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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LAWRENCE OLIN, HAROLD NYANJOM,
SHERON SMITH-JACKSON, JANICE VEGA-
LATKER, MARC BOEHM, and RAVEN
WINHAM, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. 3:18-cv-01881-RS

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: July 14, 2022
Time: 1:30 p.m.
Court: Courtroom 3, 17th Floor

Hon. Richard Seeborg

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 14, 2022, at 1:30 p.m., or as soon thereafter as the parties may be heard, Plaintiffs Lawrence Olin, Harold Nyanjom, Sheron Smith-Jackson, Janice Vega-Latker, Marc Boehm, and Raven Winham (“Plaintiffs”) will move this Court at the United States Courthouse located at 450 Golden Gate Avenue, San Francisco, California 94102, Courtroom 3 – 17th Floor, before the Honorable Richard Seeborg, pursuant to Fed. R. Civ. P. 23, for the Court to: (i) grant preliminary approval of the proposed Class Action Settlement Agreement (“Settlement”), (ii) provisionally certify the Settlement Class for the purposes of preliminary approval, designate Plaintiffs as the Class Representatives, and appoint Interim Class Counsel Bursor & Fisher, P.A. as Class Counsel, (iii) mandate procedures and deadlines for exclusion requests and objections, and (iv) set a date, time and place for a final approval hearing.

This motion is made on the grounds that preliminary approval of the proposed class action settlement is proper, and that the applicable requirements of Rule 23 have been met. This motion is based on Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement, the accompanying Declaration of Neal J. Deckant and exhibits thereto, the pleadings and papers on file herein, and any other written and oral arguments that may be presented to the Court.

Dated: May 18, 2022

BURSOR & FISHER, P.A.

By: /s/ Neal J. Deckant
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1 **I. INTRODUCTION**

2 Plaintiffs Lawrence Olin, Harold Nyanjom, Sheron Smith-Jackson, Janice Vega-Latker,
3 Marc Boehm, and Raven Winham (collectively, “Plaintiffs”) respectfully submit this Motion for
4 the Court’s preliminary approval of a proposed Class Action Settlement Agreement (hereinafter,
5 the “Settlement”) resolving the above-captioned action (the “Action”), which alleges that
6 Defendant Facebook, Inc., now Meta Platforms, Inc., (“Defendant,” “Facebook,” or “Meta”)
7 scraped Android users’ call and text logs without consent by exploiting a vulnerability in the
8 permission settings for the Facebook Messenger application. Third Amended Class Action
9 Complaint (“TACC”), ¶ 1 (ECF No. 184).

10 Pursuant to the terms of the Settlement, Meta has agreed to substantial changes that achieve
11 the precise relief Plaintiffs sought to accomplish with this litigation. Specifically, pursuant to the
12 terms of the Settlement, Meta had confirmed that the allegedly unlawful conduct challenged in the
13 operative TACC has ceased—namely, Meta confirms that, after the filing of this lawsuit, it ceased
14 uploading call and text log data through the Facebook Messenger application (or the Facebook Lite
15 application). In addition, Meta has agreed to the deletion of all call and text log data uploaded
16 from persons in the United States using Android devices. Pursuant to the Settlement, absent
17 Settlement Class Members would release claims for declaratory, injunctive, and non-monetary
18 equitable relief only—claims for monetary damages are specifically excluded from the proposed
19 Settlement Class Members’ Released Claims. Service awards and attorneys’ fees and costs that
20 may be awarded will be paid by Meta. As detailed herein, this Settlement remediates the
21 challenged practices that are the subject of this litigation, achieves the goals of the litigation as set
22 forth in the operative TACC, protects the interests of any Settlement Class Members that may not
23 be remedied through injunctive relief, and falls well within the “range of reasonableness”
24 applicable at the preliminary approval stage.

25 The Settlement is the product of extensive arm’s-length negotiations between the parties
26 and their experienced and informed counsel. Settlement negotiations spanned over eight months
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1 and included a mediation session before the highly respected and skilled mediator, Hon. Wayne
2 Andersen (Ret.) of JAMS, who ultimately made a mediator’s proposal in February 2022 that both
3 sides accepted. Prior to reaching a resolution, and through four years of hard-fought
4 litigation, Class Counsel thoroughly examined both the facts and law involved in this case,
5 reviewed and analyzed several rounds of documents produced by Meta, and spent significant time
6 and efforts on expert discovery whereby Plaintiffs’ experts reviewed the source code for the
7 Facebook Messenger application at the heart of this dispute. Class Counsel possess a firm
8 understanding of both the strengths and weaknesses of Plaintiffs’ allegations and Meta’s potential
9 defenses. Both prior to and during the negotiations, Class Counsel faced formidable opposition
10 from Meta’s counsel who zealously defended their client’s position. Both sides were well-
11 represented by seasoned and informed counsel who vigorously pursued their respective clients’
12 interests.

13 In sum, the Settlement achieves significant business practice changes, and benefits the
14 Settlement Class now, without the inherent risks of continued litigation and without requiring
15 Settlement Class Members to release any claims they may have for monetary relief. The
16 Settlement was only reached after years of discovery and months of arm’s-length negotiations and
17 enjoys the support of a neutral mediator who had an integral part in the settlement negotiations.
18 Consequently, the Settlement satisfies the criteria for preliminary approval.

