UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PAUL PERKINS, PENNIE SEMPELL, ANN BRANDWEIN, ERIN EGGERS, CLARE CONNAUGHTON, JAKE KUSHNER, NATALIE RICHSTONE, NICOLE CROSBY, and LESLIE WALL; individually and on behalf of all others similarly situated,

Plaintiffs
v.

LINKEDIN CORPORATION,

Defendant.

Case No. 13-CV-04303-LHK

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

This matter is before the Court on Class Counsel's motion for final approval of the proposed class action settlement ("Settlement") between individual and representative Plaintiffs Paul Perkins, Pennie Sempell, Ann Brandwein, Erin Eggers, Clare Connaughton, Jake Kushner, Natalie Richstone, Nicole Crosby, and Leslie Wall, and the Class they represent (collectively, "Plaintiffs"), and Defendant LinkedIn Corporation ("LinkedIn" or "Defendant"). Having considered the Motion for Final Approval, the Motion for Attorneys' Fees, Litigation Costs, and Incentive Awards (Dkt. No. 116), the Amended Settlement Agreement (the "Settlement Agreement"), the pleadings and other papers filed in this Action, the statements of counsel and

the Parties, and all of the arguments and evidence presented at the Final Approval Hearing held on February 11, 2016, and for good cause shown, IT IS HEREBY ORDERED as follows:

Unless otherwise defined herein, all terms that are capitalized herein shall have the meanings ascribed to those terms in the Settlement Agreement.

The Court has jurisdiction over the subject matter of the Settlement Agreement with respect to and over all parties to the Settlement Agreement, including all Class Members and Defendant.

I. The Settlement Is Fair, Adequate, and Reasonable

In evaluating a proposed class action settlement under Federal Rule of Civil Procedure 23(e), the standard is whether the settlement "is fundamentally fair, adequate, and reasonable." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *accord Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1375 (9th Cir. 1993). A district court may consider some or all of the following factors when making this determination: "the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Officers for Justice*, 688 F.2d at 625. The Court finds that the Settlement is fair, adequate, and reasonable in light of these factors.

First, the Settlement reflects the strength of Plaintiffs' case as well as the Defendant's position. This Court has been "exposed to the litigants and their strategies, positions and proof," *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1988) (quotation marks and citation omitted), and finds that the judicial policy favoring the compromise and settlement of class action suits is applicable here. *See In re Netflix Privacy Litig.*, No. 11-379, 2013 WL 1120801, at *3 (N.D. Cal. Mar. 18, 2013) (Davila, J.); *In re High-Tech Employee Antitrust Litig.*, No. 11-2509, 2015 WL 5159441, at *1 (N.D. Cal. Sept. 2, 2015) (Koh, J.); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The Court is also satisfied that the Settlement was reached

1 after arm's-length negotiations by capable counsel, and was not a product of fraud, overreaching,
2 or collusion among the parties. *City of Seattle*, 955 F.2d., at 1290.

3 Second, the risks, expense, complexity, and likely duration of further litigation also
4 support the Court's final approval of the Settlement. At the time of the current Settlement, many
5 important pretrial issues had yet to be resolved, presenting significant risks to both sides.
6 LinkedIn has vigorously contested its liability, arguing that its terms of service and privacy
7 policies, as well as LinkedIn users' knowledge based upon receipt of Add Connections emails
8 from other members and other potential forms of notice, are sufficient for a jury to find that
9 members of the proposed Class consented to the challenged conduct. LinkedIn also argues that
10 the single publication rule may prevent Class Members from challenging reminder emails
11 separately from initial invitation emails on the grounds that the communications constituted a
12 "single integrated publication." (Declaration of Nicholas Diamand In Support of Plaintiffs'
13 Motion for Final Approval, ("Diamand Decl.") ¶22, Dkt [ ]). The outcome at trial was
14 uncertain, providing additional risks to both sides. In addition, the contested class certification
15 issues would be extensive, and any trial outcome would be subject to potential appeals, which
16 would have (at best) substantially delayed any potential recovery achieved for the Class at trial.

