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

20 IN RE: YAHOO MAIL LITIGATION

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

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
ENTRY OF STIPULATED INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: August 25, 2016
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 by the Court, plaintiffs Cody Baker, Brian Pincus, Rebecca Abrams, and Halima Nobles move, pursuant to Federal Rule of Civil Procedure 23(e) for entry of an order granting final approval of the settlement agreement reached with Defendant Yahoo!, Inc. dated January 7, 2016 (the "Settlement Agreement," ECF No. 174-3, as amended March 15, 2016, ECF No. 181) and entry of the stipulated injunction provided in paragraph 31 thereof.

This motion is made on the grounds that the settlement is fair, reasonable and adequate, and should be granted final approval. The 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 Daniel C. Girard (the "Girard Decl.") and Laurence D. King (the "King Decl."), which provide a more detailed summary of the litigation.

Dated: May 31, 2016

Respectfully Submitted,

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1 **I. INTRODUCTION**

2 Plaintiffs Cody Baker, Brian Pincus, Rebecca Abrams, and Halima Nobles respectfully move for
3 final approval of the Settlement Agreement with Yahoo. In October 2011, Yahoo announced a plan to
4 scan incoming and outgoing email for keywords for targeted advertising purposes, and updated its terms
5 of service to reflect the new practice. Plaintiffs are four individuals who occasionally correspond with
6 Yahoo Mail subscribers. Plaintiffs do not use Yahoo Mail and never agreed to Yahoo's new terms of
7 service. Plaintiffs sued, alleging that Yahoo was required to obtain their consent to scan their emails
8 with Yahoo Mail subscribers while the emails were in transit.

9 After more than two years of litigation, and with cross motions for summary judgment fully
10 briefed, the parties settled. The settlement was negotiated with the assistance of Cathy Yanni, an
11 experienced JAMS mediator. Yahoo will restructure its email delivery architecture to ensure that
12 incoming and outgoing email is no longer intercepted while in transit. The changes will be complex and
13 expensive, but they will bring Yahoo's email scanning practices into compliance with California law.
14 Yahoo will also make corrective changes to its website that will disclose additional information about its
15 conduct, and certify that it did not collect and store any class member's email content for the purposes of
16 its 2013 test of Google's AdSense for Content, the conduct that plaintiffs alleged was a violation of the
17 Stored Communications Act ("SCA").

18 This Court granted preliminary approval of the settlement and set a schedule for class notice,
19 motions for final approval and fees, objections, and a final approval hearing. *See* Order Granting Mot.
20 for Prelim. Approval of Class Action Settlement, Mar. 15, 2016, ECF No. 182 ("Preliminary Approval
21 Order"). As directed in the Preliminary Approval Order, plaintiffs now move for final approval of the
22 settlement, including entry of a stipulated injunction provided in paragraph 31(a) of the Settlement
23 Agreement, which will resolve all equitable claims of the nationwide class and California class that the
24 Court certified on May 26, 2015. *See* Order Granting in Part and Denying in Part Mot. for Class
25 Certification, ECF No. 105. The settlement was reached on a fully developed record and approximates
26 the relief plaintiffs could expect to achieve if they prevailed on the merits. The settlement does not
27 release any money damage claims for any class members (other than the four representative plaintiffs),
28

1 and individual class members are free to pursue such claims without the need to opt out of the class.
2 Likewise, the settlement does not bar future litigation if Yahoo ever resumes the challenged practices.

3 For all the reasons discussed below, the settlement should be approved as fair, reasonable and
4 adequate.

5 **II. TERMS OF THE SETTLEMENT AGREEMENT**

6 On January 7, 2016, the parties agreed to settle this litigation on a class-wide basis, and provided
7 a copy of the Settlement Agreement to the Court as Exhibit 1 to Laurence D. King's declaration in
8 support of plaintiffs' motion for preliminary approval. ECF No. 174-3. At the preliminary approval
9 hearing on March 10, 2016, the Court instructed the parties to modify the procedures for objections.
10 Girard Decl. ¶ 58; King Decl. ¶ 48. The parties therefore amended paragraph 41 of the Settlement
11 Agreement on March 15, 2016 and made conforming changes to the proposed class notice (Exhibit D to
12 the Settlement Agreement). ECF No. 181 ("Settlement Addendum"). A copy of the amendment was
13 provided to the Court. *Id.* The Court preliminarily approved the settlement terms, as amended. ECF No.
14 182; Girard Decl. ¶ 58; King Decl. ¶ 48. These terms are summarized below.

15 **A. Stipulated Injunction: Yahoo's Changes to Its System Architecture and Website**

16 Yahoo has agreed to adopt practices that comply with California's Invasion of Privacy Act
17 ("CIPA"). Settlement Agreement ¶ 31. Yahoo will make fundamental technical changes such that, for
18 incoming email, email content will only be retrieved from servers from which email is accessible by
19 Yahoo Mail users, and only sent to servers for analysis for advertising purposes after a Yahoo Mail user
20 can access the email in his or her inbox. *Id.* ¶ 31(a). For outgoing email, Yahoo will make technical
21 changes such that email content will only be retrieved from servers from which outgoing email is
22 accessible by Yahoo Mail users, and only sent to servers for analysis for advertising purposes after a
23 Yahoo Mail user can access the outgoing email in his or her sent email folder. *Id.* Yahoo has agreed to
24 make these significant structural changes to its system architecture for the processing of *all* incoming
25 and outgoing email, not just emails sent to and from the California class members. *Id.* ¶¶ 13 (defining
26 "Class Members"), 31(a) (relief applies to all "Class Members").

