

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Philip Charvat, on behalf of himself and others similarly situated,)	
)	Case No. 1:12-cv-05746
Plaintiff,)	
)	
v.)	
)	
Elizabeth Valente, Resort Marketing Group, Inc., Carnival Corporation & PLC, Royal Caribbean Cruises, Ltd., NCL (Bahamas) Ltd.,)	Hon. Judge Andrea R. Wood Hon. Mag. Judge Mary Rowland
)	
Defendants.)	

**MOTION FOR A CLASS REPRESENTATIVE INCENTIVE AWARD AND
INCORPORATED MEMORANDUM IN SUPPORT**

Counsel for the plaintiff, Philip Charvat (“Mr. Charvat”), respectfully submit this memorandum in support of their request that this Court recognize Mr. Charvat’s exemplary service to the class in this case with an incentive award of \$50,000.

Mr. Charvat’s Experience as a TCPA Litigant

Mr. Charvat is a TCPA advocate well versed in the law. On three prior occasions, Mr. Charvat has been appointed by courts in the Seventh Circuit as class representative in TCPA class actions. *See Charvat and Desai v. ADT Sec. Servs., Inc.*, No. 11-1925 (Dkt. No. 243) (N.D. Ill.) (Bucklo, J.); *Charvat v. AEP Energy, Inc.*, No. 14-3121 (Dkt. No. 41) (N.D. Ill.) (Zagel, J.); *Charvat v. Nat’l Guardian Life Ins. Co.*, No. 15-43 (Dkt. No. 70) (W.D. Wis.) (Peterson, J). Individually, Mr. Charvat is responsible for many important appellate telemarketing decisions recognizing and clarifying the broad protections afforded consumers under the TCPA. *See Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 61 (6th Cir. 2010) (remarking that “Philip Charvat has not been shy in taking on the role of a private attorney general under the Telephone Consumer Protection Act,” collecting cases); *Charvat v. NMP, LLC*, 656 F.3d 440 (6th Cir.

2011); *Charvat v. GVN Mich., Inc.*, 561 F.3d 623 (6th Cir. 2009); *Charvat v. Farmers Ins. Columbus, Inc.*, 897 N.E.2d 167 (Ohio Ct. App. 2008); *Charvat v. Ryan*, 879 N.E.2d 765 (Ohio 2007); *Charvat v. Crawford*, 799 N.E.2d 661 (Ohio Ct. App. 2003). In 2007, for example, the Ohio Supreme Court recognized Mr. Charvat's wide success as a TCPA litigant stating:

Although ... Charvat has filed numerous lawsuits under the TCPA in recent years, there is no evidence that any of these cases have been frivolous. In fact, the evidence establishes that Charvat has been successful in all but one of nearly 60 lawsuits filed in the Franklin County Municipal and Common Pleas Courts.

See State ex. rel. Charvat v. Frye, 868 N.E.2d 270, 275 (Ohio 2007).

The Defendants Attack Mr. Charvat.¹

Over five years ago, Mr. Charvat began receiving prerecorded telemarketing calls promoting the goods or services of Carnival, Royal Caribbean and Norwegian cruise lines. As Mr. Charvat did not consent to receive such calls, they were in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). It turned out that Mr. Charvat was not alone, and that *millions* of other consumers nationwide received identical prerecorded telemarketing calls that were made by Defendant Resort Marketing Group, Inc. and its principal, Elizabeth Valente (collectively, "RMG"), promoting the products of Defendants Carnival Corporation & PLC, Royal Caribbean Cruises, Ltd., NCL (Bahamas) Ltd. (collectively, "Cruise Defendants"). In July of 2012, Mr. Charvat filed suit, seeking to hold to account RMG and the Cruise Defendants for the illegal telemarketing campaign at issue. Mr. Charvat did so, not to benefit himself individually, but to seek relief on behalf of all consumers similarly situated, and to cause the illegal telemarketing campaign at issue to cease.

