

1 Daniel C. Girard (SBN 114826)
2 Jordan Elias (SBN 228731)
3 **GIRARD GIBBS LLP**
4 601 California Street, 14th Floor
5 San Francisco, CA 94108
6 Telephone: (415) 981-4800
7 Facsimile: (415) 981-4846
8 *dcg@girardgibbs.com*

9 Laurence D. King (SBN 206423)
10 **KAPLAN FOX & KILSHEIMER LLP**
11 350 Sansome Street, Suite 400
12 San Francisco, CA 94104
13 Telephone: (415) 772-4700
14 Facsimile: (415) 772-4707
15 *lking@kaplanfox.com*

Frederic S. Fox (admitted *pro hac vice*)
David A. Straite (admitted *pro hac vice*)
KAPLAN FOX & KILSHEIMER LLP
850 Third Ave., 14th Floor
New York, NY 10022
Telephone: (212) 687-1980
Facsimile: (212) 687-7714
dstraite@kaplanfox.com

16 *Co-Lead Class Counsel*

17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**
19 **SAN JOSE DIVISION**

20 IN RE: YAHOO MAIL LITIGATION

21 Consolidated Case No.: 5:13-cv-04980-LHK

22 **PLAINTIFFS' NOTICE OF MOTION AND**
23 **MOTION FOR ATTORNEYS' FEES AND**
24 **COSTS AND LEAD PLAINTIFF SERVICE**
25 **AWARDS; MEMORANDUM OF POINTS**
26 **AND AUTHORITIES IN SUPPORT**

27 Date: August 25, 2016
28 Time: 1:30 p.m.
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 25, 2016 at 1:30 p.m., in Courtroom 8 of the above-entitled Court, or at such other time as may be designated, Court-appointed Lead Counsel Girard Gibbs LLP and Kaplan Fox & Kilsheimer LLP, having prosecuted this action successfully to a class-wide settlement, respectfully move pursuant to Federal Rule of Civil Procedure 23(h) and 54(d)(2) for an award of attorneys’ fees and expenses in the amount of \$4 million to be paid by Yahoo!, Inc. Lead Counsel also request service awards to the four court-appointed class representatives in the amount of \$5,000 each.

This motion is based on this Notice of Motion and Motion, the supporting Memorandum, the argument of counsel, and all papers and records on file in this matter. The motion is also supported by the accompanying declarations of Laurence D. King (the “King Declaration”) and Daniel C. Girard (the “Girard Declaration”), which provide a more detailed summary of the litigation efforts of Lead Counsel and the class representatives, and lodestar and expense data for all counsel.

Dated: May 31, 2016

Respectfully Submitted,

KAPLAN FOX & KILSHEIMER LLP

GIRARD GIBBS LLP

By: /s/ Laurence D. King
Laurence D. King (SBN 206423)
350 Sansome Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 772-4700
Facsimile: (415) 772-4707
lking@kaplanfox.com

By: /s/ Daniel C. Girard
Daniel C. Girard (SBN 114826)
Jordan Elias (SBN 228731)
601 California Street, 14th Floor
San Francisco, CA 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846
dcg@girardgibbs.com

Frederic S. Fox (admitted *pro hac vice*)
David A. Straite (admitted *pro hac vice*)
850 Third Ave., 14th Floor
New York, NY 10022
Telephone: (212) 687-1980
Facsimile: (212) 687-7714
dstraite@kaplanfox.com

Co-Lead Class Counsel

TABLE OF CONTENTS

1

2 I. INTRODUCTION 1

3 II. SUMMARY OF COUNSEL’S WORK IN THIS LITIGATION..... 2

4 A. Case Investigation and Factual Research..... 2

5 B. Pleadings and Motion Practice..... 3

6 C. Fact and Expert Discovery 3

7 D. Class Certification..... 5

8 E. Cross-Motions for Summary Judgment and *Daubert* Motions..... 6

9 F. Mediation and Settlement 7

10 III. ARGUMENT 7

11 A. Counsel’s Fee Request Is Reasonable and Appropriate Under the Circumstances. 7

12 1. Lead Counsel Obtained an Excellent Result..... 8

13 2. The Fee Was Negotiated and Agreed Upon at Arms’ Length by Skilled and

14 Experienced Counsel. 10

15 3. Application of the Lodestar Method Supports the Reasonableness of the Fee.... 11

16 a. The Time Lead Counsel Devoted to This Case Was Appropriately

17 Spent in Light of the Favorable Result and the Litigation Risks..... 12

18 b. Counsel’s Hourly Rates Are Reasonable and Have Been Repeatedly

19 Approved by Courts..... 13

20 c. The Requested Fee Represents a Negative Multiplier..... 14

21 B. Lead Counsel’s Out-of-Pocket Litigation Expenses Were Reasonably Incurred in

22 Furtherance of the Prosecution of the Claims, and Should Be Awarded..... 15

23 C. Because Lead Counsel Are in the Best Position to Assess the Contributions of Non-

24 Lead Counsel, the Court Should Permit Lead Counsel to Allocate the Fee in the

25 First Instance..... 16

26 D. The Requested Service Awards Are Reasonable and Should Be Approved. 17

27 IV. CONCLUSION..... 19

28

TABLE OF AUTHORITIES

Cases

Blum v. Stenson,
465 U.S. 886 (1984) 13

Cabrales v. County of Los Angeles,
935 F.2d 1050 (9th Cir. 1991)..... 10

Camacho v. Bridgeport Fin., Inc.,
523 F.3d 973 (9th Cir. 2008)..... 13

Center for Biological Diversity v. County of San Bernardino,
185 Cal. App. 4th 866 (2010)..... 10

Chun-Hoon v. McKee Foods Corp.,
716 F. Supp. 2d 848 (N.D. Cal. 2010)..... 15

Covillo v. Specialtys Cafe,
No. C-11-00594 DMR, 2014 WL 954516 (N.D. Cal. Mar. 6, 2014)..... 18

Cunningham v. County of Los Angeles,
879 F.2d 481 (9th Cir. 1988)..... 11

Fischel v. Equitable Life Assur. Soc’y of U.S.,
307 F.3d 997 (9th Cir. 2002)..... 14

Guam Soc’y of Obstetricians & Gynecologists v. Ada,
100 F.3d 691 (9th Cir. 1996)..... 11

Guidiville Rancheria of California v. United States,
12-cv-1326-YGR (N.D. Cal., Aug. 18, 2015), ECF No. 289..... 14

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998)..... 11, 14

Harless v. Clorox Co.,
273 F.R.D. 630 (S.D. Cal. 2011)..... 17

Harris v. Marhoefer,
24 F.3d 16 (9th Cir. 1994)..... 11

Hensley v. Eckerhart,
461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) 10, 11

In re Adobe Systems Inc. Privacy Litig.,
No. 5:13-cv-05226-LHK (N.D. Cal. Aug. 13, 2015), ECF No. 107 14

1 *In re Ampicillin Antitrust Litig.*,
81 F.R.D. 395 (D.D.C. 1978)..... 17

2

3 *In re Apple Computer, Inc. Deriv. Litig.*,
No. C 06-4128, 2008 WL 4820784 (N.D. Cal. Nov. 5, 2008)..... 10

4

5 *In re Bluetooth Headset Prods. Liab. Litig.*,
654 F.3d 935 (9th Cir. 2011)..... 11

6

7 *In re China Sunergy Sec. Litig.*,
No. 07 Civ. 7895 (DAB), 2011 WL 1899715 (S.D.N.Y. May 13, 2011)..... 15

