UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD ZYBURO, on behalf of himself and all others similarly situated, Plaintiff, v. NCSPLUS INC., Defendant.	CASE NO: 12-cv-06677 (JSR)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF ATTORNEYS' FEES, COSTS AND EXPENSES AND SERVICE AWARD TO PLAINTIFF AS CLASS REPRESENTATIVE

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Plaintiff seeks the entry of an Order granting his Motion for Approval of Attorneys' Fees, Costs and Expenses and a Service Award to Plaintiff as Class Representative for the reasons set forth in this supporting Memorandum.

I. INTRODUCTION

As the settlement was preliminarily approved by this Court on March 16, 2015 (Doc. 103), Plaintiff's Counsel respectfully request that the Court award attorneys' fees, costs and expenses in the amount of $450,000.00, which is 25% of the settlement amount being paid by Defendant and its insurer to resolve the claims of the Class. The amount sought is reasonable in light of the complexities and risks of litigation, the results achieved, and the work performed by Counsel. Moreover, the fee was negotiated during mediation only after negotiations on the material terms of the relief for the Class were concluded. An additional $146,116.14 is sought for the reasonable costs and expenses incurred to file and prosecute this case.

As demonstrated throughout the litigation and the settlement processes, Plaintiff's Counsel were the *material factor* in obtaining the relief to the Class. The settlement obtained in this case was the product of vigorous and efficient efforts by Plaintiff's Counsel on behalf of the Class to seek the maximum relief under the law and available from Defendant. Court approval is also sought for a service award in the amount of $10,000.00 to Plaintiff, Edward Zyburo, for his service and effort in pursuing this litigation to a favorable outcome for the Class.

II. FACTUAL AND PROCEDURAL HISTORY OF THE LITIGATION

A brief history of this litigation is important, particularly as it relates to Defendant's insurance policy – the single source of settlement funds. On August 31, 2012, Plaintiff filed this suit seeking class action status. The Complaint alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq*. ("**TCPA**"), and sought certification of the proposed class,

statutory damages, and costs on behalf of Plaintiff and the proposed class. (Doc. 1). Defendant answered the Complaint on September 15, 2012. (DE 6). On March 5, 2013, Plaintiff filed his Motion for Class Certification and supporting documents. (Docs. 19, 20, 22 and 23). Defendant opposed the Motion, and Plaintiff replied in support of his Motion. (Docs. 24 and 27).

Plaintiff proceeded to serve written discovery requests. In its responses, Defendant repeatedly represented that it had no insurance and, therefore, would be unable to cover any class-wide damages. Relying on this representation, Plaintiff petitioned the Court to withdraw his pending Motion for Class Certification and to drop the class claims pled in his original Complaint. (Doc. 29). On April 5, 2013, the Court held a conference on this issue, accepted Plaintiff's petition in full, and instructed the Clerk to close Plaintiff's pending Motion for Class Certification. *Id*. On April 22, 2013, Plaintiff filed his Amended Complaint, alleging individual claims for negligent violations of the TCPA (Count I), knowing and/or willful violations of the TCPA (Count II), and violations of the Fair Debt Collection Practices Act (Count III). (Doc. 28).

On July 17, 2013, Plaintiff took the Rule 30(b)(6) deposition of Christopher Rekhow, a co-owner of Defendant. During the deposition, Rekhow divulged that, contrary to prior representations Defendant *did* have insurance. (Doc. 65, Ex. A). A copy of the insurance policy, issued by Continental Casualty Company on November 15, 2011 and providing miscellaneous professional liability coverage in the amount of $2,000,000, was subsequently provided to Plaintiff's Counsel. (Doc. 65, Ex. B). On July 23, 2013, the parties contacted the Court regarding Defendant's belated and contradictory revelation of insurance coverage. The Court held an evidentiary hearing on this matter, which began on October 3, 2013, and continued on October 18, 2013. (Doc. 45). At the hearing, Christopher Rekhow and Lynn Goldberg, the co-owners of Defendant, admitted that they had jointly concealed the existence of the insurance policy from their counsel. (Docs. 45 and 46).

As a direct result of this concealment, Defendant's discovery responses failed to disclose that Defendant had an insurance policy. *Id*. On October 23, 2013, the Court reinstated the original class action Complaint and Motion for Class Certification, and permitted Plaintiff to submit an application for reimbursement of fees and costs arising from Defendant's misconduct. (Doc. 45).

During the commencement of this case, Plaintiff's Counsel made a claim on behalf of Defendant for coverage under the insurance policy revealed during discovery. After this claim was denied, Plaintiff commenced a coverage case styled *Zyburo v. Continental Insurance Company, 1:13-cv-06438-JSR* T (S.D.N.Y. 2014) ("**coverage case**"), seeking a determination that the policy provided coverage for the claims advanced in the Complaint. Plaintiff's Counsel undertook this course of action as they believed that Defendant's insurer had improperly denied coverage, thereby exposing itself to a bad faith claim with the potential that the insurer would ultimately be responsible for the payment of the judgment for damages entered following the successful resolution of this class action. In addition, it was Plaintiff's Counsel's belief that this claim was the one potential asset available to pay the claims of the class in full. The coverage case was assigned to this Court. After motion practice, the Court dismissed the coverage case, opining that it was premature to pursue such a case before Plaintiff obtained a judgment in his favor and on behalf of the Class against Defendant. Unfortunately, as revealed during mediation and confirmed by discovery during the mediation process, no such claim against the carrier existed, thus eliminating what Plaintiff believed to be a significant source of recovery for the Class.

