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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DIANA SOUKHAPHONH, individually and on behalf of all others similarly situated,

Plaintiff,

v.

HOT TOPIC, INC., a California corporation,

Defendant.

Case No. 2:16-CV-05124-DMG (AGRx)

Hon. Dolly M. Gee

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR CLASS REPRESENTATIVE SERVICE AWARDS AND FOR ATTORNEYS' FEES AND EXPENSES

Date: February 7, 2020
Time: 10:00 a.m.
Place: Courtroom 8C

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on February 7, 2020 at 10:00 a.m., in Courtroom 8C of the above-captioned Court before the Honorable Judge Dolly Gee, Plaintiff Diana Soukhaphonh ("Plaintiff") will and hereby does move for an Order awarding: (a) a service award of $15,000 to Plaintiff; (b) Class Counsel's attorneys' fees in the amount of $835,800, totaling 28% of the $2,985,000 Settlement Fund, and; (c) reimbursement of litigation expenses in the amount of $100,000.

Plaintiff respectfully requests that the Court grant this motion because: (a) the service award is modest and justified in light of Plaintiff's time and commitment to the case; (b) the requested attorneys' fees are fair and reasonable because Class Counsel was able to achieve an excellent result through a settlement that provides a remedy to all class members nationwide in a case that faced extremely high risks if litigation continued, in that Defendant was at financial risk of bankruptcy, continued to maintain that it obtained Plaintiff's and class members' consent to receive promotional text messages, and would have challenged Plaintiff's motion for class certification; (c) Class Counsel expended extensive and longstanding efforts to create a Settlement Fund of $2.985 million and obtain permanent injunctive relief that provides immediate, substantial, and continuing benefits to the class; (d) the requested fees comport with Ninth Circuit case law developed in similar common fund litigation; and (e) the $100,000 in expenses for which reimbursement is sought is substantially less than the expenses that were actually reasonably and necessarily incurred prosecuting this action.

This Motion is based upon the Memorandum of Points and Authorities; the concurrently filed Declarations of David P. Milian, Robert Ahdoot, and Plaintiff Diana Soukhaphonh; the Class Action Settlement Agreement (the "Settlement") previously filed with the Court (ECF 237-1); and all papers filed in support thereof; the argument of counsel; all papers and records on file in this matter; and such other matters as the Court may consider.

Dated November 22, 2019

By: */s/ Robert Ahdoot*
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Class Counsel and Attorneys for Plaintiff

TABLES OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Class Counsel[1] request that the Court award its attorneys' fees in an amount equal to 28% of the $2.985 million settlement fund (*i.e.,* $835,800), plus costs and expenses capped at $100,000, and an incentive award of $15,000 for Diana Soukhaphonh, the named plaintiff.

The requested fees are fair and reasonable because Class Counsel were able to achieve an excellent, efficient settlement that provides monetary relief to all class members, as well as important injunctive relief that will benefit the class and the public generally. While facing the risk that class members (and Class Counsel) could receive nothing had this case ended unfavorably in litigation, Class Counsel's efforts resulted in the creation of a Settlement Fund totaling $2,985,000, a portion of which Defendant Hot Topic, Inc. (hereinafter "Defendant" or "Hot Topic') has already deposited in escrow. The Settlement also provides for prospective relief in the form of Defendant's cessation of its text marketing program that Plaintiff contends violates the Telephone Consumer Protection Act ("TCPA") and requires Hot Topic's commitment to undertake substantive training before it implements its plan to re-engage in a text messaging program.

For its success in achieving the Settlement, Class Counsel should be awarded the fees it requests, which amount is also reasonable under a lodestar crosscheck provided below for the Court's consideration (indeed the amount requested *is far less than* Class Counsel's actual lodestar and results in a negative multiplier of .66). Class Counsel further requests reimbursement of its reasonable expenses capped at the amount agreed to under the Settlement of $100,000. This amount is also far less than the actual amount of expenses incurred ($155,999.61). Class Counsel also seeks an incentive award of $15,000 for the named Plaintiff, who spent three years diligently prosecuting this case, traveled from her home in Delaware to California for her deposition and was deposed a

[1] Capitalized terms not otherwise defined herein, shall have the same meaning set forth in the Settlement Agreement, docketed as D.E. 237-1.

second time in Delaware. In addition to the numerous hours she spent before and after work assisting Class Counsel, Ms. Soukhaphonh was required to miss 4 days of work to fulfill her obligations to the Class. Hot Topic has advised that it does not, and will not, oppose these requests. Class Counsel and Plaintiff respectfully request that the Court grant this Motion.

II. BACKGROUND

A. Procedural History

Plaintiff alleged that Defendant sent her a promotional text message without obtaining prior express written consent, in violation of the TCPA. Plaintiff further alleged that Defendant engaged in a widescale practice of sending promotional text messages to similarly-situated consumers throughout the United States without obtaining the level of consent required by the TCPA. Following extensive pre-filing investigations,[2] on July 12, 2016, Plaintiff filed a Class Action Complaint (ECF 1), alleging negligent and willful violations of the TCPA and seeking statutory damages and injunctive relief.

