1 LARRY C. RUSS (SBN 82760)
lruss@raklaw.com
2 NATHAN D. MEYER (SBN 239850)
nmeyer@raklaw.com
3 RUSS AUGUST & KABAT
12424 Wilshire Boulevard, 12th Floor
4 Los Angeles, California 90025
Telephone: (310) 826-7424
5 Facsimile: (310) 826-6991

6 MICHAEL W. SOBOL (SBN 194857)
msobol@lchb.com
7 NICHOLAS R. DIAMAND (*Pro Hac Vice*)
ndiamand@lchb.com
8 MELISSA GARDNER (SBN 289096)
mgardner@lchb.com
9 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
10 San Francisco, CA 94111
Telephone: (415) 956-1000
11 Facsimile: (415) 956-1008

12 *Class Counsel*

DORIAN S. BERGER (SBN 264424)
dberger@olavidunne.com
DANIEL P. HIPSKIND (SBN 266763)
dhipskind@olavidunne.com
OLAVI DUNNE LLP
1880 Century Park East, Ste. 815
Los Angeles, California 90067
Telephone: (213) 516-7900
Facsimile: (213) 516-7910

13

UNITED STATES DISTRICT COURT

14

NORTHERN DISTRICT OF CALIFORNIA

15

SAN JOSE DIVISION

16

17 PAUL PERKINS, PENNIE SEMPELL,
ANN BRANDWEIN, ERIN EGGERS,
18 CLARE CONNAUGHTON, JAKE
KUSHNER, NATALIE RICHSTONE,
19 NICOLE CROSBY, and LESLIE WALL;
individually and on behalf of all others
20 similarly situated,

21   Plaintiffs
            v.
22
LINKEDIN CORPORATION,
23
                          Defendant.
24

Case No. 13-CV-04303-LHK

**NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: February 11, 2016
Time: 1:30 pm
Courtroom: Room 8, 4th Floor
Judge: Honorable Lucy H. Koh

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1283489.8

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

NOTICE OF MOTION AND
MOTION ISO FINAL SETTLEMENT APPROVAL
CASE NO. 13-CV-04303-LHK

1283489.8

1

TABLE OF AUTHORITIES
(continued)

2

Page

27

28

NOTICE OF MOTION AND
MOTION ISO FINAL SETTLEMENT APPROVAL
CASE NO. 13-CV-04303-LHK

1283489.8

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TREATISES

1283489.8

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 11, 2016 at 1:30 p.m., or as soon as the matter may be heard in Courtroom 8 of the above-entitled court, Class Representatives Paul Perkins, Pennie Sempell, Ann Brandwein, Erin Eggers, Clare Connaughton, Jake Kushner, Natalie Richstone, Nicole Crosby, and Leslie Wall ("Plaintiffs") will and hereby do move, pursuant to Federal Rule of Civil Procedure 23(e), for entry of an order finally approving the Settlement with Defendant LinkedIn Corporation ("LinkedIn"), specifically:

1. finding that the Settlement is fair, reasonable, and adequate within the meaning of Rule 23(e) of the Federal Rules of Civil Procedure;

2. finding that the notice provided to the Class constitutes due, adequate, and sufficient notice, and meets the requirements of due process and applicable law;

3. approving the method for distributing monetary relief under the Settlement;

4. directing that this action be dismissed with prejudice as against Defendant;

5. approving the release of claims as specified in the Settlement as binding and effective;

6. reserving exclusive and continuing jurisdiction over the Settlement; and

7. directing that final judgment of dismissal be entered as between Plaintiffs and Defendant.

This motion is brought pursuant to Federal Rule of Civil Procedure 23(e) and is based upon the supporting Memorandum of Points and Authorities filed concurrently with this Notice; the supporting Declarations of Nathan Meyer ("Meyer Decl."), Nicholas Diamand ("Diamand Decl."), Dorian Berger ("Berger Decl."), Daniel Burke ("Burke Decl."), Kenneth Jue ("Jue Decl."), Adam Weinstein ("Weinstein Decl."), and Kurt Andersen ("Andersen Decl."), filed concurrently with this Notice; the records, pleadings, and papers filed in this action, and upon such argument as may be presented to the Court at the hearing on this motion.

NOTICE OF MOTION AND
MOTION ISO FINAL SETTLEMENT APPROVAL
CASE NO. 13-CV-04303-LHK

1283489.8

I.   __INTRODUCTION__

Plaintiffs respectfully submit this Memorandum in support of final approval of the Class

Action Settlement with LinkedIn. The Settlement is fair, reasonable, and adequate. This action

challenges LinkedIn's Add Connections service which allows users to import contact information

from their email accounts and invite contacts to join their LinkedIn network. Plaintiffs allege that

LinkedIn improperly grew its member base through Add Connections, particularly through the use of

invitation emails and up to two subsequent reminder emails sent by LinkedIn displaying the names

and/or likenesses of Class Members. Pursuant to the terms of the Settlement, LinkedIn has made

significant and meaningful changes to its disclosures and functionality for the use of its Add

Connections service, which are designed to address, remedy, and prospectively prevent the

fundamental harms that gave rise to this litigation. Additionally, LinkedIn has agreed to pay $13

million to establish a non-reversionary cash Settlement Fund from which Settlement Class Members

who submit valid claims will be sent cash payments. The Court granted preliminary approval on

September 15, 2015. (Dkt. No. 106, at 3).

The Notice Plan, which the Court found was "consistent with the requirements of Rule 23 and

due process, and constitute[s] the best notice practicable under the circumstances," (*id.* at 4), has been

fully implemented with a thoroughly positive result. Following direct email notice to the Class (of

20,890,903 members), 443,047 valid Claim Forms, 145 exclusion requests (0.0007%), 8 valid

objections (0.00004%), and 85 total objections, inclusive (0.0004%), to the Settlement were received.

The Parties carried out the Court's Order and the Settlement should be finally approved.

II.   __FACTUAL AND PROCEDURAL BACKGROUND__[1]

Plaintiffs are individuals who used LinkedIn's Add Connections service and initiated emails

containing their names and/or likenesses, inviting others to join their professional networks on

LinkedIn. Plaintiffs assert violations of California common law and statutory rights of publicity, and

California's Unfair Competition Law (the "UCL"); and seek monetary, injunctive and other equitable

---

[1] Plaintiffs provide a brief overview here of the factual and procedural background for the Court's
convenience. A more fulsome description was included in Plaintiffs' Motion for Preliminary
Approval of Class Action Settlement (Dkt. No. 95).

1 relief against LinkedIn, as well as statutory damages pursuant to California Civil Code § 3344. (Dkt.

2 No. 70). LinkedIn answered the operative Complaint on January 9, 2015. (Dkt. No. 73).

3   On June 11, 2015, Plaintiffs moved for preliminary approval of the Settlement, and a hearing

4 was held on August 27, 2015. (Dkt. Nos. 95, 102). On September 10, 2015, the Parties submitted

5 additional materials and a Joint Statement regarding Plaintiffs' Motion for Preliminary Approval.

6 (Dkt. Nos. 102, 105). On September 15, 2015, the Court granted the Motion for Preliminary

7 Approval, appointed the undersigned as Class Counsel; appointed Gilardi & Co., LLC as Settlement

8 Administrator; approved the form and manner of notice to the Class; and scheduled a Final Approval

9 Hearing. (Dkt. No. 106).

10   Notice was disseminated on October 2, 2015, by direct email to the Settlement Class. (Burke

11 Decl. ¶4). Claims were filed throughout the claims period up to the opt-out deadline of December 14,

12 2015. (*See* Dkt. No. 106, ¶27). Pursuant to the Settlement terms, shortly after that deadline, the

13 Settlement Administrator initiated a procedure for claimants who had not established Class

14 membership to cure deficient claim forms. (Burke Decl. ¶24). As discussed *infra*, that process

15 concludes on January 20, 2016. On November 30, 2015, Class Counsel moved for attorneys' fees,

16 litigation costs, and incentive awards for the Class Representatives. (Dkt. No. 116). By February 4,

17 2016, Class Counsel will respond to objections[2] to its fee petition and report final claims data,

18 including figures from the ongoing process to cure deficient claim forms.

19 **III.   TERMS OF THE SETTLEMENT**

20   The Settlement resolves all claims of Class Members against LinkedIn. The key terms of the

21 Amended Class Action Settlement (Dkt. No. 105-2) are described below.

22   **A.   The Class Definition**

23   The Court has certified a Settlement Class, defined as follows:

24   All current and former LinkedIn members who used Add Connections to import
        information from external email accounts and to send emails to persons who were
        non-members in which the member's name, photograph, likeness and/or identity was

25   displayed between September 17, 2011 and October 31, 2014.[3]

26 _____

27 [2] LinkedIn, together with the Settlement Administrator, will also confirm according to its own
    records which objections have been submitted by verified Class Members. Diamand Decl. ¶28.

