UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WADDELL WILLIAMS, on behalf of himself and others similarly situated, Plaintiff, vs. BLUESTEM BRANDS, INC. Defendant.	Case No. 8:17-CV-01971-T-27AAS

CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND AN INCENTIVE AWARD

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Introduction

For their efforts over nearly two years to secure the settlement presented—which resulted in Bluestem Brands, Inc. ("Bluestem") agreeing to pay a total of $1,269,500 for the benefit of consumers nationwide—class counsel seek an award of attorneys' fees of $380,850 (30% of the total settlement), reimbursement of their reasonable litigation costs and expenses in the amount of $17,120.82, and an incentive award of $5,000 to class representative Waddell Williams. Class counsel's requests are reasonable, justified, and in line with awards approved in analogous Telephone Consumer Protection Act ("TCPA") class actions. Moreover, after notice to class members, to date not one objected to any part of the settlement or the requests for attorneys' fees, costs, expenses, and an incentive award.[1]

Argument

I. This Court should approve class counsel's request for an award of attorneys' fees.

The Supreme Court "has recognized consistently 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). The Eleventh Circuit agrees: "Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval." *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991) (citing Fed. R. Civ. P. 23(e)); *accord Muransky v. Godvia Chocolatier, Inc.*, 922 F.3d 1175, 1194-95 (11th Cir. 2019) ("*Camden I* holds that attorneys' fees awarded from a common fund shall be

[1] The class notice specifically informed class members that class counsel would seek an award of attorneys' fees in an amount up to 30% of the total settlement, and reimbursement of litigation costs and expenses not to exceed $18,500. The notices also stated that Mr. Williams would seek an incentive award of $5,000. The deadline for objections is July 16, 2019.

based upon a reasonable percentage of the fund established for the benefit of the class.") (internal quotation omitted).

To that end, the Supreme Court acknowledged that "common fund fee awards should be computed as a fair percentage of the fund." *Camden I*, 946 F.2d at 774 (citing *Blum v. Stenson*, 465 U.S. 886, 900 (1984)); *see also Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 689 (M.D. Ala. 1988) ("Indeed, every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund bases."). And with reference not only to *Blum*, but to other decisions endorsing a percentage-of-the-fund calculation, the Eleventh Circuit stated: "[I]n this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Id*.; *see also Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-CV-3066-JEC, 2008 WL 11234103, at *2 (N.D. Ga. Mar. 4, 2008) ("Since 1991, the Eleventh Circuit has required district courts in this circuit to follow the 'percentage of the fund' approach to awarding fees in class action cases."); *Gevaerts v. TD Bank, N.A.*, No. 11:14-cv-20744-RLR, 2015 WL 6751061, at *10 (S.D. Fla. Nov. 5, 2015) ("It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained.").

"[T]here is[, however,] no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee[.]" *Id*. Rather, "the amount of any fee must be determined upon the facts of each case." *Id*. To make this determination, "the *Johnson* factors [may be] appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases." *Camden I Condo. Ass'n, Inc*., 946 F.2 at 775. In addition, other factors such as "the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-

monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action," are also pertinent. *Id*.

Against this backdrop, "[t]o avoid depleting the funds available for distribution to the class, an upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded." *Wreyford v. Citizens for Transp. Mobility, Inc.*, No. 1:12-CV-2524-JFK, 2014 WL 11860700, at *1 (N.D. Ga. Oct. 16, 2014).

Here, class counsel requests an award of attorneys' fees equal to 30% of the total settlement.

A. The *Johnson* factors support the requested award of attorneys' fees.

While "factors which will impact upon the appropriate percentage to be awarded as a fee in any particular case will undoubtedly vary," *Camden I Condo. Ass'n, Inc*., 946 F.2 at 775, "the *Johnson* factors continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases." *Id*. at 775; *see also Columbus Drywall & Insulation, Inc*., 2008 WL 11234103, at *2 ("In deciding what percentage of the fund to award, the court may consider the twelve factors in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

The *Johnson* factors are the amount involved and the results obtained; the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the experience, reputation, and ability of the attorneys; the undesirability of the case; the nature and length of the professional relationship with the client; and awards in similar cases. *Johnson*, 488 F.2d at 717-19.

The *Johnson* factors, however, were developed in the statutory fee context, and "the inherent differences between statutory fee and common fund cases could justify a trial judge's

decision to assign different relative weights to those factors in the two types of cases." *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988). Moreover, "[r]arely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation." *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993).

1. Class counsel obtained an excellent result.

"The most important element in determining the appropriate fee to be awarded class counsel out of a common fund is the result obtained for the class through the efforts of such counsel." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 351 (N.D. Ga. 1993); *see also Mashburn*, 684 F. Supp. at 693 ("The critical element in determining the appropriate fee to be awarded class counsel out of a common fund is the result obtained for the class through the efforts of such counsel."); *accord Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1342 (S.D. Fla. 2007) ("The result achieved is a major factor to consider in making a fee award.").

Here, in the face of significant legal hurdles, *see* Argument, Section I.A.3, class counsel obtained an excellent result. From the outset, the non-reversionary cash settlement fund is noteworthy, particularly considering the changing legal landscape in which class counsel litigated this matter. *See, e.g., ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018).

As well, the settlement compares favorably, on a per-class member basis (calculated by dividing the total settlement fund by the number of potential class members), to similar TCPA class action settlements. Indeed, dividing the maximum settlement payment (up to $1.269 million) by 182,370 (the approximate number of class members who likely received wrong number calls from Bluestem) amounts to just under $7 per person. In comparison, in *Picchi v. World Fin. Network Bank*, No. 11-CV-61797-CIV-Altonaga/O'Sullivan (S.D. Fla. Jan. 30, 2015), final approval was granted in a similar wrong number TCPA class action for $2.63 per person (settling claims of 3 million class members for $7.9 million). *Compare with, e.g., Prather v. Wells Fargo*

Bank, N.A., No. 1:15-cv-04231-SCJ, 2017 WL 770132 (N.D. Ga. Feb. 24, 2017) ($4.65 per class member); *Luster v. Wells Fargo Dealer Servs., Inc.*, No. 1:15-cv-01058-TWT, ECF No. 60 (N.D. Ga. Feb. 23, 2017) ($4.65 per class member); *Cross v. Wells Fargo Bank, N.A.*, No. 2:15-cv-01270-RWS, 2016 WL 5109533 (N.D. Ga. Sept. 13, 2016) ($4.75 per class member); *Markos v. Wells Fargo Bank, N.A.*, Case No. 1:15-cv-01156-LMM, 2016 WL 4708028 (N.D. Ga. Sept. 7, 2016) ($4.95 per class member); *Wilkins v. HSBC Bank Nev., N.A.*, No. 14-190, 2015 WL 890566 (N.D. Ill. Feb. 27, 2015) ($4.41 per class member); *Duke v. Bank of Am., N.A.*, No. 5:12-cv-04009-EJD (N.D. Cal.) ($4.15 per class member).

