IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ROBERT KOLINEK, individually and on behalf of a class of similarly situated individuals, *Plaintiff*, *v.* WALGREEN CO., an Illinois corporation, *Defendant*.	Case No. 13-cv-04806 Hon. Matthew F. Kennelly

PLAINTIFF'S RESPONSE TO OBJECTIONS AND REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

This brief specifically addresses the responses to the motion for final approval filed by Objectors Gleith Cozby, Rendee Bullard (both represented by one set of lawyers), and Melinda Franz (represented by another) (Cozby, Bullard, and Franz are collectively referred to as the "Objectors"). These three individuals—and their professional objector counsel—have raised three primary challenges to the Settlement. First, Cozby and Bullard argue that the Settlement Class supposedly contains a large percentage of individuals who provided prior express consent to receive the Prerecorded Prescription Calls at issue and thus, class certification is inappropriate here. Second, Objector Franz argues that the monetary relief obtained by the Settlement is too small to justify approval. And third, all of the Objectors argue that the requested attorneys' fees are excessive. As explained in their preliminary and final approval papers, and more specifically herein, none of these arguments are supported by the facts or the law and thus, they should not stand in the way of final approval.

On the issue of whether a substantial number of class members consented to the subject calls, the Objectors have not adduced *any* evidence that even a single class member uniquely provided prior express consent specifically to receive Prerecorded Prescription Calls. Objectors' counsel seem to believe that the question of consent comes down to how a class member *feels* about receiving a call. But that is not so; the TCPA requires prior express consent, something that either happened or did not happen by virtue of the class providing their telephone contact numbers to Walgreens (a disputed common issue that is being settled here). Objectors themselves (as opposed to their lawyers) seem to better understand that the issue of consent is a legal—not emotional—one. Indeed, while telling this Court that they liked the challenged calls, they simultaneously submitted claim forms where they attested that they had never given legal

(i.e., prior express) consent to receive them. Cozby's and Bullard's attack on the appropriateness of class certification is, therefore, simply wrong.

In terms of the amount of the relief secured for the class, the Objectors refuse to acknowledge that the settlement is in-line with, or even—based on the nature of the claim and the many risks the class faced—better than similar settlements in so-called "direct relationship" TCPA cases. Most notable is Cozby's and Bullard's argument. Straining to find a way to distinguish this settlement, they try to re-evaluate every TCPA settlement under a new standard: by looking at the average claimed amount if each and every class member had submitted a claim. Thus, they argue that the real value of the settlement in the *In re Capital One* matter was $2.72 per class member and the instant settlement is less than that. Though clearly innovative, not a single court (to Class Counsel's knowledge) has ever viewed a TCPA settlement in such terms. As Judge Holderman made clear, the question is how much claiming class members actually receive and whether that is a fair amount. The question of what they might have received had 100% of the class made claims is a purely philosophical one and has no impact on any single class member.[1]

Finally, despite the hysteria the Objectors try to create, the requested attorneys' fees fit within the market rate for such fees in TCPA class actions, and given the strength of the settlement and the quality of the work performed, are entirely supported by the law. The

[1] Indeed, the argument that the settlement in *In re Capital One*—where claiming class members received $34—was four times better for class members than the instant settlement—where claiming class members are projected to receive $30—is the type of issue best left for an undergraduate class on metaphysics. To the actual class, there is no material difference. Filing class members will receive virtually the same amount as in *In re Capital One* (despite that the instant case presented larger risks). And non-claiming class members in both cases get the same: nothing.

Objectors' arguments to the contrary—while no doubt predictable—can be easily dispatched as well.

Accordingly, the Court should overrule the objections, grant Plaintiff's motion for final approval, and grant Plaintiff's motion for attorneys' fees, costs, and a reasonable incentive award.

ARGUMENT

I. Common Issues Predominate Among Settlement Class Members.

Turning first to the issue of certification, Objectors Cozby and Bullard assert that the settlement class was improperly certified, arguing that the class contains "millions" of individuals who value the calls and wished to receive them. (Dkt. 159 ["Cozby Resp."] at 7.) The problems with that argument are three-fold: first, it misunderstands the elements of a TCPA claim and the burden of proof on the issue of prior express consent; second, it ignores the fact that Walgreens would present common, class-wide proof in support of its prior express consent defense anyway; and third, it (seemingly) attempts to raise an ascertainability challenge where the Seventh Circuit has already ruled that none should lie.

To satisfy Rule 23(b)(3)'s predominance requirement, common questions must qualitatively "represent a significant aspect of [the] case." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012), *reh'g denied* (Feb. 28, 2012) (citation omitted). Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). When common evidence can be used to prove a class's claims, the predominance requirement is generally satisfied. *See Messner*, 669 F.3d at 818–19.

As Objectors Cozby and Bullard admit, the predominance inquiry begins with "the substantive elements of [Plaintiff's] cause of action and inquire into the proof necessary for the

various elements." *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981). By contrast and as this Court has already held, "'[p]rior express consent' under the TCPA is an affirmative defense on which the defendant bears the burden of proof; it is not a required element of the plaintiff's claim." (Dkt. 38 at 3 (*vacated on other grounds* by dkt. 51); *see also* dkt. 51 at 1 (referring to "the TCPA-sanctioned affirmative defense of prior express consent").) Thus, it is not an element of the claim itself, and predominance plainly exists in a TCPA class action where the plaintiff can show by common proof that the class received calls (i) on their cellular telephones (ii) that were made using an automatic telephone dialing system or an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(A).

