**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, CHANCERY DIVISION**

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| JUDITH FLAHIVE, individually and on behalf of a class of similarly situated individuals,<br><br>*Plaintiff*,<br><br>v.<br><br>INVENTURUS KNOWLEDGE SOLUTIONS, INC., a Delaware corporation,<br><br>*Defendant*. | ) | Case No. 2017-CH-07570<br><br>Hon. Anna Helen Demacopoulos |

**PLAINTIFF'S MOTION & MEMORANDUM FOR**
**APPROVAL OF ATTORNEY FEES, EXPENSES, & INCENTIVE AWARD**

Plaintiff, Judith Flahive, by and through her attorneys, and pursuant to 735 ILCS 5/2-801 and this Court's August 30, 2017 Preliminary Approval Order, hereby moves for an award of attorney fees and expenses for Class Counsel, as well as an incentive award to Plaintiff as the Class Representative in connection with the class action Settlement with Defendant, Inventurus Knowledge Solutions, Inc. ("IKS" or "Defendant"). Defendant does not object to the relief sought herein. In support of this Motion, Plaintiff submits the following memorandum of law.

Dated: September 29, 2017

Respectfully submitted,

JUDITH FLAHIVE, individually and on behalf of the Settlement Class

By: /s/ *Paul T. Geske*
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## I. INTRODUCTION

The Class Action Settlement[1] that Class Counsel has achieved in this case is an exceptional result for Settlement Class Members. It establishes a Settlement Fund of $1,200,000 to provide each Settlement Class Member who files a valid, timely claim with up to $200 in cash for having received automated phone calls in violation of the federal Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227 *et seq*. In addition to the financial benefit to the Settlement Class Members, the Settlement also includes terms that provide significant non-monetary relief designed to minimize or eliminate the allegedly unlawful calls at issue in this case.

Notice of the Settlement through Publication Notice and Direct Notice commenced on September 12, 2017 and has successfully reached thousands of potential Settlement Class Members. To date, the Settlement Administrator has commenced sending Direct Notice by email to over 32,000 potential Settlement Class Members, and the Publication Notice has appeared in USA Today and online through the Settlement Website reaching many more individuals. As of the filing of this Motion, claims have already been filed and no Settlement Class Member has objected to the proposed Settlement.

With this Motion, Class Counsel request a fees and costs of less than 29% of the total Settlement Fund made available to the Settlement Class, amounting to $345,000. 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 Illinois law and fee awards granted in other cases in the Circuit Court of Cook County and the Northern District of Illinois, and is also reasonable given the time and costs Class Counsel have committed to resolving this

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

litigation for the benefit of the Settlement Class Members.

Both Class Counsel and the Class Representative devoted significant time and effort to the prosecution of the Settlement Class Members' claims, and their efforts have yielded an extraordinary benefit for thousands of consumers nationwide. The requested attorneys' fees and costs and Incentive Award are amply justified in light of the investment, risks, and excellent results obtained for the Settlement Class Members. Plaintiff and Class Counsel respectfully request that the Court approve attorneys' fees and costs of $345,000, and the agreed-upon Incentive Award of $2,500.00 for Plaintiff as Class Representative.



## II. BACKGROUND

### A. The Telephone Consumer Protection Act.

Seeking to protect consumers against a growing flood of invasive and unwanted automated calls, Congress enacted the Telephone Consumer Protection Act to "ban all autodialed calls . . . [to] cellular phones . . . unless the called party consents to receiving them, or unless the calls are made for emergency purposes[.]" S. Rep. No. 102-178, at 6 (1991); *see also Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 742 (2012). Based on an extensive legislative record, Congress found that consumers "consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy," and that "[b]anning such automated or prerecorded calls . . . except when the receiving party consents to receiving the call . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Pub. L. No. 102-243, § 2(10), 2(12), 105 Stat. 2394 (1991); *Mims*, 132 S. Ct. at 745 ("Congress reported, '[m]any consumers are outraged over the proliferation of intrusive, nuisance [telemarketing] calls[.]").

