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7
8 *One of the Attorneys for Plaintiff Sidney*
9 *Naiman and the Proposed Settlement Class*

10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 SIDNEY NAIMAN, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 TOTAL MERCHANT SERVICES, INC.
18 and QUALITY MERCHANT
19 SERVICES, INC.,

20 Defendants.

No. 4:17-cv-03806-CW

**DECLARATION OF JON B. FUGNER IN
SUPPORT OF PLAINTIFF’S MOTION FOR
ATTORNEYS’ FEES, REIMBURSEMENT
OF COSTS AND SERVICE AWARD**

Complaint Filed: July 5, 2017

DATE: April 2, 2019

TIME: 2:30 p.m.

LOCATION: 1301 Clay St., Oakland, CA 94612
Courtroom 6—2nd Floor

1 I, Jon B. Fougner, declare under penalty of perjury:

2 1. I am an attorney duly licensed to practice law in the States of California and New
3 York.

4 2. I am co-counsel of record to Plaintiff Sidney Naiman in this case.

5 3. I respectfully submit this declaration in support of Plaintiff's Motion for
6 Attorneys' Fees, Reimbursement of Costs and Service Award.

7 4. Except where otherwise stated or evident from context, the following facts are of
8 my personal knowledge. If called as a witness I could and would testify competently as to their
9 truth.

10 **Risks of the Litigation**

11 5. I am familiar with the risks involved with prosecuting TCPA class actions. My
12 co-counsel and I have prosecuted several cases (including putative TCPA class actions) that,
13 after our investment of time and money, have resulted in no recovery of costs or attorneys' fees,
14 or recovery far below our lodestar. *See, e.g., Naiman v. TranzVia LLC*, No. 17-cv-4813-PJH,
15 2017 U.S. Dist. LEXIS 199131 (N.D. Cal. Dec. 4, 2017) (granting defendant's motion to dismiss
16 in a TCPA case).

17 6. I have received no reimbursement of costs or payment of attorneys' fees in this
18 case.

19 7. Since beginning work on this case in June of 2017, I have worked with no
20 guarantee of being compensated for my time and efforts. My recovery has always been
21 contingent on successfully obtaining relief for Plaintiff and class members. As a result, there was
22 a substantial risk of non-payment, particularly in light of the legal challenges involved in
23 litigating this case. My work on this case has necessarily been to the exclusion of work on other
24 matters.

25 **Experience**

26 8. I graduated *summa cum laude*, Phi Beta Kappa from Yale in 2005.

27 9. After that, I completed a Fulbright Scholarship.

1 10. After that, I worked at Goldman Sachs and Facebook.

2 11. I received my J.D. from Yale Law School in 2014. At that time, Yale was the #1
3 ranked law school in the country, according to U.S. News & World Report.

4 12. I was selected as an:

- 5 a. editor of *The Yale Law Journal*; and
6 b. articles editor of the *Yale Journal on Regulation*.

7 13. During law school, I was awarded the:

- 8 a. Judge Ralph K. Winter Prize in economics; and
9 b. William K.S. Wang Prize in business organizations.

10 14. During summers in law school, I worked:

- 11 a. in the chambers of the Honorable Susan G. Braden, United States Court of
12 Federal Claims;
13 b. at Wachtell, Lipton, Rosen & Katz, which at that time was the #1 ranked law
14 firm in the country, according to Vault; and
15 c. at Munger, Tolles & Olson LLP.

16 15. I am the author of *Antitrust Enforcement in Private Equity*, 31 Yale J. on Reg.
17 Online 25 (2013).

18 16. On the first try, I passed the:

- 19 a. July 2014 New York Bar Examination was admitted to practice in March
20 2015; and
21 b. July 2016 California Bar Examination and was admitted to practice in January
22 2017.

23 17. I am admitted to practice before the United States District Courts for the:

- 24 a. Central District of California;
25 b. Northern District of California; and
26 c. Southern District of California.

1 18. I have served as proposed class co-counsel in several putative class actions.

2 Among those are several TCPA cases, including:

- 3 a. *Shelton v. Post Univ., Inc.*, No. 3:18-cv-01801-JCH (D. Conn. filed Nov. 1,
4 2018);
5 b. *Jeffrey Katz Chiropractic, Inc. v. Tivity Health Support, LLC*, No. 18-cv-
6 05400-RS (N.D. Cal. filed Sept. 1, 2018); and
7 c. *Berman v. Freedom Fin. Network, LLC*, Case 4:18-cv-01060-YGR (N.D. Cal.
8 filed Feb. 19, 2018).

9 19. Additionally, I have served as lead counsel to the plaintiff(s) in the following
10 TCPA cases:

- 11 a. *Cunningham v. Performance SLC LLC*, Case 8:18-cv-01093-AG-AGR (C.D.
12 Cal. filed June 20, 2018);
13 b. *Cunningham v. Student Loan Advocacy Grp.*, Case 3:18-cv-00329-GPC-JLB
14 (S.D. Cal. filed Feb. 10, 2018); and
15 c. *Heidarpour v. Empire Capital Funding Grp. Inc.*, Case 4:18-cv-00250-YGR
16 (N.D. Cal. filed Jan. 11, 2018).

