

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 WILLIAM LOFTUS, SIDNEY NAIMAN, and
4 LOUIS NAIMAN, individually and on behalf of
5 all others similarly situated,

Case No. 3:19-cv-01608-RS

Hon. Richard Seeborg

6 Plaintiffs,

7 v.

8 SUNRUN INC., and MEDIA MIX 365, LLC, and
9 DOES 1-10,

10 Defendants.

11 **Declaration of Matthew P. McCue in Support of Motion for**
12 **Preliminary Approval of Class Action Settlement**

13 I, Matthew P. McCue, declare under penalty of perjury:

14 1. I am an attorney duly admitted to practice in the Commonwealth of Massachusetts, I
15 am over 18 years of age, am competent to testify and make this affidavit on personal knowledge. I
16 make this declaration in support of Plaintiffs’ Unopposed Motion for Preliminary of Class Action. In
17 this declaration I will describe the work that I and my co-counsel have done in identifying and
18 investigating potential claims in the action and to set forth my qualifications to serve as class
19 counsel, and describe my experience in representing plaintiff classes in class actions, and cases
20 brought under the 47 U.S.C. § 227, the Telephone Consumer Protection Act. (“TCPA”).

21 1. I was involved in every stage of representing Plaintiffs in this case, from pre-trial
22 investigation, analysis of Plaintiffs’ potential claims, and review of documents and discovery
23 responses, mediation and settlement negotiations.

24 2. The instant litigation was filed in March of 2019. *See* ECF #1.

25 3. From the outset, Plaintiffs’ counsel pursued their investigation vigorously
26 culminating with the filing of an Amended Complaint (ECF #36) and a Motion for a Temporary
27 Restraining Order seeking to to preserve crucial class evidence. *See* ECF #39. This motion was
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1 ultimately granted (ECF # 41). An Order granting a similar preliminary injunction was entered on
2 July 29, 2019. ECF #56. Plaintiffs' counsel thereafter pursued a Motion for Entry of Default against
3 Media Mix, who had failed to appear. ECF #60-63. On September 10, 2019, Plaintiffs' counsel filed
4 a Motion for a Temporary Restraining Order against Media Mix and its principals, when it became
5 apparent that Media Mix was ceasing operations, and the potential destruction of crucial class
6 evidence was apparent. ECF 64. Class counsel also engaged in litigation to thwart Media Mix's
7 counsel from withdrawing from the litigation, and to obtain crucial discovery production. *See* ECF
8 70, 71, 72, 74, 75, 76, 77, 78.
9

10 4. Plaintiffs believe they have a strong case for liability. However, as is set forth in
11 Plaintiffs' Motion for Preliminary Approval, the case faced significant legal hurdles on both whether
12 the system used by Defendant to make the calls qualified as an "automatic telephone dialing system"
13 ("ATDS") and whether California Penal Code § 632.7 ("CIPA") applied to Defendant's recording of
14 calls. Further, SunRun did not make the illegal calls at issue. Rather, the calls were made by
15 SunRun's telemarketing vendors. For Plaintiff to hold SunRun to account for calls made by third
16 parties, they would have to prove that SunRun was vicariously liable for the actions of its agents. *See*
17 *In re DISH Network, LLC*, 28 FCC Rcd. 6574, 6588 ¶ 37 (2013) (footnotes and alteration marks
18 omitted).
19

20 5. Defendant has always denied liability and continues to do so. Defendant maintains
21 that it has substantial factual and legal defenses to all claims and class allegations in the Litigation.
22 Defendant specifically denies that an automated dialer was used to call Plaintiffs or class members
23 without their prior express written consent; that they violated the TCPA; that they recorded calls
24 without disclosure in violation of CIPA and that Plaintiff and class members are entitled to any
25 relief. Defendant further contends that the allegations contained in the First Amended Complaint are
26 not amenable to class certification.
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1 15. KCC is a nationally known class action administrator. See <https://www.kccllc.com/>

2 16. KCC was selected only after a competitive bidding process during which two other
3 national known administrators submitted proposals.

