Honorable Richard A. Jones

IN THE FEDERAL DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BRETT DURANT, On Behalf of Himself and all other similarly situated, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign automobile insurance company, Defendant.	**CLASS ACTION** NO. 2-15-CV-01710-RAJ **DECLARATION OF TYLER FIRKINS ROE IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY FEES & COSTS AWARD** **Note on Motion Calendar:** **June 10, 2019 at 1:30 p.m.**

I, Tyler K. Firkins, declare as follows:

1. I am Class Counsel for the Plaintiff Class in the above-entitled action and make this Declaration from my own personal knowledge. I am competent to be a witness herein.

Background and Experience

2. Attached hereto as Exhibit A is a true and correct copy of the time spent by my law firm handling this matter. The time sheets attached are compiled from two separate databases. This occurred because we switched our case management software during the course of this litigation. Originally, my firm used Timeslips by Sage as our timekeeping

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software. We switched in the last two years to CLIO. Unfortunately, the Timeslips program would not communicate with CLIO so we could not import the data. We therefore imported the information from both Timeslips and CLIO into an Excl spreadsheet. To ensure the completeness of the information in Exhibit A, I also reviewed all my emails and calendars entries from 2013 to the present. Exhibit A is therefore a true and correct compilation of the time that this law spent on this case. It is our firm's practice to maintain contemporaneous records of the work we do using practice management software as indicated above.

3. Attached hereto as Exhibit B is a true and correct copy of the costs I advanced on behalf of the Plaintiff Class in this case totaling $48,239.00.

4. Attached hereto as Exhibit C is a true and correct copy of the current Laffey Matrix reflecting the reasonable market rates for attorneys in Washington D.C. I have included this document not as primary evidence, but because it supports the analysis of Tamara Roe and Darrell Cochran and actually reflects that I should be charging a higher rate.

5. Attached hereto as Exhibit D is a true and correct copy of the bid proposal from Rust Consulting for the Administrative expenses in this matter for notice and distribution. I confirmed via email that this pricing remains accurate.

6. I am a partner at Van Siclen, Stocks & Firkins. I attended Seattle University School of Law, graduating in 1991. I have been continuously practicing law for twenty-seven years in complex litigation. My practice focuses on representing individuals against corporations and government entities in the areas of wrongful death, personal injury, class actions, and insurance bad faith. I have handled numerous complex, high-profile cases that have resulted in substantial verdicts or settlements. Before this case, I have litigated cases in

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the Washington State Supreme Court including several landmark cases such as *Federal Way School Dist. No. 210 v. Vinson*, 172 Wn.2d 756 (2011) and *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wn.2d 199 (2008). I also successfully prosecuted a case in which the then largest award of sanctions in state history was affirmed on appeal in *Roberson v. Perez*,123 Wn.App. 320 (2004). I represented numerous civil rights clients in federal actions associated with the notorious Wenatchee Sex Ring Case, including appeals to the 9th Circuit Court of Appeals. I have previously represented Washington consumers in class action litigation including successfully prosecuting *Barquest v. Farmers Insurance*, which was also an insurance bad faith class action involving PIP insurance. Almost every case that I handle is on a contingent fee. My hourly rate of $500.00 is reasonable considering my skill and experience and when compared to King County attorneys with similar trial experience. It is my opinion that my rate of $500 per hour is the market rate in Seattle for an attorney with my experience.

7. During the course of this litigation, beginning in 2013, I have employed various associates who have substantially assisted me on this case including Stephanie Messplay and Jeffrey Musto. Ms. Messplay recently left our firm and joined the Peterson Wampold firm in Seattle to pursue her appellate practice. Ms. Messplay had been with Van Siclen Stocks Firkins since 2014. She is a graduate of the University of Virginia School of Law in Charlottesville, Virginia, where she served as a contributing editor on the Virginia Journal of International Law. She served on the Washington Court of Appeals, Division I, as a Law Clerk for the Honorable Stephen J. Dwyer. She has since returned to court multiple times to argue on behalf of her clients, including in In re Marriage of Lane, 188 Wn. App.

