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18 **UNITED STATES DISTRICT COURT FOR THE**
19 **CENTRAL DISTRICT OF CALIFORNIA**
20 **SANTA ANA DIVISION**

20 IN RE: VIZIO, INC., CONSUMER
21 PRIVACY LITIGATION

Case No. 8:16-ml-02693- JLS (KESx)

22 This document relates to:

23 ALL ACTIONS

24 **PLAINTIFFS' MEMORANDUM OF**
25 **POINTS AND AUTHORITIES IN**
26 **SUPPORT OF MOTION FOR**
27 **PRELIMINARY APPROVAL OF**
28 **PROPOSED CLASS ACTION**
SETTLEMENT (UNOPPOSED)

Date: December 7, 2018

Time: 10:30 a.m.

Dept: Courtroom 10-A

Judge: Hon. Josephine L. Staton

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1 **I. Introduction**

2 Plaintiffs seek preliminary approval of a settlement agreement providing monetary
3 and injunctive relief for all individuals in the United States who purchased a Vizio Smart
4 Television for personal or household use, and not for resale, that was subsequently
5 connected to the Internet at any time between February 1, 2014 and February 6, 2017.
6 The nationwide relief negotiated at arm’s length and under the supervision of a retired
7 federal judge, after years of intensive litigation and probing discovery, would end this
8 multi-district litigation against Vizio on the following terms:

9 *First*, Vizio will establish a non-reversionary \$17 million fund for proportional
10 monetary payments for settlement class members who submit a claim. The fund will cover
11 any court-approved expenses, costs, and attorneys’ fees.

12 *Second*, beginning in December 2016, after this lawsuit was filed and in substantial
13 part because of it, Vizio revised its on-screen disclosures regarding its viewing-data
14 collection and sharing practices, in a stand-alone, on-screen disclosure, and asked for
15 permission to collect and share viewing data. Under this settlement, Vizio will make
16 additional changes to its on-screen disclosure for new customers and will add a disclosure
17 to a “quick start” guide that accompanies new Smart TVs.

18 *Third*, Vizio will delete all viewing data collected during the class period which it
19 possesses. An independent auditor will confirm that this deletion is successful.

20 Plaintiffs and class counsel are proud to present this settlement agreement to the
21 Court because it is restorative. The revenue that Vizio obtained from the collection and
22 licensing of viewing data during the class period will be fully disgorged; and in turn
23 settlement class members will receive compensation comfortably within the range of
24 reasonableness for their claims. Just as important, Vizio’s collection of viewing data by
25 default ended as of February 2017. Vizio’s disclosures were revamped—and will be
26 further revised as a result of this settlement. And Vizio will destroy the remaining
27 contested viewing data in its possession.

28 Given the settlement’s many strengths and the real risk of achieving far less after

1 trial, the Court should grant this unopposed motion to begin the settlement approval
2 process.

3 **II. Summary of Argument**

4 All of the factors this Court must consider in determining whether to grant a
5 motion for preliminary approval are met here.

6 *First*, it is appropriate to conditionally certify a nationwide settlement class of all
7 individuals who purchased affected Smart TVs that were subsequently connected to the
8 Internet during the class period. Millions of consumers purchased the affected TVs and
9 connected them to the Internet (numerosity); questions common to all settlement class
10 members, including whether Vizio disclosed information that would readily permit an
11 ordinary person to identify a specific individual's video-watching behavior, are answerable
12 through common proof (commonality); the harm that Plaintiffs have suffered is identical
13 to the harm suffered by all settlement class members (typicality); and Plaintiffs and class
14 counsel will continue to vigorously prosecute this litigation on behalf of the settlement
15 class, as they have to date (adequacy).¹

16 In addition, common questions predominate over any individual ones because
17 Vizio engaged in a uniform course of conduct applicable to all settlement class members.
18 This includes the core allegation that Vizio collected and shared viewing data during the
19 class period without consumers' knowledge or consent. The proposed settlement class is
20 thus sufficiently cohesive to warrant adjudication by representation. And here, because
21 conditional certification of a single nationwide class would be based on alleged violations
22 of federal law, there can be no argument that differences in state law defeat
23 predominance.

24 Further, class adjudication is superior to other available methods of adjudication,
25 such as individual litigation, for two reasons. The high cost of litigating this case involving
26 complex technology overwhelms Vizio's potential liability per consumer. And the only
27 economically rational way for litigants and the courts to resolve millions of such claims is

28 ¹ Vizio does not oppose class certification solely for the purposes of settlement only.

1 through the class device.

2 *Second*, the proposed settlement is fair, reasonable, and adequate, and will likely be
3 granted final approval. It is the product of serious, informed, non-collusive negotiations,
4 before a former federal judge, after considerable litigation and discovery. It does not
5 improperly grant preferential treatment to class representatives or segments of the class. It
6 falls within the range of possible approval. And it has no obvious deficiencies. To assure
7 the Court that preliminary approval is appropriate and final approval likely, Plaintiffs
8 discuss herein the class definition, benefits, claims process, distribution plan (including for
9 unclaimed funds), the scope of the release, the range of litigated outcomes, the extent of
10 discovery, the views of Plaintiffs and counsel, the manner in which attorneys' fees will be
11 addressed, and demonstrate there are no signs, explicit or subtle, of collusion between the
12 parties. Plaintiffs will also seek the Court's approval of a settlement administrator.

13 *Third*, the proposed content and method of the class notice plan is sufficient. The
14 notice program is tailored to this case and designed to maximize the number of claims
15 from approximately 16 million class members. Affected Smart TVs that remain connected
16 to the Internet will display a clear, concise, and plain notice to an estimated 6 million class
17 members. That same notice will be e-mailed to an estimated 9 million class members. A
18 custom digital and print media campaign accounting for class demographics further
19 pushes the reach of this notice program well past the constitutional line. A long-form
20 notice will also be available, in English and Spanish, at www.VizioTVsettlement.com, and
21 it will answer typical questions and provide important information. Not only is this digital
22 notice program the best practicable under the circumstances, it avoids the sizeable
23 expense that attends first-class mail notice.

24 **III. Overview of the Litigation**

25 **A. The alleged circumstances that prompted these lawsuits.²**

26 Based in Irvine, California, Vizio has designed and sold televisions in the United

27
28 ² Vizio's current disclosures concerning viewing data collection and licensing, which were implemented in early 2017, are described in more detail in Section IV.C.

1 States since 2002. This includes Internet-connected televisions, or “Smart” TVs, a key
2 feature of which is the TV’s ability to access online media content, including movies and
3 music.

4 Beginning in February 2014, Vizio remotely installed automated (or automatic)
5 content recognition software on Smart TVs that had already been sold and that did not
6 have such software when sold. In about August 2014, Vizio began selling Smart TVs with
7 this software pre-installed.

8 This technology monitors the video stream of all physical inputs and certain
9 streamed content, by capturing real-time or near real-time data to construct a historical
10 record of the content displayed on-screen with one-second granularity. A mathematical
11 representation of a subsample of the viewing data, along with a unique identification
12 number assigned to the TV, are sent to a server that operates as a match database.

13 More simply: Say you own a Smart TV with this software and it is connected to the
14 Internet. You are watching a cable news program. As the program plays, the software
15 captures certain pixels that appear on your screen and sends the mathematical
16 representation and a unique number assigned to your TV to a computer server in the
17 cloud. If the server has in its library this particular program,³ then what you’re watching
18 on your Smart TV is identified; but if not, not. If there is no match, the viewing
19 information is discarded. But if there is a match, a summary of the viewing information is
20 stored.

21 In addition to capturing information about what is displayed, the software collects
22 the TV’s Internet-protocol address and WiFi signal strength, among other information.
23 This information facilitates the delivery of advertisements to other electronic devices
24 connected to the same network, such as a mobile device.

25 Why is “viewing data”—information about the content viewed on a TV and reports
26 or data derived therefrom or combined with such data—collected? According to public

27 _____
28 ³ The server ingests certain types of content and certain services but not pornographic material.

1 statements by Vizio, “the collection of viewing data can be used to generate intelligent
2 insights for advertisers and media content providers and to drive their delivery of more
3 relevant, personalized content to Smart TVs.” Vizio, *Form S-1 Registration Statement* (July
4 24, 2015), at *2.⁴ At one point, Vizio stated that its tracking software captures up to 100
5 billion data points each day from more than 10 million televisions, and “provides highly
6 specific viewing behavior data on a massive scale with great accuracy, ...” *Id.*

7 Vizio earns revenue by licensing this data to third parties. Decl. of Wilda Siu
8 (identifying specific amount). Between February 1, 2014 and February 6, 2017, Vizio
9 earned revenue that is less than the settlement amount.

10 During this time, the data was licensed to third parties under contracts that purport
11 to bar them from associating viewing data with individuals or households by name or
12 physical addresses. (Vizio does not itself associate viewing data with individuals or
13 households by name or physical address, or share information such as name or physical
14 address with third parties.) The contracts, however, allow third parties to associate viewing
15 data with demographic information such as sex, age, income, marital status, and
16 education.

17 Between February 2014 and February 2017, third parties licensed viewing data for
18 three purposes: to determine in the aggregate what consumers watch and how they watch
19 it; to analyze the effectiveness of advertising; and, starting in 2016 (after a notification was
20 displayed on-screen referencing explicitly the delivery of target advertisements based on
21 the collection of viewing data), to enable ad retargeting.

22 Consumers who purchased Smart TVs that received this tracking software through
23 a software update were presented with a message on the TV that said:

24 The VIZIO Privacy Policy has changed. Smart Interactivity has been enabled
25 on your TV, but you may disable it in the settings menu. See
26 www.vizio.com/privacy for more details. This message will time out in 1
minute.

27 ⁴ Available at
28 <https://www.sec.gov/Archives/edgar/data/1648158/000119312515262817/d946612ds1.htm>.

1 Consumers who purchased Smart TVs with this software pre-installed also received this
2 notice.

3 “Smart Interactivity” referred to the collection of viewing data. The software was
4 on by default and operated continuously unless it was turned off by the consumer.

5 The settings menu of these TVs included the setting “Smart Interactivity” and the
6 description, “Enables program offers and suggestions.” Although Vizio maintains that it
7 intended to and worked to develop certain program offers and suggestions during the
8 class period, no program offers or suggestions were enabled for more than two years.

9 To turn “Smart Interactivity” off, a consumer would have had to find this setting in
10 the menu, click on it, and then click again to disable it.

11 Between approximately Fall 2015 and Summer 2016, consumers whose Smart TVs
12 had ACR software installed received a new notice stating:

13 Select Reset & Admin in System to disable the collection and analysis of
14 viewing history from this television (“Smart Interactivity”). NEW: Smart
15 Interactivity may enable the delivery of tailored ads based upon viewing
16 history to smartphones or other devices that share an IP address or other
non-personal identifiers with the television.

