IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL KAISER-NYMAN, individually and on behalf of a class of all persons and entities similarly situated, Plaintiff vs. FIRST CHOICE PAYMENT SOLUTIONS G.P., d/b/a SEKURE MERCHANT SOLUTIONS Defendant.	Case No. 1:17-cv-05472 Honorable Thomas M. Durkin

PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, COSTS,
AN INCENTIVE AWARD AND INCORPORATED MEMORANDUM IN SUPPORT

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I. INTRODUCTION

On September 10, 2018 this Court preliminarily approved a proposed class action settlement between Plaintiff Michael Kaiser-Nyman ("Plaintiff") and the Defendant First Choice Payment Solutions G.P. d/b/a Sekure Merchant Solutions ("First Choice" or "Defendant") (collectively, Plaintiff and Defendant shall be referred to as "the Parties"). Dkt. No. 41. The Settlement requires First Choice to pay $6,250,000 into a common fund for the benefit of the recipients of its automated telemarketing calls, which Plaintiff alleges violated of the Telephone Consumer Protection Act, 47 U.S.C. § 227, ("TCPA"). Each valid claimant will receive a *pro rata* share following subtractions for the costs of notice and administration, court awarded attorneys' fees and costs, and any incentive award. In addition to the monetary benefit to the Settlement Class Members, the settlement also provides significant prospective relief designed to eliminate future telemarketing violations.

Class Counsel have zealously prosecuted these claims on behalf of the class, achieving the Settlement after substantial first and third-party discovery, including tens of thousands of pages of documents, depositions, and a detailed analysis of call data received from Five9, Inc., the call broadcaster that made the calls at issue. The Settlement was reached only after an all-day mediation with the Hon. Morton Denlow (Ret.) of JAMS in Chicago on June 5, 2018, followed by further negotiations between counsel for the parties.

As compensation for the substantial benefit conferred upon the Settlement Class, Class Counsel respectfully move the Court for an award of attorneys' fees of $1,797,465.00—equal to one-third of the Settlement Fund exclusive of estimated settlement administration expenses, class counsel's litigation expenses and the requested incentive award. This request is well within the range of reasonableness and represents a nearly $300,000 reduction from the maximum possible

fee request identified in the Class Notice. Class Counsel also seek reimbursement of $19,250.00 in out-of-pocket costs, and $15,000 as an award to the named plaintiff.

Counsel's request should be approved because it represents the market rate for this type of case and settlement, is in line with the Seventh Circuit's directives in *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975-80 (7th Cir. 2003) ("*Synthroid II*") and *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) and is reasonable and appropriate in light of the substantial risks presented in prosecuting this action, the quality and extent of work conducted, and the stakes of the case.

II. BACKGROUND AND SETTLEMENT

A. Background

This case rests on alleged violations of the TCPA which prohibits, *inter alia*, initiating any telephone solicitation to a cell phone using an ATDS or an artificial or prerecorded voice. *See* 47 U.S.C. § 227(b). Guided by the Court's participation in the Mandatory Initial Discovery Pilot ("MIDP"), the parties have exchanged tens of thousands of pages of first party and third-party discovery and engaged in a thorough investigation of the claims and defenses.

First Choice provides payment processing services to businesses in the United States. *See* Dkt. No. 35-2, Affidavit of Anthony Paronich at ¶ 7. To promote its services, First Choice uses telemarketing. *Id.* at ¶ 8. First Choice purchases data from third parties, including Dun & Bradstreet, to be used in its telemarketing. *Id.* at ¶ 9. Dun & Bradstreet sells aggregated business data to the public, including telephone numbers. *See* https://www.dnb.com/products/marketing-sales/dnb-hoovers.html (Last Visited October 11, 2018).

During his deposition, Eyal Artzy, one of the managers of First Choice, testified that he was primarily responsible to oversee the "lead acquisition process" at First Choice, which

includes telemarketing. Paronich Affidavit at ¶ 10. Mr. Artzy testified that First Choice has 200-250 telemarketing employees at any time, and that they used the Five9 dialing system in multiple modes, including, but not limited to, manual, predictive and preview, to make calls to potential business that might want to sign up for their credit card processing services. *Id.* at ¶ 11. In an effort to try to avoid autodialed calls to cellular telephones, First Choice purchased lists of cellular telephone numbers from Interactive Marketing Solutions, a member of the Data & Marketing Association, to be scrubbed against the data purchases from third parties, including, but not limited to, Dun & Bradstreet. *Id.* at ¶ 12. Despite this process, an analysis of First Choice's calling data showed the calls to cellular telephones that are the subject of this case. *Id.* at ¶ 13.

On June 5, 2018, the parties mediated with the Hon. Morton Denlow (Ret.). *Id.* at ¶ 14. Although the parties did not reach a settlement during that mediation, it led to subsequent settlement discussions amongst counsel that culminated in the Settlement Agreement that the Court preliminarily approved. *Id.* at ¶ 15.

B. <u>The Settlement</u>

The Settlement requires Defendant to pay $6,250,000 for the benefit of a Settlement Class defined as:

> All persons within the United States to whom Defendant made a telephone call through the Five9, Inc. dialing software and/or system (*i.e.*, an automated telephone dialing system or an artificial or prerecorded voice) to any telephone number assigned to a cellular telephone service or any service for which the called party is charged for the call for the purpose of promoting Defendant's goods or services from July 26, 2013 through February 1, 2018. These individuals are identified on the Class List.
>
> Excluded from the Settlement Class are the following: (1) any trial judge that may preside over this Action; (ii) Defendant; (iii) any of the Released Parties; (iv) Class Counsel and their employees; (v) the immediate family of any of the foregoing Persons; (vi) any member of the Settlement Class who has timely submitted a Request for Exclusion by the

> Objection/Exclusion Deadline; and (vii) any Person who has previously given a valid release of the claims asserted in the Action.

(Agreement ¶ 1.41.) The Settlement Fund will exclusively be used to pay: (1) cash settlement awards to Settlement Class Members; (2) Settlement Administration Expenses; (3) court-approved attorney's fees of up to one-third of the entire settlement amount; and (4) a court-approved incentive award to the Class Representative of up to $15,000. (Agreement ¶¶ 15.1-15.2.)

