CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

STACEY BENBOW; TERESA HERBERT; DENNIS PHILIP; DAWAUN LUCAS; DAVID DOMINGUEZ HOOPER; METE TASIN; and REEJAUNTE SMITH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SMILEDIRECTCLUB, INC.; and SMILEDIRECTCLUB, LLC,

Defendants.

Case No. 2020CH07269

Calendar: 2

Hon. Raymond W. Mitchell

REPRESENTATIVE PLAINTIFFS' AMENDED UNOPPOSED MOTION FOR SERVICE AWARDS AND FEE AWARD AND INCORPORATED MEMORANDUM OF LAW

Dated: April 16, 2021

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Pursuant to 735 ILCS 5/2-801 and the Court's Orders dated February 4, 2021 and March 3, 2021, Representative Plaintiffs Stacey Benbow, Teresa Herbert, Dennis Philip, Dawaun Lucas, David Dominguez Hooper, Mete Tasin, and Reejaunte Smith ("Representative Plaintiffs") and Class Counsel at Hedin Hall LLP and Bursor & Fisher, P.A. respectfully move for the Court's approval of Service Awards and a Fee Award in connection with the Parties' preliminarily approved Settlement.[1] Defendants do not object to the requested Service Award or Fee Award amounts.

INTRODUCTION

In this consumer class action, the Representative Plaintiffs alleged that Defendants SmileDirectClub, Inc. and SmileDirectClub, LLC (collectively, "SmileDirectClub") sent text-message advertisements to their cellular devices and those of numerous other similarly situated consumers using an "automatic telephone dialing system," ("ATDS"), without the requisite consent, in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

After over a year of litigation, involving multiple cases proceeding first in federal court and now in state court, the Parties reached a comprehensive class-wide resolution to this Action, which the Court preliminarily approved in its order dated February 4, 2021. The preliminarily approved Settlement establishes an all-cash, settlement fund of up to $11,500,000.00 (eleven million and five hundred thousand dollars) that Defendants, through SmileDirectClub, LLC, have agreed to make available for the benefit of the Settlement Class; the settlement fund will be used to pay all cash-awards to Settlement Class Members, Settlement Administration Costs, Service Awards to the Representative Plaintiffs, and a Fee Award to Class Counsel. The Settlement also

[1] Unless otherwise defined herein, all capitalized terms have the same force, meaning and effect as ascribed in Section 2 ("Definitions") of the Settlement Agreement.

provides meaningful injunctive relief to the Settlement Class, requiring SmileDirectClub to institute TCPA awareness and oversight procedures for marketing personnel at the company as a means of preventing future transmissions of text messages via an ATDS absent the requisite consent.

Notably, this is the only TCPA autodialing-restriction case in the country to have settled class-wide after the Supreme Court granted certiorari in *Facebook Inc. v. Duguid,* _ S. Ct. _, 2021 WL 1215717 (U.S. Apr. 1, 2021). That is not surprising: after certiorari was granted in *Facebook*, TCPA defendants nationwide recognized that a victory for the appellant on the question the Supreme Court had agreed to decide – namely, whether dialing technology must randomly or sequentially generate or store telephone numbers in order to constitute an "automatic telephone dialing system" covered by the statute, or whether merely dialing telephone numbers from lists would suffice – would absolve nearly all of them from potential liability under the TCPA. And in fact, just two weeks ago the Supreme Court issued a unanimous decision holding that "[t]o qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." *Facebook Inc.*, 2021 WL 1215717, at *1. In so ruling, the Supreme Court rejected the statutory interpretation, advanced by the Plaintiffs in this case, that dialing technology constitutes an ATDS if it "receive[s] and store[s] telephone numbers and then automatically dial[s] such numbers." (Compl. ¶ 44.) Thus, had Class Counsel not settled this case when it did, Settlement Class Members would be unable to establish SmileDirectClub's liability under the TCPA and unable to recover any relief whatsoever.

Moreover, even in the unlikely event that Settlement Class Members could establish that SmileDirectClub was utilizing an ATDS post *Facebook*, their claims would likely have been sent

to individual arbitration based on the arbitration agreement included in SmileDirectClub's terms of service. Or worse, the court might well have held that Settlement Class Members provided their "express written consent" to receive the text messages at issue. SmileDirectClub had raised both arguments at the time of settlement, and an adverse decision on either one would have left the class without any recovery. Simply put, the Settlement Class faced several significant risks of total non-recovery in this litigation, both at the outset and when it settled.

The Settlement's Notice Plan commenced on March 20, 2021 and Notice has been disseminated to the approximately 1.8 million potential Settlement Class Members. To date, thousands of Settlement Class Members have already submitted claims and more continue to submit claims each day.[2]

Class Counsel invested an enormous amount of time and significant resources, monetary and otherwise, investigating and litigating these claims and negotiating the Settlement on behalf of the Settlement Class – a high-risk undertaking that no other attorneys were willing to take on and which ultimately produced an extraordinary result for consumers nationwide. The Representative Plaintiffs likewise played an invaluable role in this action by assisting their counsel at every stage of the proceedings, including by providing counsel with key documents and information regarding their claims, reviewing pleadings and other filings in the case, and taking an active role in negotiating, drafting, and executing the Settlement. Class Counsel continue to devote substantial time and resources to this action on a daily basis by overseeing the notice and administration process, fielding Settlement Class Members' inquiries concerning the Settlement (over 150 to date), and assisting Settlement Class Members file claims – and they will continue to

[2] Settlement Class Members have until June 28, 2021 to submit claims. Class Counsel is working with Google, LLC to ensure that Settlement Class Members who have gmail.com accounts receive the Class Notice in their "inbox" rather than their "spam" folder.

do so until the administration process concludes and funds have been disbursed to class members.

