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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

IN RE FACEBOOK INTERNET  
TRACKING LITIGATION

Case No. 5:12-MD-2314-EJD

**NOTICE OF MOTION AND MOTION FOR  
CERTIFICATION OF SETTLEMENT  
CLASS AND PRELIMINARY APPROVAL  
OF CLASS ACTION SETTLEMENT  
PURSUANT TO FEDERAL RULE OF CIVIL  
PROCEDURE 23(e)(1); AND APPROVING  
FORM AND CONTENT OF CLASS NOTICE,  
WITH SUPPORTING MEMORANDUM OF  
POINTS AND AUTHORITIES**

Judge: Hon. Edward J. Davila  
Courtroom 4, 5<sup>th</sup> Floor  
Hearing Date: March 31, 2022  
Time: 9:00 a.m.

THIS DOCUMENT RELATES TO  
ALL ACTIONS

**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on March 31, 2022, at 9:00 a.m. in Courtroom 4 of the United States District Court for the Northern District of California, Robert F. Peckham Federal Building & United States Courthouse, 280 South First Street, San Jose, California 95113, the Honorable Edward J. Davila presiding, the Lead Plaintiffs<sup>1</sup> will, and hereby do, move for an Order pursuant to Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”): (i) preliminarily approving the proposed Settlement and Settlement Agreement (“Agreement” or “Agr’t”); (ii) certifying a class for settlement purposes; (iii) approving the form and manner of notice to the Settlement Class; (iv) approving the selection of the Settlement Administrator; and (iv) scheduling a Final Fairness Hearing before the Court.

The proposed Settlement provides two forms of relief for the proposed Settlement Class: injunctive relief and monetary relief. For the *injunctive relief*, Defendant Meta Platforms, Inc., formerly Facebook, Inc. (“Meta” or “Defendant”) has agreed to sequester and delete all data that Plaintiffs alleged was wrongfully collected during the Settlement Class Period. For the *monetary relief*, the proposed Settlement also establishes a fully non-reversionary Settlement Fund of **\$90 million**. The Settlement, if approved, will also resolve a parallel class action in California State Court.

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the accompanying Joint Declaration of David A. Straite and Stephen G. Grygiel in Support of Plaintiffs’ Motion for Preliminary Approval of Proposed Settlement dated February 14, 2022 (“Joint Declaration”), and its attached exhibits (including the Settlement Agreement dated February 14, 2022 and its attached exhibits and appendices), the pleadings and records on file in this Action, and other such matters and argument as the Court may consider at the hearing of this motion.

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<sup>1</sup> All capitalized words are defined in Settlement Agreement, unless otherwise defined herein.

**STATEMENT OF ISSUES TO BE DECIDED**

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1. Whether the proposed Settlement is within the range of fairness, reasonableness and adequacy as to warrant: (a) the Court’s preliminary approval; (b) certification of a Settlement Class for settlement purposes; (c) the dissemination of Notice of the Settlement’s terms to Settlement Class Members; and (d) setting a hearing date for final approval of the Settlement as well as motions or other applications for Fees and Expense Award and for Service Awards;
2. Whether the proposed forms of Notice and Notice Plan adequately inform Settlement Class Members of the terms of the Settlement and their rights with respect to the Settlement;
3. Whether the selection of Angeion Group as Settlement Administrator should be approved;
4. Whether the proposed distribution of the Settlement Fund should be preliminarily approved; and
5. Whether the Claim Form and Opt-Out Forms are sufficient.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Named Plaintiffs Perrin Davis, Dr. Brian Lentz, Michael Vickery and Cynthia Quinn (collectively “Named Plaintiffs”) respectfully request entry of the proposed Preliminary Approval Order, attached as Exhibit F to the Settlement Agreement. The Preliminary Approval Order will: (i) grant preliminary approval of the Settlement on the terms and conditions stated in the Settlement Agreement; (ii) provisionally certify a Settlement Class and appoint Lead Counsel; (iii) approve the form and manner for providing notice to the Settlement Class of the proposed Settlement; (iv) approve the parties’ joint selection of the Settlement Administrator; and (v) schedule the date for the Final Fairness Hearing and set the schedule for various deadlines in connection with the Settlement.

The proposed Settlement provides two forms of relief for the class. Standing alone, each would be sufficient to support settlement approval. Combined, they are unprecedented:

- ***Injunctive Relief:*** Defendant Meta Platforms, Inc., formerly Facebook, Inc. (“Meta” or “Defendant”) has agreed to sequester and delete the data that Plaintiffs alleged was wrongfully collected during the Settlement Class Period. Such relief represents the “**gold standard**” of relief in data privacy class actions alleging improper data collection.
- ***Monetary Relief:*** The proposed settlement also establishes a fully non-reversionary Settlement Fund of **\$90 Million**, which if approved, will be one of the ten largest data privacy class action settlements ever. *See* Joint Declaration, **Exhibit 13** (chart of data privacy class action settlements). Plaintiffs calculate that the Settlement Fund represents disgorgement of at least 100% of the additional net profits during the Settlement Class Period related to the data the Lead Plaintiffs alleged was wrongfully obtained.

Even before the Settlement was reached, this litigation had already profoundly improved privacy rights. The Ninth Circuit clarified that when personal data is unlawfully copied and monetized, the result is economic harm (not just privacy harm) even if the value of the data in plaintiffs’ hands does not diminish. Before the Ninth Circuit’s ruling, courts were split regarding the question of whether economic harm required consequential diminution of the value of the data. The Ninth Circuit also ruled that Facebook is not a party to the communications that it allegedly intercepted within the meaning the Wiretap Act, firmly establishing that such data collection

1 requires actual consent. Defendant sought Supreme Court review, which was denied last year.

2 The proposed Settlement was also fully informed by discovery over several years and was  
3 made possible with the assistance of a leading mediator, Randall Wulff, over three sessions. *Id.* ¶¶  
4 19-23. Following mediation, the parties continued to negotiate the injunctive relief (among other  
5 provisions) over six months. *Id.* ¶ 24. The proposed Settlement is not the product of collusion: as  
6 noted below and in the Joint Declaration, no clear sailing (Defendant has the right to be heard on  
7 any fee application, including the right to oppose) clause exists and the Named Plaintiffs were not  
8 even informed of the proposed Service Awards until after they considered the deal terms and  
9 approved.<sup>2</sup> *Id.* ¶ 25. The selection of the proposed Claims Administrator followed competitive  
10 bidding and was jointly agreed by both Class Counsel and Defendant. *Id.* ¶¶ 26-27. Accordingly,  
11 the proposed Settlement is fair, adequate and reasonable, such that notice of the Settlement's terms  
12 should be disseminated to Settlement Class Members and a Final Fairness Hearing scheduled  
13 finally to approve the proposed Settlement.

## 14 II. SUMMARY OF THE LITIGATION

15 Illustrating the perseverance of Named Plaintiffs and Lead Counsel brought to this case,  
16 litigation began ten (10) years ago with the MDL Transfer Order of February 8, 2012. (Dkt. # 1).  
17 Having consensually ordered the leadership structure for the consolidated cases, Class Counsel and  
18 their colleagues consulted with three technology and privacy experts, Joint Decl. ¶ 28, carefully  
19 researched and drafted in succession three extensive Complaints describing in detail the nature of  
20 the alleged privacy violations, and briefed and argued Motions to Dismiss on all three Complaints.  
21 *See* Dkt. Nos. 18, 35, 44, 52-55, 59, 87 (First Amended Consolidated Class Action Complaint  
22 ("FAC")); Dkt. Nos. 90-93, 101, 104-105, 109, 119, 148 (Second Amended Consolidated Class  
23 Action Complaint ("SAC")); Dkt. Nos. 157, 162-163, 168, 171, 174 (Third Amended Consolidated  
24 Class Action Complaint ("TAC")).

25 The result of deep legal research and factual analysis, the FAC was some 43 pages long,

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26  
27 <sup>2</sup> Named Plaintiffs in the parallel State Court Action, *Ung, et al. v. Facebook, Inc.*, 112-cv-217244  
28 (Cal. Super. Ct.), agree with the relief sought in this motion and also signed the Settlement Agreement.

1 contained 120 paragraphs of factual allegations, and alleged eleven substantive Counts.<sup>3</sup> The SAC  
 2 was some 57 pages long, set forth 154 paragraphs of factual allegations, and alleged eleven Counts.<sup>4</sup>  
 3 In light of the Court's Orders dismissing the FAC (Dkt. # 87) and SAC (Dkt. # 148), the TAC set  
 4 forth 110 paragraphs of factual allegations, and only two counts: Breach of Contract (Count I), and  
 5 Breach of the Covenant of Good Faith and Fair Dealing (Count II), as allowed by the Court.

