

UNITED STATES DISTRICT COURT  
FOR DISTRICT OF MASSACHUSETTS

KENNETH A. THOMAS MD, LLC, a  
Connecticut limited liability company,  
individually and on behalf of all others similarly  
situated,

*Plaintiff,*

v.

BEST DOCTORS, INC.,

*Defendant.*

Case No. 1:18-cv-10957-DPW

**CLASS COUNSEL'S MOTION FOR CLASS COUNSEL EXPENSES**

Pursuant to Federal Rule of Civil Procedure 23(h) and the Court's Order Conditionally Certifying Settlement Class, Authorizing Provision of Notice, and Scheduling Fairness Hearing (ECF No. 74), Class Counsel respectfully requests that the Court enter an order approving reimbursement of Class Counsel's out-of-pocket expenses of \$3,695.91.

Class Counsel's motion is supported by the accompanying memorandum of law and the record in this action, including the motion for preliminary approval of the class action settlement. WHEREFORE, Class Counsel hereby respectfully requests that the Court approve the requested expenses at or after the fairness hearing. A proposed Order for the Court's consideration is attached as Exhibit 1.

Respectfully submitted,

Dated: September 12, 2022

/s/Avi R. Kaufman

Avi R. Kaufman (admitted *pro hac vice*)  
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Coral Gables, FL 33133

Telephone: (305) 469-5881

*Class Counsel*

**CERTIFICATE OF CONFERRAL**

I hereby certify that I have conferred in good faith with opposing counsel on September 12, 2022, and is authorized to represent that Defendant's counsel does not oppose the requested relief.

*/s/Avi R. Kaufman*

Avi R. Kaufman (admitted *pro hac vice*)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on September 12, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

*/s/Avi R. Kaufman*

Avi R. Kaufman (admitted *pro hac vice*)

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**[PROPOSED] ORDER GRANTING  
REIMBURSEMENT OF CLASS COUNSEL EXPENSES**

This cause came before the Court pursuant to Class Counsel’s motion for reimbursement of Class Counsel’s out-of-pocket expenses. Having considered Class Counsel’s Motion for an Award of Class Counsel Expenses and finding that the amount of expenses is reasonable and was reasonably incurred, Class Counsel is awarded reimbursement of costs and expenses of \$3,695.91, representing fair and reasonable reimbursement for Class Counsel’s efforts in investigating, litigating and settling this action. *See Cullinane v. Uber Techs., Inc.*, No. 14-14750-DPW, 2020 U.S. Dist. LEXIS 38798, at \*10 (D. Mass. Jan. 29, 2020) (granting reimbursement of class counsel expenses where “the amount of expenses is reasonable and was reasonably incurred in the course of the litigation”); *In re Fid./MICRON Sec. Litig. v. Fid. MAGELLAN FUND*, 167 F.3d 735, 737 (1st Cir. 1999) (“lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax”).

All reimbursement of expenses to Class Counsel in this Action shall be made from the Settlement Amount, and the Released Parties shall have no liability or responsibility for the payment of Class Counsel's expenses except as provided in the Settlement Agreement.

SO ORDERED on October \_\_, 2022.

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Hon. Douglas P. Woodlock  
United States District Court

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**MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S  
MOTION FOR CLASS COUNSEL EXPENSES**

Pursuant to Federal Rule of Civil Procedure 23(h), the Court's Order Conditionally Certifying Settlement Class, Authorizing Provision of Notice, and Scheduling Fairness Hearing (ECF No. 74), and the Settlement Agreement,<sup>1</sup> Class Counsel respectfully requests that the Court enter an order approving Class Counsel's requested out-of-pocket expenses of \$3,695.91.