Representative Plaintiffs and Class Counsel respectfully request the Court's approval of Service Awards of $2,500 to each of the seven Representative Plaintiffs ($17,500 in total) and a Fee Award of 32.7% of the settlement fund (or $3,765,000) – $100,000 of which Class Counsel has agreed to designate as a *cy pres* award to be split between two worthy legal-aid recipients in the greater Chicago area of the Court's choosing ($50,000 to each recipient).[3] In other words, Class Counsel's requested Fee Award, if approved, will provide $3,665,000 to Class Counsel and $100,000 to two legal aid societies for the betterment of the greater Chicago community.

As detailed below, the requested awards are appropriate under governing Illinois law, consistent with the amounts awarded in prior similar settlements in Cook County Circuit Court, and fairly compensate Class Counsel and Representative Plaintiffs for the work they performed and commendable result they achieved in this high-risk litigation.

TELEPHONE CONSUMER PROTECTION ACT

The TCPA was enacted more than two decades ago in response to "[v]oluminous consumer complaints about abuses of telephone technology." *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 744 (2012). The TCPA and its implementing regulations specifically prohibit the transmission of marketing text messages to cellular phones via an "automatic telephone dialing system" (or "ATDS") absent "express written consent." 47 U.S.C. § 227(b)(1)(A)(iii).

BACKGROUND

I. NATURE OF THE ACTION[4]

Defendants own and operate an oral care company that created the first medtech platform

[3] Further, pursuant to 735 ILCS 2-807, any residual funds (i.e., uncashed check funds) shall also be distributed to an "eligible organization."

[4] This section includes allegations from Plaintiffs' Complaint.

for the delivery of orthodontic care. Among other products and services, Defendants provide dental practices and their affiliated dentists and orthodontists with dental support organization services, including the use of its telehealth platform. (Compl. ¶ 11.) One of the ways that Defendants' customers can begin seeking treatment using the Defendants' telehealth platform is by booking an appointment to have their initial information collected at one of their brick-and-mortar retail locations across the United States. *Id*. To build their business and market and sell the products and services that Defendants and their affiliated network of doctors provide, Defendants transmit text-message advertisements to their customers. (*See, e.g., id.* ¶¶ 19, 23; *see also id.* ¶¶ 26, 29, 32, 35, 38 (other Representative Plaintiffs).)

Transmitted on the Short Messages Service ("SMS") platform, Defendants' text messages are sent for "telemarketing purposes" and constitute "advertisements" as defined by 47 C.F.R. 64.1200(f). (*Id.* ¶ 15.) Defendants use various telephone numbers to send its text messages, including various five-digit short-code numbers. (*Id.* ¶¶ 19, 23, 26, 29, 32, 35, 38.) The Complaint alleges that Defendants transmit their text messages to consumers using an "automatic telephone dialing system" ("ATDS") within the meaning of the TCPA, 47 U.S.C. § 227(b)(1)(A). *Id.* ¶ 63. Defendants dispute that they have used an ATDS.

Defendants sent these text-message advertisements to customers who, while creating an account on Defendants' platform, checked the box depicted in the screenshot below:

(*See Lucas v. SmileDirectClub Inc.*, No. 2:20-cv-06059-VAP-E (C.D. Cal.), ECF No. 17 at 3-4. Defendants argue that consumers who checked this box consented to receive their advertising and telemarketing text messages and agreed to arbitrate all claims against Defendants. These issues were pending in Defendants' Motion to Compel Arbitration, filed in the *Lucas* case, at the time of

settlement. (*Id.*)

The Representative Plaintiffs contend that, by checking the box on the screen shown above, they did not provide Defendants with TCPA-compliant "express written consent" to send them advertisements and that Defendants therefore violated the TCPA when they sent autodialed "advertising" text messages to them and the other Settlement Class Members. Specifically, the Representative Plaintiffs contend that the checkbox depicted above does not strictly comply with the TCPA's regulatory provisions governing "express written consent," which require, inter alia, that consumers receive a notice that "clearly and conspicuously" discloses that an ATDS will be used to transmit "advertising" and/or "telemarketing" messages to their mobile numbers, and that consent to receive such messages is not a condition of purchasing goods or services. *See* 47 C.F.R. § 64.1200(f)(8). The Representative Plaintiffs also contend that they did not assent to the arbitration clause for similar reasons.

Defendants reject this theory and contend that the Representative Plaintiffs' claims are without merit. Throughout this litigation, Defendants have maintained that they did not use an ATDS and that the checkbox shown above complied with the TCPA's requirements for obtaining "express written consent" and constituted valid agreement to the arbitration clause.

Thus, absent the Settlement, the outcome of this litigation would turn on whether an ATDS was used to send the text messages in question and on whether a consumer, by checking the box on the screen shown above, manifested his or her "express written consent" within the meaning of the TCPA and/or agreed to arbitrate his or her claims.

