THE HONORABLE MICHAEL K. RYAN
Department 37
Hearing Date: May 23, 2025
Hearing Time: 11:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JANE DOE and JOHN DOE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

VIRGINIA MASON MEDICAL CENTER, and VIRGINIA MASON HEALTH SYSTEM,

Defendants.

NO. 19-2-26674-1 SEA

DECLARATION OF JASON 'JAY' BARNES IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, LITIGATION COSTS, AND SERVICE AWARD

I, Jason 'Jay' Barnes, declare as follows:

1. I am a shareholder at the law firm Simmons Hanly Conroy, LLC (SHC), co-counsel of record for Plaintiffs and the Class in this matter. I am admitted to practice before this Court *pro hac vice*. I respectfully submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Litigation Costs, and Service Award. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration, and could testify competently to them if called upon to do so.

Simmons Hanly Conroy's Work on this Case

2. With its substantial background in litigating cases against Facebook/Meta and other healthcare providers involving similar claims and technology, SHC took the lead in

developing the overall strategy in this case. I and other SHC attorneys directed or were involved in every aspect of the litigation, and coordinated the work of the other firms.

3. We started investigating the claims in this lawsuit many months before filing the complaint. The investigation included working with computer science expert Richard Smith to understand how Virginia Mason was using source code on its website to transmit patient data to Facebook, Google, and other third parties. Among other things, Mr. Smith tracked the information transmitted from Virginia Mason's website to third parties for Gorny Dandurand's client, Jane Doe. SHC took the lead on developing the facts and legal theories, as well as drafting the complaint.

4. SHC was responsible for developing the strategy for and managing discovery. We drafted discovery to Virginia Mason and subpoenas to third parties. We reviewed and analyzed the majority of the evidence developed in the case, including documents produced by defendants and third parties. We took most of the depositions. We also retained and worked with experts as the case progressed to refine the claims and litigation strategy. We also had primary responsibility for communicating with defense counsel throughout the litigation.

5. I and other SHC attorneys were involved in the strategy and drafting of all major motions, including responding to the motions to dismiss and motion to decertify and for summary judgment, and the motions for a preliminary injunction, class certification, summary judgment, and class notice. I argued several of the motions.

6. I was preparing to serve as lead counsel at trial when the parties negotiated the settlement. I and other SHC attorneys directed the trial strategy, compiled evidence, and prepared witnesses.

7. I participated in the mediation on February 20, 2024, with Judge Laura Inveen, as well as the subsequent negotiations that led to the class settlement.

Simmons Hanly Conroy's Experience

8. SHC is a national litigation firm with offices in Illinois, Missouri, New York, and California. Since its founding in 1999, SHC has recovered over $4 billion in verdicts and

settlements for its clients. In the class action field, SHC members have served as class counsel or co-counsel on a number of cases, including *Parko v. Shell Oil Company*, 3:12-cv-00336-NJR-RJD (S.D. Ill.); *Keltner v. SunCoke Energy, Inc.*, Case No.: 2014-L-1540 (Ill. Cir. Ct. Madison Co.); *Buck et. al v. Republic Services, Inc*., 4:13-cv-801-TCM (E.D.Mo.); *Chambers v. Merrill Lynch & Co., Inc.*, *et al.*, 10-cv-07109 (S.D.N.Y.); *Madanat v. First Data Corporation*, 11-cv-364 (E.D.N.Y); *Closson v. Bank of America*, 04- 436877 (Cal. Superior Ct., S.F. Co.); *Remson v. Verizon*, 07-cv-5296 (E.D.N.Y); *Jones v. Honeywell International, Inc*., 04-009174 (Fla. Cir. Ct., Hillsborough Co.); *Thomas v. ConocoPhillips, Inc*., 2008 CA 001381 (Fla. Cir. Ct., Escambia Co.).

9. SHC is also a leader in national mass tort litigation. SHC partner Paul J. Hanly, Jr. is currently Co-Lead Counsel in *In re: National Prescription Opiate Litigation,* MDL 2804 (N.D. Ohio), and lawyers at the firm currently serve or have served on the Plaintiffs' Executive and/or Steering Committees in: *In Re: Testosterone Replacement Therapy Products Liability Litigation*, MDL 2545 (N.D. Ill.); *In Re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, MDL 2100 (S. D. Ill.); *In Re: Chantix (Varenicline) Products Liability Litigation*, MDL 2092 (N.D. Ala.); *In Re: Depuy Orthopaedics, Inc. Pinnacle Hip Implant Product Liability Litigation*, MDL 2244 (N.D. Tex.); *In Re: Actos (Pioglitazone) Products Liability Litigation*, MDL 2299 (W.D. La.); *In re Propecia (Finasteride) Products Liability Litigation*, MDL No. 2331 (S.D.N.Y); *In re Zoloft (Sertraline Hydrochloride) Products Liability Litigation*, MDL No. 2342, (E.D. Pa.); *In re: Bausch & Lomb, Inc. Contact Lens Solution Products Liability Litigation*, MDL 1785 (D.S.C.); *In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, MDL 2151 (C.D. Cal.); *In re Zyprexa Products Liability Litigation*, MDL 1596 (E.D.N.Y); *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, MDL 1699 (N.D. Cal.); *In re Ephedra Products Liability Litigation*, MDL 1598 (S.D.N.Y); *In re: Medtronic, Inc. Implantable Defibrillators Product Liability Litigation*, MDL 1726 (D. Minn.). In addition, shareholders of the firm have previously served on the Plaintiffs' Executive Committee in *In re Terrorist Attacks on September 11, 2001*, MDL 1570 (S.D.N.Y), which includes class actions, individual personal injury, death and property damage claims as well as serving as

and co-lead counsel in the New Jersey state-court coordination *In re Zelnorm Litigation*, Case 28 (N.J. Superior Ct.).

10. Additional information about class actions litigated by Simmons Hanly Conroy, LLC is available on our website, www.simmonsfirm.com.

11. I graduated in 2005 from the University of Missouri, Columbia School of Law. Before joining SHC, I served eight years as a state representative in the Missouri General Assembly, where I fought against fraud, abuse and waste as chairman of the House Committee on Government Oversight and Accountability. I also served as chairman of the Special Investigative Committee on Oversight formed in 2018 to investigate the wrongdoings of former Missouri governor Eric Greitens.

12. As a shareholder of SHC, I have significant leadership roles in directing the litigation of several class action cases. For the past several years, I have not only rigorously pursued privacy violations arising out of the use of the Facebook Pixel on hospital websites, but also through similar tools created by other tech companies, including Google. I am currently Co-Lead Counsel in *In re Meta Pixel Healthcare Litigation*, Case No. 3:22-cv-03580-WHO. I served as Chairman of the Steering Committee in a case against Facebook that is of particular importance because it was a landmark victory for data privacy rights, achieved only after a more than ten-year battle. *In re Facebook Internet Tracking Litig.*, Case No. 5:12-md-02314-EJD (N.D. Cal.).[1]

13. In addition, I have been appointed as lead counsel or served in leadership roles in several consumer privacy class action cases, including but not limited to: *In re Google Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125 (3d Cir. 2015); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016); *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589 (9th Cir. 2020); *Doe v. Partners, et. al.*, Case No. 1984-CV-01651 (Suffolk County,

[1] June 2020: Facebook, Cookies and Data Privacy: A Watershed Moment?, JD Supra (2020), https://www.quinnemanuel.com/the-firm/publications/article-june-2020-facebook-cookies-and-data-privacy-a-watershed-moment/ ("[C]ompanies that profit from the sale of user data should be on notice that the decision in [Facebook Internet Tracking] may well be a watershed for data privacy lawsuits in this area.").

Massachusetts 2019); *Doe v. Medstar, Inc*., Case No. 24-C-20-000591 (Baltimore City, Maryland 2019); and *Calhoun v. Google*, Case No. 5:20-cv-05146-LHK (N.D. Cal. 2020).

14. **Eric Johnson** is a partner at Simmons Hanly Conroy, focusing his practice on complex litigation, mass torts and consumer class actions. Eric graduated with his master's degree in public health from the University of Illinois at Chicago and earned his J.D. from St. Louis University's School of Law in 2009 where he was a member of the school's National Moot Court Competition Team. During law school, he also worked as a law clerk for Judge Paula Bryant in the 22nd Judicial Circuit Court in St. Louis. Eric is a member of the New York, Illinois, and Missouri Bars. As a partner of the firm, Eric has represented individuals in consumer protection and consumer fraud class actions, dangerous drugs and defective medical devices litigations, and data privacy actions. In 2012, Eric was selected to serve on the national multidistrict litigation discovery sub-committee involving the DePuy Pinnacle System metal-on-metal hip implant. He was also awarded the Judge Robert G. Dowd, Sr. Appellate Advocacy Award in 2008. Mr. Johnson has significant experience in consumer privacy class actions as has served in leadership roles in numerous medical privacy cases including *Doe v. Partners, et. al.*, Case No. 1984-CV-01651 (Suffolk County, Massachusetts 2019); *Doe v. Medstar, Inc*., Case No. 24-C-20-000591 (Baltimore City, Maryland 2019); and *Kurowski v. Rush*, Case No. 1:22-cv-05380-MFK (N.D. Ill. 2022).

15. **Jenny Paulson** is a Senior Associate at Simmons Hanly Conroy where she focuses her practice on class action lawsuits in the Complex Litigation Department. Jenny graduated summa cum laude with her J.D. and M.B.A. from Southern Illinois University in 2017, where she was the managing editor of the school's Law Journal. Following graduation, Jenny clerked for the Honorable Nancy J. Rosenstengel, the Honorable Mark A. Beatty, and the Honorable Clifford J. Proud in the United States District Court for the Southern District of Illinois. Jenny is a member of the Missouri and Illinois Bar and admitted to practice in the Southern District of Illinois, the Eastern District of Missouri, and the Eighth Circuit Court of Appeals. As an associate

at the firm, Jenny focuses her practice on consumer protection and data privacy class actions and assists with all stages of litigation. .

16. **Payal Gurnani** is an associate at Simmons Hanly Conroy. She joined the firm in 2019, focusing her practice on mass torts and class actions, with an emphasis on cases involving internet privacy and dangerous drugs and devices. She graduated from Northern Illinois University College of Law in 2005. As project manager in the Complex Litigation Department, Payal draws on more than 15 years' experience as an attorney and a former career in information technology to help her clients. She directs a team of e-discovery attorneys, performs pre-trial evidentiary analysis, drafts memorandums, prepares witness presentations, assists with deposition preparation, as well as performs many other duties. Before joining the firm, Payal practiced as a civil defense attorney where she worked on all stages of the litigation process, from intake to resolution, including taking and defending depositions, negotiating settlements and drafting, arguing and winning substantive motions. Her practice included a wide array of cases, ranging from medical malpractice and defamation lawsuits to products and employer's liability matters.

17. **Sasha Bassett** is an associate with Simmons Hanly Conroy at the firm's headquarters in Alton, Illinois. She is a 2023 graduate of Washington University and former President of Alton Main Street from 2017 to 2019, she was the driving force behind the revitalization of the downtown district. She continued her commitment to social progress and environmental preservation by serving on the boards of local United Way and Sierra Club chapters. Ms. Bassett also holds an M.A from Webster University in Nongovernmental Organizations and a B.A. from The Evergreen State College. Currently, Sasha's practice is focused on data privacy. As part of her role, she researches the practices and policies of tech companies, determining areas where they fall short of protecting the consumer — or fail to disclose these practices.

18. **Kyle Tate** is an attorney at Simmons Hanly Conroy in the Complex Litigation Department. He joined the firm in 2019 and has more than 20 years of experience representing

clients in complex legal cases. He focuses his practice on mass tort litigation cases that involve healthcare and privacy issues. Prior to joining Simmons Hanly Conroy, Kyle headed his own firm for eight years, where he provided legal services to corporations, health care providers and nonprofit agencies regarding regulations and compliance with the PPACA and the ACA. He also worked as assistant counsel for the St. Louis County Circuit Court and as policy advisor for Rep. Charles Portwood in Jefferson City, where he helped pass Missouri's "Ticket to Work" bill, helping many with disabilities return to work. Kyle received a B.A. in History from University of Illinois at Urbana-Champaign in 1995. He received his J.D. with a Certificate in Health Law from Saint Louis University School of Law in 2002. At SLU, he was named Student of the Year in 2002, served as lead editor for the Journal of Health Law from 2001-2002 and as an editor from 2000-2001.

19. **Crystal Knox** was an associate in Simmons Hanly Conroy's' document research group. She received her J.D. in 2013 from John Marshall School of Law.

20. **Brad Biggs** was an associate in Simmons Hanly Conroy's' document research group. He received his J.D. in 2017 from Marquette University School of Law.

21. **Lauren Daugherty** was a 3L intern with Simmons Hanly Conroy and assisted with trial preparation and discovery tasks.