8

9 *In re Copley Pharm., Inc.*,
50 F. Supp. 2d 1141 (D. Wyo. 1999)..... 17

10

11 *In re Countrywide Fin. Corp. Customer Data Security Breach Litig.*,
No. 3:08-md-01998-TBR, 2010 WL 3341200 (W.D. Ky. Aug. 23, 2010)..... 12

12

13 *In re CSO Hedge Fund Litig.*,
No. 1:12-cv-7717-GHW (S.D.N.Y. Jan. 28, 2016), ECF No. 171..... 14

14

15 *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*,
MDL No. 901, 1992 WL 226321 (C.D. Cal. June 10, 1992)..... 10

16

17 *In re Google Inc. Gmail Litigation*,
No. 13-MD-02430-LHK, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014)..... 5

18

19 *In re High-Tech Employee Antitrust Litig.*,
No. 5:11-cv-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015)..... 13, 14

20

21 *In re Linerboard Antitrust Litig.*,
MDL No. 1261, 2004 WL 1221350 (E.D. Pa. June 2, 2004)..... 17

22

23 *In re Media Vision Tech. Sec. Litig.*,
913 F. Supp. 1362 (N.D. Cal. 1996)..... 15

24

25 *In re Mego Fin. Corp. Sec. Litig.*,
213 F.3d 454 (9th Cir. 2000)..... 18

26

27 *In re Residential Capital, LLC, et al.*,
No. 12-BK-12020 (Bankr. S.D.N.Y., June 26, 2012), ECF No. 506..... 14

28

29 *In re Sony Gaming Networks & Customer Data Security Breach Litig.*,
No. 3:11-md-02258-AJB-MDD (S.D. Cal. Apr. 30, 2015), ECF No. 204-1 12

30 *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*,
No. 8:10ML 02151 JVS (FMOx), 2013 U.S. Dist. LEXIS 123298 (C.D. Cal. July 24, 2013) 17

1 *In re Toys R Us FACTA Litig.*,
295 F.R.D. 438 (C.D. Cal. 2014) 11, 16, 18

2

3 *Kerr v. Screen Extras Guild, Inc.*,
526 F.2d 67 (9th Cir. 1975)..... 14

4

5 *Ketchum v. Moses*,
24 Cal. 4th 1122 (2001)..... 10, 14

6 *Kevranian v. Yahoo! Inc.*,
No. 5:13-cv-04547-LHK (N.D. Cal. Jan. 8, 2014), ECF No. 36 13

7

8 *Mangold v. California Public Utilities Comm’n*,
67 F.3d 1470 (9th Cir. 1995)..... 8

9

10 *Parkinson v. Hyundai Motor Am.*,
796 F. Supp. 2d 1160 (C.D. Cal. 2010)..... 14

11 *Paul, Johnson, Alston & Hunt v. Gaulty*,
886 F.2d 268 (9th Cir. 1989)..... 11

12

13 *Pelletz v. Weyerhaeuser Co.*,
592 F. Supp. 2d 1322 (W.D. Wash. 2009) 15

14

15 *Pierce v. Rosetta Stone, Ltd.*,
No. C 11-01283 SBA, 2013 WL 5402120 (N.D. Cal. Sept. 26, 2013)..... 18

16

17 *Rodriguez v. W. Publishing Corp.*,
563 F.3d 948 (9th Cir. 2009)..... 17

18

19 *Sadowska v. Volkswagen Grp. of Am., Inc.*,
No. CV 11-00665-BRO (AGRx), 2013 WL 9600948 (C.D. Cal. Sept. 25, 2013) 8, 10, 11, 15

20

21 *Serrano v. Unruh*,
32 Cal. 3d 621 (1982)..... 8

22

23 *Staton v. Boeing Co.*,
327 F.3d 938 (9th Cir. 2003)..... 7, 11, 15

24

25 *Stetson v. Grissom*,
2016 WL 2731587 (9th Cir. May 11, 2016)..... 13

26

27 *Vandervort v. Balboa Capital Corp.*,
8 F. Supp. 3d 1200 (C.D. Cal. 2014)..... 18

28

28 *Wing v. Asarco Inc.*,
114 F.3d 986 (9th Cir. 1997)..... 15

1 *Winterrowd v. American General Annuity Insurance Co.*,
2 556 F.3d 815 (9th Cir. 2009)..... 12

3 *Wren v. RGIS Inventory Specialists*,
4 No. C-06-05778-JCS, 2011 WL 1230826 (N.D. Cal. Apr. 1, 2011)..... 18

5 *Zalaya v. Yahoo! Inc.*,
6 No. 5:13-cv-04619-LHK (N.D. Cal. Jan. 9, 2014), ECF No. 23 13

6 **Other Authorities**

7 Theodore Eisenberg & Geoffrey P. Miller, *Attorneys’ Fees and Expenses in Class Action Settlements:*
8 *1993-2008*,
9 7 J. Empir. L. Stud. 248 (2010)..... 15

10 **Rules**

11 Cal. Civ. Proc. Code § 1021.5 8

12 Fed. R. Civ. P. 23(h) 7

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **I. INTRODUCTION**

2 Lead Counsel Girard Gibbs LLP and Kaplan Fox & Kilsheimer LLP (together, “Lead
3 Counsel”) respectfully move for attorneys’ fees, reimbursement of litigation expenses, and service
4 awards pursuant to the settlement agreement with defendant Yahoo!, Inc. Decl. of Laurence D. King
5 in Supp. of Mot. for Prelim. Approval of Class Action Settlement Ex. 1, Jan. 7, 2016, ECF No. 174-3
6 (the “Settlement Agreement”). Lead Counsel seek—and Yahoo has agreed not to oppose—a
7 combined fee and expense award of \$4,000,000, to be paid by Yahoo separately from the Class
8 benefits. This amount is fair and reasonable based upon the relief Lead Counsel achieved for the Class
9 and the contingent nature of the representation. The reasonableness of the fee request is further
10 evidenced by the fact that actual lodestar and expenses incurred slightly exceed \$4 million such that
11 the agreed-upon award represents a negative multiplier. Lead Counsel dedicated 6,857.20 hours—a
12 total “lodestar” value of \$3,841,533.50—to investigation, depositions, document review, expert
13 discovery, motion practice (including the motion for class certification and cross-motions for summary
14 judgment), and successful settlement negotiations, and incurred \$206,566.40 in expenses.¹

15 The settlement was negotiated on a developed record and at an advanced stage of the litigation.
16 The settlement achieves the litigation’s main goal, delivering the core relief plaintiffs could expect to
17 obtain had they prevailed on the merits of their claim under the California Invasion of Privacy Act
18 (“CIPA”). Yahoo has agreed to fundamentally restructure its email delivery architecture to process
19 incoming and outgoing email in a manner that complies with CIPA. Yahoo will no longer intercept
20 emails in transit, effectively enhancing the value to consumers of their personal communications. The
21 settlement thus establishes important pro-consumer benchmarks that may guide law enforcers and
22 privacy law advocates in the future. In addition, Yahoo has agreed to modify its website to disclose its
23 relevant conduct more fully. Significantly, the settlement does not release money damage claims for
24 any class member other than the four representative plaintiffs—absent class members are free to

25 _____
26 ¹ Additional counsel Sydney Hall (counsel for plaintiff Nobles) and additional counsel Glancy Prongay
27 Murray LLP (counsel for plaintiff Abrams) provided some assistance on this matter. Lodestar and
28 expenses of additional counsel are not included in the figures above and Lead Counsel are not requesting
any additional fee and expense awards. Instead, Lead Counsel propose to compensate additional
counsel for their efforts out of the requested \$4 million. *See* Section III.C.

