UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ACCOUNTING OUTSOURCING, L.L.C., Individually and as representative of the CLASS	:	CIVIL ACTION NO. 03-CV-161
	:	SECTION:
VERSUS	:	
VERIZON WIRELESS PERSONAL COMMUNICATIONS, L.P. d/b/a VERIZON WIRELESS d/b/a VERIZON WIRELESS SOLUTIONS CENTER	:	JUDGE: BRADY
	:	MAGISTRATE: DALBY

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MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS

NOW INTO COURT come Class Counsel, Christopher K. Jones, John P. Wolff, III, Philip Bohrer and Keith D. Jones, who hereby submit the following Memorandum in Support of Motion for Award of Attorneys' Fees and Reimbursement of Costs:

I. INTRODUCTION

On May 25, 2007, this Honorable Court granted preliminary approval to the class action settlement between Defendant and the Class. Pursuant to the Order approving the Settlement Agreement, plaintiffs are required to petition this Honorable Court for an award of attorneys' fees and costs. The settlement provided that Class Counsel could be paid a percent of the total value of the settlement, not to exceed 36.5%, for attorneys' fees and costs. Counsel for plaintiff and the Class devoted their skill, time and resources to this matter, which included significant discovery, substantial pleadings and developing and negotiating a settlement that returns to the Class a result that compensates the Class for its loss.

Class Counsel request an award of $2,314,328.10 for legal fees under the percentage of recovery method, which takes into consideration the benefits achieved by counsel on behalf of the class members. In addition, as provided in the Stipulation and Class Action Settlement Agreement, Class Counsel request reimbursement of costs from the settlement fund in the amount of $150,000.

II. FACTUAL BACKGROUND

As the Court is aware, this suit arises out of Defendant's alleged violations of the Telephone Consumer Protection Act of 1991 (TCPA) and the Louisiana Unsolicited Telefascimile Message Act ("UMTA"). Plaintiff has filed this class action suit against the Defendant, on behalf of itself and all others similarly situated. Plaintiff has alleged that Defendant transmitted thousands of unsolicited telefacsimile advertisements. Plaintiff's petition sought statutory damages and injunctive relief preventing further violation of the TCPA. Defendant has asserted various affirmative defenses both to class certification and on the merits.

III. PROCEDURAL BACKGROUND

This litigation began when suit was filed in the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, Docket No. 504,006, Section 21 on January 30, 2003. On March 3, 2003, Defendant removed this action to this Honorable Court.

A. Motion to Remand

Subsequent to the removal, this action was consolidated with 15 other similar suits. Plaintiff, along with plaintiffs in the other consolidated cases, filed Motions to Remand in

each of the cases.

Several briefs were submitted in support of and in opposition to the Motions to Remand. Given the uniqueness of the issue, extensive analysis and research was necessary to address these issues.[1] After extensive briefing of the issue and oral arguments, the Court ultimately held that jurisdiction was appropriate in federal court. This important issue was one of first impression and necessitated hours of research and drafting of numerous memoranda.

B. Consolidated Motion to Dismiss

The Court elected to entertain a consolidated Motion to Dismiss by all of the Defendants in the consolidated cases, including this one. The Motion to Dismiss addressed a number of constitutional challenges, including arguments that the TCPA was void for vagueness, applied strict liability, violated the advertisers' due process rights, and violated the First Amendment and Equal Protection clause. The Motion to Dismiss further argued that neither Louisiana, nor the TCPA authorized prosecution of such claims as a class action. Both sides submitted multiple briefs. Evidencing the complexity of the issues presented was the Court's 56 page opinion denying all of the arguments on all counts. As the Court is aware, the preparation of the briefs and related research required many hours of work. In fact, Class Counsel spent many hours consulting with assistant U.S. and Louisiana Attorneys General, each of whom also prepared memoranda in opposition to the Motion to Dismiss.

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[1] 47 U.S.C. § 227(b)(3) provides that a person or entity may, if otherwise permitted by the laws or rules of court of a State, bring a private cause of action for a violation of the TCPA "in an appropriate court of that State."

