**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**

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**LORI HELING,**

**PLAINTIFF**

**VS.** **CASE NO. 15-CV-1274**

**CREDITORS COLLECTION SERVICE, INC.,**

**DEFENDANT.**

**DEFENDANT.**

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**DEFENDANT'S BRIEF OPPOSING PLAINTIFF'S ATTORNEY'S FEES**

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## I. BACKGROUND

Plaintiff commenced this action on October 26, 2015, seeking actual damages and statutory damages for what was alleged as the Defendant's multiple violations of the FDCPA ("Act") arising from an attempt to collect an unpaid dental bill. The Complaint alleged a host of violations related to a lawsuit commenced in the Sheboygan County Circuit Court, including allegations that the debt was listed in the garnishment action as $538.94, when the alleged balance of the debt was $400, ECF #1, ¶35, that the debt was actually $200, though the defendant tried to collect over $500, ECF #1, ¶40, and that the Plaintiff was told the debt *could* not be vacated, ECF #1, ¶40-41. There were several other allegations critical of the procedures employed to obtain judgment, to commence garnishment and to obtain payment. The Complaint listed six different provisions of the Act that had supposedly been violated by the actions of the Defendant. And for that, the Complaint sought actual damages for the

Plaintiff's past and continued suffering, personal humiliation, embarrassment, mental anguish and emotional distress, as well as statutory damages, fees and costs.

In the motion to dismiss that followed based upon Rooker-Feldman grounds Plaintiff re-characterized/abandoned several of the allegations contained in the Complaint as background such that three distinct issues arose from the decision denying the motion to dismiss. And while those three issues remained for trial at the conclusion of the summary judgment decision, they were honed even further, with the "overcharge" issue being limited to a $20 "satisfaction charge" assessed for Ms. Heling to obtain a satisfaction of the judgment that had properly been entered against her. Yes, the jury found that assessing the satisfaction charge violated the Act, and that the first notice had not been *sent to* Ms. Heling. But the jury did not sustain the claim that Ms. Heling was told that she could not vacate the judgment.

Though the Plaintiff had reiterated her demand for actual damages in the Rule 26(a) disclosures,[1] the Plaintiff abandoned her claim for actual damages on the eve of trial. So the only damages sought at trial was $1000 of statutory damages. The jury awarded only a share of that, awarding $500 statutory damages for the two sustained claimed violations: for imposing the $20 satisfaction fee, for not sending the first notice *to* her.

Fourteen months of litigation, demands for damages for emotional distress and humiliation, motion practice, written discovery, depositions and two days of trial to a jury, all for the result of a $500 award. It is hard to see how this case makes any sense. But then there is the silver lining. Plaintiff's attorneys now petition this court claiming to be representing the "successful party," seeking attorneys' fees in the amount of **$73,429.50** from an agency that had at the time of trial three employees which included its owner.

[1] Attached as Exhibit 1.

Defendant objects to the Plaintiff's request for nearly $74,000 of fees upon the basis that Plaintiff was not "successful" in this action, i.e. though she "prevailed" by obtaining a statutory damage award for all of one-half ($500) of the nominal award allowed under the "additional" or statutory damages provision of the FDCPA, she did not succeed in obtaining an award that justifies an award of attorney fees. Also any such award as that sought by the Plaintiff is excessive, unreasonable and unfair. For this reason, Defendant believes the Plaintiff is not entitled to an award of her fees, or at the very least any fee award should be drastically reduced. Grounds for the denial or reduction of a fee award are detailed below.

## II. Legal Standard for an award of Fees

Defendant's argument begins with an undeniable fact. No sane person would ever spend $74,000 in attorney's fees to seek a $1,000 award. No attorney would pursue such an award while incurring such expense. At least, not in the real world where clients pay their attorneys to vindicate a claim. And when even that effort falls short, at least by half and probably more, the effort is certainly not met with claims of obtaining success. Plaintiff originally sought an actual damage award that was not ever quantified, and that was eventually abandoned, but that does not enhance the success achieved by a $500 award of statutory damages; it serves instead to expose the degree to which the action became unsuccessful, no matter how the Plaintiff tried to recast its case.

The Fair Debt Collection Practices Act provides that a plaintiff may recover,

"(3) in the case of any *successful action* to enforce the foregoing liability, the *costs* of the action, together with a *reasonable attorney's fee* as determined by the court." 15 USC 1692k(a)(3). (emphasis added)

This fee-shifting statute provides that both *costs* and a *reasonable attorney's* fees depends upon a "successful action" to enforce the foregoing liability, i.e. actual and statutory damages. There is no ambiguity in "successful action to enforce . . . liability," it requires both actual and statutory damages.

*Dechert v. Cadle Co.*, 441 F.3d 801 (7th Cir. 2006). "Success" is the threshold for a determination of whether to award attorney's fees *and* costs, and if so, how much.