The problems that Congress sought to address with the TCPA have grown worse in recent

years as cellphones have become ubiquitous, and as many people carry their cellphone on them at all times. *See Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831, 842 (Ariz. Ct. App. 2005). Unwanted text messages reach into individuals' pockets and can create an interruption at any moment—at home, at work, in the car, on vacation, or during private moments. *Id.* In addition to the annoyance and aggravation that necessarily accompanies the receipt of unwanted automated calls, in some situations they can even cause the called parties to incur costs, as many consumers have cellphone service plans that require them to pay for incoming calls, or otherwise incur a usage deduction out of a limited amount of monthly minutes. And even when recipients ask not to receive such calls, callers often fail to honor such requests.

To address the problems associated with automated calls, Section 227(b)(1) of the TCPA prohibits companies from making automated calls to an individual's cellphone number without the recipient's prior express consent. 47 U.S.C. § 227(b)(1); *Thrasher-Lyon v. Illinois Farmers Ins. Co.*, 861 F. Supp. 2d 898, 904-905 (N.D. Ill. 2012). Prior express consent is an affirmative defense, for which the defendant bears the burden of proof. *Sengenberger v. Credit Control Services, Inc.*, No. 09-cv-2796, 2010 WL 1791270, at *4 (N.D. Ill. May 5, 2010) ("if the[re is a] question as to whether express consent was provided, the burden will be on the [defendant] to show it obtained the necessary prior express consent." (internal citation omitted)). The FCC and numerous courts have also clarified that consumers may revoke any consent that was previously given, and any calls made after revocation are unlawful. *Declaratory Ruling & Order, In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, ¶ 55 (2015) ("we clarify that consumers may revoke consent through any reasonable means.").

**B. Factual & Procedural Background.**

Defendant IKS provides calling services to companies in the healthcare industry, including

automated payment-reminder calls to its clients' customers. IKS utilizes an automated calling service to transmit automated or prerecorded voice messages to its clients' customers that remind its clients' customers about payments due on their accounts. However, in carrying on its automated calling activities, IKS failed to implement effective limitations and safeguards in advance of making automated calls to ensure that it complies with the TCPA by only making such calls to individuals who have consented to receive them. As a result, IKS routinely makes automated calls to cellphones belonging to individuals who never gave valid consent to be called by IKS or its clients.

Additionally, IKS often fails to effectively honor and process customers' requests to discontinue robocalls, and continues to make such calls even after the called parties complain or, in Plaintiff's case, attempt to expressly revoke consent. Similarly, IKS often makes erroneous payment reminder calls to consumers who have no outstanding debt whatsoever, due to IKS's failure to obtain up-to-date patient information from its clients and to acknowledge when a customer submits full payment on a debt.

In or about March 2015, IKS made automated calls to Plaintiff to remind her about a payment she owed to a healthcare company. Upon receiving these calls, Plaintiff communicated to Defendant that she no longer wanted to receive such automated calls. Despite this communication, however, she continued to receive numerous calls from Defendant. Plaintiff thereafter initiated this lawsuit, which the Parties agreed to attempt to resolve through mediation following initial discovery practice and the conclusion of previous litigation involving similar claims against Defendant.

To that end, Plaintiff's counsel met with Defendant's outside counsel and corporate representatives for a full-day mediation session with the Hon. Morton Denlow (ret.) of JAMS, who

has expertise in class settlements. After contentious negotiations, no settlement agreement was reached, but there was an agreement to continue to explore the possibility of resolving the case. The Parties' counsel subsequently had numerous telephone discussions to explore the details of a potential class-wide resolution, and the Parties were finally able to reach an agreement in principle to resolve the case after months of negotiation. Following formal mediation, counsel for Plaintiff and for IKS also expended significant efforts in conducting further confirmatory inquiry regarding IKS's automated dialing operation, identifying potential Settlement Class Members, and finalizing the form of notice as well as the scope of the release and settlement benefits. Eventually, these discussions culminated in the class action Settlement Agreement.



## III. THE SETTLEMENT

### A. Monetary And Non-Monetary Relief To The Settlement Class Members.

Class Counsel's prosecution of Plaintiff's claim and this litigation has culminated in a Class Action Settlement that provides substantial monetary relief to the Settlement Class Members, as well as significant prospective relief through changes to IKS's practices that will greatly reduce or eliminate further intrusions on the privacy of the Settlement Class Members and the public generally. The Settlement establishes a $1,200,000 cash Settlement Fund. (Settlement Agreement, Ex. A, at § 1.40). Each Settlement Class Member who submits a valid, timely Claim will be entitled to a cash payment from the Settlement Fund, up to $200.00, after payments for notice and administration costs, Court-approved attorneys' fees and expenses, and any Court-approved incentive award to the Class Representative. (*Id.* at § 2.3(b)).[2]

The Settlement also provides significant non-monetary relief of an injunctive nature to the

[2] The total payment to each Settlement Class Member will ultimately depend on the number of valid claims submitted. If the number of valid claims filed would exhaust the Settlement Fund, each Settlement Class Member's individual payment will be reduced *pro rata*.