17 **B. An abbreviated history of these legal proceedings.**

18 In November 2015, investigative journalists at ProPublica reported that Vizio
19 Smart TVs collect and share customers’ viewing habits with advertisers. Class action
20 complaints were filed apace and later centralized for pre-trial proceedings in this Court.

21 Upon centralization here, the Court appointed interim co-lead counsel and a
22 steering committee for Plaintiffs, as well as lead counsel for Defendants; denied a request
23 by Vizio to stay discovery until the pleadings were set; and issued a case management
24 schedule.

25 In August 2016, Plaintiffs filed a consolidated class action complaint against several
26 Vizio entities on behalf of a nationwide class of individuals who purchased affected Smart
27 TVs, and on behalf of subclasses of individuals from California, Florida, Massachusetts,
28 New York, and Florida. The complaint asserted a variety of federal and state privacy

1 claims, and state consumer protection claims. The common thread linking all of these
2 claims was the allegation that “Vizio offered Smart TVs equipped with automatic content
3 recognition software that collected consumers’ viewing histories and then sold that
4 information—along with ‘highly specific’ information about consumers’ digital
5 identities—to third parties, without consumers’ knowledge or consent.” Order Denying
6 Mot. for Interlocutory Appeal at 2.

7 Vizio responded to the complaint by moving to dismiss. After the Court received
8 outsized briefing and held oral argument, it granted and denied the motion in part,
9 allowing Plaintiffs the opportunity to replead any dismissed claim.

10 In March 2017, Plaintiffs filed a second consolidated complaint. Vizio again moved
11 to dismiss. It argued that Plaintiffs’ claims for injunctive relief were moot because Vizio
12 had entered into a consent decree with the Federal Trade Commission in February 2017
13 that required Vizio to change its business practices relating to the collection of viewing
14 data. Vizio also contested certain legal claims as insufficiently pleaded, and it asked the
15 Court to strike the class definition in the second consolidated complaint because it
16 included consumers who might be bound by arbitration agreements that forbid class
17 proceedings in any forum.

18 After briefing and oral argument, the Court denied Vizio’s motion in full. Vizio
19 then filed an answer to the second consolidated complaint in August 2017. A few months
20 later, the Court refused Vizio’s separate request to certify an immediate appeal on
21 questions of law pertaining to Vizio’s liability under the federal Video Privacy Protection
22 Act.

23 As things stand, Dieisha Hodges and Rory Zufolo of California; John Walsh of
24 Massachusetts; Chris Rizzitello of New York; Linda Thomson of Washington; and Mark
25 Queenan of Florida are named Plaintiffs for the nationwide class and their respective state
26 sub-classes.

27 The Defendants named in the operative pleadings are Vizio, Inc., Vizio Holdings,
28 Inc., Vizio Inscape Technologies, LLC; and Vizio Inscape Services, LLC. Their roles are

1 as follows. Vizio, Inc. is the primary Vizio entity for consumer electronics, such as Smart
2 TVs. Vizio Holdings, Inc. was established as a holding company pending a public offering
3 that was initiated with the filing of an S1 in July 2015 but did not advance.

4 Inscape Data, Inc. (formerly Vizio Inscape Technologies, LLC) (hereinafter
5 “Inscape”) develops the software on Vizio units that can recognize onscreen content, and
6 selectively maintains a record of viewing history associated with the television. Inscape
7 also owns the underlying automated content recognition technology, which recognizes
8 onscreen content.⁵ And Vizio Services, LLC (formerly Vizio Inscape Services, LLC) is the
9 entity that enters into contracts with customers for Inscape viewing data.⁶

10 As for the parties’ respective legal theories, Plaintiffs have proceeded to discovery
11 under the Video Privacy Protection Act, Wiretap Act, California Invasion of Privacy Act,
12 California Consumer Legal Remedies Act, California Unfair Competition Law, Florida
13 Deceptive and Unfair Trade Practices Act, N.Y. Gen. Bus. Law § 349, Massachusetts
14 Unfair and Deceptive Trade Practices Statute, Massachusetts Privacy Act, Washington
15 Consumer Protection Act, unjust enrichment, intrusion upon seclusion, and fraudulent
16 omission claims.

17 Vizio has denied Plaintiffs’ allegations and has raised thirty-seven affirmative
18 defenses. Vizio takes the position that it properly disclosed the collection of viewing data
19 to consumers; that consumers consented to or had knowledge of Vizio’s collection and
20 sharing of viewing data; that the data collected by Vizio does not constitute personally
21 identifiable information; that consumers must arbitrate their claims and cannot maintain
22 class actions; and consumers’ damages are speculative or must be judicially limited by law
23 which proscribes damages awards that exceed actual harm.

24 _____
25 ⁵ Inscape is the original Cognitive Media Networks Inc. entity. It was converted to an LLC
26 when acquired by Vizio, Inc., and all Vizio-owned viewing data was transferred to this
27 entity.

28 ⁶ The second consolidated complaint named Vizio Inscape Technologies, LLC and Vizio
Inscape Services, LLC. The Defendants’ answer to this complaint recognizes that the
former is now Vizio Services, LLC, and the latter is now Inscape Data, Inc. We thus refer
to these Vizio entities by their current corporate names in settlement documents and this
motion.

1 **IV. Terms of Proposed Settlement**⁷

2 **A. Proposed Settlement Class**

3 If approved, the settlement would offer relief to the following proposed class:

4 All individuals in the United States who purchased a VIZIO Smart
5 Television for personal or household use, and not for resale, that was
6 subsequently connected to the Internet at any time between February 1, 2014
7 and February 6, 2017.

8 Joint Decl. in Support of Motion for Preliminary Approval, Ex. 1 (hereinafter,
9 “Settlement”) ¶ I.32.

10 The time frame proposed corresponds with when Vizio first implemented
11 automatic content recognition technology (February 1, 2014), and when Vizio stopped
12 collecting viewing data through this software from Vizio Smart TVs unless the consumer
13 affirmatively consented (February 6, 2017). Settlement ¶¶ Recitals B.10-14. Note that
14 “viewing data” is defined in the settlement agreement to correspond with the definition of
15 viewing data in the consent decree with the Federal Trade Commission.

16 All Vizio Smart TVs, including the SmartCast product line, were pre-installed with
17 this software, or the software was installed remotely through an over-the-air update. The
18 number of TVs with this software which connected to Vizio’s servers during the class
19 period is approximately 16 million. Assuming one purchaser per TV per household, the
20 proposed class covers approximately 16 million individuals

21 The proposed settlement class definition parallels the nationwide class definition
22 pleaded in the operative Second Consolidated Complaint (which is identical to the
23 definition pleaded in the Consolidated Complaint). The definition proposed in these
24 pleadings was:

25 All individuals in the United States who purchased a VIZIO Smart TV with
26 Smart Interactivity capability for personal or household use, and not for
27 resale, during the applicable statute of limitations period.

28 Second Consol. Compl., Doc. 136 at ¶ 102.

⁷ For readability, defined terms are not capitalized in the motion or memorandum, unless in quoted material or in the conclusion. The proposed order, by contrast, capitalizes defined terms as they appear in the settlement agreement.

1 The parties have made two changes to the proposed nationwide settlement class
2 definition, neither of which affects the scope of the class. First, the proposed class
3 definition now includes a specific date range. Second, the proposed class definition no
4 longer refers to “Smart Interactivity capability,” the Vizio’s name for the automated
5 content recognition software. Because Vizio’s entire Smart TV line had this software
6 during the class period, it is unnecessary to mention the software by name for purposes of
7 class identification. The time period specified is sufficient to identify who is in, and who is
8 outside of, the proposed class. The deletion of this language also improves clarity.

9 **B. Settlement Fund**

10 The proposed settlement contemplates a settlement fund in the amount of
11 \$17,000,000. After payment of attorneys’ fees and expenses to Class Counsel, payment of
12 the settlement administration costs, and payment of service awards, the remaining balance
13 will be distributed proportionally to all settlement class members who submit valid claims.

14 The settlement fund is non-reversionary, meaning, Vizio will not be entitled to
15 retain any part of the settlement amount that is not paid out or distributed as part of the
16 administration of the settlement for any reason. Any part of the settlement amount that
17 cannot feasibly be distributed to the class will be subject to a cy pres distribution to be
18 proposed by Plaintiffs and approved by the Court.

19 Plaintiffs will ask the Court to award each named plaintiff up to \$5,000 from the
20 settlement fund in recognition of the time, effort, and expense they incurred pursuing
21 claims against Vizio, which ultimately benefited the entire class. Vizio will not oppose this
22 request. The settlement agreement preserves the Court’s supervisory authority to
23 determine the appropriateness of any service award.

24 Counsel will petition the Court for an award of attorneys’ fees and reimbursement
25 of costs or expenses from the settlement fund. Vizio will not oppose a request that does
26 not exceed 33 percent of the settlement fund. The settlement agreement also preserves the
27 Court’s supervisory authority to determine the appropriateness of any such award or
28 reimbursement.

1 **C. Injunctive Relief**

2 The proposed settlement provides several different forms of injunctive relief in the
3 form of business practice changes that correspond with changes which took place during
4 the class period pursuant to a consent decree between Vizio and the Federal Trade
5 Commission. *See* Settlement, §§ VI, XII.

6 Under this consent order, Vizio agreed to display a prominent and detailed
7 notification on the TV screen, separate and apart from any privacy policy, terms of use
8 page, or other similar document. As part of this notification, Vizio gave consumers the
9 option to accept viewing data collection. If a consumer opted not to accept viewing data
10 collection, then no viewing data would be collected from the Smart TV.

11 Professor Joseph Turow, a leading privacy expert, was asked to review the
12 disclosures Vizio has used since February 2017 and the disclosures proposed here, as well
13 as contemporaneous on-screen disclosures of other smart television manufacturers whose
14 TV sets have software that collect viewing data. He concluded that only the revised Vizio
15 on-screen disclosures implemented with the FTC agreement:

16 prominently and collectively disclose to the customer—separate from any
17 privacy policy, terms of use page, or other similar document— four
18 categories of information: the types of viewing data that are collected and
19 used; the types of viewing data that will be shared with third parties; specific
categories of such third parties; and purposes for sharing such information.

20 Turow Decl. ¶ 32.⁸ Professor Turow also concluded that these revised disclosures “are
21 reasonably informative,” and “[a]s compared to the previous disclosures, this presentation
22 gives readers a useful overview of what the viewing data collection yields Vizio and
23 possibly them.” *Id.* ¶ 28.

24 Vizio’s imposition of prominent and clear disclosures in February 2017, and its
25 shift to an affirmative consent model, is a significant change which resolves a central
26 concern that motivated this lawsuit and the Federal Trade Commission’s investigation.

