UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: LIFE TIME FITNESS, INC., TELEPHONE CONSUMER PROTECTION ACT (TCPA) LITIGATION This document relates to: All actions	Case No.: 0:14-md-02564-JNE-SER MDL Docket No. 2564 **Plaintiffs' Memorandum in Support of Motion for Award of Attorneys' Fees and Costs, and Payment of Service Awards**

I. Introduction

On March 9, 2015, the Court preliminarily approved the proposed class action Settlement[1] of all Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 claims and defenses, entered into between Plaintiffs Noah Petersen, Paul Sarenpa, Catherine Gould, and Branden Silva, (collectively "Plaintiffs") and Defendant Life Time Fitness ("Life Time") during the class period. Pursuant to the Settlement Agreement, Class Counsel petitions this Court to award their fees and costs. Life Time agreed to reimburse Plaintiffs and the Settlement Class for their fees and costs. The measure of attorneys' fees, like a contingency fee agreement, is a percentage of the benefit available to the Settlement Class. Here, Class Counsel secured a benefit valued at up to $15 million for the approximately 592,840 Settlement Class Members who received intrusive and disruptive marketing text message advertisements from Life Time. Class Counsel now seeks 28% of the benefit as fees and costs, a figure that is significantly lower than the

[1] Capitalized terms in this memorandum have the same meaning as specified in the Settlement Agreement.

typical contingency fee agreement. The total amount of Class Counsel's request is $4.2 million, which represents $4,166,790.18 in fees and $33,209.82 in costs. Class Counsel and Plaintiffs make this request pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs also respectfully move the Court for Service Awards of $5,000 to each of the four Plaintiffs, for their efforts and work advocating on behalf of the Settlement Class throughout this Action.

II. Background

A. Class Counsel Achieved a Substantial Benefit for the Settlement Class

Class Counsel have obtained significant monetary relief for Plaintiffs and Settlement Class Members who received intrusive and annoying text message advertisements from Life Time without their prior express written consent. Pursuant to the Settlement Agreement, Life Time will make a Total Settlement Payment of all Cash Awards, Membership Awards, and Settlement Costs including claims administration costs, court-awarded attorneys' fees, and court-awarded service awards as described below. The Minimum Total Settlement Payment will be ten million dollars ($10,000,000) and the Maximum Total Settlement Payment will be fifteen million dollars ($15,000,000).

While many recent TCPA class action cases have settled for $20–40 per class member, this settlement provides between $100-250 per class member. (§ 4.02.) Each Settlement Class Member who submits a timely and valid Approved Claim may choose either a Cash Award of $100, subject to pro rata adjustment, or a Membership Award. The Membership Award is either a three-month single membership at a Life Time

Fitness Gold Club of the Settlement Class Member's choice or a $250 credit, subject to a pro rata adjustment, to be applied toward the cost of any other new or existing Life Time Fitness membership. The pro rata adjustment to the Cash Award or the credit means that the amount could go up (or down) depending on the claims rate. Based upon current response rates from the Settlement Class, Class Counsel does not expect a downward adjustment. Accordingly, the Settlement achieved by Class Counsel provides exceptional monetary relief.

B. The Quality and Amount of Work Performed by Class Counsel

Class Counsel has vigorously litigated this Action over the course of the last thirteen months, devoting expertise and many hours and resources to achieve relief for Plaintiffs and Settlement Class Members.

In early 2014, four Plaintiffs from around the country filed three separate class action complaints against Life Time alleging violations of the TCPA. The three cases were filed independently by different counsel, each of whom investigated the claims, prepared a complaint, and filed the lawsuits. Each of the plaintiffs then prepared to litigate their claims.[2] Then, on June 18, 2014, Life Time moved the United States Judicial Panel on Multidistrict Litigation to consolidate the class actions for pretrial proceedings in this District. Plaintiffs did not have notice of Defendant's motion until it was filed.

[2] On February 23, 2015, Plaintiff Salam filed a Notice of Voluntary Dismissal of his claims without prejudice pursuant to an agreement with Defendant. Accordingly, Plaintiff Salam is no longer a Plaintiff and is not serving as a Class Representative. Mr. Salam is a class member under the terms of the Settlement and his counsel is a member of the Plaintiffs' Executive Committee.

Until this time, all three cases had been litigated separately and apart from one another. After Defendant filed its Motion for Consolidation, Plaintiff Silva filed his complaint. All counsel for all Plaintiffs each supported the transfer, and each drafted and filed separate briefing to that effect. In an effort to conserve resources, Plaintiffs' counsel agreed to common representation for the limited purpose of appearing at the MDL hearing. Defendant's Motion for Consolidation was granted and the five cases were consolidated in this District.