Also important, the settlement here provides participating class members with real monetary relief—an estimated $39 per claimant as of this filing, after deducting all settlement costs. This is despite the purely statutory damages at issue—damages that courts have deemed too small to incentivize individual actions. *See, e.g.*, *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 699 (S.D. Fla. 2015) (noting that the small potential recovery in individual TCPA actions reduced the likelihood that class members will bring suit); *St. Louis Heart Center, Inc. v. Vein Ctrs. for Excellence, Inc.*, No. 12-174, 2013 WL 6498245, at *11 (E.D. Mo. Dec. 11, 2013) (explaining that because the statutory damages available to each individual class member are small, it is unlikely that the class members have interest in individually controlling the prosecution of separate actions); *Siding & Insulation Co. v. Beachwood Hair Clinic, Inc.*, 279 F.R.D. 442, 446 (N.D. Ohio 2012) (stating that since each class member is unlikely to recover more than a small amount, they are unlikely to bring individual suits under the TCPA). This means that because of the settlement at hand, consumers will receive significant cash relief they otherwise likely would never have pursued on their own.

In sum, the settlement here represents an excellent recovery for the class. *See Markos v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01156-LMM, 2017 WL 416425, at *4 (N.D. Ga. Jan. 30, 2017) (finding that the cash recovery of $24 per claimant in a TCPA class action is "an excellent result when compared to the issues Plaintiffs would face if they had to litigate the matter").

2. The time and labor required to resolve this matter were significant.

Although the time and labor required "is an essential touchstone for recovery in a statutory fee case where reasonableness is measured in part by reference to the lodestar analysis," *Brown*, 838 F.2d at 456, in a common fund case "the amount involved . . . and the results obtained may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class." *Id*. In other words, the "'time and labor involved' factor need not be evaluated using the lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater weight to other factors, the basis of which is clearly reflected in the record." *Id*.

Nonetheless, class counsel spent significant time on this matter over nearly two years. This case involved motion practice, written discovery, depositions, experts, and formal mediation before the parties reached a settlement. *See* Declaration of Michael L. Greenwald, attached as Exhibit A, ¶¶ 43-76, 83.

More specifically, class counsel devoted significant time and resources to this case, including: (a) conducting an investigation into the underlying facts regarding Mr. Williams's claims and class members' claims; (b) preparing a class action complaint; (c) researching the law pertinent to class members' claims and Bluestem's defenses; (d) preparing and serving initial written discovery requests, negotiating Bluestem's discovery responses and production of documents, and gathering documents and information relevant to Bluestem's discovery requests to Mr. Williams; (e) researching and opposing Bluestem's motion to stay; (f) researching and

opposing Bluestem's motion to transfer this matter to the Southern District of California; (g) researching and opposing Bluestem's motion for reconsideration of this Court's order denying Bluestem's motion to transfer; (h) researching issues related to class certification, including strategies for how to best satisfy the requirements of Rule 23; (i) preparing for and taking the corporate representative deposition of Bluestem pursuant to Rule 30(b)(6); (j) hiring an expert witness and facilitating the expert witness's report; (k) pursuing third-party discovery through subpoenas; (l) reviewing nearly 16,000 pages of documents produced by Bluestem; (m) defending the deposition of Mr. Williams's expert witness; (n) preparing for and defending Mr. Williams's deposition; (o) taking the deposition of Bluestem's expert witness; (p) preparing Mr. Williams's motion for class certification and appointment of class counsel; (q) preparing for and attending mediation in Philadelphia before Judge Welsh, including preparing a detailed mediation statement; (r) preparing the parties' class action settlement agreement, along with the proposed class notices and claim form; (s) negotiating with class administration companies to secure the best notice plan practicable; (t) preparing Mr. Williams's motion for preliminary approval of the class action settlement; (u) preparing Mr. Williams's motion for final approval of the class action settlement; (v) preparing the instant motion for approval of an award of attorneys' fees, reimbursement of expenses, and an incentive award; (w) preparing a detailed declaration in support of settlement approval; (x) conferring with the class administrator to oversee the notice, claims, and administration process; (y) repeatedly conferring with Mr. Williams throughout this case; and (z) conferring with class members to answer questions about the settlement process. *Id*., ¶ 83.

Class counsel's time and labor was therefore substantial, and supports the requested attorneys' fee award.

3. The questions underlying this matter were both difficult and novel.

This matter involved many legal questions, most of which were difficult, and several of which were novel. Indeed, Bluestem made a host of arguments that the value of class members' claims should be severely discounted, if not eliminated entirely.

For example, Bluestem contended that the platform it utilized to make calls was not an automatic telephone dialing system ("ATDS"), and produced an expert report supporting its position. If this Court agreed, class members' claims would fail. *See, e.g., Glasser v. Hilton Grand Vacations Co., LLC*, No. 8:16-cv-952-JDW-AAS, 2018 WL 4565751, at *7 (M.D. Fla. Sept. 24, 2018 (Whittemore, J.) (granting summary judgment in favor of the defendant and finding that the defendant did not place the calls at issue by using an ATDS).

Separately, the Federal Communications Commission's July 10, 2015 Declaratory Ruling and Order ("2015 FCC Order") included a one-call safe harbor for calls made to reassigned cellular telephone numbers, like those at issue here. While the D.C. Circuit Court of Appeals invalidated that portion of the 2015 FCC Order in *ACA Int'l*, it directed the FCC to reconsider whether and, if so how, callers can reasonably rely on consent given by prior subscribers. Should the FCC institute an expansive, backward-looking safe harbor, Bluestem may have a viable defense to many of the calls at issue.

Bluestem also contended that it maintains robust safeguards to ensure compliance with the TCPA. While Bluestem vehemently disputed any liability, to the extent any violations did occur, Bluestem would argue that any violation of the TCPA was unintentional and would not support increased statutory damages.

Moreover, Mr. Williams faced significant risks in obtaining class certification. *See* ECF Nos. 47-50 (Bluestem's opposition to class certification and related report and exhibits). Several courts in this Circuit have refused to certify TCPA class actions, making the likelihood of

certification uncertain. *See, e.g.*, *Wilson v. Badcock Home Furniture*, 329 F.R.D. 454 (M.D. Fla. 2018) (Jung, J.); *Tillman v. Ally Fin. Inc.*, No. 16-313, 2017 WL 7194275 (M.D. Fla. Sept. 29, 2017) (Steele, J.); *Shamblin v. Obama for America*, No. 8:13-cv-2428-T-33TBM, 2015 WL 1909765, at *8 (M.D. Fla. Apr. 27, 2015) (Covington, J.).

Separately, Bluestem's uncertain financial position created a substantial risk that, even if Mr. Williams ultimately prevailed, the class would recover little or nothing. *See* ECF No. 56 at 4.

In short, many of the issues underlying this matter involve difficult and unsettled legal questions, which are at the forefront of class action, constitutional, and consumer protection law, further underscoring the value of the services provided by class counsel. And as this Court noted in preliminarily approving the settlement, "[o]bjectively, the likelihood of success at trial is, at best, uncertain." *Williams v. Bluestem Brands, Inc.*, No. 8:17-cv-1971-T-27AAS, 2019 WL 1450090, at *2 (M.D. Fla. Apr. 2, 2019) (Whittemore, J.).

