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8
9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN JOSE DIVISION**

12
13 **IN RE GOOGLE ADWORDS LITIGATION**

Case No. 08-cv-3369-EJD

**NOTICE OF MOTION AND MOTION
FOR (1) PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT, (2)
APPROVAL OF CLASS NOTICE, AND (3)
PROVISIONAL CERTIFICATION OF
SETTLEMENT CLASS; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: March 9, 2017
Time: 9:00 a.m.
Judge: Hon. Edward J. Davila
Courtroom: 4, 5th Floor

Action Filed: July 11, 2008

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NOTICE OF MOTION

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD HEREIN:

PLEASE TAKE NOTICE that on March 9, 2017 at 9:00 a.m., or as soon thereafter as this matter can be heard, in the Courtroom of the Honorable Edward J. Davila, United States District Judge for the Northern District of California, 280 South 1st Street, 5th Floor, Courtroom 4, San Jose, California 95113, plaintiffs Pulaski & Middleman, LLC, JIT Packaging, Inc., RK West, Inc., and Richard Oesterling (collectively, “Plaintiffs”) will and hereby do move this Court for an order pursuant to Federal Rule of Civil Procedure 23(e):

1. Granting preliminary approval to the settlement reached between Plaintiffs and defendant Google Inc. (“Google”) based upon the terms set forth in the Class Action Settlement Agreement (the “Settlement Agreement”) filed herewith;¹

2. Certifying, for settlement purposes only, the Settlement Class specified in the Settlement Agreement pursuant to Federal Rule of Civil Procedure 23;

3. Approving the parties’ proposed form and method of notice of the settlement to Settlement Class Members set forth in the Settlement Agreement;

4. Establishing a schedule for the dissemination of the notice program set forth in the Settlement Agreement to Settlement Class Members, as well as the deadlines and procedures for Settlement Class Members to object to, or opt-out of, the settlement;

5. Approving the parties’ proposed Claim Form and the procedures set forth in the Settlement Agreement for Settlement Class Members to submit claims;

6. Confirming the law firm of Schubert Jonckheer Kolbe LLP as Class Counsel;

7. Confirming Plaintiffs as Class Representatives;

8. Appointing Analytics LLC (“Analytics”) as Settlement Administrator and directing Analytics to carry out the duties and responsibilities of the Settlement Administrator as specified in the Settlement Agreement;

¹ The Settlement Agreement is submitted as Exhibit A to the Declaration of Noah M. Schubert, filed herewith. Capitalized terms not defined herein have the meanings set forth in the Settlement Agreement.

1 **I. INTRODUCTION**

2 Plaintiffs in this consolidated action respectfully submit for the Court’s preliminary
3 approval the proposed nationwide class action Settlement Agreement resolving this litigation.
4 Pursuant to the terms of the Settlement Agreement, Google has agreed to establish a \$22.5 million
5 non-reversionary Settlement Fund from which Class Members who submit valid claims will
6 receive cash payments.

7 The Settlement Agreement is the product of hard-fought litigation over the past eight years,
8 considerable discovery and motion practice, appellate proceedings before the U.S. Court of
9 Appeals for the Ninth Circuit, and extensive arm’s-length negotiations between the parties and
10 their informed counsel with the assistance of a distinguished and experienced mediator—Hon
11 Layn R. Phillips, U.S. District Judge (Ret.). As discussed below, the Settlement Agreement is fair,
12 reasonable, and adequate given the claims asserted and released, the alleged harm and estimated
13 restitution recoverable by Class Members had Plaintiffs prevailed at trial, and the parties’
14 respective litigation risks. The Settlement Agreement plainly falls well within the “range of
15 reasonableness” applicable at the preliminary approval stage. Furthermore, the settlement provides
16 for a robust, multi-pronged notice program, which is well-tailored to provide Class Members the
17 best notice practicable of the pendency of the case, the terms of the Settlement Agreement, Class
18 Counsel’s fee and expense application, the proposed Service Awards to the Class Representatives,
19 Class Members’ rights to object to any of the foregoing or opt out of the Settlement Agreement,
20 and how to submit a claim form. Moreover, Plaintiffs and their counsel strongly believe the
21 Settlement Agreement to be in the best interests of Class Members.

22 Accordingly, the Court should grant Plaintiffs’ motion and enter the proposed preliminary
23 approval order, submitted herewith.

24
25 **II. BACKGROUND**

26 **a. Plaintiffs’ Allegations and the Litigation History**

27 This is a class action against Google for alleged violations of California’s Unfair
28 Competition Law (“UCL”) (Cal. Bus. & Prof. Code §§ 17200 *et seq.*) and False Advertising Law

1 (“FAL”) (Cal. Bus. & Prof. Code §§ 17500 *et seq.*) in connection with Google’s AdWords
2 program for internet advertisers. Plaintiffs allege that Google failed to disclose to its AdWords
3 customers that it placed their ads on parked domains and error pages between July 11, 2004 and
4 March 31, 2008 and claim that such pages are of low quality. As a result of these practices,
5 Plaintiffs allege that they and the Class Members overpaid Google for advertising on these
6 websites and are owed restitution. Google denies these allegations.

7 The first of the several actions in this consolidated litigation was filed in July 2008 (*Levitte*
8 *v. Google*, No. 08-cv-03369 (N.D. Cal. July 11, 2008)). On February 25, 2009, the Court (Hon.
9 James Ware presiding) consolidated the *Levitte* action with (i) *RK West, Inc. v. Google*, No. 08-cv-
10 03452 (N.D. Cal. July 17, 2008), (ii) *Pulaski & Middleman, LLC v. Google*, No. 08-cv-03888
11 (N.D. Cal. Aug. 14, 2008), and (iii) *JIT Packaging, Inc. v. Google*, No. 08-cv-04543 (N.D. Cal.
12 Oct. 10, 2008) as *In re Google AdWords Litigation*. See Dkt. No. 40. The consolidation order
13 appointed Schubert Jonckheer Kolbe & Kralowec LLP (now Schubert Jonckheer & Kolbe LLP) as
14 interim class counsel. *Id.* Plaintiffs filed a consolidated complaint on April 24, 2009, which Google
15 answered on May 18, 2009. Plaintiffs amended their complaint twice thereafter, and on March 17,
16 2011, Judge Ware denied Google’s motion to dismiss Plaintiffs’ Third Amended Complaint,
17 holding that Plaintiffs “adequately alleged a cause of action for fraud under California law.” Dkt.
18 No. 235, p. 5.

