UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

GRACE MURRAY, GRACE ENGEN, JEANNE TIPPET, STEPHEN BAUER, ROBIN TUBESING, NIKOLE SIMECEK, MICHELLE MCOSKER, JACQUELINE GROFF, and HEATHER HALL, on behalf of themselves and others similarly situated, Plaintiffs, vs. GROCERY DELIVERY E-SERVICES USA INC. DBA HELLO FRESH, Defendant.	Case No. 19-cv-12608-WGY

OBJECTOR SARAH MCDONALD'S RESPONSE TO NAMED PLAINTIFFS' SUPPLEMENTAL BRIEF

I. INTRODUCTION

Objector McDonald agrees with Named Plaintiffs that HelloFresh's former customers are not bound to arbitrate claims arising from wrongs HelloFresh committed after class members had effectively terminated the agreements containing arbitration provisions. McDonald further agrees with both Named Plaintiffs and the Defendant ("HelloFresh") that the arbitration provisions do not present a disparity among class members that is material to the value of the claims compromised. Nothing about HelloFresh's arbitration clauses warrants creating subclasses. Differences going to the merits of the claims at issue, in contrast, do require independently represented subclasses. McDonald maintains there are at differences in the various theories

undergirding absent class members' claims, and that they are material to the value of the claims compromised. *Infra* 2-5

Named Plaintiffs have not adequately documented their expenses or their lodestars. First Circuit precedent requires submission of detailed contemporaneous billing records—which Named Plaintiffs concede are available, but which they continue to withhold. This Court should not award expenses or fees given the inadequate record provided. Neither should it rely on Class Counsel's secret submission of a document on New York City billing rates. *Infra* at 5-11.

II. ARGUMENT

A. Differing Arbitration Clauses Do Not Require Independently Represented Subclasses

McDonald respectfully agrees with Named Plaintiffs that HelloFresh's arbitration provisions govern no class members' claims, and that they are accordingly irrelevant to class certification and settlement approval. And as HelloFresh itself notes, while separate representation of subclasses may be required when the merits of different class members' claims differ, an agreement to arbitrate has nothing to do with the underlying merits of the claims.

HelloFresh's arbitration clauses do not govern any class members' claims in this proceeding. "Claims arising after the expiration of a contract containing an arbitration provision," the First Circuit holds, "are only presumed to be subject to arbitration if the 'dispute has its real source in the contract.'" *Breda v. Cellco P'ship,* 934 F.3d 1, 7 (1st Cir. 2019) (quoting *Litton Fin. Printing Div. v. NLRB,* 501 U.S. 190, 205 (1991)). In *Breda,* as here, the defendant placed calls to a former customer after the termination of their contractual relationship under a contract that included an arbitration agreement. The First Circuit held that

> Breda's TCPA claims do not have their real source in her expired Agreement with VZW. All of the material facts underlying her claims -- that is, all of the facts and occurrences relating to VZW's automated calls -- occurred after the Agreement's

> termination. *See, e.g., Stevens-Bratton v. TruGreen, Inc.,* 675 Fed. App'x 563, 568-69 (6th Cir. 2017) (finding no presumption of arbitrability where plaintiff based her TCPA claims on calls that occurred after the agreement expired).

Breda, 934 F.3d at 7-8 (footnote omitted).

The First Circuit held, moreover, that TCPA claims could not be regarded as claims that arose from the terminated contractual relationship:

> Nor do Breda's statutory TCPA claims involve a contractual right or a right that accrued or vested under the Agreement. *See, e.g., Rahmany v. T-Mobile USA Inc.,* 717 Fed. App'x 752, 753 (9th Cir. 2018) (Mem.) ("The TCPA, not the Wireless Agreement, creates and defines any alleged duty to refrain from sending an unwanted text message."); *Gamble v. New Eng. Auto Fin., Inc.,* 735 Fed. App'x 664, 666 (11th Cir. 2018) (noting that plaintiff's TCPA claim "arises not from the Loan Agreement or any breach of it, but from post-agreement conduct that allegedly violates a separate, distinct federal law"); *see also Doe v. Princess Cruise Lines, Ltd.,* 657 F.3d 1204, 1218 (11th Cir. 2011) ("The term 'arising out of' [in standard arbitration provisions] is broad, but it is not all encompassing. ... [It] requires the existence of some direct relationship between the dispute and the performance of duties specified by the contract."). We therefore conclude that Breda's claims are not subject to a presumption in favorof arbitrability.

Breda, 934 F.3d at 8 (footnotes omitted). "For these reasons, the district court correctly denied VZW's motion to compel [arbitration]," the First Circuit held. *Id.* at 9.

McDonald thus agrees with Named Plaintiffs that, applying *Breda* as the controlling precedent, none of the class members' claims in this proceeding are subject to the arbitration clauses in their former contracts with HelloFresh.

McDonald disagrees, however, with certain of Named Plaintiffs' assertions. For example, Named Plaintiffs say: "Here, HelloFresh engaged in the same illegal telemarketing conduct with all Settlement Class Members, each of whom is a former HelloFresh customer." DE92:6. That is substantively inaccurate. Named Plaintiffs allege that HelloFresh's telemarketing violated three completely distinct TCPA provisions: (1) a prohibition on calls to cell phones made using an ATDS platform, (2) a prohibition on calls to individuals who (like Objector McDonald)

registered their numbers with the National Do Not Call Registry ("NDNCR"), and (3) a prohibition on calls to individuals who specifically asked HelloFresh not to call them. These three classes of claims vary widely from one another in their elements and their value—with the NDNCR claims being by far the strongest, and ATDS claims without doubt the weakest.

That matters a lot, for class members with strong claims cannot be grouped with class members holding weak and likely worthless claims. This Court has held that differences in strength of state-law antitrust claims required separate subclasses in light of the underlying claims' differing strengths. *See In re Relafen Antitrust Litig.,* 225 F.R.D. 14, 21-22 (2004). Subclasses should be similarly required here, where the NDNCR claimants and ATDS claimants have claims that vary radically in their strength and value for reasons that go to the merits.

Defendant HelloFresh's response to Named Plaintiffs' supplemental brief underscores the important distinction between claims subject to differing arbitration agreements, and claims that differ widely in value on account of issues relating to their merit. HelloFresh observes that courts

> regularly approve class action settlements where class members are paid equally despite the fact that some of them may have agreed to arbitration.
>
> This is ***because an arbitration defense does not affect the merits or value of any particular claim***, but only whether the claim may be brought in court or in arbitration. For example, if a defendant is liable for violating the Telephone Consumer Protection Act ("TCPA") for making a phone call, the plaintiff can recover a statutory penalty of $500 for each call in violation regardless of whether the plaintiff brings that claim in court or in arbitration.

DE97:1-2 (emphasis added). HelloFresh reiterates: "Unlike other defenses on the merits, the defense of arbitration does not affect the value of any particular claim." DE97:3. Simply put, "arbitration does not impact the underlying merits or value of a claim." DE97:5. "Perhaps most importantly," HelloFresh observes, "it is equitable to pay all class members the same because arbitration does not impact the underlying merits or affect the value of any particular claim."

DE97:9. "The merits and value of a class member's claim do not change simply because the member signed up after February 2017 and may potentially be required to pursue their claims in arbitration." DE97:9.

It should be apparent that the arbitration defense is very different from HelloFresh's apparently ironclad merits-based defense to the ATDS claims in this case. That the dialing platform HelloFresh used to place calls to cell phones cannot qualify as an ATDS is an absolute defense to the ATDS claims in this case, rendering them essentially worthless. *Facebook, Inc. v. Duguid,* 141 S. Ct. 1163 (2021); *Barnett v. Bank of America, N.A.,* No. 3:20-CV-272-RJC-DSC, 2021 WL 2187950, at *3 (W.D.N.C. May 28, 2021) (no ATDS claims where "numbers chosen for the calls are selected from a pre-existing list created based on criteria from the dialer administrators, rather than by random or sequential number generators").

