IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSS DUTCHER, Plaintiff, v. NEWREZ LLC d/b/a SHELLPOINT MORTGAGE SERVICING, Defendant.	Docket No. 2:21-cv-02062-MAK

PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND PAYMENT OF SERVICE AWARD

Plaintiff[1] Ross Dutcher respectfully moves this Court pursuant to FED. R. CIV. P. 23(h) and 54(d)(2) for an order:

1. awarding Plaintiff's counsel, Bailey & Glasser, LLP and Gucovschi Rozenshteyn, PLLC, attorneys' fees of $250,000.00 total to be paid directly by defendant Shellpoint, separate from and in addition to the $500,000.00 cash fund (the "Settlement Fund") that Shellpoint will also pay for the Settlement Class and the other relief in the Settlement, pursuant to the terms of the Parties' RSA;

2. awarding Plaintiff's counsel Bailey & Glasser, LLP $1,300.00 in reimbursement for certain costs and expenses it incurred and disbursed in prosecuting this litigation on behalf of Plaintiff and the Settlement Class, also to be paid by Shellpoint separate from and in addition to the Settlement Fund and the other relief in the Settlement; and

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[1] All capitalized terms used but not otherwise defined herein have the meaning set forth in the Revised Class Action Settlement Agreement (the "RSA") filed with the Court on April 21, 2022. ECF 54-1.

3. awarding Plaintiff Dutcher $5,000.00 total, consisting of $2,500.00 in settlement of his individual TCPA claims and $2,500.00 for his service in representing the Settlement Class in this Action, also to be paid by Shellpoint separate from and in addition to the Settlement Fund and the other relief in the Settlement.

The grounds on which this motion is based are set forth in the accompanying memorandum of law, the declaration of Lawrence J. Lederer and accompanying exhibits filed concurrently herewith, the declarations of Adrian Gucovschi and Plaintiff Ross Dutcher filed concurrently herewith, and the prior filings and proceedings in this litigation. In addition, Plaintiff has conferred with defendant Shellpoint which has advised it has no objection to the requested awards.

Accordingly, Plaintiff respectfully requests that this motion be granted and that the Court grant the requested attorneys' fees, reimbursement of litigation expenses and award to Plaintiff in full.

Dated: July 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Plaintiff's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Payment Of Service Award* has been served on all counsel of record via the Court's Electronic Filing System.

Dated: July 6, 2022

/s/ Lawrence J. Lederer

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSS DUTCHER,

Plaintiff,

v.

SHELLPOINT LLC d/b/a SHELLPOINT MORTGAGE SERVICING,

Defendant.

Docket No. 2:21-cv-02062-MAK

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND PAYMENT OF SERVICE AWARD

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Plaintiff[1] on behalf of himself and the Settlement Class, submits this memorandum in support of his motion for an award of attorneys' fees, reimbursement of litigation expenses, and payment of a service award pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2).

I. Introduction

After more than a year of hard-fought litigation, Plaintiff's counsel secured a class-wide recovery from defendant Shellpoint consisting of a non-reversionary $500,000.00 cash fund (the "Settlement Fund") -- which is the maximum amount of damages permitted in class actions under the FDCPA -- to compensate Settlement Class Members, the bulk of whom will receive their *pro rata* share via an automatic credit on their mortgage statements, and none of whom need to file any claim form in order to participate; prospective relief including changes to Shellpoint's statements to its customers under CARES Act forbearance and how it handles any related complaints; separately paid notice and settlement administration expenses of the Settlement Administrator and Taxes and Tax Expenses for the Settlement Fund; a separate payment to Plaintiff of up to $5,000.00 consisting of $2,500.00 for his service to the Settlement Class and $2,500.00 to individually settle his TCPA claims; and separately paid attorneys' fees of up to $250,000.00 and reimbursement of up to $1,300.00 in litigation costs to Plaintiff's counsel. ECF 54-1.

