UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-23142-KMW

ABC BARTENDING SCHOOL OF MIAMI, INC.,
individually and as representative of a
class of similarly-situated persons,

Plaintiff,

v.

AMERICAN CHEMICALS & EQUIPMENT, INC.
(*d.b.a.* "AMERICAN OSMENT", "GORILLA GLIDES",
and "STOCKUP.COM"), and STEVEN MOTE,

Defendants.
_____/

CASE NO. 16-CV-24705-KMW

BAIS YAAKOV OF SPRING VALLEY,
on behalf of itself and all others similarly situated,

Plaintiff,

v.

AMERICAN CHEMICALS & EQUIPMENT, INC.
d/b/a AMERICANOSMENT d/b/a STOCKUP.COM,

Defendant.
_____/

**PLAINTIFFS' UNOPPOSED MOTION
FOR ENTRY OF FINAL APPROVAL ORDER AND JUDGMENT
OF CLASS ACTION SETTLEMENT AGREEMENT,
APPROVAL OF FEE AND COST APPLICATION,
AND INCORPORATED MEMORANDUM OF LAW**

Respectfully submitted,

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I. Introduction

Plaintiff, ABC Bartending School of Miami, Inc. ("ABC"), initiated this action on August 21, 2015. It alleged that Defendant, American Chemicals & Equipment, Inc. ("ACE")—doing business as "American Osment", "Gorilla Glides", and "Stockup.Com"—sent unsolicited fax advertisements to ABC and other members of a putative class, with the authorization or direct, personal participation of Defendant, Steven Mote, resulting in losses to ABC and members of the class. ABC asserted claims under the Telephone Consumer Protection Act ("TCPA"),[1] and under common law theories of conversion, trespass to chattels, and negligence *per se*.

Defendants denied ABC's material allegations, and that ABC or the putative class were entitled to any relief. For instance, Defendants disputed that the faxes at issue were "advertisements" within the scope of the TCPA, that the faxes were sent without the recipients' prior express permission, or that Mr. Mote could be held individually liable for the faxes. Defendants also observed that the individual responsible for the faxes was not their employee, but an independent contractor. In addition, Defendants argued that even if any liability could attach to them, the scope of the monetary relief that ABC had requested—including $925,471,500 in statutory damages—far exceeded: (a) their ability to pay, and (b) constitutional due process.

The parties diligently worked through the discovery process, and began settlement discussions in February 2016, with the assistance of certified mediator David Lichter, Esq. Parallel with those discussions, the parties proceeded to fully brief Defendants' preemptive motion to deny class certification and strike class allegations (D.E. 54, 71, 81), as well as ABC's motions

[1] The TCPA prohibits sending unsolicited fax advertisements unless specific requirements are satisfied, and provides a private right of action for injunctive relief and statutory damages of $500.00 per violation, which may be trebled upon a finding of a willful or knowing violation. *See* 47 U.S.C. § 227(b)(3).

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for summary judgment (D.E. 55, 56, 70, 77, 80) and for class certification (D.E. 71, 81, 84). Defendants also moved to exclude ABC's expert report (D.E. 74, 82, 83). In addition, the parties prepared for trial, set to start during the September 19, 2016 two-week period. (D.E. 16.)

In the meantime, ACE faced a separate lawsuit also premised on its alleged sending of unsolicited fax advertisements. Specifically, on June 15, 2016, Bais Yaakov of Spring Valley ("BYSV") filed an action in the Northern District of Alabama—Case No. 16-CV-00978-JHE—asserting TCPA and state law claims that overlapped with the claims asserted in the Miami action. The parties in the Alabama action also engaged in settlement discussions, and believed they had reached an understanding on the material terms of a settlement. Upon being informed of the Alabama action and the asserted agreement, ABC sought relief from this Court, as it believed that the settlement contravened the "first-to-file rule" and Local Rule 3.8. Defendants opposed ABC's efforts to dispute the asserted agreement. The Court held a hearing on August 24, 2016, and encouraged the parties to engage in global settlement discussions.

The Settlement Agreement (D.E. 107-1), preliminary approved on December 19, 2016 (D.E. 116), was the result of those discussions, aided by months of arms-length negotiations that had previously taken place. Thus, the Settlement Agreement was reached after a thorough consideration and analysis of the factual and legal issues in dispute, the risks and expenses inherent in protected litigation, and importantly, Defendants' finances. The Settlement Agreement is not only fair, reasonable, and adequate, but an excellent compromise that affords meaningful relief to the Settlement Class. Proof of this is that Class Notice was disseminated to tens of thousands of Settlement Class Members, and there has not been a single objection to the Settlement Agreement. Thus, the relief requested is unopposed, and Plaintiffs respectfully request entry of the proposed Final Approval Order and Judgment (107-1 Ex. 5), and any other relief deemed just and proper.

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II. Summary of the Settlement Terms and the Claims Process

The parties agreed to, and the Court ordered, the provisional certification of a Rule 23(b)(3) Settlement Class under the terms outlined below and more fully set forth in the Settlement Agreement. Capitalized terms are defined therein.

1. The Settlement Class.

Upon Final approval, the parties' Settlement Agreement will dispose of all claims related to the sending of unsolicited fax advertisements to the following Settlement Class:

> All persons or legal entities in the United States who, during the Class Period [(October 22, 2012 to September 20, 2016)], owned, used, subscribed to, or controlled any fax number(s) on the Facsimile List[2], and who received a facsimile advertisement from or on behalf of Defendants American Chemicals & Equipment, Inc., including its subsidiaries, affiliates, and d/b/a's and/or Steven K. Mote, including but not limited to facsimile advertisements promoting (1) "Gorilla Glides", "www.GorillaGlides.com", and offering "Gorilla Glides" floor protection products, and/or (2) "StockUp.com", and offering office supply products.

(Settlement Agreement § 2.48.) The Settlement Class includes 13,818 school districts and 90,129 schools and companies, some of which had multiple fax numbers. There were an additional 53,382 fax numbers in the Facsimile List that were not associated with a specific person or entity.

Members of the Settlement Class who are not excluded, and Defendants, will be subject to mutual releases for claims related to the sending of facsimile advertisements during the Class Period. (Settlement Agreement §§ 2.42, 10.1.)

2. The Class Notice.

Notice of the Settlement Agreement was first sent to the Settlement Class on January 6, 2017, via facsimile to the numbers on the Facsimile List. The one-page notice included

[2] The Facsimile List is composed of the available records of fax numbers to which it appears Defendants may have sent the faxes at issue, and where available, their associated email and/or mailing addresses—*i.e.*, the school lists ACE purchased from ASD Data Services LLC (D.E. 59), and WestFax, Inc.'s transmission logs for the April 21, 2015-August 18, 2015 period (D.E. 61).

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information about the Settlement Agreement, as well as instructions about how to timely submit a claim, opt out, or object to the terms thereof. The notice also directed the Settlement Class to a Settlement Website (www.AmericanChemicalsSettlement.com) with comprehensive information about the Settlement Agreement, copies thereof, the claim form, and other pertinent case documents. (Settlement Agreement §§ 6.1-6.5, Exs. 2-3.)[3]

3. The Claims Requirements.

Claims were to be submitted to the Settlement Administrator by March 7, 2017 (D.E. 116 ¶ 8), via fax, email, or mail, using a simple one-page form available for download from the Settlement Website. The form was to be signed by an authorized representative of a Claimant under penalty of perjury, stating the number of the subject faxes claimed received. (Settlement Agreement § 3.5, Ex. 1.)

