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7   UNITED STATES DISTRICT COURT
8   NORTHERN DISTRICT OF CALIFORNIA
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JONATHAN DIAZ, and others,

                    Plaintiffs,

          v.

GOOGLE LLC,

                    Defendant.

Case No. 21-cv-03080-NC

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Re: ECF 64

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17   Plaintiffs Jonathan Diaz and Lewis Bornmann ("Plaintiffs") bring a putative class

18   action against Google LLC ("Defendant"). Defendant designed a digital contact tracing

19   system to "slow or stop the spread of COVID-19 on mobile devices using Google's

20   Android operating system." ECF 64 at 6. Plaintiffs allege that Google "unlawfully

21   exposed confidential medical information and personally identifying information" through

22   this system. *Id.* Before the Court is Plaintiffs' motion for preliminary approval of class

23   action settlement. ECF 64. The Court held a hearing on this motion on June 23, 2022.

24   Having considered the Plaintiff's motion, the input of counsel at the June 23, 2022,

25   hearing, and the record in this case, the Court GRANTS Plaintiffs' motion for preliminary

26   approval of class action settlement.

27   **I.   LEGAL STANDARD**

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1   of a certified class . . . may be settled . . . only with the court's approval." Fed. R. Civ. P.

2   23(e). "The purpose of Rule 23(e) is to protect the unnamed members of the class from

3   unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d

4   1095, 1100 (9th Cir. 2008). Accordingly, in order to approve a class action settlement

5   under Rule 23, a district court must conclude that the settlement is "fundamentally fair,

6   adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)

7   *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In

8   determining whether the proposed settlement meets this standard, the Court does not have

9   the ability "to delete, modify, or substitute certain provisions . . . The settlement must stand

10 or fall in its entirety." *Id.* at 1026.

11   Where "the parties negotiate a settlement before the class has been certified,

12 settlement approval requires a higher standard of fairness and a more probing inquiry than

13 may normally be required under Rule 23(e)." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d

14 1035, 1048 (9th Cir. 2019) (internal quotation marks and citations omitted). In such cases,

15 the Court must apply "an even higher level of scrutiny for evidence of collusion or other

16 conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's

17 approval as fair." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir.

18 2011). Signs of potential collusion include:

19   "(1) when counsel receive a disproportionate distribution of the settlement;

20   (2) when the parties negotiate a 'clear sailing' arrangement" (i.e., an

21   arrangement where defendant will not object to a certain fee request by class

22   counsel); and

23   (3) when the parties create a reverter that returns unclaimed fees to the

24   defendant."

25 *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015) (quoting *Bluetooth*, 654 F.3d

26 at 947) (internal quotations omitted).

27   "The Court may grant preliminary approval of a settlement and direct notice

1   non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly

2   grant preferential treatment to class representatives or segments of the class; and (4)

3   falls within the range of possible approval." *Foster v. Adams & Assoc.*, No. 18-cv-

4   02723-JSC, 2021 U.S. Dist. LEXIS 203351, at *11 (N.D. Cal. 2021); *Harris v.*

5   *Vector Mktg. Corp.*, No. 08-cv-05198-EMC, 2011 WL 1627973, at *7 (N.D. Cal.

6   2011).

7   **II.   THE SETTLEMENT**

8   Under the Settlement Agreement, Google has conducted: (1) software code changes

9   to the EN System on April 21, May 5, and May 26, 2021, providing more privacy

10   protection for contact tracing app users, and (2) a process designed to search for and

11   eliminate Exposure Notification (EN) System data that could be found on Google's

12   databases. ECF 64 at 12. The EN System requires users to allow use of their personal

13   health information and general location information to inform of potential exposure to

14   persons infected with COVID-19. *Id.* at 7-8.

15   Upon execution of the Settlement Agreement, Google will represent and ensure that

16   the following are true: (1) Google does not put any data generated from their EN System

17   about a user's health status where a third party could determine a user's COVID status, (2)

18   Google uses a process that reviews and eliminates EN System data in its databases, (3)

19   Google issued a "Partner Security Advisory" to third parties explaining at Google had been

20   advised of vulnerabilities by Plaintiffs, implemented a relevant "fix," did not determine

21   that identifying information was used wrongfully, and that third parties should eliminate

22   potentially sensitive information acquired without explicit user consent, (4) Google did not

23   find evidence that EN System data that was logged to device system logs was misused, and

24   (5) Google investigated and found that no team had attempted to use EN and non-EN