Simmons Hanly Conroy's Attorneys' Fees and Costs

22. Since the beginning of this case, SHC has worked with no guarantee of being compensated for its time and efforts. Payment of SHC's fees and incurred litigation costs has always been contingent on successfully obtaining relief for the plaintiffs and class members. As a result, there was a substantial risk of non-payment, particularly in light of the challenges inherent in this type of case. The firm's work on this case has necessarily been to the exclusion of work on other matters that likely would have generated fees. SHC has also been denied use of the fees it earned over the course of this case

A. Simmons Hanly Conroy's Lodestar

23. I reviewed the firm's contemporaneous billing records and reduced and eliminated time where appropriate. I eliminated time that was administrative in nature, or that appeared to be redundant or inefficient. I also removed time billed by attorneys and staff members who devoted fewer than ten hours to the case. It is my firm belief that the time billed was reasonably necessary to litigate this case and secure a settlement on behalf of plaintiffs and the class.

24. The following table identifies the attorneys and staff members from SHC who worked on this case and for whom the recovery of fees is sought. For each of the timekeepers below I have stated the current hourly rate, the number of hours worked, and the total amount of fees. These time summaries are taken from contemporaneous, daily time reports prepared and maintained by SHC in the regular course of business.

NAME AND POSITION	DESCRIPTION OF WORK PERFORMED	RATE	HOURS BILLED	TOTAL
ATTORNEYS				
Jay Barnes Partner J.D. from Univ. of Missouri, 2005	Supervised overall litigation and coordinated legal team; developed facts and legal claims; drafted complaint and amended complaint; worked with experts; supervised and worked on briefing, and argued most motions; analyzed evidence and directed discovery strategy; took most depositions, including expert depositions; defended expert depositions; led trial preparation and strategy; negotiated settlement.	$1,300	711.5	$924,950.00
Eric Johnson Partner J.D. from St. Louis University's School of Law, 2009	Assisted with overall case development and strategy; drafted response to motion to dismiss and assisted with other briefing; prepared for and	$900	449.1	$404,190.00

NAME AND POSITION	DESCRIPTION OF WORK PERFORMED	RATE	HOURS BILLED	TOTAL
	participated in depositions; participated in discovery strategy and conferences with opposing counsel; analyzed evidence and legal claims; trial preparation; worked on notice plans; participated in settlement negotiations.			
Jenny Paulson Senior Associate J.D. from Southern Illinois University, 2017	Factual and legal research and development of claims; coordinated with plaintiffs; drafted discovery requests and responses, and subpoenas to third parties; worked with experts; assisted with briefing; reviewed and analyzed documents produced by defendants and third parties; prepared for and participated in depositions; prepared focus group materials; worked on trial preparation, including identifying witnesses and exhibits and jury instructions; worked on settlement issues.	$600	217.1	$130,260.00
Sasha Bassett Associate J.D. from Washington Univ., 2023	Researched claims; worked on written discovery.	$400	28.9	$11,560.00
Payal Gurnani Associate J.D. from Northern Illinois University College of Law, 2005	Reviewed documents produced in discovery; legal research; assisted with depositions; trial preparation.	$325	424	$137,800.00
Kyle Tate Associate J.D. from St. Louis Univ. School of Law, 2002	Reviewed and analyzed documents produced in discovery.	$325	490.2	$159,315.00

NAME AND POSITION	DESCRIPTION OF WORK PERFORMED	RATE	HOURS BILLED	TOTAL
Crystal Knox Former Associate J.D. from John Marshall Law School, 2013	Reviewed and analyzed documents produced in discovery; trial preparation.	$325	499.5	$162,337.50
Brad Biggs Former Associate J.D. from Marquette Univ. Law School, 2008	Reviewed and analyzed documents produced in discovery.	$300	211.5	$63,450.00
LEGAL INTERN				
Lauren Daugherty	Legal and factual research; assisted with expert deposition.	$80	38.5	$3,080.00
TOTAL			3,070.3	$1,996,942.50

25. SHC sets rates for attorneys and staff members based on a variety of factors, including among others: the experience, skill and sophistication required for the types of legal services typically performed; the rates customarily charged in the markets where legal services are typically performed; and the experience, reputation and ability of the attorneys and staff members. SHC's rates have been approved by courts in cases around the country, including *Doe v. Partners, et. al.*, Case No. 1984-CV-01651 (Suffolk County, Massachusetts 2019), *In re Facebook Internet Tracking*, Case No. 5:12-md-02314-EJD (N.D. Ca. 2012); and *Kurowski v. Rush*, Case No. 1:22-cv-05380-MFK (N.D. Ill. 2022). The orders in the *Partners* and *Facebook* litigation are attached as **Exhibits 1 and 2**.

B. Simmons Hanly Conroy, LLC's Litigation Costs

26. SHC has incurred out-of-pocket litigation expenses totaling $118,856.05 primarily to cover expenses related to court reporters and transcripts, expert fees, mediation and focus group fees, and travel costs. The following chart summarizes SHC's litigation costs:

Category of Expense	Total
Expert Witness Fees	$42,147.90
Travel	$12,871.31
Discovery, Document Preservation, and Administrative Costs	$33,197.94
Mediation and Focus Group	$17,916.00
Deposition Expenses and Court Reporting	$12,722.90
TOTAL	**$118,856.05**

I declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

EXECUTED at Jefferson City, Missouri and DATED this 26th day of February, 2025.

By: */s/ Jason 'Jay' Barnes*
Jason 'Jay' Barnes, Admitted Pro Hac Vice

DECLARATION OF SERVICE

I, Beth E. Terrell, hereby certify that on February 26, 2025, I caused true and correct copies of the foregoing to be served via the means indicated below:

Paul G. Karlsgodt, WSBA #40311 Email: pkarlsgodt@bakerlaw.com BAKER & HOSTETLER LLP 1801 California Street, Suite 4400 Denver, Colorado 80202 Telephone: (303) 861-0600 Facsimile: (303) 861-7805	☐ U.S. Mail, postage prepaid ☐ Hand Delivered via Messenger Service ☐ Overnight Courier ☐ Facsimile ☐ Electronic Mail ☒ Via King County Electronic Filing Notification System
Logan F. Peppin, WSBA #55704 Email: lpeppin@bakerlaw.com Alexander Vitruk, WSBA #57337 Email: avitruk@bakerlaw.com BAKER & HOSTETLER LLP 999 Third Avenue, Suite 3900 Seattle, Washington 98104-4076 Telephone: (206) 332-1380 Facsimile: (206) 624-7317	☐ U.S. Mail, postage prepaid ☐ Hand Delivered via Messenger Service ☐ Overnight Courier ☐ Facsimile ☐ Electronic Mail ☒ Via King County Electronic Filing Notification System

Attorneys for Defendants

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 26th day of February, 2025.

By: /s/ Beth E. Terrell, WSBA #26759
Beth E. Terrell, WSBA #26759

EXHIBIT 1

NOTIFY

76

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
Civil No. 19-1651-BLS1

Notice sent 1-24-21 AB CHS JMC KTC — EST SW TAU SNC — MTM VL G SMJ SC — EEN JRK GR

JOHN DOE and JANE DOE,
Individually and on Behalf of All Others Similarly Situated,
Plaintiffs

vs.

PARTNERS HEALTHCARE SYSTEM, INC., & others[1]
Defendants

JUDGMENT AND FINAL ORDER

WHEREAS, a Settlement Agreement, dated as of August 9, 2021 (the "Settlement Agreement"), was made and entered into by and among the following Settling Parties: (i) John Doe and Jane Doe ("Representative Plaintiffs"), individually and on behalf of the Settlement Class Members (as further defined in the Settlement Agreement), by and through Jason "Jay" Barnes and Eric Johnson of the law firm Simmons Hanly Conroy LLC, J. Michael Connolly of the law firm Kenney & Connolly P.C., Jeffrey A. Koncius and Nicole Ramirez of the law firm Kiesel Law LLP, Stephen M. Gorny and Christopher D. Dandurand of the law firm The Gorny Law Firm P.C., and Amy Gunn and Elizabeth Lenivy of The Simon Law Firm, P.C. (collectively, "Class Counsel"); and (ii) Partners Healthcare System, Inc. (now Mass General Brigham Incorporated) and its owned and operated affiliates, including the General Hospital Corporation d/b/a Massachusetts General Hospital ("MGH"), Brigham Health, Inc. ("BWH"), and, separately, the Dana-Farber Cancer Institute ("DFCI") (collectively, the "Defendants" as further defined in the Settlement Agreement), for the benefit of all Released Parties (as defined in the Settlement Agreement), by and through the Defendants' counsel of record, Mark S. Melodia, Michael T. Maroney, and Christopher M. Iaquinto, of Holland & Knight LLP, and

WHEREAS, on September 24, 2021, the Court entered an Order of Preliminary Approval Order ("Preliminary Approval Order") that, among other things, (a) preliminarily certified, pursuant to Massachusetts Rule of Civil Procedure 23, a class for the purposes of settlement only; (b) approved the form of notice to Settlement Class Members, and the method of dissemination thereof; (c) directed that appropriate notice of the settlement be given to the Settlement Class; and (d) set a hearing date for final approval of the settlement; and

WHEREAS, on October 18, 2021, the Court granted an Emergency Notice to Amend Postcard Notice; and

---

[1] The General Hospital Corporation d/b/a Massachusetts General Hospital; Brigham Health, Inc.; and Dana-Farber Cancer Institute, Inc.

JUDGMENT ENTERED ON DOCKET 1-24-22
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d)
NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

Unknown

WHEREAS, the notice to the Settlement Class ordered by the Court has been provided, as attested to in the Declaration of Class Administrator filed with the Court on January 6, 2022 ("First Class Administrator Declaration") and the Supplemental Declaration of Class Administrator, which was attached as Exhibit A to the Joint Response to Certain Objections to Final Class Action Settlement Approval, which was filed with the Court on January 14, 2022 ("Second Class Administrator Declaration"); and

WHEREAS, on January 18, 2022, a hearing was held on whether the settlement set forth in the Settlement Agreement was fair, reasonable, adequate, and in the best interests of the Settlement Class, such hearing date being a due and appropriate number of days after such notice to the Settlement Class; and

NOW THEREFORE, having reviewed and considered the submissions presented with respect to the settlement set forth in the Settlement Agreement and the record in these proceedings, having heard and considered the evidence presented by the parties and the arguments of counsel and those objecting to the settlement, having determined that the settlement set forth in the Settlement Agreement is fair, reasonable, adequate, and in the best interests of the Settlement Class;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The Court incorporates by reference the definitions set forth in the Settlement Agreement.

2. The Court finds it has personal and subject-matter jurisdiction over this matter, the Settling Parties, and all Settlement Class Members.

3. The form, content, and method of dissemination of the notice given to the Settlement Class were adequate and reasonable, and constituted the best notice practicable under the circumstances. The notice, as given, provided valid, due, and sufficient notice of the proposed settlement, the terms and conditions set forth in the Settlement Agreement, and these proceedings to all Persons entitled to such notice, and said notice fully satisfied the requirements of Massachusetts Rule of Civil Procedure 23 and due process.

4. The Representative Plaintiffs and Settlement Class Counsel fairly and adequately represented the interests of Settlement Class Members in connection with the settlement set forth in the Settlement Agreement.

5. All objections to the settlement set forth in the Settlement Agreement have been considered. For the reasons stated on the record on January 18, 2022, the objection presented by Peter Cole on behalf of his wife, Farah Ravanvbakhsh, is sustained, and Farah Ravanvbakhsh shall be included among the "Settlement Class Members who made a claim," as that phrase is used in Section IV.3.e. of the Settlement Agreement; and the objection by Nathan Horowitz on behalf of his minor son is overruled because neither Mr. Horowitz, nor his minor son, is a member of the Settlement Class. The objections presented by Jeffrey A. Young, Cailin Carleo, Sara Boucher, Shawn Denkiewicz, Jennifer Denkiewicz, Olivia Denkiewicz, Natalie

Denkiewicz, Lorna Graham, Chantal L. Blanchet, Stephen Epstein, Elizabeth O'Donnell, Sean O'Donnell, and Cathleen O'Donnell, are sustained, largely without objection of the parties, and all of these individuals shall be included among the "Settlement Class Members who made a claim," as that phrase is used in Section IV.3.e. of the Settlement Agreement. The blank return postcards returned as objections by Igor DS Ferreira, Tayla Glavin, Robert G. Renaud, Scarlett Moreira Da Cunha, Keishla Ortiz, Joriel Ortiz, Katishka Marie Castro, Angelishka Castro-Ortiz, Jayden C. Castro, Justin Frederiksen, and Cynthia M. Drago, shall be treated as one of the "blank postcards" requiring follow-up by Angeion under Paragraph 14 of the First Class Administrator Declaration and Paragraph 10 of the Second Class Administrator Declaration. Having reviewed all of the other objections, I find that that they are either incomplete, improperly presented, mooted by the settlement, or not supported by credible evidence. I find that the settlement set forth in the Settlement Agreement, as further modified herein, is in all respects, fair, adequate, reasonable, proper, and in the best interests of the Settlement Class, and is hereby approved.

6. Representative Plaintiffs, Defendants, the Settlement Administrator, and Settlement Class Members shall consummate the settlement according to the terms of the Settlement Agreement, as further modified herein.

7. The Settlement Agreement, and each and every term and provision thereof, shall be deemed incorporated herein as if explicitly set forth herein and shall have the full force and effect of an order of this Court.

8. The Settlement Administrator shall complete resolution of the potential claims described in Paragraphs 14 and 15 of the First Class Administrator Declaration and Paragraph 10 of the Second Class Administrator Declaration in a timely fashion. Except for the resolution of these identified potential claims, no further claim or potential claim may be filed or entertained.

