IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ISRAEL GARCIA, individually and on behalf of a class of similarly situated individuals,

Plaintiff,

v.

TARGET CORPORATION, a Minnesota corporation,

Defendant.

No.: 16-CV-02574-MJD-BRT

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF *UNOPPOSED* MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

After more than three years of litigation, extensive discovery efforts, full briefing on both dispositive motions and class certification, and months of contentious negotiations, including multiple full-day mediations before Magistrate Becky R. Thorson, the Parties[1] are pleased to report that they have reached a class action settlement that, if approved, will provide millions of dollars in relief to thousands of individuals. In this putative class action brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), the Parties have reached a proposed Settlement, under which Defendant Target Corporation ("Target") will establish a $7.05 million common fund to be distributed to the Settlement Class after payment of fees, costs, and expenses. By this Motion, Plaintiff Israel Garcia seeks preliminary approval of the Settlement Agreement, claims procedure, and the proposed form and method of class notice pursuant to Federal Rule of Civil Procedure 23(e).

Federal Rule of Civil Procedure 23 provides that at this stage of the Settlement-approval process, notice should issue if the Court determines it "will likely be able to" (1) approve the proposed Settlement, based on whether the proposed Settlement Class representatives and proposed Class Counsel "have adequately represented the class," and whether the Settlement "was negotiated at arm's length," provides "adequate" relief for the Settlement Class, and treats Settlement Class Members "equitably relative to each

[1] Unless otherwise stated, capitalized terms have the same meaning as those terms are used in the Settlement Agreement, attached hereto as Exhibit A.

other"; and (2) "certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1) & (2).

The record adduced during discovery, as well as the procedural and substantive aspects of the Settlement, satisfy those requirements. While Plaintiff maintains that, absent a settlement he would be able to secure class certification and prevail on the merits at trial, success would be far from assured, and the Defendant, Target, has extensive resources that it has made clear it would utilize to continue to defend this case. Accordingly, by any measure, this Settlement is an extraordinary result and, if approved, would bring meaningful relief to thousands of individuals, as well as certainty and closure to what has been, and likely would continue to be, highly contentious and costly litigation.

As explained in detail below, the Court "will likely be able to" find that the Settlement is fair, reasonable, and adequate, and provides greater relief than other TCPA settlements that have been approved in courts throughout the country. Preliminary approval of the Settlement and distribution of notice to the Settlement Class is in the best interest of the putative Class Members, and the Court will likely also find that the proposed Settlement Class meets all of the requirements for certification of a settlement class under Federal Rule 23. Accordingly, Plaintiff respectfully requests that the Court enter an Order (i) granting preliminary approval to the Settlement; (ii) appointing Plaintiff as Class Representative; (iii) approving the proposed notice plan; (iv) appointing Myles McGuire, Evan M. Meyers and Eugene Y. Turin of McGuire Law, P.C.; Daniel M. Hutchinson of Lieff Cabraser Heimann & Bernstein, LLP; Aaron Siri of Siri Glimstad

LLP; Jarrett L. Ellzey of Hughes Ellzey, LLP; and Robert K. Shelquist of Lockridge Grindal Nauen, PLLP, as Class Counsel; and (v) scheduling a final approval hearing.

II. BACKGROUND

A. The Telephone Consumer Protection Act.

Seeking to protect consumers against a growing flood of invasive and unwanted automated calls, Congress enacted the TCPA to "ban all autodialed calls . . . [to] cellular phones . . . unless the called party consents to receiving them, or unless the calls are made for emergency purposes[.]" S. Rep. No. 102-178, at 6 (1991); *see also Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 742 (2012). Based on an extensive legislative record, Congress found that consumers "consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy," and that "[b]anning such automated or prerecorded calls . . . except when the receiving party consents to receiving the call . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Pub. L. No. 102-243, § 2(10), 2(12), 105 Stat. 2394 (1991); *Mims*, 132 S. Ct. at 745 ("Congress reported, '[m]any consumers are outraged over the proliferation of intrusive, nuisance [telemarketing] calls").

However, despite the enactment of the TCPA, the establishment of a national do-not-call list, and other efforts to reduce intrusive robocalls, unwanted calls remain a top consumer complaint.[2] Indeed, unwanted phone calls to cellphones are particularly

[2] *Declaratory Ruling & Order, In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015) (hereinafter, the "2015 FCC

invasive, because many people keep their cellphones with them at nearly all times. In addition to the annoyance and aggravation that necessarily accompanies the receipt of unwanted phone calls, they can cause the called parties to incur costs, as many consumers have cellphone service plans that require them to pay for such incoming calls, or otherwise incur a usage deduction out of a limited amount of monthly talk minutes. And even when recipients ask not to receive such calls, callers often fail to honor such requests.

To address the problems associated with unauthorized automated calls, Section 227(b)(1) of the TCPA prohibits companies from making automated calls to an individual's cellphone number without the recipient's prior express consent. 47 U.S.C. § 227(b)(1); *Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 819 (8th Cir. 2015). The TCPA sets statutory damages in the amount of $500 per violation, which can be trebled if the violation was willful. *See* § 227(b)(3)(B-C).

While the TCPA restricts automated calls to cellphones, it does not ban automated calls entirely. Rather, companies may place automated calls to individuals' cellphones without violating the TCPA so long as they obtain the recipients' express consent before placing such calls. § 227(b)(1)(A) (exempting calls made with "the prior express consent of the called party"). "Prior consent is not an element of Plaintiffs' prima facie case, but is an affirmative defense for which Defendants bear the burden of proof." *Golan v. Veritas Entm't, LLC*, No. 14-cv-00069, 2017 WL 2861671, at *8 (E.D. Mo. July 5, 2017).

Order") ("By the fourth quarter of 2012, robocall complaints had peaked at more than 200,000 per month").

Importantly, the consent that matters for purposes of the TCPA is consent from the party who actually received the calls—not the person whom the defendant intended to call. Numerous courts and the FCC have confirmed that the TCPA's use of the phrase "called party" refers to the subscriber or actual user of the telephone number called. *See, e.g.*, *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 639–41 (7th Cir. 2012) ("We conclude that 'called party' in § 227(b)(1) means the person subscribing to the called number at the time the call is made"); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1525 (11th Cir. 2014); *see also Greenley v. Laborers' Int'l Union of N. Am.*, 271 F. Supp. 3d 1128, 1140 (D. Minn. 2017) ("[h]ere, [the plaintiff] has satisfied the narrowest interpretation of 'called party'—namely, that the meaning of 'called party' is limited to the 'subscriber' of the cellular telephone service"). Consequently, any automated phone calls that Target placed to individuals who were not Target customers and did not provide their permission to receive such calls were made without consent as a matter of law.

B. Procedural History And Factual Background.

1. Target's allegedly unlawful calling practices.

Target is a nationwide retailer that operates department stores in states across the country. (*See* Class Action Complaint ("Complaint"), Dkt. 1, at ¶ 9.) As part of its retail sales operations, Target collects its customers' telephone numbers when a customer opens a Target branded credit card. (*Id.* at ¶ 10.) These phone numbers are subsequently used to send automated phone calls related to the debt collection conducted on these accounts. (*Id.*) However, as Plaintiff alleges in his Complaint, many of the automated phone calls placed by Target were received by individuals who were not Target

customers and did not provide their prior express consent to receive such calls. (Complaint at ¶ 12.) Specifically, Plaintiff Garcia received automated calls on his cellular telephone that attempted to collect on a Target credit card debt account. (*Id.* at ¶¶ 14–15.) However, Plaintiff Garcia was not a Target account holder at the time of the calls and never gave consent to receive such calls from Target. (*Id.* at ¶ 20.) While Target has implemented some procedures in an attempt to prevent such calls, as Plaintiff alleges, Target failed to consistently verify that it had consent to place calls to all of the phone numbers to which it places automated debt collection calls. (*Id.* at ¶¶ 11–12.)

2. The Litigation.

This suit was originally filed against Target in the Southern District of Florida on February 27, 2016. (Dkt. 1.) Subsequently, with the agreement of the Parties, this case was transferred to this Court on July 29, 2016. (Dkt. 25.) The Court thereafter granted Target's Motion to Stay on November 3, 2016 (Dkt. 55), which stayed the case until the stay was lifted on May 22, 2018. (Dkt. 72.) Thereafter, Plaintiff propounded numerous interrogatories and document requests on Target regarding both Plaintiff's case on the merits – including what type of calling equipment was used by Target to place the calls at issue and what efforts Target took to avoid such unauthorized calls to non-customers – as well as class discovery regarding the identification of other individuals who received such unauthorized calls and Target's efforts to identify when it has placed an unauthorized call. On August 3, 2018, following extensive discovery efforts and after receiving thousands of pages of documents, Plaintiff Garcia filed his Motion to Compel (Dkt. 84), seeking production of additional documents relating to identifying putative

class members who received unauthorized automated calls from Target. After full briefing, Plaintiff prevailed, with Plaintiff's Motion to Compel being granted in part. (Dkt. 98.) Subsequently, Plaintiff proceeded with discovery, including obtaining detailed calling data that allowed Plaintiff to have an expert analyze and determine the efficacy and accuracy of Target's account record system and determine the number of putative class members. Plaintiff also proceeded with oral discovery and deposed Target's corporate representatives. Following the close of discovery, the Parties proceeded to fully brief *both* Target's Motion for Summary Judgment (Dkt. 118), as well as Plaintiff's Motion for Class Certification (Dkt. 99), which Target vigorously opposed and even sought to strike Plaintiff's expert witness. (Dkt. 132.)

It was after the close of discovery, and the filing of the Parties respective case-dispositive motions that the Parties attended their first settlement conference with Magistrate Judge Thorson on November 9, 2018. (Dkt. 116.) Despite a full-day mediation, the Parties were not able to reach an agreement as to a proposed class settlement. The Parties thereafter attended two more settlement conferences on December 11, 2018 (Dkt. 155) and January 17, 2019. (Dkt. 163.) It was only after the conclusion of the third settlement conference, and thanks to the efforts of Magistrate Judge Thorson, that the Parties reached an agreement and accepted the mediator's proposal that was presented to the Parties by Magistrate Thorson, and which has been memorialized in the Settlement Agreement being presented for approval before the Court in this motion.

III. SETTLEMENT TERMS

A. The Proposed Settlement Class.

The proposed Settlement would create a nationwide settlement class defined as follows: all individual and entities in the United States and its Territories who received non-emergency debt collection calls from or on behalf of Target between March 27, 2012 and May 15, 2018 on their cellular telephone and who were not the debtor on the account, as evidenced by a "wrong party" release code in Target's records, and who subsequently never consented to receive such calls. (Settlement Agreement at ¶ 1.31.)

B. Monetary Relief.

As part of the Settlement, Target has agreed to establish a $7.05 million cash Settlement Fund. (*Id.* at ¶ 1.33.) Each Settlement Class Member will be able to submit a claim that will entitle them to receive $70.00 from the Settlement Fund. (*Id.* at ¶ 2.1.) The Settlement Fund will also be used to provide for the costs of notice and administration, attorneys' fees and costs, and incentive an award payment to Plaintiff. (*Id.* at ¶ 1.33.)

Based on the estimated number of claims expected in response to the notice program developed with the assistance of the proposed Settlement Administrator, Epiq Systems, Inc. ("Epiq"), Plaintiff anticipates that each Settlement Class Member will receive the full $70.00 claim amount permitted by the Settlement, a significant amount that is well within the range of previously approved TCPA settlements.

C. Notice And Settlement Administration.

The Parties have agreed to retain Epiq as the Settlement Administrator. Epiq will be responsible for receiving Claim Forms submitted by Settlement Class Members, determining whether all submitted information is complete and accurate, and effectuating class notice. (Settlement Agreement at ¶¶ 1.30, 4.1–4.4, 5.1–5.3.) Notice will be provided through a combination of direct mail and email notice, including a published and publicly accessible Settlement Website. (*Id.* at ¶¶ 4.2–4.3.)

Target currently maintains a database of unique telephone numbers associated with wrong number codes that received the automated calls at issue that was previously produced to Plaintiff and that will be provided to the Settlement Administrator for the purpose of providing direct notice. (*Id.* at ¶ 4.2.) The Settlement Administrator will use the database to conduct a reverse lookup to identify the non-Target customers who would be Class Members. (*Id.* at ¶ 4.3(a)). Such individuals will then receive notice by U.S. Mail to the extent the Settlement Administrator can determine a valid mailing address, or by e-mail if the Settlement Administrator is able to find a valid e-mail address. (*Id.*) All forms of Notice are attached to the Settlement Agreement as Exhibits 1–3.[3] The Parties estimate there are approximately 200,000 Class Members who received the allegedly unauthorized calls at issue from Target and will receive direct notice. (*See* Declaration of Eugene Y. Turin ("Turin Decl."), attached hereto as Exhibit B, at ¶ 8.)

[3] Unless otherwise indicated, all references to numbered exhibits (e.g., "Ex. 1") are references to the exhibits attached to the Settlement Agreement, filed contemporaneously herewith.

The direct notice will point Settlement Class Members to the Settlement Website, which will contain electronic versions of the Claim Form that can be submitted online (or via email or via regular mail), as well as the full Settlement Agreement, a detailed Long Form Notice, important court documents, and answers to frequently asked questions. (Settlement Agreement at ¶ 4.3(b)). The format and language of each form of notice have been carefully drafted in straightforward, easy-to-read language that clearly informs Settlement Class Members of all the material aspects of the Settlement, such as the relief they are entitled to under the settlement, the amount of attorneys' fees and incentive award that may be sought, and instructions and deadlines for opting out from, or objecting to, the Settlement. (*Id.* at ¶ 4.4, Exs. 1–3.)

D. Opt-Out And Objection Procedure.

Settlement Class Members will have an opportunity to exclude themselves from the Settlement or object to its approval. (*Id.* at ¶¶ 4.6–4.7.) The procedures and deadlines for filing opt-out requests and objections will be referenced in all forms of the notice and on the Settlement Website. (*Id.*; *see also* Exs. 1–3.) With respect to objections, the notices inform Settlement Class Members that the Final Approval Hearing will be their opportunity to appear and have their objections heard. (*Id.* at ¶ 4.4, Exs. 1–3.) The notices also inform Settlement Class Members that they will be bound by the release unless they timely exercise their right to exclusion. (Exs. 1–3.)

E. Attorneys' Fees And Incentive Awards.

Subject to Court approval, attorneys' fees are to be paid out of the Settlement Fund. (Settlement Agreement at ¶ 8.1.) Under the Settlement Agreement, Class Counsel

have agreed to limit their request for attorneys' fees to no more than 27.5% of the Settlement Fund, or a maximum of $1,938,750.00. (Settlement Agreement at ¶ 8.1.) Target has also agreed to pay from the Settlement Fund, subject to Court approval, an incentive award to the named Plaintiff of $10,000. (*Id.* at ¶ 8.2.)

F. Release of Liability.

In exchange for the monetary and prospective relief described above, each Settlement Class Member who does not exclude himself or herself will be deemed to have released and forever discharged Target and the other "Releasees" (e.g. Target's affiliates) from any claims related to or arising out of Target's automated phone calls relating to debt collection on its Target branded credit cards. (Settlement Agreement at ¶¶ 1.25–1.26, 3.1–3.3.)

IV. PRELIMINARY APPROVAL & CERTIFICATION

The proposed Settlement provides substantial relief to the Settlement Class Members and represents a fair and reasonable resolution of this dispute. It thus merits this Court's preliminary approval and permission for notice to be sent to the Settlement Class Members. Rule 23 directs the Court at the preliminary approval stage to only determine whether it "will be likely" to grant final approval of the proposed Settlement as "fair, reasonable, and adequate," pursuant to Fed. R. Civ. P. 23(e)(2), and certifiable "for purposes of judgment on the proposal," pursuant to Fed. R. Civ. P. 23(e)(1)(B)(ii). The recent amendments to Rule 23 build upon the well-established two-step process in this Circuit of performing a "preliminary" evaluation of the fairness of the settlement to determine whether notice is to be sent out, prior to the final fairness inquiry. *See* Conte

& Newberg, 4 *Newberg on Class Actions*, § 13:14 (5th Ed., June 2019 update); *Dryer v. Nat'l Football League*, No. 09-cv-2182, 2013 WL 1408351, at *1 (D. Minn. Apr. 8, 2013); *Briles v. Tiburon Fin., LLC*, No. 15-cv-241, 2016 WL 4094866, at *1 (D. Neb. Aug. 1, 2016). Accordingly, the preliminary approval evaluation is not a final fairness hearing. Rather, it is a preliminary, pre-notification evaluation to determine whether the proposed settlement is "within the range of possible approval" such that there is reason to notify the class members of the proposed settlement and to proceed with a fairness hearing. *Newberg*, § 13:14; *Martin* at 383 (quoting Manual for Complex Litigation (Fourth) § 21.632 (2004)). The preliminary approval stage is an "initial evaluation" of the fairness of the proposed settlement based on the written submissions and informal presentation from the settling parties. *Id.* Thus, the Court must find at the preliminary approval stage simply that it is "*likely*" to determine at the final approval hearing that the Settlement is "fair, reasonable, and adequate" and certifiable. Fed. R. Civ. P. 23(e)(1)(B).

A. The Court Will Likely Find That The Proposed Settlement Is Fair, Reasonable, And Adequate.

As the amendments to Rule 23 direct, in determining whether to preliminarily approve a settlement, the Court must first evaluate whether it is "likely" to finally determine that the settlement is fair, reasonable, and adequate. Under Rule 23, as amended, the factors in determining whether a settlement is fair, reasonable, and adequate include: (1) whether the class representatives and class counsel have adequately represented the class; (2) whether the settlement was negotiated at arm's length; (3) the

relief provided to the class versus the cost and risk of proceeding to trial, the method by which relief will be distributed to the class, and the proposed attorneys' fees award; and (4) whether the settlement treats all class members equally to one another. Fed. R. Civ. P. 23(e)(2). Application of these factors to this case demonstrates that the proposed Settlement is fair, reasonable, and adequate.

1. The Settlement was reached after extensive discovery, litigation, and arm's-length negotiation.

The first two factors under the amended Rule 23(e)(2) are intended to "look[] to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2)(A)–(B) Advisory Committee's Note. In determining whether these factors are satisfied the Court may consider "the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, [which] may indicate whether counsel negotiating on behalf of the class had an adequate information base." *Id.*

The negotiations that led to the Settlement followed an extended period of contentious discovery and briefing on multiple case-dispositive motions. Indeed, it was not until a *third* settlement conference and a mediator's proposal that the instant Settlement was finally agreed to between the Parties. Plaintiff's counsel has at this point reviewed thousands of pages of documents produced by Target and conducted several depositions of Target's corporate designees. In addition, Plaintiff's Counsel worked with experts to conduct a detailed analysis of Target's call records to verify the accuracy of its record keeping system and determine the size of the putative Class. Much of this

discovery was obtained only after extended meet-and-confer discussions and, in several cases, contested discovery-related proceedings, including motion to compel proceedings. Accordingly, given that Plaintiff and his counsel had sufficient information about the facts of the allegedly unauthorized calls at issue to fairly weigh their prospects of success at trial versus the negotiated outcome provided by the Settlement, the Court should, and is likely to, find that they adequately represented the Class.

Further, the Parties' settlement negotiations were at all times conducted at arm's length and were facilitated by an experienced mediator: Magistrate Judge Thorson. *See* Fed. R. Civ. P. 23(e)(2)(A)–(B) Advisory Committee's Note ("[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests").

2. The relief provided by the Settlement is more than adequate and provides equal relief to all Class Members.

The Court is also likely to find that the proposed Settlement satisfies Rule 23's requirements of providing adequate relief when weighed against the likely outcome of any trial on the merits. The Settlement in this case is an extraordinary result for, and provides significant benefits to, the Settlement Class, as every Settlement Class Member with an approved claim will receive $70.00 from a Settlement Fund totaling $7.05 million, less approved fees and expenses. Because each Settlement Class Member will receive an equal share of the Settlement Fund, the proposed Settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(2)(D).

While Plaintiff believes his TCPA claim against Target is strong he is also aware that Target has denied Plaintiff's allegations and has raised numerous legal defenses, any of which, if successful, would result in the Plaintiff and the proposed Settlement Class Members receiving no payment whatsoever. For example, Target has already filed its opposition to Plaintiff's motion for class certification, and given that this case involves what is often termed "misdirected" automated calls, class certification is far from certain, with courts frequently denying class certification in identical cases. *Compare Tomeo v. CitiGroup, Inc.*, No. 13-cv-4046, 2018 WL 4627386 (N.D. Ill. Sept. 27, 2018) (denying class certification) *and Davis v. AT&T Corp.*, No. 15-cv-2342, 2017 WL 1155350, (S.D. Cal. Mar. 28, 2017) (same), *with Brown v. DirecTV, LLC*, No. 13-cv-1170, 2019 WL 1434669 (C.D. Cal. Mar. 29, 2019) (granting class certification). Furthermore, on the merits of Plaintiff's claim, Target has also filed its motion for summary judgment arguing that its system does not constitute an ATDS and that the calls in question are not actionable because Target could reasonably rely on the consent of the customer it was intending to reach. *See Roark v. Credit One Bank, N.A.*, No. 16-cv-173, 2018 WL 5921652 (D. Minn. Nov. 13, 2018). A similar holding here would substantially reduce the value of Plaintiff's and Settlement Class Members' claims.

Taking these realities into account, and recognizing the risks involved in any litigation, the settlement relief represents an excellent result for the Settlement Class. The total amount of the Settlement Fund, and the payments to participating Settlement Class Members, are significant in light of the risks of ongoing litigation. If Target were to succeed on its defenses to liability against Plaintiff's individual claims, or otherwise

prevail in opposing class certification, the Settlement Class Members would recover nothing.

Furthermore, any trial in this matter is likely to be complex and expensive. "Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation." *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (citation omitted); *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 649 (8th Cir. 2012) (denying objector's challenges to a class action settlement and stating that the objector "ignore[d] the substantial risk the plaintiffs would not prevail"). The trial is also unlikely to take place for some time given that prior to mediation the Parties were actively litigating several issues, including a motion for class certification and motion for summary judgment that would have to be re-filed and ruled upon before a trial date could even be contemplated. (Dkt. 172.) "If the Court approves the [Settlement], the present lawsuit will come to an end and [Settlement Class Members] will realize both immediate and future benefits as a result." *Schulte*, 805 F. Supp. 2d at 586. With this Settlement, Plaintiff and the Settlement Class Members will receive meaningful payments now, instead of years from now—or perhaps never. *See Id.* at 582. In short, in the absence of settlement, it is certain that the expense, duration, and complexity of the protracted litigation that would result would be substantial.

Even in the event that the litigation reached trial, evidence and witnesses from across the country would have to be assembled in multiple forums. Given the complexity of the issues and the amount in controversy, the losing Party would likely appeal both the

decision on the merits (at summary judgment and/or trial), as well as the decision on class certification. As such, the immediate relief provided to the Settlement Class under the Settlement Agreement weighs heavily in favor of its approval compared to the inherent risk and delay of continued litigation, trial, and appeal.

Furthermore, the other factors to be considered under Rule 23(e)(2)(C) are also all satisfied here. As detailed above, the Parties have prepared an extensive notice plan that will ensure that Class Members receive effective notice informing them about the Settlement and that will allow them to easily submit a claim for compensation from the Settlement Fund. *See supra* Section III.C; Fed. R. Civ. P. 23(e)(2)(C)(ii). In addition, Plaintiffs' Counsel's anticipated attorneys' fees request – no more than 27.5% of the $7.05 settlement amount being provided to the Class – falls well within, and indeed below, the customary 33% range of attorneys' fees award in other similar settlements, and will likely be found reasonable in light of the significant recovery achieved for the Class Members and the efforts undertaken by Plaintiff's Counsel in pursuing these claims on behalf of the Settlement Class. Fed. R. Civ. P. 23(e)(2)(C)(iii), *see, e.g., In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017) (affirming the district court's award of $2.8 million, or 28% of the proposed settlement fund in a TCPA class action); *Vergara v. Uber Technologies, Inc.*, No. 15-cv-6942, Dkt. 111 (N.D. Ill. 2018) (awarding 33% of settlement fund in a TCPA class action). Class Members will also have the opportunity to express their views on fee application at the Final Approval Hearing. Plaintiffs have also identified all agreements

made in connection with the Settlement, which are solely limited to the terms contained in the Settlement Agreement. Fed. R. Civ. P. 23(e)(2)(C)(iv).

In sum, the duration of the litigation; the extensive and sometimes contentious investigation and discovery process; the excellent result for the Settlement Class in spite of the significant procedural and substantive hurdles faced by Plaintiff; and the participation of an experienced mediator throughout the negotiation process are all testament to the fairness of the proposed Settlement. Similar class action settlements involving alleged violations of the TCPA have regularly received final approval in Districts across the country.

Here, the Parties estimate there are approximately 200,000 Class Members who received the allegedly unauthorized calls at issue from Target. (*See* Turin Decl. at ¶ 8.) Accordingly, each valid claimant will at a *minimum* receive a settlement payment of $35 – before deduction for administration, fees and expenses – which is well within the range of the TCPA settlements reviewed above and compares favorably with other "wrong number" settlements. *See, e.g., James v. JPMorgan Chase Bank, N.A.*, No. 15-cv-02424 (M.D. Fla.), Dkt. No. 51 (prelim. approval mot.) and Dkt. No. 58, June 5, 2017 (approving settlement that provided $3,750,000 for approximately 675,000 class members, or $5.56 per class member); *Lofton v. Verizon Wireless*, No. 13-cv- 05665 (N.D. Cal.), Dkt. No. 207-1, Apr. 14, 2016 (motion for final approval of class settlement that provided $4,000,000 for approximately 242,666 potential class members, or $16.48 per member), and Dkt. No. 217, May 27, 2017 (approving settlement). Accordingly, the proposed Settlement, which provides significant relief through a $7.05 million Settlement

Fund and which Class Counsel estimate will result in Settlement Class Members receiving the full $70 per valid claim, is likely to be found fair, reasonable, and adequate, and warrants the Court's preliminary approval.

B. The Court Will Likely Find That The Proposed Settlement Class Meets All Requirements For Certification For Purposes Of Settlement Under Federal Rule 23.

The proposed Settlement is not only likely to be found fair, reasonable, and adequate, but the proposed Settlement Class is also likely to be finally certified by the Court at the final approval hearing. As explained below, the Settlement Class meets all of the criteria for certification under Rule 23(a) and 23(b)(3).

1. The Proposed Settlement Class meets all prerequisites for certification under Federal Rule 23(a).

i. The Proposed Settlement Class is ascertainable based on objective criteria.

Here, and as already argued in Plaintiff's motion for class certification, the proposed Settlement Class Members are readily ascertainable using Target's database that has been produced to Plaintiff's Counsel. Target maintains a database that records any instances when a phone number is found to have been called in error. (Settlement Agreement at ¶ 4.2; Turin Decl. at ¶ 7.) Using this database, the Settlement Administrator will identify the individual associated with the phone number at the time of Target's calls by conducting a reverse lookup to identify the putative Class Member. Settlement Agreement at ¶ 4.2; *see West v. California Servs. Bureau, Inc.*, 323 F.R.D. 295, 302 (N.D. Cal. 2017), *leave to appeal denied sub nom. Membreno v. California Serv. Bureau, Inc.*, No. 17-80258, 2018 WL 1604629 (9th Cir. Mar. 27, 2018) (granting

class certification in a misdirected call case and describing use of a reverse-lookup to identify class members); *Soppet*, 679 F.3d at 642 (describing use of a "reverse-lookup"). The Settlement Administrator will thereafter send direct notice by mail or e-mail to any address obtained through the reverse lookup process.

ii. Numerosity

The numerosity requirement of Rule 23(a)(1) is met where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The Settlement Class at issue here is undoubtedly numerous. It includes many thousands of individuals scattered across the country. Based on Target's Notice Database and estimates provided by the Settlement Administrator, it is likely that direct notice will be mailed to as many as 200,000 individuals. (Turin Decl. at ¶ 8; Declaration of Eamon Mason on behalf of Epiq, attached hereto as Exhibit C, at ¶ 4.) In short, the estimated number of individuals in the Settlement Class, coupled with the fact that Settlement Class Members are geographically disbursed throughout the country, renders joinder impracticable and supports a finding of numerosity. *See Beckmann v. CBS, Inc.*, 192 F.R.D. 608, 613 (D. Minn. 2000) (numerosity was satisfied with a class of 71 persons); *Gawarecki v. ATM Network, Inc.*, No. 11-cv-1923, 2014 WL 2600056, at *9 (D. Minn. June 10, 2014) (numerosity satisfied with a class of at least 41 individuals).

iii. Commonality

The second prerequisite of Rule 23(a) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "As a general rule, the commonality requirement imposes a very light burden on [a] plaintiff seeking to certify a class and is

easily satisfied." *In re The Hartford Sales Practices Litig.*, 192 F.R.D. 592, 603 (D. Minn. 1999). Commonality exists where "the course of conduct giving rise to a cause of action affects all class members, and . . . at least one of the elements of that cause of action is shared by all class members." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 559 (D. Minn. 2010).

In this case, the Settlement Class members' claims are nearly identical such that there are numerous common elements. Plaintiff and all other Settlement Class members assert the same claim—that Target violated Section 227(b)(1)(A) of the TCPA by placing automated telephone calls relating to debt collection to their cellphones without prior express consent. Accordingly, the elements of each of the Settlement Class member's claim are identical and arise out of the same, uniform set of facts. Common questions of law and fact include, but are not limited to:

- Whether the members of the Settlement Class used or subscribed to a cellphone number that received one or more automated telephone debt collection calls from Target;
- Whether the members of the Settlement Class were Target accountholders at the time they received the automated debt collection telephone calls; and
- Whether the debt collection phone calls were placed to members of the Settlement Class using an "ATDS".

Many courts in other TCPA cases with the same set of facts involving misdirected calls placed on behalf of financial service companies have concluded that the issues discussed above are sufficient to satisfy the commonality standard. *See e.g. Abdeljalil v. General Elec. Capital Corp.*, 306 F.R.D. 303, 308 (S.D. Cal. 2015) (finding commonality was satisfied in TCPA class action involving debt collection to telephone numbers that

were marked in the defendant's system with "wrong number" codes); *West*, 323 F.R.D. at 301 (same); *Johnson v. Navient Sols., Inc.*, 315 F.R.D. 501, 502 (S.D. Ind. 2016); *Lavigne v. First Cmty. Bancshares, Inc.*, No. 15-cv-00934, 2018 WL 2694457, at *4 (D.N.M. June 5, 2018).

iv. Typicality

The typicality prong of subsection 23(a)(3) requires that the class representative's claims be typical of the class members' claims. Fed. R. Civ. P. 23(a)(3). Typicality is "fairly easily met" where Plaintiff's claims 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[.]" *Backer Law Firm v. Costco Wholesale Corp.*, 321 F.R.D. 343, 349 (W.D. Mo. 2017); *In re Target Data Breach*, 309 F.R.D. 482, 490 (D. Minn. 2015) (citing *In re TJX Companies Retail Sec. Breach Litig.*, 246 F.R.D. 389, 393 (D. Mass. 2007)). Courts have found that typicality is met where the defendant's action of sending unsolicited advertisements resulted in TCPA claims of the named plaintiff and members of the class. *See, e.g.*, *CE Design v. Beaty Const., Inc.*, 07-cv-3340, 2009 WL 192481, *5 (N.D. Ill. Jan. 26, 2009) (finding typicality where defendant's practice of sending unsolicited advertisements to the named plaintiff and the proposed class resulted in the claims of the potential plaintiffs being "based upon the same legal theory, *i.e.* violation of the TCPA").

Here, Plaintiff and the members of the proposed Settlement Class all allege that Target placed automated debt collection phone calls to them regarding Target's financial services without their prior express consent in violation of the TCPA. Further, Plaintiff

and the putative Settlement Class Members have all suffered the same injury: a violation of their rights protected under the TCPA. Because the Settlement Class Members assert identical claims that are based on the same legal theory, the same facts, and the same course of conduct by Target, and seek redress for the same injury, Plaintiff is typical of the Settlement Class he seeks to represent.

v. Adequacy

The final subsection of Rule 23(a) requires that the class representative "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To satisfy the adequacy requirement, class representatives must show that they: (1) have common interests with the members of the class, and (2) will vigorously prosecute the interests of the class through qualified counsel." *Burch v. Qwest Commc'ns Int'l, Inc.*, 677 F. Supp. 2d 1101, 1127–28 (D. Minn. 2009) (internal citation omitted). Here, both factors are met and, therefore, the adequacy requirement is satisfied. It is persuasive evidence of the adequacy of proposed class counsel where they have been found adequate to serve as class counsel in other cases. *See e.g.*, *Karsjens v. Jesson*, 283 F.R.D. 514, 519 (D. Minn. 2012).

Here, Plaintiff's interests are representative of, and consistent with, the interests of the proposed Settlement Class Members—all have received allegedly unlawful automated debt collection calls regarding Target credit card accounts despite not being a Target credit card account holder at the time of the calls, and all seek relief under the TCPA. Plaintiff's pursuit of this matter, including producing documents and participating in the discovery process, as well as representing the Settlement Class

Members interests throughout the settlement process, demonstrates that he has been and will remain a zealous advocate for the Settlement Class and has no interests that are antagonistic to the interests of the putative Settlement Class Members.

Plaintiff is also represented by experienced, competent counsel. Proposed Class Counsel have regularly engaged in complex class litigation and have extensive experience in consumer class action lawsuits involving cellular telephony and, in particular, the TCPA. Plaintiff's Counsel and their firms have been appointed as class counsel in numerous complex consumer class actions, including numerous TCPA cases such as the one before the Court here. (*See* Turin Decl. at ¶¶ 10–12; *see* Declaration of Daniel M. Hutchinson, attached hereto as Exhibit D, at ¶¶ 5–11; *see* Declaration of Robert K. Shelquist, attached hereto as Exhibit E, at ¶ 3.) As such, proposed Class Counsel are well qualified to assess the fairness and reasonableness of the Settlement Agreement reached in this case.

2. The Proposed Settlement Class Is Certifiable Under Federal Rule 23(b)(3).

A class is certifiable under Rule 23(b)(3) where "questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In TCPA cases, the predominance requirement is generally met where, as here, the class members' claims focus on a specific calling operation by a particular defendant. *See, e.g., Abdeljalil*, 306 F.R.D. 303

at 311; *West*, 323 F.R.D. at 302; *Johnson*, 315 F.R.D. at 503; *Lavigne*, 2018 WL 2694457, at *8.

In this case, as in *Lavigne* and *West*, common questions predominate because all of the Class Members received the same automated debt collection calls relating to Target branded credit cards, and all of the Class Members did not consent to receive such calls. In other words, all of the Settlement Class Members were sent the same type of automated phone calls, under similar circumstances, by the same entity, and without their prior express consent. As such, the elements of any given Settlement Class Member's claim will be based on the same class-wide proof applicable to other Settlement Class Members within the same class. *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995) (Predominance is satisfied "when there exists generalized evidence that proves or disproves an element on a simultaneous, classwide basis, since such proof obviates the need to examine each class member's individual position").

As to the dialing system used by Target, testimony of Target's corporate representatives has made clear that Target utilized the same automated dialing systems that constituted "predictive dialers" to place all of the automated calls. Accordingly, whether all of the automated calls at issue were placed using an ATDS is subject to common proof that predominates over any individual issues.

Furthermore, and most importantly, whether Target had consent to call any of the Class Members is also a common issue that predominates over any individual issues. In particular, other courts have found that in misdirected call cases such as the one before the Court here, "questions common to the class 'predominate over' other questions under

Rule 23(b)(3)" where the plaintiff proposed to use a reverse-lookup service to identify the putative class members. *West*, 323 F.R.D. at 302. Specifically, the same database that will be used by the Settlement Administrator to send notice to the Class Members can be used to identify individuals who received automated calls from Target that they did not consent to receive. Accordingly, common questions will predominate over any potential individualized issues.

A class action is also superior to any other method available to fairly and efficiently adjudicate the Settlement Class Members' claims. A class action is the superior method of resolving large scale claims if it will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615. In determining whether a class action is the superior method, courts often consider the following factors: (1) the class members' interest in individually controlling separate actions; (2) any litigation already begun by class members; (3) the desirability of concentrating the litigation in the particular forum; and (4) the difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3); *Golan*, 2017 WL 193560, at *6.

Here, the Class members' interest in pursuing individual actions is minimal given that most members of the Class would find the cost of litigating their claims – each of which is statutorily limited to $500 – to be prohibitive. Indeed, the Supreme Court "has stated that the policy consideration behind Rule 23(b)(3) is to 'overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action

prosecuting his or her rights.'" *St. Louis Heart Ctr., Inc. v. Vein Centers For Excellence, Inc.*, No. 12-cv-174, 2013 WL 6498245, at *10 (E.D. Mo. Dec. 11, 2013) (citing *Amchem*, 521 U.S. at 617).

