No. 12-3757-cv

In the United States Court of Appeals
for the Second Circuit

JOEL J. CABALA,
Plaintiff-Appellee,

v.

TIMOTHY W. CROWLEY, KIM A. MORRIS,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Connecticut
(Case No. 3:09-cv-00651-VLB)

BRIEF FOR PLAINTIFF-APPELLEE JOEL J. CABALA

Deepak Gupta
GUPTA BECK PLLC
1625 Massachusetts Avenue, NW
Suite 500
Washington, DC 20036
(202) 470-3826

Counsel for Appellee Joel J. Cabala

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Jurisdictional Statement 1

Statement of the Issue 2

Statement of the Case and of the Facts 2

A. Statutory Background 3

B. Factual and Procedural Background 4

C. The District Court's Decision on Attorney's Fees 7

Summary of Argument 9

Standard of Review 11

Argument 12

I. The FDCPA contains no "bad faith" exception to the rule mandating fees for successful plaintiffs and, in any event, this case involved no "bad faith." 12

A. The FDCPA mandates, without exceptions, an award of reasonable fees to successful plaintiffs. 12

B. In any event, the district court correctly concluded that the parties' informal settlement negotiations provided no basis for a finding of "bad faith." 15

II. Morris's attacks on the attorney-client relationship between the plaintiff and his trial counsel are both factually wrong and legally irrelevant. 20

Conclusion 22

TABLE OF AUTHORITIES

Cases

Alderman v. Pan Am World Airways,
169 F.3d 99 (2d Cir. 1999)....11

Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany & Albany County Board of Elections,
522 F.3d 182 (2d Cir. 2008)....12

Birmingham v. Sogen-Swiss International Corp. Retirement Plan,
718 F.2d 515 (2d Cir. 1983)....22

Buckhannon Bd. & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001)....17

Cohen v. American Credit Bureau,
2012 WL 847429 (D.N.J. 2012)....13

Crescent Publishing Group, Inc. v. Playboy Enterprises, Inc.,
246 F.3d 142 (2d Cir. 2001)....11

Emanuel v. American Credit Exchange,
870 F.2d 805 (2d Cir. 1989)....13

Gagne v. Vaccaro,
766 A.2d 416 (Conn. 2001)....21

Goldberger v. Integrated Resources, Inc.,
209 F.3d 43 (2d Cir. 2000)....11

Gozlon-Peretz v. United States,
498 U.S. 395 (1991)....13

Jacobson v. Healthcare Financial Services, Inc.,
516 F.3d 85 (2d Cir. 2008)....11, 13

Kerin v. U.S. Postal Service,
218 F.3d 185 (2d Cir. 2000)....11

Kokkonen v. Guardian Life Insurance Co. of America,
511 U.S. 375 (1994)....16

Lee v. Thomas & Thomas,
109 F.3d 302 (6th Cir. 1997)....19

Marek v. Chesny,
473 U.S. 1 (1985) 15

McKnight v. Gizze,
119 Conn. 251 (Conn. 1934) 21

Menard v. Morris,
No. 3:09-cv-01165 (D. Conn. 2012)...20

Murphy v. Equifax Check Service, Inc.,
35 F. Supp. 2d. 200 (D. Conn. 1999)..16

NAACP v. Town of East Haven,
259 F.3d 113 (2d Cir. 2001)...9, 14, 15, 19

Nigh v. Koons Buick Pontiac GMC, Inc.,
478 F.3d 183 (4th Cir. 2007)..17

Ortiz v. Regan,
980 F.2d 138 (2d Cir. 1992)..14, 19

Raishevich v. Foster,
247 F.3d 337 (2d Cir. 2001)..14, 16

Samsung Electronics Co., Ltd. v. Rambus, Inc.,
398 F. Supp. 2d 470 (E.D. Va. 2005)...16

Sanderson v. Winner,
507 F.2d 477 (10th Cir. 1974)..21

Simmons v. United Mortgage & Loan Investment, LLC,
634 F.3d 754 (4th Cir. 2011)...16, 17

Tolentino v. Friedman,
46 F.3d 645 (7th Cir. 1995)..13

Zinni v. ER Solutions, Inc.,
692 F.3d 1162 (11th Cir. 2012)..16

Statutes

Fair Debt Collection Practices Act,
15 U.S.C. § 1692(a) 3
15 U.S.C. § 1692e(2)(A)...3
15 U.S.C. § 1692f(1)...3
15 U.S.C. § 1692k(a)(2) 3
15 U.S.C. § 1692k(a)(3) 2, 3, 13, 17

