UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In re Collecto, Inc. Telephone Consumer Protection Act (TCPA) Litigation	Master No. 1:14-md-2513-RGS Individual Case No. 1:14-cv-10478-RGS This Document Relates To: All Member Actions

PLAINTIFFS' MEMORANDUM SUPPORTING
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs John Lofton, Robert Pegg, Ralph Davenport and Richard Davenport (collectively, "Plaintiffs") hereby submit their memorandum in support of their motion for preliminary approval of class action settlement with Defendant Collecto, Inc. ("Collecto").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

Rules

Other Authorities

I. INTRODUCTION

This case arises out of calls by Collecto to Pegg, Lofton, the Davenports and other cellular telephone users in the course of attempting to collect debts owed to others. Representative Plaintiffs allege that Collecto made these calls using "automatic telephone dialing systems," as defined under 47 U.S.C. § 227 ("TCPA"). Plaintiffs further allege that instead of calling debtors who owed money to creditors for whom Collecto sought to collect, Collecto called the wrong numbers and dialed the cellular telephones of Plaintiffs and putative class members, all of whom are individuals who did not have an agreement with a creditor for whom Collecto sought to collect. All of these wrong number calls occurred between July 23, 2009 and June 30, 2014.

After years of litigation, the parties were finally able to settle the case. In very broad strokes, the settlement provides a $3.2 million common fund to be distributed to class members who submit claims forms, in exchange for a release of any claims against Collecto related to calls made between July 23, 2009, and June 30, 2014. From the evidence adduced in the case to date, it appears there are approximately 206,000 class members. Given the number of Class Members and the size of the common fund, the settlement's benefits compare favorably to similar settlements on a pro rata basis. Parisi Decl., ¶¶16-17. Conversely, the path of continued litigation is always treacherous and the risk that plaintiffs might lose, either on the merits or on class certification, and that Class Members would recover nothing, is ever-present. Given the benefits of the settlement and the risks of continued litigation, this settlement is fair, reasonable, and adequate.

II. BACKGROUND

This case has been extensively and bitterly litigated for years. A summary of important milestones in the litigation below.

This litigation began with three separate class actions. On July 16, 2013, John Lofton

filed a class action against Collecto, Inc. alleging violations of the TCPA. On July 23, 2013, Ralph and Richard Davenport filed a similar TCPA class action against Collecto. Then on August 13, 2013, Robert Pegg filed a similar TCPA class action against Collecto. Plaintiff Lofton filed a motion to transfer and consolidate with the Judicial Panel on Multidistrict Litigation which was granted by the JPML. The actions were then assigned to the Hon. Richard G. Stearns in February 2014. With an Order entered February 20, 2014, Judge Stearns coordinated these actions for pretrial purposes under the caption *In re: Collecto, Inc., Telephone Consumer Protection Act (TCPA) Litigation*.

Collecto initially moved to stay this case in anticipation of the FCC's then-pending order on the definition of an "automatic telephone dialing system" under 47 U.S.C. § 227(a)(1). Counsel for plaintiffs opposed this motion, which was denied by the Court on November 3, 2014.

Following a ruling on Collecto's motion to stay, Representative Plaintiffs engaged in significant discovery, including, among other things, six sets of requests for admission directed to Collecto with a total of 104 individual requests, three sets of interrogatories directed to Collecto with a total of 21 interrogatories, and ten sets of requests for production of documents with a total 180 individual requests. Parisi Decl., ¶6. In addition, prior to consolidation of the cases before the MDL Panel, counsel in the Lofton action had served an additional 56 requests for admission, twelve interrogatories and 56 document requests on Collecto. *Id*. All of this discovery generated huge quantities of information about Collecto, its dialers, and its defenses in this action. Plaintiffs also filed five motions to compel further responses to discovery, which resulted in yet even more information being provided by Collecto.

Beyond the written discovery, Representative Plaintiffs also deposed Collecto three times through its designated representatives Peter Cappola, the Director of Telephony Services, and

once through Steven Madden, Collecto's Manager of Application Development. *Id*. at ¶7. Both Collecto and Representative Plaintiffs retained experts, who provided expert reports, and who were deposed by the respective opposing side. *Id*. at ¶9.