In *Farrar v. Hobby*, 506 U.S.103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), the district court in a §1983 action awarded the plaintiffs who were seeking $17 million in compensatory damages only nominal damages, yet awarded plaintiff nearly $250,000 in attorney's fees. The Fifth Circuit reversed holding that the plaintiffs were not prevailing parties entitled to fees under § 1988. The Supreme Court granted certiorari and held that a civil rights plaintiff recovering only nominal damages is nonetheless a prevailing party under § 1988. The Court, however, went on to hold that the plaintiffs, though prevailing parties, were not entitled to the fees awarded by the district court. In fact they were not entitled to any fees at all. The Court held that before conducting the lodestar analysis, a district court faced with a petition for attorneys' fees should consider the extent of success of the litigation. "When the plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." *Id.* (citation omitted).[2]

Justice O'Connor concurred in the opinion but wrote separately to explain why she believed the denial of fees was appropriate. She wrote that "when a plaintiff's victory is purely technical or *de minimis*, a district court need not go through the usual complexities involved in calculating attorney's fees.... Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to `award low fees or no fees' at all." *Id.* at 120-122, 113 S.Ct. at 576 (O'Connor, J., concurring). Justice O'Connor suggested that there are three factors courts should consider when determining whether a victory is *de minimis* or otherwise strictly technical: (1) the difference between the judgment recovered and the recovery sought; (2) the significance of the legal issues on which the

[2] This prevailing party analysis was further modified in *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602-06, 121 S. Ct. 1835 (2001). See also *Dechert v. Cadle Company*, 441 F.3d 474, 476 (7th Cir. 2006).

plaintiff prevailed; and (3) the public purpose served by the litigation. *Id.*, at 121-122; *Cartwright v. Stamper*, 7 F.3d 106, 109 (7th Cir. 1993), citing *Farrar*, 506 U.S. 103, 121-122, 113 S.Ct. at 578-79. (O'Connor, J., concurring). (Reversing fee award of $52,875 and reducing it to $0 though Plaintiff established a violation of fourth amendment rights and trespass).

Contrary to the claims of the Plaintiff, the FDCPA does not mandate a fee award in the lodestar amount. See, e.g. Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983); *Giovanni v. Bidna & Keys*, 255 Fed. Appx. 124, 125 (9th Cir. 2007); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 628-29 (4th Cir. 1995). As the Court in *Carroll* noted:

> "If the concept of discretion is to have any meaning at all, it must encompass the ability to depart from the lodestar in appropriate circumstances. *Hensley* itself recognized that, in certain circumstances, an award in the lodestar amount may be excessive." *Carroll*, 53 F.3d at 628-29.

In determining an attorney's fee award, the barometer for the amount of the award is "reasonableness." This standard applies to the methodology used to calculate appropriate fees under 42 U.S.C §1988, and by extension cases for the award of fees under the FDCPA. *Tolentino v. Friedman*, 46 F.3d 645, 65-652 (7th Cir.), *cert. denied*, 515 U.S. 1160 (1995). A reasonable fee is generally calculated by application of the "lodestar" method, which requires multiplying the hours reasonably expended by a reasonable hourly rate. See, e.g. *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983); *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d.Cir. 2001). The lodestar may be adjusted upward or downward, *Altergott v. Modern Collection Techniques, Inc.*, 864 F. Supp. 778, 780 (N.D. Ill. 1994) (where 70 % of the legal fees were incurred after defendant admitted a violation of the FDCPA, the Court reduced the lodestar amount by 50%, noting that the defendant "should not have to shoulder the entire financial burden occasioned by [the plaintiff's attorneys'] failure to make a reasonable assessment of the value of their case" at 783). The adjustments to the lodestar may be based on many different factors, as previously enumerated in *Hensley*, and as further adopted by the 7th Circuit in *Tolentino v. Friedman*, 46 F.3d 645,652 (7th Cir. 1995), e.g. the 12 factors enumerated in

*Tolentino*,[3] but clearly the most important factor is "the degree of success obtained." *Farrar*, 506 U.S. at 114 (quoting *Hensley*, 461 U.S. at 436). Success must be measured not only in the amount of the recovery but also in terms of the principle established and the harm checked. *Zagorski v. Midwest Billing Services, Inc.*, 128 F.3d 1164, 1166 (7th Cir. 1997). "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 440, 103 S.Ct. 1933. Plaintiffs often present multiple claims and theories for relief, each with a range of potential awards,

> "involving numerous challenges to institutional practices or conditions.... Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a prevailing party therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved."
> *Hensley*, 461 U.S. at 436, 103 S.Ct. 1933.

If a court chooses to make downward adjustments, it may either reduce the overall award or attempt to identify specific hours that should be eliminated. *Id.* at 436-37, 103 S.Ct. 1933. In a case where a plaintiff presents distinctly different claims for relief that are based on different facts and legal theories no fee should be awarded for services on the unsuccessful claim. *Id.* at 434-35, 103 S.Ct. 1933. The law also requires a court to exclude claimed hours from its lodestar calculation that it finds to be "excessive, redundant, or otherwise unnecessary." *Rivera v. Corporate Receivables, Inc.*, 540 F.Supp.2d 329, 338 (D.Conn. 2008). *Reiter v. Metropolitan Transp. Auth. of State of New York*, No. 01 CV 2762(GWG), 2007 WL 2775144 at *9 (S.D.N.Y. Sept. 25, 2007) (quoting *Hensley*, 461 U.S. at 434, 103 S.Ct. 1933). There is no precise rule or formula for making these determinations, and, because

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[3] "There are several factors that a court should consider when calculating attorney's fees, including (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the plaintiff's attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley*, at 441, 103 S.Ct. at 1943-44." *Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir.), *cert. denied*, 515 U.S. 1160 (1995).

"it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application," a court may apply an across-the-board percentage cut "as a practical means of trimming fat from a fee application." *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir.1983).

This determination of reasonableness must account for "the facts and circumstances of the underlying litigation." Carroll, 53 F.3d at 628-629. This is consistent with the reality that the district court "has a ringside view of the relevant conduct of the parties and of the underlying legal dispute." Id. Thus inevitably, the district court "will engage in a fair amount of 'judgment calling' based upon its experience with the case and the general experience as to how much a case requires." *Evans v. Port Auth. of N.Y. & N.J.*, 273 F.3d 346, 362 (3d Cir. 2001). Such broad discretion is necessary to dissuade counsel from the "propensity …to engage in secondary or satellite litigation" over attorney's fees. *Hensley*, 461 U.S. at 433-37. In the end, the amount of any attorney's fees should bear a reasonable relationship to the nature of the defendant's violation and a court may reduce any award from the lodestar amount to properly reflect the degree of success achieved.