9. The determination of the Settlement Administrator shall be final as to all claims and potential claims. The Released Parties shall not be liable to pay any amount on any claim not approved by the Settlement Administrator.

10. Each Released Claim of each Settlement Class Member is hereby extinguished as against the Released Persons.

11. Class Counsel is hereby awarded attorneys' fees in the amount of $4,215,477. Having reviewed Class Counsel's application, the Court finds that the lodestar amount times three for attorneys' fees is fair, reasonable, and appropriate. I find that the requested fee award, which together with the other fees in this case, totals less than one-third of the common fund, is appropriate after considering, among other things: (a) the time and labor expended by counsel, which counsel has submitted largely without contemporary time records; (b) the stage of the litigation when a settlement was achieved (after substantial written discovery during the COVID-19 pandemic, but before written discovery was completed, without depositions, and without litigation of summary judgment motions or the conduct of a trial); (c) the magnitude and complexities of the litigation; (d) the risk of the litigation; (e) the quality of representation; and (f) the requested fee in relation to the settlement. Furthermore, Class Counsel expects to perform more work even after entry of the instant order.

12. Class Counsel's request for litigation expenses in the amount of $68,069.17 is hereby approved. The Court finds these expenses to be reasonable, appropriate, and necessarily incurred for the prosecution and resolution of the action.

13. The Settlement Class Representatives are hereby awarded service payments in the amount of $3,500 each. The Court finds this award to be justified under the facts of this case and consistent with applicable legal authorities.

14. The Settlement Administrator ("Angeion"), has performed the notice and claims administration services so as to effectuate the terms of the settlement and as ordered by the Court. As a result, Angeion's charge for fees and expenses in the amount of $1,496,933 is hereby approved. The Court finds these charges to be reasonable, appropriate, and necessarily incurred, based on the work Angeion has done and will have to do in the future to effectuate the terms of the settlement. In addition to reporting to the Parties on the status of the Claim Form submissions under paragraph 11 of the Second Class Administrator Declaration, Angeion shall also provide such reports to the Court.

15. The Settlement Fund, less the amounts approved in paragraphs 11 through 14 above, shall constitute the Net Settlement Fund described in the Settlement Agreement.

16. The Net Settlement Fund shall be distributed as set forth in the Settlement Agreement and this Final Judgment and Order.

17. Without affecting the finality of this Judgment in any way, this Court retains continuing jurisdiction over the Settling Parties and the Settlement Class for the administration, consummation, and enforcement of the terms of the Settlement Agreement as set forth in the Settlement Agreement and herein.

18. In the event the Effective Date does not occur, this Judgment and Final Order shall be rendered null and void and shall be vacated and, in such event, as provided in the Settlement Agreement, this Judgment and all orders entered in connection herewith shall be vacated and null and void.

SO ORDERED.

Dated: January 20, 2022

Peter B. Krupp
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.: 1984CV01651

JOHN DOE AND JANE DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

PARTNERS HEALTHCARE SYSTEM, INC.; THE GENERAL HOSPITAL CORPORATION d/b/a MASSACHUSETTS GENERAL HOSPITAL; BRIGHAM HEALTH, INC.; DANA-FARBER CANCER INSTITUTE, INC.,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR ASSENTED TO MOTION FOR FINAL CLASS ACTION SETTLEMENT APPROVAL

In September 2021, the parties reached a class-wide settlement of the underlying litigation, which if granted final approval would provide substantial relief to the class members. This settlement was preliminarily approved by the Court and, as set forth herein, remains fair, reasonable, adequate, and in the best interests of the members of the Settlement Class. The parties respectfully request final approval.

The settlement established a non-reversionary common fund of $18.4 million to compensate Settlement Class Members. Among other requirements, and subject to certain exclusions, Settlement Class Members are patients who used Defendants' web properties between May 23, 2016 and July 31, 2021.

As of the December 15, 2021 deadline for making claims, almost three million postcard notices were sent and 108,193 claims have been filed. Declaration of Class Administrator, ("Angeion Dec."), ¶13, Exhibit B. An additional 39,637 individuals returned blank postcards without making a claim, prompting follow-up requests for clarification from the Settlement Administrator. The parties have budgeted $10,926,329.83, or 59.14% of the Settlement Fund, to be allocated to make cash payments. Excluding the blank postcards, this fund will result in the maximum $100 distribution per claim. But even if every one of the 39,637 persons who sent blank postcards responded to the request for clarification by making a claim, the *pro rata* distribution would not go below $73 per claim. In any event, the bulk of the Settlement Fund, almost 60%, will be paid in direct cash benefits to settlement class members to say nothing of the remedial actions already taken during the pendency of this case.

Class Counsel has requested attorneys' fees of $5,901,668 or 32.07% of the Settlement Fund, with $68,069.17 in associated costs. This falls within the norms of class settlements approved in Massachusetts (and in other technology-related cases, generally) and is consistent with statements made when seeking preliminary approval. Counsel further requests service awards to the Settlement Class Representatives of $3,500 each, totaling $7,000.

Finally, Notice and claims administration has been budgeted at $1,496,933, or about 8% of the Settlement Fund. The parties do not expect any significant amount to be left over for *cy pres* distribution, although Massachusetts Interest on Lawyers' Trust Accounts ("IOLTA") program has been designated to receive any such funds.

In contrast to the 108,193 class members who endorsed the action by making a claim, only two objections have been filed—only one of which was a class member. As explained in a Joinder filed herewith by the Defendants, one objector is not a class member and his complaints have no merit. Additionally, the sole class-member objector's only objection was that he was unable to timely submit a claim due to USPS delays in forwarding his mail service and, therefore, was unable to

participate. With the Court's assent, counsel for the parties have no objection to allowing this class member to participate given that his failure to submit a timely claim was through no fault of his own.

In short, the settlement compensates patients for the central allegation of this litigation, namely that code on Defendants' websites caused the Plaintiffs' internet browsers to make disclosures to third-parties without obtaining sufficient consent. While Defendants vigorously deny the allegations in the litigation, they have agreed to the settlement reflected herein and assent to (and join) Plaintiffs' Motion for Final Approval of the Settlement. Accordingly, and because the settlement is eminently fair, adequate, reasonable, and in the best interests of the class, Plaintiffs respectfully now move the Court for final settlement approval.

PROCEDURAL HISTORY

Plaintiffs commenced and prosecuted this class action against Defendants alleging claims for negligence, breach of fiduciary duty, violations of G.L. c. 214, § 1B, violations of G.L. c 93A, § 9, and violations of G.L. c. 272, § 99—all related to their use of third-party website analytics tools, cookies, pixels, and related technologies that Plaintiffs allege disclosed information to third parties without sufficient consent. When this matter was filed, Plaintiffs also moved for a Preliminary Injunction, which the Court later denied after two rounds of extensive briefing, including expert submissions. Additionally, Defendants filed a motion to dismiss Plaintiffs' Complaint in its entirety. After the Court granted, in part, and denied, in part, Defendants' motion to dismiss, the parties engaged in extensive written discovery, including 46 interrogatories, 664 requests for production, and 710 requests for admission, most with multiple subparts.

On April 19, 2021, the parties mediated before the Honorable Edward Leibensperger (Ret.), a widely respected former member of the Massachusetts judiciary. While the parties did not reach a settlement during the mediation, they had a fruitful exchange of information and agreed to reconvene and continue negotiations. In conjunction with, and assistance from Judge Leibensperger, the parties

continued settlement discussions, and held a second mediation on June 3, 2021. Despite another full day of negotiation, the parties were, again, unable to reach a settlement. However, through follow-up discussions, the parties reached an agreement, followed by extensive email exchanges and telephone conferences ironing out the remaining details for the final settlement documents, which were executed in full on August 11, 2021.

PRELIMINARY APPROVAL WAS GRANTED, THE NOTICE PLAN WAS SUCCESSFULLY EXECUTED, AND THE CLASS HAD A FAVORABLE RESPONSE

The parties submitted their preliminary approval papers to Judge Davis detailing the settlement terms and the notice plan. Judge Davis held the preliminary approval hearing on September 24, 2021. At the preliminary approval hearing, Judge Davis approved the settlement in its entirety subject to certain non-substantive changes to the settlement documents, such as adding Class Counsel's contact information to the notice forms and streamlining the requirements for objections. Upon approval, the parties began disseminating notice to class members through the Angeion Group. Angeion successfully completed mailing 2,962,770 postcard notices to potential class members by the November 15 deadline. Angeion Dec. at ¶4. The settlement website went live that same day (https://macookiesettlement.com/). The settlement website allowed class members to make claims, submit objections, find answers to frequently asked questions, and view the long-form settlement notice, and preliminary approval order. Additionally, the website also provided the contact information for the settlement administrator so class members could ask questions and obtain any information not otherwise provided on the website.

Of the nearly 3 million postcard notices sent out, only 78,726 were returned as undeliverable and, of those, 28,720 were able to be re-mailed. Angeion Dec. 6. Angeion further received and responded to over 11,488 calls constituting over 60,000 minutes of direct class member support time.

Angeion Dec. at ¶11. As of December 17, the parties had received 108,208 claims *and only a single objection* from a class member. Exhibit B Angeion Dec. – Exhibit C to Declaration.

Additionally, another 39,637 individuals returned blank postcards without making a claim through the settlement website. It is unclear what these individuals intended but the parties have approved a supplemental second round of mailings to these individuals to allow them to properly file a claim if that is their intention. As noted above, even if every one of the 39,637 persons who sent blank postcards responded to the request for clarification by making a claim, the pro rata distribution would not go below $73 per claim.

Taken together, the main terms of the settlement for which the parties request final approval are as follows:

1. A common fund of $18,400,000 for cash payments to members of the Settlement Class;
2. Payments of $10,926,329.83 distributed *pro rata* to settlement class members whose claims are approved by the Settlement Administrator by the Effective Date;
3. Service awards of $3,500 to each of the Settlement Class Representatives in recognition of their contributions;
4. Total administration fee to Angeion Group, LLC of $1,496,933 for the administration of the class notice, claims process, and supplemental notice program;
5. Total attorneys' fees of $5,901,668 and expenses of $68,069.17; and
6. Distribution of any unallocated funds to the Court-designated *cy pres,* Massachusetts Interest on Lawyers' Trust Accounts ("IOLTA") program.

APPLICABLE LEGAL STANDARDS

"A class action in Massachusetts ... may not be settled without the final approval of the court, and notice of any proposed settlement must be provided to all members of the class." *In re Massachusetts Smokeless Tobacco Litig.,* No. CIV.A. 03-5038-BLS1, 2008 WL 1923063, at *2 (Mass. Super. Apr. 9, 2008) (Gants, J.). Approval of a class settlement involves a two-step process: counsel submits the proposed terms of settlement and the court makes a preliminary fairness evaluation. If the court is likely to

approve the settlement, then it grants preliminary approval and direct that notice under Rule 23(c) be given to class members of a formal fairness hearing, at which time objections may be heard. *In re Massachusetts Smokeless Tobacco Litig.*, No. CIV.A. 03-5038-BLS1, 2008 WL 1923063, at *3; MANUAL FOR COMPLEX LITIGATION, § 21.632 (4th ed. 2004); William B. Rubenstein, 4 *Newberg on Class Actions* § 13:13 (5th ed. 2014 and Supp. 2021). "Because settlement of a class action, like settlement of any litigation, is a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Sniffin v. Prudential Ins. Co. of Am.*, 395 Mass. 415, 421, 480 N.E.2d 294, 298 (1985) (quoting *Armstrong v. Bd. of Sch. Dir. of Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980)).

"Approval of a class action settlement which binds absent class members requires determining that the settlement is 'fair, reasonable, and adequate.'" *Vermont Pure Holdings, Ltd. v. Berry*, No. 0601814BLS1, 2010 WL 1665258, at *10 (Mass. Super. Feb. 8, 2010) (citing 4 Newberg on Class Actions § 11:41; 2 McLaughlin on Class Actions § 6:7). In evaluating the fairness of the settlement, Massachusetts courts have often looked to their federal counterpart for guidance, including the factors set forth in Rule 23. *Sniffin v. Prudential Ins. Co. of Am.*, 395 Mass. 415, 421 (1985). Under any standard, this settlement is fair, reasonable, and adequate.

ARGUMENT

I. THE SETTLEMENT SATISFIES ALL RELEVANT FACTORS

Massachusetts courts look at several factors in determining whether a proposed class action settlement is "fair, reasonable, and adequate," and frequently draw on federal cases in their analysis. *Vermont Pure Holdings, Ltd. v. Berry*, No. 0601814BLS1, 2010 WL 1665258, at *10 n. 5 (Mass. Super. Feb. 8, 2010). These factors include:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including the timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e). According to the Rule's Advisory Committee notes: the goal is to "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." 2018 Advisory Committee Notes.