15 U.S.C. § 1692k(d) 1
28 U.S.C. § 1291 2
28 U.S.C. § 1331 1
42 U.S.C. § 1988(b) 14

Rules

Federal Rule of Civil Procedure 68 .... 8, 15, 18, 19

INTRODUCTION

In this attorney's-fees appeal, the defendant does not deny that the district court had the statutory authority to award fees. Nor does the defendant contest the rates or hours awarded by the district court. Instead, the defendant contends that the district court abused its discretion by awarding *any* fees—on the theory that the plaintiff's trial counsel acted in "bad faith." But the record does not support the defendant's various ad hominem attacks on plaintiff's trial counsel. And nowhere in 58 pages of appellate briefing does the defendant identify a single mistake made by the district court—let alone an abuse of discretion.

To the contrary, the district court correctly concluded that the plaintiff's counsel "pursued this matter efficiently" and that it was *the defendant's* refusal to agree to an enforceable judgment and repeated refusal to accept the plaintiff's reasonable settlement offers—a total of 15 times over the course of the litigation—that "had the effect of prolonging the litigation and increasing Plaintiff's attorney's fees." JA 113, 118-19.

The district judge was in the best position to referee the squabble among trial counsel and assess the parties' litigation conduct firsthand. Because the district court did not abuse its discretion in doing so, its judgment should be affirmed.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). The defendant timely filed a notice of appeal on

September 18, 2012 from the district court's final order of August 24, 2012. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The plaintiff made 15 settlement offers throughout the course of the litigation over his Fair Debt Collection Practices Act (FDCPA) claim, but the defendant repeatedly refused to settle and "insisted on negotiating a settlement without admission of liability" or an enforceable judgment. JA 114. The defendant never made an offer of judgment under Federal Rule of Civil Procedure 68. After the parties ultimately settled and "agree[d] that costs and attorney's fees [would] be decided by the Court," JA 20, the district court awarded the plaintiff attorney's fees in the amount it determined to be reasonable. JA 121. The FDCPA provides that "in the case of any successful action," the defendant is liable for "a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1692k(a)(3).

Notwithstanding the statutory rule mandating reasonable attorney's fees in successful FDCPA actions, did the district court abuse its discretion in awarding fees (1) because this case falls into an unexpressed "bad faith" exception to the statutory rule; or (2) because the attorney-client relationship between the plaintiff and his attorney was insufficiently formal?

STATEMENT OF THE CASE AND OF THE FACTS

This appeal arises from a case involving violations of the FDCPA by the defendant debt collector. On appeal, the defendant does not dispute the underlying

violations. Nor does the defendant contest the reasonableness of the rate or hours. Instead, the defendant contends that because the plaintiff did not agree to *his* settlement terms, the district court abused its discretion in awarding fees.

A. Statutory Background

Congress enacted the FDCPA in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Among other things, the Act prohibits the collection of any debt unless "expressly authorized by the agreement creating the debt or permitted by law," *id.* § 1692f(1), as well as the false representation of the "legal status of any debt," *id.* § 1692e(2)(A). Congress provided for both public and private enforcement of the Act. To compensate for the often-intangible harms caused by debt-collection abuse, the statute allows consumers to seek both actual damages and statutory damages of up to $1,000. *Id.* § 1692k(a)(2).

"[I]n the case of *any* successful action to enforce the foregoing liability," a debt collector is liable to the successful plaintiff for "a reasonable attorney's fee as determined by the court." *Id.* § 1692k(a)(3) (emphasis added). The statute's text provides no exception to this rule. *Id.* A prevailing defendant, on the other hand, may recover fees only if the action itself was "brought in bad faith and for the purpose of harassment." *Id.*

B. Factual and Procedural Background

1. *The defendant's debt-collection practices.* Defendant Benjamin Morris was a debt collector.[1] JA 12. In August 2008, Morris contacted Joel Cabala to attempt to collect a debt that he claimed was owned by CUDA & Associates, LLC, a debt buyer. *Id.* CUDA, however, did not then own the debt, and thus had no legal right to collect it. *Id.*

2. *Faulkner and Pinsky's co-counseling arrangement.* Cabala gave the letter to his attorney, Irving Pinsky, whom he had retained to prevent foreclosure. DN 71-1 (Cabala Dep. 6:1-10). Cabala told Pinsky to "handle the matter in the best manner that he saw fit." *Id.* (Cabala Dep. 5:10-14). Following his client's instructions to "pursue it as he deemed necessary," Pinsky contacted Joanne Faulkner, an experienced consumer advocate. *Id.* (Cabala Dep. 6:6, 6:11-17).

