UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LATONYA SIMMS, on behalf of herself, and all others similarly situated,	)	
Plaintiff,	)	
v.	)	No. 1:14-cv-00737-WTL-DLP
EXACTTARGET, LLC,	)	
Defendant.	)	

REPORT AND RECOMMENDATION

This matter has been referred to the Undersigned to issue a Report and Recommendation on Plaintiff's Motion for Final Approval of Class Action Settlement (Dkt. 172) and Plaintiff's Motion for Approval of Attorneys' Fees, Cost, and Incentive Award (Dkt. 166).[1] For the reasons set forth below, the Magistrate Judge recommends that both Motions be **GRANTED**.

I. Background and Claims Administration Process

On February 12, 2018, this Court entered a preliminary order of approval of the Plaintiff's class action settlement. (Dkt. 162). The Court preliminarily certified (for settlement purposes only) the proposed Settlement class, consisting of: all persons in the United States who received a text message via ExactTarget texting platform from or on behalf of Simply Fashion during the Class Period (i.e., July 23, 2009, through September 30, 2013). In addition, the Order (1) preliminarily

[1] On June 11, 2018, District Judge William T. Lawrence designated the Undersigned Magistrate Judge to issue a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (Dkt. 168).

approved the Settlement Agreement; (2) appointed Plaintiff Latonya Simms as Class Representative; (3) and appointed Ronald A. Marron, Alexis M. Wood, and Kas L. Gallucci as Class Counsel. The Plaintiff filed a Motion for Attorney's Fees, Costs, and Incentive Award on May 22, 2018 (Dkt. 166) and subsequently filed a Motion for Final Approval of the Class Action Settlement on July 6, 2018 (Dkt. 172).

As set forth in the Preliminary Approval Motion (Dkt. 159), the Settlement Agreement provides the following benefits to the Class to be paid by the Defendant:

1. $6.25 million non-reversionary Settlement Fund from which all Settlement Class members will be paid;
2. All monies remaining in the Settlement Fund after the expiration of all checks to the Settlement Class and payment to the Claims Administrator of any unreimbursed administration costs and expenses will be donated to the *Cy Pres* recipient, Privacy Rights Clearinghouse;
3. All reasonable administration expenses including those related to notice; and
4. Attorney's fees and costs to Plaintiff's Class counsel and incentive award to the Class representative, subject to Court approval.

Heffler Claims Group was appointed by the Court to act as Settlement Administrator, to provide notification and administration services in accordance with this Court's Preliminary Approval Order (Dkt. 162) and the Settlement Agreement. (Dkt. 159-2). Several types of notice have been given to apprise the Class Members of their rights to either submit a claim, exclude themselves, or

object to the Settlement. These notices resulted in approximately 13,212 claims reviewed and verified.

Of the 528,451 for whom the Defendant had a phone number, Heffler Claims Group was able to obtain some form of address information for 482,816 Settlement Class Members. Of the 333,259 Settlement Class Members who had at least one email address on record, Heffler sent 553,789 email notices. A large percentage of these emails were considered undeliverable due to a bounceback, or an invalid or unsubscribed email address. Of those whose email was undeliverable and those that only had a physical mailing address, Heffler sent approximately 271,221 postcard notices to Settlement Class Members. For the remaining 45,635 Class Members for whom the Defendant did not have an email address or physical address, Heffler created and hosted a website and a supplemental online media campaign using banner ads through Google Display Network, Facebook, and Instagram. Heffler has estimated that the mail notices and email notices reached approximately 83.49% of the Class Members.

The deadline for submitting claims, for opting out, and for objecting passed on June 12, 2018. There have been no objections filed and only one request for exclusion. Based upon the claims submitted, the Claims Administrator and Class Counsel represent that of the estimated 15,000 valid, timely claims, the expected *pro rata* share for each approved Class Member will be roughly $265.75 per valid claim. (Dkt. 174 at 8 and Dkt. 174-2 at 4).

II. Final Approval Hearing

The Undersigned received and reviewed the following documents submitted in support of Final Approval.