Each Settlement Class Member who submits a valid claim shall be entitled to receive *pro rata* share of the Settlement Fund after all Settlement Administrative Expenses, Incentive Awards, and Fee awards are paid out of the Settlement Fund. (Agreement. ¶ 4.3.) If all the attorneys' fees, expenses, incentive award and Settlement Administration Expenses are approved as requested, based upon a 10% claim rate Plaintiff's counsel estimate that the average Settlement Class Member payment would be approximately $30. (Paronich Decl. ¶ 16.) The Settlement provides for a potential second distribution for any funds remaining due to uncashed settlement distribution checks to those Settlement Class Members that cashed their first distribution checks, to the extent administratively feasible.[1] (Agreement. ¶ 4.3(d).)

As part of the proposed Settlement, the Defendant has also agreed to ensure that it maintains a system to comply with the TCPA's requirements, which is described below:

> (i) Defendant purchases sales leads from non-party Dun & Bradstreet, Inc. and its affiliates, including, Hoover's, that are uploaded to Defendant's mySQL Database; (ii) Defendant purchases and receives bi-monthly lists from non-party Interactive Marketing Solutions, Corp. ("IMS") that reflect wireless numbers and landline ported to wireless numbers; (iii) Defendant scrubs its mySQL Database against each such list received from IMS in an effort

[1] If distribution of any amounts remaining from uncashed checks is administratively infeasible—*i.e.*, Settlement Class Members would receive less than an additional $5.00, after administrative costs—then that amount will instead be distributed to a Court-approved *cy pres* recipient. (Agreement ¶ 4.3(d)) The Parties propose the National Consumer Law Center as the designated *cy pres* recipient. (Agreement ¶ 1.15)

> to remove wireless numbers and landline ported to wireless numbers from Defendant's mySQL Database; and (iv) Defendant only makes calls to those telephone numbers in its MySQL Database that have been scrubbed against the lists received from IMS.

(Agreement ¶ 4.2) This process will provide Settlement Class Members (and the public) with further relief.

Plaintiff respectfully requests that the Court approve attorneys' fees equal to one-third of the Settlement Fund exclusive of Settlement Administration Expenses, Class Counsel's litigation costs and the requested Incentive Award, or $1,797,465, plus costs of $19,250.00.[2] As detailed below, the requested award is in line with the market rate for similar legal services in this jurisdiction, and fairly reflects the result achieved.

III. LEGAL STANDARD FOR ATTORNEYS' FEE DECISIONS

The Seventh Circuit and other federal courts have long recognized that when counsel's efforts result in the creation of a common fund that benefits the plaintiff and unnamed class members, counsel have a right to be compensated from that fund for their successful efforts in creating it. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("lawyer who recovers a common fund … is entitled to a reasonable attorneys' fee from the fund as a whole"); *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) ("the attorneys for the class petition the court for compensation from the settlement or common fund created for the class's benefit"). The goal is to award counsel "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") (collecting cases).

[2] The estimated settlement administration expenses for a 7.5% participation rate in the settlement is: $823,353. As such, the attorney fee requested was determined based on the following formula: $6,250,000 - 823,353 (administration) - $15,000 requested incentive award - $19,250 litigation expenses ÷ 3 = $1,797,465.67, which Class Counsel rounded down.

In common fund cases, courts have discretion to use one of two methods to determine whether the request reflects the market rate for legal services: (1) percentage of the fund; or (2) lodestar plus a risk multiplier. *Am. Art China, Co. v. Foxfire Printing & Pkg., Inc.*, 743 F.3d 243, 247 (7th Cir. 2014). "[T]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class." *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, No. 09-7670, 2011 WL 13257072, at *3 (N.D. Ill. Nov. 30, 2011).

IV. ARGUMENT

Class Counsel's requested fee is reasonable and within the market rate. Consequently, the requested fees and costs should, respectfully, be awarded, as further set forth herein.

A. The Court Should Calculate Fees as a "Percentage of the Fund."

Courts in this District routinely hold that the percentage of the fund reflects the "market rate" for TCPA class actions because "given the opportunity … class members and Plaintiff's counsel would have bargained for" such. *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-4462, 2015 WL 1399367, at *5 (N.D. Ill. Mar. 23, 2015); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12-4069, 2017 WL 1369741, at *2, 9 (N.D. Ill. Apr. 10, 2017) (using percentage-of-the-fund method in TCPA case and declining to engage in lodestar analysis); *Wright v. Nationstar Mortg. LLC*, No. 14-1045, 2016 WL 4505169, *17 (N.D. Ill. Aug. 26, 2016) (same); *In re Capital One Tel. Consumer Prot. Act Litig.* ("*In re Capital One*"), 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (percentage of the fund method is "more likely to yield an accurate approximation of the market rate" in TCPA case, and that, "had an arm's length negotiation been feasible, the court believes that the class would have negotiated a fee arrangement based on a percentage of the recovery, consistent with the normal practice in consumer class actions"). The preference for the percentage-of-the-fund approach makes sense because it best reflects the way

fees work in such cases. In a non-fee-shifting matter like a personal injury or TCPA case, the only way for a lawyer to be paid is through a percentage of the client's recovery.

One of the advantages that the percentage of the fund has over lodestar, and a substantial reason why it more accurately represents the "market rate," is that "the lodestar method [would] require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly-injured plaintiffs likely would not be interested in doing." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 501 (N.D. Ill. 2015) (using percentage-of-the-fund method in TCPA class action). Indeed, "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994). As one seminal case found:

> The percentage method is bereft of largely judgmental and time-wasting computations of lodestars and multipliers. These latter computations, no matter how conscientious, often seem to take on the character of so much Mumbo Jumbo. They do not guarantee a more fair result or a more expeditious disposition of litigation.