As detailed extensively in Plaintiff's motions for preliminary and final approval, that is quite clearly the case here. By definition, the class consists exclusively of individuals who received Prerecorded Prescription Calls from Walgreens on their cellular telephones, and their membership has been confirmed by reference to Walgreens' own internal records of the calls that it made. (*See* dkt. 98-2, ¶¶ 12–14.) Likewise, by definition, the calls at issue are specifically those that included artificial prerecorded messages. (Dkt. 98-1 § 1.24.) As such, and as with many TCPA cases, common issues predominate because proof of the elements of the claim is uniform across the class. *See*, *e.g.*, *Birchmeier v. Caribbean Cruise Lines, Inc.*, 302 F.R.D. 240, 253 (N.D. Ill. Aug. 11, 2014); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) ("Class certification is normal in litigation under [47 U.S.C.] § 227.").

Nevertheless, Objectors Cozby and Bullard argue that common issues cannot predominate because requiring class members to prove that they *did not* consent would require individualized issues of proof. (Cozby Resp. at 4–8.) Again, Plaintiff and the Class do not need to prove their lack of consent; rather, the burden would rest on Walgreens to show by a

preponderance of the evidence that it had obtained their express consent prior to calling. (Dkt. 38 at 3; Dkt. 51 at 1.) To that end, Walgreens has contended throughout the litigation that all of the phone numbers used to call settlement class members were voluntarily provided by or on behalf of the class members themselves in connection with a healthcare transaction and that such voluntary provision of a phone number is sufficient consent under the TCPA for these healthcare calls. From a legal prospective, the question of whether that sort of voluntary provision of a phone number constitutes prior express consent to receive Prerecorded Prescription Calls would necessarily be answered in the same way for each and every class member—either voluntary provision of a number is valid consent or it is not.

Even setting aside that the legal issue of consent can be resolved on a class-wide basis, consent poses a common and predominant factual question as well. That is, Plaintiff contends that there is no evidence that Walgreens, prior to obtaining the phone numbers, informed class members that they would be receiving Prerecorded Prescription Calls and thus, they did not know about them and necessarily could not have consented to receive them. As an example, Plaintiff alleges that he provided his relevant phone number to Walgreens before the calling program even existed. (*See* dkt. 51 at 4, 8 (holding that "the FCC has established no such general rule [regarding the mere provision of a phone number acting as consent]…. Rather, to the extent the FCC's orders establish a rule, it is that the general scope of a consumer's consent depends on its context and the purpose for which it is given. Consent for one purpose does not equate to consent for all purposes.").)

The only argument that the Objectors offer to support their position is that many of the class members supposedly wanted to receive the calls at issue, that most did not opt-out of receiving them, and that many opted back in to receiving the calls after having opted out. (Dkt.

159 at 2–3.) That argument is a red herring. Again, the consent inquiry is not a subjective one—it does not ask whether class members benefited from the calls, whether they liked them, or even whether they would consent to them if given the opportunity. Rather, it is an objective question aimed at determining whether class members provided their *express* consent (as defined by the TCPA and its implementing rules and regulations) *prior* to receiving even a single offending call. *See* 47 U.S.C. § 227(b)(1)(A). Since *that* issue will be assessed by reference to Walgreens' common practices, procedures and records, common issues predominate here. (*See* Dkt. 98 at 11–12, 17–18.)

In any event, to the extent the Objectors' argument is focused on commonality and predominance at all, this Court has already noted that no authority exists "supporting the proposition that commonality . . . is lacking simply because some class members may subjectively attach different values to" the wrongfulness of the defendant's conduct. *In re Southwest Airlines Voucher Litig.*, No. 11-cv-8176, 2013 WL 4510197, at *5 (N.D. Ill. Aug. 26, 2013), *appeal dismissed* (Jan. 3, 2014), *aff'd as modified,* No. 13-3264, 2015 WL 4939676 (7th Cir. Aug. 20, 2015).

Ultimately, as the Supreme Court has held, even a single common question of law or fact is sufficient to satisfy Rule 23(a)'s commonality requirement. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2562 (2011). Here there at least three common questions suitable for class-wide treatment, including the issue of consent. Thus, commonality is clearly satisfied.

Insofar as Cozby and Bullard's argument is rooted in ascertainability concerns related to settlement class members attesting to whether they consented to receive the calls on the claim form, they are mistaken there as well. *See Mullins v. Direct Digital, LLC*, No. 15-1776, 2015 WL 4546159, at *11 (7th Cir. July 28, 2015). In this regard, Cozby and Bullard argue that the class

should have been defined to include only those individuals who "did not consent" to receive the calls, so that only those individuals may recover under the settlement. (Dkt. 159 at 4 n.2.) But that wouldn't work and is unnecessary for a few reasons. For one, such a class definition would be impermissibly fail-safe—i.e., membership in the class would be defined based on the merits of the claims at issue. *Mullins*, 2015 WL 4546159, at *5 (collecting cases). It would also make the class unascertainable inasmuch as it would be based on "subjective criteria, such as [class members'] state of mind"—whether (as Cozby and Bullard put it) class members wanted or liked the calls and thus believed they had consented to receive them. *Id.* at *4 (collecting cases). Beyond that, the Seventh Circuit has said that there is no issue with class members self-identifying by way of affidavit or other affirmations of class membership, which is exactly what the claim form in this case requires. *Id.* at *11.

