

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARCIA KIMBLE, *individually, and
on behalf of all others similarly
situated,*

Case. No. 2:23-cv-10037-DML-EAS

Plaintiff,

District Judge David M. Lawson

v.

FIRST AMERICAN HOME
WARRANTY CORP. and
FIVESTRATA LLC,

Magistrate Judge Elizabeth A.
Stafford

Defendants.

**PLAINTIFF’S UNOPPOSED MOTION FOR ATTORNEYS’ FEES,
COSTS, EXPENSES, AND AN INCENTIVE AWARD**

Pursuant to Federal Rule of Civil Procedure 23(h) and the Court’s Order dated January 19, 2024 (ECF No. 50), Plaintiff Marcia Kimble (“Plaintiff” or “Kimble”) submits this unopposed motion for attorneys’ fees, costs, expenses and a representative incentive award in connection with the class action settlement reached with Defendants First American Home Warranty Corp. and FiveStrata, LLC (collectively “Defendants”).

In total, Plaintiff seeks an award of \$195,000 in attorneys’ fees, \$17,044.05 in litigation costs and expenses and a representative service award of \$5,000 to Plaintiff. These amounts are fair, reasonable and consistent with awards provided

in similar cases. For those reasons, set forth at length in the following memorandum and supporting papers, Plaintiff respectfully requests that this Court grant her unopposed motion for attorneys' fees, costs and expenses incurred and a class incentive award.

Respectfully submitted,

/s/ Christopher E. Roberts

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Counsel for Plaintiff and the Class

Dated: May 30, 2024

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MARCIA KIMBLE, *individually, and
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Plaintiff,

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FIRST AMERICAN HOME
WARRANTY CORP. and
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Magistrate Judge Elizabeth A.
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Defendants.

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF HER
UNOPPOSED MOTION FOR ATTORNEYS’ FEES,
COSTS, EXPENSES, AND AN INCENTIVE AWARD**

Pursuant to Federal Rule of Civil Procedure 23(h) and the Court’s Order dated January 19, 2024 (ECF No. 50), Plaintiff Marcia Kimble (“Plaintiff” or “Kimble”) submits this memorandum of law in support of her unopposed motion for attorneys’ fees, costs, expenses and a representative incentive award in connection with the class action settlement reached with Defendants First American Home Warranty Corp. and FiveStrata, LLC (collectively “Defendants”).

I. STATEMENT OF ISSUES PRESENTED

Should this Court: (1) grant Class Counsel’s request for attorneys’ fees in the amount of \$195,000.00, which is equal to 27.85% of the gross class fund; (2)

reimburse Class Counsel \$17,044.05 for litigation costs and expenses they reasonably incurred in prosecuting this case, and (3) award Ms. Kimble \$5,000 for her service to the class.

II. PRIMARY CONTROLLING AUTHORITIES

The authorities set forth in this brief all carry equal weight. However, pursuant to Federal Rule of Civil Procedure 23(e) and (h), this Court should award the requested attorneys' fees, litigation expenses and representative service award.

III. INTRODUCTION

Plaintiff seeks final approval of her counsel's requested attorneys' fees, reimbursement of expenses, and payment of a class representative incentive award, consistent with the Order granting preliminary approval of the class settlement entered on January 19, 2024. Doc. 50.

The parties reached a class-wide settlement in connection with the claim filed under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") at a September 21, 2023, mediation in Detroit with retired Judge Gerald Rosen of JAMS. Defendants agreed to pay \$700,000.00 to resolve the case, none of which will revert to Defendants. With notice having been sent to over 20,000 class members, over 3,200 members submitted valid claims. This is a robust participation rate of

approximately 16%, with few opt-outs and no objections. Participating class members will receive approximately \$130 each.¹

Consistent with the Order granting preliminary approval and without objection from any of the over 20,000 class members or either paying defendant, class counsel seeks attorneys' fees of \$195,000.00, which is 27.85% of the common fund - to be paid to class counsel Butsch Roberts & Associates, LLC and Kimmel & Silverman, P.C. Class counsel also seek \$17,044.05 in litigation costs and expenses they reasonably incurred in this litigation, and an award of \$5,000.00 to Ms. Kimble for her service to the class. The requested fees, reimbursement of costs and class representative incentive award are reasonable, fair and adequate. This motion should therefore be granted.

IV. This Court should approve Ms. Kimble request for an award of attorneys' fees.

The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In the context of class actions, district courts within the Sixth Circuit typically award attorneys' fees as

¹ See ECF 53, p. 9; ECF 53-1 ¶ 12 (3,295 members recovering a pro rata share from a class fund of approximately \$450,000.00 comes to \$129.33).

a percentage of the common funds obtained for class members. That is, “[r]ather than the court’s ascertaining a ‘reasonable fee,’ the attorney receives a percentage of the fund awarded to the class.” *Fournier v. PFS Invs., Inc.*, 997 F. Supp. 828, 832 (E.D. Mich. 1998).