In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 724 F. Supp. 160, 170 (S.D.N.Y. 1989); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) (noting it is easier to establish market based contingency fee percentages than to "hassle over every item or category of hours and expense and what multiple to fix and so forth"); *Gaskill v. Gordon*, 942 F. Supp. 382, 386 (N.D. Ill. 1996) (percentage of fund "provides a more effective way of determining whether the hours expended were reasonable"), *aff'd*, 160 F.3d 361 (7th Cir. 1998). Thus, here, where Class Counsel has secured a non-reversionary, common fund TCPA class settlement for the benefit of the Class, fees should be determined on a percentage-of-the-fund basis.

B. Counsel's Request Is Within the "Market Rate."

The Seventh Circuit has held that courts should determine this percentage by

approximating the market rate, and in *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975-80 (7th Cir. 2003) ("*Synthroid II*"), itself determined the "market" fee as a percentage of the *entire* settlement fund. More recently, in *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014), the Court established a presumption for fee requests, holding that notice and administration costs should be deducted before weighing the percentage for attorney's fees.

However, *Pearson* did not overrule *Synthroid II*, and did not purport to lower the "market rate" for attorney's fees in consumer class actions like this one. Rather, *Pearson* holds that district courts enjoy wide discretion to award whatever fees are reasonable and appropriate; under the *Pearson* presumption, fees in any given settlement should not "exceed *a third* or at most a *half* of the total amount of money going to class members and their counsel." *Pearson*, 772 F.3d at 782 (emphasis added).

Here, Plaintiff's fee request falls on the bottom of the *Pearson* presumption: Class Counsel's requested fee award, $1,797,465—equal to one-third of the Settlement Fund exclusive of estimated Settlement Administration Expenses, class counsel's litigation expenses and the requested Incentive Award—well under the 50% deemed presumptively reasonable under *Pearson*. As Judge Chang held earlier this year in another TCPA class action, *Leung v. XPO Logistics, Inc.*, No. 15 C 03877, 2018 U.S. Dist. LEXIS 89727, at *29-31 (N.D. Ill. May 30, 2018):

> The Court holds that a third of the net fund is a more appropriate award. A one-third award is in line with the Seventh Circuit's suggestion in *Pearson* that "attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel." 772 F.3d at 782. A one-third fee is also similar to awards in a number of post-*Redman* and *Pearson* TCPA settlements…Taking all this into account, an award of 33.3% of the estimated net fund is reasonable and in line with the market.

A similar analysis is appropriate here.

The Seventh Circuit has elucidated 'benchmarks' that can assist courts in estimating the market rate, including "the fee contract between the plaintiff and counsel, data from similar cases, and information from class-counsel auctions," *Kolinek*, 311 F.R.D. at 501 (citing *Synthroid I*, 264 F.3d at 719). Other factors are relevant, as well, including the risk counsel undertook in accepting the case, the quality of performance and the stakes of the case. *Synthroid I*, 264 F.3d at 721. As explained below, each of these factors supports the requested fee.

1. The Requested Fee is Supported by the Contract between Plaintiff and Counsel.

The requested fee award is not only supported by the fee awards deemed reasonable in similar class cases; it is in line with representation agreements commonly entered into in this District, including between Plaintiff and his counsel. In addition to analyzing the market price for legal services from analogous cases, courts also may examine "actual fee contracts that were negotiated for private litigation." *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005); *see also Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) (requiring weight be given to the judgment of the parties and their counsel where, as here, the fees were agreed to through arm's length negotiations after the parties agreed on the other key deal terms). Here, counsel for Plaintiff and Plaintiff entered into a contract that permitted the recovery of one-third of the total amount of any settlement. *See* Declaration of Anthony Paronich ("Second Paronich Affidavit") attached as Exhibit 1, at ¶ 10.

The customary contingency agreement in this Circuit is 33% to 40% of the total recovery. *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (observing that "40% is the customary fee in tort litigation" and noting, with approval, contract providing for one-third contingent fee if litigation settled before trial); *Retsky Family Ltd. P'ship v. Price Waterhouse, LLP*, No. 97-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (recognizing that a customary contingent fee

is "between 33 1/3% and 40%" and awarding counsel one-third of the common fund). Here, Plaintiff entered into a retainer agreement with Class Counsel that reflects this fee range, which supports a finding that the requested fee reflects the amount Class Counsel would have received had they negotiated their fee *ex ante*. *Taubenfeld*, 415 F.3d at 599.

2. The Requested Fee Reflects the Fees Awarded in Other Settlements.

"As the Seventh Circuit has held, attorney's fee awards in analogous class action settlements shed light on the market rate for legal services in similar cases." *Kolinek*, 311 F.R.D. at 493–94 (citation omitted). Here, Class Counsel's request for fees totaling one-third of the Settlement Fund exclusive of Settlement Administration Expenses and any Incentive Award—or approximately 28% of the entire Settlement Fund—finds support in numerous other decisions. Some TCPA cases approving fees in this range from this District are as follows: *Charvat v. AEP Energy, Inc.*, No. 14-3121, Dkt. No. 44 (N.D. Ill. Nov. 20, 2015) (awarding fees in TCPA class action settlement of one-third total Settlement Fund) (Zagel, J.); *Martin v. Dun & Bradstreet, Inc.*, No. 12-215, Dkt. 63 (N.D. Ill. Jan. 16, 2014) (one-third of total payout) (Martin, J.); *Hanley v. Fifth Third Bank*, No. 12-1612 (N.D. Ill.) (Dkt. No. 87) (awarding attorneys' fees of one-third of total settlement fund); *Cummings v. Sallie Mae*, No. 12-9984, Dkt. 91 (N.D. Ill. May 30, 2014) (Gottschall, J.) (one-third of common fund); *Desai v. ADT Sec. Servs., Inc.*, No. 11-1925, Dkt. 243 (N.D. Ill. June 21, 2013) (Bucklo, J.) (one-third of the fund); *Paldo Sign & Display Co. v. Topsail Sportswear, Inc.*, No. 08-5959, Dkt. 116 (N.D. Ill. Dec. 21, 2011) (Kennelly, J.) (one-third of settlement fund plus expenses); *CE Design Ltd. v. CV's Crab House North, Inc.*, No. 07-5456, Dkt. 424 (N.D. Ill. Oct. 27, 2011) (Kennelly, J.) (one-third of fund plus expenses); *Saf-T-Gard Int'l, Inc. v. Seiko Corp. of Am.*, No. 09-776, Dkt. 100 (N.D. Ill. Jan. 14, 2011) (Bucklo, J.) (fees and expenses equal to 33% of the settlement fund); *G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 07-5953, Dkt. 146 (N.D. Ill. Nov. 1, 2010) (Kendall, J.) (fees of one-third of settlement

