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22 **UNITED STATES DISTRICT COURT**
23 **NORTHERN DISTRICT OF CALIFORNIA**
24 **SAN FRANCISCO DIVISION**

25 IN RE: 23ANDME, INC. CUSTOMER DATA
26 SECURITY BREACH LITIGATION

No. 3:24-md-03098-EMC

27 This Document Relates to: ALL ACTIONS

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

28 Judge: Hon. Edward M. Chen
Courtroom: 5, 17th Floor
Hearing Date: October 17, 2024
Hearing Time: 1:30 p.m.

1 **TO THE COURT, THE PARTIES, AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on October 17, 2024, at 1:30 p.m. or as soon thereafter as
3 counsel may be heard, before the Honorable Edward M. Chen, at the United States District Court for
4 the Northern District of California, San Francisco Division, located at 450 Golden Gate Ave. San
5 Francisco, CA 94102, Plaintiffs will and hereby do move this Court, pursuant to Federal Rule of Civil
6 Procedure 23, for an order granting Plaintiffs’ Unopposed Motion for Preliminary Approval of Class
7 Action Settlement.

8 Plaintiffs base their Motion for Preliminary Approval of Class Action Settlement on this Notice;
9 the Memorandum of Points and Authorities filed in support thereof; the Settlement Agreement and
10 Release (“Settlement Agreement”) and all exhibits attached thereto; the Declaration of Cari Campen
11 Laufenberg, Norman E. Siegel and Gayle M. Blatt in Support of Plaintiffs’ Motion for Preliminary
12 Approval of Class Action Settlement (“Class Counsel Decl.”); the Declaration of Carla A. Peak
13 (“Admin. Decl.”) and all exhibits attached thereto; the Declaration of Gerald Thompson (“CyEx Decl.”)
14 all other records and papers on file in this action; any oral argument on the Motion; and all other matters
15 properly before the Court.

16 Plaintiffs seek an order pursuant to Federal Rule of Civil Procedure 23(b)(3) certifying the
17 Settlement Class more fully described in the Settlement Agreement filed concurrently herewith;
18 preliminarily approving the Settlement as fair, reasonable, and adequate; directing notice to be
19 disseminated to the Settlement Class in the form and manner proposed by the parties as set forth in the
20 Settlement Agreement and Exhibits 1-4 to the Admin. Decl.; appointing Verita to serve as the
21 Settlement Administrator; appointing Plaintiffs as Class Representatives and the undersigned attorneys
22 as Class Counsel; and setting a hearing date and schedule for final approval of the Settlement and
23 consideration of Class Counsel’s forthcoming motion for an award of fees, costs, expenses, and service
24 awards.

25 Dated: September 12, 2024

26 By: /s/ Gayle M. Blatt
27 Gayle M. Blatt (SBN 122048)

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CERTIFICATE OF SERVICE

I, Cass L. Lazar, hereby certify that on September 12, 2024, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notification to all counsel of record.

/s/ Cass L. Lazar

Cass L. Lazar

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26 IN RE: 23ANDME, INC. CUSTOMER DATA
27 SECURITY BREACH LITIGATION

28 This Document Relates to: ALL ACTIONS

No. 3:24-md-03098-EMC

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Judge: Hon. Edward M. Chen
Courtroom: 5, 17th Floor
Hearing Date: October 17, 2024
Hearing Time: 1:30 p.m.

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TABLE OF AUTHORITIES

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<i>Bruton v. Gerber Prods. Co.</i> , 703 F. App'x 468 (9th Cir. 2017)	20
<i>Burlesci v. Petersen</i> , 68 Cal. App. 4th 1062 (1998)	20
<i>Campbell v. Facebook Inc.</i> , 2017 WL 3581179 (N.D. Cal. Aug. 18, 2017)	34
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<i>Carter v. Vivendi Ticketing US LLC</i> , 2023 WL 8153712 (C.D. Cal. Oct. 30, 2023)	34
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 7 *Cotter v. Lyft, Inc.*
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7 *In re Anthem, Inc. Data Breach Litig.*,

8 327 F.R.D. 299 (N.D. Cal. 2018)25, 31, 34

9 *In re Apple Inc. Device Performance Litig.*,

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11 *In re Bluetooth Headset Prod. Liab. Litig.*,

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19 *In re Live Concert Antitrust Litig.*,

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23 952 F.3d 471 (4th Cir. 2020).....12

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26 *In re Tableware Antitrust Litig.*,

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28 *In re Volkswagen “Clean Diesel” Mktg. Sales Practices & Prod. Liab. Litig.*,

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In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prod. Liab. Litig.,

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1 *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prod. Liab. Litig.,*
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5 *In re Yahoo! Inc. Customer Data Sec. Breach Litig.,*
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7 *Jabbari v. Wells Fargo & Co.,*
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9 *Jimenez v. Allstate Ins. Co.,*
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11 *Kremen v. Cohen,*
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13 *Lagunas v. Young Adult Inst., Inc.,*
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15 *Lane v. Facebook, Inc.,*
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17 *Marzec v. California Pub. Emps. Ret. Sys.,*
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1 *Opperman v. Path, Inc.*,

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3 *Parsons v. Ryan*,

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5 *Phillips Petroleum Co v. Shutts*,

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7 *Rudolph v. Hudson’s Bay Co.*,

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9 *Rutherford Holdings, LLC v. Plaza Del Rey*,

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11 *Singh v. Roadrunner Intermodal Servs., LLC*,

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13 *Slaven v. BP Am., Inc.*,

14 190 F.R.D. 649 (C.D. Cal. 2000).....26

15 *Snyder & Assocs. Acquisitions LLC v. United States*,

16 859 F.3d 1152 (9th Cir. 2017)20

17 *St. Louis, I.M. & S. Ry. Co. v. Williams*,

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19 *Sutter Health v. Superior Ct.*,

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21 *Sweet v. DeVos*,

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23 *Trosper v. Styker Corp.*,

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25 *True v. Am. Honda Motor Co.*,

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27 *Tyson Foods, Inc. v. Bouaphakeo*,

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9 *Worldvision Enterprises, Inc. v. Am. Broad. Companies, Inc.*,
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11 *Young v. Facebook, Inc.*,
12 790 F. Supp. 2d 1110 (N.D. Cal. 2011).....13
13 *Young v. Wideawake Death Row Ent., LLC*,
14 2011 WL 13371881 (C.D. Cal. May 16, 2011).....14
15
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1 Other Authorities

2 4 A Conte & H. Newberg, *Newberg on Class Actions*, § 11:50 (4th ed. 2002)25

3 7AA Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1780.1 (3d ed.)12

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I. INTRODUCTION

1 The proposed Settlement Class Representatives¹ and Defendant 23andMe have reached a
2 settlement that will create a non-reversionary Settlement Fund of \$30 million to provide substantial
3 relief to Settlement Class Members. This is an outstanding result at an early juncture in the case and
4 maximizes the relief available from a Defendant in an uncertain financial situation.
5

6 The benefits provided by the Settlement Fund are carefully tailored to redress the harms faced
7 by the victims of the 23andMe Security Incident announced in October 2023, which involved the
8 release of Personal Information, including limited health information and ethnic and genetic
9 information. *See* Dkt. 78, Consolidated Class Action Complaint (“Complaint” or “Compl.”). If the
10 Settlement is approved, the benefits available to Settlement Class Members will provide: (1) monetary
11 reimbursement for Extraordinary Claims up to \$10,000 for losses incurred as the direct result of the
12 Security Incident, including expenses for identity fraud, the installation of physical security or
13 monitoring systems, and professional mental health treatment; (2) cash payments for Settlement Class
14 Members who were residents of states with genetic privacy laws providing for statutory damages
15 (Alaska, California, Illinois, and Oregon); (3) cash payments for Settlement Class Members that had
16 health information compromised in the Security Incident, and (4) three years of state of the art Privacy
17 & Medical Shield + Genetic Monitoring (“Privacy Shield”) for all Settlement Class Members who
18 enroll. Privacy Shield is a unique monitoring program with added components designed specifically
19 for this Settlement that provides extensive benefits for victims of the Security Incident. Further, as part
20 of the Settlement, 23andMe agreed to implement and maintain—at its own expense—important
21 Business Practice Commitments, which will strengthen the security and protections of the Personal
22 Information in its possession. These benefits are described more fully in the Settlement Benefits Plan
23 (“SBP”) and below. In short, the Settlement addresses the central allegation of this Litigation and
24 achieves key relief sought by Plaintiffs.²

25 Considering the substantial monetary and non-monetary benefits conferred upon Settlement

26 ¹ The capitalized terms in this memorandum have the meaning set forth in the Settlement Agreement.

27 ² While 23andMe denies Plaintiffs’ allegations, it has agreed to the Settlement Agreement and does not
28 oppose this Motion.

1 Class Members and the significant risks faced through continued litigation including the financial
 2 condition of the Defendant, the terms of the Settlement are “fair, reasonable, and adequate” in
 3 accordance with Federal Rule of Civil Procedure 23(e)(2). Therefore, Plaintiffs respectfully request
 4 the Court preliminarily approve the proposed Settlement, appoint Class Counsel and the Settlement
 5 Class Representatives, authorize the provision of Notice to the Settlement Classes, and set a hearing
 6 to consider final approval of the Settlement. In support of this Motion, Plaintiffs submit the Settlement
 7 Agreement (“SA”) (Ex. A); an agreed proposed order granting preliminary approval (Ex. A-1); the
 8 proposed Settlement Benefits Plan (“SBP”) (Ex. B); the Case Comparison Chart (Ex. C); Declaration
 9 of Class Counsel (“Class Counsel Decl.”) (Ex. D); the Declaration of Carla A. Peak on behalf of the
 10 proposed Notice and Claims Administrator including details of the Notice Program, attaching the
 11 proposed Settlement Notices and Claim Form (“Admin. Decl.”) (Ex. E); and the Declaration of Gerald
 12 Thompson on behalf of CyEx, the provider of Privacy Shield (“CyEx Decl.”) (Ex. F).

13 **II. THE SETTLEMENT IS THE RESULT OF ZEALOUS ADVOCACY**
 14 **AND SKILLFUL NEGOTIATION**

15 The severity of this Security Incident combined with 23andMe’s challenging financial position
 16 presented extraordinary challenges to achieving the Settlement, far beyond those in a typical data
 17 breach MDL. Class Counsel Decl. ¶ 33. Even prior to the Security Incident and the resulting wave of
 18 lawsuits now centralized in this Court, 23andMe’s financial condition was dire. Revenue and earnings
 19 were in steep decline, and by September 2023 (a month before the Security Incident) its stock started
 20 trading below \$1. Class Counsel Decl. ¶ 29. 23andMe’s financial issues were exacerbated by
 21 revelation of the Security Incident, and by November 2023, 23andMe’s stock was no longer in
 22 compliance with Nasdaq regulations that require listed stocks maintain a minimum bid price of \$1 per
 23 share. *Id.* 23andMe had recently reported a substantial loss in the first half of its calendar year based
 24 on declining revenue. The latest quarterly report revealed losses of \$69.4 million on revenue of only
 25 \$40.4 million.³ And as of September 10, 2024, 23andMe’s stock was trading at an all-time low of

26 _____
 27 ³ 23andMe Holding Co., *Form 8-K* (Aug. 5, 2024), [https://www.sec.gov/Archives/edgar/
 data/1804591/000180459124000045/me-20240808x8kxexx991.htm](https://www.sec.gov/Archives/edgar/data/1804591/000180459124000045/me-20240808x8kxexx991.htm).

1 \$0.30 a share resulting in a market capitalization of roughly \$151 million. Class Counsel Decl. ¶ 31.

2 Given 23andMe’s financial position, litigation exposure in this and other cases, and limited
3 funds available, an early attempt at resolution was a rational path forward for the proposed Class. The
4 Court recognized the precariousness of the situation for the Class and ordered Interim Co-Lead
5 Counsel to “immediately upon appointment” arrange “for further mediation with Randy Wulff who is
6 designated as mediator in this case[.]” Dkt. 62, Pretrial Order No. 2, ¶ 9. Following two mediation
7 sessions prior to the appointment of Interim Co-Lead Counsel, on June 26, 2024, the Parties attended
8 a third in-person mediation session with Mr. Wulff. After another lengthy arms-length session, the
9 Parties were at an impasse. Mr. Wulff then presented a mediator’s proposal that was eventually
10 accepted by both Parties. The Parties then turned to documenting the agreement under the terms and
11 conditions set forth in the Settlement Agreement. As a condition of the Settlement, and in exchange
12 for payment of the Settlement Fund, the Settlement Class Representatives, on behalf of the proposed
13 Settlement Class, agreed to release their claims and all potential claims that could have been brought
14 based on the identical factual predicate as those alleged in the Complaint.