4 17. Over the past two years, the law firms of lead counsel on this case have partnered
5 with KCC on eight other class action settlement administrations.

6 18. The anticipated administration costs in this case are estimated at \$478,000.00.

7 19. In my experience with TCPA class actions, this is a reasonable expenses in relation to
8 the value of the settlement.

9 20. The costs of administration will be paid from the common fund.

10 21. The notice provided to class members is easily understandable and took into account
11 the educational level and language needs of class members.

12 22. The notice includes contact information, the address for a website, links to notice and
13 key motions relating to the settlement, and instructions on how to access the case docket via
14 PACER, or in person at the courthouse.

15 23. The notice states the date of the final approval hearing and clearly states such date
16 could change without notice.

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20 **QUALIFICATIONS OF COUNSEL**

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

25 25. In 1994, I was admitted to the Bar in Massachusetts. Since then, I have been admitted
26 to practice before the United States District Court for the District of Massachusetts, the First Circuit
27 Court of Appeals, the United States District Court for the District of Colorado, the Sixth Circuit
28

1 Court of Appeals and the United States Supreme Court.

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

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

10 28. In November of 2004, I started my own law firm focusing exclusively on the litigation
11 of consumer class actions and serious personal injury cases.

12 29. I am in good standing in every court to which I am admitted to practice.

13 30. A sampling of other class actions in which I have represented classes of consumers
14 follows:
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- 16 i. Mey v. Herbalife International, Inc., USDC, D. W. Va., Civil Action
17 No. 01-C-263M. Co-lead counsel with Attorney Broderick and additional co-
18 counsel, prosecuting consumer class action pursuant to TCPA on behalf of
19 nationwide class of junk fax and prerecorded telephone solicitation recipients.
20 \$7,000,000 class action settlement preliminarily approved on July 6, 2007 and
21 granted final approval on February 5, 2008.
- 22 ii. Mulhern v. MacLeod d/b/a ABC Mortgage Company, Norfolk
23 Superior Court, 2005-01619 (Donovan, J.). Representing class of
24 Massachusetts consumers who received unsolicited facsimile advertisements in
25 violation of the TCPA and G.L. c. 93A. Case certified as a class action, and I
26 was appointed co-lead counsel with Attorney Edward Broderick by the Court
27 on February 17, 2006, settlement for
28 \$475,000 granted final approval by the Court on July 25, 2007.
- 29 iii. Evan Fray-Witzer, v. Metropolitan Antiques, LLC, NO. 02-5827 Business
30 Session, (Van Gestel, J.). In this case, the defendant filed two Motions to
Dismiss challenging the Plaintiffs' right to pursue a private right of action 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

1 litigation, my co-counsel and I successfully litigated the issue of whether
2 commercial general liability insurance provided coverage for the alleged illegal
3 telemarketing at issue. We ultimately appealed this issue to the Massachusetts
4 Supreme Judicial Court which issued a decision reversing the contrary decision
of the trial court and finding coverage. See Terra Nova Insurance v. Fray-Witzer
et al., 449 Mass. 206 (2007). This case resolved for \$1,800,000.