A. The Settlement Class Representatives and Class Counsel Have Adequately Represented the Settlement Class

The class representatives and class counsel have adequately represented the Settlement Class since the cases were filed in May 2019. As the Court is aware, Class counsel has engaged in extensive motion practice and submission of comprehensive and complicated expert evidence regarding their attempt to obtain a preliminary injunction against Defendants, in addition to simultaneously defending against Defendants' efforts to have this matter dismissed. Counsel is well-qualified to represent the class and has expended significant time and resources to advance the interests of the class. *See* Declaration of Jason "Jay" Barnes, ¶¶3-8, Exhibit C; *see also* Declaration of Jeffrey A. Koncius, Exhibit D; Declaration of Stephen M. Gorny, Exhibit E; Declaration of J. Michael Conley, Exhibit F. Moreover, these efforts involved complicated, nuanced, and novel questions, including the scope of the Massachusetts consumer protection statute and Defendants' common law duties. Twice, class counsel has amended the pleadings to add new allegations and/or claims to prosecute this matter to the fullest extent permitted by the Court's orders. Class counsel has also vigorously pursued discovery,

including propounding 46 interrogatories, 664 requests for production, and 710 requests for admission, most with multiple subparts. Notably, class counsel continued to actively pursue and obtain discovery from the hospital-Defendants through the darkest days of the pandemic.

The class representatives have been equally engaged, promptly, and accurately responding to discovery propounded by Defendants. They also both personally appeared at mediation in order to support and advocate for the class. Furthermore, they remained in regular contact with counsel, assisted in the investigation of their claims, and helped located responsive documents and information over the course of the case.

B. The Settlement was Negotiated at Arm's Length.

After nearly three years of intense litigation, it is beyond dispute that the settlement was honestly and fairly negotiated by competent counsel and involved the assistance of a local, well-respected mediator, who is also a former member of this Court. Defendants strongly disagreed with Plaintiffs' factual positions and legal interpretations at every step, including fundamental questions regarding the abilities of the third-party website analytics tools, cookies, pixels, and related technologies at issue.

The parties' attempts at mediation reflected these same foundational disagreements, further demonstrating the arms-length nature of the settlement. After extensive discovery disagreements, the parties finally agree to mediate the cases with Judge Leibensperger. Both mediations with Judge Leibensperger lasted a full day; and consisted of the parties exchanging vast amounts of data regarding the class and issues pertaining to certification. The parties did not reach an agreement in principle until four months after their initial meeting with the mediator, during much of which they continued to prepare and spar in hotly contested litigation. Under these circumstances, it cannot be questioned that the agreement was reached at arm's length.

C. The Relief for the Settlement Class is Adequate

This settlement provides significant relief to Settlement Class members that compensates them fairly for their claims and is well within the range of settlements of similar cases, particularly in light of the following factors:

1. The costs, risks, and delay of trial and appeal

The parties naturally dispute the strength of Plaintiffs' cases, and the settlement reflects the parties' compromise of their assessments of the worst-case and best-case scenarios, weighing the likelihood of various potential outcomes. Plaintiffs' best-case scenario is class certification and recovery on the merits after a jury trial. Plaintiffs' worst-case scenario is that the class certification under Rule 23 is denied for the state law claims, summary judgment is granted to Defendant, and/or Plaintiffs lose at trial. In addition to the ordinary uncertainty in litigation, Plaintiffs' claims involve applications of legal questions for which Defendants likely would have sought appellate review. Although Plaintiffs believe strongly in the merits of their claims, the number of uncertainties weigh in favor of a guaranteed resolution.

This case is complex and carries significant risks for the parties as to legal and factual issues, and litigating the case to trial would likely consume significant time and expense. The remaining discovery, certification briefing, summary judgment, trial, and appeal would consume significantly more time and resources, particularly at a time when jury trials are significantly delayed due to the pandemic. Plaintiffs will likely have brought multiple witnesses for several days of preparation and testimony, at great expense to the parties and inconvenience to the witnesses. Moreover, the parties would bring expensive expert witnesses to trial, as demonstrated by the significant expense incurred in providing expert evidence in support of their motion for preliminary injunction. And regardless of the outcome, again, a lengthy appeal would be all but a certainty.

On the other hand, the settlement ensures that Settlement Class Members will recover significant, immediate cash relief. Specifically, the settlement provides monetary relief to eligible class members who used Defendants' web properties during the applicable period. Class members who establish their usage via a claim form will receive a proportional cash award from the settlement fund of up to $100. Because of the non-reversionary nature of the agreement, the entire benefit of the settlement will inure to the class or *cy pres*, rather than revert to Defendants.

Additionally, the Settlement Class's overwhelmingly positive response demonstrates fairness of the settlement over the uncertainty of protracted litigation. The parties received claims from nearly 110,000 individuals and only a single objection from a class member whose only objection was his inability to timely file a claim due to USPS forwarding delays. The fact that none of the nearly 3 million class members who received a direct notice objected to the terms of the settlement demands the conclusion that the settlement is fair, adequate, and reasonable.

2. The effectiveness of administration

Angeion Group's execution of the notice plan was effective and professional. The Court's approved notice plan included a settlement website, a dedicated phone number, and a class-wide direct notice postage campaign based on data from Defendants' administrative patient files.[1] The Notice Plan clearly informed Settlement Class Members of the terms of the settlement; their rights and obligations; and the process for filing a claim or raising objections. The online claim form asked only three questions to determine whether someone is a Settlement Class Member. If they are, they can submit a claim. If the person cannot self-certify as required by the form, their claim will not be approved.

[1] Because of the sensitive nature of administering a settlement seeking to remedy alleged patient privacy violations, the parties have endeavored to restrict the disclosure of patient information to only that which is necessary to effectuate adequate class notice.

Direct Notice to All Potential Class Members Through First-Class Mail

Angeion performed the necessary steps to provide all potential class members with direct notice regarding their rights and the process associated with the Settlement Agreement. Defendants provided Angeion with a Class List of all their patients that received treatment at the included facilities during the class period. Angeion identified 2,962,770 individuals on the Class List as having sufficient contact information to provide direct notice. Angeion Dec. at ¶4. Angeion then processed the mailing list through the USPS National Change of Address database ("NCOA") to identify individuals that had filed a change of address recently. Angeion Dec. at ¶5. Of the nearly 3 million notices disseminated, 98% percent did not require re-mailing. Of the notices that USPS returned to Angeion, Angeion was able to re-mail 28,720 of them through address verification searches (i.e., "skip traces"). Angeion Dec. at ¶6. With this re-mailing, **Angeion disseminated direct notice to 98.3% of the potential class.** By any measure, a direct notice of this magnitude is a remarkable if not unprecedented success. *See, e.g., In re Serzone Products Liability Litig.*, 231 F.R.D. 221, 236 (S.D. W.Va. 2005) (holding the notice plan designed to effectively reach approximately 80% of class members comports with the requirements of due process); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1061 (S.D. Tex. 2012) (approving a notice plan that was estimated to reach 81.4% of class members); I*n re McCormick & Co., Inc., Pepper Prod. Mktg. & Sales Practices Litig.*, No. 1:15-mc-1825, fn. 2 (D.D.C. June 5, 2020) (Doc. 244 (Final Approval Order) (finally approving a settlement in which notice was effected through publication, online display, and social impressions and was estimated to have reached 72% of the settlement class)).

Given the simplicity of the self-certification-based claims process using designated claim codes, the administration plan required minimal claims interrogation from the administrator—and therefore, minimal administrative expense to the common fund. Under this process, any claims submitted with a valid claim code will be automatically approved upon the effective date of the settlement and paid

thereafter. The only claims that require individual investigation are those submitted by claimants that contacted the administrator or counsel to obtain a class code based upon their representation that they were a class member but did not receive a claim code. The administrator created a claim code for the individual subject to confirmation of their eligibility as a class member for these individuals.

3. The proposed attorney's fees

Massachusetts prescribes to a straight-forward lodestar method of determining attorney's fees. "Where a party 'has, at his or her own expense, been successful in creating, preserving or enlarging a fund in which other parties have a rightful share,' a court may order the payment of attorneys' fees and expenses out of the fund as part of a damages award." *Coggins v. New England Patriots Football Club, Inc.*, 406 Mass. 666, 669 (1990) (quoting *Pearson v. Board of Health of Chicopee,* 402 Mass. 797, 801 n. 3 (1988)).

> The current, standard method for calculating what constitutes reasonable attorney's fees is the "lodestar" method, which requires the court to determine the fair market rate for the legal services provided and multiply that rate by the number of hours reasonably spent on the case. *Ross v. Continental Resources*, 73 Mass.App.Ct. 497, 515 (2009). "After making its initial [lodestar] calculation, the court then may adjust the fee upward or downward based on other considerations, including the results obtained." *T & D Video, Inc. v. City of Revere*, 66 Mass.App.Ct. 461, 477 (2006), *reversed in part by*, 450 Mass. 107 (2007).

Jacobs L., LLC v. Bos. Out-Patient Surgical Suites, LLC, No. 1484CV01049BLS1, 2018 WL 4937851, at *3 (Mass. Super. Aug. 17, 2018) (Davis, J.). As a threshold matter, Defendants do not oppose Class Counsel's request for attorneys' fees or expenses given the request is less than the 33% of the common fund as set forth in the Settlement Agreement and represented during preliminary approval. *Gorgens v. McGovern,* 2008 WL 2754527, at *5 (Mass. App. Ct. July 15, 2008) ("It is unfortunate that the parties have failed to heed Justice Powell's admonition that '[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.' "). Furthermore, the amount requested herein falls below 33% of the common fund, as represented to the Court when it granted preliminary approval. *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172

(D. Mass. 2014) (noting "nearly two-thirds of class action fee awards ... were between 25% and 35% of the common fund.") Moreover, a request at less than one-third of just the monetary success of the case is important because it corresponds directly to the contingency fee percentage that plaintiff's counsel routinely receive in a standard result-based compensation agreements (such those which Class Counsel entered into with the Settlement Class Representatives).

The first step employed in awarding fees under the lodestar method is to calculate the number of hours of work reasonably performed at a reasonable hourly rate. As of January 6, 2022, Class Counsel spent a total of 1,417.2 hours working on this case over the last nearly three years and incurred expenses totaling $68,069.17. Class counsel's expenditure of time constitutes a combined lodestar of $1,405,159 based on their current hourly rates. Barnes Dec. at ¶11; Koncius Dec., ¶9, Gorny Dec., Conley Dec. ¶6 A breakdown of hours expended by firm is as follows:

Class Counsel	Hours	Lodestar
Simmons Hanly Conroy	1,189	$1,205,135
Kenney Conley PC	112.9	$107,255
Kiesel law LLP	90.5	$65,489
The Gorny Law Firm	24.8	$27,280
TOTAL	1,417.2	$1,405,159

Id. These hours were reasonable and necessary for the prosecution and resolution of the case—a case for which there was no template. Rather, it was among the first of its kind and required significant time and research by Class Counsel merely to bring to file. The Class Complaint alone spanned 112 pages with 428 paragraphs of allegations detailing and explaining the technical details of the source code alleged to be used by the Defendants, how those technologies worked, and their capabilities which gave rise to alleged liability.

Nor was there a successful model for bringing such a case. For example, *Smith v. Facebook, Inc.*, 262 F. Supp. 3d 943, 948 (N.D. Cal. 2017), *aff'd*, 745 F. App'x 8 (9th Cir. 2018), was dismissed and later affirmed by the Ninth Circuit. While *Smith* was heavily briefed by the parties on Defendants' motion to dismiss, unlike *Smith*, Class Counsel *prevailed* after extensive cross briefing on Defendants' and Plaintiffs' cross motion for preliminary injunction. Additionally, this success was only seen after multiple hearings with competing submissions of supplemental authority from both parties.

After receiving favorable results from the motion to dismiss and the preliminary injunction, Class Counsel served comprehensive written discovery, including 46 interrogatories, 664 requests for production, and 710 requests for admission, most with multiple subparts. These requests were served in December 2019—the eve of the pandemic. Nonetheless, the parties worked tirelessly to exchange responsive information even as Defendants' hospitals became increasingly strained by the pandemic.

Despite these legal and practical challenges, Class Counsel went on to obtain an excellent result for the class—a common fund settlement Judge Leibensperger noted was among the highest of which he was aware.

Next, Class Counsels' current hourly rates reflect prevailing rates in Boston, specifically, and the northeast, generally, for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 331 (D. Mass.), *aff'd*, 809 F.3d 78 (1st Cir. 2015) (awarding partner rate of up to $910 per hour in a decision seven years ago). These attorney rates range from $625 - $1,150 per hour and are consistent with the rates approved for Class Counsel and other experienced litigators in class actions. Indeed, rates "in excess of $1,000 an hour[] are by now not uncommon" in complex cases. *U.S. Bank Nat'l Ass'n v. Dexia Real Estate Capital Mkts.*, 12 Civ. 9412 (PAE), 2016 WL 6996176, at *8 (S.D.N.Y. Nov. 30, 2016) (awarding partner rate of $1,055 per hour). Additionally, these rates are commensurate with those observed in the northeast, which is particularly relevant in this case, given that both sides required representation by specialists licensed

and practicing in across the county, including New York, California, and Pennsylvania. *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 91, 103 (D. Mass. 1998) (noting that "out-of-town rates have typically been allowed, both within and without the First Circuit, when a 'specialist' was required for the handling of the case"); *see also Vista Outdoor, Inc. v. Reeves Family Trust*, 16 Civ. 5766 (JSR), 2018 WL 3104631, at *6 (S.D.N.Y. May 24, 2018) (awarding partner rates of up to $1,260 per hour); *MSC Mediterranean Shipping Co. Holding SA v. Forsyth Kownacki LLC*, 16 Civ. 8103 (LGS), 2017 WL 1194372, at *3 (S.D.N.Y. Mar. 30, 2017) (awarding hourly rates of $1,048.47 per hour for partners). This case could not have been brought without the assistance of out of state counsel with significant and direct experience in Internet technology and privacy cases. Indeed, Class Counsel is not aware of any local plaintiffs' attorneys experienced in technology-based consumer privacy cases. Additionally, Class Counsel sought to efficiently litigate this case by handling it principally with only two attorneys.