Shortly after the MDL consolidation, the attorneys who are now Class Counsel worked cooperatively and immediately divided responsibilities among the attorneys who have litigated this Action to ensure efficiency and avoid duplication of efforts. These efforts culminated in Class Counsel's Motion for Class Leadership, which was filed with the Court on November 18, 2014. Around this same time, Class Counsel also drafted and filed the Plaintiffs' Consolidated Class Action Complaint, which was filed on November 20, 2014.

At the outset of this litigation, Class Counsel requested, received, and reviewed documents relating to the computer systems Life Time used to send the text messages, documents identifying and describing the text messages, and documents identifying the number of text messages sent. Class Counsel also reviewed various agreements that Plaintiffs and the Settlement Class Members had with Life Time that it asserted could be construed as consent.

On November 20, 2014, the Parties conducted an all-day JAMS mediation session with the Honorable Edward A. Infante (retired), in San Francisco, California. Class Counsel devoted significant time to preparing for the mediation to increase the likelihood of significant recovery for the putative class, which included researching numerous legal and factual issues related to the merits of Plaintiffs' claims and Life Time's defenses as well as other similar class action settlements throughout the country to determine fair and reasonable settlement terms, researching Life Time's financial condition, investigating the computer systems used by Life Time to send the text messages, studying recent developments in TCPA case law and FCC proceedings. In addition, Class Counsel prepared a lengthy mediation statement (and a supplemental mediation statement) to inform Judge Infante of the facts and legal merits of the case.

Ultimately, the Parties agreed on various components of a settlement, but not on all the essential terms at the mediation in San Francisco. The parties continued to mediate with Judge Infante by telephone in the days following the mediation and direct negotiations between the parties continued for several months thereafter. Class Counsel participated in numerous telephone calls and email exchanges with Defendant's Counsel all while keeping Plaintiffs apprised of the status of negotiations.

To assist with the negotiations, Class Counsel engaged in thorough discovery of Life Time's text message marketing practices. In February 2015, Class Counsel Shawn Wanta and Christopher Jozwiak deposed Life Time's Rule 30(b)(6) corporate designee. The deposition brought to light the efforts Life Time took to identify the individuals who

received the text messages to ensure that the number of class members provided by Life Time in discovery was accurate. The deposition also confirmed that members of the settlement class could be identified and therefore that any class notice would comport with the requirements of procedural Due Process.

Shortly after the deposition, the Parties ultimately reached a settlement. Class Counsel prepared the Settlement Agreement and its accompanying exhibits. Class Counsel and Life Time's counsel exchanged numerous drafts of the Settlement Agreement before finalizing the Settlement Agreement.

Thereafter, Class Counsel devoted significant time working with class settlement claims administrators and creating a notice plan that comports with due process requirements. Class counsel worked with four different claims administrators and ultimately selected the most qualified and cost-effective administrator. Counsel also prepared the proposed Notice to Settlement Class Members.

After completing the proposed notice, Class Counsel briefed and filed Plaintiffs' Motion for Preliminary Approval of Settlement. Class Counsel and Life Time's Counsel had several discussions regarding Plaintiffs' Memorandum in Support of the Motion and the various exhibits submitted with the proposed Preliminary Approval Order.

Class Counsel's work is not finished. They expect to devote time to briefing Plaintiffs' Memorandum in Support of Final Approval in anticipation of the Final Approval Hearing scheduled for July 30, 2015 and to respond to any issues that arise in the approval process including continuing to address any class member inquiries.

C. Life Time Has Agreed Class Counsel's Attorneys' Fees and Costs Should Be Paid From the Settlement Fund

The Settlement Agreement requires Life Time to reimburse Plaintiffs and the Settlement Class for Class Counsel's attorneys' fees and costs. (§ 5.01). The Parties have also agreed that the attorneys' fees will be paid out of the Total Settlement Payment. (§ 4.01). After the Court granted preliminary approval, the Parties attempted to agree on the amount of attorneys' fees and costs to be paid from the Total Settlement Payment of up to $15 million. The parties have engaged in numerous discussions via telephone and email—sometimes with the assistance of Judge Infante—to try to reach agreement. Unfortunately, these efforts have been unsuccessful and the Parties have ceased negotiations on the matter and now ask the Court to award $4,200,000 for attorneys' fees and costs, or 28 percent of the Settlement Fund.

III. Argument

Rule 23(h) of the Federal Rules of Civil Procedure states that, "[i]n a certified class action, the court may award reasonable attorney's fees and non-taxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). An award of attorneys' fees is committed to the sound discretion of the Court. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156-57 (8th Cir. 1999). It is granted not only to compensate counsel for the time invested in prosecuting a class action, but is also designed to "award counsel for the benefit they brought to the class and take into account the risk undertaken in prosecuting [an] action." *In re Monosodium Glutamate Antitrust Litig.*, No. 00-MDL-132-

PAM, 2003 WL 297276, at *1 (D. Minn. Feb. 6, 2003). Here, Class Counsel have obtained significant relief for Plaintiffs and the Settlement Class Members that justifies the award of attorneys' fees Class Counsel requests.