In response to the lawsuit, Defendants collectively mounted an unprecedented personal

¹ Extensive briefing as to the facts contained in this motion may be found throughout the docket, but particularly at the following docket entries: Dkt. 123, 175, 185, 446, 492, 503, 512, and 529. Such briefing submitted on behalf of Mr. Charvat detailing these facts is incorporated herein by reference.

attack on Mr. Charvat. First, Defendants accused Mr. Charvat's daughter Allison of "planting" evidence of consent on the internet purportedly "consenting" to receive the telemarketing calls at issue. To pursue this theory, Defendants deposed both Mr. Charvat and his daughter Alison, and accused Alison of being a "liar." Defendants even went so far as to wrongfully accuse Mr. Charvat of committing a "fraud on the court" due to his purported "consent" to receive the calls at issue. *E.g.*, Dkt. 446 at 2.² For years, Defendants continued to pursue this theory, causing Mr. Charvat and counsel to dedicate hundreds of hours of time, and many pages of briefing, to debunking their various false theories of consent. For years, Mr. Charvat endured the cloud of these baseless allegations, but never lost sight of his goal of holding Defendants accountable *to the class* for their illegal actions.

The Defendants Sue Mr. Charvat.

In addition, and as if ceaseless yet baseless, public allegations of fraudulent and otherwise unethical conduct were not enough, RMG and the Cruise Defendants jointly attacked Mr. Charvat for, ironically, having the audacity to tape-record the illegal, prerecorded calls at issue in this case. In order to prove that he had received the illegal telemarketing calls at issue, Mr. Charvat tape-recorded the calls made to his home in Ohio. Under Ohio law, this was perfectly legal. Mr. Charvat made no secret of the fact that he recorded the calls, as he produced copies of the calls to the attorneys for Defendants when he filed his First Amended Complaint. On May 3, 2013, however, RMG—the telemarketer who illegally called Mr. Charvat—*sued Mr. Charvat*. Dkt. 123 at 35-44. RMG claimed that because it made the calls at issue from Illinois and into Ohio, it

² Defendants went so far as to submit the affidavit of an unrelated third party to suggest, based on "findings" from some informal online research he conducted, that Mr. Charvat had somehow coerced companies into violating the law. When Class Counsel deposed this individual—who turned out to be an ex-con—he admitted that the purported "opt-in" lead data Defendants claimed showed that Mr. Charvat consented to the calls at issue was fabricated. Dkt. 512-1, Pascale Dep. at 94; *see also* Dkt. 470 (Judge Rowland finding Mr. Pascale's conclusions to be "based on unauthenticated data and ... speculative").

was Illinois law that applied. Since Illinois law, at the time, required both parties to a call to consent to recording, RMG reasoned that the calls were illegally recorded in violation of Illinois law. Following suit, the Cruise Defendants also accused Mr. Charvat of engaging in illegal conduct by tape-recording the telemarketing calls, and petitioned this Court to strike from evidence the tapes of the telemarketing calls.³ RMG's lawsuit sought unspecified damages from Mr. Charvat, personally. To respond to these baseless allegations, Mr. Charvat and his counsel, again, dedicated extensive time and briefing to defend Mr. Charvat who simply sought to hold Defendants accountable for their collective massive violation of federal telemarketing law. In the end, RMG dismissed this frivolous lawsuit against Mr. Charvat.

Mr. Charvat's Service Should Be Recognized.

Federal courts often exercise their discretion under Rule 23(d) and (e) to approve case contribution awards to plaintiffs who instituted and prosecuted actions, on the theory that there would be no class-wide benefit absent their suits. These awards recognize the burdens assumed by plaintiff litigants in instituting and prosecuting the actions, the time spent by plaintiffs on communicating with counsel and fulfilling class responsibilities of supervision, and the risks that plaintiffs bear in bringing the suit. In *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998), the Seventh Circuit Court of Appeals awarded the class representative \$25,000, and recognized that “because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.” *Id.* at 1016; *see also In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) (“incentive awards are justified when necessary to induce individuals to become named representatives”); *Heekin v. Anthem, Inc.*, No. 05-1908, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (approving \$25,000 incentive award to lead class plaintiff over objection); *Lively v. Dynegy, Inc.*, No. 05-0063, 2008

³ This Court denied the Cruise Defendants motion to strike this evidence.

