IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSHUA SOMOGYI, KELLY WHYLE SOMOGYI and STEWART SIELEMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. FREEDOM MORTGAGE CORP., Defendant.	Case No. 1:17-cv-06546-RMB-JS CLASS ACTION JURY TRIAL DEMANDED

PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS

Plaintiffs[1] Joshua Somogyi, Kelly Whyle Somogyi and Stewart Sieleman (collectively "Plaintiffs") respectfully move this Court pursuant to FED. R. CIV. P. 23(h) for entry of an Order:

1. awarding Plaintiffs' Counsel (including Berger Montague PC, Mahany Law Firm, and the Law Offices of Stefan Coleman, P.A.) attorneys' fees of $3,000,000, which represents approximately 31.58% of the $9.5 million non-reversionary cash Settlement Amount to be established for the Settlement Class in this litigation pursuant to the terms of the Parties' Settlement Agreement;

[1] Unless otherwise stated, all capitalized terms used herein are as defined in the Stipulation and Agreement of Settlement filed with the Court on August 1, 2019 (Dkt. 89-4) (the "Settlement Agreement").

2. awarding Plaintiffs' Counsel $60,658.30 in reimbursement for the actual Litigation Expenses they incurred and disbursed in prosecuting this litigation on behalf of Plaintiffs and the Settlement Class; and

3. awarding a Service Award of $5,000 to each of the three named Plaintiffs for their service in representing the Settlement Class in this Action.

The grounds on which this motion is based are set forth in the accompanying memorandum of law, the Declaration of Lawrence J. Lederer in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards filed concurrently herewith (the "Lederer Decl."), the documents, exhibits and additional information set forth in and attached to the Lederer Decl., all other documents filed in connection with the Settlement, and all other proceedings in this Action.

Accordingly, Plaintiffs respectfully request that this motion be granted and that the Court approve and enter the proposed form of Order that is contemporaneously submitted herewith.

Dated: June 2, 2020

Respectfully submitted,

Berger Montague PC

By: */s/ Lane L. Vines*

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CERTIFICATE OF SERVICE

I, Lane L. Vines, hereby certify that I caused a true and correct copy of the foregoing *Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards and Memorandum of Law in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards*, and accompanying documents, to be served upon counsel for defendant Freedom Mortgage Corp. via the Court's electronic filing system (ECF) on June 2, 2020:

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JOSHUA SOMOGYI, KELLY WHYLE SOMOGYI and STEWART SIELEMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. FREEDOM MORTGAGE CORP., Defendant.	Case No. 1:17-cv-06546-RMB-JS CLASS ACTION JURY TRIAL DEMANDED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS

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I. Introduction

After more than two years of hard-fought litigation, class counsel secured a $9.5 million cash fund and remedial relief binding defendant Freedom Mortgage Corp. ("FMC") to enhanced compliance with the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), *ad infinitum*. This is an excellent result in the circumstances of this case.

There were many obstacles to achieving any recovery. Plaintiffs[1] overcame two separate rounds of motions to dismiss or to stay; engaged in substantial formal and informal investigation and discovery that began before the filing of the first complaint, and extended throughout the mediation and settlement negotiation phases; and successfully navigated an evolving landscape in how the TCPA is interpreted and applied and also amid ongoing challenges to the constitutionality of the TCPA itself.

Absent the Settlement, Plaintiffs would face significant additional risk including contested class certification proceedings, summary judgment and, even assuming Plaintiffs survive summary judgment and certify a litigation class,

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[1] Unless otherwise stated, all capitalized terms used herein are as defined in the Stipulation and Agreement of Settlement filed with the Court on August 1, 2019 (Dkt. 89-4) (the "Settlement Agreement"); all citation to docket entries in the *Somogyi* action are to ECF rather than native page numbers; and all emphasis is added and internal quotation marks, citations and footnotes are omitted.

establishing liability and damages at trial and sustaining that judgment on appeal. Among other defenses, FMC contends that it had the requisite consent to call its own portfolio mortgage clients -- and that, in any event, this defense inherently raises individual issues that alone defeats a finding of predominance necessary to certify any litigation class. FMC also contends that it did not use an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice to make any telemarketing calls. Instead of continued risky, prolonged and costly additional litigation, the Settlement Class will be entitled to share in a substantial cash fund and remedial relief that, in sum, "is well designed with specific requirements and thus is likely to provide real prospective relief, and … meaningful additional benefit to consumers, rather than simply restating existing law." Russell Decl. ¶ 30.

Plaintiffs' Counsel prosecuted this litigation on a purely contingent basis and have received no payment or reimbursement of their expenses for their services. For their successful efforts, and in consideration of the work already undertaken on behalf of the Settlement Class and additional work going forward, Settlement Class Counsel on behalf of all Plaintiffs' Counsel seek attorneys' fees of $3,000,000, which is approximately 31.58% of the $9.5 million cash fund; reimbursement of $60,658.30 in litigation costs; and payment of $15,000 in total Service Awards, or

$5,000 each, for the three named Plaintiffs in recognition of their services for the Settlement Class.

The requested fee is fair given the relief secured for the Settlement Class, and the work that counsel did to achieve it. The requested fee is also consistent with percentage fee awards in TCPA and other class action cases in this Circuit and elsewhere. And a lodestar cross-check confirms that the requested fee, which represents a multiplier of approximately 1.84 on Plaintiffs' Counsel's collective current lodestar, "is well within the acceptable range in this Circuit" and is especially fair when coupled with the additional corporate compliance relief. *In re Nat'l Football League Players' Concussion Injury Litig.*, Nos. 18-2012, *et al.*, 2020 WL 2214131, at *3, n.8 (3d Cir. May 7, 2020) (holding that the district court's "lodestar cross-check revealed a multiplier of 2.96, which *is well within the acceptable range in this Circuit*").

Although the deadline remains open, no objection has been received as of May 29, 2020 to the requested fee following extensive notice to the putative Settlement Class of 1,524,198, or in response to the CAFA notice. *See* Kaufman Decl. ¶¶ 9-11; FMC's CAFA Cert. ¶ 1; Lederer Decl. ¶ 53. Plaintiffs also support the requested attorneys' fees. Lederer Decl. ¶ 75 (attaching Plaintiffs' supplemental declarations).

Here, counsel assumed substantial contingent risk in litigating this case. There was a real and distinct possibility of no recovery at all, and that no class would be certified. Given the many risks assumed, the complexity and amount of work involved, the skill and expertise required and the excellent relief secured, the Court should approve the requested fee, reimbursement of expenses, and payment of Service Awards in full.

II. Background[2]

A. Investigation and Complaints

Following extensive pre-complaint investigation, including interviews with former FMC employees who worked at one of FMC's call centers, the Somogyi plaintiffs filed the first of what ultimately included four separate complaints or amended complaints in this litigation. *Somogyi v. Freedom Mortg. Corp.*, C.A. No. 17-6546 (JBS/JS), 2018 WL 3656158, at *2 (D.N.J. Aug. 2, 2018). Subsequently, plaintiff Sieleman filed the related case *Sieleman v. Freedom Mortg. Corp.*, C.A. No. 17-13110 (JBS/JS) (D.N.J.).

