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15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 OAKLAND DIVISION

18 DR. TIMOTHY COLLINS and SIDNEY
19 NAIMAN, individually and on behalf of all
20 others similarly situated,

21 Plaintiffs,

22 v.

23 TOTAL MERCHANT SERVICES, INC.,
24 QUALITY MERCHANT SERVICES, INC.
25 MICHAEL ALIMENTO and BOBBY
26 POWERS

27 Defendants.

Case No. 4:17-cv-03806-CW

**SECOND AMENDED COMPLAINT
FOR DAMAGES AND INJUNCTIVE
RELIEF**

Class Action

JURY TRIAL DEMAND

Complaint Filed: July 5, 2017

Plaintiffs Sidney Naiman and Dr. Timothy Collins (collectively referred to as
“Plaintiffs”), by their undersigned counsel, for this class action complaint against Total Merchant
Services, Inc., and its present, former, or future direct and indirect parent companies,
subsidiaries, affiliates, agents, and/or other related entities (“Total Merchant Services”) Quality

1 Merchant Services, Inc. and its present, former, or future direct and indirect parent companies,
2 subsidiaries, affiliates, agents, and/or other related entities (“Quality Merchant”), Quality’s
3 owner and employee who operated its telemarketing campaign, Michael Alimento (“Mr.
4 Alimento”) and Bobby Powers the “territory owner” at Total Merchant Services who conducted
5 the facsimile advertisement campaign (collectively referred to as the “Defendants”), and allege
6 as follows:

7 **I. INTRODUCTION**

8 1. Nature of Action. Plaintiffs, individually and as class representative for all others
9 similarly situated, bring this action against the Defendants for violations of the Telephone
10 Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”).

11 **II. PARTIES**

12 2. Plaintiff Sidney Naiman is an individual residing in California, in this District.
13 3. Plaintiff Dr. Timothy Collins is an individual residing in California.
14 4. Defendant Total Merchant Services, Inc. is a Delaware corporation with its principal
15 place of business in Woodland Hills, California. Total Merchant Services is registered to do and
16 is doing business in California and throughout the United States.

17 5. Defendant Quality Merchant Services, Inc. is an Illinois corporation with its principal
18 place of business in Bartlett, IL. Quality Merchant Services does business throughout the United
19 States, including into California.

20 6. Defendant Michael Alimento is an individual residing in Illinois, and is the owner and
21 Vice President of Quality Merchant Services, Inc. Mr. Alimento operates the telemarketing
22 campaign for Quality Merchant.

23 7. Defendant Bobby Powers is an individual residing in Hawaii who identifies himself
24 as a “Territory Owner” for Total Merchant Services. Mr. Powers operates the facsimile
25 advertisement campaign for Total Merchant that is the subject of this case.

III. JURISDICTION AND VENUE

1
2 8. Jurisdiction. This Court has subject matter jurisdiction over Plaintiff’s TCPA claims
3 pursuant to 28 U.S.C. § 1331 because Plaintiff’s TCPA claims arise under the laws of the United
4 States, specifically, 47 U.S.C. § 227.

5 9. Personal Jurisdiction. This Court has personal jurisdiction over Total Merchant
6 Services because it has submitted to California jurisdiction by registering with the Secretary of
7 State to do business in this State, and a substantial part of the wrongful acts alleged in this
8 Complaint were committed in California. This Court has personal jurisdiction over the remaining
9 defendants because they intentionally directed their conduct into California, and they committed
10 a substantial part of the wrongful acts alleged in this Complaint in California.

11 10. Venue. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1)-(2)
12 because a substantial part of the events giving rise to Plaintiff Naiman’s claims occurred in this
13 District.

14 11. Intradistrict Assignment. Assignment to this Division is proper pursuant to Civil L.R.
15 3-2(c) because a substantial part of the events or omissions that give rise to Plaintiff Naiman’s
16 claims occurred in the County of Contra Costa.

17 **IV. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 47 U.S.C. § 227**

18 12. In 1991, Congress enacted the TCPA in response to a growing number of consumer
19 complaints regarding certain telemarketing practices.

20
21 Automated Calls to Cellular Telephones

22 13. The TCPA makes it unlawful “to make any call (other than a call made for
23 emergency purposes or made with the prior express consent of the called party) using an
24 automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone
25 number assigned to a ... cellular telephone service.” 47 U.S.C. § 227(b)(1)(A). The TCPA
26

1 provides a private cause of action to persons who receive calls in violation of 47 U.S.C.
2 § 227(b)(1)(A). 47 U.S.C. § 227(b)(3).

3 14. According to findings by the Federal Communication Commission (“FCC”), the
4 agency Congress vested with authority to issue regulations implementing the TCPA, such calls
5 are prohibited because, as Congress found, automated or prerecorded telephone calls are a
6 greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly
7 and inconvenient.

