UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:15-cv-21264-MGC

JUSTIN MARK BOISE, individually and on behalf of all those similarly situated,

Plaintiff,

v.

ACE AMERICAN INSURANCE COMPANY and ACE USA, INC.,

Defendants.

REPLY IN SUPPORT OF OBJECTION OF FREDDIE GLOVER

I. Mr. Glover's Objection that a 30% Fee is Too Much is Founded in Law and Fact.

Every one of Mr. Glover's arguments pertaining to class counsels' excessive 30% fee request is premised in law and fact.[1] This $9.7 million TCPA settlement in which claimants will now take $63 rather than the previously represented $95, and which amounts to roughly a 1% recovery of potential damages,[2] does not pass the threshold for an upward adjustment from the Eleventh Circuit's 25% benchmark. *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1243 (11th Cir. 2011); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991)

Class counsels' oversized response[3] is to (1) shoot the messenger, and (2) rehash their arguments made in support of a 30% recovery. Ironically, in mislabeling Mr. Glover's objection as boilerplate, class counsel manage to avoid the substance of his arguments. Mr. Glover cited substantial authority demonstrating class counsel are not entitled to exceed the benchmark, and referenced many far better TCPA settlements that resulted in lower fees.

Mr. Glover did not conjure the notion that, in general, TCPA litigation produces fees at or below the benchmark. As his objection specified, the "data available on past awards in TCPA cases and other class actions show[s] that the median fee for large TCPA class actions were between 20% and 24% of the settlement fund[.]" *Wilkins v. HSBC Bank Nevada, N.A.*, 14 C 190, 2015

[1] Class counsel claim that Mr. Glover's objection is "devoid of legal support and [is] littered with unsupported and erroneous statements of law and fact." Response to Objection, ECF Doc. 91, at 25. Yet, they fail to identify a single erroneous statement of law or fact. That Mr. Glover firmly believes this is a straightforward TCPA settlement undeserving of a 5% push above the benchmark, while obviously disagreeable to class counsel, does not make it either a false statement of law or fact.

[2] ECF Doc. 87, at 1. Class counsels' opposition does not controvert Mr. Glover's numbers. It is therefore undisputed that the settlement provides no more than 1% of potential damages under the TCPA.

[3] The twenty-five page response exceeds the page limitation requirements in Local Rule 7.1(c)(2) (limiting an opposition to twenty pages absent permission of the Court). Class counsel did not seek leave to go beyond this limitation. As such, the response should be stricken.

WL 890566, at *10 (N.D. Ill. Feb. 27, 2015) (citing *In re Capital One Tel. Consumer Prot. Act Lit.*, No. 12 C 10064, 2015 WL 605203, at *11-12, 15 (N.D. Ill. Feb. 12, 2015)).[4] Other than cherry-picking cases outside the norm, class counsel offer no substantive response to this data.

In fact, class counsels' response fails to distinguish or even mention six TCPA class action opinions identified in Mr. Glover's objection awarding 20% or less in fees.[5] *See Gehrich v. Chase Bank USA, N.A.*, No. 12 C5510, 2016 WL 806549 (N.D. Ill. Mar. 3, 2016) (awarding class counsel 21% of the common fund); *Bayat* v. *Bank of the West*, 2015 WL 1744342, at *10 & n.10 (N.D. Cal. Apr. 15, 2015) (opting for the lodestar method but awarding the equivalent of 13.5% of the over $3.3 million settlement fund); *Rose* v. *Bank of Am. Corp.*, 2014 WL 4273358, at *5, *13 (N.D. Cal. Aug. 29, 2014) (choosing the lodestar method and awarding a fee that constituted about 7.5% of the over $32 million fund); *Michel* v. *WM Healthcare Solutions, Inc.*, 2014 WL 497031, at *23 (S.D. Ohio Feb. 7, 2014) (awarding 15% of the $4.3 million settlement fund); *Malta v. Fed. Home Loan Mortgage Corp.*, 10-CV-1290-BEN-NLS, 2013 WL 12095060, at *1 (S.D. Cal. June 21, 2013) (22.5%); *Arthur* v. *Sallie Mae, Inc.*, 2012 WL 4076119, at *2 (W.D. Wash. Sept. 17, 2012) (awarding 20% of the about $24 million fund).

