**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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| **DINA FLORY,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**McCABE, WEISBERG & CONWAY, LLC, et al.,**<br><br>**Defendants.** | **CIVIL ACTION NO. :18-cv-15522-AET-TJB** |

**DEFENDANTS' OBJECTION TO THE PLAINTIFF'S FEE REQUEST SUBMITTED IN CONJUNCTION WITH THE ACCEPTED OFFER OF JUDGMENT**

**Background**

This matter concerns an alleged, immaterial violation of the Fair Debt Collection Practices Act by McCabe Weisberg & Conway, LLC (the "McCabe Firm"). The plaintiff, Dina Flory, had two mortgage-secured loans with the McCabe Firm's client, First Atlantic Credit Union ("First Atlantic," and together with the McCabe Firm, the "Defendants"). Flory paid off the second, smaller loan but fell into default on the first. The McCabe Firm sent a Notice of Intent to Foreclose Mortgage to Ms. Flory on September 21, 2018 (the "First NOI"). Everything in the First NOI was accurate, including the account number and the arrears figures, with the exception of the reference to the loan date and original principal amount of the loan at issue. In the "Re" line and paragraph 1 of the First NOI, the McCabe Firm referred to the loan date and the original, principal amount of the second, smaller May 22, 2009 loan ($8,000.00) instead of the loan date and the original, principal amount of the larger, October 1, 2004 loan ($246,600.00). The McCabe Firm discovered its error and sent an amended Notice of Intention to Foreclosure on October 16, 2018 that corrected

the loan date and original, principal amount figure, and also provided updated arrears figures (the "Second NOI").[1] The error was corrected before the Plaintiff ever consulted her attorney in this case. See Certification of Ira J. Metrick, Esq. in Support of Plaintiff's Motion to Approve Attorney's Fees and Costs (the "Fee Certification), at ¶19, reconstructed time entry for October 22, 2018 (initial consultation).

**Procedural History**

On October 31, 2018, counsel for Ms. Flory filed a complaint in this Court raising two, straight-forward counts under the Fair Debt Collection Practices Act (the "FDCPA") against the McCabe Firm, and a claim of "Respondeat Superior Liability" against First Atlantic (the "Complaint").[2] The substance of the claim, and the operative FDCPA counts, span approximately 4 pages. However, the Complaint is triple that size with nearly 80 Complaint paragraphs as a result of Plaintiff's transparent attempt to influence this Court with extraneous and scandalous materials contained in a section headed "BY WAY OF BACKGROUND" and elsewhere in the Complaint.

Because the McCabe Firm's alleged error neither resulted in actual harm to Ms. Flory, nor denied her information required to be given by the Fair Debt Collection Practices Act, Counsel for the McCabe Firm immediately began work on a responsive motion to dismiss based upon Spokeo

[1] The New Jersey Fair Foreclosure Act requires mortgage lenders to send NOIs so that borrowers in default might have 30 days to cure their loan arrears before a mortgage foreclosure can be filed. See N.J. Stat. § 2A:50-56 (2018). When the McCabe Firm sent the Second NOI to Ms. Flory, it likewise granted her a new thirty-day grace period to cure the loan.

[2] Perhaps realizing that a creditor collecting its own debt is not a "debt collector" as defined by the FDCPA, see 15 U.S.C. §1692a(6) (2018), and therefore, not subject to the Act's proscriptions, counsel for Plaintiff has used the respondeat superior claim in this and other cases despite New Jersey authorities calling into question the viability of such a claim. See, e.g., Baldasarre v. Butler, 132 N.J. 278, 291-92 (N.J. 1993); Mastropole v. Giudice, 2016 N.J. Super. Unpub. LEXIS 50, at *19-*20 (App. Div. Jan. 11, 2016). See also Miguel Carrera v. Bayview Loan Servicing, LLC, et al., United Stated District Court, District of New Jersey, Civil Action No. 3:18-cv-13824 (PGS) (another FDCPA case brought by Plaintiff's counsel in which a similar "respondeat superior liability" claim is the subject of a pending motion to dismiss).