27 As a result of these changes, Yahoo will only access incoming email content for advertising
28 purposes after it has been delivered to Yahoo Mail subscribers' inboxes, and will only access outgoing

1 email for advertising purposes after it has been placed in Yahoo Mail subscribers' sent email folders.
2 Settlement Agreement ¶ 31(a). These changes will remain in place for at least three years. *Id.* Yahoo
3 counsel confirmed at the preliminary approval hearing that Yahoo has no intention of eliminating these
4 changes to its email architecture after the three-year injunction expires. Preliminary Approval Hearing
5 Tr. 37:3-38:4. Should Yahoo nevertheless do so, renewed litigation would not be foreclosed. *Id.*;
6 Preliminary Approval Order ¶ 6. The settlement does not prohibit Yahoo from analyzing incoming and
7 outgoing email for spam, malware, and abuse detection and protection. Settlement Agreement ¶ 31(d).

8 Yahoo has also agreed to make several changes to its website, described in detail in paragraph
9 31(f) of the Settlement Agreement. First, in its Yahoo Privacy Center webpage, Yahoo will disclose that
10 "Yahoo analyzes and stores all communications content, including email content from incoming and
11 outgoing mail." Settlement Agreement ¶ 31(f)(i). Second, Yahoo will replace the heading "Information
12 Collection and Use Practices" with "Premium Services," and replace the heading "Personally Relevant
13 Experiences" with "Information Collection and Use Practices." *Id.* ¶ 31(f)(ii). Finally, Yahoo will
14 disclose that "Yahoo may share keywords, package tracking and product identification numbers with
15 third parties in order to enhance your user experience and provide targeted ads" and such information
16 "may also be used for interest-based advertising." *Id.* ¶ 31(f)(iii).

17 In addition, Yahoo will certify that it did not collect and store any class member's email content
18 for the purposes of its 2013 test of Google's AdSense for Content, the conduct that plaintiffs contend
19 violated the SCA. Settlement Agreement ¶ 31(g).

20 **B. Limited Release**

21 In exchange for Yahoo's agreement to provide the benefits above, plaintiffs and class members
22 will release Yahoo from all equitable claims asserted in this case and claims arising from the same
23 nucleus of operative fact as the claims asserted in this case. Settlement Agreement ¶ 32. Class members
24 release claims for declaratory, injunctive and non-monetary equitable relief only. *Id.* The four named
25 class representatives will also release claims for damages. *Id.* The settlement does not release future
26 claims if Yahoo reverts to past practice after the injunction expires. *Id.*

1 **C. Attorneys' Fees and Expenses**

2 Co-Lead Class Counsel are contemporaneously moving for an award of attorneys' fees and costs.
3 If approved, that award would be paid solely by Yahoo and in no way impact any class member who
4 elects to pursue future money damage claims. Settlement Agreement ¶ 48. Yahoo has agreed not to
5 oppose a fee request of \$4 million. *Id.* The parties negotiated this attorneys' fee provision after they
6 agreed to the class relief. *Id.*; Decl. of Laurence D. King ¶ 7, Jan. 7, 2016, ECF No. 174-2.

7 **D. Class Representative Service Awards**

8 The Class Representatives, who actively participated in this litigation, request that the Court
9 approve a \$5,000 service award for each of them. Yahoo does not oppose the request. Settlement
10 Agreement ¶ 52. The request for service awards appears in the motion for attorneys' fees and expenses,
11 which as noted above is being filed separately.

12 **E. Objections**

13 At this Court's direction, the parties modified the objection procedure. *See* Settlement
14 Addendum 1-2. Any class member wishing to object to the settlement need only mail the objection to
15 the Court. *Id.* Counsel need not be copied on the objection, and the objector need not register with
16 ECF. *Id.* The Court's courtroom deputy has confirmed that, as of this date, no objections have been
17 received. The deadline to object is July 1, 2016. *See* Preliminary Approval Order ¶ 21.

18 **III. PROCEDURAL HISTORY**

19 **A. Plaintiffs' Claims and Yahoo's Motion to Dismiss**

20 On January 22, 2014, the Court consolidated four related class actions against Yahoo and
21 appointed Girard Gibbs and Kaplan Fox to serve as co-lead interim class counsel. ECF Nos. 27, 29;
22 Girard Decl. ¶ 18. Plaintiffs filed a consolidated complaint on February 12, 2014, asserting claims for
23 violations of the CIPA, the SCA, the federal Wiretap Act, and the California Constitution, seeking
24 damages and injunctive and declaratory relief. ECF No. 35; Girard Decl. ¶ 19. Yahoo moved to
25 dismiss, (ECF No. 37), and the Court upheld plaintiffs' CIPA claim and the portion of the SCA claim
26 alleging that Yahoo shared the content of email with third parties, (ECF No. 49). Girard Decl. ¶¶ 20-22.
27 The Court dismissed the remaining claims. ECF No. 49.