Plaintiffs allege that, beginning in 2013, FMC called Plaintiffs' residential and cellular phones using an ATDS marketed by Genesys. Plaintiffs allege that this

[2] The Parties' Settlement Agreement (Dkt. 89-4 ¶¶ B-Y) and Plaintiffs' memorandum seeking preliminary approval of the proposed Settlement (Dkt. 89-2 at 10-16) describe this case's history and is incorporated here. *See also* Lederer Decl. ¶¶ 9-23 (summarizing procedural history).

system enabled FMC employees to press a single button on a computer keyboard screen, and that the software would then automatically choose a number to be called and dial it without further human intervention. Plaintiffs also allege that FMC used a "ringless voicemail" system to place prerecorded messages to customers; that FMC continued to place calls even after the customer requested that the calls cease; and that FMC managers deleted certain "do-not-call" ("DNC") requests from its computers so that even these customers could be called again. Plaintiffs contend that these practices constituted willful and/or knowing violations of the TCPA, and seek actual and statutory damages, treble damages and other relief. *See generally Somogyi*, 2018 WL 3656158, at *2 (summarizing allegations); *Sieleman v. Freedom Mortg. Corp.*, C.A. No. 17-13110 (JBS/JS), 2018 WL 3656159, at *1-2 (D.N.J. Aug. 2, 2018) (same).

B. FMC's Motions to Dismiss

FMC first filed a motion to dismiss or to stay in the *Somogyi* case on November 1, 2017. Dkt. 15. Plaintiffs responded by filing an amended complaint on November 20, 2017. Dkt. 19.

On December 18, 2017, FMC filed another motion to dismiss or to stay the litigation. Dkt. 26. Among other defenses, FMC argued that it did not use an ATDS because, under plaintiffs' own allegations, the pressing of a single button constitutes human intervention rather than automated calling; that plaintiffs were

not called using a random or sequential number generator; and that plaintiffs failed to plausibly allege that FMC used a prerecorded or artificial voice to call their residential line and failed to sufficiently allege facts regarding their DNC requests. FMC argued in the alternative that the Court should stay the litigation pending a ruling in *ACA International v. FCC*, C.A. No. 15-1211 (D.D.C.), concerning the Federal Communications Commission's interpretation of what constitutes an ATDS. *See* Dkt. 26-1 at 10-11.

Extensive briefing, supplemental briefing and additional written submissions followed. *See* Dkt. 28, 32-34, 40-41. FMC also filed a separate motion to dismiss in the *Sieleman* action, which was also followed by additional and separate briefing. *See Sieleman* Dkt. 6, 10, 14.

On July 19, 2018, Judge Simandle convened oral argument on the motions to dismiss in both the *Somogyi* (Dkt. 42, 45) and *Sieleman* (Dkt. 18) actions. On August 2, 2018, Judge Simandle issued separate rulings denying FMC's motions to dismiss, holding in both cases that Plaintiffs "alleged sufficient facts to plausibly state a claim under the TCPA." *Somogyi*, 2018 WL 3656158, at *8; *Sieleman*, 2018 WL 3656159, at *9.

By Order on August 9, 2018, the Court consolidated the *Somogyi* (Dkt. 51) and *Sieleman* (Dkt. 33) cases for discovery and case management purposes only. On September 13, 2018, FMC filed its answer and affirmative defenses in the

Somogyi action (Dkt. 56) and a separate answer and affirmative defenses in *Sieleman* (Dkt. 40). Subsequently, the Plaintiffs agreed to consolidate their cases for all purposes (voluntarily, without any need for judicial intervention), and FMC stipulated to the filing of Plaintiffs' operative Consolidated Second Amended Complaint in the first-filed *Somogyi* action (Dkt. 78, 80), following which the *Sieleman* action was dismissed. On April 12, 2019, FMC filed its answer and affirmative defenses to Plaintiffs' Consolidated Second Amended Complaint. Dkt. 85.

In its answer, FMC maintains, among other defenses, that it had the requisite consent to place calls to its own mortgage portfolio clients and that any calls fall within the "established business relationship" exception of the TCPA (*id.* ¶¶ 2-3 at 23); that FMC did not place any calls using an ATDS or an artificial or prerecorded voice (*id.*); and that FMC did not violate any DNC policies (*id.* ¶ 5 at 23). FMC also argues that any calls were informational, noncommercial and did not constitute telemarketing (*id.* ¶ 1 at 23); that Plaintiffs lack standing (*id.* ¶ 13 at 24) and are not proper representatives of any litigation class (*id.* ¶ 19 at 25); that FMC "established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the TCPA or any of its regulations" (*id.* ¶ 21 at 25); and that neither FMC nor its vendors even placed calls to all class members during the class period, and that this "uninjured" class member issue both

precludes the certification of any litigation class and violates FMC's due process rights. *Id.* ¶ 25 at 26.

C. Discovery

Plaintiffs engaged in extensive formal and informal discovery. Discovery began before the filing of the first complaint, and extended through the litigation, mediation and settlement negotiation phases. Lederer Decl. ¶ 18.

Among other things, after the Parties negotiated a discovery confidentiality order that the Court approved (Dkt. 71), Plaintiffs analyzed thousands of pages of documents and spreadsheets obtained from FMC (Lederer Decl. ¶ 19); subpoenaed and obtained additional documents from nine non-parties including telemarketing and telephone equipment vendors and telephone carriers (*id.* ¶ 19, 22); deposed three present or former FMC employees and prepared for, noticed and were scheduled to take the depositions of four other FMC employees as of the time the Settlement was reached (*id.* ¶ 19-21); obtained additional information via the Parties' initial disclosures, interrogatories and other written discovery including requests for onsite inspection of FMC's headquarters and branch offices (*id.* ¶ 19); briefed and argued discovery disputes over which this Court presided (*e.g.*, Dkt. 59-61); and retained and consulted with experts concerning ATDS, telephone voicemail and data mining and other issues. Lederer Decl. ¶ 19. Plaintiffs also attended scheduling and status conferences conducted by the Court (*e.g.*, Dkt. 64,

66), and received additional call data spreadsheets and other information as part of the mediation process. Lederer Decl. ¶ 19.

D. Mediation, Settlement Negotiations and Preliminary Approval

The Parties first agreed to mediate in February 2019 and retained the Hon. Diane Welsh, retired former U.S. Magistrate Judge for the Eastern District of Pennsylvania. *Id.* ¶ 24. On March 13, 2019, the Parties submitted to Judge Welsh detailed written mediation statements, and exchanged them with each other. *Id.* On March 18 and May 3, 2019, the Parties attended full-day, in-person mediation sessions at the offices of Judge Welsh. *Id.* On May 17, 2019, the Parties attended a third in-person mediation session. *Id.* The Parties did not reach any resolution during these mediation sessions. The May 17 mediation session ended early with the Parties still very far apart in their respective positions, and the Parties agreed to continue the litigation. *Id.*

Subsequently in May 2019, the Parties resumed their settlement negotiations independently and, via counsel, met both in-person and telephonically several times which ultimately led to the Settlement. *Id.* ¶ 25. On May 31, 2019, the Parties reached an agreement-in-principle to settle and, on July 8, 2019, entered into their MOU. *Id.* On July 31, 2019, the Parties entered into their Settlement Agreement following many additional negotiations concerning the terms. *Id.* ¶ 26. On August 1, 2019, Plaintiffs filed the Settlement Agreement with the Court, together

with Plaintiffs' accompanying motion, memorandum of law, and proposed forms of notice, claim forms, Preliminary Approval Order and Order and Final Judgment, seeking preliminary approval of the Settlement. Dkt. 89. On January 23, 2020, the Court conducted a conference call to discuss but not decide Plaintiffs' motion (Dkt. 92), following which Plaintiffs submitted an amended proposed Preliminary Approval Order. Dkt. 93.

