No. 23-3550

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEVEN AKINS; JASON ARICIU; ANTHONY BELL; BRIDGETT BURK; TERRY FISCHER; TYLER KING; JORDAN O'HARA; CHERYL SENKO,

Plaintiffs-Appellees,

SARAH FELDMAN; JILL MAHANEY,

Objectors-Appellants,

v.

FACEBOOK, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
U.S. District Court for the Northern District of California
3:18-md-02843-VC
The Hon. Vince Chhabria

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES

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INTRODUCTION

This class action arose from claims that Facebook provided third parties with unauthorized and widespread access to users' personal information from 2007 through 2022.[1] The parties engaged in nearly five years of costly and contentious litigation. After extensive discovery and motion practice, they achieved a $725 million settlement, which is the largest settlement of a private data-privacy class action. Having considered the robust record and applicable law, the district court approved the settlement as fair, adequate, and reasonable and awarded attorneys' fees.

Out of an estimated 250 million class members, only two—Sarah Feldman and Jill Mahaney (the "Objectors")—have appealed, challenging the district court's final approval order and award of attorneys' fees.[2] The Objectors do not dispute the settlement's procedural fairness or that the district court considered and responded

[1] These allegations largely concern actions taken when the Defendant was named "Facebook, Inc." Several years after this action began, the Defendant changed its name to "Meta Platforms, Inc." For simplicity's sake, Plaintiffs will refer to the Defendant uniformly as "Facebook."

[2] A third objector has dismissed his appeal. Stipulated Motion to Voluntarily Dismiss Appeal, May 2, 2024, ECF 17.1.

to their arguments. And they admit that the $725 million settlement is "objectively large." Appellants' Opening Brief ("OB") at 7. Nonetheless, they maintain that the district court abused its discretion in approving the adequacy and allocation of the settlement relief and in awarding fees of 25% of the settlement fund. They are incorrect.

First, the district court properly approved the settlement as fair, reasonable, and adequate under Rule 23(e)(2). The Objectors say that the district court was required to quantify both the maximum theoretical damages and the probability that Plaintiffs would succeed in recovering those damages after trial. This proposed approach conflicts with Circuit precedent: this Court has "never prescribed a particular formula by which" a settlement "must be tested." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Nor are district courts "required to find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award." *Lane v. Facebook, Inc.*, 696 F.3d 811, 823 (9th Cir. 2012).

The district court also properly rejected the Objectors' claim that the $725 million settlement must be evaluated against a baseline of

$625 billion, the maximum theoretical statutory damages available under the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710. Because the amount of this theoretical recovery would violate due process and be reduced, the district court did not abuse its discretion in rejecting $625 billion as a benchmark against which to evaluate the settlement. Indeed, earlier this year, this Court rejected a nearly identical argument raised by one of the Objectors here (Feldman). *In re Facebook, Inc. Internet Tracking Litig.*, No. 22-16903, 2024 WL 700985, at *1 (9th Cir. Feb. 21, 2024) [hereinafter "*Facebook Tracking*"]. There, the panel affirmed the approval of a $90 million class settlement, finding that the district court had "properly rejected the $1.24 trillion in statutory damages proposed by the Objectors as an unreasonable baseline that would violate due process." *Id.*

The Objectors also challenge the settlement based on its plan for allocating funds. As the district court noted, this challenge relies on an illusory distinction between Facebook users who joined the platform before, and users who joined after, certain contractual disclosures were made in 2009. The district court did not abuse its discretion in approving the settlement's fair and reasonable allocation of funds.

Second, the district court acted well within its discretion in awarding 25% of the settlement fund as attorneys' fees. The Objectors do not contest the bulk of the district court's factual findings. Instead, they challenge the district court's finding that class counsel achieved an excellent result, arguing that the settlement is not large enough. That challenge fails for the same reason that their objections to the settlement fail: it wrongly assumes $625 billion as a realistic benchmark against which to measure the settlement. The Objectors also dispute the district court's finding that the fee here was within the range awarded in other settlements of comparable size. That finding was amply supported by empirical data on class settlements, as well as a lodestar cross-check yielding a below-average 1.99 multiplier, which the Objectors do not contest.

For these reasons and the others laid out below, the district court's final approval order and fee award should be affirmed.

STATEMENT OF JURISDICTION

Plaintiffs agree with the Objectors' statement of jurisdiction.

STATEMENT OF THE ISSUES

1(a). Did the district court act within its discretion in approving a $725 million class settlement, achieved after years of litigation, under the relevant Rule 23(e)(2) factors?

1(b). Did the district court act within its discretion in approving the settlement's allocation of funds as fair and reasonable considering the procedural posture of the case, facts that emerged in discovery, and defenses available to Facebook at summary judgment and trial?

2. Did the district court act within its discretion in granting the requested fee award of 25% of the settlement fund after determining that the requested fee was justified by the results achieved, the risks counsel faced, fee awards in comparable settlements, the burdens counsel shouldered while litigating, and the fact that a lodestar cross-check showed that a 25% fee was 1.99 times class counsel's lodestar fee?

STATEMENT OF THE CASE

I. This settlement resolves litigation arising out of the Cambridge Analytica scandal.

In 2018, a press report revealed that Cambridge Analytica, a political consulting firm, had used the personal information of millions of Facebook users to target them with political messages, both on and off Facebook. 2-SER-451, ¶ 3. These users' personal information was obtained through an app on the Facebook platform. That app collected data not only from the 300,000 users who installed the app, but also from those users' Facebook friends—as many as 87 million users in all. 2-SER-458–59, ¶¶ 397, 400. This revelation launched multiple inquiries into what user information Facebook was sharing with other third parties.

In the wake of this scandal, users filed multiple class actions against Facebook. The actions were transferred under 28 U.S.C. § 1407 to Judge Vince Chhabria of the United States District Court for the Northern District of California, who oversaw consolidated pretrial proceedings. After consolidation, the court appointed two co-lead counsel to represent the proposed class.

Plaintiffs' consolidated complaint alleged that Facebook had shared users' personal information with third parties without, or beyond, the users' consent. It also alleged that Facebook had failed to monitor and safeguard users' data. Based on this conduct, Plaintiffs asserted that Facebook had breached its agreements with users, negligently failed to prevent third parties' misuse of users' information, and invaded users' privacy under California common law. Plaintiffs also brought claims under the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701–2713, and the VPPA, *id.* § 2710.

The VPPA has figured prominently in the Objectors' arguments before the district court and on appeal. The VPPA applies to "video tape service providers," a term whose broad statutory definition, Plaintiffs alleged, includes Facebook. *See id.* § 2710(a)(4). The statute regulates information that identifies someone "as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3). This "personally identifiable information" may not be disclosed to third parties unless the consumer has consented. *See id.* § 2710(b)(1)–(2). To obtain legally effective consent, the VPPA establishes specific procedures that a video tape service provider must follow. *Id.* § 2710(b)(2)(B). Plaintiffs alleged that Facebook had violated the VPPA by disclosing information about videos that users had accessed on Facebook without securing the users' effective consent under the VPPA. 2-ER-57–58.

II. The case moves into nearly three years of contentious and extensive discovery.

Facebook filed a motion under Federal Rule of Civil Procedure 12(b)(1) and (b)(6) to dismiss the entirety of Plaintiffs' complaint. The district court issued a ruling in September 2019 that largely upheld Plaintiffs' claims. *See* 2-ER-24–94.

The case then proceeded to discovery. Disputes over discovery quickly accumulated, 1-SER-78–79, ¶¶ 37–40, and in March 2020, the district court referred the case for all discovery purposes to then-Magistrate Judge Jacqueline Scott Corley, Dist. Ct. ECF No. 390.

In May 2020, the burgeoning discovery disputes prompted Judge Corley to order the parties to meet several times a week to discuss their disagreements. 1-SER-80, ¶ 47. Despite these negotiations, resolution of some discovery disputes took months, *see, e.g.*, 1-SER-81–82, ¶¶ 49–55, and many disputes were not resolved at all, *see* 1-SER-84, ¶ 64.

