

EXHIBIT B

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15

UNITED STATES DISTRICT COURT

16

NORTHERN DISTRICT OF CALIFORNIA

17

18 MATTHEW CAMPBELL and MICHAEL
HURLEY, on behalf of themselves and all
19 others similarly situated,

20

Plaintiffs,

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v.

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FACEBOOK, INC.,

23

Defendant.

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25

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27

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Case No. C 13-05996 PJH

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION**

Date: March 16, 2016
Time: 9:00 a.m.
Judge: Hon. Phyllis J. Hamilton
Place: Courtroom 3, 3rd Floor

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1 **I. INTRODUCTION**

2 Plaintiffs trust that the Court will not be fooled by Facebook’s latest misdirection which
3 opens its Opposition, falsely claiming that this litigation concerns nothing more than displaying
4 previews of URLs within Private Messages. The record incontrovertibly puts at issue Facebook’s
5 systematic capturing and cataloging of the content of its users’ Private Messages, and redirecting and
6 repurposing that content through a host of undisclosed, privacy-invasive practices. That Facebook’s
7 practices are an exploitation, and *not* a natural extension, of its provision of electronic
8 communication services, is evident from the very nature of those practices which Facebook does not
9 deny, including mining the content [REDACTED]

10 [REDACTED]
11 [REDACTED].
12 Facebook trivializes these privacy invasions, comparing itself to the *New York Times*
13 compiling a bestseller list, or *Billboard* charting the top 100 hits. The comparisons are wholly inapt
14 because neither the *Times* nor *Billboard* gather the identities of purchasers, nor secretly obtain the
15 information from communications which it holds out to be “private.” By prominently highlighting
16 this ill-fitting analogy, Facebook betrays its fundamental disregard for the importance of not only the
17 legal strictures of ECPA and CIPA, but the long-established common law heritage embodied in those
18 statutes which recognizes the vital importance of privacy to our democratic values. ECPA and CIPA
19 ensure that this guarantee of privacy extends to electronic communications, as they become the
20 dominant medium of the 21st Century. Yet without obtaining consent— [REDACTED]

21 [REDACTED]—Facebook has engineered its system architecture to intercept
22 and catalog the URLs people are discussing and sharing with each other in communications that
23 *Facebook* itself represents as being “private.” Facebook then utilizes these data for the current and
24 future objective of accumulating, analyzing and refining user data and enhancing its targeted
25 advertising efforts. CAC ¶ 31. Facebook’s interception of Private Message content breaches the
26 barrier traditionally respected by common carriers in the context of postal mail and telephone calls.

27 Facebook’s attempts to disregard—and consign to the past—ECPA’s and CIPA’s legal limits
28 cannot distract from the core, common concern of this litigation: Facebook structured its system to

1 capture content of Private Messages, to use that information for its own, undisclosed purposes, and to
2 store that information in perpetuity. This privacy intrusion is common to a class of users
3 ascertainable from Facebook’s data. It was effectuated by a uniform functionality engineered by
4 Facebook to [REDACTED]. The
5 predominant questions of liability and the appropriate remedies—statutory damages and equitable
6 and injunctive relief—are suitable for class treatment under Rule 23(b)(3) or alternatively Rule
7 23(b)(2).

8 **II. ARGUMENT**

9 **A. Plaintiffs and their Counsel are Adequate Under Federal Rule 23(a)(4)**

10 Matthew Campbell and Michael Hurley are exemplary representative plaintiffs. They are
11 completely fulfilling their duties as class representatives. They remain informed of developments
12 in the litigation, communicate with counsel, review pleadings prior to filing, and timely respond
13 to discovery.¹ They are fairly and adequately protecting the interests of the class. Facebook’s
14 challenges to their adequacy are baseless.

15 In a case centered on Facebook’s internal, surreptitious processing of information which
16 no class member would have any reason to suspect, Plaintiffs learning of their claims from
17 counsel is unsurprising and entirely proper. “[T]hat is simply the nature of a claim of this type.”
18 *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008) (finding adequacy where
19 plaintiffs learned of claims from law firm advertisement; noting, “[t]he average person would
20 have no reason to [know of his claims] particularly when a substantial part of the allegations
21 involve the concealment of material information.”). Moreover, far from being “recruited,”
22 Campbell and Hurley affirmatively volunteered to serve as class representatives.² Therefore,
23 Facebook’s accusation that this is a “lawyer-driven” case is baseless.

24 _____
25 ¹ Ex. 2 (Campbell Dep. 17:3-7; 77:3-16; 128:8-22; 132:17-22; 139:3-23); Ex. 3 (Hurley Dep.
65:18-66:1; 70:19-72:5; 77:19-80:2; 84:8-85:9). Unless otherwise noted, all cited Exhibits are to
the Declaration of David Slade (“Slade Decl.”).

26 ² Dkt. 158-161; 163 (Facebook Appendix of Evidence, (“App.”)), at 5:6-7; 485-86. Furthermore,
27 “[t]here is nothing inherently improper with the recruitment of class representatives.” *See Guido*
28 *v. L’Oreal, USA, Inc.*, No. 11-1067, 2013 WL 3353857, at *8 (C.D. Cal. July 1, 2013) (citing
Manual for Complex Litigation (Fourth) § 21.26); *Gutierrez v. Wells Fargo Bank, N.A.*, No. 7-
5923, 2008 WL 4279550, at *18 (N.D. Cal. Sept. 11, 2008) (Alsup, J.) (plaintiff solicited through

