

THE HONORABLE THOMAS S. ZILLY

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

KEVIN PINE, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

A PLACE FOR MOM, INC., a Delaware
corporation,

Defendant.

Case No. 17-cv-1826

**DECLARATION OF GARY M. KLINGER
IN SUPPORT OF PLAINTIFF'S MOTION
FOR ATTORNEYS' FEES AND COSTS,
AND SERVICE AWARDS TO THE
PLAINTIFFS**

1 I, Gary Klinger, being competent to testify, make the following declaration based on my
2 personal knowledge, and where stated, upon information and belief, I declare:

3 1. I am currently a partner in the law firm Mason Lietz & Klinger LLP (“MLK” or
4 “Mason Lietz & Klinger”), which was founded on March 16, 2020. Prior to founding MLK, I
5 was a partner in the law firm Kozonis & Klinger, Ltd. I am one of the lead attorneys for Plaintiff
6 and the Class in this matter. I submit this declaration in support of Plaintiff’s Motion for
7 Attorneys’ Fees, Costs and Service Awards. Except as otherwise noted, I have personal
8 knowledge of the facts set forth in this declaration, and could testify competently to them if
9 called upon to do so.

10 2. Prior to forming my current firm, I worked as an attorney at several prestigious
11 national law firms including, Schiff Hardin, LLP, Riley Safer Holmes & Cancila LLP, and
12 Cozen O’Connor P.C., where I focused on complex and class action litigation involving
13 consumer, privacy and product liability matters.

14 3. At my current law firm, I concentrate on class action litigation on behalf of
15 consumers. In particular, I focus on consumer and privacy class actions involving wide-ranging
16 theories such as consumer fraud, breach of contract and breach of common and statutory privacy
17 laws.

18 4. Throughout my legal career, I have resolved dozens of class action cases
19 involving consumer and privacy statutes in state and federal courts across the country. Some
20 representative cases include the following: *Smith v. State Farm Mut. Auto. Ins. Co.*, No. 1:13-cv-
21 2018 (N.D. Ill.); *Jochan v. State Farm Mut. Auto. Ins. Co.*, No. 1:15-cv-04326 (N.D. Ill.); *Burk v.*
22 *State Farm Fire & Cas. Co.*, No. 14-cv-02642-PHX-GMS (D. Ariz.); *Aguilar v. State Farm Mut.*
23 *Auto. Ins. Co.*, No. 16-cv-01211 (C.D. Ill.); *Kim v. State Farm Mut. Auto. Ins. Co.*, No. 2015-
24 CH-08655 (Cook Cty. Ill. Cir. Ct.); *Sweis v. State Farm Mut. Auto. Ins. Co.*, No. 2015-CH-18757
25 (Cook Cty. Ill. Cir. Ct.); *Ghose Inc. v. 7 Eleven, Inc.*, No. 2012-CH-04114 (Cook Cty. Ill. Cir.
26 Ct.); *Schumacher v. State Auto. Ins. Co.*, No. 13-cv-00232 (S.D. Ohio); *Block v. Lifeway Foods,*
Inc., No. 17-cv-01717 (N.D. Ill.); *Chavez v. Church & Dwight Co., Inc.*, No. 17-cv-01948 (N.D.

