UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GILBERTO FRANCO, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

ALLIED INTERSTATE LLC f/k/a ALLIED INTERSTATE, INC.,

Defendant.

CASE NO.: 1:13-cv-04053-KBF

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' SUPPLEMENTAL OPPOSITION [DOC. 119] TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff, Gilberto Franco, on behalf of himself and all others similarly situated, respectfully submits this Memorandum of Law in support of his Response to Defendant's Second Supplemental Opposition [Doc. 119] to Plaintiff's Motion for Class Certification.

I. INTRODUCTION

The gist of Defendant, Allied Interstate LLC's newest Supplemental Opposition [Doc. 119] is that, by tendering to Mr. Franco an amount at least equal to his "individual claim," Allied can unilaterally change the facts to make it impossible to ever certify a class action. Allied's tender was refused. [*Thomasson Decl.* at ¶2, Exh. A]. If allowed, Allied's ploy would permit all defendants to unilaterally make class actions impossible by simply mailing a check for a paltry sum and avoid class liability and significantly higher amounts of class damages.

The Supreme Court's and Second Circuit's recent decisions concerning Rule 68 Offers reflect the unmistakable policy that, after being served with a class action complaint, defendants cannot unilaterally change the facts and circumstances to avoid class certification. Instead, a class action defendant who wants to unconditionally surrender must surrender to both the individual *and* class claims.

II. THE CLASS CERTIFICATION MOTION RECORD.

The Court's prior Order noted that Plaintiff's class certification motion "is otherwise fully briefed." [Doc. 113]. Plaintiff understands the motion record to consist of:

1. Notice of Motion [Doc. 42].;
2. Plaintiff's Memorandum in Support [Doc. 43];
3. Declaration of Craig Thor Kimmel [Doc. 44];
4. Declaration of William F. Horn [Doc. 45];
5. Declaration of Andrew T. Thomasson [Doc. 46];
6. Declaration of Joseph L. Gentilcore [Doc. 47];
7. Defendant's Memorandum in Opposition [Doc. 65 (which appears to be identical to Doc. 66)];
8. Amended Declaration of William F. Horn [Doc. 71];
9. Amended Declaration of Andrew T. Thomasson [Doc. 72]; and
10. Plaintiff's Memorandum in Reply [Doc. 74 (which is a corrected version of Doc. 69 and Doc. 75 appears to be identical and to be the corrected version of ECF Nos. 70)].

On April 30, 2018, without leave of Court and prior to the Second Circuit's recent mandate [Doc. 112], Allied filed a Supplemental Letter Brief in further opposition to Plaintiff's Motion for Class Certification [Doc. 111]. That letter focused on the typicality element under Fed. R. Civ. P. 23(a)(2). The letter also incorporated by reference Allied's "prior briefing" as a basis to deny class certification. *Id.* at 3. Allied's "prior briefing" on class certification merely consisted of three paragraphs. [Doc. 65 at pages 11-12 of 12]. There, Allied limited also its attack to adequacy under Fed. R. Civ. P. 23(a)(4) and was based on mootness arising from its unaccepted Rule 68 Offer of Judgment.

Allied's persistent attack on adequacy and typicality fails. It is law of the case, based on the Second Circuit's Mandate [Doc. 88], that Allied's unaccepted Offer did not result in

mootness. Allied's "prior briefing" never challenged—and, hence, waived any dispute concerning—all other elements of class certification; namely, numerosity, commonality, adequacy of counsel, predominance, and superiority.

More than four years after Plaintiff timely filed his Class Certification Motion [Doc. 42], Allied's April 30, 2018 letter [Doc. 111] first raised any issue as to typicality. Plaintiff responded [Doc. 115] and the Court, by Order filed May 21, 2018 [Doc. 117], allowed Allied yet a *further* opportunity for:

> "…**full briefing on any other grounds defendant seeks to raise** and as alluded to in defendants most recent letter (ECF No. 111.) …. **Such opposition may include any additional argument that defendant wishes to make against certification**…."

(Emphasis added) [Doc. 117].