6 Plaintiffs undertook and responded to written discovery, Joint Decl. ¶ 29, briefed a Motion  
 7 to Compel (Dkt. Nos. 110, 114-115, 141-142), briefed Defendant's Motion to Stay Discovery  
 8 (Docket Nos. 108, 111, 112), established a document database, reviewed Defendant's productions  
 9 of documents, and, before settlement was reached, had been negotiating with Defendant about the  
 10 custodians and search terms for additional document production from Defendant.

11 Plaintiffs filed, briefed and argued an appeal to the Ninth Circuit. That appeal resulted in a  
 12 ruling of first impression in the Ninth Circuit that "Facebook is not exempt from liability as a matter  
 13 of law under the Wiretap Act or CIPA as a party to the communication." *In re Facebook, Inc.*  
 14 *Internet Tracking Litig.*, 956 F. 3d 589, 608 (9<sup>th</sup> Cir. 2020). Further, the Ninth Circuit's ruling found  
 15 that Named Plaintiffs had sufficiently alleged economic harm and reversed the dismissal as to a  
 16 number of Named Plaintiffs' other claims, listed below. Underscoring its importance in privacy  
 17 rights litigation, by Plaintiffs' count the Ninth Circuit's ruling has already been cited more than 50  
 18 times in reported cases just in the past 18 months.

19 Defendant then filed a petition for a writ of certiorari to the United States Supreme Court.  
 20 Plaintiffs retained and worked with noted Supreme Court counsel (Gupta Wessler PLLC), jointly  
 21 developing and briefing the arguments in opposition to the petition. The Supreme Court declined  
 22

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23 <sup>3</sup> Wiretap Act (Count I); SCA (Count II); CFAA (Count III); Invasion of Privacy (Count IV);  
 24 Intrusion Upon Seclusion (Count V); Conversion (Count VI); Trespass to Chattels (Count VII);  
 25 Violation of Cal. Bus, and Prof. Code § 17200 (UCL) (Count VIII); Cal. Penal Code § 502 (Count  
 IX); Cal. Penal Code § 630 (CIPA) (Count X); and Cal. Civil Code § 1750 (CLRA) (Count XI).

26 <sup>4</sup> Wiretap Act (Count I); SCA (Count II); CIPA (Count III); Invasion of Privacy (Count IV);  
 27 Intrusion Upon Seclusion (Count V); Breach of Contract (Count VI); Breach of the Duty of Good  
 28 Faith and Fair Dealing (Count VII); Civil Fraud/ Cal. Civil Code §§ 1572 and 1573; Trespass to  
 Chattels (Count IX); Penal Code § 502 (Count X); and Larceny/Cal. Penal Code §§ 484 and 496.

1 to grant certiorari, and the case was remanded with eight (8) claims for litigation.<sup>5</sup>

### 2 **III. MEDIATION**

3 Plaintiffs and Defendant next agreed to mediate the case before Randy Wulff, a highly  
4 respected mediator. Joint Decl. ¶ 19. Further, Plaintiffs engaged an economic consultant to perform  
5 economic analyses of several alternative damages models, including the approximate net profits  
6 Defendant received from the information Plaintiffs alleged that Defendant improperly collected;  
7 royalty value of a license to monitor Internet browsing; and restitution models. Joint Decl. ¶ 28.

8 The parties briefed their positions for Mr. Wulff and engaged in an initial seven (7) hour  
9 mediation on April 27, 2021. Joint Decl. ¶ 19. Interim Lead Counsel appointed a Settlement  
10 Committee consisting of Lead Counsel plus former Hawai'i Attorney General Margery Bronster,  
11 Laurence King, Robert Hatch and Jay Barnes. Also assisting was counsel for State Court plaintiffs,  
12 Renee Wicklund. Joint Decl. ¶ 20. Mr. Wulff helped guide substantial additional document  
13 discovery in aid of mediation. Joint Decl. ¶ 21. Plaintiffs submitted a supplemental mediation brief  
14 on July 12, 2021, and the parties mediated again on July 13, 2021, this time for approximately ten  
15 (10) hours. Joint Decl. ¶ 22. In a final effort to resolve the case consensually, the parties mediated  
16 again on July 23, 2021. After almost four (4) more hours of negotiations, the Parties agreed to  
17 accept a Mediator's proposal and reached a settlement agreement in principle. Joint Decl. ¶ 23.  
18 Following the agreement in principle, the parties spent approximately six (6) months negotiating  
19 the contours of the injunctive relief, vetted claims administrators, and evaluated the class member  
20 data set to transfer for claims processing. Joint Decl. ¶ 24.

### 21 **IV. THE PROPOSED SETTLEMENT**

22 The Settlement provides an excellent result for Settlement Class Members who do not opt  
23 out, including the following terms: (1) **Monetary Consideration** -- \$90 million in a non-  
24 reversionary Settlement Fund (*see* Agr't §§ 1.42, 4.1, 7.8) ; (2) **Injunctive Relief** - Defendant  
25 committed to expunge the data Plaintiffs alleged had been impermissibly gathered, subject only to  
26 preservation of that data in a restricted-access location for this litigation pending final judgment

27 \_\_\_\_\_  
28 <sup>5</sup> (1) Wiretap Act (2) CIPA (3) intrusion upon seclusion; (4) invasion of privacy; (5) statutory larceny; (6) trespass; (7) Cal. Computer Crime Law; and (8) statutory fraud.

1 and dismissal of all appeals, and pledged not to use that data for any other purposes (*see* Agr't §§  
2 1.42, 5.1 – 5.6); (3) **Scope of Releases** – commensurate with the Settlement Consideration paid by  
3 the Defendant (*see* Settlement Agreement § 1.42), Settlement Class Members who do not opt-out  
4 will release only claims that were asserted or could have been asserted in the Actions and that arose  
5 during the Class Period (*see* Agr't §§ 1.33, 1.36, 1.37, 9); (4) **Notice** – Lead Counsel chose a “belt  
6 and suspenders” approach that includes publication notice and direct notice, either of which alone  
7 is robust. In Lead Counsel’s judgment, this approach is appropriate given the vintage of the case.  
8 The vast majority of the Settlement Class Members will receive direct email notice of the  
9 Settlement, which will be supplemented by publication notice and Settlement Website Notice (*see*  
10 Agr't §§ 1.27, 1.29, 1.45, 1.46, 7.2) ; (5) **Administrative Costs** - the costs of Notice and the  
11 Settlement Administrator would be paid by the Settlement Fund (*see* Agr't § 7.6) ; (6) **Settlement**  
12 **Class Definition** – all persons who, between April 22, 2010 and September 26, 2011, inclusive,  
13 were Facebook Users in the United States that visited non-Facebook websites that displayed the  
14 Facebook Like button, with no attestation requirement that Settlement Class Members with active  
15 accounts affirmatively state that they visited non-Facebook pages containing the Facebook Like  
16 button (*see* Agr't § 1.10); (7) **Service Awards** - the Named Plaintiffs in the Federal Court Action  
17 and in the State Court Action may receive Service Awards upon Lead Counsel’s application to the  
18 Court (amount of the request may not exceed \$5,000 per Named Plaintiff) (*see* Agr't §§ 1.39, 11);  
19 (8) **No Clear Sailing** – Lead Counsel will move for a Fee and Expense Award and Defendant  
20 retains the right to object, oppose, support or otherwise respond, for any good faith reason, to any  
21 such Motion (*see* Agr't § 10.1); and (9) **Unconditional Settlement** - the Settlement is not  
22 conditioned on the Court’s award of Attorneys’ Fees or Expenses or any Service Awards, or on the  
23 award of any amount of Attorneys’ Fees and Expenses or Service Awards. *See* Agr't § 10.4. As  
24 noted in the proposed Notice, Plaintiffs intend to request up to 29% of the Settlement Fund, plus  
25 reasonable expenses, but Defendant retains the right to oppose.

## 26 V. ARGUMENT

### 27 A. *Legal Requirements for Preliminary Settlement Approval*

28 “In the Ninth Circuit, there is a ‘strong judicial policy that favors settlements’ of class



1 actions.” *Ortega v. Aho Enterprises, Inc.*, No. 19-cv-00404-DMR, 2021 WL 5584761, at \* 5 (N.D.  
2 Cal. Nov. 30, 2021) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.  
3 1992)). The judiciary’s foundational pro-settlement principle is rooted in the public interest. *See*  
4 *Van Bronkhorst v. Safeco Corp.*, 529 F. 2d 943, 950 (9<sup>th</sup> Cir. 1976) (“[T]here is an overriding public  
5 interest in settling and quieting litigation...**particularly true in class action suits.**” (emphasis  
6 added)).