There were many obstacles to achieving any recovery. Plaintiff overcame two separate rounds of motions to dismiss; engaged in substantial investigation that began before the filing of the first complaint, and extended throughout the settlement negotiations; obtained and produced

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[1] All capitalized terms used but not otherwise defined herein have the meaning set forth in the Revised Class Action Settlement Agreement (the "RSA") filed with the Court on April 21, 2022. ECF 54-1.

substantial formal and informal discovery, including numerous meet and confer conferences that resulted in the production of thousands of pages of documents including the voice recordings of Plaintiff's calls with Shellpoint among other things; and successfully navigated an evolving litigation landscape amid what the Court stated was "the novelty of the mandated forbearance under the CARES Act." ECF 35 at 2.

Absent the Settlement, Plaintiff would face significant additional risk including contested class certification proceedings, summary judgment and, even assuming Plaintiff prevailed at those stages, establishing liability and damages at trial and sustaining that judgment on appeal. Among other defenses, Shellpoint contends that its mortgage statement language was not misleading and that Plaintiff lacks class-wide TCPA claims and that Plaintiff's FDCPA claims are preempted and precluded, that Plaintiff incurred no damage and that, even assuming liability, no class should be certified because Plaintiff's proposed class definitions are impermissible "fail-safe" classes. Instead of continued risky, prolonged and costly additional litigation, the Settlement Class will be entitled to share in a substantial cash fund and remedial relief.

Plaintiff's counsel prosecuted this litigation on a purely contingent basis and have received no payment or reimbursement of their expenses for their services. *See* Declaration of Lawrence J. Lederer (the "Lederer Decl.") ¶ 47. For their successful efforts, and in consideration of the work already undertaken on behalf of the Settlement Class and additional work going forward, Plaintiff's counsel seek attorneys' fees of $250,000.00; reimbursement of $1,300.00 in litigation costs; and a payment of $5,000.00 to Plaintiff.

Notably, as part of Plaintiff's counsel's work leading to the Settlement, Shellpoint has agreed to pay the requested $5,000.00 to Plaintiff, and the requested $250,000.00 in attorneys' fees and $1,300.00 in reimbursement of litigation expenses to Plaintiff's counsel,

separate from and in addition to the $500,000.00 Settlement Fund for the Settlement Class and the other relief in the Settlement subject to the approval of the Court. In addition, Plaintiff's counsel's collective lodestar to date of $726,978.00 materially exceeds the requested $250,000.00 fee which would actually represent a negative multiplier to counsel of approximately 0.65% of their collective lodestar. *See* Lederer Decl. ¶¶ 51-52.

The requested fee is fair given the relief secured for the Settlement Class and the work that counsel did to achieve it. Plaintiff's counsel respectfully submit that the Settlement is the result of their diligent efforts, as well as their well-earned reputations as attorneys who are unwavering in their dedication to the interests of the class and willing to zealously prosecute a meritorious case. Here, in a case asserting claims based on complex legal and factual issues that were opposed by highly skilled and experienced defense counsel, Plaintiff's counsel succeeded in securing an excellent result for the Settlement Class under difficult and challenging circumstances. Here, counsel assumed substantial contingent risk in litigating this case. There was a real and distinct possibility of no recovery at all, and that no class would be certified. Given the many risks assumed, the complexity and amount of work involved, the skill and expertise required and the excellent relief secured, the Court should approve the requested awards in full.

II. Background

A. Investigation and Complaints

Plaintiff filed this case against Shellpoint on May 5, 2021, alleging claims under the TCPA, 47 U.S.C. § 227, *et seq*. Specifically, Plaintiff alleged that Shellpoint made prerecorded robocalls, and calls using an ATDS, to consumers' cell phones without prior express consent. ECF 1 ¶¶ 54-59.

On August 2, 2021, Shellpoint filed a motion to dismiss and to strike the class action allegations. ECF 23. Plaintiff filed an amended complaint which mooted that motion. ECF 27-28. The amended complaint added claims under the FDCPA and Rosenthal Act, based on Plaintiff's claim that Shellpoint sent misleading monthly statements to borrowers under CARES Act forbearance plans. On September 10, 2021, Shellpoint filed another motion to dismiss and to strike, ECF 30, which Plaintiff opposed on September 24, 2021. ECF 31. Following oral argument on October 27, 2021, the Court denied the motion by Order on November 3, 2021. ECF 35. On November 17, 2021, Shellpoint filed an answer to the amended complaint (ECF 37) denying any liability and asserting a number of affirmative defenses.