On February 19, 2020, the Court conducted a hearing and, by oral ruling, granted preliminary approval to the Settlement, stating that "[t]he Court is completely satisfied that the settlement terms as proposed are fair, reasonable, adequate, and in the best interest of the settlement class." *Quoting* Feb. 19, 2020 Hrg. Tr. (Lederer Decl. Exhibit 4) at 17.

On February 24, 2020, the Court issued its Preliminary Approval Order. Dkt. 96. In accord with the Court's Preliminary Approval Order, notice was mailed beginning on April 24, 2020 to putative class members, and June 23, 2020 was established as the deadline for putative class members to file claims or to opt-out or object to any aspect of the Settlement, and September 10, 2020 for the Final Approval Hearing.[3] By Letter Order also on February 24, 2020, the Court directed

[3] At Plaintiffs' suggestion and with FMC's agreement, the Parties added the following language to both notices: "Due to the evolving situation concerning COVID-19, the Court may decide to hold this [Final Approval] Hearing telephonically. In the event the Court requires or permits telephonic participation

that Plaintiffs address the ruling in *Ward v. Flagship Credit Acceptance LLC*, C.A. No. 17-2069, 2020 WL 759389 (E.D. Pa. Feb. 13, 2020), and provide lodestar and other information. Dkt. 95.

III. Argument

A. The Requested Attorneys' Fees Should Be Granted in Full

"In a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). As the Supreme Court has long recognized, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Third Circuit has stated that the "heart of this [rule] is a concern for fairness and unjust enrichment; the law will not reward those who reap the substantial benefits of litigation without participating in its costs." *Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139, 145 (3d Cir. 1998).

To determine a reasonable fee, "the percentage-of-recovery method is favored in cases involving a common fund." *S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 773 (3d Cir. 2019). *See also Dewey v.*

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in this Hearing, the dial-in number for the Hearing will be posted on the Settlement website. Interested Settlement Class Members should check the Settlement website for that information prior to the Hearing." *See* Kaufman Decl. ¶ 8 (attaching exemplars of the notices); Lederer Decl. ¶ 47.

Volkswagen Aktiengesellschaft, 558 F. App'x 191, 197 (3d Cir. 2014) ("The percentage-of-recovery method is generally favored in cases involving a common fund") (quoting *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001)).

The percentage method "allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (citation omitted). *See also* REPORT OF THE THIRD CIRCUIT TASK FORCE, COURT AWARDED ATTORNEY FEES, 15 (Oct. 8, 1985), 108 F.R.D. 237, 255 (1986) ("recommend[ing] that in the traditional common-fund situation … the district court … should attempt to establish a percentage fee arrangement").[4]

Courts may also confirm the reasonableness of the percentage requested through a lodestar cross-check. *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). The purpose of the cross-check is merely to confirm the

[4] Courts in other Circuits also apply the percentage fee approach in common fund cases. *See, e.g.*, *Fresno Cty. Emps. Ret. Ass'n v. Isaacson*, 925 F.3d 63, 72 (2d Cir. 2019); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1267-68 (D.C. Cir. 1993); *In re Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 301 (1st Cir. 1995); *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991).

reasonableness of the requested fee. *Id.* at 305-06. The Court "should explain how the application of a multiplier is justified by the facts of a particular case" (*id.* at 306), but "the lodestar cross-check does not trump the primary reliance on the percentage of common fund method." *Id.* at 307. *See also In re AT&T Corp.*, 455 F.3d at 164 ("The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method.").

"The awarding of attorneys' fees in a class action settlement is within the Court's discretion, provided that the Court thoroughly analyzes and reviews an application for such fees." *Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, C.A. No. 08-3610 (CLW), 2015 WL 2383358, at *7 (D.N.J. May 18, 2015), *aff'd*, 639 F. App'x 880 (3d Cir. 2016) (citing *In re Rite Aid*, 396 F.3d at 299). *Accord In re National Football League Players' Concussion Injury Litig.*, 2020 WL 2214131, at *3, n.6 ("we give district courts considerable deference in fee decisions").

The Third Circuit has identified ten factors for courts to consider in reviewing requests for an attorney fee award in common fund cases:

> (1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee

> that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

In re Diet Drugs Prod. Liab. Litig., 582 F.3d 524, 541 (3d Cir. 2009) (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998)).

The *Gunter*/*Prudential* factors should not "be applied in a rigid, formulaic manner, but rather a court must weigh them in light of the facts and circumstances of each case." *Moore v. Comcast Corp.*, No. 08-cv-773, 2011 WL 238821, at *4 (E.D. Pa. Jan. 24, 2011). All applicable factors support approval of the requested 31.58% fee in this case.

1. Size of Fund Created and Number of Persons Benefitted

The non-reversionary $9.5 million cash fund alone is an excellent recovery for Settlement Class members and, as the Court stated during the preliminary approval hearing, is "a very, very reasonable sum comparatively to what we usually see in these cases." *Quoting* Feb. 19, 2020 Hrg. Tr. (Lederer Decl. Exhibit 4) at 23. *See also* Dkt. 89-2 at 21-22 (estimating per claimant payment of $37.61;

citing recoveries in other TCPA cases).[5] Subject to final approval by the Court, the net proceeds from the fund will be distributed evenly among what Plaintiffs anticipate will be at least tens of thousands of Authorized Claimants. *See* Dkt. 89-4 ¶ 4.2; Kaufman Decl. ¶ 13 (stating that, as of May 29, 2020, 49,705 claim forms have been received seeking to share in the settlement fund).

The cash fund will therefore provide a substantial benefit for the Settlement Class. *See, e.g.*, *Lenahan v. Sears, Roebuck & Co.*, No. 02-cv-0045, 2006 WL 2085282, at *19 (D.N.J. July 24, 2006), *aff'd*, 266 F. App'x 114 (3d Cir. 2008) ("The Class here is comprised of approximately 16,000 persons who will share in a cash settlement fund of $15 million, less attorneys' fees, expenses and incentive awards as granted by this Court. The settlement amount is significant, especially in view of the risks and obstacles to recovery presented in this case."); *Chemi v. Champion Mortg.*, C.A. No. 05-1238, 2009 WL 1470429, at *10 (D.N.J. May 26, 2009) ("While the current matter does not qualify as a 'very large settlement,' it is still significant that Plaintiffs have secured $1.2 million for the 917 class members"); *Maddy v. General Electric Co.*, CV-14-490-JBS-KMW, 2017 WL 2780741, at *7 (D.N.J. June 26, 2017) ("[T]here is tremendous benefit to the Class

[5] Plaintiffs have separately filed herewith a memorandum of law in support of Plaintiffs' motion for final approval of the Settlement that cites recoveries in other TCPA cases.

