UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Ben Hawkins, *on behalf of himself and all others similarly situated,*	:	Case No. 1:19-cv-01186
Plaintiff,	:	
v.	:	Hon. Judge Leonie M. Brinkema
Navy Federal Credit Union,	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES
AND FOR A CLASS REPRESENTATIVE SERVICE AWARD

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I. INTRODUCTION

Plaintiff Ben Hawkins ("Plaintiff") submits this Memorandum in Support of his Motion for an Award of Attorneys' Fees and Expenses and for a Class Representative Service Award as required by the Court's Preliminary Certification Order [Doc. 31]. Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2) and the Settlement Agreement preliminarily approved by the Court on March 23, 2020 [Doc. 31], Plaintiff respectfully requests an order awarding (1) $2,775,000 in attorneys' fees (30% of the $9,250,000 Settlement Fund); (2) $12,323.10 in reasonable costs and expenses; and (3) $15,000 as a service award for Mr. Hawkins.

As demonstrated below, the fee requested by Class Counsel is appropriate under the percentage-of-the-fund method, which is the preferred approach for determining a reasonable fee in a common fund case such as this. The requested fee percentage is 30%, which is less than the 33 1/3% permitted by the Settlement Agreement, is less than the "not to exceed" fee amount described in the class notice, and is well within the range typically approved by district courts in this Circuit. The requested attorneys' fee award is also fair and reasonable and adequately compensates Class Counsel for their investment of time and reward them for the efficient and excellent results obtained in the face of significant risks. Likewise, as discussed below, the requested $15,000 service award for Mr. Hawkins is reasonable and appropriate. Accordingly, Plaintiff's motion should be granted.

II. PROCEDURAL HISTORY AND SETTLEMENT

This case arises from nonconsensual, autodialed wrong-number text messages Defendant Navy Federal Credit Union ("Navy Federal" or "NFCU") allegedly sent to the cell phone numbers of Plaintiff and other non-customers, which Plaintiff asserts violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b). The TCPA prohibits, among other

things, making any nonemergency, autodialed call (including a text message call) to a cellular telephone number without the called party's prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii); *In re Rules & Regs. Implementing the TCPA*, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003).

Plaintiff initiated this action on September 13, 2019, seeking redress on behalf of himself and others for NFCU's nonconsensual, autodialed text messages to their cell phones in violation of the TCPA. Compl. [Doc 1], ¶ 1. After holding a Fed. R. Civ. P. 26(f) conference, the parties exchanged initial disclosures and Plaintiff served requests for production, interrogatories, and requests for admission on October 18, 2019. NFCU served its objections pursuant to Local Rule 26(C) on November 4, 2019. Burke Decl. [Doc. 26-2], ¶ 13.

With formal discovery ongoing, the parties agreed to attempt to resolve the case through mediation. On November 15, 2019, the parties jointly moved the Court to stay the action pending a mediation scheduled to take place on January 7, 2020. *See* Joint Mot. to Stay [Doc. 18]. The Court ordered the action stayed until January 21, 2020. *See* Stay Order [Doc. 20]. The parties thereafter engaged in informal discovery, focusing on information relevant to the settlement process. Burke Decl. [Doc. 26-2], ¶¶ 13-14. Informal discovery revealed – and confirmatory discovery corroborated – that NFCU does not have direct documents or data that would demonstrate how many text messages went to non-members. *Id.*, ¶ 14. Although NFCU was able to account for text messages having been sent to approximately 5.9 million unique cellular telephones, some of its outbound texting data was permanently deleted when it terminated its relationship with texting vendor Monitise n/k/a Fiserv. *Id*. This data was reportedly lost less than two weeks before the case was filed. *Id*. After substantial meet and confer efforts related to determining how many non-members might have been texted, NFCU disclosed that its applicable database contained approximately 66,000 unique phone numbers that received texts

from NFCU and had been coded as "wrong numbers." *Id*. However, subsequent analysis suggests that the number of NFCU non-members who received texts is 57,195. Declaration of Jeffrey S. Goldenberg In Support of Plaintiff's Motion for an Award of Attorneys' Fees and Expenses and for a Class Representative Service Award ("Second Goldenberg Decl."), ¶¶ 9-12, attached as Exhibit 1 to Plaintiff's Motion for an Award of Attorneys' Fees and Expenses and for a Class Representative Service Award. While not precise, under these circumstances, the 57,195 figure represents the best practicable estimate of the number of non-member cell phones texted. *Id*. at 12.

With relevant information concerning the nature and scope of the class, as well as substantial policy and practice documents and an exchange of pre-mediation briefs, the parties mediated on January 7, 2020 and reached a settlement in principle. Burke Decl., ¶ 15. The Settlement was the result of good faith, contentious, arms-length negotiations. *Id*. Settlement discussions took place under the direction of Hon. Morton Denlow (ret) of JAMS Chicago, an experienced and well-respected private mediator. During the mediation, the parties made extensive presentations setting forth their respective positions. *Id*. At the end of the mediation, the parties signed a term sheet containing the principal terms of settlement. *Id*.

On January 21, 2020, Plaintiff's counsel notified the Court that the parties' mediation was successful and that the parties were engaged in confirmatory discovery while trying to finalize the terms of the Settlement Agreement. *See* Notice [Doc. 21]. The parties continued to work over the next few months finalizing the terms of the Settlement Agreement, assembling a list of Settlement Class Members for notice, designing and finalizing the notices and settlement website, and engaging a Settlement Administrator. Burke Decl. [Doc. 26-2], ¶ 15.