1. Plaintiff's Brief and Memorandum in Support of the Motion for Final Approval of Class Action Settlement with supporting affidavits and exhibits filed on July 6, 2018;
2. Declaration of Class Counsel Ronald Marron Re: Motion for Final Approval filed on July 6, 2018;
3. Declaration of Heffler Claims Group Client Services Manager Joseph F. Mahan Re: Administration of Notice Procedures and Implementation of the Settlement Notice Plan filed July 6, 2018.
4. Plaintiff's Motion and Support Brief for Attorney's Fees, Costs and Incentive Award filed together on May 22, 2018.
5. Declaration of Class Counsel Ronald A. Marron Re: Motion for Attorney's Fees, Expenses, and Incentive Award filed on May 22, 2018;
6. Declaration of Attorney Douglas J. Campion Re: Motion for Attorney's Fees, Expenses and Incentive Award filed on May 22, 2018;
7. Declaration of Attorney David S. Almeida Re: Motion for Attorney's Fees, Expenses and Incentive Award filed on May 22, 2018;

On Friday, July 20, 2018, the Undersigned conducted a Final Approval Hearing, at the U.S. District Courthouse, 46 East Ohio Street, Suite 105, Indianapolis, Indiana. Appearing at the hearing on behalf of the Plaintiff was Kas

L. Gallucci from the Law Offices of Ronald A. Marron and J. Dominick Larry from Benesch, Friedlander, Coplan & Aronoff, LLP. The Defendant was represented by Tonia O. Klausner from Wilson Sonsini Goodrich & Rosati. No other persons or their representatives appeared in person or called into the hearing.

Plaintiff's counsel summarized the terms of the Settlement Agreement, which are set forth in the Settlement Agreement and Release filed with the Court in November 2017 (Dkt. 159-2). The Settlement Agreement resolves all Telephone Consumer Protection Act ("TCPA") claims in this matter against the Defendant that arise from text messages sent to consumers advertising the now-defunct retailer Simply Fashion, in connection with Simply Fashion's customer loyalty program. At the July 20, 2018 hearing, the Court also heard arguments on the Plaintiff's Motion for Attorney's Fees, Costs and Incentive Award.

III. Final Approval of Settlement

Settlement of class claims brought under Fed. R. Civ. P. 23 may be approved if the Court finds the settlement to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Seventh Circuit Court of Appeals has characterized the Court's role as that of a fiduciary to the class members in considering whether a settlement is fair and reasonable. *Wong v. Accretive Health, Inc.,* 773 F.3d 859, 862 (7th Cir. 2014). In this Report and Recommendation, the Undersigned will outline and discuss the relevant factors to assist the Court in determining whether this class action settlement is fair, adequate, and reasonable and should be finally certified and approved.

A. Class Certification

In order to certify a class, the Court must find that the putative class satisfies the four prerequisites set forth in Federal Rule of Civil Procedure 23(a). If the putative class does satisfy these prerequisites, the Court must additionally find that it satisfies the requirements set forth in Federal Rule of Civil Procedure 23(b), which vary depending upon which of three different types of classes is proposed.

Rule 23(a) requires the party seeking certification to demonstrate that the members of the class are so numerous that joinder is impracticable (numerosity); there are questions of law or fact common to the proposed class (commonality); the class representative's claims are typical of the claims of the class (typicality); and the representative will fairly and adequately represent the interests of the class (adequacy of representation). Fed. R. Civ. P. 23(a)(1)–(4).

1. Numerosity

Under Rule 23(a)(1), a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity is typically satisfied where there are at least forty members of a putative class. *See, e.g., Pruitt v. City of Chicago*, 472 F.3d 925, 926–27 (7th Cir. 2006). At last count, the class in this case had 528,451 members. The numerosity requirement is, thus, clearly satisfied.

2. Commonality

Rule 23(a)'s second requirement is that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality "requires the plaintiff to demonstrate that the class members 'have suffered the same injury'. . ." *Wal–Mart*

Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). "Their claims must depend on a common contention" that "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart*, 131 S.Ct. at 2551. Commonality is satisfied in this case, as all the class claims depend upon the common contention that ExactTarget violated the TCPA by sending text messages that advertised for Simply Fashion. Each claim, therefore, arises from the same conduct.