4. The Settlement Class's Relief.

In addition to an injunction prohibiting future violations of the TCPA's restrictive provisions (47 U.S.C. § 227), Defendants agreed to fund a Settlement Common Fund of $1,550,000, over a period of five years. In particular, Defendants are to deposit $1,000,000 into the Settlement Common Fund within ten days after the final order approving the Settlement Agreement has become Final. Thereafter, Defendants are to deposit the following amounts on each indicated anniversary of said order's finality: 1st anniversary = $70,000; 2nd anniversary = $90,0000; 3rd anniversary = $126,000; 4th anniversary = $132,000; 5th

[3] When transmission of facsimile notice was not confirmed as successful after two attempts, and an email address associated with the fax number of the unsuccessful transmission was available from the Facsimile List, the same notice was sent via email thereto. Similarly, when email notice was returned as undeliverable and a mailing address associated with the fax number was available from the Facsimile List, notice was sent via a postcard through regular mail.

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anniversary = $132,000. (Settlement Agreement § 3.1.)[4]

The Settlement Agreement further provides that members of the Settlement Class will receive monetary relief of up to $500 *per* copy of a Qualifying Facsimile Advertisement submitted along with a valid claim. Members of the Settlement Cass who do not submit copies of one or more Qualifying Facsimile Advertisements are eligible to receive monetary relief as follows:

Quantity of Qualifying Facsimile Advertisements	Total Payment Amount (Subject to Pro Rata Reduction)
1 facsimile advertisement	$150
2 facsimile advertisements	$200
3 facsimile advertisements	$250
4 facsimile advertisements	$300
5 or more facsimile advertisements	$325

(Settlement Agreement §§ 3.2. 3.3, 3.6.)

5. <u>Claims, Objections, Opt-Outs, and Approved Claims</u>.

As of March 17, 2017, the Settlement Administrator had received 1,236 timely Claims, with no objections and one opt-out.[5] A breakdown of the Approved Claims, with the amounts Approved Claimants are set to receive upon Final approval, will be available from the Settlement Administrator, who is required to submit a declaration by March 30, 2017.

[4] The Settlement Common Fund will be used to pay valid claims from the Settlement Class, approved settlement administration costs, incentive awards, and attorneys' fees and expenses. Settlement Class payments, approved settlement administration costs, and attorneys' fees and expenses, will be disbursed after each deposit into the Settlement Common Fund. Funds remaining in the Settlement Common Fund, if any, will revert to Defendants. (Settlement Agreement §§ 2.50, 3.4.)

[5] An additional opt-out request was mailed to the Court and filed on February 14, 2017. (D.E. 117.)

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III. Argument

A. The Court Should Enter The Final Approval Order And Judgment.

1. Governing Principles of Judicial Review.

The Federal Rules of Civil Procedure contemplate that class actions, as all other actions, may be resolved via "settlement . . . or compromise", consistent with the strong judicial policy that favors settlement agreements. Fed. R. Civ. P. 23(e).[6]

At the final approval stage, following notice and sufficient time for class members to object and otherwise be heard, a court determines whether the settlement "'is fair, adequate and reasonable and is not the product of collusion between the parties.'" *Bennett*, 737 F.2d at 986 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). In this regard, a court may rely on the judgment of experienced counsel for the parties, considering the following factors: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Id.*; *accord Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011); *see also Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012) ("In considering the settlement, the district

[6] *In re United States Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits. Complex litigation . . . can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive. Accordingly, the Federal Rules of Civil Procedure authorize district courts to facilitate settlements in all types of litigation, not just class actions.") (citation omitted); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) ("Determining the fairness of the settlement is left to the sound discretion of the trial court and we will not overturn the court's decision absent a clear showing of abuse of that discretion. In addition, our judgment is informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement.") (citations omitted).

court may rely upon the judgment of experienced counsel for the parties. Absent fraud, collusion, or the like, the district court should be hesitant to substitute its own judgment for that of counsel.") (quotation marks and citation omitted).

Moreover, where as here, the proposed settlement is reached prior to class certification, a court must consider whether certification is otherwise proper—*i.e.*, in this case, whether the proposed class satisfies "numerosity", "commonality", "typicality", "adequacy", "predominance", and "superiority". Fed. R. Civ. P. 23(a),(b)(3). Nonetheless, certain aspects of a settlement class's certification are less rigorous than in the context of a disputed certification. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.") (citation omitted). Thus, the overarching considerations are, once again, fairness, reasonableness, and adequacy.

2. <u>The Court Should Grant Final Approval of the Settlement Agreement</u>.

The Settlement Agreement easily satisfies the foregoing considerations. As the Court is aware, while Plaintiffs are confident in the technical merits of their case, success via summary judgment and/or trial was opposed, uncertain, and in any event, would likely result in protracted litigation in: (a) this Court (*e.g.*, proceedings to determine whether, as Defendants advanced, a statutory award should be reduced as unconstitutionally excessive), (b) bankruptcy court (*i.e.*, in a proceeding for reorganization and/or liquidation), as well as (c) the Eleventh Circuit Court of Appeals and/or the Supreme Court. In other words, success on the merits is contested, not guaranteed, and any such success may well constitute a pyrrhic victory given the liability exposure at issue vis-à-vis Defendants' actual resources.

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Plaintiffs thoroughly weighed these considerations in the best interests of the class, and with the assistance of multiple knowledgeable professionals—including experienced class counsel, bankruptcy counsel, and accountants—to reach the Settlement Agreement. Class Counsel's opinion—informed by an intimate knowledge of the facts ascertained after a thorough discovery process, the applicable law, and Defendants' finances[7]—is that the terms of the Settlement Agreement are not only fair, adequate, and reasonable, but afford excellent benefits to the Settlement Class.[8]

In particular, in addition to an injunction prohibiting Defendants' future violation of the TCPA's restrictive provisions governing fax advertisement (47 U.S.C. § 227), members of the Settlement Class are eligible to recover up to $500 *per* subject fax if they provide legitimate copies of the same, and even as to faxes for which copies are not provided, from up to $150 for one fax, to up to $325 for five faxes. The only procedural requirement for this relief was the completion and timely submission—via fax, email, or regular mail—of a simple claim form available for download from the Settlement Website, which had to be executed under penalty of perjury, stating the number of faxes the Claimant received.

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[7] Plaintiff was allowed access to Defendants' financial records on a confidential basis, and those records were reviewed with the assistance of multiple accountants.

[8] *See, e.g., Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-CV-1290, 2013 WL 444619, at *6-7 (S.D. Cal. Feb. 4, 2013) (granting preliminary approval in a TCPA telephone calls case where it was estimated that claimants would receive between $2 and $213.80 per capita, noting: "A settlement is not judged against only the amount that might have been recovered had the plaintiff prevailed at trial, nor must the settlement provide 100% of the damages sought to be fair and reasonable. There is a 'range of reasonableness' in determining whether to approve settlement 'which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.' The adequacy of the amount recovered must be judged as 'a yielding of absolutes . . . . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation.' 'It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair.'") (nationwide citations omitted).

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To assist Claimants in the process, the Settlement Website included Exhibit 2 to ABC's expert's report (D.E. 57-9), which listed some of the fax numbers to which the faxes at issue were sent, as well as the number of confirmed transmissions to such numbers during a portion of the Class Period. The Settlement Website also included a copy of the Settlement Agreement, a longer notice that provided information in a "frequently-asked-questions" format, and other important information, such as the pertinent deadlines. In addition, the Settlement Administrator was available through a toll-free number to provide information about the Settlement Agreement and the completion and submission of claims. Thus, the Settlement Agreement provided meaningful relief *and* an effective mechanism for the Settlement Class to benefit therefrom.

