claim, and for requesting exclusion or objecting to the settlement was April 24, 2017. In total, KCC received 28,727 timely claims. [Filing No. 93-1 (Powell Decl.) at 4-5.] In contrast, just one Settlement Class Member objected. [Filing No. 93-5 (Powell Decl., Ex. D).] Only 46 Settlement Class Members requested to opt out. [Filing No. 93-1 (Powell Decl.), 93-4 (Powell Decl., Ex. C).] Of the exclusion requests, two (2) were untimely. [Filing No. 93-1 (Powell Decl.) at 9.]

The notice program has been successful. KCC estimates Postcard Notices reached 97% of Class Members and 12.57% timely submitted potentially valid claims.[2] [Filing No. 93-1 (Powell Decl.) at 4.] The claims rate is significantly higher than the average in TCPA cases. [*Id.*] In sum, the notice program implemented by KCC has provided due and adequate notice of these proceedings and satisfies the requirements of due process.

C. The settlement satisfies the criteria for settlement approval.

In evaluating a settlement, a district court must consider "the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *Isby*, 75 F.3d at 1999); *see also Martin v. Reid*, 8018 F.3d 302, 306-307 (7th Cir. 2016) (same). "The 'most important factor relevant to the fairness of a class action settlement' is the first one listed: 'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.'" *Synfuel*, 463 F.3d at 653 (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979)).

The judge also "must assess the value of the settlement to the class and the reasonableness of the agreed-upon attorneys' fees for class counsel, bearing in mind that the higher the fees the less compensation will be received by the class members." *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). The judge evaluating the settlement is "a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014).

[2] An analysis of potentially invalid claims has not been completed. [Filing No. 93-1 (Powell Decl.) at 4.]

1. The strength of Plaintiff's case compared to the amount of the settlement.

The settlement reached in this case requires Defendants to pay $2,895,000 into a Settlement Fund, out of which $1,792,500 will be distributed to the Settlement Class Members who have filed timely valid claims. Settlement Class Members who filed a timely claim will receive approximately $60.17. [*See* Filing No. 93-1 (Powell Decl.) at 4.] The Settlement Fund is non-reversionary. No amount will return to Caliber.[3]

The $60.17 cash award does not constitute the full measure of statutory damages potentially available to the Settlement Class but this fact alone should not weigh against final approval. The $60.17 cash award also is slightly less than the $70–$100 Plaintiff estimated Settlement Class members would receive in her preliminary approval papers. (*See* Filing No. 81 (Mtn. for Prelim. App.) at 1.] This is because the settlement's notice program achieved a substantially higher claims rate — 12.57% — than many other TCPA cases. [Filing No. 93-1 (Powell Decl.) at 4.] Because more Settlement Class members are sharing in the settlement benefits, the pro rata share is slightly lower than originally estimated.

But a settlement is a compromise, and courts need not reject a settlement "solely because it does not provide a complete victory to plaintiffs." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (St. Eve, J.). The settlement compares favorably to other TCPA settlements in the Seventh Circuit and elsewhere. *See Wright v. Nationstar Mtg. LLC*, No. 14 C 10457, 2016 WL 4505169, at *8–9 (N.D. Ill. Aug. 29, 2016) (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); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) (granting final approval where each class member would be awarded $39.66); *Kolinek v. Walgreen Co.*,

[3] In her motions for preliminary approval [Filing No. 81] and for attorneys' fees, costs and service awards [Filing No. 87], Plaintiff inadvertently identified the National Consumer Law Center as the *cy pres* beneficiary. The *cy pres* beneficiary designated in the Settlement Agreement is actually the National Alliance to End Homelessness. [*See* Filing No. 82-1 (Settlement Agreement at §IV(3).]

311 F.R.D. 483, 493–94 (N.D. Ill. 2015) ($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).

Although Plaintiff has thoroughly investigated the factual and legal bases for her claims, Plaintiff faced a number of difficult challenges if the litigation were to continue. First, Plaintiff faced challenges 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) and *Balschmiter v. TD Auto Fin., LLC*, 303 F.R.D. 508, 527–28 (E.D. Wis. 2014) (same); *with Saf-T-Gard Int'l v. Vanguard Energy Servs.*, Case No. 12 C 3671, 2012 WL 6106714 (N.D. Ill. Dec. 6, 2012) (certifying a TCPA class and finding 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).