The party seeking fees bears the burden of proving the reasonableness of the hourly rate and the reasonableness of the hours worked. *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 550 (7th Cir.1999). If the party seeking fees meets her burden, the burden shifts to the opposing party to demonstrate why a lower rate should be awarded. *Id.*, at 555. If the party seeking fees does not meet her burden, then the Court "has the authority to make its own determination of a reasonable rate." *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 640 (7th Cir. 2011) citing *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 409 (7th Cir. 1999) (where plaintiff only offered self-serving affidavits to demonstrate the market rate, the district court did not err by reducing the rate from $190 per hour to $115 per hour).

Courts have drastically reduced attorney's fees in FDCPA cases from the lodestar amount in cases of extended litigation with minimal recoveries. In *Carroll v. Wolpoff & Abramson*, 53 F.3d 626

(4th Cir. 1995) the Fourth Circuit Court of Appeals affirmed the District Court's award of $500 as attorney fees where the Plaintiff had recovered only $50 of the $1000 maximum statutory fee. Plaintiff had sought fees of $9783.63. The award of $50 was "a mere five percent of the amount of statutory damages she initially sought." *Id*., at 629. The court also noted that the plaintiff had at most established only a technical violation—a failure to include the mandated 1692e(11) language in a subsequent letter sent to the debtor. In affirming the award, the court stated, "In view of the statutory language, it was not an abuse of the district court's discretion to measure Carroll's success in terms of the nature of Wolpoff & Abramson's violation ["hardly morally culpable or otherwise deserving of anything more than a very small award of damages" *Id.*, at 629] and the limited damage award she received." *Id*., at 630. The Court went on to conclude, "If we were to overturn this fee award, we would over-encourage litigation alleging technical violations of this and other statutes aimed principally at collecting attorney's fees. We think the better course is to allow trial courts the freedom to engage in limited fee shifting when there has been limited success." *Id.*, at 630-631.

In *Cohen v. American Credit Bureau, Inc*., 2012 U.S. Dist. LEXIS 33687, Civil Action No. 10-5112 (D.N. J., 2012)[4] U.S. Magistrate Judge Mark Falk reduced the Plaintiff's fee request from $29,210.25 to $1046.75. Even though the Plaintiff received through an accepted offer of judgment the full statutory damages award, the court reduced the award because the true purpose of the ensuing litigation was adjudged a complete failure. Plaintiff's efforts to "create new law" did not happen, and new precedent was not achieved. But the court's thorough review of the law is instructive in a case where though statutory damages were obtained to the fullest extent permitted, the case was deemed to be only a nominal success.

[4] Copy attached as Exhibit 2.

In *Beckham v. Midwest Billing Service, Inc.*, Case No.95-C-915, (W.D.Wis., 1995)[5] Judge Crabb similarly faced the issue of appropriately limiting an FDCPA fee award to the degree of success obtained. There, the court found for the plaintiff and awarded statutory damages of $200, one-fifth of the maximum sought by the plaintiff. The Court applied the Lodestar analysis to the requested $3825.00 fee, reducing the "lodestar" to $2450, and then further reduced the claim to reflect the limited success that the plaintiff achieved—to $800--approximately one-fifth of the hours initially claimed, or 4 times the award.

More recently, in *Dechert v. Cadle*, 441 F.3d 801 (7th Cir. 2006), the Seventh Circuit reversed the District Court's award of attorney's fees of $60,000 in a case where the Plaintiff obtained a $1000 award for the Defendant's abuse of discovery in an FDCPA case but then abandoned all remaining claims of damage. In reversing to allow for no award of fees, the Court held that the Plaintiff had not successfully enforced "any liability under the Fair Debt Collection Practices Act."

These cases and many others like them show that courts reduce the requested fees when the success is limited according to the Farrar three part test: "when a plaintiff's 'victory' is purely technical or *de minimis,* a district court need not go through the usual complexities involved in calculating attorney's fees.... Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to `award low fees or no fees' at all." *Farrar,* at 117-118, 113 S.Ct. at 576 (O'Connor, J., concurring).

The Seventh Circuit has determined that the District Court enjoys a decided advantage over appellate courts in calculating fee awards and therefore retains a great deal of discretion in fixing the amount of the final award. *Zagorski v. Midwest Billing Service, Inc.,* 128 F.3d 1164, 1167 (7th Cir. 1997). In assessing the lodestar amount of fees, the court may adjust the lodestar figure to reflect the degree of success obtained. And in doing so, the court may decline to award fees for specific work

[5] Copy attached as Exhibit 3.

performed in the litigation or, alternatively, it "may simply reduce the award to account for the limited success. *Hensley*, 461 U.S. at 436-37.

### III. A word About the Settlement Efforts

Plaintiff would have this court believe that throughout this litigation plaintiff stood ready and willing to resolve this case with a settlement, but that the obstreperous Defendant refused. Such a claim is difficult to argue without publishing the actual numbers that were demanded or discussed. Indeed the truth is at every turn, even in the opening correspondence and demand, plaintiff demanded more than she was entitled. And that is the hallmark of this litigation. Attorneys claim $3600, when the amounts to which they would be entitled is nearer to $700, even if the plaintiff alone is entitled to $500, because at that point, the plaintiff's attorneys have expended nothing in costs and little in time. Yet they demand so much more--because they can—"you don't want to pay $3600, then the demand will climb from there." A well-meaning defendant might even acknowledge a technical violation in a case like this, but can never convince the Plaintiff's attorney that all they are entitled to is a portion of the maximum $1000 award plus an hour or two of attorney's fees. As in the case, the Plaintiff was always entitled to $500, that is the effect of the verdict, but the fees that were demanded from the beginning amounted to paying the attorneys $1000's per hour. Add to that specious claims for actual damages, and its off to the races.

