

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

1 David M. Given (SBN 142375)
2 Nicholas A. Carlin (SBN 112532)
3 PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
4 39 Mesa Street, Suite 201
5 The Presidio
6 San Francisco, CA 94129
7 Tel: 415-398-0900
8 Fax: 415-398-0911
9 Email: dm@phillaw.com
10 nac@phillaw.com

11 James M. Wagstaffe (SBN 95535)
12 Michael J. von Loewenfeldt (SBN 178665)
13 Frank Busch (SBN 258228)
14 KERR & WAGSTAFFE LLP
15 100 Spear Street, 18th Floor
16 San Francisco, CA 94105
17 Tel: 415-371-8500
18 Fax: 415-371-0500
19 Email: wagstaffe@kerrwagstaffe.com
20 myl@kerrwagstaffe.com
21 busch@kerrwagstaffe.com

22 Interim Co-Lead Counsel for Plaintiffs
23 [ADDITIONAL COUNSEL LISTED BELOW]

24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA

26 MARC OPPERMAN, et al.,
27 Plaintiffs,
28 v.
29 PATH, INC., et al.,
30 Defendants.

Case No. 13-cv-00453-JST

**PLAINTIFFS’ NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Hearing Date: May 25, 2017
Time: 2:00 p.m.
Courtroom: 9, 19th Floor (San Francisco)

THIS MOTION RELATES TO:
Opperman v. Path, Inc., No. 13-cv-453-JST
Hernandez v. Path, Inc., No. 12-cv-1515-JST

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

1 **TO THE COURT, ALL PARTIES, AND COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 25, 2017, at 2:00 PM, or as soon thereafter as
3 the matter may be heard, in Courtroom 9, 19th Floor of the United States District Courthouse,
4 450 Golden Gate Avenue, San Francisco, California, 94102, before the Honorable Jon S. Tigar,
5 Plaintiffs Allen Beuershausen, Giuliana Biondi, Lauren Carter, Stephen Dean, Stephanie
6 Cooley, Jason Green, Claire Hodgins, Gentry Hoffman, Rachelle King, Nirali Mandalaywala,
7 Claire Moses, Judy Paul, and Gregory Varner (hereinafter, “Plaintiffs”), on their own and on
8 behalf of the Settlement Class (as defined below), will and hereby do move this Court for an
9 Order: (1) granting preliminary approval of the proposed Settlement Agreement (as defined
10 below); (2) certifying for settlement purposes only the proposed Settlement Class, as defined in
11 the Settlement Agreement; (3) appointing the law firms constituting the Plaintiffs’ Steering
12 Committee (ECF No. 400) as Class Counsel representing the proposed Settlement Class; (4)
13 appointing Plaintiffs as Representative Plaintiffs representing the Settlement Class; (5)
14 approving the parties’ proposed Notice Plan, including the proposed forms of notice, as set forth
15 in the Settlement Agreement, and directing that notice be disseminated pursuant to such
16 program; (6) appointing KCC Class Action Services, LLC as the Settlement Administrator, and
17 directing KCC Class Action Services, LLC to carry out the duties and responsibilities of the
18 Settlement Administrator specified in the Settlement Agreement; (7) approving the parties’
19 proposed Electronic Claim Form, and approving the procedures set forth in the Settlement
20 Agreement for Settlement Class Members to submit claims, exclude themselves from the
21 Settlement Class, and/or object to the Settlement Agreement; (8) staying all non-settlement
22 related proceedings in the Action against the App Defendants pending final approval of the
23 Settlement Agreement; and (9) scheduling a hearing pursuant to Rule 23(e) of the Federal Rules
24 of Civil Procedure to determine whether the Settlement Agreement is fair, reasonable, and
25 adequate and should be finally approved as well as a hearing on Class Counsel’s motion for an
26 award of attorneys’ fees, costs and Representative Plaintiffs’ enhancement awards.

27 The grounds for this motion are that the Settlement Agreement is within the range of
28 reasonableness to be finally approved as fair, adequate and reasonable in all respects.

1 This Motion is based upon this Notice of Motion and Motion, the attached Memorandum
2 of Points and Authorities, the Settlement Agreement filed herewith, the accompanying
3 Declarations of David M. Given, Michael von Loewenfeldt, Jeff Edwards, Carl Schwenker, and
4 Jennifer Sarnelli, the papers and records on file in this Action, and such other written and oral
5 arguments as may be presented at or before the hearing to the Court.

6
7 Dated: April 3, 2017

/s/ David M. Given

8 David M. Given
9 Nicholas A Carlin
10 PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
11 39 Mesa Street, Suite 201
12 San Francisco, CA 94129
13 Tel: (415) 398-0900

14 Michael von Loewenfeldt
15 James M. Wagstaffe
16 Frank Busch
17 KERR & WAGSTAFFE LLP
18 101 Mission Street, 18th Floor
19 San Francisco, CA 94105
20 Tel: (415) 371-8500
21 Fax: (415) 371-0500

22 *Interim Co-Lead Counsel for Plaintiffs*

23 Carl F. Schwenker (admitted *pro hac vice*)
24 LAW OFFICES OF CARL F. SCHWENKER
25 The Haehnel Building
26 1101 East 11th Street
27 Austin, TX 78702
28 Tel: (512) 480-8427
Fax: (512) 857-1294

Plaintiffs' Liaison Counsel

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

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

Jeff Edwards (admitted *pro hac vice*)
EDWARDS LAW
The Haehnel Building
1101 East 11th Street
Austin, TX 78702
Tel: (512) 623-7727
Fax: (512) 623-7729

Jennifer Sarnelli (SBN 242510)
GARDY & NOTIS, LLP
Tower 56
126 East 56th Street, 8th Floor
New York, NY 10022
Tel: (212) 905-0509
Fax: (212) 905-0508

Plaintiffs' Steering Committee

TABLE OF CONTENTS

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

Page

I. INTRODUCTION 1

II. BACKGROUND 2

 A. Procedural History..... 2

 B. Counsel’s Investigation and Discovery 3

 C. Settlement Negotiations 4

III. TERMS OF THE SETTLEMENT 4

 A. Provisional Certification of the Settlement Class 5

 B. Benefits to the Settlement Class 6

 1. The Settlement Account and Contingent Payment 6

 a. The Claim Process 6

 b. Payments to Settlement Class Members 7

 C. Notice Plan 8

 1. Settlement Website and Full Notice 8

 2. Direct Email Notice 8

 3. Twitter “Promoted Tweet” Notice 9

 D. Opt-Out Procedure 9

 E. Opportunity to Object 10

 F. Payment of Attorneys’ Fees, Costs, and Expenses 10

 G. Incentive Awards for Representative Plaintiffs 10

 H. Release 10

IV. LEGAL ARGUMENT 11

 A. Class Action Settlement Procedure 11

 B. The Proposed Settlement Class Should be Certified 11

 C. Standards for Preliminary Settlement Approval 12

 D. The Proposed Settlement Agreement Is Within the Range of Reasonableness 14

 E. The Proposed Notice Plan Should be Approved 17

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

1 F. The Proposed Plan of Distribution Is Fair, Reasonable, and Adequate 18

2 G. The Court Should Set a Final Approval Hearing Schedule 19

3 V. CONCLUSION 20

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

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
 39 Mesa Street, Suite 201 – The Presidio
 San Francisco, CA 94129
 Telephone: 415-398-0900 – Fax: 415-398-0911

