

CLOSED,CMM,REF_DISCOV

U.S. District Court
Southern District of Florida (Ft Lauderdale)
CIVIL DOCKET FOR CASE #: 0:14-cv-60604-KMM

Gay v. Tom's of Maine, Inc.
Assigned to: Judge K. Michael Moore
Referred to: Magistrate Judge Chris M. McAliley
Cause: 28:1332 Diversity-Fraud

Date Filed: 03/07/2014
Date Terminated: 09/09/2015
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff

Allison Gay
On Behalf of Herself and All Others
Similarly Situated

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Date Filed	#	Docket Text
03/07/2014	1	COMPLAINT against Tom's of Maine, Inc.. Filing fees \$ 400.00 receipt number 113C-6549143, filed by Allison Gay. (Attachments: # 1 Civil Cover Sheet, # 2 Summon(s))(Zipperian, Nathan) (Entered: 03/07/2014)
03/07/2014	2	Judge Assignment to Judge K. Michael Moore (cbr) (Entered: 03/07/2014)
03/07/2014	3	Summons Issued as to Tom's of Maine, Inc.. (cbr) (Entered: 03/07/2014)
03/10/2014	4	<p>PAPERLESS PRETRIAL ORDER. THIS ORDER has been entered upon the filing of the complaint. Plaintiff's counsel is hereby ORDERED to forward to all defendants, upon receipt of a responsive pleading, a copy of this order. It is further ORDERED that S.D. Fla. L.R. 16.1 shall apply to this case and the parties shall hold a scheduling conference no later than twenty (20) days after the filing of the first responsive pleading by the last responding defendant, or within sixty (60) days after the filing of the complaint, whichever occurs first. However, if all defendants have not been served by the expiration of this deadline, Plaintiff shall move for an enlargement of time to hold the scheduling conference, not to exceed 120 days from the filing of the Complaint. Within ten (10) days of the scheduling conference, counsel shall file a joint scheduling report. Failure of counsel to file a joint scheduling report within the deadlines set forth above may result in dismissal, default, and the imposition of other sanctions including attorney's fees and costs. The parties should note that the time period for filing a joint scheduling report is not tolled by the filing of any other pleading, such as an amended complaint or Rule 12 motion. The scheduling conference may be held via telephone. At the conference, the parties shall comply with the following agenda that the Court adopts from S.D. Fla. L.R. 16.1: (1) Documents (S.D. Fla. L.R. 16.1.B.1 and 2) - The parties shall determine the procedure for exchanging a copy of or a description by category and location of all documents and other evidence that is reasonably available and that a party expects to offer or may offer if the need arises. Fed. R. Civ. P. 26(a)(1)(B). (a) Documents include computations of the nature and extent of any category of damages claimed by the disclosing party unless the computations are privileged or otherwise protected from disclosure. Fed. R. Civ. P. 26(a)(1)(C). (b) Documents include insurance agreements which may be at issue with the satisfaction of the judgment. Fed. R. Civ. P. 26(a)(1)(D). (2) List of Witnesses - The parties shall exchange the name, address and telephone number of each individual known to have knowledge of the facts supporting the material allegations of the pleading filed by the party. Fed. R. Civ. P. 26(a)(1)(A). The parties have a continuing obligation to disclose this information. (3) Discussions</p>