17 Third, the Settlement provides for meaningful consideration—a total of $13 million where
18 the Class size is approximately 20.8 million. Other recent comparable class action settlements in
19 the area of digital privacy have not achieved this level of monetary relief when measured against
20 the size of the settlement class. *See Fraley v. Facebook, Inc*., No. 11-1726 (N.D. Cal.) (Seeborg,
21 J.) (granting final approval of $20 million cash fund where the class size was estimated 124
22 million members; *In re Google Referrer Header Privacy Litig.,* No. 10-4809, 2015 WL 1520475
23 (N.D. Cal. Mar. 31, 2015) (Davila, J.) (granting final approval to $8.5 million settlement where
24 the class size was estimated 129 million members); *In re Netflix Privacy Litig.*, No. 11-379, 2013
25 WL 1120801 (N.D. Cal. Mar. 18, 2013) (Davlia, J.) (granting final approval to $9 million
26 settlement where class size was estimated 62 million members); *In re Google Buzz Privacy Litig.*,
27 No. 10-672, 2011 WL 7460099 (N.D. Cal. June 2, 2011) (Ware, J.) (granting final approval to
28 $8.5 million settlement where class size was estimated 37 million members).

Fourth, the views of Plaintiffs' counsel, who are experienced in litigating and settling complex consumer class actions, weigh in favor of final approval. *Linney v. Cellular Alaska P'Ship*, No. 96-3008-DJL, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997) (Jensen, J.), *aff'd* 151 F.3d 1234 (9th Cir. 1998). Class Counsel endorse the Settlement as fair, adequate, and reasonable. (Diamand Decl. ¶2, Declaration of Nathan D. Meyer Regarding Compliance With Notice Requirements in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Meyer Decl.") ¶2, Dkt [ ]).

Finally, the reaction of the Class Members supports the Court's final approval of the Settlement. Out of 20.8 million Class Members, only eight submitted valid objections (about .00004 percent of the Class, or about one in every 2.6 million Class Members). (Declaration of Daniel Burke on Behalf of Settlement Administrator Gilardi & Co. LLC Regarding Compliance with Notice Requirements, ("Burke Decl.") ¶27, Dkt. [ ]) Seventy-seven (.0004 percent) submitted objections that failed to comply with the procedural requirements set forth in this Court's Order Granting Preliminary Approval. In addition, only 145 Class Members have opted out of the Settlement (less than .0007 percent of the Class). (*Id.*, ¶30.) The low rates of objections and opt-outs are "indicia of approval of the class." *High-Tech*, 2015 WL 5159441, at *3 (finding indicia of approval where 11 class members out of 64,466, or about .017% submitted objections, and "less than 0.9%" opted out); *Fraley*, 966 F. Supp. 2d at 947 (approving settlement where 29 of 150 million Class Members filed valid objections, and 6,825 opted out); *Sugarman v. Ducati N. Am., Inc.*, No. 10-5246, 2012 WL 113361, at *3 (N.D. Cal. Jan. 12, 2012) (observing that objections from 42 of 38,774 is a "positive response"); *Churchill Vill., LLC v. GE*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming district court's approval of settlement where forty-five of 90,000 class members objected to the settlement (.05 percent), and 500 class members opted out (about .56 percent)).

None of the objections here warranted rejection of the Settlement. *See Browne v. Am. Honda Motor Co.*, No. CV 09-06750 MM DTBX, 2010 WL 9499072, at *15 (C.D. Cal. July 29, 2010) ("The fact that there is opposition does not necessitate disapproval of the settlement. Instead, the court must independently evaluate whether the objections being raised suggest

serious reasons why the proposal might be unfair.") (brackets and internal quotation marks omitted). The positive response from the Class strongly favors Settlement approval.