Members in light of the stage of the litigation, the remaining hurdles prior to even arriving at a trial date, and the risks associated with continued litigation").

Here, moreover, as another "material term to the proposed Settlement" (Dkt. 89-4 ¶ 3.1), within 180 days from the Effective Date FMC will also be obligated to:

> (a) designate a senior manager to be responsible for assuring FMC's compliance with the TCPA. That person will report directly to the office of the CEO;
>
> (b) provide additional training concerning the TCPA's do-not-call ("DNC") lists to ensure that all FMC employees, as well as all external third-party vendors of FMC (including any newly hired such vendors) that make marketing calls for or on behalf of FMC, adhere to FMC's DNC List; and
>
> (c) establish, maintain, and implement updated written procedures to facilitate TCPA compliance regarding DNC policies and DNC lists.

Id.

These TCPA compliance enhancements extend beyond the baseline requirements of the TCPA and its implementing regulations; will govern automatically and classwide, without the need for any Settlement Class Member to file a claim; and FMC would be obligated to implement and maintain these procedures on an *ad infinitum* basis, with potential additional consequences to the Company for any future alleged violations, including potential treble damages for

any future willful violations. *See* 47 U.S.C. § 227(b)(3)(C) (providing treble damages for willful and knowing violations of the TCPA).

As summarized by Professor Russell, "the proposed corporate compliance relief is unique and provides a novel additional benefit to plaintiffs when compared to other TCPA cases." Russell Decl. ¶ 26.

The relief obtained and the number of persons who will benefit therefore weighs in favor of the requested fee.

2. The Presence or Absence of Substantial Objections

Although as noted the objection deadline has not yet passed, no objection has been filed to any aspect of the requested fees as of May 29, 2020. Lederer Decl. ¶ 53. Further, the notices mailed by the Settlement Administrator, Heffler Claims Group LLC ("Heffler"), advised that Plaintiffs' Counsel would seek "up to" and "no more than" a 33⅓% fee award, not the reduced 31.58% actually requested. *See* Dkt. 96 at 15, 23. Also as noted above, no objections have been filed by any state of federal officials following the CAFA notice. *See* FMC's CAFA Cert. (Lederer Decl. Exhibit 11) ¶ 1.

Plaintiffs intend to file with the Court updated information concerning any potential objections by August 31, 2020 in accord with the Preliminary Approval Order. Dkt. 96 ¶ 15.

3. The Skill and Efficiency of the Attorneys Involved

Plaintiffs' Counsel are skilled class action litigators with experience in TCPA and other complex cases. *See* Lederer Decl. ¶¶ 3, 6, 7 (attaching firm résumés of Plaintiffs' Counsel); Dkt. 89-5, 89-6. As the Court stated during the preliminary approval hearing, "[t]he Court is satisfied that plaintiffs' counsel and proposed class counsel have adequate experience and abilities to represent the class." *Quoting* Feb. 19, 2020 Hrg. Tr. (Lederer Decl. Exhibit 4) at 17.

As the Court also stated, counsel "worked efficiently and appropriately to get a very fair settlement" (*id.* at 22), and the "Court has personal knowledge that the case was vigorously and appropriately and professionally litigated by both sides as reflected in the extensive docket entries. This Court has managed the litigation since its inception." *Id.* at 16. *Accord In re National Football League Players' Concussion Injury Litig.*, 2020 WL 2214131, at *5, n.11 ("We are hard-pressed to think of anyone better than Judge Brody in this instance to make this decision. The Court presided over this case from the start ….").

Class counsel's work secured the monetary and non-monetary benefits for the Settlement Class efficiently, and thereby helped conserve judicial resources which also supports the fee requested. *See, e.g., Kapolka v. Anchor Drilling Fluids USA, LLC*, C.A. No. 2:18-01007-NR, 2019 WL 5394751, at *9 (W.D. Pa. Oct. 22, 2019) (counsel's work saved "[c]onsiderable judicial time and resources").

The quality and experience of defense counsel is also relevant. *See, e.g.*, *Lan v. Ludrof,* C.A. No. 1:06-114-SJM, 2008 WL 763763, at *23 (W.D. Pa. Mar. 21, 2008) (counsel's achievement is "all the more compelling" when "confronted with a formidable opposition"); *In re Corel Corp. Inc. Secs. Litig.*, 293 F. Supp. 2d 484, 496 (E.D. Pa. 2003) (class counsel's success "in the face of formidable legal opposition further evidences the quality of their work").

FMC is represented by top litigators Michael McTigue and Meredith Slawe of Cozen O'Connor, and formerly with the national law firms Akin Gump and Drinker. Mr. McTigue, FMC's lead counsel, has over 25 years of litigation experience defending TCPA and consumer cases in courts throughout the country, and Ms. Slawe is also similarly experienced. *See* https://www.cozen.com/people/bios/mctigue-michael; https://www.cozen.com/people/bios/slawe-meredith.

This case involved a number of highly disputed complex, nuanced legal and factual issues under the TCPA and Rule 23, and uncertain and evolving issues such as what equipment qualifies as an ATDS. "The Third Circuit has explained that the goal of the percentage fee-award device is to ensure 'that competent counsel continue to undertake risky, complex, and novel litigation.'" *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 747 (E.D. Pa. 2013) (quoting *Gunter*, 223 F.3d at 198).

In evaluating the skill and efficiency of the attorneys involved, courts look to "the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Chemi,* 2009 WL 1470429, at *11. *Accord Maddy,* 2017 WL 2780741, at *7 (awarding 33⅓% fee; stating that the "issues in the case were thoroughly contested and this matter was 'hard-fought' by skilled, professional counsel" and that "simply stated, class counsel took this case on a pure contingency basis").

Plaintiffs' Counsel assumed a significant risk in undertaking this case on a pure contingency basis; invested time, effort and money over more than two years of litigation with no guarantee of recovery; and were prepared to continue prosecuting the litigation until conclusion. Here, in sum, the bottom line quality of representation is reflected in the exemplary Settlement before the Court. Class counsel's skill, tenacity and efficiency in navigating the many legal and factual challenges in this case also favor the requested fee.

4. The Complexity and Duration of the Litigation

The Parties have litigated this case for over two years. Plaintiffs' Counsel took this case on contingency, and there was a substantial risk that the investment of time, personnel and resources would not be successful. Courts have recognized

that this is an important consideration in determining an appropriate fee. *See, e.g. In re Merck & Co., Inc. Vytorin ERISA Litig.*, C.A. No. 08-285 (DMC), 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010) (holding that "[t]he risk of little to no recovery weighs in favor of an award of attorneys' fees"); *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104 (E.D. Pa. 2013) ("[A]s a contingent fee case, counsel faced a risk of nonpayment …. This factor supports approval of the requested fee."); *Kapolka*, 2019 WL 5394751, at *9 (representation "on a contingent basis … favors approving the fee award").