Plaintiff moved the Court to preliminarily approve the Settlement on March 12, 2020. *See*

Motion for Preliminary Approval [Doc. 25]. The Settlement Agreement requires NFCU to fund a $9,250,000 Settlement Fund, from which payments to Settlement Class members,[1] notice, administrative costs, service awards, attorneys' fees, and expenses shall be paid. Agreement [Doc. 27-1], ¶¶ 41, 46. This common fund is non-reversionary, so no money will be returned to NFCU. Any Settlement Class Member who certifies that he or she received one or more text messages from NFCU will receive one Claim Credit (i.e., a "Basic Claim"). Agreement, ¶ 66(a). However, any Class member who submits proof of receipt of texts in addition to certifying that he or she received one or more text messages from NFCU will receive one Claim Credit for each text message received as established by the documentation (i.e., a "Proof of Receipt Claim"). Agreement, ¶ 66(a). When the Claim Deadline passes, the Settlement Administrator will subtract the Non-Claim Costs[2] from the Settlement Fund, and the remaining amount shall be divided by the number of approved Claim Credits to calculate the Claim Credit Amount. Agreement, ¶ 75. Each Claimant with one or more Claim Credits will receive a Settlement Fund Payment equal to the number of his or her Claim Credits multiplied by the Claim Credit Amount. *Id.*

The Settlement Agreement further provides that Class Counsel may apply to the Court for an award of reasonable attorneys' fees not to exceed one-third ($3,083,333.33) of the

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[1] The Settlement Class is defined as "[a]ll nonmember persons of Navy Federal who received text messages (other than text messages concerning fraud) on their cellular telephone from Navy Federal, or anyone on its behalf, between September 15, 2015 through the date of Preliminary Certification. Excluded from the Class are all current employees, officers, and directors of Navy Federal; federal, state, and local governments and all agencies and subdivisions thereunder; and the Judges and mediators to whom this Action is or has been assigned and any member of his or her immediate family." Agreement [Doc. 27-1], ¶ 38.

[2] Non-Claim Costs include (1) any Court-awarded attorneys' fees and costs to Class Counsel; (2) any Court-awarded Service Award to Plaintiff; (3) costs of settlement administration and the Notice Program; (4) taxes, if any; and (5) any other cost and/or expense incurred in connection with the Settlement. Agreement, ¶ 74.

Settlement Fund, as well as reasonable expenses incurred in the action. Agreement, ¶ 84. It also provides that Class Counsel may request a Service Award for Plaintiff Hawkins not to exceed $15,000. Agreement, ¶¶ 35, 87.

The Court granted preliminary approval to the Settlement on March 23, 2020 and scheduled a final approval hearing for October 9, 2020. *See* Preliminary Approval Order [Doc. 31].

III. ARGUMENT

A. The Settlement Creates A Common Fund From Which Costs And Attorneys' Fees Should Be Paid.

Under the so-called "American Rule," each party to a lawsuit normally bears its own attorneys' fees unless there is express authorization to the contrary. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). However, the Supreme Court has identified several important exceptions to the rule.[3] One such exception provides that "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This doctrine, known as the "common-fund doctrine," is derived from a federal court's "historic equity jurisdiction," *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939), and is premised upon the principle "that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478. Accordingly,

[3] The Supreme Court has recognized three exceptions, pursuant to which a federal court can award attorneys' fees through its inherent powers. These exceptions are: (1) where a party's litigation efforts directly benefit others (the "common fund" exception); (2) where a party willfully disobeyed a court order; and (3) where a party acts in bad faith, vexatiously, or for oppressive reasons (the "bad faith" exception). *See Chambers v. NASCO, Inc*., 501 U.S. 32, 45-46 (1991).

attorneys who contribute to the creation of the common fund for the benefit of unnamed class members are entitled to a reasonable fee therefrom.

B. Percentage-of-the-Fund Is The Appropriate Method For Awarding Attorneys' Fees In Common Fund Cases.

There are two primary methods of calculating attorneys' fees in class actions: (1) the percentage-of-the-fund method; and (2) the lodestar method. The lodestar method requires the multiplication of the number of hours worked by a reasonable hourly rate, the product of which the Court can then adjust by employing a "multiplier." *In re Mills Corp. Sec. Litig.,* 265 F.R.D. 246, 260 (E.D. Va. 2009). The percentage-of-the-fund method involves an award based on a percentage of the Class' recovery, set by the weighing of a number of factors by the court. *Id*. It is generally within the discretion of the Court to determine the best method of calculating attorneys' fees to appropriately compensate class counsel. *In re Wachovia Corp. ERISA Litig*., 2011 WL 5037183, at *2 (W.D.N.C. Oct. 24, 2011).

