UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FRANCIS WOODROW, individually and on behalf of all others similarly situated, Plaintiff, v. SAGENT AUTO, LLC d/b/a SAGENT LENDING TECHNOLOGIES, Defendant.	Case No. 2:18-cv-01054 Hon. Judge J.P. Stadtmueller Hon. Mag. Judge William E. Duffin

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

On May 7, 2019, this Court preliminarily approved a proposed class action settlement between Plaintiff Francis Woodrow and Defendant Sagent Auto, LLC ("Sagent"). Dkt. 37. The Settlement creates a $1,750,000, non-reversionary common fund for the benefit of approximately 212,054 persons who received a prerecorded or automated call to their cell phone from Sagent (f/k/a Fiserv Automotive Solutions, LLC) using its Noble version 8.02 telephony system between July 1, 2014 and March 19, 2019, which Plaintiff alleges violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Valid claimants are expected to receive at least $50 each. Class Counsel have zealously prosecuted Plaintiff's claims over the past year, achieving the Settlement only after extensive first and third-party discovery, an all-day mediation with a retired federal magistrate judge, and weeks of subsequent negotiations finalizing the Agreement.

As compensation for the substantial benefit conferred upon the Settlement Class, Class Counsel respectfully move the Court for an award of attorneys' fees of $583,333.33, which represents 33⅓% of the Settlement Fund. Class Counsel additionally seek reimbursement of their out-of-pocket costs of $23,714 incurred in prosecuting the case. This request should be approved because (1) it represents the market rate for this type of settlement, and (2) represents a reasonable and appropriate amount in light of the substantial risks presented in prosecuting this action, the quality and extent of work conducted, and the stakes of the case. Class Counsel also respectfully move the Court for an award of $10,000 to Plaintiff Francis Woodrow for his work on behalf of the Class.

II. BACKGROUND AND SETTLEMENT

This case concerns alleged violations of the TCPA, which prohibits, *inter alia*, initiating any non-emergency call to a cell phone number using an automatic telephone dialing system

("autodialer" or "ATDS") or an artificial or prerecorded voice, without the prior express consent of the called party. *See* 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii). In Plaintiff Woodrow's case, he received multiple automated calls from Sagent to his cell phone, even though he never had any relationship with Sagent and did not consent to receive the calls at issue. Compl. ¶¶ 16-28.

Plaintiff Woodrow originally joined an action against Nationwide Bank on February 27, 2018, *Upshaw v. Nationwide Mutual Ins. Co.*, No. 2:17-cv-01013 (S.D. Ohio). Through discovery in that action, Plaintiff learned that a Sagent entity made the calls to his and others' phones. Exhibit A, McCue Decl. ¶¶4-7. Through the *Upshaw* action, Plaintiff also obtained key formal and informal discovery regarding the calls to his cell phone, the calling system in place, and Defendant's and Nationwide Bank's call records. *Id.* Ultimately, the case against Nationwide Bank was dismissed, and Plaintiff filed this action on July 10, 2018, seeking redress for Defendant's calling at issue. Dkt. 1.[1]

Thereafter, the Parties engaged in extensive first and third-party discovery, which included exchanging written discovery requests and thousands of pages of responsive materials, conducting depositions of Plaintiff and two Fed. R. Civ. P. 30(b)(6) deponents of Defendant, and retaining experts in anticipation of class certification and summary judgment briefing. Exhibit A, McCue Decl. ¶¶8-19. Indeed, on March 1, 2019, Sagent moved for summary judgment, which included a 24-page declaration from its expert. Dkt. 24. On March 12, 2019, the Parties participated in an all-day mediation before the Hon. Morton Denlow (Ret.) of JAMS in Chicago, preceded by the exchange of mediation position papers. Exhibit A, McCue Decl. ¶¶ 20-25. The

[1] Plaintiff initially named Fiserv, Inc. as the defendant in this matter, which was subsequently replaced as a defendant with related company Fiserv Automotive Solutions, LLC on October 4, 2018. *See* Dkt. 15. Defendant thereafter changed its name to its current Sagent iteration, which the Court permitted Plaintiff to substitute as a defendant on May 7, 2019. Dkt. 37.

