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

16 In re FACEBOOK BIOMETRIC)
17 INFORMATION PRIVACY LITIGATION)

Master File No. 3:15-cv-03747-JD

) CLASS ACTION

18 This Document Relates To:)

19 ALL ACTIONS.)

) PLAINTIFFS' NOTICE OF MOTION AND
) AMENDED MOTION FOR FINAL
) APPROVAL OF CLASS ACTION
) SETTLEMENT; MEMORANDUM OF
20 POINTS AND AUTHORITIES IN SUPPORT
21 THEREOF

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25
26
27
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TABLE OF CONTENTS

1				Page
2				
3				
4	I.	ISSUES TO BE DECIDED.....		1
5	II.	MEMORANDUM OF POINTS AND AUTHORITIES		1
6	III.	BACKGROUND AND CASE HISTORY		2
7	IV.	NOTICE SATISFIED DUE PROCESS AND PRODUCED A HIGH CLAIMS RATE ..		2
8		A. The Court Approved Notice Plan was Successfully Implemented.		2
9		B. The Objections to the Sufficiency of the Notice Should be Overruled.....		6
10		C. More Than 1.5 Million Class Members Have Submitted Claims.....		8
11	V.	THE SETTLEMENT MERITS FINAL APPROVAL		8
12		A. Class Counsel and the Class Representatives Have Protected		
13		the Class’s Interests and Support the Settlement.		9
14		B. The Settlement was Negotiated at Arm’s Length.		10
15		C. The Amount Offered by the Settlement Supports Final Approval.		10
16		i. Projected recovery per claiming class member is unprecedented		
17		for a privacy settlement.		11
18		ii. The conduct remedy here provides “meaningful” relief.		13
19		iii. The risks inherent in further litigation demonstrate the		
20		adequacy of the relief.		14
21		iv. The objections to the adequacy of relief are meritless.....		15
22		D. The High Claims Rate Shows the Effectiveness of the Method		
23		of Distribution of Funds to the Class.		19
24	VI.	OBJECTIONS TO THE PROPOSED SERVICE AWARD ARE MERITLESS		21
25		A. Service Awards are Permitted in Class Actions.....		21
26		B. The Proposed Service Awards are Appropriate.		23
27	VII.	THE OBJECTIONS TO CLASS COUNSEL’S FEE REQUEST SHOULD		
28		BE OVERRULED		23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IX. CONCLUSION.....25

TABLE OF AUTHORITIES

1				Page
2				
3	U.S. Supreme Court Cases:			
4	<i>Alyeska Pipeline Serv. Co. v. Wilderness Soc’y,</i>			
5	421 U.S. 240 (1975).....			25
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9	547 U.S. 1051 (2006).....			19
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11	251 U.S. 63 (1919).....			18
12	<i>Trustees v. Greenough,</i>			
13	105 U.S. 527 (1881).....			22
14	U.S. Circuit Court of Appeals Cases:			
15	<i>Churchill Vill., L.L.C. v. Gen. Elec.,</i>			
16	361 F.3d 566 (9th Cir. 2004)			8, 21
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923 F.3d 85 (2d Cir. 2019).....22

3

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No. 18-cv-03424, 2020 WL 5748721 (N.D. Cal. Sept. 25, 2020).....20

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No. 15-cv-05764, 2019 WL 7372275 (N.D. Cal. Dec. 31, 2019).....21

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No. 17-cv-07370, 2019 WL 4059850 (N.D. Cal. Aug. 28, 2019)15

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327 F.R.D. 299 (N.D. Cal. 2018).....12, 20

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Nos. 03-cv-2659-SI, 03-cv-2878-SI, 2007 WL 1114010 (N.D. Cal. Apr. 13, 2007).....10

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9	No. 16-cv-1678, 2020 WL 6277436 (S.D. Cal. Oct. 26, 2020).....	9
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13	No. 17 CH 1624 (Ill. Cir. Ct. Cook Cnty.)	13
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	Rules and Statutory Provisions:	
20	740 ILCS 14.....	<i>passim</i>
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28		

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1 PLEASE TAKE NOTICE that on January 7, 2021 at 10:00 a.m., Carlo Licata, Nimesh
2 Patel, and Adam Pezen (“Plaintiffs”) will move this Court for an Order granting final approval to
3 the class action settlement. (Dkt. 468) This Motion is supported by the following memorandum,
4 the Declaration of Class Counsel (dkt. 499-1), the Declaration of Lana Lucchesi (Exhibit A), and
5 the Second Expert Declaration of William Rubenstein (Exhibit B).

6 **I. ISSUES TO BE DECIDED**

- 7 1. Whether the notice provided to the class satisfies Rule 23 and due process.
- 8 2. Whether the proposed Settlement is fair, reasonable, and adequate.
- 9 3. Whether the objections should be overruled.

10 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

11 After an initial hearing where this Court set forth its concerns with the initial settlement,
12 the parties returned with both answers to the Court’s questions and several improved Settlement
13 terms. The Court then held a second hearing which included the presentation of live testimony on
14 issues of notice, the settlement’s relationship to the FTC consent decree, and the conduct remedy.
15 Afterward, the Court found that “the \$650 million that will be awarded to the Illinois class is
16 impressive both as an absolute number and relative to other class actions settlements in privacy
17 cases.” (Dkt. 474 at 5.) As evidenced in the bi-weekly submissions, the notice plan has been
18 successfully implemented and any issues that arose were promptly addressed. This robust notice,
19 combined with a newsworthy, historic settlement, and Class Counsel’s independent efforts to
20 ensure that Class members had the information they needed has paid off: more than 1.5 million
21 Class members have submitted claims, around 22% of the Class. By contrast, only 107
22 individuals have opted out (0.01% of the Class). If Class Counsel’s fee request is approved in full,
23 and including administration costs, claiming Class members will recover approximately \$342,
24 right in line with Class Counsel’s projections at preliminary approval. A claims rate of around
25 22% is a remarkable figure in consumer class actions generally, particularly for classes of this
26 size, and exceeds claims rates in the handful of other consumer settlements under the Biometric
27 Information Privacy Act (“BIPA”). By contrast, the Settlement has drawn just three objections
28 that repeat issues already raised by the Court or the parties—one from an apparently conflicted

1 *pro se* felon; another from “John Pentz, a[] serial meritless objector[],” *Hefler v. Wells Fargo &*
 2 *Co.*, No. 16-cv-05479-JST, 2018 WL 6619983, at *16 n.19 (N.D. Cal. Dec. 18, 2018) (Tigar, J.)
 3 (rejecting nearly identical objections made by Pentz); and one that has already been withdrawn in
 4 large part based on the objector’s renewed understanding of the Settlement.

5 Given the Settlement’s substantial relief, perhaps none of this should have been much of a
 6 surprise. The Settlement, which was reached only after “fierce [litigation] for over five years, with
 7 no legal pebble left unturned,” (Dkt. 474 at 2), months of negotiations with former Ambassador
 8 Jeffrey L. Bleich, and the critical guidance of this Court, is an exemplar in the privacy space.
 9 Indeed, the substantial monetary relief provided here stands in stark contrast to many recent
 10 privacy settlements against large technology companies. For instance, Judge Breyer recently
 11 approved a *cy pres*-only settlement in a case alleging that Google had invaded certain statutorily
 12 guaranteed privacy rights. *In re Google LLC Street View Elec. Commc’ns Litig.*, No. 10-md-
 13 02184-CRB, 2020 WL 1288377, at *11-14 (N.D. Cal. Mar. 18, 2020). And just this November,
 14 Judge Alsup granted preliminary approval to a class-action settlement against Facebook that
 15 surrendered data-security claims in exchange only for injunctive relief. *Adkins v. Facebook, Inc.*,
 16 No. 18-cv-05982-WHA, Dkt. 314 (N.D. Cal. Nov. 15, 2020).

17 As the Court previously found, the Settlement, reached after an adversarial class
 18 certification decision affirmed on appeal, is “the product of serious, informed, and noncollusive
 19 negotiations.” (Dkt. 474 at 4.) The claims process has demonstrated that the Class is extremely
 20 satisfied with those efforts. The Court should therefore grant final approval to the Settlement.