**I. Background**

Plaintiff Kenneth A. Thomas MD, LLC, on behalf of itself and a class of similarly situated persons, and Defendant Best Doctors, Inc. negotiated a class action settlement that makes \$738,375.00 available to fund the settlement, after payment of settlement costs. Under the Settlement Agreement, individual payments will automatically be issued to all Settlement Class Members who do not opt out of the Settlement without the need for them to submit claim forms,

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<sup>1</sup> The Settlement Agreement refers to the Second Amended Settlement Agreement and Release (ECF No. 69-1). All capitalized terms used herein have the same definitions as in the Settlement Agreement.

and there is no reversion to Defendant of any unclaimed monies payable to Settlement Class Members. This is an excellent result for the Settlement Class.

On May 27, 2022, the Court entered an Order Conditionally Certifying Settlement Class, Authorizing Provision of Notice, and Scheduling Fairness Hearing (ECF No. 74).

Pursuant to the Settlement Agreement and the Court approved Notice, Class Counsel may apply to the Court for reimbursement of out of pocket costs and expenses of up to \$10,000 incurred in this Action. Settlement at ¶ 4.2 and Exs. A & B.

Class Counsel has incurred \$3,695.91 of out of pocket costs and expenses for travel and lodging for the hearing on Defendant's motion to dismiss, the initial scheduling conference, and the FCC meeting, filing and *pro hac vice* fees, and transcript costs. Declaration of Avi R. Kaufman, attached hereto as Exhibit 1.

## **II. Class Counsel's Request for Expenses Is Reasonable**

Rule 23(h) permits the Court to “award . . . nontaxable costs that are authorized by law or by the parties' agreement.” Fed. R. Civ. P. 23(h). “Courts typically allow counsel to recover their reasonable out-of-pocket expenses. Indeed, courts normally grant expense requests in common fund cases as a matter of course.” *Hanley v. Tampa Bay Sports & Entm't Ltd. Liab. Co.*, No. 8:19-CV-00550-CEH-CPT, 2020 U.S. Dist. LEXIS 89175, at \*17 (M.D. Fla. Apr. 23, 2020) (collecting cases and approving cost award); *Cullinane v. Uber Techs., Inc.*, No. 14-14750-DPW, 2020 U.S. Dist. LEXIS 38798, at \*10 (D. Mass. Jan. 29, 2020) (granting reimbursement of class counsel expenses where “the amount of expenses is reasonable and was reasonably incurred in the course of the litigation”); *In re Fid./MICRON Sec. Litig. v. Fid. MAGELLAN FUND*, 167 F.3d 735, 737 (1st Cir. 1999) (“lawyers whose efforts succeed in creating a common fund for the benefit of a

class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax”).

Here, the Settlement permits Class Counsel to seek reimbursement of reasonable expenses.

Class Counsel has incurred expenses in the prosecution of this action for which he seeks reimbursement totaling \$3,695.91 for filing fees, pro hac vice fees, transcript cost, and travel and lodging fees. Kaufman Decl. ¶ 13. Based on counsel’s experience, these efforts and expenditures were necessary to obtain the settlement relief for the class, and were the type of hours and costs and expenses that would have been recoverable in private practice from a non-contingency client. *Id.*

Accordingly, as these expenses were reasonable and necessary for prosecuting this action and are the types of expenses typically billed to clients in non-contingency matters, Class Counsel respectfully submits that his request for reimbursement of out of pocket expenses should be approved.

Respectfully submitted,

Dated: September 12, 2022

/s/Avi R. Kaufman  
Avi R. Kaufman (admitted *pro hac vice*)  
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*Class Counsel*

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**DECLARATION OF AVI KAUFMAN IN SUPPORT OF  
CLASS COUNSEL'S MOTION FOR CLASS COUNSEL EXPENSES**

Avi R. Kaufman declares as follows:

1. I am the attorney designated as Class Counsel for Plaintiff under the Settlement Agreement entered into with Defendant Best Doctors, Inc.<sup>1</sup> I submit this declaration in support of Class Counsel's Motion for Class Counsel Expenses. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration and could testify competently to them if called upon to do so.