In this case once the motion to Dismiss was filed, any demand reflected the additional time expended in the case plus a specious claim of actual damages, full statutory damages and costs. In short, there was no way that a settlement could be reached unless the Plaintiff's attorney were willing to negotiate their fees. And that never happened. Nor should settlement, or the lack thereof, be relevant to a reasonable fee award in this case. This case was not hard fought, and counsel cooperated well to avoid unnecessary costs and expenses. It just wasn't settled.

## IV. Plaintiff has no agreement for the Award of Attorney's Fees

The claim to attorney's fees belongs to the Plaintiff. *Pony v. County of Los Angeles,* 433 F.3d 1138(9th Cir.), cert. den. sub.nom. *Mitchell v. LA County,* 547 U.S. 1193, 126 S.Ct. 2864, 165 L.Ed.2d 874*874896 (2006), and *Manning v. Astrue,* 510 F.3d 1246 (10th Cir.2007); *Gorton v. Hostak, Henzl and Bichler, S.C.,* 217 Wis.2d 493, 502-3, 577 N.W. 2d 617 (Wis. 1998). *Pony* stands for the proposition that the right to recover attorney's fees under 42 U.S.C. § 1988 is vested in the prevailing party, not the attorney. Because the plaintiff has the burden to prove not only the reasonableness but the entitlement to fees in the first instance, *Spegon v. Catholic Bishop of Chicago,* 175 F.3d 544, 550 (7th Cir.1999), plaintiff needs to first show the agreement she has with her attorneys. And that claim further depends upon her agreements to pay her attorneys for their efforts in this case.

Plaintiff has not presented the fee agreement to support her claim nor is it privileged. *In re Semel,* 411 F.2d 195, 197 (3d Cir.), *cert, denied,* 396 U.S. 905, 90 S. Ct. 220,24 L.Ed.2d 181 (1969); *accord, In re Walsh,* 623 F.2d 489, 494 (7th Cir. 1980); *United States v. Hodge and Zweig,* 548 F.2d 1347, 1353 (9th Cir.1977); *In re Michaelson,* 511 F.2d 882, 888 (9th Cir.), *cert, denied,* 421 U.S. 978, 95 S. Ct. 1979, 44 L.Ed.2d 469 (1975); *In re Grand Jury Investigation (Tinari),* 631 F.2d 17,19 (3d Cir. 1990) (in the absence of unusual circumstances, the privilege does not shield the fact of retention, the identity of clients, and fee arrangements).

Defendant objects to the Plaintiff's fee petition on the grounds that she fails to present evidence of her agreement to compensate her attorneys in this matter. Upon this failure to meet its initial burden, the fee petition should be denied.

## V. Plaintiff was unsuccessful on her actual damage claim asserted under the FDCPA and should not receive any fees related to such claims.

By all appearances, Plaintiff claimed to be seeking actual damages against the Defendant not only in the Complaint and in her Rule 26(a) disclosures, but also in various other motions brought during the litigation. But the Plaintiff abandoned those claims just prior to the trial. Of course the Defendant did not know that the Plaintiff would abandon the claim for actual damages and it seems

that so much of this case was litigated over the actual damage claim. Plaintiff made her claim for actual damages--emotional damage, suffering past and present, embarrassment and humiliation—for a debt she owed, and for a debt she ultimately paid. It is not surprising as a matter of trial strategy that the claim was ultimately abandoned, even though it was retained until the bitter end. Thus in this respect, the case was an utter failure and was entirely unsuccessful. Frankly, looking back there was little if any evidence to support such claims, but those claims had to be discovered, deposed and litigated.

Having been unsuccessful on her actual damage claim should entitle the petition for fees in this regard to a denial, absolutely and without award for such fees in the case at all. Yet it is difficult to parse through the time records of the Plaintiff's attorneys to determine what part of their time was devoted to this unsuccessful pursuit.

Defendant submits that the unsuccessfulness of this case is permeated at every turn by the lack of success for actual damages. Much of the depositions taken by the Plaintiff of Defendant's witnesses, and of the written discovery, was aimed at the hope of getting an actual damage award. At least that is what the defendant was defending against. But in the end with no evidence of such damages, the suit seemed doomed. And with the final request for only statutory damages of $1000, the suit seemed a glorious waste of time. But the jury didn't even see fit to award that for these very technical and *de minmus* violations. The jury awarded only half.

Defendant submits that on this basis alone, the attorney fees of the Plaintiff should be summarily denied or reduced for to something that reflects the broad effort in this case to achieve something that was not obtained. Defendant will give specific examples below in this brief that might be reasonable in this case, sums that while low, reflect the success obtained in comparison to the amounts sought.

**V. Under the Farrar three factor test, Plaintiff was unsuccessful and is not entitled to a fee, or only a small fee if any at all.**

Plaintiff sought actual damages for past and continued suffering, personal humiliation, embarrassment, mental anguish and emotional distress. She also sought statutory damages of $1,000.

Plaintiff claims in its submissions that they were forced to take this case to conclusion, to a jury trial to obtain the limited verdict she obtained, as if the defendant is now to be punished for defending itself from the claims made in the Complaint. But an award of fees is not punishment.