C. Discovery

Class Counsel also engaged in significant discovery. Initial disclosures were exchanged as was formal and informal written discovery and document production. Defendant's corporate deposition was taken, as was the deposition of the class representative, and many of its employees. In addition, discovery was taken from other third parties, including the Canadian company hired by Defendant to transmit the subject fax advertisements. Counsel were required to travel to Saskatchewan, Canada to take this deposition.

Additional discovery was taken to address alleged spoliation issues, which required many hours of time.

D. Pleadings/Briefs

In addition to the preliminary motions related to jurisdiction and dispositive issues, this case involved many other pleadings, including multiple discovery motions as well as a spoliation motion. Appeals were taken of magistrate judge decisions, and the parties litigated an issue related to the expansion of the class definition.

Plaintiff also moved for class certification, which required significant briefing.

E. Settlement Negotiations

Early in the litigation, the parties participated in an unsuccessful two-day mediation. Thereafter, over the next couple of years, the parties continued with settlement discussions, and finally came to an agreement, over four years after this suit was originally filed.

F. Settlement Implementation

Since agreeing to the settlement, Class Counsel has performed a number of tasks which have required substantial time and resources:

1. Contracted with a notice administrator, Hannis T. Bourgeois, LLP, for preparation of a notice plan and assisted with the preparation of a Notice to the class members, and coordinated with them for the printing and mailing of all notices and communications with and tracking of opt-outs and objectors;

2. Contracted, communicated with and secured the consent of Hannis T. Bourgeois, LLP to act as Court Appointed Disbursing Agent;

3. Prepared an extensive Memorandum in Support of the Joint Motion for Preliminary Approval of Class Action Settlement;

4. Prepared and negotiated an extensive order preliminarily approving the settlement and certifying the class.

Class Counsel performed extensive work on behalf of the class and obtained a benefit for the class as a result. Class Counsel are entitled to an award of attorneys' fees and costs from the fund established.

IV. ATTORNEYS' FEES ANALYSIS

A. Introduction

The issue before the Court is whether the attorneys' fees and costs requested are appropriate under the circumstances. Further, Class Counsel submit that the proper manner for determining the appropriateness of the award is by the percentage of recovery, or common benefit, method whereby the attorneys' fee award is based upon the award obtained for the class. Given the amount of time and resources expended to litigate this case, and the novelty of the issues involved, Class Counsel's fee request is appropriate and the Court

should employ the common benefit method.

B. Common Benefit Method

Under the "common benefit" doctrine, first articulated by the Supreme Court over a century ago, counsel whose efforts obtain, protect, preserve or make available substantial benefits to a class of persons are entitled to attorneys' fee based upon the worth of the benefit to the class.[2] It has long been recognized that a person who maintains a suit that results in the creation of a benefit in which others have a common interest may obtain fees from that common benefit.[3] In fact, the Supreme Court has consistently held that the percentage of recovery approach is an appropriate methodology for awarding Plaintiffs' Counsel's fees in a common fund case.[4]

The Fifth Circuit has held that "it is well-settled that the 'common benefit' or 'common fund' equitable doctrine allows for the assessment of attorneys' fees against a

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[2] Newberg on Class Actions, §14.01 (3rd ed. 1992); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1881). See also: "Common Fund and Substantial Benefit" Awarding Attorneys' Fees and Managing Fee Litigation (Federal Judicial Center 1995), pp. 49-85. The history and justification for the practice of awarding fees from common funds are examined in detail in Charles Silver, *A Restitutionary Theory of Attorneys Fees in Class Actions,* 76 Cornell Law Review 401 (1991).

[3] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("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 attorneys' fee from the fund as a whole."). *See also Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

[4] *See, e.g., Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class"); *Sprague*, 307 U.S. at 164-67; *Central R.R. & Banking Co.*, 113 U.S. at 123.

common fund created by the attorneys' efforts.[5] Most recently, Courts in the Fifth Circuit have applied a blended approach whereby the Courts have adopted the common fund method, and analyzed the proposed fee under the twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir.1974).[6] Nevertheless, numerous district courts in the Fifth Circuit have simply applied the percentage fee method in common fund cases.[7] Further, as the Eastern District of Texas has recognized, the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuit Courts of Appeal, along with the District of Columbia, either allow judges to use the percentage method or require them to do so.[8]

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[5] *Barton v. Drummond Co.*, 636 F.2d 978, 982 (5th Cir. 1981); *see also Parker v. Anderson*, 667 F.2d 1204, 1213 (5th Cir. 1982).