However, the Supreme Court has suggested that percentage-of-recovery is the appropriate method for awarding fees under the common fund doctrine. *See Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . . ."). Indeed, most Courts of Appeals have joined the Supreme Court in affirmatively endorsing the percentage-of-recovery method as an appropriate method for determining an award of attorneys' fees in common fund cases.[4]

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[4] *See, e.g., In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig*., 56 F.3d 295, 308 (1st Cir. 1995); *Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 49 (2nd Cir. 2000); In re GMC, 55 F.3d 768, 821-22 (3rd Cir. 1995); *Rawlings v. Prudential-Bache Props., Inc*., 9 F.3d 513, 515-16 (6th Cir. 1993); *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1047-50 (9th Cir. 2002); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Camden I. Condo. Ass'n,*

Although the Fourth Circuit has not definitively addressed the issue, "district [courts] within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method for calculating attorneys' fees in common fund cases." *In re Mills Corp. Sec. Litig*., 265 F.R.D. at 261. *See also Berry v. LexisNexis Risk & Info. Analytics, Grp., Inc*., 2014 WL 4403524, at *15 (E.D. Va. Sept. 5, 2014) ("Where there is a common fund, the percentage method of awarding attorneys' fees is favored by the Supreme Court, the Fourth Circuit, and district courts within this Circuit."); *Jones v. Dominion Resource Services, Inc*., 601 F. Supp. 2d 756, 759 (S.D. W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases."); *Strang v. JHM Mortg. Sec. Ltd P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) ("Although the Fourth Circuit has not yet ruled on the issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases.").

These courts recognize that the percentage-of-the-fund method is "more efficient and less burdensome than the traditional lodestar method and offers a more reasonable measure of compensation for common fund cases." *Strang*, 890 F. Supp. at 503. It also better aligns the interest of class counsel and class members because it ties the attorneys' fees award to the overall result achieved rather than hours expended by the attorneys. *See Thomas v. FTS USA, LLC*, 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017), *report and recommendation adopted*, 2017 WL 1147460 (E.D. Va. Mar. 27, 2017). *See also Deem v. Ames True Temper, Inc*., 2013 WL 2285972, at *5 (S.D. W. Va. May 23, 2013) ("The percentage method 'is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and punishes it

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Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp v. Shalala*, 1 F.3d 1261, 1268-70 (D.C. Cir. 1993).

for failure.'" (quoting *In re Prudential Ins. Co. Am. Sales Litig*., 148 F.3d 283, 333 (3d Cir. 1998)).

In light of the "clear consensus among the federal and state courts, consistent with Supreme Court precedent," this Court should apply the "better-reasoned and more equitable method of determining attorneys' fees in [common fund] cases" and award fees as a percentage of the Settlement Fund. *Deem,* 2013 WL 2285972, at *5.

C. Class Counsel's Attorneys' Fee Request Of 30% Of The Common Fund Is Fair And Reasonable.

Although the Settlement Agreement authorizes Class Counsel to request up to 33 1/3% of the Settlement Fund (i.e., $3,083,333.33) in attorneys' fees, Class Counsel request less - $2,775,000 (30% of the $9,250,000 common fund). Agreement, ¶¶ 84-88. Such an award is comfortably within the range typically approved by courts in this Circuit. *See, e.g., Manuel v. Wells Fargo Bank, Nat'l Ass'n*, 2016 WL 1070819, at *5 (E.D. Va. Mar. 15, 2016) ("Recent empirical data on fee awards demonstrates that class action percentage awards for attorneys' fees generally fall between twenty and thirty percent."); *Hooker v. Sirius XM Radio, Inc*., 2017 WL 4484258, at *7 (E.D. Va. May 11, 2017) ("fee awards under the percentage method are typically between 25 percent to 30 percent of the a settlement value").

In assessing the reasonableness of attorneys' fee requests, district courts in the Fourth Circuit normally consider seven primary factors: "(1) the results obtained for the Class; (2) objections by members of the Class to the settlement terms and/or fees requested by counsel; (3) the quality, skill, and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) public policy; and (7) awards in similar cases." *In re*

Mills, 265 F.R.D. at 261.[5] These factors weigh in support of granting Class Counsel's request for an award of 30% of the Settlement Fund.

1. Class Counsel Achieved Excellent Results For The Class.

The result achieved is recognized as the most important factor when considering an attorneys' fee request. *See Hensley*, 461 U.S. at 436 ("[T]he most critical factor is the degree of success obtained."); *McKnight v. Circuit City Stores, Inc*., 14 F. App'x. 147, 149 (4th Cir. 2001) (same); *Loudermilk Servs., Inc. v. Marathon Petrol. Co*., 623 F. Supp. 2d 713, 718 (S.D. W. Va. 2009) ("The result achieved should . . . be the most prominent factor considered in the analysis."). Here, the Settlement creates a non-reversionary cash Settlement Fund of $9,250,000 to compensate Settlement Class Members. Agreement, ¶ 41. According to NFCU's records and information obtained from the Settlement Administrator, there are approximately 57,195 Class Members associated with a cell phone number that has "wrong number" flag although the actual Class size may be smaller or larger than this amount, for example, if the wrong-number call recipient never informed Navy Federal that it was a wrong number. Second Goldenberg Dec., ¶ 9-12. Although the amounts that each Settlement Class Member will receive under the Settlement cannot be determined with precision until the claims period is complete and the total

