

**IN THE MISSOURI CIRCUIT COURT
FOR THE TWENTY-FIRST JUDICIAL CIRCUIT
ST. LOUIS COUNTY**

**ASSOCIATED MANAGEMENT)
SERVICES, INC., and CHARLES)
D. FUSZNER, D.M.D., P.C.,)
individually and on behalf of all)
others similarly situated,)**

Plaintiffs,

v.

**MEDICAL WASTE SERVICES,)
LLC d/b/a MEDICAL WASTE)
SERVICES and LARRY D. CASEY,)**

Defendants.

No. 19SL-CC00832-01

Div. 35

**PLAINTIFFS’ MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT**

I. INTRODUCTION.

On February 11, 2020, this Court preliminarily approved the Settlement Agreement and Release (“Agreement” or “Settlement Agreement”) (**Exhibit 1**) reached between Plaintiffs Associated Management Services, Inc. (AMS), and Charles D. Fuszner, D.M.D., P.C. (Fuszner), and Defendants Medical Waste Services, LLC d/b/a Medical Waste Services and Larry D. Casey in this action under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Simultaneously, this Court directed Notice to be disseminated to the Settlement Class. The Notice plan approved by the Court has now been implemented and direct notice has reached 90.5% of the Settlement Class. Not one of the 4,466 members of the Settlement Class objected or opted out. The fact that no objections were filed—despite direct notice and the constant presence of an aggressive

professional objectors' bar—is a testament to the strength and fairness of the Agreement. The response from members of the Settlement Class has been unanimously positive.

The Agreement—which resulted following all-day mediation and many subsequent rounds of negotiations—is an excellent result for the proposed Settlement Class (“Class”), as it provides for a \$60 cash benefit to the members of the Class. In addition, Defendants have agreed to prospective relief regarding future fax advertisements. Defendants agreed to pay \$250,000 into a Settlement Fund for the 4,466 unique fax numbers to which the faxes were sent, inclusive of attorney’s fees and expenses to Class Counsel for which Class Counsel would not request more than \$82,500 and for incentive awards to AMS and Fuszner for which those plaintiffs would not request more than \$10,000 and \$5,000, respectively. Defendants also agreed to pay all costs of notice and administration from the Settlement Fund. In consideration for the Agreement, Plaintiffs, on behalf of the Class, agreed to dismiss this Action and unconditionally release and discharge Defendants and other Released Parties from all claims relating to this Action.

The fairness, adequacy, and reasonableness of the Settlement compare favorably to other recent TCPA settlements, both in Missouri and across the country, especially when considered in light of the hurdles that would have been involved in obtaining a class-wide judgment. *See, e.g., Prater v. Medicredit, Inc.*, No. 4:14-cv-00159-ERW, Doc. Nos. 73-74 (E.D. Mo. July 13, 2015) (preliminarily approving settlement providing minimum payout of \$9.05 per claim); *Lees v. Anthem Ins. Cos., Inc.*, No. 13-cv-1411-SNLJ, Doc. 74 (E.D. Mo. June 10, 2015) (providing minimum payout of \$36 per claim); *see also Stephan Zouras LLP v. American Registry LLC*, No. 1:14-cv-00943, Doc. Nos. 44, 69 (N.D. Ill. Aug. 21, 2015) (finally approving settlement that provided for cash payment of \$20 to each claiming class member and optional video subscription); *In re: Zydus Unsolicited*

Fax Litig., No. 13-cv-3105, Docs. 50, 82 (N.D. Ill. July 9, 2015) (preliminarily approving fax settlement providing for maximum benefit amount of \$30 subject to reduction).

Moreover, Defendants denied that Plaintiffs' claims could be certified as a class action if this case were to proceed. They contended, among other alleged deficiencies, that Plaintiffs' proposed class is not ascertainable, that individual issues predominate over any common ones, and that a class action would be neither superior nor manageable.

If the Agreement is finally approved, each claiming Settlement Class member will promptly receive a \$60 cash benefit, Defendants will change their practices to ensure TCPA compliance, and the Parties will be able to end this litigation. As detailed below, Plaintiffs request that the Court grant final approval.

II. BACKGROUND.

A. Plaintiffs' Allegations.

In the Amended Class Action Junk-Fax Petition (Amended Petition), Plaintiffs allege that in the relevant time period, dating back to February 25, 2015, Defendants violated the TCPA by sending unsolicited fax advertisements that did not contain the required opt-out notice and without prior express invitation or permission or an established business relationship. Plaintiffs assert class-wide claims for violations of the TCPA, and seek statutory damages of \$500 per negligent violation and \$1,500 for each knowing or willful violation. Defendants deny having violated the TCPA or any law and raised a host of defenses to Plaintiffs' claims.