		and Deadlines (S.D. Fla. L.R. 16.1.B.2) - The parties shall discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. Failure to comply with this Order or to exchange the information listed above may result in sanctions and / or the exclusion of documents or witnesses at the time of trial. S.D. Fla. L.R. 16.1.M. Telephonic appearances are not permitted for any purpose. Upon reaching a settlement in this matter the parties are instructed to notify the Court by telephone and to file a Notice of Settlement within twenty-four (24) hours. Signed by Judge K. Michael Moore on 3/10/2014. (dht) (Entered: 03/10/2014)
03/10/2014	5	PAPERLESS ORDER REFERRING PRETRIAL DISCOVERY MATTERS TO MAGISTRATE JUDGE EDWIN G. TORRES. PURSUANT to 28 U.S.C. § 636 and the Magistrate Rules of the Local Rules of the Southern District of Florida, the above captioned Cause is referred to United States Magistrate Judge Edwin G. Torres to take all necessary and proper action as required by law with respect to any and all pretrial discovery matters. Any motion affecting deadlines set by the Court's Scheduling Order is excluded from this referral, unless specifically referred by separate Order. Signed by Judge K. Michael Moore on 3/10/2014. (dht) (Entered: 03/10/2014)
04/03/2014	6	Case Reassignment of Paired Magistrate Judge pursuant to Administrative Order(s) 2013-63 to Magistrate Judge Chris M. McAliley. Magistrate Judge Edwin G. Torres no longer assigned to case. (vp) (Entered: 04/03/2014)
04/09/2014	7	NOTICE of Attorney Appearance by Barry Marshall Sabin on behalf of Tom's of Maine, Inc.. Attorney Barry Marshall Sabin added to party Tom's of Maine, Inc.(pty:dft). (Sabin, Barry) (Entered: 04/09/2014)
04/09/2014	8	Unopposed MOTION for Extension of Time to File Answer RE: Complaints re 1 Complaint by Tom's of Maine, Inc.. (Attachments: # 1 Text of Proposed Order)(Sabin, Barry) (Entered: 04/09/2014)
04/15/2014	9	PAPERLESS ORDER. THIS CAUSE came before the Court upon Defendant's Unopposed Motion for Extension of Time to File a Response to Plaintiff's Complaint 8 . UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion 8 is GRANTED IN PART AND DENIED IN PART. Defendant may file its Response to the Complaint on or before April 29, 2014. Signed by Judge K. Michael Moore on 4/15/2014. (dht) (Entered: 04/15/2014)
04/23/2014	10	Second MOTION for Extension of Time to File Answer RE: Complaints re 1 Complaint by Tom's of Maine, Inc.. (Attachments: # 1 Text of Proposed Order)(Sabin, Barry) (Entered: 04/23/2014)
04/24/2014	11	PAPERLESS ORDER. THIS CAUSE came before the Court upon Defendant's Second Unopposed Motion for Extension of Time to Respond to Plaintiff's Complaint 10 . UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion 10 is GRANTED. Defendant may file its Response to the Complaint on or before June 9, 2014. Signed by Judge K. Michael Moore on 4/24/2014. (dht) (Entered: 04/24/2014)