TABLE OF AUTHORITIES

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

Page

CASES

Amchem Prods. v. Windsor,
521 U.S. 591 (1997) 17

Churchill Village v. Gen. Elec.,
361 F.3d 566 (9th Cir. 2004)..... *passim*

Class Plaintiffs v. City of Seattle,
955 F.2d 1268 (9th Cir. 1992)..... 11, 12

Create-A-Card v. Intuit,
2009 U.S. Dist. LEXIS 93989 (N.D. Cal. Sept. 22, 2009)..... 14

Cummings v. Connell,
402 F.3d 936 (9th Cir. 2005)..... 16

Fraley v. Facebook,
966 F. Supp. 2d 939 (N.D. Cal. 2013)..... 11

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998)..... 13

In re Am. Family Enterprises,
256 B.R. 377, 425 (D.N.J. 2000)..... 16

In re Cathode Ray Tube (CRT) Antitrust Litig.,
2017 WL 565003 (N.D. Cal. Feb. 13, 2017)..... 13

In re Citric Acid Antitrust Litig.,
145 F. Supp. 2d 1152 (N.D. Cal. 2001)..... 18

In re Oracle Sec. Litig.,
U.S. Dist. LEXIS 21593 (N.D. Cal. June 16, 1994)..... 18

In re Syncor ERISA Litig.,
516 F.3d 1095 (9th Cir. 2008)..... 12

Linney v. Cellular Alaska,
Dist. LEXIS 24300 (N.D. Cal. July 18, 1997) 14

Mangone v. First USA Bank,
206 F.R.D. 222 (S.D. Ill. 2001)..... 16

Officers for Justice v. Civil Serv. Comm’n,
688 F. 2d 615, 625 (9th Cir. 1982)..... 12

Saint v. BMW of N. Am., LLC,
2015 WL 2448846 (D.N.J. May 21, 2015) 16

Tableware Antitrust Litigation,
484 F. Supp. 2d 1078 (N.D. Cal. 2007)..... 13

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

1 *Torrise v. Tucson Elec. Power*,
2 8 F.3d 1370 (9th Cir. 1993)..... 13

3 *Vasquez v. Coast Valley Roofing*,
4 670 F. Supp. 2d 1114 (E.D. Cal. 2009)..... 13

5 **RULES**

6 Fed. R. Civ. P. 23.....*passim*

8 **OTHER AUTHORITIES**

9 MANUAL FOR COMPLEX LITIGATION
10 § 13.14 at 173 (4th ed. 2002)..... 13

11 MANUAL FOR COMPLEX LITIGATION
12 §§ 21.63 *et seq.* (4th ed. 2004) 11

13 4 NEWBERG ON CLASS ACTIONS
14 §§ 11.22, *et seq.* (4th ed. 2002) 11

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs, on behalf of themselves and all Settlement Class Members (as defined below), respectfully submit for the Court’s preliminary approval a proposed Class Action Settlement Agreement (the “Settlement Agreement” filed herewith) resolving the above-captioned action against Defendants Foodspotting, Inc. (“Foodspotting”), Foursquare Labs, Inc. (“Foursquare”), Gowalla, Inc. (“Gowalla”), Instagram, LLC (“Instagram”), Kik Interactive, Inc. (“Kik”), Kong Technologies, Inc. (formerly known as Path, Inc.) (“Path”), Twitter, Inc. (“Twitter”) and Yelp! Inc. (“Yelp”) (collectively, the “App Defendants”).

Pursuant to the terms of the Settlement Agreement, the App Defendants will pay \$5.3 million to establish a non-reversionary common fund from which Settlement Class Members who submit valid claims will be sent cash or cash-equivalent payments on a per app basis. The majority of the costs of administration shall be borne by the App Defendants on top of the foregoing amount.

The Settlement Agreement will end the case against the App Defendants for invasion of privacy/intrusion upon seclusion and against Apple for aiding and abetting the same. The misrepresentation case against Apple will continue.

The Settlement Agreement is the product of protracted and highly adversarial litigation, spanning five years and reflected in the case’s procedural history before the Court, together with extensive and complex negotiations between and among the parties and their experienced and informed counsel. Included in those negotiations was the involvement of a neutral third-party mediator, the Honorable William J. Cahill (Ret.), from JAMS.

The Settlement Agreement falls well within the “range of reasonableness” applicable at the preliminary approval stage. The App Defendants deny that they are liable or that any class member was harmed, but do not oppose this motion and will cooperate in the settlement process. Plaintiffs and their undersigned counsel believe the Settlement Agreement to be in the best interests of the Settlement Class Members and wish to begin the court approval process required

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

1 for all class action settlements. Accordingly, Plaintiffs respectfully request that the Court grant
2 this motion.

3 **II. BACKGROUND**

4 **A. Procedural History**

5 The main *Opperman* case began in March 2012 in the federal district court in Austin,
6 Texas. ECF No. 1. It followed public news reporting about the uploading of iDevice users'
7 address book data by certain apps available on the Apple App Store without users' knowledge or
8 consent. ECF No. 1. Federal Trade Commission and Congressional inquiries ensued. ECF No.
9 1.

10 Additional cases were filed in this District shortly after *Opperman*. ECF No. 401. In
11 January 2013, the federal court in Austin transferred *Opperman* to this District, finding it a more
12 convenient forum. ECF No. 218. The court here eventually related the various cases, and
13 assigned the matter to the Honorable Jon S. Tigar. ECF No. 322. In October 2013, the Court
14 named co-lead counsel and appointed a Plaintiffs' Steering Committee. ECF No. 400.

15 The parties engaged in almost three years of Rule 12 motion practice beginning in the
16 Austin federal court. In August 2013, in the related *Pirozzi* case, the Court sustained all but one
17 of the claims made against Apple from various legal attacks. ECF No. 55. In May 2014, the
18 Court issued a 55-page decision dealing with various legal attacks on the first consolidated
19 amended complaint in the case. ECF No. 67.

20 In June 2014, Plaintiffs filed their operative pleading, the Second Consolidated Amended
21 Complaint ("SCAC"), asserting claims against the App Defendants for invasion of
22 privacy/intrusion on seclusion and conversion, as well as various claims against Apple. ECF
23 No. 478. The App Defendants and Apple responded with nine separate motions to dismiss. On
24 March 23, 2015, following extensive briefing and hearing, the Court issued an order denying the
25 bulk of these motions, granting dismissal of Plaintiffs' conversion claim and finding, among
26 other things, that Plaintiffs adequately pled a claim for invasion of privacy/intrusion on
27 seclusion against the App Defendants and for aiding and abetting on the part of Apple in
28 connection therewith. ECF No. 543.

1 In November 2015, Plaintiffs Carter, Cooley and Green moved for class certification
2 against Path and Apple. ECF No. 585. In July 2016, the Court granted in part and denied in
3 part that motion, certifying nominal and punitive damage claims against Path and Apple for a
4 class of users of the Path mobile app who had their address book data uploaded from their
5 iDevices between November 2011 and February 2012. ECF No. 761. Plaintiffs opposed, and
6 the Ninth Circuit subsequently denied Apple's Rule 23(g) appeal of that order. ECF No. 848.

7 In August 2016, several Plaintiffs filed an omnibus motion for class certification against
8 five of the remaining App Defendants and Apple on their invasion of privacy and aiding and
9 abetting claims. ECF No. 799. At the same time, several Plaintiffs moved for class certification
10 against Apple on their false advertising claims. ECF No. 801-3. The present motion moots the
11 former; the latter certification motion remains pending.

12 In September 2016, after extensive briefing and argument, the Court issued an order
13 denying Yelp's motion for summary judgment. ECF No. 828.

14 As of this writing, the docket in the *Opperman* case alone, apart from the other related
15 cases, has almost 900 entries/filings.

