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

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

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

16 Plaintiff,

17 v.

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

21 Defendants.

No. 4:17-cv-03806-CW

**DECLARATION OF MATTHEW P. McCUE  
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, Matthew P. McCue, declare under penalty of perjury:

2 1. I am an attorney duly admitted to practice in the Commonwealth of  
3 Massachusetts. I am over 18 years of age. I am competent to testify and make this affidavit on  
4 personal knowledge. I have extensive experience in the prosecution of class actions on behalf of  
5 consumers.

6 2. I am admitted to practice in this case *pro hac vice* as co-counsel of record to  
7 Plaintiff Sidney Naiman.

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

10 4. I make this affidavit to describe the work that I and my co-counsel have done in  
11 identifying, investigating and prosecuting the claims in the action and to set forth my  
12 qualifications to serve as class counsel.

13 5. I was involved in every stage of litigation in this case, including pre-trial  
14 investigation, analysis of Plaintiff's potential claims, researching and drafting the class  
15 certification motion, expert work, review of documents, discovery responses, depositions and  
16 general preparation for mediation and trial. I also participated in settlement negotiations and  
17 strategy, participated in the mediation process and contributed to preparing the proposed  
18 settlement agreement and motion for preliminary approval.

19 6. I am a 1993 honors graduate of Suffolk Law School in Boston, Massachusetts.  
20 Following graduation from law school, I served as a law clerk to the Justices of the Massachusetts  
21 Superior Court. I then served a second year as a law clerk for the Honorable F. Owen Eagan,  
22 United States Magistrate Judge for the United States District Court for the District of Connecticut.

23 7. In 1994, I was admitted to the Bar in Massachusetts. Since then, I have been  
24 admitted to practice before the United States District Court for the District of Massachusetts, the  
25 First Circuit Court of Appeals, the United States District Court for the District of Colorado, the  
26 Sixth Circuit Court of Appeals and the United States Supreme Court.

1 8. Following my clerkships, I was employed as a litigation associate with the Boston  
2 law firm of Hanify & King. In 1997, I joined the law firm of Mirick O’Connell as a litigation  
3 associate where I focused my trial and appellate practice on plaintiff’s personal injury and  
4 consumer protection law.

5 9. In the summer of 2002, I was recognized by the legal publication *Massachusetts*  
6 *Lawyers Weekly* as one of five “Up and Coming Attorneys” for my work on behalf of consumers  
7 and accident victims.

8 10. In November of 2004, I started my own law firm focusing exclusively on litigating  
9 consumer class actions and serious personal injury cases.

10 11. I am in good standing in every court before which I am admitted to practice.

11 12. A sampling of other class actions in which I have represented classes of consumers  
12 follows:

13 i. Mey v. Herbalife International, Inc., USDC, D. W. Va., Civil Action  
14 No. 01-C-263M. Co-lead counsel with Attorney Broderick and additional  
15 co- counsel, prosecuting consumer class action pursuant to TCPA on behalf  
16 of nationwide class of junk fax and prerecorded telephone solicitation  
17 recipients. \$7,000,000 class action settlement preliminarily approved on  
18 July 6, 2007 and granted final approval on February 5, 2008.

18 ii. Mulhern v. MacLeod d/b/a ABC Mortgage Company, Norfolk  
19 Superior Court, 2005-01619 (Donovan, J.). Representing class of  
20 Massachusetts consumers who received unsolicited facsimile advertisements  
21 in violation of the TCPA and G.L. c. 93A. Case certified as a class action,  
22 and I was appointed co-lead counsel with Attorney Edward Broderick by the  
23 Court on February 17, 2006, settlement for  
24 \$475,000 granted final approval by the Court on July 25, 2007.