A. The Court Should Approve the Service Awards of $5,000 for the Class Representatives

Plaintiffs respectfully request the Court approve Service Awards in the amount of $5,000 to each of the Class Representatives for their efforts. The total amount requested—$20,000—is 0.13% of the total benefit recovered on behalf of the class.

Service or incentive payments recognize a named plaintiff's time and efforts on behalf of a class. In addition, service awards advance public policy by encouraging individuals to come forward and take action to protect the rights of the class. Recognizing this public policy, courts within the Eighth Circuit routinely approve the award of payments to class representatives for their assistance to a plaintiff class. *See In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005); *White v. Nat'l Football League*, 822 F. Supp. 1389, 1406 (D. Minn. 1993) (citing cases). Indeed, this District has recognized that "[s]mall incentive awards, which serve as premiums to any claims-based recovery from the Settlement, promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits." *Yarrington v. Solvay Pharm., Inc.*, 697 F.Supp.2d 1057, 1068 (D. Minn. 2010). In deciding whether to grant a service award, a court should consider the, "actions plaintiff took to protect the class's interest, the degree to which the class has benefitted from those

actions and the amount of time and effort plaintiff expended in pursuing the litigation." *Zilhaver v. UnitedHealthGroup, Inc.*, 646 F.Supp.2d 1075, 1085 (D. Minn. 2009) (citing *Koenig v. U.S. Bank*, 291 F.3d 1035, 1038 (8th Cir. 2002)).

Here, each of the four Plaintiffs have played an essential role throughout the duration of the case. In addition to lending their names to this matter and thus subjecting themselves to public attention, Plaintiffs were actively engaged in this Action. Among other efforts, Plaintiffs have assisted Class Counsel by providing evidence and gathering facts for this case for the complaints and other filings; collecting documents to assist in negotiating a favorable settlement; advocating on behalf of the class members; and staying abreast of the Action and settlement negotiations. (Wanta Decl. ¶ 6).

In addition, TCPA cases cannot be feasibly litigated on an individual basis. The TCPA does not provide for statutory attorneys' fees; thus, an individual would not likely be able to retain counsel without promise of full recovery of that counsel's time and effort, which would be unlikely given relatively small damages in most TCPA cases (in this case average just $100 more than the Court's filing fee). Thus, without individuals willing to serve as class representatives, and share the costs and risk litigation on a class basis, the private enforcement mechanism of the TCPA would be ineffective, Furthermore, no Settlement Class Member has objected to the awards so far and likewise, Life Time has agreed to them. (§ 5.02.)

Plaintiffs' efforts and time acting as Class Representatives should not go unrecognized. Earlier this year, a court found that a $5,000 service award to named

plaintiffs in a TCPA case is appropriate. *See In re Capital One Telephone Consumer Prot. Act Litig.*, ____ F.Supp.3d ____, 2015 WL 605203 *19 (N.D. Ill. 2015) ("a $5,000 award is consistent with the awards granted by other courts in this district in similar litigation."). Accordingly, Plaintiffs respectfully request the Court approve these Service Awards.

B. The Court Should Award Class Counsel Their Requested Fees and Costs

Class Counsel seek a total award of attorneys' fees and costs of $4.2 million, or 28% of the Maximum Total Settlement Payment of $15 million; Class Counsel's expenses of $33,209.82 are encompassed in this fee request and Class Counsel do not seek a separate award of costs or expenses. This requested amount is fair and reasonable and well supported by Eighth Circuit precedent, as well as other similar TCPA cases where courts have awarded fees based upon a percentage of the benefit obtained. Although Life Time has not agreed to pay this specific amount, it has agreed that Class Counsel should be paid from the settlement fund. Accordingly, the Court should follow well-established case law, employ the percentage-of-the-benefit common fund approach, and award Class Counsel the requested fees and costs.

1. The Common Fund Percentage-of-the-Benefit Approach Is the Preferred Method of Assessing the Reasonableness of Class Counsel's Fees and Costs

The "common fund" doctrine of awarding attorneys' fees and costs applies where, as here, counsel recovers a certain and calculable fund on behalf of a group of individuals, and no fee-shifting statute applies. Indeed, the United States Supreme Court has recognized that "a litigant or a lawyer who recovers a common fund for the benefit of

persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This doctrine is based in equity and works to address the reality that individuals who benefit from a lawsuit "without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* A common fund exists when "each member of a certified class has an undisputed and mathematically ascertainable claim to a part of a lump-sum judgment recovered on his behalf." *Id. at* 478-79.[3] While "the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery." *Id*. at 479.

