UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MIRANDA L. DAY,
for herself and all persons
similarly situated,

Plaintiff,

v. CASE No. 8:10-CV-2463-T-TGW

PERSELS & ASSOCIATES,
LLC, et al.,

Defendants.

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ORDER

This class action, which alleges violations of the Credit Repair Organizations Act, 15 U.S.C. 1679, et seq., and several common law claims, is before this court on remand from the Eleventh Circuit. This court previously approved the parties' proposed settlement as fair, adequate, and reasonable despite the lack of a monetary payment to the Class based, in part, on the defendants' financial inability to pay a meaningful award. On appeal, the Eleventh Circuit vacated that judgment and remanded the matter for further proceedings because the record did not adequately document the defendants' inability to satisfy a judgment. Based on a somewhat

supplemented record and the purported strength of defendant CareOne Services, Inc.'s contention that arbitration is the appropriate forum for the named plaintiff's claims, the parties again request approval of the proposed settlement agreement.

However, last year, while this case was on appeal, there was a startling development that changed my perspective completely. In a class action lawsuit in Washington State involving essentially the same claims and same defendants, Class members received a total settlement of $2,200,000. As a result, each Class member received an average of $562, which was about one-third of the total fees paid to the defendants. Under these circumstances, it appears grossly unfair to the Class members in the other 49 states to be denied any recovery at all, while the defendants, in turn, have their potential liability eliminated in those states. Accordingly, the parties' joint motion to approve the settlement (Doc. 176) will be denied.

I.

The facts of this case have been set forth in detail in Orders by this court and the Eleventh Circuit (see Doc. 157). See Day v. Persels & Associates, LLC, 729 F.3d 1309 (11th Cir. 2013). To briefly summarize, the

named plaintiff and the defendants previously sought approval of a settlement of this lawsuit, the terms of which included injunctive relief, a *cy pres* award of $100,000, an incentive payment of $5,000 to the named plaintiff, and payment of an attorneys' fee up to $300,000. Following a fairness hearing, this court approved the proposed settlement as "fair, adequate, and reasonable despite the lack of a monetary payment to the Class members" based on "(1) the ability of the Class members to opt out of the settlement agreement; (2) the financial inability of the defendants to pay a meaningful award, much less to respond to a large judgment; and (3) my complete confidence in the ability and integrity of [Class] counsel" (Doc. 157, pp. 15-16). Objector Raymond Gunn subsequently appealed the Order approving the settlement, arguing that the settlement was not fair, adequate, and reasonable (Doc. 158).[1] Two amicus briefs were filed in support of the appeal: one from the National Association of Consumer Advocates, and another from the attorneys general

[1]Specifically, objector Gunn "argued that 1) the settlement is not fair because it releases valuable claims but provides no benefit to the class; 2) the ability to opt out cannot cure the unfairness of a settlement; 3) the reactions of the class and the state attorneys general do not support approval; 4) the claim that defendants are unable to fund a meaningful settlement lacks adequate evidentiary support; and 5) deference to the views of class counsel is inappropriate under the circumstances of this case" (Doc. 177, p. 2).

of twenty-five states and the District of Columbia.[2] On September 10, 2013, the Eleventh Circuit vacated the final judgment approving the settlement agreement and remanded the case for further proceedings on the ground that the record did not adequately support the defendants' inability to satisfy a judgment. Day v. Persels & Associates, LLC, supra, 729 F.3d at 1326-28. More particularly, the Eleventh Circuit held that this court abused its discretion in finding that the seven defendants in this case would be financially unable to satisfy a judgment when the record only documented the financial condition of one defendant. Id. at 1326-27.

Upon remand, a scheduling conference was held on December 3, 2013 (Doc. 172). Counsel for the plaintiff and the defendants were present at the hearing; no other parties or entities were represented. The parties argued that the settlement should "go forward," and proposed supplementing the record with evidence concerning the defendants' financial inability to satisfy a judgment. Based on the parties' proposal, this court entered an

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[2]Prior to the first fairness hearing, a letter in opposition to the proposed settlement was submitted by five state attorneys general (Doc. 152).

Order directing the clerk to reopen the case and setting a final hearing concerning the settlement (Doc. 173).

Thereafter, counsel for Persels & Associates, LLC; Ruther & Associates, LLC; Legal Advice Line, LLC; Neil J. Ruther; Jimmy B. Persels; and Robyn R. Freedman (collectively "law firm defendants") filed a fourth declaration from Ruther, a declaration from Persels, and a declaration from Freedman (Docs. 174, 175).[3] These declarations provide financial information concerning all of the law firm defendants. No declaration or other financial information was submitted on behalf of CareOne.