05/30/2014	12	PAPERLESS ORDER. THIS CAUSE came before the Court upon a sua sponte examination of the record. On March 10, 2014, this Court entered a Pretrial Order 4 requiring the Parties to file a joint scheduling report within ten (10) days of their joint scheduling conference, which was to be held no later than twenty (20) days after the filing of the first responsive pleading by the last responding defendant, or within sixty (60) days after the filing of the complaint, whichever occurred first. The Order cautioned, "[f]ailure of counsel to file a joint scheduling report within the deadlines set forth above may result in dismissal, default, and the imposition of other sanctions including attorneys' fees and costs." The deadline for filing a joint scheduling report has passed and no extension of time has been requested. Accordingly, based on the foregoing, it is ORDERED AND ADJUDGED that this action is DISMISSED WITHOUT PREJUDICE. The Clerk of the Court is instructed to CLOSE this case. All pending motions are DENIED AS MOOT. The Parties may move to reopen this matter upon filing a joint scheduling report. Signed by Judge K. Michael Moore on 5/30/2014. (dht) (Entered: 05/30/2014)
07/24/2015	13	SCHEDULING REPORT - Rule 16.1 by Allison Gay (Attachments: # 1 Text of Proposed Order Proposed Scheduling Order)(Zipperian, Nathan) (Entered: 07/24/2015)
07/24/2015	14	First AMENDED COMPLAINT against All Plaintiffs, filed by Allison Gay. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Zipperian, Nathan) (Entered: 07/24/2015)
07/24/2015	15	Unopposed MOTION for Settlement <i>Preliminary Approval of Class Action Settlement</i> by Allison Gay. Responses due by 8/10/2015 (Attachments: # 1 Text of Proposed Order Preliminary Approval of Class Action Settlement, # 2 Affidavit Declaration of Nathan C. Zipperian in Support of Motion for Preliminary Approval, # 3 Exhibit A to Declaration of Nathan Zipperian, # 4 Exhibit Exhibit B to Declaration of Nathan Zipperian)(Zipperian, Nathan) (Entered: 07/24/2015)
08/13/2015	16	PAPERLESS ORDER. THIS CAUSE is before the Court on Plaintiff's 15 Unopposed Motion for Preliminary Approval of Class Action Settlement. In their motion, Plaintiffs' counsel seeks \$1.5 million in attorney's fees and expenses, or 33.3% of the fund established for the benefit of the class. In considering a fee award in the class action context, the district court has a significant supervisory role. <i>Waters v. Int'l Precious Metals Corp.</i> , 190 F.3d 1291, 1293 (11th Cir. 1999). Federal Rules of Civil Procedure 23(e) mandates that a class action shall not be dismissed or compromised without the approval of the court. <i>Id.</i> (citations omitted). The United States Court of Appeals for the Eleventh Circuit has held that attorney's fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class," and that the majority of common fund fee awards fall between 20% to 30% of the fund. <i>Id.</i> at 1294. The Eleventh Circuit has instructed district courts to "view this range as a 'benchmark' which 'may be adjusted in accordance with the individual circumstances of each case,' using the factors set forth in <i>Johnson v. Georgia Highway Express, Inc.</i> , 488 F.2d 714 (5th Cir. 1974), abrogated on other grounds by <i>Blanchard v. Bergeron</i> , 489 U.S. 87 (1989). <i>Id.</i> Johnson instructs that a district court should consider twelve factors in determining an attorney's fee award: (1) time and labor; (2) novelty and difficulty of the questions; (3) requisite skill; (4) preclusion of other employment; (5) customary fee; (6) fixed or contingent fee; (7) time limitations; (8) amount involved and results