In common fund cases such as this one, the percentage-of-the-benefit approach is the preferred method of assessing the reasonableness of any fee. *Petrovic,* 200 F.3d at 1157; *see also Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 245 (8th Cir. 1996) (stating "the [Third Circuit] Task Force recommended that the percentage of the benefit method be employed in common fund situations."); *In re Xcel Energy, Inc.*, 364 F.Supp.2d at 991 (stating the percentage-of-the-benefit approach is "well established"). This is because the lodestar approach has well-recognized deficiencies, as the Eighth Circuit noted:

> [T]he lodestar creates a disincentive for the early settlement of cases. The [Third Circuit Task Force] report in this area added "...

[3] Although the Court has not entered judgment against Life Time, the common fund doctrine is applicable in this Action because a Settlement Agreement has been reached and a definite settlement fund established.

> there appears to be a conscious, or perhaps, unconscious, desire to keep the litigation alive despite a reasonable prospect of settlement, to maximize the number of hours to be included in computing the lodestar." … the lodestar does not provide the district court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered.

Johnston, 83 F.3d at 245. The policy behind the percentage-of-the-benefit approach is in line with Rule 1 of the Federal Rules of Civil Procedure, which states that the Rules "shall be construed and administered to ensure the *just, speedy, and inexpensive determination* of every action", Fed. R. Civ. P. 1, and that attorneys share the responsibility with the court of ensuring that cases are "resolved not only fairly, but without undue cost or delay." Fed. R. Civ. P. 1 advisory committee's notes on 1993 amendments.

This District previously applied Rule 1 to conclude that a percentage-of-the-benefit approach was best-suited to an early class settlement:

> All counsel-both those representing plaintiffs and defendants-conducted this litigation in an exemplary manner and fulfilled their obligations under Rule 1. This is the type of complex litigation that easily could have dragged on for several more years. Instead, it had a relatively short stay of two and a half years on this court's docket because counsel litigated the case efficiently and inexpensively. The lodestar of plaintiffs' counsel could easily have been much higher had not counsel cooperated with one another through the litigation and settlement process. Instead, all plaintiffs' counsel presented a modest lodestar because they moved the case along efficiently to a just result in a remarkably short period of time.

In re Xcel Energy, Inc., 364 F. Supp. 2d at 992.

In settlements such as this, where the settlement fund contains a floor and a ceiling, courts use the ceiling as the measure of the benefit to the class. *See e.g. Williams v.*

MGM–Pathe Commc'ns Co., 129 F.3d 1026, 1027 (9th Cir. 1997) (per curiam) (district court abused its discretion by basing fee on class members' claims against fund rather than on percentage of entire fund or lodestar); *In re Wal–Mart Stores Inc. Wage & Hour Lit.*, No. 06–02069, 2011 WL 31266, *3, *7 (N.D. Cal. Jan. 5, 2011) (basing fee percentage on ceiling amount, following supplemental briefing on class actions structured with a floor and ceiling amount); *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013) (citing *Williams* with approval). "An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not. We side with the circuits that take this approach." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007). Here, the $15 million benefit made available to the Settlement Class is neither illusory nor meaningless because each class claimant will benefit from having the total amount of the fund set at $15 million because each payment will be based upon a percentage of a total fund—the larger the fund, the lower chance of a reduction of the benefit. *See Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291, 1297 (11th Cir. 1999) (holding a district court did not abuse its discretion in calculating fees based upon the ceiling of a fund, even though a portion of the fund reverted to the defendant).

The Eighth Circuit has also utilized the twelve-factor test from *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719-20 (5th Cir. 1974) to further determine the reasonableness of any requested fee. A court "has wide discretion as to which factors to apply and the relative weight to assign to each." *In re Xcel Energy*, 364 F. Supp. 2d at 993.

Indeed, in *In re Xcel Energy*, the Court considered seven factors similar to those in *Johnson*, which this Court has since utilized again for determining the reasonableness of an award of attorneys' fees. *Id.*; *see also Yarrington*, 697 F.Supp.2d at 1062. These seven factors are:

> (1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel was exposed, (3) the difficulty and novelty of the legal and factual issues of the case, (4) the skill of the lawyers, both plaintiffs' and defendants', (5) the time and labor involved, (6) the reaction of the class, and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases. *Id.* Each of these factors supports the Court's decision to award Settlement Class Counsel's requested fees.

Yarrington, 697 F.Supp.2d at 1062 (internal citations omitted). Here, starting with factor 7, application of all the factors demonstrates that Plaintiffs' fee request is reasonable.

2. The Requested Award Is Typical of Awards in Other Class Actions in This Circuit and TCPA Settlements in Both This Circuit and Nationally

Class Counsel secured a measurable settlement fund to the Settlement Class of a minimum of $10 million and a maximum of $15 million. Following the Claims Period, all Settlement Class Members who have filed an Approved Claim will receive a numerically determinable amount from the Total Settlement Payment. Furthermore, although the amount of attorneys' fees was not resolved between the Parties in mediation and negotiations, the Parties did agree that Life Time will pay Class Counsel's attorneys' fees out of the Total Settlement Payment. Accordingly, the Settlement presents a common fund and application of the percentage-of-the-fund methodology is applicable here.

