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

FREDERICK LUSTER, on behalf of himself and all others similarly situated,	:	
Plaintiff,	:	Civil Action File No. 1:15-cv-01058-TWT
v.	:	
WELLS FARGO DEALER SERVICES, INC.,	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS, AND SERVICE AWARD FOR CLASS REPRESENTATIVE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

I. INTRODUCTION

This is a Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., class action, based upon allegedly improper autodialed calls to cellular telephones. The parties have reached a class action settlement, which the Court has preliminarily approved. Dkt. Nos. 60, 63, 66. The settlement calls for Wells Fargo Dealer Services, Inc. ("Wells Fargo") to create a non-reversionary $14,834,058 fund for the benefit of 3,190,120 Settlement Class Members.

Class Counsel respectfully request an award of: (a) attorneys' fees and costs in the total amount of $4,450,217.40, which is 30% of the Settlement Fund that Class Counsel obtained for the Class; and (b) a Service Award for the Class Representative of $20,000. The requested fees and Service Award are fair, reasonable, consistent with Eleventh Circuit law, and should be approved.[1]

Class Counsel respectfully seek fees under the percentage-of-the-fund method, which, under long-standing and controlling Circuit authority, is the appropriate method for calculating and awarding fees in a common fund settlement like this. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991). Here, Class Counsel seek 30% of the Settlement Fund inclusive of, and not

[1] The Settlement is attached as Exhibit 1 to Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 57-2). Unless otherwise stated, all capitalized terms in this Memorandum carry the same meaning as defined in the Settlement.

in addition to, their costs and expenses. *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294-95 (11th Cir. 1999) (affirming where district court identified 30% as the benchmark and adjusted upward due to circumstances of the case). The relevant factors confirm that Class Counsel's request is well-supported. The Service Award is also well-justified for Mr. Luster's efforts on behalf of the Class.

For these reasons, and as detailed below, Class Counsel respectfully submit that the requested fee and Service Award are well-supported and should be approved.

II. BACKGROUND

A. The Common Settlement Fund and Cash Payments to the Class

The Settlement requires Wells Fargo to fund a non-reversionary, cash Settlement Fund of $14,834,058. Settlement at ¶ 4.03; Dkt. No. 66.[2] Each Class Member who submits a simple claim form online, by phone, or by mail will receive a Cash Award. Settlement at ¶¶ 4.04, 4.05. Under no circumstances will any amount of the Settlement Fund revert to Wells Fargo.

The amount of each Cash Award is the claiming Class Member's *pro rata* share of the Settlement Fund. *Id*. at ¶¶ 4.04, 4.05. Although it is not possible to

[2] Confirmatory discovery showed that the size of the class was 194,928 lower than Wells Fargo originally estimated, so pursuant to the Settlement Agreement at ¶ 4.03, the total amount of the fund was lowered to $14,834,058 from $15,740,473. Dkt. No. 66 at pp. 2-3. The dollars-per-class member remained the same.

predict 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 estimate that each Cash Award will be in the range of $25 to $50. Ex. A (Burke Decl.) at ¶ 21.

If uncashed checks permit a second *pro rata* distribution equal to or greater than $1.00 per qualifying claimant, the Claims Administrator will make a second *pro rata* distribution to Settlement Class Members who cashed settlement checks. Settlement at ¶ 7.04(e). 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* to Samuelson Law, Technology & Public Policy Clinic at Berkeley Law School, subject to Court approval. *Id.* at ¶ 7.04(f); Dkt. No. 65 (preliminarily approving the Samuelson Clinic).

B. Class Counsel's Prosecution of This Matter

Class Counsel worked hard to obtain the substantial, all-cash, non-reversionary Settlement Fund for the Class. Since 2012, co-lead Class Counsel and additional Class Counsel have engaged in a comprehensive litigation to pursue class action TCPA claims against Wells Fargo. Ex. A (Burke Decl.) at ¶ 13. This case, which arises from automated calls made as to automobile transactions, is the fourth settlement of its kind that Class Counsel have obtained in the Northern

