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14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16
 17 SAN JOSE DIVISION

18 CLRB HANSON INDUSTRIES, LLC d/b/a
 19 INDUSTRIAL PRINTING, and HOWARD
 20 STERN, on behalf of themselves and all others
 similarly situated,

21 Plaintiffs,

22 vs.

23 GOOGLE, INC.,

24 Defendant.
 25

Case No. C 05-03649 JW PVT

**PLAINTIFFS' RESPONSE TO CLASS
 MEMBER OBJECTIONS**

Date: September 14, 2009

Time: 9:00 a.m.

Place: Courtroom 8

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I. SUMMARY OF ARGUMENT

Plaintiffs respectfully submit this memorandum in response to (1) the Preliminary Objections to Proposed Settlement and Notice to Appear at Fairness Hearing, filed by Matthew Weiss (Docket Item No. 329; *see also* Docket Item No. 335); (2) Objection to Proposed Settlement, Notice of Appearance and Intent to Be Heard, filed by Randy R. Lyons and Chase Thompson (Docket Item No. 326); (3) the objection letter dated July 13, 2009, filed by Forrest Jenkins (Docket Item No. 331); and (4) the Objection and Demand to Include Harry Tootle as Additional Representative Plaintiff and to Award Compensation to Same (Docket Item No. 330) (collectively, the “Objections”). Plaintiffs’ response is supported also by Plaintiffs’ Motion for Final Approval of Class Action Certification and Settlement, filed concurrently herewith (“Motion for Final Approval”), and Plaintiffs’ Motion for Award of Attorneys’ Fees and Class Representative Incentive Compensation Awards, also filed concurrently herewith, along with the supporting declarations of Rachel S. Black, Lester L. Levy, and Markham Sherwood, also filed concurrently herewith. Representative Plaintiffs’ Counsel firmly believe that the Settlement, the attorneys’ fee and expense application, and the requested incentive compensation awards are fair and reasonable, and each has been approved by the Representative Plaintiffs.

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Plaintiffs submit that the Objections should be overruled because none of the objectors included the required proof demonstrating that each objector was an AdWords Advertiser and none raise a meaningful objection to the settlement terms, the requested award for attorneys’ fees and costs, or the requested incentive compensation award. As set forth in Plaintiffs’ Memorandum in support of its Motion for Final Approval, Representative Plaintiffs’ Counsel recommend that the Settlement be approved by this Court because the Settlement, which will result in substantial benefit to the Class, is fair, reasonable and adequate and is the result of extensive arm’s-length negotiations that took place over a period of nearly three months in a case that was intensely litigated for three and one-half years.

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Representative Plaintiffs’ Counsel also submit that their request for an attorneys’ fee award of \$5 million (plus accrued interest) plus actual expenses of \$147,599.50 is also fair and reasonable under the applicable legal standards and in light of the significant risks faced and the excellent result

1 achieved. The fee requested is more than fair and reasonable when considered under the applicable
2 standards and is well within the normal range of awards made in contingent fee matters of this type,
3 particularly in view of the outstanding result achieved, the quality of the work performed, and the
4 considerable risks attendant in bringing and pursuing this litigation.

5 Finally, Representative Plaintiffs' Counsel submit that the Court should overrule the objections
6 to their request for an incentive compensation award of \$20,000 to each of the two Representative
7 Plaintiffs. The requested incentive compensation award is also fair and reasonable and is intended to
8 compensate the Representative Plaintiffs for their efforts supporting this litigation since the inception
9 of the case in 2005, which included producing numerous documents, responding to numerous
10 interrogatories and requests for admission, and testifying at deposition, and for undertaking the risk
11 that their efforts would not produce a successful result.

12 **II. BACKGROUND**

13 For the Court's convenience, copied below is the Background set forth in Plaintiffs'
14 accompanying Memorandum in support of their Motion for Final Approval.

15 **A. Procedural and Factual Background of the Litigation**

16 Plaintiffs filed their original Class Action Complaint on August 3, 2005, in the Superior Court
17 of the State of California, County of Santa Clara, alleging causes of action against Google for unfair
18 competition, breach of contract, negligent misrepresentation, unjust enrichment, constructive trust,
19 breach of the implied covenant of good faith and fair dealing, fraud, and injunctive and declaratory
20 relief. (*See* Docket Item No. 1, Ex. A.) In preparation for filing the complaint, Representative
21 Plaintiffs' Counsel conducted an extensive factual investigation, including discussions with AdWords
22 Advertisers, reviewing numerous AdWords account records, and reviewing AdWords account
23 agreements, tutorials, and other public materials concerning the AdWords program. Declaration of
24 Lester L. Levy in Support of Plaintiffs' Motion for Final Approval of Class Action Certification and
25 Settlement, Plaintiffs' Motion for Award of Attorneys' Fees and Expenses and Class Representative
26 Incentive Compensation Award, and Plaintiffs' Response to Class Member Objections ("Levy Decl.")
27 ¶¶ 4, 6 (filed concurrently herewith). Representative Plaintiffs' Counsel also conducted an extensive
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1 legal investigation into the causes of action most appropriate based on their factual investigation and
2 the potential defenses that Google might assert. *Id.*

