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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

No. 1:19-cv-12608-WGY

GRACE MURRAY, on behalf of themselves and others
similarly situated,
Plaintiffs

vs.

GROCERY DELIVERY E-SERVICES USA, INC.,
Defendant

For Zoom Hearing Before:
Judge William G. Young

Final Approval of Settlement

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, May 11, 2021

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
bulldog@richromanow.com

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A P P E A R A N C E S

ANTHONY I. PARONICH, ESQ.
MARY TURKE, ESQ.
SAMUEL J. STRAUSS, ESQ.
Paronich Law, P.C.
350 Lincoln Street, Suite 2400
Hingham, MA 02043
(508) 221-1510
Email: Anthony@paronichlaw.com

and

STACEY SLAUGHTER, ESQ.
Robins, Kaplan, LLP
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
(612) 349-8500
Email: Sslaughter@robinskaplan.com
For Plaintiff

SHANNON Z. PETERSEN, ESQ.
Sheppard, Mullin, Richter & Hampton, LLP
12275 El Camino Real, Suite 200
San Diego, CA 92130-4092
(858) 720-8900
Email: Spetersen@sheppardmullin.com
For Defendant

ERIC ALAN ISAACSON, ESQ.
Law Office of Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037
(858) 263-9581
Email: Ericalanisaacson@icloud.com
For the Objector, Sarah McDonald

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

2 (Begins, 2:00 p.m.)

3 THE CLERK: Now hearing Civil Matter 19-12608,
4 Murray versus Grocery Delivery E-Services.

5 THE COURT: Good afternoon counsel, this is a
6 fairness hearing on a putative class action. The
7 hearing is conducted first on our zoom platform. Our
8 host for the hearing is Courtroom Deputy Clerk, Jennifer
9 Gaudet. The proceedings are taken down by our Official
10 Court Reporter, Rich Romanow. I have law clerks on the
11 line.

12 We also welcome the Honorable Nomo Sakamoto, a
13 colleague who sits in the Sapporo District Court in
14 Japan. Whenever I have an international jurist, she's
15 studying here in Cambridge, I invite them to be present
16 and see things exactly the way I see them.

17 This is an official hearing of the Court so of
18 course it is open to the press and public. I never
19 inquire as to whether any members of the press or public
20 are present, but if they are, you, one, are welcome,
21 and, two, I must remind you to keep your microphone
22 muted and that the rules of court remain in full force
23 and effect, that is to say there is no retransmission,
24 streaming, rebroadcast, taping, or other transcribing of
25 these proceedings.

1 Now with that done, could counsel introduce
2 themselves starting with counsel for the plaintiffs.

3 MR. PARONICH: Good afternoon, your Honor, Anthony
4 Paronich, class counsel here on behalf of the plaintiff,
5 and with me are my co-counsel Mary Turke and Sam
6 Strauss.

7 THE COURT: And good afternoon to you.

8 And for HelloFresh?

9 MS. SLAUGHTER: I'm sorry, Stacey Slaughter of
10 Robins Kaplan, also on behalf of the class plaintiffs,
11 thank you, your Honor.

12 THE COURT: And you are welcome. I'm sorry.

13 For HelloFresh?

14 MR. PETERSEN: Shannon Petersen for the defendant,
15 HelloFresh, your Honor.

16 THE COURT: And good afternoon to you.

17 And for the Objector?

18 MR. ISAACSON: Eric Alan Isaacson for the
19 Objector, Sarah McDonald.

20 THE COURT: All right.

21 There's one preliminary matter for the -- if I
22 have not ruled on it, I've denied discovery for the
23 Objector -- of the Objector. I do allow the motion to
24 file a reply and I have received it and I have read it.

25 I think it makes sense to start with the Objector.

1 I've read your materials, Mr. Isaacson, but I'll afford
2 you no more than 10 minutes oral argument, and I'll hear
3 you first. Go ahead.

4 MR. ISAACSON: Thank you very much, your Honor.

5 The proposed settlement raises, I think, a number
6 of serious problems. I'll start with the fact that the
7 class representatives expect or have applied for
8 incentive awards in the thousands of dollars in a case
9 in which they've settled for less than \$3 per class
10 member. I think that the incentive awards are illegal
11 under the Supreme Court's foundational Common Fund
12 decisions from the 1880s. The Eleventh Circuit so held
13 recently in a case called **Johnson vs. End Path Solutions**
14 and I urge this Court to honor the Supreme Court's
15 holding that class representatives are not entitled to
16 compensation for services on behalf of a class in a
17 Common Fund case.

18 I think that the issue is extremely important
19 because of the disincentive that incentive awards give
20 class representatives to actually serve the interests of
21 the class. Somebody who thinks that they can routinely
22 apply for and get an incentive award of thousands of
23 dollars -- two of the class members are asking \$10,000
24 apiece in this case, um, gives them a reason not to much
25 care that other members of the class are only getting \$3

1 or less than \$3 per class member --

2 THE COURT: Why do you say \$3? I mean isn't the
3 award \$89 for those who file a claim?

4 MR. ISAACSON: So few people thought it worth
5 their trouble to file claims in the case that it ends up
6 coming out to about \$89 that will be distributed.