[6] *Faircloth v. Certified Finance Inc.*, 2001 WL 527489 (E.D.La. 2001).

[7] *See e.g. In the matter of the Complaint of Ingram Barge Company,* Civil Action No. 97.226 "A" (M.D.LA.) approximately 40% fee of $40.5 million settlement; *In re Harrah's Entertainment, Inc.*, 1998 WL 832574 (E.D. La. 1998); *In re: Medical Care America Sec. Lit.*, Civil Action No. 3:92CV 1996-J (N.D. Tex. April 24, 1996) (Order and Final Judgment); *In re Prudential Bache*, 1994 WL 150742, at *5 (E.D. La. 1994); *In re Shell Oil*, 155 F.R.D. at 573; *In re Catfish Antitrust Litigation*, 939 F.Supp. 493, 500 (N.D.Miss.1996); *TransAmerica Refining Corp., et al v. Dravo Corp., et al*, Civil Action No. H-88-789 (S.D. Tex. 1992) (Order Granting Joint Petition for Attorneys' Fees and Expenses);*In re Middle South Util. Sec. Litig.*, Civ. A. No. 85-3681, 1991 WL 275769, at *1 (E.D. La. 1991); *Kleinman v. Harris*, Civil Action No. 3:89-CV-1869-X (N.D. Tex. June 21, 1993); *In re Granada Partnerships Sec. Litig.*, MDL No. 837 (S.D. Tex. 1992); *In re Lomas Fin. Corp. Sec. Litig.*, Civil Action No. CA-3-89-1962-6 (N.D. Tex. 1992) *Rywell v. Healthvest*, CA3-89-2394-H (N.D. Tex. Dec. 3, 1991); *Teichler v. DSC Communications Corp.*, CA3-85-2005-T (N.D. Tex. Oct. 22, 1990); *Finkel v. Docutel/Olivetta Corp.*, CA3-84- (N.D. Tex. 1990).

[8] *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp2d 942 (E.D., Texas 2000) [citations omitted].

C. Lodestar Method[9] is not Appropriate

The alternative to the common fund method is the lodestar method. A "lodestar" fee award is computed by multiplying the number of hours expended by the attorneys' hourly rates. The Court then can, in its discretion, adjust the lodestar depending on the respective weight of *Johnson* factors.[10] Often these lodestar issues can take on a life of their own and overshadow the underlying litigation. Given the issues likely to arise in computing a lodestar, courts across the country, both federal and state, are retreating from a lodestar analysis in favor of setting common benefit fees at a percentage of the benefit secured.

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[9] The lodestar method of fee award, which gives rise to the fee based on time, has been roundly criticized by scholars and repudiated by most commentators. *See e.g., Macey & Miller, the Plaintiffs' Attorney Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.CHI.L.REV. 1, 4, 59-61 (1991) (identifying problems associated with applying the lodestar and recognizing the percentage of recovery method as superior); Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Though Class and Derivative Actions*, 86 Col.l. Rev. 669, 691, 724-25 (1986); Miller, *Attorneys Fees in Class Actions*, (Federal Judicial Center 1980); Coffe, *Rescuing the Private attorney General: Why the Model of Lawyer as Bounty Hunter is Not Working*, 42Md. L. Rev. 215 (1983); Court Awarded attorney Fees, Report of the Third Circuit Task Force, Oct. 8, 1985 (Arthur R. Miller, Reporter), 108 F.R.D. 237. Beginning in 1885 with the Supreme Court's decision in *Central R,.R. Co. v. Pettus*, 113 U.S. 116, 127-28 (1885), for over 100 years the overwhelming weight of authority has approved the use of a percentage method in computing fees in common fund cases.