15 **A. Brief Summary of the Litigation**

16 On August 11, 2023, a threat actor on the dark web claimed to have samples of 23andMe
17 genetic user data for sale. Compl. ¶¶ 418-419. In early October 2023, a threat actor made available via
18 a link to certain Personal Information, including the ethnicity information relating to data of one
19 million 23andMe users with Ashkenazi Jewish DNA descent, and another 100,000 with Chinese DNA.
20 *Id.* ¶ 420. On October 6, 2023, a researcher examining the leaked database reported the data included
21 more than 300,000 users of Chinese heritage. Compl. ¶ 421. On that date, 23andMe confirmed it was
22 the source of the stolen data, and after an investigation, determined the threat actor downloaded
23 Personal Information without authorization relating to approximately 6.6 million natural persons in
24 the United States. *Id.* ¶¶ 422-439.⁴ The Personal Information accessed varied on a person-by-person
25 basis. For most of the impacted customers, the Personal Information accessed by the threat actor
26 included the Personal Information from a customer’s DNA Relatives profile or Family Tree Profile

27 _____
28 ⁴ This number was confirmed to be 6.4 million natural persons in the United States. SA ¶ 3.

1 within 23andMe’s DNA Relatives feature, which may have included their name, sex, birth year,
2 information about the customer’s ancestry based on their genetic information, self-reported location
3 (city/zip code), ancestor birth locations, family names and family tree information. For a small number
4 of customers, the threat actor also accessed Personal Information about the customer’s present or
5 future health based on the analysis of their genetic data, their self-reported health information, and
6 their uninterpreted genotype data. *Id.* ¶ 1.

7 After announcement of the Security Incident, over 40 putative class action lawsuits were filed
8 against 23andMe asserting claims for a raft of common law torts and various statutory claims—
9 including several that provide statutory damages for the disclosure of genetic information. On
10 December 21, 2023, 23andMe filed a Motion to Transfer Actions to the Northern District of California
11 Pursuant to 18 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings with the Judicial
12 Panel on Multidistrict Litigation, MDL No. 3098. On April 11, 2024, the JPML centralized the
13 Litigation before the Honorable Edward M. Chen of the Northern District of California, where dozens
14 of putative class action lawsuits were pending. The Court considered applications for the appointment
15 of Interim Co-Lead Counsel under Fed. R. Civ. P. 23(g) and held a hearing on the motions on June 3,
16 2024. On June 5, 2024, the Court appointed Interim Co-Lead Counsel. Dkt. 62. Upon appointment,
17 Interim Co-Lead Counsel filed a 186-page consolidated complaint on June 26, 2024, alleging 40
18 causes of action. Dkt. 78. The operative complaint in this action is a superseding operative complaint
19 that aggregated claims brought by litigants around the country.

20 **B. A Summary of the Mediation Efforts and Agreement to Settle**

21 Prior to the appointment of Interim Co-Lead Counsel, starting in January 2024, a small group
22 of Plaintiffs’ counsel and 23andMe scheduled an early mediation for January 31, 2024. Class Counsel
23 Decl. ¶ 23. Other Plaintiffs’ lawyers—including Interim Co-Lead Counsel—learned of the mediation
24 and participated either in person or by Zoom. Plaintiffs’ counsel representing nearly every case filed
25 against 23andMe participated in the January 31, 2024, mediation overseen by Mr. Wulff, which
26 although productive, did not result in a settlement. *Id.*

27 Subsequently, a smaller group of Plaintiffs’ counsel, including Interim Co-Lead Counsel
28

1 Norman E. Siegel and Gayle M. Blatt, agreed to participate in a second mediation with 23andMe
2 before Mr. Wulff, with a commitment to keep all Plaintiffs' counsel informed as to the progress of the
3 negotiations. Class Counsel Decl. ¶ 24. Prior to this mediation, the group engaged an independent
4 forensic accounting firm to advise it with respect to 23andMe's financial condition, and continued
5 their work with experts to, among other things, develop business practice changes designed to protect
6 Settlement Class Members' sensitive data. *Id.* On March 20, 2024, the Parties engaged in a second
7 day-long mediation under the direction of Mr. Wulff. Like the first mediation, the process was
8 productive but did not result in a settlement. *Id.*

9 On June 5, 2024, the Court appointed Mr. Siegel, Ms. Blatt and Cari C. Laufenberg to serve as
10 Interim Co-Lead Counsel, authorizing them to pursue the Litigation on behalf of the Plaintiffs, and to
11 continue settlement negotiations on behalf of the Plaintiffs and the putative class members, which now
12 comprise the Settlement Class. Dkt. 62. Interim Co-Lead Counsel and Defendant were directed by the
13 Court to coordinate with Mr. Wulff for further attempts at resolution. Dkt. 62 ¶ 9.

14 Beginning prior to the first mediation on January 31, 2024, the Parties exchanged informal
15 discovery in preparation for the mediation sessions before Mr. Wulff and continued discussions
16 through June 26, 2024, when an additional mediation session was held. The arm's length mediation
17 sessions resulted in a mediator's proposal for resolution of Plaintiffs' claims against Defendant. Class
18 Counsel Decl. ¶¶ 26. On July 12, 2024, all Parties accepted the mediator's proposal, reaching agreement
19 in principle to resolve this Litigation. *Id.* The acceptance of the mediator's proposal resulted in the
20 July 29, 2024, execution of a term sheet containing the material terms of the Settlement. Class Counsel
21 Decl. ¶ 28. And, now presented for the Court's consideration, is the formal Settlement Agreement,
22 attached as Exhibit A, which forms the basis of this Motion.

23 III. SETTLEMENT TERMS

24 A. Benefits to Settlement Class Members

25 The Settlement Agreement provides monetary benefits in the form of a non-reversionary
26 Settlement Fund of \$30,000,000, which shall be used to pay for: (1) benefits to the Settlement Class
27 as outlined below; (2) Notice and Claims Administrative Costs; (3) attorneys' fees and expenses

1 awarded by the Court; and (4) Service Awards awarded by the Court. SA ¶¶ 58-59. The Net Settlement
 2 Fund shall be used to pay for cash payments to Settlement Class Members who make valid claims,
 3 and to provide Privacy Shield for all Settlement Class Members who enroll. SBP ¶ 3.

4 *First*, Settlement Class Members may make an Extraordinary Claim for verifiable
 5 unreimbursed costs or expenditures up to \$10,000 related to the Security Incident. Extraordinary
 6 Claims provide reimbursement for: (1) unreimbursed costs incurred as a direct result of identity fraud
 7 or falsified tax returns that the Settlement Class Member establishes were the result of the Security
 8 Incident; (2) unreimbursed costs associated with the purchase of a physical security or monitoring
 9 system that a Settlement Class Member establishes was purchased in response to the Security Incident;
 10 and (3) unreimbursed costs associated with seeking professional mental health counseling or treatment
 11 that a Settlement Class Member establishes were the result of the Security Incident. *Id.* ¶ 4.

12 *Second*, Settlement Class Members who were residents of Alaska, California, Illinois or
 13 Oregon —states that have genetic privacy laws with statutory damages provisions—may make a
 14 Statutory Cash Claim. *Id.* ¶ 6. Interim Co-Lead Counsel anticipates that, depending on the claims rate,
 15 the Statutory Cash Claims will result in payments of approximately \$100 for eligible claimants. Class
 16 Counsel Decl. ¶ 38.⁵

17 *Third*, the small number of Settlement Class Members that had health information
 18 compromised in the Security Incident may submit a Health Information Claim. Health Information
 19 Claims will be paid a fixed \$100 cash payment. *Id.* ¶ 38.⁶

20 *Fourth*, all Settlement Class Members will be entitled to enroll in Privacy Shield, which will
 21 be available for three years. This monitoring program was developed by experts in the field specifically
 22 for this case, and provides substantial web and dark web monitoring for Settlement Class Members.
 23 CyEx Dec. ¶¶ 6-7. Privacy Shield will also aid in reducing Settlement Class Members' digital

24 _____
 25 ⁵ By way of example, Interim Co-Lead Counsel estimates that a 10% claims rate for Statutory Cash
 26 Claims will result in payments of at least \$100—and up to 35% more if the Extraordinary Claims Fund
 is not exhausted.

27 ⁶ All Extraordinary Claims, Statutory Cash Claims, and Health Information Claims shall be paid
 28 pursuant to the Payment Schedule detailed in the Settlement Benefits Plan submitted by Interim Co-
 Lead Counsel in conjunction with this motion for Preliminary Approval. SA ¶ 43.

1 footprint. The extensive benefits are described in the Declaration of Gerald Thompson. *See id.* ¶¶ 6-7.

2 To take advantage of the cash payments and to enroll in Privacy Shield, Settlement Class
3 Members will submit Claim Forms to the Notice and Claims Administrator electronically or download
4 a form for mailing from the Settlement Website. SA ¶ 100. Settlement Class Members will be able to
5 receive their payments by an electronic payment option or can opt for a mailed check. SBP ¶ 13.
6 Activation codes for Privacy Shield will be automatically sent after the Effective Date to Settlement
7 Class Members who submitted a claim. However, even if they do not make a claim for Privacy Shield
8 prior to the Claims Deadline, Settlement Class Members will be entitled to enroll *at any point* during
9 the three-year period that Privacy Shield is active and will be able to take advantage of the remaining
10 time available on the three-year term of the program. SBP ¶ 12. Should any funds remain from the
11 failure of Settlement Class Members to timely negotiate a settlement check or to timely provide
12 required tax information such that a settlement check could issue, they will be used to extend the active
13 period for Privacy Shield. No funds may revert to 23andMe. SBP ¶ 8.

14 **B. The Settlement Includes Important Business Practice Commitments Designed to Enhance
15 the Security of Settlement Class Members' Personal Information**

16 As additional consideration for the Settlement, 23andMe commits to adopting, paying for,
17 implementing and maintaining the following Business Practices Commitments related to information
18 security to safeguard current users' and Settlement Class Members' Personal Information. Each
19 Business Practice Commitment is described in detail in the Settlement Agreement. SA ¶¶ 70. These
20 commitments include: (1) enhanced password protection; (2) mandated multi-factor authentication;
21 (3) annual security awareness training; (4) annual computer scans and cybersecurity audits; (5)
22 information security program; (6) maintenance of data breach incidents response plan and threat
23 management; and (7) limited retention of inactive Personal Information. *Id.* Moreover, the Class
24 Notice will provide a link where Settlement Class Members can have their information deleted by
25 23andMe, subject to certain conditions such as legal record retention requirements. SA ¶ 71. At least
26 14 days in advance of the Final Approval Hearing, 23andMe will file a report with the Court, with a
27 copy to Class Counsel, detailing the status of its compliance with the Business Practice Commitments
28 identified above. The report is to be certified by the most senior 23andMe employee with responsibility

1 for overseeing the Business Practice Commitments. *Id.* at ¶ 72.

2 **C. Class Definition and the Estimated Class Size**

3 The Settlement Class includes: “all natural persons who were residents of the United States on
4 August 11, 2023 and whose Personal Information was compromised in the Security Incident.” SA
5 ¶ 44. The Statutory Subclass is defined to include Settlement Class Members who were residents of
6 Alaska, Oregon, California or Illinois as of August 11, 2023. SA ¶ 51. The Settlement Class and
7 Statutory Subclass specifically exclude: (i) 23andMe and its officers and directors; (ii) all Settlement
8 Class Members who timely and validly request to opt-out from the Settlement Class; (iii) the Judge
9 assigned to evaluate the fairness of this settlement; and (iv) potential class members who have
10 provided 23andMe with an express release of claims arising out of or related to the Security Incident
11 prior to the Effective Date of this Settlement. SA ¶ 44.⁷ 23andMe’s investigation determined the threat
12 actor downloaded Personal Information without authorization relating to approximately 6.4 million
13 natural persons in the United States. SA ¶ 3. The Statutory Subclass includes approximately 1.4 million
14 natural persons in the United States. Class Counsel Decl. ¶ 44.

15 **D. Counsel’s Fees and Costs and the Settlement Class Representatives’ Service Awards**

16 Interim Co-Lead Counsel anticipate they will petition the Court for attorneys’ fees of up to
17 25% of the Qualified Settlement Fund, and reimbursement of reasonable expenses incurred in the
18 Litigation. SA ¶ 97; *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (“*In*
19 *re Bluetooth*”). The Settlement Class and the Court will have a full opportunity to consider the
20 appropriate fees as part of the final approval process. There is no “clear sailing” agreement, and final
21 approval is not contingent upon approval of the requested attorneys’ fees, costs and expenses. SA ¶¶
22 97, 99, 104. Interim Co-Lead Counsel also intends to request reimbursement for expenses associated
23 with the retention of cybersecurity and financial experts, mediation costs, and other costs incurred
24 during the Litigation.