19 Since filing this action, Plaintiffs conducted extensive discovery relating to the facts at
20 issue and class certification, including an analysis of almost one million pages of documents and
21 data produced by Google. Schubert Decl. ¶ 4. Plaintiffs also took the depositions of three Google
22 employees and two Google experts. *Id.* Plaintiffs also made several productions of documents to
23 Google, provided interrogatory responses, and were each deposed by Google between August 31,
24 2010 and September 22, 2010. Discovery was at times hotly-contested, with both parties filing
25 motions to compel additional discovery, which the Court granted on several occasions. See Dkt.
26 Nos. 125, 152, 174, 240. In connection with Plaintiffs’ motion for class certification, the parties
27 exchanged expert reports on October 4, 2010, and each of the parties’ experts was deposed
28 thereafter.

1 On March 14, 2011, Plaintiffs moved for certification of a class of all Google AdWords
2 customers who, during the period July 11, 2004 through March 31, 2008, were charged by Google
3 for clicks on their advertisements that Google placed on parked domains or error pages. Google
4 strongly opposed Plaintiffs' motion, and the Court held oral argument thereon on June 24, 2011.
5 Following additional supplemental briefing requested by the Court, on January 5, 2012, Plaintiffs'
6 class certification motion was denied. Dkt. No. 315. On May 4, 2012, the Court further denied
7 Plaintiffs' motion for leave to file a motion for reconsideration of the class certification decision.
8 Dkt. No. 326. Then, Plaintiffs petitioned the U.S. Court of Appeals for the Ninth Circuit for
9 permission to appeal the Court's denial of class certification under Federal Rule of Civil Procedure
10 23(f). On August 9, 2012, the Ninth Circuit granted Plaintiffs' petition. On September 21, 2015,
11 the Ninth Circuit reversed the Court's denial of class certification and remanded the case for
12 further proceedings. On December 8, 2015, the Ninth Circuit denied Google's petition for panel
13 rehearing and rehearing *en banc*. On March 1, 2016, Google filed a petition for a writ of certiorari
14 in the U.S. Supreme Court. On June 6, 2016, after briefing by the parties, the U.S. Supreme Court
15 denied Google's petition.

16 On August 25, 2016, the Court convened a case management conference. During that
17 CMC, the Court indicated its intention to formally certify the putative class in light of the Ninth
18 Circuit's reversal and to set a schedule for dissemination of class notice. The Court, however,
19 deferred orders on class notice until after a scheduled mediation, in the hope that the parties could
20 reach a settlement.

21 **b. Settlement Discussions, Mediation, and Resolution**

22 The parties first explored potential settlement in February 2011, after the parties had
23 engaged in extensive class certification document and deposition discovery (discussed above). At
24 the time that the parties participated in this mediation with Judge Phillips in San Francisco,
25 Google's motion to dismiss the Third Amended Complaint was pending. The parties could not
26 reach a settlement at that time.

27 During the course of litigation concerning class certification and subsequent appellate
28 proceedings, the parties further engaged in informal negotiations among themselves and with

1 Judge Phillips. However, the parties' settlement positions remained too far apart to reach a
 2 resolution. Following the Ninth Circuit's decision reversing the Court's class certification denial
 3 (and the U.S. Supreme Court's denial of Google's petition for a writ of certiorari), the parties
 4 attended a subsequent in-person mediation with Judge Phillips on October 31, 2016 in San
 5 Francisco. With Judge Phillips's assistance, the parties reached an agreement in principle at the
 6 conclusion of the mediation, the material elements of which were memorialized in a binding term
 7 sheet. The parties continued their negotiations, and, on February 23, 2017, they executed the
 8 Settlement Agreement. In the intervening months, the parties devoted substantial time and effort to
 9 negotiate all of the details of the proposed settlement.

11 **III. SUMMARY OF THE SETTLEMENT AGREEMENT**

12 **a. Class Definition**

13 Plaintiffs seek provisional certification of the Settlement Class,¹ defined in the Settlement
 14 Agreement as "all persons or entities located within the United States who, from July 11, 2004
 15 through March 31, 2008, had an AdWords account with Google and were charged for clicks on
 16 advertisements appearing on parked domains and/or error pages." Settlement Agreement, § 1.41.
 17 The proposed Settlement Class is identical to the proposed class in Plaintiffs' operative Third
 18 Amended Complaint. *See* Dkt. No. 166, ¶ 101. Google does not oppose certification of the above
 19 class for settlement purposes only. *See* Settlement Agreement, § 7.2.

20 **b. Monetary Relief**

21 The Settlement Agreement provides that Google will create a \$22.5 million non-
 22 reversionary Settlement Fund comprised of four components: (1) Settlement Payments to Class
 23 Members who submit valid and timely Claims Forms; (2) a Fee and Expense Award to Class
 24 Counsel; (3) proposed Service Awards to each of the Class Representatives; and (4) Notice and

25
 26 ¹ To be clear, Plaintiffs only seek that the Court make a preliminary determination regarding class
 27 certification of a settlement class in order to provide notice to absent class members. This Court
 28 should reserve the class certification decision for final approval of the Settlement. *See In re Nat.*
Football League Players Concussion Injury Litig., 775 F.3d 570, 583(3d Circ. 2014); William B.
 Rubenstein, 4 Newberg on Class Actions § 13:17 (5th ed. 2012).

