UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Craftwood Lumber Company, on behalf of itself and all others similarly situated, Plaintiff, v. Senco Brands, Inc., Defendant.	Case No. 1:14-cv-06866 **Hon. John Robert Blakey**

Plaintiff's Memorandum of Law in Support of Motion for Award of Attorneys' Fees and Reimbursement of Expenses

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Introduction

Class Counsel secured a $3 million settlement for over 3,700 recipients of fax promotions from Senco Brands, Inc. Unlike virtually all other TCPA class settlements, net settlement proceeds will be automatically distributed to the class, without the need for members to complete and submit detailed claim forms. Procuring this outstanding recovery required more than two years of intense, hard-fought litigation against SBI and its experienced defense team.

Class Counsel now move for an order awarding reasonable attorneys' fees of one third of the settlement fund created by their efforts and reimbursement of litigation expenses. The requested fee is at the low end of the market for contingent fee agreements. The fee is also well supported by Seventh Circuit precedent, and, most importantly, is in line with fee awards in comparable junk fax class settlements in this circuit. Class Counsel added great value for the class in obtaining not only one of the largest TCPA junk fax recoveries per class member, but also one that will be automatically distributed to class members and not revert to SBI – key features that few other TCPA settlements can boast. All standard measurement tools fully support the requested fee.

Finally, if the Court elects to cross-check the requested fee using the lodestar method, any cross-check would support the requested fee. Craftwood's attorneys expended 2,400 hours prosecuting this case against a determined and highly-motivated party, represented by capable and experienced class action defense counsel. The requested fee of $983,333 represents 73 percent of Craftwood's attorneys' lodestar, $1,342,901.

Class Counsel's Work on Behalf of the Class

Class Counsel commenced this case on Craftwood's behalf in September 2014, alleging that SBI had sent unsolicited facsimile advertisements in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, and had failed to include opt-out notices in *all* facsimile

advertisements, whether unsolicited or *solicited*, in violation of FCC regulations. (*See* D.E. 1.) Craftwood sought certification of the class of recipients of all fax advertisements sent by SBI within the preceding four years.[1]

Class Counsel conducted extensive discovery of SBI's fax advertising activities. The discovery confirmed that since its formation in mid-2009, SBI implemented a regular and systematic fax-blasting program to advertise to former customers of Senco Products, Inc., whose assets had been acquired in a 2009 bankruptcy acquisition. (D.E. 107-3 at 178:21-179:6; D.E. 107-5 at 17:8-18, 19:13-20:7, 33:4-36:1.) Since September 1, 2010, SBI successfully blasted 28,393 fax transmissions to 3,731 unique telephone facsimile numbers. (D.E. 107-5 at 80:20-86:5; D.E. 107-4 at 160:13-23.)

Obtaining this critical information did not come easily. Class Counsel met extreme resistance from SBI's legal team from the start. Only a few months after filing, SBI obtained a stay of the litigation because it had petitioned the FCC to waive the company's violations of the FCC regulation requiring opt-out disclosures on solicited faxes. (D.E. 69-4.) This paused the case for several months. (D.E. 42, 49.)[2] Just after the stay was lifted (August 2015), SBI tried to stop the matter again. SBI attempted to "pick-off" Craftwood as class representative by serving a Rule 68 Offer. (*See* D.E. 67-6, Ex. 2.)[3] Craftwood refused. Then SBI promptly moved for another stay based on two cases pending before the Supreme Court: *Gomez v. Campbell-Ewald*

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[1] To preempt any pick-off attempt by SBI, on the same day it filed its complaint, Craftwood filed a protective class certification motion. (D.E. 3.)

[2] SBI received a retroactive waiver August 28, 2015. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 2015 WL 5120879 (FCC Aug. 28, 2015); (D.E. 132-2 at 14)

[3] SBI later served two additional Rule 68 offers on Craftwood in August and September 2016, which Craftwood also rejected. (*See* D.E. 132-7; D.E. 132-9.)

Co., 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015) (No. 14-857), and *Robins v. Spokeo, Inc*., 742 F.3d 409 (9th Cir. 2014), *cert granted*, 135 S. Ct. 1892 (2015) (No. 13-1339). SBI argued that (1) its pick-off offer mooted the case even though it was not accepted and that the Supreme Court's ruling in *Campbell-Ewald* would be dispositive of the issue (D.E. 55-2 at 6-8); and (2) the Supreme Court's ruling in *Spokeo* would impact whether Craftwood has Article III standing purportedly because Craftwood did not allege an actual injury-in fact in its complaint. (*Id*. at 13.)