4. Class counsel relied on particular skill and experience in performing the legal services required.

"[T]he prosecution and management of a complex national class action requires unique legal skills and abilities." *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-CV-3066-JEC, 2012 WL 12540344, at *4 (N.D. Ga. Oct. 26, 2012) (internal citation omitted). Here, class counsel relied on their particular skill in litigating and negotiating the settlement. *See* Ex. A, ¶¶ 12-42. Class counsel's substantial experience and skill support the requested fee award. *See Williams*, 2019 WL 1450090, at *4 ("Greenwald Davidson Radbil PLLC has extensive experience representing plaintiffs in class actions.").

5. The time spent on this matter limited counsel's ability to work on other matters.

"[S]ubstantial and concentrated time investment by plaintiffs' counsel would tend to preclude other lucrative opportunities, thus warranting a higher percentage of the fund." *Columbus*

Drywall & Insulation, Inc., 2008 WL 11234103, at *2. This is the case here, as class counsel have expended a significant amount of time to ultimately obtain the results achieved for the class. *See* Ex. A, ¶¶ 43-76, 83; *see also Gevaerts*, 2015 WL 6751061, at *13 ("It is uncontroverted that the attorney time spent on the Action was time that could not be spent on other matters. Consequently, this factor supports the requested fee."); *accord Lucken Family Ltd. P'ship, LLLP v. Ultra Res., Inc.*, No. 09-CV-01543-REB-KMT, 2010 WL 5387559, at *5 (D. Colo. Dec. 22, 2010) ("Because of the number of hours that class counsel have been required to devote to this case, class counsel necessarily were precluded from handling other litigation matters during that time.").

6. The award requested here is on par with awards in similar TCPA settlements.

"Numerous recent decisions within this Circuit have awarded attorneys' fees up to (and at times in excess of) 30 percent." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1365 (S.D. Fla. 2011). Class counsel's request for an award of attorneys' fees of $380,850, which amounts to 30% of the total settlement, therefore, is well within the range of fee awards affirmed by the Eleventh Circuit and approved by district courts within it. *See, e.g.*, *Muransky*, 922 F.3d at 1194-96 (affirming fee award of 33% of settlement); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1292-98 (11th Cir. 1999) (affirming award of one-third of a $40 million settlement fund); *Morgan v. Public Storage*, No. 14-cv-21559-Ungaro/Otazo-Reyes, 2018 WL 1324690, at *14 (S.D. Fla. Mar. 9, 2018) ("The Court finds that this factor supports a fee award of 33% because it is consistent with attorneys' fees awards in federal class actions in this Circuit.") (collecting cases); *Legg v. Laboratory Corp. of Am. Holdings*, No. 14-61543-CIV-Rosenberg/Brannon, 2016 WL 3944069, at *3 (S.D. Fla. Feb. 18, 2016) (awarding fees of one-third of settlement fund plus reimbursement of expenses); *Gevaerts*, 2015 WL 6751061, at *10 (approving award of attorneys' fees of 30% of $20 million common fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (awarding fees of 31 1/3% of $1.06 billion settlement fund); *In re:*

Terazosin Hydrochloride Antitrust Litig., No. 99–1317–MDL–Seitz (S.D. Fla. April 19, 2005) (awarding fees of one-third of settlement fund of over $30 million); *In re: Managed Care Litig. v. Aetna*, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding fees and costs of 35.5% of settlement fund of $100 million).

Importantly, this analysis does not differ when limited to TCPA class actions. *See, e.g.*, *James v. JPMorgan Chase Bank, N.A.*, No. 8:15-cv-2424-T-23JSS, 2017 WL 2472499, at *2 (M.D. Fla. June 5, 2017) (Merryday, J.) (awarding attorneys' fees of 30% of the settlement fund, plus the reimbursement of litigation expenses); *Schwyhart v. AmSher Collection Servs., Inc.*, No. 2:15-cv-1175-JEO, 2017 WL 1034201 (N.D. Ala. Mar. 16, 2017) (awarding attorneys' fees of one-third of the settlement fund, plus the reimbursement of litigation expenses); *Markos*, 2017 WL 416425, at *3 (awarding attorneys' fees of 30% of the common fund because "the Settlement provides substantial benefits to the Settlement Class. Second, the Court finds the payment fair and reasonable in light of the work performed by Class Counsel."); *Soto v. The Gallup Org.*, No. 13-cv-61747, ECF No. 95 (S.D. Fla. Nov. 24, 2015) (awarding fee of one-third of settlement fund); *Guarisma v. ADCAHB Med. Coverages, Inc.*, No. 13-cv-21016, ECF No. 95 (S.D. Fla. June 24, 2015) (same).[2] Class counsel's request, therefore, comports with customary fee awards in similar cases.

[2] *See also, e.g.*, *Ikuseghan v. Multicare Health Sys.*, No. C14-5539, 2016 WL 4363198, at *2 (W.D. Wash. Aug. 16, 2016) (awarding 30%, plus costs); *Prater v. Medicredit, Inc.*, No. 4:14-CV-00159-ERW, 2015 WL 8331602, at *3 (E.D. Mo. Dec. 7, 2015) (awarding one-third, plus costs); *Allen v. JPMorgan Chase Bank, N.A.*, No. 13-cv-8285, ECF No. 93 (N.D. Ill. Oct. 21, 2015) (awarding 33%); *Hageman v. AT&T Mobility LLC, et al.*, No. 1:13-cv-50, ECF No. 68 (D. Mont. Feb. 11, 2015) (awarding 33%); *Vendervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding 33%); *Martin v. Dun & Bradstreet, Inc. et al*, No. 1:12-cv-00215, Dkt. No. 63 (N.D. Ill. Jan. 16, 2014) (awarding more than one-third); *Cummings v. Sallie Mae*, No. 1:12-cv-9984, ECF No. 91 (N.D. Ill. May 30, 2014) (awarding 33%); *Hanley v. Fifth Third Bank*, No. 1:12-cv-01612, ECF No. 86 (N.D. Ill. Dec. 23, 2013) (awarding 33%); *Desai v. ADT Sec. Servs., Inc.*, No. 1:11-cv-1925, ECF No. 243 (N.D. Ill. June 21, 2013) (awarding 33%); *Locklear*

7. Class counsel litigated this matter on a contingent basis.

"Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award." *Columbus Drywall & Insulation, Inc.*, 2008 WL 11234103, at *3 (quoting *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992)). This is, in part, because even in ordinary cases "uncertain is the outcome," *id*., and the corresponding risk taken by counsel in connection with contingent fee arrangements—no assurance of payment—warrants a higher percentage of the fund. *Id*.

With this in mind, the Southern District of Florida observed:

> A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Behrens v. Wometco Enters, Inc., 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd,* 899 F.2d 21 (11th Cir. 1990) (internal citation omitted).