plus expenses); *Hinman v. M&M Rentals, Inc.*, No. 06-1156, Dkt. 225 (N.D. Ill. Oct. 6, 2009) (Bucklo, J.) (fees and expenses equal to 33% of the fund); *Holtzman v. CCH*, No. 07-7033, Dkt. 33 (N.D. Ill. Sept. 30, 2009) (Nordberg, J.) (same); *CE Design, Ltd. v. Exterior Sys., Inc.*, No. 07-66, Dkt. 39 (N.D. Ill. Dec. 6, 2007) (Darrah, J.) (same).

Some other, non-TCPA cases supporting the reasonableness of Class Counsel's fee request include: *Spano v. The Boeing Co.*, No. 06-743, 2016 WL 3791123 (S.D. Ill. Mar. 31, 2016) (awarding 33⅓% of the monetary settlement); *McCue v. MB Fin., Inc.*, No. 15-988, 2015 WL 4522564 (N.D. Ill. July 23, 2015) (awarding 33.33% of the fund plus costs); *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475 (N.D. Ill. July 17, 2015) (awarding 33.33% of the fund plus costs); *Zolkos v. Scriptfleet, Inc.*, No. 12-8230, 2015 WL 4275540 (N.D. Ill. July 13, 2015) (awarding 33.33% of the fund plus expenses); *Prena v. BMO Fin. Corp.*, No. 15-09175, 2015 WL 2344949 (N.D. Ill. May 15, 2015) (awarding 33.5% of fund after deducting notice costs); *Bickel v. Sheriff of Whitley Cnty*, No. 08-102, 2015 WL 1402018 (N.D. Ind. Mar. 26, 2015) (awarding 43.7% of fund); *In re Dairy Farmers of Am., Inc.*, MDL No. 2031, 2015 WL 753946 (N.D. Ill. Feb. 20, 2015) (33.33% of the fund);[3] *Taubenfeld*, 415 F.3d at 600 (noting counsel had submitted a table of thirteen cases in N.D. Ill. where counsel were awarded fees amounting to 30–39% of settlement fund); *In re Ky. Grilled Chicken*, 2011 WL 13257072, at *5 (approving 32.7% of common fund); *City of Greenville v. Syngenta Corp Prot., Inc.*, 904 F. Supp. 2d 902, 908–09 (S.D. Ill. 2012) (approving one-third fee because a "contingent fee of one-third of any recovery after the reimbursement of costs and expenses reflects the market price,"

[3] *Synthroid I* also says that District Courts may look to any data from pre-suit negotiations and class-counsel auctions, however such information is "basically non-existent" in a TCPA case like this one. *Kolinek*, 311 F.R.D. 501.

citing cases); *Will v. Gen. Dynamics Corp.*, No. 06-698, 2010 WL 4818174, *3 (S.D. Ill. Nov. 22, 2010) (finding "the market rate for complex plaintiffs' attorney work in this case and similar cases is a contingency fee" and agreeing "a one-third fee is consistent with the market rate"); *In re Bankcorp. Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming award of 36% of settlement fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of attorneys' fees equal to 33.33% of the total recovery); *Greene v. Emersons Ltd.*, No. 76-2178, 1987 WL 11558, at *8 (S.D.N.Y. May 20, 1987) (awarding attorneys' fees and expenses in excess of 46% of the settlement fund); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1131–32 (W.D. La. 1997) (awarding attorneys' fees equal to 36% of the common fund); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 503 (D.D.C. 1981) (awarding attorneys' fees in excess of 40% of the settlement fund); *Beech Cinema, Inc. v. 20th Century Fox Film Corp.*, 480 F. Supp. 1195, 1198–99 (S.D.N.Y. 1979) (awarding fees in excess of 50% of the settlement fund); *Van Gemert v. Boeing Co.*, 516 F. Supp. 412, 420 (S.D.N.Y. 1981) (awarding fees of 36% of fund).

Post-*Pearson*, some courts in this Circuit have employed a percentage-of-the-fund analysis that wholly excludes costs and any incentive award from the calculation under *Pearson*, while incorporating a percentage "risk adjustment". *See, e.g., Martin v. JTH Tax, Inc.*, No. 13-6923 (N.D. Ill. Sept. 16, 2015) (awarding 38% of fund minus expenses, notice/admin costs, and service award) (Shah, J.); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 501 (N.D. Ill. 2015) (awarding 36% of fund minus notice/admin costs and service award) (Kennelly, J.); *Fulton Dental, LLC v. Bisco, Inc.*, 1:15-cv-11038, Dkt. No. 71 (N.D.Ill. Mar. 7, 2018) (Chang, J.) (awarding one-third of total settlement in TCPA junk fax case). In fact, this is the approach employed by this Court in *Vergara v. Uber Techs., Inc.*, 2018 U.S. Dist. LEXIS 117355 (N.D. Ill. Feb. 26, 2018) (Durkin, J.):

> The Court adopts what "appears to have become the standard model in this circuit" for awarding fee awards in TCPA cases like this one involving a common fund settlement: a sliding-scale percentage approach. *See, e.g., Aranda v. Caribbean Cruise Line, Inc.*, 2017 U.S. Dist. LEXIS 54080, 2017 WL 1369741, at *5 (N.D. Ill. Apr. 10, 2017); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. 2015) (examining data from TCPA common fund settlements to adopt approach). Under this approach, the common fund is separated into bands, and class counsel is awarded a percentage of each band, with the percentage awarded decreasing as the size of the common fund increases…
>
> The base percentage applied to the first $10 million band is 30%, and the base percentage applied to the second $10 million band is 25%. *Capital One*, 80 F. Supp. 3d at 804…
>
> As discussed at the January 23, 2018 hearing, this case, like *Aranda*, involved "real and significant" risk by plaintiffs' counsel, 2017 U.S. Dist. LEXIS 54080, [WL] at *6, including litigating against a defendant with substantial resources, [*5] strong legal defenses, and a willingness to litigate. This Court therefore agreed with plaintiffs that a six-point risk premium should be applied to the first $10 million band.