8
9 15. The FCC also recognized that “wireless customers are charged for incoming calls
10 whether they pay in advance or after the minutes are used.” *In re Rules and Regulations*
11 *Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Report and Order,
12 18 F.C.C. Rcd. 14014, 14115 ¶ 165 (2003).

13
14 16. In 2013, the FCC required prior express written consent for all autodialed or
15 prerecorded telemarketing calls (“robocalls”) to wireless numbers and residential lines.
16 Specifically, it ordered:

17 [A] consumer’s written consent to receive telemarketing robocalls
18 must be signed and be sufficient to show that the consumer: (1)
19 received “clear and conspicuous disclosure” of the consequences of
20 providing the requested consent, i.e., that the consumer will receive
21 future calls that deliver prerecorded messages by or on behalf of a
22 specific seller; and (2) having received this information, agrees
unambiguously to receive such calls at a telephone number the
consumer designates. In addition, the written agreement must be
obtained “without requiring, directly or indirectly, that the
agreement be executed as a condition of purchasing any good or
service.”

23 *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*,
24 27 F.C.C. Rcd. 1830, 1844 ¶ 33 (2012) (footnotes omitted).

25 17. The FCC regulations also “generally establish that the party on whose behalf a
26 solicitation is made bears ultimate responsibility for any violations.” *In the Matter of Rules and*
27

1 *Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 92-90,
2 Memorandum and Order, 10 F.C.C. Rcd. 12391, 12397 ¶ 13 (1995).

3 18. The FCC confirmed this principle in 2013, when it explained that “a seller ... may be
4 held vicariously liable under federal common law principles of agency for violations of either
5 section 227(b) or section 227(c) that are committed by third-party telemarketers.” *In the Matter*
6 *of the Joint Petition Filed by Dish Network, LLC*, 28 F.C.C. Rcd. 6574, 6574 ¶ 1 (2013).

7
8 The Transmission of Facsimile Advertisements

9 19. The TCPA was also enacted to protect the property rights of the recipients of
10 unsolicited facsimile advertisements.

11 20. The TCPA prohibits the use of a facsimile machine to send unsolicited
12 advertisements for goods and services. 47 U.S.C. § 227(b)(1)(C).

13 21. The TCPA requires that even facsimile advertisements being sent to companies who
14 consented to receipt, or with whom the advertiser has an established business relationship, must
15 include language on the facsimile that clearly informs the recipient that it may request that future
16 facsimiles cease, and that failure to remove the consumer’s facsimile from the telemarketer’s
17 database within thirty days is itself a violation of the TCPA. These requirements are referred to
18 as “Compliant Opt Out Notice.”
19
20

21
22 The TCPA Imposes Personal Liability on Individuals who Participate in or Commission the
23 TCPA Violations

24 22. Under the TCPA, an individual such as Mr. Alimento, may be personally liable for
25 the acts alleged in this Complaint pursuant to 47 U.S.C. § 217 of the TCPA, which reads, *inter*
26 *alia*:
27

1 [T]he act, omission, or failure of any officer, agent, or other person acting for or
2 employed by any common carrier or user, acting within the scope of his
3 employment, shall in every case be also deemed to be the act, omission, or failure
4 of such carrier or user *as well as of that person*.

5 47. U.S.C. § 217.

6 23. When considering individual officer liability, other Courts have agreed that a
7 corporate officer involved in the telemarketing at issue may be personally liable under the
8 TCPA. *See, e.g., Jackson Five Star Catering, Inc. v. Beason*, 2013 U.S. Dist. LEXIS 159985,
9 *10 (E.D. Mich. Nov. 8, 2013) (“[M]any courts have held that corporate actors can be
10 individually liable for violating the TCPA "where they "had direct, personal participation in or
11 personally authorized the conduct found to have violated the statute.”); *Maryland v. Universal*
12 *Elections*, 787 F. Supp. 2d 408, 415-16 (D. Md. 2011) (“If an individual acting on behalf of a
13 corporation could avoid individual liability, the TCPA would lose much of its force.”).

14 24. Defendant Mr. Alimento is personally liable under the “participation theory” of
15 liability because he was the controlling officer of Quality Merchant, knew of Quality Merchant’s
16 pre-recorded telemarketing conduct, and directed employees and/or agents of Quality Merchant
17 to continue making those violations.

18 25. In fact, Mr. Alimento was the only third party identified by Total Merchant in its
19 initial disclosures relating to the pre-recorded telemarketing call alleged by Plaintiff Naiman.

20 26. This is because defendant Mr. Alimento authorized and oversaw Quality Merchant’s
21 telemarketing processes.