25 ⁷ The Settlement Class definition encompasses the same persons as the Nationwide Class in the
26 Complaint. The “Nationwide Ethnically Targeted Persons Class” is subsumed within the Settlement
27 Class definition. The proposed Statutory Subclass definition applies only to residents of the four states
28 with genetic privacy statutes that provide statutory damages, as alleged in the Complaint, and here, the
eligibility is defined as of August 11, 2023, the date the initial data appeared on the dark web.

1 The current compensable common benefit lodestar—as explained in detail in the Class Counsel
 2 Declaration—is currently approximately \$3,560,000, with approximately \$1,500,000 likely to be
 3 incurred during the remainder of the case.⁸ Class Counsel Decl. ¶¶ 49-56. Should proposed Class
 4 Counsel seek \$7,500,000 in fees (25% of the Fund), the resulting lodestar multiplier would be 1.48.
 5 *Id.* ¶ 57. Proposed Class Counsel will submit finalized figures in connection with their forthcoming
 6 motion for fees and expenses. ¶ 58.

7 Under the Settlement, proposed Class Counsel will seek approval of Settlement Awards of
 8 \$500 for each Settlement Class Representative, which 23andMe will not oppose. SA ¶ 98. The
 9 Settlement is not contingent upon approval of the Service Awards to the Settlement Class
 10 Representatives, and the Settlement Class and the Court will have a full opportunity to evaluate the
 11 request for such awards as part of the final approval process. *Id.* ¶¶ 99, 104.

12 **E. The Settlement’s Release is Coextensive with the Ninth Circuit’s “identical factual
 13 predicate” Requirement**

14 The Settlement Agreement proposes a mutual release between each Settlement Class Member
 15 and specified Parties listed in the Agreement, including 23andMe and its past or present parents,
 16 subsidiaries, directors, employees, and agents, for all the claims asserted as part of this MDL as well
 17 as claims that have not been asserted but “aris[e] out of the identical factual predicate as the
 18 allegations” in the Litigation. SA ¶¶ 15, 37-39; *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir.
 19 2010) (quoting *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008); *Class Plaintiffs v. City
 20 of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992)). There are two state court cases, which assert
 21 overlapping class claims related to the Security Incident, which would be covered by the release as
 22 would any individual action or arbitration unless the Settlement Class Member elects to opt out of the
 23 Settlement. These claims and their known status are addressed in further detail in the Declaration of
 24 Class Counsel. Class Counsel Decl. ¶¶ 45-48.

25 **IV. THE SETTLEMENT MERITS PRELIMINARY APPROVAL**

26 Under Federal Rule of Civil Procedure 23(e)(2), before approving a class action settlement, a

27 ⁸ Interim Co-Lead Counsel have reviewed the time submitted by representing counsel in the MDL and
 28 provided an explanation of the lodestar in their declaration. Further review will be conducted, and more
 details provided in conjunction with the formal Motion for Attorneys’ Fees.

1 district court must conclude that the settlement is “fair, reasonable, and adequate.” *In re Apple Inc.*
 2 *Device Performance Litig.*, 50 F.4th 769, 780 (9th Cir. 2022) (quoting Fed. R. Civ. P. 23(e)(2)); *see*
 3 *also Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1035 (N.D. Cal. 2016). “Courts reviewing class action
 4 settlements must ‘ensure[] that unnamed class members are protected from unjust or unfair settlements
 5 affecting their rights,’ while also accounting for ‘the strong judicial policy that favors settlements,
 6 particularly where complex class action litigation is concerned.’” *Campbell v. Facebook, Inc.*, 951
 7 F.3d 1106, 1120–21 (9th Cir. 2020) (citations omitted).

8 A district court’s review of a proposed class action settlement generally involves two steps.
 9 First, at the preliminary approval stage, a court “determines whether a proposed settlement is ‘within
 10 the range of possible approval’ and whether or not notice should be sent to class members.” *True v.*
 11 *Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010) (citation omitted).⁹ In evaluating
 12 whether the proposed settlement falls “within the range of possible approval,” the most important
 13 factor is “‘plaintiffs’ expected recovery balanced against the value of the settlement offer.’” *Cotter v.*
 14 *Lyft, Inc.* 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (citation omitted). And where, as here, the
 15 settlement was reached prior to class certification, “the district court must apply a ‘higher standard of
 16 fairness.’” *Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), *overruled on*
 17 *other grounds by Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338 (2011)); *see also In re Apple Inc.*
 18 *Device Performance Litig.*, 50 F.4th at 776 (“As we have repeatedly admonished, settlement prior to
 19 class certification requires extra scrutiny.”).

20 Under the factors set forth in *Hanlon*, a district court must consider:

21 [T]he strength of the plaintiff’s case; the risk, expense, complexity, and
 22 likely duration of further litigation; the risk of maintaining class action
 23 status throughout the trial; the amount offered in settlement; the extent of
 24 discovery completed and the stage of the proceedings; the experience and
 views of counsel; the presence of a government participant; and the reaction
 of the class members to the proposed settlement.¹⁰

25
 26 ⁹ *See also, e.g.*, U.S.D.C., N.D. Cal., *Procedural Guidance for Class Action Settlements*,
<https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements>.

27 ¹⁰ The last factor—the reaction of class members—is not known because Class Members have not yet
 28 had the opportunity to react. This factor will need to be evaluated at the final approval stage.

1 *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1120 (N.D. Cal. 2016) (quoting *Hanlon*, 150
2 F.3d at 1026). As shown below, these factors, as well as others, strongly favor preliminary approval.

3 **A. The Strengths and Risks of Plaintiffs' Claims**

4 Plaintiffs believe their claims are meritorious, and the strength of Plaintiffs' claims is a critical
5 factor that drove settlement negotiations and the proposed Settlement Agreement. At the same time,
6 Plaintiffs face substantial risks that could decrease the amount of recovery—or even defeat recovery
7 on a classwide basis altogether. The strengths and risks of Plaintiffs' claims are addressed below, first
8 with respect to overarching considerations and then by categories of claims. With respect to each
9 category of claims, Plaintiffs offer, to the extent possible, an estimate of the range of recovery for each
10 category of claims as well as the extent to which Plaintiffs believe a discount is appropriate for
11 settlement purposes.¹¹

12 **B. The Financial Condition of the Defendant Supports Approval of the Settlement**

13 Simply put, the overarching consideration that weighs in favor of preliminary approval is
14 23andMe's financial condition. As set forth above, 23andMe has dwindling resources and faces
15 substantial financial challenges. Plaintiffs' counsel engaged an independent forensic accounting firm
16 that confirmed what is apparent in 23andMe's publicly-filed reports—the company has limited funds,
17 no reliable access to new capital, and mounting litigation exposure in other proceedings and
18 investigations, meaning that any litigated judgment significantly more than the Settlement is likely to
19 be uncollectable. This fact weighs strongly in favor of settlement approval. *See, e.g., In re Volkswagen*
20 *"Clean Diesel" Marketing, Sales Practices and Prods. Liab. Litig.*, MDL 2672, 2016 WL 6248426,
21 at *11 (N.D. CA. October 25, 2016) (noting that a settlement class could also receive nothing not only
22 "because of the risks of litigation *but also because of the solvency risks[.]*" (emphasis added)); *In re*

23 _____
24 ¹¹ Plaintiffs do not analyze punitive damages at this stage, even though some claims allow for their
25 recovery. Plaintiffs do not intend to argue against the imposition of punitive damages. Rather, punitive
26 damages are inherently unpredictable and discretionary; as such, they typically play a limited role in
27 determining the fairness of a settlement. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., &*
28 *Prod. Liab. Litig.*, MDL No. 2672, 2017 WL 2212783, at *24 (N.D. Cal. May 17, 2017) (because "any
award of punitive damages is inherently speculative and discretionary, courts regularly approve
settlements that offer no or little compensation representing the risk of a punitive damages award")
(citation omitted).

1 *Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig.*,
2 952 F.3d 471, 485 (4th Cir. 2020) (noting that the defendant’s “potential inability to pay litigated
3 judgments . . . weighs in favor of the court’s adequacy ruling”).

4 **1. Risks Related to Class Certification**

5 Although Plaintiffs believe a class would be certified for at least some, if not all, of their
6 nationwide claims, as well as claims brought on behalf of the State Subclasses, Plaintiffs recognize
7 the significant risk of an adverse class certification ruling by this Court, the Ninth Circuit, or the
8 Supreme Court. In this regard, Plaintiffs have already developed evidence of 23andMe’s general
9 practices, and many of Plaintiffs’ claims concern standard provisions that apply uniformly to every
10 person using 23andMe’s services. *See, e.g., Ellsworth v. U.S. Bank, N.A.*, No. 3:12-cv-02506-LB, 2014
11 WL 2734953, at *20 (N.D. Cal. June 13, 2014) (“identical mortgage contracts” supports certification).
12 For example, Plaintiffs’ contract claims concern standard provisions that apply uniformly to every
13 person using 23andMe’s services. Likewise, with regard to Plaintiffs’ negligence claims, Plaintiffs’
14 allegations concerning 23andMe’s duties vis-à-vis its users’ Personal Information applies equally to
15 all Settlement Class Members, as do its arguments regarding whether 23andMe breached its duties to
16 Settlement Class Members. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014).

17 However, as noted above, Plaintiffs also face significant risks with respect to class
18 certification. For instance, choice of law issues could also present a potential hurdle for some of
19 Plaintiffs’ nationwide claims. *See* 7AA Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc.
20 Civ. § 1780.1 (3d ed.) (noting that class actions requiring application of multiple state laws can
21 implicate Rule 23(b)(3)’s requirements of predominance and superiority). Similarly, for other claims,
22 23andMe might successfully argue that individualized issues would predominate. Further, even if
23 Plaintiffs successfully certified one or more classes, there would be a risk that the Court could later
24 decertify the class. *See In re Netflix Privacy Litig.*, Case No. 5:11-cv-00379 EJD, 2013 WL 1120801,
25 at *6 (N.D. Cal. Mar. 18, 2013) (“The notion that a district court could decertify a class at any time is
26 one that weighs in favor of settlement.”).

2. Comparing the Strengths and Risks of the Contract-Related Claims

Plaintiffs bring contract-based claims—breach of express contract, breach of implied contract, and breach of the implied covenant of good faith and fair dealing (Counts 5, 6, and 107)—based on 23andMe’s breach of its agreement with Plaintiffs and Settlement Class Members by failing to protect their Personal Information. Dkt. 78 at 109. Specifically, Plaintiffs allege that 23andMe (1) failed to take reasonable steps to use safe and secure systems to protect that information; and (2) allowed Personal Information to be disclosed to unauthorized third parties, in violation of applicable agreements with 23andMe. *Id.* In support of these contract-based claims, Plaintiffs believe they could prove that 23andMe’s data security systems were deficient and were the proximate cause of the exfiltration of Plaintiffs’ Personal Information. Conversely, there remain significant risks in continuing to litigate these claims. For example, 23andMe may argue that Plaintiffs’ express breach of contract claim fails to identify which specific contractual provision 23andMe breached. *See Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1117 (N.D. Cal. 2011) (explaining that a claim for breach of contract “must allege the specific provisions in the contract creating the obligation the defendant is said to have breached”). Such an argument may prove convincing for the Court.

However, Plaintiffs’ breach of implied contract claim may address concerns in that regard. *See, e.g., Castillo v. Seagate Tech., LLC*, Case No. 16-cv-01958-RS, 2016 WL 9280242, at *9 (N.D. Cal. Sept. 14, 2016) (noting in declining to dismiss implied breach of contract claim that, “[w]hile Seagate made no explicit promises as to the ongoing protection of personal information, it is difficult to imagine how, in our day and age of data and identity theft, the mandatory receipt of Social Security numbers or other sensitive personal information would not imply the recipient’s assent to protect the information sufficiently.”); *Rudolph v. Hudson’s Bay Co.*, Case No. 18-cv-8472 (PKC), 2019 WL 2023713, at *11 (S.D.N.Y. May 7, 2019) (“Other courts applying California law have concluded that an implied contract is formed where a person discloses sensitive information in order to receive a benefit, with the expectation that such information will be protected.”).

Damages may prove challenging for Plaintiffs’ contract-based claims given the difficulties in quantifying the resulting economic and non-economic harm suffered on a classwide basis. Likewise,

1 the remedy of restitution also entails risk.¹² Pursuing this remedy would not require Plaintiffs to
2 demonstrate their own quantifiable loss, and restitutionary disgorgement may be appropriate where,
3 as here, “actual damages are difficult to prove.” *Young v. Wideawake Death Row Ent., LLC*, Case No.
4 CV 10-1010 CAS (JEMx), 2011 WL 13371881, at *2–3 (C.D. Cal. May 16, 2011); *see also* Rest.
5 (Third) of Restitution and Unjust Enrichment § 1 cmt. a (2011). Nevertheless, quantifying the extent
6 to which 23andMe was unjustly enriched is a hurdle that may be difficult for Plaintiffs to overcome,
7 as associating certain profits with 23andMe’s broad misconduct in this case will likely be challenging,
8 and for this reason the Court might find Plaintiffs’ method of calculating of such figures to be
9 unpersuasive or reject them altogether.