1 Administration Costs. Class Members will receive Settlement Payments on a *pro rata* basis in
 2 proportion to the total amount they each spent on Google AdWords ads that were placed on parked
 3 domains and error pages during the Settlement Class Period (July 11, 2004 through March 31,
 4 2008). Accordingly, the amount of each settlement payment will depend on both the number and
 5 size of valid claims.

6 If the total payment amount from claims exceeds the Net Settlement Fund,² the amount of
 7 the Settlement Payment to each claimant will be reduced on a *pro rata* basis. Settlement
 8 Agreement § 2.4.1. By way of illustration, if the Net Settlement Fund totals approximately \$15
 9 million and Claimants submit approved claims totaling approximately \$30 million in amounts
 10 spent on Google AdWords ads placed on parked domains and error pages during the Settlement
 11 Class Period, then each Claimant will receive a settlement payment totaling 50% of the total
 12 amount they spent on such Google ads.³

13 It is possible that Claimants will submit approved claims totaling an amount less than the
 14 Net Settlement Fund. Schubert Decl. ¶ 11. In this instance, Claimants will receive 100% of the
 15 amounts they are owed from their Claims as settlement payments (i.e., a full refund of the total
 16 amount they paid for ads placed on parked domains and error pages during the Settlement Class
 17 Period). In this event, residual amounts will exist in the Net Settlement Fund, which will be further
 18 distributed. *See* § III(h), below.

19 Settlement Class Members submitting Claims can elect to receive settlement payments
 20 through an electronic transfer of funds to their bank account through the Automated Clearing
 21 House system (“ACH”), by check, or as an AdWords credit (for current Google customers).
 22 Settlement Class Members may complete and submit a claim form online through the settlement
 23

24
 25 ² Net Settlement Fund is the amount remaining in the \$22.5 million Settlement Fund after
 26 deducting any Court-approved fee and expense award to Class Counsel, service awards to the
 27 Class Representatives, and Notice and Administration Costs. The amounts intended to be sought
 for these categories are discussed below. *See* §§ III(d), (f)-(g).

28 ³ No settlement payment will be made to a Settlement Class Member if the total amount of that
 payment would be less than \$1.00 *See* Settlement Agreement § 2.5.3.

1 website, www.AdWordsClassAction.com, or by mail to the Settlement Administrator. The
2 deadline for submitting claims will be 60 days after the notice program is complete.

3 **c. Release**

4 In exchange for the benefits provided by the Settlement Agreement, Plaintiffs and
5 Settlement Class Members will release Google of all claims or causes of action that were (or could
6 have reasonably been) alleged in this Action, including all acts, omissions, or other conduct related
7 to the placement of any Settlement Class Members' Google AdWords ads on any parked domains
8 or error pages during the Settlement Class Period. *See* Settlement Agreement, §§ 1.34, 6.2-6.5.
9 This release shall not be construed to bar the plaintiffs in a related case, *Woods v. Google*, No.
10 5:11-cv-01263-EJD (N.D. Cal.), from pursuing the separate claims alleged in that action.

11 **d. Notice and Settlement Administration Expenses**

12 Subject to the Court's approval, the parties have selected Analytics as the Settlement
13 Administrator which will provide notice and claims administration in connection with the
14 proposed settlement. Pursuant to the Settlement Agreement, notice and administrative costs will be
15 paid from the Settlement Fund. Based on a projected administrative fee and expense proposal,
16 Plaintiffs currently anticipate such costs to be approximately \$280,000. Plaintiffs believe this
17 estimate is reasonable under the circumstances and in relation to the value of the Settlement Fund
18 given the size of the Settlement Class and that the notice plan provides for multiple methods of
19 reaching Settlement Class Members. *See* § VII, below.

20 **e. Objection Procedures**

21 Any Class Member may object to the Settlement Agreement, Class Counsel's application
22 for attorneys' fees and costs, or the request for Class Representative Service Awards. To be
23 considered, an objection must be in writing, submitted online or by mail to the Claims
24 Administrator by the deadline proscribed by the notices,⁴ and must include all of the information
25 proscribed by the Website Notice. *See* Settlement Agreement, § 5.1.1.

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28 ⁴ The parties propose that the deadline to send objections be 60 days after the Notice Date set by
the Court.

1 **f. Service Awards**

2 Class Counsel will request service awards of up to \$5,000 each for the four Class
3 Representatives to compensate them for their time and efforts in the litigation, including appearing
4 for their depositions and producing documents. Any such service award is separate and apart from
5 any Settlement Payment the Class Representatives may receive by submitting a settlement claim.
6 Pursuant to the Settlement Agreement, any Service Awards to the Class Representatives will be
7 paid from the Settlement Fund. As will be more fully explained in their forthcoming motion for
8 attorneys' fees and expenses,⁵ Class Counsel believes that these requested service awards are
9 commensurate with the Class Representatives' participation in the litigation and in achieving the
10 Settlement on behalf of the Class.

11 **g. Attorneys' Fees and Expenses**

12 Class Counsel will apply for an award of reasonable attorneys' fees and expenses in
13 amounts not to exceed \$6.5 million and \$700,000, respectively. Pursuant to the Settlement
14 Agreement, all attorneys' fees and expenses awarded to Class Counsel will be paid from the
15 Settlement Fund. As will be more fully explained in their forthcoming motion for attorneys' fees
16 and expenses, Class Counsel believe that the amounts sought are fair, reasonable, and appropriate
17 in light of the their commitment of time and resources in prosecuting the action, the results
18 achieved for the Class Members, the risks that Class Counsel assumed in taking on this contingent
19 matter, the complexity of the issues involved, and applicable law. Class Counsel notes that their
20 lodestar calculation since inception of this class action lawsuit—combined with that of their co-
21 counsel—currently exceeds \$6.5 million, the maximum amount of fees they intend to seek in
22 connection with their anticipated fee and expense motion. Google has taken no position on this
23 request and reserves all rights until the motion for attorneys' fees and expenses is filed.

