

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

CASE NO. 9:17-CV-80393-ROSENBERG

CHARLES T. JOHNSON, on behalf of
himself and all others similarly situated,

Plaintiff,

v.

NPAS SOLUTIONS, LLC,

Defendant.

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ORDER ON REMAND

THIS CAUSE comes before the Court on remand from the Eleventh Circuit. This Telephone Consumer Protection Act (“TCPA”) case began in March of 2017. Around a year later, after the parties reached a settlement, the Court held a final fairness hearing in which the Court heard argument on class counsel’s Motion for Attorneys’ Fees, Costs, Expenses, and an Incentive Award, DE 44, and Motion for Final Approval of Class Action Settlement, DE 43. Jenna Dickenson objected to both Motions. After the Court approved the parties’ proposed settlement, Ms. Dickenson appealed the Court’s order approving the settlement. On appeal, the Eleventh Circuit reversed in part and remanded in part for the Court to explain its fee award to class counsel, its approval of the settlement, and its denial of Ms. Dickenson’s objections. The Court explains these decisions in this Order.

I. Fee Award to Class Counsel

Under Federal Rule of Civil Procedure 23(h)(3), a court “must find the facts and state its legal conclusions” when awarding reasonable attorneys’ fees and costs in class actions. In this case, on April 6, 2018, class counsel moved for the award of attorneys’ fees and costs. DE 44. Class counsel sought 30% of the settlement fund of \$1,432,000, which amounted to \$429,600, in attorneys’ fees and \$3,475.52 for litigation costs and expenses. *Id.* at 3. The Court held a hearing on the motion on May 7, 2018. At the hearing, the Court explained that it would grant the motion. Tr. at 22. Now, on remand, the Court reviews the record to further explain the findings of fact and conclusions of law it made at the time of the hearing in support of its decision to grant class counsel’s motion for attorneys’ fees and costs.

A. Legal Standard for Attorneys’ Fees

Attorneys’ fees awarded from a common fund are based upon a “reasonable percentage of the fund established for the benefit of the class.” *Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *see also* DE 61 at 31 n.14 (“*Camden I* therefore remains good law, and the district court should apply it in the first instance on remand.”). To determine a “reasonable percentage,” a court evaluates the *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), factors, along with a few other factors. *Camden I*, 946 F.2d at 775.

Under Eleventh Circuit caselaw, a court should consider the following factors: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) time limitations imposed by the client or the circumstances; (7) the amount involved and the results obtained; (8) the experience, reputation, and ability of the attorneys; (9) the undesirability of the case; (10) the nature and length of the professional relationship with the client; (11) awards in similar cases; (12) the time required to

reach a settlement; (13) whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel; (14) any non-monetary benefits conferred upon the class by the settlement; (15) the economics involved in prosecuting a class action; and (16) any “additional factors unique to a particular case which will be relevant to the district court’s consideration.” *Id.*; *Johnson*, 488 F.2d at 717-19.

B. Analysis of Fees

In this case, the Court determined that a fee award of 30% of the settlement fund of \$1,432,000 was reasonable in light of all of the relevant factors under Eleventh Circuit caselaw. In this section, the Court explains its findings of facts, conclusions of law, and reasoning that it made at the hearing in support of its determination that the attorneys’ fee award was reasonable.

First, as for the time and labor involved in reaching a settlement and resolving this case, the Court found that class counsel had invested a good deal of time and labor in litigating this case. The case was pending for more than a year. DE 44-1 ¶¶ 42-58. During that time, the Defendant moved to dismiss and moved to strike allegations from the Plaintiff’s Complaint. DE 13, 19. Class counsel represented that they “devoted significant time and resources to this case” because of their efforts to investigate the facts underlying the Plaintiff’s claims and the class members’ claims, preparing a class action complaint, researching the law, amending their complaint, preparing and serving initial discovery requests, negotiating with the Defendant about the discovery responses, researching class certification issues, working with an expert witness, and settling the matter. *Id.* ¶ 68. The Court accepted the class counsel’s representation that they had invested a good deal of time and labor into this case. Further, at the hearing it became clear to the Court that class counsel would continue to expend time and resources on this case as issues impacting this case were on appeal, thereby requiring the counsel to monitor the resolution of those issues at the very least. Tr. at 20. Moreover, from the class counsel’s affidavit and representations at the hearing, the Court

agreed with class counsel that they had invested a substantial amount of time and labor in this case.