The majority of objectors[1] objected on the grounds that this case should never have been brought. These objections do not comment on any aspect of the Settlement but, rather, oppose the claims alleged as being entirely frivolous. Because such objections appear to support no recovery for the Class, these objectors' interests apparently are adverse to the Class, and the objections should be overruled. *See Ko v. Natura Pet Products, Inc.*, No. 9-02619, 2012 WL 3945541, at *6 (N.D. Cal. Sept. 10, 2012) (Armstrong, J.) ("[A]n objection based on a concern for the Defendants and an apparent non-substantive assessment of the frivolity of the action are not germane to the issue of whether the settlement is fair."); *Wren v. RGIS Inventory Specialists*, No. 6-5778, 2011 WL 1230826, at *13 (N.D. Cal. Apr. 1, 2011) (Spero, J.) (overruling objections submitted that "do not go to the fairness of the settlement").

Eleven objectors from this Class of 20.8 million: Gregory Paul Berning, Daniel Brown/Jenny Hill, Susan Entin, Johnnie Graham, Dylan Jacobs, Mary Means, Darline S. Spencer, Gessica Still, Olen York, and Farage Yuzupov,[2] object on the basis (in whole or in part) that the Settlement should be rejected because it should be larger.

In objecting to the size of the Settlement, none of these Class Members adequately takes into account the risks and delays involved in proceeding to trial. They ignore that the Settlement provides the Class with a timely and certain cash recovery, as well as meaningful, tailored, long-term prospective relief, while a trial—and any subsequent appeal—is highly uncertain, would entail significant additional costs, and in any event would substantially delay any recovery

[1] These 45 objections were filed by Jamie Anderson-Stewart, Claude Baudoin, Erich Berg, Boyan Boyanov,William Calderwood, Ian Cornell, BC Crothers, Mary C. Don, Stephen Foerster, Melodie Kate Ford, Gary Gill, Julie Gordon, Kevin Grell, Kira Harris, Ashley Houston, Mark Howard, Michael Hughes, Cassandra Jones, Roland Klose, Chinmay Kommuru, Anthony Lee Krauch, August E. Lasseter, Timothy Lezon, Tom Lucas, Timothy McDonald, William F. McNamara, Keith Miller, Donald G. Muldoon, Caleb T. Nelson, Robert Petersen, Lyle Polyak, Philip Reinemann, Karrie Reuter, John Rollinson, Doug Smith, Gabriel L. Smith, Ken Stuczynski, Jeanine Thompson, Nozima Tojimatova, Carol A. Tomczyk, K. Weeks, Frederick Wells, Steven White, Daniel Whitinger, and Philip Wrona. (Declaration of Kenneth Jue on Behalf of Settlement Administrator Gilardi & Co. LLC, Attaching Objections, ("Jue Decl.") (Dkt. [ ]) Exs. 1, 3, 4, 8, 11, 14-15, 17, 20-21, 23, 25, 27-28, 30-32, 34-35, 37-38, 42, 46, 48, 50-51, 54 55, 58-59, 62, 64-65, 69, 72-74, 77-80, 93).

[2] (Jue Decl., Exs. 5, 9, 18, 26, 33, 47, 66-67, 84-85)

achieved. "'[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes.'" *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting *Officers for Justice*, 688 F.2d at 624) (affirming settlement approval). "Estimates of what constitutes a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *High-Tech*, 2015 WL 5159441, at *7 (citation and quotation marks omitted). Thus, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Id.*

A number of objectors[3] contend that the result here is unfair and inadequate because California's statutory right of publicity, Cal. Civ. Code § 3344, provides for $750 in statutory damages, much more than the total amount that will be distributed to Class Members through this Settlement. Objector Mary Means, for example, argues that the statutory penalty alone would have resulted in a recovery of $1.56 billion for the 20.8 million members of the class. (Dkt. No. 118). While such a recovery may theoretically have been possible, the Settlement represents a fair and adequate compromise in light of significant risks faced by the Class. In overruling similar objections regarding the settlement of class-wide claims under Cal. Civil Code § 3344, Judge Seeborg of this District explained that "[g]iven the class size, it is not plausible that class members could recover the full amount of the statutory penalties . . . as such a judgment would pose due process concerns and threaten [the defendant's] existence." *Fraley*, 966 F. Supp. 2d at 944.