1 Ill.); *Craftwood Lumber Co. v. CMT USA, Inc.*, No. 14-cv-06864 (N.D. Ill.); *LaBrier v. State*
 2 *Farm Fire & Cas. Co.*, No. 15-cv-04093 (W.D. Mo.); *Dennington v. State Farm Fire & Cas.*
 3 *Co.*, No. 14-cv-04001 (W.D. Ark.); *Selby v. State Farm Mut. Auto. Ins. Co.*, No. 2010-CH-43684
 4 (Cook Cty. Ill. Cir. Ct.); *O'Sullivan v. iSpring Water Sys., LLC*, No. 17-cv-2237 (N.D. Ga.); *In re*
 5 *Auto Body Shop Antitrust Litig.*, No. 14-md-02557 (M.D. Fla.); *Karpilovsky v. All Web Leads,*
 6 *Inc.*, No. 1:17-cv-01307 (N.D. Ill. 2017); *Accardi v. Hartford Underwrites Ins. Co.*, No. 18-cvs-
 7 2162 (N.C. Bus. Ct.); *Burk v. Direct Energy, LP*, No. 4:19-cv-663 (S.D. Tex.); *Bellenger v.*
 8 *Accounts Receivable Mgmt., Inc.*, No. 19-cv-60205 (S.D. Fla.); *Drake v. Mirand Response Sys.,*
 9 *Inc.*, No. 1:19-CV-1458-RLY-DML (S.D. Ind.); *Fry v. Gen. Revenue Corp.*, No. 19-cv-172 (S.D.
 10 Ohio); *Poole v. Benjamin Moore*, No. 18-cv-05168 (W.D. Wash.); *Thomas v. Fin. Corp. of*
 11 *America*, No. 3:19-cv-00152 (N.D. Tex.); *Bonoan v. Adobe Inc.*, No. 3:19-cv-01068 (N.D. Cal.);
 12 *Musto v. American Express Co.*, No. 19-cv-01782 (S.D. N.Y.); and *Palmer v. KCI USA, Inc.*, No.
 13 19-cv-3084 (D. Neb.).

14 5. I have been appointed by state and federal courts to act as Class Counsel for
 15 millions of consumers and recovered tens of millions of dollars for consumers throughout the
 16 country. Presently, I am lead or co-lead counsel in more than thirty (30) active class action
 17 lawsuits pending in state and federal courts across the country.

18 6. In addition to concentrating my practice on class action litigation involving
 19 consumer, privacy, and product liability matters, I also make substantial efforts to stay apprised
 20 of the current law on these issues. In recent years, I have attended various legal training seminars
 21 and conferences such as the driTM conference for Class Actions, The Consumer Rights Litigation
 22 Conference and Class Action Symposium, as well as attended various seminars offered by
 23 Strafford on class action issues. I am also a member of the International Association of Privacy
 24 Professionals.

25 7. I graduated from the University of Illinois at Urbana-Champaign in 2007 (B.A.
 26 Economics), and from the University of Illinois College of Law in 2010 (J.D., *cum laude*). While
 at the U of I College of Law, I was a member of, and ultimately appointed as the Executive

1 Editor for, the Illinois Business Law Journal. My published work includes: *The U.S. Financial*
2 *Crisis: Is Legislative Action the Right Approach?* Ill. Bus. L. J. (Mar. 2, 2009).

3 8. I became licensed to practice law in the State of Illinois in 2010, and am a
4 member of the Trial Bar for the Northern District of Illinois as well as the U.S. Bankruptcy Court
5 for the Northern District of Illinois. Additionally, I am admitted to practice in federal courts
6 across the country, including, but not limited to, the U.S. District Courts for the District of
7 Colorado, the Central District of Illinois, the Northern District of Illinois, Northern District of
8 Indiana, Southern District of Indiana, Eastern District of Michigan and the Eastern District of
9 Texas.

10 9. Class Counsel's requested fees in this case are reasonable both in light of the
11 percent of common fund/common benefit method of calculating fees as well as the lodestar
12 method for assessing fees.

13 10. Since the inception of this case, I have litigated vigorously on behalf of the class,
14 expending substantial resources.

15 **I. Overview of My Efforts in this Action**

16 **A. Overview of Work Performed**

17 11. This litigation has been difficult and contentious. Class Counsel has engaged in a
18 comprehensive litigation strategy to pursue class action TCPA claims against Defendant.

19 12. Prior to joining this action, I thoroughly researched Defendant's practices and
20 Plaintiff's legal claims by, among other things, conducting an independent investigation and
21 researching relevant TCPA case law and regulations. This information was critical to my
22 understanding of the nature of the problem, the scope of potential damages and remedies, and the
23 potential risks and benefits of continued litigation.

24 13. The Kim Action. On August 7, 2017, Plaintiff Andrew Kim filed a Complaint in
25 the United States District Court for the Northern District of Illinois entitled *Kim v. A Place for*
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1 *Mom, Inc.*, No. 1:17-cv-05716 (N.D. Ill.) (the “Action”). The Complaint alleged that Defendant
2 violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (the “TCPA”) by
3 using an automatic telephone dialing system to call cellular phones without the prior express
4 written consent of Kim and the putative class members.