1 Facebook incorrectly asserts that Plaintiffs have unduly deferred to counsel. In fulfilling
2 their duties as class representatives, Plaintiffs hired competent counsel to prosecute this case. *See*
3 *Stuart v. Radioshack Corp.*, No. 7-4499, 2009 WL 281941, at *10 (N.D. Cal. Feb. 5, 2009).³
4 Adequacy does not require that Plaintiffs participate in “legal strategy” or draft discovery
5 requests. Nor do Plaintiffs’ prior relationships with associates in the offices of the firms proposed
6 as class counsel undermine their independence. *But see Cummings v. Connell*, 316 F.3d 886, 896
7 (9th Cir. 2003) (“[T]his circuit does not favor denial of class certification on the basis of
8 speculative conflicts”); *In re Online DVD Rental Antitrust Litig.*, No. 9-2029, 2010 WL 5396064,
9 at *4 (N.D. Cal. Dec. 23, 2010), *aff’d*, 779 F.3d 934 (9th Cir. 2015) (same); *Banks v. Nissan N.*
10 *Am., Inc.*, 301 F.R.D. 327, 334 (N.D. Cal. 2013) (rejecting “purely speculative” argument that
11 plaintiff was inadequate). Plaintiffs’ independence is particularly exemplified by Mr. Campbell,
12 who, in addition to being a lawyer himself, is an accomplished investigative journalist who has
13 broken stories leading to the resignation or termination of Arkansas’s Lieutenant Governor, a
14 district judge, and the superintendent of the Little Rock School District.⁴

15 Facebook’s speculation finds no support in the law. “While some courts have expressed
16 reservations about the adequacy of a proposed class representative when he or she is a close
17 family member of an attorney representing the class . . . they have not expressed similar concerns
18 when proposed class representatives are merely friends or acquaintances of the class members’
19 attorney.” *Poulos v. Caesars World, Inc.*, No. 94-1126, 2002 WL 1991180, at *6 n.9 (D. Nev.
20 June 25, 2002) *aff’d in part*, 379 F.3d 654 (9th Cir. 2004). Moreover, “courts routinely observe
21 [that] a named plaintiff will not be disqualified simply because of a close or familial relationship

22 radio advertisement adequate); *Zhu v. UCBH Holdings, Inc.*, 682 F. Supp. 2d 1049, 1054-55
23 (N.D. Cal. 2010) (White, J.) (plaintiff solicited through press releases adequate), *Edwards v. First*
24 *Am. Corp.*, 289 F.R.D. 296, 302-03 (C.D. Cal. 2012) (plaintiff solicited by counsel who came to
her house and knocked on her door adequate).

25 ³ *See also Astiana v. Ben & Jerry’s Homemade, Inc.*, No. 10-4387, 2014 WL 60097, at *8 (N.D.
Cal. Jan. 7, 2014) (“The plaintiff’s burden of showing adequacy is fairly minimal.”); *Lee v. Pep*
26 *Boys-Manny Moe & Jack of Cal.*, No. 12-5064, 2015 WL 9480475, at *10 (N.D. Cal. Dec. 23,
2015) (“a party . . . will be deemed inadequate only if [he or] she is ‘startlingly unfamiliar’ with
the case.”); *L’Oreal, USA*, 2013 WL 3353857, at *7-8 (“A representative plaintiff’s lack of
27 detailed, comprehensive knowledge about the legal technicalities of the claims asserted in class
litigation . . . provides no basis on which to deny a motion for class certification.”).

28 ⁴ *See, e.g., Exs. 4 & 5.*

1 with one of the attorneys representing the class.” *In re TFT-LCD Antitrust Litig.*, 267 F.R.D. 583,
2 594-95 (N.D. Cal. 2010); *In re Static Random Access Memory Antitrust Litig.*, 264 F.R.D. 603,
3 609 (N.D. Cal. 2009) (“[d]efendants have not shown how . . . these relationships have manifested
4 a conflict nor have they provided legal authority . . . that these relationships establish conflicts”).

5 Facebook cites three out-of-District cases which concerned manifest evidence—not
6 present here—of an actual conflict or inadequate diligence, distinct from a mere friendship
7 between the plaintiff and one of the counsel. *See London v. Wal-Mart Stores, Inc.*, 340 F.3d
8 1246, 1255 (11th Cir. 2003) (counsel had deposited a large sum with the plaintiff (his friend and
9 stock broker) following resolution of a lawsuit similar to the one for which plaintiff proposed to
10 represent the class); *Bohn v. Pharmavite, LLC*, No. 11-10430, 2013 WL 4517895, at *3 (C.D.
11 Cal. Aug. 7, 2013) (plaintiff was inadequate, in part, because her deposition testimony and lack of
12 diligence “raise[d] serious questions about her interest and commitment to protecting the interest
13 of the classes”); *Moheb v. Nutramax Labs. Inc.*, No. 12-3633, 2012 WL 6951904, at *5 (C.D.
14 Cal. Sept. 4, 2012) (conflating adequacy and typicality inquiries, holding that plaintiff was
15 inadequate, in part, because her claims and injuries were not typical).⁵ Likewise, Facebook cites
16 *Bodner v. Oreck Direct, LLC*, where plaintiff displayed “undeniable and overwhelming ignorance
17 regarding the nature of [the] action, the facts alleged, and the theories of relief.” No. 6-4756,
18 2007 WL 1223777, at *2 (N.D. Cal. Apr. 25, 2007) (noting also that the same counsel and
19 plaintiff had been the subject of controversy in a past case). *See Trosper v. Stryker Corp.*, No. 13-
20 607, 2014 WL 4145448, at *13-14 (N.D. Cal. Aug. 21, 2014) (finding defendant’s reliance on
21 *Bodner* “unpersuasive” given “lack of any allegations or showing of impropriety concerning class
22 counsel”).

23
24
25 ⁵ Facebook’s other citations each found plaintiffs inadequate on grounds with no analog here. *See*
26 *In re Facebook, Inc., PPC Advert. Litig.*, 282 F.R.D. 446, 454 (N.D. Cal. 2012) (plaintiff who
27 knew “essentially nothing about the case” inadequate); *Sanchez v. Wal-Mart Stores, Inc.*, No. 6-
28 2573, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009) (plaintiff who made claim-splitting
decision that “create[d] a conflict” with the class inadequate); *Welling v. Alexy*, 155 F.R.D. 654,
659 (N.D. Cal. 1994) (plaintiff with “demonstrated level of disinterest in [the] lawsuit [and] vast
experience as a . . . class action plaintiff render[ing] him subject to unique defenses” inadequate).

1 Next, Facebook presents misleading excerpts of the deposition testimony of a former
2 plaintiff dismissed from the case, David Shadpour, to suggest improprieties of proposed class
3 counsel. Mr. Shadpour filed a copycat complaint through not the proposed class counsel, but
4 other counsel which no longer seeks appointment to represent the class. To the extent that Mr.
5 Shadpour [REDACTED]
6 [REDACTED]
7 [REDACTED], it does not impugn the class representatives or class counsel
8 proposed here. Indeed, immediately upon learning, in late May 2015 [REDACTED]
9 [REDACTED]
10 [REDACTED]. Further, when LCHB and CBP
11 [REDACTED], they promptly
12 took steps to effectuate such withdrawal (*id.* ¶¶ 6-10), including by litigating his right to leave the
13 case without a deposition for which he was unwilling to sit.⁶ If [REDACTED]
14 [REDACTED]
15 [REDACTED]. *Id.* ¶ 6. Accordingly, Facebook’s misleading attempt to tar proposed
16 class counsel with questions concerning the adequacy of Mr. Shadpour and his lawyers
17 (Pomerantz LLP, Tostrud Law Group, and Glancy Prongay & Murray LLP), who have not been
18 proposed to serve the class, should be rejected outright.

19 **B. The Class Is Ascertainable through Facebook’s Databases**

20 As explained in the opening and rebuttal reports of Dr. Golbeck, the class members can be
21 readily ascertained for the purposes of Rule 23(b)(3) through Facebook’s own database records—
22 a fact that, despite nitpicking the particular code example Dr. Golbeck provides, Facebook never
23 denies. When a Private Message is sent with a URL attachment, Facebook source code

24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 ⁶ Ex. 6 (Shadpour Dep. 67:4-69:8); *See also* Dkt. 89, 94, 96, 105.
28 ⁷ Dkt. 138 (Plaintiffs’ Motion for Class Certification), at 4:15-22.

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[REDACTED]

Facebook’s contention that Dr. Golbeck’s method of identifying class members is both over- and under-inclusive is simply a reframing of its meritless “variabilities” argument addressed in the following section. The simple fact is that Facebook [REDACTED] [REDACTED] [REDACTED] [REDACTED] There are no “barriers” to readily ascertaining the class.

C. Facebook’s Manufactured “Variabilities” Are Irrelevant to Resolving the Material Legal and Factual Issues Through Common Proof

The commonality requirement of Rule 23(a) is “the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation,” and commonality fails only where there are “[d]issimilarities within the proposed class [that] impede the generation of common answers.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quotation omitted) (emphasis added). The predominance inquiry, while more rigorous and only relevant to the Rule 23(b)(3) inquiry, still revolves around common issues, requiring that “common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (citation

⁸ Ex. 1 (Golbeck Rebuttal Rpt.), at ¶¶ 8-10; Ex. 7 ([REDACTED]).
⁹ Golbeck Rpt., at ¶¶ 98-106; Ex. 1 (Rebuttal Rpt.), at ¶¶ 8-10.
¹⁰ Facebook maintains [REDACTED] Ex. 1 (Rebuttal Rpt.), at ¶ 17.1.

1 omitted). Facebook’s arguments regarding purported “variabilities” or “individualized issues”
2 fail to defeat a finding of commonality and predominance here.

3 As a threshold matter, Facebook does not dispute that the core functionality used to
4 intercept Private Message content—

5 [REDACTED].¹¹

6 Contrary to Facebook’s assertion, the technical refinement of the class definition to specify the
7 inclusion of the URL attachment within the Private Message simply

8 [REDACTED]. This
9 refinement allows for both precision in the class definition and ascertainment of the members.

10 [REDACTED]

11 [REDACTED]. Accordingly, each class member
12 was subjected to uniform conduct because when each class member sent or received a Private
13 Message containing a URL attachment, such message was subject to the same interception of
14 content. A determination of whether such conduct violates ECPA and CIPA will be decided
15 uniformly as to all class members.

16 Facebook’s irrelevant parade of “variabilities” fall into two, broad categories:

17 (1) variables that simply determine that a user falls *outside* the class, and (2) variabilities in
18 Facebook’s *post-interception* use of the redirected and stored message content.

19 *First*, Facebook lists a variety of situations in which a user could send a Private Message
20 that does not include a URL attachment

21 [REDACTED]. These “variabilities” are simply instances where
22 the user would *not* qualify for membership in the class and would *not* be included in Dr.

23 Golbeck’s method of ascertaining class members: (1) a user could have sent a private message
24 without a URL; (2) a user could send a Private Message via Facebook’s mobile application,
25 which

26 [REDACTED]

27 ¹¹ Golbeck Rpt., at ¶¶ 32-55, 107, 116-118; *see also*, App. at 1606-1692 (Jun. 1, 2015 Decl. of
28 Alex Himel).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]¹² These are not “dissimilarities” *within* the proposed class; they are simply
5 examples of instances that fall *outside* the class definition—instances where a user did not send or
6 receive a Private Message with a URL attachment. As such, these variables are irrelevant to the
7 issues to be determined *within* the class.¹³

8 *Second*, Facebook lists several post-interception uses of Private Message content,
9 asserting that each use creates a separate path to liability. Plaintiffs do allege that Facebook used
10 [REDACTED] the unlawfully obtained Private Message content in several ways, as such
11 demonstrates that the interception was both for purposes other than transmission of the message
12 and outside the ordinary course of Facebook’s business.¹⁴ These uses also show how Facebook
13 unjustly enriched itself in multiple ways. However, proof of Facebook’s use outside the course of
14 ordinary business is common to all class members because, as Plaintiffs’ analysis of Facebook’s
15 source code shows, Facebook made at least one of those uses— [REDACTED] —
16 with respect to all the Private Messages sent which would qualify users for class membership.
17 *See*, Golbeck Rpt., at ¶¶ 32-42 (detailing the code used to [REDACTED]
18 [REDACTED]); *Id.* at ¶¶ 98-105 (illustrating a methodology for identifying class members based upon
19 [REDACTED]); Ex. 1, (Golbeck Rebuttal Rpt.) at ¶¶ 8-12 (illustrating
20 a methodology to confirm, [REDACTED]

21 [REDACTED]
22 [REDACTED] is
23 immaterial to liability but evinces Facebook’s unjust enrichment. If anything, Facebook’s

24 _____
25 ¹² Opp. at 11:11-28, 12:1-4; 17:12-13; 18:12-16; 22:13-17; 23:14-17.

26 ¹³ Facebook also misconstrues the class definition with its hypothetical where a user types or
27 inserts a URL and then once the URL Attachment is generated and visible within the message
28 deletes the URL text that prompted its inclusion. The class definition does not require that the
URL be included in the Private Message twice as both (a) the original text that prompts the
creation of the URL attachment and (b) the URL attachment. Once is enough.

¹⁴ *See, e.g.*, Dkt. 29 (Motion to Dismiss), at 14-15.

1 reference to these many uses highlights the significance of its underlying interception [REDACTED]
2 [REDACTED]
3 [REDACTED]. While the
4 scope of Facebook’s exploitation of message content is immaterial to commonality and
5 predominance, it underscores the significance of the privacy intrusion and the importance of the
6 injunctive relief sought by Plaintiffs.

7 In addition, none of the cases Facebook cites support its proposition that the URL’s
8 included within Private Messages may not constitute “content.” In *In re Zynga Privacy Litig.*,
9 750 F.3d 1098, 1105 (9th Cir. 2014), the Ninth Circuit addressed the question of whether “HTTP
10 referer information” (metadata about a particular web request) constituted the contents of a
11 communication, and held that it does not. Specifically, the court drew a distinction between the
12 “contents” of a communication and “record information” related to that communication, such as
13 who sent the communication or where it was sent from, holding “the term ‘contents’ refers to the
14 intended message conveyed by the communication, and does not include record information
15 regarding the characteristics of the message that is generated in the course of the
16 communication”. *Id.*, at 1106-107. Facebook does not—and cannot— argue that URLs sent by
17 users *within* their Private Messages constitute “record information” as opposed to the “intended
18 message” of the communication, and thus *Zynga* is inapposite, as are its progeny cited by
19 Facebook. See *In re Facebook Internet Tracking Litig.*, No. 12-2314, 2015 WL 6438744, at *9
20 (N.D. Cal. Oct. 23, 2015) (no ECPA claim where plaintiffs alleged interception of “cookies
21 [which] contain only a Facebook user's unique identification information and a record of
22 browsing history” as opposed to the contents of a communication); *In re Nickelodeon Consumer*
23 *Privacy Litig.*, No. 12-7829, 2014 WL 3012873, at *1, *15 (D.N.J. July 2, 2014) (no interception
24 of contents of communication where defendants collected cookies linking IP addresses to videos
25 and webpages viewed). Finally, Facebook illogically claims Plaintiffs did not redact the URLs
26 from Private Messages produced in discovery because “they do not view the URLs as ‘content,’”
27 (Opp. Br., at 23), while knowing full well Plaintiffs disclosed this private content only for the
28 purposes of furthering discovery and pursuant to the privacy safeguard of the Protective Order.

1 *Mgmt. Corp.*, a case squarely on point, finding that issues of implied consent did not defeat
2 predominance where “[d]espite extensive discovery, [the defendant] has not produced evidence
3 that a single person meeting the class definition actually consented” to the plaintiff’s alleged
4 violations of CIPA. No. 13-02468, 2014 WL 4627271, at *12 (C.D. Cal. Sept. 8, 2014).

5 **2. Facebook Fails to Point to Sufficient Evidence from which Consent to**
6 **Interceptions for Inflating Like Counts Could Be Implied**

7 Facebook trumpets the supposed existence of “*various* [Facebook] sources,” from which
8 users could have learned of the incrementing of Like counts, but it actually cites only *one*
9 Facebook document: a developer guidance on Facebook’s website from mid-2011 until
10 December, 2012.¹⁷ Directed to web developers as an overview of how to encode a Like button on
11 a third-party website, it appears *nowhere* in Facebook’s Statement of Rights and Responsibilities
12 or its Data Use Policy directed at its users.¹⁸ The reference itself is obscure,¹⁹ as even Facebook
13 employees concede: [REDACTED]

14 [REDACTED]
15 [REDACTED],²⁰

16 Facebook similarly overstates the significance of the brief coverage that its practice of
17 increasing the Like counter received. A review of Exhibit E to Facebook’s brief reveals that, of

18
19 _____
20 ¹⁷ Opp. Br., at 20:1-4

21 ¹⁸ See, e.g., App. 139 (FB000000163).

22 ¹⁹ Only at the bottom, at the end of an FAQ section, Facebook stated that the number of “Likes”
23 for a given social plugin included, inter alia, “the number of inbox messages containing this URL
24 as an attachment.” App. 139 (FB000000163). The developer guidance says nothing about
25 Facebook’s use of Private Message content [REDACTED]

26 [REDACTED] Moreover, this
27 statement does not put the reader on notice that the “attachment” would then [REDACTED]

28 [REDACTED] Statement from [REDACTED]. Nov. 13 Gardner Decl. ISO
29 Class Cert., Ex. 28 (emphasis added); The Google Analytics data relied upon by Facebook
30 supports this proposition. While the webpage with Facebook’s developer guidance received 4.3
31 million views in 2011 and 2.5 million views in 2012, visitors spent an average of 78 *seconds*
32 viewing the page in 2011, and only 42 *seconds* viewing the page in 2012. (App. 1496, 1502 at
33 entry #1). Given the average time spent on this multipage document, the bulk of which was
34 devoted to substantive coding instructions, it is not credible that a meaningful percentage of
35 viewers even *saw* the FAQs.

1 the 77 articles listed, only 29 address the scanning of messages to increase Like counts.²¹ With
2 regard to those, Facebook acknowledges that they were published right round the time Facebook
3 [REDACTED] ceased inflating Like counts. As Alex Himel stated in his deposition,

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]²²

7 In short, Facebook cites to a single disclosure not directed at its users and minimal media
8 coverage spanning “a few days” before its claimed change in practices. Accordingly, the instant
9 matter is readily distinguishable from *Gmail*, where the court found “a panoply of sources,”
10 stretching back almost a decade. *In re Google Inc. Gmail Litig.*, No. 13-2430, 2014 WL
11 1102660, at *17 (N.D. Cal. Mar. 18, 2014).²³ To the extent that such a paucity of sources would
12 alert some subset of Facebook users to the lone practice of scanning messages to inflate Like
13 counts, this does not create an individualized issue sufficient to defeat predominance. *Ellsworth*
14 *v. U.S. Bank, N.A.*, No. 12-2506, 2014 WL 2734953, at *29 (N.D. Cal. June 13, 2014) (“Courts
15 traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because
16 affirmative defenses may be available against individual members . . . instead, where common
17 issues otherwise predominated, courts have usually certified rule 23(b)(3) classes even though
18 individual issues were present in one or more affirmative defenses.”) (quoting *Smilow v. Sw. Bell*
19 *Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003)). Further, as discussed above, none of the

20
21 ²¹ Source nos. 6, 8, 10, 12, 14, 16, 17, 19, 22, 23, 24, 25, 32, 34, 36, 38, 46, 46, 50, 51, 52, 53, 66,
22 67, 69, 70, 71, 72, and 73. Additionally, Facebook lists its developer guidance twice (source nos.
23 3 and 4). The remaining 36 articles address subjects not challenged in this litigation.

²² Ex. 8 (Feb. 4, 2016 Dep. of Alex Himel 251:4-8).

²³ The analysis is the same with regard to *Backhaut v. Apple Inc.*, which included, *inter alia*,
24 multiple disclosures by the defendant, articles in news media outlets and “technical journals”
25 spanning a period of several months, and the named plaintiff’s own admission that there was “a
26 who[l]e host of information online regarding” the interceptions at issue. No. 14-2285, 2015 WL
27 4776427, at *14 (N.D. Cal. Aug. 13, 2015). Facebook’s reliance on *Murray v. Fin. Visions, Inc.*,
28 is equally misplaced. No. 7-2578, 2008 WL 4850328 (D. Ariz. Nov. 6, 2008). There, the
defendant re-routed the putative class’s emails in order to comply with SEC regulations, and thus
the court’s analysis turned on an inquiry into express consent, based upon the defendant’s stated
policy. *Id.* at *1-4. Finally, *Gannon v. Network Tel. Servs.*, concerned ascertainability, and not
implied consent. No. 13-56813, 2016 WL 145811 (9th Cir. 2016).

1 information cited to by Facebook addresses the *additional* interceptions and uses identified by
2 Plaintiffs.

3 **3.** [REDACTED]

4 Facebook’s position that Plaintiffs impliedly consented to message scans because they
5 “continued to send Facebook messages containing URLs even after filing this lawsuit and
6 receiving discovery requests”²⁴ is untenable. Facebook has repeatedly— [REDACTED] —
7 stated that it ceased scanning messages as of October 2012.²⁵ Indeed, at their depositions,
8 Plaintiffs uniformly testified that they were unaware of any continued scanning.²⁶ Moreover,
9 Facebook’s [REDACTED]
10 still could not put the named Plaintiffs on notice. The Protective Order in place in this litigation
11 prevents counsel from revealing to Plaintiffs any information designated “CONFIDENTIAL” or
12 “HIGHLY CONFIDENTIAL – ATTORNEY’S EYES ONLY” by Facebook.²⁷

13 **4. Facebook’s “URL Preview” Is a Separate Functionality From the**
14 **Interceptions and Uses Challenged by Plaintiffs**

15 The presence of the “URL preview” in a private message provides no evidence of implied
16 consent. Indeed, Facebook argues only that the preview “alerted people ... that the URL had been
17 ‘processed’” or “stored by Facebook.”²⁸ The preview is a separate functionality from the multiple
18 interceptions and uses challenged by Plaintiffs. *Supra*, at D.1. Therefore, the “URL preview”
19 simply puts a user on notice that Facebook has created a URL preview, and nothing more.

20 **E. Common Proof Establishes the Class’s Entitlement to Monetary Recovery**

21 **1. Statutory Damages**

22 Ignoring Plaintiffs’ opening citations to authority recognizing the inherent superiority of
23 class litigation in actions for statutory damages, Facebook relies on a single non-binding, non-

24 ²⁴ Opp. Br., at 21:7-8.

25 ²⁵ *See, e.g.*, Dkt. 45 (Oct. 1, 2015 Hearing Transcript), at 5:3-6, in which Facebook’s counsel
26 represented that “the Consolidated Amended Complaint challenges routine commercial conduct
27 that was completely innocuous that Plaintiffs admit ceased over two years ago.”

28 ²⁶ Ex. 3 (Hurley Tr.) 49:10-12; 66:2-13; 157:5-6; Ex. 2 (Campbell Tr.) 196:16-197:24; 200:13-
201:9; 205:15-22.

²⁷ *See generally* Dkt. 76.

²⁸ Opp. Br., at 20:14-15, 20-21.

1 class-action authority for the proposition that awarding statutory damages requires an
2 “individualized’ analysis. *See, e.g.,* Opening Br. at 21 citing *Holloway v. Full Spectrum Lending*,
3 No. 6-5975, 2007 WL 7698843 at *8-9 (C.D. Cal. 2007) (finding superiority of class actions
4 seeking statutory damages); Opp. Br., at 25-26.²⁹ To the contrary, ECPA’s statutory damages
5 provision demonstrates that:

6 Congress has instructed courts to make a determination regarding the sufficiency
7 of the case against defendant and the seriousness of the alleged conduct. Where
8 the Court determines that such a threshold is met, it must award the particular
9 amount determined by Congress, rather than engaging in the guesswork involved
in gauging the defendant's culpability and the harm to the plaintiff based on
minimal evidence and weak inferences.

10 *DirectTV, Inc. v. Huynh*, No. 4-3496, 2005 WL 5864467, at *8 (N.D. Cal. May 31, 2005) *aff’d*,
11 503 F.3d 847 (9th Cir. 2007). The statutory damages framework allows the Court to avoid
12 speculation about pecuniary losses, and instead first make the determination of whether a
13 violation of ECPA or CIPA occurred. If so, the set statutory damage amounts may be invoked if
14 the Court agrees that the severity of Facebook’s conduct warrants it.

15 The very criteria Facebook asserts will require individualized inquiry can be better
16 addressed through common proof. Statutory damages serve to deter conduct which would violate
17 ECPA or CIPA. *Huynh*, 2005 WL 5864467, at *8; *Omni Hotels*, 2014 WL 4627271, at *14 (“the
18 Legislature evidently decided that minimum damages of \$5,000 per violation serve CIPA's
19 purposes”). As such, the primary consideration focuses on the conduct of the defendant.
20 Facebook designed its source code to operate the same way across all users and acted
21 indiscriminately towards the class by virtue of its uniform policies and business practices.
22 Therefore, for example, determining the “extent of any intrusion,” its “severity,” or “purpose,”
23 must all focus on Facebook’s uniform conduct. Indeed, statutory damages offer a path to class
24 certification, not a barrier. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006)

25 ²⁹ Both the Eastern District of California case that Facebook cites, and the Fourth Circuit case
26 upon which that case relies, are individual, non-class cases, and therefore quite unsurprisingly
27 neither addresses how common proof can form the proper basis for an award of statutory damages
28 applicable to a certified class. Opp. Br. at 26 citing *Dish Network LLC v. Gonzalez*, No. 13-107,
2013 WL 2991040 (E.D. Cal. 2013). See also *DirectTV v. Rawlins*, 523 F.3d 318 (4th Cir. 2008)
(cited by *Gonzalez*).

1 (seeking certification of statutory damage claims avoids “the sort of person-specific arguments
2 that render class treatment infeasible”).

3 Moreover, the availability of statutory damages under the Wiretap Act, as later amended
4 under ECPA, recognizes that quantifying actual pecuniary losses from violations of privacy may
5 be too difficult. As the Supreme Court has stated, “liquidated damages serve a particular useful
6 function when damages are uncertain in nature or amount or are unmeasurable.” *Rex Trailer*
7 *Co. v. U.S.*, 350 U.S. 148, 153 (1956). *See also Desilets v. Wal-Mart Stores, Inc.*, 171 F.3d 711,
8 716 (1st Cir. 1999) (noting that when Congress enacted ECPA, “it chose to fix liquidated
9 damages”).³⁰ “Damages for a violation of an individual's privacy are a quintessential example of
10 damages that are uncertain and possibly unmeasurable. Since liquidated damages are an
11 appropriate substitute for the potentially uncertain and unmeasurable actual damages of a privacy
12 violation, it follows that proof of actual damages is not necessary for an award of liquidated
13 damages.” *Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1213 (11th Cir. 2005) (Driver’s
14 Privacy Protection Act); *In re Hulu Privacy Litig.*, No. 11-3764, 2013 WL 6773794 (N.D. Cal.
15 2013) (same, Video Privacy Protection Act).³¹ The same is true regarding Plaintiffs’ CIPA claim.
16 *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1018 (C.D. Cal. 2014); Cal. Penal Code
17 § 637.2(a), (c) (providing for damages of “the greater of” \$5000 or “[t]hree times the amount of
18 actual damages, *if any*, sustained by the plaintiff,” and expressly not requiring a showing of actual
19 damages) (emphasis added). The only harm or injury needed to be shown to invoke the statutory
20 damage frameworks of ECPA and CIPA is the invasion of privacy manifested by the violation of

21 ³⁰ The Wiretap Act, as originally enacted as part of the Omnibus Crime Control and Safe Streets
22 Act of 1968 (P.L. 90-351, Sec 802), contained an enforcement provision that provided for
23 recovery of “liquidated damages” as an alternative to actual damages. In 1986, ECPA renamed
24 these “statutory damages.”

25 ³¹ Here, “proof of actual damages,” means calculation of specific pecuniary loss, and not
26 demonstration of harm or injury which is established by virtue of the violation of the statute itself.
27 The Legislative history makes clear that statutory privacy protections are intended to remedy the
28 invasion into private space rather than mere pecuniary injuries that may follow. In enacting the
Wiretap Act, Congress noted that, “the right of privacy, the right to be left alone, and the right
against unreasonable searches and seizures – the right, that is, to be personally secure – are
among the most highly valued rights of an American citizen. These guarantees have been a part
of Anglo-Saxon law ever since the 15th century.” Cong. Rec. May 23, 1968 at S6 (also noting
that the statute will represent a “landmark in the development of the historic right to privacy in
our society”).

1 the statute's substantive provisions. *See Vista Mktg., LLC v. Burkett*, No. 14-14068, 2016 WL
2 425165, *12 (11th Cir. 2016) (distinguishing the Stored Communications Act which, in contrast
3 to ECPA, requires a showing of actual damages for entitlement to statutory damages).

4 Accordingly, the assessment of the appropriate statutory damages is inherently well-suited
5 for class treatment in privacy cases.³²

6 **2. Equitable Relief and Disgorgement of Profits**

7 ECPA entitles prevailing Plaintiffs to “any profits made by the violator as a result of the
8 violation,” and, additionally, to “equitable relief,” which may include disgorgement of ill-gotten
9 gains (*i.e.*, unjust enrichment). 18 U.S.C. § 2520(b)(1), (c)(2)(A). As an alternative to statutory
10 damages, Plaintiffs’ economist, Fernando Torres, identifies a methodology which employs
11 common proof to calculate Facebook’s revenues derived from adding URL links into its targeted
12 advertising platform, enhancing its analytics regarding user behavior, and inflating the Like
13 count. In addition, he provides a method for an equitable allocation to class members on a per-
14 URL basis that is consistent with Plaintiffs’ liability theory.³³ That is what Rule 23(b)(3)
15 requires. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430 (2013).

16 In mischaracterizing Plaintiffs’ request for equitable disgorgement as one, instead, seeking
17 “actual damages,” Facebook incorrectly concludes that Mr. Torres’ model will lead to
18 individualized issues of proof.³⁴ Questions of whether any particular interception of a class
19 member’s URL in fact increased a “Like” counter are correctly absent from his methodology. All
20 putative class members are entitled to recovery for the violation of their privacy rights which
21 defines their class membership. Whether or not Facebook successfully or fully exploited each

22 ³² Facebook seemingly acknowledges that controlling Ninth Circuit precedent defeats its
23 argument that the amount of potential aggregated statutory damages precludes class certification.
24 *Opp. Br.*, at 26 citing, as a “*but see*,” *Bateman v. AMC, Inc.*, 623 F.3d 708, 711 (9th Cir. 2010)
25 (“enormous” aggregate damages liability “is not an appropriate reason to deny class
certification”); *see also Omni Hotels*, 2014 WL 4627271 (certifying CIPA claims for class
treatment and rejecting argument that amount of potential statutory damages defeated
superiority).

26 ³³ Ex. 9 (Updated Rpt. of Fernando Torres iso Mot. for Class Certification), ¶¶ 11, 51-60, 72-74.

27 ³⁴ Facebook’s, and Dr. Catherine Tucker’s primary challenge to Plaintiffs’ damages methodology
28 rests on this false characterization. Plaintiffs reserve their rights to strike as irrelevant the Expert
Witness Report of Dr. Catherine Tucker to the extent it covers the “actual damages” prong of 18
U.S.C. § 2520(c)(2)(A) which are not addressed by Plaintiffs or Fernando Torres.

1 interception (such as where its otherwise ubiquitous social plugin was present alongside each
2 interception), while arguably relevant to an actual damage theory, does not impact the profits and
3 other benefits generated from its broad course of misconduct. Thus, by definition, Mr. Torres’
4 model does not invite any of these or other individualized issues.³⁵

5 Facebook suggests striking Mr. Torres’ opinion on similarly faulty premises. First,
6 Facebook engages in questionable semantics to argue that “benefits to Facebook,” as opposed to
7 unjust enrichment or “profits,” are not available, as clearly the ECPA provides for them. 18
8 U.S.C. § 2520(c)(2)(A). Facebook’s sole purported grounds for this argument is an out-of-
9 context quote from *Huynh*, 2005 WL 5864467, which addressed the “actual damages” prong of
10 ECPA, not the equitable relief or profits prong. It is irrelevant in this context that “Defendant’s
11 benefit is a poor measure of plaintiff’s actual losses,” (*id.*, at *7), and that, instead, the Plaintiff’s
12 “true *actual damages*” should be measured by a formula of losses the Plaintiff suffered. *Id.*
13 (emphasis added).³⁶

14 Second, Facebook’s contention that Mr. Torres’ reference in the damages model to
15 Facebook’s Social Graph “has nothing to do with the practices at issue” ignores Plaintiffs’ theory
16 that Facebook is unjustly enriched by its ability to enhance and augment its most powerful
17 marketing tool with intercepted content from Private Messages.³⁷ Quite simply, the spoils from
18 unlawful conduct are pertinent to this case.

19 Third, Facebook’s own case law concisely demonstrates that Mr. Torres’ methodology is
20 sufficiently complete at this stage. “It is not necessary that plaintiffs show that their expert’s

21 ³⁵ *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115 (N.D. Cal. 2014) is inapposite, as there this
22 Court found, in an actual damages context, that the necessity of “mini-trials” and discovery on
23 damages issues defeated predominance, where plaintiffs offered no methodology at all, but rather
unsubstantiated claims that class members had “similar kinds of damages.” *Id.*, at 128.

24 ³⁶ *Hebrew Univ. of Jerusalem v. GM*, No. 10-3790, 2012 WL 12507522, at *5-6 (C.D. Cal. May
25 31, 2012) is also inapposite. Facebook does not, and cannot, contend that the Torres Report lacks
26 academic support: among the supporting materials underpinning the Torres Report is “The
27 Anatomy of the Facebook Social Graph” by Johan Ugander et al. (the “Ugander Study”). Ex. 9
(Torres Rpt.), at ¶ 49, n. 88-92. All four contributing authors are identified as affiliated with
28 Facebook.

³⁷ Ex. 9 (Torres Rpt.), ¶¶ 35-60; Ex. 10 (Transcript of Deposition of Fernando Torres), 87:3-8: “

1 methods will work with certainty at [the class certification stage;] rather, plaintiffs' burden is to
2 present the court with a likely method for determining class damages.” *Pecover v. Elec. Arts Inc.*,
3 No. 8-2820, 2010 WL 8742757, at *24 (N.D. Cal. Dec. 21, 2010) (internal quotation omitted).
4 Moreover, in *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 552 (C.D. Cal. 2014), the court struck
5 an expert declaration that “provide[d] no damages model at all,” contrasting it with
6 circumstances, as here, where the Court was presented with—and admitted—a damages model
7 with “a structure or framework that could be used to analyze the [relevant] data.” *Id.*, at 552-53
8 (internal citation omitted).

9 Lastly, Facebook’s own expert has now [REDACTED]
10 [REDACTED]. At
11 her deposition, Dr. Tucker [REDACTED]
12 [REDACTED]³⁸ Her testimony is compromised on that
13 basis alone. Moreover, Dr. Tucker [REDACTED]
14 [REDACTED]
15 [REDACTED]³⁹ In fact, the economic literature supports Mr. Torres’
16 contention. For example, Aswath Damodaran,⁴⁰ in his authoritative treatise Damodaran on
17 Valuation,⁴¹ has established the valuation principle that “research and development expenses are
18 designed to generate future growth and should be treated as capital expenditures.”⁴² Mr. Torres’
19 expert testimony should not be excluded on this or any of the other bases that Facebook presents.

20 **F. Alternatively, Plaintiffs Have Demonstrated that Certification is Appropriate**
21 **Pursuant to Rule 23(b)(2)**

22 Alternatively, Plaintiffs’ claims for declaratory and injunctive relief satisfy Rule 23(b)(2)
23 because, by utilizing a uniform system architecture and source code to intercept and catalog its
24

25 ³⁸ Ex. 11 (Transcript of Deposition of Catherine Tucker), 176:18-21.

26 ³⁹ *Id.*, 181: 10-14.

27 ⁴⁰ <http://pages.stern.nyu.edu/~adamodar/>.

28 ⁴¹ *Damodaran on Valuation: Security Analysis for Investment and Corporate Finance*, 2nd Ed. 2006, John Wiley & Sons, NY, in Ch. 3 *Estimating Cash Flows*; Ch. 12 *The Value of Intangibles*.

⁴² A. Damodaran, *Research and Dvlpt. Expenses: Implications for Profitability Measurement and Valuation*, (<http://people.stern.nyu.edu/adamodar/pdfiles/papers/R&D.pdf>), p.3.

1 users' Private Message content, Facebook has "acted or refused to act on grounds generally
2 applicable to the class," and relief can be appropriately fashioned "with respect to the class as a
3 whole." Fed. R. Civ. P. 23(b)(2). Showing Facebook's practice generally applicable to the
4 putative class is all that is required pursuant to Rule 23(b)(2); there is no concurrent requirement
5 to show predominance of common issues or superiority of class adjudication. *Walters v. Reno*,
6 145 F.3d 1032, 1047 (9th Cir. 1998).⁴³

7 Facebook's principal argument against certifying a 23(b)(2) class is a repetition of its
8 meritless argument that some putative class members impliedly consented to having their
9 messages scanned.⁴⁴ Facebook overlooks that this inquiry goes to predominance and is therefore
10 immaterial in the 23(b)(2) context. As one court noted in a CIPA context where the "implied
11 consent" affirmative defense had more legitimacy:

12 Yahoo may well be correct that some class members do not have viable SCA or
13 CIPA claims because they consented to Yahoo's conduct. That does not, however,
14 vitiate the operative fact that the proposed Rule 23(b)(2) class challenges Yahoo's
15 uniform policy of intercepting, scanning, and using contents of emails sent to and
16 from Yahoo Mail subscribers by non-Yahoo Mail subscribers. As in *Rodriguez*,
17 Plaintiffs complain of a pattern or practice that is generally applicable to the class
18 as a whole. This is sufficient to satisfy Rule 23(b)(2).

19 *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 600 (N.D. Cal. 2015) (internal citations, quotations
20 omitted).

21 Facebook's speculation that some class members may prefer to have their privacy invaded
22 has no legal significance.⁴⁵ "A difference of opinion about the propriety of the specific relief
23 sought in a class action among potential class members is not sufficient to defeat certification."
24

25 ⁴³ Additionally, while the Ninth Circuit has not considered whether ascertainability is required in
26 the Rule 23(b)(2) context, all other Circuits addressing the issue have held that it is not. *Shelton*
27 *v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015) ("The nature of Rule 23(b)(2) actions, the Advisory
28 Committee's note on (b)(2) actions, and the practice of many of [sic] other federal courts all lead
us to conclude that ascertainability is not a requirement for certification of a (b)(2) class seeking
only injunctive and declaratory relief . . ."); *Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir.
2004); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1976). District courts in the Ninth Circuit
have adopted this view. *P.P. v. Compton Unified Sch. Dist.*, No. 15-3726, 2015 WL 5752770, at
*23 (C.D. Cal. Sept. 29, 2015); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1325-26 (W.D. Wash.
2015); *In re Yahoo*, 308 F.R.D. at 597-98.

⁴⁴ *Opp. Br.*, at 28:5-17.

⁴⁵ "There is little doubt that many members of the proposed class here welcome the routine
practices challenged here." *Id.* at 28:21-22.

1 *Californians for Disability Rights, Inc. v. Cal. DOT*, 249 F.R.D. 334, 348 (N.D. Cal. 2008);
2 *accord, Walters*, 145 F.3d at 1047 (“All the class members need not be aggrieved by or desire to
3 challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2).”) (citing 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1775 (2d ed. 1986)).
4 Moreover, despite Facebook’s misleading citations to deposition testimony, all the deponents
5 objected to Facebook’s redirection and acquisition of Private Message content for purposes
6 unrelated to the transmission of messages.⁴⁶ Thus, the requested relief addresses “a pattern or
7 practice that is generally applicable to the class as a whole.” *Walters*, 145 F.3d at 1047 (9th Cir.
8 1998). To the extent that Facebook implies that opinions may differ as to the precise scope of the
9 ultimate relief, this argument is premature. *Ashker v. Governor of Cal.*, No. 9-5796, 2014 WL
10 2465191, at *7 (N.D. Cal. June 2, 2014) (citation omitted) (plaintiffs do not need to articulate
11 injunctive relief “with exacting precision at the class certification stage”).

12
13 Finally, Plaintiffs’ request for certification pursuant to 23(b)(2) would be *in lieu* of the
14 23(b)(3) class. As clearly pled, Plaintiffs seek damages and declaratory and injunctive relief in
15 their request for class certification pursuant to Rule 23(b)(3), but only declaratory and injunctive
16 relief in the alternative request for certification pursuant to Rule 23(b)(2).⁴⁷ The authority cited
17 by Facebook is thus inapposite, as the proposed classes in those cases sought damages *and*
18 injunctive relief concurrently in a 23(b)(2) context. Accordingly, Facebook’s arguments are
19 without merit. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) (When
20 “injunctive relief is the primary relief sought,” class actions “are properly brought under Rule
21 23(b)(2).”)

22 **III. CONCLUSION**

23 Accordingly, Plaintiffs request that the Court grant their motion for class certification.

24 ⁴⁶ *Opp. Br.*, at 29:1-14. Contrary to Facebook’s assertion that absent class member

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

App. At 1370.

28 Opening Br. at 24: 23-25.

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