UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VINCENT LEUNG, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

XPO LOGISTICS, INC.,

Defendants.

MERIDITH HALSEY,

Objector.

Case No. 15-CV-03877

CLASS ACTION

Hon. Edmond E. Chang

OBJECTION TO MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD

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INTRODUCTION

Class counsel nickels and dimes the class while twisting precedent to arrive at the $2,333,334 fee award they arbitrarily chose for themselves. Even though "[a] proper attorneys' fee award is based on success obtained *and* expense (including opportunity cost of time) incurred,"[1] the Fee Request failed to give any lodestar information and failed to describe which attorneys would be receiving what under the settlement. *See* Motion in Support of Attorneys' Fees and Costs ("Fee Request"), Dkt. 144. Instead, Plaintiff premises his request upon a bizarre misreading of *Pearson*, supposing that the Seventh Circuit *endorsed* attorneys' fees above 34% when holding that fees should not "exceed a third or at most a half of the total amount of money going to class members and their counsel." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014). In spite of requesting more than a third of the net total without justification or lodestar accounting, Plaintiffs incongruously brag that their "request falls squarely within the *Pearson* presumption." Fee Request at 7.

Seventh Circuit law is clear: one third should be regarded as a ceiling absent exceptional circumstances, and attorneys' fees should be awarded as a percentage of the net fund *after* costs, administration costs, the incentive award, and *cy pres* payment (if any) is deducted. The percentage should be based on the "total amount of money going to class members and their counsel." *Pearson*, 772 F.3d at 782.

After final costs are deducted, counsel should be awarded no more than 25% of the net fund, which is the median award in TCPA class actions of this size. Plaintiffs have not articulated any reason to suppose this particular action was especially risky, so no additional bonus should be applied to the market-approximating rate. *See Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 237 (N.D. Ill. 2016). The savings will remain in the settlement fund, which will be proportionally distributed to claiming class members. *See* Class Action Settlement Agreement ("Settlement"), Dkt. 139-1 at ¶ 5.2.

In all likelihood, a 25% fee award overcompensates class counsel because it represents a rate larger that class counsel's (undisclosed) lodestar and a reasonable risk multiplier. Given the lack of

[1] *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687 (7th Cir. 2008) (emphasis in original).

lodestar information provided, the court should infer that 25% of the net fund—an amount likely over $1.6 million—hardly constitutes starvation wages. A 25% attorneys' fee award would return at least $632,584 to the common fund for the benefit of class members. If 5% of class members file claims, each claimant will receive approximately $40.42 more than they would under class counsel's proposed fee award.

Given class counsel's unprincipled request for more than one third of the net settlement fund, the court may choose to award *less* than the median 25% award here. A lower percentage is appropriate to deter counsel from nickel-and-diming class members in future settlements. *Id.* at 238. "To discourage such greed a severer reaction is needful." *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980). Most settlements of this size receive no objection, and so counsel may be tempted to entirely withhold lodestar information and request a too-large award, as they have in this case. Unless counsel occasionally receive a penalty, there will be no incentive for them to request reasonable fees.

Halsey also objects to the selection of the National Consumer Law Center as the recipient of *cy pres* residual funds.

I. Objector Meridith Halsey is a member of the class and intends to appear through counsel at the fairness hearing.

As documented in the accompanying Declaration of Meridith Halsey ("Halsey Decl.", attached at Exhibit 1), Objector Halsey is a member of the class. Ms. Halsey is the wife of M. Frank Bedanarz, an attorney with the Center for Class Action Fairness ("CCAF") who represents her in this matter. Ms. Halsey's address is 1145 E. Hyde Park Blvd. Unit 3A, Chicago, Illinois 60615 and her cell phone number was called by defendant following delivery of Ikea furniture.[2] *See* Halsey Decl. ¶¶ 2-3.

