**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| JENNIFER OSSOLA, JOETTA CALLENTINE and SCOTT DOLEMBA, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS CENTURION BANK, AND WEST ASSET MANAGEMENT, INC.<br><br>Defendants. | ) | Case No. 1:13-cv-04836<br><br>Hon. Judge John Z. Lee<br>Hon. Mag. Judge Jeffrey Cole |

**CALLENTINE'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM**

# TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS**
**(continued)**

**Page**

**Cases**

**Statutes**

**Treatises**

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Plaintiff Joetta Callentine respectfully moves the Court for preliminary approval of the nationwide class action settlement (the "Telemarketing Settlement") reached between Plaintiff Callentine ("Plaintiff" or "Callentine") and Defendants American Express Company and American Express Centurion Bank (together, "American Express"). The proposed Telemarketing Settlement would resolve all telemarketing claims in the above-entitled action.[1] Plaintiff alleges that American Express violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), by placing telemarketing calls, or having a third-party, Alorica Inc. ("Alorica"), place calls, to cellular telephones through the use of an automatic telephone dialing system or an artificial or prerecorded voice without the prior express consent of Plaintiff and the putative class members.

Under the Telemarketing Settlement Agreement, American Express is required to pay $8,250,000 into a settlement fund ("Fund") for a class consisting of approximately 798,626 persons based upon unique cellular telephone numbers. Eligible Telemarketing Settlement Class Members who file qualified claims will receive a pro rata cash payment from this Fund. Not a single penny of the Fund will ever revert back to American Express.

This action involves sharply opposing positions on many issues, including three critical ones. First, the parties disagreed whether, going forward, the Federal Communications

[1] Plaintiff Jennifer Ossola and Scott Dolemba, American Express and West Asset Management, Inc. ("WAM") have entered into a separate class action settlement (the "Debt Collection Settlement") to resolve the individual and putative class claims asserted by Plaintiffs Ossola and Dolemba in the action relating to debt collection calls by WAM on behalf of American Express. Plaintiffs Ossola and Dolemba are concurrently moving for preliminary approval of the Debt Collection Settlement. Together, the Telemarketing and Debt Collection Settlements will resolve all claims asserted in the action against all defendants.

Commission (the "FCC") rulings as to the definition of an "automatic telephone dialing system" ("autodialer") under the TCPA will be upheld by the D.C. Circuit.

Second, the parties disagree whether the claims of certain Telemarketing Class Members are subject to arbitration agreements that American Express maintains would extinguish Telemarketing Class Members' ability to pursue their TCPA claims outside of the arbitration process.

Finally, the parties also disagree as to whether a class can be certified because of what American Express maintains are inherently individual issues among Telemarketing Settlement Class Members. Despite these disagreements, the parties reached this settlement after several years of hard-fought litigation and a robust mediation before the Honorable Morton Denlow (Ret.) of JAMS and subsequent settlement discussions.

With this motion, Plaintiff seeks preliminary approval of the Telemarketing Settlement and provisional certification of a nationwide class for purposes of providing the Telemarketing Settlement Class with notice of the Telemarketing Settlement and an opportunity to opt-out, object, or otherwise be heard. The proposed Telemarketing Settlement satisfies all criteria for preliminary settlement approval under Seventh Circuit law.

## II. STATEMENT OF THE FACTS

### A. Procedural Background

On October 25, 2013, Plaintiff filed an amended class action complaint against American Express Company and American Express Centurion Bank. Dkt. No. 34. Callentine alleged that American Express, or someone on behalf of American Express, made calls using an automatic dialing system or an artificial or prerecorded voice to her cell phone. Dkt. No. 34, ¶ 50. On December 17, 2013, the Court entered an Order consolidating cases 13-cv-4836 and 13-cv-5278,

and ordering a Consolidated Complaint to be filed by January 24, 2014. Dkt. No. 70. On January 24, 2014, Plaintiff filed a Consolidated Class Action Complaint. Dkt. No. 71.

On February 14, 2014, American Express filed its Answer and Affirmative Defenses to the Consolidated Class Action Complaint. Dkt. No. 81. Therein, American Express denied that it placed any telephone calls to Callentine. Dkt. No. 81, p. 12-13. American Express also put forth defenses including that American Express had consent for any calls placed to the named Plaintiffs and the putative class, a constitutional challenge that TCPA damages violate the due process clause, and a defense that any person purportedly in the Telemarketing Settlement Class is subject to a binding arbitration agreement. Dkt No. 81, p. 24-25

On June 10, 2014 Plaintiff filed an Amended Consolidated Class Action Complaint. Dkt. No. 126.

On July 8, 2014, American Express filed a motion to Compel Arbitration of Plaintiff Callentine. Dkt. No. 138. This motion was denied on February 6, 2015. Dkt. No. 238.

On July 8, 2014, American Express filed a motion to Strike the Class Allegations in the Consolidated Complaint. Dkt. No. 140. This motion was denied on February 20, 2015. Dkt. No. 249.

On July 8, 2014, American Express filed a Motion for Partial Summary Judgment. Dkt. No. 142. This motion was denied on February 20, 2015. Dkt. No. 245.

On March 24, 2015, Defendant West Asset Management filed a Motion to Stay on Primary Jurisdictional grounds pending a decision from the Federal Communications Commission. Dkt. No. 274. American Express joined in this motion on April 1, 2015. Dkt. No. 280. This motion was denied on May 12, 2015. Dkt. No. 286.

On October 2, 2015, American Express filed a Motion to Stay pending the outcome of an appeal of the Federal Communication Commission's July 2015 Declaratory Ruling and Order. Dkt. No. 310. This motion was denied on December 15, 2015. Dkt. No. 330.