10 Given the above challenges, trying the contract-based claims carries risk, requiring a discount.
11 Plaintiffs assert that there is a relatively wide range of possible recoveries if their contract-based claims
12 were successful at trial, ranging from a significant fraction of the settlement amount at the low end to
13 several times the settlement amount at the high end. Given the merits-based and procedural risks, the
14 benefit Settlement Class Members would receive under the proposed Settlement Agreement
15 appropriately accounts for the risks associated with continuing to litigate Plaintiffs’ contract claims.

16 **3. Comparing the Strengths and Risks of the Negligence-Based Claims**

17 Plaintiffs allege that 23andMe is liable for negligence and negligence per se (Counts 1 and 2)
18 for failing to provide fair, reasonable, or adequate data security practices to safeguard Plaintiffs’ and
19 Settlement Class Members’ sensitive Personal Information. Plaintiffs believe they would be able to
20 prove that 23andMe owed a duty to Plaintiffs and Settlement Class Members to exercise reasonable
21 care in safeguarding their Personal Information, and that it breached that duty. In this regard, Plaintiffs
22 believe that they would be able to demonstrate how 23andMe failed to (1) implement adequate security
23 systems, (2) detect the Security Incident while it was ongoing, (3) maintain security systems consistent
24 with industry standards during the period of the Security Incident, (4) comply with regulations
25 protecting the Personal Information at issue, and (5) disclose in a timely and adequate manner that

26 ¹² *See Alkayali v. Hoed*, Case No. 3:18-cv-777-H-JMA, 2018 WL 3425980, at *6–7 (S.D. Cal. July 16,
27 2018) (“California law permits plaintiffs to seek disgorgement of a defendant’s unjust enrichment as a
28 restitutionary remedy for breach of contract.”).

1 Plaintiffs’ and Settlement Class Members’ Personal Information in 23andMe’s possession had been
2 compromised.

3 However, the negligence-based claims face obstacles as well. First, 23andMe may argue that
4 at least some Plaintiffs assumed the risk of identity theft and fraud by recycling their login credentials
5 and failing to use a unique password. In a letter to a group of users who filed claims against the
6 company, 23andMe said that “users negligently recycled and failed to update their passwords
7 following these past security incidents, which are unrelated to 23andMe,” and that “[t]herefore, the
8 incident was not a result of 23andMe’s alleged failure to maintain reasonable security measures.”¹³

9 Second, as noted above, Plaintiffs presentation of a classwide damages model quantifying the
10 Settlement Class Members’ damages attributable to 23andMe’s negligence may be subject to
11 challenge. Although 23andMe admitted that different categories of Plaintiffs’ Personal Information
12 were compromised, including, *inter alia*, names, sex, dates of birth, various genetic information,
13 ancestry reports, and family tree information,¹⁴ 23andMe could argue that not all categories of
14 information were compromised by unauthorized third parties for all Settlement Class Members.
15 Separately, Plaintiffs also face the risk that 23andMe may be able to successfully argue that
16 quantifiable actual damages theories may not predominate at the class certification stage. *See, e.g.*,
17 *Opperman v. Path, Inc.*, No. 3:13-cv-00453-JST, 2016 WL 3844326, at *14–15 (N.D. Cal. July 15,
18 2016) (discussing issues with valuing privacy on a classwide basis). This means that Plaintiffs might
19 elect to pursue nominal damages, which are appropriate “where the amount of damages is uncertain.”
20 *Id.* at *16 (quoting *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 5:11-cv-01846-LHK, 2012 WL
21 2571719, at *28 (N.D. Cal. June 30, 2012)).

22 Litigating the negligence claims therefore carries risk, meriting a discount. Plaintiffs assert that
23 there is a range of possible recoveries if their negligence-based claims were successful at trial,
24 however, the analysis is not without challenge. To date, there have been no data breach cases tried to
25

26 ¹³ Lorenzo Franceschi-Biccieri, *23andMe tells victims it’s their fault that their data was breached*,
27 TechCrunch (Jan. 3, 2024), <https://techcrunch.com/2024/01/03/23andme-tells-victims-its-their-fault-that-their-data-was-breached>.

28 ¹⁴ Dkt. 78 at 75.

1 verdict, and the damages range is therefore difficult to quantify. Traditionally, Plaintiffs have
2 advanced damages models based on various measurements designed to make Plaintiffs and the Class
3 whole, including for example, the retail value of restorative monitoring programs for the class.
4 However, these damages models remain untested. Given this, the assumed range of verdicts, were
5 Plaintiffs successful, has the potential to range from a fraction of the settlement amount at the low end
6 to multiples of the settlement. Given the merits-based and procedural risks, the benefits Settlement
7 Class Members would receive under the proposed Settlement Agreement appropriately accounts for
8 the risks associated with continuing to litigate Plaintiffs' negligence claims.

9 **4. Comparing the Strengths and Risks of the Privacy-Based Torts**

10 Plaintiffs' privacy-based torts—invasion of privacy based upon intrusion upon seclusion and
11 invasion of privacy under the California Constitution (Counts 4 and 17)—require showing that (1)
12 Plaintiffs had a reasonable expectation that their Personal Information would be kept private, and that
13 (2) 23andMe's disclosure of their sensitive Personal Information was highly offensive. *See In re*
14 *Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020) (listing elements for both
15 claims). Both elements are mixed questions of law and fact. *Hill v. Nat'l Collegiate Athletic Assn.*, 7
16 Cal. 4th 1, 40 (1994).

17 Plaintiffs privately disclosed their Personal Information to 23andMe as part of obtaining
18 genetic testing and analysis services. Dkt. 78 at 131. Plaintiffs are confident the evidence will support
19 Plaintiffs' allegation that they had a reasonable expectation that their most sensitive Personal
20 Information would be kept confidential and protected from unauthorized disclosure. *Id.* However,
21 significant risks remain with proving these privacy-based torts at trial. To prevail, Plaintiffs must prove
22 that the disclosure of their Personal Information was highly offensive to a reasonable person.
23 "Determining whether a defendant's actions were 'highly offensive to a reasonable person' requires a
24 holistic consideration of factors such as the likelihood of serious harm to the victim, the degree and
25 setting of the intrusion, the intruder's motives and objectives, and whether countervailing interests or
26 social norms render the intrusion inoffensive." *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d
27 at 606 (quoting *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009)). *See id.* ("the highly
28

1 offensive analysis focuses on the degree to which the intrusion is unacceptable as a matter of public
2 policy”). Because the “highly offensive” analysis requires a holistic interpretation of many factors, in
3 part guided by public policy, 23andMe could succeed in arguing that some or all of the compromised
4 Personal Information does not meet this high bar. *Cf. In re Ambry Genetics Data Breach Litig.*, 567
5 F. Supp. 3d 1130, 1143 (C.D. Cal. 2021) (explaining that courts routinely refuse to dismiss invasion
6 of privacy claims in data breach cases “involve[ing] medical information[] because the disclosure of
7 such information is more likely to constitute an ‘egregious breach of the social norms’ that is ‘highly
8 offensive’”) (citing cases).

9 Moreover, for the same reasons as discussed above with respect to Plaintiffs’ negligence-based
10 claims, Plaintiffs may face challenges in quantifying the damages attributable to 23andMe’s privacy
11 violations on a classwide basis, and might therefore elect to pursue nominal damages. *See, e.g.,*
12 *Opperman*, 2016 WL 3844326, at *14–16. As such, litigating the privacy-based tort claims carries
13 risk, meriting a discount. As with Plaintiffs’ other claims, their privacy-based tort claims could result
14 in recoveries from a fraction of the settlement amount to multiples of the settlement. The proposed
15 Settlement Agreement therefore appropriately accounts for the risks associated with continuing to
16 litigate Plaintiffs’ privacy-based tort claims.

17 **5. Comparing the Strengths and Risks of the Breach of Confidence and Breach of** 18 **Fiduciary Duty Claims**

19 To allege breach of fiduciary duty (Count 8), a plaintiff must show “(1) existence of a fiduciary
20 duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach.” *Vaxiion*
21 *Therapeutics, Inc. v. Foley & Lardner LLP*, 593 F. Supp. 2d 1153, 1169 (S.D. Cal. 2008). Whether a
22 fiduciary duty exists is a question of law. *Marzec v. California Pub. Emps. Ret. Sys.*, 236 Cal. App.
23 4th 889, 915 (2015). In response, 23andMe would likely argue that 23andMe did not owe Plaintiffs a
24 fiduciary duty. “A fiduciary relationship is any relation existing between parties to a transaction
25 wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other
26 party.” *Gilman v. Dalby*, 176 Cal. App. 4th 606, 613 (2009) (cleaned up). “[T]raditional examples of
27 fiduciary relationships include those of trustee/beneficiary, corporate directors and majority
28 shareholders, business partners, joint adventurers, and agent/principal.” *Id.* at 614. The Court may rule

1 that Plaintiffs entered into an arms-length business relationship with 23andMe insufficient to create a
2 fiduciary duty, despite the fact that Plaintiffs tasked 23andMe with safeguarding their sensitive
3 Personal Information as part of this relationship. *See Worldvision Enterprises, Inc. v. Am. Broad.*
4 *Companies, Inc.*, 142 Cal. App. 3d 589, 595 (1983) (“The mere fact that in the course of their business
5 relationships the parties reposed trust and confidence in each other does not impose any corresponding
6 fiduciary duty in the absence of an act creating or establishing a fiduciary relationship known to law.”).
7 Such an argument raised by defendants has found support in similar factual circumstances. *See, e.g.,*
8 *In re Ambry Genetics Data Breach Litig.*, 567 F. Supp. 3d at 1145–46 (“Plaintiffs have failed to allege
9 sufficient facts to establish a fiduciary relationship between themselves and Defendants,” as “Plaintiffs
10 simply allege that Defendants collected Plaintiffs’ private information so Defendants could provide
11 their genetic testing to screen for and diagnose diseases,” which “is not a situation where the parties
12 have a special relationship.”).

13 Similarly, the tort for breach of confidence in California (Count 3) “is based upon the concept
14 of an implied obligation or contract between the parties that confidential information will not be
15 disclosed.” *Ent. Rsch. Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1226-27 (9th Cir.
16 1997). A plaintiff must allege “(1) the plaintiff conveyed ‘confidential and novel information’ to the
17 defendant; (2) the defendant had knowledge that the information was being disclosed in confidence;
18 (3) there was an understanding between the defendant and the plaintiff that the confidence be
19 maintained; and (4) there was a disclosure or use in violation of the understanding.” *Id.* at 1227
20 (citation omitted).

21 23andMe may argue that Plaintiffs’ breach of confidence fails as a matter of law because
22 23andMe did not “disclose” Plaintiffs’ sensitive Personal Information, but it was instead stolen from
23 23andMe. Resolution of this issue would therefore depend on how the Court interprets the word
24 “disclosure” for the claim’s fourth element. Some California courts have followed the interpretation
25 that favors 23andMe, when disclosure of information is due to an unauthorized party’s activities rather
26 than a defendant’s affirmative actions. *See, e.g., In re Ambry Genetics Data Breach Litig.*, 567 F.
27 Supp. 3d at 1146–47 (“Plaintiffs do not allege that Defendants affirmatively shared any information
28

1 or performed any act that gave hackers information,” and because “Defendants made no ‘disclosure’
2 of Plaintiffs’ confidential information, they cannot be held liable on a claim for breach of
3 confidence.”); *Sutter Health v. Superior Ct.*, 227 Cal. App. 4th 1546, 1555–56 (2014) (explaining that
4 the “ordinary meaning” of the word “disclosure” “suggest[s] that disclosure occurs when the health
5 care provider affirmatively shares medical information with another person or entity”).

6 Further, for the same reasons as discussed above with respect to Plaintiffs’ privacy- and
7 negligence-based claims, Plaintiffs would likely face challenges in quantifying the damages
8 attributable to 23andMe’s violations on a classwide basis, and might therefore elect to pursue nominal
9 damages. To date, there are no data breach verdicts on which to base the expected range of recoveries
10 with any assurance. Therefore, litigating the breach of confidence and breach of fiduciary duty claims
11 carries risk, meriting a discount. The range of potential outcomes is from a fraction of the settlement
12 amount to multiples of settlement amount. Given these risks, the Settlement appropriately accounts
13 for the risks associated with continuing to litigate Plaintiffs’ breach of confidence and breach of
14 fiduciary duty claims.