19 **II. OVERVIEW OF THE LITIGATION**

20 On March 27, 2017, Plaintiffs Anthony Williams, Tyoka Brumfield, and Wendy Burnett
21 filed a class action complaint in the United States District Court for the Northern District of
22 California asserting claims against Meta on behalf of themselves and a proposed class of “all
23 persons in the United States who installed the Facebook Messenger and Facebook Lite apps for
24 Android, and granted Facebook permission to access their ‘Contact List’” under the California
25 Consumers Legal Remedies Act (“CLRA,” Cal. Civ. Code § 1750, *et seq.*), California Unfair
26 Competition Law (“UCL,” Cal. Bus. and Prof. Code § 17200, *et seq.*), California Computer Data
27 Access and Fraud Act (“CDAFA,” Cal. Pen. Code § 502), California Constitutional Right to
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1 Privacy, Intrusion Upon Seclusion, Trespass to Personal Property, New York’s Deceptive Acts or
2 Practices Law (N.Y. Gen. Bus. Law § 349), and unjust enrichment. The complaint alleged that,
3 *inter alia*, when users installed the Facebook Messenger and Facebook Lite applications on their
4 Android devices, they were prompted to grant Facebook access to the their “Contact Lists,” and
5 that upon doing so, these apps uploaded users’ call and text logs. *See, e.g.*, ECF No. 1.

6 Shortly thereafter, four other complaints were filed in the United States District Court for
7 the Northern District of California alleging similar facts and asserting similar classwide claims
8 against Meta, including *Renken, et al. v. Facebook, Inc.*, Case No. 5:18-cv-01896 (filed Mar. 27,
9 2018), *Tracy v. Facebook, Inc.*, Case No. 3:18-cv-02128 (filed Apr. 9, 2018), *Sternemann, et al. v.*
10 *Facebook, Inc.*, Case No. 3:18-cv-02677 (filed May 7, 2018), and *Condelles v. Facebook, Inc.*,
11 Case No. 3:18-cv-02727 (filed May 9, 2018). The Court then related the *Renken, Tracy,*
12 *Sternemann,* and *Condelles* complaints to the instant case. *See* ECF Nos. 18, 27, 42, and 44. On
13 June 26, 2018, the Court consolidated all of the aforementioned actions and appointed Bursor &
14 Fisher, P.A. as interim lead counsel. *See* ECF No. 51.

15 On July 13, 2018, Plaintiffs filed a First Amended Consolidated Class Action Complaint
16 asserting CLRA, UCL, CDAFA, California Constitutional Right to Privacy, Intrusion Upon
17 Seclusion, Trespass to Personal Property, GBL § 349, and unjust enrichment claims on behalf of
18 themselves and a proposed class of “all persons in the United States who installed the Facebook
19 Messenger and Facebook Lite apps for Android, and granted Facebook permission to access their
20 ‘Contact List.’” *See* ECF No. 52.

21 On September 25, 2018, Meta moved to dismiss the First Amended Consolidated Class
22 Action Complaint, and Plaintiffs opposed Meta’s motion on October 30, 2018. On December 6,
23 2018, the Court held oral argument on Meta’s motion, and on December 18, 2018 (*see* ECF No.
24 79), the Court issued an order granting Meta’s motion to dismiss the First Amended Consolidated
25 Class Action Complaint, dismissing the claims under Trespass to Personal Property, UCL, CLRA,
26 and GBL § 349 without leave to amend, and dismissing all other claims with leave to amend. *See*
27 ECF No. 85.
28

1 On January 22, 2019, Settlement Class Representatives Lawrence Olin, Harold Nyanjom,
2 Sheron Smith-Jackson, and Janice Vega-Latker filed a Second Amended Consolidated Class
3 Action Complaint asserting claims under the CDAFA, California Constitutional Right to Privacy,
4 Intrusion Upon Seclusion, unjust enrichment, and fraud on behalf of themselves and a proposed
5 class of “all persons in the United States who installed the Facebook Messenger and Facebook Lite
6 apps for Android, and granted Facebook permission to access their ‘Contacts.’” *See* ECF No. 88.

7 On February 26, 2019, Meta moved to dismiss the Second Amended Consolidated Class
8 Action Complaint, and Plaintiffs filed their opposition on March 19, 2019. On May 23, 2019, the
9 Court held oral argument on Meta’s motion (*see* ECF No. 113). On August 29, 2019, the Court
10 issued an order granting in part and denying in part Meta’s motion to dismiss the Second Amended
11 Consolidated Class Action Complaint, dismissing the allegations relating to the Facebook Lite
12 application without prejudice and otherwise denying the motion. *See* ECF No. 128. On September
13 13, 2019, Plaintiffs Williams, Brumfield, and Burnett voluntarily dismissed their claims pursuant to
14 Federal Rule of Civil Procedure 41(a), which action was unopposed by Meta. *See* ECF No. 137.

15 On December 18, 2020, Settlement Class Representatives Lawrence Olin, Harold Nyanjom,
16 Sheron Smith-Jackson, Janice Vega-Latker, Blake Carlyle, Marc Boehm, and Raven Winham filed
17 a Third Amended Consolidated Class Action Complaint (“TACC”) asserting claims under the
18 CDAFA, California Constitutional Right to Privacy, Intrusion Upon Seclusion, unjust enrichment,
19 fraud, and the California Invasion of Privacy Act (“CIPA”) (Cal. Pen. Code §§ 631, 632, 635) on
20 behalf of themselves and a proposed class of “all persons in the United States who installed the
21 Facebook Messenger app for Android, and granted Facebook permission to access their
22 ‘Contacts.’” *See* ECF No. 184. Meta moved to dismiss the TACC on January 28, 2021, and
23 Plaintiffs filed their opposition on February 18, 2021. On May 14, 2021, the Court issued an order
24 granting Meta’s motion to dismiss the TACC, dismissing the newly-added CIPA claims.

