UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARIA VERGARA, SANDEEP PAL, JENNIFER REILLY, JUSTIN BARTOLET, JAMES LATHROP, and JONATHAN GRINDELL, individually and on behalf of similarly situated individuals,	)	
Plaintiffs,	)	No. 15-cv-06942
v.	)	Hon. Thomas M. Durkin
UBER TECHNOLOGIES, INC., a Delaware corporation,	)	
Defendant.	)	

PLAINTIFFS' *UNOPPOSED* MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARDS

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I. INTRODUCTION

This Court preliminarily approved the Parties' class action Settlement Agreement,[1] bringing to a close nearly three years of litigation spanning multiple courts across the country. Notice has been distributed and Settlement Class Members have begun to file claims. In advance of the Final Approval Hearing, Plaintiffs now move for approval of the agreed-upon Incentive Awards and an award of attorneys' fees and expenses for Class Counsel.

The Class Action Settlement that Class Counsel achieved in this case is an exceptional result for the Settlement Class Members. Under the Settlement, Defendant Uber Technologies, Inc. ("Uber") has agreed to create a Settlement Fund of $20,000,000 that will be fully distributed to all of the Settlement Class Members, with each individual receiving a *pro rata* share following subtractions for the costs of notice and administration, court awarded attorneys' fees and costs, and the Incentive Awards to Plaintiffs. In addition to the monetary benefit to the Settlement Class Members, the Settlement also provides significant prospective relief designed to minimize or eliminate the unsolicited text messages that Uber allegedly sent in violation of the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227 *et seq*.

To date, the Settlement has been met with overwhelming approval from Settlement Class Members. Notice of the Settlement commenced on October 8, 2017. Through a combination of direct notice by email and postcard, and publication notice through a press release and advertisements online and in USA Today, notice of the Settlement has successfully reached millions of potential Settlement Class Members. As of the filing of this Motion, over 62,000 claims have already been filed, and of the millions of Settlement Class Members who received notice,

[1] Unless otherwise indicated, capitalized terms have the same meaning as those terms are defined in the Parties' Settlement Agreement, attached hereto as Exhibit A.

only seven have elected to opt out of the Settlement. There have been no objections.

With this Motion, Class Counsel request a fee award of $6,350,000—an amount less than one-third of the Settlement Fund and well within the market rate for cases of this size, as determined using the Northern District's established sliding-scale formula. As explained in detail below, Class Counsel's requested fee award is justified given the exceptional monetary and non-monetary relief provided under the Settlement, is consistent with Seventh Circuit law and fee awards granted in similar TCPA class action settlements in the Northern District of Illinois, and is also reasonable given the time and costs Class Counsel have committed to resolving this litigation for the benefit of the Settlement Class Members.

Both Class Counsel and the Class Representatives devoted significant time and effort to the prosecution of the Settlement Class Members' claims in the face of staunch defenses and significant risks. Class Counsel's efforts have yielded an extraordinary benefit for millions of consumers nationwide. The requested attorneys' fees and costs and Incentive Awards are amply justified in light of the investment, risks, and excellent results obtained for the Settlement Class Members. Plaintiffs and Class Counsel respectfully request that the Court approve their requested attorneys' fees of $6,350,000, plus litigation costs incurred, and the agreed-upon Incentive Awards of $10,000.00 for each Class Representative.

II. BACKGROUND

A. History Of The Litigation And Class Counsel's Efforts During Negotiations.

This Settlement resolves claims against Uber for violations of the TCPA. Plaintiffs alleged in multiple lawsuits filed in at least six states around the country that Uber violated the TCPA on a massive scale by sending millions of unsolicited, automated text messages to cellphone owners nationwide. In the last several years, Uber has been named as a defendant in more than a dozen

text message TCPA cases filed in courts across the country.[2] Indeed, on June 22, 2016, a plaintiff in another putative TCPA class action against Uber filed a motion to transfer with the Judicial Panel on Multidistrict Litigation (JPML), seeking to have all TCPA litigation against Uber transferred to the Northern District of Illinois for consolidated or coordinated proceedings. *See* Motion to Transfer Related Actions to the Northern District of Illinois Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings, *In re Uber Techs., Inc. Telephone Consumer Protection Act (TCPA) Litig.*, MDL No. 2733, ECF No. 1. Following the JPML's denial of the § 1407 motion to transfer, this nationwide Settlement Agreement was reached by Class Counsel, who represent the plaintiffs in the oldest and most procedurally advanced cases.[3]

Uber is an international technology company and the developer of the Uber mobile app—a smartphone application that connects available drivers with passengers seeking transportation (the "Uber App"). One of the primary ways in which Uber communicates with consumers is through text messages sent to individuals' cellphones. Uber's phenomenal growth since 2010 has been dependent on the massive enlistment of drivers and riders, and text messaging is central to that marketing campaign. The breadth and depth of Uber's text messaging platform is vast, with

[2] *See, e.g., Bank v. Uber Techs., Inc.*, No. 15-cv-04858 (E.D.N.Y) (closed); *Calmese v. Uber Techs., Inc.*, No. 16-cv-06277 (N.D. Ill.) (closed); *Cubria v. Uber Techs., Inc.*, 16-cv-00544 (W.D. Tex.) (stayed); *Charles Christopher Johnson v. Uber Techs., Inc.*, 16-cv-05468 (N.D. Ill.) (pending); *Fronda v. Uber Techs., Inc.*, No. 16-cv-05534 (N.D. Cal.) (closed); *Gordon v. Uber Techs., Inc.*, No. 15-cv-03008 (N.D. Ga.) (closed); *Matthew Johnson v. Uber Techs., Inc.*, 16-cv-50113 (N.D. Ill.) (closed); *Moore v. Uber Technologies, Inc.*, No. 16-cv-03870 (N.D. Cal.) (closed); *Kafatos v. Uber Techs., Inc.*, 15-cv-03727 (N.D. Cal.) (closed); *Kolloukian v. Uber Techs., Inc.*, 15-cv-02856 (C.D. Cal.) (closed); *Lainer v. Uber Techs., Inc.*, 15-cv-09925 (C.D. Cal.) (closed); *Noorparvar v. Uber Techs., Inc.*, No. 14-cv-01771 (C.D. Cal.) (closed); *Sabatino v. Uber Techs., Inc.*, No. 15-cv-00363 (N.D. Cal.) (closed); *Shaver v. Uber Techs., Inc.*, 16-cv-22067 (S.D. Fla.) (closed); *Giacomaro v. Uber Techs., Inc.*, 2:17-cv-03923 (E.D.N.Y.) (closed).

[3] Plaintiffs Jonathan Grindell, Jennifer Reilly, James Lathrop, Sandeep Pal, and Justin Bartolet originally filed suit against Uber in the United States District Court for the Northern District of California. *Lathrop v. Uber Techs., Inc.*, No. 14-cv-5678 (the "California Litigation"). The California Litigation was voluntarily dismissed on August 11, 2017 and, on that same date, the complaint in this litigation (originally filed by Plaintiff Vergara) was amended to include the claims of Mr. Grindell, Ms. Reilly, Mr. Lathrop, Mr. Pal, and Mr. Bartolet. (*See* Dkt. 82.)

the capability to deliver millions of text messages every year to consumers in virtually every major metropolitan area across the country.

