UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 9:17-cv-80393-RLR

CHARLES S. FISHMAN, on behalf of himself and others similarly situated,

Plaintiff,

vs.

NPAS SOLUTIONS, LLC,

Defendant.

PLAINTIFF'S SUBMISSION IN RESPONSE TO ELEVENTH CIRCUIT'S MANDATE

In awarding attorneys' fees of $429,600, which amounts to 30 percent of the $1.432 million non-reversionary common fund at issue, this Court examined the factors enumerated in *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). ECF No. 77 at 2-7. However, with respect to one of the factors—the "time-and-labor factor"—the Eleventh Circuit found that class counsel did not sufficiently substantiate the time it spent in connection with this matter:

> Even if, as class counsel say, our precedent in common-fund cases indicates that a true lodestar analysis isn't necessary, that doesn't mean that a lawyer seeking attorneys' fees can predicate a request for a one third fee on conclusory assertions about time spent. One wishing to obtain a fee award from such a fund still must show something sufficiently concrete to permit a court to conclude that a particular fee is reasonable.

See ECF No. 94 at 8.

At the same time, the Eleventh Circuit again confirmed—over the objection of Jenna Dickenson, the lone objector to the parties' class action settlement—that district courts are to determine attorneys' fees in connection with a common fund class action settlement as a percentage of the fund obtained for class members, and not based on counsel's lodestar. *Id.* at 5-6 n.2 ("our

precedents foreclose this argument").

And while the Eleventh Circuit did not specify what evidence is "sufficiently concrete" to demonstrate the time and labor devoted as referenced by *Camden I*, it remanded "for further proceedings consistent with [its] opinion." *Id*. at 9. To hopefully avoid further unnecessary litigation in this already very-long-pending matter, class counsel respectfully submits their lodestar and detailed time records reflecting the work they committed to this case over the past nearly eight years. *See* Declaration of Michael Greenwald ("Greenwald Dec."), attached as Exhibit A.

In sum, through November 22, 2024, and after deducting 59.5 hours in an exercise of billing discretion, class counsel Greenwald Davidson Radbil PLLC ("GDR") devoted 918.4 hours to the prosecution of this case and successfully defending against Ms. Dickenson's objections to the settlement amount on appeal. Greenwald Dec., ¶¶ 52-53; *id*. at Ex. 1.

GDR spent these hours investigating the claims at issue, as well as litigating the case in this Court (including written discovery, the provision of an expert report, negotiating and securing the $1.432 million class action settlement at issue, and shepherding the settlement through preliminary approval, class notice, and final approval). *Id*., ¶¶ 41-42. Moreover, GDR dedicated considerable resources to defending the settlement through two appeals to the Eleventh Circuit and three remand proceedings in this Court. *Id*., ¶¶ 43-44.

At the same time, and to protect class members' interests, GDR attorneys stayed abreast of the ever-evolving interpretations of the Telephone Consumer Protection Act ("TCPA"). *See id*., Ex. 1. To be sure, as this case worked its way through post-judgment proceedings, several significant

legal issues loomed, any of which could have eviscerated class members' claims had Ms. Dickenson succeeded in overturning approval of the settlement.[1]

Indeed, one of those issues—the definition of an automatic telephone dialing system ("ATDS") under the TCPA, which represented a significant risk to the class during the pendency of the original litigation—ultimately was resolved in a manner unfavorable to the class. *See Facebook v. Duguid*, 141 S.Ct. 1163 (2021); *Glasser v. Hilton Grand Vacations Co, LLC*, 948 F.3d 1301 (11th Cir. 2020). Despite the Eleventh Circuit's 2020 decision in *Glasser* and the Supreme Court's *Facebook* decision in 2021, Ms. Dickenson continued her efforts to have the settlement undone. Had she succeeded—or stated otherwise, had class counsel not succeeded in defending against Ms. Dickenson's efforts to undue the settlement—it is likely that class members would have been left with nothing.