Although class counsel believe that the claims are meritorious, this case involves a number of complicated legal and factual issues and defenses. As discussed above, for example, FMC maintains that it had the requisite consent to call its own client borrowers and that it did not place any calls using an ATDS or an artificial or prerecorded voice. Along these lines, although rejecting FMC's motions to dismiss in full, Judge Simandle recognized that the ATDS issues alone would continue to be disputed, holding only that, "*[a]t this stage*, Plaintiffs' allegation satisfies the human intervention test …." *Somogyi*, 2018 WL 3656158, at *6. *Accord Sieleman*, 2018 WL 3656159, at *6 ("Plaintiff has *adequately pleaded* the ATDS element under the TCPA.").

Plaintiffs faced increasingly complex and evolving issues in how the TCPA is interpreted and applied, such as concerning what constitutes an ATDS, the

availability of damages, and even the constitutionality of the TCPA's automated call ban itself. *See, e.g., Collins v. Nat'l. Student Loan Program,* 360 F. Supp. 3d 268, 274 (D.N.J. 2018) (Bumb, J.) (granting defendant summary judgment on ATDS grounds; stating that "Plaintiffs fail to cite any evidence" that the system "has the 'present capacity' to initiate autodialed calls"); *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 962 (8th Cir. 2019) (affirming ruling that statutory damages under the TCPA violates due process); *Barr v. Am. Assoc. of Political Consultants, Inc.*, 19-631 (cert. granted Jan. 10, 2020; oral argument held May 6, 2020).

Even the issue of whether FMC's own portfolio clients could unilaterally revoke their consent to be called would be contested. *See, e.g., Reyes v. Lincoln Auto. Fin. Services*, 861 F.3d 51, 56 (2d Cir. 2017) ("the TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent"); *Medley v. Dish Network, LLC*, No. 18-13841, 2020 WL 2092594, at *5 (11th Cir. May 1, 2020) (nothing in the TCPA "allows unilateral revocation of consent given in a bargained-for contract").

Plaintiffs also faced risks in certifying a litigation class and maintaining it through a likely Rule 23(f) appeal, trial, post-trial motions, and any appeal on the merits. For example, FMC contends that its own mortgage portfolio putative class member clients had established business relationships with FMC and thus did not require separate consent for any calls made, and that the issue of consent, and

whether any class member properly revoked their consent to be called, raise individual issues that preclude certification of any litigation class. *See, e.g.*, Dkt. 85 ¶¶ 2-3 at 23. These defenses pose risk concerning especially predominance under Rule 23(b)(3). *See, e.g., In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 195 (3d Cir. 2020) (reversing class certification under Rule 23(f) on predominance grounds and remanding).

Further litigation will add additional complexity and prolong the proceedings. *See, e.g., Hegab v. Family Dollar Stores, Inc.*, C.A. No. 11-1206, 2015 WL 1021130, at *13 (D.N.J. Mar. 9, 2015) (complexity and duration of the litigation favored approval of fee); *Acevedo v. BrightView Landscapes, LLC*, C.A. No. 3:13-2529, 2017 WL 4354809, at *18 (M.D. Pa. Oct. 2, 2017) (awarding 33⅓% fee; "extensive informal discovery and … ample amount of time engaging in mediation [that included] three full-day sessions" supports requested fee).[6]

[6] As the Court is aware from experience, the risk of no recovery in complex cases of this type is real. In numerous hard-fought lawsuits, plaintiffs' attorneys have received little or no fee, despite *years* of meritorious, professional work, due to the discovery of facts unknown when the case started, changes in the law while the case was pending, or a decision of a judge, jury, or court of appeals. *See, e.g., Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming district court's ruling overturning jury verdict in favor of plaintiff class); *In re Oracle Corp. Secs. Litig.*, C.A. No. C01-00988SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd sub nom.*, 627 F.3d 376 (9th Cir. 2010) (affirming summary judgment for defendants after eight years of litigation).

From the outset, Plaintiffs' Counsel undertook this complex and potentially lengthy litigation knowing that there was significant and real risk as to whether counsel would be compensated. The complexity and duration of this litigation therefore also support the requested fee.

5. The Risk of Nonpayment

"Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees." *Saini v. BMW of North America, LLC*, C.A. No. 12-6105 (CCC), 2015 WL 2448846, at *18 (D.N.J. May 21, 2015). Courts have also recognized that "[s]uccess is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable." *Martin v. Foster Wheeler Energy Corp.*, C.A. No. 06-0878, 2008 WL 906472, at *4 (M.D. Pa. Mar. 31, 2008). "[C]ourts have recognized that the risk of non-payment is heightened in a case of this nature where counsel accepts a case on a contingent basis." *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 438 (D.N.J. 2004).

Plaintiffs' Counsel "accepted the responsibility of prosecuting this class action on a contingent fee basis and without any guarantee of success or award." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 281 (3d Cir. 2009) ("Class Counsel invested a substantial amount of time and effort to reach this point and obtain the favorable Settlement."). In undertaking this case, counsel faced risk in establishing liability through trial, judgment and any appeal, and maintaining

certification of a litigation class. *In re Rite Aid*, 396 F.3d at 304. While FMC agreed to settle, it also had significant defenses to both liability and class certification as discussed above. Obtaining any monetary or remedial relief was uncertain from the outset.

The risk of non-payment in this case also supports the requested fee. *See, e.g.*, *Hegab*, 2015 WL 1021130, at *13 (risk of non-payment supported requested fee where "[c]lass counsel undertook this action on a contingent fee basis, assuming a substantial risk that they might not be compensated for their efforts"); *Brumley v. Camin Cargo Control, Inc.*, C.A. Nos. 08-1798 (JLL), 10-2451 (JLL), 09-6128 (JLL), 2012 WL 1019337, at *11 (D.N.J. Mar. 26, 2012) (approving fee award of 33⅓%; "Plaintiffs' counsel risked non-payment during the period of their representation since they represented Plaintiffs entirely on a contingency basis, with no retainer fees or expenses paid at the beginning of the litigation."); *Lenahan*, 2006 WL 2085282, at *21 ("Plaintiffs still faced significant risks at trial … the risk of non-payment weighs in favor of approving the fee request.").

6. A Lodestar Cross-Check Supports the Requested Fee

The fairness of the requested 31.58% fee is confirmed by a lodestar cross-check. The Third Circuit has stated that the "abridged lodestar analysis" is calculated "by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given

geographical area, the nature of the services provided, and the experience of the attorneys." *In re Rite Aid*, 396 F.3d at 305. Unlike a statutory fee-shifting case, the lodestar cross-check of the percentage award in common fund cases "need entail neither mathematical precision nor bean-counting." *Id.* at 306. Instead, the Court "may rely on summaries submitted by the attorneys and need not review actual billing records." *Id.* at 307. *Accord Schuler v. Medicines*, C.A. No. 14-1149 (CCC), 2016 WL 3457218, at *10 (D.N.J. June 24, 2016).

As set forth in the accompanying declarations, Plaintiffs' Counsel collectively expended 2,727.10 hours in this litigation through May 31, 2020, including 2,206.40 hours by Berger Montague, 345.80 by Mahany Law, and 174.90 by the Law Offices of Stefan Coleman, representing a collective lodestar of $1,626,563.00.[7] Lederer Decl. ¶ 61. The work performed by each firm is also summarized in Plaintiffs' Counsel's accompanying declarations.