District of Georgia: *Markos v. Wells Fargo*, No. 14-cv-1156-LMM (N.D. Ga.) (mortgage-related calls); *Cross v. Wells Fargo*, No. 15-cv-1270-RWS (N.D. Ga) (deposit account calls); and *Prather v. Wells Fargo*, No. 16-cv-4231-CAP (N.D. Ga.) (approval pending, student loan calls). But before any of these cases were filed, Class Counsel thoroughly researched and investigated Wells Fargo's practices and Plaintiff's legal claims by, among other things, interviewing Class Members, reviewing Class Members' pertinent documents and information, including account applications and agreements, and researching relevant TCPA case law and regulations. This information was critical to Class Counsel's understanding of the nature of the Class's claims and the scope of potential damages and remedies, particularly because the TCPA legal landscape is in a state of flux. *Id.* at ¶ 11; *see also, e.g.*, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C.R. 7961, 30 FCC Rcd. 7961, 62 Communications Reg. (P&F) 1539, 2015 WL 4387780 (F.C.C.) ("2015 Declaratory Ruling"), *pet. for rev. pending*, *ACC Int'l v. FCC*, No. 15-1211 (D.C. Cir.).

After filing this case, the parties agreed to explore mediation in large part because Class Counsel's extensive pre-filing investigation and expertise from dozens of TCPA class actions, including TCPA class actions against Wells Fargo

itself, prepared them to navigate an effective – and efficient – resolution of this litigation. *See, e.g.*, Ex. A (Burke Decl.) at ¶¶ 13, 17. To facilitate mediation, the parties conducted significant informal discovery, including the exchange of thousands of pages of documents and production of information pertaining to the size and scope of the putative class. *Id.* at ¶ 17. Concurrent with settlement negotiations, Class Counsel also continued to speak with scores of Class Members about their experiences and problems with Wells Fargo's phone calls. *Id.* at ¶ 17.

The Settlement was reached only after good faith, contentious, arms'-length negotiations. All settlement discussions took place under the direction of Hunter R. Hughes, an experienced and well-respected private mediator. *Id.* at ¶¶ 17-18. To facilitate mediation, the parties submitted detailed mediation submissions setting forth their respective views on the case. *Id.* at ¶ 17.

With Mr. Hughes' assistance, the parties continued to negotiate the terms of the Settlement over the course of several months, until a final Settlement Agreement was executed on February 16, 2017. *Id.* at ¶ 18; Settlement at pp. 37-45. The parties initiated additional confirmatory discovery to confirm the Final Class Size, including a deposition of Timothy Rae, Wells Fargo's corporate representative most knowledgeable about the size of the Settlement Class, taken on April 18, 2017. Ex. A (Burke Decl.) at ¶ 20.

III. ARGUMENT

A. Class Counsel Are Entitled to a Percentage of the Common Fund Created Through Their Efforts.

It is well established that, when a party has conferred a substantial benefit upon a class, his counsel is entitled to an allowance of attorneys' fees based upon the benefit obtained. *See, e.g.*, *Camden 1 Condo. Ass'n*, 946 F.2d at 771; *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-v-3066, 2012 WL 12540344, at *1 (N.D. Ga. Oct. 26, 2012); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011). 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)). Furthermore, "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*, 2012 WL 12540344, at *1 (internal quotation marks and alterations omitted).

Where, as in this case, Class Counsel's efforts result in an all-cash fund that provides direct monetary payments to the Class, attorneys' fees are determined as a percentage of the fund that Class Counsel's efforts created for the Class's benefit. *See Camden I Condo. Ass'n*, 946 F.2d at 774 ("[A]ttorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.").

This Court has substantial discretion in determining the appropriate fee percentage awarded to counsel, within a specified range. *See, e.g., Carpenters Health & Welfare Fund v. Coca-Cola Co.*, 587 F. Supp. 2d 1266, 1268-69 (N.D. Ga. 2008) ("[T]here is no hard and fast rule mandating a certain percentage of a common fund which may reasonable be awarded as a fee because the amount of any fee must be determined upon the facts of the case.") (quoting *Camden I Condo. Ass'n*, 946 F.2d at 774). Nevertheless, "[t]he majority of common fund fee awards fall between 20 percent to 30 percent of the fund," although "an upper limit of 50 percent of the fund may be stated as a general rule, though even larger percentages have been awarded." *Camden I Condo. Ass'n*, 946 F.2d at 774-75; *see also Waters*, 190 F.3d at 1294-95 (explaining that "[*Camden I*] directed district courts to view this range as a 'benchmark,'" and affirming where the district court

identified 30% as the benchmark and adjusted upward due to circumstances of the case).