Cozby's and Bullard's settlement fund dilution argument fails for the same reasons. (*See* dkt. 159 at 8 n.4.) First, the settlement already includes a mechanism (which again, the Seventh Circuit has specifically endorsed) to ensure that only those class members who affirm on their claim forms that they did not consent to receive the calls will receive a share of the settlement fund. *Mullins*, 2015 WL 4546159, at *11. And in any event, "in practice, the risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible. [The Seventh Circuit is] aware of no empirical evidence that the risk of dilution caused by inaccurate or fraudulent claims in the typical low-value consumer class action is significant." *Id.*; (*see also* Transcript of August 24, 2015 Hearing ["Aug. 24 Tr."] at 26:23–27:5, true and accurate excerpts

of which are attached as Exhibit 1) ("So, in other words, if somebody is not able to make that representation under oath, they don't get any money … they haven't put in a claim for it.").[2]

Accordingly, Cozby's and Bullard's arguments not only fundamentally misunderstand the burden of proof accompanying a TCPA claim, but the meaning of the phrase "prior express consent" as well, and they may properly be overruled.

II. The Substantial Relief to the Class Justifies Final Approval of the Settlement.

Next, the Objectors argue that the Court should deny final approval because the monetary relief to the settlement class "is on the low side of compensation." (Dkt. 160 ["Franz Resp."] at 6; Cozby Resp. at 4.) Specifically, Cozby and Bullard argue that the Court should assess the recovery for the class in terms of dollars per class member in total, rather than in terms of the actual cash recovery for each claiming class member. Of course, they offer no explanation for why this Court should be more concerned about the abstract over the concrete, and beyond that, their argument fails because this settlement provides for per-claimant relief that compares favorably with other recently approved TCPA settlements. Franz, for her part, makes an even less sensible argument: that the settlement fails by comparison to the $4.5 billion or more theoretically available at trial. Ultimately, both arguments demonstrate a lack of familiarity with the governing case law, as well as a willful ignorance of practical realities.

Beginning with Cozby's and Bullard's argument that the settlement is deficient because it fails to offer enough hypothetical per-class-member relief, there is simply no support for such an

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[2] Even if some portion of the class could be shown to have granted prior express consent in some unique fashion, "there is no reason at this stage to believe that many" did, *see Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009), and the Seventh Circuit has held that such a circumstance would not act to prohibit certification anyway. *Id.* ("What is true is that a class will often include persons who have not been injured by the defendant's conduct, indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification.").

analysis. Indeed, not a single court (to Class Counsel's knowledge) has ever viewed a TCPA settlement in such terms. To the contrary, in his exhaustive recent opinion in the *In re Capital One* TCPA case, Judge Holderman noted that, for purposes of comparing settlements, a per-claimant analysis is far more useful. *See In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) ("The recovery per class member—excluding administrative costs, Named Plaintiff awards, and attorneys' fees—is a relatively diminutive $2.72. The court does not have the necessary data to compare this proposed settlement to other TCPA actions based on the recovery per *class member*. There are, however, a number of benchmark settlements to which the Court can compare the recovery *per claimant*.") (emphasis in original). That is obviously the most meaningful approach inasmuch as it assesses a settlement in terms of what class members will actually receive, rather than focusing on hypothetical calculations based on 100% participation by a class—which the parties and the Court know will almost never happen (in this or any other case).

Under that more practical analysis—which takes into account the number of claiming class members and the relief actually available to them—the settlement here (as predicted) provides relief that compares favorably with other recently approved TCPA settlements. As explained repeatedly in Plaintiff's preliminary and final approval briefs—and unaccounted for by the Objectors—settlements in "direct relationship" TCPA cases like this—where the individual called voluntarily provided his or her cellular telephone number to the caller at some point—traditionally provide claiming class members coupons or cash payments of $25 or less. *See*, *e.g.*, *Kazemi v. Payless Shoesource, Inc.*, No. 09-cv-5142, Dkt. 94 (N.D. Cal. 2012) (providing $25 voucher per class member); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, No. 11-md-2261, Dkt. 97 (S.D. Cal. 2013) (providing for $20 voucher that could be redeemed for $15 cash after nine-

month waiting period). Here, however, claimants will receive approximately $30 in cash relief, which is within the range of approvable recoveries for this type of case. *See In re Capital One*, 80 F. Supp. 3d at 789 (noting that $34.60 per claimant recovery "falls within the range of recoveries in other TCPA actions, but as Judge Davila noted in discussing a similarly sized settlement last year, it falls on the 'lower end of the scale.'" (quoting *Rose v. Bank of Am. Corp.*, No. 11-cv-2390, 2014 WL 4273358, at *11 (N.D. Cal. Aug. 29, 2014)).[3]

Franz, meanwhile, argues that the settlement fails by comparison to the $4.5 billion to $13.5 billion (or more, since some individuals received multiple calls) theoretically available under the TCPA. (Franz Resp. at 6.) That comparison is, for several reasons, both dishonest and unhelpful. To start, such a recovery is simply impossible. Moreover, taking this case to trial in hopes of obtaining a multi-billion dollar judgment would probably do more harm than good, given that—in addition to the lengthy delay before any recovery, as well as the enormous risk involved—due process concerns would likely limit any such recovery, possibly even to an amount less than the settlement. *See*, *e.g.*, *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 900–01 (W.D. Tex. 2001) (reducing TCPA junk fax damages award from $2.34 *billion* to $459,375, or *seven cents* per negligent violation and twenty-one cents per knowing violation.);[4] *see also In*

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[3] Notably, Cozby and Bullard have failed to offer a single authority suggesting that the relief available under the Parties' settlement would be insufficient under their own, per class member, analysis.