3 On September 12, 2005, Google removed the action from the Superior Court to this Court.
4 (Docket Item No. 1.) After Google filed its first motion to dismiss (*see* Docket Item No. 14), Plaintiffs
5 filed a First Amended Class Action Complaint alleging claims for breach of contract; breach of
6 implied covenant of good faith and fair dealing; unfair competition under the Unfair Competition Law
7 (“UCL”), CAL. BUS. & PROF. CODE § 17200, *et seq.*; false advertising under the False Advertising Law
8 (“FAL”), CAL. BUS. & PROF. CODE § 17500, *et seq.*; and unjust enrichment. (Docket Item No. 18.)
9 On January 3, 2006, Google filed a motion to dismiss Plaintiffs’ unjust enrichment claim. (Docket
10 Item No. 30.) Plaintiffs opposed the motion in briefs filed on February 2, 2006. (Docket Item Nos.
11 34, 35.) On April 12, 2006, the Court granted Google’s motion to dismiss while granting Plaintiffs
12 leave to amend. (Docket Item No. 46.)

13 On May 4, 2006, Plaintiffs filed their Second Amended Class Action Complaint (“SAC”), the
14 operative complaint in this matter. (Docket Item No. 47.) The SAC alleges five causes of action:
15 (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) UCL;
16 (4) FAL; and (5) unjust enrichment. (*Id.*) The SAC seeks damages, restitution, and injunctive relief to
17 remedy Google’s practices of (1) charging its AdWords advertisers up to 120% of their per day Daily
18 Budget on any given day (the “120% claims”) and (2) charging AdWords customers who paused their
19 campaigns more than their per day Daily Budget times the number of days their campaigns were not
20 paused during the billing period (the “pausing claims”).

21 Google moved unsuccessfully to dismiss Plaintiffs’ UCL claim as alleged in the SAC. (Docket
22 Item No. 52.) Google subsequently filed three separate motions for partial summary judgment.
23 (Docket Item Nos. 85, 202, 234). The Court dismissed with prejudice Plaintiffs’ second and fifth
24 causes of action for breach of the implied covenant of good faith and fair dealing and unjust
25 enrichment. Google also successfully argued that its practice of charging AdWords Advertisers up to
26 120% of their Daily Budget on any given day does not, in and of itself, constitute breach of contract.
27 The Court held that triable issues of fact existed as to whether Google’s practice of charging up to
28

1 120% of an AdWords Advertiser's per day Daily Budget violates the UCL and FAL and whether
2 Google's pre-September 2006 pausing practices constitute a breach of contract.¹

3 During the hearing on its most recent motion for summary judgment, Google represented to the
4 Court that it would be filing yet another motion for summary judgment to dismiss Plaintiffs' 120%
5 claims under the UCL and FAL. (See Docket Item No. 295.) Google indicated that it had newly
6 discovered evidence proving that Google had disclosed to potential advertisers during the AdWords
7 sign-up process that it may charge AdWords customers up to 120% of their per day Daily Budget on
8 any day in order to make up for underdelivery of ads on any other day during that same billing period.
9 Google provided Plaintiffs with copies of the purported AdWords sign-up screens, which contained
10 disclosures that raised issues as to Plaintiffs' ability to prove their 120% claims under the UCL and
11 FAL, particularly for members of the Class who signed up for AdWords prior to June 2005.

12 Based on this evidence, Plaintiffs intended to seek leave to file a Third Amended Complaint to,
13 among other things, dismiss their 120% claims under the UCL and FAL for those Class Members who
14 signed up for AdWords prior to June 2005, and to name a new class representative who had signed up
15 for AdWords after June 2005. Google indicated that it would oppose Plaintiffs' expected motion for
16 leave to file the Third Amended Complaint.