Faulkner and Pinsky have had a working agreement for more than 25 years: Pinsky, a lawyer in general practice, retains his role as the principal attorney and manages all contact with the client, while Faulkner is responsible for the litigation. DN 71-2 (Faulkner Dep. 11:17-12:4).

Faulkner has been litigating consumer cases—largely for clients who cannot afford representation—for over 35 years. DN 57-2. In 2002, she received the

[1] Benjamin Morris died while the case was pending in the district court and the administrators of his estate were substituted as the defendants. JA 105 n.1. For simplicity's sake, these defendants and Morris's estate will be collectively referred to as "Morris" or "the defendant" throughout this brief.

highest honor in the field of consumer law: the Vern Countryman Award from the National Consumer Law Center, "for excellence and dedication in the practice of consumer law on behalf of low income consumers." *Id.* Among other positions, she has served on the Federal Reserve Board's Consumer Advisory Council and the Board of Directors of the National Consumer Law Center, and is a founding member of the National Association of Consumer Advocates. *Id.* She has lectured and written on consumer law, including for the Connecticut Bar Association, and has testified before Congress and the Federal Trade Commission on issues of consumer law. *Id.*

3. *This lawsuit.* In April 2009, Cabala filed a complaint against Morris for violating the FDCPA by falsely stating that CUDA owned the debt at the time he sought to collect. JA 12. The complaint sought $1,000 in statutory damages. *Id.*

4. *Cabala's offers to settle or stipulate to judgment*. Throughout the course of litigation, Cabala made repeated offers to settle or stipulate to judgment. JA 102-04. A week after filing the complaint, Cabala made a settlement offer for a lump sum of $3,350, comprised of statutory damages plus attorney's fees and costs. JA 44. Morris did not respond. JA 102. Two months later, Morris offered to settle for $1,000, but with the preconditions that (1) Morris would not admit to any guilt or wrongdoing, (2) any attorney's fees would be determined by a court after a hearing, and (3) the $1,000 settlement would also be a full settlement of all

potential claims against non-party CUDA. JA 31. Morris's offer did not include an offer of judgment that would have given the district court authority to decide the amount of fees or rendered the settlement's terms enforceable in federal court. *Id.*

In response, Cabala offered a stipulation of judgment for $1,001 for the case against Morris and reasonable attorney's fees and costs as to be determined by the court. JA 102. Once again, Morris did not respond. JA 102. A week later, Cabala sent Morris a prepared stipulation for judgment, which Morris refused because he did not want judgment entered against him. JA 45.

Cabala informed Morris that the parties would have to stipulate to judgment to have reasonable attorney's fees determined by the court. JA 46. Cabala also informed Morris that he was free to make an offer for a lump sum and withdrawal. *Id.* Morris claimed that before considering a lump sum offer he needed to see Faulkner's internal billing records so he could determine "what, if anything" he was willing to pay in legal fees. JA 47. Cabala informed Morris that he was not entitled to the records but maintained his willingness to settle, *id.*—Morris could offer a lump sum that included fees and costs, or could stipulate to judgment and allow the court to determine reasonable fees and costs. JA 46.

All told, over the course of the litigation, Cabala made 15 offers to settle or stipulate to judgment. JA 102-04. Each time, Morris either did not directly respond or refused to settle because he did not want judgment entered against him. *Id.*

Instead, Morris made repeated requests for Faulkner's billing records, JA 47, refusing any settlement that included fees unless he first had access to her internal records. JA 49. Faulkner informed Morris that he had no right to demand them during litigation but could see them after he stipulated to judgment. JA 47.