		obtained; (9) experience, reputation, and ability of attorneys; (10) undesirability of the case; (11) nature and length of professional relationship with client; and (12) award in similar cases. Here, the requested fee award is above the "benchmark" established by the Eleventh Circuit. Accordingly, by August 20, 21, 2015, Plaintiffs' counsel shall explain, in no more than five (5) pages, why this Court should deviate upward from the benchmark, per the factors set forth in Johnson. Signed by Chief Judge K. Michael Moore on 8/13/2015. (mg00) (Entered: 08/13/2015)
08/20/2015	17	MEMORANDUM of Law re 16 Order,,,,,, by Allison Gay. (Zipperian, Nathan) (Entered: 08/20/2015)
09/01/2015	18	<p>PAPERLESS ORDER. This cause is before the Court on Plaintiff's 15 Unopposed Motion for Preliminary Approval of Class Action Settlement. In their motion for preliminary approval, Plaintiffs asked for \$1.5 million in attorney's fees and expenses, or 33.3% of the fund established for the benefit of the class. After a careful review of the record, however, the Court ordered Plaintiffs to justify the requested fee award. (ECF No. 16). In response, Plaintiffs lowered the amount sought from \$1.5 million to \$1.35 million, or 30% of the fund. (ECF No. 17). The Court will now address the appropriateness of this revised amount.</p> <p>In considering a fee award in the class action context, the district court has a significant supervisory role. <i>Waters v. Int'l Precious Metals Corp.</i>, 190 F.3d 1291, 1293 (11th Cir. 1999). Federal Rules of Civil Procedure 23(e) mandates that a class action shall not be dismissed or compromised without the approval of the court. <i>Id.</i> (citations omitted). The United States Court of Appeals for the Eleventh Circuit has held that attorney's fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class," and that the majority of common fund fee awards fall between 20% to 30% of the fund. <i>Id.</i> at 1294. The Eleventh Circuit has instructed district courts to "view this range as a 'benchmark' which 'may be adjusted in accordance with the individual circumstances of each case,' using the factors set forth in <i>Johnson v. Georgia Highway Express, Inc.</i>, 488 F.2d 714 (5th Cir. 1974), abrogated on other grounds by <i>Blanchard v. Bergeron</i>, 489 U.S. 87 (1989). <i>Id.</i> Johnson instructs that a district court should consider twelve factors in determining an attorney's fee award: (1) time and labor; (2) novelty and difficulty of the questions; (3) requisite skill; (4) preclusion of other employment; (5) customary fee; (6) fixed or contingent fee; (7) time limitations; (8) amount involved and results obtained; (9) experience, reputation, and ability of attorneys; (10) undesirability of the case; (11) nature and length of professional relationship with client; and (12) award in similar cases.</p> <p>Applying the Johnson factors to this case, the Court finds that \$1.35 million in attorney's fees is excessive. While the Court does not doubt that class counsel has "vigorously investigated the class claims and protected the class members' interests" for over a year while this case has been pending, as well as assumed a financial risk in handling this case on a contingency basis, the time and labor expended on this matter does not justify an award at the highest end of the Eleventh Circuit's benchmark. Before the Court dismissed this action on May 30, 2014, for the parties' failure to file a joint scheduling report, the docket contained eleven entries, only two of which were filed by Plaintiffs. The docket reflects no discovery, much less any discovery disputes, and no motion</p>

		<p>practice whatsoever. On top of that, by Plaintiffs' own admission, the estimated out-of-pocket expenses will total less than \$50,000. Nevertheless, Plaintiffs ask this court to approve a settlement that awards \$1.35 million in attorney's fees, based only on class counsel's efforts in reaching a settlement and the risk associated with contingency-based representation, and without a single citation to a factually analogous case where a court in this circuit awarded such a high amount under similar circumstances. Based on these considerations, 30% in attorney's fees is not a reasonable percentage of the fund established for the class' benefit.</p> <p>Accordingly, the 15 Unopposed Motion for Preliminary Approval of Class Action Settlement is denied. The Court finds that an attorney's fee award of \$1.035 million, or 23% of the fund, plus out-of-pocket expenses not to exceed \$50,000, is reasonable in this case. The parties must submit a revised motion for preliminary approval consistent with this order by September 8, 2015. Failure to comply with this order may result in the imposition of sanctions, including, but not limited to, dismissal.</p> <p>Signed by Chief Judge K. Michael Moore on 9/1/2015. (mg00) (Entered: 09/01/2015)</p>
09/01/2015	19	<p>PAPERLESS ORDER. This cause is before the Court on the parties' 13 Joint Scheduling Report and Motion to Reopen Matter. On May 30, 2015, the Court dismissed this action because the parties failed to file a joint scheduling report. Having reached a settlement, and upon the filing of a joint scheduling report, Plaintiffs move to reopen the case so that the settlement can be presented to the Court for its consideration. Accordingly, the Clerk of Court is instructed to reopen this case. All previously issued orders in this action remain in effect except those inconsistent with this order. The parties shall move to reopen any previously filed motions that were mooted when this case was closed. Signed by Chief Judge K. Michael Moore on 9/1/2015. (mg00) (Entered: 09/01/2015)</p>
09/08/2015	20	<p>MOTION for Settlement (<i>Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement</i>) by Allison Gay. Responses due by 9/25/2015 (Attachments: # 1 Declaration of Nathan Zipperian in Support, # 2 Exhibit A to Dec of Nathan Zipperian - Joint Stipulation of Settlement, # 3 Exhibit B to Dec of Nathan Zipperian - Firm Resumes, # 4 Text of Proposed Order)(Zipperian, Nathan) (Entered: 09/08/2015)</p>
09/09/2015	21	<p>ORDER granting 20 Motion for Settlement. Signed by Chief Judge K. Michael Moore on 9/9/2015. (mg00)</p> <p>NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69. (Entered: 09/09/2015)</p>
09/09/2015	22	<p>PAPERLESS NOTICE of Hearing: Pursuant to paragraph 8, 21 : Fairness Hearing set for 1/28/2016 11:00 AM in Miami Division before Chief Judge K. Michael Moore. (rg1) (Entered: 09/09/2015)</p>
10/13/2015	23	<p>Letter of Objection to Case from Rebecca Harris (cbr) (Entered: 10/13/2015)</p>

