IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ABANTE ROOTER AND PLUMBING, INC., individually and on behalf of a class of all persons and entities similarly situated, Plaintiff, v. OH INSURANCE AGENCY and ALLSTATE INSURANCE COMPANY, Defendants.	)	Case No. 1:15-cv-09025 Hon. Judge Jorge L. Alonso Hon. Mag. Judge Young B. Kim

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM
IN FURTHER SUPPORT OF FEE PETITION

At the August 29, 2019 hearing on Plaintiff's Motion for Attorneys' Fees, Expenses and Incentive Award, the Court ordered that Class Counsel supplement their fee petition with certain data, as well as answers to questions posed by the Court. This filing, together with the accompanying Declarations of Alexander H. Burke, Edward A. Broderick, and Matthew P. McCue submitted herewith as Exhibits 1-3. Class Counsel submit the following responses to the Court's questions below:

1. How many of these TCPA cases were filed in Federal Court in 2014 and 2015 by Edward Broderick, Alexander Burke and/or Matthew McCue?

2. And of those TCPA cases that were filed in 2014 and 2015 by those three attorneys or any of those three attorneys, how many ended in summary judgment against their client?

3. How many ended in a verdict against their client?

4. Have any of those cases gone to trial, or did any of those cases go to trial?

5. How many ended in settlement?

6. And how many of those cases have pending motions to approve settlements?

Case Filing and Resolution Information: Questions 1-6

Burke 2014-2015

- Total Cases – 47
- Adverse Summary Judgment – 0[1]
- Verdict against Plaintiff – 0
- Cases going to trial - 0
- Cases ending in Class Settlement – 14
- Cases with still pending motions to approve settlements - 1

Broderick 2014-2015

- Total Cases - 43
- Adverse Summary Judgment - 1
- Verdict against Plaintiff - 0
- Cases going to trial - 1
- Cases ending in Class Settlement – 14
- Cases with still pending motions to approve settlements – 1
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McCue 2014-2015

- Total Cases - 43
- Adverse Summary Judgment - 1
- Verdict against Plaintiff - 0
- Cases going to trial - 1
- Cases ending in Class Settlement – 14
- Cases with still pending motions to approve settlements - 1

[1] Although Burke Law did not lose summary judgment in any 2014-filed cases, it lost class certification in three such cases, which were case-ending. As the Seventh Circuit has recognized, "denial of class certification often dooms the suit . . . ." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672F.3d 482, 484 (7th Cir. 2012); *Blair v. Equifax Check Servs*., 181 F.3d 832, 834-835 (7th Cir. 1999). Additionally, the publicly-traded defendant declared bankruptcy in one of those cases. Messrs. Broderick and McCue shared in that class certification defeat, and had a defendant declare bankruptcy after a settlement that was being funded over time, funding only 58% of the expected settlement.

Lodestar Information

Burke Law Offices, LLC[2]

Alexander H. Burke Law 313.5 hours.
Daniel J. Marovitch – 253.2 hours.

Broderick Law, P.C.[3]

Edward A. Broderick 188.20
Anthony Paronich 224.6

Law Offices of Matthew P. McCue[4]

Matthew P. McCue 270 hours.

Legal Analysis Regarding Expenses and Incentive to Keep Expenses Reasonable

"In a certified class action, 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). This settlement creates a $10,500,000 non-reversionary lump sum of money, and is therefore a "common fund" settlement, as opposed to a "claims-made" settlement. See *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 832 (7th Cir. 2018).

"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." *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 563 (7th Cir. 1994) (internal quotation marks omitted). "As part of the settlement, the plaintiff's litigation costs and expenses should be reimbursed, including expert fees, deposition costs, travel expenses, and the like." Consumer Class Actions, § 14.7.9 (Nat'l Consumer Law Ctr. 2019)

[2] See Burke Declaration at ¶ 25, attached as Exhibit 1.
[3] See Broderick Declaration at ¶ 21, attached as Exhibit 2.
[4] See McCue Declaration at ¶ 19, attached as Exhibit 3.

The touchstone of recoverable costs is the "market" for comparable legal services: are the costs of the type that a reasonable paying-client would reimburse? Thus, the Seventh Circuit reversed a district judge's decision not to reimburse legal research fees:

> the market—the paying, arms' length market—reimburses lawyers' Lexis and Westlaw expenses, just as it reimburses their paralegal expenses, rather than requiring that these items be folded into overhead. Markets know market values better than judges do. And as with paralegals, so with computerized research: if reimbursement at market rates is disallowed, the effect will be to induce lawyers to substitute their own, more expensive time for that of the paralegal or the computer.

Matter of Cont'l Illinois Sec. Litig., 962 F.2d 566, 570 (7th Cir. 1992), as amended on denial of reh'g (May 22, 1992).