In addition to a percentage of the fund in fees, Class Counsel are entitled to reimbursement of out-of-pocket costs and expenses 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).

In this case, Class Counsel, although entitled to percentage of the fund as fees *plus* expenses, seek 30% of the fund *inclusive* of expenses.[3] [4] The requested award is thus well within the norm in this Circuit and should be approved. *See, e.g.*, *Waters*, 190 F.3d at 1294-95 (approving 33 1/3%); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1365 ("Numerous recent decisions within this Circuit have awarded attorneys' fees up to (and at times in excess of) 30 percent").

---

[3] Class Counsel request that the Court determine an aggregate fee and costs award and give co-lead Class Counsel the authority to allocate among Class Counsel. *See Craft v. North Seattle Cmty. College Found.*, No. 07-cv-132, Dkt. No. 135 (M.D. Ga. Sept. 2, 2010) ("At the appropriate time, Class Counsel, in its discretion but subject to any agreements with counsel for the Class, shall allocate and distribute this award of Attorneys' Fees among counsel for the Class."); *In re Domestic Air Transp.*, 148 F.R.D. at 357 ("Ideally, allocation is a private matter to be handled among class counsel.").

[4] Class Counsel have also agreed to pay half of the costs associated with reprinting the mailed notice, which is expected to cost approximately $100,000, out of their fees, and not from the Fund.

B. The Relevant Factors Support the Requested Fee.

The Eleventh Circuit has identified a list of factors potentially relevant in determining the appropriate percentage to be awarded as a fee. First are twelve factors identified in *Johnson v. Ga. Hwy. Exp., Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974):[5] (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) the 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 length of the professional relationship with the client; and (12) awards in similar cases. *Camden I Condo. Ass'n*, 946 F.2d at 772 n.3, 776.

As is evident from the number of factors identified, district courts are not required to evaluate each and every factor in each and every case. Rather, "[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

[5] *Camden I* looked to *Johnson* because "decisions of the former Fifth Circuit rendered before October 1, 1981, are binding on this circuit." *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377, 1381 n.1 (11th Cir. 2006).

awarded as fees." *Id.*; *see also In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1359 ("These factors are merely guidelines[.]"). Here, the relevant factors demonstrate that the requested fee award is reasonable and should be granted.

1. Class Counsel Obtained an Excellent Result for the Class.

The eighth *Johnson* factor—"the amount involved and the results obtained"—is "the most important factor," recognizing as it does that "a fee award should reflect the relief obtained." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204-05 (S.D. Fla. 2006); *see also Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1342 (S.D. Fla. 2007) ("The result achieved is a major factor to consider in making a fee award."); *In re Domestic Air Transp.*, 148 F.R.D. at 351 ("The most important element in determining the appropriate fee to be awarded class counsel out of a common fund is the result obtained for the class through the efforts of such counsel."). The Settlement here is a terrific result for the Class and supports the 30% fee request, subsuming costs, which is well within the typical range.

The Settlement requires Wells Fargo to pay $14,834,058 into a non-reversionary, cash Settlement Fund that will result in estimated payments of between $25 and $50 for Class Members who submit a simple claim form. That

result is excellent when measured against twenty-five years of TCPA settlements, for example:

Caption	Amount	Class Members
Gehrich v. Chase Bank USA, N.A., No. 12-5510, 2016 WL 806549 (N.D. Ill. Mar. 3, 2016)	$34 million	More than 32 million
Arthur v. Sallie Mae Inc., No. 10-198 (W.D. Wash.)	$24.15 million	7,792,256
Malta v. Fed. Home Loan Mortg. Corp., No. 10-1290, 2013 WL 444619 (S.D. Cal. Feb. 5, 2013)	$17.1 million	5,887,508
Duke v. Bank of Am., N.A., No. 12-4009 (N.D. Cal.)	$32,083,905	7,723,860
Connor v. JPMorgan Chase Bank, No. 10-1284 (S.D. Cal.)	$11,665,592.09	2,684,518
Wilkins v. HSBC Bank Nev., N.A., No. 14-190 (N.D. Ill.)	$39,975,000	9,065,262
In re Capital One Tel. Consumer Protection Act Litig., No. 12-10064 (N.D. Ill.)	$75,455,098	16,645,221
Kramer v. Autobytel, No. 10-2722, 2012 U.S. Dist. LEXIS 185800 (N.D. Cal. Jan. 27, 2012)	$12.2 million	47 million
Adams v. AllianceOne Receivables Mgmt. Inc., No. 08-248 (S.D. Cal.)	$9 million	More than 6,079,411