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597 (2015). Stephanie regularly assisted me in handling complex litigation matters in addition to representing clients in complex litigation matters on her own. Ms. Messplay was the primary associate assisting me in this case. I believe the rate of $400 per hour is reasonable for the work she performed on this case.

8. Jeffrey Musto also worked on this matter. Mr. Musto remains with our firm concentrating his practice on complex litigation including personal injury, medical malpractice and employment law. He graduated from the University of Washington School of Law, with honors. He received two degrees from the University of Pennsylvania, B.A., double major in Psychology and Political Science, 2009. Jeffrey previously worked for Ralph Nadar at the Center for Study of Responsive Law, which is Mr. Nadar's principal office, founded in 1968. I believe the rate of $400 per hour is reasonable for the work he performed on this case.

9. Diana Butler has been my paralegal for the last 25 years. She was the responsible paralegal in all of the matters I referenced above. Diana handles all complex civil litigation matters in my firm. She was responsible for all paralegal duties associated with this case. Given the length and nature of her experience, I believe the rate of $175 per hour is reasonable for the work she performed in this matter.

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10. Below is the breakdown of hours and dollars for each person's work on this case:

USER	TOTAL HOURS	TOTAL DOLLARS
Diana Butler	554.80	$97,002.50
Jennifer Hamblen (Paralegal)	.7	$122.50
Jeffrey Musto	24.3	$9,720.00
Stephanie Messplay	423.2	$168,325.00
David Nauheim	1021.6	$459,720.00
Tyler Firkins	1901.55	$948,545.00
TOTAL	3,926.15	$1,683.435.00

History of litigation

11. Mr. Nauheim first contacted me 2013. I met with David to discuss his idea for a class action. I believe David contacted me because of my work in a similar case, *Barquest v. Farmers*. I drove to meet David and discuss the case. We then agreed to meet with one of David's clients whom we thought might be an appropriate class representative. I reviewed her file but learned that she did not want to serve in that capacity once we explained the process to her. David and I continued to periodically discuss the case. Eventually David and I discussed another client of his, Brett Durant. I began doing significant prefiling research in early 2014, and determined that I thought the case would be appropriate as a class action. I then researched Brett's case and the work David had done on it.

12. In 2014, Mr. Nauheim and I reached an agreement to co-counsel the case and entered into a contingent fee agreement with Mr. Durant who had agreed to serve as the class representative after having the duties explained to him. The fee agreement provides for a 33% contingent fee.

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13. I then continued performing substantial prefiling research into both the facts and the law not only of the regulations but also the issues that might arise in the certification process. David, my associate, and I began to draft the necessary pleadings that would be filed in the case.

14. I filed this action in King County Superior Court on April 9, 2014. [Dkt. 1, Ex 2.] Instead of Answering the Complaint, State Farm moved to dismiss under Rule 12(b)(6) with a myriad of legal theories that we had to research and defeat. At the same time, we brought a cross motion for Partial Summary Judgment. On September 19, 2014, Superior Court Judge Susan Amini denied State Farm's Motion to Dismiss. Judge Amini did not rule on the Plaintiff's Motion for Partial Summary Judgment. State Farm then answered the Complaint.

15. Subsequently, we served extensive discovery requests, which State Farm resisted. Class counsel then successfully moved to compel discovery responses and obtained an Order for State Farm to produce discovery responses, including 60 redacted randomized claims files. One of our earliest but most important victories was a motion to compel production of a select number of claim files.

16. David, my associate, Stephanie, my paralegal, Diana, and I began the time-consuming process of reviewing and analyzing, tens of thousands of pages of documents produced by State Farm, including the sixty claims files, some of which were over 1000 pages, and also claims handling manual and policies and training materials. We divided up the files for review among us, and we documented the analysis of each file in an elaborate spreadsheet. I then set about retaining necessary experts. I retained a bad faith and statistical

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expert, and I collaborated with them in their analysis of the claim files and the calculation of damages. The work took months and was necessary to support the Plaintiff's forthcoming Motion for Class Certification.