Those ATDS claims were known to be of questionable value when Named Plaintiffs settled all claims, including both strong NDNCR claims and sketchy ATDS claims on the same terms, without differentiation as to their real settlement value. For that reason the settlement should not be approved.

B. Named Plaintiffs Have Not Adequately Documented Their Expenses or their Lodestars

Named Plaintiffs still have not adequately documented their expenses, which should accordingly be denied. *See Loc. 589, Amalgamated Transit Union v. Massachusetts Bay Transportation Auth.,* No. 13-CV-11455-ADB, 2017 WL 1227915, at *3 (D. Mass. Mar. 31, 2017) ("because the documentation provided by Plaintiffs is not adequate, the Court will not award attorneys' fees or expense reimbursement to local counsel Rogal and Hynes").

Neither have they adequately documented Class Counsel's lodestars for purpose of awarding attorney's fees. In a footnote they say: "Class Counsel can certainly provide the Court

with detailed time records if requested but has not done so here where it appears the Court historically has not required such records." 92:19 n.15. The proper standard, however, is what the First Circuit requires. And First Circuit precedent requires the submission of detailed contemporaneous time records.[1]

Here, as in *Calhoun v. Acme Cleveland Corp.,* 801 F.2d 558, 560 (1st Cir. 1986), counsel's "submissions themselves ... do not meet the requirements that" the appellate court has "carefully delineated for an award of attorney's fees in this circuit."

> The court must secure from the attorneys a full and specific accounting of their time; bills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed during the hour or hours in question should be refused.

Calhoun v. Acme Cleveland Corp., 801 F.2d 558, 560 (1st Cir.1986) (quoting *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir.1977)); *see also Castaneda-Castillo v. Holder,* 723 F.3d 48, 79 (1st Cir. 2013).

> The affidavit here was little more than a tally of hours and tasks relative to the case as a whole. Attorneys who anticipate requesting their fees from the court would be well advised to maintain detailed, contemporaneous time records that will enable a later determination of the amount of time spent on particular issues.

Calhoun v. Acme Cleveland Corp., 801 F.2d 558, 560 (1st Cir. 1986) (quoting *Wojtkowski v. Cade,* 725 F.2d 127, 130 (1st Cir.1984)). "Those records should describe 'with particularity the date, activity and time spent on each litigation task.'" *Cox v. Massachusetts Dep't of Correction,* No. CV 13-10379-FDS, 2019 WL 2075588, at *4 (D. Mass. May 10, 2019) (quoting *Rosie D. v. Patrick,* 593 F. Supp. 2d 325, 329 (D. Mass. 2009)).

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[1] Class Counsel remain reluctant to disclose their time records despite this Court's request for disclosure of the lodestar. *See* Transcript of May 11, 2021 Fairness Hearing at 33 (The Court: "But if you want more than 20 percent of that $8,900,000, you've got to show me the Lodestar and you've got to argue why you should get more than that.").

Class Counsel's submissions all fall far short of the governing standards, making it impossible to adequately evaluate whether the hours claimed were necessary and appropriate. *See* DE92-1:6-10¶¶19-29 & Exhibit 2 (Stacey Slaughter Supp. Decl.); DE92-2:6-9¶¶15-18 (Samuel J. Strauss Supp. Decl.); DE92-3:3-6¶¶8-14. From what has ben submitted, though, the hours billed by senior lawyers at extremely high rates do appear to be excessive.

