**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| MORGAN A. TAYLOR, on behalf of herself and all others similarly situated,<br>Plaintiff,<br><br>v.<br><br>PROFESSIONAL PLACEMENT SERVICES, LLC and KOHL'S DEPARTMENT STORES, INC.,<br>Defendants. | * | Case No. 1:17-cv-00599-AT |

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

The Court has preliminarily approved a proposed class action settlement ("Settlement") between Plaintiff, on behalf of herself and others similarly situated, and Defendant Professional Placement Services, LLC ("PPS").[1] The Settlement is an excellent result; it requires PPS to pay $1,700,000 into a non-reversionary, common fund for the benefit of a Settlement Class of consumers, like Plaintiff, to whom PPS allegedly placed nonconsensual, wrong-number calls using a VoApps "direct-to-voicemail" service that delivers a prerecorded message directly to a cell

[1] A true and correct copy of the Settlement Agreement was filed as Dkt. 59-3, with further supplements at Dkt. 62 and 63.

phone's voicemail. Valid claimants are expected to receive about $500 or more.

The Settlement is the result of the dedicated efforts of experienced and knowledgeable attorneys, who negotiated the proposed Settlement after mediation with a retired federal magistrate judge. This extraordinary Settlement was achieved only after Plaintiff's counsel had received substantive discovery as to the size and nature of the proposed class, which guaranteed informed and effective negotiations.

To compensate them for their efforts, Class Counsel respectfully seek a fee award of $566,666.66, which is one-third of the common fund and is consistent with fees awarded in other TCPA class litigation in this Circuit. Counsel also request that the Court reimburse their out-of-pocket expenses totaling $7,777.61, and grant an incentive award of $15,000 to Plaintiff Morgan Taylor for her services to the Class as its Class Representative. The requested attorneys' fees and incentive award are reasonable and in line with the Eleventh Circuit's guidelines. For these reasons, and as set forth herein, Plaintiff respectfully requests that the Court grant this motion.

## I. SUMMARY OF THE LITIGATION

### A. The TCPA.

The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, was

enacted in response to widespread public outrage over the proliferation of intrusive, nuisance calling practices. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012). Indeed, "[m]onth after month, unwanted robocalls and texts … top the list of consumer complaints received by the [FCC]."[2] As relates to this case, the TCPA generally prohibits making *any* non-emergency call using an automatic telephone dialing system or an artificial or prerecorded voice to a cell phone without prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA functions as a congressionally created incentive for private individuals to enforce the law. *Alea London Ltd. v. Am. Home Svcs., Inc.*, 638 F. 3d 768, 778-79 (11th Cir. 2011).

**B. Summary of Case Proceedings.**

After receiving a series of prerecorded wrong-number messages on her cell phone for a person identified as "Amy Porter," on November 18, 2016, Plaintiff Taylor filed her class action complaint in the Superior Court of DeKalb County, Georgia, alleging that PPS caused automated calls to be placed to herself and others without prior express consent, in violation of the TCPA. PPS removed the case to this District on February 16, 2017. On May 26, 2017, PPS moved to stay the proceedings pending third-party proceedings before the FCC and D.C. Circuit

[2] *In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, ¶ 1 (2015).

it argued could impact the case based, for example, on the issues of "direct drop" voicemails and the identity of the "called party" for the purposes of consent. Dkt. 14. PPS ultimately withdrew its motion to stay after Plaintiff briefed her response and the petition before the FCC was withdrawn.[3] Dkt. 19, 21. Plaintiff amended her complaint on October 27, 2017, which included adding one of PPS' clients, Kohl's Department Stores, Inc., as a defendant based on PPS having made calls to Plaintiff on its behalf. Dkt. 34.

