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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

**[PROPOSED] PRELIMINARY APPROVAL
ORDER**

21 Plaintiff Sidney Naiman has moved for preliminary approval of a proposed class settlement
22 (the motion) that would resolve Plaintiff’s proposed class-action claims under the Telephone
23 Consumer Protection Act (TCPA), 47 U.S.C. § 227. Upon consideration of the motion, the
24 Settlement Agreement and the Stipulation as to Changes to Class Action Settlement filed as Docket
25 Number 101-1 (collectively, the Settlement Agreement), and the exhibits thereto, the Court
26 **GRANTS** preliminary approval of the Settlement Agreement, finding specifically as follows.¹

27 **I. Jurisdiction**

28 1. The Court preliminarily finds that it has jurisdiction over the subject matter of this

¹ Unless otherwise defined herein, all terms used in this Order that are defined terms in the Settlement Agreement have the same meaning as set forth in the Settlement Agreement.

1 action and personal jurisdiction over the parties and the members of the Settlement Class
2 described below.

3 **II. Certification of Settlement Class**

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5 2. Under Rule 23 of the Federal Rules of Civil Procedure, the Court preliminarily
6 certifies for settlement purposes only the following “Settlement Class,” consisting of:

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

15 **III. Class Representative and Class Counsel**

16
17 3. The Court preliminarily appoints Plaintiff Sidney Naiman as Class Representative
18 of the Settlement Class.

19 4. Under Rule 23(g), the following attorneys and firms are preliminarily appointed as
20 Class Counsel for the Settlement Class:

21 Edward Broderick
22 Anthony Paronich
23 BRODERICK & PARONICH, P.C.
24 99 High St., Suite 304
25 Boston, Massachusetts 02110

26 -and-

27 Matthew P. McCue
28 THE LAW OFFICE OF MATTHEW P. MCCUE
1 South Avenue, Suite 3
Natick, Massachusetts 01760

-and-

1 Jon Bernhard Fougner
2 600 California Street, 11th Floor
3 San Francisco, CA 94108

-and-

4 Andrew Heidarpour
5 Heidarpour Law Firm
6 1300 Pennsylvania Ave NW, 190-318
7 Washington, DC 20004

8 **IV. Rule 23 Requirements**

9 5. The Court preliminarily finds that the prerequisites for a class action under Federal
10 Rule of Civil Procedure 23(a) have been satisfied for settlement purposes in that: (a) Settlement
11 Class Members are so numerous that joinder of them all is impracticable, because the Settlement
12 Class includes more than 50,000 people; (b) there are questions of law and fact common to the
13 Settlement Class Members, including whether the telemarketing campaign at issue violated the
14 TCPA and whether Defendant Total Merchant is vicariously liable for Defendant Quality
15 Merchant Services Inc.'s actions as part of that campaign; (c) the claims of the Class
16 Representative are typical of the claims of the Settlement Class Members because they arise from
17 the same conduct by Total Merchant and Quality Merchant and are based on the same legal
18 theories; (d) the Class Representative will fairly and adequately represent the interests of the
19 Settlement Class Members because the record lacks any indication that the Class Representative
20 has any conflict of interest with members of the Settlement Class. Additionally, Class Counsel
21 have experience in litigating class actions such as this one and are in a position to adequately
22 represent the interests of the Settlement Class. The Court further finds that the requirements for
23 class certification under Rule 23(b)(3) have been satisfied for settlement purposes in that
24 (A) questions of law and fact common to the Settlement Class Members, such as whether Quality
25 Merchant made the calls at issue using an automated telephone dialing system or a pre-recorded
26 message; whether Quality Merchant acted willfully when making the calls at issue; and whether
27 Total Merchant is vicariously liable for the calls made by Quality Merchant, predominate over
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1 any questions affecting only individual Settlement Class Members; and (B) a class action is
2 superior to other available methods for the fair and efficient adjudication of the controversy,
3 because, in the absence of a class action vehicle, members of the Settlement Class likely would
4 not litigate their claims against Defendants individually given that the potential recovery for each
5 member of the Settlement Class is relatively modest.

6 **V. Preliminary Approval of the Settlement**

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8 6. Pursuant to the Settlement Agreement, Defendant Total Merchant has agreed to
9 pay Seven Million Five Hundred Thousand Dollars (\$7,500,000) to create the Settlement Fund.
10 Amounts awarded to Class Counsel or the Class Representative will be exclusively paid from the
11 Settlement Fund. Settlement Class Members will receive a pro-rata share of the Settlement Fund
12 after attorneys' fees and costs, the Class Representative's award, the costs of notice and
13 administration, and any other expenditure authorized by the Court are deducted therefrom. In
14 addition to payments from the Settlement Fund, Defendant Total Merchant also has agreed that it
15 will take the following remedial steps: (1) it has terminated its relationship with co-Defendant
16 Quality Merchant; (2) it has agreed that, to the extent it uses an automated telephone dialing
17 system and/or artificial or prerecorded voice messages, Defendant Total Merchant will promptly
18 stop using such automated telephone dialing systems and/or artificial or prerecorded voice
19 messages to contact cellular telephones for telemarketing purposes without the recipient's prior
20 express written consent. Furthermore, co-Defendant Quality Merchant will immediately and
21 permanently cease and desist from using automated telephone dialing systems and artificial or
22 prerecorded voice messages similar to the Spitfire dialing system used in this case (i.e., a
23 computer-based dialing system) for any telemarketing purposes without the recipient's prior
24 express written consent.
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26 7. Having considered the motion for preliminary approval, the Settlement
27 Agreement, and the exhibits thereto, as well as the Stipulation as to Changes to Class Action
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1 Settlement and the exhibits thereto filed as Docket Number 101-1, the Court preliminarily finds
2 that the Settlement Agreement is fair, adequate, reasonable, and in the best interests of the
3 Settlement Class. This finding is supported by, among other things, the complex legal and factual
4 posture of the action, the fact that the Settlement Agreement is the result of arm's-length
5 negotiations presided over by a neutral mediator, and that the settlement will result in benefits to
6 Settlement Class Members.

7 **VI. Notice and Administration**

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9 8. The Court appoints Epiq to perform the functions and duties of the Settlement
10 Administrator set forth in the Settlement Agreement—including effectuating the Notice Plan—
11 and to provide such other administration services as are reasonably necessary to facilitate the
12 completion of the Settlement Agreement.

13 9. The Court has carefully considered the notice program set forth in the Settlement
14 Agreement. The Court finds that such notice program constitutes the best notice practicable under
15 the circumstances and satisfies fully the requirements of Rule 23(c)(2) and the requirements of
16 due process.

17 10. The Court thus approves the notice program and the form, content, and
18 requirements of the Notice described in and attached as exhibits to Docket Number 101-1. The
19 Settlement Administrator shall cause the Notice Plan to be completed on or before December 4,
20 2018. Class Counsel shall, not less than twenty-one days before the Final Approval Hearing, file
21 with the Court a declaration executed by the Settlement Administrator attesting to the timely
22 completion of the notice program.

23 11. All costs of providing Class Notice to the Settlement Class, processing Claim
24 Forms, and administering distributions from the Settlement Fund shall be exclusively paid out of
25 the Settlement Fund, as provided by the Settlement Agreement, but the cost award to the
26 Settlement Administrator shall not be approved until the Final Approval Hearing.
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1 **VII. Exclusion and “Opt-Outs”**

2 12. Each and every member of the Settlement Class shall be bound by all
3 determinations and orders pertaining to the Settlement Agreement, including the release of all
4 claims to the extent set forth in the Settlement Agreement, unless such persons request exclusion
5 from the Settlement Agreement in a timely and proper manner, as hereinafter provided.

6 13. A member of the Settlement Class wishing to request exclusion (or “opt-out”)
7 from the Settlement Agreement shall mail the request in written form, by first class mail, postage
8 prepaid, which must be postmarked no later than February 4, 2019, to the address specified in the
9 Notice. In the written request for exclusion, the member of the Settlement Class must state his or
10 her full name, address, and telephone number(s). Further, the written request for exclusion must
11 include the case name and number, a statement that the member of the Settlement Class
12 submitting the request wishes to be excluded from the Settlement Agreement, and the personal
13 signature of the member of the Settlement Class submitting the request. The request for exclusion
14 shall not be effective unless it provides the required information and is made within the time
15 stated above, or the exclusion is otherwise accepted by the Court. No member of the Settlement
16 Class, or any person acting on behalf of or in concert or in participation with a member of the
17 Settlement Class, may request exclusion of any other member of the Settlement Class from the
18 Settlement Agreement.
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20 14. Members of the Settlement Class who timely request exclusion from the
21 Settlement Agreement will relinquish their rights to benefits under the settlement and will not
22 release any claims against Defendant Total Merchant or any of the other Released Parties.

23 15. All Settlement Class Members who do not timely and validly request exclusion
24 shall be so bound by all terms of the Settlement Agreement and by the Final Approval Order and
25 Judgment even if they have previously initiated or subsequently initiate individual litigation or
26 other proceedings against Defendant Total Merchant or any of the other Released Parties.

27 16. The Settlement Administrator will promptly provide all Parties with copies of any
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1 exclusion requests, and Plaintiff shall file a list of all persons who have validly opted out of the
2 Settlement Agreement with the Court before the Final Approval Hearing.

3 **VIII. Objections**

4 17. Any Settlement Class Member who does not file a timely request for exclusion,
5 but who wishes to object to approval of the proposed Settlement Agreement, to the requested
6 award of attorneys' fees and expenses, or to the requested compensation award to the Class
7 Representative, must submit to the Clerk of the Court for the United States District Court for the
8 Northern District of California, 1301 Clay Street, 4th Floor, Oakland, California 94612, a written
9 statement that includes: his or her full name and address; the telephone numbers that he or she
10 maintains were called; all grounds for the objection, with factual and legal support for each stated
11 ground; the identity of any witnesses he or she may call to testify; copies of any exhibits that he
12 or she intends to introduce into evidence at the Final Approval Hearing; and a statement of
13 whether he or she intends to appear at the Final Approval Hearing and, if so, whether he or she
14 intends to appear with counsel. The Court will consider objections to the Settlement Agreement,
15 to the requested award of attorneys' fees and expenses, or to the requested compensation award
16 to the Class Representative only if, on or before February 4, 2019, such objections and any
17 supporting papers are mailed to the Clerk of this Court, who is ordered to scan them onto the
18 electronic case docket. The February 4, 2019, deadline is the date by which any mailing
19 containing objections to the Settlement Agreement must be postmarked.
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21 18. A Settlement Class Member who has timely filed a written objection as set forth
22 above may appear at the Final Approval Hearing in person or through counsel to be heard orally
23 regarding his or her objection. It is not necessary, however, for a Settlement Class Member who
24 has filed a timely objection to appear at the Final Approval Hearing. No Settlement Class
25 Member wishing to be heard orally in opposition to the approval of the Settlement and/or the
26 request for attorneys' fees and expenses and/or the request for a compensation award to the Class
27 Representative will be heard unless that person has filed a timely written objection as set forth
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1 above.

2 19. Any member of the Settlement Class who does not opt out or make an objection
3 to the Settlement Agreement in the manner provided herein shall be deemed to have waived any
4 such objection by appeal, collateral attack, or otherwise, and shall be bound by the Settlement
5 Agreement, the releases contained therein, and all aspects of the Final Approval Order and
6 Judgment.

7 **IX. Application for an Award of Attorneys' Fees, Costs, and an Incentive Award**

8 20. Any application for a compensation award to the Class Representative, as well as
9 any application for an award of attorneys' fees and expenses, must be filed on or before
10 December 13, 2018.

11 **X. Final Approval Hearing**

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13 21. A Final Approval Hearing will be held before the Court on April 2, 2019, at 2:30
14 p.m. at the United States District Court, 1301 Clay Street, Oakland, California 94612, for the
15 following purposes:

16 (a) to finally determine whether the requirements of Federal Rules of Civil
17 Procedure 23(a) and (b)(3) are met;

18 (b) to determine whether the Settlement is fair, reasonable, and adequate, and
19 should be approved by the Court;

20 (c) to determine whether the judgment as provided under the Settlement
21 Agreement should be entered, including an order prohibiting Settlement Class Members
22 from further pursuing claims released in the Settlement Agreement;

23 (d) to consider the application for an award of attorneys' fees and expenses of
24 Class Counsel;

25 (e) to consider the application for a compensation award to the Class
26 Representative;

1 (f) to consider the distribution of the Settlement Fund under the terms of the
2 Settlement Agreement; and

3 (g) to rule upon such other matters as the Court may deem appropriate.

4 22. On or before February 12, 2019, Class Counsel shall file and serve a motion for
5 final approval.

6 23. The Final Approval Hearing may be postponed, adjourned, transferred, or
7 continued by order of the Court without further notice to the Settlement Class. At, or following,
8 the Final Approval Hearing, the Court may enter a Final Approval Order and Judgment in
9 accordance with the Settlement Agreement that will adjudicate the rights of all members of the
10 Settlement Class.

11 24. For clarity, the deadlines the Parties shall adhere to are as follows:

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13 **Class Notice Completed by: December 4, 2018**

14 **Incentive Award and Fee Application: December 13, 2018**

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16 **Objection/Exclusion Deadline: February 4, 2019**

17 **Claim Deadline: February 4, 2019**

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19 **Final Approval Submissions: February 12, 2019**

20 **Final Approval Hearing: April 2, 2019, at 2:30 p.m.**

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1 28. The Court retains jurisdiction to consider all further matters arising out of or
2 connected with the Settlement Agreement.

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4 DATED: November 13, 2018
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