

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR MIAMI-
DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 07-08453 CA 09

JAMES SOPER, AIMEE DISHKIN, and
KAMELL ABDONEY on behalf of
themselves and all others
similarly situated,

Plaintiffs,

v.

TBC RETAIL GROUP, INC.
d/b/a TIRE KINGDOM, INC., a Florida for
profit corporation,

Defendant.

FINAL APPROVAL ORDER AND JUDGMENT

This matter came before the Court on the parties' Joint Motion for Final Order Certifying the Settlement Class, Approving the Settlement Agreement and granting Plaintiffs' Fee and Cost Application. The settling parties consist of Class Representatives, James Soper, Aimee Dishkin, and Kamell Abdoney ("Plaintiffs" or "Class Representatives") and Defendant TBC Retail Group, Inc. d/b/a Tire Kingdom, Inc. ("Defendant" or "TBC").

On May 7, 2014, the Court granted the parties' Joint Motion for Preliminary Approval of Settlement Agreement asking the Court to approve a proposed Settlement Agreement ("Settlement Agreement"), certifying a settlement class, and set a Final Approval Hearing. The parties now seek final certification of the Settlement Class and final approval of the Settlement

Agreement. The Class Representatives also seek approval of an incentive award to the Class Representative and attorneys' fees and costs for Class Counsel, which Defendant has agreed not to object or oppose up to the amount requested in the application. A Final Approval Hearing was held on all of these issues on October 7, 2014 ("Final Approval Hearing").

The Court has considered evidence including: (i) all motions, memoranda and papers filed in support of the Settlement Agreement; and (ii) arguments of Class Counsel and counsel for Defendant. For the reasons set forth below, the Court makes final its certification of the Settlement Class, approves the Settlement Agreement, approves an incentive award to Class Representative in the amount of \$5,000.00, and approves attorneys' fees and costs to Class Counsel in the amount of \$2,030,000. Being otherwise fully advised in the premises, the Court orders and adjudges as follows:

I. HISTORY OF THE LITIGATION

This case stems from a putative class action complaint that Plaintiffs filed against Defendant. The Complaint asserts claims alleging TBC failed to disclose that a shop fee will be charged, and/or otherwise improperly charged a shop fee based on the retail price of the service as opposed to the advertised or discounted price of the service, and/or improperly charged a shop fee based on the charge for a purchased part or product, throughout Florida. The Complaint sought monetary and injunctive relief on behalf of Plaintiffs, individually, and a putative class.

After almost seven years of adversarial litigation, appeals, and mediations, the parties reached a settlement that is the subject of this Order.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Certification of the Settlement Class

1. For purposes of the settlement of this action, the Court hereby makes final its prior certification of the following Settlement Class in this action:

- a. Class 1 (Non-Disclosure of Shop Fee): Any and all residents of Florida who, between March 23, 2003 and March 23, 2014, paid TBC a shop fee in Florida when such shop fee was not disclosed in the applicable TBC advertisement.
- b. Sub-Class 1 (Miami-Dade County): Any and all residents of Miami-Dade County who, between March 23, 2003 and March 23, 2014, paid TBC a shop fee in Miami-Dade County when such shop fee was not disclosed in the applicable TBC advertisement.
- c. Class 2 (Charging Shop Fee on Non-Discounted Price): Any and all residents of Florida who, between March 23, 2003 and March 23, 2014, paid TBC a shop fee in Florida when such shop fee was based on a percentage of the retail price for the transaction, rather than the discount or charged price for the transaction.
- d. Sub-Class 2 (Miami-Dade County): Any and all residents of Miami-Dade County who, between March 23, 2003 and March 23, 2014, paid TBC a shop fee Miami-Dade County when such shop fee was based on a percentage of the retail price for the transaction, rather than the discount or charged price.
- e. Class 3 (Charging Shop Fee on Parts/Products): Any and all residents of Florida who, between February 5, 2005 and March 23, 2014, paid TBC a shop fee in Florida when such shop fee was based on the charge for the purchased part or product.

Excluded from these Classes are those who file a Request for Exclusion, governmental entities, Defendant, its parent, subsidiaries, affiliates, directors, officers, attorneys, and members of their immediate families and the Court and persons within the third degree of relationship to the Court.

The reasons for this Court's order follow below.

2. For purposes of the settlement of this action, and informed by Judge Wilson's class certification order and this Court's previous ruling denying Defendant's motion to decertify the class action, the Court finds that the requirements of Rules 1.220(b)(3)) of the Florida Rules of Civil Procedure have been satisfied in that:

The Class is ascertainable on the basis of the records of TBC and other objective criteria, and Class Members are so numerous that it is impracticable to bring all Class Members before the Court.