Second, as for the novelty and difficulty of the questions involved, the Court found that class counsel grappled with complicated questions, including the question of consent, when preparing for class certification. In a motion to dismiss, the Defendant argued that the Plaintiffs could not certify the class because the question of whether the Plaintiffs had or had not given the Defendant prior consent to be autodialed was a fact-intensive inquiry. DE 13 at 16. At the hearing, the class counsel explained that, for each Plaintiff,

the number was provided by a patient, and the issue is, does that concept [sic] attach to the cell number or the person. The Eleventh Circuit said no, it is the person. That issue is on appeal to the D.C. Circuit, and the D.C. Circuit has injected -- or has dicta about whether there is a reasonable reliance standard, can the Defendant reasonably rely on the consent it got from a prior cell phone holder. A lot of the issues are up in the air and there is uncertainty. One certain thing is the outcome here is uncertain given the flux of the law.

Tr. at 10-11. Because the legal issues affecting class certification in this case were in flux at the time the class counsel prepared to certify the class, the Court recognized at the time of the hearing on attorneys' fees that class counsel grappled with complicated questions of both law and strategy in this case.

Third, as for the skill requisite to perform the legal service properly and the experience, reputation, and ability of the attorneys, the Court found that the case was specialized and required a familiarity with the TCPA and TCPA class actions. Further, the Court found that the class counsel in this case had a great deal of experience litigating TCPA class action cases. They reported that they had served as class counsel in at least twelve TCPA class action cases filed in federal court and many more consumer protection class action cases filed in federal and state court. DE 44-1 at 3. Therefore, the Court recognized at the time of the hearing on attorneys' fees that the case required particularized skills and that the class counsel had those skills.

Fourth, as for the preclusion of other employment due to acceptance of the case, the Court found that class counsel were unable to work on some other matters because of their work on this case. In the motion and at the hearing, class counsel explained that they “are a small firm,” consequently with “any case we take is time we can’t spend doing something else.” Tr. at 11. Because of their limited capacity and the length of this case, the Court determined that class counsel’s work on this case precluded them from work on other matters.

Fifth, as for the customary fee and awards in similar cases, the Court determined that a 30% fee is customary in TCPA class action cases. At the hearing, class counsel argued that 30% is the customary fee in consumer protection class action cases, including in TCPA class action cases. *Id.*; *see also* DE 44 at 11-12 (citing several TCPA class action cases in the Eleventh Circuit where courts awarded attorneys’ fees of 30%). At the time of the hearing, the Court conducted its own research on the matter. From the Court’s own research and review of the cases that the class counsel cited, the Court determined that 30% is a customary fee often awarded in TCPA class action cases. *See, e.g., Jairam v. Colourpop Cosms., LLC*, No. 19-CV-62438-RAR, 2020 WL 5848620, at *9 (S.D. Fla. Oct. 1, 2020).

Sixth, as for the amount involved, the results obtained, and the undesirability of the case, the Court determined at the time of the hearing that class counsel obtained a favorable result for the class. In the settlement, the class was awarded \$1,432,000. In the motion, class counsel compared this settlement amount to that awarded in other TCPA class action cases. DE 44 at 6-7. From the Court’s review of those cases at the time of the hearing, the Court agreed with class counsel that they had obtained a favorable result in the case, especially in light of the changing landscape of TCPA cases, as class counsel acknowledged at the hearing. Tr. at 10. At the time of the hearing, all parties recognized that the definition of an “autodialer” under the TCPA could

narrow in the future, which is exactly what ended up happening. For context, if the case had been filed today, instead of in 2017, the case very likely would not have resulted in a favorable settlement for the class because the Supreme Court's decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), eliminated liability in this type of case on the part of the Defendant. The changing legal landscape in TCPA cases affirmed the Court's belief that the settlement was favorable for the class in light of the risks of going to trial, and it also led the Court to determine that the case was undesirable and risky for the class counsel.