7 Preliminary settlement approval “has both a procedural and a substantive component.” *In*  
8 *re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). “Courts often begin  
9 by examining the process that led to the settlement’s terms to ensure that those terms are ‘the result  
10 of vigorous, arms-length bargaining’ and then turn to the substantive terms of the agreement.”  
11 *Ahmed v. Beverly Health and Rehab. Servs., Inc.*, 2018 WL 746393, at \* (E.D. Cal. Feb. 7, 2018)  
12 (citing *West v. Circle K Stores, Inc.*, Civ. No. 04-438 WBS GGH, 2006 WL 1652598, at \* 11 (E.D.  
13 Cal. June 13, 2006)). First, the Court must find that a Rule 23 class exists. *Id.* If, as here, it does,  
14 the Court then turns to the familiar Rule 23 requirements, analyzing whether the proposed  
15 settlement “is fundamentally fair adequate and reasonable.” *Hanlon v. Chrysler Corp.* 150 F. 3d  
16 1011, 1026 (9<sup>th</sup> Cir. 1998). The Court is not looking to see if the settlement might have been better,  
17 but, rather, whether the settlement’s terms “fall within the range of possible approval.” *Ortega*,  
18 2021 WL 5584761, at \*5. This preliminary approval “range of reasonableness” inquiry does not  
19 require the Court to “specifically weigh[ ] the merits of the class’s case against the settlement  
20 amount and quantif[y] the expected value of fully litigating the matter.” *Rodriguez v. W. Publ’g*  
21 *Corp.*, 563 F. 3d 948, 965 (9<sup>th</sup> Cir. 2009); *accord*, *Kendall v. Odonate Therapeutics, Inc.*, 2022 WL  
22 118416, at \* 6 (N.D. Cal. Jan. 11, 2022).

23 The Court must find that the settlement is “the product of an arms-length, non-collusive,  
24 negotiated resolution[ ].” *Id.* Preliminary approval is warranted where the Court finds that “the  
25 proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has  
26 no obvious deficiencies, does not improperly grant preferential treatment to class representatives  
27 or segments of the class and falls within the range of possible approval.” *In re Tableware*, 484 F.  
28 Supp. 2d at 1079 (citing Manual For Complex Litigation 2d § 30.44 (2d ed. 1985)). Crucially

1 important in this threshold inquiry is the presence – or absence – of “red flags” suggesting that the  
 2 settlement is in some way “collusive” or otherwise improper. *See Briseno v. Henderson*, 998 F. 3d  
 3 1014, 1019 (9<sup>th</sup> Cir. 2021). Such “red flags” can include: “(1) ‘when counsel receive[s] a  
 4 disproportionate distribution of the settlement;’ (2) ‘when the parties negotiate a clear sailing  
 5 arrangement,’ under which the defendant agrees not to challenge a request for an agreed-upon  
 6 attorney’s fee; and (3) when the agreement contains a ‘kicker’ or ‘reverter’ clause that returns  
 7 unawarded fees to the defendant, rather than the class.” *Id.* at 1023 (quoting *In re Bluetooth Headset*  
 8 *Prods. Liab. Litig.*, 654 F. 3d 935, 947 (9<sup>th</sup> Cir. 2011). None of “these so-called *Bluetooth* factors,”  
 9 or any other factors suggesting “potential collusion,” appear in the proposed Settlement. *Briseno*,  
 10 998 F. 3d at 1023.

11 Where the proposed settlement fulfills the required criteria for preliminary approval, the  
 12 Court will “schedule[e] a fairness hearing where it will make a final determination of the class  
 13 settlement.” *In re Haier Freezer Consumer Litig.*, No. 5:11-CV-02911-EJD, 2013 WL 2237890,  
 14 at \* 3 (N.D. Cal. May 21, 2013 (citation omitted)).

15 **B. Conditional Certification of the Settlement Class and Re-Appointment of Class**  
 16 **Counsel is Warranted**

17 The Settlement is conditioned upon the Court’s approval, for settlement purposes only, of  
 18 a Settlement Class consisting of “All persons who, between April 22, 2010 and September 26,  
 19 2011, inclusive, were Facebook Users in the United States that visited non-Facebook websites that  
 20 displayed the Facebook Like button.” Agr’t. § 1.37. Facebook can determine class membership  
 21 internally for current subscribers and attestations are only required for former subscribers.<sup>6</sup>

22 Class certification under Rule 23 requires two steps. First, the plaintiff must show that the  
 23 numerosity, commonality, typicality and adequacy requirements are satisfied. *See Fed. R. Civ. P.*  
 24 *23(a)*. The Court applies a “‘rigorous analysis.’” *Wang v. Chinese Daily News*, 737 F. 3d 538, 542  
 25 (9<sup>th</sup> Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). Second, the  
 26 plaintiff must demonstrate satisfaction of at least one of the Rule 23(b) requirements. Here, that is

27 \_\_\_\_\_  
 28 <sup>6</sup> *Briseno v. ConAgra Foods, Inc.*, 844 F. 3d 1121, 1133 (9<sup>th</sup> Cir. 2017) (certification appropriate even where class membership relies on class member’s self-identification).

1 the predominance and superiority mandate of Rule 23(b)(3), that “questions of law or fact common  
 2 to Class Members predominate over any questions affecting only individual members, and ...[that]  
 3 a class action is superior to other available methods for fairly and efficiently adjudicating the  
 4 controversy.” Fed. R. Civ. P. 23(b)(3).

5 **1. Rule 23(a)’s Requirements Are Met**

6 **Numerosity.** Rule 23(a)(1)’s numerosity requirement means that a proposed class must be  
 7 “so numerous that joinder of all members is impracticable.” With over 124 million Settlement Class  
 8 Members, based on Defendant’s internal data, numerosity is satisfied.

9 **Commonality.** Rule 23(a)(2)’s commonality requirement entails a showing that “there are  
 10 questions of law or fact common to the class.” For Rule 23(a)(2) purposes, a single common  
 11 question suffices (*see Wal-Mart*, 564 U.S. at 359), if it is “of such a nature that it is capable of  
 12 classwide-resolution – which means that determination of its truth or falsity will resolve an issue  
 13 that is central to the validity of each one of the claims in one stroke.” *Id.* at 350. “[T]he threshold  
 14 for meeting the commonality requirement is relatively low.” *Senne v. Kansas City Royals Baseball*  
 15 *Corp.*, 2021WL 3129460, at \* 18 (N.D. Cal. July 23, 2021). *See also Marshall v. Northrop*  
 16 *Grumman Corp.*, No. 2:16-cv-06794-AB-JC, 2017 WL 6888281, at \* 6 (C. D. Cal. Nov. 2, 2017)  
 17 (commonality is permissive standard (citation omitted)); *Parkinson v Hyundai Motor Am.*, 258  
 18 F.R.D. 580, 594 (C.D. Cal. 2008) (commonality is low bar)).

19 What matters for commonality is “the capacity of a class-wide proceeding to generate  
 20 common answers apt to drive the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 350-351.  
 21 *Accord, Noll v. eBay, Inc.*, 309 F.R.D. 593, 603 (N.D. Cal. 2015). Whether the Defendant tracked  
 22 Facebook users when those users visited non-Facebook pages containing the Facebook Like button  
 23 is a common issue that is central to the validity of all of the Settlement Class Members’ claims.  
 24 Here the ““common issues”” are ““of sufficient importance to the case that...the most efficient  
 25 method of determining the rights of the parties is through a class action.”” *In re Tea Station*  
 26 *Investment, Inc.*, 2021 WL 4988436, at \* 13 (C.D. Cal. October 26, 2021 (quoting *Krznieskiak v.*  
 27 *Cendant Corp.*, 2007 WL 1795703, at \* 7 (N.D. Cal. June 20, 2007)). Commonality is satisfied.

28 **Typicality.** Rule 23(a)(3) requires that “the claims or defenses of the representative parties

1 are typical of the claims or defenses of the class.” The typicality requirement “assure[s] that the  
 2 interest[s] of the named representative[s] align[ ] with the interests of the class.” *Ebarle v. Lifelock,*  
 3 *Inc.*, No. 15-cv-258-HSG, 2016 WL 234364, at \* 4 (N.D. Cal. Jan. 20, 2016) (citing *Hanon v.*  
 4 *Dataproducts Corp.*, 976 F. 2d 497, 508 (9<sup>th</sup> Cir. 1992)). Typicality’s test: “whether other [class]  
 5 members have the same or similar injury, whether the action is based on conduct which is not  
 6 unique to the named plaintiffs, and whether other class members have been injured by the same  
 7 course of conduct.” *Hanon*, 976 F. 2d at 508. Like commonality, typicality has a “low threshold.”  
 8 *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159,  
 9 165 (C.D. Cal. 2002) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F. 3d  
 10 154, 182 (3d Cir. 2001)).