Ruther is a resident of Maryland and owns most of his assets in a tenancy by the entirety with his wife (Doc. 174, p. 3[4]). The only assets that Ruther does not own in a tenancy by the entirety are: (1) a partial interest in Wings, LLC, which he alleges "cannot be attached to satisfy a judgment against [him]"; (2) an ownership interest in Persels & Associates; and (3) an

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[3]The law firm defendants subsequently submitted financial statements of Persels & Associates in support of Ruther's fourth declaration (Doc. 178, pp. 3-7).

[4]For consistency, the page numbers for Docs. 144, 174, 175, and 178 refer to the page numbers assigned by the CM/ECF system.

ownership interest in Consumer Law Associates, LLC, a company with no assets (id., p. 4).

According to Ruther, Persels & Associates sustained net losses from 2010 through October 2013 (id.). As of October 2013, Persels & Associates had a negative net worth of $20,399,043.42 (id.). Pursuant to a settlement agreement in an unrelated matter, Persels & Associates agreed to pay $18 million to My Professional Advice, Inc., in a series of payments through 2019 (id., p. 5).

Ruther & Associates, LLC, was the predecessor of Persels & Associates (id., p. 4). Ruther states that this company "is no longer in business under the former name and has no employees, officers or assets" (id.).

Legal Advice Line, LLC, was a Maryland limited liability corporation (id., p. 5). "It has done no business in at least the last six years and has no assets" (id.).

Persels, a Maryland resident, owns most of his assets in a tenancy by the entirety with his wife (id., p. 7). Aside from three individual retirement accounts, the only assets that Persels owns apart from his wife are:

(1) an undeveloped lot valued at approximately $2,000, which he owns with his sibling; and (2) personal effects, including a ring and clothing, worth approximately $1,500 (id., p. 8). He receives monthly Social Security payments in the amount of $2,054.50 (id.).

According to her declaration, Freedman is a resident of New Jersey and owns most of her assets with her husband in a tenancy by the entirety (Doc. 175, p. 3). She also has two individual retirement accounts (id., p. 4).

The settling parties' memorandum states that Freedman is "primarily a stay-at-home mother," and her income from legal work in 2013 was approximately $1,000 (Doc. 176, p. 10). With her husband, Freedman "owns non-retirement assets with an aggregate value of approximately $681,000" (id.).

On January 15, 2014, the named plaintiff and the defendants moved for final approval of the settlement (Doc. 176). The parties contend that the declarations filed by the law firm defendants "provide ample support for the proposition that the Law Firm Defendants, individually and in the aggregate, are financially unable to satisfy a substantial judgment" (id., p. 8).

With respect to CareOne, the parties assert that the settlement should be approved, not on the basis of CareOne's inability to pay a judgment, but rather on the strength of CareOne's argument that the named plaintiff's claims against CareOne are subject to binding, individual arbitration (id., pp. 11-15).

Objector Gunn filed a response opposing final approval of the proposed settlement, asserting that the proposed settlement is not fair, reasonable, and adequate for several reasons (Doc. 177). Among other things, Gunn notes that: (1) a Class of Washington residents recently settled claims against CareOne, Persels & Associates, Ruther, and Persels for a total of $2,200,000, of which $750,000 was covered by insurance (id., pp. 4, 10); and (2) and no evidence has been presented suggesting that defendant CareOne would be unable to satisfy a judgment (id., p. 3).[5]

In response to Gunn's opposition, the law firm defendants filed supplemental declarations from Persels, Freedman, and Ruther (Docs. 179,

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[5]As discussed in more detail below, a Class of 2,738 consumers settled with CareOne, Persels & Associates, Ruther, and Persels for $2,200,000 (Doc. 177, pp. 4, 10). See Bronzich v. Persels & Associates, LLC, Case No. 2:10-CV-0364-TOR (Doc. 311) (E.D. Wash. Jan. 25, 2013). A separate Class of 712 Washington consumers settled claims against Ruther, Persels, and others for $1,155,000 (Doc. 177, p. 10). See Brown v. Consumer Law Associates, LLC, 2013 WL 2285368 (E.D. Wash. May 23, 2013).

180, 182). These declarations indicate that there is no insurance coverage for the claims in this lawsuit.[6]

A final fairness hearing was held before me on January 22, 2014. Counsel for the plaintiff, the defendants, and objector Gunn participated.

