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Master Docket No. 3:15-cv-3747-JD

*In re Facebook Biometric Information
Privacy Litigation*

**PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR CLASS
CERTIFICATION**

Date: February 16, 2018
Time: 10:00 a.m.
Location: Courtroom 11

Hon. James Donato

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INTRODUCTION

1
2 Defendant Facebook, Inc. (“Facebook”) concedes that the central issues in this case—
3 whether it collects and stores biometric data and whether it obtains consent to collect that data—
4 are common. And Facebook does not meaningfully contest that it scans the faces in all uploaded
5 photos of class members, even if it may not ultimately recognize a face in every single photo.
6 Facebook principally argues that the clear predominance of these common issues is irrelevant in
7 light of a single decision of an intermediary Illinois court, *Rosenbach v. Six Flags Entertainment*
8 *Corp.*, which Facebook contends requires individual showings of “statutory injury.” But
9 *Rosenbach* is plainly distinguishable and of questionable value given that it conflicts with long-
10 settled principles of Illinois law. And even if that the decision applies, the many common issues
11 in the case still militate in favor of certification.

12 *Rosenbach* aside, Facebook focuses its opposition largely on procedural issues that, in the
13 end, do not preclude class certification. For example, Facebook complains that the proposed
14 class definition differs from the tentative definition included in the complaint. But, especially in
15 a highly technical case like this, it is expected that a class definition will evolve as the case
16 progresses through fact and expert discovery. And, contrary to Facebook’s assertion, no rule of
17 law requires a proposed class definition be congruous with or narrower than the definition put
18 forth in the complaint.

19 Facebook also incorrectly contends that that any claims process would require a “photo
20 by photo” review. But that would be no different than a typical claims process where class
21 members submit affidavits or other evidence of class membership that can be challenged or
22 verified by the defendant. [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 Facebook last makes hackneyed and perfunctory attacks on the adequacy and typicality
26 of the proposed class representatives. But the proposed named plaintiffs have demonstrated a
27 sufficient understanding of the case to adequately represent the proposed class (the “Class”).
28

1 Tellingly, Facebook’s opposition omits any meaningful discussion of the proposed
2 subclass (the “Subclass”), which is not subject to many of the same meritless attacks Facebook
3 makes against the Class. A trial or claims process of the claims of the Subclass would not require
4 a photo-by-photo review, nor would there be questions of whether Facebook even has collected
5 the data in question. Thus both the proposed Class and Subclass should be certified.

6 **I. The proposed class definition is proper.**

7 Plaintiffs’ proposed Class and Subclass are clearly defined and appropriately tailored to
8 the claims asserted and relief sought by proposed class members. Facebook nevertheless
9 contends that certification of the Class (though not the Subclass) is impermissible because the
10 proposed definition is somehow “broader” than the definition contained in the complaint. (Opp.
11 at 6-9.) It is not altogether clear that the proposed Class is in fact broader: The class tentatively
12 proposed in the operative complaint is essentially coterminous with Facebook’s potential liability
13 under the statute. (Dkt. 40, ¶ 53.) Without citation, Facebook argues that the class is limited “to
14 users for whom Facebook had created and stores a template.” (Opp. at 6.) Portions of the
15 complaint did reference stored face templates (Dkt. 40, ¶¶ 24-27), but the complaint also
16 described the process of extracting data from individual photos, a process that essentially
17 characterizes the initial scans of face geometry that are the subject of the Class’s legal theory
18 (Dkt. 40, ¶¶ 4, 23). Facebook asserts that its discovery responses were premised upon its
19 narrower interpretation of the complaint (Opp. at 8 & n.6), but there is no reason why a class
20 definition should be limited by a defendant’s self-serving discovery conduct if the definition
21 otherwise comports with the evidentiary record the parties have compiled.

22 And at all events Facebook’s proposed rule is at odds with federal law. Rule 23 sets forth
23 a series of criteria plaintiffs must meet in order to certify a class. The Supreme Court has held
24 that when plaintiffs satisfy those criteria a district court *must* certify a proposed class. *Shady*
25 *Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (in portion joined
26 by a majority: Rule 23 “by its terms ... creates a categorical rule entitling a plaintiff whose suit
27 meets the specified criteria to pursue his claim as a class action.”). The Ninth Circuit also has
28 emphasized that courts should not engraft additional prerequisites to certification onto Rule 23.

