UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DR. STEVEN ARKIN, Plaintiff, v. SMITH MEDICAL PARTNERS, LLC, *et al.*, Defendants.	)	No. 8:19-cv-01723-CEH-AEP Consolidated with: No. 8:119-cv-2410-T-36TGW

PLAINTIFF ARKIN'S MOTION FOR ATTORNEY FEES IN THE EVENT THE *PRESSMAN* SETTLEMENT GAINS FINAL APPROVAL

Plaintiff, Dr. Steven Arkin ("Plaintiff" or "Arkin"), and his counsel, Anderson + Wanca ("Arkin Counsel"), hereby move for an award of attorney fees in the event that the Court grants final approval to the settlement it preliminarily approved on August 4, 2020 (the "*Pressman* Settlement").[1] In the *Pressman* Settlement, Pressman, Inc. and its counsel, Bock Hatch Lewis & Oppenheim ("Bock Hatch"), propose to treat the 1,660 claims filed by class members in the *Arkin* Settlement negotiated by Arkin Counsel as valid claims in the *Pressman* Settlement. (Doc. 55-1, *Pressman* Settlement Agreement § III.1.e). Those claims were filed solely due to Arkin Counsel's work in identifying, filing, and litigating the case against Defendants Smith Medical Partners, LLC and H.D. Smith LLC ("Defendants"), and in the event the Court grants final approval to the *Pressman* Settlement, all attorney fees attributable to the 1,660 claims submitted in the *Arkin* Settlement should be paid to Arkin Counsel.

[1] Objections to final approval of the *Pressman* Settlement are due October 19, 2020, per the Preliminary Approval Order. (Doc. 80, ¶ 18).

Background

On September 15, 2017, Plaintiff Arkin, a medical doctor, received a fax from "Smith Medical Partners" asking Arkin to make Defendants "your one-stop shop for all your pharmaceutical needs" and listing the prices of various pharmaceutical drugs. (Doc. 1-1, Ex. A to Complaint). Arkin and his counsel, Anderson + Wanca, promptly determined that the fax was sent without Arkin's "prior express invitation or permission" or any other justification, and filed suit just 11 days later, on September 26, 2017, alleging Defendants sent Arkin and a putative class of other persons or entities "unsolicited advertisements" by facsimile in violation of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(C). The action was styled *Dr. Steven Arkin v. Smith Medical Partners, LLC & H.D. Smith, LLC*, 8:17-cv-2233-CEH-AEP (M.D. Fla) ("*Arkin I*").

Arkin I was litigated for nearly a year. Arkin issued written discovery on November 28, 2017, and Defendants filed their Answer on December 22, 2017. (Declaration of Ross M. Good ("Good Decl.") ¶ 3 (citing *Arkin I* Doc. 28)). Shortly thereafter, the parties discussed the possibility of participating in private mediation, and on or about February 9, 2018, by agreement of the parties and to further potential settlement discussions, Defendants produced voluminous documents relating to the faxing at issue, including but not limited to transmission logs, fax templates, and exception logs related to 3,278 fax broadcasts. (Good Decl. ¶ 3). Arkin Counsel analyzed the 3,278 fax broadcasts to determine whether each constituted TCPA violations within the *Arkin I* class period. (*Id.* ¶ 4). The parties participated in numerous discussions regarding the scope of class definition that would be applicable for any potential settlement. (*Id.*)

On or about February 28, 2018, Arkin Counsel became aware that Defendants' counsel would be replaced shortly with Defendants' current counsel, Jaszczuk P.C. (*Id.* ¶ 5). Thereafter, Defendants' current counsel removed Arkin Counsels' access to the documents Defendants

produced in preparation of private mediation. (*Id.*) Defendants then filed a Motion for Entry of Protective Order and Confidentiality Order. (*Id.* (citing *Arkin I* Doc. 52)). On May 4, 2018, Arkin filed a Motion to Amend Scheduling Order and Motion to Compel the discovery that was previously provided. (*Id.* ¶ 6 (citing *Arkin I* Docs. 58–59)). On June 25, 2018, the Court entered an Amended Case Scheduling Order. (*Id.* ¶ 7 (citing *Arkin I* Doc. 73)). On June 28, 2018, Magistrate Judge Porcelli ruled on the Motion for Entry of Protective Order and Confidentiality Order and Arkin's Motion to Compel; no appeal was taken of Magistrate Judge Porcelli's decision. (*Id.* (citing *Arkin I* Doc. 75)).