22 27. Furthermore, Mr. Alimento responded to a subpoena in his individual capacity in this
23 matter and produced information relating to his knowledge of the pre-recorded telemarketing call
24 the Plaintiff alleges.
25
26
27

1 28. Finally, Mr. Alimento is also personally liable because he was responsible for
2 ensuring compliance with Quality Merchant and their vendors, including TCPA compliance.

3 29. Defendant Mr. Powers is personally liable under the “participation theory” of liability
4 for the facsimile advertisement campaign, because he personally conducted the campaign and
5 transmitted the facsimile advertisements himself or through an electronic service that allowed for
6 transmission *en masse*.

7 30. In fact, Mr. Powers was the only third party identified by Total Merchant in its initial
8 disclosures relating to the facsimile advertisement campaign alleged by Plaintiff Dr. Collins.

9 31. This is because defendant Mr. Powers authorized and oversaw the facsimile
10 advertisement campaign.
11

12 **V. FACTUAL ALLEGATIONS**

13 **A. Factual Allegations Regarding Total Merchant Services**

14 32. Total Merchant Services offers various payment technologies for businesses. *See*
15 <http://totalmerchantservices.com> (last visited June 23, 2017).
16

17 33. Total Merchant Services “is a registered ISO/MSP of Wells Fargo Bank, N.A,” i.e.,
18 an Independent Selling Organization / Member Service Provider of Wells Fargo Bank. *Id.*
19

20 34. One of Total Merchant Services’ strategies for marketing its payment services
21 involves the use of an automatic telephone dialing system (“ATDS”) to solicit business.

22 35. Total Merchant Services uses ATDS equipment that has the capacity to store or
23 produce telephone numbers to be called, that includes autodialers and predictive dialers, and that
24 plays a prerecorded message once the calls connect.

25 36. Recipients of these calls, including Plaintiff Naiman, did not consent to receive such
26 telephone calls.
27

1 37. Total Merchant Services also make calls using an ATDS to cellular telephones whose
2 owners, including Plaintiff Naiman, have not provided prior express written consent to receive
3 such calls.

4 38. Another one of Total Merchant Services' strategies for marketing its payment
5 services involves the use of sending facsimile advertisements to solicit business.

6 39. Recipients of these faxes, including Plaintiff Dr. Collins, did not consent to receive
7 them.

8 40. Total Merchant Services also sends faxes, such as the ones received by Dr. Collins,
9 that do not have appropriate "opt-out" notices.

10 **B. Factual Allegations Regarding Plaintiff Dr. Collins**

11 41. Plaintiff Dr. Collins is, and at all times mentioned herein was, a "person" as defined
12 by 47 U.S.C. § 153(39).

13 42. On July 5, 2017 the Plaintiff Dr. Collins received a facsimile advertisement Bobby
14 Powers.

15 43. The facsimile advertisement contained direct contact information for "Bobby
16 Powers".

17 44. According to his LinkedIn profile, Bobby Powers has been a sales representative at
18 Total Merchant Services for 17 years. See [https://www.linkedin.com/in/bobby-powers-
19 90834315/](https://www.linkedin.com/in/bobby-powers-90834315/) (Last Visited August 17, 2017).

20 45. Mr. Powers also identifies himself on his Facebook page as a "Territory Owner" at
21 Total Merchant Services.

22 46. The Plaintiff Dr. Collins received similar faxes on July 12, 2017 and August 8, 2017.

23 47. All of the facsimile advertisements Dr. Collins is aware he received are attached as
24 Exhibit 1.

25 48. The facsimile advertisements were generic and a number state "ATTENTION
26 MERCHANTS".
27

1 49. In fact, one of the facsimile advertisements had a place for the recipient to place their
2 business card, confirming that the goal of the transmission was to generate new business.

3 50. None of the facsimile advertisements contain a compliant opt-out notice.

4 51. Plaintiff Dr. Collins has never been a customer of Total Merchant Services, nor has
5 he ever been interested in being a customer of Total Merchant Services.

6 52. Plaintiff Dr. Collins did not provide consent to receive facsimile advertisements from,
7 or on behalf of, Total Merchant Services.

8 53. Plaintiff Dr. Collins's privacy has been violated by the above-described call from, or
9 on behalf of, Total Merchant Services. The faxes are an annoying, harassing nuisance.

10 54. Plaintiff Dr. Collins and all members of the Facsimile Advertisement Class, defined
11 below, have been harmed by the acts of Total Merchant Services because their privacy has been
12 violated and they were subjected to annoying and harassing faxes that constituted a nuisance.
13 The calls also occupied Plaintiff Dr. Collins's facsimile line, rendering it unavailable for
14 legitimate communication.

15 **C. Factual Allegations Regarding Plaintiff Naiman**

16 55. Plaintiff Naiman is, and at all times mentioned herein was, a "person" as defined by
17 47 U.S.C. § 153(39).