In May 2010, Cabala proposed a settlement that included $15,000 in fees—a number much lower than the actual amount accrued at the time, DN 57-3—and $869.82 in costs. JA 104. Morris counter-offered, stating that he was willing to pay a total of $2,500—inclusive of statutory damages as well as all fees and costs. *Id.* After more than a year, and Cabala's repeated offers, the parties stipulated to judgment in September 2010. JA 20-22.

C. The District Court's Decision on Attorney's Fees

As part of their settlement, the "parties agree[d] that costs and attorney's fees [would] be decided by the Court." JA 20. The court approved the agreement and entered judgment. JA 22.

Despite that agreement, Morris opposed Cabala's motion for attorney's fees and contended that Cabala should not be awarded *any* fees. JA 106-07. The district court granted the motion. JA 121. *First*, the court rejected Morris's argument that Faulkner's refusal to accept either of Morris's settlement offers was in "bad faith." JA 112-13. The court concluded that because there was a "sincere" and "legitimate" dispute regarding the form of settlement, Faulkner was not litigating in "bad faith."

Id. By refusing to facilitate Morris's "strategic objective" of avoiding judgment, Faulkner was not the "cause of the delay in the resolution of the matter." *Id.* Rather, it was Morris who "insisted on negotiating a settlement without admission of liability and failed to take advantage of Rule 68." JA 114; *see* Fed. R. Civ. P. 68 (allowing defendant to make an offer of judgment and avoid liability for costs, including attorney's fees, incurred after making the offer). That gambit on Morris's part "had the effect of prolonging the litigation and increasing Plaintiff's attorney's fees." JA 113.

Second, Morris argued (JA 107) that Faulkner was not Cabala's attorney at all—despite Cabala's belief that "via [his] agreement with Irving Pinsky [he had] an agreement with Mrs. Faulkner." DN 71-1 (Cabala Dep. 6:20-21). The district court reasoned that, in light of Faulkner's agreement with Pinsky, Morris's argument that Faulkner was not Cabala's counsel was "unpersuasive." JA 109. The court further concluded that Faulkner was not merely pursuing a personal economic interest, as Morris contended. "[F]rom the outset of the case," the court observed, "Faulkner indicated her willingness to submit her fees to the Court upon an offer or stipulation of judgment." JA 114.

Third, the court concluded that the $32,489.29 in attorney's fees and costs that Cabala sought was reasonable because "Faulkner's fee records demonstrate

that she pursued this matter efficiently as a result of her expertise" and her hourly rate was "in line with prevailing rates." JA 118-19. This appeal followed.

SUMMARY OF ARGUMENT

The standard of review largely resolves this factbound fee appeal. Abuse of discretion—already one of the most deferential standards of review—takes on special significance in fee appeals because the district judge is best equipped to evaluate how efficiently the lawyers have done their work. Even more so here, because defendant Morris's appeal rests exclusively on his sustained attacks on the propriety of his opponent's conduct. Yet Morris's lengthy brief fails to identify a single mistake—let alone an abuse of discretion—in the district court's decision.

I. The central thrust of Morris's appeal is his claim that Cabala's counsel acted in "bad faith" by refusing Morris's informal offers to settle on his terms. But there is no bad-faith exception to the statutory mandate that successful FDCPA plaintiffs are entitled to fees. And, even if there were, this Court has held that informal settlement negotiations are not an appropriate basis for finding bad faith. *NAACP v. Town of E. Haven*, 259 F.3d 113, 120 (2d Cir. 2001). That is especially true given Rule 68, which allows defendants to make offers of judgment and thereby avoid liability for all fees subsequently incurred. *Id.*

The district court correctly concluded that Morris's litigation strategy—his repeated refusal to admit liability, to offer full relief, or to take advantage of Rule

68—"significantly contributed to the delay in the resolution of this case and the accrual of additional attorney's fees." JA 112. Without a judgment, Cabala could not enforce any recovery and the court would have neither jurisdiction nor statutory authority to award attorney's fees. The court also correctly concluded that Cabala reasonably rejected both Morris's initial informal offer—conditioned on the lack of a judgment and settlement with a non-party—and his final offer, which was not even within the ballpark. Cabala, by contrast, offered to settle or stipulate to judgment 15 times throughout the litigation.