11 Satisfying the typicality requirement can be done through either plaintiff-focused (same or  
 12 similar injury) or defendant-focused (same or similar conduct towards class members) showings.  
 13 Either approach here confirms typicality is satisfied. All Settlement Class Members suffered  
 14 essentially the same injury –Defendant’s alleged tracking of their cyberspace comings and goings.  
 15 Defendant behaved the same way towards all class members in performing that tracking, including  
 16 the Named Plaintiffs.

17 **Adequacy.** Rule 23(a)’s adequacy requirement is two-fold. First, no conflicts of interest  
 18 can exist between the class members on one hand and, on the other hand, the Named Plaintiffs and  
 19 Lead Counsel. Second, the Named Plaintiffs and Lead Counsel must show they will vigorously  
 20 pursue the case on the class’s behalf. *See Ebarle*, 2016 WL 234364, at \* 4 (citing *In re Mego Fin.*  
 21 *Corp. Sec. Litig.*, 213 F. 3d 454, 462 (9<sup>th</sup> Cir. 2000)).

22 Both prongs of Rule 23(a)(4)’s adequacy test are met here. Only a “fundamental” conflict  
 23 going “to the heart of the litigation” will prevent a finding of Rule 23(a)(4) adequacy. *In re Online*  
 24 *DVD-Rental Antitrust Litig.*, 779 F. 3d 934, 942 (9<sup>th</sup> Cir. 2015). No fact shows or inference suggests  
 25 any, let alone “fundamental,” conflict of interest between the absent class members and the Named  
 26 Plaintiffs and Lead Counsel.

27 The track record in this case shows that Named Plaintiffs and Lead Counsel have and will  
 28 continue to be fully committed to prosecuting the case for the benefit of the entire class. *See*

1 *Hawkins v. The Kroger Company*, 337 F.R.D. 518, 540 (S.D. Cal. 2020) (“lengthy and contentious  
2 proceedings thus far demonstrate Plaintiff’s counsel’s vigorousness”). Lead Counsels’ long record  
3 of experience in class actions, and privacy rights class actions in particular, provides further support  
4 for a finding of Rule 23(a)(4) adequacy. Joint Decl. Exs. 2-4.

5 Finally, analysis under Rule 23(g), which is part of the Rule 23(a)(4) adequacy analysis (*see*  
6 *Victorino v. FCA US LLC*, 322 F.R.D. 403, 406 (S.D. Cal. 2017)) shows the adequacy requirement  
7 is met. Lead Counsel have done a great deal of work, over many years, “identifying or investigating  
8 potential claims” (Fed. R. Civ. P. 23(g)(1)(A)(i)); has, as their resumes demonstrate, demonstrable  
9 experience and has achieved substantial success in complex litigation and class actions, including  
10 privacy rights litigation (Fed. R. Civ. P. 23(g)(1)(A)(i)); possesses extensive “knowledge of the  
11 applicable law” (Fed. R. Civ. P. 23(g)(1)(A)(iii)); and has committed enormous resources, in time,  
12 work, and hard costs “to representing the class.” Fed. R. Civ. P. 23(g)(1)(A)(iv).

## 13 **2. Rule 23(b)’s Test is Met**

14 Named Plaintiffs seek conditional certification under Rule 23(b)(3), authorizing a class  
15 action where: (1) questions of law and fact common to the class members predominate over  
16 questions pertaining only to individual class members, and (2) a class action is superior to other  
17 adjudicative methods in achieving fair and efficient litigation of the controversy. Every Settlement  
18 Class Member suffered substantially the same type of injury from the same or substantially the  
19 same conduct by the Defendant. This uniform and class-unifying predicate question can be resolved  
20 for all Settlement Class Members in a single class-wide adjudication.

21 Named Plaintiffs must also show that a class action is the “most efficient and effective  
22 means of resolving the controversy.” *eBay*, 309 F.R.D. at 604 (quoting *Wolin v. Jaguar Land Rover*  
23 *N. Am., LLC*, 617 F.3d 1168, 1175-76 (9<sup>th</sup> Cir. 2010)). A class action is the most efficient  
24 adjudicative procedure here, given the vast number of Settlement Class Members and the centrality  
25 of the predominant and class-unifying common questions.

26 Nor does the theoretical availability of substantial individual damages mitigate against a  
27 finding of superiority. While a principal purpose of the class device is the aggregation of small  
28 claims that are uneconomic to litigate (*see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617

1 (1997)), the theoretical availability of non-trivial damages recoverable by individual litigants is no  
 2 bar to class certification. *See Fleisher v. Phoenix Life Ins. Co.*, 2013 WL 12224042, at \* 17  
 3 (S.D.N.Y. July 12, 2013) (“the existence of large individual claims that are sufficient for individual  
 4 suits is no bar to a class when the advantages of unitary adjudication exist to determine the  
 5 defendant’s liability” (quoting *Board of Trustees of the AFTRA Ret. Fund v. J.P. Morgan Bank*,  
 6 269 F.R.D. 340, 355 (S.D.N.Y. 2010)); *accord*, *Bryan v. Amrep Corp.*, 429 F. Supp. 313, 318  
 7 (S.D.N.Y. 1977) (“Where there is a need to remedy a common legal grievance, and where a class  
 8 action serves to achieve economies of time, effort and expense, it is ‘superior’ to other forms of  
 9 litigation even though individual claims are large.”).

10 First, the potential availability of statutory damages and attorneys’ fees awards under the  
 11 Wiretap Act do not undermine a finding of superiority. *See Zinser v. Accufix Research Instit., Inc.*,  
 12 253 F. 3d 1180, 1190-1191, *amended by* 273 F. 3d 1266 (9<sup>th</sup> Cir. 2001); *accord*, *Magadia v. Wal-*  
 13 *Mart Associates, Inc.*, 324 F.R.D. 213, 226 (N.D. Cal. 2018) (wage and hour case; rejecting  
 14 defendant’s argument that superiority was unmet because of potentially large damages “in the  
 15 multiple thousands of dollars” available to individual litigants). Second, whatever damages any  
 16 individual litigant might theoretically recover, the difficulty of the legal and factual issues – as  
 17 reflected in the case’s long journey through this Court, the Ninth Circuit, to the United States  
 18 Supreme Court and back - individual litigations here are not just impractical but highly unlikely to  
 19 be brought in the first place. Third, any individual Settlement Class Member can opt out of the  
 20 Settlement Class and pursue individual litigation.<sup>7</sup>

21 ***C. Preliminary Approval of the Proposed Settlement Should be Granted***

22 A cognate of the “strong judicial policy favoring class settlements,” *Tait v. BSH Home*  
 23 *Appliances Corp.*, 2015 WL 4537463, at \* 4 (S.D. Cal. July 27, 2015), is the principle that the

24 \_\_\_\_\_  
 25 <sup>7</sup> “[I]n the context of settlement, the other requirements of Rule 23(b)(3), such as ‘the desirability  
 26 or undesirability of concentrating the litigation of the claims in the particular forum’ and ‘the likely  
 27 difficulties in managing a class action[,]’ *see* Fed. R. Civ. P. 23(b)(3)(C)-(D), ‘are rendered moot  
 28 and are irrelevant.’” *Spann v. JC Penney Corp.*, 314 F.R. D. 312, 323 (C.D. Cal. 2016) (quoting  
*Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 444 (E.D. Cal. 2013); *Amchem Products,*  
*Inc. v. Windsor*, 521 U.S. 591, 620 (1997))

1 reviewing Court’s role does not extend to “second-guess the agreement’s terms.” *Id.* (citing *Officers*  
 2 *for Justice*, 688 F. 2d at 625). After all, settlement’s “very essence...is compromise, ‘a yielding of  
 3 absolutes and an abandoning of highest hopes.’” *Officers for Justice v. Civil Serv. Comm’n*, 688  
 4 F.2d 615, 624 (9<sup>th</sup> Cir. 1982) (quoting *Cotton v. Hinton*, 559 F. 2d 1326, 1330 (5<sup>th</sup> Cir. 1977)). And  
 5 “[p]arties represented by competent counsel are better positioned than courts to produce a  
 6 settlement that fairly reflects each party’s expected outcome in litigation.” *Parker v. Cherne*  
 7 *Contracting Corp.*, No. 18-cv-01912-HSG, 2021 WL 5834227, at \* 5 (N.D. Cal. Dec. 9, 2021)  
 8 (quoting *Rodriguez v. West Pub. Corp.*, 563 F. 3d 948, 963 (9<sup>th</sup> Cir. 2009)).

9 Where, as here, “the settlement agreement is the result of formal and informal settlement  
 10 negotiation, including the voluntary exchange of extensive information and documents related to  
 11 claims in [the case]...the decision to settle was informed by the time and expense that both sides  
 12 would incur in the course of further litigation” the Court should “see[ ] no reason to second-guess  
 13 counsel’s determination that settlement is in the best interest of the class.” *Ahmed*, 2018 WL  
 14 746393, at \* 9 (citing *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 942 (N.D. Cal. 2013), as  
 15 “holding that a settlement reached after informed negotiations ‘is entitled to a degree of deference  
 16 as the private consensual decision of the parties’” (quoting *Hanlon*, 150 F. 3d at 1027)).

