

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE No. 15-20702-Civ-COOKE/TORRES

KELSEY O'BRIEN and KATHLEEN ADVEY,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

GOVSIMPLIFIED, LLC,

Defendant.

**ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION FOR FINAL
APPROVAL OF SETTLEMENT, ATTORNEYS' FEES, AND CLASS
REPRESENTATIVE INCENTIVES**

THIS MATTER is before the Court on Plaintiffs' Unopposed Motion for Final Approval of Settlement, Attorneys' Fees and Class Representative Incentives ("Motion") (ECF No. 45). The Court has carefully considered the Motion and is otherwise fully advised in the premises. For the reasons outlined in Plaintiffs' Motion and during the Fairness Hearing on July 20, 2016, I grant the Plaintiffs' Motion.¹

I. SETTLEMENT TERMS

A. Summary of the Settlement Terms

The Settlement's terms are detailed in the Agreement attached as Exhibit A to Plaintiffs' Motion. The following is a summary of the material terms of the Settlement.

1. The Settlement Class

The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rule of Civil Procedure. The Settlement Class is defined as:

¹ Because the factual and procedural history of this case is included in Plaintiffs' Motion, I omit this history in my Order.

All consumers in the United States who—from January 20, 2011, through the first day the Notice is emailed, mailed, or published—purchased, and did not receive a direct refund or indirect refund through chargeback, EINs on GovSimplified’s EIN websites, www.ein-gov.us, www1.ein-gov.us, www.taxid-gov.us, www1.taxid-gov.us, and www.govsimplified.co/ein.

ECF No. 43, Exh. A, ¶ 17.

2. Injunctive Relief for the Benefit of the Settlement Class

Defendant revised its website disclaimers to address a number of the deficiencies identified in Plaintiffs’ Complaint. Specifically, Plaintiffs claimed that Defendant’s website disclaimers were too small and inconspicuous, and that customers’ signatures approving GovSimplified as their third-party designee before the IRS, were not being obtained at all, or were not properly obtained. Under the terms of the Settlement, Defendant agreed to the following significant modifications to all of its EIN-related websites:

- The disclaimer font on the front page of Defendant’s websites that advises consumers that Defendant is not affiliated with the IRS must be at least a 14-pixel font;
- The aforementioned disclaimer must be in a darker color than contained in the current website, and that color must contrast with the websites’ background;
- The current disclaimer language will be revised to state explicitly that an EIN can be obtained for free from the IRS, by replacing the term “SS4” with “EIN Number.”

Additionally, Defendant will include its corporate name and address on any SS4 form submitted to the IRS on behalf of Defendant’s customers. Finally, Defendant will not process any EIN applications without obtaining a signature from each customer on the SS4 form itself – either via a signature tool on the Defendant’s website, or by mail or fax.

3. Monetary Relief for the Benefit of the Settlement Class

The Settlement creates a common fund of up to \$900,000.00 (“Settlement Fund”) to be funded by the Defendant. After payment of costs of administration and attorney’s fees and costs, the parties expect that \$570,000.00 will be available to fund class member claims

and class representative incentive payments (“Net Settlement Amount”). Each member of the Settlement Class will be permitted to file claims for up to 10% of his or her alleged damages, meaning the total purchase price that the claimant paid to Defendant for an EIN during the Class Period. If the total amount of such valid claims exceeds the amount of the Settlement Fund (after fees and costs and incentive awards are deducted from the Settlement Fund as provided herein), each valid claimant shall receive a pro rata share of his or her alleged damages. Defendant is responsible for paying all valid claims approved by the Claims Administrator. After the payment of claims, fees, costs, and incentive awards, any funds remaining in the Settlement Fund will revert to Defendant.

4. Releases

Pursuant to the Settlement, Plaintiffs and each member of the Settlement Class who has not timely opted out of the Settlement as of June 21, 2016, is deemed to have released Defendant, its affiliated companies, and their officers, employees, directors, and agents of and for all claims that were brought or could have been brought by them in this litigation.

Defendant, its affiliated companies, and their officers, employees, directors, and agents shall be deemed to have released Plaintiffs, the Settlement Class, and their attorneys and agents of and for all claims that were or could be brought against any of them arising from the bringing or conduct of this litigation or the bringing of the claims set forth in the Complaint and Amended Complaint filed by Plaintiffs.