[5] These seven factors overlap substantially with those used by some courts within the Fourth Circuit when applying the lodestar method. These lodestar factors (often referred to as the Barber factors) include: (1) time and labor expended; (2) novelty and difficulty of the questions raised; (3) skill required to properly perform the legal services; (4) attorney's opportunity costs in pressing the litigation; (5) customary fee for like work; (6) attorney's expectations at the outset of litigation; (7) time limitations imposed by the client or circumstances; (8) amount in controversy and results obtained; (9) experience, reputation, and ability of the attorney; (10) undesirability of the case within the legal community in which the suit arose; (11) nature and length of the professional relationship between the attorney and client; and (12) fee awards in similar cases. *See In re Mills*, 265 F.R.D. at 261 n.6 (citing *Barber v. Kimbrell's Inc*., 577 F.2d 216, 226 (4th Cir. 1978)).

number of valid claimants is known, Class Counsel estimates based on past experience with TCPA settlements that each claimant will likely receive substantially more than $100. Burke Decl. [26-2], ¶ 17. This compares very favorably to other TCPA settlements that have been approved.[6] Indeed, this Court has already found the Settlement preliminarily fair and adequate when it preliminarily approved the Settlement.

Notably, Navy Federal possessed substantial defenses to the merits of the claims at issue, both at the trial court level and on appeal – especially given the rapidly evolving TCPA legal landscape. 2020 has been a volatile year for consumers with potential TCPA claims, to say the least. The Supreme Court just released a decision in which it considered invalidating the entire TCPA as unconstitutional but decided instead to merely sever a problematic debt-collection exception from the law. *See Barr v. Am. Ass'n of Political Consultants, Inc*, No. 19-631, __S.Ct. __, 2020 WL 3633780 (July 6, 2020). Meanwhile, decisions from the Eleventh and Seventh Circuits have followed the Third Circuit's decision in *Dominguez v. Yahoo, Inc*., 894 F.3d 116 (3d Cir. 2018) and severely restricted the scope of "automated telephone dialing system" (ATDS) under the statute. *See Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020); *Ali Gadelhak v. AT&T Services, Inc*., 950 F.3d 458 (7th Cir. Feb. 19, 2020). In contrast, the Second Circuit has sided with the Ninth Circuit's more consumer-friendly

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[6] *See, e.g., Gehrich v. Chase Bank USA, N.A*., 316 F.R.D. 215, 228 (N.D. Ill. 2016) (approving TCPA settlement estimated at $52.50/claimant); *In re Capital One TCPA Litig*., 80 F. Supp. 3d 781, 790 (N.D. Ill. 2015) (approving TCPA settlement estimated at $34.60/claimant); *Estrada v. iYogi, Inc*., 2015 WL 5895942, at *7 (E.D. Cal. Oct. 6, 2015) (preliminarily approving TCPA settlement estimated at $40/class member); *Steinfeld v. Discover Fin. Servs*., No. 12-01118, Doc. 96, ¶ 6 (N.D. Cal. Mar. 10, 2014) ($46.98 each); *Adams v. AllianceOne Receivables Mgmt., Inc*., No. 08-248, Doc. 137 (S.D. Cal. Sept. 28, 2012) ($40 each); *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 944 (D. Minn. 2016) ($33.20 each); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044–45 (S.D.Cal.2015) ($13.75 each); *Rose v. Bank of Am. Corp*., 2014 WL 4273358, at *5 (N.D. Cal. Aug. 29, 2014) (between $20 and $40).

interpretation of ATDS. *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018); *Duran v. La Boom Disco, Inc*., 955 F. 3d 279, 281 (2d Cir. 2020). There is now a bona fide circuit split on this issue. If the Fourth Circuit or this Court were to agree with the Seventh and Eleventh Circuits, this case would be worthless. Given the significant risk of proceeding, the value obtained from settling this litigation should not be underestimated. Moreover, in addition to the inherent risk as to the outcome, achieving a result that resolves this litigation now is valuable in that it avoids the certain delay of continuing litigation with the possibility of appeals. The delay in the process alone, regardless of result, would be of great detriment to the Class.

Balanced against the many risks involved with proceeding, the Settlement provides an excellent result for the Class and supports Class Counsel's request for attorneys' fees.

2. No Objections Have Been Submitted.

"A lack of objections by class members as to fees requested by counsel weighs in favor of the reasonableness of the fees." *In re Genworth Fin. Sec. Litig*., 210 F. Supp. 3d 837, 844 (E.D. Va. 2016). A notice of settlement was sent by regular U.S. mail to nearly 51,000 potential class members, and email notice was provided to more than 28,500 potential class members. Second Goldenberg Decl., ¶ 13. The Notice advised potential members of the settlement class that counsel would seek an attorneys' fees award of up to $3,083,333 (33.3% of the Settlement Fund) – $308,333 *more* than the 30% that Class Counsel now requests. Yet no objections have been received to date. *Id.* at 14. *See In re Neustar, Inc. Sec. Litig*., 2015 WL 8484438, at *7 (E.D. Va. Dec. 8, 2015) ("The lack of objection is particularly informative of fairness in this case because Class Counsel is seeking less in fees and expenses than was disclosed in the notice."); *West v. Circle K Stores, Inc*., 2006 WL 8458679, at *5 (E.D. Cal. Oct. 20, 2006) ("[T]he notice informed plaintiffs of the upper bound of attorneys' fees, and plaintiffs' counsel are now

requesting $250,000 less in attorneys' fees. The lack of objections to the settlement is perhaps the most significant factor weighing in favor of settlement."). This factor also weighs in support granting Class Counsel's attorneys' fee request.

3. Class Counsel Skillfully And Efficiently Litigated The Action.

The quality of the representation is another important factor supporting Class Counsel's fee request. *See In re Mi*lls, 265 F.R.D. at 261. Here, Class Counsel has substantial experience representing plaintiffs in consumer and TCPA class action litigation. Class Counsel's experience and proficiency was central to the success achieved in this litigation. Co-lead Class Counsel Alexander H. Burke has been practicing law for 17 years and devotes his practice entirely to complex litigation, including TCPA class action litigation. *See generally* Burke Decl. [Doc. 26-2]. Likewise, co-lead counsel Jeffrey Goldenberg has been practicing law for 26 years and devotes his practice entirely to complex class action litigation. *See generally* Goldenberg Decl. [Doc. 26-3]. Joseph Lyon has been practicing law for 17 years and devotes his entire practice to plaintiffs' complex litigation, including mass tort and class actions on a national basis. *See generally* Lyon Decl. [Doc. 26-4].

Courts often evaluate the quality of the work performed by plaintiff's counsel in light of the quality of the representation of the opposition. *See In re Mills*, 265 F.R.D. at 262 (noting that counsel reached a favorable settlement against "experienced and sophisticated defense attorneys"). Here, Plaintiff's counsel faced formidable opposition from Wilmer Cutler Pickering Hale and Door, LPP, an internationally recognized law firm with over 1,000 attorneys and 13 offices in the United States, Europe and Asia.[7] In the face of this skilled opposition, Plaintiff's

[7] https://www.wilmerhale.com/en/about (last visited July 7, 2020).

counsel were able to develop a case that was sufficiently strong to efficiently settle on terms that offer substantial monetary benefits to the Class. Plaintiff respectfully submits that the skill and efficiency with which Class Counsel litigated this case to a favorable conclusion strongly supports the award of the attorneys' fees requested. *See Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 198 (3d Cir. 2000) ("Commentators discussing fee awards have correctly noted that one purpose of the percentage method of awarding fees—rather than the lodestar method, which arguably encourages lawyers to run up their billable hours—is to encourage early settlements by not penalizing efficient counsel.")

4. The Complexity And Duration Of The Litigation.

In evaluating the complexity and duration of the litigation, courts consider not only the time between filing the complaint and reaching settlement, but also the complexity of the suit, especially "when the applicable laws are new, changing, or unclear." *Kay Co. v. Equitable Prod. Co*., 749 F. Supp. 2d 455, 465 (S.D. W. Va. 2010) (citations omitted). Here, although this case was settled relatively early in the litigation, the legal landscape for TCPA cases is in flux, with Circuits split over the meaning of an "automated telephone dialing system." *Compare Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020) and *Ali Gadelhak v. AT&T Services, Inc*., 950 F.3d 458 (7th Cir. Feb. 19, 2020) *with Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) and *Duran v. La Boom Disco, Inc*., 955 F. 3d 279, 281 (2d Cir. 2020). "[T]he TCPA is a complex statute which does require interpretation." *Rosenberg v. LoanDepot.com LLC*, 435 F. Supp. 3d 308, 322 (D. Mass. 2020).

Courts recognize that "there are good reasons to award higher-than-typical fees when the issues in a case are particularly 'novel and complex.'" *Good v. W. Virginia-Am. Water Co*., 2017 WL 2884535, at *25 (S.D.W. Va. July 6, 2017). *See also Muhammad v. Nat'l City Mortgage,*

Inc., 2008 WL 5377783, at *8 (S.D.W. Va. Dec. 19, 2008) (approving 33% fee award and finding issues complex, in part, because they involved "application of state consumer protection law, and difficult federal preemption issues"); *Cox v. Branch Banking & Tr. Co*., 2019 WL 164814, at *5 (S.D.W. Va. Jan. 10, 2019) (approving 33% fee award, noting that "[t]he case involved complex issues related to Defendants' policies and application of state consumer protection law").

The fact that Class Counsel was willing to take on this case despite the tumultuous legal landscape supports Class Counsel's fee request.

Nor should Class Counsel be punished for resolving this case early and efficiently, given the potential risk of an adverse decision from the Fourth Circuit on the scope of the TCPA. *See, e.g., Smith v. Res-Care, Inc*., 2015 WL 6479658, at *8 (S.D.W. Va. Oct. 27, 2015) (approving 33% award as reasonable, noting that "Class Counsel resolved the litigation by settlement at the earliest opportunity, thus procuring efficient settlement of the case without over-litigating"); *Kelly v. Johns Hopkins*, 2020 WL 434473, at *4 (D. Md. Jan. 28, 2020) ("It is important that Class Counsel not be penalized where its record of success produces an early settlement and a favorable result for the class."); *Faircloth v. Barnhart*, 398 F. Supp. 2d 1169, 1174 (D.N.M. 2005) (refusing to "penalize" counsel "for representing their client more efficiently than a less experienced attorney might"); *Owens v. U.S. Dep't of Labor*, 1990 WL 174947, at *4 (D.D.C. Oct. 22, 1990) ("Indeed, it would seem unfair to penalize counsel for their speed and efficiency, and to deny enhancement based solely upon the absolute length of representation would create a perverse incentive for delay and dilatoriness, to the detriment of class members and judicial resources."); *Segen v. OptionsXpress Holdings Inc*., 631 F. Supp. 2d 465, 477 (D. Del. 2009) ("To reduce their fee award … would be to penalize Plaintiff's counsel for their efficiency and to

ignore the Third Circuit's directive that success should be rewarded in common fund."); *Singleton v. Domino's Pizza, LLC*, 976 F.Supp.2d 665, 681 (D. Md. 2013) ("An attractive aspect of the 'percentage of recovery' method is the results-driven nature which ties the attorneys' award to the overall result achieved rather than the hours expended by the attorneys.")