25 Throughout this litigation, the Parties engaged in extensive written and ESI discovery,
26 including inspection by Settlement Class Representatives’ software expert of the source code
27 relating to uploading of call and text logs through the Facebook Messenger for Android
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1 application, including full revision history of the code; the production of documents reflecting
2 Settlement Class Representatives' call and text history uploading and settings; and other internal
3 documents regarding the in-app consent screen and functionality of the feature at issue. The parties
4 also engaged in extensive discovery motion practice and exchanged voluminous written discovery
5 requests and responses. The Parties agreed to mediate the case on June 15, 2021, with the
6 Honorable Wayne Andersen (Ret.) of JAMS, who served for nearly 20 years on the U.S. District
7 Court for the Northern District of Illinois. The mediation lasted a full day but was unsuccessful.
8 Thereafter, however, the parties continued to engage in arm's length negotiations facilitated by
9 Judge Andersen over the next eight months, which culminated in a mediator's proposal in February
10 2022 that both sides accepted. The Parties have since negotiated, finalized, and executed the Class
11 Action Settlement Agreement, submitted herewith.

12 **III. THE PROPOSED SETTLEMENT TERMS**

13 The Settlement achieves and memorializes significant changes to Meta's practices related
14 to uploading call and text history data from users of Facebook Messenger and Facebook Lite
15 mobile applications for Android. Key aspects of the proposed Settlement are outlined below:

16 **1. Class Definition**

17 For the purposes of the provisional certification, the parties propose that the Settlement
18 Class be defined as follows: "All persons in the United States who installed the Facebook
19 Messenger and Facebook Lite apps for Android, and granted Meta permission to access their
20 contacts." Settlement ¶ 45.

21 **2. Consideration and Injunctive Relief**

22 "After the filing of this lawsuit, Meta ceased uploading Call and Text History Data from
23 persons in the United States through the Facebook Messenger or Facebook Lite apps for Android.
24 Meta confirms that it has not uploaded Call and Text History Data from persons in the United
25 States through the Facebook Messenger or Facebook Lite apps for Android since March 2019."
26 Settlement ¶ 49.

1 In addition, “Meta shall delete all Call and Text History Data uploaded from persons in the
2 United States through the Facebook Messenger or Facebook Lite apps for Android devices that
3 Meta is not otherwise legally obligated to preserve by jurisdictions outside of the United States
4 within 45 days of the effective date (which shall be seven (7) days after the final settlement
5 approval order and final judgment have been entered and become Final). Any data retained
6 because of continuing legal obligations will be quarantined in access-controlled data warehouse
7 tables that are segregated from any systems used or accessed in the ordinary course of Meta’s
8 business, and access to this data is limited to Meta’s Legal team. Any such data will be preserved
9 and used solely in connection with any legal obligations and not for any business use, and Meta
10 will delete all such data within 45 days of the expiration of any legal obligation to preserve it.” *Id.*

11 **3. Release**

12 “Upon the Effective Date, Settlement Class Representatives’ Releasing Parties will be
13 deemed to have, and by operation of the Final Approval Order and Final Judgment will have fully,
14 finally, and forever released, relinquished, and discharged any and all past, present, and future
15 claims, actions, demands, causes of action, suits, debts, obligations, damages, rights or liabilities,
16 of any nature and description whatsoever, known or unknown, recognized now or hereafter,
17 existing or preexisting, expected or unexpected, pursuant to any theory of recovery (including, but
18 not limited to, those based in contract or tort, common law or equity, federal, state, or local law,
19 statute, ordinance, or regulation), against the Released Parties, from the Settlement Class
20 Representatives’ first interaction with Meta up until and including the Effective Date, that result
21 from, arise out of, are based on, or relate in any way to the practices and claims that were alleged in
22 the Action, for any type of relief that can be released as a matter of law, including, without
23 limitation, claims for monetary relief, damages (whether compensatory, consequential, punitive,
24 exemplary, liquidated, and/or statutory), costs, penalties, interest, attorneys’ fees, litigation costs,
25 restitution, or equitable relief (“Settlement Class Representatives’ Released Claims”). Settlement
26 Class Representatives’ Releasing Parties are forever enjoined from taking any action seeking any
27 relief against the Released Parties based on any of Settlement Class Representatives’ Released
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1 Claims.” Settlement ¶ 53. “ Upon the Effective Date, the Releasing Parties will be deemed to
2 have, and by operation of the Final Approval Order and Final Judgment will have fully, finally, and
3 forever released, relinquished, and discharged any and all past, present, and future claims, actions,
4 demands, causes of action, suits, debts, obligations, and rights or liabilities for injunctive and/or
5 declaratory relief, of any nature and description whatsoever, known or unknown, existing or
6 preexisting, recognized now or hereafter, expected or unexpected, pursuant to any theory of
7 recovery (including, but not limited to, those based in contract or tort, common law or equity,
8 federal, state, or local law, statute, ordinance, or regulation) against the Released Parties, from the
9 Releasing Parties’ first interaction with Meta up until and including the Effective Date, that result
10 from, arise out of, are based on, or relate in any way to the practices and claims that were alleged in
11 the Action (“Settlement Class Members’ Released Claims”), except that, notwithstanding the
12 foregoing, the Releasing Parties do not release claims for monetary relief or damages. The
13 Releasing Parties are forever enjoined from taking any action seeking injunctive and/or declaratory
14 relief against the Released Parties based on any Settlement Class Members’ Released Claims.” *Id.*
15 ¶ 54.

16 **4. Service Awards to Named Plaintiffs**

17 Subject to the Court’s approval, Meta has agreed to pay incentive awards to each Plaintiff
18 in an amount not to exceed \$1,500. Settlement ¶ 64. The named Plaintiffs have spent substantial
19 time on this action, have assisted with the investigation of this action and the drafting of the
20 multiple Complaints, have participated in significant written and ESI discovery, have been in
21 frequent contact with counsel, and have stayed informed of the status of the action, through
22 settlement.

23 **5. Attorneys’ Fees and Expenses**

24 Interim Class Counsel will make an application to the Court for an award of attorneys’ fees,
25 costs, and expenses not to exceed \$1,080,000. Interim Class Counsel provided Meta a copy of
26 summaries of Class Counsel’s time records while the parties were negotiating a potential
27 settlement, and as a result of that review, Meta will take no position on Class Counsel’s
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1 application and agrees to pay the amount of fees and costs determined by the Court. Notably, all
2 terms regarding fees and costs were negotiated and agreed to by the parties only after full
3 agreement was reached as to all other material terms. Deckant Decl., ¶ 9; Settlement ¶ 61.

4 **IV. CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS IS**
5 **APPROPRIATE**

6 **A. Rule 23(a) is Satisfied**

7 **1. Numerosity**

8 A case may be certified as a class action only if “the class is so numerous that joinder of
9 all members is impracticable.” Fed. R. Civ. P. 23(a)(1). While there is no fixed rule, numerosity
10 is generally presumed when the potential number of class members reaches forty (40). *See Jordan*
11 *v. Cnty. of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S.
12 810 (1982). In addition, “[b]ecause plaintiffs seek injunctive and declaratory relief, the numerosity
13 requirement is relaxed and plaintiffs may rely on [] reasonable inference[s] arising from plaintiffs’
14 other evidence that the number of unknown and future members of [the] proposed []class ... is
15 sufficient to make joinder impracticable.” *Arnott v. U.S. Citizenship & Immigration Servs.*, 290
16 F.R.D. 579, 586 (C.D. Cal. Oct. 22, 2012) (quoting *Sueoka v. U.S.*, 101 F. App’x 649, 653 (9th Cir.
17 2004)).

18 Here, numerosity is readily satisfied. The total number of Settlement Class Members is
19 estimated to be in the millions. Accordingly, the numerosity requirement is easily met for the
20 purposes of preliminary approval.

21 **2. Commonality**

22 “Commonality requires the plaintiff to demonstrate that the class members have suffered
23 the same injury.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011). “This
24 requirement has been construed permissively, and all questions of fact and law need not be
25 common to satisfy the rule.” *In re Yahoo! Inc. Customer Data Security Breach Litig.*, 2020 WL
26 4212811, at *2 (N.D. Cal. July 22, 2020) (“*In re Yahoo!*”) (internal quotations omitted). “Indeed,
27 “for purposes of Rule 23(a)(2), even a single common question will do.” *Id.*

1 Here, Plaintiffs allege that Defendant scraped call and text metadata from Android users of
2 Facebook Messenger and Facebook Lite mobile applications. Resolution of this common claim
3 depends on a critical, common question of fact: whether Defendant’s collection of this data is
4 violative of California’s constitutional right to privacy, intrusion upon seclusion, unjust
5 enrichment, and common law fraud. Thus, commonality is satisfied. *See, e.g., Martinelli v.*
6 *Johnson & Johnson*, 2019 WL 1429653, at *6 (E.D. Cal. Mar. 29, 2019); *In re NJOY, Inc.*
7 *Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1096-97 (C.D. Cal. 2015).

8 **3. Typicality**

9 Rule 23(a)(3) requires that “the claims and defenses of the representative parties are typical
10 of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality does not require total
11 identity between representative plaintiffs and class members. *Armstrong v. Davis*, 275 F.3d 849,
12 868 (9th Cir. 2001). Rather, typicality is satisfied so long as the plaintiffs’ claims stem “from the
13 same event, practice, or course of conduct that forms the basis of the class claims, and is based
14 upon the same legal theory.” *Jordan*, 669 F.2d at 1322; *In re Juniper Networks Sec. Litig.*, 264
15 F.R.D. 584, 589 (N.D. Cal. 2009) (“representative claims are ‘typical’ if they are reasonably co-
16 extensive with those of absent class members”) (citation omitted).

17 Here, Settlement Class Representatives’ claims stem from the same common course of
18 conduct as the claims of the Settlement Class Members. Namely, Settlement Class Representatives
19 contend that they did not consent to Meta’s collection of their call and text metadata—the conduct
20 that forms the basis of this lawsuit. Just as with Settlement Class Representatives themselves,
21 Meta’s conduct is common to all Settlement Class Members and represents a common thread of
22 conduct resulting in injury to all Settlement Class Members. The injunctive and declaratory relief
23 achieved by the Settlement would apply to Settlement Class Representatives and Settlement Class
24 Members equally. Accordingly, the typicality requirement is met.

25 **4. Adequacy**

26 Rule 23(a)(4) requires that the representative plaintiffs will “fairly and adequately” protect
27 the interests of the class. The two-prong test for determining adequacy is: “(1) Do the
28

1 representative plaintiffs and their counsel have any conflicts of interest with other class members?;
2 and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf
3 of the class?” *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon*, 150 F.3d at 1020.

4 Both prongs are satisfied here.

5 First, the Settlement Class Representatives’ interests are aligned with, and not antagonistic
6 to, the interests of the Settlement Class Members. Indeed, the Settlement Class Representatives
7 and the Settlement Class Members are equally interested in ensuring that Meta’s practices
8 regarding the upload of call and text history data were conducted with consent. *See Hanlon*, 150
9 F.3d at 1021 (adequacy satisfied where “each...plaintiff has the same problem”). Accordingly, the
10 Settlement Class Representatives will fairly and adequately protect the interests of all Settlement
11 Class Members.

12 Second, Settlement Class Representatives and Interim Class Counsel have vigorously and
13 competently pursued the Settlement Class Members’ claims. Interim Class Counsel has engaged in
14 significant, arm’s-length negotiations over the course of many months, including with the
15 assistance of a certified mediator. Deckant Decl., ¶¶ 3-4; *see also Villegas v. J.P. Morgan Chase &*
16 *Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (use of mediator “tends to support the
17 conclusion that the settlement process was not collusive”). The Settlement acknowledges the
18 cessation of Meta’s uploading of call and text log data through the Facebook Messenger or
19 Facebook Lite apps for Android, and requires the deletion of said metadata – the exact relief that
20 Settlement Class Representatives sought on behalf of themselves and the Settlement Class
21 Members. Further, Interim Class Counsel have extensive experience and expertise in prosecuting
22 complex class actions. Class Counsel are active practitioners who are highly experienced in class
23 action, product liability, and consumer fraud litigation. *See Deckant Decl.*, Ex. 2 (firm resume of
24 Bursor & Fisher, P.A.).

25 Thus, in pursuing this litigation, Interim Class Counsel, as well as Settlement Class
26 Representatives, have advanced and will continue to advance and fully protect the common
27 interests of all members of the Settlement Class. Accordingly, Rule 23(a)(4) is satisfied.

B. Rule 23(b)(2) is Satisfied

1
2 In addition to the requirements of Rule 23(a), at least one of the prongs of Rule 23(b) must
3 be satisfied. Here, the proposed Settlement Class satisfies Rule 23(b)(2), which permits a class
4 action if the Court finds that “the party opposing the class has acted or refused to act on grounds
5 that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is
6 appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Where, as here, a plaintiff
7 seeks “uniform relief” addressing commonly and consistently-applied data collection practices, the
8 requirements of Rule 23(b)(2) are satisfied. *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 600 (N.D.
9 Cal. May 26, 2015) (holding that the requirements of Rule 23(b)(2) were satisfied where “all
10 emails sent from and to [an electronic communication service provider’s] subscribers are subject to
11 the same interception and scanning processes”); *see also Campbell v. Facebook, Inc.*, Case No.
12 4:13-cv-05996-PJH, ECF No. 235 (N.D. Cal. Apr. 26, 2017) (granting preliminary approval of
13 settlement based on alleged conduct of uniformly intercepting content of private Facebook
14 messages without user consent).

C. Preliminary Approval of the Settlement is Appropriate

15 Public policy “strong[ly] ... favors settlements, particularly where complex class action
16 litigation is concerned.” *Pilkington v. Cardinal Health, Inc.*, 516 F.3d 1095, 1101 (9th Cir. 2008);
17 *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City*
18 *of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

19 “[T]he decision to approve or reject a settlement is committed to the sound discretion of the
20 trial judge because he is exposed to the litigants and their strategies, positions, and proof.” *Hanlon*,
21 150 F.3d at 1026. In exercising such discretion, the Court should give “proper deference to the
22 private consensual decision of the parties ... [T]he court’s intrusion upon what is otherwise a
23 private consensual agreement negotiated between the parties to a lawsuit must be limited to the
24 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
25 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
26 whole, is fair, reasonable and adequate to all concerned.” *Hanlon*, 150 F.3d at 1027; *see also* Fed.
27 R. Civ. P. 23(e)(2). “The involvement of a neutral or court-affiliated mediator or facilitator in [the
28

1 parties’] negotiations may bear on whether they were conducted in a manner that would protect and
2 further the class interests.” Rule 23(e)(2)(B) Advisory Committee’s Note; *accord Pederson v.*
3 *Airport Terminal Servs.*, No. 15-cv-02400, 2018 WL 2138457, at *7 (C.D. Cal. April 5, 2018) (the
4 oversight “of an experienced mediator” reflected non-collusive negotiations).

5 The proposed Settlement here satisfies the standard for preliminary approval because: **(a)** it
6 is within the range of reasonableness; **(b)** there is no reason to doubt its fairness because it is the
7 product of hard-fought, arm’s-length negotiations between the parties and was only reached after a
8 thorough investigation by Interim Class Counsel of the facts and the law; and **(c)** Plaintiffs and
9 Interim Class Counsel believe it is in the best interest of the Settlement Class.

10 **1. The Settlement Falls Within the Range of Reasonableness**

11 To grant preliminary approval of the proposed Settlement, the Court need only find that it
12 falls within “the range of reasonableness.” Alba Conte et al., *Newberg on Class Actions* § 11.25, at
13 11-91 (4th ed. 2002). The *Manual for Complex Litigation (Fourth)* (2004) (“*Manual*”) characterizes the preliminary approval stage as an “initial evaluation” of the fairness of the
14 proposed settlement made by the court on the basis of written submissions and informal
15 presentation from the settling parties. *Manual* § 21.632. Evaluating where a proposed settlement
16 falls within this spectrum entails focus “on substantive fairness and adequacy,” and weighing
17 “Plaintiffs’ expected recovery ... against the value of the settlement offer.” *Hendricks v. Starkist*
18 *Co.*, 2015 WL 4498083, at *6 (N.D. Cal. July 23, 2015) (quotation omitted).

19 Here, Plaintiffs sought classwide declaratory and injunctive relief related to Meta’s
20 practices of uploading call and text history data from Facebook Messenger and Facebook Lite
21 users’ Android phones without consent. While Meta has vigorously contested its liability, the
22 terms of the Settlement provide meaningful, targeted relief that addresses the exact conduct that
23 forms the basis for this lawsuit.
24

25 In contrast to the tangible, immediate benefits of the Settlement, the outcome of continued
26 litigation, class certification, summary judgment, trial, and potential appeals is uncertain and could
27 add years to this litigation. Meta has vigorously denied any wrongdoing and has asserted that it
28

1 obtained all required consents from Settlement Class Representatives and the Settlement Class,
2 and, absent settlement, Plaintiffs anticipate Meta would continue to defend this action aggressively
3 up to and through trial, including a motion for summary judgment and exhausting all possible
4 avenues for appeals. While Plaintiffs strongly believe in the merits of their case, they recognize the
5 uncertainty that continued litigation brings, and the hurdles they would have to overcome at many,
6 critical junctures throughout the case. And even with victory for Plaintiffs at class certification,
7 summary judgment, or trial brings the possibility of Ninth Circuit reversal on appeal.

8 Thus, despite Plaintiffs' firm belief in the strength of their claims, there is at least some risk
9 that, absent a settlement, Meta might prevail in motion practice, at trial, or on appeal, resulting in
10 no relief at all to the Class. This weighs in favor of preliminary approval. *See, e.g., Rodriguez v.*
11 *West Publishing Corp.*, 563 F.3d 963, 966 (9th Cir. 2009) (noting that the elimination of “[r]isk,
12 expense, complexity, and likely duration of further litigation,” including, *inter alia*, an “anticipated
13 motion for summary judgment, and ... [i]n evitable appeals would likely prolong the litigation, and
14 any recovery by class members, for years,” which facts militated in favor of approval of
15 settlement); *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) (“[I]n any case there is a range of
16 reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and
17 fact in any particular case and the concomitant risks and costs necessarily inherent in taking any
18 litigation to completion.”).

19 Ultimately, Meta has agreed to provide the relief sought on behalf of the Settlement
20 Class—namely, it has implemented and confirmed substantial changes to its business practices
21 resulting in the cessation of call and text log data uploading from users of Facebook Messenger and
22 Facebook Lite applications for Android, and the deletion of any uploaded data collected as a result
23 of these practices. Similarly, the release obtained by Meta only extends to Settlement Class
24 Members' claims for injunctive and declaratory relief. Importantly, no Settlement Class Member,
25 with the exception of Plaintiffs, will release any claim for damages. *See, e.g., In re Yahoo Mail*
26 *Litig.*, 2016 WL 8114216 (N.D. Cal. Mar. 15, 2016) (N.D. Cal. Mar. 15, 2016) (holding that a
27 similar result obtained on behalf of a class of email users and settled under Rule 23(b)(2) was
28

1 within the range of possible approval); *Campbell v. Facebook, Inc.*, Case No. 4:13-cv-05996-PJH,
2 ECF No. 235 (N.D. Cal. Apr. 26, 2017) (same).

3 In sum, the Settlement provides substantial, meaningful relief to all Settlement Class
4 Members based on the strengths of their claims without delay and is within the range of possible
5 approval, particularly in light of the above risks that Settlement Class Members would face in
6 further litigation.

7 **2. The Settlement is the Product of Arm’s-Length**
8 **Negotiations After a Thorough Investigation, Without**
9 **Any Indicia of Collusion**

10 “Before approving a class action settlement, the district court must reach a reasoned
11 judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion
12 among, the negotiating parties.” *City of Seattle*, 955 F.2d at 1290. Where a settlement is the
13 product of arm’s-length negotiations conducted by capable and experienced counsel, the court
14 begins its analysis with a presumption that the settlement is fair and reasonable. *See* 4 Newberg §
15 11.41; *In re Heritage Bond Litig.*, 2005 WL 1594403, at *2 (C.D. Cal. June 10, 2005); *Kramer v.*
16 *XPO Logistics, Inc.*, 2020 WL 1643712, at *1 (N.D. Cal. Apr. 2, 2020); *G. F. v. Contra Costa*
17 *County*, 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) (“[T]he assistance of an experienced
18 mediator in the settlement process confirms that the settlement is non-collusive.”) (internal
19 quotations omitted).

20 Here, the Settlement was reached after informed, extensive arm’s-length negotiations.
21 First, the Settlement was reached after a thorough investigation into and discovery of the legal and
22 factual issues in the Action. In particular, Interim Class Counsel conducted an extensive pre-suit
23 investigation into the factual underpinnings of the practices challenged in the Action, as well as the
24 applicable law. In addition to their pre-filing efforts, Interim Class Counsel engaged in extensive
25 motion practice and the exchange of written discovery requests and responses, including discovery
26 motion practice. Interim Class Counsel also engaged in the review of several rounds of production
27 of electronic documents, as well as expert discovery into Meta’s source code regarding the
28 complained-of conduct. The source code review spanned many months and encompassed highly

1 technical documentation relevant to the alleged data upload functions and the inner working of
2 Meta's mobile applications.

3 Second, the Settlement was reached only after the parties participated in a mediation
4 session before Hon. Wayne Andersen (Ret.), an experienced mediator with JAMS and retired
5 district court judge. Although the initial mediation was not successful, it was held only after the
6 exchange of confidential mediation statements, which discussed the strengths and weaknesses of
7 both Plaintiffs' allegations and Meta's potential defenses and relevant documents related thereto.
8 Throughout the mediation session, counsel vigorously advocated for their respective clients'
9 positions. Only after more than eight months of subsequent negotiations—with the continued
10 assistance of Judge Andersen—including numerous phone calls and email exchanges, were counsel
11 able to reach an agreement through acceptance of a mediator's proposal.

12 In sum, the Settlement was reached only after Interim Class Counsel conducted an
13 extensive factual investigation and discovery into the Meta's alleged misconduct and thoroughly
14 researched the law pertinent to Plaintiffs' and Class Members' claims and Meta's defenses thereto.
15 Consequently, Interim Class Counsel had a wealth of information at their disposal before entering
16 into settlement negotiations, which allowed Class Counsel to adequately assess the strengths and
17 weaknesses of the case and to balance the benefits of settlement against the risks of further
18 litigation. Nothing in the course of the negotiations or in the substance of the proposed Settlement
19 presents any reason to doubt the Settlement's fairness.

20 **3. The Recommendation of Experienced Counsel Favors**
21 **Approval**

22 In considering a proposed class settlement, “[t]he recommendations of plaintiffs’ counsel
23 should be given a presumption of reasonableness.” *Knight v. Red Door Salons, Inc.*, 2009 WL
24 248367, at *4 (N.D. Cal. Feb. 2, 2009); *see also Linney v. Cellular Alaska P’ship*, 1997 WL
25 450064, at *5 (N.D. Cal. July 18, 1997). Here, Interim Class Counsel endorses the Settlement as
26 fair, adequate, and reasonable. Deckant Decl., ¶¶ 7-8.

27 As demonstrated herein and in Interim Class Counsel's Firm Resume, Interim Class
28 Counsel have extensive experience litigating and settling consumer class actions and other complex

1 matters, and have conducted an extensive investigation into the factual and legal issues raised in
 2 this lawsuit. *Id.* ¶¶ 6-7. Using their experience and knowledge, Interim Class Counsel have
 3 weighed the benefits of the Settlement against the inherent risks and expense of continued
 4 litigation, and they strongly believe that the proposed Settlement is fair, reasonable, and adequate.
 5 The fact that qualified and well-informed counsel endorse the Settlement as being fair, reasonable,
 6 and adequate weighs in favor of preliminarily approving the Settlement.

7 **4. The Settlement Class Meets All Of The New Rule**
 8 **23(e)(2) Factors**

9 *a. Rule 23(e)(2)(A) – The Class Representatives*
 10 *And Class Counsel Have Adequately*
 11 *Represented The Class*

12 “The Ninth Circuit has explained that ‘adequacy of representation ... requires that two
 13 questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest
 14 with other class members and (b) will the named plaintiffs and their counsel prosecute the action
 15 vigorously on behalf of the class?’” *Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *6 (N.D.
 16 Cal. Dec. 18, 2018) (quoting *In re Mego Financial Corp. Sec. Litig.*, 213 F.3d at 462). Here, this
 17 prong is met for the very same reasons that Plaintiffs and Interim Class Counsel have shown in
 18 meeting the adequacy prong under Fed. R. Civ. P. 23(a)(4). *See* Argument § V.A.4, *supra*; *see*
 19 *also Hilsley v. Ocean Spray Cranberries, Inc.*, 2020 WL 520616, at *5 (S.D. Cal. Jan. 31, 2020)
 20 (“Because the Court found that adequacy under Rule 23(a)(4) has been satisfied above, due to the
 21 similarity, the adequacy factor under Rule 23(e)(2)(A) is also met.”).

22 *b. Rule 23(e)(2)(B) – The Proposal Was*
 23 *Negotiated At Arm’s Length*

24 A court may “presume that through negotiation, the Parties, counsel, and mediator arrived
 25 at a reasonable range of settlement by considering Plaintiff’s likelihood of recovery.” *Garner*,
 26 2010 WL 1687832, at *9 (citing *Rodriguez*, 563 F.3d at 965). Here, both Interim Class Counsel
 27 and counsel for Defendant are experienced in class action litigation, and were “thoroughly familiar
 28 with the applicable facts, legal theories, and defenses on both sides.” *Hilsley*, 2020 WL 520616, at
 *5. Further, “the Settlement was reached as a result of informed and non-collusive arms-length

1 negotiations [over a number of months] facilitated by a neutral mediator.” *Kramer v. XPO*
 2 *Logistics, Inc.*, 2020 WL 1643712, at *1 (N.D. Cal. Apr. 2, 2020); *G. F. v. Contra Costa County*,
 3 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) (“[T]he assistance of an experienced mediator
 4 in the settlement process confirms that the settlement is non-collusive.”) (internal quotations
 5 omitted); *see also* Deckant Decl., ¶¶ 3-4. Thus, this prong is met.

6 c. Rule 23(e)(2)(C) – The Relief Provided For
 7 The Class Is Adequate

8 Fed. R. Civ. P. 23(e)(2)(C) requires that the Court consider whether “the relief provided for
 9 the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the
 10 effectiveness of any proposed method of distributing relief to the class, including the method of
 11 processing class-member claims; (iii) the terms of any proposed award of attorney’s fees, including
 12 timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).” “The
 13 amount offered in the proposed settlement agreement is generally considered to be the most
 14 important consideration of any class settlement.” *Hilsley*, 2020 WL 520616, at *6. Each prong is
 15 met.

16 **“The Costs, Risks, And Delay Of Trial And Appeal”:** Plaintiffs established above that
 17 this factor is met. *See* Argument §§ IV.C.1, *supra*.

18 **“The Effectiveness Of Any Proposed Method Of Distributing Relief To The Class”:**
 19 Because the Settlement Agreement provides for automatic injunctive and declaratory relief without
 20 the need for a claims process, and because Class Members’ claims for monetary damages are not
 21 being released by the Settlement Agreement, Plaintiffs respectfully submit this factor is
 22 inapplicable to the Court’s analysis.

23 **“The Terms Of Any Proposed Award Of Attorney’s Fees”:** Class Counsel will petition
 24 this Court for an award of no more than \$1,080,000 in attorneys’ fees, inclusive of any costs and
 25 expenses. Settlement ¶ 61.¹ Under Ninth Circuit standards, a District Court may award the
 26 requested attorneys’ fees under the lodestar method. *Hanlon*, 150 F.3d at 1029. The lodestar

27 ¹ The Court need not “determine attorney’s fees at the preliminary approval stage” and Class
 28 Counsel will “fully address the reasonableness of their requested fee award in their forthcoming
 Motion for Attorneys’ Fees, Costs, and Incentive Awards.” *Hilsley*, 2020 WL 520616, at *7.

1 figure is calculated by multiplying the hours spent on the case by reasonable hourly rates for the
2 region and attorney experience. *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d
3 935, 941-42 (9th Cir. 2011). The resulting lodestar figure may be adjusted upward or downward
4 by use of a multiplier to account for factors including, but not limited to: (i) the quality of the
5 representation; (ii) the benefit obtained for the class; (iii) the complexity and novelty of the issues
6 presented; and (iv) the risk of nonpayment. *Hanlon*, 150 F.3d at 1029; *Kerr v. Screen Extras*
7 *Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). Courts typically apply a multiplier or enhancement to
8 the lodestar to account for the substantial risk that class counsel undertook by accepting a case
9 where no payment would be received if the lawsuit did not succeed. *Vizcaino v. Microsoft Corp.*,
10 290 F.3d 1043, 1051 (9th Cir. 2002). As of May 16, 2022, Interim Class Counsel has billed a total
11 of 1712.1 hours at a blended rate of \$548 per hour. Deckant Decl., ¶ 11. Accordingly, Interim
12 Class Counsel’s lodestar to date is \$1,108,875.00. *Id.* Should the Court award the requested
13 attorneys’ fees, Interim Class Counsel would receive a negative multiplier based on their current
14 lodestar. *Id.* However, Interim Class Counsel anticipates spending 100 additional hours before
15 final approval, thus lowering the lodestar multiplier even further. *Id.*

16 **“Any Agreement Required To Be Identified By Rule 23(e)(3)”**: This prong asks
17 whether there was “any agreement made in connection with the proposal.” *In re GSE Bonds*
18 *Antitrust Litig.*, 414 F. Supp. 3d at 696. Here, other than the Settlement, no such agreement exists.
19 Deckant Decl., ¶ 10.

20 In light of the foregoing, the Settlement provides adequate relief to the Settlement Class
21 under Rule 23(e)(2)(C).

22 *d. Rule 23(e)(2)(D) – The Proposal Treats Class*
23 *Members Equitably Relative To Each Other*

24 Under this factor, courts consider whether the Settlement “improperly grant[s] preferential
25 treatment to class representatives or segments of the class.” *Hefler*, 2018 WL 6619983, at *8.
26 Here, each Settlement Class Member enjoys the same injunctive and declaratory relief, without
27 being subject to a claims process of any kind. Thus, this Rule 23(e)(2) factor is also met.
28

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court:

- a) Grant preliminary approval of the proposed Class Action Settlement Agreement (“Settlement”) entered into between the parties;
- b) Certify the Settlement Class as defined in the Settlement;
- c) Appoint Plaintiffs as Settlement Class Representatives of the proposed Settlement Class;
- d) Appoint Bursor & Fisher, P.A. as Class Counsel for the proposed Settlement Class;
- e) Stay all non-Settlement related proceedings in this matter pending final approval of the Settlement; and
- f) Set a Fairness Hearing and certain other dates in connection with the final approval of the Settlement.

Dated: May 18, 2022

BURSOR & FISHER, P.A.

By: /s/ Neal J. Deckant
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