IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JUANITA WILLIAMS, on behalf of herself and others similarly situated,

Plaintiff,

v.

CHOICE HEALTH INSURANCE, LLC,

Defendant.

Case No. 1:23-cv-00292-RAH-KFP

CLASS ACTION

PLAINTIFF'S SUPPLEMENTAL SUBMISSION REGARDING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff Juanita Williams ("Representative Plaintiff") is in receipt of the Court's July 3, 2024 Order as well as the Court's July 5, 2024 Order (ECF No. 43) regarding *Drazen v. Godaddy.com*, 101 F.4th 1223 (11th Cir. 2024) and in this submission will address both issues raised by the Court.

1. **The Plaintiff is withdrawing her Request.**

Plaintiff believes there is a range of arguments and case law that support her Request. *See e.g. Sinkfield v. Persolve Recoveries, LLC*, 2023 WL 511195 (S.D. Fl.) (discussing general release and holding "Because the Plaintiff is being paid this $1,500.00, *not* as "a salary, a bounty, or both," but in exchange for agreeing to a broader release of claims than the release the other Class Members have given, this payment doesn't violate the strictures of *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1258 (11th Cir. 2020).") and *Mitchell v. Allstate Vehicle & Prop. Ins. Co.*, 2023 U.S. Dist. 1345719 (N.D. Ala. Aug. 3, 2023) (holding that in a matter brought under Alabama law a service award is appropriate because "Alabama law permits service awards for class representatives in class actions. *See, e.g., Perdue v. Green*, 127 So.3d 343, 402-03, 406 (Ala. 2012)." Despite this and in the interest of fulfilling her fiduciary obligations to the Class, Plaintiff will withdraw her Request so as to not delay or impede approval of the Class Action Settlement in this matter.

2. **The Settlement does not have the Concerns Present in *Drazen*.**

The Court asked the parties to be prepared with respect to the following issues discussed in *Drazen*:

> whether the terms of the preliminary approval, notice and disclosures, release language, the number of timely claims made by the class compared against the number of class members, the method of computing the attorneys' fees award, type of settlement common fund or claims-made, settlement agreement, etc. at issue here satisfies all of the concerns raised in the *Drazen* decision.

See ECF No. 43.

As an initial matter, Plaintiff did not previously discuss *Drazen* in her prior papers because: 1) Plaintiff's Motion for Attorney Fees was filed on April 22, 2024,

approximately three weeks before the *Drazen* decision issued, and 2) the Settlement being presented for approval in this matter consists entirely of cash payments and injunctive relief with no coupon elements and so none of the concerns and resulting analysis set forth in *Drazen* have any application in this matter[1].

A. The Opt-Out Provision in this Settlement Was Straightforward and did not Contain a Signature under the Penalty of Perjury.

The Eleventh Circuit also took issue with the requirement that an opt-out be signed under the penalty of perjury. *Drazen* at 1258. Here, there was no such requirement and for there to be any opt-outs, the class member simply had to identify themselves and simply "state[] an intention to be excluded". *See* ECF No. 35-1 at ¶ 9.4.1.

B. The Notice Provided was Adequate as there were no pending Dispositive Risks to the Case

In this case, unlike in *Drazen*, there was no existential crisis with respect to any Supreme Court case such as the *Facebook* case discussed in *Drazen*. Furthermore, there was no fixed damages amount to disclose. Violations of the TCPA's Do Not Call provision provides for damages of "up to" $500. *See* 47 U.S.C. 227(c)(5). In other words, if a jury determines that the proper damages for an unwanted telemarketing call is $5, those are the damages that would be awarded. As such, there is no fixed amount of damages that could be included in the notice. Instead, the short

[1] The *Drazen* decision is somewhat unusual in the context that the extensive written Opinion by Judge Tjoflat was joined in only one section by two judges, which is embodied by Judge Wilson's separate opinion that was joined by Judge Branch. Judge Wilson's decision - in which he concurred in the judgment and agreed with the analysis that required the district court to address the settlement and the appropriate fees under the coupon settlement review standards under CAFA – is the Opinion of the Court under applicable circuit precedent. See, e.g., *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1031 n.6 (11th Cir. 2003) (citing *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1055 (11th Cir. 1998) and quoting *McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002) ("Two is a majority of three, and a majority of participating judges controls a court's decision.")

form and long form notice informed Class Members properly advised individuals that the case was relating to violations for calls to the National Do Not Call Registry.

C. The Release Provided is not Overbroad

In *Drazen*, the Eleventh Circuit took issue with the District Court "in essence, amending the release provisions in a material way: to limit their sweep to the claims Plaintiffs' alleged in the Complaint against GoDaddy." *Drazen* at 1256. Here, no such amendment is necessary, even if it were proper, as the release at issue is already limited to telephone calls made to class members. *See* ECF No. 35-1 at ¶ 1.1.31. Furthermore, the release of any third party is already explicitly limited to actions "taken on behalf of Choice Health Insurance, LLC." *Id.* at ¶ 1.1.32.

D. Class Counsel Timely Moved for an Award of Attorneys Fees and Provided Notice to the Class and Time for them to Object.

In *Drazen*, the class did not have a chance to object to the attorney fee motion, unlike here where the objections, claim and exclusion deadlines all fell on the same date. *See* ECF No. 36. Moreover, Class Counsel filed their motion for attorneys fees 30 days before the objection deadline, which gave absent class members a chance to review the motion and provide any objections with specificity. No such objections were provided.

E. The Claims Percentage was Consistent with What Other TCPA Cases Have Approved as well as other Eleventh Circuit Court of Appeals Cases.

