

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

**IN RE: TELEXFREE SECURITIES
LITIGATION**

MDL No. 4:14-md-2566-TSH

**This Document Relates to:
ALL CASES**

**MEMORANDUM IN SUPPORT OF MOTION FOR AN INTERIM AWARD OF
ATTORNEYS' FEES**

I. INTRODUCTION

Class Counsel submit this Motion For An Interim Award of Attorneys' Fees ("Fee Motion") seeking an interim award of attorney fees on the grounds that they have obtained a significant settlement on behalf of the plaintiff class – \$22,500,000 with Defendants Fidelity Bank and John Merrill (the "Fidelity Settlement") – and have prosecuted this case for over six years without payment. They seek a fee award of 30% of the Fidelity Settlement– \$6,750,000.¹

The fee Class Counsel seek is fair and reasonable. The percentage award sought is consistent with awards in similar cases and is supported by the factors courts consider when awarding attorney fees. The Fidelity Settlement is a significant result for the class. Plaintiffs' case is not only risky and complex, it has required a substantial amount of high-quality work by counsel in the face of vigorous and well-funded opposition by a host of law firms, including some of the largest and most respected in the country. Plaintiffs' lodestar for this MDL exceeds

¹ This Court has previously finally approved settlements in the amount of \$2,100,000 with several Defendants. Dkt. 1057-60. Plaintiffs were reimbursed \$683,600.00 in litigation expenses from the first set of settlements but neither sought nor took attorneys' fees from those settlements. Dkt. 1061. Plaintiffs do not seek fees from the first settlements now. However, if the fee sought here is calculated as a percentage of the total settlement funds obtained thus far in the case, it is equal to 27.4%.

\$18 million. The lodestar cross-check eliminates any question of a windfall to Plaintiffs' Counsel because the fee sought is approximately one-third of the lodestar. Finally, the response of the class to date has been positive. The Court-approved notice informed the class that Plaintiffs would seek a fee of up to one third of the of the settlements; in fact, Class Counsel seek less than that. No objections have been received to date.

Plaintiffs respectfully submit that an interim fee award is appropriate. The Fidelity Settlement is the first substantial settlement in the case (Plaintiffs hope and expect that there will be more) and Plaintiffs' Counsel have amassed a substantial lodestar in the over six years they have litigated this case.² This work by Class Counsel made possible the very positive settlement with the Fidelity Defendants.

II. FACTUAL BACKGROUND

Class Counsel has effectively prosecuted this case against those responsible for the massive fraud and resulting losses suffered by the victims of the TelexFree Scheme. In addition to the Fidelity Settlement now before the Court for final approval, and the settlements already approved by the Court, Plaintiffs' Counsel have obtained evidence – described in Plaintiffs' motion for leave to file a Fifth Consolidated Amended Complaint now pending before the Court (Dkt. 983-84)– establishing the liability of over 65 defendants for Plaintiffs' losses. To do this, Class Counsel have had to overcome significant obstacles.

As the Court is aware, Plaintiffs' case is complex and risky. It involves a complicated and

² Because almost all of the issues in this case alleging joint and several liability relate to all MDL Defendants – e.g., the nature and operation of the fraud, the interrelated activities of the defendants, the law of aiding and abetting and conspiracy, etc. – Plaintiffs submit for the Court's consideration their lodestar for the entire case. Even to the extent that some issues can be characterized as primarily relating to a single Defendant or group of Defendants, because what any single Defendant pays (or does not pay) determines in part the damages for which the other Defendants remain jointly and severally liable, they still relate to and affect the case as a whole.

wide-ranging pyramid/Ponzi scheme that swindled hundreds of thousands of people over the course of several years. While naming TelexFree and its affiliated fraudsters, the litigation focuses on persons and entities who knowingly provided essential and substantial services to TelexFree including banks, pay processors, investment companies, accounting firms, and law firms and many of their employees and principals, who provided essential assistance to the fraud despite having actual knowledge that TelexFree was operating an unlawful enterprise.

The quantity of evidence needed to successfully prosecute the case is wide-ranging and broad. Plaintiffs have been required to review and analyze over a million pages of communications and financial records to document each defendants' knowledge of the fraudulent scheme and their day-to-day activities to assist it, including the movement of money into, out of and between TelexFree accounts (including those of TelexFree insiders and related companies) on a daily basis amounting to tens of thousands of transactions.