Settlement Class and the public. IKS has agreed to implement material changes to its business practices in order to minimize, if not effectively eliminate, misdirected automated calls and improve company policies for honoring do-not-call requests. (Ex. A, at § 2.8.) These changes will result in significantly fewer misdirected, unauthorized automated calls to individuals such as Plaintiff who had never provided their phone numbers to IKS or its customers and/or had revoked any consent previously provided. Furthermore, IKS has agreed to consult best practices in the automatic calling industry to further avoid misdirected calls prospectively.

### B. Pursuant To The Settlement Agreement's Notice Plan, Direct Notice Has Been Sent To More Than 32,000 Individuals.

Under the Settlement Agreement's Notice Plan, which has already gone into effect, Direct Notice is being provided by email to more than 32,000 individuals who may be eligible to file a claim. (*See* Declaration of Evan M. Meyers, ¶ 16, hereinafter "Meyers Decl."). In addition, the Publication Notice has appeared in USA Today and reached thousands of other individuals across the United States in the major regions where Defendant and its clients operate. The Settlement Website is online, and to date, there have already been hundreds of unique visits to the website. Of the tens of thousands of potential Settlement Class Members who have received notice, none have filed an objection.

## IV. ARGUMENT

### A. The Court Should Award Class Counsel's Requested Attorneys' Fees.

Pursuant to the Settlement, Class Counsel seek attorney fees, inclusive of costs, in the amount of $345,000, which amounts to less than 29% of the Settlement Fund. (Settlement Agreement, Ex. A, at § 8.1). This proportion is well within the range of fees approved in other similar TCPA class actions, and is fair and reasonable in light of the work performed by Class Counsel and the recovery secured on behalf of the Settlement Class Members. It is well-settled

that attorneys who, by their efforts, create a common fund for the benefit of a class are entitled to reasonable compensation for their services. *See Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261, 265 (2011) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a 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.").

In cases where, as here, a class action settlement results in the creation of a settlement fund, "[t]he Illinois Supreme Court has adopted the approach taken by the majority of Federal courts on the issue of attorney fees[.]" *Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 13-14 (1st Dist. 1992) (citing *Fiorito v. Jones*, 72 Ill. 2d 73 (1978)). That is, where "an equitable fund has been created, attorneys for the successful plaintiff may directly petition the court for the reasonable value of those of their services which benefited the class." *Id.* This rule "is based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) (citing *Skelton v. Gen. Motors Corp*., 860 F.2d 250, 252 (7th Cir. 1988)).

In deciding an appropriate fee in such cases, "a trial judge has discretionary authority to choose a percentage[-of-the-fund] or a lodestar method[.]" *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235, 243–44 (1995)). Under the percentage-of-the-fund approach, the attorneys' fees awarded are "based upon a percentage of the amount recovered on behalf of the plaintiff class." *Brundidge*, 168 Ill. 2d at 238. Alternatively, when applying the lodestar approach, the attorneys' fees to be awarded are calculated by determining the total amount of hours spent by counsel in order to secure the relief obtained for the class at a reasonable hourly rate, multiplied by a "weighted" "risk multiplier" that takes into account various factors such as "the contingency nature

of the proceeding, the complexity of the litigation, and the benefits that were conferred upon the class members." *Id.* at 240. Here, the requested fee award is reasonable under either method.

### B. Under The Percentage-Of-The-Fund Method Of Calculating Attorney Fees—The Preferred Method In TCPA Class Actions—Class Counsel's Requested Fees Are Reasonable.