The Parties engaged in thorough first- and third-party discovery. This discovery included Defendant's production of details about the scope of the putative class as well as information about the nature and cause of the alleged TCPA violations at issue. Plaintiff's claims also faced a novel issue: Whether the VoApps "direct-to-voicemail" messages PPS sent to Plaintiff and others constitute

[3] Plaintiff's counsel have aggressively fought to confirm that these "direct drop" voicemails are deemed "calls" under the TCPA, including through: (1) formal litigation, *e.g.* Dkt. 19 (motion to stay response brief) and *Saunders v. Dyck O'Neal, Inc.*, 319 F. Supp. 3d 907, 912 (W.D. Mich. 2018) (granting summary judgment in consumers' favor on the issue); (2) comments to the FCC, *e.g.*, https://ecfsapi.fcc.gov/file/1051819842910/FCC%20Comments.final.pdf and https://ecfsapi.fcc.gov/file/10602096349972/AATM%20Reply%20Comments.final.pdf; and (3) social and traditional media, *e.g.*, Bernard, Tara S., *No, Your Phone Didn't Ring. So Why Voice Mail From a Telemarketer?* (The New York Times June 3, 2017) (https://www.nytimes.com/2017/06/03/business/phone-ringless-voicemail-fcc-telemarketer.html) (quoting Class Counsel). Plaintiff's counsel respectfully believe that their efforts were critical to not only convincing the FCC petitioner to withdraw its petition, but in ultimately facilitating the exceptional Settlement now before the Court.

"calls" under the TCPA, since they are technically made using a backdoor approach that doesn't cause the consumer's phone to ring.[4] To that end, Plaintiff's case was also materially aided by Class Counsel's concurrent prosecution of a separate action in the Western District of Michigan, in which Burke Law Offices, LLC achieved a major summary judgment victory confirming, on an issue-of-first-impression, that these VoApps messages are, indeed, "calls" under the TCPA. *Saunders v. Dyck O'Neal, Inc.*, 319 F. Supp. 3d 907, 912 (W.D. Mich. 2018) ("[Defendant's] direct-to-voicemail messages are a 'call' under the TCPA, and [Plaintiff's] claim will proceed. To hold otherwise 'would elevate form over substance, thwart Congressional intent that evolving technologies not deprive mobile consumers of the TCPA's protections, and potentially open a floodgate of unwanted [voicemail] messages to wireless consumers.'") (quoting *In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, at 115 (2015)).

The Parties conducted extensive settlement discussions, with counsel

[4] "Specifically, VoApp's Adaptive Signaling technology 'causes the mobile switch to make a call to a phone number assigned to the voicemail service provider's enhanced service platform (i.e. the voicemail computer or server), not the consumer's phone number.'" *Saunders*, 319 F. Supp. 3d at 909. The consumer's cell phone number is then used to specify the particular voicemail box to which the message is to be delivered.

For example, such a voicemail could be left for a T-Mobile subscriber by dialing telephone number (805) 637-7243 to reach T-Mobile's voicemail server, then entering the subscriber's cellular telephone number to leave a voicemail for that subscriber. Other cellular providers have similar access numbers.

preparing and serving a detailed mediation brief on Defendant and the mediator prior to successfully mediating this matter for approximately 12 hours on May 30, 2018, before Judge Arlander Keys (Ret.) of JAMS in Chicago, Illinois. Exhibit B, Holcombe Decl. ¶¶ 40-41. Although the monetary terms were agreed to at the mediation, for several months thereafter, the Parties negotiated numerous specific terms of the Settlement and for which the final product is now before the Court. Plaintiff ultimately moved for preliminary approval on January 11, 2019. Dkt. 59. After multiple supplemental submissions by the Parties to address issues raised by the Court, the Court granted preliminary approval on March 5, 2019. Dkt. 62-64.

**C. The Notice Informs Class Members About this Fee Request.**

Consistent with Eleventh Circuit law and Federal Rule of Civil Procedure 23(h), the Class Notice advises Class Members of the proposed attorneys' fee award as both a percentage and the exact dollar amount sought. Specifically, the notice informs Class Members that Class Counsel seek an award of "up to one-third of the total settlement, or $566,666.66" in attorneys' fees, plus costs. Dkt. 63-1 at 6 (Long Form Notice); Dkt. 62-1 at 2 (Short Form Notice). The Notice also directs Class Members to a website that repeats this information, and provides a toll-free telephone number for questions. *See* www.PPSTCPASettlement.com. Once filed, this motion will also be posted to the Settlement Website.