Moreover, the wrongful conduct of the Defendants -- essentially money laundering -- resulted in an intentionally obscure, almost impenetrable web of financial transactions amongst a myriad of different bank accounts, financial institutions and payment systems that was intended to conceal the source of the swindled funds and the roles of the various participants in the scheme. Accordingly, it was (and continues to be) a painstaking and difficult task to understand and document the workings of the TelexFree fraud, and the roles played in it by each of the Defendants. The difficult and meticulous nature of this work is plain, for example, from the expert reports on the participation of four of the large banks involved in the fraud. Each of the lengthy reports required, among many other things, detailed examination of the transaction records of the myriad accounts maintained by each bank on behalf of TelexFree. *See, e.g.*, Dkt. 869-1 (Bank of America 62-page report); 869-2 (Wells Fargo Bank and Wells Fargo Advisors

81-page report); 869-3 (TD Bank 50-page report); 1099-1 (PNC Bank 39-page report).

Plaintiffs' task has been made substantially more difficult by the fact that the bulk of the evidence demonstrating their liability is in the possession of Defendants and other parties, who have resisted discovery. Defendants have enormous resources and their army of lawyers have fought Plaintiffs at every turn. Defendants have opposed virtually all discovery in the action and have succeeded in delaying, sometimes for years, access to important evidence. For example, by filing a meritless motion to quash, the Defendants prevented Plaintiffs from gaining access to a critical trove of documents in the possession of the TelexFree Bankruptcy Trustee for years. This large production – over 90,000 pages plus excel spreadsheets (approximately 150,000 images³) contained essential evidence demonstrating the liability of many Defendants. Dkt. 979-3 at 16.

Defendants' refusal to make timely discovery has disadvantaged Plaintiffs in many ways. In general, it has meant that Plaintiffs (and the Court) have been forced to respond to Defendants' attacks when they were not aware of the full extent of Defendants' knowledge of and participation in the TelexFree fraud. For example, Defendants filed numerous motions to dismiss – some of which the Court granted – which Plaintiffs were forced to defend without such knowledge. In addition, several defendants misrepresented to the Court and counsel the nature of their participation in the TelexFree scheme. For example, at the motion to dismiss hearing on November 2, 2015, counsel for Defendant Bank of America (“BoA”) represented that BoA had operated only a single account for TelexFree and repeatedly stated that BoA performed no services for TelexFree after May 2013. This was false. As explained in Plaintiffs' motion to amend, years later Plaintiffs obtained evidence showing that in fact BoA maintained 25 accounts for TelexFree and its related persons and entities throughout the course of the TelexFree scheme

³ Plaintiffs have received data in a range of forms. “Images” as used here is roughly equivalent to a page in a hardcopy document.

and continued to do so all the way through TelexFree's bankruptcy filing in April 2014. Dkt. 979-3 at 5-6; Bonsignore Decl. ¶ 48.

Similarly, Wells Fargo represented to the Court that the accounts of TelexFree founder Carlos Wanzeler's wife (Katia) were unrelated to TelexFree, and that Defendant Cardenas' termination from Wells Fargo Advisors was not related to participation in the TelexFree fraud. Both statements were false, but Plaintiffs were not able to obtain evidence proving them false until months later. Dkt. 979-3 at 19, n. 28. While Plaintiffs ultimately obtained evidence demonstrating the liability of the Dismissed Defendants, the fact that the Court granted the motions to dismiss – and that those defendants have opposed Plaintiffs' motion to amend on the ground that the Court's orders should be with prejudice – amply demonstrates the substantial risks inherent in the prosecution of this case. Bonsignore Decl. ¶ 49.

Defendants' refusal to make discovery has also created substantial practical difficulties. For example, as a result of Defendants' delaying tactics, Plaintiffs received the Bankruptcy Trustee's October 2019 production only six weeks before their 5th amended complaint was due. To review, analyze and compile this massive amount of evidence into a complaint in six weeks was an immense and difficult undertaking. Bonsignore Decl. ¶¶ 26, 130; Dkt. 979-3 at 16.

As the Court is also well aware, other factors have increased the complexities and difficulties Class Counsel have faced. Among other things, TelexFree's bankruptcy has required Plaintiffs not only to monitor proceedings in the bankruptcy court, but also to litigate discovery and other matters there. One issue has already gone to the Court of Appeals. Bonsignore Decl. ¶ 157.

Plaintiffs have also had to deal with the various criminal and administrative investigations into the TelexFree fraud. While these investigations have disclosed some

information about the TelexFree scheme, they have also presented obstacles to Plaintiffs' case. For example, because of the investigation by the Department of Justice, this Court stayed proceedings in this action for over four years. *Bonsignore Decl.* ¶ 25.

Despite all of these obstacles, Plaintiffs' Counsel have fully committed themselves to the case. As detailed below, they have devoted tens of thousands of hours of attorney and para-professional labor and advanced litigation expenses. Plaintiffs' Counsel have worked tirelessly to, *inter alia*, fight for discovery and other evidence; review and analyze the enormous amounts of evidence they have been able to obtain, including extensive expert analysis; develop evidence and theories of liability as to over 60 defendants; revise their complaint to reflect these developing claims; and oppose an unceasing onslaught of attacks from defense counsel. The fact that their labors have borne fruit – both in terms of the settlements they have achieved as well as the evidence they have obtained against the non-settling defendants – demonstrates that Plaintiffs' Counsel have prosecuted this case effectively and well, and that their work has provided substantial benefits to the class, and will continue to do so.