17 20. I keep up with local and national developments in TCPA and class action practice,
18 including through CLE. For example, I attended the:

- 19 a. 21st Annual National Institute on Class Actions on October 26-27, 2017, in
20 Washington, D.C.;
21 b. 5th Annual Western Regional CLE Program on Class Actions and Mass Torts
22 on June 22, 2018, in San Francisco; and
23 c. 2018 Civil Law Symposium: Class Actions on September 13, 2018, in San
24 Francisco.

25 **Timekeeping**

26 21. I bill in 6-minute increments. I do not bill for most *de minimis* tasks, including
27 most brief phone calls and emails.

1 22. In this case, I recorded most of my time contemporaneously. Almost all of the rest
2 was entered based on contemporaneously time-stamped electronically stored information,
3 including phone bills and email headers.

4 23. I collaborated with my co-counsel throughout the litigation and settlement of this
5 case. We ‘divided and conquered’ to avoid redundant effort. I frequently used legal research that
6 one or more of us had conducted in prior TCPA cases, including cases that did not ultimately
7 result in the payment of meaningful (if any) recovery for us, and I did not bill this case for that
8 work. I contributed to the drafting of the complaints and the factual research underlying them. I
9 worked on discovery, including drafting initial disclosures, interrogatories, requests for
10 production and a notice of deposition. I represented Plaintiff at hearings, including the initial
11 case management conference, hearings on motions to compel the production of documents and
12 the hearing on the motion for preliminary approval. I drafted deposition questions meant to elicit
13 evidence of vicarious liability, second-chaired the depositions, and drafted the motion for class
14 certification based on the testimony elicited. To economize our time, I drafted the motion from a
15 preexisting template developed by my co-counsel and me over the course of past cases, both
16 successful and unsuccessful. In preparation for the mediation, I built a timeline of evidence of
17 vicarious liability, the key issue in dispute. Following the Court’s feedback at the hearing on
18 preliminary approval, I worked with co-counsel, opposing counsel and the settlement
19 administrator to improve and ultimately execute the notice plan. I am fielding inbound inquiries
20 from class members and monitoring the claims process, most of which efforts are not reflected in
21 my billings.

22 24. I did not bill for time spent on this declaration or the motion to which it is
23 attached.

24 25. I allocated no fraction of overhead and administrative time to this case.

25 26. I reviewed my time entries for any that appeared to be redundant, extraneous or
26 inefficient and reduced them accordingly.

1 27. My billings include an estimate of 8 hours to be spent in the future, including
2 working with the settlement administrator, preparing the motion for final approval, attending the
3 hearing thereon and communicating with class members. Based on my experience in this case to
4 date, I believe 8 hours is a conservative underestimate of this time.

5 28. All told, my billings in this case understate my total hours worked on it.

6 **Hourly Rate**

7 29. My usual and customary rate is \$500 per hour.

8 30. My opposing counsel frequently are law firm partners.

9 31. To determine a reasonable hourly rate for this matter, I began with the Laffey
10 Matrix, which I understand was developed for Washington, D.C.-area courts. According to its
11 website, the benchmark set by the Laffey Matrix based on my number of years out of law school
12 is \$455 per hour.

13 32. According to the August 10, 2012 edition of the *San Francisco Daily Journal*, a
14 reasonable hourly rate for attorneys in the San Francisco Bay Area is higher than the rate
15 suggested by the Laffey Matrix. According to the *Journal*, (1) the average associate billing rate
16 in the San Francisco market was \$482 per hour in 2012, and (2) such rates typically rise by the
17 rate of inflation.

18 33. According to a government-published inflation calculator, \$482 in 2012 equaled
19 \$527 in 2018.

20 34. Based on the foregoing authorities and my knowledge of the San Francisco legal
21 market and the rates billed by my law school classmates, I determined \$500 as my hourly rate for
22 this matter.

23 **Lodestar**

24 35. I billed 195.7 hours on this case. I would bill those hours to an hourly client. I am
25 sold out: I work on average over 40 hours per week and regularly turn down apparently
26 meritorious TCPA representations, including class cases. Including the 8 future hours, my
27 lodestar for this case is \$101,850.

Costs

36. To date, I have incurred over \$720.96 in unreimbursed litigation costs in prosecuting this case, including \$297.96 in airfare and \$423 in hotels. Excluded from that number are a variety of *de minimis* costs.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

RESPECTFULLY SUBMITTED AND DATED this 13th day of December, 2018.

By: /s/ Jon B. Fougner
Jon B. Fougner

One of the Attorneys for Plaintiff Sidney Naiman and the Proposed Settlement Class