standing (lack of jurisdiction in the absence of a justiciable injury-in-fact) and materiality (as required by the Third Circuit in Jensen v. Pressler & Pressler, 791 F.3d 413 (3d Cir. 2015)).[3] Given the expense of securing a dismissal, even as the first course of action in a litigation, however, the Defendants also decided to submit an offer of judgment (the "Offer of Judgment") to Ms. Flory in the hope of terminating the litigation promptly, responsibly and efficiently. The Offer of Judgment was made on November 15, 2018 in the amount of $1001.00 (essentially, statutory damages under the FDCPA -- no damages were offered on the "respondeat superior liability" claim against Atlantic Financial) "plus reasonable attorney's fees and costs as determined by the Court." Ms. Flory accepted the Offer of Judgment 4 days later in a letter by her counsel dated November 19, 2018. When the parties could not agree on an appropriate fee for Flory's counsel, the Offer of Judgment was filed with this Court on November 21, 2018, and the Court was made aware that a fee approval process would be necessary to bring the litigation to a close.

Counsel for Flory filed the Fee Certification and a supporting memorandum of law in support of his petition for $5,425.00 in attorney's fees on December 13, 2018 (the "Fee Application").[4] Counsel attaches no contemporaneous time records or any market evidence supporting his requested rate of $350/hour. Moreover, his reconstructed statement of services contained in the Fee Certification is excessive and includes administrative tasks for which compensation is not appropriate. Therefore, the Defendants file this objection to the Fee Application.

[3] The Defendants also were considering a Motion to Strike the extraneous portions of the Complaint pursuant to Federal Rule of Civil Procedure 12(f).

[4] Counsel also seeks an award of $513.20 in cost to which the Defendants do not object.

**Argument**

## I. PLAINTIFF HAS NOT MET HER BURDEN CONCERNING THE REASONABLENESS OF HER COUNSEL'S RATE AND RESULTING FEE

### A. Plaintiff's Burden of Proof on a Fee Request Under Section 1692k(a)(3) of the FDCPA

Plaintiff correctly notes that the burden of proving the reasonableness of a fee application rests on the applicant. Plaintiff's Memorandum in Support of Fee Application, at unnumbered p. 4. See, e.g., Interfaith Cmty. Org. v. Honeywell Int'l, Inc. 426 F.3d 694, 703 n.5 (3d Cir. 2005) ("[The] party seeking attorney fees bears the ultimate burden of showing that its requested hourly rate and the hours it claims are reasonable.") (*citing* Rode v. Dellaciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)). She says little more about the nature of that burden and the means by which it is satisfied, however. The New Jersey District Courts, on the other hand, have spoken a great deal on the subject. As noted by the this Court in the FDCPA case Piccinetti v. Clayton,

> "Reasonable hourly rates are typically determined based on the market rate in the attorney's community for lawyers of similar expertise and experience." Machado [v. Law Offices of Jeffrey H. Ward], 2017 U.S. Dist. EXIS 102869, 2017 WL 2838458, at *2 (*citing* Interfaith, 426 F.3d at 713). Evans v. Port Auth. of N.Y. and N.J., 273 F.3d 346, [361] (3d Cir. 2001). The attorney seeking fees bears the burden of establishing that the rate requested 'constitutes a reasonable market rate for the essential character and complexity of the legal services rendered.' Smith v. Philadelphia Hous. Auth., 107 F.3d 223, 225 (3d Cir. 1997). With respect to the hours claimed, it is incumbent upon the Court to 'exclude hours that are not reasonably expended." Rode, 892 F.2d at 1183 (*citing* Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed.2d 40 (1983)). "Hours are not reasonably expended if they are excessive redundant, or otherwise unnecessary." Id. . . .
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> Further, while the lodestar calculation is "strongly presumed to yield a reasonable fee" (Washington v. Phila. County Ct. of C.P., 89 F.3d 1031, 1035 (3d Cir. 1996) (*citing* City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed.2d 449 (1992)), "[t]he court can adjust the lodestar downward if the lodestar is not reasonable in light of the results obtained."