On August 1, 2014, Plaintiff filed his Notice of Amended Motion for Class Certification. (Doc. 64). After evidentiary hearings on August 29, 2014 and September 2, 2014, the Court granted Plaintiff's Amended Motion for Class Certification on September 16, 2014 and certified a class consisting of "all persons within the United States whose cellular telephones were called by

NCSPlus Inc. using an automatic telephone dialing system with the capacity to store or produce telephone numbers, including, but not limited to, an automated dialing machine, auto-dialer or predictive dialer and/or utilizing an artificial or prerecorded voice, without such persons' prior express consent, between August 31, 2008 and August 31, 2012." (Docs. 64 and 77).

The trial of this case was set to begin on January 26, 2015, and Plaintiff's Counsel undertook all work necessary to prepare the case for trial. Due to a conflict on the Court's calendar, the Court reset the trial of the case to begin on February 24, 2015. (Doc. 95). At the time of entry of the order resetting the trial date, little was left to be done by Plaintiff's Counsel to prepare the case for trial.

Prior to the scheduled trial of this case, the parties met before a mediator, the Honorable Garrett Brown, Jr. (retired), a former United States District Judge for the District of New Jersey, to explore the potential resolution of Plaintiff's claims and the claims of the Class. Judge Brown is well regarded as a skilled and experienced mediator who has mediated many complex cases and class actions. Settlement discussions were prompted by the parties' desire to avoid the burden, expense and uncertainties inherent to protracted litigation, including any appeals of the final judgment and the Court's decision to certify the Class , and to put to rest any and all claims or causes of actions that have been, or could have been, asserted against Defendant arising out of the claims contained in the Complaint.

The parties attended a mediation session on February 10, 2015 in New York. As of the date of the mediation and based upon their state of preparedness for trial, Plaintiff's Counsel were well versed on the strengths and weaknesses of their respective positions in the case. During the mediation session, the parties set forth and discussed their respective positions on the merits of the Class claims and the potential for a settlement that would involve class-wide relief. A significant

portion of the session was spent discussing Defendant's lack of available assets to satisfy the claims of Plaintiff and the Class in the event that Plaintiff was successful at trial, the presence or lack of a bad faith claim against Defendant's insurer, and the remaining coverage available under the wasting policy issued by Continental Casualty Company in the amount of $2,000,000.00. The parties exchanged offers and counter-offers and negotiated the points of each vigorously. Ultimately, the parties were unable to agree to a settlement during the in-person mediation session.

As discussed above, Plaintiff's Counsel was provided information during the mediation session (which they later confirmed through a confirmatory process) establishing that there was no viable bad faith claim against Continental Casualty Company. Plaintiff's Counsel already had concerns regarding Defendant's lack of little assets beyond its insurance coverage based upon previously-provided discovery. These factors were significant considerations in the mediation and settlement discussions.

Ultimately, the parties were able to reach a settlement whereby a settlement fund in the amount of $1,800,000.00 would be funded entirely from Defendant's insurance policy. This amount represents almost all of the remaining coverage under Defendant's wasting policy. This "all in" amount was accepted subject to Plaintiff's confirmation that Defendant has no meaningful assets which could be liquidated to satisfy any sum recovered at trial, and that a bad faith claim does not exist in connection with Continental Casualty Company's handling of a claim for coverage under Defendant's policy. Both have been confirmed as accurate through the confirmatory process.

III. SUMMARY OF THE PROPOSED SETTLEMENT

The settlement was funded by a $1,800,000.00 cash payment made by Continental Casualty Company out of the remaining amount of Defendant's liability policy, which provided coverage in

the amount of $2,000,000.00. These monies have been transferred by Continental Casualty Company to the Escrow Agent.

The detailed terms of the settlement are set forth in the Stipulation of Settlement filed previously with the Court. (Doc. 102). The $1,800,000.00 cash payment, less any service award given to Plaintiff, any attorneys' fees, costs and expenses awarded to Plaintiff's Counsel, and the fees and costs associated with the administration and notice of the settlement, will be distributed to Class Members in accord with the plan of distribution, which is described in the Stipulation of Settlement.

IV. AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES

The Stipulation of Settlement provides that Plaintiff's Counsel will seek an award of attorneys' fees, costs and expenses to be paid from the settlement proceeds of $1,800,000.00 As this settlement creates a common fund, Plaintiff's Counsel seek attorneys' fees of $450,000.00, which is 25% of the settlement proceeds, in consideration of the services they have performed in the past, and those services they may be required to perform in the future regarding communication with Class Members, obtaining final approval of the settlement, or defending the final judgment in the event of an appeal. Moreover, as reflected in the attached declarations and fee chart, the collective lodestar of Plaintiff's Counsel significantly exceeds the amount sought.[1] *See* Exhibits A, B, C, D and E, attached hereto. Thus, the requested fees are fair and reasonable.