3. Typicality

The third requirement of Rule 23(a) is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is satisfied when a plaintiff's claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely–Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). In this case, each class member's claim arises from the same event (text messages received that advertised for Simply Fashion) and the same legal theory (that the text messages violated the TCPA). Simms' claim, therefore, is typical of the class claims.

4. Adequacy

Lastly, Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy

of representation requirement involves two inquiries: whether the plaintiff's attorney is qualified, experienced, and capable of conducting this type of litigation, and whether the named plaintiff's interests are not antagonistic to those of the class. *See, e.g., Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). The Named Plaintiff has sufficiently demonstrated that she shares the same interests and suffered the same injuries as those suffered by the putative class members. Plaintiff has also demonstrated that her counsel is competent and has extensive experience with previous class actions of this type. Simms and her counsel are, therefore, adequate class representatives.

5. Rule 23(b) Analysis

As a final hurdle before class certification, the plaintiff must show that she fits into at least one of the categories outlined in Rule 23(b), which sets forth the circumstances under which a class action may be maintained. Under Rule 23(b)(3), a class action may be maintained if the Court finds that the questions of law or fact common to class members *predominate* over any questions affecting individual class members, and that a class action is *superior* to other available methods of adjudicating the controversy. Fed. R. Civ. P. 23(b)(3) (emphases added). Courts consider: a) the class members' interests in individually controlling the prosecution or defense of separate actions; b) the extent and nature of any litigation concerning the controversy already begun by or against class members; c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and d) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3).

"Considerable overlap exists between Rule 23(a)(2)'s commonality prerequisite and Rule 23(b)(3). Rule 23(a)(2) requires that common issues exist; Rule 23(b)(3) requires that they predominate." *Mejdreck v. Lockformer Co.*, 2002 WL 1838141, *6 (N.D. Ill. 2002) (quoting *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F.Supp. 1399, 1419 (N.D. Ill. 1996)). Because the Plaintiff's and class members' claims turn on the outcome of the same legal question, namely whether ExactTarget's use of advertising text messages violated the TCPA, it makes sense to adjudicate the claims all at once, rather than having the hundreds of thousands of class members file individual cases. For the foregoing reasons, the requirements of Rule 23(a) and (b)(3) are met and the Undersigned recommends that final certification of the proposed class be granted.

B. Claims Process and Responses to Class Notice

The Undersigned believes that the form, substance, and delivery of the class notices was fair and reasonable and fairly appraised the Class Members of the terms of the proposed settlement, how they could seek additional information, opt out of the settlement, or object to the settlement. As noted previously, there have been no objections to the settlement and only one requested exclusion.

The Class Members were given from on or about March 14, 2018 until June 12, 2018 to submit claims to the Court-appointed Settlement Administrator. The Undersigned believes that the claims process was straight-forward, because claims could be submitted online, by downloading a claim form and mailing it in, or calling a toll-free 800 number. (Docket 174-4). If the person received an email notice, each

email had a claim member identification and a link to the claim form online, expediting the submission. If the person did not receive an email, that person received a postcard notice which contained both a Class Member identification and a claim form (Dkts. 174-5, 174-6). As a result of this simple claims procedure, a substantial number of online and paper claims (16,418) were timely submitted, including 169 late paper claims. (Dkt. 174-2).

The Undersigned recommends that this Court find that the notice requirements set forth in the Class Action Fairness Act and other applicable law have been satisfied. The Notice Plan previously approved by this Court has been followed and thus the Court should find that the process satisfied due process requirements.

C. Settlement Agreement

If the Court certifies a class, the next step is evaluation of the Settlement Agreement itself. Because the proposed settlement would bind class members here (Dkt. 159-2), the Court may approve the settlement only after finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

Courts generally consider a number of factors, including: (1) the strength of the Plaintiff's case compared to the amount of Defendant's settlement offer; (2) an assessment of the likely complexity, length, and expense of continued litigation; (3) an evaluation of the amount of opposition to the settlement by affected parties; (4) the opinion of competent, experienced counsel; and (5) 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); see also Fed. R. Civ. P. 23(e)(2). The Undersigned concludes that these factors weigh in favor of final approval of the Settlement Agreement in this case. The Settlement was the result of adversarial, arms-length negotiations between experienced attorneys, mediations with Magistrate Judge Morton Denlow (ret.) of JAMS[2] Chicago, and months of continued settlement discussions.