Accordingly, the requested fee of $3 million represents a multiplier of approximately 1.84 on Plaintiffs' Counsel's collective lodestar. This multiplier is

[7] In calculating lodestar, Plaintiffs' Counsel used their current billing rates. *See, e.g.*, *Lanni v. New Jersey*, 259 F.3d 146, 149-50 (3d Cir. 2001) ("When attorney's fees are awarded, the current market rate must be used. The current market rate is the rate at the time of the fee petition, not the rate at the time the services were performed."); *Earley v. JMK Assoc.*, No. 18-760, 2020 WL 1875535, at *1-2 (E.D. Pa. 2020) (accord).

lower than the 2.96 multiplier the Third Circuit recently affirmed as "within the acceptable range" in *In re Nat'l Football League*, 2020 WL 2214131, *3, n.8, and is in line with multipliers that have been approved by courts in TCPA and other cases within the Third Circuit and elsewhere. *See, e.g., In re Prudential*, 148 F.3d at 341 ("multiples ranging from one to four are frequently awarded in common fund cases, when the lodestar method is applied"); *In re Diet Drugs*, 582 F.3d at 545 (accord); *In re Rite Aid*, 396 F.3d at 307 ("the resulting multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award"); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 742 ("strongly suggest[ing]" that a multiplier of 3 would be warranted); *Fitzgerald v. Gann Law Books*, C.A. No. 2:11-04287 KM, 2014 WL 8773315 (D.N.J. Dec. 17, 2014) (TCPA case; awarding 35% fee under the percentage method with a multiplier of 2.0); *Dobkin v. NRG Residential Solar Solutions, LLC*, C.A. No. 3:15-05089 (D.N.J. May 14, 2018) (TCPA case; awarding fee of 33⅓% with a 2.3 multiplier); *Landsman & Funk*, 639 F. App'x 880 (TCPA case; affirming percentage award of 33⅓% with a multiplier of approximately 2); *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 256 (D.N.J. 2005) (approving 2.83 multiplier); *Milliron v. T-Mobile USA, Inc.*, 423 F. App'x 131, 135 (3d Cir. 2011) (affirming fee of 33⅓% and multiplier of 2.21; stating that "we have approved a multiplier of 2.99 in a relatively simple case").

A multiplier of 1.84 is also fair in the specific circumstances of this case given "the risks of nonrecovery facing counsel," and to "incentivize counsel to undertake socially beneficial litigation" and "reward counsel for an extraordinary result." *In re Prudential Ins.*, 148 F.3d at 340. *See also Kapolka*, 2019 WL 5394751, at *12 (approving 2.54 multiplier given "risk undertaken"; "substantial attorney time and resources expended"; the "positive result obtained"; and "the public interests advanced" by the litigation); *Lan*, 2008 WL 763763, at *27 (3.04 multiplier "justified by the skill and efficiency demonstrated by Class Counsel"); *Jackson v. Wells Fargo Bank*, 136 F. Supp. 3d 687, 717 (W.D. Pa. 2015) (2.83 multiplier "supported by the excellent result achieved for the class and the efficiency with which class counsel resolved the matter").[8] This factor therefore also supports the requested fees.

7. Awards in Similar Cases

The requested 31.58% fee is also consistent with percentage fee awards by courts in common fund cases within the Third Circuit. *See, e.g.*, *Castro v. Sanofi Pasteur Inc.*, C.A. No. 11-7178 (JMV) (MAH), 2017 WL 4776626, at *9 (D.N.J.

[8] Class counsel's lodestar will increase as additional work is performed communicating with putative class members, preparing additional filings and argument concerning final approval and, assuming the Court grants final approval, overseeing the claims administration and distribution process. Lederer Decl. ¶ 57. Thus, this will lower the multiplier.

Oct. 23, 2017) (awarding fee of 33⅓%; stating that "[t]he one-third fee is within the range of fees typically awarded within the Third Circuit through the percentage-of-recovery method"); *In re Gen. Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) (review of 289 class action settlements demonstrates "average attorney's fee percentage [of] 31.71%" with a median value that "turns out to be one-third"); *Williams v. Aramark Sports, LLC*, No. 10-cv-1044, 2011 WL 4018205, at *10 (E.D. Pa. Sept. 9, 2011) (accord); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) (citing cases; "courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses"); *In re Fasteners Antitrust Litig.*, C.A. No. 08-MD-1912, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014) (a one-third fee is "consistent with attorney's fees awards generally granted in this Circuit."); *In re Corel Corp.*, 293 F. Supp. 2d at 497-98 (awarding fee of 33⅓%); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 433-34 (E.D. Pa. 2001) (same).

The Third Circuit recently affirmed a fee award of 33⅓% in a TCPA case that had been contested by an objector. *See Landsman & Funk*, 639 F. App'x at 884.

The requested 31.58% fee is also consistent with, and lower than, the 33⅓% fee awards in many other TCPA cases. *See, e.g., Bais Yaakov of Spring Valley v.*

Peterson's Nelnet, LLC, C.A. No. 3:11-11 (TJB), 2015 WL 12866997 (D.N.J. Jan. 26, 2015); *Dakota Med., Inc. v. RehabCare Grp., Inc.*, C.A. No. 1:14-02081-DAD-BAM, 2017 WL 4180497, at *7-8 (E.D. Cal. Sept. 21, 2017); *Todd S. Elwert, Inc., DC v. All. Healthcare Servs., Inc.*, C.A. No. No. 15-2673, 2018 WL 4539287, at *4 (N.D. Ohio Sept. 21, 2018); *Wreyford v. Citizens for Transportation Mobility, Inc.*, C.A. No. 12-2524, 2014 WL 11860700, at *1 (N.D. Ga. Oct. 16, 2014); *Schwyhart v. AmSher Collection Servs., Inc.*, No. 15-1175, 2017 WL 1034201, at *3 (N.D. Ala. Mar. 16, 2017); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (finding 33% award appropriate in "in smaller cases -- particularly where the common fund is under $10 million").

The requested 31.58% fee is especially fair given the additional remedial relief achieved by the Settlement. *See, e.g.*, *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1244-45 (11th Cir. 2011) ("the $1.5 million payment is designed to compensate the class counsel for the non-monetary benefits they achieved for the class"); Russell Decl. ¶ 31 (concluding that "the corporate compliance relief in the proposed settlement … provides a significant benefit to class members, as well as to individuals outside the class, and is thus a material and valuable supplement to the monetary component of the settlement").