7 THE COURT: Well I thought -- wait a minute. I
8 thought the notice went out to over 400,000 people and
9 I've got a little over 100,000 claims, that's a take-up
10 of 25 percent. It's higher than usual actually.

11 MR. ISAACSON: My understanding is the class went
12 to -- notice went to more than 4 million people, so it's
13 a class of around 4.8 million, and that the, um --

14 THE COURT: I stand corrected. Thank you.

15 MR. ISAACSON: It's a very small percentage.

16 I think that we've got a situation where class
17 counsel filed an action and settled it very quickly
18 without taking -- really without doing discovery,
19 without doing a single deposition, without even having
20 the named plaintiffs sit for depositions, settled it
21 rapidly, although they filed it in three courts, um --

22 THE COURT: Yes, you raised that, they filed it in
23 three courts. What's the matter with that?

24 MR. ISAACSON: Well I think that indicates there's
25 some kind of forum shopping going on, your Honor.

1 THE COURT: (Laughs.) That's permissible. It
2 just so happens that this Court moved more rapidly. But
3 that doesn't -- when you say "forum shopping," yes, I
4 suppose they're looking for prompt action. Are we going
5 to fault them for that?

6 MR. ISAACSON: The prompt action that you've got
7 is a settlement filed so rapidly that the plaintiffs'
8 attorneys are asking for a third of the funds, um,
9 millions of dollars, without disclosing how many hours
10 they put in working on the case. They didn't take
11 significant discovery, that's a factor you need to
12 consider in evaluating the adequacy of the settlement.
13 It's also a factor that goes into the motivations of
14 these folks. I think the class has a right to know how
15 many hours they put in on the case. I think this Court
16 has a right to know how many hours they put it on this
17 case. I think that's necessary to this Court exercising
18 an informed discretion in determining, um, among other
19 things, whether the settlement is an adequate one or
20 whether it was one motivated by a desire to get
21 exorbitant attorneys fees for minimal work. It also is
22 relevant to the Court's discretionary determination of
23 whether to award fees based on a percentage of the funds
24 or as a Lodestar methodology. And even if the Court
25 chooses one or the other of those methodologies, as a

1 fiduciary to the class I think the Court has an
2 obligation to do a cross-check to evaluate all of the
3 information that is available. And they are basically
4 -- basically trying to, um, conceal that, conceal that
5 from the class and conceal that from the Court. I think
6 that is impermissible.

7 Now I think what's going on is that they did --
8 they're going to be getting a huge multiplier in a case
9 where they really didn't do much of anything other than
10 file claims on behalf of a 4.8 million member class
11 that, um, breaks down into three categories. There's
12 ATDS dialing platform claims, which were extremely risky
13 at the time that they filed, and they knew when they
14 settled the case that the Supreme Court agreed to
15 certiori in the **Facebook vs. Duguid** case, and that those
16 claims might well be worthless. You've got national
17 Do-Not-Call registry claims, which we know are extremely
18 valuable, we've seen those claims go to trial on both
19 the East Coast and the West Coast. In the **Krakauer**
20 case, the claims paid off after trial, um, after a jury
21 trial at the rate of \$1200 per call. That's per call,
22 not per class member. Per call. And in the, um, **Perry**
23 **vs. Rash** case on the West Coast it was \$500 per call.

24 THE COURT: It's always easy to say a few
25 successful cases, but that doesn't set the market for

1 settlement, does it?

2 MR. ISAACSON: Well I think that if you're talking
3 about the cases that have gone to trial, the TCPA
4 plaintiffs with Do-Not-Call registry claims have won.
5 It's not like there are a lot of cases out there where
6 the plaintiffs have gone to trial and lost. And if
7 you're talking about a recovery of \$500 or \$1200 or
8 \$1500 per call, it's hard to justify, um, recovery of
9 less than \$3 per class member -- not per call, per class
10 member, and --

11 THE COURT: What is it that you would like the
12 Court to do, specifically?

13 MR. ISAACSON: I think the Court should invalidate
14 the -- I think the Court should hold that the incentive
15 awards are illegal. I think that the Court should hold
16 that, um, class counsel have waived the right to request
17 fees by trying to conceal from the class the hours they
18 put into the case and conceal from the Court. If the
19 Court thinks that's too extreme, it ought to at least
20 require that they submit and document their Lodestar in
21 the case so that the Court can make an intelligent
22 determination.