17 As the lengthy docket shows, this case’s litigation future carried a number of serious risks.  
 18 Those risks permeated class certification, summary judgment and trial. This Settlement, on the  
 19 other hand, produces an immediate cash benefit to Settlement Class Members, is undeniably a  
 20 favorable resolution of the Actions and eliminates the risk that after years of continued litigation  
 21 and appeals, the Settlement Class Members might receive nothing.

22 **1. Proposed Settlement Results from Arms-Length, Non-Collusive**  
**Negotiated Resolution**

23 **a. Proposed Settlement is Product of Mediator’s Proposal and is**  
 24 **Supported by Experienced Counsel**

25 “The Ninth Circuit ‘put[s] a good deal of stock in the product of an arms-length, non-  
 26 collusive, negotiated resolution’ in approving a class action settlement.” *Ortega* 2021 WL  
 27 5584761, at \* 9 (quoting *Rodriguez*, 563 F. 3d at 965). This is just such a case. It was litigated  
 28

1 over almost a decade. Settlement ultimately came after days of negotiations over three separate  
2 and intense mediation sessions by Zoom conferences on April 27, 2021; July 13, 2021; and July  
3 23, 2021. Each session was conducted by Randy Wulff, a highly respected mediator well-versed  
4 in the strengths and weaknesses of each side’s arguments. Numerous other settlement  
5 communications were interspersed with the actual mediations. The final dollar amount of the  
6 Settlement was based on the Mediator’s proposal.

7 No discussion of attorneys’ fees and expenses occurred in any of the Mediation sessions.  
8 The Parties and Mediator proceeded on the understanding that, at the appropriate time, Class  
9 Counsel would make an application for a Fee and Expense Award from the Settlement Fund.

10 The crucial independent role played by Mr. Wulff strongly supports settlement. *See Villegas*  
11 *v. J.P. Morgan Chase & Co.*, No. CV-09-00261 SBA (EMC), 2012 WL 5878390, at \* 6 (N.D. Cal.  
12 Nov. 21, 2012) (private mediation “tends to support the conclusion that the settlement process was  
13 not collusive”); *Campbell v. Facebook, Inc.*, 951 F. 3d 1106, 1122 (9<sup>th</sup> Cir. 2020) (that settlement  
14 resulted from four in-person, arms-length mediations before two different mediators supported  
15 settlement approval); *Camilo v. Ozuna*, No. 18-cv-02842-VKD, 2020 WL 1557428, at \* 8 (N.D.  
16 Cal. April 1, 2020) (“While the participation of a neutral mediator is not, by itself, dispositive of  
17 whether the settlement is fair, adequate and reasonable, it nonetheless is ‘a factor weighing in favor  
18 of a finding of non-collusiveness.’” (quoting *In re Bluetooth*, 654 F. 3d at 948)); *Baker v. SeaWorld*  
19 *Entertainment, Inc.*, No. 14-cv-02129-MMA-AGS, 2020 WL 4260712, at \* 6 (S.D. Cal. July 24,  
20 2020) (where “Settlement Agreement was reached through intensive, good-faith bargaining in  
21 several mediation sessions” with Magistrate Judge and then with another professional mediator,  
22 “these negotiations support approval of the Settlement Agreement”(internal citations omitted).

23 Settlement Class Counsel carefully considered the pros and cons of the Settlement  
24 ultimately achieved, and equally carefully weighed the Settlement’s fairness to the Settlement Class  
25 Members. Nor did negotiations stop after the final mediation session. The Parties continued to  
26 diligently negotiate the terms of the Settlement Agreement until reaching a final draft that  
27 Settlement Class Counsel is convinced is entirely fair to the Settlement Class Members. *See, e.g.*,  
28 *Campbell*, 951 F. 3d at 1106; *Hanlon*, 150 F. 3d at 1026.



1 Throughout the litigation, mediation and settlement process, the Defendant has been  
 2 zealously represented by extremely able and highly experienced attorneys from two major law  
 3 firms: Cooley LLP and Mayer Brown. Their strong advocacy ensured that any settlement would  
 4 necessarily only come from hard-fought negotiations and that further litigation would be full of  
 5 risks for the Settlement Class Members. Both support preliminary settlement approval.

6 **b. The Stage of the Proceedings, and the Discovery Completed**  
 7 **Support Preliminary Settlement Approval**

8 In making a preliminary settlement approval ruling, the Court examines the work Lead  
 9 Counsel did to investigate their claims and to obtain discovery to support those claims. *See In re*  
 10 *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672, CRB (JSC),  
 11 2016 WL 6248426, at \* 14 (N.D. Cal. Oct. 25, 2016) (“extensive review of discovery materials  
 12 indicates [Plaintiffs have] sufficient information to make an informed decision about the settlement.  
 13 As such, this factor favors approving the Settlement.”). *See also In re Portal Software Sec. Litig.*,  
 14 No. C-03-5138 VRW, 2007 WL 4171201, at \* 4 (N.D. Cal. Nov. 26, 2007).

15 As the FAC, SAC and TAC show, and the numerous dismissal briefs, supplemental  
 16 authority filings, Ninth Circuit appeal and Supreme Court papers demonstrate, Lead Counsel  
 17 thoroughly investigated their claims and fully understood the legal and factual arguments  
 18 concerning those claims. Lead Counsel retained four internet, technology and privacy experts and  
 19 a fourth expert to develop damages modeling used at mediation. Joint Decl. ¶ 28. Lead Counsel  
 20 propounded (and responded to) interrogatories, received and carefully reviewed multiple rounds of  
 21 document productions, filed a Motion to Compel to obtain further document production from  
 22 additional custodians based on expanded search terms, and negotiated and obtained further  
 23 document discovery in aid of mediation. Joint Decl. ¶¶ 21, 29. Plaintiffs also engaged a mock jury  
 24 and focus group consultant in July 2021 in advance of mediation to help decide how far they could  
 25 push the negotiations. Joint Decl. ¶ 30. Lead Counsel thus had a clear understanding of the risks  
 26 that summary judgment and trial would entail.

27 **2. Procedural Guidance Factors for Class Action Settlements are Satisfied**

28 Adopted on November 1, 2018, the Northern District of California’s Procedural Guidance

1 for evaluating class action settlements applies here. As discussed below, each of the Guidance  
2 factors supports preliminary settlement approval.

3 **a. Guidance 1: Differences, Range and Plan of Allocation**

4 **i. Guidance 1a.-d.: Differences in the Proposed Settlement  
5 Class and the Class Proposed in the SAC**

6 Section 1 of the Guidance requires discussion concerning any differences between the  
7 Settlement Class and the class proposed in the Operative Complaint (here, the SAC). Reflecting  
8 the compromises inherent in settlements and the necessity of corresponding adjustments, courts  
9 routinely approve settlement classes defined differently from the operative complaint's definition,  
10 and changes between claims released in a settlement and claims to be certified for class treatment.  
11 *See, e.g., In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2012 WL 2598819, at \* 1 (N.D.  
12 Cal. July 5, 2012) (approving settlement class different from class defined in Consolidated Class  
13 Action Complaint); *In re Chrysler-Dodge-Jeep Ecodiesel Mkting, Sales Practices, and Prods. Liab.*  
14 *Litig.*, No. 17-md-02777-EMC, 2019 WL 536661, at \* 3-7 (N.D. Cal. Feb. 11, 2019) (same);  
15 *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-cv-02200-HSG, 2020 WL 511953, at 5-6 (N.D.  
16 Cal. Jan. 31, 2020) (approving settlement class defined differently from classes certified); *Spann*,  
17 314 F.R.D. at 318-15 (same).

18 Here the proposed Settlement Class differs from that described in the SAC. The SAC (Dkt.  
19 # 93) described:

20 [A] Class of all persons who had active Facebook accounts and used Facebook  
21 between April 22, 2010 and September 26, 2011, both dates inclusive, and whose  
22 Internet use was tracked at times not logged into their Facebook accounts.  
23 Plaintiffs Quinn, Davis and Lentz also bring claims on behalf of a Subclass of  
24 Facebook subscribers who used Internet Explorer between April 22, 2010 and  
25 September 17, 2010, and whose Internet use was tracked while not logged into  
26 their Facebook accounts.

27 The Settlement Agreement defines the class as “[a]ll persons who, between April 22, 2010 and  
28 September 26, 2011, inclusive, were Facebook Users in the United States that visited non-Facebook  
websites that displayed the Facebook Like button.” Agr’t § 1.37.