Parties succeeded in achieving an agreement in principle at the mediation with an executed term sheet, and for weeks thereafter continued to negotiate and finalize the terms of the proposed Settlement now before the Court. *Id.*

The Settlement requires Sagent to pay $1,750,000 for the benefit of this Settlement Class defined as:

> All persons in the United States who received a prerecorded and/or automated call from Defendant on their cellular telephone that was initiated by Defendant's Noble version 8.02 telephony system between July 1, 2014 and March 19, 2019.

Dkt. 34-1, Agr. ¶¶ 1.35, 1.38. Sagent's records reveal that it made call attempts to approximately 212,054 unique cell phone numbers. Exhibit A, McCue Decl. ¶26-27. Each Class Member will be entitled to submit a claim for a pro rata share of the Settlement Fund less the cost of Settlement Administration Expenses, Class Counsel's fees and expenses, and any Incentive Award the Court may award. Dkt. 34-1, Agr. ¶¶ 1.37, 3.4.a. The Settlement is completely non-reversionary—all unclaimed or undistributed amounts remaining in the Settlement Fund after all payments under the Settlement Agreement will, to the extent administratively feasible, be redistributed to the Settlement Class or, if not administratively feasible, to a Court-approved *cy pres* recipient. *Id.* ¶ 1.38, 3.4.b. Notice and administration through Kurtzman Carson Consultants LLC ("KCC") is expected to cost approximately $170,000. Valid and timely claimants are expected to receive Cash Benefits of $50 or more. Exhibit A, McCue Decl. ¶30-31.[2] In addition to the Cash Benefits, Settlement Class Members will receive prospective relief, as well: Defendant has agreed to maintain a proper Do Not Call list and conduct annual TCPA compliance training for call center employees. Dkt. 34-1, Agr. ¶ 3.3.

[2] This estimate is based on counsels' past experience as to the claims rate in past TCPA class action settlements. Of course, the claims rate could be higher or lower than estimated and the anticipated pay-out per class member could change accordingly.

Plaintiff respectfully requests that the Court approve attorneys' fees of $583,333.33 and costs of $23,714, as well as a $10,000 incentive award for Plaintiff Woodrow. As explained below, the requested fee award is in line with the market rate for similar attorney services in this jurisdiction, and fairly reflects the result achieved. Similarly, the requested incentive award is comparable to other TCPA cases and should be approved.

III. LEGAL STANDARD FOR ATTORNEY'S FEE DECISIONS

The Seventh Circuit requires courts to determine class action attorneys' fees by "[d]oing their best 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 Mkt. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") (collecting cases). In this context, "at the time" is at the start of the case: The Court must "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." *Id.* That is so because "[t]he best time to determine this rate is the beginning of the case, not the end (when hindsight alters of the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets." *Id.*

The "common fund" doctrine applies where, as here, litigation results in the recovery of a certain and calculable fund on behalf of a group of beneficiaries. 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) ("[A] 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) ("[T]he attorneys for the class petition the court for compensation from the settlement or common fund created for the class's benefit.").

The approach favored for consumer class actions in the Seventh Circuit is to compute attorneys' fees as a percentage of the benefit conferred upon the class; "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); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (finding percentage-of-the-fund to be the "normal practice in consumer class actions"). As other courts have explained:

> 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); *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) (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 method "provides a more effective way of determining whether the hours expended were reasonable"), *aff'd*, 160 F.3d 361 (7th Cir. 1998).

The Seventh Circuit has also determined that, in assessing the reasonableness of requested attorneys' fee, courts should consider the ratio of "(1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) (omitting administrative costs and incentive awards from analysis). The Seventh Circuit has clarified that the "presumption" should be 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." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014).