Notable on that list is the *Malta* case, which, like this case, involved Wells Fargo calls. This case yields a per-class-member recovery that is approximately ***40% higher*** than what the class received in *Malta*.[6]

Most importantly, the Settlement provides Class Members with real monetary relief, despite the fact that this is a purely statutory damages case

[6] $4.65 per class member here versus $2.90 in *Malta*.

involving nominal economic damages or actual damages (such as invasion of privacy) that are difficult to quantify. This Settlement provides direct, monetary benefits to Class Members who realistically would not have filed their own individual lawsuits because the vast majority of such cases would have been too small to bring on their own.

In sum, the settlement here represents an objectively excellent recovery for the class. *See Markos v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01156-LMM, 2017 WL 416425, at *4 (N.D. Ga. Jan. 30, 2017) (May, J.) (finding that the cash recovery of $24 per claimant in a TCPA class action is "an excellent result when compared to the issues Plaintiffs would face if they had to litigate the matter").

2. Class Counsel Worked Hard to Secure Prompt Relief for the Class.

The first *Johnson* factor measures Class Counsel's efforts at securing the result for the Class. Those considerations support the fee requested here. Class Counsel worked hard to obtain the substantial, all-cash, non-reversionary Settlement Fund for the Class. This case and the Settlement are part of a global litigation strategy to pursue class action TCPA claims against Wells Fargo. Before filing this action Counsel thoroughly investigated Wells Fargo's practices and Plaintiff's claims. That investigation and research was critical to Class Counsel's

understanding of the claims and remedies at issue, in particular because the TCPA legal landscape is in a state of flux. *See* 2015 Declaratory Ruling.

The quality of those efforts is best evidenced by the result: a large, all-cash, non-reversionary Settlement Fund that compares very favorably with similar large TCPA class settlements. *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."). Just as important, Class Counsel's pre-filing investigation and approach to mediation resulted in a Settlement *now*, rather than after years of litigation.

3. Class Counsel Are Experienced TCPA and Class Action Lawyers.

An important factor in favor of the requested fee is Class Counsel's experience, reputation, and ability. *See Allapattah Servs.*, 454 F. Supp. 2d at 1209 ("Courts in this circuit routinely emphasis this factor in calculating percentage fee awards."). Class Counsel are experienced class action litigators who have successfully prosecuted complex consumer cases, and who are particularly skilled and experienced in litigating TCPA class actions. Ex. A (Burke Decl.) at ¶¶ 2-10; Ex. B (Hutchinson Decl.) at ¶¶ 3-22, 29; Ex. C (Campion Decl.) at ¶¶ 4-10; Ex. D (Feagle Decl.) at ¶¶ 6-27; Ex. E (Kazerounian Decl.) at ¶¶ 5-27; Ex. F (Keogh

Decl.) at ¶¶ 14-50; Ex. G (Swigart Decl.) at ¶¶ 5-13; Ex. H (Wilson Decl.) at ¶¶ 1-8. Collectively, they have been involved in nearly every major piece of TCPA litigation involving banks and debt collectors, and have recovered hundreds of millions of dollars in non-reversionary cash for consumer class members. *Id*.

Moreover, although Class Counsel seek fees based on a percentage-of-the-fund method (as is required in this Circuit), they nonetheless worked closely and in cooperation with one another to divide tasks, ensure efficient case management, and prevent duplication of efforts. By assigning specific tasks among firms, they were able to capitalize on their expertise and obtain the best and most efficient resolution to this matter. Ex. A (Burke Decl.) at ¶ 12.