> Rode, 892 F.2d at 1183 (*citing* Hensley, 461 U.S. 434-37). "Indeed, 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" Farrar v. Hobby, 506 U.S. 103, 114, 113 S. Ct. 566, 121 L. Ed.2d 494 (1992) (*quoting* Hensley, 461 U.S. at 436). As such, where a plaintiff has achieved only limited or partial success, "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." Hensley, 461 U.S. at 436. When a fee award based on the lodestar calculation would be excessive, the Court may exercise its measured discretion to reduce same. Farrar, 506 U.S. at 115; *see* Machado, 2017 U.S. Dist. LEXIS 102869, 2017 WL 2838458, at *2.

2018 U.S. Dist. LEXIS 183611, at *8-*9 (D.N.J. Oct. 26, 2018).

In order to establish the appropriate "reasonable market rate for the essential character and complexity of the services rendered," the applicant ordinarily "submit[s] affidavits of other attorneys in the relevant legal community attesting to the range and prevailing rates charged by attorneys with similar skill and experience." Mann v. Gem Recovery Sys., 2018 U.S. Dist. LEXIS 124285, at *4 (D.N.J. July 25, 2018) (*quoting* Phila. Hous. Auth., 107 F.3d at 225 and Wade v. Colander, 2010 U.S. Dist. LEXIS 138518, at *10 (D.N.J. Dec. 28, 2010)). See also, e.g., Machado, 2017 U.S. Dist. LEXIS 102869, at *4 ("To satisfy his burden, 'the fee petitioner must 'submit evidence supporting the hours worked and [the] rates claimed.'") (*quoting* Rode, 892 F.3d at 1183); Castro v. McCarthy & Jennerich, 2013 U.S. Dist. LEXIS 11989, at *6-*7 (D.N.J. Jan. 10, 2013) ("The prevailing party bears the burden of proving, **through competent evidence**, the reasonableness of the hours worked and the rates claimed.") (emphasis added).

### B. The Rate Requested by Plaintiff's Counsel Is Not Supported by any Evidence, and is not Commensurate with his Relevant Experience

Contrary to the Plaintiff's burden, counsel for the Plaintiff has submitted no evidence in support of the local market that would justify his requested rate of $350/hour. Rather, he submits a self-serving Fee Certification that discusses minimally his practice and experience, see Fee

Certification, at ¶¶3-5, 16-19, and largely repeats the extraneous allegations from the Complaint that were wholly irrelevant to the FDCPA claims from the start. Id., at ¶¶6-15. According to the Fee Certification, Counsel, began his career as a real estate attorney, and only "[a]fter the real estate market crash, … began working with N.J. Legal Services and found my way to loan modification and foreclosure defense." Fee Certification, at ¶4. More recently still, within "the past 3-4 years, [counsel] began taking a limited amount of FDCPA cases which resulted from foreclosure issues." Id.[5] Based on this minimal experience, counsel suggests that he is entitled to $350/hour "based on a review of Affidavits for Services submitted to me in other matters, and through discussions with colleagues." Id. at 18. These affidavits of other, alleged peers are not attached to the Fee Certification, nor are the details of the claims/litigation they concern, or the experience of the attorneys' who provided them, given. The undersigned could find no New Jersey authority accepting anything remotely like this bare bones presentation as adequate proof of the reasonableness of a fee application. Compare Bilazzo v. Portfolio Recovery Assocs., LLC, 876 F. Supp.2d 452, 469-70 (D.N.J. 2012) (Court "declines to consider Plaintiff's supporting materials as indicative of the prevailing market rate in this District" thus rejecting applicant submitted biographies, the 2010 Consumer Law Attorney Fee Survey, the 2004 National Law Journal Survey, the Laffey Matrix and an affidavit of a California consumer protection attorney).[6]

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[5] In point of fact, a simple search of counsel's name in Pacer reveals that he has brought an even dozen FDCPA cases in the United States District Court for the District of New Jersey from 2014 through the end of 2018. Each case was withdrawn, dismissed or settled within months of its filing. Not one of these cases developed into a full-blown litigation or generated a dispositive opinion by the Court.