5
6 14. On August 8, 2017, Ms. Tammy Hussin of Hussin Law Firm reached out to
7 myself and Lieff Cabraser Heimann & Bernstein LLP (“LCHB”) and noted that she represented
8 another person with identical TCPA claims against APFM.

9 15. Mr. Kim actively litigated the class claims and the Parties exchanged over 500
10 pages of mandatory discovery pursuant to the Northern District of Illinois’s Mandatory Initial
11 Disclosures Discovery Pilot Project.

12 16. However, for reasons unrelated to this lawsuit, Mr. Kim decided that he now
13 longer wished to remain a plaintiff and proposed class representative in this action.

14 17. On October 13, 2017, Plaintiff’s counsel moved to substitute Kevin Pine for
15 Andrew Kim. (Dkt. No. 26.) The Northern District of Illinois Court granted the motion. (Dkt.
16 No. 28.)

17 18. The Pine Action. On October 17, 2017, Plaintiff filed the First Amended Class
18 Action Complaint and substituted Kevin Pine for Andrew Kim as the named plaintiff. (Dkt. No.
19 30). The First Amended Complaint contained identical allegations that Defendant violated the
20 TCPA by using an automatic telephone dialing system to call cellular phones without the prior
21 express written consent of Pine and the putative class members.

22 23
24 19. The parties stipulated to transfer venue of the Action to the United States District
25 Court for the Western District of Washington. (Dkt. No. 32).

1 20. The transferred action was entitled *Pine v. A Place for Mom, Inc.*, No. 2:17-cv-
2 01826-TSZ (W.D. Wash.).

3 21. The Classwide Discovery. The Parties have engaged in significant discovery
4 regarding Plaintiff’s allegations and Defendant’s defenses.

5 22. Plaintiffs served two sets of requests for production of documents and
6 propounded 17 interrogatories. Following a series of meet and confer efforts, APFM produced a
7 total of 2,272 pages of documents and responded to each of the interrogatories.

8 23. The parties’ meet and confer efforts regarding APFM’s call data was particularly
9 extensive and contentious. Although Defendant produced call data to a third-party vendor so
10 that it could estimate the total number of cellular telephone numbers dialed by Defendant, APFM
11 refused to produce call data to Plaintiff.
12

13 24. Class counsel therefore filed a 15-page motion to compel with 223 pages of
14 supporting exhibits. Dkt. No. 90. APFM opposed, Dkt. Nos. 91-93, and Class counsel filed a
15 reply. Dkt. No. 96. On June 13, 2019, the Court granted Plaintiff’s motion.
16

17 25. Class counsel deposed Defendant’s two Rule 30(b)(6) witnesses.

18 26. Class counsel also pursued discovery from third parties, government agencies,
19 and class members with relevant information.
20

21 27. Plaintiff obtained written responses and/or documents in response to nonparty
22 subpoenas to third parties TELUS International (U.S.) Corporation; TPUSA-FHCS, Inc. fka
23 Aegis USA, Inc.; Working Solutions, LLC; and Tree Rings, LLC.

24 28. Plaintiff obtained approximately 500 pages of documents from the Washington
25 State Office of the Attorney General pursuant to a request under the Public Disclosure Act
26 (“PDA”), RCW 42.56 et seq.

1 29. From the Federal Trade Commission, Class counsel sought and obtained
2 approximately 112 consumer complaints.

3 30. In addition, Class counsel procured over 200 class member declarations from
4 persons who received telephone calls from Defendant and declarations from third-party
5 witnesses at Working Solutions. Class Counsel's interviews of Class Members confirmed that
6 making the calls without their prior express consent stop was the single most important thing to
7 them.
8

9 31. For his part, Plaintiff Pine participated fully in discovery.

10 32. Mr. Pine sat for a full-day deposition and responded to each of APFM's
11 questions.
12

13 33. Mr. Pine also responded to 11 document requests and 19 interrogatories.

14 34. Motion Practice. The Parties have engaged in extensive motion practice
15 regarding Defendant's potential defenses.

16 35. On January 25, 2018, Defendant filed a motion to dismiss. Dkt. No. 50.
17 Defendant argued, among other things, that: the TCPA does not require heightened consent for
18 Defendant's calls to Plaintiff because they were made in response to his request for information
19 and because Defendant is not a telemarketer and Defendant obtained Plaintiff's prior express
20 consent.
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22 36. On February 12, 2018, Plaintiff filed his opposition and contested all grounds on
23 which Defendant sought dismissal. Dkt. No. 61.