[1] The records of the time expended by class counsel in this Action, maintained contemporaneously with the work performed, are voluminous and, even with redactions, contain confidential information that would disclose strategy, mental impressions, work product and the like. Consistent with established practice in common fund cases, Plaintiff's Counsel could have summarized the records in their supporting declarations and awaited a request from the Court to make the records available for *in camera* review. *See In re Ins. Brokerage Antitrust Litig*., 579 F.3d 241, 284 (3d Cir. 2009) (summaries of time records sufficient in common fund case because court used information only to cross-check reasonableness of fee award); *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 200 (3d Cir. 2000) (appropriate for counsel to wait to submit detailed time records until Court requested them). However, in order to save time and permit the Court to make as searching a review as it deems necessary, Plaintiff's Counsel are submitting their time records *in camera* concurrently with the filing of this Memorandum. The time records will also be made available to Class Members who request to see them, by appointment, in the offices of Morgan & Morgan, located in midtown Manhattan.

A chart detailing the lodestar of Plaintiff's Counsel expended to date is attached hereto as Exhibit A.

Parties to a class action settlement often agree that a defendant will pay attorneys' fees to plaintiff's counsel. Such an arrangement poses no particular problem for court approval, where the amount of the fee is reasonable under the circumstances. Rule 23(h) embodies this principle by providing that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law *or by agreement of the parties*." Fed. R. Civ. P. 23(h) (emphasis added). Federal courts at all levels encourage litigants to resolve fee issues by agreement whenever possible, and such agreements are generally entitled to deference. As the United States Supreme Court explained, "[a] request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also*, *Johnson v. Ga. Hwy. Express, Inc*., 488 F.2d 714, 720 (5th Cir. 1974) ("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorneys' fees."). The United States Court of Appeals for the Second Circuit has specifically recognized the utility of such agreements in resolving class actions, explaining that "an agreement 'not to oppose' an application for fees up to a point is essential to completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." *Malchman v. Davis*, 761 F.2d 893, 905, n.5 (2d Cir. 1985). Indeed, the Supreme Court has suggested that such agreements be encouraged as a matter of public policy. *See Hensley*, 461 U.S. at 437.

A. The Parties' Agreed-Upon Fee Is Reasonable Under Governing Legal Standards.

In this Circuit, the determination of what is a reasonable attorneys' fee is guided by the six factors set forth in *Goldberger v. Integrated Res. Inc.,* 209 F.3d 43, 50 (2d Cir. 2000). These factors are: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of litigation…; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." As this Court has recognized,

> "While it is the analysis of these six factors that ultimately undergirds the Court's fee award, two methods of determining reasonable fee awards can be used as heuristics, though neither is dispositive: a) the so-called "lodestar" method, "under which the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate," and b) the "simpler" method of "set[ting] some percentage of the recovery as a fee." See *Id.* at 47. However, "[i]t bears emphasis that whether calculated pursuant to the lodestar or the percentage method, the fees awarded in common fund cases may not exceed what is 'reasonable' under the circumstances."

City of Pontiac General Employees' Retirement v. Lockheed Martin Corp., 954 F.Supp.2d 276, 280 (S.D.N.Y. 2013).

In this District, an award of attorneys' fees in the amount of 25% of the common fund has been found to be reasonable. *Id.* at 281 (citing *Goldberger,* 209 F.3d at 51-52, and *Theodore Eisenberg and Geoffrey P. Miller, Attorneys' Fees and Expenses in Class Action Settlements:* 1993-2008, 7.J. Empirical Legal Stud. 245, 262 (2010)). *See also In re Lyondell Chem. Co.,* Case No. 09-10023 (REG), 2011 WL 6015063 (Bankr. S.D.N.Y. 2011). In the case of *In re Marsh Erisa Litigation*, 265 F.R.D. 128 (S.D.N.Y. 2010), Judge McMahon observed that, where, as here, the fund is not a "mega" recovery, courts have awarded percentage fees of one-third or higher. 265 F.R.D. at 149 (citing example of the EDS ERISA litigation, where the settlement

was "only" $12.5 million and the court awarded the requested one-third fee); *Guaman v. AJNA-BAR NYC, et al.*, Case No. 12-CIV-2987 (DF), 2013 WL 445896, at *6 (S.D.NY. Feb. 5, 2013) (one third of the common fund approved); *In re Currency Conversion Fee Antitrust Litig.,* 263 F.R.D. 110 (S.D.N.Y. 2009) (approving fee of 25.5%), aff'd *sub nom*; *Priceline.com v. Silverman,* 405 Fed. Appx. 532 (2d Cir. 2010); *In re Telik, Inc. Sec. Lit.,* 576 F.Supp.2d 570 (S.D. NY. 2008) (approving fee of 25%); *In re Excess Value Ins. Coverage Litig.,* 598 F.Supp.2d 380 (S.D.N.Y. 2005) (approving fee of 30% of settlement value).

