

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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GRACE MURRAY, AMANDA ENGEN,  
STEPHEN BAUER, JEANNE TIPPETT,  
ROBIN TUBESING, NIKOLE SIMECEK,  
MICHELLE MCOSKER, JACQUELINE  
GROFF, and HEATHER HALL, on behalf  
of themselves and others similarly situated,

Plaintiffs,

Plaintiffs,

v.

GROCERY DELIVERY E-SERVICES  
USA INC. DBA HELLO FRESH,

Defendant.

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Case No. 19-cv-12608-WGY

**PARTIES' JOINT STATUS REPORT TO THE COURT**

Pursuant to the Court's request at the July 9, 2021 status conference, the Parties submit this Joint Status Report addressing the status of negotiating an amendment to the Settlement Agreement, a process by which Class Members will be informed of the amendment to the Settlement Agreement, an update on the claims rate for the Settlement, and a procedure to finalize approval of the Settlement.

**I. AMENDMENT TO THE SETTLEMENT AGREEMENT**

Following the Court's further hearing on the motion for final approval of the Settlement in this matter that took place on June 9, 2021, the Parties worked to negotiate an amendment to the Settlement Agreement to address the Court's concerns raised at the June 9 hearing. The Parties engaged the Hon George King (Ret.) from JAMS, with whom the Parties had previously mediated to successfully reach the Settlement in this matter, to facilitate the negotiations on the amendment.

The Parties and Judge King met on July 2, 2021, via telephone conference. As a result of this further mediation session with Judge King, the Parties agreed on the terms and language of a Settlement Amendment. *See Exhibit 1*, Settlement Amendment.

In relevant part, the Settlement Amendment provides:

**2.2.2.** Any Future Claims For Violation Of The TCPA Not Subject To Arbitration. In the event that any of the Settlement Class Members have future claims for violation of the TCPA or any similar state law claims, they are not releasing such claims and HelloFresh agrees that if any such claims for violation of the TCPA are filed in a court of law within four years, or the applicable statute of limitations, whichever is longer, of the Effective Date, HelloFresh will not seek to compel arbitration of any such claims. However, if a Settlement Class Member desires to participate in an arbitration related to alleged claims for violation of the TCPA or any similar state law claims, this agreement will not prohibit them from doing so.

*See id.*

The Parties believe that this language, negotiated at arms-length via a mediation session with Judge King, satisfies this Court's concerns, provides a valuable benefit to Settlement Class Members, and is acceptable to HelloFresh as it allows Settlement Class Members to either proceed in court or arbitrate future claims that arise from this conduct.

## **II. INFORMING SETTLEMENT CLASS MEMBERS ABOUT THE BENEFIT CONTAINED IN THE SETTLEMENT AMENDMENT**

To inform Settlement Class Members about the additional benefit provided to them in the Settlement Amendment and to provide Settlement Class Members with another opportunity to file a claim, opt-out, or file an objection, the Parties have agreed to issue supplemental Class Notice to the Settlement Class (excluding those who have already filed a claim). Although the Parties believe that additional notice is unnecessary under Fed. R. Civ. P. 23 because the Settlement Amendment provides a further benefit to the Settlement Class (see below), the Parties believe that this supplemental Class Notice is ultimately in the best interest of the Settlement Class and can be done

in an efficient and cost-effective manner.

The Parties have obtained an estimate from the Court-appointed Settlement Administrator, KCC, to conduct a supplemental e-mail notice campaign. The e-mail notice will inform Settlement Class Members of the additional benefit provided in the Settlement Amendment. It will also give Settlement Class Members a second opportunity to file a claim and take part in the monetary benefit of the Settlement, opt out, or object to the updated version of the Settlement. *See Exhibit 2.* The Supplemental Notice will be sent within 21 days of the Court's Order approving the Settlement (with the Settlement Amendment) and recipients will be given 21 days to advise the settlement administrator whether they want to file a claim, opt out, or object. The Supplemental Notice program will ensure that Settlement Class Members are fully informed about the Settlement terms, including the Settlement Amendment. HelloFresh has agreed to pay the costs of the Supplemental Notice program, so that the cost of the Supplemental Notice program will not come out of the Class Members' recovery in the Settlement Fund. However, all other costs of processing claims or opt-outs will be paid from the Settlement Fund.