IV. ARGUMENT

A. Class Counsel's Requested Fee Award Is Reasonable.

The percentage-of-the-fund method should be used here. *See Florin*, 34 F.3d at 566. Class Counsel's and Plaintiff's efforts have resulted in a $1,750,000 non-reversionary Settlement Fund and prospective relief that provides substantial, actual value to the Settlement Class. Class Members will have the opportunity to submit a claim for a Cash Benefit estimated at $50 or more, and the Class will further benefit from changes to Sagent's practices aimed at ensuring TCPA compliance in the future. Class Counsel seek attorneys' fees of one-third of the Settlement Fund, or $583,333.33, plus out-of-pocket costs of $23,714. Given the result obtained for the Class, and the fact that the fee request is set at the "market range," the requested fee award is presumptively reasonable. Further, the requested fee award of one-third of the total Settlement Fund is also consistent with the "market price" as reflected in the fees approved by judges in this Circuit in other TCPA class cases, considering the risks of non-payment, the quality and extent of Class Counsel's work on behalf of the Settlement Class, and the overall stakes of the case.

1. Seventh Circuit Attorney Fee Analysis

"Reversionary" or "claims made" settlements, where the defendant takes back any amount of unclaimed/unused settlement funds, have come under scrutiny by the Seventh Circuit. Here, however, there is a non-reversionary, "true" lump-sum cash fund of $1,750,000. *Pearson*'s discussion of *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980), highlights the difference:

> [I]n [*Boeing*] the "harvest" created by class counsel was an actual, existing judgment fund, and each member of the class had "an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Id.* at 479. "Nothing in the court's order made Boeing's liability for this amount contingent upon the presentation of individual claims." *Id.* at 480 n.5. The class members [in *Boeing*] were known, the benefits of the settlement had been "traced with some accuracy," and costs could be "shifted with some exactitude to

> those benefiting." *Id.* at 480-81. [Unlike in *Boeing*,] … [t]here is no fund in the present case and no litigated judgment, and there was no reasonable expectation in advance of the deadline for filing claims that more members of the class would submit claims than did.

Pearson, 772 F.3d at 782.

In contrast, the $1,750,000, non-reversionary common Settlement Fund here presents precisely the type of "actual, existing judgment fund" cited with approval by the Seventh Circuit in *Pearson*. Further, each Class Member has "an undisputed and mathematically ascertainable claim" to their share of a lump-sum judgment. And while, in a reversionary settlement like the one addressed in *Pearson*, "class counsel lack any incentive to push back against the defendant's creating a burdensome claims process in order to minimize the number of claims," *id.*, the notice plan in *this* case (i.e., direct mail notice supplemented with a dedicated settlement website) presents no such issue because no money will revert to Defendant.

Here, Class Counsel's requested fee award easily satisfies the *Pearson* presumption of reasonableness: It is approximately 37.1% of the total of requested attorneys' fees plus anticipated Settlement Class benefits—well under the 50% high-mark referenced as presumptively reasonable in *Pearson*.[3]

Class Counsel submit that this fee request is reasonable, consistent with market rates, and should be approved. *See Charvat v. AEP Energy, Inc.*, No. 1:14cv03121 (N.D. Ill. Jan. 16, 2014) (Dkt. No. 44) (attached as Exhibit 1 to the McCue Decl.) (awarding one-third of the $6,000,000 million common fund in TCPA case, which was 40% of common fund less administration expenses); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. Feb. 15, 2015) (awarding 36% of common fund in fees for the first $10,000,000 of TCPA settlement); *Martin v.*

[3] $583,333.33 Fee Award ÷ ($1,750,000 Settlement Fund - $170,000 Estimated Settlement Administration Expenses - $10,000 Incentive Award) = approximately 0.37%.