2. The Parties' Settlement is exceedingly fair and provides an excellent result for the Settlement Class.

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<sup>1</sup> The Settlement Agreement refers to the Second Amended Settlement Agreement and Release (ECF No. 69-1). All capitalized defined terms used herein have the same meanings ascribed in the Settlement Agreement.

3. Under the Settlement Agreement: (1) all Settlement Class Members who do not opt out will automatically be mailed Individual Awards based on the number of faxes they received without the need for Settlement Class Members to submit claim forms or take any action with regard to the settlement whatsoever; and (2) there is no reversion to Defendant of any unclaimed monies payable to Settlement Class Members. Settlement Agreement at §§ 5.3-5.4.

4. These distribution terms were specifically bargained for by Plaintiff as part of the settlement negotiation process to ensure that the maximum number of Settlement Class Members would receive Individual Awards checks. And these terms were negotiated with the understanding that Defendant has, and as part of the settlement administration process is supplying, all Settlement Class Members' mailing addresses, making it reasonable to expect that the Settlement Administrator will be able to deliver Individual Awards checks to the vast majority of the Settlement Class Members, leaving it to them to determine whether to cash those checks.

5. Under the Settlement Agreement, the Parties have agreed to a process for maximizing the distribution of funds associated with Individual Awards checks that may go uncashed to other Settlement Class Members. The distribution plan reflected in the Settlement Agreement should result in the distribution of the maximum amount of settlement funds to the maximum number of Settlement Class Members.

6. To prevail on a TCPA fax claim, a person must establish that they received an unsolicited fax advertisement to their fax machine. 47 U.S.C. § (b)(1)(C). However, federal courts have been divided as to whether faxes that do not on their face solicit the purchase of goods or services can be deemed fax advertisements under the TCPA. Additionally, federal courts have regularly denied class certification in TCPA cases involving individualized inquiries

into whether putative class members consented to be contacted. In this case, both of these issues presented potential hurdles going forward as Defendant consistently maintained that its faxes were not advertisements and that it had obtained fax recipients' fax numbers, and correspondingly prospective consent, in a variety of different manners.

7. In fact, in December 2018, Defendant filed a petition with the Federal Communications Commission seeking a determination that the faxes it sent to Plaintiff and Settlement Class Members did not constitute advertisements under the TCPA, which Plaintiff opposed in a comment filed with the FCC (*see* ECF 34-1). As a result of the filing of Plaintiff's comment, Plaintiff's counsel met with the FCC to discuss the agency's views on Defendant's petition and the broader issue of whether faxes that do not on their face solicit the purchase of goods or services could be deemed fax advertisements. Also at this meeting, other pending petitions relating to the viability of Plaintiff's TCPA fax claims were discussed. This meeting with the FCC informed Plaintiff's counsel as to the risk of a ruling by the FCC in Defendant's favor on the petition that could have preceded and impacted the ruling by this Court on the precise issue of whether the faxes constituted advertisements, dooming Plaintiff's and Settlement Class Members' claims.

8. Notably, although the parties first commenced settlement negotiations in March 2019 in connection with the District of Massachusetts' local rules requirements, settlement discussions were tabled for months until after Plaintiff's counsel's meeting with the FCC on Defendant's petition, and after the Parties' exchange of discovery directed towards the key issues of whether Defendant's faxes (1) constituted advertisements and (2) were sent without consent. Specifically, in discovery, Defendant provided documents and information concerning the purpose and reasons for sending the faxes, the key inquiry in determining whether the faxes were

advertisements, including sales and other financial data reflecting that sales of goods and services to physicians like Plaintiff and Settlement Class Members, including recognition items such as Best Doctors plaques, which totaled less than one tenth of one percent (0.1%) of Defendants' revenues for the relevant time period. Defendant also provided documents and information demonstrating that Defendant obtained Settlement Class Members' fax numbers in a variety of ways over a number of years, some of which may have been sufficient to constitute consent, including through direct communications by facsimile, mail, email, Internet profile, and telephone.