In September 2016, Defendant moved to dismiss the Complaint for lack of standing under Article III (ECF 21), arguing that Plaintiff's receipt of a single text message, at best, causes only a *de minimis* harm that fails to establish Article III standing. In January of 2017, the Court denied Hot Topic's motion to dismiss (ECF 41) because it "agree[d] with [Plaintiff] to the extent that her invasion of privacy allegation constitutes a concrete injury for the purpose of establishing Article III standing." ECF 41 at 2.

Shortly thereafter, the Court permitted Hot Topic to file a motion for summary judgment on its affirmative defense of consent. ECF 46. Hot Topic's motion for summary judgment (ECF 53) was denied in February of 2018. ECF 175. The Court explained that:

[2] For instance, before filing this action, Plaintiff and her counsel investigated the means by which Hot Topic acquired consumers' cell phone numbers, the dialing technology used by Hot Topic to deliver text messages, and the potential litigation risks relating to the terms "ATDS," "advertisement," "telemarketing," "promotional," and "express written consent." *See* D.E. 237-3 ¶ 5. Class Counsel also conducted numerous pre-filing interviews of Plaintiff and reviewed electronic data and various online materials concerning Defendant's marketing practices. *Id.*

> Hot Topic's defense hinges upon the premise that Plaintiff provided prior express consent by opting-in to receiving text message alerts on May 26, 2015. Therefore, the Court must determine whether Hot Topic has satisfied its burden of showing that the only reasonable inference a factfinder could draw is that Plaintiff opted-in during that transaction.

ECF 175 at 7. The Court concluded that summary judgment was improper because "[t]here is a genuine dispute of material fact regarding whether Plaintiff opted-in to receiving text messages during her May 26, 2015 online transaction." *Id.* at 11. The Court continued, "The resolution of this disputed fact affects not only whether the first text message introduced or included an advertisement or constituted telemarketing, but also whether Plaintiff provided prior express consent and/or prior express written consent for that text message." *Id.* at 11.

In April 2018, Hot Topic moved to stay the case pending the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041 (9th Cir. 2018). ECF 184. The issue on appeal in *Marks* was whether certain equipment used constituted an automatic telephone dialing system ("ATDS") under the TCPA even though it did not have the present or potential capacity to generate random or sequential telephone numbers. Plaintiff bore the burden of proving that the dialing technology employed by Defendant constituted an ATDS as an element of Plaintiff's claim. Because the law on this critical component of Plaintiff's claims was ever-changing and rulings within the Ninth Circuit lacked uniformity, the Court granted Hot Topic's motion to stay "pending the outcome in *Marks,*" finding that the Ninth Circuit's decision could "effectively terminate this action" or, in the least, "provide further clarity on the statutory definition of ATDS and thereby significantly narrow the scope of permissible discovery in this case." ECF 200 at 4. On September 20, 2018, the Ninth Circuit rendered its opinion, finding that "the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically." *Marks*, 904 F.3d at 1052. Accordingly, on October 30, 2018, the Court lifted the stay. ECF 202.

In March of 2019, Plaintiff moved for class certification and appointment of class counsel. ECF 212. Following a day-long mediation before the Honorable Edward A. Infante (Ret.) and multiple subsequent phone conferences and in-person meetings, the parties settled the case and signed the Settlement Agreement. ECF 227. On May 17, 2019, Plaintiff moved for preliminary approval of the Settlement and approval of the form and method of class notice. ECF 237. The Court preliminarily approved the Settlement on July 29, 2019 (ECF 255), after requesting additional briefing (ECF 244).

B. Class Counsel Engaged In Substantial Discovery and Motion Practice

This case required substantial work in discovery and motion practice. Class Counsel propounded and responded to numerous written discovery requests, issued third party subpoenas, and participated in a total of 11 depositions, including the Plaintiff's, who was deposed twice. Declaration of David P. Milian ("Milian Decl.") ¶7, concurrently filed.

Quickly after filing the Complaint, Class Counsel had to oppose a blockbuster motion to dismiss (ECF 23), raising novel Article III standing issues and which opposition entailed several supplemental filings (ECF 25-27, 29, 36-40). This Court then issued its Order Denying Defendant's Motion to Dismiss on January 13, 2017 (ECF 41).

Written discovery propounded between the parties in this action included the following: Plaintiff's First Request for Production Directed to Defendant; Plaintiff's First Set of Interrogatories Directed to Defendant; Plaintiff's Second Request for Production Directed to Defendant; Defendant Hot Topic Responses to First Request for Production; Defendant Hot Topics Responses to First Set of Interrogatories; Plaintiff's Responses to Defendant's First Request for Production; Plaintiff's Responses to Defendant's First Set of Interrogatories; Plaintiff's Responses to Defendant's Requests for Admissions. Milian Decl. ¶ 8.

In addition, Class Counsel served third party subpoenas *decus tecum* for depositions on the following key witnesses: T-Mobile, Jessica Chien, Jorge Rivas, Mary Galfaian, Eugenia Wu, Omid Yardi, Loyalty 360, and Impact Mobile (a Canadian

company). Milian Decl.¶ 7.