Furthermore, the Settlement Class satisfied the certification requirements of a Rule 23(b)(3) settlement class. First, its definition is adequate and ensures ascertainability by virtue of its limitation to those persons and entities having a requisite connection to the fax numbers in the Facsimile List. (*See supra* n.2.) This included thousands of schools (*id.*); thus, numerosity is satisfied. In addition, commonality, typicality, predominance, and superiority are satisfied for the same reasons those elements were found present in the junk fax action under review in this Court's *Sarris* certification. *See Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 695-99 (S.D. Fla. 2015) (Williams, J.).

Moreover, ABC thoroughly addressed and supported its standing and adequacy, as well as the adequacy of its counsel, in its certification briefing. (D.E. 71 (Mot. Class Cert.) at 2-3, 5-21; D.E. 71-2 (Pl.'s Decl.); D.E. 71-3 (Martinez Decl); D.E. 71-4 (Hernandez Decl.); D.E. 84 (Pl.'s Cert. Reply) at 2-4, 6-7.)

Similarly, BYSV, as well as its counsel, satisfied the adequacy requirement. Indeed, BYSV has previously been appointed class representative, and its counsel class counsel, on behalf

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of a similar settlement class in a TCPA junk fax action.[9] In short, final approval of the Settlement Agreement is also proper because the Settlement Class satisfies all the requirements of Rule 23(a),(b)(3).

3. The Eleventh Circuit's Factors Favor Approval of the Settlement Agreement.

As noted, the Eleventh Circuit has instructed that courts should consider several factors in determining whether a class action settlement agreement should be approved. *See Faught v. Am. Home Shield Corp.*, 668 F.3d at 1240 ("We have instructed the district court to consider the following factors: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved."). Each of the pertinent factors favors approval in this case.

1. The Likelihood of Success at Trial.

While as previously noted, Plaintiffs were confident in the merits of their case, summary judgment and class certification rulings were outstanding, and Defendants were expected to vigorously oppose all remaining substantive determinations, as they did prior to settlement. More importantly, a trial victory would not necessarily mean "success"; the minimum statutory

[9] (*E.g.*, *Bais Yaakov of Spring Valley v. Richmond, The Am. Int'l Univ. in London, Inc.*, *et al.*, Case No. 13-cv-04564 (S.D.N.Y.), D.E. 134 (Prelim. Appr. Order appointing Aytan Bellin, Esq. class counsel), D.E. 150 (Final Order and J.); *see also Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1207, 1209 (C.D. Cal. 2014) (commenting on Mr. Bellin's experience, results, skills, and quality of work in granting final approval of a settlement in a TCPA junk fax action; *accord Kaye v. Amicus Mediation & Arbitration Grp., Inc.*, 300 F.R.D. 67, 82 (D. Conn. 2014) (noting Mr. Bellin's "expertise and experience in this area of the law"); *Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 F. App'x 880, 884 (3d Cir. 2016) (describing Mr. Bellin as "highly skilled and experienced in this type of litigation"); *Fitzgerald v. Gann Law Books, Inc., et al.*, Case No. 11-cv-04287 (D.N.J), D.E. 85 (Prelim. Approval Order appointing Mr. Bellin and Jeffrey Eilender, Esq. class counsel), D.E. 101 (Final Order and J).)

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liability at issue alone was astronomical—*i.e.*, $500 per violation x 1,850,943 faxes = $925,471,500—and unlikely to ever be satisfied. Thus, given these considerations and the inherent uncertainty of litigation, the "success" factor favors final approval of the Settlement Agreement.

2. The Range of Possible Recovery.

Class Counsel reviewed Defendants' confidential financial information—some of which was filed under seal (D.E. 79)—with the assistance of qualified accountants. Based on this review, Class Counsel determined that any "possible *recovery*" was in a range exponentially below the amount of Defendants' potential liability, which could be as high as $2,776,414,500, if the TCPA violations were found to be willful and/or knowing. For this reason, and to maximize the total amount available to the Settlement Class, Plaintiffs insisted that monetary relief be based not only on the merits and strength of Plaintiffs' claims and Defendants' defenses, but also on an assessment of Defendants' ability to pay over time, which is how liabilities exceeding a defendant's immediate ability to pay have been resolved for the benefit of a class in prior instances. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 103-04 (2d Cir. 2005) (outlining the terms of a settlement providing for defendants' installment payments over years); *accord Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 148-49 (S.D. Ohio 1992) (same); *In re Certainteed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 204-05 (E.D. Pa. 2014) (same). This framework resulted in a proposal for the availability of a larger fund from which to satisfy valid claims. At the same time, the framework diminished the risk that Defendants would be forced out of business, and that thus, the Settlement Class would be left without a meaningful remedy. In sum, based on these considerations and a thorough assessment of the collectable value of a potential judgment, this factor overwhelmingly favors approval of the compromise embodied in the Settlement Agreement.

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3. The Range of Recovery at Which Settlement is Fair, Adequate, and Reasonable.

The foregoing discussion also impacts a consideration of this factor. In addition to an injunction prohibiting the conduct that precipitated this action, the Settlement Common Fund is substantial, yet, an amount that Defendants can satisfy. Furthermore, the recovery amounts set forth in the Settlement Agreement are intended to afford fair, adequate, and reasonable relief—from up to $150 for one fax, to up to $325 for five faxes, plus up to $500 *per* fax with a copy—to those members of the Settlement Class that submit valid claims. Thus, this factor also favors approval of the Settlement Agreement.

4. The Anticipated Complexity, Expense, and Duration of Litigation.

There is little doubt that without a settlement, litigation will be lengthy, time-consuming, expensive, and most likely unsatisfying to all concerned. The Court's summary judgment and class certification determinations are still pending, and even if Plaintiffs were to succeed on both, a multi-day jury trial would ensue to address the propriety of punitive damages on Plaintiffs' common law claims, and assist the Court's determination on whether to increase the TCPA award due to willful and knowing conduct. And given Defendants' due process arguments, there would also be proceedings to determine the constitutionality of any award. Appellate review would also be likely irrespective of which side prevailed. Moreover, Defendants have indicated multiple times that they would seek bankruptcy court protection, which Plaintiffs would oppose. As is readily apparent, this factor also favors final approval of the Settlement Agreement.

5. The Opposition to the Settlement.

This factor overwhelmingly favors final approval of the Settlement Agreement. Notice was sent to the tens of thousands of members of the Settlement Class, as well as the attorneys general for the United States, the States, and U.S. territories. (D.E. 108-1.) No one has

objected to the Settlement Agreement.

6. The Stage of Proceedings at Which the Settlement was Achieved.

The Settlement Agreement is the product of many months of arms-length negotiations, and was achieved following the close of all discovery, summary judgment and class certification briefings, and practically on the eve of trial. Therefore, the Settlement Agreement is based on an informed assessment of the facts, the pertinent law, and the circumstances impacting the satisfaction of a potential judgment. As the Court is also aware, the Settlement Agreement was achieved after adversarial, non-collusive proceedings in which each side fully advocated their opposing positions. Thus, this last factor also favors final approval of the Settlement Agreement.

B. The Court Should Approve Counsel's Fee And Cost Application.

In accordance with the Settlement Agreement (Settlement Agreement §§ 4.1-4.3), Class Counsel is entitled to request the approval of an attorneys' fees award of up to one-third (33.33%) of the Settlement Common Fund (*i.e.*, $516,666.66), in addition to litigation costs and expenses. (*Id.*) Similarly, Class Counsel is entitled to request the approval of incentive awards of up to $15,000 to ABC, and $10,000 to BYSV, for their efforts as class representatives. (*Id.*) Awards in these amounts are reasonable, proper, and warranted in this case.

