**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, | ) | Case No. 1:15-cv-09025 |
| v. | ) | Judge Jorge L. Alonso |
| OH INSURANCE AGENCY and ALLSTATE INSURANCE COMPANY, | ) | |
| Defendants. | ) | |

**ORDER**

Plaintiff's motion [221] to file excess pages is granted. Plaintiff's motion [208] for fees is granted in part and denied in part. The Court awards attorneys' fees in the amount of $3,500,000.00, and the Court awards the named plaintiff an incentive payment of $5,000.00. Attorney Burke is awarded reimbursement for expenses of $2519.26, attorney Broderick is awarded reimbursement for expenses of $29,413.53, and attorney McCue is awarded reimbursement for expenses of $9193.49. Plaintiff's motion [219] for final approval of settlement agreement is granted as set forth herein.

**STATEMENT**

Parties to a class action may settle a case "only with the court's approval." Fed.R.Civ.P. 23(e). A court may approve a settlement "only after a hearing and only on finding it is fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2).

The Seventh Circuit has described the dynamics of class action settlements:

> Class counsel rarely have clients to whom they are responsive. The named plaintiffs in a class action, though supposed to be the representatives of the class, are typically chosen by class counsel; the other class members are not parties and have no control over class counsel. The result is an acute conflict of interest between class counsel, whose pecuniary interest is in their fees, and class members, whose pecuniary interest is in the award to the class. Defendants are interested only in the total costs of the settlement to them, and not in the division of the costs between attorneys' fees and payment to class members. We thus have

> 'remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interest.'

*Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (citations omitted); *see also Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014) ("Class actions are the brainchildren of lawyers who specialize in prosecuting such actions, and in picking class representatives they have no incentive to select persons capable or desirous of monitoring the lawyers' conduct of the litigation.").

Thus, it is important that district judges look out for the interests of class members and that judges be "vigilant" in reviewing class action settlements. *Pearson*, 772 F.3d at 787; *Kaufman v. American Express Travel Related Serv. Co., Inc.*, 877 F.3d 276, 283 (7th Cir. 2017) ("we require district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions"). "Because 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) (internal citations omitted). In fact, the Seventh Circuit has "described the district judge as 'a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.'" *Pearson*, 772 F.3d at 780 (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)).

The Court previously granted preliminary approval of the proposed class-action settlement in this case. Having conducted a fairness hearing at which no one objected to the settlement, the Court approves the settlement.

**A. Rule 23**

The parties have proposed a settlement class made up of:

> All persons in the United States (i) to whom Oh Insurance Agency made a call for the purpose of encouraging the purchase of Allstate goods or services (ii) to a cellular telephone number (iii) using SalesDialers (iv) on or after April 19, 2013, up to and including February 21, 2017, limited to calls to telephone numbers on the Class List. The Class List is comprised of the users or subscribers of the 53,743 unique cell phone numbers listed therein.

The Court approves the class definition and concludes that this case meets the requirements of Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. With more than 50,000 class members, this case is one in which joinder of all members is impracticable. The case involves a common question, namely whether the auto-dialer used to call every plaintiff meets the definition in the statute. That question predominates over other questions. The named plaintiff's claim is typical, and the named plaintiff has fairly and adequately represented the claims of the class members in this case. Accordingly, the Court grants class certification in this case.

The Court designates named plaintiff Abante Rooter and Plumbing, Inc. as the class representative. The Court finalizes its appointment of Alexander H. Burke and Daniel J. Marovitch of Burke Law Offices, LLC, Edward A. Broderick of Broderick Law, P.C., and Matthew P. McCue of The Law Office of Matthew P. McCue, as class counsel for the settlement class.

**B. Fairness**

Next, the Court finds that the Settlement Agreement is fair, reasonable and adequate. It was negotiated at arm's length by experienced counsel who were fully informed of the facts and circumstances of the case and of the strengths and weaknesses of their respective positions. The settlement was reached only after mediation before a third-party neutral and additional months of

negotiations between the parties. Counsel for the parties were therefore well positioned to evaluate the benefits of the settlement, taking into account the expense, risk and uncertainty of protracted litigation with respect to numerous difficult questions of fact and law.