1 pursue such claims without the need to opt out of the settlement. The settlement also preserves the
2 threat of future litigation should Yahoo resume the challenged practices.

3 Lead Counsel further request, and Yahoo does not oppose, awards of \$5,000 to each of the four
4 Class Representatives in recognition of their service and the risk they undertook in bringing these
5 claims. These service awards will not affect the class relief.

6 **II. SUMMARY OF COUNSEL'S WORK IN THIS LITIGATION**

7 **A. Case Investigation and Factual Research**

8 In October and November 2013, six suits were filed in this District challenging Yahoo's new
9 practice of scanning Yahoo! Mail email content for advertising purposes, a practice that mirrored a
10 similar practice at Google with respect to its Gmail service. Girard Decl. ¶¶ 14-15; *see also* King Decl.
11 ¶ 22. Before filing, Lead Counsel interviewed potential class members about their use of Yahoo,
12 Gmail, and other email service providers and their experiences with data collection and targeted
13 advertising; reviewed and compared Yahoo's policies and procedures with those of other email service
14 providers; analyzed news reports and other relevant publicly available information; researched and
15 analyzed applicable case law and legal principles; and studied the pleadings, briefing, and this Court's
16 rulings in *In re Google Inc. Gmail Litigation*, N.D. Cal. No. 13-md-02430-LHK. Girard Decl. ¶¶ 14-
17 18; King Decl. ¶¶ 22-27.

18 The Court granted Yahoo's motion to relate the cases on December 18, 2013. ECF No. 14;
19 Girard Decl. ¶ 14. Lead Counsel negotiated with other plaintiffs' counsel to coordinate their respective
20 cases. *Id.* ¶ 16. Lead Counsel also prepared for and attended a meeting with Yahoo's counsel. *Id.* At
21 the meeting, the content of which is subject to a non-disclosure agreement, Yahoo provided technical
22 information regarding its scanning practices. Girard Decl. ¶ 16; King Decl. ¶ 26.

23 Lead Counsel Girard Gibbs also retained and worked closely with a consultant at this early
24 stage to understand the technology that companies like Yahoo use to collect personal data and create
25 targeted advertising. Girard Decl. ¶ 17. The consultant provided expert guidance regarding Yahoo's
26 patents and patent applications, as well as the type of information and documents plaintiffs should
27 seek from Yahoo in discovery. *Id.*

1 **B. Pleadings and Motion Practice**

2 On January 22, 2014, the Court consolidated the related class actions against Yahoo and
3 approved a stipulation appointing Girard Gibbs and Kaplan Fox to serve as co-lead interim class
4 counsel. ECF Nos. 27, 29; Girard Decl. ¶ 18. Plaintiffs filed a consolidated complaint on February 12,
5 2014, asserting claims for violation of CIPA, the Stored Communications Act (“SCA”), the federal
6 Wiretap Act, and the California Constitution and seeking damages and injunctive and declaratory relief.
7 ECF No. 35; Girard Decl. ¶ 19. Yahoo moved to dismiss (ECF No. 37), and the Court upheld plaintiffs’
8 CIPA claim and the portion of the SCA claim alleging that Yahoo shared the content of email with third
9 parties (ECF No. 49). Girard Decl. ¶¶ 20-22. Yahoo filed its Answer on August 26, 2014. ECF No. 53;
10 Girard Decl. ¶ 23.

11 **C. Fact and Expert Discovery**

12 Plaintiffs were required to rely on formal discovery to pin down the critical details of Yahoo’s
13 scanning practices—Yahoo did not provide this information voluntarily. *See* Girard Decl. ¶¶ 24-40.
14 The facts developed through discovery ultimately laid the groundwork for plaintiffs’ summary
15 judgment motion and eventual settlement negotiations. From the outset, the parties held opposing
16 views on many discovery issues, such as the terms of the protective order, dozens of confidential
17 documents, and the scope of discovery. Lead Counsel were able to overcome these obstacles to obtain
18 the necessary information about the Yahoo’s email scanning practices and their consequences.

19 Formal discovery began soon after the parties’ Rule 26(f) conference on January 14, 2014.
20 Girard Decl. ¶ 24; King Decl. ¶ 30. The parties exchanged initial disclosures on January 23, 2014, and
21 negotiated a Stipulated Protective Order, which Magistrate Judge Howard R. Lloyd entered with
22 modifications on February 28, 2014. Girard Decl. ¶ 24; ECF No. 34. Lead Counsel served requests
23 for production of documents on March 7, 2014. Girard Decl. ¶ 25; King Decl. ¶ 30. The requests
24 focused on Yahoo’s disclosures and subscriber agreements, the type of data Yahoo collects from
25 subscribers’ emails, regulatory inquiries, and related communications. Girard Decl. ¶ 25. Plaintiffs
26 designated one attorney as their e-discovery liaison to discuss steps taken to preserve evidence and
27 negotiate custodians and search terms with Yahoo’s counsel. *Id.*

1 Yahoo produced documents on a rolling basis starting on April 30, 2014, ultimately producing
2 more than 136,000 pages relating to its email delivery architecture and targeted advertising programs.
3 Girard Decl. ¶ 26; King Decl. ¶ 31. Lead Counsel reviewed the production to identify documents
4 relevant to plaintiffs' claims and Yahoo's defenses, "hot" documents, and documents to use in support
5 of plaintiffs' motions. *Ids.* Associate attorneys prepared memoranda summarizing the key documents,
6 and identified and compiled documents to provide to plaintiffs' expert for analysis. Girard Decl. ¶ 26.
7 Lead Counsel also served interrogatories on Yahoo on July 23, 2014. *Id.* ¶ 27. Plaintiffs responded to
8 Yahoo's document requests and interrogatories on October 13, 2014. *Id.* ¶ 30.

9 Plaintiffs disclosed Robert Sherwood as a proposed expert on August 6, 2014. Girard Decl. ¶
10 28. Yahoo objected, and Lead Counsel met and conferred with Yahoo's counsel to resolve the
11 objection. *Id.* ¶ 28. Lead Counsel did not object to Yahoo's choice of expert.

12 In September 2014, many of the filings and transcripts in Yahoo's litigation with the federal
13 government before the U.S. Foreign Intelligence Surveillance ("FISA") Court of Review were
14 declassified and made publicly available by the Director of National Intelligence. Girard Decl. ¶ 29;
15 King Decl. ¶ 34. Marc Zwillinger, counsel for Yahoo in this case, argued for Yahoo before the FISA
16 Court, raising many points of interest to Lead Counsel. Lead Counsel reviewed the declassified
17 documents and prepared a memorandum summarizing matters relevant to this litigation. Plaintiffs
18 later used several of the documents in support of their motion for summary judgment. *See* Pls.' Req.
19 for Judicial Notice in Supp. of Mot. for Summ. Judgment Exs. F-H, Sept. 19, 2015, ECF No. 132;
20 Girard Decl. ¶ 29; King Decl. ¶ 34.

21 Depositions began in early 2015. Girard Decl. ¶ 31. The parties prioritized depositions
22 relating to class certification. Plaintiffs took a Rule 30(b)(6) deposition of Yahoo on January 14, 2015,
23 on the topics of Yahoo's scanning and analysis of email, collection and storage of data from email, and
24 sharing of email content with third parties. *Id.* Yahoo then deposed all four named plaintiffs in
25 January and February 2015. *Id.* ¶ 33. While Lead Counsel coordinated strategy for all depositions,
26 named plaintiffs Nobles and Abrams were also represented by their own individual counsel at the
27 depositions. King Decl. ¶ 35.