Although the Parties agreed to provide Supplemental Notice and a second opportunity to file a claim, such notice is not required because the Settlement Amendment does not negatively affect Settlement Class Members' rights, but rather provides them with an additional benefit. This Court previously found that the notice plan complied with Rule 23 and due process because it was "reasonably calculated to adequately apprise class members of (i) the pending lawsuit, (ii) the proposed settlement, and (iii) their rights, including the right to either participate in the settlement, exclude themselves from the settlement, or object to the settlement." Doc. 68 at 2.

The Settlement Amendment does not change any of the Settlement Class Members' rights, but rather provides them with additional, valuable benefits. New notice is only required where

there are “[m]aterial alterations” to a class settlement. *Pearson v. Target Corp.*, 893 F.3d 980, 986 (7th Cir. 2018); *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 n.10 (3d Cir. 2013); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 800 F. Supp. 2d 328, 334 (D. Me. 2011). Amendments that benefit the class do not require supplemental notice. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 330 (N.D. Cal. 2018) (“When the modification makes the settlement less desirable, notice may be required because courts cannot be sure whether more class members would have chosen to object to the settlement or exclude themselves from the class.... [W]hen the modification makes the settlement more valuable to the class, courts have routinely concluded that notice is unnecessary.”); *see also In re New Motor Vehicles*, 800 F.3d at 334 (where new settlement terms result in “benefits not substantially less than those proposed in the original settlement,” new notice is not required). Thus, the Supplemental Notice plan outlined above is not required by law but is simply aimed at providing Settlement Class Members with as much information as possible as well as a second opportunity to file a claim.

### **III. THE CLAIMS RATE FOR THE SETTLEMENT IS CONSISTENT WITH SIMILAR CLASS CASES**

Using the notice procedure approved by the Court in its Preliminary Approval Order, KCC provided notice to the Settlement Class via e-mail. Doc. 79-1 at ¶¶9-15 (“Geraci Decl.”). Additionally, a smaller number of Settlement Class Members without an e-mail address in the class data were sent postcard notices. *Id.* at ¶9. Of the 4,831,285 Settlement Class Members, 100,433 submitted valid claims forms to KCC, which is a claims rate of 2.19%. Doc. 79 at 12; Geraci Decl. at ¶20.

This 2.19% claims rate is consistent with, or superior to, the rate in many similar e-mail notice campaigns performed by KCC in TCPA cases. Ex. 3, Declaration of Jay Geraci at ¶ 3 (listing cases with claims rates ranging from 0.54% to 2.28%). It is also consistent with the claims rate in

other TCPA class settlements that have been approved by courts around the country. *See, e.g. Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358, at \*10 (N.D. Cal. Aug. 29, 2014) (\$20.00-\$40.00 awarded to each class member with a 3% claims rate was “in line with recoveries obtained in similar TCPA class action settlements”); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 223 (N.D. Ill. 2016) (approving a TCPA class settlement with a 1.08% claims rate); *Bayat v. Bank of the W.*, No. C-13-2376 EMC, 2015 WL 1744342, at \*1 (N.D. Cal. Apr. 15, 2015) (granting final approval to a TCPA class settlement where the claims rate was 1.9%); *Karpilovsky v. All Web Leads, Inc.*, No. 17-cv-1307 (N.D. Ill., June 24, 2019) (Same at 1.45%) *Makaron v. Enagic USA, Inc.*, No. 15-cv-5145 (C.D. Ca., November 27, 2019) (Same at 1.6%).

Significantly higher claims rates (e.g. the 20-30% range, or more) are not the norm in consumer class action cases in general. *See Exhibit 3*, Figure 1 (Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns, An FTC Staff Report, September 2019). According to the FTC study, e-mail notice campaigns in consumer class cases (which include some TCPA cases), had “mean and median claims rates of 2% and 3%, respectively.” *See Id.* at pg. 25.

Furthermore, the fact that this settlement of approximately 4,800,000 individuals was for \$14,000,000 is consistent with similar TCPA settlements with that many class members, which further supports a claim rate consistent with other such settlements. *See Kolinek v. Walgreen Co.*, Case No. 13-cv-04806, Doc. 200 (N.D. Ill. Nov. 23, 2015) (granting final approval of a TCPA settlement on behalf of 9.2 million class members with a settlement fund of \$11,000,000); *Kramer v. Autobytel, Inc. et al.*, Case No. 10-cv-02722-CW, Doc. 137 (N.D. Cal. Jan. 12, 2012) (TCPA class settlement on behalf of 47 million class members with a settlement fund of \$12.2 million); *Ott v. Mortgage Investors Corp. of Ohio et al.*, Case No. 14-cv-00645-ST, Doc. 140 (D. Or. Nov. 10, 2015) (TCPA class settlement on behalf of 3,552,434 class members with a settlement fund of

\$7,483,600); *Steinfeld v. Discovery Financial Services et al.*, Case No. C 12-01118 JSW (N.D. Cal. March 31, 2014) (TCPA class settlement on behalf of 9.8 million class members with a settlement fund of \$8.7 million).

The Parties and KCC are pleased with the claims rate achieved given the information available, and Settlement Class Members will each receive approximately \$89 in addition to the benefits provided by the Settlement Amendment. This amount exceeds the \$69 median compensation amount for *all* types of consumer case (not just TCPA) reported in the FTC's study. *See Id.* at pg. 23. It also exceeds comparable TCPA common fund settlements against large corporations alleged to have violated the TCPA. *See e.g., Markos v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01156-LMM, 2017 WL 416425, at \*4 (N.D. Ga. Jan. 30, 2017) (\$24.00); *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 944 (D. Minn, 2016) (\$33.20); *Vasco v. Power Home Remodeling Group LLC*, No. 15-cv-4623, 2016 U.S. Dist. LEXIS 141044 (E.D. Pa. Oct. 12, 2016) (\$27); *Gehrich v. Chase Bank U.S.A., N.A.*, 316 F.R.D. 215 (N.D. Ill. March 2, 2016) (\$52.50) *Kolinek v. Walgreen Co.*, No. 13-cv-4806, 2015 WL 7450759, at \*7 (N.D. Ill. Nov. 23, 2015) (\$30); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) (\$34.60); *Rose v. Bank of Am. Corp.*, No. 11-cv-02390-EJD, 2014 U.S. Dist. LEXIS 121641, at \*30 (N.D. Cal. Aug. 29, 2014) (\$20 to \$40)); *Steinfeld v. Discover Fin. Servs.*, No. C12-01118, 2014 WL 1309352, at \*6 (N.D. Cal. Mar. 10, 2014) (\$46.98); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, No. 3:11-md-02261 (S.D. Cal. Feb. 20, 2013) (\$12.97). If additional claims are filed because of the Supplemental Notice plan outlined above, the claims rate will go up and the monetary relief to each Settlement Class Member will be re-calculated accordingly.

#### **IV. FINAL APPROVAL PROCEDURE**

The Parties propose that 30 days after the deadline to submit supplemental claims following

the Supplemental Notice plan, the Court receive supplemental briefing in support of Final Approval of the Settlement and for Fees and Costs.

Specifically, the Parties propose that Plaintiffs submit a supplemental brief in support of Final Approval of the Settlement, limited to the Settlement Amendment contents, Supplemental Notice program, and final plan for distribution. Plaintiffs do not intend to submit any amended or supplemental request for attorneys' fees, costs, or class representative incentive awards, but may include further information to support their prior requests in those submissions. Defendant and the objector would then have the opportunity to respond to Plaintiffs' supplemental brief within 14 days, also limited to the issues identified above. Finally, the Court could hold a continued Final Approval hearing to address the issues in the Parties' supplemental Final Approval briefing. The proposed schedule is below:

<b><u>EVENT</u></b>	<b><u>DATE</u></b>
<b>Supplemental Notice</b>	21 days after entry of this Court's Order.
<b>Supplemental Claims Deadline</b>	21 days after Notice is sent.
<b>Renewed Motion for Final Approval</b>	30 days after the claims deadline
<b>Defendant and Objector's Response to Motion for Final Approval</b>	14 days after the Plaintiffs' submission

Dated: July 26, 2021

Plaintiffs and the Settlement Class  
by their attorneys,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 26, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send notification to all attorneys of record.

/s/ Anthony I. Paronich  
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