**B. Discovery**

The Parties engaged in extensive discovery and conducted numerous discovery hearings before Judge Cole. *See* Dkt. Nos. 93, 113, 118, 122, 125, 166, 167, 195, 219, 222, 227, 235, 262/263, 267, 277, 283, 285, 288, 292, 294, 296, 304/305, 329/331. In addition, Plaintiff filed three separate motions to compel production of discovery from American Express. Dkt. Nos. 85, 161, and 290.

Throughout the discovery process, Counsel held numerous discovery conferences with American Express's counsel related to discovery and other issues, as well as with Alorica's counsel. The discussions were thorough and, at many points, contentious, as the parties addressed all facets of discovery as well as their respective views on class certification and of Plaintiff's class TCPA claims.[2]

**C. The Parties' Mediation**

On April 14, 2016, the parties participated in an in-person mediation session before the Honorable Morton Denlow (Ret.) of JAMS.[3] Prior to the mediation, American Express and Plaintiff submitted detailed mediation briefs to Judge Denlow, setting forth their respective views

---

[2] *See* Declarations of Keith J. Keogh ("*Keogh Decl.*") attached as Exhibit 2, ¶ 2, Daniel M. Hutchinson ("*Hutchison Decl.*") attached as Exhibit 3 ¶ 2, Alexander H. Burke ("*Burke Decl.*") attached as Exhibit 4, ¶ 10, and Declaration of Matthew Wilson ("*Wilson Decl.*") attached as Exhibit 5, ¶ 7..

[3] *Keogh Decl.* ¶ 3.

on the strengths of their cases.[4] At mediation, the parties discussed their relative views of the law and the facts and potential relief for the proposed Class.[5]

Counsel exchanged counterproposals on key aspects of the Telemarketing Settlement. At all times, the settlement negotiations were highly adversarial, non-collusive, and at arm's length.[6] Although the parties reached an agreement in principle , it was not until months later and as a result of an additional mediator's recommendation from Judge Denlow on June 22, 2016, that this settlement was finalized.[7]

### D. The Proposed Settlement

The Settlement's details are contained in the Agreement signed by the parties, a copy of which is attached as Exhibit 2. (Agreement). For purposes of preliminary approval, the following summarizes the Agreement's terms:

#### 1. The Telemarketing Settlement Class

The Telemarketing Settlement Class is defined as follows:

> All persons nationwide within the United States who, on or after July 3, 2009 through March 15, 2016, received a telemarketing call from Alorica Inc. (or its agents or affiliates) on behalf of American Express, in connection with the marketing of American Express small business charge and/or credit cards to potential customers, to a cellular telephone number through the use of an automatic telephone dialing system, predictive dialer and/or artificial or prerecorded voice.

---

[4] *Id.*
[5] *Id.*
[6] *Id.* ¶ 5.
[7] *Id.* ¶ 4.

Telemarketing Agreement § II.A.38.[8] Class Counsel has learned through informal confirmatory discovery that the Telemarketing Settlement Class is comprised of approximately 798,626 people based on unique cellular telephone numbers throughout the United States.

**2. Monetary Relief for Telemarketing Settlement Class Members**

The Telemarketing Settlement requires American Express to create a non-reversionary Telemarketing Settlement Fund of $8,250,000. Agreement § III.C.1. Out of this Fund, eligible Telemarketing Settlement Class Members who file a qualified claim will receive a Cash Award in the form of a cash payment. *Id.* § III.F.1. The amount of each Telemarketing Settlement Class Member's Award will be based on a *pro rata* distribution, depending on the number of valid and timely claims. *Id.* §§ III.F.1; II.F.2. No amount of the Telemarketing Settlement Fund will revert to Defendant. *Id.* § III.G.3. While it is not possible to predict the precise amount of each Award until all claims have been submitted, Class Counsel, based on their experience in similar TCPA class actions, estimate awards of $130 assuming a five percent claim rate after deductions for Court-approved attorneys' fees and costs, any Court-approved incentive award to the Plaintiff, and costs of notice and claims administration.

Checks for Cash Awards will be mailed within 30 days of the Effective Date,[9] and will be valid for 180 days from the date of the check. *Id.* § III.G.1. If, after the expiration date of the settlement payment checks to Telemarketing Settlement Class Members, there remains money in

---

[8] Excluded from the Telemarketing Settlement Class are the Judge to whom the Action is assigned and any member of the Judge's staff and immediate family, as well as all persons who are validly excluded from the Telemarketing Settlement Class. *Id.*

[9] The Effective Date is the fifth business day after 1) the execution of the agreement; 2) the Court enters the Final Approval Order, without material change; 3) the Debt Collection Settlement has been finally approved; and 4) final disposition of any related appeals, including without limitation appeals of persons who have objected to the Debt Collection Settlement and/or Telemarketing Settlement, and in the case of no appeal or review being filed, expiration of the applicable appellate period. Agreement § II.A.19.

the Telemarketing Settlement Fund in an amount that exceeds $100,000, a Second Distribution shall be made to each Telemarketing Settlement Class Member who cashed his or her original check, on a pro-rata basis. *Id.* § III.G.2.

In order to exercise the right to obtain the relief outlined above, Telemarketing Settlement Class Members need only complete a simple, one-page claim form and provide it to the Claims Administrator via the Telemarketing Settlement Website, by mail or via the Toll-Free Settlement Hotline. *Id.* § III.F.1; III.F.2. Telemarketing Settlement Class Members shall be notified of the settlement within 30 days after an order granting preliminary approval issues (the "Notice Deadline") (*id.* § III.B.1), and will have 90 days following the Notice Deadline to submit their claim forms. *Id.* If Telemarketing Settlement Class Members wish to object to or opt out of the Telemarketing Settlement, they will have 60 calendar days from the Notice Deadline to do so. *Id.* §§ III.B.1; III.K.1.

**3. *Cy Pres* Distributions**

Money in the Telemarketing Settlement Fund that remains undistributed after redistribution, including money not distributed because there is not enough to justify a redistribution (which will be less than $100,000 in any case), will be distributed *cy pres* to a charity mutually agreed upon by the parties, subject to this Court's approval. *Id.* § III.G.3. Accordingly, no amount of the Telemarketing Settlement Fund will revert to Defendants. *Id.* §§ III.C.1; III.G.3. The parties anticipate providing a suggestion for the Court prior to or at the hearing on preliminary approval.

**4. Telemarketing Settlement Class Release**

In exchange for the benefits allowed under the Telemarketing Settlement, Telemarketing Settlement Class Members who do not opt out will provide a release tailored to the practices at

issue in this case. Specifically, they will release all claims that "arise out of or are related in any way to the actual or alleged use by Alorica Inc., or its agents or affiliates, of an artificial or prerecorded voice, predictive dialer and/or of any automatic telephone dialing system … to make telemarketing calls on behalf of American Express." *Id.* § III.H.

**5. Class Representative Service Award**

The Telemarketing Settlement Agreement provides that Plaintiff may petition the Court for a service award, and American Express has agreed not to object so long as the award sought does not exceed $10,000. *Id.* § III.J. The Service Award shall be paid out of the Telemarketing Settlement Fund and is subject to this Court's approval; neither Court approval nor the amount of the Service Award is a condition of the Telemarketing Settlement. *Id*. In light of the fact that Plaintiff was not a customer of American Express, that she passed on an individual offer to settle her case, that she travelled to Chicago for her deposition, and that discovery sought by American Express included information concerning her sister and deceased mother which Plaintiff regarded to be of a personal nature, Plaintiff will request an incentive award of $10,000.00. The Class Notice will advise the Telemarketing Settlement Class of Plaintiff's request.

**6. Attorneys' Fees and Costs**

Prior to the Final Approval hearing, Class Counsel will apply to the Court for an award of attorneys' fees and costs. *Id*. § III.I. As will be addressed in Class Counsel's motion for attorneys' fees, courts in this district commonly award approximately 33% in common fund TCPA class settlements after settlement administration costs are deducted, particularly in cases involving a non-reversionary common fund of this size. This amount is appropriate to compensate Class Counsel in this amount here for the work they have performed in procuring a settlement for the Telemarketing Settlement Class, as well as the work remaining to be performed in documenting

the settlement, securing Court approval of the settlement, overseeing settlement implementation and administration, assisting Telemarketing Settlement Class Members, and obtaining dismissal of the action. It should be noted, however, that the enforceability of the Telemarketing Settlement is not contingent on Court approval of an award of attorneys' fees or costs. *Id.* Further, the Class Notice will inform the Telemarketing Settlement Class Members that Class Counsel will seek 33% of the class benefit. While the Parties have not agreed on an amount of fees, American Express has reserved its right to oppose Class Counsel's motion and the amount requested. *Id.*

**7. Administration and Notice**

All costs of notice and claims administration shall be advanced by American Express, credited against the Telemarketing Settlement Fund. *Id.* § III.C.1. The Claims Administrator will be Kurtzman Carson Consultants ("KCC"), subject to this Court's approval. *Id.* § II.A.10. The Claims Administrator shall administer the Telemarketing Settlement, which includes the following duties: (1) issuing Class Notice and claim forms; (2) setting up and maintaining the settlement website; (3) accepting claim forms; (4) and issuing settlement payments. *Id.* §§ II.A.10; III.D; III.E.1; III.E.2. To enable the Claims Administrator to perform its duties, American Express has agreed to provide the Claims Administrator following preliminary approval with the list of telephone numbers it received from Alorica, as well as any available identifying information, reasonably available from the records it received from Alorica as belonging to possible Telemarketing Settlement Class Members. *Id.* § III.D. American Express shall be responsible for timely compliance with the requirements of the Class Action Fairness Act, 28 U.S.C. § 1715(b). *Id.* §§ II.A.7; IIII.E.3.

Within 5 days following Preliminary Approval, the Claims Administrator shall obtain from American Express, on a confidential basis, the list of cellular telephone numbers, for the period

from July 3, 2009 through March 15, 2016, Alorica called in connection with the marketing of American Express small business charge and/or credit cards to potential customers, and who can be identified from reasonably available computerized records and/or data; and perform reverse lookups as to any cellular telephone numbers that lack demographic information to obtain current e-mail addresses and/or direct mailing addresses, and update the addresses received through the National Change of Address database for the purpose of providing the Notice and later mailing Settlement Awards. *Id.* § III.D.; E.1-2. Within thirty (30) of the entry of Preliminary Approval Order, the Claims Administrator will issue the Class Notice (Exhibit 2 to the Agreement) via mail or email to all Telemarketing Settlement Class Members in accordance with the Notice Program described in the Settlement Agreement. Id. § III.B.1.

Further, the Claims Administrator will establish and maintain a Settlement Website. *Id.* § III.E.2. The Settlement Website will provide for online submission of claims and will also include general information such as the Telemarketing Settlement Agreement; Website Notice (Exhibit 3); the Preliminary Approval Order; Claim Form (Exhibit 1) for anyone wanting to print a hard copy of and mail in the Claim Form; the operative Complaint; and any other materials the Parties agree to include. *Id.* §§ III.E.2; II.A.42; Exhibit 3.

To ensure the correct identity of Telemarketing Settlement Class Members, American Express has the right to research and review the submitted Claim Forms and to instruct the Claims Administrator to deny Claims upon good faith belief that such claim is fraudulent. *Id.* § III.F.2. However, Class Counsel shall be able to dispute any denial. *Id.* Any disputes as to the denial of Claims that cannot be resolved between American Express and Class Counsel shall be submitted to the Court. *Id.*

## III. ARGUMENT

### A. The Settlement Approval Process

Under Fed. R. Civ. P. 23(e)(1)(C), a court may approve a class action settlement if it is "fair, adequate, and reasonable, and not a product of collusion" There is usually a presumption of fairness when a proposed class settlement "is the product of arm's length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experiences." H. Newberg, A. Conte, Newberg on Class Actions § 11.41 (4th ed. 2002); *Goldsmith v. Technology Solutions Co.*, No. 92 C 4374, 1995 U.S. Dist. LEXIS 15093, at *10 n.2 (N.D. Ill. Oct. 10, 1995); *Boggess v. Hogan*, 410 F. Supp. 433, 438 (N.D. Ill. 1975).

As the Seventh Circuit has recognized, federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain:

> It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in particular, there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.

*Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 312-13 (7th Cir. 1980) (citations and quotations omitted), overruled on other grounds by *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998); *see also Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); 4 *Newberg on Class Actions* § 11.41 (4th ed. 2002) (citing cases). The traditional means for handling claims like those at issue here—

individual litigation—would unduly tax the court system, require a massive expenditure of public and private resources and, given the relatively small value of the claims of the individual class members, would be impracticable. Thus, the proposed Telemarketing Settlement is the best vehicle for Telemarketing Settlement Class Members to receive relief to which they are entitled in a prompt and efficient manner.

The *Manual for Complex Litigation* (Fourth) (2004) § 21.63 describes a three-step procedure for approval of class action settlements:

> (1) Preliminary approval of the proposed settlement at an informal hearing;
>
> (2) Dissemination of mailed and/or published notice of the settlement to all affected class members; and
>
> (3) A "formal fairness hearing" or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

This procedure, used by courts in this Circuit and endorsed by class action commentators, safeguards class members' due process rights and enables the Court to fulfill its role as the guardian of class interests. 4 *Newberg* § 11.25.

With this motion, Plaintiff requests that the Court take the first step in the settlement approval process by granting preliminary approval of the proposed Telemarketing Settlement. The purpose of preliminary evaluation of proposed class action settlements is merely to determine whether the settlement is within the "range of possible approval," and thus whether notice to the class of the settlement's terms and holding a formal fairness hearing would be worthwhile. *Am. Int'l Group, Inc. v. ACE INA Holdings, Inc.*, No. 07 C 2898, 2011 U.S. Dist. LEXIS 84219, at *32-33 (N.D. Ill. July 26, 2011) (citing *Armstrong*, 616 F.2d at 314). Accordingly, at the preliminary

approval stage, courts need not "conduct a full-fledged inquiry into whether the settlement meets Rule 23(e)'s standards." *Id.*

When determining whether a settlement is ultimately fair, adequate, and reasonable at the "final approval" stage, courts in this Circuit consider the following factors:

> (1) the strength of plaintiffs' case compared to the terms of the proposed settlement;
>
> (2) the likely complexity, length, and expense of continued litigation;
>
> (3) the amount of opposition to settlement among affected parties;
>
> (4) the opinion of competent counsel; and
>
> (5) the stage of the proceedings and the amount of discovery completed.

*Isby*, 75 F.3d at 1199. While not required, courts often consider these factors to determine whether the settlement falls within the range of possible approval at the preliminary approval stage. *See, e.g., Am. Int'1 Group*, 2011 U.S. Dist. LEXIS 84219, at *33 ("[A]lthough neither the Federal Rules of Civil Procedure nor binding case law requires it, courts in this district have performed 'a more summary version' of the final fairness inquiry at the preliminary approval stage."); *Kessler v. Am. Resorts International's Holiday Network, Ltd.*, Nos. 05 C 5944 & 07 C 2439, 2007 U.S. Dist. LEXIS 84450, at *17 (N.D. Ill. Nov. 14, 2007) ("Although this [fair, reasonable, and adequate] standard and the factors used to measure it are ultimately questions for the fairness hearing that comes after a court finds that a proposed settlement is within approval range, a more summary version of the same inquiry takes place at the preliminary phase.") In reviewing these factors, courts view the facts "in a light most favorable to the settlement." *Redman v. Radioshack Corp.*, No. 11 C 6741, 2014 U.S. Dist. LEXIS 15880, at *9 (N.D. Ill. Feb. 7, 2014) (citing *Isby*, 75 F.3d

at 1199). In addition, courts "should not substitute [their] own judgment as to the best outcomes for litigants and their counsel." *Id.* (citing *Armstrong*, 616 F.2d at 315).

Granting preliminary approval of the Telemarketing Settlement will allow all Telemarketing Settlement Class Members to receive notice of the proposed Telemarketing Settlement's terms and the date and time of the final settlement approval hearing, at which Telemarketing Settlement Class Members may voice approval of or opposition to the Settlement, and at which the parties and Telemarketing Settlement Class Members may present further evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement. *See Manual for Compl. Lit.*, at §§ 13.14, § 21.632

### B. The Telemarketing Settlement Resulted From Arm's Length Negotiations And Is Not The Product of Collusion

As a leading treatise on class action jurisprudence explains, "decisions indicate that the courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered." *Newberg*, §11.51. The requirement that a settlement be fair is designed to protect against collusion among the parties. *Mars Steel Corp. v. Cont'l Ill. Nat. Bank and Trust Co. of Chicago*, 834 F. 2d 677, 684 (7th Cir. 1987) (approved settlement upon finding of no "hanky-pank" in negotiations). There usually is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's length negotiations. *Newberg*, §11.42.

As detailed above, the Telemarketing Settlement is the result of years of litigation, culminating in an all-day mediation before Judge Denlow (Ret.), additional months of negotiations, and extensive, arm's-length negotiations between attorneys experienced in the litigation, certification, trial and settlement of nationwide class actions, which still could not be resolved without the June 22, 2016 mediator's recommendation from Judge Denlow. Counsel for

both parties are also experienced in litigating TCPA claims and understand the legal and factual issues involved in this case.

Also, as detailed above, Class Counsel thoroughly investigated and analyzed Plaintiff's TCPA claims and conducted written and oral discovery to identify the Telemarketing Settlement Class and prosecute the class claims. Through this discovery, Class Counsel learned information regarding American Express's policies and procedures with respect to its vendors, including Alorica, as well as information regarding Alorica's telephone dialing systems and the method of how calls are placed and how consent to make such calls is obtained and tracked. Class Counsel also learned information regarding the number of telephones that Alorica called and the number of calls made as they relate to the claims in this case.

As a result, Class Counsel were well-positioned to evaluate the strengths and weaknesses of their case, as well as the appropriate basis upon which to settle it.

### C. The Telemarketing Settlement is Within the "Range of Reasonableness" for Preliminary Approval

The Telemarketing Settlement meets all of the factors relevant to final approval, and thus the Telemarketing Settlement should be preliminarily approved.

#### 1. The Telemarketing Settlement Provides Substantial Relief for Telemarketing Settlement Class Members, Particularly in Light of the Uncertainty of Prevailing on the Merits

"The most important factor relevant to the fairness of a class action settlement is the first one listed: the strength of the plaintiff's case on the merits balanced against the amount offered in the settlement." *Synfuel Techs, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (internal quotes and citations omitted). Nevertheless, "[b]ecause the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete

victory to the plaintiffs." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (citations omitted).

**a. The Monetary Amount Offered in Settlement**

The Telemarketing Settlement requires American Express to pay $8,250,000 into the Telemarketing Settlement Fund. Out of this fund, all eligible Telemarketing Settlement Class Members to make a claim will receive their *pro rata* share of cash payments. Agreement § III.F.1; III.F.2. The Telemarketing Settlement Fund is non-reversionary, ensuring that nearly all monetary benefits will go to Telemarketing Settlement Class Members—none of the Telemarketing Settlement Fund will return to American Express. The Telemarketing Settlement Fund created by the Telemarketing Settlement is comparable to or better than many similar TCPA settlements. Furthermore, the monetary amount achieved by the Telemarketing Settlement is an outstanding result for Telemarketing Settlement Class Members, particularly because TCPA damages are purely statutory damages, in that Telemarketing Settlement Class Members have hard-to-quantify out-of-pocket losses or other economic harm.

Class Counsel acknowledge that the $8,250,000 Fund does not constitute the full measure of statutory damages potentially available to the Telemarketing Settlement Class. This fact alone, however, should not weigh against preliminary approval. "Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Armstrong*, 616 F.2d at 315. The Telemarketing Settlement was reached after extensive factual investigation and discovery of the claims and issues and after taking into consideration the risks involved in the actions, after extensive arm's-length

negotiations presided by an experienced mediator and former judge. Further, the Telemarketing Settlement compares favorably to other TCPA class actions settlements. Courts have approved other TCPA class action settlements involving similarly large putative classes that achieved much smaller *pro rata* monetary recoveries.[10]

Indeed, courts have found similar TCPA class action settlements to meet the standards for preliminary approval and, as well as final approval. *Connor v. JPMorgan Chase Bank, N.A.*, No. 10 CV 01284 GPC BGS (S.D. Cal. Feb. 5, 2015)[11] (entering final approval of settlement providing slightly less than 2.5 million accounts for $11,268,058); *In re Capital One TCPA Litigation*, 12-cv-10064 (MDL No. 2416) (N.D. Ill. Feb. 12, 2015) (granting final approval where each class member would be awarded $39.66) (Holderman, J.); and *Steinfeld v. Discover Fin. Svcs*. 12-cv-01118 (N.D. Cal.) (Final Approval of $46.98 to each claimant)

The key here is that the Telemarketing Settlement provides Telemarketing Settlement Class Members with real monetary relief, despite the fact that this is a purely statutory damages case in which class members incurred nominal economic damages or whose actual damages (such as to the invasion of their privacy) are difficult or impossible to quantify.

---

[10] *See, e.g., Kramer v. Autobytel*, No. 10-cv-02722, 2012 U.S. Dist. LEXIS 185800 (N.D. Cal. Jan. 27, 2012) (approving $12.2 million settlement to benefit 47 million class members); *Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-cv-1290, 2013 U.S. Dist. LEXIS 15731 (S.D. Cal. Feb. 5, 2013) (preliminarily approving $17.1 million settlement to 5,887,508 class members; final approval granted at Dkt. No. 91); *Adams v. AllianceOne Receivables Mgmt. Inc.*, No. 08-cv-00248, Dkt. Nos. 116 & 137 (S.D. Cal. Sept. 28, 2012) (approving $9 million settlement to benefit 6,696,743 class members); *Palmer v. Sprint Nextel Corp.*, No. 09-cv-01211, Dkt. Nos. 84 & 91 (W.D. Wash. Oct. 21, 2011) (approving $5.5 million settlement to benefit 18.1 million class members).