1. The Requested Fee and Cost Award is Reasonable and Comports with Counsel's Efforts on Behalf of the Settlement Class.

First, an award of attorneys' fees to class counsel is entirely proper, as it incentivizes the prosecution and redress of claims that may otherwise never be remedied. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987) ("[T]he economics of the class action suit often are such that counsel have a greater financial incentive for obtaining a successful resolution of a class suit than do the individual class members. It is not surprising, then, that the subjective desire to vigorously prosecute a class action . . . quite often is supplied more by counsel than by

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the class members themselves. Obviously this creates a potential for abuse. *Yet the financial incentives offered by the class suit serve both the public interests in the private enforcement of various regulatory schemes . . . and the private interests of the class members in obtaining redress of legal grievances that might not feasibly be remedied within the framework of a multiplicity of small individual suits for damages*.") (emphasis added) (quotation marks and citations omitted); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773-74 (11th Cir. 1991) (endorsing the percentage approach in common fund cases, which incentivizes counsel to seek class-wide relief).

Class counsel's attorneys' fees must be determined from a consideration of the total fund established for the class's benefit, not the amounts finally claimed and awarded to class members. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 480 (1980) ("[T]his 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*. . . . [A]bsentee class members'] right to share the harvest of the lawsuit upon proof of their identity, *whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel*. Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs.") (emphasis added); *accord Waters v. Int'l Precious Metals Corp*., 190 F.3d 1291, 1294-95 (11th Cir. 1999) (discussing *Boeing* and *Camden I*); *Poertner v. Gillette Co.*, 618 F. App'x 624, 628 n.2 (11th Cir. 2015) (noting that claims-made settlements are governed by the same principles that govern common fund settlements).

In particular, the attorneys' fees to be awarded must be based on a reasonable percentage of the common fund, with 25% often considered a bench mark, subject to adjustments consistent with the *Johnson* factors, as well as non-monetary benefits conferred on the class. *Id*. at 628-29

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(citing *Camden I*, 946 F.2d at 770, 774, 775 ("We agree . . . that the *Johnson* factors[10] continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases. Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action. In most instances, there will also be additional factors unique to a particular case which will be relevant to the district court's consideration.")).

Here, Class Counsel requests a $516,666.66 fee award, which corresponds to a third (33.33%) of the $1,550,000 Settlement Common Fund, and is amply supported by all the factors pertinent to a fee determination. More specifically, the Settlement Class benefited from experienced and reputable counsel who collectively spent more than 900 hours prosecuting the case. (**Ex. 1** (Martinez Decl.); **Ex. 2** (Hernandez Decl.); **Ex. 3** (Lee Decl.).) This involved substantial investigation and discovery, including three depositions (two in Alabama), several third-party subpoenas and witness interviews, and the review of thousands of pages of documents reflecting fax transmissions, recipient lists, and opt-out requests. (Martinez Decl.; D.E. 57-63.)

In addition, the case required high-level research and briefing on two dispositive motions to dismiss, a motion summary judgment, competing motions on class certification, and a motion to exclude expert testimony. (Martinez Decl.) Furthermore, since the case proceeded to within

[10] The factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (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 length of the professional relationship with the client; (12) awards in similar cases. *Id*. at 628 n.3.

weeks of the scheduled trial, Class Counsel had to prepare to try the case. (*Id.*) This included the drafting and circulation of a pretrial stipulation and proposed jury instructions, and the research and drafting of an omnibus motion in limine. (*Id.*) This is in addition to the settlement discussions, which required careful review and consideration of Defendants' financial records with the assistance of retained accountants. (*Id.*) Thus, the prosecution of this case involved substantial time, care, and attention, as well as incessant labor for more than a year. (*Id.*) During that time lead Miami Class Counsel, Mr. Martinez, worked on this case and not other pending matters. (*Id.*)

It is important to note, moreover, that the technical and legal issues at play in the case called for highly skilled counsel proficient, not only in sophisticated class action litigation in federal courts, but also in the nuances of 21st-century computer-based facsimile transmissions, and the procurement and preservation of evidence reflective of such transmissions. The inherent complexities and risks involved in this regard were further exacerbated by unique developments in class action jurisprudence that were only resolved during the pendency of the action (*e.g.*, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)). Thus, Class Counsel had to address novel and difficult questions during a particularly unsettled period in the applicable law, making prosecution of the case on a contingency basis especially risky and undesirable.[11] The risk was compounded by Defendants' repeated assertions about a potential bankruptcy filing. Nonetheless, Class Counsel honored their duty to vigorously prosecute the action, and did so expediently, as warranted by the pressing need to secure critical fax transmission data before its corruption or deletion in the normal course of business.

[11] Miami counsel's billable rate is otherwise $500/hr. for class action litigation. (Martinez Decl.)

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Furthermore, aside from attorney time and effort, Class Counsel devoted the resources necessary to a successful resolution of the case without any guarantee of recoupment.[12] For instance, Class Counsel retained Robert Biggerstaff, the preeminent expert in TCPA litigation. Class Counsel also retained an accounting firm and bankruptcy counsel to assess Defendants' financial condition and protect the Settlement Class's interests should Defendants seek bankruptcy protection. This proved critical to the conduct of informed settlement discussions, as Class Counsel had to ensure that the terms of the settlement were fair, reasonable, adequate, and corresponded to Defendants' ability to provide class-wide relief. In this regard, it is Class Counsel's opinion that the Settlement Agreement represents a fair, reasonable, and adequate result for the Settlement Class. (Martinez Decl.) Indeed, even those members of the Settlement Class that elected to forego a claim for monetary relief have benefitted from this action and the injunctive relief included in the Settlement Agreement. More specifically, the fax advertisements at issue had been burdening tens of thousands of schools nationwide for well over a year, and all such conduct has now stopped and is being enjoined.

Finally, as previously noted, notice of the Settlement Agreement was sent to the tens of thousands of members of the Settlement Class, as well as the attorneys general of the United States, the States, and U.S. territories. (D.E. 108-1.) No one has objected to the requested fees and costs

[12] A detail of the $32,278.00 in costs and expenses for which Class Counsel is requesting reimbursement is attached as **Exhibit 4**.

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award, which comports with awards in similar TCPA class actions throughout the nation,[13] as well as other class actions adjudicated in our jurisdiction. *See Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2012 WL 5290155, at *5-6 (S.D. Fla. Sept. 26, 2012) (Torres, M.J.) ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one-third.") (citing Circuit case law and listing Southern and Middle District of Florida attorneys' fees awards); *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *4 (E.D. Pa. Jan. 3, 2008) ("A lack of objections demonstrates that the Class views the settlement as a success and *finds the request for counsel fees to be reasonable*.") (emphasis added).

