

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

DR. WILLIAM M. POLLACK,)	
on behalf of plaintiff and)	
the class members defined herein,)	
)	
Plaintiff,)	13 C 7653
)	
v.)	
)	Magistrate Judge Mason
INCROWD, INC.,)	
)	
Defendant.)	

SETTLEMENT AGREEMENT

RECITALS AND DEFINITIONS

1. Parties. Defendant InCrowd, Inc. (“InCrowd” or “Defendant”) and Plaintiff Dr. William M. Pollack (“Plaintiff”) individually and as representative of the settlement class of persons defined below in paragraph 7 (the “Settlement Class”), enter into this Settlement Agreement (“Settlement Agreement”).

2. Nature of Litigation. In this lawsuit, captioned *William M. Pollack v. InCrowd, Inc.*, United States District Court, Northern District of Illinois, Eastern Division, docket no. 13 C 7653 (the “Litigation”), Plaintiff alleges that InCrowd violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”), the Illinois Consumer Fraud Act, 815 ILCS 505/2 (“ICFA”) and common law (conversion, private nuisance, and trespass to chattels) by causing unsolicited facsimile advertisements to be transmitted to a nationwide class of individuals and entities.

3. Denial of Liability. InCrowd denies violating the TCPA and Illinois state law and further denies any liability to Plaintiff and the Settlement Class for the claims alleged.

InCrowd desires to settle the claims solely to avoid the expense, burden, and uncertainty of further litigation, and to put to rest all claims, known or unknown, that have been or might have been asserted by the Plaintiff or the Settlement Class against InCrowd concerning the matters alleged in the Class Action Complaint.

4. “Class Counsel” means Edelman, Combs, Lattuner, & Goodwin LLC and its attorneys.

5. “Class Period” means the period spanning October 24, 2009 through and including October 24, 2013.

6. “Plaintiff” means Dr. William M. Pollack and Pollack Clinic of Chiropractic and any other name under which William M. Pollack operates any business enterprise and each and every one of his respective past, present or future employees (as employees of Plaintiff), agents (as agents of Plaintiff), representatives, attorneys (as counsel for Dr. William M. Pollack), heirs, assigns, or any other person acting on his behalf or for his benefit, or any person claiming through him (in their capacities as such).

7. “Settlement Class” means all persons and entities who were subscribers to fax numbers who, on or after October 24, 2009 to October 24, 2013, were sent faxes by or on behalf of InCrowd, Inc., promoting its goods or services for sale and which do not contain an opt out notice as described in 47 U.S.C. § 227.

8. “Released Parties” means InCrowd, Inc. and its parent and affiliated entities (if any); their predecessors and successors in interest and their present, former, and future affiliates, and the past and current officers, directors, shareholders, partners, members, employees, agents and insurers (Continental Casualty Company, CNA Insurance Companies and their predecessors, successors, affiliates or subsidiaries, collectively referred to herein as

“Continental”) of the foregoing persons or entities in such capacities as they relate to the actions that are the subject of the Litigation. The Parties expressly agree that any person or entity named in this Agreement which is not a party to this Agreement is an intended third party beneficiary of this Agreement.

9. “Settlement Class Member(s)” means Plaintiff and any member of the Settlement Class who is not excluded from the Settlement Class by the Court.

10. “Released Claims” means any and all causes of action, suits, claims, or demands, in law or in equity, known or unknown at this time, which any Settlement Class Member now has, did have, or may have in the future against the Released Parties, or any of them, under any legal theory, whether or not alleged, related to or arising from the transmission of facsimiles by or on behalf of InCrowd, Inc. promoting its goods or services for sale which do not contain an opt out notice as described in 47 U.S.C. § 227 from October 24, 2009 through and including October 24, 2013 (hereinafter the “Released Claims”).

11. Plaintiff, individually and on behalf of the Settlement Class, desires to settle his claims against InCrowd, having taken into account, through Plaintiff’s counsel, the risks, delay, and difficulties involved in establishing a right to recovery in excess of that offered by this settlement and the likelihood that further litigation will be protracted and expensive. Plaintiff represents and warrants that his business is a sole proprietorship and that he is the sole owner of the business and that he owned or leased the facsimile machine which received the fax at issue in the Litigation at the time the fax was received. The warranties and representations made in this Agreement survive the execution of the Agreement.

12. Plaintiff’s counsel has investigated the facts and the applicable law. Based on the foregoing, and upon an analysis of the benefits afforded by this Settlement Agreement,

Plaintiff's counsel considers it to be in the best interest of the Settlement Class to enter into this Settlement Agreement.

13. In consideration of the foregoing and other valuable consideration, Plaintiff, Plaintiff's counsel, and InCrowd, agree to settle the claims of the Plaintiff and the Settlement Class, subject to the Court's approval, on the following terms and conditions.

TERMS

1. Incorporation of Recitals and Definitions. The recitals and definitions set forth above are incorporated into this Agreement.

2. Effective Date. If there is no objection to the Court approving this Settlement, then the Settlement Agreement shall become effective (hereinafter the "Effective Date") upon the occurrence of all of the following:

(a) The Court's entry of a Final Approval Order substantially in the form of Exhibit 4, and (b) the expiration of five (5) days from the time that the Final Approval Order becomes final and non-appealable.

3. Certification of Settlement Class. Solely for the purposes of settlement, the parties stipulate to the certification of a Settlement Class, which is defined as:

All persons and entities with fax numbers who on or after October 24, 2009 to October 24, 2013, were sent faxes by or on behalf of InCrowd, Inc., promoting its goods or services for sale and which do not contain an opt out notice as described in 47 U.S.C. § 227.

For settlement purposes only, the Parties agree that, as part of the Preliminary Approval Order, the Court may make preliminary findings and enter an order granting provisional certification of the Settlement Class subject to final findings and certification in the Final Approval Order, and appointing Plaintiff as class representative and Daniel A. Edelman and Heather Kolbus of Edelman, Combs, Latturner & Goodwin, LLC as Settlement Class Counsel ("Settlement Class

Counsel”). For settlement purposes only, the Settlement Class is certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. InCrowd does not consent to certification of the Settlement Class for any purpose other than to effectuate the settlement of the Litigation. If this Settlement Agreement is not approved by the Court or is terminated pursuant to its terms or for any other reason, or is disapproved in a final order by any court of competent jurisdiction, (a) the order certifying the Settlement Class and all preliminary and/or final findings or stipulations regarding certification of the Settlement Class shall be automatically vacated upon notice to the Court of this Settlement Agreement’s termination or disapproval; (b) this Action will proceed as though the Settlement Class had never been certified and any related findings or stipulations had never been made and neither this Settlement Agreement nor any other associated settlement document may be used in seeking class certification; and (c) InCrowd reserves all procedural or substantive rights as of the date of execution of this Settlement Agreement

4. Defendant represents that, based on a review of its records, and the invoices and other documents it received from the third-party fax broadcaster, Westfax, Inc., approximately 1,303,287 facsimiles were sent on its behalf to approximately 427,119 unique fax numbers during the Class Period. Defendant will provide to Class Counsel and/or the Class Administrator the list of facsimile numbers and the number of advertising transmissions intended to be sent to each fax number based upon their records and the records of Westfax (the “Fax List”). Defendant did not receive transmission reports from Westfax. Some Settlement Class members were sent more than one facsimile advertisement. Defendant may also provide addresses of the Settlement Class members, if reasonably ascertainable.

5. Relief to Plaintiff and the Settlement Class. Continental and InCrowd

shall provide the following relief to Plaintiff and the Settlement Class, subject to the Court's approval:

- a. the creation of a \$375,000.00 Settlement Fund ("Settlement Fund") which shall be distributed as set forth below;
- b. notice and administrative expenses will be paid from the Settlement Fund up to a maximum of \$80,000. Any notice and administrative expenses in excess of \$80,000 shall be paid solely by InCrowd, and shall not reduce the Settlement Fund; and
- c. After the notice and administrative expenses are deducted from the Settlement Fund, the Net Settlement Fund shall be apportioned as follows, subject to court approval:
 - i. \$2,500 shall be paid from the Settlement Fund to Plaintiff as an incentive award in recognition of his services as Class Representative;
 - ii. counsel for Plaintiff and the Settlement Class, Edelman, Combs, Lattuner & Goodwin, LLC, shall request 25% of the Net Settlement Fund for attorney's fees, not to exceed \$73,750;
 - iii. each member of the Settlement Class who submits a valid claim form will receive a check for its pro rata share per fax transmission of the Net Settlement Fund up to a maximum of \$500 per facsimile transmission, after the amounts set forth in subparagraphs (b), (c)(i) and (c)(ii) are distributed.

6. Within 14 days of the Effective Date, Continental and InCrowd shall deliver the Net Settlement Fund to the Class Administrator to be held in trust for distribution to the Settlement Class. Any award of attorney's fees and costs and an incentive award to Plaintiff may be distributed within 14 days following the Effective Date. Within 30 days following the Effective Date, the Class Administrator shall distribute the Net Settlement Fund in accordance with this Agreement.

7. Settlement Class Members shall have at least 60 days to submit a claim form, to opt out, or object to the proposed settlement, after Notice of the proposed settlement is sent to the Settlement Class by facsimile.

8. Costs associated with notice, claims administration and distribution of settlement checks shall come from the Settlement Fund up to a maximum of \$80,000. Costs of notice and administration not to exceed \$80,000 may be advanced from the Settlement Fund. Any amounts incurred for notice and administrative expenses in excess of \$80,000 are to be paid directly by InCrowd, separate and distinct from the Settlement Fund. Administrative expenses include any work that the Class Administrator may perform as is deemed necessary by agreement of the parties to the Fax List. Defendant may select the Class Administrator and shall notify Plaintiff's Counsel of its election within 10 days after this Agreement is fully executed.

9. The settlement checks issued to the members of the Settlement Class for payment of claims under this Agreement will be void after 60 days from the date of issuance. Any Settlement Class member who does not negotiate the claim payment check issued to them within 60 days of the date of issuance of the settlement claim payment check, agrees that they rescind and withdraw their claim for monetary compensation under this Agreement but remain a member of the Settlement Class and are bound by the terms of this Agreement.

10. Undistributed Settlement Funds. Within 30 days following the last void date of the checks issued to Settlement Class members for payment of claims, the Settlement Class Administrator will report to the Parties if there are any uncashed checks or unclaimed or undistributed settlement funds. In the event that there are undistributed funds in the Settlement Fund after all payments required under this Agreement are made, the Parties may make proposals to the Court for equal distribution of such remaining funds to a *cy pres* recipient.

11. Release. Upon the Effective Date, Plaintiff and the Settlement Class members who have not been excluded from the Settlement Class, grant the following releases:

- a. Plaintiff, hereby fully releases and discharge the Released Parties from any and all liability for any and all causes of action, suits, claims, or demands, in law or in equity, known or unknown at this time, which Plaintiff now has, did have, or may have in the future against the Released Parties, or any of them, under any legal theory, whether or not alleged, related to or arising from the transmission of unsolicited advertising facsimiles by or on behalf of InCrowd, Inc. during the Class Period to members of the Settlement Class.
- b. Each member of the Settlement Class who has not been excluded from the Settlement Class, hereby fully releases and discharges the Released Parties from any and all liability for any and all causes of action, suits, claims, or demands, in law or in equity, known or unknown at this time, which each such Settlement Class member now has or ever had against the Released Parties, or any of them, under any legal theory, whether or not alleged, related to the Released Claims.

12. This Settlement Agreement may be pleaded as a full and complete defense to any action, suit or other proceeding that may be instituted or prosecuted with respect to the claims released herein. Without admitting that California law or the laws of any other state apply to this Agreement or that the release provided by Plaintiff and the Settlement Class is a general release, the Parties agree that upon the Effective Date, the Settlement Class shall be deemed to have waived and shall have expressly waived the provisions and benefits of California Civil Code §1542, which provides that a general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her, must have materially affected his or settlement with the debtor. Further, Plaintiff and the Settlement Class, expressly waive any and all provisions and rights or benefits which may be conferred upon them by any law, statute, ordinance or regulation which is similar, comparable or equivalent to California Civil Code §1542.

13. If this Settlement Agreement is not approved by the Court or for any reason does not become effective, it shall be deemed null and void and shall be without prejudice to the rights of the parties hereto and shall not be used in any subsequent proceedings in this or any other litigation, or in any manner whatsoever.

14. Attorneys' Fees, Notice Costs and Related Matters. The Class Administrator will administer the Settlement Fund for the benefit of the Settlement Class. Class Counsel will request approval from the Court for attorneys' fees in an amount not to exceed 25% of the Net Settlement Fund. Class Counsel will not request additional fees or costs from InCrowd, Continental, or the Settlement Class other than the above-referenced sums. InCrowd and Continental agree not to oppose any request by Class Counsel for fees and expenses that do not exceed \$73,750 or 25% of the Net Settlement Fund.

15. Notice. Within 5 days of entry of the Preliminary Approval Order, Defendant's Counsel shall provide Class Counsel and/or the Class Administrator with the Fax List in MS Word or Excel format. Within 35 days of entry of the Preliminary Approval Order, the Class Administrator shall cause Notice in the form of Exhibit 1 which includes a Claim Form to be sent to the facsimile numbers identified on the Fax List. The Notice shall be sent by facsimile. The Class Administrator shall make at least three attempts to transmit the Notice by facsimile to those numbers where the initial transmission failed.

Class Counsel will also post the Notice in the form of Exhibit 2, excluding a Claim Form, and this Settlement Agreement (excluding exhibits) on their firm's website. Class Counsel or the Class Administrator shall provide any Settlement Class member who contacts either of them and requests a copy of the Notice or Claim Form with the Notice.

The Class Administrator may create a website which allows for electronic submission of Claim Forms. Any website created by the Class Administrator may also post the Notices (Exhibits 1-2), Claim Form, Preliminary Approval Order, and Settlement Agreement (excluding exhibits). In addition to online claims submission, the Class Administrator will also accept Claim Forms by U.S. Mail.

Class Counsel and/or the Class Administrator shall retain all documents and records generated during the administration of the settlement including records of notice given to Class Members, confirmations of transmittals of such notices by facsimile, unconfirmed facsimile transmissions, records of undelivered mail, claim forms, and payment to Class Members for a period of one year following the issuance of the Final Approval Order, and the expiration of all deadlines for appeal therefrom. The Fax List and all other documents and records generated during the administration of the settlement shall be used for purposes consistent with notice and administration of this settlement and for no other purpose.

16. Claim Validation. The Class Administrator shall match the fax number provided by the Settlement Class Member on a returned Claim Form to a fax number on the Fax List. If the fax number does not match, then Class Counsel or the Class Administrator shall follow-up with the Settlement Class Member and inquire if they were a subscriber to other fax numbers during the Class Period (to ascertain if any different fax number is a number on the Fax List), in an effort to determine whether the claim is a valid claim.

If the fax number or fax numbers provided on a Claim Form do not match the list, and the follow-up with the Settlement Class Member has not resolved the issue, Class Counsel or the Class Administrator shall disallow the claim. If a claim is deemed disallowed by the Class Administrator, the Class Administrator must communicate that disallowance of the claim to

Class Counsel and counsel for InCrowd, and allow Class Counsel an opportunity to investigate the basis for disallowing the claim. In the event the Parties disagree as to the validity of any Claim Form or whether to disallow a claim, then Class Counsel will present the disputed claim to the Court for resolution.

Class Members submitting valid claim forms shall be paid a pro rata share of the Settlement Fund in accordance with this Agreement up to a maximum of \$500 for each facsimile transmission. If a Settlement Class member received more than one fax and it is therefore possible that they will recover more than \$599.99, such Settlement Class member will be required to submit a W-9 form. The W-9 forms will be issued to Settlement Class Members as required after entry of the Final Approval Order and before any settlement checks are issued. Settlement Class Members will have 30 days to respond to a request to complete a W-9 form. Submission of a W-9 form is a condition precedent to receiving a settlement check in excess of \$599.99. If W-9 forms need to be collected, certain dates set forth in paragraphs 6, 9, and 10 are reset and calculated as follows: within 30 days following the expiration of time for class members to complete a W-9 form, Class Counsel or the Class Administrator shall distribute the Settlement Fund to the Settlement Class members who have submitted valid claims in accordance with paragraph 16; Settlement checks to the Settlement Class members will be void 60 days from date of issuance; and within 30 days following the void date on the Settlement Class members' checks, any uncashed checks or unclaimed or undistributed funds, the disposition of which will be determined by the Court, will be disbursed. A Settlement Class Member who is entitled to recover more than \$599.99 and fails to submit a completed and valid W-9 form with the Claim Form, shall be deemed to have waived their claim to recover more than \$599.99 and the maximum amount such Settlement Class Member may recover is \$599.99.