[11] *Connor v. JPMorgan Chase Bank, N.A.*, No. 10 CV 01284 GPC BGS, Final Judgment and Order of Dismissal, Dkt. No. 160 (S.D. Cal. Feb. 5, 2015).

For all of the above reasons, the monetary amount recovered through the Settlement—on par with TCPA settlements found to be fair, adequate, and reasonable—is a great result for the Class.

**b. The Strength of Plaintiff's Case**

Plaintiff continues to believe that her claims against Defendant have merit and that she would make a compelling case if her claims were tried. Nevertheless, Plaintiff and the Telemarketing Settlement Class would face a number of difficult challenges if the litigation were to continue.

American Express maintains that, based on information produced by Alorica, the telephone dialing system used by Alorica during the class period does not qualify as an ATDS under the TCPA and, therefore, none of the calls at issue violate the TCPA. American Express further maintains that that certain individuals within the class are American Express customers who are bound by arbitration agreements. American Express maintains that such agreements extinguish these individuals' ability to pursue their TCPA claims outside of the arbitration process.

The parties also disagree as to whether a class can be certified because of what American Express maintains are inherently individual issues among putative class members. This includes whether certification would be appropriate in the face of issues relating to arbitration agreements and prior express consent. While Plaintiff continues to believe that class certification would be achievable, American Express asserted that class certification would be inappropriate due to the question of whether putative class members consented to the calls at issue. "Courts are split on whether the issue of individualized consent renders a TCPA class uncertifiable on predominance and ascertainability grounds, with the outcome depending on the specific facts of each case." *Chapman v. First Index, Inc.*, No. 09 C 5555, 2014 U.S. Dist. LEXIS 27556, at *6-7 (N.D. Ill.

March 4, 2014) (citing cases). For example, in *Savanna Group, Inc. v. Trynex, Inc.*, No. 10-cv-7995, 2013 U.S. Dist. LEXIS 1277, at *49 (N.D. Ill. Jan. 4, 2013), the court granted class certification and rejected the defendant's argument that questions of consent caused individual issues to predominate, noting that the defendant had not offered evidence tending to show that any particular class member consented to the faxes at issue, whereas in *G.M. Sign, Inc. v. Brinks Manufacturing Company*, No. 09 C 5528, 2011 U.S. Dist. LEXIS 7084, at *7-10 (N.D. Ill. March 4, 2014), the court declined to certify a class, finding that the defendant offered evidence illustrating that consent could not be shown with common proof. If American Express were able to present convincing facts to support its position, there is a risk that the Court would decline to certify the class, leaving only the named Plaintiff to pursue her individual claims.

At least some courts view awards of aggregate, statutory damages with skepticism and reduce such awards—even after a plaintiff has prevailed on the merits—on due process grounds. *See, e.g., Aliano v. Joe Caputo & Sons - Algonquin, Inc.*, No. 09 C 910, 2011 U.S. Dist. LEXIS 48323, *13 (N.D. Ill. May 5, 2011) ("[T]he Court cannot fathom how the minimum statutory damages award for willful FACTA violations in this case — between $100 and $1,000 per violation — would not violate Defendant's due process rights . . . . Such an award, although authorized by statute, would be shocking, grossly excessive, and punitive in nature."); *but see Phillips Randolph Enters., LLC v. Rice Fields*, No. 06 C 4968, 2007 U.S. Dist. LEXIS 3027, *7-8 (N.D. Ill. Jan. 11, 2007) ("Contrary to [defendant's] implicit position, the Due Process clause of the 5th Amendment does not impose upon Congress an obligation to make illegal behavior affordable, particularly for multiple violations.").

Finally, there remains a risk of losing a jury trial. And, even if Plaintiff did prevail at trial, any judgment could be reversed on appeal.

Despite these disagreements, the parties reached settlement after participating in robust mediation negotiations before the Honorable Morton Denlow (Ret.) of JAMS. The Telemarketing Settlement provides substantial relief to Telemarketing Settlement Class Members without delay and is within the range of reasonableness, particularly in light of the above risks that Telemarketing Settlement Class Members would face in litigation.

**2. Continued Litigation is Likely to be Complex, Lengthy, and Expensive**

Litigation would be lengthy and expensive if this action were to proceed. Although the parties engaged in significant discovery efforts, continued litigation would involve extensive motion practice, including Plaintiff's motion for class certification and renewed motions by American Express to compel arbitration and for summary judgment. Any judgment in favor of Telemarketing Settlement Class Members could be further delayed by the appeal process. Instead of facing the uncertainty of a potential award in their favor years from now, the Telemarketing Settlement allows Plaintiff and Telemarketing Settlement Class Members to receive immediate and certain relief. *See, e.g., Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (citation omitted) ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation.")

**3. There is Currently No Opposition to the Settlement**

All parties favor settlement. But because notice has not yet been sent to the Telemarketing Settlement Class, this factor cannot be fully evaluated prior to the final fairness hearing.