The commonality requirement is satisfied when members of a proposed class share at least one common factual or legal issue that is capable of common resolution. Here, Plaintiffs have alleged numerous questions of fact and law common to the Class. Considering the allegations of the Complaint and based on the Court's previous rulings on class certification, the Court finds that, for purposes of this settlement Class only, these common questions of fact and law predominate over questions of fact and law affecting only individual members of the Class.

Based on Plaintiffs' allegations in the Complaint and the Court's previous rulings on class certification, and for purposes of this settlement only, the Court finds that the claims of the representative Plaintiffs are typical of the claims of the Class, and that the representative Plaintiffs will fairly and adequately protect the interests of the Class, in that: (1) the interests of the named Plaintiffs and the nature of his alleged claims are consistent with those of all members of the Class; (2) there appear to be no conflicts between or among the named Plaintiffs and Class Members; (3) the named Plaintiffs have been and appear to be capable of continuing to be an active participant in both the prosecution of and the negotiations to settle this action; and (4) the named Plaintiffs and Class Members are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated class actions, particularly those involving the sort of practice and claims alleged in the Complaint.

The Court finds that for purposes of this settlement only, a resolution of the action in the manner proposed by the Joint Motion is superior to other available methods for a fair and efficient adjudication of this action.

The Court also notes that because this action is being settled, rather than litigated to conclusion, the Court need not consider the manageability issues that might otherwise be presented by litigation of a nationwide class action involving these issues. *Amchem Prods. v. Windsor*, 521 U.S. 591, 619 117 S. Ct. 2231, 2248 (1997); *Chase Manhattan Mortg. Corp. v. Porcher*, 898 So. 2d 153, 156-57 (Fla. 4th DCA 2005) (“Because Florida’s class action rule is based on Federal Rule of Civil Procedure 23, Florida courts may generally look to federal cases as persuasive authority in their interpretation of rule 1.220.”). In making these findings, the Court has considered, among other factors: (1) the interests of Class Members in individually controlling the prosecution or defense of separate actions; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning these claims already commenced; and (4) the desirability of concentrating the litigation of the claims in a particular forum. Pursuant to the aforementioned standards, the Court determines that certification of a Settlement Class under Rule 1.220(b)(3) was and is appropriate in this case.

3. The Court finds that the Class Representatives, Plaintiffs James Soper, Aimee Dishkin, and Kamell Abdoney, and their counsel, Jon M. Herskowitz of Baron & Herskowitz, Seth Miles of Grossman Roth PA, and Stephen F. Rosenthal of Podhurst Orseck, PA, have fairly and adequately represented the interests of the Class.

B. The Settlement Agreement

4. The Court finds that: (a) the proposed settlement set forth in the Joint Motion for Preliminary Approval of Settlement Agreement (the “Joint Motion”) resulted from extensive arms-length negotiations and was concluded only after counsel for Plaintiffs engaged in extensive due diligence, including the review of documents and other information, taking

depositions and (b) the proposed settlement evidenced by the Settlement Agreement is sufficient to warrant (i) certification of the Class for settlement purposes, (ii) notice thereof to the members of the Class, and (iii) a full hearing on the settlement. The Court further finds that the unanimous support of counsel for this settlement weighs in favor of its approval. Based on the foregoing, the Court concludes that the proposed settlement is fair, reasonable and adequate.

C. Notice

5. The Court finds that the Notice sent to Class Members satisfied due process. The Notice was sent to the Class pursuant to and in the manner directed by the Preliminary Order. A full opportunity to be heard has been afforded to all parties, the Class, and persons of interest. The form and manner of the Notice is hereby determined to have been the best notice practicable under the circumstances and is due and sufficient notice to the Class Members pursuant to Florida law and due process, and it is further determined that all Class Members are bound by this Order and Final Judgment.

D. Cy Pres

6. TBC will, no later than 30 days after the Effective Date, donate the difference between \$2,500,000 and the aggregate amount of relief elected by Class Members during the election period (as reported by the Notice Administrator), to mutually agreed upon charities with consumer-education programs, specifically, 25% to Legal Services of Greater Miami, Inc., 25% to Florida Justice Association Research and Education Foundation, and 50% to Children's Healthcare Charity, Inc.