Craftwood successfully opposed the second stay attempt. (*See* D.E. 71.) But at this point, the case had entered its second year with SBI providing virtually no information to Craftwood. SBI resisted discovery probing whether, and to what extent, SBI could sustain the only two defenses available under the Act—prior express permission (PEP) or an established business relationship with recipients (EBR). (D.E. 58 at 7-8.) SBI also failed to produce relevant documents, serving a mere 59 pages. (*Id*. ¶ 15.) None were fax transmission records. (D.E. 58-1 ¶¶ 15, 19, Ex. "N.")

Craftwood moved to compel in December 2015. (D.E. 76, 77.) Granting the motion finally opened the floodgates to tens of thousands of records regarding SBI's class member contacts, records identifying fax transmissions, and written discovery responses. (D.E. 146-2 ¶ 17.)

Armed with this crucial information, Class Counsel took three rule 30(b)(6) depositions, moved to compel additional information, and then took three more depositions. (*See, e.g*., D.E. 107-1 ¶¶ 3-11; D.E. 88; D.E. 91.) The depositions unearthed key facts about the fax-blasting operation—the junk faxes themselves, when and how they were sent, and who was targeted. Among other things, Craftwood discovered that SBI:

- obtained fax numbers from customers through credit applications or other

documents containing a line for the fax number (D.E. 107-4 at 47:1-54:10, 56:2-59:10; D.E. 107-2 at 82:11-87:23);

- sent only promotions and contact information through SBI's "Faxmaker" program, logging transmissions on the Faxmaker server (D.E. 107-1, Ex. A, at 14:15-19:20, 58:19-60:23; D.E. 107-1, Ex. B at 59:13-61:7; 74:9-75:15; 92:13-94:8);
- maintained a transmission log from Faxmaker that identifies the fax recipient by fax number and whether the fax was successfully sent (D.E. 107-3 at 80:20-85:16);[4]
- linked transmissions to customer information in SBI's ACT! database (D.E. 107-3 at 89:8-14, 92:8-22; D.E. 107-4 at 74:9-75:15); and
- sent all of its fax ads using the same telephone lines with the same carrier (D.E. 107-3 at 95:16-97:15, 106:23-107:4).

Class Counsel also obtained damaging admissions that supported class certification and that ultimately proved instrumental for settlement. For example, SBI admitted that recipients did not expressly agree that advertising material could be sent to their fax numbers. (D.E. 107-4 at 128:25-129:20.) SBI also admitted that the process by which promotions were faxed through the Faxmaker program was the same for everyone, a critical fact that would strongly support class certification. (D.E. 107-3 at 95:9-19.) And SBI admitted that it was aware of the TCPA and its requirements, but did nothing to comply with it until this suit was filed. (D.E. 107-5 at 22:4-23:5; D.E. 107-4 at 108:1-5.)

Other testimony elicited during depositions undermined SBI's PEP defense. One representative testified that SBI made no effort to send fax ads only to people who had consented

[4] Through this document Craftwood was able to accurately identify the class and the amount of transmissions received by each.

to them; the representative could not identify a single customer giving PEP. (D.E. 107-4 at 99:19-104:4, 175:23-179:6, 189:20-23.) The company also admitted that it would be "pure guesswork" to figure out whether any customers had given consent to receive promotions by fax. (D.E. 107-2 at 107:22-108:21.)

On the heels of an unsuccessful mediation, Craftwood filed its amended motion for class certification, which the Court took under submission. (D.E. 108.) SBI responded with two dispositive motions: (1) a renewed motion for summary judgment on grounds that Craftwood gave SBI PEP; and (2) a motion to dismiss for lack of standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *as revised* (May 24, 2016), or, in the alternative, on mootness grounds because SBI served a Rule 68 offer on Craftwood. (D.E. 132, 134.)

Only after years of fierce legal battles, with these crucial motions pending, did the parties finally achieve a settlement breakthrough. (D.E. 146-2 ¶ 9.) In late October 2016, they agreed to a $3 million common fund settlement, with no reversion to SBI. (D.E. 141-1.) The settlement is notable both for its high-dollar recovery per class member (~ $800) as well as for its class-friendly terms. Class members do not have to do anything to receive their respective shares.

Argument

I. Class Counsel Are Entitled to Recover a Reasonable Fee From the Settlement Fund

It is by now axiomatic 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); *see also Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 563 (7th Cir. 1994). District courts in the Seventh Circuit may apply either the "percentage of the fund" or the "lodestar" method in awarding fees in a class action where a common settlement fund is created. *Americana Art China, Co., Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014).

Class Counsel believe that the percentage method is appropriate in this contingency representation. The "normal practice in consumer class actions is to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-501 (N.D. Ill. 2015) (Kennelly, J.). The percentage method is easy to apply, *Florin*, 34 F.3d at 566, and mirrors the private marketplace for negotiated contingent fee arrangements. *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986). "[W]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the market rate." *Id.*

If the Court elects to cross-check the result against the lodestar fees, the amount would be well justified. The requested fee is actually well below the dollar equivalent of Class Counsel's time calculated at standard hourly rates.