23 There's also a problem with respect to adequacy of
24 representation. The Supreme Court has held in **Amchem**
25 and **Ortiz** the second --

1 THE COURT: What do you want me to do? You gave
2 two points, now what do you want me to do?

3 MR. ISAACSON: I want you to invalidate the
4 settlement on the basis of inadequate representation of
5 the class --

6 THE COURT: And then do what?

7 MR. ISAACSON: And they have to start over again.

8 THE COURT: Well what do you mean "They have to
9 start over again"?

10 MR. ISAACSON: Well with respect to, um, deciding
11 what to do with a settlement, I mean they need to have
12 separately-represented subclasses, due process requires
13 that.

14 THE COURT: And, um -- well that's an interesting
15 point. And what would the subclasses be?

16 MR. ISAACSON: The subclasses would be the ATDS
17 subclass, which quite frankly would no longer exist
18 because those claims are worthless, or would have a very
19 very very minimal recovery, um, and that's going to be
20 be the vast majority of the class of 4.8 million. The
21 class that has the valuable claims are those on the
22 Do-Not-Call registry. And then there's a further
23 subclass that would be those that are on the internal
24 Do-Not-Call list that are probably inappropriate for
25 class certification, and that was the result in the

1 **Cordoba** case in the Eleventh Circuit and in **Krakauer**,
2 those claims were abandoned just before trial because
3 they weren't suitable to proof along with the national
4 Do-Not-Call registry claims. The claims that really
5 matter, the claims that are valuable are the claims of
6 the subclass that have Do-Not-Call registry claims.

7 THE COURT: All right, I think I understand.
8 About 3 more minutes.

9 MR. ISAACSON: And I think that, um -- if you look
10 at the **Cordoba** case on remand I think it indicates -- I
11 think it indicates that the, um, comparative size of the
12 Do-Not-Call list class, which could not be certified,
13 and the national registry class, which could be properly
14 certified and proceed, that it amounted to -- the
15 Do-Not-Call registry class amounted to about 5 percent
16 of the internal Do-Not-Call class. It's a larger class.
17 So you're talking about 5 percent of the class of 4.8
18 million, you're talking about, um, around 240,000 class
19 members. And when you look at the complaint it looks
20 like class members on the Do-Not-Call registry probably
21 got 4 or 5 calls apiece. So you're talking about around
22 a million calls.

23 At the low end of the statutory damages, \$500,
24 that's a \$500 million case, and that's what you're
25 probably talking about. And quite frankly, that's why

1 HelloFresh is trying to keep the settlement in place
2 because they think that it's a bargain for them to get
3 off the hook in a \$500 million case.

4 Now that involves a lot of speculation on my part,
5 I admit, but that's because the plaintiffs have not put
6 the facts before the Court. To certify the class
7 requires findings by a preponderance of the evidence.
8 They haven't told us how many calls are at issue in the
9 case. They haven't told us how many people are on the
10 national Do-Not-Call list.

11 THE COURT: Wait. Wait a minute. Wait a minute.
12 They asked me to certify the settlement class. Now I've
13 been in that situation before, I think I know what I
14 need to know, and, um, I thank you. I do have some
15 questions for them and maybe we'll be back to you.
16 Thank you very much.

17 MR. ISAACSON: Thank you very much, your Honor.

18 THE COURT: Now I do have some questions, and
19 we'll start with the plaintiff.

20 How big is this class as you have defined it.

21 MR. PARONICH: Good afternoon, your Honor, Anthony
22 Paronich, and I'll be speaking on behalf of class
23 counsel today.

24 The settlement -- the settlement class is over 4
25 -- it's 4.8 million -- exactly it's 4.831285.

1 THE COURT: And how do you know that?

2 MR. PARONICH: During discovery we received
3 information from HelloFresh. These are -- just to take
4 a step backwards, your Honor. This telemarketing
5 campaign was conducted by HelloFresh vendors and in
6 order to effectuate those calls HelloFresh provided to
7 its vendors individuals to contact in order to try to
8 win back their business. And so we understand from
9 discovery, those are the amount of individuals that were
10 sent to the vendors for calling.

11 THE COURT: All right. And so, um -- and that
12 class runs up to when, how recently?

13 MR. PARONICH: I believe it was the -- the
14 December of 2019 because the HelloFresh calling campaign
15 ceased after the filing of the lawsuit.

16 THE COURT: Okay. So, um, some of these people --
17 I wonder what happened to the arbitration defense here?
18 You've got some people in this 4,800,000 as to whom --
19 while I rejected any claim that arbitration was
20 applicable to your client's case, um, some of these
21 people had, um -- I would imagine had, um, allegedly
22 these mandatory arbitrations. Now of course it's open
23 to HelloFresh to waive that. But that's true, isn't it?

24 MR. PARONICH: Yes, your Honor, and I think, um,
25 with due respect to Mr. Isaacson, that's why this case

1 simply wasn't a file in federal circumstance. Now the
2 arbitration issue is on appeal currently before the
3 First Circuit, it's been stayed pending potential
4 resolution of this class action settlement. Similarly
5 in the Eighth Circuit another appeal that HelloFresh had
6 taken with respect to arbitration has been stayed. And
7 as a matter of fact it is accurate that in -- after the
8 plaintiff's claims in this lawsuit, the time that the
9 plaintiff had a relationship with HelloFresh, HelloFresh
10 updated its terms and conditions to present an
11 arbitration clause and a class action waiver. So that's
12 why I wanted to --

13 THE COURT: Oh I understand that, that's something
14 that we explored to see whether this case, Ms. Murray's
15 case could go forward. So -- and then the way you
16 define the settlement class, it's anyone who in fact has
17 received these calls, and you go over the various ways
18 that they could receive the call. But the class
19 includes, um, these people. In order to make up the
20 claim, you have to assert anyway that you have received
21 these calls.

22 Correct?

23 MR. PARONICH: That is correct, your Honor. And
24 we also know from the records that HelloFresh provided.

25 THE COURT: Yeah, and that's how you -- very well.

1 So, um, did you send, um, a notice to all
2 4,831,285 people?

3 MR. PARONICH: Yes, your Honor. So the 4.8
4 million -- and I'd be happy to explain the notice
5 program if your Honor would like.

6 THE COURT: No, I -- if I need more detail, I
7 will.

8 And how many -- you've got slightly over 100,000
9 who have qualified claims. How many?

10 MR. PARONICH: 1,433, your Honor.

11 THE COURT: That's 101,433, right?

12 MR. PARONICH: No, your Honor, and my apologies if
13 I misspoke, 100,433.

14 THE COURT: Yeah, thank you. I've got that. All
15 right.

16 You know I didn't pick up the -- at least
17 Mr. Isaacson's allegations that there need to be
18 subclasses in the three that he set out for me, but I am
19 concerned that some of these, um, asserted class
20 members, against them there is the arbitration clause
21 and others there isn't. Aren't they separate? I mean
22 the ones that have arbitration clauses, of course it can
23 be waived, of course settlement is, um, desirable, and
24 we encourage settlement, but their claims are not as
25 good as the ones who have no arbitration clause like

1 Ms. Murray.

2 MR. PARONICH: Your Honor, I think the -- the
3 biggest issue with respect to that is while HelloFresh
4 did update its terms and conditions, our position
5 throughout has been that the arbitration clause itself
6 was unconscionable for a variety of reasons.

7 THE COURT: Unconscionability hasn't gotten very
8 far in the Supreme Court, has it?

9 MR. PARONICH: Not as far as we would like, your
10 Honor, but it isn't --

11 THE COURT: I'm sure that's so. But I mean I'm --
12 my point is a simple one. Everyone is going to get the
13 same \$89 and yet the claim and Mr. Isaacson points out
14 that these Do-Not-Call registry claims are better than
15 the other claims, and I'll be interested to hear you
16 talk to that. But it does seem to me, just as a matter
17 of law, that those who are facing one of these
18 anticonsumer mandatory arbitration no-class arbitration
19 clauses, which HelloFresh updated to protect itself from
20 its consumers, are in a worse position than those as to
21 whom there is no, um, arbitration clause. So I'm
22 wondering if the ones who don't face that defense should
23 get more?

24 MR. PARONICH: Understood, your Honor. And I
25 think that there's a series of issues with respect to

1 each of the causes of action. But that did allow,
2 because there are more, issues with respect to all of
3 the causes of action in the case as a whole that allowed
4 us to properly value -- that we believe properly valued
5 the case in a range of reasonableness of TCPA
6 settlements as compared with other TCPA settlements,
7 including many banks, as there's a -- the ATDS or
8 prerecorded call cases. When you have a cause of action
9 against a bank, their terms and conditions are almost
10 always going to include those arbitration clauses as
11 well. But the settlement we've struck here, even
12 understanding those defenses, does take into account the
13 various strengths and weaknesses of the claims.

14 THE COURT: How?

15 MR. PARONICH: Well so with respect to the risk of
16 the case as a whole, I'll start with the TCPA is not a
17 consumer statute where class certification is a foregone
18 conclusion.

19 Judge Gorton recently denied class certification
20 in a TCPA case alleging violations of a national Do-Not-
21 Call registry as well as other TCPA causes of action in
22 **Sandover vs. Boston Scientific Corp.** There are also a
23 series of potentially individualized issues in TCPA
24 cases that can serve as a barrier to class certification
25 including having to determine each consumer's

1 interaction with a company to determine if there was the
2 requisite consent to make contact or not. And with
3 respect to the national Do-Not-Call registry claims,
4 whether or not each telephone number was used for purely
5 residential purposes.

6 Also with respect to this case, vicarious
7 liability was a major factor with respect to resolution
8 of the case. The calls were not made by HelloFresh.
9 And in order to recovery anything at all, class members
10 would have to establish an agency relationship between
11 HelloFresh and its vendors. The agreement between
12 HelloFresh were prohibited violations of state and
13 federal law, and a plaintiff's face a factual hurdle
14 with respect to establishing that HelloFresh had
15 knowledge of conduct from these vendors that violated
16 the TCPA because there could not be that classical
17 agency relationship, so we were going to have to
18 demonstrate either implied actual authority or
19 ratification. And we did that in **Krakauer**, in the
20 **Krakauer vs. Dish Network** case, we were able to do that
21 because that case featured over 10 years of government
22 actions against Dish Network relating to the exact
23 allegation that was at issue in that case, your Honor.

24 THE COURT: Well what about this case?

25 MR. PARONICH: It's certainly not this case. And

1 the factual barrier was far higher here because there
2 was no evidence of HelloFresh facing prior scrutiny,
3 never mind government scrutiny for the conduct alleged
4 here.

5 The amount of the recovery also -- even if a
6 judgment was entered, was also something of concern to
7 us. So if class certification was granted, summary
8 judgment would survive, we go to trial, we prevail at
9 trial on due process grounds -- TCPA cases have had
10 judgments reduced, including an Eighth Circuit case
11 reducing damages to \$10 following trial, whereas here,
12 as the Court's pointed out, claimants will be recovering
13 nearly \$90, um, for each -- for a valid claim, and that
14 will be over 100,000 individuals.

15 THE COURT: Um -- no, go ahead.

16 MR. PARONICH: So I was just going to say, your
17 Honor, that there were -- those were case-centric risks,
18 but there were also various risks to each of the
19 individual causes of action that we -- that we had to
20 consider as well.

21 First, the Do-Not-Call. The ATDS case, I think --
22 while now the Facebook case from the Supreme Court
23 entered on April 1st, 2021, you know months and months
24 after our settlement was struck, there's no question
25 that the claims work harder than they were now, but

1 they're not impossible, and they don't have a series of
2 substantial affirmative defenses that the National
3 Do-Not-Call registry or the internal Do-Not-Call
4 registry cases have.

5 For example, the national Do-Not-Call registry
6 cases, your Honor, have an established business
7 relationship affirmative defense. So -- and that's a
8 serious issue here when the nature of this win-back
9 campaign was that all of the individuals who were
10 called, by the very nature of their contact, had a prior
11 business relationship with HelloFresh. An ATDS claim
12 doesn't have that issue.

13 Also case-dispositive is an affirmative defense
14 with respect to the reasonable safeguards that can be
15 put in place to avoid Do-Not-Call registry violations.
16 Here HelloFresh did have internal Do-Not-Call policies
17 and procedures. Again this is not a case where
18 HelloFresh had its own call-center in its corporate
19 office in the U.S., in New York, dialing these calls,
20 they hired vendors, had a contractual relationship with
21 those vendors, and gave them strict instructions with
22 respect to complying with the law.

23 So if we were able to overcome all of our other
24 hurdles, then something the Court could consider is did
25 HelloFresh put reasonable processes in place in order to

1 avoid liability at all and get no recovery for the class
2 members? And that was also something that was
3 substantial that we considered, but also had no chance
4 of occurring in the **Dish** case where again Dish had been
5 facing over a decade of government scrutiny for the
6 conduct that was at issue.

7 THE COURT: Thank you. But speak to me about this
8 arbitration clause, that's a defense?

9 MR. PARONICH: Well --

10 THE COURT: I think that's why the companies put
11 these anticonsumer arbitration clauses into the mix, and
12 it's clearly on dispute here that that's what HelloFresh
13 has done. It's tried to -- and maybe it has done it
14 effectively, it now, facing its liability, has immunized
15 itself from further actions under these -- under the
16 congressional statutes, and it's immunized itself
17 through an arbitration clause.

18 What steps did you take, if any, to try to secure
19 guarantees that the, um -- that HelloFresh would not
20 hide behind the arbitration clause to go on -- and no
21 one says they have, this is a settlement and they don't
22 admit it, but if they have a list of 483 -- 4,831,285
23 names that they turned over to these solicitors and over
24 100,000 people are willing to claim that they got such a
25 call, so what steps have you taken to deal with this

1 arbitration clause which you say is unconstitutional?

2 MR. PARONICH: Well I think, your Honor, the
3 unconscionability of the arbitration clause may be an
4 argument that I would like to pursue and we look forward
5 to pursuing it, but there's probably a stronger legal
6 argument that I didn't bring to the Court's attention
7 yet. Which is that HelloFresh has a relationship,
8 however long it is, with these consumers and while these
9 consumers are signing up for their services, that some
10 of them will potentially agree to arbitrate disputes
11 they have about that relationship.

12 So if a consumer receives one of these HelloFresh
13 meal kits in the mail and there's toxins in there or
14 there's an issue with respect to an injury that was
15 caused to them arising out of that relationship, the
16 consumer arguably has a requirement that they need to
17 arbitrate those claims and can't pursue them on a
18 class-wide basis.

19 What's important and is a common thread factually
20 to all the settlement class members here, your Honor, is
21 that that relationship was terminated, so that
22 relationship is over. And here --

23 THE COURT: You see I have a -- here's my concern.
24 I have a duty. If I'm going to certify a settlement
25 class, as Professor William Rubenstein says so

1 eloquently, "When companies settle class actions, what
2 they're doing is buying peace from the class members."
3 Now here, if I certify this class, as you want me to
4 certify it, for \$14 million, they're buying peace from
5 all the people to whom you have given notice, and I
6 don't have any problems with the notice. And, um,
7 against their potential liability now, I wonder whether
8 that's in the public interest?

9 I've got to think of the interests of the public
10 here where now they have this, um -- they didn't with
11 respect to Ms. Murray, but they do now, they have this
12 anticonsumer arbitration, um, clause that in effect
13 prevents consumers from all -- your posit is that
14 someone has toxins in their, um, meal pack, and there's
15 absolutely no evidence of that, that's a wild card if
16 ever, but that would be worth litigating. But the whole
17 problem with these is that these are small claims or
18 relatively small claims and that an anticonsumer
19 mandatory arbitration clause is adequate to prevent
20 people from, um, bringing such claims entirely. What
21 guarantees have I that they won't -- I won't say "go
22 right on," but if I approve this settlement, they save
23 their \$14 million and then they start a second, um,
24 campaign -- other than government supervision, what's to
25 prevent that? Have you secured any undertaking that

1 would prevent it?

2 MR. PARONICH: Your Honor, we do understand that
3 they ceased their calling efforts, but that is not
4 something that they are required to do under the
5 settlement. But with respect to the arbitration, they
6 are not going to be able to hide behind arbitration if
7 they continue their calling conduct tomorrow because --

8 THE COURT: Why not?

9 MR. PARONICH: Absolutely, your Honor. Because
10 these win-back calls relate to individuals -- and those
11 are the individuals that they made telemarketing calls
12 to, it's not their current customers, it's to
13 individuals that made the decision to end their
14 relationship with HelloFresh. So no longer could those
15 individuals be subject to an arbitration agreement that
16 related to their relationship with HelloFresh. By the
17 nature of the campaign, HelloFresh was trying to win
18 them back. And that applies to all settlement class
19 members equally no matter which time HelloFresh updated
20 their terms and conditions in an effort to improve their
21 class-action waiver or arbitration clause.

22 THE COURT: Let's press that, and I'll turn to
23 HelloFresh's counsel.

24 Mr. Petersen, um, I fully recognize that this is a
25 proposed settlement and so you must not take anything I

1 say as concluding, because I cannot, I have no record to
2 do that and I do not, concluding that HelloFresh in the
3 past has in fact violated the law, but, um, are you, as
4 its representative here and speaking on behalf of
5 HelloFresh, are you, sir, are you able to represent to
6 me that HelloFresh, as a matter of corporate policy,
7 eschews, um, violations of these statutes
8 notwithstanding the arbitration clause?

9 MR. PETERSEN: HelloFresh believes that it has
10 never violated the TCPA and ultimately will win on the
11 merits, if pressed. I will also say that HelloFresh has
12 learned some things as a result of this litigation,
13 their policies and procedures have improved, including
14 of course based upon my own advice. So to the extent
15 there are any call campaigns in the future, that there
16 will be a 100 percent guarantee that they're fully
17 compliant. I can certainly make those representations.

18 THE COURT: When you say "fully compliant," my
19 concern is fully compliant with federal law?

20 MR. PETERSEN: Fully compliant with federal law,
21 absolutely.

22 May I address the arbitration concern, your Honor?

23 THE COURT: Yes, please.

24 MR. PETERSEN: Yes. So the way we see this is
25 that the arbitration issue affects at most class

1 certification and what can be certified. It also
2 affects the individual claim that might be brought in
3 court versus an arbitration. But the point I'm trying
4 to make is it does not affect the merits of the claim,
5 these individuals still have the same claim, the
6 question is whether they can bring them in court or
7 whether they can bring them in arbitration?

8 So we made the decision -- we could have decided
9 that we're going to carve out from the settlement
10 everyone that signed up after February of 2017 where we
11 believe we have even stronger arguments that they agreed
12 to the arbitration provision, but we decided not to do
13 that because these people still have claims and there's
14 still risk and we're willing to settle everything.

15 THE COURT: I -- believe me, sir, I respect that,
16 and you're settling everything, and if I go for this,
17 the claims of these 4,800,000 people will be terminated,
18 and I understand that and I've carefully read the
19 releases that are part of this settlement.

20 I am concerned, without making any findings, that,
21 um -- and we'll get to whether some claims are stronger
22 than others, and I fully respect and, um, rely on your
23 representation on behalf of HelloFresh that this type of
24 calling will not violate federal law in the future, and
25 I make no finding that it has in the past. But at the

1 same time I am troubled given the history of -- the
2 undeniable history of arbitration clauses being used in
3 the most egregious anticonsumer way, and here there's
4 been no concession as to that. But plaintiff's counsel
5 gave an interpretation.

6 Is he right that if you have a customer, once the
7 customer is done with its business with HelloFresh and
8 is no longer a customer, when you try to win that
9 customer back, the arbitration clause does not apply, is
10 that right?

11 MR. PETERSEN: It is right that that is an
12 argument. I think that --

13 THE COURT: Well do you agree with it?

14 MR. PETERSEN: It's a good faith argument, we
15 would oppose it, and I think that we would likely compel
16 arbitration successfully against those folks who signed
17 up after February of 2017. But there's a risk and this
18 is all about the risk of loss.

19 THE COURT: I understand that it is, but here
20 where you want me to certify this class that
21 extinguishes the potential claims of 4,800,000 people, I
22 have some hesitancy, I must say, out of the fear that
23 the arbitration clause will be misused to, as a
24 practical matter, prevent legitimate claims from ever
25 seeing the inside of any forum, that's my problem, and

1 that would be Mr. Paronich's argument against it. I
2 understand you have strong arguments in its favor and
3 it's that that gives me pause, I will tell you. But let
4 me pass on here and go back to Mr. Paronich though, and
5 I thank you for your candor and I respect and accept
6 your answers.

7 Mr. Paronich, you say that everyone should get the
8 same \$89 here. I -- it seems to me, given the power of
9 a valid arbitration clause, those people probably should
10 get less than the ones who don't have arbitration
11 clauses who should probably get more, and therefore
12 Mr. Isaacson's argument that you can't adequately
13 represent all of them is a good one. Maybe we ought to
14 get other counsel in here to represent the ones who are
15 going to face an arbitration clause? If the -- if you
16 agree or after we get some arm's-length discussion this
17 is the best -- even granted that that's what HelloFresh
18 is going to pay in order to get fees, um, that they all
19 ought to get the same.

20 You see my problem?

21 MR. PARONICH: I do, your Honor, and I don't want
22 to belabor my point, but just to make sure I'm making
23 clear, in our case law that we supported with respect to
24 Ms. Murray's opposition to the motion to compel
25 arbitration, I don't think it got explored in detail

1 because the argument with respect to Ms. Murray agreeing
2 to any arbitration was so prevalent in that, but we did
3 raise the case law in our opposition that does apply to
4 all settlement class members equally. That because this
5 campaign is only calling former customers, that's not
6 arising out of the relationship that they all would have
7 potentially agreed to arbitrate, and as such it can be
8 opposed on an equal basis.

9 THE COURT: I see. I see.

10 MR. PARONICH: And, your Honor, I --

11 THE COURT: Well let me -- let me pass on that for
12 a moment.

13 What do you say to Mr. Isaacson's objection to the
14 incentive awards here?

15 MR. PARONICH: I think that Mr. Isaacson deserves
16 credit for his success at the Eleventh Circuit with that
17 same argument and I think it's notable that every
18 reported decision or those available from Lexis or
19 Westlaw that we've been able to find has rejected such,
20 the split decision from the Eleventh Circuit, and Judge
21 Saylor, as recently as February of this year, approved
22 the TCPA class Common Fund settlement that included a
23 service award.

24 THE COURT: Of how much?

25 MR. PARONICH: It was \$10,000, your Honor. And to

1 be clear -- and I don't think Mr. Isaacson was
2 misrepresenting anything, but I just wanted to clarify
3 that. There are a number of class representatives here,
4 there are two class representatives that are requesting
5 \$10,000, there are then two that are requesting \$5,000,
6 and then there are, I believe, 4, your Honor, that are
7 requesting \$2,000.

8 THE COURT: Understood.

9 If I have 100,433 valid claims at \$89 per each of
10 those claims, that comes out to what?

11 MR. PARONICH: The \$8.9 million.

12 THE COURT: That's how I figure it, \$8.9 million.
13 Now that's the fund, isn't it, that's the money you're
14 passing to people, not the 14 million? Where's the rest
15 of it going?

16 MR. PARONICH: The \$14 million -- our position,
17 your Honor, is the \$14 million is the fund, the
18 administration expenses are coming out of that as well,
19 and any awarded attorney fees or service awards will
20 also be awarded from that amount.

21 THE COURT: All right. All right.

22 (Pause.)

23 MR. PARONICH: But I will say with respect to
24 those attorneys fees, your Honor, just as the service
25 awards, this is not a settlement agreement that includes

1 a clear-sailing provision or requires any party to have
2 a --

3 THE COURT: You recognize that it has never been
4 my practice to award attorneys fees as a percentage of
5 the entire money paid by the defendant, but only a
6 percentage of the money actually conferred on the
7 plaintiff. That has been my uniform position for some
8 years now. But I understand.

9 Okay, here's the Court's, um -- (Pause.) Okay,
10 here the court's rulings.

11 The, um, objections of the -- made by the Objector
12 are most respectfully taken into account, but, um, to
13 the extent that we'll see what -- to what extent they
14 are -- they work their way into the Court's final order.

