

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION**

**ALYSSA POLACSEK, et al. individually,
and on behalf of the classes of similarly
situated persons, et al.**

Plaintiffs,

vs.

Case No. 8:04-cv-00631PJM

**DEBTICATED CONSUMER
COUNSELING, INC., et al.**

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION FOR ADDITIONAL COSTS**

Class Counsel submit this memorandum in support of their Motion for Additional Costs, filed pursuant to Rule 23(h) of the Federal Rules of Civil Procedure. The Receiver in his action just released \$8,195,435.07 to the Class Administrator for distribution to the roughly 40% of class members who were not clients of AmeriDebt (the “Non-AmeriDebt Class Members”).¹ Due to the passage of two years between the time distribution costs were approved and now, Rosenthal & Company, the Class Administrator, has incurred significant unanticipated costs. In addition, the estimated cost of the upcoming distribution has increased. Therefore, Class Counsel have moved the Court to permit compensation to the Class Administrator of \$362,097 for costs incurred over the past two years and for its services distributing the recovery to Non-AmeriDebt Class Members. This constitutes an additional award of expenses in the amount of \$136,708 over the \$225,389 previously approved but not yet disbursed to the Class Administrator.

¹ The Federal Trade Commission is making an identical redress distribution to the 60% of class members who were AmeriDebt clients.

The Advisory Committee notes to subsection (h) of Rule 23 indicate that “it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.” Federal Rules of Civil Procedure Rule 23, Advisory Committee Notes, Note to subdivision (h). Since there has been a previous award of costs in this action, as suggested by the Advisory Committee notes, the Court’s analysis of the situation should begin with that.

This Court entered its Order on Plaintiffs’ Counsels’ Motion for Attorneys’ Fees (Docket # 451-2) on July 18, 2006 (the “Order”), approving payment to Rosenthal & Co., the Class Administrator, in the amount of \$437,505.82 out of the \$2.75 million in fees and costs payable to class counsel. A portion of the \$437,505.82 were attributable to the future cost of distribution to Non-AmeriDebt Class Members.² Pursuant to an October 14, 2006 letter from Class Counsel to the Receiver, the \$2.75 million except for the sum of \$191,226, were distributed to Class Counsel and to Rosenthal to cover attorneys fees and previously incurred out-of-pocket costs. *See Exhibit 1.* Of the \$191,226 funds left with the Receiver, \$178,668 were attributable to

² Footnote #2 to the Memorandum In Support Of Plaintiffs’ Counsels’ Motion For Award Of Attorneys’ Fees explained the \$437,505.82 figure as follows:

“The \$437,505.82 figure covers the present notice cost estimate of \$179,245, a distribution cost estimate of \$178,668 (if the settlement is approved) and an outstanding balance of \$79,592.82, all of which are detailed in the exhibits to the Declaration of Daniel Rosenthal Re: Administration Costs. The notice and distribution cost estimates were based upon the original 439,482 class member count. However, yesterday, July 20, 2006, Rosenthal & Co. was able to confirm that in all likelihood there are indeed an additional 80,000 class members whose identities and contact information were inadvertently omitted in The Ballenger Group LLC’s response to a November 1, 2004 request for production of documents identifying the class issued by class counsel. (Counsel had notified the Court on June 26, 2006 of this possibility. *See* Document 443). The Supplemental Declaration of Daniel Rosenthal indicates that the additional 79-000-82,000 class members will result in additional estimated costs of \$51,027 for notice and \$41,587 for distribution. In addition, there remains a possibility that even after supplementing class records with the new information from Ballenger, the FTC may have additional AmeriDebt class member records that need to be reconciled. Counsel therefore request that the Court authorize an additional payment from the Receiver directly to Rosenthal & Co. to cover these expenses that were not anticipated when counsel agreed with the FTC to accept a flat \$2.75 million in fees and expenses. ”

The additional class members added after July 20, 2006 are referred to herein as the “New Class Members.”

distribution costs for Non-AmeriDebt Class Members based the Declaration of Daniel Rosenthal re: Administration Costs. *See* Rosenthal Declaration Docket # 147-6.