27 _____
28 ⁸ The disclosures negotiated by the parties also address these categories of information. *See id.*

1 Vizio acknowledges that “Plaintiffs’ filing of this Action was a substantial cause of
2 VIZIO’s implementation of the Disclosures.” Settlement ¶ A.12.

3 The parties have negotiated further changes to the on-screen disclosure for new
4 customers and have secured an agreement that Vizio will disclose viewing data collection
5 in a “quick-start” guide. Turow Decl. ¶¶ 5, 7, 31-33. The disclosures will be displayed in
6 substantially the same form for the next five years. *Id.* ¶ 5.

7 The changes to the on-screen disclosure are two-fold. First, a “Decline” button will
8 now appear next to an “Accept” button. *Id.* ¶ 31. The “Decline” button replaces the
9 Settings button and different process for declining data collection, which Professor Turow
10 describes in his declaration. *Id.*

11 Second, the disclosure now explicitly states that “Declining Viewing Data collection
12 will not change the functionality of your device.” *Id.* Disabling viewing data collection on
13 Smart TVs of other manufacturers can change the functionality of the TV, including key
14 features. The language to be added effectively informs consumers of Vizio Smart TVs
15 “that there have not been adverse consequences in terms of functionality if viewing data
16 collection is declined.” *Id.*

17 In addition to the on-screen disclosure, Vizio will include additional language in the
18 device’s quick start guide . . . [that] alerts the customer to the right and ability to make a
19 decision during installation about allowing Vizio’s viewing data sharing[,] . . . [and]
20 increases the chances that customers will pause and think about what choice is best for
21 them.” *Id.*

22 Professor Turow concludes, based on his evaluation of these disclosures and the
23 disclosures of other manufacturers, “that the result is far superior to the disclosures (or
24 non-disclosures) that prompted this litigation and will be among the best in the industry.”
25 *Id.* ¶ 34.. He further writes:

26 This court proceeding is to be commended for setting a precedent of
27 significance. Its resolution signals to the industry the importance of
28 obtaining affirmative consent from a consumer before viewing data is
collected, and it provides a template for a prominent and clear disclosure that

1 allows a consumer to make an informed decision. Equally significant, this
2 precedent is being set at a time when the Smart TV viewing-data collection
industry is emerging.

3 *Id.* ¶ 8.

4 The final business practice change we will mention here is Vizio’s agreement to
5 delete the remaining contested viewing data in its possession. Under the governmental
6 consent decree, Vizio was obligated to destroy viewing data that was collected prior to
7 March 1, 2016, unless a user of the television subsequently affirmatively consented to
8 viewing data collection when presented with the revised notices.

9 Under the settlement agreement, Vizio will extend the deletion period to
10 correspond with the class period and will destroy all viewing data collected during the
11 class period without exception. A third party will verify that the viewing data has been
12 successfully destroyed and will report to class counsel. If class counsel does not receive
13 such verification within the time specified by agreement, it is obligated to inform this
14 Court, which retains continuing jurisdiction to address any issues with the enforcement of
15 the settlement agreement.

16 These changes will take place after the effective date of finality.

17 **D. Release**

18 In exchange for the benefits provided under the settlement, the Plaintiffs and
19 settlement class members will release any legal claims that may arise from or relate to the
20 facts alleged or that could have been alleged in this action. This release is appropriately
21 tailored to the claims litigated to date in this multi-district litigation in that it extends only
22 to the “Vizio Released Parties” and does not include any other individual or entity.

23 **E. Notice**

24 The settlement proposes notice by electronic means.

25 First, notice will be provided directly to Vizio Smart TVs three separate times,
26 unless a person viewing the notice selects to dismiss the notice, in which case it will only
27 appear one more time (for a total of two times). The notice will time out after 45 seconds.
28 It tells class members that this is a class action; it references the class definition

1 (“Purchased a VIZIO Smart TV Connected to the Internet Between February 1, 2014 and
2 February 6, 2017? You Could Get Money From a \$17 Million Class Action Settlement”).
3 And it informs the reader that the class alleges privacy and consumer protection claims;
4 that a class member may appear through an attorney if the member wants; that class
5 members can be excluded; the time and manner for requesting exclusion; and the binding
6 effect of a class judgment. It includes the date by which to file a claim and provides the
7 address for a settlement website, which hosts the Long Form notice and important
8 pleadings and other filings. This notice is estimated to reach 6 million Smart TVs.

9 Second, a substantially similar notice will also be sent to approximately 9 million
10 potential class members via e-mail. The settlement administrator will use best practices to
11 increase deliverability and verify the number of e-mails successfully delivered

12 The sample notices do not yet include estimated compensation but an appropriate
13 estimated range for the notices would be \$13 to \$31, which assumes a 2 percent to 5
14 percent claims rate.

15 Third, a digital media campaign will supplement the TV and e-mail notices. As
16 explained further in the Declaration of Eric Schacter of A.B. Data, this campaign will
17 execute digital banners ads through the Google Display Network, Facebook (which
18 includes a settlement-specific Facebook page) and Google AdWords/Search platforms. A
19 minimum of 62 million impressions will be delivered. The campaign will also include a
20 notice through a press release over PR Newswire’s US1 and Hispanic Newlines. After the
21 press release is disseminated, both A.B. Data and PR Newswire will post the press release
22 on their respective Twitter pages. A copy of a digital banner ad is attached to the
23 Declaration of Eric Schacter of A.B. Data.

24 Lastly, the settlement administrator will set up a case-specific webpage for a long
25 form notice in English and Spanish, to host pleadings, to provide case updates, contact
26 information for the settlement administrator, as well as other information. The English
27 version of the long form notice is attached to the settlement agreement as an exhibit.

28 The notice and notice plan is further described below in Section V.C-D, the

1 Declaration of Eric Schachter of A.B. Data, and the settlement agreement.

2 **F. Administration**

3 The settlement agreement provides that payment will issue upon finality to class
4 members who submit valid a valid claim form. The claim form is attached to the
5 Declaration of Eric Schachter of A.B. Data, which describes the plan of allocation.

6 The settlement agreement also provides that the Settlement Administrator shall
7 disseminate the notice and implement the notice. And it provides procedures for
8 exclusion from the settlement class or to comment on or opt out of the settlement class.

9 Deadlines for these events and also the final approval hearing are proposed as
10 follows, under the assumption that an order granting preliminary approval issues on or
11 soon after December 7, 2018:

Event	Date
Notice of Class Action Settlement completed per Notice Plan	February 26, 2019
Deadline for Class Counsel to File Motion for Final Approval	March 19, 2019
Deadline for Class Counsel to File Motion for Attorney's Fees and Costs	March 19, 2019
Opt-Out and Objection Deadline	April 12, 2019
Reply in Support of Motions for Final Approval and Attorney's Fees and Costs	May 3, 2019
Final Approval Hearing	May 31, 2019

24 **IV. Argument**

25 The procedure for judicial approval of a proposed class action settlement under
26 Rule 23(e) typically involves three main steps:

- 27 (1) Certification of a settlement class and preliminary approval of the proposed
28 settlement after submission to the Court of a written motion for preliminary

- 1 approval.
- 2 (2) Dissemination of notice of the proposed settlement to the class members.
- 3 (3) A hearing at which evidence and argument concerning the fairness,
- 4 adequacy, and reasonableness of the proposed settlement may be presented.

5 *See* Federal Judicial Center, Manual for Complex Litigation, Fourth § 21.63 (2004).

6 Plaintiffs respectfully request that the Court begin this process by provisionally
7 certifying the proposed settlement class, granting preliminary approval of the proposed
8 settlement, and directing that notice be provided.

9 At the outset, we note that pending before Congress are amendments to Federal
10 Rule of Civil Procedure 23 that have been adopted by the Supreme Court of the United
11 States pursuant to 28 U.S.C. 2072. “Among other things, the amendments require lawyers
12 to provide additional information up front for the court to preliminarily approve
13 settlements (“frontloading”), permit notice by electronic means, impose limitations on
14 compensating objectors, and clarify final-settlement criteria.” Bolch Judicial Institute,
15 *Guidelines and Best Practices Implementing 2018 Amendments to Rule 23 Class Action Settlement*
16 *Provisions*, Duke Law School (August 2018), at *ii.⁹

17 The amendments will take effect on December 1, 2018, absent action by Congress,
18 and will “govern in all proceedings in civil cases thereafter commenced and, insofar as just
19 and practicable, all proceedings then pending.” April 26, 2018 Order of Supreme Court.¹⁰
20 Because Congress rarely takes such action, we apply here the soon-to-be-amended Rule 23
21 because this proceeding (and possibly this motion) will be pending when the new rule
22 takes effect in December, and because it is not impracticable or unjust to apply the new
23 rule to this case.

24 **A. Certification of the Proposed Settlement Class Is Appropriate.**

25 The Court should conditionally certify the settlement class for settlement purposes

26 _____
27 ⁹ Available at <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/Class-Actions-Best-Practices-Final-Version.pdf>.

28 ¹⁰ www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf (page 3 of 18). A copy of the amendments to this rule is available at this link.

1 under Rule 23(a) and 23(b)(3) based on violations of the federal Video Privacy Protection
2 Act, 18 U.S.C. § 2710, and Wiretap Act, *see* 18 U.S.C. § 2520(a).

3 “When conditionally certifying a class for settlement purposes, the Court ‘must pay
4 undiluted, even heightened, attention to class certification requirements.’” *Munday v. Navy*
5 *Fed. Credit Union*, No. SACV151629-JLS-KESx, 2016 WL 7655807, at *2 (C.D. Cal. Sept.
6 15, 2016) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 952-53 (9th Cir. 2003) (internal
7 quotation marks omitted). “A party seeking class certification must satisfy the
8 requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one
9 of the categories under Rule 23(b).” *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th
10 Cir. 2013). Rule 23 does not set forth a mere pleading standard,” but rather requires the
11 movant to be “prepared to prove that there are in fact sufficiently numerous parties,
12 common questions of law or fact, etc.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350
13 (2011) (emphasis removed). The Court, in turn, must engage in a “rigorous analysis” of
14 Rule 23 criteria, which frequently overlaps with the merits. *Id.* That said, the Court can
15 “consider merits questions at the class certification stage only to the extent they are
16 relevant to whether Rule 23 requirements have been met.” *Torres v. Mercer Canyons Inc.*, 835
17 F.3d 1125, 1133 (9th Cir. 2016).

18 “Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the
19 class whose claims they wish to litigate.” *Dukes*, 564 U.S. at 349. It sets forth four
20 requirements a party seeking class certification must satisfy: numerosity, commonality,
21 typicality, and adequacy. Fed. R. Civ. P. 23(a).