WL 4657792 (S.D. Ill. Sept. 30, 2008) (awarding \$10,000 to each of three plaintiffs); *Morlan v. Universal Guar. Life Ins.*, No. 99-274, 2003 WL 22764868 (S.D. Ill. Nov. 20, 2003) (awarding \$25,000, \$20,000, \$20,000, and \$5,000 respectively to class representatives); *Spicer v. Chicago Bd. Options Ex., Inc.*, 844 F. Supp. 1226, 1267-1268 (N.D. Ill. 1993) (collecting cases awarding incentive fees ranging from \$5,000 to \$100,000; awarding \$10,000 each to named plaintiffs); *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07-2898, 2012 WL 651727, at *16-17 (N.D. Ill. Feb. 28, 2012) (a \$25,000 incentive award is reasonable one); *Benzion v. Vivint, Inc.*, No. 12-61826 (S.D. Fla. Feb. 23, 2015) (Dkt. No. 201) (approving \$20,000 incentive award in TCPA action); *Martin v. Dun & Bradstreet, Inc.*, No. 12-00215 (N.D. Ill. Jan. 16, 2014) (Dkt. No. 66) (awarding \$20,000 incentive award to named plaintiff in TCPA action); *Hanley v. Fifth Third Bank*, No. 12-01612 (N.D. Ill. Dec. 23, 2013) (Dkt. No. 86) (awarding named plaintiff a \$25,000 incentive award in TCPA action); *Desai v. ADT Sec. Servs., Inc.*, No. 11-01925 (N.D. Ill. June 21, 2013) (Dkt. No. 243) (approving incentive awards of \$30,000 each to two named plaintiffs); *CE Design Ltd. v. Cy's Crab House N., Inc.*, No. 07-05456 (N.D. Ill. Oct. 27, 2011) (Dkt. No. 424) (\$25,000 incentive award in TCPA action).

The service of the plaintiffs in these cases, frankly, pales in comparison to the service provided to the class in this case by Mr. Charvat. As detailed above, and in the attached declaration, Mr. Charvat was instrumental to the ultimate recovery obtained for the class. Mr. Charvat easily, at any time over the past five years, could simply have walked away from this case. He had ample reason to do so, given the Defendants' ceaseless attacks on his character. Instead, however, Mr. Charvat chose to litigate this case through to the end, and for that he should be commended. Not only did Mr. Charvat endure the Defendants' personal attacks, but he participated substantively throughout the litigation, ultimately committing approximately

five hundred hours to this case over the past five years. Mr. Charvat's service to the class should be commended, and the request for an incentive award of \$50,000 should be approved.

CONCLUSION

For the above reasons, Mr. Charvat's request for an incentive award of \$50,000.00 should be granted.

Respectfully submitted,

PHILIP CHARVAT, on behalf of himself
and others similarly situated

Dated: August 7, 2017

By: /s/ Alexander H. Burke

Alexander H. Burke
Email: aburke@burkelawllc.com
Daniel J. Marovitch
Email: dmarovitch@burkelawllc.com
BURKE LAW OFFICES, LLC
155 N. Michigan Ave., Suite 9020
Chicago, IL 60601
Telephone: (312) 729-5288
Facsimile: (312) 729-5289

Matthew P. McCue
Email: mmccue@massattorneys.net
THE LAW OFFICE OF MATTHEW P. MCCUE
1 South Avenue, Suite 3
Natick, MA 01760
Telephone: (508) 655-1415
Facsimile: (508) 319-3077