9. After exchanging this discovery, and as the parties engaged in ESI in preparation for taking depositions (*see, e.g.*, ECF 44), at the end of July 2019, Plaintiff issued a class wide demand on a per fax basis for the 13,425 faxes to Settlement Class Members that were also identified through discovery. Over the ensuing two weeks, the parties engaged in continuous negotiations through counsel, culminating in an agreement as to the class definition, Defendant's changes in business practices, the monetary relief (including the automatic distribution of funds without the need for filing a claim), the release, and the manner of notice to Settlement Class Members. It was not until weeks later, after having agreement as to these and all other terms of the definitive settlement agreement, that the parties first discussed Plaintiff's anticipated request for attorneys' fees, reimbursement of costs and expenses, and a service award for the Plaintiff.

10. Thus, while the range of possible recovery in this case is between \$6,712,500 and \$20,137,500, given the risks of (1) a ruling by the FCC and/or this Court that Defendant's faxes were not advertisements because they were not sent for the purpose of soliciting the purchase of goods or services by fax recipients; or (2) a ruling by this Court that Defendant's consent defense requires individualized inquiries into class members' claims precluding class certification; and

(3) the corresponding unlikeliness that, given the facts as to the purpose of the faxes and the existence of a scheme for obtaining consent, Defendant's violations were willful and knowing, a payment of \$55 per violative fax and a settlement totaling \$738,375 is reasonable under the circumstances.

11. I have degrees from Harvard University and Georgetown University Law Center, and have been practicing law for over ten years. For more than five years after graduation, I was a litigation associate at the law firm of Carlton Fields. During that time, I represented plaintiffs and defendants in various types of individual and class litigation, including securities and TCPA class actions. In 2016, I joined the law firm of Kopelowitz Ostrow Ferguson Weiselberg Gilbert as a partner to work exclusively on consumer class actions. From 2016 until January 2018, when I departed KOFWG to start my own law firm, I represented plaintiffs in class actions arising from products defects, illegal payday loans, false advertising, and TCPA violations, including as lead counsel in a TCPA class action against CITGO Petroleum Corp. that settled for \$8.3 million in 2017.

12. Since starting Kaufman P.A., I have focused almost exclusively on TCPA class actions, litigating in various jurisdictions across the country. Among other cases, our firm has been appointed class counsel in the following TCPA cases:

- *Broward Psychology, P.A. v. SingleCare Services, LLC* (Fla. Cir. Ct. 2019), a Florida Telephone Consumer Protection Act class action resulting in a \$925,110 class wide settlement.
- *Van Elzen v. Educator Group Plans, et. al.* (E.D. Wis. 2019), a nationwide Telephone Consumer Protection Act class action resulting in a \$900,000 class wide settlement.
- *Halperin v. YouFit Health Clubs, LLC* (S.D. Fla. 2019), a nationwide Telephone Consumer Protection Act class action resulting in a \$1.4 million class wide settlement.
- *Armstrong v. Codefied Inc.* (E.D. Cal. 2019), a nationwide Telephone Consumer Protection Act class action resulting in a \$2.2 million class wide settlement.