II. The Requested One-Third Attorneys' Fees Are Justified Under this Circuit's Standards

Class Counsel's request for attorneys' fees amounting to one-third the net settlement fund[5] is reasonable and justified under applicable Seventh Circuit standards. The Seventh Circuit has "held repeatedly that, when deciding on appropriate fee levels in common-fund cases, 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." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (*Synthroid I*); *see also Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007); *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005); *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The class counsel are entitled to

[5] Class counsel have requested one third of the net settlement fund ($2,950,000), after deducting from the $3 million gross recovery projected costs of notice and settlement administration ($50,000). (*See* Robin Decl. ¶ 19.) This is directed by Seventh Circuit precedent. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.").

The object in awarding a reasonable fee is to give the lawyer what the lawyer and the class would have agreed to *ex ante* in an arm's length negotiation. *Taubenfeld*, 415 F.3d at 599. But because fees in class actions are determined after the fact, there is no precise *ex ante* "market" comparison. *See Synthroid I*, 264 F.3d at 719. Indeed, "data from pre-suit negotiations and class-counsel auctions in TCPA class actions are basically non-existent." *Kolinek*, 311 F.R.D. at 501.[6] Without the benefit of an actual *ex ante* negotiation, the court "must…simply determine what value the lawyers have provided" to the class. *Synthroid I*, 264 F.3d at 720.

The market rate for legal fees also "depends in part on the risk of nonpayment a firm agrees to bear." *Synthroid I*, 264 F.3d at 721. "[T]he higher the risk of failure the higher the contingent fee that a client would have to pay in an arm's length negotiation with the lawyer in advance of the suit." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011). The risk is not evaluated with the benefit of hindsight, but "*at the outset* of the litigation." *Florin*, 34 F.3d at 565 (original emphasis).

In determining the market rate for legal fees, courts in the Seventh Circuit thus evaluate (1) the market rate for similar contingent fee agreements; (2) fee awards in comparable cases; (3) the value class counsel provided to the class and the quality of its legal services; and (4) the risks class counsel assumed at the outset of the case. *Synthroid I*, 264 F.3d at 718, 720. The Court

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[6] Due to the practical economics of litigation, individual TCPA enforcement suits are a dying breed. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 753 (2012) ("How likely is it that a party would bring a $500 claim in, or remove a $500 claim to, federal court?"). The Court observed that "Lexis and Westlaw searches turned up 65 TCPA cases removed to federal district courts in Illinois, Indiana and Wisconsin since the Seventh Circuit held, in October 2005, that the Act does not confer exclusive jurisdiction on state courts. *All 65 cases were class actions*, not individual claims removed from small-claims court. There were also 26 private TCPA claims brought initially in federal district courts; of those, 24 were class actions." 132 S. Ct. at 753 (emphasis supplied).

may also consider Class Counsel's lodestar to cross-check the reasonableness of the fees sought under the percentage method. *See In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *17 (N.D. Ill. Dec. 9, 2009) (Gettleman, J.).

The requested fee here measures very well against the applicable standards. It is at the low end of the market for contingent fee agreements; it is in line with fee awards in comparable junk fax class settlements; it is justified by the substantial value Class Counsel obtained for the class; and it is supported by the considerable risks Class Counsel assumed in bringing this case. If the Court elects to cross-check the result using the lodestar method, a cross-check would fully support the requested fee. The request amounts to less than 74 percent of the combined lodestar of all attorneys.

A. The Requested Fee Is at the Low End of the Market

The requested fee is at the low end of the market for contingent fee agreements, which typically range from one-third to forty percent. *See Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (Darrah, J.) ("[a] customary contingency fee would range from 33 1/3% to 40% of the amount recovered."); *see also Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998); *Kirchoff*, 786 F.2d at 323; *Goldsmith v. Technology Solutions Co.*, No. 92 C 4374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995).

There is no unusual feature of this case that would take it outside the market range. The successful prosecution of this TCPA class case overcame numerous legal and factual obstacles. The case was far riskier than a large business or statutory dispute, in which damages are usually known and there is no certification threshold to surmount. The presumptive "market" rate here is no less than that for contingent legal representation.

B. The Requested Fee Is Consistent with Awards in Comparable Cases

In determining the market rate, a court may consider "attorneys' fees from analogous class action settlements" because they demonstrate "a rational relationship" between the record and the fees awarded. *Taubenfeld*, 415 F.3d at 600. The requested fee is in line with awards in analogous settlements in the Seventh Circuit. *See Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16 CIV. 3571, 2016 WL 5109196, at *4 (N.D. Ill. Sept. 16, 2016) (Norgle, J.) ("Courts routinely hold that one-third of a common fund is an appropriate attorneys' fees award in class action settlement") (citing cases); *City of Greenville v. Syngenta Crop Protection, Inc.*, 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012); *Goldsmith*, 1995 WL 17009594, at *8.

TCPA/junk fax settlements follow these norms. Class Counsel have identified 24 junk fax settlements between $500,000 and $5 million in this circuit over the last ten years. (*See* Lem Decl. ¶ 3, Ex. 1.) In all but two of these matters, courts awarded attorneys' fees of at least 30 percent of the common fund. (*Id.*) The mean fee award was 33.76 percent while the median was 33.33 percent. (*Id.*)

TABLE 1.—Attorneys' Fees Awards in Other Seventh Circuit TCPA Class Settlements

Case	Year	Court	Recovery	Average Member Recovery	Structure[7]	Fee Award
Allscripts	2012	N.D. Ill. (Kim)	1,889,000	6	CM	30
Atlas	2013	E.D. Wis. (Adelman)	900,000	286	CM Rev.	35
CareCredit	2011	N.D. Ill. (Gottschall)	1,400,000	140	CM	30
CSL Biotherapies	2009	N.D. Ill. (Kendall)	2,750,000	138	CM	30
Cutera	2010	N.D. Ill. (Hibbler)	950,000	3	CM	30
Cy's Crab House	2011	N.D. Ill. (Kennelly)	3,647,500	856	CM	33.33
Finish Thompson	2010	N.D. Ill. (Kendall)	3,000,000	231	CM Rev.	33.33
Foxfire Printing	2013	N.D. Ill (Kapala)	1,545,126	54	CM Rev.	74.27
Great Western	2010	N.D. Ill. (Kim)	612,500	18	CM	30
Handit2 Network	2015	N.D. Ill. (Shah)	1,400,000	22	CM	32.2
Illinois Nut	2015	N.D. Ill (Alonso)	2,036,800	50	CM	20

[7] "CM" indicates a claims-made settlement. "CM Rev." indicates a claims-made settlement with unclaimed funds reverting to the defendant.

Case	Year	Court	Recovery	Average Member Recovery	Structure[7]	Fee Award
Kinray	2010	N.D. Ill. (Gettleman)	501,685	47	CM	49.8
LaRoche-Posay	2011	N.D. Ill. (Hart)	1,000,000	140	CM	25
Lay	2010	S.D. Ill. (Regan)	1,737,500	500	CM	33.33
M and M Rental	2009	N.D. Ill. (Bucklo)	1,986,312	504	CM Rev.	33.33
Pizza Hut	2011	W.D. Wis. (Crabb)	1,296,000	936	CM Rev.	33.3
Preferred Chiro	2011	N.D. Ill. (Coleman)	1,551,000	389	CM Rev.	33.33
Rooflifters	2011	N.D. Ill. (Cox)	1,400,000	93	CM	30
Seiko Corp.	2011	N.D. Ill. (Bucklo)	3,500,000	135	CM Rev.	33.33
Sepracor	2011	N.D. Ill. (Pallmeyer)	2,430,000	87	CM	30
Topsail Sportswear	2011	N.D. Ill. (Kennelly)	2,000,000	190	CM Rev.	33.33
Trynex	2014	N.D. Ill. (St. Eve)	550,000	311	CM Rev.	33.3
UScoot	2010	N.D. Ill. (Keys)	25,000	5	CM	31.9
Zydus	2016	N.D. Ill. (Ellis)	1,000,000	11	CM	32.3
Average				**215**		**33.76**

Class Counsel's request is firmly in line with awards in these cases. If anything, the superior recovery in our case would justify a greater fee. This settlement's $800 per-member recovery is the third highest among settlements in table 1. It is also almost four times larger than the $215 mean recovery. The average class member recovery, however, tells only part of the story. All "comparable" settlements are claims-made structures, with nearly half reverting all unclaimed funds to the defendant. And unlike this case, several settlements set arbitrary ceilings on the claimants' recoveries, regardless of how many faxes they received. *See, e.g.*, *Sawyer v. Atlas Heating and Sheet Metal Works Inc*., No. 2:10-cv-00331 (D.E. 53-1) (E.D. Wis. Mar. 8, 2013) (recovery capped at $400 with reduction if claims exceed fund); *Sturdy v. Ceva Animal Health, LLC*, No. 3:12-cv-03201 (D.E. 18-2) (C.D. Ill. Dec. 5, 2012) (recovery capped at $1,000 per fax number); *Saf-T-Gard Int'l, Inc. v. Seiko Corp. of Am*., No. 1:09-cv-00776 (D.E. 98-2) (N.D. Ill. Jan. 7, 2011) (recovery capped at $375).