After calculating Class Counsel's lodestar, the next step in determining the attorneys' fee is to assign a multiplier. Multipliers in Suffolk County have varied between 1.5 and 5.0 depending on the underlying facts and legal theories, and have been recognized as high as 8. *In re AMICAS, Inc. S'holder Litig.*, No. 10-174-BLS2, 2010 WL 5557444, at *4 (Mass. Super. Dec. 6, 2010) ("the Court will apply an enhancement multiplier of five"); *Wright v. Balise Motor Sales Co.*, 2017 Mass. Super. LEXIS 115, (Mass. Super. Ct., July 31, 2020) ("multipliers as high as 6 to 8" have been used "where counsel have obtained benefits for the class well beyond the cash settlement value of the fund, and ran risks, including nonpayment"); *See also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 298–99, 303–04 (3rd Cir.2005) (finding no abuse of discretion where the district court approved attorney's fees with a "fairly common" lodestar multiplier of 4.07); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 182 (D. Mass. 1998)(awarding multiplier of 8.9 to arrive at a $7,500,000 fee). Class Counsel's requested multiplier of 4.2 falls squarely within those approved in Suffolk County, particularly given that it resulted in

significant monetary relief for the class and effectuated remedial action addressing website disclosures alleged in the Complaint.

This case also presented a significant risk. For example, *Smith* ultimately unsuccessful and affirmed on appeal. Undeterred, Class Counsel nonetheless incurred significant time and expense in the initial pleading and motion for preliminary injunction developing their legal theories and factual foundation (which it supported with expert evidence). Taken, together Plaintiffs' requested multiplier of 4.2 stands firmly at—if not below—multipliers awarded in novel, high-risk class actions. Given the requested multiplier and lodestar, Class Counsel respectfully requests attorneys' fees totaling $5,901,668 —or less than the one third stated in the preliminary approval papers.

Additionally, Class Counsel is seeking approval of approximately $68,069.17 for out-of-pocket expenses. It is appropriate and customary in class litigation for class counsel to be reimbursed for out-of-pocket litigation expenses from a common settlement fund. *Brennan v. Arthur D. Little, Inc.*, 2021 Mass. Super. LEXIS 36 (Mass. Super. Ct., Feb. 24, 2021) (Davis. J.); *see also* 2 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS, § 6:24 (8th ed. 2011) (noting that "class counsel also is entitled to reimbursement from the class recovery (without interest) for the costs and reasonable out-of-pocket expenses incurred in prosecuting the litigation"). These expenses were all necessary in pursuing this litigation and the results obtained. Approximately two-thirds of the incurred expenses were expert fees associated with the development of Plaintiffs' case, the preparation of substantive motions, and mediation. The remaining $23,795.12 in expenses were ordinary litigation expenses such as necessary travel for hearings and mediation fees. Furthermore, Class Counsel took reasonable measures to mitigate costs, such as permitting only two lawyers to travel to attend dispositive motion hearings. Furthermore, Plaintiffs only retained a single expert to submit a declaration supporting their motion for preliminary injunction. Given the substantial nature of the Class Settlement, Plaintiffs believe their expenses are wholly reasonable.

4. The proposal treats class members equitably

The settlement treats Settlement Class members *identically.* Any eligible Settlement Class Member who used Defendants' web properties during the class period is entitled to a uniform cash award. To make a claim, a Settlement Class Member need only complete a claim form attesting that he or she visited the Informational Websites, and was either (a) a resident of Massachusetts, and/or (b) received medical care in Massachusetts at any of the Defendant health-care providers. No further proof, verification, or individualized allocation is necessary. Any patient who completes a valid claim form will be entitled to a proportional share, up to $100 per claim. No Settlement Class members receive special treatment, except as specifically explained regarding "Service Awards" to Plaintiffs who have participated in the case.

D. The Requested Service Awards Are Reasonable.

Plaintiffs seek service payments for Plaintiff Class Representatives who have participated in the litigation, appeared at mediation, and provided written discovery responses. The total requested service awards constitute 0.0019% of the total settlement value, including attorneys' fees and expenses. In light of the small percentage of the settlement fund that the monies represent and the sensitive nature of their role as class representatives in a privacy case, Plaintiffs respectfully request that the incentive awards be approved. Courts recognize that the risk, time, and dedication that an individual devotes to a lawsuit that inures to the common benefit of others warrant a service award above what other settling plaintiffs receive. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) ("approving] incentive awards in the amount of $8,000 for each named consumer Plaintiff, $9,000 for each named consumer organization, and $14,000 for each named [third party payor] Plaintiff that participated in the litigation"); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 352 (D. Mass.), *aff'd*, 809 F.3d 78 (1st Cir. 2015) (approving incentive awards of $2,500 and $1,500 from a $3,750,000

settlement); *Carlson v. Target Enter., Inc.*, 447 F. Supp. 3d 1, 5 (D. Mass. 2020) (granting an incentive award of $7,500.00 from a $2,275,000 settlement).

Given the importance of the assistance provided by Plaintiffs, these service awards are eminently reasonable.

E. The Claims Administrator Should Be Paid its Fees and Expenses for Providing Notice and Administering the Settlement

As set forth above, the Class Notice was disseminated in the manner prescribed by this Court pursuant to the Preliminary Approval Order. To date, Angeion has been responsible for the following: (a) distributing the Class Notice by mail; (b) establishing and maintaining a settlement website and toll-free phone number; (c) receiving and logging claim forms and objections, (d) researching and updating addresses through skip-traces and similar means; (e) answering questions from the Class Members; and (f) reporting on the status of claim forms and objections.

Going forward, Angeion will continue to receive Claim Forms and process them through the supplemental notice plan, maintain the website and toll-free number, and field questions from Class Members. Having provided these services to the Class, and in contemplation of its future services, Angeion should be paid for its total expected costs of $1,496,933. Furthermore, as Angeion's services benefitted the entire Class, the Claims Administration costs should be deducted from the common fund.

CONCLUSION

The settlement presented is a fair, reasonable, and adequate settlement. Plaintiffs, therefore, respectfully request that the Court approve the settlement by executing the provided order, Exhibit A, in whole and without delay.

Respectfully submitted,

JOHN DOE and JANE DOE,
By counsel,

/s/ Jason O. Barnes

Jason O. Barnes, Esq. BBO #57583
SIMMONS HANLY CONROY
112 Madison Avenue, 7th Floor
New York, NY 10016
(618) 259-2222
jaybarnes@simmonsfirm.com

DATED: January 6, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served upon the attorney of record for each other party via e-filing on this 6th day of January 2022.

/s/ J. Michael Conley

J. Michael Conley

EXHIBIT 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE FACEBOOK INTERNET TRACKING LITIGATION

Case No. 5:12-md-02314-EJD

ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; GRANTING MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS; JUDGMENT

Re: Dkt. Nos. 254, 256

The Court previously granted a motion for preliminary approval of the Class Action Settlement between Plaintiffs and Defendant Meta Platforms, Inc., formerly Facebook, Inc., ("Defendant") on March 31, 2022. *See* Order Granting Mot. for Class Certification and Prelim. Approval of Class Action Settlement, Dkt. No. 241. As directed by the Court's preliminary approval order, Plaintiffs filed their motion for attorneys' fees, costs, and service awards on August 23, 2022. Dkt. No. 256. Thereafter, Plaintiffs filed their motion for final settlement approval on August 23, 2022. Dkt. No. 254. The Court held a hearing and took arguments from the parties and from the following objectors: plaintiffs in the *Klein* litigation appearing through counsel, Mr. Eric Alan Isaacson appearing on his own behalf, and Ms. Sarah Feldman and Mr. Cameron Jan appearing through counsel on October 27, 2022. *See* Dkt. No. 282.

Having considered the motion briefing, the terms of the Settlement Agreement, the objections and response thereto, the arguments of counsel, and the other matters on file in this action, the Court **GRANTS** the motion for final approval. The Court finds the settlement fair, adequate, and reasonable. The provisional appointments of the class representatives and class

counsel are confirmed.

The motion for attorneys' fees, expenses, and service Awards is **GRANTED**. The Court **ORDERS** that class counsel shall be paid $26,100,000 in attorneys' fees, $393,048.87 in litigation costs, and class representatives Plaintiffs Perrin Davis, Dr. Brian Lentz, Michael Vickery and Cynthia Quinn shall each be paid a service award of $5,000 and State Court Plaintiff Ryan Ung, Chi Cheng, and Alice Rosen shall each be paid a service award of $3,000.

I. BACKGROUND

A. Procedural History

Over a decade ago, on September 30, 2011, Class Members Perrin Aikens Davis, Petersen Gross, Dr. Brian K. Lentz, Tommasina Iannuzzi, Tracy Sauro, Jennifer Sauro, and Lisa Sabato filed an action (the "*Davis* Action") in this district on behalf of themselves and all others similarly situated against Defendant. *See Davis et al v. Facebook, Inc.*, No. 5:11-cv-04834-EJD. On February 8, 2012, the United States Judicial Panel on Multidistrict Litigation transferred a number of similar cases filed in other districts throughout the country for coordinated or consolidated pretrial proceedings. *See* Transfer Order, Dkt. No. 1. Shortly thereafter, the Court consolidated the actions and Plaintiffs subsequently filed the Consolidated Amended Complaint on May 17, 2012, followed by the Corrected First Amended Consolidated Class Action Complaint ("First Complaint") on May 23, 2012. *See* Dkt. Nos. 33, 35. The complaint alleges that Defendant knowingly intercepted and tracked users' internet activity on pages that displayed a "Like" button using "cookies," or small text file that the server creates and sends to the browser, which stores it in a particular directory on the user's computer in violation of state and federal laws.

Plaintiffs' First Complaint alleged violations of: (1) the Wiretap Act, 18 U.S.C. § 2510, *et. seq.*; (2) the Stored Communications Act ("SCA"), 18 U.S.C. § 2701, *et. seq.*; (3) the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; (4) invasion of privacy; (5) intrusion upon seclusion; (6) conversion; (7) trespass to chattels; (8) unfair competition or Cal. Bus, and Prof. Code § 17200, *et. seq.*; (9) the California Computer Crime Law ("CCCL") or Cal. Penal Code § 502; (10) the Invasion

of Privacy Act or Cal. Penal Code § 630; and (11) the Consumer Legal Remedies Act or Cal. Civ. Code § 1750. Dkt. No. 35. On November 17, 2017, the Court granted Defendant's motion to dismiss plaintiffs' third amended consolidated class action complaint and entered judgment against Plaintiffs. *See* Dkt. Nos. 174, 175. Plaintiffs appealed, and the Ninth Circuit affirmed the dismissal of Plaintiffs' claims for violation of the SCA, breach of contract, and implied covenant of good faith and fair dealing; it reversed and remanded Plaintiffs' remaining claims. *See* Dkt. No. 190. Defendant petitioned for writ of certiorari which the United States Supreme Court denied. *See* Dkt. No. 209. The parties provided notice of settlement shortly thereafter. *See* Dkt. No. 215.

The parties reached a settlement prior to class certification with the assistance of an experienced mediator, Mr. Randall Wulff. *See* Pl.'s Not. of Mot. & Mot. for Final Approval of Class Action Settlement with Supp. Mem. & Points of Auths., Dkt. No. 254. Section 2.1 of the Settlement Agreement defines the class as:

> All persons who, between April 22, 2010 and September 26, 2011, inclusive, were Facebook Users in the United States that visited nonFacebook websites that displayed the Facebook Like button.

("the Settlement Class"). *See* Settlement Agreement ("Agreement"), Dkt. No. 233-1 §§ 2.1(a), 2.1(b)-(f) (defining those who are excluded from the class definition). In its preliminary approval order, the Court conditionally certified the Settlement Class and provisionally appointed David A. Straite of DiCello Levitt Gutzler LLC and Stephen G. Grygiel of Grygiel Law LLC as Class Counsel; Plaintiffs Perrin Davis, Dr. Brian Lentz, Michael Vickery, and Cynthia Quinn (collectively, "Plaintiffs") and Ryan Ung, Chi Cheng, and Alice Rosen (collectively, "State Court Plaintiffs") as class representatives; and Angeion Group as the class administrator.[1] *See* Dkt. No. 241.

B. Terms of the Settlement Agreement

Under the terms of the Settlement Agreement, Defendant will pay $90,000,000 into a common settlement fund and sequester and expunge all improperly collected data without admitting

[1] The Settlement Agreement and Court Order also appoints Jay Barnes of Simmons Hanly Conroy LLC as Chair of the Plaintiffs' Counsel Executive Committee. Lead Counsel and Mr. Barnes together are referred to herein as "Class Counsel."

liability. Dkt. No. 254. This amount includes attorneys' fees and costs, the cost of class notice and settlement administration, and the class representatives' service awards.