18 56. Plaintiff Naiman's telephone number, (925) 935-XXXX, is registered to a cellular
19 telephone service.

20 57. On June 16, 2017, the Plaintiff Naiman's telephone number was called with a pre-
21 recorded message by Quality Merchant, at the direction of Michael Aliment, acting on behalf of
22 Total Merchant Services.

23 58. The caller ID showed the telephone call was from (630) 246-4315.

24 59. When the call was answered, there was a lengthy pause and a click followed by
25 silence before any voice came on the line, which indicated that the call was made using an
26 ATDS.
27

1 60. Following the lengthy pause and extended silence, a prerecorded message played
2 words to the effect that the call was being made to sell credit card processing services. The called
3 party was instructed to press a button on his telephone for further information.

4 61. In an attempt to determine the identity of the caller, the recipient pressed the button
5 for further information and was instructed by another prerecorded voice to leave a voice message
6 with a telephone number.

7 62. Shortly after leaving his voice message, the Plaintiff Naiman received a call from
8 “Perla”, who gave her telephone number as (847) 469-1081, claimed she was with Total
9 Merchant Services and proceeded to try to sell Total Merchant Services products.

10 63. After the phone call, Total Merchant Services sent Plaintiff Naiman a series of e-
11 mails attempting to sell its products.

12 64. Plaintiff Naiman has never been a customer of Total Merchant Services, nor has he
13 ever been interested in being a customer of Total Merchant Services.

14 65. Plaintiff Naiman did not provide prior express written consent to receive ATDS-
15 generated or prerecorded calls from, or on behalf of, Total Merchant Services.

16 66. Plaintiff Naiman’s privacy has been violated by the above-described call from, or on
17 behalf of, Total Merchant Services. The call was an annoying, harassing nuisance.

18 67. Plaintiff Naiman and all members of the Cellular Telephone Class, defined below,
19 have been harmed by the acts of Total Merchant Services because their privacy has been
20 violated, they were subjected to annoying and harassing calls that constituted a nuisance, and
21 they were charged for incoming calls. The calls also occupied Plaintiff Naiman’s cellular
22 telephone line, rendering it unavailable for legitimate communication.

23 **D. Factual Allegations Regarding Additional Consumer Complaints**

24 68. Unfortunately, Plaintiffs’ experiences with Total Merchant Services are not isolated
25 events. Many others have lodged complaints after having received telemarketing calls from Total
26 Merchant Services.
27

1 69. Total Merchant Services has previously been informed that it, or its agents, have been
2 making pre-recorded calls to prospective customers' cellphones.

3 70. Despite this knowledge, Total Merchant Services continued its conduct.

4 71. In fact, at least one facsimile advertisement was sent after the filing of this lawsuit, so
5 Total Merchant's conduct in violation of the TCPA is believed to continue.

6 72. With respect to the pre-recorded message calls, 800notes.com also details complaints
7 regarding calls from another caller ID that robocalled Plaintiff Naiman, (828) 548-6764:

8 **DG**

9 30 Jul 2016

10 Bottom feeding credit card merchant service.

11

12 *Caller: Telemarketer*

13 **arrr_beee**

14 21 Dec 2016

15 Pre recorded message. I did not listen.

16 *Caller: Telemarketer*

17 630-246-4315, 800Notes, <http://800notes.com/Phone.aspx/1-630-246-4315> (last visited June 23,
18 2017).

19 **VI. TOTAL MERCHANT'S LIABILITY AND ITS ARRANGEMENT WITH
20 QUALITY MERCHANT**

21 73. The Federal Communication Commission has instructed that sellers such as Total
22 Merchant may not avoid liability by outsourcing telemarketing to third parties, such as Quality
23 Merchant:

24 [A]llowing the seller to avoid potential liability by outsourcing its telemarketing
25 activities to unsupervised third parties would leave consumers in many cases
26 without an effective remedy for telemarketing intrusions. This would particularly
27 be so if the telemarketers were judgment proof, unidentifiable, or located outside
the United States, as is often the case. Even where third-party telemarketers are
identifiable, solvent, and amenable to judgment limiting liability to the telemarketer
that physically places the call would make enforcement in many cases substantially

1 more expensive and less efficient, since consumers (or law enforcement agencies)
2 would be required to sue each marketer separately in order to obtain effective relief.
3 As the FTC noted, because “[s]ellers may have thousands of ‘independent’
4 marketers, suing one or a few of them is unlikely to make a substantive difference
5 for consumer privacy.”

6 *May 2013 FCC Ruling*, 28 FCC Rcd at 6588 (¶ 37) (internal citations omitted).

7 74. In its January 4, 2008 ruling, the FCC likewise held that a company on whose behalf
8 a telephone call is made bears the responsibility for any violations. *Id.* (specifically recognizing
9 “on behalf of” liability in the context of an autodialed or prerecorded message call sent to a
10 consumer by a third party on another entity’s behalf under 47 U.S.C. § 227(b)).