17. Meanwhile, I took precertification discovery depositions and a Rule 30(b)(6) deposition. The depositions entailed extensive review of State Farm claims handling manuals and constant work with the Class experts. I spent an incredible amount of time sifting through the records just to prepare for the depositions.

18. We also defended depositions taken by State Farm, including the depositions of Brett and Sarah Durant, and their treatment providers. We prepared responses to State Farm's numerous interrogatories and requests for production, which Mr. Durant assisted with. In addition to multiple sets of interrogatories propounded to State Farm, Class Counsel also obtained discovery via multiple Public Records Requests to the Office of Insurance Commissioner.

19. In May of 2015, we resisted a discovery motion brought by State Farm. The Court denied State Farm's motion, in part, but ordered the Plaintiff to answer one single disputed interrogatory.

20. In October of 2015, we completed analysis of the claims files, and various other claims handling policies, and moved in Superior Court for certification of the class. In making the motions, we spent vast amounts of attorney time developing the motion, and the evidence adduced in multiple declarations including the expert witness declarations. This work required an extensive knowledge of what statistical evidence could support class

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certification. This was an elaborate and high stakes motion because failure would be fatal to the goals of the lawsuit.

21. The motion for class certification revealed that the claims potentially exceeded $8,000,000.00 in damages. As a consequence, State Farm removed the case to Federal Court pursuant to Class Action Fairness Act. We moved to remand the case to state court. This Court denied the motion in May of 2016. After months of litigation in state court, the case would now proceed in the U.S. District Court for the Western District of Washington.

Proceedings in Federal Court

22. We then revised the motion for class certification for federal court and filed it. [Dkt. 27.] After extensive motion practice, this Court certified a class in March of 2017. [Dkt. 50.] At this point we stood a substantial risk of losing the case if this Court had not agreed that the case was not appropriate for certification. By this time, I had already advanced substantial amounts of money on behalf of the class.

23. State Farm moved for reconsideration of this Court's class certification order. This Court denied the Motion on July 10, 2017. [Dkt. 76.] State Farm then petitioned the Ninth Circuit Court of Appeals for discretionary review under Rule 23(f). We again successfully opposed that petition and the Ninth Circuit denied discretionary review.

24. This Court conducted a telephone conference with the parties on March 22, 2017. The Court asked the parties whether the MMI issue should be certified to Office of Insurance Commissioner (OIC). In response to this question, State Farm disclosed that the OIC was already considering the issue as it had instituted a Market Continuum Action against State Farm concerning whether its MMI provision violated WAC 280-30-395(1). After

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learning of those communications, David and I felt that moving for certification of questions to the Washington Supreme Court may provide a more neutral forum on behalf of the class.

25. We drafted the appropriate pleadings and moved to certify the issues to the Washington Supreme Court. State Farm resisted the motion. This Court granted our motion and after discussion certified two questions to the Washington State Supreme Court. [Dkt. 97.]

26. We then not only briefed the certified questions but also obtained the support of three organizations who all submitted amicus briefs: the Washington State Association for Justice, Society of Interventional Pain Physicians, and the Washington Chiropractic Association. We also drafted briefs responding to the various Amici.

27. The Office of the Insurance Commissioner also filed an Amicus Brief, which not only favored Plaintiff's legal interpretation of the MMI standard, it also referred to a letter ordering State Farm to revise the MMI language. We had not previously seen a copy of that letter.

28. We then moved the Court for permission to supplement the appellate record pursuant to RAP 9.11. State Farm sought to supplement the record with other information. This set off a round of motions in which State Farm also sought permission from the Supreme Court to submit other evidence and a declaration to explain the OIC letter disallowing the MMI language that had not been produced in discovery. We drafted an opposition to State Farm's motion.

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29. The Washington Supreme Court denied State Farm's motion to supplement the record, but granted the Plaintiff's motion to supplement. The MMI Disapproval Letter was importantly admitted into the appellate record.