4. Class Counsel Undertook the Litigation at Significant Risk with No Guarantee of Recovery.

Class Counsel prosecuted this matter entirely on a contingent fee basis, Ex. A (Burke Decl.) at ¶ 11, "assum[ing] a significant risk of nonpayment or underpayment." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1364. That factor supports the requested fee. *See Id.* ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award."); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1335 (S.D. Fla. 2001) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees.") (citation omitted); *In re Domestic Air Transp.*, 148 F.R.D. at 356 (awarding a fee

multiplier where "Class Counsel have borne the entire risk of failing to achieve a successful and substantial result for the class.").

The risk of diminished or no recovery was substantial because the parties have real disputes on a number of issues relating to both class certification and the merits of Plaintiff's claim. First, Wells Fargo contends 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 Plaintiff takes a narrower view of "transaction," if the Court adopted Wells Fargo's view, the amount of recoverable damages could be reduced significantly or eliminated altogether.

Second, Plaintiff maintains that the FCC correctly determined that consent provided by a customer does not transfer to other customers called at the same number. *See* 2015 Declaratory Ruling. Wells Fargo disagrees, and argues that that a pending petition to the D.C. Circuit may overturn the FCC Order. *See ACC Int'l v. FCC*, No. 15-1211 (D.C. Cir.).

Third, while Plaintiff continues to believe that class certification would be appropriate, Wells Fargo argues that class certification outside the context of settlement would be inappropriate due to the question of whether Settlement Class Members consented to the calls at issue. *See Chapman v. First Index, Inc.*, No. 09 C 5555, 2014 WL 840565, at *2 (N.D. Ill. Mar. 4, 2014) (citing cases), *aff'd in part*, 796 F.3d 783 (7th Cir. 2015) ("Courts are split on whether the issue of individualized consent renders a TCPA class uncertifiable on predominance and ascertainability grounds, with the outcome depending on the specific facts of each case."). If Wells Fargo were able to present convincing facts to support its position, there is a risk that the Court would decline to certify the class, leaving Mr. Luster to pursue only his individual claims.

Fourth, at least some courts view awards of aggregate, statutory damages with skepticism and 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 *4 (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.").

Fifth, Wells Fargo contends that Plaintiff may lack standing to pursue his claims after *Spokeo v. Robins*, 136 S. Ct. 1540 (2016). *Spokeo* was pending when this action was filed. Although the majority of courts have concluded that TCPA claims support Article III standing, some decisions have gone the other way. This risk was especially pronounced because subject matter jurisdiction can be challenged at any time, even on appeal after a jury verdict.

Finally, there was the ever-present risk of losing a jury trial. And, even if Plaintiff did prevail, any recovery would be delayed for years by an appeal.[7] Any potential statutory recovery in this case would likely be impossible to recover as a factual matter due in part to the fact that Wells Fargo would have every incentive to litigate appeals of any such judgment over many years. Class Counsel believe that they could have prevailed on these issues, but success was by no means

[7] Wells Fargo was specifically aware that Class Counsel were willing to incur trial and appellate risk. In *Gutierrez v. Wells Fargo Bank*, No. C 07-05923 WHA (N.D. Cal.), Lieff Cabraser, following years of litigation and a two-week trial, secured an order in August 2010 holding that Wells Fargo violated California law by improperly and illegally assessing overdraft fees on its California customers and ordering $203 million in restitution to the certified class. Following Wells Fargo's appeal, in December 2012 the Ninth Circuit issued an opinion upholding and reversing portions of Judge Alsup's order, and remanding the case to the District Court for further proceedings. In May 2013, Judge Alsup reinstated the $203 million judgment against Wells Fargo and imposed post-judgment interest bringing the total award to nearly $250 million. On October 29, 2014, the Ninth Circuit affirmed the Judge Alsup's order reinstating the judgment.

assured. Each of these issues presented an acute and case-dispositive risk that the Class would receive nothing. Yet, despite the risks of recovering nothing for the Class, Class Counsel procured a $14,834,058 all-cash settlement.

5. The Requested Fee Comports with Fees Awarded in Similar Cases, as well as Customary Fees in Contingent Commercial Litigation.