- *Itayim v. CYS Group, Inc.* (S.D. Fla. 2020), a Florida Telephone Consumer Protection Act class action resulting in a \$492,250 class wide settlement.
- *Bulette v. Western Dental, et al.* (N.D. Cal. 2020), a nationwide Telephone Consumer Protection Act class action resulting in a \$9.7 million class wide settlement.
- *Donde v. Freedom Franchise Systems, LLC et al.* (S.D. Fla. 2020), a nationwide Telephone Consumer Protection Act class action settlement resulting in a \$948,475.50 class wide settlement.
- *Izor v. Abacus Data Systems, Inc.* (N.D. Cal. 2020), a nationwide Telephone Consumer Protection Act class action settlement resulting in a \$1.95 million class wide settlement.
- *Fitzhenry v. Independent Home Products, LLC* (D.S.C. 2020), a nationwide Telephone Consumer Protection Act class action making \$5.16 million available to the settlement class.
- *Judson v. Goldco Direct LLC* (C.D. Cal. 2020), a nationwide Telephone Consumer Protection Act class action settlement resulting in a \$1.5 million class wide settlement.
- *Hicks v. Houston Baptist University* (E.D.N.C. 2021), a nationwide Telephone Consumer Protection Act class action settlement resulting in a \$375,000 class wide settlement.
- *Lalli v. First Team Real Estate* (C.D. Cal. 2021), a nationwide Telephone Consumer Protection Act class action settlement resulting in a \$478,500 class wide settlement.
- *Fitzhenry, et al. v. Safe Streets USA LLC, et al.* (E.D.N.C. 2021), a nationwide Telephone Consumer Protection Act class action settlement resulting in a \$1.5 million class wide settlement.
- *Beiswinger v. West Shore Home LLC* (M.D. Fla. 2022), a nationwide Telephone Consumer Protection Act class action settlement resulting in a \$1,347,500 class wide settlement.
- *Bumpus, et al. v. Realty Brokerage Group LLC* (N.D. Cal. 2022), appointed class counsel in a contested nationwide Telephone Consumer Protection Act class action.
- *Wright, et al. v. eXp Realty, LLC* (M.D. Fla. 2021), appointed class counsel in a contested nationwide Telephone Consumer Protection Act class action, ultimately resulting in a \$26.91 million class wide settlement. (Final Approval Hearing scheduled for October 2022).

13. The costs incurred by Kaufman P.A. for which reimbursement is sought total \$3,695.91, which were reasonable and necessary to the effective litigation of this case and are the types of expenses that would typically be billed to clients in non-contingency matters, and

therefore should be approved. Class Counsel incurred out of pocket costs and expenses for travel and lodging for the hearing on Defendant's motion to dismiss, the initial scheduling conference, the FCC meeting, and the hearing on final approval of the Settlement<sup>2</sup>, filing and *pro hac vice* fees, and transcript costs. Class Counsel incurred these costs at the risk of receiving nothing in return. The costs reasonably expended in this action include the following:

<i>Expenses</i>	<i>Amount</i>
Filing and Admission Fees	\$500.00
Travel and Lodging	\$2,972.81
Transcript Cost	\$223.10
<b>Total</b>	<b>\$3695.91</b>

14. The expenses incurred in this litigation are reflected in the books and records of my firm. These books and records are prepared from receipts, check records, credit card statements, and other source materials, and are accurate records of the expenses incurred.

15. Class Counsel spent over 250 hours and more than \$3,500 to zealously promote the Class's interests. Class Counsel represented Plaintiff and the Class on a purely contingent basis. Class Counsel assumed the significant risk that they would not be compensated for time and out of pocket expenses invested into this contentious case. This risk of nonpayment incentivized counsel to work efficiently, to prevent duplication of effort, and to advance expenses responsibly.

16. The time and resources devoted to this Litigation readily justify the requested reimbursement of out of pocket expenses. Moreover, Class Counsel assumed significant risk of nonpayment in initiating and expending attorney hours in this case given the complex legal issues

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<sup>2</sup> Counsel has pre-booked his roundtrip flight for the final approval hearing.

involved and Defendant's vigorous defense of plaintiffs' and the Class's claims. Despite Class Counsel's effort in litigating this action, Class Counsel remain completely uncompensated for the time invested in the Litigation, in addition to the expenses we advanced.

17. The Settlement provides an extremely fair and reasonable recovery for the Settlement Class given the combined litigation risks, including the strength of Defendant's defenses, the challenging and unpredictable path of litigation, and the changing TCPA law landscape.

\* \* \*

I declare under penalty of perjury of the laws of Florida and the United States that the foregoing is true and correct, and that this declaration was executed in Miami, Florida, on September 12, 2022.

/s/ Avi R. Kaufman  
Avi R. Kaufman