30. David and I then extensively prepared for the high-stakes oral argument, including several moot court sessions. This preparation also involved a large amount of time reading and re-reading significant case. The case was argued on March 13, 2018.

31. On June 7, 2018, the Washington State Supreme Court handed down a 9-0 decision in favor of the Plaintiff Class. The decision not only established that State Farm's use of the MMI standard violated insurance regulations, but it also interpreted for the first time, the term "reasonable and necessary medical care" in RCW Chapter 48.22. The court held that reasonable and necessary medical care includes "palliative care, or care to maintain a stable condition, rather than to improve a person's condition." *Durant v. State Farm*, 419 P.3d 400, 406 (2018).

32. Subsequently, we began preparing a motion for sanctions against State Farm and drafting additional discovery in order to expand the class and update discovery on medical bills denied.

33. After the Washington State Supreme Court's opinion in *Durant v. State Farm*, I began discussing potential settlement frameworks with State Farm's lead counsel, Frank Falzetta. After some discussions, Frank and I realized we could not settle the matter without the assistance of a skilled mediator. We agreed to mediate with Rob Kaplan, a nationally renowned mediator of high value bad faith insurance cases. Mediation was conducted in San Diego on August 21, 2018.

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34. Prior to the mediation, I spent a substantial amount of time dealing with the damages calculations and how to convey that information with my statistical expert. We also spent a great deal of time dealing with the remaining issues, including the specter of decertification, and State Farm's various affirmative defenses. We prepared extensively for the mediation including updating damages spreadsheets repeatedly and asking State Farm for updates.

35. The most contentious issue in mediation was the form of the settlement. State Farm would only offer a "claims made" settlement. This form of settlement has very low participation rates because consumers are required to fill out forms in order to receive compensation. I had dealt with this sort of settlement in the *Barquest v. Farmers* case and I was unhappy with the participation rate. We therefore refused to negotiate unless State Farm would agree to negotiate for an "opt out-lump sum settlement," which would ensure that consumers would be paid without having to fill out forms, thereby ensuring nearly universal participation and compensation.

36. During the mediation we refused various "claims made" offers for hours. It appeared to both David and I that the mediation would fail. We were prepared to leave. In fact, I recall that I was actually preparing to leave when State Farm agreed to our settlement framework. We reached agreement for $18,500,000 lump-sum settlement. The Settlement Agreement provides that all class members who do not opt out will participate in the recovery.

37. Once a preliminary settlement was achieved, there was still a great deal of work to be done. We negotiated the form of the final settlement agreement, CAFA notice,

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the amended notice and notice of settlement. We drafted the motion for preliminary approval, and hired a notice administrator. We set up a website. I also worked with my statistical expert on the method, mathematically, to accomplish the settlement. Once all of those pleadings were filed, and this Court preliminarily approved the settlement, I worked with the administrator on preparing the notice for mailing and mailing it.

38. After the notice was mailed, as is common, we received a barrage of phone calls which my paralegal and I have responded to now for weeks. Some class members have actually come to my office to meet with me. I have also been working with the administrator and State Farm to locate alternate addresses for 128 class members whose mailed notices were returned as undeliverable.

39. We have a lot of work left to perform including finishing and filing the motion for final approval which includes reporting on all opts and objections and responding to the same. We are also still tracking down class members pursuant to the preliminary approval order. Assuming this Court finally approves the settlement, I will be required to continue to work with Rust Consulting to make sure all class members are paid by continuing to work with my expert to run his program, and for Rust to issue payments and report to the Court any remaining issues. There also remains the issue of potential objectors and appeals. There is even the possibility that a "professional objector" may need to be dealt with. The work remaining to be performed represents a substantial number of hours.