To date, neither the U.S. Attorney General nor any state attorney general has contacted Plaintiff's counsel or otherwise objected to the proposed fee award, and there has been no objection by any Class Member. Exhibit A, Burke Decl. ¶ 17. In short, there is currently no opposition to the proposed award. Plaintiff will update the Court if there are any objections (as the Class has until June 10, 2019 to object), and accordingly respond to them. Yet whether the number of objectors remains zero or a small number, a "low percentage of objections points to the reasonableness of a proposed settlement and supports its approval." *Lipuma v. Am. Express Co.*, 406 F.Supp.2d 1298, 1324 (S.D. Fla. 2005).

This Settlement not only meets, but far exceeds those standards that have been historically approved in other TCPA class cases, and it was only achieved after a substantial investment of time and resources over a more than two-year period. Given the excellent financial result for the Class, the reasonableness of the request when compared to approved awards in similar cases, and the risk and effort expended, Class Counsel's requested fee award should, respectfully, be granted.

## II. THE PROPOSED FEE AND EXPENSE AWARD IS REASONABLE.

In the Eleventh Circuit, "[i]t is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to an allowance of attorneys' fees based upon the benefit obtained." *In re Checking Acct.*

*Overdraft Litig.*, 830 F.Supp.2d 1330, 1358 (S.D. Fla. 2011) (awarding about $123 million in fees in a common fund settlement) (citing *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991), and *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

Here, the reasonableness of the fee award is confirmed by examining it as a percentage of the Settlement Fund, as well as under the various factors established for evaluating fee requests in the Eleventh Circuit (the *Johnson*/*Camden I* factors). *See Muransky v. Godiva Chocolatier, Inc.*, No. 16-16486, --- F.3d ----, 2019 WL 1760292, at *13 (11th Cir. Apr. 22, 2019) (affirming a third of the common fund as the fee award in class action).

### A. The Fee Amount Is Reasonable as a Percentage of the Total Settlement Fund.

The Supreme Court "has recognized consistently that 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Indeed, Class Counsel's request for a one-third percentage award is supported by case law both in and outside of the Eleventh Circuit, with respect to class actions under the TCPA and generally.

The requested fee of one-third of the fund easily falls within the range of reasonableness, which can be as high as 50% in this Circuit. *See Wolff v. Cash 4*

*Titles*, No. 03-22778, 2012 WL 5290155, at *4 (S.D. Fla. Sept. 26, 2012) ("One-third of the recovery is considered standard in a contingency fee agreement.") (citing Conte, *Attorneys Fee Awards* § 2.07 at 48 (2d ed. 1995)); *Seghroughni v. Advantus Rest., Inc.*, No. 12-2000, 2015 WL 2255278, at *1 (M.D. Fla. May 13, 2015) ("An attorney's fee ... which is one-third of the settlement fund ... is fair and reasonable[.]"); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295-96 (11th Cir. 1999) (affirming fee award of 33 1/3% of a $40 million settlement); *Camden I*, 946 F.2d at 774-75 ("[A]n upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded.").

Indeed, a one-third percentage award has been approved in multiple recent TCPA and other cases in this Circuit. *See Schwyhart v. AmSher Collection Servs., Inc.*, No. 15-1175, 2017 WL 1034201, at *3 (N.D. Ala. Mar. 16, 2017) (awarding fees of one-third of settlement fund, plus expenses, in TCPA class action, finding such an award to be "fair and reasonable"); *Wreyford v. Citizens for Transportation Mobility, Inc.*, No. 12-2524, 2014 WL 11860700, at *2 (N.D. Ga. Oct. 16, 2014) (awarding 33 1/3% fees plus costs in TCPA class action settlement); *Guarisma v. ADCAHB Med. Coverages, Inc.*, No. 13-21016, 2015 WL 13650934, at *4 (S.D. Fla. June 24, 2015) (approving one-third fee award plus costs in TCPA class action settlement); *see also Lees v. Anthem Ins. Cos.*, No. 13-1411, 2015 WL