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27 ⁵ The parties propose that the deadline for Plaintiffs to file their motion for attorneys' fees, costs,
28 and Service Awards to the Class Representatives be 30 days after the Notice Date.

1 **h. Residual Settlement Funds and Proposed *Cy Pres* Recipients, If Any**

2 The Settlement Agreement provides that if any residual funds remain in the Settlement
3 Fund after all Settlement Class Members who have submitted claims have received their *pro rata*
4 share of settlement funds (based on the amount each Class Member spent on AdWords ads placed
5 on parked domains and error pages) such funds (together with any funds from failed ACH transfers
6 and uncleared physical checks) will be distributed as follows:

- 7 (1) If the residual funds exceed \$100,000, they will be distributed to Settlement
8 Class Members who did not submit a Claim but who have an active Google
9 AdWords account (i.e., have placed an ad within the past six months).⁶
10 Settlement Agreement, § 2.6.1.
- 11 (2) If the residual funds are less than \$100,000, they will be evenly distributed
12 to the Public Justice Foundation and Public Counsel as *cy pres* recipients,
13 subject to Court approval. Settlement Agreement § 2.6.3.

14 Plaintiffs believe that the Public Justice Foundation and Public Counsel are appropriate *cy*
15 *pres* recipients if any such residual amounts totaling less than \$100,000 remain in the Net
16 Settlement Fund after distributions to Settlement Class Members. As will be more fully explained
17 in their anticipated final approval motion, Plaintiffs believe these organizations bear a substantial
18 nexus to the interests of the Settlement Class Members; they are consumer advocates and litigate
19 against alleged unfair business practices. *See, e.g.,* publicjustice.net and publiccounsel.org.

21 **IV. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL.**

22 Rule 23 of the Federal Rules of Civil Procedure requires court approval of any class action
23 settlement. Fed. R. Civ. P. 23(e); *see also Officers for Justice v. Civil Service Comm. of the City*
24 *and County of San Francisco*, 688 F.2d 615, 623-24 (9th Cir. 1982). To this end, the Ninth Circuit
25 has declared a strong judicial policy in favor of class action settlements. *See Class Plaintiffs v. City*

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28 ⁶ No residual settlement payment will be made to a Settlement Class Member if the total amount of that payment would be less than \$5.00. *See* Settlement Agreement § 2.6.2.

1 of *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). This public policy further means that the Ninth
2 Circuit “has long deferred to the private consensual decision of the parties” to settle. *See Rodriguez*
3 *v. W. Publ’g Corp.*, 563 F.3d 947, 965 (9th Cir. 2009); *see also Linney v. Cellular Alaska P’ship*,
4 151 F.3d 1234, 1238 (9th Cir. 1998) (“strong judicial policy that favors settlements, particularly
5 where complex class action litigation is concerned”).

6 The procedure for review of a proposed class action settlement is a well-established three-
7 step process. First, the Court must make a preliminary determination whether the proposed
8 settlement appears to be fundamentally fair, adequate, and reasonable, and is “within the range of
9 possible approval.” *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008); *see Fed. R. Civ. P.*
10 23(e)(1)(c); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). The Court need not
11 conduct a full-blown fairness analysis at this juncture; instead, it need only determine, by reference
12 to traditional fairness standards, that the settlement appears fair enough to warrant steps two and
13 three in this process—notifying the putative class members of its proposed terms and proceeding
14 with a fairness hearing. *Linney*, 151 F.3d at 1242; *Torrisi v. Tucscan Elec. Power Co.*, 8 F.3d
15 1370, 1375 (9th Cir. 1993); *Churchill Village LLC v. General Electric*, 361 F.3d 566, 575-76 (9th
16 Cir. 2004). The Court may preliminarily approve a settlement where it “appears to be the product
17 of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly
18 grant preferential treatment to class representatives or segments of the class, and falls within the
19 range of possible approval.” *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal.
20 2007).

21 Among the relevant factors the Court may consider and balance under these Rule 23(e)
22 standards are: (1) the strength of Plaintiffs’ case; (2) the risk, expense, complexity, and likely
23 duration of further litigation; (3) the risk of maintaining class action status throughout trial; (4) the
24 amount offered in settlement; (5) the extent of discovery completed; (6) the stage of the
25 proceedings; and (7) the experience and views of counsel. *See Staton v. Boeing Co.*, 327 F.3d 938,
26 959 (9th Cir. 2000); *In re Apple In-App Purchase Litig.*, 2013 U.S. Dist. LEXIS 63138, at *11
27 (N.D. Cal. May 2, 2013). Here, the proposed Settlement Agreement easily satisfies the preliminary
28 approval standard because it: (1) is the product of hard-fought, arm’s-length negotiations between

1 the parties, reached after thorough investigation by Class Counsel of the facts and the law and
 2 adversarial motion practice; (2) provides substantial financial consideration for the asserted claims
 3 in this action, which is fair, reasonable, and adequate given the parties' respective litigation risks
 4 and the recoverable restitution potentially available to Class Members; and (3) was negotiated (and
 5 is recommended) by experienced counsel.

6
 7 **a. The Settlement Is the Product of Arm's-Length
 Negotiations After a Thorough Investigation.**

8 Before approving a class action settlement, the Court "must reach a reasoned judgment that
 9 the proposed agreement is not the product of fraud or overreaching by, or collusion among, the
 10 negotiation parties." *City of Seattle*, 955 F.2d at 1290. Where a proposed settlement is the product
 11 of arms-length negotiations conducted by capable and experienced counsel, the Court should begin
 12 its analysis with a presumption that the settlement is fair and reasonable. *See In re Toys R Us-Del.,
 13 Inc. FACTA Litig.*, 295 F.R.D. 438, 450 (C.D. Cal. 2014).

14 This presumption unquestionably applies here because the material terms of the Settlement
 15 Agreement were negotiated over two full-day mediation sessions between experienced counsel
 16 possessing a firm understanding of the strengths and weaknesses of the claims and defenses in this
 17 action, is the product of significant give and take by the parties, and was reached only after
 18 significant and active involvement by the mediator, a retired U.S. District Court Judge.