[2] The Preliminary Approval Order requires objectors to provide their cellular telephone number so that parties can "confirm the objector is a Settlement Class Member." Dkt. 142 at 7. This requirement seems unnecessary when the parties are in possession of this information through Ms. Halsey's valid claim number. Ms. Halsey prefers to avoid listing her personal cell phone number on a public filing. The undersigned will serve the phone number to counsel with paper copies of this filing, as indicated in the certificate of service. This is within the spirit of the court's order directing the clerks to redact the last name, address, and phone number of any objector. Dkt. 142 at 8.

Objector Halsey is thus a class member. Objector Halsey received postcard notice of the class action from the claims administrator, Claim ID 10154316. *See id.* ¶ 5; Notice (attached at Exhibit A to Halsey Decl.). Objector Halsey's husband, the undersigned, filed a claim on her behalf and with her knowledge on January 9, 2017, receiving an email confirmation receipt bearing the Claim ID "XLE-10154316-6." *See* Halsey Decl. ¶ 8; Declaration of M. Frank Bednarz ("Bednarz Decl.", attached at Exhibit 2), ¶¶ 15-16; Confirmation email (attached at Exhibit A to Bednarz Decl.).

CCAF represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. Since it was founded in 2009,[3] CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016). To avoid doubt about her motives, Halsey is willing to stipulate to an injunction prohibiting her from accepting compensation in exchange for the settlement of his objection. Halsey Decl. ¶ 10; *see generally* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem). Halsey brings this objection through CCAF in good faith to protect the interests of the class.

Objector Halsey intends to appear through her counsel at the final approval hearing in the above-captioned matter scheduled for March 7, 2018. Objector Halsey wishes to discuss matters raised in this Objection and reserves the right to make use of all documents entered on to the docket by any settling party or objector. Objector Halsey also reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval.

II. The court owes a fiduciary duty to unnamed class members.

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court

[3] In 2015, CCAF merged with the non-profit Competitive Enterprise Institute and became a program within CEI's law and litigation program.

approval." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations." *Id.*

A district court must act as a "fiduciary of the class," for the rights and interests of absent class members. *Mirfasihi v. Fleet Mortg. Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) ("*Mirfasihi II*") (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)). The Seventh Circuit has instructed district courts as fiduciaries "to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions" prior to settlement. *Synfuel Technologies v. DHL Express (USA)*, 463 F.3d 646, 652 (7th Cir. 2006). Because the settlement here is pre-certification, an even higher degree of careful scrutiny is required. *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677, 681 (7th Cir. 1987). As the Seventh Circuit has described it, "[b]ecause class actions are rife with potential conflicts of interest between class counsel and class members … district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("*Mirfasihi I*").

Halsey's objection invokes this special fiduciary role of this Court because she challenges class counsel's excessive and unreasonable fee request. At the fee-setting stage, the relationship between class members and counsel turns directly adversarial when awarding fees from a common fund, it is incumbent upon the Court to "carefully monitor disbursement to the attorneys by scrutinizing the fee applications." *Cook v. Niedert*, 142, F.3d 1004, 1011 (7th Cir. 1998) (internal quotation omitted). Given this natural adversity, there can be no deference to class counsel's recommendation. *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 713 (7th Cir. 2015).

Moreover, "in most common-fund cases, defendants have little interest in challenging class counsel's timesheets." *Gutierrez v. Wells Fargo, NA*, No. 07-cv-05923 WHA, 2015 WL 2438274, at *6 (N.D. Cal. May 21, 2015). No individual class member has the financial incentive to object to an exorbitant fee request either; "[h]is gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). The district court (and good-faith public-minded objectors) serve as the last line of defense against overreaching fee requests. "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23.

III. Class counsel's Fee Request seeks a disproportionate award.

The "ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack*, 768 F.3d 622, 630 (7th Cir. 2014). Costs and notice costs, although paid through the settlement fund, are not benefits to the class and thus not part of "what the class members received." *Id.* There is good reason to deduct costs before setting the fee award. "If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses." *In re Wells Fargo Secs. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994). Accordingly, for purposes of calculating attorneys' fees, "costs are part of the settlement but not part of the value received from the settlement by the members of the class" and should be excluded. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014).