### 4. Class Counsel Strongly Endorse the Settlement

Class Counsel and Plaintiff strongly endorse this Settlement.[12] Class Counsel's opinion on the Telemarketing Settlement is entitled to great weight, particularly because: (1) Class Counsel are competent and experienced in class action litigation (particularly in similar TCPA class action cases)[13]; (2) Class Counsel litigated this case for several years, and in doing so, engaged in formal and informal discovery and exhaustively evaluated the claims[14]; and (3) the Telemarketing Settlement was reached at arm's length through negotiations between experienced counsel, after a robust mediation session before an experienced mediator and former judge.[15] *See McKinnie v. JP Morgan American Express Bank, N.A.*, 678 F. Supp. 2d 806, 812 (E.D. Wis. 2009) (factors including that "counsel endorses the settlement and it was achieved after arms-length negotiations facilitated by a mediator . . . suggest that the settlement is fair and merits final approval."); *see also In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000) (placing "significant weight on the unanimously strong endorsement of these settlements" by "well-respected attorneys"). This factor therefore weighs in favor of preliminary approval.

### 5. The Stage of the Proceedings and the Amount of Discovery Completed Supports Preliminary Approval

The Telemarketing Settlement was reached after almost three years of litigation and just two months before the close of discovery. As noted above, discovery has been contentious and robust. At the time of the settlement, Class Counsel had the information necessary to confirm that the Telemarketing Settlement is fair, reasonable, and adequate.[16]

---

[12] *Keogh Decl.* ¶ 9, *Hutchison Decl.* ¶ 2, *Burke Decl.* ¶ 10, *Wilson Decl.* ¶ 7.
[13] *Keogh Decl.*. ¶¶ 15-25, *Hutchison Decl.* ¶¶ 6-7, *Burke Decl.* ¶¶ 3-6, *Wilson Decl.* ¶ 3.
[14] *Keogh Decl.* ¶¶ 2-5.
[15] *Id.* ¶¶3-4.
[16] *Id.* ¶ 9.

### D. Provisional Certification of the Telemarketing Settlement Class is Appropriate

For settlement purposes, Plaintiff respectfully requests that the Court provisionally certify the Telemarketing Settlement Class defined in the Agreement. Agreement § II.A.38. Provisional certification for settlement purposes permits notice of the proposed Telemarketing Settlement to issue to inform Telemarketing Settlement Class Members of the existence and terms of the proposed Settlement, their right to be heard on its fairness, their right to opt out, and the date, time and place of the formal fairness hearing. *See Manual for Compl. Lit.*, at §§ 21.632, 21.633. Defendant has agreed to provisional certification of the Telemarketing Settlement Class, as defined in the Agreement, solely for purposes of this Settlement. For the reasons set forth below, provisional certification is appropriate under Federal Rule of Civil Procedure Rule 23.

#### 1. The Rule 23(a) Requirements are Satisfied

The numerosity requirement of Rule 23(a) is satisfied because the Telemarketing Settlement Class consists of approximately 798,626 people throughout the United States who received calls to their cell phones by Alorica on behalf of American Express through the use of an automatic telephone dialing system or an artificial or prerecorded voice, and joinder of all such persons is impracticable. *See McCabe v. Crawford & Co.*, 210 F.R.D. 631, 643 (N.D. Ill. 2002) (a class of forty or more is generally sufficient to establish numerosity). The commonality requirement is satisfied because there are many questions of law and fact common to the Telemarketing Settlement Class that center on Alorica's calls on behalf of American Express to Telemarketing Settlement Class Members on their cell phones. *See Parker v. Risk Mgmt. Alternatives, Inc.*, 206 F.R.D. 211, 213 (N.D. Ill. 2002) ("[A] common nucleus of operative fact is usually enough to satisfy the [commonality] requirement."); *G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 07 C 5953, 2009 U.S. Dist. LEXIS 73869, *12 (N.D. Ill. Aug. 20, 2009) (finding the

following common questions: "1) whether Defendant violated the TCPA by faxing advertisements without first obtaining express invitation or permission to do so; 2) whether Plaintiff and other class members are entitled to statutory damages; and 3) whether Defendants acts were 'willful' or 'knowing' under the TCPA and, if so, whether Plaintiff and other class members are entitled to trebled damages."). The typicality requirement is satisfied because Plaintiff's TCPA claims, which are based on Alorica's calls on behalf of American Express to cell phones, arise out of the same "event, practice or course of conduct that gives rise to the claim[s] of the other class members" and "are based on the same legal theory." *Parker*, 206 F.R.D. at 213. The adequacy of representation requirement is satisfied because Plaintiff's interests are coextensive with, and not antagonistic to, the interests of the Telemarketing Settlement Class. *See G.M. Sign*, 2009 U.S. Dist. LEXIS 73869, at *15-16. Further, Plaintiff is represented by qualified and competent counsel who have extensive experience and expertise in prosecuting complex class actions, including TCPA actions. *See id.*; *Keogh Decl.*. ¶¶ 15-25, *Hutchison Decl.* ¶¶ 6-7, *Burke Decl.* ¶¶ 3-6, *Wilson Decl.* ¶ 3.

**2. <u>The Rule 23(b)(3) Requirements are Satisfied</u>**

The predominance requirement of Rule 23(b)(3) is satisfied because common questions comprise a significant aspect of the case and can be resolved for all Telemarketing Settlement Class Members in a single adjudication. Common issues predominate here because the claims of the Telemarketing Settlement Class members arise from Alorica's alleged common practice of using an automated dialing system or an artificial or prerecorded voice to contact consumers on their cell phones without their consent on American Express's behalf. *See Sadowski v. Med1 Online, LLC*, No. 07 C 2973, 2008 U.S. Dist. LEXIS 41766, *13 (N.D. Ill. May 27, 2008) (finding common issues such as "how numbers were generated from Defendant's database and whether

Defendant's actions . . . violated the TCPA" to predominate, and that the issue of consent might be resolved through common proof such as "the source of the numbers" and "how Defendant selected who was to receive the [ ] faxes").