15 **6. Comparing the Strengths and Risks of the Conversion and Unjust Enrichment** 16 **Claims**

17 “In California, there is not a standalone cause of action for ‘unjust enrichment,’ which is
18 synonymous with ‘restitution.’” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015)
19 (quoting *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350 (2010)). Rather, unjust enrichment
20 (Count 10) describes “the theory underlying a claim that a defendant has been unjustly conferred a
21 benefit ‘through mistake, fraud, coercion, or request.’” *Id.* (quoting 55 Cal. Jur. 3d Restitution § 2).

22 As such, the Court may construe this cause of action as a quasi-contract claim seeking
23 restitution, as other courts in this District have done. *See Nguyen v. Stephens Inst.*, 529 F. Supp. 3d
24 1047, 1057 (N.D. Cal. 2021). *But see Bruton v. Gerber Prods. Co.*, 703 F. App’x 468, 470 (9th Cir.
25 2017) (“[T]he California Supreme Court has clarified California law, allowing an independent claim
26 for unjust enrichment to proceed[.]”). If so, 23andMe may argue that Plaintiffs may not
27 simultaneously maintain both claims for breach of contract and unjust enrichment. “As a matter of
28 law, a quasi-contract claim for unjust enrichment ‘cannot lie where there exists between the parties a

1 valid express contract covering the same subject matter.” *Nguyen*, 529 F. Supp. 3d at 1057 (quoting
2 *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014)). *See Durell*, 183 Cal.
3 App. 4th at 1370 (“As a matter of law, an unjust enrichment claim does not lie where the parties have
4 an enforceable express contract.”). Likewise, this claim therefore may face similar challenges and
5 likely outcomes as discussed above with respect to Plaintiffs’ claim for breach of implied contract.

6 Relatedly, “conversion is the unwarranted interference by defendant with the dominion over
7 the property of the plaintiff from which injury to the latter results.” *Snyder & Assocs. Acquisitions*
8 *LLC v. United States*, 859 F.3d 1152, 1161 (9th Cir. 2017) (internal quotation marks omitted). The
9 elements of conversion (Count 9) are: “(1) the plaintiff’s ownership or right to possession of the
10 property; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and (3)
11 damages.” *Hanover Ins. Co. v. Fremont Bank*, 68 F. Supp. 3d 1085, 1100 (N.D. Cal. 2014) (citing
12 *Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1066 (1998)). Plaintiffs believe they will be able to show
13 their ownership of the property at issue—their own Personal Information. *See Kremen v. Cohen*, 337
14 F.3d 1024, 1030 (9th Cir. 2003) (explaining that in California, “[p]roperty is a broad concept that
15 includes ‘every intangible benefit and prerogative susceptible of possession or disposition’”) (citation
16 omitted). And Plaintiffs likewise believe they will be able to demonstrate 23andMe’s conversion by
17 its wrongful conduct in failing to adequately safeguard Plaintiffs’ Personal Information.

18 As both claims seek restitution as a remedy, it may prove challenging to present a defensible
19 damages theory for these claims, and quantifying the extent to which 23andMe was unjustly enriched
20 is a hurdle that may be difficult for Plaintiffs to overcome, as associating certain profits with
21 23andMe’s broad misconduct in this case would likely be challenging, and the Court might find
22 Plaintiffs’ method of calculating such figures to be unpersuasive or reject it altogether. Given these
23 challenges, there is a relatively wide range of possible recoveries, ranging from a significant fraction
24 of the settlement amount to several multiples of the settlement amount. The Settlement therefore
25 appropriately accounts for the risks associated with continuing to litigate Plaintiffs’ conversion and
26 unjust enrichment claims.

1 **7. Comparing the Strengths and Risks of the State Consumer Protection-Related**
2 **Claims**

3 Plaintiffs and the various State Subclasses assert claims under state consumer protection
4 statutes (Counts 11, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 31, 33, 34, 35, 36, 38, and 40) based on
5 23andMe’s unfair and deceptive trade practices, failure to implement and maintain reasonable security
6 and privacy measures to protect Plaintiffs’ and Subclass Members’ Personal Information, and
7 misrepresenting that 23andMe would protect the privacy and confidentiality of such information.

8 There remain significant risks in continuing to litigate these claims through trial, including that
9 23andMe would likely contest whether certain statutory requirements of each claim are satisfied.
10 During discovery, Plaintiffs would seek to obtain evidence to support their allegations, for example,
11 that 23andMe engaged in unfair and deceptive trade practices, committed fraudulent acts in connection
12 with selling its services to consumers, and that 23andMe intended to mislead Plaintiffs and Subclass
13 Members and induce them to rely on 23andMe’s misrepresentations and omissions. Notwithstanding
14 the compelling evidence Plaintiffs believe would be obtained through discovery, there would remain
15 a risk of unfavorable rulings as to one or more of Plaintiffs’ consumer protection claims at the motion
16 to dismiss stage, class certification, summary judgment, or trial. Further, even if Plaintiffs were
17 successful at trial, they may face challenges in proving damages, as many consumer protection statutes
18 only provide for actual rather than statutory damages.¹⁵ Plaintiffs would likely also face challenges in
19 quantifying the damages attributable to 23andMe’s violations on a classwide basis for the same
20 reasons as discussed above with respect to Plaintiffs’ privacy and negligence-based claims.

21 For these reasons, continued litigation over Plaintiffs’ consumer protection claims carries risk,
22 meriting a discount. Plaintiffs assert that there is a relatively wide range of possible recoveries ranging
23 from a significant fraction of the settlement amount to multiples of the settlement. This amount would
24 vary on factors including the number of Subclass Members included in each of the 19 states covered
25 by Plaintiffs’ consumer protection-related claims. The Settlement therefore appropriately accounts for

26 _____
27 ¹⁵ See Carolyn L. Carter & Jonathan Sheldon, Unfair and Deceptive Acts and Practices, *National*
28 *Consumer Law Center*, (10th ed. 2021) (App’x. A – Statute-by-Statute Analysis of State UDAP
Statutes).

1 the risks associated with continuing to litigate Plaintiffs’ various consumer protection claims.

2 **8. Comparing the Strengths and Risks of the State Genetic Privacy-Based Claims**

3 Plaintiffs who are members of the Statutory Subclass assert claims under state genetic privacy
4 statutes in Alaska, Illinois, and Oregon¹⁶ based on 23andMe’s violation of Plaintiffs’ and Statutory
5 Subclass Members’ statutorily protected rights to privacy of their genetic information (Counts 13, 24,
6 and 32). 23andMe’s own disclosure of the Security Incident supports Plaintiffs’ claims. However,
7 there remain significant risks with pursuing these claims through trial. First, 23andMe will likely argue
8 that the information compromised in the Security Incident is not protected by the statutes upon which
9 the Plaintiffs’ state genetic privacy claims are based, challenging whether these state laws explicitly
10 safeguard the kind of “DNA analysis” and “genetic information” that was compromised in the Security
11 Incident. *See* Dkt. 78 at 120, ¶ 664 (defining “DNA analysis” under the Alaska Genetic Privacy Act);
12 *id.* at 145, ¶¶ 816-17 (defining “genetic information” under the Illinois Genetic Information Privacy
13 Act); *id.* at 161, ¶ 907 (describing “genetic information” under the Oregon Genetic Privacy Law).

14 Although Plaintiffs believe they would demonstrate that state genetic privacy statutes apply to
15 the claims of Plaintiffs and Statutory Subclass Members, and that the disclosure of their genetic
16 information was unauthorized, continued litigation would still present significant risks. 23andMe
17 would likely contest whether the statutes apply to the information compromised in the Security
18 Incident, whether all of the discrete requirements of the genetic privacy claims are satisfied, and
19 whether these claims could be maintained on a classwide basis. Further, there are very few cases
20 interpreting these genetic privacy statutes—and even fewer that apply to the facts at issue here—and
21 for this reason there is uncertainty regarding how these statutes would be interpreted and applied. In
22 this regard, given the absence of robust, well-settled case law under such statutes, continuing to litigate
23 Plaintiffs’ statutory genetic privacy claims would necessarily involve an unquantifiable degree of risk.

24 Evaluation of the risk therefore merits a discount. Nevertheless, the statutory damages
25 available for Plaintiffs’ genetic privacy claims are significant, ranging from \$100 for inadvertent
26

27 ¹⁶ Settlement Class Members residing in California on August 11, 2023, are also members of the
28 Statutory Subclass. Their applicable statutory claims are discussed below in section 10.

1 violations to \$150,000 or more for knowing or reckless violations. Although there is a relatively wide
2 range of possible recoveries if the genetic privacy claims were successful at trial, given the statutory
3 damages available for these claims, Plaintiffs estimate that any recoveries could be many orders of
4 magnitude more than the settlement amount at the high end. Due to the aggregate value of the statutory
5 claims, if successful, an award of statutory damages would likely face a due process challenge and
6 potentially be significantly reduced. *See Wakefield v. ViSalus, Inc.* 51 F.4th 1109, 1123 (9th Cir. 2022)
7 (finding that “aggregated statutory damages . . . are subject to constitutional limitation in extreme
8 situations—that is, when they are ‘wholly disproportioned’ and ‘obviously unreasonable’ in relation
9 to the goals of the statute and the conduct the statute prohibits,” *quoting St. Louis, I.M. & S. Ry. Co.*
10 *v. Williams*, 251 U.S. 63, 67 (1919)). And here, regardless of any constitutional issues, the financial
11 condition of the Defendant would likely prohibit satisfaction of any judgment under any of the
12 statutory claims obtained through trial.

13 **9. Comparing the Strengths and Risks of the Other California Statutory Claims**

14 California Plaintiffs asserted claims under the California Confidentiality of Medical
15 Information Act, the California Consumer Privacy Act, the California Customer Records Act, and the
16 California Consumer Legal Remedies Act (Counts 14, 15, 16, and 18) based on 23andMe’s failure to
17 take adequate security measures to store and protect its customers’ Personal Information. Available
18 information—including 23andMe’s own disclosure of the Security Incident—supports Plaintiffs’
19 claims. However, there remain significant risks with pursuing these claims through trial.

20 Although Plaintiffs believe they would demonstrate that the other California statutes apply to
21 the claims of the California Plaintiffs and Subclass Members, 23andMe would likely contest whether
22 the statutes apply to the information compromised in the Security Incident, whether all of the discrete
23 requirements of the California statutory claims are satisfied, and whether these claims could be
24 maintained on a classwide basis. This risk, and the due process issue addressed herein, merit a
25 discount. Some of Plaintiffs’ California statutory claims entitle Plaintiffs to seek actual or statutory
26 damages. Under California’s Consumer Privacy Act, for example, California Plaintiffs and Subclass
27 Members are entitled to seek statutory damages up to \$750 per consumer. *See* Dkt. 78 at ¶ 702. As
28

1 such, given the statutory damages available for these claims, Plaintiffs estimate that any verdict, were
2 Plaintiffs successful, would be orders of magnitude more than the settlement amount. If Plaintiffs
3 prevailed at trial on their CCPA or other California statutory claims, an award of statutory damages
4 would likely face the same due process challenges addressed above. As such, the benefit Settlement
5 Class Members would receive under the proposed Settlement Agreement appropriately accounts for
6 the risks associated with continuing to litigate Plaintiffs' California statutory claims.

7 **10. Comparing the Strengths and Risks of the Other State Statutory Claims**

8 Plaintiffs assert claims under other state statutes based on, among other things, 23andMe's
9 failure to disclose the Security Incident in a timely and accurate fashion (Counts 30 and 37) and
10 unauthorized disclosure of confidential healthcare records (Count 39). There remain significant risks
11 in continuing to litigate these claims through trial, including that 23andMe would likely contest
12 whether certain statutory requirements of each claim are satisfied. As such, there would remain a
13 significant risk of unfavorable rulings as to one or more of these other state statutory claims. Further,
14 even if Plaintiffs were successful at trial, to the extent prescribed statutory damages are not provided
15 for, Plaintiffs would face significant challenges in proving damages, including challenges in
16 quantifying the damages attributable to 23andMe's violations on a classwide basis for the same
17 reasons as discussed above with respect to Plaintiffs' privacy and negligence-based claims.