On July 6, 2018, Arkin disclosed Robert Biggerstaff ("Biggerstaff") as his expert witness. (*Id.* ¶ 8). On August 15, 2018, Plaintiff served Biggerstaff's expert report based upon his review of the materials produced as a result of Magistrate Judge Porcelli's order. (*Id.*) Arkin Counsel and Defendants thereafter negotiated a settlement (the "*Arkin* Settlement") in which Defendants would make available a fund of $21 million for payment of attorney fees and expenses and claims of class members. In all, Arkin Counsel devoted 671.95 hours of professional time in litigating *Arkin I*. (*Id.* ¶ 10).

On August 27, 2018, pursuant to the parties' agreement, this Court dismissed *Arkin I*, and the case was re-filed in state court in Illinois, where Defendants are located, in *Arkin v. Smith Medical Partners, LLC and H.D. Smith*, No. 18 CH 894 (Ill. Cir. Ct., Lake Cty.) ("*Arkin II*"), for the purpose of obtaining approval of the *Arkin* Settlement. The *Arkin II* court preliminarily approved the *Arkin* Settlement. Arkin Counsel caused notice of the settlement to be sent to the Class, and 1,660 class members filed claims to share in the proceeds, meaning each class member would receive $493 with no "pro rata" reduction, after payment of attorney fees and expenses. However, one objection to the *Arkin* Settlement was filed by Pressman and other

entities represented by Bock Hatch. (Doc. 59-1, Pill Box Preliminary Objections to Proposed Class Action Settlement). Bock Hatch objected on numerous grounds, including that Defendants' potential exposure was at least $1 billion given the number of faxes involved, and yet "the $21 million settlement fund proposed by the parties is just 2.1% of that potential $1 billion exposure," arguing the case was not "worth 2 cents on the dollar." (*Id.* at 16).

After Bock Hatch filed its objections to the *Arkin II* settlement, Defendants exercised their right to terminate the settlement "rather than engage in what promised to be a protracted and acrimonious objection process" (Doc. 56, Defs.' Mot. Stay Pending Preliminary Approval at 2), given the history between Bock Hatch and Arkin Counsel. *See Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 697 (11th Cir. 2017) (recounting Bock Hatch's unsuccessful "Machiavellian" plan to "underbid" Anderson + Wanca in settling that case). Pursuant to the terms of the agreement, Arkin was required to refile the case in the Middle District of Florida, and Arkin filed this action, *Arkin v. Smith Medical Partners, LLC & H.D. Smith*, No. 8:19-cv-01723-CEH-AEP (M.D. Fla.) ("*Arkin III*").

In addition, after the termination of the *Arkin II* settlement, Arkin Counsel filed *Sawyer v. Smith Medical Partners, LLC & H.D. Smith*, No. 1:19 cv 0803 (N.D. Ill.) ("*Sawyer*"), in the Northern District of Illinois asserting TCPA claims against Defendants. Bock Hatch filed a putative class action in Lake County, Illinois on behalf of Pressman and the other "Pill Box" entities, *Pressman, Inc., et al. v. Smith Medical Partners, LLC, et al*., No. 2019 CH 710 (Ill. Cir. Ct. Lake Cty.) ("*Pressman*"), which Defendants removed to the Northern District of Illinois. The *Sawyer* and *Pressman* actions were transferred to this Court and consolidated with *Arkin III*. (*See Sawyer* Doc. 60).