Because the claims are being certified for purposes of settlement, there are no issues with manageability. *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.") And, resolution of hundreds of thousands of claims in one action is far superior to individual lawsuits, and promotes consistency and efficiency of adjudication. *See Sadowski*, 2008 U.S. Dist. LEXIS 41766, at *14 (quoting *Murray v. New Cingular Wireless Servs.*, 232 F.R.D. 295, 303 (N.D. Ill. 2005)) ("In consumer actions involving small individual claims, such as this one, class treatment is often appropriate because each member's damages 'may be too insignificant to provide class members with incentive to pursue a claim individually.'") For these reasons, certification of the Telemarketing Settlement Class for purposes of settlement is appropriate.

**E. <u>The Proposed Notice Program Is Constitutionally Sound</u>**

"Rule 23(e)(1)(B) requires the court to 'direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." *Manual for Compl. Lit., supra*, at § 21.312. The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). According to the *Manual*, *supra*, at § 21.312, the settlement notice should do the following:

- Define the class;
- Describe clearly the options open to the class members and the deadlines for taking action;
- Describe the essential terms of the proposed settlement;
- Disclose any special benefits provided to the class representatives;
- Provide information regarding attorneys' fees;
- Indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to or opting out of the settlement;
- Explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set out those variations;
- Provide information that will enable class members to calculate or at least estimate their individual recoveries; and
- Prominently display the address and phone number of class counsel and the procedure for making inquiries.

The proposed forms of Notice, attached as Exhibit 2 and 3 to the Agreement, satisfy all of the criteria above. The Notice Plan provides for direct, individual notice via either email or mail. Agreement § III.E.1. For those individuals on the Class List for whom there is no email address in Alorica's records, or whose email was returned undeliverable, the Claims Administrator shall send postcard notice. *Id*. Based on the class data, almost everyone will receive mailed noticed. The Claims Administrator will utilize a reverse-phone look up process to identify Class email and/or mailing addresses, as needed. *Id*. Before sending notice via mail, the Claims Administrator shall perform a National Change of Address Update to locate the most recent address for Telemarketing Settlement Class Members. *Id*.

In addition, notice will be provided to Telemarketing Settlement Class Members online through the Settlement Website. Agreement § III.E.2.

## IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court do the following: (1) preliminarily approve the proposed Telemarketing Settlement as being within the range of possible final approval; (2) conditionally certify the Telemarketing Settlement Class and appoint Plaintiff as class representative; (3) appoint her attorneys Keogh Law, Ltd., Burke Law Offices, LLC, SmithMarco P.C., Lieff Cabraser Heimann & Bernstein, LLP, and Meyer Wilson Co., LPA as Class Counsel; (4) approve the proposed Notice and Claims Program, to be administered by KCC; (5) direct that Notice be provided to the Telemarketing Settlement Class pursuant to the terms of the Telemarketing Agreement within thirty (30) days following entry of the preliminary approval order; (6) establish a procedure for Telemarketing Settlement Class Members to object to the Telemarketing Settlement or exclude themselves from the Class; (7) set a deadline sixty (60) days after the Notice Deadline, after which no one shall be allowed to object to the Settlement, exclude himself or herself from the Telemarketing Settlement Class, or seek to intervene or submit a Claim; (8) pending final determination of whether the Telemarketing Settlement should be approved, stay all proceedings except those related to effectuating the Settlement; and (9) schedule a hearing to consider final approval of the Settlement, which shall be scheduled no earlier than one hundred thirty-five (135) days after the entry of the Preliminary Approval Order.

Dated: June 30, 2016

Respectfully Submitted,

By: *s/ Keith J. Keogh*

KEOGH LAW, LTD.

KEOGH LAW, LTD.
Keith Keogh
Email: keith@keoghlaw.com
Timothy Sostrin
Email: Tsostrin@Keoghlaw.com
Michael S. Hilicki
Email: MHilicki@Keoghlaw.com
55 W. Monroe, Ste. 3390
Chicago, Il. 60603
Phone: 312-265-3258
Fax: 312-726-1093

BURKE LAW OFFICES, LLC
Alexander H. Burke
Email: ABurke@BurkeLawLLC.com
155 N. Michigan Avenue, Suite 9020
Chicago, IL 60601
Telephone: (312) 729-5288
Facsimile: (312) 729-5289

SMITHMARCO P.C.,
Larry P. Smith
Email: lsmith@smithmarco.com
David M. Marco
Email: dmarco@smithmarco.com
205 North Michigan Avenue, Suite 2940
Chicago, IL 60601
(312) 222-9028
(888) 418-1277(fax)

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
Jonathan D. Selbin (*pro hac vice*; admitted to the N.D. Ill. general bar)
Email: jselbin@lchb.com
Douglas I. Cuthbertson (*pro hac vice*; admitted to the N.D. Ill. general bar)
Email: dcuthbertson@lchb.com
Jeremy M. Glapion
Email: jglapion@lchb.com
250 Hudson Street, 8th Floor
New York, NY 10013
Telephone: (212) 355-9500
Facsimile: (212) 355-9592

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
Daniel M. Hutchinson (*pro hac vice*; admitted to the N.D. Ill. general bar)
Email: dhutchinson@lchb.com
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

MEYER WILSON CO., LPA
Matthew R. Wilson (Ohio State Bar No. 0072925; admitted to the N.D. Ill. general bar)
Email: mwilson@meyerwilson.com
1320 Dublin Road, Ste. 100
Columbus, OH 43215
Telephone: (614) 224-6000
Facsimile: (614) 224-6066

*Attorneys for Plaintiff and the Proposed Class*