17 The Settlement was achieved after years of intense litigation, extensive briefing and pre-trial
18 discovery, one unsuccessful mediation, and arduous arm's-length negotiations. For three and one-half
19 years, Representative Plaintiffs' Counsel conducted an extensive investigation into Plaintiffs' claims.
20 Levy Decl. ¶¶ 4, 6. As part of this investigation, Plaintiffs propounded interrogatories and document
21 requests to Google and obtained hundreds of thousands of pages of documents produced by Google.
22 *Id.*; Declaration of Rachel S. Black in Support of Plaintiffs' Motion for Final Approval of Class Action
23 Certification and Settlement, Plaintiffs' Motion for Award of Attorneys' Fees and Expenses and Class
24

25
26 ¹ Plaintiffs' pausing claims are segregated into pre- and post-September 2006 claims because, in
27 September 2006, Google changed its practice of treating a paused campaign as underdelivered. (See
28 Docket Item No. 237 ¶ 6.) When Plaintiffs initially filed this lawsuit, Google treated a paused day as
an underdelivered (or shortfall) day for the month or budget period, and thus would use paused days to
absorb overdelivery on other days in the billing period. (*Id.*)

1 Representative Incentive Compensation Award, and Plaintiffs' Response to Class Member Objections
2 ("Black Decl.") ¶ 3 (filed concurrently herewith). Representative Plaintiffs' Counsel also conducted
3 depositions of key Google employees and defended Representative Plaintiffs in depositions conducted
4 by Google. *Id.*

5 On December 9, 2008, the Court set February 2, 2009, as the date for the close of all discovery.
6 (Docket Item No. 295.) The parties made diligent efforts to settle the action, including two face-to-
7 face meetings in December and January. (*See* Docket Item No. 306 ¶ 2.) During the January meeting,
8 the parties believed that the discussions had progressed to such a point that they agreed to request a
9 45-day moratorium for all litigation activities so they could focus on attempting to settle the action.
10 (*Id.* ¶ 3.) On January 8, 2009, the parties requested a 45-day continuance of, *inter alia*, the discovery
11 deadline. (Docket Item No. 305.) On January 23, 2009, the Court granted the parties' request in part,
12 setting March 2, 2009, as the close of all discovery. (Docket Item No. 308.) The parties negotiated a
13 settlement shortly thereafter (*see* Docket Item No. 310), and after several weeks of negotiation, they
14 agreed on the terms reflected in the Settlement Agreement in its current form on March 17, 2009. (*See*
15 Docket Item No. 315-2, also attached as Exhibit 1.)

16
17 **B. The Settlement Agreement**

18 Under the terms of the Settlement Agreement (Docket Item No. 315-2), Google has agreed to
19 settle the Class Members' claims on the following terms:

- 20
- 21 • Google has agreed to pay \$20,000,000, together with interest on said sum from March 27, 2009
22 (the "Settlement Proceeds"), in a combination of cash and AdWords Credits, as stated in the
23 proposed Plan of Allocation, inclusive of any Fee and Expense Award. Google has already
24 deposited the \$20 million into an escrow account, per the terms of the Settlement Agreement.
 - 25 • In addition to the Settlement Proceeds, Google has agreed to pay for all administrative costs
26 and expenses incurred in connection with providing notice to the Class and locating class
27 members, and will pay all fees and costs incurred by the Claims Administrator for
28 administering and distributing the Settlement Proceeds to the Class Members.
 - Representative Plaintiffs' Counsel successfully negotiated a distribution procedure such that
the Settlement Proceeds would be allocated to and delivered to Class Members without the
need for them to file proofs of claim.

1 Under the terms of the Settlement Agreement, Class Members who have an AdWords balance
2 due to Google that is greater than their settlement distribution will receive their distribution in the form
3 of AdWords Credits, which will offset amounts that the Class Member already owes to Google. *See*
4 Settlement Agreement ¶ 1.27. Class Members who have a balance due to Google that is less than the
5 Class Member's settlement distribution may elect to receive cash in lieu of AdWords Credits for the
6 amount that is in excess of the amount owed to Google. Class Members who have no balance due to
7 Google on their AdWords account will automatically receive their settlement distribution in cash.
8 Thus, under the terms of the Settlement, Class Members will either receive cash or the equivalent of
9 cash, in the form of a reduction of the amount already owed to Google. This is, therefore, not a
10 coupon settlement and Class Members are not required to submit a claim form to receive the benefits
11 of the Settlement.

12 **C. Release**

13 The Settlement Agreement contains a release, pursuant to which all Class Members, on behalf
14 of themselves and their respective heirs, executors, administrators, successors, assigns, employees,
15 officers, directors, attorneys, representatives, affiliates, agents, and any persons or entities they
16 represent, shall be deemed to release and forever discharge Google from all Released Claims (as
17 defined in the Settlement Agreement), and shall forever be barred and enjoined from prosecuting,
18 commencing, instituting, or asserting all or any of the Released Claims in any action or other
19 proceeding in any court of law or equity, arbitrational tribunal, administrative or other forum, whether
20 directly, representatively, derivatively, or in any other capacity against Google. *See* Settlement
21 Agreement ¶ 4.1.