Referring to the *Farrar* three factor test, the first factor considers "the difference between the judgment recovered and the recovery sought," and is the factor to be given the most weight. Here, the difference between the judgment recovered and the recovery sought is striking: $500 recovered, an undisclosed amount originally sought for actual damages. "In a case where a plaintiff presents distinctly different claims for relief that are based on different facts and legal theories no fee should be awarded for services on the unsuccessful claim. *Hensley*, at 434-35, 103 S.Ct. 1933. Plaintiff's claims morphed during the case from claims of illegally commencing legal proceedings and collecting inflated amounts of over $500 on a $200 debt, to not sending a letter to her and charging a $20 fee for satisfying the judgment. Claims for actual damages were abandoned on the eve of trial. The first factor is the most important of the three, *Farrar*, 506 U.S. at 114, 113 S.Ct. at 574 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)), and clearly weighs in favor of classifying the victory *de minimis*.

The second factor considers the significance of the legal issue on which the plaintiff "prevailed." This factor looks not at the relief obtained but to the extent the plaintiff succeeded on her theory of liability. *Id.* 506 U.S. at 121, 113 S.Ct. at 578 (O'Connor, J., concurring). There is no question that in finding for the Defendant on the "would/could "claim and in awarding only half of the nominal amount of statutory damages, the jury rejected at least one of the Plaintiff's theories of liability and found a very small amount of damage for those violations that it did sustain. Despite what this case sought to establish, the result did not in any way establish a precedent that may govern any future action or compliance practice. This factor too weighs in favor of classifying the recovery as *de minimus*.

Finally, the third factor considers the public purpose served by the victory. This factor principally relates to whether the victory vindicates important rights and deters future violations. *Farrar,* 506 U.S. at 121-122, 113 S.Ct. at 578-79 (O'Connor, J., concurring). The more important the right at stake and the more egregious the violation the more likely it is that the victory serves a public purpose. Here finding that the letter in this case was not sent to her, or that quoting the amount to be paid as including a fee to satisfy the judgment, does not serve some public purpose, or establish some deterring precedent. The verdict in this case is limited to the facts of this case. Accordingly, this factor weighs firmly in favor of finding the "victory" *de minimus*.

Based upon this analysis, this court should deny the fee petition of the Plaintiff. Her award was a *de minimus* recovery, resulting in what can only be characterized as "unsuccessful." And in the words of Justice O"Connor, " [A]fter all, where *the only* reasonable fee is no fee, an award of fees would be unjust; conversely, where a fee award would be unjust, the reasonable fee is no fee at all." *Farrar,* 506 U.S. at 118, 113 S.Ct. at 578 (O'Connor, J., concurring). Failing that, should this court deem it necessary to award the Plaintiff some amount of fees, the amount should be set in relation to the damages obtained. A $500 damage award should command a commensurate fee award of a modest multiple at most, as indicated below, two time to four times the damage award. Splitting that difference, Defendant believes that an award of $1500 would be sufficient.

**VI. The Hourly Rates charged by the Plaintiff's Counsel Are not Justified and Not Substantiated.**

A reasonable hourly rate should be based upon the specific attorney's market rate when calculating the lodestar amount. *Leffler v. Meer,* 936 F.2d 981, 985 (7th Cir. 1991). The market rate is the rate that attorney's of similar ability and experience in their community normally charge their paying clients for the type of work in question. *Eddleman v. Switchcraft,* 965 F.2f 422, 424 (7th Cir. 1992). Hours not properly billed to one's client are also not properly billed to one's adversary pursuant

to a fee-shifting statute and it is questionable whether the Plaintiff's counsel could truly bill their client $74,000 in this case.

Plaintiff's counsel seeks to establish the lodestar for their fees by simply multiplying the number of hours logged on the case times their various hourly rates, from $450 per hour for Larry Smith, $385 an hour for David Marco, and finally $300 an hour for their associate Sara Collins. Defendant believes these rates are excessive for this case. Plaintiff has submitted nothing that attests to rates in the Milwaukee area, or Wisconsin generally. And a Washington D.C. or for that matter national standard for rates of attorneys segregated by the years of practice misses the point. There are patent attorneys and then there are bankruptcy attorneys, there are those who specialize in complex litigation and those that pursue individual consumer claims. There are attorneys who command a higher hourly rate because they have clients who can pay it, and there are attorneys who earn a share of what they recover, irrespective of how that averages out for the time expended.

Plaintiff's attorneys are capable counsel, but that doesn't mean they can command or have ever been paid $300, $385, or $450 per hour by a paying client. Indeed nothing in their submissions clarify that any court has ever adopted those rates as a reasonable hourly rate, nor do any of their submissions establish that they have paying clients that pay those rates. Self-serving affidavits do little to meet their burden. Their burden is to submit proof. *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 640 (7th Cir. 2011) citing *Uphoff v. Elegant Bath, Ltd*., 176 F.3d 399, 409 (7th Cir. 1999) (where plaintiff only offered self-serving affidavits to demonstrate the market rate, the district court did not err by reducing the rate from $190 per hour to $115 per hour).

Moreover, Plaintiff's counsel hail from Chicago, Illinois, where admittedly rates are higher than Milwaukee or Wisconsin generally. When they take cases in other localities, they subject themselves to the community in which they are practicing, at rates that such community normally charges their paying clients. Similarly, the urban centers of Wisconsin including Milwaukee, are not the District of

Columbia, and therefore the Laffey Matrix has no relevance here, or in this case. By the terms of its explanatory notes, it is compiled for use *only* in the District of Columbia.[6] Washington D.C. is a very different community and a very different market for federal litigation than Madison or Milwaukee, Wisconsin. The rates for Washington, D.C rates are not applicable here.