"Reducing litigation expenses because they are higher than the private market would permit is fine; reducing them because the district judge thinks costs too high in general is not." *In re Synthroid Mktg. Litig. ("Synthroid I")*, 264 F.3d 712, 722 (7th Cir. 2001); cf. Leung v. XPO Logistics, Inc., 326 F.R.D. 185, 197 (N.D. Ill. 2018) (approving TCPA class settlement, including litigation costs coming out of the lump-sum, observing that "Both the class members and the defendant benefit from avoiding these expenses through a definite and immediate settlement.") Counsel have not been able to find any analogous case where litigation expenses were ordered to be rolled into the percentage of the fund, and the Seventh Circuit's seminal case endorsed the approach called for in this settlement. *In re Synthroid Mktg. Litig.(Synthroid II)*, 325 F.3d 974, 980 (7th Cir. 2003) (ordering litigation expenses in addition to a percentage of the fund). The Court should follow *Synthroid II* and its progeny, and approve all reasonable expenses that a paying client would pay.

This approach makes sense: litigation expenses are out-of-pocket expenditures that are made for the benefit of the class. If the case goes sour, the class members need not pay. But if the case proceeds to settlement or judgment, Class Counsel depend upon being reimbursed. After all,

no reasonable client would expect their lawyer to pay for their own travel, mediation fees or process servers. To the extent that the Court has questions as to the types of costs "regular" hourly clients pay, the Court might consider asking defense counsel to disclose the types of costs that were reimbursed in this action.

The Court also asked counsel to address what incentives there are to ensure that counsel "keep expenses and costs low." As Professor Rubenstein observed, "Generally speaking, both parties have the common objective of minimizing litigation expenses if a settlement is possible." 4 Newberg on Class Actions, §11:9 (4th Ed. 2010).

Apart from the clear risk of non-recovery of expenses, there are cost-sensitive issues that come up every single day on the plaintiff side of a contingency case. Refusing to hire an expert, declining to take a deposition, failing to serve a subpoena or declining to mediate based upon cost are pitfalls that inexperienced class action lawyers can fall into. Class counsel has a fiduciary duty to the class to appropriately balance the benefit of spending against the ultimate cost to the class. In other words, you cannot litigate without spending money on reasonably necessary items. The tension between fulfilling counsel's fiduciary duty to the class, weighed against the fiduciary duty to spend reasonably, keeps counsel properly incentivized.

Aside from the ethical considerations above, in a contingency case like this one, risk of nonpayment may also come into play. Of course, the above duties come paramount. But it is worth noting that class counsel have zero incentive to spend money on items they view as important to the case when they may not ever be reimbursed. This aligns class counsel's interests with the class. Cf. 4 Newberg on Class Actions, §11:9 (4th Ed. 2010) ("Plaintiffs' counsel sometimes complain that defense counsel are not motivated to minimize litigation expenses when they are employed on an hourly basis by a large client.")

Counsel submit that there is a large incentive to keeping litigation costs low because they advance those costs out of their pocket, on a contingency basis. This means that every dollar spent on process servers, travel, data analysis, etc. comes straight out of Counsel's pockets. These costs are advanced at the risk of non-recoupment. *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015).

Finally, the Court-approval process incentivizes class counsel not to overspend. Here, Class Counsel respectfully submit that their expenses in this litigation are reasonable and in keeping with litigation against an extraordinarily well-funded defendant represented by top-flight defense counsel. Finally, Plaintiff submits that it is meaningful that no class members have objected to costs, which are clearly laid out in the notice as coming out of the settlement fund. *See Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005).

Why shouldn't the expenses come out of the fee, if you're taking a percentage rather than being paid hourly?

Class counsel advance expenses (together with attorney time) as what is an interest free loan to the putative class. Diminishing attorneys' fees for the chance to recoup those out of pocket expenses, without interest, would not result in reasonable compensation for Class Counsel. In the typical hourly arrangement, in addition to being paid on a current basis for fees, hourly attorneys charge their clients for out of pocket expenses advanced, usually on a monthly basis. It should be no different for a contingent fee lawyer, who, as here, advances those expenses with risk of non-payment and long delayed repayment even in the event of success. Reducing contingent class counsel's fees by the amount of out of pocket expenses would also create a disincentive for class counsel to spend according to the needs of the case. As noted above, the risk of non-recovery already restrains excessive spending, but to further reduce fees

would create an untoward pressure not to properly prepare a case for trial.

Out of pocket expenses, moreover, are routinely recovered on top of a contingent fee attorneys' percentage recovery outside of the class action context.

Proof of Expenses / Receipts

Class Counsel have each submitted an itemization of their expenses with their Declarations. Class Counsel's expenses are supported by credit card statements and checks from their respective business accounts. See Burke Declaration at ¶ 17; Broderick Declaration at ¶ 22 and McCue Declaration at Exhibit 1.

Respectfully submitted,

ABANTE ROOTER AND PLUMBING, INC., individually and on behalf of a class of all persons and entities similarly situated

Dated: September 19, 2019

By: /s/ *Edward A. Broderick*

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Edward A. Broderick
Edward A. Broderick