Nearly a year later, so many discovery disputes remained unresolved that Judge Corley urged the parties to retain a discovery neutral to mediate their disputes. *Id.* The parties retained Judge Gail Andler, a retired California Superior Court judge. Judge Andler, in turn, concluded that the technical nature of the parties' disputes required the involvement of Daniel Garrie, an electronic discovery expert. 1-SER-84, ¶ 65.

Between April and July 2021, the parties engaged in frequent, time-consuming discovery mediation. 1-SER-85, ¶ 66. While this discovery mediation led to some progress, the number of unresolved disputes that still remained led Plaintiffs to propose the appointment of a Special Master to oversee discovery. 1-SER-85–86, ¶¶ 67–71.

In July 2021, with multiple discovery issues still unresolved, the district court appointed Daniel Garrie as Discovery Special Master. 2-SER-448–49. In the following months, Special Master Garrie resolved many longstanding discovery disputes, granting in whole or in part more than a dozen of Plaintiffs' motions to compel. 1-SER-87–93, ¶¶ 75–76, 81–108.

At a February 2022 status conference, the district court suggested that Facebook may have engaged in discovery misconduct and invited Plaintiffs to file a motion for sanctions.[3] 2-SER-430:2–433:5. In the

[3] The district court ultimately sanctioned Facebook and its attorneys for discovery misconduct. *In re Facebook, Inc. Consumer Privacy User Profile Litig.*, 655 F. Supp. 3d 899 (N.D. Cal. 2023).

following months, discovery accelerated, as did the parties' discovery disputes. *See* 1-SER-94–109, ¶¶ 112–164.

Through this contentious litigation, class counsel obtained extensive discovery about Facebook's data-sharing practices. This included over 1.3 million documents from Facebook, over 400,000 documents from third parties, thirty-four fact depositions, and an additional twenty-one days of testimony from corporate witnesses designated under Rule 30(b)(6). 1-SER-72–74, ¶¶ 11–13.

III. The litigation culminates in a $725 million settlement.

Plaintiffs negotiated a $725 million classwide settlement. This settlement remains the largest ever in a private data-privacy case, and the most Facebook has paid to resolve a private class action.

The parties' settlement negotiations were overseen by Judge Jay Gandhi (Ret.). Mediation sessions in October and November 2021 made no progress. 1-SER-111, ¶¶ 177–178. The parties remained far apart in another session in April 2022. 1-SER-112, ¶ 179. At further mediations in May and August 2022, Plaintiffs' position was strengthened by evidence gained in newly produced discovery. After these mediations, with Judge Gandhi's assistance, the parties reached an agreement in principle: Facebook would establish a $725 million nonreversionary fund for class members.[4] 1-SER-112, ¶¶ 180–182.

Even after reaching this agreement in principle, the parties spent additional months negotiating settlement terms. 1-SER-112–13, ¶ 183. Having deadlocked on some terms, the parties engaged Judge Corley for additional mediation. After four mediation sessions in October and November 2022, most significant disputes were resolved, although negotiations continued through December 2022. *Id.* The parties finally executed a settlement agreement on December 22, 2022. *Id.*

Under the settlement agreement, Facebook agreed to fund a $725 million cash settlement. Funds would be allocated to Facebook users based on how long they maintained accounts on Facebook. This allocation plan was designed in consultation with an expert in allocating settlements to distribute funds to users based on the amount of probable access that third parties had to their information. *See* 2-SER-325–33. Through confirmatory discovery from Facebook, Plaintiffs

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[4] In a "nonreversionary" settlement, the defendant agrees that in no event will any settlement funds return to it. 4 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 13:53 (6th ed. Nov. 2023 update); *see also id.* § 12:29.

were assured that "the amount of third parties' access to" Facebook users' data "has a positive correlation with the amount of time those users have been on the platform." 2-SER-323, ¶ 109; *see also* 2-SER-298 (explaining the practical barriers to other methods of estimating injury).

IV. The district court approves the settlement after considering, and rejecting, the Objectors' arguments.

When parties reach a settlement in a class action, they first present the proposed settlement to the district court for preliminary approval. 4 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 13:1 (6th ed. Nov. 2023 update). If the court grants preliminary approval, notice of the settlement is sent to class members, who then have an opportunity to object to the settlement or to "opt out"—*i.e.*, to exclude themselves from any binding classwide judgment. *Id.* Then, after hearing from all sides, the court decides whether to grant final approval to the settlement under Rule 23(e). *Id.*

Because the district court reviews class settlements just as rigorously at the preliminary stage as at the final stage, *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016), Plaintiffs' motion for preliminary approval offered a detailed analysis of the settlement's fairness. Plaintiffs included an in-depth discussion of the strengths and weaknesses of their case to allow the court to compare the settlement-provided relief against what the class could gain or lose by continuing to litigate. 2-SER-279–96 . They also provided the court with estimates of the maximum potential recovery under each of their claims. 2-SER-283, 285–86, 287, 288, 289, 290, 292–93.

After preliminary approval, the settlement administrator carried out a plan of class notice that reached approximately 250 million Facebook users. In response to the notice, the settlement administrator received nearly 18 million validated claims by the time of the final approval hearing—to counsel's knowledge, the largest number of validated claims to date in any class action. 1-SER-14:14–20. Eighty-two unique class members, or about 0.00003% of the estimated class, filed objections.[5] Dist. Ct. ECF Nos. 1144, 1147, 1152, 1154, 1155, 1158, 1160, 1171, 1180. A small percentage of the class chose to opt out. Dist. Ct. ECF No. 1178-1, Ex. A.

[5] Although there were ninety-four total objections, there were only eighty-two unique objectors. *See generally* Dist. Ct. ECF Nos. 1144, 1158, 1160, 1171, 1180.

Plaintiffs moved for final approval of the settlement. After briefing and a hearing, during which the district court heard from Objectors Feldman and Mahaney, as well as other objectors, the district court granted final approval of the settlement in an order that examined all relevant factors under Rule 23(e)(2). ER-6–8, ¶ 10; ER-11, ¶ 20.

The district court's order considered and rejected the Objectors' arguments against final approval. They argued that the amount of the settlement was inadequate compared to the potential statutory damages available under the class's VPPA claim. Noting that the massive "recovery theoretically available under the VPPA" would raise "potential due-process issues," the court found that the risks of proceeding with the claim, including the due-process risks, were "reasonably accounted for in Plaintiffs' analysis of the value of the VPPA claim and make the Settlement Fund a highly favorable result for the Class." *Id.*

The court also addressed the Objectors' argument that the Settlement's allocation of funds must assign increased value to the claims of class members who became users before Facebook made certain disclosures in 2009, because those class members had especially strong claims. *See infra* at 44–47 (discussing this argument in detail). The district court ruled that, for several reasons, the Objectors' distinction between pre-2009 and post-2009 users was largely illusory. ER-10, ¶ 17. In declining to recognize this distinction, the district court found the settlement allocation was reasonable.

V. The court grants attorneys' fees to class counsel after considering, and rejecting, the Objectors' arguments.

Plaintiffs simultaneously sought attorneys' fees, seeking an award of 25% of the settlement fund, the "benchmark" percentage in this Circuit. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). In support of the fee motion, Plaintiffs submitted empirical data about comparable class actions to show that the number of hours expended on the case was reasonable, as were the billing rates. They also submitted data to show that a 25% fee was well within the range of fees awarded in comparable settlements. ER-17 ¶ 5; ER-18 ¶¶ 9–12. Class counsel also detailed the nearly 150,000 hours they had spent on the case. 1-SER-70–72. The necessity of these hours, and the appropriateness of class counsel's billing rates, were supported by the declarations of counsel and two experts, one of whom reviewed all of counsel's roughly 97,997 time entries for reasonableness. 1-SER-70–72,

1-SER-74–116, 1-SER-119–22, 1-SER-133–38, 1-SER-156–94. The Objectors did not question the accuracy or appropriateness of Plaintiffs' hours or their billing rates in their underlying objection, nor do they do so here.