25 iii. Evan Fray-Witzer, v. Metropolitan Antiques, LLC, NO. 02-5827 Business  
26 Session, (Van Gestel, J.). In this case, the defendant filed two Motions to  
27 Dismiss challenging the plaintiff’s right to pursue a private right of action  
28 and challenging the statute at issue as violative of the telemarketer’s First  
Amendment rights. Both Motions to Dismiss were denied. Class  
certification was then granted and I was appointed co-lead class counsel.  
Companion to this litigation, my co-counsel and I successfully litigated the  
issue of whether commercial general liability insurance provided coverage  
for the alleged illegal telemarketing at issue. We ultimately appealed this

1 issue to the Massachusetts Supreme Judicial Court which issued a decision  
2 reversing the contrary decision of the trial court and finding coverage. See  
3 Terra Nova Insurance v. Fray-Witzer et al., 449 Mass. 206 (2007). This  
4 case resolved for \$1,800,000.

- 5 iv. Shonk Land Company, LLC v. SG Sales Company, Circuit Court of  
6 Kanawha County, West Virginia, Civil Action No. 07-C-1800 (multi-state  
7 class action on behalf of recipients of faxes in violation of TCPA, settlement  
8 for \$2,450,000, final approval granted in September of 2009.
- 9 v. Mann & Company, P.C. v. C-Tech Industries, Inc., USDC, D. Mass., C.A.  
10 1:08CV11312-RGS, class action on behalf of recipients of faxes in violation  
11 of TCPA, settlement for \$1,000,000, final approval granted in January of  
12 2010.
- 13 vi. Evan Fray Witzer v. Olde Stone Land Survey Company, Inc., Massachusetts  
14 Superior Court, Civil Action No. 08-04165 (February 3, 2011) (final  
15 approval granted for TCPA class settlement). This matter settled for  
16 \$1,300,000.
- 17 vii. Milford & Ford Associates, Inc. and D. Michael Collins vs. Cell-Tek,  
18 LLC, USDC, D. Mass. C. A. 1:09-cv- 11261-DPW, class action on  
19 behalf of recipients of faxes in violation of TCPA, settlement for \$1,800,000,  
20 final approval granted August 17, 2011 (Woodlock, J.).
- 21 viii. Collins v. Locks & Keys of Woburn Inc., Massachusetts Superior Court,  
22 Civil Action No. 07-4207-BLS2 (December 14, 2011) (final approval  
23 granted for TCPA class settlement). This matter settled for \$2,000,000.
- 24 ix. Brey Corp t/a Hobby Works v. Life Time Pavers, Inc., Circuit Court for  
25 Montgomery County, Maryland, Civil Action No. 349410-V (preliminary  
26 approval granted for TCPA class settlement). This matter settled for  
27 \$1,575,000.
- 28 x. Collins, et al v. ACS, Inc. et al, USDC, District of Massachusetts, Civil  
Action No. 10-CV-11912 a TCPA case for illegal fax advertising, which  
settled for \$1,875,000.
- xi. Desai and Charvat v. ADT Security Services, Inc., USDC, Northern District  
of Illinois, Civil Action No. 11-CV-1925, settlement of \$15,000,000,  
approved, awarding fees of one third of common fund.
- xii. Benzion v. Vivint, 0:12cv61826, USDC S.D.Fla., settlement of \$6,000,000  
granted final approval in February of 2015.
- xiii. Kensington Physical Therapy v. Jackson Physical Therapy Partners, USDC,  
District of Maryland, 8:11cv02467, settlement of \$4,500,000 granted final  
approval in February of 2015.