Dun & Bradstreet, Inc., No. 1:12cv00215 (N.D. Ill. Jan. 16, 2014) (Dkt. No. 63) (attached as Exhibit 2 to the McCue Decl.) (awarding one-third of total payout for fees in TCPA case); *Cummings v. Sallie Mae*, No. 1:12cv9984 (N.D. Ill. May 30, 2014) (Dkt. No. 91) (attached as Exhibit 3 to the McCue Decl.) (awarding one-third of fund in fees in TCPA case).

2. The risk associated with this litigation justifies the requested fee award of one-third of the common fund.

"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 Sutton*, 504 F.3d at 694 (finding abuse of discretion where lower court, in applying percentage-of-the-fund approach, 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, whose only source of a fee was a contingent one, was undercompensated").

Plaintiff's allegations in this case presented unique difficulties for class certification, summary judgment, and trial, which support the fee request. For example, Defendant's consent defense to the calls at issue presented a hurdle to Plaintiff's ability to certify a Fed. R. Civ. P. 23(b)(3) class. Difficult legal and factual issues posing potential obstacles to class certification are factors suggestive of non-recovery, *Aranda*, 2017 WL 1369741, at *7, and courts have reached drastically different results on this issue. *Compare, e.g., Saf-T-Gard Int'l, Inc. v.*

Vanguard Energy Servs., LLC, No. 12-3671, 2012 WL 6106714, at *6 (N.D. Ill. Dec. 6, 2012) (certifying TCPA class and finding no evidence that issues of consent would be individualized), *with Jamison v. First Credit Servs.*, 290 F.R.D. 92, 106-07 (N.D. Ill. 2013) (declining to certify because "issues of individualized consent predominate when a defendant sets forth specific evidence showing that a significant percentage of the putative class consented to receiving calls on their cellphone"). There was thus a real risk that the Court would find that Sagent's consent evidence precluded class certification based on lack of predominating common questions. Defendants in similar TCPA cases have at times been successful at arguing that even poor quality or purported inconsistencies in their *own* records from which the class may be identified preclude a finding of predominance under Fed. R. Civ. P. 23(b)(3). *E.g., Luster v. Green Tree Servicing, LLC*, No. 14-1763 (N.D. Ga. Sept. 5, 2018) (accepting general assertions by defendant that it obtains consent in a variety of manners in finding lack of predominance, despite fact that defendant's data admittedly lacked flags it used to track consent to place the calls at issue). Indeed, this Court recently denied certification of a proposed TCPA class alleging similar claims. *See, e.g.*, *Balschmiter v. TD Auto Finance, LLC*, 303 F.R.D. 508, 524-525 (E.D. Wisc. 2014).[4]

Further, the law governing the calls at issue has been in a state of flux. Just a few months before this case was filed, the D.C. Circuit vacated part of an FCC declaratory ruling affecting calls to wrong numbers, and which undid the FCC's prior ruling on what constituted an

[4] Plaintiff has argued that *Balschmiter* is not controlling following the Seventh Circuit's decision in *Mullins v. Direct Digital, LLC* after *Balschmiter*. 795 F.3d 654, 659-60 & n.1 (7th Cir. 2015) ("We granted the Rule 23(f) petition primarily to address the developing law of ascertainability, including among district courts within this circuit.") (citing *Balschmiter*). But, the fact remains that Plaintiff faced serious risk at class certification, as "[c]ourts are split on whether the issue of individualized consent renders a TCPA class uncertifiable on predominance and ascertainability grounds, with the outcome depending on the specific facts of each case." *Chapman v. First Index, Inc*., No. 09 C 5555, 2014 U.S. Dist. LEXIS 27556, at *6-7 (N.D. Ill. March 4, 2014) (citing cases).

automatic telephone dialing system ("ATDS" or "autodialer") under the TCPA. *ACA Int'l v. FCC*, 885 F.3d 687, 695 & 706 (D.C. Cir. 2018). Some courts have interpreted this ruling to effectively preclude much of what has traditionally been considered an autodialer in the industry and under longstanding TCPA precedent. *See Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 939 (N.D. Ill. 2018) (adopting restrictive Third Circuit interpretation of what constitutes an ATDS); *but see Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) (rejecting restrictive ATDS interpretation by the Third Circuit post-*ACA Int'l*). The risk presented by this uncertainty in the law was not hypothetical: Defendant ultimately moved for partial summary judgment on the issue of whether its dialer constitutes an "automatic telephone dialing system" under the TCPA, Dkt. 24, thus raising the very real possibility that this Court might rule adversely to Plaintiff's and the class' interests to curtail the extent to which they might be able to secure redress.

Indeed, Class Counsel pursued this litigation on a contingency basis despite knowing that, even if they were ultimately successful at trial, they would likely face a lengthy appeal process or even a reduction in the amount of recovery to the Class based on the extent of statutory damages, especially where some courts view awards of aggregate, statutory damages with skepticism and either refuse to certify a class or reduce such awards on due process grounds. *See, e.g., Aliano v. Joe Caputo & Sons-Algonquin, Inc.*, No. 09-910, 2011 WL 1706061, at *13 (N.D. Ill. May 5, 2011) ("[T]he Court cannot fathom how the minimum statutory damages award for willful FACTA violations in this case — between $100 and $1,000 per violation — would not violate Defendant's due process rights …. Such an award, although authorized by statute, would be shocking, grossly excessive, and punitive in nature."); *Golan v. Veritas Entm't, LLC*, No. 14- 69, 2017 WL 3923162, *4 (E.D. Mo. Sept. 7, 2017) (reducing

amount of damages in TCPA case).

Class Counsel assumed the risk of this litigation, including not only the generous disbursement, apportionment, and allotment of time for each of the firms involved, but also the advancement of financial costs and expenses necessary to prosecute this matter zealously on behalf of Plaintiff and the Class. Given the lack of fee shifting under the TCPA, 47 U.S.C. § 227(b)(3), the uncertainty surrounding relevant law under the TCPA, and the unknown variables in relation to the size and nature of the class pre-suit, whether this Court would ultimately certify Plaintiff's proposed class on a litigation basis, and whether Plaintiff would ultimately be successful on the merits of his claims, the risk Class Counsel assumed was significant.). This factor supports the requested fee award.

3. The requested fee comports with the contract between Plaintiff and Class Counsel, and typical contingency fee agreements in this Circuit.

The "actual fee contracts that were negotiated for private litigation" may also be relevant considerations to a fee request *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (citing *Synthroid I*, 264 F.3d at 719); *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).

The customary contingency agreement in this Circuit is 33% to 40% of the total recovery. *Gaskill v. Gordon*, 160 F.3d 361, 362-63 (7th Cir. 1998) (affirming award of 38%); *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (finding 40% to be "the customary fee in tort litigation"); *Retsky Family Ltd. P'ship v. Price Waterhouse, LLP*, No. 97-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (customary contingent fee is "between 33 1/3% and 40%"). This contingency range is further supported by the fact that the TCPA is not fee-shifting;

as such, the attorney's fee model is more akin to personal injury matters than fee-shifting cases such as those brought under the Fair Credit Reporting Act, *see* 15 U.S.C. § 1681n(a), or the Fair Debt Collection Practices Act, *see* 15 U.S.C. § 1692k(a). This absence of fee shifting increases the risk to counsel, especially where, as here, the underlying statute places a cap on the amount of statutory damages available per violation to $500 or, at most, $1,500 at the Court's discretion upon a finding of willfulness, *see* 47 U.S.C. § 227(b)(3)—an amount that, in the absence of an exceptionally large number of calls or class-wide recovery, would be cost-prohibitive considering the fact that, for example, the extent of possible monetary relief under the TCPA for a single, non-willful violation barely covers the cost of filing suit.