II. Finally, Morris's attacks on Cabala's relationship with trial counsel Faulkner are both factually wrong and legally irrelevant. As the district court correctly found, Faulkner was authorized to act as Cabala's lawyer, and Cabala understood that. And it is simply not true, as Morris contends, that Cabala was not informed of settlement offers—he was advised of all settlement offers by Faulkner's co-counsel. In any event, no precedent supports Morris's suggestion that fees were unwarranted because the attorney-client relationship was insufficiently formal. That Morris takes issue with Cabala and Faulkner's relationship is no ground for denying fees mandated by the FDCPA—particularly because his complaints are at odds with both the record and the district court's factual conclusions.

STANDARD OF REVIEW

This Court will disturb an award of attorney's fees to a successful plaintiff under the FDCPA only if the district court has abused its discretion. *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 96 (2d Cir. 2008). Because the determination relies heavily on facts unique to each case, *Alderman v. Pan Am World Airways*, 169 F.3d 99, 102 (2d Cir. 1999), and because the district court is in the best position to assess those facts, "[r]eview of an award of attorneys' fees is highly deferential to the district court," *Crescent Publ'g Grp., Inc. v. Playboy Enters., Inc.*, 246 F.3d 142, 146 (2d Cir. 2001) (internal citations omitted).

"Indeed, 'abuse of discretion'—already one of the most deferential standards of review—takes on special significance when reviewing fee decisions. The district court, which is intimately familiar with the nuances of the case, is in a far better position to make such decisions than is an appellate court, which must work from a cold record." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47-48 (2d Cir. 2000) (internal citations and quotations omitted). Where, as here, the party challenging the fee award disputes the district court's conclusions about the record, the party must demonstrate that the district court relied on "a clearly erroneous assessment of the evidence." *Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 188 (2d Cir. 2000).

ARGUMENT

I. The FDCPA Contains No "Bad Faith" Exception To the Rule Mandating Fees For Successful Plaintiffs and, In Any Event, This Case Involved No "Bad Faith."

Morris's 58-page brief is filled with character attacks on the plaintiff's trial counsel, but devoid of any legal argument suggesting that the trial court abused its discretion in awarding fees. Morris does not dispute the court's authority to award fees. Nor does he provide any basis for overturning the district court's conclusion that Cabala's attorney "pursued this matter efficiently," JA 119, and is entitled to fees under this Court's "presumptively reasonable fee" analysis. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany & Albany Cnty. Bd. of Elections*, 522 F.3d 182, 190-91 (2d Cir. 2008). Instead, despite Cabala's many offers to settle or stipulate to judgment, Morris claims that Cabala's counsel acted in "bad faith" by refusing Morris's informal offers to settle on his terms. But there is no "bad faith" exception to the statutory mandate that successful FDCPA plaintiffs are entitled to fees. And, even if there were such an exception, neither Cabala nor his counsel acted in bad faith.

A. The FDCPA Mandates, Without Exceptions, An Award of Reasonable Fees to Successful Plaintiffs.

To foster private enforcement, Congress established a clear rule for attorney's fees in FDCPA cases: "in the case of any successful action," the losing debt collector is liable for "a reasonable attorney's fee as determined by the court."

15 U.S.C. § 1692k(a)(3). The FDCPA thus "*mandates* such an award in the case of *any* successful action." *Emanuel v. Am. Credit Exch.*, 870 F.2d 805, 809 (2d Cir. 1989) (emphasis added); *see also Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir. 1995) ("The statutory language makes an award of fees mandatory."). Despite this mandate, Morris contends that an award of reasonable fees is only "usually required" in successful FDCPA actions and is "not required" at all in cases involving a finding of "bad faith." Morris Br. 28-29 (citing *Cohen v. Am. Credit Bureau*, 2012 WL 847429 (D.N.J. 2012)).

This Court, however, has never recognized such an exception to § 1692k(a)(3)'s mandatory language, and there is no statutory basis for it. The FDCPA's fees provision *does* use the term "bad faith," but its use only underscores that Congress did not create the categorical exception Morris advocates. The Act allows successful *defendants* to recover fees where an *entire action* has been "brought in bad faith *and* for the purpose of harassment." 15 U.S.C. § 1692k(a)(3) (emphasis added). By contrast, the Act "provides for fee-shifting as a matter of course to successful plaintiffs." *Jacobson*, 516 F.3d at 95. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404

(1991). Hence, Congress should be understood to have consciously decided *not* to condition fees to successful plaintiffs on a test of their good faith.