On February 18, 2020, Pressman filed a Motion for Preliminary Approval revealing that "[i]n the months following the cancellation of the *Arkin* settlement," Bock Hatch and Defendants had been negotiating a new settlement without the involvement of Arkin Counsel. (Doc. 55, Mot. Prelim. Approval at 2). The *Pressman* Settlement provides a fund of $4.5 million, about one-fifth the size of the fund in the *Arkin II* settlement, while Bock Hatch will seek $1.125 million in attorney fees, leaving each of the 46,988 class members with a guaranteed right to claim a share of approximately $71.82 ($3,375,000 / 46,988). (*Id.* at 11).

The motion for preliminary approval explains that, under the *Pressman* Settlement, "Class members who submitted claims in the canceled *Arkin* settlement will be considered to have already submitted their claims here and need take no further action to receive their share of the Settlement Fund." (*Id.* at 10). The *Pressman* Settlement states that "[t]he Settlement Administrator will treat as a Valid Claim Form each 'Valid Claim Form' submitted in the Arkin Settlement, unless the claimant submits an opt-out request in this Settlement." (Doc. 58-1, *Pressman* Settlement Agreement § III.1.f). The proposed class notice attached to the *Pressman* Settlement Agreement states, "*NOTE: If you submitted a claim in the canceled settlement in Arkin v. Smith Medical Partners, LLC, et al., Case No. 18 CH 984 (Lake County, IL), your claim will be honored in this settlement and you do not need to submit another claim form. To check on the status of your Arkin claim, you can call the settlement administrator at* _____." (Doc. 55-1, PageID 520).

As to "[t]he remaining 45,328" class members who did not submit claims in the *Arkin* Settlement, Bock Hatch argued those class members "will have another chance to submit a claim following a better notice program" than the notice in *Arkin II*. (Doc. 55, Mot. Prelim. Approval at 19). Specifically, Bock Hatch argued that "the notice and claim form will be sent both by U.S.

Mail and by facsimile, rather than only one way as in *Arkin 2*, in order to improve the reach of the notice and encourage claims participation." (*Id.* at 9). Bock Hatch states that if its "better notice program" it may be able to "double the claims rate to 8%," and argued the *Pressman* Settlement is superior to the *Arkin* Settlement because even with that doubled claims rate "claimants would still get $900 each, nearly double what Arkin supported." (Doc. 65, Pressman Reply Supp. Mot. Prelim. Approval at 3).

Arkin opposed the motion for preliminary approval of the *Pressman* Settlement, arguing (1) a lack of Rule 23(a)(4) adequacy of counsel, citing *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 697 (11th Cir. 2017); and (2) that the *Pressman* Settlement is not within the reasonable "range of recovery" under *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 770 (11th Cir. 1991). (Doc. 60, Pl. Arkin's Resp. Renewed Mot. Preliminary Approval at 2). Nevertheless, the Court granted preliminary approval to the *Pressman* Settlement by oral order at the hearing on the motion for preliminary approval on June 23, 2020 (Doc. 76), and by written order on August 4, 2020. (Doc. 80, Order Preliminarily Approving Class Action Settlement). The Court set the deadline for transmission of class notice by August 18, 2020; for "Motion for Attorney Fees and Incentive Award" by October 4, 2020;[2] for class members to opt out of the class or object to the *Pressman* Settlement by October 19, 2020; for class members to submit claims to the Settlement Administrator by November 16, 2020; for motion for final approval by November 23, 2020; and for a final approval hearing on December 10, 2020. (*Id.* at 7).

[2] October 4, 2020, was a Sunday. This Motion is timely filed Monday, October 5, 2020, pursuant to Fed. R. Civ. P. 6(a)(1)(C).

Argument

I. If the Court grants final approval of the *Pressman* Settlement, the attorney fees attributable to claims made in the *Arkin* Settlement should be allocated to Arkin Counsel.

Under Fed. R. Civ. P. 23(h), in a certified class action, and upon timely motion, the Court "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Here, although an award of attorney fees to Arkin Counsel is not provided for in "the parties' agreement," it is nonetheless "authorized by law."

Rule 23(h) "provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, *not only the award to class counsel*." Fed. R. Civ. P. 23(h), Advisory Committee Notes to 2003 Amendments (emphasis added). "In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel." *Id.* "The common-fund theory may call for awarding attorney fees to counsel other than class counsel," and "[i]f the court has appointed as class counsel attorneys who did not file one of the original complaints . . . attorneys who investigated and filed the case might be entitled to a fee award." *Manual for Complex Litig.* § 21.71 (4th ed.).