[10] The twelve *Johnson* factors include: (1) the time and labor required; (2) the novelty and difficulty of the question involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; and, (12) award in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d. 714, 717-719 (5th Cir.1974).

Over recent years, virtually no one has defended the use of the lodestar formula in common fund cases. Criticism of the lodestar has been persistent and pervasive, and one 1990 decision described its methodology as "now thoroughly discredited."[11] At a minimum, the views of the Third Circuit Task Force resonated with much of the judiciary when it called the lodestar formula a "cumbersome, enervating and often surrealistic process of preparing and evaluating fee Petitions"[12] Judge Ralph Tyson recently stated that the lodestar calculation, while not "completely discredited," was an "increasingly discredited" method of calculating attorneys' fees in a class action settlement and that the percentage method was the proper means to calculate such attorneys' fees.[13]

The principal objections to the use of the lodestar formula in the common fund context are as follows:

(A) The lodestar methodology wastes judicial time and effectively converts the court into "a public utilities commission, regulating the fees of counsel after the services have been performed, thereby combining the difficulties of rate regulation with the inequities of retrospective rate-setting."[14]

(B) The lodestar methodology creates a risk of inflated billing rates and overstated claims of hours worked, which the court simply cannot monitor effectively;

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[11] *In re Oracle Systems Security Litigation*, 131 F.R.D. 688, 689 (N.D. CAL. 1998).

[12] See Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 258 (1985).

[13] *Survey Communications, Inc. v. Corporate Express, Inc.*, 05cv40 (M.D.La. 4/19/06).

[14] *Kirchoff v. Flynn,* 786 F.2d 320 (7th Cir 1986).

(C) The lodestar formula exacerbates the conflict between attorney and client and can encourage collusive settlements by enabling the attorney to build up time so that the attorney profits even if the client does not;

(D) The lodestar formula maximizes unpredictability. Because it supplies what the *Oracle Systems* court called a "rudderless standard," the lodestar asks plaintiffs' attorneys to undertake multi-year litigation without any clear guidance as to how they will be compensated. Ultimately, everything under it is "up for grabs." Enhancements can be added or subtracted; courts can approve or disapprove billing rates; and allow or disallow attorney and paralegal time. Such uncertainty inherently undercuts the expected value of the action to plaintiffs' attorneys and hence reduces their ability and willingness to engage in sustained litigation with better financed defendants; and

(E) The lodestar stretches out the pace of litigation. Once time is equated with money, expedition becomes not only unnecessary, but counter-productive. Early settlements are arguably discouraged (or at least postponed), and the judicial time is again wasted on needless, but profitable, motions.

Obviously, one of the best reasons for supporting a percentage fee award is to encourage early settlement of cases.[15] Courts have seemingly recognized the utility of the percentage approach in common fund cases. Judge Davidson of the U.S. District Court for the Northern District of Mississippi explains:

> The majority of circuits apply a "percentage fee" approach in common fund cases such as the one at bar, either exclusively or at the discretion of the district court. e.g., *In re Thirteen Appeals*, 54 F.3d 295, 308 (1st Cir. 1995); *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig.*, 55 F.3d 768, 821 (3rd Cir. 1995); *Swedish Hosp. Corp. v. Shalala*, 303 U.S. App. D.C. 94, 1 F.3d 1261, 1268 (D.C. Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974-75 (7th Cir. 1991); *Camden I Condominium Assoc., Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F. 2d 268, 271 (9th Cir. 1989); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451,

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[15] See H. Newberg, Attorney Fee Awards § 2.07, 48-51 (1986).