The vast majority of courts presiding over class action settlements in suits brought pursuant to the TCPA have adopted the percentage-of-the-fund method in determining the appropriate amount of attorneys' fees to award class counsel. *See, e.g., In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) (finding that even though "in common fund cases like this one, district courts have discretion to choose either the lodestar or a percentage approach to calculating fees . . . [T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class"); *Sabon*, 2016 IL App (2d) 150236, at ¶ 59 (affirming trial court's award of attorneys' fees in TCPA suit of 33% of the settlement fund); *Sterk v. Path, Inc.*, No. 2015-CH-08609 (Ill. Cir. Ct. Cook Cnty) (Mikva, J.) (granting final approval and awarding class counsel 35% of settlement fund in a TCPA class action); *Sawyer v. Stericycle, Inc.*, No. 2015-CH-07190 (Ill. Cir. Ct. Cook Cnty) (Martin, Jr., J.) (granting final approval awarding class counsel 33% of settlement fund in a TCPA class action); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500 (N.D. Ill. 2015) ("[t]he Court agrees with [plaintiff's] counsel that the fee award in this case should be calculated based on a percentage-of-the-fund method"); *Wright v. Nationstar Mortg. LLC*, No. 14-cv-10457, U.S. Dist. LEXIS 115729, at *53 (N.D. Ill. Aug. 29, 2016) ("the baseline rate in TCPA common fund cases is 30% of the first $10 million of recovery") (citing *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 980 (7th Cir. 2003)); *Landsman & Funk, P.C. v. Skinder-Strauss Associates*, 639 F. App'x 880, 883 (3d Cir. 2016) (approving a "one-third percentage fee of the settlement fund").

In addition, applying the percentage-of-the-fund approach promotes early resolution of the matter as it disincentivizes protracted litigation driven solely by counsel's efforts to increase their lodestar. *Brundidge*, 168 Ill.2d at 242. For this reason, a percentage-of-the-fund method best aligns the interests of the class and its counsel, as class counsel are encouraged to seek the greatest amount of relief possible for the class rather than simply seeking the greatest possible amount of attorney time regardless of the ultimate recovery obtained for the class.

By contrast, a lodestar approach encourages significant inefficiencies and further litigation as the parties and the court have to review the extensive billing records produced and determine the reasonableness of the time spent on any particular task and whether it actually furthered the litigation. *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 924 (1st Dist. 1995) ("Percentage analysis approach eliminates the need for additional major litigation . . . as a result of plaintiffs' request for attorneys' fees . . . nearly half of the 11,000 page record in this case is devoted to fee litigation.").

Applying a percentage-of-the-fund approach is also generally more appropriate in cases like this one because it best reflects the fair market price for the legal services provided by the class counsel. *See Ryan*, 274 Ill. App. 3d at 923 (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255–56 (3d. Cir. 1985)); *Sutton*, 504 F.3d at 693 (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered).

Further, the percentage-of-the-fund method would most fairly compensate Class Counsel for the significant time and resources expended in obtaining relief for the Settlement Class Members, while taking into account the substantial risk of non-payment in bringing this litigation as well as the magnitude of the recovery achieved for the Settlement Class Members. This

approach also accurately reflects the contingent nature of the fees negotiated between Class Counsel and Plaintiff, who agreed *ex ante* that up to 33% of any settlement fund plus reimbursement of costs and expenses would represent a fair award of attorneys' fees from a fund recovered for the class. (*See* Meyers Decl., ¶ 17).

Accordingly, the Court should adopt and apply the percentage-of-the-fund approach here. Under this approach, Class Counsel's requested attorney fees are reasonable in light of the work performed and the recovery secured for the Settlement Class Members.

***i. The requested attorney fees amount to 28.75% of the Settlement Fund—a percentage well within the range found reasonable by other courts.***

The requested fee award of $345,000 is 28.75% of the Settlement Fund. This percentage is well within—and actually below—the range of attorney fee awards routinely found reasonable by other courts in class action cases. *See, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599 (N.D. Ill. 2011) (same); *Sabon*, 2016 IL App (2d) 150263, at ¶¶ 24, 59, 61, 65 (affirming over objections an attorney fee award of 33% under the "one-third percentage-of-the-award method" in a TCPA case); *Ryan*, 274 Ill. App. 3d at 924 (upholding an attorneys' fee award of 33% of the fund); *Sterk*, No. 2015-CH-08609 (approving attorneys' fee award in TCPA case of 35% of the fund); *Sawyer*, No. 2015-CH-07190 (approving attorneys' fee award in TCPA case of 33% of the fund); *Meyenburg v. Exxon Mobil Corp.*, No. 05-cv-15, U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); *Schulte*, 805 F.Supp.2d at 599 ("a number of fee awards in common-fund cases from within the Seventh Circuit

show that an award of 33.3% of the settlement fund is within the reasonable range"); *Retsky*, U.S. Dist. LEXIS 20397, at *10 ("a customary contingency fee would range from 33 1/3% to 40%").