Here, defendant will contribute a total of $7,000,000. *See* Settlement ¶ 2.30. Class counsel has submitted for reimbursement of $52,458.90 in costs (Fee Request at 1), which Objector does not oppose. As for administration costs, as of December 1, 2017, class counsel estimated that they would total between $157,000 and $197,000. Fee Request at 4. However, in all likelihood administration costs will be higher because "those costs will also be impacted if there is a direct mail reminder notice." *Id.* As it turned out, class counsel provided an unexpected "final notice" by postcard after December 29 because the claims stood at a meager 2.02%. Dkt. 145. Actual final administration costs should be determined; there is "no conceivably legitimate reason" to keep a fee request steady after the increase of administrative and notice expenses. *Gehrich*, 316 F.R.D. at 238.

Even if only $197,000 in administration costs are paid, the total funds available to the class are $6,750,541 from which class counsel is seeking $2,333,334. Accordingly, the ratio of the (1) requested fee ($2,333,334) to (2) agreed fee + class recovery ($4,417,207+$2,333,334) = 34.56%.[4] Additionally, while Halsey agrees that Mr. Leung is entitled to a service award, the court may also consider subtracting this amount from the gross common fund insofar that it represents a cost to class members rather than recovery under the complaint.[5] *Averett v. Metalworking Lubricants Co.*, No. 1:15-cv-01509, 2017 WL 4284748, at *6 (S.D. Ind. Sept. 27, 2017) (subtracting incentive award from $750,000 gross settlement to calculate fees).

Properly excluding costs and administration, 34.56% is disproportionate because it exceeds the market rate for fees. In recognition of the absence of an actual market and the concern plaintiffs' lawyers will be overpaid, the Seventh Circuit requires district courts to "assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011). Because no such market actually exists, the Seventh Circuit has suggested several "benchmarks" to help district courts estimate the market fee: (1) actual fee contracts between plaintiffs and their attorneys; (2) data from similar common fund cases where fees were privately negotiated; and (3) information from class-counsel auctions. *In re Synthroid Mkt. Litig.* ("*Synthroid I*"), 264 F.3d 712, 719 (7th Cir. 2001).

To support their fee request, class counsel distorts the first two benchmarks. (Halsey agrees that the last benchmark is inapplicable because counsel have apparently never bid to litigate a TCPA class action, instead colluding to jointly represent plaintiffs.)

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[4] This is higher than the 34.3% figure class counsel claims because class counsel failed to exclude costs, which are deducted from the settlement fund as "Settlement Costs." Settlement ¶ 6.1.

[5] The TCPA does not allow Mr. Leung to collect more than $500 per call. *See Holtzman v. Turza*, 828 F.3d 606, 608 (7th Cir. 2016). Additionally, the $10,000 payment may be excessive. Although Mr. Leung sat for a deposition, another court recently reduced requested incentive awards from $10,000 to $2,500 in a case litigated by class counsel. *See Melito v. Am. Eagle Outfitters, Inc.*, No. 14-CV-2440 (VEC), 2017 WL 3995619, at *16 (S.D.N.Y. Sept. 11, 2017)("an incentive award of $2,500 to each of the class representatives, which represents a recovery of more than ten times what class members receive and reflects ample compensation for the limited time they invested [including seven to eight hours of deposition testimony], is fair and reasonable").

A. Class counsel's own citations show that private fee agreements are not probative to determine the reasonable market rate in consumer class actions.