5. Class Counsel Faced A Substantial Risk Of Non-Payment.

Class counsel undertook this Action on a contingent-fee basis, and prosecuted the claims with no guarantee of compensation or recovery of any litigation expenses. Second Goldenberg Decl., ¶ 5. Courts within the Fourth Circuit recognize that the risk of receiving little or no recovery is a major factor when considering an award of attorneys' fees. *See, e.g., In re Mills*, 265 F.R.D. at 263 ("counsel bore a substantial risk of nonpayment . . . [t]he outcome of the case was hardly a foregone conclusion, but nonetheless counsel accepted representation of the plaintiff and the class in a contingent fee basis, fronting the costs of litigation").

As previously discussed, Class counsel faced a great deal of uncertainty in bringing this case and deserve to be compensated for the risk they accepted. This factor too supports granting Plaintiff's motion.

6. Public Policy Supports The Fee Request.

When considering a request for attorneys' fees in a class action, a court must weigh competing interests and strike the appropriate balance. *Hooker*, 2017 WL 4484258, at *8. On the one hand, "[i]ncentives for counsel to undertake worthy class action lawsuits are important because class actions serve to provide relief when it would be inefficient for an individual to pursue a claim." *Id*. (citing *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338 (1980)). "Class counsel play a vital role in protecting the rights of class members." *Thomas v. FTS USA, LLC*, 2017 WL 1148283, at *2 (E.D. Va. Jan. 9, 2017) (recognizing that "Congress

relies on the private attorney-general concept" to enforce consumer protections statutes). Accordingly, a "central factor in fixing the amount of attorneys' fees is to ensure that competent, experienced counsel will be encouraged to undertake the often risky and arduous task of representing a class…." *In re Mills*, 265 F.R.D. at 260. *See also Thomas,* 2017 WL 1148283, at *2 ("Due to the commendable work that Class Counsel undertook to protect consumers, the Court must ensure that counsel receive compensation for their work.").

On the other hand, there is also a public policy against compensating class action attorneys so much as to create to public disdain for attorneys and the legal process. *In re Mills*, 265 F.R.D. at 263. "Because of the damage caused by the perception of overcompensation of attorneys in class action suits, lawyers requesting attorneys' fees and judges reviewing those requests must exercise heightened vigilance to ensure the fees are in fact reasonable beyond reproach and worthy of our justice system." *Kay Co*., 749 F. Supp. 2d at 469.

Class Counsel's request for $2,775,000 (30% of the Settlement Fund) – approximately $308,008 less than that $3,083,333 (33 1/3%) permitted under the Settlement Agreement – strikes a just balance between these interests. Notably, the maximum a typical class member might hope to attain by filing an individual action under the TCPA is generally small. Without a sufficient incentive for qualified class action attorneys to undertake the risks associated with class litigation, the rights of potential class members with small claims would go un-vindicated. An award of 30% of the Settlement Fund provides Class Counsel reasonable compensation for the benefits obtained, without overcompensating Class Counsel to the detriment of the Class.

7. Awards In Similar Cases Support The Fee Request.

Class Counsel's request for 30% of the Settlement Fund is also consistent with (and often below) awards in similar cases. "[E]mpirical studies show that, regardless whether the

percentage method or the lodestar method is used, fee awards in the class actions average around one-third of the recovery." 4 Newberg on Class Actions § 14:6 (4th ed.). *See also In re Rite Aid Corp. Sec. Litig.,* 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (review of 289 class action settlements demonstrates "average attorney's fees percentage [of] 31.31%" with a median value that "turns out to be one-third.").

Although the Fourth Circuit has not established a fee benchmark, district courts in this circuit recognize that "percentage awards are often between 25% and 30% of the Fund." *In re Mills*, 265 F.R.D. at 264.[8] In cases involving settlements of ten million dollars or less, attorney fee awards of 33.33% plus expenses are not uncommon in TCPA cases in the Fourth Circuit. As settlements rise above the ten-million-dollar range, attorney fee award percentages tend to drop to around 30%.

Case	**Settlement Amount**	**Attorney Fee Award**	**Percentage Fee Award**
Manheim v. Measurable Solutions, Inc., No. 2:15cv04353, Dkt. #27-1 & 41 (D. S.C. Oct. 19, 2017)	$100,000	$33,000 plus expenses of $2,745.23	33%
Mey v. Got Warranty, Inc., No. 5:15cv101, Dkt. #141 & 149 (N.D. W. Va. July 26, 2017)	$650,000	$216,666.67 plus expenses of $4,609.42	33.33%
Mey v. Venture Data, LLC, No. 5:14cv123, Dkt. #313 (N.D. W. Va. Sept. 6, 2018)	$2.1 million	$700,000 plus expenses of $112,350.34	33.33%
Mey v. Patriot Payment Grp., LLC, No. 5:15cv027, Dkt. #127 (N.D. W. Va. July 26, 2017)	$3.7 million	$1,233,333.33 plus expenses of $32,616.00	33.33%
Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, No. 8:11cv2467, Dkt. #105-1 & 110 (D. Md. Feb. 12, 2015)	$4.5 million	$1.5 million plus expenses of $45,739.06	33.33%

[8] According to the leading treatise on class actions, between 2006 and 2011, the average percentage award in common fund cases in the Fourth Circuit was 27.7% and the average award in consumer class actions was 28.7%. Newberg on Class Actions § 15:83 (5th ed.).