Using “[t]he percentage of the fund method has a number of advantages; it is easy to calculate; it establishes reasonable expectations on the part of plaintiffs’ attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation.” *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). The percentage of the fund method thus “is preferred in this district because it eliminates disputes about the reasonableness of rates and hours, conserves judicial resources.” *In re Auto. Parts Antitrust Litig.*, No. 12-2311, 2018 WL 7108072, at *1 (E.D. Mich. Nov. 5, 2018); accord *Todd S. Elwert DC, Inc. v. Alliance Healthcare Servs., Inc.*, 2018 WL 4539287, at *4 (N.D. Ohio Sept. 21, 2018) (“This Court adopts the percentage of the fund method to determine reasonable attorneys’ fees here as it is the preferred method in the Sixth Circuit for common fund cases and because it most accurately reflects the results achieved in a case.”).

Here, class counsel requests an award of attorneys’ fees equal to 27.85% of the total common funds. While approval of “[t]he specific percentage is left to the court’s discretion,” *Fournier*, 997 F. Supp. at 832, the Sixth Circuit established

six factors to consider for an award's reasonableness: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).

Counsel's requested fees and expenses and the representative service award, consistent with this standard, should be granted.

A. Class counsel obtained an excellent result for the class, which surpasses recoveries in analogous TCPA settlements.

First and foremost, “[t]he value of the benefit rendered to the plaintiff class is among the most important factors to be considered.” *Mees*, 2016 WL 67521, at *5; *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 351 (N.D. Ga. 1993) (“The most important element in determining the appropriate fee to be awarded class counsel out of a common fund is the result obtained for the class through the efforts of counsel.”)

Here, in the face of significant legal hurdles, *see infra*, class counsel obtained excellent results for the class. From the outset, the non-reversionary cash settlement funds are noteworthy in and of themselves, especially considering the changing legal landscape in which class counsel litigated this matter. *See id.*

This settlement provides significantly more relief compared to other approved TCPA class settlements. After deducting the requested attorneys' fees, litigation costs and expenses, costs of notice and claims administration, and the requested incentive award to Ms. Kimble, participating TCPA Class members who submit valid claims will receive approximately \$130 - a figure toward the higher end of the spectrum of TCPA class settlements. *See, e.g., Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) (\$52.50 per claiming class member); *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 947 (D. Minn. 2016) (\$33.20 per claimant); *Wright v. Nationstar Mortg. LLC*, 2016 WL 4505169, at *8 (N.D. Ill. Aug. 29, 2016) (approximately \$45 per claimant); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) (finding that \$34.60 per person falls "within the range of recoveries" in a TCPA class action); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493 (N.D. Ill. 2015) (noting that "thirty dollars per claimant 'falls on the lower end of the scale,' it is nonetheless 'within the range of recoveries' in TCPA class actions"); *Rose v. Bank of Am. Corp.*, 2014 WL 4273358, at *10 (N.D. Cal. Aug. 29, 2014) (claimants received between \$20 and \$40 each).

Moreover, the class members who submitted valid claims will receive approximately \$130 each despite the purely statutory damages at issue. Such damages are often deemed too small to incentivize individual actions. *See, e.g.,*

Todd S. Elwert DC, Inc., 2018 WL 4539287, at *4 (“Class counsel secured a substantial benefit for class members. The [TCPA] does not provide for attorneys’ fees, so individual claimants generally must proceed *pro se*. As such, many class members might not have pursued an individual suit.”). This means that because of the settlement at hand, consumers will receive significant cash relief they otherwise likely would never have pursued on their own.

Against this backdrop, the value of the result obtained weighs heavily in favor of class counsel’s fee award request, particularly considering larger fee awards approved in this district. *See Sheean v. Convergent Outsourcing, Inc.*, 2019 WL 6039921, at *4 (E.D. Mich. Nov. 14, 2019) (awarding 33 1/3% of the fund in a TCPA case); *Martin v. Trott Law, P.C.*, 2018 WL 4679626, at *9 (E.D. Mich. Sept. 28, 2018) (Lawson, J.) (award 33 1/3% of the fund and noting that “[t]he value of the benefit rendered by plaintiffs’ counsel is substantial and evidently will result in payments of around \$82 to more than 54,000 class members”); *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) (awarding 33 1/3%); *Simpson v. Citizens Bank,*, 2014 WL 12738263, at *6 (E.D. Mich. Jan. 31, 2014) (“Class Counsel’s request for 33% of the common fund created by their efforts is well within the benchmark range and in line with what is often awarded in this Circuit.”)

In short, the per claimant recovery of approximately \$130 per claimant

exceeds typical TCPA settlements and the percentage of the fund Kimble seeks for her counsel of \$27.85% is consistent with, and often lower than, approved class settlements. Accordingly, the attorneys fee sought are reasonable and should be granted.

B. The questions underlying this matter were unsettled and uncertain.

Obtaining the results here took careful, strategic work on the part of class counsel considering the uncertainty of the litigation. This action involved many unsettled legal questions. As the Court noted in its Order granting preliminary approval, this case faced numerous hurdles that made success far from guaranteed:

[T]he plaintiff's prospects for success on the merits are uncertain. To start, First American may not be liable if it can show that FiveStrata was an independent contractor rather than an agent. *See Keating v. Peterson's NelNet*, 615 F. App'x 365, 371-72 (6th Cir. 2015) (explaining that liability under the TCPA does not extend to independent contractors). Next, the plaintiffs acknowledge that some courts have held that the TCPA's do-not-call protections do not apply to calls received on cell phones. *See, e.g., Cunningham v. Politi*, No. 18-00362, 2019 U.S. Dist. LEXIS 102545, 2019 WL 2519702, at *4 (E.D. Tex. Apr. 26, 2019). Other courts require a showing that an individual's cell phone number is used for residential purposes. *See Cunningham v. Rapid Response Monitoring Servs.*, 251 F. Supp. 3d 1187, 1201 (M.D. Tenn. 2017). This issue could require further individualized assessment. Finally, the defendants have argued that at least some putative plaintiffs consented to receiving calls, although the plaintiff disputes that there is evidence of that

Doc. 50, pp. 19-20.