3645208, at *4 (E.D. Mo. June 10, 2015) (awarding 34% of common fund as fees in TCPA class action); *Wolff*, 2012 WL 5290155, at *5 ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one third."); *Dear v. Q Club Hotel, LLC*, No. 15-60474, 2018 WL 1830793, at *4 (S.D. Fla. Mar. 14, 2018) ("A review of the case law reveals that a 33.3% fee award is a consistent award in class action common fund cases."); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 04-3066, 2012 WL 12540344, at *4 (N.D. Ga. Oct. 26, 2012) (awarding one-third of $25 million settlement fund in fees, noting that "a fee of one-third of the common fund (or more) has been awarded in a number of other antitrust class actions no more complicated than this one, most of which settled at earlier stages of litigation"); *Vinson v. Fleetcor Techs., Inc.*, No. 14-1939 (N.D. Ga. Jan. 9, 2017) (Dkt. 60, awarding one-third fees in FCRA class settlement, plus costs).

Additionally, the percentage sought is appropriate when compared to large common fund settlements generally. *See*, *e.g.*, *Muransky v. Godiva Chocolatier, Inc.*, No. 16-16486, 2019 WL 1760292, at *13 (11th Cir. Apr. 22, 2019) (affirming 33% fee award in response to objectors' appeal of approval of consumer class action FACTA settlement); *Cabot E. Broward 2 LLC v. Cabot*, No. 16-61218, 2018 WL 5905415, at *7 (S.D. Fla. Nov. 9, 2018) (citing "19 cases from this

Circuit in which attorneys' fees amounting to 33% or more of a settlement fund were awarded"); *see also Waters*, 190 F.3d at 1295-296 (Eleventh Circuit affirmed a 33.33% fee award ($13.33 million) in a $40 million settlement that, unlike here, required unclaimed funds to be paid back to the defendant).

Finally, a 33.33% contingent fee is the gold standard for attorney fee agreements in general tort litigation involving personal injury and other consumer damage cases, often requiring much less work than consumer class litigation.

In short, Plaintiff's fee request as a percentage is reasonable and in line with percentages approved in similar TCPA and other class action settlements.

### B. The Proposed Fee Award Is Also Reasonable Under *Johnson/Camden I*.

In cases in which the fees sought exceed 25% of the fund, the Eleventh Circuit endorses using the factors articulated in *Johnson v. Georgia Highway Expr., Inc.*, 488 F.2d 714 (5th Cir. 1974), to confirm the reasonableness of the award. *Muransky*, 2019 WL 1760292, at *13; *Camden I*, 946 F.2d at 775. The *Johnson*/*Camden I* factors are (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney; (5) the customary fee; (6) whether the fee is contingent; (7) time limitations imposed by the circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and

ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Camden I*, 946 F.2d at 772, n.3. These factors confirm the reasonableness of the proposed fee award here.

**1. This Case Presented Novel and Difficult Issues.**

The second, tenth, and eleventh *Johnson/Camden I* factors look to the length, novelty, and undesirability or difficulty of the case, and support approval of Class Counsel's fee request.

This case presented issues on the cutting edge of TCPA litigation, including an issue of first impression as to whether the messages placed by the VoApps system PPS used to contact Plaintiff and other class members—which effectuates a "direct drop" of a prerecorded message into a cell phone subscriber's voicemail by calling the backend landline number for the person's carrier—even made "calls" to a cell phone number under the TCPA.[5] To Plaintiff's knowledge, no court had ruled on this issue anywhere in the country until Plaintiff's counsel succeeded at a heavily-contested summary judgment motion in the *Saunders* action in 2018—more than a year-and-a-half after this case was filed. *See Saunders*, 319 F. Supp.

[5] One later-filed case in this Circuit, *Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029 (S.D. Fla.), was set to rule on the issue of whether these kind of "ringless voicemail" messages are calls under the TCPA, but the parties settled beforehand. 2017 WL 9472860, at *5 (S.D. Fla. Nov. 20, 2017).

3d at 909. Plaintiff's counsel's efforts in the *Saunders* action both informed the parties and served as a catalyst for the Parties' settlement in this case.