1 *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017). None of these or similar
2 decisions has ever indicated that the outcome of a certification decision depends in any part on
3 the relationship between the class proposed in a motion and the class proposed in a complaint.

4 A class definition should instead be keyed to the facts adduced in discovery, not to the
5 complaint. *See, e.g., Krueger v. Wyeth, Inc.*, 310 F.R.D. 468, 477, 482-83 (S.D. Cal. 2015)
6 (amending definition in light of more fully developed evidentiary record). In an individual case,
7 a plaintiff is not limited by her complaint in what relief she can recover, so long as any new relief
8 is consistent with the theories put forth in the complaint. *E.g., Kobold v. Good Samaritan*
9 *Regional Med. Ctr.*, 832 F.3d 1024, 1038 (9th Cir. 2016); *Crull v. GEM Ins. Co.*, 58 F.3d 1386,
10 1391 (9th Cir. 1995.). Different rules do not apply in the class-action context. *See Chapman v.*
11 *First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015) (Easterbrook, J.) (holding that a new class
12 definition does not require the plaintiff to amend her complaint). Furthermore, Rule 23 is
13 sufficiently flexible that it specifically allows the Court to modify the class definition at any
14 point (even after trial) prior to judgment, but does not require that any modification narrow the
15 class. *See Fed. R. Civ. P. 23(c)(1)(C)*. Rule 23 is not a one-way ratchet.

16 Given the incompatibility of its proposed rule with the substance of federal law, the cases
17 on which Facebook purports to rely provide little support for its argument. These cases don't cite
18 any controlling rule of law but instead cite each other, creating what is essentially a judicial
19 rumor chain. The first link in the chain is *Berlowitz v. Nob Hill Masonic Mgmt.*, 1996 WL
20 724776, at *2 (N.D. Cal. Dec. 6, 1996). For its assertion that a court is "bound" by the class
21 definition proposed in the complaint, *Berlowitz* cites nothing. Other courts have appropriately
22 questioned whether *Berlowitz* comports with the law and sound judicial administration. *See*
23 *Abraham v. WPX Energy Prod., Inc.*, 2017 WL 4402398, at *17-*18 (D.N.M. Sept. 30, 2017)
24 (concluding that a plaintiff is not bound in any sense by the class definition in her complaint).
25 And at bottom *Berlowitz's* statement is supported by precisely what it cited: nothing.

1 **II. The BIPA does not require any individualized showing of injury in this case that**
2 **would defeat predominance.**

3 Facebook's principal argument against certification is that, following an intermediate
4 Illinois court's decision in *Rosenbach v. Six Flags Entm't Corp.*, 2017 IL App (2d) 170317, any
5 proof of "statutory injury" will necessarily be individualized. (Opp. at 10-12.) In the first place,
6 this is a merits question that, as Facebook presents it (e.g., Opp. at 12), appears to be more of a
7 fatal similarity than a fatal dissimilarity. *See Ochoa v. McDonald's Corp.*, 2016 WL 3648550, at
8 *4 (N.D. Cal. July 7, 2016). Indeed, if a violation of each class member's privacy rights did not
9 establish injury under the BIPA, all class members claims would fail in unison. Thus,
10 predominance is met.

11 Regardless, Facebook's reliance on *Rosenbach* is misplaced. *Rosenbach* is a carefully
12 cabined opinion where the court noted that an alleged "injury or adverse effect [under BIPA]
13 need not be pecuniary," *id.* ¶ 28, and that "harm or injury to a privacy right" – which the plaintiff
14 there had *not* alleged – could suffice, *id.* ¶ 20 n.1. In other words, so long as Facebook's conduct
15 constitutes an invasive of privacy, *Rosenbach* does not apply.

16 Unlike in *Rosenbach*, each Plaintiff here testified that they believed Facebook's
17 collection of scans of their facial geometry to be an invasion of privacy. (*See* Exhibit 1, Excerpts
18 of the Deposition of Carlo Licata, at 130:21-131:7, 149:22-150:5; Exhibit 2, Excerpts of the
19 Deposition of Nimesh Patel, at 175:5-9, 175:25-176:10; Exhibit 3, Excerpts of the Deposition of
20 Adam Pezen, at 160:21-161:16, 165:8-17.) Attempting to misdirect, Facebook points to
21 testimony from the proposed named plaintiffs regarding their perceived utility of Facebook's
22 tagging feature. But that's irrelevant. No matter how useful a person may find the tagging feature
23 to be, the unconsented collection of biometric data, as Plaintiffs testified, is unquestionably an
24 invasion of privacy.