The requested fee of 30%, inclusive of costs and expenses, is well within the typical range in this Circuit. *Waters*, 190 F.3d at 1294-95 (affirming 33 1/3% fees, plus costs); *Craft*, No. 07-cv-132, Dkt. No. 135 (awarding 33 1/3%, plus costs); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1365 ("Numerous recent decisions within this Circuit have awarded attorneys' fees up to (and at times in excess of) 30 percent."); *Wolff v. Cash 4 Titles*, No. 03-cv-22778, 2012 WL 5290155, at *6 (S.D. Fla. Sept. 26, 2012) (collecting cases and concluding that 33% is consistent with the market rate in class actions).[8] Moreover, the requested fee is well within the norm for fees awarded in TCPA class actions, in this Circuit

[8] *See also, e.g.*, *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); *Allapattah Servs.*, 454 F. Supp. 2d at 1204 (awarding 31 1/3%, with costs to be awarded in a future order); *In re: Healthtronics Surgical Servs., Inc. Sec. Litig.*, No. 03-cv-02800, Dkt. No. 62 (N.D. Ga. Dec. 1, 2005) (awarding 33% plus costs); *In re: Profit Recovery Grp. Int'l, Inc. Sec. Litig.*, No. 00-cv-01416, Dkt. No. 203 (N.D. Gal. May 26, 2005) (awarding 33 1/3%, plus costs); *In re: Managed Care Litig.*, No. 00-1334, 2003 WL 22850070, at *6 (S.D. Fla. Oct. 24, 2003) (awarding 35.5% in fees and costs).

and elsewhere, *see, e.g.*, *Soto v. The Gallup Org.*, No. 13-cv-61747, Dkt. No. 95 (S.D. Fla. Nov. 24, 2015) (awarding 33 1/3%, inclusive of costs); *Guarisma v. ADCAHB Med. Coverages, Inc.*, No. 13-cv-21016, Dkt. No. 95 (S.D. Fla. June 24, 2015) (awarding 33 1/3%, plus costs), and is generally in-line with fee awards ordered in this case's companion cases, *Markos*, 2017 WL 416425, at *3 (ordering 30% of Fund) and *Cross v. Wells Fargo*, No. 15-cv-1270-RWS, Dkt. No. 103, ¶ 18 (N.D. Ga. Feb. 10, 2017) (28% of Fund).[9] [10]

[9] Class Counsel understand that Judge Story reduced fees 2% from the requested 30% because that case involved nearly double the aggregate amount at issue here and in *Markos*. The per class member recovery in *Markos* and *Cross* was comparable to this case.

[10] *See also, e.g.*, *Hageman v. AT&T Mobility LLC*, No. 1:13-cv-50, Dkt. No. 68 (D. Mont. Feb. 11, 2015) (final approval granted, awarding one-third fee award on $45 million settlement); *Ikuseghan v. Multicare Health Sys.*, No. 14-5539, 2016 WL 4363198, at *2 (W.D. Wash. Aug. 16, 2016) (awarding 30%, plus costs); *In re Capital One Tel. Consumer Protection Act Litig.*, 80 F. Supp. 3d 781, 803-807 (N.D. Ill. 2015) (awarding a modified fee structure including 36% of the first $10 million, and 25% of the next $10 million); *Vendervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding 33%); *Allen v. JPMorgan Chase Bank, N.A.*, No. 13-cv-8285, Dkt. No. 98 (N.D. Ill. Nov. 3, 2015) (awarding one-third fee award on $10,200,000 settlement); *De Los Santos v Millword Brown, Inc.*, No. 9:13-cv-80670-DPG (S.D. Fla.) (awarding one third plus expenses); *Lopera v RMS*, No. 12-cv-9649 (N.D. Ill.) (awarding one-third fee award); *Cummings v Sallie Mae*, No. 1:12-cv-9984, Dkt. No. 91 (N.D. Ill. May 30, 2014) (awarding one-third of the $9,200,000 fund for fees); *Hanley v. Fifth Third Bank*, 1:12-cv-01612, Dkt. No. 86 (N.D. Ill.) (awarding one-third of common fund for fees); *Desai v. ADT Sec. Servs., Inc.*, 1:11-cv-1925, Dkt. No. 243 (N.D. Ill.) (approving payment of one-third fee award out of common fund); *Martin v. Dun & Bradstreet, Inc.*, No. 1:12-cv-00215, Dkt. No. 63 (N.D. Ill. Jan. 16, 2014)

Footnote continued on next page

The requested fee is also less than fees typical in commercial complex litigation. *See Pinto*, 513 F. Supp. 2d at 1341 ("In private litigation, attorneys regularly contract for contingent fees between 30% and 40% directly with their clients."); *Allapattah Servs.*, 454 F. Supp. 2d at 1209 ("A fee of 31 and 1/3% to Class Counsel is well within the range of customary fees."). And, of course, in private litigation, the client typically pays out-of-pocket costs; here, Class Counsel request a fee *inclusive* of, not in addition to, such costs.