Second, even if Plaintiff was able to certify a class, at trial Plaintiff would have had the burden to rebut Caliber's consent defense. Caliber maintained that class members provided consent in a variety of ways, including by providing their cell phone numbers on loan applications. Caliber further maintained that Plaintiff would not be able to prove on a class-wide basis that class members revoked their consent because Caliber did not track revocation of consent systematically. While Plaintiff believes should have prevailed on these issues, rebutting this defense could have proven very difficult and, regardless of the outcome, the losing party almost certainly would have appealed thereby delaying class recovery even longer.

Finally, Plaintiff faced challenges even if she prevailed at trial. Some courts view awards of aggregate, statutory damages with skepticism and either refuse to certify a class or reduce such awards on due process grounds. *See, e.g.*, *Aliano v. Joe Caputo & Sons-Algonquin, Inc.*, No. 09 C 910, 2011 WL 1706061, at *13 (N.D. Ill. May 5, 2011) ("[T]he Court cannot fathom how the minimum statutory damages award for willful FACTA violations in this case — between $100 and $1,000 per violation — would not violate Defendant's due process rights …. Such an award, although authorized by statute, would be shocking, grossly excessive, and punitive in nature."). Even if the Court permitted such an award, Plaintiff could have had difficulty collecting any judgment since Caliber faced exposure of between $114 and $343 million assuming class members received only one call (228,709 class members x $500 = $114,354,500; 228,709 class members x $1,500 = $343,063,500).

Under the settlement, Settlement Class Members avoid all of those risks and obstacles to recovery and receive substantial benefits, and in a timely fashion. For these reasons, the $60.17 cash award, which is similar to other results in TCPA settlements, is an excellent result for the Settlement Class.

2. Continued litigation is likely to be complex, lengthy, and expensive.

"Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011). At the time of settlement, Plaintiff had not yet briefed her motion for class certification. In addition, Caliber very likely would have filed one or more motions for summary judgment. Assuming Plaintiff successfully certified a class and defeated any motions for summary judgment, there is a substantial risk of losing inherent in any jury trial. Moreover, any judgment obtained in favor of Plaintiff and the proposed class could be further delayed by the appeal process. This factor favors settlement approval.

3. Little opposition to the settlement and counsel support favor settlement.

The amount of opposition to a settlement among affected parties is another factor district courts should consider in deciding whether to approve a class action settlement. *Synfuel*, 463

F.3d at 653; *see also Isby*, 75 F.3d at 1199. Courts often infer that a settlement is fair, adequate, and reasonable when few class members object to it. *See, e.g., Isby*, 75 F.3d at 1200 (affirming final approval of settlement where 13% of the class submitted written objections); *In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013) (finding that the "low level of opposition" amounting to 0.01% of the class "supports the reasonableness of the settlement") (citing *In re Mexico Money Transfer Litig.*, 164 F.Supp.2d 1002, 1021 (N.D.Ill.2000)); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 584 (N.D. Ill. 2011) (approving settlement where 342 class members excluded themselves and 15 class members objected) (citing *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1021 (N.D. Ill. 2000) (holding that the fact that more than "99.9% of class members have neither opted out nor filed objections is strong circumstantial evidence in favor of the settlement"), *aff'd*, 267 F.3d 743 (7th Cir. 2001)).

Just one Settlement Class Member objected to the Settlement and 44 timely requested to opt out. The fact that more than 99% of class members have neither objected nor opted out is strong evidence in favor of the settlement. In addition, the claims rate is decidedly robust, with 28,727 Settlement Class Members timely submitting potentially valid claims, which amounts to an 12.57% claims rate. [Filing No. 93-1 (Powell Decl.) at 3–4.] The $60.17 claimants will receive is well in line with other TCPA settlements. *See* Section II.C.1, *supra* (citing cases).

Class Counsel endorse this settlement and believe it is a great result for the class. [Filing Nos. 82-84.] Class Counsel's support and the positive reaction of the class evidence that the settlement is fair, reasonable, and adequate. This factor favors settlement approval.

4. The extent of discovery completed and the stage of the proceedings.

Courts consider the extent of discovery completed and the stage of the proceedings in determining whether a class action settlement is fair, adequate and reasonable. *See Synfuel*, 463 F.3d at 653; *see also Isby*, 75 F.3d at 1200 (noting "the discovery and investigation conducted by class counsel prior to entering into settlement negotiations was 'extensive and thorough'").

Here, Class Counsel have thoroughly analyzed the factual and legal issues involved. [Filing Nos. 82, 88 (Murray Preliminary Approval Decl. and Fee Petition Decl.).] The parties actively litigated this action for a year-and-a-half. [Filing No. 88 (Murray Preliminary Approval Decl.) at 12.] Plaintiff propounded written discovery, reviewed Caliber's policies and practices, and calling records, conducted three Rule 30(b)(6) depositions, and retained an expert witness to analyze Caliber's calling records. [*Id*. at 12.] 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. [*Id*. at 12–13.] Counsel's thorough legal and factual analyses informed the settlement. [*Id*.] This factor weighs in favor of settlement.

5. The settlement is reasonable in light of the requested attorneys' fees.

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"). While courts have discretion in common fund cases to use a percentage of the fund method or a lodestar method, 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* Filing No. 87 (Plf's Mtn for Fees) at 5 – 6 (citing cases).]

In *Redman*, the Seventh Circuit instructed that district court judges must "assess the value of the settlement to the class and the reasonableness of the agreed-upon attorneys' fees for class counsel, bearing in mind that the higher the fees the less compensation will be received by the class members." *Redman*, 768 F.3d at 629. Generally speaking, the "ratio that is relevant to

assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Id.* at 630. 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.

Plaintiff originally indicated in her motion for preliminary approval that Class Counsel would seek a fee award of 33.33% of the Settlement fund after settlement administration expenses were deducted, or $870,000. [Filing No. 81 (Mtn for Prelim. App.) at 3.] In Plaintiff's Motion for Attorneys' Fees, Costs and Service Awards, Class Counsel have revised their request to seek a total award of attorneys' fees of $783,000, or 30% of the Settlement Fund after subtracting settlement administration expenses. [*See* Filing No. 87 (Mtn for Fees).] Class Counsel's requested fee is consistent with (1) fees awarded in this Circuit and elsewhere; (2) the contingency fee agreements between the Class Representatives and Class Counsel; and (3) the Seventh Circuit's statements regarding presumptively reasonable fees. The fee also is appropriate in light of the risks Class Counsel faced and the excellent work they performed achieving this settlement. [*See id.*]

D. The single unfiled objection is both invalid and lacks merit.

Of the more than 220,000 class members, one Settlement Class Member lodged an objection to the settlement—David O. Tharp. [*See* Filing No. 93-5 (Powell Decl., Ex. D).] Because Mr. Tharp did not properly file his objection with the Court, the objection is invalid. The objection also lacks merit and should be overruled.

1. <u>The $2,895,000 settlement is an excellent result for the class.</u>

Without addressing the substantial risks involved in the litigation and potential years of delay, Mr. Tharp complains that more money should have been obtained. [*See* Filing No. 93-5 (Powell Decl., Ex. D).] But "the essence of settlement is compromise" and "courts should not reject a settlement solely because it does not provide a complete victory to the plaintiffs." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (St. Eve,

J.) (quoting *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) and *Isby*, 75 F.3d at 1200) (internal quotations omitted); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 584 (N.D. Ill. 2011) (noting "simply because the proposed settlement amounts to a fraction of potential recovery does not render the proposed settlement inadequate and unfair") (quotations and citation omitted).

Plaintiff acknowledges the Seventh Circuit has "remarked the incentive of class counsel, in complicity with defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers." *Pearson*, 772 F.3d at 787 (quoting *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) and *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011) and citing *Redman*, 768 F.3d at 630). This is not the case here. Although the plain terms of the TCPA allow for statutory damages of $500 – $1,500 per call, attempting to obtain anything approaching that amount for all Settlement Class Members through litigation would entail significant risk and delay.