The so-called "common fund doctrine" employs the equitable principle that a party who incurs costs in creating a common fund that benefits others may call on them to share those costs. The rule is founded upon the principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses, including a reasonable attorney's fee; and that the most equitable way of securing such contribution is to make such expenses a charge on the fund so protected or recovered. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Alyeska Pipeline Servs. v. Wilderness Soc'y,* 421 U.S. 240, 257 (1975) ("historic power of equity" permits recovery of attorney's fees from fund); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-66 (1939) (same); *Central R.R. & Banking v. Pettus*, 113 U.S. 116, 126-27 (1885) (same); *Trustees v. Greenough,* 105 U.S. 527, 532-37 (1882). The advantage of the common fund approach is that it aligns the interests of plaintiffs and their attorneys more fully by allowing the latter to share in both the upside and downside risk of litigation. While some may criticize that the disadvantage also exists in this method in that it encourages early resolution of cases, this cannot be said here, where the case resolved *after* the Court certified a class over the objections of Defendant, who unsuccessfully challenged that order on appeal, and

after Plaintiff's Counsel had fully prepared the case for trial and were indeed ready to start the trial. In any event, the percentage sought in this motion will not yield "an unjustified 'golden harvest of fees' for the lawyer." *Goldberger*, 209 F.3d at 48 (quoting *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 468-69 (2d Cir. 1974) ("Grinnell I"), abrogated on other grounds by *Goldberger*, 209 F.3d at 43).

The "lodestar" is a product of the time expended at an hourly rate. Once calculated, the lodestar, which is presumptively reasonable, can then be adjusted as circumstances warrant. *McDow v. Rosado*, 657 F.Supp.2d 463, 467 (S.D.N.Y. 2009). The court may then exercise its discretion to enhance the lodestar if there is specific evidence that supports the award, and the enhancement is necessary to provide fair and reasonable compensation. *Perdue v. Kenny A*, 130 S.Ct. 1662 (2010).

As this Court has recognized, the lodestar method is less than perfect. *City of Pontiac General Employees' Retirement,* 954 F.Supp.2d at 280-81. It creates an incentive for attorneys to bill as many hours as possible, to do unnecessary work, and for these reasons also can create a disincentive to early settlement. *Goldberger,* 209 F.3d at 48-49 (citing *Savoie v. Merchants Bank, et al.*, 166 F.3d 456, 460-61 (2d Cir. 1999)). Under certain conditions, lodestar awards may have the opposite incentive and encourage attorneys to settle a case at an earlier stage of the proceeding when it may not be in their client's best interest. However, to settle too early deprives the attorney of the potential economic "upside" resulting from a percentage of a large common fund. *Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions*, Stan. L. Rev. 497, 543 (1991); *John C. Coffee, Jr., Understanding the Plaintiff's Attorney: Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 C. L. R. 669, 717 (1986). In any event, the Motion now before

the Court suffers from none of these possible infirmities, as the hours expended multiplied by the reasonable hourly rates of Plaintiff's Counsel is less than the percentage sought under the common fund approach. As the Court will see below, the hours expended more than supports the requested award of 25%.

1. Time and Labor Expended by Counsel

Plaintiff's Counsel have spent more than 1,100 hours on this case to date, for a lodestar totaling more than $637,500.00 at current hourly rates. This figure is substantially greater than the fee actually requested by Plaintiff's Counsel herein. The above calculations reflect the amount of time Plaintiff's Counsel spent working on the instant case over a nearly three-year period of time to ensure effective representation on behalf of the Class, including: pre-suit investigation and analysis; retaining and working extensively with an expert; conducting written discovery as well as depositions; reviewing and analyzing documents and electronic materials, as well as other information produced by Defendant; fighting extensive discovery battles; appearing at telephonic and in-person conferences and hearings, as well as oral argument on the extensive disputes; drafting a motion for class certification and appearing at two separate hearings on the motion for class certification (resulting in an order certifying the Class); responding to a petition before the Second Circuit seeking appellate review of the order certifying the class; selecting a notice administrator and developing with the administrator the notice to be provided to the Class (a cost which Plaintiff's Counsel advanced following the certification of the Class); preparing for and attending a settlement conference, and preparing submissions and evidentiary material for use in those negotiations; participating in a number of telephonic settlement negotiations through the mediator's office; drafting settlement documents; drafting papers in support of preliminary and final approval of the settlement; conducting

confirmatory discovery; and working with the Class Administrator to implement a second notice program and settlement website. *See* Yanchunis Declaration, attached hereto as Exhibit B. The chart attached as Exhibit A reflects the time expended and hourly rates of Counsel for Plaintiff, and is supported by their respective declarations attached hereto. See Yanchunis Declaration, attached hereto as Exhibit B, Howard Declaration, attached hereto as Exhibit C, Parmer Declaration, attached hereto as Exhibit D, and Safirstein Declaration, attached hereto as Exhibit E.

Importantly, Plaintiff's Counsel in this case do not seek any enhancement over lodestar and, as noted above, the amount sought by Plaintiff's Counsel is well below their collective lodestar, a fact which informs the reasonableness of the requested fees. *See Samuel v. Equicredit Corp.*, No. 00-6196, 2002 WL 970396, at *1 (E.D. Pa. May 6, 2002) (holding that the attorneys' fees were reasonable when they were equal to or less than lodestar and were paid from a source independent of the settlement fund created for the benefit of the class); *see also Hanrahan v. Britt*, 174 F.R.D. 356, 369 (E.D. Pa. 1997) (holding that where plaintiff's counsel's requested fee was less than lodestar, it indicated that counsel had requested less than the total market value of services rendered on behalf of the class and was therefore reasonable).