On August 31, 2015 Collecto filed a motion for summary judgment focused on the status of its dialers as "Automated Telephone Dialing Systems," as that term is used in the TCPA. Representative Plaintiffs opposed this motion, which the Court denied following a hearing in January 2016.

The Parties also engaged in settlement negotiations with the assistance of two mediators with extensive experience in resolving putative class action cases. On September 21, 2015, prior to Representative Plaintiffs filing their opposition to the motion for summary judgment, the Parties participated in a mediation before Mr. Antonio Piazza in San Francisco. Parisi Decl., ¶10. While that mediation resulted in an impasse, the Parties continued their settlement negotiations, and in September of 2016, the Parties attended two days of mediation in Boston with Mr. Rodney Max, another mediator with a very good reputation for resolving TCPA class actions. *Id*., ¶¶13-14. The mediation ended without a resolution even in principal, but an agreement among the participants to likely attend a third session of mediation. *Id*. Thereafter, the Parties continued their discussions and were ultimately able to come to an agreement in principal to resolve this action. With the agreement in principal, on December 8, 2016, the Parties notified this Court of the settlement. The remaining months were spent negotiating the details of the settlement and analyzing previously-produced data to define the contours of the class, as well as the notice and claims procedures.

III. THE COURT SHOULD CERTIFY A SETTLEMENT CLASS

Before certifying a class, "[a] district court must conduct a rigorous analysis of the prerequisites established by Rule 23 . . ." *Smilow v. S.W. Bell Mobile, Sys, Inc.*, 323 F.3d 32, 38

(1st Cir. 2003). Rule 23 of the Federal Rules of Civil Procedure provides that class certification is appropriate upon a showing by the plaintiff that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-614 (1997); *Otte v. Life Insurance Company of North America, et. al.*, 275 F.R.D. 50, 54 (D. Mass June 10, 2011) (Stearns, J.). This Court has indicated that:

> Although at least one common issue of fact or law at the core of the action must shape the class, Rule 23(a) does not require that every class member share every factual and legal predicate of the action.

In re Lupron Marketing and Sales Practices Litigation, 22 F.R.D., 75, 88 (2005) (Stearns, J.) citing *In re General Motors Trucks*, 55 F.3d 768, 817 (3d Cir. 1995).

In addition, in order to obtain certification pursuant to Rule 23(b)(3) the plaintiff must also show that common questions of law and fact predominate over individualized questions, and that the class action is superior to other available methods for fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b). *See Otte*, 275 F.R.D. at 54; *See In re Boston Scientific Corp. Securities Litigation*, 247 F.R.D. 244 (Woodlock, J.) (D.Mass. March 10, 2009). The First Circuit has indicated that "the class certification prerequisites should be construed in light of the underlying objectives of class actions." *Id. quoting Smilow v. S.W. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003). In this respect, the "core purpose" of Rule 23(b)(3) is "to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation." *Id.*

A. The Proposed Class Satisfies the Numerosity Requirement

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is

impracticable. The numerosity requirement of Rule 23(a) is satisfied when the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *See In re Boston Scientific Corp. Securities Litigation*, 247 F.R.D. at 281. Based on the records obtained through discovery, the Class consists of approximately 206,000 members. Verkhovskaya Decl., ¶14. Numerosity in this case is easily satisfied.

B. The Proposed Class Satisfies the Commonality Requirement

Rule 23(a)(2) requires that the party seeking certification establish that there are questions of law *or* fact common to the class. As this Court has previously stated,

> The threshold of 'commonality,' is not high. Aimed in part at 'determining whether there is a need for combined treatment and a benefit to be derived therefrom,' the rule requires only that resolution of the common questions affect all or a substantial number of the class members.

In re Lupron Marketing and Sales Pratices Litigation 22 F.R.D. at 88 *quoting Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir.1986). For that reason, the commonality requirement has been characterized as a "low hurdle." *Otte*, 275 F.R.D. at 54 *quoting S. States Police Benevolent Ass'n, Inc. v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 87 (D. Mass. 2007).

The claims in this case involve the common question of law as to whether Collecto's calls to consumers throughout the United States violated the TCPA. All class members in this case received calls on their cellular telephones between July 23, 2009 and June 30, 2014, never had an agreement with the creditor for whom Collecto sought to collect debts, they were all called by Collecto with an automatic telephone dialing system, and were either the subscriber or the assigned user of the telephone number called by Collecto. Commonality in this case is easily satisfied. Class members all received unsolicited calls and Collecto's own dialers evidence these calls.

C. The Proposed Class Satisfies the Typicality Requirement

Rule 23(a)(3) requires that the party seeking certification establish that the claims of representative plaintiffs arise from the same unlawful conduct experienced by the other members of the class. In other words, the claims of the Representative Plaintiffs must be "typical" of the claims of the rest of the class. The typicality requirement is satisfied where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This Court has described the typicality requirement as:

> The representative plaintiff satisfies the typicality requirement when its injuries arise from the same events or course of conduct as do the injuries of the class and when plaintiff's claims and those of the class are based on the same legal theory. *In re Credit Suisse-AOL Secs. Litig.*, 253 F.R.D. 17, 23 (D. Mass. 2008) . . . . The representative plaintiff's claims need not be completely identical to those of absent class members. *In re Credit Suisse*, 253 F.R.D. at 23. 'The test for typicality, like commonality, is not demanding.' *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993).

Otte, 275 F.R.D. at 55. In this case, the claims of Representative Plaintiffs Lofton, Pegg, Ralph Davenport and Richard Davenport and the class they seek to represent all arise from the same unlawful calls to cellular telephones by Collecto. The Representative Plaintiffs, like all class members, received unsolicited calls and were not the debtors. They have sustained identical statutory damages. The claims of the Representative Plaintiffs are "typical" and "similar" to all other class members as they arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and are based on the same legal theory as the members of the class.

D. Lofton, Pegg, and the Davenports, and Their Counsel Will Adequately Represent the Interests of The Class

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). As this Court has explained,

> The [adequacy] rule has two parts. 'The moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the proposed litigation.' *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir.1985).

In re Lupron Marketing and Sales Practices Litigation 22 F.R.D. at 90. With respect to the first prong, ensuring that the interests of the representative party do not conflict with the interests of any of the class members, this requirement has been explained by the United States Supreme Court in *Amchem Products, Inc.*, 521 U.S. at 591:

> The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. '[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.

Id. at 625-26.

The Representative Plaintiffs have elected not to solely pursue their individual claims in this matter, but to vindicate the rights of all individuals or entities who are similarly aggrieved, and to hold Collecto fully accountable for its practices. Mr. Lofton submitted to a deposition and all Representative Plaintiffs allowed their records to be examined by Collecto, its experts and placed before the court in this action. None of the Representative Plaintiffs have interests antagonistic to the interests of the class they seek to represent.

With respect to the adequacy of class counsel, Mr. Parisi and Mr. Meyer submit with this Motion declarations setting forth their qualifications to represent the interests of the class. Class Counsel have significant experience litigating TCPA consumer class actions to provide the required level of representation. Parisi Decl., ¶¶18-19 and Exhibit 2 attached thereto; Declaration of J. Andrew Meyer, ¶3. The qualifications of counsel, and their past experience litigating consumer class actions, including TCPA class actions, and related issues, demonstrate they are adequately qualified to represent the interests of the class. The work of class counsel in

this case, to date, also demonstrates their adequacy to represent the class.

IV. THE PROPOSED SETTLEMENT SATISFIES RULE 23(B) REQUISITES

Once it is determined that plaintiffs have satisfied the requirements for class certification set forth at Rule 23(a) of the Federal Rules of Civil Procedure, the Court must then proceed to analyze the requisites of Rule 23(b) and assess whether questions of law or fact common to the class predominate over any questions affecting only individual members, and whether use of the class action vehicle is the superior method to fairly and efficiently adjudicate the dispute at issue.

A. Common Questions of Law and Fact Predominate

Fed. R. Civ. P. 23(b)(3) requires, in pertinent part, that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The predominance inquiry does not require a plaintiff to "show that the legal and factual issues raised by the claims of each class member are identical." *Otte*, 275 F.R.D. at 57 *quoting In re Napster, Inc. Copyright Litig.*, 2005 WL 1287611, at *7 (N.D. Cal. Jun. 1, 2005). Instead, the focus should be on whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Id. quoting Amchem*, 521 U.S. at 623.

Here, common questions of law predominate. Predominance is a test readily met in certain cases alleging widespread consumer fraud or injury. *Amchem*, 521 U.S. at 625. Here, plaintiffs have alleged that between July 23, 2009 and June 30, 2014 Collecto placed calls in violation of the TCPA, with automatic telephone dialing systems, to consumers on their cellular telephones, that the consumers never had an agreement with the creditor for whom Collecto sought to collect a debt, and the consumers were the subscriber or the assigned user of the telephone number called by Collecto. For purposes of settlement, these identically situated class members will be given notice of the settlement.

B. The Class Action is Superior to Other Available Methods for Resolving This Controversy

Rule 23(b) of the Federal Rules of Civil Procedure also requires the Court to assess whether proceeding via a class action is the superior to other methods for the fair and efficient adjudication of the controversy at issue. Fed. R. Civ. P. 23(b). Courts have repeatedly noted that statutory claims with fixed damage awards, like TCPA claims, are ideal for class certification. "Where the damages are capable of mathematical or formula computation, the class action comes rather close to an ideal one and there is certainly no question of the lack of 'predominance' of the common questions." *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 n.22 (4th Cir. 1977) (*quoting* Practicing Law Institute, Current Problems In Federal Civil Practice at 491(1975)); *Montelongo v. Meese*, 803 F.2d 1341, 1351 (5th Cir. 1986) (liquidated damages awards obviated the need to resolve individual questions of reliance and damages). As this Court has previously aptly recognized:

> Given the size of the proposed class in this case, it is clear that piecemeal adjudication of claims covering substantially similar issues would be an inefficient allocation of court resources.

Otte, 275 F.R.D. at 58 *quoting In re Boston Scientific Corp. Securities Litigation*, 247 F.R.D. at 287. This principle is particularly applicable to the instant case and weighs heavily in favor of class certification as the most superior method of adjudication. The TCPA provides for minimum statutory damages of $500 per violation. 47 U.S.C. § 227(b)(3). Enforcement of this statute, however, requires individual consumers to initiate litigation and incur its attendant costs and sacrifice. The prospect of recovering $500 per wrong number call in statutory damages is too low for most people to promote prosecution of an individual suit under the TCPA.

Finally, in assessing whether class certification is the "superior" method to adjudicate the litigation, Rule 23(b) requires that the Court consider the desirability of proceeding via class action in contrast to allowing individual claims to proceed on their own, including an assessment of the difficulties in managing the dispute as a class action. As to these elements of the analysis,

class certification is the preferred course to pursue. The individual litigation of such a phenomenal number of claims would obviously consume a vast amount of judicial resources in trial courts across the United States. The misconduct in this case flows from Collecto's standard debt collection practices which are factually uniform as to each individual class member. Damages are set by statute and will be calculated by simple multiplication. Discovery has revealed that the class consists of approximately 206,000 individuals located throughout the United States. Class adjudication of this dispute is by far the most efficient and effective means to effectuate this settlement.

V. SUMMARY OF THE SETTLEMENT AGREEMENT

The Agreement is attached as Exhibit 1 to the Declaration of David C. Parisi in support of this Motion and incorporates the direct notice with claim form, long form notice, as well as the proposed Orders for Preliminary and Final Approval.

A. Class Definition and Identification and Benefits to Class Members

For settlement purposes only, the parties have stipulated to the certification of a class (the "Settlement Class" or "Class") defined as follows:

> (a) all natural persons residing in the United States; (b) who received one or more telephone calls from an automatic telephone dialing system operated by Defendant to their cellular telephone number; (c) between July 23, 2009 and June 30, 2014; where (d) the person never had an agreement with the creditor for whom Collecto sought to collect.

Parisi Decl., Ex. 1, ¶1.17. The following are excluded from the Class: "Defendant, any entity that has a controlling interest in Defendant, and Defendant's current or former directors, officers, counsel, and their immediate families. The Settlement Class also does not include any persons who validly request exclusion from the Class." *Id*.

B. Common Fund and Payments

The Agreement establishes a common fund of $3.2 million. Parisi Decl., Ex. 1, ¶1.19 Under the Agreement, the Settlement Administrator will deduct settlement administration costs (including notice and claims processing) from the fund. At the time for final approval, Class Counsel and the Representative Plaintiffs will seek costs, attorneys' fees, and an incentive award. *Id*. at ¶2.4. Each Settlement Class Member is eligible to submit a claim form (which confirms they are a Settlement Class Member). Settlement Class Members who submit approved claim forms will receive a pro rata share of the remaining common fund depending on the number of calls placed to them. Parisi Decl., Ex. 1, ¶¶1.12, 4.3, 4.4, 4.6. The Settlement Class Members' shares of the net compensation are based on the number of TCPA claims.

C. Attorneys' Fees and an Incentive Award

Under the Agreement, Class Counsel may apply to the Court for an award of attorneys' fees and reimbursement of costs and expenses incurred in the prosecution of this action, as well as class representative incentive awards. Parisi Decl., Ex. 1, ¶2.4. Accordingly, Class Counsel will file a motion for fees and costs no later than fifty (50) calendar days after notice is provided and prior to the Final Approval Hearing so that Class Members may have sufficient time to review the motion prior to the time for them to object. *Id*., at ¶2.4. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 995 (9th Cir. 2009) (class members should be provided notice of the fees sought prior to the time to object to the settlement).

The Agreement is a straight common fund. In a common fund settlement structure, "how the fund is divided between members of the class and class counsel is of no concern whatsoever to the defendants who contributed to the fund." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1301 (9th Cir. 1994). Because the parties negotiated a flat payment from Collecto that included all expenses related to the settlement, concerns about the propriety of negotiations about attorneys' fees need not infect the Agreement. Attorney's fees in the common

fund format are a percentage of total recovery for the Class, so their effect on Class Members' compensation is transparent. Here, Class Counsel may seek up to $1.3 million in fees and costs.

The four Representative Plaintiffs also plan to seek incentive awards. "Incentive awards are fairly typical in class action cases . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general. Awards are generally sought after a settlement or verdict has been achieved." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (cited, followed by *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015)). The Representative Plaintiffs may apply for incentive awards of up to $7,500 each.

D. *Cy Pres* Award

The Agreement provides that the common fund is distributed to Class Members who submit valid claims by mailing checks for the entire amount remaining in the fund. Hence, the parties intend to distribute the entire fund to Class Members, after making deductions for the Representative Plaintiffs, the Settlement Administrator, and Class Counsel. Parisi Decl., Ex. 1, ¶4.6. The Agreement precludes reversion of any funds back to Collecto. Still, Class Members have 180 days to deposit their checks and it is likely not every check will be deposited. Parisi Decl., Ex. 1, ¶4.6. If any money remains in the fund after the last check becomes invalid, that money will be paid to the proposed *cy pres* recipient, Privacy Rights Clearinghouse. Parisi Decl., Ex. 1, ¶¶4.6, 1.6. Privacy Rights Clearinghouse is a national non-profit which maintains the website privacy-information.org. Parisi Decl., ¶23. The organization has received *cy pres* funds in privacy related litigation in the past. (*Id.*) With his final approval motion, Representative Plaintiffs will submit a declaration from the recipient which will document more fully its qualifications.

E. CAFA Notice

The Agreement provides for appropriate notice to the Attorney General of the United States and the Attorneys General of all fifty states, within ten days of the submission of this Motion, under 28 U.S.C. § 1715(b). Parisi Decl., Ex. 1, ¶2.3.

F. Notice to the Class

The Settlement Agreement calls for Notice in several formats.

Direct Notice Claim Form. The Settlement Agreement calls for direct notice to class members. Parisi Decl., Ex. 1, ¶3.3.1. Through an extensive analysis of previously-produced data and employing sophisticated reverse-lookup databases, it is expected that between 80% and 90% of the potential Class Members will be receive that notice. Verkhovskaya Decl. ¶18. This percentage comports with the 70-95% reach guideline set forth in the *Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*. *Id.*

Class Counsel retained data analysis experts to prepare a class list of potential Class Members based on data produced by Collecto. The list identifies potential class members who were called by Collecto, on cellular telephones, where the name of the debtor did not match the name of the owner of the cell phone based on a commercially reasonable database of historical cellular telephone numbers and the names attached to those numbers. Verkhovskaya Decl., ¶¶8-15. Class Counsel's data analysis experts then obtained the mailing address from a reverse lookup database. *Id*.

Website Notice. No later than when notice is mailed out, the Settlement Administrator will post on a publicly accessible Internet website the long-form Website Notice attached to the Settlement Agreement as Exhibit C-2. Parisi Decl., Ex. 1, ¶3.3.2. The website also will include the Claims Form and copies of relevant filings and judicial rulings in the case. *Id*.

PR Newswire Notice. The Agreement also calls for notice to be posted via a PR Newswire Media Notice which describes the settlement and identifies the website for the Class

Notice and claim forms are located. Parisi Decl., Ex. 1, ¶3.3.3; Verkhovskaya Decl., ¶17.

VI. THE SETTLEMENT AGREEMENT SHOULD BE PRELIMINARILY APPROVED AS FAIR, REASONABLE AND ADEQUATE

Federal Rule of Civil Procedure 23(e) requires judicial approval of all class action settlements. Before approving a settlement, the Court must first find that the settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). As a general matter, courts have recognized that settlements "will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977). The First Circuit Court has long recognized that there is an overriding public interest in favor of settling class actions. *Lazar v. Pierce*, 757 F.2d 435, 439 (1st Cir. 1985); *In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) ("the law favors class action settlements").

The question for this Court is whether the settlement falls well within the range of possible approval, and is sufficiently fair, reasonable and adequate to warrant dissemination of notice apprising class members of the proposed settlement and to establish procedures for a final settlement hearing under Rule 23(e). The initial presumption of fairness of a class settlement may be established by showing that (1) the settlement has been arrived at by arm's-length bargaining; (2) sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently; and (3) the proponents of the settlement are counsel experienced in similar litigation. *4 Alba Conte & Herbert Newberg, Newberg on Class Actions,* § 11.41 (4th ed. 2002). If the court finds a settlement proposal "within the range of possible approval," it then proceeds to the second step in the review process—the final approval hearing. *See Newberg*, §11.25, at 38-39

In determining whether class action settlements should be approved, "[c]ourts judge the fairness of a proposed compromise by weighing the plaintiffs' likelihood of success on the merits

against the amount and form of the relief offered in the settlement. [Citation omitted] . . . They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

A. The Settlement Resulted from Arm's Length Negotiations – It is Not the Product of Collusion

The requirement that a settlement be fair is designed to protect against collusion among the parties. The proposed Settlement was negotiated at arm's length by knowledgeable and experienced counsel, following an extended period of contested litigation. The Settlement was arrived at only after (1) a mediation session with Anthony Piazza on September 21, 2015; (2) extensive briefing and a ruling by this Court denying Collecto's motion for summary judgment on February 10, 2016, (3) rulings by this Court on five of Plaintiffs' motions to compel; and (4) two additional days of mediation with Rodney Max on September 20 and 21, 2016. Parisi Decl., ¶¶8-14; Meyer Decl., ¶¶4-7. The contested nature of this litigation, the experience of counsel, the involvement of skilled mediators, and the fair result reached are all illustrative of the arm's length negotiations that led to the proposed Settlement. *Id*. ¶15.

B. The Factual Record Was Well Developed Through Independent Investigation

The factual record in this case was well developed by Class Counsel and the Settlement was achieved only after, full discovery was obtained, the applicability of insurance was contested in separate litigation (*Collecto, Inc. v. Torus National Insurance Company*, Case No. 1:15-cv-13350-RGS D. Mass.), and only after Class Counsel litigated the merits of the case by successfully defending Collecto's motion for summary judgment, took four depositions of Collecto, plaintiffs' and defendants experts on auto dialers were deposed, and Plaintiffs obtained five rulings on motions to compel. Parisi Decl., ¶¶6-11. By the time the Settlement was reached, Class Counsel, had "a clear view of the strengths and weaknesses" of their case. Meyer

Decl., ¶¶6-7; *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985). Class Counsel, accordingly, are in a strong position to make an informed decision on the merits of recommending the settlement, as they have a "full understanding of the legal and factual issues surrounding [the] case." *Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996). These factors strongly support approval of the proposed Settlement.

C. The Settlement Was Negotiated by Experienced Counsel

As detailed in the attached declarations, Class Counsel are experienced in TCPA class action litigation. Parisi Decl., ¶19 and Ex. 2 attached thereto; Meyer Decl., ¶¶3. Collecto was also represented by very able counsel. As a result of the evaluation of counsel on all sides, the Settlement was reached as a means of fully resolving the cases without the burden or risks attendant with further litigation.

D. Continued Litigation Would Create Significant Risk

The expense, complexity and duration of litigation are significant factors considered in evaluating the reasonableness of a settlement. Litigating this class action through trial would undoubtedly be time-consuming, expensive and risky. Had this matter proceeded further, it was anticipated that the Collecto would mount an aggressive defense raising challenges to a host of issues. Collecto's finances are also a significant issue given the potential statutory damages of over $100 could exceed Collecto's assets and resources. *See, e.g.*, ECF No. 52. Given the alternative of long and complex litigation before this Court, the risks involved in such litigation, and the possibility of further appellate litigation, the availability of prompt relief under the Settlement is highly beneficial to the Class.

E. The Agreement Falls within the Range of Possible Approval

The proposed Agreement falls well within the "range of reasonableness." Based on the information available, Class Counsel estimates (at a claim rate of five percent) that, after all

expenses are paid from the common fund, each class member would receive approximately $40 per call placed to them. Most Class Members received between two and four calls. The estimated per call amount compares favorably to the benefits achieved in similar cases. Parisi Decl., ¶16. Class Counsel believe that the benefits of the Agreement to the class sharply weigh in favor of approval. *Id*. at ¶¶17-22. The Agreement provides Class Members significant monetary compensation; many of these Class Members are unaware of their claims, would be unable to litigate those claims even if they were aware of them, and would not obtain any monetary relief from Collecto without the Agreement.

Conversely, even if Representative Plaintiffs continue to pursue the claims to class certification and trial, there is no way to assure that the Class would fare any better than the proposed Agreement. Collecto has shown these last three years that it is more than willing to vigorously litigate this matter. On balance, the proposed Agreement is a compromise—but nonetheless provides an excellent result for the Class while eliminating the risk, expense, delay, and uncertainty of continued litigation. Accordingly, the proposed Agreement is within range of obtaining final approval and the instant Motion should be granted.

F. The Agreement is Fair

The Agreement is eminently fair, and is not susceptible to manipulation. The claims-submission structure is standard in similar sorts of TCPA class settlements. Parisi Decl., ¶16. Here, a claims process is appropriate given the data available regarding potential Class Members. As mentioned, Class Members are the recipients of Collecto's wrong-number calls. The only available data regarding Class Members are the telephone numbers called by Collecto many years ago. In addition, the identity of the individuals receiving calls had to be obtained through reverse lookup. Given these limitations, a claims-made process is appropriate. *See Lee v. Ocwen Loan Servicing, LLC*, 101 F. Supp. 3d 1293, 1297 (S.D. Fla. 2015) ("a claims-made settlement is

the best possible settlement structure" given that "it is not feasible to determine specific information about proceeds on a member-by-member basis").

Each individual call is worth the same. Again, Class Counsel has cause to believe each Class Member will receive, on average, approximately $40 per call; this is meaningful enough compensation to provide Class Members an incentive to participate in the settlement and file claims—one of the most crucial factors that drive class member participation. *Biben v. Card*, 789 F. Supp. 1001, 1005 (W.D. Mo. 1992) ("settlements should provide sufficient incentive to the notice" and submit claims).