Class counsel also ignore Mr. Glover's distinctions of the *Soto* and *Guarisma* opinions from this District,[6] and continue to rely on them as if they bind the Court to exceed the benchmark. But, as Mr. Glover remarked, *Guarisma v. ADCAHBMed. Coverages, Inc.*, No. 13-cv-21016, Dkt. No. 95 (S.D. Fla. June 24, 2015) offers no analysis, and it is not clear from the order that the fees were even disputed. And, *Soto v. The Gallup Org.*, No. 13-cv-61747, Dkt. No. 95 (S.D.Fla. Nov. 24, 2015), for its part, relied on *Guarisma* for the notion that the one-third fee

[4] Objection, ECF 87, at 5.

[5] *Id*. at 5-6.

[6] *Id.* at 6.

was consistent with similar TCPA settlements. These unpublished orders are anything but *carte blanche* authority to disregard the Eleventh Circuit's benchmark.

Further, class counsels' opposition continues to rely on cases outside this Circuit that, as Mr. Glover noted, provide dramatically superior results.[7] Again, class counsel do not so much as mention the distinctions. Class counsel have no response to the fact that a 33% award in *Hageman* was justified by the largest per-class member recovery in the 25-year history of the TCPA. *Hageman v. AT&T Mobility LLC, et al.*, 1:13-cv-50, Dkt. No. 68, at 8-9 (D. Mont. Feb. 11, 2015). They have no response to the fact that the 30% fee in *Ikuseghan* was supported by "an extraordinarily good result" in which the class members received as much as they would had they successfully litigated their claims under the TCPA ($500 per call). *Id*. at *1-2. *Ikuseghan v. Multicare Health Sys.*, No. C14-5539, 2016 WL 4363198, at *2 (W.D. Wash. Aug. 16, 2016). And, they have no response to the fact that a 33% was only appropriate in *Vendervort* because class counsel secured a first-of-a-kind TCPA class certification. *Vendervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1209-10 (C.D. Cal. 2014).

To suggest that this is a cut-and-paste job is to ignore the objection, which is what class counsel have done. Although Mr. Glover's counsel regrettably copied a signature block and certificate of service that included a different client's name, Mr. Glover's objection makes entirely arguments than the objection in *Angela Sanchez-Knutson v. Ford Motor Company*, Case No. 0:14-cv-61344-WPD , ECF Doc. 457 (S.D. Fla. May 17, 2017). That objection to a consumer class action settlement advocated, *inter alia*, that: (1) the class notice violated due process; (2) the settlement was unfair in providing meager relief and an abbreviated claims period; (3) the disproportionate allocation of the settlement to class counsel along with a clear-

[7] *Id.*

sailing provision and a claims-made structure rendered the settlement unfair; (4) class counsels' fees were improperly awarded under the lodestar method without any breakdown as to how hours were accumulated, and a negative multiplier in light of the results was required; (5) a percentage cross-check could not be conducted in the absence of an estimated settlement value; and (6) the court should judicially supervise fee allocation. *Id*. The only real commonality between the cases is that in both, class counsel seek an unreasonable fee.

II. This Court Should Not Discount the Time and Labor Factor Based on Class Counsels' Tenth Circuit Authority.

The response continues to skew the *Johnson* factors in their favor to justify the $2.9 million fee request. The most important factor, the "amount involved and the result obtained," simply does not allow for 30%. Whether looking at it in the aggregate (the actual recovery, $6.3 million, is around 1% of the $491 million class damages) or on a per-claimant basis ($63 recovery v. the $500-$1,500 statutory damages per violation), the settlement is just above adequate.

Further, the very first factor, "the time and labor required," cannot possibly be construed to weigh in favor of an upward adjustment. From the outset, class counsel have failed to provide any evidence on this factor, insisting they not be required to produce any lodestar information. What we do know is that this case settled arounds one year and eight months after it was filed, which is relatively early in this context. *See An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 820 (2010) (finding average and median times to final settlement approval of around three years).

Mr. Glover does not doubt that the motion practice, electronic discovery, subpoenas, a deposition of a corporate representative, two mediations, and having to file a third-party lawsuit

were all necessary in securing the $6.3 million actual relief. But, these are not extraordinary tasks in the context of class action litigation. And they do not justify an upward adjustment.