III. SETTLEMENTS WITH FIDELITY AND OTHER DEFENDANTS

Plaintiffs have settled with four defendant groups for a total of \$24.6 million; the \$22.5 Fidelity Settlement is by far the most significant to date.

In light of the fact that this fee petition is submitted in conjunction with the Fidelity Settlement, and how sprawling and far reaching this case is, the court might well ask: where does Fidelity's conduct and this settlement fit in to the larger context of this case. The answer is that Plaintiffs allege that Fidelity Bank was one of the banks that knowingly provided essential services to the Telexfree fraud – in Fidelity's case, at a critical period for the Scheme, for

approximately four months in late 2013 – and that the settlement is (hopefully) a precursor to additional settlements with other Defendants.

Plaintiffs’ core allegations (strenuously denied by Fidelity) as to Fidelity are as follows:

- During the fall of 2013, TelexFree’s existing banks and pay processors were threatening to terminate their relationships and it was critical that TelexFree secure additional banking services to survive. TelexFree was forced to seek overseas payment processing options and was unable to process tens of millions of dollars.
- Fidelity Bank, headed by John Merrill, the brother of TelexFree insider James Merrell, provided such services for approximately four months at the end of 2013. Among other things, at account opening, Fidelity Bank was aware that TelexFree: (1) had been shuttered in Brazil; (2) had several of its bank accounts closed for suspected fraud; and (3) was a multi-level marketing company, and therefore high risk because they pose the risk of pyramid scheme-type crimes.
- Between August and December 2013, Fidelity Bank accepted over \$50 million in deposits from TelexFree and Carlos Wanzeler, including bulk deposits of money orders and checks from victims, large deposits upon closure of other TelexFree bank accounts, and large deposits from payment processors. Fidelity provided TelexFree with critical banking services until at least December 31, 2013 and, ultimately facilitated the transfer of over \$10 million to the personal accounts of Telexfree insiders, including overseas accounts.

See also Bonsignore Final Approval Decl. ¶¶ 25-32. As explained in Plaintiffs’ Final Approval brief, the settlement is an excellent result obtained only after lengthy and negotiations by well-informed counsel, including an extensive mediation before Jed Melnick. *Id.* at ¶ 39. The Court preliminarily approved the settlement, certified a settlement class, and ordered that notice be given to the class. Dkt. 1055-1056, 1097. Notice has been given as ordered by the Court. Declaration of Eric S. Schachter in Support of Final Approval, ¶ 5 (“Schachter Decl.”).

After preliminary approval and notice to the settlement class, the Court also finally approved settlements with three other groups of defendants totaling \$2,100,000, finding them to be in all respects fair, reasonable, and adequate to the Settlement Class. Dkt. 1057-1060. Plaintiffs’ Counsel were reimbursed \$683,600 in litigation expenses from these settlements but

did not seek nor accept attorneys' fees. Dkt. 1061.⁴

IV. THE WORK PERFORMED BY PLAINTIFFS' COUNSEL

Following TelexFree's collapse in April 2014, Plaintiffs' Counsel filed lawsuits on behalf of victims of the scheme. On October 21, 2014, the Judicial Panel on Multidistrict Litigation created this MDL proceeding by transferring all actions to this Court. Since then, as detailed in the declarations of counsel submitted herewith, Class Counsel have litigated this case on a contingent fee basis with no guarantee of payment. Plaintiffs' Counsel's lodestar, calculated at historical rates, is \$18,454,832.25. Bonsignore Decl. Ex. 3. This work has covered all aspects of litigation and Class Counsel have worked cooperatively, efficiently, and effectively in representing the class.⁵ With over 1000 docket entries, this case has been hard-fought at every step, and Plaintiffs have obtained and analyzed the equivalent of 1.7 million pages of evidence.

A. Motion Practice

As the over 1000 docket entries show and as the Court is aware, there has been extensive motion practice in this case. For ease of reference, Plaintiffs have compiled a summary chart of Plaintiffs' filings to date, reflecting approximately 3700 pages of briefing with some 300 accompanying attachments. Bonsignore Decl. Exhibit 15 (TelexFree Plaintiffs' Filing History). The pleading motion practice in this litigation – both responding to motions to dismiss and filing motions to amend – provides a clear example of the work required of Plaintiffs to date. For

⁴ The settling defendants were: 1) Base Commerce, LLC, including John Hughes, Brian Bonfiglio, John Kirchhefer and Alex Sidel, 2) Synovus Bank; and 3) Joseph Craft and Craft Financial Solutions Inc., and Related Parties BWFC Processing Center, LLC, ACE LLP, and Audra Craft. Dkt. 1041.