In addition to the challenging legal issues, the Defendants litigated vigorously,

forcing class counsel to manage fights on multiple fronts. *See e.g.* Doc. Nos. 34, 35, 36 (motions to dismiss and motion to bifurcate discovery); *see also* Doc. No. 33 (Plaintiff’s counsel addressing a renewed effort to bifurcate discovery after the other defendant’s effort was denied by the Court). Class counsel handled the challenges and risks aptly and entered a fair and adequate settlement for the class. Accordingly, the difficulty and uncertainty of this case warrants the attorneys’ fees requested.

C. Class counsel undertook this litigation on a contingent basis, bearing considerable risk that they would not be paid for their efforts.

Next, “[n]umerous cases recognize that the attorney’s contingent fee risk is an important factor in determining the fee award.” *Columbus Drywall & Insulation, Inc.*, 2008 WL 11234103, at *3 (N.D. Ga. Mar. 4, 2008). This is, in part, because even in ordinary cases, “uncertain is the outcome,” *id.*, and the corresponding risk taken by counsel in connection with contingent fee arrangements—no assurance of payment—warrants a higher percentage of the fund. *Id.*

As the Eastern District of Michigan previously noted:

In undertaking to prosecute this complex case entirely on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. That risk warrants an appropriate fee. The risks are inherent in financing and prosecuting complex litigation of this type, but Class Counsel undertook representation with the knowledge that they would have to spend substantial time and money and face significant risks without any assurance of being compensated for their efforts. Only the most experienced plaintiffs’ litigation firms would risk the time and expense involved in bringing this Action in light of the possibility of a recovery at an uncertain date, or of no recovery at

all.

Simpson, 2014 WL 12738263, at *7 (internal citations omitted).

Ms. Kimble entered into a contingent attorneys’ fee agreement with counsel. *See* Declaration of Christopher E. Roberts, ¶ 5; Ginsburg Dec. ¶ 17. Such risk of non-payment, combined with counsel’s dedicated efforts over the course of the last fifteen months, supports the 27.85% fee award requested. *See Martin*, 2018 WL 4679626, at *9 (awarding a one-third fee, in part, because “[c]lass counsel was retained on a contingent basis and assumed the risk of advancing substantial costs and expenses of the litigation throughout its tortuous course, particularly with respect to the herculean efforts of the parties during the electronic discovery process.”)

D. Class counsel devoted significant time and resources to achieve an excellent result.

Although the time and labor required “is an essential touchstone for recovery in a statutory fee case where reasonableness is measured in part by reference to the lodestar analysis,” in a common fund case, “the amount involved . . . and the results obtained may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class.” *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988). In other words, class

counsel's time and labor "need not be evaluated using the lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater weight to other factors, the basis of which is clearly reflected in the record." *Id.*; see also *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473, at *5 (E.D. Mich. Jan. 20, 2015) ("the quality of work performed in a case that settles before trial is best measured by the benefit obtained").

Class counsel have spent significant time on this matter for well over one year. Specifically, class counsel achieved the results in this case after: (a) investigating the underlying facts concerning Plaintiff's and the class members' claims; (b) investigating and researching the defenses presented by Defendants; (c) performing legal research concerning the class members' claims, Defendants' defenses and other issues raised by Defendants in various motions filed in the case; (d) drafting an amended complaint; (e) holding multiple meetings with Plaintiff; (f) discussing various legal issues and defenses with opposing counsel; (g) appearing in Court for conferences and hearings and preparing for these appearances; (h) meeting with the mediator before mediation; (i) preparing a mediation statement; (j) appearing for a mediation; (k) drafting a settlement agreement and class notice documents; (l) conferring with opposing counsel and the settlement administrator to develop a notice plan; (m) reviewing and revising the settlement website; (n) researching, drafting and preparing a motion for

preliminary approval of the class action settlement; (o) responding to class member inquiries about the case; (p) staying in close contact with the settlement administrator about the settlement and issues that arose. Among other items not included in this list include the preparation of Plaintiff's Unopposed Motion for Attorneys' Fees, Expenses, and an Incentive Award, time spent preparing for, traveling to and appearing for the final approval hearing, and additional correspondence with the settlement administrator (and potentially class members). Roberts Declaration, ¶¶ 8-12²; Ginsburg Dec. ¶¶ 19-33.

Counsel's time was significant and supports the requested attorneys' fees.