- 1           xiv. Jay Clogg Realty v. Burger King Corp., USDC, District of Maryland,  
2           8:13cv00662, settlement of \$8.5 million granted final approval in May of  
3           2015.
- 4           xv. Charvat v. AEP Energy, 1:14cv03121 ND Ill, class settlement of \$6 million  
5           granted final approval on September 28, 2015.
- 6           xvi. Thomas Krakauer v. Dish Network, L.L.C., USDC, MDNC, Civil Action  
7           No. 1:14-CV-333 on September 9, 2015. I was co-trial counsel in the case  
8           which resulted in a jury verdict in favor of plaintiff and the class of  
9           \$20,446,400 on January 19, 2017. (Dkt. 292). On May 22, 2017, this amount  
10          was trebled by the Court after finding that Dish Network’s violations were  
11          “willful or knowing”, for a revised damages award of \$61,339,200. (Dkt.  
12          No. 338).
- 13          xvii. Dr. Charles Shulruff, D.D.S. v. Inter-med, Inc., 1:16-cv-00999, ND Ill, class  
14          settlement of \$400,000 granted final approval on November 22, 2016.
- 15          xviii. Toney v. Quality Resources, Inc., Cheryl Mercuris and Sempris LLC, 13-cv-  
16          00042, in which a TCPA class settlement was granted final approval on  
17          December 1, 2016 with TCPA settlement in the amount of \$2,150,00 with  
18          one of three defendants an assignment of rights against defendant’s  
19          insurance carrier. The case continues against the two non-settling  
20          defendants.
- 21          xix. Bull v. US Coachways, Inc., 1:14-cv-05789, in which a TCPA class  
22          settlement was finally approved on November 11, 2016 with an agreement  
23          for judgment in the amount of \$49,932,375 with an assignment of rights  
24          against defendant’s insurance carrier.
- 25          xx. Smith v. State Farm Mut. Auto. Ins. Co., et. al., USDC, ND. Ill., 1:13-cv-  
26          02018, TCPA class settlement of \$7,000,000.00 granted final approval on  
27          December 8, 2016.
- 28          xxi. Mey v. Frontier Communications Corporation, USDC, D. Ct., 3:13-cv-  
            1191-MPS, a TCPA class settlement of \$11,000,000 granted preliminary  
            approval on January 26, 2017.
- xxii. Biringer v. First Family Insurance, Inc., USDC, ND. Fla., a TCPA class  
            settlement of \$2,900,000 granted final approval on April 24, 2017.
- xxiii. Abramson v. Alpha Gas and Electric, LLC, USDC, SD. NY., 7:15-cv-  
            05299-KMK, a TCPA class settlement of \$1,100,000 granted final approval  
            on May 3, 2017.
- xxiv. Heidarpour v. Central Payment Co., USDC, MD. Ga., 16-cv-01215, a TCPA  
            class settlement of \$6,500,000 granted final approval on May 4, 2017.
- xxv. Abante Rooter and Plumbing, Inc. v. New York Life Insurance Company,

1 USDC, SD. NY., 1:16-cv-03588-BCM, a TCPA class settlement of  
2 \$3,250,000 granted preliminary approval on May 18, 2017.

3 xxvi. Abramson v. CWS Apartment Home, LLC, USDC, WD. Tex., 16-cv-01215,  
4 a TCPA class settlement of \$368,000.00 granted final approval on May 19,  
5 2017.

6 xxvii. Charvat v. Elizabeth Valente, et al, USDC, NDIL, 1:12-cv-05746,  
7 \$12,500,000 TCPA settlement granted preliminary approval on July 6, 2017.

8 xxviii. Mey v. Got Warranty, Inc., et. al., USDC, NDWV., 5:15-cv-00101-JPB-  
9 JES, a TCPA class settlement of \$650,000 granted final approval on July 26,  
10 2017.

11 xxix. Mey v. Patriot Payment Group, LLC, USDC, NDWV., 5:15-cv-00027-JPB-  
12 JES, a TCPA class settlement of \$3,700,000 granted final approval on July  
13 26, 2017.

14 xxx. Charvat and Wheeler v. Plymouth Rock Energy, LLC, et al, USDC, EDNY,  
15 2:15-cv-04106-JMA-SIL, a TCPA class settlement of \$1,675,000 granted  
16 preliminary approval on September 15, 2017.

17 xxxi. Fulton Dental, LLC v. Bisco, Inc., USDC, NDIL, 1:15-cv-11038. TCPA  
18 class settlement for \$262,500 granted preliminary approval on November 6,  
19 2017.

20 xxxii. Abante Rooter and Plumbing, Inc. v. Birch Communications, Inc., USDC,  
21 NDGA, 1:15-cv-03262-AT. TCPA class settlement of \$12,000,000 granted  
22 final approval on December 14, 2017.