19 The Settlement Agreement is informed by—and the result of—Class Counsel's extensive
 20 investigation and discovery regarding the legal and factual issues in this litigation. As reflected
 21 above, prior to entering mediation in February 2011, Class Counsel had already analyzed nearly
 22 one million pages of documents and data produced by Google central to Plaintiffs' claims, deposed
 23 several Google employees and experts, litigated multiple discovery motions, and retained an expert
 24 for class certification purposes. Schubert Decl. ¶ 4-5. Plaintiffs were also deposed by Google
 25 before the February 2011 mediation. *Id.* Additionally, at the time, the parties were in the midst of a
 26 contested motion to dismiss Plaintiffs' Third Amended Complaint. The parties could not reach a
 27 settlement then, given their respective positions and the uncertainty regarding the pending motion
 28 to dismiss and looming class certification issues. *Id.* Consequently, the parties continued litigating,

1 received an order denying Google’s motion to dismiss, and engaged in substantial motion and
2 appellate work regarding class certification. This extensive discovery and substantial litigation of
3 issues central to the litigation informed Plaintiffs and their counsel in mediating and negotiating
4 the proposed Settlement Agreement in October 2016 (and in the months thereafter). *Id.* Indeed, the
5 strengths and weaknesses of the parties’ respective positions were fully vetted during the
6 mediation process. *Id.* During these negotiations, Class Counsel zealously advanced Plaintiffs’
7 positions and was fully prepared to continue to litigate rather than accept a settlement that was not
8 in the best interests of the class. *Id.*

9 In addition, that the Settlement Agreement was reached with the active involvement of
10 Judge Phillips, acting as mediator, further demonstrates the non-collusive nature of the settlement.
11 *See, e.g., In re Amtel Corp. Derivative Litig.*, 2010 U.S. Dist. LEXIS 145551, at *43 (N.D. Cal.
12 Mar. 31, 2010) (“Judge Phillips’ participation [as mediator] weighs considerably against any
13 inference of a collusive settlement.”); *G.F. v. Contra Costa Cnty.*, 2015 U.S. Dist. LEXIS 100512,
14 at *43 (N.D. Cal. July 30, 2015) (“the assistance of an experienced mediator in the settlement
15 process confirms that the settlement is non-collusive”).

16
17 **b. The Amount of the Settlement Fund Is Fair, Reasonable,
and Adequate under the Circumstances.**

18 The Settlement Agreement provides substantial monetary relief to Settlement Class
19 Members and is well within the “range of reasonableness.” Under terms of the Settlement
20 Agreement, Settlement Class Members who submit timely and valid claims will each receive a *pro*
21 *rata* share of the Net Settlement Fund, which is tied the total amount each claimant spent on
22 Google AdWords ads that were placed on parked domains and error pages during the Settlement
23 Class Period. Under the circumstances—including the estimated restitution recoverable by Class
24 Members had Plaintiffs prevailed at trial and the attendant risks and delay of further litigation,
25 trial, and appeals—the Settlement Agreement is eminently fair.

26 To put the \$22.5 million Settlement Fund in perspective, Plaintiffs estimate (through
27 consultation with their damages expert, Robert Kneuper, Ph.D.) that had they prevailed at trial and
28 established liability consistent with their allegations in the operative Third Amended Complaint,

1 restitution to the class would be in the range of \$45 million to \$77 million. *See* Declaration of
2 Robert Kneuper, Ph.D., ¶¶ 7-9, filed herewith.⁷ Accordingly, the \$22.5 settlement recovery is an
3 outstanding result—representing between 29.2% and 50% of the relief Plaintiffs could have
4 recovered at trial, assuming that Plaintiffs prevail both on the merits and on their damages theories,
5 which are each vigorously disputed by Google —while avoiding the myriad of risks, delays, and
6 hurdles of a trial.

7 Specifically, Plaintiffs contend in this action that Google violated the UCL and FAL in
8 connection with its AdWords program for Internet advertisers by failing to disclose to its
9 customers the placement of their ads on low-quality parked domain and error pages. Plaintiffs
10 allege that these advertisers therefore overpaid and are owed restitution. Google denies each of
11 these allegations and any liability. And had this litigation continued, Plaintiffs further expected
12 Google to raise numerous defenses, including that the placement of AdWords customers’ ads on
13 such pages was, in fact, properly disclosed and that a reasonable customer would not be otherwise
14 misled by these practices.

15 Critically, Google indicated that it intended to move to decertify the class, based on
16 purported changes in relevant class action jurisprudence, thereby potentially unwinding Plaintiffs’
17 hard-fought victory at the Ninth Circuit. *See* Joint Case Management Statement, Dkt. No. 353,
18 pp. 3-5 (filed Aug. 18, 2016). Even if denied, the issue could again be raised on appeal, potentially
19 further delaying any relief to class members for years. Accordingly, Plaintiffs’ ability to recover
20 class-wide still remained vulnerable. Plaintiffs further expected that continued prosecution of this
21 action would likely result in competing (and time-consuming) motions for summary judgment on
22 various grounds. And at trial, Google would surely again dispute Plaintiffs’ damages models (and
23 the amount of restitution available), subjecting Plaintiffs’ experts to further scrutiny, as well as
24 potential motions to exclude such testimony.

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27 ⁷ Mr. Kneuper bases his preliminary restitution estimate upon the review of documents produced in
28 this litigation, the parties’ expert reports, data relating to Google’s advertising program, and
publicly available materials. *See id.*, ¶¶ 6, 11-15.

1 Although Plaintiffs and Class Counsel are confident in the strength of their claims, the
 2 appropriateness of class action treatment, and their restitution analysis, continued litigation of this
 3 action through trial and appeals would pose significant risks. In light of these risks, the \$22.5
 4 million Settlement Fund—representing between 29.2% and 50% of the relief Plaintiffs could have
 5 recovered at trial—is an outstanding result for the Settlement Class.

6 **c. The Recommendation of Experienced Counsel Favors Approval.**

7 In considering a proposed class settlement, “[t]he recommendations of plaintiffs’ counsel
 8 should be given a presumption of reasonableness.” *Knight v. Red Door Saloons*, 2009 U.S. Dist.
 9 LEXIS 11149, at *11 (N.D. Cal. Feb. 2, 2009). This presumption exists because “[p]arties
 10 represented by competent counsel are better positioned than courts to produce a settlement that
 11 fairly reflects each party’s expected outcome in litigation.” *Rodriguez*, 563 F.3d at 967. Here,
 12 Class Counsel firmly believes that the proposed settlement is an exceptional result for Settlement
 13 Class Members and thus strongly endorses the Settlement Agreement as fair, adequate, and
 14 reasonable. Schubert Decl. ¶ 12.

15 Class Counsel has extensive experience litigating and settling consumer class actions and
 16 other complex matters. *See* Schubert Decl., Ex. B. They have conducted an extensive investigation
 17 into the factual and legal issues raised in this consolidated action. The fact that qualified and well-
 18 informed counsel endorse the settlement as being fair, reasonable, and adequate weighs in favor of
 19 the Court preliminarily approving the proposed Settlement.

20
 21 **V. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED.**

22 Before granting preliminary approval, the Court must preliminarily determine that the
 23 proposed Settlement Class is proper for settlement purposes and thus satisfies the requirements of
 24 Federal Rule of Civil Procedure 23(a) and 23(b)(3). *See Staton*, 327 F.3d at 952; *Amchem Prods.*
 25 *Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Here, the Court has not formally entered an order
 26 certifying this case as a class action, although it indicated at the August 25, 2016 case management
 27 conference its intention to do so in light of the Ninth Circuit’s September 21, 2015 reversal of the
 28 Court’s earlier order denying class certification.

1 Pursuant to the Federal Rules, there are four preliminary requirements for class
2 certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.
3 See Fed. R. Civ. P. 23(a)(1)-(4). If these are satisfied, the Court must then examine whether the
4 requirements of Rule 23(b)(1), (b)(2), or (b)(3) are satisfied. In its January 5, 2012 order denying
5 Plaintiffs' class certification motion, the Court found that Plaintiffs had satisfied the standards
6 under Rule 23(a) (numerosity, commonality, typicality, and adequacy), while the remaining Rule
7 23(b) requirement was addressed by the Ninth Circuit, as discussed below. Google agrees that the
8 Settlement Class should be certified under Federal Rule of Civil Procedure 23 for settlement
9 purposes only but otherwise disputes Plaintiffs' positions regarding class certification. See
10 Settlement Agreement, § 7.2.

11 **a. The Numerosity Requirement Is Satisfied.**

12 Numerosity is satisfied where "the class is so numerous that joinder of all members is
13 impracticable." Fed. R. Civ. P. 23(a)(1). "[G]enerally if the named plaintiff demonstrates that the
14 potential number of plaintiffs exceeds 40,' the numerosity requirement is satisfied." *Miletak v.*
15 *Allstate Ins. Co.*, 2010 WL 800579, at *10 (N.D. Cal. Mar. 5, 2010) (citation omitted); see also
16 *O'Shea v. Epson Am., Inc.*, 2011 U.S. Dist. LEXIS 105504, at *2 (C.D. Cal. Sept. 19, 2011).
17 Plaintiffs believe that the Settlement Class totals approximately 2.33 million members. Schubert
18 Decl. ¶ 10. And the Court previously found that the numeroisty requirement was satisfied. See Dkt.
19 No. 315, p. 19.

20 **b. The Commonality Requirement Is Satisfied.**

21 The second threshold to certification requires that "there are questions of law or fact
22 common to the class." Fed. R. Civ. P. 23(a)(2); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir.
23 2001). This requirement is met through the existence of a "common contention" that is of "such a
24 nature that it is capable of classwide resolution[.]" *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338,
25 350 (2011). In their class certification motion, Plaintiffs presented the following question which
26 they argued was capable of classwide resolution: "whether Google's alleged omissions were
27 misleading to a reasonable AdWords customer." The Court agreed that this presented a valid
28 common question for purposes of the commonality requirement. See Dkt. No. 315, pp. 19-20.

1 **c. The Typicality Requirement Is Satisfied.**

2 Rule 23 next requires that the representative plaintiffs' claims are typical of those of the
3 putative class they seek to represent, ensuring that "the interest[s] of the name representative[s]
4 align[] with the interests of the class." *Wolin v. Jaguar Land Rover N. Am. LLC*, 617 F.3d 1168,
5 1175 (9th Cir. 2010); Fed. R. Civ. P. 23(a)(3). Under the requirement's "permissive standards,"
6 claims are typical if they are "reasonably co-extensive with those of absent class members; they
7 need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Here, the Class Representatives'
8 claims arise out of the same alleged omissions as do the claims of all Settlement Class Members:
9 Google's alleged failure to disclose that, regardless of whether a particular AdWords customer
10 chose to be placed in Google's "Search" or "Content" network, Google would place their ads on
11 parked domains and error pages, and charge them for clicks on those sites. Because the Plaintiffs'
12 claims involve the same legal claim based upon the same course of events as do the claims of all
13 class members, the Court found that the Plaintiffs' claims were sufficiently typical to satisfy Rule
14 23(a)(3). *See* Dkt. No. 315, p. 20.

15 **d. The Requirement of Adequate Representation Is Satisfied.**

16 The final Rule 23(a) prerequisite is that the proposed class representatives have and will
17 continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To
18 determine if representation is adequate, the Court must ask "(1) do the named plaintiffs and their
19 counsel have any conflicts of interest with other class members and (2) will the named plaintiffs
20 and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at
21 1020. Here, the Court already found no evidence that the Class Representatives or their counsel
22 had any conflicts of interest with the proposed class members. *See* Dkt. No. 315, p. 21. The Court
23 also found that Class Counsel has significant class action experience and was capable of fairly and
24 adequately representing the Class Representatives and the proposed class, thereby satisfying Rule
25 23(a)'s adequacy requirement. *Id.* Both Class Representatives and Class Counsel will continue to
26 adequately represent the interests of the proposed Settlement Class.