E. Class counsel should be rewarded for their roles as private attorneys general serving a greater public good.

"Attorneys who undertake the risk to vindicate legal rights that may otherwise go unredressed function as 'private attorneys general.'" *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1217 (S.D. Fla. 2006). Their role as such merits significant weight in evaluating proper compensation for class counsel in TCPA class-actions, as the TCPA is unique from other consumer protection statutes in that it lacks a fee-shifting mechanism in the language of the

² A lodestar crosscheck also supports the requested fee award. The fees requested results in a 1.33 multiplier *without* accounting for the filing of this motion and brief and other work on the case. Roberts Declaration, ¶¶ 8-12; Ginsburg Dec., ¶ 33. *See generally Bowman v. Art Van Furniture, Inc.*, 2018 WL 6444514, at *3 (E.D. Mich. Dec. 10, 2018) (applying a lodestar multiplier of 2).

statute. *See* 47 U.S.C. § 227(c)(5)(B) *contra* 15 U.S.C. § 1692k (attorneys’ fees recoverable for plaintiffs under the Fair Debt Collection Practices Act; 15 U.S.C. § 1681n(a)(3) (attorneys’ fees recoverable for plaintiffs under the Fair Credit Reporting Act) Accordingly, “awarding attorneys’ fees in [TCPA] class actions benefits society by encouraging attorneys to pursue [TCPA] claims through class actions... class actions are arguably the only effective way to enforce the [TCPA] as individual suits are unlikely.” *Todd S. Elwert DC, Inc.*, 2018 WL 4539287, at *4.

Prosecuting claims under the TCPA also serve the public interest. As this Court noted, Americans continue to experience “the common irritant of unwelcome solicitation calls from merchants seeking to generate sales leads.” ECF No. 50, p. 1. Three decades after the TCPA was passed into law, there were nonetheless five million complaints from Americans to the FTC in 2021 alone, for unwanted telemarketing calls. Federal Trade Comm’n, *FTC Issues Biennial Report to Congress on the National Do Not Call Registry* (Jan. 5, 2022), available at: <https://www.ftc.gov/news-events/news/press-releases2022/01/ftc-issues-biennial-report-congress-national-do-not-call-registry>. With technology facilitating cost-efficient robocalls and the widespread transmission of consumer data to telemarketers, TCPA class-actions serve as a check to protect the interest of consumer privacy.

Accordingly, it benefits the public interest that attorneys be incentivized to serve as private attorneys general through TCPA class-actions. Public policy favors approving Kimble's motion for attorneys' fees.

F. The attorneys' fees requested are consistent with, and less than other class-action settlements in this Circuit.

The percentage of the common fund which Kimble seeks for her counsel of 27.85%, is notably lower than the standard 33% awarded in class-action settlements in this Circuit. *See Sheean v. Convergent Outsourcing, Inc.*, 2019 WL 6039921, at *4 (E.D. Mich. Nov. 14, 2019) (awarding 33 1/3% of the fund in a TCPA class-action); *Martin v. Trott Law, P.C.*, 2018 WL 4679626, at *9 (E.D. Mich. Sept. 28, 2018) (Lawson, J.) (award 33 1/3% of the fund and noting that “[t]he value of the benefit rendered by plaintiffs’ counsel is substantial and evidently will result in payments of around \$82 to more than 54,000 class members”); *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) (awarding 33 1/3%); *Simpson v. Citizens Bank*,, 2014 WL 12738263, at *6 (E.D. Mich. Jan. 31, 2014) (“Class Counsel’s request for 33% of the common fund created by their efforts is well within the benchmark range and in line with what is often awarded in this Circuit”); *Carr v. Bob Evans Farms, Inc.*, No. 17-1875, 2018 WL 7508650, at *5 (N.D. Ohio July 27, 2018)

(one-third of common fund awarded as attorney fee); *Osman v. Grube, Inc.*, No. 16- 802, 2018 WL 2095172, at *5 (N.D. Ohio May 4, 2018) (same).

Having obtained a comparatively high recovery for participating class members,³ Kimble nonetheless seeks a comparatively modest attorney fee for her counsel.

V. The Court should approve reimbursement of class counsel’s litigation costs and expenses of \$17,044.05.

Under “the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement.” *Todd S. Elwert DC, Inc.*, 2018 WL 4539287, at *5. Class counsel incurred reasonable costs and expenses in connection with this matter, including filing and service fees, mediation costs, and travel costs. These categories of expenses for which class counsel seek reimbursement are the type of expenses routinely charged to paying clients in the marketplace and thus are properly reimbursed under Rule 23. *See Todd S. Elwert DC, Inc.*, 2018 WL 4539287, at *5 (“Reasonable expenses include the costs of document production, consulting with experts, travel, and other litigation-related expenses.”).

Class counsel seek reimbursement for \$17,044.05 in litigation costs and

³ *See supra* Section IV(A) (collecting cases where TCPA class settlements received final approval with per claimant recoveries between \$20-\$90 compared to the \$130 her participating member here).

expenses. *See* Roberts Declaration, ¶¶ 18-19. These expenses are eminently reasonable in a class action like this and were necessary for the successful prosecution of this action. Notably, no class member has objected to counsel's request for reimbursement of litigation costs and expenses, which are less than the \$18,000 in total costs to which the Court granted preliminary approval (ECF No. 50) and expenses set forth in the class notices.

VI. The Court should approve an incentive award to Ms. Kimble in the amount of \$5,000.

“Incentive awards are ‘efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class.’” *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 2016 WL 6272094, at *2 (W.D. Mich. Mar. 1, 2016) (quoting *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003)). Such awards are “usually viewed as extensions of the common-fund doctrine, a doctrine that holds that a litigant who recovers a common fund for the benefit of persons other than himself is entitled to recover some of his litigation expenses from the fund as a whole.” *Hadix*, 322 F.3d at 898.