The reason for this change is simple and benefits the class. The revised definition conforms

1 to discovery and removes the necessity for Settlement Class Members to attest in their Claim  
 2 Forms, based on their Internet usage a decade ago, that, while logged out of their Facebook  
 3 accounts, they visited non-Facebook web pages containing the Facebook Like button. This revised  
 4 Settlement Class definition also permits equal treatment of all Settlement Class Members,  
 5 eliminates a number of technical hurdles in confirming class membership and streamlines  
 6 Settlement Administration by allocating settlement payments on a per-Claimant basis.

7 **ii. Guidance 1e: The Proposed Settlement Provides a**  
 8 **Favorable Recovery and Falls Within the Range of**  
 9 **Approvability**

10 The Guidance requires comparative analysis of the anticipated Settlement Class recovery  
 11 and the potential class recovery if the Named Plaintiffs fully prevailed on their claims, and an  
 12 explanation of why the amounts differ, as they almost always will in any large class action  
 13 settlement. The Settlement provides for a non-reversionary Settlement Fund of \$90,000,000.00  
 14 Class Counsel’s research shows that this is one of the ten largest monetary settlements in data  
 15 privacy class action history, which alone is a powerful indication that the settlement falls within  
 16 the range of possible approval. Joint Decl. Ex. 13. Indeed, Plaintiffs estimate that the Settlement  
 17 Fund represents a *complete disgorgement* of all net profits earned on the data that Plaintiffs contend  
 18 was improperly collected. *Id.* ¶ 28.

19 The following discussion should not be interpreted as the Named Plaintiffs’ and Lead  
 20 Counsel’s concession that they would not have prevailed on their claims. Rather, it is a candid and  
 21 clear-eyed explanation of the risk-reward calculus, performed by experienced and well-informed  
 22 Lead Counsel, about the proof issues of each claim, the potential damages available for each claim,  
 23 and the implications for certification of a litigation class, in light of the best interests of the  
 24 Settlement Class. *See Rodriguez*, 563 F. 3d at 963 (court should consider “the experience and views  
 25 of counsel”); *Ortega*, 2021 WL 5584761, at \* 8 (“The experience and views of counsel weigh in  
 26 favor of approving the settlement.”); *In re Pac. Enters. Sec. Litig.*, 47 F. 3d 373, 378 (9<sup>th</sup> Cir. 1995)  
 27 (“Parties represented by competent counsel are better positioned than courts to produce a settlement  
 28 that fairly reflects each party’s expected outcome in litigation.”).

1 **iii. Guidance 1f.-g.: Allocation Plan Merits Preliminary**  
 2 **Approval**

3 Section 1 of the Guidance requires the Named Plaintiffs to detail their proposed allocation  
 4 plan, their expectation of the number of anticipated claims by Settlement Class Members, and  
 5 whether any reversion of the Settlement Fund will occur.

6 The Settlement’s allocation plan is straightforward. All Settlement Class Members will be  
 7 entitled to an equal cash payment. *See Agr’t § 4.4.* Calibrating payments by individual Settlement  
 8 Class Member’s frequency of Facebook usage, the dates during the Class Period when they were  
 9 using their Facebook accounts and visiting pages with the Like button, and other similarly  
 10 individualized metrics would, even if technically possible (which is uncertain) have created an  
 11 enormously expensive and complex administrative regime and reduced the settlement funds  
 12 available to all Claimants. *See In re: Cathode Ray Tube (Crt) Antitrust Litig.*, MDL No. 1917, 2016  
 13 WL 6778406, at \* (N.D. Cal. Nov. 16, 2016) (“[A]lthough it is possible that a more precise  
 14 allocation plan could be fashioned, undertaking such an effort would be time-consuming and  
 15 costly... Moreover, the standard of review requires only an allocation plan that has a ‘reasonable,  
 16 rational basis;’ it does not require the best possible plan of allocation.” (quoting *Vinh Nguyen v.*  
 17 *Radiant Pharm. Corp.*, 2014 WL 1802293, at \*5 (C.D. Cal. May 6, 2014).

18 Payments to Settlement Class Members will be based on final claims rates and the size of  
 19 the Net Settlement Fund (the Settlement Fund remaining net of Settlement Administration  
 20 Expenses, an Award of Attorneys’ Fees and Expenses, and the requested Service Awards. *See Agr’t*  
 21 *§ 4.2.* A recent Federal Trade Commission study, based on data from more than 100 consumer class  
 22 actions, calculated the weighted mean claims rate between 4%-5%.<sup>8</sup> Because the majority of  
 23 Settlement Class Members will receive direct email notice (*see Agr’t §7.2*), Class Counsel  
 24 anticipates a “take rate” within the mean calculated by the FTC. *Cf. In re Tik Tok, Inc. Consumer*  
 25 *Privacy Litig.*, MDL No. 2498, Master Docket No. 20 C 4699, 2021 WL 4478403, at \*11, n. 6

26 <sup>8</sup> *See* Federal Trade Commission, Consumers and Class Actions: A Retrospective and Analysis of  
 27 Settlement Campaigns (Sept. 2019) at p. 21. Accessible at  
 28 [https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-](https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf)  
[campaigns/class\\_action\\_fairness\\_report\\_0.pdf](https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf) (last reviewed February 10, 2022).

1 (N.D. Ill. Sept. 30, 2021) (noting that Prof. William B. Rubenstein found that the “average claims  
2 rate for classes above 2.7 million class members is less than 1.5%”).

3 In no event will any of the Settlement Fund revert to the Defendant or be paid to Class  
4 Counsel. *See Agr’t* § 4.9. If the Net Settlement Fund has funds remaining after the initial Settlement  
5 Payments are made, a second payment will be made, on a *pro rata* basis, to each Authorized  
6 Claimant who received an initial Settlement Payment. *See Agr’t* § 4.8. If the Settlement  
7 Administrator determines that such second payments are not economically feasible to send to  
8 Authorized Claimants who elected to receive a mailed check rather than electronic transfer, the  
9 second round of payments will be distributed, on a *pro rata* basis, only to Authorized Claimants  
10 who elected to receive electronic payments. *See id.* § 4.8.

11 If a second distribution of Settlement Payments is not, in the Settlement Administrator’s  
12 opinion, economically and administratively feasible, or if funds remain in the Net Settlement Fund  
13 for an additional 100 days after any second distribution, the Parties will confer and present the  
14 Court with a proposal for handling those remaining funds. *See id.* §§ 4.7, 4.9. The proposed Plan  
15 of Allocation “need only have a reasonable, rational basis, particularly if recommended by  
16 experienced and competent counsel.” *In re Regulus Therapeutics, Inc.*, No. 3:17-cv-182-BTM-  
17 RBB, No. 3:17-cv-267-BTM-RBB, 2020 WL 6381898, at \* 5 (S.D. Cal. Oct. 30, 2020) (quoting  
18 *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002). *See also Schueneman*  
19 *v. Arena Pharmaceuticals, Inc.*, No. 3:10-CV-01959-CAB-(BLM), 2020 WL 3129566, at \* 7 (S.D.  
20 Cal. June 12, 2020) (same). That standard is met here. The allocation formula has a reasonable and  
21 rational basis for distribution and provides for equal cash payments, on a *pro rata* basis, to any  
22 Settlement Class Member who submits an Approved Claim. *See Schueneman*, 2020 WL 3129666,  
23 at \* 7 (approving allocation plan that “generally treats all class members’ losses in the same way  
24 and awards a pro rata share to every Authorized Claimant”).

25 **b. Guidance 2: The Proposed Settlement Administrator**

26 The Parties request that the Court authorize the retention of Angeion Group (“Angeion”) as  
27 the Settlement Administrator. *See Agr’t* § 1.41. Angeion has worked previously with Class Counsel  
28 and Defendant’s counsel, Joint Decl. ¶ 27, and is a nationally recognized notice and claims

1 administration firm with extensive experience in class actions and a thorough understanding of the  
2 due process requirements for notice.

3 The Parties reviewed proposals from two additional potential Settlement Administrators  
4 besides Angeion, and, on balance and based upon their previous work with Angeion, decided that  
5 Angeion was the best choice for to administer this Settlement.

6 **c. Guidance 3: Proposed Notices to Settlement Class are Approvable**

7 Rule 23(c)(2)(B) requires that settlement notice must be “the best notice that is practicable  
8 under the circumstances, including individual notice to all members who can be identified through  
9 reasonable effort.” *See also* Rule 23(e)(1) (“The court must direct notice in a reasonable manner to  
10 all class members would be bound by the propos[ed settlement].”). Notice “must generally  
11 describe[ ] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to  
12 investigate and to come forward and be heard.” *Lane v. Facebook, Inc.*, 696 F. 3d 811, 826 (9<sup>th</sup>  
13 Cir. 2012) (citation omitted).