That certain Class Members evaluate the risks differently, or would prefer to go to trial despite those risks, does not prevent the Court from granting final approval to the Settlement. *See Browne v. Am. Honda Motor Co.*, No. 9-6750, 2010 WL 9499072, at *15 (C.D. Cal. July 29, 2010) ("The fact that there is opposition does not necessitate disapproval of the

[3] Daniel Brown/Jenny Hill, Susan House, Dylan Jacobs, and Mary Means. (Jue Decl., Exs. 9, 29, 33, 47).

settlement. Instead, the court must independently evaluate whether the objections being raised suggest serious reasons why the proposal might be unfair.") (citation omitted)).

Accordingly, the Court finds that the Settlement is fair, adequate, and reasonable within the meaning of Rule 23(e) of the Federal Rules of Civil Procedure.

II. **The Notice Program Was Appropriate**

Federal Rule of Civil Procedure 23(c)(2)(B) requires that the settling parties provide settlement Class Members with "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)."

The Court finds that the Notice Plan has been fully implemented in compliance with this Court's Order (Dkt. No. 106, at 4), and complies with Fed. R. Civ. P. 23(c)(2)(B). Notice was sent to Class Members by direct email. The Email Notice, which was reviewed and approved by this Court, provided a clear description of who is a member of the Class and Class members' rights and options under the Settlement. The Notice explained how to receive money from the Settlement, how to opt-out of the Settlement, how to object to the Settlement, how to obtain copies of relevant papers filed in the case, and how to contact Class Counsel and the Settlement Administrator.

The Court approved this Notice Plan. (Dkt. No. 106, at 4). The Court ordered LinkedIn to send or cause to be sent the Email Notice to each Person in the Settlement Class using the email address that LinkedIn has on file for his or her LinkedIn account, and to attempt to re-send notices that were returned undeliverable, or bounced back. (*Id*). LinkedIn did so. (Declaration of Kurt Andersen In Support of Plaintiffs' Motion for Final Approval of the Class Action Settlement, ¶¶ 5-6, Dkt. [ ]). The Court ordered the Settlement Administrator, Gilardi & Co.,

LLC to publish the Website Notice through the Settlement Website, and to develop, host, and maintain such Settlement Website. (*Id.*). The Settlement Administrator did so. (Burke Decl. ¶2). Additional Notice was provided to the Class through media coverage of the Settlement and Notice Program, which further supports a finding that Class Members received adequate Notice of the Settlement. (Diamand Decl. ¶¶ 11-13).

Class Members could submit a Claim Form either electronically, through the Settlement Website, or by mail. The Claim Form requested, but did not require, that Class Members provide the unique Claim ID included in each Email Notice in an effort to ensure that Class Members who, for whatever reason, lacked access to the email address associated with their LinkedIn account were not improperly excluded from filing a Claim. Such claimants were asked, instead, to provide the email address associated with their LinkedIn account for verification. Class Members also had a variety of methods by which to view relevant documents, contact the Settlement Administrator or Class Counsel, opt out of the Settlement, or object to the Settlement. These methods included mail, telephone, a case-specific website, and email. (Burke Decl. ¶2; Diamand Decl. ¶15; Meyer Decl. ¶4). For instance, the Settlement Administrator received 143 requests for mailed copies of the Notice over the telephone, by email and by mail. (Burke Decl. ¶12). The Settlement Administrator sent a copy of the Notice whenever one was requested. *Id.* Class members also contacted Class Counsel, through telephone, email and mail, with questions and requests. (Diamand Decl.¶ ¶15-19; Meyer Decl. ¶¶8-31). Class Counsel answered Class Member questions and responded to requests. (*Id.*).

III. <u>The Plan of Distribution is Fair, Reasonable and Adequate.</u>

The Plan of Distribution is fair, reasonable and adequate. It will provide each Class Member with a *pro rata* payment from the monetary relief available for such payments ("Net Settlement Fund"). Such *pro rata* distributions are "cost-effective, simple, and fundamentally fair." *High-Tech*, 2015 WL 5159441, at *8 (quoting *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 285 (D. Minn. 1997). The Court also notes that there will be no reversion of unclaimed funds to the Defendant. Accordingly, the Plan of Distribution is approved.

IT IS SO ORDERED

Dated: February__, 2016

LUCY H. KOH
United States District Judge