Contrary to class counsel's discussion, contingency fee agreements with consumer plaintiffs do not tell courts much about the hypothetical market rate between the class and counsel. Retainer agreements between consumers and class counsel "are of little value to determining the market rate because named plaintiffs are less often sophisticated buyers of legal services and more often 'the cat's paws of the class lawyers.'" *In re Capital One Tel. Consumer Protec. Act Litig.*, 80 F. Supp. 3d 781, 796 (N.D. Ill. 2015) ("*Capital One*") (quoting *In re Trans Union Corp. Priv. Litig.*, 629 F.3d 741, 744 (7th Cir. 2011)); *see also Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 501 (N.D. Ill. 2015) (reaching same conclusion); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 235 (N.D. Ill. 2016) (same). Thus, unlike the sophisticated plaintiffs in *Synthroid I*, the plaintiffs "did not have 'a sufficient stake to drive a hard—or any—bargain with the lawyer.'" *Capital One*, 80 F. Supp. 3d at 796 (quoting *In re Continental Ill. Sec. Litig.*, 962 F.2d at 572).

B. Class counsel's 34.56% fee request exceeds market rate.

As for "data from similar common fund cases," class counsel cherry picks the most attorney-generous sample of settlements it can find as supposed support for its position. For example, class counsel provides two pages of string citations predating *Pearson* and *Redman* of settlements where at least one third of the gross fund in fees was awarded. Fee Request at 9-10. Of course, many pre-*Pearson* cases awarded less than 33% in fees, but these are omitted.

The most comprehensive look at fees in TCPA cases was performed by the court in *Capital One*, which reviewed 72 TCPA settlements between 2010 and 2014 and found that the median fee for settlements like this one—between $4.6 and 9.8 million—is 25%. *Capital One*, 80 F. Supp. 3d at 799. The mean fee in such settlements was similar: 24.1% for settlements $4.6 to $7 million and 25.8% for settlements $7 to $9.8 million. *Id.* Class counsel dismisses this data because Judge Holderman's "ultimate analysis included cases from the Ninth Circuit, where the 'benchmark' for attorney's fees in class actions is 25%." Fee Request at 10-11. This complaint is meritless for several reasons. In the first place, of the 72 cases examined by Judge Holderman, only 25 were settled in districts within the Ninth

Circuit. *See* Declaration filed in *Wilkins v. HSBC Bank Nevada, N.A.*, No. 1:14-cv-0190-JFH, Dkt. 109-1 at 2 (N.D. Ill. Dec. 8, 2014). More importantly, Judge Holderman found the data relevant for a good reason: the market for TCPA legal services is nationwide. The rates awarded thus provide highly reliable evidence that the hypothetical *ex ante* market for TCPA attorneys would bargain for much less than the 34.56% class counsel seeks here. TCPA class actions have been and are regularly brought in Ninth Circuit district courts, where filing attorneys know they are unlikely to get more than 25%. In the absence of a lodestar cross-check, this court should conclude that 25% is the most accurate market rate for what class counsel in TCPA actions would agree to at the outset of a case. We *know* it is because they class counsel's colleagues in Washington and California—jurisdictions no less costly than this one—regularly bring TCPA suits knowing they are unlikely to achieve more than 25%.

Turning to post-*Pearson* TCPA settlements, plaintiffs cherry-pick only five cases—three of them not available in Westlaw—awarding 33% or more in attorneys' fees. The reasoning in the available orders shows that they are not persuasive.

- In *Capital One* plaintiffs requested 30% attorneys' fees in a $75 million settlement. *See* 80 F. Supp. 3d at 794. Plaintiffs counterintuitively characterize this case as awarding "36% of the total fund" because the first $10 million of the settlement was awarded at 36%, but in fact the overall fee award was 20.77%. *Id.* at 808. In any event, the 36% fee for the first $10 million was only awarded because the case was "riskier than a typical TCPA class action." *Id.* at 806.
- *Martin v. JTH Tax, Inc.* involved a smaller $3 million settlement, which the *Capital One* survey suggests should be paid at a higher rate based on small size alone. Additionally, based on the transcript provided by class counsel, the *Martin* court likewise found there was "additional risk" above the typical TCPA case. No. 13-cv-6923, Dkt. 89 at 15 (N.D. Ill. Sep. 16, 2015).
- Finally, the court in *Kolinek v. Walgreen Co.* found that unusual risk was illustrated because the district court dismissed the "suit with prejudice before reversing course on [a] motion to reconsider." 311 F.R.D. 483, 502 (N.D. Ill. 2015).

