

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Craftwood Lumber Company, on behalf of
itself and all others similarly situated,

Plaintiff,

v.

SBI Brands, Inc.,

Defendant.

Case No. 1:14-cv-06866

Hon. John Robert Blakey

Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Incentive Fee Award
for Service as Class Representative

Table of Contents

	Page
Introduction.....	1
Factual Background	1
Argument	3
I. Craftwood Is Entitled to an Incentive Award	3
II. An Award of \$35,430 for Craftwood Is Reasonable	5
Conclusion	8

Table of Authorities

	Page(s)
Cases	
<i>American Int'l Group, Inc. v. ACE INA Holdings, Inc.</i> , No. 07 CV 2898, 2012 WL 651727 (N.D. Ill. Feb. 28, 2012).....	6, 7
<i>Beesley v. International Paper Co.</i> , No. 3:06-CV-703-DRH-CJP, 2014 WL 375432 (S.D. Ill. Jan. 31, 2014).....	6
<i>CE Design v. Cy's Crab House</i> , No 1:07-cv-05456 (N.D. Ill. Oct. 27, 2011)	6
<i>Cook v. Niedert</i> , 142 F.3d 1004 (7th Cir. 1998)	4, 6, 7, 8
<i>Critchfield Physical Therapy v. Taranto Group, Inc.</i> , 293 Kan. 285, 263 P.3d 767 (Kan. 2011)	5
<i>Hanley v. Fifth Third Bank</i> , No. 1:12-cv-1612 (N.D. Ill. Dec. 23, 2013).....	6
<i>Heekin v. Anthem, Inc.</i> , No. 1:05-01908, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012).....	6
<i>In re Southwest Airlines Voucher Litig.</i> , No. 11 C 8176, 2013 WL 4510197 (N.D. Ill. Aug. 26, 2013).....	4
<i>Spicer v. Chicago Bd. Options Exch., Inc.</i> , 844 F. Supp. 1226 (N.D. Ill. 1993)	3
<i>In re Synthroid Mktg. Litig.</i> , 264 F.3d 712 (7th Cir. 2001)	4
<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294 (N.D. Cal. 1995).....	6
<i>Will v. General Dynamics Corp.</i> , Civil No. 06-698-GPM, 2010 WL 4818174 (S.D. Ill. Nov. 22, 2010).....	7

Introduction

Plaintiff Craftwood Lumber Company vigorously prosecuted its claims, against a tenacious and skilled adversary, for mass junk faxing in violation of the TCPA. Craftwood was steadfast in its prosecution and was undeterred by numerous Senco Brands, Inc., attempts to buy out its individual claims with increasing individual settlement offers. Craftwood's stewardship produced an extraordinary result for *all* recipients of SBI junk faxes. The proposed settlement creates a \$3 million fund for a class of more than 3,700 fax recipients. Class members will share its benefits without having to submit claims or prove they received any of the 28,393 fax transmissions. The gross settlement recovery averages \$105 for each documented fax transmission, with a total expected benefit around \$800. None of this would have happened without Craftwood's initiative and resolve to see this case through.

Craftwood now seeks an incentive award of \$35,430. Craftwood oversaw nearly every stage of litigation, including the negotiation of the settlement. Craftwood president David Brunjes devoted significant time to this case—over 90 hours. Even more impressive was Craftwood's determination to obtain relief for the entire class and stop SBI's junk faxing program. Craftwood could have accepted any one of the three five-figure attempts by SBI to pick it off and walked away from the case. To incentivize representatives like Craftwood to continue to step forward to protect consumers' rights and resist similar defense buy-off attempts, Craftwood should receive a substantial service award.

Factual Background

Craftwood Lumber & Hardware of Highland Park is one of the state's largest lumber and hardware dealers. (Brunjes Decl. ¶ 2.) The company regularly receives junk faxes, which interfere with its business operations and unnecessarily consume its resources. (*Id.* ¶ 6.) Even

after filing more than 280 complaints with the Federal Communications Commission, however, the flow of junk faxes did not stop. (Brunjes Decl. ¶ 8.)