B. Discovery

Plaintiff engaged in extensive formal and informal discovery that included, among other things: corporate affiliate Shellpoint Partners LLC; the Parties' initial disclosures; Shellpoint's production of thousands of pages of documents and spreadsheet data; several separate meet-and-confers lasting several hours over multiple days involving the exchange of additional information and detailed written correspondence between the Parties concerning the evidence produced which obviated Plaintiff from having to move to compel; interrogatories; preparation and issuance of Plaintiff's corporate designee deposition notice to Shellpoint identifying 22 separate topics; and additional publicly available and other information. *See* Lederer Decl. ¶ 27. Discovery continued through February 2022, when the Parties reached their agreement to settle subject to the Court's approval. Discovery also revealed significant challenges with pursuing Plaintiff's TCPA claims on a class-wide basis. *Id.* ¶ 43.

C. Settlement Negotiations and Preliminary Approval

While in the midst of merits and class certification discovery, the Parties first discussed the possibility of a negotiated resolution in January 2022. Lederer Decl. ¶ 29. Although no resolution was reached during any of these initial discussions, the Parties continued their negotiations which ultimately led to an agreement in principle to settle by late February 2022 subject to entering into a written settlement agreement.

The material terms of the proposed Settlement include the following:

1. *Settlement Class:* As approved in the Court's preliminary approval Order, the Settlement Class includes all consumers nationwide: (1) whose residential mortgage loan was serviced by Shellpoint; (2) whose residential mortgage loan had been placed into a CARES Act forbearance plan; and (3) who, while under a CARES Act forbearance plan, received a periodic mortgage statement in the same form as the statement attached as Exhibit A to the Settlement Agreement. ECF 55 ¶ 18(a). The Settlement Class excludes those who opt out. *Id.* ¶ 30.

2. *Proposed Relief*: The proposed relief consists of the $500,000.00 Settlement Fund, without any deduction for *any* settlement administration or attorneys' fees or any other costs; an additional payment of up to $5,000.00 to Plaintiff; prospective changes to Shellpoint's mortgage statement and other reform subject to the Court's continuing jurisdiction; separately paid notice and settlement administration costs; and separately paid attorneys' fees up to $250,000.00 and litigation costs up to $1,300.00 to Plaintiff's counsel.[2]

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[2] If the Court does not award Plaintiff the requested $5,000.00 payment, those funds will not revert to Shellpoint but instead be added to the settlement fund. ECF 55 ¶ 12. The Parties' RSA does not, however, provide that any unpaid balance, if any, of the up to $250,000.00 in attorneys' fees Shellpoint has also separately agreed to pay to Plaintiff's counsel would be added to the Settlement Fund. Instead, Shellpoint's position is that it is entitled to retain any such unpaid balance if the Court awards less than $250,000 in attorneys' fees. Lederer Decl. ¶ 37.

3. *Settlement Administrator:* The Settlement Administrator, Kroll Business Services ("Kroll"), has substantial experience in providing notice and administering class action settlements. *See* https://www.krollbusinessservices.com. Kroll timely began to mail the Short-Form Notice to class members beginning on May 27, 2022 consistent with the Court's Order. ECF 55 ¶ 23(b); Lederer Decl. ¶ 6, 40. Kroll and Plaintiff's counsel will by separate submission confirm compliance with the Court's directives concerning the Notice program by July 29, 2022 as the Court directed. ECF 55 ¶ 23(g).

4. *Release*: Settlement Class Members will release claims under the FDCPA, the Rosenthal Act and any other law relating to the claims alleged in the amended complaint, but, other than Plaintiff, will not release any claims they may have under the TCPA. Further, and in response to class member inquiries, Plaintiff also proposed and negotiated with Shellpoint a carve-out to clarify that the release class members will give excludes individualized claims and defenses concerning specific amounts or charges allegedly due. Lederer Decl. ¶ 42.