1. Strength of Plaintiff's Case Compared to Settlement

The "most important factor" in determining whether a proposed settlement agreement satisfies Rule 23(e) is the "strength of [P]laintiffs' case on the merits balanced against the amount offered in the settlement." *Kaufman v. American Express Travel Related Services Company*, 877 F.3d 276, 284 (7th Cir. 2017) (citing *Synfuel Techs., v. DHL Express*, 463 F.3d at 653). Specifically, the Court must "estimate the likely outcome of a trial" to determine the adequacy of a settlement." *Eubank v. Pella Corp.*, 753 F.3d 718, 727 (7th Cir. 2014).

The Plaintiff's claims have merit and, if the Plaintiff prevailed at trial, the Defendant could face substantial statutory penalties. However, as outlined in Plaintiff's Preliminary Approval Motion, there were a number of potential roadblocks to the Plaintiff's case, should it proceed on the merits. (Dkt. 159 at 22). The Defendant argues that its text messaging system is not an automatic telephone dialing system ("ATDS"); that it did not make the calls; and that Simply Fashion obtained consent for a portion of the Class Members. *Id.* While the Plaintiff

[2] JAMS is a private alternative dispute resolution provider. When the company started in 1979, JAMS was an acronym for Judicial Arbitration and Mediation Services, Inc.

believes that it could have overcome these issues, the risk that the text messaging system did not constitute an ATDS held a substantial chance of success for the Defendant and would have been detrimental to the Class Members. *Id.*

In weighing the merits of the case against the settlement offer, the Seventh Circuit has recognized that this valuing of a hypothetical-continued litigation is "necessarily speculative" and an inexact science. Thus, this Court is only expected to estimate and come to a "ballpark valuation." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2002).

As it stands, the settlement requires ExactTarget to pay $6.25 million into the Settlement Fund, from which (after deducting attorneys' fees, costs, administrative expenses, proposed *cy pres* distributions, and incentive awards) all eligible class members will receive their *pro rata* share. (Dkt. 174-2 at 4). If the Plaintiff's Motion for Attorneys' Fees, Costs, and Incentive Award is granted in full and the number of claimants averages out at 15,000, the recovery per claimant would be approximately $256.75 per valid claim. *Id.*

This is, of course, far less than the Class Members could receive if they prevailed at trial, because the TCPA awards statutory damages of $500 for each text message, or $1,500 if the violations were willful or knowing. *See*, 47 U.S.C. § 227(b)(5). The proposed recovery, however, falls well within the range of recoveries in other recently approved TCPA class settlements. *See*, *e.g.*, *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 790 (N.D. Ill. 2015) (providing $34.60 recovery per claiming class member in debt-collection TCPA settlement); *Arthur v.*

Sallie Mae, Inc., No. 10-cv-0198, 2012 WL 90101, at *3 (W.D. Wash. Jan. 10, 2012) ($20 to $40 per claiming class member in debt collection TCPA settlement); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) ($52.40 per claiming class member); *Kolinek*, 311 F.R.D. at 493–94 (approximately $30 to claiming class members who received prescription refill reminder calls). *See, e.g.*, *Kramer v. Autobytel*, No. 10-cv-2722, ECF No. 148 ($100 to claiming class members); *Weinstein v. The Timberland Co.*, No. 06-cv-484, ECF No. 93 ($150 per claiming class member); *Satterfield v. Simon & Schuster, Inc.*, No. 06-cv-2893, ECF No. 132 ($175 per claiming class member); *Lozano v. Twentieth Century Fox Film Corp.*, No. 09-cv-634, ECF No. 65 ($200 to claiming class members). That is a clear indicator of fairness.

Moreover, a settlement need not provide the class with the maximum possible damages to be reasonable. As the Seventh Circuit has cautioned, a district court should not reject a settlement "solely because it does not provide a complete victory to plaintiffs," for "the essence of settlement is compromise." *Isby v. Bayh,* 75 F.3d 1191, 1199 (7th Cir. 1996). "Individual class members receive less than the maximum value of their TCPA claims, but they receive a payout without having suffered anything beyond a few unwanted calls or texts, they receive it (reasonably) quickly, and they receive it without the time, expense, and uncertainty of litigation." *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 230 (N.D. Ill. 2016). The Undersigned, in assessing the significant litigation risks and individual recovery amount, agrees with the parties that the overall settlement amount is fair

under the circumstances of the present case: the class members forfeit their chance at the full $500 (or $1500) statutory damages award, but gain certainty, avoid litigation costs, and recover now instead of years later.