25   System data for any use by Google. ECF 64 at 12-13.

26   As a complete and final settlement, Google will: (1) not revert the software code

27   changes mentioned above, (2) confirm in writing that, after a good-faith search, it has

28   identified no EN system data on its internal systems that could be used to infer health

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1   status of an EN user, (3) edit the "Exposure Notifications and your privacy" section at

2   http://www.google.com/covid19/exposurenotifications/ to explain and describe the

3   heightened security and privacy protections implemented to address concerns brought by

4   Plaintiffs; and (4) allow Plaintiffs to seek an injunction to enforce the terms of the

5   Settlement Agreement from the Court. ECF 64 at 13.

6   This Settlement does not provide for claims for damages or other monetary relief and

7   only releases claims for injunctive relief related to handling of Google's EN System data

8   on system logs. ECF 64 at 13-14.

9   **III. DISCUSSION**

10   The Court GRANTS the motion for preliminary approval of class action settlement

11   for the following reasons: (1) the Settlement is fair, reasonable, and adequate under Rule

12   23; (2) the Settlement satisfies District Procedural Guidance for Class Action Settlements;

13   and (3) the Court is likely to certify the Settlement Class.

14   **A.   The Settlement is Fair, Reasonable, and Adequate.**

15   The Court may approve a proposed settlement agreement "only on finding that it is

16   fair, reasonable, and adequate" by considering if: (1) the class representatives and the class

17   counsel have adequately represented the class; (2) the settlement was negotiated at arm's

18   length; (3) the relief provided to the class is adequate; and (4) the settlement treats class

19   members equitably in relation to one another. Fed. R. Civ. P. 23(e)(2).

20   **1.   The Class has been Adequately Represented by Plaintiffs and their Counsel.**

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22   Plaintiffs and their Counsel have conducted a forensic investigation of the security

     issues allegedly present in Defendant's EN system, researched applicable law to the case,

23   drafted two complaints and a response to Google's Motion to Dismiss and request for

24   judicial notice, and began discovery. ECF 64-1 at 4 (Cuthbertson Decl.); ECF 1; ECF 25.

25   The Court finds that Plaintiffs and their Counsel have adequately represented the

26   class by due diligence in investigating, researching, drafting, filing, and mediating the

27   cause of action. The Court finds that the Settlement is the produce of informed and

1   efficient advocacy on behalf of the Settlement class.

2   **2.   The Settlement was Negotiated at Arm's Length.**

3   Potential signs of collusion include instances where counsel receives a large portion

4   of settlement, when parties negotiate a 'clear sailing' agreement, or when parties create a

5   reverter that returns unclaimed fees to the defendant. *Allen*, 787 F.3d at 1224 (quoting

6   *Bluetooth*, 654 F.3d at 947) (internal quotations omitted). Furthermore, where "the parties

7   negotiate a settlement before the class has been certified, settlement approval requires a

8   higher standard of fairness and a more probing inquiry than may normally be required

9   under Rule 23(e)." *Roes, 1-2*, 944 F.3d at 1048 (internal quotation marks and citations

10   omitted).

11   The parties mediated this case before the Hon. Read Ambler (Ret.) of JAMS, a

12   highly experienced mediator. ECF 64 at 15. "While the participation of a neutral mediator

13   is not . . . dispositive . . . it nonetheless is 'a factor weighing in favor of a finding of non-

14   collusiveness.'" *Camilo v. Ozuna*, 2020 WL 1557428, at *8 (N.D. Cal. Apr. 1, 2020)

15   (quoting *Bluetooth*, 654 F.3d at 948).

16   Additionally, the settlement does not involve damages to the Settlement Class, so it

17   does not bear the signs of one potential sign of collusion involving a reverter. Although

18   Plaintiffs' Counsel's proposed attorney fees make up most of the settlement fees, Parties

19   have agreed that Google may contest the amount and that the Parties will accept any Court

20   order on attorneys' fees and expenses. ECF 64 at 18. Class Counsel has also expressed

21   that they will base their fee application on its lodestar, offering a basis for its attorney's

22   fees ask. *Id.* In addition, the service awards of $2,500 for each of the two class

23   representatives is reasonable given their contributions and there is no indication of a 'clear

24   sailing' agreement. *Id.* at 22-23.

25   The Court finds that the Settlement Proposal was negotiated at arm's length and

26   without any of the potential signs of collusion, even under the higher standard of fairness

27   reserved for settlements negotiated before class certification.

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