The bottom line combined cash and corporate compliance relief in the Settlement here, and the substantial work that class counsel undertook to achieve it, squarely distinguish this case from *Ward*, 2020 WL 759389. In *Ward*, Judge Baylson declined to approve a proposed $4 million TCPA class action settlement and a requested 33⅓% attorneys' fee, holding that, "[i]n a case such as this, where there was 'no real litigation,' the Court is doubtful that an attorneys' fee award of one-third of the settlement is justified." *Id.* at *22. In *Ward*, plaintiffs filed a complaint and then "[t]he parties immediately entered into" settlement negotiations (*id.* at *1); the defendant "never filed an answer or motion" (*id.* at *3); and "[t]here was no briefing on the substantive issues" and plaintiffs did only "informal discovery" and "confirmatory formal discovery" post-mediation that "did not include investigation into the merits" (*id.* at *12).[9]

Here, by contrast, this case was "vigorously and appropriately litigated by both sides as reflected in the extensive docket entries" (*quoting* Feb. 19, 2020 Hrg. Tr. (Lederer Decl. Exhibit 4) at 16); there is a comprehensive record of litigation,

[9] The parties in *Ward* seek to appeal Judge Baylson's ruling under FED. R. CIV. P. 23(f). *See Ward v. Flagship Credit Acceptance LLC*, No. 20-8019 (3d Cir.). Among other things, defendant contends that Judge Baylson "incorrectly failed to apply a presumption of reasonableness … finding instead that the parties' substantial informal discovery was insufficient." *Id.* Dkt. 2 at 9 (filed Mar. 9, 2020).

discovery, motion practice, briefing and argument; Plaintiffs do not even seek a fee of one-third, but instead an award of 31.58%; and the $9.5 million cash fund is coupled with remedial relief that, as the Court also previously stated, makes this "a terrific" result for the Settlement Class in "a very appropriately litigated case." *Quoting* Feb. 19, 2020 Hrg. Tr. at 23, 25. *Accord* Russell Decl. ¶ 26 ("Based on my research, it appears that the proposed corporate compliance relief is unique and provides a novel additional benefit to plaintiffs when compared to other TCPA cases.").

Thus, this factor also supports approval of the requested fee.

8. The Value of Benefits Attributable to the Efforts of Class Counsel Relative to the Efforts of Other Groups

Here, "[t]he entirety of the value achieved for the Class was attributable to Class counsel; no other groups, such as government agencies conducting investigations, were involved in this case." *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 421 (E.D. Pa. 2010) (approving 33.1% fee in consumer class action).

Further, to the extent that "[u]nsolicited telephone marketing calls ('robocalls') are a significant, pervasive problem facing consumers" as Judge Baylson stated in *Ward*, 2020 WL 759389, at *6, Plaintiffs' achievement in securing the cash and remedial relief proposed in the Settlement here is also

noteworthy from a public policy perspective because it fosters compliance with the TCPA. As Professor Russell stated:

> I also considered the corporate compliance relief in light of the history, purpose, and text of the TCPA, which further contributes to my opinion that the compliance relief materially supplements and adds value on top of the cash component of the settlement, for the benefit of the settlement class. The TCPA's primary purpose is to reduce the likelihood of residential telemarketing. In passing the Act, Congress found that unrestricted telemarketing constitute an "an intrusive invasion of privacy and … a risk to public safety," noted citizens' widespread "outrage[] over the proliferation of intrusive, nuisance calls to their homes from telemarketers," and the need for federal law designed to "control residential telemarketing practices." P.L. 102-243, Sec. 2.

Russell Decl. ¶ 19.

Therefore, this factor supports the fee requested.

9. The Percentage Fee that Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Arrangement

"[T]he goal of the fee setting process is to 'determine what the lawyer would have received if he were selling his service in the market rather than being paid by Court Order.'" *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *15 (E.D. Pa. June 2, 2004).

The requested 31.58% fee is consistent with privately negotiated contingent fees on the open market. *See, e.g., Bredbenner v. Liberty Travel, Inc.*, C.A. No. 09-1248, 2011 WL 1344745, at *21 (D.N.J. Apr. 8, 2011) (stating that, in private,

non-class action litigation, "the customary contingent fee would likely range between 30% and 40% of the recovery"); *In re Remeron Direct Purchaser Antirust Litig.*, C.A. No. 03-0085 (FSH), 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation."); *Halley v. Honeywell Int'l Inc.*, 861 F.3d 481, 496 (3d Cir. 2017) (accord); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 340 (E.D. Pa. 2007) ("'[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.'"). Accordingly, this factor favors the fee requested.

10. Any Innovative Terms of Settlement

Class action settlements often provide a direct financial benefit to the plaintiff class. But many, if not most, do not deliver specific, concrete corporate compliance relief directly addressing the very conduct being complained of. *See* Russell Decl. ¶ 26 ("Based on my research, it appears the proposed corporate compliance relief is unique and provides a novel additional benefit to plaintiffs when compared to other TCPA cases.").

Here as previously noted, the remedial relief, which consists of enhanced training, monitoring, and compliance reporting directly to the CEO, governs automatically, classwide, and obligates FMC permanently. Further, as Professor

Russell states, this relief "is closely calibrated to its intended goal of reducing the likelihood of TCPA violations in the future." *Id.* ¶ 12. In reaching that conclusion, Professor Russell analyzes those reforms based on four categories: "first, general principles of the design of corporate compliance programs; second, the nature and purpose of the TCPA statute; third, the relevance of the relief to the settlement class; and fourth, a consideration of the relief in light of the settlement as a whole and in comparison to other TCPA settlements." *Id.*

Accordingly, this factor also supports the requested fee.

B. Counsel's Expenses Are Reasonable and Should Be Reimbursed

"Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Safety Components, Inc. Secs. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001) (citing *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1224-25 (3d Cir. 1995)). *Accord* FED. R. CIV. P. 23(h).

Collectively, Plaintiffs' Counsel expended a total of $60,658.30 in out-of-pocket costs and disbursements in this litigation through May 31, 2020, consisting of $49,216.86 by Berger Montague, $9,492.24 by Mahany Law, and $1,949.20 by Coleman. Lederer Decl. ¶ 77. This amount is less than the $85,000 maximum set forth in the notice to the Settlement Class, and consists primarily of costs for experts that Plaintiffs retained and counsel paid; mediation fees and costs; and

computerized research and deposition reporting and transcripts. *Id.* ¶ 78. All of the expenses incurred were reasonable and necessary to the prosecution of this case. *Id.* ¶ 81.

Reimbursement of these expenses should be approved in full. From the beginning of the case, counsel funded this litigation aware that they might not obtain any recovery or reimbursement of the costs they advanced and, at the very least, would not recover anything until the litigation concluded and was successful in producing a recovery. Counsel also understood that, even if the case was ultimately successful, an award of expenses would not compensate counsel for the lost use of the funds advanced. The expenses incurred are reasonable in the circumstances of this case and should be approved. *See, e.g., In re Remeron End-Payor Antitrust Litig.*, C.A. Nos. 02-2007 FSH, 04-5126 FSH, 2005 WL 2230314, at *32 (D.N.J. Sept. 13, 2005); *Bradburn*, 513 F. Supp. 2d at 336; *Tavares v. S-L Distrib. Co.*, C.A. No. 13-1313, 2016 WL 1743268, at *15 (M.D. Pa. May 2, 2016).

Settlement Class Counsel anticipate that they will incur some additional expenses in connection with final approval and, assuming the Court grants final approval, overseeing the distribution of the net settlement funds. Lederer Decl. ¶ 82. Counsel intends to provide the Court with supplemental information

concerning their out-of-pocket costs by August 31, 2020 in accord with the Preliminary Approval Order. Dkt. 96 ¶ 15.

C. Plaintiffs Should Receive the Requested Service Awards

"'Incentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class.'" *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 334 n.65 (3d Cir. 2012).