2. Complexity, Length, and Expense of Litigation

The Seventh Circuit has instructed district courts to consider the likely complexity, length, and expense of continued litigation when determining whether a class action settlement satisfies Rule 23(e)(2). *Synfuel Techs.,* 463 F.3d at 653. When litigation will be costly and lengthy, settlement is especially favored because "the present lawsuit will come to an end and Class Members will realize both immediate and future benefits as a result." *Schulte v. Fifth Third Bank,* 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011). This factor weighs heavily in favor of approval of the settlement in this case.

If the Court approves the proposed Settlement Agreement, this case will end and the class members will be entitled to the relief that ExactTarget has promised. If, on the other hand, the Court were to deny approval, protracted litigation would follow. The parties would have to continue extensive discovery on class certification and on the merits of the claims; class certification and summary judgment would be vigorously contested. All of these proceedings would increase time and expense while reducing the possibility of recovery. *E.g., Gehrich*, 316 F.R.D. at 230 (the parties would have "to retain experts, analyze an enormous quantity of data, and engage in substantial motion practice, which could have resulted in reducing or

negating, and certainly would have delayed, any judgment in favor of Plaintiffs, even putting aside the near certainty of appeal").

3. Amount of Opposition

Significant opposition to a proposed settlement by interested parties should signal to a court that the settlement should not be approved. *Synfuel Techs.*, 463 F.3d at 653. Here, no objections have been filed, and only one member has opted out of the settlement. This extremely low percentage of opposition favors a finding that the settlement is fair, reasonable, and adequate. *Gehrich*, 316 F.R.D. at 230.[3]

4. Opinion of Competent Counsel

The Seventh Circuit has held that the opinion of competent counsel is relevant to determining the fairness, reasonableness, and adequacy of a class action settlement. *Synfuel Techs.*, 463 F.3d at 653; *see also*, *Redman v. RadioShack Corp.,* 768 F.3d 622, 629 (7th Cir. 2014); *Eubank*, 753 F.3d at 720. Class counsel in this case are highly experienced class action litigators who strongly support the proposed settlement. No reasons exist for this Court not to accept the recommendation of Class Counsel for final approval of the settlement.

5. Stage of Litigation and Amount of Discovery

The final *Synfuel* factor is designed to allow the Courts to determine "how fully the district court and counsel are able to evaluate the merits of plaintiffs'

[3] It is common for TCPA actions to have low opt-out and objection rates because of the relatively low individual stakes. *E.g., In re Capital One Tel. Consumer Prot. Act. Litig.*, 80 F. Supp. 3d 781, 792 (N.D. Ill. 2015) (0.0032% opt-out rate); *Kolinek v. Walgreen Co.,* 311 F.R.D. 483, 495 (N.D. Ill. 2015) (0.001668% opt out rate and 0.0002209% objection rate); *Gehrich*, 316 F.R.D. at 232 (.000697% opt-out rate and .000056% objection rate).

claims." *Kolinek,* 311 F.R.D. at 495-96 (citing *Armstrong v. Bd. Of Sch. Dirs. Of City of Milwaukee,* 616 F.2d 305, 325 (7th Cir. 1980)). Here, the parties have agreed upon a settlement "only after conducting initial pre-suit investigation and analysis, discovery (both fact and expert), summary judgment briefing, further proceedings related to Simply Fashion's bankruptcy, another round of summary judgment briefing, a full-day mediation, and months of subsequent negotiations." (Dkt. 174 at 19). The parties engaged in substantial discovery, enough to ensure that the parties understood their relative legal positions, before agreeing to a settlement. The case is at a stage where the parties can appropriately value the litigation and arrive at a fair settlement. The stage of litigation and the amount of discovery produced in this matter weigh in favor of granting final approval.