Class counsel reference Tenth Circuit authority, *Brown v. Phillips Co.*, 838 F.2d 451, 456 (10th Cir. 1988), to suggest that the time and labor factor can be discounted outside the context of the lodestar method. Yet, there is no indication that courts in the Eleventh Circuit have followed that approach. *See e.g., Martin v. Glob. Mktg. Research Services, Inc.*, 614CV1290ORL31KRS, 2016 WL 4129033, at *2 (M.D. Fla. Aug. 3, 2016) (where class counsel sought a 30% fee, requiring submission of time sheets "on the class action settlement website . . . [t]o provide potential class members sufficient time to make their assessment" and noting that "determination of the reasonableness of such a fee will depend upon an assessment of the time and labor required, and the time sheets are obviously integral to that assessment"). Class counsels' hiding the ball, and refusing to provide any lodestar information is a red flag for an excessive fee request.

III. The Risks of this TCPA Litigation were Not Extraordinary.

Class counsel have seemingly taken offense to Mr. Glover's characterization of this as straightforward TCPA litigation. Yet, most of the obstacles to recovery which they name are not, as Mr. Glover explained in his objection and supported with authority, unique to this action.[8]

Class counsels' response simply regurgitates the risks without reference (again) to Mr. Glover's authority. The standard is not whether "liability was easy to prove."[9] It is whether the novelty and difficulty in this TCPA action warrant a deviation from the established benchmark. They do not. *See e.g., Wilkins v. HSBC Bank Nevada, N.A.*, 14 C 190, 2015 WL 890566, at *11(N.D. Ill. Feb. 27, 2015) (awarding 23.7% in a case where the defenses included "the class

[8] ECF Doc. 87, at 10.

[9] ECF Doc. 91, at 12.

members' alleged consent to receive automated phone calls; Rule 23 manageability issues; and potentially forthcoming FCC orders"); *see also Aboudi v. T-Mobile USA, Inc.*, No. 12cv2169, 2015 WL 4923602, at *4 (S.D. Cal. Aug. 18, 2015) (awarding 25% attorneys' fees in a case involving issue of class certification and argument that the class was not ascertainable); *Gehrich*, 316 F.R.D. at 229, 238-39 (awarding 21% in a case involving similar risks, including *Spokeo* standing question and the appeal of the FCC ruling).

Further, as Mr. Glover's objection reminded, the $500-$1,500 TCPA liability goes far in mitigating those risks. *See, e.g.*, *Rose* v. *Bank of Am. Corp.*, 2014 WL 4273358, at *12 (N.D. Cal. Aug. 29, 2014) (reducing requested attorneys' fee award and noting "because the TCPA has the potential of ruinous financial liability . . . defendants will almost always settle if there is any merit at all to the case"); *Bayat*, 2015 WL 1744342, at *9 (noting that there is less risk in a TCPA case "where the potential recovery of statutory damages is as large as it is here . . . due solely to the size of the class and damages fixed by statute"); *see also Gehrich*, 316 F.R.D. at 237 ("this case settled contemporaneously with or after several recent cases in this District and elsewhere that had established a template for TCPA litigation against large financial institutions, vastly reducing the uncertainty and risk for Class Counsel").

Nor does the fact "that class counsel worked for over two years to ultimately obtain the settlement—with no payment during that time and no guarantee[,]" mean that it was "undesirable to many attorneys." This platitude provides no guidance for this Court to exceed the benchmark.[10]

[10] Response, ECF 91, at 19.

IV. Class Counsels' *Ad Hominem* Attacks are a Substitute for Legal Argument.

Class counsel suggest this Court should disregard Mr. Glover's objection based on one of his attorneys' prior representation of other objecting class members. But, Mr. Bandas' representation of objectors in other class actions "has no greater bearing on the merits of the objection raised [in this class action] than a plaintiff's counsel's experience in filing class actions speaks to the merits of claims he brings." *True v. American Honda Motor Co.*, 749 F. Supp. 2d. 1052, 1079 (C.D. Cal. 2010). Of course, some courts, and obviously class counsel, have taken issue with objectors and their attorneys; yet, others have recognized the essential role they play in the approval process of class action settlements. *UFCW Loc. 880-Retail Food Employers Jt. Pension Fund v. Newmont Min. Corp.*, 352 Fed. Appx. 232, 236 (10th Cir. 2009) (citation omitted) (objectors "add value to the class-action settlement process by . . . preventing collusion between lead plaintiff and defendants").