Finally, even though the ink has dried on the Stipulation of Settlement, Plaintiff's Counsel's work is not done. Plaintiff's Counsel will prepare for and attend the final fairness hearing, respond to any inquiries about the Settlement from Class Members, address any objections filed against the Settlement, and defend the final judgment in the unlikely event that any appeals are taken.

2. Magnitude and Complexities of the Litigation

Plaintiff's challenge to Defendant's practice of using an auto dialer, while certainly not a case of first impression, nevertheless implicated highly technical issues, as well as legal issues. Moreover, the lack of a defendant with deep pockets rendered the case risky and undesirable, as collectability was uncertain throughout the case. The legal hurdles were many and substantial, and the time and expense demands were substantial. Although Class Counsel were confident that they would develop a convincing case, they were also aware that these cases are not easily won. In light of these challenges, obtaining a settlement which provides some level of distribution to the Class is significant.

3. Risk of the Litigation

Contingency fee arrangements serve important functions in our legal system by providing access to legal services to many individuals who could not otherwise pay for them. Moreover, such arrangements foster efficient use of resources by attorneys. Accordingly, courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *McDaniel v. City of Schenectady,* 595 F. 3d 441, 424 (2d Cir. 2010); *Beckman v. Key Bank, N.A.,* 293 F.R.D. 467, 479 (S.D.N.Y. 2013); *In re Keyspan Corp., Sec. Lit.,* Case No.01-CV-5852 (ARR), 2005 WL 3093399, at *5 (E.D.N.Y. Sept. 30, 2005). For example, in awarding attorneys' fees in a contingent fee case, one district court noted the risks that plaintiffs' counsel had taken. The court stated:

> [a]lthough today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable.

> Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

In re Prudential-Bache Energy Income P'ships Sec. Litig., No. 888, 1994 WL 202394, at *6 (E.D. La. May 18, 1994). *See also Grinnell Corp.*, 495 F.2d at 470 (the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award). Indeed, the risk of taking a case has been referred to as the most important of the *Goldberger* factors. *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 129 (S.D.N.Y. 2009); *In re Bristol-Myers Squibb Securities Litig.*, 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005) (internal citation omitted).

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claims for negligent violations of the TCPA (Count I), knowing and/or willful violations of the TCPA (Count II), and violations of the Fair Debt Collection Practices Act (Count III). (Doc. 28).

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During the commencement of this case, Plaintiff's Counsel made a claim on behalf of Defendant for coverage under the insurance policy revealed during discovery. After this claim was denied, Plaintiff commenced the coverage case against Continental Insurance Company, seeking a determination that the policy provided coverage for the claims advanced in the Complaint. Such a step was necessary, as Plaintiff's Counsel believed that Defendant's insurer had improperly denied coverage, thereby exposing itself to a bad faith claim with the potential

that the insurer would ultimately be responsible for the payment of the judgment for damages entered following the successful resolution of this class action. The coverage case was assigned to this Court. After motion practice, the Court dismissed the coverage case, opining that it was premature to file such a case before Plaintiff obtained a judgment in his favor and on behalf of the Class against Defendant. Unfortunately, as revealed during the mediation and confirmed via discovery during the mediation process, no such claim against the carrier existed, thus eliminating what Plaintiff believed to be a significant source of recovery for the Class.

On August 1, 2014, Plaintiff filed his Notice of Amended Motion for Class Certification. (Doc. 64). After evidentiary hearings on August 29, 2014 and September 2, 2014, the Court granted Plaintiff's Amended Motion for Class Certification on September 16, 2014, and certified a Class consisting of "all persons within the United States whose cellular telephones were called by NCSPlus Inc. using an automatic telephone dialing system with the capacity to store or produce telephone numbers, including, but not limited to, an automated dialing machine, auto-dialer or predictive dialer and/or utilizing an artificial or prerecorded voice, without such persons' prior express consent, between August 31, 2008 and August 31, 2012." (Docs. 64 and 77).

The trial of this case was set to begin on January 26, 2015, and Plaintiff's Counsel undertook all work necessary to prepare the case for trial. Due to a conflict on the Court's calendar, the Court reset the trial of the case to begin on February 24, 2015. (Doc. 95). At the time of entry of this order, nothing was left to be done by Plaintiff's Counsel to try the case.

Prior to the scheduled trial of this case, the parties met before a mediator, the Honorable Garrett Brown, Jr. (retired), a former United States District Judge in the District of New Jersey, to explore the potential resolution of the claims on a class-wide basis. Judge Brown is well

known as a skilled and experienced mediator who has mediated many complex cases and class actions. These discussions were prompted by the parties' desire to avoid the burden, expense and uncertainties inherent to protracted litigation, and to put to rest any and all claims or causes of actions that have been, or could have been, asserted against Defendant arising out of the claims contained in the complaint.