Class Counsel Robins Kaplan provide only a vague list of tasks performed in the case, many of which should have been assigned to associates working under the supervision of more experienced lawyers. DE92-1:6-8¶¶20-21 (Stacey Slaughter Supp. Decl.). Robins Kaplan claims to have devoted 1,015 hours to the case. DE92-1:28(Exhibit 2). Of that, only 22.8 hours were paralegal or support staff time, and only 36.1 hours were billed by associates (at $630 per hour). No explanation is given for this. The remainder of the time–over 956 hours–was billed by partners at rates ranging between $802 to $1,105 per hour. DE92-1:28(Exhibit 2). Even the minimal work allocated to Robins Kaplan associates was billed at rates of $600 and hour and higher. *Id.* The average rate billed for all timekeepers at the firm, including non-attorneys, was $852.95. DE92-1:9¶27. Another firm representing plaintiffs, Turke & Strauss, claims 1,023.6 hours for a lodestar of $460,245. The Paronich Law firm claims an additional 561.7 hours for a lodestar of $308,935. The grand total is a claim of over 2,600 hours, with an extremely high percentage of the time claimed by Robins Kaplan partners at extravagantly premium rates. DE92-1:10¶29.

Robins Kaplan's lodestar, in particular, appears to be grossly inflated not only because far too much time was billed by senior partners for work that likely could have been done by associates, but for the further reason that they seek to be compensated at the rates charged by prestigious New York City law firms. Compared to the billing rates charged by attorneys at

Turke & Strauss and the Paronich law firm, even, Robins Kaplan's billing rates—starting at $600 an hour for associates and running to over $1,000 an hour for partners—are exorbitant. Contrast Robins Kaplan's rates, for example, with those of their co-counsel on this case. The most senior partners at Turke & Strauss bill $550 an hour (Samuel J. Strauss) and $650 an hour (Mary C. Turke). DE92-2:7 (table). Anthony Paronich, who is one of the most experienced TCPA lawyers in the country, attests: "My billing rate is $550, which is consistent with what I've had approved in other Massachusetts jurisdictions in TCPA cases." DE92-3:5-6¶14.

Yet Robins Kaplan's Minnesota lawyers litigating this case insist that they are entitled to be compensated like Wall Street lawyers for work that they performed in Minnesota and Massachusetts:

> The Robins Kaplan hourly billing rates for complex litigation are comparable to those of other large, national law firms, with attorneys licensed to practice in New York. Exhibit 3 is a report from Thomson Reuter's Peer Monitor showing comparable billing rates among AmLaw 100 firms with a New York city office.

DE92-1:9¶28 (Stacey Slaughter Supp. Decl.).

The First Circuit, however, holds that attorney's fees ordinarily should be awarded on the basis of rates charged by attorneys in the local community, rather than rates charged by lawyers on Wall Street. "The reasonable hourly rate is usually stated to be 'that prevailing in the community for similar work.'" *Maceira v. Pagan,* 698 F.2d 38, 40 (1st Cir. 1983) (quoting *Copeland v. Marshall,* 641 F.2d 880, 892 (D.C. Cir. 1980)). Nothing in the record in this case suggests that the litigation could not be handled by attorneys charging local rates—let alone that compensation at New York City rates is necessary. Robins Kaplan's billing rates should be capped at the $550 to $650 an hour billed by their experienced co-counsel in this case.

McDonald further objects that Robbins Kaplan cannot rely on secret submissions to establish New York City rates. Attorney's fee applications in consumer class actions should be based on publicly accessible documentation.

Generally speaking, courts should be loath to rely on secret submissions to resolve important issues. Judicial records are presumptively subject to public inspection. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993). "[T]he presumption is at its strongest when the document in question, as here, has been submitted as a basis for judicial decision making." *In re Boston Herald, Inc*., 321 F.3d 174, 198 (1st Cir. 2003) (citation and quotations omitted); *see also F.T.C. v. Standard Fin. Mgmt. Corp*., 830 F.2d 404, 409 (1st Cir. 1987); *Joy v. North,* 692 F.2d 880, 893 (2d Cir. 1982) (same). The common-law right of access is "instrumental in securing the integrity of the process." *Chicago Tribune Co. v. Bridgestone/Firestone Inc*., 263 F.3d 1304, 1311 (11th Cir. 2001).