Plaintiff agreed to an individual settlement of his TCPA claims as part of the proposed Settlement based on the evidence produced in discovery which demonstrated that Plaintiff's TCPA claims were unique to him rather than class-wide and following production by Shellpoint of, among other things, the full recordings of its calls with Plaintiff. Plaintiff's TCPA claims also faced a number of other significant defenses such as whether Shellpoint customers had received and been injured by receipt of any pre-recorded telemarketing, as opposed to informational, calls; whether they consented or revoked their consent to any such calls; and whether any class could be certified. *See, e.g., TransUnion v. Ramirez,* 141 S.Ct. 2190 (2021) (class members must all have suffered concrete injury to have standing); *Eldridge v. Cabela's*

Inc., 2017 WL 4364205, at *9 (W.D. Ky. Sept. 29, 2017) (putative TCPA class based on consent revocation was unsustainable).

Plaintiff's own call recordings reflected unique issues concerning his alleged initial consent and later verbal revocation of that consent. Shellpoint also maintained and discovery supported that the dialer it used only made calls to Shellpoint customers from set lists and, thus, was not an ATDS, *see Facebook, Inc. v. Duguid,* 141 S.Ct. 1163, 1170 (2021), and that the calls and CARES Act messages were protected commercial communications with its own client borrowers rather than improper telemarketing under the TCPA. Further, while Plaintiff will release and prejudicially dismiss his individual TCPA claims if the Settlement is approved, Settlement Class Members will not release any such TCPA claims. ECF 54-1 Art. XI.B.

The Parties jointly reported their proposed agreement in principle to settle to the Court on February 25, 2022. As directed by the Court (ECF 45), the Parties jointly moved to extend scheduling deadlines. ECF 46. On March 25, 2022, Plaintiff filed the proposed Settlement with the Court and accompanying papers. ECF 50. The Court conducted a hearing on April 7, 2022 concerning preliminary approval (ECF 52) following which the Court granted counsel leave to file a supplemental memorandum and a revised settlement agreement if warranted (ECF 53), which Plaintiff filed on April 21, 2022. *See* ECF 54 (attaching RSA and accompanying documents). On April 25, 2022, the Court preliminarily approved the Settlement and directed Notice be sent to the class and set accompanying deadlines and the Fairness Hearing.

Although the opt-out and objection deadlines remain open until July 27, 2022, the evidence thus far is that the Notice program was quite robust in reaching putative Settlement Class Members and advising them of their options, *and* that the Settlement Class thus far overwhelmingly supports the proposed Settlement. Lederer Decl. ¶¶ 40-41.

III. Argument

A. The Requested Attorneys' Fees Should be Approved in Full

"In a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Supreme Court has long recognized that "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).

Here, the Settlement provides that class counsel will seek an award of attorneys' fees based on their lodestar and that Shellpoint will separately pay, in addition to and apart from the $500,000.00 Settlement Fund and other relief in the Settlement, up to $250,000.00 in attorneys' fees, plus up to $1,300.00 in reimbursement of litigation expenses. Thus, the fee award will *not* come out of the common fund or in any way reduce class members' payments. In addition, class members will have a full opportunity to review the fee petition prior to the objection deadline, and Plaintiff's counsel's collective lodestar to date already exceeds $250,000.00, meaning that an award by the Court of the $250,000.00 in full will result in a *negative* multiplier in any event. Lederer Decl. ¶¶ 45, 51-52.

Ultimately, "[t]he amount of a fee award ... is within the district court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 299 (3d Cir. 2005) (Feb. 25, 2005) .

B. The Requested Fee Is Fair and Reasonable

The Settlement establishes a non-reversionary Settlement Fund of $500,000.00 -- the maximum recovery permitted under the FDCPA -- from which Settlement Class Members will receive payments. Plaintiff's counsel will receive any fee and expense reimbursement also

separately, and on top of, that Fund when the class is paid. The Third Circuit has identified the following ten factors that courts should consider in reviewing a request for attorneys' fees:

> (1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

In re Diet Drugs Prod. Liab. Litig., 582 F.3d 524, 541 (3d Cir. 2009) (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 336-40 (3d Cir. 1998)). The *Gunter/Prudential* factors should not "be applied in a rigid, formulaic manner, but rather a court must weigh them in light of the facts and circumstances of each case." *Moore v. Comcast Corp.*, 2011 WL 238821, at *4 (E.D. Pa. Jan. 24, 2011).