Defendants and the third party respondents objected to nearly every discovery request. Over several months Class Counsel engaged in a series of telephonic meet-and-confer conferences to resolve or narrow the scope of these disputes. The parties were able to resolve many of their disputes without Court intervention. However, despite these good faith efforts, some of the parties' disputes required court intervention. The parties brought several discovery disputes during Phase 1 before Magistrate Judge Alicia G. Rosenberg, and held multiple telephonic conferences and hearings during Phase II before Hon. William McCurine, Jr. (Ret.), Special Master. (ECF 182).

These efforts resulted in the production and review of over 10,000 pages of documents produced by Defendants and third parties in this action. Plaintiff's discovery efforts were critical to the prosecution and ultimate success in this case. Milian Decl.¶ 9(g).

On May 5, 2017, Hot Topic moved for summary judgment arguing, in part, that Plaintiff had consented to receive text messages from Hot Topic. In support of its claims, Hot Topic relied on numerous declarations and electronically stored data contained in its two legacy data systems and information extracted from allegedly accurate restorations of those systems. (ECF 53, 54, 55, 56, 57). Defendant retained the national accounting firm KPMG LLP as its information systems expert to support Defendant's summary judgment motion. ECF 57-1. To adequately oppose the motion, Class Counsel retained a computer forensics and data analysis expert. Class Counsel conducted an extensive review of Hot Topic's records to argue that disputed issues concerning Plaintiff's lack of consent exist, precluding the proper entry of summary judgment. Plaintiff's opposition to the motion was comprehensive (ECF 144), included a detailed statement of genuine disputes of material fact and additional uncontroverted facts (ECF 145), was supported by multiple declarations (ECF 146, 147, 148, 149) and raised specific evidentiary objections under FRE 106, 602, 701, 702, 705, 802, 803 and 901 (ECF 150). This Court then denied Hot Topic's Motion for Summary Judgment (ECF 175).

C. The Settlement Resulted From Contentious Arms-Length Negotiations

From the outset of the case, the Parties engaged in direct communications, and as part of their obligation under Fed. R. Civ. P. 26, discussed the prospect of resolution. Those discussions eventually led to an agreement between the Parties to engage in mediation, which the Parties agreed would take place before U.S. District Court Judge Edward Infante (Ret.), a highly regarded neutral with JAMS and who possesses substantial experience mediating complex class action cases. In preparation for the mediation, Class Counsel prepared a detailed mediation statement, which it shared with Defendant, outlining the strengths of Plaintiff's case and assessing Defendant's claims.

On August 7, 2017, the parties attended a full-day mediation session before Hon. Edward A. Infante (Ret.). Despite the parties' good faith efforts, the action was not settled at that time. (ECF 92). On March 7, 2019, Class Counsel, Defendant's General Counsel, and Defendant's litigation counsel met in person to discuss settlement. In the four week period following the March 7th meeting, Class Counsel engaged in over a dozen conference calls with Defendant's General Counsel and litigation counsel regarding settlement. Also during that period Class Counsel filed Plaintiff's Motion for Class Certification. (ECF 224). Settlement negotiations were at all times contentious and hard fought. These efforts culminated on April 8, 2019 with the parties' execution of a binding Settlement Term Sheet. That process included multiple rounds of redlines and multiple phone calls between Class Counsel and Defendant's counsel to discuss proposed edits. On May 17, 2019, Plaintiff filed her Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement and attached a copy of the parties' fully executed Settlement Agreement. (ECF 237). Milian Decl. ¶13.

The Settlement applies to a class consisting of all persons "who received one or more text messages sent by or on behalf of Defendant Hot Topic to a cellular phone between August 1, 2012 and the date th[e Settlement Agreement] is preliminarily approved [(*i.e.*, July 29, 2019)]." ECF 237 at 6. The Settlement Fund totals $2,985,000 and consist of a $1.5 million guaranteed, non-reversionary component; *i.e.*, not a penny

of this amount may revert to Hot Topic under any circumstance. *Id.* at 7. In addition, to the extent the total amount of approved claims multiplied by fifteen dollars exceeds $1.5 million, the Settlement Fund will be increased upwards so that it equals the total amount of approved claims multiplied by fifteen dollars, up to the total amount of the Settlement Fund (*i.e.*, $2.985 million). *Id.* That amount will cover *pro rata* payments to class members, the class representative's incentive payment, and attorneys' fees and costs. *Id.* at 7-8.

Finally, and significantly, Defendant agreed to the entry of a permanent injunction prohibiting it from continuing or reinstituting the marketing practices that Plaintiff alleged violated the TCPA. In addition, before restarting its text message marketing program, Defendant must comply with all TCPA requirements and institute compliance and training measures to prevent future violations of the TCPA. ECF 237 at 8; ECF 246 at 4.

III. LEGAL STANDARD

Plaintiffs' Counsel seeks an award of attorneys' fees in the amount of $835,800, which represents 28% of the $2.985 million Settlement Fund. Rule 23 permits a court to award "reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).