22 “A proposed class must also satisfy the requirements for at least one of the three
23 types of class actions enumerated in Rule 23(b).” *Munday*, 2016 WL 7655807, at *3. Here,
24 Plaintiffs seek certification under Rule 23(b)(3), which authorizes a class proceeding if
25 “the court finds that the questions of law or fact common to class members predominate
26 over any questions affecting only individual members, and that a class action is superior to
27 other available methods for fairly and efficiently adjudicating the controversy.” Fed. R.
28 Civ. P. 23(b)(3).

1 **1. Rule 23(a) Is Satisfied.**

2 **a. The Class Members Are Too Numerous to Be Joined.**

3 The proposed class is so numerous that joinder of all members is impracticable. *See*
4 Fed. R. Civ. P. 23(a)(1). Vizio collected viewing data from Smart TVs that were connected
5 to the Internet between February 1, 2014 and February 6, 2017. All such TVs had
6 automated content recognition software installed, including the SmartCast product line.¹¹
7 Vizio estimates that 16 million TVs connected to its servers during the settlement class
8 period. Because the class is defined as one purchaser per household per television,
9 numerosity is plainly met.

10 **b. The Action Involves Common Questions of Law or Fact.**

11 Under Rule 23(a)(2)'s requirement that there be "questions of law or fact common
12 to the class," the claims "must depend upon a common contention" such that
13 "determination of [their] truth or falsity will resolve an issue that is central to the validity
14 of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. "What matters to class
15 certification . . . is not the raising of common 'questions'—even in droves—but, rather the
16 capacity of a classwide proceeding to generate common answers apt to drive the
17 resolution of the litigation." *Id.* (internal citation omitted, emphasis removed).

18 Here, commonality is satisfied because the "circumstances of each particular class
19 member . . . retain a common core of factual or legal issues with the rest of the class."
20 *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (citations and
21 quotations omitted). Plaintiffs' claims center on whether Vizio collected and shared what
22 Plaintiffs consider to be personally identifiable viewing data without consumers'
23 knowledge or consent. Because the core issues of Vizio's nondisclosure and the collection
24 and sharing of viewing data is common to the claims, Plaintiffs have met their "minimal"
25 burden of demonstrating commonality. *See Astiana v. Kashi Co.*, 291 F.R.D. 493, 502 (C.D.
26 Cal. 2013).

27 _____
28 ¹¹ Viewing data was not collected from a small percentage of SmartCast TVs during the
class period; however, it would be administratively difficult to exclude purchasers of such
TVs during the class period.

1 **c. Plaintiffs' Claims Are Typical of Those of the Class.**

2 “[R]epresentative claims are ‘typical’ [under Rule 23(a)(3)] if they are reasonably
3 coextensive with those of absent class members.” *Torres*, 835 F.3d at 1141. “Measures of
4 typicality include ‘whether other members have the same or similar injury, whether the
5 action is based on conduct which is not unique to the named plaintiffs, and whether other
6 class members have been injured in the same course of conduct.’” *Id.* (citation omitted).

7 Here, the claims of Plaintiffs and all class members arise out of the same course of
8 conduct—the alleged collection and sharing of personally identifiable viewing data
9 without consumers’ knowledge or consent—and assert the same theories of liability. As a
10 result, the typicality requirement is satisfied.

11 **d. Plaintiffs and Their Counsel Will Fairly and Adequately**
12 **Protect the Interests of Class Members.**

13 The test for evaluating adequacy of representation under Rule 23(a)(4) is: “(1) Do
14 the representative plaintiffs and their counsel have any conflicts of interest with other
15 class members; and (2) will the representative plaintiffs and their counsel prosecute the
16 action vigorously on behalf of the class?” *Staton*, 327 F.3d at 957.

17 In this instance, there is no conflict between Plaintiffs and the settlement class
18 members. Plaintiffs were allegedly harmed in the same way as all class members when
19 their personally identifiable viewing data was collected without their consent or
20 knowledge. In light of this common injury, the named Plaintiffs have every incentive to
21 vigorously pursue the class claims. And in fact, each has done so: Plaintiffs have made
22 important contributions to the case, including by preparing and sitting for depositions.
23 Each Plaintiff has agreed to undertake the responsibilities of serving as a class
24 representative, and each has sworn that he or she will continue to act in the class
25 members’ best interests.

26 Class counsel likewise are qualified to continue representing the class. The Court
27 appointed us as interim co-lead class counsel because of our experience in data privacy
28 and consumer class actions. Since then, this Court and Magistrate Judge Scott have had an

1 opportunity to review class counsel’s written work and oral presentations, including the
2 work of Andre Mura and Adam Zapala. The results obtained in the course of litigation
3 and settlement negotiations confirm counsel’s adequacy.

4 **2. Rule 23(b)(3) Is Satisfied.**

5 **a. Common Questions of Fact and Law Predominate.**

6 Predominance analysis under Rule 23(b)(3) “focuses on the relationship between
7 the common and individual issues in the case, and tests whether the proposed class is
8 sufficiently cohesive” *Ebret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 894-95 (N.D. Cal.
9 2015) (quoting *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 964 (9th Cir. 2013)). “When a
10 proposed class challenges a uniform policy, the validity of that policy tends to be the
11 predominant issue in the litigation.” *Nicholson v. UTI Worldwide, Inc.*, No. 3:09-cv-722-JPG-
12 DGW, 2011 WL 1775726, at *7 (S.D. Ill. May 10, 2011) (citation omitted). Further, when
13 a settlement class is proposed, the manageability criteria of Rule 23(b)(3) do not apply.
14 *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

15 This case involves an alleged uniform policy of Vizio to equip its Smart TVs with
16 software that collects viewing data to license to third parties, in order to create an
17 additional revenue stream for Vizio. The common thread running through Plaintiffs’
18 federal privacy claims—the Video Privacy Protection Act, and the Wiretap Act—is that
19 Vizio allegedly collected (or intercepted) personally identifiable viewing data, without
20 consumers’ consent or knowledge, as this viewing data was communicated on the TV
21 screen.¹² Plaintiffs allege Vizio then licensed this sensitive viewing data to third parties—
22 along with information about their digital identities—thus allegedly enabling these third
23 parties to connect viewing data with individuals on a personal, or household, level.

24 Because the technology at issue operated uniformly across Vizio’s TVs, legal and
25

26 ¹² This is likewise a core allegation for Plaintiffs’ state-law privacy claims. These state laws
27 are closely related to federal privacy law. *See In re Vizio, Inc., Consumer Privacy Litig.*, 238 F.
28 Supp. 3d 1204, 1215 (C.D. Cal. 2017) (“Plaintiffs’ federal claims under the Wiretap Act
bear a ‘close relationship’ to the tort of invasion of privacy.”). Also, this allegation
addresses issues important to the consumer protection claims, which ask whether Vizio
adequately informed consumers of this data collection and licensing.

1 factual issues respecting collection and disclosure may be resolved for all in a single
2 adjudication. Issues of consent or knowledge may also be answered for all on a class-wide
3 basis, because arguably there is no evidence of any adequate disclosure of the collection of
4 viewing data during the class period. Consequently, central issues common to the class
5 predominate over any individual considerations that might arise.

6 Finally, because conditional certification of a single nationwide class is based on
7 violations of federal law, there can be no argument that differences in state law defeat
8 predominance.¹³ See *Gustafson v. BAC Home Loans Servicing, LP*, 294 F.R.D. 529, 544 (C.D.
9 Cal. 2013); see also *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) (class
10 representatives can meet the predominance requirement by limiting their legal theories to
11 aspects of law that are uniform).

12
13 **b. A Class Action Is the Superior Method for Resolving**
14 **These Claims.**

15 A class action is superior under Rule 23(b)(3) because it represents the only realistic
16 means through which purchasers of affected Smart TVs may obtain relief. See, e.g.,
17 *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (explaining that a class
18 action may be superior where “classwide litigation of common issues will reduce litigation
19 costs and promote greater efficiency”). Even assuming class members could recover
20 statutory damages, they nonetheless would lack an incentive to bring their own cases given
21 the high expert costs involved in litigating a case such as this concerning complex
22 technology. *Mullins v. Premier Nutrition Corp.*, No. 13-CV-01271-RS, 2016 WL 1535057, at
23

24 ¹³ Such an argument would fail on its own terms. “Variations in state law do not
25 necessarily preclude a 23(b)(3) action,” and would not do so here if conditional
26 certification of consumer claims were sought, because of “the commonality of substantive
27 law applicable to all class members.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir.
28 1998); *id.* at 1022-23 (concluding “the idiosyncratic differences between state consumer
protection laws are not sufficiently substantive to predominate over the shared claims”); *In
re Hyundai And Kia Fuel Econ. Litig.*, 897 F.3d 1003, 1007 (9th Cir. 2018) (granting en banc
review of this issue). In any event, here the issue is academic, because conditional
certification of a nationwide class is based on federal law, which fully suffices for purposes
of preliminary and final approval of this settlement.

1 *8 (N.D. Cal. Apr. 15, 2016) (“Cases, such as this, ‘where litigation costs dwarf potential
2 recovery’ are paradigmatic examples of those well-suited for classwide prosecution.”)
3 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998)).

4 **3. Appointment of Class Counsel Is Merited.**

5 Under Rule 23(g), “a court that certifies a class must appoint class counsel.” Fed. R.
6 Civ. P. 23(g). As discussed above in addressing the adequacy requirement of Rule 23(a),
7 Eric Gibbs and Andre Mura of Gibbs Law Group LLP, and Joseph Cotchett and Adam
8 Zapala of Cotchett, Pitre, McCarthy LLP, each possesses the necessary skill and expertise
9 to ably represent the class, as each has to date. The Court should thus appoint these four
10 lawyers as class counsel.

11 * * *

12 For all these reasons, the proposed settlement class merits provisional certification.

13 **B. Preliminary Approval of the Settlement Is Warranted.**

14 “To preliminarily approve a proposed class action settlement, Rule 23(e)(2) requires
15 the Court to determine whether the proposed settlement is fair, reasonable, and
16 adequate.” *Oda v. DeMarini Sports, Inc.*, No. 8:15-cv-2131-JLS-JCGx, slip op. at 13 (C.D.
17 Cal. June 6, 2018) (Doc. 157) (citing Fed. R. Civ. P. 23(e)(2)). If preliminary approval is
18 granted, the Court will examine many of the same procedural and substantive factors at
19 the approval stage that it is now considering at this notice stage. *Id.*

20 “A proposed settlement that is ‘fair, adequate and free from collusion’ will pass
21 judicial muster.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*,
22 895 F.3d 597, 610 (9th Cir. 2018). “To determine whether a settlement agreement meets
23 these standards, a district court must consider a number of factors, including: the strength
24 of plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation;
25 the risk of maintaining class action status throughout the trial; the amount offered in
26 settlement; the extent of discovery completed, and the stage of the proceedings; the
27 experience and views of counsel; the presence of a governmental participant; and the
28 reaction of the class members to the proposed settlement.” *Staton*, 327 F.3d at 959

1 (internal citation and quotation marks omitted).

2 In addition, “[w]hen, as here, the settlement was negotiated before the district court
3 certified the class, ‘there is an even greater potential for a breach of fiduciary duty’ by class
4 counsel, so we require the district court to undertake an additional search for ‘more subtle
5 signs that class counsel have allowed pursuit of their own self-interests and that of certain
6 class members to infect the negotiations.’” *In re Volkswagen*, 895 F.3d at 610–11. “Such
7 signs include (1) when counsel receive a disproportionate distribution of the settlement,
8 (2) when the parties negotiate a clear sailing arrangement providing for the payment of
9 attorneys’ fees separate and apart from class funds, and (3) when the parties arrange for
10 fees not awarded to revert to defendants rather than be added to the class fund.” *Oda*, No.
11 8:15-cv-2131-JLS-JCGx, slip op. at 14 (citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654
12 F.3d 935, 946-47 (9th Cir. 2011)).

13 The 2018 amendments to Rule 23(e) similarly require counsel to provide additional
14 information up front at the preliminary approval stage, so that the court can determine
15 whether it “will likely be able to [finally] approve” it. Duke Law School, *Implementing 2018*
16 *Amendments to Rule 23*, *supra*, at *2. This information must address the adequacy of class
17 representatives and class counsel; whether the settlement proposal was negotiated at arm’s
18 length; the relief provided to the class, in view of a variety of factors, including the costs,
19 risks, and delay of trial and appeal; the effectiveness of any proposed method of
20 distributing relief to the class, including the method of processing class-member claims;
21 the terms of any proposed award of attorney’s fees, including timing of payment; and any
22 agreement required to be identified under Rule 23(e)(3); and lastly whether the proposal
23 treats class members equitably relative to each other.

24 Ultimately, however, the factors are “guideposts. ‘The relative degree of importance
25 to be attached to any particular factor will depend upon . . . the unique facts and
26 circumstances presented by each individual case.’” *In re Volkswagen*, 895 F.3d at 611 (citing
27 *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th
28 Cir. 1982). “Deciding whether a settlement is fair is ultimately an amalgam of delicate

1 balancing, gross approximations and rough justice,” that is “best left” to the sound
2 discretion of the trial judge. *Id.* (internal citation and quotation marks omitted).

3 Furthermore, “[a]t this preliminary stage and because Class Members will receive an
4 opportunity to be heard on the Settlement Agreement, a full fairness analysis is
5 unnecessary.” *Oda*, No. 8:15-cv-2131-JLS-JCGx, slip op. at 14 (citation and quotation
6 marks omitted). The 2018 amendments to Rule 23 do not change this law. Despite
7 requiring courts to ask whether a proposed settlement is likely to win final approval, the
8 preliminary approval standard remains “more lenient than the eventual standard required
9 to grant final approval.” Duke Law School, *Implementing 2018 Amendments to Rule 23, supra*,
10 at *2.

11 As such, “preliminary approval and notice of the settlement terms to the proposed
12 Class are appropriate where [1] the proposed settlement appears to be the product of
13 serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not
14 improperly grant preferential treatment to class representatives or segments of the class,
15 and [4] falls within the range of *possible* approval” *Oda*, No. 8:15-cv-2131-JLS-JCGx,
16 slip op. at 15 (citing *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal.
17 2007) (emphasis supplied by *Oda*); *see also Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386
18 (C.D. Cal. 2007) (“To determine whether preliminary approval is appropriate, the
19 settlement need only be *potentially* fair, as the Court will make a final determination of its
20 adequacy at the hearing on the Final Approval, after such time as any party has had a
21 chance to object and/or opt out.”) (emphasis in original).

22 After evaluating the “lengthy but non-exhaustive list of [overlapping fairness]
23 factors,” *In re Volkswagen*, 895 F.3d at 610, the Court should preliminarily approve the
24 settlement agreement because it is fair, reasonable, and adequate, and will likely be granted
25 final approval.

26 **1. Strength of Plaintiffs’ Case**

27 As mentioned, the principal claims at issue here involve Vizio’s alleged collection
28 and licensing of viewing data without consumers’ knowledge or consent. The collection of

1 the content of this communication in real time (Wiretap Act) for purposes of licensing to
2 third parties (VPPA) without consumers' knowledge or consent (Wiretap, VPPA) are core
3 issues that unite Plaintiffs' federal privacy claims, and are similarly critical to the resolution
4 of Plaintiffs' state-law privacy claims (the scope of the intrusion and the sensitivity of the
5 information obtained) and consumer-protection claims (whether these practices were
6 adequately disclosed in marketing materials or privacy policies). If these legal theories were
7 proven at summary judgment or trial, Plaintiffs could theoretically be entitled to liquidated
8 or statutory damages under the VPPA or Wiretap Act, for \$2,500 and \$10,000,
9 respectively.¹⁴

10 Plaintiffs allege that the viewing data is sensitive and personally identifies them.
11 Vizio disputes the sensitive and personal nature of the data collected and shared. The
12 recent decision in *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 981 (9th Cir. 2017), throws a
13 wrench in the gears of Plaintiffs' case. There, the Ninth Circuit held that "personally
14 identifiable information" under the VPPA includes only information that readily permits
15 an ordinary person to identify a particular individual as having watched certain videos. *Id.*
16 at 985. This is a less forgiving legal standard than that applied by the First Circuit in
17 *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486 (1st Cir. 2016), and adopted
18 by this Court: "whether a video tape service provider can escape liability for disclosures
19 that would reasonably and foreseeably result in identifying a specific person as watching a
20 particular program merely because an 'ordinary person' would not be able, on her own, to
21 identify the consumer." Order Denying Mot. for Interlocutory Appeal, Doc 224 at 12

22
23 ¹⁴ For almost the entire class period, the California wiretap act authorized a single \$5,000
24 award of statutory damages per individual, rather than an award per violation. *See Ramos v.*
25 *Capital One, N.A.*, No. 17-CV-00435-BLF, 2017 WL 3232488, at *5-7 (N.D. Cal. July 27,
26 2017), *appeal dismissed*, No. 17-16723, 2017 WL 5891737 (9th Cir. Nov. 14, 2017). Still,
27 because the elements of the federal and state wiretap claims are essentially the same, and
28 because these two laws arguably serve the same remedial purpose, courts applying
California law might not allow a California plaintiff to recover multiple statutory penalties
for the same wiretap. *See Los Angeles Cnty. Metro. Transp. Auth. v. Superior Court*, 123 Cal.
App. 4th 261, 267 (2004). We thus consider the federal Wiretap Act claim only, though it
hardly matters whether we consider only one wiretap act or both; either way, any such
award of statutory damages would be colossal and could never be recovered from Vizio.

1 n.4.¹⁵

2 Applied here, *Eichenberger*'s more restrictive standard for "personally identifiable
3 information" under the VPPA would be difficult to meet. Put simply, whether the
4 information Vizio discloses would require too much detective work for an ordinary
5 person to link an individual to viewing data is a factual matter that could be challenging
6 for Plaintiffs to establish under Ninth Circuit law. We say this recognizing that the Ninth
7 Circuit itself left the open the possibility that "modern technology may indeed alter—or
8 may already have altered—what qualifies under the statute" as personally identifiable. 876
9 F.3d at 986.

10 The Wiretap Act claim also raises issues of first impression in this circuit. The
11 statute authorizes "any person whose wire, oral, or electronic communication is
12 intercepted, disclosed, or intentionally used in violation of this chapter" to sue for
13 damages. 18 U.S.C. § 2520(a). Vizio has argued that it does not "intercept" any electronic
14 communications, and the messages it collects do not constitute the "contents" of an
15 electronic communication. Plaintiffs, in turn, believe there is favorable evidence
16 supporting the real-time nature of the interception of the contents of a communication.

17 Even so, whether information qualifies as having been "intercepted" within the
18 meaning of the Wiretap Act, if it is acquired simultaneously with its arrival on the Smart
19 TV, has not been established. The Ninth Circuit in *Konop v. Hawaiian Airlines* suggested in
20 dicta that the Wiretap Act might not be implicated by such facts, but it did not resolve the
21 issue. 302 F.3d 868, 878 (9th Cir. 2002).

22 This Court identified legal authority to support the view that such an acquisition
23 "satisfies the contemporaneous interception requirement." *In re Vizio*, 238 F. Supp. 3d at

24 ¹⁵ While *Yershov* sets forth a more forgiving legal standard, it was nonetheless
25 insurmountable in that case. See *Yershov*, Joint Stipulation of Dismissal With Prejudice,
26 Case No. 1:14-cv-13112-FDS (D. Mass. March 27, 2017) (Doc. 83 at 1) ("the Parties agree
27 that Plaintiff lacks sufficient evidence to support his allegation that Defendant violated the
28 Video Privacy Protection Act by 'disclosing his PII—in the form of the title of the videos
he watched [on the USA Today App], his unique Android ID, and his GPS coordinates—
to third party analytics company Adobe Systems Inc.' from which Adobe identified
Yershov and attributed his video viewing records to an individualized profile of Plaintiff
Yershov in its databases.") (brackets and internal quotation marks removed).

1 1226 (citing *United States v. Szymuszkiewicz*, 622 F.3d 701, 706 (7th Cir. 2010)). Plaintiffs
2 would defend that view. But *Szymuszkiewicz* has been criticized by a leading Fourth
3 Amendment scholar who claims the Seventh Circuit misread the Wiretap Act. Orin Kerr,
4 *The Perils of Interpreting Statutes With Multiple Remedial Schemes: A Comment on the Dicta in*
5 *United States v. Szymuszkiewicz*, The Volokh Conspiracy blog.¹⁶ The professor’s arguments
6 have some force, so it is not free from doubt that Plaintiffs could prevail on their Wiretap
7 Act claim.¹⁷

8 As for Plaintiffs’ remaining claims, their strength on the merits may largely turn on
9 whether consumers were adequately advised that their viewing data would be collected
10 and shared. The parties disagree on this point, because Plaintiffs believe there is evidence
11 that Vizio’s disclosures in marketing materials and privacy policies during the class period
12 were inadequate.

13 In addition, the remaining claims may turn on whether the information collected is
14 deemed sensitive. This matters both for purposes of materiality under the consumer-
15 protection claims and the state privacy claims, which may be actionable when community
16 norms are violated. Again, the parties disagree on the degree of risk for these claims. If the
17 named Plaintiffs’ negative reaction to Vizio’s conduct is any indication, however,
18 likeminded jurors could resolve these factual questions favorably for Plaintiffs.

19 Finally, even if Plaintiffs are able to establish that Vizio violated these federal
20 privacy laws, “statutory damages are not to be awarded mechanically.” *Campbell v. Facebook*
21 *Inc.*, 315 F.R.D. 250, 268 (N.D. Cal. 2016). The Wiretap Act, for instance, “makes the
22 decision of whether or not to award damages subject to the court’s discretion.” *DirecTV,*
23 *Inc. v. Hynh*, 2005 WL 5864467, at *8 (N.D.Cal. May 31, 2005), *aff’d*, 503 F.3d 847 (9th
24 Cir. 2007). This is apparent in the text of the Wiretap Act, “which was amended in 1986

25 _____
26 ¹⁶ <http://volokh.com/2010/09/10/the-perils-of-interpreting-statutes-with-multiple-remedial-schemes-a-comment-on-the-dicta-in-united-states-v-szymuszkiewicz/>.

27 ¹⁷ Citing *In re Zynga Privacy Litigation*, 750 F.3d 1098, 1106 (9th Cir. 2014), Vizio has argued
28 that Wiretap Act claim should fail because the information Vizio collects from Smart TVs does not constitute the “contents” of an electronic communication. Plaintiffs disagree with Vizio’s reading of *In re Zynga*.

1 to state that the court ‘may’ award damages, rather than stating that it ‘shall’ award
2 damages.” *Campbell*, 315 F.R.D. at 268. The Court’s “discretion is limited to deciding
3 whether to ‘either award the statutory sum or nothing at all,’ it ‘may not award any
4 amount between those two figures.” *Id.* (quoting *Huynh*, 2005 WL 5864467, at *8).¹⁸

5 In authorizing liquidated damages under the VPPA, Congress employed similar
6 language—“The court may award . . . actual damages but not less than liquidated damages
7 in an amount of \$2,500,” or punitive damages, 18 U.S.C. § 2710(c)(2)—rather than
8 directing that a court “shall” award such damages. *See id.*

9 When exercising such discretion, courts consider “(1) whether the defendant
10 profited from his violation; (2) whether there was any evidence that the defendant actually
11 used his pirate access devices; (3) the extent of [plaintiff’s] financial harm; (4) the extent of
12 the defendant’s violation; (5) whether the defendant had a legitimate reason for his
13 actions; (6) whether an award of damages would serve a legitimate purpose; and (7)
14 whether the defendant was also subject to another judgment based on the same conduct.”
15 *Huynh*, 2005 WL 5864467 at *8.¹⁹ If this Court were to conclude that some or many class
16 members suffered little monetary harm from the collection and disclosure of viewing data,
17 it could conclude that any liquidated, statutory, or punitive damages would
18 disproportionately penalize Vizio.²⁰

19 For all these reasons, while aspects of Plaintiffs’ claims are strong, Plaintiffs may
20 face considerable headwinds in seeking to establish new law in these complex areas and to

21 ¹⁸ The \$10,000 lump sum for liquidated damages is limited to a single award per victim as
22 long as the violations are “interrelated and time compacted.” *Smoot v. United Transp. Union*,
246 F.3d 633, 642-645 (6th Cir. 2001).

23 ¹⁹ We see no sensible reason why such factors would not also be germane to the VPPA.

24 ²⁰ In *Campbell*, the court declined to certify a Rule 23(b)(3) litigation class because it
25 concluded that “sorting out those disproportionate damages awards would require
26 individualized analyses that would predominate over common ones.” 315 F.R.D. at 269.
27 Plaintiffs believe this analysis of predominance clashes with *Tyson Foods, Inc. v. Bouaphakeo*,
28 which recognized: “When one or more of the central issues in the action are common to
the class and can be said to predominate, the action may be considered proper under Rule
23(b)(3) even though other important matters will have to be tried separately, such as
damages or some affirmative defenses peculiar to some individual class members.” 136 S.
Ct. 1036, 1045 (2016) (internal quotation marks and citation omitted). Therefore, Plaintiffs
have not mentioned this case as posing a risk to class certification.

1 recover more in the way of monetary relief. *See also* Section IV.B.2 (explaining that further
2 litigation could extinguish Plaintiffs’ legal entitlement to, and ability to negotiate for,
3 injunctive relief). Overall, then, this factor weighs in favor of preliminary approval.

4 **2. Risk, Complexity, Costs, and Likely Duration of Further**
5 **Litigation, and Risk of Maintaining Class Certification**

6 This litigation is complex because it “involves several intricate technologies”; it is
7 risky because it requires Plaintiffs to establish new law; and it is expensive because it
8 requires intensive work by qualified experts familiar with the data industry, tracking
9 software, and privacy practices in the digital sphere. Order Denying Mot. for Interlocutory
10 Appeal, Doc. 224 at 5. Neither party is likely to accept a dispositive, adverse ruling
11 without an appeal. The litigation has been intensive to date, and would only become more
12 so, and increasingly costly, if litigation were to continue.

13 More critically, if this settlement is not approved, it is unlikely that further litigation
14 would lead to a better settlement. This is evident for two reasons. One, there is the risk
15 that Vizio will again seek to limit Plaintiffs’ injunctive relief based on its compliance with
16 the consent decree with the Federal Trade Commission. The Court previously denied such
17 a request by Vizio—an important ruling which allowed Plaintiffs to negotiate the
18 injunctive relief in this case. But it did so without prejudice, noting Vizio could yet satisfy
19 its “formidable burden” of demonstrating that “subsequent events make it absolutely clear
20 that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of*
21 *the Earth, Inc. v. Laidlaw Emvtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation
22 omitted).

23 Two, if Plaintiffs were to succeed in certifying a litigation class, Vizio would then
24 press the Court to “definitively adjudicate the enforceability of the arbitration agreement.”
25 Order Denying Mot. to Dismiss and Strike. The arbitration agreement that applies to such
26 class members does not, by its terms, permit class proceedings, and it does not allow the
27 arbitrator to award equitable relief. *See* Brinkman Decl., Exs. A-B, Docs. 142-3, 142-4.
28 Also, monetary relief in arbitration may be limited to actual damages. *Id.*

1 If either of these two events were to occur, Plaintiffs would be diminished in their
2 ability to negotiate settlement terms as favorable as those in the proposed settlement.

3 Costs will increase substantially if the litigation continues through class certification,
4 *Daubert* motions, summary judgment, trial, and appeals. Expert costs in particular would
5 be high. Plaintiffs have been judicious in their use of experts to date, but class certification
6 and trial will require considerable work by experts.

7 Plaintiffs do not see serious obstacles to obtaining and maintaining class
8 certification. Even so, Vizio would vigorously resist class certification, before this Court
9 and on appeal. Even a “small” risk that class certification is not achievable “weigh(s) in
10 favor of granting final approval, as the settlement would eliminate the risk.” *Vandervort v.*
11 *Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1206 (C.D. Cal. 2014).

12 This settlement, by comparison, “eliminates the risks inherent in certifying a class,
13 prevailing at trial, and withstanding any subsequent appeals, and it may provide the last
14 opportunity for class members to obtain” monetary and injunctive relief. *Oda*, No. 8:15-
15 cv-2131-JLS-JCGx, slip op. at 16. This factor therefore weights in favor of settlement
16 approval. *See Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D.
17 Cal. 2004) (“In most situations, unless the settlement is clearly inadequate, its acceptance
18 and approval are preferable to lengthy and expensive litigation with uncertain results.”
19 (citation omitted)).

20 **3. Amount Offered in Settlement**

21 “To determine whether a settlement ‘falls within the range of possible approval,’
22 courts focus on ‘substantive fairness and adequacy’ and ‘consider plaintiffs’ expected
23 recovery balanced against the value of the settlement offer.’” *Schuchard v. Law Office of Rory*
24 *W. Clark*, No. 15-cv-01329-JSC, 2016 WL 232435, at *10 (N.D. Cal. Jan. 20, 2016)
25 (quoting *Tableware*, 484 F. Supp. 2d at 1080). “Immediate receipt of money through
26 settlement, even if lower than what could potentially be achieved through ultimate success
27 on the merits, has value to a class, especially when compared to risky and costly continued
28 litigation.” *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015).

1 The class benefits offered in this settlement—both monetary and injunctive
2 relief—represent an excellent outcome for the class. To begin, the settlement establishes a
3 cash fund of \$17,000,000. This is more than the revenue Vizio obtained from licensing
4 viewing data during the class period. *See* *Siu Decl.* ¶ 11. Plaintiffs’ expert calculates that
5 actual harm per consumer is in the range of \$0.78 and \$4.76. *See Egelman Rep.* at 12.
6 There are approximately 16 million class members. After payment of notice and
7 administration costs and any approved award of attorneys’ fees, costs, and service awards,
8 all funds remaining in the settlement fund will be distributed to the class (*i.e.*, “the net
9 settlement fund”).

10 In addition to the monetary benefits obtained through the settlement, Plaintiffs
11 have obtained extensive injunctive relief. Plaintiffs’ expert has opined that the value of the
12 injunctive relief is, conservatively, \$6 to \$8 million. *See Egelman Rep.* at 3, 12. Thus, even
13 assuming that 100 percent of the class submits a claim for payment from the Settlement
14 Fund, each member of the class would theoretically receive up to \$0.62 in direct
15 compensation (assuming \$10,000,000 in a Net Settlement Fund made available to 16
16 million class members), plus the value of injunctive relief per class member, which is
17 approximately \$0.50. Thus, in a scenario where 100 percent of the class make claims, each
18 class member would receive \$1.12 in settlement benefits, which is above 100 percent of
19 the damages a class member could expect to receive at trial at the lower bounded range of
20 the maximum amount recoverable. Assuming a more realistic claims rate of 5 percent—
21 which is still considered on the high end of claims rates for consumer class actions—
22 Plaintiffs estimate that the per class member recovery would be \$13.00 (\$12.50 from the
23 settlement fund and \$0.50 in injunctive relief). These amounts greatly exceed the
24 maximum value of actual harm per consumer, per TV.

25 Because Plaintiffs’ expert estimates that average damages for actual harm from the
26 collection and sharing of viewing data is between \$0.78 and \$4.76, the ranges that class
27 counsel anticipate as direct payment to class members represents a highly favorable
28 recovery on a per-TV basis. *See Egelman Rep.* at 12. And it is more favorable still once the

1 value of injunctive relief is considered, as it must be. *Cf. Lee v. Enter. Leasing Co.-W.*, No.
2 3:10-CV-00326-LRH, 2015 WL 2345540, at *5 n.5 (D. Nev. May 15, 2015) (“[T]he Ninth
3 Circuit considers the value available to the class in determining total value, rather than
4 merely the amount redeemed.”) (emphasis removed).

5 An examination of settlements in similar consumer privacy cases, where parties
6 pleaded claims for statutory damages under the VPPA or Wiretap Act, further confirms
7 the reasonableness of the proposed settlement in this case. *Perkins v LinkedIn*, which
8 concerned the collection and dissemination of user e-mails and address book contents,
9 settled for \$13 million. No. 5:13-cv-04303-LHK (N.D. Cal.), Doc. 134 at 4. *Google Referrer*
10 *Header Privacy Litigation*, which concerned the collection and use of users’ search terms,
11 settled for \$8.5 million. No. 5:10-cv-04809-EJD (N.D. Cal.), Doc. 85 at 10, *aff’d*, 869 F.3d
12 737 (2017), *cert. granted*, 138 S. Ct. 1697 (2018). *Sony Gaming Networks*, which concerned the
13 disclosure of Sony PlayStation account holder information, settled for \$15 million. No.
14 3:11-md-02258 (S.D. Cal.), Doc. 204-1 at 6-10. *In re Netflix Privacy Litigation*, which
15 concerned the collection and retention of users’ viewing and personal information, settled
16 for \$9 million plus injunctive relief valued at \$4.65 million. No. 5:11-cv-00379 (N.D. Cal.),
17 Doc. 256 at 10. *Fraley v. Facebook*, which concerned the collection of names and likenesses
18 for promotional purposes, settled for \$20 million. No. 3:11-cv-01726 (N.D. Cal.),
19 Doc. 359 at 5. And *Lane v. Facebook*, which concerned the public dissemination of
20 information about members’ online activities, settled for \$9.5 million. No. 5:08-cv-03845
21 (N.D. Cal.), Doc. 108 at 4.

22 Several of the settlements just mentioned—*In re Netflix*, *Google Referrer Header*, and
23 *Lane*—resolved the claims of significantly larger classes. The amounts achieved in those
24 settlements were so small per class member that courts concluded compensation could
25 not feasibly be distributed to class members, and thus directed funds to *cy pres* recipients.
26 This fact further confirms the reasonableness of the settlement benefits achieved in this
27 case.

28 The reasonableness of the settlement is further supported by the Declaration of

1 Wilda Siu, senior director of accounting at Vizio, Inc. In this declaration, Ms. Siu discusses
2 Vizio’s financial position in relation to the settlement amount, and she confirms the
3 revenue received during the class period from the licensing of viewing data. This
4 evidentiary submission demonstrates that “the aggregate size of the settlement—and,
5 relatedly, each individual claimant’s recovery—is fully supported by the reality of
6 Defendants’ financial position.” *Etter v. Thetford Corp.*, NO. SACV 13-00081-JLS (RNBx),
7 slip op. at 20 (C.D. Cal. Mar. 29, 2016) (Doc. 468) (order granting plaintiffs’ renewed
8 motion for preliminary approval of class action settlement).

9 Finally, the amount of the settlement is fair in view of the claims released by
10 Plaintiffs and the class. Each class member will release claims that were or could have
11 been asserted in this action, and the release does not extend beyond the Vizio released
12 parties. Settlement § XVII.1. Because the release mirrors those that have won approval in
13 other similar cases, its scope supports the conclusion that the amount offered in this
14 settlement is fair. *See Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (“A settlement
15 agreement may preclude a party from bringing a related claim in the future even though
16 the claim was not presented and might not have been presentable in the class action, but
17 only where the released claim is based on the identical factual predicate as that underlying
18 the claims in the settled class action.” (internal quotation marks and citation omitted)).

19 **4. Method of Distributing Relief**

20 The 2018 amendments to Rule 23 instruct that the effectiveness of any proposed
21 method of distributing relief to the class, including the method of processing class-
22 member claims, should be considered as part of the fairness inquiry. This factor supports
23 approval for several reasons.

24 For one, A.B. Data will distribute relief directly from the settlement fund to all
25 settlement class members who submit valid claims. The settlement class will have the
26 option to receive payment immediately through electronic payment systems (such as
27 PayPal) or by printed check.

28 For another, the claims process is not unduly demanding, burdensome, or

1 oppressive. A claimant need not submit a receipt but must state under oath that he or she
2 is a class member based on the objective criteria set forth in the class definition. *See*
3 Schachter Decl. ¶ 17.

4 Further, the claims process facilitates the filing of claims. Claimants can complete a
5 claim form on a website or on a paper form, and the case-specific website answers
6 frequently asked questions through a long-form notice and provides a toll-free telephone
7 number with an automated interactive voice response system.

8 Finally, the claims process will also deter unjustified claims and has appropriate
9 security for electronic payment methods. The e-mail notice will provide a unique pin that
10 is associated with an e-mail address. A.B. Data also employs fraud-detection techniques.
11 The electronic payment walls, in turn, are operated by the payment systems themselves,
12 such as PayPal, and thus have advanced security in place. The class member is simply
13 directed to the platforms of these systems. A.B. Data does not receive any log in or
14 password information.

15 For all these reasons, the method of distributing relief is reasonable and supports
16 preliminary approval.

17 **5. Attorneys' Fees and Costs, and Service Awards**

18 At this stage, courts do not formally consider whether to approve attorneys' fees or
19 service payments for named Plaintiffs. Nevertheless, in light of the amendments to Rule
20 23, we forecast the application for such payments.

21 In the Ninth Circuit, when the percentage-of-recovery method is employed, 25
22 percent of a common fund is a presumptively reasonable amount of attorneys' fees. *See In*
23 *re Bluetooth*, 654 F.3d at 942. Here, counsel will not ask for more than 25 percent of the
24 total value of the settlement for monetary *and* injunctive relief. *See Staton*, 327 F.3d at 974
25 (“where the value to individual class members of benefits deriving from injunctive relief
26 can be accurately ascertained [] courts [may] include such relief as part of the value of a
27 common fund for purposes of applying the percentage method of determining fees.”).

28 Plaintiffs will seek service awards of \$5,000. This enhancement is set at the Ninth

1 Circuit’s benchmark award for representative plaintiffs. *See In re Online DVD-Rental*
2 *Antitrust Litig.*, 779 F.3d 934, 947-48 (9th Cir. 2015). It is an appropriate enhancement in
3 this case because the representative Plaintiffs actively participated in the litigation and sat
4 for depositions, and because the cumulative awards sought will constitute a small fraction
5 (0.18 percent) of the total settlement fund. *Rhom v. Thumbtack, Inc.*, No. 16-CV-02008-
6 HSG, 2017 WL 4642409, at *8 (N.D. Cal. Oct. 17, 2017) (“A \$5,000 award also equals
7 approximately 1–2% of the total settlement fund, which is consistent with other court-
8 approved enhancements.”).

9 **6. Stage of the Proceedings and Extent of Discovery Completed**

10 In order to settle a class action, the parties must have “sufficient information to
11 make an informed decision about settlement.” *Linney v. Cellular Alaska P’ship*, 151 F.3d
12 1234, 1239 (9th Cir. 1998). This information can be obtained through formal or informal
13 discovery. *See Clesceri v. Beach City Investigations & Protective Servs., Inc.*, No. CV-10-3873-JLS
14 (RZx), 2011 WL 320998, at *9 (C.D. Cal. Jan. 27, 2011).

15 Plaintiffs have engaged in extensive discovery, formally and informally, including
16 the production and review of voluminous documents, interrogatories, depositions of all of
17 the Plaintiffs, and one non-party deposition. Further, Plaintiffs took three Fed. R. Civ P.
18 30(b)(6) depositions of Vizio and served additional interrogatories in the course of
19 crafting injunctive relief. During this period, Vizio also shared information memorializing
20 business-practice changes that Vizio had made pursuant to its consent decree with the
21 government. The report was provided to Plaintiffs under Fed. R. Evid. 408.

22 Plaintiffs consulted with leading technologists and privacy experts about the
23 strengths and weaknesses of this case. What’s more, Plaintiffs’ legal theories were put to
24 adversarial testing through two motions to dismiss, a motion for interlocutory appeal, and
25 numerous discovery motions before Magistrate Judge Scott.

26 Although the parties are proposing to settle before class certification, they possess
27 sufficient information to make an informed decision about the settlement. This factor,
28 then, weighs in favor of granting preliminary approval.

1 **7. Support of Experienced Counsel**

2 “The recommendations of plaintiffs’ counsel should be given a presumption of
3 reasonableness.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008)
4 (citation omitted). In fact, experienced counsel’s judgment in this respect carries
5 considerable weight. *See Nat’l Rural Telcoms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528
6 (C.D. Cal. 2004) (“‘Great weight’ is accorded to the recommendation of counsel, who are
7 most closely acquainted with the facts of the underlying litigation.”) (citation omitted).

8 Class counsel wholeheartedly endorse the settlement agreement as fair, reasonable,
9 and adequate. That endorsement is the product of arm’s length negotiations before a
10 former federal judge and following relevant discovery. The Court should therefore credit
11 counsel’s recommendation that the settlement warrants preliminary approval. *See Linney v.*
12 *Cellular Alaska P’ship*, Nos. C-96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal. July 18,
13 1997), *aff’d*, 151 F.3d 1234 (9th Cir. 1998) (“The involvement of experienced class action
14 counsel and the fact that the settlement agreement was reached in arm’s length
15 negotiations, after relevant discovery had taken place create a presumption that the
16 agreement is fair.”).

17 **8. Positive Views of Class Members**

18 The named Plaintiffs have all submitted declarations summarizing their individual
19 views of the settlement. *See* Hodges Decl., Zufolo Decl., Walsh Decl., Rizzitello Decl.,
20 Thomson Decl., and Queenan Decl. All are excited by the benefits achieved for the class
21 and support settlement approval. As the views of other class members are known, the
22 Court may take them into account as well. At this stage, however, all indications are that
23 the class is reacting positively to the proposed settlement.

24 **9. No Signs of Collusion**

25 When, as here, a class settlement is reached before class certification, courts are
26 “particularly vigilant” in searching for signs of collusion. *In re Bluetooth*, 654 F.3d at 946–
27 47. Courts must look for explicit collusion and “more subtle signs that class counsel have
28 allowed pursuit of their own self-interests and that of certain class members to infect the

1 negotiations.” *Id.* at 947. Such signs include “when the parties arrange for fees not
2 awarded to revert to defendants rather than be added to the class fund,” disproportionate
3 distributions of settlement funds to counsel, and clear-sailing arrangements. *Id.*

4 There are no signs, explicit or subtle, of collusion between the parties here. First,
5 settlement funds will not revert to Vizio under any circumstances. Settlement funds will
6 go to class members, and the use of electronic payment methods will increase the chances
7 that even small dollar amounts can be distributed to the class. These payments will be
8 divided proportionally among purchasers per TV per household, and thus all class
9 members are treated equitably. The same may be said for the injunctive relief which
10 admits no distinctions among class members. The named Plaintiffs, moreover, have stated
11 under oath that they understand they are not legally entitled to any benefits other than
12 those available to all settlement class members.