Class Counsel have devoted substantial time and resources to investigating, litigating, and resolving this case and the related actions. (*See* Declaration of Hassan A. Zavareei ("Zavareei Decl."), attached hereto, ¶¶ 3, 8-35, 39; *see also* Declaration of Myles McGuire ("McGuire Decl."), attached hereto, ¶¶ 13-18.) Counsel spent significant time communicating with Plaintiffs, investigating facts, researching the law, preparing well-pleaded complaints and amended complaints, engaging in discovery, working with expert witnesses, briefing and arguing discovery disputes, preparing briefs for and appearing before the JPML, reviewing documents, taking and defending numerous depositions, negotiating the Settlement Agreement and preparing the settlement-related documents and filings, and supervising the settlement claims administration process. (*Id.*)

Plaintiffs Jonathan Grindell, Jennifer Reilly, and James Lathrop filed suit against Uber alleging violations of the TCPA nearly three years ago in the United States District Court for the Northern District of California. (*See Lathrop, et al. v. Uber Techs., Inc.*, No. 3:14-cv-05678-JST, Dkt. 1.)[4] Plaintiffs Sandeep Pal and Justin Bartolet joined the lawsuit a few weeks later. (*Lathrop* Dkt. 10.) The plaintiffs who brought the California Litigation are all individuals who received unwanted text messages from Uber related to becoming a driver for Uber. Plaintiff Vergara filed her lawsuit against Uber on August 7, 2015, alleging that she received numerous unsolicited text messages from Uber despite never having expressed any interest in being an Uber driver or rider. (First Amended Class Action Complaint ("FAC"), Dkt. 82, ¶¶ 32-35.) In both cases, Class Counsel

[4] All citations that reference docket entries in the California Litigation are denoted "*Lathrop* Dkt." Unless denoted "*Lathrop* Dkt.," all citations that contain ECF numbers are references to filings or docket entries in the *Vergara* action, *Vergara v. Uber Techs., Inc.*, No. 15-cv-06942 (N.D. Ill.).

developed complex claims and obtained an excellent recovery for consumers in the face of relentless opposition by Uber.

1. The California Litigation.

In the California Litigation, Class Counsel defeated a motion to dismiss, defeated a motion to stay, engaged in extensive discovery efforts including the production and review of electronically-stored information ("ESI"), defeated a motion for summary judgment, and served two lengthy expert reports on hotly contested issues. Early in the California Litigation, Plaintiffs moved for class certification (*Lathrop* Dkt. 42) and Uber moved to dismiss the claims of some of the Plaintiffs on the ground that they provided prior express consent to receive the text messages at issue (*Lathrop* Dkt. 25.) The court stayed proceedings on the class certification motion in light of the pending motion to dismiss and instructed Plaintiffs to re-notice the motion at a later appropriate time. (*Lathrop* Dkt. 43.) After full briefing on Uber's Motion to Dismiss, the court rejected Uber's primary consent argument and largely denied the motion. (*Lathrop* Dkt. 49 at 13.)

In November 2015, Uber moved to stay the California Litigation entirely pending both the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), and the D.C. Circuit's decision on the appeal related to a 2015 FCC Order on TCPA issues. (*Lathrop* Dkt. 71.) The court held a hearing on the motion, at which Class Counsel appeared and argued, and Uber's motion was ultimately denied. (*Lathrop* Dkt. 112.)

In connection with discovery, Class Counsel prepared and served initial disclosures, several sets of interrogatories, requests for admission, and ten sets of document requests; responded to discovery requests, including interrogatories and document requests to each named plaintiff; reviewed over 4,000 documents; met and conferred with defense counsel to resolve various discovery disputes; served third-party discovery; took numerous depositions (including a

third-party deposition); and prepared Plaintiffs for deposition and defended those depositions. (Zavareei Decl. ¶¶ 13-14, 17, 49-50.) Class Counsel prevailed on several discovery disputes via the *Lathrop* court's letter briefing process, which extended over many months. Class Counsel filed five separate Joint Letter Briefs (*Lathrop* Dkt. Nos. 159, 160, 161, 204, 235) and were largely successful in those discovery disputes. Class Counsel's dogged pursuit of key discovery strengthened the case. (Zavareei Decl. ¶ 15.) For instance, Uber was ultimately forced, via Court order, to produce important discovery such as a sample of its text logs and additional information about its website screen flows. (*Lathrop* Dkt. Nos. 169, 187.)

The claims in this litigation involve complex text message development and processing issues. Thus, a tremendous amount of work was necessary to determine how Uber's text messaging system worked and how the fatal flaws in its system resulted in Uber sending millions of unauthorized text messages. To that end, Class Counsel conducted three separate Rule 30(b)(6) depositions of Uber and deposed four additional Uber employee witnesses. (Zavareei Decl. ¶ 17). Uber ultimately produced over 4,000 pages of documents related to its text messaging practices and responded to numerous interrogatories. (*Id.* ¶ 13). Class Counsel also obtained documents from and deposed third-party Twilio, Inc., the primary mobile-messaging company used by Uber to send its text messages. (*Id.* ¶ 17.) The discovery process was key to this successful litigation and settlement. (*Id.* ¶ 18.) Among other things, information obtained during the discovery process revealed how Uber's text messaging ecosystem functions, traced the information contained in Uber's databases related to text messages sent to Settlement Class Members, uncovered the details of Uber's various web and Uber App portals for both initiating the process to become a driver and input information into Uber's Refer-a-Friend text messaging program, and informed the selection of witnesses. (*Id.*) The discovery process also informed Plaintiffs' arguments as to class

certification and Plaintiffs' strategy during settlement negotiations, which were critical to achieving this Settlement. (*Id*. ¶ 19.)

In April 2016, while the Parties were in the midst of fact discovery and before any expert discovery had been conducted, Uber filed a summary judgment motion. (*Lathrop* Dkt. 146.) Class Counsel successfully opposed the summary judgment bid. (*Lathrop* Dkt. 201.) In addition, Class Counsel consulted with expert witnesses, retaining experts on Uber's alleged "automated telephone dialing system" ("ATDS") and its text message logs. Class Counsel served lengthy and technical expert reports on Uber on February 15, 2017, with experts Randall Snyder and Arthur Olsen providing detailed and thorough testimony. In total, Class Counsel appeared and argued at eight hearings and/or conferences in the California Litigation. (Zavareei Decl.¶ 22.)

2. The Illinois Litigation.

Uber similarly fiercely contested the claims of Plaintiff Vergara in the Illinois Litigation, but Class Counsel fought, and won, significant battles to eventually reach this Settlement. As in the California Litigation, Uber filed an early motion to stay the Illinois Litigation altogether pending the conclusion of proceedings before the U.S. Court of Appeals for the D.C. Circuit. (Dkt. 11.) Class Counsel opposed that motion and, after oral argument, Class Counsel prevailed in defeating the stay request. (Dkt. 17.) Class Counsel then aggressively pursued discovery, propounding interrogatories and document requests in January 2016. Uber resisted some of Class Counsel's discovery efforts and Class Counsel then spent months pursuing additional documents and other discovery from Uber.

In May 2016, Uber moved for judgment on the pleadings pursuant to Rule 12(c). (Dkt. 24.) Shortly thereafter, the MDL motion to transfer was filed, and since the Illinois Litigation was included in the motion to transfer, Class Counsel moved for a stay pending resolution of the MDL

matter. (Dkt. 40.) Following full briefing, Class Counsel prevailed on the motion to stay. (Dkt. 47.) After the JPML denied consolidation as an MDL, and the stay of the Illinois Litigation thereby ended, Uber filed another motion for judgment on the pleadings. (Dkt. 52.) Class Counsel again extensively briefed Uber's motion, after which Uber agreed to mediate, and the Illinois Litigation was stayed pending the outcome of mediation. (Dkt. 61.)