16 **B. Counsel's Investigation and Discovery**

17 Formal discovery in the *Opperman* case began in August 2015. Given Decl. at ¶ 7.
18 Since that time, counsel have defended a dozen-plus Plaintiff depositions (some Plaintiffs were
19 deposed more than once), have responded to hundreds of written discovery requests, have
20 supervised the forensic imaging of Plaintiffs' respective iDevices, have posed hundreds of
21 written discovery requests to the App Defendants, have reviewed those requests and conducted
22 all follow up meet and confer to them, have organized and reviewed tens of thousands of pages
23 of documents produced in the case and have spent hundreds of thousands of dollars in out-of-
24 pocket costs in prosecuting the action. *Id.*

25 Counsel have thus far taken the depositions of three Apple employees, one Twitter
26 employee and two Path employees. *Id.* at ¶ 8. The parties had scheduled several more
27 depositions but those came off calendar when the parties set their mediation with Judge Cahill.
28 *Id.* Over the course of these proceedings, various discovery disputes made their way to the

1 Court, including an all-day meet and confer held at the courthouse under Magistrate Judge
2 Spero's supervision. Id.

3 Counsel retained a source code expert as well as two damages experts; all of Plaintiffs'
4 experts proffered expert reports or opinions to the Court, and all have been deposed. Id. at ¶ 9.
5 (One of the two damages experts gave a declaration in support of the motion to certify the false
6 advertising class against Apple. ECF No. 802-3.) Plaintiffs' source code expert reviewed,
7 analyzed and reported to counsel upon each of the App Defendants' source code versions
8 produced to Plaintiffs. Given Decl. at ¶ 9. Much of that review required onsite visits to secure
9 rooms, as well as counsel's presence. Id.

10 C. Settlement Negotiations

11 Informal settlement discussions between and among the parties took place throughout
12 this litigation. Given Decl. at ¶ 10. The parties first engaged in formal mediated negotiations
13 beginning Nov. 1, 2016 with the Honorable William J. Cahill (Ret.) at JAMS in San Francisco.
14 Id. Two of the smaller defendants had reached tentative agreements with Plaintiffs prior to the
15 formal joint mediation. Id.

16 Between that date and the Jan. 2017 notice to the Court of the parties' tentative
17 settlement (ECF No. 856), the parties met two more times with Judge Cahill for a total of three
18 in-person sessions, and engaged in numerous telephone and email communications with him on
19 the nature and scope of their agreement. Id. at ¶ 11. The parties also exchanged mediation
20 briefs as well as additional data and other information pertaining to class size and membership
21 beyond that contained in formal discovery responses. Id. Drafting of the settlement agreement
22 consumed another several weeks, with various iterations exchanged between attorneys for the
23 respective parties before reaching the document proffered to the Court for approval. Id.

24 III. TERMS OF THE SETTLEMENT

25 The Settlement Agreement resolves the claims of Plaintiffs and the Settlement Class
26 against the App Defendants. The details are contained in the Settlement Agreement, the key
27 terms of which are described below.
28

1 **A. Provisional Certification of the Settlement Class**

2 Plaintiffs seek provisional certification of a Settlement Class, defined in Section 1.36 of
3 the Settlement Agreement. The proposed Settlement Class includes all natural persons in the
4 United States meeting one or more of the following class definitions:

5 (A) who received from Apple’s App Store a copy of versions 2.5 through
6 3.1 of the iOS mobile application entitled **Foodspotting**, and activated via such
7 App on their Apple iDevice the “Find iPhone Contacts” feature of the
8 Foodspotting mobile application between August 9, 2011 and February 19, 2012
9 (the “Foodspotting Class Period”);

10 (B) who received from Apple’s App Store one or more of versions 1.1
11 through 4.2 of the iOS mobile application entitled **Foursquare**, and did one or
12 both of the following between April 4, 2009 and February 14, 2012 (the
13 “Foursquare Class Period”): (1) for versions 1.1 through 4.2, activated via such
14 App on their Apple iDevice (iPhone, iPad, iPod Touch) the “Add Friends”
15 feature of the Foursquare mobile application or (2) for versions 3.1 through 4.2,
16 registered via their iDevice as a Foursquare user through the Foursquare mobile
17 application;

18 (C) who received from Apple’s App Store one or more of versions 1.5.0
19 through 4.1 of the iOS mobile application entitled **Gowalla**, and did one or both
20 of the following within the Gowalla mobile application between February 23,
21 2010 and February 23, 2012 (the “Gowalla Class Period”): (1) selected a
22 checkbox stating “Automatically connect with friends from my address book”
23 and then depressed a “Let’s Get Started” button; (2) depressed a “Find Friends”
24 button and then depressed an “Address Book” button;

25 (D) (i) owned an Apple iDevice on which he or she registered an account
26 for any of the versions 1.0.0 through 2.0.7 of the **Instagram** App obtained from
27 the Apple App Store; (ii) utilized the Find Friends feature of the Instagram App
28 between October 6, 2010 and February 10, 2012 (the “Instagram Class Period”);
and (iii) resided within the United States at the time he or she registered an
Instagram account and used the Find Friends Feature;

 (E) (i) owned an Apple iDevice on which he or she downloaded from
Apple App Store, installed, and registered an account on the **Kik** App; (ii)
installed version 5.4.0 of the Kik App; (iii) after installing version 5.4.0, utilized
the Suggested Friends feature of the Kik App between December 22, 2011 and
February 11, 2012 (the “Kik Class Period”); (iv) as a result of such use of the
Suggested Friends Feature, had contacts data uploaded to Kik’s servers in non-
hashed format; and (v) resided within the United States at the time he or she
registered a Kik account and used the Suggested Friends Feature;

 (F) who received from Apple’s App Store a copy of version 2.0 through
2.0.5 of the iOS mobile application entitled **Path**, and who were Path registrants
and activated via such App on their Apple iDevice the Path mobile application
between November 29, 2011 and February 7, 2012 (the “Path Class Period”);

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

1 (G) who received preinstalled on an Apple iDevice and/or from Apple's
2 App Store between March 11, 2011 and February 21, 2012 (the "Twitter Class
3 Period") a copy of versions 3.3 through 4.0.1 of the iOS mobile application
4 entitled **Twitter**, and activated via such App on their Apple iDevice the "Find
5 Friends" feature of the Twitter mobile application; and/or

6 (H) who received from Apple's App Store a copy of versions 4.0.0
7 through 5.6.0 of the iOS mobile application entitled **Yelp**, and activated via such
8 App on their Apple iDevice the "Find Friends" feature of the Yelp mobile
9 application between January 16, 2010 and February 22, 2012 (the "Yelp Class
10 Period").

11 The settlement class definition comes directly from Plaintiffs' class certification
12 motion(s). In the case of Path, the definition mirrors the one the Court accepted for certification.
13 ECF No. 761, at 28. The others track those proposed in the omnibus motion. ECF No. 870-1, at
14 2. The settlement class definition deviates from the class proposed in the Second Consolidated
15 Amended Complaint (ECF No. 478) only in that it is more narrowly tailored, due to the benefit
16 of the extensive discovery conducted in this case.