Here, this settlement would not have been possible but for the dedication of Ms. Kimble. *See* Roberts Declaration, ¶¶ 13-16; Ginsburg Dec., ¶¶ 18, 27, 28; Declaration of Marcia Kimble, ¶¶ 11-19; Ms. Kimble retained and produced critical records, on which Plaintiff's counsel relied to bolster her claim. *See id.*

Furthermore, Kimble actively participated throughout the case, including regular conferrals with her counsel, appearing and participating in an all-day mediation and appearing in person for the preliminary approval hearing. *See* Kimble Dec., ¶¶ 11-23; Ginsburg Dec. ¶¶ 18-19, 23, 28; Roberts Dec. ¶¶ 13-16. An incentive award of \$5,000 to Ms. Kimble is justified considering her efforts. Moreover, this award is certainly reasonable considering other awards granted. *See, e.g., Johansen v. One Planet Ops, Inc.*, 2020 WL 7062806, at *5 (S.D. Ohio Mar. 25, 2020) (\$10,000 award for class representative); *Jackson's Five Star Catering, Inc. v. Beason*, 2:10-cv-10010, ECF No. 90 (E.D. Mich. Apr. 15, 2015) (Tarnow, J.) (\$15,000 award for class representative); *See Charvat v. Valente*, 2019 WL 5576932 (2019), 2019 U.S. Dist. LEXIS 187225, at *33 (N.D. Ill. Oct. 28, 2019) (\$25,000 award for class representative).

Marcia Kimble has been a model class representative in the course of this litigation and the modest service award of \$5,000.00 should be given final approval.

VII. CONCLUSION

For the foregoing reasons, without opposition from Defendants First American Home Warranty Corp. or FiveStrata, LLC, Plaintiff and Class Representative Marcia Kimble respectfully requests that the Court approve an award

of attorneys' fees of \$195,000, reimbursement of litigation costs and expenses of \$17,044.05, and an incentive award of \$5,000 for Plaintiff.

/s/ Christopher E. Roberts

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Counsel for Plaintiff and the Class

CERTIFICATE OF CONFERENCE

I, Jacob U. Ginsburg, Esq. hereby certify that Herman Hofman, counsel for FiveStrata and Mark Silver, counsel for First American Home Warranty Corp. confirmed on May 29, 2024 they will not oppose our motion for attorneys' fees, expenses and a representative incentive award.

/s/ Jacob U. Ginsburg

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2024, a copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Jacob U. Ginsburg

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARCIA KIMBLE, *individually, and
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Plaintiff,

District Judge David M. Lawson

v.

FIRST AMERICAN HOME
WARRANTY CORP. and
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Magistrate Judge Elizabeth A.
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Defendants.

**DECLARATION OF CHRISTOPHER E. ROBERTS IN SUPPORT OF
PLAINTIFF’S UNOPPOSED MOTION FOR ATTORNEYS’ FEES,
EXPENSES AND AN INCENTIVE AWARD**

I, Christopher E. Roberts, hereby declare, pursuant to 28 U.S.C. § 1746:

1. This Declaration is submitted in support of Plaintiff’s Unopposed Motion for Attorneys’ Fees, Expenses, and an Incentive Award.

2. I am over the age of 18 years, am of sound mind, and am otherwise competent to make this Declaration. I have personal knowledge of the matters and statements included in this Declaration.

3. I am a partner at Butsch Roberts & Associates, LLC, and have been appointed as class-counsel in this matter. I am an owner of the firm. My biographical information and experience are set forth in the Declaration I submitted in support of

preliminary approval of the settlement (Doc. 43-2). For purpose of brevity, I incorporate my experience and background set forth in my previous Declaration into this Declaration.

4. The information in my previously filed Declaration is still accurate, with two relevant additions. I have been appointed to serve as class counsel in two additional TCPA cases since the time I filed the Declaration. Those cases are *Burnett v. CallCore Media, Inc.*, Case No. 4:21-cv-03176 (S.D. Tex.) and *Giancristofaro et al. v. Ima Pizza, LLC d/b/a &Pizza*, Case No. 23SL-CC04108 (Circuit Court of St. Louis County, Missouri).

5. My firm handled this case on a contingency basis and has not received any payment for our services to date. My firm has also not been reimbursed for the litigation costs and expenses it has advanced to date.

6. My firm, along with the firm of Kimmel and Silverman, P.C. are collectively requesting \$195,000.00 in attorneys' fees. This amount represents 27.85% of the \$700,000 non-reversionary common fund in this case.

7. The requested attorneys' fees are fair and reasonable and are consistent with the attorneys' fees awards in similar class action cases.

8. This case has been pending for over 16 months. During the time of my firm's involvement, my firm devoted time and resources to effectively and efficiently adjudicating this case, including, but not limited to: (a) investigating the

underlying facts concerning Plaintiff's and the class members' claims; (b) investigating and researching the defenses presented by Defendants; (c) performing legal research concerning the class members' claims, Defendants' defenses and other issues raised by Defendants in various motions filed in the case; (d) drafting an amended complaint; (e) holding multiple meetings with Plaintiff; (f) discussing various legal issues and defenses with opposing counsel; (g) appearing in Court for conferences and hearings and preparing for these appearances; (h) meeting with the mediator before mediation; (i) preparing a mediation statement; (j) appearing for a mediation; (k) drafting a settlement agreement and class notice documents; (l) conferring with opposing counsel and the settlement administrator to develop a notice plan; (m) reviewing and revising the settlement website; (n) researching, drafting and preparing a motion for preliminary approval of the class action settlement; (o) responding to class member inquiries about the case; (p) staying in close contact with the settlement administrator about the settlement and issues that arose. Among other items not included in this list include the preparation of Plaintiff's Unopposed Motion for Attorneys' Fees, Expenses, and an Incentive Award, time spent preparing for, traveling to and appearing for the final approval hearing, and additional correspondence with the settlement administrator (and potentially class members).