18 Therefore, continued litigation over Plaintiffs' other state statutory claims carries risk, meriting
19 a discount. Plaintiffs assert that there is a relatively wide range of possible recoveries if Plaintiffs'
20 other state statutory claims were successful at trial, ranging from a significant fraction of the settlement
21 amount at the low end to multiples the settlement at the high end. This amount would vary on factors
22 including the number of Subclass Members included in each of the states covered by Plaintiffs' other
23 state statutory claims. Given the merits-based and procedural risks discussed above, the benefit
24 Settlement Class Members would receive under the proposed Settlement Agreement appropriately
25 accounts for the risks associated with continuing to litigate Plaintiffs' other state statutory claims.¹⁷

26 ¹⁷ In addition to the claim-specific risks described above, some damages may be duplicative. While
27 tenable arguments exist to the contrary, 23andMe could argue that damages for the contract, negligence,
28

1 **C. Further Litigation Would Be Uncertain, Expensive, Complex, and Lengthy**

2 Continuing this Litigation would be extremely expensive, complex, uncertain, and lengthy. In
 3 this regard, “unless the settlement is clearly inadequate, its acceptance and approval are preferable to
 4 lengthy and expensive litigation with uncertain results.” 4 A Conte & H. Newberg, *Newberg on Class*
 5 *Actions*, § 11:50 at 155 (4th ed. 2002). Because data breach case law is still relatively undeveloped,
 6 data breach cases are among the more risky and uncertain areas of class action litigation. *See In re*
 7 *Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 317 (N.D. Cal. 2018) (“Data-breach litigation is in
 8 its infancy with threshold issues still playing out in the courts.”). For example, “damages
 9 methodologies in data breach cases are largely untested and have yet to be presented to a jury.”
 10 *Hashemi v. Bosley, Inc.*, No. 21-946 PSG (RAOx), 2022 WL 2155117, at *7 (C.D. Cal. Feb. 22, 2022).
 11 As the *Hashemi* court noted, “it is difficult to estimate Plaintiffs’ expected recovery given the relative
 12 dearth of precedent and exemplar cases that have proceeded to trial.” *Id.* Given these uncertainties,
 13 “[c]ourts have noted that legal uncertainty supports approval of a settlement.” *In re Anthem*, 327
 14 F.R.D. at 317. *See Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971, at *10 (N.D.
 15 Cal. Nov. 16, 2007) (noting that “legal uncertainties at the time of settlement—particularly those
 16 which go to fundamental legal issues—favor approval.”).

17 In addition to the risks set forth above, there is a risk of unfavorable rulings at the motion to
 18 dismiss and summary judgment stages, such as with respect to complex issues including injury,
 19 damages, or statutory requirements for claims brought under relatively untested state privacy laws.
 20 Moreover, there is the risk of an adverse jury verdict at trial. *See Meredith Corp. v. SESAC, LLC*, 87
 21 F. Supp. 3d 650, 664 (S.D.N.Y. 2015) (approving settlement and noting that jury verdict “could have
 22 turned on, among other factors, the persuasiveness of each side’s expert witnesses” and “the
 23 justifications advanced by” the defendant for its practices). In particular, the complexity and number

24 _____
 25 and privacy claims all compensate Plaintiffs for the same harm: injury from 23andMe’s failure to
 26 securely maintain their sensitive Personal Information. If such an argument proves successful, damages
 27 on the claims may not be stacked on top of each other. *See, e.g., Ambassador Hotel Co. v. Wei-Chuan*
Inv., 189 F.3d 1017, 1032 (9th Cir. 1999) (“[A] plaintiff may not receive multiple awards for the same
 28 item of damage.”).

1 of issues involved would make presenting the case to the trier of fact and proving damages on a
 2 classwide basis challenging, and it is possible that a jury might not reach a unanimous verdict on all
 3 issues. While Plaintiffs believe they would be able to present a compelling case to a jury, the complex
 4 and relatively novel issues at stake here create a wide range of potential outcomes. Finally, even if
 5 Plaintiffs were to obtain a favorable jury verdict, 23andMe would still have arguments as to why this
 6 Court, the Ninth Circuit, or the Supreme Court should reduce or overturn the verdict. Additionally,
 7 23andMe's dire financial condition could result in the Settlement Class Members receiving no
 8 compensation for the harms resulted from this Security Incident.

9 Resolving the action at this time saves the Parties the expenses of additional litigation and
 10 substantially benefits the Class by providing meaningful relief now, without having to wait or face the
 11 risks and uncertainties inherent with protracted litigation of the matter. Nearly all class action
 12 settlements reflect tradeoffs and difficult choices. Here, the Parties' ability to reach a settlement
 13 eliminates these risks by ensuring that Plaintiffs and Settlement Class Members receive a recovery
 14 that is certain and immediate, and the total value of the benefits under the proposed Settlement
 15 Agreement appropriately accounts for the risks of further protracted litigation.

16 **V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS**

17 **A. The Settlement Class Satisfies the Rule 23(a) Prerequisites**

18 **1. The Class Is Sufficiently Numerous**

19 Numerosity requires the proposed class to be so numerous that joinder is impracticable. Fed.
 20 R. Civ. P. 23(a). Numerosity is generally satisfied when the class exceeds forty members. *See, e.g.,*
 21 *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000); *Lagunas v. Young Adult Inst., Inc.*, No.
 22 23-CV-00654-RS, 2024 WL 1025121, at *3 (N.D. Cal. Mar. 8, 2024) (class of 299 employees
 23 sufficiently numerous). The class here is made up of approximately 6.4 million individuals. SA ¶ 3.

24 **2. There Are Common Questions of Law and Fact**

25 Commonality requires that the action involve "questions of law or fact common to the class."
 26 Fed. R. Civ. P. 23(a)(2); see also *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012).
 27 (characterizing commonality as a "limited burden" which "only requires a single significant question
 28 of law or fact"). Where claims "derive from a common core of salient facts, and share many common

1 legal issues,” commonality is met. *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 488
2 (C.D. Cal. 2006). The class claims primarily derive from 23andMe’s failure to implement basic data
3 security policies and measures where it knew or should have known its existing policies and measures
4 were inadequate. Thus, “whether [23andMe] employed sufficient security measures to protect the
5 Settlement Class Members’ Personal Information from the Data Breaches lies at the heart of every
6 claim.” *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL
7 4212811, at *3 (N.D. Cal. July 22, 2020). “Related factual questions about whether [23andMe] knew
8 that its data security was inadequate and whether [it] timely disclosed and adequately responded to the
9 Data Breaches also apply uniformly across the entire Settlement Class.” *Id.*

10 This uniform conduct raises common questions, resolution of which will generate common
11 answers “apt to drive the resolution of the litigation” for the Class as a whole. *Wal-Mart Stores, Inc.*
12 *v. Dukes*, 564 U.S. 338, 350 (2011). Though no judicial determination has been made, Interim Co-
13 Lead Counsel believe it is likely that California law would likely be applied to the primary common
14 law claims. 23andMe’s Terms of Service specify that California law applies to its Terms of Service,
15 under which certain of the Settlement Class Members’ claims arise. 23andMe is headquartered in
16 California, is the forum for disputes dictated by the Terms of Service, the activity and decisions which
17 led to the Settlement Class Members’ damages occurred in California, and the documents and
18 witnesses with information relevant to this matter are in California too.

19 Though Plaintiffs’ Consolidated Class Action Complaint includes numerous state consumer
20 statutory and other claims, not all claims are likely to be pursued in this case for reasons analyzed
21 herein. *Jabbari v. Wells Fargo & Co.*, 965 F.3d 1001, 1008 (9th Cir. 2020) (“Only rarely will a class
22 assert every possible claim that might offer relief”).

23 The common legal and factual questions arising from Plaintiffs’ claims include whether
24 23andMe owed a duty to the Settlement Class Members to exercise due care in safeguarding and
25 preventing unauthorized access to their personal and genetic information; whether 23andMe breached
26 that duty; whether 23andMe implemented and maintained reasonable data security procedures and
27 practices commensurate with the sensitivity of the information being stored; whether 23andMe acted

1 negligently in connection with the monitoring and/or protecting of Settlement Class Members’
2 personal and genetic information; whether 23andMe breached its contractual obligations to Settlement
3 Class Members, and whether such breach caused harm; whether 23andMe’s actions constitute a
4 violation of the applicable data privacy statutes of Alaska, California, Illinois, and Oregon; whether
5 23andMe adequately addressed and fixed the vulnerabilities which permitted the Security Incident to
6 occur; and whether Defendant caused Plaintiffs’ and Settlement Class Members’ damages. These more
7 than suffice to meet the commonality requirement.

8 **3. The Settlement Class Representatives’ Claims are Typical of the Settlement Class**
9 **Members’ Claims**

10 Fed. R. Civ. P. 23(a)(3) requires that the Settlement Class Representatives claims be typical of
11 the claims of the proposed class. The test is whether other members of the class have the same or
12 similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
13 whether the class members have been injured by the same course of conduct. *Ellis v. Costco Wholesale*
14 *Corp.*, 657 F. 3d 970, 984 (9th Cir. 2011). Further, the typicality requirement is a “permissive
15 requirement” and “requires only that Plaintiffs’ claims be ‘reasonably co-extensive,’ not ‘substantially
16 identical’ with the proposed class members’ claims.” *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 593
17 (N.D. Cal. 2015) (quoting *Hanlon*, 150 F.3d at 1020). Where a plaintiff suffered a similar injury and
18 other class members were injured by the same course of conduct, typicality is satisfied. *See Parsons*
19 *v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014).

20 Here, the experiences of the Settlement Class Representatives match the experiences of the
21 millions of other Settlement Class Members that make up the Settlement Class. 23andMe failed to
22 adopt practices that would have prevented the cybercriminals from accessing the personal and genetic
23 information of the members of the Settlement Class, and cybercriminals took advantage of those
24 failures. Because the Settlement Class Representatives’ allegations involve the “same course of
25 conduct,” which is “not unique to the named plaintiffs,” typicality is satisfied here. *Valliere v. Tesoro*
26 *Ref. & Mktg. Co. LLC*, No. 17-CV-00123-JST, 2020 WL 13505042, at *5 (N.D. Cal. June 26, 2020)
27 (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

1 **4. The proposed Settlement Class Representatives and Class Counsel Will—and**
2 **Have—Fairly and Adequately Protected the Interests of the Settlement Class**

3 Rule 23(a)(4) permits certification of a class action only if “the representative parties will fairly
4 and adequately protect the interests of the class” which requires that the named plaintiffs (1) not have
5 conflicts of interest with the proposed Class; and (2) be represented by qualified and competent
6 counsel. *In re Volkswagen “Clean Diesel” Mktg. Sales Practices & Prod. Liab. Litig.*, 895 F.3d 597,
7 607 (9th Cir. 2018). Both criteria are readily met here.

8 The proposed Settlement Class Representatives do not have any interests antagonistic to the
9 other Settlement Class Members, whose interests they will continue to vigorously protect. *See, e.g.*,
10 *In re Yahoo! Inc.*, 2020 WL 4212811, at *4–5. The Settlement Class Representatives are aligned with
11 Settlement Class Members as their interest is in proving that 23andMe should have prevented the theft
12 of their personal and genetic information. And they are aligned in seeking remuneration from 23andMe
13 for the resulting harm. In addition, each proposed Settlement Class Representative understands their
14 duties as class representatives, has agreed to consider and protect the interests of absent Settlement
15 Class Members, and has participated in this Litigation and Settlement. The proposed Settlement Class
16 Representatives have provided their counsel with necessary factual information, reviewed pleadings,
17 have had ongoing communications with their counsel regarding various issues pertaining to this case,
18 and will continue to do so until the case closes. Their participation easily meets the adequacy
19 requirement. *See Trosper v. Styker Corp.*, No. 13-CV-0607-LHK, 2014 WL 4145448, at *43 (N.D.
20 Cal. Aug. 21, 2014) (“All that is necessary is a ‘rudimentary understanding of the present action and
21 . . . a demonstrated willingness to assist counsel in the prosecution of the litigation.’” (quoting *In re*
22 *Live Concert Antitrust Litig.*, 247 F.R.D. 98, 120 (C.D. Cal. 2007) (citation omitted))).

23 Interim Co-Lead Counsel are highly qualified lawyers who have successfully prosecuted high-
24 stakes complex cases and consumer class actions. *See* Class Counsel Decl. ¶ 4. They have devoted the
25 resources necessary to see this case through despite risk. *Id.* ¶ 5. Interim Co-Lead Counsel’s work on
26 this case began months before their appointment and has included, since their appointment in their
27 interim capacity, preparing a Consolidated Complaint, addressing issues of appropriate representative

1 plaintiffs, consulting with experts, evaluating ongoing informal discovery, preparing to and attending
2 mediation, including analyzing documents produced in mediation, evaluating options for settlement
3 benefits that would meet the needs of this Settlement Class, and reaching the proposed Settlement.
4 They have been guided by the Settlement Class Members' interests throughout the management of
5 this case and present this Settlement as in their best interests without reservation. *Id.* ¶ 5.

6 **B. The Settlement Class Satisfies Rule 23(b)(3)**

7 Rule 23(b)(3) requires that (i) “questions of law or fact common to class members predominate
8 over any questions affecting only individual members” and (ii) that a class action is “superior to other
9 available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).
10 Both of these requirements are satisfied here.

11 **1. Common Issues of Law and Fact Predominate**

12 The predominance inquiry under Rule 23(b)(3) focuses on whether the “common questions
13 present a significant aspect of the case and . . . can be resolved for all members of the class in a single
14 adjudication.” *Hanlon*, 150 F.3d at 1022 (citation and quotation omitted). If so, “there is clear
15 justification for handling the dispute on a representative rather than on an individual basis.” *Id.*
16 (citation and quotation omitted). Even if just one common question predominates, “the action may be
17 considered proper under Rule 23(b)(3) even though other important matters will have to be tried
18 separately.” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (footnotes omitted).

19 The common questions in this case, described above, can be resolved for all members of the
20 Settlement Class in a single adjudication. 23andMe's data security policies were common to all
21 Settlement Class Members, and whether 23andMe failed to properly secure their personal and genetic
22 information can be answered on a classwide basis. Whether 23andMe was negligent, by virtue of its
23 security practices, is a question that focuses on 23andMe's conduct and thus can be answered for the
24 class as a whole. *See In re JUUL Labs, Inc., Mktg. Sales Pracs. & Prod. Liab. Litig.*, 609 F. Supp. 3d
25 942 (N.D. Cal. 2022) (explaining that claims that “require common proof of the defendant's conduct”
26 are appropriate for class certification). Whether 23andMe failed to meet contractual obligations to
27 keep Settlement Class Members' personal information private, and whether or not 23andMe could

1 have readily prevented this loss to the Settlement Class Members by taking action can be resolved
2 classwide, using the same expert analysis, documentary evidence and testimony. *Abante Rooter &*
3 *Plumbing, Inc. v. Pivotal Payments Inc.*, No. 3:16-cv-05486, 2018 WL 8949777 at *5 (N.D. Cal. Oct.
4 15, 2018) (“Predominance is satisfied because the overarching common question... can be resolved
5 using the same evidence for all class members and is exactly the kind of predominant common issue
6 that makes certification appropriate.”). Indeed, “the focus on a defendant’s security measures in a data
7 breach class action ‘is the precise type of predominant question that makes class-wide adjudication
8 worthwhile.’” *In re Yahoo! Inc.*, 2020 WL 4212811, at *7 (quoting *In re Anthem*, 327 F.R.D. at 312).
9 And whether or not the type of information released in this Security Incident is covered by the
10 applicable statutes protecting genetic information can be determined by common evidence. Thus,
11 common questions abound.

12 Rule 23(b)(3) also requires a class action to be “superior to other available methods for the fair
13 and efficient adjudication of the controversy” and lists four non-exclusive factors relevant to a
14 predominance finding: (A) the class members’ interests in individually controlling the prosecution or
15 defense of separate actions; (B) the extent and nature of any litigation concerning the controversy
16 already begun by or against class members; (C) the desirability or undesirability of concentrating the
17 litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class
18 action. The applicable factors weigh in favor of a predominance finding.

19 In this matter, any member of the Settlement Class who wants to control their own case can
20 easily opt out of the Settlement to pursue arbitration or their own lawsuit and some will exercise that
21 right. The actions of these individuals do not affect the predominance analysis here, as there are
22 expected to be more than 6.3 million class members who will not have interest in seeking a separate
23 action in arbitration or otherwise. There have been individuals, who through counsel have made
24 demands for arbitration, though those numbers appear to be a very small percentage of the Settlement
25 Class (far less than 1%). But even if that percentage increases, the efficiencies of collectively
26 adjudicating the many common legal and factual questions, as well as the risks and expense of
27 litigating this case weigh in favor of predominance. Moreover, there are two known class action cases
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1 and two multi-plaintiff cases arising out of this incident that are pending in the Santa Clara Superior
2 Court awaiting a ruling on a petition for Judicial Council for coordinated proceedings. Those cases are
3 in their early stages with a Case Management Conference scheduled for October 31, 2024. The
4 plaintiffs in those cases are Settlement Class Members who may participate in the Settlement, or they
5 may opt to request exclusion. The JPML has already made the decision to centralize the actions before
6 this Court and made findings suggesting the desirability of concentrating the litigation of the claims
7 in this forum. And where, as here, the court is deciding the certification in the settlement context, it
8 need not consider manageability issues. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

9 **2. Class Treatment is Superior**

10 Rule 23(b)(3)'s "superiority" element "requires determination of whether the objectives of the
11 particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. A
12 class action is the only reasonable method here to efficiently and fairly adjudicate Settlement Class
13 Members' claims against 23andMe. See, e.g., *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 809
14 (1985) ("Class actions...permit the plaintiffs to pool claims which would be uneconomical to litigate
15 individually").

16 The sheer number of potential separate trials, were they to be pursued, also favors certification.
17 Even if Settlement Class Members could afford individual litigation, the court system could not.
18 Individualized litigation creates a potential for inconsistent or contradictory judgments and increases
19 the delay and expense to all parties and the court system. By contrast, the class action device presents
20 far fewer management difficulties, and provides the benefits of single adjudication, economy of scale,
21 and comprehensive supervision by a single court. Thus, superiority of class treatment to the instant
22 litigation is easily shown here.

23 **C. The Relief Offered in the Settlement Is More Than Adequate**

24 The Settlement benefits provide fair, reasonable and adequate relief for all Settlement Class
25 Members. FRCP 23 (e) requires that a settlement seeking to bind absent class members must be fair,
26 reasonable and adequate. Preliminary approval is appropriate if "the proposed settlement appears to
27 be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not
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1 improperly grant preferential treatment to class representatives or segments of the class, and falls
2 within the range of possible approval.” *Sweet v. DeVos*, No. C 19-03674 WHA, 2020 WL 4876897,
3 at *1 (N.D. Cal. May 22, 2020) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079
4 (N.D. Cal. 2007)). The proposed settlement need not be ideal, but it must be fair and free of collusion,
5 consistent with counsel’s fiduciary obligations to the class. *Hanlon*, 150 F. 3d at 1027. And “whether
6 a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question
7 whether the settlement is perfect in the estimation of the reviewing court.” *Lane v. Facebook, Inc.*,
8 696 F. 3d 811, 819 (9th Cir 2012).

9 The cash value of the Settlement Fund is \$30 million. The benefits to the Class account for the
10 multiple aspects of harm the Settlement Class Members have suffered, and the damages caused by the
11 exposure of Settlement Class Members’ Personal Information are squarely addressed by the settlement
12 benefits. Like most data breach settlements, this Settlement compensates those that suffered financial
13 loss as a result of fraud. But given the unique allegations of harm here, this Settlement also
14 compensates Settlement Class Members who spent money on counseling for anxiety or emotional
15 unrest due to the sensitive nature of the information exposed in this incident. Moreover, to the extent
16 any Settlement Class Member spent money to increase their physical security, those expenses are
17 reimbursable under the Settlement. This unique reimbursement plan is directed toward the harms
18 suffered by the Settlement Class Members here.

19 Further, all Settlement Class Members residing in states that provide statutory damages for
20 exposure of genetic information on August 11, 2023 (the date it was first reported genetic information
21 was downloaded onto certain dark web sites) are entitled to claim a Statutory Cash payment. And the
22 small number of those Settlement Class Members that had health information compromised will
23 receive \$100, in addition to any other payments for which they are eligible. Importantly, the Settlement
24 Fund will be used to provide all Settlement Class Members with a unique and robust monitoring plan
25 to assist in mitigating the damage caused by this particular incident. Thus, the Settlement provides fair
26 and adequate relief to all Settlement Class Members because the relief is tailored to the types of injuries
27 suffered. *In re Anthem*, 327 F.R.D. at 332 (“A plan of allocation that reimburses class members based
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1 on the type and extent of their injuries is generally reasonable”) (citing cases).

2 The Settlement also provides for Business Practice Commitments which will provide enhanced
3 security for Settlement Class Members’ Personal Information. SA ¶ 70. These may not be available
4 through a trial of this matter, and they include enhanced password protection, mandated two or
5 multifactor authentication; annual security training; annual computer scans and cybersecurity audits;
6 and Information Security Program and Retention Policy changes. This is a benefit to all Settlement
7 Class Members, provided and paid for solely by 23andMe. Finally, the Settlement will provide clear
8 instructions for Settlement Class Members on how to delete their data with a link in the Notice to
9 where they can request such deletion.

10 This is a significant result for all Settlement Class Members. In fact, “other courts have
11 approved settlements in privacy and security cases when each class member received just a few dollars
12 or less.” *Carter v. Vivendi Ticketing US LLC*, No. SACV2201981CJCDFMX, 2023 WL 8153712, at
13 *5 (C.D. Cal. Oct. 30, 2023); *see, e.g., In re Yahoo! Inc.*, 2020 WL 4212811, at *10 (approving a
14 Settlement Fund of \$117.5 million with a settlement class size of approximately 194 million and
15 collecting cases where recovery was only a few dollars per person or less); *Hashemi*, 2022 WL
16 2155117, at *7 (collecting cases with estimated settlement values of less than \$1 per class member).
17 Some privacy class actions have even settled for non-monetary relief alone. *See, e.g., Campbell v.*
18 *Facebook Inc.*, 2017 WL 3581179, at *8 (N.D. Cal. Aug. 18, 2017) (granting final approval of
19 settlement providing for declaratory and injunctive relief in litigation alleging Facebook engaged in
20 user privacy violations), *aff’d*, 951 F.3d 1106 (9th Cir. 2020); *In re Google LLC St. View Elec.*
21 *Comm’ns Litig.*, 611 F. Supp. 3d 872 (N.D. Cal. 2020) (granting final approval of settlement
22 providing injunctive relief and creating a non-distributable *cy pres* settlement fund in litigation
23 alleging Google violated privacy by illegally gathering Wi-Fi network data).

24 **1. The Settlement Is Fair and Reasonable in Light of the Defendant’s Financial**
25 **Condition.**

26 As stated earlier, a factor to consider when evaluating any class action settlement is whether
27 the defendant is in a precarious financial situation. This is a factor that can weigh heavily in favor of
28 approving a proposed settlement. *See, e.g., Cavazos v. Salas Concrete, Inc.*, No.

1 119CV00062DADEPG, 2022 WL 2918361, at *5 (E.D. Cal. July 25, 2022) (finding that defendant’s
2 threatened insolvency and the possibility that the class members would recover nothing weighed
3 heavily in favor of settlement); *Singh v. Roadrunner Intermodal Servs., LLC*, No.
4 115CV01497DADBAM, 2018 WL 4382202, at *3 (E.D. Cal. Sept. 13, 2018) (“Having voiced a
5 concern about defendants’ declining financial condition and its possible default at every stage of the
6 settlement process, the court finds plaintiffs’ counsel’s concerns to be both legitimate and
7 persuasive”).

8 These financial struggles reveal 23andMe is a company that could not withstand a significant
9 judgment. So, the Settlement obtained here is not only prudent, but is a significant victory for the
10 Settlement Class Members. Class Counsel Decl. ¶ 32.

11 **2. The Notice and Claims Process is Fair and Reasonable.**

12 Next, the Court must consider “the effectiveness of any proposed method of distributing relief
13 to the class, including the method of processing class-member claims.” Fed. R. Civ. P. 23(e)(2)(C)(ii).
14 “Often it will be important for the court to scrutinize the method of claims processing to ensure that it
15 facilitates filing legitimate claims.” Fed. R. Civ. P. 23 advisory committee’s note to 2018 amendment.
16 “A claims processing method should deter or defeat unjustified claims, but the court should be alert to
17 whether the claims process is unduly demanding.” *Id.*

18 Here, the relief distribution is straightforward. Settlement Class Members are able to easily
19 complete and submit either online or by mail, a simple Claim Form covering all available types of
20 relief. Any required documentation can be uploaded to the Settlement Website or sent to the Claims
21 Administrator by mail. In addition, Settlement Class Members are encouraged to use a Claim Form to
22 enroll in Privacy Shield to receive the maximum length of that benefit, though valid enrollments will
23 be accepted at any time during the three years the services are available. SBP, ¶ 12(d). Cash payments
24 will be made by digital payment or check, at the Settlement Class Member’s election, and codes to
25 activate Privacy Shield will be provided to Settlement Class Members following the Effective Date as
26 set forth in the SBP ¶¶ 12-13. Thus, the procedures for submitting a claim or enrolling in Privacy
27 Shield are not unduly demanding and the proposed method of distributing relief is adequate.

1 **3. Interim Co-Lead Counsel Believes the Settlement Is an Outstanding Result.**

2 “Great weight is accorded to the recommendation of counsel, who are most closely acquainted
3 with the facts of the underlying litigation.” *Forsyth v. HP Inc.*, No. 16-CV-04775-EJD, 2024 WL
4 1354551, at *5 (N.D. Cal. Mar. 29, 2024) (quoting *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*,
5 221 F.R.D. 523, 528 (C.D. Cal. 2004)). Here, Interim Co-Lead Counsel, who have decades of
6 experience litigating class actions, believe that the Settlement reflects a significant success. Class
7 Counsel Decl. ¶ 18. Furthermore, as discussed previously, the unique nature of this Security Incident
8 and Plaintiffs’ damages theories and claims do carry a risk that this Court, a jury, or an appellate court
9 may find them unavailing. “Approval of a class settlement is appropriate when ‘there are significant
10 barriers plaintiffs must overcome in making their case.’” *Betancourt v. Advantage Hum. Resourcing,*
11 *Inc.*, No.14-CV-01788-JST, 2016 WL 344532, at *4 (N.D. Cal. Jan. 28, 2016). When Defendant’s
12 financial condition is considered, Interim Co-Lead Counsel individually and collectively believe this
13 is an outstanding result for the Class.