B. Relevant Procedural History.

In February 2019, AMS filed a Class Action Junk-Fax Petition in this Court in *Associated Management Services, Inc. v. Medical Waste Services, LLC d/b/a Medical Waste Services*, Case No. 19SL-CC00832, and in Count I alleged violation of the TCPA.

AMS then served Medical Waste Services with interrogatories and requests for production of documents.

Medical Waste Services removed the case to the Eastern District of Missouri in April 2019, where it was assigned to United States District Judge Rodney W. Sippel as Case No. 4:19-cv-00912-RWS (Federal Action). Defendants then jointly answered, raising thirty-two affirmative defenses. The district court set a scheduling conference, ordering AMS and Defendants first to confer and to submit a joint proposed scheduling plan. After conferring and exchanging additional information, AMS and Defendants jointly moved for a stay to allow early mediation. Rather than grant a stay, the district court reset the conference to allow time for mediation.

On September 23, 2019, AMS and Defendants engaged in mediation in St. Louis before Robert Litz, USA&M's Senior Vice President. At mediation, AMS informed Defendants that Fuszner had also received alleged unsolicited fax advertisements from them. Progress was made, but no settlement was achieved at mediation.

After mediation, AMS and Defendants filed their proposed scheduling plan and the case moved forward. AMS served more discovery requests and moved for remand based on Defendants' answer and affirmative defenses wherein Defendants maintained that AMS and the putative class lacked standing under Article III of the United States Constitution. After Defendants responded in opposition and AMS replied, the district court denied AMS's remand motion as premature and without prejudice.

At the federal courthouse on November 7, 2019, moments before commencing the scheduling conference, AMS and Defendants agreed in theory to a settlement, which included adding Fuszner as an additional Class Representative. Thereafter, AMS and Defendants filed a joint motion to remand, which the district court granted.

Following remand, AMS filed a Rule 55.34 list of documents filed in federal court and then a Consent Motion for Leave To File Amended Class Action Junk-Fax Petition and To Add an Additional Plaintiff, i.e., Fuszner, along with the proposed amended petition. This Court granted the Consent Motion on January 7, 2020. Shortly thereafter, the Parties finalized the Agreement. On February 11, 2020, the Court granted Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and ordered notice to the Class.

III. TERMS OF THE SETTLEMENT AGREEMENT.

The key terms of the Agreement, **Exhibit 1**,¹ are summarized as follows:

A. Appointment of two Class Representatives and appointment of Class Counsel.

"[T]he Parties agree to the appointment of Plaintiffs as Class Representatives and to the appointment of Ronald J. Eisenberg as Class Counsel for the Settlement Class."

(Ex. 1 § 4.01.)

B. Class Definition

All persons in the United States who from February 25, 2015, until [February 11, 2020], (1) were sent by or on behalf of Defendants a telephone facsimile message of material advertising the commercial availability or quality of any property, goods, or services, (2) with respect to whom Defendants cannot provide evidence of prior express invitation or permission for the sending of such fax or (3) with whom Defendants did not have an established business relationship, and (4) the fax identified in subpart (1) of this definition (a) did not display a clear and conspicuous opt-out notice on the first page stating that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under 47 C.F.R. § 64.1200(a)(4)(v) is unlawful, (b) did not display a clear and conspicuous opt-out notice on the first page with a telephone number for sending the

¹ Exhibits A through E of the Settlement Agreement were attached to Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, filed on February 10, 2020, and, for purposes of brevity are incorporated by reference rather than reattached hereto.

opt-out request, or (c) did not display a clear and conspicuous opt-out notice on the first page with a facsimile number for sending the opt-out request.

(*Id.* § 2.07.) Excluded from the Class are (a) Defendants and their employees, agents, and representatives, (b) the judge to whom the Action is assigned; and (c) any member of the judge’s staff or immediate family. (*Id.*)

C. Types of Relief.

1. Monetary Relief.

There are 4,466 Settlement Class Members. A “Qualified Class Member” means a Settlement Class Member who submits a claim for a payment that meets the requirements of Section 10.03 of the Agreement and is approved pursuant to Section 11.01. (Ex. 1 § 2.24.) Defendants agreed to provide to each Qualified Class Member \$60. (*Id.* § 5.01.)