What their submissions do establish, is that there is a rough parity between the amount of damages obtained and the fees awarded to them in cases that they have litigated. ECF #67-5, 67-6. In short, the judgments attached show that when fees are generally in excess of the award it is only by a multiple of the damage award of two, to four times. Or, the attorneys' fee award is less than the modest damages awarded. These submissions by Plaintiffs are largely default judgments entered without an appearance by the Defendant. It is hardly proof of court determinations of Plaintiff's counsel's hourly rates.

Defendant believes that for determining the lodestar, a reasonable rate for the Plaintiff's counsel is $200 to $250 per hour.

**VII. A Lodestar analysis leads to the same result.**

Defendant feels compelled to nonetheless go through the billings of the Plaintiff to point out time spent on this case that was duplicative, unsuccessful, administrative, excessive, unnecessary or simply un-compensable. Whether the "lodestar" is then reduced to award a reasonable fee in view of the nominal recovery, or reduced to reflect a percentage of fees similar to the percentage of recovery, Defendant submits that either no fee or a very small fee should be all that the plaintiff should receive.

Defendant has attached the Plaintiff's itemization as an exhibit to this brief,[7] having numbered each entry on the left hand side of the page. Defendant will refer to the exhibit to point out items that are being challenged.

[6] See the Laffey Matrix attached to the Plaintiff's submissions, ECF # 67-3, ¶ 1 ("for use in District of Columbia courts.").

[7] Attached as Exhibit 4.

### A. Plaintiff is not entitled to charge for administrative, or travel related time

When calculating a fee award a court should exclude hours that were not reasonably expended, such as time spent on tasks that are not normally billed to a client or hours expended by counsel on tasks that should be delegated to a non-professional assistant. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Spegon v. Catholic Bishop of Chicago*, 175 F.3d at 553. Administrative tasks include "organizing file folders, document preparation, copying of faxing documents, scheduling matters, and mailing letters. *Moore v. Midland Credit Management, Inc.*, 2012 WL 6217579, at *12 (N.D.Ind.2012); See also *Pace v. Pottawattomie Country Club, Inc.*, 2009 WL 4843403, at *13 (N.D. Ind. 2009) (finding the following tasks are clerical and not allowable as part of a fee award: "sending pleadings to client; review of appearances, summons, waiver of service and other similar documents; payments to EEOC, drafting cover sheets; and filing documents with the court").

With all due respect for the Assistant of the Plaintiff's Attorneys' firm, Nicole Dycha, the services she provided falls into the category of administrative tasks, though referred to in the Plaintiff's submissions as "paralegal." All of the entries for her time describe what can only be called administrative tasks. Those entries are at items 3, 5, 9, 10, 11, 12, 13, 15, 34, 50, 64, 70, 73, and 97, totaling 3.2 hours at $130 per hour, or **$416.00. See attached Exhibit B, numbered entries.** These administrative tasks are clearly necessary, but that doesn't mean that the Plaintiff is entitled to seek reimbursement for them as part of an attorney's fee award.

Moreover, Attorney Smith included 3.4 hours of driving time to Milwaukee from Chicago and back to attend the deposition of the Plaintiff on August 1, 2016, at an hourly rate of $450 per hour. See Attached Exhibit 4, Entry No. 80. This charge of **$1530.00** to attend a deposition in the city where the Plaintiff's filed the action—where the Plaintiff's counsel chose to represent the Plaintiff--is not recoverable through a fee shifting provision of the FDCPA. We have already objected to the excessive

rate per hour, for attending a deposition taken by and at the request of the Defendant. The two hours devoted to that should be reduced as well.

**B. Plaintiff's Attorneys are not entitled to Fees for Excessive and Duplicative Time Entries**

The Seventh Circuit encourages district courts to "scrutinize fee petitions for duplicative billing when multiple lawyers seek fees. *Schlacher v. Law Offices of Phillip J. Ritche & Associates, P.C.*, 574 F.3d 852, 858 (7th Cir. 2009). Other than some opening correspondence and the deposition attendance referenced above, Plaintiff staffed this case with two attorneys for much of its history, David Marco and Sara Collins. A review of the entries in the billing indicates that the amount of time spent in drafting a response to the motion to dismiss exceeded 25 hours, which Ms. Collins billed at $300. Attorney Marco's time was more limited, 2.5. When it came time for the Summary Judgment response, Attorney Collins billed over 32 hours, with David Marco billing 3.1.

Defendant suggest that this time is excessive for an experienced attorney of 14 or 16 years of experience, who pursue claims like this all the time. Defendant suggest that one-half of the expended time is reasonable. A deduction of 31.3 hours is therefore appropriate, or **$9390.00.**

**C. Not necessary or not compensable (administrative or other reasons)**

Some of the attorney time was simply not necessary, was on collateral or other unrelated matters, or was simply not appropriate for an attorney with experience in handling these kinds of cases. Many entries are vague regarding just what was done by the attorney, and include a number of items such that it is difficult to determine what time was spent performing what tasks. For example, Entry No. 8 with our comments:

> "Case up for Filing: Received back client approval and updated file (*to this point nothing has occurred for an attorney to bill his client*); Reviewed complaint *again* and perform edits; (*billable, though he just spent over 2 hours drafting and editing the complaint before sending it to his client*) prepared filing documents; reviewed summons; provided instructions to

paralegal for filing (*this seems very administrative and is not what attorneys bill $375 an hour for*). **.80 hours.**

The problem with this submission is that due to the "block billing" aspect of it, we can't determine what time was spent performing what seems to be administrative tasks or what time was spent re-editing the complaint. This block billing leaves the Defendant and Court without sufficient information to determine the proper charge. But because it is the Plaintiff's burden to show the reasonable attorney's fees incurred, and the time spent performing compensable tasks, the submission fails.