In sum, the fees contemplated under Class Counsel's representation agreements for cases in this District and elsewhere generally fall within the one-third to 40% range. This factor supports a finding that the requested fee reflects the amount Class Counsel would have received had they negotiated their fee ex ante, and should be awarded.

4. 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 v. Walgreen Co*., 311 F.R.D. 483, 493-94 (N.D. Ill. 2015) (citation omitted).

The reasonableness of Class Counsel's fee request here is further supported by the fact that awards of one-third of a settlement fund are commonplace. *See Martin v. Dun & Bradstreet, Inc.*, No. 12-215 (N.D. Ill. Jan. 16, 2014) (Martin, J.) (Dkt. 63) (one-third of total payout); *Hanley v. Fifth Third Bank*, No. 12-1612 (N.D. Ill.) (Dkt. 87) (awarding attorneys' fees of one-third of total settlement fund); *Cummings v. Sallie Mae*, No. 12-9984 (N.D. Ill. May 30, 2014) (Dkt. 91) (one-third of common fund); *Desai v. ADT Sec. Servs., Inc.*, No. 11-1925 (N.D. Ill. June 21, 2013) (Dkt. 243) (one-third of the settlement fund); *Paldo Sign & Display Co. v.*

Topsail Sportswear, Inc., No. 08-5959 (N.D. Ill. Dec. 21, 2011) (Dkt. 116) (fees equal to one-third of the settlement fund plus expenses); *CE Design Ltd. v. CV's Crab House North, Inc.*, No. 07-5456 (N.D. Ill. Oct. 27, 2011) (Dkt. 424) (fees equal to one-third of settlement plus expenses); *Saf-T-Gard Int'l, Inc. v. Seiko Corp. of Am.*, No. 09-776 (N.D. Ill. Jan. 14, 2011) (Dkt. 100) (fees and expenses equal to 33% of the settlement fund); *G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 07-5953 (N.D. Ill. Nov. 1, 2010) (Dkt. 146) (fees of one-third of settlement plus expenses); *Hinman v. M&M Rentals, Inc.*, No. 06-1156 (N.D. Ill. Oct. 6, 2009) (Dkt. 225) (fees and expenses equal to 33% of the fund); *Holtzman v. CCH*, No. 07-7033 (N.D. Ill. Sept. 30, 2009) (Dkt. 33) (same); *CE Design, Ltd. v. Exterior Sys., Inc.*, No. 07-66 (N.D. Ill. Dec. 6, 2007) (Dkt. 39) (same).[5]

Indeed, even if this Court were to consider Plaintiff's fee request in terms of the *Pearson* reasonableness ratio (i.e., fee as a percentage of the fee plus total in direct benefits to the class), that 37.1% figure likewise plainly falls within the range of reasonableness in this Circuit. *E.g.,*

[5] Some other, non-TCPA cases where one-third of the entire fund was awarded, include: *Taubenfeld*, 415 F.3d at 600 (noting counsel had submitted a table of thirteen cases in the Northern District of Illinois where counsel was awarded fees amounting to 30–39% of the settlement fund); *City of Greenville v. Syngenta Corp Prot., Inc.*, 904 F. Supp. 2d 902, 908–09 (S.D. Ill. 2012) (approving a one-third fee because a "contingent fee of one-third of any recovery after the reimbursement of costs and expenses reflects the market price" and 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 the 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. Twentieth 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).

