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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

FACEBOOK INC.,

Defendant.

Case No. 4:13-cv-5996-PJH

**OBJECTION OF ANNA ST. JOHN TO
PROPOSED SETTLEMENT**

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

ANNA ST. JOHN,
Objector.

Case No. 4:13-cv-5996-PJH

OBJECTION OF ANNA ST. JOHN TO PROPOSED SETTLEMENT

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25 *London v. Wal-Mart Stores, Inc.*,
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10 *Otey v. CrowdFlower, Inc.*, No. 12-cv-05524-JST,
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11 *In re Dry Max Pampers Litig.* (“Pampers”),
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13 *Pearson v. NBTY, Inc.*,
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19 *Redman v. RadioShack Corp.*,
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20 *Retta v. Millennium Prods.*, No. CV 15-1801 PSG,
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22 *Richardson v. L’Oreal USA, Inc.*,
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25 *Silber v. Mabon*,
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23 **Other Authorities**

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26	Brunet, Edward, <i>Class Action Objectors: Extortionist Free Riders or Fairness Guarantors</i> , 2003 U. CHI. LEGAL F. 403 (2003).....	3
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1 Brian T. Fitzpatrick, *The End of Objector Blackmail?*,
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2 Burdge, Ronald L.,
3 *United States Consumer Law Attorney Fee Survey Report*..... 15

4 Federal Judicial Center,
5 MANUAL FOR COMPLEX LITIGATION § 21.311 (4th ed.)..... 20

6 Goode, Lauren, *Messenger and WhatsApp process 60 billion messages a day, three times more than SMS*,
7 THE VERGE (Apr. 12, 2016)1

8 Karlsgodt, Paul & Raj Chohan,
9 *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*,
10 BNA: CLASS ACTION LITIG. REPORT (Aug. 12, 2011)3

11 Lahav, Alexandra, *Fundamental Principles for Class Action Governance*,
12 37 IND. L. REV. 65 (2003)..... 17

13 Liptak, Adam, *When Lawyers Cut Their Clients Out of the Deal*,
14 N.Y. TIMES (Aug. 13, 2013), at A122

15 Newberg, Herbert & Alba Conte,
16 4 NEWBERG ON CLASS ACTIONS § 8:18 (4th ed. 2009) 18

17 Newberg, Herbert & Alba Conte,
18 4 NEWBERG ON CLASS ACTIONS § 11:42 (4th ed. 2009)4

19 Newberg, Herbert & Alba Conte,
20 4 NEWBERG ON CLASS ACTIONS § 13:20 (4th ed. 2009)5

21 Yu, Roger, *USA Today, WSJ, NYT are top three papers in circulation*,
22 USA TODAY (OCT. 28, 2014) 20

23

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SUMMARY OF ARGUMENT

The proposed settlement provides over \$3.8 million to attorneys and 22 words on one of Facebook’s help pages for one year to everyone else. The 22-word statement constitutes the only injunctive relief of the proposed settlement; all other purported relief merely describes changes implemented years ago and does not bind Facebook in any way whatsoever.

Class action settlement principles require that class members—not class counsel—be the primary beneficiaries of a settlement, and that the class’s representatives (counsel and the named plaintiffs) demonstrate undivided loyalty to the absent class. This settlement violates these principles and should be rejected on three independent grounds.

First, the gross disproportion between attorneys’ fees and purported class benefit renders the proposed settlement unfair.

Second, in affirming a settlement that provides no value to unnamed class members, the named representatives and class counsel have inadequately represented the class.

Third, the parties’ failure to notify class members of the settlement is constitutionally deficient and unreasonable under Rule 23. The settling parties agreed that no notice should be provided to class members about the settlement, even though Facebook conveys 60 *billion* personal messages per day between its users.¹ Although this Court required class counsel to post settlement documents on its own websites, such method could not have reasonably informed class members of their waiver of injunctive claims against Facebook. When the class members are Facebook users known to Facebook, and when electronic notice can be inexpensively provided, notice to class members should be provided by the most logical and “reasonable” means under Rule 23(e)(1): via Facebook.

¹ Lauren Goode, *Messenger and Whats.App process 60 billion messages a day, three times more than SMS*, THE VERGE (Apr. 12, 2016), available online at: <https://www.theverge.com/2016/4/12/11415198/facebook-messenger-whatsapp-number-messages-vs-sms-f8-2016>

1 For these reasons, the court should reject final approval of the cynical proposed settlement,
2 which the parties had hoped could be approved under cover of obscurity, with no notice to absent
3 class members.

4 ARGUMENT

5 **I. Objector Anna St. John is a member of the class and intends to appear through *pro*** 6 ***bono* counsel at the fairness hearing.**

7 Objector Anna St. John is a member of the class; she sent and received numerous messages
8 on Facebook that included a URL attachment between December 30, 2011 and March 1, 2017,
9 including messages on or about June 4, 2012, August 5, 2012, November 12, 2012, June 25, 2015, and
10 September 6, 2015. Declaration of Anna St. John (“St. John Decl.”) at ¶ 4. St. John, an attorney with
11 Competitive Enterprise Institute’s Center for Class Action Fairness (“CCAF”), is a natural person
12 who resides within the United States. *See id.* at ¶ 2-3. She is not a director, officer, agent, or employee
13 of Facebook or its subsidiaries and affiliated companies, nor is she a relation of the Court or its staff.
14 *Id.* at ¶ 5. Her business address is 1310 L Street NW, 7th Floor, Washington, DC 20005.

15 St. John intends to appear at the August 9, 2017 fairness hearing through one of her pro bono
16 attorneys—either Theodore H. Frank or William I. Chamberlain of CCAF. Frank and Chamberlain
17 are members of the bar of the Northern District of California.

18 CCAF represents class members *pro bono* in class actions where class counsel employs unfair
19 class action procedures to benefit themselves at the expense of the class. *See e.g., Pearson v. NBTY, Inc.*,
20 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF “flagged fatal weaknesses in the proposed
21 settlement” and demonstrated “why objectors play an essential role in judicial review of proposed
22 settlements of class actions”); *In re Dry Max Pampers Litig.* (“*Pampers*”), 724 F.3d 713, 716-17 (describing
23 CCAF’s client’s objections as “numerous, detailed, and substantive”) (reversing settlement approval
24 and certification); *Richardson v. L’Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing
25 CCAF’s client’s objection as “comprehensive and sophisticated” and noting that “[o]ne good objector
26 may be worth many frivolous objectors in ascertaining the fairness of a settlement”) (rejecting

1 settlement approval and certification); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y.
2 TIMES, Aug. 13, 2013, at A12 (calling Frank “[t]he leading critic of abusive class-action settlements”).

3 Since its founding in 2009, CCAF has won over \$100 million for class members. *See, e.g., In re*
4 *Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *9 (W.D. Wash. Jun. 15, 2012)
5 (noting that CCAF’s client “was relentless in his identification of the numerous ways in which the
6 proposed settlements would have rewarded class counsel ... at the expense of class members” and
7 “significantly influenced the court’s decision to reject the first settlement and to insist on
8 improvements to the second”).

9 Because it has been CCAF’s experience that class action attorneys often employ *ad hominem*
10 attacks in attempting to discredit objections, it is perhaps relevant to distinguish CCAF’s mission from
11 the agenda of those who are often styled “professional objectors.” A “professional objector” is a
12 specific term referring to for-profit attorneys who attempt or threaten to disrupt a settlement unless
13 plaintiffs’ attorneys buy them off with a share of the attorneys’ fees. Some courts presume that such
14 objectors’ legal arguments are not made in good faith. Edward Brunet, *Class Action Objectors: Extortionist*
15 *Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 437 n.150 (2003). This is not CCAF’s
16 *modus operandi*. Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious*
17 *Threat to Approval*, BNA: CLASS ACTION LITIG. REPORT (Aug. 12, 2011) (distinguishing CCAF from
18 professional objectors). CCAF refuses to engage in *quid pro quo* settlements and does not extort
19 attorneys; and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely
20 through charitable donations and court-awarded attorneys’ fees. *See generally* Declaration of Theodore
21 H. Frank.

22 To avoid doubt about her motives, St. John is willing to stipulate to an injunction prohibiting
23 her from accepting compensation in exchange for the settlement of her objection. *See* Brian T.
24 Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of
25 objections as solution to objector blackmail problem). St. John brings this objection through CCAF
26 in good faith to protect the interests of the class. St. John Decl. at ¶ 7.

1 At this time, St. John does not intend to call any witnesses at the fairness hearing, but reserves
2 her right to make use of all documents entered on the docket by any settling party, objector, or *amicus*.
3 Objector St. John also reserves the right to cross-examine any witnesses who testify at the hearing in
4 support of final approval.

5 **II. The Court owes a fiduciary duty to unnamed class members.**

6 “Class-action settlements are different from other settlements. The parties to an ordinary
7 settlement bargain away only their own rights—which is why ordinary settlements do not require court
8 approval.” *Pampers*, 724 F.3d at 715. Unlike ordinary settlements, “class-action settlements affect not
9 only the interests of the parties and counsel who negotiate them, but also the interests of unnamed
10 class members who by definition are not present during the negotiations.” *Id.* “[T]hus, there is always
11 the danger that the parties and counsel will bargain away the interests of unnamed class members in
12 order to maximize their own.” *Id.*

13 To guard against this danger, a district court must act as a “fiduciary for the class ... with ‘a
14 jealous regard’” for the rights and interests of absent class members. *In re Mercury Interactive Corp. Sec.*
15 *Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (quoting *In re Washington Pub. Power Supply Sys. Litig.*, 19 F.3d
16 1291, 1302 (9th Cir. 1994)). It “must remain alert to the possibility that some class counsel may urge
17 a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment
18 on fees.” *In re HP Inkjet Printer Litig.* (“*HP Inkjet*”), 716 F.3d 1173, 1178 (9th Cir. 2013) (citation and
19 internal quotation omitted). And it must not “assume the passive role” that is appropriate when
20 confronted with an unopposed motion in ordinary bilateral litigation. *Redman v. RadioShack Corp.*, 768
21 F.3d 622, 629 (7th Cir. 2014). In particular, settlement valuation “must be examined with great care
22 to eliminate the possibility that it serves only the ‘self-interests’ of the attorneys and the parties, and
23 not the class, by assigning a dollar number to the fund that is fictitious.” *Dennis v. Kellogg Co.*, 697 F.3d
24 858, 868 (9th Cir. 2012). It is error to exalt fictions over “economic reality.” *Allen v. Bedolla*, 787 F.3d
25 1218, 1224 (9th Cir. 2015).

1 There should be no presumption in favor of settlement approval: the proponents of a
2 settlement bear the burden of proving its fairness. *See, e.g., Koby v. ARS Nat'l Servs.*, 846 F.3d 1071,
3 1079 (9th Cir. 2017) (citing *Pampers*, 724 F.3d at 719); *True v. Am. Honda Co.*, 749 F. Supp. 2d 1052,
4 1080 (C.D. Cal. 2010) (citing Herbert Newberg & Alba Conte, 4 NEWBERG ON CLASS ACTIONS §
5 11:42 (4th ed. 2009); accord American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05(c)
6 (2010). Any such presumption would be “inconsistent with [the] probing inquiry” required in this
7 Circuit. *Retta v. Millennium Prods.*, No. CV 15-1801 PSG, 2016 WL 6520138, at *4 (C.D. Cal. Sept. 21,
8 2016) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). “Under Rule 23(e) the
9 district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.
10 The court cannot accept a settlement that the proponents have not shown to be fair, reasonable and
11 adequate.” *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.* (“GMC Pick-Up”), 55 F.3d 768, 785
12 (3d Cir. 1995) (internal quotation and alteration omitted).

13 Likewise, in determining whether the class can be certified, “[a] trial court has a continuing
14 duty in a class action case to scrutinize the class attorney to see that he or she is adequately protecting
15 the interests of the class.” Herbert Newberg & Alba Conte, 4 NEWBERG ON CLASS ACTIONS § 13:20
16 (4th ed. 2009). The Court must “make sure that class counsel are behaving as honest fiduciaries for
17 the class as a whole.” *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) (quoting *Mirfasibi*
18 *v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004)). More than that, it must protect against “even
19 the appearance of divided loyalties of counsel.” *Radcliffe v. Experian Info Solutions*, 715 F.3d 1157, 1167
20 (9th Cir. 2013) (internal quotation marks omitted).

21 Ultimately, “[b]oth the class representative and the courts have a duty to protect the interests
22 of absent class members.” *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992).

23 **III. A settlement that provides no unique consideration to class members for their release**
24 **but pays millions in attorneys’ fees cannot be approved.**

25 There is nothing wrong with a relatively small settlement, but Ninth Circuit law forbids class
26 counsel from diverting most the settlement’s value to themselves. If the claims are weak, \$3.8 million

1 may be an appropriate valuation of the case. But if that’s so, fairness under Rule 23(e) requires that
2 class members—not attorneys—receive proportional benefits. Counsel may not game the system by
3 agreeing to credit illusory injunctive relief while providing royal treatment for attorneys’ fees.

4 **A. Alleged injunctive relief provides no relief to class members, so cannot justify**
5 **the waiver of their claims.**

6 The alleged injunctive relief provides no relief to the class, so based upon controlling Ninth
7 Circuit authority cannot be relied upon to approve the settlement. The proponents of a settlement
8 must bear “the burden of demonstrating that class members would benefit from the settlement’s
9 injunctive relief.” *Koby*, 846 F.3d at 1080; *Pampers*, 724 F.3d at 719 (compiling authorities). “[N]on-
10 cash relief ... is recognized as a prime indicator of suspect settlements.” *GMC Pick-Up*, 55 F.3d at 803.

11 The proposed settlement offers only one form of injunctive relief: a milquetoast 22-word
12 disclosure buried in Facebook’s online help pages:

13 **Additional Explanatory Language.** Facebook shall display the
14 following, additional language, without material variation, on its United
15 States website for Help Center materials concerning messages within
16 30 days of the Effective Date: “*We use tools to identify and store links shared
17 in messages, including a count of the number of times links are shared.*” Facebook
18 shall make this additional language available on its United States
19 website for a period of one year from the date it is posted, provided
20 however that Facebook may update the disclosures to ensure accuracy
21 with ongoing product changes.

22 Class Action Settlement Agreement and Release, Dkt. 227-3 (“Settlement”) ¶ 40(d) (italics added).

23 All other provisions of the proposed settlement are not enforced by an injunction at all. Nor
24 were the changes in Facebook’s practices “acknowledged” by other provisions brought about by the
25 Settlement. Instead, the Settlement includes recitations for “Acknowledgement regarding the
26 Cessation of Practices” including that (1) until 2012, sending links by private message often increased
27 the “like” count associated with third-party websites, (2) until 2012, owners of third-party websites
could obtain aggregate statistics and demographic information about users sharing links in messages,
and (3) until July 2014, developers using the “Recommendation Feed” feature would sometimes see
page recommendations for their own websites that used a backup “PHP backend” algorithm, which

1 in part considered the number of times a link was shared via private message. *See* Settlement ¶ 40(a).
2 These “acknowledgements” provide exactly what counsel for Facebook provided at the motion to
3 dismiss hearing in 2014—a representation that all of the complained-about practices have ceased,
4 mostly in 2012 before the suit was even filed. *See* Transcript of Oct. 1, 2014 hearing, Dkt. 45 at 5-7.
5 The proposed settlement also acknowledges that Facebook changed its Data Policy in 2015. *See*
6 Settlement ¶ 40(c). It’s difficult to imagine how this constitutes any benefit given that plaintiffs cited
7 this same policy as deficient in 2016. *See* Second Amended Complaint, Dkt. 196 ¶ 60. Even if the
8 business practice changes were meaningful at the time, the acknowledgment now is “of no real value”
9 since it “does not obligate [the defendant] to do anything it was not already doing.” *Koby*, 846 F.3d at
10 1080; *see also Hofmann v. Dutch LLC*, No. 3:14-cv-02418-GPC-JLB, 2017 WL 840646, at *7 (S.D. Cal.
11 Mar. 2, 2017) (refusing to credit injunctive relief when the defendant had voluntarily revised its labeling
12 before the settlement); *Polar Int’l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 114 (S.D.N.Y. 1999) (finding
13 “reassurance” that rights had not been violated to be “virtually worthless”).

14 In fact, the acknowledgements demonstrate that plaintiffs have *not* prevailed on the merits in
15 spite of requesting nearly \$3.9 million in fees and costs. While plaintiffs pleaded that any “interception”
16 and “scanning” of messages unneeded for transmission violates the ECPA, Second Amended
17 Complaint, Dkt. 196 at ¶ 79-86, the settlement agreement implicitly endorses Facebook’s continued
18 scanning of links sent through private message. Facebook merely “confirms, *as of the date it has executed*
19 *this agreement below*,” that Facebook was not using data “from EntShares created from URL attachments
20 sent by users in Facebook Messages for: 1) targeted advertising; 2) sharing personally identifying user
21 information with third parties; 3) use in any public counters in the ‘link_stats’ and Graph APIs; and
22 4) displaying lists of URLs representing the most recommended webpages on a particular web site.”
23 Settlement ¶ 40(b) (emphasis added). Read next to the complaint, this disclosure provides
24 astonishingly little assurance. The representation allows that Facebook continues to analyze shared
25 links “for the current or future objective of accumulating and analyzing user data and thereafter
26 refining user profiles.” Second Amended Complaint, Dkt. 196 ¶ 46. Facebook also apparently still

1 shares data collected from message URLs with third parties, provided that it is not personally
2 identifiable—otherwise the words “personally identifying” would be unneeded in the above-quoted
3 acknowledgement. Yet plaintiffs specifically complained about the sharing of such demographic data
4 with third parties. *Id.* ¶ 47.

5 The proposed settlement does not even enjoin Facebook from resuming such practices.
6 Whereas this Court denied defendant’s motion to dismiss injunctive relief claims because “plaintiffs
7 have adequately alleged that there is a ‘sufficient likelihood’ that Facebook could resume the practice,”
8 Dkt. 43 at 19, plaintiffs have secured nothing to prevent relapse. No injunction attaches to Facebook’s
9 representations and acknowledgements, which apply only as of the date of execution. Under the
10 proposed settlement, Facebook may resume all of the complained about practices immediately, so
11 long as it posts the agreed vague disclosure somewhere in its “Help Center” for one year.²

12 As for the 22-word “explanatory language” required by the Settlement, the parties cannot meet
13 their burden to demonstrate its value to the class. *Koby*, 846 F.3d at 1080. The purported injunctive
14 relief to the class is neither relief, nor is it directed to the class. The settling parties provide only
15 conclusory statements that these the disclosure has value, and this is inadequate to find a settlement
16 fair.

17 The proposed injunction is much less substantial than the ones found to be lacking in *Pampers*.
18 As here, the settlement in *Pampers* required revisions to defendants’ website (except for *two* years), and
19 it further required label changes and the resumption of a refund program that had been voluntarily
20 offered by the defendant. *Pampers*, 724 F.3d at 716. Only equitable claims were surrendered by the
21 *Pampers* class. *Id.* However, the court observed that “‘courts must be particularly vigilant’ for ‘subtle

22
23 ² Even if Facebook had agreed to enjoin itself, such injunction would have dubious value. *See*
24 *Koby*, 846 F.3d at 1080 (Defendant “took that step for its own business reasons (presumably to avoid
25 further litigation risk), not because of any court-or settlement-imposed obligation.”) (*citing Crawford v.*
26 *Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000)); *In re Scotts EZ Seed Litig.*, 304 F.R.D.
397, 408 (S.D.N.Y. 2015) (“[I]t appears the [alleged misrepresentation] has already been removed from
EZ Seed’s packaging ..., and it is not clear what additional injunctive relief plaintiffs seek.”).

1 signs that class counsel have allowed pursuit of their own self-interests and that of certain class
2 members to infect the negotiations.” *Id.* at 718 (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th
3 Cir. 2012)). In *Pampers*, given the meaningless relief and \$2.73 million in attorneys’ fees, “[t]he signs
4 [were] not particularly subtle.” *Id.* The signs are even less subtle here, where plaintiffs secured only
5 website notice as purported justification for nearly \$3.9 million in fees and expenses.

6 As in *Pampers* and *Koby*, class members will not be primary beneficiaries of the purported relief.
7 In *Pampers*, the parties argued that past customers would benefit from new disclosures, and in *Koby*,
8 the parties argued that a class would benefit from the modification of collection practices by the
9 defendant, but in each case the proposed injunction provided no unique benefit to the class. As here,
10 the injunctions in *Pampers* and *Koby* applied to all *future* customers and debtors respectively, whether or
11 not they were class members, which was “an obvious mismatch between the injunctive relief provided
12 and the definition of the proposed class.” *Koby*, 846 at 1079. Precisely such a mismatch exists here.
13 The class includes past Facebook users, but the only conceivable beneficiaries are *future* users. Under
14 the proposed settlement all Americans with an internet connection receive the same dubious relief—
15 a statement buried in Facebook’s Help Center. Even if this were valuable, and even if class counsel
16 was not the primary beneficiary of the agreement, this “relief” is conferred on *all* future users,
17 regardless of class membership. *Pampers*, 724 F.3d at 720 (“The fairness of the settlement must be
18 evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other
19 people, much less on whether it interferes with the defendant’s marketing plans.” (emphasis in
20 original) (internal quotation marks omitted)). “[F]uture purchasers are not members of the class,
21 defined as it is as consumers who have purchased [the product].” *Pearson*, 772 F.3d at 786. “No changes
22 to future advertising by [the defendant] will benefit those who already were misled by [the defendant]’s
23 representations.” *True*, 749 F. Supp. 2d at 1077. A court in this district recently echoed this reasoning
24 in denied approval of a settlement that would have required the defendant to alter its in-software help
25 file and online FAQs and marketing materials: “The prospective relief, while of some value to future
26

1 customers, does not provide relief to class members, who have already suffered injury.” *Boyd v.*
2 *Avanquest N. Am. Inc.*, No. 12-cv-04391-WHO, 2015 WL 4396137, at *4 (N.D. Cal. Jul. 17, 2015).

3 Even among those who might read Facebook help pages in the future, “the named plaintiffs
4 provided no evidence to suggest that many, if any, members of the proposed class would derive a
5 benefit from obtaining the injunctive relief afforded by the settlement.” *Koby*, 846 F.3d at 1080. Class
6 counsel makes no attempt to demonstrate any benefit, and simply mischaracterizes the settlement that
7 injunctive relief constitutes “meaningful relief targeted to each of the three URL uses alleged, as well
8 as significant additions to Facebook’s public disclosures regarding its use of Private Message content.”
9 Motion for Final Approval, Dkt. 237 at 7. As discussed above, it does nothing of the sort. Regarding
10 the three URL uses, the Settlement merely recites Facebook’s past actions—most stopped before the
11 suit was even filed—and nothing more is required of Facebook except to post a 22-word notice for
12 one year. *See* Settlement ¶ 40.

13 Class counsel do not and cannot articulate any reason that class members benefit from posting
14 22 words in the Facebook Help Center, and the parties bear the burden of showing such benefit. Even
15 if it were valuable, it provides no particular relief to the class of past Facebook users, so cannot possibly
16 justify nearly \$3.9 million in fees and expenses.

17 **B. In “economic reality,” the settlement prioritizes attorneys’ fees over class**
18 **redress.**

19 This settlement features all three indicia of impermissible self-dealing identified by the Ninth
20 Circuit: (1) a disproportionate distribution of fees to counsel; (2) a “clear sailing agreement” that
21 defendants will not challenge the fee request; and (3) a “kicker” that ensures any reduction in fees will
22 revert to the defendant. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011);
23 *Allen*, 787 F.3d at 1224.

24 The most telling sign of self-dealing in this settlement is that “class counsel are amply
25 rewarded” while “the class receives no monetary distribution.” *Bluetooth*, 654 F.3d at 947 (quoting
26 *Hanlon*, 150 F.3d at 1021). The benchmark for a reasonable award in the Ninth Circuit in a case alleging

1 economic injury is 25% of the class benefit. *See, e.g., id.* at 942; *HP Inkjet*, 716 F.3d at 1190. While
2 injunctive relief might confer a valuable benefit that justifies an otherwise disproportionate award, no
3 evidence here proves such benefit and plaintiffs’ own complaints suggest otherwise. *Cf. Bluetooth*, 654
4 F.3d at 945 n.8 (“We note, however, that the value of the injunctive relief is not apparent to us from
5 the face of the complaint, which seeks to recover significant monetary damages for alleged economic
6 injury, nor from the progression of the settlement talks, the last of which occurred after defendants
7 had already voluntarily added new warnings to their websites and product manuals.”).

8 A class action settlement may not confer preferential treatment upon class counsel to the
9 detriment of class members. “Such inequities in treatment make a settlement unfair” for neither class
10 counsel nor the named representatives are entitled to disregard their “fiduciary responsibilities” and
11 enrich themselves while leaving the class behind. *Pampers*, 724 F.3d at 718-21 (cleaned up) (reversing
12 settlement approval where class counsel received \$2.73 million and absent class members were offered
13 a money-back refund program, prospective labeling changes, and a *cy pres* donation).

14 Disproportionate fees suggest self-dealing, which infects the entire settlement, not just the fee
15 request. To be lawyer-driven and self-dealing, a settlement need not be collusive. Courts “must be
16 particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel
17 have allowed pursuit of their own self-interests ... to infect the negotiations.” *Bluetooth*, 654 F.3d at
18 947 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003)). There need only be acquiescence for
19 such self-dealing to occur: “a defendant is interested only in disposing of the total claim asserted
20 against it” and “the allocation between the class payment and the attorneys’ fees is of little or no
21 interest to the defense.” *Staton*, 327 F.3d at 964 (quoting *GMC Pick-Up*, 55 F.3d at 819-20); *accord*
22 *Bluetooth*, 654 F.3d at 949; *Mirfasibi*, 356 F.3d at 785. “If fees are unreasonably high, the likelihood is
23 that the defendant obtained an economically beneficial concession with regard to the merits
24 provisions, in the form of lower monetary payments to class members or less injunctive relief for the
25 class than could otherwise have obtained.” *Staton*, 327 F.3d at 964; *accord Bluetooth*, 654 F.3d at 947.

1 This is the case here, where the class obtains dubious recovery whereas class counsel
2 negotiated clear-sailing for \$3,890,000 in attorney fees and expenses. That is, Facebook agreed in
3 advance not to oppose the fee request by class counsel. *See* Settlement, Dkt. 227-3 ¶ 57. Such a clause,
4 by its “very existence” “increases the likelihood that class counsel will have bargained away
5 something of value to the class.” *Bluetooth*, 654 F.3d at 948 (quoting *Weinberger v. Great N. Nekoosa*
6 *Corp.*, 925 F.2d 518, 525 (1st Cir. 1991)). Clear sailing lays the groundwork for lawyers to “urge a class
7 settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees”
8 and “suggest[s], strongly, that the fee request [should] be placed under the microscope of judicial
9 scrutiny.” *Weinberger*, 925 F.2d at 524-25.

10 To complete *Bluetooth*’s unholy troika, the settlement segregates the fee award, such that any
11 any reduction in that request would only benefit Facebook. Settlement ¶ 57. This settlement
12 demonstrates that Facebook is willing to pay at least \$3.9 million to make the injunctive part of this
13 case go away. The kicker makes it impossible for this Court to give the class the relief *that Facebook is*
14 *willing to pay*. “[I]here is no apparent reason the class should not benefit from the excess allotted for
15 fees.” *Bluetooth*, 654 F.3d at 949. It would be reversible error to approve a settlement that provides
16 class counsel a disproportionate share of the settlement value. But if the Court instead reduces the
17 fee, it cannot pass that money on to the class; that money reverts to the defendant. The parties have
18 prevented the Court from returning the fees and class relief to their natural equilibrium.

19 Given the disproportionate, segregated, and unopposed fees that have been negotiated, this
20 settlement must fall. When injunctive relief “may be largely or even entirely worthless” “even a modest
21 award of attorneys’ fees ... is excessive.” *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 721 (7th
22 Cir. 2016). Even if the fees were reduced by 95%, the settlement would still be too lopsided to approve.
23 *See Koby*, 846 F.3d 1071 (\$67,500 : \$0 ratio untenable); *Cranford v. Equifax Payment Info*, 201 F.3d 877,
24 882 (7th Cir. 2000) (\$78,000 : \$0 ratio unsupportable).

1 **IV. The proposed settlement suffers from fatally inadequate representation.**

2 Independently, the proposed class should be decertified due to inadequate representation. The
3 class representatives have approved a settlement that provides no benefit to unrepresented class
4 members, but thousands to themselves and millions to their counsel. The class representatives
5 comprehensively failed to guard the interests of absent class members who have their injunctive claims
6 waived for no real benefit.

7 It is “altogether proper” to inspect the terms of a settlement when evaluating whether
8 adequacy is met. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997); *accord Radcliffe*, 715 F.3d
9 at 1166 (“[O]ur [23(a)(4)] analysis focuses on the agreement.”). Rule 23(a)(4), grounded in the Due
10 Process Clause of the Constitution, conditions class certification upon a demonstration that “the
11 representative parties will fairly and adequately protect the interests of the class.” This provision, along
12 with “basic due process,” demands that the named representatives and class counsel manifest
13 “undivided loyalties to absent class members.” *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331,
14 338 (4th Cir. 1998). This representative duty “does not permit even the appearance of divided
15 loyalties.” *Radcliffe*, 715 F.3d at 1167 (internal quotation marks omitted)

16 Class counsel must “prosecute the case in the interest of the class ... rather than just in their
17 interests as lawyers who if successful will obtain a share of any judgment or settlement as
18 compensation for their efforts.” *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913,
19 917 (7th Cir. 2011). When “class counsel agree[s] to accept excessive fees and costs to the detriment
20 of class plaintiffs, then class counsel breache[s] their fiduciary duty to the class.” *Lobatꝯ v. U.S. West*
21 *Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000). Similarly, the named representatives may not
22 “leverage” “the class device” for their own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952
23 (7th Cir. 2006). Here, class counsel and their friends, the named representatives,³ have signed off on

24
25 ³ Each of the two named plaintiffs is personal friends with counsel in this case. *See* Facebook’s
26 Opposition to Motion for Class Certification, Dkt. 178-2 at 15-16; *see also* Dkt. 180-1 (instant messages
27 between representative Campbell and attorney Slade of Carney Bates & Pulliam, PLLC). Such

1 a settlement that divides the entirety of the \$3.9 million in settlement proceeds among themselves,
2 while generating no demonstrable benefit for absent class members. Such representation is simply too
3 self-serving to be adequate under rules 23(a)(4) and (g)(4).

4 Nor does the purported injunctive relief cure the representatives' inadequacy, because
5 Facebook changed its source code to resolve the issues in this case three years ago—and in some
6 instances, almost five years ago, *before the lawsuit was even filed*. See Settlement, Dkt. 227-3, ¶¶ 40(a). “A
7 class representative who proposes that high transaction costs (notice and attorneys’ fees) be incurred
8 at the class members’ expense to obtain no benefit is not adequately protecting the class members’
9 interests.” *Walgreen*, 832 F.3d at 725 (internal quotation marks and alterations omitted). The only novel
10 relief obtained in the settlement is a single sentence added to Facebook’s Help Center materials to the
11 effect that Facebook “use[s] tools to identify and store links shared in messages, including a count of
12 the number of times links are shared.” Settlement, Dkt. 227-3, ¶ 40(d). \$3.9 million in costs and fees—
13 for twenty-two words. That is not enough to render the class representatives adequate.

14 Federal courts have seen—and rejected—arrangements like this before. In *Pampers*,
15 approximately 50 class representatives signed off on a settlement that granted them “incentive awards”
16 of \$1000 each per affected child and afforded class counsel a hefty fee. 724 F.3d at 716. Absent class
17 members, conversely, were left with prospective injunctive relief and the right to participate in a
18 money-back guarantee program that was already available to them before the settlement. *Id.* The Sixth
19 Circuit found that this settlement agreement rendered the class representatives inadequate because
20 “there [was] no overlap between” the deal obtained by the class representatives and that obtained by
21 the class itself. *Id.* at 722. That windfall meant that the class representatives had no remaining “interest
22 in vigorously prosecuting the interests of unnamed class members.” *Id.* (cleaned up). This settlement
23 mirrors *Pampers*: the named plaintiffs obtain \$5,000 service awards, class counsel obtains a hefty fee,
24 and absent class members receive only injunctive relief that adds nearly nothing to what was already
25 friendships “cast[] doubt on [the representative’s] ability to place the interests of the class above that
26 of class counsel.” *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003).

1 available to them. Also, as in *Pampers*, the named representatives here are binding themselves to a
2 broader release than absent class members, amounting to a side settlement that highlights the
3 leveraging of the class device. *Compare* Settlement ¶ 47 with ¶ 49.

4 The parties might point to the fact that the class’s monetary claims have not been waived to
5 justify their adequacy. That does not help; neither were the monetary claims waived in *Pampers*. *See also*
6 *Grok Lines Inc. v. Paschall Truck Lines, Inc.*, No. 14 C 08033, 2015 WL 5544504, at *7 (N.D. Ill. Sept. 18,
7 2015) (rejecting as unacceptable a settlement where class counsel simply “abandoned pursuit of a
8 monetary recovery for the class” in favor of an injunctive relief-only settlement and a lump sum of
9 attorneys’ fees). The class is in the best negotiating position when it can assert claims for injunctive
10 relief class-wide—*especially* if it will be challenging to certify a class for the monetary claims. But when
11 the representatives sign off on a settlement like this—releasing the class’ injunctive relief claims and
12 pocketing all of the settlement value—the class is left worse off, as any future attempts to litigate on
13 behalf of the class won’t have injunctive claims or (b)(2) certification to use as leverage. If the class is
14 strictly worse off after a settlement than they were before it, the representatives did not provide
15 adequate representation.

16 **V. In the alternative, if the Court approves the settlement, it should scrutinize attorneys’**
17 **fees.**

18 The proposed settlement’s laughable “relief” suggest it should be rejected in its entirety. To
19 the extent it is not, class counsel’s proposed lodestar filings are woefully deficient. Class counsel’s
20 failure to submit detailed hours prevents class members and the Court from evaluating the
21 reasonableness of those hours, and so should prevent the award of attorneys’ fees on the basis of
22 lodestar. *See, e.g., Otey v. CrowdFlower, Inc.*, No. 12-cv-05524-JST, 2014 WL 1477630, at *9 (N.D. Cal.
23 Apr. 15, 2014) (“The Court is ... unable to determine whether the hours spent are reasonable, because
24 Plaintiffs’ counsel have provided no evidence or itemized records to support the hours they worked.”).

25 Class counsel’s sketchy billing raises two concerns. *First*, the lodestar is distended and
26 unreasonably top-heavy, to the extent that the entire blended hourly rate of the lodestar figure exceeds

1 \$582/hour. Dkt. 239, Ex. 1. These are astonishingly high average rates and they imply senior attorneys
2 performed most activity on the case. *See, e.g., FB-Stark, LLC v. White*, No. CV-12-0095-PHX-PGR,
3 2012 WL 4466532, at *2 (D. Ariz. Sept. 26, 2012) (criticizing partner who performed tasks “that could
4 have, and should have, been done by the lesser-paid employees who worked on this litigation, such as
5 the two associate attorneys and the paralegal assigned to the case”); *Zucker v. Occidental Petroleum Corp.*,
6 968 F. Supp. 1396, 1402 (C.D. Cal. 1997) (“[L]egal research [is] a task that most certainly could have
7 been tackled by an associate billing at a lower rate.”). The high blended rate also arises from unusually
8 high billing rates. For example, 10 different paralegals and (non-attorney) researchers each billed at a
9 minimum rate of \$345/hr. Dkt. 239, Ex. 1. As another example, one contract attorney—that is, a
10 temporary attorney typically billed to clients in the industry at perhaps \$50/hour—is billed here at
11 \$515/hr for a total of \$208,575. *Id.* In the absence of such improper practices, one would expect the
12 blended rate to be closer to typical west-coast rates.⁴

13 *Second*, the fee application obscures how the fee award will actually be split between counsel.
14 “Class Counsel shall have the sole and absolute discretion to allocate the Attorneys’ Fees and Costs
15 Award amongst Class Counsel and *any other attorney.*” Settlement, Dkt. 227-3 at 15 (emphasis added).
16 Class counsel ought to disclose fee agreements, especially here where defendant credibly argued that
17 former plaintiffs’ counsel in this case are inadequate. *See* Order Granting in Part Class Certification,
18 Dkt. 192 at 17 (“While Mr. Shadpour’s deposition testimony also indicates that he did not review the

19 ⁴ *See, e.g., In re Quaker Oats Labeling Litig.*, No. 10-cv-00502, 2014 WL 12616764, at *1 (N.D.
20 Cal. July 29, 2014) (blended rate of \$437.54 “in line with blended rates approved in other similar
21 cases”); *Bruno v. Quten Research Inst., LLC*, No. SACV 11-00173 DOC(Ex), 2013 WL 990495, at *4
22 (C.D. Cal. Mar. 13, 2013) (blended rate was \$366.87/hr); *Nguyen v. BMW of N. Am. LLC*, No. C 10-
23 02257 SI, 2012 WL 1380276, at *3 (N.D. Cal. Apr. 20, 2012) (finding reasonable blended rate to be
24 \$470/hr); *see also Gabriel Techs. Corp. v. Qualcomm Inc.*, No. 08-cv-1992 AJB (MDD), 2013 WL 410103,
25 at *9 (S.D. Cal. Feb. 1, 2013) (finding blended rate of \$447/hr to be “in line with that of the
26 community” when compared to peers in Los Angeles, Silicon Valley, San Francisco, and San Diego)
see also Ronald L. Burdge, *United States Consumer Law Attorney Fee Survey Report, 2015-16, available at*
<https://www.nclc.org/images/pdf/litigation/tools/atty-fee-survey-2015-2016.pdf> (describing typical
consumer law attorney billing rates around the country).

1 consolidated complaint filed in this action, plaintiffs provide a declaration stating that the consolidated
2 complaint was provided to Mr. Shadpour's former counsel, so any failure to review it cannot be
3 attributable to the putative class counsel.”).

4 “In a class action settlement, the district court has an independent duty under Federal Rule of
5 Civil Procedure 23 to the class and the public to ensure that attorneys’ fees are reasonable and divided
6 up fairly among plaintiffs’ counsel.” *In re High Sulfur Content*, 517 F.3d 220, 227 (5th Cir. 2008). “[T]he
7 district court must not ... delegate that duty to the parties.” *Id.* at 228 (internal quotation marks
8 omitted). The appellants in *High Sulfur*, attorneys dissatisfied with their share, complained that the
9 district court had sealed the fee allocation list, such that they could not compare their fee awards to
10 those of other attorneys. The Fifth Circuit agreed: “One cannot ... compare apples to oranges without
11 knowing what the oranges are.” *Id.* at 232. That court also held that it was impermissible for the district
12 court to defer to the allocation proposed by the attorneys themselves. In a case predating Rule 23(h),
13 the Second Circuit similarly “reject[ed] this authority ... to the extent it allows counsel to divide the
14 award among themselves in any manner they deem satisfactory under a private fee sharing agreement.”
15 *In re “Agent Orange” Prods. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987). “Such a division overlooks the
16 district court’s role as protector of class interests under Fed. R. Civ. P. 23(e).” *Id.* The Second Circuit
17 decreed that “in all future class actions counsel must inform the court of the existence of a fee sharing
18 agreement at the time it is formulated.” *Id.* at 226.

19 In this Circuit, before the adoption of Rule 23(h) in 2003, court oversight of the fee division
20 was a best practice, even though it was not required. *Contrast In re Critical Path, Inc., Sec. Litig.*, No. C
21 01-00551 WHA, 2002 WL 32627559, at *8 (N.D. Cal. Jun. 18, 2002) (“The attorneys have provided
22 no indication as to how the overall fee would be divided between them. Given the respective work
23 performed by the Berman and Bernstein firms, certain allocations could lead to an unreasonable fee
24 for one firm or the other. The Court believes that the better practice, for future cases, is to disclose
25 the exact allocation proposed between the firms. As this has not been done, given the risk of a
26 disparate award this order will determine a reasonable allocation on its own.”) *with Six (6) Mexican*

1 *Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (not mandatory for trial court to
2 individuate the award). The rule allowed a court to “reject a fee allocation agreement where it finds
3 that the agreement rewards an attorney in disproportion to the benefits that attorney conferred upon
4 the class—even if the allocation in fact has no impact on the class.” *In re FPI/Agrotech Sec. Litig.*, 105
5 F.3d 469, 473 (9th Cir. 1997).

6 At least two rationales undergirding Rule 23(h)’s preference for court oversight of fee divisions
7 apply here. *First*, if one of the law firms has secretly agreed to accept less than its lodestar or to a
8 smaller multiplier than is being requested from the Court, it is the class that is entitled to that giveback,
9 not the law firm that has secretly extracted a return greater than would be approved by the Court. *Cf.*
10 *Pearson*, 772 F.3d at 786; *Bluetooth*, 654 F.3d at 949 (givebacks to defendant instead of class is a sign of
11 impermissible self-dealing because “there is no apparent reason the class should not benefit from the
12 excess allotted for fees”). Perhaps one firm is entitled to a larger multiplier of its lodestar than another
13 firm, but those reasons should be tested in court. *Second*, class counsel—which won certification in
14 part by assuring that former counsel would not serve the class, Dkt. 178-3 at 5—should not be able
15 to distribute funds to former counsel. “Public confidence in the fairness of attorney compensation in
16 class actions is vital to the proper enforcement of substantive law.” *Laffitte v. Robert Half Int’l*, 376 P.3d
17 672, 688-92 (Cal. 2016) (Liu, J., concurring). Before any fee is awarded, class counsel should produce
18 all agreements concerning the distribution of attorneys’ fees.

19 **VI. The notice to the class was constitutionally deficient.**

20 The principle of disclosure through notice has been referred to as the “first and perhaps most
21 important principle for class action governance.” Alexandra Lahav, *Fundamental Principles for Class*
22 *Action Governance*, 37 IND. L. REV. 65, 118 (2003). Facebook possesses the contact information of every
23 class member; after all, each Facebook account holder entrusts Facebook with his or her personal
24 information. Nevertheless, class members are not afforded direct notice of the settlement. In fact, the
25 settling parties originally proposed no notice whatsoever, erroneously declaring that because this is a
26 proposed 23(b)(2) class, notice could be dispensed with altogether. Settlement ¶ 56. Although the

1 Court required them to post settlement-related documents on class counsel’s public websites,
2 Preliminary Approval Order 3, posting documents on two law firms’ websites does not meet the “best
3 notice practicable” standard. It is not “reasonable” notice, and, in fact, it is not formal “notice” at all
4 given that there is no discrete “clear and concise[]”⁵ statement of the necessary information in either
5 short or long-form.

6 Notice is not discretionary under Rule 23: “The court must direct notice in a reasonable
7 manner to all class members who would be bound by the proposal.” Rule 23(e)(1). *See also* 23(h)(1)
8 (notice of class counsel’s fee motion “must be ... directed to class members in a reasonable manner”).
9 While the “best notice practicable” is not statutorily prescribed under 23(e)(1) or (h)(1) as it is under
10 (b)(3), notice of settlement is still subject to the constitutional constraints elucidated in *Mullane v.*
11 *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).⁶ The *Mullane* constitutional imperative is that
12 the settlement notice be “reasonably calculated, under all the circumstances, to apprise interested
13 parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.*
14 at 314. A “mere gesture” will not suffice. *Id.* at 315. Nor will “lip service” to class members’ right to
15 object. *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 408 (W.D.N.Y. 2013). Notice must evince a
16 genuine desire to actually inform the absentees. *Jones v. Flowers*, 547 U.S. 220, 229-30 (2006).

17 Even where the settlement class is to be certified under Rule 23(b)(2) rather than (b)(3), “it is
18 necessary that the notice be given in a form and manner that does not systematically leave an
19 identifiable group without notice.” *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 835 (9th Cir.
20 1976) (following *Mullane*); *see also Mendonza v. United States*, 623 F.2d 1338, 1350 n.16 (9th Cir. 1980)
21 (rejecting idea that notice can be dispensed with in a (b)(2) settlement). And that makes perfect sense
22 because any other approach infringes class members’ right of objection. *See Mullane*, 339 U.S. at 314

23 ⁵ Fed. R. Civ. P. 23(c)(2)(B).

24 ⁶ *See also* NEWBERG ON CLASS ACTIONS § 8:18 (4th ed. 2002) (“The court’s formulation of an
25 adequate notice procedure under Rule 23(e) is limited only by constitutional due process
26 considerations.”).

1 (“This right to be heard has little reality or worth unless one is informed that the matter is pending
2 and can choose for himself whether to appear or default, acquiesce or contest.”). Notice serves
3 purposes beyond just enabling the right of opt-out. *See In re Katrina Canal Breaches Litig.*, 628 F.3d 185,
4 197 (5th Cir. 2010) (notice of mandatory class settlement allows class members “to make a decision
5 whether to object to the settlement”).

6 Under the *Mullane* standard, there can be no dispute that anything less than direct notice is
7 unacceptable when the contact information for class members is housed within the defendants’
8 records. *See, e.g., Mullane*, 339 U.S. at 318; *cf. Larson v. AT&T Mobility LLC*, 687 F.3d 109, 122-31 (3d
9 Cir. 2012) (reversing notice plan that did not require defendants to search through their records for
10 the purpose of providing individual notice). Direct notifications through Facebook’s systems should
11 be neither particularly costly nor burdensome given that Facebook routinely communicates with its
12 users in a variety of ways. In any event, “[p]laintiffs’ pocketbooks are not a factor—the mandatory
13 notice requirement may not be relaxed based on the high cost of providing notice.” *In re Motor Fuel*
14 *Temperature Sales Practices Litig.*, 279 F.R.D. 598, 617 (D. Kan. 2012). Individual electronic notice is
15 obligatory here.

16 Even if individual notice were not required, the feeble gesture of posting certain documents
17 on law firm websites is not reasonably calculated to apprise class members of the settlement.⁷
18 “Reasonableness is admittedly a flexible standard, but to hold that this notice satisfied due process
19 would rob the words of the Supreme Court of their meaning.” *Hecht v. United Collection Bureau, Inc.*, 691
20 F.3d 218, 225 (2d Cir. 2012) (repudiating one-time USA Today publication settlement notice as
21 inadequate). If one-time publication in a nationwide publication with a daily circulation of more than
22

23 ⁷ The settlement webpage on Lieff Cabraser’s website cannot directly be accessed from its
24 homepage. As for the page posted on Carney, Bates & Pullman’s website, it is hidden from internet
25 searches, as the entire website is, by a restrictive “Disallow: /” command in the site’s “robots.txt,” file.
26 As a result, a class member attempting to find the Carney, Bates & Pullman settlement page could not
do so using Google or any other search engine.

1 4 million⁸ does not comport with *Mullane*'s standard, posting on two firms' websites certainly does not
2 either. One cannot reasonably expect any significant number of class members to look at the website
3 of two plaintiffs' law firms, especially when class members are not even aware of the representation.
4 It is particularly striking that the settlement declines to employ any means of disseminating notice
5 through Facebook, given that other settlements frequently make use of Facebook even where
6 Facebook is not a defendant in the case and Facebook usage is not a prerequisite to class membership
7 as it is here. *See, e.g., Allen v. Similasan Corp.*, No. 12-cv-00376, 2017 WL 1346404, at *2 (S.D. Cal. Apr.
8 12, 2017) (notice included advertising on Facebook targeted to reach likely class members); *Hendricks*
9 *v. Starkist Co.*, No. 13-cv-00729-HSG, 2016 WL 5462423, at *3 (N.D. Cal. Sept. 29, 2016) (publication
10 notice included establishing a Facebook page); *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-
11 04149, 2008 WL 8150856, at *3 n.20 (C.D. Cal. Jul. 21, 2008) (noting that Facebook flyer was viewed
12 584,000 times).

13 A settlement website—in this case two webpages within class counsel's websites—is a “useful
14 supplement,” but it cannot replace direct or publication notice as the pillar of a notice program.
15 Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION § 21.311 (4th ed.). The website should
16 “link[] to the notice and other important documents,” but not masquerade as the Notice itself. Judge
17 Hamilton's Procedural Guidance for Class Action Settlements, *available at*
18 [http://www.cand.uscourts.gov/filelibrary/1408/STANDING.%20class%20action%20settlements1.](http://www.cand.uscourts.gov/filelibrary/1408/STANDING.%20class%20action%20settlements1.pdf)
19 [pdf](http://www.cbplaw.com/facebook-settlement/). In any event, class counsel's settlement webpages ([http://www.cbplaw.com/facebook-](http://www.cbplaw.com/facebook-settlement/)
20 [settlement/](https://www.lieffcabraser.com/privacy/facebook-privacy/); <https://www.lieffcabraser.com/privacy/facebook-privacy/>) do not comply with the
21 content required of notices under this Court's Procedural Guidance. They do not “clearly state that
22 the date [of the hearing] may change without further notice to the class” nor do they advise class
23 members to check for such scheduling changes. *See id.*

24 _____
25 ⁸ Roger Yu, *USA Today, WSJ, NYT are top three papers in circulation*, USA TODAY (OCT. 28, 2014),
26 available at: [https://www.usatoday.com/story/money/business/2014/10/28/aam-circulation-data-](https://www.usatoday.com/story/money/business/2014/10/28/aam-circulation-data-september/18057983/)
[september/18057983/](https://www.usatoday.com/story/money/business/2014/10/28/aam-circulation-data-september/18057983/).

1 The incentives are clear: For the settling parties, meager notice means less resistance, and even
2 more importantly, less cost to settlement. But for class members, it means an abridgment of statutory
3 and constitutional rights. This Court should consider the wisdom of the Western District of New
4 York: “If plaintiffs and their attorneys are acting like they have something to hide from the absent
5 class members, perhaps it’s because they do.” *Felix*, 290 F.R.D. at 408.

6
7 **CONCLUSION**

8 Class counsel has negotiated a settlement that provides nearly \$3.9 million to them, \$10,000
9 to their personal friends, the class representatives, and a vague 22-word statement buried in
10 Facebook’s “Help Center” to the class. Such a disproportionate, poorly-noticed, and unfair settlement
11 cannot be approved, even though “only” the injunctive claims of millions of absent class members
12 are bargained away.


13 Dated: June 26, 2017

Respectfully submitted,

14
15 */s/ William I. Chamberlain*

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1 I, Anna St. John, am the objector. I sign my foregoing written objection pursuant to the
2 Court's Preliminary Approval Order (Dkt. 235) ¶ 9.

3
4 

5
6 Anna St. John

7
8
9 **CERTIFICATE OF SERVICE**

10 I hereby certify that, on June 26, 2017, service of this document was accomplished
11 pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

12
13
14 /s/ William I. Chamberlain
15 William I. Chamberlain