14 The proposed Notice describes in plain English the proposed Settlement and, among other  
15 things, clearly describes: (1) the nature, history and status of the litigation; (2) the definition of the  
16 Settlement Class and who is excluded from the Settlement Class; (3) the reasons the Parties propose  
17 the Settlement; (4) the Settlement Consideration; (5) the estimated reimbursement per individual  
18 Claimant; (6) the Settlement Class’s claims and issues; (7) the Parties’ disagreements over liability  
19 and damages; (8) the rights to opt-out from and object to the proposed Settlement; (9) the Releases  
20 required by the proposed Settlement; (10) the amount of Service Awards for the Named Plaintiffs;  
21 (11) the plan for distributing the Settlement Payment to Settlement Class Members who submit  
22 valid claim forms; (12) the maximum amount of Attorneys’ Fees and expenses that Class Counsel  
23 will seek; (13) the date, time and place of the Final Fairness Hearing.

24 The Defendant will supply the Settlement Administrator with the email addresses for  
25 Settlement Class Members for whom Defendant has such email addresses, which is the vast  
26 majority of the Settlement Class. The Settlement Administrator will then cause direct email notices  
27 to be sent to all Settlement Class Members for which it receives such addresses, including with  
28 each transmission the complete Settlement Notice, links to the Claim Form and Settlement Website,

1 and contact information for the Settlement Administrator. *See Agr't* §§ 1.19, 1.27, 7.2, 7.5(a). For  
2 Settlement Class Members for whom the Defendant lacks an email address, and for direct email  
3 notices that “bounce back” as undelivered, the Settlement Administrator will search public records  
4 databases for valid mailing addresses and seek to effect Notice through the United States mail.  
5 Further, the Settlement Administrator will effect publication notice. Joint Decl. Ex. B.

6 Here, direct email notice to the vast majority of Settlement Class Members for whom the  
7 Defendant has email addresses, supplemented by media notice, and the notice provided through the  
8 Settlement Website that will include downloadable copies of the Notice, the Claim Form and  
9 various other Court Orders and filings (*see Agr't* §§ 1.45, 1.46, 7.2, 7.5) fully satisfy the  
10 requirements of Rules 23(c)(2)(B) and 23(e). *See, e.g., Taylor v. Shutterfly, Inc.*, No. 5:18-cv-  
11 00266-BLF, 2021 WL 5810294, at \*2 (N.D. Cal. Dec. 7, 2021) (approving direct email notice to  
12 class members by Angeion); *Cottle v. Plaid, Inc.*, 20-cv-3056-DMR, 2021 WL 5415252, at \* 5-6  
13 (N.D. Cal., Nov. 19, 2021). (preliminarily approving settlement administered by Angeion that  
14 included email notice).

15 Rule 23(h)(1) requires that “[n]otice of the motion [for attorneys’ fees] must be served on  
16 all parties, and, for motions by class counsel, directed to class members in a reasonable manner.”  
17 The proposed Notice here satisfies that requirement, because it informs Settlement Class Members  
18 that Class Counsel will apply to the Court for a Fee and Expense Award as a percentage of and to  
19 be paid from the Settlement Fund, states the maximum amount Lead Counsel will seek, and  
20 describes the effect on Settlement Class Members of any such award.

21 Courts have routinely approved similar notice programs as compliant with Rule 23 and due  
22 process. *See, e.g., Norcia v. Samsung Telecommunications America, LLC*, Case No. 14-cv-00582-  
23 JD, 2021 WL 3053018, at \* 2 (N.D. Cal. July 20, 2021) (email notice, two publication notices and  
24 settlement website); *In re: Yahoo! Inc. Customer Data Security Breach Litig.*, No. 16-MD-02572-  
25 LHK, 2020 WL 4212811, at \*19-20 (N.D. Cal. July 22, 2020) (email, publication in two magazines,  
26 online advertisements; finding notice program compliant even though only 0.6% of class made  
27 claims, citing, *inter alia*, *Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2016 WL 613255, at  
28 \* 7 (N.D. Cal. Feb. 16, 2016) as “approving notice plan that provided for email notice and

1 settlement website”)); *Cohorst v. BRE Properties, Inc.*, No. 3:10-cv-2666-JM-BGS, 2011 WL  
2 7061923, at \* 2 (S.D. Cal. Nov. 14, 2011) (website, publication and email notice program).

3 **d. Guidance 4 and 5: Opt-Outs and Objections**

4 The proposed Notice complies with Rule 23(e)(5) as it explains a Settlement Class  
5 Member’s right to: (1) request to opt-out of the Settlement and the manner in which such opt-out  
6 request must be submitted; (2) object to the Settlement in whole or in part, and the requirements  
7 for filing and serving objections; and (3) participate in the Settlement and instructions for  
8 completing and submitting a Claim Form to the Settlement Administrator. *See* Agr’t §§ 8.1 – 8.12,  
9 and Ex. D thereto. The proposed Notice provides Lead Counsel’s contact information and the  
10 Court’s postal address. *Id.*

11 **e. Guidance 6: The Anticipated Attorneys’ Fees and Expenses Request**

12 Lead Counsel anticipate requesting an award of attorneys’ fees up to 29% of the Settlement  
13 Fund, or \$26.1 million, plus reimbursement of reasonable out-of-pocket expenses. The Defendant  
14 has the right to object to this request – indeed to *any* request for attorneys’ fees and expenses (*see*  
15 Agr’t §10.1) - but the requested award is entirely justified. “Having obtained excellent results for  
16 the...class, class counsel seek compensation for their efforts as they have a right to do under  
17 relevant case law.” *Kang and Moses v. Wells Fargo Bank, N.A.*, Nos. 17-cv-06220-BLF, 21-cv-  
18 00071-BLF, 2021 WL 5826230, at \* 10 (N.D. Cal. Dec. 8, 2021).

19 “In common fund cases it is appropriate to use a percentage calculation with a lode-star  
20 cross check to determine an attorneys’ fees award.” *Id.* at \* 16 (citing *Lafitte v. Robert Half Internat,*  
21 *Inc.*, 1 Cal. 5<sup>th</sup> 480, 503 (2016)). That is because of “[t]he recognized advantages of the percentage  
22 method – including relative ease of calculation, alignment of incentives between counsel and the  
23 class, a better approximation of market conditions in a contingency case, and the encouragement it  
24 provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation.”<sup>9</sup>  
25 *Kang and Moses*, 2021 WL 58262230, at \* 16 (quoting *Lafitte*, 1 Cal. 5<sup>th</sup> at 503). *See also Harrison*

26 \_\_\_\_\_  
27 <sup>9</sup> Obviously the proposed Settlement is not “early.” But prolonging litigation of this ten-year-old  
28 case, in light of the large settlement fund and injunctive relief obtained, seemed squarely to  
contradict the settlement class’s best interests.



1 v. *Bank of America Corp.*, Nos. 19-cv-00316-LB, 19-cv-02491-LB, 20-cv-02119, 2021 WL  
2 5507175, at \* (N.D. Cal. Nov. 24, 2021) (“When the settlement involves a common fund, courts  
3 typically award attorney’s fees based on a percentage of the settlement fund.”).

4 **f. Guidance 7: The Proposed Settlement and Proposed Service**  
5 **Awards Do Not Unjustly Favor any Class Members, including**  
6 **Named Plaintiffs**

7 Lead Counsel may request Service Awards of up to \$5,000 for the Named Plaintiffs.  
8 Defendant has agreed not to oppose. See Agr’t §11,1, 11.2.

9 In determining if a Settlement improperly grants preferential treatment to Named Plaintiffs,  
10 the Court may consider whether there is a “significant disparity between the incentive award[ ] and  
11 the payments to the rest of the class members” such that it creates a conflict of interest. *Radcliffe v.*  
12 *Experian Info. Solutions, Inc.*, 715 F. 3d 1157, 1165 (9<sup>th</sup> Cir. 2013). Here the Court considers “the  
13 number of class representatives, the average incentive award amount, and the proportion of the total  
14 settlement that is spent on incentive awards.” *In re Online DVD-Rental Antitrust Litig.*, 779 F. 3d  
15 934, 947 (9<sup>th</sup> Cir. 2015) (quoting *Staton v. Boeing Co.*, 327 F. 3d 938, 977 (9<sup>th</sup> Cir. 2003)). The  
16 Court may also consider “the actions the plaintiff has taken to protect the interests of the class, the  
17 degree to which the class has benefitted from those actions, [and] the amount of time and effort the  
18 plaintiff expended in pursuing the litigation.” *Staton*, 327 F. 3d at 977. See also *In re Magsafe Apple*  
19 *Power Litig.*, No. 5:09-CV-01911-EJD, 2015 WL 428105, at \* 15 (N. D. Cal. Jan. 30, 2015) (same).  
20 Finally, the Court must determine if a conflict exists where the incentive award is conditioned on  
21 the class representative’s approval and support of the Settlement. See *Radcliffe*, 715 F. 3d at 1161.