10/26/2015	24	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Melissa W. Wolchansky. Filing Fee \$ 75.00. Receipt # 7349. (ksa) (Entered: 10/27/2015)
10/27/2015	25	Letter of Objection to Settlement from David A Balz (cbr) (Entered: 10/27/2015)
10/28/2015	26	PAPERLESS ORDER. This cause is before the Court on 24 the Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filings. Upon consideration of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is ordered and adjudged that the Motion to Appear Pro Hac Vice is granted. Melissa W. Wolchansky, Esq., may appear pro hac vice in this matter. The Clerk of Court shall provide electronic notification of all electronic filings to Ms. Wolchansky at wolchansky@halunenlaw.com. Signed by Chief Judge K. Michael Moore on 10/28/2015. (mg00) (Entered: 10/28/2015)
12/01/2015	27	Objection and NOTICE of Intent to Appear by Steven Franklyn Helfand (srd) (Entered: 12/02/2015)
12/07/2015	28	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for James C. Shah. Filing Fee \$ 75.00. Receipt # 113C-8303016 by Allison Gay. Responses due by 12/24/2015 (Zipperian, Nathan) (Entered: 12/07/2015)
12/08/2015	29	PAPERLESS ORDER. This cause is before the Court on the Plaintiffs' 28 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing. Upon consideration of the motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is ordered and adjudged that the Motion to Appear Pro Hac Vice is granted. James C. Shah, Esq. may appear pro hac vice in this matter. The Clerk of the Court shall provide electronic notification of all electronic filings to Mr. Shah at ajshah@sfnslaw.com. Signed by Chief Judge K. Michael Moore on 12/8/2015. (mg00) (Entered: 12/08/2015)
12/11/2015	30	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Michael R. Reese. Filing Fee \$ 75.00. Receipt # 113C-8319067 by Allison Gay. Responses due by 12/31/2015 (Zipperian, Nathan) (Entered: 12/11/2015)
12/14/2015	31	PAPERLESS ORDER. This cause is before the Court on the Plaintiffs' 30 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing. Upon consideration of the motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is ordered and adjudged that the Motion to Appear Pro Hac Vice is granted. Michael R. Reese, Esq. may appear pro hac vice in this matter. The Clerk of the Court shall provide electronic notification of all electronic filings to Mr. Reese at mreese@reesellp.com. Signed by Chief Judge K. Michael Moore on 12/14/2015. (mg00) (Entered: 12/14/2015)
12/15/2015	32	Unopposed MOTION for Settlement (<i>Memorandum of Law in Support of Unopposed Motion for Final Approval of Class Action Settlement, Application for Service Awards, and Class Counsel's Application for Attorneys' Fees and Expenses</i>) by Allison Gay. Responses due by 1/4/2016 (Attachments: # 1 Declaration of James C. Shah in Support,