9. In short, my firm and Kimmel & Silverman, P.C. worked effectively and efficiently to litigate this case in a favorable manner for class members, and to then guide this case through preliminary and final approval.

10. In light of the excellent result achieved in this case, coupled with counsel's efforts in achieving those results, the uncertainty of the relevant legal issues, that this case was litigated on a contingent basis, the experience and ability of the firms involved and the public service provided by the law firms' and Plaintiff's role in effectively acting as private attorneys general with respect to the TCPA, I believe the settlement is fair, reasonable and adequate. I further believe that the attorneys' fees requested are fair and reasonable.

11. To date, my firm has expended 102.1 hours litigating this case. This time does not account for the time spent on the instant motion, nor time preparing for and appearing for the final approval hearing. At a rate of \$525/hour, this totals \$53,602.50.

12. To date, I understand the firm of Kimmel and Silverman has expended 195.7 hours litigating this case. This time does not account for the time spent on the instant motion, nor time preparing for and appearing for the final approval hearing. At a rate of \$475/hour, this totals \$92,957.50. While the percentage of the fund method is the appropriate method upon which to base the fee award, the lodestar methodology also supports the requested award. The current total amount of fees

incurred between the two firms is \$146,560.00 without accounting for the time spent on this motion or on additional time spent on final approval or other future items. This is a reasonable lodestar multiple of 1.33.

13. Ms. Kimble has been an outstanding class representative.

14. Ms. Kimble kept diligent records which helped to effectively litigate and resolve this case. Ms. Kimble has also remained incredibly active in this case. She has stayed in close contact with counsel and has made a concerted effort to stay apprised as to the developments in the case. She has made herself available to make strategic decisions in the best interests of the class, including attending an all-day mediation with Judge Rosen.

15. Without Ms. Kimble's efforts and dedication to this case, the class settlement would not have been possible.

16. Considering the time and effort Ms. Kimble devoted to this case as well as the results achieved for the class, I firmly believe an incentive award in the amount of \$5,000.00 is fair and reasonable.

17. Class counsel also separately request the reimbursement of costs and expenses reasonable incurred in connection with the prosecution of this case. Such expenses are included in the books and records maintained by the law firms of Butsch Roberts & Associates LLC and Kimmel & Silverman, P.C.

18. To date, the firms have collectively incurred of \$17,044.05. Kimmel and Silverman, P.C. incurred \$8,603.00 and Butsch Roberts & Associates LLC incurred \$8,441.05.

19. These expenses include the filing fee and service of the Complaints (\$569), mediation fees for JAMS/Judge Rosen (\$12,275.13), printing and shipping costs associated with the mediation (\$35), and travel-related expenses such as flights and hotels (\$4,164.92) (for hearings and mediation).

20. For the reasons set forth in this declaration and the accompanying motion, I respectfully request that the Court grant Plaintiff's Unopposed Motion for Attorneys' Fees, Expenses, and an Incentive Award.

As provided by 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed on May 30, 2024

/s/ Christopher E. Roberts
Christopher E. Roberts

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARCIA KIMBLE, *individually, and
on behalf of all others similarly
situated,*

Plaintiff,

v.

FIRST AMERICAN HOME
WARRANTY CORP. and
FIVESTRATA LLC,

Defendants.

Case. No. 2:23-cv-10037-DML-EAS

District Judge David M. Lawson

Magistrate Judge Elizabeth A.
Stafford

**DECLARATION OF JACOB U. GINSBURG IN SUPPORT OF
PLAINTIFF’S UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT**

I, Jacob U. Ginsburg, Esq., hereby declare as follows:

1. I am an adult resident of the Commonwealth of Pennsylvania.
2. I have personal knowledge of the statements made in this declaration.
3. I am of sound mind and am otherwise competent to make this declaration.
4. I am counsel for the Plaintiff, Marcia Kimble, in this matter.
5. I submit this Declaration in support of Kimble’s unopposed motion for preliminary approval of class settlement.

Professional Background

6. I am a 2011 graduate of Temple University School of Law, where I was a Deans' List student and Articles Editor of the Temple International and Comparative Law Journal.

7. I have been licensed to practice law before the Supreme Court of Pennsylvania since 2011, the Supreme Court of New Jersey since 2011 and the Supreme Court of Michigan since 2020. I am a member in good standing in each of those jurisdictions.