Vergara at *3, 5-6 (N.D. Ill. Feb. 26, 2018).

As discussed below, just like Plaintiff's counsel in *Vergara and Aranda,* from the outset Class Counsel undertook substantial risk that they would ultimately achieve nothing for their efforts on behalf of the Class. However, despite these same risks being present, Class Counsel seek 2.67% less than this Court awarded in *Vergara* and the other TCPA class actions mentioned therein. As such, Class Counsel's request for fees of one-third of the Settlement Fund exclusive of Settlement Administration Expenses and any Incentive Award—or about 28% of the overall Fund, itself—is not only presumptively reasonable under *Pearson*; but also fully supported given the substantial risk undertaken. *See also Smith v. State Farm Mut. Auto. Ins. Co.*, 1:13-cv-2018, Dkt. No. 338 (N.D. Ill. Dec. 8, 2016) (St. Eve, J.) (awarding one-third of settlement amount after administrative costs deducted).

In sum, Class Counsel's requested fee reflects fees approved by other courts in TCPA and other class cases in this Circuit. Consequently, the requested fee award is reasonable, and

should be approved.

3. Other Factors Support the Requested Fee.

Beyond comparisons to similar fee awards and agreements, the market price for legal fees "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Sutton*, 504 F.3d at 693 (quotation and internal marks omitted). Given the result achieved for the benefit of the Settlement Class in this case, considering the risk of nonpayment to Class Counsel and extensive resources expended, Class Counsel respectfully submit that their requested fee is reasonable and appropriate under the totality of circumstances, and should be approved.

a. Risk of Nonpayment

From uncertain class size to changing regulatory precedent and the inability to establish an absence of predominating individualized issues sufficient for certification of a litigation class, Class Counsel faced substantial risk and uncertainty at the outset of this action that they would receive no compensation despite investing the time and resources necessary to adequately prosecute this case. This risk supports the requested fee award.

"Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (citing *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986)). Thus, the risk of non-payment is a key consideration in assessing the reasonableness of a requested fee and must be incorporated into any ultimate fee award. *See Florin*, 34 F.3d at 565 ("The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.") (quotations and citations omitted); *Sutton*, 504 F.3d at 694 (finding abuse of discretion where court refused to account for

the risk of loss on basis that "class actions rarely go to trial and that they all settle[,]" noting that "there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit[;] ... [b]ecause the district court failed to provide for the risk of loss, the possibility exists that Counsel … was undercompensated").

Success in this case was far from guaranteed. As an initial matter, on July 10, 2015, the FCC released an omnibus declaratory ruling clarifying numerous relevant issues affecting the TCPA, such as consent or the definition of an "automatic telephone dialing system" under the statute[4]—which was recently overturned in part in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Following the D.C. Circuit's decision in *ACA Int'l* courts have been split on what constitutes an "automatic telephone dialing system" under the TCPA.

Even in this District, for example, judicial minds differ as to what constitutes an ATDS. Judge Feinerman recently held in *Pinkus v. Sirius XM Radio, Inc.*, No. 16 C 10858, 2018 U.S. Dist. LEXIS 125043 (N.D. Ill. July 26, 2018) that an ATDS must generate random numbers to be called:

> As relevant here, the TCPA prohibits "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any [ATDS] ... to any telephone number assigned to a ... cellular telephone service ... ." 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id*…
>
> *ACA International* did not itself articulate a definitive view of which functions characterize an ATDS. *See* 885 F.3d at 703 (noting that "[i]t might be permissible" for the FCC to conclude *either* that a device can "qualify as an ATDS only if it can generate random or sequential numbers to be dialed" *or* that it can "so qualify even if lacks that capacity"). Given this, the parties' dispute can be reduced to the question whether a predictive dialing device that calls telephone numbers from a

[4] *See* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1.pdf.

> stored list of numbers—rather than having generated those numbers either randomly or sequentially—satisfies [*25] the statutory definition of ATDS.
>
> So, the phrase "using a random or sequential number generator" necessarily conveys that an ATDS must have the capacity to generate telephone phone numbers, either randomly or sequentially, and then to dial those numbers. *See Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 (3d Cir. 2015) (holding that "'random or sequential' number generation ... refers to the numbers themselves rather than the manner in which they are dialed"). This interpretation finds support in the FCC's pre-2003 understanding of the statutory term ATDS. The 1992 Order expressed the view that "[t]he prohibitions of § 227(b)(1)"—which, as noted, make it unlawful to use an ATDS under certain conditions—"clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion." 7 FCC Rcd. 8752, 8776 ¶ 47. And in a follow-on 1995 ruling, the Commission described "calls dialed to numbers generated randomly or in sequence" as "autodialed." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12400 ¶ 19 (1995). The FCC's pre-2003 understanding of § 227(a)(1) thus reinforces what its plain text shows—that equipment qualifies as an ATDS only if it has the capacity to function ... by generating random or sequential telephone numbers and dialing those numbers.

Pinkus at *4, 29-31 (N.D. Ill. July 26, 2018).

The Third Circuit Court of Appeals adopted a similar stance in *Dominguez v. Yahoo, Inc.*:

> The decision in *ACA International* has narrowed the scope of this appeal. In light of the D.C. Circuit's holding, we interpret the statutory definition of an autodialer as we did prior to the issuance of 2015 Declaratory Ruling. Dominguez can no longer rely on his argument that the Email SMS Service had the latent or potential capacity to function as autodialer. The only remaining question, then, is whether Dominguez provided evidence to show that the Email SMS Service had the present capacity to function [**6] as [an] autodialer…
>
> Ultimately, Dominguez cannot point to any evidence that creates a genuine dispute of fact as to whether the Email SMS Service had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers. On the contrary, the record indicates that the Email SMS Service sent messages only to numbers that had been individually and manually inputted into its system by a user. There can be little doubt that Dominguez suffered great annoyance as a result of the unwanted text messages. But those messages were sent precisely because the prior owner of Dominguez's telephone number had affirmatively opted to receive them, not because of random number generation. The TCPA's prohibition on autodialers is therefore not the proper means of redress.

