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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MATTHEW CAMPBELL and MICHAEL HURLEY,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. C 13-05996 PJH-SK

CLASS ACTION

FACEBOOK'S STATEMENT IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND RESPONSE TO OBJECTION

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. INTRODUCTION AND SUMMARY OF RESPONSE

On May 18, 2016, after years of extensive and hard-fought discovery and motion practice, this Court issued an order denying certification of a proposed damages class under Federal Rule of Civil Procedure 23(b)(3), but granting certification of an injunctive-relief-only class under Federal Rule of Civil Procedure 23(b)(2). Following entry of that order, the Court suggested at a case management conference that the case might be well positioned for settlement in light of the order. (Dkt. 203.) The parties then conducted ***three*** mediation sessions with ***two*** respected and distinguished mediators—over the course of several months (and amidst further discovery and motion practice)—and finally reached a negotiated settlement to resolve this action. (Dkts. 221 & 222.)

Given that the Court denied certification of a damages class, the settlement naturally does not include monetary relief for class members, nor does it release such claims. It does, however, achieve the core non-monetary relief sought by the suit: (i) confirmation that the three uses of URL message data at issue ceased; (ii) recognition that Facebook's enhanced disclosures—which were developed *after* the filing of this action and made available *after* the Court's ruling on the Motion to Dismiss, and which plainly disclose that Facebook collects the "***content*** and other information" that people provide when they "***message*** or communicate with others"—benefitted the class (consent is a complete defense to ECPA and CIPA claims); and (iii) a requirement that Facebook display additional, "plain English" explanatory language regarding its ongoing treatment of URLs shared in messages on its Help Center, which has been visited hundreds of thousands of times this year alone. (*See* Dkt. 227-3 ¶ 40.) On April 19, 2017, at the preliminary approval hearing, the Court stated:

> ***I certified only an injunctive relief class. There's only injunctive relief that's at issue here. . . . There are no damages at issue. You all have arrived at a mutually agreeable position with respect to the challenged uses that Facebook was making of the -- of the information. I think that's reasonable. I mean, that's what you were seeking in the case. And I find that the settlement on its face is certainly within the ballpark of a settlement that the court would ultimately find adequate and reasonable.***

(Jessen Decl., Ex. 1 (Dkt. 236, Apr. 19, 2017 Hearing Tr.) at 4:3–14 (emphases added).) The Court subsequently granted preliminary approval, finding that "the Settlement Agreement substantially fulfills the purposes and objectives of the class action and provides beneficial relief to the Settlement Class." (Dkt. 235 at 2.)

Since entry of that order, no new facts or issues have emerged that change the Court's conclusion in any respect. The settlement remains fair, reasonable, and adequate, particularly when balanced against the significant hurdles that Plaintiffs would face if they pursued further litigation. Nonetheless, a single individual—Anna St. John ("Objector"), an attorney with the Competitive Enterprise Institute's Center for Class Action Fairness—has objected to the settlement on several grounds.[1] The objection is meritless. Objector's core argument is that the settlement could have been "better," but Ninth Circuit law is clear this is not a valid basis for rejecting a settlement:

> Of course it is possible, as many of the objectors' affidavits imply, that the settlement could have been better. But this possibility does not mean the settlement presented was not fair, reasonable or adequate. Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998).

Rather than address the *Hanlon* factors (which plainly show final approval is warranted), Objector focuses on the supposed "disproportion between attorneys' fees and purported class benefit." (Dkt. 243 at 7.) But the settlement benefits and attorneys' fees are distinct:

> The procedure for and the allowance or disallowance by the Court of any application for attorneys' fees, costs, expenses, and/or reimbursement to be paid to Class Counsel, and the procedure for any payment to Class Representatives, ***are not part of the settlement of the Released Claims as set forth in this Settlement Agreement, and are to be considered by the Court separately from the Court's consideration***

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[1] As a threshold matter, Objector has failed to meet her burden to show that she is an "aggrieved class member" who has standing to object to the settlement. *See In re First Cap. Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994); *In re TracFone Unlimited Serv. Plan. Litig.*, 112 F. Supp. 3d 993, 1008 (N.D. Cal. 2015). She claims that, during the class period, she "sent or received private messages on Facebook . . . that included a URL in its content and from which Facebook generated a URL attachment"—though she acknowledges she has not done so in almost two years. (Dkt. 243-2 ¶ 4.) But Objector failed to attach any of those messages to her declaration. *See* Fed. R. Evid. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise."); *In re Yahoo Mail Litig.*, No. 13-4980-LHK, 2016 WL 4474612, at *8 (N.D. Cal. Aug. 25, 2016) (objector failed to "prove that he has standing to object" because "he did not have actual evidence of his Class Membership" but only "guessed that he was a Class Member"); *cf. Sapiano v. Millenium Ent't, LLC*, No. 12-8122, 2013 WL 12120262, at *4 (C.D. Cal. Nov. 14, 2013) (in the summary judgment context, "the Ninth Circuit routinely holds that when a party refers to documentary evidence as the source of a factual allegation in an affidavit or declaration, the party must attach the relevant documents to the affidavit or declaration"). As Facebook has established (*see, e.g.*, Dkt. 178-2 at 10–13), not every URL in a message generates a URL attachment, and Objector has the burden of establishing that the URLs in her messages actually generated URL attachments. On this basis alone, the Court should dismiss her objection. *See In re Yahoo Mail Litig.*, 2016 WL 4474612, at *8 (holding that the objector's "inability to show standing provides a separate and independent basis to overrule his objection").

