IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michelle Lee Tannlund, *et al.* v. **Real Time Resolutions, Inc.**	Case No. 1:14-cv-5149 Hon. Edmond E. Chang

Plaintiff's Motion for
Attorneys' Fees, Expenses, and Incentive Award

After more than five years of litigation and three separate class actions, Class Counsel has succeeded in changing the business practices of Defendant Real Time Resolutions, Inc. ("Real Time") to bring it into compliance with federal law. The settlement that has been preliminarily approved memorializes these changes and provides substantial cash relief for class members.

Class Counsel files this motion for an award of attorneys' fees in the amount of $502,000; out-of-pocket costs of $30,805.55; and a service award of $12,500 for the sole named Plaintiff and class representative, Michelle Tannlund.

Class Counsel's requested fee is within the market price for contingent legal fees in complex litigation, and is reasonable and appropriate given the attorneys' fees awarded in similar cases, the risks presented by this case, the quality and amount of work performed by Class Counsel, and the result achieved. The requested fee also is within the range that the Seventh Circuit has suggested is presumptively reasonable. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) (suggesting in a consumer class action case

"attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel").[1]

Background

1. The Settlement

The proposed settlement establishes a Settlement Fund of $1,300,000 which will be used to pay cash settlement awards to Settlement Class Members who submit timely and valid claims, attorneys' fees and costs as ordered by the Court, and a service award to Ms. Tannlund as ordered by the Court. Settlement Agreement ("SA") §§ 2.33, 5.02 (R. 81-1). No part of the fund reverts to Real Time "regardless of the number of claimants, claims made, checks cashed, or otherwise." *Id.* § 5.02. Notably, the Settlement Fund does not include money for settlement notice or claims administration costs, which is paid separately by Real Time and in addition to the $1.3 million for the class and counsel. *Id.* § 8.03.

The Settlement Class is defined as all living persons in the United States who meet three criteria: (1) received a call from Real Time between August 30, 2009 and April 10, 2017 on a cellular telephone number; (2) where the telephone number was uploaded to and dialed by Real Time's calling system; and (3) did not give express consent prior to the call being placed. SA §§ 2.31 (defining Settlement Class); 2.15 (defining Class Period). Excluded are persons to whom Real Time made no calls after receiving a release of claims or when the person called filed for bankruptcy and received a discharge of debts. SA § 2.31. The definition also excluded judicial officers, staff, and immediate family members to whom the action is assigned, and persons associated with or employed by Real Time. *Id.*

[1] The requested fee of $502,000 is fractionally less than forty percent (39.94%) after subtracting the requested out-of-pocket costs and service award.

On April 10, 2017, Honorable Amy J. St. Eve, substituting for the then-assigned Judge, Honorable James B. Zagel, entered an order preliminarily approving the settlement and finding that there was reasonable cause to submit the proposed Settlement Agreement to the class members and hold a hearing regarding final approval. R. 89 ¶ 1. Since the entry of that order, the action has been re-assigned to this Court, who ordered that the dates and briefing schedule previously set by Judge St. Eve remain in place. R. 90, 91.

2. Class Counsel Faced a Substantial Risk of Nonpayment

Class Counsel undertook representation on a pure contingency basis and have devoted substantial resources to the prosecution of this case with no guarantee that they would be compensated for their time or reimbursed for their expenses. Ankcorn Decl. ¶ 12. The risks presented by taking this case are not academic or hypothetical; Class Counsel have lost putative TCPA class actions against Real Time twice before and recovered nothing for their efforts. *Id.* ¶ 13. A third putative class action was filed by two other law firms and was similarly stymied and settled on an individual basis only after having been stayed for nearly two years pursuant to the primary jurisdiction doctrine. *Id.* ¶ 14.

Further, "[c]ourts are split on whether the issue of individualized consent renders a TCPA class uncertifiable on predominance and ascertainability grounds, with the outcome depending on the specific facts of each case." *Chapman v. First Index, Inc.*, No. 09-cv-5555, 2014 U.S. Dist. LEXIS 27556, at *6-8 (N.D. Ill. March 4, 2014) (citing cases). For example, in *Zeidel v. A&M (2015) LLC*, No. 13-cv-6989, 2017 U.S. Dist. LEXIS 48024, at *13 (N.D. Ill. Mar. 30, 2017), the court granted class certification because of the uniformity of that defendant's calling practices and its policy of gathering cell phone numbers orally, without asking for consent). On the other hand, in *G.M. Sign,*

Inc. v. Brinks Mfg. Co., No. 09-cv-5528, 2011 U.S. Dist. LEXIS 7084, at *22-23 (N.D. Ill. Jan. 25, 2011), the court declined to certify a class on predominance grounds, finding that the defendant offered evidence illustrating that consent could not be shown with common proof. If Real Time were able to present convincing facts to support its position, there is a risk that the Court would decline to certify the class, leaving only the named Plaintiff to pursue her individual claims.