Except for these cherry-picked cases, most courts in this district have recently refused to award more than 30% of the net fund in TCPA settlements. In particular, courts have generally rejected awarding an enhanced percentage for purported above-average risk. *See Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 239 (N.D. Ill. 2016) (awarding fees based on *Capital One* sliding scale, but declining to apply 6% risk premium on first $10 million); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-CV-4462, 2015 WL 2147679, at *4 (N.D. Ill. May 6, 2015) (same); *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14-cv-190, 2015 WL 890566, at *11 (N.D. Ill. Feb. 27, 2015) (same); *Wright v. Nationstar Mortage LLC*, No. 14-cv-10457, 2016 WL 4505169, at *15 (N.D. Ill. Aug. 29, 2016) (same).

1. The Court cannot award risk multipliers because it has not been provided with lodestar billing.

Class counsel muddles precedents that require risk multipliers in cases awarding fees on the basis of lodestar. Fee Request at 13-14. Such risk adjustment applies to lodestar fee awards—not percentage recovery—because awarding only lodestar would under-compensate counsel for the risk of unsuccessful cases. As this Court has explained, the concept of risk multiplier does not similarly apply to percentage awards:

> Although the risk enhancer is proper in *lodestar* cases, it does not reflect market forces in a percentage-of-recovery case. Some background on the purposes of the risk multiplier explains why. Generally, a risk multiplier, as the name suggests, "reflect[s] the risky character of [an attorney's] undertaking." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 569. When a court uses the lodestar approach, a risk multiplier is necessary because the lodestar does not adequately compensate an attorney for the risks of taking on a consumer class action on a contingency basis.

Wright v. Nationstar Mortage LLC, No. 14-cv-10457, 2016 WL 4505169, at *15 (N.D. Ill. Aug. 29, 2016) (emphasis in original). "The risk multiplier does not sensibly apply to percentage-of-recovery cases, however, because the latter approach already incorporates the risks of the lawsuit." *Id.* at *16.

In any event, class counsel has not articulated any reason for supposing this case presented more risk than the typical TCPA suit. The market rate for such suits was surveyed and captured by the court in *Capital One* and ought to be awarded as a median TCPA case, at 25%.

2. Lodestar data is routinely withheld by TCPA counsel, but it appears an appropriate *ex ante* market rate is likely less than 25%.

The rates awarded in TCPA cases appear systemically excessive based on the limited lodestar data we have. Billing information is frequently not disclosed in TCPA cases in this district, but a couple TCPA cases suggest astonishingly high lodestar multipliers. *See Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 239 (plaintiffs' fee request represents a 8.4 lodestar multiplier, and 6.64 multiplier awarded); *see also* Expert Report of M. Todd Henderson filed in *Capital One*, No. 12-cv-10064, Dkt. 294 ("Henderson Report," attached as Bednarz Decl. Exhibit B), at 3 (class counsel requested attorneys' fees which represented 10.2 lodestar multiplier; 7.1 multiplier ultimately awarded). "While TCPA cases pose some risk, approximately 43% of such cases are successful." *Capital One*, 80 F. Supp. 3d at 806. Thus, on average lodestar multipliers should be more along the lines of 2.5 than 7—because such multiplier adequately rewards counsel for the cases that fail.