⁵ Plaintiffs' Counsel's lodestar understates the amount of work done. It excludes: 1) work related to this fee application and timekeeping in general; 2) work excluded as inefficient or duplicative; and 3) work related to the order to show cause proceedings [Dkt. 898, 911-12, 914, 917]. Bonsignore Decl. ¶¶ 72-73, 76. Further detail regarding Plaintiff Counsel's work can be found in the declarations of each plaintiffs' firm. In addition, if the Court desires, Class Counsel will submit further information, including individual time records. Bonsignore Decl. ¶ 74 n.9.

example, Plaintiffs have faced multiple rounds of motions to dismiss and similar challenges to their complaints. *See, e.g.*, Dkt. 164-176, 178-184, 187-189, 193, 194, 210, 239-42, 535 (Motions to Dismiss Second Consolidated Amended Complaint). Plaintiffs' recent Motion to Amend has been similarly contested – Defendants filed 17 Oppositions. Dkt. 983-84, 1003, 1004, 1007-09, 1011, 1013, 1019-21, 1-24, 1026-27, 1029-34. Plaintiffs reviewed and analyzed all 17 Oppositions and supporting documents and filed four responses – one omnibus reply brief and three separate reply briefs addressing discrete arguments. Dkt. 1065-1071.

Plaintiffs have also successfully litigated discovery motions filed by Defendants. *See, e.g.*, Dkt. 507-508, 510, 752 (Motion to Quash briefing and Order denying Motion to Quash). In addition to formal motion practice before the Court, Plaintiffs have engaged in meet and confers with Defendants to address discovery disputes without needing to involve the Court. *Bonsignore Decl.* ¶ 117, n. 12.

B. Pleadings

Plaintiffs have also spent substantial time drafting the complaints herein, including amended complaints reflecting additional evidence obtained through their discovery, investigation, and analysis. In 2015, they filed their Second Consolidated Amended Complaint. Dkt. 141-146. In 2015, they drafted a proposed 3rd CAC adding additional allegations regarding an unjust enrichment claim against a defendant class of promoters who had profited from the scheme. Dkt. 252-53. In 2017, they filed their 4th CAC adding nineteen new defendants against whom Plaintiffs' informal discovery efforts showed were liable for Plaintiffs' losses. Dkt. 473, 503. Plaintiffs' motion to file their 5th CAC is now pending before the Court. Dkt. 984. The 5th CAC well demonstrates the massive amount of work Class Counsel have put into this case. It explains the wrongful conduct of over 65 defendants occurring over three years and is over 290

pages long. Dkt. 983-1

C. Discovery, Investigation, and Factual Research

Discovery in this action has been extensive and hard-fought. Class Counsel have obtained, reviewed and analyzed over 1.7 million-page equivalents of discovery via formal and informal means. Most of their efforts were strongly opposed by Defendants. Bonsignore Decl. ¶¶ 26, 96.

Prior to filing the Second CAC, and during the four year stay of this action, Plaintiffs pursued various forms of informal discovery, including publicly available information about TelexFree's operation and interviewing witnesses. Plaintiffs also obtained many documents from the first round of settlements and have spent substantial time working to interview witnesses linked to those settlements. Bonsignore Decl. ¶ 6, 127, 129, 134.

After the stay was lifted, Plaintiffs pursued formal discovery. After the Court denied Defendants' Motion to Quash the subpoena issued to the Bankruptcy Trustee, in October 2019, Plaintiffs received approximately 98,000 pages and additional excel spreadsheets from the Trustee. Bonsignore Decl. ¶ 130.

Plaintiffs also propounded approximately 600 interrogatories, 2375 requests for production of documents, and 275 Requests for Admissions on 29 Defendants. Bonsignore Decl. ¶ 119. Each set of discovery has required substantial meet and confer work (and occasional motion practice) with each of the various individual Defendants to whom discovery has been propounded. In general, each Defendant has resisted each and every discovery request propounded by Plaintiffs. Bonsignore Decl. ¶ 128. Plaintiffs have also responded to discovery requests propounded by several Defendants. Bonsignore Decl. ¶ 119.

D. Court Appearances

Plaintiffs' Counsel have appeared many times before the Court to argue motions and for scheduled case management conferences through the pendency of the litigation. *See e.g.*, Dkt. 31, 75, 105, 212, 328, 367, 385, 489, 687, 919, 971, 1053, 1083, 1088, 1091, 1094. Most required substantial preparation time. Bonsignore Decl. ¶¶ 116-120.