14 **4. The Settlement Also Satisfies the “Bluetooth” Factors.**

15 Prior to class certification, there is an even greater potential for a breach of fiduciary duty owed
16 the class during settlement. Accordingly, such agreements must withstand an even higher level of
17 scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule
18 23(e) before securing the court’s approval as fair. *In re Bluetooth* , 654 F.3d at 946. At the preliminary
19 approval stage, courts are directed to consider the three factors set out in *In re Bluetooth*. *See id.* at
20 947. Evaluation of these factors assists the Court in determining whether Plaintiffs’ counsel have
21 “allowed pursuit of their own self-interests and that of certain class members to infect the
22 negotiations.” *Id.* at 947. Here, evaluation of the *Bluetooth* factors further supports granting
23 preliminary settlement approval.

24 Here, all Settlement Class Members will receive benefits of value. This is not a settlement in
25 which the entire class will “receive[] no monetary distribution but class counsel are amply rewarded.”
26 *Id.* In fact, it is expected that nearly \$20,000,000 in cash payments will be distributed. In addition,
27 Class Counsel anticipates requesting a fee of 25% of the Settlement Fund as attorneys’ fees plus
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1 reimbursement of reasonable expenses. The Settlement Agreement does not include a “clear sailing”
2 provision. *Id.* Rather, all attorneys’ fees will be payable solely from the Settlement Fund in a
3 percentage determined by the Court. SA ¶ 97. The fees are therefore not being paid by 23andMe in
4 exchange for Plaintiffs’ acceptance of an unfair class settlement. *In re Bluetooth*, 654 F.3d at 947.
5 Further, this is a non-reversionary settlement, reached through arm’s length negotiations and under no
6 circumstances will 23andMe receive any of the settlement funds back. The entire Settlement Fund,
7 less notice and administration, taxes, attorneys’ fees and costs, will be utilized to provide cash and
8 other benefits to claimants. SA ¶ 59. Any residual funds available due to uncashed or unclaimed
9 benefits will be used to fund additional months of Privacy Shield for the benefit of the Settlement
10 Class Members. SBP ¶ 8. Thus, the *Bluetooth* factors are more than satisfied here.

11 **VI. THE PROPOSED NOTICE PROGRAM, SETTLEMENT ADMINISTRATOR, AND**
12 **PROCESS FOR OPT-OUTS AND OBJECTIONS SHOULD BE APPROVED**

13 **A. The Proposed Notice Plan**

14 **1. Class Notice**

15 Rule 23 requires the Court to direct the best notice practicable to all class members who would
16 be bound by a proposed settlement. *See* Fed. R. Civ. P. 23(c)(2)(B), (e)(1). The proposed Notice plan
17 meets those standards. *See generally* Admin. Decl. Notice will be effectuated the following ways: (i)
18 via email using the same email list 23andMe used to notify its affected customers of the Security
19 Incident; (ii) where an email address is unavailable, via direct mail notice to the mailing address
20 23andMe used to notify its affected customers of the Security Incident; (iii) by notice provided through
21 23andMe’s website and mobile application to the Settlement Class Members upon logging into their
22 accounts on the website or mobile application; and (iv) the media plan as implemented by the
23 Settlement Administrator. SA ¶ 75.

24 The Settlement Administrator will establish the Settlement Website. *Id.* ¶¶ 78, 100(g). The
25 Settlement Website will contain an online claims submission portal, FAQs, and downloadable copies
26 of important case documents, including: (1) Class Notice and Claim Form; (2) the Settlement
27 Agreement; (3) Plaintiffs’ Consolidated Complaint; (4) Plaintiffs’ Motion for Preliminary Approval
28 of Class Action Settlement; (5) Order Granting Preliminary Approval; and, when filed, (6) Plaintiffs’

1 Motion for Attorneys' Fees, Litigation Expenses and Service Awards, Plaintiffs Motion for Final
2 Approval of Class Action Settlement and any Orders thereon. *Id.*

3 The Settlement Administrator will establish a toll-free help telephone line with information
4 responsive to frequently asked questions about the Settlement and will provide Settlement Class
5 Members the opportunity to request a call back or leave a message requesting assistance. The number
6 shall be included in the Class Notice and posted on the Settlement Website. The Notice and Claims
7 Administrator will establish and maintain a P.O. Box and email inbox, as well as provide mailed paper
8 copies of the Class Notice and Claim Form upon request. *Id.*

9 **2. CAFA Notice**

10 The Notice and Settlement Administrator, at the direction of 23andMe, will provide notice
11 pursuant to the Class Action Fairness Act ("CAFA") within ten (10) days after the Settlement
12 Agreement is filed with the Court. SA ¶ 76.

13 **B. The Settlement Administrator**

14 **1. The Settlement Administrator Selection Process**

15 Interim Co-Lead Counsel propose Verita (formally KCC) as the Notice and Claims
16 Administrator. They do so only after evaluating bids from nine prospective settlement administrators.
17 Class Counsel Decl. ¶ 63. Interim Co-Lead Counsel discussed and received bids from these nine
18 prospective administrators for the methods of notice contemplated in this case based on the Settlement
19 Class Member data available, including email, mail, mobile application, and media notice. *Id.* Only
20 after receiving and evaluating the revised bids did Interim Co-Lead Counsel select Verita.

21 Collectively, Interim Co-Lead Counsel have used Verita as a settlement administrator on 2
22 occasions in the past two years, as detailed in their Declaration. *Id.* ¶ 65; *see also* Admin. Decl. ¶ 9.
23 Verita has considerable experience as the appointment settlement administrator in large data breach
24 class action settlements. Admin. Decl. ¶¶ 8, 10. In its declaration, Verita details the extensive data
25 security measures it has established to securely handle Settlement Class Members' data. Admin. Decl.
26 ¶¶ 41-45. It also maintains comprehensive insurance coverage, including sufficient Errors &
27 Omissions coverage. Admin. Decl. ¶ 46. The Parties would not have selected Verita absent their
28 comfort with its procedures for securely handling class member data.

1 Verita has agreed to cap the costs of notice and administration between \$727,000 and
2 \$1,038,000, depending on the claims rate, the percentage of online claims, and the percentage of
3 claimants who choose digital payments. Admin. Decl. ¶ 49. The costs will be paid out of the Settlement
4 Fund. SA ¶ 59. The estimated costs are reasonable when compared to the value of the Settlement and
5 the size of the Settlement Class, including the anticipated engagement by the Class as set forth below.

6 **2. The Settlement Administrator's Estimated Claims Rate**

7 Estimating a claims rate is complex. However, the Settlement Administrator has estimated that
8 there will be between a 5-10% claims rate based on its experiences in other data breach cases. Admin.
9 Decl. ¶ 37. The Notice Plan proposed here is intended to maximize the claims rate and encourage as
10 much Settlement Class Member participation as possible. *See generally* Admin. Decl. ¶¶ 15-32.

11 **C. Opt-Outs and Objections: Timeline, Instructions, and Forms**

12 The proposed Class Notice advises Settlement Class Members of their right (i) to opt out of
13 the Settlement or (ii) to object to the Settlement, to Class Counsel's Motion for Attorneys' Fees, or to
14 Service Awards to the Class Representatives, and (iii) of the associated deadlines. Admin. Decl. Exs.
15 1, 2, 4. The proposed schedule ensures that Settlement Class Members have at least 95 days from the
16 order granting preliminary approval to opt out or object to the Settlement, with at least 35 days to opt
17 out or object to the motion for attorneys' fees and expenses. N.D. Cal. Procedural Guidance ¶ 9.

18 The opt-out and objection instructions are in plain language and clearly prompt those who wish
19 to opt-out or to object to provide the specific information each action requires. Class Counsel Decl.
20 ¶ 68; Admin. Decl. Exs. 1, 2, 4. The Class Notice clearly informs Settlement Class Members of the
21 Opt-Out Deadline, how to opt-out, the consequences of opting out, and requires that they supply only
22 the information needed to opt out of the Settlement. Admin. Decl. Exs. 1, 2, 4; SA ¶¶ 80-84. Similarly,
23 the Class Notice informs Settlement Class Members about how to send their written objections to the
24 Court or file in person with the Court (or if represented by counsel to have counsel e-file), tells them
25 that the Court can only approve or deny the Settlement and cannot change its terms, and clearly
26 identifies the Objection Deadline. Class Counsel Decl. ¶ 69; Admin. Decl. Exs. 1, 2, 4.

27 The Settlement Agreement also provides for a preliminary injunction to enjoin ongoing
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1 litigation and arbitrations against 23andMe until such time as the Settlement Class Member opts-out
2 of the Settlement after receiving Notice. SA ¶ 73(h). This injunction is within the Court’s
3 jurisdiction pursuant to Federal Rule 23(d), which “vests a district court with the authority and
4 discretion to protect the interests and rights of class members and to ensure its control over the integrity
5 of the settlement approval process.” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir.
6 1998). The proposed injunction tracks similar preliminary injunctions approved by this Court in
7 granting preliminary approval of class action settlements. *See, e.g., Roberts v. AT&T Mobility LLC*,
8 No. 3:15-cv-03418-EMC (N.D. Cal. Mar. 31, 2021). In order to protect this MDL Settlement and the
9 Court’s jurisdiction, and particularly given 23andMe’s financial position, Plaintiffs support the entry
10 of the preliminary injunction in the proposed Preliminary Approval Order but note that the provision
11 is severable from the remainder of the Settlement Agreement. SA ¶ 105.

12 VII. CONCLUSION

13 The proposed Settlement is immediate, substantial, and fair. It achieves the goals of the
14 Litigation, benefits the entire Settlement Class, and accounts for the risks and uncertainties of
15 continued, vigorously contested litigation and 23andMe’s financial position. Plaintiffs therefore are
16 pleased to present the Settlement to the Court for its consideration. Plaintiffs respectfully request that
17 the Court preliminarily approve the \$30 million non-reversionary Settlement, certify the Settlement
18 Class, appoint the undersigned as Class Counsel and the Named Plaintiffs as Settlement Class
19 Representatives, order dissemination of Class Notice to Settlement Class Members in accordance with
20 the proposed Notice Plan, set a date for the Final Approval Hearing, and stay related actions as set
21 forth in the proposed order.

PROPOSED FINAL APPROVAL HEARING SCHEDULE

Plaintiffs' [Proposed] Order granting Preliminary Approval of Class Action Settlement, filed herewith, includes the following proposed schedule for the approval process:

EVENT	PROPOSED TIME FOR COMPLIANCE
23andMe shall serve or cause to be served the notice required by the CAFA	10 days following the filing of the Motion for Preliminary Approval
23andMe shall deposit the Notice Payment into the Qualified Settlement Fund for purposes of facilitating the Notice Program	10 days following the Preliminary Approval Order
23andMe shall, for the purpose of facilitating Notice, provide or cause to be provided to the Notice and Claims Administrator information about the Settlement Class Members as set forth in SA ¶ 75 to effectuate the Notice Program	20 days following the Preliminary Approval Order
Notice Program substantial completion deadline ("Notice Deadline")	60 days following the Preliminary Approval Order
Class Counsel shall file a motion for fees, expenses, costs, and Service Awards	35 days before the Objection Deadline (60 days following the Preliminary Approval Order)
Deadline for objections and opt-outs ("Objection Deadline and Opt-Out Deadline")	35 days after the Notice Deadline (95 days following the Preliminary Approval Order)
Notice and Claims Administrator shall provide a final report to Class Counsel that summarizes the number of opt-outs received to date	10 days after the Opt-Out Deadline (105 days following the Preliminary Approval Order)
Class Counsel shall file all papers in support of the application for the Final Approval Order and Final Judgment	55 days after the Notice Deadline (115 days following the Preliminary Approval Order)
Deadline for submitting a claim ("Claims Deadline")	90 days from the Notice Deadline (150 days following the Preliminary Approval Order)
Deadline for 23andMe to report on compliance with Business Practice Commitments	14 days before Final Approval Hearing
Hearing on Final Approval of the Settlement	At least 35 days after the filing of Motion for Final Approval (Civil LR 7-2(a))

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RESPECTFULLY SUBMITTED this 12th day of September, 2024.

/s/ Gayle M. Blatt
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Interim Co-Lead Counsel

CERTIFICATE OF SERVICE

I, Cass L. Lazar, hereby certify that on September 12, 2024, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notification to all counsel of record.

/s/ Cass L. Lazar

Cass L. Lazar

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