454 (10th Cir. 1988). The United States Supreme Court has also noted that in a common fund case, application of a "percentage fee" approach is the proper method in awarding attorneys' fees. *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 79 L. Ed. 2d 891, 903 n.16, 104 S.Ct. 1541 (1984) ("Unlike the calculation of attorneys' fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed upon the class . . . "). Indeed, every "common fund" case to come before the Supreme Court utilized a percentage approach, and when given the opportunity, the Court declined to adopt the lodestar method in the common fund context. E.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980); see also *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1184 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 127-28, 5 S. Ct. 387, 393, 28 L. Ed. 915 (1885); *Trustees v. Greenough*, 105 U. S. (15 Otto) 527, 26 L. Ed. 1157 (1881).[16]

When the Court considered the attorney fee issue in the *In Re Combustion Inc.* litigation, it concluded that a percentage fee award within the *Johnson* framework was appropriate and reasoned as follows:

> Even though it is apparent that the *Johnson* factors must be addressed to ensure that the resulting fee is reasonable, not every factor need be necessarily considered. If a district court has articulated and clearly utilized the *Johnson* framework as the basis of its analysis, "we will not require the trial court's findings to be so excruciatingly explicit in this area of minutiae that decisions on fee awards consume more paper than did the cases from which they arose." *Louisiana Power & Light v. Kellstrom*, 50 F.3d 319, 331 (5th Cir. 1990).
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> It is the opinion of this Court that in common fund cases such as the instant case, Fifth Circuit precedent requires a district court only to justify its award of attorneys' fees within the framework of the *Johnson* factors regardless of whether the award is determined by the lodestar or percentage of fund method. Further, a district court may exercise its discretion as to whether the fee evaluation more reasonably fits into a percentage of funds or into a lodestar calculation as long as either selection is supported by *Johnson* factor analysis.
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> The review of district court opinions in this circuit, as was done in *In re Prudential-Bache Energy Income Part. Securities Litigation*, 1994 U. S. Dist.

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[16] *In re: Catfish*, 939 F.Supp. 493 (N.D.Miss. 1996).

LEXIS 6621, 1994 WL 150742 (E.D.La. 1994), indicates that the district courts within this circuit utilize the percentage of the fund method. See also *In re Catfish Litigation*, 939 F. Supp. 493 (N.D.Ms 1996) (citing problems with the application of the lodestar method due to the circumstances of the case, so adopting the percentage of fund validated with the *Johnson* factors).[17]

D. Illustrative Cases

In addition to the many cases in which this Court has employed the percentage method, the following is an illustrative list of class actions in the Fifth Circuit where the percentage method (alone, or with a lodestar check) was used:

- *In the Matter of the Complaint of the Ingram Barge Company Civil Action* No. 97-226 "A" (M.D.LA.);
- *In re Combustion, Inc.*, 968 F. Supp. 1116, (W.D.LA. 1997);
- *In re Catfish Antitrust Litigation,* 939 F. Supp. 493, 500 (N.D. Miss. 1996);
- *Orzel v Gilliam*, Civil Action No. 3:90 CV-0044-G (N.D. Tex. May 16, 1995) (Judge Fish);
- *In re Prudential-Bache Energy Income Partnerships Securities Litigation,* No. 888, 1994 WL 202394, at *1 (E.D. La. May 18, 1994) ("*Prudential I*");
- *Steiner v Phillips,* Civil Action No. 3:89-1387-X (N.D. Tex. March 14, 1994) (Judge Kendall);
- *Belman v Warrington*, Civil Action No. H-91-3767 (S.D. Tex. Nov 16, 1993);
- *In re Intellicall Securities Litigation*, Civil Action No. 3:91-CV-0730-P (N.D. Tex. September 22, 1993) (Judge Salis);
- *Kleinman v Harris*, Civil Action No. 3:89-CV-1869-X (N.D. Tex. June 31, 1993);
- *In re First Republic Bank Securities Litigation*, Civil Action No. 3:88-CV-0641-H (N.D. Tex. Feb. 28, 1992 and March 8, 1993) (Judge Sanders);

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[17] 968 F.Supp. 1116, 1135 (W.D.La. 1997).