E. Expert Analysis

Plaintiffs have spent substantial time working with their experts, including Professor Patricia McCoy, to analyze the evidence and produce expert reports analyzing and explaining the role played by certain bank defendants. This work involved analysis of documents by experienced counsel, coordinating with Professor McCoy to ensure she had the information she needed, and reviewing the draft expert reports to guide litigation strategy. Four expert reports have been completed and filed. *See, e.g.*, Dkt. 869, 869-1, 869-2, 869-3; 1099.

F. Settlement

As noted above, Plaintiffs have settled with four defendant groups. Each settlement required extensive negotiation, including, among other things, preparation for and attendance at mediation sessions conducted by Jed Melnick, drafting of mediation briefs, analysis of Defendants' mediation briefs, as well as substantial additional communication between plaintiffs and defense counsel. Bonsignore Decl. ¶¶ 165-180. Plaintiffs worked with experts to analyze Defendants' liability and ability respond to a judgment. Plaintiffs have also spent significant time on settlement discussions with other defendants. Bonsignore Decl. ¶ 168.

G. Bankruptcy, Appeal, and Criminal Investigations

This class action has proceeded in parallel with criminal proceedings brought by the Department of Justice and bankruptcy proceedings. Plaintiffs monitored the bankruptcy

proceedings and have worked to address issues particular to bankruptcy law and its impact on this case, including analyzing the impact of the bankruptcy stay on litigation strategy and litigating a standing issue concerning claims against a group of TelexFree net winners. Bonsignore Decl. ¶¶ 112-115. Class Counsel briefed and argued an appeal regarding this standing issue. *In re TelexFree, LLC*, 941 F. 3d 576 (1st Cir. 2019).

H. Plaintiffs Have Worked Efficiently

Class Counsel have worked efficiently. Among other things, Lead Counsel has directed all assignments to avoid duplication of effort, and specific firms have been assigned to specific defendants to ensure that Plaintiffs' Counsel have the most complete and up to date understanding of the evidence relating to each of the many defendants. In addition, initial document review has been performed by junior lawyers whose hourly rates were capped at \$200 and supervised by more senior lawyers for quality control. Bonsignore Decl. ¶ 68; *see Arkansas Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, No. CV 11-10230-MLW, 2020 WL 949885, *51 (D. Mass. Feb. 27, 2020), *appeal dismissed sub nom. Arkansas Teacher Ret. Sys. v. State St. Corp.*, No. 20-1365, 2020 WL 5793216 (1st Cir. Sept. 3, 2020) (approving \$200 rate for document review)

V. ARGUMENT

A. Reimbursement of Attorneys' Fees and Expenses is Appropriate in a Class Case.

Class Counsel have produced a substantial benefit for the class in the form of a common fund and are entitled to payment of reasonable attorneys' fees and expenses from that fund. "[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The common fund doctrine is founded on the equitable

principle that those who have profited from litigation should share its costs.” *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F. 3d 295, 305 n. 6 (1st Cir. 1995).

Courts may award fees from a common fund “either on a percentage of the fund basis or by fashioning a lodestar.” *Id.* at 307. The percentage of the fund method is favored in the First Circuit. *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 458 (D. P.R. 2011) (“*Cabotage*”). “Standard awards in the First Circuit range from 20% at the low end to 33% at the high end. More commonly, courts in this Circuit award fees between 25% (the benchmark) and 30%.” *Bettencourt v. Jeanne D’Arc Credit Union*, No. 17-cv-12548-NMG, 2020 WL 3316223, *2 (D. Mass. June 17, 2020). However, an award of one-third “is not out of proportion with large class actions.” *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 81 (D. Mass. 2005) (one-third fee award awarded based on work done, result obtained, and 2.02 multiplier). Interim fee awards are commonplace in complex class actions when settlements are reached with some, but not all, defendants. *See, e.g., In re Nineteen Appeals Arising Out of San Juan Dupont Hotel Fire Litig.*, 982 F.2d 603, 610 (1st Cir. 1992); *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC)(JO), 2012 WL 5289514, at *9 (E.D.N.Y. Oct. 23, 2012) (“Fees can be awarded based on an interim settlement.”); *In re Air Cargo Shipping Services Antitrust Litig.*, No. 06-MD01775 (JG)(VVP), 2012 WL 3138596 (E.D.N.Y. Aug. 2, 2012) (third interim award).

“(B)ecause each common fund case presents its own unique set of circumstances; trial courts must assess each request for fees and expenses on its own terms.” *In re Fidelity/Micron Securities Litig.*, 167 F.3d 735, 737 (1st Cir. 1999). “Reasonableness is the touchstone.” *Id.* “When a class action has been settled . . . there is a tension between the interests of counsel in maximizing their compensation and the interests of members of the class in maximizing their

recovery. The court, therefore, acts as a fiduciary to protect the interests of the class.” *Arkansas Teacher Ret. Sys.*, 2020 WL 949885, at *2.