The parties attended a mediation session on February 10, 2015 in New York. As of the date of the mediation and based upon their state of preparedness for trial, Plaintiff's Counsel were well versed on the strengths and weaknesses of their case. During this session, the parties set forth and discussed their respective positions on the merits of the Class claims and the potential for a settlement that would involve class-wide relief. A significant portion of the session was spent discussing Defendant's lack of available assets to satisfy the claims of Plaintiff and the Class in the event that Plaintiff was successful at trial, the presence or lack of a bad faith claim against Defendant's insurer, and the remaining coverage available under the wasting policy issued by Continental Casualty Company to Defendant in the amount of $2,000,000.00. The parties exchanged offers and counter-offers and negotiated the points of each vigorously. Ultimately, the parties were unable to agree to a settlement during the in-person mediation session.

During mediation, Plaintiff's Counsel were provided information (which they later confirmed through a confirmatory process) regarding the possibility that a bad faith claim against Continental Casualty Company did not exist. Plaintiff's Counsel already had concerns regarding Defendant's lack of assets beyond its insurance coverage based upon previously-provided discovery. The Court will recall that Defendant could not pay certain amounts awarded to Plaintiff's Counsel as sanctions and was afforded the ability to make installment payments

because of its poor cash positon. These factors were significant considerations in the mediation and settlement discussions. Ultimately, the parties were able to reach a settlement whereby a Settlement Fund in the amount of $1,800,000.00 would be funded entirely from Defendant's insurance policy.

It is an established practice to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See R. Posner, Economic Analysis of Law,* § 21.9, at 534-35 (3d ed. 1986). Contingent fees that exceed the market value of the services rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose. *In re Washington Public Power Supply Sys. Sec. Litig*., 19 F.3d 1291, 1299 (9th Cir. 1994). Importantly, Plaintiff's Counsel's request for fees seeks no premium over their normal hourly rates, does not exceed the market value of their services, if rendered on a non-contingent basis, and is fair and reasonable.

4. Quality of Representation

The successful prosecution of this litigation required specialized experience and expertise in TCPA and class action law. The high quality work of Plaintiff's Counsel is not unique to these litigation proceedings, however. Lead counsel, John Yanchunis and the law firm of Morgan & Morgan, have been involved in the successful prosecution of a significant number of class action lawsuits on a nationwide basis over the past nineteen years. Currently, Mr. Yanchunis is co-lead on the executive committees or is *liason* on a number of pending MDLs around the country. In addition, Mr. Yanchunis is a frequent lecturer on class action litigation and related issues, and serves as the expert for The Florida Bar on ethics issues related to class action litigation. The quality of Plaintiff's Counsel's efforts to obtain maximum relief for the

Class is also evidenced by Plaintiff's Counsel's relentless pursuit of discovery from Defendant, continued pursuit of the litigation during each phase of the litigation, including the certification of the Class and the successful defense of this Court's certification order on appeal (Doc. 90), the preparation of the case for trial, and the preparation for and participation in mediation and settlement.

The quality of opposing counsel is also relevant when evaluating the quality of the services rendered by Plaintiff's Counsel. *See, e.g., Chakejian v. Equifax Info. Servs., LLC*, No. 07-2211, 2011 WL 241109, at *15 (E.D. Pa. June 15, 2011); *In re March & McLennan Companies, Inc. Secs. Litig.*, No. 04 Civ. 8144(CM), 2009 WL 5178546, at *19 (S.D.N.Y. Dec. 23, 2009); *In re Merrill Lynch Tyco Research Secs. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008); *In re Warner Communications Sec. Litig.*, 618 F.Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re King Resources Co. Sec. Litig.*, 429 F.Supp. 610, 634 (D. Colo. 1976); *Arenson v. Board of Trade*, 372 F.Supp. 1349, 1351 (N.D. Ill. 1974). Here, Defendant was well represented by experienced and qualified attorneys in the area of TCPA litigation, who vigorously contested the claims raised by Plaintiff. Plaintiff's Counsel's ability to obtain favorable results in the face of such an adversary evidences the quality of Class Counsel's work. *See In re Adelphia Communications Corp. Sec and Derivative Litig.*, No. 03 MDL 1529 LMM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) (holding that "[t]he fact that the settlements were obtained from defendants represented by formidable opposing counsel from some of the best defense firms in the country also evidences the high quality of lead counsels' work.") (internal quotations omitted).

5. Requested Fee in Relation to Settlement – Class Counsel's Hourly Rates Are Reasonable in Light of the Nature of This Case

Plaintiff's Counsel are experienced and skilled practitioners in class actions and complex litigation. As such, Plaintiff's Counsel's rates reflect the competitive market hourly rates for national cases involving complex and class action litigation, as well as the reputation, experience and success of the lawyers and firms involved. Considering the complex nature of this case and Plaintiff's Counsel's experience, reputation and skill, as well as the results obtained in the settlement and the fact that their hourly rates do not contain a contingency mark-up, Plaintiff's Counsel's hourly rates should be deemed reasonable.