3. Mediation and Settlement Negotiations.

On May 23, 2017, Class Counsel attended a full-day mediation in California with the Hon. Layn R. Phillips (Ret.) of Phillips ADR, a former U.S. District Court Judge with expertise in complex litigation. (Zavareei Decl. ¶ 25; McGuire Decl. ¶ 18.) By the time of the mediation, Class Counsel was fully informed of the merits of the litigation, having engaged in extensive discovery and motion practice for years. Class Counsel prepared a lengthy mediation statement and zealously advocated the position of Plaintiffs and the putative class members before the mediator. Class Counsel was fully prepared to continue to litigate rather than accept a settlement that was not in the best interest of Plaintiffs and the putative class members. (Zavareei Decl. ¶ 26; McGuire Decl. ¶¶ 17-18.) After a full day of negotiations extending into the evening, the Parties reached a settlement in principle.

Class Counsel then participated in several follow-up conferences with Judge Phillips and Uber's counsel. Class Counsel negotiated the details of a comprehensive Settlement Agreement over a period of months, engaging in significant edits and revisions to the same. (Zavareei Decl. ¶¶ 27-29; McGuire Decl. ¶¶ 17-18.) That Settlement Agreement provides both monetary compensation and meaningful injunctive relief, while avoiding the risks and delay of further litigation. Working with Uber's counsel, Class Counsel prepared the Notices for the Settlement Classes, a proposed Preliminary Approval Order, and a proposed Final Approval Order. (Zavareei

Decl. ¶¶ 30; McGuire Decl. ¶ 18.) Class Counsel also prepared the First Amended Class Action Complaint (Dkt. 82) and the motion for preliminary approval of the Settlement (Dkt. 85). Class Counsel participated in the hearing on the motion for preliminary approval on August 16, 2017, with the Court granting preliminary approval of the Settlement the following day. (Dkt. 88.)

B. Class Counsel's Continuing Efforts Since Preliminary Approval.

Class Counsel has continued to invest significant time and effort in this action following preliminary approval. (Zavareei Decl. ¶¶ 32; McGuire Decl. ¶ 18.) The Parties selected Epiq Systems Class Action and Claims Solutions ("Epiq") as Settlement Administrator, and Class Counsel have been actively involved in supervising and managing all aspects of Epiq's administration of the notice program and claims process. (Zavareei Decl. ¶¶ 32-33; McGuire Decl. ¶ 18.) Class Counsel have regularly communicated with the Settlement Administrator to ensure a smooth notice process following preliminary approval. (*Id.*) To that end, Class Counsel have reviewed the language and content of the settlement website, reviewed and edited scripts for the automated telephone hotline, responded to Settlement Class Members who contacted Class Counsel directly, communicated with the named Plaintiffs regarding the notice and claims process, communicated with opposing counsel regarding notice issues, and prepared the present motion. (Zavareei Decl. ¶ 33; McGuire Decl. ¶ 18.) Class Counsel will continue to devote their time and effort as the claims process continues, as well as appear at the final approval hearing, respond to ongoing inquiries from Settlement Class Members, and monitor the distribution of settlement payments by the Settlement Administrator. (*Id.*)

In total, Class Counsel spent 5,506.55 combined hours on this case to date. (Zavareei Decl. ¶ 35; McGuire Decl. ¶ 25.) Class Counsel also conservatively estimate that they will expend at least an additional $95,000 in attorney time in connection with final approval, responding to

objectors, and effectuating the Settlement, resulting in a total lodestar of at least $3,246,954.20. (Zavareei Decl. ¶ 39; McGuire Decl. ¶ 26.) Class counsel also incurred $205,732.48 in case-related expenses, including expert witness fees, court reporting fees, and travel-related expenses. (Zavareei Decl. ¶ 36; McGuire Decl. ¶ 27.) Class Counsel's combined efforts amply support the requested fee award, and demonstrate that the fees which will be paid to Class Counsel under the Settlement Agreement are both reasonable and well-earned.

III. RELIEF FOR THE SETTLEMENT CLASS MEMBERS

A. The Settlement's Notice Plan Has Succeeded In Notifying Millions Of Potential Settlement Class Members.

Under the Settlement Agreement's Notice Plan, which has already gone into effect, Direct Notice has been provided by email and postcard to more than six million individuals who may be eligible to file a claim. (*See* McGuire Decl. ¶ 28.) In addition, the Publication Notice has appeared in a press release and advertisements online and in USA Today, reaching many more individuals across the United States in the major regions where Uber operates. (*Id.*) The Settlement Website is online, and to date, there have already been more than 411,000 page hits. (*Id.*) To date, of the millions of potential Settlement Class Members who have received notice through Direct Notice or Publication Notice, none have filed an objection and only seven have elected to opt out of the Settlement. (Zavareei Decl. ¶ 42.)

B. Monetary And Non-Monetary Relief.

As detailed in Plaintiffs' preliminary approval filings, Class Counsel's prosecution of Plaintiffs' claims and of this litigation has culminated in a Settlement that provides substantial monetary relief to the Settlement Class Members, as well as significant prospective relief through changes to Uber's business practices that will greatly reduce or eliminate further intrusions on the privacy of the Settlement Class Members and the public generally. For monetary compensation,

Uber has agreed to establish a $20,000,000 cash Settlement Fund. (Exh. A ¶ 45.) Following subtractions for the costs of notice and administration, court awarded attorneys' fees and costs, and Incentive Awards to Plaintiffs, the Settlement Fund will be distributed in full to Settlement Class Members whose claims are approved. (*Id.* ¶¶ 45-47.)

The Settlement Fund is to be distributed to Settlement Class Members *pro rata*. (*Id.*) As such, there is no cap on the total amount that each Settlement Class Member can receive. (*Id.*) However, the amount of each Settlement Class Member's payment will ultimately depend on the total number of approved claims. (*Id.*) Based on the number of claims filed to date, Plaintiffs anticipate a payment per Settlement Class Member of between $120 and $200, which is well within the range of previously approved TCPA settlements. (*See infra* Section IV.A.iv; *see also* Zavareei Decl. ¶¶ 40-41.)

The Settlement also provides significant non-monetary, prospective relief that will benefit the Settlement Class Members and the general public. As part of the Settlement, and in response to this litigation, Uber has implemented significant changes designed to reduce or eliminate the kinds of unauthorized text messages at issue in this litigation. (Ex. A ¶ 48.) First, Uber has agreed to completely discontinue its Refer-a-Friend program on cellular phones that Uber issues to requesting drivers. (*Id.*) Second, Uber has agreed to maintain the robust opt-out protocol that it instituted after the cases were filed. (*Id.*) This newly adopted opt-out protocol includes a broad set of opt-out terms that allows Uber's system to correctly identify and abide by consumers' attempts to revoke consent to receive future messages. (*Id.*) Third, Uber has agreed to adhere to several account creation and signup processes to help reduce the incidence of texting incorrect phone numbers. (*Id.*) These processes include confirmatory steps that ask users to verify the phone number they input during account signup, and automatic deletion of any unverified numbers. (*Id.*)

Together, these processes will reduce or eliminate text messages like those at issue in this lawsuit, and will thus benefit the Settlement Class Members and the public at large.

C. The Settlement Class Members' Response To The Settlement Has Been Overwhelmingly Positive.

The Settlement Class Members' positive response to this Settlement strongly supports a finding that Class Counsel's requested fee award is justified. As described in Plaintiffs' Motion for Preliminary Approval and explained in more detail below, the Settlement—both in terms of the available monetary relief and the significant changes to Uber's text messaging practices—is exceptional when compared with similar TCPA settlements approved in cases in this District and throughout the country. To date, the Settlement has received a high level of participation by the Settlement Class Members, with tens of thousands of claims having been filed. (Zavareei Decl. ¶ 42.) Over 62,000 claims have already been filed and only seven individuals have elected to opt out of the Settlement. (*Id.*) As of the date of filing this Motion, no objections have been filed. (*Id.*) Although the claims deadline is not until December 15, 2017, and the Settlement Administrator is currently still in the process of reviewing and analyzing the claims and opt-outs received, the strong support and participation from the Settlement Class Members thus far is a testament to the fairness and reasonableness of the Settlement and of the relief provided to the Settlement Class Members.

IV. DISCUSSION

Federal Rule of Civil Procedure 23 provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Seventh Circuit recognizes "two approaches used to calculate attorneys' fees: the lodestar method . . . and the percentage-of-recovery method . . . ." *Wright v. Nationstar Mortg. LLC*, No. 14 C 10457, 2016 WL 4505169, at *14 (N.D. Ill. Aug. 29, 2016) (citing *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 562 (7th Cir. 1994)

(hereinafter "*Florin I*")). Generally, "a district judge has discretion to use either method, depending on the particular circumstances of the case." *Cook v. Niedert*, 142 F.3d 1004, 1010 (7th Cir. 1998).

However, in TCPA class actions like this one, where the defendant creates a common fund that is distributed in full, the percentage-of-the-fund method is "the normal practice," because "such an approach is more efficient for the court and more likely to yield an accurate approximation of the market rate." *In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp. 3d 781, 794-95 (N.D. Ill. 2015); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-01 (N.D. Ill. 2015) ("The Court agrees with [class] counsel that the fee award in this case should be calculated based on a percentage-of-the-fund method . . . because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of [many] million lightly-injured plaintiffs likely would not be interested in doing."); *Williams v. Gen. Elec. Capital Auto Lease*, No. 94 C 7410, 1995 WL 765266, *9 (N.D. Ill. Dec. 6, 1995) ("The approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class") (collecting cases). Moreover, the percentage-of-the-fund method is the best method for recreating the market for TCPA attorneys, because TCPA attorneys generally work on contingency and are not paid by lodestar.

Here, Class Counsel's requested fee award is $6,350,000, which represents 33.3% of the Settlement Fund following the deduction of expenses of administration and the Incentive Awards. *Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014). As explained in detail below, this fee award is within the market rate for settlements of this size (determined using the formula this District has adopted), is within the range of fees approved in other similar TCPA class actions, and is fair and reasonable in light of the work

performed and the recovery secured on behalf of the Settlement Class Members.

A. Under The Percentage-Of-The-Fund Method For Calculating Attorneys' Fees—The Preferred Method In TCPA Class Actions—Class Counsel's Requested Fees Are Reasonable And Within The Market Rate.

When a representative party has created a "common fund" for, or has conferred a "substantial benefit" upon, an identifiable class, counsel for that party is entitled to an award of attorneys' fees from the fund. *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."); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 717 (7th Cir. 2001) (hereinafter "*Synthroid I*"); *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007). This rule "is based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton*, 504 F.3d at 691-92 (citing *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988)).

In determining an appropriate award in a common fund case, a court must endeavor to award "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." *Synthroid I*, 264 F.3d at 718. In other words, the percentage awarded should "approximate the market rate that prevails between willing buyers and willing sellers of legal services." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) (citations omitted); *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (holding that a court should attempt to "recreate the market" and determine what the parties would have agreed to *ex ante* (citation omitted)).

The Seventh Circuit has articulated three factors to help district courts estimate the appropriate market fee: "(1) actual fee contracts between plaintiffs and their attorneys; (2) data from similar cases where fees were privately negotiated; and (3) information from class-counsel

auctions." *Capital One*, 80 F. Supp. 3d at 796 (citing *Synthroid I*, 264 F.3d at 719); *see Taubenfeld*, 415 F.3d at 599. An application of these factors in this case shows that Class Counsel's requested fees are reasonable and well-earned.

1. Class Counsel's retainer agreements with Plaintiffs contemplate the requested fee award.

The first factor courts consider in determining the percentage of the fund that the class and class counsel would have agreed to *ex ante* is the actual agreed-upon amount in class counsel's retainer agreement. *Capital One*, 80 F. Supp. 3d at 796 (citing *Synthroid I*, 264 F.3d at 719). Here, Class Counsel's retainer agreements with Plaintiffs provide for a contingency fee of 33% of all monies recovered in addition to the costs of notice and administration. (McGuire Decl. ¶ 22; Zavareei Decl. ¶ 43.) Given the $20,000,000 Settlement Fund here, Plaintiffs' agreement with Class Counsel contemplates a fee award of at least $6.6 million in addition to the recovery of all costs and expenses—which is more than Class Counsel is requesting. This fee percentage is within the range of fees previously awarded in the Seventh Circuit. *See, e.g., Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("The typical contingent fee is between 33 and 40 percent"). And the agreements' percentage is in line with what Class Counsel are actually seeking, as Class Counsel's requested fee award amounts to 33.3% of the Settlement Fund less administration costs and Incentive Awards. Accordingly, the retainer agreements with Plaintiffs support a finding that the Settlement Class Members would have agreed to Class Counsel's requested fee in an *ex ante* negotiation. *See Capital One*, 80 F. Supp. 3d at 796; *see also Kolinek*, 311 F.R.D. at 500.

2. Class Counsel's requested fee was calculated using the sliding-scale formula this District has adopted.

The second and third *Synthroid I* factors direct courts to examine empirical evidence of fees determined during pre-suit negotiations and court-conducted class counsel auctions. However,

in the TCPA context, such data is "non-existent." *Capital One*, 80 F. Supp. 3d at 796. Accordingly, courts reviewing TCPA class action settlements have established the market by looking at how fees were awarded at the end of other, similar class actions. *Kolinek*, 31 F.R.D. at 501 ("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.") (citing *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 600 (7th Cir. 2005)).

To determine the appropriate market rate in TCPA cases like this one that involve large classes, judges in this District have examined data compiled from other common fund TCPA class action settlements. *Capital One*, 80 F. Supp. 3d at 798-804. Based on this data, courts in this District have adopted a "sliding scale" approach, under which the common fund is separated into tranches and class counsel is awarded a percentage of each tranche, with the percentage awarded decreasing as the size of the common fund increases. *Id.* at 804 n.16; *see also In re: Synthroid Mktg. Litig.*, 325 F.3d 974, 979 (7th Cir. 2003) (hereinafter "*Synthroid II*"). The sliding scale for the award of fees in TCPA class actions, prior to accounting for the risks associated with a particular case, is as follows:

Size of Recovery	**Percentage Awarded as Fees (not including adjustment for risk)**
First $10 million	30%
Next $10 million	25%
$20 - 45 million	20%
Excess above $45 million	15%

Capital One, 80 F. Supp. 3d at 804 n.13 (citing *Synthroid II*, 325 F.3d at 979). Judge Holderman's analysis in *Capital One* has since been adopted and applied by numerous other courts in this District, including in TCPA settlements similar to this one in terms of size and structure. *See, e.g.*,

Aranda v. Caribbean Cruise Line, Inc., No. 12 C 4069, 2017 WL 1369741, at *9 (N.D. Ill. Apr. 10, 2017); *Wilkins v. HSBC Bank of Nev., N.A.*, No. 14-cv-190, 2015 WL 890566, at *10 (N.D. Ill. Feb. 27, 2015); *Kolinek*, 311 F.R.D. at 501-02; *Craftwood Lumber Co. v. Interline Brands*, No. 11-cv-4462, 2015 WL 2147679, at *4 (N.D. Ill. May 6, 2015).