II. PRE-FILING INVESTIGATION

Class Counsel conducted a comprehensive pre-filing investigation concerning every aspect of the factual and legal issues underlying the claims alleged in this matter. (Hedin Decl. ¶¶ 11-

12.) These extensive pre-filing efforts included:

- Researching the nature of Defendants' business, including its online and brick-and-mortar stores, as well as the company's SMS text message marketing practices;

- Interviewing dozens of recipients of Defendants' text messages about their use of Defendants' products and services, the text messages they received from Defendants, and inspecting and analyzing these consumers' text-message transmission histories, the screenshots of text messages that they received from Defendants (extracted from their devices), and various other records reflecting their interactions with Defendants;

- Researching any changes in Defendants' business practices over the pertinent period of time, including historical postings from consumers on social media and online complaint websites concerning their receipt of Defendants' text messages, and hundreds of screenshots posted by these consumers depicting the text messages they received from Defendants over the statutory period;

- Performing research and analysis regarding Defendants' text messages and text-message transmission systems, and the short-code telephone numbers used to deliver Defendants' text messages to consumers;

- Performing an in-depth analysis of the various versions of the Defendants' Privacy Policy, Terms of Service, and other publicly accessible documents available on Defendants' websites at various times during the statutory period;

- Researching the relevant law and examining the pertinent facts to assess the merits of potential TCPA claims against Defendants and defenses that Defendants might assert thereto, including any potential grounds for Defendants to seek to compel its customers to arbitrate such disputes;

- Investigating Defendants' financial condition in order to assess the likelihood of ultimately recovering a class-wide statutory damages award from Defendants; and

- Reviewing numerous FCC declaratory rulings and orders in effect during the statutory period, as well as then-pending FCC rulemaking proceedings and comment periods pertaining thereto, in order to gauge the likelihood of such proceedings being held applicable to claims for violation of the TCPA against Defendants.[5]

(Hedin Decl. ¶ 11.)

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[5] *See, e.g.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015); *Petition for Reconsideration of Great Lakes Higher Education Corp.; Nelnet, Inc.*; *Pennsylvania Higher Education Assistance Agency; and the Student Loan Servicing Alliance*, CG Docket No. 02-278 (filed Dec. 16, 2016).

As a result of this thorough pre-filing investigation, Class Counsel was able to develop multiple potentially viable theories of liability for TCPA claims against Defendants, analyze the legal issues relevant to the merits of claims under each such theory, assess the likelihood of Defendants successfully compelling such claims to arbitration, and ultimately prepare complaints against Defendants aimed at maximizing the likelihood of certifying a class and recovering meaningful class-wide relief. (Hedin Decl. ¶ 12.)

III. LITIGATION IN FEDERAL DISTRICT COURT

On February 3, 2020, Plaintiff Philip filed a class action complaint against SmileDirectClub, Inc. in the U.S. District Court for the Central District of California, alleging that SmileDirectClub, Inc. had violated the TCPA by transmitting unsolicited telemarketing text messages via an ATDS to him and numerous other consumers across the country. (Hedin Decl. ¶¶ 13-14.)

On April 6, 2020, SmileDirectClub, Inc. moved to dismiss or transfer Plaintiff Philip's complaint pursuant to Fed. R. Civ. P. 12(b)(2). (Hedin Decl. ¶ 15 (citing *Philip*, ECF No. 13).) In response to the motion, on April 20, 2020, Plaintiff Philip filed a first amended complaint. *Id.* (citing *Philip*, ECF No. 14).) On May 4, 2020, SmileDirectClub, Inc. filed a renewed motion to dismiss and motion to transfer pursuant to Fed. R. Civ. P. 12(b)(2). (Hedin Decl. ¶ 16 (citing *Philip*, ECF No. 16).) On June 8, 2020, Plaintiff Philip filed a response in opposition to the motion. (Hedin Decl. ¶ 17 (citing *Philip*, ECF No. 20).). On June 17, 2020, SmileDirectClub, Inc. filed a reply to the motion. (Hedin Decl. ¶ 20 (citing *Philip*, ECF No. 22).).

On July 8, 2020, Plaintiffs Lucas, Dominguez Hooper, Tasin, and Smith filed a complaint in the U.S. District Court for the Central District of California, alleging class-wide claims for violation of the TCPA against Defendant. (Hedin Decl. ¶ 21 (citing *Lucas*, ECF No. 1).)

On September 8, 2020, Defendants filed a motion to dismiss Plaintiff Hooper's and Tasin's claims pursuant to Fed. R. Civ. P. 12(b)(3), or in the alternative, to transfer the entire action to the Middle District of Tennessee (Hedin Decl. ¶ 22 (citing *Lucas*, ECF No. 16)), as well as a motion to compel arbitration (Hedin Decl. ¶ 23 (citing *Lucas*, ECF No. 17)).

Shortly thereafter, the Parties agreed to explore resolution at mediation before Judge Andersen, JAMS mediator and former U.S. District Judge for the Northern District of Illinois, on October 20, 2020 in Chicago, Illinois. Class Counsel negotiated terms for the mediation, including Defendants' agreement to provide key data to Plaintiffs in advance. (Hedin Decl. ¶¶ 25-26.)

IV. SETTLEMENT NEGOTIATIONS

Several weeks before the mediation, Class Counsel reviewed categories of supplemental materials, including business records and ESI pertaining to the merits of Plaintiffs' claims and Defendants' defenses (including issues of potential consent), issues of class certification, and the size and scope of potential settlement classes. (Hedin Decl. ¶ 26, ¶ 28.)

Armed with these materials and the knowledge acquired through Class Counsel's comprehensive pre-filing and post-filing investigations, Plaintiffs and their counsel were able to intelligently assess the strengths and weaknesses of the Settlement Class's claims and Defendants' defenses, the likelihood of prevailing at class certification, the size of the Settlement Class and the extent of potentially recoverable class-wide damages, and Defendants' ability to satisfy a judgment. (Hedin Decl. ¶ 28.) The Parties prepared and exchanged mediation statements detailing their respective views of the case and settlement positions prior to mediation. (Hedin Decl. ¶ 29.)

On October 20, 2020, the Parties attended a full day of mediation under the supervision of Judge Andersen of JAMS in Chicago, Illinois. (Hedin Decl. ¶ 30.) While the Parties negotiated at arms'-length for over ten (10) hours, they failed to reach an agreement that day. *Id.* The next day,

Judge Andersen made a mediator's proposal to settle the case, which the Parties eventually accepted after further negotiations with Judge Andersen. (Hedin Decl. ¶ 31.) The Parties then executed a binding term sheet to be later memorialized in the Settlement Agreement, conditioned upon further negotiations over the remaining terms and confirmatory discovery regarding the size and composition of the Settlement Class, among other important details. (Hedin Decl. ¶ 32.)