23 xxxiii. Abante Rooter and Plumbing, Inc. v. Alarm.com, Inc., USDC, NDCA 4:15-  
24 cv-06314-YGR. TCPA class settlement of \$28,000,000 awaiting  
25 preliminary approval.

### 26 Risks of the Litigation

27 13. I am familiar with the risks involved with prosecuting TCPA class actions. My  
28 co-counsel and I have prosecuted many TCPA class actions that, after our investment of time and  
money, resulted in no recovery of costs or attorneys' fees, or recovery far below our lodestar.

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

15. Since beginning work on this case, I have worked with no guarantee of being  
compensated for my time and efforts. My recovery has always been contingent on successfully  
obtaining relief for Plaintiff and class members. As a result, there was a substantial risk of non-

1 payment, particularly in light of the legal challenges involved in litigating this case. My work on  
2 this case has necessarily been to the exclusion of work on other matters.

3 **Timekeeping**

4 16. I record my time contemporaneously in Timeslips software. Where my time was  
5 not contemporaneously documented, I estimated by time using calendars, e-mails and  
6 electronically stored records.

7 17. I collaborated with my co-counsel throughout the litigation and settlement of this  
8 case. We worked efficiently and avoided redundant effort. The declaration of my co-counsel  
9 Anthony Paronich contains a detailed description of the work collaboratively performed by  
10 Plaintiff's counsel.

11 18. I did not bill for time spent on this declaration or the motion to which it is  
12 attached.

13 19. I allocated no fraction of overhead and administrative time to this case.

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

16 21. My billings include an estimate of hours to be spent in the future, including  
17 working with the settlement administrator, preparing the motion for final approval, attending the  
18 hearing thereon and communicating with class members.

19 22. My billings in this case total 225 hours. I would bill those hours to an hourly  
20 client. I am sold out: I work on average over 40 hours per week and regularly turn down  
21 apparently meritorious TCPA representations, including class cases.

22 **Hourly Rate**

23 23. My current billable rate is \$700 per hour. My rate has been approved by courts in  
24 several other nationwide class actions. *E.g.*, *Mey v. Frontier Commc'ns Corp.*, No. 3:13-cv-  
25 1191-MPS (D. Conn. June 9, 2017) (court approves attorneys' fees based on lodestar hourly rate  
26 of \$700); *Heidarpour v. Central Payment Co.*, No. 16-cv-01215 (M.D. Ga. May 4, 2017) (same);  
27 *Mey v. Interstate Nat'l Dealer Servs., Inc.*, No. 14-01846 (N.D. Ga. June 8, 2016) (same); *Jay*  
28



1 *Clogg Realty Grp., Inc. v. Burger King Corp.*, No. 13-cv-00662 (D. Md. April 15, 2015) (same);  
2 *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, No. 11-02467 (D. Md.  
3 Feb. 12, 2015) (same).

4 24. My opposing counsel frequently are law firm partners who bill at that rate, or  
5 higher.

6 25. To cross check my hourly rate for this matter, I consulted the Laffey Matrix,  
7 which I understand was developed for Washington, D.C.-area courts. According to its website,  
8 the benchmark set by the Laffey Matrix based on my number of years out of law school (24  
9 years) is \$894 per hour.

10 26. According to the August 10, 2012 edition of the *San Francisco Daily Journal*, a  
11 reasonable hourly rate for attorneys in the San Francisco Bay Area is higher than the rate  
12 suggested by the Laffey Matrix.

13 27. My lodestar for this case, inclusive of the estimated eight hours for future work, is  
14 \$157,500.

15 **Costs**

16 28. To date, I have incurred \$3,766 in unreimbursed litigation costs in prosecuting  
17 this case, including mediation, flights, hotels and meals.

18  
19 I declare under penalty of perjury under the laws of the Commonwealth of Massachusetts  
20 and the United States of America that the foregoing is true and correct.

21 RESPECTFULLY SUBMITTED AND DATED this 13th day of December, 2018.  
22

23  
24 By: /s/ Matthew P. McCue

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