2. Prospective Relief.

Defendants have also agreed to injunctive relief requiring that all future unsolicited faxed advertisements they send will comply with the TCPA and corresponding regulations. (*Id.* § 5.03.) The Agreement includes the text of the opt-out language Defendants will use on any future unsolicited faxed advertisements. (*Id.*)

D. Claims Process

Settlement Class Members shall be entitled to submit through the Settlement Website or by mail a completed Claim Form to the Claims Administrator. (*Id.* § 10.02.) All claims must be submitted by the Claims Deadline in the Settlement Notice. (*Id.*) When submitting a claim, Settlement Class Members must provide their name, current address, telephone number, and facsimile number at which they received a Fax Advertisement during the Class Period, and must also attest to the truth of the information provided on the Claim Form. (*Id.* § 10.03 & Ex. E.)

E. Payment of Notice and Administration Expenses

Defendants have agreed to pay all costs of providing notice and settlement administration through the Claims Administrator. (*Id.* § 8.02.)

F. Incentive Awards for Class Representatives

In recognition of Plaintiffs' devoted service to the Class and significant financial benefit conferred to the Class time, Class Counsel will petition the Court for incentive awards not to exceed \$10,000 for AMS and \$5,000 for Fuszner. (*Id.* § 6.02.)

G. Payment of Attorney's Fees and Expenses

Class Counsel will move for an award of attorney's fees and expenses to be paid from the Settlement Fund. (*Id.* § 6.01.) The requested fees and expenses will not exceed \$82,500, which equals slightly less than one-third of the Settlement Fund. (*Id.*)

H. Release of Liability

In exchange for the relief described above, Defendants will receive full release of all claims related to the faxed advertisements to Settlement Class Members. (*Id.* § XV.)

IV. THE IMPLEMENTED NOTICE PLAN SATISFIES DUE PROCESS.

Missouri Supreme Court Rule 52.08(e) governs the settlement of class actions and requires that notice of the proposed compromise shall be given to all members of the class as the court directs. Under Rule 52.08(e), the notice must satisfy due process and, thus, must fairly apprise the prospective members of the class of the terms of the settlement and of the options that are open to them in connection with the proceedings. *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 385 (Mo. Ct. App. W.D. 1997). The information need only be general in nature and can refer the putative class members to the court or counsel for detailed information. *Id.*

The notice must be the "best notice practicable under the circumstances, including

individual notice to all members who can be identified through reasonable effort.” Mo. S. Ct. R. 52.08(c)(2); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). Here, in compliance with the preliminary approval order, Rule 52.08, and due process, the Class Notice was issued. It clearly and accurately described the nature of the litigation and the Settlement Agreement’s terms, the Settlement Class members’ options and rights, and the information required by Rule 52.08(c)(2). The Notice explained that Settlement Class members could object to the Agreement, which included the attorney’s fees and incentive awards to be sought, or could opt out.

In addition to containing proper content, the Notice was originally mailed to 4,466 Settlement Class members.² (Ex. 2 ¶ 3 & Ex. A thereto.) Out of the 694 Notices that were returned undeliverable, the Settlement Administrator was successfully able to reach 258 by re-mailed notices. (Ex. 2 ¶ 4.) All told, of the 4,466 Settlement Class members, 4,030 (90.5%) received actual notice. (*Id.*) This high percentage of actual notice achieved easily exceeds the 70% reach generally considered reasonable. *Federal Judicial Ctr., Judges’ Class Action Notice & Claims Process Checklist & Plain Language Guide 3* (2010) (notice plan reaching at least 70% of class is reasonable); see *Barfield v. Sho-Me Power Elec. Co-op.*, No. 11-cv-04321, 2013 WL 3872181, at *14 (W.D. Mo. July 25, 2013) (court is only required to provide best practicable notice to those members identifiable by reasonable effort—not achieve actual notice on every potential class member). Thus, the Class Notice satisfied Rule 52.08 and due process. The Settlement Administrator received 270 timely filed claim forms (Ex. 2 ¶ 7), resulting in a percentage of timely-filed claims within the

² On February 18, 2020, the Settlement Administrator received from Medical Waste Services a list of 4,478 persons identified as the Class List; however, after removing duplicate records and processing the names and addresses through the National Change of Address Database to update any addresses on file with the United States Postal Service, a total of 4,466 addresses were found and updated with available addresses. (Ex. 2 ¶ 3.)