15 The Court cannot today make a final order. The
16 Court requests briefing as to why the representation
17 here has been adequate given the, um, defensive claims
18 raised by the arbitration clause as to all class members
19 subsequent to that arbitration clause, and I will ask
20 you how long you want to file such a brief.

21 The Court, um, will gauge its attorney fee award
22 not on the total \$14 million, but on the \$8.9 million
23 presently available to the class. Whether that award is
24 greater than 20 percent will depend upon the brief which
25 the, um, class counsel will file which will disclose to

1 the Court a calculus of a Lodestar so I can balance that
2 against what I would normally award, which would be 33
3 percent of the actual sums transferred to the, um,
4 members of the plaintiff's class.

5 All the administrative fees are all approved. The
6 incentive awards are approved. The, um -- it may be
7 that given the Court's orders and the settlement amount
8 of \$14 million, the award to the individual class
9 members could not be raised somewhat to get us up to, in
10 the aggregate, \$14 million, if the attorneys fees were
11 somewhat less.

12 Having said that, I, um, I want to be clear what I
13 want on the brief. I want to know why I should certify
14 this settlement class in light of the difference between
15 the people who do not have an arbitration clause bar and
16 those who face an anticonsumer arbitration clause bar.
17 Just allowing the payment of \$14 million and then
18 immunizing a defendant, any defendant from having to
19 respond to litigation of this sort, which is authorized
20 by the Congress, does not seem to me to be in the public
21 interest and I'm not prepared to approve that unless
22 I -- that's all explained to the Court.

23 How long to file such a brief? We'll ask -- and
24 anyone may file a brief, but it's really the plaintiff
25 who's got the laboring oar here. So, Mr. Petersen, I'll

1 of course accept a brief from you.

2 Mr. Paronich, how long do you want?

3 MR. PARONICH: 21 days, your Honor. If I could
4 ask one clarifying question?

5 THE COURT: Of course you can.

6 MR. PARONICH: So I certainly understand the
7 Court's directive in terms of how we're supposed to
8 brief the settlement class, but I'm slightly confused
9 with respect to the attorney fee issue. Are -- I do
10 understand that we're to submit --

11 THE COURT: No, here's the attorney fee issue.

12 In my mind, as a matter of law, the fund is
13 \$8,900,000 and slightly more than that. Perhaps if
14 you're going to reduce your claim, the fund would grow.
15 But if you want more than 20 percent of that \$8,900,000,
16 you've got to show me the Lodestar and you've got to
17 argue why you should get more than that.

18 Normally I give 33 percent for some of the reasons
19 that Mr. Isaacson mentioned and I'll -- well here's my
20 concern. I'm perfectly happy the case settled rapidly,
21 that's excellent, and on the other hand I really am
22 troubled by the possibility here that, um, HelloFresh is
23 making a distinctly anticonsumer move here and is
24 protecting itself from, um, these types of suits in the
25 future by the arbitration clause. Having said that, I

1 do want to say that I absolutely respect Mr. Petersen's
2 representation made on HelloFresh's behalf and I accept
3 him -- I fully accept him at his word. I simply must be
4 concerned -- (Phone rings.) I must be concerned about
5 the public interest and, um, I'm trying to be.

6 Does that answer your question?

7 MR. PARONICH: It certainly does. Thank you, your
8 Honor.

9 THE COURT: Mr. Petersen, any questions?

10 MR. PETERSEN: We thank your Honor for the
11 permission to file a brief. A question. Whether or not
12 it would also be 21 days or perhaps, to avoid
13 repetition, whether or not you want to give us perhaps 7
14 days after the plaintiff has filed its --

15 THE COURT: You have 7 days thereafter.

16 Mr. Isaacson, I'm not requiring anything from you
17 but I would welcome it. Do you have any questions, sir?

18 MR. ISAACSON: Your Honor, I would request leave
19 to file a responsive brief 7 days after, um, their
20 briefs have been filed.

21 THE COURT: No, we're not going to extend it like
22 that. You can have the 7 days after the plaintiff's
23 brief along with HelloFresh, but that's the total amount
24 of time.

25 MR. ISAACSON: Okay.

1 THE COURT: And I will then review the briefs.

2 MR. ISAACSON: So we file contemporaneously with
3 Mr. Petersen's brief?

4 THE COURT: That's right. That's right.

5 I thank you all. It's been well-argued. This
6 business of looking at the public interest broadly is --
7 has support in the case law, but this would be the first
8 time I've done it. It's this arbitration clause that's
9 giving me, um, a problem here. But I've been as
10 transparent as I know how. And I do thank you all.
11 We'll recess.

12 (Ends, 2:50 p.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes
before Judge William G. Young, on Tuesday, May 11, 2021,
to the best of my skill and ability.

/s/ Richard H. Romanow 05-21-21

RICHARD H. ROMANOW Date