25 Regardless, it is undisputed that each Class and Subclass member was subject to the same
26 conduct that invaded the privacy of the named plaintiffs. In a variety of circumstances, courts
27 have not hesitated to conclude that whether an act or type of act was invasive of privacy presents
28 a common question. *E.g., In re Lenovo Adware Litig.*, 2016 WL 6277245, at *18 (N.D. Cal. Oct.

1 27, 2016); *Opperman v. Path, Inc.*, 2016 WL 3844326, at *4, *12 (N.D. Cal. July 15, 2016);
2 *Mirkarimi v. Nevada Property I, LLC*, 2015 WL 5022327, at *2 (S.D. Cal. Aug. 24, 2015);
3 *Tabata v. Charleston Area Med. Ctr., Inc.*, 759 S.E.2d 459, 466-67 (W. Va. 2014). The same
4 result is appropriate here.

5 Furthermore, there is also good reason to believe that the Illinois Supreme Court would
6 reject *Rosenbach*'s reasoning. *See Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1047-
7 48 (9th Cir. 2013) (observing that single decision of intermediate state court was merely
8 evidence of proper interpretation of state law and declining to follow decision in light of contrary
9 evidence). Illinois courts have long recognized that an individual is "aggrieved" when their legal
10 rights are violated. *See Am. Surety Co. v. Jones*, 51 N.E.2d 122, 126 (Ill. 1943) ("aggrieved"
11 person is "a person who is immediately aggrieved by the act done, ... and not one who is only
12 consequently aggrieved") (quotations omitted); *In re Appointment of Special Prosecutor*, 902
13 N.E.2d 730, 740 (Ill. App. Ct. 2009) (a party is "aggrieved in the legal sense when [a] legal right
14 has been invaded"); *Greeling v. Abendroth*, 813 N.E.2d 768, 772 (Ill. App. Ct. 2004)
15 ("aggrieved" means to "suffer [] from an infringement or denial of legal rights"); *Chi. Area*
16 *Council of Boy Scouts of Am. v. City of Chi. Comm'n on Human Relations*, 748 N.E.2d 759, 770
17 (Ill. App. Ct. 2001). *Rosenbach* doesn't address any of this precedent.

18 *Rosenbach* also ignores, and arguably splits with, *Doe v. Chand*, 781 N.E.2d 340 (Ill.
19 App. Ct. 2002). Interpreting a nearly identical right of action provision in a related statute, *see*
20 410 Ill Comp. Stat. 305/13, which is identical to 740 Ill. Comp. Stat. 14/20 but for the amount of
21 available damages, the court in *Doe* held that the statutory "amounts can be recovered without
22 proof of actual damages." 781 N.E.2d at 351. That reasoning is incompatible with *Rosenbach*'s
23 requirement that some consequence is necessary to invoke the BIPA's identically worded right
24 of action.

25 In the face of the overwhelming weight of Illinois precedent, *Rosenbach* relied on two
26 federal decisions and a decision of the Wisconsin court of appeals. The principal federal decision
27 discussed in *Rosenbach* is *McCullough v. Smarte Carte, Inc.*, 2016 WL 4077108 (N.D. Ill. Aug.
28 1, 2016). (The court also cited *Vigil v. Take-Two Interactive Software*, 235 F. Supp. 3d 499, 519-

1 21 (S.D.N.Y. 2017), but that decision largely adopted *McCullough*'s analysis.) *McCullough*,
2 however, mistakenly relied on the meaning of "aggrieved" in other Illinois statutes that, unlike
3 BIPA, *explicitly define* the term to require an injury resulting from a violation of the statute. *See*
4 2016 WL 4077108, at *4 (citing 70 Ill. Comp. Stat. 405/3.20). The legislature's choice not to
5 define "aggrieved" in the BIPA reflects an intent to adopt the ordinary, or historically
6 understood, meaning of the word. *Hartney Fuel Oil Co. v. Hamer*, 998 N.E.2d 1227, 1234 (Ill.
7 2013) ("Words should be given their plain and obvious meaning unless the legislative act
8 changes that meaning."). Without a definition, "aggrieved" identifies those individuals whose
9 rights were violated, it doesn't create a consequential harm requirement. Given the weak support
10 for its conclusion, this Court should conclude that *Rosenbach*'s analysis would be rejected by the
11 Illinois Supreme Court. *See Allied Waste Servs. of N. Am., LLC v. Tibble*, 177 F. Supp. 3d 1103,
12 1109 (N.D. Ill. 2016) (rejecting recent decisions of Illinois Appellate Court because those
13 decisions implicitly conflicted with the past approach of the Illinois Supreme Court on the same
14 issue).¹