28 [3] Defendant, its subsidiaries, and affiliates and each of their respective officers, directors and
    Footnote continued on next page

1

B.   Benefits to the Settlement Class

2

1.   Prospective Relief for all United States LinkedIn Users

3   As a direct result of this Settlement, LinkedIn made significant practice changes to its

4 operations designed to ensure that United States LinkedIn users are provided adequate notice and

5 control over LinkedIn's use of their names and likenesses in Add Connections emails. The

6 disclosures on LinkedIn's website have been improved so that Class Members do not inadvertently

7 upload their address books or initiate emails to their contacts. (Declaration of Adam Kaplan In

8 Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement; Dkt. No. 105-4).

9 On the *Add Connections Import* screen, which users view before LinkedIn uploads contact

10 information for potential invitation recipients, LinkedIn now expressly states that it will "import your

11 address book to suggest connections." (*Id.*). When this suit was filed, LinkedIn made no such

12 disclosures, and merely stated "[g]et started by adding your email address." (Dkt. No. 1, ¶¶9-15; 25).

13 Additionally, pursuant to the Settlement, LinkedIn's *Add Connections Invitations* permission screen

14 has been revised to state that "[i]f someone you invite doesn't respond right away, we'll send up to

15 two reminders." (Settlement, § 2.2; Dkt. No. 105-4, at 12). Plaintiffs alleged that LinkedIn

16 previously did not disclose its practice of sending reminder emails following initial invitation emails

17 (Dkt. No. 1, ¶18), and, once the Add Connections invitations process had been initiated, LinkedIn

18 users had no practical way to stop reminder emails from being sent. (Dkt. No. 1, ¶¶32-33). Although

19 the functionality was designed to facilitate hundreds or thousands of Add Connection invitations

20 going out with modest effort – just a few clicks, undoing each invitation had to be done manually, one

21 invitation at a time, which effectively limited users' ability to do so. (*Id.*) Now, pursuant to the

22 Settlement, LinkedIn has implemented functionality allowing users who send an initial Add

23 Connection invitation to withdraw those invitations *en masse*, preventing unwanted reminder emails

24 from being sent. (Berger Decl. ¶7; Dkt. No. 105-4, at 14). This relief is of significant value to the

25 Class and achieves, prospectively, the key goals of this litigation.

26

_____

27 *Footnote continued from previous page*
employees; Class Counsel and Defendant's Counsel; and any judicial officer to whom the Action is
assigned benefits to the Settlement Class are all excluded from the Class. (Dkt. No. 106, at 2).

28

1

2.   Monetary Relief, Claims Figures and Payments to Class Members

2

LinkedIn has also agreed to establish a Settlement Fund of $13 million to be used for: (a)

3

providing compensation to Settlement Class Members; (b) payment of Settlement Administration and

4

Notice Expenses; and (c) payment of any court-approved attorney Fee Award and Incentive Awards

5

for the Class Representatives. (Settlement, §§ 2.1.1, 1.23, 8.1.1).

6

Settlement Administration expenses are capped at and are expected to be under $750,000.

7

Plaintiffs seek Incentive Awards of $1,500 for each of the nine Named Plaintiffs for a total of $13,500

8

(Dkt. No. 116) and attorneys' fees (*inclusive* of all litigation costs) in the amount of 25% of the

9

Settlement Fund, $3.25 million. (*Id.*). The portion of the Settlement Fund available for payments to

10

Authorized Claimants thus totals approximately $9 million.[4] (Should the Court award less than the

11

amounts sought in the petition for Incentive Awards and/or Attorneys' fees and costs, the difference

12

between the amounts sought and awarded will remain in the Settlement Fund to pay Authorized

13

Claimants. (Settlement, § 8.1.1)).

14

A total of 567,816 Claim Forms were submitted. (Burke Decl. ¶19). Of these, 377,104

15

claimants provided the Claim ID from their Email Notice and were thus counted as Valid Claimants.

16

(*Id.* ¶17, Weinstein Decl. ¶12). 188,738 individuals submitted Claim Forms without providing their

17

Claim ID, and instead submitted the email address they used to sign up for LinkedIn as a means of

18

validating their Class membership. (Burke Decl. ¶17).[5] On December 15, 2015, after removing 6,637

19

exact duplicate claims, the Settlement Administrator provided to LinkedIn the names and email

20

addresses submitted by the 182,101 such individuals. (*Id.* ¶¶19-20). Pursuant to the Settlement,

21

LinkedIn checked that information against records of Add Connections users between September 17,

22

2011 and October 31, 2014, and identified 1,011 duplicate Claims, (Weinstein Decl. ¶13) and an

23

additional 65,943 Authorized Claimants, (*Id.*) for a total of 443,047 valid Claims, to date.

24

25

26

27

[4] The Settlement provided for a Contingent Payment by LinkedIn of up to $750,000 if the Net Settlement Fund had been insufficient to allow for *pro rata* payments of at least $10 to each Authorized Claimant, with the payment equal to that amount necessary to increase the amount of such *pro rata* payments to Authorized Claimants to a maximum of $10. (Settlement, §2.1.2). Because the expected *pro rata* distribution is at least $16, LinkedIn's obligation to make the Contingent Payment will not be triggered.

[5] 1,974 claimants submitted claims by mail, email or fax. (Burke Decl. ¶18).

28

- 4 -

1   On January 6, 2016, in consultation with the Parties, the Settlement Administrator sent to the

2   remaining 112,022 Claimants (to the current email address they provided) a Notice of Deficiency,

3   which contained a hyperlink to a webpage created by the Settlement Administrator where claimants

4   could re-submit the email address associated with their LinkedIn account, or their unique Claim ID, in

5   order to validate their claim. (Burke Decl. ¶24, Weinstein Decl. ¶14). The deadline for claimants to

6   respond to the Notice of Deficiency is January 20, 2016. Assuming that 100% of these claims are

7   cured, the estimated total number of Authorized Claimants will be 556,469, resulting in an estimated

8   *pro rata* payment to each Authorized Claimant of no less than $16.[6] Pursuant to the proposed Plan of

9   Distribution (Settlement, § 3.1), the Authorized Claimants may, at their option, receive payments via

10   either (1) a physical mailed check, valid for ninety days, or (2) direct ACH transfer to the financial

11   institution identified on their Claim Forms. (Settlement, §§ 3.1.2(a)-(b).)

12   Any funds from checks not cashed within ninety days of issuance and funds from failed ACH

13   transfers shall revert to the Settlement Fund. (Settlement, § 3.1.2(b).) If, in consultation with the

14   Settlement Administrator, the Parties determine that such reverted funds can be distributed again *pro*

15   *rata* to the Authorized Claimants in an economically feasible manner, the funds shall be distributed

16   accordingly. (*Id.*) If not, upon Court approval, the Settlement Administrator will distribute the

17   reverted funds *pro rata* to the three *Cy Pres* recipients: Access Now, Electronic Privacy Information

18   Center ("EPIC"), and the Network for Teaching Entrepreneurship ("NFTE").[7] (*Id.*)

19   If the Settlement is approved, no portion of the Settlement Fund will revert to LinkedIn.

20   **C.   Release**

21   In exchange for the benefits provided pursuant to the Settlement, Class Members will release

22   LinkedIn and related persons and entities ("Released Parties") from all claims that were or could have

23   been asserted arising from or related to allegations in the Action regarding the alleged use of Add

24   Connections to grow LinkedIn's member base including, without limitation, (i) accessing, importing,

25   storing and/or using information from LinkedIn users' external email accounts; (ii) using LinkedIn

---

[6] Plaintiffs intend to provide the final number of Valid Claims and proposed *pro rata* payment from
the Settlement Fund in their Reply in support of Plaintiffs' Motion for Attorneys' Fees, Litigation
Costs, and Incentive Awards, which will be filed on or before February 4, 2016.

[7] The *Cy Pres* recipients are described further below at IV.D.4.d.

1   users' names, photographs, likenesses, and/or identities in emails relating to Add Connections; or (iii)

2   related disclosures, representations, and omissions. (Settlement, §§ 1.29-1.31, 4.1).

3   **IV.   ARGUMENT**

4   **A.   The Class Action Settlement Approval Process**

5   Judicial proceedings under Federal Rule of Civil Procedure 23 have led to a defined three-step

6   procedure for the approval of class action settlements:

7   (1)   Preliminary approval of the proposed settlement after submission to the
                        court of a written motion for preliminary approval;
8

9   (2)   Dissemination of notice of the proposed settlement to the class; and

10   (3)   A formal fairness hearing, or final settlement approval hearing, at which
                        class members may be heard regarding the settlement, and at which
                        evidence and argument concerning the fairness, adequacy, and
11   reasonableness of the settlement is presented.

12   *See* MANUAL FOR COMPLEX LITIGATION (Fourth) §§ 21.632, *et seq.* (2004). This procedure

13   safeguards class members' procedural due process rights and enables courts to fulfill their roles as

14   guardians of class interests. *See* 4 NEWBERG ON CLASS ACTIONS, §§ 11.22, *et seq.* (4th ed. 2002).

15   This Court completed the first step in the settlement approval process when it granted

16   preliminary approval to the Settlement. (Dkt. No. 106). The second step has been completed as well:

17   the Court-approved Notice Plan was fully implemented. By this motion, Class Counsel request that

18   the Court take the third and final step, and grant final approval of the Settlement.