In a different statutory context—where Congress provided that "the court, in its discretion, *may* allow" fees to the prevailing party, 42 U.S.C. § 1988(b)—this Court has said that "[a]bsent a showing of bad faith, a party's declining settlement offers should not operate to reduce an otherwise appropriate fee award." *Ortiz v. Regan*, 980 F.2d 138, 141 (2d Cir. 1992) (internal citations omitted). Even if one reads *Ortiz* as leaving room for a bad-faith exception (at least in § 1988 cases), both *Ortiz* itself and this Court's later precedents make clear that "informal negotiations alone cannot establish bad faith," *NAACP v. Town of E. Haven*, 259 F.3d 113, 120 (2d Cir. 2001)—precisely the opposite of the rule Morris advances here. A contrary rule would result in "hindsight scrutiny of a litigant's tactical decisions that would 'improperly dissuade' 'plaintiffs with meritorious claims … from pressing forward with their litigation.'" *Id.* (quoting *Ortiz*, 980 F.2d at 140-41) (brackets omitted); *see also Raishevich v. Foster*, 247 F.3d 337, 347 (2d Cir. 2001) (criticizing use of refusal to settle as a basis for denying fees). Thus, even if the FDCPA's language permitted it, a bad-faith exception modeled on *Ortiz* would not encompass the second-guessing of informal settlement negotiations advocated by Morris.

In any event, it is unnecessary for this Court to create a new bad-faith exception to the FDCPA's mandate because the statute's reasonableness standard

is fully capable of accommodating legitimate concerns about the litigation conduct of plaintiffs and their counsel. And regardless of whether bad faith is understood as a categorical exception or merely a factor bearing on reasonableness, Morris has utterly failed to demonstrate any bad faith in *this* case.

B. In Any Event, the District Court Correctly Concluded That The Parties' Informal Settlement Negotiations Provided No Basis for A Finding of "Bad Faith."

1. *Informal Negotiations Cannot Establish Bad Faith.* Even if this Court were to read a "bad faith" exception into the FDCPA, the district court did not abuse its discretion in concluding that Cabala did not act in bad faith by rejecting Morris's informal settlement offers. JA 113. As explained above, this Court has held that "informal negotiations alone cannot establish bad faith." *NAACP*, 259 F.3d at 120.

That rule is especially apt given the availability of Rule 68, which "permits a party defending against a claim to make a settlement offer and thereby avoid any liability for costs, including attorney's fees, incurred after the making of the offer." *Id.* at 121; *see* Fed. R. Civ. P. 68. The "critical feature" of a Rule 68 offer is that it "allows judgment to be taken against the defendant." *Marek v. Chesny*, 473 U.S. 1, 6 (1985). In this case, Morris "could have made a formal offer of judgment pursuant to Rule 68 but chose not to use this procedure." *NAACP*, 259 F.3d at 121. Since "it is far from settled that a court *may* use the refusal to accept an informal oral

settlement proposal, as opposed to a formal written offer made pursuant to Fed. R. Civ. P. 68, as a basis to deny fees," *Raishevich*, 247 F.3d at 347 (emphasis added), the district court can hardly be said to have abused its discretion by refraining from taking that questionable step.[2]

Morris's contrary argument—that his initial informal offer was sufficient to make subsequent litigation unreasonable and any fees per se unreasonable (at 33-37)—rests on the faulty premise that his offer left Cabala without a legal interest in his claim. But that overlooks the obvious: "A judgment is important to [plaintiffs] because the district court can enforce it." *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1168 (11th Cir. 2012). An informal offer, by contrast, is no more than "a mere promise to pay"—a promise that, if breached, would leave Cabala with "the prospect of filing a breach of contract suit in state court with its attendant filing fees—resulting in two lawsuits instead of just one." *Id.; accord Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 766 (4th Cir. 2011). Unless a settlement agreement is incorporated into a court's judgment, enforcement of the agreement is not "a continuation or renewal of the dismissed suit." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994). Rather, it is a separate claim for enforcement of a

[2] Morris's argument relies on a single outlier case—*Murphy v. Equifax Check Service, Inc.*, 35 F. Supp. 2d 200 (D. Conn. 1999). "Except for *Murphy*, there appears to be no authority for the proposition that a plaintiff can be compelled to accept an offer of settlement absent a formal offer of judgment. And, *Murphy* simply does not explain how that can be done." *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 398 F. Supp. 2d 470, 486 (E.D. Va. 2005).

contract under state law, "and hence requires its own basis for jurisdiction." *Id.* Thus, even if Cabala had accepted Morris's offer, the court would have had no jurisdiction to enforce it. *See Simmons*, 634 F.3d at 765 ("[D]istrict courts . . . lack the power to enforce the terms of a settlement agreement absent jurisdiction over a breach of contract action for failure to comply with the settlement agreement.").