21 **III. BACKGROUND AND CASE HISTORY**

22 The Court is deeply familiar with the procedural history of this case and the settlement
 23 terms. In accordance with the *Procedural Guidance for Class Action Settlements* Plaintiffs
 24 incorporate by reference, but do not repeat, that history or the terms here. (Dkts. 499, 499-1),

25 **IV. NOTICE SATISFIED DUE PROCESS AND PRODUCED A HIGH CLAIMS RATE**

26 **A. The Court-Approved Notice Plan was Successfully Implemented.**

27 Granting final approval requires the Court consider whether the Class received “the best
 28 notice that is practicable under the circumstances, including individual notice to all members who

1 can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B); *accord Eisen v. Carlisle*
2 *& Jacquelin*, 417 U.S. 156, 173 (1974). “The class must be notified of a proposed settlement in a
3 manner that does not systematically leave any group without notice.” *Officers for Justice v. Civil*
4 *Serv. Comm’n of City & Cnty. of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted). “The
5 rule does not insist on actual notice to all class members in all cases.” *Mullins v Direct Digital*
6 *LLC*, 795 F.3d 654, 665 (7th Cir. 2015); *see also Juris v. Inamed Corp.*, 685 F.3d 1294, 1321
7 (11th Cir. 2012) (noting that “even in Rule 23(b)(3) class actions, due process does not require
8 that class members actually receive notice” and collecting cases). Although what constitutes the
9 “best notice practicable” is case-specific, a notice campaign that reaches 70% of a class is often
10 reasonable. Federal Judicial Center, *Judges’ Class Action Notice & Claims Process Checklist &*
11 *Plain Language Guide*, at 3 (2010). The Notice must also accurately describe the Settlement. *See*
12 *Fed. R. Civ. P. 23(e)(1)(A)*; *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir.
13 2015). Along with the Court, Plaintiffs sought through the notice “to achieve a high claims rate
14 and payout to class members . . . [and] establish best practices for online notice.” (Dkt. 474 at 7.)

15 As the Court and Class Counsel recognized after the Class was certified, reaching a class
16 composed of entirely online users alleging online privacy violations was going to require
17 primarily online notice. Over Facebook’s objections at that stage, the Court-ordered certification
18 notice was to be directed to the class via Class members’ Facebook newsfeed channel, via jewel
19 notices, direct email notice, and a web page dedicated to the lawsuit. (*See* Dkts. 402, 474.) The
20 Settlement notice includes all these methods plus a second round of emails, targeted internet
21 banner ads, print publication, and required CAFA notice to government officials. But the right
22 methods are only part of a successful notice campaign: the notice also needs to effectively alert
23 class members to their rights and get them to exercise those rights. Per the Court’s instructions,
24 after the first preliminary approval hearing, the parties, with the assistance of Facebook’s media
25 team and an email designer, reworded and redesigned the entire notice program to make it eye-
26 catching and easily understandable. The parties also ensured that the claim form is easy to
27 understand and so Class members could file a claim in less than two minutes. The Court approved
28 the methods and the retooled notice finding that “together they constitute the best practicable

1 notice to individual class members under the circumstances of this case.” (Dkt. 474 at 6.)

2 As set out in the bi-weekly status reports, the notice plan has been successfully completed,
3 any hiccups have been identified and remedied, and the resultant claims rate is among the highest
4 of any consumer class action (and the highest of one this size). The two methods of direct notice
5 were successful. First, as Facebook has explained, it “has complied with this Court’s order and
6 provided the approved Newsfeed and jewel notice to the class by the September 23 notice date.”
7 (Dkt. 492.) And as Facebook representative Gary McCoy testified at the preliminary approval
8 hearing, this was the best and common method by which Facebook would seek to communicate
9 important information to its user base. As of the Claims Deadline, the separately filed declaration
10 of Jake Webb states that the Jewel and Newsfeed notices created approximately 9.1 million
11 unique impressions, with 30.47% of those recipients engaging with the notice.

12 The Settlement Administrator (Gilardi & Co.) also successfully implemented several
13 additional forms of notice. For direct notice, Gilardi sent emails to each email address associated
14 with a person on the Class List. It turns out, for some of the records in the Class List, the data
15 contained multiple distinct email addresses associated with the same record such that there were
16 15,372,906 emails associated with 12,340,049 accounts. (Lucchesi Decl. ¶ 7.) Gilardi sent the
17 email notice to each of these addresses because the Parties believed that the benefits of providing
18 Class members notice to the email address they actually monitor far outweighed the minimal
19 downside of sending duplicate emails to Class members who actively use multiple addresses.
20 Gilardi also determined that 2,608,319 of the emails provided were no longer valid address (*i.e.*,
21 out-of-date school or work accounts). (*Id.*) For the first round, 10,295,502 emails were
22 successfully delivered to at least one of the email addresses associated with an account. (*Id.* ¶ 9.)

23 As the parties reported, Class Counsel discovered from Class members that around 5.7
24 million emails associated with a Gmail address were routed to users’ spam folders. (Dkt. 492
25 ¶ 11.) Class Counsel reached out to outside and inside counsel for Google and was able to
26 coordinate a follow up email to those Gmail users of which 99.9% were successfully delivered
27 and no issues were reported of those emails being routed as spam. (Lucchesi Decl. ¶ 11.)

1 A “reminder” campaign was initiated as the Claims Deadline was approaching with
 2 notices being sent to 12,888,208 emails. 9,956,299 of those emails were successfully delivered.
 3 (*Id.* ¶¶ 12-13.) Ultimately, of the 34,036,599 total emails that were sent, 25,336,835 (74.4%)
 4 were successfully delivered. Delivery of at least one email was successful to 11,326,353 of the
 5 12,340,049 accounts on the Class List that was associated with an email (91.8%). (*Id.* ¶ 14.)

6 In an effort to reach Class members who may not have received the Facebook-provided
 7 notice or Gilardi’s multiple emails, two forms of publication notice were provided: print ads in
 8 the September 23 editions of the *Chicago Tribune* and *Chicago Sun Times* and a Google Display
 9 Network internet banner ad campaign that ran from September 23 to October 23. (*Id.* ¶ 15.)¹ The
 10 Google campaign generated 27,907,627 impressions running banner ads on high-quality sites
 11 typically visited by the target audience of Illinois Facebook users over 18 and Illinois residents
 12 aged 25-54 generally. (*Id.* ¶ 16.) This exceeded the goal of 27.1 million impressions.

13 In addition, the Settlement received significant favorable press attention. Many articles
 14 highlighted the changes made to the Settlement in light of the Court’s concerns about the initial
 15 agreement. And many articles praised the ultimate benefits provided. For instance, an article on
 16 *Fortune*’s website noted that “The case represents one of the biggest payouts for privacy
 17 violations to date, and contrasts sharply with other settlements such as that for the notorious data
 18 breach at Equifax—for which victims are expected to receive almost nothing.” An article in the
 19 *New York Times* similarly noted that the Settlement here “dwarfs” the *Equifax* settlement. Articles
 20 such as that featured in the *Chicago Tribune* undoubtedly helped spread the word about the
 21 Settlement. And local news articles throughout the state encouraged Illinoisans to submit claims.²

22 _____
 23 ¹ As previously reported, Class Counsel paid for the short-form notice to be published in *The*
Pantagraph and *The Southern Illinoisan*, two daily regional newspapers. (Dkt. 501.)

24 ² See Jeff John Roberts, *Facebook adds \$100 million to landmark facial recognition settlement*
 25 *payout*, FORTUNE (July 23, 2020), available at <https://perma.cc/P7EH-NMSL> Natasha Singer and
 26 Mike Isaac, *Facebook to Pay \$550 Million to Settle Facial Recognition Suit*, N.Y. TIMES (Jan.
 27 29, 2020), available at <https://perma.cc/X99S-743P>; *Deadline Approaches for Illinois Facebook*
 28 *Users to File Claim for Payouts in \$650M Settlement*, NBC 5 CHICAGO (Nov. 6, 2020) available
 at <https://perma.cc/6R4Y-FSW9>; Ally Marotti, *A massive Facebook privacy settlement just got*
bigger. Illinois users could split \$650 million, CHICAGO TRIBUNE (July 24, 2020), available at
<https://perma.cc/X826-MMVQ>; Lorraine Swanson, *Clock Ticking For Illinois Facebook Users*

1 The Settlement was also the subject of a virtual town hall meeting by several supportive
 2 Illinois legislators on November 16, 2020. Representative Ann Williams called the Settlement
 3 “historic” and noted that it would “result in a substantial amount of money for Illinois Facebook
 4 users,” an amount she later termed “unheard of.” A lawyer at Edelson PC was on hand to provide
 5 attendees information on how they could submit a claim, and to answer any questions.