Plaintiffs' request for a 28% attorneys' fee award is comparable with other common benefit awards granted in this District. Most "courts applying the percentage-of-the-fund approach award fees in the 25% to 30% range, adjusting up or down for the circumstances of the case." *In re Monosodium Glutamate Antitrust Litig.*, 2003 WL 297276, at *1. Indeed, a recent empirical study of every federal class action settlement in 2006-2007 found that the mean and median award of attorneys' fees in the Eighth Circuit were 26.1% and 30%, respectively. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. Empirical Legal Stud. 811, 836 (2010). However, courts in this District have awarded up to 36% of the common fund in other class actions. *In re Xcel Energy, Inc.*, 364 F.Supp.2d at 998 (citing 11 cases from this District in which this Court awarded attorneys' fees between 25% and 36% in class actions.).

Plaintiffs' request is also *less than* the 33.33% fee awards that have been granted in other TCPA cases in this Circuit. *See e.g. Heller v. HRB Tax Group, Inc.*, No. 4:11-cv-01121, Dkt. No. 60 (E.D. Mo. Aug. 9, 2013) (awarding attorneys' fees of 33.3% of the common fund); *Lindsey Transmission v. Office Depot, Inc.*, No. 4:12-cv-00221, Dkt. No. 100 (E.D. Mo. June 23, 2014) (awarding attorneys' fees totaling 33% of the settlement fund). Courts elsewhere have consistently awarded attorneys' fees between 25% and 33% of the common fund settlements obtained by class counsel. *In re Capital One Telephone Consumer Protection Act Litig.*, 2015 WL 605203 (N.D. Ill. Feb. 12, 2015) (awarding class counsel 35% of the first $10 million of the settlement fund, and a decreasing percentage thereafter); *Desai v. ADT Security Sys.*, No. 1:11-cv-01925 (N.D. Ill. June 21, 2013)

(awarding attorneys' fees of 33% of the common fund of $15,000,000); *Satterfield v. Simon & Schuster, Inc.*, No. 4:06-cv-02893, Dkt. No. 132 (N.D. Cal. Aug. 6, 2010) (awarding attorneys' fees of 25% of the settlement fund of $10,000,000); *Hanley v. Fifth Third Bank*, No. 1:12-cv-1612, Dkt. No. 86 (N.D. Ill. Dec. 23, 2013) (awarding attorneys' fees of 33.33% of the settlement fund); *Spillman v. Domino's Pizza LLC*, No. 3:10-cv-349, Dkt. No. 242 (M.D. La. May 23, 2013) (awarding attorneys' fees of 25.35% of settlement fund); *Cummings v. Sallie Mae, Inc.*, No. 1:12-cv-09984, Dkt. No. 91 (N.D. Ill. May 30, 2014) (awarding attorneys' fees of 33% of the settlement fund of $9,250,000).

In *In re Capital One*, the District Court for the Northern District of Illinois extensively and carefully analyzed the reasonableness of the plaintiffs' requested fee. *See In re Capital One*, 2015 WL 605203, at *32–68. The court considered voluminous data regarding fee awards in other TCPA cases, empirical studies on class action fee awards, and analyzed statistics provided to the court by the litigants in another TCPA action on the court's docket. After thorough consideration of a number of factors affecting attorneys' fee awards, the court adopted a modification of the structure employed in *Synthroid II*, which provides for a fee award that increases at a decreasing rate. *Id*. at 53-54, 62. (citing *In re Synthroid Marketing Litig.*, 325 F.3d 974 (7th Cir. 2003)).

The *Capital One* court ultimately created "tiers" of awards. For the first $10 million, the fee percentage was set at 36%, for a fee award of $3,600,000, in recognition of the risks involved early in litigation. *Id*. at 62. For the second $10 million, the fee percentage was set at 25% for a total of $2,500,000, and so on up to settlement amounts in

excess of $45 million. *Id.* Based on this structure, a $15 million settlement would result in fee award of $4,850,000, or 32.33% of the common fund.

While the recovery for the individual class members in the instant matter is at least more than two-and-a-half times the recovery for the class members in *Capital One*, Class Counsel's request for an award of attorneys' fees of 28% of the total $15 million benefit achieved for the class is reasonable in comparison with fee awards in other class actions and TCPA litigation in this Circuit and around the country.