[13] *See CE Design, Ltd. v. Exterior Sys., Inc.*, No. 07-CV-66, D.E. 32-2, 39 (N.D. Ill. Dec. 6, 2007) (33.33% ($315,334 settlement fund; $105,686.33 in fees and costs; $9,500 incentive award)); *Holtzman v. CCH Inc.*, No. 07-CV-7033, D.E. 24, 33 (N.D. Ill. Sept. 30, 2009) (33.33% ($397,000 settlement fund; $132,333,33 in fees and $1,000 in costs; $5,000 incentive award)); *G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 07-CV-5953, D.E. 146 (N.D. Ill. Nov. 1, 2010) (33.33% ($3,000,000 settlement fund; $1,000,000 in fees and $37,254.08 in costs; $,9,500 incentive award)); *Saf-TGard Int'l, Inc. v. Seiko Corp. of Am.*, No. 09-CV-0776, D.E. 89-1, 100 (N.D. Ill. Jan. 14, 2011) (33% (up to $3,500,000 in payments to the class; $1,155,000 in fees and costs; $12,000 incentive award)); *Targin Sign Sys., Inc. v. Preferred Chiro. Ctr., Ltd.*, No. 09-CV-1399, D.E. 140 (N.D. Ill. May 26, 2011) (33.33% ($1,551,000 settlement fund; $517,000 in fees and $42,640.44 in costs; $9,500 incentive award)); *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, No. 10-CV-331, D.E. 59 (E.D. Wis. July 19, 2013) (35% fee ($900,000 settlement fund; $315,000 in fees and $30,000 in costs; $9,500 incentive award)); *The Savanna Group, Inc. v. Trynex, Inc.*, No. 10-CV-7995, D.E. 243 (N.D. Ill. Mar. 4, 2014) (33.33% ($2,550,000 settlement fund; $850,000 in fees and $62,250 in costs; $15,000 incentive award)); *Sandusky Wellness Ctr. v. Heel, Inc.*, No. 12-CV-1470, D.E. 95 (N.D. Ohio Apr. 25, 2014) (33.33% ($6,000,000 settlement fund; $2,000,000 in fees and $170,000 in costs; $15,000 incentive award)); *Hinman v. M&M Rental Ctr., Inc.*, No. 06-CV-1156, D.E. 264 (N.D. Ill. Oct. 24, 2014) (33.33% ($2,105,754.57 settlement fund; $701,918.19 in fees and $44,359.07 in costs; $15,000 incentive award)); *Jackson's Five Star Catering, Inc. v. Beason*, No. 10-CV-10010, D.E. 78-1, 90 (E.D. Mich. Apr. 15, 2015) (33.33% ($1,630,000 settlement fund; $543,333.33 in fees and $91,666.67 in costs; $15,000 incentive award)); *Jay Clogg Realty Group, Inc. v. Burger King Corp.*, No. 13-CV-662, D.E. 103 (D. Md. Apr. 15, 2015) (33.33% ($8,500,000 settlement fund; $2,833,050 in fees and $78,259.68 in costs; $15,000 incentive award)); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, No. 10-CV-253, D.E. 245 (W.D. Mich. July 30, 2015) (33.33% ($112,500 settlement fund; $37,500 in fees and $35,500 in costs; $9,500 incentive award)).

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In sum, Class Counsel respectfully requests an attorneys' fees award of $516,666.66, in addition to $32,278.00 for the reasonable costs and expenses incurred on behalf of the Class.

2. The Requested Incentive Awards are Reasonable and Proper.

The requested incentive awards—$15,000 to ABC and $10,000 to BYSV—are in line with incentive awards in TCPA litigation. (*See supra* n.13.) Moreover, they are entirely proper, particularly given the Plaintiffs' initiative, commitment, and willingness to participate in legal proceedings to benefit, not just themselves, but a class, and the time and assistance they actually contributed to that effort.[14] *See Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) ("Incentive awards are not uncommon in class action litigation where, as here, a common fund has been created for the benefit of the class. Incentive awards compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. Incentive awards serve an important function, particularly where the named plaintiffs participated actively in the litigation.") (citation omitted).

More specifically, out of the tens of thousands of members of the Settlement Class, only ABC and BYSV agreed to take affirmative legal action to stop and remedy the fax advertising at issue, which had been ongoing for more than a year, and would have likely continued but for their willingness to commit valuable resources (*e.g.*, time and work disruption) to prosecute this case. They did this without a guarantee of success, knowing that participating in a legal action

[14] For instance, ABC: (1) acted diligently to contact counsel after receiving a subject fax on August 18, 2015, (2) discussed with counsel the complaint's allegations, its representative role, and committed itself to pursue relief on behalf of the class, (3) authorized the action to be timely filed on August 21, 2015, (4) regularly monitored the progress of the case and counsel's efforts on behalf of the class, (5) devoted a full work day to attend mediation, (6) devoted half a work day to attend its deposition, (7) devoted a number of hours to attend the Court's August 24, 2016 status conference (D.E. 96), and (8) otherwise contributed to the prosecution of the action via competent testimony and declarations in support of timely motions for summary judgment and class certification. (ABC Decl. (D.E. 71-2); ABC Dep. (D.E. 64-1).)

would burden their busy operations. Given the advanced posture of the Miami proceedings, ABC bore most of this burden. (*See supra* n.14.) Nevertheless, BYSV stood ready to satisfy the same obligations, providing an additional safeguard that contributed to the resolution of the action. Thus, both ABC and BYSV should be rewarded for their contributions to the Settlement Class. Again, Defendants have agreed to this relief, and no one has objected.

IV. Conclusion

For all the foregoing reasons, Plaintiffs respectfully submit that final approval of the Settlement Agreement is warranted. Thus, Plaintiffs request that the Court enter an order in the form appended to the Settlement Agreement (107-1) as Exhibit 5 that, *inter alia*:

1. Grants final approval of the Settlement Agreement;
2. Certifies the Settlement Class;
3. Appoints Plaintiffs as Class Representatives, and their respective counsel as Class Counsel;
4. Awards $516,666.66 to Class Counsel as reasonable attorneys' fees;
5. Awards to $32,278.00 to Class Counsel as costs and expenses;
6. Awards $15,000 to ABC and $10,000 to BYSV as incentive awards; and,
7. Grants any other relief deemed just and proper to effect the Settlement Agreement.

PRE-FILING CERTIFICATION

I certify having conferred with Defendants' counsel prior to the filing of this Motion, who has confirmed that the relief requested herein is unopposed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 23, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all the below counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-23142-KMW

ABC BARTENDING SCHOOL OF MIAMI, INC.,
individually and as representative of a
class of similarly-situated persons,

Plaintiff,

v.

AMERICAN CHEMICALS & EQUIPMENT, INC.
(*d.b.a.* "AMERICAN OSMENT", "GORILLA GLIDES",
and "STOCKUP.COM"), and STEVEN MOTE,

Defendants.
_____/

CASE NO. 16-CV-24705-KMW

BAIS YAAKOV OF SPRING VALLEY,
on behalf of itself and all others similarly situated,

Plaintiff,

v.

AMERICAN CHEMICALS & EQUIPMENT, INC.
d/b/a AMERICANOSMENT d/b/a STOCKUP.COM,

Defendant.
_____/

DECLARATION OF ARTURO MARTINEZ

I, Arturo Martinez, member of Wallen Hernandez Lee Martinez, LLP, attorneys for Plaintiff ABC Bartending School of Miami, Inc., based on my personal knowledge, state that:

A. Counsel's Background and Experience.

1. I have been licensed to practice law in the State of Florida since 2001, and have been a member in good standing of the Florida Bar since my admission.

2. I am also admitted to practice law in the United States District Courts for the

Southern District of Florida, the Middle District of Florida, the District of Colorado, and the United States Court of Appeals for the Eleventh Circuit.

3. Previously, I was a partner in the Miami office of the law firm Shutts & Bowen LLP, as part of its Business Litigation Practice Group.

4. In addition, I was a judicial clerk in this Court, completing a two-year clerkship with the Honorable Ursula Ungaro.

5. Aside from my time as judicial clerk, I have been in private practice my entire career as a trial and appellate attorney dedicated to the resolution of complex civil litigation matters, including class actions. My trial experience includes three jury trials in this Court.