Dominguez v. Yahoo, Inc., 894 F.3d 116, 119, 121 (3d Cir. 2018).

It is undisputed that the Defendant's dialing system does not "create" or generate the telephone numbers it dials. Instead, it takes the telephone numbers that Defendant has purchased from Dun & Bradstreet, as outlined above, and calls them when Defendant's telemarketers execute a computer command to begin the calling campaign. *See* Second Paronich Affidavit at ¶ 2. If this Court were to agree with Judge Feinerman in *Pinkus* or if the Seventh Circuit Court of Appeals were to adopt the approach of the Third Circuit Court of Appeals, no one, including the Plaintiff, would have been able to recover *anything at all*. Other courts have adopted the same position as Judge Feinerman and Third Circuit Court of Appeals. *See e.g. Glasser, v. Hilton Grand Vacations Company, LLC*, No. 8:16-CV-952-JDW-AAS, 2018 WL 4565751 (M.D. Fla. Sept. 24, 2018); *Marshall v. CBE Group, Inc.*, Case No. 2:16-cv-02046-GMN, 2018 WL 1567852 (D. Nev. Mar. 30, 2018); *Herrick v. GoDaddy.com LLC*, No. CV-16-00254-PHX-DJH, 2018 WL 2229131 (D. Ariz. May 14, 2018); *Gary v. TrueBlue, Inc.*, Case No. 17-cv-10544, 2018 WL 3647046 (E.D. Mich. Aug. 1, 2018); *Keyes v. Ocwen Loan Servicing*, No. 17-cv-11492, 2018 U.S. Dist. LEXIS 138445, at *15 (E.D. Mich. Aug. 16, 2018). While Plaintiff's counsel agrees with this Court's comments at preliminary approval regarding whether predictive dialers are ATDS, the case was filed – and of course negotiated – without the benefit of such comments and without the benefit of *Marks v. Crunch San Diego, LLC*, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) holding the same.

Class Counsel accepted that litigating risked recovering nothing for the class, Plaintiff, or counsel, and would have required significant expenditure of time, money, and resources — including potentially substantial expert expenses and notice costs if the class were certified— for which Class Counsel would receive absolutely no compensation upon losing at summary

judgment, class certification, or trial. S*ee In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1035-35 (N.D. Ill. 2011) (finding significant risk of nonpayment where, among other reasons, counsel would have to overcome case dispositive defenses and certify a class); *Jamison*, 290 F.R.D. at 102–09 (denying class certification in part because a class-wide determination of consent would require "a series of mini-trials"); *Green v. DirecTV, Inc.*, No. 10-117, 2010 WL 4628734, at *5 (N.D. Ill. Nov. 8, 2010) (granting summary judgment against TCPA plaintiff).

This risk was real. Plaintiff lawyers lose TCPA cases regularly, both through dispositive motions, summary judgment and through denial of class certification. This includes counsel for Plaintiff. *See e.g. Childress v. Liberty Mut. Ins. Co.*, No. 1:17-cv-01051, ECF No. 42 (D. N.M. Sept. 28, 2018) (order granting motion to dismiss in TCPA action); *Fabricant v. United Card Solutions LLC*, No. 2:18-cv-01429, ECF No. 34 (C.D. Cal. July 25, 2018) (order denying class certification); *Naiman v. TranzVia LLC*, No. 17-cv-4813-PJH, 2017 U.S. Dist. LEXIS 199131 (N.D. Cal. Dec. 4, 2017) (order granting motion to dismiss in TCPA action); *Donaca v. Dish Network, LLC.*, 303 F.R.D. 390, 396-402 (D. Colo. 2014) (denying class certification in TCPA action); *Fitzhenry v. ADT Corp.*, No. 14-80180, 2014 WL 6663379, at *8 (S.D. Fla. Nov. 3, 2014) (order denying class certification); *Brey Corp. v. LQ Mgmt. LLC*, No. 11-718, 2014 WL 943445, at *1 (D. Md. Jan. 30, 2014) (same); *Johansen v. Nat'l Gas & Elec. LLC*, No. 2:17-cv-587, 2018 U.S. Dist. LEXIS 138785 (S.D. Ohio Aug. 16, 2018) (order granting motion for summary judgment in TCPA action); *Mey v. Pinnacle Sec., LLC*, Civil Action No. 5:11CV47, 2012 U.S. Dist. LEXIS 129267 (N.D.W. Va. Sep. 12, 2012) (same).

Class Counsel pursued this action without knowing the size and scope of the class—information solely in the possession of Defendant and its vendor—and anticipating (correctly)

that identifying such information would require extensive discovery. TCPA plaintiffs sometimes lose such motions and are unable to proceed on a class basis as a result. *See, e.g., Gusman v. Comcast Corp.*, 298 F.R.D. 592, 596–97 (S.D. Cal. 2014) (denying motion to compel production of call data). Similarly, Class Counsel also accepted the possibility that, given the class period going back several years before the suit was filed, and the fact that businesses often purge their call records on a regular basis, necessary class call data would likely be difficult to obtain or even destroyed, potentially obliterating any ability to identify class members and ultimately obtain class-wide relief. In fact, here, the calling records of contacts to the putative class was only recovered after the dialing provider for the Defendant was involved through third party discovery. This was a necessary step: Sekure only maintained call data for 90 days. *See* Second Paronich Affidavit at ¶ 3.