Quality of Results Obtained by Class Counsel

40. Ultimately, we negotiated the Settlement Agreement that is currently before the Court. This Settlement Agreement ensures maximum participation by class members, is

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simple, and economical to administer. Each consumer will receive an amount that is greater than the actual medical bills which State Farm improperly denied, even after the award of the requested attorneys' fees, administrative expenses, costs and the proposed incentive award. In fact, I worked with Dr. Sampson to calculate the approximate recovery. The median recovery will be 120% after attorneys' fees, awards, administrative expenses and costs. Every class member will receive at a minimum 100% of the medical bills denied pursuant to the class definition. Thus, we accomplished 100% ability to participate with more than 100% compensation. Few class actions can claim to achieve such success.

41. This case, in my opinion, has put an end to State Farm's MMI claims handling practices. Hundreds of Washington lawyers simply ignored it. I think David contacted other lawyers about bringing this case who did not wish to undertake the case. But as reflected by this settlement, more than 4,000 Washington consumers will directly benefit from this action. Still more consumers will benefit from our work on this case.

42. The *Durant v. State Farm* decision is a landmark case with far reaching impact in my opinion. It sets the standard for coverage of all PIP claims in the state of Washington by declaring, for the first time, that reasonable and necessary medical treatment includes palliative treatment. The ruling means that auto insurers in Washington must include palliative treatment in their PIP coverage.

43. Mr. Nauheim and I have both commented to one another that auto insurers in Washington have begun changing their practices in light of the decision. Allstate Insurance Company has been sending letters to insureds who had PIP benefits terminated based on

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having reached MMI, notifying them of the decision and inviting them to submit any medical bills that were incurred after their PIP coverage was terminated.

44. I recently learned on my listserv that three separate copycat class actions have begun seeking to stop similar claims handling practices by other insurers. (*See, Mikeshia Morrison v. Esurance Insurance Co.* (Case No. 2:18-cv-01316-TSZ); *Merle Nichols v. Geico General Insurance Co.* (Case No. 2:18-cv-1253 RAJ); and *Joel Stedman v. Progressive Direct Insurance Co.* (Case No. C18-1254 RSL)

45. The decision is also impacting third party and UIM personal injury claims. The concept of "reasonable and necessary medical care" is central to every personal injury claim. In particular, I am attacking Defense Experts relying on the old theory of MMI to express opinions about whether treatment is reasonable and necessary. I have heard others are filing motions to exclude such testimony.

46. The decision is also important because it was the first time the Washington Supreme Court has clearly articulated the public policy behind PIP coverage. The Court stated: "This regulation and the noted statute reflect Washington's *strong public policy in favor of full compensation* of medical benefits for victims of road accidents." *Durant*, 419 P.3d at 407 (emphasis added).

Risks to Class Counsel

47. This case represented an extensive risk to me and my law firm. I knew I would be advancing all the costs for this class action, including payments made for multiple experts and maintaining large amounts of ESI. I also knew that taking this case would involve a great deal of my time, the time of my associates and the time of my paralegal. Over

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the years that has proven to be true. At times of intense litigation, I was not available to even meet with potential clients and likely lost a lot of business in the process. I stood the very real risk from the beginning until the present that there would be no recovery and that the substantial costs I advanced would never be recovered. Thus, not only would I lose all the time in the case, more than a million dollars of time, but also the loss of actual cash money paid to experts and for documents.

48. I think it is instructive that I was not the first lawyer David talked to about the case. It is my understanding that others refused to participate.

Quality of Adversary

49. This case was risky for financial reasons but also because of the lack of clear law on the subject. We had to make the law in this case. And we had to do so against two nationally celebrated law firms. Lead counsel for State Farm, Frank Falzetta, is a nationally renowned defense lawyer specializing in class action defense. He had, at his disposal, multiple associates who spent a tremendous amount of time litigating this matter for years. State Farm, the defendant, also has substantial resources to contest this matter. In the end, even after class certification, we were forced to go to the Washington Supreme Court before the defendant and their skilled lawyers would even discuss settlement.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS A TRUE AND CORRECT STATEMENT.

DATED this 5th day of April 2019 at Auburn, Washington.

/s/ Tyler K. Firkins

Tyler K. Firkins

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