Here, Mr. Williams entered into a contingent attorneys' fee agreement with his counsel. *See* Ex. A, ¶¶ 9, 85. In particular, the agreement permitted class counsel to apply for an award of attorneys' fees in the event that a common fund was established for the benefit of the class.

Thus, "[i]n undertaking to prosecute this complex action on that basis, Class Counsel assumed a significant risk of non-payment or underpayment. Numerous cases recognize such a risk as an important factor in determining a fee award." *Gevaerts*, 2015 WL 6751061, at *13; *see also Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1215 ("This factor weighs heavily in favor of a 31 and 1/3% percentage fee for Class Counsel because the fee in this action has been completely

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Elec., Inc. v. Norma L. Lay, No. 3:09-cv-00531, ECF No. 67 (S.D. Ill. Sept. 8, 2010) (awarding one-third); *CE Design Ltd. v. Cy's Crab House N., Inc.*, No. 1:07-cv-5456, ECF No. 424 (N.D. Ill. Oct. 21, 2011) (awarding 33%); *Holtzman v. CCH*, No. 1:07-cv-7033, ECF No. 33 (N.D. Ill. Sept. 30, 2009) (awarding 33%).

contingent."); *accord Been v. O.K. Indus., Inc.*, No. CIV–02–285–RAW, 2011 WL 4478766, at *9 (E.D. Okla. Aug. 16, 2011) ("Courts agree that a larger fee is appropriate in contingent matters where payment depends on the attorney's success.").

8. This matter was undesirable to many attorneys.

That class counsel worked for over one-and-a-half years to ultimately obtain the settlement—with no payment during that time and no guarantee of success—makes this matter undesirable to many. *See Columbus Drywall & Insulation, Inc.*, 2008 WL 11234103, at *4 (explaining that the prospect of expending significant time and money with no assurance of payment, to litigate a case against well-represented defendants, would deter many lawyers from assuming representation).

So, although class counsel ultimately obtained a result that any attorney should be proud of, the road leading to a resolution here was paved with large quantities of time and expense that would deter many attorneys from accepting this matter. *See* Ex. A, ¶¶ 43-76, 83. And this is especially true given the high quality of Bluestem's legal representation.

B. Additional factors support an award of attorneys' fees equal to 30% of the total settlement.

"Attorneys who undertake the risk to vindicate legal rights that may otherwise go unredressed function as 'private attorneys general.'" *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1217. This is particularly important here, where, as previously noted, *see supra*, Argument, Section I.A.1, damages awards under the TCPA—a statute that does not include a fee-shifting provision—are often too small to incentivize individual actions. And given such a circumstance, "courts treat successfully fulfilling [the private attorney general role] as a . . . factor when awarding class counsel attorneys' fees." *Id*. (citing *Ressler*, 149 F.R.D. at 657) (noting that when class counsel act

as private attorneys general, "public policy favors the granting of counsel fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions").

The public policy fostered by the private attorney general role is, however, frustrated where a defendant has the ability to overwhelm, for example, the small-firm plaintiff lawyers who typically represent consumers in actions under the TCPA. This is a reality that results from the fact that, as noted above, *see supra*, Argument, Section I.A.7, class counsel were required to risk a significant amount of time, over the course of nearly two years, as well as out-of-pocket costs and expenses, to reach the result obtained here. And "[u]nless that risk is compensated with a commensurate reward, few firms, no matter how large or well financed, will have any incentive to represent the small stake holders in class actions against corporate America, no matter how worthy the cause or wrongful the defendant's conduct." *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1217.

Accordingly, a contingent attorneys' fee award that amounts to 30% of the settlement is appropriate where "absent an award of [such fees] . . . the entire purpose and function of class litigation under Rule 23 of the Federal Rules of Civil Procedure will be undermined and subverted to the interests of those lawyers who would prefer to take minor sums to serve their own self interest rather than obtaining real justice on behalf of their injured clients." *Id*. at 1217-18 (citing John J. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, M. L. Rev., 216, 225-26 (1983)).

With this is mind, and considering the lack of incentive for aggrieved consumers to bring individual suits and that Bluestem employs excellent legal counsel, class counsel's request for attorneys' fees is supported by the economics involved in litigating this matter. *See Gevaerts*, 2015 WL 6751061, at *13 ("Public policy concerns—in particular, ensuring the continued availability

of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims—support the requested fee here.").

In sum:

> In this action, the applicable *Johnson* factors counsel in favor of approving a 30% fee. Litigating a large class action consumes more time than an individual action and might preclude an attorney's accepting other cases during the pendency of the class-action litigation. Also, the class counsel accepted this action on contingency, and the added risk of a contingency-fee arrangement often warrants an added reward. Additionally, the class counsel's result ($81 per class member who submitted a claim) equals or exceeds the typical award in a TCPA class action. The success of class counsel in obtaining a favorable result for the class militates toward approving the requested attorney's fee. Finally, as the class counsel observes (Doc. 57–1), the class counsel's experience in litigating a TCPA class action favors approving a 30% attorney's fee. Because the requested attorney's fee appears reasonable in this circumstance, the request is **GRANTED**.

James, 2017 WL 2472499, at *2.

II. This Court should approve an incentive award to Mr. Williams of $5,000.

"[I]ncentive awards are appropriate to recognize the efforts of the representative plaintiffs to obtain recovery for the class." *In re Domestic Air Transp. Litig.*, 148 F.R.D. at 358 ("Modest compensation may sometimes be merited for extra time spent by the class representatives in meeting with class members, gathering discovery materials on behalf of the class, and similar efforts.") (internal quotation omitted); *see also Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) ("[Courts] routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation."); *Allapattah Servs.*, 454 F. Supp. 2d at 1218 ("Incentive awards are not uncommon in class litigation where, as here, a common fund has been created for the benefit of the class.").

Here, Mr. Williams took critical steps to protect the interests of the class, and spent considerable time pursuing their claims. In particular, Mr. Williams frequently communicated with his counsel by telephone and email. He kept himself apprised of this matter by reading documents

filed with this Court, and approving drafts before filing. Mr. Williams was deposed in this case, responded to written discovery requests, and attended mediation in Philadelphia, actively participating in the settlement negotiations. *See* Ex. A, ¶¶ 87-91.

Given Mr. Williams's active participation in this matter, and as recognition for the results he provided to the class, an incentive award of $5,000 is justified. *See Gibbs v. Centerplate, Inc.*, No. 8:17-cv-02187-EAK-JSS, 2018 WL 6983498, at *9 (M.D. Fla. Dec. 28, 2018) (Sneed, M.J.) ("Class Counsel stated that Phlisida Gibbs participated in reviewing documents, participated in discovery, and remained engaged throughout the course of the litigation. The Court finds that an incentive award of $5,000.00 to Ms. Gibbs as the Representative Plaintiff is reasonable, consistent with the incentive awards approved in other class actions in this district, and adequately recognizes her efforts to obtain recovery for the Settlement Class."); *see also Muransky*, 922 F.3d at 1197 (affirming incentive award of $10,000).