In light of the Supreme Court's decision in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), which vacated a federal district court's approval of a class action settlement and remanded for the district court to consider the plaintiffs' standing under Article III of the U.S. Constitution and thus its own subject-matter jurisdiction, the Parties agreed that the most prudent course forward for each of their respective clients – and, most of all, for the members of the Settlement Class – was to seek approval of the Settlement in a state-court forum unconstrained by the jurisdictional limitations of Article III of the U.S. Constitution, where it could be ensured that the presiding court has jurisdiction to approve the proposed Settlement and authorize the prompt disbursement of its substantial benefits to the members of the Settlement Class.[6] (Hedin Decl. ¶ 33.) Thus, Plaintiffs filed a notice of voluntary dismissal without prejudice of their case pending in the Central District of California. (*Id.* (citing *Lucas,* ECF No. 27).)

On December 14, 2020, the Representative Plaintiffs initiated this Action by filing a consolidated Class Action Complaint (hereinafter, the "Complaint") in this Court, alleging the same claims against Defendants as alleged in the prior federal actions. (Hedin Decl. ¶ 34.)

Prior to executing the Settlement Agreement, Defendants produced to Class Counsel materials for Class Counsel to confirm the approximate size and scope of the Settlement Class

[6] *See Frank*, 139 S. Ct. at 1046 ("We have an obligation to assure ourselves of litigants' standing under Article III. That obligation extends to court approval of proposed class action settlements. A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing.").

contemplated by the Settlement, among other merits and class-related details. (Hedin Decl. ¶ 35.) Thereafter, the Parties held a competitive bidding process in which three (3) nationally recognized class-action settlement administration companies submitted bids to administer the Settlement, ultimately agreeing to engage KCC, LLC ("KCC") as Settlement Administrator. (Hedin Decl. ¶ 36.) Class Counsel worked to ensure that all notice-related materials comply with due process and applicable law and are easily understood by Settlement Class Members. *Id*.

On December 21, 2020, the Parties signed the Settlement Agreement. (Hedin Decl. ¶ 37.)

TERMS OF THE SETTLEMENT

A copy of the Settlement Agreement is attached as Exhibit 1 to the Hedin Decl. (filed concurrently herewith), the key terms of which are summarized as follows:

I. SETTLEMENT CLASS DEFINITION

Plaintiff requests that the Court preliminarily certify the following Settlement Class:

> All persons within the United States who receive one or more text messages that may include advertising or telemarketing under the TCPA, from Defendants between July 7, 2016 and the date of the Court's order granting preliminary approval of the Settlement.

Settlement Agreement § 2.1.49.[7]

II. MONETARY RELIEF

Defendants, through SmileDirectClub, LLC, have agreed to make available up to $11,500,000.00 for the benefit of Settlement Class Members, which will be used to pay all Settlement costs, including all Settlement Shares to Settlement Class Members, all Settlement Administration Costs to KCC, and a Fee Award to Class Counsel and Service Awards to the

[7] The following are excluded from the Settlement Class: (1) any trial judge and other judicial officers who may preside over this case; (2) the Mediator; (3) the Released Parties; (4) Plaintiffs' Counsel; (5) any Settlement Class Member who has timely submitted a Request for Exclusion by the Opt-Out Deadline; and (6) any person or entity who has previously given a valid release of the claims asserted in the Action. Settlement Agreement § 2.1.49.

Representative Plaintiffs. Each Settlement Class Member who submits a valid claim will receive a cash payment of $10 if the Settlement is approved. *Id.* § 4.2.1.

III. NON-MONETARY RELIEF

Defendants have also agreed to implement and maintain changes to their practices going forward, to ensure compliance with the TCPA, including by instituting TCPA awareness and oversight procedures for marketing personnel. *Id.* § 11.1.1. Additionally, Settlement Class Members will be afforded the opportunity to make a Revocation Request to ensure that they do not receive unwanted calls and/or text messages going forward. *Id.* § 11.1.2.

IV. NOTICE PLAN AND CLAIMS PROCESS

Defendants, through SmileDirectClub, LLC, have agreed to pay all Settlement Administration Costs. *See* Settlement Agreement §§ 5.1-5.2.

The Claim Form is attached as Exhibit "A" and the proposed Class Notices are attached as Exhibit "B" and Exhibit "C" to the Settlement Agreement. The Class Notice was disseminated to the Settlement Class by e-mail in advance of the Notice Date. Settlement Agreement § 5.5.4.

The Settlement Administrator has created and is maintaining the Settlement Website, which was activated in advance of the Notice Date, at the URL www.sdcitcpasettlement.com. *Id.* § 5.4.1. The Settlement Website provides information about the Settlement and makes all relevant case-related documents available for download. *Id.* Settlement Class Members are able to file claims electronically on an easy-to-understand web-based form on the Settlement Website, where they may select the method of payment for their Settlement Share (Benefit Check or Electronic Payment) and the address where payment should be sent. *Id.*; *see also id.,* Ex. A (online form).

Claim Forms must be submitted to the Settlement Administrator by the Claims Deadline. *Id.* §§ 2.1.8, 6.1. Approved Claimants will receive their payments within sixty (60) days from the

Effective Date or the Claims Deadline (whichever is later). *Id.* §§ 6.2-6.3.