Seventh, as for any substantial objections raised by class members or other parties to the settlement terms or the fees requested by counsel, at the time of the hearing, the Court determined that there were not any substantial objections to the settlement terms and fees. At the time of the hearing, there was only one objection filed opposing the settlement and fee award by one objector out of a class of around 180,000 possible objectors.

Last, as for the economics involved in prosecuting a class action, class counsel worked on this class action case for more than a year without compensation on a contingency basis. As class counsel explained in their motion, this rendered the case inherently undesirable and risky for them, without even beginning to take into consideration the law and the facts of the case. DE 44 at 14-16. Likely, many other attorneys would not take on this class action case because of this inherent risk. While this TCPA class action is no longer viable as pled, the Court determined at the time that it was valuable to award 30% of the settlement fund to class counsel to incentivize other attorneys to take on similar cases in order to protect consumers with meritorious claims, who may not be able to afford to pay counsel on a non-contingency basis. Therefore, the Court considered the economics of the case when it awarded fees in this case.

Furthermore, the Court weighed all of the factors explained above when it awarded fees in

this case. At the time of the hearing, the Court determined that an attorneys' fees award of 30% of the non-reversionary settlement fund of \$1,432,000, which amounted to \$429,600, was reasonable, and the Court continues to believe that a 30% fee award is reasonable when considering all of the factors listed above at this time.

C. Costs

Just as with attorneys' fees, under Rule 23(h)(3), a court "must find the facts and state its legal conclusions" when awarding reasonable costs. In this case, class counsel sought \$3,475.52 for litigation costs and expenses. In support of this request, class counsel filed an affidavit attesting that they accumulated \$3,475.52 in litigation expenses from filing fees, service of process, expert witness fees, and travel-related costs. DE 44-1 at 14. There were no objections to these costs. At the time of the hearing on the motion, the Court reviewed the affidavit and arguments made at the hearing. From the Court's review of the costs requested and the context of the class action litigation, the Court believed that awarding class counsel \$3,475.52 in costs was reasonable, and the Court still believes that this award is reasonable.

II. Approval of the Settlement

A court may only approve a class action settlement agreement that is fair, adequate, reasonable, and not the product of collusion. Under *Leverso v. SouthTrust Bank of AL., N.A.*, 18 F.3d 1527, 1530 & n.6 (11th Cir. 1994), before a court can approve a class action settlement, the court must analyze the following six factors:

(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement.

In addition, under the newly amended Federal Rule of Civil Procedure 23(e)(2), before a court can

approve a class action settlement, the Court must also consider whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

At the time of the hearing, Rule 23(e) required courts to determine that a settlement was “fair, reasonable, and adequate,” but, unlike the new version of the Rule, it did not require courts to evaluate specific, enumerated factors in determining whether a settlement should be approved. Therefore, during the hearing, the class counsel only walked through each *Leverso* factor on the record, analyzing how each factor applied to the facts of the case, but did not walk through the Rule 23 factors. Tr. at 7-9.

At the time of the hearing, the Court approved the settlement because it was fair, reasonable, adequate, and not the product of collusion in consideration of all of the *Leverso* factors. The Court found that there was no fraud or collusion behind the settlement based upon the parties’ representations on the record that this was a hard-fought case and the lack of objections on this ground. The Court determined that the class action was complex, as the Court explained above in Section I; the experts required, the disputed class certification process, and the rest of the class action proceedings in a case of this size and nature would be expensive; and the litigation would be lengthy, posing a problem for the class as it would be litigating against a well-funded and ably represented Defendant in a changing legal landscape, as explained above in Section I. The Court also recognized that the case had proceeded through most of discovery and after service of the

class's expert report; the parties had not quickly settled this case, they had done so after the contours of the case and the challenges to the class's case had become clearer. At the time of the hearing, the Court also found that the class's probability of success on the merits was low, as explained in Section I. In light of the class's potential inability to state a TCPA claim as a result of changes in the law, the Court recognized that, instead of a settlement of \$1,432,000, the class could well end up without any recovery. Because of this factor and the other *Leverso* factors, the Court agreed with the opinions of the class counsel and the Defendants as represented on the record and in the Motion for Final Approval of Class Action Settlement, DE 43, that the settlement was a good result for the class. For these reasons, the Court approved the settlement at the hearing.