1. Size of Fund Created and Number of Persons Benefitted

In awarding fees, the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). The Settlement Fund alone is an excellent recovery as it is the statutory maximum amount recoverable under FDCPA. 15 U.S.C. § 1692k(a)(2)(B). The Court has thus found this "fair, reasonable, and adequate considering the costs, risks and delay of litigation, trial, and appeal." ECF 55 ¶ 10. Indeed, class counsel could not achieve a better result for class members by trying the case to verdict. Also as part of the Settlement, Shellpoint will implement prospective changes to the subject periodic statement, as well as escalated review of certain complaints made by borrowers operating under a CARES Act forbearance plan.

It is likewise unclear whether Plaintiff could achieve any monetary recovery under the Rosenthal Act beyond the Settlement Fund already obtained. *See Gonzalez v. Arrow Fin. Services*, 660 F.3d 1055, 1068 n.16 (9th Cir. 2011) ("We express no opinion on whether the FDCPA might preempt in part (as inconsistent with § 1692k(a)(2)(c)) class recovery under federal and state law when the total statutory damages exceed $500,000 or one percent of the debt collector's net worth."). Even if an additional $500,000 recovery *was* available under the separate cap in the Rosenthal Act, *see* Cal. Civ. Code § 1788.62(b), the Settlement Fund here already represents 50% of such a theoretical double recovery.

The proposed Settlement Class includes approximately 103,946 members. In accordance with the RSA, and subject to final approval by the Court, most Settlement Class Members will receive payment of their portion of the Settlement Fund via automatic credit to their mortgage account, with the remaining Settlement Class Members being mailed checks. *See* 54-1 Art. III.A. Thus, the relief obtained and the number of persons who will be benefitted by the Settlement weigh heavily in favor of the fee requested.

2. The Presence or Absence of Substantial Objections

The Notice disseminated to the Settlement Class stated that Plaintiff's counsel would seek, and that Shellpoint has agreed to pay "above and in addition to the $500,000" Settlement Fund, attorneys' fees of up to a "maximum of $250,000." *See* Lederer Decl. ¶ 6 (attaching Short-Form Notice). Although as noted the objection deadline has not yet passed, no objection has been filed to any aspect of the requested fees to date. *Id.* ¶ 41. Also, no objections have been filed by any state or federal officials following the CAFA notice. *Id.* ¶ 46. *See also In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) (stating that "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of

objectors creates a strong presumption that this factor weighs in favor of the Settlement"); *High St. Rehab., LLC v. Am. Specialty Health Inc.*, 2019 WL 4140784, at *4 (E.D. Pa. Aug. 29, 2019) ("A low number of objectors or opt-outs is persuasive evidence of the proposed settlement's fairness and adequacy."). Plaintiff intends to file updated information confirming compliance with the Notice directives of the Court by July 29, 2022 (ECF 55 ¶ 23(g)), and concerning any potential objections by October 7, 2022 (*Id.* ¶ 35) in accord with the Court's Order.

3. The Skill and Efficiency of the Attorneys Involved

The quality of the representation is also relevant in determining fee awards. "In evaluating the skill and efficiency of the attorneys involved, courts have looked to 'the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.'" *Alexander v. Washington Mut., Inc.*, 2012 WL 6021103, at *2 (E.D. Pa. Dec. 4, 2012) (quotation omitted).

Here, the quality of Plaintiff's counsel's representation of Plaintiff and the Class, as well as their skill and experience in class action litigation and other complex cases, support the requested fee. *See* Lederer Decl. ¶¶ 7-8 (attaching firm resumés of Plaintiff's counsel). Among other things, Plaintiff's counsel investigated Shellpoint's alleged conduct; drafted detailed initial and amended complaints; successfully opposed Shellpoint's motions to dismiss; obtained and reviewed thousands of pages documents from Shellpoint; resolved discovery disputes before they reached the Court; propounded and responded to written discovery; engaged in arm's length settlement negotiations leading to the Settlement and documented and prepared the accompanying papers in support of it. *Id.* ¶¶ 14-20, 29. Class counsel's work secured the monetary and non-monetary benefits for the Settlement Class quickly and efficiently, and

thereby helped conserve judicial resources which also supports the fee requested particularly given that the risks and uncertainties of continued litigation could have resulted in no recovery, even after years of costly litigation. Moreover, especially given the statutory cap on damages under the FDCPA, Plaintiff's counsel also successfully negotiated fees to be paid separately rather than out of the common fund, which further supports awarding the requested fee.