Also considerable, the requested incentive award to Mr. Williams is in line with—and in many cases less than—incentive awards approved in comparable TCPA matters. *See, e.g.*, *James*, 2017 WL 2472499, at *2 (approving incentive awards of $5,000 for each class representative in TCPA class action); *Schwyhart*, 2017 WL 1034201 (approving $10,000 incentive award to class representative in TCPA class action); *Cross v. Wells Fargo Bank, N.A.*, No. 2:15-cv-01270-RWS, ECF No. 103 (N.D. Ga. Feb. 10, 2017) (approving incentive award of $15,000 to TCPA class representative); *Markos*, 2017 WL 416425, at *3 (approving incentive awards of $20,000 each in TCPA class action); *Jones v. I.Q. Data Int'l, Inc.*, No. 1:14-CV-00130-PJK, 2015 WL 5704016, at *2 (D.N.M. Sept. 23, 2015) ($20,000 incentive award from $1 million common fund); *Prater*, 2015 WL 8331602, at *3 ($20,000 incentive award in TCPA class action); *Craftwood Lumber Co.*

v. Interline Brands, Inc., No. 11-CV-4462, 2015 WL 1399367, at *6 (N.D. Ill. Mar. 23, 2015) (collecting cases and approving a $25,000 award to TCPA class representative).

This Court, therefore, should approve an incentive award to Mr. Williams of $5,000.

III. This Court should approve class counsel's request for reimbursement of litigation costs and expenses.

"There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund." *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 519 (W.D. Pa. 2003). Here, class counsel incurred reasonable costs and expenses in connection with this matter, including filing and service fees, mediation costs, deposition costs, travel costs, and costs associated with retaining Mr. Williams's expert witness.

Importantly, the categories of expenses for which class counsel seek reimbursement are the type of expenses routinely charged to paying clients in the marketplace and, therefore, are properly reimbursed under Rule 23. *See Gevaerts*, 2015 WL 6751061, at *14 ("Finally, the Court finds that Class Counsel's request for reimbursement of $300,666.95, representing certain out-of-pocket costs and expenses that Class Counsel incurred during the prosecution and settlement of the Action against TD Bank, is reasonable and justified. These costs and expenses consists of, among others, fees for experts, photocopies, travel, online research, translation services, mediator fees, and document review and coding expenses."); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 549 (S.D. Fla 1988) ("In addition, plaintiff's counsel is entitled to be reimbursed from the class fund for the reasonable expenses incurred in this action. In summary, these expenses include the necessary costs associated with any action: travel, depositions, filing fees, postage, telephone, and copying. The $31,456.41 paid by the plaintiff's counsel for these expenses is fair and reasonable.") (internal citation omitted).

Here, class counsel seek the reimbursement of $17,120.82 in litigation costs and expenses. *See* Ex. A, ¶¶ 92-96 (documenting reimbursable litigation costs and expenses). These expenses are eminently reasonable in a class action like this and were necessary to the successful prosecution of this action. *See Gibbs*, 2018 WL 6983498, at *9 ("The costs sought are recoverable as reasonable and necessary out-of-pocket expenses incurred in the course of activities that benefitted the class.").

Noteworthy, to date no class members have objected to counsel's request for reimbursement of litigation costs and expenses, which are less than the $18,500 in costs and expenses set forth in the class notice.

Conclusion

Class counsel respectfully request that this Court grant their requests for an award of attorneys' fees in the amount of $380,850, which amounts to 30% of the settlement, as well as reimbursement of litigation costs and expenses in the amount of $17,120.82, and for an incentive award to Mr. Williams of $5,000.

Dated: June 14, 2019

/s/ Michael L. Greenwald
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Class Counsel

Certificate of Service

I certify that a copy of the foregoing was filed electronically on June 14, 2019, via the Court Clerk's CM/ECF system, which will provide notice to all counsel of record.

/s/ Michael L. Greenwald
Michael L. Greenwald

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WADDELL WILLIAMS, on behalf of himself and others similarly situated, Plaintiff, vs. BLUESTEM BRANDS, INC., Defendant.	Case No. 8:17-CV-01971-T-27AAS

DECLARATION OF MICHAEL L. GREENWALD IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND AN INCENTIVE AWARD

I, Michael L. Greenwald, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My name is Michael L. Greenwald.

2. I am over twenty-one years of age.

3. I am fully competent to make the statements contained in this declaration.

4. I have personal knowledge of the statements included in this declaration.

5. I am a partner at the law firm of Greenwald Davidson Radbil PLLC ("GDR"), counsel for Waddell Williams and the class in this action.

6. GDR, which focuses on consumer protection class action litigation, maintains offices in Boca Raton and Austin, Texas.

7. I am admitted to practice before this Court.

8. I submit this declaration in support of class counsel's motion for attorneys' fees, costs, expenses, and an incentive award.

9. GDR handled this case on a contingency basis.

10. GDR has not received any payment for its services to date, nor has it been reimbursed for the litigation expenses it has advanced.

11. This declaration includes a profile of my firm, its attorneys, and an outline of work performed leading up to, and throughout, this matter, as well as our litigation costs and expenses.

Class Counsel

12. GDR has been appointed class counsel in a number of class actions under the Telephone Consumer Protection Act ("TCPA"), including:

- *Knapper v. Cox Communications, Inc.*, No. CV-17-00913-PHX-SPL (D. Ariz.);
- *Reyes v. BCA Fin. Servs., Inc.*, No. 16-24077-CIV-Goodman (S.D. Fla.);
- *Johnson v. NPAS Solutions, LLC,* No. 9:17-cv-80393-ROSENBERG/HOPKINS (S.D. Fla.);
- *Martinez, et al., v. Medicredit, Inc.*, No. 4:16-cv-01138 ERW (E.D. Mo.);
- *Luster v. Wells Fargo Dealer Servs., Inc.*, No. 1:15-cv-01058-TWT (N.D. Ga.);
- *Johnson v. Navient Solutions, Inc., f/k/a Sallie Mae, Inc.*, No. 1:15-cv-0716-LJM (S.D. Ind.);
- *Toure and Heard v. Navient Solutions, Inc., f/k/a Sallie Mae, Inc.*, No. 1:17-cv-00071-LJM-TAB (S.D. Ind.);
- *Cross v. Wells Fargo Bank, N.A.*, No. 2:15-cv-01270-RWS (N.D. Ga.);
- *James v. JPMorgan Chase Bank, N.A.*, No. 8:15-cv-2424-T-23JSS (M.D. Fla.) (Merryday, J.);
- *Schwyhart v. AmSher Collection Servs., Inc.*, No. 2:15-cv-1175-JEO (N.D. Ala.);
- *Prather v. Wells Fargo Bank, N.A.*, No. 1:15-cv-04231-SCJ (N.D. Ga.);
- *Markos v. Wells Fargo Bank, N.A.*, No. 15-1156 (N.D. Ga.);
- *Prater v. Medicredit, Inc.*, No. 14-00159 (E.D. Mo.);
- *Jones v. I.Q. Data Int'l, Inc.*, No. 1:14–cv–00130–PJK–GBW (D.N.M.); and

- *Ritchie v. Van Ru Credit Corp.*, No. 2:12–CV–01714–PHX–SM (D. Ariz.).