24 37. Defendant filed a reply in support of its motion to dismiss on February 16, 2018.
25 Dkt. No. 64.
26

1 38. The Court thereafter requested supplemental briefing concerning the effect of
2 *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Dkt. No. 75.

3 39. Defendant argued, among other things, that Plaintiff failed to state a claim under
4 the narrowed definition of “automatic telephone dialing system” (“ATDS”). Dkt. Nos. 79, 81.

5 40. Plaintiff contested all grounds on which Defendant relied on *ACA International*.
6 Dkt. Nos. 78, 82.

7 41. Following several months of discovery, the Court granted Defendant’s motion to
8 dismiss without prejudice. Dkt. No. 107.

9 42. Plaintiff thereafter filed a Second Amended Complaint (Dkt. No. 111), which
10 Defendant moved to dismiss on similar grounds as the First Amended Complaint. Dkt. No. 112.

11 43. Plaintiff again contested the grounds on which Defendant sought dismissal. Dkt.
12 No. 115.

13 44. In a nine-page order, the Court denied Defendant’s motion to dismiss the Second
14 Amended Complaint. Dkt. No. 123.

15 45. Separately, although it was never filed, I, along with my co-counsel, prepared a
16 motion for class certification that included expert analysis of Defendant’s records. I worked with
17 this expert to prepare this analysis, which was ultimately to serve as the basis for his expert
18 report that was never produced.

19 46. The Mediation Efforts. In July of 2018, after extensive briefing on APFM’s first
20 motion to dismiss was completed, the parties mediated with Lou Peterson of Hillis Clark Martin
21 & Peterson P.S.

22 47. Prior to that mediation, the parties submitted detailed mediation briefs.
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1 48. However, the mediation was unsuccessful, in part, because of the parties' very
2 different view of the merits and the parties were too far apart on the monetary relief. At that
3 time, APFM's motion to dismiss was pending before the Court, which I believe likely played a
4 role in the differences between the parties' respective positions.

5
6 49. In April of 2019, after the Court denied APFM's second motion to dismiss in its
7 entirety, the parties agreed to a second day-long mediation with the Hon. Edward A. Infante
8 (ret.) of JAMS in San Francisco.

9 50. Prior to the mediation, Plaintiff and APFM submitted a second round of detailed
10 mediation briefs to Judge Infante, setting forth their respective views on the strengths of their
11 cases.

12
13 51. In addition, at the second mediation, APFM provided Plaintiff with informal
14 discovery regarding its financial status and ability to fund a settlement. In particular, APFM
15 provided information informally that a judgment resulting from a complete victory for Plaintiff
16 and the Class would be nearly impossible for Plaintiff to collect.

17 52. Although the second day-long mediation did not result in settlement, the parties
18 continued to exchange correspondence and information with each other and the mediator
19 regarding the possibility of settlement, which ultimately resolved the case.

20
21 53. At all times, the settlement negotiations were highly adversarial, non-collusive,
22 and at arm's length. The settlement negotiations were also prolonged and hard-fought; the
23 parties exchanged a series of counterproposals on key aspects of the Settlement, including
24 monetary relief for the Class and Defendant's practice changes. The negotiation process nearly
25 broke down several times as Class Counsel continually advocated for a larger fund for the Class,
26

1 while Defendant wanted a smaller fund. The case settled only after Plaintiff and Defendant
2 accepted a mediator's proposal.

3 54. Class Counsel did not begin negotiations regarding Class counsel's fee amount
4 with Defendant until *after* the parties reached agreement on the material terms of the relief for
5 the Class.

6
7 55. Drafting and Implementing the Settlement. Following the mediation and
8 acceptance of the mediator's proposal, Class counsel spent time considerable time negotiating
9 the final settlement terms; negotiating, drafting, and revising the Settlement Agreement and
10 exhibits; meeting and conferring with Defendant regarding settlement terms; soliciting
11 competitive bids from settlement administrators regarding the notice plan; meeting and
12 conferring with settlement administrators regarding the notice plan; revising the Motion for
13 Preliminary Approval; drafting the proposed orders regarding preliminary approval, and all of
14 the forms of class notice; and drafting a declaration in support of preliminary approval.