> Suppose a lawyer can get all the work he wants at $200 an hour regardless of the outcome of the case, and he is asked to handle on a contingent basis a case that he estimates he has only a 50 percent chance of winning. Then if (as under the lodestar method) he is still to be paid on an hourly basis, he will charge (if risk neutral) $400 an hour for his work on the case in order that his expected fee will be $200, his normal billing rate. If the fee award is to simulate market compensation, therefore, the lawyer in this example is entitled to a risk multiplier of 2 (2 × $200 = $400).

Steinlauf v. Continental Illinois Corp., 962 F.2d 566, 569 (7th Cir. 1992).

Instead, class counsel in TCPA actions in this district typically refuse to disclose lodestar figures, which does not allow any meaningful insight into the hypothetical *ex ante* market. Counsel thus perpetuate fee percentages that appear too high—overcompensating counsel and shortchanging class members.

In the absence of lodestar data, the Court should award no more than 25% of the net common fund, which is the median rate for TCPA suits and better reflects the hypothetical *ex ante* bargain for attorneys' fees.

C. Plaintiffs' failure to disclose lodestar further suggests the Fee Request is unreasonable and unlawfully handicaps objectors and the Court.

Although district courts retain discretion to award fees on the basis of either lodestar or as percentage of the fund, *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994), plaintiffs have effectively usurped that choice by refusing to provide any lodestar information whatsoever. Similarly, and in violation of Rule 23(h), the parties have "handicapped" absent class members by not submitting the "details of class counsel's hours and expenses" before the objection deadline. *Redman*, 768 F.3d at 638. Under the Seventh Circuit's *ex ante* approach, the ability to conduct a lodestar cross-check is quite valuable because "any law firm engaged in such *ex ante* negotiations would attempt to estimate the opportunity costs of the engagement by calculating the number of hours likely required for a particular litigation compared to some other investment of their time and efforts." *Williams v. Rohm & Haas Pension Plan*, 2010 WL 2291872, at *2 (S.D. Ind. Jun. 1, 2010) (citing *In re Trans Union Corp. Privacy Litig.*, 2009 WL 4799954, at *10, *17 (N.D. Ill. Dec. 9, 2009) (utilizing lodestar data for purposes of cross-check)).

For a base lodestar, "Even $538 per hour…would be excessive." *Pearson*, 772 F.3d at 781. As for multiplier, the Seventh Circuit itself has suggested that a lodestar multiplier of two might be a "sensible ceiling" to avoid unwarranted attorney windfalls. *Skelton v. Gen. Motors Corp.*, 860 F. 2d 250, 258 (7th Cir. 1988); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) (citing *Skelton* approvingly); *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) (same). As the Seventh Circuit recently noted, "attorneys' fees don't ride an escalator called risk into the financial stratosphere." *Redman*, 768 F.3d at 633.

The Court should infer that lodestar in this case was quite modest. If the lodestar was even half of the $2,333,334 fee request, counsel surely would have trumpeted it.

From prior practice, we observe that counsel declines to disclose lodestar in cases where relatively little work was performed. For example, class counsel participated in the *Capital One* settlement, where class counsel requested fees of $22.6 million without disclosing their lodestar. No. 12-cv-10064 (N.D. Ill.), Dkt. 176. Only after CCAF filed an objection and successfully sought discovery for billing in *Capital One* and other TCPA cases filed by counsel in that case—including cases brought by Keogh Law, Ltd—did counsel disclose that their lodestar was $2.2 million. No. 12-cv-10064, Dkt. 252 at 3-6. CCAF retained an expert who reported that the lodestar multiplier sought in *Capital One* amounted to an astonishing 10.2 times lodestar. *See* Henderson Report at 6.

A similar outrageous multiplier may exists here, but we cannot know because no billing information was submitted.

The likely windfall multiplier is problematic because the $7 million gross Settlement fund represents about $22 per class members—just pennies on the dollar. Such a settlement can only be fair if the plaintiffs have perhaps a 4.5% chance of success, but if plaintiffs have brought a class action with less than a 4.5% chance of success, it is inequitable for them to win windfall profit from bringing a case at the expense of their clients. *Cf. Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); Howard Erichson, *The Problem of Settlement Class Actions*, 82 WASH. U. L. REV. 951 (2014).