11 75. In fact, for more than twenty years, the FCC has explained that its “rules generally
12 establish that the party on whose behalf a solicitation is made bears ultimate responsibility for
13 any violations.” *In re Rules & Regulations Implementing the TCPA*, CC Docket No. 92-90,
14 Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 (¶ 13) (1995).

15 76. On May 9, 2013, the FCC released a Declaratory Ruling holding that a corporation or
16 other entity that contracts out its telephone marketing “may be held vicariously liable under
17 federal common law principles of agency for violations of either section 227(b) or section 227(c)
18 that are committed by third-party telemarketers.”¹

19 77. The May 2013 FCC Ruling held that, even absent evidence of a formal contractual
20 relationship between the seller and the telemarketer, a seller is liable for telemarketing calls if the
21 telemarketer “has apparent (if not actual) authority” to make the calls. 28 FCC Rcd at 6586 (¶
22 34).

23
24
25
26
27 ¹ *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling
Concerning the TCPA Rules*, 28 FCC Rcd 6574, 6574 (¶ 1) (2013) (“May 2013 FCC Ruling”).

1 78. The May 2013 FCC Ruling further clarifies the circumstances under which a
2 telemarketer has apparent authority:

3 [A]pparent authority may be supported by evidence that the seller allows the
4 outside sales entity access to information and systems that normally would be
5 within the seller's exclusive control, including: access to detailed information
6 regarding the nature and pricing of the seller's products and services or to the
7 seller's customer information. The ability by the outside sales entity to enter
8 consumer information into the seller's sales or customer systems, as well as the
9 authority to use the seller's trade name, trademark and service mark may also be
10 relevant. It may also be persuasive that the seller approved, wrote or reviewed the
11 outside entity's telemarketing scripts. Finally, a seller would be responsible under
12 the TCPA for the unauthorized conduct of a third-party telemarketer that is
13 otherwise authorized to market on the seller's behalf if the seller knew (or
14 reasonably should have known) that the telemarketer was violating the TCPA on
15 the seller's behalf and the seller failed to take effective steps within its power to
16 force the telemarketer to cease that conduct.

17 FCC Rcd at 6592 (¶ 46).

18 79. Total Merchant is directly liable for the Quality Merchant-commissioned
19 telemarketing calls because it actively participated in those calls through guidelines it directed
20 Quality Merchant, and the third parties they worked with, to follow.

21 80. Total Merchant is also directly liable for the Quality Merchant-commissioned
22 telemarketing calls because it actively participated in the calls by "allow[ing] the outside sales
23 entity access to information and systems that normally would be within the seller's exclusive
24 control", when it allowed Quality Merchant access to its telemarketing calling system because
25 Quality Merchant or the third party it worked with, was able to automatically transfer the
26 Plaintiff to a Total Merchant representative during the call, as all of the follow up about the sale
27 came directly from Total Merchant.

81. Total Merchant knowingly and actively accepted this business, which originated
through the illegal telemarketing calls from Quality Merchant commissioned telemarketing calls.

1 Indeed, Total Merchant employees marketed its products and services to Plaintiff on the call to
2 the Plaintiff.

3 82. Total Merchant maintains interim control over Quality Merchant's actions as to
4 telemarketing and other activities by directing the content of their agents' advertising as well as
5 dictating the parameters for potential prospects that they would accept.

6 83. Total Merchant knew (or reasonably should have known) that Quality Merchant was
7 violating the TCPA on its behalf, and failed to take effective steps within its power to force the
8 telemarketer to cease that conduct. Any reasonable seller that accepts "warm transfer" calls from
9 lead generators would, and indeed must, investigate to ensure that those calls were made in
10 compliance with TCPA rules and regulations.

11 84. Finally, the May 2013 FCC Ruling states that called parties may obtain "evidence of
12 these kinds of relationships . . . through discovery, if they are not independently privy to such
13 information." *Id.* at 6592-593 (¶ 46). Evidence of circumstances pointing to apparent authority
14 on behalf of the telemarketer "should be sufficient to place upon the seller the burden of
15 demonstrating that a reasonable consumer would not sensibly assume that the telemarketer was
16 acting as the seller's authorized agent." *Id.* at 6593 (¶ 46).

17
18
19 **VII. TOTAL MERCHANT'S LIABILITY FOR THE FACSIMILE ADVERTISING OF**
20 **BOBBY POWERS**

21
22 85. The TCPA prohibits the "use any telephone facsimile machine, computer, or other
23 device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. §
24 227(b)(1)(C) (2006).