6. Absence of Collusion

In recent years, the Seventh Circuit has raised attention to and emphasized the importance of ensuring the absence of collusion in class action settlements. *See Pearson,* 772 F.3d at 778; *Redman,* 768 F.3d at 637; *Eubank,* 753 F.3d at 721. In class action suits, named plaintiffs typically exercise little control over class counsel, and the class has little or no ability to hold accountable either the named plaintiffs or class counsel. *See Eubank*, 753 F.3d at 719. Class counsel and defendants sometimes exploit these dynamics to generate a settlement that extinguishes the claims against the defendant and enriches class counsel and the class representatives with large awards, but does not provide commensurate or

adequate benefit for the class. (*Gehrich*, 316 F.R.D. at 230 (citing *Redman*, 768 F.3d at 629; *Eubank*, 753 F.3d at 720)).

Nothing in the record before this Court suggests that the proposed settlement has been affected by collusion. The settlement was facilitated by the Honorable Judge Denlow through a day-long mediation and multiple subsequent phone calls and appears to be the result of adversarial arm's-length negotiations between attorneys experienced in the litigation, certification, trial, and settlement of nationwide class action cases. Accordingly, the Undersigned believes that no basis exists to conclude that the proposed settlement is the result of collusion or that would preclude this Court from finally approving the settlement.

D. Attorneys' Fees

On May 22, 2018, Plaintiff filed a motion for attorneys' fees, costs, and incentive award. (Dkt. 166). Rule 23(h) allows the Court to award "reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). When it comes to fees, there is a "built-in-conflict of interest" between the class and their attorneys: the attorneys would naturally prefer to maximize their fees, but because fees come out of the same pot as the award to the class, the attorneys' interests are not aligned with their clients' interest. *Redman*, 768 F.3d at 629. Meanwhile, the defendant cares only about its overall payout, not how the payout is divided between the class and class counsel, so the defendant cannot be relied on to guard the interests of the class. *Id.*

Because of this, the Court must vigilantly safeguard the interests of the Class Members when reviewing the request for attorneys' fees. This is a "common fund" case, meaning that because the defendant is paying a specific sum in exchange for release of liability to all plaintiffs, equitable principles permit the Court to "determine[ ] the amount of attorney's fees that plaintiffs' counsel may recover" from the fund "based on the notion that not one plaintiff, but all those who have benefitted from litigation should share its costs." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 563 (7th Cir. 1994); Fed. R. Civ. P. 23(h). At the same time, the Court must evaluate the fee award to determine if the requested amount is reasonable and not the result of unfair self-dealing by class counsel. *Camp Drug Store v. Cochran Wholesale*, 897 F.3d 825, 832 (7th Cir. 2018). This reasonableness determination is made by "awarding 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 Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001).

1. Base Percentage for Legal Services

When assessing a fair market rate for legal fees, the Seventh Circuit has directed the Court to consider several factors, including the risk of nonpayment, the quality of the attorney's performance, the amount of work necessary to resolve the litigation, and the stakes of the case. *Camp Drug Store*, 897 F.3d at 833. "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). Such estimation is

inherently conjectural, and there is no prescribed method of calculation, so in common fund cases, the district court is given discretion in employing either the lodestar or percentage-of-the-fund approach when calculating attorneys' fees. *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011); *Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 246-47 (7th Cir. 2014).

Choosing which method to use is at the Court's discretion, and the circumstances of the case will inform which method is more appropriate. *Florin*, 34 F.3d at 566 ("We therefore restate the law of this circuit that in common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court."); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974-95 (7th Cir. 1991) (same). If the fee requested by Class Counsel is too high, "[t]he simple and obvious way for the judge to correct [the problem] is to increase the share of the settlement received by the class, at the expense of Class Counsel." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) (quoting *Redman*, 768 F.3d at 632) (quotation marks omitted).