15
16 56. I also anticipate doing further work overseeing settlement administration. This
17 will include working with the Settlement Administrator on various notice issues including, but
18 not limited, to creating an adequate publication and internet notice plan; reviewing draft claims
19 forms and notices that the Settlement Administrator will prepare based on text drafted by Class
20 counsel; responding to class member inquiries and answering any questions they have about the
21 Settlement; and assisting class members in filing claims forms.

22
23 **B. Contingent Nature of Action**

24 57. This matter has required me to spend time on this litigation that could have been
25 spent on other matters. At various times during the litigation of this class action, this lawsuit has
26 consumed significant amounts of my time.

1 58. Such time could otherwise have been spent on other fee-generating work.
2 Because I undertook representation of this matter on a contingency-fee basis, I shouldered the
3 risk of expending substantial costs and time in litigating the action without any monetary gain in
4 the event of an adverse judgment.

5 59. If not devoted to litigating this action, from which any remuneration to me is
6 wholly contingent on a successful outcome, the time that I spent working on this case could and
7 would have been spent pursuing other potentially fee generating matters.

8 60. Litigation is inherently unpredictable and therefore risky. Here, that risk was very
9 real: In the last year alone, I have lost a number of TCPA class actions without any recovery for
10 the proposed class or any fees for their work on behalf of the proposed class. *See Musto v. Indra*
11 *Energy*, Case No. 19-cv-1788 (E.D. N.Y.) (dismissing case); *Bonoan v. Discover Financial*
12 *Services, Inc.* 19-cv-06268 (dismissing case); *Sanders v. Bank of America*, 19-cv-00069
13 (W.D.N.C.) (dismissing case); *Taylor v. CCS Financial Services, Inc.*, 19-cv-01681 (D. Mass.)
14 (dismissing case); *Groomes v. Lab465, LLC*, 20-cv-01047 (N.D. Ill.) (dismissing case).

15 61. Therefore, despite my devotion to this case and my confidence in the TCPA
16 claims alleged against Defendant, there have been many factors beyond my control that posed
17 significant risks.

18 62. In particular, a number of petitions pending before the FCC have placed the
19 TCPA legal landscape in a state of flux and could have ended this case.

20 **C. Careful Assignment of Work**

21 63. I and other Class Counsel therefore made every effort to litigate this efficiently by
22 reducing duplication of effort and assigning work to the lowest billing timekeepers where
23 feasible.
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1 64. In addition, I worked closely with co-counsel to divide tasks, ensure efficient case
2 management, and prevent duplication of efforts. By assigning specific tasks among firms, we
3 were able to avoid replicating work. Only where it was necessary to have involvement from all
4 of the firms, such as during the mediations, did such involvement occur.

5
6 **MLK's / K&K's Lodestar, Fees & Expenses**

7 65. My current hourly rate is \$700.00 per hour, which reflects the market within
8 which MLK's primary offices are located: Washington, D.C. and Chicago. My hourly rate has
9 periodically been negotiated with and paid on an hourly basis by sophisticated commercial
10 entities.

11 66. I have maintained contemporaneous time records since the commencement of this
12 action. Through June 11, 2020, I have worked a total of 574.7 hours in this action, with a total
13 lodestar of \$402,290.00.

14 67. My regular practice is to keep contemporaneous time records, maintained on a
15 daily basis, and describing tasks performed in 0.1 hour increments.

16 68. I maintained all books and records regarding costs expended on this case in the
17 ordinary course of business, which books and records are prepared from expense vouchers and
18 check records. I have reviewed the records of costs expended in this matter.

19 69. I have incurred \$23,724.51 in expenses, which include my payments for (1)
20 expert analysis of Defendant's records, (2) deposition fees; (3) travel to court hearings,
21 deposition, and mediation; (4) hard costs such as the mediator's fee, legal research through
22 Westlaw, and Federal Express, postage, and messengering fees; and (5) other costs such as
23 printing, copying, and telephone charges.
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* * *

I declare under penalty of perjury of the laws of Illinois and the United States that the foregoing is true and correct, and that this declaration was executed in Chicago, Illinois on this 11th day of June, 2020.

/s/ Gary M. Klinger

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