In common fund cases, the Ninth Circuit permits district courts to award attorney's fees under either the "percentage of the benefit" method or the "lodestar" method. *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *Hanlon v Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). As numerous courts have held, a fee request may be properly based on the total settlement fund that has been made available to the class. "The percentage [for determining fees] applies to the total benefits provided, even where the actual payments to the class following a claims process is lower." *Hall v. Bank of Am., N.A.*, No. 1:12-cv-22700-FAM, 2014 WL 7184039, at *9 (S.D. Fla. Dec. 17, 2014). The Supreme Court has "recognized consistently that a litigant or 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).

Both the Ninth and Second Circuits have ruled that it is an abuse of discretion to base class counsels' fee awards on the dollar amount of the claims made rather than a percentage of the entire fund available to the class. *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (reversing district court for basing fee award on claimed portion of common fund); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (same). District courts within the Eleventh Circuit have implemented the reasoning of the Ninth and Second Circuits. *See, e.g., Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV-GOODMAN, 2016 WL 1529902, at *23 (S.D. Fla. Apr. 14, 2016) ("the valuation of counsel's fee should be based on the opportunity created for the Settlement Class . . . [a]nd counsel should not be penalized for class members' failure to take advantage of such a settlement"); *Los Santos v. Millward Brown, Inc.*, No. 9:13-CV-80670-DPG, 2015 WL 11438497 (S.D. Fla. Sept. 11, 2015) (approving $2,750,000 in attorneys' fees where, at time of class counsel's fee request, 7,599 class members had submitted claims for $50 each resulting in a distribution to class members totaling $379,950). These decisions are consistent with *Boeing,* 444 U.S. at 480-81, in which the Supreme Court concluded that attorneys for a successful class may recover a fee based on the entire common fund created for the class, even if some class members make no claims, causing money to remain in the common fund that otherwise would be returned to the defendant.

The benchmark in this Circuit for a fee award in a common fund case is 25% of the recovery obtained. *Hanlon*, 150 F.3d at 1029. "While the benchmark is not per se valid, the Ninth Circuit has recognized that requesting the 25% benchmark award only shows the reasonableness of a fee request." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-2541-CW, 2017 WL 6040065 (N.D. Cal. Dec. 6, 2017), at *2 ("[I]n most common fund cases, the award exceeds the [25%] benchmark.") (quotations omitted). In "megafund" cases, fees will commonly be under

the benchmark, while in smaller cases—particularly where the common fund is under $10 million, like this case—awards more frequently exceed the benchmark. *See Lopez v. Youngblood,* No. CV–F–07–0474 DLB, 2011 WL 10483569, at *13 (E.D. Cal. Sept. 2, 2011).

The Ninth Circuit has identified factors the Court may consider in assessing whether an award is reasonable and whether a departure from the benchmark figure is warranted, including: (1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; and (4) the contingent nature of the fee and the financial burden carried by the plaintiffs. *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1048–50 (9th Cir. 2002), *applied by Vandervort v. Balboa Capital Corp.,* 8 F. Supp. 3d 1200, 1208–1209 (C.D. Cal. 2014).

IV. THE REQUESTED AWARD IS FAIR, REASONABLE, AND JUSTIFIED

After considering the circumstances of this case and the terms of the Settlement Agreement, the Court should determine that the fee award requested by Class Counsel is fair, reasonable, and justified.

A. Class Counsel Achieved Excellent Results

Class Counsel's efforts have resulted in a Settlement Fund totaling $2,985,000 available for distribution to class members who file timely claims. In addition, in assessing the benefits conferred on the class following the Settlement, the Court should also consider the non-pecuniary benefits such as modifications to Defendant's business practices. *See Loring v. City of Scottsdale,* 721 F.2d 274, 275 (9th Cir. 1983) (finding the district court erred by "fail[ing] to take into account the present nonmonetary benefit bestowed upon plaintiffs' class"); *Mills v. Elec. Auto-Lite Co.,* 396 U.S. 375, 392 (1970) (concluding that non-pecuniary benefits are within the scope of the "common fund" doctrine).

Hot Topic has already placed a portion of the $2,985,000 Settlement Fund into an Escrow Account ECF 237-1 § 2.1(a). Each settlement class member with an approved claim is entitled to a *pro rata* portion of at least $1.5 million. *Id.* § 2.1(b). To the extent

the total amount of approved claims multiplied by fifteen dollars exceeds $1.5 million, then the Settlement Fund will be increased by fifteen dollars for each approved claim exceeding $1.5 million up to a total of $2.985 million. *Id.* § 2.1(c).