The quality and experience of defense counsel is also relevant. *See Alexander*, 2012 WL 6021103, at *2. Shellpoint is represented by skilled, experienced defense counsel from the national firm Akerman LLP. *See* Marc J. Gottlieb - Akerman LLP and Celia Chapman Falzone - Akerman LLP. Plaintiff's counsel assumed a significant risk in undertaking this case on a pure contingency basis; invested time, effort and money over more than a year of litigation with no guarantee of recovery; and were prepared to continue prosecuting the litigation until conclusion. Here, in sum, the bottom line quality of representation is reflected in the commendable Settlement before the Court. Class counsel's skill, tenacity and efficiency in navigating the many legal and factual challenges in this case also favor the requested fee.

4. The Complexity and Duration of the Litigation

The Parties have litigated this case for more than a year. Plaintiff's counsel took this case on contingency, and there was a substantial risk that the investment of time, personnel and resources would not be successful. Courts have recognized that this is an important consideration in determining an appropriate fee.

Moreover, the Third Circuit has instructed that "[w]hat matters is not the amount or type of discovery class counsel pursued, but whether they had developed enough information about the case to appreciate sufficiently the value of the claims." *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 439 (3d Cir. 2016) ("[R]equiring parties to conduct formal discovery before

reaching a proposed class settlement would take a valuable bargaining chip -- the costs of formal discovery itself -- off the table during negotiations. This could deter the early settlement of disputes.”).

Here, the Parties reached the Settlement through arm’s length negotiations after considering the substantial discovery. Prior to agreeing to the Settlement, Plaintiff’s counsel was well-versed in both the applicable law and facts at issue. In addition to conducting initial legal and factual research, Plaintiff’s counsel received substantial formal and informal discovery from Shellpoint including business records, policies and procedures related to the TCPA and the FDCPA, and other information relevant to the claims alleged. Plaintiff’s counsel then considered the relative strengths and weaknesses of the Parties’ claims, contentions and defenses and the benefits the Settlement offers to the class. In view of the risks in certifying a litigation class and maintaining it through a likely Rule 23(f) appeal, trial, post-trial motions, and any appeal on the merits, Plaintiff and counsel believe that the Settlement is in the best interest of the Settlement Class. Lederer Decl. ¶¶ 9, 39; Second Supplemental Declaration of Plaintiff Ross Dutcher (the “Dutcher Decl.”) ¶¶ 5-6.

Further litigation will add complexity and prolong the proceedings. “Instead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery ... [such that] it may be preferable ‘to take the bird in the hand instead of the prospective flock in the bush.’” *In re Currency Conversion Fee Antitrust Litig.*, 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006) (citation omitted). Absent the settlement, it is “entirely possible that the class would have recovered nothing at all, or a range of recovery not far from what this bird-in-the-hand supplies.” *In re ATI Techs., Inc. Secs. Litig.*, 2003 WL

1962400, at *2 (E.D. Pa. Apr. 28, 2003).[3] The complexity and duration of this litigation therefore also support the requested fee.

5. The Risk of Nonpayment

"Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees." *Saini v. BMW of North America, LLC*, 2015 WL 2448846, at *18 (D.N.J. May 21, 2015). As many courts have recognized, "[s]uccess is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable." *Martin v. Foster Wheeler Energy Corp.*, 2008 WL 906472, at *4 (M.D. Pa. Mar. 31, 2008). "There is a greater risk of nonpayment for cases taken on a contingent fee basis. *West Palm Beach Police Pension Fund v. DFC Glob. Corp.*, 2017 WL 4167440, at *8 (E.D. Pa. Sept. 20, 2017).

Here, Plaintiffs' counsel "accepted the responsibility of prosecuting this class action on a contingent fee basis and without any guarantee of success or award." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 281 (3d Cir. 2009) ("Class Counsel invested a substantial amount of time and effort to reach this point and obtain the favorable Settlement."). In undertaking this case, counsel faced risk in establishing liability through trial, judgment and any appeal, and maintaining certification of a litigation class. While Shellpoint agreed to settle, it also had significant defenses to both liability and class certification as discussed above. Obtaining any monetary or remedial relief was uncertain from the outset.