VII. THE FORM AND METHOD OF CLASS NOTICE ARE ADEQUATE AND SATISFY THE REQUIREMENTS OF RULE 23.

Under Rule 23(e)(1) of the Federal Rules of Civil Procedure, when approving a class action settlement, the district court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173-77 (1974); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Further, it is well established law that an evaluation of notice for purposes of due process does not require actual receipt of notice by each individual class member. *Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012) (*citing In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y.1996)). Indeed, due process requires only a good faith effort to provide actual notice, rather than the receipt of actual notice by every class member. For example, "[w]here certain class members' names and addresses cannot be determined with reasonable efforts, notice by publication is generally considered adequate," and is a "long-accepted norm in large class actions." *Juris*, 685 F.3d at 1320 (*citing Gordon v. Hunt*, 117 F.R.D. 58, 63 (S.D.N.Y.1987)).

The Parties' Settlement Agreement contemplates direct mail notice which is the "gold standard" for notice under Rule 23. Notice to the Settlement Class is to be accomplished first by direct mail to as many Class Members as can be identified using the books and records of

Collecto coupled with various third party databases as described in the declaration of Anya Verkhovskaya. Verkhovskaya Decl., ¶¶12-15; Parisi Decl., Ex. 1, ¶3.3.1. To the extent mail is returned as undeliverable, the Claims Administrator will make a good faith attempt to locate such class members and re-mail notice. In addition, the Settlement Agreement requires that information regarding the settlement will be disseminated to the press through a PR Newswire release. *Parisi Decl., Ex. 1*, ¶3.3.3. Thus, the proposed notice is "reasonably calculated to reach absent class members." *Reppert v. Marvin Lumber 7 Cedar Co.*, 359 F.3d 53, 56 (1st Cir. 2004).

At a minimum, notice must inform class members of "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 336 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015). Here, the parties have negotiated forms of notice which more than adequately meet these requirements. Parisi Decl., Ex. 1, and Exhibits B and C-2 attached thereto. The Parties' proposed notice plan will objectively and neutrally apprise all Class Members of the nature of the action, the definition of the Class sought to be certified for purposes of the Settlement, the Class claims and issues, that Class Members may enter an appearance before the Court at the Fairness Hearing, that the Court will exclude from the Class any Class Member who opts out (and sets for the procedures and deadlines for doing so), and the binding effect of a class judgment on Class Members under Rule 23(c)(3)(B). The proposed notice plan further will apprise Class Members of the procedures and deadlines for submitting objections. All forms of the notices are written in plain and straightforward language and are consistent with Rules 23(c)(2)(B) and 23(e)(1). Accordingly, the Court should approve

the proposed notice plan contained in the Parties' Settlement Agreement.

VIII. SUGGESTED SCHEDULE

Because time is needed to prepare and issue notice to the Settlement Class Members, because they need to be given sufficient time to consider the notice and decide whether to make a claim or consult with Class Counsel ask any questions they may have about the settlement, Class Counsel suggests the following general scheduling outline for evaluating and concluding this settlement:

Deadline for notice to be provided to the Class members	**_____, 2017** [30 days after the date of the Preliminary Approval Order]
Deadline for Class Counsel for file motion for fees and incentive awards	**_____, 2017** [50 days after the Notice deadline]
Deadline for Class members to file objections or submit requests for exclusion (Opt-Out and Objection Deadline)	**_____, 2017** [75 days after the Notice deadline]
Deadline for Settlement Class Members to submit a Claim Form (Claim Period)	**_____, 2017** [75 days after the Notice deadline]
Deadline for Parties to file the following: (1) List of persons who made timely and proper requests for exclusion (under seal); (2) Proof of Class Notice; and (3) Motion and memorandum in support of final approval, including responses to any objections.	**_____, 2017** [14 days after deadline for objections]
Final Approval Hearing	**_____, 2017 at ____ _.m.** [No earlier than 133 days from the Notice Deadline]

IX. CONCLUSION

For the foregoing reasons, Representative laintiffs respectfully request the Court grant preliminary approval of the Settlement Agreement, approve notice, certify the class on a

preliminary basis, appoint Class Counsel and Representative Plaintiffs as class representatives, appoint Ilym Group, Inc. as Settlement Administrator, enter the proposed Preliminary Order submitted herewith, and set the hearing for final approval.

Dated: July 12, 2017 By: /s/David C. Parisi
David C. Parisi

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