B. Plaintiffs’ Fee Request is Reasonable and Appropriate

Plaintiffs’ fee request for 30% of the settlement fund -- \$6,750,000 – is consistent with the law and appropriate in the context of this case. The First Circuit has not identified factors that must be considered, but “in evaluating a request for fees and reimbursement of expenses, courts in this district generally consider the factors set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) and *Goldberger v. Integrated Res.*, 209 F.3d 43 (2d Cir. 2000).” *In re Solodyn Antitrust Litig.*, No. CV114MD2503DJC, 2018 WL 7075881, *2 (D. Mass. July 18, 2018). These include: (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations. *Arkansas Teacher Ret. Sys.*, 2020 WL 949885, at *2 (D. Mass. Feb. 27, 2020) (citing *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014)(“*Neurontin*”) (applying *Goldberger* factors). The reaction of the class is also important. *Mooney v. Domino’s Pizza, Inc.*, 2018 WL 10232918, *1 (D. Mass. Jan. 23, 2018) (“no member of the Settlement Class objected to the proposed award of fees and costs.”).

Courts also generally perform a “lodestar cross-check” comparing the fee sought to the value of the work invested by counsel on an hourly basis, *Arkansas Teacher Ret. Sys.*, 2020 WL 949885, at *2-3. However, the cross-check does not require that the Court “determine the necessity and reasonableness of every hour expended.” *In re Thirteen Appeals*, 56 F. 3d at 307. To compensate for the contingent nature of class actions, courts often award a fee that exceeds the lodestar by a multiplier of 2 to 4. *See e.g., Mooney*, 2018 WL 1023918 (4.77 multiplier);

Gordan v. Mass. Mutual Life Insurance Co., 2016 WL 11272044 (D. Mass. Nov. 3, 2016) (3.66 multiplier); *Neurontin* at 171-72 (3.32 multiplier); *Relafen* at 81 (2.02 multiplier); *In re Tyco Intern., Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 271 (D. N.H. 2007) (2.697 multiplier); *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 408 (D. Mass. 2008) (1.97 multiplier); *Carlson v. Target Enterprise, Inc.*, 447 F. Supp. 3d 1, 3-4 (D. Mass. 2020) (Hillman, J.) (fee award of 23% of settlement fund; lodestar was 13% of settlement fund). Each of these factors justify a fee award of \$6,750,000, or 30 percent here.

1. The Settlement Fund is Significant and Benefits the Entire Class

Class Counsel have secured a recovery of \$22,500,000 for the class with the Fidelity Settlement, and an overall recovery of \$24,600,000 to date. As explained in Plaintiffs' motion for final approval, the Fidelity Settlement confers an immediate benefit to class members and represents a substantial recovery, especially in light of the significant risks involved in the action.⁶ The settlement amount is a substantial sum, especially given Fidelity Bank's financial situation, and the settlement negotiations were protracted and difficult. And while Plaintiffs believe that they have a strong case, it is not without substantial risks, as explained herein. Finally, Plaintiffs believe that the Fidelity Settlement will also benefit the class as an "icebreaker" – i.e., it will be an encouragement to additional settlements – and because it requires the cooperation of Fidelity Bank and John Merrill in the prosecution of Plaintiffs' case. Bonsignore Decl. ¶ 13.

2. Class Counsel Are Experienced and Skilled in Class Action Litigation and Have Effectively Prosecuted this Action.

The skill and quality of legal counsel also support the requested fee award. Class Counsel

⁶ The first settlements also provided the class with a substantial benefit. *See e.g.*, Dkt. 1057 at ¶ 7 ("the settlement is, in all respects, fair, reasonable, and adequate to the Settlement Class."); Dkt. 1058 (same).

are experienced litigators and count among the nation's most experienced and skilled practitioners in the complex class action field. As explained above, Class Counsel have worked effectively and well in this factually and legally complex case. They have overcome substantial obstacles, not only to recover \$24.6 million so far, but also – perhaps more importantly – to obtain critical evidence and build Plaintiffs' case against the remaining Defendants. Class Counsel are also opposed by an army of skilled attorneys with near limitless resources. *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976) (Caliber of opposing counsel is another important factor in assessing the quality of Class Counsel's work).⁷

3. This Case is Complex and Long-Running

As explained above and in the Bonsignore Declaration filed herewith, this is an exceedingly complex case. Plaintiffs have been required to confront novel and difficult legal and factual issues at every turn as well as the obstacles presented by the criminal and bankruptcy cases and the resulting four year stay. Plaintiffs represent the victims of an enormous Ponzi/pyramid scheme in the relatively novel position of seeking recovery through civil litigation. The factual background of this case also requires familiarity with specialized and varied areas of the law, including banking regulations and bankruptcy law, and Class Counsel have had to coordinate with, and litigate in, Bankruptcy Court, as well as accommodate parallel criminal investigations. Plaintiffs have already prosecuted the case for more than six years. This factor also supports the fee award requested.