Of note, then, it was not until earlier *this year*—six years after judgment was entered—that Ms. Dickenson finally abandoned her objection to the settlement amount, and acknowledged that "[t]he $1.4 million common fund cannot be deemed an insufficient recovery[.]" *See* Opening Brief of Appellant Jenna Dickenson, No. 23-12353, at 57 (11th Cir. Apr. 1, 2024) (waiving objection to approval of the settlement).[2]

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[1] For example, case law regarding Article III standing for statutory violations under the TCPA continues to evolve. *See, e.g.*, *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) (receipt of single text message does not confer Article III standing), *abrogated by Drazen v. GoDaddy.com, LLC*, 74 F.4th 1336 (11th Cir. 2023) (receipt of unwanted text messages causes a concrete injury). Separately, courts diverged on the question of whether the TCPA was enforceable during the time period when the Supreme Court found one of its provisions to be unconstitutional. *Compare, e.g.*, *Creasy v. Charter Comm., Inc.*, 489 F. Supp. 3d 499 (E.D. La. 2020) (unenforceable), *with Lindenbaum v. Realgy, LLC*, 13 F.4th 524 (6th Cir. 2021) (enforceable).

[2] Ms. Dickenson's seven years of appellate efforts have succeeded in saving the class a mere $6,000—the amount of Mr. Johnson's incentive award. This represents less than one-half of one percent of the settlement fund, a tiny fraction that pales in comparison to the seven years (and counting) class members have had to wait to receive their recoveries.

Surprisingly, considering their continuing efforts to have the settlement undone, in April 2023, two years after the *Facebook* ruling and more than three years after *Glasser*—Ms. Dickenson's counsel claimed to have not even considered the *Facebook* decision's impact on class members' claims should Ms. Dickenson succeed in her efforts to have the settlement nullified:

> The last point – or one of the last points that Mr. Greenwald made I think was that the Supreme Court's opinion in Facebook versus Duguid dealing with auto dialers would basically – if the settlement were not approved, would make settlement impossible because the class would no longer have claims, is something that I hadn't really thought deeply about and is something that maybe is worth considering.
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> I would hate to see the settlement disapproved if it is, in fact, impossible then to enter a better settlement. I really haven't given much thought to that, but it strikes me as a point Mr. Greenwald made that is worth consideration.

Appendix of Appellant Jenna Dickenson, No. 23-12353 (11th Cir.), Doc. 30-1, DE 81, 29:7-17.

Yet, two years prior, in connection with an objection to a different TCPA class action settlement also involving ATDS claims,[3] Ms. Dickenson's counsel noted on behalf of a different objector the "Third, Seventh, and Eleventh circuit's adopt[ion of] narrow definitions under which the ATDS claims in this case would likely fail." *See* Exhibit B at 18-19. Ms. Dickenson's counsel then noted the then-upcoming oral argument in *Facebook*, set for December 8, 2021, and explained that "Named Plaintiffs and Class Counsel sensibly identify *Facebook v. Duguid* as a serious threat to the ATDS claims in this case" and that "[p]erhaps the ATDS claims should be significantly discounted[.]" *Id.* at 19.

Notwithstanding, Ms. Dickenson persisted with her opposition to the approval of the settlement itself here until April 2024, further justifying the hours GDR spent protecting class members' interests in opposition.

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[3] *Murray v. Grocery Delivery E-Services USA Inc.*, No. 19-cv-12608-WGY (D. Mass.).

In addition to the hours already spent on this case, it is unknown how many additional hours GDR must devote going forward as additional proceedings are possible. Greenwald Dec., ¶ 60. Regardless, GDR is firmly committed to seeing this case through to the end for the benefit of class members and does not seek, nor will it seek, any additional attorneys' fees from the common fund beyond the $429,600 awarded by this Court. *Id.*, ¶ 61.