5. The Notice Program

The Notice Program has provided the best notice practicable utilizing information Defendant provided about members of the Settlement Class. The Declaration of Dahl Administration provides details of the Notice Program and confirms that as of July 11, 2016, the Program successfully reached 99.96% of the Settlement Class, providing them with the information regarding the Settlement and their rights thereunder. This includes a description of the material terms of the Settlement, the right to “opt out” of the Class, the right to object to the Settlement, Class Counsel’s Fee Application, the request for Incentive Awards, the date by which members of the Settlement Class may “opt out” or object, the date of the Final Approval Hearing, and the internet address of the settlement website at which Settlement Class Members may access the Agreement and other related documents and information. *See* [D.E. 45], Ex. A, ¶¶ 5-11. The Notice and Notice Program satisfy all

applicable requirements of law, including but not limited to Rule 23 and the Constitutional requirement of due process.

The Notice Program provided notice in the following ways:

- the Claims Administrator emailed the Short-Form Notice to 101,568 Settlement Class members for whom Defendant had email addresses, with a link to the website where class members can submit electronic claim forms (“Emailed Notice”);
- the Claims Administrator sent 4,562 Short-Form Notices on a postcard by United States mail to those Settlement Class members for whom Defendant did not have email addresses or where the email address was invalid or undeliverable (“Mailed Notice”);
- the Claims Administrator posted the Short-Form Notice and Long-Form Notice to a case-specific website (the “Claims Website”) that included additional information about the lawsuit and the Court’s pertinent orders (“Online Notice”);
- the Claims Administrator established a toll-free telephone number that provided information to Class members, including the information contained in the short-form notice, and responded to Class member emails and phone calls. *Id.*, ¶¶ 13-14; and
- a reminder Emailed Notice will be sent on August 1, 2016, as the August 22, 2016 Claim Filing deadline approaches; where the email address was invalid or undeliverable, a reminder Mailed Notice will be sent.

6. Claims Administration

Dahl Administration is the Claims Administrator. All fees and charges for the administration of the Settlement will be paid from the Settlement Fund. The Claims Administrator’s responsibilities included:

- Administering the Notice Program, including sending the Emailed Notice and Mailed Notice, posting the Online Notice, and publishing the Published Notice;

- Establishing and maintaining an address where opt-out requests from the Settlement Class may be sent;
- Establishing and maintaining the Settlement Website, which includes the Online Notice;
- Providing reports that summarize the number of requests for exclusion received, the total number of exclusion requests received to date, and other pertinent information;
- Reviewing claims submitted by the Settlement Class and comparing those claims with Defendant's records; and
- Processing and transmitting distributions from the Settlement Fund to the Settlement Class.

The required claim forms, which can be completed online on the Claims Website, require claimants to provide only the following information: name, address, entity for which an EIN was obtained, and last four digits of that entity's EIN.

II. ANALYSIS

A. Settlement Fairness

"A class action settlement [] should be approved so long as it is fair, adequate and reasonable and is not the product of collusion between the parties." *Access Now, Inc. v. Claire's Stores, Inc.*, 00-14017-CIV, 2002 WL 1162422, at *4 (S.D. Fla. May 7, 2002) (internal quotation and citations omitted). There are six factors for the Court to consider when assessing the fairness, reasonableness, and adequacy of a class action settlement:

- (1) the existence of fraud or collusion behind the settlement;
- (2) the complexity, expense, and likely duration of the litigation;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the probability of the plaintiffs' success on the merits;
- (5) the range of possible recovery; and
- (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement. *In re Checking Account Overdraft Litig.*, 830 F. Supp.

2d 1330, 1345 (S.D. Fla. 2011) (citing *Leverso v. SouthTrust Bank of AL., Nat. Assoc.*, 18 F.3d 1527, 1530 n.6 (11th Cir. 1994); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)).