B. Other Factors Demonstrate the Requested Fee Award Is Fair, Reasonable, and Justified

1. Class Counsel Obtained a Substantial Benefit for the Class

The size of the fund created for the benefit of the class is generally the factor given the greatest emphasis because "a common fund is itself the measure of success … [and] represents the benchmark from which a reasonable fee will be awarded." Manual for Complex Litigation (Fourth) §14.121 (2004) (quoting 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 14:6 at 547, 550 (4th ed. 2002)). Here, Class Counsel created a substantial settlement fund for the Settlement Class Members of up to $15 million, out of which all costs associated with the Settlement, including up to a $5,000 payment to each of the four Class Representatives, costs associated with claims administration, and attorneys' fees and expenses, will be paid. To Class Counsel's knowledge, this is the highest TCPA settlement achieved on behalf of a class in this District.

2. Class Counsel Assumed Significant Risk in Taking on This Action on a Contingency Basisj

"Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorneys' fees." *Yarrington*, 697 F.Supp.2d at 1062 (quoting *In re Xcel Energy*, 364 F.Supp.2d at 994). Class Counsel accepted representation in this Action on a purely contingent basis and therefore assumed significant risk that they would not be compensated for their time, effort, and expenses, as there was no guarantee of a recovery.

Here, Life Time raised numerous defenses that increased risk of no recovery for Settlement Class Members. These defenses included the assertion that Life Time did not use an automatic telephone dialing system ("ATDS") to send the text messages to Plaintiffs and the Settlement Class Members. Life Time also asserted that all recipients of the text messages had given prior express consent to receive them because they had previously provided their cell phone numbers to Life Time in connection with a membership agreement or a guest register. Finally, while Life Time agreed to certification of the Settlement Class for settlement purposes only, the company had previously expressed its disagreement that the claim asserted is suitable for Class Certification, should this matter proceed to trial. While Plaintiffs have always maintained the strength of their claims and believe they would have prevailed on these issues if raised by Life Time, success was far from assured.

3. This Action Presented Difficult Legal Questions

This case presented multiple difficult legal issues that would have been tested in motion practice or at trial. These issues concern whether Life Time received the appropriate form of consent before sending the Settlement Class Members text messages and whether Life Time used an ATDS to send text messages to the Settlement Class Members.

a. Whether Life Time Obtained the Settlement Class Members' Consent to Send Them Text Messages Presented a Contested Issue in This Litigation

The rules concerning the form of consent needed to send text messages changed in October 2013. Before October 2013, many courts concluded that, under certain circumstances, a person consented to receiving a call under the TCPA simply by providing a business their phone number. *See generally Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-CV-2902, 2012 WL 5511039 (N.D. Ala. Nov. 9, 2012). However, in October 2013, the FCC revised its rules and regulations by requiring a person or entity to obtain "prior express written consent" from a consumer before calling that person. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 F.C.C.R. ¶¶2, 66, 2012 WL 507959; 47 C.F.R. §64.1200(a)(2). Under the new regulations "prior express written consent" means an agreement in writing, bearing the signature of the consumer called, notifying the consumer that they may be contacted via an automatic telephone dialing system or a prerecorded voice and that receiving the communication is not a condition for purchasing any property, goods or services. 47 C.F.R. § 64.1200(f)(8).

Whether Life Time received the proper form of consent from the Settlement Class Members before sending them text message advertisements would have been a highly contested issue in this case. Many of the Settlement Class Members provided their cell phone numbers to Life Time in writing before the October 2013 rules took effect. Life Time therefore claimed that the new definition did not extend retroactively to revoke the consent the text message recipients had allegedly provided previously. While Plaintiffs believe that they have very strong arguments to counter this claim, Defendant nevertheless would have continued to litigate this issue.

b. Whether Life Time Used an ATDS to Contact the Settlement Class Members Is an Issue That Defendants Would Have Continued to Litigate

Another disputed issue was whether Life Time used an ATDS to send text message advertisements to the Settlement Class Members. To have a claim under the TCPA, the call must be made via an ATDS. 47 U.S.C. §227(a)(1) and (b)(1)(A). Plaintiffs contends that the web-based service used by Life Time to send text messages is an ATDS because it stored telephone numbers and dialed these numbers without human intervention. Life Time contends that the service used is not an ATDS because the service did not store or produce telephone numbers using a random or sequential number generator.

Courts have reached different conclusions on the requirements of an ATDS. *Compare Sterk v. Path, Inc.*, 46 F.Supp.3d 813 (N.D. Ill. 2014) (adopting Plaintiffs' interpretation) *with Dominguez v. Yahoo!, Inc.*, 8 F.Supp.3d 637 (E.D. Pa. 2014), *appeal argued* No. 14-1751 (3d Cir. Nov. 21, 2014) (adopting Defendant's interpretation).

Although this Court has adopted an ATDS definition consistent with Plaintiffs' interpretation, Defendant would have continued to litigate the requirements of an ATDS. Further, whether Defendant's calling technology has the requisite capacity to randomly or sequentially generate numbers for TCPA purposes is a factual question that would have been the subject of extensive discovery.