Once the appropriate market-based percentages are determined using the chart, the Seventh Circuit instructs district courts to calculate the base attorneys' fee amount by multiplying the percentages by the amount of money actually paid to the class. *Pearson*, 772 F.3d at 781; *Redman*, 768 F.3d at 630; *Capital One*, 80 F. Supp. 3d at 795 (quoting *Redman*, 768 F.3d at 630). Here, the Parties anticipate that the costs of notice and administration will not exceed approximately $897,000 (and may be lower). After subtracting these costs and the incentive awards pursuant to *Pearson* and *Redman*, the Settlement Fund provides direct relief to the class in the amount of $19,043,000. Applying this District's established formula from *Capital One* to this amount results in a reasonable attorneys' fees award—prior to any risk adjustment—of $5,260,750 (30% of the first $10 million plus 25% of the remaining $9,043,000).

3. The risks associated with this litigation justify an upward adjustment to the base fee award under this District's sliding-scale formula.

Given the substantial risk of non-payment that Class Counsel undertook in prosecuting this litigation against a defendant with substantial resources, strong legal defenses, and a willingness to litigate, Plaintiffs request a 6% upward adjustment to the first two tranches, justifying a risk-adjusted fee award of $6,350,000 (36% of the first $10 million plus just under 31% of the remaining $9,043,000). A 6% upward risk adjustment to the base percentages of the first two tranches is both reasonable and justified given the substantial risks Class Counsel assumed in prosecuting this litigation. *See, e.g.*, *Aranda*, 2017 WL 1369741, at *9 (applying a risk premium of 6% to the first tranche, 5% to the second, 4% to the third, and so on); *Capital One*, 80 F. Supp.

3d at 806 (finding that a 6% increase—equating to 36% of the first $10 million in the fund—was justified in a TCPA case that was only "slightly riskier" than a typical TCPA case); *Kolinek*, 311 F.R.D. at 502–03 (relying on *Captial One* and granting a 30% fee award with a 6% upward risk adjustment).

For example, in *Aranda*, also a large TCPA class action, the court applied this District's sliding scale formula and increased the benchmark percentages of each tranche to account for the case's riskiness. 2017 WL 1369741, at **6-9. The *Aranda* court found that "difficult legal and factual issues [] pose[d] potential obstacles to plaintiffs' success at the case's outset," including "[t]he difficulty in identifying class members" and that such risks, amongst other factors, supported its award of a risk premium. *Id*. at *7-8. The *Aranda* court ultimately calculated the fee as follows:

> Taking the award structure in *Gehrich*, *Wilkins*, *Craftwood*, and *Capital One* as a guide (30% for the first band, 25% for the second band, 20% for the third band, 15% for the fourth band), the Court applies a six-point premium to the first band, a five-point premium to the second band, a four-point premium to the third band, and a three-point premium to the fourth band. Thus, the Court awards class counsel 36% of the first $10 million ($3.6 million), 30% of the second $10 million ($3 million), 24% of the band from $20 million to $56 million ($8.64 million), and 18% of the remainder.

Id. at *9. Here, the facts of this case not only posed difficulties in identifying putative class members, they also presented strong defenses on the merits of Plaintiffs' claims. Throughout the litigation, Uber denied Plaintiffs' allegations and raised several legal defenses, any of which, if successful, would have resulted in the Plaintiffs and the proposed Settlement Class Members receiving no payment whatsoever. Had this case not settled, Uber would have vigorously contested Plaintiffs' motion for class certification in the California Litigation and proceeded to a second round of summary judgment briefing. And, in the Illinois action, Uber would have stood on its pending motion for judgment on the pleadings. Even if Uber's motion for judgment on the pleadings was denied, Uber would have similarly pursued summary judgment and opposed class

certification in the Illinois action as well. Certification in either case would have been challenging given the nature of the putative class members' claims and the difficulty of identifying the individuals who received misdirected calls.

For example, as to Settlement Class A, Uber asserted in the California Litigation that it is not the "maker" or "initiator" of the Refer-a-Friend messages, and therefore it cannot be held liable for those messages under the TCPA, because all Refer-a-Friend messages are initiated by Uber mobile app users. *See Warciak v. Nikil, Inc.*, No. 16 C 5731, 2017 WL 1093162 (N.D. Ill. March 23, 2017); *McKenna v. WhisperText*, No. 5:14-cv-00424-PSG, 2015 WL 5264750, at *4–5 (N.D. Cal. Sept. 9, 2015). For the same reason, Uber also argued that the messages were the product of "human intervention," and therefore were not sent using an ATDS. Uber also indicated that it intended to vigorously oppose certification of any Refer-a-Friend class, contending that individualized issues of consent made class-wide treatment improper.

As to Settlement Class B—the prospective drivers—Uber argued that the Settlement Class B Members gave express consent to receive text messages when they input their phone numbers as part of their incomplete driver applications. Although the Settlement Class B Members subsequently attempted to revoke their alleged prior consent, Uber has taken the position that these attempts at revocation were ineffective, because they were not done by a "reasonable means" and did not follow Uber's opt-out protocol. Uber also argued, as to Settlement Class B, that it did not use an ATDS to send the text messages, that an identifiable class could not be ascertained, and that individualized issues as to consent would bar certification. Indeed, the *Capital One* court cited these same risks in adding a risk premium to the *Capital One* class counsel's fee award.[5]

[5] *Capital One*, 80 F. Supp. 3d at 805 (noting risks posed by fact that "[s]ome customers provided Capital One with their cell phone numbers as their primary contact numbers, arguably waiving any right not to receive debt collection calls on their cell phone from Capital One," and that "at the outset of the litigation there was a serious question whether the Plaintiff's claims could meet Rule 23's manageability requirement

Finally, as to Settlement Class C, Uber has argued that the relevant messages were not sent using an ATDS, because they were targeted to specific individuals—albeit not the person who ultimately received the message. (*See generally* Dkt. 52.) Uber has maintained that there is no liability under the TCPA for such "misdirected" or "wrong number" messages. Uber further believes that no class action could be certified for Settlement Class C due to purported individualized issues.

The ATDS issue in particular posed substantial risk for all of the Settlement Class Members due to the ongoing regulatory uncertainty surrounding the FCC's interpretation of ATDS. Over the past several years, the FCC has frequently considered and ruled on petitions that exclude certain text messaging equipment from the TCPA's definition of an ATDS, including text messages sent in response to the actions of cellphone app users like those in this case. *See, e.g.*, *Wilkins*, 2015 WL 890566 (noting that "alternative interpretations" of the FCC Orders "will continue to add significant risk to large TCPA litigation") (citing *Capital One*, 80 F. Supp. 3d at 791). As several courts in this District have recognized, "the FCC frequently issues orders interpreting or reinterpreting the TCPA . . . the FCC's interpretations are binding on this Court . . . and prosecuting this litigation through discovery and a trial would only allow a greater opportunity for the FCC to issue" a ruling undermining Plaintiffs' and the class's claims. *See Kolinek*, 311 F.R.D. at 494. As such, the Settlement Class Members here ran the very real risk that FCC rulings could remove the types of text messages at issue in one or more of the Settlement Classes from the TCPA's purview, further undermining their claims.