Moreover, even assuming sufficient discovery could be obtained, Class Counsel accepted the risk that the Court might ultimately deny certification. This is a very real concern, as, for example, courts are divided as to whether consent issues predominate over common questions in TCPA cases, depending on the circumstances of the case. *Compare Tomeo v. CitiGroup, Inc.*, No. 13 C 4046, 2018 WL 4627386, at *1 (N.D. Ill. Sept. 27, 2018) (denying class certification in TCPA case after nearly five years of hard-fought discovery and litigation); *Jamison v. First Credit Servs.*, 290 F.R.D. 92, 107 (N.D. Ill. 2013) (finding issues of consent to predominate in TCPA action) and *Balschmiter v. TD Auto Fin. LLC*, 303 F.R.D. 508, 527 (E.D. Wis. 2014) (same), with *Saf-T-Gard Int'l v. Vanguard Energy Servs.*, No. 12-3671, 2012 WL 6106714 (N.D. Ill. Dec. 6, 2012) (certifying a class in a TCPA action and finding no evidence supported the view that issues of consent would be individualized) and *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 253 (N.D. Ill. 2014) (same). Here, Plaintiff's case faced further risk than is

typical on class certification in a TCPA case because the Defendant's dialing system used multiple modes, including a "manual" and "preview mode". *See* Second Paronich Affidavit at ¶ 4. The Plaintiff faced a risk at certification of not being able to identify which calls were made in certain modes, which was not readily apparent from the telemarketing dialer records of the Defendant. *Id.* at ¶ 5.

The narrative of the Defendant's telemarketing compliance efforts could present a case for reduction of any damages awarded after trial. As the Court explained in *Golan v. Veritas Entm't, LLC* before reducing the damages awarded in that TCPA class action lawsuit to $10 a call:

> Three courts have reduced damages awards in TCPA cases. In *Texas v. American Blastfax, Incorporated*, plaintiff, the state of Texas, brought suit against defendants, American Blastfax, Incorporated and two of its officers and directors. 164 F.Supp.2d 892, 894 (W.D. Tex. 2001). The district court held defendant Blastfax had violated the TCPA by sending unsolicited intrastate fax advertisements. *Id.* at 894. Defendants presented evidence the average cost of receiving an unwanted fax is seven cents per page. *Id.* at 900. Although it stated the TCPA provides for liquidated damages of $500 for each violation, the district court found it would be inequitable and unreasonable to award that amount for each violation. *Id.* Instead, the district court interpreted the provision as providing for "up to" $500 per violation. *Id.* The district court found a reasonable award was seven cents per violation, which it trebled because defendants' conduct was willful and knowing, for a total amount of $495,375…
>
> The next case which reduced damages for TCPA violations is *Maryland v. Universal Elections, Incorporated*, 862 F.Supp.2d 457 (D. Md. 2012). The state of Maryland brought a civil enforcement action against Universal Actions, Incorporated and two individuals, alleging defendants violated the TCPA by making 112,000 prerecorded telephone calls to residents on Election Day. *Id.* at 459. The district court found defendants violated the TCPA. *Id.* at 463-464. The base damages award could have been $34,000,000 and could have exceeded one hundred million dollars if trebled, because the violations were knowing. *Id.* at 464. The state of Maryland requested $10,424,550. *Id.* at 465. The district court awarded $1,000,000. *Id.* at 466. The district court reasoned "a $10 million penalty is disproportionate to the size of the company and the defendants' presumptive ability to pay." *Id.*
>
> The third case is *United States v. Dish Network, LLC*, No. 09-3073, 256 F. Supp.

> 3d 810, 2017 U.S. Dist. LEXIS 85543, 2017 WL 2427297 (C.D. Ill. Jun. 5, 2017). Plaintiffs, the United States and the States of California, Illinois, North Carolina, and Ohio, alleged defendant, Dish Network, LLC, violated the TCPA, as well as several state laws and regulations, by placing telephone calls to telephone numbers on the do-not-call list. 2017 U.S. Dist. LEXIS 85543, [WL]at *1. After a bench trial, the Central District of Illinois entered judgment in favor of the plaintiffs and against the defendant. *Id.* Plaintiffs asked for a damages award of $2.1 billion. 2017 U.S. Dist. LEXIS 85543, [WL] at *139. The district court awarded civil penalties and statutory damages of $280,000,000, approximately 20 percent of the defendant's after-tax profits for 2016, finding this amount was "appropriate and constitutionally proportionate, reasonable, and consistent with due process." *Id.* The district court further reasoned "[t]he amount represents a significant penalty for the millions and millions of Do-Not-Call violations caused by Dish over years and years of careless and reckless conduct." *Id.* Finally, the district court stated "[t]he injury to consumers, the disregard for the law, and the steadfast refusal to accept responsibility require a significant and substantial monetary award."

Golan v. Veritas Entm't, LLC, No. 4:14CV00069 ERW, 2017 U.S. Dist. LEXIS 144501, at *6-9 (E.D. Mo. Sep. 7, 2017). Here, there is no dispute that the Defendant was aware of the TCPA's restrictions on telemarketing to cellular telephones and had a process in place to prevent violations, as discussed above, with explicit steps to ensure that occurred. While there was apparently some error with respect to following that policy, that narrative raised a number of due process or damages reduction concerns consistent with the cases reviewed in *Golan*.

Thus, Class Counsel took on substantial risk in deciding to pursue this action. In light of the considerable risk undertaken by Class Counsel in prosecuting this action on a purely contingent fee basis, the requested fee award—one-third of the Settlement Fund exclusive of Settlement Administration Expenses and any Incentive Award, or about 28% of the Fund overall—is reasonable and should be granted.

b. Quality of Performance and Work Invested

The quality of Class Counsel's performance and time invested through substantial discovery and adversarial negotiations to achieve a $6.25 million Settlement Fund for the benefit of the Settlement Class further supports the requested fee award. *Sutton*, 504 F.3d at 693. In

addition to accepting considerable risk in litigating this action, Class Counsel committed their time and resources to this case without any guarantee of compensation, whatsoever, only achieving the Settlement after substantial litigation. Class Counsel are experienced in consumer and class action litigation, including under the TCPA. (*See* Broderick Decl. (Dkt. No. 35-3) at ¶ 8; Burke Decl. (Dkt. No. 35-4) at ¶ 7; McCue Decl. (Dkt. No. 35-5) at ¶ 9; Paronich Decl. (Dkt. No. 35-2) at ¶ 4.)