As was made clear in its supplemental filings, Defendant fully intends to reinstate its text message marketing program (ECF 248, p.2-3). Under the Settlement Agreement, Hot Topic agreed to "changes to [its] business practice relating to its text message marketing programs directed to consumers. As a continuing and future benefit to all Settlement Class Members and the public, Hot Topic represents that it has halted its text message marketing program." *Id.* § 2.2. Hot Topic further agreed that, "prior to starting any new text message marketing program, . . . it will implement a training program and institute compliance protocols to ensure compliance with the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*" *Id.* Thus, the Settlement Agreement presents non-monetary benefits to the class in the form of permanent injunctive relief which requires changes to Hot Topic's marketing practices, and the establishment of training and compliance measures to ensure Hot Topic does not violate the TCPA in the future; these non-monetary/prospective forms of relief confer a substantial additional benefit to class members. *See Spann v. J.C. Penney Corp.,* 314 F.R.D. 312, 326 (C.D. Cal. 2016) ("Additionally, the settlement promotes consumer protection in that JCPenney has agreed that its advertising and pricing practices as of the date of the settlement agreement and continuing forward "will not violate Federal or California law, including California's specific price-comparison advertising statutes.").

The fee award requested here represents a smaller percentage of the common fund than fees awarded in other TCPA cases within the Ninth Circuit. *See, e.g., Vandervort,* 8 F. Supp. 3d at 1210 (awarding fees amounting to 33% of the settlement fund ceiling); *Ikuseghan v. Multicare Health Sys.,* No. C14-5539 BHS, 2016 WL 4363198, at *2 (W.D. Wash. Aug. 16, 2016) (awarding fees amounting to 30% of settlement fund); *Gutierrez-Rodriguez v. R.M. Galicia, Inc.,* No. 16-CV-00182-H-BLM, 2018 WL 1470198, at *7 (S.D. Cal. Mar. 26, 2018) (awarding fees amounting to 28.8% of the settlement fund). And

28% of the common fund is an even smaller percentage of fees than those awarded in non-TCPA class actions. For example, sister district courts presiding over wage and hour class actions usually award attorneys' fees in the 30-40% range. *See, e.g., Vasquez v. Coast Valley Roofing, Inc.,* 266 F.R.D. 482, 491-92 (E.D. Cal. 2010) (citing to five recent wage and hour class actions where federal district courts approved attorney fee awards ranging from 30 to 33%); *Singer v. Becton Dickinson & Co.,* No. 08-CV-821-IEG (BLM), 2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010) (approving attorney fee award of 33.33% of the common fund and holding that award was similar to awards in three other wage and hour class action cases where fees ranged from 30.3% to 40%).

Simply stated, Class Counsel's efforts establishes a nearly $3 million fund, and provides substantial and meaningful permanent injunctive relief for the class. Class Counsel undertook this matter with the real risk that it would receive no compensation, while also advancing $156,000 in out-of-pocket costs and expending over $1.2 million in professional billable time. Class Counsel vigorously pursued Plaintiff's claims and those of the Settlement class for three years against a Defendant that conceded nothing and vigorously litigated every issue. Class Counsel should be awarded fees amounting to 28% of the Settlement Fund, which amount is fully in accord with fees awarded in similar cases.

B. This Nationwide Class Action was Complex and Fraught with Substantial Risk

This case required extensive pre- and post-filing investigation, research, and legal analysis, causing Class Counsel to expend 2,260.5 hours in pursuit of the favorable Settlement Class Counsel ultimately obtained.

Following the extensive briefing on Defendant's Motion to Dismiss, this action only got more complicated once the pleading stage closed. During both phases of discovery, eleven depositions were taken, including computer experts and two highly technical depositions noticed under Federal Rule of Civil Procedure 30(b)(6). In addition, Plaintiff obtained from Hot Topic, and eventually analyzed, 10,000 pages of documents over the course of dozens upon dozens of hours. Milian Decl. ¶10(e).

Risk is an important factor in determining a fair fee award. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008) ("The risk that further litigation might result in Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees") (citing *Vizcaino*, 290 F.3d at 1047). The risks of litigation faced by Class Counsel in this case were great, and Class Counsel faced the possibility of gaining nothing for its efforts. Although Plaintiff and Class Counsel believe the claims asserted "against Defendant have merit and that she would have prevailed at summary judgment and/or trial[,] . . . Plaintiff and Class Counsel recognize that Defendant has raised factual and legal defenses that present a risk that Plaintiff and the putative class may not prevail." ECF 237-1 at 2 ¶ (C). Indeed, "[a]t all times, Defendant has denied and continues to deny any wrongdoing and has denied and continues to deny that it has committed, or threatened or attempted to commit, any wrongful act or violation of law or duty alleged in [this a]ction." *Id.* at 2 ¶ (B).

At the inception and throughout these proceedings, Class Counsel faced the following real risks, the adverse realization of any of which would certainly have resulted in Plaintiff and the Settlement Class receiving nothing:

(1) The question of whether Hot Topic's texting technology was an automatic telephone dialing system ("ATDS") under the TCPA and applicable FCC regulations and orders remained contested during the pendency of this action. *See* FCC Public Notice, *Consumer & Gov't Affairs Bureau Seeks Comment on Interpretation of the Tel. Consumer Prot. Act in Light of the D.C. Cir.'s ACA Int'l Decision,* 2 (May 14, 2018) (questioning "how to interpret [capacity] [in the ATDS definition] in light of the court's guidance"). Indeed, the case was stayed for five months while the Ninth Circuit resolved the question of whether equipment arguably similar to the equipment at issue in this case constitutes an ATDS even though it "did not have the present or potential capacity to generate random or sequential telephone numbers and the telephone numbers were input into the database without human intervention." ECF 200 at 2 (internal quotation omitted).