8. I have been admitted to practice law in the United States District Court for the Eastern District of Pennsylvania since 2011; the U.S. District Court for the District of New Jersey since 2011; the U.S. District Court for the Western District of Pennsylvania since 2011; the U.S. District Court for the District of New Jersey since 2011; the U.S. District Court for the Middle District of Pennsylvania since 2016; the U.S. District Court for the Eastern District of Michigan since 2018; the U.S. District Court for the Northern District of Ohio since 2019; the U.S. District Court for the Eastern District of Texas since 2020; the U.S. District Court for the Eastern District of Wisconsin since 2021; the U.S. District Court for the Northern District of Texas since 2021; the U.S. District Court for the Southern District of Texas since 2021; the U.S. District Court for the Southern District of Indiana since 2021; the U.S. District Court for the Eastern District of Arkansas since 2021; the

U.S. District Court for the Western District of Arkansas since 2021; the U.S. District Court for the Northern District of Illinois since 2021; the U.S. District Court for the Western District of Texas since 2021; the Ninth Circuit Court of Appeals since 2022; the Third Circuit Court of Appeals since 2022 and the U.S. District Court for the District of Colorado since 2023.

9. I have never had my license suspended or been subject to any disciplinary proceedings.

10. For most of the time I have been an attorney, my practice has consisted of representing consumers in various types of consumer protection litigation.

11. I have argued, arbitrated and tried cases to verdict under various state consumer protection statutes, the Fair Debt Collection Practices, the Magnuson-Moss Warranty Improvement Act, and the Telephone Consumer Protection Act (“TCPA”).

12. I have been approved as class counsel in the following TCPA class-actions: *Burnett v. CallCore Media, Inc.*, Case No. 4:21-cv-03176, ECF No. 32 (S.D. Tex.) (February 29, 2024), *Giancristofaro et al. v. Ima Pizza, LLC d/b/a & Pizza*, Case No. 23SL-CC04108 (Circuit Court of St. Louis County, Missouri) (March 27, 2024), as well as by this Court in this case *Kimble v. First Am. Home Warranty Corp., et al.*, ECF No. 50 (January 19, 2024).

13. I have represented hundreds of plaintiffs in claims asserted under the TCPA in federal court and private arbitration. Several recent notable TCPA decisions on matters I have argued, tried and/or briefed follow below:

- Successfully appealed a district court's dismissal of a TCPA claim for lack of standing, to the Ninth Circuit, where a 3-0 panel expanded Article III standing to subscribers who are not the "customary user" of a given phone registered on the Do-Not-Call Registry. *Hall v. Smosh Dot Com, Inc.*, 72 F.4th 983 (9th Cir. 2023);
- Obtained a unanimous jury verdict for a plaintiff with claims under the federal do-not-call rules, despite the fact he used his phone for business purposes. *Noviello v. Adam Wines Consulting, LLC*, 3:22-cv-52-BN (ECF 74); *See also Noviello v. Holloway Funding Grp., No. 3:22-cv-52-BN*, 2023 WL 128395 (2023 U.S. Dist. LEXIS 3060 (N.D. Tex. Jan. 9, 2023) (overcoming summary judgment earlier in same case); and,
- Successfully argued that text messages offering to buy a home could constitute the "solicitations" as defined by the TCPA, even though the texting party was offering to buy, rather than sell property. *Pepper v. GVG Capital LLC*, No. H-22-2912, 2023 U.S. Dist. LEXIS 100425, 2023 WL 3914291 (S.D. Tex. June 9, 2023).

14. I am a member in good standing of National Association of Consumer Advocates.

15. In August 2016, I taught a seminar with the National Business Institute on the FDCPA, the Truth-in-Lending Act and Consumer Financial Protection Bureau's regulations as they relate to mortgage foreclosures. NATIONAL BUSINESS INSTITUTE, Foreclosure Bootcamp: *FDCPA, TILA and CFPB Regulations as to Foreclosures* (Sonesta Hotel, Philadelphia, PA, (Aug. 2, 2016).

The Kimble Litigation

16. In December 2022, I first spoke with Marcia Kimble, who advised she believed she had a case against First American Home Warranty Corp. and was interested in pursuing a lawsuit and wished to be represented by my firm.

17. My firm handled this case on a contingency basis and has not received any payment for our services to date. My firm has also not been reimbursed for the litigation costs and expenses it has advanced to date. That is also true of my co-counsel Chris Roberts and his firm of Butsch Roberts & Associates, LLC.

18. Ms. Kimble maintained very detailed records, including screenshots, notes and recordings. Ultimately, Ms. Kimble produced a call recording neither Defendant produced, which helped to significantly advance the case and move the case toward a resolution.

19. After speaking with Ms. Kimble at length, learning of her background in public service and carefully reviewing the documentation and records she provided, I discussed with her the possibility of pursuing the case as a class-action. Ms. Kimble expressed eagerness serve as a class representative.

20. Upon direction from the Court, the Parties agreed to an in-person class-based mediation with retired Judge Gerald E. Rosen on September 21, 2023.

21. In the weeks leading up to mediation, counsel for the Parties held several phone and Zoom conferences, where we discussed how to efficiently produce class information and data.

22. In those conferences we also discussed the parameters of mediation.

23. Ms. Kimble attended several telephone conferences with my co-counsel Chris Roberts and I, in order to prepare for mediation.

24. We had several conference calls with Judge Rosen in anticipation of mediation.

25. On August 24, 2023, Herman Hofman produced the data FiveStrata had reflecting the 21,953 numbers on the do-not-call registry called by FiveStrata as well as an initial settlement offer.

26. We also conveyed a settlement demand to both Defendants.

27. On September 21, 2023 I appeared with Marcia Kimble and Chris Roberts before Judge Rosen.

28. After a full day mediation, the Parties agreed on the mediator's recommended terms, of a \$700,000 non-reversionary *pro rata* settlement. I was pleased with the result, and Marcia Kimble accepted upon the recommendation of myself, my co-counsel and Judge Rosen.