V. SERVICE AWARDS AND FEE AWARD

Defendants, through SmileDirectClub, LLC, have agreed to pay Service Awards to the Representative Plaintiffs and Fee Award to Class Counsel in the amounts requested herein. *Id*. §§ 4.2.2-4.2.3. The Class Notices informed the Settlement Class of these amounts. *See id*., Exs. B-C.

VI. OBJECTION AND OPT-OUT RIGHTS

Any Settlement Class Member who wishes to opt out of or object to the Settlement must do so before the Opt-Out or Objection Deadline and in compliance with all of the requirements set forth in Section 8.2 of the Settlement Agreement. Settlement Agreement § 2.1.35; § 8.3.

VII. RELEASE

Upon the Court's entry of the Final Approval Order and Judgment, the Representative Plaintiffs and Settlement Class Members who have not excluded themselves will have fully, finally, and forever released, relinquished, and discharged Defendants and Released Parties from the Released Claims, i.e., all claims arising from or relating to text messages and phone calls by, from, and/or on behalf of Defendants. *See* Settlement Agreement §§ 2.1.41-2.1.43, 7.

THE REQUESTED SERVICE AWARDS SHOULD BE APPROVED

Because a named plaintiff is essential to any class action, service awards, also known as incentive awards, "are "justified when necessary to induce individuals to become named representatives." *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016) (internal citation omitted) (approving incentive awards of $25,000 and $10,000); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992) (noting that incentive awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits"). Additionally, by lending their names to this litigation, the Representative Plaintiffs opened themselves up to "scrutiny and attention," which in and of itself

"is certainly worthy of some type of remuneration." *See Schulte*, 805 F. Supp. 2d at 600-01.

In this case, the Representative Plaintiffs are well-deserving of modest $2,500 Service Award given the vital role that each of them played. Even though no award of any sort has been promised to any of the Representative Plaintiffs, each of them nonetheless contributed time and effort pursuing these claims on behalf of the Settlement Class—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (*See* Hedin Decl. ¶ 54.) The Representative Plaintiffs participated in counsel's investigation and provided them their cell phone records and screenshots of the subject texts they received, participated in discovery and the litigation, reviewed pleadings and court filings, consulted with Class Counsel on numerous occasions, and provided feedback on a number of other filings, most importantly the Settlement Agreement. (Hedin Decl. ¶ 42.) But for the Representative Plaintiffs' assistance and active involvement in the litigation, the Settlement would not have been possible. (Hedin Decl. ¶ 54.)

The modest amount of the Service Award requested for each Representative Plaintiff – $2,500 – equates to just 0.02% of the total settlement fund, which is less than the average incentive award granted in a class settlement. *See, e.g., Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, U.S. Dist. LEXIS 35421, at *19 (N.D. Ill. Mar. 23, 2015) ("a study on incentive awards for class action plaintiffs (also conducted by Eisenberg and Miller) . . . found that the mean incentive fee granted in class actions overall is .161% [of the total recovery]"). In fact, courts routinely approve service awards much larger than the amounts sought here. *See, e.g., Craftwood Lumber Co.*, U.S. Dist. LEXIS 35421, at *20 (awarding $25,000 incentive award); *Satterfield v. Simon & Schuster*, No. 06-cv-2893, Dkt. 131, at 4 (awarding incentive awards totaling $30,000, including a $20,000 award to one class representatives).

Accordingly, a Service Award of $2,500 to each Representative Plaintiff (for a total of $17,500 for all seven Representative Plaintiffs) is fair and reasonable and should be approved.

THE REQUESTED FEE AWARD SHOULD BE APPROVED

Class Counsel respectfully request the Court's approval of a Fee Award of 32.7% of the settlement fund (or $3,765,000) – $100,000 of which Class Counsel has agreed to designate as a *cy pres* award to be split by two worthy legal-aid recipients in the greater Chicago area of the Court's choosing ($50,000 to each recipient) for use in furtherance of their charitable purposes.

I. CLASS COUNSEL SHOULD BE AWARDED THE *EX ANTE* MARKET RATE FOR THE LEGAL SERVICES THEY PERFORMED FOR THE BENEFIT OF THE SETTLEMENT CLASS

Courts strongly encourage negotiated fee awards in class action settlements. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of the fee."). "The Illinois Supreme Court has adopted the approach taken by the majority of federal courts on the issue of attorney fees in equitable fund cases," *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13 (1st Dist. 1992) (citing *Fiorito v. Jones*, 72 Ill.2d 73 (1978)), which is to permit "attorneys for the successful plaintiff [to] directly petition the court for the reasonable value of those of their services which benefited the class." *Id.* at 14 (citing *Fiorito*, 72 Ill.2d 73). This rule "is based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) (*citing Skelton v. Gen. Motors Corp*., 860 F.2d 250, 252 (7th Cir. 1988)); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole").

"In deciding fee levels in common fund cases" such as the instant matter, courts must "'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) (quotation omitted). In performing this inquiry, the Illinois Supreme Court has determined that courts may "choose a percentage[-of-the-fund] or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235, 243–44 (1995)).

II. THE COURT SHOULD APPLY THE PERCENTAGE-OF-THE-FUND METHOD IN THIS CASE

In this case, the Court should use the percentage-of-the-fund method in determining an appropriate Fee Award to Class Counsel.

In "choosing between the percentage and lodestar approaches," courts "look to the calculation method most commonly used in the marketplace at the time such a negotiation would have occurred." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-01 (N.D. Ill. 2015) (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)).