25 86. The statute, however, is silent regarding who qualifies as a "sender" of junk faxes.
26
27

1 87. Recognizing this ambiguity, the FCC issued an order in 1995, clarifying that “the
2 entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance
3 with the rule banning unsolicited facsimile advertisements.” *In re Rules & Regulations*
4 *Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12407
5 (1995).

6 88. This definition of “sender” was later codified in 2006 as “the person or entity on
7 whose behalf a facsimile unsolicited advertisement is sent or whose goods or services
8 are advertised or promoted in the unsolicited advertisement.” 47 C.F.R. 64.1200(f)(10).
9

10 89. Roughly a year after the 2013 FCC Ruling, the Eleventh Circuit requested the FCC's
11 position on the principles governing a defendant's liability for fax ads sent by a third party.

12 90. In its response, the FCC clarified that “the DISH Network ruling applies only
13 to liability for telemarketing calls and neither addresses nor alters the Commission's pre-existing
14 regulatory treatment of unsolicited facsimile advertisements.”
15

16 91. That standard, the letter explained, is embodied in the definition of “sender” as stated
17 in the FCC's 1995 order: “the entity or entities on whose behalf facsimiles are transmitted are
18 ultimately liable for compliance with the rule banning unsolicited
19 facsimile advertisements.” *Id.* (quoting 10 FCC Rcd. at 12407).

20 92. This means, according to the FCC, that “senders” of junk faxes are directly liable, and
21 that principles of vicarious liability are irrelevant.

22 93. Here, from the plain face of the facsimile advertisements, Total Merchant goods and
23 services were advertised on each communication.
24

25 94. However, even under the 2013 FCC Order, Total Merchant is still liable for the
26 actions of its “Territory Owner” Bobby Powers:
27

1 a. Because it actively participated in the facsimile advertisements through
2 guidelines it directed Mr. Powers, and the third parties they worked with, to follow.

3 b. Total Merchant knowingly and actively accepted this business, which
4 originated through the illegal telemarketing calls from Mr. Powers facsimile advertisements.

5 c. Total Merchant maintains interim control over Mr. Powers's actions as to
6 telemarketing and other activities by directing the content of their agents' advertising as well as
7 dictating the parameters for potential prospects that they would accept.

8 d. Total Merchant knew (or reasonably should have known) that Mr. Powers
9 was violating the TCPA on its behalf, and failed to take effective steps within its power to force
10 the telemarketer to cease that conduct. Any reasonable seller that accepts leads from facsimile
11 advertisements would, and indeed must, investigate to ensure that those contacts were made in
12 compliance with TCPA rules and regulations.
13
14

15
16 **VIII. CLASS ACTION ALLEGATIONS**

17 95. Class Definitions. Pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3), Plaintiffs bring this
18 case as a class action on behalf of national classes ("Classes") defined as follows:

19 CELLULAR TELEPHONE CLASS – PLAINTIFF NAIMAN

20 All persons to whom: (a) Defendants and/or a third party acting on
21 Defendants' behalf made one or more non-emergency telephone
22 calls; (b) promoting Defendants' goods or services; (c) to their
23 cellular telephone number; (d) through the use of an automatic
24 telephone dialing system or an artificial or prerecorded voice; (e) at
25 any time in the period that begins four years before the date of filing
26 this Complaint and ends at the date of trial.

27 FACSIMILE ADVERTISEMENT CLASS – PLAINTIFF DR. COLLINS

All persons to whom: (a) Defendants and/or a third party acting on
Defendants' behalf sent a facsimile advertisement; (b) promoting
Defendants' goods or services; (c) at any time in the period that

1 begins four years before the date of filing this Complaint and ends
2 at the date of trial.

3 Excluded from the Classes are Defendants, any entity in which Defendants has a controlling
4 interest or that has a controlling interest in Defendants, and Defendants' legal representatives,
5 assignees, and successors. Also excluded are the judge to whom this case is assigned and any
6 member of the judge's immediate family.

7 96. Numerosity. The Classes are so numerous that joinder of all members is
8 impracticable. On information and belief, the Classes have more than 100 members. Moreover,
9 the disposition of the claims of the Classes in a single action will provide substantial benefits to
10 all parties and the Court.

11 97. Commonality. There are numerous questions of law and fact common to Plaintiffs
12 and members of the Classes. These common questions of law and fact include, but are not
13 limited to, the following:

14 a. Whether Defendants and/or its affiliates or agents, and/or other persons or
15 entities acting on its behalf, violated 47 U.S.C. § 227(b)(1)(A) by making any call, except for
16 emergency purposes, to a cellular telephone number using an ATDS and/or artificial or
17 prerecorded voice;

18 b. Whether Defendants and/or its affiliates or agents, and/or other persons or
19 entities acting on its behalf, knowingly and/or willfully violated 47 U.S.C. § 227(b)(1)(A) by
20 making calls, except for emergency purposes, to cellular telephone numbers using an ATDS
21 and/or artificial or prerecorded voice, thus entitling Plaintiff and the Cellular Telephone Class to
22 treble damages;