“In evaluating these considerations, the Court must not try the case on the merits.” *Access Now, Inc.*, 2002 WL 1162422, at *4 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). “Rather, the Court must rely upon the judgment of experienced counsel and, absent fraud, ‘should be hesitant to substitute its own judgment for that of counsel.’” *Id.* (quoting *Cotton*, 559 F.2d at 1330). Also, “[i]n evaluating a settlement’s fairness, ‘it should not be forgotten that compromise is the essence of a settlement. The trial court should not make a proponent of a proposed settlement ‘justify each term of settlement against a hypothetical or speculative measure of what concessions might [be] gained.’” *Ass’n For Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 468 (S.D. Fla. 2002) (quoting *Cotton*, 559 F.2d at 1330). “Above all, the court must be mindful that inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.” *Id.* (internal quotation omitted). As set forth below, the Court finds that this Settlement meets these standards for final approval, and more than that, is an excellent result under the facts and circumstances here presented.

I find the Settlement satisfies these six factors. First, there is no indication of fraud or collusion. Second, the Settlement—which will immediately provide relief for the Settlement Class without the need for further litigation—is preferable to the expense and time that the lengthy litigation process would require. Third, the stage of the proceedings, the detailed allegations, and the discovery obtained demonstrate that Class Counsel had adequate knowledge to agree to and recommend approval of the Settlement. Fourth, the Court recognizes that there are substantial hurdles in prosecuting this case through trial and an appeal, so the prospect of recovering more for the Settlement Class after an unpredictable jury trial does not outweigh the immediate benefits of the Settlement. Fifth, the recovery is reasonable given the damages limitations after a successful trial. Sixth, not a single Class Member excluded or objected to the Settlement, and Class Counsel in this matter were experienced and ably represented their clients’ interests throughout the litigation.

B. Class Counsel 33% Fee Award

The Eleventh Circuit considers the following factors when evaluating the reasonable percentage to award Class Counsel: (1) the time and labor required; (2) the novelty and

difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases. *See Camden I Condo Ass’n v. Dunkle*, 946 F.2d 768, 772 n. 3 (11 Cir. 1991). The Court may also consider the time required to reach settlement, the existence of substantial objections and any non-monetary benefits, and the economics involved in prosecuting a class action. *Id.* at 775; *see also In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1359.

Here, Class Counsel’s request for fees of \$300,000 representing 1/3 of the Settlement Fund, is reasonable and in line with fee awards granted in comparable cases.

C. Service Awards


“[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218-19 (S.D. Fla. 2006) (internal quotation omitted). This court should approve the requested service award of \$7,500.00 for Kelsey O’Brien and \$1,000.00 for Kathleen Advey. The mailed and published notices were very detailed, and fully advised class members that Class Counsel would apply for services awards totaling \$8,500.00 for the two representative plaintiffs. No class members objected to this reasonable request. In instituting this litigation, Kelsey O’Brien acted as a private attorney general seeking a remedy for what appeared to be a public wrong. *See Pinto*, 513 F. Supp. 2d at 1344. “Private class action suits are a primary weapon in the enforcement of laws designed for the protection of the public.” *Wilson*, 2016 WL 457011 at *15 (internal citation omitted). The representative plaintiffs were integral in aiding the investigation and settlement of this matter. Specifically, Kelsey O’Brien assisted in the prosecution of this case from its inception. Both O’Brien and Advey oversaw and guided Class Counsel’s litigation strategy, provided factual information and insight into facts gleaned from counsel’s investigation, and were prepared to testify at trial. Thus the award of \$8,500.00, which is unopposed by Defendant, is granted.

III. CONCLUSION

For the foregoing reasons, it is **ORDERED and ADJUDGED** that the Court hereby:

1. **GRANTS** final approval of the Settlement (ECF No. 45);
2. **APPROVES** Class Counsel's attorneys' fee request, inclusive of costs, of 33% of the Settlement Fund or \$300,000.00;
3. **APPROVES** an incentive award for Plaintiff Kelsey O'Brien of \$7,500;
4. **APPROVES** an incentive award for Plaintiff Kathleen Advey of \$1,000.

DONE and ORDERED in chambers at Miami, Florida, this 1st day of August 2016.



MARCIA G. COOKE

United States District Judge

Copies furnished to:

Edwin G. Torres, U.S. Magistrate Judge
Counsel of record