Birchmeier v. Caribbean Cruise Line, Inc., 896 F.3d 792, 795 (7th Cir. 2018) (affirming post-*Pearson* fee award in TCPA class action that included, inter alia, "the sum of 36% of the first $10 million"); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. 2015) (same); *Martin v. JTH Tax, Inc.*, No. 13-6923 (N.D. Ill. Sept. 16, 2015) (38% of TCPA class settlement fund exclusive of expenses, administration costs, and service award); *Kolinek v. Walgreen Co*., 311 F.R.D. 483, 501 (N.D. Ill. 2015) (36% of TCPA class settlement fund exclusive of notice/admin costs and service award). Plaintiff respectfully submits that the success Class Counsel secured on behalf of the Class despite the considerable obstacles and risk faced in this litigation, and without the waste of judicial resources that so often occurs in these cases through extended discovery battles and adversarial motion practice, supports the requested fee.

Class Counsel's requested fee also reflects post-*Pearson* fees approved by other courts in non-TCPA cases in this Circuit. *Spano v. The Boeing Co.*, No. 06-743, 2016 WL 3791123 (S.D. Ill. March 31, 2016) (awarding 33 1/3% 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 the 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 the fund); *In re Dairy Farmers of Am., Inc.*, MDL No. 2031, 2015 WL 753946 (N.D. Ill. Feb. 20, 2015) (awarding 33.33% of the

fund).[6]

Moreover, the reasonableness of Class Counsel's fee request is further supported by this Court's prior reasoning. In *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009), a consumer class action under the Electronic Fund Transfers Act, this Court granted the plaintiff's fee request of 30% of the maximum $2.1 million reversionary settlement fund over objections, citing authority that "fee awards in common fund class actions were between 20% and 40% of the gross monetary settlement." *Id.* (citing 4 Newberg on Class Actions § 14:6, p. 558 (4th ed. 2002). Here, not only does the proposed fee request of 33⅓% of the Settlement Fund likewise fall within this same range of reasonableness, but Plaintiff respectfully submits that the absence of any reverter makes this Settlement objectively better than the one in *McKinnie*: Not one penny of the Settlement Fund will go back to Sagent.

Consequently, the requested fee award falls in line with numerous other settlements approved as reasonable in this Circuit and it, respectfully, should be approved.

5. The quality of performance and work invested support the fee request.

The quality of Class Counsel's performance and time invested through substantial discovery and adversarial negotiations to achieve a $1.75 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. They conducted a pre-suit investigation, propounded discovery, reviewed thousands of pages of documents, took depositions, subpoenaed

[6] *Synthroid I* also says that District Courts may look to any data from pre-suit negotiations and class-counsel auctions but such information is basically non-existent" in the TCPA context. *Kolinek*, 311 F.R.D. 501.

third parties, retained experts, prepared for moving for class certification, participated in an all-day mediation in Chicago preceded by the exchange of mediation briefs, spent weeks thereafter negotiating and finalizing the settlement and ancillary papers, and otherwise zealously prosecuted this action for the benefit of the Class. Exhibit A, McCue Decl. ¶¶ 8-27.

Class Counsel are experienced in consumer and class action litigation, including under the TCPA. *See* Exhibit A- F, Declarations of Counsel. And 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 the adversarial nature of the litigation and settlement discussions, Class Counsel respectfully submit that their experience and the quality and amount of work invested for the benefit of the Class supports the requested fee.

6. The stakes of the case further support the fee request.

The stakes of the case further support the requested fee award. This case involves more than 200,000 Settlement Class Members who allegedly received nonconsensual automated calls from Defendant. The amount each Settlement Class Member is individually eligible to recover is low—between $500 and $1,500 per violation, *see* 47 U.S.C. § 227(b)(3)—and thus individuals are unlikely to file individual lawsuits, especially because the TCPA does not provide for the recovery of attorneys' fees. 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.

B. The Court Should Also Award Reasonable Reimbursement for Expenses.

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.*, No. 06- 703, 2014 WL 375432, *3 (S.D. Ill. Jan. 31, 2014) (citing Fed. R. Civ. P. 23; *Boeing*, 444 U.S. at 478). 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 $23,714.00 in reimbursable expenses related to filing, appearances, discovery, subpoenas, data analysis, expert retention and analysis, mediation, litigation, and travel. Exhibit A, McCue Decl. ¶46. These expenses are modest and 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, based on counsel's experience. *Id.* Accordingly, Class Counsel request that the Court approve as reasonable expenses in the amount of $23,714.00.