Moreover, Plaintiff's allegations in this case—based on nonconsensual debt collection calls—present unique difficulties at class certification, with defendants at times being successful at arguing that poor quality or purported inconsistencies in their own records from which the class may be identified preclude a finding of predominance. *E.g.*, *Luster v. Green Tree Servicing, LLC*, No. 14-1763 (N.D. Ga. Sept. 5, 2018) (accepting general assertions by defendant that it obtains consent in a variety of manners in finding lack of predominance, despite fact that defendant's data admittedly lacked flags it used to track consent to place the calls at issue).

Further, the law governing such calls has been in a state of flux. Indeed, while this case was pending, the D.C. Circuit vacated part of an FCC declaratory ruling that permitted a one-call safe-harbor for wrong-number calls to reassigned numbers. *ACA Int'l v. FCC*, 885 F.3d 687, 706 (D.C. Cir. 2018). Given the uncertainty surrounding this area of the TCPA, the class-related question underlying this matter—i.e., whether this Court should certify Plaintiff's proposed class—was both novel and difficult.

Class Counsel assumed the risk of this litigation, including not only the generous disbursement/apportionment/allotment of time for each of the two firms

involved, but also the advancement of significant financial costs and expenses necessary to ultimately prosecute this matter zealously on behalf of Plaintiff and the class for over two years, on a fully contingent basis. As a result, the risk Class Counsel assumed in litigating this matter given the length, novelty, expense and nature of this action was significant, further supported by the fact that the TCPA is not fee-shifting. 47 U.S.C. § 227(b)(3). These factors thus support the fee award.

**2. Class Counsel Achieved an Excellent Result for the Class.**

The eighth *Johnson/Camden I* factor looks to the amount involved in the litigation "with particular emphasis on the 'monetary results achieved'" by class counsel. *Allapattah Servs., Inc.,* 454 F.Supp.2d at 1202; *see also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) ("In common fund cases … the monetary amount of the victory is often the true measure of success[.]").

Here, the Parties' negotiated agreement provides a Settlement Fund of $1,700,000, with an expected individual claimant recovery of approximately $500 or more. This is an exceptional result: Indeed, outside of willful conduct, $500 per violation is the ***maximum*** class members could potentially obtain under the TCPA in statutory damages for a violation, 47 U.S.C. § 227(b)(3). Were class members to pursue their claims individually, any amount they would hope to recover would be significantly reduced by attorneys' fees and costs that do not detract from their

individual recoveries here.[6] This expected net amount to each class member far exceeds what has been approved in many other TCPA class action settlements.[7] Accordingly, this factor weighs strongly in favor of the proposed fee award.

**3. The Time and Labor Required, Preclusion from Other Employment, and the Time Limits Imposed Justify the Cost and Fee Amount.**

The first, fourth, and seventh *Johnson/Camden I* factors – the time and labor, preclusion of other employment, and time limitations imposed, respectively – are also interrelated inquires that support the reasonableness of the fee request.

Upon preliminary approval, the Court requested that Counsel provide estimates of their lodestar; those estimates tallied up to 337.8 hours. Dkt. 62. Class Counsel spent this time engaged in litigation against a well-heeled and insured defendant and sophisticated defense counsel. The work needed included, *inter alia*, counsel's pre-suit investigation, preparing the complaint, briefing PPS' motion to stay, submitting both Comments and Reply Comments to the FCC on the ringless

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[6] Indeed, it costs $400 to *file* a lawsuit in federal court, just $100 more than the TCPA's base statutory damages provides. 47 U.S.C. § 227(b)(3).