22 The proposed maximum Service Awards are well within the approvability range.  
23 “Incentive awards typically range from \$2,000 to \$10,000.” *Bellinghausen v. Tractor Supply Co.*,  
24 306 F.R.D. 245, 267 (N.D. Cal. 2015) (collecting cases). Courts in the Northern District of  
25 California have found awards of \$5,000 presumptively reasonable. See *In re LinkedIn User Privacy*  
26 *Litig.*, 309 F.R.D. 573, 592 (N.D. Cal. 2015); *Rosado v. eBay Inc.*, No. 5:12-cv-04005-EJD, 2016  
27 WL 3401987, at \* 9 (N.D. Cal. June 21, 2016). Here, the proposed Settlement is not conditioned  
28 on approval of any Service Awards (see Agr’t § 3.6) and the proposed Service Awards are not

1 conditioned on the Named Plaintiff's support of the Settlement. *See id.* § 11.4. These facts strongly  
2 support a finding that the Settlement does not grant preferential treatment to the Named Plaintiffs.

3 The Service Awards requested for the Named Plaintiffs are several times greater than the  
4 estimated Settlement Payments to Settlement Class Members. But this disparity, common in cases  
5 of this type and size, does not constitute improper preferential treatment, as courts have regularly  
6 ruled. *See, e.g., LinkedIn*, 309 F.R.D. at 582 (approving \$5,000 incentive award where class  
7 members would receive approximately \$14.81); *Online DVD Rental*, 779 F. 3d at 947-948  
8 (approving incentive award of \$5,000, "roughly 417 times larger than the \$12 individual award,  
9 noting \$5,000 was "an amount we said was reasonable in *Staton* [327 F. 3d at 976-977]").

10 In any event, the amount of each Service Award is less important than the cumulative  
11 amount of Service Awards in analyzing whether impermissible preferential treatment exists. *See*  
12 *Online DVD Rental*, 779 F. 3d at 947-948 (citing *Staton*, 327 F. 3d at 948-949, 976-977). The  
13 maximum amount of the proposed Service Awards in aggregate would be only \$35,000, a mere  
14 fraction of one percent of the Net Settlement Fund, showing the absence of preferential treatment  
15 and is eminently approvable. *See Online DVD Rental*, 779 F. 3d at 947-948 (approving Service  
16 Awards constituting 0.17% of settlement fund). *Cf. Staton*, 327 F. 3d at 976-977 (rejecting Service  
17 Awards comprising 6.0% of settlement fund).

18 The Plaintiffs spent many hours working with Lead Counsel, reviewing pleadings,  
19 responding to interrogatories and reviewing and producing documents (the federal Action Named  
20 Plaintiffs), corresponding with Lead Counsel throughout the case and discussing its various twists  
21 and turns, and discussing the Mediation and ultimate proposed Settlement with Class Counsel – *for*  
22 *more than ten years*. No Named Plaintiff ever withdrew from the case. Their dedication to the case,  
23 the time and work they did in prosecuting it, all with no guarantees of any recovery at all, support  
24 the Court's granting of the full amount of the requested Service Awards. *See, e.g., Eddings v. Health*  
25 *Net, Inc.*, No. CV-10-1744-JST (RZX), 2013 WL 3013867, at \* 7 (C.D. Cal. June 13, 2013)  
26 (approving \$6,000 service award from \$600,000 settlement to compensate named plaintiff for time,  
27 effort and risk).

28 In absolute dollar terms and in their percentage of the Settlement Fund, the Service Awards

1 do not grant improper preferential treatment to the Named Plaintiffs or to any chosen segment of  
 2 the Settlement Class. No conflict of interest exists between the Named Plaintiffs and the rest of the  
 3 Class Members. *See Radcliffe*, 715 F. 3d at 611.

4 **g. Guidance 8: Cy Pres Recipients**

5 The Agreement does not contemplate cy pres distributions. The Parties will confer about  
 6 the distribution of any Net Settlement Funds that cannot be economically or administratively  
 7 feasibly distributed to Settlement Class Members after two rounds, and present the Court a proposal  
 8 for the treatment of any such funds. *See* Settlement Agreement § 4.9. In light of the large class  
 9 size, and the proposed Settlement’s plan for secondary distributions where they can be efficiently  
 10 made (*see id.* § 4.8), the Parties do not anticipate a large residue of undistributed funds. In no event  
 11 will any such undistributed funds revert to the Defendant or Class Counsel. *Id.* § 4.9.

12 **h. Guidance 9: Proposed Timeline**

13 In connection with preliminary Settlement approval, the Court must set dates for a number  
 14 of related proceedings and events. The Parties suggest the following schedule:

<u>Event</u>	<u>Proposed Timeline</u>
Deadline for Defendant to provide names, emails, mailing addresses of Settlement Class Members to Settlement Administrator.	Not later than thirty (30) days following entry of the Preliminary Approval Order.
Deadline for Settlement Administrator to complete email and/or mail notice to Settlement Class Members (the “Notice Date”).	Not later than seventy-five (75) days after receipt of information from Defendant.
Deadline for Settlement Class Members to submit Claim Forms.	Postmarked or submitted no later than seventy (70) days from the Notice Date.
Deadline for Objectors either to deliver written Objections by hand or postmarked/sent by First Class Mail.	Postmarked or submitted no later than sixty (60) days from the Notice Date.
Deadline for Settlement Class Members to submit an Opt-Out Form	Postmarked or submitted no later than sixty (60) days from the Notice Date.
Deadline to submit opening briefs and supporting documents in favor of Final Approval of the Settlement	Not later than sixty-five (65) days before the Final Fairness Hearing.
Deadline to submit opening briefs and supporting documents for Motion Fee and Expense Award and for Service Awards	Not later than sixty-five (65) days before the Final Fairness Hearing.
Final Fairness Hearing	Scheduled at the Court’s discretion.

1 **i. Guidance 10: Class Action Fairness Act**

2 As required by Section 10 of the Guidance, and the Class Action Fairness Act, 28 U.S.C. §  
3 1711, *et seq.*, the Settlement Administrator, at Defendant's direction, will serve notice of the  
4 Settlement and other required documents upon the appropriate government officials, and will  
5 provide proof of such service prior to the Preliminary Approval hearing. *See Agr't* §§ 1.6, 7.3.

6 **j. Guidance 11: Past Distributions**

7 Lead Counsel identify the settlements below as a useful comparisons; Lead Counsel also  
8 refer the Court to Exhibit 13 of the Joint Declaration which is a chart of 75 selected data privacy  
9 and data breach class action settlements which could also inform the Court's analysis.

10 <b>Case Name</b>	<i>In re Google Plus Profile Litigation</i> , 5:18-cv-06164-EJD (N.D. Cal.)	<i>In re Ashley Madison Customer Data Security Breach Litigation</i> , 4:15-md-02669-JAR (E.D. Mo.)
11 <b>Settlement Fund</b>	\$7,500,000	\$11,200,000
12 <b>Number of Class Members</b>	Approximately 300 million class members	Tens of millions
13 <b>Number of Class Members to whom Notice was sent</b>	Notice to approximately 161 million email addresses	Media only
14 <b>Notice Methods</b>	Email	Print & digital media, press release
15 <b>Claim Forms Submitted (Number and Amount)</b>	1,820,606 claim submissions of which 1,720,029 were valid (NSF was \$3,709,830.48)	4,236 claim submissions, of which 3,861 were valid (NSF was \$3,647,961.66)
16 <b>Average Claimant Recovery</b>	\$2.15	\$944.82
17 <b>Distributions to Cy Pres Recipients</b>	TBD	Yes
18 <b>Administrative Costs</b>	\$1,939,611.29	\$309,240
19 <b>Attorneys' Fees and Costs</b>	\$1,875,000 fees and \$68,558.23 costs	\$3,733,333.33 fees and \$78,032.38 costs

20 **VI. CONCLUSION**

21 For all of the reasons discussed in the foregoing, the Named Plaintiffs respectfully request  
22 that the Court certify a Settlement Class for settlement purposes, preliminarily approve the  
23 proposed Settlement, approve Notice and the selection of Angeion as the Settlement Administrator,  
24 and set a Final Fairness Hearing.  
25  
26  
27  
28

1 Dated: February 14, 2022

Respectfully Submitted,

2 **DICELLO LEVITT GUTZLER LLC**

**GRYGIEL LAW LLC**

3           /s/ David Straite          

          /s/ Steve Grygiel          

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**ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(h)(3)**

I, David A. Straite, attest that concurrence in the filing of this document has been obtained from the other signatories. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of February, 2022, at New York, NY

*/s/ David Straite*

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David A. Straite