And in consumer litigation, where "the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery," *Kolinek*, 311 F.R.D. at 500-01, state and federal courts in Illinois and throughout the country are in near unanimous agreement that the percentage-of-the-fund approach best yields the fair market price for the services provided by counsel to the class. *See Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 2006) ("When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the 'market rate.'"); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995) (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citation omitted); *Williams v. Gen. Elec. Capital Auto Lease*, 94 C 7410, 1995 WL 765266, *9 (N.D. Ill. Dec. 26, 1995) (noting that "[t]he approach

favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class"); *see also, e.g., Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (explaining that where "a class suit produces a fund for the class," as is the case here, "it is commonplace to award the lawyers for the class a percentage of the fund," and affirming fee award of 38% of $20 million recovery to class); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) ("[T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class.").

This Court should likewise calculate Class Counsel's Fee Award using percentage-of-the-fund method. The percent-of-the-fund method best replicates the *ex ante* market value of the services that Class Counsel provided to the Settlement Class. It is not just the typical method used in contingency-fee cases generally, *see Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998), but it is also the means by which an informed Settlement Class and Class Counsel would have established counsel's fee *ex ante*, at the outset of the litigation. *See Kolinek*, 311 F.R.D. at 500-01 (in TCPA context, "the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery"). The percentage-of-the-fund method also better aligns Class Counsel's interests with those of the Settlement Class because it bases the fee on the results the lawyers achieve for their clients rather than on the number of motions they file, documents they review, or hours they work, and it avoids some of the problems the lodestar-times-multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients' best interests). *Brundidge*, 168 Ill.2d at 242; *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Synthroid Mktg. Litig.*, 264

F.3d 712 at 720-721 (7th Cir. 2001).[8] And it is also simpler to apply. *Id*.; *see also, e.g., Kolinek*, 311 F.R.D. at 501; *Ryan*, 274 Ill. App. 3d at 924.

Accordingly, Class Counsel respectfully requests that the Court apply the percentage-of-the-fund approach in determining an appropriate Fee Award in this case.

III. THE COURT SHOULD APPROVE A FEE AWARD OF 32.7% OF THE SETTLEMENT FUND

In terms of the percentage to award, Class Counsel respectfully requests that the Court award a Fee Award of 32.7% of the settlement fund (or $3,765,000**)**, of which $3,665,000 will be paid to Class Counsel (31.8% of the settlement fund) and the remaining $100,000 will be paid as *cy pres* relief to two worthy recipients of the Court's choosing ($50,000 to each recipient).

An award to Class Counsel of 31.8% of the settlement fund to Class Counsel is well within the range of fees typically awarded to class counsel by Illinois courts in comparable all-cash class action settlements.[9] *See, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (*citing Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Meyenburg v. Exxon Mobil Corp.*, No. 05-cv-15, U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006); *see also, e.g., e.g., Sabon, Inc.*, 2016 IL App (2d) 150236,

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[8] In this case for example, a lodestar approach would have created a perverse incentive for Class Counsel to reject or delay entering into the Settlement offer set forth in the Settlement Agreement merely to bill more hours through more unnecessary, wasteful, and inefficient litigation—an approach that, had it been adopted by Class Counsel, would almost certainly have resulted in no recovery to the Settlement Class Members in light of the Supreme Court's decision in *Facebook.*

[9] The requested award of fees to Class Counsel of 31.8% of the settlement fund is inclusive of $21,222.66 in out-of-pocket litigation expenses incurred in the prosecution of this action to date, not including those that will continue to accrue as the Settlement process continues. (Hedin Decl. ¶ 51; Fraietta Decl. ¶ 11.) Although typically awarded in addition to the requested fee award, in this case Class Counsel do not seek reimbursement of these expenses on top of the requested Fee Award. *See, e.g., Kaplan v. Houlihan Smith & Co.*, No. 12-cv-5134, U.S. Dist. LEXIS 83936, at *12 (N.D. Ill. June 20, 2014); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993).

at ¶ 59 (upholding an attorneys' fees award of one-third of a reversionary fund recovered in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]").

And in this case in particular, the requested Fee Award would fairly and reasonably compensate Class Counsel for (1) agreeing to take on this action in the face of substantial risk, (2) achieving an excellent result on behalf of the Settlement Class, and (3) investing substantial time and other resources investigating, prosecuting, and resolving this action.

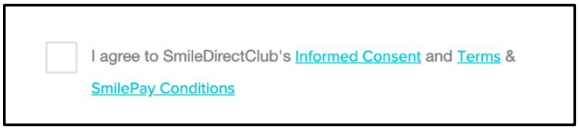
A. This was High Risk and Undesirable Litigation at its Inception, and Class Counsel Should be Rewarded for Having Pursued it on Behalf of the Class

The requested Fee Award is particularly reasonable given the risks associated with this litigation at the time it was commenced. As noted by the U.S. District Court for the Northern District of Illinois in *In re Capital One*, "the average TCPA case carries [just] a 43% chance of success." 80 F. Supp. 3d at 806. However, this litigation was even riskier than usual given SmileDirectClub's numerous potentially meritorious defenses and the shifting judicial, regulatory and legislative landscape with respect to the TCPA that existed at the outset of the case (and which drastically evolved in SmileDirectClub's favor in recent weeks).