[6] This Court has accepted the Philadelphia Community Legal Services Range of Hourly Rates as a reasonable guide for hourly rates based on attorney experience. See, e.g., Bilazzo, 876 F. Supp.2d at 470; Levy v. Global Credit & Collection Corp., 2011 U.S. Dist. LEXIS 124226, *8 (D.N.J. Oct. 27, 2011). According to the most recent statement available on CLS's website at https://clsphila.org/about-cls/attorney-fees, an appropriate fee range for an attorney with 2 to 5 years of

### C. The Time Records of Plaintiff's Counsel Are Unreliable and Include Excessive and other Inappropriate Charges

As noted above, the Plaintiff's litigation strategy for this straight-forward, and possibly unsustainable FDCPA litigation, was to try and unduly influence the Court with a long recitation of alleged facts that are wholly irrelevant to the claims contained in the Complaint. Not surprisingly, then, the lion's share of counsel's fee application can be traced to 9.25 hours spent developing those extraneous facts such as the borrower's military service, efforts to secure a voluntary loan modification/short sale from her lender, employment travails, commuting hardships, health issues and the like. See Fee Certification, ¶19, at reconstructed time entries for 10/29/2018 through 10/31/2018. Thus, Plaintiff seeks to shift a total of 10.75 hours at $350/hour (or $3,762.50) to the Defendants for the drafting and filing of what should have been a simple and brief FDCPA complaint (and this, after already spending two and a half hours speaking with and meeting the Plaintiff about her case on October 22 and October 25). Compare Piccinetti, 2018 U.S. Dist. LEXIS 183611, at *25 (the Court concludes that "there is simply no reason it should have taken Mr. Marcus 1.1 hours to craft an Amended Complaint that closely resembles the original Complaint that only required 1.7 hours to complete… ."); Mann, 2018 U.S. Dist. LEXIS 124285, at *9-*10 (Court finds 1.7 hours spent drafting the FDCPA complaint reasonable); Machado, 2017 U.S. Dist. LEXIS 102869, at *9-*10 (Court reduces time awarded for drafting amended complaint to 1.5 hours).

Moreover, Plaintiff seeks fees to "research some issues of law" without any further

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relevant experience is $220/hour to $255/hour. Of course, this is based on the large, metropolitan Philadelphia market, and arguably would require a downward adjustment if used in a smaller municipal center. See also Castro, 2013 U.S. Dist. Lexis 11989, at 13 ("Defendants persuasively contend that cases within this District uniformly set $325 as the maximum hourly rate reserved for the most experienced attorneys handling FDCPA cases.") (emphasis added).

specificity, see Fee Certification, ¶19, reconstructed time entry for 10/25/18, and for inappropriate secretarial and administrative tasks such as "pull[ing] exhibits," filing pleadings, arranging for service of the complaint, receiving affidavits of service, and the like. Id. at reconstructed time entries for 10/31/18 and 11/8/18.

Finally, counsel's fee records are not attached to the Fee Application, but rather, are reconstructed in the body of the Fee Certification itself. Counsel's explanation of how he keeps his time is certainly unusual and, it is submitted, not consistent with sound practice. See Fee Certification, at ¶19. Between the unusual method by which counsel maintains his time and the clumping together of numerous tasks under long, single, daily time entries, it is submitted that counsel's records themselves do not bear the badges of reliability, and further undermine Plaintiff's minimal effort to establish the reasonableness of the fee she seeks.