Among the junk faxes received by Craftwood was a fax sent by SBI on January 4, 2012, advertising SBI's products. (Brunjes Decl. ¶ 7.) Convinced from the FCC's inaction that the best way to stop junk faxes is through legal action, on September 5, 2014, Craftwood commenced this lawsuit against SBI to recover damages under the Telephone Consumer Protection Act. (*Id.* ¶ 5.) Craftwood brought the case on behalf of itself and all others to whom SBI had sent junk faxes during the four years preceding the filing of the complaint.

From the outset, Craftwood assumed an active role in the case. David Brunjes, Craftwood's President, has been instrumental in guiding and overseeing the litigation. Brunjes spent considerable time reviewing and responding to SBI discovery—requests for admission, requests for production of documents, and fact-intensive interrogatories. (Brunjes Decl. ¶ 10.) Among other things, Brunjes personally searched through years of archived information in Craftwood's warehouse and stored electronically to respond to SBI's document requests. (*Id.*) And he sat for a full day of intense cross-examination by SBI's attorney at deposition. (*Id.*)

Beyond his participation in discovery, Brunjes regularly conferred with class counsel about major case issues, engaging in strategy discussions and joining in settlement negotiations. (Brunjes Decl. ¶¶ 10, 12.) At the April 2016 mediation in Santa Monica, California, Brunjes took the lead at times, negotiating directly with SBI general counsel Clifford Mentrup. (*Id.* ¶ 10.) Even after mediation, Brunjes assisted Class Counsel in formulating settlement strategy and settlement terms. (*Id.* ¶ 12.)

Amidst this constant involvement in every stage of the litigation, Craftwood also rejected numerous attempts by SBI to buy it off with successively increasing settlement offers. SBI first

offered Craftwood \$15,030 on August 31, 2015, to walk away from the lawsuit. (*See* D.E. 67-6, Ex. 2; Brunjes Decl. ¶ 13.) Almost exactly a year later, SBI offered Craftwood \$15,430 to end the litigation. (*See* D.E. 132-7; Brunjes Decl. ¶ 14.) In September 2016, SBI upped the ante with a \$25,430 offer. (*See* D.E. 132-9.) Then SBI moved for an order permitting it to tender funds under authority of Rule 67. (*See* D.E. 134-1.) Craftwood rebuffed all pick-off attempts and pressed forward to achieve a settlement that would benefit *all* class members. (*See* D.E. 132-9; Brunjes Decl. ¶ 14.)

Brunjes' diligence took substantial hours away from Craftwood's business. Brunjes kept notes of most of his activities in the case; he reasonably estimates that he devoted at least 90 hours to the litigation. (Brunjes Decl. ¶ 10.) Craftwood thus took on the duties and responsibilities of class representative and executed them to a degree above and beyond what is to be expected of a usual class representative. These efforts consummated with a \$3 million class settlement. Craftwood's individual gross benefit from the settlement, however, is projected to be only \$1,050, despite the huge time-investment and effort it has expended in procuring the large class settlement. (*See* D.E. 67-6, Ex. 2, 132-7 at 2-3.)

Argument

I. Craftwood Is Entitled to an Incentive Award

Courts have long recognized that class representatives, like Craftwood, should be compensated for their service to the class, and have recognized the importance of incentive awards for class representatives. *See Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1266-68 (N.D. Ill. 1993) (Will, J.) (collecting cases). The granting of an incentive award will not only compensate Craftwood, but will also promote the larger public interest of ensuring that active and diligent class representatives spearhead class actions. Because a named plaintiff

is essential to every class action, incentive awards are intended to provide economic motivation to induce individuals to participate in the suit, and lend their names and support to class actions generally. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722-23 (7th Cir. 2001); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). The need for incentive awards is particularly strong where the value of class members' individual claims is small, and no individual plaintiff would stand to gain enough on his or her own to justify filing suit. *See In re Southwest Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *11 (N.D. Ill. Aug. 26, 2013) (Kennelly, J.).

Craftwood's service exemplifies the reasons for approving an incentive award. The action set out to stop unwanted faxing and recover statutory damages available under the TCPA. The litigation accomplished both purposes. As a direct result of the lawsuit, SBI stopped its junk fax program. (*See* D.E. 145.) Under the proposed settlement, SBI will also establish a \$3,000,000 settlement fund to compensate eligible class members pro rata based on the number faxes received. (*See* D.E. 149 ¶ 3.) The terms of the settlement are extremely favorable to all class members. Craftwood secured an automatic distribution settlement, relieving class members of the burden of submitting claims or proving they received SBI faxes in order to receive payment. (*Id.* ¶ 8.) The gross settlement recovery per fax will average \$105 for each documented fax transmission, or about \$800 per class member.¹ This is nothing short of a phenomenal result, requiring little to no effort on each members' part to enjoy the benefits under the settlement.

¹ The estimates were made by dividing the \$3 million fund by the number of transmissions (28,393) and presumptive class members (3,731). (*See* D.E. 107-5 at 80:20-86:5; D.E. 107-4 at 160:13-23.) Assuming an attorneys' fee award of one-third (net of notice and administration expense), the average class member is expected to receive over \$500 from the settlement.

In addition to compensating Craftwood for its efforts and results, approving an award will also encourage potential class representatives to bring class claims and to diligently prosecute them. This is particularly true in TCPA cases. Courts recognize that few plaintiffs would find it “worth their while” to bring individual small claims TCPA actions, which would “frustrate the intent of the TCPA and protect junk fax advertisers from liability.” *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285, 301, 263 P.3d 767, 780 (Kan. 2011). This underscores just how important incentive awards are for TCPA class representatives. Compensating plaintiffs under the TCPA at the rate of \$500 per violation is frankly not enough for someone to assume the duties and responsibilities of a class representative. And it certainly is not enough to motivate class representatives to participate to the extent and in the manner in which Craftwood carried out its duties here. Craftwood initiated this matter with the best intentions, and its consistent service and vigilance entitle Craftwood to an incentive award that reflects its outstanding contributions to the case.

II. An Award of \$35,430 for Craftwood Is Reasonable

Craftwood respectfully requests an award up to \$35,430 in recognition of its service to the class. This award is reasonable because it reflects Craftwood’s exceptional service, its substantial time devoted to the litigation (which spanned over two years), its own small recovery of the settlement fund, and the outstanding result achieved for the class. Most critically, this award reflects Craftwood’s steadfast resistance to numerous SBI attempts to pick it off from the case, and staying the course for the benefit of the entire class.

In determining the size of an incentive award, “relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the

litigation.” *Niedert*, 142 F.3d at 1016. Courts have also considered the duration of the litigation, the size of the award in relationship to the total class recovery, and the personal benefit or lack thereof enjoyed by the class representative as a result of the litigation. *See American Int’l Group, Inc. v. ACE INA Holdings, Inc.*, No. 07 CV 2898, 2012 WL 651727, at *17 (N.D. Ill. Feb. 28, 2012) (Gettleman, J.); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). All these factors support the requested award.

Brunjes devoted at least 90 hours to the case and was actively involved in the matter for nearly two years. (Brunjes Decl. ¶ 10.) He oversaw the litigation, participated in investigation and discovery, reviewed all filings in the case, regularly conferred with class counsel, and participated in strategy and settlement discussions and negotiations. (*Id.*) Brunjes attended mediation in the Los Angeles area, and actively participated in direct discussions with SBI’s general counsel. (*Id.*) These efforts ultimately led to the extremely favorable class-wide settlement.

Courts in both the Northern District and Seventh Circuit regularly award incentive awards of *at least* \$25,000. *See, e.g., Heekin v. Anthem, Inc.*, No. 1:05-01908, 2012 WL 5878032, at *1 (S.D. Ind. Nov. 20, 2012). These awards have been given in cases similar to the \$3 million fund created here. *See Hanley v. Fifth Third Bank*, No. 1:12-cv-1612, (Dkt. 86) (N.D. Ill. Dec. 23, 2013) (Castillo, J.) (approving \$25,000 incentive award in \$4.5 million settlement); *CE Design v. Cy’s Crab House*, No 1:07-cv-05456, (Dkt. 424) (N.D. Ill. Oct. 27, 2011) (Kennelly, J.) (approving \$25,000 incentive award in \$3,647,500 settlement). And there are numerous examples of \$25,000 awards to *each* to *several* plaintiffs, pushing the total incentive award (and, in turn, the portion of the settlement fund) even higher. *See, e.g., Beesley v. International Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31,

2014) (awarding \$25,000 each to six named plaintiffs); *American International Group v. ACE INA Holdings, Inc.*, No. 09 C 2026, 2012 WL 651727, at *16 (N.D. Ill. Feb. 28, 2012) (Gettleman, J.) (awarding \$25,000 each to seven named plaintiffs); *Will v. General Dynamics Corp.*, Civil No. 06-698-GPM, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) (awarding \$25,000 each to three named plaintiffs).

This is an exceptional situation, and Craftwood should actually receive *more* than \$25,000. Craftwood turned down three escalating pick-off attempts by SBI, each designed to entice the company to sell out the class for its own benefit. Craftwood refused offers of \$15,030, \$15,430, and \$25,430, the last of which SBI claimed would fully compensate Craftwood for all its statutory damages, exemplary damages, and costs. (*See* D.E. 132-9.) In fact, if Craftwood would have accepted SBI's initial offer, its attorneys would not have even discovered the extent and breadth of SBI's junk fax program.² Only six months later did SBI finally produce critical evidence of class-wide liability. (*See* D.E. 146-2 ¶ 17.)

The Seventh Circuit's policy on incentive awards has significant meaning here: "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook*, 142 F.3d at 1016. Craftwood was offered \$25,430 to end this litigation. It only makes sense that an award larger than that is appropriate and "necessary." Simply put, it should not be to Craftwood's economic detriment to stay the course of litigation for the class's benefit. Instead, because the pick-off has

² SBI first offered Craftwood \$15,030 on August 31, 2015, to walk away from the lawsuit. (*See* D.E. 67-6, Ex. 2; Brunjes Decl. ¶ 13.) Soon after, Craftwood moved to compel responses to interrogatories and requests for production. (*See* D.E. 57.) The Court granted Craftwood's motion and ordered SBI to produce documents that ultimately proved relevant to class-wide liability. (D.E. 77; D.E. 146-2 ¶ 17.)

become a regular part of the defense toolkit, there must be incentives to keep class representatives engaged in efforts to protect the entire class. Turning down SBI's substantial pick-offs was an exemplary action that Craftwood took to protect the interests of the class; without it, thousands of class members would not stand to receive \$800 on average by way of an automatic distribution. *Cook*, 142 F.3d at 1016. Under these circumstances, an incentive award of \$35,430 is more than appropriate. It rewards an individual entity, like Craftwood, for diligent representation of others, leading to a substantial class recovery.

The stellar class response also favors this exemplary award. No class members have objected to the requested award. (Robin Decl. ¶ 18.) In fact, only two members have opted out of the settlement. (*Id.* ¶ 17.) But so far 584 members have submitted class member information forms to make sure settlement checks would be sent to the correct address. (*Id.* ¶ 16.) Indeed, certain class members provided full-throated support for the settlement. (*See* Schade Decl. ¶¶ 3-6.)

Conclusion

For the reasons stated above, Class Counsel and Craftwood respectfully request that this Court approve a \$35,430 incentive award for Craftwood to be paid from the class settlement fund.

DATED: April 5, 2017

PAYNE & FEARS LLP

 /c/ C. Darryl Cordero
C. Darryl Cordero
Attorneys for Plaintiff Craftwood Lumber Company,
on behalf of itself and all others similarly situated

CERTIFICATE OF SERVICE

The undersigned, an attorney, states that on this fifth day of April, 2017, he caused the foregoing **Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Incentive Fee Award for Service as Class Representative** to be filed electronically with the Clerk of Court using the CM/ECF system, and which will send electronic notification to the following:

Matthew K. Brown
jhoke@paynefears.com,
ir.courtnotices@paynefears.com,
mkb@paynefears.com

Daniel F. Lula
dfl@paynefears.com

Scott O. Luskin
sol@paynefears.com
pdavid@paynefears.com

Joshua Briones
lalocke@blankrome.com,
jbriones@blankrome.com

Charles Robert Watkins
twilson@gseattorneys.com,
charlesw@gseattorneys.com

Frank F. Owen
ffo@castlepalms.com

Ana Tagvoryan
sbrockway@blankrome.com,
atagvoryan@blankrome.com

Stephen W. Heil
swh@crayhuber.com,
anthony@crayhuber.com,
agatha@crayhuber.com

Jeffrey N. Rosenthal
rosenthal-j@blankrome.com

Zachary Gordon Shook
zgs@crayhuber.com

/s/ C. Darryl Cordero

C. Darryl Cordero