Here, there would be no case to settle but for the actions of Arkin Counsel in identifying, investigating, and filing this case in 2017, and subsequently obtaining the discovery necessary to identify the scope of the class and the number of potential violations. Although Arkin Counsel have not been formally "selected as class counsel," the relevant question in deciding whether to award fees from a common fund is whether the attorneys "have indeed conferred a benefit on the class," as Arkin Counsel have here. *Gottlieb v. Barry*, 43 F.3d 474, 489 (10th Cir. 1994).

In *Gottlieb*, for example, the Tenth Circuit reversed a district court's order awarding no attorney fees from the settlement fund to "non-designated counsel" who were not appointed class counsel, but who had initially filed and "vigorously pursued" their cases "for sixteen months before class counsel was designated." *Id.* at 488. The Tenth Circuit held that "it seems implausible that all of sixteen months of work, pursued on multiple fronts by multiple counsel, suddenly becomes worthless upon the selection of a few counsel to serve as class counsel." *Id.* at 489. The court found no reason why "the work of counsel later designated as class counsel should be fully compensated, while the work of counsel who were not later designated class counsel, but on whose shoulders class counsel admittedly stood, should be wholly uncompensated." *Id.*; *see also Vaughan Milliron v. T-Mobile USA, Inc.*, No. CIV.A. 08-4149 (JLL), 2009 WL 3345762, at *22 (D.N.J. Sept. 10, 2009) (awarding non-class counsel 16% of fee award for work done prior to appointment of class counsel on behalf of California class, where 16% of nationwide settlement class resided in California).

The same reasoning applies here. Arkin Counsel initially filed and "vigorously pursued" the case against Defendants for over a year in *Arkin I*, devoting 671.95 hours of professional time for a "lodestar" of $360,080. (Good Decl. ¶ 10). The 1,660 claims submitted in the *Arkin* Settlement are attributable to Arkin Counsel's efforts. Pressman, in contrast, was not even aware of a potential TCPA case against Defendants until the "Pill Box" entities "received notice of the *Arkin 2* settlement and then objected to it." (Doc. 65, Pressman Reply Supp. Mot. Prelim. Approval at 8). If Bock Hatch is confident that its "better notice program" will increase the claims rate, and perhaps even "double the claims rate to 8%" (Doc. 65, Pressman Reply Supp. Mot. Prelim. Approval at 3), then Bock Hatch would be entitled to their share of attorney fees attributable to that additional benefit to the Class.

In sum, if the Court grants final approval of the *Pressman* Settlement and awards attorney fees from the settlement fund, it should allocate to Arkin Counsel the attorney fees attributable to the 1,660 claims submitted in the *Arkin* Settlement.

II. If the Court grants final approval to the *Pressman* Settlement, the appropriate attorney fee is the 25% "benchmark."

The *Pressman* Settlement contemplates that attorney fees will, subject to Court approval, be 25% of the $4.5 million fund. (*Pressman* Settlement Agreement § VI.1.A). Plaintiff Arkin agrees that this is the appropriate percentage, as the Eleventh Circuit "benchmark" rate. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991). "The Eleventh Circuit made clear in *Camden I* that percentage of the fund is the exclusive method for awarding fees in common fund class actions." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011) (citing *Camden I*, 946 F.2d at 774).

The Eleventh Circuit identified 12 non-exclusive factors in awarding attorney fees from a common-fund class settlement: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; (12) awards in similar cases. *Camden I*, 946 F.2d at 772 n.3 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir.1974)). These factors are guidelines, and the Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1333 (S.D. Fla. 2001) (quoting *Camden I*, 946 F.2d at 775).