Edward A. Broderick
Email: ted@broderick-law.com
Anthony I. Paronich
Email: anthony@broderick-law.com
BRODERICK & PARONICH, P.C.
99 High St., Suite 304
Boston, MA 02110
Telephone: (617) 738-7080
Facsimile: (617) 830-0327

Counsel for Plaintiff and the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that, on August 7, 2017, I caused the foregoing to be electronically filed with the Clerk of the United States District Court for the Northern District of Illinois using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Alexander H. Burke

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Philip Charvat on behalf of himself and others)	
similarly situated,)	
Plaintiff,)	Case No. 1:12-cv-5746
)	
v.)	Judge Wood
)	Mag. Judge Rowland
Elizabeth Valente, Resort Marketing Group, Inc.,)	
Carnival Corporation & PLC, Royal Caribbean)	
Cruises, Ltd., NCL (Bahamas) Ltd.)	
Defendants.)	

DECLARATION OF PHILIP J. CHARVAT

I attest under the pains and penalties of perjury, that the following facts are true and based on my personal knowledge.

1. I am a resident of Ohio, where I live with my wife, Sandra.
2. I have two adult daughters, Allison and Catherine.
3. For well over a decade now, I have diligently pursued telemarketers who made illegal calls to my home.
4. I have spent thousands of hours researching telemarketing laws and working on briefs and pleadings in telemarketing cases.
5. Over the past ten years, I have litigated about one hundred telemarketing cases. Some of my cases have ended up being resolved by appellate courts and have addressed and resolved many important issues of telemarketing law. *See State ex rel. Charvat v. Frye*, 114 Ohio St. 3d 76 (Ohio 2007) (Ohio Supreme Court recognizes Mr. Charvat's wide success as a TCPA litigant); *Charvat v. NMP, LLC*, 656 F.3d 440 (6th Cir. 2011) (Sixth Circuit reverses trial court decision based on lack of subject matter jurisdiction); *Charvat v. GVN Mich., Inc.*, 561

F.3d 623 (6th Cir. 2009) (clarifying damages a consumer may pursue under the TCPA); *Charvat v. Ryan*, 116 Ohio St. 3d 394 (Ohio 2007) (reversing trial court decision against Mr. Charvat as to the evidentiary basis to obtain treble damages under the TCPA); *Charvat v. Crawford*, 155 Ohio App. 3d 161, 2003 Ohio 5891, 799 N.E.2d 661 (Ohio Ct. App. 2003) (rejecting telemarketers claim that it was offering plaintiff a job and not trying to sell goods or services).

6. I have also frequently submitted comments to the Federal Communications Commission as to their interpretation and enforcement of telemarketing law.

7. On three prior occasions, I have been appointed as the class representative in TCPA class actions. *See Charvat and Desai v. ADT Security Services, Inc.*, No. 11-1925 (Dkt. No. 243) (N.D. Ill.) (Bucklo, J.); *Charvat v. AEP Energy, Inc.*, 1:14-cv-03121 (Dkt. No. 41) (N.D. Ill) (Zagel, J.); *Charvat v. National Guardian Life Insurance Company*, No. 3:15-cv-00043 (Dkt. No. 70) (W.D. Wis.) (Peterson, J.).

8. Relevant to this case, in 2010 and 2011, I received numerous pre-recorded telemarketing calls from an entity that fictitiously identified itself as “Travel Services” promoting the goods and services of Carnival, Royal Caribbean and Norwegian Cruise Lines.

9. I tape recorded these illegal calls made to my home in Ohio in accord with both Ohio and federal law, for later submission as evidence at trial.

10. In 2012, I authorized my counsel to proceed with a TCPA consumer class action against the Defendants.

11. The telemarketer who made the robocalls to my home was actually called Resort Marketing Group, Inc. (“RMG”).

12. Shortly after I filed this litigation, RMG counterclaimed against me personally for my purported violation of the Illinois Wiretap Act. Although the recordings I had made were

compliant with Ohio and federal law, and although RMG initiated the calls to me in Ohio from its telemarketing call center in Illinois, and did not properly identify itself nor provide a telephone number in its recorded messages, RMG claimed that I violated the privacy rights of its employees by tape recording the illegal, prerecorded telemarketing calls at issue.