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[3] As the Court is aware, the risk of no recovery here, and in complex cases of this type more generally, is real. In numerous hard-fought lawsuits, plaintiffs' attorneys have received little or no fee -- despite *years* of excellent, professional work -- due to the discovery of facts unknown when the case started, changes in the law while the case was pending, or a decision of a judge, jury, or court of appeals. *See, e.g., Hubbard v. BankAtlantic Bancorp, Inc.,* 688 F.3d 713 (11th Cir. 2012) (affirming district court's ruling overturning jury verdict in favor of plaintiff class); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376 (9th Cir. 2010) (affirming summary judgment for defendants after nine years of litigation).

6. A Lodestar Cross-Check Supports the Requested Fee

The fairness of the requested $250,000.00 fee is confirmed by a lodestar cross- check. The Third Circuit has stated that the "abridged lodestar analysis" is calculated "by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *Rite Aid*, 396 F.3d at 305. Unlike a statutory fee-shifting case, the lodestar cross-check "need entail neither mathematical precision nor bean-counting." *Id.* at 306. Instead, the Court "may rely on summaries submitted by the attorneys and need not review actual billing records." *Id.* at 307.

The amount of time spent by Plaintiff's counsel demonstrates a significant commitment of resources to this litigation and weighs in favor of the fee requested. *See Stoner v. CBA Info. Servs.*, 352 F. Supp. 2d 549, 553 & n.3 (E.D. Pa. 2005) (plaintiff's counsel expended 560 hours in FCRA case; "Plaintiff's counsel spent many hours of preparation on the case, including extensive settlement negotiations" and "reached resolution efficiently and relatively rapidly."). Plaintiff's counsel collectively expended 1,108.20 hours in this litigation through June 30, 2022, including 949.20 hours by Bailey & Glasser, LLP and 159 hours by Gucovschi Rozenshteyn, PLLC, representing a collective lodestar of $726,978.00. Lederer Decl. ¶ 51. The work performed by each firm is also summarized in Plaintiff's counsel's accompanying declarations.

The Third Circuit has repeatedly observed that *upward* multipliers "'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *Diet Drugs*, 582 F.3d at 545 n.42. Here, the requested award of $250,000.00 will result in a negative multiple on Plaintiff's counsel's lodestar of approximately 0.65%. Accordingly, the lodestar cross-check likewise supports approval of the requested $250,000.00 fee in full.

7. Awards in Similar Cases

The Third Circuit affirmed attorneys' fees of one-third of a settlement fund that had been contested by an objector, and where the fund included a reverter provision. *See Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 F. App'x 880, 883-84 (3d Cir. 2016). Although there is no reversion here and Shellpoint has agreed to separately pay attorneys' fees up to $250,000.00, the requested fee is well within the range of fairness even if the recovery is considered collectively with the Settlement Fund ($500,000.00 Settlement Fund plus $250,000.00 attorneys' fee). *See, e.g.*, *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 822 (3rd Cir. 1995) (in common fund cases "fee awards have ranged from nineteen percent to forty-five percent of the settlement fund"); *Wood v. Saroj & Manju Invs. Philadelphia LLC*, 2021 WL 1945809, at *12 (E.D. Pa. May 14, 2021) ("[C]ourts have awarded attorneys' fees of around 33 percent of class/collective recovery even in cases involving much larger funds, which entitle attorneys to a presumptively lower percentage fee."); *Whiteley v. Zynerba Pharms., Inc.*, 2021 WL 4206696, at *12 (E.D. Pa. Sept. 16, 2021) (33% fee "falls in the middle" of the range of fees in the Third Circuit).

Thus, this factor also supports approval of the requested fee.

8. The Value of Benefits Attributable to the Efforts of Class Counsel Relative to the Efforts of Other Groups

Here, "[t]he entirety of the value achieved for the Class was attributable to Class counsel; no other groups, such as government agencies conducting investigations, were involved in this case." *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 421 (E.D. Pa. 2010) (approving 33.1% fee in consumer class action). As such, this factor supports the fee requested.