17. Right to Object. Any Settlement Class member may object to the Settlement Agreement and appear in person or through counsel, at his, her or its own expense. The deadline to object shall be set by the Court in the Preliminary Approval Order and the Parties shall propose that it be at least 60 days after the Notice is sent. Any Settlement Class member may object to the Settlement Agreement by filing with the Court and mailing a copy of the objection to Plaintiff's Counsel and Defendant's Counsel. Any objection must include: (a) the name, address, and facsimile phone number of the person(s) or entity objecting to the Settlement Agreement; (b) a statement of the objection to the Settlement Agreement; (c) an explanation of the legal and factual basis for the objection; and (d) documentation, if any, to support the objection.

18. Right of Exclusion. All Settlement Class members who properly file a timely written request for exclusion from the Settlement Class shall be excluded from the Settlement Class and shall have no rights as Settlement Class members pursuant to this Settlement Agreement. A request for exclusion must be in writing and state the name, address, and facsimile phone number (to which fax was sent) of the person(s) or entity seeking exclusion. Each request must also contain a signed statement providing that: "I/we hereby request that I/we be excluded from the proposed Settlement Class in the Litigation." The request must be mailed to Class Counsel or the Class Administrator at the address provided in the Notice and postmarked or received by Class Counsel or the Class Administrator on such date as set by the Court. A request for exclusion that does not include all of the foregoing information, or that is sent to an address other than the one designated in the Notice, or that is not postmarked or received by Class Counsel or the Class Administrator within the time specified, shall be invalid and the person(s) serving such a request shall remain a Settlement Class member and shall be

bound by the terms of the Settlement Agreement, if approved. Settlement Class members shall have at least 60 days from the date that Notice is sent to opt out of the Settlement.

19. Preliminary Approval. As soon as practicable after execution of this Settlement Agreement, Class Counsel shall file a Motion for Preliminary Approval of this Settlement Agreement and shall present such motion to the Court requesting the entry of a Preliminary Approval Order substantially in the form of Exhibit 3 or in such other form which is mutually acceptable to the Parties:

20. Final Approval. Class Counsel shall file a memorandum in support of final approval of the Settlement, which shall include Class Counsel's request for an award of attorney's fees and costs, prior to the date the Court sets for the final approval hearing. The Parties shall request the Court to enter a Final Approval Order substantially in the form of Exhibit 4, or in another form which is mutually acceptable to the Parties. Pursuant to CAFA, the Final Approval Order shall not be entered until the expiration of at least 90 days from the date the preliminary approval order was entered. Entry of a Final Approval Order substantially in the form of Exhibit 4 or in another form which is mutually acceptable to the Parties is a condition precedent to this Agreement becoming fully effective. In the event a Final Approval Order substantially in the form of Exhibit 4 or in another form which is mutually acceptable to the Parties is not entered, then this Agreement shall be null and void and is rescinded.

21. The fact that the Court may require non-substantive changes to documents attached as Exhibits 1 through 4 does not invalidate this Settlement Agreement.

22. Release of Attorneys' Lien. In consideration of this Settlement Agreement, Class Counsel hereby waives, discharges and releases the "Released Parties," as defined in paragraph 7 of the Recitals and Definitions above, of and from any and all claims for

attorneys' fees, by lien or otherwise, for legal services rendered by Class Counsel in connection with this Class Action Complaint, other than the amount awarded by the Court as specified above.

23. Dismissal Order. At the hearing on Final Accounting of the settlement, Plaintiff shall present an Order or Stipulation of Dismissal dismissing the claims of Plaintiff and the Class Members, except those who have opted out of the Settlement, against Defendant InCrowd with prejudice and without costs, except as those provided by the parties' agreement.

24. Applicable Law. This Settlement Agreement shall be governed by and interpreted in accordance with the state law of the State of Illinois.

25. Miscellaneous Provisions. The parties and their attorneys agree to cooperate fully and in good faith with one another in seeking approval of this Settlement Agreement, and to use their best efforts to effect the consummation of this Settlement Agreement and the settlement provided for herein. Whether or not this Settlement Agreement and the settlement contemplated hereunder are consummated, this Settlement Agreement and the proceedings had in connection herewith shall in no event be construed as, or be deemed to be, evidence of an admission or concession on the part of InCrowd of any liability or wrongdoing whatsoever.