⁷ Class Counsel acknowledge that the Court has expressed concern about Class Counsel's missteps in connection with the filing of their amended complaint in November 2019 ("November Complaint"). Class Counsel respectfully submit that those missteps do not compel a conclusion different from that set forth above – i.e., that they have prosecuted this case effectively and well in the face of significant obstacles, especially in light of the exigencies created by the late (and very large and important) production of documents by the Bankruptcy Trustee just six weeks before the deadline for filing Plaintiffs' November Complaint. Dkt. 979-3 at 16; Bonsignore Decl. ¶ 28; *see also* Dkt. 1067 at 9-10.

4. This Case is Risky with No Guarantee of Success

Risk is an important factor in determining a fair fee award and this case presented a substantial risk of nonpayment. *See e.g., In re Veeco Instruments Inc. Sec. Litig.*, No. 05-md-01695(CM), 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007) (“[T]he risk of non-payment in complex cases, such as this one, is very real.”) This factor also supports the fee award Class Counsel request. As explained, Class Counsel seek to unravel a complex financial fraud to secure recovery for the victims in a relatively novel area of the law. The case presents significant obstacles, including obtaining evidence demonstrating each Defendant’s knowledge of and participation in the fraudulent scheme, as well as complex and sometimes ambiguous legal issues, among other things. Plaintiffs also face Defendants with vast resources and skilled counsel. And as noted, this Court has already granted motions to dismiss as to certain important Defendants. Additionally, while Plaintiffs are confident in their claims, class action litigation is inherently unpredictable. *In re NASDAQ Mkt-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998). For example, there is always the risk that class certification may be denied.

5. Class Counsel Has Devoted A Significant Amount of Time to This Case

Class Counsel has devoted a total of 44,480.56 hours prosecuting this Action. Bonsignore Decl., Ex. 3. As explained above, and in counsel’s declarations, all of this time was reasonable and necessary for the prosecution of this action, reflects the complex, hard-fought litigation to date and has benefitted the class. In addition, the work on this case has also precluded class counsel from working on other cases. Bonsignore Decl. ¶ 54. This work also supports this fee request. *See, e.g., Relafen* (one-third fee request where counsel devoted over 29,000 hours to case over four years).

6. This Award is Consistent with Awards in Other Class Action Cases

Plaintiffs’ requested fee award of 30% of the Fidelity Settlement is consistent with

awards in other class action cases in the First Circuit. “Usually courts award class counsel a percentage of the common fund as attorneys’ fees. Frequently the most appropriate award is found to be in the 20 to 30% range.” *Arkansas Teacher Ret. Sys.*, 2020 WL 949885, at *2. However, a fee award of one-third “is not out of proportion with large class actions.” *Relafen* at 81. *See also In re Solodyn Antitrust Litig.*, No. CV114MD2503DJC, 2018 WL 7075881, at *2 (D. Mass. July 18, 2018) (33 1/3% fee); *Gordon*, 2016 WL 11272044 (fees one-third of \$30.9 million settlement (included reimbursement of costs); *Sylvester v. CIGNA Corp.*, 401 F. Supp. 2d 147 (D. Me. 2005) (fees one-third of \$2.3 million recovery).

Cases awarding a lower percentage usually involve significant multipliers or concerns of a windfall due to an early settlement. *See, e.g., Neurontin* at 171-72 (28% fee, 3.97 multiplier); *Cabotage*, 815 F. Supp. 2d at 460 (23% fee where case settled before discovery and low risk); *Carlson*, 447 F. Supp. 3d at 3-4 (23% fee where lodestar was 13% of fund); *Ciuffitelli v. Deloitte & Touche LLP*, 2019 WL 6840844 (D. Ore. Dec. 16, 2019) (24.6% fee, 3.75 multiplier) (adopting Magistrate Judge Report and Recommendation, 2019 WL 6893018 (Nov. 26, 2019)).

7. Public Policy Supports This Award

Public policy considerations also support the fee sought here. “Class action plaintiffs’ attorneys provide an invaluable service by aggregating the seemingly insignificant harms endured by a large multitude into a distinct sum where the collective injury can then become apparent.” *Cabotage*, 815 F. Supp. 2d at 463. “Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling such small claimants to pool their claims and resources.” *In re Telectronics Pacing Sys. Inc.*, 137 F. Supp. 2d 1029, 1043 (S.D. Ohio 2001). “Without a fee that reflects the risk and effort involved in this litigation, future plaintiffs’ attorneys might hesitate to be similarly aggressive and persistent when faced with a similarly

complicated, risky case and similarly intransigent defendants.” *In re Tyco Int’l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 270 (D. N.H. 2007).

