

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Claudia Wilken, Judge

SIDNEY NAIMAN, INDIVIDUALLY )  
AND ON BEHALF OF ALL OTHERS )  
SIMILARLY SITUATED, )  
 )  
Plaintiff, )  
 )  
VS. )  
 )  
TOTAL MERCHANT SERVICES, INC., )  
ET AL., )  
 )  
Defendants. )  
\_\_\_\_\_ )

NO. CV 17-03806-CW

Oakland, California  
Tuesday, October 9, 2018

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

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(Appearances continued on the next page)

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**BY: KEVIN LIU, ESQUIRE**

1 Tuesday - October 9, 2018

2:24 p.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Calling CV 17-3806, Naiman vs. Total  
5 Merchant Services, Inc.

6 Counsel, please state your appearances.

7 **MR. PARONICH:** Good afternoon, Your Honor. Anthony  
8 Paronich for the plaintiff.

9 **MS. JAFFE:** Good afternoon, Your Honor. Jill Jaffe  
10 for Total Merchant Services.

11 **MR. ZANN:** Good afternoon. Lawren Zann,  
12 telephonically, on behalf of defendant Total Merchant Services.

13 **THE COURT:** And you are?

14 **MR. FUGNER:** Good afternoon, Your Honor. Jon Fougner  
15 for the plaintiff.

16 **MR. LIU:** Good afternoon, Your Honor. Kevin Liu for  
17 defendant Quality Merchant Services.

18 **THE COURT:** Okay. Why don't you come up as well.

19 Is there anyone else here? Is anyone appearing for --  
20 what's the individual's name? Alterman?

21 **MR. PARONICH:** For the individual Alimento?

22 **THE COURT:** Alimento.

23 **MR. PARONICH:** Yes. So Alimento -- there is -- his  
24 company is Quality Merchant Services, and for him as an  
25 individual, there is a stipulation of dismissal that's pending.

1 So other than the attorney for his company, I don't think he  
2 has separate individual counsel.

3 **MR. LIU:** Your Honor, Kevin Liu here. We represent  
4 defendant Brian Alimento as well, and we did -- we did  
5 stipulate to a dismissal early on and -- I think it was June or  
6 July, early this year.

7 **THE COURT:** Okay. Well, I have a number of questions,  
8 and that's one of them. Why are you dismissing Quality and  
9 Alimento and why did Collins dismiss his claims?

10 **MR. PARONICH:** So Dr. Collins, Your Honor, dismissed  
11 his claims because they related to separate telemarketing  
12 conduct. There were fax advertising messages that we resolved  
13 individually because the evidence we were able to gather showed  
14 that the conduct was not very far-reaching. There weren't many  
15 faxes to send, and unlike Quality Merchant Services, Mr. Powers  
16 sent faxes for a number of different payment process providers  
17 at once.

18 **THE COURT:** Who is Mr. Powers?

19 **MR. PARONICH:** Robert Powers is the individual that --  
20 the case had Dr. Collins, who was suing Total Merchant Services  
21 and Mr. Powers as the alleged agent for Total Merchant  
22 Services. And then Mr. Naiman was suing Total Merchant  
23 Services and Quality and Mr. Alimento as the alleged agent, but  
24 they were two different telemarketing programs.

25 **THE COURT:** Okay. So you're dismissing Collins'

1 claims because they were claims about faxes, and there weren't  
2 enough faxes to make it worthy of a class action or worthy of  
3 his own pursuant of it?

4 **MR. PARONICH:** So we did -- we resolved it  
5 individually. He was -- he got his statutory damages for his  
6 individual claim, but -- that is correct. There were not  
7 enough faxes for there to be a class claim. And the evidence  
8 about those faxes as for them allegedly being on behalf of  
9 Total Merchant Services, it was not apparent if they were  
10 actually sent on behalf of Total Merchant Services or one of  
11 the other many payment processors he's worked with.

12 **THE COURT:** So are fax claims being released in this  
13 settlement?

14 **MR. PARONICH:** They are not, Your Honor. They are  
15 released in his individual settlement for his individual --  
16 Dr. Collins' individual claims, but for no other class members.

17 **THE COURT:** Nobody else is releasing any fax claims?

18 **MR. PARONICH:** No, Your Honor.

19 **THE COURT:** Why are you releasing Quality given that  
20 it appears to be only Total that is doing anything to garner a  
21 release?

22 **MR. PARONICH:** During the settlement negotiations and  
23 the mediation, Quality attended, and when the defendants and  
24 plaintiffs were exchanging terms of settlement, releasing both  
25 parties, the money does appear to me to be coming from Total

1 Merchant Services, but it is also possible Quality is  
2 contributing directly to Total Merchant.

3 I don't know, but I know that when we were presented with  
4 the settlement terms during the mediation, it would be for a  
5 release of both of the defendants for the telemarketing  
6 conduct.

7 **THE COURT:** So is it your view that the 7.5 million  
8 isn't an appropriate amount for all of the conduct, whether it  
9 was committed by Total or by Quality?

10 **MR. PARONICH:** Our view is that the 7.5 million is a  
11 satisfactory number for both the vicarious liability conduct  
12 and the direct liability conduct of the Alimentos when taking  
13 into account the financial condition of the Alimentos and their  
14 company, which is not very strong.

15 **THE COURT:** Well, that's sort of my question. Have  
16 you checked into the financial circumstances of Quality or the  
17 Alimentos?

18 **MR. PARONICH:** It was one of the first things we did  
19 when they were able to retain counsel, and Your Honor may  
20 recall at the beginning of the case, there was a bit of a back  
21 and forth as there was a corporate pro se Answer filed and then  
22 they finally did retain counsel.

23 Unfortunately, from our perspective, we verified that the  
24 insurance policies that the Alimentos had for the business had  
25 explicit TCPA exclusions and that their revenue numbers were --

1 they were very modest.

2           **THE COURT:** So what was the difficulty with finding  
3 vicarious liability on the part of Total?

4           **MR. PARONICH:** That's a good question, Your Honor.  
5 So the difficulty, as --

6           **THE COURT:** Maybe I should ask them if you feel  
7 constrained in explaining it to me.

8           **MR. PARONICH:** I'd be happy to answer or to supplement  
9 anything that they have to say if they don't cover my views as  
10 well, whatever your preference would be.

11           **THE COURT:** What is the problem with finding liability  
12 against Total?

13           **MS. JAFFE:** Lawren, do you want to --

14           **MR. ZANN:** Sure.

15           Your Honor, I'll -- absolutely. Lawren Zann on the  
16 telephone, Your Honor, if I may.

17           So in order to establish the vicarious liability, whether  
18 plaintiff chooses to travel down the traditional agency  
19 approach and goes into actual, apparent, or ratification, or if  
20 plaintiff decides to go down the *Jones* approach and the 10  
21 factors analyzed under *Jones*, we believe under either approach,  
22 the control analysis that is necessary to establish the  
23 agent-principal relationship, it's missing.

24           In terms of the actual analysis, there is no actual  
25 permission granted from TMS to QMS to engage in the

1 telemarketing activity that's at issue in this case. At times,  
2 it's talked around, but there is never that direct authority  
3 provided.

4 As far as the apparent agency angle is concerned, there  
5 are no communications between TMS directly with the plaintiff  
6 in this case, Mr. Naiman. So there is no manifestations on  
7 behalf of TMS that led Mr. Naiman to believe QMS had the  
8 authority to act on behalf of TMS.