B. Discovery

1 **B. Discovery**
2 The parties held their Rule 26(f) conference on January 14, 2014, and commenced discovery
3 shortly thereafter. Girard Decl. ¶ 24; King Decl. ¶ 30. In response to plaintiffs' requests for production,
4 Yahoo produced more than 136,000 pages of documents relating to its system architecture and targeted
5 advertising programs. Girard Decl. ¶ 26; King Decl. ¶ 31. Plaintiffs also served two sets of
6 interrogatories and one set of requests for admission. Girard Decl. ¶¶ 27, 34. Yahoo produced two
7 corporate executives in response to plaintiffs' Rule 30(b)(6) deposition notice: Director of Engineering
8 Amir Doron (on topics related to Yahoo's technology and targeted advertising) and Senior Product
9 Manager Kevin Day (on the topic of AdSense for Content for Mail). King Decl. ¶ 35. In addition,
10 plaintiffs deposed the following Yahoo employees: Gareth Shue, Engineering Director of Mail and
11 Delivery; Douglas Sharp, Vice President of Communications Engineering; Shoen Yang, Senior Director
12 of Business Planning; and Matthew Thompson, Director of Product Management. *Id.* Plaintiffs
13 deposed Kevin Day in his individual capacity as well as in his capacity as a Rule 30(b)(6) corporate
14 representative. *Id.*

15 Plaintiffs responded to interrogatories and requests for production and produced documents.
16 Girard Decl. ¶ 30; King Decl. ¶ 32. Yahoo deposed all four plaintiffs. Girard Decl. ¶ 33; King Decl. ¶
17 35. The parties exchanged opening and rebuttal expert reports on topics related to Yahoo's email
18 delivery, spam filtering, and data analysis processes, as well as the feasibility of technological and
19 commercial modifications to Yahoo's architecture to comply with the relevant privacy laws. Girard
20 Decl. ¶¶ 28, 37; King Decl. ¶ 38. Plaintiffs deposed Yahoo's expert and Yahoo deposed plaintiffs'
21 expert twice. Girard Decl. ¶¶ 38-39; King Decl. ¶¶ 39-40. The parties resolved a number of discovery
22 disputes without Court intervention. King Decl. ¶ 33.

C. Class Certification

23 **C. Class Certification**
24 Plaintiffs filed a motion for class certification on February 5, 2015. ECF Nos. 60-66. Following
25 the Court's denial of class certification in *In re Google Inc. Gmail Litigation*, No. 13-MD-02430-LHK,
26 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014), plaintiffs chose to pursue only injunctive and declaratory
27 relief and therefore sought certification under Rule 23(b)(2). Yahoo vigorously opposed certification,
28 arguing among other things that individualized issues of consent precluded certification and that the

1 plaintiffs were atypical and inadequate representatives. ECF Nos. 77-80; Girard Decl. ¶ 43. In their
2 reply, plaintiffs argued that the individualized issues of consent that precluded certification in the *Gmail*
3 case were not present because plaintiffs sought certification under Rule 23(b)(2), which requires only
4 that Yahoo have acted on grounds generally applicable to the class and that the plaintiffs seek
5 “indivisible” injunctive relief. ECF No. 89; Girard Decl. ¶ 44.

6 On May 26, 2015, the Court granted plaintiffs’ motion, but declined to certify a nationwide class
7 for plaintiffs’ CIPA claim. ECF No. 105; Girard Decl. ¶ 46. The Court certified two classes: (1) as to
8 plaintiffs’ CIPA claim, a class of all persons in California who are not Yahoo Mail subscribers and who
9 have sent emails to or received emails from a Yahoo Mail subscriber from October 2, 2012 to the
10 present, or who will send emails to or receive emails from a Yahoo Mail subscriber in the future; (2) as
11 to plaintiffs’ SCA claim, a class of all persons in the United States who are not Yahoo Mail subscribers
12 and who have sent emails to or received emails from a Yahoo mail subscriber from October 2, 2011 to
13 the present, or who will send emails to or receive emails from a Yahoo Mail subscriber in the future.
14 ECF No. 105.

15 Yahoo filed a Rule 23(f) petition, which the Ninth Circuit denied. No. 15-80101, ECF Nos. 1, 5;
16 Girard Decl. ¶ 47.

17 **D. Cross-Motions for Summary Judgment and *Daubert* Motions**

18 Following the close of fact and expert discovery, the parties filed cross-motions for summary
19 judgment and motions to exclude each other’s expert witnesses. ECF Nos. 131-135, 143-146, 151-152,
20 154-156, 158-159, 161-164, 166, 167. Plaintiffs argued that Yahoo violates CIPA as a matter of law
21 because it intercepts and extracts the content of all incoming and outgoing email before the email is
22 delivered to the recipient. Plaintiffs also argued that Yahoo violated the SCA when it tested Google’s
23 AdSense for Mail in 2013. Plaintiffs requested that the Court grant judgment in their favor and enter a
24 permanent injunction and declaratory relief. In its summary judgment motion, Yahoo argued that its
25 conduct does not violate CIPA because it does not read or learn the content of emails for advertising
26 purposes until after the emails have been delivered to the intended recipients. Yahoo also argued that
27 several constitutional defenses precluded application of CIPA. Finally, Yahoo argued that it did not
28 violate the SCA because its test of AdSense for Mail did not involve sharing email content with a third

1 party and that it discontinued its limited use of AdSense for Mail after the 2013 test. In opposing
2 plaintiffs' motion, Yahoo argued that plaintiffs had failed to show class-wide lack of consent, that
3 plaintiffs lacked Article III standing, and that they were not entitled to injunctive relief.

4 **E. Settlement Negotiations**

5 Following an unsuccessful December 2014 mediation, Yahoo advised the Court that it believed
6 any further mediation should take place after summary judgment and *Daubert* motions were fully
7 briefed. See Supplemental Joint Case Management Conference, Apr. 30, 2015, ECF No. 94, and Case
8 Management Order, May 27, 2015, ECF No. 107. Accordingly, upon completion of briefing on cross-
9 motions for summary judgment and *Daubert*, the parties mediated before Cathy Yanni of JAMS on
10 November 4, 2015. Girard Dec. ¶ 54; King Decl. ¶ 43. After an additional month of arms-length
11 negotiations facilitated by Ms. Yanni, the parties reached an agreement in principle and notified the
12 Court. ECF No. 172; Girard Decl. ¶ 55; King Decl. ¶ 45. The parties then exchanged several drafts of
13 the Settlement Agreement and related settlement documents before agreeing to a final version dated
14 January 7, 2016. Girard Decl. ¶ 56; King Decl. ¶¶ 45-46.

15 **IV. THE NOTICE PLAN HAS BEEN EXECUTED SUCCESSFULLY AND SATISFIES DUE** 16 **PROCESS**

17 Courts sometimes dispense with class notice when a settlement involves only injunctive relief.
18 See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011). Because the Court certified the
19 classes here under Rule 23(b)(2) and the settlement involves only injunctive relief, notice is not
20 mandatory. See *id.* ("The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out,
21 and does not even oblige the District Court to afford them notice of the action."); Fed. R. Civ. P.
22 23(c)(2), (e); *Lilly v. Jamba Juice Co.*, No. 3:13-cv-02998-JST, 2015 WL 1248027, at *8-9 (N.D. Cal.
23 Mar. 18, 2015) (class notice was not necessary when the relief was injunctive, and where, as here, the
24 settlement did not release class member claims for monetary relief).

25 Although class notice was not required, the parties agreed to provide notice to the class by
26 publishing notice online across a network of websites. See Settlement Agreement ¶ 37, Ex. C. Under
27 the plan, Kinsella Media, Inc. disseminated notice via Advertising.com, which placed banner ads on a
28 collection of popular websites. *Id.* at Ex. C. These banner ads directed internet users to a settlement

1 website through a link, which provides the notice to class members found in Exhibit D to the Settlement
 2 Agreement. The settlement website was established by Rust Consulting, Inc., and Advertising.com will
 3 ensure that these ads will make 75,000,000 unique impressions¹ upon internet users—with no single user
 4 receiving more than three impressions. *Id.* at Ex. C. The Court approved the proposed form of notice
 5 on March 15, 2016, finding that it complied with due process of law. *See* Preliminary Approval Order ¶
 6 12. Yahoo also agreed to provide notice to appropriate federal and state government officials in
 7 compliance with the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1715. Settlement Agreement ¶
 8 40.

9 In accordance with the Preliminary Approval Order, Yahoo has filed a “declaration attesting that
 10 the Notice was provided in accordance with the Settlement Agreement and this Order.” *See* Decl. of
 11 Brittney Barr, May 27, 2016, ECF No. 185. Also in accordance with the Preliminary Approval Order,
 12 Yahoo has filed a Notice of Compliance with CAFA, 28 U.S.C. § 1715. ECF No. 183.

13 **V. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL**

14 Before approving a class action settlement, a court must determine that the settlement is “fair,
 15 reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d
 16 934, 944 (9th Cir. 2015). The Ninth Circuit has recognized “the strong judicial policy that favors
 17 settlements, particularly where complex class litigation is concerned,” *Class Plaintiffs v. City of Seattle*,
 18 955 F.2d 1268, 1276 (9th Cir. 1992), and “[i]t is the settlement taken as a whole, rather than the
 19 individual component parts, that must be examined for overall fairness,” *In re Online DVD-Rental*, 779
 20 F.3d at 944 (quoting *Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1026 (9th Cir. 1998)). To assess the
 21 fairness of a settlement, courts look to the eight so-called *Churchill* factors:

22 (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely
 23 duration of further litigation; (3) the risk of maintaining class action status throughout
 24 the trial; (4) the amount offered in settlement; (5) the extent of discovery completed
 25 and the stage of the proceedings; (6) the experience and view of counsel; (7) the
 26 presence of a governmental participant; and (8) the reaction of the class members to
 27 the proposed settlement.

28 ¹ An “impression” occurs when an ad is viewed by an internet user.

1 *In re Online DVD-Rental*, 779 F.3d at 944 (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654
 2 F.3d 935, 946 (9th Cir. 2011)). Here, as explained below, each of the *Churchill* factors weigh in favor
 3 of final approval of the settlement.

4 **A. The settlement is fair relative to the strength of plaintiffs’ case**

5 The first *Churchill* factor—the strength of plaintiff’s case—weighs in favor of settlement
 6 approval because plaintiffs achieved their goal of enforcing compliance with CIPA. Yahoo has agreed
 7 to process *all* incoming and outgoing email in a manner that complies with CIPA for a period of at least
 8 three years. Yahoo has also represented that it has no intention of eliminating the changes to its email
 9 architecture after three years. Settlement Agreement ¶ 31(b). Throughout this litigation, plaintiffs’
 10 position has been that Yahoo’s conduct violates CIPA because Yahoo intercepts email without obtaining
 11 the consent of both parties before the email arrives in the recipient’s mailbox. Though Yahoo disagrees
 12 with plaintiffs’ position, it has agreed to make technical changes such that it will not retrieve incoming
 13 email content for advertising purposes until after Yahoo Mail subscribers can access the emails in their
 14 inboxes, and will retrieve outgoing email content for advertising purposes only after Yahoo Mail
 15 subscribers can access the emails in their sent email folders. These changes will require significant
 16 modifications to Yahoo’s email infrastructure. As Yahoo’s Senior Manager of Engineering explains,
 17 “[t]hese changes are substantial for Yahoo and require a considerable investment of time, money, and
 18 resources.” Decl. of Nick Huang in Supp. of Mot. For Prelim. Approval of Settlement ¶ 5, Jan. 7, 2016,
 19 ECF No. 174-4. Moreover, the technical changes apply to *all* incoming and outgoing email, not just
 20 emails to and from California residents.²

21 Ultimate success in this case was far from guaranteed. In assessing the strength of a plaintiff’s
 22 case, “there is no ‘particular formula by which th[e] outcome must be tested.’” *Bellinghausen v. Tractor*
 23 *Supply Co.*, 306 F.R.D. 245, 255 (N.D. Cal. 2015) (quoting *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948,
 24 965 (9th Cir. 2009)). “Rather, the Court’s assessment of the likelihood of success is ‘nothing more than
 25 an amalgam of delicate balancing, gross approximations and rough justice.’” *Id.* (quoting *Rodriguez*,

26 _____
 27 ² The settlement does not impact Yahoo’s ability to analyze incoming and outgoing email for the
 28 purposes of spam, malware, and abuse detection. Plaintiffs recognize the value to Yahoo Mail
 subscribers and class members of these protections, and did not contend that Yahoo’s performance of
 these functions violated the law.

1 563 F.3d at 965). When the parties settled, cross-motions for summary judgment remained undecided.
2 *See Rodriguez*, 563 F.3d at 966; *see also In re Portal Software, Inc. Secs. Litig.*, No. C-03-5138 VRW,
3 2007 WL 1991529, at *6 (N.D. Cal. June 30, 2007) (recognizing “the risk of summary judgment, which
4 defendants had filed before settlement . . . and the anticipated expense and complexity of further
5 litigation”); *Nat’l Rural Telecomm. Cooperative v. DirecTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004)
6 (“The Court shall consider the vagaries of litigation and compare the significance of immediate recovery
7 by way of the compromise to the mere possibility of relief in the future, after protracted and expensive
8 litigation. In this respect, ‘It has been held proper to take the bird in the hand instead of a prospective
9 flock in the bush.’” (citation omitted)). While plaintiffs believe they would ultimately have prevailed
10 had litigation continued, the outcome was not guaranteed. *See Preliminary Approval Order* ¶ 11
11 (following briefing on summary judgment, “the Court’s initial analysis suggested some vulnerability in
12 Plaintiffs’ case.”).

13 Other legal issues raised by Yahoo involve relatively untested propositions. There is scant case
14 law interpreting section 631 of the CIPA, and even less case law applying it in the context of email. In
15 the *Gmail* case, this Court held that section 631 applies to email communications, but the Court was not
16 called upon to address the merits of the plaintiffs’ claims. *In re Google Inc. Gmail Litig.*, No. 13-MD-
17 02430-LHK, 2013 WL 5423918, at *20-21 (N.D. Cal. Sept. 26, 2013). Thus, while plaintiffs have
18 proffered their interpretation of the statute based on cases addressing telephone communications and
19 provisions of the federal Wiretap Act, the law remains unsettled and this Court or the Ninth Circuit
20 could conclude that Yahoo’s conduct does not violate the CIPA. Further, Yahoo argued in its motion
21 for summary judgment that the undisputed evidence demonstrated that it did not analyze email content
22 for advertising purposes until after the email had been delivered to the intended recipient, even if Yahoo
23 extracted the content in transit.

24 Given these risks, and because Yahoo has agreed to change its practices in a way that plaintiffs
25 agree complies with CIPA, the settlement is fair. Other courts have granted final approval of settlements
26 in which defendants have agreed to change business practices to comply with the law. *See, e.g., In re*
27 *Colgate-Palmolive Softsoap Antibacterial Hand Soap Mktg. & Sales Practices Litig.*, No. 12-md-2320-
28 PB, 2015 WL 7282543, at *2, *10-13 (D.N.H. Nov. 16, 2015) (granting final approval of settlement that

1 required the defendant to cease using allegedly misleading marketing statements, without releasing class
2 members' monetary claims, because "[t]he proposed settlement provides a benefit equal to, or greater
3 than, what class members would likely achieve through continued litigation").

4 The changes Yahoo has agreed to make to the disclosures on its website provide an additional
5 benefit to class members and the public. Settlement Agreement ¶ 31(f). The changes will highlight
6 some of the information Yahoo already has available on its website—such as providing revised headings
7 on the Privacy Center webpage that make it easier to locate information about the email content Yahoo
8 collects and uses—and will provide additional information about Yahoo's practices. *Id.* Plaintiffs
9 believe these changes benefit the Class and that the disclosures should be modified as part of the
10 settlement so that they are available to those who seek out more information about Yahoo's information
11 collection practices. Yahoo has also agreed to certify that it did not collect and store any class member's
12 email content for the purposes of its 2013 test of Google's AdSense for Content, the conduct that
13 plaintiffs alleged violated the SCA. *Id.* ¶ 31(g).

14 Finally, the limited scope of the release is appropriate here. Plaintiffs and class members will
15 only release Yahoo from claims that were actually asserted in this case and claims arising from the same
16 nucleus of operative fact as the claims asserted in this case. Settlement Agreement ¶ 32. "In the Ninth
17 Circuit when a district court approves a class action settlement, 'a federal court may release not only
18 those claims alleged in the complaint, but also a claim 'based on the identical factual predicate as that
19 underlying the claims in the settled class action.'" *Chavez v. PVH Corp.*, No. 13-cv-01797-LHK, 2015
20 WL 581382, at *5 (N.D. Cal. Feb. 11, 2015) (quoting *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442
21 F.3d 741, 748 (9th Cir. 2006)). Importantly, class members will only release claims for injunctive,
22 declaratory and non-monetary equitable relief. Only the four named plaintiffs are releasing Yahoo from
23 money damage claims. Settlement Agreement ¶ 32.

24 Consequently, the first *Churchill* factor supports settlement approval. *See Bayat v. Bank of the*
25 *W.*, No. C-13-2376 EMC, 2015 WL 1744342, at *3 (N.D. Cal. Apr. 15, 2015) ("Because the strength of
26 Plaintiffs' claims is in doubt, the first *Churchill Village* factor tips in favor of final approval of the
27 settlement."); *Larsen v. Trader Joe's Co.*, No. 11-cv-05188-WHO, 2014 WL 3404531, at *4 (N.D. Cal.

28

1 July 11, 2014) (finding first *Churchill* factor weighed in favor of settlement approval in light of
2 “significant risks that lie ahead through summary judgment and trial”).

3 **B. The settlement is preferable to the risk, expense, and complexity of continued**
4 **litigation.**

5 The second *Churchill* factor—the risk, expense, complexity, and likely duration of further
6 litigation—also weighs in favor of settlement approval. “Generally, unless the settlement is clearly
7 inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain
8 results.” *Ching v. Siemens Indus., Inc.*, No. 11-cv-04838-MEJ, 2014 WL 2926210, at *4 (N.D. Cal.
9 June 27, 2014) (internal quotations omitted). Immediate receipt of injunctive relief has value to a class,
10 especially when compared to risky and costly continued litigation. *See LaGarde v. Support.com, Inc.*,
11 No. C 12-0609 JSC, 2013 WL 1283325, at *4 (N.D. Cal. Mar. 26, 2013) (“In light of the risks and costs
12 of continued litigation, the immediate rewards to class members are preferable.”); *In re HP Laser*
13 *Printer Litig.*, No. SACV 07-0667, 2011 WL 3861703, at *2-3 (C.D. Cal. Aug. 31, 2011) (approving
14 injunctive relief consisting of change to business practices and enhanced disclosures as superior to
15 continued litigation).

16 Continued litigation would have been risky for plaintiffs. The hurdles noted above make the
17 outcome of continued litigation uncertain, and present “a significant risk that litigation might result in a
18 lesser recover[y] for the class or no recovery at all.” *Bellinghausen*, 306 F.R.D. at 255. This factor is
19 particularly important because Yahoo continued the challenged practice during the litigation. It would
20 have made little sense for plaintiffs to press on when Yahoo was offering to bring its scanning practices
21 into line with plaintiffs’ understanding of the law.

22 Continued litigation also would have been costly, in terms of both time and money. *See Ching*,
23 2014 WL 2926210, at *4 (noting that this *Churchill* factor looks to “the probable costs, in both time and
24 money, of continued litigation” (citation and internal quotations omitted)). Yahoo has steadfastly
25 maintained that it would vigorously defend this case to judgment and beyond, and both sides were
26 preparing for trial at the time of settlement. Expert testimony would have been required at trial. *See*
27 *LaGarde*, 2013 WL 1283325, at *4 (*Churchill* factor met where continued litigation would turn on the
28 resolution of complicated factual issues regarding technical design and functionality of software). Given

1 the novelty of several legal issues, the losing party would likely have appealed, leading to further
2 expense and delay. *See Bayat*, 2015 WL 1744342, at *4 (“[R]egardless of who prevails on the merits of
3 [a contested issue], the losing party would likely appeal, thus significantly prolonging this litigation and
4 increasing its expense and complexity.”); *Larsen*, 2014 WL 3404531, at *4 (“Avoiding such
5 unnecessary and unwarranted expenditure of resources and time would benefit all parties, as well as
6 conserve judicial resources.”); *Ching*, 2014 WL 2926210, at *3 (same). Consequently, because
7 continued litigation would be risky, costly, complex, and long, the second *Churchill* factor favors
8 settlement approval.

9 **C. The risk of maintaining class status favors approval of the settlement.**

10 The third *Churchill* factor—the risk of maintaining class action status throughout the trial—
11 weighs in favor of approving the settlement. From the outset of this litigation, Yahoo challenged the
12 ability of plaintiffs to proceed on a class basis, including by filing a Rule 23(f) petition following this
13 Court’s certification of a national class and California subclass. While the 23(f) petition was denied,
14 Yahoo was likely to seek decertification of the national class if the SCA claim failed. As the Supreme
15 Court has noted, a district court may decertify a class at any time. *See Gen. Tel. Co. of Sw. v. Falcon*,
16 457 U.S. 147, 160 (1982).

17 **D. The settlement provides valuable injunctive relief without releasing money damage**
18 **claims by the class.**

19 The fourth *Churchill* factor—the relief achieved in settlement—“is generally considered the
20 most important.” *Bayat*, 2015 WL 1744342, at *4. Injunctive relief may provide greater benefits to a
21 class than monetary relief, especially when the defendant agrees to change fundamental business
22 practices. *See, e.g., In re Colgate-Palmolive*, 2015 WL 7282543 at *10-11 (defendant agreed to stop
23 misleading marketing statements regarding triclosan on its Softsoap Antibacterial products); *In re HP*
24 *Laser Printer Litig.*, 2011 WL 3861703 at *2-4 (defendant agreed to stop using a mechanism that
25 stopped printing after a set number of pages).

26 The settlement will benefit all class members and the public—not just the California subclass—
27 by requiring Yahoo to change its email delivery architecture. Given the unusual posture of this case (an
28 alleged ongoing harm during the pendency of the litigation), the timing of this benefit is as important as

1 the substance. Every day that the litigation dragged on was another day that plaintiffs contend Yahoo
 2 was violating California law. Furthermore, the settlement will promote privacy rights going forward.
 3 By securing Yahoo’s agreement to modify its systems to refrain from scanning emails for advertising
 4 purposes until the email is in storage (either the inbox or sent items box), the settlement signals to the
 5 market and to privacy advocates that scanning for spam can be disaggregated from scanning for content
 6 for advertising purposes. Privacy advocates can be expected to look to this settlement as establishing
 7 that spam control programs do not give email service providers (ESPs) free rein to disregard two-party
 8 consent laws like CIPA. More broadly, this settlement empowers privacy advocates to challenge
 9 internet service providers (ISPs) who may in the future scan electronic communications sent to or
 10 received by their customers but who do not act as the ESP (and thus do not provide email storage).³

11 **E. The parties had sufficient information to reach the settlement.**

12 The next *Churchill* factor—the extent of discovery completed and the stage of the proceedings—
 13 “evaluates whether ‘the parties have sufficient information to make an informed decision about
 14 settlement.’” *Larsen*, 2014 WL 3404531, at *5 (quoting *Linney v. Cellular Alaska P’ship*, 151 F.3d
 15 1234, 1239 (9th Cir. 1998)). This factor strongly supports granting approval here. Formal discovery is
 16 not a requirement for final settlement approval; “[r]ather, the court’s focus is on whether the parties
 17 carefully investigated the claims before reaching a resolution.” *Bellinghausen*, 306 F.R.D. at 257
 18 (citation and internal quotations omitted). The parties in Yahoo! Mail completed all fact discovery,
 19 including production and review of more than 136,000 pages of documents, Girard Decl. ¶ 26, King
 20 Decl. ¶ 31; took depositions of all fact witnesses, Girard Decl. ¶ 35, King Decl. ¶ 35; took depositions of
 21 all four named plaintiffs, *id.*; and produced and responded to interrogatories. Girard Decl. ¶¶ 27, 30, 34.
 22 The parties completed all expert discovery, including exchanging initial report and rebuttal reports, and
 23 deposing both sides’ experts. Girard Decl. ¶¶ 37-40; King Decl. ¶¶ 38-42. The parties also filed cross-
 24 motions for summary judgment and reply briefing, and participated in mediation before an experienced
 25 neutral. Girard Decl. ¶¶ 48-56; King Decl. ¶¶ 41, 43-46.

26 _____
 27 ³ The Court’s class certification opinion has also provided a road map on certification issues in other
 28 privacy cases, most recently in an analogous case against Facebook. *See, e.g., Campbell v. Facebook*
Inc., No. 13-CV-5996-PJH, 2016 WL 2897936, at *5 (N.D. Cal. May 18, 2016) (citing this Court’s
 analysis in addressing ascertainability and challenges to (b)(2) certification).

1 In short, counsel had more than sufficient information to make an informed decision on resolving
2 this case on fair and reasonable terms. *See Bellinghausen*, 306 F.R.D. at 257 (factor supported approval
3 where parties had litigated multiple motions to dismiss, engaged in formal and informal discovery,
4 produced and analyzed hundreds of pages of documents, prepared detailed mediation briefs, and
5 participated in mediation); *LaGarde*, 2013 WL 1283325, at *7 (factor supported approval where
6 plaintiff had presented technology expert’s conclusions to defendant and parties had engaged in limited
7 motion practice).

8 **F. Experienced counsel recommend the settlement.**

9 The sixth *Churchill* factor—the experience and views of counsel—also weighs in favor of final
10 settlement approval. Class counsel are experienced in prosecuting and settling class actions generally
11 and are recognized leaders in the emerging field of data privacy specifically. *See, e.g.*, Firm Resume of
12 Kaplan Fox & Kilsheimer LLP, Ex. A to King Decl., Feb. 5, 2015, ECF No. 61; Firm Resume of Girard
13 Gibbs LLP, Ex. 44 to Girard Decl., Feb. 5, 2015, ECF No. 60-7. Further, class counsel have been
14 litigating this case since the end of 2013. As other courts have noted, “[t]he opinions of counsel should
15 be given considerable weight both because of counsel’s familiarity with this litigation and previous
16 experience with cases.” *Larsen*, 2014 WL 3404531, at *5; *Ching*, 2014 WL 2926210, at *5. On the
17 other side of this action are highly qualified counsel from two well-known law firms (Morrison &
18 Foerster LLP and Zwillgen PLLC) who skillfully defended their client, but nevertheless agree that this
19 settlement is preferable to continued litigation. Lead Counsel believe the settlement is in the best
20 interests of the class, especially in light of the ongoing nature of the alleged privacy violation and the
21 fact that claims for money damages for past harm are not being released. Girard Decl. ¶ 56; King Decl.
22 ¶ 4. Thus, the recommendation of counsel supports final approval of the settlement. *Bellinghausen*, 306
23 F.R.D. at 257 (citing *Hanlon*, 150 F.3d at 1026).

24 **G. Presence of a governmental party.**

25 The next *Churchill* factor looks to the presence of a governmental party. There has been no
26 involvement of any federal or state government in this litigation. Further, consistent with CAFA, 28
27 U.S.C. § 1715, Rust Consulting, Inc., at the direction of counsel for defendant Yahoo, certified that a
28 notice of the proposed settlement was provided to appropriate state and federal officials on January 15,

1 2016, and identified each official. [ECF No. 183-1]. Rust also certified that it sent a CD to each
2 identified official containing the Settlement Agreement, complaint and relevant motions. There have
3 been no objections or communications from regulators, which weighs in favor of final approval. *See*
4 *LaGarde*, 2013 WL 1283325, at *7 (“CAFA presumes that, once put on notice, state or federal officials
5 will raise any concerns that they may have during the normal course of class action settlement
6 procedures.” (citation and internal quotations omitted)).

7 **H. Reaction of class members.**

8 The final *Churchill* factor—the reaction of class members—likewise supports final approval of
9 the settlement. “Courts have repeatedly recognized that the absence of a large number of objections to a
10 proposed class action settlement raises a strong presumption that the terms of the proposed class
11 settlement action are favorable to the class members.” *Bellinghausen*, 306 F.R.D. at 258 (citation and
12 quotations omitted). Thus, this Court “may appropriately infer that a class action settlement is fair,
13 adequate, and reasonable when few class members object to it.” *Id.* (citation and quotations omitted).

14 Plaintiffs estimated hundreds of thousands if not millions of class members in their discussion of
15 the “numerosity” prong of Rule 23(a); Yahoo did not dispute numerosity or this estimate. *See* ECF No.
16 105 at 15. Counsel are not aware of any objections to date, and the lack of any objection from any class
17 member in a class of this size shows an overall exceptionally positive reaction by the class so far, which
18 supports final approval. *See, e.g., Rodriguez*, 563 F.3d at 967 (approving district court’s finding of
19 “favorable reaction” to settlement where 52,000 class members submitted claims and 54 objected);
20 *Larsen*, 2014 WL 3404531, at *5 (finding “positive response” where nearly 60,000 class members
21 submitted claims, 23 opted out, and 16 objected).

1 **VI. CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for
3 final approval of the settlement.

4 Dated: May 31, 2016

Respectfully submitted,

6 **KAPLAN FOX & KILSHEIMER LLP**

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22 **ATTESTATION STATEMENT**

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

26 /s/ Daniel C. Girard

27 Daniel C. Girard