The uncertainty of the FCC's position on this issue, and the Ninth Circuit's

interpretation of the FCC's position, presented substantial risks to Plaintiff and the Class Members' ability to obtain any recovery. These risks remain, as it is unclear whether the FCC will adopt the same or similar definition as the court in *Marks* or whether it will take the extreme position that a TCPA violation occurs simply when the numbers called are generated randomly or sequentially; absent the Settlement, this position would have been detrimental to Plaintiffs. Further, were the FCC to adopt a definition in conflict with *Marks*, it is uncertain what effect such a new rule would have on cases currently pending in this Court. Because a key element of proof rests on a showing that Defendant's text messages were sent using an ATDS, any new FCC rule limiting the definition to exclude technology that dials from a stored list of numbers, as the system powering Defendant's text messages did here, would have erased Plaintiff's and class members' cause of action under the TCPA.

(2) Defendant asserted throughout this action that it uniformly obtained TCPA-compliant consent with respect to Plaintiff and every member of the settlement class. Defendant maintained during settlement discussions that evidence produced through discovery supported Defendant's consent defense. Defendant continued to maintain that, absent settlement, Defendant would introduce evidence through documents and expert witness testimony that would establish its consent defense class-wide. Plaintiff and the Settlement Class faced the risk that Defendant may have succeeded on this defense, resulting in Plaintiff and the class recovering nothing in the litigation.

(3) Class Counsel remained confident that class certification was warranted in this case. Nevertheless, there was a legitimate risk that class action status might not be maintained through trial. *See Staton v. Boeing Co*., 327 F.3d 938, 959 (9th Cir. 2003) (identifying risks associated with maintaining class status throughout trial as relevant factor for assessing settlement); *Nat'l Rural Telecomm.'s v. DirectTV, Inc*., 221 F.R.D. 523, 525 (C.D. Cal 2004) (same). Absent settlement, Defendant surely would have opposed Plaintiff's Motion for Class Certification (ECF 224) and would have sought an immediate interlocutory appeal of an order granting certification under Rule 23(f). While

class certification always poses a risk, class certification in TCPA cases typically involves an expensive and prolonged battle regarding certification, merits, and damages issues. Without prevailing at the class certification stage, the case would effectively be over, and the Class and Class Counsel would have gained nothing from continued litigation. Assuming Plaintiff prevailed at class certification, proving liability on the merits would have required further risky litigation and additional expert work.

(4) Plaintiff and the class faced the risk that if they would have proceeded to trial and prevailed, the victory would have been purely symbolic. Class Counsel faced a legitimate risk that in the face of a judgment, Defendant would declare bankruptcy. According to the publication *Business Insider*, Defendant's indirect parent company, HT Intermediate Holding Corp., was one of eighteen retailers in the United States facing a risk of bankruptcy in 2018. *See* Hayley Peterson, *Retail bankruptcies just hit an all-time high—and these 18 companies could be the next to default*, Business Insider (Apr. 14, 2018, 8:55 a.m.), www.businessinsider.com/bankruptcies-expected-this-year-2018-4 (last visited Nov. 22, 2019). The fact that mall-based brick-and-mortar retailers like Defendant were in the grips of the most economically challenging period in industry history was a risk factor Class Counsel understood when it undertook this case on a purely contingent basis and advanced over $150,000 in out-of-pocket costs. While a bankruptcy at any stage of the proceeding would likely have resulted in no recovery, Class Counsel nevertheless expended its own cash resources and incurred 2,000 hours of professional time advancing Plaintiff's and the class's claims.

C. Successfully Prosecuting This Matter Required Significant Skill and Effort on the Part of Class Counsel

The "prosecution and management of a complex national class action requires unique legal skills and abilities" that are to be considered when determining a reasonable fee. *In re Omnivision Techs., Inc.,* 559 F. Supp. 2d at 1047 (citation omitted). "[C]lass actions have a well-deserved reputation as being most complex." *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (internal citation and

quotations omitted); *see also Vizcaino*, 290 F.3d at 1048 (reasoning that the complexity of the issues involved, and skill and effort displayed by class counsel are among the relevant factors for determining the proper fee under the percentage approach). Class Counsel's able prosecution of this case is borne from its attorneys' considerable experience in this area of the law. Indeed, Class Counsel specialize in consumer class actions and have served as counsel for classes of plaintiffs in a variety of substantive areas. *See* Milian Decl. ¶ ¶4-7; Declaration of Robert Ahdoot ("Ahdoot Decl.") ¶17-26.

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutalization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. *See Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."). Here, Class Counsel squared off against reputable defense counsel who were highly skilled in class action defense, and whose litigation strategies compelled Class Counsel to thoroughly argue every issue. Indeed, the caliber of opposing counsel supports the requested award.