17 **B. Benefits to the Settlement Class**

18 **1. The Settlement Account and Contingent Payment**

19 Pursuant to Section 1.37 of the Settlement Agreement, the App Defendants will establish
20 a non-reversionary Settlement Account of \$5.3 Million Dollars to be used for: (a) providing
21 compensation to Settlement Class Members and (b) in the case of Foodspotting, Gowalla, Yelp,
22 and Twitter (to the extent Twitter's pro-rated administration costs exceed \$125,000), payment of
23 a share of Settlement Administration and Notice Expenses, including the costs of disseminating
24 notice, processing Claim Forms and requests for exclusion, administering payments to
25 Settlement Class Members, and other costs incurred in performing the obligations of the
26 Settlement Administrator. (Settlement Agreement, §§ 1.37, 2.1-2.3, 5.1-5.1.4.) Any fee and
27 cost award to Class Counsel and incentive awards to Plaintiffs shall also be paid from the
28 Settlement Account. (Settlement Agreement, § 8.3.)

a. The Claim Process

Pursuant to the proposed Plan of Allocation contained in Section 7 of the Settlement
Agreement, to receive payment under the Settlement, Settlement Class Members must timely
submit a valid Electronic Claim Form through the Settlement Website. (Settlement Agreement,

1 § 7.1.) A proposed Electronic Claim Form is attached as Exhibit A to the Settlement
2 Agreement. (Settlement Agreement, § 1.8.) The deadline for submitting claims will be one-
3 hundred and twenty (120) days after entry of the proposed Preliminary Approval Order or such
4 other deadline as is set by the Court. (Settlement Agreement, § 1.1.)

5 Upon receipt of a completed Electronic Claim Form, the Settlement Administrator shall
6 cause an automated response to be sent to the Settlement Class Member via email, confirming
7 receipt of the completed form. (Settlement Agreement, § 7.3.) After final approval, the
8 Settlement Administrator will calculate the value of each share and disclose those calculations to
9 Remaining App Developer Defendants’ Counsel and Co-Lead Class Counsel, and then
10 distribute payment to each Settlement Class Member who timely submitted a valid Electronic
11 Claim Form (“Eligible Claimant”). (Settlement Agreement, §§ 7.7, 7.8.)

12 **b. Payments to Settlement Class Members**

13 Pursuant to the proposed plan of allocation contained in Section 7 of the Settlement
14 Agreement, Eligible Claimants shall be sent payment via either (1) a physical postcard check,
15 valid for ninety (90) days, or (2) Electronic Payment in the form of a code for cash value credit
16 on Amazon.com. (Settlement Agreement, §§ 7.4, 7.8.)¹ Where an Eligible Claimant elects to
17 receive a postcard check, the amount of \$0.35 shall be deducted to cover the cost of postage, and
18 the incremental cost over the cost of electronic distribution shall be deducted from the common
19 fund. (Settlement Agreement, §§ 7.4, 5.1.3.2(B).) This option is only designed for people who
20 do not shop at Amazon.com because sending physical checks to all claimants would be cost
21 prohibitive. Given Decl. at ¶ 15.

22 Each Eligible Claimant is entitled to one share for each App designated on their
23 Electronic Claim Form, subject to a maximum of eight shares per Eligible Claimant.
24 (Settlement Agreement, § 7.5.) Payments from the Settlement Fund shall be distributed *pro rata*
25 to each Eligible Claimant based on the total number of shares eligible for distribution.
26 (Settlement Agreement, §§ 7.4, 7.7.) Distribution of payments to Eligible Claimants shall be

27
28
1 Payments made with Amazon.com credits do not expire. Given Decl. at ¶ 15.

1 completed within thirty (30) days after the Effective Date, as defined in Section 1.7 of the
2 Settlement Agreement. (Settlement Agreement, §§ 7.9, 1.7.)

3 Any funds from checks not cashed within ninety (90) days of issuance and funds from
4 failed Electronic Payments shall be distributed on a cy pres basis to the Electronic Frontier
5 Foundation (“EFF”) after first receiving permission of the Court to do so.² (Settlement
6 Agreement, § 7.10.)

7 **C. Notice Plan**

8 Pursuant to the proposed notice plan contained in Section 5 of the Settlement
9 Agreement, the parties have designed a plan to give Settlement Class Members the best notice
10 practicable of the Settlement Agreement, the claims process and deadline, Class Counsel’s fee
11 application, and their opt-out and objection rights. As set forth below, the Notice Plan will be
12 administered with the help of an independent, and highly qualified, Settlement Administrator,
13 and will consist of several parts.

14 **1. Settlement Website and Full Notice**

15 Within thirty (30) days after entry of the Preliminary Approval Order, the Settlement
16 Administrator will set up the Settlement Website and a toll-free number. (Settlement
17 Agreement, § 5.3.) The Settlement Website will post notice generally describing the terms of
18 the Settlement, including the proposed Plan of Allocation, and the terms of the Co-Lead Class
19 Counsel’s anticipated Fee and Expense Application (“Full Notice”). (Settlement Agreement, §
20 1.16.) The Full Notice will be published on the Settlement Website; a proposed Full Notice is
21 attached as Exhibit B to the Settlement Agreement. (Settlement Agreement, § 5.3.)

22 **2. Direct Email Notice**

23 Within fifteen (15) days after the entry of the Preliminary Approval Order, each
24 Remaining App Developer Defendant shall provide the Settlement Administrator with a list of
25 Settlement Class Members, including their names, usernames, email addresses, or, for Twitter,
26

27 ² EFF is the leading nonprofit organization defending civil liberties in the digital world.
28 Founded in 1990, EFF champions user privacy, free expression, and innovation through impact
litigation, policy analysis, grassroots activism, and technology development. See Electronic
Frontier Foundation, *About Us*, <https://www.eff.org/about> (last visited on March 27, 2017).

1 Twitter Handles, to the extent this information is in the Remaining App Developer Defendants’
2 possession. (Settlement Agreement, § 4.1.) To the extent any Remaining App Developer
3 Defendant is unable to provide email addresses (or, for Twitter, handles), the parties will meet
4 and confer regarding alternative contact information to be provided to the Settlement
5 Administrator pursuant to Section 4.1.1 of the Settlement Agreement. (Settlement Agreement, §
6 4.1.1.)

7 Within sixty (60) days after entry of the Preliminary Approval Order, the Settlement
8 Administrator will send notice summarizing the proposed Settlement terms (“Summary Notice”)
9 by email to the Settlement Class Members. (Settlement Agreement, § 5.2.2.) A proposed
10 Summary Notice to be sent via email is attached as Exhibit C to the Settlement Agreement.
11 (Settlement Agreement, § 1.40.1.)

12 **3. Twitter “Promoted Tweet” Notice**

13 Within thirty (30) days after entry of the Preliminary Approval Order, the Settlement
14 Administrator shall use the Twitter account @settlementnews (or other mutually agreeable
15 account) as a Twitter advertiser and shall send a Summary Notice using Twitter’s Promoted
16 Tweet’s product to all potential class members for whom a Twitter handle is provided.
17 (Settlement Agreement, § 5.2.1.) A proposed Summary Notice to be published via Promoted
18 Tweet is attached as Exhibit D to the Settlement Agreement. (Settlement Agreement, § 1.40.2.)

19 **D. Opt-Out Procedure**

20 Under Section 6.2 of the Settlement Agreement, any person within the definition of the
21 Settlement Class may request to be excluded from the Settlement Class by sending a written
22 request to the Settlement Administrator postmarked on or before a date no later than sixty (60)
23 days after the Notice date (the “Opt-Out Deadline”). (Settlement Agreement, §§ 1.22, 6.2.)
24 Valid requests must include the information prescribed by the Notice, including a statement that
25 the person sending the request wishes to be excluded from the Settlement Class. (Settlement
26 Agreement, § 6.2.)
27
28

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

1 **E. Opportunity to Object**

2 Under Section 6.1 of the Settlement Agreement, any person within the definition of the
3 Settlement Class who does not timely and validly request to be excluded may object to the
4 Settlement, Class Counsel’s fee application, and/or the amount requested for incentive awards
5 for the Representative Plaintiffs. (Settlement Agreement, § 6.1.) To be considered, an objection
6 must be filed with the Court, and must be in writing, personally signed by the objector, and
7 include the information prescribed by the Notice. (Settlement Agreement, § 6.1.)