In completing this work, and in light of their substantial class action litigation experience, *see id.*, ¶¶ 5-7, 11-40, GDR partners Michael Greenwald, Aaron Radbil, and James Davidson billed at an hourly rate of $550, partner Jesse S. Johnson billed at an hourly rate of $500, and former associate Alexander D. Kruzyk billed at an hourly rate of $450. *Id.*, ¶¶ 57-58. Significantly, other courts in this District recently approved GDR's hourly rates of $450 and $500—just $50 less for partners and senior partners, respectively, two and a half years ago—in Fair Debt Collection Practices Act ("FDCPA") class litigation. *Acuna v. Medical Com. Audit, Inc.*, No. 21-81256, 2022 WL 1597814, at *2 (S.D. Fla. May 20, 2022) (Dimitrouleas, J.); *see also Sinkfield v. Persolve Recoveries, LLC*, No. 21-80338, 2022 WL 17835799, at *3 (S.D. Fla. Dec. 21, 2022) (Reinhart, M.J.) (approving rates of between $400/hour and $500/hour), *report and recommendation adopted,* No. 21-80338, 2023 WL 2891237 (S.D. Fla. Jan. 5, 2023) (Altman, J.); *Lloyd v. James E. Albertelli, P.A.*, No. 20-60300, 2020 WL 7295767, at *2 (S.D. Fla. Dec. 10, 2020) (approving GDR rates of $400/hour and $450/hour nearly four years ago) (Smith, J.); *Newman v. Eduardo Meloni, P.A.*, No. 20-60027, 2020 WL 5269442, at *2 (S.D. Fla. Sept. 4, 2020) (Ungaro, J.) (approving GDR rates between $350/hour and $450/hour over four years ago).[4]

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[4] District courts throughout the country likewise find GDR's rates to be reasonable. *See, e.g.*, *Cooper v. Investinet, LLC*, No. 21-1562, 2022 WL 1125394, at *2 (S.D. Ind. Apr. 14, 2022) (approving GDR hourly rates ranging from $400 to $500); *Brockman v. Mankin Law Group, P.A.*, No. 20-893, 2021 WL 913082, at *2 (M.D. Fla. Mar. 10, 2021) (approving GDR's partners' hourly

Also worth noting, GDR's rates are consistent with prevailing market rates previously found to be reasonable in this District and elsewhere nationwide. *See, e.g.*, *Parrot, Inc. v. Nicestuff Distrib. Int'l, Inc.*, No. 06-61231-CIV, 2010 WL 680948, at *8 (S.D. Fla. Feb. 24, 2010) (Dimitrouleas, J.) ("For the year, 2007, an hourly rate of $440.00 for a partner with 19 years of experience, and $290.00 for a fourth-year associate, fall well within rates charged by law firms in the local market."); *Fresco v. Auto. Dirs.*, No. 03-61063, 2009 WL 9054828, at *7-8 (S.D. Fla. Jan. 20, 2009) (Martinez, J.) (rates ranging from $400 for associates to $600 for a senior partner were reasonable, 15 years ago, in a fee-shifting case under the Driver's Privacy Protection Act).[5]

In total, therefore, and through November 22, 2024, GDR has accrued a combined lodestar of $498,855.00 after deducting 59.5 hours in an exercise of billing discretion. Greenwald Dec., ¶¶ 52, 56; *id*. at Ex. 1. This lodestar far exceeds the $429,600 fee awarded by this Court, and further

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rates ranging from $400 to $450); *Riddle v. Atkins & Ogle Law Offices, LC*, No. 19-249, 2020 WL 3496470, at *2 (S.D. W. Va. June 29, 2020) (same); *Aikens v. Malcolm Cisneros*, No. 17-2462, ECF No. 76 at 16 (C.D. Cal. Jan. 2, 2020) (same); *Dickens v. G.C. Servs. Ltd. P'ship*, No. 16-803, 2019 WL 1771524, at *1 (M.D. Fla. Apr. 10, 2019) ("As for the billing rates, [GDR] charged associate and partner rates ranging from $350 to $450 per hour. The Court agrees that for this type of litigation and the market rate in Tampa, the rates are reasonable.").