15 Finally, Facebook wrongly assumes that any need for individualized inquiry on the
16 question of "aggrievement" necessarily destroys predominance. Predominance requires a
17 comparative inquiry. *See Marlo v. United Postal Serv., Inc.*, 251 F.R.D. 476, 483 (C.D. Cal.
18 2008). When "significant aspect[s]" of a case like this one can be resolved on a classwide basis,
19 class certification is ordinarily appropriate. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022
20 (9th Cir. 1998). And resolving whether Facebook's conduct invaded an individual's privacy is a
21 simple matter, likely requiring just a sworn statement from a class member. Thus, even if
22 Facebook is right on the merits, there's no reason to think that literal application of *Rosenbach*
23 destroys the benefits created by classwide litigation of the common issues. Thus, certification
24 would nevertheless be appropriate.

25
26
27 ¹ If the Court has any doubts about the correct interpretation of Illinois law, it may make sense
28 to stay decision pending the resolution of the appeal in *Sekura v. Krishna Schaumberg Tan, Inc.*,
No. 18-1075, which is pending in the Illinois Appellate Court's First District.

1 **III. The supposed need for a “photo by photo” analysis to confirm class membership**
 2 **does not defeat predominance or superiority.**

3 Facebook next decries the need for a “photo by photo” analysis. (Opp. at 15-19.)²

4 [REDACTED]

5 [REDACTED]

6 [REDACTED] The argument appears to be that the class is overbroad. *See*
 7 *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1135-38 (9th Cir. 2016).

8 But Facebook overstates the issue. In the first place, Facebook’s argument is premised in
 9 part on the notion that a “scan of face geometry” occurs only when the scan recognizes a face in
 10 a picture. [REDACTED]

11 [REDACTED] *See* Exhibit 5, Rebuttal Expert Report of
 12 Jeffrey S. Dunn, at 8-9, 10-14, 24.) And even if Facebook is correct, Facebook’s evidence
 13 doesn’t demonstrate any predominance issue. The odds that Facebook’s analysis of a single
 14 picture failed to inflict an invasion of a class member’s biometric privacy are quite different from
 15 the odds that Facebook’s conduct wasn’t injurious with respect to the dozens if not hundreds of
 16 pictures of a single class member that were uploaded to Facebook. In other words, Facebook’s
 17 evidence about the number of faces recognized in uploaded photos doesn’t come close to

18
 19 ² Facebook grossly overstates its position when it asserts that “every element” of liability
 20 requires photo-by-photo review. (Opp at 19.) Whether the data generated by Facebook’s facial-
 21 recognition software qualifies as a biometric identifier, for instance, is a question that can easily
 22 be answered without looking at every photo, as is the question whether Facebook has obtained
 23 consent to collect a class member’s biometrics. In truth, this photo-by-photo review bears only
 24 on the amount of damages a class member would be entitled to. And “the presence of
 25 individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3).” *Leyva v.*
 26 *Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

24 ³ [REDACTED]

1 establishing the kind of overbreadth necessary to defeat predominance. *See id.* at 1136-38. And,
2 at all events, Facebook’s concerns can be accommodated by simply construing the phrase
3 “appeared in” within the class definition to mean those whose faces have been detected by
4 Facebook’s technology.⁴ *Holman v. Experian Info. Sols., Inc.*, 2012 WL 1496203, at *8 (N.D.
5 Cal. Apr. 27, 2012) (“District courts are permitted to limit or modify class definitions to provide
6 the necessary precision.”).

7 Facebook hints that these same concerns render the class action unmanageable. (Opp. at
8 16.) But given the amount of information Facebook collects on users, it isn’t clear why a “photo
9 by photo” review would be burdensome or unmanageable. [REDACTED]

10 [REDACTED]
11 [REDACTED] In other words, a “photo by photo”
12 claims process would be exactly like any claims process that requires the parties to consult the
13 defendant’s records. *See, e.g., In re Community Bank of N. Va. Mortg. Lending Practices Litig.*,
14 795 F.3d 380, 397 (3d Cir. 2015) (approving process for identifying class members that required
15 “consult[ing] CBNV’s business records and then follow[ing] a few steps”); *see also Briseno*, 823
16 F.3d at 1133 (approving a claims process that permitted class members to self-identify through
17 affidavits which the defendant would have the opportunity to test adversarially). Facebook seems
18 to think this case is different because its technology has been “inconsistent” in the past, but that
19 argument again relies on the faulty premise that only recognized faces have been “scanned.” The
20 default rule, of course, is that class certification should not be denied on manageability grounds
21 except as a last resort. *Id.* at 1128. Facebook provides no compelling reason to displace the
22 default rule here.

23 _____
24 ⁴ Facebook’s brief argument about paper prints (Opp. at 18-19) invokes similar concerns.
25 Facebook implicitly acknowledges that a substantial majority of the photos uploaded to
26 Facebook are digital photos to which the statute’s exception for “photographs” does not apply.
27 As to individuals who appear in digital uploads, the class is similarly situated with respect to
28 Facebook. But Facebook believes the relative handful of scanned paper prints undercuts this
similarity. Again, as in *Torres*, the argument doesn’t defeat certification unless Facebook can
tender evidence permitting the inference that a substantial portion of the class appears *only* in
scanned paper prints. Facebook provides no reason to believe that such individuals exist in great
numbers, if at all.

1 Finally, it bears noting that none of Facebook’s concerns about photo-by-photo review
2 have anything to do with the Subclass. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 **IV. Extraterritoriality concerns do not stand in the way of certification.**

7 Facebook suggests (Opp. at 17-18) that Illinois’s presumption against extraterritoriality
8 will present too many individualized issues. But both the proposed Class and Subclass are
9 premised in the first instance on Illinois citizenship. Plaintiffs have made clear in two previous
10 filings their position that the proposed Class and Subclass definitions appropriately account for
11 the legislature’s intent on the scope of the BIPA. (Dkt. 272, at 12-20; Mem. at 12-14.)
12 Facebook’s contrary position, particularly as expressed in its opposition to class certification,
13 cannot be squared with the intent of the Illinois legislature, and should be rejected.

14 **V. Facebook’s damages argument is meritless.**

15 Facebook’s suggestion that Plaintiffs’ damages theory precludes class treatment (Opp. at
16 19-21) is nonsense. First, the notion that the potential for a \$1000 or \$5000 damages award is
17 sufficient incentive to pursue individual litigation lacks support in appellate precedent, the broad
18 consensus of district court opinions, and common sense. *See, e.g., Leyva*, 716 F.3d at 515
19 (concluding that a claim for “less than \$10,000” was small enough to counsel in favor of class
20 treatment). What’s more, the question isn’t whether \$1,000 is sufficient incentive to litigate
21 individually in a vacuum, but whether it is enough money *in the circumstances of this case* to
22 justify individual litigation. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017).
23 Here, a \$1,000 award is not a sufficient incentive to litigate “against funded defenses and with a
24 ... need for expert testimony.” *Id.*

25 Facebook suggests that the potential for an award of attorneys’ fees militates against class
26 certification (Opp. at 20), but courts have recognized that an award of fees can’t compensate for
27 many of the other burdens inherent in litigation, and so by itself is too thin a reed to support
28 denying class certification. *E.g., Fosnight v. LVNV Funding, Inc.*, 310 F.R.D. 389, 394 (S.D. Ind.

1 2015). And, as the Seventh Circuit has recognized, a fee-shifting provision encourages class
2 litigation, promoting the deterrent effects of consumer-protection statutes. *See Mace v. Van Ru*
3 *Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (“The attorney’s fee provision makes the class
4 action more likely to proceed, thereby helping to deter future violations.”).

5 Finally, due process is no impediment to certification (cf. Opp. at 20-21) because the
6 potential for a large aggregate damages award is generally an inappropriate consideration at the
7 class-certification stage. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 722 (9th Cir.
8 2010). *Bateman* instructs district courts only to examine whether class treatment is inconsistent
9 with legislative intent. Facebook suggests that Illinois legislature has evinced an intent *not* to
10 have BIPA claims litigated on a class basis by (1) inserting the word “aggrieved” into the right of
11 action and (2) providing for the recovery of statutory damages. This is interpretive alchemy. The
12 BIPA was enacted well after the Illinois statute providing for class actions was passed and says
13 nothing about the availability of class relief, and so, as in *Bateman*, the Court should assume that
14 the Illinois legislature presumed that the statute could be enforced through a class action. 623
15 F.3d at 717; *see Application of Rosewell*, 603 N.E.2d 681, 683 (Ill. App. Ct. 1992) (“Since the
16 Revenue Act does not expressly exempt tax objection proceedings from class actions, we will
17 not read into the statute such an exemption.”), *superseded by statute as stated in Fakhoury v.*
18 *Pappas*, 916 N.E.2d 1161 (Ill. App. Ct. 2009). In instances in which the Illinois legislature has
19 meant to preclude class litigation, it has used much clearer language. *See* 35 Ill. Comp. Stat.
20 200/23-15(a) (“no complaint [under this law] shall be filed as a class action”). Such language is
21 plainly absent from the BIPA. There is no indication that the legislature intended to encourage
22 individual enforcement of the BIPA at the expense of class litigation. *See also Bateman*, 623
23 F.3d at 718-19 (observing that refusing to certify a class under a statute that provided for both
24 statutory and actual damages would detract from both the compensatory and deterrent objectives
25 of the statute).

26 And, of course, if the Court is concerned about the potential aggregate damages award
27 available in this case, it retains the option to reduce the award after judgment to comport with
28 Due Process. As Judge Easterbrook reasoned, “an award that would be unconstitutionally

1 excessive may be reduced, but constitutional limits are best applied after a class has been
2 certified. Reducing recoveries by forcing everyone to litigate independently—so that
3 constitutional bounds are not tested, because the statute cannot be enforced by more than a
4 handful of victims—has little to recommend it.” *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948,
5 954 (7th Cir. 2006); *see, e.g., In re Hulu Privacy Litig.*, 2014 WL 2758598, at *23 (N.D. Cal.
6 June 17, 2014) (observing that the size of a damages award is best addressed after a class is
7 certified).

8 **VI. Facebook’s attacks on the Proposed Class Representatives are baseless.**

9 Facebook last argues in a perfunctory manner that none of the plaintiffs are qualified to
10 represent the proposed Class and Subclass (Opp. at 23-25), but these arguments can be discarded
11 quickly.

12 Facebook first observes that “no competent evidence” establishes any plaintiff’s
13 membership in the proposed Class or Subclass. But Facebook does not dispute either (1) that the
14 available evidence permits the inference of Class membership, and (2) that the plaintiffs are in
15 fact members of the proposed Class and Subclass. (Opp. at 23.) Facebook’s argument, then,
16 amounts to an argument that membership in a class may only be proved by direct evidence. But
17 circumstantial evidence can be used to prove any fact in federal point. *U.S. Postal Serv. Bd. of*
18 *Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). As with many of its other arguments, no rule
19 of law supports Facebook’s argument.

20 Facebook’s argument that the plaintiffs aren’t adequate representatives because, to
21 Facebook’s mind, they know little about the lawsuit has been soundly rejected by numerous
22 courts. “A named plaintiff does not need to have special knowledge of the case or possess a
23 detailed understanding of the legal or factual basis on which a class action is maintained.”
24 *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 110 (N.D. Cal. 2008). Here, the named plaintiffs have
25 demonstrated a basic understanding of the facts and legal theory of the case. (See Dkt. 255, Exh.
26 28, at 182:6-184:7 (Pezen discussing class’s legal theory regarding informed consent); Dkt. 255,
27 Ex. 29, at 149:21-150:5 (Licata discussing same); Dkt. 285, Ex. 9-10, at 187:2-3 (Patel
28 discussing same).) That is all that is required. *Id.* The testimony cited by Facebook demonstrates

1 no more than the plaintiffs’ “normal degree of trust in [their] counsel’s ability to handle the
2 complexities of legal process and [their] understandable reticence to micromanage [their]
3 lawyers’ activities.” *Bautista v. Valero Mktg. & Supply Co.*, 2017 WL 4418681, at *6 (N.D.
4 Cal. Oct. 4, 2017).

5 **CONCLUSION**

6 Both the proposed Class and Subclass should be certified, Plaintiffs named as class
7 representatives, and their attorneys appointed as Class Counsel.

8 Respectfully submitted,

9 **ADAM PEZEN, CARLO LICATA, and**
10 **NIMESH PATEL**, individually and on behalf of all
11 others similarly situated,

12 Dated: February 9, 2018

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Plaintiffs and the Putative Class
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