The way the settlement is designed, every class member for whom the parties have an address will receive a share of the settlement fund. Settlement checks (expected to be a few cents shy of $150 per person) will be sent automatically to those members for whom the parties have an address. These class members will thus receive real money for a minor nuisance. In addition, class members for whom the parties lack an address were still allowed to file claims.

The parties did an excellent job of notifying class members of the settlement. For classes certified under Rule 23(b)(3), as this one is, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2). "When class members' names and addresses are known or knowable with reasonable effort, notice can be accomplished by first-class mail." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir. 2015). Here, the parties used multiples vendors and databases to locate addresses associated with 53,035 phone numbers out of 53,743 class members. Thus, the parties obtained addresses for 98.7% of the class and sent notice packets to those 53,035 addresses.

Some packets were returned. For the 266 packets returned by the postal service with forwarding addresses, the parties sent notice packets to the new addresses. The parties also received 9,422 returned notice packets that did not contain forwarding addresses. Of those returned packets, the parties were able to obtain addresses for (and resend notice packets to) 1,324 class members. Thus, the parties believe they successfully delivered notice by mail to 83.6% of the class.

In addition to notices by mail, the parties used other efforts to provide notice of the settlement to class members for whom they lacked a valid address. The parties developed a website with information about the settlement and advertised the settlement on the internet. Those efforts yielded 79 valid claims, although 42 were from class members who had received notice (and, thus, had no need to file a claim). The internet process yielded 37 class members who, like the members for whom the parties already had addresses, will receive settlement checks.[1]

Through these efforts, the vast majority of class members were notified of the settlement, yet neither the parties nor the Court received a single objection. No one appeared at the fairness hearing to object. Only one class member opted out.

For all of these reasons, the Court finds the settlement fair, reasonable and adequate. The Court grants final approval to the Settlement Agreement. The Court approves the plan of distribution for the Settlement Fund as set forth in the Settlement Agreement. The Settlement Administrator is ordered to comply with the terms of the Settlement Agreement with respect to distribution of Settlement Relief, including a further payment, if administratively feasible. *See Pearson*, 772 F.3d at 784 ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to intended beneficiaries."). Should any funds (in an amount greater than is feasible to redistribute to class members) remain unclaimed, the Court hereby approves Electronic Privacy Information Center ("EPIC") as *cy pres* recipient who shall receive a distribution of any unclaimed funds, after accounting for the costs of administering that distribution. The funds to EPIC shall be earmarked for work associated with the FCC to protect

[1] The Court also finds that the notice obligations under the Class Action Fairness Act, 28 U.S.C. § 1715, have been met in connection with the proposed Settlement.

consumers under the Telephone Consumer Protection Act ("TCPA"). The Court finds this organization closely aligned with the interests of the class.

The Court expressly integrates and embodies the Settlement Agreement and Releases into this Order. This Court shall retain jurisdiction over the construction, interpretation, consummation, implementation and enforcement of the Settlement Agreement and Releases contained therein, including jurisdiction to enter such further orders as may be necessary or appropriate to administer and implement the terms and provisions of the Settlement Agreement.

**C. Fees and costs**

When considering whether and how much to award plaintiffs' counsel, "district courts must approximate the fees that the lawyers and their clients would have agreed to at the outset of the litigation given the suit's risks, competitive rates in the market, and related considerations." *Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 797 (7th Cir. 2018). The difficulty, of course, is that lawyers do not volunteer at the beginning of a case to state how much they are willing to take in order to be selected as class counsel, and the class members are not present to negotiate a good deal for themselves.

The Seventh Circuit allows a district judge discretion to choose between awarding a reasonable percentage of a common fund or awarding a reasonable lodestar (which essentially boils down to reasonable hours multiplied by reasonable rates). *Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2018) ("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.") (quoting *Florin v. Nationsbank of Ga. N.A.*, 34 F.3d 560, 566 (7th Cir. 1994)).