There is also administrative aspects to the some of the time billed by Attorney Marco. He also did much of his own filing of documents. He also sought, with no objection by opposing counsel motions seeking extensions of time to file responses to the motion to dismiss and the summary judgment motion, and a motion to allow him to participate in the final pre-trial conference from Forida. Attorney Marco's time also involves a lot of references to "reviewing this," or "seeing to that." The Defendant has estimated that approximately 15 hours of attorney Marco's time falls into these categories which could loosely be called performing administrative tasks, filing motions to alter scheduling deadlines and appearances for his own convenience, and simply reviewing or instructing his paralegal. See Exhibit 4, Entries No. 17, 18, 19, 20, 21, 22, 23, 32, 35, 38, 46, 47, 51, 54, 57, 61, 67, 68, 69, 82, 83, 88, 96, 97, 108,in clude examples. Defendant suggest that a deduction of 15 hours be made from Attorney Marco's time for **$5625.**

There are also a number of entries that while they try to delineate the time spent on various tasks, the tasks tend to be administrative. For example Entry No. 76 and 77. These entries are the mirror images of Larry Smith speaking to David Marco about the upcoming deposition of the client, and deciding who of the two of them should accompany her to the deposition. They each spent one-half hour on that—meaning that they are billing the defendant **$412.50** (1/2 x $450, + ½ x $375) to decide who should go to the deposition. No attorney would bill his client for that, and the defendant

should not be billed either. Similarly are the communications between Sara Collins and David Marco regarding the drafting of responses to the motion to dismsss, the summary judgment motion and other trial preparation. See Exhibit 4, Entry No. 19, 20, approx.. 0.4; 66-69Approx. 1.0; 80-83, approx.. 2.0, for a total of 3.4 hours or a deduction of **$1275.**

One other category of billing is for deposition prep and trial testimony preparation. Attorney Marco spent a large amount of time preparing for both his witness and those of the defendant both at trial and at deposition. For deposition of the Defendant, he spent at least 10.9 hours, (entry no. 58-60) and then taking the depositions amounted to another 5 hours. (Entry No.60) For trial testimony, Attorney Marco spent nearly 20.7 hours (Entry No. 116 through 131). Total hours for deposition and testimony prep was over 30 hours, with 5 hours more to actually conduct the depositions. This expenditure of time for an attorney experienced in consumer litigation is in excess of what is reasonable. Defendant suggest that the time be cut in half, deducting 17.5 hours at $375 per hour, or **$6562.50.**

**The above items totaled amounts to requested reductions of $25, 206.** Defendant submits that **$25,206** should be deducted from the total of $73, 429.50 before arriving at the lodestar because it represents time that could not be charged to the Defendant. This leaves $48,223.50. But this reduced amount is before considering the appropriate billing rate per hour and the lack of success that any remaining time contributed to the outcome of the case.

**D. Plaintiff's attorneys spent time pursuing matters that were not successful.**

As previously mentioned, Plaintiff's attorneys spent time pursuing claims that were entirely unsuccessful. From actual damage claims for embarrassment, emotional damages, and suffering to seeking the full amount of statutory damages reserved for intentional, persistent and egregious conduct, Plaintiff's damage claims were either abandoned by the Plaintiff herself, or rejected by the jury. Attaching the hours spent pursuing unsuccessful theories, whether through research, questioning of

witnesses at deposition and at trial, or in preparing for depositions and trial, in pursuing discovery, and generally litigating the case permeates every aspect of this case. When the "success" achieved is so slight and the justified reduction of the fee request so vast, it is hard to identify a particular number of hours spent pursuing unsuccessful claims, since nearly all of the time was spent pursuing unsuccessful claims. Suffice it to say that all of the hours after the very outset of the case are suspect, as being in pursuit of failed claims.

That the Plaintiff's counsel could not see this is explained only by their rush to judgment in the first place. But that is the hallmark of FDCPA cases, we are sad to say. The Courts have time and time again commented on the Plaintiffs rush to file suit, rather than resolving their modest debt.[8] Defendant submits that Plaintiff's lack of success justifies a reduction to the amounts specified below.

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[8] As Judge Harold A Ackerman, Senior United States District Judge for the District of New Jersey said in a recent opinion he authored while sitting by designation in a matter heard by the Sixth Circuit (quoting from *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F. Supp.2d 133, at 138):

> "Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the 'widespread and serious national problem' of abuse that the Senate observed in adopting the legislation, 1977 U.S.C.C.A.N. 1695, 1696, nor to ferret out collection abuse in the form of 'obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.' Id. Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs.
>
> "It is interesting to contemplate the genesis of these suits. The hypothetical Mr. Least Sophisticated Consumer ("LSC") makes a $400 purchase. His debt remains unpaid and undisputed. He eventually receives a collection letter requesting payment of the debt which he rightfully owes. Mr. LSC, upon receiving a debt collection letter that contains some minute variation from the statute's requirements, immediately exclaims 'This clearly runs afoul of the FDCPA!' and –rather than simply pay what he owes—repairs to his lawyer's office to vindicate a perceived 'wrong.' '[T]here comes a point where this Court should not be ignorant as judges of what we know as men.' *Watts v. State of Ind.*, 338 U.S. 49, 52, 69 S. Ct. 1347, 1349, 93 L. Ed. 1801 (1949). Id at 138-39." *Federal Home Loan Mtg. Corp. v. Lamar*, 503 F.3d 504 (6th Cir. 2007). The Court went on to declare, "We echo Jacobson's sentiments and concerns. Lamar fits the description of Jacobson's hypothetical consumer to a tee, and we will not 'countenance lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray."