13. GDR also has been appointed class counsel in more than two dozen class actions brought under consumer protection statutes other than the TCPA in the past four years, including, for example:

- *Dickens v. GC Servs. Ltd. P'Ship*, No. 8:16-cv-00803-JSM-TGW (M.D. Fla.) (Moody, J.);
- *Kagno v. Bush Ross, P.A.*, No. 8:17-cv-1468-T-26AEP (M.D. Fla.) (Lazzara, J.);
- *Johnston v. Kass Shuler, P.A.*, No. 8:16-cv-03390-SDM-AEP (M.D. Fla.) (Merryday, J.);
- *Jallo v. Resurgent Capital Servs., L.P.*, No. 4:14-cv-00449 (E.D. Tex.);
- *Macy v. GC Servs. Ltd. P'ship*, No. 3:15-cv-00819-DJH-CHL (W.D. Ky.);
- *Rhodes v. Nat'l Collection Sys., Inc.*, No. 15-cv-02049-REB-KMT (D. Colo.);
- *McCurdy v. Prof'l Credit Servs.*, No. 6:15-cv-01498-AA (D. Or.);
- *Schuchardt v. Law Office of Rory W. Clark*, No. 3:15-cv-01329-JSC (N.D. Cal.);
- *Globus v. Pioneer Credit Recovery, Inc.*, No. 15-CV-152V (W.D.N.Y.);
- *McWilliams v. Advanced Recovery Sys., Inc.*, No. 3:15-CV-70-CWR-LRA (S.D. Miss.);
- *Rhodes v. Olson Assocs., P.C., d/b/a Olson Shaner*, No. 14-cv-00919-CMA-MJW (D. Colo.); and
- *Roundtree v. Bush Ross, P.A.*, No. 8:14-cv-00357-JDW-AEP (M.D. Fla.) (Whittemore, J.).

14. Multiple district courts have commented on GDR's useful knowledge and experience in connection with class action litigation.

15. For example, in a similar TCPA matter, Judge Merryday "appoint[ed]— . . . as class counsel Michael L. Greenwald, James L. Davidson, and Aaron D. Radbil of Greenwald Davidson Radbil PLLC, each of whom has significant experience litigating TCPA class actions." *James v. JPMorgan Chase Bank, N.A.*, No. 8:15-cv-2424-T-23JSS, 2016 WL 6908118, at *1 (M.D. Fla. Nov. 22, 2016).

16. In *Schwyhart v. AmSher Collection Services, Inc.*, Judge John E. Ott, Chief Magistrate Judge of the Northern District of Alabama, stated upon granting final approval to a TCPA settlement for which he appointed GDR as class counsel:

> I cannot reiterate enough how impressed I am with both your handling of the case, both in the Court's presence as well as on the phone conferences, as well as in the written materials submitted. . . . I am very satisfied and I am very pleased with what I have seen in this case. As a judge, I don't get to say that every time, so that is quite a compliment to you all, and thank you for that.

No. 2:15-cv-1175-JEO (N.D. Ala. Mar. 15, 2017).

17. In *Ritchie v. Van Ru Credit Corp.*, also a TCPA class action, Judge Stephen M McNamee, Senior U.S. District Court Judge for the District of Arizona, stated upon granting final approval of the settlement:

> I want to thank all of you. It's been a pleasure. I hope that you will come back and see us at some time in the future. And if you don't, I have a lot of cases I would like to assign you, because you've been immensely helpful both to your clients and to the Court. And that's important. So I want to thank you all very much.

No. CIV-12-1714 (D. Ariz. July 21, 2014).

18. In a recent Fair Debt Collection Practices Act ("FDCPA") matter, Judge Carlton W. Reeves of the Southern District of Mississippi described GDR as follows:

> More important, frankly, is the skill with which plaintiff's counsel litigated this matter. On that point there is no disagreement. Defense counsel concedes that her opponent—a specialist in the field who has been class counsel in dozens of these matters across the country—'is to be commended for his work' for the class, 'was professional at all times' ..., and used his 'excellent negotiation skills' to achieve a settlement fund greater than that required by the law.
>
> The undersigned concurs ... Counsel's level of experience in handling cases brought under the FDCPA, other consumer protection statutes, and class actions generally cannot be overstated.

McWilliams v. Advanced Recovery Sys., Inc., No. 3:15-CV-70-CWR-LRA, 2017 WL 2625118, at

*3 (S.D. Miss. June 16, 2017).

19. And in *Roundtree v. Bush Ross, P.A.,* this Court wrote in appointing GDR class counsel: "Greenwald [Davidson Radbil PLLC] has been appointed as class counsel in a number of actions and thus provides great experience in representing plaintiffs in consumer class actions." 304 F.R.D. 644, 661 (M.D. Fla. 2015) (Whittemore, J.).

20. More information about GDR is available on the firm's website, www.gdrlawfirm.com.

Michael L. Greenwald

21. I graduated from the University of Virginia in 2001 and Duke University School of Law in 2004.

22. I have been appointed class counsel in more than a dozen consumer protection class actions in the past three years. *See* http://www.gdrlawfirm.com/michael-greenwald (last visited June 10, 2019).

23. Prior to forming GDR, I spent six years as a litigator at Robbins Geller Rudman & Dowd LLP—one of the nation's largest plaintiff's class action firms—where I focused on complex class actions, including securities and consumer protection litigation.

24. While at Robbins Geller, I served on the litigation teams responsible for the successful prosecution of numerous class actions, including: *In re Evergreen Ultra Short Opportunities Fund Sec. Litig. (D. Mass.)*; *In re Red Hat, Inc. Sec. Litig.* (E.D.N.C.); *City of Ann Arbor Employees' Retirement Sys. v. Sonoco Products Co., et al*. (D.S.C.); *Norfolk County Retirement Sys., et. al. v. Ustian* (N.D. Ill.); *Romero v. U.S. Unwired, Inc*. (E.D. La.); *Lefkoe v. Jos. A. Bank Clothiers, Inc*. (D. Md.); and *In re Odimo, Inc. Sec. Litig.* (Fla.).

25. I started my career as an attorney at Holland & Knight LLP.

Aaron D. Radbil

26. Aaron D. Radbil graduated from the University of Arizona in 2002 and from the University of Miami School of Law in 2006.

27. Mr. Radbil has extensive experience litigating consumer protection class actions, including those under the TCPA. *See* http://www.gdrlawfirm.com/Aaron-Radbil (last visited June 10, 2019).