Further, while very few, if any, of the Class members would be able to obtain any relief absent a class action, the alternative to providing class wide relief is hundreds or thousands of the Class members filing individual suits. Because there are approximately 200,000 proposed Class members, it would be inefficient for courts to separately adjudicate hundreds or thousands of cases across the country, potentially resulting in inconsistent outcomes. A single class action, on the other hand, would efficiently and justly resolve the dispute for all Class members at once. *See Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc.*, 250 F. Supp. 3d 354, 362 (D. Minn. 2017) ("Litigating the claims of this putative class in one federal action is far superior to forcing each of 3,256 putative class members to . . . litigate a TCPA action to a conclusion").

Finally, the claims of Plaintiff and the Class members can be easily managed as a class action. As set forth above, liability can be established on a class wide basis based on the same common set of evidence consisting of Target's own customer records. Nor are there any potential difficulties with ascertaining the actual identities of the Class members and providing notice.

Accordingly, a class action is the superior vehicle for adjudicating this case—a result reached by many other courts in assessing similar TCPA class actions. *See, e.g.*, *Sandusky Wellness Ctr., LLC*, 250 F. Supp. 3d at 362*; Abdeljalil*, 306 F.R.D. at 311–12; *West*, 323 F.R.D. at 306; *Lavigne*, 2018 WL 2694457, at *8.

C. The proposed Notice Plan satisfies Due Process and the requirements of Federal Rule 23.

Where, as here, a class is certified pursuant to Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must contain specific information in plain, easily understood language, including the nature of the action, the class definition(s), the claims, and the rights of class members. Fed. R. Civ. P. 23(c)(2)(B)(i)–(vii); *see In re AT&T*, 270 F.R.D. at 352.

As discussed above, the Parties have agreed to a comprehensive notice plan that more than satisfies the requirements of Due Process and Rule 23. The Settlement Agreement contemplates a multi-part notice plan designed to reach as many potential Settlement Class Members as possible. Under the notice plan, the Settlement Administrator will send direct notice of the Settlement via email or U.S. Mail to Settlement Class Members who will be identified by conducting a reverse-lookup on the phone numbers from Target's database identified as being contacted in error. The Settlement Administrator will be utilizing a database consisting of contact information for 95% of the U.S. adult population to conduct the reverse-lookup and provide direct notice to the Settlement Class Members. (*See* Mason Decl. at ¶ 5.) Additionally, the Settlement Administrator will establish a website containing the relevant court documents, notices, and the Claim Form, and which will provide for the online submission of claims. In compliance with Rule 23(e)(4), all of the notices will inform

Settlement Class Members of their right to object or exclude themselves from the Settlement and the process and deadlines for doing so.

Finally, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, and no later than ten days after filing the Agreement with the Court, the Settlement Administrator, on behalf of Target, will send required notice to the appropriate government entities. *Id*., § 1715(b). Because the proposed notice plan effectuates direct notice to all class members that can be identified by Target's records and fully apprises class members of their rights, it comports with the requirements of Due Process and Rule 23 and should be approved. (*See* Mason Decl. at ¶ 6.)

D. Plaintiff's Counsel Should Be Appointed Class Counsel.

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the Court must consider counsel's work in identifying or investigating potential claims; experience in handling class actions or other complex litigation, and the types of claims asserted in the case; knowledge of the applicable law; and resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

As described in detail above, proposed Class Counsel have diligently investigated Plaintiff's TCPA claims and the feasibility of class certification, have committed extensive efforts to negotiating and executing this Settlement and the related papers, and have devoted and will continue to devote substantial time and resources to this litigation. Proposed Class Counsel have extensive experience with similar class action litigation,

including scores of TCPA cases, and have been appointed class counsel in many class actions, including numerous TCPA cases in this District and in courts throughout the country, including in a TCPA case in which Plaintiff's Counsel prevailed at the U.S. Supreme Court. (Turin Decl. at ¶¶ 10–12; Hutchinson Decl. at ¶¶ 5–11; Shelquist Decl. at ¶ 3.) As such, Proposed Class Counsel have an in-depth knowledge of the laws applicable to the Settlement Class Members' claims and certification of the Settlement Class. Accordingly, the Court should appoint Plaintiff's Counsel to serve as Class Counsel for the proposed Settlement Class pursuant to Rule 23(g).

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order (1) granting preliminary approval of the proposed Settlement; (2) appointing Plaintiff Israel Garcia as Class Representative; (3) appointing Myles McGuire, Evan M. Meyers and Eugene Y. Turin of McGuire Law, P.C.; Daniel M. Hutchinson of Lieff Cabraser Heimann & Bernstein, LLP; Aaron Siri of Siri Glimstad LLP; Jarrett L. Ellzey of Hughes Ellzey, LLP; and Robert K. Shelquist of Lockridge Grindal Nauen, PLLP as Class Counsel; (4) approving the form and content of the proposed notice and ordering that it be effectuated; (5) scheduling a final approval hearing; and (6) providing such other and further relief as the Court deems reasonable and just.

Dated: June 21, 2019

Respectfully submitted,

ISRAEL GARCIA, individually and on behalf of a Class of similarly situated individuals

By: /s/ Eugene Y. Turin
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