23 c. Whether Defendants is liable for ATDS-generated and/or automated or
24 prerecorded calls promoting its products or services made by its affiliates and agents and/or other
25 persons or entities acting on its behalf; and

26 d. Whether Defendants and/or its affiliates and agents and/or other persons or
27 entities acting on its behalf sent facsimile advertisements without prior permission;

1 e. Whether Defendants and/or its affiliates and agents and/or other persons or
2 entities acting on its behalf sent facsimile advertisements without a compliant opt-out notice;

3 f. Whether Defendants and/or its affiliates and agents and/or other persons or
4 entities acting on its behalf should be enjoined from violating the TCPA in the future.

5 98. Typicality. Plaintiffs' claims are typical of the claims of the respective Classes.
6 Plaintiffs' claims, like the claims of the Classes, arise out of the same common course of conduct
7 by Defendants and are based on the same legal and remedial theories.

8 99. Adequacy. Plaintiffs will fairly and adequately protect the interests of the Classes.
9 Plaintiffs have retained competent and capable attorneys with significant experience in complex
10 and class action litigation, including consumer class actions and TCPA class actions. Plaintiffs
11 and their counsel are committed to prosecuting this action vigorously on behalf of the Classes
12 and have the financial resources to do so. Neither Plaintiffs nor its counsel have interests that are
13 contrary to or that conflict with those of the proposed Classes.

14 100. Predominance. Defendants has engaged in a common course of conduct toward
15 Plaintiffs and members of the Classes. The common issues arising from this conduct that affect
16 Plaintiffs and members of the Classes predominate over any individual issues. Adjudication of
17 these common issues in a single action has important and desirable advantages, including judicial
18 economy.

19 101. Superiority. A class action is the superior method for the fair and efficient
20 adjudication of this controversy. Classwide relief is essential to compel Defendants to comply
21 with the TCPA. The interest of individual members of the Classes in individually controlling the
22 prosecution of separate claims against Defendants is small because the damages in an individual
23 action for violation of the TCPA are small. Management of these claims is likely to present
24 significantly fewer difficulties than are presented in many class actions because the calls at issue
25 are automated and because the TCPA articulates bright-line standards for liability and damages.
26 Class treatment is superior to multiple individual suits or piecemeal litigation because it
27 conserves judicial resources, promotes consistency and efficiency of adjudication, provides a

1 forum for small claimants, and deters illegal activities. There will be no significant difficulty in
2 the management of this case as a class action.

3 102. Injunctive and Declaratory Relief is Appropriate. Defendants has acted on
4 grounds generally applicable to the Classes, thereby making final injunctive relief and
5 corresponding declaratory relief with respect to the Classes appropriate on a classwide basis.

6 **IX. FIRST CLAIM FOR RELIEF**
7 **(Violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A))**

8 103. Plaintiff Naiman realleges and incorporates by reference each and every
9 allegation set forth in the preceding paragraphs.

10 104. The foregoing acts and omissions of Defendants and/or its affiliates or agents,
11 and/or other persons or entities acting on its behalf, constitute numerous and multiple violations
12 of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making non-emergency calls to the cellular telephone
13 numbers of Plaintiff Naiman and members of the Cellular Telephone Class using an ATDS
14 and/or artificial or prerecorded voice.

15 105. As a result of violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by Defendants
16 and/or its affiliates or agents and/or other persons or entities acting on its behalf, Plaintiff
17 Naiman and members of the Cellular Telephone Class are entitled to an award of \$500 in
18 damages for each and every call made to their cellular telephone numbers using an ATDS and/or
19 artificial or prerecorded voice in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

20 106. Plaintiff Naiman and members of the Cellular Telephone Class are also entitled to
21 and do seek injunctive relief prohibiting Defendants and/or its affiliates, agents, and/or other
22 persons or entities acting on its behalf from violating the TCPA, 47 U.S.C. § 227(b)(1)(A), by
23 making calls, except for emergency purposes, to any cellular telephone numbers using an ATDS
24 and/or artificial or prerecorded voice in the future.

1 **X. SECOND CLAIM FOR RELIEF**
2 **(Knowing and/or Willful Violations of the Telephone Consumer Protection Act, 47 U.S.C.**
3 **§ 227(b)(1)(A))**

4 107. Plaintiff Naiman realleges and incorporates by reference each and every
5 allegation set forth in the preceding paragraphs.

6 108. The foregoing acts and omissions of Defendants and/or its affiliates or agents,
7 and/or other persons or entities acting on its behalf, constitute numerous and multiple violations
8 of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except for emergency purposes, to the
9 cellular telephone numbers of Plaintiff Naiman and members of the Cellular Telephone Class
10 using an ATDS and/or artificial or prerecorded voice.