E. Service Award

7. The Parties have negotiated a service award of \$5,000 for each of the Class Representatives. The Court finds that such an amount is reasonable and approves the Defendant's payment of an incentive award of \$5,000 to each Class Representative. The Court further finds that the service award is not tantamount to a payment for damages; rather the award represents remuneration for the services performed for the benefit of the Settlement Class and reflects the amount of time and effort spent by the Class Representative, the duration of the litigation, and the role to the class in commencing the suit. Finally, the Court notes that the record is clear that the Class Representatives negotiated the settlement terms before there was a discussion of a service award to the Class Representatives and all negotiations were free from fraud or collusion. The Court finds that the incentive award of \$5,000 to each Class Representative for the significant work and responsibility that went into this case is fair and reasonable.

F. Attorneys' Fees and Costs

8. The Settling Parties agreed in the Settlement Agreement that Class Counsel would seek, and Defendant would not oppose, undermine, or solicit others to do so, a request for an award of Aggregate Fees and costs in an amount of \$2,030,000. Thus, Defendant agreed not to oppose as unreasonable an award of Aggregate Fees and Costs in an amount of \$2,030,000.

9. The Florida Unfair Deceptive Trade Practices Act, the Florida Motor Vehicle Repair Act, and the Miami-Dade County Motor Vehicle Repair Ordinance are statutes that permit an award of reasonable attorney's fees and other litigation costs reasonably incurred to prevailing Plaintiffs. "The court's order on attorney's fees must allow meaningful review -- the district court must articulate the decisions it made, give principled reasons for those decisions, and show

its calculation." *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1304 (11th Cir. 1988) (citing *Adams v. Mathis*, 752 F.2d 553, 554 (11th Cir. 1985)). Even when there is a settlement, as in this case, "the district court has a supervisory role and ultimately must calculate and set the attorneys' fees award up to a maximum of the [negotiated] cap." *Dikeman v. Progressive Exp. Ins. Co.*, 312 Fed. Appx. 168, 172 n.3 (11th Cir. 2008). "A district court is not bound by the agreement of the parties as to the amount of attorneys' fees. In fixing the amount of attorneys' fees the court must, of course, take all [appropriate] criteria into account, including the difficulty of the case and the uncertainty of recovery. [The Court] is not, however, merely to ratify a pre-arranged compact." *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980) (internal citations omitted).

10. The Court finds that an award of Aggregate Fees and costs in an amount of \$2,030,000 is reasonable for the three law firms who litigated this case over a period of seven years.

III. FINAL JUDGMENT AND ORDER

NOW THEREFORE, after consideration of all motions, memoranda in support, argument of counsel, and being otherwise duly advised in the premises, it is **ORDERED and ADJUDGED** as follows:

11. Plaintiffs' Motion for Entry of an Order Approving Defendant's Payment of Agreed Upon Incentive Awards to Class Representatives and Attorneys' Fees and Expenses is **GRANTED**. The Court awards \$2,030,000 in attorneys' fees and costs, and an incentive award in the amount of \$5,000 to each Class Representative, James Soper, Aimee Dishkin, and Kamell Abdoney. Defendant shall pay the award of attorneys' fees and expenses to Class Counsel and

incentive awards to Class Representatives in accordance with the terms of the Settlement Agreement.

12. For purposes of this Final Judgment and Order, the Court adopts and incorporates the definitions and meanings of the defined terms set forth in the Parties' Settlement Agreement.

13. Plaintiffs' Motion for Final Certification of Settlement Class, Final Approval of Class Action Settlement, and Entry of Final Judgment and Order **is GRANTED**.

14. The Court expressly approves each and every term contained in the Parties' Settlement Agreement. The Court reserves continuing and exclusive jurisdiction over the parties with respect to all matters relating to this Settlement Agreement, including the administration, interpretation, effectuation, and enforcement of the Settlement Agreement and this Final Judgment and Order.

15. The Class Representatives and the Class Members and all persons claiming by or through them, except Class Members who have timely opted out, are **PERMANENTLY BARRED** and **ENJOINED** from instituting, commencing and/or prosecuting, directly or indirectly, any claim, suit or proceeding against the Released Parties (as defined in the Settlement Agreement) with respect to any and all Released Claims.

16. Subject to the above reservation of jurisdiction, the case is hereby **DISMISSED WITH PREJUDICE**.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 10/07/14.


JERALD BAGLEY
CIRCUIT COURT JUDGE

FINAL ORDERS AS TO ALL PARTIES

SRS DISPOSITION NUMBER 12

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

Judge's Initials JB

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

JERALD BAGLEY
CIRCUIT COURT JUDGE

Copies provided to: All Counsel of Record
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