Class counsels' character attack on Mr. Bandas misleads the Court with half-truths. While Judge Dimitrouleas overruled the client's objection to the requirement in the class notice of having to produce a list of all cases in which the client or his attorneys objected to a class action settlement in the preceding five years, the judge nevertheless declined to strike the objection for failing produce a list.[11]

Class counsel cite a Reuters article with a salacious title suggesting Mr. Bandas violated Georgia law in connection with his assistance of a client without making an appearance.[12] What is not mentioned from the title is Mr. Bandas disclosed his assistance (as he did here), and in so

[11] See *Angela Sanchez-Knutson v. Ford Motor Company*, Case No. 0:14-cv-61344-WPD , ECF Doc. 468, at 9 (S.D. Fla. May 17, 2017).

[12] Response, ECF Doc. 91, at 2.

doing, fully complied with applicable law.[13] Also not identified in the title is class counsel ultimately abandoned the unfounded allegations.[14] Admittedly, Judge Caproni of the Southern District of New York had harsh words for Mr. Bandas, but she nevertheless declined to enter sanctions.[15]

Class counsel also leave out that Mr. Bandas' clients have repeatedly succeeded in overturning unfair settlements and excessive fee awards. *See, e.g., In re Baby Products Antitrust Litig*., 708 F.3d 163, 181-82 (3d Cir. 2013) ("We vacate the District Court's orders approving settlement and the fund allocation plan[;] "[w]e vacate the Court's order awarding attorneys' fees and costs because this award was based on the now-vacated settlement"); *Dennis v. Kellogg Co*., 697 F.3d 858, 868 (9th Cir. 2012) ("we reverse the district court's order approving the settlement and dismissing the case, vacate the judgment and award of attorneys' fees, and remand for further proceedings"); *Litwin v. iRenew Bio Energy Sols*., LLC, 172 Cal. Rptr. 3d 328, 333 (Cal. App. 2d Dist. 2014), as modified (May 29, 2014) (in a case in which Mr. Bandas represented the objector in the lower court, the "the order granting final approval of the settlement must be reversed").

Most recently, one of Mr. Bandas' clients assisted in returning $4.3 million in excessive fees to the class members. *See Edwards v. National Milk Prod. Fed*., 11-04766, ECF Doc. 485, at 12, 19 (N.D. Cal. June 26, 2017); Objection of Ira Conner Erwin, ECF Doc. 441. In *Edwards*, the judge dismissed similar personal attacks and labeling of litigants as "professional

[13] *Markos v. Wells Fargo Bank*, No. 1:15-cv-001156-LMN, ECF Doc. 77, at 1-2, 10-11 (N.D. Ga.)

[14] *Id*. at ECF Doc. 86.

[15] *Garber v. Office of Comm'r of Baseball*, 2017 WL 752183, at *5 (S.D.N.Y. Feb. 27, 2017).

objectors[,]" and admonished class counsel to focus on the substance of the objections. *Id.* at ECF Doc. 485, at 2.

Of course, it is neither logically nor legally permissible to conclude that an objection is valid or invalid from outcomes in other cases, especially when those outcomes are mixed. Only the merits of the objections should be of concern to the Court and class counsel.

CONCLUSION

Class counsels seemingly forget that the burden lies with them to show their 30% fee request, above the Eleventh Circuit's 25% benchmark, is reasonable. This Court should exercise its fiduciary duty on behalf of the absent class members, and not simply accept class counsels' insistence that the class members' relative silence amounts to acquiescence to this high fee. Mr. Glover thus finds nothing in class counsels' response that diminishes his objection in any respect, and reiterates his requests as stated in his objection with even greater confidence.

DATED: September 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 21st day of September, I electronically filed the foregoing document with the Clerk of the Court using CM/EFC. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Electronic Filing. The undersigned further certifies he caused to be served via USPS First Class Mail, postage prepaid, a copy of this Objection and associated exhibits upon all parties identified on the attached Service List.

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