In the lodestar-multiplier method in common fund class actions, the Court decides the amount of attorney fees based on an hourly rate of compensation applied to the hours worked. A multiplier to the lodestar figure is used to compensate attorneys for risk, difficulty and other factors to increase the total attorney fees awarded. There is no fixed method for determining the amount of the multiplier and the multipliers vary significantly from case to case. The lodestar

method, if applied here, would require the Plaintiff to monitor counsel and ensure that counsel work efficiently on an hourly basis, something a class of several thousand lightly-injured plaintiffs likely would not be interested in doing. *Kolinek*, 311 F.R.D. at 501; *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, (N.D. Ill. 2018); *see also* Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements*, 1 J. Empirical Legal Studies 27, 31-32 (Mar. 2004) ("The percentage method is easy to calculate, does not involve the court in fee audits, and does not create incentives to waste time."). For these reasons, the Undersigned agrees with the Plaintiff that a percentage-of-the-fund of method should be used for assessing the reasonableness of the market rate for the requested attorneys' fees.

The Seventh Circuit has established a "presumption" 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 v. NBTY, Inc.*, 772 F.3d 778,782 (7th Cir. 2014). To guide courts in this assessment of attorneys' fees in common-fund TCPA settlements, the Seventh Circuit has employed a sliding-scale approach. *See*, *Aranda v. Carribbean Cruise Line, Inc.*, 2017 WL 1369741 at *5 (N.D. Ill. Apr. 10, 2017); *In re Capital One Tel. Consumer Prot. Act. Litig.*, 80 F. Supp. 3d 781, 792 (N.D. Ill. 2015).

Recovery	Fee Percentage	Fee
First $10 million	30%	$3,000,000
Next $10 million	25%	$2,500,000
$20-45 million	20%	$5,000,000

Under this approach, the common fund is separated into rows, and Class Counsel are awarded a percentage of each row, with the percentage award decreasing as the size of the common fund increases. *See*, *Aranda v. Carribbean Cruise Line, Inc.*, 2017 WL 1369741 at *5 (N.D. Ill. Apr. 10, 2017); *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979 (7th Cir. 2003).

The $6.25 million Settlement Fund in this case implicates only the first row. The Seventh Circuit applies a benchmark of 30% in calculating the attorney fee award where the class recovery is less than $10 million. *In re Synthroid Mktg. Litig.,* 325 F.3d 974, 980 (7th Cir. 2003). See *Vergara v. Uber Techs., Inc.*, 15-cv-6942 (N.D. Ill. Feb. 26, 2018), ECF No. 111 at 3-4 (awarding 30% of first $10M of net fund, plus a 6% risk premium); *Kolinek*, 311 F.R.D. at 501–02 (collecting cases and awarding attorney's fees in the amount of a baseline 30% plus a 6% risk enhancement, for a total of 36% of the net settlement fund); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, 2015 WL 2147679 (N.D. Ill. May 6, 2015) (affirming prior order applying *Capital One* framework); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12-cv-4069, 2017 WL 12834447 (N.D. Ill. Apr. 10, 2017) (applying *Capital One* framework with risk premiums to TCPA fee award); *Ashack v. Caliber Home Loans, Inc.*, No. 15-cv-1069, 2017 WL 2618885, at *2 (S.D. Ind. June 16, 2017) (finding thirty percent fee award reasonable under Seventh Circuit precedent and *Capital One*); *Averett v. Metalworking Lubricants Co.*, No. 15-cv-1509, 2017 WL 4284748, at *7 (S.D. Ind. Sept. 27, 2017) (describing *Capital One* as "finding after an extensive and instructive discussion that the market rate for

attorneys' fees in class actions brought under the Telephone Consumer Protection Act reflects 30% of the award to class members when the award is less than $10 million.").

Class Counsel contend that the market rate for the service that they have provided is a 30% base, pursuant to the precedent set in *Capital One* for recovery under $10 million, plus a 5% upward adjustment based on the heightened risk of nonrecovery associated with this type of litigation, totaling $2,073,750.00 in fees and costs. Thus, the question for the Court is whether a base rate of 30% is fair and reasonable and whether a 5% risk adjustment is fair and reasonable in this case.

Prior to securing a class settlement agreement, Class Counsel participated in initial pre-suit investigation and analysis, conducted both fact and expert discovery, engaged in summary judgment practice, proceedings related to Simply Fashion's bankruptcy, a full-day mediation, months of subsequent negotiations, and a telephonic mediation conference. All of this demonstrates Class Counsel's significant participation in the litigation and the effort they put in to secure a victory for the class. Most importantly, all of this would have been foreseeable at the time Class Counsel participated in arm's length negotiation of their fee. For these reasons, the Undersigned agrees that the 30% base rate requested by Class Counsel is reasonable.