[5] *See also Topp, Inc. v. Uniden Am. Corp.*, No. 05-21698, 2007 WL 2155604, at *2-3 (S.D. Fla. July 25, 2007) (Simonton, M.J.) (holding as reasonable attorney hourly rate of $551); *accord Salazar v. Midwest Servicing Grp., Inc.*, No. 17-137, 2018 WL 4802139, at *6 (C.D. Cal. Oct. 2, 2018) (finding reasonable hourly rates ranging from $450 to $495 in FDCPA case); *Kurgan v. Chiro One Wellness Ctrs. LLC*, No. 10-1899, 2015 WL 1850599, at *4 (N.D. Ill. April 21, 2015) (finding reasonable hourly rates of $500 and $600 for partners in FLSA class action); *De Amaral v. Goldsmith & Hull*, No. 12-3580, 2014 WL 1309954, at *3 (N.D. Cal. Apr. 1, 2014) (finding rates of $450 per hour for a partner to be reasonable in FDCPA case); *Hull v. Owen Cnty. State Bank*, No. 11-1303, 2014 WL 1328142, at *5 (S.D. Ind. Mar. 31, 2014) ("As a result, the Court awards Mr. Calhoun a total of $54,152.00 for fees (98 hours at $550.00 per hour plus 1.8 hours at $140.00 per hour) and $2,178.04 in costs."); *Lowther v. A.K. Steel Corp.*, No. 11-877, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (employing a lodestar cross-check over a decade ago, the court concluded that $500 per hour was a reasonable rate for the two senior attorneys and that rates between $100 and $450 per hour were reasonable for other attorneys and involved staff); *Rodriguez v. Pressler & Pressler, L.L.P.*, 06-5103, 2009 WL 689056, at *1 (E.D.N.Y. Mar. 16, 2009) (approving hourly rate of $450 and $300 in FDCPA case, over 15 years ago).

underscores the award's reasonableness.

Further demonstrating the reasonableness of the fees incurred by GDR are the hourly rates proffered by counsel for Ms. Dickenson in connection with their objections to the TCPA settlement in *Murray*. There, counsel Eric Isaacson sought fees based on an hourly rate of $1,100 for his work. *See* Exhibit C at 3. Utilizing Mr. Isaacson's claimed hourly rate here would yield a lodestar for GDR of $1,010,240.00—2.35 times the fee this Court awarded.

In the same case, John W. Davis, also counsel for Ms. Dickenson here, represented that his hourly rate was $825 at the time. *See* Exhibit D at 7. Utilizing Mr. Davis' hourly rate here would yield a lodestar for GDR of $757,680.00—1.76 times the fee this Court awarded. Each of these formulations yields a lodestar well in excess of the awarded fee, further supporting its reasonableness. Curiously, neither Mr. Isaacson nor Mr. Davis provided detailed time records in connection with their fee request in *Murray*. *See* Exs. C, D.

Also supporting the 30% fee here is Mr. Isaacson's and Mr. Davis' backing of a fee amounting to 26.8% of the $11 million common fund in *Murray*, which they deemed to be "collectively reasonable." *See* Exhibit E at 2. The total fee awarded in *Murray* was nearly $3 million, which is almost seven times the amount awarded by the Court here. *See* Exhibit F at 8. Of that amount, the court awarded counsel for Ms. Dickenson $750,000 in attorneys' fees because their objection ultimately resulted in additional money for class members who had claims separate from any ATDS claims. *Id*. Also of note, the court's analysis of the fee awards in *Murray* was limited to two short paragraphs. *See* Ex. F at 8-9. Unlike their protestations to the fulsomeness of this Court's

prior orders,[6] counsel for Ms. Dickenson did not appeal the order awarding them $750,000 in attorneys' fees, and therefore did not assert, as they did here, that the court's order in *Murray* lacked sufficient detail.

Finally, while it is unclear whether counsel provided notice to the class in *Murray* regarding their request for $750,000 in attorneys' fees, GDR will do so here by posting this submission and supporting declaration, including counsel's billing records, to the dedicated settlement website, www.JohnsonNPASsolutionssettlement.com. *See* ECF No. 43-1 at 13, 15 (class notices directing class members to the settlement website for additional information). Class members will then have an opportunity to review counsel's submissions and can respond should they choose to do so.

Conclusion

GDR is a small firm, now with only four attorneys. Greenwald Dec., ¶ 47. GDR has handled this case on contingency and has, to date, received no payment for its years of work on this case. *Id.*, ¶¶ 46, 48. The time and labor GDR devoted to this case yields a lodestar well in excess of the fees awarded by this Court, and further supports its reasonableness. As a result, GDR respectfully requests that this Court amend its June 15, 2023 order, ECF No. 77, to include GDR's lodestar and find that the "time-and-labor factor" (in addition to the other pertinent factors) fully supports the awarded fee of 30 percent of the common fund attained for the class.

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[6] *See, e.g.*, Opening Brief of Appellant Jenna Dickenson, No. 18-12344, at 28 (11th Cir. Aug. 6, 2018) ("the district court offered only a boilerplate recitation of factors it was required to discuss and meaningfully evaluate.").

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Respectfully submitted,

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