C. The Class Representative Service Award Is Reasonable.

Courts "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." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (citation omitted) (awarding $300,000 service payments to each of four

---

Footnote continued from previous page
(awarding more than 33 1/3%); *Locklear Elec., Inc. v. Norma L. Lay*, No. 3:09-cv-00531, Dkt. No. 67 (S.D. Ill. Sept. 8, 2010) (awarding 33 1/3%, plus costs); *Paldo Sign & Display Co. v. Topsail Sportswear, Inc.*, No. 1:08-cv-5959, Dkt. No. 116 (N.D. Ill. Dec. 21, 2011) (approving one-third of the settlement fund for fee award plus costs); *CE Design Ltd. v. Cy's Crab House N., Inc.*, No. 1:07-cv-5456, Dkt. No. 424 (N.D. Ill. Oct. 27, 2011) (same); *G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 1:07-cv-05953, Dkt. No. 146 (N.D. Ill. Nov. 1, 2010) (same); *Hinman v. M & M Rental Ctr., Inc.*, No. 1:06-cv-1156, Dkt. No. 225 (N.D. Ill. Oct. 6, 2009) (same); *Holtzman v. CCH*, No. 1:07-cv-7033, Dkt. No. 33 (N.D. Ill. Sept. 30, 2009) (same); *CE Design, Ltd. v. Exterior Sys., Inc.*, No. 1:07-cv-66, Dkt. No. 39 (N.D. Ill. Dec. 6, 2007) (same); *Accounting Outsourcing, LLC v. Verizon Wireless*, No. 03-161, 2007 U.S. Dist. LEXIS 97153, at *6-7 (M.D. La. 2007) (awarding fee award in excess of 35% of the common fund, plus costs).

representative plaintiffs); *see also Allapattah Servs.*, 454 F. Supp. 2d at 1218 ("Incentive awards are not uncommon in class litigation where, as here, a common fund has been created for the benefit of the class."). The Settlement Agreement permits Mr. Luster to request up to $20,000 as a Service Award. Settlement at ¶ 5.03. This proposed service award – along with the fee request – are plainly disclosed and explained in the mailed notice. Dkt. No. 66-3.

This requested Service Award is reasonable and should be approved, especially in light of the fact that Mr. Luster received, and refused, a Rule 68 offer of judgment from Wells Fargo. Ex. A (Burke Decl.) at ¶ 23. Mr. Luster put the Class's interests before his own, rejecting guaranteed money while at the same time selling out the class early on. The offer of judgment also placed Mr. Luster at personal risk: Mr. Luster may have had to pay Wells Fargo's costs had he not secured a judgment in excess of the money offered. Such costs in a case like this typically dwarf an individual plaintiff's recovery.

The requested award is also consistent with awards in other TCPA settlements. *See Markos*, 2017 WL 416425, at *3 ("The Court further approves a service award of $20,000 for each named Plaintiff and specifically finds such amount to be reasonable in light of the service performed by each Plaintiff for the class. Each of the named Plaintiffs rejected a Rule 68 offer of judgment that would

have compensated them more than this service award, and therefore each put the class's interests above his or her own."); *Cross v. Wells Fargo*, No. 15-cv-1270-RWS, Dkt. No. 103, ¶ 18 (N.D. Ga. Feb. 10, 2017) ($15,000); *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); *Martin v. Dun & Bradstreet, Inc.*, No. 1:12-cv-215, 2014 WL 9913504, at *3 (N.D. Ill. Jan. 16, 2014) (approving $20,000 service award to TCPA class representative); *Benzion v. Vivint, Inc.*, No. 12-61826, Dkt. No. 201 (S.D. Fla. Feb. 23, 2015) (awarding $20,000 incentive award in TCPA class settlement); *Hageman v. AT&T Mobility LLC*, No. 1:13-cv-50, Dkt. No. 68 (D. Mont. Feb. 11, 2015) ($25,000 incentive award in TCPA class settlement). The requested Service Award is thus reasonable, and it respectfully should be granted.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that this Court (a) award attorneys' fees and costs in the total amount of $4,450,217.40, which is 30% of the $14,834,058 Settlement Fund; (b) award a Service Award to the Class Representative of $20,000; and (c) authorize co-lead Class Counsel to allocate the awarded fees and costs among Class Counsel.