6. In addition to this action, I have participated in the litigation of ten (10) class action lawsuits,[1] including as part of settlement discussions. I have also participated in the litigation and settlement of numerous other complex civil litigation matters in this and other courts, as well as arbitration tribunals, including litigation involving common law tort claims, statutory tort claims (*e.g.*, Electronic Fund Transfer Act, Employee Polygraph Protection Act, Fair Credit Reporting Act, Fair Labor Standards Act, Florida Deceptive and Unfair Trade Practices Act, Florida Securities and Investor Protection Act, patent infringement, Racketeer Influenced and Corrupt Organizations Act, trademark infringement), and contract-based claims, including insurance coverage disputes.

[1] *Perotti v. Bloomingdale's, Inc.*, No. 05-19630 (11th Jud. Cir. Fla.); *Taylor v. Nat'l Auto. Lenders, Inc.*, No. 06-22871 (11th Jud. Cir. Fla.); *Envtl. Progress, Inc. v. Metro. Life Ins. Co.*, No. 9:12-cv-80907 (S.D. Fla.) (TCPA action); *C-Mart v. Metro. Life Ins. Co.*, 9:13-cv-80561 (S.D. Fla.) (TCPA action); *Coons v. Mercury Ins. Co. of Fla.*, No. 14-12569 (11th Jud. Cir. Fla.); *Dye v. United Servs. Auto. Ass'n*, No. 1:14-cv-22429 (S.D. Fla.); *Aviles v. Gov't Employees Ins. Co.*, No. 1:14-cv-22464 (S.D. Fla.); *Coccaro v. GEICO Gen. Ins. Co.*, No. 9:14-cv-80461 (S.D. Fla.); *Mr. Wood Custom Floors, Inc.* v. *CFN Capital LLC*, No. 1:15-cv-23011 (S.D. Fla.) (TCPA action); *Hallums v. Infinity Ins. Co.*, No. 1:16-cv-24507 (S.D. Fla.).

B. Counsel's Efforts in the Prosecution of this Action.

7. The Plaintiff, ABC Bartending School of Miami, Inc. ("ABC"), via its President, Mark Drobiarz, contacted the undersigned after receiving the August 18, 2015 fax reproduced in the complaint, forwarding the same for my review.

8. This action was filed promptly thereafter, on August 21, 2015 (D.E. 1), following my investigation into the matter, and only after I had forwarded a draft of the complaint to Mr. Drobiarz, discussed its basis and confirmed the facts within ABC's knowledge with Mr. Drobiarz, explained the allegations included therein, as well as ABC's rights and responsibilities as class representative, and received authorization to file the same.

9. Following service of process on August 25, 2015 (D.E. 5), counsel for the corporate Defendant, American Chemicals & Equipment, Inc. ("ACE") entered an appearance, and on Thursday, September 17, 2015, requested a 30-day enlargement to respond to the complaint, which ABC did not oppose. (D.E. 6-9.)

10. Soon thereafter, on Monday, September 21, 2015, I forwarded drafts of a joint scheduling report and a proposed scheduling order to ACE's counsel, and also requested the scheduling of a conference call that same week to discuss the same. This was done for the purpose of satisfying the Rule 26(f) conference requirements, in order for discovery to commence and proceed without delay.[2] Of particular concern was the fact that, in the undersigned's experience, some fax broadcasters and telephone service providers maintain transmission records for a limited period of time. Thus, it was critical to proceed expeditiously and secure pertinent records before their loss in the normal course of business.

[2] "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) . . . ." Fed. R. Civ. P. 26(d)(1).

11. Due to ACE's counsel's unavailability, the parties could not hold a Rule 26(f) conference until September 29, 2015, at which time they agreed that ABC (through counsel) could begin its discovery the following week—*i.e.*, October 5, 2015.

12. Promptly on October 5, 2015, ABC: (1) served its First Set of Interrogatories and First Request for Production of Documents on ACE; (2) requested a date between November 16 and December 18, 2015 for ACE's Rule 30(b)(6) deposition; and, (3) served a subpoena duces tecum on non-party Bandwith.com, the original carrier for telephone number (205) 224-9874, the opt-out fax number that ACE included in the faxes at issue in the case ("Faxes").[3]

13. On Monday, October 12, 2015, I contacted ACE's counsel because he had yet to provide: (1) proposed comments/revisions to the draft joint scheduling report and order (despite initially indicating they would be provided by Friday, October 2, 2015, and subsequently by Friday, October 9, 2015), or (2) a proposed date for ACE's deposition. ACE's counsel informed that both matters had been forwarded to ACE, but that he was being replaced as counsel, and thus, could not provide a response on either point.

14. Accordingly, on Monday, October 12, 2015, upon being contacted by ACE's replacement counsel, I again forwarded the draft joint scheduling report and order for proposed comments/revisions,[4] and again requested a proposed date for ACE's deposition.

15. On October 20, 2015, I served a notice unilaterally setting ACE's deposition for

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[3] The subpoena requested "[c]opies of: (a) documents sufficient to ascertain the identity and address of your customer and/or end user for telephone # 205-224-9874; (b) all your agreements, invoices, payment records for telephone # 205-224-9874." ABC had to subpoena several carriers until it was able to locate the number's then service provider (Fax87.com), who turned over records confirming the use of (205) 224-9874 as an opt-out fax number for the Faxes.

[4] The draft report and proposed order were forwarded yet again to ACE's counsel on October 16, 2015, once the Court issued its order requiring the same (D.E. 14). ACE's counsel provided revisions on October 28, 2015, and the report and proposed order were filed the next day (D.E. 15).

November 20, 2015, since a deposition date had yet to be provided, despite repeated requests since October 5, 2015. I requested confirmation of the November 20 date, or that any other available deposition date between November 16-December 18, 2015 be provided. Since neither a confirmation nor an alternative date were forthcoming, I contacted chambers for the Hon. Magistrate Judge Andrea Simonton and reserved time for a discovery hearing. Only then was a deposition date provided.[5]

16. Then, on October 23, 2016, ACE served a Rule 68 offer of judgment (D.E. 19-1), and a separate offer, both to ABC only (not the class). While the Eleventh Circuit had already considered and rejected such attempts to "pick off" a class action plaintiff (*see Stein v. Buccaneers Ltd. P'Ship*, 772 F.3d 698 (11th Cir. 2014)), the Supreme Court had recently agreed to entertain the issue (*see Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (U.S. May 18, 2015)). Thus, ACE's offers required a careful review of the pertinent authorities, briefs, and oral arguments before the Supreme Court.

17. I forwarded ACE's offers to ABC, and ABC considered them unacceptable. Nonetheless, I explained the offers to ABC, and informed ABC of the proceedings then pending before the Supreme Court.[6]

18. As expected, on November 9, 2015, ACE served a Motion to Stay the Action (D.E. 19), arguing that the case should be stayed pending the Supreme Court's determinations in the *Gomez* and *Spokeo* matters. In a related move, ACE served insufficient responses to Plaintiff's Interrogatories and Request for Production of Documents, taking the position that

[5] ACE's Rule 30(b)(6) deposition took place in Birmingham, Alabama, on December 18, 2015.

[6] On January 20, 2016, the Supreme Court rejected the mootness-by-unaccepted-offer argument underlying ACE's offers. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) ("[A]n unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, so the District Court retained jurisdiction to adjudicate Gomez's complaint.").

since it had moved to stay the action, it could wait for a ruling on that motion before proceeding to fact discovery. As a result, ABC had to file an Opposition to ACE's Motion to Stay (D.E. 23), and attend a hearing to address ACE's discovery posture (D.E. 25). The Court: (1) rejected ACE's proposition that it could wait to provide proper discovery responses until after a ruling on its Motion to Stay (*id.*), and (2) denied ACE's Motion to Stay (D.E. 29).