- 5 iv. Shonk Land Company, LLC v. SG Sales Company, Circuit Court of Kanawha
6 County, West Virginia, Civil Action No. 07-C-1800 (multi-state class action on
7 behalf of recipients of faxes in violation of TCPA, settlement for \$2,450,000,
final approval granted in September of 2009.
- 8 v. Mann & Company, P.C. v. C-Tech Industries, Inc., USDC, D. Mass., C.A.
9 1:08CV11312-RGS, class action on behalf of recipients of faxes in violation of
TCPA, settlement for \$1,000,000, final approval granted in January of 2010.
- 10 vi. Evan Fray Witzer v. Olde Stone Land Survey Company, Inc.,
11 Massachusetts Superior Court, Civil Action No. 08-04165 (February
12 3, 2011) (final approval granted for TCPA class settlement). This
matter settled for \$1,300,000.
- 13 vii. Milford & Ford Associates, Inc. and D. Michael Collins vs.
14 Cell-Tek, LLC, USDC, D. Mass. C. A. 1:09-cv- 11261-DPW,
15 class action on behalf of recipients of faxes in violation of TCPA,
settlement for \$1,800,000, final approval granted August 17, 2011
(Woodlock, J.).
- 16 viii. Collins v. Locks & Keys of Woburn Inc., Massachusetts Superior
17 Court, Civil Action No. 07-4207-BLS2 (December 14, 2011) (final
18 approval granted for TCPA class settlement). This matter settled for
\$2,000,000.
- 19 ix. Brey Corp t/a Hobby Works v. Life Time Pavers, Inc., Circuit Court for
20 Montgomery County, Maryland, Civil Action No. 349410-V. This matter
settled for \$1,575,000.
- 21 x. Collins, et al v. ACS, Inc. et al, USDC, District of Massachusetts, Civil Action
22 No. 10-CV-11912 a TCPA case for illegal fax advertising, which settled for
\$1,875,000.
- 23 xi. Desai and Charvat v. ADT Security Services, Inc., USDC, Northern
24 District of Illinois, Civil Action No. 11-CV-1925, settlement of
\$15,000,000, approved, awarding fees of one third of common fund.
- 25 xii. Benzion v. Vivint, 0:12cv61826, USDC S.D.Fla., settlement of
26 \$6,000,000 granted final approval in February of 2015.
- 27 xiii. Kensington Physical Therapy v. Jackson Physical Therapy Partners, USDC,
28 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 2015.
- 3 xv. Charvat v. AEP Energy, 1:14cv03121 ND Ill, class settlement of \$6 million
4 granted final approval on September 28, 2015.
- 5 xvi. Mey v. Interstate National Dealer Services, Inc., USDC, ND. Ga., 1:14-cv-
6 01846-ELR, TCPA class settlement of \$4,200,000 granted final approval on
7 June 8, 2016.
- 8 xvii. Philip Charvat and Ken Johansen v. National Guardian Life Insurance
9 Company, USDC, WD. WI., 15-cv-43-JDP, TCPA class settlement for
10 \$1,500,000 granted final approval on August 4, 2016.
- 11 xviii. Thomas Krakauer v. Dish Network, L.L.C., USDC, MDNC, Civil Action No.
12 1:14-CV-333 on September 9, 2015. I was co-trial counsel in the case which
13 resulted in a jury verdict in favor of plaintiff and the class of \$20,446,400 on
14 January 19, 2017. (Dkt. 292). On May 22, 2017, this amount was trebled by
15 the Court after finding that Dish Network's violations were "willful or
16 knowing", for a revised damages award of \$61,339,200. (Dkt. No. 338).
17 Affirmed on appeal, *Krakauer v. Dish Network, LLC*, 925 F.3d 643 (4th Cir.
18 May 20, 2019), *cert. denied. Dish Network, L.L.C. v. Krakauer*, 140 S.Ct. 676
19 (December 16, 2019).
- 20 xix. Dr. Charles Shulruff, D.D.S. v. Inter-med, Inc., 1:16-cv-00999, ND Ill, class
21 settlement of \$400,000 granted final approval on November 22, 2016.
- 22 xx. Toney v. Quality Resources, Inc., Cheryl Mercuris and Sempris LLC, 13-cv-
23 00042, in which a TCPA class settlement was granted final approval on
24 December 1, 2016 with TCPA settlement in the amount of \$2,150,00 with one
25 of three defendants an assignment of rights against defendant's insurance
26 carrier. Second settlement of \$3,300,000 granted final approval on September
27 25, 2018.
- 28 xxi. Bull v. US Coachways, Inc., 1:14-cv-05789, settlement distributing \$3,250,000
 approved on May 18, 2019.
- xxii. Smith v. State Farm Mut. Auto. Ins. Co. , et. al., USDC, ND. Ill., 1:13-cv-
 02018, TCPA class settlement of \$7,000,000.00 granted final approval on
 December 8, 2016.
- xxiii. Mey v. Frontier Communications Corporation, USDC, D. Ct., 3:13-cv-1191-
 MPS, a TCPA class settlement of \$11,000,000 granted final approval on June 2,
 2017.
- xxiv. Biringer v. First Family Insurance, Inc., USDC, ND. Fla., a TCPA class
 settlement of \$2,900,000 granted final approval on April 24, 2017.
- xxv. 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.