**E. Calculating the Lodestar**

Deducting these subtotals from the gross amount requested by the Plaintiff, $73,429.50 minus $25,206 leaves **$48,223.50.** This number divided by the hourly rate of David Marco which is $375 (Most of the remaining hours are his) reflects 128 hours. As Defendant has challenged the hourly rate, and adjusting those to $250 per hour, the lodestar is **$32,149.**

With the lodestar at **$32,149**, the final task for the court, if it hasn't already done so, is to reduce the lodestar amount by the "degree of success obtained." Again with the *de minimus* recovery achieved by the Plaintiff, there are various ways to reduce the lodestar in a way that could render the fee award reasonable, if there is to be any fee award at all. While we don't know what amount of actual damages the Plaintiff was seeking throughout this case, up to the time of trial, Defendant can assume that to be practical, the plaintiff must have been pursuing at least as much as was being incurred to represent her. In other words, if she was hoping to recover $75,000 of actual damages as an amount sufficient to justify the expenditure of fees in the first instance, then comparing that amount sought to the amount obtained, i.e. the plaintiff was seeking over $75,000 and obtained $500 just .06% of that amount, and then applying a similar percentage to the fees sought would give to the Plaintiff a similar percentage of the fees.

So $\frac{500}{75{,}000} = \frac{X}{\$32{,}149}$, where *X* equals the fee award. The answer: X = **$214.30** (.006 x 32,149). This seems like a low number, but that is because the Plaintiff sought actual damages only to abandon that claim before trial.

Other formulas can be derived from the cases cited above. But many of those cases involve a full award of the $1000 statutory damages, or a percentage of them, when that was the only damage sought, i.e. they obtained a much greater portion of what they sought. Some involve damages awarded

by stipulation or verdict, and in some cases by an offer of judgment in that amount under Rule 68. Often a formula is simply a multiple of the award. As in *Carroll*, the court awarded a fee of $500 on a statutory damage award of $50, a full 10 times the amount recovered. Other courts, have awarded less than that, as in the Beckham case cited above, where Judge Crabb awarded $800 as fees on a $200 statutory damage verdict—four times the amount recovered. And yet, in these cases plaintiff sought so much *less*, seeking at most $1000 in statutory damages. The failure of this case when seeking so much more, makes this case the exception that proves the rule—that a lower award is justified when compared to the amount sought. When comparing what the Plaintiff recovered to the amounts sought, and further comparing the damages received in each of the categories that the plaintiff sought, it is clear that plaintiff received nothing for her troubles, despite the nominal award of $500.00 she received.

As indicated previously, the Defendant believes that an award of two to four times the statutory damage award obtained at trial should be the limit of a reasonable attorneys fee in this case. And averaging that range, would amount to a fee award of just $1500.

That may seem low, but something that should be said isn't being said enough. The Defendant, has had to defend itself, and now at great additional expense has to make this defense to this claim for fees. The court must recognize at the end of the day that it is the Defendant that has really suffered harmed. And even a denial outright of any fees, or most of the fees sought by the Plaintiff will not alleviate the harm and cost that the Defendant has had to bear, merely to prove that Defendant was right and that Plaintiff was wrong—her claimed violations were technical and not worth the large sums demanded from the beginning and that continued thereafter. The great injustice at the end of the day will be that the Defendant will have incurred great expense to make that point. But there is also a public cost that has been incurred. The Court and the jury has spent its time and energies in this matter. In short, it is time for the Plaintiff's attorneys, the ones who caused this injustice in the first place, to

suffer some too. Their fees should not be paid. They should be left to suffer along with the Defendant, the Plaintiff, and the public.

For all of these reasons, the Defendant submits that a reasonable fee is a fee of **$1500.00.** Or, some low multiple of the award that the Plaintiff did obtain. Five times would be $2500. Ten times, like in *Carroll*, $5,000.

**CONCLUSION**

This case, and the issue before the court, presents the worst of the consumer law, fee-shifting cases. A plaintiff sues on a "gotcha" claim, with no interest in resolving the underlying dispute short of a filed lawsuit within days of the "offending" events. The plaintiffs' attorneys at every stage of the proceeding, demand many times more than the case is ever worth, causing the defendant to incur the substantial costs of a defense or pay the "ransom." And when the defense substantially prevails, as when a plaintiff receives nearly nothing for her trouble, or perhaps even in spite of it, the Plaintiff asks for over $74,000 in fees, the price for defending against what can only be called an unsuccessful action.

Awarding Plaintiff fees in the amount of $74,000 in this case where she achieved an entitlement to $500, would be a travesty of justice. Just as plaintiff would be entitled to her fees had she actually achieved the "success" she sought in this action, actual damages in an amount that made sense, maybe as much as $75,000, she should suffer the loss of such fees when she achieves only what could ever be called a nominal award. Success is judged by an objective standard, and receiving 6/100 of 1 per cent of the amount sought (.006) cannot be considered a victory—not even by her attorneys.

For all these reasons, the Defendant requests that the court reduce any award of fees to recognize the failure this case is for the Plaintiff. Any more fees than specified above simply "greases the wheels" to promote needless litigation and to reward plaintiff's counsel for bringing a bad case to trial.

Dated this _20rd_ day February, 2017.

*s/ David McDorman*_____

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