***ii. The requested percentage of attorney fees is appropriate given the significant risks involved in continued litigation.***

The attorneys' fees sought in this case are particularly reasonable in light of the risks of bringing the litigation and the relief that Class Counsel has obtained for the Settlement Class. *See Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding an attorneys' fees award of one-third of the fund recovered in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]"); *Ryan*, 274 Ill. App. 3d at 924 (noting the trial court's decision to award class counsel 33 1/3% of the common fund was reasonable given the funds recovered for the class and the contingency risk).

As noted in *Capital One*, "the average TCPA case carries [just] a 43% chance of success." 80 F. Supp. 3d at 806. However, the prosecution of this case was particularly risky given the numerous defenses presented by IKS—both on the merits and at class certification. Specifically, IKS has taken the position that no class can be certified on the basis of misdirected calls or calls placed to those who attempted to revoke consent, due to the number of individualized issues involved. Moreover, there is an appeal pending before the D.C. Circuit Court of Appeals challenging whether "misdirected" calls such as the ones received by some of the Settlement Class Members are even actionable under the TCPA. *See ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir.). As such, this litigation presented multiple risks to Plaintiff's ultimate success, both on the merits and on class certification, and IKS would have strenuously defended the claims asserted had this Settlement not been reached.

***iii. The substantial monetary and non-monetary relief obtained on behalf of the Settlement Class Members further justify the requested percentage of attorney fees.***

Despite the significant risks inherent in any further litigation, Class Counsel were able to obtain an excellent result for the Settlement Class Members. As stated above, the Settlement Agreement provides for the creation of a $1,200,000 cash Settlement Fund, from which Settlement Class Members can submit claims for a cash award of up to $200.00. (Settlement Agreement, Ex. A, at §§ 1.40, 2.3(b)). The cash award being made available to the Settlement Class Members is on the high end of the range of class compensation in other TCPA settlements approved by courts. *See, e.g., Sabon*, 2016 IL App (2d) 150236, at ¶ 59 (affirming award of attorneys' fees of 33% of a $7.6 million common fund from which class members received approximately $50 per claim); *Kolinek*, 311 F.R.D. at 494, 503 (awarding attorneys' fees award of 36% of an $11 million common-fund from which class members received approximately $30 per claim); *Wright*, 2016 U.S. Dist. LEXIS 115729, at *27, *62 (awarding attorneys' fees award of 30% of a $12.1 million common-fund from which class members received $45 each); *Murray v. Bill Me Later, Inc.*, No. 12-cv-4789, (N.D. Ill. 2014) (awarding attorneys' fees award of 33% of a $9.9 million common-fund from which class members received approximately $135 per claim).

In addition to the monetary compensation that Class Counsel have obtained for the Settlement Class Members, the Settlement Agreement also provides for substantial prospective relief. As stated above, under the terms of the Settlement Agreement negotiated by Class Counsel, IKS has agreed to implement material changes to its business practices in order to minimize, if not effectively eliminate, misdirected automated calls and improve company policies for honoring do-not-call requests. (Ex. A, § 2.8). These changes will result in significantly fewer misdirected and unauthorized automated calls to individuals such as Plaintiff. Furthermore, IKS has agreed to

consult automatic calling industry best practices to further avoid misdirected calls prospectively. Given the scope of IKS's telecommunications operations and the thousands of customers that it calls across the country, implementing these changes has and will continue to require considerable efforts and expenditures by IKS, and will benefit consumers.

The non-monetary relief obtained by Class Counsel in this case further justifies the reasonableness of the attorneys' fee being sought here. *See Spano v. Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, at *1 (S.D. Ill. Mar. 31, 2016) ("A court must also consider the overall benefit to the Class, including non-monetary benefits, when evaluating the fee request. . . . This is important so as to encourage attorneys to obtain meaningful affirmative relief") (citing *Beesley v. Int'l Paper Co.*, No. 06-cv-703, 2014 U.S. Dist. LEXIS 12037, at *5 (S.D. Ill. Jan 31, 2014)); Manual for Complex Litigation, Fourth, § 21.71, at 337 (2004)); *see also Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973) (stating that awarding attorneys' fees when relief is obtained on behalf of a class "must logically extend, not only to litigation that confers a monetary benefit to others, but also litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others.").



Given the significant monetary compensation obtained for the Settlement Class Members—up to $200 for every valid claim submitted—and the changes in IKS's calling practices implemented as a result of the Settlement obtained by Class Counsel, an attorney fee award of 28.75% of the Settlement Fund is reasonable and fair compensation—particularly, as discussed above, in light of the "substantial risk in prosecuting this case under a contingency fee agreement" and the "defenses asserted by [IKS]." *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59.

### C. Class Counsel's Requested Fees are Also Appropriate Under the Lodestar Method.

Although, as explained above, the weight of authority supports application of a percentage-

of-the-fund analysis in assessing the reasonableness of attorney fees, the fees sought here are also reasonable and appropriate under the lodestar method. In determining the amount of attorneys' fees to be awarded pursuant to the lodestar method the first step is to "multiply[] a reasonable hourly rate by the number of hours reasonably expended." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433–37 (1983)); *Brundidge*, 168 Ill. 2d at 239 (noting that under the lodestar method "the reasonable hours devoted by plaintiff's attorneys should be the starting point in assessing fees."). A 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." *Jeffboat, LLC v. Director, Office of Workers' Comp. Programs*, 553 F.3d 487, 489 (7th Cir. 2009). Once the base lodestar is computed, the Court must adjust the lodestar using a risk multiplier that takes into account "the contingency nature of the proceeding, the complexity of the litigation, and the benefits [to] . . . the class." *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 58 (citing *Brundidge,* 168 Ill. 2d at 239–40); *see also Wright*, 2016 U.S. Dist. LEXIS 115729, at *57 ("[A] risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel had no sure source of compensation for their services") (citing *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994)); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975–76 (7th Cir. 1991) (remanding case for recalculation of attorneys' fees because the trial court failed to award a risk multiplier).

Typical multipliers awarded in comparable class action litigation average around 3–4, but are often much higher. *See Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 59 (noting that a multiplier of "2.97" was "well within the range of multipliers used in other common-fund cases" and that some courts have awarded multipliers as high as "19.6"); *Spano*, 2016 WL 3791123, at *3 ("Courts have generally held that a lodestar multiplier falling between 2 and 4.5 demonstrate a reasonable

attorney's fees") (internal citations omitted); *Beverly Bank v. Bd. of Review of Will Cnty*, 193 Ill. App. 3d 130, 137, 142 (3d Dist. 1989) (upholding trial court's decision to award a 2.5 multiplier "to account for the substantial contingent risk inherent in th[e] case.").

Here, as detailed in the attached Declaration, the base lodestar of Class Counsel is $194,412.12. (Meyers Decl., ¶¶ 22-23).[3] Class Counsel's hourly rates are comparable to rates charged by attorneys with similar experience, skill, and reputation for similar services in the Chicago legal market. (*Id.* ¶ 21); *see Shortino v. Illinois Bell Tel. Co.*, 279 Ill. App. 3d 769, 772–73 (1st Dist. 1996) (affirming trial court decision that class counsel's submitted rate [in 1996] of "$350 per hour . . . was reasonable" based on "affidavits from [class counsel]" regarding their "experience and reputation" and stating that "there is evidence in this record to support a rate as high as $450 per hour"); *In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, No. 06-cv-7023, U.S. Dist. LEXIS 124235, at *50 (N.D. Ill. Sept. 13, 2016) (evaluating attorneys' fees petition and finding that hourly rates of $800 per hour for class counsel with 23 years of experience and $515 per hour for class counsel with 9 years of experience "in line with those prevailing in the community"); *Payton v. Kale Realty, LLC*, No. 13-cv-8002, U.S. Dist. LEXIS 176454, at *24 (N.D. Ill. Aug. 20, 2015) (approving in a TCPA class action suit a "partner rate of $550 per hour" and an "associate rate of $400 per hour"); *Murray v. Bill Me Later, Inc.*, No. 12-cv-04789, Dkt. 78 (N.D. Ill. Nov. 20, 2014) (approving billable rates in TCPA class action settlement of $650, $625, and $595 for Chicago-based partners and $220 for law clerks).