13 Any amount that is not feasibly distributable to the class will be split by next-best
14 recipients. Plaintiffs propose that the next-best recipients should be: Electronic Privacy
15 Information Center, Privacy Rights Clearinghouse, and World Privacy Forum. Any
16 residual would be divided evenly. These organizations submitted applications in which
17 they explained how they would commit to use distributed funds in a specified way that
18 benefits the class or substantial portions of it and addresses issues related to the basis of
19 the lawsuit. And each was asked to confirm that the organization is independent of the
20 parties, their counsel, and the district court. The applications which Plaintiffs received are
21 being submitted to the Court so that it can independently determine the suitability of
22 these next-best recipients. *See* Joint Decl., Ex. 4. This process further confirms that there
23 is no collusion.

24 Second, there will not be a disproportionate distribution of the settlement fund to
25 counsel.

26 Third, under the settlement agreement, attorneys’ fees are to be awarded from the
27 settlement fund. Although Vizio informed Plaintiffs, after all material class settlement
28 benefits had been negotiated, that it would not oppose an application for fees that does

1 not exceed 33% of \$17,000,000, the settlement agreement explicitly says that the Court is
2 to determine the proportion of the settlement fund that will be awarded as attorneys' fees.
3 Thus, the agreement does not in any way affect the Court's "supervisory discretion" in
4 approving fees. *See Vandervort v. Balboa Capital Corp.*, 2013 WL 12123234, at *5 (C.D. Cal.
5 Nov. 20, 2013) (quoting *Staton*, 327 F.3d at 970).

6 The timing of the payment of attorneys' fees—shortly after the final approval of
7 fees by this Court—is not controversial, either. *Pelzer v. Vassalle*, 655 Fed. App'x 352, 365
8 (6th Cir. 2016) ("Quick-pay provisions are common.") (citing Brian T. Fitzpatrick, *The*
9 *End of Objector Blackmail?*, 62 Vand. L. Rev. 1623, 1643 (2009), which found over one-third
10 of federal class action settlement agreements in 2006 included quick-pay provisions);
11 *Brown v. Hain Celestial Group, Inc.*, 2016 WL 631880, at *10 (N.D. Cal. Feb. 17, 2016)
12 ("Courts . . . approve these 'quick pay' provisions routinely.") (citation omitted); *In re TFT-*
13 *LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *1 (N.D. Cal. Dec. 27, 2011) (same).

14 Lastly, there is no undisclosed agreement made in connection with the settlement
15 proposal.

16 For all these reasons, there is no cause for concern that the settlement is the
17 product of collusion.

18 * * *

19 Considering all these guideposts, the Court should preliminarily conclude that the
20 proposed settlement is fair, reasonable, and adequate, and likely to receive final approval.

21 **C. Approval of the Proposed Settlement Administrator**

22 Plaintiffs propose, and Vizio does not oppose, the appointment of A.B. Data, Ltd.
23 as settlement administrator. Documentation of A.B. Data's competence is included in the
24 Declaration of Eric Schacter, vice-president of this company. Notably, this Court has
25 previously approved of A.B. Data as a settlement administrator in another class action
26 settlement. *Munday v. Navy Federal Credit Union*, 2016 WL 7655796, at *9 (C.D. Cal. Sep. 15,
27 2016) (Staton, J.) (order granting renewed joint motion for preliminary approval of class
28 action settlement). For these reasons, the Court should appoint A.B. Data to serve in this

1 capacity in this case.²¹

2 **D. Preliminary Approval of Class Notice Form and Method**

3 Even as amended in 2018, Fed. R. Civ. P. 23(c)(b)(2) requires the “best notice that
4 is practicable under the circumstances, including individual notice to all members who can
5 be identified through reasonable effort” for certified (b)(3) litigation classes. S. Ct., *Proposed*
6 *Amendments to the Fed. R. Civ. P.*, at *6.²² The 2018 amendments apply the requirements of
7 subdivision (c)(2)(B) to the notice of class-action settlements for (b)(3) classes. The
8 settlement agreement contemplates a single, combined notice advising the class of the
9 proposed certification and settlement of (b)(3) classes under both Rule 23(e)(1) and
10 (c)(2)(B).

11 Rule 23(c)(2)(B) was amended because means of communication have evolved and
12 permitting notice by *electronic* means, including e-mails, digital media, and social media, may
13 provide the best practicable notice under the circumstances. Duke Law School,
14 *Implementing 2018 Amendments to Rule 23, supra*, Rules Appendix C, at *17-18.²³ Specifically,
15 the amended language expressly provides that notice can be made by one or a
16 combination of means, including “United States mail, electronic means, or other
17 appropriate means.” *See* S. Ct., *Proposed Amendments, supra*, at *6.

18 The Committee Note to amended Rule 23 advises: “Counsel should consider which
19 method or methods of giving notice will be most effective; simply assuming that the
20 ‘traditional’ methods are best may disregard contemporary communication realities.”
21 Duke Law School, *Implementing 2018 Amendments to Rule 23, supra*, Rules Appendix C, at
22 *19. Consistent with that directive, counsel for the parties and the settlement
23 administrator have carefully considered cost, customer preference, and effectiveness, in
24 determining the best practicable means of communicating the settlement benefits and
25

26 ²¹ Plaintiffs will apply for an award of costs to A.B. Data for settlement administration
concurrently with their application for attorneys’ fees and service payments.

27 ²² *Available at* https://www.fjc.gov/sites/default/files/materials/58/frcv18_5924.pdf.

28 ²³ *Available at* <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/Class-Actions-Best-Practices-Final-Version.pdf>.

1 rights of exclusion (among other matters) to the class.

2 Vizio has communicated with its customers directly through affected TVs to
3 provide disclosures during and after the class period. Working with the settlement
4 administrator, the parties and the Court will know precisely the number of affected Smart
5 TVs which successfully display the on-screen notice.

6 The parties have a solid sense of the number of Smart TVs capable of displaying
7 the notice based upon the number of TVs which have communicated with Vizio's servers
8 within the last 3 months and 6 months. Based on these estimates, notice will be sent
9 through the Internet directly to approximately 6,000,000 Vizio TVs purchased by potential
10 Settlement Class Members. As such, the notice will effectively reach the class.

11 The notice will display three times for 45 seconds, unless the option to dismiss the
12 notice is selected, in which case it will display a second time but not a third time. The easy-
13 to-remember settlement website address—www.VizioTVsettlement.com—is displayed
14 prominently in the center of the screen and in large font. Because of the frequency of the
15 TV notice, there is assurance that the notice will actually come to the attention of the
16 class.

17 Lastly, the TV notice is informative, engaging, and easy to understand. And it
18 allows class members to learn of their rights and options, and to act on them by visiting
19 the settlement website.

20 In *Hinsbaw v. Vizio*, the court preliminarily approved a class action settlement and
21 notice plan which authorized Vizio to display a class action notice on Vizio TVs, among
22 other notice. *See* No. 8:14-cv-00876-DOC (C.D. Cal.), Doc. 56 at § 7.3. Subsequently, the
23 court granted final approval. *Hinsbaw*, Doc. 69 at 3-4. Under that notice plan, the TV
24 notice displayed a total of two times for 30 seconds unless the class member selected a
25 command button to remove it. *Hinsbaw*, Doc. 56 at § 7.3.

26 The TV Notice presented in this case is superior in that it will display more
27 frequently for longer intervals. The TV Notice here also has the information demanded by
28 Rule 23(c)(B)(2). And in contrast with the *Hinsbaw* TV notice, the text of which is

1 represented in a single font-size, the text in the TV notice here is formatted to enhance
2 class member engagement. We draw these comparisons not to diminish the TV Notice in
3 *Hinsbam*, which satisfied Rule 23, but to explain the reasons why the design of the TV
4 Notice in this case will be particularly effective.

5 Notice is also accomplished through a combination of e-mail, and digital and print
6 media. Vizio has a large number of e-mail addresses. This reflects the manner in which
7 customers engage Vizio. It also reflects “contemporary communication realities” of this
8 particular demographic. Approximately 9,000,000 potential Settlement Class Members will
9 receive the notice via e-mail. A.B. Data implements certain best practices to increase
10 deliverability and bypass SPAM and junk filters and can verify the number of e-mails
11 successfully delivered.²⁴

12 Other forms of notice, such as the digital and print media campaign, will provide
13 more than adequate coverage in the event that the outreach of the e-mail and TV notice
14 reaches fewer settlement class members than estimated. Digital banners ads through the
15 Google Display Network, Facebook (which includes a settlement-specific Facebook page)
16 and Google AdWords/Search platforms will yield a minimum of 62 million impressions.
17 Utilizing the known contact information and demographics of the settlement class, the
18 digital banner ads will be specifically targeted to settlement class members and likely
19 settlement class members.

20 Notice of the proposed settlement will be sent to relevant state and federal
21 authorities per the terms of 28 U.S.C. § 1715(b) at least 90 days prior to the date for the
22 final fairness hearing. 28 U.S.C. § 1715(d). A declaration attesting to this fact will be
23 submitted to the Court.

24 Under Rule 23, the notice must include, in a manner that is understandable to
25 potential class members: “(i) the nature of the action; (ii) the definition of the class
26 certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an

27 ²⁴ Plaintiffs have provided the Court with mock ups of the TV and e-mail notice, so that
28 the Court can review the notice in a similar manner in which it will be presented to the class.

1 appearance through an attorney if the member so desires; (v) that the court will exclude
2 from the class any member who requests exclusion; (vi) the time and manner for
3 requesting exclusion; and (vii) the binding effect of a class judgment on members under
4 Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B). This information is included in each of the
5 notices in language that is easy to understand.

6 Because the class notices and notice plan set forth in the settlement agreement
7 satisfy the requirements of due process and Federal Rule of Civil Procedure 23, and
8 provide the best notice practicable under the circumstances, the Court should direct the
9 parties and the Settlement Administrator to proceed with providing notice to settlement
10 class members pursuant to the terms of the settlement agreement and its order granting
11 preliminary approval.

12 **V. CONCLUSION**

13 For the foregoing reasons, Plaintiffs respectfully request that the Court enter the
14 proposed Preliminary Approval Order, thereby:

- 15 (1) preliminarily approving the proposed Settlement;
- 16 (2) provisionally certifying the proposed Settlement Class;
- 17 (3) appointing Plaintiffs as Class Representatives;
- 18 (4) appointing Class Counsel as Settlement Class Counsel;
- 19 (5) approving Plaintiffs’ proposed notice program and directing that the notice
20 be carried out under that program;
- 21 (6) appointing A.B. Data, Ltd. as Settlement Administrator and directing it to
22 carry out the duties and responsibilities stated in the Settlement;
- 23 (7) approving Electronic Privacy Information Center, Privacy Rights
24 Clearinghouse, and World Privacy Forum as next-best recipients of residual
25 funds that cannot feasibly be distributed to class members; and
- 26 (8) setting a Final Approval Hearing and certain other dates in connection with
27 the settlement approval process.

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Respectfully submitted,

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