[4] Judge Sparks of the Western District of Texas explained the damages reduction as follows:

> Although the TCPA provides for liquidated damages of $500 for each violation, the Court finds it would be inequitable and unreasonable to award $500 for each of these violations . . . The Court therefore will interpret the provision as providing for "up to" $500 per violation. Using the undisputed expert evidence submitted by the defendants that each unwanted fax page costs the recipient seven cents, the Court finds a reasonable award, in this case, is seven cents per violation.

re Capital One, 80 F. Supp. 3d at 790 ("[A] settlement is a compromise, and courts need not—and indeed should not—'reject a settlement solely because it does not provide a complete victory to plaintiffs.' *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010). This is especially true when a complete victory would most surely bankrupt the prospective judgment debtor."). Third, such a comparison wholly ignores the time-value of money, as well as the risk of non-recovery that would accompany continued litigation, even though the Seventh Circuit has instructed trial courts to consider those factors. *See Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). And fourth, to the extent Franz's challenge relies on the fact that some class members received multiple calls, it ignores the fact that those individuals were not only the ones most likely to approve of receiving the calls (given that they had multiple opportunities to opt-out and chose not to), but also that they got the most use out of Walgreens' Prerecorded Prescription Calls.

In support of her position that the settlement should have recovered more money, Franz relies on a single case (without any discussion of it whatsoever) out of the Northern District of California, where claimants in a TCPA class action against a debt collector obtained between $300 and $325 each from a $1 million settlement fund. *See Grannan v. Alliant Law Group, P.C.*, No. 10-cv-2803, 2012 WL 216522, at *7 (N.D. Cal. Jan. 24, 2012). The *Grannan* recovery, however, in addition to being an outlier among TCPA settlements, is distinguishable on the facts. For instance, there is no evidence that the plaintiff or the class in *Grannan* had a "direct relationship" with the defendant (i.e., that they had voluntarily provided their cellular telephone numbers to the defendant) like the class did here. It also appears from the record that in *Grannan*

Id. at 901 (footnote omitted).

the amount recovered for the class was not based on TCPA precedent or a desire to obtain a particular individual payment amount, but rather, (i) on the fact that the defendant had only its $1 million insurance policy available to fund a settlement, and (ii) just 1,986 claims were filed out of the more than 137,000 class members. *Id.* Moreover, Franz fails to account for the practical realities of this case, namely the very real possibility that the Court could have dismissed Plaintiff's and the class's claims in their entirety if it found *either* that the voluntary provision of Plaintiff's and the class's cell phone numbers to Walgreens constituted "prior express consent" under the TCPA (as it originally did), *or* that Walgreens' calls fell within the TCPA's emergency purpose exception (which remained an open issue subject to further factual development). (*See* dkt. 20 at 9–15; Dkt. 51 at 8–9.) *See also TCPA Omnibus Ruling & Order*, FCC 15-72, ¶ 146 (June 18, 2015), https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order.[5]

Ultimately, the Objectors' challenges to the amount of relief available, at their core, "simply argue[] that the amount awarded to [c]lass [m]embers should be increased." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 592 (N.D. Ill. 2011) (quoting *Browning v. Yahoo! Inc.*, No. 04-cv-1463, 2007 WL 4105971, at *5 (N.D. Cal. Nov. 16, 2007)). This "is . . . 'tantamount to complaining that the settlement should be 'better,' which is not a valid objection.'" *Id.* And, of course, the biggest problem with the Objectors' argument comes from their own conduct, given their decision to file claims for relief under the settlement, rather than exercising their right to opt out and pursue the greater amount of damages supposedly available by virtue of their claims. (*See* Aug. 24 Tr. at 31:17–32:15.)

[5] In any event, the Objectors cannot dispute that the $11 million settlement fund established here "would be substantial under most circumstances." *See Lane v. Facebook, Inc.*, 696 F.3d 811, 824 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 8 (Nov. 4, 2013).

III. The Relief to the Class and the Risk of Nonpayment Justify the Attorneys' Fees Sought.

Finally and as is often the case when serial objectors are involved, Franz, Cozby, and Bullard all contend that Class Counsel's fee request is excessive. They assert that the fees should be calculated using the lodestar method, that the risks facing Class Counsel in taking and pursuing this litigation were minimal, and that supposed collusion undermines Counsel's entitlement to fees. Each argument misses its mark.

A. The market rate for attorneys' fees in common fund TCPA class actions is based on a sliding scale calculated from a percentage of the money recovered for the class.

First, the Objectors mischaracterize Plaintiff's argument underlying his fee petition. Kolinek never argued that the Seventh Circuit ordered abandonment of the lodestar method for calculating attorneys' fees. Plaintiff has always pointed out that it is within the Court's discretion to use either the lodestar method or the percentage-of-the-fund method to determine the proper "market rate" for attorneys' fees. (Dkt. 105-1 at 13 n.3.) That said, given the structure of the settlement (i.e., a pure common fund with no reverter), the preferred method of calculating fees in the Seventh Circuit is by applying a "market rate" analysis using the percentage-of-the-fund method, rather than lodestar. Indeed, the Seventh Circuit has "consistently directed district courts to 'do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007). In the TCPA class action market, it is well established that the market rate for attorneys' fees is based on the percentage-of-the-fund method. *See*, *e.g.*, *In re Capital One*, 80 F. Supp. 3d at 789–90; *Craftwood Lumber Co. v. Interline Brands*, No. 11-cv-4462, 2015 WL 2147679, at *4 (N.D. Ill. May 6, 2015); *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14-cv-190, 2015 WL 890566 (N.D. Ill. Feb. 27, 2015).

Former Chief Judge Holderman (ret.) recently performed an extensive analysis of *seventy-one* recent TCPA class action settlements to determine the appropriate market rate for attorneys' fees in this type of case. *In re Capital One*, 80 F. Supp. 3d at 798. The results were clear: "[T]he market rate in a typical TCPA class action [is] a sliding-scale fee," calculated based on a percentage of the money recovered for the class. *Craftwood Lumber*, 2015 WL 2147679, at *4 (citing *In re Capital One*, 80 F. Supp. 3d at 804 n.13); *cf. Williams v. Gen. Elec. Capital Auto Lease*, No. 94-cv-7410, 1995 WL 765266, at *9 (N.D. Ill. Dec. 26, 1995) (noting general principle in common fund class actions that market rate is computed "as a percentage of the benefit conferred upon the class."). Through his extensive analysis, Judge Holderman found that the sliding-scale market rate for fees in TCPA class actions included, *inter alia*, a fee percentage of 30 percent for the first $10 million recovered, plus a risk premium where appropriate. *See In re Capital One*, 80 F. Supp. 3d at 806; *see also Wilkins*, 2015 WL 890566, at *1 (applying 30% market rate to first $10 million recovered in TCPA class action settlement and decreasing percentage thereafter). Here, Plaintiff seeks that same 30 percent rate and six percent risk premium awarded in *In re Capital One*. *See* 80 F. Supp. 3d at 806.

In arguing that the Court should instead base any fee award on the lodestar method, Objectors Franz, Cozby, and Bullard do not even cite *In re Capital One* or acknowledge Judge Holderman's comprehensive analysis of similar cases. Instead, they make four arguments. First, that this case somehow "was not a typical TCPA case at all" because "[t]he case was settled very early on in the proceedings." (Franz Resp. at 9.) But this case was settled only after extensive briefing and argument and three rulings by the Court on dispositive motions to dismiss, confirmatory document production, interrogatory and deposition discovery (including a Rule 30(b)(6) deposition of Walgreens), and two mediations before Judge Andersen (ret.) of JAMS in

Chicago. Moreover, as the Objectors' own cited authorities prove, TCPA cases settle at all stages, often without any dispositive briefing at all. *See*, *e.g.*, *Grannan*, 2012 WL 216522, at *1 (settled after defendant answered and "some" discovery was conducted); *Bayat v. Bank of the West*, No. 13-cv-2376, 2015 WL 1744342, at *6 (N.D. Cal. Apr. 15, 2015) ("The parties in this case reached a quick settlement. Class counsel billed only 621 hours of attorney time on this litigation . . . most of which was spent in settlement negotiations and drafting the approval (and other court) papers; not conducting discovery or investigating the claims.").

Second, they argue that Class Counsel failed to provide facts supporting the "market rate" and instead only relied on self-serving affidavits. (Franz Resp. at 6; Cozby Resp. at 5.) But that argument wholly ignores Class Counsel's reliance on Judge Holderman's exhaustive analysis of market rates in TCPA class actions. *See generally In re Capital One*, 80 F. Supp. 3d 781. It also demonstrates the Objectors' apparent misunderstanding of what constitutes evidence—that is, Class Counsel provided an affidavit that included such evidence of the reasonableness of their fee request as (i) the fact that their hourly-paying clients paid the same rates as they sought to be approved here, and (ii) courts throughout the country have approved those same rates. (*See* dkt. 154-1); *cf. In re Southwest Airlines Voucher Litig.*, 2013 WL 5497275, at *8–9 (describing counsel's failure to include in his fee affidavit, *inter alia*, any description of his work experience or any indication "that the attorneys have charged and obtained these rates for similar litigation, or indeed for any litigation."). And finally, it ignores that the Court specifically directed the form in which Class Counsel's affidavit supporting their fee request was to be filed. (*See* dkt. 152.)[6]

[6] Insofar as the Objectors' position is that Class Counsel was required to file their actual billing records, (Cozby Resp. at 10; Franz Resp. at 10), they offer no authority to that effect and are mistaken in any event. It is not customary practice in this Circuit to file line item billing records, and it is rare for any court to require such a filing. *See generally In re Southwest Airlines Voucher Litig.*, 2013 WL 5497275, at *3, *aff'd*, No. 13-3264, 2015 WL 4939676 (7th Cir. Aug.

Third, they argue that the supposedly deficient recovery compels a reduced fee award. But as described in Section II, *supra*, the recovery in this case closely tracks recoveries in similar "direct relationship" TCPA class actions, as do the fees sought. For instance, not only does the per-claimant relief in this case fall within a few dollars of that in *In re Capital One*, the attorneys' fee percentage sought by Class Counsel tracks Judge Holderman's market rate and risk adjustment analysis exactly. (Dkt. 137-1 at 34.)

And fourth, they argue that should the Court employ a lodestar analysis, Class Counsel's billable rates and hours billed are excessive. (Franz Resp. at 7; Cozby Resp. at 5.) Neither assertion holds water. As an initial matter, the hours billed by Class Counsel (more than 1,900) are well short of those in the recent *In re Capital One* and *In re Southwest Airlines*, despite the fact that the cases were at approximately the same stage of litigation when settled. *See In re Capital One*, 80 F. Supp. 3d at 794 (4,268 hours); *In re Southwest Airlines Voucher Litig.*, 2013 WL 5497275, at *3 (2,899.2 hours). Predictably, the Objectors have no support for their position that Class Counsel's hours billed are "incredibly high" (Franz Resp. at 10)—only the unsupported assertions of counsel with no experience in the field. Moreover and as explained above, Class Counsel's hourly rates are supported by ample evidence—again, Class Counsel's corporate clients pay the same hourly rates sought in this case, (Dkt. 154-1, ¶ 7), and Courts throughout the country have routinely approved their hourly rates.. *See, e.g., Kulesa v. PC Cleaner, Inc.*, No. 12-cv-725, Dkt. 101, at 16–17 (C.D. Cal. Aug. 26, 2014) (recognizing that

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20, 2015) (considering a fee request based upon 2,899.2 hours billed but not requiring the submission of detailed time records); *Williams v. Rohm & Haas Pension Plan*, No. 04-cv-0078, 2010 WL 4723725, at *1 (S.D. Ind. Nov. 12, 2010), *aff'd,* 658 F.3d 629 (7th Cir. 2011) (awarding attorneys' fees after considering, *inter alia*, "estimated summaries of hours worked and the hourly rates which they claim are appropriate for those professionals who worked on the matter within Plaintiff's counsel's firm."); *see also* Third Circuit Task Force, *Selection of Class Counsel*, 105 (2002) (when using the lodestar as a cross-check, "the court should be satisfied with a summary of the hours expended by all counsel…."); (*see also* dkt. 152).

Edelson PC's hourly rates are reasonable and approved by courts throughout the country); *Robles v. Lucky Brand Dungarees, Inc.*, No. 10-cv-04846, Dkt. 105, at 6–7 (N.D. Cal. May 10, 2013) ("The Court finds the rates charged to be appropriate and reasonable in light of the experience of each attorney and that the hourly rates are in line with comparable market rates."); *Ellison v. Steven Madden, Ltd.*, No. 11-cv-5935, Dkt. 73 (C.D. Cal. May 7, 2013) (approving Edelson PC's hourly rates and noting that "the billing rates are reasonable in the California and Chicago legal markets, where Class Counsel's firm is located, and have been approved by state and federal courts in similar settlements."); *Gross v. Symantec Corp.*, No. 12-cv-00154, Dkt. 88 (N.D. Cal. Mar. 21, 2014) (finding Edelson PC's current "hourly rates are reasonable and have previously been approved by other courts throughout the country"). Finally, to the extent the Objectors argue that the lodestar multiplier of 3.35 is excessive, (*see* Cozby Resp. at 5; Franz Resp. at 7), they ignore the fact that it falls well within the approval range for similar cases, including in this District. *See In re Capital One*, 80 F. Supp. 3d 781 (awarding fees equal to 7.07 multiplier); *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14-cv-190, Dkts. 90, 117 (N.D. Ill.) (awarding fees equal to 11.04 multiplier); *Harman v. Lyphomed, Inc.,* 945 F.2d 969, 975 (7th Cir. 1991) ("Multipliers anywhere between one and four have been approved.") (citation omitted).

Thus, relying in large part on Judge Holderman's analysis in *In re Capital One*, Plaintiff has shown that under applicable Seventh Circuit precedent, the percentage-of-the-fund method of calculating attorneys' fees is appropriate in this case, as is the 36-percent fee sought by Class Counsel.

B. Class Counsel faced a real risk of total nonpayment.

Contrary to the Objectors' contentions, the obvious risks of nonpayment in this case support Class Counsel's fee request as well. Objector Franz contends that Class Counsel "did not

assume any risk of nonpayment." (Franz Resp. at 11.) But that baseless assertion ignores the fact that Plaintiff's claims were dismissed *with prejudice*, before the Court took the rare step of granting Plaintiff's motion for reconsideration. (*See* dkts. 38, 51.) Moreover, it also ignores the fact that Plaintiff (and every other class member) had provided his telephone number to Walgreens, (Dkt. 1, ¶¶ 18–19), as well as the fact that Walgreens clearly would argue (and potentially could establish) that its calls fell within the TCPA's emergency purposes exception. (*See* dkt. 20 at 9–15); *see also TCPA Omnibus Ruling & Order*, FCC 15-72, ¶ 146 (June 18, 2015), https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order.[7]

A point-by-point examination for Franz's argument demonstrates its absurdity. Franz begins by arguing that Walgreens' emergency purpose defense "should have been forecast, assessed, and countered by the allegations of the complaint." (Franz Resp. 10.) That argument misunderstands the role of the pleadings under the Federal Rules. To the extent Franz is asserting that the Complaint should've included some sort of factual rebuttal of Walgreens' defense (although it's not clear what such an allegation would look like) in order to survive a motion to dismiss, Franz forgets that Plaintiff's complaint did in fact survive Walgreens' motion to dismiss. (*See* dkt. 51.) And to the extent Franz is trying to say that further allegations in the Complaint would have served some evidentiary purpose down the line, she is wrong again; "a plaintiff may not rely on the mere allegations of the complaint to oppose a motion for summary judgment." *Pignato v. Am. Trans Air.*, No. 90-cv-2012, 1991 WL 30056, at *1 (N.D. Ill. Mar. 1, 1991).

[7] In fact, Franz's entire argument rests on the faulty premise that Plaintiff's complaint was lacking in detail, which (as Franz believes) would indicate that Class Counsel thought that settlement was a sure thing upon filing. (Franz Resp. at 6–7.) But Franz offers no explanation for what allegations Plaintiff could have included in his complaint that would have demonstrated Class Counsel's acceptance of risk, or (more importantly) why Class Counsel would include such allegations in the Complaint. And in any event, that position highlights the risks here given the Court's stated view that the consent and emergency purpose defenses were in need of further factual development. (Dkt. 51 at 8–9.)