22 **D. Notice to the Class**

23 Class notice was disseminated pursuant to this Court's Order Certifying Settlement Class and
24 Granting Preliminary Approval of Class Action Settlement, issued May 12, 2009. (Docket Item
25 No. 319.) On June 9, 2009, the Claims Administrator (Gilardi & Co., LLC) distributed via email to
26 1,129,685 members of the Class (as identified by Google) the Notice of Pendency and Proposed
27 Settlement of Class Action and Settlement Hearing ("Notice"), substantially in the form attached as
28 Exhibit 1 to the Court's May 12, 2009, Order. Declaration of Markham Sherwood ("Sherwood

1 Decl.”), filed concurrently herewith, ¶ 3 & Ex. A (Notice). Members of the Class whose email address
2 was no longer working or was unknown received the Notice via US mail. *Id.* ¶ 4. The Claims
3 Administrator also posted the Notice, the Preliminary Approval Order, the Settlement Agreement, and
4 a chart with the exclusion and objection deadlines on a website,
5 www.adwordscustomersettlement.com; and published a summary notice in *The Wall Street Journal*
6 and *USA Today*. *Id.* ¶¶ 5-6 & Ex. B (Summary Notice).

7 The Court-approved Notice fully comports with the requirements of Rule 23(c)(2)(B) and
8 (e)(1) and due process because it constitutes the best notice practicable under the circumstances. It
9 fairly apprises members of the Class of the essential terms of the Settlement and advises members of
10 the Class of their rights thereunder. It advises Class Members of the pendency of this action, the
11 proposed settlement, and Representative Plaintiffs’ Counsel’s application for a fee and expense award
12 and for an incentive compensation award to Representative Plaintiffs; describes the facts underlying
13 this action; states who members of the Class are; provides information regarding attorneys’ fees and
14 how Class Members may object to the proposed settlement; and clearly indicates contact information
15 for both Representative Plaintiffs’ Counsel and defense counsel. This is more than adequate notice
16 under the circumstances.

17
18 **E. Exclusion from the Class**

19 Class Members had the opportunity to request exclusion from the Class by submitting, by first-
20 class mail so that it was actually received by the Claims Administrator no later than July 14, 2009, a
21 written request for exclusion from the Class. A total of 75 members of the Class served requests for
22 exclusion.² Sherwood Decl. ¶ 7 & Ex. C.

23 **F. Class Member Objections**

24 Class Members who chose to object to the proposed Settlement were required to file and serve
25 Representative Plaintiffs’ Counsel by hand or by first-class mail on or before July 14, 2009, written
26 objections and copies of all briefs or other papers (including proof of the dates that the person was an
27 _____

28 ² The Claims Administrator received the requests of six members of the class after the July 14, 2009
deadline. Sherwood Decl. ¶ 7 & Ex. 3.

1 AdWords Advertiser). Four objections were served, none of which provides proof that the objector
2 was an AdWords Advertiser; nor do they specify the dates that the objectors were AdWords
3 Advertisers.

4 **G. Claims Administration**

5 Per the terms of the Settlement Agreement, after any Order granting final approval becomes
6 final, Google is to provide the Claims Administrator with AdWords account records sufficient for the
7 Claims Administrator to calculate the Settlement Distribution due to each Class Member under the
8 Plan of Allocation. Settlement Agreement ¶ 1.27. Class Members are not required to submit claim
9 forms to receive the benefits of the Settlement. The Claims Administrator will issue checks to all
10 Class Members who are not Active AdWords Advertisers and to those Active AdWords Advertisers
11 who elect to receive cash in lieu of AdWords Credits per the terms of the Settlement Agreement.
12 Google is responsible for distributing AdWords Credits. Within five business days of receiving
13 evidence that Google has distributed and applied the AdWords Credits to Active AdWords Advertisers
14 who did not elect to receive their distribution in cash per the Plan of Allocation, the Claims
15 Administrator is to transfer from the Escrow Account to Google the dollar amount of such AdWords
16 Credits. A proportionate share of the interest earned on such funds shall be added to the Cash
17 Settlement Proceeds to be distributed to the Class Members.

18 **H. Continued Jurisdiction**

19 The Settlement Agreement contemplates that the Court would retain continuing jurisdiction
20 over the Settlement Proceeds and the Parties for the purposes of (a) implementing and effectuating the
21 Agreement; and (b) construing, enforcing, and administering the Settlement Agreement, including the
22 distribution of the Settlement Proceeds to Authorized Claimants. *See* Settlement Agreement ¶ 4.2.

23 **III. THE OBJECTIONS TO THE PROPOSED SETTLEMENT SHOULD BE**
24 **OVERRULED**

25 Pursuant to the Court's Order dated May 12, 2009, Class members who chose to object to the
26 proposed Settlement were required to file and serve Representative Plaintiffs' Counsel by hand or by
27 first-class mail on or before July 14, 2009, written objections and copies of all briefs or other papers.
28 (*See* Docket Item No. 319.) The Court required objections to include proof of the dates that the person

1 was an AdWords Advertiser. (*Id.*) Four objections were served. None of the objections provide proof
2 of the dates that the objector was an AdWords Advertiser, and none raise a legitimate reason for
3 disapproving the Settlement, denying the requested award of attorneys' fees and expenses, or denying
4 the requested incentive compensation awards to the Representative Plaintiffs. Each objection,
5 addressed in turn below, should be overruled.

6 **A. The Weiss Objection Should Be Overruled**

7 On July 14, 2009, an objection to the Settlement was filed on behalf of objector Matthew
8 Weiss. (*See* Docket Item No. 329.) Although the objection provides an AdWords account number
9 and address for Mr. Weiss, it provides no proof or specificity of the dates that Mr. Weiss was an
10 AdWords Advertiser, as required by Court Order (indeed, no such proof exists because Mr. Weiss was
11 never an AdWords Advertiser). Rather, Mr. Weiss's objection is not supported by any declaration or
12 evidence whatsoever, and contains only a general averment that Mr. Weiss became an AdWords
13 Advertiser "between June 1, 2005 and February 28, 2009, inclusive." (Docket Item No. 329, at 2.) On
14 this basis alone, Mr. Weiss's objection should be overruled.

15 Mr. Weiss subsequently discovered that he is not a member of the Class at all and has no
16 standing to object to the Settlement.³ Mr. Weiss attempted to cure his lack of standing by filing a
17 "Notice of Scrivener's Errors" on August 6, 2009, which purports to (1) change the name of the
18 purported objector from "Matthew Weiss" to "Weiss & Associates, PC," and (2) add a new AdWords
19 Account number. (Docket Item No. 335.) This untimely attempt to substitute a new objector should
20 be denied.

21
22 Should the Court overlook the deficiencies in Mr. Weiss's and his law firm's purported
23 objection, the objection should be denied because it does not raise a legitimate reason for disapproving
24

25 ³ Mr. Weiss appeared for his deposition concerning his objection on August 6, 2009. At the
26 deposition, Mr. Weiss's counsel, Richard Abend, stated that Mr. Weiss, in preparing for his
27 deposition, noticed that the objection should have been filed on behalf of Weiss & Associates PC and
28 not on behalf of Mr. Weiss personally. Levy Decl. Ex. A (Weiss Dep. 3:12-18). Thus, per Mr.
Weiss's own admission, he is not a Class member and lacks standing to object to the Settlement. *See, e.g., Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) ("[N]on-class members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement.").

1 the Settlement, the requested award of attorneys' fees and expenses, or the Representative Plaintiffs'
2 incentive compensation awards. Weiss's attorney objected on the following grounds:⁴ (1) 99% of
3 Google's revenue is derived from its advertising programs, and its 2006 advertising revenues
4 amounted to \$10.492 billion; (2) the Court must make findings with regard to Plaintiffs' likelihood of
5 success at trial, and "[e]ven a thorough examination for the case file in and of itself would not allow a
6 Class Member to estimate plaintiffs' likelihood of success"; (3) the range of possible recoveries was
7 not disclosed and therefore "no determination as to the reasonableness of this proposed Settlement can
8 be made"; (4) the size of the class is not disclosed; (5) the number of overcharges per Class Member is
9 not disclosed; (6) the average cumulative value of each Class Member overcharge is unknown; (7) the
10 total amount of estimated damages is not disclosed; and (8) the Notice does not contain any
11 information supporting a fee award. (Docket Item No. 335.) None of these objections are valid.

12 As for the first objection, Google's revenue does not represent anything close to the potential
13 recovery of the Class. As detailed in Plaintiffs' Memorandum in support of Plaintiffs' Motion for
14 Final Approval, the Class Members' claims are likely limited to 20% overcharges for their first month
15 of advertisement, and pausing overcharges are likely limited to a small time period (prior to September
16 2006). *See also* Black Decl. ¶ 7. Thus, Google's annual advertising revenue bears absolutely no
17 relation to the Class Members' potential recovery.

18 As for the second objection, Representative Plaintiffs' Counsel have thoroughly analyzed this
19 case and have determined that the Settlement achieves an excellent result for the Class in light of the
20 real possibility of zero recovery if the case were litigated to a final resolution. Black Decl. ¶ 9. Mr.
21 Weiss, on the other hand, testified that he did not even read any of the filings in this action other than
22 the Class Notice, that he was unaware of Google's defenses or the strength of Plaintiffs' case, and that
23 he never read the AdWords Agreement or FAQs when he signed his law firm up to use Google
24 AdWords. Levy Decl. ¶ 96 & Ex. A (Weiss Dep. 8:4-6, 20:5-12, 30:15-32:4). He is also unaware of
25 whether the "attorneys who are handling this on my behalf or on Weiss & Associates' behalf I should
26 _____

27
28 ⁴ Mr. Weiss did not read his objection prior to it being filed. Levy Decl. Ex. A (Weiss Dep. 15:19-16:2).

1 say” obtained or reviewed any of the Court filings.⁵ *Id.* (Weiss Dep. 20:13–22). Yet he admitted that
2 from reading the Notice that Representative Plaintiffs’ Counsel did “a lot of work” and did a “good
3 job” withstanding Google’s summary judgment motions. *Id.* (Weiss Dep. 19:15–19).

4 Weiss’s objections concerning the lack of detail set forth in the Notice concerning class size
5 and overcharge amount are similarly without merit. Although it is true that the Court-approved Notice
6 did not detail the range of possible recoveries or the estimated recovery, the estimated size of the
7 Class, the number of overcharges per Class Member, or the average cumulative value of each Class
8 Member overcharge, it is not necessary to provide such detailed information in order for a notice to be
9 valid and a settlement to be approved. Indeed, Mr. Weiss cites no authority supporting the proposition
10 that this information must be stated in the Settlement Notice. To the contrary, Federal Rule of Civil
11 Procedure 23(c)(2)(B) provides, in pertinent part that, “For any class certified under Rule 23(b)(3), the
12 court must direct to class members the best notice practicable under the circumstances, including
13 individual notice to all members who can be identified through a reasonable effort.” FED. R. CIV. P.
14 23(c)(2)(B) (emphasis added). Proper notice should include:

- 15 • the essential terms of the proposed settlement;
- 16 • disclosure of any special benefits provided to the class representatives;
- 17 • information regarding attorney fees;

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21 ⁵ Mr. Weiss, who is an attorney himself, testified that his attorney, Mr. Sherwood, is co-counsel with
22 two other attorneys (Paul Rothstein and Albert Bacharach) who are purportedly representing Mr.
23 Weiss’s law firm in this objection. Levy Decl. ¶ 95 & Ex. A (Weiss Dep. 19:12–20:6). Mr. Weiss
24 testified that as part of his practice he works with Messrs. Rothstein and Bacharach objecting to class
25 action settlements. *Id.* (Weiss Dep. 25:23–26:1). Undoubtedly Mr. Weiss’s objection is at least in part
26 motivated by the unwritten agreement Mr. Weiss entered into with his counsel, pursuant to which he
27 personally will receive 25% of any fees generated by this objection. *Id.* (Weiss Dep. 34:11–17).

28 Notably, Messrs. Rothstein and Bacharach have also filed objections to class action settlements
with attorney Steve Miller, a Colorado lawyer who has filed an objection to the Settlement on behalf
of two persons located in Alabama. Levy Decl. ¶ 103. For example, in *TransUnion Privacy
Litigation* Messrs. Rothstein, Bacharach, and Miller were among a group of attorneys who filed
objections to the class action settlement. *Id.* When the objections were overruled by the Court as
meritless, the objectors filed Notices of Appeal and were paid fees to dismiss the appeal. *Id.* They
dismissed the appeal without any modification to the settlement. *Id.*

- 1 • the time and place of the hearing to consider approval of the settlement, and the method for
2 objecting to the settlement;
- 3 • explanation of the procedures for allocating and distributing settlement funds; and
- 4 • prominently display the address and phone number of class counsel and the procedure for
5 making inquiries.

6 *Id.* Details concerning potential damages and precise recovery are not required to be included in the
7 Class Notice. Indeed, individual recoveries from a proposed lump-sum settlement are often uncertain,
8 especially before opt-outs are known, and there is no requirement that a notice of settlement even
9 disclose the formula for calculating one's recovery. As the Eighth Circuit has held,

10 We do not agree with the objectors' contention that a mailed notice of
11 settlement must contain a formula for calculating individual awards. It
12 is well settled that the notice is not required to provide a complete source
13 of information. The weight of authority rejects the proposition that a
14 specific formula must always be included in the notice.

15 *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) (internal quotation marks omitted).

16 Here, the Court-approved Notice fully comports with the requirements of Rule 23(c)(2)(B) and
17 (e)(1) and due process because it constituted the best notice practicable under the circumstances. It
18 fairly apprised members of the class of the essential terms of the Settlement and advised members of
19 the class of their rights thereunder. Sherwood Decl. Ex. A. It advised Class members of the pendency
20 of this action, the basic terms of the proposed Settlement (and posted the actual Settlement Agreement
21 on the website), and Representative Plaintiffs' Counsel's application for a fee and expense award and
22 for an incentive compensation award to Representative Plaintiffs; described the facts underlying this
23 action; stated who members of the Class are; provided information regarding attorneys' fees and how
24 Class Members may object to the Settlement; and clearly indicated contact information for both
25 Representative Plaintiffs' Counsel and defense counsel. *Id.* It stated that Representative Plaintiffs'
26 counsel, in determining to settle the action, considered "the substantial expense and length of time
27 necessary to prosecute the litigation through complete pretrial discovery, trial, post-trial motions and
28 likely appeals, taking into consideration the significant uncertainties in predicting the outcome of this
complex litigation." *Id.* It states that Representative Plaintiffs' Counsel "concluded that it is in the
best interests of the Class to settle the Action" in light of the "uncertainty and risk of the outcome of

1 any litigation, especially complex litigation such as this, and the difficulties and risks inherent in the
2 trial of such an action.” *Id.* at p. 45. This is more than adequate notice under the circumstances.

3 Weiss’s final objection, that Representative Plaintiffs’ Counsel should have been required to
4 file their initial motion for fees “prior to the Notice being prepared so that the fee information could
5 have been included in the Notice,” is also without basis. (Docket Item No. 329, ¶ 17). The Notice
6 informed members of the class that Representative Plaintiffs’ Counsel would apply “for an award of
7 attorney’s fees from the Settlement Proceeds in an amount not exceeding \$5,000,000, plus a
8 proportionate share of the interest earned on the Settlement Proceeds, and for reimbursement of their
9 costs and expenses, not to exceed \$250,000.” Sherwood Decl. Ex. A. This provided sufficient
10 information for the Class Members to raise any objection to the requested award of attorneys’ fees and
11 expenses. Accordingly, Weiss’s objection should be overruled.

12
13 **B. The Lyons and Thompson Objection Should Be Overruled**

14 Attorney Steve Miller has filed an objection to the Settlement on behalf of purported Class
15 Members “Randy R. Lyons and Chase Thompson individually and d/b/a Etech Digital Playroom, Inc.
16 and Universal Pro Audio, LLC.” (Docket Item No. 326.) As with the Weiss objection, the Lyons and
17 Thomas objection is invalid on its face in that it fails to provide the addresses and account information
18 for the objectors and proof of the dates that each objector was an AdWords Advertiser, as required by
19 the Court’s Order. Instead, Mr. Miller’s clients merely aver “that they “believe[] they are identified as
20 Class Members” and that they “regularly advertised on Google during the class period.” (*Id.* at 2.)

21 Even if the Court overlooks this deficiency and considers the Lyons and Thompson objection
22 on its merits, the objection should also be overruled. Lyons and Thompson objected to the Settlement
23 because “Defendants have available information sufficient to identify all Class Members and to
24 compute with reasonable certainty the amount that each identified Class Member will ultimately
25 receive based on the allocation formula” but failed to disclose this information to the Class Members.
26 (*Id.* at 3.) Without citing to any supporting authority, Lyons and Thompson aver that “[i]t is
27 imperative to understanding whether a proposed Settlement is fair, adequate and reasonable that Class
28 Members be able to ascertain what their actual benefit will be and how this relates to actual

1 overcharges.” (*Id.*) As discussed above, this is wrong, and the Settlement should not be rejected on
2 this basis. *See Petrovic*, 200 F.3d at 1153.

3 Lyons and Thompson also complain that the Notice does not give members of the class
4 “sufficient information regarding the terms of the settlement and have succeeded in making the
5 settlement so opaque and complex as to not be fully understood.” (Docket Item No. 326, at 4.) This
6 argument is also without merit. The Court-approved Notice provided details concerning the precise
7 terms of Settlement, settlement calculation and distribution, and provided an email address and contact
8 information for Representative Plaintiffs’ Counsel should any member of the Class have questions
9 concerning the proposed Settlement. Sherwood Decl. Ex. A. Indeed, Representative Plaintiffs’
10 Counsel received numerous telephone and email inquiries. Black Decl. ¶ 14.

11 Without providing any detail or reasoning, Lyons and Thompson object to the requested
12 attorneys’ fees “as being excessive” and to the requested representative fee “as being excessive.”
13 (Docket Item No. 326, at 4.) These conclusory objections should also be overruled. As explained in
14 detail in Plaintiffs’ Memorandum in support of their Motion for an Award of Attorneys’ Fees and
15 Expenses, the requested award of attorneys’ fees and expenses are well within the range of reasonable
16 fee awards, as are the incentive compensation awards for the Representative Plaintiffs.

17 Notably, when Representative Plaintiffs’ Counsel attempted to depose Mr. Miller’s clients to
18 ascertain the basis for their objections and to determine whether they had standing to object to the
19 Settlement, Mr. Miller refused to produce them for deposition.⁶ Representative Plaintiffs’ Counsel
20 sought to compel the depositions, but Magistrate Judge Trumbull denied the motion because the
21 discovery period had ended, without prejudice to Plaintiffs to seek relief from the Court to reopen
22

23
24 ⁶ Mr. Miller thwarted efforts by Representative Plaintiffs’ Counsel to ascertain whether Lyons and
25 Thompson also entered into a fee sharing arrangement similar to the agreement Mr. Weiss testified
26 that he entered into with his counsel. Mr. Miller has previously received compensation for dismissing
27 an appeal of a trial court’s rejection of his objection to a class action settlement in *Reformulated*
28 *Gasoline Antitrust and Patent Litigation*. Levy Decl. ¶ 104. In that case, Mr. Miller filed an objection
to the proposed settlement on behalf of Leslie Yagar (formerly Leslie Miller). *Id.* After the objection
was denied as meritless, Mr. Miller filed a Notice of Appeal and was paid a fee when he dismissed the
appeal. *Id.* Mr. Miller accepted payment and dismissed his appeal even though there was no
modification to the settlement. *Id.*

1 discovery. (Docket Item No. 338.) Should the Court be inclined to sustain the Lyons and Thompson
2 objections in whole or in part, Representative Plaintiffs' Counsel request that the Court require the
3 objectors to testify at deposition so that counsel may learn the bona fides of their objections, and to
4 determine whether they are in fact Class Members.

5 **C. The Jenkins Objection Should Be Overruled**

6 Forrest Jenkins complains that, even after he "read the settlement notice," he "cannot tell how
7 much I am going to receive under this settlement" because it "is far too complicated and dependent
8 upon contingencies." (Docket Item No. 331.) He further objects that "the attorneys' fees and
9 incentive awards are too high and should be reduced so the class receives more of the settlement
10 funds." *Id.* As discussed above, there is no requirement that a notice of settlement disclose individual
11 recoveries, *Petrovic*, 200 F.3d at 1153, and the requested attorneys' fee and expenses award and
12 incentive compensation award are fair and reasonable. Mr. Jenkins's objection should therefore be
13 overruled.

14 **D. Tootle's Objection Should Be Overruled**

15 The objection filed by "Harry Tootle d/b/a American International Commission on Peace
16 Officers Standards and Training" states no basis for objecting. (Docket Item No. 330.) Mr. Tootle's
17 sole demand is that he "be included as a Representative Plaintiff and receive a \$20,000 Incentive
18 Compensation Award plus any other compensation deemed fitting and proper by this Court." (*Id.*)
19 Mr. Tootle states no reason why he should be entitled to an incentive compensation award. He did not
20 serve as a Representative Plaintiff and did not participate in the litigation. He was not interviewed or
21 deposed or required to respond to any discovery requests, nor were his bank or business records
22 subpoenaed by Google. Accordingly, Mr. Tootle's objection (request) should be overruled (denied).

23 **IV. CONCLUSION**

24 For the reasons set forth herein, in Plaintiffs' Motion for Final Approval of Class Action
25 Certification and Settlement, and in Plaintiffs' Motion for Award of Attorneys' Fees and Expenses,
26 and the facts set forth in the accompanying declarations of Rachel S. Black, Lester L. Levy, and
27 Markham Sherwood, Plaintiffs respectfully request that the Court overrule the Objections and certify
28 the Settlement Class, approve the Settlement together with the Plan of Allocation as fair, reasonable,

1 and adequate, and grant the requested attorneys' fees and expenses and Representative Plaintiffs'
2 incentive compensation awards.

3 Dated: August 24, 2009

Respectfully submitted,

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27 Attorneys for Plaintiffs
28

CERTIFICATE OF SERVICE

I hereby certify that on the date written above, that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The Court or the CM/ECF system will send notification of such filings to all CM/ECF participants.

I further certify that a true and correct copy of this document was sent via U.S. first-class mail, postage pre-paid, to all non-CM/ECF participants, as follows:

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