- *Transamerica Refining Corp. v. Dravo Corp.*, Civil Action No. H-88-789 (S.D. Tex. November 16, 1992) (Judge Black);

- *In re Granada Partnerships Securities Litigation*, MDL No. 837 (S.D. Tex. Oct. 16, 1992);

- *In re Lomas Fin. Corp. Securities Litigation*, Civil Action No. CA-3-89-1962-G (N.D. Tex. Jan. 28, 1992);

- *In re Middle S. Util. Securities Litigation,* 1991 LEXIS 18062 (E.D. La. Dec. 17, 1991);

- *Rywell v Healthvest*, CA-3-89-2394-H (N.D. Tex. Dec. 3, 1991);

- *Longden v Sunderman*, Civil Action No. 3-87-0612-H (N.D. Tex. May 1, 1991) (Judge Sanders), aff'd, 979 F.2d 1095 (5th Cir. 1992);

- *Teichler v DSC Communications Corp.*, CA-3-85-2005-T (N.D. Tex. Oct 22, 1990);

- *Finkel v Docutel/Olivetti Corp.,* CA-3-84-0566 (N.D. Tex. Feb. 23, 1990).

In *Longden v Sunderman*,[18] the Fifth Circuit *affirmed* a percentage fee award, noting that the district court had stated its preference for the percentage approach "as a matter of policy."

In *In re Harrah's Entertainment, Inc. Sec. Litig.*,[19] the trial judge noted:

> "The Court will apply the percentage fee method in accordance with the request of counsel. The Court does not believe that application of the lodestar method would result in a more reasonable award of fees. Moreover, application of the lodestar method would be unduly burdensome."

If mechanically applied, determining fees based on hours spent invariably leads to an

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[18] 979 F.2d 1095 (5th Cir. 1992).

[19] 1998 WL 832574 *4 (E.D. La., Nov. 25, 1998).

unsatisfactory result in this type of litigation. "Where success is a condition precedent to compensation, 'hours of time expended' is a nebulous, highly variable standard, of limited significance."[20]

An award of the percentage of the fund serves important policy goals in addition to providing access to our legal system for many who would otherwise be unable to finance today's expensive litigation. The nature of the contingency fee system permits greater recovery for successful cases, thereby offsetting the losses from unsuccessful ones.

E. Fee Percentage

Class Counsel submit that a 36.5% attorneys' fee award is reasonable under the circumstances. One Court has opined that contingency fee awards have a usual range between 33 and 50 percent in personal injury litigation.[21] This request is within the range of fees awarded in similar cases in other jurisdictions as well.[22]

For the reasons stated above, Class Counsel suggests that, in the case at bar, a reasonable attorneys' fee is thirty-six and one half percent of the total value of the settlement

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[20] *Foster*, 577 F.2d at 337, n.1.

[21] See *Continental Illinois Securities v. Steinlauf,* 562 F.2d 566 (7th Cir. 1992).

[22] *See, e.g., In re Safety Components Int'l Sec. Litig.,* 166 F.Supp.2d 72, 101 (D.N.J. Sept. 27, 2001) (listing cases in Second and Third Circuit wherein 30-33% of Settlement Fund awarded); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 152 (E.D. Pa. 2000) (awarding 33 1/3% settlement fund plus expenses); *In re Greenwich Parm. Sec. Litig.*, No. 92-3071, 1995 U.S. Dist. LEXIS 5717, at *19 (E.D. Pa. Apr. 27, 1995) (finding 33 1/3% of settlement fund appropriate for settlement of approximately $4.4 million); *In re: F&M Distrib. Sec. Litig.,* No. 95-CV-71778-DT, 1999 U.S. Dist. LEXIS 11090, at *21 (E.D. Mich. June 29, 1999) (awarding 30% of Settlement Fund as attorneys' fees).

fund.

F. The *Johnson* factors.

Although Class Counsel submit that the Fifth Circuit, and most other circuits, apply the common fund method exclusively, application of the *Johnson* factors further supports a finding that the attorneys' fee request is appropriate.[23]

(a) The time and labor required; the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

A simple review of the record establishes the amount of time necessitated to prosecute this action. Response to the consolidated Motion to Dismiss, briefing on discovery issues and the class certification motion required many hours of effort and preparation. These efforts, and those more fully described above, support the conclusion that Class Counsel have devoted a large percentage of their available time to the investigation and prosecution of this case on behalf of more than 10,000 Class members.

