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2
3 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
4 AT SEATTLE

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

6 Plaintiff,

7 v.

8 A PLACE FOR MOM, INC.,

9 Defendant.

C17-1826 TSZ

MINUTE ORDER

10 The following Minute Order is made by direction of the Court, the Honorable
11 Thomas S. Zilly, United States District Judge:

12 (1) Plaintiff's motion for preliminary approval of class action settlement,
13 docket no. 134, is DENIED without prejudice. The parties propose a settlement pursuant
14 to which defendant will provide \$6,000,000 in settlement funds in three installments, and
15 all attorney's fees, litigation expenses, settlement administration costs (not to exceed
16 \$320,000), and incentive awards to the current and former named plaintiffs will be paid
before the remaining proceeds are distributed on a pro rata basis to class members who
opt in and/or to a charity chosen by the parties, namely the Fisher Center for Alzheimer's
Research Foundation. The Court is unwilling to approve the terms of this proposed
settlement for the following reasons:

17 (a) Class Definition: The parties have proposed to define the class as:

18 All persons within the United States who, between
19 August 7, 2013, and August 15, 2019, received a
20 nonemergency Call from Defendant, or any party acting
on its behalf, to a cellular telephone through the use of
an automated telephone dialing system or an artificial or
prerecorded voice.

21 Defendant has consistently denied, and continues to deny, using an automatic
22 telephone dialing system ("ATDS") to call the cellular telephone numbers at issue
23 in this matter. See Mot. at 11 (docket no. 134); see also Minute Order (docket

1 no. 107); Order (docket no. 123). The Court declines to define a class using a
2 disputed term of art. The proposed class definition, which relies solely on
3 plaintiff's characterization of an ATDS, rather than an ascertainable fact, lacks the
4 clarity required to determine who is in the class.¹

5 (b) Pro Rata Distribution and Opt-In Requirement: The parties have
6 proposed a method of dividing the settlement proceeds that might create a conflict
7 between the class and its representatives or among class members. By allocating
8 settlement funds among only those class members who complete and return a
9 claim form, the proposed settlement creates an incentive to minimize the number
10 of persons who "opt in." The Court declines to approve any settlement in which
11 class members must "opt in" or fill out a claim form to obtain their share of the
12 proceeds.

13 (c) Unquantified Deductions: Plaintiff has provided no estimate
14 concerning the amount of attorney's fees and litigation expenses that might reduce
15 the sum available for class members, and without such figures, the Court cannot
16 begin to evaluate whether the proposed settlement is fair, reasonable, adequate,
17 and in the best interests of the class. The Settlement Agreement indicates that
18 defendant will not object to plaintiff's request for attorney's fees if plaintiff seeks
19 25% or less of the settlement funds, and that defendant will not object to any
20 amount of litigation expenses.² Whether defendant has a right to object, however,
21 is not relevant because defendant is not a party with any real interest in how the
22 settlement proceeds are distributed. Absent an upper limit on attorney's fees and
23 litigation expenses, the Court is unwilling to approve this settlement.

(d) Cy Pres Recipient: Plaintiff's motion does not indicate how the
Fisher Center for Alzheimer's Research Foundation as a cy pres recipient
"account[s] for the nature of the . . . lawsuit, the objectives of the underlying
statutes, and the interests of the silent class members, including their geographic
diversity." *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011); *see also*
Dennis v. Kellogg Co., 697 F.3d 858 (9th Cir. 2012). Although the identified
charity might be of some interest to the individuals for whom defendant provides
or has provided services, the parties have not explained how it addresses or even

19 ¹ The parties also refer to "Locate Class Members," but they do not make clear whether they
20 intend to define a subclass of persons who are "known members" of the class and/or who will
21 receive notice via U.S. mail. *See* Agr. at ¶¶ 2.26 & 8.2, Ex. 1 to Mot. (docket no. 134-1 at 7 &
19).

22 ² The proposed notice to the class indicates that defendant will not object to litigation expenses
23 not exceeding \$50,000, *see* Ex. C to Agr. (docket no. 134-1 at 51), but this figure is not set forth
in the Settlement Agreement, *see* Agr. at ¶ 5.1, Ex. 1 to Mot. (docket no. 134-1 at 13).

1 relates to the concerns underlying the Telephone Consumer Protection Act, under
2 which this case was brought.

3 (e) Submissions to the Clerk of the Court: The proposed notice to class
4 members indicates that individuals wishing to address the Court at the final
5 approval hearing must send a letter to the Clerk of the Court. The Court will not
6 require that class members submit any documentation as a prerequisite to
7 appearing or speaking at any final approval hearing. Moreover, the Court will not
8 approve any notice that directs class members to send materials to the Clerk of the
9 Court rather than to the settlement administrator.

10 (2) The parties are REMINDED that, pursuant to 28 U.S.C. § 1715, notices of
11 class action settlements must be provided to the appropriate federal and state officials. In
12 connection with any renewed motion for preliminary approval of class action settlement,
13 the parties shall indicate when the requisite notices were sent and to whom. Any renewed
14 motion for preliminary approval of class action settlement shall be filed within forty-two
15 (42) days (*i.e.*, six (6) weeks) of the date of this Minute Order. If no such motion can be
16 timely filed, the parties shall instead submit, by the same date, a Joint Status Report
17 proposing a trial date and related deadlines.

18 (3) The Clerk is directed to send a copy of this Minute Order to all counsel of
19 record.

20 Dated this 25th day of September, 2019.

21 William M. McCool
22 Clerk

23 s/Karen Dews
Deputy Clerk