In addition, Life Time could have petitioned the FCC to seek a declaratory ruling on the consent or ATDS issues. Such a petition could have delayed the resolution of this litigation for several years.

4. Class Counsel Are Skilled and Experienced Practitioners

Class Counsel, Shawn J. Wanta and Christopher D. Jozwiak of the law firm Baillon Thome Jozwiak and Wanta LLP have expertise in class action litigation and have demonstrated diligent and competent representation in the present Action, as evidenced by their efforts to efficiently reach a fair resolution. Moreover, Mr. Wanta and Mr. Jozwiak have previously been appointed to leadership in multidistrict litigations and appointed as class counsel in numerous other class actions. (Wanta Decl. ¶ 5.)

Gordon Rudd and Zimmerman Reed PLLP have been appointed to numerous leadership positions in complex multidistrict litigations and class actions. By way of example, Mr. Rudd is currently serving in this District as class counsel in *Dryer, et al. v. National Football League*, Case No. 0:09-cv-02182, and is litigating claims on behalf of financial institutions where the Firm serves as lead counsel in *In re: Target Corporation*

Customer Data Security Breach Litigation, MDL 2522, pending before Judge Magnuson. (Rudd Decl. ¶ 4.)

David T. Butsch and Christopher E. Roberts of Butsch Roberts & Associates LLC have over thirty years of combined litigation experience. The lawyers of Butsch Roberts & Associates LLC have been appointed as lead class counsel in multiple class action cases in state and federal courts. (Butsch Decl. ¶ 4.)

Katrina Carroll heads Lite DePalma Greenberg, LLC's Chicago office. She has been actively involved in many of the firm's class actions since 2001 in the areas of consumer fraud, antitrust, securities fraud and ERISA. She has litigated some of the most prominent securities fraud class actions in the country as Co-Lead counsel, including *In re Motorola Securities Litigation* (N.D. Ill.), where LDG achieved a $193 million settlement for aggrieved investors, and in *In re Tenet Healthcare Corp. Securities Litigation*, (C.D. Cal.), which resulted in settlements of $216.5 million against one set of defendants and $65 million against the auditor defendant, representing one of the largest auditor settlements of all time. (Carroll Decl. ¶ 4.)

5. Class Counsel's Work Supports the Requested Fee

Since the inception of this case thirteen months ago, Class Counsel have committed significant time to investigate, litigate, and settle this Action, by, among other things: (1) investigating Plaintiffs' claims in four separate actions; (2) conducting legal research on the TCPA in the separate actions prior to consolidation and jointly after this MDL was formed; (3) consolidating this action into multidistrict litigation; (4) retaining and

consulting with an expert witness; (5) conducting discovery, including a Rule 30(b)(6) deposition of Life Time's corporate designee, serving interrogatories and document requests on Life Time; (6) analyzing the voluminous records of documents Life Time provided to Class Counsel; (7) participating in an all-day mediation in San Francisco, California; (8) actively negotiating the terms of the Settlement with Life Time over a period of three months; (9) drafting Plaintiffs' Memorandum in Support of the Motion for Preliminary Approval; and (10) responding to inquiries from Settlement Class Members regarding the Settlement. At the time of this Motion, Class Counsel has devoted a total of 1,305.95 hours to the Action. But, Class Counsel's work is not finished. The attorneys will continue to field calls from Settlement Class Members and will handle the Final Approval briefing and hearing this summer.

Class Counsel has been committed to vigorously prosecuting this litigation and has done so efficiently—reaching a Settlement after only a year of litigation. Overall, these efforts have been substantial and the amount and quality of work supports the requested fee.

6. No Class Member Has Objected to an Award of Attorneys' Fees at This Time

Pursuant to this Court's Order, the Claims Administrator mailed and emailed Class Notice to more than 592,000 potential Settlement Class Members. Class Notice specifically advised each recipient that Class Counsel would apply to this Court for attorneys' fees of up to $4.5 million. It also directed Settlement Class Members to the

Life Time TCPA web site (www.LifeTimeTCPAsettlement.com) and the toll-free phone number, which contains detailed instructions regarding how to object to the attorneys' fees. The objection deadline has not yet passed. However, at the time of filing, no Settlement Class Member has objected to the requested award for attorneys' fees. The lack of objections is "strong evidence of the propriety and acceptability" of the fee request. *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (E.D. Fla. 1992). *See also 9-M Corp. v. Sprint Commc'ns Co. L.P.,* No. 11-3401 DWF/JSM, 2012 WL 5495905, at *3 (D. Minn. Nov. 12, 2012) (observing the absence of objections to attorneys' fees requests supports a finding of reasonableness).[4]

C. A Lodestar Plus Multiplier Cross-Check Supports the Requested Fee

Although not required, "courts applying the percentage-of-the-fund method may verify the reasonableness of an attorney fee award by cross-checking it against the lodestar method." *Yarrington*, 697 F.Supp.2d at 1061 (citing *In re Xcel*, 364 F.Supp.2d at 991). To determine the reasonableness of attorneys' fees under the lodestar method, courts in this Circuit look to: (1) the number of hours spent by counsel; (2) counsel's "reasonable hourly rate"; (3) the contingent nature of success; and (4) the quality of the attorneys' work. *In re UnitedHealth Grp., Inc. S'holder Derivative Litig.*, 631 F.Supp.2d 1151, 1158-59 (D. Minn. 2009) (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975)). Factors three and four essentially overlap with the *Johnson* factors.