D. Class Counsel Carried the Financial Burden with Substantial Risk of Nonpayment

Finally, because of the risk factors identified above and because the TCPA does not provide for an award of attorneys' fees to a prevailing plaintiff, Class Counsel's recovery of costs and fees in this case has always been contingent upon achieving a successful outcome and substantial recovery, even after overcoming numerous substantial hurdles, each of which had the ability to end this litigation, leaving the Class (and, of course, Class Counsel) with nothing gained.

Such a substantial risk of nonpayment in return for advancing all costs and fees weighs heavily in favor of finding Class Counsel's requested award reasonable. Very few lawyers are willing (let alone able) to invest tens of thousands of dollars and significant

time and resources to prosecute a lawsuit that involves complicated, uncertain legal questions and carries with it the substantial risk of receiving no compensation. The undesirability of this lawsuit should also be considered by the Court when determining whether the fee requested by Class Counsel is reasonable. *See Quesada v. Thomason,* 50 F.2d 537, 539 n.1 (9th Cir. 1988) (setting forth "undesirability" of the case as a factor to consider as a basis to adjust the lodestar amount of fees to be awarded to counsel). Tellingly, not a single other case related to this action was filed against Defendant, either before or after Plaintiff filed suit, thus strongly suggesting that the high-risk nature of these claims made the litigation undesirable to other counsel practicing in this area of law. Indeed, despite the three-year pendency of this case, no other law firm was willing to risk filing suit against Defendant.

E. A Lodestar Cross-check Confirms the Reasonableness of the Requested Fees

Application of the lodestar method as a cross-check—or even as a preliminary method of calculating fees—confirms the reasonableness of the fees requested. *See Vizcaino,* 290 F.3d at 1050-51. The accompanying declarations set forth the hours of work and billing rates used to calculate the lodestars here. As described in those declarations, Plaintiffs' counsel and their professional staff have devoted a total of 2,260.5 hours to this litigation and have a total adjusted lodestar, to date, of $1,255,355.50. Milian Decl. ¶¶14-19; Ahdoot Decl. ¶ 7-12, and Exhibits B, C, D, E and F attached thereto.

All this time was reasonable and necessary for the prosecution of this action. Class Counsel took meaningful steps to ensure the efficiency of their work. Milian Decl. ¶¶ 13-18. And, as explained further below, these amounts do not include either the additional time that Class Counsel will have to spend going forward, which is likely to exceed fifty hours, or the additional travel expenses associated with the forthcoming final approval of the Settlement.

1. Class Counsel's Hourly Rates are Reasonable

In assessing the reasonableness of an attorney's hourly rate, courts consider whether

the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984). Courts apply each biller's current rates for all hours of work performed, regardless of when the work was performed, as a means of compensating for the delay in payment. *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994). Here, Class Counsel's customary rates are in line with prevailing rates in this District and previously have been approved by courts in- and outside this District, and/or are paid by hourly-paying clients of the firms. Milian Decl. ¶20-21; Ahdoot Decl. ¶ 14, 27-33.

2. The Number of Hours Class Counsel Worked is Reasonable

The number of hours that Class Counsel billed for this matter is reasonable. *See Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000) (counsel entitled to recover for all hours reasonably expended). Class Counsel maintained contemporaneous, detailed time records billed in 1/10-hour increments. Milian Decl. ¶16; Ahdoot Decl. ¶ 11. Class Counsel has included charts setting forth the amount of time each time keeper spent litigating this case, each individual time keeper's normal billing rate, each lawyer's level of experience, and the total time and fees expended to date. Milian Decl. Exhibit A; Ahdoot Decl. ¶12.

These amounts are reasonable given the length of the case and the complexity of the issues involved. Moreover, Class Counsel's rates are reasonable given that Class Counsel have years of litigation experience and the billable rates associated with each time keeper is consonant with that person's experience. Milian Decl. ¶4-6;15; Ahdoot Decl. ¶12, 17-26. The requested fee of $835,800 is significantly less than the total lodestar of $1,255,355.50, and represents a negative multiplier of .66. This is far below the range of acceptable positive multipliers in a common fund case. *See, e.g., Vandervort,* 8 F. Supp. 3d at 1210 (approving fee award 2.52 times higher than the lodestar); *Vizcaino,* 290 F.3d at 1051 n.6 (noting majority of fee awards are 1.5 to 3 times higher than the lodestar).

V. CLASS COUNSEL SHOULD BE REIMBURSED FOR ITS REASONABLE OUT-OF-POCKET EXPENSES

Class Counsel incurred reimbursable expenses totaling $155,999.61. Milian Decl.¶19; Ahdoot Decl. ¶16. Despite incurring these legitimate out of pocket costs on behalf of the Class, Class Counsel requests reimbursement in the amount of $100,000 for expenses incurred in prosecution of this action. Pursuant to the Settlement Agreement Class Counsel agreed to cap its expense reimbursement request at $100,000. ECF 237-1 § 8.1.

Reimbursement of taxable costs is governed by 28 U.S.C. § 1920 and Federal Rule of Civil Procedure 54. Expense awards are typically limited to out-of-pocket expenses that are charged to a fee-paying client and should be reasonable and necessary. *See Harris v. Marhoefer,* 24 F.3d 16, 19 (9th Cir. 1994); *see also In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) ("I award Lead Counsel reimbursement from the Fund for . . . costs and expenses. . . . [T]hese expenses reflect[] the costs of . . . litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses. . . . I see no reason to depart from the common practice in this circuit of granting expense requests.").