[7] *E.g., Markos v. Wells Fargo Bank, N.A.*, No. 15-1156, 2017 WL 416425, at *4 (N.D. Ga. Jan. 30, 2017) (approving $24 per claimant in a TCPA class action); *Wright v. Nationstar Mortgage LLC*, No. 14-10457, 2016 WL 4505169, at *2 (N.D. Ill. Aug. 29, 2016) (granting final approval to TCPA class settlement where anticipated claimant recovery was $45); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 790 (N.D. Ill. 2015) ($34.60); *Kolinek v. Walgreen Co.*, No. 13-4806, 2015 WL 7450759, at *19 (N.D. Ill. Nov. 23, 2015) (approximately $30).

voicemail issue, conducting significant discovery, preparing for and attending a full-day, 12-hour mediation in Chicago (preceded by detailed mediation briefs), conducting additional extensive negotiations beyond the mediation to reach the actual settlement, and securing preliminary approval of the settlement. Exhibit A, Burke Decl. ¶ 13; Exhibit B, Holcombe Decl. ¶¶ 28-45. All of this work diverted substantial time and resources from other matters. *See Yates v. Mobile Cnty. Pers. Bd.*, 719 F.2d 1530, 1535 (11th Cir. 1983) (expenditure of time "necessarily had some adverse impact upon the ability of counsel for plaintiff to accept other work, and this factor should raise the amount of the award"); *Stalcup v. Schlage Lock Co.*, 505 F. Supp. 2d 704, 708 (D. Colo. 2007) ("[T]he *Johnson* court concluded that priority work that delays a lawyer's other work is entitled to a premium.").

The Settlement also reflects Class Counsel's experience in handling large TCPA cases. *See* Exhibit A, Burke Decl. ¶ 7; Exhibit B, Holcombe Decl. ¶ 21. This experience ensured that Class Counsel were adequate to the task, willing to do what it took to achieve an excellent result, and genuinely understood what the case was worth given the law, facts, and risks (for both sides), after thorough discovery. Even then, the case did not settle until after Plaintiff secured crucial information pertaining the size and nature of the class and the Parties attended an all-day mediation with an experienced retired federal magistrate judge, further evidencing

the hard-fought effort expended by Class Counsel to achieve this excellent result.

Furthermore, each of Class Counsels' firms is relatively small. *See* Exhibit A, Burke Decl. ¶ 12; Exhibit B, Holcombe Decl. ¶¶ 3, 8, 13. The amount of work Class Counsel can handle at any given time is accordingly limited, and their efforts in connection with, and commitment to, this matter, curtailed an ability to accept other work. The above factors thus support the proposed award.

**4. The Requested Fee Is Consistent with Other Consumer Class Settlements.**

The fifth and twelfth *Johnson*/*Camden I* factors, the customary fee and awards in similar cases, also support approval. As discussed above, plenty of consumer class actions – including many TCPA cases in this Circuit – have granted one-third percentage-of-the-fund fee awards. *E.g., Gottlieb v. CITGO Petroleum Corp.*, No. 16-81911 [Dkt. 67 at pp. 5-6] (S.D. Fla. Nov. 29, 2017) (awarding attorneys' fees of 33.33% of settlement fund in TCPA class action, plus costs); *Chimeno-Buzzi v. Hollister Co.,* No. 14-23120 [Dkt. 155 at p. 8] (S.D. Fla. Apr. 11, 2016) (granting one-third fee award in TCPA class action settlement, finding it to be "consistent with the trend in this Circuit"); *Guarisma*, 2015 WL 13650934, at *4 (approving 33% fee award); *Legg v. Lab. Corp. of Am.*, No. 14-61543, 2016 WL 3944069, at *3 (S.D. Fla. Feb. 18, 2016) (FACTA case awarding one-third of recovery for attorneys' fees, plus expenses, finding it "consistent with

other fee awards in this Circuit") (citing *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295-96 (11th Cir. 1999), for having affirmed class attorneys' award of 33.3%); *Atkinson v. Wal-Mart Stores, Inc.*, No. 08-691, 2011 WL 6846747, at *7 (M.D. Fla. Dec. 29, 2011) ("[T]he Court finds that Class Counsel's fee agreements with clients usually provide for a fee of between 33⅓% to 40% to trial, and 40% to 45% on appeal. The customary fee for the clients and the class is at least 33⅓%."); *Wolff*, 2012 WL 5290155, at *5 (citing cases supporting one-third as market rate); *Dear*, 2018 WL 1830793, at *4 (same). Accordingly, this factor also favors the proposed fee award.

