No. 23-____

In the Supreme Court of the United States

ERIC ALAN ISAACSON, PETITIONER,

vs.

META PLATFORMS, INC. (F.K.A. FACEBOOK, INC.); PERRIN AKINS DAVIS; BRIAN K. LENTZ; CYNTHIA D. QUINN; MATTHEW J. VICKERY, RYAN UNG; CHI CHENG; ALICE ROSEN, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"Since the decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole," *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980), provided the fee award is "made with moderation." *Greenough,* 105 U.S. at 536-37. But payments to representative plaintiffs for their own "personal services" in the case are "decidedly objectionable," "illegally made," *id.* at 537-38, and "unsupported by reason or authority." *Pettus,* 113 U.S. at 122. The Eleventh Circuit thus holds that "Supreme Court precedent prohibits incentive awards" to reward settling plaintiffs for serving as class representatives. *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1255 (11th Cir.2020). The First, Second, Seventh, and Ninth Circuits reject that conclusion, holding that *Greenough* and *Pettus* no longer bind them. Ignoring *Greenough*'s mandate that fee awards be "made with moderation," moreover, lower courts regularly approve of paying class-action lawyers several times the unenhanced lodestar that this Court holds is a presumptively reasonable attorney's fee in fee-shifting cases. The questions presented are:

1. May district courts approve payments from class-action settlement funds to reward and encourage litigants for service as representative plaintiffs?

2. May district courts in common-fund cases pay class-action lawyers multiples of their lodestar, unconstrained by this Court's precedents on reasonable attorney's fees?

PARTIES TO THE PROCEEDING

Eric Alan Isaacson, the Petitioner here, was an Objector-Appellant below.

Perrin Akins Davis, Brian K. Lentz, Cynthia D. Quinn, Matthew J. Vickery, are Respondents here, and were Named Plaintiffs-Appellees below.

Ryan Ung, Chi Cheng, and Alice Rosen are included as Respondents before this Court, because the Petition challenges the approval of payments to them as representative plaintiffs in related state-court litigation. Although no formal entries of appearance were made for them below, Petitioner understands their interests to have been represented below by counsel for the Named Plaintiffs-Appellees Davis, Lentz, Quinn, and Vickery.

Meta Platforms, Inc. (f.k.a. Facebook, Inc.) is a Respondent here, and was the Defendant-Appellee below.

Sarah Feldman and Hondo Jan are Respondents here who, like Isaacson, were Objector-Appellants below.

Because Isaacson is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

This case arises from the following proceedings:

In re Facebook Internet Tracking Litigation, No. 5:12-MD-02314-EJD (N.D. Cal.).

In re Facebook Internet Tracking Litigation, Nos. 22-16903, 22-16904 (9th Cir.).

The federal class-action settlement approved by the District Court, and affirmed by the Court of Appeals, also resolves what the Settlement papers describe as a "parallel state court action," *Ung, et al. v. Facebook, Inc.,* No. 112-cv-217244 (Santa Clara Superior Court, 2012).

No other proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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OTHER MATERIALS

REPORTS OF THE OPINIONS BELOW

The Ninth Circuit's panel opinion affirming the District Court's approval of a common-fund class-action settlement, along with awards of incentive payments to the representative plaintiffs and common-fund attorney's fees to their lawyers, is not reported. It is available on both WestLaw and LEXIS: *In re Facebook, Inc. Internet Tracking Litig.,* No. 22-16903, 2024 WL 700985, 2024 U.S. App. LEXIS 3952 (9th Cir. Feb. 21, 2024). It is reproduced at Pet.App. 1a-5a.

The District Court's opinion approving the class-action settlement and awarding incentive payments to the representative plaintiffs and common-fund attorney's fees to their lawyers is not reported, but is available on WestLaw and LEXIS: *In re Facebook Internet Tracking Litig.,* No.5:12-MD-02314-EJD, 2022 WL 16902426, 2022 U.S. Dist. LEXIS 205651 (N.D.Cal. Nov. 10, 2022). It is reproduced at Pet.App.6a-38a.

Several earlier decisions dealing with motions to dismiss the class claims, review of which this Petition does not seek, are reported:

The District Court's opinions granting motions to dismiss are reported: *In re Facebook Internet Tracking Litig.,* 140 F.Supp.3d 922 (N.D.Cal.2015); *In re Facebook Internet Tracking Litig.,* 263 F.Supp.3d 836 (N.D.Cal.2017); *In re Facebook Internet Tracking Litig.,* 290 F.Supp.3d 916 (N.D.Cal.2017).

The Ninth Circuit's opinion affirming in part, and reversing in part, the District Court's orders dismissing the claims is reported as *In re Facebook Internet Tracking Litig.,* 956 F.3d 589 (9th Cir.2020), *cert. denied sub nom. Facebook, Inc. v. Davis,* No. 20-727, 141 S.Ct. 1684 (2021).

JURISDICTION

The Court of Appeals issued its decision on February 21, 2024, Pet.App.1a, and on April 1, 2024, denied timely petitions for rehearing filed by Objector-Appellants Sarah Feldman and Hondo Jan, Pet.App.39a, and by Objector Appellant (and Petitioner herein) Eric Alan Isaacson. Pet.App.40a.

Granting Isaacson's timely application for an extension of time, Justice Elena Kagan on June 17, 2024, extended the time to file this Petition to August 29, 2024. *See Isaacson v. Meta Platforms, Inc.,* No. 23A1112.

This Court has jurisdiction under 28 U.S.C. §1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at Pet.App.41a.

STATEMENT OF THE CASE

This class action involves Facebook users' very substantial invasion-of-privacy claims, which the Named Plaintiffs settled and released in return for a common-fund amounting to just 73 cents per Class Member, from which the Named Plaintiffs then collected thousands of dollars apiece for their "service" in procuring such a settlement, and from which their lawyers were awarded attorney's fees amounting to more than three times their reasonable hourly rates.

Petitioner Eric Alan Isaacson is a Class Member bound by the Settlement, who challenges the Named Plaintiffs' service awards as contrary to this Court's foundational common-fund precedents, *Trustees v. Greenough,* 105 U.S. 527, 537-38 (1882)("*Greenough*"), and *Central Railroad & Banking Co. v. Pettus,* 113

U.S. 116, 122 (1885)("*Pettus*"), which held that payments rewarding representative plaintiffs for their own "personal services" in securing a common fund are both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. 537-38; *accord Pettus,* 113 U.S. at 122 (*Greenough* rejected such awards "as unsupported by reason or authority"). Isaacson also challenges Class Counsel's attorney's fee award as contrary both to *Greenough*'s mandate that common-fund attorney's fees must be awarded "with moderation and a jealous regard to the rights of those who are interested in the fund," *Greenough,* 105 U.S. at 536-37, and inconsistent with this Court's more recent decisions holding, in statutory fee-shifting cases, that attorneys' unenhanced lodestar provides a presumptively reasonable and sufficient fee. *See, e.g., Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 546, 552-53 (2010) (mandating "a strong presumption that the lodestar is sufficient"); *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992)("[w]e have established a 'strong presumption' that the lodestar represents the 'reasonable'" fee")(quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986), *supplemented*, 483 U.S. 711 (1987)).

This matter arises from the settlement of an MDL class action consolidating cases filed in 2011 on behalf of Facebook users in the United States, alleging that between April 22, 2010, and September 26, 2011, Facebook, Inc. (since renamed Meta Platforms, Inc.) surreptitiously and unlawfully spied on its users' Internet browsing even after they logged out of Facebook, compiling browsing histories of their visits to third-party websites. The Named Plaintiffs asserted claims under the federal Wiretap Act, the California Invasion of Privacy Act ("CIPA"), and other state laws.

In a series of orders, the District Court dismissed all the claims with prejudice.[1]

The Ninth Circuit reversed in substantial part. Given the character of the surreptitious surveillance alleged, and noting that "[t]he parties do not dispute that Facebook engaged in these tracking practices after its users had logged out of Facebook," the Ninth Circuit held that the "Plaintiffs adequately stated claims for relief for invasion of privacy, intrusion upon seclusion, breach of contract, breach of the implied covenant of good faith and fair dealing, as well as their claims under the Wiretap Act, and CIPA." *In re Facebook, Inc. Internet Tracking Litig.,* 956 F.3d 589, 596, 601 (9th Cir.2020), *cert. denied sub nom. Facebook, Inc. v. Davis,* No. 20-727, 141 S.Ct. 1684 (2021).

Facing massive potential liability, Facebook petitioned for certiorari, asking this Court to review and overturn the Ninth Circuit's decision sustaining the Wiretap Act claims.[2] Facebook explained that, with their Wiretap Act claims, the "Plaintiffs seek $15 billion in class-wide damages."[3] Under the Wiretap Act, Facebook told the Court, "Plaintiffs may recover either 'the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation,' or 'statutory damages of whichever is greater of $100 a day for each day of

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[1] *See In re Facebook Internet Tracking Litig.,* 140 F.Supp.3d 922 (N.D.Cal.2015); *In re Facebook Internet Tracking Litig.,* 263 F.Supp.3d 836 (N.D.Cal.2017); *In re Facebook Internet Tracking Litig.,* 290 F.Supp. 3d 916 (N.D.Cal.2017).

[2] Petition for Certiorari, *Facebook, Inc. v. Davis,* No. 20-727 (filed Nov. 20, 2020) [https://perma.cc/KH35-LKGB].

[3] *Id.* at 2; *see also id.* at 12 ("plaintiffs seek more than $15 billion in total damages").

violation or $10,000.'"[4] "And courts may award 'punitive damages in appropriate cases,' as well as 'a reasonable attorney's fee.'"[5]

This placed Facebook in an economic predicament if this Court would not intervene: "Because of the Wiretap Act's draconian penalty scheme—which authorizes punitive damages and statutory damages of $100 per *day* of violation across class members, 18 U.S.C. §2520(c)(2)—claims that survive past the motion-to-dismiss stage place enormous settlement pressure on defendants."[6] Facebook did not mention that under the California Invasion of Privacy Act ("CIPA"), it also faced liability for statutory damages of $5,000 per violation.[7] Neither did it quantify its potential liability under the other claims asserted.

This Court denied certiorari, *see Facebook, Inc. v. Davis,* 141 S.Ct. 1684 (2021), leaving Facebook with "enormous settlement pressure" given its Wiretap Act liability of $100 per day, to each of 124 million class members, over a Class Period extending more than a year.

Yet on remand, Facebook managed to negotiate a Settlement under which the 124 million class members' claims would be released for just 73 cents apiece. The Named Plaintiffs agreed to settle the entire class action for a common fund of just $90 million—thereby releasing the 124 million class members' apparently very substantial claims in return for a common-fund recovery of about 73 cents per class

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[4] *Id.* at 5-6 (quoting 18 U.S.C. §2520(c)(2)).

[5] *Id.* at 6 (quoting 18 U.SC. §2520(b)(2)-(3).

[6] *Id.* at 33 (Facebook's emphasis).

[7] *See* California Penal Code §637.2(a)(1) (providing for recovery of "Five thousand dollars ($5,000) per violation").

member. That is not enough to compensate class members for the time it takes to read the class notice and submit a claim, let alone to make them whole for the serious privacy harms alleged.[8]

In light of the remarkably small recovery, only "approximately 1,558,805 total Class Members," from the Class of 124 million victims of Facebook's unlawful surveillance, bothered to "submit[ ] valid claims by September 22, 2022." Pet.App.17a. In the end, only one-and-a-quarter percent of the Class submitted claims.[9]

As a result, the few who filed claims might receive as much as $39.21 apiece for Facebook's unlawful invasions of their privacy rights.[10] Even that is but a tiny fraction of class members' claims for *$100 a day* under the Wiretap Act, or for the alternative statutory damages $10,000 apiece under the Wiretap Act, and for $5,000 per violation under the CIPA. Since fewer than two percent of the Class submitted claims, the vast majority of the Class—more than 98%—end up with nothing.

The Named Plaintiffs and their lawyers did somewhat better under the common-fund Settlement that they negotiated. The Named Plaintiffs applied for, and received, awards from the common fund of from $3,000 to $5,000 apiece, to reward them for their

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[8] The District Court's final order approving the Settlement notes that "[a]fter deductions from the common fund for fees, costs, and service awards, approximately $61,124,415.87, will remain," which amounts to just under 50 cents apiece for the 124 million class members. Pet.App.10a-11a (Final Order).

[9] 4-ER-640(DE290:13(lines6-15)) (transcript of Oct. 27, 2022, final-approval hearing).