In re Monitronics Int'l, Inc. TCPA Litig., No.1:13md2493, Dkt. #1214 (N.D. W. Va. June 12, 2018)	$28 million	$8.3 million plus expenses of $602,909.	29.64%
Hooker v Sirius XM Radio, Inc., No. 2017 WL 4484258, *9 (E.D. Va. May 11, 2017)[9]	$35 million+	$12.25 million plus expenses of $191,330.88	25% + 10%

Fee decisions in TCPA cases in other federal jurisdictions similarly show that Class Counsel's request for 30% of the Settlement Fund is reasonable.

Case	**Settlement Amount**	**Attorney Fee Award**	**Percentage Fee Award**
Heller v HRB Tax Group, Inc., No. 4:11cv1121, Dkt. #60 (E.D. Mo. Aug. 8, 2013)	$95,150	$31,716.66	33.33%
Lindsay Transmission, LLC v. Office Depot, Inc., No. 4:12cv221, Dkt. #93-1 & 100 (E.D. Mo. June 23, 2014)	$381,150	$125,779.50	33%
Balbarin v North Star Capital Acquisition, 2012 WL 13035056 (N.D. Ill. 2016)	$500,000	$166,667	33.33%
Martin v. JTH Tax, Inc, dba Liberty Tax, No. 1:13cv6923, Dkt. #64 & 86 (N.D. Ill. Sept. 23, 2015)	$3 million	$1,000,000	33.33%
Vandervort v. Balboa Capital Corp., 8 F. Supp. 3d 1200 (C.D. Cal. 2014)	$3.3 million	$1,100,000	33.33%
Hanley v. Fifth Third Bank, No.1:12cv1612, Dkt. #69-1 & 87 (N.D. Ill. Dec. 23, 2013)	$4.5 million	$1,500,000	33.33%
Guarisma v. ADCAHB Medical Coverages, Inc., 2015 WL 13650934 (S.D. Fla. 2015)	$4.5 million	$1,500,000	33.33%
Lees v. Anthem Ins. Cos., No. 4:13cv1411, 2015 WL 3645208 (E.D. Mo. 2015)	$4.75 million	$1,625,000	34%
Martin v. Dun & Bradstreet, 2014 WL 9913504 (N.D. Ill. 2014)	$4.9 million	$1,633,333	33.33%
Martinez v. Medicredit, Inc., 2018 WL 2223681 (E.D. Mo. May 15, 2018)	$5 million	$1,666,666	33.33%
Charvat v. AEP Energy, No. 1:14cv03121, Dkt. #22-1 & 41 (N.D. Ill Sept. 28, 2015)	$6.0 million	$2,000,000	33.33%

[9] In *Hooker*, the court awarded attorneys' fees of $12.25 million, being 35% of the cash settlement amount of $35 million. The court clarified that a 25% fee was awarded for the cash amount and a "bonus"10% to award class counsel for additional non-monetary relief that was not easily quantifiable. *Id*. at *5.

In re Life Time Fitness, 2015 WL 7737335 (D. Minn. 2015)	$10.0 million	$2,800,000	28%
Soto v. The Gallup Organization, No. 0:13cv61747, Dkt. #95 (S.D. Fla. Nov. 24, 2015)	$12 million	$4,000,000	33.33%
Melito v. American Eagle Outfitters, Inc., 2017 WL 3995619 (S.D.N.Y. Sept. 11, 2017)	$14.5 million	$4,350,000	30%
Johnson v. Navient Solutions, Inc., No. 1:15cv716, Dkt. #177 (S.D. Ind. July 13, 2017)	$19.7 million	$6,417,052	33 %

D. Class Counsel's Request For Litigation Costs And Expenses Is Reasonable.

Under Rule 23(h), a trial court may award nontaxable costs that are authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h). Here, a cost award is authorized by both the parties' settlement agreement, Agreement, ¶ 84, and the common fund doctrine. *In re Microstrategy, Inc*., 172 F. Supp. 2d 778, 791 (E.D. Va. 2001) (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.1994) (holding that those costs typically billed by attorneys to paying clients in the marketplace may be reimbursed)). Expenses that are normally charged to a fee-paying client include mailing costs, online legal research, long-distance telephone use, expert and mediator fees, travel expenses for mediation and court proceedings, and court filing fees. *Reynolds v. Fid. Investments Institutional Operations Co., Inc*., No. 1:18-CV-423, 2020 WL 92092, at *4 (M.D.N.C. Jan. 8, 2020)

Here, Class Counsel have incurred $12,323.10 in reasonable out-of-pocket expenses. Second Goldenberg Decl., ¶ 5. Because these expenses were advanced with no guarantee of recovery, Class Counsel had a strong incentive to keep them to a reasonable level. Class Counsel has provided the Court with a summary of the costs and expenses advanced. *Id*., ¶¶ 6-8.