9 As far as the ratification analysis goes, because there  
10 isn't that agent relationship in the first place, which is a  
11 prerequisite to establishing ratification, we would argue that  
12 that could not be met either.

13 And then when we look at the ten *Jones* factors -- the  
14 control exerted, whether or not QMS was employed in distinct  
15 occupation, whether or not QMS performed work under the  
16 supervision of TMS, the tools of instrumentalities of the sale,  
17 the payment, whether it's by time or job, as well as the  
18 subjective intent of the parties -- those seven factors weigh  
19 strongly against the control -- control of TMS over QMS.

20 And, you know, the subjective intent, it's set out in the  
21 contract itself. And the remainder of those factors, the  
22 control exerted by employer, in this case TMS, being very  
23 little, the tools and instrumentalities provided by TMS  
24 vis-à-vis those provided by QMS weigh strongly on QMS's side  
25 and so on and so forth. Those factors came out during

1 discovery and principally through the oral depositions of the  
2 Alimentos, both individually and as corporate rep on behalf of  
3 QMS.

4 **THE COURT:** What would you say for the plaintiff?

5 **MR. PARONICH:** Yes, Your Honor.

6 When we were evaluating vicarious liability at the  
7 beginning of the case as it related to the Quality and Total  
8 relationship, we started with the contract, and it wasn't  
9 surprising to us to see that independent contractor provision  
10 in there, but that's, of course, not dispositive.

11 But then what we looked at, because it varies in the TCPA  
12 cases, and the Ninth Circuit has seen it in *Jones*, and plenty  
13 of district courts have seen it in other cases -- there are  
14 plenty of alleged principal-agent relationships where the  
15 principal will provide the dialer, the telephone numbers, the  
16 script, the recorded message, or some of these, what I would  
17 call -- these principal telemarketing tools to allow their  
18 alleged agent to function and to generate new business for  
19 them.

20 I think this is a substantial recovery for the class, but  
21 I must admit that none of those four principal tools from  
22 alleged principal to alleged agent were present in this case,  
23 and we've seen them present in plenty of other TCPA cases.

24 **THE COURT:** So the entity whose services were being  
25 solicited for was Total?

1           **MR. PARONICH:** Yes.

2           **THE COURT:** And Total made a deal with Quality to  
3 solicit business for Total?

4           **MR. PARONICH:** Yes. That's right. But there was  
5 no -- sorry. I don't --

6           **THE COURT:** So your idea would be that Total just told  
7 Quality, "Get us some business," but didn't either know or  
8 allow them -- either allow them, tell them, or even know that  
9 they were doing so by way of automated calls?

10           **MR. PARONICH:** Right. And to not make the defendants'  
11 argument for them, but also part of the contract between the  
12 parties, there was an unequivocal statement that anything you  
13 do to solicit business for us was going to be in compliance  
14 with state and federal law, and the reality was that what --  
15 what the plaintiff alleges the Alimentos were doing was  
16 certainly not.

17           **THE COURT:** But when Mr. Naiman becomes solicited, he  
18 understands he is being solicited on behalf of Total.

19           **MR. PARONICH:** When he -- he listened to the  
20 solicitation and participated in it long enough to find out  
21 that it was being -- there was a call that was happening on  
22 behalf of Total.

23           But in the prerecorded message that was played, for  
24 instance, on the call, it did not say, "Please sign up for  
25 these payment processing services with Total Merchant." It was

1 more generic than that.

2 **THE COURT:** So regardless of what kind of money  
3 Quality has, did you explore the possibility of some sort of  
4 cease and desist agreement from Quality?

5 **MR. PARONICH:** Cease and desist agreement with respect  
6 to acting on behalf of Total Merchant?

7 **THE COURT:** No. Of disobeying the law by using  
8 automated phone calling.

9 **MR. PARONICH:** So -- apologies, Your Honor, for not  
10 understanding first. But one of the first conversations we had  
11 with their counsel was to explore discovery, to obtain the --  
12 the records of this calling conduct allegedly on behalf of  
13 Total Merchant, and to find out if it was still going on. And  
14 what we learned is before Total Merchant -- excuse me -- before  
15 Quality Merchant was brought into the lawsuit, they were served  
16 with a subpoena seeking information that would identify class  
17 members and information about the potential vicarious liability  
18 of Total Merchant for their conduct, and when they were in  
19 receipt of that subpoena, they stopped all of their automated  
20 calling practices.

21 **THE COURT:** But maybe they start up again tomorrow.

22 **MR. PARONICH:** Well, the --

23 **THE COURT:** If you're not negotiating for a cease and  
24 desist order on their part.

25 **MR. PARONICH:** Understood. Part of the settlement and

1 the non-monetary prospective relief is that Total Merchant has  
2 terminated its relationship with Quality --

3 **THE COURT:** I saw that. But maybe Quality then finds  
4 some other principal and continues its business bothering  
5 consumers with automated telephone calls.

6 **MR. PARONICH:** That's a fair point, Your Honor.

7 From our conversations with their attorneys, that -- my  
8 understanding is they aren't using any of that equipment  
9 anymore, but if you look at this Settlement Agreement in a  
10 vacuum and you say is there anything in there that requires  
11 Quality to no longer engage in this conduct, I would have to  
12 concede that's not true.

13 **THE COURT:** Right. I did read it.

14 **MR. PARONICH:** Yeah. You'd be right.

15 **THE COURT:** Well, I have a number of problems, and at  
16 least some of them are going to end up with some suggestions of  
17 changes to the agreement, and I'm going to have you submit  
18 another proposal.

19 And so one of the proposals I would make would be that you  
20 explore the possibility with Quality and the Alimentos of  
21 agreeing as part of their release, because they are being  
22 released in this settlement -- that as part of their release,  
23 they agree to obey the law and not to use these sorts of  
24 mechanisms anymore. That shouldn't be too much of a stretch, I  
25 wouldn't think, for someone to agree to obey the law.

1 Another concern I have is the apparent similarity of the  
2 names of Total Merchant and Quality Merchant and a question as  
3 to whether there is some relationship with them. Have you  
4 checked into their boards of directors or their principals or  
5 any connections between them that might lead us to believe that  
6 one is getting off the hook while the other one is going to go  
7 on with the same kind of conduct or anything of that nature?

8 **MR. PARONICH:** The -- as even I've been talking today  
9 you've seen I have confused them, so this has come up in the  
10 litigation, but the -- our understanding, explored through both  
11 the Rule 33 and 34 discovery, as well as the depositions that  
12 we took, is that the -- Quality Merchant Services is just run  
13 by Brian Alimento and Michael Alimento and then potential, you  
14 know, 1099 workers that they have, and there is no -- they have  
15 never been directly employed or share any kind of ownership  
16 interest with Total Merchant Services.

17 **THE COURT:** Have you asked Total Merchant about that?

18 **MR. PARONICH:** But -- that was also confirmed in the  
19 Rule 33 and 34 discovery to Total Merchant, and then in  
20 deposition, we asked Quality Merchant as well, and maybe Lawren  
21 or somebody from Total Merchant could even more specifically  
22 address this, but I'm confident that there is no common  
23 ownership or joint interests.

24 **THE COURT:** Total agrees not to use Quality anymore,  
25 but Total doesn't agree not to use automated dialing equipment,

1 so that might be another thought, would be to ask Total to  
2 cease and desist, not only using Quality, but using any company  
3 or even on its own violating the TCPA.

4 **MR. PARONICH:** Understood, Your Honor. I guess  
5 when -- just as we explore when we'll submit a revised proposal  
6 for your consideration, the -- using automated dialing  
7 equipment is sometimes permissible if you have --

8 **THE COURT:** Okay. Well, doing whatever it is that  
9 violates the law. I mean, you can narrow it down more. But  
10 the point would be not making illegal phone calls to consumers.

11 **MR. PARONICH:** Understood, Your Honor.

12 **THE COURT:** I have some concerns about a number of  
13 different things that seem to vary amongst the Complaint, the  
14 class definition, the release, and the covenant to sue.

15 The first one is "calls by cell phone" or "calls by cell  
16 phone or other mechanism for which a person is charged." Now,  
17 I can't remember how it goes. I think the Complaint alludes to  
18 both. The class definition only alludes to cell phones, and  
19 I'm not sure what the release alludes to.

20 The bottom line is I think the release is too broad, and  
21 I -- to the extent the release is broader than the Complaint, I  
22 have a problem. To the extent the release is narrower than the  
23 Complaint, I guess I don't have as much of a problem. And I  
24 can't remember how each of these things went, and I didn't  
25 write them all down on my notes, but in some of the -- in some

1 of the places, it talks only about cell phones and in others,  
2 it talks about cell phones and other phones for which the  
3 receiver gets charged or something of that nature.

4 Why is there that difference?

5 **MR. PARONICH:** So I understand what you're saying,  
6 Your Honor, and just to clarify, the Complaint talks just about  
7 cell phones -- they are both the same subsection of the TCPA,  
8 but the Complaint just mentions cell phones and the class  
9 definition before you does mention both cell phones and other  
10 number -- other phones which the parties charge for the call,  
11 which is almost always cell phones, but there could be a  
12 scenario, especially if Your Honor is expressing a concern for  
13 that -- that would be another thing the plaintiff would be  
14 willing to talk about with the defendant, is having this  
15 settlement marry what is in the Complaint, which is just  
16 mentioning cell phones.

17 **THE COURT:** Okay. And then the release would only  
18 mention cell phones?

19 **MR. PARONICH:** Yes. That's correct, Your Honor.

20 **THE COURT:** And the covenant not to sue.

21 The same concern comes with respect to "Spitfire" versus  
22 "Spitfire or something else like Spitfire."

23 **MR. PARONICH:** Understood, Your Honor, and I -- I  
24 think it will be -- this is a conversation that the parties had  
25 while negotiating. I think left to ourselves to submit to you

1 a revised order, I feel confident that we would be able to  
2 clarify the intention of the parties and just do a better job  
3 with the language. The intention of the parties is just to  
4 relate conduct on the Spitfire dialer.

5 **THE COURT:** Okay. Well, ideally everything would  
6 match. The Complaint would say the same thing that the class  
7 definition says which would say the same thing as what the  
8 release and the covenant not to sue say.

9 **MR. PARONICH:** Just to be clear, Your Honor, your  
10 point earlier about mentioning both cell phones and a telephone  
11 that the receiving party is called on, that is slightly broader  
12 than the Complaint, but just mentioning the Spitfire Dialer,  
13 that would be much narrower that's in the Complaint. So that's  
14 why the parties submitted that.

15 There is a number of different dialing systems that, you  
16 know -- I don't think the Alimentos used any other ones, but  
17 this -- this settlement because these calling records just  
18 relates to one specific dialer, so that would be narrower than  
19 what is in the Complaint.

20 **THE COURT:** Except if the release says "doing this or  
21 anything like it, including, but not limited to," then that  
22 could in turn bring back in more than Spitfire and bring back  
23 in other things that are like Spitfire that aren't Spitfire.

24 **MR. PARONICH:** Understood, Your Honor. The parties  
25 intention is to limit this to Spitfire, and so that will be

1 unequivocally clear in the next iteration.

2           **THE COURT:** Okay. Well, this is in no particular  
3 order, but I want to alert to you the fact that what I do in  
4 determining attorneys' fees is I crosscheck against lodestar,  
5 so you didn't have to do it now, but you should understand that  
6 while 25 percent is within a sort of a range of reasonableness,  
7 that may not be the case in a case that was settled very early  
8 on and that I will want to see not every dot of I and cross of  
9 T, but I will want to know what your representation is as to  
10 your hourly rate and the number of hours you've got in the  
11 case, and I'll consider that in deciding the fairness of a 25  
12 percent common fund.

13           **MR. PARONICH:** Understood, Your Honor. I think there  
14 was a substantial amount of work done in the case, but to cut  
15 to the chase, our fee brief will have our lodestar --

16           **THE COURT:** Okay.

17           **MR. PARONICH:** -- in it.

18           **THE COURT:** And similarly, the class -- the class  
19 representation service award, 10,000 is on the high side,  
20 particularly for a case that settled relatively early, so I  
21 will want to see a more fulsome description of what Mr. Naiman  
22 actually did.

23           **MR. PARONICH:** In our fee brief, Your Honor, we also  
24 traditionally include a section on the incentive award and the  
25 litigation costs.

1           **THE COURT:** Okay. And there is Ninth Circuit law, as  
2 I'm sure you're aware, about multiples of the expected recovery  
3 of the typical class member vis-à-vis the incentive award, and  
4 a hundred percent, 200 percent tends to sometimes not be  
5 approved. So --

6           **MR. PARONICH:** We'll --

7           **THE COURT:** You will get to that.

8           **MR. PARONICH:** We will be prepared to address that.

9 And I also want to point out, Your Honor, as it relates to both  
10 attorneys' fees and the incentive award, none of these are  
11 conditional or blowup provision triggers in our settlement.

12           **THE COURT:** I'm aware of that.

13           So I have some interest in -- well, I always have an  
14 interest in making it easy for people to claim their money, and  
15 in this particular case and cases like it, sometimes it seems  
16 possible to send money without a claim form. And I wondered  
17 whether you had discussed that, thought about it.

18           I understand that the problem would be you'd be assuming a  
19 10 percent recovery rate to estimate how much you think  
20 everybody is going to get. You couldn't assume that when you  
21 sent the check. You would have to assume a hundred percent  
22 recovery or something like it. Then you'd have to do a second  
23 round, and maybe all of that is the reason why you don't want  
24 to do it that way.

25           Another idea might be to send out the postcard and tell

1       them, "Here is how much we think we'll send you and here is the  
2       address we think we'll send it to, and if we send it and it  
3       doesn't" -- whether it comes back or not, "if you don't respond  
4       or you don't cash the check, you'll be releasing your claims  
5       anyway," that would still have the problem of -- of not being  
6       able to send out the full amount.

7               I'm guessing that you used 10 percent because that --  
8       research shows that that's a typical outcome from a class  
9       notice like this one.

10               **MR. PARONICH:** We --

11               **THE COURT:** Am I right?

12               **MR. PARONICH:** We did, Your Honor. And I'll just  
13       admit I constantly struggle with this issue of doing a claims  
14       process or not in terms of representing the -- doing the best I  
15       can to represent the class that I seek to represent, you  
16       struggle with should you do a claims process at all or do you  
17       just keep hammering away at litigation and settlement until  
18       there is enough money on the table where you can just  
19       distribute the check to all your class members.

20               And I will say that in TCPA cases, there have been an  
21       instance or two where we have just distributed checks. And I  
22       will explain, from our perspective, why we didn't recommend  
23       that here but would be willing to hear from the Court.

24               We explained earlier that there were none of those kind of  
25       four big factors of direction and control that we look at in

1 vicarious liability with these alleged principal and agents,  
2 and one of them is sending -- sometimes our alleged principal  
3 will provide the alleged agent with the data to make calls on  
4 because, you know, for whatever reason, it's data they've  
5 harvested, it's their customer list, it's something like that.

6 Here that's not the case. Quality went to a third party  
7 that it found on the internet, and the testimony was --  
8 actually I think it was the first Google hit for buying  
9 telephone numbers and just made an internet transaction with  
10 that company and got data and started calling on it.

11 You can look the data and tell even by the fact that they  
12 purchased names and addresses, but 20 percent of them didn't  
13 have names and addresses and a lot of the names look fake. The  
14 data is just simply -- it's not even imperfect. It's not that  
15 great.

16 So the decision we made -- and this was part of  
17 negotiation because, you know, to be frank, Your Honor, at  
18 \$7.5 million for 50,000 people, I would not be embarrassed  
19 walking that settlement with the risks presented in this case  
20 on vicarious liability and recommending that that's a -- that's  
21 an amount that I think compares favorably to other TCPA cases,  
22 even that have a claims process.

23 The issue is that the choice that we made was making this  
24 claims process that we think we needed to do because of this  
25 unverified data as easy as possible, and the claims process

1 we've engaged in is a postcard that is telling exactly what you  
2 were talking about earlier, Your Honor. Here -- it will be a  
3 pro rata distribution, but here based on our experience -- and  
4 we used the conservatively high 10-percent number because it  
5 would be better to manage expectations that way -- here is what  
6 we expect that you would recover.

7 Here using this unique claim ID, go online or call if you  
8 don't have internet access and we'll mail you one at no cost to  
9 you with a return mail for no cost to send it back. But you  
10 can go online, insert your claim number, and then in our  
11 papers, Your Honor, it pre-populates all of the fields: The  
12 name, the address, to the extent there is one in the data.

13 And most importantly, from my perspective, Your Honor,  
14 when we're thinking about just fully informing consumers of  
15 what's going to be in their best interests, we're also showing  
16 the number of calls that the calling data shows. And then the  
17 consumer can make a decision, "Oh, the calling data shows I  
18 have 15 calls. Well, you know what? I'm going to make a  
19 decision that I'm going to opt out and I'm going to try to file  
20 a small claims case on my own because that's -- that's worth it  
21 to me."

22 And putting all that data, including the pre-population  
23 and the number of calls, I think filling out this claim form is  
24 going to be just a matter of -- we said less than five minutes  
25 in the brief. I've done it because we practiced it before the

1 site would go live, and I'm no computer wizard. It's not  
2 difficult at all.

3 Sorry. That was a bit of a diatribe on -- this was not a  
4 "Okay, most TCPA settlements do claim forms; let's do claim  
5 forms." It was something that we thought about and we  
6 considered, and if the Court feels that there is a different  
7 way that we should be doing it, I would be willing to listen to  
8 that.

9 **THE COURT:** Well, I do have some ideas about the claim  
10 form, but what I was -- I understand that you couldn't tell  
11 them they're going to get the amount of money that they would  
12 get if there were only a 10-percent return. You'd have to tell  
13 them the amount they would get if there was a hundred percent  
14 return, perhaps, to be careful. And then that -- you'd  
15 necessarily have a second round, which would be expensive.

16 **MR. PARONICH:** Right. If we were -- sorry. I may  
17 have misunderstood.

18 But to answer your question, if we were simply sending  
19 checks, the notice absolutely would have to say it's not even  
20 how much you're expected to get, it's how much your check will  
21 be for because we're going to issue checks and then there will  
22 be a second round of notice if it's not administratively  
23 infeasible.

24 **THE COURT:** Right.

25 **MR. PARONICH:** So the way we did it we thought was in

1 the best interests of the consumers. There is another way to  
2 do it and it would look like that.

3 **THE COURT:** Okay.

4 So on the notice, there is a typo on page 1. It's about  
5 three quarters of the way down, and it says -- it has a phone  
6 number, and the phone number -- it says "phone number" and then  
7 it says the word "access." Something is missing there. And  
8 there is not a space between the "phone number" and "access."  
9 And I think there's even a word missing. I don't have it right  
10 in front of me now.

11 **MR. PARONICH:** Your Honor, is this on the postcard  
12 notice?

13 **THE COURT:** No. It's on the long-form notice.

14 **MR. PARONICH:** On the long form?

15 **MR. FOUGNER:** Right here.

16 **THE COURT:** I just made a note to myself. Did you  
17 find it?

18 **MR. PARONICH:** Yes. We see it. That's -- we  
19 provided -- that's actually my phone number because we  
20 provide -- we do -- our preference is to provide phone number  
21 for counsel and so class members can reach out, but there  
22 should be -- there is just a rogue -- there should be a  
23 deletion starting at "access" and for sentence flow, but that  
24 is certainly something we will fix.

25 **THE COURT:** And the website sample that you gave me

1 has some placeholder gibberish in it. You know how the  
2 computer people do, they write things that look like Latin.  
3 Well, that's still there. And also there is mention of another  
4 company called Pivot that is still there. So you need to proof  
5 read your web page.

6 **MR. PARONICH:** That's on the proposed web claim form  
7 page?

8 **THE COURT:** Not the claim form. It's the web page,  
9 period. It's like the landing page of the web or that's what  
10 it looks like, anyway.

11 The postcard -- I don't know what to say. The print is  
12 just too small, and you're trying to say a lot stuff. I don't  
13 know if this is actual size. I don't know what the font is,  
14 but it looks awfully small to me.

15 So where is it now? Is it in the --

16 **MR. PARONICH:** What exhibit is that? Exhibit 3 in the  
17 Settlement Agreement, Your Honor.

18 **THE COURT:** Exhibit 3 to the settlement. Is that,  
19 like, actual size?

20 **MR. PARONICH:** I was going to say to answer your  
21 question, the -- that was developed in conjunction with our  
22 proposed administrator to say this is what we want to say.  
23 What postcard can we fit it on that will say all of these  
24 things and still save the costs for class members of more  
25 postage, but with your direction, we can absolutely increase

1 the font size and just use a bigger form, even if that needs to  
2 be a letter versus a postcard.

3 **THE COURT:** Okay. Or you could cut some stuff.

4 **MR. PARONICH:** Yes. With your direction, we would be  
5 happy to cut some stuff as well.

6 **THE COURT:** I think the postcard is not a bad idea so  
7 they don't have to open a letter, and I didn't try doing this  
8 myself, but I think actually it would be better if you could  
9 keep it on a postcard if you can get rid of a lot of the stuff  
10 and say, "For more details, go to the web page." But why don't  
11 I leave that to you to take a shot at both.

12 The suggestion I would have, though, would be on front  
13 side of the postcard to say something more attention-grabbing  
14 and larger, such as, "You may be entitled to money from a class  
15 action settlement. See other side." And have that be in 14  
16 point font underlined and bolded and so on. And then once you  
17 get their attention, have the other side with perhaps less  
18 stuff.

19 **MR. PARONICH:** We will use less lawyer speak and make  
20 it bigger front font.

21 **THE COURT:** Yes.

22 And then on the second page, you know, if you read the  
23 first paragraph, it doesn't say what the case is about. And  
24 then you go to the second page, and it says, "Who is included:  
25 You were identified as someone who may have received one or

1 more of these phone calls," but there is no reference for  
2 "these." We don't know -- I mean, you know what phone calls  
3 you're talking about, but the reader doesn't yet because the  
4 reader hasn't seen anything like that.

5 So the first thing has to be, "This is a lawsuit about  
6 spam phone calls," or whatever you want to say, and then you  
7 can say -- and I wouldn't -- to be more encouraging, I would  
8 say something more like, "Records show that you did receive  
9 some of these calls," so they aren't thinking -- because when I  
10 get these things, I look at them and say do I want to claim  
11 that I bought this thing? I don't remember for sure. I'd  
12 rather not than be wrong.

13 But if you tell people "we already know that you" -- or  
14 "we think" at least or "your name is on a list" or whatever, I  
15 think that would make them feel more comfortable with making a  
16 claim if they knew that, "Yeah, I did get one of these calls"  
17 because I don't remember all the spam calls I ever got in my  
18 life and I wouldn't want to claim that I did, so some people  
19 might make a claim if they knew that there was actually  
20 evidence that they did get a call.

21 **MR. PARONICH:** We do try to stay away from statements  
22 that "you received," but I -- your point is well-taken and we  
23 can absolutely develop something --

24 **THE COURT:** Be a little more encouraging --

25 **MR. PARONICH:** Yeah.

1           **THE COURT:** -- than "you were identified as someone  
2 who may have received." I mean, I don't want to write it for  
3 you again, but you might think about trying to make it a little  
4 more encouraging.

5           **MR. PARONICH:** Understood, Your Honor.

6           **THE COURT:** I suppose you don't want to scare them  
7 either and say, "We found your name and address and social  
8 security number on a list."

9           **MR. PARONICH:** Sure.

10          **THE COURT:** But anyway, see what you can do about  
11 that.

12          **MR. FUGNER:** Your Honor, about one-third of the  
13 language on that postcard is from the district's procedural  
14 guidance. Is it acceptable to truncate that language and have  
15 it in full on the main form?

16          **THE COURT:** Yes. That's the tradeoff. Do you want to  
17 have so much stuff that you have to go to a letter format or  
18 you can make it short but still not misleading and keep it on a  
19 postcard? I would try to make it short but not misleading and  
20 keep it on a postcard.

21           What about CAFA? Has someone done the CAFA notice  
22 already?

23          **MR. PARONICH:** So CAFA was sent out within 10 days of  
24 the preliminary approval motion being filed, Your Honor.

25          **THE COURT:** To whom? All 50 states?

1           **MR. PARONICH:** I think there was the mailing list of  
2 58 entities that -- Lawren, if you would like to --

3           **MR. ZANN:** Yes, Your Honor. Lawren Zann here on  
4 behalf of TMS telephonically.

5           So CAFA notices were sent out to all state Attorney  
6 Generals, the United States Attorney Generals, as well as the  
7 Attorney Generals for the territories of Guam, Puerto Rico,  
8 Virgin Islands.

9           I believe that there were 54 total CAFA notices sent.  
10 They were sent in conjunction with our settlement  
11 administrator, who just recently provided a declaration to the  
12 effect of everything I just stated.

13           **THE COURT:** Okay. So when setting the schedule, we'll  
14 need to make that at least 90 days after the CAFA notice. You  
15 know that. And CAFA says the defendants are supposed to do it.  
16 I know there's cases where the settlement administrators do it.  
17 I don't see any problem with that, unless anyone else does.

18           Is it okay to have the -- was it the settlement  
19 administrator who did it?

20           **MR. PARONICH:** The settlement administrator --

21           **MR. ZANN:** They ultimately -- I'm sorry, go ahead.

22           **MR. PARONICH:** I was just going to say the settlement  
23 administrator working in conjunction with the defendant has  
24 done it in our experience in these cases and here as well, I  
25 believe.

1           **THE COURT:** And no one has any reason to believe there  
2 is a problem with that?

3           **MR. ZANN:** That is correct.

4           **MR. PARONICH:** No. In fact, Your Honor, it's often --  
5 because the settlement administrator does it so frequently,  
6 they have a process that I think makes it pretty efficient and  
7 effective.

8           **THE COURT:** Okay. So could you explain to me how --  
9 how you have a list of these people's names and addresses and  
10 phone numbers?

11           **MR. PARONICH:** Sure.

12           So the discovery in the case revealed that when Quality  
13 Merchant decided that it wanted to go telemarket to promote a  
14 payment processing services, it signed up with the dialing  
15 system, but then it had to find phone numbers to call. And  
16 what it went to was a company -- Dun & Bradstreet and --  
17 because their target was businesses. And they could purchase  
18 what I think -- Dun & Bradstreet would call it proprietary, but  
19 I think it's publicly-available business data. And the  
20 publicly-available business data on the Dun & Bradstreet  
21 website has a TCPA disclosure saying that you can use this for  
22 whatever purpose you would like, but you understand that you  
23 need to comply with all state and federal laws regarding  
24 solicitation.

25           Whether or not that was done here is often -- is up for

1 debate, but what did happen is they purchased this data, they  
2 used --

3 **THE COURT:** Quality did this or Total did this?

4 **MR. PARONICH:** No. And that's an important part of  
5 our vicarious liability, Your Honor. This is what Quality did.  
6 We have had TCPA cases where the alleged principal has done it.  
7 That is not what happened here.

8 **THE COURT:** Okay.

9 **MR. PARONICH:** So Quality went and purchased this  
10 information. They had the Dun & Bradstreet account. They  
11 provided Dun & Bradstreet with what are called SIC codes, S-I-C  
12 codes, which are different types of businesses that they wanted  
13 to target.

14 Dun & Bradstreet charges them money and sends them a list,  
15 which is name, address, telephone number, and I believe that is  
16 all that is included in the list. There is no other -- I mean,  
17 they're businesses so I don't think there would be that much  
18 personal identifying information anyways, but this is not  
19 something where they are also purchasing email addresses or  
20 anything like social security numbers or -- nothing like that.

21 But it just wasn't used for what Dun & Bradstreet's stated  
22 intended purpose is.

23 **THE COURT:** Okay. So you still have that list?

24 **MR. PARONICH:** We --

25 **THE COURT:** The defendant still has that list?

1           **MR. PARONICH:** We actually -- we obtained it in  
2 discovery and that is part of -- in our preliminary approval  
3 motion, we explained that when we're working on the estimated  
4 notice and administration expenses, how many actual, complete  
5 names and addresses are on those lists. That was part of the  
6 quote that the administrator did because, you know, if they're  
7 going to have to take -- you can take a phone number and find  
8 someone's name and address. It's not always perfect, but it  
9 can be done and it costs money.

10           But part of them putting together an accurate quote for  
11 this Court's consideration, as they're also seeking  
12 appointment, is to say, "Here is how many names and addresses  
13 we have and here is going to be the estimated cost for" -- I  
14 believe it's about 11,000 phone numbers that they need to go  
15 and get names and addresses for.

16           **THE COURT:** Yeah. Well, my -- another concern that I  
17 have about that is that I -- I guess that if somebody's letter  
18 is returned as undeliverable and they don't then submit a claim  
19 form, they are bound by the release.

20           **MR. PARONICH:** That would be true, Your Honor, but if  
21 a -- an address is returned as undeliverable, part of the  
22 administrator's quote is going -- I believe it's called the  
23 NCOA database.

24           **THE COURT:** You do a skip trace. I know.

25           But let's say ultimately you aren't ever able to do that,

1 then that person has released. So it seemed -- am I right?

2 **MR. PARONICH:** That is correct. But they wouldn't  
3 necessarily need -- if they have the website or they go on to  
4 the website, we also did provide an ability for them to submit  
5 a claim using their phone number, which may be different than  
6 your point, but I did want to point that out.

7 **THE COURT:** Right. No. What I'm getting at is that  
8 I'm concerned that somewhere down the road, somebody comes  
9 forward and says, "I didn't get mine and I want to sue," and  
10 you need to be able to show who -- who got mailed one.

11 So what I'm getting at is can we keep the list somewhere  
12 so that we'll be able to tell in the future who got sent a  
13 notice and what address it got sent to and whether it was  
14 delivered or not delivered?

15 **MR. PARONICH:** Yes. That is part -- I'm not sure if  
16 this is what happens in every TCPA case, but in all of the TCPA  
17 settlements we do, part of the administrator's quote is  
18 maintaining that list, and in their proposed final approval  
19 affidavit, they won't attach that list unless the Court wants  
20 it, but they will say, "Here is exactly how many people we  
21 reached, here is how many people we reached after doing the  
22 skip trace, and here is how many people we were never able to  
23 reach," and they have a list of, not just the numbers, but  
24 exactly who that was.

25 **THE COURT:** Which they keep for X numbers of years or

1 something?

2 **MR. PARONICH:** It might be five years, but I think  
3 it's several.

4 **THE COURT:** Is that written down somewhere so they  
5 will have to do that? Does their quote include them doing  
6 that?

7 **MR. PARONICH:** Their quote includes a contract that  
8 we've signed that has that as a provision.

9 **THE COURT:** Okay. Maybe in a supplemental filing, you  
10 could assure me of that.

11 **MR. PARONICH:** I'd be happy to do that.

12 **THE COURT:** Okay.

13 What do you think about the second round of checks being  
14 infeasible administratively or economically? Do you have a  
15 reason for wanting to make it vague like that or would you  
16 consider working out a formula in advance that said something  
17 like if it's going to cost \$3 to mail, then we won't do it  
18 unless the check is for at least \$10 or something along those  
19 lines.

20 **MR. PARONICH:** We've done it in the past, Your Honor,  
21 at \$5. I always want to give class member -- class members  
22 money instead of cy pres. I'm -- is the language here just  
23 administratively infeasible, because usually we say that and  
24 then say, "i.e., \$5," but we're happy to make it --

25 **THE COURT:** I would consider defining it so you don't

1 have disputes over what is infeasible and what isn't. It could  
2 conceivably say "come back to court," but I don't especially  
3 want to decide it either. So if you could agree on what dollar  
4 amounts you think are infeasible, then you could just plug that  
5 in.

6 **MR. PARONICH:** Why -- I don't want to necessarily say  
7 it's too vague. I'm just thinking through why we would have  
8 done it that way in conjunction with the settlement  
9 administrator is because I think, depending on how many checks  
10 have to be written, the dollar amounts in feasibility could be  
11 different, but that certainly seems like something we could  
12 cover with the administrator and just say tell us when it turns  
13 in the red.

14 **THE COURT:** Yeah. Or "write me back and say here is  
15 why we did it this way, because there is a whole continuum,"  
16 and then maybe you could add something like, "In the event of a  
17 dispute, the Court will retain jurisdiction to make the  
18 decision."

19 **MR. PARONICH:** Understood. But we also understand  
20 that it's not a dispute that you necessarily might want to  
21 hear, but we will make it clear.

22 **THE COURT:** Okay. I mentioned this earlier. Is the  
23 10 percent claims rate -- does that come from research as to  
24 common claims outcomes?

25 **MR. PARONICH:** In connection with another settlement

1 we recently submitted in federal court in the Southern District  
2 of New York, I signed an affidavit. We had an administrator  
3 sign an affidavit that -- in our TCPA cases, our TCPA  
4 settlements, which there have been about 30 of -- our standard  
5 claim rate has been between 5 and 8 percent, and why we used 10  
6 is to be conservative on that analysis.

7 **THE COURT:** Okay. Again, maybe you could put that  
8 into a further showing.

9 **MR. PARONICH:** I would be happy to have us or --  
10 and/or the administrator submit an affidavit explaining where  
11 we got that from.

12 **THE COURT:** Yeah. I mean, I have seen similar numbers  
13 in the past. I know they're out there. I don't want to do a  
14 lot of make work, but if you are able to do it --

15 **MR. PARONICH:** We're happy to do it.

16 **THE COURT:** I may have missed this, but I think there  
17 is a usually a toll-free number that people can call, either  
18 for the claims administrator or for the lawyers.

19 **MR. PARONICH:** There certainly is, but as we mentioned  
20 earlier, we do like to put an attorney phone number on there,  
21 but I think there's also -- yep. So at the bottom of the  
22 long-form notice and at the bottom of the postcard notice, both  
23 have an attorney phone number, but then there is also a  
24 toll-free number at the bottom of each of those.

25 So on the long-form notice, every scrolling screen will

1 have a toll-free number as well.

2 **THE COURT:** Okay.

3 There is a few things that aren't disclosed as being  
4 available on the settlement website. I think maybe the  
5 attorneys' fee request or something like that, so it's not  
6 expensive to put more documents on there, so if you could go  
7 back over the agreement and make sure that everything that  
8 anybody could want will be on the website and it will be  
9 explained somewhere that they can look on the website to find  
10 that stuff.

11 **MR. PARONICH:** I'm happy to do that, Your Honor, but  
12 if you wouldn't mind, I will just tell you what we typically  
13 put on the website is the operative Complaint, which here would  
14 be the Second Amended Complaint. We put the Settlement  
15 Agreement on there, and we post the attorney fee brief as soon  
16 as it's filed. Those are the three big ones.

17 **THE COURT:** I'm trying to think what I thought wasn't  
18 there, and I don't have it in front of me. Maybe I'll find it  
19 in a minute.

20 **MR. PARONICH:** But -- sorry, Your Honor, not to put  
21 you on the spot. The point is we can be more explicit in the  
22 Settlement Agreement about exactly what will be available on  
23 the website, and if for some reason you think, "Hey, I also  
24 think Document X should be there," it's -- I mean, I think it's  
25 free. I don't think we get billed for it.

1           **THE COURT:** I'm going to page through my notes in a  
2 minute. It will probably jump out at me.

3           The most substantive matter is really the form of the  
4 release, and I have some concerns about it, which are -- if you  
5 have the release language in front of you.

6           **MR. PARONICH:** I'm pulling it out.

7           **THE COURT:** And I imagine it will be the defendant who  
8 might care about this more, so perhaps the person on the phone  
9 would want to look as well at the release paragraph. It's  
10 about halfway down. And I've got a couple of issues with it.

11           "Solicitation or other marketing or dissemination that was  
12 made by or on behalf of defendant by Quality Merchant or its  
13 agents promoting," it says "its," but I think what you mean is  
14 "defendants' goods or services." And then you say, "including  
15 the actual or alleged use."

16           And what I would propose would be to say "via" or "by way  
17 of" instead of "including" which implies that there might be  
18 other things; for example, things other than Spitfire, things  
19 other than cell phones. That's why I have those concerns, is  
20 because if you use "including," that implies it could be a lot  
21 of other stuff. So I would propose saying "via" or "by way  
22 of."

23           And then a couple lines further down, it says, "or  
24 otherwise," which I would propose to take out as being overly  
25 inclusive. It says, "involving calls to cell phones from

1 July 5th to the date of final approval or otherwise."

2 And then it says, "arising under the TCPA or similar  
3 federal or state laws governing such matters and any rule or  
4 regulation thereunder, including without limitation." So I  
5 would cross out "or otherwise" and I would cross out "without  
6 limitation."

7 And then further down, you say, "Releasing parties do not  
8 know or suspect who exists in their favor as of July 5th,  
9 2013." What if somebody knew about it before then, but it was  
10 a different law besides TCPA, because you're having them  
11 release claims, marketing and other types of claims other than  
12 TCPA. So I know the statute of limitations is four years on  
13 the TCPA, but if they're releasing other state and federal  
14 marketing claims, maybe one of those has a five-year statute of  
15 limitations.

16 So I don't know if you can say "prior to the statute of  
17 limitations running" or add a couple more years in there to  
18 cover other potentially longer statutes or something. I don't  
19 know a solution, but I see an issue there.

20 **MR. PARONICH:** Understood, Your Honor, and I think I  
21 can explore it more with defense counsel, but I think, you  
22 know, because -- adding a couple of years in there seems  
23 desirable, but I almost think about do we just run into the  
24 same issue and why not just go with the expiration of the  
25 applicable statute of limitations language. Yeah. Okay.

1           **THE COURT:** The covenant-not-to-sue language is  
2 somewhat different. And I -- maybe you need a minute to pull  
3 that up for yourself.

4           The first clause I have a problem with is "agree not to  
5 otherwise assist others in doing so," which strikes me as sort  
6 of vague and potentially subject to abuse and not very likely  
7 to be pursued.

8           **MR. PARONICH:** Your Honor, if you wouldn't mind, do  
9 you have the provision, the Settlement Agreement provision, in  
10 front of you? Just I want to follow along.

11           **THE COURT:** I have it.

12           **MR. ZANN:** It's going to be -- Your Honor, if I may,  
13 it's Section 6.5, for everybody's awareness.

14           **THE COURT:** And I guess I would just ask you to  
15 consider crossing that phrase out as something that could lead  
16 to disputes and isn't likely to protect anybody from much of  
17 anything.

18           And then later in the covenant not to sue is "or in any  
19 other proceeding in any forum," and then here's the part I have  
20 a problem with, "based upon, arising out of, related or, or  
21 otherwise in connection with in whole or in part the released  
22 claims." That seems, again, pretty broad, and perhaps you  
23 could just say "any forum with respect to the released claims,"  
24 or at least make it somehow arising out of the same set of  
25 facts or relating to similar marketing laws or something, but

1 to say "related to or in connection with in whole or in part"  
2 seems awfully broad to me, so maybe could give a little thought  
3 to that.

4 **MR. PARONICH:** We'll discuss that with the defendant,  
5 Your Honor.

6 **THE COURT:** Yeah.

7 I think that's it, but if you give me a minute, I'm going  
8 to go through another set of notes and see -- oh, the cy pres  
9 people, are they a national organization? As you know, the  
10 Ninth Circuit likes not only subject matter similarity, but  
11 also geographic similarity. The subject matter seems fine.  
12 The organization has the word "national" in its title, which  
13 might lead one to believe that it was a national organization,  
14 but do you have any information that it actually is a national  
15 organization?

16 **MR. PARONICH:** That's right, Your Honor. We are aware  
17 of the Ninth Circuit's directive there and specifically chose  
18 an organization that we've had previously approved in the Ninth  
19 Circuit in TCPA cases because they are a national organization.

20 **THE COURT:** Okay. Maybe you could stick that in some  
21 sort of supplemental showing.

22 **MR. PARONICH:** I would be happy to.

23 **THE COURT:** Cite to their web page or say you've  
24 discussed it or say that it's been approved by the Ninth  
25 Circuit or anything that would give us comfort in that regard

1 and perhaps save you appellate issues.

2 Oh, I guess the problem with the 800 number was that it  
3 doesn't say it in the Settlement Agreement, so maybe it says it  
4 on the notices, but it doesn't say in the Settlement Agreement  
5 that you have to have one.

6 **MR. PARONICH:** So just to clarify, Your Honor, in our  
7 supplemental settlement or amended Settlement Agreement here,  
8 you would want us to have a provision that the notice will  
9 provide a toll-free number?

10 **THE COURT:** Yeah. I think that would be good.

11 **MR. PARONICH:** Okay.

12 **THE COURT:** So here are the things that weren't clear  
13 to me as being on the website, and that was the motion for  
14 attorneys' fees and costs, the service award, and the costs of  
15 administration.

16 **MR. PARONICH:** So those -- the attorneys' fees and the  
17 service award --

18 **THE COURT:** The motion. The motion. You don't need  
19 to put all your fees on there, but the motion.

20 **MR. PARONICH:** Understood.

21 The motion that will talk about the incentive award, we  
22 post that contemporaneously, but we will say that in the  
23 amended Settlement Agreement.

24 The costs of notice, I'm happy to put it on there and I  
25 understand the desire to. We will think through and I will

1 submit exactly how we are going to do that because I have it in  
2 a declaration for preliminary approval that this is what they  
3 told us, but are you envisioning that maybe we put the quote on  
4 there or just --

5 **THE COURT:** No. I think -- well, initially just the  
6 amount that you've agreed it would not be more than, and  
7 eventually when you're moving for final approval, you would  
8 have the actual amount.

9 **MR. PARONICH:** Sure. We'll certainly have that in  
10 there, and we'll post a motion for final approval on the  
11 website as well. And I think -- but in our -- in -- in our  
12 motions for attorneys' fees and incentive award, that amount  
13 also would be in there, but we could -- should we do a  
14 dedicated document that just says that or having that in the  
15 fee motion is fine?

16 **THE COURT:** No. Just as long as it's in there  
17 somewhere.

18 **MR. PARONICH:** Okay.

19 **THE COURT:** This is sort of optional, but if it's  
20 possible to file the settlement administrator's declaration  
21 sooner than 10 days before the hearing, that would be helpful.  
22 If it could even be filed when you file the motion for final  
23 approval. Maybe you don't have it at that point?

24 **MR. PARONICH:** I feel like that's something that we  
25 should be able to push them on to do. I think --

1           **THE COURT:** It would be easier for me if I had  
2 everything at once instead of having to wait a while for that.

3           **MR. PARONICH:** I think if contemporaneous with the  
4 motion for final approval is acceptable to you, that has to be  
5 something they'll be able to do.

6           **THE COURT:** Okay. Or at least look into it.

7           **MR. PARONICH:** Sure.

8           I'm sorry, Your Honor, is that in the Settlement Agreement  
9 it has that timeline of 10 days, because that seems atypical  
10 for what we do? If you have it in front of you. If not --

11           **THE COURT:** I don't know.

12           **MR. PARONICH:** Okay. That's fine.

13           **THE COURT:** Oh, yes. The Settlement Agreement.

14           **MR. PARONICH:** Okay. So that is -- we'll be certain  
15 to remove that because that wasn't part of -- our preliminary  
16 approval order that envisioned a timeline did not have a  
17 different timeline for that.

18           **THE COURT:** It's Section 7.4 of the Settlement  
19 Agreement.

20           **MR. PARONICH:** Thank you, Your Honor.

21           **THE COURT:** And you'll be filing a declaration about  
22 the CAFA notice having been given?

23           **MR. PARONICH:** It will be with the administrator's  
24 final approval affidavit, but would you like one earlier?

25           **THE COURT:** No. You're telling me it was done, so

1 I'll assume it was, until I see that it was.

2 CAFA.

3 **MR. PARONICH:** And we'll -- just to be clear,  
4 Your Honor, we'll do it in conjunction with the administrator,  
5 but --

6 **THE COURT:** Well, actually maybe you should just go  
7 ahead and do it now. Just do a declaration saying it was done.

8 **MR. PARONICH:** Okay.

9 **THE COURT:** Because it is supposed to be 10 days after  
10 the preliminary approval papers are filed, so it was done a  
11 while back, so it doesn't have to have every single thing, but  
12 at least some sort of conclusory declaration that it was done  
13 in a timely fashion.

14 **MR. PARONICH:** When we submit an amended Settlement  
15 Agreement for your consideration, we'll include that.

16 **THE COURT:** Okay.

17 And then once you redo this and see how all the timing  
18 works out, you can contact the courtroom deputy, Mr. Merry, and  
19 get a proposed date, and if you're able to and you get a date  
20 from him that I'm available, you can go ahead and prepare the  
21 whole schedule, including the dates.

22 **MR. PARONICH:** Seek a final approval date?

23 **THE COURT:** Right.

24 **MR. PARONICH:** Okay. We will.

25 **THE COURT:** Well, of course if it's all going to be

1 keyed off the preliminary approval so if you assume that -- I  
2 guess figure out when you're going to submit, give me a week or  
3 so to look at it and then figure out the dates after that. We  
4 can always change them.

5 **MR. PARONICH:** Understood. So we'll submit the  
6 revised documents and then we'll calendar a week later to  
7 follow up with the courtroom deputy and maybe submit a concrete  
8 proposed preliminary approval order?

9 **THE COURT:** Right.

10 **MR. PARONICH:** Okay.

11 **THE COURT:** Okay. Now, for the defendant, the  
12 plaintiffs' attorney made a number of representations about  
13 things that he thought could be fixed. As you -- I didn't hear  
14 you scream out or choke on any of them.

15 Do you likewise feel confident that you will be able to  
16 speak with him and address some of these issues?

17 **MR. ZANN:** Yes, Your Honor. I'm quite confident that  
18 we'll be able to hammer out, if not everything, the gross  
19 majority of everything you have related to us today.

20 **THE COURT:** Okay. If there's some problem and you  
21 each want to the submit a separate statement saying what you  
22 think can and can't be done and what will happen if it isn't  
23 fixed, then I -- I mean, if somebody says, "We won't do it and  
24 we think it's a material change and the whole settlement is  
25 going to blow up," you can tell me that, and if someone else

1 says -- just has a dispute about what's the best way to do it,  
2 you can ask me and I'll tell you what I think.

3 **MR. PARONICH:** Yeah. I guess, Your Honor --

4 **MR. ZANN:** Appreciate it.

5 **MR. PARONICH:** Not to just jump on that right away,  
6 but I'll tell you it took awhile for us to come to the  
7 conclusion that we are -- our recommendation is that in this  
8 case a claims process works.

9 Is there anything we've discussed today that would give  
10 you reason to believe that you think a proveable settlement  
11 would do something differently with respect to actually doing a  
12 claims process versus not?

13 **THE COURT:** No. I guess as long as you thought about  
14 it.

15 **MR. PARONICH:** I have.

16 **THE COURT:** You might put in a supplemental showing.  
17 You might address that in a couple of paragraphs and say that  
18 you've done it the other way and why you think this would serve  
19 the goals of having more claimants and more money going to  
20 claimants than doing it some other way and laying out what  
21 would happen if you did it the other way, the administrative  
22 and financial burdens that that would lead to.

23 If you disagree on it and the defendant thinks one thing  
24 and you think another, you could both explain what you think  
25 and ask for an opinion.

1           **MR. PARONICH:** Okay.

2           **THE COURT:** But as long as I understand that you've  
3 thought of it with the goals of the class action litigation in  
4 mind and more knowledge than I have about how much these things  
5 cost, then I'm likely to approve it.

6           **MR. PARONICH:** Okay. Thank you, Your Honor.

7           **THE COURT:** Anything else then from the defendant?

8           **MR. LIU:** No, Your Honor.

9           **MR. ZANN:** Your Honor, I guess just to add an  
10 administrative matter having -- tangentially related to the  
11 settlement, we have upcoming deadlines in the matter. While we  
12 work out these remaining issues on the settlement such that we  
13 can obtain preliminary approval, is it possible for the Court  
14 to stay all deadlines? I don't anticipate it being an issue  
15 down the road, but if for some reason --

16           **THE COURT:** Yeah. You've got a hearing date coming up  
17 and maybe some briefing dates coming up. You don't mind  
18 staying those?

19           **MR. PARONICH:** We don't, Your Honor.

20           **THE COURT:** So no upcoming dates will go forward  
21 unless and until there is a problem with the settlement.

22           I think the trial is set for next summer. We don't need  
23 to vacate that quite yet, but we can certainly vacate the  
24 briefing schedule on the class cert motion and the hearing date  
25 on the class cert motion.

1           And I guess I should ask Quality's attorney the same  
2 question I asked the others: You don't have any reason to  
3 believe that there will be a problem with your client in the  
4 sorts of things that I've talked about?

5           **MR. LIU:** Right. No issues with our client.

6           **THE COURT:** Okay.

7           Anything else then?

8           **MR. PARONICH:** No, Your Honor.

9           **MR. FUGNER:** Your Honor, just one clarification. In  
10 terms of the process with Mr. Merry, will that be resubmitting  
11 a 35-day notice motion compliant with 7(2)(a)?

12           **THE COURT:** Oh, no. Just a sort of supplemental, an  
13 additional memorandum supported by, to the extent you need  
14 defendants' approval, a stipulation. If there is a need to  
15 modify the Settlement Agreement itself, you'd have to file  
16 that.

17           I think you can do this without really modifying the  
18 Settlement Agreement if you just enter into some sort of  
19 stipulation, but, no, please don't do everything over again. I  
20 don't want to read it again. Just do the parts that get  
21 changed.

22           **MR. PARONICH:** We'll do a supplemental submission,  
23 Your Honor, and in that supplemental submission, explain what  
24 we're changing, and we'll do that via an attached stipulation,  
25 but to be clear, what I'm envisioning is not new signatures,

1 and that seems consistent with what you're envisioning.

2 **THE COURT:** Yeah. That's fine. Okay. Thank you.

3 **MR. PARONICH:** Thank you, Your Honor.

4 **MS. JAFFE:** Thank you, Your Honor.

5 **MR. ZANN:** Thank you, Your Honor.

6 (Proceedings adjourned at 3:26 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Friday, October 12, 2018

*Pamela Batalo Hebel*

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Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR  
U.S. Court Reporter