29. After mediation, the Parties and Judge Rosen had numerous calls and a zoom session to discuss the fine details of the settlement, administration and the mechanics of filing the preliminary approval motion.

30. I drafted the motion for preliminary approval, along with my co-counsel.

31. I appeared and argued in-person at the preliminary approval hearing on January 17, 2024.

32. I drafted the motion for final approval and the motion for attorneys' fees along with my co-counsel, Chris Roberts.

33. In total, I expended 195.7 hours prosecuting this case. At a rate of \$475/hour, this totals \$92,957.50.

34. My firm Silverman, P.C. incurred \$8,603.00 in costs. Butsch Roberts & Associates LLC incurred \$8,441.05 in costs. The total costs/expenses incurred comes to \$17,044.05.

35. After preliminary approval was granted and notice was issued to class members, I received numerous calls from class members seeking to participate in the class and asking for guidance for same.

36. I understand the claim rate of 16% to be comparatively high for *pro rata* TCPA class settlements.

37. With over 3,200 valid claims compared to approximately 50 opt-outs and no objections, it is my perception the class reacted favorably to the settlement.

38. I understood the reaction of the class to be consistent with the views of Ms. Kimble, my co-counsel and myself. Namely, that this is a fair and adequate class settlement.

39. For those reasons, I recommend the Court grant final approval of the class settlement and of the motion for attorneys fees of \$195,000, of litigation costs of \$17,044.05 and a class incentive award of \$5,000.00.

I, Jacob U. Ginsburg hereby declare the foregoing is true and correct subject to the penalties of perjury.


JACOB U. GINSBURG

Dated: May 30, 2024

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARCIA KIMBLE, *individually, and
on behalf of all others similarly
situated,*

Case. No. 2:23-cv-10037-DML-EMS

Plaintiff,

District Judge David M. Lawson

v.

FIRST AMERICAN HOME
WARRANTY CORP. and
FIVESTRATA LLC,

Defendants. /

DECLARATION OF MARCIA KIMBLE

I, Marcia Kimble, hereby declare the following under the penalty of perjury:

1. I am an adult citizen of the State of Michigan.
2. I am over the age of 18 and am fully competent to make this declaration.
3. I have personal knowledge of all statements made in this declaration.
4. I am the Plaintiff and putative class-representative in the above-

captioned matter.

5. I am not related to my counsel, nor am I related to any person associated with either of the Defendants, First American Home Warranty or FiveStrata.

6. I am a resident of Detroit, Michigan, where I have lived for most of my life, since childhood.

7. I graduated from Detroit Martin Luther King, Jr. High School in 1981 and the Detroit Business Institute in 1987, where I obtained a certificate in marketing and management.

8. In my professional career, I worked for public and non-profit institutions, including the Volunteers of America, Detroit Medical Center and the Detroit Housing Commission.

9. I currently serve on the board of the Charlevoix Village Association, through which I advocate to the City of Detroit on behalf of residents of my neighborhood.

10. At all times relevant to this matter, I was (and still am) the owner, subscriber and primary user of a telephone with the number (313) xxx-4318.

11. In pursuit of this case, I gathered screenshots and recordings, as well as other documents, which I provided to my attorneys in order to file this lawsuit.

12. Given my interest and background in public service, the role of class-representative in a consumer-protection matter appealed to me. Therefore, I embraced the opportunity to file this case as a class-action and serve as class representative.

13. While this suit was pending, I communicated frequently and regularly with my attorneys, answered their questions and participated in the various aspects of litigation.

14. In July of 2023, I learned that the case would go to mediation in September 2023 with retired Judge Rosen of JAMS.

15. In the weeks leading up to the mediation, I provided my lawyers information to assist them with preparing a mediation statement and conferred with my counsel about a possible class settlement.

16. I also had multiple conferences with my lawyers to prepare for the mediation.

17. I appeared in-person for mediation at JAMS in Detroit on September 21, 2023.

18. I arrived at mediation at 8:30 a.m. (thirty minutes before the 9:00 am start time) and stayed until after 5:30 p.m., once the parties had agreed to the terms of the settlement.

19. I participated in each step of the mediation, including answering questions from Judge Rosen, and fought to obtain the best possible result for class members.

20. Finally, toward the end of mediation, the Defendants agreed to pay a total of \$700,000.00 to resolve this case.

21. After consulting with my attorneys, and, at the recommendation of Judge Rosen during mediation, I accepted that offer, which I believe to be a fair and positive outcome for class members.

22. Since mediation, I have communicated regularly with my attorneys regarding the negotiations about the release/agreement language.

23. I appeared in person at the motion for preliminary approval hearing on January 17, 2024.

24. After the notice and claim form was sent out to class members, I signed and returned a valid claim form.

25. I have learned that over 15% of members submitted valid claim forms, which I understand is a high participation rate.

26. That further confirms my belief that this is a fair and adequate class settlement and members are receiving fair compensation.

27. It has been an honor to serve as class representative and I strongly recommend final approval for this settlement.

I, Marcia Kimble, hereby certify and declare under penalty of perjury the foregoing is true and correct.

Date: *May 29, 2024*

Marcia Kimble
MARCIA KIMBLE