		# 2 Exhibit 1 to Declaration of James C. Shah, # 3 Exhibit 2 to Declaration of James C. Shah, # 4 Exhibit 3 to Declaration of James C. Shah)(Zipperian, Nathan) (Entered: 12/15/2015)
12/29/2015	33	RESPONSE in Opposition re 32 Unopposed MOTION for Settlement (<i>Memorandum of Law in Support of Unopposed Motion for Final Approval of Class Action Settlement, Application for Service Awards, and Class Counsel's Application for Attorneys' Fees and Expenses</i>) filed by Samuel Goldstone. Replies due by 1/8/2016. (pes) (Entered: 12/30/2015)
12/29/2015	34	RESPONSE in Opposition re 32 Unopposed MOTION for Settlement (<i>Memorandum of Law in Support of Unopposed Motion for Final Approval of Class Action Settlement, Application for Service Awards, and Class Counsel's Application for Attorneys' Fees and Expenses</i>) filed by Patrick S. Sweeney. Replies due by 1/8/2016. (pes) (Entered: 12/30/2015)
12/30/2015	35	RESPONSE/REPLY <i>Objection of Dawn Weaver to Notice of Settlement and Notice of Intent to Appear</i> by Dawn Weaver. (Sweeney, Patrick) (Entered: 12/30/2015)
01/14/2016	36	REPLY to Response to Motion re 32 Unopposed MOTION for Settlement (<i>Memorandum of Law in Support of Unopposed Motion for Final Approval of Class Action Settlement, Application for Service Awards, and Class Counsel's Application for Attorneys' Fees and Expenses</i>) filed by Allison Gay. (Attachments: # 1 Supplemental Declaration of Jeffrey D. Dahl with Respect to Implementation of the Notice Plan and Performance of Required Settlement Administration Activities, # 2 Certificate of Service)(Zipperian, Nathan) (Entered: 01/14/2016)
01/27/2016	37	NOTICE of Attorney Appearance by Patrick K Dahl on behalf of Tom's of Maine, Inc.. Attorney Patrick K Dahl added to party Tom's of Maine, Inc.(pty:dft). (Dahl, Patrick) (Entered: 01/27/2016)
01/27/2016	38	NOTICE of Attorney Appearance by Carlos A Garcia on behalf of Tom's of Maine, Inc.. Attorney Carlos A Garcia added to party Tom's of Maine, Inc.(pty:dft). (Garcia, Carlos) (Entered: 01/27/2016)
01/27/2016	39	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for David K. Callahan. Filing Fee \$ 75.00 Receipt # 113C-8433889 by Tom's of Maine, Inc.. Responses due by 2/16/2016 (Attachments: # 1 Exhibit Certification of David K. Callahan, # 2 Text of Proposed Order)(Garcia, Carlos) (Entered: 01/27/2016)
01/28/2016	40	PAPERLESS Minute Entry for proceedings held before Chief Judge K. Michael Moore: Fairness Hearing held on 1/28/2016. Order to Follow. APPEARANCES: James C. Shah, Melissa W. Wolchhansky, Nathan C. Zipperian, Patrick K. Dahl, David Callahan, Cliff Wilkins (Corporate Representative) and Steven Helfand (Objector) Court Reporter: William Romanishin, 305-523-5558 / Bill_Romanishin@flsd.uscourts.gov (ra) (Entered: 01/28/2016)
01/29/2016	41	PAPERLESS ORDER. This cause is before the Court on 39 Defendant Tom's of Maine, Inc.'s motion to appear pro hac vice. Upon consideration of the motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is ordered

		and adjudged that the motion for admission pro hac vice is granted. David K. Callahan, Esq. may appear pro hac vice in this matter. The Clerk of Court shall provide electronic notification of all electronic filings to Mr. Callahan at David.Callahan@lw.com. Signed by Chief Judge K. Michael Moore on 1/29/2016. (mg00) (Entered: 01/29/2016)
01/29/2016	42	NOTICE by Allison Gay (<i>Notice of Filing of [Proposed] Final Settlement Order and Judgment</i>) (Attachments: # 1 Text of Proposed Order) (Zipperian, Nathan) (Entered: 01/29/2016)