In addition, several industry groups have appealed the FCC's recent Declaratory Ruling and Order, which may further limit recovery under the TCPA as it is poised to significantly alter the definition of what constitutes an automatic telephone dialing system and whether consent to be called using an ATDS may be withdrawn. *See ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. Filed Sept. 21, 2015). Additionally, the Second Circuit two weeks ago issued a ruling holding that a consumer's right to revoke consent can be trumped by a provision in a lender's standard form contract. *Reyes v. Lincoln Automotive Financial Services*, 2017 U.S. App. LEXIS 11057 (2nd Cir. June 22, 2017). While Class Counsel contends that *Reyes* is contrary to the 2015 FCC Order, creates a circuit split by contradicting two other rulings (*Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) and *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265 (3rd Cir. 2013)), and improperly construes a contract including a provision for consent to mean that the consent is irrevocable, the decision underscores the increasing difficulties in prosecuting TCPA cases. The composition of FCC has also radically changed, with two of its three current members having gone on record as being hostile towards TCPA litigation. In short, the risk of non-payment for putative class counsel in such cases has substantially increased.

Moreover, this case had its own set of challenges. Real Time filed a motion for judgment on the pleadings immediately after its Answer, alleging that Plaintiff had expressly authorized Real Time to call her cell phone number when she agreed to the

terms of a loan modification agreement. R. 13 (motion), 14 (memorandum). Real Time also claimed that the agreement released all claims prior to the modification agreement. Memo., at 9-10, fn. 10. In addition to this motion, Real Time also moved to transfer venue to its hometown, the United States District Court for the Northern District of Texas. R. 15 (motion), 16 (memorandum). Transfer of venue would be consequential as the Fifth Circuit has consistently taken the position that consent or lack of the same cannot be established on a class-wide basis in TCPA actions and "only mini-trials can determine this issue." *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318, 329 (5th Cir. 2008). There are, as a consequence, no cases in that circuit where a plaintiff has successfully certified a TCPA class in a contested motion. *See, e.g.*, *Conrad v. GMAC*, 283 F.R.D. 326, 329 (N.D. Tex. 2012) (finding that individual issues of consent would predominate at a trial on the merits if a class was certified).[2]

With respect to the alleged general release, Plaintiff maintains that she revoked her consent after executing the loan modification agreement. Tannlund Decl. ¶ 2. And there is substantial doubt that the general release would be enforceable given that it fails to comply with either Texas or California law governing general releases.[3] *See* Cal. Civ. Code § 1542 ("A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."); *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004) (a release must be conspicuous and must follow the express negligence rule). Courts generally find that a person can waive California's statutory protection, but it must be expressly

[2] Notably, *Conrad* is the latest district court decision in the Fifth Circuit ruling on a contested class certification motion in a TCPA case, showing how rare it is for such cases to be filed in that circuit in light of *Gene & Gene* and the difficulties of certifying a class.

[3] The property securing the debt is located in California while Real Time is domiciled in Texas. The purported release has no choice of law provision. R. 11-1, at 4.

stated. *See, e.g., Belasco v. Wells*, 234 Cal.App4th 409, 422, 183 Cal.Rptr. 840, 851 (2015) (Section 1542's provisions can be waived if that waiver is conspicuous in the release documents). That did not happen here. Nor was the release prominently and conspicuously set out as required by Texas and California law. Thus, class counsel was able to use their expertise in this area of the law, along with the facts of this case to negotiate a very favorable outcome for class members.

3. Class Counsel Obtained an Outstanding Result for the Class

In the face of these obstacles — the very likely outcome being either a denial of class certification or a complete dismissal in which class members receive nothing, Class Counsel used their expertise and experience to negotiate a settlement that provides class members with a cash award that may be as much as $578.[4] This recovery far exceeds recent payouts in TCPA class action settlements. *See Wilkins v. HSBC Bank Nev., N.A.*, 2015 U.S. Dist. LEXIS 23869, *12 (N.D. Ill. Feb. 27, 2015) (approving a TCPA settlement with an estimated $93 payment to each class member); *Wright v. Nationstar Mortg. LLC*, 2016 U.S. Dist. LEXIS 115729, *27 (N.D. Ill. Aug. 29, 2016) (approving a TCPA settlement with an estimated $45 to each class member). As such, it is reasonable to award 40% of the settlement fund in light of the riskiness of this particular litigation and the quality of the result achieved from class members.