normal range typically received in TCPA fax class actions. Additional timely-filed claim forms are expected to arrive until June 5, 2020, which will increase the claims rate. (*Id.*)

V. THE SETTLEMENT AGREEMENT WARRANTS FINAL APPROVAL.

A. Standard for Judicial Evaluation and Approval.

The Settlement Agreement is the product of extensive, arms-length, and hard-fought negotiations. The negotiations were conducted by Class Counsel, who is highly experienced in litigating and settling class actions and, in particular, TCPA class actions, and by Defendants' counsel, also experienced in defending class actions. "When determining if a settlement is fair, reasonable, and adequate, the court must consider: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members." *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 266 (Mo. Ct. App. E.D. 2011). "In reviewing the class-action settlement to determine whether it is fair, reasonable, and adequate under Rule 52.08, [the appellate court applies] an abuse of discretion standard." *Id.* at 265. As demonstrated below, each of the standards for finding that the Settlement Agreement is "fair, reasonable, and adequate" are easily met.

1. Absence of Fraud or Collusion.

As discussed above, the Parties litigated this matter aggressively. They engaged in arm's-length settlement negotiations, with many rounds of negotiations, as well as mediation. The Agreement, if approved, will make substantial monetary relief available to the Settlement Class. These facts demonstrate that there was no fraud or collusion.

2. The likely costs, complexity, and length of further litigation.

Class actions have a well-deserved reputation for complexity. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 315 (N.D. Ga. 1993). There is no exception here. Absent settlement, Defendants would vigorously oppose the claims asserted. Plaintiffs and Class Counsel recognize and acknowledge the time, expense, and risk of the proceedings necessary to prosecute the litigation against Defendants through motion practice, further written discovery, depositions, trial, and potential appeals. Such further litigation against Defendants here, or on appeal, would be extremely expensive for the Settlement Class, would cause substantial delay, and would not move them closer to collecting any compensation. Absent settlement, a lengthy and expensive trial would be a virtual certainty. Given the nature of the case, an appeal would likely be exercised. The Settlement Agreement avoids all these expenses and uncertainties.

3. The Stage of the Proceedings and the Amount of Discovery Completed.

The stage of proceedings and amount of discovery, which is described in Section II.B. above, supports final approval. Plaintiffs propounded discovery and obtained information to evaluate the strengths and weaknesses of their case.

Moreover, the law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. *See In re Charter Communications, Inc., Securities Litig.*, No. MDL 1506, 4:02-CV-1186 CAS, 2005 WL 4045741, at *4 (E.D. Mo. June 30, 2005) (“Settlement . . . minimizes the litigation expenses of both Parties and also reduces the strain such litigation imposes upon already scarce judicial resources.”); *Cotton v.*

Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977) (“[T]here is an overriding public interest in favor of settlement.”). This case is ideally positioned for settlement.

4. Probability of Plaintiffs’ Success on the Merits.

Generally, surety of settlement makes it the favored policy as compared to the dangers and unforeseen hazards of litigation. See *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. MDL 1559 4:03–MD–015, 2004 WL 3671053, at *11 (W.D.Mo. Apr. 20, 2004) (citing *In re BankAmerica Corp. Secs. Litig.*, 210 F.R.D. 694, 701 (E.D.Mo. 2002)). Prevailing class-wide on contested TCPA cases is difficult.

Plaintiffs alleged that Defendants faxed unsolicited advertisements to Plaintiffs and a class of others in violation of the TCPA. Specifically, Plaintiffs submit that Defendants sent facsimile advertisements to 4,466 unique fax numbers. Defendants, meanwhile, denied and continue to deny that they violated the TCPA or that Plaintiffs would have been able to obtain a contested class certification. While Plaintiffs presented a strong case, class action suits, especially ones vigorously defended by experienced counsel, are notoriously difficult and unpredictable.

A settlement, however, eliminates the risk associated with litigation and provides a beneficial and certain resolution of the litigation for the Settlement Class. Due to the risks and expenses involved in pursuing the lawsuit to conclusion, the likelihood of protracted litigation, the costs of one or more procedural and substantive appeals, and the likelihood of realistically collecting an amount in excess of this Settlement, reaching this settlement is a fair, reasonable, and adequate result for the Class.