There were 5,586 claims forms returned out of 244,912 Settlement Class Members who received the notice. In other words, 2.2% of class members who received notice submitted claims. This amount is in excess of what was present of what has otherwise been permitted by the Eleventh Circuit. *See, e.g., Poertner v. Gillette Co.*, 618 Fed. App'x. 624, 625-26 (11th Cir. 2015) (approving settlement

with claims rate of less than 1%). This is also typical for TCPA cases, which unlike many consumer class actions, typically involve "cold calls", where the consumer does not have a prior relationship with the company.[2]

F. When Considering the Attorneys Fees, here all Class Members Benefit from the Fund, Unlike in *Drazen*. Furthermore, the Class Action Fairness Act does not apply to this Settlement and there is no "Clear Sailing" Provision.

As part of the mediation engaged in by the parties, Choice Health agreed to terminate its relationship with Digital Media Solutions, LLC ("DMS"), the entity that sold it the consumer data called. *See* ECF No. 35-1 at ¶ 4.4. This relief was the non-monetary relief negotiated on behalf of the class that benefits all of the class. *Id.* Class Counsel also hired an economic expert, Jon Haghayeghi, Ph.D., who provided an economic valuation of this relief at up to $9,909,231 per year. *See* ECF No. 37-1. This analysis by Dr. Haghayeghi has been accepted by multiple courts providing final approval to TCPA class actions in the Eleventh Circuit, as discussed in Class Counsel's fee motion.

Indeed, this is the process that the *Drazen* Court envisioned when distinguishing what *Drazen* had not done and explaining why the prior Eleventh Circuit precedent did not apply:

> The case was not focused on whether the valuation should be based on "actual payments to the class" or payments that could have been made if more claims were submitted. The "substantial nonmonetary benefit" was Gillette agreeing to stop putting the allegedly misleading statements on the packaging of Ultra batteries. *Id.* at 626. The *cy pres* award was a donation of $6 million of batteries to charities over the next five years. *Id.* We have nothing like that in the *Drazen* settlement.

[2] *See e.g. Friedman v. LAC Basketball Club, Inc.*, No. 13-cv-00818 CBM (C.D. Cal.): 2%; *Kolinek v. Walgreens, Co.*, No. 13-cv-04806 (N.D. Ill.): 2.28%; *Abramson v. Palmco Energy P.A. LLC*, No. 19-cv-1675 (W.D. Pa.): 0.60%; *Abramson v. American Advisors Group*, (18-cv-615-PLD) (W.D. Pa.): 0.54%; *Braver v. Northstar Alarm Services, LLC*, No. 17-cv-00383 (W.D. Okla.): 1.93% ; *Hennie v. ICOT Hearing Systems, LLC dba ListenClear and ICOT Holdings LLC*, No. 18-cv-02045 (N.D. Ga.): 1.13% rate; *Soukhaphonh v. Hot Topic, Inc.*, No. 16-cv-05124 (C.D. Cal.): 1.26%.

Drazen at *1266. Here, the requested attorney fee is itself justified by this substantial relief as the Eleventh Circuit held in *Poertner v. Gillete Co.*, 618 Fed. Appx. 624, 628 (11th. Cir. 2015):

> To determine whether the settlement's allocation of benefits was fair, the district court concluded that the value of the nonmonetary relief and cy pres award were part of the settlement pie. Neither conclusion rests on an incorrect or unreasonable application of our precedents. For example, in a case involving a class action settlement that created a reversionary common fund, we held that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class," describing 25 percent as the "bench mark" attorneys' fee award.

Other courts in the Eleventh Circuit have similarly found. *See e.g. Montoya v. PNC Bank, N.A.*, 2016 U.S. Dist. LEXIS 50315, *55 (S.D. Fl., April 13, 2016) ("The results here, $32.3 million in monetary benefits and injunctive relief, are excellent… Defendants will be mandated to cease the key practices at the core of Plaintiffs' complaint. These results are powerful support for the fee award."); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005) (valuing injunctive relief as part of "significant relief" made available to class and determining that settlement was fair, adequate, and reasonable).

Furthermore, unlike in *Drazen*, there is no "clear sailing" provision, requiring the Defendant to have no opposition to the requested fee. Finally, the Court in *Drazen* held that the Class Action Fairness Act, 28 U.S.C. § 1712, applies because the settlement was a coupon settlement. *Drazen* at 1267. No such argument is made here because there is no dispute that CAFA does *not* apply to this settlement as there is nothing resembling a coupon present.

Respectfully submitted,

/s/ Anthony I. Paronich
Anthony I. Paronich (admitted *pro hac vice*)
(MA 678437)
Paronich Law, P.C.
350 Lincoln Street, Suite 2400
Hingham, MA 02043
(508) 221-1510
anthony@paronichlaw.com

Brian K. Murphy (admitted *pro hac vice*) (OH 0070654)
Jonathan P. Misny (admitted *pro hac vice*) (OH 0090673)
Murray Murphy Moul + Basil LLP
1114 Dublin Road
Columbus, OH 43215
Telephone: 614.488.0400
Facsimile: 614.488.0401
E-mail: murphy@mmmb.com
misny@mmmb.com

Joel Davidson Connally
Strength & Connally, LLC
7020 Fain Park Drive, Suite 3
Montgomery, AL 36117
jc@strengthconnally.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, hereby certify that on July 8, 2024, I caused the foregoing to be filed via the Court CM/ECF filing system which will effect service on all counsel of record.

Anthony I. Paronich
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