The issues presented by this litigation were novel and difficult. In fact, to Class Counsel's knowledge, these are the first cases ever brought in Louisiana under the TCPA. Substantial skill was required to navigate a successful conclusion. Issues addressed in the Motions to Dismiss, such as constitutional challenges and insurance coverage, as well as the Motion for Class Certification, created complex issues requiring experience and skill on the part of Class Counsel. The novelty and difficulty of the questions involved and the requisite

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[23] While the Fifth Circuit recognizes that the award of attorneys fees may be supported by the *Johnson* factors, rarely are all of the *Johnson* factors applicable to a particular case. *See Harrah's*, 1998 WL 832574, at *3-4 (citations omitted). Nevertheless, Class Counsel will address each in turn.

effort necessary in the exercise of that skill to achieve a favorable result in this action are self-evident and supported by the record.

Class Counsel have met and performed the duties and responsibilities delegated to them by the Court in a highly capable manner for the best interests of the Class.

(b) Likelihood of preclusion of other employment.

Class Counsel spent many hours prosecuting this case. Although not precluded from engaging in other litigation, this case prevented Class Counsel from devoting time to other cases.

(c) The customary fee for similar work in the community.

Under the circumstances, and given the novel issues involved, a 36.5% award is reasonable and customary for similar work in the community.

(d) The amount involved and the results obtained.

Class Counsel negotiated a cash settlement valued at over $6 million. This is an excellent result given the novelty of the claim and potential for no recovery. Each class member, upon completion of a proof of claim form, will receive cash in the amount of $397.00, almost full value of the statutory damages available under the TCPA. Given that many similar cases have recovered only coupons for the class members, or a cash award much less than the one secured in this settlement, this result is favorable especially given the viability and insurance coverage concerns.

(e) Time limitations imposed by the client or the circumstances.

Clearly, given the extensive motion practice involved in this litigation, substantial

time commitments were necessary to properly prosecute this case. Class Counsel were required to meet numerous time deadlines associated with the various Motions.

(f) The nature and length of the professional relationship with the client.

Although not the type of litigation to which this factor necessarily applies, Class Counsel were in constant contact with the class representative during the course of this litigation. The class representative was periodically apprised of the status of the proceedings in the course of the motion practice. In addition, Class Counsel worked together with the class representative to answer all discovery requests.

Since Class Counsel were not aware of the identities of the class members at the outset of this litigation, communication with them was impossible. However, they endeavored to identify each class member after the settlement and have worked tirelessly since that time to ensure that each member of the class is apprised of the settlement and has the opportunity to participate.

(g) The experience, reputation, and ability of the attorneys.

The Court has been made aware, through its relationship with Class Counsel in the conduct of these proceedings, of their ability, experience and reputation as able litigation counsel, particularly sensitive to the best interests of the Class. For purposes of qualifying as Class Counsel, each attorney has filed into the record his respective affidavit of qualifications, including references to other class actions in which each has engaged as lead or primary counsel.

(h) Whether the fee is fixed or contingent.

Class counsel originally represented the class representative on a contingent fee basis. Contingent fees, as opposed to fixed fees, are the norm in personal injury and most consumer claims. However, Rule 23 requires that in a common fund case such as this, the Court has the final assessment and approval of the reasonableness of the fee award to the Class Counsel. Again, Class Counsel respectfully suggest the Court should award fees based on the percentage of fund method.

(i) The undesirability of the case.

When this case was originally filed, the likely outcome was simply unknown. Very few reported decisions contemplated the TCPA. Nevertheless, Class Counsel filed this action, knowing that the possibility existed that they would never recover for the class.

This case may be considered "undesirable" based on some of the factors discussed above, not the least of which was the uncertainty of the possible result. Thus the risk assumed by Class Counsel in handling the case on a contingency basis, is substantially significant. There were real possibilities that the suit would not be successful. No person knew in January 2003 what result would be obtained. No one knew the number of Class members that would be involved, nor the time and cost of working the case and preparing it for trial. Nor did Class Counsel have a basis for a reasonable appraisal as to the possible outcome. In light of these considerations, the risks assumed by Class Counsel were substantial. At all times, the defendant vigorously contested not only its liability, but also the certification of the class.