Nor would Cabala have been able to enforce any settlement by pursuing a new claim for breach of contract in state court. Morris's offers would not be enforceable contracts under state law even if they had been accepted by Cabala, because the offers left an essential term—the amount of attorneys' fees—unresolved. And the district court would have lacked authority to award attorney's fees under the FDCPA without a stipulation of judgment because the Act authorizes attorney's fees only "in the case of any successful action." 15 U.S.C. § 1692k(a)(3). *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (requiring a judicial imprimatur, as opposed to an informal settlement, to invoke a court's authority to award attorney's fees to a "prevailing party"); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 478 F.3d 183, 186 (4th Cir. 2007) ("[T]here is little reason to suppose that a successful action is anything more or less than an action brought by a prevailing party."). In any event, even if the settlement could somehow give the court authority to award fees, the court correctly found that it was not bad faith for Cabala to believe otherwise. JA 112.

Morris wanted the court to determine fees and costs, but was unwilling to accept the necessary legal change in the relationship provided by a stipulation to judgment. At the same time, Morris was unwilling to make an informal settlement offer for everything to which Cabala could reasonably be considered entitled. The district court correctly concluded that Morris's "fail[ure] to take advantage of Rule 68," coupled with his insistence on a settlement that did not include an admission of liability, "had the effect of prolonging the litigation and increasing Plaintiff's attorney's fees." JA 113-14. If anyone was guilty of "bad faith," it was Morris.

2. *Cabala Reasonably Refused Morris's Offers*. Even if (contrary to this Court's precedent) informal negotiations were sufficient to show bad faith, Cabala reasonably refused Morris's inadequate offers. Morris's initial informal offer included three preconditions: (1) that the settlement would apply to all claims against non-party CUDA as well as Morris; (2) that there would be no judgment (and hence no jurisdictional basis to enforce the settlement or award fees); and (3) that the court would nevertheless hold a "hearing" on fees. JA 31-32. Cabala's refusal would have been reasonable had Morris's offer contained only the first or second of these preconditions, let alone all three.

The same goes for Morris's informal offer of May 2010. More than a year into the lawsuit, after Cabala offered a lump settlement of $16,869.82, Morris made a counteroffer of $2,500. JA 55,104. That amount differed by nearly $20,000

from the actual fees incurred and thus was neither "within the ball park" nor remotely "reasonable in light of the circumstances existing at the time." *Lee v. Thomas & Thomas*, 109 F.3d 302, 305-06 (6th Cir. 1997); *see* DN 57-3.

It was not bad faith for Cabala to refuse these inadequate settlement terms. *See NAACP*, 259 F.3d at 121. Morris cannot now claim, in hindsight, that he might have offered a proper Rule 68 offer of full relief had negotiations only continued. As this Court emphasized in both *Ortiz* and *NAACP*, to sustain such a claim would impose undue pressure on plaintiffs to settle because they would be forced to "guess as to whether . . . later a district court would find that the negotiations would have been fruitful had they continued." *Id.* at 122.

Cabala's good faith is especially apparent here because he continued negotiations throughout the litigation, offering to settle or stipulate to judgment 15 times. JA 102-04. By contrast, the district court concluded that Morris's litigation strategy—his repeated refusal to admit liability, to offer full relief, or to take advantage of Rule 68—"significantly contributed to the delay in the resolution of this case and the accrual of additional attorney's fees." JA 112. In so finding, the district court was not wrong, and certainly did not abuse its discretion.

II. Morris's Attacks on the Attorney-Client Relationship Between the Plaintiff and His Trial Counsel Are Both Factually Wrong and Legally Irrelevant.