In sum, although Plaintiffs believe their TCPA claims against Uber are strong, they

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given that Capital One would have to review its records to determine which class members provided consent through cardholder agreements, [and] which class members actually provided their cell phone numbers to Capital One . . . .").

recognize that Uber's liability was far from certain. (Zavareei Decl. ¶ 8; McGuire Decl. ¶ 13, 16, 21.) Class Counsel undertook representing the Plaintiffs in the Illinois Litigation and California Litigation knowing that they would face strong opposition from a defendant with substantial financial resources. (*Id.*) Class Counsel nonetheless worked tirelessly to obtain a large non-reversionary settlement fund and effective injunctive relief in the face of numerous significant defenses raised by Uber. As one defense-side TCPA partner at Manatt Phelps & Phillips LLP summarized, this is an excellent settlement, particularly in light of the difficulties involved in this particular case:

> By all accounts, ***$20 million is a very large settlement, especially considering the hurdles plaintiffs faced both in obtaining class certification and on the merits***. Individual issues of when, how and whether consent was revoked could easily predominate for the class of prospective Uber drivers who did not complete the application process. Furthermore, an autodialer may not have been used to send Vergara the offending texts, which were manually initiated by another user.[6]

Had Uber prevailed either on the merits or in defeating class certification, the Settlement Class Members would have received *nothing*. Class Counsel achieved an excellent result in obtaining a $20,000,000 Settlement Fund to be distributed as compensation to Settlement Class Members with valid claims. Class Counsel were also able to obtain significant prospective relief to materially reduce or prevent future unauthorized text messages.

The strength of Uber's defenses, and its willingness to pursue them, is further demonstrated by the number of recent TCPA cases against Uber that have failed. As explained above, last year, the Illinois Litigation and California Litigation were among roughly twelve separate TCPA cases against Uber before the JPML pursuant to a motion to transfer and consolidate under 28 U.S.C. § 1407. The JPML declined to consolidate the cases, and many of the individual cases were either

[6] *See* Christine M. Reilly, *Customer's Typo Costs Uber $20M in TCPA Dispute*, (Sept. 27, 2017), https://www.lexology.com/library/detail.aspx?g=8cd44c1b-6a84-4456-b327-d4307329c8d5 (emphasis added).

dismissed on the merits or stayed pending mandatory arbitration. Only the two firms representing Plaintiffs here were able withstand Uber's defenses and bear the risks and expenses of litigation.

Class Counsel achieved these results solely due to their extensive class action experience and significant efforts in prosecuting this litigation, including investigating and analyzing novel issues relating to Uber's automated text messaging system and how Uber dealt with attempts at revoking consent; conducting extensive discovery on Uber's messaging system and business practices; identifying potential Settlement Class Members; and productively mediating this case and negotiating the final Settlement Agreement. Given the significant efforts needed to secure the Settlement in this litigation, and the risks inherent in this type of class action, an upward risk adjustment to Class Counsel's base is reasonable and justified.

4. An upward adjustment to Class Counsel's base fee is also justified by the substantial monetary and nonmonetary benefits to the Settlement Class Members.

The requested risk enhancements are also justified due to the benefit this Settlement provides to the Settlement Class Members compared against the benefits of comparable TCPA settlements. As described in Plaintiffs' Motion for Preliminary Approval (Dkt. 85) the monetary and prospective relief provided under the Settlement is an exceptional result for the Settlement Classes, both in terms of what the Settlement Class Members could have hoped to recover at trial, and in relation to other similar TCPA class action settlements.

In many TCPA cases, class members recover less than $200. *See, e.g.*, *Kramer v. Autobytel, Inc.*, No. 10-cv- 2722, Dkt. 148 (N.D. Cal. Jan. 27, 2012) (providing for a cash payment of $100 to each class member); *Weinstein v. The Timberland Co.*, No. 06-cv-00484, Dkt. 93 (N.D. Ill. Dec. 18, 2008) (providing for a cash payment of $150 to each class member); *Satterfield v. Simon & Schuster, Inc.*, No. 06-cv-2893, Dkt. 132 (N.D. Cal. Aug. 6, 2010) (providing for a cash payment

of $175 to each class member); *Lozano v. Twentieth Century Fox Film Corp.*, No. 09-cv-6344, Dkt. 65 (N.D. Ill. Apr. 15, 2011) (providing for a cash payment of $200 to each class member).

However, in some cases, such as those involving the risks and strong legal defenses present here, the recovery is often far less. *See, e.g.*, *Capital One*, 80 F. Supp. 3d at 790 (providing a $34.60 recovery per claiming class member); *Arthur v. Sallie Mae, Inc.*, No. C10-0198JLR, 2012 WL 90101, at *3 (W.D. Wash. Jan. 10, 2012) (approving a settlement where class members were due to receive between $20 and $40); *Kazemi v. Payless Shoesource, Inc.*, No. 3:09-cv-05142, Dkt. 94 (N.D. Cal. Apr. 2, 2012) (providing a $25 voucher to each class member); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, No. 3:11-MD-02261, Dkt. 97 (S.D. Cal. Feb. 20, 2013) (providing a $20 voucher, which could be redeemed for $15 cash after expiration of nine-month waiting period).

Here, although the individual *pro rata* payments that will be made to Settlement Class Members who submit valid claims will ultimately depend on the number of claims filed, the monetary relief will still be fair and reasonable, and at least in the range of the other similar settlements cited above. Taking the current claims of approximately 62,000 Settlement Class Members, and assuming all claims are deemed valid, the per Settlement Class Member distribution would be more than $200. (Zavareei Decl. ¶ 41.) Assuming another 40,000 Settlement Class Members file valid claims (a very ambitious assumption), the payout to Settlement Class Members would still be more than $120.00. (*Id.*) Either result would be outstanding in light of the challenges and risks overcome in this hard-fought litigation.[7]

Ultimately, taken as a whole, this Settlement represents a strong result for the Settlement

[7] Even if large participation may ultimately lower the originally anticipated amount of individual payments, a high claims rate will nonetheless demonstrate that the Settlement Class Members have a positive view of the Settlement. *See, e.g.*, *Cruz v. Sky Chefs, Inc.*, No. C-12-02705 DMR, 2014 WL 7247065, at *5 (N.D. Cal. Dec. 19, 2014) (noting that a "robust" claims rate and a low number of opt-outs show a positive reaction on the part of the class). Indeed, over 62,000 potential Settlement Class Members have already filed claims to date, demonstrating that they believe their participation in the Settlement is worthwhile.

Class Members. Given the heightened risks and strong legal defenses present here, and compared to awards in similar TCPA actions, the requested risk enhancement of 6% per tranche, bringing the adjusted fee award to $6,350,000, is reasonable and fair in this instance. *See, e.g.*, *Aranda*, 2017 WL 1369741, at *9; *Capital One*, 80 F. Supp. 3d at 806; *Kolinek*, 311 F.R.D. at 502–03. Accordingly, the market rate and risk factors in this litigation confirm that the requested fee award is both reasonable and justified.

B. Class Counsel's Requested Fee Award Is Also Appropriate Under The Lodestar Method.

Although "consideration of a lodestar check is not an issue of required methodology," *Williams v. Rohm and Haas Pens. Plan*, 658 F.3d 629, 636 (7th Cir. 2011), and the weight of authority supports using the percentage-of-the-fund method for awarding attorneys' fees in large consumer cases involving a common fund, *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) ("The use of a lodestar cross-check is no longer recommended in the Seventh Circuit"), the fees sought here are also fair and reasonable under the lodestar method. An appropriate multiplier of 1.96 applied to Class Counsel's base lodestar, reflecting the high risk of taking on this litigation, the excellent result for the Settlement Class Members, and Class Counsel's experience, expertise, and time spent prosecuting this litigation, results in an adjusted lodestar in excess of Class Counsel's requested fee award of $6,350,000.[8] Accordingly, a lodestar check confirms the reasonableness of Class Counsel's fee request and fairly compensates them for obtaining an exceptional result in the face of significant risks.

1. The requested fee award reflects a reasonable rate under the lodestar method, because it comports with the prevailing market value of the time and resources that Class Counsel invested in this litigation.

[8] 1.96 multiplied by Class Counsel's base lodestar of $3,246,954.20, which includes the low end of Class Counsel's additional anticipated time, equals a risk-adjusted lodestar of $6,364,030.23.

Under the lodestar method, courts consider the number of hours expended by class counsel, class counsel's hourly rate, and the level of risk taken on by class counsel. *See Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010). The first step in determining the amount of attorneys' fees to award is to calculate the base rate by "multiplying a reasonable hourly rate by the number of hours reasonably expended." *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983)). The best evidence of a reasonable hourly rate is "the amount the attorney actually bills for similar work," or "if that rate can't be determined, then the district court may rely on evidence of rates charged by similarly experienced attorneys in the community and evidence of rates set for the attorney in similar cases." *Montanez v. Simon*, 755 F.3d 547, 553 (7th Cir. 2014); *see also Jeffboat LLC v. Director, Office of Workers' Comp. Programs*, 553 F.3d 487, 489 (7th Cir. 2009) (holding that reasonable hourly rate should be in line with the prevailing rate in the "community for similar services by lawyers of reasonably comparable skill, experience and reputation") (quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984)).

Here, as detailed in the attached Declarations of Myles McGuire and Hassan Zavareei, Class Counsel's rates are comparable to those charged by attorneys with similar backgrounds and experience, and are commensurate with judicially approved rates in class actions in this District and in the Northern District of California (where the California Litigation was originally pending). (McGuire Decl. ¶¶ 23-25); (Zavareei Decl. ¶¶ 44-45); *Spano*, 2016 WL 3791123, at *4 (approving class counsel's rates of $850 per hour for attorneys with 15–24 years of experience; $612 per hour for attorneys with 5–14 years of experience; and $460 per hour for attorneys with 2–4 years of experience); *Abbott v. Lockheed Martin Corp.*, No. 06–cv–701, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) (approving similar rates) *Reid v. Unilever U.S., Inc.*, No. 12 C 6058, 2015 WL 3653318, at *16 (N.D. Ill. June 10, 2015) (approving $650 per hour for a partner representing

plaintiffs in consumer class actions)*; see also Civil Rights Educ. and Enf't Ctr. v. Ashford Hosp. Trust, Inc.*, No. 15-cv-00216, 2016 WL 1177950, at *5 (N.D. Cal. Mar. 22, 2016) (requested hourly rates of $900, $750, $550, $500, $430, and $360 for attorneys and $225 for paralegals were "in line with the market rates charged by attorneys and paralegals of similar experience, skill, and expertise practicing in the Northern District of California."); *G.F. v. Contra Costa County*, No. 13-cv-03667-MEJ, 2015 WL 7571789, at *14 (N.D. Cal. Nov. 25, 2015) (hourly rates between $175 per hour and $975 per hour, which included "an hourly rate of $845-$975 for two of the most senior and experienced litigators," were "in line with the overall range of market rates for attorneys and for litigation support staff of similar abilities and experience" in the Northern District of California between 2013 and 2014); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M-07-1827-SI, MDL No. 1827, 2013 WL 1365900, at *9 (N.D. Cal. Apr. 3 2013) (finding individual billing rates up to $1,000 per hour reasonable for the lead class counsel in an antitrust case).

Class Counsel's rates are also justified by their experience and expertise in litigating class actions, including many cases involving consumer protection, consumer privacy, and TCPA violations. (McGuire Decl. ¶¶ 6-7; Zavareei Decl. ¶¶ 2, 6, 46.) Further, numerous state and federal courts, including courts in this District, have previously approved Class Counsel's then-current hourly rates as reasonable. (McGuire Decl. ¶ 24; Zavareei Decl. ¶ 45).[9] The fact that many other courts have approved Class Counsel's hourly rates further supports the rates' reasonableness in the Chicago market. *See People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307,

[9] The hourly rates shown for the attorneys at Tycko & Zavareei LLP are the firm's 2017 rates charged as delineated by the Adjusted Laffey Matrix (http://www.laffeymatrix.com/), which provides market rates for attorneys working in the Washington, D.C. and Baltimore areas. Although the Adjusted Laffey Matrix is updated annually, courts have awarded attorneys' fees consistent with the Adjusted Laffey Matrix to Tycko & Zavareei LLP in a number of cases, including in the Northern District of California, where the California Litigation was pending. (*See* Zavareei Decl. ¶ 45); *see also, e.g.*, *Kumar v. Salov North America Corp.*, No. 14-CV-2411-YGR, 2017 WL 2902898 (N.D. Cal. July 7, 2017).

1312 (7th Cir. 1996) ("[R]ates awarded in similar cases are clearly evidence of an attorney's market rate.").

The number of hours Class Counsel worked is also reasonable given the length of the litigation, the complexity of the two cases, and the size of the Settlement Fund recovered for the Settlement Class Members. As stated in the McGuire Declaration and Zavareei Declaration, Class Counsel have logged 5,506.55 hours in uncompensated time in order to achieve the Settlement in this case, and to-date have billed $3,151,954.20 in attorneys' fees. (McGuire Decl. ¶¶ 25-27; Zavareei Decl. ¶¶ 35-36, 29.) Further, Class Counsel anticipate expending additional time and effort through final approval to respond to inquiries from Settlement Class Members, respond to any potential objectors, prepare final approval papers, review claims, and advocate on behalf of the Settlement Class Members in the event a claim is wrongfully denied. (*Id.*) Class Counsel conservatively estimate that the lodestar for these additional efforts will be approximately $95,000–$190,000, resulting in a total base lodestar of at least $3,246,954.20. (*Id.*)

2. The risks of this litigation and the exceptional relief obtained on behalf of the Settlement Class Members justify a multiplier of 1.96.

The second step of the lodestar analysis is the application of a risk multiplier to the base amount. If a court decides to apply the lodestar method in a contingency fee case, then "a risk multiplier is not merely available . . . but mandated," because "counsel had no sure source of compensation for their services." *Florin I*, 34 F.3d at 565 (internal quotation omitted). "The need for [a risk multiplier] adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent." *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, (7th Cir. 1992). The amount of the multiplier is, like the percentage of the fund, "an effort to mimic market forces." *Florin v. Nationsbank of Ga., N.A.*, 60 F.3d 1245, 1247 (7th Cir. 1995) (hereinafter "*Florin II*").

To set the multiplier, "[a] court must assess the riskiness of the litigation by measuring the probability of success of this type of case at the outset of the litigation." *Florin I*, 34 F.3d at 565 (emphasis in original). Although coming up with the exact number of a multiplier "is inevitably somewhat subjective," *id.*, the Seventh Circuit has held that "[t]he multiplier is determined by dividing 1 by the probability of success," *Florin II*, 60 F.3d at 1248 n.3. The probability of success depends on a number of factors. For example, some cases are less risky because they come on the heels of a government investigation or criminal prosecution.

Class Counsel's current lodestar of $3,246,954.20 requires a multiplier of less than 1.96 to reach the $6,350,000 in attorneys' fees requested. Using the *Florin II* formula, a multiplier of 1.96 implies a 51% chance of success at the outset of the litigation (1/1.96=.51). At the beginning of this litigation, estimating a 51% chance of success would have been reasonable—even conservative—due to the risks inherent in this case and strength of Uber's defenses.

First, this case did not begin with any help from a government investigation or other outside source. Class Counsel and the named plaintiffs investigated and prosecuted this case on their own. Second, as explained above, Uber disputed whether any of the text messages at issue were sent with an ATDS, and it planned to raise a consent defense to virtually all of the Settlement Class Members' claims. Uber also intended to oppose certification on multiple grounds, including whether certification would be manageable and whether individualized issues would predominate over common questions.

The requested multiplier is not only necessary to appropriately compensate Class Counsel for the risk involved in this litigation, it is also in line with multipliers in other cases in the Seventh Circuit. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) ("Multipliers anywhere between one and four have been approved") (internal citation omitted); *Spano*, 2016 WL 3791123,

at *3 ("In risky litigation such as this, lodestar multipliers can be reasonable in a range between 2 and 5") (collecting cases). This is especially true when compared to settlements with a similar recovery. Courts regularly approve settlements with higher multipliers than Class Counsel's request here, even for cases that are not as risky. Given the high risk involved in this case, a multiplier of 1.96 is consistent with the market rate and well within the range of attorneys' fees awarded by numerous other courts. *Id.*

The exceptional relief obtained on behalf of the Settlement Class Members also warrants Class Counsel's requested multiplier. Given the risks inherent in this litigation and the many hurdles Class Counsel overcame, this Settlement is an outstanding result in terms of the total monetary compensation made available to the Settlement Class Members, the anticipated amount of per-Class Member payments, and the substantial prospective relief. *See Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, 2014 WL 7781572, at *2 (N.D. Ill. Oct. 22, 2014) ("Having shouldered these risks, and having achieved outstanding results for the Class, Class Counsel have earned their requested multiplier [of 1.97]").[10]

In sum, although the lodestar method is not particularly well-suited to evaluating fee requests in a common fund case like this one, Class Counsel's requested fee is reasonable even if the Court were to use the lodestar method. Class Counsel's base lodestar is appropriate and reasonable given the efforts expended, the results obtained, and the relief made available to the Settlement Class Members. Further, the risks taken in prosecuting this case coupled with the

[10] The outstanding results here distinguish this case from other cases like *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, 867 F.3d 791 (7th Cir. 2017), where courts have declined to apply a risk multiplier. In *Sears*, for example, class counsel sought a fee award of approximately $6 million, even though the class members were estimated to receive no more than $900,000. *Id.* at 792. Given that the fees sought vastly exceeded the recovery for the class, the *Sears* court found that class counsel's requested fees were unreasonable and that no multiplier was justified. *Id.* at 793 ("the pre-multiplier figure sought by class counsel [is] already thrice the damages awarded the class").

success obtained for the Settlement Class Members amply justify the modest multiplier requested. As such, regardless of whether this Court uses the percentage-of-the-fund method or the lodestar method, the requested attorneys' fee award is fair, reasonable, and justified.

C. The Court Should Also Award Class Counsel's Reasonable Litigation 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). Reimbursable expenses include expert fees; travel; long distance and conference telephone; postage; delivery services; and computerized legal research. *See, e.g.*, *In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 570 ("clear error" to deny reimbursement of Lexis and Westlaw expenses because "the arms' length market reimburses" such expenses); *Beesley*, 2014 WL 375432, *3 (granting reimbursement from common fund for litigation expenses including "expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation."); *City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 910 (S.D. Ill. 2012) (granting reimbursement of expenses including "experts' fees, other consulting fees, deposition expenses, travel, and photocopying costs").

Here, Class Counsel have incurred $205,732.48 in reimbursable expenses related to filing, appearances, discovery, subpoenas, experts, mediation, travel, copying, case administration,

postage, delivery services, computerized legal research, and transcripts. (McGuire Decl. ¶ 27; Zavareei Decl. ¶ 36.) 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 Classes, and they are typical of expenses regularly awarded in large-scale class actions. Accordingly, Class Counsel request that the Court approve as reasonable the agreed-upon expenses in the amount of $205,732.48.

D. The Agreed-Upon Incentive Awards Are Warranted And Are In Line With Other Incentive Awards Approved By Other Courts In This District.

The requested Incentive Awards of $10,000 for each Class Representative's service to the Settlement Class Members are also fair and reasonable and warrant approval. 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*, 142 F.3d at 1016; *Spano*, 2016 WL 3791123, at *4. In deciding whether an incentive award is reasonable, "relevant factors include 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." *Cook*, 142 F.3d at 1016.

The factors warranting incentive awards are satisfied here. Each Plaintiff has worked alongside Class Counsel and remained actively engaged through every stage of this litigation—from assisting with the initial investigation of their claims, reviewing the complaint and other filings, consulting with Class Counsel on numerous occasions and providing Class Counsel with the information needed to pursue their and the Settlement Class Members' claims, and responding to requests for additional information throughout the settlement process. (McGuire Decl. ¶¶ 29-

30; Zavareei Decl. ¶ 48.) Each of the Plaintiffs in the California litigation responded to written discovery from Uber. (Zavareei Decl. ¶ 49.) Further, Plaintiffs Lathrop, Bartolet, Grindell and Reilly sat for depositions, and each Plaintiff was prepared to testify in court in the event the cases proceeded to trial. (*Id.* ¶ 50.)

Although no award of any sort was promised to Plaintiffs prior to or during the litigation, Plaintiffs nonetheless contributed their time and effort in pursuing their own TCPA claims and serving as representatives on behalf of the Settlement Class Members—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (McGuire Decl. ¶ 32; Zavareei Decl. ¶ 51.) Moreover, agreeing to serve as class representatives meant that Plaintiffs publicly put their names on this litigation, subjecting them to "scrutiny and attention," which by itself "is certainly worthy of some type of remuneration." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 600-01 (N.D. Ill. 2011). Were it not for Plaintiffs' willingness to pursue their claims on a classwide basis and their efforts and contributions to the litigation, including participating in and monitoring the cases through settlement and approval, the substantial benefits to the Settlement Class Members afforded under the Settlement Agreement would not exist.

The proposed Incentive Awards amount to less than 0.3% of the total Settlement Fund and are well within the range of awards approved in similar class action settlements. *See, e.g.*, *Craftwood*, 2015 WL 1399367, at *6 (finding that $25,000 incentive award was reasonable and "in line with incentive fees awarded by other courts in this district"); *Aranda*, 2017 WL 1369741, at *10 (awarding $10,000 incentive awards to each of the class representatives); *see Martin v. Reid*, 818 F.3d 302, 306 (7th Cir. 2016) (affirming approval of settlement agreement with $10,000 incentive award); *Spano*, 2016 WL 3791123, at *4 (approving $10,000 incentive awards).

Compensating Plaintiffs for the risks and efforts they undertook on behalf of the Settlement Class Members is especially appropriate given the exceptional results obtained. No objectors have raised an objection to the requested Incentive Awards to date. Accordingly, incentive awards of $10,000 to each Plaintiff are reasonable, justified by Plaintiffs' time and effort in this case, and should be approved.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the requested fee award of $6,350,000, award Class Counsel their reasonable litigation expenses of $205,732.48, approve the requested Incentive Awards of $10,000 to each Class Representative, and award such other and further relief the Court deems equitable and just.

Dated: November 15, 2017

Respectfully submitted,

MARIA VERGARA, JAMES LATHROP, SANDEEP PAL, JENNIFER REILLY, JUSTIN BARTOLET, and JONATHAN GRINDELL, individually and on behalf of classes of similarly situated individuals

By: /s/ *Paul T. Geske*
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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2017, I electronically filed the foregoing *Plaintiffs'* Unopposed *Motion for Approval of Attorneys' Fees, Expenses, and Incentive Awards* with the Clerk of the Court using the CM/ECF system. A copy of said document will be electronically transmitted to all counsel of record.

/s/ *Paul T. Geske*