[4] If a Settlement Class Member objects to the reasonableness of attorneys' fees, Class Counsel will file a response prior to final approval.

Class Counsel has logged over 1,305 hours in uncompensated time in order to achieve the Settlement. As charted in the declarations of Class Counsel, this amounts to a lodestar of $687,928.75. Class Counsel has also advanced $33,209.82 in litigation, discovery, and mediation costs.

Finally, it is important to note that Class Counsel effectively and efficiently litigated and negotiated on behalf of Plaintiffs leading to an early compromise between the Parties. While Class Counsel's lodestar could have been much higher, Class Counsel's diligence resulted in the Settlement being reached after just short of one year of litigation. *In re Xcel Energy, Inc.*, 364 F.Supp.2d at 992 ("the lodestar of plaintiffs' counsel could easily have been much higher had not counsel cooperated with one another through this litigation and settlement process.").

Class Counsel should not be penalized for handling the case efficiently. In fact, the requested fee should not be reduced because contingent fee cases hold substantial risks from the start. *See Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result"), *overruled* on *other grounds* by *Int'l Woodworkers of Am., AFL-CIO v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986); *In re Lucent Techs., Inc. Sec. Litig.*, 327 F.Supp. 2d 426, 438 (D. N.J. 2004) ("Furthermore, courts have recognized that the risk of non-payment is heightened in a case of this nature where counsel accepts a case on a contingent basis") (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 199 (3d Cir. 2000).

A "lodestar cross-check need entail neither mathematical precision nor bean counting, but instead is determined by considering the unique circumstances of each case." *In re Xcel Energy*, 364 F.Supp.2d at 999. A multiplier "need not fall within any pre-defined range, so long as the court's analysis justifies the award, such as when the multiplier is in line with multipliers used in other cases." *Id.* Courts in this District and elsewhere have approved attorneys' fees based on the percentage-of-the-fund method that resulted in a similar lodestar multiplier as exists in this case. *See e.g. In re Xcel Energy*, 364 F.Supp.2d at 999 (concluding a lodestar multiplier of 4.7 was reasonable and citing other District of Minnesota cases that have approved multipliers between 4.3 and 5.3); *In re UnitedHealth Group, Inc.*, 643 F.Supp.2d 1094, 1106 (D. Minn. 2009) (finding a lodestar multiplier of 6.5 reasonable); *Malta v. Freddie Mac & Wells Fargo Home Mortgage*, No. 3:10-cv-01290 (S.D. Cal. June 16, 2013) (awarding fees in TCPA litigation with a lodestar cross-check multiplier of 5.16); *Gutierrez, et al. v. Barclays Group*, et al., No. 3:10-cv-01012 (S.D. Cal. Mar. 12, 2012) (awarding fees in TCPA litigation with a lodestar cross-check multiplier of 4.64). Thus, in consideration of the risks assumed by Class Counsel as described above, the significant benefit achieved for the Settlement Class, and case precedent, the multiplier here is reasonable.

Class Counsel took this case with no promise of recovery or payment. For over a year, Class Counsel carried all costs and faced financial risk in prosecuting these cases on behalf of the class members. The case was resolved expeditiously and through skilled negotiation that resulted in a benefit to each Settlement Class Member in an amount

greater than similar cases. Class Counsel opposed a team of skilled defense attorneys. Despite these obstacles, Class Counsel secured a favorable recovery and fair resolution for the class members, negotiating a settlement that provides a $15 million fund. Class Counsel therefore should be rewarded commensurately.

IV. Conclusion

Class Counsel has efficiently and effectively resolved this matter for the class members and should be awarded for their efforts. Moreover, Class counsel assumed significant risk in taking on this litigation on a contingency basis. They have invested time, effort, and financial resources without the guarantee of recovering their fees and costs. Nonetheless, Class Counsel has worked diligently to achieve a significant benefit for Plaintiffs and the Settlement Class that should not go unrecognized. Based on the foregoing, Class Counsel respectfully request that the Court grant its motion and award Class Counsel attorneys' fees in the amount of $4.2 million. Plaintiffs further request the Court approve the Service Awards of $5,000 each to the four Plaintiffs for a total of $20,000.

Dated: May 4, 2015

Respectfully submitted,

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