In its order granting attorneys' fees, the district court said it did "not take lightly the concern that a fee award equaling 25% of the Settlement Fund can be inappropriate in cases involving a massive monetary recovery for the class." ER-16, ¶ 2. "As a result," the court said, it approached the 25% benchmark fee with "skepticism." *Id.* Nevertheless, it determined that "the circumstances of this case justify awarding Class Counsel" a 25% fee. ER-16–18, ¶¶ 2–12. In particular, the court found that counsel achieved "significant monetary benefits" for the class; that the "magnitude of the Settlement Fund is due more to the efforts of counsel than the size of the Class"; and that counsel faced "a meaningful risk" of recovering nothing given the "challenges posed by novel legal issues, complicated facts, difficulties of proof, as well as the resources of the Defendant and its aggressive approach to litigation." ER-16–17, ¶¶ 3–4.

The district court addressed and rejected the Objectors' arguments against the requested fee award. The Objectors claimed that because the Settlement Fund is large, the fee award must be lower than 25%. The district court responded, however, that this Court "has rejected the position that fee percentages must invariably fall as settlement amounts rise." ER-17, ¶ 6 (citing *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 933 (9th Cir. 2020) (rejecting "bright-line rule")). The relevant question, the court noted, was "whether a given percentage would confer 'windfall profits . . . in light of the hours spent on the case,'" and here, the number of hours that counsel had spent on the case confirmed that "a 25% award is reasonable and does not confer a windfall on counsel." ER-17, ¶¶ 6, 8 (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)).

VI. The Objectors appeal the final approval order.

After the Court set aside the Objectors' challenges to the settlement, they appealed the district court's orders on final approval and attorneys' fees. So did a former objector-appellant, Jonathan Fortman. Plaintiffs moved under Federal Rule of Appellate Procedure 7 for appeal bonds, which are meant to guarantee the payment of costs on appeal.

In response to Plaintiffs' motion, the Objectors told the district court that Plaintiffs might not incur any costs on this appeal because Objector Feldman and her counsel were raising the "same issue" in another Ninth Circuit appeal, *Facebook Tracking*. 1-SER-3. In *Facebook Tracking*, as here, Objector Feldman argued that a class settlement was unfair because it recovered only a fraction of the maximum theoretical statutory damages. *See id.* "[I]f the appeal in *Facebook Tracking* is ultimately unsuccessful," the Objectors told the district court, they would "dismiss their appeal in the instant action, thus sparing Class counsel the need to incur" costs on appeal. *Id.* The district court denied Plaintiffs' motion for a bond.

This Court held oral argument in the *Facebook Tracking* appeal on February 7, 2024. Two weeks later, the Court issued a memorandum disposition rejecting objectors' arguments in their entirety and affirming the district court's approval of a class settlement and award of attorneys' fees. *Facebook Tracking*, 2024 WL 700985, at *1.

Fortman voluntarily dismissed his appeal in early May 2024. Stipulated Motion to Voluntarily Dismiss Appeal, May 2, 2024, ECF 17.1. The Objectors did not.

SUMMARY OF ARGUMENT

1. Settlement approval. In granting final approval to the parties' $725 million settlement, the district court applied the correct legal standard, making findings on all relevant factors under Rule 23(e)(2). Most of those findings are not contested on appeal.

Nevertheless, the Objectors argue that the district court abused its discretion because it declined to evaluate the class's VPPA claim using a rigid formula. In the Objectors' view, the district court was required to assess the settlement by (1) quantifying the maximum theoretical recovery under the VPPA and the probability of success; (2) multiplying these two numbers to find the claim's litigation value; and (3) then comparing the resulting figure to the settlement amount. The Objectors' proposed formula is overly mechanical and does not allow for any other considerations including the implications of due process or Plaintiffs' ability to collect a massive verdict.

The Court has rejected this argument in at least two published decisions. In *Lane*, the Court held that a district court need not find "a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award." 696 F.3d at 823. And in *Rodriguez*, the Court declined to "prescribe[] a particular formula" for settlement approval, including "quantif[ication]" of "the net expected value of continued litigation to the class." 563 F.3d at 965 (internal quotation marks and citation omitted).

The Objectors also maintain that the district court was required to use a theoretical VPPA verdict of $625 billion as a "starting place" for evaluating the settlement. OB 15. This argument also fails: the district court considered it and determined that the "potential due-process issues" raised by such a massive verdict made $625 billion an unrealistic benchmark for evaluating the settlement. ER-8–9, ¶ 12.

In making this determination, the district court acted within its discretion. It was not required to evaluate the settlement's adequacy using a verdict that the Objectors themselves concede would not realistically be upheld and that would likely cause a bankruptcy filing.

The Objectors also challenge the settlement's plan for allocating funds among class members, which fairly distributes funds based on how long a class member maintained an active Facebook account. They argue that the plan does not properly account for differences between users who signed up for Facebook before certain disclosures were made in 2009 and users who signed up after those disclosures. But the district court explained in depth why this distinction is illusory—and the Objectors offer no response to that explanation here.

2. Award of fees. In awarding attorneys' fees, the district court again applied the correct legal standard. Most of the district court's findings are unchallenged. Instead, the Objectors dispute only two parts of the district court's order.

First, the Objectors dispute the district court's finding that a 25% fee was within the range of fees awarded in comparable settlements. In making that finding, the district court relied on empirical data that Plaintiffs submitted about fee percentages in similar settlements—data whose accuracy is not disputed. The Objectors maintain that the court should have relied on different data, including fees awarded in a different set of settlements that the Objectors did not submit to the district court. But the record supports the district court's decision to rely on the data submitted by Plaintiffs, and its determination on this factual issue is reviewed deferentially on appeal. Nor do the Objectors challenge the district court's "lodestar cross-check," which gauged the reasonableness of a 25% fee by accounting for the over 149,000 hours of legal work required to secure the result here. The district court was well within its discretion to find that the result of that cross-check—a below-average "lodestar multiplier" of 1.99—supported the 25% fee as fair and reasonable.

Second, the Objectors argue that the district court abused its discretion when it determined that class counsel had achieved an excellent result for the class. This argument turns on the Objectors' incorrect views about how the district court was required to evaluate the class's VPPA claim. Again, the district court did not abuse its considerable discretion when it determined that the class's realistic recovery under the VPPA, and the strengths and weaknesses of the VPPA claim, made the settlement a remarkable achievement.

STANDARD OF REVIEW

I. The district court's settlement approval is reviewed for abuse of discretion.

"Review of the district court's decision to approve a class action settlement is extremely limited." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). The decision is reviewed "for clear abuse of discretion." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (citation and quotation omitted). "Parties seeking to overturn the settlement approval must make a 'strong showing' that the district court clearly abused its discretion." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc) (citation omitted).

Under this standard, the Court will affirm so long as "the district judge applies the proper legal standard and his findings of fact are not clearly erroneous." *In re Google Inc. St. View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1110 (9th Cir. 2021) (citation omitted). This deferential standard is appropriate because the district court has been "exposed to the litigants, and their strategies, positions and proof." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (citation omitted), *overruled on other grounds as recognized in Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1046 (9th Cir. 2010).

The Objectors argue that the Court must review the settlement approval de novo because this case involves the legal standard applied in *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109 (9th Cir. 2022), which held that massive aggregate statutory damages can violate due process. OB 9–10. But this Court is reviewing the approval of a class-action settlement, not the constitutionality of a statutory-damages award. And the Objectors do not argue that *Wakefield* changed the legal standard for class-action settlement approval or that the district court did not correctly identify that legal standard. Accordingly, this Court should review the settlement for abuse of discretion. *See also infra* at 40–42.

II. The district court's award of attorneys' fees is reviewed for abuse of discretion.

The "district court's award of fees and costs to class counsel, and its method of calculation" of fees, are also reviewed "for abuse of discretion." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177 (9th Cir. 2013). This standard requires "[f]indings of fact underlying an award of fees" to be "reviewed for clear error." *Google Inc. St. View*, 21 F.4th at 1110 (citation omitted). "[B]road deference" is accorded "to the district court's determination on fee awards" this Court has commented, "because of [the district court's] 'superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.'" *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

ARGUMENT ON SETTLEMENT APPROVAL

I. Most of the Court's order approving the settlement is unchallenged on appeal.

Federal Rule of Civil Procedure 23 requires a district court to approve a class-action settlement as "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Rule 23 "set[s] forth specific factors to consider in determining whether a settlement" should be approved. *Briseño v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021). These factors are whether: (1) "the class representatives and class counsel have adequately represented the class"; (2) "the proposal was negotiated at arm's length"; (3) "the relief provided for the class is adequate"; and (4) "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2).

Most of the Rule 23(e)(2) factors are undisputed on appeal, as is the settlement approval's procedural fairness. The Objectors do not dispute that the class representatives and class counsel, in the district court's words, "ably protected and furthered the best interests of the Class at every step in this action." ER-6, ¶ 10(a); *see* Fed. R. Civ. P. 23(e)(2)(A). Nor do they dispute that the settlement "was reached as a result of extensive arm's length negotiations." ER-6, ¶ 10(b); *see* Fed. R. Civ. P. 23(e)(2)(B).

Although the Objectors argue that the district court abused its discretion when it determined that "the relief provided to the class [was] adequate," Fed. R. Civ. P. 23(e)(2)(C), they do not dispute the factual findings supporting this determination. Thus, it is undisputed that "further litigation would likely be complex, expensive, and lengthy," ER-7, ¶ 10(c); *see* Fed. R. Civ. P. 23(e)(2)(C)(i), and that the "methods of processing claims and distributing [settlement] funds" are "fair and adequate." ER-8, ¶ 10(f); *see* Fed. R. Civ. P. 23(e)(2)(C)(ii).

The Objectors do not challenge the district court's assessment of the "risks" of further litigation. Fed. R. Civ. P. 23(e)(2)(C)(i). Even here, however, the district court's assessment of the class's non-VPPA claims is undisputed.[6] And on the VPPA claim, the Objectors do not dispute the risks posed by the statute's two-year statute of limitations, 18 U.S.C. § 2710(c)(3), or the challenges of succeeding on the merits of the claim. *See* 1-SER-242–44.

The Objectors similarly do not dispute that the district court provided "'a reasoned response' to all non-frivolous objections," as this Court requires. *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (citation omitted). The court addressed and overruled their objection premised on theoretical statutory damages for the VPPA claims, *see* ER-5, ¶¶ 4, 6; ER-8–9, ¶¶ 11–12; ER-9–10, ¶¶ 15–17; ER-11, ¶ 19, and the Objectors merely disagree with the substance of the court's response. OB 19; *see also infra* at 43 (discussing that response). The court also addressed and overruled the Objectors' challenge to the allocation plan.

With the procedural fairness of the settlement undisputed, the only questions presented on settlement approval are whether the district court acted within its discretion in (1) approving the total

[6] As the Objectors acknowledge, *see* OB 13, the district court agreed with the analysis of risks and benefits that Plaintiffs provided in their motion for preliminary approval. *See* ER-7, ¶ 10(d) (citing that analysis).

settlement amount, and (2) approving the allocation plan. The answer to both questions is yes.

II. The Objectors have forfeited any argument involving the Stored Communications Act.

The Objectors raise arguments that they failed to raise below. *E.g.*, OB 20 n.10, 21. Before the district court, the Objectors' arguments against the settlement pertained only to the VPPA. Their objection did not mention the SCA, let alone "raise[]" it "sufficiently for the trial court to rule on it." *O'Rourke v. Seaboard Sur. Co.* (*In re E.R. Fegert, Inc.*), 887 F.2d 955, 957 (9th Cir. 1989); *see* 2-ER-282–98. For that reason, arguments based on the SCA are not preserved for appellate review.

In any event, as Plaintiffs explained, and as the district court agreed, the SCA claim offered the class negligible value. *See* 2-SER-286–87; ER-7, ¶ 10(d). The Objectors do not argue otherwise. And a massive statutory-damages award under the SCA would raise the same due-process problems as an award under the VPPA. *See infra* at 33–37.

III. The district court acted within its discretion when it declined to apply a rigid settlement-approval formula that this Court has already rejected.

In moving for settlement approval, Plaintiffs noted that the VPPA theoretically provided for $2,500 in statutory damages per class member. 2-SER-285. They also evaluated the strengths and weaknesses of the VPPA claim on its merits, 2-SER-283–84, explaining that the class could not realistically expect to recover $2,500 per class member—for due-process reasons among others, 2-SER-284–86. And, as the Objectors acknowledge, the district court considered and agreed with Plaintiffs' assessment of the VPPA claim. *See* ER-7, ¶ 10(d) (citing that assessment).

Nonetheless, the Objectors assert that the district court was required to state the maximum recoverable damages under the VPPA and assign an exact number to the claim's probability of success. It was then required to multiply maximum damages against the probability of success to quantify the VPPA claim's "likely litigation value," OB 21, and to compare that dollar amount to the settlement. OB 14, 18.

This Court has rejected this argument twice. In *Lane*, it held that district courts are not "required to find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award." 696 F.3d at 823. *Lane* is squarely on point. There, as here, settlement objectors argued that a district court, in approving a class-action settlement, had erred by failing to assign a value to the class's VPPA claims. *Id.* at 822–23. This Court rejected that argument, holding that a district court need not "include in its approval order a specific finding of fact as to the potential recovery for each of the plaintiffs' causes of action." *Id.* "[A]ny prediction" of an exact number for statutory damages would necessarily be "speculative and contingent." *Id.* What is required, rather, is a *qualitative* assessment of plaintiffs' claims. *Id.* The district court performed that assessment here. *See* ER-7, ¶ 10(d) (citing the analysis in Plaintiffs' motion for preliminary approval); *see also supra* at 14; *infra* at 32–33.

This Court also rejected the Objectors' rigid formula for settlement approval in *Rodriguez*. There, class-settlement objectors argued that the district court "should have specifically weighed the merits of the Class's case against the settlement amount and quantified the expected value of fully litigating the matter." 563 F.3d at 965. To support that argument, the objectors in that case, like the Objectors here, urged this Court to adopt the Seventh Circuit's approach to class settlements. *Compare id.*, with OB 20–21. In response, this Court explained that its approach is "somewhat different" from the Seventh Circuit's. *Rodriguez*, 563 F.3d at 965. The Ninth Circuit "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, and ha[s] never prescribed a particular formula by which that outcome must be tested." *Id.* (citations omitted). It is undisputed that this settlement was reached at arms-length, and *Rodriguez* forecloses the Objectors' demand for a formulaic analysis.

Finally, to argue that the district court abused its discretion by declining to follow the rigid formula that they advocate, the Objectors rely on the Northern District of California's *Procedural Guidance for Class Action Settlements*.[7] Their reliance is misplaced. Nowhere does the *Guidance* contradict *Lane* and *Rodriguez* by imposing a rigid formula for settlement approval on district courts. Besides, Plaintiffs provided the district court with what the *Guidance* requires: a detailed assessment of the strengths and weaknesses of each claim, including claim-by-claim estimates of maximum theoretical damages (for the VPPA, $2,500 per class member). *See* 2-ER-131; *see also* 2-ER-125–42. Nowhere does the *Guidance* require parties seeking approval of class

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[7] https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements.

settlements to go beyond these estimates, or to assign an exact number to their probability of success.

IV. The district court acted within its discretion when it treated $625 billion in statutory damages as an unrealistic baseline against which to measure the settlement.

The district court carefully considered the risks Plaintiffs would face in proving their VPPA claim, agreeing with Plaintiffs' assessment of the "significant legal risks and difficulties of proof," which had "been reasonably accounted for in Plaintiffs' analysis of the value of the VPPA claim." ER-8–9, ¶ 12. The court also agreed that serious "due-process issues raised" by "a massive award of statutory damages" made it unrealistic for Plaintiffs to expect to receive a theoretical $625 billion in VPPA damages even if they were successful. *Id.*; *see also* 1-SER-17:1–6, 17:12–13 (remarking on the improbability of a judgment that is "anything remotely close to the maximum" under the VPPA).

The Objectors do not dispute the district court's assessment of the risks posed by the VPPA claim. They have also conceded that Plaintiffs could not realistically expect to receive $625 billion under the VPPA. 1-SER-16:16–17 ("[W]e concede that that verdict would be unlikely to be upheld."). Nevertheless, they contend that the district court was required to use $625 billion as "the starting place" for evaluating the settlement here, OB 15, and to adopt the Objectors' mode of analyzing the due-process issue, *id.* at 16–18.

The district court was required to carefully consider the relevant factors and give a reasoned response to objectors, as it did. It did not abuse its discretion when it refused to rule that the settlement was too small compared to a concededly unrealistic baseline, or when it declined to adopt the Objectors' views on substantive merits issues. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 895 F.3d 597, 609 (9th Cir. 2018) ("[W]e hold district courts to a high procedural standard," but "rarely overturn an approval" of a class-action settlement "for substantive reasons." (citation, quotation marks, and alterations omitted)).

A. The district court properly found that constitutional problems make a $625 billion VPPA verdict unrealistic.

In approving the settlement, the district court agreed with Plaintiffs that a $625 billion verdict could not realistically stand against a due-process challenge. *See* ER-7, ¶ 10(d) (citing Plaintiffs' motion for preliminary approval); ER-8–9, ¶ 12 (same). A successful due-process challenge, in turn, could lead to a massive reduction of a jury verdict. *See* 1-SER-16:25–17:6, 1-SER-17:12–13. In *Golan v. FreeEats.com, Inc.*, for example, the Eighth Circuit affirmed a district court that had reduced $1.6 billion in statutory damages by 98%. 930 F.3d 950, 962–63 (8th Cir. 2019). The district court's analysis of the due-process problem posed by a $625 billion verdict was not an abuse of discretion.

Under this Court's decision in *Wakefield*, massive aggregate statutory damages will violate due process "when they are 'wholly disproportioned' and 'obviously unreasonable' in relation to the goals of the statute and the conduct the statute prohibits." *Wakefield*, 51 F.4th at 1123 (quoting *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919)). Applying this standard, this Court in *Wakefield* held that a verdict of $925 million in statutory damages created potential due-process problems that the district court needed to analyze on remand. *Id.* at 1125. Here, although the district court was not required to rule definitively on how *Wakefield* would apply to a $625 billion VPPA verdict, the decision highlights the serious constitutional issues that such a verdict could raise.

For example, if a $925 million verdict created potential due-process problems in *Wakefield*, a $625 *billion* verdict, which is nearly 675 times larger, would seem to create far more severe problems. And these "constitutional due process concerns" would be "heightened" where—as here—plaintiffs may be "unable to quantify any actual damages they have suffered." *Wakefield*, 51 F.4th at 1120; *see* 2-SER-274 (discussing difficulties in quantifying classwide actual damages). VPPA damages of $625 billion would also greatly exceed any disgorgement of profits that Plaintiffs could receive under a contractual claim. *See* 2-SER-283 (discussing estimated range of disgorgement).

Facebook's deep pockets would not mitigate the due-process problem. Statutory damages violate due process "when they are wholly disproportioned and obviously unreasonable in relation to *the goals of the statute and the conduct the statute prohibits*." *Wakefield*, 51 F.4th at 1123 (emphasis added, quotation and citation omitted). This standard appears to make the constitutionality of statutory damages depend on the nature of the offense, not the resources of the offender. *Id*.

The constitutional problems highlighted by *Wakefield* recently led this Court to reject arguments materially identical to the ones the

Objectors make here. *Facebook Tracking*, 2024 WL 700985. In *Facebook Tracking*, the district court had approved a $90 million class-action settlement involving Facebook. The class had asserted a claim under the Electronic Communications Privacy Act ("Wiretap Act"), 18 U.S.C. §§ 2510–2523, which permits "statutory damages at $10,000 per violation." 2024 WL 700985, at *1. On appeal, Objector Feldman—also an objector in that case—argued that the district court "should have analyzed the settlement by aggregating statutory damages" under the Wiretap Act, which totaled $1.24 trillion. *Id.* This Court disagreed, reasoning that the district court "properly rejected the $1.24 trillion in statutory damages . . . as an unreasonable baseline that would violate due process." *Id.* Tellingly, the Court found this conclusion straightforward enough that it felt no need to publish its disposition. *See* Circuit Rule 36-2. Nor was this the first time the Court had easily rejected the argument. *See Fraley v. Batman*, 638 F. App'x 594, 597 (9th Cir. 2016) (approving class settlement that awarded $15 to each claiming class member, even though a $750 statutory penalty was available, partly because "an award of $750 per claiming class member could implicate due process concerns").

If anything, the numbers here make this a clearer case than *Facebook Tracking*. There, a $90 million settlement was reasonable despite objectors' assertion of $1.24 trillion in statutory damages. Here, Plaintiffs secured a settlement about eight times *larger* than $90 million, while the asserted statutory damages are *half* the size of $1.24 trillion—making this settlement sixteen times better in proportional terms. If the *Facebook Tracking* settlement was "fair and reasonable," 2024 WL 700985, at *1, this settlement is only more so.

B. The district court properly found that practical problems also make a $625 billion VPPA verdict unrealistic.

Beyond the constitutional problems a $625 billion verdict would create, Plaintiffs and the district court deemed that figure unrealistic because of the *practical* problems that could flow from it. For instance, even if a $625 billion verdict were upheld, Plaintiffs would face an unacceptable risk of not being able to collect it. *See* 2-SER-285 (citing *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 944 (N.D. Cal. 2013), *aff'd sub nom. Fraley v. Batman*, 638 F. App'x 594 (9th Cir. 2016)) (making this point). A $625 billion verdict would represent about half of Facebook's market capitalization and is many times more than

Facebook's most recent yearly net income of $39.1 billion.[8] This magnitude of liability could trigger a bankruptcy petition and an ultimate recovery of mere "pennies on the dollar." Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 Yale J. Reg. 766, 774 (2021). This consideration also supports the district court's rejection of $625 billion as an unrealistic recovery. *Cf. Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (relying on the defendant's precarious financial position to affirm a class-settlement approval).

C. The district court properly rejected the Objectors' approach to the due-process problem.

The Objectors nevertheless contend that the district court abused its discretion in failing to adopt their approach to the due-process problem. They assert that the district court was required to start with a $625 billion baseline, multiply it by some percentage that represents

[8] *See* Nasdaq, Meta Platforms, Inc. Class A Common Stock (META), https://www.nasdaq.com/market-activity/stocks/meta [https://perma.cc/D525-8RR5] (market capitalization as of mid-August 2024); Meta Platforms, Inc., Form 10-K at 60 (Feb. 2, 2024), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/c7318154-f6ae-4866-89fa-f0c589f2ee3d.pdf [https://perma.cc/8RJA-VKEL] (net income in 2023).

the probability of success, and only *then* consider whether the resulting number may violate due process. OB 17, 18, 20 n.10. For several reasons, the district court was right to reject this approach.

First, the district court acted within its discretion in declining to use a purely theoretical $625 billion baseline to evaluate the class's VPPA claim. *See* ER-8–9, ¶ 12. It was under no obligation to start its evaluation with a verdict that would not actually be upheld.

Second, the Objectors' proposed approach sidesteps the real due-process issue—that a reviewing court would evaluate the constitutionality of a $625 billion verdict, not $625 billion discounted by the probability of success. The Objectors, however, first multiply a $625 billion verdict against a number representing the probability of success. They then ask whether the product of that multiplication—not the $625 billion verdict itself—would violate due process. That is not how any court would review the constitutionality of a $625 billion verdict; courts review actual verdicts, not hypothetical risk-discounted ones. *See Wakefield*, 51 F.4th at 1125 (remanding for the district court to consider the constitutionality of the verdict that the jury actually awarded, not the verdict reduced for litigation risk).

Third, as noted above, the Objectors effectively concede that a $625 billion verdict could not stand. 1-SER-16:16–17. If even the Objectors agree that Plaintiffs could not receive $625 billion in VPPA damages, it would have been illogical—and potentially an abuse of discretion—for the district court to use that number as a starting point for analyzing the settlement. *See BladeRoom Grp. Ltd. v. Emerson Elec. Co.*, 20 F.4th 1231, 1247 (9th Cir. 2021) (district court abuses its discretion by basing its ruling on an "illogical" finding of fact).

D. *Wakefield* does not mandate the use of $625 billion as a baseline for the settlement.

According to the Objectors, *Wakefield* does not "establish[] a yardstick for due process limitations in this case," OB 15, and it was legal error for the district court to rely in any way on it. This argument should be rejected.

As an initial matter, a singular focus on *Wakefield*'s due-process standard ignores that the district court rejected $625 billion as a baseline not just because of due-process concerns, but also because it would likely not be collectible. *See supra* at 37–38. The Objectors do not address this reason for deeming $625 billion an unrealistic recovery.

As for *Wakefield*, the district court did not reach—and was not required to reach—any definite conclusions about exactly how the case would apply to a hypothetical $625 billion verdict. That is a merits issue. And in assessing a class-action settlement, "[n]either the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Officers for Justice v. Civ. Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Rather, the district court was simply required to "show it has explored comprehensively" the risks of continuing to litigate. *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 782 (9th Cir. 2022) (quotation and citation omitted). The district court met that standard. *See* ER-7–9 ¶¶ 10(c)–(e), 11–12; 1-SER-16:25–17:15.

Nor did the district court abuse its discretion simply because it agreed with Plaintiffs in finding *Wakefield* instructive. ER-7, ¶ 10(d) (citing Plaintiffs' discussion with approval); ER-8, ¶ 12 (same). The Objectors do not dispute that the case established the Ninth Circuit's legal standard for due-process limitations on aggregate statutory damages. Even so, they say that *Wakefield* is "entirely irrelevant" because it concerned a claim under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, not the VPPA. OB 15–16. According to the Objectors, due process permits VPPA damages to be higher than TCPA damages because the VPPA protects "a substantial harm conferring standing." OB 16. This distinction is illusory. Both statutes protect privacy interests whose invasion confers standing. *See Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983–84 (9th Cir. 2017) (VPPA); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (TCPA).

Finally, the district court was not required to quantify the upper boundary of statutory damages that would comply with due process. *Cf.* OB 18. Apart from the fact that federal courts do not issue advisory opinions, that number is another contested merits issue on which the district court was not required "to reach any ultimate conclusions." *Officers for Justice*, 688 F.2d at 625. The Objectors' demand for exact quantification also conflicts with *Lane* and *Rodriguez*, which explicitly rejected the need to quantify "the potential recovery" under each settled claim. *Lane*, 696 F.3d at 823; *accord Rodriguez*, 563 F.3d at 965; *see also supra* at 29–31 (discussing *Lane* and *Rodriguez*).

V. The district court did not misconstrue the Objectors' argument regarding the $725 million recovery.

When the district court discussed the Objectors' arguments about the class's VPPA claim, it noted that they discussed only the due-process concerns raised by a $625 billion verdict: they did not "discuss any of the risks involved in proceeding with the claim, aside from potential due-process issues raised by statutory damages." ER-8, ¶ 12. The Objectors now claim that this response misunderstood their objection which did account for other litigation risks. OB 19–20.

But it is the Objectors who misunderstand the district court, not the other way round. As Plaintiffs have noted, the Objectors effectively conceded that a $625 billion verdict has no realistic chance of surviving review, and the district court rightly rejected $625 billion as an unrealistic baseline. Hence, the only remaining criticism the Objectors could have leveled against Plaintiffs' evaluation of the VPPA claim was that Plaintiffs had overrated *other* litigation risks. As the district court explained, however, the Objectors made no such criticism—which left their objection without any basis.

VI. The district court acted within its discretion in rejecting the Objectors' challenge to the plan of allocation.

Under the settlement, funds are allocated to class members based on how long they have had an activated account on the Facebook platform. In challenging this plan of allocation, the Objectors point to the way that the district court disposed of Plaintiffs' allegations about Facebook's "friend sharing" practice. "Friend sharing," Plaintiffs alleged, was a practice that allowed app developers on the Facebook platform to access the personal information of both the user that installed the app and that user's friends.[9] *See* OB 23–26.

In ruling on these allegations, the district court's motion-to-dismiss order distinguished between Facebook users who signed up before 2009 and those who signed up afterward.[10] Users who signed up after 2009, the district court ruled, had largely consented to friend

[9] "Friend sharing" was only one of the four major categories of misconduct that Plaintiffs alleged. *See* 2-ER-112.

[10] The district court's motion-to-dismiss ruling distinguished between users who signed up "before roughly 2009" and those who signed up afterward. 2-ER-50; *see also* 2-ER-50 n.14 (noting that the date that allegedly divided the two groups was "unclear" at the pleading stage). The Objectors refer to these two groups as those who "signed up prior to 2010" and those "who signed up in 2010 and later." OB 25. Plaintiffs will refer to these groups as users who signed up "before 2009" and those who signed up "after 2009."

sharing by agreeing to Facebook's terms of service. Insofar as these post-2009 users' non-VPPA claims were based on friend sharing, the court necessarily dismissed them on consent grounds. Whether users who signed up before 2009 had validly consented to the practice, by contrast, was a question of fact that the district court said it could not determine on a motion to dismiss. 2-ER-45–50.

In light of this ruling, the Objectors say, the district court should not have approved a settlement that allocates funds based solely on how long a user has been on the Facebook platform. According to the Objectors, this plan of allocation does not "treat class members equitably relative to each other," Fed. R. Civ. P. 23(e)(2)(C)(iv), because it fails to allocate more of the fund to users who signed up before 2009. Pre-2009 users are owed more of the fund, the Objectors maintain, because those users may not have consented to friend sharing, and may have claims based on that practice that post-2009 users do not.

The district court responded to this argument at length, noting three deficiencies in it.

First, the district court pointed out that the distinction between pre-2009 and post-2009 users did not apply to the class's VPPA claim.

ER-10, ¶ 17. Under that claim, Facebook had no "consent defense . . . , at least at the pleading stage," to *either* group of users. *Id.* This fact favors an allocation that does not distinguish between pre- and post-2009 users.

Second, the district court noted that the Objectors' distinction between pre- and post-2009 users places too much weight on a ruling early in the case. The motion-to-dismiss ruling merely stated that it could not hold as a matter of law that pre-2009 users had consented to friend sharing. 2-ER-45–50. Facebook retained the ability to press its consent defense at summary judgment and trial. ER-10, ¶ 17.

Third, the district court observed that facts found in discovery may well have erased any distinction between pre- and post-2009 users. Facebook's post-2009 contractual language, when it disclosed that apps could engage in friend sharing, promised that apps would use friend data only "in connection with" the user who had installed the app. 2-SER-471, ¶ 516 (emphasis omitted); *see also* 1-SER-62. So, while post-2009 users consented to a particular use of friend data, Plaintiffs had found evidence strongly suggesting that Facebook had not honored the limited scope of that consent. 2-SER-359–62 (citing documents reprinted at 2-SER-368–81, 2-SER-383–90, 2-SER-392–403, 2-SER-405–17, 2-SER-424–25). Such evidence blurs the distinction on which the Objectors base their argument, because it means that post-2009 users retain potentially viable claims based on friend sharing. To reflect this evidence, Plaintiffs would have moved to amend their complaint if litigation had continued. ER-10, ¶ 17.

The district court's analysis supports its determination that the Objectors' distinction between the pre-2009 users and the post-2009 users was largely illusory—and that the settlement was not required to reflect this distinction to fairly and equitably distribute funds to class members. The Objectors offer no reply to the district court's thorough analysis and do not dispute the factual findings that support it. *See In re Equity Funding Corp. of Am. Sec. Litig.*, 603 F.2d 1353, 1366 (9th Cir. 1979) (affirming settlement allocation where it was supported by unchallenged findings of fact). The district court's analysis also shows that there is no intraclass conflict between pre-2009 and post-2009 users, unlike in *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), on which the Objectors rely. *Cf.* OB 24–25.

ARGUMENT ON THE AWARD OF FEES

The Objectors challenge the district court's 25% fee award in only two limited respects. *First*, they argue that the $725 million settlement necessarily requires a lower fee percentage than this Circuit's benchmark of 25%, and they dispute the court's finding—grounded in empirical data—that a 25% fee was within the range awarded in other, comparable settlements. Instead, based in part on data they never submitted to the district court, the Objectors claim the court should have awarded a 11.2% fee. *Second*, the Objectors dispute whether class counsel achieved excellent results for the class. Both challenges fail.

I. In awarding attorneys' fees, the district court applied the correct legal standard and made numerous unchallenged findings.

Where attorneys have secured a "common fund for the benefit of persons other than" their own clients, they are "entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In a common-fund settlement like this one, there are two different methods for calculating attorneys' fees. The first is the percentage-of-recovery method, which awards attorneys a percentage of the fund that their efforts created. *Bluetooth*, 654 F.3d at 942. The second is the lodestar method, under which fees are "calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation . . . by a reasonable hourly rate.” *Id.* at 941. District courts have discretion to employ either method so long as the resulting fees are reasonable. *Id.* at 942.

When using the percentage-of-recovery method, “courts typically calculate 25% of the fund as the ‘benchmark’ for a reasonable fee award, providing adequate explanation in the record of any ‘special circumstances’ justifying a departure” from the benchmark. *Id.* (citations omitted). District courts may also “cross-check”—that is, compare—the percentage-of-recovery figure against what a lodestar calculation would have produced. *Online DVD-Rental*, 779 F.3d at 955.

This lodestar cross-check typically shows that the percentage fee exceeds the lodestar. 5 *Newberg and Rubenstein on Class Actions*, *supra*, § 15:86 (noting that this is “the norm”). The degree to which the percentage fee exceeds the lodestar is generally called the “multiplier” or “risk multiplier.” That multiplier is used to account for the risk that class counsel assumed in working on a contingent basis. *See Vizcaino*, 290 F.3d at 1051.

To award fees here, the district court used the percentage-of-recovery method. While it acknowledged that the benchmark award in this Circuit is 25%, it viewed the 25% fee request with greater skepticism than usual given the magnitude of this settlement:

> The Court does not take lightly the concern that a fee award equaling 25% of the Settlement Fund can be inappropriate in cases involving a massive monetary recovery for the class. In many such cases, the 25% benchmark will be too high. As a result, the Court has viewed the proposed fee award with greater skepticism, and less deference to the 25% benchmark, than in a typical case.

ER-16, ¶ 2. Nevertheless, the court determined, after considering all the circumstances of this case, that a 25% fee was "fair and reasonable." *Id.*

To explain this determination, the district court first analyzed the "several factors" that district courts may consider in deciding whether to depart from the 25% benchmark fee. *Online DVD-Rental*, 779 F.3d at 954; *see* ER-16–18, ¶¶ 3–8. Among these factors are (1) whether class counsel "achieved exceptional results for the class"; (2) whether the case was risky for class counsel; (3) "the range of fee awards out of common funds of comparable size"; and (4) the burdens that class counsel shouldered while litigating the case, and whether they were borne on contingency. *Vizcaino*, 290 F.3d at 1048–50; *see also Online DVD-Rental*, 779 F.3d at 954–55.

On several of these factors, the Objectors do not challenge the district court's findings. They do not deny that "novel legal issues, complicated facts, difficulties of proof, as well as the resources of the Defendant and its aggressive approach to litigation," all "created a meaningful risk that the Class and counsel would ultimately receive nothing." ER-17, ¶ 4. Nor do the Objectors deny that this risk was "concentrated . . . on two firms, which bore significant financial burdens and . . . spent more than 149,000 hours on a contingent basis." *Id.*

The Objectors also do not challenge the lodestar cross-check the court performed after it examined the factors relevant to a percentage fee. In support of class counsel's lodestar, Plaintiffs submitted declarations from two experts, including one who specializes in reviewing outside counsel's time. That expert analyzed 97,997 time entries. Another expert evaluated class counsel's billing rates and their aggregate hours. Both experts opined that the time spent to achieve the results in this case was justified. 1-SER-130–40, 1-SER-175–83. Neither the Objectors nor Facebook challenge their conclusions or the court's independent findings that counsel expended a reasonable number of hours and that counsel's billing rates are reasonable. ER-18, ¶¶ 10–11. Nor do the Objectors deny that comparing counsel's lodestar against a 25% fee "yields a multiplier of 1.99, which empirical research indicates is below average in settlements of comparable size." *Id.* ¶ 12.

For the district court, the modest size of the multiplier confirmed that a 25% fee is reasonable under the circumstances. *See Vizcaino*, 290 F.3d at 1050 ("[T]he lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted."). When a class settlement is large, the court noted, a 25% fee can constitute a "windfall . . . in light of the hours spent on the case." ER-17, ¶ 6 (quoting *Bluetooth*, 654 F.3d at 942). The below-average multiplier here confirmed that a 25% fee was not a windfall given the hours that class counsel spent on this case. *See* ER-17–18, ¶¶ 6, 8. While the Objectors argued that the lodestar was irrelevant, the court rejected that position, since "a lodestar cross-check assists a court in evaluating what percentage is reasonable." ER-17, ¶ 7 (citing *Apple Inc. Device Performance*, 50 F.4th at 784). Again, the Objectors do not challenge any aspect of the district court's lodestar cross-check on appeal.

II. The district court did not abuse its discretion by finding that the fee here was reasonable and within the range awarded in comparable cases.

The Objectors assert that the district court clearly erred in finding that "a 25% fee is within the range of awards made in class-action settlements of comparable size and type." ER-17, ¶ 5. In making this finding, the district court referred to data provided by Professor Brian Fitzpatrick, the Milton R. Underwood Chair in Free Enterprise at Vanderbilt Law School, a leading scholar of class-action settlements. *Id.* Professor Fitzpatrick collected federal data-privacy settlements of $100 million or more, where the average award was 22% and the median was 20.4%. 2-ER-192–93, ¶ 22. He also collected settlements of comparable size—specifically, federal non-securities common-fund class-action settlements from 2008 to the present where the monetary relief was between $500 million and $1 billion. 2-ER-190–91, ¶ 21. In this group, the mean fee percentage was 20.3%, with a median of 20.7%, while half of the fee awards exceeded 25%, the fee in this case. 2-ER-190–91, ¶ 21.

The Objectors do not contest the accuracy of any of these data. The arguments they do advance are ones that the district court was entitled to, and did, reject.

A. The district court did not abuse its discretion by preferring Professor Fitzpatrick's more recent data to the results of a prior study.

The Objectors first suggest that the district court should have used data from an earlier empirical study by Professor Fitzpatrick in 2010. OB 28. But as the Objectors acknowledge, the part of the study on which they rely (a survey of settlements between $500 million and $1 billion) contained only two data points. Given this "paucity of data," Professor Fitzpatrick himself put little stock in that part of his study, concluding that the larger data set he submitted to the district court showed that "the fee request here is much closer to the average than the numbers in my [prior] study suggest." 2-ER-188, ¶ 21. The district court did not clearly err by relying on the more recent data rather than on the prior study. *See, e.g.*, *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1358–59 (9th Cir. 1985) (en banc) (in reviewing factual finding, appellate court defers to weight district court gave competing evidence).

B. The district court did not abuse its discretion by awarding a 25% fee.

The Objectors next assert that the district court's 25% award is "5 percentage points too high" because non-securities cases with settlements between $500 million and $1 billion had mean and median fee percentages of roughly 20%. OB 29.[11]

But this Court has never required every fee award to precisely conform to the mean or median in cases of comparable size. Indeed, that would eviscerate district courts' "broad discretion" over fee awards and consideration of case-specific circumstances. *Hyundai*, 926 F.3d at 572. Rather, recognizing that individual cases are different, this Court has called for analysis of "the *range* of fee awards" in comparable cases. *Vizcaino*, 290 F.3d at 1050 (emphasis added). And here, it is undisputed that 25% is within the range of fees awarded in non-securities settlements ranging from $500 million to $1 billion. Indeed, half of those settlements had fees *above* 25%. 2-ER-190–91, ¶ 21.

Crucially, the Objectors also ignore the district court's *reasons* for finding a 25% fee appropriate. One of those reasons was the court's

[11] The Objectors also briefly state that two studies found that settlements in this range had average awards of 16% and 17%. The Objectors never argued that the district court should rely on these studies instead of Professor Fitzpatrick's data, *see* 2-SER-293–94, so any such argument is not preserved for review. Moreover, one of these studies was limited to securities cases and the age of the other study's data is unclear. *See* 2-ER-189. It was within the district court's discretion to give more weight to Professor Fitzpatrick's more recent data about non-securities settlements.

lodestar cross-check, which produced a 1.99 lodestar multiplier, well below the 2.87 mean and 2.90 median multipliers for comparably sized settlements. ER-18, ¶ 12 (citing 1-SER-186–87, ¶¶ 42–43). That *below-average* multiplier amply justified a modestly *above-average* percentage fee, especially where "novel legal issues, complicated facts, difficulties of proof, as well as the resources of the Defendant and its aggressive approach to litigation, created a meaningful risk that the Class and counsel would receive nothing." ER-17, ¶ 4; *see Vizcaino*, 290 F.3d at 1050 ("[T]he lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted.").

C. The Objectors' new list of settlements between $1.04 billion and $7.27 billion is not preserved and shows no abuse of discretion.

Next, the Objectors offer a list of class settlements ranging from $1.04 billion to $7.27 billion, where the Objectors claim that the median fee award was 7.4%. But by failing to provide this list to the district court, the Objectors failed to preserve their argument for review. *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159 n.7 (9th Cir. 2010).

Even if this Court were inclined to address the Objectors' new argument, it should reject it. Although the Objectors assert that the

$725 million settlement "is actually closer" in size to their new list than the smaller data-privacy settlements Professor Fitzpatrick examined, their arithmetic is incorrect. OB 29. The $725 million settlement amount is closer even to the smallest data-privacy settlement on Professor Fitzpatrick's list than it is to 11 of the 15 settlements on the Objectors' list. *Compare* 2-ER-192–93, ¶ 22, *with* OB 29–30. Those 11 settlements range from $2.3 billion to $7.27 billion—far larger than the settlement here.

More broadly, the Objectors misunderstand the purpose of the list of data-privacy settlements. The Objectors suggest that the fees awarded in data-privacy settlements are irrelevant because those settlements were smaller than the $725 million settlement here. But the purpose of the data-privacy settlements was to show the fees awarded in cases of comparable *kind*. The kind of litigation is relevant to the fees award, because the challenges this litigation posed "created a meaningful risk that the Class and counsel would ultimately receive nothing." ER-17, ¶ 4.

But even if only comparably *sized* settlements were relevant here, the district court acted properly: it examined settlements between $500 million and $1 billion, the range into which the $725 million settlement here falls. ER-17, ¶ 5; ER-18, ¶¶ 10, 12. It was under no obligation to examine the Objectors' list of settlements even if they had presented them, since those settlements fall into a much higher numerical range of $1.04 billion to $7.27 billion.

D. A comparison with *Facebook Biometric* does not establish an abuse of discretion.

The Objectors point out that in the one other data-privacy case that settled for between $500 million and $1 billion, *In re Facebook Biometric Information Privacy Litigation*, 522 F. Supp. 3d 617 (N.D. Cal. 2021), *aff'd*, No. 21-15553, 2022 WL 822923 (9th Cir. Mar. 17, 2022), the attorneys were awarded a lower percentage fee (15%) than here. OB 29. Of course, a 15% fee award in one case hardly mandates the same fee percentage in every other large privacy settlement. No "particular percentage" is reasonable or unreasonable "in the abstract, without reference to all the circumstances of the case." *Vizcaino*, 290 F.3d at 1048 (citation omitted).

Further, the fee percentage in *Facebook Biometric* is only part of the story. A key difference to this case is the amount of time class counsel were required to invest in the litigation. Counsel in *Facebook*

Biometric had expended only about one-fifth of the time that class counsel have invested here. 522 F. Supp. 3d at 631, 633. As a result, in *Facebook Biometric*, the 15% fee resulted in a multiplier of 4.71, far higher than the 1.99 multiplier here. *Id.* at 633. Even so, the *Facebook Biometric* court found the 4.71 multiplier acceptable, *id.*, and this Court affirmed, 2022 WL 822923, at *1. Here, the district court determined that a much lower lodestar multiplier confirmed the reasonableness of a higher percentage fee. This was no abuse of discretion. *See Vizcaino*, 290 F.3d at 1050 ("[T]he lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted.").

The Objectors also suggest in a footnote that the *Facebook Biometric* settlement provided a "far greater share" of statutory damages. OB 31 n.29. True or not, this has nothing to do with whether the fee is justified in this case. The reasonableness of a fee cannot be judged "without reference to all the circumstances of the case." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994). Here, the circumstances show that counsel achieved an outstanding result that required an extraordinary amount of work. The district court was well within its discretion to determine that a 25% fee, yielding a 1.99 multiplier was appropriate.

E. Two fee awards from the Northern District of California do not show an abuse of discretion.

Finally, the Objectors cite two fee awards from the Northern District of California to argue that the district court abused its discretion by awarding 25% of a settlement of this size. OB 27–28. Even if there were inconsistencies between the fees in those two cases and the fee here, it would not establish that the district court abused its broad discretion in awarding fees here. *See Google Inc. St. View*, 21 F.4th at 1114 n.5. And in any event, there is no inconsistency.

In fact, *Alexander v. FedEx Ground Package System, Inc.*, No. 05-cv-00038-EMC, 2016 WL 3351017 (N.D. Cal. June 15, 2016), endorses the approach the district court took here: treating the lodestar cross-check as an important factor in determining whether a percentage fee is reasonable. The district court in *Alexander* stressed that percentage fees may decrease as settlement size increases to prevent a windfall given the amount of work counsel has performed. *Id.* at *1–2; *see also Bluetooth*, 654 F.3d at 942. For that reason, in large cases, "the lodestar cross-check assumes particular importance." *Alexander*, 2016 WL

3351017, at *2. The cross-check in *Alexander* produced "a multiplier of approximately 4," double the 1.99 multiplier here and above the typical multiplier in comparably sized cases. *Id.* at *3. The court in *Alexander* also expressed a concern that the lodestar in that case was unreasonably large. *See id.* All of these considerations led to a below-benchmark percentage fee of 16.4%. *Id.* Here, by contrast, the Objectors have never challenged the lodestar cross-check or the reasonableness of counsel's hours or rates, or disputed that the resulting multiplier is well below average for comparably sized cases. *See also* ER-18, ¶¶ 10–11 (explaining why the court found hours and rates to be reasonable).

The court in *In re High-Tech Employee Antitrust Litigation* used the lodestar instead of the percentage method to award fees, so the case has limited relevance to the percentage fee here. No. 11-CV-02509-LHK, 2015 WL 5158730, at *7–8 (N.D. Cal. Sept. 2, 2015). In any event, it awarded a lodestar multiplier of 2.2, *id.* at *11, above the 1.99 multiplier awarded here, and thus lends no support for a lower fee.

III. The district court did not abuse its discretion by finding that counsel achieved an excellent result in the face of many challenges.

Finally, the Objectors assert that the district court erred in finding that class counsel achieved an excellent result. OB 27. But the Objectors' assertions rely on their fundamentally flawed method of evaluating the settlement. Because that method is wrong, their criticisms of the result are likewise wrong.

Further, in awarding the fee, the district court noted "[t]he challenges posed by novel legal issues, complicated facts, difficulties of proof, as well as the resources of the Defendant and its aggressive approach to litigation, created a meaningful risk that the Class and counsel would ultimately receive nothing." ER-17, ¶ 4. And it emphasized how the "leadership structure . . . concentrated that risk on two firms, which bore significant financial burdens and as of May 31, 2023, spent more than 149,000 hours on a contingent basis." *Id.* None of these findings are disputed. Together, they amply confirm "that a 25% award is reasonable and does not confer a windfall on counsel in light of (among other things) the amount and quality of work counsel has performed, the risks counsel has assumed during this litigation, the success achieved by counsel's persistence, and the reasonable multiplier." ER-17–18, ¶ 8.

CONCLUSION

The district court's orders granting final approval to the settlement and awarding attorneys' fees to class counsel should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,236 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I relied on the word count of Microsoft Word 2016 in preparing this certificate.

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because the brief—in both its text and its footnotes—has been prepared in 14-point Century Schoolbook font.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Derek W. Loeser
Derek W. Loeser

CERTIFICATE OF SERVICE

I, Derek Loeser, hereby certify that on August 19, 2024, I caused to be electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the ACMS system which will send notification of such filing to all counsel of record registered in the ACMS system.

/s/ Derek Loeser
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