Following the hearing, with the court's permission (Doc. 185), the law firm defendants filed certain confidential financial information under seal (Doc. S-186). These documents include, among other things, tax returns, balance sheets, bank statements, a second declaration from Freedman, a revised fifth declaration from Ruther, and the settlement agreement with My Professional Advice, Inc. (id.).

II.

Pursuant to Rule 23(e), Fed.R.Civ.P., the court must approve the settlement by a certified class. In order to approve a settlement, the district court must find that it is "fair, adequate, reasonable, and not the product of collusion." Leverso v. SouthTrust Bank of Ala., Nat. Assoc., 18 F.3d 1527, 1530 (11th Cir. 1994); see also Rule 23(e), Fed.R.Civ.P. Several factors

[6] Persels & Associates' policy with Catlin Speciality Insurance Company, policy number LPP-2079989-0412, only covers claims filed on or after April 23, 2012 (Doc. 182).

useful in making this determination are: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement is achieved. Sterling v. Stewart, 158 F.3d 1199, 1204 n.6 (11th Cir. 1998); Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984).

It is noted that there is a "strong judicial policy favoring settlement." Bennett v. Behring Corp., supra, 737 F.2d at 986. Thus, "absent fraud, collusion, or the like, [the trial court] should be hesitant to substitute its own judgment for that of counsel." Canupp v. Liberty Behavioral Healthcare Corp., 447 Fed. Appx. 976, 978 (11th Cir. 2011) (quoting Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)). However, a primary concern in this analysis is insuring that the rights of the passive Class members are not jeopardized by the proposed settlement. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623 (1997).

III.

Recently, objector Gunn has provided information that completely changes my viewpoint that it is fair to deny Class members in every state, except Washington, any compensation at all, while the defendants are absolved of all liability in all other 49 states. Thus, objector Gunn points out that, since this court initially approved the settlement, two classes of Washington consumers have received substantial settlements from four of the defendants in this case (Doc. 177, pp. 4, 10-11). Most significantly, in Bronzich v. Persels & Associates, LLC, Case No. 2:10-CV-0364-TOR (Doc. 311) (E.D. Wash. Jan. 25, 2013), a Class of 2,738 consumers settled claims against CareOne, Persels & Associates, Ruther, and Persels for $2,200,000, "of which $1,540,000 was paid directly to the class members pursuant to a formula that reimbursed each class member about 33 percent of the total fees paid to defendants" (Doc. 177, pp. 4, 10). The average payment received by each Class member was $562 (id., p. 10). An insurance company funded $750,000 of the settlement (id., p. 4), and the remainder was financed by CareOne. In addition, a Class of 712 Washington consumers settled with Ruther, Persels, and others (not including CareOne) for a total of $1,155,000,

with each Class member receiving approximately 30% of the fees paid to the defendants (id., pp. 10-11). Brown v. Consumer Law Associates, LLC, 2013 WL 2285368 (E.D. Wash. May 23, 2013).[7] An estimated $776,331.95 was distributed directly to the Class, and it was expected that more than half of the Class members would "receive a payment in excess of $1,000." Brown v. Consumer Law Associates, LLC, supra, 2013 WL 2285368 at *3.

It just seems fundamentally unfair to me that Class members in Washington got a significant recovery, while Class members everywhere else get nothing. Under Rule 23(e)(2), a settlement can be approved only if it is, among other things, "fair." Under the circumstances, I cannot make such a finding.

At the hearing, the defendants' attorneys argued that the Bronzich settlement should not be used as a foundation for finding that the proposed settlement in this case is unfair. In this regard, the law firm defendants did not contribute to the settlement in Washington, and they did not have insurance coverage for those claims. CareOne's counsel vaguely

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[7]Counsel for Gunn explained at the hearing that Consumer Law Associates, LLC, is part of the Persels group of companies.

asserted that CareOne faced enormous exposure in Washington, but it has only slight exposure in this case.

The defendants' arguments miss the point: the settlements in Washington confirm that at least one defendant, CareOne, has the financial ability to respond to a judgment. CareOne certainly has not presented any evidence to the contrary. Under these circumstances, the lack of a monetary payment to the Class in this case is blatantly unfair.

CareOne is entitled to take the position that it has minimal exposure in this case, and it cannot be compelled to pay a large settlement to this Class. On the other hand, with CareOne having taken that position, the appropriate approach is to have the case go forward to see if CareOne's assessment of the settlement value proves correct, or at least reasonable. To approve a settlement with no compensation for Class members would require me to accept at face value CareOne's assessment of the settlement value. I am in no position to do that.