First, when the Settlement was reached in this case, an appeal concerning the proper interpretation of the statutory term ATDS was pending before the Supreme Court in *Facebook*. At that time, there was a three-to-three Circuit split amongst the Circuit Court of Appeals on the issue. *Compare Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 460 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1312 (11th Cir. 2020); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (all holding that an ATDS is solely equipment with the present capacity to store or produce numbers using a random or sequential generator and to dial such numbers), *with Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043 (9th Cir. 2018); *Duran v.*

La Boom Disco, Inc., 955 F.3d 279, 287 (2d Cir. 2020); *Allan v. Pennsylvania Higher Educ. Assistance Agency*, 968 F.3d 567, 576 (6th Cir. 2020) (all holding that an ATDS including equipment that merely dials from lists of numbers). Class Counsel is unaware of any other TCPA case, besides this one, that settled on a class-wide basis after the Supreme Court granted certiorari in *Facebook* (other than cases that also involved pre-recorded calls, which were not implicated by Facebook's appeal); this is not surprising given that the Supreme Court's decision in *Facebook* had the potential to absolve TCPA defendants of liability across the board in autodialing-restriction cases such as this one. And that is exactly what happened. On April 1, 2021, the Supreme Court issued a unanimous decision holding that "[t]o qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." *Facebook Inc.*, -- S. Ct. --, 2021 WL 1215717, at *1. In so ruling, the Supreme Court rejected the statutory interpretation, advanced by the Representative Plaintiffs in this case, that dialing technology constitutes an ATDS if it "receive[s] and store[s] telephone numbers and then automatically dial[s] such numbers." (Compl. ¶ 44.) Thus, had Class Counsel not settled this case when it did, Settlement Class Members would have been unable to establish SmileDirectClub's liability under the TCPA and would not be entitled to any relief.

Second, Plaintiffs were at substantial risk that the court would grant Defendants' motion to compel arbitration. As detailed in Defendants' motion to compel arbitration, class members, including Plaintiffs Lucas and Tasin, were required to affirmatively check a box to agree to Defendants' "Informed Consent Agreement:"



(Hedin Decl. ¶ 23.) Included within that was an arbitration clause and an express class action

waiver. *Id.* Thus, if Defendants prevailed on their motion to compel arbitration, the case could not proceed as a class action.

Third, Plaintiffs were also at risk that their claims would be subject to a consent defense. Through their counsel, Defendants indicated that if the case had not settled, they would have moved for summary judgment on the ground Plaintiffs consented to be texted based on the same Informed Consent referenced in connection with the arbitration motion. (Hedin Decl. ¶ 40.)

Fourth, the Parties disagree whether the Settlement Class could be certified on a contested motion for class certification. Defendants steadfastly maintained that individual issues among Settlement Class members predominate. While Plaintiffs disagree and believe the Settlement Class is well-suited for certification, including on a contested basis, the courts presiding over this litigation could have disagreed and denied certification on various grounds.

Fifth, even if Representative Plaintiffs were to win class certification, there would remain a risk of losing a jury trial. And even assuming they prevailed at trial, any judgment or order granting class certification could be reversed on appeal and, even if they were not, any class-wide award could be devastating to Defendants. *See In re Capital One*, 80 F. Supp. 3d at 790. A pyrrhic victory for the Settlement Class at trial would be in no one's interest.

Finally, even assuming Defendants could satisfy a class-wide judgment in this case – which, given the estimated size of the Settlement Class, would amount to at least billions of dollars in the aggregate, measured at $500.00 (or $1,500.00 if trebled) per violation – any such judgment would likely be reduced on due process grounds. In *Golan v. Veritas Entm't, LLC*, No. 4:14CV00069 ERW, 2017 WL 3923162 (E.D. Mo. Sept. 7, 2017), for example, a class of TCPA plaintiffs won a judgment at trial for $1.6 billion ($500.00 for each of approximately 3.2 million violations), only to have the trial court remit the award to $32 million – or approximately $10.00

per violation – on the grounds that the $1.6 billion awarded by the jury was so annihilative as to violate the Due Process clause of the U.S. Constitution. *See Golan*, 2017 WL 3923162, at *2-3. The trial court's decision in *Golan* was recently affirmed, in its entirety, by the U.S. Court of Appeals for the Eight Circuit. *Golan v. FreeEats.com, Inc*., No. 17-3156, 2019 WL 3118582 (8th Cir. July 16, 2019). In this case, each claiming Settlement Class Member will receive $10 – the same amount that class members ultimately recovered in *Golan*, after years of uncertain litigation and a total victory at trial. By any measure, this case had numerous risks of total non-recovery.

In considering the reasonableness of a fee request in a contingency class action settlement, courts consider how the legal market would have assessed the case's risk at its inception and, in turn, how the market's risk assessment would have affected a hypothetical *ex ante* fee negotiation between counsel and potential client. *See Goodell v. Charter Communications, LLC*, No. 08-cv-512-bbc, 2010 WL 3259349, at *1 (W.D. Wis. Aug. 17, 2010) ("The question is not how risky the case looks when it is at an end but how the market would have assessed the risks at the outset."). Here, Class Counsel began their pre-filing investigation into this matter in early 2020, at which time there were no other TCPA claims being prosecuted against SmileDirectClub by any other counsel. SmileDirectClub's Terms of Service had an arbitration provision and a class-action waiver that required individual arbitration of all disputes relating in any way to its service, and it appears this litigation was viewed as simply too risky to pursue by other counsel. Although Class Counsel and the Representative Plaintiffs nonetheless plowed forward, prepared comprehensive briefing in opposition to SmileDirectClub's motion to compel arbitration, and negotiated the $11.5 million Settlement presently before the Court, in determining whether to meet Class Counsel's fee at the outset of this case, the Settlement Class would have known that no other firm had come forward to offer its services in this matter to the class or individual participants. Moreover, after

Class Counsel commenced the litigation, no other counsel came forward to compete with Class Counsel for control of the case, to propose to the Court that it be appointed lead counsel at a lower fee structure, or to offer to share in the case's risk and expense with Class Counsel.[10] *Id*.

The market thus judged this to be a high-risk case. Competition for control is brisk when lawyers think cases have significant potential to generate large recoveries and significant attorney's fees. *See In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979 (7th Cir. 2003). As Judge Easterbrook once observed: "Lack of competition not only implies a higher fee but also suggests that most members of the . . . bar saw this litigation as too risky for their practices." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013). That is exactly the circumstance here. Other attorneys and firms chose to pass on offering representation to Settlement Class members in this case because they found it not worth the risk, further confirming that Class Counsel would have obtained the requested Fee Award in an *ex ante* negotiation with the Settlement Class.