19. As a result, ACE provided supplemental discovery responses on December 7, 2015. These responses revealed WestFax, Inc. ("WestFax"), the fax broadcaster ACE used to send the Faxes—whose identity ACE had thus far refused to disclose—and ASD Data Services LLC ("ASD"), the data aggregator ACE used to obtain the fax numbers used in its faxing campaign. ABC subpoenaed WestFax and ASD the very next day.[7]

20. ACE was also forced to disclose pertinent fax logs in its possession—another item ACE had refused to disclose. ACE produced these logs on December 16, 2015. ABC retained an expert witness, Mr. Robert Biggerstaff, to analyze these logs and provide his opinion on the same.

21. As noted, ACE's Rule 30(b)(6) deposition took place in Birmingham, Alabama, on December 18, 2015. ACE's deposition supported the naming of Defendant Mr. Steven Mote, who had previously been included in the case as a "John Doe" Defendant. ABC requested leave to amend the complaint for this purpose on January 7, 2016 (D.E. 32), and the Court granted the motion on January 11, 2016 (D.E. 33).[8]

22. Thereafter, in preparation for the February 9, 2016 mediation before David Lichter, I drafted a confidential mediation statement, as well as a term sheet of material terms in aid

[7] WestFax and ASD provided responsive documents; WestFax also agreed to submit a declaration.

[8] Defendants moved to dismiss the Amended Complaint (D.E. 36, 45), and ABC timely opposed the same (D.E. 46, 47).

of settlement discussions. Preparation in support of ABC's mediation position also included the retention of bankruptcy attorney Andrew Herron, of Herron Ortiz, to assist in the evaluation of the class's claims in the event of a bankruptcy filing, which Defendants had threatened.

23. Mr. Drobiarz, co-counsel Eric Hernandez,[9] and I attended the February 9, 2016 mediation session on behalf of ABC. The parties agreed to adjourn, exchange further information, and continue the mediation with the assistance of Mr. Lichter. (D.E. 42.) To this end, the parties filed a Joint Motion for Extension of Time in Light of Ongoing Settlement Discussions (D.E. 43), which the Court partly granted on February 17, 2016 (D.E. 44).

24. Then, on February 29, 2016, Mr. Lichter forwarded Defendants' first and only monetary offer for class settlement conveyed prior to ABC's May 10, 2016 deposition.[10] I forwarded the offer to ABC on March 1, 2016, and discussed the same with Mr. Drobiarz. Since the offer was unacceptable, I also discussed a counteroffer with Mr. Drobiarz, which was subsequently communicated to Mr. Lichter to be relayed to the Defendants. The counteroffer was prepared after consultation with accountant Dana Kaufman, of Kaufman & Company, P.A., who was retained to assist in the evaluation of financial information requested in discovery and produced as part of the mediation.

25. On March 1, 2016, I also requested a date to depose Mr. Mote. Once again, no such date was provided until ABC noticed the matter for a discovery hearing (D.E. 48), after which

[9] Mr. Hernandez has participated in every material aspect of the litigation, including in the framing of a litigation strategy and a discovery plan, and the drafting of ABC's legal memoranda.

[10] Months after the February offer, on May 18, 2016—after ABC's May 10, 2016 deposition—Mr. Lichter forwarded Defendants' second offer for class settlement.

Defendants agreed to an April 15, 2016 deposition. (D.E. 49.) Mr. Mote was deposed on that date in Birmingham, Alabama.

26. Thereafter, ABC timely moved for summary judgment (D.E. 55-63), and completed that briefing on July 22, 2016 (D.E. 77-80). Similarly, ABC timely moved for class certification, completing that briefing on August 8, 2016. (D.E. 71, 84.) During this time ABC also opposed Defendants' motion to exclude the testimony of ABC's expert, Robert Biggerstaff (D.E. 82).

27. Moreover, since trial was scheduled to begin in September 2016 (D.E. 16), ABC drafted and circulated a proposed joint pre-trial stipulation, as well as proposed jury instructions, all of which were due by August 19, 2016. (*Id.*) ABC also drafted an omnibus motion in limine due by that date. (*Id.*)

28. Then, on August 16, 2016, ACE's counsel informed the undersigned of an Alabama action that had been pending against ACE, and that the parties therein believed they had reached a settlement that impacted the class relief sought herein. ABC immediately filed an emergency motion to enjoin the Alabama proceedings. (D.E. 88.) ABC also retained Alabama counsel to represent its position in the proceedings therein.

29. The Court held a hearing on August 24, 2016 (D.E. 96), encouraging the parties to engage in global settlement discussions. Discussions were fruitful, with the parties executing a term sheet that led to the Settlement Agreement that the Court preliminarily approved on December 21, 2016. (D.E. 116.) Thereafter, the undersigned has actively monitored the Settlement Agreement's notice and claims process via regular reports provided by the Settlement Administrator.

30. The foregoing account, as well as ABC's filings in the case, reflect that the

undersigned investigated and prosecuted the claims in this action with the required zeal, experience, and knowledge to fairly and adequately represent the interests of the class. Indeed, despite numerous obstacles, counsel acted diligently to secure the pertinent fax transmission records, as well as the lay and expert witness testimony necessary to prove the class's statutory and common law claims. Furthermore, counsel demonstrated effectiveness in the handling of complex litigation matters, including class actions and TCPA claims.

31. Moreover, as the retention of an expert witness, bankruptcy counsel, and an accounting firm demonstrated, this matter was properly staffed and resourced, consistent with its level of complexity and the needs of the case. In this regard, it is important to note that I was primarily responsible for prosecution of the Miami action, having spent a total of 863.8 hours in tasks in its support. The work was performed on a contingency basis, despite the fact that the firm's billable rate in class action litigation is $500/hr., and that the case's obligations prevented my work on other pending billable matters.

C. <u>The Settlement Agreement</u>.

32. This matter was resolved through arms-length negotiations devoid of any collusion. Indeed, an agreement was reached only after the adversarial process had progressed to within weeks of the scheduled trial date.

33. It is my opinion that the Settlement Agreement is fair, reasonable, and adequate. This opinion is informed by my review of numerous settlements in TCPA class actions throughout the nation, my intimate knowledge of the factual and legal issues remaining for adjudication, and Defendants' financial wherewithal, which I considered with the assistance of multiple accountants.

I declare under penalty of perjury that the facts stated herein are true and correct.

Executed on March 23, 2017.

Arturo Martinez

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-23142-KMW

ABC BARTENDING SCHOOL OF MIAMI, INC.,
individually and as representative of a
class of similarly-situated persons,

Plaintiff,

v.

AMERICAN CHEMICALS & EQUIPMENT, INC.
(*d.b.a.* "AMERICAN OSMENT", "GORILLA GLIDES",
and "STOCKUP.COM"), and STEVEN MOTE,

Defendants.
_____/

CASE NO. 16-CV-24705-KMW

BAIS YAAKOV OF SPRING VALLEY,
on behalf of itself and all others similarly situated,

Plaintiff,

v.

AMERICAN CHEMICALS & EQUIPMENT, INC.
d/b/a AMERICANOSMENT d/b/a STOCKUP.COM,

Defendant.
_____/

DECLARATION OF ERIC HERNANDEZ

I, Eric Hernandez, member of Wallen Hernandez Lee Martinez, LLP, attorneys for Plaintiff ABC Bartending School of Miami, Inc., based on my personal knowledge, state that:

1. I have been licensed to practice law in the State of Florida since 2000, and have been a member in good standing of the Florida Bar since that time.