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[4] Notices were sent out beginning on May 10, 2017 and the claims deadline is August 23. As of June 23, the claims administrator has received 1,303 presumptively valid claims. An additional 8,800 claims have been received which contain serious indicia of fraud, such as listing ten telephone numbers on a single claim, none of which appear on Real Time's list. Further substantiation will be required from these claimants. SA § 10.2 (procedure for re-submitting claims). The cash award of $578 is calculated after subtracting the requested fees, costs, and incentive award from the gross common fund and dividing by 1303. It is preliminary and subject to change; Class Counsel will submit more complete data for final approval together with a detailed declaration from the claims administrator.

Argument

1. Legal Standard

The default rule is that parties bear their own litigation expenses, absent some sort of legal authority (like a statute) allowing the prevailing party to recover fees. *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 562 (7th Cir. 1994). Another exception is "[i]n a certified class action, [where] the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). When a class action "results in the creation of a common fund for the benefit of the plaintiff class," a court can exercise its equitable discretion to shift fees. *Florin*, 34 F.3d at 563. The court "determines the amount of attorney's fees that plaintiffs' counsel may recover from this fund, thereby diminishing the amount of money that ultimately will be distributed to the plaintiff class. The common fund doctrine is based on the notion that not one plaintiff, but all those who have benefitted from litigation should share its costs." *Id.* (citation and quotation marks omitted). When evaluating the propriety of fees, "[t]he district court must balance the competing goals of fairly compensating attorneys for their services . . . and of protecting the interests of the class members. . . ." *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988) (citation omitted). Like reviewing any other part of the Settlement Agreement, the court must vigilantly safeguard the interests of the class when reviewing the request for attorneys' fees.

A fee award should "approximate the market rate that prevails between willing buyers and willing sellers of legal services." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) (citations omitted). In other words, a court should attempt to "recreate the market" and determine what the parties would have agreed to *ex ante* by considering "actual fee contracts that were privately negotiated for similar litigation,

information from other cases, and data from class-counsel auctions." *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (citation omitted). There are two approaches used to calculate attorneys' fees: the lodestar method, which multiplies the number of hours by a reasonable hourly rate, and the percentage-of-recovery method, which is what its name sounds like — a percentage of the common fund. *Florin*, 34 F.3d at 562. Choosing which method to use is at the court's discretion, and the circumstances will inform which of the methods is more appropriate. *Id.* at 566 ("We therefore restate the law of this circuit that in common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court."); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974-95 (7th Cir. 1991) (same). If the fee requested by class counsel is too high, "[t]he simple and obvious way for the judge to correct [the problem] is to increase the share of the settlement received by the class, at the expense of class counsel." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) (internal quotation omitted).

Although courts have discretion to apply either a "percentage-of-the-fund" or "lodestar" method, in a true common fund case, courts generally prefer the percentage method, finding it the best way to approximate the market rate. *See Beesley v. Int'l Paper Co.*, No. 06-cv-703, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis.") (citation omitted); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598, n. 27 (N.D. Ill. 2011) (recognizing irrelevance of lodestar crosscheck); *Will v. Gen. Dynamics Corp.*, No. 06-698, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive."); *In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 948 n. 10 (N.D. Ill. 2001) ("To view the matter through the lens of free market principles,

[lodestar analysis] (with or without a multiplier) is truly unjustified as a matter of logical analysis.")

Here, Class Counsel submits that the percentage-of-recovery method is proper, because when considering the market rate for counsel's services in an *ex ante* position, "the normal practice in consumer class actions" is to "negotiate[] a fee arrangement based on a percentage of the recovery." *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 795 (N.D.Ill. 2015). "This is so because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of [several] million lightly-injured plaintiffs likely would not be interested in doing." *Kolinek v. Wallgreen Co.*, 311 F.R.D. 483, 501 (N.D.Ill. 2015). Similarly, because of the coordination problems with so many plaintiffs, it is unlikely that class members would want to pay attorneys' fees in advance.

2. Forty Percent of the Net Common Fund is Appropriate Here

When determining the appropriate "percentage of the fund" to award Class Counsel, "courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Taubenfeld*, 415 F.3d at 599. When recreating the market, courts consider three factors including (1) actual fee contracts that were privately negotiated for similar litigation, (2) information from other cases, and (3) data from class counsel auctions. *Id.* No class counsel auction was conducted for this case and Class Counsel is unaware of any consumer class action where an auction has been conducted. Ankcorn Decl. ¶ 15. However, substantial evidence supporting the first two factors exists. With respect to the first factor, the customary contingency fee agreement in this Circuit is 33% to 40% of the total recovery and Class Counsel's actual retainer agreements reflect this fee.

Ankcorn Decl. ¶ 16. With respect to the second factor, data from prior TCPA settlements support the requested fee percentage.