[10] Pet.App.11a (final order); 4-ER-639(DE290:12(lines14-15)) (transcript of Oct. 27, 2022 final-approval hearing).

"service" in securing just 73 cents apiece for the rest of the Class, and to encourage others to serve as class representatives in future class actions.[11]

Class Counsel, for their part, requested and received 29% of the $90-million common fund as attorney's fees. The resulting $26.1 million attorney's fee award, compensates them at *more than three times their lodestar,* which this Court holds "is presumptively sufficient" to compensate class-action plaintiffs' counsel whenever a fee shifting statute mandates that defendants pay the attorney's fees of winning plaintiffs. *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 552 (2010); *see* Pet.App.32a (awarding Class Counsel a "multiplier of 3.28" times their lodestar). To be clear: Winning the case would have earned Class Counsel, under *Perdue,* their unenhanced lodestar, representing their hours reasonably billed multiplied by their reasonable hourly rates. But by settling 124 million class members' claims for just 73 cents apiece, Class Counsel were able to collect more than three times their claimed lodestar.

As a class member who would be bound by the Settlement, Isaacson vigorously objected before the District Court, arguing *inter alia* that the 73-cents-per-class-member recovery was woefully inadequate, that the incentive awards of $3,000 to $5,000 apiece for the Named Plaintiffs are unlawful under this Court's foundational common-fund precedents, and that Class

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[11] The final-approval order directed that "Plaintiffs Perrin Davis, Dr. Brian Lentz, Michael Vickery and Cynthia Quinn shall each be paid a service award of $5,000 and State Court Plaintiff Ryan Ung, Chi Cheng, and Alice Rosen shall each be paid a service award of $3,000." Pet.App.7a (Final Order). The District Court specified that "[t]he class representatives are being rewarded for their service to the class," and "to incentivize the participation of future lead plaintiffs." Pet.App.37a.

Counsel's requested common-fund fee award—at more than three times their lodestar—was excessive.

Citing *Trustees v. Greenough,* 105 U.S. 527, 537 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885), Isaacson specifically objected that "'Supreme Court precedent prohibits incentive awards.'" *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1255 (11th Cir.2020), *rehearing denied*, 43 F.4th 1138 (11th Cir.2022), *cert. denied sub nom. Johnson v. Dickenson,* 143 S.Ct. 1745 (2023), *and sub nom. Dickenson v. Johnson,* 143 S.Ct. 1746 (2023).[12]

Isaacson also objected to the requested attorney's fee award. Given the Wiretap Act's statutory fee-shifting provision, Class Counsel's attorney's fee award on winning the case would have been limited, absent extraordinary circumstances, to their lodestar—which is to say, the sum of their hours reasonably worked multiplied by their reasonable hourly rates. *See Perdue,* 559 U.S. at 546, 552-53.

By negotiating a settlement under which class members would receive a tiny fraction of a percent of their realistic claims, Class Counsel could ask for a common-fund fee award of *nearly three times* their reasonable hourly rates. Isaacson explained:

> Had Class Counsel proceeded to trial and won, their compensation would have been limited to their unenhanced lodestar as presumptively reasonable compensation for [their] time and effort on the case. *See Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 546 (2010). They should not receive several times their lodestar for quitting,

[12] *See* 2-ER-073(DE269:6[ECFp12]) (Objection).

> and selling the Class out for the tiniest fraction of recoverable damages.[13]

Isaacson contended that the presumptively reasonable attorney's fee award under *Perdue* also should be deemed a reasonable award under *Greenough,* which requires courts awarding common-fund attorney's fees to act with "moderation and a jealous regard to the rights of those who are interested in the fund." *Greenough,* 105 U.S. at 536.[14] A common-fund fee award at more than three times Class Counsel's reasonable rates seemed beyond the bounds of moderation.

But the District Court rejected Isaacson's objections.

Citing the Ninth Circuit's published opinion, *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785 (9th Cir.2022), the District Court rebuffed Isaacson's contention that this Court's precedents bar the payment of service awards to representative plaintiffs. The District Court acknowledged that Isaacson "objects to the service awards as 'illegal and inequitable' in common fund cases, citing to *Trs. v. Greenough,* 105 U.S. 527, 537-38 (1882) and *Central R.R. & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885)." Pet.App.36a. "However," it held,

> the Ninth Circuit squarely addressed this argument in *Apple*, where the objectors similarly asserted that such awards conflict with Supreme Court precedent. *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785 (9th Cir.2022). The Ninth Circuit "previously

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[13] *See* 2-ER-076(DE269:9[ECFp15]) (Objection).

[14] *See* 2-ER-077(DE269:10[ECFp20]) (Objection) (quoting *Greenough*).

> considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant," and concluded that service or incentive awards are permissible so long as they are reasonable. *Id.*

Pet.App.36a (quoting *Apple Device,* 50 F.3d at 785).

The District Court said it intended the incentive awards in this case both to compensate the representative plaintiffs for their service on behalf of the class, and also to incentivize others to pursue future class actions:

> The class representatives are being rewarded for their service to the class. *In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 934, 943 (9th Cir.2015) ("[Service or] incentive awards [ ] are intended to compensate class representatives for work undertaken on behalf of a class."). Moreover, service or incentive awards may also serve to incentivize the participation of future lead plaintiffs. The Court therefore overrules Mr. Isaacson's objection.

Pet.App.37a.

The District Court similarly overruled Isaacson's objections to the requested attorney's fee award. Acknowledging Isaacson's contention "that the multiplier on Class Counsel's lodestar (3.28) is far too high," the District Court countered Isaacson's argument—grounded in precedents of this Court—merely by noting that Class Counsel had cited numerous nonprecedential lower-court decisions ignoring limitations from this Court's precedents to approve large fee multipliers:

> Finally, Objector Mr. Isaacson opposed the request for attorneys' fees and costs as excessive,

> particularly given what Mr. Isaacson perceives as poor results compared to potentially recoverable damages. Dkt No. 269 at 9. Mr. Isaacson contends that the multiplier on Class Counsel's lodestar (3.28) is far too high. *Id.* In response, Class Counsel refers back to their motion brief where Counsel cites to a number of cases supporting the reasonableness of the requested multiplier. *See e.g., Sheikh v. Tesla, Inc.*, No. 17-cv-02193-BLF, 2018 WL 5794532, at *8 (N.D.Cal. Nov. 2, 2018); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Antitrust Litig.*, 768 F.App'x 651, 653 (9th Cir.2019); *Steiner v. Am. Broad. Co.*, 248 F.App'x 780, 783 (9th Cir.2007); *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *8. ...
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> Based on the foregoing, the Court finds an award of attorneys' fees in the amount of $26,100,000 to be fair, reasonable, and adequate and approves Class Counsel's request.

Pet.App.33a-34a.

Isaacson timely appealed to the Ninth Circuit, which affirmed the District Court's service awards in an unpublished opinion that also cited and followed *Apple Device Performance*:

> Awarding modest service awards of $3,000 to $5,000 each to seven named Plaintiffs was also not an abuse of discretion. *See In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785-87 (9th Cir.2022).

Pet.App.5a.

The Ninth Circuit held, moreover, that a common-fund attorney's fee award amounting to more than three times the attorney's reasonable hourly rates

> is well within the permissible bounds of this Circuit's decisions. *See Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1051 n.6 (9th Cir.2002) (noting the range of multipliers applied in most common fund cases is 1.0 to 4.0)."

Pet.App.4a-5a.

Isaacson now seeks this Court's review of the rulings on incentive awards and attorney's fees.

REASONS FOR GRANTING THE WRIT

This case presents a clear conflict among the circuits on the propriety of paying representative plaintiffs "service awards" or "incentive awards," from common-fund recoveries, in order to compensate them for personal service as class representatives—and as an incentive to encourage others to file and settle further class actions. The Eleventh Circuit holds that "Supreme Court precedent prohibits incentive awards." *NPAS Solutions,* 975 F.3d at 1255, while the First, Second, Seventh, and Ninth Circuits all hold that this Court's foundational common-fund decisions no longer bind them.

The case also presents an opportunity to remind lower courts that common-fund attorney's fees are to be awarded "with moderation and a jealous regard to the rights of those who are interested in the fund," *Greenough,* 105 U.S. at 536-37, and to bring the lower courts' common-fund cases back into line with this Court's decisions, such as *Perdue,* holding that attorneys' unenhanced lodestar provides them a presumptively reasonable and sufficient fee. *See, e.g., Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 546, 552-53 (2010)(mandating "a strong presumption that the lodestar is sufficient"); *City of Burlington v. Dague,* 505

U.S. 557, 562 (1992)("[w]e have established a 'strong presumption' that the lodestar represents the 'reasonable'" fee")(quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986), *supplemented*, 483 U.S. 711 (1987)).

Both questions are extremely important. The promise of incentive awards can be used by class counsel first to recruit representative plaintiffs to file new class actions, and then to induce those plaintiffs to agree to settlements that recover little for the class. Class counsel, for their part, are apt to respond to the economic incentives produced by this Court's holdings, on the one hand, that if they prevail they will be presumptively limited to their unenhanced lodestar, and lower courts' holdings, on the other, that by settling class claims for remarkably little they can collect fees amounting to several times their reasonable lodestar. The current legal regime presents truly perverse incentives.

I. REVIEW IS NEEDED TO RESOLVE WHETHER THIS COURT'S FOUNDATIONAL COMMON-FUND PRECEDENTS STILL PROHIBIT SERVICE AWARDS

"Since the decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole," *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980), but that that any payment compensating a representative plaintiff for "personal services" in prosecuting the litigation is both "decidedly objectionable" and "illegally made."

Greenough, 105 U.S. at 537-38. A named plaintiff's "claim to be compensated, out of the fund ... for his personal services" the Court flatly "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122.; *see generally* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv.L.Rev. 1597, 1601-02 (1974).

Greenough and *Pettus* seemed to be pretty clear. Professor John P. Dawson explained in his 1974 article reviewing the common-fund doctrine:

> The Court in *Greenough* ... drew a sharp distinction .... While [Francis] Vose, the active litigant, was held to be entitled to a "charge" for the reasonable value of his lawyers' services, which the lower court would fix with a wide discretion, it had no discretion to award an allowance to Vose himself for his own time and expenses.

Dawson, *Lawyers and Involuntary Clients,* 87 Harv. L. Rev. at 1602.[15] For a century lower courts honored the rule of *Greenough* and *Pettus,* that named plaintiffs in common-fund cases may be reimbursed for reasonable litigation expenses including attorney's fees, but not for their personal service as class representatives. In *Crutcher v. Logan,* 102 F.2d 612, 613 (5th Cir.1939), for example, the Fifth Circuit recognized that under *Greenough* and *Pettus* claimants who are themselves interested in a common fund can receive "no compensation for personal services." And writing in 1974, Professor Dawson observed that *Greenough "*has

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[15] For examples of opinions favorably citing Professor Dawson's article see: *U.S. Airways, Inc. v. McCutchen,* 569 U.S. 88, 103 (2013); *Bloomer v. Liberty Mut. Ins. Co.,* 445 U.S. 74, 88 n.15 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 258 (1975).

been followed in this." Dawson, *Lawyers and Involuntary Clients,* 87 Harv. L. Rev. at 1602. He could find "no case that uses the *Greenough* doctrine to reimburse the litigants themselves for their own time, travel, or personal expenses, however necessary their efforts may have been to litigation that conferred gains on others." *Id.*

That soon changed. And the circuits now are in clear conflict concerning whether *Greenough* and *Pettus* nonetheless continue to bar payments from common-fund recoveries to compensate litigants for their service as representative plaintiffs, and to encourage others to file even more class actions.

Writing in 2006, Professors Theodore Eisenberg and Geoffrey Miller noted the utter "lack of specific authorization for incentive awards in the relevant statutes or court rules."[16] "Beginning around 1990, however, awards for representative plaintiffs began to find readier acceptance," and soon orders "approving incentive awards proliferated," so that "[b]y the turn of the century, some considered these awards to be 'routine.'"[17] Today they are ubiquitous, their promise employed by class-action lawyers to recruit representative plaintiffs who otherwise wouldn't care

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[16] Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study,* 53 U.C.L.A. L.Rev. 1303, 1312-13 (2006).

[17] *Id.* at 1310-11 & n.21; *see also* Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform,* 73 Neb.L.Rev. 646, 673 (1994)("Cases in the late 1970s and early 1980s abhorred such preferences, but recent cases permit such practices more freely.")(footnotes omitted); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges,* 71 N.Y.U. L. Rev. 74, 101 n.102 (1996); Andrew Blum, *Class Actions' New Wrinkle: Bonus Awards,* National Law Journal, Oct. 7, 1991, p.1.

enough to litigate, and then to induce any who want to litigate too vigorously to accept settlements that recover little for the class while rewarding class counsel with rich fees.