Dated: July 24, 2017

By: */s/ Alexander H. Burke*

BURKE LAW OFFICES, LLC
Alexander H. Burke (*pro hac vice*)
Email: aburke@burkelawllc.com
155 N. Michigan Ave., Suite 9020
Chicago, IL 60601
Telephone: (312) 729-5288
Facsimile: (312) 729-5289

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
Daniel M. Hutchinson (*pro hac vice*)
Email: dhutchinson@lchb.com
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Jonathan D. Selbin (*pro hac vice*)
Email: jselbin@lchb.com
250 Hudson Street, 8th Floor
New York, NY 10013
Telephone: (212) 355-9500
Facsimile: (212) 355-9592

Andrew R. Kaufman (*pro hac vice*)
Email: akaufman@lchb.com
150 Fourth Avenue North, Suite 1650
Nashville, TN 37219
Telephone: (615) 313-9000
Facsimile: (615) 313-9965

SKAAR & FEAGLE, LLP
James M. Feagle (Ga. Bar No. 256916)
Email: jfeagle@skaarandfeagle.com
2374 Main Street, Suite B

Tucker, GA 30084
Telephone: (404) 373-1970
Facsimile: (404) 601-1855

Justin T. Holcombe (Ga. Bar No. 552100)
Email: jholcombe@skaarandfeable.com
Kris Skaar (Ga. Bar No. 649610)
Email: krisskaar@aol.com
133 Mirramont Lake Drive
Woodstock, GA 30189
Telephone: (770) 427-5600
Facsimile (404) 601-1855

MEYER WILSON CO., LPA
Matthew R. Wilson (*pro hac vice*)
Email: mwilson@meyerwilson.com
Michael J. Boyle, Jr. (*pro hac vice*)
Email: mboyle@meyerwilson.com
1320 Dublin Road, Ste. 100
Columbus, OH 43215
Telephone: (614) 224-6000
Facsimile: (614) 224-6066

LAW OFFICES OF DOUGLAS J. CAMPION, APC
Douglas J. Campion (*pro hac vice*)
Email: doug@djcampion.com
17150 Via Del Campo, Suite 100
San Diego, CA 92127
Telephone: (619) 299-2091
Facsimile: (619) 858-0034

KEOGH LAW, LTD.
Keith Keogh (*pro hac vice*)
Email: keith@koeghlaw.com
55 W. Monroe, Ste. 3390
Chicago, IL 60603

Telephone: (312) 265-3258
Facsimile: (312) 726-1093

GREENWALD DAVIDSON RADBIL PLLC
Michael L. Greenwald (*pro hac vice*)
Email: mgreenwald@gdrlawfirm.com
5550 Glades Rd., Suite 500
Boca Raton, FL 33431
Telephone: (561) 826-5477
Facsimile: (561) 961-5684

Aaron D. Radbil (*pro hac vice*)
Email: aradbil@gdrlawfirm.com
106 East Sixth Street, Suite 913
Austin, TX 78701
Telephone: (512) 322-3912
Facsimile: (561) 961-5684

KAZAROUNI LAW GROUP, APC
Abbas Kazerounian (*pro hac vice*)
Email: ak@kazlg.com
245 Fischer Avenue, Unit D1
Costa Mesa, CA 92626
Telephone: (800) 400-6806
Facsimile: (800) 520-5523

HYDE & SWIGART
Joshua B. Swigart (*pro hac vice*)
Email: josh@westcoastlitigation.com
2221 Camino del Rio South, Suite 101
San Diego, CA 92108
Telephone: (619) 233-7770
Facsimile: (619) 297-1022

Class Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rules 5.1.C and 7.1.D of the Northern District of Georgia, that the foregoing was prepared in 14-point Times New Roman Font.

July 24, 2017.

/s/ Alexander H. Burke

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to all attorneys of record.

July 24, 2017.

/s/ Alexander H. Burke