No class member has filed an objection to the amount of costs which are significantly lower than the $15,000 estimate that was included in the notice to the class members. As such,

the Court should award Class Counsel $12,323.10 in costs and litigation expenses.

E. The Requested Service Award Is Reasonable.

At the end of a successful class action, it is common for trial courts to compensate class representatives for the time and effort they invested to benefit the class. *Reynolds v. Fid. Investments Institutional Operations Co., Inc*., 2020 WL 92092, at *4 (M.D.N.C. Jan. 8, 2020). "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." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). "Incentive or service awards reward representative plaintiffs' work in support of the class, as well as their promotion of the public interest" and "[c]ourts around the country have allowed such awards to named plaintiffs or class representatives." *Deem*, 2013 WL 2285972, at *6. To determine whether a service payment is warranted, the court normally considers the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation. *Id*.

Here, Plaintiff Hawkins has made important and valuable contributions to the prosecution and fair resolution of this action on behalf of all Class Members. Plaintiff Hawkins assisted Class Counsel's investigation of the claims by providing factual information and other relevant information related to his claims and by providing documents in his possession relevant to the action. Declaration of Ben Hawkins in Support of Plaintiff's Motion for an Award of Attorneys' Fees and Expenses and for a Class Representative Service Award ("Hawkins Dec."), ¶ 3, attached as Exhibit 2 to Plaintiff's Motion for an Award of Attorneys' Fees and Expenses and for a Class Representative Service Award. Plaintiff also assisted Class Counsel's efforts to prepare the Complaint and negotiate the Settlement Agreement. *Id*. Class Members were apprised of

Plaintiff's request for a Service Award in the Notice to Class Members, and no Class Member has objected to the Service Award. Second Goldenberg Dec., ¶ 14.

Moreover, the amount of the service award requested – $15,000 – is well within the range of such awards approved by courts in this circuit. *See, e.g., Robinson v. Carolina First Bank NA*, 2019 WL 2591153, at *18 (D.S.C. June 21, 2019) ("The Service Award in the amount of $15,000 is well within the range of reasonable incentive awards approved by courts."); *McCurley v. Flowers Foods, Inc*., 2018 WL 6650138, at *8 (D.S.C. Sept. 10, 2018) (collecting cases and approving $25,000 service award as reasonable). In fact, an empirical study published in 2006 suggests that the average award per class representative is about $16,000. 4 Newberg on Class Actions § 11:38 (4th ed.).

District courts in the Fourth Circuit have approved service awards as high as $50,000. *See Helmick v. Columbia Gas Transmission*, 2010 WL 2671506, *3 (S.D. W. Va. 2010) ($50,000). They have also approved service awards as high as $20,000 in TCPA cases. *See, e.g., Mey v. Patriot Payment Grp., LLC*, No. 5:15cv027 (N.D. W. Va.), Dkt. #127 ($20,000); *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, No. 8:11cv2467 (D. Md.), Dkt. #110 ($15,000); *Mey v. Venture Data, LLC*, No. 5:14cv123 (N.D. W. Va.), Dkt. #313 ($15,000). The same is true in TCPA cases nationally, with service awards reaching as high as $25,000 or even $35,000.[10]

[10] *Kwan v. Clearwire Corp*., No. 2:09cv1392 (W.D. Wash.), Dkt. #201 ($35,000); *Allen v. JP Morgan Chase Bank, N.A*., No. 1:13cv8285 (N.D. Ill.), Dkt. #98 ($25,000); *Johnson v. Navient Solutions*, No. 1:15cv716 (S.D. Ind.), Dkt. #177 ($25,000); *Hageman v. AT&T Mobility LLC,* 2015 WL 9855925 (D. Mont 2015) ($20,000); *Benzion v. Vivint Inc*., 2015 WL 11143078 (S.D. Fla. 2015) ($20,000); *Jones v. I.Q. Data Int'l, Inc*., 2015 WL 5704016 (D.N.M. 2015) ($20,000); *Palmer v. Sprint Solutions, Inc.*, 2011 WL 13238842 (W.D. Wash. 2011) ($17,500); *Ikuseghan v.*

But for Mr. Hawkins putting the interests of the Class above his own, the Class would have received nothing. There have been no objections to the requested service award, and Mr. Hawkins properly earned it through his participation in the litigation and his unwavering support for the Class as explained in his accompanying declaration. The Court should approve a service award in the requested amount of $15,000.

IV. CONCLUSION

For all the foregoing reasons, Class Counsel respectfully request that the Court award attorneys' fees in the amount $2,775,000, being 30% of the Settlement Fund, and reimbursement of litigation costs and expenses in the amount of $12,323.10. Class Counsel also request that the Court approve a $15,000 service award for Mr. Hawkins in recognition of his valuable service to the Class.

Respectfully submitted,

BEN HAWKINS, on behalf of himself and all others similarly situated

Dated: July 8, 2020

By: */s/ David J. Dickens*

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Multicare Health Sys., No. 3:14cv5539, 2016 WL 4363198, at *3(W.D. Wash. 2016) ($15,000); *Guarisma v. ADCAHB Medical Coverages, Inc*., 2015 WL 13650934 (S.D. Fla. 2015) ($15,000).

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CERTIFICATE OF SERVICE

I hereby certify that, on July 8, 2020, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ David J. Dickens