The Court adheres to its analysis, findings of fact, and conclusions of law that it made when evaluating the *Leverso* factors at the time of the hearing and listed above in this Order. In addition, now, in light of the amendments to Rule 23, the Court now addresses the new Rule 23(e)(2) factors for approval of the settlement. First, the Court finds that the class representatives and class counsel adequately represented the class because they efficiently and productively resolved the matter for the class. As explained in Section I, within around a year, the class reached a favorable settlement to resolve a risky, complicated, and expensive class action case that, if filed today, would fail to state a claim. Second, the settlement was negotiated at arm's length through mediation after around one year of litigation. Third, the relief provided for the class was adequate in light of the costs, risks, and delay of trial and appeal, as explained in Section I. In an affidavit attached to the Motion for Final Approval of Class Action Settlement, DE 43, the settlement administrator for this class action explained the proposed process for distributing relief to the class. The Court has reviewed this affidavit and finds that the processes for submitting claims weighs toward a finding of adequacy of the settlement because the relief distribution process has online, telephonic, and

mail forms allowing several avenues for class members to receive funds. As explained in Section I, the Court maintains that the award of attorneys' fees in this case is reasonable. The Court determines that the relief provided for the class is adequate when the terms and timing of the attorneys' fees are considered, along with the agreements made and the other Rule 23(e)(2)(C) factors. Fourth and finally, now that the incentive award is eliminated, the settlement treats all of the class members the same and, thereby equitably relative to each other.

Moreover, at the time of the hearing, the Court determined that the settlement was fair, reasonable, adequate, and not the product of collusion when considering the *Leverso* factors for all of the reasons explained in this section. Further, the Court finds that the settlement should be approved in light of the *Leverso* factors and the Court's evaluation of the factors outlined in amended Rule 23.

III. Denial of Objections

At the time of the hearing, Ms. Dickenson made four objections. Objection (1) was that the Court could not approve the contemplated attorneys' fees at the hearing because class counsel had not filed their motion for fees before the deadline to object to the fees; Objection (2) was that the named plaintiff had failed to show that the proposed settlement was fair, reasonable, and adequate; Objection (3) was that the Court should use the lodestar method to determine the fee award, and, in the alternative, if the Court utilizes a percentage method, then the percentage of fees awarded should be 5%; and Objection (4) was that the proposed incentive award was excessive and precluded by Supreme Court precedent. *See* DE 42. At the hearing, the Court summarized Ms. Dickenson's arguments made in support of her objections, Tr. at 5, and then dismissed the objections, *id.* at 22.


On appeal, the Eleventh Circuit ruled on Objections (1), (4), and part of (3), as far as

Objection (3) related to use of the lodestar method. As a result, on remand, the Court need only explain its denial of Objections (2) and part of (3). Stated plainly, the Court must explain its denial of Ms. Dickenson's objection that the named plaintiff failed to show that the proposed settlement was fair, reasonable, and adequate, and the Court must also explain its denial of Ms. Dickenson's objection that the attorneys' fees award in this case should have been 5% of the settlement fund.

Since both of the remaining objections are intertwined with the other remanded issues in this case, the Court believes that it has now adequately explained its findings of fact, conclusions of law, and reasoning for overruling each objection in the above two sections of this Order. In summary, though, the Court overruled Ms. Dickenson's objection to the approval of the settlement because the Court determined that the plaintiff had shown that the settlement was fair, reasonable, and adequate for all of the reasons stated in Section II, and the Court overruled the objection to the award of attorneys' fees at a percentage higher than 5% because the Court determined that an award of 30% was reasonable for all of the reasons stated in Section I.

DONE AND ORDERED in Chambers, West Palm Beach, Florida, this 15th day of June, 2023.

Copies furnished to:
Counsel of Record


ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE