

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

Case No. [15-cv-03747-JD](#)

**ORDER RE FINAL APPROVAL,
ATTORNEYS' FEES AND COSTS,
AND INCENTIVE AWARDS**

Re: Dkt. Nos. 499, 517

By any measure, the \$650 million settlement in this biometric privacy class action is a landmark result. It is one the largest settlements ever for a privacy violation, and it will put at least \$345 into the hands of every class member interested in being compensated. At the Court's request, the parties jointly developed an innovative notice and claims procedure that generated an impressive claims rate. The settlement attracted widespread support from the class, and drew only three objections out of millions of class members.

All of this was achieved in the context of a new and untested statute, the Illinois Biometric Information Privacy Act (BIPA), 740 Ill. Comp. Stat. 14/1 *et seq.* (2008). The case raised several complicated and intensely litigated issues, including the question of whether a statutory privacy injury was sufficiently "real" and concrete to establish an injury in fact for standing under Article III and the BIPA. The Court determined that it was, and two other courts -- the Illinois Supreme Court and the Ninth Circuit -- reached the same conclusion. The standing issue makes this settlement all the more valuable because Facebook and other big tech companies continue to fight the proposition that a statutory privacy violation is a genuine harm. In a pending Supreme Court case about the Fair Credit Reporting Act, which is unrelated to this action, Facebook, Google, and eBay filed an amicus brief that points to this settlement and asks the Court to reverse

the "mistaken holding" that a statutory privacy violation is an actual injury. See Brief for Amici

1 Curiae eBay, Inc. *et al.* Supporting Petitioner at 4, *Trans Union LLC v. Ramirez*, No. 20-297 (U.S.
2 Feb. 8, 2021). This underscores the considerable legal risks both sides would have faced had this
3 case continued on.

4 Overall, the settlement is a major win for consumers in the hotly contested area of digital
5 privacy. Final approval of the class action settlement is granted. Attorneys' fees and costs, and
6 incentive awards to the named plaintiffs, are also granted, although in lesser amounts than
7 requested.

8 BACKGROUND

9 This case has traveled a long and winding road since it was filed in 2015, and the Court
10 focuses here on the key events most pertinent to final approval and the fees award. A heavily
11 litigated class certification motion was resolved in favor of certification of a class of Facebook
12 users located in Illinois for whom Facebook created and stored a face template after June 7, 2011.
13 Dkt. No. 333 at 15. The certified class, which is also the class for the settlement, Dkt. No. 468,
14 Ex. A at 5-6 (¶ 1.7), challenged Facebook's "Tag Suggestions" program, which looks for and
15 identifies people's faces in photographs uploaded to Facebook to promote user tagging. The class
16 members alleged that Facebook collected and stored their biometric data -- namely digital scans of
17 their faces -- without prior notice or consent, thereby violating Sections 15(a) and 15(b) of the
18 BIPA, 740 Ill. Comp. Stat. 14/15(a)-(b).

19 After substantial briefing and argument, the Court concluded that a violation of the BIPA
20 was enough to establish an injury in fact for purposes of Article III standing. *See* Dkt. No. 294.
21 This was not the only serious disagreement between the parties in the early stage of the case.
22 A significant battle was also fought over a choice-of-law provision in Facebook's user agreements,
23 and whether California law applied to the exclusion of a claim under the BIPA, as Facebook
24 argued. The Court held an evidentiary hearing to help resolve that dispute, and concluded that
25 Illinois law applied. *See* Dkt. No. 120. But the injury-in-fact issue stands out both because it was
26 a threshold issue for the litigation as a whole, and because it became a central issue in Facebook's
27 discretionary appeal to the Ninth Circuit of the Court's certification of the class. *See* Dkt.

28 No. 106-116. The circuit court affirmed the Court's conclusions about standing and certification

1 Dkt. No. 416. The Supreme Court denied Facebook’s petition for certiorari. Dkt. No. 426. While
2 these events were unfolding in federal court, the Illinois Supreme Court published a decision in
3 another BIPA case that cited and adopted the Court’s construction of the statute on the question of
4 who counts as an “aggrieved” person with a right of action under the statute. *See Rosenbach v. Six*
5 *Flags Entm’t Corp.*, 129 N.E.3d 1197 (Ill. 2019).

6 The settlement of the case was its own long chapter in this litigation. Three days before a
7 trial setting conference, the parties advised that a settlement in principle had been reached. Dkt.
8 No. 427. The Court denied preliminary approval of the initial settlement proposal over concerns
9 about the discount on statutory damages under the BIPA, a conduct remedy that did not appear to
10 require meaningful changes by Facebook, over-broad releases by the class, and the form of notice
11 to class members. Dkt. No. 456.

12 The parties responded substantively to the Court’s concerns. After another round of
13 negotiations, they revised the proposed settlement in several significant ways. To start, Facebook
14 agreed to increase its settlement payment by \$100 million, which brought the total amount of the
15 non-reversionary common fund to \$650 million. The settlement administration expenses, taxes,
16 and class representative incentive awards and attorney’s fees and costs will be paid from this fund,
17 and the balance will be distributed on a pro rata basis to each class member who submits a valid
18 claim. Dkt. No. 468, Ex. A at 10 (¶ 1.31). The parties also clarified the changes that Facebook
19 will implement. For all users who have not affirmatively opted in or consented to biometric scans,
20 Facebook will set its “Face Recognition” default user setting to “off,” and it will delete all existing
21 and stored face templates for class members unless Facebook obtains a class member’s express
22 consent after a separate disclosure about how Facebook will use the face templates. *Id.* at 13-14
23 (¶ 2.9). It will also delete the face templates of any class members who have had no activity on
24 Facebook for three years. *Id.* at 14 (¶ 2.9(c)). At the preliminary approval hearing, Facebook’s
25 product manager for the Face Recognition program stated under oath that this change to the Face
26 Recognition default setting to “opt in” would be not just in Illinois or the United States, but
27 “global.” Dkt. No. 470 at 10:11-17.

1 For the notice and claims procedures, the parties maximized outreach to class members by
2 leveraging Facebook’s direct access to users and using other internet channels. Facebook advised
3 the Court that it would deploy “the most aggressive methods that we use to reach users in the ways
4 that we best can at Facebook,” and the Court further encouraged the parties to optimize outreach
5 by consulting a behavioral economist or psychologist to provide expert advice on techniques. Dkt.
6 No. 470 at 19:19-21; 25:13-25. The claim form was easy to complete online or by mail, and
7 required only basic information about class members’ Facebook accounts, and in the event their
8 email address was not found in Facebook’s records, the class member’s “approximate dates and
9 addresses where you lived in Illinois” for at least 6 months during the class period. *See* Dkt.
10 No. 468, Ex. A (Ex. A). Class members had their choice of four payment options: paper check,
11 Zelle, PayPal, or direct deposit. *Id.* These measures generated a claims rate of approximately
12 22%, a result that vastly exceeds the rate of 4-9% that is typical for consumer class actions. *See*
13 Fed. Trade Comm’n, *Consumers and Class Actions: A Retrospective and Analysis of Settlement*
14 *Campaigns* 11 (2019) (“Across all cases in our sample requiring a claims process, the median
15 calculated claims rate was 9%, and the weighted mean (*i.e.*, cases weighted by the number of
16 notice recipients) was 4%.”).

17 The scope of the release was revised to limit it to the boundaries of this litigation. Class
18 members who did not opt out will release Facebook, Inc., Face.com, and their associated entities,
19 from known or unknown claims “arising from or related to plaintiffs’ allegations regarding the
20 alleged collection, storage, or dissemination of biometric data related to facial recognition
21 technology from Facebook users located in Illinois, including all claims and issues that were
22 litigated in the action or that could have been brought in the Action and claims for any violation of
23 the Illinois Biometric Information Privacy Act (‘BIPA’) or other Illinois statutory or common law
24 related to facial recognition.” Dkt. No. 468, Ex. A at 8 (¶¶ 1.25, 1.26). Put more simply, the class
25 is releasing only the claims that were or could have been litigated here. In addition, in response to
26 a concern on the Court’s part, the release now excludes Facebook’s affiliated entities Instagram,
27 Inc., WhatsApp Inc., and Oculus VR Inc., which were included originally even though they did
28

1 not use the Tag Suggestions feature. *See id.* at 8 (¶ 1.26). Claims may be pursued against those
2 companies under the BIPA irrespective of this settlement.

3 Based on these and other substantive revisions, the Court granted preliminary approval of
4 the settlement. Dkt. No. 474. An unusual development ensued. A law firm that hitherto had
5 played no role whatsoever in this case posted a misleading online solicitation about the settlement.
6 *See* Dkt. No. 477. The post deceptively invited people to “sign up for a claim” when the law firm
7 actually was trying to recruit opt-outs. The parties brought the problem to the Court’s attention,
8 and the Court held a hearing on the matter at which the law firm appeared and participated. Dkt.
9 No. 486. The law firm agreed to take down the posts and to send a curative notice to
10 approximately 3,724 class members who had responded to the misleading solicitation. Dkt.
11 No. 494. This appears to have fully corrected the situation, and there is no evidence of any
12 residual issues.

13 As the notice and claims procedures unfolded, the parties kept the Court apprised of
14 progress with regular status reports. *See* Dkt. Nos. 475, 476, 492, 496, 501, 503, and 506. The
15 claims period ended on November 23, 2020.

16 This order resolves plaintiffs’ motion for final approval, and motion for fees, expenses, and
17 costs. Dkt. Nos. 499, 517. It also addresses and overrules three objections filed by four objectors.
18 *See* Dkt. Nos. 497 (objection of Kevin C. Williams), 504 (objection of Dawn Frankfother and
19 Cathy Flanagan), 519 (objection of Kara Ross). Objectors Frankfother and Flanagan also filed an
20 opposition to plaintiffs’ motion for final approval. Dkt. No. 518.

21 The Court has carefully reviewed all of the voluminous filings with respect to final
22 approval and fees, which include expert declarations, letters from class members, and other
23 materials. On January 14, 2021, the Court held a lengthy final approval hearing. Dkt. No. 530.
24 The hearing featured arguments by the parties, the objectors Frankfother, Flanagan, and Ross, who
25 appeared through their counsel, as well as remarks by the class’s expert, Professor William B.
26 Rubenstein of Harvard Law School. *Id.*

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.