13. This lawsuit placed me at personal financial risk for seeking to hold the defendants to account for their illegal telemarketing practices.

14. In addition, the Cruise Defendants jointly petitioned the Court to exclude the recordings from evidence claiming they were purportedly “illegally obtained.” In doing so, the Cruise Defendants also accused me of acting unethically, an accusation I take seriously and personally.

15. In my view, the counterclaim, and the motions to exclude, were frivolous and solely designed to intimidate and harass me and to discourage me from continuing to pursue this litigation on behalf of myself and all other consumers.

16. Ultimately, of course, the Court denied the motion to exclude the recordings as evidence and RMG dismissed the complaint against me after the Illinois Supreme Court declared the Illinois Wire-Tap Act unconstitutional (*People v. Clark* 2014 IL 115776; *see also People v. Melongo* 2014 IL 114852). This occurred, however, only after my counsel and I spent a significant amount of time researching and briefing these issues.

17. Even with the dismissal of the Wire-Tap complaint, however, the defendants continued to hold a threat of another wire-tap potential lawsuit over my head for the entirety of this litigation, as they explicitly reserved the right to sue me again in the future. The defendants also argued at class certification that the threat of this lawsuit against me destroyed my typicality to represent the class.

18. The defendants' attack on my character continued throughout this litigation. For example, the defendants alleged that my daughter had planted evidence of consent on the internet. This was false. My counsel and I spent many hours researching and debunking these allegations and attacks on myself and my family. The defendants even, at one point, accused my daughter of being a "liar" and accused me of committing a "fraud on the court" by purportedly planting consent "evidence" on the internet. They also claimed that I "masked" my IP address on my computer so I could apparently consent to receive telemarketing calls on the Internet without detection. Again, these allegations were all false and were affirmatively disproven by myself and my counsel, but only after hundreds of hours of work, depositions in multiple states, and extensive briefing in opposition.

19. Throughout this litigation, I worked closely with my counsel to respond to many sets of discovery from multiple parties. My wife and I also traveled to Chicago where the defendants insisted on taking my deposition. The deposition lasted for more than seven hours, during which my character was repeatedly attacked by defense counsel. The defendants also traveled to San Francisco where they deposed my daughter purportedly to investigate their claim that my daughter consented to receive the calls at issue on the Internet.

20. In addition, the Defendants broadly sought access to my entire home computer database, all documents I ever created with anything to do with the TCPA, and many years of past tax returns. Again, I believe these efforts were intended to intimidate me and to encourage me to cease my efforts to hold the defendants accountable. Ultimately, the defendants' tactics in this regard were rejected by the Court but, again, required many hours of time of both myself and my counsel.

21. I also read carefully many of the motions and briefs submitted by my counsel throughout this case. I worked closely with my counsel on many of these briefs, particularly those which attacked my character, and I spent many hours researching and producing information to my counsel to rebut defendants' allegations.

22. Finally, I consulted closely with my counsel throughout the settlement process to ensure that a fair result was reached for all members of the class.

23. In total, I would estimate that I have easily spent five hundred hours working on this case over the past five years. I also spent several hundred additional hours continuing to research, to date, the use of wire-tap laws to chill consumers' from proving and pursuing telemarketing claims. It is truly ironic that wire-tap laws meant to protect privacy rights are being twisted by telemarketers to attack consumers to prevent the enforcement of the TCPA, a statute designed to protect privacy rights.

24. I respectfully ask that this Court approve an incentive award that it deems fair. Regardless of the amount, however, it is most important to me that this Court recognize that the defendants' attacks on my character, and on the character of my daughter, throughout this litigation, were false, frivolous and unfair.

SWORN TO UNDER THE PAINS AND PENALTIES OF PERJURY, THIS 21ST DAY OF JULY, 2017.

/s/ Philip J. Charvat