**5. This Case Required a High Level of Skill and Experience.**

The third and ninth *Johnson/Camden I* factors – the skill required to perform the legal services properly, and the experience, reputation, and ability of the attorneys – also confirm that the fees and expenses sought are reasonable. As shown, Class Counsel achieved a settlement that confers substantial benefits on the Class despite litigating against a sophisticated and well-financed defendant represented by top-tier counsel. *See In re Sunbeam Sec. Litig.,* 176 F.Supp.2d at 1334 ("[I]n assessing the quality of representation, courts have also looked to the quality of the opposition the plaintiffs' attorneys faced.").

This outcome was made possible by Class Counsel's extensive experience in

litigating class actions of similar size, scope and complexity. Class Counsel were able to steer this case to a substantial TCPA recovery per class member, while avoiding the risk that contested class certification or summary judgment rulings, or trial, might fall in Defendant's favor. Class Counsel regularly engage in complex litigation involving consumer issues, including under the TCPA, and they have been appointed class counsel in numerous cases. *See* Exhibit A, Burke Decl. ¶¶ 3-8; Exhibit B, Holcombe Decl. ¶ 21. Indeed, Class Counsel's efforts in the *Saunders* case resulted in a favorable summary judgment ruling affirming that VoApps messages are "calls" under the TCPA. Although that ruling happened after the parties in this case had reached a settlement in principle, the two depositions, expert report and background knowledge Burke Law Offices, LLC gained from its work in *Saunders* served as a catalyst for the successful negotiation of the Settlement in this case. And Class Counsel achieved this result without extensive discovery battles that could have drained the Parties' and Court's resources. *See Snead v. Interim HealthCare of Rochester, Inc.*, 286 F. Supp. 3d 546, 560 (W.D.N.Y. 2018) (identifying fact that favorable settlement was achieved "without great exertion of Court resources" as "a positive reflection of counsel's experience and the quality of the representation").

Thus, the skill required, and experience of Class Counsel support the

reasonableness of the proposed fee award, and it should, respectfully, be approved.

**6. The Class Representative and His Counsel Entered into a Contingent Attorneys' Fee Agreement.**

The sixth *Johnson/Camden I* factor – whether the fee is contingent – also supports Class Counsel's fee request. Here, Plaintiff's agreement with her counsel provides that the fee for their services is contingent upon effecting a recovery or successful result and that, should this case proceed as a class action, Plaintiff's counsel compensation will be determined by the Court, payable solely from the parties against whom Plaintiff's claims are brought. *See* Exhibit A, Burke Decl. ¶ 14. Thus, that the attorneys' fee arrangement in this case was contingent "weighs in favor of the requested attorneys' fees award; "'[s]uch a large investment of money [and time] place[s] incredible burdens upon … law practices and should be appropriately considered.'" *In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1256 (D.N.M. 2012).

Consequently, all of the *Johnson/Camden I* factors support Class Counsel's requested fee award, and the Court should grant this motion.

**7. The Class Representative's Incentive Award Request Is Fair, Reasonable, and Supported by Law.**

"Incentive awards are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009); *see also Hadix v. Johnson*, 322

F.3d 895, 897 (6th Cir. 2003) (explaining that "[i]ncentive awards are typically awards to class representatives for their often extensive involvement with a lawsuit," and noting that "[n]umerous courts have authorized incentive awards"). These awards "serve an important function in promoting class action settlements." *Sheppard v. Cons. Edison Co. of N.Y., Inc.*, No. 94-0403, 2002 U.S. Dist. LEXIS 16314, at *16 (E.D.N.Y. Aug. 1, 2002).

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

The class representative here, Morgan Taylor, spent considerable time pursuing Class Members' claims. In particular, Ms. Taylor communicated with counsel to keep apprised of this matter, participated in the pre-suit investigation and discovery process, including producing documents and responding to information requests, and ultimately approved and executed the Settlement

Agreement. Exhibit A, Burke Decl. ¶ 15.