Next, Franz asserts that because Plaintiff's complaint was only nine pages in length, that somehow establishes that "Class Counsel took the case assuming there was little to no risk of nonpayment." This makes little sense. For one, and as described above, it is unclear what Franz believes Plaintiff could have properly alleged that would've quantified its appreciation of the risk inherent in the case, or prevented Walgreens from asserting its defenses. Perhaps Franz would have preferred Class Counsel to ignore its Rule 11 obligations and assert counterfactually that Plaintiff had never provided his number to Walgreens, or that the calls at issue didn't involve refill reminders. In any event, the idea that attorneys with "pioneer[ing]" experience in the TCPA field, *see Ellison*, No. 11-cv-5935, Dkt. 73 at 9 (C.D. Cal. May 7, 2013), wouldn't have recognized that Walgreens would assert its prior express consent and emergency purpose exemption defenses prior to filing is patently absurd.[8]

Finally, Franz argues that Class Counsel "realized there was a risk of nonpayment" "[*a*]*fter defeating the motion to dismiss*," and that only then did Class Counsel decide to settle. (Franz Resp. 12.) This, too, makes little sense. Indeed, if Plaintiff and Class Counsel had (somehow) been wholly unaware of Walgreens' potential defenses before filing, and were driven to settlement only out of fear, they surely would have settled immediately upon the filing of Walgreens' motion to dismiss, or, at the very least, after the Court granted that motion. But they didn't. Instead, they continued to prosecute this case, devoting substantial time and resources in their efforts to obtain the rare result of convincing the Court to reconsider a previous ruling. And, of course, they ultimately succeeded. As a last note, Franz's point is undermined even further by

[8] The same goes for Franz's accusation that Class Counsel ignored their professional duties and failed to perform a pre-suit investigation. Not only is the record uncontroverted that Counsel did perform such an investigation, (*see* dkt. 110-1, ¶¶ 3,4 28), it is also unclear what else, exactly, from the investigation should have been included in the Complaint, other than a mere assertion that such an investigation took place.

the fact that she is simultaneously contending that Class Counsel should have aimed for the billions in statutory damages theoretically available in the case. Either the case was exceptionally risky (it was) and Class Counsel should have realized it before filing (they did), or it was a sure thing (it wasn't) and Class Counsel should've recovered billions (they couldn't have). But Franz can't make both arguments.

Thus, the idea that Class Counsel faced *zero risk of nonpayment* in a case that was at one point dismissed with prejudice, and where a subsequent FCC order may ultimately lend further support to Defendant's position, is nonsense. *See In re Capital One*, 80 F. Supp. 3d at 791 (noting that "without the prompt and final resolution a settlement provides [p]laintiffs [in TCPA] run the risk that forthcoming FCC orders may extinguish their claims."). Thus, as discussed more fully in Plaintiff's motion for attorneys' fees, the six percent risk premium sought by Class Counsel is more than justified. (Dkt. 105-1 at 17–18); *see also In re Capital One*, 80 F. Supp. 3d at 806 ("Absent better information and in light of the court's determination that this case was only slightly riskier than a typical TCPA class action, the court" applies a six-percent risk premium "to the entire fee award.").

C. The settlement does not contain a clear-sailing provision, nor was it the product of collusion in any way.

Franz's final erroneous argument is that Class Counsel's endorsement of the settlement, and with it, Class Counsel's entitlement to fees, is undermined by the settlement's supposed inclusion of a "clear sailing provision," which calls for "heightened scrutiny" from the Court. (Franz Resp. at 12.) The mere fact that Franz makes this argument, however, demonstrates that her counsel either doesn't understand what a clear sailing provision is, or that he did not perform an adequate investigation into the settlement's terms prior to filing his client's objection and response.

As described in the very case relied on by Franz, a "clear-sailing clause" is one in which "the defendant agrees not to contest class counsel's request for attorneys' fees." *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014), *cert denied sub. nom. Nicaj v. Shoe Carnival, Inc.*, 135 S. Ct. 1429 (2015). Here, however, while Walgreens agreed that Class Counsel would be entitled to have its attorneys' fees paid from the Settlement Fund in an amount determined by the Court, *nothing* in the Settlement Agreement prohibited Walgreens from contesting the amount sought. (*See* dkt. 98-1 at § 8.1.) Indeed, throughout this litigation, Walgreens retained its right to challenge the fees sought by Class Counsel, and would surely have done so had it believed that Class Counsel's request compromised the fairness, reasonability, or adequacy of the settlement. Thus, because the settlement agreement did not prohibit Walgreens from contesting Class Counsel's fee petition, there simply is no "clear sailing" provision, and therefore, not even the appearance of collusion.

Furthermore, any suggestion of collusion is undermined by the nature of the settlement process itself. Specifically, prior to reaching agreement on any of the material terms, the Parties engaged in numerous and lengthy teleconferences, followed by a full-day, in-person mediation with Judge Anderson (ret.) of JAMS in Chicago. Over the course of subsequent days, the Parties continued to negotiate the terms of the settlement, while engaging in confirmatory discovery (including service of formal written discovery, as well as a Rule 30(b)(6) deposition of Walgreens' Director of Outbound Programs, Customer Care Operations). Ultimately, after approximately *five months* of negotiations and discovery—not to mention a second mediation before the Judge Andersen—the Parties were able to reach the settlement agreement. *See McCue v. MB Financial, Inc.*, No. 2015 WL 4522564, at *4 (N.D. Ill. July 23, 2015) (finding the settlement non-collusive when it was reached as a "result of extensive, arms'-length negotiations

by counsel"); *see also In re Southwest Airlines Voucher Litig.*, 2013 WL 4510197, at *1 (noting that Judge Andersen is "a highly respected retired judge of this court.").