In *Johnson v. NPAS Sols., LLC*, --- F.3d ---, 2020 WL 5553312, at *13 n.14 (11th Cir. Sept. 17, 2020), the Eleventh Circuit recently reaffirmed that *Camden I* "remains good law," and that the percentage-of-the-fund method is the exclusive means for determining attorney fees in a class settlement. The Eleventh Circuit also cautioned, however, that although a fee award is a matter of the district court's discretion, the court must "identify all factors upon which it relied and explain how each factor affected its selection of the percentage of the fund awarded as fees" in making its findings of fact and law pursuant to Rule 52(a). *Id.*, 2020 WL 5553312, at *12.

The first, fourth, and seventh *Johnson* factors—the time and labor, preclusion of other employment, and time limitations imposed, respectively—are interrelated inquires and each support the reasonableness of the request. Arkin filed the first TCPA case against Defendants in September 2017, and litigated *Arkin I* for nearly a year. The case required examination of voluminous electronic discovery, including fax records and other documents produced by Defendants. (Good Decl. ¶ 3–4). The work necessitated by this case diverted counsels' time and resources from being put into other matters. *See Yates v. Mobile Cnty. Pers. Bd.*, 719 F.2d 1530, 1535 (11th Cir. 1983) (expenditure of time necessarily had some adverse impact upon ability of counsel for plaintiff to accept other work, and this factor should raise the amount of the award); *see also Stalcup v. Schlage Lock Co.*, 505 F. Supp. 2d 704, 708 (D. Colo. 2007) (noting *Johnson* "concluded that priority work that delays a lawyer's other work is entitled to a premium").

On the other hand, the case did not involve dispositive motion practice or depositions, as in some cases where the award may exceed the benchmark. *See Camden I Condo. Ass'n*, 946 F.2d at 774-775 (as a general rule, "an upper limit is 50%"); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295–96 (11th Cir. 1999) (affirming attorney fee of 33.3%); *Wolff v. Cash 4 Titles*, No. 03-cv-22778, 2012 WL 5290155, at *6 (S.D. Fla. Sept. 26, 2012) (concluding that

33% is consistent with the market rate in class actions). Thus, the first, fourth and seventh *Johnson* factors justify a 25% fee.

The second, sixth, and tenth *Johnson* factors—the novelty and difficulty of the questions, whether the fee is contingent, and the "undesirability" of the case, respectively—are also interrelated and support the requested cost and fee award. This case was novel in that there was a huge volume of faxing activity, but it required substantial review to determine which faxes were actionable. The ability to recover costs and fees in this case has always been contingent on a successful outcome and substantial recovery because the TCPA does not provide for an award of attorney fees to a prevailing plaintiff. 47 U.S.C. § 227(b)(3). Counsel had to advance the costs and fees, and risked receiving nothing in return. This is important because "[a] determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high." *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007). Indeed, "[a] contingency fee arrangement often justifies an increase in the award of attorney's fees." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1364 (quoting *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d at 1335). Accordingly, some courts have observed that "[a]ttorneys' risk is perhaps the foremost factor in determining an appropriate fee award." *Francisco v. Numismatic Guar. Corp.*, No. 06-61677, 2007 U.S. Dist. LEXIS 96618 at *35 (S.D. Fla. Jan. 30, 2007).

The novelty and contingent nature of the case demonstrate the undesirability of the case. Few lawyers will take on a lawsuit that consumes significant attorney time, involves uncertain questions, and requires the lawyers to advance out-of-pocket costs, with no guarantee of payment. The outcome was anything but certain when Arkin Counsel agreed to take the case,

and thus these factors all weigh in favor of approving a 25% fee. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1364 ("'Undesirability' and relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit, not retroactively, with the benefit of hindsight") (citing *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976)).

The eighth *Johnson* factor looks to the amount involved in the litigation with particular emphasis on the "monetary results achieved" in the case by class counsel. *See Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1202 (S.D. Fla. 2006). Here, Plaintiffs Arkin and Sawyer argued that the $4.5 million amount of the *Pressman* Settlement was too low, given the strength of the case and Defendants' massive potential liability. (Doc. 60, Arkin Resp. Renewed Mot. Prelim. Approval at 6–8). However, the Court disagreed, stating that it considered Arkin's arguments and found the Settlement was "within the range of reasonableness" and that the Court "will likely be able to approve" the Settlement. (Doc. 80, Prelim. Approval Order ¶¶ 5, 7).