8 **F. Payment of Attorneys’ Fees, Costs, and Expenses**

9 Under Section 8 of the Settlement Agreement, Class Counsel will petition the Court for
10 reasonable attorneys’ fees, costs, and expenses. (Settlement Agreement, § 8.1.) Should the
11 Court award less than the amount sought in the petition, the difference between the amount
12 sought and the amount awarded shall remain in the Settlement Account to pay Eligible
13 Claimants. (Settlement Agreement, §§ 8.2, 8.3.)

14 **G. Incentive Awards for Representative Plaintiffs**

15 Under Section 9 of the Settlement Agreement, Class Counsel are entitled to petition the
16 Court for an Incentive Award for each Representative Plaintiff. (Settlement Agreement, § 9.1.)
17 Should the Court award less than the amount sought in the petition, the difference between the
18 amount sought and the amount awarded shall remain in the Settlement Account to pay Eligible
19 Claimants. (Settlement Agreement, §§ 9.2, 9.3.) The Incentive Award is designed to reward the
20 class representatives for their service on behalf of the Settlement Class.

21 **H. Release**

22 Under Section 11 of the Settlement Agreement, in exchange for the benefits provided
23 pursuant to the Settlement Agreement, Settlement Class Members who have not excluded
24 themselves from the Settlement by the Opt-Out Deadline (“Releasing Persons”) will release the
25 Remaining App Developer Defendants and all related parties and Apple, Inc. (“Released
26 Persons”) from all claims that were or could have been asserted arising from or related to
27 allegations in the pending lawsuit regarding the alleged misappropriation and misuse of
28 Plaintiffs’ private address book data. (Settlement Agreement, §§ 1.28, 1.29, 11.1, 11.3.)

1 Apple, Inc. shall be released by this agreement as to the aiding and abetting claims, but
2 not as to Plaintiffs' separate misrepresentation claims against Apple. (Settlement Agreement, §
3 1.28.)

4 **IV. LEGAL ARGUMENT**

5 **A. Class Action Settlement Procedure**

6 A class action may not be settled without the approval of the Court. Fed. R. Civ. P.
7 23(e); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir. 1992); *Fraley v.*
8 *Facebook*, 966 F. Supp. 2d 939, 941 (N.D. Cal. 2013).

9 Judicial proceedings under Rule 23 have led to a defined three-step procedure for
10 approval of class action settlements:

- 11 (1) Certification of a settlement class and preliminary approval of the
12 proposed settlement after submission to the Court of a written motion for preliminary approval;
13 (2) Dissemination of notice of the proposed settlement to the affected class
14 members; and
15 (3) A formal fairness hearing, or final settlement approval hearing, at which
16 evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement
17 are presented.

18 See *Manual for Complex Litigation*, §§ 21.63 et seq. (4th ed. 2004). This procedure safeguards
19 class members' procedural due process rights and enables the Court to fulfill its role as the
20 guardian of class interests. See 4 *Newberg on Class Actions*, §§ 11.22, et seq. (4th ed. 2002)
21 (describing class action settlement procedure).

22 By this motion, Plaintiffs request that the Court take the first step in the settlement
23 approval process and preliminarily approve the parties' proposed Settlement Agreement.

24 **B. The Proposed Settlement Class Should be Certified**

25 Provisional certification of the Settlement Class as defined for settlement purposes is
26 appropriate because Rule 23(a) and Rule 23(b)(3) are satisfied. The Court ruled upon this
27 subject in connection with the Path class certification motion (ECF No. 761), and at the time of
28 the Settlement Agreement it had pending before it an omnibus motion for class certification

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

1 addressing the subject for the other App Defendants with the exception of Foodspotting and
2 Gowalla, who had settled (ECF No. 870).

3 The Settlement Class includes an estimated seven million eligible claimants.³ Given
4 Decl. at ¶ 12. However, that figure embodies multiple counting for individuals who may have
5 downloaded more than one charged app – for example, all but one of the Plaintiffs fit within this
6 category. *Id.*

7 In any event, commonality, typicality and predominance are all met for reasons
8 previously set out for the Court in Plaintiffs’ class certification motions. Similarly, Plaintiffs
9 and Class Counsel have previously demonstrated that they will fairly and adequately protect the
10 interests of Settlement Class Members. ECF No. 761.

11 For all the reasons stated previously, Plaintiffs respectfully submit that the Court approve
12 certification of the proposed Settlement Class.

13 **C. Standards for Preliminary Settlement Approval**

14 Rule 23(e) requires that any settlement of claims brought on a class basis be approved by
15 the Court. There is “a strong judicial policy that favors settlements, particularly where complex
16 class action litigation is concerned.” *City of Seattle*, 955 F.2d at 1276. See also *In re Syncor*
17 *ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Churchill Village v. Gen. Elec.*, 361 F.3d
18 566, 576 (9th Cir. 2004).

19 Courts recognize that as a matter of sound policy, settlements of disputed claims are
20 encouraged and a settlement approval hearing should “not [] be turned into a trial or rehearsal
21 for trial on the merits.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F. 2d 615, 625 (9th Cir.
22 1982), cert. denied, 459 U.S. 1217 (1983). The Court must give “proper deference” to the
23 Settlement Agreement, because “intrusion upon what is otherwise a private consensual
24

25 ³ The class lists provided by the App Defendants will be over-inclusive because (1) two of
26 the App Defendants cannot presently segregate class members from their general user base as of
27 the relevant period, and (2) many of the other App Defendants cannot segregate persons who
28 used an Android device instead of an Apple iOS device or who reside outside of the United
States from their lists of persons who triggered the find friends feature in the manner challenged
in this case. As a result, the Notice will be sent to an over-inclusive list to make sure all class
members receive notice. Given Decl. at ¶ 13; von Loewenfeldt Decl. at ¶ 14. The simple online
claim form allows individuals receiving the notice to confirm their class membership.

1 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
2 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
3 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
4 reasonable and adequate to all concerned.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th
5 Cir. 1998) (quotation omitted).

6 The purpose of the Court’s preliminary evaluation of the proposed Settlement
7 Agreement is to determine whether it is within “the range of reasonableness,” and thus whether
8 notice to the class of the terms and conditions of the settlement, and the scheduling of a formal
9 fairness hearing, are worthwhile. “Preliminary approval of a settlement is appropriate if ‘the
10 proposed settlement appears to be the product of serious, informed, non-collusive negotiations,
11 has no obvious deficiencies, does not improperly grant preferential treatment to class
12 representatives or segments of the class, and falls within the range of possible approval.’ The
13 proposed settlement need not be ideal, but it must be fair and free of collusion, consistent with
14 counsel’s fiduciary obligations to the class.” *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No.
15 14-CV-2058 JST, 2017 WL 565003, at *3 (N.D. Cal. Feb. 13, 2017) (citations omitted).
16 Application of the pertinent factors here support an order granting the motion for preliminary
17 approval. *Churchill*, 361 F.3d at 575; see also *Torrissi v. Tucson Elec. Power*, 8 F.3d 1370, 1375
18 (9th Cir. 1993).