The Second Circuit Court of Appeals has recognized that, in determining an appropriate market rate for an attorney, "legal markets may be defined by practice area" rather than merely by geography. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, et al.*, 522 F.3d 182, 192 (S.D.N.Y. 2015) (citing *A.R. ex. Rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d 65, 80 (2d Cir. 2005)). Further, the district court has discretion "to determine the relevant community for calculating attorneys' fees . . . ." *Id.*, 407 F.3d at 81 (holding that the district court could determine the relevant community where the case was not commenced and litigated in a single federal district) (citing *Polk v. N.Y. State Dep't of Corr. Servs.*, 722 F.2d 23, 24 (2d Cir. 1983)). "As such, courts in the Second Circuit are not required to strictly adhere to the forum rule where circumstances warrant otherwise. *Id.* ("[T]here is good reason for a district court not to be wed to the rates in its own community. If they are lower than those in another district, skilled lawyers from such other districts will be dissuaded from taking meritorious cases in the district with lower rates."). The Second Circuit Court of Appeals has explained that the district court may adjust the prevailing hourly rate in the district "to account for plaintiff's reasonable decision to retain out-of-district counsel, just as it may adjust the base

hourly rate to account for other case-specific variables." *Arbor Hill Concerned Citizens Neighborhood Ass'n.*, 522 F.3d at 184; *Velez v. Novartis Pharms. Corp.,* 2010 U.S. Dist. LEXIS 125945, at *22 (S.D.N.Y. Nov. 30, 2010) (approving lodestar calculation based on hourly rates of $750, $750, $700 and $600 for senior attorneys, and $500 and $400 for two other lawyers, finding those rates in 2010 below the prevailing market rates charged by firms of similar caliber, including defense firms, that litigate regularly in New York City).

Plaintiff's Counsel's hourly rates are particularly reasonable in light of the non-contingent hourly rates charged at law firms across the country representing commercial clients and the United States Government.[2] The results of a survey of the top 15 law firms were published in the February 2015 edition of *The American Lawyer*, which cited a survey conducted by its sister publication *The National Law Journal*, and disclosed the hourly rates listed in the chart attached hereto as Exhibit F.

Plaintiff's Counsel's requested hourly rates are reasonable, particularly in light of the rates within the fee hierarchies of other law firms for comparable work in complex litigation and class action proceedings, and are also consistent with rates approved by the United States Government and courts throughout the Second Circuit. In light of these fees, the overall agreed-upon fee for Plaintiff's Counsel, provided in the Stipulation of Settlement, is reasonable.

From the outset, Plaintiff's Counsel understood that they were embarking on a complex, expensive and lengthy litigation, where recovery was not assured. Through their extensive efforts, Plaintiff's Counsel have achieved a settlement targeted to address the allegations leveled against Defendant. "Perhaps no better indicator of the quality of representation here exists than

[2] The United States government has approved of and agreed to non-contingent hourly rates in excess of those sought here. *See* U.S. Dep't of Treasury, Procurement Servs. Div., contract with Cadwalader, Wickersham & Taft, LLP (Jan. 27, 2009); U.S. Dep't of Treasury, Procurement Servs. Div., contract with Cadwalader, Wickersham & Taft, LLP (Mar. 30, 2009); and U.S. Dep't of Treasury, Procurement Servs. Div., contract with Sonnenschein, Nath, & Rosenthal, LLP (Mar. 30, 2009).

the result obtained." *See Behrens v. Wometco Enter., Inc*., 118 F.R.D. 534, 547 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Plaintiff's Counsel achieved this settlement at a high degree of financial risk to themselves and without any assurance of either compensation for their services or reimbursement for their expenditures. No client or Class Member was asked to pay fees or advance costs. Unlike Defendant's counsel, who were compensated throughout the litigation, Plaintiff's Counsel have received no compensation over the past nearly four years regarding their attorneys' fees. Although it is an established practice in the private legal market to reward attorneys for taking the risk of non-payment under these circumstances by paying them a premium over their normal hourly rates for contingency cases, Plaintiff's Counsel's requested fee does not reflect such an upward adjustment. *See* Richard Posner, *Economic Analysis of Law* section 21.9, at 534-35 (3ed. 1986).

6. Public Policy Considerations

Courts are encouraged to reward lawyers who undertake socially beneficial cases. *See In re Rio Hair Naturalizer Prod. Liability Litig*., MDL No. 1055, 1996 WL 780512, at *17-18 (E.D. Mich. Dec. 20, 1996) ("The court also finds the 'benefit to society factor satisfied in this case. Without compensation to those who are willing to undertake the inherent complexities and unknowns of consumer class action litigation, enforcement of the federal and state consumer protection laws would be jeopardized."); *Fleet Inv. Co., Inc. v. Rogers,* 620 F.2d 792, 793-94 (10th Cir. 1980) (stating "[t]he value of an attorneys' services is not only measured by the amount of the recovery to plaintiff, but also the non-monetary benefit accruing to others, in this case the public at large from his successful vindication of a national policy to protect consumers from fraud in the used car business.")

In the instant case, although the result obtained is targeted to address the violations of the TCPA and benefits the Class, Plaintiff's Counsel merely seeks modest compensation for their work in this matter. Taking into consideration these public policy considerations, the attorneys' fees sought here are warranted, fair and reasonable.

