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9 *Attorneys for Plaintiff and the Proposed Class*

10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 SIDNEY NAIMAN, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 TOTAL MERCHANT SERVICES, INC.
18 and QUALITY MERCHANT
19 SERVICES, INC.,

20 Defendants.

No. 4:17-cv-03806-CW

SUPPLEMENTAL SUBMISSION IN SUPPORT
OF PLAINTIFF'S UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT

1 TO: THE CLERK OF THE COURT; and
 2 TO: DEFENDANTS TOTAL MERCHANT SERVICES, INC. and QUALITY
 3 MERCHANT SERVICES, INC. and THEIR ATTORNEYS OF RECORD:

4 I. INTRODUCTION

5 On August 29, 2018, a class action settlement agreement (“Agreement” or “Settlement
 6 Agreement”) was entered into by and among Sidney Naiman (“Plaintiff”), individually and on
 7 behalf of the class of persons he seeks to represent (the “Settlement Class”), and Total Merchant
 8 Services, Inc. (“Total” or “Defendant”) (Plaintiff, the Settlement Class, and Defendant
 9 collectively, the “Parties”). On October 9, 2018, the Court held a hearing regarding preliminary
 10 approval of the Agreement. The Court provided its feedback to the Parties regarding the
 11 Agreement and the class notice and claims process contemplated thereby. The Parties
 12 endeavored to reflect the Court’s feedback in an amendment to their Agreement and to the class
 13 notice and claims process contemplated thereby. Attached as Exhibit 1 is a Stipulation reflecting
 14 those changes (“Stipulation”). The Stipulation and the Court’s response to the settlement is
 15 discussed below.

16 II. THE COURT’S FEEDBACK AT THE OCTOBER 9, 2018 PRELIMINARY 17 APPROVAL HEARING AND PROVISIONS IN THE STIPULATION

18 During the hearing regarding preliminary approval of the Agreement the Court made
 19 several inquiries. For the convenience of the Court, attached as Exhibit 2 is a transcript of that
 20 hearing.

21 The Court inquired about Plaintiff’s counsel’s due diligence regarding Quality Merchant
 22 Services’ (“Quality”) inability to fund a class action settlement. Ex. 2 at 6. While the Court
 23 appeared satisfied with Plaintiff’s counsel’s explanation, the Stipulation makes clear that
 24 “Quality represents and warrants that its net worth is less than \$25,000.” Ex. 1 at ¶ 4.

25 The Court indicated that it wanted to ensure that the neither Total nor Quality would
 26 simply resume the alleged conduct and wanted the parties to agree to remedial relief beyond the
 27 termination of their relationship. The parties’ Stipulation provides that neither defendant will use
 28 automatic dialing equipment for any telemarketing purposes unless it has the recipient’s prior

1 express written consent (which allows for such calling under the Telephone Consumer Protection
2 Act, 47 U.S.C. § 227). Ex. 1 at ¶¶ 1-2.

3 In light of their similar-sounding names, the Court also wanted to confirm that the co-
4 defendants do not have any overlap in ownership or control. They do not. “Defendant and
5 Quality represent and warrant that there is no overlap in their ownership structures, boards of
6 directors, or staff.” Ex. 1 at ¶ 3.

7 The Court discussed with the parties the class definition, release and the associated
8 covenant not to sue. Ex. 2 at 14. The Stipulation makes the following changes and discusses the
9 Court’s feedback:

10
11 5. The definition of “Settlement Class” in section 1.41 is changed to mean
12 the following: “all persons within the United States to whom Quality Merchant
13 Services, Inc., Michael Alimento, and/or Brian Alimento made a telephone call
14 using the Spitfire dialing software and/or system to any telephone number
15 assigned to a cellular telephone service for the purpose of promoting Defendant’s
16 goods or services from July 5, 2013 through June 8, 2018. These individuals are
17 identified on the Class List. Excluded from the Settlement Class are the
18 following: (1) any trial judge who may preside over this Action; (ii) Defendant;
19 (iii) any of the Released Parties; (iv) Class Counsel and their employees; (v) the
20 immediate family of any of the foregoing Persons; (vi) any member of the
21 Settlement Class who has timely submitted a Request for Exclusion by the
22 Objection/Exclusion Deadline; and (vii) any Person who has previously given a
23 valid release of the claims asserted in the Action.”

19 6. The new definition of “Settlement Class” in the immediately preceding
20 paragraph removes the qualifier “(i.e., an automated telephone dialing system or
21 an artificial or prerecorded voice)” from the definition of the Spitfire dialer and
22 removes from the Settlement Class people who received calls only to a (non-
23 cellular) “service for which the called party is charged for the call.”

24 9. The release in section 6.1 is changed to the following: “The Releasing
25 Parties do hereby release and fully, finally, and forever discharge the Released
26 Parties from all claims, debts, controversies, losses, liabilities, liens, demands,
27 causes of action, suits, damages (including, but not limited to, actual, statutory,
28 trebled, exemplary, or punitive), fees (including, but not limited to, attorneys’
fees), expenses, and obligations of any kind or nature whatsoever, whether in law
or in equity, whether known or unknown, fixed or contingent, claimed or
unclaimed, direct or indirect, individual or representative, arising out of or

1 relating to any telemarketing, solicitation, or other marketing or dissemination
 2 that was made by QMS, Michael Alimento, and/or Brian Alimento on behalf of
 3 Defendant promoting Total Merchant goods or services by way of the actual or
 4 alleged use of the Spitfire dialing system arising under the TCPA or similar
 5 federal or state laws governing such matters, and any rule or regulation
 6 thereunder, including the claims alleged in the SAC, from, the beginning of time
 7 through the date of signature of this Settlement Agreement. This release
 8 specifically extends to claims that the Releasing Parties do not know or suspect to
 9 exist in their favor as of the date of the Final Approval and Judgment, which
 10 release is meant to and constitutes a waiver and relinquishment, without
 11 limitation, of Section 1542 of the California Civil Code, which provides:

12 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
 13 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR**
 14 **HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH**
 15 **IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED**
 16 **HIS OR HER SETTLEMENT WITH THE DEBTOR.”**

17 10. The new “Released Claims” section 6.1 in the immediately preceding
 18 paragraph changes the **bold** terms and deletes the *italicized* terms found in the
 19 prior release, as follows:

20 Old Release

21 “. . . was made by **or** on behalf of Defendant promoting **its** goods or services
 22 **including** the actual or alleged use of an **automatic telephone dialing system or**
 23 **an artificial or prerecorded voice** *or otherwise* arising under the TCPA or
 24 similar federal or state laws governing such matters, and any rule or regulation
 25 thereunder, including, *without limitation*, the claims alleged . . .”

26 New Release

27 “was made by **QMS, Michael Alimento, and/or Brian Alimento** on behalf of
 28 Defendant promoting **Defendant’s** goods or services **via** the actual or alleged use
 of **the Spitfire dialing system** arising under the TCPA or similar federal or state
 laws governing such matters and any rule or regulation thereunder, including the
 claims alleged . . .”

11. The new “Released Claims” section 6.1 also makes clear that the TCPA’s
 statute of limitations will not apply to claims with a different statute of limitations
 by changing “from **four years before the filing of the Action** until the date of
 signature of this Settlement Agreement” to “from the beginning of time through
 the date of signature of this Settlement Agreement.”

12. The covenant not to sue in section 6.5 is changed to the following:
 “Plaintiff and the Settlement Class Members agree and covenant not to sue any of
 the Released Parties with respect to any of the Released Claims and agree forever
 to be barred from filing, instituting, maintaining, collecting, proceeding against,
 or seeking to establish liability against any of the Released Parties in any federal,

1 state, or local court or forum, in or before any administrative agency, or in any
 2 other proceeding in any forum with respect to any of the Released Claims.”

3 13. The new covenant-not-to-sue provision in section 6.5 in the immediately
 4 preceding paragraph deletes “and agree not to otherwise assist others in doing so”
 5 from the original document and changes “**based upon, arising out of, related to,
 or otherwise in connection with, in whole or in part,** the Released Claims” to
 “with respect to any of the Released Claims.”

6 Ex. 1 at ¶¶ 5, 6, 9-13. The revised settlement class definition, like the prior settlement class
 7 definition, is narrower than the corresponding class definition in the Second Amended
 8 Complaint:

Putative Class, SAC, Dkt. No. 41 at 16	Settlement Class
Includes calls by any third party acting on the defendants’ behalf	Includes only calls by Quality, Michael Alimento, and/or Brian Alimento
Includes calls made by any ATDS or artificial or prerecorded voice	Includes only calls made by any ATDS or artificial or prerecorded voice using the Spitfire dialing system
Spans July 5, 2013 until the date of trial	Spans July 5, 2013 until June 8, 2018
Is open-ended with respect to the identity of the class members	Limits the class to 50,417 persons identified by Plaintiff’s expert

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 22 Next, there was discussion of whether the Plaintiff would recommend using a claims
 23 process in this matter. As detailed in the Stipulation and the accompanying affidavit of Plaintiff’s
 24 counsel:

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 26 Mr. Paronich explains that he has been class counsel for TCPA settlements that
 27 have included a claims process and for those that have not, and considered both
 28 approaches for the Settlement. Here, the data obtained by Quality for its
 telemarketing was purchased over the internet from a non-verifiable database. It
 did not include names or addresses for over 10,000 members of the putative
 settlement class. The names and addresses that were included were at times

1 indecipherable or clearly false. A claims process prevents fraudulent claims and is
2 necessary here because this is not the type of case, such as an employment case,
3 where the defendant has verified payroll records containing the names, addresses,
4 and social security numbers of all class members. It would be inefficient,
5 counterproductive, and potentially harmful to class members through increased
6 costs to mail checks without a claims process to verify that the information is
7 reliable. As a result, Plaintiff's counsel is recommending a claims process here.
8 However, imperative to Plaintiff's counsel's recommendation is that the claims
9 submission process include mechanisms for encouraging claims and not be
10 burdensome. To that end, the information for class members who enter their ID
11 number from the notice will be pre-populated on the claim form, making the
12 process fast and easy. The form will also tell class members how many calls they
13 got so they can make an informed decision regarding whether or not to opt out of
14 the settlement.

15 *Id.* at ¶ 20.

16 For similar reasons, most courts in the Ninth Circuit that have overseen consumer class
17 settlements and TCPA class cases elsewhere have included a claims process. *See, e.g., Krakauer*
18 *v. Dish Network, L.L.C.*, No. 1:14-CV-333, slip. op. at 5-6 (M.D.N.C. Jan. 25, 2018), ECF No.
19 407 (entering judgment after trial in favor of 191 TCPA class members who had been fully
20 identified and reserving judgment for class members who had not been fully identified, finding
21 “[a] claims process for these persons is more appropriate”); *In re Uber FCRA Litig.*, Case No.
22 14-cv-05200-EMC, 2017 WL 2806698, at *8 (N.D. Cal. June 29, 2017) (finding claims process
23 necessary even though the defendant had contact information for all potential class members
24 because the contact information was not “verifiably current”); *Barani v. Wells Fargo Bank, N.A.*,
25 No. 12-cv-2999-GPC (KSC), 2014 WL 1389329 (S.D. Cal. Apr. 9, 2014) (preliminarily
26 approving settlement in TCPA case where class members were identified through reverse
27 lookups and the net settlement fund was to be divided among settlement class members who
28 submitted claims); *Rinky Dink, Inc. v. World Bus. Lenders, LLC*, No. 14-0268-JCC, 2016 WL
4052588, at *8-9 (W.D. Wash. Feb. 3, 2016) (same); *Lemus v. H&R Block Enters. LLC*, No. C
09-3179 SI, 2012 WL 3638550, at *2-3 (N.D. Cal. Aug. 22, 2012) (approving claims-made
settlement). Mr. Paronich's affidavit, attached as Exhibit D to the Stipulation, also indicates that
the class member payout estimates in the notices are based on Plaintiff's counsel's experience
with response rates in other TCPA settlements. Ex. 1 at ¶ 19.

1 The Court also instructed the parties to make several improvements to the notices. First,
2 the parties corrected a typographical error on the first page of the Longform Notice. *Id.* at ¶ 14.
3 Second, the draft website notices removed *lorem ipsum* placeholder text and other extraneous
4 references. *Id.* at ¶ 17. The parties also made several changes to the postcard notice. The revised
5 postcard notice:

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- 7 a. increases the font size on the front from 6.5 (front) and 8 (back) to 12;
- 8 b. makes the language more concise, approachable and personalized; and
- 9 c. adds to the front the following language in bold and all capitals: “**A
10 CLASS ACTION SETTLEMENT MAY ENTITLE YOU TO A CASH
11 PAYMENT, BECAUSE YOUR NAME WAS ON A LIST OF PEOPLE
12 WHO GOT PAYMENT-PROCESSING MARKETING CALLS**”.

11 *Id.* at ¶ 15. The parties have also made clear in the Stipulation that a toll-free number will be
12 included in the postcard and long-form notice for class members to call. *Id.* at ¶ 16.

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14 With respect to administration of the Settlement, the Stipulation addresses the feasibility
15 of distributing a second check to claimants who cash their first check:

16 7. Section 4.3(d) is changed to the following: “If any amounts remain in the
17 Settlement Fund because any Settlement Class Member fails to cash his/her/its
18 Benefit Check, or such Benefit Check expires or otherwise becomes null and
19 void, the Settlement Administrator shall distribute the remaining Settlement Fund
20 to the Settlement Class Members who cashed their Benefit Check from the
21 previous round of distribution on a *pro rata* basis (with pro ration based on shares
as set forth in Section 4.3(b) of this Settlement Agreement), except that (1) no
check under \$5 shall be issued or mailed. Any remaining Settlement Funds shall
be distributed to the Cy-Pres Recipient.”

22 8. The new section 4.3(d) in the immediately preceding paragraph changes
23 the distribution plan insofar as it specifies the exact monetary threshold (\$5) for
24 ending distributions to class members and for distributing leftover unclaimed
25 funds to the Cy-Pres Recipient, whereas the prior language referred less precisely
to whether further distributions were “administratively and economically
feasible.”

26 *Id.* at ¶¶ 7-8.
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1 The Settlement Administrator has also represented that it will monitor and record the
2 details of every successful and failed delivery of direct notice and distribution, and that it
3 maintains those records for at least 5 years and can make them available to the Court or the
4 parties upon request. *Id.* at ¶ 22. Also attached to the Stipulation as Exhibit E is the Declaration
5 of Stephanie J. Fiereck, Esq. of Epiq explaining that it has properly and timely notified the
6 appropriate state and federal officials of the Settlement Agreement under the Class Action
7 Fairness Act of 2005 (“CAFA”). *See* 28 U.S.C. § 1715. Epiq also confirmed that it will provide
8 the declaration contemplated by section 7.4 of the Settlement Agreement no later than 21 days
9 before the Final Approval Hearing. *Id.* at ¶ 24. The parties have also stipulated that, at a
10 minimum, the following documents will be posted on the Settlement Website:

- 11 a) The Second Amended Complaint, Dkt. No. 41;
- 12 b) The Settlement Agreement, including all exhibits thereto, Dkt. No. 92-1;
- 13 c) The Stipulation as to Changes to Class Action Settlement;
- 14 d) Plaintiff’s Motion for Preliminary Approval, Dkt. No. 92;
- 15 e) This Court’s Order granting Plaintiff’s Motion for Preliminary Approval, should
16 such Order issue;
- 17 f) The forthcoming Plaintiff’s Motion for Attorneys Fees, Costs and an Incentive
18 Award, which shall include the estimated cost of administration as well as class counsel’s
19 estimated lodestar to date, calculated based on hourly rate and hours worked;
- 20 g) This Court’s Order granting Plaintiff’s Motion for Attorneys Fees, Costs and an
21 Incentive Award, should such Order issue;
- 22 h) The forthcoming Plaintiff’s Motion for Final Approval of Class Action
23 Settlement; and
- 24 i) This Court’s Order granting Plaintiff’s Motion for Final Approval, should such
25 Order issue.

26
27 *Id.* at ¶ 18.
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1 Finally, since a second settlement distribution will occur to claimants who cash their first
2 settlement check, the parties do not believe there will be much, if any, *cy pres* funds leftover from
3 the settlement. However, the Stipulation includes a reference to Plaintiff's counsel's affidavit,
4 which explains that the National Consumer Law Center ("NCLC") is a national organization and
5 thus geographically appropriate *cy pres* recipient for a national class settlement. *Id.* at ¶ 21.
6 As the Court requested after Plaintiff's suggestion, Plaintiff compiled some of the district court
7 opinions approving NCLC as *cy pres* recipients in consumer class actions. *See, e.g., Lee v. Glob.*
8 *Tel*Link Corp.*, 2018 U.S. Dist. LEXIS 163410, at *25 (C.D. Cal. Sept. 24, 2018)
9 ("The National Consumer Law Center advocates against automated calls and will further the
10 goals of the absent class members."); *Estakhrian v. Obenstine*, No. CV 11-3480 FMO (CWx),
11 2016 U.S. Dist. LEXIS 147105, at *22-23 (C.D. Cal. Oct. 24, 2016) (collecting cases approving
12 NCLC as a *cy pres* recipient); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015
13 U.S. Dist. LEXIS 20725, at *25 (N.D. Cal. Feb. 20, 2015); *Custom LED, LLC v. eBay, Inc.*, 2014
14 U.S. Dist. LEXIS 87180, 2014 WL 2916871, *10 (N.D. Cal. June 24, 2014).

15 III. CONCLUSION

16 Based on Plaintiff's prior submission and the Stipulation, Plaintiff respectfully requests
17 that the Court enter an order that (1) certifies the proposed settlement class for settlement
18 purposes only; (2) grants preliminary approval of the proposed settlement; (3) directs notice to be
19 disseminated to class members in the form and manner proposed by the parties as set forth in the
20 settlement agreement; (4) appoints Epiq to serve as the Settlement Administrator; and (5) sets a
21 schedule and hearing date for final approval of the settlement and related deadlines.

22 A Revised Proposed Preliminary Order is attached as Exhibit F to the Stipulation.
23 However, as the Court instructed at the October 9, 2018, hearing, Plaintiff will wait
24 approximately one week before contacting the Courtroom Deputy, and will provide the Court
25 with the Revised Proposed Preliminary Order that has dates and deadlines for the settlement
26 inserted based on the final approval hearing date that the Courtroom Deputy provides.

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RESPECTFULLY SUBMITTED AND DATED on November 8, 2018.

By: Jon B. Fougner

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CERTIFICATE OF SERVICE

I, Jon B. Fougner, hereby certify that on November 8, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

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