These concerns apply with particular force to this case. As Plaintiffs’ have explained, this MDL is the sole proceeding dedicated to protecting and pursuing the rights and claims of the victims of the TelexFree Scheme and its importance cannot be overstated. Plaintiffs have not been able to recover any meaningful portion of their collective losses through the bankruptcy and regulatory actions. In addition, this scheme is part of an epidemic of financial fraud.

Governmental actions and bankruptcy proceedings have focused on the criminal punishment of, and restitution from, the primary actors of financial frauds, leaving a stark enforcement gap against the financial institutions and professionals whose services are essential to these schemes. This MDL litigation may well present the only opportunity to fill that gap. *See* Dkt. 979-3.

C. The Reaction of The Class Also Supports the Fee Requested

As explained in Plaintiffs’ Motion for Final Approval, the response of the class has been positive. Notice has been provided to the settlement class as ordered by the court. Schachter Decl. ¶ 5. The court-approved Notice informed the Class, among other things, that Class Counsel would ask the Court for attorneys’ fees of one-third of the total settlement fund (\$7,492,500). Dkt. 1095. In fact, Class Counsel is requesting less – 30% or \$6,750,000. While the deadline to do so of January 11, 2021 has not passed, to date, only a few class members have requested to be excluded, and none have submitted objections. Schachter Decl. ¶ 15-16

D. A Lodestar Cross-Check (and Negative Multiplier) Supports the Reasonableness of This Award

“In addition to considering the customary factors, courts regularly check the reasonableness of a requested fee award against the “lodestar” of plaintiff’s counsel to determine whether awarding a multiple of the lodestar is justified.” *Arkansas Teacher Ret. Sys.*, 2020 WL

949885, at *2-3. As explained above, Courts often award a multiplier to compensate counsel for, among other things, the risk of non-payment and delay inherent in class action litigation.

Gordan, 2016 WL 11272044, at *3 (“In cases where there is high risk and the likelihood of receiving no little or no recovery is a distinct possibility, it is common for a court to apply a multiplier to compensate the attorneys for the risk of nonpayment.”). Courts also use the lodestar cross-check to confirm that a fee award will not result in a “windfall” to counsel. *Cabotage*, 815 F. Supp. 2d at 464.

The lodestar is calculated by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate for each attorney. *In re Thirteen Appeals*, 56 F.3d at 305 (citing *Blum v. Stenson*, 465 U.S. 886, 896-902 (1984)). “[T]he rate that private counsel actually charges for her services, while not conclusive, is a reliable indicium of market value.” *United States v. One Star Class Sloop Sailboat*, 546 F.3d 26, 40 (1st Cir. 2008). As explained above, and in counsel’s declarations, the work performed by Class Counsel was reasonable and necessary and has benefitted the class. In addition, the lodestar has been calculated using reasonable and customary hourly rates based on accurate and contemporaneously maintained time records.

Here, the \$6,750,000 fee Class Counsel seek is just over one-third (approximately 37%) of their lodestar of \$18,454,832.25 (calculated using historical rates) Bonsignore Decl. ¶ 68(f), Ex. 3. The negative multiplier confirms the reasonableness of the fee. *See Solodyn*, 2018 WL 7075881, *2 (Negative multiplier of 0.82 was “a more than reasonable number.”)

VI. CONCLUSION

WHEREFORE, and for the reasons stated above, Plaintiffs respectfully request an order directing payment of \$6,750,000 in attorneys’ fees from the Fidelity Settlement.

Dated: January 4, 2021

Respectfully submitted,
TELEXFREE CLASS PLAINTIFFS
By their attorneys,

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CERTIFICATE OF SERVICE

I, Robert J. Bonsignore, hereby certify that on this 4th day of January 2021, I caused the foregoing to be electronically filed with the Clerk of the Court by using the Case Management/Electronic Case Filing (CM/ECF) system, which will send a notice of electronic filing to all parties registered with the CM/ECF system in the above-captioned matter. A copy will be forwarded via first class mail, postage prepaid, to those parties not electronically registered at their last and/or only known address.

1. MOTION FOR AN INTERIM AWARD OF ATTORNEYS' FEES;
2. MEMORANDUM IN SUPPORT OF MOTION FOR AN INTERIM AWARD OF ATTORNEYS' FEES;
3. ATTACHMENT A: DECLARATION OF ROBERT J. BONSIGNORE IN SUPPORT OF FOR AN INTERIM AWARD OF ATTORNEYS' FEES INCLUDING EXHIBITS 1 THROUGH 15.

/s/ Robert J. Bonsignore
Robert J. Bonsignore