Morris's attacks on Cabala and Faulkner's attorney-client relationship (at 43-53) fare no better than his attacks on Faulkner's litigation conduct. As to the facts: *First*, Faulkner was authorized to act as Cabala's lawyer. Cabala directed Pinsky to retain whatever resources "he saw fit," DN 71-1 (Cabala Dep. 5:13-14), and Pinsky used that authority to refer the matter to Faulkner—under their longstanding co-counseling arrangement—to litigate Cabala's FDCPA claim. DN 71-2 (Faulkner Dep. 6:14-21). Cabala acknowledged that communication regarding the litigation would go through Pinsky. DN 71-1 (Cabala Dep. 15:20-24). And he believed that Faulkner was his attorney for purposes of the FDCPA case. *Id.* (Cabala Dep. 6:20-21) ("I believe that via my agreement with Irving Pinsky I have an agreement with Mrs. Faulkner."). The district court thus correctly concluded, based on the record, that Morris's characterization of this attorney-client relationship was "unpersuasive." JA 109. [3]

---

[3] In a further attempt to impugn Faulkner's character, Morris cites (at 46-48) a case that was vacated because the plaintiff's sons "engaged without authorization Attorney Faulkner to pursue litigation in the name of their mother Mona Menard unbeknownst to her." *Menard v. Morris*, No. 3:09-cv-01165, Doc. 87 at 24 (D. Conn. 2012). But Morris fails to mention *why* the judgment was vacated and omits the key facts: the named plaintiff did not speak English, *id.* at 18, and her sons falsely claimed to be acting under her authority. *Id.* at 24. "Faulkner's belief that Mona Menard had authorized her to prosecute the matter," the court found, "was entirely based on [the sons'] fraudulent conduct." *Id.* at 28.

Second, it is simply not true, as Morris contends (at 48-53), that Cabala was uninformed of any settlement offers or that Faulkner "unilaterally rejected" offers of settlement. Morris Br. 7. To the contrary, Faulkner's deposition makes clear that Pinsky advised Cabala regarding offers of settlement. DN 71-2 (Faulkner Dep. 10:20-25, 11:1-11) (explaining that she relayed settlement offers to Pinsky, who would respond after conferring with Cabala).

As to the law: In more than 17 pages of extended discussion (at 43-59), Morris cites not a single legal precedent that supports overturning a fee award based on alleged defects in the attorney-client relationship. That is not surprising, because the rules of professional conduct are not "procedural weapons" to be enforced by "an antagonist in a collateral proceeding." *Gagne v. Vaccaro*, 766 A.2d 416, 425 (Conn. 2001); *see also McKnight v. Gizze*, 175 A. 676, 678 (Conn. 1934) (so long as attorney's "legal services are rendered in complete fulfillment" of "honesty and loyalty to his client," "neither justice nor reason requires that he be penalized by denying him full compensation" due to flaw in contract); *Sanderson v. Winner*, 507 F.2d 477, 480 (10th Cir. 1974) ("Neither the court nor the defendant has legitimate concern as to the propriety of the [fee] arrangement under the code of responsibility."). Morris cannot claim that the court abused its discretion in awarding Cabala reasonable attorney's fees mandated by the FDCPA simply because *he* takes issue with Cabala and Faulkner's relationship—particularly when

his complaints are wholly at odds with the record and the district court's factual conclusions.

*   *   *

In fixing a fee award, a district court may appropriately compensate a successful plaintiff for the time and expense necessitated by defense "counsel who fought the case bitterly to the very end and even now continue their recalcitrant posture." *Birmingham v. Sogen-Swiss Intern. Corp. Retirement Plan*, 718 F.2d 515, 523 (2d Cir. 1983). Throughout this litigation, Cabala pursued settlement, but Morris refused to settle on any terms other than his own. The district court appropriately concluded that Morris's counsel "significantly contributed to the delay in the resolution of this case and the accrual of additional attorney's fees." JA 112. In light of Morris's recalcitrant posture, the district court did not abuse its discretion in awarding Cabala reasonable attorney's fees and costs.

CONCLUSION

The district court's award of attorney's fees should be affirmed.

Respectfully submitted,

/s/ Deepak Gupta

Deepak Gupta
GUPTA BECK PLLC
1625 Massachusetts Avenue, NW, Suite 500
Washington, DC 20036

April 24, 2013

Counsel for Appellee Joel J. Cabala

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 5,359 words in this brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2013, I filed this brief with the Clerk of the U.S. Court of Appeals for the Second Circuit using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the system.

/s/ Deepak Gupta

Deepak Gupta