1 **e. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)**

2 In addition to meeting the requirements of Rule 23(a), Plaintiffs must also meet one of the
3 three requirements of Rule 23(b) to certify the proposed Settlement Class. *Zinser v. Accufix*
4 *Research Inst., Inc.*, 253 F.3d 1180, 1186, *amended by* 273 F.3d 1266 (9th Cir. 2001). Class
5 certification pursuant to Rule 23(b)(3) requires that “the questions of law and fact common to
6 members of the class predominate over any questions affecting only individual members, and that
7 a class action mechanism is superior to other available methods for the fair and efficient
8 adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). Both elements are satisfied here.

9 i. Common Questions of Law and Fact Predominate

10 The test under Rule 23(b)(3) evaluates whether “adjudication of common issues will help
11 achieve judicial economy.” *Aho v. AmeriCredit Financial Services, Inc.*, 2011 WL 5401799, at *9
12 (S.D. Cal. Nov. 8, 2011) (quoting *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th
13 Cir. 2009)) (internal citation omitted). The predominance inquiry “focuses on the relationship
14 between the common and individual issues and tests whether the proposed class [is] sufficiently
15 cohesive to warrant adjudication by representation.” *Vinole*, 571 F.3d at 944. Certification under
16 Rule 23(b)(3) is appropriate and encouraged “whenever the actual interests of the parties can be
17 served best by settling their differences in a single action.” *Hanlon*, 150 F.3d at 1022.

18 In its earlier order denying class certification, the Court concluded that the Plaintiffs did not
19 meet this predominance requirement, finding that the question of which advertisers among the
20 proposed class members were entitled to restitution would require individualized inquiries due to
21 the nature of restitutionary relief sought. *See* Dkt. No. 315, pp. 22-25. The Ninth Circuit
22 overturned this holding, finding that to the extent the Court rested its holding that common
23 questions did not predominate on the putative class’s entitlement to restitution, it erred. *Pulaski &*
24 *Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 985 (9th Cir. 2015). The Ninth Circuit also held
25 that the Court abused its discretion in denying class certification by concluding that *Yokoyama v.*
26 *Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (“damage calculations alone
27 cannot defeat certification”) did not apply. *Id.* at 986-87. Accordingly, Rule 23(b)(3) is plainly
28 satisfied here for settlement purposes.

1 ii. This Class Action is the Superior Method of Adjudication

2 Lastly, a class action must be “superior to other available methods for the fair and efficient
3 adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). “A class action is the superior method
4 for managing litigation if no realistic alternative exists.” *Reynoso v. South County Concepts*, 2007
5 WL 4592119, at *4 (C.D. Cal. Oct. 15, 2007). In addition, a class action is superior where, as here,
6 “classwide litigation of common issues will reduce litigation costs and promote greater efficiency.”
7 *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234 (9th Cir. 1996); *Otsuka v. Polo Ralph Lauren*
8 *Corp.*, 251 F.R.D. 439, 448 (N.D. Cal. 2008).

9 Here, there are no realistic alternatives to a class action given that the number of proposed
10 Settlement Class Members exceeds two million. Additionally, most Settlement Class Members
11 would find the cost of litigating individual claims to be prohibitive in light of the potential
12 recovery, and the court system could not handle such an immense burden. *See Tait v. BSH Home*
13 *Appliances Corp.*, 289 F.R.D. 466, 486 (C.D. Cal. 2012) (“superiority requirement is met ‘[w]here
14 recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis’”)
15 (quoting *Wolin*, 617 F.3d at 1175). A class action is also a superior method for resolving this case
16 by settlement because the collective resolution of the claims avoids the possibility of duplicative
17 individual controversies or inconsistent judicial determinations.

18
19 **VI. THE COURT SHOULD AFFIRM THE APPOINTMENT OF CLASS COUNSEL.**

20 The Court’s earlier consolidation order appointed Schubert Jonckheer & Kolbe as interim
21 class counsel. Dkt. No. 40. Additionally, the Court found that Plaintiffs here are represented by
22 attorneys who have significant class action experience—including experience in UCL actions—
23 and who were capable of fairly and adequately representing Plaintiffs and the proposed class. Dkt.
24 No. 315, p. 21. As further demonstrated through the declaration of Noah M. Schubert, submitted
25 herewith, appointment of Schubert Jonckheer & Kolbe as Class Counsel fully meets the
26 requirements of Rule 23(g). Here, Class Counsel has performed an extraordinary amount of
27 important work investigating and researching the claims at issue, reviewing and analyzing
28 Google’s document production, conducting depositions, and litigating significant motions

1 (including appellate proceedings and a petition for a writ of certiorari in the U.S. Supreme Court).
2 Class Counsel is highly experienced in consumer class action matters and has been appointed class
3 counsel on numerous occasions. *See* Schubert Decl., Ex. B. Additionally, Class Counsel has
4 committed (and continues to commit) significant financial and staff resources to the representation
5 of the Settlement Class.

6
7 **VII. THE PROPOSED NOTICE PLAN IS ADEQUATE.**

8 Once preliminary approval of a class action is granted, notice must be directed to class
9 members. Rule 23(c)(2)(B) requires the parties to provide class members with “the best notice ...
10 practicable under the circumstances, including individual notice to all members who can be
11 identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Furthermore, Rule 23(e)(1)
12 requires provision of reasonable notice to all class members that would be bound by the proposed
13 settlement. “Notice is satisfactory if it generally describes the terms of the settlement in sufficient
14 detail to alert those with adverse viewpoints to investigate and to come forward and be heard.”
15 *Churchill Village LLC*, 361 F.3d at 575 (citations and internal quotations omitted). The notice plan
16 proposed here is comprehensive and multi-pronged, fully satisfying the applicable requirements of
17 due process and Federal Rule of Civil Procedure 23, as discussed below.