The fifth and twelfth *Johnson* factors, the customary fee and awards in similar cases, support approval. Many similar TCPA class settlements provide greater than 25% as a fee. *See Medical & Chiropractic Clinic, Inc. v. KMH Cardiology Centres Inc.*, No. 8:16-cv-00644-SDM-JSS (M.D. Fla. Nov. 17, 2017) (awarding 30% of the settlement fund plus costs); *Medical & Chiropractic Clinic, Inc. v. Ancient Nutrition, LLC*, No. 8:16-cv-2342, Doc. 52 (M.D. Fla. July 11, 2017) (awarding 33% of the settlement fund plus costs). The 25% benchmark is easily justified here.

The remaining *Johnson* factors—the skill required and the experience, reputation, and ability of the attorneys—confirm that the costs and fees sought are reasonable. Arkin Counsel were able to identify and file *Arkin I* within two weeks after Arkin received the Fax, and were

able to obtain the relevant information despite Defendants being represented by experienced top-tier counsel. *See In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d at 1334 ("In assessing the quality of representation, courts have also looked to the quality of the opposition the plaintiffs' attorneys faced."). Arkin Counsel have extensive experience in litigating dozens of TCPA class actions of similar size, scope, and complexity to the instant action. Arkin Counsel regularly engage in complex litigation involving consumer issues and have been lead counsel in numerous TCPA cases. *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 WL 7366255, at *6 (S.D. Fla. Dec. 24, 2014) ("Anderson & Wanca is one of very few firms that specialize in TCPA class actions and so is knowledgeable of the applicable law and experienced in litigating TCPA classes."); *Etter v. Allstate Ins. Co.*, 323 F.R.D. 308, 312 (N.D. Cal. 2017) (finding A+W "experienced TCPA litigators"); *Fauley v. Drug Depot, Inc.*, 323 F.R.D. 594, 601 (N.D. Ill. 2018) (holding A+W "diligently" litigated the case); *Fauley v. Heska Corp.*, 326 F.R.D. 496, 507 (N.D. Ill. 2018) (holding A+W "is experienced, knowledgeable in TCPA cases, competent, and has sufficient resources to pursue this litigation"); *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, 318 F.R.D.712, 720 (N.D. Ill. 2016). The *Johnson* factors confirm that a 25% fee award is reasonable.

III. The Court cannot at present grant an incentive award to any Plaintiff in this action in light of *Johnson v. NPAS*, but Plaintiffs Arkin and Sawyer reserve their right to seek such an award if the Eleventh Circuit or Supreme Court vacates that decision.

Arkin Counsel have not in this motion sought an "incentive award" for Plaintiffs Arkin or Sawyer, in light of the Eleventh Circuit's recent decision in *Johnson v. NPAS Sols., LLC*, --- F.3d ---, 2020 WL 5553312, at *7 (11th Cir. Sept. 17, 2020). In *Johnson*, the majority opinion held that "Supreme Court precedent prohibits incentive awards" for named plaintiffs. *Id.* (citing *Trustees v. Greenough*, 105 U.S. 527 (1882); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885)).

The parties to the appeal in *Johnson* have obtained extensions of time to file petitions for rehearing or rehearing en banc to October 22, 2020. (*Johnson v. NPAS Sols.*, No. 18-12344 (Orders Granting Mots. for Extension Sept. 28, 2020, and Sept. 30, 2020)). Plaintiffs Arkin and Sawyer reserve their right to seek an incentive award in the event that the majority opinion in *Johnson* prohibiting such awards is vacated or reversed.

Local Rule 3.01(g) Certification

Counsel for Arkin and Sawyer hereby certify that prior to filing this motion, on October 5, 2020, they conferred with counsel for the Parties. Defendants' Counsel has advised that they take no position to the relief requested. Counsel for Pressmen has advised that they will oppose the relief sought by Counsel for Arkin and Sawyer.