19   **B.   The Court-Approved Notice Program Meets Applicable Standards and Has
                        Been Fully Implemented.**
20

21   When a proposed class action settlement is presented for court approval, Rule 23(c)(2)(B) of

22   the Federal Rules of Civil Procedure requires:

23   the best notice that is practicable under the circumstances, including individual
               notice to all members who can be identified through reasonable effort. The notice
24   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,
25   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
26   member who requests exclusion; (vi) the time and manner for requesting
               exclusion; and (vii) the binding effect of a class judgment on members under
27   Rule 23(c)(3).

28   The Notice Plan approved by this Court, which included (i) direct Email Notice to Class

1   Members using their last-known contact information on file with LinkedIn; (ii) maintenance of a

2   Settlement Website which provided links to case documents and other information needed to evaluate

3   the Settlement; and (iii) several means for Class Members to inquire about the case, the Settlement,

4   and the claims process, provided valid, due, and sufficient notice to Class Members, and constitutes

5   the best notice practicable under the circumstances. The content of the notice complied with the

6   requirements of Rule 23(c)(2)(B). The notice provided a clear description of who is a member of the

7   Class and the binding effects of Class membership. (Dkt. No. 105-2, Ex. C (Website Notice)). The

8   notice explained how to receive money from the Settlement, how to opt out of the Settlement, how to

9   object to the Settlement, how to obtain copies of papers filed in the case, and how to contact Class

10 Counsel and the Settlement Administrator with any further questions or requests. (*Id.*) Each Email

11 Notice that was disseminated contained a unique Claim ID, which Class Members could use to

12 identify themselves as Authorized Claimants.

13   The Notice also explained that the Settlement itself was filed publicly with the Court and

14 available online by visiting the Settlement Website at www.addconnectionssettlement.com. As a

15 result, every provision of the Settlement was available to each Class Member. Other relevant case

16 and settlement documents were available at the same website.

17   The Court approved this notice plan. (Dkt. No. 106, at 4). LinkedIn thus sent or cause to be

18 sent the Email Notice to each Settlement Class Member, and attempted to re-send notices that were

19 returned undeliverable, or bounced back. (*Id*., Andersen Decl. ¶¶5-6). The Court ordered the

20 Settlement Administrator, Gilardi & Co., LLC to publish the Website Notice through the Settlement

21 Website, and to develop, host, and maintain such Settlement Website. (Dkt. No 106). The Settlement

22 Administrator did so; as of January 13, 2016, 2,028,251 website visits had been recorded. (Burke

23 Decl. ¶3). The Court found that this notice was "consistent with the requirements of Rule 23 and due

24 process, and constitute[d] the best notice practicable under the circumstances." (Dkt. No. 106).

25   Class Members could submit a Claim Form either electronically, through the Settlement

26 Website, or by mail. The Claim Form requested, but did not require, that Class Members provide the

27 unique Claim ID included in each Email Notice to ensure that Class Members who, for whatever

28 reason, lacked access to the email address associated with their LinkedIn account were not improperly

1283489.8   - 7 -

1   excluded from filing a Claim. Such claimants were asked, instead, to provide the email address

2   associated with their LinkedIn account for verification. Class Members also had a variety of methods

3   by which to view relevant documents, contact the Settlement Administrator or Class Counsel, opt out

4   of the Settlement, or object to the Settlement. These methods included mail, telephone, a case-

5   specific website, and email. (Burke Decl. ¶2, Diamand Decl. ¶15, Meyer Decl. ¶4).[8]

6   For instance, the Settlement Administrator received 12,194 emails regarding the Settlement

7   (Burke Decl. ¶7), and received 143 requests for mailed copies of the Notice over the phone, by email,

8   and by mail. (*Id.* ¶12) The Settlement Administrator sent a copy of the Notice whenever one was

9   requested. (*Id.*) Class Members also contacted Class Counsel, through both email and telephone,

10   with questions and requests. (Diamand Decl. ¶¶15-19; Meyer Decl. ¶¶8-31). Class Counsel

11   answered Class Member questions and responded to requests. (*Id.*)

12   **C.   Significant Additional Notice was Achieved Through Media Coverage of the
             Settlement and Notice Program.**

13

14   In addition to the direct Notice program, broad nationwide notice of the settlement resulted

15   from spontaneous coverage by hundreds of blogs and news outlets. (Diamand Decl. ¶¶ 11-13 (citing

16   media coverage of the settlement during the Notice Period)). For example, Fortune.com's October 15,

17   2015 article: "LinkedIn Will Pay $13M For Sending Those Awful Emails," covered the Settlement

18   and Class definition, and linked to the Settlement Website.[9] Additional notice garnered through

19   accurate media coverage about the Settlement, a large proportion of which provided a link to the

20   Settlement Website, further supports a finding that Class Members received adequate Notice of the

21   Settlement.

22   Even those articles that misrepresented the scope of the Settlement Class or the terms of the

23   Settlement alerted Class Members to the Settlement, provided a link to the Settlement Website and

24   [8] The initial response to Email Notice was thoroughly positive; so much so that it initially strained
     the Settlement Website prompting a slower than expected load and rendering it temporarily
25   unavailable to some visitors after dissemination of the Email Notice. (Diamand Decl. ¶4; Meyer
     Decl. ¶ 11; Burke Decl. ¶5). Class Counsel responded to telephone and email inquiries regarding
26   the Settlement Website throughout this period. For the remainder of and throughout the Notice
     Period, the Settlement Website and online Claim Form were accessible to Class Members.
27   [9] Jeff John Roberts, *LinkedIn will pay $13M for sending those awful emails*, Oct. 5, 2015, Fortune,
     available at http://fortune.com/2015/10/05/linkedin-class-action/ (last visited Jan. 6, 2016).
28

1   were frequently corrected following contact from Class Counsel. For example, the October 7, 2015

2   Los Angeles Times Business Section reported that Class Members were eligible to receive $1,500 if

3   they filed a claim, (Diamand Decl. ¶13; Exs. 4-6), and an October 6, 2015 Inquisitr.com article stated

4   that the Settlement entitled *recipients* of LinkedIn's "spam" emails to payments of up to $1,500 each.

5   (*Id.*). These articles, like dozens of others, provided a link to the Settlement Website, where claims

6   could be submitted electronically whether or not someone had received the Email Notice or possessed

7   a unique Claim ID. Class Counsel contacted these and other reporters who published inaccurate

8   information and obtained corrections. (*Id.* ¶13). According to the Settlement Administrator, the

9   initially incorrect articles and those that were never corrected may explain the number of claims

10 submitted by claimants who may not be members of the Class. (Burke Decl. ¶22).

11   **D.   Final Approval of the Settlement is Appropriate.**

12   "The law favors the compromise and settlement of class action suits." *In re Netflix Privacy*

13 *Litig.*, No. 11-379, 2013 WL 1120801, at *3 (N.D. Cal. Mar. 18, 2013) (Davila, J.); *see also In re*

14 *High-Tech Emp. Antitrust Litig.*, No. 11-2509, 2015 WL 5159441, at *1 (N.D. Cal. Sept. 2, 2015)

15 (Koh, J.); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "[T]he decision to

16 approve or reject a settlement is committed to the sound discretion of the trial judge because [she] is

17 'exposed to the litigants and their strategies, positions and proof.'" *Hanlon v. Chrysler Corp.*, 150

18 F.3d 1011, 1026 (9th Cir. 1988) (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615,

19 626 (9th Cir. 1982)). In exercising such discretion, courts should give "proper deference to the

20 private consensual decision of the parties. . . . [T]he court's intrusion upon what is otherwise a private

21 consensual agreement negotiated between the parties to a lawsuit must be limited to the extent

22 necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching

23 by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,

24 reasonable and adequate to all concerned." *Id.* at 1027 (citation and quotations omitted). Here,

25 relevant factors support final approval of the Settlement.

26   "[T]here is an overriding public interest in settling and quieting litigation" and "[t]his is

27 particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir.

28 1976); *see also Utility Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989).

1   In evaluating a proposed class action settlement, the Ninth Circuit has recognized that:

2   [T]he universally applied standard is whether the settlement is fundamentally fair,
     adequate and reasonable. The district court's ultimate determination will
3   necessarily involve a balancing of several factors which may include, among
     others, some or all of the following: the strength of plaintiffs' case; the risk,
4   expense, complexity, and likely duration of further litigation; the risk of
     maintaining class action status throughout the trial; the amount offered in
5   settlement; the extent of discovery completed, and the stage of the proceedings; the
     experience and views of counsel; the presence of a governmental participant; and
6   the reaction of the class members to the proposed settlement.