Even if only 25% of the net funds are awarded, it would likely result in a significant lodestar multiplier. To the extent class counsel denies this fact, they should provide actual detailed lodestar billing information as most plaintiffs' attorneys do in most settlements.

While the Objector agrees that fees are properly awarded on the basis of percentage of fund, she disagrees that counsel here are entitled to 30% of the net fund—much less 34.56%—just because other courts have applied such unfair and unreasonable rates. As another court observed about prior approved hourly rates, "there is good reason to doubt that unopposed hourly rates awarded as part of class settlements are an accurate proxy for an attorney's actual market rate." *De La Riva v. Houlihan Smith & Co., Inc.*, No. 10-cv-8206, 2014 WL 7053772, at *3 (N.D. Ill. Dec. 12, 2014). The same applies here; that fees above 33% were approved in another case does not imply such fees should be allowed in every case. "By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to…No wonder the 'caselaw' is so generous to plaintiffs' attorneys." *Id.* at *3.

"Other bad stuff exists" is not sufficient analysis under Rule 23. While a lodestar cross-check need not be performed in every case, the systemic refusal of TCPA counsel to provide lodestar information in this district has obscured the true market rate. The point of the Seventh Circuit's market-based approach is to estimate the appropriate level of compensation. The importance of the risk-adjusted lodestar calculation is that it helps us figure out what the appropriate or suitable amount is in a particular case, or on average.

We can infer that the true market rate is less than 30% because many fee requests in TCPA class actions refuse to include any lodestar information whatsoever, in apparent fear that the district court might slash fees on the basis of this knowledge. *Cf. Bayat v. Bank of the West*, No. C-13-2376 EMC, 2015 WL 1744342, at *8 (N.D. Cal. Apr. 15, 2015) (refusing to award 25% of a $2.48 million settlement because it would result in a 2.76 lodestar multiplier). Counsel rationally withholds information that might suggest they are overpaid relative to their peers. Additionally, as discussed above, the willingness of counsel to undertake TCPA actions in Ninth Circuit courts suggests at minimum that 25% is an attractive rate for such legal work, *ex ante*.

IV. A reduced fee award is appropriate as a deterrent for its excessive fee request.

The Court should consider awarding a smaller fee in this case because class counsel has misrepresented *Pearson* to mean that fees greater than one third are appropriate. It seems class counsel arbitrarily decided it should receive $2,333,334 in spite of precedents clearly excluding costs from the fee calculation.

> There is no conceivably legitimate reason why Class Counsel did not reduce their fee request at this point to 33.34% of the then-reduced pool, and their failure to do so undermines any argument that [the fee request] results from a principled methodology. Class Counsel should consider themselves fortunate that the court did not dock their attorney fees to punish their wholly unprincipled approach in this particular respect and to discourage future counsel from falling short in the same way.

Gehrich, 316 F.R.D. at 238 (N.D. Ill. 2016).

If the only consequence from trying to claim a disproportionate share of a settlement is that class counsel will get what they would have been entitled to if they had agreed to a fair settlement in the first place, there is no reason class counsel should not to try for a "free roll" and seek a selfish initial fee request. On the rare occasions counsel gets caught, they would be no worse off than if they had not tried; if no objector investigates and the district court fails to scrutinize the deal, they receive a windfall. In the parlance of the gambler, this is playing with house money. If "the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place. To discourage such greed a severer reaction is needful." *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980). An "outside-chance opportunity for a megabucks prize must cost to play." *Commonwealth Electric Co. v. Woods Hole*, 754 F.2d 46, 49 (1st Cir. 1985).

V. The Settlement's *cy pres* component is improper and at minimum should not be counted as class relief.

Ms. Halsey also conditionally objects to the settlement itself to the extent it diverts class recovery to a *cy pres* recipient representing a potential conflict of interest with class counsel.