19 At the preliminary approval stage, a final analysis of the settlement’s merits is
20 premature. A more detailed assessment of those merits is reserved for final approval, after class
21 notice has been sent and class members have had the opportunity to object to, or opt out of, the
22 settlement. See, e.g., *Tableware Antitrust Litigation*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal.
23 2007); *Vasquez v. Coast Valley Roofing*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009); Manual
24 for Complex Litigation, § 13.14 at 173 (“First, the judge reviews the proposal preliminarily to
25 determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision
26 on approval is made after the hearing.”). Nonetheless, as shown below, the proposed Settlement
27 is fair, reasonable and adequate. In the event, the Court should allow the proposed Notice Plan
28 to go forward.

1 **D. The Proposed Settlement Agreement Is Within the Range of Reasonableness**

2 The proposed Settlement Agreement meets the standards for preliminary approval. As a
 3 preliminary matter, the Settlement Agreement is entitled to “an initial presumption of fairness”
 4 because it is the result of arm’s length negotiations among experienced counsel, facilitated by an
 5 experienced and respected mediator, occurring after the parties completed significant formal fact
 6 discovery and Plaintiffs tested the bona fides of one class certification motion and the App
 7 Defendants tested the bona fides of one summary judgment motion. *Create-A-Card v. Intuit*,
 8 No. 07-6452, 2009 U.S. Dist. LEXIS 93989, at *8-9 (N.D. Cal. Sept. 22, 2009) (“This Court
 9 begins its analysis with a presumption that a class settlement is fair and should be approved if it
 10 is the product of arm’s length negotiations conducted by capable counsel with extensive
 11 experience in complex class action litigation.”); *Linney v. Cellular Alaska*, No. 96-3008, 1997
 12 U.S. Dist. LEXIS 24300, at *16 (N.D. Cal. July 18, 1997) (“The involvement of experienced
 13 class action counsel and the fact that the settlement agreement was reached in arm’s length
 14 negotiations, after relevant discovery had taken place create a presumption that the agreement is
 15 fair.”), *aff’d*, 151 F.3d 1234 (9th Cir. 1998).

16 Applying the pertinent *Churchill* factors, the Settlement Agreement is clearly within the
 17 range of reasonableness.

18 Strengths and risks of Plaintiffs’ case – While the Settlement Agreement provides the
 19 Settlement Class with a recovery consistent with this Court’s prior ruling concerning nominal
 20 damages, the outcome of a trial – and any subsequent appeals – is highly uncertain and in any
 21 event would substantially delay any recovery achieved. While Plaintiffs defeated Yelp’s “bell-
 22 weather” summary judgment motion, liability remains highly disputed in the case. So does the
 23 question of whether claims of some or all of the Settlement Class should be certified. As the
 24 Court is well aware, throughout this litigation the App Defendants have vigorously contested
 25 both their liability and Plaintiffs’ ability to certify the asserted claims for class treatment, and
 26 have promised serial motion practice to test these propositions. ECF No. 617 (Tr.), at pg. 29, ¶¶
 27 1-25, pg. 30, ¶¶ 1-23, pg. 31, ¶¶ 16-24, pg. 33, ¶¶ 2-9, 11-23.

1 Risk of maintaining class action status to trial – The Court has certified one nominal
2 damages class against Path on Plaintiffs’ invasion of privacy/intrusion upon seclusion claim.
3 ECF No. 761. Plaintiffs have pending an omnibus motion against five of the remaining seven
4 App Defendants who propose to settle. ECF No. 870. While Plaintiffs’ counsel is confident of
5 their position on class certification with regard to the other App Defendants, there are risks
6 relating to certifying additional classes in the case. See, e.g., Given Decl. at ¶ 16 (discussing
7 ascertainability issues). Moreover, case law continues to evolve in this area.

8 Amount offered in settlement – The consideration – a \$5.3 million cash fund for a class
9 of approximately seven million or less – is substantial, particularly in light of the Court’s prior
10 ruling concerning nominal damages, the very real risk that the jury could find no liability or
11 award no damages, and the fact that any jury verdict would be subject to appellate review.
12 Relevant points of comparison indicate that the amount in settlement is in excess on a per head
13 basis than settlements approved by this District in other data privacy matters. Given Decl. at ¶¶
14 15 & 16.

15 The Settlement Agreement treats all class members and apps equally. Doing so is fair
16 because nominal damages are not intended to compensate or be dependent on a defendant’s
17 degree of fault. As the Ninth Circuit has explained,

Nominal damages, as the term implies, are in name only and
customarily are defined as a mere token or “trifling.” . . .

An award of nominal damages is intended to serve as a symbol that
defendant’s conduct resulted in a technical, as opposed to
injurious, violation of plaintiff’s rights. Nominal damages are not
intended to compensate a plaintiff for injuries, nor to act as a
measure of the severity of a defendant’s wrongful conduct.
Recovery of nominal damages is important not for the amount of
the award, but for the fact of the award. Indeed, nominal damages
do not measure anything.

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

1 *Cummings v. Connell*, 402 F.3d 936, 945 (9th Cir. 2005) (citations omitted). As the Court has
 2 previously noted, the nature of nominal damages erases many of the potential distinctions in this
 3 case.⁴ (ECF No. 763, at pg. 26, fn 12.)

4 The extent of discovery completed and stage of proceedings – As detailed above and in
 5 the supporting declarations, extensive discovery has occurred in the case against the App
 6 Defendants. Plaintiffs and their counsel consulted with source code and damages experts. They
 7 also had the benefit of the Court’s views on the matter in rulings on liability and class
 8 certification. The information revealed in discovery as well as their experts’ review and analysis
 9 of same, together with the Court’s rulings, provided Plaintiffs and their counsel with a sufficient
 10 baseline to evaluate the strengths and weaknesses of Plaintiffs’ claims and the benefits of the
 11 proposed Settlement Agreement.

12 The experience and views of lead counsel – Plaintiffs and the Class Members are
 13 represented in this case by lead counsel who have significant experience in complex class action
 14 litigation, have negotiated other substantial class settlements, and have the ability to litigate this
 15 case on a classwide basis together with the other members of the Plaintiffs’ Steering Committee
 16 if a fair settlement were not offered. Given Decl. at ¶¶ 1-3; von Loewenfeldt Decl. at ¶¶ 1-4;
 17 Edwards Decl. at ¶¶ 1-4; Schwenker Decl. at ¶¶ 1-4; Sarnelli Decl. at ¶¶ 1-3. Counsel were
 18 satisfied with the Settlement Agreement only after conducting intensive settlement negotiations
 19 and thorough investigation into the factual and legal issues raised in this case, the latter of which
 20 were thoroughly vetted by Plaintiffs’ counsel and tested by the Court. Given Decl. at ¶ 18; von
 21 Loewenfeldt Decl. at ¶ 19; Edwards Decl. at ¶ 5-17; Schwenker Decl. at ¶¶ 5-7, 9, 13; Sarnelli
 22 Decl. at ¶ 4. In negotiating and evaluating the Settlement Agreement, counsel relied upon their
 23

24
 25 ⁴ Nor do potential differences in theoretical punitive damage claims require distinctions be
 26 drawn between defendants. *Saint v. BMW of N. Am., LLC*, No. CIV.A. 12-6105 CCC, 2015 WL
 27 2448846, at *9 (D.N.J. May 21, 2015) (“the mere possibility of punitive or multiple damages is
 28 not an appropriate measure of the Settlement’s reasonableness”); *Mangone v. First USA Bank*,
 206 F.R.D. 222, 229 (S.D. Ill. 2001) (“Punitive damages are generally not appropriate in
 measuring the fairness of a proposed class action settlement.”) (citing cases); *In re Am. Family
 Enterprises*, 256 B.R. 377, 425 (D.N.J. 2000) (“However, single damages, not treble or punitive
 damages, are the appropriate yardstick by which the fairness of a proposed class action
 settlement should be measured.”).