Finally, Franz's contention that Class Counsel regularly agree to settlements that are denied approval is laughable. In support, Objector Franz cites to *two* settlements out of dozens reached over the last four years that did not receive approval on the plaintiffs' initial motions. In the *Palm* case cited by Franz, the Court ultimately approved a settlement with only minor alterations to the terms. *See Standiford v. Palm, Inc. et al.*, No. 09-cv-05719, Dkts. 75, 82, 90 (N.D. Cal.). Likewise, in the *Boyd* matter, and despite Franz's selective quotations, the Court held that "the proposed relief in the Settlement Agreement is fair to class members, who otherwise risk obtaining nothing." *Boyd v. Avanquest N. Am., Inc.*, No. 12-cv-4391, 2015 WL 4396137, at *4 (N.D. Cal. July 17, 2015). While the Court ultimately denied approval based on ambiguities regarding the relief's expiration period as well as the specifics of the release, the Parties in that case have agreed on a revised settlement that addresses those concerns and will be filed for approval shortly. Thus, while Franz strained to find *two* settlements out of hundreds that were denied approval, she ignored the fact that Class Counsel have not, to date, presented a Court with a class settlement that was not eventually approved in substantially identical fashion.

Ultimately, each of the objectors' challenges to Class Counsel's fee petition lacks a factual or legal basis. Accordingly, the Court should approve Class Counsel's fee request in its entirety.

CONCLUSION

For the foregoing reasons, Plaintiff Robert Kolinek, on behalf of himself and the settlement class, respectfully requests that the Court overrule the objections; grant final approval

to the proposed settlement; grant Plaintiffs' motion for attorneys' fees, costs, and a reasonable incentive award; and award such other relief as it finds appropriate and just.

Respectfully submitted,

ROBERT KOLINEK, individually and on behalf of the Settlement Class,

Dated: September 8, 2015

By: /s/ Rafey S. Balabanian
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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT KOLINEK, et al., Plaintiffs, vs. WALGREEN CO., an Illinois Corporation, Defendant.	Docket No. 13 C 4806 Chicago, Illinois August 24, 2015 9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HONORABLE MATTHEW F. KENNELLY

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THE COURT: I figured you would.

MR. ANDREOZZI: Thank you for the opportunity.

Yes, to be clear, Walgreens does believe that it has consent and valid consent, if not for everyone, for many, many people in the class. If the case were to go forward, Walgreens would argue that at every stage.

But one point I would make, I agree that the Seventh Circuit's decision in Mullins v. DirecTV is very clear that you can't have a subjective class definition, define the class as only those people who did not consent. That is a failsafe class. You have to define the class as everyone who got the calls.

Now, the argument was made here that including in the class people who wanted to get the calls impermissibly diluted the $11 million settlement fund, the structure of the settlement prevents that because the structure of the settlement, in order to share in the settlement fund, the claimant has to submit a claim form and check the box that says, I received these calls without my consent. So they're affirming under penalty of perjury that they didn't consent. Those are the only people who are getting paid out of the settlement fund.

THE COURT: So, in other words, if somebody is not able to make that representation under oath, they don't get any money.

MR. ANDREOZZI: That's correct, your Honor.

THE COURT: And they have effectively opted out of the settlement at that point-ish. I mean, I understand they haven't filed something saying, I opt out, but they haven't put in a claim for it.

MR. ANDREOZZI: That's exactly right. And the other -- and your Honor had us modify the claim form because, you know, we recognized some people may say, look, I didn't consent previously to get these calls, but --

THE COURT: But now I want them.

MR. ANDREOZZI: Now I want them. There is a second box they can check to opt themselves back in.

THE COURT: I recall that, yes.

Mr. Howe?

MR. HOWE: With respect, the issue of subjectivity versus objectivity is a red herring. Walgreens itself acknowledges that it contends that many members of the putative class consented. Walgreens has evidence that would support that, and --

THE COURT: What is that evidence?

MR. HOWE: Well --

THE COURT: I'm asking you. You just said it. I'm asking you.

MR. HOWE: I'm presuming that they have records that they would be establishing at trial, as counsel said, that

that are going to be receiving the notices and going to be able to submit the claims form. We suggest that the class is overbroad as defined --

THE COURT: Time out a second. Hang on a second. You're on the reply brief of Cozby and Bullard in opposition to class settlement. Those are two of your three, right? The third is Franz.

MR. HOWE: Right. Correct.

THE COURT: Okay. The request for relief is don't certify the class, don't approve the settlement. That's what page 9 says. The class cannot be certified due to a lack of predominance among the class. Even if the class could be certified, the attorneys' fees requested by class counsel are excessive. Therefore, the Court should deny approval of the class settlement. And, alternatively, it says cut back the fee award.

Is there any problem with asking me to deny approval of something that your clients have asked to participate in?

MR. HOWE: Your Honor, no.

THE COURT: You said don't approve the settlement because there's no viable class, but your two clients, at least two of your clients, I don't know about the third, two of your clients have signed up on something saying, I want to participate in the settlement.

MR. HOWE: Your Honor, the role of the objector is to

try to present information to the Court that will allow the Court to assess the propriety of the settlement that's being presented. We have objections with respect to the fee award that we put in our papers, and we have certain other objections; but with respect to the objections of the class, we would respectfully suggest that as presently constituted, it requires --

THE COURT: You're skating around my question, respectfully, Mr. Howe.

My question is, isn't there something a bit inconsistent with -- and you're not here as a -- you don't have any independent role. You're representing a client. Isn't there something inconsistent about Cozby on the one hand saying, here's my form, give me my payment, and on the other hand saying, don't approve the settlement.

MR. HOWE: I see nothing inconsistent with that whatsoever, your Honor.

THE COURT: Really? Why?

MR. HOWE: Because Cozby is a member of the class that this Court has certified, and if this class approves the settlement, Cozby is entitled to participate, and Cozby has a right to present whatever objections that any objector may wish to present to the Court.

What would the alternative be, to say that you're not a member of the class --