6 Finally, Class Counsel responded to hundreds of inquiries and worked directly with
 7 several Class members to help them with any questions they had about membership in the class or
 8 filing claims. In addition, Edelson PC also responded to requests from members of the Class who
 9 are incarcerated providing the materials they needed to submit claims. Class Counsel was also
 10 required to protect the Class from opportunists who through misleading advertising sought to
 11 solicit class member opt-outs. (Dkts. 477; 494; 496 ¶ 6.)

12 Ultimately, all of this notice and press coverage resulted in over 6.2 million visits to the
 13 Settlement website. (Lucchesi Decl. ¶ 17.) And as explained below, over 1.5 million Class
 14 members have submitted claims. (*Id.* ¶ 19.) To achieve these impressive notice results, Gilardi has
 15 incurred \$1,828,009.89 in costs, which should be approved by the Court. (*Id.* ¶ 22.)

16 **B. The Objections to the Sufficiency of Notice Should be Overruled.**

17 Two of the three objections, the joint objection on behalf of Dawn Frankforther and Cathy
 18 Flanagan and Kara Ross (who has since withdrawn her objection on this point), raise undeveloped
 19 concerns that the notice plan failed to comply with Due Process.³ Objector Ross, for instance,
 20

21 *To File Claims*, PATCH.COM (Nov. 11, 2020), available at <https://perma.cc/U2RC-82PY>; Riley
 22 O’Neil, *Illinois Facebook Users Have 2 Weeks Left To Apply For Settlement*, WROK 1440,
 available at <https://perma.cc/86H4-97PU>.

23 ³ The objection of Kara Ross—prepared with the assistance of counsel who is also her
 24 husband—is deficient. First, it does not state whether it is being filed individually or on behalf of
 25 some group of class members. Fed. R. Civ. P. 23(e)(5)(A.) Second, it fails to provide information
 26 required of the objectors as listed in the Court-approved notice, including: an address, email or
 27 telephone number associated with her Facebook account, an explanation of why she believes she
 28 is a class member, and any citation to legal authority. The Court can overrule it on these grounds
 alone. *In re Yahoo! Inc. Customer Data Security Breach Litig.*, No. 16-md-02752, 2020 WL
 4212811, at *14 (N.D. Cal. July 22, 2020) (“The Court need not consider . . . noncompliant
 objections.”); *Moore v. Verizon Commc ’ns Inc.*, No. 09-cv-1823 SBA, 2013 WL 4610764, at *12

1 claims to know personally (but does not identify) members of the Class who supposedly did not
 2 receive individual notice, and asks the Court to require Class Counsel to “disclose its method of
 3 identifying class members.” (Dkt. 506-1 at 2.) But Class Counsel already has informed the Court
 4 of how the Class List was constructed—that only Facebook users in Illinois for more than 6
 5 months with a template are Class members—and the Court found that comported with its earlier
 6 rulings and with Due Process. (Dkt. 474 at 4-7.) When this was conveyed to Ms. Ross’s counsel,
 7 he immediately withdrew that objection. Moreover, even if Ms. Ross was correct about her
 8 withdrawn objection, due process not require that every class member receive the notice.⁴

9 Objectors Frankfother and Flanagan contend that the notice plan here was inadequate, but
 10 they develop no evidence or argument along those lines. (Dkt. 504 at 7, 10.)⁵ In fact, the only
 11 “evidence” of inadequate notice appears to be what they consider to be a low claims rate. Putting
 12 aside that these objectors fail to meet their burden to substantiate their objection, the 22% claims
 13 rate here is anything but low and is squarely within the projected range provided to the Court (as
 14 required by the Northern District Guidelines) during the preliminary approval process. (Dkt. 445
 15 at 11-12.) Given the hard evidence that nearly the entire Class received individual notice more
 16 than once, there is no basis to find that notice failed to satisfy Due Process.

17 _____
 18 (N.D. Cal. Aug. 28, 2013) (overruling objections “for failing to comply with the procedural
 19 requirements for objecting to the Settlement.”).

20 ⁴ Objector Ross has also withdrawn her objection to the requirement that a class member’s opt
 21 out request be personally signed after Class Counsel and Facebook agreed to not contest her
 22 counsel (husband)’s opting out of 17 other family members on his word that they had agreed.
 Regardless, a signature is a standard requirement (it prevents opt outs from being filed without
 the class member’s knowledge), and no other opt outs appeared hindered by the requirement.

23 ⁵ As described in Plaintiff’s motion to issue discovery, Frankfother and Flanagan are
 24 represented by John J. Pentz, a well-known serial for-profit objector. *See* dkts. 507 & 514
 (quoting several judicial opinions describing Pentz’s objection history).

25 Pentz’s co-counsel, Kendrick Jan, has appeared as co-counsel to Pentz before, filing an
 26 objection in *In re Apple Inc. Device Performance Litigation*, that is practically identical to the
 27 objection they lodge here. *See* Objection, *In re Apple Inc. Device Performance Litig.*, No. 18-
 28 md-2827, Dkt. 512 (N.D. Cal. Oct. 5, 2020). Indeed, it appears that Mr. Jan got admitted to
 practice in this Court on September 30, 2020 precisely so that he could sponsor the *pro hac vice*
 admission of Mr. Pentz in the *Apple Device* case and in this case. The objection in *Apple Device*
 was filed for Sarah Feldman, who is related to Pentz, and Hondo Jan.

1 **C. More Than 1.5 Million Class Members Have Submitted Claims.**

2 Given the breadth of the notice plan and the amount of publicity this Settlement has
 3 received, it should come as no surprise that the Class’s reaction has been overwhelmingly
 4 favorable. Back in July this Court noted that this Settlement presents an “opportunity to move the
 5 marker” in terms of class member participation. (7/23/20 Tr. at 31:11-16.) The parties heeded that
 6 advice and, at the suggestion of a behavioral scientist, subtly altered the claim flow to encourage
 7 more claims. (Dkt. 476 at 1-2.) These efforts, combined with the robust notice plan, have paid off:
 8 more than 1.5 million Class members have submitted claims, around 22% of the Class. By
 9 contrast, only 109 individuals have opted out, representing less than 0.02% of the Class.
 10 Assuming *arguendo* that Counsel’s fee request is approved in full (Dkt. 499), and based upon
 11 projections from Gilardi for the cost of administering the Settlement, claiming Class members
 12 stand to recover around \$342, in line with the projections at preliminary approval. As explained
 13 further below, this claim rate dwarfs what is typical in any consumer class action.

14 **V. THE SETTLEMENT MERITS FINAL APPROVAL**

15 To approve the settlement of a certified class as fair, reasonable, and adequate, Rule 23(e)
 16 requires Court to consider “whether (A) the class representatives and class counsel have
 17 adequately represented the class; (B) the proposal was negotiated at arm’s length; (C) the relief
 18 provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and
 19 appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including
 20 the method of processing class-member claims; (iii) the terms of any proposed award of
 21 attorney’s fees, including timing of payment; and (iv) any agreement required to be identified
 22 under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.”
 23 These factors largely encompass those identified by the Ninth Circuit for evaluating a class
 24 settlement. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)
 25 (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).⁶ Relevant Ninth
 26

27 ⁶ The *Churchill* factors are: (1) the strength of the plaintiff’s case; (2) the risk, expense,
 28 complexity, and likely duration of further litigation; (3) the risk of maintaining class action status

1 Circuit factors are often reviewed alongside those identified by Rule 23. *See, e.g., Walters v.*
 2 *Target Corp.*, No. 16-cv-1678, 2020 WL 6277436, at *5 (S.D. Cal. Oct. 26, 2020).

3 The Court has already given the Settlement here a hard look, initially denying preliminary
 4 approval, based on concerns about the relief afforded to Class members under the agreement, the
 5 scope of the release, potential overlap with the 2019 FTC Consent Decree, the manner of notice,
 6 and the dry, legalistic language used in both the notice and claim form. (Dkt. 456.) The Court
 7 gave the revised Settlement similarly close scrutiny, determining that amendments to the
 8 Settlement, including greater monetary relief, and revisions to the language of the release and to
 9 the substance of the notice documents, had sufficiently addressed its concerns. (Dkt. 474 at 1.)
 10 The Court also heard the testimony and asked questions of a Facebook witness (Gary McCoy) as
 11 to how the Settlement’s conduct remedy is not redundant with the company’s agreement with the
 12 government. (*Id.* at 6.) Further developments, specifically the overwhelmingly positive reaction of
 13 the Class and minimal objections of little substance, confirm the Court’s preliminary findings. *See*
 14 *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1036-37 (N.D. Cal. 2016) (when district court conducts
 15 a “rigorous inquiry” at preliminary approval stage and “identif[ies] any flaws” in a settlement and
 16 “allows the parties to decide how to respond to those flaws,” final approval should focus on
 17 potential flaws identified by objectors or exposed by “further factual development”); *see also*
 18 *Uschold v. NSMG Shared Servs. LLC*, No. 18-cv-01039, 2020 WL 3035776, at *9 (N.D. Cal.
 19 June 5, 2020) (adhering to preliminary analysis about settlement value because “there is nothing
 20 in the final approval materials that changes the Court’s analysis on that score”). Class Counsel
 21 examines the fairness factors identified in Rule 23(e) and by the Ninth Circuit below, mindful that
 22 objections require a “reasoned response.” *Officers for Justice*, 688 F.2d at 624.

23 **A. Class Counsel and the Class Representatives Have Protected the Class’s**
 24 **Interests and Support the Settlement.**

25 As the Court has previously found, Class Counsel and the class representatives have
 26 adequately represented the class throughout the five years they fiercely litigated this case. (Dkt.

27 _____
 28 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed
 and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a
 governmental participant; and (8) the reaction of the class members of the proposed settlement.

1 474.) This zealous representation has continued during the notice and claims process where Class
2 Counsel have spoken with hundreds of Class members, watched for and resolved issues with the
3 email notice, and identified misleading communications being provided that necessitated the
4 filing of a TRO. (Dkt. 499-1 ¶¶ 133-38.) The Court should confirm that finding.

5 Class Counsel's support of the Settlement can be considered and also favors approval. *In*
6 *re Bluetooth*, 654 F.3d at 946. Here, Class Counsel have extensive experience litigating consumer
7 class actions, including in the privacy space. It is their considered judgment that the Settlement
8 represents an outstanding result for the Certified Class. (Dkt. 499-1 ¶ 122.) "Given Class
9 Counsel's extensive experience in this field, and their assertion that the settlement is fair,
10 adequate, and reasonable, this factor supports final approval of the Settlement Agreement."
11 *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 685 (N.D. Cal. 2016). It is also
12 notable that experienced lawyers at Cooley LLP recommend approval of the Settlement.

13 **B. The Settlement was Negotiated at Arm's Length.**

14 This Court has already found "that the proposed settlement was the product of serious,
15 informed and noncollusive negotiations" and lacked a clear sailing agreement. (Dkt. 474.) That
16 conclusion remains correct. The parties mediated three separate times at different stages of the
17 proceedings, reaching a settlement only after Facebook's *en banc* petition to the Ninth Circuit had
18 been denied. (Dkt. 499-1 ¶¶ 109-112.) And during the final attempt at resolution, even after
19 reaching an agreement in principle, the parties repeatedly had to engage with Ambassador Bleich
20 to resolve differences that arose between them as to the open terms. (*Id.* at 113-18.) *See Satchell*
21 *v. Fed. Exp. Corp.*, Nos. 03-cv-2659-SI, 03-cv-2878-SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr.
22 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the
23 settlement is non-collusive."). Nor does the Settlement suffer from any of the warning signs that
24 the Ninth Circuit has instructed district courts to watch out for. *See In re Bluetooth*, 654 F.3d at
25 946-47 (identifying "clear sailing" arrangements and reversionary funds may suggest the presence
26 of collusion or bad faith).

27 **C. The Amount Offered by the Settlement Supports Final Approval.**

28 Next, the relief afforded to Class members by the Settlement here is extraordinary. As

1 explained below, the relief available to Class members under the Settlement go beyond what has
2 been offered by any comparator settlement. This factor weighs heavily in favor of final approval
3 of the Settlement, especially in light of the costs and risk of a trial and further appeals.

4 **i. Projected recovery is unprecedented for a privacy settlement.**

5 The monetary relief awarded to claiming Class members remains unprecedented. As
6 Professor Rubenstein lays out, the size of the Settlement here is the largest privacy settlement on
7 record, and when compared to the size of the Class, provides substantially more relief than any
8 privacy settlement. (Dkt. 499-3, Tables 1 & 2.) Indeed, the \$650 million recovery outpaces every
9 other privacy settlement by at least \$144.5 million. But the runner-up, the settlement in *In re*
10 *Equifax, Inc. Customer Data Security Breach Litigation*, No. 17-md-2800, 2020 WL 256132
11 (N.D. Ga.), compensated a class of around 147 million Americans, or about 21 times larger than
12 the Class here. Other large privacy settlements provide even more lopsided comparisons. As
13 Professor Rubenstein shows, on a gross per class member basis, the Settlement here is easily
14 record-breaking. Indeed, of the 20 largest privacy settlements since 2014, “fifteen of these cases
15 return less than \$15 per member, while this Settlement returns close to \$100.” (Dkt. 499-3 ¶ 18.)

16 Moreover, the awards to claiming Class members further show that the relief provided by
17 the Settlement is fair. Class members will receive around \$342, an amount that is unheard of in a
18 class action privacy settlement. Given that Class members stood to recover \$1,000 only if
19 successful in a trial that was rife with significant risks, this figure represents a modest discount for
20 the Class, consistent with the potential delay and risks that lay ahead at trial and on appeal.

21 Such a gentle discount is rare in class action privacy settlements where statutory damages
22 are available. For example, large class actions under the Telephone Consumer Protection Act,
23 which provides for \$500 in statutory damages, typically settle for less than \$40 per person. *See,*
24 *e.g., In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp. 3d 781, 787 (N.D.
25 Ill. 2015) (providing \$34.60 to each claiming class member); *Hashw v. Dept. Stores Nat’l Bank*,
26 182 F. Supp. 3d 935, 940, 944-45 (D. Minn. Apr. 26, 2016) (providing class members who
27 received over 100 calls in violation of the TCPA a single \$33.20 payment). Many other statutory
28 class actions result in similar recoveries. A large privacy case under the Drivers’ Privacy

1 Protection Act provided for a \$50 million cash settlement fund that afforded about 600,000 class
2 members \$160 of the \$2,500 they might have been entitled to after trial. *Kehoe v. Fidelity Fed.*
3 *Bank & Tr.*, No. 03-cv-80593, Dkt. 215 at 7 (S.D. Fla. Nov. 17, 2006). And in *In re Vizio, Inc.*,
4 *Consumer Privacy Litigation*, No. 16-ml-02693-JLS-KES (C.D. Cal.), the plaintiffs alleged that
5 defendant’s smart TVs collected viewing history and transmitted that data, along with personally
6 identifiable information, to third parties in violation of the Video Privacy Protection Act, 18
7 U.S.C. § 2710, which allows for recovery of \$2,500, *id.* § 2710(c)(1)-(2). From the resulting \$17
8 million settlement, claiming class members received about \$18 per television purchased. *See In re*
9 *Vizio*, Dkt. 347-1 at 2. These cases are consistent with decision from this district, which has
10 approved settlements embodying similar discounts across a range of subject matter. *See, e.g.*,
11 *Uschold*, 2020 WL 3035776, at *9 (approving a 12% recovery); *see also Officers for Justice*, 688
12 F.2d at 628 (“It is well-settled law that a cash settlement amounting to only a fraction of the
13 potential recovery will not per se render the settlement inadequate or unfair.”).

14 The relief available to claiming Class members also dwarfs the relief available to class
15 members in all privacy class actions of remotely comparable size. For instance, when compared
16 to *Equifax* on numbers alone, this Settlement provides over 27 times more value per Class
17 member—\$94.20 in cash compared to \$3.44 of restricted benefits. In order to be comparable in
18 terms of dollars available per class member, the *Equifax* settlement would have had to have
19 created \$13 billion all-cash, non-reversionary fund. The same is true for other large privacy
20 settlements. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 324 (N.D. Cal.
21 2018) (explaining that only \$13 million of the \$115 million fund was available for cash payments,
22 with the rest being reserved to purchase credit monitoring services); *In re Yahoo! Inc.*, 2020 WL
23 4212811, at *22 (cash relief made available to class members with existing credit monitoring,
24 out-of-pocket losses, and who paid for premium services).

25 The individual class member recovery here also far outstrips other consumer BIPA
26 settlements. In *Prelipceanu v. Jumio Corp.*, No. 2018 CH 15883 (Ill. Cir. Ct., Cook Cnty.), the
27 final check amount was \$262. In another consumer BIPA action, *Sekura v. L.A. Tan Enterprises,*
28 *Inc.*, No. 15 CH 16694 (Ill. Cir. Ct., Cook Cnty.), class members received around \$170. And in a

1 third consumer BIPA settlement, *Carroll v. Crème de la Crème*, No. 17 CH 1624 (Ill. Cir. Ct.
2 Cook Cnty.), class members received only credit monitoring.⁷

3 The substantial monetary relief also is remarkable in light of the fact that many privacy
4 class actions settle for mere *cy pres* relief, or other non-monetary relief, like the settlement in
5 *Crème de la Crème*, which provided only credit monitoring for class members. In fact, Judge
6 Alsop of this district recently preliminarily approved a class-action settlement in *Adkins v.*
7 *Facebook, Inc.*, a case arising from a hack of Facebook, that included only injunctive relief. *See*
8 Order Granting Preliminary Settlement Approval, *Adkins*, No. 18-cv-05982 WHA, Dkt. 314.
9 Indeed, class-action settlements providing no monetary benefit to the settlement class are fairly
10 common in cases against Facebook, and other so-called “tech giants.” *See, e.g., Lane v.*
11 *Facebook, Inc.*, 696 F.3d 811, 820–22 (9th Cir. 2012); *In re Google LLC Street View*, 2020 WL
12 1288377, at *11-14 (approving *cy pres* only settlement despite availability of statutory damages).

13 In other words, the per class member recovery here in a case of this size is peerless.
14 Whether viewed through the lens of BIPA specifically, of other massive privacy settlements, of
15 other settlements where statutory damages were available, or of settlements against large
16 technology companies, class member recovery here is extraordinary. This is particularly so in
17 light of the very real risk of nonpayment presented by the impending trial, as the Court has
18 outlined in previous orders. (Dkt. 474 at 5; Dkt. 404 at 3.)

19 **ii. The conduct remedy here provides “meaningful” relief.**

20 First, as the Court previously found, the conduct remedy agreed to by the parties provides
21 “meaningful” relief to Class members. (Dkt. 474 at 6.) This remains true. The Settlement requires
22 Facebook to turn off Face Recognition and then delete the biometric data it collected about Class
23 members unless they provide informed consent to turn it back on and for Facebook to continue to
24 retain that data. No BIPA settlement offers any more significant non-monetary relief. And

25 _____
26 ⁷ As previously noted, several BIPA lawsuits by employees against their employer have settled
27 for more than \$1,000 per class member. (Dkt. 445 at 17 n.8.) Professor Rubenstein finds these
28 settlements are a poor comparison because they involve small classes (settlements are typically
for the cost of defense) and involve legal issues not present here. (*See* Dkt. 499-3 ¶ 19(b).)

1 consumer settlements frequently offer less relief. In the settlement of the *Preliceanu* action
2 referenced above, which received final approval after Plaintiffs had submitted their preliminary
3 approval papers, the defendant agreed only to “obtain through commercially reasonable methods
4 BIPA-compliant consent,” along with pledges to follow the law. It’s unclear what “commercially
5 reasonable” means and the no pledge to turn off or delete data unless consent is obtained. By
6 contrast, here, Facebook will turn Face Recognition off and obtain consent with clear language
7 and delete data if a Class member does not consent or is inactive for several years.

8 One objector, Kevin C. Williams, appears to take issue with the conduct relief here,
9 arguing generally that Facebook users should demand “more privacy [and] more protection . . .
10 based on the wrongs perpetrated on Facebook on its users.” (Dkt. 497 at 2.) But this suit, under a
11 single state’s law regarding a specific type of privacy violation, is not the vehicle to make
12 sweeping changes to Facebook’s governance model or change what the Illinois General Assembly
13 requires of those who collect biometrics. Given the context of this lawsuit, the non-monetary
14 relief provided by the Settlement is outstanding.

15 **iii. The risks in further litigation demonstrate the adequacy of the relief.**

16 As the Court has observed, the Settlement was reached on the eve of trial. (Dkt. 474 at 2.)
17 In fact, trial preparations had begun in earnest in 2018. Class Counsel spent a week with Rodney
18 Jew, an experienced trial consultant formulating a trial strategy, and the parties had exchanged
19 proposed motions *in limine*. (See Dkt. 499-1 ¶¶ 83-86.) Those preparations were temporarily put
20 on hold by Facebook’s interlocutory appeal of this Court’s class certification order. While that
21 appeal ultimately put to rest one of Facebook’s principal contentions, i.e., that class members
22 lacked standing to sue (*see Patel v. Facebook, Inc.*, 932 F.3d 1264, 1275 (9th Cir. 2019)),
23 numerous critical factual disputes remained for trial. For instance, the Ninth Circuit’s order left
24 the door open for Facebook to pursue arguments about extraterritoriality, and basic liability
25 disputes “about whether Facebook’s facial recognition technology collects a ‘scan of face
26 geometry’ as required under BIPA, and whether Facebook had a good-faith reason for acting as it
27 did with respect to Illinois users” remained for the jury to resolve. (Dkt. 474 at 5; *see id.* at 4-5
28 (noting that these “specific disputes of fact . . . the jury’s resolution of which was uncertain . . .

1 could have had far-reaching impacts on Facebook’s liability”).) There have been no developments
2 (such as new binding precedent from Illinois courts) which could upset the Court’s earlier
3 findings in this regard. Further, in addition to the uncertainty of a trial, even if Plaintiffs prevailed
4 before the jury, a second lengthy and complex appeal was in the offing, challenging not just the
5 Court’s trial orders, but also certain earlier decisions, such as the Court’s resolution of Facebook’s
6 choice-of-law argument, and Facebook’s invocation of the “photograph” exception, as well as a
7 constitutional challenge to the size of any ultimate verdict. (See Dkt. 445-1 ¶ 8.) A lengthy appeal
8 (and possible remand) also would have left open the door for perhaps the greatest risk to recovery
9 that the Class was facing: an amendment to the BIPA which might have gutted the Class’s claims.

10 All of this provides ample reason to settle now rather than risk trial and subsequent appeal
11 at a chance for a larger payout, particularly given that the larger payout is by no means guaranteed
12 even if the Class prevails on the merits, as any verdict could be reduced on account of Due
13 Process. *See, e.g., Uschold*, 2020 WL 3035776, at *9 (“The challenges Plaintiffs would face
14 should this case move forward instead of settling, in contrast to the finality and speed of recovery
15 under the parties’ agreement, weighs in favor of approving the settlement.”). Particularly given
16 the relief provided by the Settlement, the strength of the Plaintiffs case, balanced against the risks
17 inherent at trial, and presented by lengthy and complex appeals here, supports final approval of
18 the Settlement. *See Delgado v. MarketSource, Inc.*, No. 17-cv-07370, 2019 WL 4059850, at *5
19 (N.D. Cal. Aug. 28, 2019) (finding that “both sides had a well-developed sense of the risks and
20 benefits of continued litigation” which “weighs in favor of approval”).

21 **iv. The objections to the adequacy of relief are meritless.**

22 Despite the facial reasonableness of the relief and the Court’s determination at preliminary
23 approval that the \$650 million fund was an “impressive result,” all three objections raise concerns
24 with the size of the Settlement Fund. These objections should be overruled. As the Ninth Circuit
25 observed in *Hanlon*, “settlement is the offspring of compromise; the question . . . is not whether
26 the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free
27 from collusion.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); *see also Fraley*
28 *v. Facebook, Inc.*, 966 F. Supp. 2d 939, 948 (N.D. Cal. 2013) (finding that objections seeking

1 more relief did not show that settlement was unfair or inadequate). In arguing that the Settlement
2 relief is inadequate, the objectors “bear the burden of proving any assertions they raise
3 challenging the reasonableness of a class action settlement.” *In re LinkedIn User Privacy Litig.*,
4 309 F.R.D. 573, 592 (N.D. Cal. 2015). The objectors fail to meet this burden.

5 Objector Williams claims that the Settlement is too small because Facebook could afford
6 to pay more. (Dkt. 497 at 2.) But this undeveloped argument ignores the substantial nature of the
7 relief actually secured.⁸ This Settlement is record-breaking when it comes to monetary relief
8 made available in a consumer settlement. Williams’s unsubstantiated assertion “is insufficient to
9 rebut the Parties’ evidence and argument that the settlement was negotiated at arms’ length
10 between experienced counsel and a respected mediator who actually evaluated the case.” *Nunez v.*
11 *BAE Sys. San Diego Ship Repair Inc.*, 292 F. Supp. 3d 1018, 1042 (S.D. Cal. 2017).

12 Objector Ross appears to believe that the case should have settled for no less than \$5,000
13 per class member, or, in other words, full relief after a finding of willfulness. (Dkt. 506-1 at 1-2.)
14 Ross argues that Facebook acted willfully by “caus[ing] class members’ private activities and
15 whereabouts to become known to violent ex-husbands, to stalkers, as well as to jealous and
16 spiteful in-laws and acquaintances.” (*Id.* at 1.) Such wild accusations, signed by counsel, have
17 nothing do with the facial recognition claims under BIPA at issue here. Beyond these claims
18 Ross’s contention that the parties should have settled for more just won’t do. *See Hanlon*, 150
19 F.3d at 1027; *Nunez*, 292 F. Supp. 3d at 1042

20 Objectors Frankfother and Flanagan spill the most ink on their opposition to the amount
21 offered in Settlement, ultimately arguing that the case should have settled for no less than \$5
22 billion. Indeed, their central point—that the Settlement Fund is not big enough—was central to
23 the Court’s earlier refusal to grant preliminary approval to the Settlement. (Dkt. 456 at 1.) In light
24 of those and other concerns the parties returned to the negotiating table, and produced a revised
25

26
27 ⁸ Williams also may have an ulterior motive for objecting: As a result of a conviction for money
28 laundering, he owes restitution of nearly \$1.9 million including the proceeds of any judgment. *See*
Judgment, United States v. Williams, No. 4:13-cr-40019-JPG, Dkt. 40 (S.D. Ill. Nov. 15, 2013).

1 Settlement that increased the Settlement Fund to \$650 million. (Stipulation ¶ 1.30) The Court
2 found that this addition “substantially allay[ed]” its concerns and was “an impressive result.”
3 (Dkt. 474 at 5.) The gist of Frankfother and Flanagan’s objection is that the Court was wrong, and
4 that only a \$5 billion settlement would have been sufficient. But the relief available to claiming
5 Class members here is extraordinary, and the size of the Settlement Fund fairly reflects the type of
6 compromises that are the very essence of settlement. *See In re Yahoo! Inc.*, 2020 WL 4212811, at
7 *14 (rejecting objections to the amount of monetary relief available for “fail[ing] to adequately
8 take into account the risks and delays” that would face the class).

9 In disagreeing with the Court’s earlier findings, Frankfother and Flanagan proceed from
10 two false or misleading premises. First, they say that the class is 10 million individuals. (Dkt. 504
11 at 6-7.) That is incorrect, it’s about 7 million as has been repeatedly explained. (*See, e.g.*, Dkt. 255
12 at 6.) Second, they assert that “all significant legal questions had been resolved in favor of the
13 Plaintiffs.” (Dkt. 504 at 8.) This is, at best, highly misleading. As this Court has found, significant
14 factual questions remained open for the jury to resolve. (Dkt. 474 at 5.) The objectors attempt to
15 downplay these very real trial risks by arguing that Facebook’s argument about the type of data it
16 collects is “frivolous.” (Dkt. 504 at 6 n.4.) That statement lacks any basis in the record. In fact, on
17 this issue specifically the parties had marshaled competing expert testimony which this Court
18 concluded created a genuine issue of fact for trial. (Dkt. 372 at 2-6 (noting the parties “unleash
19 volleys of competing evidence.”) Facebook’s position was well-supported by evidence and
20 certainly was not “frivolous.” Indeed, the objectors’ support for the idea that this position is
21 frivolous is the FTC’s recent settlement with Facebook, but this merely confirms that they have
22 no idea what they are talking about. (See Dkt. 504 at 6 n.4 (“Facebook would never have agreed
23 to pay \$5 billion through an FTC consent decree if there were any question about its use of facial
24 geometry in its collection of biometric data.”).) The FTC settlement had almost nothing to do with
25 Facebook’s face scanning practices (it was focused on privacy failures highlighted by the
26 Cambridge Analytica scandal), and even the small slice concerning Tag Suggestions had nothing
27 to do with whether Facebook was complying with BIPA.

1 Frankfother and Flanagan also contend that “Facebook’s voluntary \$5 billion payment in
2 the FTC action would appear to undermine any argument that a \$10 billion verdict for violation of
3 BIPA constitutes a violation of due process.” (*id.* at 8.) Again, the FTC settlement was concerned
4 with a far broader range of conduct, including failure to abide by an earlier settlement with the
5 FTC. In any event, the argument is legally mistaken. Frankfother and Flanagan appear to believe
6 that Facebook’s ability to pay is either the sole or principal basis for a reduction of an award
7 under Due Process. But that is wrong. *See United States v. Dish Network LLC*, 954 F.3d 970, 980
8 (7th Cir. 2020) (“Normally the legal system bases civil damages and penalties on harm done, not
9 on the depth of the wrongdoer’s pocket.”). The Due Process Clause asks whether the verdict is
10 “so severe and oppressive as to be wholly disproportioned *to the offense* or obviously
11 unreasonable.” *St. Louis, Iron Mountain, & S. R. Co. v. Williams*, 251 U.S. 63, 67 (1919)
12 (emphasis added). The FTC settlement is therefore not a reasonable guidepost here, because it
13 says little about the types of harms alleged. Moreover, the FTC settlement was national in scope,
14 as opposed to the single-state class here. If the instant Settlement were national, to make the
15 comparison with the FTC settlement more straightforward, it would amount to over \$17 billion.
16 In other words, if the FTC settlement shows anything, it shows that the relief here is outstanding.

17 Based on these misunderstandings, the objectors argue that any settlement here should
18 have been at least \$5 billion. But aside from the misunderstandings already laid out above, “the
19 very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest
20 hopes.” *Officers for Justice*, 688 F.2d at 624 (quotations omitted). This Court has already found
21 that the Class faced significant risks at trial which could have left them with nothing. (Dkt. 474 at
22 5.) Class Counsel appropriately took those risks into account when deciding to settle, and to settle
23 for less than full relief. Frankfother and Flanagan omit *any* discussion of the many other
24 landmines that lay ahead for the Class. As discussed in detail at preliminary approval papers, even
25 plaintiffs prevailed at trial, a second appeal loomed, at which Facebook would have the
26 opportunity to contest certain of the Court’s earlier rulings including its contentions about
27 extraterritoriality. (See Dkt. 445 at 20-21, 23; Dkt. 465 at 3-16.) There also existed the possibility
28 that Facebook might successfully petition the Supreme Court for certiorari, further delaying

1 payment to the Class. *See Fid. Bank & Trust Co. v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J.,
2 concurring in the denial of certiorari) (“This enormous potential liability . . . is a strong factor in
3 deciding whether to grant certiorari.”). Class Counsel was entitled to account for these risks and
4 the potential for delay in determining what constitutes a reasonable settlement for the Class.

5 Even then, beyond the demand for a \$5 billion settlement fund, it is hard to see exactly
6 what the objectors’ issue with the Settlement is. The objectors acknowledge that a 50% discount
7 would be appropriate. (Dkt. 504 at 7.) As it happens, claiming Class members stand to recover
8 around \$342, which amounts to nearly half the relief the objectors demand. When one adjusts for
9 the objectors’ misunderstandings, and accounts for the risks they ignore, the relief available to
10 claiming Class members is right in line with what the objectors ask for.

11 **D. The High Claims Show the Effective Distribution of Funds to the Class.**

12 Rule 23(e)(2) directs the Court to consider whether the relief is adequate in light of “the
13 effectiveness of [the] proposed method of distributing relief to the class.” The Committee Notes
14 explain that this factor concerns the claims process, which should not be “unduly demanding” but
15 which should “deter or defeat unjustified claims.” The high claims rate in this action is clear
16 evidence that the claims process was easily navigated. Indeed, the on-line claim process was
17 exceptionally simple to use, allowing most Class members to submit claims in less than two
18 minutes and without the need to hunt down any extraneous information—the only information
19 that most Class members needed was their contact information, the email or phone number they
20 used to sign up with Facebook, and how they wanted to receive their payment. Individuals not on
21 the Class List also were permitted to submit claims so long as they provided their address in
22 Illinois during the class period and a statement that they uploaded a picture of their face. All told,
23 only about 164,000 individuals of the over 1.5 million claimants took this latter route. Of those,
24 only around 15,000 claims did not provide sufficient information.

25 As for distribution, the claim form asked Class members how they would like to be paid
26 from the Settlement Fund. Class members could choose from several online options, or to receive
27 a paper check. These options were selected to maximize convenience to Class members. Again,
28 there have been no objections to this manner of distributing relief, which is substantially effective.

1 Finally, the overwhelmingly positive reaction of the Class favors final approval.
2 Approximately 22% of the Class has submitted claims. This is an enormous number, particularly
3 in light of the size of the Class, and persuasive evidence that the Class believes the Settlement
4 provides valuable relief. *See Bailey v. Kinder Morgan GP*, No. 18-cv-03424, 2020 WL 5748721,
5 at *6 (N.D. Cal. Sept. 25, 2020) (“The absence of a large number of objections to a proposed class
6 action settlement raises a strong presumption that the terms of a proposed class settlement action
7 are favorable to the class members.”) (quotations omitted). As Professor Rubenstein explains, the
8 typical claims rate for a class of this size is around 5%. The claims rate here is *at least* four times
9 higher, and sixteen times the average claims rate for a class of this size. (2d Rubenstein Decl. ¶ 5.)
10 The claims rate here also outperforms historical norms even when considering the amount of
11 relief offered by the Settlement. As Professor Rubenstein explains, the claims rate here is about
12 two to two-and-a-half times the historical claims rates for settlements offering this much relief per
13 class member. (*Id.* ¶ 6.)

14 The claims rate here also compares favorably to rates in similar cases. For instance, the
15 claims rate here outpaces other consumer BIPA settlements. The claims rate in *Jumio* is not
16 known, but it is believed to be around 8%. The claims rate in *Sekura* was around 12%. When
17 taking into account that the Class here was much larger than in those actions, it is clear that the
18 claims rate here is truly a cut above. *See In re Nexus 6P Prods. Liab. Litig.*, No. 17-cv-02185,
19 2019 WL 6622842, at *7 (N.D. Cal. Nov. 12, 2019) (deeming an 18% claims rate “substantial”).

20 And again, extending this comparison to other privacy cases involving large classes or the
21 potential for large statutory damage awards only confirms that class member participation weighs
22 overwhelmingly in favor of settlement approval. For instance, in *In re Equifax*, which received
23 publicity from several national news outlets and prominent national political figures, the claims
24 rate was just slightly over 10%. *See* 2020 WL 256132, at *4. Other large data breach settlements
25 featured even less class member participation. *See In re Target*, No. 14-cv-2522, 2017 WL
26 2178306, at *1-2 (D. Minn.) (225,000 claims in class of over 100 million); *In re Anthem*, 327
27 F.R.D. at 321 (1.8% claims rate). Statutory damages cases are similar. For instance, in the *Vizio*
28 action, the claims rate was around 4%. *See In re Vizio*, No. No. 16-ml-02693, Dkt. 337 at 9. And

1 in cases under Michigan’s Preservation of Personal Privacy Act, where a potential \$5,000
 2 statutory damages award was settled on a classwide basis, claims rates tended to range from 11%
 3 in *Coulter-Owens v. Rodale*, No. 14-cv-12688-RHC-RSW (E.D. Mich.), to 16% in *Raden v.*
 4 *Martha Stewart Living Omnimedia, Inc.*, No. 16-cv-12808 (E.D. Mich.).

5 Not only is the claims rate here high, but only 109 Class members opted out (0.02% of
 6 the Class) and there are just three objections to the Settlement. Courts in this district have found
 7 that a class’s reaction to a settlement was positive despite much higher opt-out and objection
 8 rates. *See, e.g., Corzine v. Whirlpool Corp.*, No. 15-cv-05764, 2019 WL 7372275, at *6 (N.D.
 9 Cal. Dec. 31, 2019) (finding that 18 objections and 199 opt outs from a class of around 1 million
 10 reflected the class’s “favorable view” of the settlement); *In re Nexus 6P*, 2019 WL 6622842, at
 11 *10 (31 opt outs in class of 511,000 “confirms that the settlement is fair and reasonable”);
 12 *Sugarman v. Ducati N. Am., Inc.*, No. 10-cv-05246, 2012 WL 113361, at *3 (N.D. Cal. Jan. 12,
 13 2012) (finding a “positive response” from the class when the court received 28 objections and 42
 14 opt outs from a class of less than 39,000); *see also Rodriguez v. West Publ’g Corp.*, 563 F.3d 948,
 15 967 (9th Cir. 2009) (concluding that the district court “had discretion to find a favorable reaction”
 16 when 54 of 376,301 class members objected to settlement); *Churchill Village*, 361 F.3d at 577
 17 (affirming approval of class-action settlement where 45 of 90,000 class members objected). That
 18 only three meritless objections have been filed speaks volumes to the Settlement’s fairness.

19 **VI. OBJECTIONS TO THE PROPOSED SERVICE AWARDS ARE MERITLESS**

20 Objectors Frankfother and Flanagan argue that the proposed \$7,500 service awards to the
 21 named plaintiffs are either not allowed as a matter of equity, or so high that they demonstrate
 22 inadequate representation of the Class. (Dkt. 504 at 13-15.) On this point, Objector Williams
 23 appears to believe that the Class Representatives should actually receive *more* for their service to
 24 the Class. (Dkt. 497 at 2.) In any event, Frankfother and Flanagan’s argument goes nowhere.

25 **A. Service Awards are Permitted in Class Actions.**

26 First, relying on a recent Eleventh Circuit opinion, *Johnson v. NPAS Solutions, LLC*, 975
 27 F.3d 1244 (11th Cir. 2020), Objectors contend that all incentive awards are barred under equitable
 28 principles. (Dkt. 504 at 13-14.) As they acknowledge, however, there is ample Ninth Circuit

1 authority upholding service awards. *See Rodriguez*, 563 F.3d at 958 (noting that “incentive
2 awards are fairly typical in class action cases” and “are discretionary”). Regardless of what the
3 Eleventh Circuit has held, this Ninth Circuit precedent is binding here. Moreover, the Second
4 Circuit has rejected precisely the same arguments that were accepted in *Johnson*. *See Melito v.*
5 *Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019).

6 In any event, *Johnson* is unpersuasive. *Johnson* relied principally on *Trustees v.*
7 *Greenough*, a nineteenth-century Supreme Court decision concluding that a representative
8 plaintiff could not recover an award for “personal services and private expenses” incurred while
9 litigating on behalf of a class of bondholders. 105 U.S. 527, 537 (1881). *Johnson* concludes that
10 service awards are akin to the award for “personal services and private expenses” decreed in
11 *Greenough*. 975 F.3d at 1258-59. But *Johnson*’s analogy to *Greenough* is strained. The plaintiff
12 in *Greenough*, Vose, sought an award of “\$2,500 a year for ten years of personal services” plus
13 interest of \$9,625, as well as another \$15,003.35 for “railroad fares and hotel bills.” 105 U.S. at
14 530. Adjusted to 2020 dollars, Vose asked for a salary of around \$66,000/year for litigating the
15 case, as well as expenses of around \$400,000, amounting to a total award of around \$1.3 million.
16 This preposterous request simply cannot be analogized in good faith to service awards of just a
17 few thousand dollars. The representatives here do not seek a salary, or for reimbursement of
18 hundreds of thousands of dollars of expenses. Instead, they seek an award for reasons the Ninth
19 Circuit has recognized as legitimate: “for work done on behalf of the class, to make up for
20 financial or reputational risk undertaken in bringing the action, and . . . to recognize their
21 willingness to act as a private attorney general.” *Rodriguez*, 563 F.3d at 958-59.

22 Moreover, Congress or the Rules Committee have recognized the legitimacy of service
23 awards. For instance, Congress has specifically outlawed them in federal private securities
24 litigation. *See* 15 U.S.C. § 78u-4(a)(2)(A)(vi). It would make no sense for Congress to have taken
25 this step if it thought that incentive awards were impermissible as a general matter.

26 And recent amendments to Rule 23 also cover the awarding of service awards. Rule
27 23(e)(2)(D) now requires district courts to ensure that a class action settlement “treats class
28 members equitably relative to each other.” This provision easily covers service awards. Such

1 awards are made by virtue of a settlement, so a court would need to ensure that this proposed
 2 additional allocation of funds to a class representative is sufficiently justified that the settlement
 3 “treats class members equitably relative to each other.” Indeed, the crux of Frankfother and
 4 Flanagan’s argument with respect to the size of the award is that it is inequitable.

5 **B. The Proposed Service Awards are Appropriate.**

6 With respect to the size of the award, Frankfother and Flanagan’s arguments again fail.
 7 They suggest that the size of the award divorces the interests of the representatives from those of
 8 the Class. (Dkt. 504 at 14.) The argument is not well developed, but Frankfother and Flanagan
 9 claim that the Class Representatives sold out the Class to obtain a modest service award.

10 There is no evidence or authority to support this argument. As to the law, the Ninth Circuit
 11 rejected a nearly identical argument in *In re Online DVD-Rental*, holding that because the awards
 12 were left to the discretion of the district court they did not “create an impermissible conflict
 13 between class members and their representatives.” 779 F.3d at 943. As to the facts, the record is
 14 clear that the Class Representatives have selflessly served the Class at every turn, and were
 15 preparing to offer trial testimony before the interlocutory appeal, and then again before the case
 16 settled. (Dkts. 499-7, 499-8, 499-9.) The behavior is inconsistent with the idea that they sold out
 17 the Class for a few thousand dollars. Moreover, Objectors’ argument makes no sense: the
 18 proposed \$7,500 service award is on the low side. *See* 5 William B. Rubenstein, NEWBERG ON
 19 CLASS ACTIONS § 17:8 (5th ed., June 2020 update). The Class Representatives easily could have
 20 obtained the same award by settling earlier in the case or for a smaller amount.

21 **VII. OBJECTIONS TO THE FEE REQUEST SHOULD BE OVERRULED**

22 Two objections argue that Class Counsel’s fee request of 20% of the initial \$550 million
 23 settlement, or 16.9% of the final Settlement, is excessive. These objections should be overruled.

24 Objectors Frankfother and Flanagan contend that because this is a so-called “megafund”
 25 case, Counsel’s fee should be “substantially less” than the Ninth Circuit’s 25% benchmark. (Dkt.
 26 504 at 9.) Of course, Counsel’s fee request *is* substantially less than the Circuit benchmark. *Cf.*
 27 *Hefler*, 2018 WL 6619983, at *13 (finding an award of 20% of a \$480 million fund to be
 28 reasonable). As *Hefler* noted, the “median” award “in cases with large settlements over \$100

1 million,” is 19% to 22.3%. *Id.* Class Counsel’s fee request is right in line with these awards.

2 In any event, Frankfother’s and Flanagan’s argument ignores critical Ninth Circuit case
3 law as well as virtually all of the authority and experts reports in Plaintiff’s petition for fees. First,
4 the Ninth Circuit has acknowledged the 25% figure as a benchmark in a megafund case. *See*
5 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). *Vizcaino* itself makes clear that
6 the Ninth Circuit has “*not* adopt[ed]” a categorical rule that the percentage of an award must
7 “decrease[] as the amount of the fund increases.” *Id.* at 1047 (emphasis added). Instead, the
8 question in any case, megafund or no, is whether the proposed award “is proper and fair in light
9 of the amount and quality of the work done by the attorneys.” *In re TFT-LCD (Flat Panel)*
10 *Antitrust Litig.*, No. 07-cv-1827, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013) (awarding
11 28.6% of \$1.08 billion fund and rejecting objectors’ argument to “reduce the award or use a
12 sliding scale model . . . to avoid a windfall for the attorneys”).

13 Frankfother and Flanagan argue that *In re Washington Public Power Supply System*
14 *Securities Litigation*, 19 F.3d 1291 (9th Cir. 1994), controls here. But the lesson of *WPPSS* is
15 simply that a district court must consider “all the circumstances of the case” when settling on a
16 reasonable fee. *Id.* at 1297-98. That’s consistent with other Ninth Circuit precedent establishing
17 that “mechanical” application of any fee calculation method may be an abuse of discretion. *In re*
18 *Online DVD-Rental*, 779 F.3d at 949. Class Counsel does not ask for a mechanical fee
19 calculation, but a specific fee based on the circumstances of this case. (Dkt. 499.) Beyond that
20 basic teaching, *WPPSS* does not set forth a rule specific to so-called megafunds.

21 Next, Frankfother’s and Flanagan argue that the fee award should be based on a lodestar,
22 rather than a percentage-of-the-fund analysis. (Dkt. 504 at 11-13.) Class Counsel’s fee petition
23 and accompanying declaration of Professor Fitzpatrick discuss in depth why the percentage-of-
24 the-fund method should prevail here. Frankfother and Flanagan do raise one point worth
25 discussing, however: Objectors contend that a lodestar analysis is preferable because it would
26 have been required had the case gone to trial, so to use a percentage analysis here gives Class
27 Counsel a windfall. (Dkt 504 at 11-12.) But Frankfother’s and Flanagan’s legal premise is
28 incorrect. It is true that BIPA contains a fee-shifting provision. But a fee shifting provision does

1 not limit a court's equitable power to award fees from a common fund. *See Staton v. Boeing Co.*,
2 327 F.3d 938, 968 (9th Cir. 2003). As the Supreme Court has held, fee shifting statutes do not
3 "interfer[e] with the historic power of equity to permit the trustee of a fund or property, or a party
4 preserving or recovering a fund for the benefit of others in addition to himself, to recover his
5 costs, including his attorneys' fees, from the fund or property itself or directly from the other
6 parties enjoying the benefit." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257
7 (1975). And, under Illinois law, the existence of a statutory fee-shifting provision is not intended
8 to curtail a court's ability to compensate counsel or to foreclose consideration of a percentage-
9 based contingent fee. *See Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887,
10 ¶ 100; *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 3d 231, 241 (1996). Thus,
11 it is simply not true that this was necessarily a "fee shifting" case before it settled.

12 Frankfother and Flanagan raise some other arguments, questioning the inclusion some of
13 the hours in Class Counsel's lodestar calculation and the total multiplier. These assertions can be
14 dealt with quickly as they wholly ignore the evidence submitted in support of the fee award. As to
15 the multiplier, as Professor Rubenstein opined, Class Counsel worked extremely efficiently to
16 achieve the result here, and the success achieved amply supports the requested multiplier of 5.31.
17 (*See* Dkt. 499-3 ¶¶ 25-54.) Frankfother's and Flanagan's argument that the Court should exclude
18 all hours related to Class Counsel's legislative efforts to protect BIPA from being gutted by
19 amendment ignores the realities of modern litigation. (*See* Dkt. 499 at 15.) Defending a novel
20 large statutory class action today includes a budget for legislative efforts to change the law and
21 escape liability; Class Counsel must meet those actions which as part of their obligations in
22 litigating such a case. Frankfother and Flanagan also claim that any lodestar calculation should
23 exclude all hours attributable to Class Counsel's paralegals and other litigation support team
24 members (or at a minimum it is their hourly wages that should be charged). But the inclusion of
25 time from those involved in such necessary parts of litigation is routine and the rates charged are
26 in-line with what comparable defense firms charge their clients.

27 **IX. CONCLUSION**

28 The Court should grant final approval to the Settlement and overrule the objections.

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DATED: December 14, 2020

Respectfully submitted,

/s/ Jay Edelson

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CERTIFICATE OF SERVICE

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I hereby certify that on December 14, 2020, I served the above and foregoing Notice of Amended Motion and Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of a Class Action Settlement by causing true and accurate copies of such paper to be filed with the Court's CM/ECF system, which will send e-mail notification of such filing to counsel for all parties. Although they are not parties, I have also caused a copy of the foregoing to be emailed to Objectors Kara Ross (through her counsel) and Kevin C. Williams, at the email addresses they provided on their objections.

s/ Jay Edelson