9. The Percentage Fee that Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Agreement

"[T]he goal of the fee setting process is to determine what the lawyer would have received if he were selling his service in the market rather than being paid by Court Order." *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *15 (E.D. Pa. June 2, 2004) (quotation omitted). For example, "[i]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery." *Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 340 (E.D. Pa. 2007). Here, on the other hand, the attorneys' fees are not being paid from a common fund. Instead, they were negotiated *on top* of the statutory maximum for an FDCPA class. And as noted, even if the recovery is considered collectively ($500,000 Settlement Fund plus $250,000 attorneys' fee), counsel's request for attorneys' fees of $250,000 amounts to one-third of the recovery and is well within the range especially given the additional remedial and other relief obtained.

Thus, this factor favors the fee requested.

10. Any Innovative Terms of Settlement

Class action settlements often provide a direct financial benefit to the plaintiff class. But many, if not most, do not deliver specific, concrete corporate compliance relief directly addressing the very conduct that gave rise to the claims at issue. Here, Shellpoint has agreed to undertake meaningful business reforms to address the aspects of the mortgage statements that Plaintiff alleged were misleading and ran afoul of the FDCPA. ECF 54-1 Art. IV.

The payment of attorneys' fees, expenses, and the costs of claims administration will be paid on top of the maximum recovery allowed by statute. Thus, 100% of the Settlement Fund

will go to class members, with any unclaimed balance to a *cy pres* recipient approved by the Court.

Accordingly, this factor also supports the requested fee.

C. Counsel's Expenses Are Reasonable and Should Be Reimbursed

"Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *Caddick v. Tasty Baking Co.*, 2021 WL 4989587, at *9 (E.D. Pa. Oct. 27, 2021). *Accord Linerboard,* 2004 WL 1221350, at *3 n.6.

Plaintiff's counsel expended a total of $1,881.05 in out-of- pocket costs and disbursements in this litigation through June 30, 2022. Lederer Decl. ¶ 61. This amount is more than the $1,300.00 Shellpoint has agreed to separately pay, and consists primarily of costs for Westlaw computer research. *Id.* All of the expenses incurred were reasonable and necessary to the prosecution of this case and are all of the type that are customarily incurred in litigation and routinely charged to clients billed by the hour. *Id.* ¶ 63.

From the beginning of the case, counsel funded this litigation aware that they might not obtain any recovery or reimbursement of the costs they advanced and, at the very least, would not recover anything until the litigation concluded and was successful in producing a recovery. Counsel also understood that, even if the case was ultimately successful, an award of expenses would not compensate counsel for the lost use of the funds advanced. In sum, reimbursement of the requested $1,300.00 in litigation expenses should be approved in full.

D. Plaintiff Should Receive the Requested Service Award

"Incentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class." *Sullivan v. DB Invs., Inc.*, 667

F.3d 273, 333 n.65 (3d Cir. 2011) (citation omitted). "'The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation,' and to 'reward the public service of contributing to the enforcement of mandatory laws.'" *Id.* (quotation omitted).

Here, Plaintiff took steps to protect the interests of the class and spent time pursuing the claims underlying this matter. To start, Plaintiff's initial decision to pursue this case as a class action, and not simply seek individual damages, directly benefited the class. Plaintiff assisted in the development of the facts in this case; assisted in preparing the complaints and amended complaints; produced relevant documents; and conferred with counsel throughout the investigation, litigation and discovery. Lederer Decl. ¶¶ 65-66; Dutcher Decl. ¶ 4.

The requested $2,500 is lower than awards that courts have approved in many similar consumer protection matters. *See, e.g.*, *Brown v. Rita's Water Ice Franchise Co. LLC*, 242 F. Supp. 3d 356, 371 (E.D. Pa. 2017) ($5,000 incentive award); *Barel v. Bank of Am.*, 255 F.R.D. 393, 402 (E.D. Pa. 2009) ($10,000 incentive award).

Conclusion

Plaintiff respectfully requests that the Court grant the requested attorneys' fees, reimbursement of expenses and service award in full.

Dated: July 6, 2022

Respectfully submitted,

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