C. The Incentive Award to the Class Representative Should Be Approved.

Class Counsel also respectfully request that the Court grant a service award of $10,000 to Plaintiff Woodrow 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."). Indeed, without Plaintiff serving as Class Representative, the Class would not have been able to recover anything. *See In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. 10-4038, 2011 WL 5547159, at *5 (N.D. Iowa Nov. 9, 2011) ("[E]ach … plaintiff has provided invaluable assistance and demonstrated an ongoing commitment to protecting the interests of class members. The requested incentive award for each named plaintiff recognizes this commitment and the benefits secured for other class members, and is thus reasonable under the circumstances of this case.").

The Class Representative, Francis Woodrow, spent considerable time pursuing Class Members' claims in both this action and in the *Upshaw* action. In particular, Mr. Woodrow communicated with counsel to keep apprised of this matter, participated in the pre-suit investigation and discovery process, including producing documents, responding to information requests, and sitting for a deposition, and ultimately approved and executed the Settlement Agreement. Exhibit A, McCue Decl. ¶¶8-19.

Moreover, the amount requested here, $10,000, is comparable to or less than other awards approved by federal courts in this Circuit. *See, e.g., Cook*, 142 F.3d at 1016 (affirming $25,000 incentive award); *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); *Will*, 2010 WL 4818174, at *4 (awarding $25,000 each to three named plaintiffs); *Benzion v. Vivint, Inc.*, No. 12-61826 (S.D. Fla. Feb. 23, 2015) (Dkt. 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) (Dkt. 243 ¶ 20) (awarding $30,000 incentive awards in TCPA class settlement).

V. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant this motion and award Class Counsel $583,333.33 in fees and $23,714 to reimburse their out-of-pocket costs. Class Counsel further request that the Court approve a service award to Plaintiff Woodrow in the amount of $10,000.

Dated: June 3, 2019

Respectfully submitted,

FRANCIS WOODROW, individually and
on behalf of all others similarly situated

By: ***/s/ Matthew P. McCue***

Matthew P. McCue
THE LAW OFFICE OF MATTHEW P. MCCUE
1 South Ave., 3rd Floor
Natick, MA 01760
Telephone: (508) 655-1415
mmccue@massattorneys.net

Alexander H Burke
BURKE LAW OFFICES LLC
155 N. Michigan Ave., Suite 9020
Chicago, IL 60601
Telephone: (312) 729-5288
aburke@burkelawllc.com

Jonathan D. Selbin
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson St., 8th Floor
New York, NY 10013
Telephone: (212) 355-9500
jselbin@lchb.com

Daniel M Hutchinson
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery St., Suite 3000
San Francisco, CA 94111
Telephone: (415) 956-1000
dhutchinson@lchb.com

Matthew R. Wilson
Michael J. Boyle, Jr.
MEYER WILSON CO., LPA
1320 Dublin Rd., Suite 100
Columbus, OH 43215
Telephone: (614) 224-6000
mwilson@meyerwilson.com
mboyle@meyerwilson.com

Edward A. Broderick
BRODERICK LAW, P.C.
99 High St., Suite 304
Boston, MA 02110
Telephone: (617) 738-7080
ted@broderick-law.com

Stefan Coleman
LAW OFFICES OF STEFAN COLEMAN P.A.
201 S. Biscayne Blvd., 28th Floor
Miami, FL 33131
Telephone: (877) 333-9427
law@stefancoleman.com

Counsel for Plaintiff and the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, June 3, 2019, filed the within and foregoing motion, memorandum, and exhibits using the CM/ECF system, which shall serve such on all counsel of record.

/s/ Matthew P. McCue