The next day, Allied filed a letter which, among other things, asserted it had issued a check payable to Plaintiff for $2,750 and sent it to Plaintiff's counsel. [Doc. 118]. Allied's tendered check was refused. [*Thomasson Decl.* at ¶2, Exh. A]. Nevertheless, Allied's Supplemental Opposition relies entirely on its rejected tender as the basis for its singular, years long, argument that Plaintiff lacks typicality and adequacy. The argument fails.

(Mr. Franco requests the Court not hold the age of the motion papers against him; if the Court were to identify any aspect of the motion deficient, Mr. Franco requests the Court deny the motion without prejudice and grant him leave to file supplemental materials.)

III. DEFENDANT'S *NEW* TYPICALITY AND ADEQUACY ARGUMENT IS UNSUPPORTED BY THE FACTS AND LAW.

Essential to Allied's arguments are two nonexistent facts: (1) Plaintiff "received payment" and (2) the payment exceeded Plaintiff's "maximum claim." No payment was received; instead, Allied tendered a check in settlement of Plaintiff's claims which Plaintiff rejected and returned.

Plaintiff's cause of action is for violation of the FDCPA. [Doc. 67 at ¶¶47–48]. In ¶49, he demanded "**judgment** in his favor **and in favor of the Plaintiff Class**" as follows:

(i) An order certifying that the First Cause of Action may be maintained as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiff and the undersigned counsel to represent the Plaintiff Class as previously set forth and defined *supra*;

(ii) An award of the maximum statutory damages for Plaintiff and the Plaintiff Class pursuant to 15 U.S.C. § 1692k(a)(2)(B);

(iii) Attorney's fees, litigation expenses, and costs pursuant to 15 U.S.C. § 1692k(a)(3); and

(iv) For such other and further relief as may be just and proper.

Allied's paltry tender of $2,750 did not meet or exceed the relief Plaintiff sought; instead, it fell woefully short. Indeed, Allied did not tender any class relief or attorneys' fees and costs in a case which it has litigated for more than 5 years and twice lost before the Court of Appeals. The amount of and the amount of class damages, and attorney's fees and costs, are substantially in excess of $2,750. [*Thomasson Decl.* ¶3].

"[T]he payment of a smaller sum then the one claimed does not constitute payment." *Holzer v. Deutsche Reichsbahn Gesellschaft*, 159 Misc. 830, 835 (N.Y. Sup. Ct. 1936), *aff'd sub nom. Holzer v. Deutsche Reichsbahn-Gesellschaft*, 252 A.D. 729 (N.Y. App. Div. 1937), *aff'd in part, modified in part*, 277 N.Y. 474 (1938). "As a general rule, a tender must include everything to which the creditor is entitled, including interest to the time the tender is made, or else it is not legally effective." *Nat'l Sav. Bank of Albany v. Hartmann*, 179 A.D.2d 76, 77 (N.Y. App. Div. 1992) (quoting 83 NY Jur 2d, Payment and Tender, § 151 at 38). Consequently, Plaintiff rejected Allied's tender.

At best, Allied's letter enclosing a check for $2,750 was an offer to settle. [Doc. 118 at 3] Offers to settle are generally inadmissible. Fed. R. Evid. 408. Here, Allied offered payment of $2,750 "in compensation of Mr. Franco's claims against Allied asserted in this matter." [Doc. 118 at 3]. Mr. Franco rejected the offer. [*Thomasson Decl.* at ¶2, Exh. A].

While Allied can be recognized for its tenacity, the fact remains a defendant in a putative class action cannot unilaterally avoid class liability through gimmicks or creative litigation strategies. Instead, the facts here present a classic case for class certification: a *standardized*, template form letter is sent to 2,652 consumers; the lawfulness of that letter is adjudged from the objective "least sophisticated consumer" standard which is an issue of law; and the award of statutory damages is readily calculated by factors applicable to all class members.

In sum, nothing about this case suggests the need for any individual inquiry notwithstanding Allied's unilateral efforts to change the facts to its liking after being sued.

IV. CONCLUSION

For the reasons provided here and in Plaintiff's submissions enumerated in Part II, above, Plaintiff respectfully requests the Court grant his Class Certification Motion pursuant to Fed. R. Civ. P. 23(c).

DATED: June 18, 2018

s/ Andrew T. Thomasson

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