26. Benefit of this Settlement Agreement. This Settlement Agreement shall be binding upon and inure to the benefit of the Plaintiff, the Released Parties and Settlement Class Members, as these terms are defined in the Recitals and Definitions, and each of their respective successors and personal representatives, predecessors, affiliates, heirs, executors and assigns. It is expressly understood by the Parties that the Released Parties are intended third-party beneficiaries of this Agreement.

27. Authority. The Parties hereby represent to one another that they have full power and authority to enter into this Settlement Agreement and carry out their obligations.

28. Right to Set Aside Settlement Agreement. InCrowd shall have the right, but not the obligation, to set aside or rescind this Settlement Agreement, if more than 500 Settlement Class members submit non-duplicative, timely and valid requests for exclusion from this Settlement Class. InCrowd must timely exercise its right to rescind the Agreement by filing a Notice of Rescission with the Clerk of the Court prior to the entry of a Final Approval Order by the Court.

29. Entire Agreement. Any and all prior understandings and agreements between the Parties with respect to the subject matter of this Settlement Agreement are merged into and with this Settlement Agreement, which fully and completely expresses the entire agreement and understanding of the Parties with respect to the subject matter hereof. This Settlement Agreement may be amended, modified or changed only by a written instrument or instruments executed by duly authorized officers or other representatives of the Parties expressly amending, modifying or changing this Settlement Agreement and may not be amended, modified or changed orally.

30. Counterparts. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute the same instrument. Signatures provided by facsimile or e-mail shall be deemed legal and binding for all purposes.

31. Headings. The headings in this Settlement Agreement are for convenience of reference only and are not to be taken to be a part of the provisions of this Settlement Agreement, nor to control or affect meanings, constructions or the effect of the same.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be duly executed and delivered by their duly authorized representatives on the date last written below.

PLAINTIFF

Dr. William M. Pollack

DEFENDANT

InCrowd, Inc.

By: 

Its: *Co-founder & CEO*

Continental Casualty Company

By: _____

Its: _____

Daniel A. Edelman
Heather Kolbus
EDELMAN, COMBS, LATTURNER
& GOODWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, IL 60603
(312) 739-4200
(312) 419-0379 (FAX)
*Counsel for Plaintiff Dr. Pollack
and Settlement Class*

David S. Almeida
David M. Poell
SHEPPARD MULLIN RICHTER
& HAMPTON LLP
70 W. Madison Street, 48th Floor
Chicago, IL 60602
(312) 499-6300
(312) 499-6301 (FAX)
Counsel for Defendant InCrowd, Inc.

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PLAINTIFF

Dr. William M. Pollack

DEFENDANT

InCrowd, Inc.

By: _____

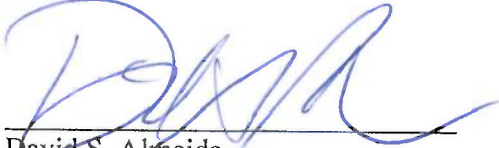
Its: _____

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Daniel A. Edelman
Heather Kolbus
EDELMAN, COMBS, LATTURNER
& GOODWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, IL 60603
(312) 739-4200
(312) 419-0379 (FAX)
*Counsel for Plaintiff Dr. Pollack
and Settlement Class*



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David M. Poell
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DEFENDANT

InCrowd, Inc.

By: _____

Its: _____

Continental Casualty Company

By:  _____

Its: Director / Senior Litigation Counsel

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Heather Kolbus
EDELMAN, COMBS, LATTURNER
& GOODWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, IL 60603
(312) 739-4200
(312) 419-0379 (FAX)
*Counsel for Plaintiff Dr. Pollack
and Settlement Class*

David S. Almeida
David M. Poell
SHEPPARD MULLIN RICHTER
& HAMPTON LLP
70 W. Madison Street, 48th Floor
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Dr. William M. Pollack



DEFENDANT

InCrowd, Inc.


By: _____

Its: _____

Continental Casualty Company

By: _____

Its: _____


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EDELMAN, COMBS, LATTURNER
& GOODWIN, LLC
20 S. Clark Street, Suite 1500
Chicago, IL 60603
(312) 739-4200
(312) 419-0379 (FAX)
*Counsel for Plaintiff Dr. Pollack
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David M. Poell
SHEPPARD MULLIN RICHTER
& HAMPTON LLP
70 W. Madison Street, 48th Floor
Chicago, IL 60602
(312) 499-6300
(312) 499-6301 (FAX)
Counsel for Defendant InCrowd, Inc.