The unfairness of the settlement is further demonstrated by the expansive benefit received by the defendants. Although the named plaintiff filed the amended complaint on behalf of herself and a Class of 10,000

Florida consumers (Doc. 98), the proposed settlement relieves the defendants from liability in all states except Washington (which has been separately resolved). This aspect of the settlement has bothered me from the beginning, but nobody made a point of it. Nevertheless, now with CareOne taking the position it does not want to contribute sufficiently to permit Class members to be compensated, the expansion of the alleged Class from Florida to a Class of 48 more states strikes me as unjustified overreaching. After all, CareOne is essentially paying nothing for the additional release of liability in 48 states.

The expansion of the Class is also unfair to the Florida Class members. Thus, it would most likely be easier for the defendants to fund a payment to the Class if it was limited, as alleged in the amended complaint, to 10,000 consumers in Florida. Thus, even if assets of the law firm defendants are not subject to collection, the defendants may be willing to pay something to the alleged Florida Class to eliminate the burden of defending this lawsuit.

The parties contend that their proposed settlement should be approved independently of CareOne's financial condition due to the "strength of CareOne's argument that plaintiff's claims against CareOne are subject to

binding, individual arbitration" (Doc. 176, p. 11). However, as the Eleventh Circuit explained on appeal (Day v. Persels & Associates, LLC, supra, 729 F.3d at 1327 (quoting Bennett v. Behring Corp., supra, 737 F.2d at 986)):

> Although CareOne stated that it would appeal the denial of its motion to compel arbitration, at this point only speculation supports a finding that CareOne was likely to prevail. This speculation is not sufficient to support the exclusion of the assets of CareOne from "the range of possible recovery."

There has been no showing that CareOne's likelihood of prevailing is any less speculative now than it was on appeal.

Moreover, even if CareOne were to prevail with its arbitration argument, that would only relieve CareOne from liability for the claims of the named plaintiff. There has been no evidence introduced that CareOne had binding arbitration provisions in agreements with each member of the Class, and it is speculative to think at this point that it does. Consequently, CareOne still faces potential liability for the claims of the 125,010 Class members in addition to the named plaintiff (see Doc. 144, p. 8).

Counsel for CareOne argued at the hearing that the court should also consider, as a basis for approving CareOne's role in the proposed settlement, the substantial financial contribution that CareOne will make if

the settlement is approved. This contention is not persuasive. Thus, as evidenced by the Washington settlements, CareOne's contribution of approximately $405,000 to the settlement in this case is an extremely small price to pay for a nationwide release of liability.

The parties and objector Gunn disagree about whether on remand the issue is the defendants' ability to contribute to a settlement or whether a judgment is collectable. The settling parties assert that the defendants must only show an inability to pay a judgment. Objector Gunn, on the other hand, contends that the court should consider both the defendants' ability to satisfy a judgment and their ability to contribute to a settlement. It seems to me that, in evaluating a settlement, particularly one that does not compensate the Class members, both factors should be considered.

In any event, from all that appears, one or more of the defendants can financially contribute to this matter, whether to satisfy a judgment or to contribute to a settlement. Thus, the parties' memorandum indicates that half of defendant Freedman's non-retirement assets, which have an aggregate value of approximately $681,000, may be subject to collection (Doc. 176, p. 10). Further, as previously discussed, CareOne's contribution to the Bronzich

settlement confirms that it has the financial resources to respond to a judgment or meaningfully contribute to a monetary award for the Class.

It is recognized that the Class members were provided with an opportunity to opt-out of the settlement agreement, and an individual who opts-out retains the ability to sue the defendants and seek full reimbursement. This option, which was sufficiently explained in a Notice that reached approximately 98.4% of the Class (see Doc. 157, p. 7), continues to weigh substantially in favor of approving the settlement. However, there is no indication that the Eleventh Circuit thought the opt-out provision was an overriding consideration, and it certainly does not overcome the unfairness of the proposed settlement in light of the resolution of the Washington cases.

It is, therefore, upon consideration,

ORDERED:

That the Joint Motion in Support of Final Hearing on Settlement (Doc. 176) be, and the same is hereby, **DENIED**. The case will therefore

proceed on the docket, and any motions which were previously denied as moot in light of the proposed settlement may be refiled.

DONE and ORDERED at Tampa, Florida, this 14th day of February, 2014.

THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE