

1 Michael W. Sobol (State Bar No. 194857)
msobol@lchb.com
2 David T. Rudolph (State Bar No. 233457)
drudolph@lchb.com
3 Melissa Gardner (State Bar No. 289096)
mgardner@lchb.com
4 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
5 San Francisco, CA 94111-3339
Telephone: 415.956.1000
6 Facsimile: 415.956.1008

7 Rachel Geman
rgeman@lchb.com
8 Nicholas Diamand
ndiamand@lchb.com
9 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
10 New York, NY 10013-1413
Telephone: 212.355.9500
11 Facsimile: 212.355.9592

12 Hank Bates (State Bar No. 167688)
hbates@cbplaw.com
13 Allen Carney
acarney@cbplaw.com
14 David Slade
dslade@cbplaw.com
15 CARNEY BATES & PULLIAM, PLLC
519 West 7th Street
16 Little Rock, AR 72201
Telephone: 501.312.8500
17 Facsimile: 501.312.8505

18 *Attorneys for Plaintiffs and the Class*

19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA**

22 MATTHEW CAMPBELL, MICHAEL
HURLEY, on behalf of themselves and all
23 others similarly situated,

24 Plaintiffs,

25 v.

26 FACEBOOK, INC.,

27 Defendant.
28

Case No. 4:13-cv-05996-PJH

**PLAINTIFFS' NOTICE OF MOTION;
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; AND MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: April 12, 2017
Time: 9:00 a.m
Judge: Hon. Phyllis J. Hamilton
Place: Courtroom 3, 3rd Floor

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 12, 2017, at 9:00 a.m., in the Courtroom of the Honorable Phyllis J. Hamilton, United States District Judge for the Northern District of California, Courtroom 3, 1301 Clay Street, Oakland, California, 94612, Plaintiffs Matthew Campbell and Michael Hurley will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23, for an Order:

- A. Granting preliminary approval of the proposed Class Action Settlement Agreement (“Settlement”) entered into between the parties;¹
- B. Certifying the Settlement Class as defined in the Settlement;
- C. Appointing Class Representatives Matthew Campbell and Michael Hurley as Settlement Class Representatives of the proposed Settlement Class, extending the class period for the injunctive-relief class previously certified by the Court;
- D. Appointing current class counsel Lief Cabraser Heimann & Bernstein, LLP and Carney Bates & Pulliam, PLLC for the proposed Settlement Class;
- E. Staying all non-Settlement related proceedings in the above-captioned case (the “Action”) pending final approval of the Settlement; and
- F. Setting a Fairness Hearing and certain other dates in connection with the final approval of the Settlement.

This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the Settlement, including all exhibits thereto, the accompanying Joint Declaration of Class Counsel (“Joint Decl.”), the argument of counsel, all papers and records on file in this matter, and such other matters as the Court may consider.

¹ See Exhibit 1 to the Joint Declaration of Class Counsel (“Joint Declaration”).

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Dated: March 1, 2017

Respectfully submitted,

CARNEY BATES & PULLIAM, PLLC

By: /s/ Hank Bates

Hank Bates (State Bar No. 167688)
hbates@cbplaw.com
Allen Carney
acarney@cbplaw.com
David Slade
dslade@cbplaw.com
519 West 7th Street
Little Rock, AR 72201
Telephone: 501.312.8500
Facsimile: 501.312.8505

Michael W. Sobol
msobol@lchb.com
David T. Rudolph
drudolph@lchb.com
Melissa Gardner
mgardner@lchb.com
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: 415.956.1000
Facsimile: 415.956.1008

Rachel Geman
rgeman@lchb.com
Nicholas Diamand
ndiamand@lchb.com
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Telephone: 212.355.9500
Facsimile: 212.355.9592

Class Counsel

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Plaintiffs and Class Representatives Mathew Campbell and Michael Hurley respectfully submit for the Court's preliminary approval a proposed Class Action Settlement Agreement ("Settlement") resolving the above-captioned action (the "Action"), which alleges that Defendant Facebook, Inc. ("Facebook") intercepted the content of private Facebook messages, without consent, in violation of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510, *et seq.* ("ECPA") and Cal. Penal Code §§ 630, *et seq.* ("CIPA").

Pursuant to the terms of the Settlement, Facebook has agreed to substantial changes that bring Facebook's message processing practices in compliance with Class Counsel's view of ECPA and CIPA's requirements. Specifically, pursuant to the terms of the Settlement, Facebook has confirmed that the alleged unlawful conduct challenged in the operative Second Amended Complaint has ceased—namely, Facebook confirms that it no longer utilizes data from URLs within private messages to (1) generate recommendations to its users; (2) share user data with third parties or (3) increase "like" counter numbers on third party websites. In addition, Facebook has confirmed, as of the date of the Settlement, that it is not using any data from EntShares created from URL attachments sent by users in Facebook Messages in any public counters in the "link_stats" and Graph APIs. In addition, during the course of this litigation, Facebook made changes to its operative disclosures to its users, stating that it collects the "content and other information" that people provide when they "message or communicate with others,"—thereby further explaining the ways in which Facebook may use that content. Facebook has also agreed to display additional educational language on its United States website for Help Center materials concerning its processing of URLs shared within messages.

Pursuant to the Settlement, absent Settlement Class Members would release claims for declaratory, injunctive, and non-monetary equitable relief only; claims for monetary damages are specifically excluded from the proposed Settlement Class Members' Released Claims. Attorneys' fees and costs and service awards to the Class Representatives that may be awarded by the Court will be paid by Facebook. The Settlement addresses each of the challenged practices

1 that the Court certified for class treatment, achieves the goals of the litigation as articulated in the
2 operative Second Amended Complaint, protects the interests of any Settlement Class Members
3 that may not be remedied through injunctive relief, and falls well within the “range of
4 reasonableness” applicable at the preliminary approval stage.

5 The Settlement is the product of extensive arm’s-length negotiations between the parties
6 and their experienced and informed counsel. Settlement negotiations spanned over six months
7 and included multiple mediation sessions before highly respected and skilled mediators Cathy
8 Yanni and Randall Wulff. Prior to reaching a resolution, and through three years of hard-fought
9 litigation, Class Counsel thoroughly examined both the facts and rapidly-developing law involved
10 in this case, reviewed and analyzed tens of thousands of documents produced by Facebook, spent
11 hundreds of hours reviewing detailed technical documentation, deposed more than a dozen
12 witnesses and achieved certification of a class for injunctive relief. Class Counsel possess a firm
13 understanding of both the strengths and weaknesses of Class Representatives’ allegations and
14 Facebook’s potential defenses. Both prior to and during the negotiations, Class Counsel faced
15 formidable opposition from Facebook’s counsel who zealously defended their client’s position.
16 Both sides were well-represented by seasoned and informed counsel who vigorously pursued
17 their respective clients’ interests.

18 In sum, the Settlement achieves significant business practice changes, and benefits the
19 Settlement Class now, without the inherent risks of continued litigation and without requiring
20 Class Members to release any claims they may have for monetary relief. The Settlement was
21 only reached after months of discovery and arm’s-length negotiations and enjoys the support of a
22 neutral mediator who had an integral part in the settlement negotiations. Consequently, the
23 Settlement satisfies the criteria for preliminary approval.

24 **II. OVERVIEW OF THE LITIGATION**

25 On December 30, 2013, Plaintiffs Matthew Campbell and Michael Hurley filed a class
26 action complaint in the United States District Court for the Northern District of California
27 asserting claims under the Electronic Communications Privacy Act (“ECPA”; 18 U.S.C. §§ 2510
28 *et seq.*); the California Invasion of Privacy Act (“CIPA”; Cal. Penal Code §§ 630, *et seq.*); and

1 California’s Unfair Competition Law (“UCL”; California Business and Professions Code
2 §§ 17200, *et seq.*), alleging, *inter alia*, that Facebook “read[] its users’ personal, private Facebook
3 messages without their consent” for “purposes including but not limited to data mining and user
4 profiling,” and “generating ‘Likes’ for web pages” and “targeted advertising,” on behalf of
5 themselves and a proposed class of “[a]ll natural person Facebook users located within the United
6 States who have sent or received private messages where such message included URLs in the
7 content, from within two years before the filing of this action up through and including the date of
8 the judgment in this case” (Dkt. 1).

9 On January 21, 2014, David Shadpour filed another complaint in the United States District
10 Court for the Northern District of California alleging similar facts and asserting similar claims
11 under ECPA, CIPA and the UCL against Facebook (*see Shadpour v. Facebook, Inc.*, Case
12 No. 5:14-cv-00307-PSG (N.D. Cal.), Dkt. 1).

13 On April 15, 2014, the Court granted Plaintiffs’ Motion to Consolidate the Related
14 Actions (Dkt. 24), thereby consolidating the *Campbell* and *Shadpour* actions, and on April 25,
15 2014, the Class Representatives filed a Consolidated Amended Complaint asserting ECPA, CIPA,
16 and UCL claims on behalf of themselves and a proposed class of “[a]ll natural-person Facebook
17 users located within the United States who have sent or received private messages that included
18 URLs in their content, from within two years before the filing of this action up through and
19 including the date when Facebook ceased its practice” (Dkt. 25).²

20 On December 23, 2014, the Court issued an order granting in part and denying in part
21 Facebook’s motion to dismiss the Consolidated Amended Complaint, dismissing the claims under
22 CIPA § 632 and the UCL, but denying the motion to dismiss claims under ECPA and CIPA § 631
23 (Dkt. 43).

24 The parties engaged in almost two years of extensive discovery, including the production
25 of tens of thousands of pages of documents, fact and expert depositions of 18 witnesses (spanning
26 19 days of testimony), informal conferences and discussions, hundreds of hours reviewing

27 ² On October 2, 2015 David Shadpour voluntarily dismissed his claims, with prejudice, pursuant
28 to Federal Rule of Civil Procedure 41(a) (Dkt. 123).

1 detailed technical documentation, substantial discovery motion practice and the exchange of
2 hundreds of pages of written discovery requests and responses. A mediation between the parties
3 before Cathy Yanni of JAMS on August 19, 2015 was unsuccessful.

4 On May 18, 2016, the Court issued an order granting in part and denying in part Plaintiffs'
5 Motion for Class Certification, denying certification as to the proposed damages class under
6 Federal Rule of Civil Procedure 23(b)(3), but granting certification of the injunctive-relief class
7 under Federal Rule of Civil Procedure 23(b)(2). Specifically, the Court certified for class
8 treatment three specific alleged uses by Facebook of URLs included in private messages:
9 (1) Facebook's cataloging URLs shared in private messages and counting them as a "like" on the
10 relevant third-party website, (2) Facebook's use of data regarding URLs shared in private
11 messages to generate recommendations for Facebook users, and (3) Facebook's sharing of data
12 regarding URLs in messages (and attendant demographic data about the messages' participants)
13 with third parties. (Dkt. 192, at 3-5). In addition, the Court directed the Plaintiffs to file a Second
14 Amended Complaint "(1) revising the class definition to reflect the definition set forth in the class
15 certification motion, and (2) adding allegations regarding the sharing of data with third parties"
16 (*Id.* at 6). On June 7, 2016, the Class Representatives filed a revised, Second Amended
17 Complaint as ordered (Dkt. 196).

18 Following the class certification ruling, the parties engaged in additional discovery and
19 then agreed to further mediate their dispute; first in a second and third session before Cathy Yanni
20 on July 21, 2016, and July 28, 2016, and then in a fourth session with Randall Wulff on
21 December 7, 2016. In a Joint Status Report filed on December 23, 2016, the parties informed the
22 Court that they had reached a settlement-in-principle to resolve the Action. (Dkt. 222).
23 Thereafter, the parties memorialized the settlement in the Settlement Agreement executed on
24 March 1, 2017 and filed herewith as Exhibit 1 to the Joint Declaration of Michael W. Sobol and
25 Hank Bates ("Joint Declaration").

26 **III. THE PROPOSED SETTLEMENT TERMS AND SCHEDULE OF EVENTS**

27 The Settlement achieves and memorializes significant changes to Facebook's practices
28 related to the use of URLs in private messages that address each of the three challenged practices

1 certified for class treatment by the Court and detailed in the operative Second Amended
2 Complaint, bringing Facebook's practices related to the use of URLs in private messages within
3 compliance, in Class Counsel's view, of both ECPA and CIPA. Specifically, in consideration for
4 the dismissal of the Action with prejudice and the releases provided in the Settlement Agreement,
5 Facebook has agreed to the following:

6 **1. Cessation of the Three URL Uses Relevant to this Class Action**

7 In the Settlement Agreement, Facebook confirms that the following uses of data from
8 EntShares created from URLs sent in Facebook Messages during the Class Period have ceased, as
9 of the dates set forth below specific to each use:

- 10 • **“Like” Count Increment.** From the beginning of the Class Period until on or
11 about December 19, 2012, Facebook source code was engineered so that when an
12 anonymous, aggregate count was displayed next to a “Like” button on a third-party
13 web page, that count often included, *inter alia*, the number of times a URL related
14 to that particular website had been shared by Facebook users in Facebook
15 Messages and resulted in creation of an EntShare. On or about December 19,
16 2012, Facebook changed its source code such that the external count no longer
17 included the number of shares, by users, of URLs in private messages that resulted
18 in creation of EntShares. Settlement Agreement ¶ 40(a)(i).
- 19 • **Sharing of URL Data with Third Parties.** Facebook makes its “Insights” user
20 interface and related API available to owners of third-party websites that choose to
21 include Facebook tools or features, for purposes of providing anonymous,
22 aggregate data about interaction with and traffic to their websites. During certain
23 periods of time during the Class Period, this information included anonymous,
24 aggregate statistics and demographic information about users who shared links to
25 those sites across the Facebook platform. From the beginning of the Class Period
26 until on or about October 11, 2012, these statistics and demographic information
27 included information about users who shared URLs in Facebook Messages that
28 resulted in creation of EntShares. On or about October 11, 2012, Facebook

1 changed its source code such that it ceased including information about URL
2 shares in Facebook Messages that resulted in creation of EntShares (and attendant
3 statistics and demographic information) within Insights and its related API.

4 Settlement Agreement ¶ 40(a)(ii).

- 5 • **Use of URL Data to Generate Recommendations.** Facebook's
6 Recommendations Feed was a social plugin offered to developers that displayed a
7 list of URLs representing the most recommended webpages on that developer's
8 site. Over time, two different units of Facebook source code determined the list of
9 URLs that would appear in the Recommendations Feed for a given webpage at a
10 given time. One of those units of Facebook source code was the "PHP backend."
11 Although, during the Class Period, the PHP backend was not the primary system
12 determining the list of URLs that would appear in the Recommendations Feed, the
13 PHP backend served as a backup system if the primary system failed. The PHP
14 backend considered, *inter alia*, an anonymous, aggregate count of, *inter alia*, the
15 number of times a URL had been shared in a Facebook Message and resulted in
16 creation of an EntShare. On or about July 9, 2014, Facebook changed its code
17 such that it ceased utilizing the PHP backend as the backup system for its
18 Recommendations Feed. Settlement Agreement ¶ 40(a)(iii).
- 19 • **Use of EntShares created from URLs in Messages.** In addition, Facebook
20 confirms that, as of the date of execution of the Settlement Agreement, it is not
21 using any data from EntShares created from URL attachments sent by users in
22 Facebook Messages for: 1) targeted advertising; 2) sharing personally identifying
23 user information with third parties; 3) use in any public counters in the "link_stats"
24 and Graph APIs; and 4) displaying lists of URLs representing the most
25 recommended webpages on a particular web site. Settlement Agreement ¶ 40(b).
- 26 • **Disclosure Changes.** Facebook implemented enhanced disclosures after the filing
27 of this Action that benefited the Class. Specific to the private message function, in
28 January 2015, Facebook revised its Data Policy to disclose that Facebook collects

1 the “content and other information” that people provide when they “message or
2 communicate with others,” and to further explain the ways in which Facebook may
3 use that content. Settlement Agreement ¶ 40(c). Facebook has taken the position
4 that these changes—implemented during the course of this litigation—were
5 significant and transparent enough to establish consent to the practices complained
6 of in this action (or at minimum neutralize any further suggestion that Facebook
7 users were not aware of the practices complained of in this action).

- 8 • **Additional Explanatory Language.** Pursuant to the Settlement Agreement,
9 Facebook will display the following additional language, without material
10 variation, on its United States website for Help Center materials concerning
11 messages within 30 days of the Effective Date: “We use tools to identify and store
12 links shared in messages, including a count of the number of times links are
13 shared.” Facebook will make this additional language available on its United
14 States website for a period of one year from the date it is posted, provided however
15 that Facebook may update the disclosures to ensure accuracy with ongoing product
16 changes. Settlement Agreement ¶ 40(d).

17 In exchange for the foregoing consideration, the Action will be dismissed with prejudice
18 upon final approval of the Settlement, and the Settlement Class Members will thereby release all
19 claims which have been or could have been asserted against Facebook by any member of the
20 Settlement Class in this Action, with the caveat that the release provided under the Settlement
21 Agreement extends *solely* to claims for declaratory, injunctive, and non-monetary equitable relief.
22 No Settlement Class Member, with the exception of the Class Representatives, will release any
23 claim for monetary damages under CIPA or ECPA. Settlement Agreement, ¶¶ 44-49. In other
24 words, the class benefits and the class release parallel the contours of the class certified by the
25 Court. Additionally, Facebook has agreed not to take a position on an application by Class
26 Counsel for an award of \$3,890,000 in Attorneys’ Fees and Expenses (which represents a
27 negative Lodestar multiplier), and for Service Awards in the amount of \$5,000 to each of the
28 Class Representatives. Settlement Agreement, ¶¶ 57, 60.

1 Finally, pursuant to the Settlement Agreement, Facebook is obligated to serve notice of
 2 the Settlement Agreement that meets the requirements of 28 U.S.C. § 1715, on the appropriate
 3 federal and state officials no later than ten (10) days following the filing of this Settlement
 4 Agreement with the Court. Settlement Agreement ¶ 56. As the class claims in this Action only
 5 pertain to declaratory, injunctive, and non-monetary equitable relief and the proposed Class
 6 Settlement does not include any release of monetary claims, notice to Class Members was not
 7 required after the Court's May 18, 2016 order certifying the class pursuant to Fed. R.
 8 Civ. P. 23(b)(2) and is not required as part of the proposed Settlement. *See Wal-Mart Stores,*
 9 *Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011); *Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST,
 10 2015 U.S. WL 1248027, at *9 (N.D. Cal. Mar. 18, 2015) (“[E]ven if notified of the settlement,
 11 the settlement class would not have the right to opt out from the injunctive settlement and the
 12 settlement does not release the monetary claims of class members, [therefore] the Court
 13 concludes that class notice is not necessary.”); *In re Yahoo Mail Litig.*, No. 13-CV-4980-LHK,
 14 2016 WL 4474612, at *5 (N.D. Cal. Aug. 25, 2016) (“[B]ecause Rule 23(b)(2) provides only
 15 injunctive and declaratory relief, ‘notice to the class is not required.’”) (quoting in part *Lyon v.*
 16 *United States Immigration and Customs Enf’t*, 300 F.R.D. 628, 643 (N.D. Cal. 2014)); *Hart v.*
 17 *Colvin*, No. 15-cv-00623-JST, 2016 WL 6611002 at *9 (N.D. Cal. 2016); *Kim v. Space Pencil,*
 18 *Inc.*, No. C 11-03796 LB, 2012 WL 5948951 (N.D. Cal. 2012); *Kline v. Dymatize Enterprises,*
 19 *LLC*, No. 15-cv-2348-AJB-RBB, 2016 WL 6026330 at *6 (S.D. Cal. 2016); *Bee, Denning, Inc. v.*
 20 *Capital Alliance Group*, No. 13-cv-02654-BAS, 2016 WL 3952153 at *9 (S.D. Cal. 2016).