B. THE EXPENSES SOUGHT BY PLAINTIFF'S COUNSEL ARE REASONABLE

An attorney is entitled to "recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer,* 24 F.3d 16, 19 (9th Cir. 1994) (citation omitted). The rationale supporting an award of litigation expenses from the common fund is basically the same as the rationale supporting an award of attorneys' fees from the common fund. In this way, Class Members bear the litigation expenses that Class Counsel incurs for the benefit of the Class. The expenses to date are $146,116.14, and are summarized by category in the chart included in the Yanchunis Declaration, attached hereto as Exhibit B.

V. PLAINTIFF, EDWARD ZYBURO, IS ENTITLED TO A SERVICE AWARD

Class Counsel request approval of a service award for Plaintiff, Edward Zyburo, in the amount of ten thousand dollars ($10,000.00). Plaintiff has been the class representative in this case from the litigation's commencement in 2012, and has done everything required of him to prosecute the claims of the Class and serve as their representative.

The award of service payments to class representatives rests within the discretion of the court. *Macedonia Church v. Lancaster Hotel,* LP, No. 05-0153 (TLM), 2011 WL 2360138, at *13 (D. Conn. June 9, 2011). Service awards are recognized as "an important way of reimbursing class representatives who take on a variety of risks and tasks when they commence representative actions, such as complying with discovery requests . . . ." *Velez*, 2010 WL 4877852, at *25. "Federal courts

consistently approve incentive awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they shoulder during litigation." *Camp v. Progressive Corp.*, No. 02-2680, 2004 WL 2149079, at *8 (E.D. La. Sept. 23, 2004) (omitting internal citations); *UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp.*, 352 Fed. Appx. 232 (10th Cir. 2009); *see also Carrabba v. Randall's Food Markets, Inc.*, 191 F.Supp.2d 815, 835 (N.D. Tex. 2002) (recognizing practice of awarding incentive awards). "Serving as a class representative is a burdensome task and it is true without class representatives, the entire class would receive nothing." *Kay Co. v. Equitable Production Co.*, 749 F.Supp.2d 455, 472 (S.D. W.Va. 2010). Moreover, under circumstances where a private class action suit serves as a means to enforce laws that protect the public, "[c]ourts have found it appropriate to specially reward named class Plaintiffs for the benefits they have conferred." *Pinto v. Princess Cruise Lines*, 513 F.Supp.2d 1334, 1334 (S.D. Fla. 2007).

The amount requested here is consistent with or below the amounts typically awarded in class litigation. *Camp*, 2004 WL 2149079, at *7 (awarding up to $10,000.00 to each named plaintiff as incentive awards, for a total payment of $102,000.00); *Kay Co.*, 749 F. Supp. 2d at 473 (awarding $15,000.00 to each class representative for initiating the litigation, provided and analyzed their records and provided their records in discovery.); *In re Lease Oil Antitrust Litigation (No. II),* 186 F.R.D. 403, 449 (S.D. Tex. 1999) (awarding named plaintiffs up to $10,000.00 each for participating in lawsuit); *In re Granada P'ship Sec. Litig.*, 805 F. Supp. 1236, 1247 (S.D. Tex. 1992) (granting request for incentive award of $5,000.00 to representative class action plaintiffs); *Purdie v. Ace Cash Express, Inc.*, No. Civ. A. 301CV1754, 2003 WL 22976611, at *7 (N.D. Tex. Dec. 11, 2003) (awarding the three named plaintiffs a combined

incentive award of $16,665.00); *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 504 (N.D. Miss. 1996) (awarding each of four named plaintiffs a $10,000.00 incentive award).

The declaration of Class Counsel supports the service award requested. Plaintiff actively participated in this case, including the discovery process. Mr. Zyburo travelled to New York City for his deposition, and also to appear at a hearing on the motion for class certification, where he was examined by Counsel for both parties and by the Court. He kept up with the development of the case after its initiation, and he participated in the negotiation phase of the case. *See* Yanchunis Declaration, attached hereto as Exhibit B, and the transcript of Plaintiff's testimony. (Doc. 78). Plaintiff has demonstrated a keen interest in the enforcement of the claims in this case. The requested service award is justified in light of Plaintiff's devotion of his time and energy to prosecuting a representative action, and reasonable in consideration of the overall benefit conferred on the Class.

VI. CONCLUSION

Based on the foregoing, Plaintiff's Counsel respectfully request that the Court: (i) enter an order approving the payment of $450,000.00, which is 25% of the common fund of $1,800,000.00 for attorneys' fees, an award of costs and expenses in the amount of $146,116.14, (ii) approve the agreed-upon service award to Plaintiff in the amount of $10,000.00, and (iii) enter an order granting to Plaintiff's Counsel and Plaintiff such other and further relief as is appropriate.

Dated: May 26, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2015, the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES, COSTS AND EXPENSES AND SERVICE AWARD TO PLAINTIFF AS CLASS REPRESENTATIVE** was filed using the Court's CM/ECF System, which will send notice to all counsel of record.

/s/ John A. Yanchunis
John A. Yanchunis, Esq.