1. Attorneys' Fees and Costs

Under the Settlement Agreement, Class Counsel agreed to seek up to $26,100,000 in attorneys' fees exclusive of hours for State Court Counsel, which would be paid out of any award approved by the court, and no more than $393,048.87 in litigation costs inclusive of costs incurred in the parallel action in the Santa Clara Superior Court.[2] Class Counsel represents that "State Court Counsel will not be making a separate fee or expense application here nor in the state court proceeding." Dkt. No. 256 at 18. The common settlement fund also includes a provision for $2,353,535.26 in settlement administration costs. Weisbrot Fourth Decl. Dkt. No. 281 ¶ 7. The Claims Administrator attests that Plaintiffs have incurred $1,655,782.54 in settlement administration costs and projects that it will incur an additional $697,752.72 in settlement costs. *Id.* at ¶¶ 5-6. In addition, service awards of $5,000 each will be paid to Plaintiffs Davis, Lentz, Vickery, and Quinn, and up to $3,000 each will be paid to the three State Court Plaintiffs Ung, Cheng, and Rosen in exchange for a general release of all claims against Defendant. Mot. for Attorneys' Fees & Costs, Dkt. No. 256 at 23.

2. Class Relief

After deductions from the common fund for fees, costs, and service awards, approximately $61,124,415.87 will remain to be distributed among the participating Class Members. Weisbrot Fourth Decl. ¶ 7. Class members will be paid an equal pro rata share of the Net Settlement Fund. Dkt. No. 256 at 8. Dividing this amount across the 1,558,805 valid claims submitted by participating Class Members yields an average recovery of approximately $39.21 per Class Member. Weisbrot Fourth Decl. ¶ 7. The Agreement provides that no amount will revert to Defendant. In addition, the Agreement provides for injunctive relief where Facebook will sequester and delete all data that was wrongfully collected during the Class Period. Dkt. No. 254.

[2] *Ung, et al. v. Facebook, Inc.*, Case No. 2012-1-CV-217244.

3. Unclaimed Payments

Pursuant to the Settlement Agreement, when checks mailed to participating Class Members are not redeemed or deposited within ninety (90) days, that Settlement Class Member waives and releases their claim for payment. Dkt. No. 233-1 § 4.5. Any unclaimed money in the Settlement Fund "(less any additional Administrative Costs) shall be distributed on an equal basis to each Authorized Claimant who received a Settlement Payment that was electronically processed or a check which was negotiated." *Id.* at § 4.7. At no point will any funds revert to Defendant or be paid to a *cy pres* recipient; rather, the Agreement provides that:

> To the extent that any second distribution is not administratively and economically feasible, as determined by the Settlement Administrator, or funds remain in the Net Settlement Fund for an additional one hundred (100) days after the second distribution, the Parties shall confer and present a proposal for treatment of the remaining funds to the Court.

Id. at § 4.8. In exchange for the settlement awards, Class Members will release claims against Defendant as set forth in the Settlement Agreement at Section 9.

C. Class Notice and Claims Administration

The Settlement Agreement is being administered by Angeion Group, LLC ("Angeion"). Following the Court's preliminary approval and conditional certification of the settlement, Angeion provided direct notice via email to all reasonably identifiable Settlement Class Members. The "Notice Plan" includes a media campaign that uses "state-of-the-art targeted internet notice, social media notice, and a paid search campaign." Dkt. No. 233-1, Ex. 1B ¶ 12.

The Class Administrator established a settlement website (the "Settlement Website") at www.fbinternettrackingsettlement.com, a dedicated email address to field questions at info@fbinternettrackingsettlement.com. Weisbrot First Decl. Dkt. No. 255-1 ¶¶ 15-19. The Settlement Website includes the settlement notices, the procedures for Class Members to submit claims or exclude themselves, a contact information page that includes address and telephone numbers for the claim administrator and the parties, the Settlement Agreement, the preliminary approval order, claim form, and opt-out form. In addition, the motion for final approval and the application for attorneys' fees, costs, and service awards were uploaded to the website after they

were filed. The Class Administrator also operated a toll-free number for Class Member inquiries.

Class members were given until September 12, 2022, to object to or exclude themselves from the Settlement Agreement. Out of 1,558,805 total Class Members who submitted valid claims 1,374 persons filed timely requests to opt out of the Settlement Class.

A total of 2,054,346 claims were received by the administrator, of which 1,558,805 were accepted as valid. Weisbrot Fourth Decl. Dkt. No. 281-1 ¶ 4.

II. FINAL APPROVAL OF SETTLEMENT

A. Legal Standard

A court may approve a proposed class action settlement of a certified class only "after a hearing and on finding that it is fair, reasonable, and adequate," and that it meets the requirements for class certification. Fed. R. Civ. P. 23(e)(2). In reviewing the proposed settlement, a court need not address whether the settlement is ideal or the best outcome, but only whether the settlement is fair, free of collusion, and consistent with plaintiff's fiduciary obligations to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d at 1027 *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The *Hanlon* court identified the following factors relevant to assessing a settlement proposal: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceeding; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of Class Members to the proposed settlement. *Id.* at 1026 (citation omitted); *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

Settlements that occur before formal class certification also "require a higher standard of fairness." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). In reviewing such settlements, in addition to considering the above factors, a court also must ensure that "the settlement is not the product of collusion among the negotiating parties." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011).

B. Analysis

1. The Settlement Class Meets the Prerequisites for Certification

As the Court found in its order granting preliminary approval and conditional certification of the settlement class herein, the prerequisites of Rule 23 have been satisfied for purposes of certification of the Settlement Class, as discussed in more detail below. *See* Dkt. No. 241.

Likewise, the *Churchill* factors are satisfied. *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). This case was hard-fought. The parties engaged in both discovery and substantive motion practice (three rounds of motions to dismiss), which ultimately disposed of Plaintiffs' claims. Plaintiffs successfully appealed to the Ninth Circuit and developed data privacy precedent in the process. Defendant went to great lengths to shield itself from Plaintiffs' claims and subsequently petitioned the Supreme Court for writ of certoriari, which was denied. While Plaintiffs believed in the strength of their case, Class Counsel recognized the substantial risk and cost in continued litigation, including novel and uncertain damage theories that may likely require a "battle of experts" to determine, for example, the value of the data and the extent of any damages calibrated to the Defendant's use of the data. Dkt. No. 254 at 12–15. Counsel also pointed to other considerations, such as obtaining class certification and "[a] fourth Motion to Dismiss, discovery, litigation class certification, summary judgment, trial and appeals would have consumed many more years, involving tremendous time and expense of the parties and the Court." *Id.* at 14.

Only after the Supreme Court denied Defendant's petition—almost eleven years after this action was initiated—did the parties agree to mediate. The parties negotiated at arms-length; they spent three days in mediation and six months in informal settlement discussions. This settlement fund constituted the seventh largest monetary settlement of its kind for data privacy cases at the time of settlement. Most significantly, however, the Settlement Agreement provides injunctive relief whereby Defendant must expunge the data at issue to the benefit of all Class Members, regardless of whether they filed a claim, opted out, or objected to the Settlement.

2. Adequacy of Notice

A court must "direct notice [of a proposed class settlement] in a reasonable manner to all

class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "The class must be notified of a proposed settlement in a manner that does not systematically leave any group without notice." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982). Adequate notice requires: (i) the best notice practicable; (ii) reasonably calculated, under the circumstances, to apprise the Class members of the proposed settlement and of their right to object or to exclude themselves as provided in the settlement agreement; (iii) reasonable and constitute due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) meet all applicable requirements of due process and any other applicable requirements under federal law. Phillips *Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

The Court found that the parties' proposed notice procedures provided the best notice practicable and reasonably calculated to apprise Class Members of the settlement and their rights to object or exclude themselves. Dkt. No. 241. Pursuant to those procedures, the Class Administrator provided direct email notice to all reasonably identifiable Settlement Class embers, combined with a media campaign that used targeted internet notice, social media notice, and a paid search campaign. Weisbrot First Decl. Dkt. No. 255-1 ¶ 5. Angeion established a settlement website (www.fbinternettrackingsettlement.com), a dedicated email address to field questions (info@fbinternettrackingsettlement.com.), and a toll-free hotline (1-844-665-0905) dedicated to the settlement. *Id.* ¶¶ 15-19.

The first round of notice was sent to 114,078,891 Class Members' email addresses and 86,075,107 of those emails were successfully delivered. *Id.* ¶ 9. The media campaign notice ran for four weeks and created 377,909,804 impressions. *Id.* ¶ 11. At the hearing, Mr. Weisbrot (the CEO of Angeion) reported that the media campaign reached slightly over 80% of all adults in the U.S. who are 18 years of age or older in addition to the 99% of all Class Members who were reached

directly. *See also* Weisbrot First Decl. ¶ 25. Angeion also employed a "claims stimulation package" which consisted of sponsored listings on two class action settlement websites, such as www.topclassactions.com and www.classaction.org, and utilized active listening on Twitter to monitor Twitter traffic for discussion of the settlement and to provide notice and answer questions on Twitter as appropriate. *Id.* ¶ 12. In addition, Angeion sent email reminder notices to the 86,075,105 Class Members who had successfully received the first notice, extended the paid search campaign, and utilized a banner advertisement campaign for a month. Weisbrot Second Decl. ¶ 5.

The Court finds that Plaintiffs' notice meets all applicable requirements of due process and is particularly impressed with Plaintiffs' methodology and use of technology to reach as many Class Members as possible. Based upon the foregoing, the Court finds that the Settlement Class has been provided adequate notice.

3. The Settlement Is Fair And Reasonable

As the Court previously found in its order granting preliminary approval, the *Hanlon* factors indicate the settlement here is fair and reasonable and treats Class Members equitably relative to one another. Dkt. No. 241.

The reaction of the class was for the most part positive; there were very few objectors and opt-outs relative to the size of the Settlement Class. There were a total of 9 objectors and 1,374 opt-outs as of the September 12, 2022 deadline. These objections and opt-outs constitute a small fraction of the approximately 1,558,805 total Class Members who submitted valid claims by September 22, 2022. "[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1043 (N.D. Cal. 2008) (citation omitted); *see also Churchill Vill.*, 361 F.3d at 577 (holding that approval of a settlement that received 45 objections (0.05%) and 500 opt-outs (0.56%) out of 90,000 class members was proper).

In its preliminary approval order, the Court approved the proposed plan of allocation. Dkt.

No. 241. That plan is straightforward; all Settlement Class members are entitled to equal cash payment, and payments will be based on final claims rates and the size of the Settlement Fund less fees and expenses. *Id.* at 17. The Court finds the plan of allocation to be fair and reasonable and to treat Class Members equitably and therefore approves the plan of allocation.

4. Objections

The Court received written objections from nine (9) objectors in total, eight (8) of which were submitted by or on behalf of the following individuals: (1) Martin Suroor Corrado; (2) Michael E. Colley, (3) Edward W. Orr, (4) Eleni Gugliotta, (5) Austin Williams, (6) Sarah Feldman, (7) Cameron Jan, and (8) Eric Alan Isaacson.[3] *See* Dkt. Nos. 234, 235, 248, 249, 251, 257, 262, 263, 265, 267, 269. All eight of these objectors oppose the final approval of the settlement. In addition, the Court received a ninth (9) objection from Class Members (the "Klein Objectors") in *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.) currently pending in the Northern District of California before Judge Donato. Dkt. No. 267. As discussed more below, the Klein Objectors do not oppose the fee request, and their opposition to the settlement is limited to the release of claims; they specifically seek clarification and assurance that the release language of the Settlement Agreement does not affect their antitrust litigation. *Id.*

Finally, no objector opposed Plaintiffs' request for reimbursement of litigation expenses nor the allocation plan. The Court has considered all objections and overrules them for the reasons stated on the record at oral argument and as further explained below. The Court addresses each objector's arguments in turn.[4]

[3] The docket also indicates that Ms. Anne Barschall filed a letter with the Court. *See* Dkt. No. 261. At the hearing Class Counsel clarified that Ms. Barschall did not object to either motion, and that her inquiry regarding alternative methods to file her claim has since been resolved. *See* Dkt. No. 273 at 6.

[4] The Court has reviewed and considered the objections from Mr. Corrado, Mr. Colley, and Mr. Orr. Dkt. Nos. 234, 235, 248, 249, 251, and 263. The Court finds that these objections raise issues that are not relevant to the scope of the Settlement nor the motions before the Court, and therefore overrules them.

a. Objector Gugliotta

Objector Ms. Eleni Gugliotta through her counsel objects to approval of the settlement on the grounds that it is not fair, reasonable, nor adequate. Dkt. No. 257. Ms. Gugliotta asserts that the settlement amount is too low compared to Defendant's yearly earnings and to other class action settlements which have yielded larger settlement amounts. *Id.* at 2–4. Ms. Gugliotta also contends that Class Counsel's notice is deficient because it failed to disclose the class size and it imposed an onerous amount of public disclosure of personal information to state an objection. *Id.* at 4. As to the former objection, Class Counsel responds that these metrics are not relevant to gauge reasonableness, but even so, Ms. Gugliotta relies on global current figures to make her comparison rather than using data limited to the U.S. and relevant to the class period time frame ending in September 2011. Dkt. No. 273.

Class Counsel contend that the settlement amount is reasonable because it is one of the top ten data privacy class action settlements ever and it is a "disgorge[ment] of any unjust enrichment earned on the data." Dkt. No. 254 at 3. In response to the latter objection, Counsel notes that the Class was in fact informed that there are approximately 124 million Class Members in Plaintiffs' motions—which would permit a Class Member to calculate what monetary and injunctive relief they are accepting to release the claims—and contends that the disclosure of basic information in objections is to reduce risk of fraud. *Id.* at 4.

Ms. Gugliotta also objects to the signature requirement, contending that an objector represented by counsel should not be required to sign the objection because it is logistically burdensome.[5] *Id.* at 7. The Court finds this argument unpersuasive. Accordingly, the Court overrules Ms. Gugliotta's objections, finding that the objection disclosure requirements are not so burdensome as to discourage objections; the settlement amount is fair, reasonable, and adequate; the

[5] Ms. Gugliotta also objects on the grounds that the Agreement does not identify a *cy pres* recipient and to the settlement being a "claims made" settlement. Dkt. No. 257 at 2, 5. Class Counsel clarifies that this is a common fund settlement, not a claims-made-settlement. Dkt. No. 273 at 5. Moreover, it is true that the Agreement does not identify a *cy pres* recipient because it provides a different method for handling unclaimed funds as discussed in *supra* Section B(2).

notice provided was not deficient; and the objection signature requirement is not logistically burdensome.

b. Objector Williams

Pro se Objector Austin Williams filed an objection contesting the settlement amount for providing inadequate compensation to victims. Dkt. No. 262. Mr. Williams expressed his concern that the settlement will not deter Defendant from unlawfully collecting and using user data in the future because the settlement is such a small fraction of Facebook's annual revenue of $1.97 billion and $3.7 billion in 2010 and 2011 respectively. *Id.* at 1. In reference to the injunctive relief, Mr. Williams also expressed his doubt that the data could ever be fully deleted from existence despite Defendant's promise to expunge the data pursuant to the Agreement. *Id.* at 2.

Class Counsel responds that, like Ms. Gugliotta, Mr. Williams relies on Facebook's global revenue during the years at issue, rather than limiting it to the United States, and that he fails to explain why gross revenues rather than net profits should be used in this case "where the Ninth Circuit used an unjust enrichment measure of damages, which is measured by net profits." Dkt. No. 273 at 7. Regarding Mr. Williams' deletion of data concern, Class Counsel notes that Defendant provided a sworn declaration stating that it will sequester and delete the data and there is no reason to assume that Defendant will defraud the Court. Dkt. No. 262 at 2.

Mr. Williams also objects to approval of the settlement on the grounds that either further discovery or trial could have uncovered additional wrongdoing. Dkt. No. 262 at 2. The Court acknowledges Mr. Williams' concerns but is not persuaded by speculation, particularly where substantial and exhaustive discovery has already occurred. For the foregoing reasons, the Court overrules Mr. Williams' objection.

c. Objectors Feldman and Jan

Objectors Sarah Feldman and Cameron Jan jointly object to approval of the settlement and the requested fees and expenses by and through their counsel.[6] Dkt. No. 265. First, Feldman and

[6] Feldman and Jan oppose the settlement agreement for two other reasons. First, they oppose

Jan oppose the settlement fund as not fair, reasonable, nor adequate because the settlement amount is well below the recoverable statutory damages. They contend that the settlement amount is not justifiable compared to the potentially recoverable $1.24 trillion in statutory damages according to their calculations, which they obtained by multiplying the $10,000 minimum statutory damages recoverable per Class Member by the 124 million Class Members. *Id.* at 10–11. Feldman and Jan assert that Plaintiffs were required to provide a calculation of the potential class recovery if Plaintiffs had fully prevailed on each of their claims and a justification of any such discount. *Id.*

Class Counsel responds that the real measure of damages is closer to $900 million in consideration of the Supreme Court's dicta in *State Farm*, reasoning that while there is no rigid benchmark, statutory damages would likely be capped at a multiplier of ten. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410, 424–26 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process."); Dkt. No. 273 at 9. Feldman and Jan acknowledge that a trillion-dollar recovery is unlikely and that Class Members could reasonably expect recovery of up to $900 million if the Court were to regard statutory damages as punitive damages but nonetheless assert that the settlement amount is indefensible. Plaintiffs argue that settlement is reasonable because it is a complete disgorgement of all net profits earned on the allegedly improperly collected data. Dkt. Nos. 256 at 8. By Class Counsel's

---

service awards to non-Class member State Court Plaintiffs Chi Cheng and Alice Rosen because they allegedly "disavow[ed] class membership" since they were not Facebook users during the Class Period. Dkt. No. 265 at 20. Class Counsel responds that Objectors Feldman and Jan misread the complaint, as Cheng and Rosen pled that, at the time of filing the complaint in state court, they were nonFaceboook users—not that they did not have Facebook accounts during the relevant class period from April 22, 2010 to September 26, 2011. State Court Plaintiffs Cheng and Rosen are participants in this settlement based on their surrender of related claims in the state action. Dkt. No. 271 at 8–9.

Second, Feldman and Jan oppose the settlement for failing to comply with the Court's Procedural Guidance for Class Action Settlements which requires any explanation as to any differences between the claims to be released and the claims in the "operative complaint." Dkt. No. 265 at 10. Feldmand and Jan take issue with what constitutes the "operative complaint" here because, after two rounds of motion to dismiss, only Plaintiffs' breach of contract and breach of the covenant of good faith and fair dealing remained in the TAC. *See* Third Amended Complaint ("TAC"), Dkt. No. 157. However, the operative claims here are those identified by the Ninth Circuit on appeal.

calculations, the settlement fund is 10% of the potentially recoverable statutory damages; Feldman and Jan do not explain why 10% recovery plus injunctive relief is unfair under these circumstances. Dkt. No. 273 at 9.

Objectors Feldman and Jan also oppose the notice plan and contend that the low percentage of claims submitted by Class Members is, in part, due to Plaintiffs' failure to provide Class Members with the best notice practicable. Dkt. No. 265 at 14. At the hearing, Feldman and Jan's counsel contended that Plaintiffs should have utilized social media to effect notice. In their opinion, notice should have been provided via Facebook Messenger rather than through email. Class counsel responds that the take rate "is approaching 2%" which is a satisfactory claims rate for class sizes in the millions. Dkt. No. 273 at 9 (citing *In re TikTok, Inc., Consumer Privacy Litig.*, 565 F. Supp. 3d 1076, 1090 n.6 (N.D. Ill. Sept. 30, 2021) ("[a]ccording to the plaintiff's expert in *In re Facebook*, the average claims rate for classes above 2.7 million class members is less than 1.5%."); *Pollard v. Remington Arms Co.*, LLC, 320 F.R.D. 198, 214–15 (W.D. Mo. Mar. 14, 2017) (collecting cases that have approved settlements "where the claims rate was less than one percent"). During the hearing Mr. Weisbrot responded that Plaintiffs did in fact use social media (Twitter) to effect notice. *See also* Dkt. No. 255-1. Moreover, Mr. Weisbrot considered the plan very successful, as it reached 99% of Class Members directly and reached approximately 80% of *all* adults 18 years or older in the United States. (emphasis added).

For these reasons and the reasons discussed above, the Court finds the notice plan to be adequate.

d. Objector Isaacson

Pro se Objector Eric Allan Isaacson, who is an attorney and a member of the bar of this Court, objects to the settlement, the requested attorneys' fees, and the service awards. Dkt. No. 269 at 7. At the outset Mr. Isaacson objects to the filing of the complaints under seal (with publicly available redacted versions) as improperly depriving class members of information needed to evaluate the case. However, as Class Counsel points out, the Ninth Circuit affirmed the

sealing and the Court cannot now relitigate this issue. Dkt. No. 173 at 12.

Next, Mr. Isaacson objects on the grounds that monetary relief is too low because, according to his calculations, the settlement amount would yield approximately fifty cents per class member after deducting all fees and expenses. Dkt. No. 269 at 4. To reach this conclusion Mr. Isaacson divided the net settlement fund by all 124 million potential class members (rather than by the number of Settlement Class Members who submitted a valid claim). *Id.* Like Objectors Jan and Feldman, Mr. Isaacson focuses on the potential recoverable statutory damages under the Wiretap Act, finding the settlement fund lacking relative to these damages. *Id.* at 4–5. Class Counsel projected that Settlement Class Members would receive approximately $40 per person after factoring in the number of claims received and those still anticipated to be received. Dkt. No. 256 at 9. In terms of the potential statutory damages, Class Counsel reiterates that:

> [T]he maximum Wiretap Act recovery[,] assuming all the many remaining liability hurdles were cleared—would likely never pass Due Process muster, and their argument that $900 million in Wiretap Act damages is a reasonable figure (passing, for the moment, the problem that Wiretap Act damages are (i) discretionary in the first instance and (ii) "all or nothing" in nature") means that a $90 million settlement, if all allocable to the Wiretap Act damages, is 10% of the recoverable damages.

Dkt. No. 273 at 13–14. Class Counsel attests to having analyzed maximum recoveries in the "best day in court" scenario and weighing it against the barriers to achieving such a result before accepting settlement. *Id.*; *see* Dkt. No. 254 at 12–14 (describing factual and legal obstacles in litigating).

Next, Mr. Isaacson argues that Plaintiffs failed to provide information required by the Court's Procedural Guidance for Class Action Settlements ¶ 1)e in failing to provide a calculation of the potential class recovery if plaintiffs had fully prevailed on each of their claims and an explanation as to why the settlement amount differs. Dkt. No. 269 at 5. In addition, he contends that Counsel did not provide "'an estimate of the number and/or percentage of class members who are expected to submit a claim… the identity of the examples used for the estimate, and the reason for the selection of those examples.'" *Id.* (quoting Procedural Guidance ¶1)g). Class Counsel

explains that they provided this information in their motion for preliminary approval, which identified an estimated "take rate" under 5% consistent with FTC research, and in Angeion's declaration, which provided updated claim administration cost estimates based on 1%, 3% or 5% take rates. Dkt. No. 254 at 14.

Finally, Mr. Isaacson takes issue with the injunctive relief insofar as Plaintiffs have stated that "Defendant will delete the sequestered Settlement Class Data from Defendant's systems *to the extent not already deleted*."[7] Dkt. No. 269 at 5–6 (italicized for emphasis). Mr. Isaacson questions the meaning of this phrase and whether such data has already been deleted before settlement, in which case he believes that the injunctive relief would be of little value to Class Members. *Id.* At the hearing, Counsel clarified that regardless of whether Defendant had deleted some or all (though unlikely) of the allegedly improperly collected data, Defendant was not required to do so before it was imposed by the parties' settlement. The purpose of the injunctive relief was to ensure that the data would be completely expunged.

Accordingly, the Court overrules Mr. Isaacson's objections.

e. The *Klein* Objectors

Kupcho, Grabert and Klein (the "Klein Objectors") are lead plaintiffs in an antitrust case against Defendant's parent company presently before Judge Donato in *Klein v. Meta Platforms, Inc.*, Case No. 20-cv-08570 (N.D. Cal.).[8] Dkt. No. 267 at 1. The Klein Objectors do not oppose the fees award and only oppose the Settlement out of concern that the language of the release clause is too broad and may release claims such as those asserted in their litigation. The Settlement Agreement defines "released claims" as:

[A]ny and all claims, demands, actions, causes of action, lawsuits,

[7] Plaintiffs did not assign a monetary value on the injunctive relief in accordance with Ninth Circuit law, which disfavors attempting to assign monetary values on injunctions in common fund cases. Instead, in determining whether to depart from the 25% benchmark, Class Counsel asks that the fees be awarded based on the monetary component but also in consideration of the injunctive relief as a "relevant circumstance." Dkt. No. 273 at 14; *See Boeing*, 327 F.3d at 974.

[8] The Klein Objectors are the proposed representatives of the "Consumer Class," and their counsel are the court-appointed interim counsel for that class.

> ***arbitrations, damages, or liabilities, whether known or unknown***, legal, equitable, or otherwise that were asserted ***or could have been asserted in the Actions***, regarding the alleged collection, storage, or internal use by Facebook of data related to browsing history (such as IP address, Uniform Resource Locator (URL), referrer header information, and search terms) obtained from cookies stored on the devices of Facebook Users in the United States who visited nonFacebook websites that displayed the Facebook Like button during the Settlement Class Period . . . .

Dkt. 233-1 at 9–10, § 1.33 (emphasis added). They seek either (i) clarification that the Settlement is not intended to release or otherwise limit the *Klein* claims or (ii) insertion of language in the Settlement Agreement release clause that carves out their claims. *Id.* at 11–12. Class Counsel represents that the Settlement Agreement is not intended to release or otherwise limit the *Klein* claims and urges the Court to deny the Klein Objector's requested relief for a host of reasons, including Defendant's waiver of any argument that the release clause bars the *Klein* claims by failing to comply with the Procedural Guidance on overlapping cases. *Id.* at 2, 10 n.5, 12 (citing to Northern District of California Procedural Guidance for Class Action Settlements, Preliminary Approval ¶ 13). At the hearing, Defendant would not state on the record whether the release clause impacts the *Klein* litigation without having first reviewed the *Klein* pleadings.