28. Mr. Radbil is admitted to practice before this Court.

29. In addition to his experience litigating consumer protection class actions, Mr. Radbil has briefed, argued, and prevailed on a variety of issues of significant consumer interest before federal and state courts of appeals. *See, e.g.*, *Dickens v. GC Servs. Ltd. P'ship.*, 706 F. App'x. 592 (11th Cir. 2017); *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068 (9th Cir. 2016); *Lea v. Buy Direct, L.L.C.*, 755 F.3d 250 (5th Cir. 2014); *Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605 (5th Cir. 2014); *Stout v. FreeScore, LLC*, 743 F.3d 680 (9th Cir. 2014); *Yunker v. Allianceone Receivables Mgmt., Inc.*, 701 F.3d 369 (11th Cir. 2012); *Guajardo v. GC Servs., LP*, No. 11-20269, 2012 WL 5419505 (5th Cir. Nov. 7, 2012); *Sorensen v. Credit Int'l Corp.*, 475 F. App'x 244 (9th Cir. 2012); *Ponce v. BCA Fin. Serv., Inc.*, 467 F. App'x 806 (11th Cir. 2012); *Mady v. DaimlerChrysler Corp.*, 59 So. 3d 1129 (Fla. 2011); *Talley v. U.S. Dep't of Agric.*, 595 F. 3d 754 (7th Cir. 2010), *reh'g en banc granted, opinion vacated* (June 10, 2010), *on rehearing en banc* (September 24, 2010), *decision affirmed*, No. 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010); *Oppenheim v. I.C. Sys., Inc.*, 627 F. 3d 833 (11th Cir. 2010).

James L. Davidson

30. James L. Davidson graduated from the University of Florida in 2000 and the University of Florida Fredric G. Levin College of Law in 2003.

31. Mr. Davidson is admitted to practice before this Court.

32. He has been appointed class counsel in a host of consumer protection class actions. *See* http://www.gdrlawfirm.com/James-Davidson (last visited June 10, 2019).

33. Prior to forming GDR, Mr. Davidson spent five years as a litigator at Robbins Geller, where he focused on complex class actions, including securities and consumer protection litigation.

34. While at Robbins Geller, Mr. Davidson served on the litigation teams responsible for the successful prosecution of numerous class actions, including: *Local 731 I.B. of T. Excavators and Pavers Pension Trust Fund et al. v. Swanson et al.*; *In re Pet Food Products Liability Litigation*; *In re Mannatech, Inc. Sec. Litig.*; *In re Webloyalty, Inc. Mktg. and Sales Practices Litig.*; and *In re Navisite Migration Litig*.

Jesse S. Johnson

35. Jesse S. Johnson earned his Bachelor of Science degree in Business Administration from the University of Florida, where he graduated magna cum laude in 2005.

36. He earned his Juris Doctor degree with honors from the University of Florida Fredric G. Levin College of Law in 2009, along with his Master of Arts in Business Administration from the University of Florida Hough Graduate School of Business the same year.

37. Mr. Johnson is admitted to practice before this Court.

38. While an attorney at GDR, Mr. Johnson has been appointed as class counsel in more than a dozen consumer protection class actions. *See* http://www.gdrlawfirm.com/Jesse-Johnson (last visited June 10, 2019).

39. Mr. Johnson started his legal career as an associate at Robbins Geller, where he served on the litigation teams responsible for the successful prosecution of numerous class actions,

including: *Sterling Heights Gen. Emps.' Ret. Sys. v. Hospira, Inc. et al.*, No. 1:11-cv-08332 (N.D. Ill.); *Eshe Fund v. Fifth Third Bancorp*, No. 1:08-cv-00421 (S.D. Ohio); *City of St. Clair Shores Gen. Emps.' Ret. Sys. v. Lender Processing Servs., Inc.*, No. 3:10-cv-01073 (M.D. Fla.); and *In re Synovus Fin. Corp.*, No. 1:09-cv-01811 (N.D. Ga.).

Alexander D. Kruzyk

40. Alexander D. Kruzyk earned his Bachelor of Management and Organizational Studies from the University of Western Ontario in 2011 and earned his Juris Doctor degree with honors from the University of Florida Fredric G. Levin College of Law in 2014.

41. Mr. Kruzyk is admitted to practice before this Court.

42. Prior to joining GDR in 2017, Mr. Kruzyk was an associate with Robbins Geller, where he assisted with several complex class actions. *See* http://www.gdrlawfirm.com/Alexander-Kruzyk (last visited June 10, 2019).

Procedural History

43. Mr. Williams filed his class action complaint on August 18, 2017. ECF No. 1.

44. On October 27, 2017, Bluestem Brands, Inc. ("Bluestem") filed its answer and affirmative defenses, through which it largely denied Mr. Williams's allegations and asserted five affirmative defenses, including prior express consent, lack of standing, and the purported unconstitutionality of statutory damages under the TCPA. ECF No. 7.

45. At the same time, Bluestem moved to stay this case pending the decision of the United States Court of Appeals for the District of Columbia in *ACA International, et al. v. FCC*, No. 15-1211 (D.C. Cir.). ECF No. 8.

46. On November 6, 2017, Mr. Williams filed his opposition to Bluestem's motion to stay. ECF Nos. 9, 11.

47. On December 4, 2017, Mr. Williams issued a subpoena to MetroPCS—his wireless carrier—to obtain his telephone records.

48. On December 6, 2017, the parties filed their Case Management Report. ECF No. 16.

49. This Court entered its Case Management and Scheduling Order on December 8, 2017. ECF No. 17.

50. On December 15, 2017, the parties served their initial disclosures.

51. On December 18, 2017, this Court denied Bluestem's motion to stay. ECF No. 18.

52. On January 16, 2018, Mr. Williams served his initial interrogatories and requests for production of documents.

53. On March 16, 2018, Bluestem moved to transfer this case to the Southern District of California to join a different proposed TCPA class action against it. ECF No. 20.

54. Mr. Williams opposed Bluestem's motion to transfer. ECF No. 21.

55. On May 10, 2018, and to facilitate the exchange of discovery, the parties jointly moved for entry of a stipulated protective order, ECF No. 27, which this Court entered on May 22, 2018. ECF No. 34.

56. On May 11, 2018, Bluestem served written discovery requests on Mr. Williams.

57. On May 30, 2018, this Court denied Bluestem's motion to transfer. ECF No. 35.

58. Bluestem then moved this Court to reconsider its decision denying the motion to transfer. ECF No. 36.

59. This Court denied Bluestem's motion for reconsideration on June 5, 2018. ECF No. 37.

60. On July 18, 2018, the parties jointly moved this Court for approval to select Hon. Diane M. Welsh (Ret.) of JAMS as mediator. ECF No. 38.

61. Also on July 18, 2018, Mr. Williams took Bluestem's deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Bluestem designated two witnesses to testify on its behalf—Mark Bursey and William Powell.

62. On July 26, 2018, Bluestem took Mr. Williams's deposition.

63. On July 31, 2018, Mr. Williams filed his motion for class certification. ECF No. 40.

64. At the same time, Mr. Williams served the report of his expert witness, Cameron Azari. ECF No. 40-7.

65. On August 1, 2018, Bluestem took the deposition of Betty Smith, a third party who was the previous subscriber to Mr. Williams's cellular telephone number.