In this case, plaintiffs' counsel seeks attorneys' fees in the amount of $3,500,000.00, which is one-third of the $10,500,000.00 total settlement, plus expenses in the amount of $73,420.69. As to attorneys' fees, the Court agrees that a reasonable class of plaintiffs making an *ex ante* bargain would have agreed to pay the attorneys one third of the recovery in this case. It is hard to imagine the class agreeing each to kick in an equal share of, say, $300 per hour multiplied by the number of hours it would take the attorneys to achieve a victory or settlement or, worse yet, a loss in this case, given that each stood to gain only a little. Much easier to imagine *ex ante* is the members' agreeing to a contingency fee to incentivize the attorneys to maximize the award to the class members. Given the potential difficulty in establishing that an auto-dialer was used in this case, the Court agrees that a reasonable class would have agreed *ex ante* to a contingency fee of a third of the recovery. Furthermore, the attorneys did a fine job representing the class. The attorneys obtained a solid settlement for the class and were responsive to the Court's concerns about the settlement. Accordingly, the Court awards attorneys' fees in the amount of $3,500,000.00.

As for expenses, counsel originally requested $73,420.69 in "reimbursable expenses" they "incurred." [Docket 208 at 27]. They supported that request with declarations from attorneys: Edward A. Broderick, who declared his firm spent $29,413.53; Alexander H. Burke, who declared his firm spent $3,482.19; and Matthew P. McCue, who declared his firm spent $9,186. There was (and still is) no explanation for the remaining $31,338.97 requested by counsel. The remainder is denied for failure to provide any support. When asked for proof of the expenses they had incurred, the three attorneys provided supplemental declarations itemizing their claimed expenses. Accordingly, Burke is awarded reimbursement for expenses of $2519.26

[Docket 218-1], Broderick is awarded reimbursement for expenses of $29,413.53 [Docket 223], and McCue is awarded reimbursement for expenses of $9193.49 [Docket 218-3].

**D. Incentive award**

Plaintiff Abante Rooter and Plumbing, Inc. seeks an incentive award of $10,000.00 for agreeing to be the plaintiff in this suit.

> It is true that class actions are almost always the brainchild of lawyers who specialize in bringing such actions. But they still have to find someone who is a member of the prospective class to agree to be named as plaintiff, because a suit cannot be brought without a plaintiff. And a class action plaintiff assumes a risk; should the suit fail, *he may find himself liable for the defendant's costs or even, if the suit is held to have been frivolous, for the defendant's attorneys' fees. The incentive award is designed to compensate him for these risks*, as well as for any time he spent sitting for depositions and otherwise participating in the litigation as any plaintiff must do. The plaintiff's duties are not onerous and the risk of incurring liability is small; a defendant is unlikely to seek a judgment against an individual of modest means (and how often are wealthy people the named plaintiffs in class action suits?). The incentive award therefore is usually modest—the median award is only $4,000.00 per class representative.

*Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876-77 (7th Cir. 2012) (emphasis added) (internal citations omitted). The Seventh Circuit has affirmed an incentive award of $1,000.00. *Camp Drug Store, Inc. v. Cochran Wholesale Pharmaceutical, Inc.*, 897 F.3d 825, 835 (7th Cir. 2018) ("Given how little exertion the named plaintiffs expended in pursuing this action, the district court's award of $1,000.00 was among the reasonable options from which the district court could choose. Consequently, there was no abuse of discretion, and we will not disturb the district court's incentive award.").

In this case, the named plaintiff faced little to no risk of being on the hook for fees and costs. At the April 18, 2019 hearing on plaintiff's motion for preliminary approval of the settlement, the Court asked plaintiff's counsel whether plaintiff would be responsible for the costs if plaintiff lost the case. Plaintiff's counsel responded that "Counsel has agreed to cover

the costs of the case in the contract." [Docket 196 at 14]. Plaintiff argues that its principal, Fred Heidarpour, spent time communicating with counsel and participated in the pre-suit investigation. Plaintiff does not say how much time Heidarpour devoted and does not argue that Heidarpour spent time being deposed or attending the mediation. Nonetheless, Heidarpour's suit has achieved a respectable amount of compensation for the class members. Accordingly, the Court awards plaintiff an incentive payment of $5,000.00.

**SO ORDERED.**

**ENTERED: December 10, 2019**

**HON. JORGE ALONSO**
**United States District Judge**