21 Consistent with the provisions of the Settlement, Plaintiffs respectfully propose the
 22 following schedule:

- 23 • Class Counsel’s motions for final approval and for attorneys’ fees, costs and
 24 service awards: 30 days after the Court’s order of preliminary approval;
- 25 • Objection Deadline: 60 days after the Court’s order of preliminary approval;
- 26 • Deadline for parties to file a response to any comments or objections by a Class
 27 Member: 74 days after the Court’s order of preliminary approval;
- 28 • Final Approval Hearing: at least 100 days after the filing of this motion for

preliminary approval and at least 81 days after the Court’s order of preliminary approval.

IV. CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS IS APPROPRIATE

The parties agree that for purposes of settlement only, the class certified by the Court on May 18, 2016 should be modified slightly to bring the end of the class period current to the date of execution of the Settlement and to explicitly include Facebook users located in United States territories. Accordingly, for the purposes of the provisional certification, the parties propose that the Settlement Class be defined as follows:

All natural-person Facebook users located within the United States and its territories who have sent, or received from a Facebook user, private messages that included URLs in their content (and from which Facebook generated a URL attachment), from December 30, 2011 to March 1, 2017.

These revisions to the class definition do not materially change the analysis for class certification pursuant to Rule 23(a) and Rule 23(b)(2) of a class for injunctive and declaratory relief. Accordingly, as discussed below, for the same reasons the Court previously held in its May 18, 2016 Class Certification Order (Dkt. 192, “Class Cert. Order”), the proposed Settlement Class meets the requirement of class certification set forth in Rule 23(a) and Rule 23(b)(2).

A. Rule 23(a) is Satisfied.

1. The Settlement Class Is Too Numerous to Permit Joinder.

A case may be certified as a class action only if “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). While there is no fixed rule, numerosity is generally presumed when the potential number of class members reaches forty (40). *Jordan v. Cnty. of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). In addition, “[b]ecause plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed and plaintiffs may rely on [] reasonable inference[s] arising from plaintiffs’ other evidence that the number of unknown and future members of [the] proposed [class ... is sufficient to make joinder impracticable.” *Arnott v. U.S. Citizenship & Immigration Servs.*, 290 F.R.D. 579, 586 (C.D. Cal. Oct. 22, 2012) (all but last alteration in original) (quoting

1 *Sueoka v. U.S.*, 101 F. App'x 649, 653 (9th Cir. 2004)).

2 Here, numerosity is readily satisfied. The total Facebook audience in the United States is
3 estimated to be more than 190 million.³ Even if only a small fraction of Facebook users
4 embedded a URL in a private message during the Class period, the numerosity requirement would
5 easily be met. Indeed, the Court made such an inference in granting class certification for
6 purposes of litigation. Class Cert. Order, at 13.

7 **2. This Action Presents Common Questions of Law or Fact.**

8 Rule 23(a)(2) requires that there be one or more questions common to the class. *See*
9 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); 1 Newberg § 3.10; *see also Wal-*
10 *Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011). Plaintiffs “need only show the
11 existence of a common question of law or fact that is significant and capable of classwide
12 resolution.” *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 592 (N.D. Cal. 2015) (citations omitted).
13 The Court has already held that “a single common question is sufficient” to satisfy Rule 23(a)(2),
14 and that commonality is established by “the mere fact that Facebook creates a share object every
15 time a message is sent with a URL.” Class Cert. Order at 15.

16 **3. Class Representatives’ Claims are Typical of Those of the Settlement**
17 **Class.**

18 Rule 23(a)(3) requires that “the claims and defenses of the representative parties are
19 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality does not
20 require total identity between representative plaintiffs and class members. *Armstrong v. Davis*,
21 275 F.3d 849, 868 (9th Cir. 2001). Rather, typicality is satisfied so long as the plaintiffs’ claims
22 stem “from the same event, practice, or course of conduct that forms the basis of the class claims,
23 and is based upon the same legal theory.” *Jordan*, 669 F.2d at 1322; *In re Juniper Networks Sec.*
24 *Litig.*, 264 F.R.D. 584, 589 (N.D. Cal. 2009) (“representative claims are ‘typical’ if they are
25 reasonably co-extensive with those of absent class members”) (citation omitted).

26 Here, the Class Representatives’ claims stem from the same common course of conduct as

27 _____
28 ³ <https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/>

1 the claims of the Class Members. Class Representatives and the Class Members contend that
2 they did not consent to Facebook’s processing of their electronic communications, which conduct
3 forms the basis for this suit. Facebook’s conduct is common to all Class Members and represents
4 a common thread of conduct resulting in injury to all Class Members. The injunctive and
5 declaratory relief achieved by the Settlement would apply to all Class Representatives and Class
6 Members equally. As the Court has already held, “Plaintiffs argue that they are users who have
7 sent private messages containing a URL link, and that Facebook intercepted the URL content of
8 their messages in the same manner that it did with the rest of the class’s messages,” and
9 accordingly, “the typicality requirement is met.” Class Cert. Order, at 16.

10 **4. Class Representatives and Their Counsel Will Fairly and Adequately**
11 **Protect the Interests of the Settlement Class Members.**

12 Rule 23(a)(4) requires that the representative plaintiffs will “fairly and adequately” protect
13 the interests of the class. The two-prong test for determining adequacy is: “(1) Do the
14 representative plaintiffs and their counsel have any conflicts of interest with other class
15 members?; and (2) will the representative plaintiffs and their counsel prosecute the action
16 vigorously on behalf of the class?” *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003);
17 *Hanlon*, 150 F.3d at 1020. Both prongs are satisfied here.

18 First, the Class Representatives’ interests are aligned with, and not antagonistic to, the
19 interests of the Settlement Class Members. Indeed, the Class Representatives and the Settlement
20 Class Members are equally interested in ensuring that Facebook’s treatment of, and practices
21 regarding, the content of their private communications are conducted in compliance with ECPA
22 and CIPA. *See Hanlon*, 150 F.3d at 1021 (adequacy satisfied where “each...plaintiff has the
23 same problem”). Accordingly, the Class Representatives will fairly and adequately protect the
24 interests of all Settlement Class Members.

25 Second, Class Counsel have extensive experience litigating and settling class actions,
26 including consumer cases throughout the United States. *See* Joint Decl., ¶¶ 17-22. Class Counsel
27 are well-qualified to represent the Settlement Class. In addition, Class Counsel, along with the
28 Class Representatives, have vigorously litigated this action in order to protect the interests of the

1 Settlement Class and maximize the relief obtained for all Settlement Class Members, as
2 evidenced by, *inter alia*, the terms of the proposed Settlement. See Joint Decl., ¶¶ 6-14, 23-27.

3 In granting class certification for purposes of litigation, the Court found “no indication
4 that either plaintiffs or their counsel has any conflict with the Class Members, nor any reason to
5 believe that they would not prosecute this action vigorously on behalf of the Class.
6 Accordingly...the adequacy requirement [is] met.” Class Cert. Order at 17. Since the Court’s
7 order granting class certification, Class Counsel have continued to vigorously litigate this action
8 and have further engaged in extensive settlement negotiations, further evidencing that
9 Rule 23(a)’s adequacy requirement remains satisfied.

10 **B. The Requirements of Rule 23(b)(2) are Satisfied.**

11 In addition to the requirements of Rule 23(a), at least one of the prongs of Rule 23(b) must
12 be satisfied. Here, the proposed Settlement Class satisfies Rule 23(b)(2), which permits a class
13 action if the Court finds that “the party opposing the class has acted or refused to act on grounds
14 that apply generally to the class, so that final injunctive relief or corresponding declaratory relief
15 is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).

16 Under identical circumstances, courts in this District have held that the requirements of
17 Rule 23(b)(2) are satisfied where “all emails sent from and to [an electronic communication
18 service provider’s] subscribers are subject to the same interception and scanning processes.” *In*
19 *re Yahoo Mail Litig.*, 308 F.R.D. at 598 (“*Yahoo*”). Like this Action, *Yahoo* dealt with an
20 electronic communication service provider’s common policy and practice of processing electronic
21 communications in a manner that allegedly resulted in interception and the extraction of message
22 content. *Id.* Where, as here, the plaintiffs sought “uniform relief” addressing commonly- and
23 consistently-applied message-scanning practices, the *Yahoo* court held that the requirements of
24 Rule 23(b)(2) were satisfied. *Id.* at 600.

25 In the instant matter, the Court has found the reasoning in *Yahoo* persuasive and adopted
26 same with regard to the facts of this case, finding that certification under Rule 23(b)(2)—for
27 injunctive and declaratory relief only—was proper. Class Cert. Order, at 27-29 (citing *Yahoo*,
28 308 F.R.D. at 598-601).

1 **C. Preliminary Approval of the Settlement is Appropriate.**

2 Public policy “strong[ly] ... favors settlements, particularly where complex class action
3 litigation is concerned.” *Pilkington v. Cardinal Health, Inc.*, 516 F.3d 1095, 1101 (9th Cir.
4 2008); *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class*
5 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

6 “[T]he decision to approve or reject a settlement is committed to the sound discretion of
7 the trial judge because he is exposed to the litigants and their strategies, positions, and proof.”
8 *Hanlon*, 150 F.3d at 1026. In exercising such discretion, the Court should give “proper deference
9 to the private consensual decision of the parties... [T]he court’s intrusion upon what is otherwise a
10 private consensual agreement negotiated between the parties to a lawsuit must be limited to the
11 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
12 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
13 whole, is fair, reasonable and adequate to all concerned.” *Hanlon*, 150 F.3d at 1027; *see also*
14 *Fed. R. Civ. P. 23(e)(2)*.

15 The proposed Settlement here satisfies the standard for preliminary approval because:
16 (a) it is within the range of possible approval; (b) there is no reason to doubt its fairness because it
17 is the product of hard-fought, arm’s-length negotiations between the parties and was only reached
18 after a thorough investigation by Class Counsel of the facts and the law; and (c) Class
19 Representatives and Class Counsel believe it is in the best interest of the Settlement Class.

20 **1. The Settlement Falls Within the Range of Possible Approval**

21 To grant preliminary approval of the proposed Settlement, the Court need only find that it
22 falls within “the range of reasonableness.” *Alba Conte et al., Newberg on Class Actions* § 11.25,
23 at 11-91 (4th ed. 2002). *The Manual for Complex Litigation (Fourth)* (2004) (“*Manual*”)
24 characterizes the preliminary approval stage as an “initial evaluation” of the fairness of the
25 proposed settlement made by the court on the basis of written submissions and informal
26 presentation from the settling parties. *Manual* § 21.632. Evaluating where a proposed settlement
27 falls within this spectrum entails focus “on substantive fairness and adequacy,” and weighing
28 “Plaintiffs’ expected recovery ... against the value of the settlement offer.” *Hendricks v. Starkist*

1 Co, No. 13-cv-00729-HSG, 2015 WL 4498083, at *6 (N.D. Cal. July 23, 2015) (quotation
2 omitted).

3 Here, consistent with the Court's May 18, 2016 Order certifying an injunctive relief class,
4 Plaintiffs sought classwide declaratory, injunctive, and non-monetary equitable relief under
5 ECPA and CIPA related to three specific uses by Facebook of URLs in private messages, as
6 detailed in the operative Second Amended Complaint. While Facebook has vigorously contested
7 its liability, the terms of the Settlement provide meaningful, targeted relief that addresses all three
8 URL uses alleged in the operative Second Amended Complaint in a manner that Class
9 Representatives contend brings Facebook's practices into compliance with Class Representatives'
10 view of both ECPA and CIPA.

11 In contrast to the tangible, immediate benefits of the Settlement, the outcome of continued
12 litigation, trial and potential appeal is uncertain and could add years to this litigation. Facebook
13 has vigorously denied any wrongdoing, and, absent settlement, Class Representatives anticipate
14 Facebook would defend this action aggressively at multiple, procedural steps prior to trial,
15 including a motion for summary judgment. While Class Representatives strongly believe in the
16 merits of their case, they recognize that the law is in relative infancy in the context of ECPA's
17 application to electronic messages, and this uncertainty presents at least some element of risk at
18 multiple, critical junctures in this Action. For instance, the parties have advanced conflicting
19 interpretations of certain elements of Class Representatives' ECPA claim, including the
20 definitions and effect of the terms "in transit" and "storage," and Class Representatives may face
21 the risk on appeal that the Ninth Circuit might agree with Facebook's interpretation of these
22 terms.

23 While Class Representatives firmly believe in the strength of their claims, and have
24 amassed substantial evidence in support of those claims through the discovery process, there is at
25 least some risk that, absent a settlement, Facebook might prevail in motion practice, at trial, or on
26 appeal, resulting in no relief to the Class. This weighs in favor of preliminary approval. *See, e.g.,*
27 *Rodriguez v. West Publishing Corp.*, 563 F.3d 963, 966 (9th Cir. 2009) (noting that the
28 elimination of "[r]isk, expense, complexity, and likely duration of further litigation," including,

1 *inter alia*, an “anticipated motion for summary judgment, and ... [i]nevitable appeals would likely
 2 prolong the litigation, and any recovery by class members, for years,” which facts militated in
 3 favor of approval of settlement); *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) (“[I]n any
 4 case there is a range of reasonableness with respect to a settlement—a range which recognizes the
 5 uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily
 6 inherent in taking any litigation to completion.”).

7 Ultimately, Facebook has agreed to provide the injunctive relief sought on behalf of the
 8 Settlement Class—namely, it has implemented and confirmed substantial changes to both its
 9 business practices and to its disclosures and Help Center materials, which Class Representatives
 10 contend bring Facebook’s business practices into compliance with their view of ECPA and CIPA.
 11 Similarly, the release obtained by Facebook only extends to Settlement Class Members’ claims
 12 for declaratory, injunctive, and non-monetary equitable relief. No Settlement Class Member,
 13 with the exception of the Class Representatives, will release any claim for damages. *See In re*
 14 *Yahoo Mail Litig.*, No. 13-cv-04980-LHK (N.D. Cal.) (ECF No. 182) (N.D. Cal. Mar. 15, 2016)
 15 (holding, under analogous circumstances, that a very similar result obtained on behalf of a class
 16 of email users and certified under Rule 23(b)(2) was within the range of possible approval).

17 In sum, the Settlement provides substantial, meaningful relief to all Settlement Class
 18 Members based on the strengths of their claims without delay and is within the range of possible
 19 approval, particularly in light of the above risks that Settlement Class Members would face in
 20 further litigation.

21 **2. The Settlement is the Product of Arm’s-Length Negotiations After a**
 22 **Thorough Investigation, Without a Trace of Collusion**

23 “Before approving a class action settlement, the district court must reach a reasoned
 24 judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion
 25 among, the negotiating parties.” *City of Seattle*, 955 F.2d at 1290. Where a settlement is the
 26 product of arm’s-length negotiations conducted by capable and experienced counsel, the court
 27 begins its analysis with a presumption that the settlement is fair and reasonable. *See* 4 Newberg
 28 § 11.41; *In re Heritage Bond Litig.*, No. 02-ML-1475-DT, 2005 WL 1594403, at *2 (C.D. Cal.

1 June 10, 2005); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980).

2 Here, the Settlement was reached after informed, extensive arm's-length negotiations.
3 First, the Settlement was reached after a thorough investigation into and discovery of the legal
4 and factual issues in the Action. In particular, before filing suit, Class Counsel conducted an
5 extensive investigation into the factual underpinnings of the practices challenged in the Action, as
6 well as the applicable law. In addition to their pre-filing efforts, Class Counsel engaged in
7 extensive discovery, including the review of tens of thousands of pages of documents, fact and
8 expert depositions of 18 witnesses (spanning 19 days of testimony), a detailed review (totaling
9 hundreds of hours) of highly technical documentation relevant to the private message function,
10 substantial discovery motion practice and the exchange of hundreds of pages of written discovery
11 requests and responses.

12 Second, the Settlement was reached only after the parties participated in three in-person
13 mediation sessions before experienced mediators Randall Wulff and Cathy Yanni as well as
14 multiple telephone conferences with the mediators. These mediation sessions were informed
15 through the exchange of confidential mediation statements, which discussed the strengths and
16 weaknesses of both Class Representatives' allegations and Facebook's potential defenses and
17 relevant documents related thereto. Throughout the mediation sessions, counsel vigorously
18 advocated for their respective clients' positions. Notwithstanding the contentious nature of the
19 mediation sessions, the parties were able to come to an agreement in principle with the assistance
20 of both mediators.

21 In sum, the Settlement was reached only after Class Counsel conducted an extensive
22 factual investigation and discovery into the Facebook's alleged misconduct and thoroughly
23 researched the law pertinent to Class Representatives' and Class Members' claims and
24 Facebook's defenses. Consequently, Class Counsel had a wealth of information at their disposal
25 before entering into settlement negotiations, which allowed Class Counsel to adequately assess
26 the strengths and weaknesses of the case and to balance the benefits of settlement against the risks
27 of further litigation. Nothing in the course of the negotiations or in the substance of the proposed
28 Settlement presents any reason to doubt the Settlement's fairness.

1 **3. The Recommendation of Experienced Counsel Favors Approval.**

2 In considering a proposed class settlement, “[t]he recommendations of plaintiffs’ counsel
3 should be given a presumption of reasonableness.” *Knight v. Red Door Salons, Inc.*, No. 08-
4 01520 SC, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009); *see also Linney v. Cellular Alaska*
5 *P’ship*, No. C-96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997). Here, Class
6 Counsel endorse the Settlement as fair, adequate, and reasonable. Joint Decl., ¶¶ 23-27.

7 As demonstrated herein and in each respective firm’s resume, Class Counsel have
8 extensive experience litigating and settling consumer class actions and other complex matters (see
9 Joint Decl., ¶¶ 17-22) and have conducted an extensive investigation into the factual and legal
10 issues raised in this Action (see Joint Decl., ¶¶ 6-14, 23-27). Using their experience and
11 knowledge, Class Counsel have weighed the benefits of the Settlement against the inherent risks
12 and expense of continued litigation, and they strongly believe that the proposed Settlement is fair,
13 reasonable, and adequate. The fact that qualified and well-informed counsel endorse the
14 Settlement as being fair, reasonable, and adequate weighs in favor of approving the Settlement.

15 **V. CONCLUSION**

16 For the foregoing reasons, Plaintiffs respectfully request that the Court do the following:

- 17 a. Grant preliminary approval of the proposed Class Action Settlement Agreement
18 (“Settlement”) entered into between the parties;⁴
- 19 b. Certify the Settlement Class as defined in the Settlement;
- 20 c. Appoint Plaintiffs as Settlement Class Representatives of the proposed Class;
- 21 d. Appoint Lief Cabraser Heimann & Bernstein LLP and Carney Bates & Pulliam
22 PLLC as Class Counsel for the proposed Settlement Class;
- 23 e. Stay all non-Settlement related proceedings in the above-captioned case (the
24 “Action”) pending final approval of the Settlement; and
- 25 f. Set a Fairness Hearing and certain other dates in connection with the final approval
26 of the Settlement.

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28 ⁴ *See* Exhibit 1 to the Joint Declaration of Michael W. Sobol and Hank Bates.

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Respectfully submitted,

CARNEY BATES & PULLIAM, PLLC

By: /s/ Hank Bates

Hank Bates (State Bar No. 167688)
hbates@cbplaw.com
Allen Carney
acarney@cbplaw.com
David Slade
dslade@cbplaw.com
519 West 7th Street
Little Rock, AR 72201
Telephone: 501.312.8500
Facsimile: 501.312.8505

Michael W. Sobol (State Bar No. 194857)
msobol@lchb.com
David T. Rudolph (State Bar No. 233457)
drudolph@lchb.com
Melissa Gardner (State Bar No. 289096)
mgardner@lchb.com
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: 415.956.1000
Facsimile: 415.956.1008

Rachel Geman
rgeman@lchb.com
Nicholas Diamand
ndiamand@lchb.com
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Telephone: 212.355.9500
Facsimile: 212.355.9592

Class Counsel

ATTESTATION

I, Michael W. Sobol, am the ECF user whose identification and password are being used in this filing. I hereby attest that Hank Bates has concurred in this filing.

/s/ Michael W. Sobol
Michael W. Sobol, Esq.