Moreover, because they were proceeding on a contingent fee basis, Class Counsel "had a strong incentive to keep expenses at a reasonable level[.]" *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010). Given the strength of the settlement obtained for the class, the extensive discovery conducted and guided through the MIDP process and the adversarial nature of the litigation and settlement discussions, Class Counsel respectfully submit that their experience and the quality and amount of work invested in this action for the benefit of the class supports the requested fee award.

c. Stakes of the Case

The stakes of the case further support the requested fee award. This case involves more than one million Settlement Class Members who allegedly received unsolicited telemarketing calls from the Defendant. The amount each Settlement Class Member is individually eligible to recover is low (between $500 and $1,500 per call), and thus individuals are unlikely to file individual lawsuits, especially because the TCPA does not provide for the recovery of attorneys' fees. In fact, no one else brought a lawsuit against the Defendant during the class period. Indeed, individual litigants likely would have to provide proof of calls well beyond what is required here to submit a claim and call records may not be available going back to the beginning of the class period, making it even less likely that people would file individual lawsuits. A class action is realistically the only way that many individuals would receive any relief. In light of the number

of Settlement Class Members and the fact that they likely would not have received any relief without the assistance of Class Counsel, the requested fee is reasonable and should be granted.

V. THE COURT SHOULD ALSO AWARD CLASS COUNSEL'S REASONABLE EXPENSES INCURRED IN PROSECUTING THIS LITIGATION.

It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses. *Beesley v. Int'l Paper Co.*, 3:06-CV-703-DRH-CJP, 2014 WL 375432, *3 (S.D. Ill. Jan. 31, 2014) (citing Fed. R. Civ. P. 23; *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980)). The Seventh Circuit has held that costs and expenses should be awarded based on the types of "expenses private clients in large class actions (auctions and otherwise) pay." *Synthroid I*, 264 F.3d at 722; *see also Spicer v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (noting that courts regularly award reimbursement of those expenses that are reasonable and necessarily incurred in the course of litigation).

Here, Class Counsel have incurred $19,250.00 in reimbursable expenses related to filing, service, expert imaging, appearances, discovery, subpoenas, data analysis, mediation and travel. *See* Second Paronich Affidavit at ¶ 9. Class Counsel's expenses here all fall into the categories outlined above and were all reasonably incurred in pursuing this litigation. *Id.* Settlement Class Counsel has reviewed the expense records carefully and determined that the expenses were necessary to the successful prosecution of this case. *Id.* These expenses were necessary to prosecute litigation of this size and complexity on behalf of the Settlement Class, and they are typical of expenses regularly awarded in large-scale class actions. Accordingly, Class Counsel request that the Court approve as reasonable expenses in the amount of $19,250.00.

VI. THE INCENTIVE AWARD TO THE CLASS REPRESENTATIVE SHOULD BE APPROVED.

Class Counsel also respectfully request that the Court grant a service award of $15,000 to Plaintiff for his efforts on behalf of the class. Service awards compensating named plaintiffs for

work done on behalf of the class are routinely awarded. Such awards encourage individual plaintiffs to undertake the responsibility of representative lawsuits. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (recognizing that "because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit"); *Synthroid I*, 264 F.3d at 722 ("Incentive awards are justified when necessary to induce individuals to become named representatives.").

Mr. Kaiser-Nyman has never been a Plaintiff in a TCPA class action prior to the filing of this case and had filed a single small claims court individual TCPA case previously. *See* Second Paronich Affidavit at ¶ 6. As such, the discovery process for TCPA cases was new to him. As part of the MIDP process, the Plaintiff had all of his electronics imaged to preserve and refute any affirmative defense offered that he consented to the telemarketing calls. Imaging a plaintiff's *entire* devices – rather than merely preserving relevant data – is a rather extreme measure that Kaiser Nyman agreed to do in order to completely eliminate any possible "opt-in" argument by Sekure. Imaging devices "brings home" the invasion of privacy that class plaintiffs endure. Plaintiff also spent considerable time responding to the discovery requests from the MIDP process. Mr. Kaiser-Nyman could have decided that "enough is enough" and tried to drop or settle his case individually at any time—and other class plaintiffs might well have done just that. Instead, he persevered for the benefit of the class. Mr. Kaiser-Nyman also worked with Class Counsel to investigate the case, stayed abreast of the proceedings through litigation and settlement, and reviewed and approved the proposed settlement. *Id.* at ¶ 7. All of this for the benefit of the class: individual resolution could likely have been immediate.

Moreover, the amount requested, $15,000, is comparable to or less than other awards approved by federal courts in Illinois and elsewhere in TCPA cases. *See, e.g.*, *Heekin v. Anthem*,

Inc., No. 05-01908, 2012 WL 5878032, *1 (S.D. Ind. Nov. 20, 2012) (approving $25,000 incentive award to lead class plaintiff over objection); *Benzion v. Vivint, Inc.*, No. 12-61826 (S.D. Fla. Feb. 23, 2015) (ECF No. 201) (awarding $20,000 incentive award in TCPA class settlement); *Desai v. ADT Security Servs., Inc.*, No. 11-1925 (N.D. Ill. Feb. 27, 2013) (ECF No. 243 ¶ 20) (awarding $30,000 incentive award to each Plaintiff in TCPA class settlement); *Fairway Medical Center, L.L.C. v. Mcgowan Enterprises, Inc*., 2018 U.S.Dist LEXIS 50403 (E.D. La. March 27, 2018) (court awards $75,000 to a TCPA class representative as an incentive award).

VII. CONCLUSION

WHEREFORE, Class Counsel respectfully request that the Court grant this motion and award Class Counsel attorneys' fees in the amount of $1,797,465—equal to one-third of the Settlement Fund exclusive of estimated Settlement Administration Expenses, class counsel's litigation expenses and the requested Incentive Award as well as reimbursement of $19,250 in out-of-pocket costs.

Respectfully submitted,

PLAINTIFF MICHAEL KAISER-NYMAN, on behalf of himself and others similarly situated

Dated: October 11, 2018

By: */s/ Anthony I. Paronich*

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CERTIFICATE OF SERVICE

I certify that, on October 11, 2018, I caused the foregoing to be electronically filed with the Clerk of the United States District Court for the Northern District of Illinois using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Anthony I. Paronich