This settlement's automatic distribution and non-reversionary features distinguish it from virtually all other junk fax recoveries in this circuit. Because consumer class actions suffer from notoriously low claims rates, automatic distribution settlements are much more likely to result in meaningful compensation to the class. *See* Brian T. Fitzpatrick & Robert C. Gilbert, *An*

Empirical Look at Compensation in Consumer Class Actions, 11 N.Y.U. J.L. & Bus. 767, 770 (2015). Similarly, low claims rates in reversionary settlements, particularly in consumer class actions, generally enable defendants to retain significant portions of the "maximum potential recovery" they had theoretically committed to pay. *See* Deborah H. Hensler, *et al*., *Class Action Dilemmas: Pursing Public Goals for Private Gain* (Rand 2000); *see also In re TJX Cos. Retail Sec'y Breach Litig*., 584 F. Supp. 2d 395, 405 (D. Mass. 2008).

Based on these "comparable" settlements, at the outset of the case, the class would have expected to obtain a reversionary, claims-made settlement with an average recovery on a per-class member basis of $215. Instead they will automatically receive an average of about $800 per class member, and no settlement funds will revert to SBI. There is no "maximum potential recovery" as in the peer group cases shown in table 1; there is an actual class recovery of $3 million.

The requested fee is also consistent with the Seventh Circuit's recent holding in *Redman* that the amount awarded to class counsel should be determined by reference to the value the class *actually receives*, not a hypothetical amount the defendant might pay. 768 F.3d at 630. This settlement, unlike the vast majority of consumer cases, will be automatically distributed to all class members. Sums represented by un-cashed settlement checks will redistributed to the class. In short, the class will actually receive all or nearly all the settlement proceeds that are not applied to notice and settlement administration, attorneys' fees, costs, and an incentive award.

C. The Requested Fee Appropriately Compensates Counsel for the Value They Added to Procure the Class's Extraordinary Recovery

In order to evaluate "what value the lawyers have provided" to the class (*Synthroid I*, 264 F.3d at 720), the Court should asses the value the class would have expected to receive before class counsel performed any legal work – and compare it to the result that was ultimately

achieved. That allows the Court to base the fee award on the value that the attorneys created for the class. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (the "most critical factor" in evaluating reasonable attorneys' fees "is the degree of success obtained" by class counsel).

Here, one way of calculating the amount the class would have expected to receive before class counsel performed any legal work is by reviewing settlements in comparable junk fax class actions in the Seventh Circuit. Class Counsel seek a percentage of the fund in line with similarly sized settlements in the Seventh Circuit in the last decade, despite achieving a superior result. Indeed, the request follows this Court's one-third award in *Heidbreder*, a claims-made TCPA settlement. *Heidbreder Bldg. Group, LLC v. Ass'n of the Wall and Ceiling Indus.*, Case No. 14 C 6913 (D.E. 58) (N.D. Ill. June 28, 2016). In light of the value Class Counsel added, a fee award of one third the common fund easily approximates the market rate for legal services, is reasonable, and should be granted.

D. Class Counsel Assumed Significant Risks in Bringing This Case

At the beginning of this case Class Counsel assumed substantial risk the case would produce no or little recovery. TCPA contingency matters are fraught with data availability risks, liability risks, procedural risks, and regulatory risks. This case was no different.

To establish the number of transmissions and ascertainability of the class, transmission records are essential. But the quality of the defendant's records are unknown when litigation begins. Class Counsel ran the risk that SBI wouldn't have records sufficient to establish successful transmission of the fax ads. *See* § 227(a)(5), (b)(1)(C); *Hinman v. M and M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 806 (N.D. Ill. 2008) (Bucklo, J.). At the outset, Class counsel faced a huge risk that record defects would leave them with proof only of a single fax transmission to Craftwood.

Even if SBI did have transmission records, Class Counsel faced the prospect that those transmission records would show that SBI sent very few fax advertisements. While discovery ultimately revealed a large fax blasting operation, at the time of filing, Class Counsel did not know the precise size of SBI's fax advertising campaign. They risked engaging in expensive and time consuming discovery only to learn later on the case had little value.

There was also a risk that SBI would be able to successfully "pick-off" Craftwood as the class representative merely by serving an unaccepted settlement offer. At the time, circuit courts were split on the question whether a case becomes moot, and thus beyond the judicial power of Article III, when the named plaintiff receives an offer of complete relief on his individual claim before a class is certified. In the middle of the case, the Supreme Court reviewed *Campbell-Ewald* to decide the question. Although the Supreme Court held that an unaccepted settlement offer does not moot a case, it left open the possibility that a defendant could moot the case by depositing the full amount of the plaintiff's individual claim and getting the court to enter judgment for the plaintiff in that amount. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), *as revised* (Feb. 9, 2016). After the ruling, that is precisely what SBI attempted to do, by tendering funds to Craftwood and seeking dismissal contending that the offer mooted Craftwood's individual claim. (D.E. 134; *see* Cordero Decl. ¶ 17.)

There was also the risk that SBI could establish that it didn't violate the TCPA because recipients had consented to receive the faxes. (Cordero Decl. ¶¶ 13-14.) If the company could establish PEP, it would provide a complete defense to the statutory claim for those recipients. *See* § 227(a)(5). SBI contended that class members gave permission through a number of methods, including credit applications and discussions with sales representatives. (D.E. 146-4 at Resp. to Interrogatory No. 2.) SBI also contended that Senco Products had received permission from its customers, and that those permissions were transferred to SBI through a 2009

bankruptcy sale. (D.E. 107-6, 107-8; *see also* D.E. 107-5.) This risk even materialized when SBI moved for summary judgment based on its contention that Craftwood gave Senco Products PEP to send fax ads. (D.E. 67-2 at 14-16; D.E. 132-2 at 19-24.)

Class Counsel also faced considerable risks associated with the claim that SBI had violated the FCC regulation requiring advertisers to include opt-out disclosures on solicited advertisements. (*See* D.E. 1, ¶ 20.) At the time this action commenced, several parties had petitioned the FCC to rescind the regulation in its entirety, or alternatively, to grant retroactive waivers of the regulation due to claimed confusion over its application to solicited advertisements. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, FCC 14-164, Order, ¶ 10 (Oct. 30, 2014). This risk ultimately turned to reality last Friday with the issuance of the District of Columbia Circuit's ruling in *Bais Yaakov*. *See Bais Yaakov of Spring Valley v. Federal Commc'ns Comm'n*, No. 14-1234, 2017 WL 1192909 (D.C. Cir. Mar. 31, 2017). There, the court held that the FCC regulation requiring opt-out notices on solicited faxes was invalid because it exceeded the FCC's statutory authority under the TCPA. 2017 WL 1192909, at *4.

Class Counsel also faced the risk that a class would not be certified. (Cordero Decl. ¶ 12.) Certification of TCPA enforcement actions is not a certainty. The Fifth Circuit has observed that: "[T]here are no invariable rules regarding the suitability of a particular case filed under this subsection of the TCPA for class treatment; the unique facts of each case generally will determine whether certification is proper." G*ene and Gene, LLC v. BioPay, LLC*, 541 F.3d 318, 328 (5th Cir. 2008). At the outset of litigation, several arguments posed a potential risk to a successful class certification: (1) a contention that Craftwood had consented to receive fax advertisements (D.E. 132; *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726-

727 (7th Cir. 2011)); (2) an SBI contention that individual inquiries of recipient credit applications and discussions with sales representatives were needed to resolve the PEP issue (*Chapman v. First Index, Inc.*, No. 1:09-cv-05555, 2014 WL 840565, at *3 (N.D. Ill. Mar. 4, 2014)); or (3) a contention that fax recipients could not be identified (*Saf-T-Gard Int'l, Inc. v. Wagener Equities, Inc.*, 251 F.R.D. 312, 315 (N.D. Ill. 2008) (Gettleman, J.)).

At the case's inception, Class Counsel faced substantial risk that the lawsuit would produce little or no fees for their efforts. And during litigation, Counsel overcame numerous pitfalls to achieve a favorable settlement for the class. Class Counsel assumed at least as much, if not more, risk than the attorneys in any of the other 24 TCPA/junk fax settlements reported in table 1. This too supports the requested fee.

E. The Requested Fee Is Further Supported by a Lodestar Cross-Check

Any lodestar cross-check, if performed, would firmly support the requested award.[8] The lodestar method first requires calculation of a base lodestar amount by "multiplying a reasonable hourly rate by the number of hours reasonably expended." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983)). The requested fees here amount to only 73 percent of lodestar. The base lodestar is $1,342,901, as shown in table 2.

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[8] Courts in this district have approved the use of a lodestar cross check to assess the reasonableness of a fee request under the percentage of the recovery method. *Trans Union*, 2009 WL 4799954, at *17; *Abrams v. Van Kampen Funds, Inc*., No. 01 C 7538, 2006 WL 163023, at *7-8 (N.D. Ill. Jan.18, 2006) (Hart, J.). Although some courts have declined to consider the lodestar in common fund cases (*Silverman v. Motorola, Inc*., No. 07 C 4507, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012) (St. Eve, J.)), the high lodestar underscores Class Counsel's commitment to the case and the reasonableness of the requested fee.

TABLE 2.—*Lodestar Summary*

Professional	Rate	Hours	Lodestar
P&F Attorneys			
Cordero	$775	709.90	$550,173
O'Brien	$585	113.1	$66,134
Lula	$595	83.5	$51,111
Luskin	$470	594.1	$279,227
Brown	$470	68.0	$31,960
Lem	$445	175.1	$77,920
Jones	$320	181.2	$57,984
Others	$401	71.9	$28,843
P&F Paralegals	$215	173.3	$37,260
P&F Subtotal		2,165.2	$1,180,612
Co-Counsel			
Zimmermann	$735	153.9	$113,117
Frank Owen	$450	34.3	$15,435
GSE	$735	45.9	$33,737
Total		**2399.3**	**$1,342,901**[9]

The base lodestar is typically adjusted upward using a multiplier to take into account various factors in the litigation, including "the complexity of the legal issues involved, the degree of success obtained, and the public interest advanced by the litigation." *Gastineau*, 592 F.3d at 748. "Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation." *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995); *see also In re Cenco, Inc. Secs. Litig.*, 519 F. Supp. 322, 327 (N.D. Ill. 1981) (Crowley, J.).

The fee requested here is considerably less than lodestar. Indeed, the request amounts to only 73 percent of the base lodestar. This fact strongly favors the requested fee. *E.g.*, *Wade v. Minatta Transp. Co.*, No. C10-2796 BZ, 2012 WL 300397, at *2 (N.D. Cal. Feb. 1, 2012)

[9] The rates in this table represent Class Counsel's current hourly charges. (Cordero Decl. ¶ 20; Owen Decl. ¶ 14; Watkins Decl. ¶ 9.) Because Zimmermann does not have an hourly rate, we have applied the hourly rate charged by Watkins. "Hours" are those worked through March 31, 2017. In calculating the lodestar, a court may use the attorneys' current rates or an interest factor to compensate for the delay in payment. *See Smith v. Village of Maywood*, 17 F.3d 219, 221 (7th Cir. 1994). Courts generally prefer the former because it "is equally accurate and far more efficiently arrived at." *Harper v. City of Chicago Heights*, No. 87 C 5112, 1994 WL 710782, at *3 (N.D. Ill. Dec. 16, 1994) (Will, J.).

(requested fee less than lodestar supports a finding of reasonableness); *Fogarazzo v. Lehman Bros.*, No. 03 CIV. 5194 SAS, 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011).

F. The Class's Reaction Supports the Requested Fee

The class's backing of the settlement also supports the requested fee. The class was notified that class counsel would apply for attorneys' fees of up to one third of the $3 million settlement fund, plus costs of litigation. (*See* Robin Decl, Ex. A at 1; D.E. 145-6 at 1; www.sbisettlement.com.) Class members were advised that they have the right to object. (D.E. 145-6 at 2.) Yet to date, not one class member has objected to any aspect of the settlement, including the fee and expense request.[10] (Robin Decl. ¶ 18.) The absence of objections is indication that the requested fees are reasonable. *See In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 747 (E.D. Pa. 2013) (lack of objections "strongly supports approval of the requested fee"); *Retsky Family*, 2001 WL 1568856, at *4. Instead, Class members have demonstrated their support by completing and returning class member information forms. (*Id.* ¶ 16.) Other class members have even stepped forward to provide declarations expressing strong support for the settlement, including the requested attorneys' fees. (*See* Schade Decl., *passim*.)

III. Class Counsel Request that the Award Be Allocated Based on Contractual Fee Agreements

When litigation commenced in 2014, Class Counsel entered into written co-counsel agreements. (Cordero Decl. ¶ 22.)[11] Among other things, the agreements contain formulas for determining Class Counsel's respective shares of any attorneys' fee recovery. In addition to

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[10] The deadline for class members to object to the settlement is May 2, 2017. (D.E. 152 ¶ 14.)

[11] One agreement was among Payne & Fears, C. Darryl Cordero, Inc., Zimmermann, and Guin Stokes & Evans. The other agreement was among Payne & Fears, C. Darryl Cordero, Inc., Zimmermann, and Owen. (Cordero Decl. ¶ 22.)

Class Counsel, the agreements include former Craftwood attorney Scott Zimmermann, who withdrew from the case in April 2016. (*See* D.E. 81.)

With the exception of Owen, the formulas generally allocate any fee recovery based on the attorneys' relative shares of the total "lodestar," measured at the time fees are received. (Cordero Decl. ¶ 24.)[12] Owen was accorded a fixed 10 percent of any fee recovery, regardless of his lodestar. (*Id*. ¶ 24.)

The applicable principles are straight-forward. When a fee-sharing agreement in a class action suit bears a reasonable relationship to the services performed by the attorneys, it should be honored. *Goodyear v. Estes Exp. Lines, Inc*., No. 1:06CV863-JDT-TAB, 2008 WL 687130, at *4 (S.D. Ind. Mar. 10, 2008) (approving fees allocated under fee-sharing agreement). Conversely, if the agreement rewards an attorney in disproportion to the benefits that attorney conferred upon the class—even if it has no impact on the class—a court may reject a fee allocation agreement. *In re FPI/Agretech Secs. Litig*., 105 F.3d 469, 473 (9th Cir. 1997); *see also Wanninger v. SPNV Hldgs., Inc*., No. 85 C 2081, 1994 WL 285071, at *2-3 (N.D. Ill. June 24, 1994) (Marovich, J.) (refusing to enforce "agreements in which an attorney or firm would recover fees far in excess of the value of the work performed on the case.").

At this stage, a final allocation is not possible because for all firms other than Frank Owen fees are allocated based on work performed through the time they are paid.[13] All that can be done at this point is a snapshot based on work performed to date. Assuming the Court grants

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[12] As mentioned earlier, Scott Zimmermann does not have an hourly billing rate owing to the fact that he works exclusively on a contingency basis. The co-counsel agreements assign him the same hourly rate as Lead Settlement Class Counsel Darryl Cordero. (Cordero Decl. ¶ 24.)

[13] Class Counsel recognize that strict adherence to this time-frame is impractical because the order on the fee motion will issue at or soon after the final approval hearing. They request, however, that fees be allocated based on work performed through that hearing.

the motion for fees in full, the formulas would call for the following allocations based on work performed through March 31, 2017 (Cordero Decl. ¶¶ 26-27.), as set forth in table 3.

TABLE 3.—*Attorneys' Fees Contractual Allocations (Interim)*

Firm	Percentage	Provisional Fees
Frank Owen	10.0	98,333.33
Guin Stokes & Evans LLP	2.0	19,955.52
Payne & Fears LLP	80.3	790,233.01
Scott Zimmermann	7.6	74,811.14
Total		**983,333.00**

At the final approval hearing, Class Counsel will provide updated percentages and proposed allocations based on work performed through that time.

IV. Class Counsel Are Entitled to Recover Their Reasonable Expenses

In addition to an award of fees, attorneys who create a common fund for the benefit of a class are also entitled to payment of reasonable litigation expenses and costs from the fund. *Synthroid I*, 264 F.3d at 722; *Continental Illinois*, 962 F.2d at 570. "The standard of reasonableness [of costs] is to be given a liberal interpretation." *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1368 (N.D. Cal. 1995). In fact, "[w]ith the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of the litigation, or as an aspect of settlement of the case, may be taxed." *Id*. "Likewise the amount of itemization and detail required is a question for the market. If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more." *Synthroid I*, 264 F.3d at 722.

Counsel have incurred costs of $61,357.31 to date. The expense detail is set forth in the accompanying Cordero, Owen, Zimmermann, and Watkins declarations. Counsel also anticipate an additional $2,000 in travel expenses for the final approval hearing, which will be incurred in June. These expenses were reasonable given the high stakes, the expert analysis required, and the overall class recovery. The combined cost detail for all firms is shown in table 4:

TABLE 4.—*Expense Summary*

Description	Total
Delivery Services	$2,739.47
Deposition Transcripts	$4,546.30
Experts	$13,110.00
Hearing Transcripts	$174.90
Mediator Charges	$5,312.50
Notary	$16.66
Filing Fees and Court Costs	$618.00
Outside Counsel	$4,090.17
Photocopies (in-house)	$774.00
Photocopies (outside)	$1,305.90
Postage	$94.81
Private Investigator	$41.42
Telephone	$15.33
Travel Expenses	$26,517.85
Anticipated Travel Expenses	$2,000.00
Total	**$61,357.31**

The expenses represent only 2 percent of the class's recovery, half the 4-percent average in class cases. *See AT&T Mobility*, 792 F. Supp. 2d at 1041 (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 70 (2004)). The Court should find this small amount reasonable for a case of this size and duration.

Conclusion

Craftwood and Class Counsel respectfully request that the Court enter an order awarding attorneys' fees in the total amount of $983,333, and that the fee be allocated in accordance with the parties' co-counsel agreements. Craftwood and Class Counsel also respectfully request reimbursement of expenses in the amount of $61,357.31.

DATED: April 5, 2017

PAYNE & FEARS LLP

/s/ C. Darryl Cordero
C. Darryl Cordero
Attorneys for Plaintiff Craftwood Lumber Company

CERTIFICATE OF SERVICE

The undersigned, an attorney, states that on this fifth day of April, 2017, he caused the foregoing **Brief in Support of Motion for Award of Attorneys' Fees and Reimbursement of Expenses** to be filed electronically with the Clerk of Court using the CM/ECF system, and which will send electronic notification to the following:

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