Simply put, this litigation presented numerous risks of non-recovery to the Settlement Class and thus non-payment to Class Counsel at the outset, and the requested Fee Award reasonably compensates Class Counsel for assuming such risks for the Settlement Class's benefit.

B. The Outstanding Result that Class Counsel Achieved for the Settlement Class Further Supports the Requested Fee Award

Despite the many serious risks of non-recovery to the Settlement Class and thus non-payment to Class Counsel described above, both at the outset and for the duration of the adversarial proceedings, Class Counsel nevertheless achieved an excellent result for the Settlement Class.

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[10] Shortly after Class Counsel commenced this litigation in California and the case appeared in the legal news journals (but prior to a decision on SmileDirectClub's motion to compel arbitration), two copy-cat actions were filed in federal courts in Tennessee and New York, both of which were thereafter quickly voluntarily dismissed after SmileDirectClub moved to compel arbitration. *See Moshen v. SmileDirectClub*, No. 1:20-cv-04053-RPK-PK (E.D.N.Y); *Jairam v. SmileDirectClub, LLC*, No. 3:20-cv-00894 (M.D. Tenn.).

Pursuant to the Settlement Agreement, SmileDirectClub, through SmileDirectClub, LLC, has agreed to establish settlement fund of up to $11,500,000 in cash, from which each claiming Settlement Class Member will receive a check or electronic payment of $10.00. Given the enormous risks presented in this case, both at the commencement of the litigation and when the Settlement was negotiated, the per-claimant relief provided by the Settlement in this case ($10.00) compares favorably with per-claimant recoveries in prior TCPA settlements, including in cases where the class faced far fewer risks of non-recovery than those faced by the Settlement Class here. *See, e.g., Goldschmidt v. Rack Room Shoes, Inc.*, No. 1:18-cv-21220-KMW (S.D. Fla. 2019) (approving TCPA class action settlement providing up to $5 cash and a $10 voucher per claiming settlement class member); *Wijesinha v. Susan B. Anthony List Inc*., Case No. 1:18-cv-22880-JEM (S.D. Fla. 2019) (approving TCPA settlement providing $5 per claimant); *Poirier v. Cubamax Travel, Inc.*, Case No. 1:18-cv-23240-CMA (S.D. Fla. 2019) (approving TCPA settlement providing $7 per claimant); *Soukhaphonh v. Hot Topic, Inc.*, No. 16-cv-5124-DMG, ECF Nos. 253 & 244 at 2 (C.D. Cal. July 26, 2019) (approving TCPA settlement providing $2.44 to $6.17 per claimant); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, No. 3:11-md-02261 (S.D. Cal. Feb. 20, 2013) (approving TCPA settlement providing $12.97 cash or $17.29 voucher to each claimant); *Manouchehri v. Styles for Less, Inc.*, Case No. 14cv2521 NLS, 2016 WL 3387473, at *2, 5 (S.D. Cal. June 20, 2016) (approving TCPA settlement providing $10.00 cash to each claimant).[11]

In addition to the monetary compensation that Class Counsel have obtained for the Settlement Class Members, the Settlement also provides meaningful injunctive relief to the Settlement Class, requiring SmileDirectClub to institute TCPA awareness and oversight

[11] Indeed, many prior approved settlements in similar cases offered no cash relief at all. *See, e.g.*, *Clark v. Payless ShoeSource, Inc.*, No. 2:09-cv-00915, ECF No. 61, at 7, 72 (W.D. Wash. May 22, 2012) ($10 merchandise certificate per claimant).

procedures for marketing personnel at the company as a means of preventing any transmissions of text messages via an ATDS absent the requisite consent in the future. The presence of meaningful nonmonetary injunctive relief is also useful in determining whether the fee award being sought is reasonable. *See Spano*, 2016 WL 3791123, at *1 ("A court must also consider the overall benefit to the Class, including non-monetary benefits, when evaluating the fee request").

And to achieve this result, Class Counsel expended an enormous amount of attorney time and tens of thousands of dollars in out-of-pocket costs and expenses investigating, prosecuting, and negotiating the terms of the Settlement, without any guarantee of reimbursement (Hedin Decl. ¶¶ 49-51; Fraietta Decl. ¶ 9). As a result of the work Class Counsel devoted to this litigation, their law firms were forced to forgo representing consumers in other matters that we otherwise would have taken on. (Hedin Decl. ¶ 50; Fraietta Decl. ¶ 10.)

Finally, it is worth reiterating that, but for this Settlement, Settlement Class Members would almost certainly be unable to state a claim for violation of the TCPA against SmileDirectClub – and thus unable to obtain any relief, monetary or otherwise – in light of the Supreme Court's recent decision in the *Facebook* appeal, which was pending at the time Class Counsel negotiated the Settlement. These circumstances confirm both the adequacy of the relief provided by the Settlement and the reasonableness of the Fee Award requested for achieving it.

CONCLUSION

For the foregoing reasons, Representative Plaintiffs and Class Counsel respectfully request that the Court approve Service Awards to the seven Representative Plaintiffs of $2,500 each (totaling $17,500) and approve a total Fee Award of 32.7% of the settlement fund, $3,665,000 to Class Counsel (equating to 31.8% of the settlement fund) and $100,000 to be split equally between two worthy legal-aid recipients in the greater Chicago area selected by the Court as a *cy pres* award.

Dated: April 16, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a true and correct copy of the foregoing to be served upon the following parties by email on the date indicated below:

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