2. Risk Adjustment

In this case, because Class Counsel is requesting a 5% risk enhancement, the Court must also consider the risk that Class Counsel assumed by undertaking class

representation. Risk is necessarily a factor in determining the price class counsel would have charged in arm's length *ex ante* negotiations. In high risk cases, district courts apply an upward risk adjustment to the base percentage. *See, Aranda*, 2017 WL 1369741, at *8-9. Courts typically apply a six-point premium to the first $10 million in the standard sliding-scale structure. *Id.* at 9.

Class Counsel argue that the facts and circumstances of this case presented a 5% risk enhancement that justify the requested fee award of 35% of the net settlement fund. Class Counsel maintain that particular risks were involved in taking on this case, including substantive issues, related to whether Exact Target could establish itself as a common carrier, whether Defendant could prove that the Plaintiff gave consent to receiving text messages from Simply Fashion, and whether the Defendant's system constituted an ATDS; procedural issues, related to whether the Plaintiff could obtain class certification; regulatory issues, related to whether the FCC or a Court would conclude that text messages do not fall under the purview of the TCPA; and practical issues, related to whether Simply Fashion would remain in business or whether the bankruptcy would prevent any recovery. (Dkt. 167 at 17-18). The Court accepts that these risks exist, but must determine whether they rendered this case risky enough to justify an enhanced fee award of an additional 5% above the baseline.

The issues of consent and class certification, for instance, are part of every TCPA case. Class counsel undoubtedly worked hard on this case and performed well, but hard work and good performance are accounted for in the market

contingency fee. Though the stakes were high in this case, because over half a million class members were involved, that too is standard in TCPA cases and is accounted for in the market rate

The Court places significant value, however, on the other arguments put forward by Class Counsel, in that Simply Fashion's bankruptcy unquestionably infused doubt and delay into these proceedings and it was unclear whether text messages were covered under the TCPA. The parties had to engage in significant discovery, briefing on summary judgment, and litigation involving Simply Fashion's bankruptcy, stretching the case out over five years. To that end, the Court agrees with Class Counsel that a risk adjustment of 5% is fair and reasonable in this case and is in line with the market rate. Therefore, the Undersigned recommends an award of $2,073,750.00 in attorneys' fees and costs.

E. Incentive Award

Finally, Plaintiff and Class Representative Latonya Simms requests an incentive aware of $5,000 to be paid from the $6.25 million cash Settlement, for her services to the Settlement Class. (Dkt. 167 at 26). Incentive awards "are justified when necessary to induce individuals to become named representatives." *Synthroid I,* 264 F.3d at 722. A named plaintiff is an essential ingredient of any class action. *Camp Drug Store*, 897 F.3d at 834. Therefore, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit. *Id.* In deciding whether an incentive award is proper and, if so, in what amount, "relevant factors include the actions the plaintiff has taken to protect the interests of the class, the

degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

Simms attached her name to this litigation since its original filing date in July 2013, assisted with pre-suit investigation, and participated in the discovery process. She remained involved throughout the bankruptcy of Simply Fashion and the subsequent stay of the present case. The award is justified based on her role working with class counsel, approving the settlement agreement and fee application, and volunteering to play an active role if the parties continued litigating through trial. Furthermore, courts in this Circuit routinely approve $5,000 incentive awards. The Undersigned can find no reason why this modest incentive award should not be approved.

IV. CONCLUSION

For the reasons detailed herein, the Magistrate Judge recommends that Plaintiff's Motion for Approval of Attorney's Fees, Cost, and Incentive Award (Dkt. 166) be **GRANTED** and Plaintiff's Motion for Final Approval of Class Action Settlement (Dkt. 172) be **GRANTED**.

Any objections to the Magistrate Judge's Report and Recommendation shall be filed with the Clerk in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), and failure to timely file objections within fourteen (14) days after service shall constitute a waiver of subsequent review absent a showing of good cause for such failure.

Date: 10/2/2018

Doris L. Pryor
United States Magistrate Judge
Southern District of Indiana

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