> ***of the fairness, reasonableness, and adequacy of the settlement of the Released Claims as set forth in this Settlement Agreement.***

(Dkt. 227-3 ¶ 66 (emphases added).) In other words, the parties expressly agreed that the Court should evaluate the fairness of the settlement separate and apart from counsel's request for fees and costs. This allows the class to reap the benefits of the settlement and prioritize their interests over class counsel—which apparently is Objector's primary aim. And there simply can be no serious doubt that the relief here—which, as the Court observed, provides Plaintiffs "what [they] were seeking in the case" (Apr. 19 Hr'g Tr. at 4:10–11)—is fair, reasonable, and adequate.

As detailed below, Objector's other arguments are similarly baseless: First, this is not a "common fund" settlement from which attorneys' fees would be paid, so it is inaccurate to characterize the settlement as allowing for the possibility of any "reversion" to Facebook. Second, Facebook maintains the Court was under no obligation to provide ***any*** notice of this injunctive-relief-only settlement, yet it did exercise its discretion to order notice, which allowed Objector herself to learn of the settlement. Certainly the Court did not abuse its discretion in ordering notice in the form it did, and Objector cites no authority mandating notice via the Facebook platform—which would be gross overkill in this case and would confuse massive segments of the user base (a large portion of which likely are not members of the class).

The Court should grant final approval to the settlement and bring this lengthy and expensive lawsuit to the fair, reasonable, and adequate conclusion negotiated by the parties.

II. ARGUMENT

Courts in the Ninth Circuit consider the following factors in assessing whether a settlement agreement is fair, reasonable, and adequate: (a) the strength of plaintiff's case; (b) the risk, expense, complexity, and likely duration of further litigation; (c) the risk of maintaining class action status throughout the trial; (d) the amount offered in settlement; (e) the extent of discovery completed, and the stage of the proceedings; (f) the experience and views of counsel; (g) the presence of a governmental participant; and (h) the reaction of the class members to the proposed settlement. *Hanlon*, 150 F.3d at 1026; *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). "Not all of these factors will apply to every class action settlement." *Nat'l Rural Telecomms.*

Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

Plaintiffs' Motion for Final Approval (Dkt. 237) detailed why each of these factors supports final approval here. Below, Facebook addresses (1) the weaknesses of Plaintiffs' case and the risk of further litigation (which the Ninth Circuit has held is a core factor but Objector ignores entirely), and (2) the settlement benefits, while also responding to the core objections asserted.

A. THE PROPOSED SETTLEMENT IS VERY FAVORABLE TO THE CLASS GIVEN THE CONSIDERABLE RISK INVOLVED WITH CONTINUED LITIGATION

Objector fails to address the weaknesses of Plaintiffs' claims. But "[b]asic to [analyzing a proposed settlement] in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." *Yeagley v. Wells Fargo & Co.*, No. 05-3403, 2008 WL 171083, at *4 (N.D. Cal. Jan. 18, 2008), *rev'd on other grounds*, 365 F. App'x 886 (9th Cir. 2010) (quoting *Protective Comm. For Indep. Stockholders v. Anderson*, 390 U.S. 414, 424–25 (1968)); *see also Browning v. Yahoo! Inc.*, No. 04-01463, 2007 WL 4105971, at *5 (N.D. Cal. Nov. 16, 2007) (approving settlement and noting that "perhaps most importantly, [the] objections do not sufficiently consider . . . the considerable risks involved with continued litigation"). Courts routinely approve as fair and reasonable settlements that offer even minimal benefits in exchange for the release of weak claims. *See, e.g.*, *Officers for Justice*, 688 F.2d at 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair. . . . It is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness."); *Yeagley*, 2008 WL 171083, at *4–5.

Here, Facebook has robust defenses to Plaintiffs' two remaining claims, which would have prevented the class from obtaining any recovery in this case.

First, this Court repeatedly stressed the lack of harm to Plaintiffs and the class. It dismissed Plaintiffs' UCL claim because Plaintiffs had not suffered any economic injury. (Dkt. 43 at 19.) Similarly, in its class certification order, the Court stated that it was "persuaded . . . that many class

members . . . have suffered little, if any, harm." (Dkt. 192 at 26–27.) The Court also found that the question of whether there was any actual damage from the challenged practices "would be answered in the negative for many class members, including one of the named plaintiffs [Hurley]." (*Id.* at 26.) And as recently as the hearing on preliminary approval, the Court reiterated that it "had some real issue as to whether or not there was any actual harm in this case." (Apr. 19 Hr'g Tr. at 4:20–21.)

Second, while Plaintiffs were limited by the class certification order to seeking injunctive relief only, the three "uses" of message data that the Court certified for class treatment had ceased many years earlier. (Dkt. 227-3 ¶ 40(a).) Thus, even if Plaintiffs had prevailed at trial, it remains entirely unclear what type of "injunctive" relief (if any) Plaintiffs could have achieved (or what the point of such relief would have been) with respect to these historical practices.

Third, as Plaintiffs' Motion for Final Approval acknowledges, "in the context of ECPA's [and CIPA's] application to electronic messages, there is uncertainty in the law that presents increased risks [to Plaintiffs] surrounding such issues as the interpretation of the terms 'in transit' and 'storage.'" (Dkt. 237.) The reality is that Facebook had strong, dipositive arguments—which it would have presented at summary judgment or, if necessary, trial—that (i) there simply was no "interception" (because the challenged conduct occurred in electronic storage), and (ii) any interception would have been in the "ordinary course of [Facebook's] business" (a separate exemption under the Wiretap Act, *see* 18 U.S.C. § 2510(5)(a)(ii)). (Dkt. 60 at 4–5.)

The *In re Yahoo Mail Litigation* matter—another message "scanning" case with similar legal issues, but different facts—is instructive. There, in granting final approval of the settlement, Judge Koh stated that her analysis of the parties' summary judgment motions "***suggested some vulnerability in Plaintiffs' case***. In particular, in *Backhaut v. Apple Inc.*, 148 F. Supp. 3d 844, 852 (N.D. Cal. 2015), ***the Court determined that defendant did not violate federal or state law when scanning and analyzing users' text messages***. Although *Backhaut* involved a different company and a different process, ***the* Backhaut *decision nonetheless did not weigh in Plaintiffs' favor***." *In re Yahoo Mail Litig.*, 2016 WL 4474612, at *6 (emphases added); *see also id.* at *11 (stating that the court "had identified several vulnerabilities in Plaintiffs' case"). Precisely the same thing is true of Plaintiffs' novel legal claims here, and this "legal uncertainty favors approval." *Id.* at *6 (citing

Browning, 2007 WL 4105971, at *10 ("[L]egal uncertainties at the time of settlement—particularly those which go to fundamental legal issues—favor approval.")).

Fourth, consent is a complete defense to Plaintiffs' claims, and Facebook's current Data Policy, which was updated in January 2015 and binds ***every person*** who uses Facebook (and, by definition, the entire class), ***expressly discloses*** the alleged interceptions/uses that Plaintiffs challenge. Specifically, it explains that Facebook collects "***the content and other information***" that people provide when they use Facebook, including when they "***message or communicate with others***," and explains the ways in which Facebook may use that content. (Jessen Decl., Ex. 2 (Facebook Data Policy), §§ I–II (emphases added).) This Court had not yet had the opportunity to evaluate these disclosures, because other policies were in effect when the Court ruled on Facebook's motion to dismiss in 2014. Given these enhanced disclosures, Facebook expected to prevail on summary judgment because Plaintiffs and class members had expressly consented to any alleged "interceptions" since at least January 2015. *See, e.g.*, *In re Yahoo Mail Litig*., 7 F. Supp. 3d 1016, 1030 (N.D. Cal. 2014) (dismissing Wiretap Act claims where Yahoo's terms informed email users that Yahoo would "scan and analyze e-mails" to provide personal product features, serve targeted advertising, create user profiles, and share content with third parties); *Deering v. CenturyTel, Inc.*, No. 10-63, 2011 WL 1842859, at *2–3 (D. Mont. May 16, 2011) (dismissing Wiretap Act claim upon finding that, "by using [defendant's] services despite the disclosures made in the Privacy Policy, [plaintiff] and the putative class members consented to the interception and use of their electronic communications").

Objector has chosen to ignore this factor altogether. Were courts to begin adopting such objections insisting on relief that does not properly weigh the value of the underlying claims, it would become difficult—if not impossible—for parties to settle weak claims. Indeed, the mere filing of a frivolous class action would force a defendant into an untenable choice of litigating through class certification on the merits, or forking over significant compensation notwithstanding the weakness of the claims. But the rule is precisely the opposite: the Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). And class members with prospects "so bleak as to

render [the limited settlement benefits] a good value for a relatively weak case," would be denied a "good value" in the form of those limited benefits. *Yeagley*, 2008 WL 171083, at *5.

B. THE SETTLEMENT BENEFITS PROVIDE REAL VALUE TO THE CLASS—PARTICULARLY IN LIGHT OF THE SUBSTANTIAL HURDLES TO CONTINUED LITIGATION

Where plaintiffs' claims are questionable, federal courts consistently approve settlements providing only non-monetary relief to class members in exchange for a broad release—even where money damages are available.[2] Here, Objector's contention that "[n]on-cash relief . . . is recognized as a prime indicator of suspect settlements" (Dkt. 243 at 12) is nonsensical because the Court ***denied*** certification of a damages class. (Dkt. 192.) *See also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages"). Moreover, the non-monetary relief provided by the settlement directly addresses the core claims in the case and will benefit all people who use Facebook's messages product. *See, e.g.*, *In re LifeLock*, 2010 WL 3715138, at *5 ("The [injunctive] relief afforded is what was explicitly sought in the Litigation, as it responds directly to the challenges raised in the complaints in these cases."). As Plaintiffs and Class Counsel have acknowledged, "the Settlement brings Facebook's practices relevant to this Action into compliance with ECPA and CIPA." (Dkt. 237 at 7.) Balancing these benefits against the substantial uncertainties, risks, and problems surrounding Plaintiffs' claims, and the strong possibility that

[2] *See, e.g.*, *Bell Atl. Corp. v Bolger*, 2 F.3d 1304, 1311 (3rd Cir. 1993) (approving settlement with no pecuniary relief where the probability of plaintiffs' success on the merits was uncertain); *Chin v. RCN Corp.*, No. 08-7349, 2010 WL 3958794, at *4 (S.D.N.Y. Sept. 8, 2010) (rejecting objections that "suggest that injunctive relief—or at least injunctive relief that is temporary—is inadequate, and that only damages will suffice," because the defendant had strong arguments that it did not violate any law and that "the possibility that Plaintiffs could do slightly better if the case were to proceed further needs to be counterbalanced against the real possibility that—in addition to running up significantly more costs, potentially over the course of several more years—the Plaintiffs could ultimately do much worse"); *Yong Soon Oh v. AT&T Corp.*, 225 F.R.D. 142, 150 (D.N.J. 2004) (approving settlement that provided only injunctive relief in exchange for a broad release of damages due to the weakness of plaintiffs' case); *First State Orthopaedics v. Concentra, Inc.*, 534 F. Supp. 2d 500, 521–22 (E.D. Pa. 2007) (noting that "the absence of monetary relief does not automatically render a settlement unfair," and approving settlement providing only injunctive relief in exchange for the release of money damages where the merits of plaintiffs' case were weak); *In re LifeLock, Inc. Mktg. & Sales Practices Litig.*, MDL No. 08-1977, 2010 WL 3715138, at *5 (D. Ariz. Aug. 31, 2010) ("Many courts have approved settlements where, as here, the consideration offered consists of injunctive relief."); *Myers v. MedQuist, Inc.*, No. 05-4608, 2009 WL 900787, at *16 (D.N.J. Mar. 31, 2009) ("The question is whether the proposed settlement provides a good value for Plaintiffs' weak claims, notwithstanding the absence of direct monetary payments to individual class members.").

Plaintiffs and the class may not recover anything if they proceed to trial, weighs heavily in favor of approving this settlement. *See Chin*, 2010 WL 3958794, at *3–5.

Objector essentially nitpicks the settlement. For example, she complains at length about the additional explanatory language that Facebook has agreed to post on its Help Center webpage, deriding it as "milquetoast" and stating—with no factual support—that Facebook is attempting to "bur[y]" the language. (Dkt. 243 at 12, 15, 28.) This assertion is demonstrably false: the relevant Help Center webpage has been visited ***hundreds of thousands*** of times over the last six months in the United States (Jessen Decl., ¶ 4), and the additional language makes clear that Facebook "use[s] tools to identify and store links shared in messages, including a count of the number of times links are shared." (Dkt. 227-3 ¶ 40(d).) Moreover, Plaintiffs had attacked the language on Facebook's Help Center website regarding messages in their complaint (Dkt. 196 ¶ 22), and the new explanatory language directly addresses their concern through "plain English" disclosures about the highly technical processes at the center of this lawsuit. This alone indisputably constitutes value to the class.

Furthermore, this language ***supplements*** the language in Facebook's revised Data Policy (discussed above, *see supra* at p. 6). Objector asserts that since Facebook updated its Data Policy in 2015, it cannot provide value to the class. This overlooks the fact that Facebook updated the Data Policy *after* the filing of this action and *after* the ruling on the Motion to Dismiss. (*See* Dkt. 43 at 14–16.) Accordingly, Facebook's enhanced disclosures also benefit the class.[3]

[3] Citing Plaintiffs' Second Amended Complaint, Objector claims that "[i]t's difficult to imagine how [Facebook's updated Data Policy] constitutes any benefit given that plaintiffs cited this same policy as deficient in 2016." (Dkt. 243 at 13.) This is false: the Second Amended Complaint expressly refers to the policy "in effect on December 30, 2013, the date on which the initial complaint was filed in this action." (Dkt. 196 at p.4 n.2 & ¶¶ 16–18.)

Objector also suggests that *Koby v. ARS Nat'l Services, Inc.*, 846 F.3d 1071 (9th Cir. 2017) and *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013)—cases where appellate courts rejected class settlements—are analogous, but those cases have ***nothing*** in common with this case: In *Koby*, the "class settlement [was] negotiated prior to formal class certification" (which meant it had to "withstand an even higher level of scrutiny"), and there was "no evidence that the relief afforded by the settlement ha[d] any value to the class members, ***yet to obtain it they had to relinquish their right to seek damages in any other class action***." 846 F.3d at 1079 (emphasis added). In *Pampers*, the parties began discussing settlement "before any formal discovery in the case," the plaintiffs voluntarily abandoned their attempt to certify a Rule 23(b)(3) damages class, and class counsel sought $2.73 million in fees yet "did not take a single deposition, serve a single request for written discovery, or even file a response to [the defendant's] motion to dismiss." 724 F.3d at 716, 718.

Objector's argument that the "only conceivable beneficiaries" of the settlement are "future users"

Objector also complains that, although the three challenged uses ceased many years ago, Facebook is not enjoined from resuming them in this future. (Dkt. 243 at 14.) But Objector misapprehends the nature of two statutes at issue. Under the Wiretap Act and California Invasion of Privacy Act, consent is a complete defense, and companies may obtain consent through their user agreements. 18 U.S.C. § 2511(2)(d); Cal. Penal Code § 631(a). Facebook's updated Data Policy unquestionably obtains that consent; thus, any resumption of the practices would not be unlawful.

In the end, Objector's essential argument is that the settlement could have been "better," but this is not a valid basis for rejecting a settlement. *See Hanlon*, 150 F.3d at 1026–27; *Browning*, 2007 WL 4105971, at *5 (noting that objectors' complaints that the settlement did not provide a full cash refund "is tantamount to complaining that the settlement should be 'better,' which is not a valid objection"); *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 195 (N.D. Ill. 1981) ("By definition, a fair settlement need not satisfy every concern of the plaintiff class, but may fall anywhere within a broad range of upper and lower limits.").

C. THE SETTLEMENT NEGOTIATIONS WERE CONDUCTED AT ARM'S LENGTH

Next, Objector asserts without substantiation that class counsel engaged in "self-dealing," relying primarily on the alleged "disproportion" between the class benefits and the request for attorneys' fees. (Dkt. 243 at 16–18.) Objector offers only an overly expansive reading of the Ninth Circuit's decision in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011). As opposed to the broader propositions for which Objector's counsel (Mr. Frank) advocated in *Bluetooth*, the actual decision simply requires district courts to examine the record to ensure that class counsel did not engage in impermissible self-dealing in reaching the particular settlement. *Id.* at 949. The Ninth Circuit concluded in *Bluetooth* that the district court failed to undertake that analysis, and that the record did "not adequately dispel the possibility that class counsel bargained away a benefit to the class in exchange for their own interests." *Id.* at 938. The court remanded to

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of Facebook is also misplaced. (Dkt. 243 at 15.) By its nature, prospective injunctive relief cannot "compensate" for past injuries, yet courts have repeatedly approved settlements providing *only* injunctive relief to the class and have found no conflict among class members or with class counsel. *See supra*, n.2. Objector's argument also ignores the fact that one of the central disputes in this lawsuit involved allegedly inadequate disclosures (i.e., an alleged failure to obtain consent), and that there was a serious question as to whether class members had suffered any "injury."

allow for that analysis, and the Ninth Circuit specifically noted that the district court could reapprove the settlement as structured (with an 8-to-1 ratio of attorneys' fees to class benefits). *Id*. at 949–50.

Here, by contrast, the benefits to the class are meaningful, there is no evidence of fraud or collusion, and the settlement is the result of extensive and intensive arm's-length negotiations occurring over several years and multiple mediation sessions with two distinguished mediators—and Objector neither sought nor obtained any evidence to demonstrate otherwise. *See In re Quaker Oats Labeling Litig.*, No. 10-0502, 2014 WL 12616763, at *1 (N.D. Cal. July 29, 2014) (granting final approval of settlement despite similar objections that the settlement only provided injunctive relief to the class and contained several *Bluetooth* "warning signs" because "the settlement, including the provisions regarding attorney fees, are reasonable, fair, and not the product of collusion, or any disregard for the interests of the class"). Additionally, unlike the present case, *Bluetooth* did not involve many years of litigation and discovery, including briefing and rulings on dispositive and class certification motions. To the contrary, at the time of the settlement in *Bluetooth*, no formal discovery had been conducted, the district court had issued no dispositive rulings, and the only briefing that occurred was a motion to dismiss. 654 F.3d at 939.

By contrast, the settlement here is presumptively fair because it was the result of good faith, arm's-length negotiations between the parties. *See, e.g.*, *Nat'l Rural Telecomms.*, 221 F.R.D. at 528 ("A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair."); *Fernandez v. Victoria Secret Stores, LLC*, No. 06-04149, 2008 WL 8150856, at *4 (C.D. Cal. July 21, 2008) (the settlement was entitled to a presumption of fairness because the parties had engaged in extensive discovery and motions practice, and reached settlement with the help of an able and neutral mediator); *In re Apple Computer, Inc. Derivative Litig.*, No. 06-4128, 2008 WL 4820784, at *3 (N.D. Cal. Nov. 5, 2008) (parties' negotiations free of collusion because, among other things, the parties negotiated the benefits to the class before discussing attorneys' fees). Objector has offered no argument (and produced no evidence, of which there is none) to rebut this presumption.

Furthermore, it makes no sense for the Objector to argue that "[t]he most telling sign of self-dealing in this settlement is that 'class counsel are amply rewarded' while 'the class receives no monetary distribution'" (Dkt. 243 at 16) because, again, as this Court noted, "[t]here are no damages

at issue." (Apr. 19 Hr'g Tr. at 4:3–7.) Objector's argument that "if the Court . . . reduces the [requested attorneys'] fee, it cannot pass that money on to the class; that money reverts to the defendant" (Dkt. 243 at 18) is similarly misplaced. This is not a "common fund" settlement from which the fees would be paid. For this reason, it is inaccurate to describe the settlement as allowing for the possibility of a "reversion" to Facebook. Facebook's only agreement is to "***pay the amount of fees and costs determined by the Court***" (up to $3,890,000), and, to this day, it has paid nothing. (Dkt. 227-3 ¶ 57 (emphasis added).) Accordingly, there is nothing to "revert" to Facebook, and Objector's argument mischaracterizes the settlement in this case. *See Shames v. Hertz Corp.*, No. 07-2174, 2012 WL 5392159, at *14 (S.D. Cal. Nov. 5, 2012) (approving settlement where "the attorneys' fees . . . are wholly separate from the class settlement—and will have no impact one way or the other on the amount the class recovers—a 'savings' for Defendants [should the court not grant the full amount of negotiated attorneys' fees] does not implicate the concerns the Ninth Circuit expressed about the 'kicker' provision in the *Bluetooth* settlement"). In addition, as explained above (*supra* at pp. 2–3) the fee award is completely separate from the settlement benefits, so the settlement would still go forward regardless of how the Court rules on attorneys' fees. (Dkt. 227-3 ¶ 66.)

D. THE FORM OF NOTICE ORDERED BY THE COURT WAS MORE THAN ADEQUATE

Finally, although she learned about and objected to the settlement here, Objector complains about the form of notice ordered by the Court, declaring that "individual electronic notice [was] obligatory here." (Dkt. 243 at 26.) Objector cites no authority for this proposition, and she is wrong. In fact, no notice was required for this injunctive-relief-only settlement (*see infra* at p. 12) but the Court exercised its discretion to order notice, which the parties provided. (Dkts. 235 & 237.)

Prior to the preliminary approval hearing, notice had already been provided through (1) CAFA notices to the federal and state attorneys general for all fifty states and all U.S. territories; (2) publicly available filings accessible through the PACER/CM-ECF system; and (3) extensive news coverage. (Apr. 19 Hr'g Tr. at 11:10–18, 18:9–22; Dkt. 233 (exemplar news coverage).) At the preliminary approval hearing, the parties and the Court discussed notice at length. (*See* Apr. 19 Hr'g Tr. at 6:7–30:22; Dkt. 236.) The parties presented the myriad ways that class members may have already learned of the settlement and discussed the impossibility of ascertaining class members and

the difficulties of providing individual notice. (*Id.* at 8:21–9:9, 11:19–23:4.) After considering these facts, the Court concluded that an additional form of notice would be appropriate, primarily to better facilitate class members' rights to object to any motion for attorneys' fees. (*Id.* at 14:14–25; 25:20–24; 26:1–28:5.)[4] The Court exercised its discretion and ordered that Plaintiffs' counsel make information about the settlement accessible on their public firm websites. (Dkt. 235 ¶ 7(d); 237.)

The notice ordered by the Court went above and beyond the requirements of Rule 23. Notice is discretionary for a settlement class certified under Rule 23(b)(2) that provides for injunctive relief only and includes no damages release. *See* Fed. R. Civ. P. 23(c)(2).[5] Nevertheless, the Court considered the facts of the case and exercised its discretion to order notice. (*See* Dkt. 235 ¶ 7; 237.) Objector does not claim to have had any trouble learning of the lawsuit or the settlement, or learning how and when to make an objection and/or attend the fairness hearing, yet she argues that class members are also entitled to *individual notice* under Rule 23. Objector is wrong. Individual notice is not required where class members cannot opt out or are not required to "take affirmative action" to participate in the settlement. *Hart*, 2016 WL 6611002, at *9; c*f*. Fed. R. Civ. P. 23(e)(1)(B) advisory

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[4] "My concern is less about the injunctive relief, the practices that Facebook is ceasing to engage in for the reasons that I already stated. My concern is less about that than it is about giving the parties an opportunity to object if they wish to the fees that are being sought." (*Id*. at 25:20–24.)

[5] *See, e.g., In re Yahoo Mail Litig.*, 2016 WL 4474612, at *5 ("[B]ecause Rule 23(b)(2) provides only injunctive and declaratory relief, 'notice to the class is not required.'"); *Lilly v. Jamba Juice Co.*, No. 13-02998, 2015 WL 1248027, at *8, *9 (N.D. Cal. Mar. 18, 2015) (because "a Rule 23(b)(2) class is considered 'mandatory,'" courts are not obligated to "afford [class members] notice of the action"; "Because, even if notified of the settlement, the settlement class would not have the right to opt out from the injunctive settlement and the settlement does not release the monetary claims of class members, the Court concludes that class notice is not necessary"); *Kim v. Space Pencil, Inc.*, No. 11-03796, 2012 WL 5948951, at *4 (N.D. Cal. Nov. 28, 2012) ("The court exercises its discretion and does not direct notice here because the settlement does not alter the unnamed class members' legal rights."). *See also Dukes*, 564 U.S. at 362 ("The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action."); *Hart v. Colvin*, No. 15-00623, 2016 WL 6611002, at *9 (N.D. Cal. Nov. 9, 2016) ("When, for instance, 'the settlement provides for only injunctive relief, and, therefore, there is no potential for the named plaintiffs to benefit at the expense of the rest of the class,' notice 'is not uniformly required.'") (quoting *Green v. Am. Express Co.*, 200 F.R.D. 211, 212-13 (S.D.N.Y. 2001); *Kline v. Dymatize Enters., LLC*, No. 15-2348, 2016 WL 6026330, at *6 (S.D. Cal. Oct. 13, 2016) ("Here, the Court finds that notice to the class of the settlement is not necessary because under the settlement, Plaintiffs and the class release only those claims they may have for injunctive relief—relief they will receive through the settlement—but not claims for statutory damages or other monetary awards."); *Jermyn v. Best Buy Stores, L.P.*, No. 08-214, 2012 WL 2505644, at *12 (S.D.N.Y. June 27, 2012) ("Because this injunctive settlement specifically preserves and does not release class members' monetary claims, notice to class members is not required."); *Foti v. NCO Fin. Sys., Inc.*, No. 04-00707, 2008 U.S. Dist. LEXIS 16511, at *13-14 (S.D.N.Y. Feb. 19, 2008) (same).

committee's note (2003) (for a Rule 23(b)(3) class, "[i]ndividual notice is appropriate, for example, if class members are required to take action—such as filing claims—to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3)").

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950), is not to the contrary. In *Mullane*, the Supreme Court considered whether a state banking law permitting settlement of common trust funds with only publication notice violated the Due Process clause of the Fourteenth Amendment. *Id*. at 313. Critically, the proceeding at issue in *Mullane* "may [have] deprive[d] beneficiaries of property," and therefore it was required to be preceded by notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. at 313–14. Far from holding that individual notice was required, the Court explained that, even in such a case *where property rights were in jeopardy*, the notice required need only be "reasonably met" "with due regard for the practicalities and peculiarities of the case," and that individual notice would ***not*** be required for beneficiaries whose interests were "conjectural" or "ephemeral," or "unknown" or "could not with due diligence be ascertained." *Id*. at 314–17. Ultimately, the court concluded that, in light of the specific facts of *Mullane*, individual mail notice was only required for beneficiaries whose addresses were known, because providing such notice "would not seriously burden" the entity. *Id.* at 319.

Contrary to Objector's suggestion, in (b)(2) cases pertaining only to injunctive relief, courts "may" (but need not) order notice. Indeed, "[c]ourts typically require less notice in Rule 23(b)(2) actions, as their outcomes do not truly bind class members." *Lilly*, 2015 WL 1248027, at *8; *Hart*, 2016 WL 6611002, at *9 (same). This is true even where counsel for Plaintiffs are seeking substantial fees. Because the fees are not part of a common fund, the amount does not impact the relief to the class members. *Jermyn*, 2012 WL 2505644, at *9, *12. Specifically, notice is not required where, as here, there is "no potential for [counsel and] the named plaintiffs to benefit at the expense of the rest of the class." *Hart*, 2016 WL 6611002, at *9 (quoting *Green*, 200 F.R.D. at 212–13).[6]

6 Objector does not cite a single authority standing for the proposition that notice (let alone individual notice) is required for an injunctive-relief-only settlement where class members reserve

Objector also assumes, contrary to the record evidence, that individual notice to the class through Facebook "should be neither particularly costly nor burdensome." (Dkt. 243 at 26.) As Facebook has explained (and has supported with declarations from knowledgeable engineers), this is false. ***First***, ascertaining the class—U.S. users who sent or received a private message that included a URL and generated a URL attachment during a 5-plus year period—is practically impossible. (*See* Harrison and Himel Decls. in Support of Def's Objection to and Request to Strike Pls.' Reply Evidence, Dkts. 180-25 & 184-21.) Facebook's systems store ***trillions*** of items of data, which are only searchable and retrievable in structured ways. (*Id.*) There is no way for Facebook currently to search its systems to identify class members. (*Id.*) Even if Facebook attempted to develop new tools to identify class members, it would require searching through trillions of items of data, which could take up to a year or more. (*Id.*) Undertaking this burden is not required by any standard in any case cited by Objector. To the contrary, Objector's cases acknowledge that notice need not be provided in ways that are "not reasonably possible or practicable," and that individual notice is not required. *Mullane*, 339 U.S. at 317; *Mendoza*, 623 F.2d at 1351 ("A party's capability to provide individual notice does not make such notice mandatory" when other notice "will suffice.").

Second, Facebook also has explained that providing broader notice—to over two hundred million U.S. Facebook users or some other more ascertainable group—would be burdensome and

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their rights to seek damages. In fact, a number of cases that Objector cites are entirely consistent with this Court's approach—assessing the need for notice according to the circumstances of the case. *See, e.g.*, *Mendoza v. United States*, 623 F.2d 1338, 1350 n.16, 1351 (9th Cir. 1980) (emphasizing that Rule 23 "accords a wide discretion to the District Court as to the form and content of the notice" and stating only that notice may be appropriate in (b)(2) cases in some circumstances); *Mandujano v. Basic Vegetable Prods., Inc*., 541 F.2d 832, 835 (9th Cir. 1976) (merely quoting Rule 23 in stating that notice should be given "in such manner as the court directs"). The other cases cited by Objector are not to the contrary and are not remotely applicable, as they all involve Rule 23(b)(3) classes or damages releases. *See, e.g., Jones v. Flowers*, 547 U.S. 220, 221–22 (2006) (regarding notice to an ***individual*** prior to taking his home pursuant to an Arkansas tax sale statute); *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 122–31 (3d Cir. 2012) (finding that $100,000 was not an unreasonable burden to accomplish individualized notice in a ***(b)(3)*** settlement); *Hecht v. United Collection Bureau, Inc*., 691 F.3d 218, 224–25 (2d Cir. 2012) (one-time publication was insufficient to satisfy notice and opt-out rights before precluding individual claims for ***damages***); *In re Katrina Canal Breaches Litig*., 628 F.3d 185, 197 (5th Cir. 2010) (regarding a settlement for a common fund and release of ***all*** claims); *Felix v. Northstar Location Servs., LLC*, 290 F.R.D. 397, 407–08 (W.D.N.Y. 2013) (suggesting that notice was required where a proposed settlement included releases of ***all*** class claims, including both damages and injunctive relief); *In re Motor Fuel Temperature Sales Practices Litig*., 279 F.R.D. 598, 617–18 (D. Kan. 2012) (requiring publication (but not individual) notice to a ***(b)(3)*** class).

counterproductive. (*See* Apr. 19 Hr'g Tr. at 8:21–9:9, 12:5–21.) Whereas notice to class members is meant to inform them of their rights, such overbroad notice is not required, is more likely to confuse recipients, and is likely to generate an extremely burdensome influx of inquiries to Facebook, despite the fact that class members have no right to any individual relief or to opt out of the settlement. *See, e.g.*, *In re Wholesale Grocery Prod. Antitrust Litig.*, No. 09-2090, 2017 WL 826917, at *2, *3–4 (D. Minn. Mar. 1, 2017) (supplemental overbroad notice was "unnecessary overkill and may cause confusion" for customers "who do not fall within any Class but may believe their rights are impacted by the litigation"); *In re FedEx Ground Package Sys., Inc. Emp't Practices Litig.*, No. MDL 1700, 2017 WL 2532552, at *2 (N.D. Ind. June 12, 2017) (rejecting class representatives' proposed additions to class notice as "***overkill that could confuse more than educate***") (emphasis added).[7]

Here, the Court ordered notice appropriate to the circumstances of the case and above and beyond the minimum requirements of Rule 23.[8] Where the parties have achieved a settlement that is fair, reasonable, and adequate, and class members have no right to opt out and do not give up rights to damages, unnecessarily costly and confusing notice procedures are not in anyone's interests, including the interests of the class.

III. CONCLUSION

Given the substantial benefits conferred on the class by the settlement (particularly in light of the substantial questions surrounding Plaintiffs' claims), the remaining *Hanlon* factors, and the presumption of fairness accorded by the process by which the parties achieved it, Facebook respectfully requests that the Court approve the settlement as fair, reasonable, and adequate.

[7] Notably, all of the examples cited by Objector of "mak[ing] use of Facebook" for settlement notice involved ***(b)(3) classes***, and none of them involved the kind of individual notice through Facebook that Objector appears to be seeking here.

[8] Objector's reference to the Court's class action settlement guidance is not on point. The guidance is intended to be a helpful tool for litigants and is expressly labeled as "guidance" that parties should "consider." It also is not tailored to (b)(2) settlements. For example, it provides guidance regarding notice relating to excluding oneself from the class, and members of a (b)(2) class have no such right.

Respectfully submitted,

Dated: July 10, 2017

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