"'The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation,' and to 'reward the public service of contributing to the enforcement of mandatory laws.'" *Id.* (quoting *Bredbenner*, 2011 WL 1344745, at *21). *Accord In re Liquid Aluminum Sulfate Antitrust Litig.*, C.A. No. 16-md-2687 (MCA) (MAH), 2019 WL 7375288, at *6 (D.N.J. Nov. 7, 2019) (awarding lead plaintiffs $25,000 each).

"[C]ourts regularly approve $5,000 incentive awards in common fund cases like this one." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 503 (N.D. Ill. 2015) (TCPA case; dismissing objections to $5,000 service award, finding that plaintiff "attached his name to this litigation and participated in pre-filing investigation and informal and formal discovery"). *See also Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 239 (N.D. Ill. 2016) (courts have "routinely granted $5,000 incentive awards to named plaintiffs in TCPA cases"); *In re Capital One*, 80 F. Supp. 3d at

809 (accord); *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041 (N.D. Ill. 2011) (citing cases); *Vandervort*, 8 F. Supp. 3d at 1210 (awarding two plaintiffs $5,000 each).

The notices mailed to Settlement Class Members also advised of the requested Service Awards. Again while the deadline remains open, no objections from any Settlement Class Member were received as of May 29, 2020, and no objections were filed or received in response to the CAFA notice.

Service Awards of $5,000 to each Plaintiff should be granted in full. Here, each Plaintiff assisted in the development of the facts in this case; assisted in preparing the complaints and amended complaints; produced applicable documents to FMC; attended depositions conducted by FMC; conferred with counsel throughout the investigation, litigation, discovery, mediation and settlement phases; and, more generally, spearheaded this litigation throughout as the Court-appointed class representatives. Dkt. 96 ¶ 4; Lederer Decl. ¶¶ 84-85.

Plaintiffs' willingness to step forward and serve as the lead plaintiffs and class fiduciaries directly led to the benefits that the proposed Settlement provides to the Settlement Class. Thus, the requested Service Awards should be approved in full. *See also Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) ("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"); *Kapolka*, 2019 WL 5394751, at *13 ("Courts have ample authority to award incentive or 'service' payments to particular class members where the individual provided a benefit to the class or incurred risks during the course of the litigation.").

CONCLUSION

Plaintiffs respectfully request that the Court grant the requested attorneys' fees, reimbursement of expenses, and Service Awards in full.

Dated: June 2, 2020

Respectfully submitted,

Berger Montague PC

By: */s/ Lane L. Vines*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSHUA SOMOGYI, KELLY WHYLE SOMOGYI and STEWART SIELEMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. FREEDOM MORTGAGE CORP., Defendant.	Case No. 1:17-cv-06546-RMB-JS CLASS ACTION JURY TRIAL DEMANDED

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND PAYMENT OF SERVICE AWARDS

Plaintiffs'[1] Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards (the "Fee Motion") came before the Court for hearing on September 10, 2020. The Court has considered the Fee Motion and all other submissions and argument in connection therewith, including the memorandum of law in support thereof, the Declaration of Lawrence J. Lederer, the declarations and other documents attached thereto, and all additional papers and argument filed in connection therewith and during the Final Approval Hearing and all other prior proceedings in this litigation. Adequate notice of the

[1] Unless otherwise stated, all capitalized terms used herein are as defined in the Stipulation and Agreement of Settlement filed with the Court on August 1, 2019 (Dkt. 89-4) (the "Settlement Agreement").

Settlement and the Fee Motion having been given to the Settlement Class in accordance with the Court's Preliminary Approval Order preliminarily approving the Settlement (Dkt. 96), and the Court having considered all other papers and proceedings in this matter, the Court hereby finds, concludes, and Orders, as follows:

1. This Court has jurisdiction over the subject matter of the Action and over all parties to the Action, including members of the Settlement Class.

2. Notice of the Fee Motion was provided to putative Settlement Class Members in a reasonable manner, and such notice complies with Rule 23(h)(1) of the FED. R. CIV. P. and the requirements of due process.

3. Settlement Class Members were timely and properly given the opportunity to object to the Fee Motion in compliance with Rule 23(h)(2) of the FED. R. CIV. P.

4. No Settlement Class Member objected to the Fee Motion.

5. The Fee Motion is granted. Plaintiffs' Counsel are hereby awarded a total attorneys' fee in the amount of $3,000,000, or approximately 31.58% of the total $9.5 million gross Settlement Amount.

6. In addition, Plaintiffs' Counsel are also awarded $60,658.30 total in reimbursement of Litigation Expenses they incurred and disbursed in prosecuting this litigation for the Settlement Class.

7. In making this award of attorneys' fees and expenses to be paid from the Settlement, the Court has considered and found that:

a. The Settlement has created a non-reversionary settlement fund of $9.5 million in cash and remedial relief for the benefit of the Settlement Class pursuant to the terms of the Settlement Agreement and the Preliminary Approval Order;

b. Settlement Class Members who timely submit valid Claim Forms will benefit from the Settlement because of the efforts of Plaintiffs' Counsel, and all Settlement Class Members will benefit automatically from the corporate remedial relief that is also a material part of the Settlement;

c. The fee sought by Plaintiffs' Counsel is fair and reasonable in the circumstances of this case and supported by Plaintiffs, and no objections from any member of the Settlement Class has been received to the Fee Motion;

d. The Plaintiffs have each submitted sworn declarations in support of the Settlement and the Fee Motion;

e. The notice mailed to putative Settlement Class Members stated that Plaintiffs' Counsel would seek attorneys' fees of up to one-third of the Settlement Amount, or $3,166,666.67 total, and reimbursement of up to $85,000 in Litigation Expenses, and further directed Settlement Class Members to a website on which the Fee Motion and other information concerning the Settlement was

accessible shortly after being filed with the Court, and no objections to the Fee Motion were made as stated above;

f. This Action has been prosecuted with skill, perseverance, and diligence as reflected by the Settlement achieved and the positive reception of the Settlement by the Settlement Class;

g. The Action involved complex factual and legal issues that were skillfully researched and developed by Plaintiffs' Counsel, and vigorously disputed by defendant Freedom Mortgage Corp. ("FMC");

h. Had the Settlement not been achieved, a significant risk existed that Settlement Class Members may have recovered significantly less than the Settlement reached or nothing from defendant FMC or that no class would be certified by the Court;

i. Public policy considerations also support the requested fee in that Plaintiffs' Counsel undertook this litigation on a completely contingent basis, dedicating significant resources to successfully prosecute this Action on behalf of the Settlement Class; and

j. The amount of attorneys' fees awarded and expenses reimbursed is reasonable and appropriate to the specific circumstances of the Action.

8. Plaintiffs Joshua Somogyi, Kelly Whyle Somogyi and Stewart Sieleman are each awarded $5,000 payable from the Settlement Amount in view of their participation and contributions to this litigation and representation of and service to the Settlement Class.

9. There is no just reason for delay in the entry of this Order, and immediate entry of this Order by the Clerk of Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: _____, 2020

THE HONORABLE JOEL SCHNEIDER
UNITED STATES MAGISTRATE JUDGE