Under the terms of the Settlement, payments to class members are capped at $500. *See* Settlement ¶ 12.3. Therefore, if fewer that about 9,000 valid claims are received, than significant amounts of money may be diverted to the designated *cy pres* recipient, the National Consumer Law Center (NCLC). *Id.* As of December 1, 2017, only 6271 claims had been received in total, with no estimate of how many claims were likely valid. Dkt. 145. To the extent that significant amounts of money would be diverted to a *cy pres*, the Settlement should be rejected in its entirety for artificially limiting class relief in favor of a non-party. Moreover, counsel may not be awarded fees from any money not delivered to class members. *Pearson*, 772 F.3d at 784 (no validity to *cy pres* awards where it is feasible to give such funds to class members). This is particularly true in this case because the TCPA does not provide for fee shifting. *See Holtzman v. Turza*, 828 F.3d 606, 608 (7th Cir. 2016).

Based on the December 1, 2017, status report, 11,000 or more claims will likely be filed, and if this occurs, Ms. Halsey only objects to the selection of *cy pres* recipient, which stands to receive the proceeds of any uncashed checks that are not substantial enough to warrant a second distributions. *See* Settlement ¶¶ 2.9 & 12.3. Class counsel has ties to the NCLC, which has a "Partnership Counsel" including numerous plaintiffs firms that class counsel has frequently litigated with in other cases.[6] Class counsel has also spoken frequently at their annual conferences.[7] "*Cy pres* distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of the negotiations." *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012). Here, that potential self-interest relates to "[p]rivate ordering pervasive in MDLs," which "favors attorneys with long-standing business relationships and encourages attorneys to curry favor with one another to secure lucrative positions in future leadership hierarchies, and condones attorneys' behind-the-scenes political wrangling" and allows "lead lawyers to influence both their own and others' compensation" from common-benefit fees. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litig.*, 70 VAND. L. REV. 67, 82-84 (2017). Conflicts in class proceedings present a recurring problem and ought not be encouraged, certainly not where they are undisclosed. *See Southwest Airlines Voucher Litig.*, 799 F.3d at 715-16. Thus, Halsey objects to the National Consumer Law Center being a recipient of any residual funds from the Settlement.

CONCLUSION

The Court should ascertain total administration costs and subtract all costs from the settlement fund before awarding any percentage of fees. The fee award should be no more than 25%, which will amount to perhaps $1.6 million, pending confirmation of final administration costs. The savings—likely at least $632,584—should remain in the settlement fund and be distributed to claimants under terms of the Settlement on a *pro rata* basis, resulting in perhaps $40 more per claimant.

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[6] *See* Leadership for National Consumer Law Center, *available at* https://www.nclc.org/about-us/leadership.html#pc (listing numerous well-known plaintiffs' attorneys on the "Partners Council" of the organization)

[7] *See* Keith J. Keogh profile, available at http://www.keoghlaw.com/attorneys/keith-j-keogh/ (indicating that attorney Keogh has spoken on seven panels at various National Consumer Law Center annual conferences).

Dated: January 30, 2018.

/s/ M.Frank Bednarz
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CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Objection of Meridith Halsey via the ECF system for the Northern District of Illinois and the contemporaneously-filed declarations of Meridith Halsey and M. Frank Bednarz, and exhibits thereto, thus effecting service on all attorneys registered for electronic filing.

Additionally, he caused to be served via First-Class mail a copy of this Objection and a letter indicating Ms. Halsey's telephone number upon the following:

Keogh Law, Ltd., 55 W. Monroe, Ste. 3390 Chicago, Illinois 60603	E. Clay Marquez, O'Melveny & Myers LLP Two Embarcadero Center, 28th Floor San Francisco, California 94111

Dated: January 30, 2018

/s/ M. Frank Bednarz