Class Counsel requests reimbursement for: (1) hotels, parking and transportation; (2) outside vendor photocopies; (3) postage; (4) filing fees; (5) delivery services; (6) online legal research that is outside of Class Counsel's monthly electronic database packages; (7) experts, consultants, and investigators; (8) Special Master fees;, and (9) mediation fees.

"The reimbursement for travel expenses, both under 28 U.S.C. §1920 and [Rule] 54(d), is within the broad discretion of the Court." *In re Media Vision Tech. Sec. Litig.,* 913 F. Supp. 1362, 1369 (N.D. Cal. 1996). Postage and notice expenses are also generally recoverable. *In re Immune Response Secs. Litig.,* 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007) (citing cases). Filing fees and photocopies are also a necessary expense of litigation. *Id.* The Ninth Circuit has also approved of reimbursement for messenger

services as costs. *Harris,* 24 F.3d at 19. And "computerized legal research is an essential tool of a modern efficient law office and given the complexity of this case, the costs of online legal research services are also reasonable." *In re Immune Response Secs. Litig,* 497 F. Supp. 2d at 1178 (internal quotation omitted).

For the Court to award reimbursement for expert witness fees, the Court "must find that the expert testimony submitted was 'crucial or indispensable' to the litigation at hand." *In re Media Vision Tech. Sec. Litig.,* 913 F. Supp. 2d at 1366. Here, Plaintiff asserts that the investigation of this case required expert analysis in response to Defendant's reliance on KPMG LLP's expert report in support of Defendant's Motion for Summary Judgment. Given the complex factual nature of this case and the central role that Defendant's legacy databases and process for backing up electronically stored information played in this action, the Court should find that reimbursement for experts and consultants is reasonable.

Class Counsel also requests reimbursement for the expenses associated with the mediation session before the Honorable Edward A. Infante (Ret.). Mediation expenses have previously been awarded in common fund cases upon a finding that such expenses are both reasonable and necessary. *See, e.g., In re Immune Response Secs. Litig.,* 497 F. Supp. 2d at 1366 (awarding mediation fees in case that "involved protracted litigation, which would not have come to an end prior to trial without the assistance of a mediator") (collecting out-of-Circuit cases).

VI. THE REQUESTED SERVICE AWARD IS REASONABLE

Finally, Class Counsel respectfully requests that the Court enter a modest service award to Diana Soukhaphonh, the named plaintiff. Such awards are routinely approved by courts to compensate named plaintiffs for their work on behalf of the class; to account for financial, personal, or reputational risks associated with litigation; and to encourage plaintiffs to step forward on behalf of unnamed class members in the future. *See Van Vranken v. Atl. Richfield Co.,* 901 F. Supp. 294, 299 (N.D. Cal. 1995) (setting forth discretionary criteria to consider when approving an incentive award).

Here, the requested service award of $15,000 is well justified and reasonable. In addition to lending her name to this matter and thus subjecting herself to significant public attention, Plaintiff was actively engaged in this action and assisted Class Counsel in seeking, and eventually obtaining, a favorable result for the entire class. Plaintiff provided her cellular telephone records and related documents and information during discovery, reviewed pleadings and filings, and reviewed and approved the Settlement Agreement. She also traveled from her home in Delaware to be deposed by in California and submitted a declaration in opposition to Hot Topic's summary judgment motion. ECF 147. In addition, Plaintiff sat for a *second* deposition in Delaware in the weeks immediately prior to the parties reaching a settlement. in addition to the numerous hours spent in the evenings and mornings before work, Ms. Soukhaphonh's efforts required her to miss 4 days from work and obtain permission to leave work early on at least one additional occasion. Soukhaphonh Declaration, ¶6, concurrently filed. Her sacrifice, preparation and dedication to this case is notable, particularly given the relatively small size of her personal financial stake.

The amount requested (*i.e.*, $15,000.00) is equal to or less than amounts frequently approved by federal courts presiding over TCPA class actions. *See, e.g., Ikuseghan,* 2016 WL 4363198, at *3 (approving incentive award of $15,000); *Benzion v. Vivint, Inc.*, No. 12-61826, 2015 WL 11143078 (S.D. Fla. Feb. 23, 2015) (approving incentive award of $20,000); *Desai v. ADT Sec. Servs., Inc.,* No. 11-1925, 2011 WL 2837435 (N.D. Ill. Feb. 27, 2013) (approving incentive award of $30,000).

VII. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court enter an order awarding Class Counsel attorneys' fees in the amount of $835,800, plus reimbursement of litigation costs, capped by agreement, in the amount of $100,000; and awarding the named plaintiff, Diana Soukhaphonh, an incentive award of $15,000 for her efforts and commitment on behalf of the class members.

Dated: November 22, 2019

Respectfully submitted,

By: */s/ Robert Ahdoot*

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