Mr. Tharp's assertion that this settlement is unreasonable because Plaintiff could have obtained more money lacks merit. Moreover, to the extent and Settlement Class Member decided that the payment was insufficient he or she could simply have opted out and pursued an individual case.

2. The settlement fairly allocates the funds.

Mr. Tharp asserts that the settlement structure is unfair because of the amounts Class Counsel and Plaintiff may receive if the Court approves the requested attorneys' fees and costs, and service award. [*See* Filing No. 93-5 (Powell Decl., Ex. D).) Again, the objection should be overruled. Mr. Tharp does not challenge the arguments and authority that Class Counsel provided in their fee petition [Filing No. 87 (Plf's Mtn for Fees)], which supports a finding that Class Counsel have requested attorneys' fees and costs that are well in line with fees awarded in the Seventh Circuit. Indeed, Plaintiff's counsel followed the methodology set forth by Judge

Holderman in a TCPA class action and that has been routinely applied in TCPA class settlements in the Seventh Circuit. No reason exists to deviate from Judge Holderman's method here.

a. *Awarding counsel 30% of the fund for fees is fair and reasonable.*

It is well established 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*, 444 U.S. at 478; *Sutton*, 504 F.3d at 691. As set forth above, "the approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class." *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 364, 379 (N.D. Ill. 2011).

The Seventh Circuit has suggested that in consumer cases, which often have low claims rates, the "presumption" should be that attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel." *Pearson*, 772 F.3d at 782. After subtracting the administration expenses, Class Counsel seek 30% of the $2,610,000 remaining in the Settlement Fund. Therefore, the requested fee is presumptively reasonable under *Pearson*.

Class Counsel's requested fee also reflects percentages awarded in other TCPA cases. Courts in the Seventh Circuit and elsewhere have recognized that the baseline rate in TCPA cases is 30% of the first $10 million of recovery. *See In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (analyzing data from seventy-two TCPA cases and establishing a market rate (or sliding scale) for the award of fees in TCPA class actions); *see also 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); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 501–02 (N.D. Ill. 2015) (awarding attorneys' fees equal to 36% of the settlement fund less administrative costs and the incentive award); *Wilkins v. HSBC*, No. 14 D 190, 2015 WL 890566, at *11 (N.D. Ill. Feb. 27, 2015) (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). In short, Class Counsel's request for 30% is in line with settlements in similar cases and the objector fails to provide any argument or analysis as to why 30% of the fund is unreasonable here.

Class Counsel are also 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*, 444 U.S. at 478. Neither objector asserts any reason for their challenge Class Counsel's request for reimbursement of $30,000 in out-of-pocket costs.

Class Counsel's request for reimbursement to cover expert expenses, filing fees, deposition costs, computerized legal research, travel, mediation fees, and administrative costs such as copying, mailing, and messenger expenses is reasonable. [Filing Nos. 82 (Murray Decl.) ¶ 31; 83 (Frasher Decl.) ¶ 31; 84 (Saeed 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. The objection to awarding Class Counsel their requested fees and costs should be overruled.

b. *The service award to the Class Representative is fair and reasonable.*

Service awards compensating named plaintiffs for work done on behalf of the class are also 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 In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) ("Incentive awards are justified when necessary to induce individuals to become named representatives."). As with his vague objection to Counsel's requested fees and costs, Mr. Tharp does not provide any specific reasons for challenging Plaintiff's requested service award.

The requested service award of $4,500 for Plaintiff Ashack is more than reasonable. Plaintiff Ashack kept abreast of the proceedings throughout the litigation, sat for a deposition, and reviewed and approved the proposed settlement. The 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). Any objection regarding the amount to be awarded as a service award to Plaintiff should be overruled.

III. CONCLUSION

The settlement is fair, adequate, and reasonable in all respects. Therefore, Plaintiff respectfully requests that the Court overrule the objection and grant final approval to the settlement.

RESPECTFULLY SUBMITTED AND DATED this 17th day of May, 2017.

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CERTIFICATE OF SERVICE

I, Jennifer Rust Murray, hereby certify that on May 17, 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:

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