Further, several state and federal courts have previously approved the then-current hourly rates of Class Counsel as reasonable. (Meyers Decl., ¶ 21). The fact that other courts have approved the hourly rates submitted by Class Counsel is indicative that they are reasonable and correspond

[3] Prior to submission, Class Counsel reviewed the hours expended by the attorneys and staff on this case and reduced any hours deemed duplicative or excessive. (Meyers Decl., ¶ 22).

to the market rate. *See People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1312 (7th Cir. 1996) ("rates awarded in similar cases are clearly evidence of an attorney's market rate.").

It is also readily-apparent that a multiplier to the base lodestar is warranted in this case. Class Counsel undertook significant risk in proceeding with this litigation. Defendant's liability to Plaintiff was far from clear, and Class Counsel agreed to commence this litigation knowing they would assuredly face significant opposition from a defendant with the financial resources of IKS. (Meyers Decl., ¶¶ 11-12, 19). Had this case not settled, IKS would have proceeded with further motion practice and vigorously opposed Plaintiff's efforts to certify her proposed class. (*Id.*). Certification would have been challenging given the nature of the putative class members' claims and the difficulty of identifying the individuals who received misdirected calls.

Had IKS prevailed either on the merits or in defeating class certification, the Settlement Class Members would have received *nothing*. Class Counsel achieved an excellent result for the Settlement Class Members in obtaining a $1,200,000.00 Settlement Fund and the ability to receive up to $200.00 in compensation for valid claims. Class Counsel were also able to obtain significant prospective relief to materially reduce or prevent future unauthorized calls.

Class Counsel were able to achieve these results solely due to their extensive efforts in prosecuting this litigation, investigating and analyzing novel issues relating to IKS's automated calling operation and how IKS dealt with attempts at revoking consent; conducting extensive discovery on IKS's calling operation and business practices; identifying potential Settlement Class Members; and productively mediating this case and negotiating the final Settlement Agreement. (*Id.*, ¶¶ 13-15) Given the significant efforts needed to secure the Settlement in this litigation, a multiplier of Class Counsel's actual fees is justified to account for the risk inherent in this type of

class action. (*See id*., ¶¶ 13, 19).

Class Counsel's lodestar of $194,412.12 reflects the significant efforts taken by Class Counsel to obtain the compensation made available for Settlement Class Members who submit valid claims. The lack of any opposition to date demonstrates that the Settlement Class Members overwhelmingly support that result. Furthermore, Class Counsel anticipate expending additional time and effort through Final Approval and beyond in order to respond to inquiries from Settlement Class Members, respond to any potential objectors, prepare Final Approval papers, review any claims rejected by IKS and/or the Settlement Administrator, and advocate on behalf of the Settlement Class Members if a claim is wrongfully denied. (Settlement Agreement, Ex. A, at § 2.6(c)). Class Counsel conservatively estimate that the additional lodestar for such efforts will, collectively, be approximately $20,000–$40,000. (Meyers Decl., ¶ 23). In short, Class Counsel's current lodestar of $194,412.12—not even including this future additional time that will undoubtedly be required—requires a multiplier of less than 1.8 to reach the attorneys' fees requested. This amount is reasonable given the efforts expended, the results obtained, and the relief made available to the Settlement Class. In short, Class Counsel's base lodestar is reasonable, and the risk taken in prosecuting this case coupled with the success obtained for the Settlement Class amply justifies the modest lodestar and multiplier requested.

As such, regardless of whether this Court uses the percentage-of-the-fund method or the lodestar method, the attorney fee award sought by Class Counsel is reasonable and justified. The requested fee award is consistent with the market rate and well within the range of attorneys' fees awarded by numerous other Illinois state and federal courts.

### D. The Court Should Also Award Class Counsel's Requested Reimbursable Litigation Expenses.

Class Counsel have expended $7,986.65 in reimbursable expenses related to filing fees,

discovery, mediation, copying, and case administration, with the potential of more expenses yet to come. (Meyers Decl., Ex. C, at ¶ 21.) Courts regularly award reimbursement of the expenses counsel incurred in prosecuting the litigation. *See, e.g., Kaplan v. Houlihan Smith & Co.*, No. 12-cv-5134, U.S. Dist. LEXIS 83936, at *12 (N.D. Ill. June 20, 2014) (awarding expenses "for which a paying client would reimburse its lawyer"); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation). Therefore, Class Counsel request the Court approve as reasonable the incurred expenses, a request which Defendant does not oppose. Accordingly, this Court should award a total fee and expense award to Class Counsel of $345,000.