And "in class actions—where by definition 'some members of the public are also parties to the [case]'—the standards for denying public access to the record 'should be applied ... with particular strictness.'" *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan,* 825 F.3d 299, 305 (6th Cir. 2016).

Plaintiffs' sole justification offered for infringing the public's right of access in this nationwide class action is that

> Exhibit 3 is obtained from a Thomson Reuter's Peer Monitor report that shows billing rates among AmLaw 100 firms with a New York city office, but that data is proprietary in nature to Thomson Reuters, and the firm's received permissions to use the data limit the ability to share it publicly.

DE93:1. Robins Kaplan offered virtually nothing to support the argument that this information should be impounded or sealed. Mere conclusory assertions of counsel are insufficient to overcome the presumptive right to access court records. *In re Providence Journal Co., Inc.,* 293

F.3d 1, 13 (1st Cir. 2002) ("public access is too precious to be foreclosed by conclusory assertions").

Named Plaintiffs' memorandum supporting secrecy asserted: "Counsel for the Plaintiffs met and conferred with counsel for HelloFresh and counsel for Ms. McDonald regarding this motion. Counsel for Ms. McDonald did not respond." DE93:1. The supposed "meet and confer," however, consisted of sending McDonald's counsel an email on the morning of May 7, 2021, and then filing their motion without waiting for a response—which McDonald's counsel sent the same day, indicating that she would oppose the motion. Under the circumstances, the secret submission, which McDonald's counsel have had no opportunity to review, ought not be considered by the Court.

Even if Class Counsel's claimed lodestars were to be credited (and on the present record they should not be), the multiplier of 2.74 that Class Counsel request is excessive. The Supreme Court holds "that "a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious ... case." *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 552, (2010). And attorneys' unenhanced lodestars are presumptively sufficient to do that. *See id.* Indeed, "there is a 'strong presumption' that the lodestar figure is reasonable," although "that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 554 (2010). In *Perdue* the Court reversed a fee award with a "large enhancement" amounting to a multiplier of 1.75. *Id.* at 557.

Here, Class Counsel have offered nothing sufficient to justify a multiplier of 2.74 times their lodestar. A district judge acts as a fiduciary when it comes time to approve an attorney's fee

award. McDonald respectfully submits that a fiduciary would not pay a multiple of the sum that the Supreme Court has determined is sufficient to constitute a reasonable attorney's fee.

Named Plaintiffs say that a generous fee is justified because "HelloFresh ceased its illegal calling activity after Plaintiffs filed this lawsuit which further benefits the Settlement Class." DE92:3. Yet the Settlement Agreement provides no injunctive relief, giving this Court nothing additional to value in connection with awarding attorney's fees. This Court itself confirmed the point at the May 11, 2021 final approval hearing, asking whether Named Plaintiffs' counsel had "secured any undertaking that would prevent" HelloFresh from initiating another robocall campaign. TR23:22-24:1. Counsel conceded that "[W]e do understand that they ceased their calling efforts, but that is not something that they are required to do under the settlement." *Id*. at 24:2-5.

Class Counsel have provided inadequate documentation and inadequate grounds for the award of expenses and fees that they request.

III. CONCLUSION

Formal subclasses and separate representation are required to address the differing strengths of the three subclasses of claims and to protect the interests of each subclass of claimants. The motion for an award of expenses and attorney's fees should be denied.

Dated: June 8, 2021

Respectfully submitted,

/s/ Eric Alan Isaacson
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CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2021, I am filing and serving the foregoing document through the Court's CM/ECF system, which will send notice to all counsel of record.

/s/ Eric Alan Isaacson
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