18 First, the parties have agreed to directly notify Settlement Class Members via email at the
19 address listed on the Settlement Class Member’s AdWords account, using current contact
20 information Google will provide to the Settlement Administrator. Settlement Agreement, §§ 4.1,
21 4.1.3, 4.2.2., Ex. A. The parties propose disseminating this Email Notice as soon as reasonably
22 practicable, but no later than thirty days following entry of an order preliminarily approving the
23 Settlement Agreement, and expect to stagger the Email Notices over a ten day period to maximize
24 deliverability. *Id.* at § 4.1.1, Ex. A. The Settlement Administrator will monitor the delivery of such
25 Email Notices, and where it can reasonably determine that the notice was not opened, the
26 Settlement Administrator will resend an additional Email Notice. *Id.* at § 4.2.4. Direct email notice
27 is a particularly effective form of notice here, because nearly all correspondence between Google
28 and Settlement Class Members was transactional in nature and occurred online or via email. *See*

1 Declaration of Richard W. Simmons, ¶ 17, filed herewith. The Email Notice includes salient
2 settlement information: (i) a brief overview of the litigation and the Settlement Agreement; (ii) the
3 deadlines for submitting a claim, objecting to the Settlement Agreement, and opting out, as well as
4 information related to the final approval hearing; and (iii) instructions on how to obtain additional
5 information through a link to the Settlement Website, by emailing the Settlement Administrator, or
6 by calling the Settlement Administrator at the toll-free number. *See* Settlement Agreement, Ex. C.

7 Additionally, after dissemination of the Email Notice is complete, the Settlement
8 Administrator will mail a supplemental Postcard Notice to all Settlement Class Members to whom
9 the Email Notice bounced at the billing address listed in the Settlement Class Member's AdWords
10 billing profile. *Id.* at §§ 4.3, Ex. A. Like the Email Notice, the Postcard Notice includes: (i) a brief
11 overview of the litigation and the Settlement Agreement; (ii) the deadlines for submitting a claim,
12 objecting to the Settlement Agreement, and opting out, as well as information related to the final
13 approval hearing; and (iii) instructions on how to obtain additional information through a link to
14 the Settlement Website, by emailing the Settlement Administrator, or by calling the Settlement
15 Administrator at the toll-free number. *See* Ex. D.

16 Class Counsel will also issue a press release providing further notice of the Settlement
17 Agreement, which will include a link to the Settlement Website, AdWordsClassAction.com and
18 contact information for the Settlement Administrator. *Id.* at §§ 4.5, 4.5.1, 4.5.2.⁸

19 The Email Notice, Postcard Notice, and press release each include the address for the
20 Settlement Website, which will be created and maintained by the Settlement Administrator. There,
21 the long-form Website Notice, more fully describing information relevant to the Settlement
22 Agreement and approval process, will be available for viewing and download. *See* Ex. B. The
23 Settlement Website will allow Claimants to submit a claim electronically (or download for printing
24 and submission by mail), include a Frequently Asked Question (FAQ) section, prominently list

25
26
27 ⁸ In the unlikely event that the Settlement Administrator determines that less than 70% of the
28 Settlement Class is contacted through the above forms of notice, a Supplemental Digital Notice
will be provided to Settlement Class Members.

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1 important deadlines, and host relevant case documents (which will be available for viewing and
2 download). *See* Simmons Decl., ¶ 28.⁹

3 The Settlement Administrator will also provide email and toll-free phone support to
4 Settlement Class Members regarding the Settlement Agreement. *See* Settlement Agreement, Ex. A.

5 Additionally, within ten days of the Settlement Agreement being filed with the Court, the
6 Settlement Administrator will serve notice of the Settlement Agreement and other required
7 documents upon relevant government officials in accordance with the Class Action Fairness Act,
8 28 U.S.C. § 1715 (“CAFA”). Settlement Agreement, § 4.7. In advance of the scheduled March 9,
9 2017 preliminary approval hearing, the Settlement Administrator will provide proof of service of
10 the CAFA notice for filing with the Court. *Id.*

11 The proposed method of giving notice (similar if not identical to the method used in
12 countless other class actions) is appropriate because it provides a fair opportunity for members of
13 the Settlement Class to obtain full disclosure of the information relevant to the Settlement
14 Agreement and to make an informed decision regarding their participation therein. Thus, the
15 notices and the procedures embodied therein amply satisfy all applicable requirements.

16 **VIII. THE COURT SHOULD SCHEDULE A FINAL FAIRNESS HEARING AND**
17 **RELATED DATES.**

18 The next steps in the settlement approval process are to notify Class Members of the
19 proposed Settlement Agreement, allow Class Members an opportunity to exclude themselves or
20 submit objections, and hold a Final Fairness Hearing. Accordingly, the parties propose the
21 following schedule:

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28

⁹ The Settlement Website will also be optimized for smartphones. Simmons Decl., ¶ 29.

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Event	Date
Notice Date deadline	30 days after entry of the Preliminary Approval Order
Last day for Plaintiffs to file their motion for attorneys' fees, costs, and service awards to the class representatives	30 days after the Notice Date
Opt-Out deadline	60 days after the Notice Date
Objection deadline	60 days after the Notice Date
Deadline for Plaintiffs to file their motion seeking final approval of the Settlement Agreement	14 days before the Final Fairness Hearing
Deadline for the parties to file responses to any submitted objections	14 days before the Final Fairness Hearing
Final Fairness Hearing	To Be Set by the Court (approximately 120 days after entry of the Preliminary Approval Order)

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant preliminary approval to the proposed Settlement Agreement, provisionally certify the Settlement Class, approve the proposed form and method of class notice, set a date for disseminating class notice, set the deadlines for objecting to and opting out of the settlement, and schedule a final approval hearing. A proposed order is submitted herewith.

Dated: February 23, 2017

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