### E. The Agreed-Upon Incentive Award For Plaintiff Is Reasonable And Should Be Approved.

The requested $2,500 Incentive Award is reasonable and very modest compared to other incentive awards granted to class representatives in similar TCPA class actions. Because a named plaintiff is essential to any class action, "[i]ncentive awards are justified when necessary to induce individuals to become named representatives." *Spano*, 2016 WL 3791123, at *4 (internal citation omitted) (approving incentive awards of $25,000 and $10,000 for class representatives); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992) (noting that incentive awards "are not atypical in class action cases . . . and serve to encourage the filing of class actions suits.").

Here, Plaintiff's efforts and participation in prosecuting this case justify the $2,500 Incentive Award sought. Even though no award of any sort was promised to Plaintiff prior to the commencement of the litigation or at any time thereafter, Plaintiff nonetheless contributed her time and effort in pursuing her own TCPA claim, as well as in serving as a representative on behalf of the Settlement Class Members—exhibiting a willingness to participate and undertake the

responsibilities and risks attendant with bringing a representative action.

Plaintiff participated in the initial investigation of her claim and provided her personal cellphone records to Class Counsel to aid in preparing the initial pleadings and issuing discovery, reviewed the pleadings prior to filing, consulted with Class Counsel on numerous occasions, and provided feedback on a number of other filings including, most importantly, the Settlement Agreement.

Further, agreeing to serve as the Class Representative meant that Plaintiff publicly placed her name on this suit and opened herself to "scrutiny and attention" which, in and of itself, "is certainly worthy of some type of remuneration." *See Schulte*, 805 F. Supp. 2d at 600–01. Were it not for Plaintiff's willingness to bring this action on a classwide basis, her efforts and contributions to the litigation by assisting Class Counsel with their investigation and filing of this suit, and her continued participation and monitoring of the case up through settlement, the substantial benefit to the Settlement Class Members afforded under the Settlement Agreement would not exist.

The $2,500 Incentive Award requested for Plaintiff amounts to roughly 0.2% of the total Settlement Fund, which is well in line with the average incentive award granted in class actions. *See, e.g., Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, U.S. Dist. LEXIS 35421, at *19 (N.D. Ill. Mar. 23, 2015) ("a study on incentive awards for class action plaintiffs (also conducted by Eisenberg and Miller) . . . found that the mean incentive fee granted in class actions overall is .161% [of the total recovery]") (citing Eisenberg & Miller, *Incentive Award to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A. L. Rev. 1303, 1339 (2006)). Indeed, numerous courts that have granted final approval in similar TCPA settlements have awarded significantly larger incentive awards than the one sought here. *See, e.g., Craftwood Lumber Co.*, U.S. Dist. LEXIS 35421, at *20 (awarding $25,000 incentive award); *Satterfield v. Simon &*

*Schuster*, No. 06-cv-2893, Dkt. 131, at 4 (awarding incentive awards totaling $30,000, including a $20,000 award to one of the class representatives); *Lozano v. Twentieth Century Fox Film Corp.*, No. 09-cv-6344, Dkt. 65, at 5 (awarding $15,000 incentive award to the plaintiff); *Murray et al v. Bill Me Later, Inc.*, No. 12-cv-04789, Dkt. 78 (awarding $30,000 incentive awards to both class representatives).

Compensating Plaintiff for the risks and efforts she undertook to benefit the Settlement Class Members is reasonable under the circumstances of this case, especially in light of the exceptional results obtained. As shown above, courts have regularly approved incentive awards in similar class action litigation consistent with and greater than the agreed-upon $2,500 Incentive Award here. Moreover, no objection to the Incentive Award has been raised to date. Accordingly, an Incentive Award of $2,500 to Plaintiff is reasonable, justified by Plaintiff's time and effort in this case, and should be approved.



## V. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court enter an Order: (i) approving an award of attorneys' fees and costs of $345,000.00; and (ii) approving an Incentive Award in the amount of $2,500.00 to Plaintiff in recognition of her efforts on behalf of the Settlement Class Members.

Dated: September 29, 2017

Respectfully submitted,

JUDITH FLAHIVE, individually and on behalf of the Settlement Class

By: /s/ *Paul T. Geske*
One of Her Attorneys

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