The dramatic change cannot be attributed to anything in Federal Rule of Civil Procedure 23, which currently governs class actions, for it says nothing at all to authorize payments prohibited by *Greenough* and *Pettus* which, although they, preceded Rule 23, were themselves class actions that produced common-fund recoveries. Class actions, it is well to remember, were around long before Rule 23's promulgation in 1938, let alone its amendment in 1966.[18]

Both *Greenough* and *Pettus* held that when a representative plaintiff's litigation produces a "common fund" benefiting a larger class, the fund may be assessed for representative plaintiff's litigation expenses and reasonable attorney's fees. *See Greenough,* 105 U.S. at 536-37; *Pettus,* 113 U.S. at 122. But *Greenough* and *Pettus* also clearly held that any payment from a common fund compensating representative plaintiffs for their own "personal services" on behalf of a class is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A named plaintiff's "claim to be compensated, out of the fund ... for his personal

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[18] *See Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356, 363 (1921)("Class suits have long been recognized in federal jurisprudence.")(citing, e.g., *Smith v. Swormstedt,* 57 U.S. (16 How.) 288, 303 (1853)); *see also Hansberry v. Lee,* 311 U.S. 32, 42-42 (1940)(collecting citations); *Terrett v. Taylor,* 13 U.S. (9 Cranch) 43, 43 (1815)(Taylor and other vestrymen of the Episcopal Church of Alexandria sued "*on behalf of themselves and others*, members of the said church, and of the congregation belonging to the said church'")(syllabus; emphasis added); *Wormley v. Wormley,* 21 U.S. 421, 451, n.v (1823)(reporter's note); *West v. Randall,* 29 F.Cas. 718, 722 (C.C.D.R.I.1820)(Story, J.).

services" was "rejected as unsupported by reason or authority." *Pettus,* 113 U.S. at 122. Neither decision focused on whether *the amount* sought was reasonable. They broadly proscribed payments to representative plaintiffs, without qualification.

The Eleventh Circuit accordingly holds that "Supreme Court precedent prohibits incentive awards." *NPAS Solutions,* 975 F.3d at 1255.[19] Yet the First, Second, Seventh, and Ninth Circuit all hold to the contrary, that this Court's foundational common-fund decisions have been superseded by the lower courts' more recent practice, since the 1990s, of freely awarding bonuses to representative plaintiffs.

Four circuits are in plain conflict with the Eleventh Circuit:

> *Murray v. Grocery Delivery E-Servs. USA Inc.,* 55 F.4th 340, 352-53 (1st Cir.2022);
>
> *Melito v. Experian Mktg. Sols., Inc.,* 923 F.3d 85, 96 (2d Cir.2019); *Hyland v. Navient Corp.,* 48 F.4th 110, 123-24 (2d Cir.2022); *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.,* 62 F.4th 704, 721 (2d Cir.2023); *Moses v. New York Times Co.,* 79 F.4th 235, 253-56 (2d Cir.2023);
>
> *Scott v. Dart,* 99 F.4th 1076, 1082, 1084-88 (7th Cir.2024), *reh'g denied,* 108 F.4th 931 (7th Cir.2024);
>
> *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785-87 (9th Cir.2022).

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[19] *Accord, e.g., In re Equifax Inc. Customer Data Security Breach Litig.,* 999 F.3d 1247, 1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinic, Inc. v. Oppenheim,* 981 F.3d 983, 994 n.4 (11th Cir.2020)("service awards are foreclosed by Supreme Court precedent").

These decisions typically note controversy surrounding the Eleventh Circuit's decision in *NPAS Solutions,* which was accompanied by Judge Beverly Martin's vigorous dissent. *See NPAS Solutions,* 975 F.4th at 1264-1269. When it took the better part of two years for the court to deny en banc rehearing, moreover, the order was accompanied by a further dissent authored by Judge Jill Pryor and joined by Judges Charles R. Wilson, Adalberto Jordan, and Robin S. Rosenbaum. *See Johnson v. NPAS Solutions,* 43 F.4th 1138, 1139-53 (11th Cir.2022)(Jill Pryor, Cir.J., dissenting from denial of en banc rehearing).

The Second Circuit nonetheless acknowledged in *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.,* 62 F.4th 704, 721 (2d Cir.2023), that "[s]ervice awards are likely impermissible under Supreme Court precedent." The Second Circuit declared, however, that it would adhere to its own precedents allowing incentive awards—even though they conflict with this Court's foundational common-fund decisions—because "practice and usage seem to have superseded *Greenough* (if that is possible)." *Fikes Wholesale,* 62 F.4th at 721. In a concurring opinion the *Fikes Wholesale* panel opinion's author, Judge Dennis Jacobs, explained that the panel could not follow the Eleventh Circuit's "thorough and well-reasoned opinion" in *NPAS Solutions,* because the Second Circuit "has twice come out the opposite way," first in *Melito v. Experian Marketing Solutions,* 923 F.3d 85, 96 (2d Cir.2019), which contained no real analysis, and then in *Hyland v. Navient Corp.,* 48 F.4th 110, 124 (2d Cir.2022), which "over-read *Melito* to hold that 'Rule 23 does not *per se* prohibit service awards.'" *Fikes Wholesale,* 62 F.4th at 729 (Jacobs, Cir.J., concurring). As a consequence of *Melito* and *Hyland*, Judge Jacobs

wrote, "we now find ourselves on the wrong side of a circuit split." *Id.*

The Second Circuit subsequently asserted, in *Moses v. New York Times Co.,* 79 F.4th 235, 254-55 (2d Cir.2023), that this Court's holdings in "*Greenough* and *Pettus* have been superseded, not merely by practice and usage" in the lower courts, "but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned nineteenth-century precedents." *Moses,* 79 F.4th at 254-55. According to *Moses*, this Court's common-fund precedents—explicitly prohibiting payments to compensate litigants for their service as representative plaintiffs—were implicitly overruled by Federal Rule of Civil Procedure 23 (which says nothing at all on the subject). *Moses* did not explain when or how Rule 23 created a claim for representative plaintiffs to be compensated from a common fund recovery—let alone how it might be reconciled with the Rules Enabling Act's provision that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b); *see Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 612-13 (1997).

Justified or not, the First, and Seventh, and Ninth Circuits all have joined the Second Circuit in dismissing the continuing relevance of this Court's foundational common-fund class-action decisions. Most pertinent for present purposes—since the decision controlled the result below here—the Ninth Circuit in *Apple Device* specifically rejected the Eleventh Circuit's conclusion "that *Greenough* and *Pettus* prohibit any incentive award to class representatives." *Apple Device,* 50 F.4th at 785 n.13 (9th Cir.2022)(citing *NPAS Solutions,* 975 F.3d at 1255, with disapproval).

Rejecting contentions "that our twenty-first century precedent allowing such awards conflicts with Supreme Court precedent from the nineteenth century," the Ninth Circuit held that "we have previously considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant." *Apple Device,* 50 F.4th at 785. Where it had done this the Ninth Circuit did not say. In fact, no reported decision of the Ninth Circuit had ever reconciled its relatively recent practice of approving incentive awards with the holdings of either *Greenough* or *Pettus*. The Ninth Circuit in *Apple Device* nonetheless emphatically rejected what it described as the Eleventh Circuit's "opposite conclusion," in *NPAS Solutions,* "that *Greenough* and *Pettus* prohibit any incentive award to class representatives." *Apple Device,* 50 F.3d at 785 n.13.

So did the First Circuit in *Murray,* which dismissed this Court's *Greenough* and *Pettus* decisions as "late-nineteenth-century creditor lawsuits" that, though litigated by bondholders as class actions, cannot be deemed to control "modern-day class actions under Rule 23." *Murray,* 55 F.4th at 352. The First Circuit's opinion identifies nothing in Rule 23 that purports to authorize the incentive awards of the past several decades.

Most recently, the Seventh Circuit in *Scott v. Dart,* 99 F.4th 1076, 1084-88, *reh'g denied,* 108 F.4th 931, 932 (7th Cir.2024), also declined to follow the Eleventh Circuit—in a decision holding that a named plaintiff who after a denial of class certification had settled his individual claim for $7,500 should nevertheless be able pursue claims on behalf of a class on remand, with a potential incentive award giving him the stake in the case required by Article III. The Seventh Circuit endorsed the view expressed in *Moses*: "As the Second

Circuit recently explained, '*Greenough* and *Pettus* have been superseded, not merely by practice and usage, but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned nineteenth-century precedents.'" *Scott v. Dart,* 99 F.4th at 1085 (quoting *Moses,* 79 F.4th at 254-55).

Dissenting in other respects, Judge Kirsh observed that the circuits will remain in conflict on incentive awards no matter what the Seventh Circuit does, adding that "'[u]nless our circuit is an outlier, 'it makes little sense for us to jump from one side of the circuit split to the other.'" *Scott v. Dart,* 99 F.4th at 1093-94 (Kirsch, dissenting) (citation omitted). Judge Easterbrook's opinion on denial of en banc rehearing said he "agree[d] with that view and therefore have not called for a vote on the petition for rehearing en banc." *Scott v. Dart,* 108 F.4th 931, 932 (7th Cir.2024). Whatever the Seventh Circuit might do, Judge Easterbrook observed, "[t]he Supreme Court must sooner or later resolve this conflict." *Id.* The Seventh Circuit clearly has no intention of revisiting the issue itself.

This Court's review is needed now to resolve this already clear and deeply embedded conflict among the circuits. The Eleventh Circuit adhered to its September 2020 *NPAS Solutions* holding despite Judge Jill Pryor's lengthy August 2022 dissent from denial of en banc rehearing, which itself concludes that "it will be up to the Supreme Court to overrule or clarify *Greenough* and *Pettus*." *Johnson v. NPAS Solutions, LLC,* 43 F.4th 1138, 1139-53 (11th Cir.2022)(Jill Pryor, Cir.J., joined by Wilson, Jordan, and Rosenbaum, Cir.JJ., dissenting from denial of en banc rehearing). That "Supreme Court precedent prohibits incentive awards" is well-settled Eleventh

Circuit law. *NPAS Solutions,* 975 F.3d at 1255; *accord, e.g., Equifax,* 999 F.3d at 1257 ("such awards are prohibited"); *Oppenheim,* 981 F.3d at 994 n.4 (11th Cir.2020)("service awards are foreclosed by Supreme Court precedent").

The contrary position of the First, Second, Seventh, and Ninth Circuits also is settled. They all reject the Eleventh Circuit's conclusion that *Greenough* and *Pettus* bar incentive awards compensating named plaintiffs for personal service as class representatives. Only this Court can resolve the conflict.

The need for this Court's immediate review is intensified, moreover, by a footnote of passing dictum in in *China Agritech Inc. v. Resh*, 584 U.S. 732, 747 n.7 (2018), an opinion on *American Pipe* tolling that cites a 1998 Seventh Circuit opinion affirming an incentive award in order to illustrate representative plaintiffs' motives for taking charge of class-action lawsuits that they otherwise might not care about. The footnote said:

> The class representative might receive a share of class recovery above and beyond her individual claim. *See, e.g., Cook v. Niedert,* 142 F.3d 1004, 1016 (C.A.7 1998)(affirming class representative's $25,000 incentive award).

China Agritech, 138 S.Ct. at 1811 n.7.

China Agritech can hardly be taken as a decision that considered and overruled the doctrine of *Greenough* and *Pettus,* which it does not even cite, let alone discuss. "This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Illinois Council on Long Term Care,* 529 U.S. 1, 18 (2000). "The notion that [this Court] created a new rule *sub silentio*—and in a case where certiorari had been granted on an entirely different question, and

the parties had neither briefed nor argued the ... issue—is implausible." *Mickens v. Taylor,* 535 U.S. 162, 172 (2002).

Yet lower courts are now citing *China Agritech* to justify incentive awards. The Ninth Circuit in *Apple Devise,* for example, observed that

> the Supreme Court recently acknowledged that "[a] class representative might receive a share of class recovery above and beyond her individual claim" through an incentive award, *China Agritech, Inc. v. Resh,* __U.S.__, 138 S.Ct. 1800, 1811 n.7 123 (2018). Nonetheless, the Feldman objectors contend that our twenty-first century precedent allowing such awards conflicts with Supreme Court precedent from the nineteenth century—*Trustees v. Greenough*, 105 U.S. 527 (1881), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885).

Apple Device Performance Litig., 50 F.4th at 785 (footnote omitted). The Ninth Circuit seems to think that *China Agritech* has overruled *Greenough* and *Pettus.*

A panel of the Second Circuit similarly rationalized that court's approval of incentive awards by asserting that "the Supreme Court appears to have left *Greenough* and *Pettus* in the rear view," when "without reference to either case, the Supreme Court acknowledged that a class representative 'might receive a share of class recovery above and beyond her individual claim.'" *Moses,* 79 F.4th at 255 (quoting *China Agritech, Inc. v. Resh,* 584 U.S. 732, 747 n.7 (2018)(citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998)). And the Seventh Circuit made similar use

of *China Agritech*'s footnote in *Scott v. Dart,* 99 F.4th at 1087.

It should be this Court's exclusive prerogative to decide whether to overrule, reaffirm, or modify *Greenough* and *Pettus*. If it does not act swiftly, the lower Courts will conclude that it has indeed abandoned its leading common-fund precedents.

II. CIRCUIT COURTS ARE IGNORING THIS COURT'S MANDATE THAT COMMON-FUND ATTORNEY'S FEES BE AWARDED "WITH MODERATION"

This Court's review is needed for the further reason that lower courts are systematically ignoring both *Greenough*'s mandate that common-fund attorney's fee are awards are to be "made with moderation and a jealous regard to the rights of those who are interested in the fund," *Greenough,* 105 U.S. at 536-37, and this Court's more recent decisions holding, in statutory fee-shifting cases, that attorneys' unenhanced lodestar provides a presumptively reasonable and sufficient fee. *See, e.g., Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 546, 552-53 (2010)(mandating "a strong presumption that the lodestar is sufficient"); *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992)("[w]e have established a 'strong presumption' that the lodestar represents the 'reasonable'" fee")(quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986), *supplemented*, 483 U.S. 711 (1987)).

The circuit courts, on the other hand, insist that this Court's rule generally proscribing "multipliers in statutory fee cases does not apply to common fund cases." *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1051 (9th Cir. 2002)(approving fee award of 3.65 times class counsel's lodestar).

The Second Circuit's decision in *Fikes Wholesale,* for example, involved the settlement of a class action asserting antitrust claims subject to the antitrust law's mandatory fee-shifting had the claims only been proved.[20] But the lawyers would have been presumptively limited, under *Perdue,* to their unenhanced lodestar had they actually won the case and subjected the defendants to liability for their attorney's fees. So they settled—and got paid a lot more for their time than they could have by winning the case. The Second Circuit justified a 2.45 multiplier of the class counsel's lodestar, explaining that whenever this Court's decisions concerning reasonable "'statutory fees and the common-fund doctrine collide, the common-fund doctrine operates autonomously from fee-shifting principles.'" *Fikes Wholesale,* 62 F.4th at 727 (quoting *Fresno County Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.,* 925 F.3d 63, 69 (2d Cir.2019)).

This case is a perfect example of the problem. Had Class Counsel succeeded in proving the Wiretap Act claims, imposing liability of $100 a day, Facebook would have been liable to pay "a reasonable attorney's fee." 18 U.SC. §2520(b)(3). Under this Court's decisions defining "a reasonable attorney's fee" under fee-shifting statutes, Class Counsel's unenhanced lodestar would have been the presumptively reasonable fee, absent rare circumstances wholly sufficient to attract

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[20] "Under the antitrust laws ... allowance of attorneys' fees to a plaintiff awarded treble damages is mandatory." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 261 & n.34 (1975). Indeed: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and *shall recover* threefold the damages by him sustained, and the cost of suit, including *a reasonable attorney's fee*." 15 U.S.C. §15(a) (emphasis added).

and compensate competent counsel. *See Perdue,* 505 U.S. at 546, 552-53. Yet by throwing in the towel, and settling for a common fund amounting to just 73 cents per class member, Class Counsel were able to seek—and indeed they obtained—a fee award of *more than three times* their claimed lodestar. This, according to the Ninth Circuit, was

> well within the permissible bounds of this Circuit's decisions. *See Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1051 n.6 (9th Cir.2002) (noting the range of multipliers applied in most common fund cases is 1.0 to 4.0).

Pet.App.4a-5a.

Why would lawyers bother to prove cases, if settling claims for a fraction of their worth gets the lawyers paid several times more than they would receive by litigating to win? Large multipliers are rampant in attorney's fee awards from common-fund settlements. *See, e.g., Fikes Wholesale,* 62 F.4th at 724 (multiplier of 2.45); *In re Diet Drugs,* 582 F.3d 524, 545 n.42 (3d Cir.2009)("Whether the multiplier is 2.6, 3.4, or somewhere in that neighborhood, it is not problematically high."); *Vizcaino,* 290 F.3d at 1050-51 & n.6 (awarding a 3.65 multiplier from $96.9-million fund); *Steiner v. Am. B'casting Co.,* 248 F.App'x 780, 783 (9th Cir.2007)(holding a multiplier of 6.85 "falls well within the range of multipliers that courts have allowed"); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 123 (2d Cir.2005)(approving "a multiplier of 3.5" times lodestar in an antitrust class action).

No wonder so many class actions are filed, and settled for relatively little—since doing so ensures that the lawyers will make far more money than they could by actually prosecuting cases to maximize the class's recovery.

The conflicts inherent in class-action litigation are exacerbated when class-action lawyers can promote their own personal interest in settling cheaply by using the promise of incentive awards to recruit representative plaintiffs who really do not care, with the objective of entering settlements that recover rather little for ordinary class members, but substantial incentive awards to reward the representative plaintiffs who will agree to the poor settlements.

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING EXTREMELY IMPORTANT ISSUES AFFECTING CLASS ACTIONS

The questions presented are extraordinarily important. Incentive awards have come to affect *most* class-action settlements—precisely because class-action plaintiffs' lawyers find them such an attractive means of obtaining and manipulating compliant representative plaintiffs. Litigation that Congress sought to encourage by providing for fee-shifting is instead cut short when class-action lawyers induce the representative plaintiffs to settle cheaply—so that the lawyers may receive multiples of their lodestars, rather than an unenhanced lodestar award given to those who litigate to win. The combination of incentive awards, and excessive common-fund fee awards, undermines the very integrity of class-action litigation—and frustrates Congressional purpose in providing for fee shifting in the first place.

The Sixth Circuit has warned that incentive awards to representative plaintiffs provide "'a *disincentive* for the [named-plaintiff] class members to care about the adequacy of relief afforded unnamed class members[.]'" *Shane Group, Inc. v. Blue Cross Blue Shield,* 825 F.3d

299, 311 (6th Cir.2016)(quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013)(court's emphasis)). Yet despite their corrosive effect on Named Plaintiffs' ability to provide unconflicted representation, incentive awards now affect the great majority of class-action settlements. And class-action lawyers are wont to settle claims cheaply in return for red-carpet treatment on fees, like that received in this case.

The fact that the Ninth Circuit's opinion is unpublished ought not dissuade the Court from granting certiorari to resolve the issues presented. Where, as here, an unpublished opinion follows a published precedent of the same circuit that conflicts with the law of another circuit, it presents a viable vehicle for resolving the pre-existing precedential conflict.

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 354 (1991), for example, this Court granted certiorari to review an unpublished disposition of the Ninth Circuit that followed existing Ninth Circuit precedent applying state-law limitations periods to federal securities-fraud claims under §10(b) of the Securities Exchange Act of 1934. This Court explained that "[i]n its unpublished opinion" the Ninth Circuit had

> selected the 2-year Oregon limitations period. In so doing, it implicitly rejected petitioner's argument that a federal limitations period should apply to Rule 10b–5 claims. ... In view of the divergence of opinion among the Circuits regarding the proper limitations period for Rule 10b–5 claims, we granted certiorari to address this important issue.

Lampf, 501 U.S. at 354. The Ninth Circuit's unpublished disposition that "implicitly" decided a question in line with existing Ninth Circuit precedent provided an excellent avenue to resolving the existing conflict among the circuits. *See id.* at 354 & n.1; *cf. Comm'r v. McCoy,* 484 U.S. 3, 7 (1987)(granting certiorari to summarily reverse an unpublished order of the Sixth Circuit, explaining that "the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished."

CONCLUSION

The circuits are in conflict on the question of whether this Court's foundational common-fund precedents control common-fund class-action settlements approved under Rule 23. The question implicates this Court's sole prerogative to reconsider or overrule its own decisions. It also implicates the integrity of class-action litigation, given incentive awards' tendency to seriously undermine class representatives' ability to adequately represent absent class members' interests. And the case provides an opportunity to require common-fund attorney's fees be awarded with moderation, and in line with the reasonable fees that plaintiffs' lawyers would be paid under fee-shifting statutes if they actually litigated to win.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 29, 2024

APPENDIX

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FACEBOOK, INC. INTERNET TRACKING LITIGATION,
No. 22-16903

PERRIN AIKENS DAVIS; BRIAN K. LENTZ; CYNTHIA D. QUINN; MATTHEW J. VICKERY,
Plaintiffs-Appellees,

SARAH FELDMAN; HONDO JAN,
Objectors-Appellants,
v.
META PLATFORMS, INC., FKA Facebook, Inc.,
Defendant-Appellee.
No. 22-16904

PERRIN AIKENS DAVIS; BRIAN K. LENTZ; CYNTHIA D. QUINN; MATTHEW J. VICKERY,
Plaintiffs-Appellees,
v.
ERIC ALAN ISAACSON,
Objector-Appellant,
v.
META PLATFORMS, INC., FKA Facebook, Inc.,
Defendant-Appellee.

MEMORANDUM*

Filed February 21, 2024

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted February 7, 2024
San Francisco, California

Before: R. NELSON, FORREST, and SANCHEZ, Circuit Judges.

Objectors Sarah Feldman, Hondo Jan, and Eric Alan Isaacson (collectively, the "Objectors") appeal the district court's order approving a class-action settlement between Plaintiffs and Defendant Meta Platforms, Inc., formerly Facebook, Inc. We have jurisdiction following entry of final judgment under 28 U.S.C. §1291 to review an objecting class member's timely appeal from the district court's order approving a class-action settlement as to all parties and claims. *See Allen v. Bedolla,* 787 F.3d 1218, 1220 (9th Cir.2015). We affirm.

1. In 2011, Facebook users began suing Facebook for tracking their online activities without their consent, stating common law and statutory causes of action in contract and tort. These lawsuits against Facebook were consolidated in a multidistrict litigation proceeding. Ultimately, the parties entered into a settlement agreement under which Facebook agreed to pay $90 million into a settlement fund, then the seventh-largest amount in a privacy class-action settlement. Facebook further agreed to search for, collect, sequester, and delete "all cookie data" it improperly received or collected between April 22, 2010 and September 26, 2011. Class Counsel sought $26.1 million in attorneys' fees, as well as service awards of $3,000 to $5,000 for each of the seven named

Plaintiffs. Following a fairness hearing, the district court overruled the Objectors' objections and granted final approval of the class-action settlement along with associated fees and awards.

2. A district court must decide after a hearing whether a class-action settlement is "fair, reasonable, and adequate," considering the factors set forth in *Hanlon v. Chrysler Corp.,* 150 F.3d 1011 (9th Cir.1998). *Lane v. Facebook, Inc.,* 696 F.3d 811, 818-19 (9th Cir. 2012) (quoting Fed.R.Civ.P. 23(e)(2)). "Parties seeking to overturn the settlement approval must make a 'strong showing' that the district court clearly abused its discretion." *Campbell v. Facebook, Inc.,* 951 F.3d 1106, 1121 (9th Cir.2020)(citation omitted). The Objectors argue that the district court abused its discretion by incorrectly using disgorgement as the measure of actual damages when the court should have analyzed the settlement by aggregating statutory damages at $10,000 per violation under the Electronic Communications Privacy Act ("Wiretap Act"), 18 U.S.C. §§2510-2523.

In its final order approving the settlement, the district court applied the correct legal standard under Federal Rule 23 of Civil Procedure and the Hanlon factors. With 124 million potentially affected Facebook users in the United States, the district court properly rejected the $1.24 trillion in statutory damages proposed by Objectors as an unreasonable baseline that would violate due process. *See Wakefield v. ViSalus, Inc.,* 51 F.4th 1109, 1121-22 (9th Cir.2022). The district court did not clearly abuse its discretion in accepting class counsel's estimate that $900 million represented a "best-day-in-court" verdict, and by determining that the $90-million settlement—in conjunction with injunctive relief benefitting the entire

class—was fair and reasonable. *See Rodriguez v. W. Publ'g Corp.,* 563 F.3d 948, 965 (9th Cir.2009) (concluding that ten percent of the class's estimated damages was a fair and reasonable settlement award). Nor did the district court impermissibly apply a "presumption of fairness" to the settlement. *See Saucillo v. Peck,* 25 F.4th 1118, 1131 (9th Cir.2022). The district court merely noted that the "absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms ... are favorable to the class members." Consideration of the class's reaction to the proposed settlement is one of the factors the district court should consider in evaluating a settlement proposal. *See Hanlon,* 150 F.3d at 1026.

3. The district court did not abuse its discretion in using the percentage- of-the-fund method in finding the proposed attorneys' fees of $26.1 million (29% of the settlement fund) reasonable. The court cited class counsel's creation of new law in the Ninth Circuit and its attainment of substantial monetary and injunctive relief for the class as grounds for the upward departure of four percentage points above the 25-percent benchmark. *See In re Facebook, Inc. Internet Tracking Litig.,* 956 F.3d 589 (9th Cir.2020). The district court also conducted a "cross- check of the percentage-of-the-fund [method] using the lodestar method" and found that the requested attorneys' fee award represents a multiplier of 3.28 from the post-multidistrict consolidation lodestar. *See In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d 935, 944 (9th Cir.2011). That is well within the permissible bounds of this Circuit's decisions. *See Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1051 n.6 (9th Cir.2002)(noting the range of multipliers applied in most common fund cases is 1.0

to 4.0). Awarding modest service awards of $3,000 to $5,000 each to seven named Plaintiffs was also not an abuse of discretion. *See In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 785-87 (9th Cir. 2022).

4. Finally, class notice of settlement comported with Rule 23 and constitutional due process by "describ[ing] the action and the plaintiffs' rights in it," as well as describing how to participate in or object to settlement. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985). Objector Isaacson contends that the district court erroneously authorized material redactions of Plaintiffs' complaints and sealed exhibits, but he never moved to unseal the complaints or exhibits, and he fails to explain why a class representative or absent class member would need to know this information to evaluate the settlement or "protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT," NORTHERN DISTRICT OF CALIFORNIA

IN RE FACEBOOK INTERNET TRACKING LITIGATION

Case No. 5:12-md-02314-EJD

ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; GRANTING MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS; JUDGMENT

Re: Dkt. Nos. 254, 256

EDWARD J. DAVILA, United States District Judge

The Court previously granted a motion for preliminary approval of the Class Action Settlement between Plaintiffs and Defendant Meta Platforms, Inc., formerly Facebook, Inc., ("Defendant") on March 31, 2022. *See* Order Granting Mot. for Class Certification and Prelim. Approval of Class Action Settlement, Dkt. No. 241. As directed by the Court's preliminary approval order, Plaintiffs filed their motion for attorneys' fees, costs, and service awards on August 23, 2022. Dkt. No. 256. Thereafter, Plaintiffs filed their motion for final settlement approval on August 23, 2022. Dkt. No. 254. The Court held a hearing and took arguments from the parties and from the following objectors: plaintiffs in the *Klein* litigation appearing through counsel, Mr. Eric Alan Isaacson appearing on his own behalf, and Ms. Sarah Feldman

and Mr. Cameron Jan appearing through counsel on October 27, 2022. *See* Dkt. No. 282.

Having considered the motion briefing, the terms of the Settlement Agreement, the objections and response thereto, the arguments of counsel, and the other matters on file in this action, the Court **GRANTS** the motion for final approval. The Court finds the settlement fair, adequate, and reasonable. The provisional appointments of the class representatives and class counsel are confirmed.

The motion for attorneys' fees, expenses, and service Awards is **GRANTED**. The Court **ORDERS** that class counsel shall be paid $26,100,000 in attorneys' fees, $393,048.87 in litigation costs, and class representatives Plaintiffs Perrin Davis, Dr. Brian Lentz, Michael Vickery and Cynthia Quinn shall each be paid a service award of $5,000 and State Court Plaintiff Ryan Ung, Chi Cheng, and Alice Rosen shall each be paid a service award of $3,000.

I. BACKGROUND

A. Procedural History

Over a decade ago, on September 30, 2011, Class Members Perrin Aikens Davis, Petersen Gross, Dr. Brian K. Lentz, Tommasina Iannuzzi, Tracy Sauro, Jennifer Sauro, and Lisa Sabato filed an action (the "*Davis* Action") in this district on behalf of themselves and all others similarly situated against Defendant. *See Davis et al v. Facebook, Inc.*, No. 5:11-cv-04834-EJD. On February 8, 2012, the United States Judicial Panel on Multidistrict Litigation transferred a number of similar cases filed in other districts throughout the country for coordinated or consolidated pretrial proceedings. *See* Transfer Order, Dkt. No. 1. Shortly thereafter, the Court consolidated the actions and

Plaintiffs subsequently filed the Consolidated Amended Complaint on May 17, 2012, followed by the Corrected First Amended Consolidated Class Action Complaint ("First Complaint") on May 23, 2012. *See* Dkt. Nos. 33, 35. The complaint alleges that Defendant knowingly intercepted and tracked users' internet activity on pages that displayed a "Like" button using "cookies," or small text file that the server creates and sends to the browser, which stores it in a particular directory on the user's computer in violation of state and federal laws.

Plaintiffs' First Complaint alleged violations of: (1) the Wiretap Act, 18 U.S.C. §2510, *et. seq*.; (2) the Stored Communications Act ("SCA"), 18 U.S.C. §2701, *et. seq*.; (3) the Computer Fraud and Abuse Act, 18 U.S.C. §1030; (4) invasion of privacy; (5) intrusion upon seclusion; (6) conversion; (7) trespass to chattels; (8) unfair competition or Cal. Bus, and Prof. Code §17200, *et. seq*.; (9) the California Computer Crime Law ("CCCL") or Cal. Penal Code §502; (10) the Invasion of Privacy Act or Cal. Penal Code §630; and (11) the Consumer Legal Remedies Act or Cal.Civ. Code §1750. Dkt. No. 35. On November 17, 2017, the Court granted Defendant's motion to dismiss plaintiffs' third amended consolidated class action complaint and entered judgment against Plaintiffs. *See* Dkt. Nos. 174, 175. Plaintiffs appealed, and the Ninth Circuit affirmed the dismissal of Plaintiffs' claims for violation of the SCA, breach of contract, and implied covenant of good faith and fair dealing; it reversed and remanded Plaintiffs' remaining claims. *See* Dkt. No. 190. Defendant petitioned for writ of certiorari which the United States Supreme Court denied. *See* Dkt. No. 209. The parties provided notice of settlement shortly thereafter. *See* Dkt. No. 215.

The parties reached a settlement prior to class certification with the assistance of an experienced mediator, Mr. Randall Wulff. *See* Pl.'s Not. of Mot. & Mot. for Final Approval of Class Action Settlement with Supp. Mem. & Points of Auths., Dkt. No. 254. Section 2.1 of the Settlement Agreement defines the class as:

> All persons who, between April 22, 2010 and September 26, 2011, inclusive, were Facebook Users in the United States that visited nonFacebook websites that displayed the Facebook Like button.

("the Settlement Class"). *See* Settlement Agreement ("Agreement"), Dkt. No. 233-1 §§2.1(a), 2.1(b)-(f) (defining those who are excluded from the class definition). In its preliminary approval order, the Court conditionally certified the Settlement Class and provisionally appointed David A. Straite of DiCello Levitt Gutzler LLC and Stephen G. Grygiel of Grygiel Law LLC as Class Counsel; Plaintiffs Perrin Davis, Dr. Brian Lentz, Michael Vickery, and Cynthia Quinn (collectively, "Plaintiffs") and Ryan Ung, Chi Cheng, and Alice Rosen (collectively, "State Court Plaintiffs") as class representatives; and Angeion Group as the class administrator.[1] *See* Dkt. No. 241.

B. Terms of the Settlement Agreement

Under the terms of the Settlement Agreement, Defendant will pay $90,000,000 into a common settlement fund and sequester and expunge all improperly collected data without admitting liability.

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[1] The Settlement Agreement and Court Order also appoints Jay Barnes of Simmons Hanly Conroy LLC as Chair of the Plaintiffs' Counsel Executive Committee. Lead Counsel and Mr. Barnes together are referred to herein as "Class Counsel."

Dkt. No. 254. This amount includes attorneys' fees and costs, the cost of class notice and settlement administration, and the class representatives' service awards.

1. Attorneys' Fees and Costs

Under the Settlement Agreement, Class Counsel agreed to seek up to $26,100,000 in attorneys' fees exclusive of hours for State Court Counsel, which would be paid out of any award approved by the court, and no more than $393,048.87 in litigation costs inclusive of costs incurred in the parallel action in the Santa Clara Superior Court.[2] Class Counsel represents that "State Court Counsel will not be making a separate fee or expense application here nor in the state court proceeding." Dkt. No. 256 at 18. The common settlement fund also includes a provision for $2,353,535.26 in settlement administration costs. Weisbrot Fourth Decl. Dkt. No. 281 ¶7. The Claims Administrator attests that Plaintiffs have incurred $1,655,782.54 in settlement administration costs and projects that it will incur an additional $697,752.72 in settlement costs. *Id.* at ¶¶5-6. In addition, service awards of $5,000 each will be paid to Plaintiffs Davis, Lentz, Vickery, and Quinn, and up to $3,000 each will be paid to the three State Court Plaintiffs Ung, Cheng, and Rosen in exchange for a general release of all claims against Defendant. Mot. for Attorneys' Fees & Costs, Dkt. No. 256 at 23.

2. Class Relief

After deductions from the common fund for fees, costs, and service awards, approximately $61,124,415.87 will remain to be distributed among

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[2] *Ung, et al. v. Facebook, Inc.,* Case No. 2012-1- CV-217244.

the participating Class Members. Weisbrot Fourth Decl. ¶7. Class members will be paid an equal pro rata share of the Net Settlement Fund. Dkt. No. 256 at 8. Dividing this amount across the 1,558,805 valid claims submitted by participating Class Members yields an average recovery of approximately $39.21 per Class Member. Weisbrot Fourth Decl. ¶7. The Agreement provides that no amount will revert to Defendant. In addition, the Agreement provides for injunctive relief where Facebook will sequester and delete all data that was wrongfully collected during the Class Period. Dkt. No. 254.

3. Unclaimed Payments

Pursuant to the Settlement Agreement, when checks mailed to participating Class Members are not redeemed or deposited within ninety (90) days, that Settlement Class Member waives and releases their claim for payment. Dkt. No. 233-1 §4.5. Any unclaimed money in the Settlement Fund "(less any additional Administrative Costs) shall be distributed on an equal basis to each Authorized Claimant who received a Settlement Payment that was electronically processed or a check which was negotiated." *Id.* at §4.7. At no point will any funds revert to Defendant or be paid to a *cy pres* recipient; rather, the Agreement provides that:

> To the extent that any second distribution is not administratively and economically feasible, as determined by the Settlement Administrator, or funds remain in the Net Settlement Fund for an additional one hundred (100) days after the second distribution, the Parties shall confer and present a proposal for treatment of the remaining funds to the Court.

Id. at §4.8. In exchange for the settlement awards, Class Members will release claims against Defendant as set forth in the Settlement Agreement at Section 9.

C. Class Notice and Claims Administration

The Settlement Agreement is being administered by Angeion Group, LLC ("Angeion"). Following the Court's preliminary approval and conditional certification of the settlement, Angeion provided direct notice via email to all reasonably identifiable Settlement Class Members. The "Notice Plan" includes a media campaign that uses "state-of-the-art targeted internet notice, social media notice, and a paid search campaign." Dkt. No. 233-1, Ex. 1B ¶12.

The Class Administrator established a settlement website (the "Settlement Website") at www.fbinternettrackingsettlement.com, a dedicated email address to field questions at info@fbinternettrackingsettlement.com. Weisbrot First Decl. Dkt. No. 255-1 ¶¶15-19. The Settlement Website includes the settlement notices, the procedures for Class Members to submit claims or exclude themselves, a contact information page that includes address and telephone numbers for the claim administrator and the parties, the Settlement Agreement, the preliminary approval order, claim form, and opt-out form. In addition, the motion for final approval and the application for attorneys' fees, costs, and service awards were uploaded to the website after they were filed. The Class Administrator also operated a toll-free number for Class Member inquiries.

Class members were given until September 12, 2022, to object to or exclude themselves from the Settlement Agreement. Out of 1,558,805 total Class Members who submitted valid claims 1,374 persons filed timely requests to opt out of the Settlement Class.

A total of 2,054,346 claims were received by the administrator, of which 1,558,805 were accepted as valid. Weisbrot Fourth Decl. Dkt. No. 281-1 ¶4.

II. FINAL APPROVAL OF SETTLEMENT

A. Legal Standard

A court may approve a proposed class action settlement of a certified class only "after a hearing and on finding that it is fair, reasonable, and adequate," and that it meets the requirements for class certification. Fed.R.Civ.P. 23(e)(2). In reviewing the proposed settlement, a court need not address whether the settlement is ideal or the best outcome, but only whether the settlement is fair, free of collusion, and consistent with plaintiff's fiduciary obligations to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d at 1027 *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The *Hanlon* court identified the following factors relevant to assessing a settlement proposal: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceeding; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of Class Members to the proposed settlement. *Id.* at 1026 (citation omitted); *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.2004).

Settlements that occur before formal class certification also "require a higher standard of fairness." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir.2000). In reviewing such settlements, in addition to considering the above factors, a court also must ensure that "the settlement is not the

product of collusion among the negotiating parties." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir.2011).

B. Analysis

1. The Settlement Class Meets the Prerequisites for Certification

As the Court found in its order granting preliminary approval and conditional certification of the settlement class herein, the prerequisites of Rule 23 have been satisfied for purposes of certification of the Settlement Class, as discussed in more detail below. *See* Dkt. No. 241.

Likewise, the *Churchill* factors are satisfied. *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.2004). This case was hard-fought. The parties engaged in both discovery and substantive motion practice (three rounds of motions to dismiss), which ultimately disposed of Plaintiffs' claims. Plaintiffs successfully appealed to the Ninth Circuit and developed data privacy precedent in the process. Defendant went to great lengths to shield itself from Plaintiffs' claims and subsequently petitioned the Supreme Court for writ of certoriari, which was denied. While Plaintiffs believed in the strength of their case, Class Counsel recognized the substantial risk and cost in continued litigation, including novel and uncertain damage theories that may likely require a "battle of experts" to determine, for example, the value of the data and the extent of any damages calibrated to the Defendant's use of the data. Dkt. No. 254 at 12–15. Counsel also pointed to other considerations, such as obtaining class certification and "[a] fourth Motion to Dismiss, discovery, litigation class certification, summary judgment, trial and appeals would have consumed many more years, involving tremendous

time and expense of the parties and the Court." *Id.* at 14.

Only after the Supreme Court denied Defendant's petition—almost eleven years after this action was initiated—did the parties agree to mediate. The parties negotiated at arms-length; they spent three days in mediation and six months in informal settlement discussions. This settlement fund constituted the seventh largest monetary settlement of its kind for data privacy cases at the time of settlement. Most significantly, however, the Settlement Agreement provides injunctive relief whereby Defendant must expunge the data at issue to the benefit of all Class Members, regardless of whether they filed a claim, opted out, or objected to the Settlement.

2. Adequacy of Notice

A court must "direct notice [of a proposed class settlement] in a reasonable manner to all class members who would be bound by the proposal." Fed.R.Civ.P. 23(e)(1). "The class must be notified of a proposed settlement in a manner that does not systematically leave any group without notice." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir.1982). Adequate notice requires: (i) the best notice practicable; (ii) reasonably calculated, under the circumstances, to apprise the Class members of the proposed settlement and of their right to object or to exclude themselves as provided in the settlement agreement; (iii) reasonable and constitute due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) meet all applicable requirements of due process and any other applicable requirements under federal law. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Due process requires "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." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

The Court found that the parties' proposed notice procedures provided the best notice practicable and reasonably calculated to apprise Class Members of the settlement and their rights to object or exclude themselves. Dkt. No. 241. Pursuant to those procedures, the Class Administrator provided direct email notice to all reasonably identifiable Settlement Class embers, combined with a media campaign that used targeted internet notice, social media notice, and a paid search campaign. Weisbrot First Decl. Dkt. No. 255-1 ¶5. Angeion established a settlement website (www.fbinternettrackingsettlement.com), a dedicated email address to field questions (info@fbinternettrackingsettlement.com.), and a toll-free hotline (1-844-665-0905) dedicated to the settlement. *Id.* ¶¶15-19.

The first round of notice was sent to 114,078,891 Class Members' email addresses and 86,075,107 of those emails were successfully delivered. *Id.* ¶9. The media campaign notice ran for four weeks and created 377,909,804 impressions. *Id.* ¶11. At the hearing, Mr. Weisbrot (the CEO of Angeion) reported that the media campaign reached slightly over 80% of all adults in the U.S. who are 18 years of age or older in addition to the 99% of all Class Members who were reached directly. *See also* Weisbrot First Decl. ¶25. Angeion also employed a "claims stimulation package" which consisted of sponsored listings on two class action settlement websites, such as www.topclassactions.com and www.classaction.org, and utilized active listening on Twitter to monitor Twitter traffic for discussion of the settlement and to provide notice and answer

questions on Twitter as appropriate. *Id.* ¶12. In addition, Angeion sent email reminder notices to the 86,075,105 Class Members who had successfully received the first notice, extended the paid search campaign, and utilized a banner advertisement campaign for a month. Weisbrot Second Decl. ¶5.

The Court finds that Plaintiffs' notice meets all applicable requirements of due process and is particularly impressed with Plaintiffs' methodology and use of technology to reach as many Class Members as possible. Based upon the foregoing, the Court finds that the Settlement Class has been provided adequate notice.

3. The Settlement Is Fair And Reasonable

As the Court previously found in its order granting preliminary approval, the *Hanlon* factors indicate the settlement here is fair and reasonable and treats Class Members equitably relative to one another. Dkt. No. 241.

The reaction of the class was for the most part positive; there were very few objectors and opt-outs relative to the size of the Settlement Class. There were a total of 9 objectors and 1,374 opt-outs as of the September 12, 2022 deadline. These objections and opt-outs constitute a small fraction of the approximately 1,558,805 total Class Members who submitted valid claims by September 22, 2022. "[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1043 (N.D. Cal. 2008)(citation omitted); *see also Churchill Vill.*, 361 F.3d at 577 (holding that approval of a settlement that

received 45 objections (0.05%) and 500 opt-outs (0.56%) out of 90,000 class members was proper).

In its preliminary approval order, the Court approved the proposed plan of allocation. Dkt. No. 241. That plan is straightforward; all Settlement Class members are entitled to equal cash payment, and payments will be based on final claims rates and the size of the Settlement Fund less fees and expenses. *Id.* at 17. The Court finds the plan of allocation to be fair and reasonable and to treat Class Members equitably and therefore approves the plan of allocation.

4. Objections

The Court received written objections from nine (9) objectors in total, eight (8) of which were submitted by or on behalf of the following individuals: (1) Martin Suroor Corrado; (2) Michael E. Colley, (3) Edward W. Orr, (4) Eleni Gugliotta, (5) Austin Williams, (6) Sarah Feldman, (7) Cameron Jan, and (8) Eric Alan Isaacson.[3] *See* Dkt. Nos. 234, 235, 248, 249, 251, 257, 262, 263, 265, 267, 269. All eight of these objectors oppose the final approval of the settlement. In addition, the Court received a ninth (9) objection from Class Members (the "Klein Objectors") in *Klein v. Meta Platforms, Inc.*, No. 3:20-cv-08570-JD (N.D. Cal.) currently pending in the Northern District of California before Judge Donato. Dkt. No. 267. As discussed more below, the Klein Objectors do not oppose the fee request, and their opposition to the settlement is limited to the release of claims; they specifically seek clarification and assurance that the

[3] The docket also indicates that Ms. Anne Barschall filed a letter with the Court. See Dkt. No. 261. At the hearing Class Counsel clarified that Ms. Barschall did not object to either motion, and that her inquiry regarding alternative methods to file her claim has since been resolved. See Dkt. No. 273 at 6.

release language of the Settlement Agreement does not affect their antitrust litigation. *Id.*

Finally, no objector opposed Plaintiffs' request for reimbursement of litigation expenses nor the allocation plan. The Court has considered all objections and overrules them for the reasons stated on the record at oral argument and as further explained below. The Court addresses each objector's arguments in turn.[4]

a. Objector Gugliotta

Objector Ms. Eleni Gugliotta through her counsel objects to approval of the settlement on the grounds that it is not fair, reasonable, nor adequate. Dkt. No. 257. Ms. Gugliotta asserts that the settlement amount is too low compared to Defendant's yearly earnings and to other class action settlements which have yielded larger settlement amounts. *Id.* at 2-4. Ms. Gugliotta also contends that Class Counsel's notice is deficient because it failed to disclose the class size and it imposed an onerous amount of public disclosure of personal information to state an objection. *Id.* at 4. As to the former objection, Class Counsel responds that these metrics are not relevant to gauge reasonableness, but even so, Ms. Gugliotta relies on global current figures to make her comparison rather than using data limited to the U.S. and relevant to the class period time frame ending in September 2011. Dkt. No. 273.

Class Counsel contend that the settlement amount is reasonable because it is one of the top ten data

[4] The Court has reviewed and considered the objections from Mr. Corrado, Mr. Colley, and Mr. Orr. Dkt. Nos. 234, 235, 248, 249, 251, and 263. The Court finds that these objections raise issues that are not relevant to the scope of the Settlement nor the motions before the Court, and therefore overrules them.

privacy class action settlements ever and it is a "disgorge[ment] of any unjust enrichment earned on the data." Dkt. No. 254 at 3. In response to the latter objection, Counsel notes that the Class was in fact informed that there are approximately 124 million Class Members in Plaintiffs' motions—which would permit a Class Member to calculate what monetary and injunctive relief they are accepting to release the claims—and contends that the disclosure of basic information in objections is to reduce risk of fraud. *Id.* at 4.

Ms. Gugliotta also objects to the signature requirement, contending that an objector represented by counsel should not be required to sign the objection because it is logistically burdensome.[5] *Id.* at 7. The Court finds this argument unpersuasive. Accordingly, the Court overrules Ms. Gugliotta's objections, finding that the objection disclosure requirements are not so burdensome as to discourage objections; the settlement amount is fair, reasonable, and adequate; the notice provided was not deficient; and the objection signature requirement is not logistically burdensome.

b. Objector Williams

Pro se Objector Austin Williams filed an objection contesting the settlement amount for providing inadequate compensation to victims. Dkt. No. 262. Mr. Williams expressed his concern that the settlement

[5] Ms. Gugliotta also objects on the grounds that the Agreement does not identify a cy pres recipient and to the settlement being a "claims made" settlement. Dkt. No. 257 at 2, 5. Class Counsel clarifies that this is a common fund settlement, not a claims-made-settlement. Dkt. No. 273 at 5. Moreover, it is true that the Agreement does not identify a cy pres recipient because it provides a different method for handling unclaimed funds as discussed in supra Section B(2).

will not deter Defendant from unlawfully collecting and using user data in the future because the settlement is such a small fraction of Facebook's annual revenue of $1.97 billion and $3.7 billion in 2010 and 2011 respectively. *Id.* at 1. In reference to the injunctive relief, Mr. Williams also expressed his doubt that the data could ever be fully deleted from existence despite Defendant's promise to expunge the data pursuant to the Agreement. *Id.* at 2.

Class Counsel responds that, like Ms. Gugliotta, Mr. Williams relies on Facebook's global revenue during the years at issue, rather than limiting it to the United States, and that he fails to explain why gross revenues rather than net profits should be used in this case "where the Ninth Circuit used an unjust enrichment measure of damages, which is measured by net profits." Dkt. No. 273 at 7. Regarding Mr. Williams' deletion of data concern, Class Counsel notes that Defendant provided a sworn declaration stating that it will sequester and delete the data and there is no reason to assume that Defendant will defraud the Court. Dkt. No. 262 at 2.

Mr. Williams also objects to approval of the settlement on the grounds that either further discovery or trial could have uncovered additional wrongdoing. Dkt. No. 262 at 2. The Court acknowledges Mr. Williams' concerns but is not persuaded by speculation, particularly where substantial and exhaustive discovery has already occurred. For the foregoing reasons, the Court overrules Mr. Williams' objection.

c. Objectors Feldman and Jan

Objectors Sarah Feldman and Cameron Jan jointly object to approval of the settlement and the requested

fees and expenses by and through their counsel.[6] Dkt. No. 265. First, Feldman and Jan oppose the settlement fund as not fair, reasonable, nor adequate because the settlement amount is well below the recoverable statutory damages. They contend that the settlement amount is not justifiable compared to the potentially recoverable $1.24 trillion in statutory damages according to their calculations, which they obtained by multiplying the $10,000 minimum statutory damages recoverable per Class Member by the 124 million Class Members. *Id.* at 10–11. Feldman and Jan assert that Plaintiffs were required to provide a calculation of the potential class recovery if Plaintiffs had fully prevailed on each of their claims and a justification of any such discount. *Id.*

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[6] Feldman and Jan oppose the settlement agreement for two other reasons. First, they oppose service awards to non-Class member State Court Plaintiffs Chi Cheng and Alice Rosen because they allegedly "disavow[ed] class membership" since they were not Facebook users during the Class Period. Dkt. No. 265 at 20. Class Counsel responds that Objectors Feldman and Jan misread the complaint, as Cheng and Rosen pled that, at the time of filing the complaint in state court, they were nonFaceboook users—not that they did not have Facebook accounts during the relevant class period from April 22, 2010 to September 26, 2011. State Court Plaintiffs Cheng and Rosen are participants in this settlement based on their surrender of related claims in the state action. Dkt. No. 271 at 8–9.

Second, Feldman and Jan oppose the settlement for failing to comply with the Court's Procedural Guidance for Class Action Settlements which requires any explanation as to any differences between the claims to be released and the claims in the "operative complaint." Dkt. No. 265 at 10. Feldman and Jan take issue with what constitutes the "operative complaint" here because, after two rounds of motion to dismiss, only Plaintiffs' breach of contract and breach of the covenant of good faith and fair dealing remained in the TAC. See Third Amended Complaint ("TAC"), Dkt. No. 157. However, the operative claims here are those identified by the Ninth Circuit on appeal.

Class Counsel responds that the real measure of damages is closer to $900 million in consideration of the Supreme Court's dicta in *State Farm*, reasoning that while there is no rigid benchmark, statutory damages would likely be capped at a multiplier of ten. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410, 424-26 (2003)("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process."); Dkt. No. 273 at 9. Feldman and Jan acknowledge that a trillion-dollar recovery is unlikely and that Class Members could reasonably expect recovery of up to $900 million if the Court were to regard statutory damages as punitive damages but nonetheless assert that the settlement amount is indefensible. Plaintiffs argue that settlement is reasonable because it is a complete disgorgement of all net profits earned on the allegedly improperly collected data. Dkt. Nos. 256 at 8. By Class Counsel's calculations, the settlement fund is 10% of the potentially recoverable statutory damages; Feldman and Jan do not explain why 10% recovery plus injunctive relief is unfair under these circumstances. Dkt. No. 273 at 9.

Objectors Feldman and Jan also oppose the notice plan and contend that the low percentage of claims submitted by Class Members is, in part, due to Plaintiffs' failure to provide Class Members with the best notice practicable. Dkt. No. 265 at 14. At the hearing, Feldman and Jan's counsel contended that Plaintiffs should have utilized social media to effect notice. In their opinion, notice should have been provided via Facebook Messenger rather than through email. Class counsel responds that the take rate "is approaching 2%" which is a satisfactory claims rate for class sizes in the millions. Dkt. No. 273 at 9 (citing *In re TikTok, Inc., Consumer Privacy Litig.*, 565 F.Supp.

3d 1076, 1090 n.6 (N.D.Ill. Sept. 30, 2021) ("[a]ccording to the plaintiff's expert in *In re Facebook*, the average claims rate for classes above 2.7 million class members is less than 1.5%."); *Pollard v. Remington Arms Co.*, LLC, 320 F.R.D. 198, 214–15 (W.D.Mo. Mar. 14, 2017)(collecting cases that have approved settlements "where the claims rate was less than one percent"). During the hearing Mr. Weisbrot responded that Plaintiffs did in fact use social media (Twitter) to effect notice. *See also* Dkt. No. 255-1. Moreover, Mr. Weisbrot considered the plan very successful, as it reached 99% of Class Members directly and reached approximately 80% of *all* adults 18 years or older in the United States. (emphasis added).

For these reasons and the reasons discussed above, the Court finds the notice plan to be adequate.

d. Objector Isaacson

Pro se Objector Eric Allan Isaacson, who is an attorney and a member of the bar of this Court, objects to the settlement, the requested attorneys' fees, and the service awards. Dkt. No. 269 at 7. At the outset Mr. Isaacson objects to the filing of the complaints under seal (with publicly available redacted versions) as improperly depriving class members of information needed to evaluate the case. However, as Class Counsel points out, the Ninth Circuit affirmed the sealing and the Court cannot now relitigate this issue. Dkt. No. 173 at 12.

Next, Mr. Isaacson objects on the grounds that monetary relief is too low because, according to his calculations, the settlement amount would yield approximately fifty cents per class member after deducting all fees and expenses. Dkt. No. 269 at 4. To reach this conclusion Mr. Isaacson divided the net settlement fund by all 124 million potential class

members (rather than by the number of Settlement Class Members who submitted a valid claim). *Id.* Like Objectors Jan and Feldman, Mr. Isaacson focuses on the potential recoverable statutory damages under the Wiretap Act, finding the settlement fund lacking relative to these damages. *Id.* at 4-5. Class Counsel projected that Settlement Class Members would receive approximately $40 per person after factoring in the number of claims received and those still anticipated to be received. Dkt. No. 256 at 9. In terms of the potential statutory damages, Class Counsel reiterates that:

> [T]he maximum Wiretap Act recovery[,] assuming all the many remaining liability hurdles were cleared—would likely never pass Due Process muster, and their argument that $900 million in Wiretap Act damages is a reasonable figure (passing, for the moment, the problem that Wiretap Act damages are (i) discretionary in the first instance and (ii) "all or nothing" in nature") means that a $90 million settlement, if all allocable to the Wiretap Act damages, is 10% of the recoverable damages.

Dkt. No. 273 at 13-14. Class Counsel attests to having analyzed maximum recoveries in the "best day in court" scenario and weighing it against the barriers to achieving such a result before accepting settlement. *Id.*; *see* Dkt. No. 254 at 12-14 (describing factual and legal obstacles in litigating).

Next, Mr. Isaacson argues that Plaintiffs failed to provide information required by the Court's Procedural Guidance for Class Action Settlements ¶1)e in failing to provide a calculation of the potential class recovery if plaintiffs had fully prevailed on each of their claims and an explanation as to why the settlement amount differs. Dkt. No. 269 at 5. In

addition, he contends that Counsel did not provide " 'an estimate of the number and/or percentage of class members who are expected to submit a claim... the identity of the examples used for the estimate, and the reason for the selection of those examples.'" *Id.* (quoting Procedural Guidance ¶1)g). Class Counsel explains that they provided this information in their motion for preliminary approval, which identified an estimated "take rate" under 5% consistent with FTC research, and in Angeion's declaration, which provided updated claim administration cost estimates based on 1%, 3% or 5% take rates. Dkt. No. 254 at 14.

Finally, Mr. Isaacson takes issue with the injunctive relief insofar as Plaintiffs have stated that "Defendant will delete the sequestered Settlement Class Data from Defendant's systems *to the extent not already deleted.*"[7] Dkt. No. 269 at 5-6 (italicized for emphasis). Mr. Isaacson questions the meaning of this phrase and whether such data has already been deleted before settlement, in which case he believes that the injunctive relief would be of little value to Class Members. *Id.* At the hearing, Counsel clarified that regardless of whether Defendant had deleted some or all (though unlikely) of the allegedly improperly collected data, Defendant was not required to do so before it was imposed by the parties' settlement. The purpose of the injunctive relief was to ensure that the data would be completely expunged.

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[7] Plaintiffs did not assign a monetary value on the injunctive relief in accordance with Ninth Circuit law, which disfavors attempting to assign monetary values on injunctions in common fund cases. Instead, in determining whether to depart from the 25% benchmark, Class Counsel asks that the fees be awarded based on the monetary component but also in consideration of the injunctive relief as a "relevant circumstance." Dkt. No. 273 at 14; *See Boeing,* 327 F.3d at 974.

Accordingly, the Court overrules Mr. Isaacson's objections.

e. The *Klein* Objectors

Kupcho, Grabert and Klein (the "Klein Objectors") are lead plaintiffs in an antitrust case against Defendant's parent company presently before Judge Donato in *Klein v. Meta Platforms, Inc.*, Case No. 20-cv-08570 (N.D. Cal.).[8] Dkt. No. 267 at 1. The Klein Objectors do not oppose the fees award and only oppose the Settlement out of concern that the language of the release clause is too broad and may release claims such as those asserted in their litigation. The Settlement Agreement defines "released claims" as:

> ***[A]ny and all claims, demands, actions, causes of action, lawsuits, arbitrations, damages, or liabilities, whether known or unknown***, legal, equitable, or otherwise that were asserted ***or could have been asserted in the Actions***, regarding the alleged collection, storage, or internal use by Facebook of data related to browsing history (such as IP address, Uniform Resource Locator (URL), referrer header information, and search terms) obtained from cookies stored on the devices of Facebook Users in the United States who visited nonFacebook websites that displayed the Facebook Like button during the Settlement Class Period ....

Dkt. 233-1 at 9-10, §1.33 (emphasis added). They seek either (i) clarification that the Settlement is not intended to release or otherwise limit the *Klein* claims or (ii) insertion of language in the Settlement

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[8] The Klein Objectors are the proposed representatives of the "Consumer Class," and their counsel are the court-appointed interim counsel for that class.

Agreement release clause that carves out their claims. *Id.* at 11-12. Class Counsel represents that the Settlement Agreement is not intended to release or otherwise limit the *Klein* claims and urges the Court to deny the Klein Objector's requested relief for a host of reasons, including Defendant's waiver of any argument that the release clause bars the *Klein* claims by failing to comply with the Procedural Guidance on overlapping cases. *Id.* at 2, 10 n.5, 12 (citing to Northern District of California Procedural Guidance for Class Action Settlements, Preliminary Approval ¶13). At the hearing, Defendant would not state on the record whether the release clause impacts the *Klein* litigation without having first reviewed the *Klein* pleadings.

The Court overrules this objection without determining whether the claims asserted in *Klein* are released by this Settlement Agreement.[9]

5. Certification Is Granted and the Settlement Is Approved

After reviewing all of the required factors, the Court finds the Settlement Agreement to be fair, reasonable, and adequate, and certification of the Settlement Class as defined therein to be proper. The Settlement Agreement specifies those are excluded from the Settlement Class. Dkt. No. 233-1 §§1.41, 2.1(b)-(f).

III. MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE AWARDS

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[9] Because Defendant has not substantively responded to whether the Klein action would be released under the Settlement Agreement at the hearing, the Court declines to rule on any issues of preclusion in this instance. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.,* 442 F.3d 741, 747 (9th Cir.2006).

Attorneys' fees and costs may be awarded in a certified class action under Federal Rule of Civil Procedure 23(h). Such fees must be found "fair, reasonable, and adequate" in order to be approved. Fed.R.Civ.P. 23(e); *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). To "avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Id.* at 963. "[T]he members of the class retain an interest in assuring that the fees to be paid class counsel are not unreasonably high," since unreasonably high fees are a likely indicator that the class has obtained less monetary or injunctive relief than they might otherwise. *Id.* at 964.

Class counsel requests an attorneys' fee award of $26,100,000. Based on the declarations submitted by counsel, the attorneys' fees sought amount to approximately 29% of the percentage-of-the-fund. Defendants do not oppose the fee request.

The Court analyzes an attorneys' fee request based on either the "lodestar" method or a percentage of the total settlement fund made available to the class, including costs, fees, and injunctive relief. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.2002). The Ninth Circuit encourages courts to use another method as a cross-check in order to avoid a "mechanical or formulaic approach that results in an unreasonable reward." *In re Bluetooth*, 654 F.3d at 944-45 (citing *Vizcaino*, 290 F.3d at 1050-51.)

Under the lodestar approach, a court multiplies the number of hours reasonably expended by the reasonable hourly rate. *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir.2016)("[A] court calculates the

lodestar figure by multiplying the number of hours reasonably expended on a case by a reasonable hourly rate. A reasonable hourly rate is ordinarily the 'prevailing market rate [ ] in the relevant community.'"). Under the percentage-of-the-fund method, courts in the Ninth Circuit "typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *In re Bluetooth*, 654 F.3d at 942 (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990)). The benchmark should be adjusted when the percentage recovery would be "either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers*, 904 F.2d at 1311. When using the percentage-of-recovery method, courts consider a number of factors, including whether class counsel " 'achieved exceptional results for the class,' whether the case was risky for class counsel, whether counsel's performance 'generated benefits beyond the cash settlement fund,' the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir. 2015) (quoting *Vizcaino*, 290 F.3d at 1047-50. "[T]he most critical factor [in determining appropriate attorney's fee awards] is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

Using the percentage-of-the-fund method, the Court finds the attorneys' fees sought to be reasonable. Here, the settlement value is $90,000,000 and Class Counsel requests $26,100,000 in attorneys' fees, which equals 29%-of-the-fund. The Court may adjust the benchmark

"'upward or downward to account for any unusual circumstances involved in the case.'" *In re Google St. View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1120 (9th Cir.2021)(quoting *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir.2002)). Class Counsel requests an upward adjustment of 4% above the 25% benchmark because Counsel created "new law" after appealing and arguing before the Ninth Circuit, and achieved an exceptional result for the Class in obtaining both monetary and injunctive relief.[10] Dkt. No. 256 at 22–23. *Ontiveros v. Zamora*, 303 F.R.D. 356, 373 (E.D.Cal. Oct. 8, 2014) ("[N]ovelty of class counsel's legal arguments may constitute 'special circumstances' justifying a departure from the benchmark" and concluding such upward departure was warranted (citing *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1250 (9th Cir.1981)). The injunctive relief is particularly meaningful here because the deletion of the data at issue benefits all Class Members, regardless of whether they filed a claim, opted out, or objected to the Settlement. The Court agrees therefore that both considerations warrant an upward adjustment from the benchmark

The Court also considered a cross-check of the percentage-of-the-fund using the lodestar method. The lodestar figure for post-consolidation hours is 9,233.98 hours at $863.02 rate for a total of $7,969,186.5. *See* Dkt. No. 255-27. Plaintiffs claim hourly rates that are commensurate with their experience and with the legal market in this district, citing to a range for attorneys, including associates, counsel, and partners

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[10] *See In re Facebook, Inc. Internet Tracking Litig.,* 956 F.3d 589, 608 (9th Cir. 2020). As of the date of filing motion for preliminary approval, Plaintiffs mentioned that the Ninth Circuit's ruling had been cited more than 50 times in reported cases in the past 18 months. Dkt. No. 232 at 3.

across all firms as $300–$1,200 and paralegals at $125–$375 an hour. Dkt. No. 256 at 19. On the basis of these reasonable hourly rates and amounts, class counsel calculates the combined lodestar to be $7,969,186.5, which represents a multiplier of 3.28 exclusive of any pre-consolidation time. Dkt. No. 256 at 20. The Court finds that the hours claimed were reasonably incurred and that the rates charged are reasonable and commensurate with those charged by attorneys with similar experience in the market. The Court also finds that Class Counsel represented their clients with skill and diligence for over ten years on a contingent fee basis and obtained an excellent result for the class, taking into account the possible outcomes and risks of proceeding trial.

A. Objections

Objectors Gugliotta, Feldman, Jan, and Isaacson also opposed Plaintiffs' fee request in addition to opposing final approval of settlement.

Objector Gugliotta opposes the attorneys' fees award because it is based on the gross settlement fund rather than "on the value of the Net Settlement Proceeds or the amount of claims filed and paid." Dkt. No. 257 at 9. Gugliotta further asserts that the fee award disproportionately compensates Class Counsel despite what she considers inadequate benefits obtained for the class. *Id.* at 8. In response Class Counsel points out that Gugliotta does not offer any support for her contention that the fee request should be tethered to the take-rate of the class. The Court is inclined to agree. Counsel sufficiently demonstrated how their advocacy, which spanned 11 years, warranted a 29% fee award after having successfully appealed the class's dismissed claims and developed new law in data

privacy. For these reasons the Court overrules Gugliotta's objections.

Objectors Feldman and Jan challenge the $26.1 million in requested attorneys' fees (29% of the fund, which is greater than a 3x lodestar multiplier) and instead propose a 20% fee which is closer to a 2x lodestar multiplier, or $18 million. Dkt. No. 265 at 10. Class Counsel responds that courts will find an upward adjustment of the 25% benchmark to be appropriate in certain circumstances, particularly one that results in a change in the law, and that Defendants fail to justify a fee below the benchmark in this case. Dkt. No. 273 at 10. Feldman and Jan also contend that Plaintiffs lodestar crosscheck is insufficient because it provides only "summary numbers" in support of their claimed lodestar. Dkt. No. 265 at 11. However, this is not true—each attorney complied with the Northern District of California's Procedural Guidance for Class Action Settlements by filing declarations inclusive of their rates, hours, and summaries of their roles and time spent in the case. Dkt. No. 255. For these reasons the Court overrules Feldman and Jan's objections.

Finally, Objector Mr. Isaacson opposed the request for attorneys' fees and costs as excessive, particularly given what Mr. Isaacson perceives as poor results compared to potentially recoverable damages. Dkt No. 269 at 9. Mr. Isaacson contends that the multiplier on Class Counsel's lodestar (3.28) is far too high. *Id.* In response, Class Counsel refers back to their motion brief where Counsel cites to a number of cases supporting the reasonableness of the requested multiplier. *See e.g., Sheikh v. Tesla, Inc.*, No. 17-cv-02193-BLF, 2018 WL 5794532, at *8 (N.D. Cal., Nov. 2, 2018); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Antitrust Litig.*, 768 F.App'x 651, 653

(9th Cir. 2019); *Steiner v. Am. Broad. Co.*, 248 F.App'x 780, 783 (9th Cir.2007); *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *8. Mr. Isaacson also objects to the Settlement because it purportedly permits Class Counsel to be paid before Class Members receive payment. *Id.* at 12 (citing to *Hart v. BHH, LLC*, 334 F.R.D. 74, 77 (S.D.N.Y.2020)). The Court declines to find the settlement unreasonable based on this argument.

Based on the foregoing, the Court finds an award of attorneys' fees in the amount of $26,100,000 to be fair, reasonable, and adequate and approves Class Counsel's request.

B. Costs Award

Class counsel is entitled to reimbursement of reasonable out-of-pocket expenses. Fed.R.Civ.P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.1994) (holding that attorneys may recover reasonable expenses that would typically be billed to paying clients in non-contingency matters). Costs compensable under Rule 23(h) include "nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h). Here, class counsel seeks reimbursement for litigation expenses, and provides records documenting those expenses, in the amount of $393,048.87. None of the objectors oppose Class Counsel's requested costs. Accordingly, the Court finds this amount reasonable, fair, and adequate and approves Class Counsel's request for litigation expenses.

C. Service Awards

The district court must evaluate named plaintiff's requested service award (also referred to as "incentive awards") using relevant factors including "the actions

the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions ... [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Staton*, 327 F.3d at 977. "Such awards are discretionary ... and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-959 (9th Cir.2009). The Ninth Circuit has emphasized that district courts must "scrutiniz[e] all incentive awards [and service awards] to determine whether they destroy the adequacy of the class representatives." *Radcliffe v. Experian Info. Sols.*, 715 F.3d 1157, 1163 (9th Cir.2013).

Here, the Plaintiffs came forward to represent the data privacy interests of more than 124 million others for over a ten year period with very little personally to gain. Plaintiff compiled documents, answered interrogatories in response to discovery requests, regularly corresponded with counsel telephonically and by email, and took the substantial risk of litigation which, at a minimum, involves a risk of losing and paying the other side's costs. Because the laws are not self-enforcing, it is appropriate to incentivize those who come forward with little to gain and at personal risk and who work to achieve a settlement that confers substantial benefits on others—particularly when these individuals dedicate ten years to doing so. The Court also considers "the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). Here, the aggregate $29,000

sought for seven (7) Service Awards constitutes a very small fraction (0.0004%) of the $90 million Settlement Fund. Dkt. No. at 256.

Objector Isaacson opposes the requested award for class representatives. First, he objects to the service awards as "illegal and inequitable" in common fund cases, citing to *Trs. v. Greenough*, 105 U.S. 527, 537–38 (1882) and *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 122 (1885). However, the Ninth Circuit squarely addressed this argument in *Apple*, where the objectors similarly asserted that such awards conflict with Supreme Court precedent. *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785 (9th Cir. 2022). The Ninth Circuit "previously considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant," and concluded that service or incentive awards are permissible so long as they are reasonable. *Id.*; *see also* Dkt. No. 273 at 13.

Mr. Isaacson ceded this point at the hearing but takes issue with the class representatives' declarations where at least two of the named plaintiffs indicate that they were "not even aware of the possibility of any Service Award" until after reviewing and approving of the Settlement Agreement. Davis Decl., Dkt. No. 255-16 ¶17; *see also* Lentz Decl., Dkt. No. 255-19 ¶18. Class Counsel responded that, as a matter of practice, they do not inform class representatives of service awards until *after* they have examined the Settlement Agreement in order to ensure that any award would not influence the class representatives' acceptance of the terms. *See* Dkt. No. at 256 at 24. Mr. Isaacson therefore opposes the awards on the grounds that they could not have incentivized Plaintiffs Davis or Lentz since neither of them were aware of such awards at the

time they agreed to represent the class. Dkt. No. 269 at 7.

In consideration of Objector Isaacson's point, the Court clarifies that in this case the awards are best characterized as a "service" award rather than an "incentive" award. This characterization more appropriately captures the purpose of the award in this instance. The class representatives are being rewarded for their service to the class. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir.2015)("[Service or] incentive awards [ ] are intended to compensate class representatives for work undertaken on behalf of a class."). Moreover, service or incentive awards may also serve to incentivize the participation of future lead plaintiffs. The Court therefore overrules Mr. Isaacson's objection.

Accordingly, the Court approves the requested service award payment for all aforementioned Named Plaintiffs.

IV. CONCLUSION

Based upon the foregoing, the motion for final approval of class settlement is **GRANTED**. The motion for attorneys' fees, costs, and service awards is **GRANTED** as follows: Class Counsel is awarded $26,100,000 in attorneys' fees and $393,048.87 in litigation costs.

Plaintiffs Davis, Lentz, Vickery, and Quinn are granted a service award of $5,000 each, and State Court Plaintiffs Ung, Cheng, and Rosen are granted a service award of $3,000 each.

Without affecting the finality of this order in any way, the Court retains jurisdiction of all matters relating to the interpretation, administration,

implementation, effectuation and enforcement of this order and the Settlement.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that final judgment is **ENTERED** in accordance with the terms of the Settlement, the Order Granting Preliminary Approval of Class Action Settlement filed on March 31, 2022, and this order. This document will constitute a final judgment (and a separate document constituting the judgment) for purposes of Rule 58, Federal Rules of Civil Procedure.

As provided in the Settlement Agreement, the parties shall file a post-distribution accounting in accordance with this District's Procedural Guidance for Class Action Settlements within 21 days after the distribution of the settlement funds and payment of attorneys' fees. The Court **SETS** a compliance deadline on **Friday, February 10, 2023** to verify timely filing of the post-distribution accounting.

IT IS SO ORDERED.

Dated: November 10, 2022

EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

In re: FACEBOOK, INC. INTERNET TRACKING LITIGATION,

No. 22-16903

ORDER
FILED APR 1 2024

PERRIN AIKENS DAVIS; et al.,
Plaintiffs-Appellees,

v.

SARAH FELDMAN; HONDO JAN,
Objectors-Appellants,

v.

META PLATFORMS, INC., FKA Facebook, Inc.,
Defendant-Appellee.

Before: R. NELSON, FORREST, and SANCHEZ, Circuit Judges.

Judges R. Nelson, Forrest, and Sanchez voted to deny Objectors-Appellants Sarah Feldman and Hondo Jan's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Accordingly, Objectors-Appellants' petition for rehearing en banc, filed March 5, 2024 (Dkt. 62), is **DENIED.**

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

In re: FACEBOOK, INC. INTERNET TRACKING LITIGATION,

No. 22-16904

ORDER
FILED APR 1 2024

PERRIN AIKENS DAVIS; et al.,
Plaintiffs-Appellees,
v.
ERIC ALAN ISAACSON,
Objector-Appellant,
v.
META PLATFORMS, INC., FKA Facebook, Inc.,
Defendant-Appellee.

Before: R. NELSON, FORREST, and SANCHEZ, Circuit Judges.

Judges R. Nelson, Forrest, and Sanchez voted to deny Objector-Appellant Eric Alan Isaacson's petitions for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Accordingly, Objector-Appellant's petitions for rehearing and rehearing en banc, filed March 6, 2024 (Dkt. 64), are **DENIED.**

APPENDIX F

Federal Rule of Civil Procedure Rule 23

Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order*.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice*.

(A) *For (b)(1) or (b)(2) Classes*. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with

information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements*. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections*.

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for

motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).