(j) Comparable awards in similar cases.

In another recent junk fax class settlement, the Court approved an $8.4 million attorneys' fee award in a settlement comprised solely of coupons.[24] Using the common fund method, the Court found that in view of the risks assumed by Class Counsel, the time Class Counsel invested to prosecute this action, the quality of Class Counsel's work, and the substantial benefits bestowed upon the class, approval of the $8.4 million fee was appropriate.

Given that the TCPA generally provides for exclusive state court jurisdiction,[25] all other TCPA class settlements have occurred in state courts. Accordingly, Class Counsel has had difficulties identifying comparable awards in similar cases. Nevertheless, Class Counsel submit that the benefit obtained for the class members in this case greatly exceeds many of the other settlements nationwide, especially since the class members are entitled to cash benefits instead of only coupons. In addition, the questionable viability of the Defendant, and the disputed insurance coverage issues, further represent the success of the settlement.

Importantly, no opt-outs have been filed, and there are no objections to the settlement. No opposition to the proposed settlement further warrants a finding that the settlement and the applicable attorneys' fees are reasonable and appropriate.

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[24] *Gold Seal Termite and Pest Control v. PrimeTV, LLC*, Cause No. 49D10-0304-CP-000702, Marion Superior Court, Ohio (November 14, 2004); Order Approving Class Settlement attached as Exhibit A.

[25] However, this Court has held that jurisdiction is appropriate in federal court. *Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, LP*, 294 F.Supp.2d 834 (M.D. La. 2003).

V. COSTS

Pursuant to the terms of the Stipulation and Class Action Settlement Agreement, which was preliminarily approved on May 25, 2007, Defendant agreed to pay up to $150,000 in litigation and administrative costs Class Counsel seek reimbursement of costs incurred in this litigation in the amount of $133,722.82. Class Counsel have incurred the following costs thus far in prosecuting this class action and administering the settlement:

1) Joint Out of pocket Expenses[26] $70,730.58

2) Hannis T. Bourgeois administrative costs[27] $62,992.24

3) **TOTAL $133,722.82**

The SA contemplates reimbursement of all administrative and litigation costs up to $150,000. Thus, Class Counsel seeks recovery of $133,722.82. Because administrative costs are included in that reimbursement, Class Counsel are not seeking reimbursement for any additional amount for services provided and costs incurred by Hannis T. Bourgeois.

These costs and expenses include those incurred to date. Class Counsel submit that these totals may increase, but such increase is likely minimal. Any increase in costs or

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[26] See itemized Statements of all out of pocket expenses, which include paralegal costs ($75.00/hour), copy charges, long distance, fax charges, and other miscellaneous charges attached as Exhibit B.

[27] See itemized statement from Hannis T. Bourgeious, LLP listing out of pocket expenses, attached as Exhibit C, and statement providing the cost of the settlement administration services, attached Exhibit D. Also note that the CADA will incur additional expenses associated with disbursement of the settlement proceeds after final approval. If warranted, Plaintiff will request additional funds for reimbursement of those costs, which are not expected to exceed $1,000.

expenses may be handled in the distribution process.

VI. CONCLUSION

WHEREFORE, Class Counsel pray that this Honorable Court enter an order adopting the percentage of recovery method and awarding attorney fees in the amount of $2,314,328.10 and costs in the amount of $133,722.82.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 17, 2007, a copy of the foregoing Memorandum in Support of Plaintiff's Motion for Award of Attorneys' Fees and Reimbursement of Costs was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the court's electronic filing system to: Philip Bohrer, Keith D. Jones, John P. Wolff, III, Michael W. McKay, and Michael D. Lutgring. I also certify that I have mailed by U.S. Postal Service copies of this filing to E. Duncan Getchell and Howard C. Vick, Jr., McGuire Woods, LLP, One James Center, 901 East Cary Street, Richmond, Virginia 23219.

s/Christopher K. Jones
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