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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  
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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