7   *Officers for Justice*, 688 F.2d at 625 (citations omitted); *accord Torrisi v. Tucson Elec. Power Co.*, 8

8   F.3d 1370, 1375 (9th Cir. 1993).

9   **1.   The Settlement is the Product of Arm's-Length Negotiations and,
                               Therefore, Presumptively Fair and Reasonable.**
10

11   "'Before approving a class action settlement, the district court must reach a reasoned

12   judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion

13   among, the negotiating parties . . .'" *City of Seattle*, 955 F.2d at 1290 (quoting *Ficalora v. Lockheed*

14   *Cal. Co.*, 751 F.2d 995, 997 (9th Cir. 1985)). "'Where a settlement is the product of arms-length

15   negotiations conducted by capable and experienced counsel, the court begins its analysis with a

16   presumption that the settlement is fair and reasonable.'" *Wakefield v. Wells Fargo & Co.*, No. 13-

17   5053, 2015 WL 3430240, at *4 (N.D. Cal. May 28, 2015) (Beeler, J.) (quoting *Garner v. State Farm*

18   *Mut. Auto Ins. Co.*, 2010 WL 1687832, *13 (N.D. Cal. Apr. 22, 2010)); *Linney v. Cellular Alaska*

19   *P'ship*, No. 96-3008, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997) (Jensen, J.), *aff'd*, 151 F.3d

20   1234 (9th Cir. 1998) ("The involvement of experienced class action counsel and the fact that the

21   settlement agreement was reached in arm's length negotiations, after relevant discovery had taken

22   place create a presumption that the agreement is fair."). The active participation of Antonio Piazza of

23   Mediated Negotiations, a neutral mediator with extensive experience mediating complex litigation,

24   further supports a finding of fairness. *See Satchell v. Fed. Express Corp.*, Nos. 03-2659, 03-2878,

25   2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("assistance of an experienced mediator in the

26   settlement process confirms that the settlement is non-collusive"); *In re Indep. Energy Holdings PLC*

27   *Sec. Litig.*, No. 6689, 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) ("[T]he fact that the

28   Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private

1   mediator experienced in complex litigation, is further proof that it is fair and reasonable.").

2   All Parties were represented throughout extensive arm's-length negotiations by counsel

3   experienced in the prosecution, defense, and settlement of complex consumer and digital privacy

4   cases and class actions. (*See* Dkt. Nos. 96-98 (Diamand, Russ, and Berger Declarations in support of

5   Motion for Preliminary Approval). The Settlement is, therefore, presumptively fair.

6   ## 2.   The Litigation Risks Favor Final Approval.

7   The potential risks attendant on further litigation also support final approval. If this case

8   continued to be litigated, the contested factual and legal issues of liability under the state right of

9   publicity laws and the UCL, along with contested class certification issues, would be extensive.

10   LinkedIn has vigorously contested its liability, arguing that its terms of service and privacy policies,

11   as well as LinkedIn users' knowledge based upon receipt of Add Connections emails from other

12   members and other potential forms of notice, would be sufficient for a jury to find that the proposed

13   Class consented to the challenged conduct. LinkedIn also argues that the single publication rule may

14   prevent Class Members from challenging reminder emails separately from initial invitation emails

15   because the communications constituted a "single integrated publication." (Diamand Decl. ¶22).

16   LinkedIn has also raised arguments under the First Amendment and Article III of the Constitution, the

17   Communications Decency Act, and California's "Incidental Use" doctrine which, although rejected

18   by this Court, were preserved for appeal. (Dkt. Nos. 47, 69 (Motions to Dismiss Orders)).

19   LinkedIn also vigorously would contest class certification claiming that injury and consent are

20   inherently individualized issues. *See Fraley v. Facebook, Inc*., 966 F. Supp. 2d 939, 942-43 (N.D. Cal.

21   2013) (Seeborg, J.) (granting final approval of class-wide settlement of the UCL and Cal. Civ. Code §

22   3344 claims, recognizing "substantial burden" of quantifying class-wide injury, and "significant

23   risk . . . that class certification would prove unwarranted in light of consent issues."). Class Counsel

24   maintain that their claims are meritorious and could succeed at trial. Nonetheless, the value to the

25   Class of a swift, certain recovery, plus the prospective relief obtained through this Settlement,

26   balanced against the real risk of no recovery or one significantly delayed through litigation and

27   appeals, weighs in favor of the Settlement.

28

NOTICE OF MOTION AND
MOTION ISO FINAL SETTLEMENT APPROVAL
CASE NO. 13-CV-04303-LHK

1

3.   The Recommendation of Experienced Counsel Favors Approval.

2   The judgment of experienced counsel regarding the Settlement also carries considerable

3   weight. *See Linney*, 1997 WL 450064, at *5; *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18

4   (N.D. Cal. 1980); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 257 (N.D. Cal. 2015)

5   (quoting *Rodriguez v. West Pub. Corp.*, 2007 WL 2827379, at *8 (C.D. Cal. Sept. 10, 2007) ("The

6   trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties.")

7   "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd*

8   *v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979). Here, Plaintiffs' counsel endorse this

9   Settlement as fair, adequate and reasonable. *See, e.g.*, Diamand Decl. ¶2; Meyer Decl. ¶2. This factor

10 also weighs in favor of approval.

11

4.   The Class Response Favors Final Approval.

12   A court may appropriately infer that a class settlement is fair, reasonable, and adequate when

13 few Class members object to it. *See Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir.

14 1977); *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("the

15 absence of a large number of objections to a proposed class settlement action raises a strong

16 presumption that the terms of a proposed class action settlement are favorable to the class members.").

17 Indeed, a court can approve a class action settlement over the objections of a significant percentage of

18 class members. *See Boyd v. Bechtel*, 485 F. Supp. at 624 ("A settlement is not unfair simply because a

19 large number or a certain percentage of class members oppose it, as long as it is otherwise fair,

20 adequate, and reasonable"); *City of Seattle*, 955 F.2d at 1291-96.

21   Class Counsel received a tremendous positive response to the Settlement; hundreds of

22 thousands of Class Members filed Claims, evidencing their support of the Settlement, and many wrote

23 to Class Counsel expressing their approval of the settlement, and their disapproval of LinkedIn's

24 conduct prior to implementation of the prospective relief. For example, one Class Members wrote, "I

25 did not agree to the two follow-up emails. That persistence was annoying." (Diamand Decl. ¶20). Out

26 of more than 20.8 million Class Members, only 85 submitted documents that could be construed as

27 objections (0.0004% of the Class). (Burke Decl. ¶29). Of these possible objectors, 19 supported the

28

1   goals of the litigation and objected to LinkedIn's conduct, rather than specifically to the Settlement.[10]

2   The Settlement Administrator has reviewed these documents for compliance with the Court's Order

3   (Dkt. No. 106) for submitting a valid objection: 8 of the filed objections were valid.[11] (Burke Decl. ¶

4   27). 145 individuals have sought to opt out of the Settlement (0.0007% of the Class). (*Id.* ¶30).

5   The "low rates of objections and opt-outs are indicia of approval of the class." *High-Tech*,

6   2015 WL 5159441, at *3 (quotation and citation marks omitted) (finding indicia of approval where 11

7   class members out of 64,466, or about 0.017% submitted objections, and "less than 0.9%" opted out);

8   *Fraley*, 966 F. Supp. 2d at 947 (approving settlement where 29 of 150 million Class Members filed

9   valid objections, and 6,825 opted out); *Sugarman v. Ducati N. Am., Inc.*, No. 10-5246, 2012 WL

10   113361, at *3 (N.D. Cal. Jan. 12, 2012) (objections from 42 of 38,774 class members—more than

11   0.1 %,—is a "positive response"); *Churchill Vill., LLC v. GE*, 361 F.3d 566, 577 (9th Cir. 2004)

12   (affirming district court's approval of settlement where 45 of 90,000 class members objected to the

13   settlement (.05 %), and 500 class members opted out (0.56%)).

14   The objections and letters stating concerns about the Settlement fall into eight categories:

15   Objections to (a) the litigation itself; (b) the monetary relief; (c) the *cy pres* provisions; (d) the

16   prospective relief; (e) the Notice; (f) the claims process; (g) the Release; and (h) the requested

17   attorneys' fees and incentive awards.[12] None raises meritorious concerns. *See Browne v. Am. Honda*

18   *Motor Co.*, No. 9-6750, 2010 WL 9499072, at *15 (C.D. Cal. July 29, 2010) ("[O]pposition does not

19   necessitate disapproval of the settlement. Instead, the court must independently evaluate whether the

20

21   [10] For instance, objector Gerald Monge wrote, "Numerous acquaintances of mine were offended that I released their names to LinkedIn (Jue Decl., Ex. 49); " Lindsay Finnie wrote, "I agree with the terms of the lawsuit and expect reimbursement" (*Id.*, Ex. 19); Rustin Coburn wrote "I . . .

22   seriously do not like that LinkedIn used the 'Add Connections' service to import contacts. . . This is unethical and hopefully illegal (*Id.*, Ex. 12);" Diane Kushmer wrote "I see this as an invasion to my

23   privacy and to the privacy of the people in my contacts (*Id.*, Ex. 40). Additional objectors who appear to support the litigation and/or the Settlement are June Barrett, Anne Butman, Shataia

24   Denise Blocker, Antuan Booker, Nora Cordero, Elizabeth Garcia, Julius Gonzala, Christopher H. Peters, Donata Ray, Youssef Rifai, Carol Stocks, Scott L. Teague, Efrain Valdez, Melanie Wobig,

25   Quintena Woodward. (*Id*, Exs. 2, 10, 6-7, 13, 22, 24, 53, 57, 60, 68, 71, 75, 81-82)).

    [11] Such procedurally deficient objections should be overruled on that basis alone. Should the Court
26   wish to consider their substance, however, they are addressed herein.

    [12] Objections to Class Counsel's request for Attorneys' Fees and Incentive Awards will be
27   addressed in the Reply in support of Class Counsel's fee petition, to be filed on or before February 4, 2016.

28

1   objections being raised suggest serious reasons why the proposal might be unfair.") (citation

2   omitted)). This positive response from the Class strongly favors Settlement approval.

3   **a.   Objections to the Litigation Itself**

4   The majority of objectors[13] objected to the case having been brought in the first place. These

5   objections do not comment on any aspect of the Settlement, but rather oppose the claims alleged as

6   being frivolous, and in large part challenge the propriety of any monetary recovery for violation of

7   digital privacy rights. Because such objections appear to support no recovery for the Class, these

8   objectors' interests apparently are adverse to the Class, and the objections should be overruled. *See*

9   *Ko v. Natura Pet Prods., Inc.*, No. 9-2619, 2012 WL 3945541, at *6 (N.D. Cal. Sept. 10, 2012)

10   (Armstrong, J.) ("[A]n objection based on a concern for the Defendants and an apparent non-

11   substantive assessment of the frivolity of the action are not germane to the issue of whether the

12   settlement is fair."); *Wren v. RGIS Inventory Specialists*, No. 6-5778, 2011 WL 1230826, at *13 (N.D.

13   Cal. Apr. 1, 2011) (Spero, J.) (overruling objections submitted that "do not go to the fairness of the

14   settlement").

15   **b.   Objections to the Monetary Relief**

16   Eleven individuals objected on the basis (in whole or in part) that the Settlement should be

17   rejected because it should be larger: Gregory Paul Berning, Daniel Brown/Jenny Hill, Susan Entin,

18   Johnnie Graham, Dylan Jacobs, Mary Means, Darline S. Spencer, Gessica Still, Olen York, and

19   Farage Yuzupov.[14] (Jue Decl., Exs. 5, 9, 18, 26, 33, 47, 66-67, 84-85).

20   However, none of these Class Members adequately account for the risks and delays involved

21   ────────────────────────

22   [13] These 45 objections were filed by Jamie Anderson-Stewart, Claude Baudoin, Erich Berg,
     Boyan Boyanov, William Calderwood, Ian Cornell, BC Crothers, Mary C. Don, Stephen Foerster,
     Melodie Kate Ford, Gary Gill, Julie Gordon, Kevin Grell, Kira Harris, Ashley Houston, Mark

23   Howard, Michael Hughes, Cassandra Jones, Roland Klose, Chinmay Kommuru, Anthony Lee
     Krauch, August E. Lasseter, Timothy Lezon, Tom Lucas, Timothy McDonald, William F.

24   McNamara, Keith Miller, Donald G. Muldoon, Caleb T. Nelson, Robert Petersen, Lyle Polyak,
     Philip Reinemann, Karrie Reuter, John Rollinson, Doug Smith, Gabriel L. Smith, Ken Stuczynski,

25   Jeanine Thompson, Nozima Tojimatova, Carol A. Tomczyk, K. Weeks, Frederick Wells, Steven
     White, Daniel Whitinger, and Philip Wrona. (Jue Decl., Exs. 1, 3, 4, 8, 11, 14-15, 17, 20-21, 23,

26   25, 27-28, 30-32, 34-35, 37-38, 42, 46, 48, 50-51, 54 55, 58-59, 62, 64-65, 69, 72-74, 77-80, 93).
     [14] Of these objectors, Yuzupov alone stated that the actual harm he suffered exceeded the amount of

27   the expected *pro rata* payment. (Jue Decl., Ex. 85). Gloria Larravide (*Id.*, Ex. 41), objected that
     too much money was recovered for the Class.

28

1   in proceeding to trial. They ignore that the Settlement provides the Class with a timely, and certain

2   cash recovery, plus meaningful, tailored, long-term prospective relief, while a trial—and any

3   subsequent appeal—is highly uncertain, would entail significant additional costs, and indubitably

4   would substantially delay any recovery achieved. "'[T]he very essence of a settlement is

5   compromise, a yielding of absolutes and an abandoning of highest hopes.'" *Linney v. Cellular Alaska*

6   *P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting *Officers for Justice*, 688 F.2d at 624) (affirming

7   settlement approval). "Estimates of what constitutes a fair settlement figure are tempered by factors

8   such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery

9   (often measured in years)." *High-Tech*, 2015 WL 5159441, at *4 (citation and quotation marks

10   omitted). Thus, "[t]he fact that a proposed settlement may only amount to a fraction of the potential

11   recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should

12   be disapproved." *Id.*

13   A number of objectors (Brown/Hill, House, Jacobs, and Means. (Jue Decl., Exs. 9, 29, 33,

14   47)), contend that the result here is unfair and inadequate because California's statutory right of

15   publicity, Cal. Civ. Code § 3344, provides for $750 in statutory damages, much more than the

16   minimum $16 *pro rata* payment available through this Settlement. Objector Mary Means, for

17   example, argues that the statutory penalty alone would have resulted in a recovery of $1.56 billion for

18   the 20.8 million members of the class. (Jue Decl., Ex. 47, at 4). Such a class-wide recovery is highly

19   unlikely. Indeed, in overruling similar objections regarding the settlement of class-wide claims under

20   Cal. Civil Code § 3344, Judge Seeborg of this District explained that "[g]iven the class size, it is not

21   plausible that class members could recover the full amount of the statutory penalties . . . as such a

22   judgment would pose due process concerns and threaten [the defendant's] existence." *Fraley*, 966 F.

23   Supp. 2d at 944; *see also Parker v. Time Warner Entm't Co., L.P*., 331 F.3d 13, 22 (2d Cir. 2003)

24   ("[T]he potential for a devastatingly large damages award, out of all reasonable proportion to the

25   actual harm suffered by members of the plaintiff class, may raise due process issues."). The

26   Settlement also obviates the risk that any individual plaintiff must take in pursuing a claim under Cal.

27   Civ. Code § 3344, which contains a fee-shifting provision.

28   This result is particularly impressive in light of other recent class action settlements in the area

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1   of digital privacy, which have achieved lesser monetary relief when measured against the size of the

2   settlement class. *See Fraley*, 966 F. Supp. 2d at 949 (granting final approval of $20 million to 124

3   million member class); *In re Google Referrer Header Privacy Litig.,* No. 10-4809, 2015 WL 1520475

4   (N.D. Cal. Mar. 31, 2015) (Davila, J.) (granting final approval of $8.5 million to 129 million member

5   class); *In re Netflix Privacy Litig.*, No. 11-379, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013) (Davila,

6   J.) (granting final approval of $9 million to 62 million member class); *In re Google Buzz Privacy*

7   *Litig.*, No. 10-672, 2011 WL 7460099 (N.D. Cal. June 2, 2011) (Ware, J.) (granting final approval of

8   $8.5 million to 37 million member class).

9   In addition, pursuant to the Settlement, the monetary relief will be allocated *pro rata* based

10 upon the number of valid claims that are submitted. Such *pro rata* distributions are "cost-effective,

11 simple, and fundamentally fair." *High-Tech*, 2015 WL 5159441, at *8 (quoting *In re Airline Ticket*

12 *Comm'n Antitrust Litig.*, 953 F. Supp. 280, 285 (D. Minn. 1997).

13   That certain Class Members evaluate the risks and potential benefits differently, or would

14 prefer to go to trial despite the risks, does not prevent the Court from granting final approval. *See*

15 *Browne*, 2010 WL 9499072, at *15. The objections to the monetary relief should be overruled.

16   **c.   Objections to the Prospective Relief**

17   Class members Mary Means and Olen York object that the Settlement's prospective relief

18 provisions are insufficient. (Jue Decl., Exs. 47, 84). Specifically, Means claims that "[t]he

19 [p]rospective [r]elief is a [s]cam" because:

20   •   LinkedIn's disclosure that "We'll import your address book to suggest connections
            and help you manage your contacts" does not disclose that data will be "used by
21   LinkedIn for hundreds of millions of dollars in profits;"

22   •   "LinkedIn fails to inform the consumer they intend to sell the data collected on the
            open market for profit;"
23

24   •   LinkedIn "fails to inform class members LinkedIn will collect the data of the people in
            the class member's email contact list and LinkedIn will sell it for profit and/or expose
            it to a security lapse;" and
25

26   •   The newly-implemented feature allowing members who invite contacts to connect
            through add connections to withdraw invitations, thereby stopping reminder emails
            from being sent "pre-existed the settlement."
27

28 (Jue Decl., Ex. 47, at 5-6).

NOTICE OF MOTION AND
MOTION ISO FINAL SETTLEMENT APPROVAL
CASE NO. 13-CV-04303-LHK

1   The majority of Means' objections relating to the injunctive provisions are premised on

2   misunderstandings of the allegations at issue here. LinkedIn's profits through the alleged

3   violation of Plaintiffs' rights of publicity are unrelated to Ms. Means' claims of LinkedIn's

4   "sell[ing of] data collected on the open market for profit" and none of the allegations or claims

5   relate to any actual or perceived likelihood of a "security lapse" on the part of LinkedIn.

6   Finally, Means claims that the LinkedIn feature allowing users to withdraw invitations and

7   stop reminder emails "pre-existed the settlement." The pre-existing functionality may have

8   allowed a user to open each individual invitation and withdraw it to stop reminder emails from

9   being sent, (*see* Dkt. No. 70, ¶85), but this process needed to be repeated for each individual

10 invitation and could take a LinkedIn user hours to stop reminders from being sent in the event the

11 member inadvertently sent hundreds of connection invitations. (*Id.*) "No functionality on the

12 LinkedIn website allows a user to withdraw all invitations at once." (*Id.* at ¶86.) This is the

13 functionality that the Settlement Agreement requires of LinkedIn; functionality that was not

14 available until recently. (*See* Settlement, § 2.2.4; Dkt. No. 105-4).

15   York objects that "LinkedIn should discontinue the 'Add Connections' tool from the

16 members' package and send apologies to those contacted." (Jue Decl. Ex. 84). While it is

17 undoubtedly true that discontinuing "Add Connections" would eliminate "any concern of

18 misappropriation, or lack of consent, or commercial exploitation, . . . 'the question we address is

19 not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate

20 and free from collusion.'" *Fraley*, 996 F. Supp. 2d at 944-45 (quoting *Hanlon*, 150 F.3d at 1027).

21   These objections should be disregarded by the Court.

22   **d.   Objections to the Cy Pres Provisions**

23   Objections to the *cy pres* provisions of the settlement fall into two categories: to the

24 Parties' selection of *Cy Pres* Recipients (brought by objectors Susan House, Dylan Jacobs, Daniel

25 Pratt, and Hannah Tanner); and to a provision for a *cy pres* distribution at all (raised by Dylan

26 Jacobs, Daniel Pratt, and Mary Means). The objections lack merit and should be overruled.[15]

27 [15] (Jue Decl., Exs. 29, 33, 47, 56, 70). The proposed *Cy Pres* Recipients were identified in both the
    Settlement (Settlement § 1.12), and the Website Notice. The objection of Dylan Jacobs stating the
28   *Footnote continued on next page*

                                          NOTICE OF MOTION AND
                                    MOTION ISO FINAL SETTLEMENT APPROVAL
                                          CASE NO. 13-CV-04303-LHK

1   The *Cy Pres* Recipients were selected based upon the alignment of their missions to the

2   digital privacy and career-related reputational issues at stake in this case. *See Dennis v. Kellogg*

3   *Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (approval of *cy pres* distribution requires "a driving nexus

4   between the plaintiff class and the *cy pres* beneficiaries."). As discussed above, the *Cy Pres*

5   Recipients are Access Now, which "defends . . . digital rights,"[16] EPIC, which focuses on

6   "protect[ing] privacy, freedom of expression, and democratic values,"[17] and NFTE, which

7   "inspire[s] young people from low-income communities to stay in school, to recognize business

8   opportunities and to plan for successful futures."[18] *C.f. Nachshin v. AOL, LLC*, 663 F.3d 1034,

9   1041 (9th Cir. 2011) (observing, in connection with litigation over "unlawful advertising

10   campaign that exploited users' outgoing e-mail messages" that "non-profit organizations that

11   work to protect internet users from fraud, predation, and other forms of online malfeasance"

12   would be appropriate *cy pres* beneficiaries).

13   **Access Now.** Tanner and House incorrectly object that Access Now is not aligned with

14   the interests of this Class because it devotes only 2% of its program expenses to activities within

15   the United States. (Jue Decl., Ex. 29, at 5; Ex. 70, at 5). In fact, Access Now devotes more than

16   70% of its expenditures to activities in the US.[19]

17   **EPIC.** Tanner and House object to EPIC's selection by the Parties on the grounds that

18   EPIC is a "repeat player" which should be required to account for its use of previous *cy pres*

19   awards before gaining entitlement to another. (*Id.*). Prior receipt of *cy pres* awards is no bar to

20   EPIC's selection here. Indeed, that history only serves to reinforce EPIC's suitability: "EPIC has

21   demonstrated that it is a well-established and respected organization within the field of internet

22   _____

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23   contrary (Jue Decl., Ex. 33, at 3) should be overruled.

[16] *See* Access Now, *About Us*, https://www.accessnow.org/ (last visited Dec. 30, 2015).

24   [17] *See* Electronic Privacy Information Center, *About EPIC*, https://epic.org/epic/about.html (last visited Dec. 30, 2015).

25   [18] *See* Network for Teaching Entrepreneurship, *Mission*, http://www.nfte.com/what/mission (last visited Dec. 30, 2015).

26   [19] Access's total program expenditures for tax year 2014 were $2,892,307. Deducting the $806,801 spent outside of the US, approximately $2,085,509, or 72% of Access's expenditures were in the

27   US. Further, Tanner's conclusory assertion that Class Counsel has a "shadowy" connection to Access (Jue Decl., Ex. 70) is unfounded, and should be disregarded by the Court.

28

1   privacy." *Google Buzz*, 2011 WL 7460099, at *1. Further, EPIC regularly posts updates

2   regarding its activities, such as providing research and expert commentary (including at

3   Congressional hearings) on emerging privacy issues, submitting comments on behalf of the public

4   in regulatory proceedings, and filing *amicus curiae* briefs in appellate courts, including the U.S.

5   Supreme Court, in support of policies favorable to consumer privacy.[20] As a national organization

6   focused on precisely the kinds of privacy issues involved in this litigation, EPIC is an eminently

7   suitable recipient for any *cy pres* distribution resulting from this Settlement. The objections lack

8   merit.

9   **NFTE.** Tanner and House also specifically object to the Parties' selection of NFTE on

10   the grounds that LinkedIn's founder, Reid Hoffman, is a member of NFTE's Board of Overseers.

11   The Board of Overseers is a 25-person group, separate from NFTE's 18-person Board of

12   Directors, is composed "of business, academic and community leaders committed to helping

13   NFTE through their unique expertise and their vast networks."[21] Class Counsel have investigated

14   and found no evidence that either Mr. Hoffman or LinkedIn have any pecuniary interest in funds

15   provided to NFTE. Mr. Hoffman's role as a source of expertise and access to the field of internet

16   technology does not create a conflict of interest that required disclosure. *C.f. Lane v. Facebook,*

17   *Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (overruling objections based upon appointment of

18   defendant's employee to Board of Directors of non-profit created to distribute *cy pres* funds from

19   settlement).

20   Indeed, because the interests of the Class are directly aligned, both geographically and

21   substantively, with the missions of these *Cy Pres* Recipients, a *cy pres* distribution of the Net

22   Settlement Fund would be appropriate and provide the "next-best" recovery for the Class. *See*

23   *Lane*, 696 F.3d at 819-20, quoting *Nachshin*, 663 F.3d at 1036 (affirming approval of exclusively

24   *cy pres* settlement; holding that to find settlement fair, reasonable, and adequate requires that *cy*

25   *pres* recipients "account[] for the nature of the plaintiffs' lawsuit, the objectives of the underlying

26   _____

[20] *See generally* https://www.epic.org/.

27   [21] NFTE, *In Memoriam, John C. Whitehead*, founder of NFTE's Board of Overseers, available at
     https://nfte.com/in-memoriam-john-c-whitehead (last visited Jan. 8, 2016).

28

NOTICE OF MOTION AND
MOTION ISO FINAL SETTLEMENT APPROVAL
CASE NO. 13-CV-04303-LHK

1   statutes, and the interests of the silent class members . . . ."). Nevertheless, in an effort to achieve

2   the *best* practicable distribution, the Settlement incorporates meaningful safeguards to prevent

3   funds from being distributed through *cy pres*. It imposes strict prerequisites that the Parties, the

4   Settlement Administrator, and the mediator, first, must determine that a *pro rata* distribution to

5   Authorized Claimants is not economically feasible, and, second, that Court approval be obtained,

6   before the Net Settlement Fund may be distributed through *cy pres.* (Settlement, § 3.1.3).

7   Similarly, funds unclaimed by such Authorized Claimants (from checks not cashed or failed ACH

8   deposits) may be distributed through *cy pres*, only if the Settlement Administrator determines that

9   a secondary distribution of such funds *pro rata* to Authorized Claimants is not economically

10   feasible. (Settlement, § 3.1.2(b)). Because the *cy pres* provisions of the Settlement are

11   fundamentally fair, reasonable, and adequate, these objections should be overruled.

12   **e.   Objections to the Notice**

13   Six objectors: Brown/Hill, House, Means, Jorge Pardo, and Tanner, submitted objections to

14   the content of the Notice disseminated to the Class. (Jue Decl., Exs. 9, 29, 47, 52, 70).

15   House, Means, Brown, and Hill object that the Notice was inadequate because the text of the

16   Website Notice failed to state that Class Members could potentially recover $750 in statutory

17   damages for LinkedIn's alleged violation of Cal. Civ. Code § 3344. House adds that a potential

18   recovery of punitive damages, attorneys' fees, and statutory penalties under the UCL[22] should all have

19   been described, as well. Means speculates that Class Counsel purposefully omitted reference to Cal.

20   Civ. Code § 3344 in the Email and Website Notice in order to prevent Class Members from realizing

21   the value of their claims. (Jue Decl., Ex. 47, at 10).[23]

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22   [22] In fact, the UCL provides for recovery of such damages only in circumstances not applicable here,
     such as in an action by certain governmental entities, or to challenge conduct directed to one or
23   more senior citizens or disabled persons. *See* Cal. Bus. and Prof. Code §§ 17206; 17206.1.

     [23] Pardo objects that the Notice failed to state how compensation to Class Members would be
24   calculated or the criteria for accepting claims. (Jue Decl., Ex. 52). In fact, the Notice stated that
     funds would be distributed *pro rata* based on the number of approved claims, and that to be
25   approved, the claim need only be submitted, timely, by a Class Member. (Dkt. No. 105-2, Ex. C §§
     6, 8). Brown and Hill also object that Class Members could not estimate their *pro rata* share of the
26   Settlement because the Class size was not disclosed in the Notice. This information was contained
     in the Preliminary Approval Order, posted to the Settlement Website (Dkt. No. 106, at 2; Burke
27   Decl. ¶2). Even so, such estimates were not possible until the Settlement Administrator calculated
     the final number of Authorized Claimants.

28

1   House and Means also argue that the Settlement Website is deficient, asserting that it fails to

2   comply with the Procedural Guidance for Class Action Settlements ("Guidance"). The Guidance

3   states that a Settlement Website should provide links to "motions for approval and for attorneys' fees

4   and any other important documents in the case," with instructions how to access such documents via

5   PACER or by visiting the Court.[24] House argues that the Final Approval motion should have been

6   posted during the Notice Period. (*Id*., Ex. 29, at 4).[25] Means argues that the Preliminary Approval

7   Motion should have been posted. (*Id.*, Ex. 47, at 10). Neither contends that the Notice otherwise

8   failed to comply with the Guidance. Each objection lacks merit and should be overruled.

9   Rule 23 requires that Notice of a settlement describe "(i) the nature of the action;" (ii) "the

10   definition of the class certified;" (iii) "the class claims, issues, or defenses;" (iv) "that a class member

11   may enter an appearance through an attorney if the member so desires;" (v) "that the court will

12   exclude from the class any member who requests exclusion;" (vi) "the time and manner for requesting

13   exclusion;" and (vii) "the binding effect of a class judgment on members" Fed. R. Civ. P. 23(c)(2)(B).

14   Generally, notice of a settlement is adequate if it "describes the terms of the settlement in sufficient

15   detail to alert those with adverse viewpoints to investigate and to come forward and be heard."

16   *Churchill Vill., L.L.C*, 361 F.3d at 575 (quotations and citation omitted). It is unsurprising, therefore,

17   that courts in this District have routinely approved class action settlements where claims for statutory

18   damages were alleged, but specific notice of potentially recoverable statutory penalties was nowhere

19   posted to the settlement website. *See e.g., Keller v. Nat'l Coll. Athletic Ass'n (NCAA)*, No. 9-1967,

20   2015 WL 5005901, at *7 (N.D. Cal. Aug. 19, 2015) (Wilken, J.) (granting final approval to class

21   action asserting Cal. Civ. Code § 3344 claims where notice[26] did not identify statute or potential

22   statutory penalties); *Arendas v. Citibank*, No. 11-6462 (Breyer, J.), at Dkt. No. 41 (granting final

23   approval where notice[27] did not specify statutory cause of action or statutory penalties recoverable

24   under Consumer Legal Remedies Act); *Bayat v. Bank of the W*., No. 13-2376, 2015 WL 1744342, at

25   ---

[24] *See* http://www.cand.uscourts.gov/ClassActionSettlementGuidance

26   [25] Pursuant to this Court's Order, Dkt. No. 106, it shall be posted on the day that it is filed.

[26] Available at http://www.ncaa-ea-likeness-settlement.com/.

27   [27] *See also* settlement website, available at http://www.arendasoverdraftfeesettlement.com/
(omitting motion for preliminary approval from case documents).

28

1   *2 (N.D. Cal. Apr. 15, 2015) (Chen, J.) (granting final approval where statutory penalties recoverable

2   under Telephone Consumer Protection Act not specified in notice[28]); (Diamand Decl. Exs. 7-9).[29]

3   The content of the Notice, including the list of documents provided on the Settlement Website,

4   was approved by the Court, and met the requirements of Rule 23. Indeed, although not required by

5   the Federal Rules, the Guidance, or independently in this Court's Order approving the Notice plan,

6   information regarding statutory penalties and other recoverable damages in this action *was* available

7   on the Settlement Website. For example, the Court's Order on LinkedIn's Second Motion to Dismiss,

8   which was posted to the Settlement Website throughout the Notice Period (Burke Decl. ¶2) discussed

9   the statutory damages available under Cal. Civ. Code § 3344 at length, and referred explicitly to the

10 $750 minimum statutory damages in a section entitled "Minimum Statutory Damages Under Section

11 3344." (Dkt. No. 69, at 21-27). Likewise, the operative complaint which was posted to the Website

12 (Burke Decl. ¶2) stated that this action seeks recovery of $750 in statutory penalties on behalf of each

13 Class Member. (Dkt. No. 70, ¶161). Thus, the objections based on the purported failure to disclose

14 the value of Class Members' claims lack a factual or legal basis.

15   Nor does an adequate Notice program require posting motions for preliminary approval to the

16 settlement website. Websites for class settlements recently approved in this District have not done so.

17 *Keller*, 2015 WL 5005901, at *7; *Arendas*, No. 11-6462, at Dkt. No. 41; *Bayat*, 2015 WL 1744342, at

18 *2; (Diamand Decl. ¶¶ 23-25; Exs. 7-9).[30] Because the Notice here was implemented in full

19 compliance with this Court's Order (Dkt. No. 106), these objections should be disregarded.

20 ### f.   **Objections to the Claims Process**

21   Three objectors: House, Means, and Kin Wah Kung contend, without merit, that the Claims

22 Process was unfair. (Jue Decl., Exs. 29, 47, 39). Kung and House object that claimants did not know,

23 in advance of filing a Claim, whether or in what amount they would receive a payment. Kung

24 describes the situation as a "Catch-22," in which Class Members were asked to sign away their rights

25 ---

[28] Available at http://www.bayattcpasettlement.com/.

26 [29] For the same reasons, Means' objection that the Notice is deficient because it does not expressly
state that the Court cannot change the terms of the Settlement should be rejected.

27 [30] Although not required by Court Order or the mandates of Rule 23, the Motion for Preliminary
Approval was posted to the Settlement Website on January 6, 2016. (Burke Decl. ¶ 31).

28

1   without knowing whether they would "be entitled to anything at all." (Jue Decl., Ex. 39, at 2). These

2   objections lack merit for several reasons.

3   Since the Settlement provides for *pro rata* payments based on the *final* number of Authorized

4   Claimants, the distribution amount was not calculable during the Notice Period. This, however, does

5   not make the Court-approved Notice inadequate. *See, e.g., High-Tech*, 2015 WL 5159441, at *7

6   ("The Notice's failure to include the allocation formula's denominator, which could not have been

7   calculated with precision at the time the Notice was approved, was therefore not error."); *Valerio v.*

8   *Boise Cascade Corp.*, 80 F.R.D. 626, 637 (N.D. Cal. 1978) *aff'd*, 645 F.2d 699 (9th Cir. 1981) ("The

9   aggregate amount available to all claimants was specified and the formula for determining one's

10   recovery was given. Nothing more specific is needed."). This objection should be disregarded.

11   House, Means, and Tanner object that the Claim Form, in conjunction with the Notice, was

12   designed to deter Class Members from filing claims. They assert that claimants were required to

13   make the following attestation under penalty of perjury in order to submit a claim: "I believe I was

14   injured by [LinkedIn's] use of my name or profile picture [in reminder emails]." House specifically

15   objects that Class Members were exposed to possible perjury charges without the advice of counsel,

16   while Means and Tanner object that the term "injured" was not defined in the Notice. These

17   objections lack merit. Class Members had a variety of mechanisms for obtaining advice regarding the

18   attestations on the Claim Form. Indeed, Class Counsel were prepared to, and did, provide

19   clarification of the meaning of this and any term whenever such information was requested. (Meyer

20   Decl. ¶21). Further, information regarding the types of "injury" at issue in this litigation was readily

21   available on the Settlement Website. For example, the Court's Order on LinkedIn's First Motion to

22   Dismiss, which was posted to the Settlement Website throughout the Notice Period (Burke Decl. ¶2)

23   discussed injury to Plaintiffs resulting from the challenged conduct in significant detail in connection

24   with a challenge to Plaintiffs' Article III standing. (Dkt. No. 47, at 16-23). Likewise, the operative

25   Complaint, which was posted to the Website (Burke Decl. ¶2) stated with respect to each of the nine

26   Named Plaintiffs that LinkedIn's conduct caused the Plaintiff "worry, concern, embarrassment,

27   frustration and/or injury to the feelings." (Dkt. No. 70, ¶¶24, 27). This objection lacks merit.

28   Means further objects that the Claim Form intentionally deters claims by requesting bank

1283489.8

- 23 -

1   account information, which, Means contends, jeopardizes Class Members' privacy interests. (Jue

2   Decl., Ex.47, at 7). In fact, Class Members were not required to provide this information and were

3   given the clear option to bypass that section of the Claim Form by instead checking a box to select

4   payment by personal check. (Dkt. No. 105-5, at 5 (Claim Form)). Further, the Claims process and

5   the Settlement Website meet industry standards for protection of personally identifiable information

6   (Burke Decl. ¶16); at no point was such information placed in jeopardy. The claims process was

7   straightforward, accessible, and clear to Class Members and the public, as evidenced by the 567,816

8   claims that were submitted. Objections based upon the claims process should be overruled.

9   **g.   Objections to the Release**

10   Objector Means claims that the release is too broad, specifically that it "goes too far by

11   releasing all related claims including future claims," and would operate to allow LinkedIn to use

12   consumers' names and likenesses in the future without restraint. (Jue Decl., Ex. 47, at 4-5). This

13   objection misunderstands the scope of the Release, and should be overruled.

14   The Release applies to claims "that *were* asserted or *could have* been asserted arising from or

15   related to allegations in the Action regarding the alleged use of Add Connections to grow LinkedIn's

16   member base." (Settlement, § 1.29). Claims based upon LinkedIn's theoretical future conduct were

17   not, and could not, have been asserted in this action and, thus, are outside the scope of the Release.

18   Further, in releasing claims "arising from or related to" the allegations in the Action, the Release is

19   well-within the bounds set by precedent in this District. *See Custom LED, LLC v. eBay, Inc.*, No. 12-

20   350, 2013 WL 6114379 (N.D. Cal. Nov. 20, 2013) (Tigar, J.) (approving class settlement release of

21   claims "arising out of or relating in any way to any of the legal, factual, or other allegations made in

22   the Action, or any legal theories that could have been raised on the allegations of the Action.");

23   *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (claims appropriately included in scope of

24   release can include any claim "based on the identical factual predicate as that underlying the claims in

25   the settled class action."). Because they lack merit, objections to the Release should be overruled.

26   **5.   The Repeat Objectors are not Credible**

27   Objectors House, Tanner, and, jointly, Daniel Brown and Jenny Hill are represented by

28   attorneys Joseph Darrell Palmer, Steven F. Helfand, and Alan J. Sherwood, respectively – known

1283489.8   - 24 -   NOTICE OF MOTION AND
                                                                MOTION ISO FINAL SETTLEMENT APPROVAL
                                                                     CASE NO. 13-CV-04303-LHK

1   repeat objectors.[31]   Indeed, numerous courts have labeled Mr. Palmer[32] as "vexatious," and a "serial"

2   objector. Objector House has also appeared, represented by Mr. Palmer, as an objector to several

3   other class action settlements.[33] Mr. Helfand appears to have a similar history of filing meritless

4   objections, appealing when they are overruled[34] and, at least once, appealing his fee award where an

5   objection was sustained.[35] Sherwood represented an objector to the *Fraley* settlement, whose

6   objections were overruled by the Court, and filed an appeal, which was dismissed voluntarily.

7   (Diamand Decl., Ex. 11). There is no merit to the substance of these objectors' arguments.

8   **V.   CONCLUSION**

9   Class Counsel respectfully request that the Court approve the Notice as being in compliance

10   with Federal Rule of Civil Procedure 23 and due process; approve the proposed Plan of Distribution

11   as fair, reasonable, and adequate; and grant final approval to the Settlement.

12

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15   [31] *See* https://www.serialobjector.com/persons/21 (Palmer);
     https://www.serialobjector.com/persons/302 (Helfand);

16   https://www.serialobjector.com/persons/316 (Sherwood).
     [32] *See, e.g.*, *Dennis v. Kellogg Co.*, No. 9-1786, 2013 WL 6055326, at *4 n. 2 (S.D. Cal. Nov. 4,

17   2013) ("Palmer has been widely and repeatedly criticized as a serial, professional, or otherwise
     vexatious objector") (and citations); *In re: Oil Spill*, No. MDL 2179, 2013 WL 144042, at *48 n.40

18   (E.D. La. Jan. 11, 2013) (same); *In re Uponor, Inc.*, No. 11-MD-2247, 2012 WL 3984542, at *3 (D.
     Minn. Sept. 11, 2012) (noting "the Palmer Objectors appear to be represented by an attorney …

19   who is believed to be a serial objector to other class-action settlements . . .").
     [33] *See* https://www.serialobjector.com/persons/47 (House); *see also, e.g.*, *Rose v Bank of Am. Corp.*,

20   No. 11-2390, 2015 WL 2379562 (ND Cal. May 18, 2015) (identifying objection by House,
     represented by Palmer) (Davila, J.); *Horn v Bank of Am. NA*, No. 12-1718, 2014 WL 1455917 (S.D.

21   Cal. Apr. 14, 2014) (same); *Ralston v Mortg. Inv'rs. Grp. Inc.*, No. 8-536, 2013 WL 5290240 (N.D.
     Cal. Sept. 19, 2013) (Fogel, J.) (same).

22   [34] For example, Helfand represented an objector to the settlement in *In re Yahoo! Litig. True Comm.,*
     Inc.!, No. 6-2737 (N.D. Cal. 2010) (Snyder, J.); the objections were overruled; Helfand also filed an

23   appeal (2010 WL 6020601) which was subsequently dismissed by stipulation. (Diamand Decl. Ex.
     10). *See also In re NVIDIA GPU Litig.*, 539 Fed. App'x 822 (9th Cir. 2013) (denying appeal by

24   Helfand to approval of settlement); *Barnhill v Fla. Microsoft Anti-Trust Litig.*, 905 So.2d 195 (Fla.
     Dist. Ct. App. Apr. 6, 2005) (dismissing appeal by Helfand to settlement approval); *In re*

25   *WorldCom Inc. Sec. Litig.*, No. 2-3288, 2004 WL 2591402, at *9 (S.D.N.Y. 2004) (overruling
     objection by Helfand); *In re CreditDebit Card Tying Cases*, No. A-138984, 2014 WL 5488910 (Cal.

26   Ct. App. Nov. 24, 2014) (overruling objections by both Palmer and Helfand).
     [35] *Wal-Mart Stores Inc. v Buholzer*, 156 Fed. App'x 347-48 (2d Cir. 2005) ("Not satisfied with the

27   district court's award, Davis, Helfand, and Schonbrun have appealed the decision, insisting that the
     court erred in its calculation. We affirm the judgment of the court below.")

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1283489.8   - 25 -   NOTICE OF MOTION AND
                                                             MOTION ISO FINAL SETTLEMENT APPROVAL
                                                             CASE NO. 13-CV-04303-LHK

1   Respectfully submitted,

2   Dated: January 14, 2016   LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

3   By: /s/ Nicholas Diamand
                                            Nicholas Diamand
4
                                    Michael W. Sobol
5   Nicholas Diamand
                                    Melissa Gardner
6   275 Battery Street, 29th Floor
                                    San Francisco, CA 94111
7   Telephone: (415) 956-1000
                                    Facsimile: (415) 956-1008
8   msobol@lchb.com
                                    ndiamand@lchb.com
9   mgardner@lchb.com

10 Dated: January 14, 2016   RUSS AUGUST & KABAT

11   By: /s/ Larry C. Russ
                                            Larry C. Russ
12
                                    Larry C. Russ
13   Nathan D. Meyer
                                    12424 Wilshire Boulevard, 12th Floor
14   Los Angeles, California 90025
                                    Telephone: (310) 826-7424
15   Facsimile: (310) 826-6991
                                    lruss@raklaw.com
16   nmeyer@raklaw.com

17

18 Dated: January 14, 2016   OLAVI DUNNE LLP

19   By: /s/ Dorian S. Berger
                                            Dorian S. Berger
20
                                    Dorian S. Berger
21   Daniel P. Hipskind
                                    1880 Century Park East, Ste. 1880
22   Los Angeles, California 90067
                                    Telephone: (213) 516-7900
23   Facsimile: (213) 516-7910
                                    dberger@olavidunne.com
24   dhipskind@olavidunne.com

25
                                    Class Counsel
26

27

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1283489.8   - 26 -   NOTICE OF MOTION AND
                                             MOTION ISO FINAL SETTLEMENT APPROVAL
                                             CASE NO. 13-CV-04303-LHK