5. Range of Possible Recovery.

The range of reasonableness of the settlement fund in light of the best possible recovery following trial favors settlement here. As discussed more fully above, there is no

assurance that Plaintiffs, on behalf of a class, would obtain a judgment after trial exceeding the settlement amount agreed to in the proposed settlement. Further, this case could be thrown out at summary judgment or on appeal, or certification could be denied or a jury could find that there is no liability or damages—thus providing no recovery.

As such, the realistic range for this case is anywhere from no recovery at all to an award of statutory damages, followed by uncertain collection efforts. As discussed, the Agreement, if approved, makes available substantial cash relief to the Settlement Class now and alleviates all uncertainties. Courts have found these circumstances strongly favor settlement. *See, e.g., Ring v. Metropolitan St. Louis Sewer Dist.*, 41 S.W.3d 487, 493 (Mo. Ct. App. E.D. 2000) (“The trial court was entitled to take into account the delays and risks of protracted litigation and the benefits of certainty of settlement compared to the uncertainty of litigation.”). Accordingly, the \$250,000 settlement, including \$60 for each valid claim, is fair, reasonable, and adequate for the Settlement Class.

6. Opinion of Counsel and Class Members.

Plaintiffs and Class Counsel have concluded that the terms and conditions provided for in the Settlement Agreement are fair, reasonable, adequate, and in the best interests of the Class as a means of resolving this litigation. Class Counsel has substantial experience litigating TCPA class actions and has been appointed class counsel in many cases, including TCPA cases. *See, e.g., See Golan v. Veritas Entm’t, LLC*, No. 4:14CV00069 ERW, 2017 WL 193560, at *5 (E.D. Mo. Jan. 18, 2017) (obtaining appointment as class counsel in contested TCPA robocall case involving 3.3 million illegal calls; noting that “Plaintiffs’ counsel are respected attorneys who have handled litigation of this magnitude in the past”); *Ryoo Dental, Inc. v. OCO Biomedical, Inc.*, 8:16-cv-01626-DOC-KES (Doc. 39) (C.D.Ca. Nov. 21, 2017) (nationwide TCPA class action);

Connector Castings, Inc. v. Arshon Silicon Technologies, Inc., No. 4:15-cv-01148-PLC (Doc. 64) (E.D. Mo. Sept. 21, 2016) (same); *Suzanne Degnen, D.M.D., P.C. v. Zimmer Dental, Inc.*, No. 4:15-cv-01103-RLW (Doc. 47) (E.D. Mo. Apr. 20, 2015) (same); *BPP v. Brasseler U.S.A. Dental*, No. 1811-CC00778 (St. Charles County Cir. Ct. 2018) (\$4.9 million nationwide TCPA class action). *Performance Chiropractic v. Aspen Medical Prods., Inc.*, 17SL-CC02661 (St. Louis County Cir. Ct. May 14, 2018) (appointed lead counsel in nationwide TCPA settlement); *BPP v. Integrated Media Solutions, LLC*, No. 17SL-CC01069-01 (St. Louis County Cir. Ct. May 11, 2018) (appointed lead counsel and obtained final approval in nationwide TCPA settlement involving 25,000 faxes); *Swinter Group, Inc. v. FleetOne, L.L.C.*, No. 1611-CC00730-01 (St. Charles County Cir. Ct. Jan. 19, 2018) (appointed lead counsel in TCPA settlement with 15,000 class members).

Under these circumstances, Class Counsel suggests that the Court should give weight to his opinion that the Settlement Agreement is fair, adequate, and reasonable.

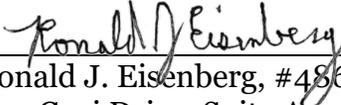
Further, the fact that no one objected to or opted out of the settlement (Ex. 2 ¶ 9) demonstrates the Settlement Class's overwhelming approval of the settlement. *See Wiles v. Southwestern Bell Tel. Co.*, No. 09-4236-CV-C-NKL, 2011 WL 2416291, at *4 (W.D. Mo. June 9, 2011) ("Having no objectors demonstrates strong support for the value and benefits delivered by the settlement."); *In re UnitedHealth Group Inc. PSLRA Litig.*, 643 F.Supp.2d 1094, 1100 (D. Minn. 2009) (citing *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1152 (8th Cir. 1999) (approving settlement where fewer than 4% of class objected)).

VI. CONCLUSION.

As discussed above, Plaintiffs request final approval of the Settlement Agreement as fair and reasonable and request any additional relief deemed just and proper.

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CERTIFICATE OF SERVICE

The above-signed certifies that this motion was filed through the eFiling system on April 29, 2020, and thus served by email to all registered counsel of record.