66. On August 2, 2018, Mr. Williams served a subpoena on third-party LiveVox, Inc. for documents and a deposition.

67. On August 3, 2018, the parties served their non-expert witness lists.

68. On August 8, 2018, Mr. Williams served his second requests for production of documents.

69. In total, Bluestem produced over 16,000 pages of documents in response to Mr. Williams's discovery requests.

70. On August 22, 2018, Bluestem took the deposition of Mr. Azari in Portland, Oregon.

71. On August 28, 2018, Bluestem filed its response in opposition to Mr. Williams's motion for class certification. ECF No. 47.

72. At the same time, Bluestem served the report of its class certification expert witness, Dr. Debra Aron. ECF No. 49.

73. On September 19, 2018, Bluestem served the expert report of Jan Kostyun. Mr. Kostyun opined that Bluestem did not use an automatic telephone dialing system, as defined by the TCPA, to place calls to members of the proposed class.

74. On September 21, 2018, Mr. Williams took Dr. Aron's deposition in Chicago.

75. On September 25, 2018, the parties mediated the case with Judge Welsh[1] in Philadelphia, where they reached an agreement in principle to resolve this action.

76. Mr. Williams filed his motion for preliminary approval of the class action settlement on November 21, 2018. ECF No. 56.

77. This Court preliminary approved the settlement on April 2, 2019. ECF No. 59.

The Settlement

78. The settlement requires Bluestem to create a non-reversionary common fund of $1 million, plus the separate payment of costs and expenses associated with class notice and administration up to $269,500.

79. Participating class members will receive an equal share of the fund after deducting attorneys' fees, costs, and expenses as awarded by the Court, and an incentive award to Mr. Williams, not to exceed $5,000 and subject to Court approval.

80. The total settlement will be up to $1,269,500.

[1] "Over the past 23 years, as a JAMS neutral and a United States Magistrate Judge, [Judge Welsh] has successfully resolved over 5000 matters, covering virtually every type of complex dispute. Specifically, Judge Welsh has extraordinary skill in resolving high-stakes multi-party commercial disputes, employment matters, catastrophic personal injury cases, class actions, mass torts and multi-district litigations (MDL's). She was recognized as a 2016-2018 'ADR Champion' by the National Law Journal." https://www.jamsadr.com/welsh/ (last visited May 29, 2019).

81. As noted above, the parties reached this settlement after written discovery regarding Bluestem's calling practices and procedures, depositions, expert discovery, and extensive motion practice.

Attorneys' Fees

82. The requested attorneys' fees of 30 percent of the total settlement are both fair and reasonable, and in line with awards in similar class actions.

83. The case has been pending for more than 1.5 years, and over that time GDR devoted significant time and resources to this case, including: (a) conducting an investigation into the underlying facts regarding Mr. Williams's claims and class members' claims; (b) preparing a class action complaint; (c) researching the law pertinent to the claims and Bluestem's defenses; (d) preparing and serving initial written discovery requests, negotiating Bluestem's discovery responses and production of documents, and gathering documents and information relevant to Bluestem's discovery requests to Mr. Williams; (e) researching and opposing Bluestem's motion to stay; (f) researching and opposing Bluestem's motion to transfer this matter to the Southern District of California; (g) researching and opposing Bluestem's motion for reconsideration of the Court's order denying Bluestem's motion to transfer; (h) researching issues related to class certification, including strategies for how to best satisfy the requirements of Rule 23; (i) preparing for and taking the corporate representative deposition of Bluestem pursuant to Rule 30(b)(6); (j) hiring an expert witness and facilitating the expert witness's report; (k) pursuing third-party discovery through subpoenas; (l) reviewing nearly 16,000 pages of documents produced by Bluestem; (m) defending the deposition of Mr. Williams's expert witness; (n) preparing for and defending Mr. Williams's deposition; (o) taking the deposition of Bluestem's expert witness; (p) preparing Mr. Williams's motion for class certification and appointment of class counsel; (q)

preparing for and attending mediation in Philadelphia before Judge Welsh, including preparing a detailed mediation statement; (r) preparing the parties' class action settlement agreement, along with the proposed class notices and claim form; (s) negotiating with class administration companies to secure the best notice plan practicable; (t) preparing Mr. Williams's motion for preliminary approval of the class action settlement; (u) preparing Mr. Williams's motion for final approval of the class action settlement; (v) preparing Mr. Williams's motion for approval of an award of attorneys' fees, reimbursement of expenses, and an incentive award; (w) preparing the instant declaration in support of settlement approval; (x) conferring with the class administrator to oversee the notice, claims, and administration process; (y) repeatedly conferring with Mr. Williams throughout this case; and (z) conferring with class members to answer questions about the settlement process.

84. In short, GDR worked effectively to litigate this case in the best interests of class members, and then guide this case through both preliminary and final approval.

85. Given the excellent result achieved in this case, the time and labor required to litigate this matter, the novelty and difficulty of the questions involved, the skill requisite to perform the legal services performed, the preclusion of other employment due to acceptance of the case, the customary fee for TCPA class actions in this jurisdiction, that GDR litigated this matter on a contingent basis, the experience, reputation, and ability of GDR, and the undesirability of this matter to many firms, among other factors, I firmly believe the settlement is fair, reasonable, and adequate, and that the attorneys' fees requested as a percentage of the settlement are fair and reasonable.

86. In addition, the requested attorneys' fees were not negotiated as part of the settlement, and Bluestem is free to oppose the attorneys' fees sought by class counsel.

Incentive Award

87. Mr. Williams has been a model class representative.

88. Mr. Williams has been actively involved in this case throughout the proceedings, including regularly conferring with his counsel and responding to Bluestem's written discovery requests.

89. Mr. Williams also sat for deposition in this case, and traveled to Philadelphia to attend mediation.

90. Without Mr. Williams's efforts and dedication to this case, the class settlement would not have been possible.

91. Given this, and considering the time and effort Mr. Williams devoted to this case as well as the result achieved for the class, I firmly believe an incentive award in the amount of $5,000 is fair and reasonable.

Reimbursement of Litigation Costs and Expenses

92. Class counsel separately request the reimbursement of costs and expenses reasonably incurred in connection with the prosecution of this action.

93. Such expenses are reflected in the books and records maintained by undersigned counsel, which are an accurate recording of the expenses incurred.

94. To date, GDR has incurred reimbursable litigation costs and expenses in the total amount of $17,120.82.

95. These expenses include the filing fee for the complaint ($400), service of process ($40), expert witness fees ($6,076.75), mediation fees for Judge Welsh ($4,650), deposition transcripts ($703.71), PACER, mailing and postage costs ($55.50), and travel-related expenses for depositions and mediation, including meals (total of $5,194.86).

96. As well, GDR has incurred additional reimbursable expenses, such as for photocopies, long distance telephone calls, and computerized legal research. Those expenses are not separately itemized herein, and GDR does not seek separate reimbursement for them.

97. For the reasons set forth herein and in the accompanying motions, I respectfully submit that: (i) the settlement is fair, reasonable, and adequate and should be approved; and (ii) this Court should grant class counsel's motion for an award of attorneys' fees, reimbursement of costs and expenses, and an incentive award.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 2019.

By: *s/ Michael L. Greenwald*
Michael L. Greenwald