Class Counsel are aware that four judges in this district (including this Court) have elected to use a "declining marginal fee scale" to determine a reasonable percentage of the fund in recent high-value TCPA settlements, starting with a presumptive fee of 30% of the net fund for the first $10 million, with upwards adjustments for contingent risk. *See Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215 (N.D. Ill. 2016); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d at 807; *Wilkins v. HSBC Bank Nev., N.A.*, No. 14-cv-190, 2015 WL 890566 (N.D. Ill. Feb. 27, 2015); *Craftwood Lumber Co. v. Interline Brands, Inc.*, Case No. 11-cv-4462, 2015 WL 2147679, at *5 (N.D. Ill. May 6, 2015). This Court followed a similar approach in *Wright v. Nationstar Mortgage, LLC*, No. 14-cv-10457 (R. 134, Final Approval Order, Aug. 29, 2016).

But a presumptive fee of 30% as used in those sliding-scale settlements is neither necessary nor appropriate here. Each of the cases cited above were "mega-fund" settlements where the common fund was in excess of $10 million: $34 million in *Chase Bank*, $75.5 million in *Capital One*, $40 million in *HSBC*, $40 million in *Craftwood Lumber*, and $12.2 million in *Nationstar*. As Judge Feinerman noted last year, a higher percentage of the fund "makes sense" when the common fund is under $5 million. *Gehrich*, 316 F.R.D. at 236.

Moreover, Courts in this district commonly exceed 30% when awarding fees from a common fund in smaller-value settlement; put differently, as the settlement decreased the percentage increases. *See, e.g., Zolkos v. Scriptfleet, Inc.*, 2015 U.S. Dist. LEXIS 91699, 2015 WL 4275540, at *3 (N.D. Ill. July 13, 2015) ($3.35 million fund, one-third for fees plus costs); *McCue v. MB Fin., Inc.*, 2015 U.S. Dist. LEXIS 96653, 2015 WL 4522564, at *3 (N.D. Ill. July 23, 2015) ($789,500 fund, one-third for fees plus costs); *Prena v. BMO*

Fin. Corp., 2015 U.S. Dist. LEXIS 65474, 2015 WL 2344949, at *1 (N.D. Ill. May 15, 2015) ($3.9 million, 33.5% for fees plus costs); *Martin v. Dun & Bradstreet, Inc.*, 2014 U.S. Dist. LEXIS 184193, 2014 WL 9913504, at *3 (N.D. Ill. Jan. 16, 2014) ($4.5 million, 36.3% for fees plus costs). Accordingly, this is not a case where a declining scale should be applied to avoid overcompensating Class Counsel.

Class Counsel's request for a forty percent contingency fee of the net fund flowing to class members is appropriate and towards the lower end of the range (one third to one half) presumed to be fair and reasonable in this Circuit. *Pearson*, 772 F.3d at 782. Based on the risks of non-payment outlined above, a forty percent contingent fee appropriately reflects the market rate for Class Counsel's legal services to the class in this litigation.

3. An Incentive Award of $12,500 is Appropriate for the Sole Named Plaintiff

"Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) ("Incentive awards are justified when necessary to induce individuals to become named representatives."). In deciding whether and how much to award, courts can consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Id.* (citation omitted).

Here, the class representative participated in the litigation by reviewing the complaint, responding to requests for information, and participating in the settlement process. Tannlund Decl. ¶ 3. She communicated with Class Counsel by phone and email at least once per month over the three-year course of litigation and took an active role in reviewing and commenting on draft settlement documents. *Id.* Although this

case settled before the first phases of discovery were complete, the class representative nevertheless "attached [her] name[] to this litigation and participated in pre-filing investigation and informal and formal discovery." *Gehrich*, 316 F.R.D. at 239. And an early settlement does not necessarily preclude an award when "the Class Representatives' roles were largely prospective in that they were committed to go through discovery as necessary, to be a part of any trial that would follow." *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041 (N.D. Ill. 2011).

Attaching her name to public, high-profile litigation in federal court was no small burden for Ms. Tannlund, who works in the financial services industry for a major international bank and must undergo regular, periodic background checks to maintain her job. Tannlund Decl. ¶¶ 4-6. Part of this review includes a search of court filings to see if she has sued or been sued. *Id.* ¶ 4. Having her name attached to this lengthy proceeding for the past three years has been difficult and created extra hurdles that Ms. Tannlund has had to jump through to keep her job. Moreover, Ms. Tannlund was committed to provide whatever discovery was necessary in this case and to be a part of the trial. Accordingly, a $12,500 incentive award is appropriate.

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Conclusion

For these reasons, Class Counsel respectfully request that the Court grant their motion and award Class Counsel $502,000, which amounts to forty percent of the net settlement fund exclusive of notice and claims administration expenses, out-of-pocket costs of $30,805.55, and a service award of $12,500 to the sole named Plaintiff.

Respectfully submitted,

Dated: July 3, 2017

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Certificate of Service

I hereby certify that on July 3, 2017, I electronically filed the above and foregoing through the Court's CM/ECF System, which perfected service on all counsel of record.

/s/ Mark Ankcorn