2. I am also admitted to practice law in the United States District Courts for the Southern District of Florida, the Middle District of Florida, the Northern District of Florida,

the United States Court of Appeals for the Eleventh Circuit, the United States Tax Court, and the United States Supreme Court.

3. Previously, I served as an Assistant United States Attorney for the Department of Justice in the Southern District of Florida. I was also an Assistant County Attorney with the Miami-Dade County Attorney's Office. In addition, I started my litigation career in private practice, as an attorney with Homer Bonner in Miami.

4. Furthermore, I was a judicial clerk for the Honorable Chief Justice Charles T. Wells, in the Florida Supreme Court, and the Honorable Magistrate Judge Patrick A. White, in the United States District Court for the Southern District of Florida.

5. I have also been a legal research and writing lecturer at the University of Miami School of Law, and Florida A&M University.

6. As an Assistant United States Attorney, I handled through trial and appeal cases involving a variety of complex financial crimes, including money laundering, export/import fraud, bank fraud, mortgage fraud, tax fraud, healthcare fraud, identity fraud, cybercrime, securities fraud, and wire fraud, as well as cases involving public corruption, human trafficking, immigration fraud, child pornography, narcotics trafficking, firearms and explosives, terrorism, armed robberies. bank robberies, and home invasions.

7. As an Assistant County Attorney, I handled through trial and appeal matters involving tort/wrongful death, taxes, commercial contract and bid protests, construction, section 1983 civil rights, employment cases (Title VII, ADEA, and ADA), sunshine and public records law, municipal bonds, and constitutional/County charter litigation.

8. While in private practice I handled a variety of complex commercial cases, including class and collective actions involving fraud and other business torts, securities and commodities law, breach of contract, unlawful employment practices, and products liability.

9. My trial experience includes approximately twenty jury trials and numerous bench trials in federal and state court and arbitration forums. Additionally, I have briefed many appellate cases and orally argued approximately ten cases before the federal and state appellate courts.

10. Aside from this action, I have participated in several class and collective action lawsuits, including: (a) the defense of investment banks from allegations that they had charged excessive fees in banking and lending; (b) the prosecution of consumers'·Deceptive and Unfair Trade Practices Act claims asserting that an e-commerce company unlawfully charged fees to provide federal tax identification numbers that were available for free; (c) a challenge to a class action settlement regarding excessive local government taxes and fees; (d) a challenge to e-commerce hotel and travel scheduling companies' unlawful collection of government taxes and fees; (e) the prosecution of individuals' claims for violation of the Telephone Consumer Protection Act; and (f) the defense of employers from alleged violations of the Fair Labor Standards Act.[1]

11. I was involved in this case since its inception, and worked with co-counsel Arturo Martinez in the development of a litigation strategy and a discovery plan to vigorously and efficiently prosecute the same. I was involved in the drafting of ABC's legal memoranda and written discovery, attended the deposition of American Chemicals & Equipment, Inc., mediation, and participated in the negotiations of the Settlement Agreement. To date, I have spent a total of 82.8 hours working on this case.

[1] I also participated in the implementation of a class action settlement stemming from County inmates' challenge to the County Department of Corrections' regulation based on alleged violations of the First Amendment right to freely exercise religion.

I declare under penalty of perjury that the facts stated herein are true and correct.

Executed on March 8, 2017.

Eric Hernandez

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CV-23142-KMW

ABC BARTENDING SCHOOL OF MIAMI, INC.,
individually and as representative of a
class of similarly-situated persons,

Plaintiff,

v.

AMERICAN CHEMICALS & EQUIPMENT, INC.
(*d.b.a.* "AMERICAN OSMENT", "GORILLA GLIDES",
and "STOCKUP.COM"), and STEVEN MOTE,

Defendants.
_____/

CASE NO. 16-CV-24705-KMW

BAIS YAAKOV OF SPRING VALLEY,
on behalf of itself and all others similarly situated,

Plaintiff,

v.

AMERICAN CHEMICALS & EQUIPMENT, INC.
d/b/a AMERICANOSMENT d/b/a STOCKUP.COM,

Defendant.
_____/

DECLARATION OF JERMAINE LEE

I, Jermaine Lee, member of Wallen Hernandez Lee Martinez, LLP, attorneys for Plaintiff ABC Bartending School of Miami, Inc., based on my personal knowledge, state that:

1. I have been licensed to practice law in the State of Florida since 2004, and have been a member in good standing of the Florida Bar since that time.

2. I am also admitted to practice law in the United States District Courts for the Southern District of Florida and the Middle District of Florida.

3. I was previously a litigation attorney in the Miami offices of Shook, Hardy & Bacon, LLP, Cozen O'Connor, and Bilzin Sumberg. Furthermore, prior to becoming an attorney I was a certified public accountant ("CPA") at PricewaterhouseCoopers. Thus, I have extensive experience reviewing financial documents, and interpreting those as part of settlement discussions during litigation.

4. My involvement in this case was in that capacity. I reviewed financial documents, including tax returns, provided by the Defendants, and was involved in the settlement discussions that led to the Settlement Agreement. To date, I have spent a total of 33.6 hours working on this case.

I declare under penalty of perjury that the facts stated herein are true and correct.

Executed on March 8, 2017.

Jermaine Lee

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NOS. 15-CV-23142-KMW / 16-CV-24705-KMW

PLAINTIFFS' COST/EXPENSE DETAIL

ITEM	COST
1. Filing Fee	$400.00
2. Service of Complaint (AlaServe, LLC)	$60.00
3. Service of Third Party Records Subpoena (Bandwidth.Com CLEC LLC and/or Bandwidth.Com, Inc.)	$90.00
4. Preparation and Delivery of Hrg. Binders (Speed Print One, Inc.)	$45.05
5. December 2015 Flight Tixs – Mia/BHM; ACE's 30(b)(5) Dep.	$1372.00
6. Hotel in BHM	$151.58
7. Service of Third Party Records Subpoena (WestFax, Inc.)	$88.00
8. Service of Third Party Records Subpoena (ASD Data Servs. LLC)	$95.00
9. Service of Third Party Dep. Subpoena (WestFax, Inc.)	$88.00
10. Service of Am. Compl.	$90.00
11. 30(b)(6) Dep. Transcript	$497.55
12. Bankruptcy Counsel (Herron Ortiz)	$1,057.50
13. TCPA Expert – Robert Biggerstaff	$18,000.00
14. Advertising Expert – Bruce Silverman	$3,500.00
15. Accounting Firm (Kaufman & Co.)	$2,500.00

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NOS. 15-CV-23142-KMW / 16-CV-24705-KMW

PLAINTIFFS' COST/EXPENSE DETAIL

16.	Mediator (David Lichter, Esq.)	$1,500.00
17.	Service of Third Pty Recds Subpoena (IberiaBank)	$120.00
18.	April 2016 Flight Tix – Mia/BHM; Mote Dep.	$702.20
19.	Hotel in BHM	$175.08
20.	Mote Dep. Transcript	$127.80
21.	Internet Archive Affidavit	$430.00
22.	Internet Archive Affidavit	$370.00
23.	Costs of Copies of Third Party Records Subpoena (GoDaddy)	$28.25
24.	Alabama Counsel for Parallel Action (Tony Mastando, Esq.)	$630.00
25.	Alabama Courts Dockets Search	$9.99
26.	Pro Hac Vice App – Bellin	$75.00
27.	Pro Hac Vice App – Eilender	$75.00
TOTAL		**$32,278.00**