11 109. As a result of knowing and/or willful violations of the TCPA, 47 U.S.C.
12 § 227(b)(1)(A), by Defendants and/or its affiliates or agents, and/or other persons or entities
13 acting on its behalf, Plaintiff Naiman and members of the Cellular Telephone Class are entitled
14 to treble damages of up to \$1,500 for each and every call made to their cellular telephone
15 numbers using an ATDS and/or artificial or prerecorded voice in violation of the statute,
16 pursuant to 47 U.S.C. § 227(b)(3).

17 **XI. THIRD CLAIM FOR RELIEF**
18 **(Violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A))**

19 110. Plaintiff Dr. Collins realleges and incorporates by reference each and every
20 allegation set forth in the preceding paragraphs.

21 111. The foregoing acts and omissions of Defendants and/or its affiliates or agents,
22 and/or other persons or entities acting on its behalf, constitute numerous and multiple violations
23 of the TCPA, by transmitting facsimile advertisements without prior permission, and,
24 independent of that, by the fact that the facsimile advertisements did not contain a complaint “opt
25 out” notice.

26 112. As a result of violations of the TCPA by Defendants and/or its affiliates or agents
27 and/or other persons or entities acting on its behalf, Plaintiff Dr. Collins and members of the

1 Facsimile Advertisement Class are entitled to an award of \$500 in damages for each and every
2 facsimile advertisement sent.

3 113. Plaintiff Dr. Collins and members of the Facsimile Advertisement Class are also
4 entitled to and do seek injunctive relief prohibiting Defendants and/or its affiliates, agents, and/or
5 other persons or entities acting on its behalf from violating the TCPA by sending facsimile
6 advertisements in the future.

7 **XII. FOURTH CLAIM FOR RELIEF**
8 **(Knowing and/or Willful Violations of the Telephone Consumer Protection Act, 47 U.S.C.**
9 **§ 227(b)(1)(A))**

10 114. Plaintiff Dr. Collins realleges and incorporates by reference each and every
11 allegation set forth in the preceding paragraphs.

12 115. The foregoing acts and omissions of Defendants and/or its affiliates or agents,
13 and/or other persons or entities acting on its behalf, constitute numerous and multiple violations
14 of the TCPA, by transmitting facsimile advertisements without prior permission, and,
15 independent of that, by the fact that the facsimile advertisements did not contain a complaint “opt
16 out” notice.

17 116. As a result of willful or knowing violations of the TCPA by Defendants and/or its
18 affiliates or agents and/or other persons or entities acting on its behalf, Plaintiff Dr. Collins and
19 members of the Facsimile Advertisement Class are entitled to an award of \$1,500 in damages for
20 each and every facsimile advertisement sent.

21 117. Plaintiff Dr. Collins and members of the Facsimile Advertisement Class are also
22 entitled to and do seek injunctive relief prohibiting Defendants and/or its affiliates, agents, and/or
23 other persons or entities acting on its behalf from violating the TCPA by sending facsimile
24 advertisements in the future.

25 **XIII. PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs, on their own behalf and on behalf of all members of the Class,
27 pray for judgment against Defendants as follows:

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- A. Certification of the proposed Classes;
- B. Appointment of Plaintiffs as representatives of the Classes;
- C. Appointment of the undersigned counsel as counsel for the Classes;
- D. A declaration that actions complained of herein by Defendants and/or its affiliates, agents, or related entities violate the TCPA;
- E. An order enjoining Defendants and its affiliates, agents and related entities from engaging in the unlawful conduct set forth herein;
- F. An award to Plaintiffs and the Classes of damages, as allowed by law;
- G. An award to Plaintiffs and the Classes of attorneys’ fees and costs, as allowed by law and/or equity;
- H. Leave to amend this Complaint to conform to the evidence presented at trial; and
- I. Orders granting such other and further relief as the Court deems necessary, just, and proper.

XIV. DEMAND FOR JURY

Plaintiffs demand a trial by jury for all issues so triable.

XV. SIGNATURE ATTESTATION

The ECF user filing this Complaint attests that concurrence in its filing has been obtained from each of the other signatories.

1 RESPECTFULLY SUBMITTED AND DATED this 7th day of November, 2017.

2
3 By: /s/ Anthony I. Paronich
4 Anthony I. Paronich

5 CERTIFICATE OF SERVICE

6 I, Anthony I. Paronich, hereby certify that on November 7, 2017, I electronically filed the
7 foregoing with the Clerk of the Court using the CM/ECF system which will send notification to
8 all counsel of record.

9 BRODERICK & PARONICH, P.C.

10 By: /s/ Anthony I. Paronich
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13 99 High Street, Suite 304
14 Boston, Massachusetts 02110
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16 *Attorney for Plaintiff*