In addition to the \$2.75 million, \$97,000 were sought and awarded to cover both notice and distribution costs associated with a large number of class members who were discovered in the summer of 2006. *See* fn 2 *supra*; Memorandum In Support Of Plaintiffs' Counsels' Motion For Award Of Attorneys' Fees (Docket # 447-2); and Supplemental Declaration of Daniel Rosenthal re: Administration Costs (Docket # 447-7). Like the \$191,226 retained by the Receiver, these \$97,000 also remained with the Receiver. However, for purposes of this motion, since the Class Administrator had performed \$50,280 of services providing notice to the New Class Members (which amount has not yet been billed to the Receiver) only \$46,720 are available for allocation to the upcoming distribution expense. Thus the funds retained by the Receiver and approved for use by the Class Administrator for the upcoming distribution are \$178,668 plus \$46,720 for a total of \$225,388.

This sum is insufficient to compensate Rosenthal & Company for past services performed and for the upcoming distribution to non-AmeriDebt class members. As set forth in Dan Rosenthal's Second Supplemental Declaration re: Administration Costs, Rosenthal has incurred costs and staff time related to the two year delay in the total amount of \$108,066 traceable to: (1) regular monthly case support staff hours of 12.5 hours per month for the 24 months (\$22,500); (2) staff hours required to work with address updates (\$33,675); (3) telephone line time related to class members calling to get information about the case during the hiatus (\$25,737); (4) data entry costs for address changes sent to Rosenthal by class members during the delay (\$11,537); (5) postage increases (\$3,215); and (6) printing cost increases (\$6,429). *See* Exhibit 2, ¶ 6.

In addition, Rosenthal reports ongoing costs that were not budgeted in October 2006. These are related to the automated telephone support line, website programming and on-going server space rental, and budgets for reissuing checks and processing requests expected to be received from people not on the class list or whose checks are not mailed to their current addresses. These unbudgeted items total approximately \$31,821. *See id* ¶ 7.

The Court's Order awarding class counsel their fees and costs does not address the expense shortfall presently confronted by the Class Administrator and Class Counsel with respect to the majority of the class. However, with respect to the New Class Members and the \$97,000 allocated for their costs of notice and distribution, the Court recognized that the estimate is Rosenthal's "best current estimate as to the amount of extra costs that will be incurred as a result of the additional class members." It concluded its order noting that "[a]ccordingly, and in light of the position of the Federal Trade Commission, the Court has determined to permit up to \$97,000 for such expenses, but no more. Class Counsel shall be responsible for any fees and expenses of Rosenthal & Co. in excess of that sum."

The Court was properly concerned that the common fund not be taxed unnecessarily. However, the Court should grant this motion for several reasons. First, the Court appears to have been concerned that any modification would upset the FTC's approval of Class Counsel's fees. But with respect to this request, there is no objection by the FTC, and it too has been frustrated by the delay in issuing redress caused by Mr. Pukke's recalcitrance. Second, the Court should take into account the very real costs associated with the extraordinary circumstance of a two year delay in distribution. The estimates of Rosenthal & Company concerning its costs were not far off, but even so, Rosenthal could not have anticipated the direct expenses associated with a two-year delay in distribution. Third, when it entered the Order, the Court acknowledged that the

\$2.75 million paid to counsel for fees and costs only amounted to only 8% of the settlement. The roughly 8% fee and administrative burden on the class recovery is modest and economical, and does not provide a sufficient windfall to Class Counsel that they can easily make up a \$136,708 shortfall in funds for expenses.

Class Counsel prudently set aside the funds estimated by Rosenthal as necessary for the distribution, and those funds remain available. However, they are nowhere near sufficient to compensate Rosenthal for its additional work over the hiatus. Without compensation, Rosenthal diligently performed for two years the services required of it to maintain readiness for a distribution. It deserves to be paid.

If the Court declines to authorize an additional payment to Rosenthal, Class Counsel, who pursued this case diligently for three years, and who were paid two years ago, might be asked to compensate Rosenthal out of their own pockets. This additional burden, which is directly attributable to the outright recalcitrance of Mr. Pukke, is significant, and the Court should not countenance it being borne by Class Counsel. It is well-settled that “he who creates or conserves a common fund or property should be reimbursed for his reasonable expenses....” *Brewer v. School Bd. of Norfolk, Va.*, 456 F. 2d 943, 948 (4th Cir. 1972). While Rosenthal’s expenses do not arise from the creation of the fund, they are a necessary cost of its distribution.

For all of these reasons, \$136,708 increase in expenses over the pre-approved \$225,389 should be approved so that the Receiver can be paid out of the \$8,195,435.07 now held by Rosenthal.³

Date: September 19, 2008.

³ The sum of \$50,280 which was attributable to notice to New Class Members whether AmeriDebt clients or not, will come from the funds still held by the Receiver.

Respectfully submitted,

/s/ Garrett M. Smith

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