## II. THIS COURT SHOULD UTILIZE ITS DISCRETION TO MAKE A MORE SUITABLE FEE AWARD OF NO MORE THAN $1,900.00 TO PLAINTIFF'S COUNSEL

Even when the Plaintiff fails to meet her burden concerning the reasonableness of her requested attorney's fees, it is incumbent on the Court, and well within its discretion, to formulate an appropriate rate and fee. Mann, 2018 U.S. Dist. LEXIS 124285, at *4. After reducing the time spent on the tasks outlined above, and applying an appropriate rate from within the CLS fee range, it is submitted a fee award of $1,900 (approximately 5.5 hours x $250/hour in fees plus $513.20 in costs) would be appropriate. While counsel claims that as a result of his efforts, the Plaintiff "very successfully prevailed," Plaintiff's Memorandum in Support of Fee Application, at unnumbered p. 3, the truth is that a very weak claim was resolved at the absolute minimum by way of Offer of Judgment in order to minimize litigation expenses only. Compare Piccinetti, 2018 U.S. Dist.

LEXIS 183611, at *19 ("The Court also acknowledges that Plaintiff settled the matter for $2500, more than the statutory maximum of $1000. As such, the Court finds that Plaintiff's counsel certainly attained a fair measure of success in these pleadings."). Moreover, it is respectfully submitted that counsel's tactic of inflating his pleadings and time by pursuing and promoting extraneous facts in the hope of swaying the Court should not be rewarded. Thus, a total fee of $1,900.00, while at the lower end of fees awarded by the New Jersey District Courts in FDCPA matters resolved promptly by way of offer of judgment or default judgment, is still squarely within the range of those awards and appropriate under the circumstances of this particular matter. See, e.g., Mann, 2018 U.S. Dist. LEXIS 124285, at *12 (Attorney's fees of $1,714.50 awarded in connection with an offer of judgment made after complaint, amended complaint and answer filed); Machado, 2017 U.S. Dist. LEXIS 102869, at *11 (Attorney's fees of $2,142.00 awarded in connection with an offer of judgment made eight months into the litigation); Havison v. Williams Alexander & Assocs., 2016 U.S. Dist. LEXIS 164989 (D.N.J. Nov. 30, 2016) (attorney's fees of $3,475 awarded in connection with a motion for default judgment); Westberry v. Comm. Fin. Sys., 2013 U.S. Dist. LEXIS 14381 (D.N.J. Feb. 4, 2013) (Attorney's fees of $4,433.50 awarded in connection with an offer of judgment made one year into the litigation); Bilazzo, 876 F. Supp.2d at 473 (Attorney's fees of $1,284.28 awarded in connection with an offer of judgment made essentially at the same time as the Offer of Judgment in this case); Whitt v. Receivables Perf. Mgmt., LLC, 2012 U.S. Dist. LEXIS 143120, at *39 (D.N.J. July 18, 2012) (Attorney's fees of $2,835.07 awarded in connection with an offer of judgment made essentially at the same time as the Offer of Judgment in this case).

WHEREFORE, the Defendants respectfully request that this Court grant in part only the Plaintiff's Fee Application and award counsel for the Plaintiff $1,375.00 in attorney's fees and $513.20 in costs.

Dated: Philadelphia, PA
January 8, 2019

Respectfully submitted,

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By: /s/ *Joseph F. Riga*
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Counsel for the Defendants

**CERTIFICATE OF SERVICE**

I, Joseph F. Riga, certify that, on the date set forth below, a true copy of the Defendants' Opposition to Plaintiff's Fee Application was served on the following by first class U.S. mail, postage pre-paid or, for those who have agreed to receive service electronically under the Court's local rules and CM/ECF program, by electronic transmission:

Ira J. Metrick, Esq. — *Counsel for Plaintiff*
57 West Main Street
Freehold, NJ 07728

Dated: Philadelphia, PA
January 8, 2019

Respectfully submitted,
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