1 investigation and drew on their experience, skill and expertise in determining that the Settlement
 2 Agreement was fair, reasonable and adequate. Given Decl. at ¶ 19; von Loewenfeldt Decl. at ¶
 3 20. While lead counsel believe that they can overcome the various defenses of the App
 4 Defendants, they are indicative of the risks, hurdles, and delays that Plaintiffs and the Class face
 5 should this matter proceed in litigation. Given Decl. at ¶ 19; von Loewenfeldt Decl. at ¶ 20.
 6 Lead counsel believe that the proposed Settlement Agreement provides considerable monetary
 7 relief for Settlement Class Members in light of the Court's order regarding nominal damages,
 8 while allowing them to avoid the risks of unfavorable, and in some cases possibly dispositive,
 9 rulings on these and other issues. Given Decl. at ¶ 20; von Loewenfeldt Decl. at ¶ 21.

10 **E. The Proposed Notice Plan Should Be Approved.**

11 Rule 23(e)(1) states that, “[t]he court must direct notice in a reasonable manner to all
 12 class members who would be bound by a proposed settlement, voluntary dismissal, or
 13 compromise.” Notice to the class must be “the best notice that is practicable under the
 14 circumstances, including individual notice to all members who can be identified through
 15 reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B); see also *Amchem Prods. v. Windsor*, 521 U.S.
 16 591, 617 (1997).

17 Here, Settlement Class Members will receive the Notice and Claim Form by email
 18 and/or tweet notice as provided in Section 5.2.2 of the Settlement Agreement. For those App
 19 Defendants who can identify the specific users who had their address book data uploaded by one
 20 of their charged apps, those users will get such direct individual email notice. For those who
 21 cannot, there will be the same direct, individual email notice but to every user who downloaded
 22 and registered for that charged app during the Class Period; in this respect, the notice will be
 23 over-inclusive, since some who downloaded and registered for a given app may not have had
 24 their address book data uploaded by that app. Given Decl. at ¶¶ 13, 14; von Loewenfeldt Decl.
 25 at ¶¶ 14, 15. Settlement Class Members who used the challenged Twitter app will receive a
 26 “tweet” notice with a link to the Administrator’s website with the Full Notice and Claim Form.
 27 (Settlement Agreement, § 5.2.1.)
 28

1 This is undoubtedly the best notice practicable under the circumstances. The parties will
 2 also cause the Settlement Administrator to maintain a website with information on the
 3 settlement. (Settlement Agreement, § 5.3.)

4 In addition to the manner of giving notice to the Class, the contents of the notice itself
 5 will satisfy Rule 23(c)(2)(B), as the notice will include all required elements: “(i) the nature of
 6 the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv)
 7 that a class member may enter an appearance through an attorney if the member so desires; (v)
 8 that the Court will exclude from the class any member who requests exclusion; (vi) the time and
 9 manner for requesting exclusion; and (vii) the binding effect of a class judgment on members
 10 under Rule 23(c)(3).” Copies of the proposed notices to the Class are attached as Exhibits B-D
 11 to the Settlement Agreement, and have been emailed to this Court pursuant to the Court’s Local
 12 Rules.

13 Finally, Section 5.4 of the Settlement Agreement comports with the Class Action
 14 Fairness Act by requiring the App Defendants to provide notice to the proper entities within 10
 15 days after the Settlement Agreement is filed with the Court. See 28 U.S.C. § 1715.

16 Accordingly, the form of notice and the manner of giving notice should be approved.

17 **F. The Proposed Plan of Distribution Is Fair, Reasonable, and Adequate**

18 A plan of distribution of class settlement funds is subject to the “fair, reasonable and
 19 adequate” standard that applies to approval of class settlements. *In re Citric Acid Antitrust*
 20 *Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001). “A plan of allocation that reimburses class
 21 members based on the type and extent of their injuries is generally reasonable.” *In re Oracle*
 22 *Sec. Litig.*, No. 90-0931, 1994 U.S. Dist. LEXIS 21593, at *3 (N.D. Cal. June 16, 1994).

23 Here, as explained above, the parties propose that the funds paid to Settlement Class
 24 Members from the Settlement Account be distributed through a claims process and allocated
 25 pursuant to a pro rata distribution based on the number of Class Members who submit a valid
 26 claim, multiplied by the number of apps they may have used that uploaded their address book
 27 data. (Settlement Agreement, §§ 7.1, 7.4, 7.5.) As discussed above, this equal method of
 28 distribution, while accounting for the number of apps each Class Member used, is fair given the

1 nominal nature of the damages. Given Decl. at ¶ 15. Any returned funds (from uncashed
2 checks or failed electronic payments) will be distributed on a cy pres basis only if unclaimed
3 after ninety (90) days. (Settlement Agreement, §§ 7.10.2-7.10.4.)

4 **G. The Court Should Set a Final Approval Hearing Schedule**

5 The last step of the settlement approval process is the final approval hearing, at which
6 the Court hears all evidence and argument necessary to evaluate the proposed Settlement
7 Agreement. At that hearing, proponents of the Settlement Agreement will explain and describe
8 its terms and conditions and offer argument in support of approval and members of the
9 Settlement Class, or their counsel, may be heard in support of or in opposition to the Settlement.

10 Plaintiffs propose the following schedule for final approval of the Settlement:

Event	Timing	Date ⁵
Last day for the Administrator to send Notice & start operating Settlement Website	30 days after entry of this Order	June 26, 2017
Last day for Plaintiffs to file their motion for attorneys' fees, costs, and incentive awards to be heard at the Fairness Hearing	106 days after entry of this Order	September 11, 2017
Last day for Class Members to file a claim, request exclusion or object to the Settlement	120 days after entry of this Order	September 25, 2017
Last day for parties to file motion for final approval and supporting briefs	137 days after entry of this Order	October 12, 2017

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
⁵ The specific calendar dates proposed assume a Preliminary Approval Order is entered on May 25, 2017.

1 **V. CONCLUSION**

2 Based on the foregoing, Plaintiffs submit that the proposed Settlement Agreement is fair,
3 adequate and reasonable, and in the best interests of the Settlement Class. Accordingly,
4 Plaintiffs respectfully request that the Court order the relief requested above.

5
6
7 Dated: April 3, 2017

/s/ David M. Given

8 David M. Given
9 Nicholas A Carlin
10 PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
11 39 Mesa Street, Suite 201
12 San Francisco, CA 94129
13 Tel: (415) 398-0900

14 Michael von Loewenfeldt
15 James M. Wagstaffe
16 Frank Busch
17 KERR & WAGSTAFFE LLP
18 101 Mission Street, 18th Floor
19 San Francisco, CA 94105
20 Tel: (415) 371-8500
21 Fax: (415) 371-0500

Interim Co-Lead Counsel for Plaintiffs

22 Carl F. Schwenker (admitted *pro hac vice*)
23 LAW OFFICES OF CARL F. SCHWENKER
24 The Haehnel Building
25 1101 East 11th Street
26 Austin, TX 78702
27 Tel: (512) 480-8427
28 Fax: (512) 857-1294

Plaintiffs' Liaison Counsel

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
39 Mesa Street, Suite 201 – The Presidio
San Francisco, CA 94129
Telephone: 415-398-0900 – Fax: 415-398-0911