The Court overrules this objection without determining whether the claims asserted in *Klein* are released by this Settlement Agreement.[9]

5. Certification Is Granted and the Settlement Is Approved

After reviewing all of the required factors, the Court finds the Settlement Agreement to be fair, reasonable, and adequate, and certification of the Settlement Class as defined therein to be proper. The Settlement Agreement specifies those are excluded from the Settlement Class. Dkt. No. 233-1 §§ 1.41, 2.1(b)-(f).

[9] Because Defendant has not substantively responded to whether the *Klein* action would be released under the Settlement Agreement at the hearing, the Court declines to rule on any issues of preclusion in this instance. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 747 (9th Cir. 2006).

III. MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE AWARDS

Attorneys' fees and costs may be awarded in a certified class action under Federal Rule of Civil Procedure 23(h). Such fees must be found "fair, reasonable, and adequate" in order to be approved. Fed. R. Civ. P. 23(e); *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). To "avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Id.* at 963. "[T]he members of the class retain an interest in assuring that the fees to be paid class counsel are not unreasonably high," since unreasonably high fees are a likely indicator that the class has obtained less monetary or injunctive relief than they might otherwise. *Id.* at 964.

Class counsel requests an attorneys' fee award of $26,100,000. Based on the declarations submitted by counsel, the attorneys' fees sought amount to approximately 29% of the percentage-of-the-fund. Defendants do not oppose the fee request.

The Court analyzes an attorneys' fee request based on either the "lodestar" method or a percentage of the total settlement fund made available to the class, including costs, fees, and injunctive relief. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The Ninth Circuit encourages courts to use another method as a cross-check in order to avoid a "mechanical or formulaic approach that results in an unreasonable reward." *In re Bluetooth*, 654 F.3d at 944–45 (citing *Vizcaino*, 290 F.3d at 1050–51.)

Under the lodestar approach, a court multiplies the number of hours reasonably expended by the reasonable hourly rate. *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016) ("[A] court calculates the lodestar figure by multiplying the number of hours reasonably expended on a case by a reasonable hourly rate. A reasonable hourly rate is ordinarily the 'prevailing market rate [] in the relevant community.'"). Under the percentage-of-the-fund method, courts in the Ninth Circuit "typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *In re Bluetooth*, 654 F.3d at 942 (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d

1301, 1311 (9th Cir. 1990)). The benchmark should be adjusted when the percentage recovery would be "either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers*, 904 F.2d at 1311. When using the percentage-of-recovery method, courts consider a number of factors, including whether class counsel " 'achieved exceptional results for the class,' whether the case was risky for class counsel, whether counsel's performance 'generated benefits beyond the cash settlement fund,' the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954–55 (9th Cir. 2015) (quoting *Vizcaino*, 290 F.3d at 1047-50. "[T]he most critical factor [in determining appropriate attorney's fee awards] is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

Using the percentage-of-the-fund method, the Court finds the attorneys' fees sought to be reasonable. Here, the settlement value is $90,000,000 and Class Counsel requests $26,100,000 in attorneys' fees, which equals 29%-of-the-fund. The Court may adjust the benchmark "'upward or downward to account for any unusual circumstances involved in the case.'" *In re Google St. View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1120 (9th Cir. 2021) (quoting *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002)). Class Counsel requests an upward adjustment of 4% above the 25% benchmark because Counsel created "new law" after appealing and arguing before the Ninth Circuit, and achieved an exceptional result for the Class in obtaining both monetary and injunctive relief.[10] Dkt. No. 256 at 22–23. *Ontiveros v. Zamora*, 303 F.R.D. 356, 373 (E.D. Cal. Oct. 8, 2014) ("[N]ovelty of class counsel's legal arguments may constitute 'special circumstances' justifying a departure from the benchmark" and concluding such upward departure was warranted (citing *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1250 (9th Cir. 1981)).

[10] *See In re Facebook, Inc. Internet Tracking Litig.*, 956 F. 3d 589, 608 (9th Cir. 2020). As of the date of filing motion for preliminary approval, Plaintiffs mentioned that the Ninth Circuit's ruling had been cited more than 50 times in reported cases in the past 18 months. Dkt. No. 232 at 3.

The injunctive relief is particularly meaningful here because the deletion of the data at issue benefits all Class Members, regardless of whether they filed a claim, opted out, or objected to the Settlement. The Court agrees therefore that both considerations warrant an upward adjustment from the benchmark

The Court also considered a cross-check of the percentage-of-the-fund using the lodestar method. The lodestar figure for post-consolidation hours is 9,233.98 hours at $863.02 rate for a total of $7,969,186.5. *See* Dkt. No. 255-27. Plaintiffs claim hourly rates that are commensurate with their experience and with the legal market in this district, citing to a range for attorneys, including associates, counsel, and partners across all firms as $300–$1,200 and paralegals at $125–$375 an hour. Dkt. No. 256 at 19. On the basis of these reasonable hourly rates and amounts, class counsel calculates the combined lodestar to be $7,969,186.5, which represents a multiplier of 3.28 exclusive of any pre-consolidation time. Dkt. No. 256 at 20. The Court finds that the hours claimed were reasonably incurred and that the rates charged are reasonable and commensurate with those charged by attorneys with similar experience in the market. The Court also finds that Class Counsel represented their clients with skill and diligence for over ten years on a contingent fee basis and obtained an excellent result for the class, taking into account the possible outcomes and risks of proceeding trial.

A. Objections

Objectors Gugliotta, Feldman, Jan, and Isaacson also opposed Plaintiffs' fee request in addition to opposing final approval of settlement.

Objector Gugliotta opposes the attorneys' fees award because it is based on the gross settlement fund rather than "on the value of the Net Settlement Proceeds or the amount of claims filed and paid." Dkt. No. 257 at 9. Gugliotta further asserts that the fee award disproportionately compensates Class Counsel despite what she considers inadequate benefits obtained for the class. *Id.* at 8. In response Class Counsel points out that Gugliotta does not offer any support for her contention that the fee request should be tethered to the take-rate of the class. The Court is

inclined to agree. Counsel sufficiently demonstrated how their advocacy, which spanned 11 years, warranted a 29% fee award after having successfully appealed the class's dismissed claims and developed new law in data privacy. For these reasons the Court overrules Gugliotta's objections.

Objectors Feldman and Jan challenge the $26.1 million in requested attorneys' fees (29% of the fund, which is greater than a 3x lodestar multiplier) and instead propose a 20% fee which is closer to a 2x lodestar multiplier, or $18 million. Dkt. No. 265 at 10. Class Counsel responds that courts will find an upward adjustment of the 25% benchmark to be appropriate in certain circumstances, particularly one that results in a change in the law, and that Defendants fail to justify a fee below the benchmark in this case. Dkt. No. 273 at 10. Feldman and Jan also contend that Plaintiffs lodestar crosscheck is insufficient because it provides only "summary numbers" in support of their claimed lodestar. Dkt. No. 265 at 11. However, this is not true—each attorney complied with the Northern District of California's Procedural Guidance for Class Action Settlements by filing declarations inclusive of their rates, hours, and summaries of their roles and time spent in the case. Dkt. No. 255. For these reasons the Court overrules Feldman and Jan's objections.

Finally, Objector Mr. Isaacson opposed the request for attorneys' fees and costs as excessive, particularly given what Mr. Isaacson perceives as poor results compared to potentially recoverable damages. Dkt No. 269 at 9. Mr. Isaacson contends that the multiplier on Class Counsel's lodestar (3.28) is far too high. *Id.* In response, Class Counsel refers back to their motion brief where Counsel cites to a number of cases supporting the reasonableness of the requested multiplier. *See e.g.*, *Sheikh v. Tesla, Inc.*, No. 17-cv-02193-BLF, 2018 WL 5794532, at *8 (N.D. Cal., Nov. 2, 2018); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Antitrust Litig.*, 768 F. App'x 651, 653 (9th Cir. 2019); *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007); *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *8. Mr. Isaacson also objects to the Settlement because it purportedly permits Class Counsel to be paid before Class Members receive payment. *Id.* at 12 (citing to *Hart v. BHH, LLC*, 334 F.R.D. 74, 77

(S.D.N.Y. 2020)). The Court declines to find the settlement unreasonable based on this argument.

Based on the foregoing, the Court finds an award of attorneys' fees in the amount of $26,100,000 to be fair, reasonable, and adequate and approves Class Counsel's request.

B. Costs Award

Class counsel is entitled to reimbursement of reasonable out-of-pocket expenses. Fed. R. Civ. P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys may recover reasonable expenses that would typically be billed to paying clients in non-contingency matters). Costs compensable under Rule 23(h) include "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, class counsel seeks reimbursement for litigation expenses, and provides records documenting those expenses, in the amount of $393,048.87. None of the objectors oppose Class Counsel's requested costs. Accordingly, the Court finds this amount reasonable, fair, and adequate and approves Class Counsel's request for litigation expenses.

C. Service Awards

The district court must evaluate named plaintiff's requested service award (also referred to as "incentive awards") using relevant factors including "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions . . . [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Staton*, 327 F.3d at 977. "Such awards are discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009). The Ninth Circuit has emphasized that district courts must "scrutiniz[e] all incentive awards [and service awards] to determine whether they destroy the adequacy of the class representatives." *Radcliffe v. Experian Info. Sols.*, 715 F.3d 1157, 1163 (9th Cir. 2013).

Here, the Plaintiffs came forward to represent the data privacy interests of more than 124

million others for over a ten year period with very little personally to gain. Plaintiff compiled documents, answered interrogatories in response to discovery requests, regularly corresponded with counsel telephonically and by email, and took the substantial risk of litigation which, at a minimum, involves a risk of losing and paying the other side's costs. Because the laws are not self-enforcing, it is appropriate to incentivize those who come forward with little to gain and at personal risk and who work to achieve a settlement that confers substantial benefits on others—particularly when these individuals dedicate ten years to doing so. The Court also considers "the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). Here, the aggregate $29,000 sought for seven (7) Service Awards constitutes a very small fraction (0.0004%) of the $90 million Settlement Fund. Dkt. No. at 256.

Objector Isaacson opposes the requested award for class representatives. First, he objects to the service awards as "illegal and inequitable" in common fund cases, citing to *Trs. v. Greenough*, 105 U.S. 527, 537–38 (1882) and *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 122 (1885). However, the Ninth Circuit squarely addressed this argument in *Apple*, where the objectors similarly asserted that such awards conflict with Supreme Court precedent. *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785 (9th Cir. 2022). The Ninth Circuit "previously considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant," and concluded that service or incentive awards are permissible so long as they are reasonable. *Id.*; *see also* Dkt. No. 273 at 13.

Mr. Isaacson ceded this point at the hearing but takes issue with the class representatives' declarations where at least two of the named plaintiffs indicate that they were "not even aware of the possibility of any Service Award" until after reviewing and approving of the Settlement Agreement. Davis Decl., Dkt. No. 255-16 ¶ 17; *see also* Lentz Decl., Dkt. No. 255-19 ¶ 18. Class Counsel responded that, as a matter of practice, they do not inform class representatives of service awards until *after* they have examined the Settlement Agreement in order to ensure that any award

would not influence the class representatives' acceptance of the terms. *See* Dkt. No. at 256 at 24. Mr. Isaacson therefore opposes the awards on the grounds that they could not have incentivized Plaintiffs Davis or Lentz since neither of them were aware of such awards at the time they agreed to represent the class. Dkt. No. 269 at 7.

In consideration of Objector Isaacson's point, the Court clarifies that in this case the awards are best characterized as a "service" award rather than an "incentive" award. This characterization more appropriately captures the purpose of the award in this instance. The class representatives are being rewarded for their service to the class. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) ("[Service or] incentive awards [] are intended to compensate class representatives for work undertaken on behalf of a class."). Moreover, service or incentive awards may also serve to incentivize the participation of future lead plaintiffs. The Court therefore overrules Mr. Isaacson's objection.

Accordingly, the Court approves the requested service award payment for all aforementioned Named Plaintiffs.

IV. CONCLUSION

Based upon the foregoing, the motion for final approval of class settlement is **GRANTED**. The motion for attorneys' fees, costs, and service awards is **GRANTED** as follows: Class Counsel is awarded $26,100,000 in attorneys' fees and $393,048.87 in litigation costs.

Plaintiffs Davis, Lentz, Vickery, and Quinn are granted a service award of $5,000 each, and State Court Plaintiffs Ung, Cheng, and Rosen are granted a service award of $3,000 each.

Without affecting the finality of this order in any way, the Court retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of this order and the Settlement.

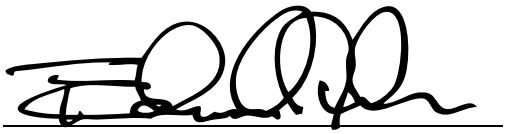
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that final judgment is **ENTERED** in accordance with the terms of the Settlement, the Order Granting Preliminary Approval of Class Action Settlement filed on March 31, 2022, and this order. This document will

constitute a final judgment (and a separate document constituting the judgment) for purposes of Rule 58, Federal Rules of Civil Procedure.

As provided in the Settlement Agreement, the parties shall file a post-distribution accounting in accordance with this District's Procedural Guidance for Class Action Settlements within 21 days after the distribution of the settlement funds and payment of attorneys' fees. The Court **SETS** a compliance deadline on **Friday, February 10, 2023** to verify timely filing of the post-distribution accounting.

IT IS SO ORDERED.

Dated: November 10, 2022



EDWARD J. DAVILA
United States District Judge