Conclusion

For the foregoing reasons, if the Court grants final approval to the *Pressman* Settlement, it should award attorney fees of 25% of the fund and allocate all attorney fees attributable to the 1,660 claims filed in the *Arkin* Settlement to Arkin Counsel.

Respectfully submitted,

s/Ross M. Good
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Attorneys for Plaintiffs Arkin & Sawyer

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

s/ Ross M. Good

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DR. STEVEN ARKIN, Plaintiff, v. SMITH MEDICAL PARTNERS, LLC, *et al.*, Defendants.	)	No. 8:19-cv-01723- CEH-AEP Consolidated with: No. 8:19-cv-2410-T-36TGW

DECLARATION OF ROSS M. GOOD

I, Ross M. Good, declare as follows:

1. I am an attorney at Anderson + Wanca, and represent Plaintiff, Dr. Steven Arkin ("Arkin"). I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would testify competently thereto.

2. I represented Arkin in *Dr. Steven Arkin v. Smith Medical Partners, LLC & H.D. Smith, LLC*, 8:17-cv-2233-CEH-AEP (M.D. Fla) ("*Arkin I*").

3. In *Arkin I*, Plaintiff Arkin issued written discovery on November 28, 2017, and Defendants filed their Answer on December 22, 2017. (*Arkin I* Doc. 28). Shortly thereafter, the parties discussed the possibility of participating in private mediation, and on or about February 9, 2018, by agreement of the parties and to further potential settlement discussions, Defendants produced voluminous documents relating to the faxing at issue, including but not limited to transmission logs, fax templates, and exception logs related to 3,278 fax broadcasts.

4. I and other of Arkin's Counsel analyzed the 3,278 fax broadcasts to determine whether each constituted TCPA violations within the *Arkin I* class period. The parties

participated in numerous discussions regarding the scope of class definition that would be applicable for any potential settlement.

5. On or about February 28, 2018, Arkin Counsel became aware that Defendants' counsel would be replaced shortly with Defendants' current counsel, Jaszczuk P.C. Thereafter, Defendants' current counsel removed Arkin Counsels' access to the documents Defendants produced in preparation of private mediation. Defendants then filed a Motion for Entry of Protective Order and Confidentiality Order. (*Arkin I* Doc. 52).

6. On May 4, 2018, Arkin filed a Motion to Amend Scheduling Order and Motion to Compel the discovery that was previously provided. (*Arkin I* Docs. 58–59).

7. On June 25, 2018, the Court entered an Amended Case Scheduling Order. (*Arkin I* Doc. 73)). On June 28, 2018, Magistrate Judge Porcelli ruled on the Motion for Entry of Protective Order and Confidentiality Order and Arkin's Motion to Compel; no appeal was taken of Magistrate Judge Porcelli's decision. (*Arkin I* Doc. 75).

8. On July 6, 2018, Arkin disclosed Robert Biggerstaff ("Biggerstaff") as his expert witness. On August 15, 2018, Plaintiff served Biggerstaff's expert report based upon his review of the materials produced as a result of Magistrate Judge Porcelli's order.

9. Arkin Counsel and Defendants thereafter negotiated a settlement (the "*Arkin* Settlement") in which Defendants would make available a fund of $21 million for payment of attorney fees and expenses and claims of class members.

10. I have reviewed my firm's time records for *Arkin I*, which reflect the following professional time expended:

Jeffrey A. Berman	33.70 hours at $600.00/hr	$20,220.00
Ross Michael Good	244.75 hours at $600.00/hr	$146,850.00
Glenn L Hara	65.75 hours at $600.00/hr	$39,450.00

Ryan M Kelly	9.80 hours at $600.00/hr	$5,880.00
Paralegal	11.85 hours at $195.00/hr	$2,310.75
Patrick Solberg	63.50 hours at $600.00/hr	$38,100.00
Wallace C Solberg	63.30 hours at $600.00/hr	$37,980.00
Brian J. Wanca	179.30 hours at $700.00/hr	$125,510.00
	Total hours 671.95	Total: $396,080.75

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

Executed on: October 5, 2020 /s/Ross M. Good