- 1 xxvi. Heidarpour v. Central Payment Co., USDC, MD. Ga., 16-cv-01215, a TCPA
2 class settlement of \$6,500,000 granted final approval on May 4, 2017.
- 3 xxvii. Abante Rooter and Plumbing, Inc. v. New York Life Insurance Company.
4 USDC, SD. NY., 1:16-cv-03588-BCM, a TCPA class settlement of \$3,250,000
5 granted final approval on February 27, 2018.
- 6 xxviii. Abramson v. CWS Apartment Home, LLC, USDC, WD. Tex., 16-cv-01215, a
7 TCPA class settlement of \$368,000.00 granted final approval on May 19, 2017.
- 8 xxix. Charvat v. Elizabeth Valente, et al, USDC, NDIL, 1:12-cv-05746, \$12,500,000
9 TCPA settlement granted final approval on November 4, 2019, appeal pending.
- 10 xxx. Mey v. Got Warranty, Inc., et. al., USDC, NDWV., 5:15-cv-00101-JPB-JES, a
11 TCPA class settlement of \$650,000 granted final approval on July 26, 2017.
- 12 xxxi. Mey v. Patriot Payment Group, LLC, USDC, NDWV., 5:15-cv-00027-JPB-JES,
13 a TCPA class settlement of \$3,700,000 granted final approval on July 26, 2017.
- 14 xxxii. 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 final
16 approval on July 31, 2018.
- 17 xxxiii. Fulton Dental, LLC v. Bisco, Inc., USDC, NDIL, 1:15-cv-11038. TCPA class
18 settlement for \$262,500 granted final approval on March 7, 2018.
- 19 xxxiv. Abante Rooter and Plumbing, Inc. v. Birch Communications, Inc., USDC,
20 NDGA, 1:15-cv-03262-AT. TCPA class settlement of \$12,000,000 granted final
21 approval on December 14, 2017.
- 22 xxxv. Mey v. Venture Data, LLC and Public Opinion Strategies, USD NDWV, 5:14-
23 cv-123. Final approval of TCPA settlement granted on September 8, 2018.
- 24 xxxvi. Abante Rooter and Plumbing, Inc. v. Alarm.com, Inc., USDC, NDCA 4:15-cv-
25 06314-YGR. TCPA class settlement of \$28,000,000 granted final approval on
26 August 15, 2019.
- 27 xxxvii. In Re Monitronics International, Inc. Telephone Consumer Protection Act
28 Litigation, USDC, NDWV, 1:13-md-02493-JPB-MJA, a TCPA class settlement
of \$28,000,000 granted final approval on June 12, 2018.
- xxxviii. Abante Rooter and Plumbing, Inc. v. Allstate Insurance Company, et al,
USDC, NDIIL 1:15-cv-00925. TCPA class settlement of \$10,500,000 granted
final approval on August 15, 2019.
- xxxix. Kaiser v. CVS Pharmacy, Inc., et al, USDC NDIL, 1:14-cv-03687, TCPA class
settlement of \$15,000,000 approved on January 30, 2020.

RECOMMENDATION OF COUNSEL

31. Based on my experience in prosecuting class actions under the TCPA, I believe this
settlement represents an excellent result for the class and merits preliminary approval by the Court.

1 PURSUANT TO 28 U.S.C. § 1746, I DECLARE SIGNED UNDER PENALTY OF PERJURY
2 OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT
3 EXECUTED THIS THIS FIFTH DAY OF AUGUST 2020 IN THE COMMONWEALTH OF
4 MASSACHUSETTS.

5 /s/ Matthew P. McCue
6 Matthew P. McCue
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