28

1 On March 4, 2015, plaintiffs served a second set of interrogatories on Yahoo directed at issues
2 relevant to class certification and Yahoo's defenses. Girard Decl. ¶ 34. After the motion for class
3 certification was filed, plaintiffs took the depositions of six additional fact witnesses. *Id.* ¶ 35.
4 Plaintiffs requested that Yahoo produce documents from additional custodians in April 2015 based on
5 information obtained from the Yahoo documents and depositions. *Id.* ¶ 36. Yahoo agreed to search
6 the files of three additional custodians and apply one additional search term. *Id.*

7 Both sides retained technology experts, and the parties exchanged expert disclosures and
8 reports on July 10, 2015. Girard Decl. ¶ 37; King Decl. ¶ 38. Both experts were deposed (and at
9 Yahoo's insistence, plaintiffs' expert was deposed twice, on July 30, 2015 and September 10, 2015).
10 Girard Decl. ¶¶ 38-39; King Decl. ¶ 39. Plaintiffs deposed Yahoo's expert on July 31, 2015. Girard
11 Decl. ¶ 39. The parties also exchanged expert rebuttal reports on August 5, 2015. *Id.* ¶ 40.

12 **D. Class Certification**

13 Plaintiffs moved for class certification on February 5, 2015. ECF Nos. 60-66; Girard Decl. ¶
14 41. Informed by the Court's opinion on class certification in *In re Google Inc. Gmail Litigation*, No.
15 13-MD-02430-LHK, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014), plaintiffs chose to pursue only
16 injunctive and declaratory relief and therefore sought certification under Rule 23(b)(2). Yahoo moved
17 to seal portions of plaintiffs' class certification filing. ECF No. 69; Girard Decl. ¶ 42. Lead Counsel
18 reviewed Yahoo's confidentiality designations and concluded they were overly broad and failed to
19 comply with this Court's rules governing filing under seal. ECF Nos. 72-73; Girard Decl. ¶ 42. The
20 Court ultimately denied many of Yahoo's proposed redactions and requests to file documents under
21 seal. ECF No. 108; Girard Decl. ¶ 42.

22 Yahoo opposed plaintiffs' motion for class certification on March 12, 2015, arguing among
23 other things that individualized issues of consent precluded certification and that the plaintiffs were
24 atypical and inadequate representatives. ECF Nos. 77-80; Girard Decl. ¶ 43. Yahoo moved to seal
25 much of the evidence submitted with the opposition. *Id.* Lead Counsel filed a response to Yahoo's
26 motion challenging many of Yahoo's designations (but supporting the sealing of plaintiffs' confidential
27 information). ECF No. 82; Girard Decl. ¶ 43. The Court ultimately denied many of Yahoo's proposed
28

1 redactions and requests to file documents under seal. ECF No. 108; Girard Decl. ¶ 43. Plaintiffs filed
2 their reply in support of class certification on April 9, 2015. ECF No. 89; Girard Decl. ¶ 44.

3 On May 26, 2015, the Court granted plaintiffs' motion, although it declined to certify a
4 nationwide class for plaintiffs' CIPA claim. ECF No. 105; Girard Decl. ¶ 46. The Court certified two
5 classes: (1) as to plaintiffs' CIPA claim, a class of all persons in California who are not Yahoo Mail
6 subscribers and who have sent emails to or received emails from a Yahoo Mail subscriber from October
7 2, 2012 to the present, or who will send emails to or receive emails from a Yahoo Mail subscriber in the
8 future; (2) as to plaintiffs' SCA claim, a class of all persons in the United States who are not Yahoo
9 Mail subscribers and who have sent emails to or received emails from a Yahoo mail subscriber from
10 October 2, 2011 to the present, or who will send emails to or receive emails from a Yahoo Mail
11 subscriber in the future. ECF No. 105. The Court also confirmed the appointment of Girard Gibbs and
12 Kaplan Fox as Lead Counsel, and appointed four Class Representatives (plaintiffs Abrams, Baker,
13 Nobles and Pincus). *Id.*

14 Yahoo filed a Rule 23(f) petition with the Ninth Circuit on June 9, 2015, which plaintiffs
15 opposed. No. 15-80101, ECF Nos. 1-1, 2; Girard Decl. ¶ 47. On August 11, 2015, the Ninth Circuit
16 denied Yahoo's petition challenging this Court's class certification order. No. 15-80101, ECF No. 5;
17 Girard Decl. ¶ 47.

18 **E. Cross-Motions for Summary Judgment and *Daubert* Motions**

19 The parties filed cross-motions for summary judgment on September 19, 2015. ECF Nos. 131-
20 33; Girard Decl. ¶ 48. Lead Counsel's motion for summary judgment was accompanied by a request
21 for judicial notice and an administrative motion to file portions of the motion under seal. ECF No. 140;
22 Girard Decl. ¶ 48. The parties filed oppositions to summary judgment on October 19, 2015 (ECF Nos.
23 156, 158-59), and replies on November 16, 2015 (ECF Nos. 166-68). Girard Decl. ¶ 50. The parties
24 also filed cross-motions to exclude the testimony of the other party's expert. ECF Nos. 144-46; Girard
25 Decl. ¶ 52; King Decl. ¶ 42. In light of the Court's March 15, 2016 preliminary approval of the
26 settlement, the Court denied as moot the motions for summary judgment, requests for judicial notice,
27 motions to seal, and motions to exclude expert testimony. ECF No. 182.

1 **F. Mediation and Settlement**

2 The parties participated in mediation with Bruce Friedman of JAMS on December 11, 2014.
3 In advance of the mediation, the parties exchanged mediation briefs. Girard Decl. ¶ 53; King Decl. ¶
4 43. The mediation was unsuccessful. *Ids.*

5 The parties participated in a second mediation on November 4, 2015 before Cathy Yanni of
6 JAMS. Girard Decl. ¶ 54; King Decl. ¶ 43. In advance, the parties exchanged mediation briefs that
7 reflected the supplemental documents, depositions, expert reports and the Court’s ruling on class
8 certification. Girard Decl. ¶ 54. The parties did not reach agreement at the mediation, but continued
9 discussions for an additional month with Ms. Yanni’s assistance. *Id.*; King Decl. ¶ 44. Counsel for
10 the parties met in person on December 4, 2015, and reached an agreement in principle. Girard Decl. ¶
11 55; King Decl. ¶ 45. The parties notified the Court of their agreement the same day. *Id.* The parties
12 then continued to negotiate the specific terms of the settlement. Girard Decl. ¶ 56; King Decl. ¶¶ 45-
13 46.

14 Lead Counsel moved for preliminary approval of the settlement on January 7, 2016. ECF No.
15 174; Girard Decl. ¶ 57. The Court held a hearing on March 10, 2016, and ordered a modification of
16 the agreement to simplify the objection procedure. Girard Decl. ¶ 58; King Decl. ¶ 48. With that
17 change, the Court granted the motion on March 15, 2016. ECF Nos. 181 (“Settlement Addendum”),
18 182.

19 **III. ARGUMENT**

20 **A. Counsel’s Fee Request Is Reasonable and Appropriate Under the Circumstances.**

21 Lead Counsel respectfully request that the Court award \$4,000,000 as “reasonable attorney’s
22 fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P.
23 23(h). Yahoo has agreed to pay this award, which will not affect the benefits for the Class. *See*
24 Settlement Agreement ¶ 48. The requested fee is “fundamentally fair, adequate, and reasonable.”
25 *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)).

26 Because Yahoo has agreed to pay this fee, “the court need not inquire into the reasonableness .
27 . . with precisely the same level of scrutiny as when the fee amount is litigated.” *Staton*, 327 F.3d at
28 966. The Court’s role is instead “to ensure that the Parties’ agreement on fees and expenses is

1 reasonable and does not reflect a collusive settlement placing the interests of counsel above the
2 interests of the Class.” *Sadowska v. Volkswagen Grp. of Am., Inc.*, No. CV 11-00665-BRO (AGRx),
3 2013 WL 9600948, at *8 (C.D. Cal. Sept. 25, 2013).

4 California law governs the accompanying award of fees because the claim settled here arises
5 under California law. *See Mangold v. California Public Utilities Comm’n*, 67 F.3d 1470, 1478 (9th
6 Cir. 1995); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). As such, this Court may
7 approve the requested award pursuant to California’s “private attorney general” statute. *See* Cal. Civ.
8 Proc. Code § 1021.5 (providing for an award of attorneys’ fees “to a successful party against one or
9 more opposing parties in any action which has resulted in the enforcement of an important right
10 affecting the public interest if . . . a significant benefit, whether pecuniary or nonpecuniary, has been
11 conferred on the general public or a large class of persons”); *Serrano v. Unruh*, 32 Cal. 3d 621, 632
12 (1982) (explaining that such an award advances “the policy of encouraging private actions to vindicate
13 important rights affecting the public interest”). The Legislature enacted the private attorney general
14 statute so that the costs of enforcing important rights in the public interest would be shifted from
15 private plaintiffs to defendants in various circumstances. *See* Cal. Civ. Proc. Code § 1021.5; *see also*
16 *Serrano*, 32 Cal. 3d at 632-33 (holding that “absent facts rendering the award unjust, parties who
17 qualify for a fee should recover for all hours reasonably spent, including those on fee-related
18 matters”).

19 **1. Lead Counsel Obtained an Excellent Result.**

20 The proposed settlement accomplishes the primary goal of this case. Yahoo has agreed to adopt
21 practices that bring its information scanning practices into compliance with CIPA. Yahoo will make
22 fundamental technical changes such that, for incoming email, email content will be retrieved from the
23 servers from which email is accessible by Yahoo Mail users, and only sent to servers for analysis for
24 advertising purposes after a Yahoo Mail user can access the email in his or her inbox. For outgoing
25 email, Yahoo will make technical changes such that email content will be retrieved from the servers
26 from which outgoing email is accessible by Yahoo Mail users, and only sent to servers for analysis for
27 advertising purposes after a Yahoo Mail user can access the outgoing email in his or her sent email
28

1 folder. Yahoo has agreed to make these significant changes to its system architecture for *all* incoming
2 and outgoing emails, not just those sent to and from Yahoo subscribers in California.

3 As a result of these changes, Yahoo may only scan incoming email content for advertising
4 purposes after it has already been delivered to Yahoo Mail subscribers' inboxes, and may only access
5 outgoing email after it has been placed in Yahoo Mail subscribers' sent email folders. These changes
6 will remain in place for three years. *See* Settlement Agreement ¶ 31(a). Yahoo counsel confirmed at the
7 preliminary approval hearing that Yahoo has no intention of reversing these changes to its email
8 architecture after the three-year injunction expires, but if Yahoo does so, new litigation would not be
9 foreclosed. Preliminary Approval Hearing Tr. 37:3-38:4; Order Granting Mot. for Prelim. Approval of
10 Class Action Settlement ¶ 6, Mar. 15, 2016, ECF No. 182 ("Preliminary Approval Order"). The
11 settlement does not prohibit Yahoo from analyzing incoming and outgoing email for spam, malware,
12 and abuse detection and protection. Settlement Agreement ¶ 31.

13 Yahoo has also agreed to make several changes and corrections to its website, described in detail
14 in paragraph 31(f) of the Settlement Agreement. First, in its Yahoo Privacy Center webpage, Yahoo
15 will disclose that "Yahoo analyzes and stores all communications content, including email content from
16 incoming and outgoing mail." Second, Yahoo will replace the heading "Information Collection and Use
17 Practices" with "Premium Services," and replace the heading "Personally Relevant Experiences" with
18 "Information Collection and Use Practices." Third, Yahoo will disclose that "Yahoo may share
19 keywords, package tracking and product identification numbers with third parties in order to enhance
20 your user experience and provide targeted ads," and that such information "may also be used for
21 interest-based advertising." Yahoo will also certify that it did not collect and store any class member's
22 email content for the purposes of its 2013 test of Google's AdSense for Content, the conduct that
23 plaintiffs contend violated the SCA. Settlement Agreement ¶ 31(g).

24 Lead Counsel's successful enforcement of privacy rights confers a benefit not only on the class
25 but also on the public at large. Privacy advocates may well look to this settlement as precedent that an
26 anti-spam program can be effective without violating two-party consent laws like CIPA. The record in
27 this case also empowers privacy advocates to challenge internet service providers (ISPs) who may in
28 the future scan electronic communications sent to or received by their customers but who, unlike

1 Yahoo, do not act as the email service provider (and thus do not provide email storage). Yahoo's
2 decision to modify its scanning practices enforces CIPA's prohibition on interception of email in transit
3 for advertising purposes. Requiring compliance with CIPA advances the public interest and the
4 proposition that companies like Yahoo that monetize the collection and resale of private consumer
5 information for advertising purposes must obtain consent before collecting that information in transit.
6 *See, e.g., Ketchum v. Moses*, 24 Cal. 4th 1122, 1133-34 (2001) (holding that a fee award should be
7 "fully compensatory" and that "absent circumstances rendering the award unjust, an attorney fee award
8 should ordinarily include compensation for all the hours reasonably spent"); *Cabrales v. County of Los*
9 *Angeles*, 935 F.2d 1050, 1052-53 (9th Cir. 1991); *Center for Biological Diversity v. County of San*
10 *Bernardino*, 185 Cal. App. 4th 866, 897-98 (2010) (declining to reduce an award of attorneys' fees
11 where the plaintiff "achieved its primary objective," because such a reduction "would impede the
12 Legislature's intent of 'encouraging attorneys to act as private attorneys general and to vindicate
13 important rights affecting the public interest'" (quoting *Ketchum*, 24 Cal. 4th at 1133-34)).

14 **2. The Fee Was Negotiated and Agreed Upon at Arms' Length by Skilled and**
15 **Experienced Counsel.**

16 "Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S.
17 424, 437 (1983). Thus, a court "should refrain from substituting its own value for a properly
18 bargained-for agreement." *In re Apple Computer, Inc. Deriv. Litig.*, No. C 06-4128, 2008 WL
19 4820784, at *3 (N.D. Cal. Nov. 5, 2008) (awarding attorneys' fees based on "the terms of the
20 settlement"). Courts therefore apply lessened scrutiny to fee agreements "negotiated at arm's length
21 with sophisticated defendants by the attorneys . . . intimately familiar with the case" and where the fee
22 "neither detracts from nor diminishes the payments and benefits that will flow to Plaintiffs
23 themselves." *In re First Capital Holdings Corp. Fin. Prods. Secs. Litig.*, MDL No. 901, 1992 WL
24 226321, at *4 (C.D. Cal. June 10, 1992) (approving agreed-upon fee of \$8 million); *accord Sadowska*,
25 2013 WL 9600948, at *8.

26 These circumstances mark the situation here. There is no basis to upset the parties' fee
27 agreement reached at an advanced stage of the case. The parties did not reach an agreement on
28 settlement until after discovery was completed, motions to dismiss were decided, the class was

1 certified, *Daubert* motions and motions for summary judgment were filed, and settlement negotiations
2 mediated by respected neutral parties had occurred. These proceedings ensured that experienced Lead
3 Counsel were fully apprised of the strengths and weaknesses of the case. And it was only after
4 reaching an agreement on settlement terms that the parties negotiated the fee. *Cf. Sadowska*, 2013 WL
5 9600948, at *8. Further demonstrating that the agreed-upon fee is fair and the product of good-faith
6 negotiations, its payment will have no bearing on the relief for the class. *See In re Bluetooth Headset*
7 *Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (noting that the amount of attorneys’ fees should
8 not result in “less injunctive relief for the class than could otherwise have been obtained”) (citing
9 *Staton*, 327 F.3d at 964). Thus, as the Court found in granting preliminary approval, the settlement
10 “appears to be the result of serious, informed, non-collusive negotiations conducted at arms length . . .
11 .” Preliminary Approval Order ¶ 4.

12 3. Application of the Lodestar Method Supports the Reasonableness of the Fee.

13 The “lodestar” method and the “percentage of the fund” method are the two primary methods
14 courts employ to determine a reasonable attorneys’ fee in connection with a class action settlement.
15 *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). While courts often rely on the
16 percentage method where a settlement creates a common fund, they rely on the lodestar method
17 where—as here—the fees are being paid separately from the class relief and the value of that relief is
18 uncertain. *Id.*; *see also In re Toys R Us FACTA Litig.*, 295 F.R.D. 438, 460 (C.D. Cal. 2014).

19 “Only in rare or exceptional cases will an attorney’s reasonable expenditure of time on a case
20 not be commensurate with the fees to which he is entitled.” *Cunningham v. County of Los Angeles*,
21 879 F.2d 481, 488 (9th Cir. 1988) (emphasis omitted). Counsel’s lodestar is calculated by multiplying
22 the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Hensley*, 461
23 U.S. at 433; *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989). As this
24 figure approximates the market value of the legal services, it “presumptively provides an accurate
25 measure of reasonable attorney’s fees.” *In re Toys R Us FACTA Litig.*, 295 F.R.D. at 460 (quoting
26 *Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir. 1994)); *see also Guam Soc’y of Obstetricians &*
27 *Gynecologists v. Ada*, 100 F.3d 691, 696 (9th Cir. 1996).

1 The accompanying declarations of Lead Counsel set forth the hours worked and the billing
2 rates used to calculate the lodestar. *See Winterrowd v. American General Annuity Ins. Co.*, 556 F.3d
3 815, 827 (9th Cir. 2009) (“Testimony of an attorney as to the number of hours worked on a particular
4 case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time
5 records.” (quoting *Martino v. Denevi*, 182 Cal.App.3d 553, 558 (1986)). Lead Counsel and their
6 professional staffs spent 6,857.20 hours working on this case, for a lodestar of \$3,841,533.50 as of
7 May 27, 2016, and incurred \$206,566.40 in expenses. As noted below, expenses do not include the
8 costs associated with self-hosting the electronic documents produced by Yahoo and the plaintiffs, a
9 cost absorbed by Lead Counsel. King Decl. ¶ 21.

10 **a. The Time Lead Counsel Devoted to This Case Was Appropriately**
11 **Spent in Light of the Favorable Result and the Litigation Risks.**

12 Lead Counsel’s efforts were necessary to achieving the settlement and are consistent with
13 efforts in other data privacy cases. *See, e.g., In re Countrywide Fin. Corp. Customer Data Security*
14 *Breach Litig.*, No. 3:08-md-01998-TBR, 2010 WL 3341200, at *10 (W.D. Ky. Aug. 23, 2010) (11,453
15 hours in case that settled about one year after filing of complaint); *In re Sony Gaming Networks &*
16 *Customer Data Security Breach Litig.*, No. 3:11-md-02258-AJB-MDD (S.D. Cal. Apr. 30, 2015), ECF
17 No. 204-1 (5,580 hours where class certification had not been briefed). Lead Counsel met by phone
18 on a weekly basis to assign upcoming tasks. Girard Decl. ¶ 3; King Decl. ¶ 11. Additional counsel
19 only worked at the direction of Lead Counsel and primarily with respect to depositions or discovery
20 responses of plaintiffs Nobles and Abrams. King Decl. ¶ 14. Lead Counsel also monitored monthly
21 time records to avoid inefficiencies and to determine if further safeguards could be employed to reduce
22 any duplication of efforts. Girard Decl. ¶ 3; King Decl. ¶ 12.

23 Lead Counsel assumed considerable risk in taking this matter on a contingent basis. While
24 Yahoo admitted scanning email, Yahoo sharply disputed scanning content while in transit. Yahoo was
25 represented by counsel of the highest caliber who mounted a vigorous defense. The Court was
26 persuaded to dismiss several of the claims, and later noted in granting preliminary approval that “the
27 Court’s initial analysis suggested some vulnerability in plaintiffs’ case. Had the Court granted
28 Yahoo’s motion for summary judgment, the Class and Lead Counsel would not have received any

1 injunctive, declaratory, or monetary relief.” Preliminary Approval Order ¶ 11. The decision of
 2 plaintiffs and their experienced counsel in the *Kevranian* and *Zalaya* actions to stipulate to dismiss
 3 their claims at the outset is indicative of the risk assumed by Lead Counsel. *See* Order Granting
 4 Stipulation to Dismiss Case, *Kevranian v. Yahoo! Inc.*, No. 5:13-cv-04547-LHK (N.D. Cal. Jan. 8,
 5 2014), ECF No. 36, *and* Order Granting Stipulation for Dismissal, *Zalaya v. Yahoo! Inc.*, Case No.
 6 5:13-cv-04619-LHK (N.D. Cal. Jan. 9, 2014), ECF No. 23.

7
 8 **b. Counsel’s Hourly Rates Are Reasonable and Have Been Repeatedly
 Approved by Courts.**

9 Counsel’s hourly rates are “in line with those prevailing in the community for similar services
 10 by lawyers of reasonably comparable skill, experience, and reputation.” *Blum v. Stenson*, 465 U.S.
 11 886, 895 n.11 (1984).² To the extent “the relevant community is the forum in which the district court
 12 sits,” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008), Counsel’s rates also
 13 conform to those generally prevailing in the San Jose legal marketplace.

14 Billing rates at each firm in this litigation vary appropriately based on experience. As detailed
 15 in the accompanying Lead Counsel declarations, current rates for partners involved in this litigation
 16 range from \$575 to \$875 per hour; rates for attorneys with the intermediate “counsel” or “of counsel”
 17 titles are \$630; rates for associates and other junior attorneys are \$350 to \$525; and rates for
 18 paraprofessionals range from \$125 to \$305 per hour. *See also In re: Washington Public Power Supply*
 19 *System Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) (in multi-year litigation, courts to use either
 20 current rates or historical rates with “a prime rate enhancement” to account for passage of time);
 21 *accord, Stetson v. Grissom*, 2016 WL 2731587, at *5 (9th Cir. May 11, 2016) (courts to use current
 22 hourly rates or prime rate enhancement “to compensate class counsel for delays in payment in
 23 contingency-fee cases”). This Court last year found sufficient evidence that each of these rate ranges
 24 is appropriate in the present market for legal services. *In re High-Tech Employee Antitrust Litig.*, No.
 25 5:11-cv-02509-LHK, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015) (approving partner rates of

26
 27 ² Lead Counsel base their rates upon the experience and skill of the attorney or paralegal performing
 28 the work. Lead Counsel set rates through periodic review of the rates charged by other law firms
 involved in similar complex litigation, and survey results published by trade periodicals such as the
 National Law Journal.

1 \$490 to \$975, counsel and associates from \$310 to \$800 per hour, and paraprofessionals from \$190 to
2 \$430 per hour).

3 These rates are comparable to or lower than the rates reported by Yahoo's counsel in other
4 actions. *See, e.g.*, Debtor's Appl. for Order Authorizing Retention of Morrison & Foerster LLP, *In re*
5 *Residential Capital, LLC, et al.*, No. 12-BK-12020 (Bankr. S.D.N.Y. June 26, 2012), ECF No. 506
6 (reporting hourly rates of \$695 to \$1,125 per hour for partners; \$550 to \$950 for counsel; \$380 to \$685
7 for associates, and \$185 to \$360 for paraprofessionals); Order Granting Motion for Attorney's Fees at
8 5, *Guidiville Rancheria of California v. United States*, No. 12-cv-1326-YGR (N.D. Cal., Aug. 18,
9 2015), ECF No. 289 (noting rates for attorneys in Morrison & Foerster's San Francisco office range
10 from \$350 per hour for associates to more than \$1,000 per hour for partners).

11 Lead Counsel's rates have been repeatedly evaluated and approved by federal courts as
12 reasonable. *See, e.g.*, *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1173 (C.D. Cal. 2010)
13 (approving Girard Gibbs's rates); Order Granting Pls.' Mot. for Approval of Attorney Fees, *In re*
14 *Adobe Systems Inc. Privacy Litig.*, No. 5:13-cv-05226-LHK (N.D. Cal. Aug. 13, 2015), ECF No. 107
15 (same); *In re High-Tech Employee*, 2015 WL 5158730, at *9 (approving Girard Gibbs's rates); Order
16 Awarding Attorneys' Fees and Expenses, *In re CSO Hedge Fund Litig.*, 1:12-cv-7717-GHW
17 (S.D.N.Y. Jan. 28, 2016), ECF No. 171 (approving Kaplan Fox's rates).

18 **c. The Requested Fee Represents a Negative Multiplier.**

19 For the purpose of awarding class counsel a reasonable fee, the lodestar may be enhanced in
20 light of the (1) results obtained, (2) novelty and complexity of the questions presented, (3) skill
21 exhibited by counsel, (4) preclusion of other legal work as a result of counsel's acceptance and
22 prosecution of the case, and (5) risk of nonpayment. *Hanlon*, 150 F.3d at 1029 (citing *Kerr v. Screen*
23 *Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)); *Ketchum*, 24 Cal. 4th at 1132. Nevertheless,
24 "although a court can adjust the lodestar upward or downward based on certain factors, adjustments
25 are the exception rather than the rule." *Fischel v. Equitable Life Assur. Soc'y of the United States*, 307
26 F.3d 997, 1007 (9th Cir. 2002) (citation and quotations omitted).

27 The award sought here—even when excluding additional counsel's fees and expenses for
28 purposes of the calculation—reflects a modest *negative* adjustment. The remaining work required to

1 complete the settlement will further amplify the negative multiplier. Even at present, the negative
 2 multiplier falls below the range of multipliers awarded in similar class action cases that involved
 3 complex, novel issues and high-caliber defense counsel. *See, e.g., Sadowska*, 2013 WL 9600948, at
 4 *9 (approving negotiated fee representing a 1.37 multiplier); *Pelletz v. Weyerhaeuser Co.*, 592 F.
 5 Supp. 2d 1322, 1328 (W.D. Wash. 2009) (approving 1.82 multiplier where “the demanding nature of
 6 this action precluded Class Counsel from accepting other potentially profitable work”); *Wing v.*
 7 *Asarco Inc.*, 114 F.3d 986, 988-89 (9th Cir. 1997) (approving 2.0 multiplier in part because of “the
 8 quality of the [defendant’s] opposition”); *see also* Theodore Eisenberg & Geoffrey P. Miller,
 9 *Attorneys’ Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empir. L. Stud. 248, 272
 10 (2010) (finding that, in the Ninth Circuit, the mean multiplier for attorneys’ fees awarded in
 11 connection with class settlements is 1.54).³

12 The negative multiplier here confirms the fairness of the agreed-upon fee award. *Chun-Hoon*
 13 *v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) (“Th[e] resulting multiplier of less
 14 than one, (sometimes called a negative multiplier) suggests that the negotiated fee award is a
 15 reasonable and fair valuation of the services rendered to the class by class counsel.”).

16 **B. Lead Counsel’s Out-of-Pocket Litigation Expenses Were Reasonably Incurred in**
 17 **Furtherance of the Prosecution of the Claims, and Should Be Awarded.**

18 Lead Counsel’s fee application includes a request for reimbursement of litigation expenses that
 19 were reasonably incurred and necessary to the prosecution of this action. *See* Girard Decl. ¶ 63; King
 20 Decl. ¶ 20. These expenses are properly recoverable by counsel who secure settlements in class
 21 actions. *See In re Media Vision Tech. Secs. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996); *Staton*,
 22 327 F.3d at 974; *see also In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL
 23 1899715, at *6 (S.D.N.Y. May 13, 2011) (noting that in a class action, attorneys should be
 24 compensated “for reasonable out-of-pocket expenses incurred and customarily charged to their clients,
 25 as long as they were ‘incidental and necessary to the representation’”) (citation omitted). Because
 26

27 _____
 28 ³ Available at:
http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1066&context=clsops_papers.

1 litigation expenses here were incurred on a contingent basis without guarantee of reimbursement,
2 counsel were motivated to keep such expenses as low as possible given the needs of the case.

3 It bears emphasis that the agreed-upon award of \$4,000,000 includes the expenses that Lead
4 Counsel advanced for the benefit of the Class; Lead Counsel are not requesting a separate award for
5 expenses on top of the \$4 million. *See* Settlement Agreement ¶ 48. As of May 27, 2016, Lead
6 Counsel have incurred \$206,566.40 in unreimbursed costs to investigate the case, hire a mediator,
7 retain experts, obtain deposition transcripts, travel, engage in legal research, and cover other
8 customary litigation expenses. As detailed in the accompanying declarations of counsel, these costs
9 were reasonably incurred in furtherance of the investigation, prosecution, and settlement of the action
10 and should be reimbursed. *See In re Toys R Us FACTA Litig.*, 295 F.R.D. at 469 (“Expenses such as
11 reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal
12 research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are
13 typically recoverable. . . . [and the court has] discretion to reimburse consulting and expert witness
14 fees.” (quotations and citation omitted)). As an additional note, Lead Counsel self-hosted all
15 electronic documents produced in this litigation—expenses associated with this service are not
16 included in the expense figures stated above. King Decl. ¶ 21.

17 **C. Because Lead Counsel Are in the Best Position to Assess the Contributions of Non-**
18 **Lead Counsel, the Court Should Permit Lead Counsel to Allocate the Fee in the**
19 **First Instance.**

20 As mentioned above, additional counsel for Class Representatives Abrams and Nobles
21 provided some assistance in the successful prosecution of this matter. *See generally* King Decl. The
22 services consisted of gathering and reviewing Ms. Nobles’ and Ms. Abrams’ documents in response to
23 Yahoo’s document requests; preparing Ms. Nobles’ and Ms. Abrams’ interrogatory responses; and
24 helping prepare for and defend their depositions. Additional counsel Lesley Portnoy also assisted with
25 additional projects. Lead Counsel approved work only after determining it to be non-duplicative.
26 King Decl. ¶ 14.

27 Lead Counsel respectfully submit that they have the best vantage point to assess the value of
28 other law firms’ contributions to this litigation, and therefore they should be afforded the discretion to
allocate these fees and expenses, subject to this Court’s review and subject to the right of additional

1 counsel to petition the Court to challenge any allocation. As Judge Selna held in the Toyota MDL,
2 efficiency and common sense support granting class counsel leeway to allocate fees “in a manner that
3 they believe, in good faith, reflects the contributions of counsel to the prosecution and settlement of
4 the claims” because “class counsel are the most familiar with the amount of work actually contributed
5 by each of the [other] firms.” *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales*
6 *Practices, & Prods. Liab. Litig.*, No. 8:10ML 02151 JVS (FMOx), 2013 U.S. Dist. LEXIS 123298, at
7 *316 (C.D. Cal. July 24, 2013).

8 Judge Selna’s approach is particularly appropriate where fees allocated to additional counsel
9 will be paid from Lead Counsel’s award. Numerous other courts have so held. *See, e.g., Harless v.*
10 *Clorox Co.*, 273 F.R.D. 630, 646 (S.D. Cal. 2011) (finding that “federal courts routinely affirm the
11 appropriateness of a single fee award to be allocated among counsel and have recognized that lead
12 counsel are better suited than a trial court to decide the relative contributions for each firm and
13 attorney”) (citations omitted); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at
14 *18 (E.D. Pa. June 2, 2004) (noting that this approach “relieves the Court of the difficult task of
15 assessing counsel’s relative contributions.”) (citation and quotations omitted); *In re Copley Pharm.,*
16 *Inc.*, 50 F. Supp. 2d 1141, 1148 (D. Wyo. 1999) (stating that “class counsel were there, working side
17 by side, communicating frequently, and can better assess the relative worth of co-counsel’s
18 contributions”); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 395, 400 (D.D.C. 1978) (“[I]t is virtually
19 impossible for the Court to determine as accurately as can the attorneys themselves the internal
20 distribution of work, responsibility and risk.”).

21 **D. The Requested Service Awards Are Reasonable and Should Be Approved.**

22 Finally, Lead Counsel seek, and Yahoo does not oppose, service awards in the amount of
23 \$5,000 for each of the four named plaintiffs. If approved, Yahoo will pay these awards separately.
24 Yahoo’s agreement to pay them will not diminish the value of the injunctive relief, nor will there be
25 any effect on the amount of any monetary relief any class member might achieve in future individual
26 litigation. Settlement Agreement ¶ 52.

27 Service or incentive awards “are fairly typical in class action cases.” *Rodriguez v. W.*
28 *Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). Such awards are “intended to compensate class

1 representatives for work done on behalf of the class, to make up for financial or reputational risk
2 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private
3 attorney general.” *Id.* at 958-59. Relevant considerations are the actions the class representative has
4 taken to protect the interests of the class, the degree to which the class has benefited from those
5 actions, and the amount of time and effort the class representative expended. *Pierce v. Rosetta Stone,*
6 *Ltd.*, No. C 11-01283 SBA, 2013 WL 5402120, at *6 (N.D. Cal. Sept. 26, 2013); *see also, e.g., In re*
7 *Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (approving \$5,000 service
8 awards); *Wren v. RGIS Inventory Specialists*, No. C-06-05778-JCS, 2011 WL 1230826, at *36 (N.D.
9 Cal. Apr. 1, 2011) (“As Plaintiffs correctly note, there is ample case law finding \$5,000 to be a
10 reasonable amount for an incentive payment.”).

11 The requested \$5,000 awards for each of the four named plaintiffs in this case are warranted.
12 The named plaintiffs actively participated in the prosecution of this case by regularly communicating
13 and working with Lead Counsel. They produced personal and work-related emails, responded to
14 interrogatories, and took time away from work to testify at a deposition. Notably, in opposing
15 plaintiffs’ motion for class certification, Yahoo quoted from and included as exhibits the interrogatory
16 responses of all four named plaintiffs and excerpts of each of their deposition transcripts. *See Decl. of*
17 *Rebekah Kaufman Exs. A-L*, Mar. 12, 2015, ECF No. 78-9, *et seq.*

18 In seeking to hold Yahoo accountable to the law, the plaintiffs also subjected themselves to
19 public attention and exposure of their personal information. Plaintiffs pursued these claims
20 notwithstanding the risks that private emails would likely be discoverable and that private information
21 might be unsealed; in effect, they risked forfeiting their own privacy rights to vindicate the privacy
22 rights of others like them. Under all the circumstances of this case, the requested service awards are
23 justified. *See, e.g., Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1208 (C.D. Cal. 2014)
24 (\$10,000); *In re Toys R Us FACTA Litig.*, 295 F.R.D. at 472 (\$5,000); *Covillo v. Specialtys Cafe*, No.
25 C-11-00594 DMR, 2014 WL 954516, at *8 (N.D. Cal. Mar. 6, 2014) (“In this district, a \$5,000
26 incentive award is presumptively reasonable.”).

1 **IV. CONCLUSION**

2 For the foregoing reasons, plaintiffs respectfully submit that the Court should award
3 \$4,000,000 in attorneys' fees and expenses, direct this award to Lead Counsel to allocate among non-
4 lead counsel as appropriate, and approve service awards of \$5,000 to each of the four named plaintiffs.

5 Dated: May 31, 2016

6 Respectfully Submitted,

7 **KAPLAN FOX & KILSHEIMER LLP**

8 **GIRARD GIBBS LLP**

9 By: /s/ Laurence D. King
10 Laurence D. King (SBN 206423)
11 350 Sansome Street, Suite 400
12 San Francisco, CA 94104
13 Telephone: (415) 772-4700
14 Facsimile: (415) 772-4707
15 *lking@kaplanfox.com*

9 By: /s/ Daniel C. Girard
10 Daniel C. Girard (SBN 114826)
11 Jordan Elias (SBN 228731)
12 601 California Street, 14th Floor
13 San Francisco, CA 94108
14 Telephone: (415) 981-4800
15 Facsimile: (415) 981-4846
16 *dcg@girardgibbs.com*

13 Frederic S. Fox (admitted *pro hac vice*)
14 David A. Straite (admitted *pro hac vice*)
15 850 Third Ave., 14th Floor
16 New York, NY 10022
17 Telephone: (212) 687-1980
18 Facsimile: (212) 687-7714
19 *dstraite@kaplanfox.com*

20 *Co-Lead Class Counsel*

21 *Co-Lead Class Counsel*

22 **ATTESTATION STATEMENT**

23 I, Daniel C. Girard, am the ECF User whose identification and password are being used to file
24 Plaintiffs' Motion for Attorneys' Fees and Costs and Service Awards. Pursuant to Civil L.R. 5-1(i)(3), I
25 attest under penalty of perjury that concurrence in this filing has been obtained from all counsel.

26 /s/ Daniel C. Girard
27 Daniel C. Girard
28