Given all of the foregoing, the requested incentive award of $15,000 is fair and reasonable, especially when compared to other approved awards. *Jones v. I.Q. Data Int'l, Inc.*, No. 14-00130, 2015 WL 5704016, at *2 (D.N.M. Sept. 23, 2015) (approving $20,000 incentive award in TCPA case); *Krueger v. Ameriprise Fin., Inc.*, No. 11-2781, 2015 WL 4246879, at *3 (D. Minn. July 13, 2015) (approving $25,000 incentive awards for each named plaintiff). Accordingly, the incentive award of $15,000 to Ms. Taylor should be approved. *See Markos v. Wells Fargo Bank, N.A.*, No. 15-1156, 2017 WL 416425, at *3 (N.D. Ga. Jan. 30, 2017) (awarding $20,000 incentive award to each named plaintiff in TCPA class settlement); *Prather v. Wells Fargo Bank, N.A.*, No. 15-4231 (N.D. Ga. Aug. 31, 2017) (Dkt. 54, awarding $15,000 to each named plaintiff in TCPA class settlement); *Luster v. Wells Fargo Dealer Servs., Inc.*, No. 15:1058 (N.D. Ga. Nov. 8, 2017) (Dkt. 80, awarding $20,000 incentive award in TCPA class settlement).

**C. The Expenses Incurred Are Reasonable and Should Be Approved.**

"It is well established that counsel who create a common fund like the one at issue are entitled to the reimbursement of litigation costs and expenses, which include such things as expert witness costs, mediation costs, computerized research, court reports, travel expenses, and copy, telephone, and facsimile

expenses." *Krueger*, 2015 WL 4246879, at *3 (citation omitted).

The Settlement permits Class Counsel to seek recovery of expenses incurred on behalf of the Class. Dkt. 59-3, Agr. ¶ 14.5. This figure totals $7,777.61, largely consisting of expenses related to mediation, travel and discovery. *See* Exhibit A, Burke Decl. ¶ 16; Exhibit B, Holcombe Decl. ¶ 48. None are for overhead-type items such as photocopying, research, telephone, etc. Thus, counsel's expenses also should be approved. *E.g.*, *Legg*, 2016 WL 3944069, at *3 (granting 1/3 percentage fee award, plus expenses); *Wolff*, 2012 WL 5290155, at *7 (awarding fees plus expenses); *Dear*, 2018 WL 1830793, at *4 (same).

## III. CONCLUSION

Class Counsel's proposed fee award is a reasonable percentage of the Settlement Fund under Eleventh Circuit law, and satisfies the *Johnson/Camden I* factors. Accordingly, for the foregoing reasons, Plaintiff respectfully requests that the Court award Class Counsel $566,666.66 in attorneys' fees and $7,777.61 in costs and expenses, as well as an incentive award of $15,000 to Plaintiff Taylor for her service as Class Representative.

Dated: May 10, 2019

Respectfully submitted,

MORGAN A. TAYLOR, on behalf of herself and all others similarly situated

By: */s/ Alexander H. Burke*

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

SKAAR & FEAGLE, LLP
James M. Feagle (Ga. Bar No. 256916)
Email: jfeagle@skaarandfeagle.com
Clifton Dorsen (Ga. Bar No. 149254)
Email: cdorsen@skaarandfeagle.com
2374 Main Street, Suite B
Tucker, GA 30084
Telephone: (404) 373-1970

Justin T. Holcombe (Ga. Bar No. 552100)
Email: jholcombe@skaarandfeable.com
Kris K. Skaar (Ga. Bar No. 649610)
Email: krisskaar@aol.com
133 Mirramont Lake Drive
Woodstock, GA 30189
Telephone: (770) 427-5600

*Counsel for Plaintiff*

**CERTIFICATE OF COMPLIANCE WITH L.R. 5.1.C & 7.1.D**

Pursuant to L.R. 7.1.D, I certify that this document has been prepared with 14-point, Times New Roman font, approved by the Court in L.R. 5.1.C.

*/s/ Alexander H. Burke*

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this day, May 10, 2019, filed the within and foregoing motion, memorandum, and exhibits using the CM/ECF system, which shall serve such on all counsel of record.

*/s/ Alexander H. Burke*