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

Jeff Edwards (admitted *pro hac vice*)
EDWARDS LAW
The Haehnel Building
1101 East 11th Street
Austin, TX 78702
Tel: (512) 623-7727
Fax: (512) 623-7729

Jennifer Sarnelli (SBN 242510)
GARDY & NOTIS, LLP
Tower 56
126 East 56th Street, 8th Floor
New York, NY 10022
Tel: (212) 905-0509
Fax: (212) 905-0508

Plaintiffs' Steering Committee

1 JAMES M. WAGSTAFFE (95535)
 MICHAEL VON LOEWENFELDT (178665)
 2 FRANK BUSCH (258288)
KERR & WAGSTAFFE LLP
 3 101 Mission Street, 18th Floor
 San Francisco, CA 94105
 4 Tel.: 415-371-8500
 Fax: 415-371-0500
 5 Email: wagstaffe@kerrwagstaffe.com
 Email: mvl@kerrwagstaffe.com
 6 Email: busch@kerrwagstaffe.com

7 DAVID M. GIVEN (142375)
 NICHOLAS A. CARLIN (112532)
 8 PHILLIPS, ERLEWINE, GIVEN & CARLIN LLP
 39 Mesa Street, Ste. 201
 9 San Francisco, CA 94129
 Tel: 415-398-0900
 10 Fax: 415-398-0911
 Email: dmg@phillaw.com
 11 Email: nac@phillaw.com

12 *Interim Co-Lead Counsel for Plaintiffs*

13 *All counsel listed on signature pages*

14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**
 16 **SAN FRANCISCO DIVISION**

17 MARC OPPERMAN, et al.,

18 Plaintiffs,

19 v.

20 PATH, INC., et al.

21 Defendants.
 22
 23
 24
 25
 26
 27
 28

Case No. 13-cv-00453-JST

CLASS ACTION

**[PROPOSED] ORDER GRANTING
 PRELIMINARY APPROVAL OF CLASS
 SETTLEMENT AND PROVISIONAL CLASS
 CERTIFICATION**

Opperman v. Path, Inc., No. 13-cv-453-JST
Hernandez v. Path, Inc., No. 12-cv-1515-JST

PHILLIPS, ERLEWINE & GIVEN, LLP
 50 California Street, 32nd Floor
 San Francisco, CA 94111
 (415) 398-0900

1 On May 25, 2017, this Court heard the motion by plaintiffs Allen Beuershausen, Giuliana
2 Biondi, Lauren Carter, Stephen Dean, Stephanie Cooley, Jason Green, Claire Hodgins, Gentry
3 Hoffman, Rachelle King, Nirali Mandalaywala, Claire Moses, Judy Paul, and Gregory Varner
4 (“Plaintiffs”) for preliminary approval of class settlement and provisional class certification
5 under Rule 23 of the Federal Rules of Civil Procedure. Unless otherwise noted, all capitalized
6 terms are defined herein as in the Settlement Agreement. The motion presents a settlement
7 between Plaintiffs and defendants Foodspotting, LLC (“Foodspotting”); Foursquare Labs, Inc.
8 (“Foursquare”); Gowalla, Inc. (“Gowalla”); Instagram, LLC (“Instagram”); Kik Interactive Inc.
9 (“Kik”); Kong Technologies, Inc. (formerly known as Path, Inc.) (“Path”); Twitter, Inc.
10 (“Twitter”); and Yelp Inc. (“Yelp”). This Court reviewed the motion, including the Settlement
11 Agreement and Release (“Settlement Agreement”). Based on this review and the findings
12 below, the motion is hereby granted as follows:

13 **FINDINGS:**

- 14 **1.** The Settlement Agreement is fair, reasonable, and adequate.
- 15 **2.** The Settlement Agreement was the product of serious, informed, non-collusive
16 negotiations by experienced counsel, has no obvious deficiencies, does not improperly grant
17 preferential treatment to the proposed class representatives or segments of the class, and falls
18 within the range of possible approval.
- 19 **3.** The Full Notice, Summary Notice, and Claim Form (each attached to the
20 Settlement Agreement) comply with due process because the notices and forms are reasonably
21 calculated to adequately apprise class members of (i) the pending lawsuit, (ii) the proposed
22 settlement, and (iii) their rights, including the right to either participate in the settlement, exclude
23 themselves from the settlement, or object to the settlement.
- 24 **4.** For settlement purposes only, the Class is so numerous that joinder of all Class
25 Members is impracticable.
- 26 **5.** For settlement purposes only, Plaintiffs’ claims are typical of the Class’s claims.
- 27
28

1 **6.** For settlement purposes only, there are questions of law and fact common to the
2 Class, which predominate over any questions affecting only individual Class Members.

3 **7.** For settlement purposes only, Class Certification is superior to other available
4 methods for the fair and efficient adjudication of the controversy.

5 **IT IS HEREBY ORDERED THAT:**

6 **1. Settlement Approval.** The Settlement Agreement, including the Full Notice,
7 Summary Notice, and Claim Form, attached to the Settlement Agreement as Exhibits A–D are
8 preliminarily approved.

9 **2. Approval of Settlement Administrator.** KCC Class Action Services, LLC is
10 approved to serve as Settlement Administrator.

11 **3. Provision of Class Notice.** The Settlement Administrator will notify Class
12 Members of the settlement in the manner specified under paragraph 5 of the Settlement
13 Agreement.

14 **4. Claim for Settlement Payment.** Class Members who want to receive payment
15 under the Settlement Agreement must accurately complete and submit a Claim Form to the
16 Claims Administrator via the Settlement Website no later than one-hundred and twenty (120)
17 days after entry of the date of this Order.

18 **5. Objection to Settlement.** Class Members who have not submitted a timely
19 written exclusion request pursuant to paragraph 6 below and who want to object to the
20 Settlement Agreement must file such objection with the Court, no later than one-hundred and
21 twenty (120) days after entry of the date of this Order. The delivery date is deemed to be the
22 date the objection is deposited in the U.S. Mail as evidenced by the postmark. The objection
23 must include: (a) the name and case number of the Action “*Opperman et al. v. Path, Inc. et al.*,
24 Case No. 13-cv-00453-JST”; (b) the full name, address, and telephone number of the person
25 objecting; and (c) in clear and concise terms, the legal and factual arguments supporting the
26 objection. Any Class Member who files and serves a written objection, as described in this
27
28

PHILLIPS, ERLEWINE & GIVEN, LLP
50 California Street, 32nd Floor
San Francisco, CA 94111
(415) 398-0900

1 paragraph, may appear at the Fairness Hearing, either in person or through personal counsel
2 hired at the Class Member’s expense, to object to the Settlement Agreement. The objection will
3 not be valid if it only objects to the lawsuit’s appropriateness or merits.

4 **6. Failure to Object to Settlement.** Class Members who fail to object to the
5 Settlement Agreement in the manner specified above will: (1) be deemed to have waived their
6 right to object to the Settlement Agreement; (2) be foreclosed from objecting (whether by a
7 subsequent objection, intervention, appeal, or any other process) to the Settlement Agreement;
8 and (3) not be entitled to speak at the Fairness Hearing.

9 **7. Requesting Exclusion.** Class Members who want to be excluded from the
10 settlement must send a letter or postcard to the Settlement Administrator stating: (a) the name
11 and case number of the Action “*Opperman et al. v. Path, Inc. et al.*, Case No. 13-cv-00453-JST”;
12 (b) the full name, address, email address, and telephone number of the person requesting
13 exclusion; and (c) a statement that the person does not wish to participate in the Settlement,
14 postmarked no later than one-hundred and twenty (120) days after entry of the date of this Order.

15 **8. Provisional Class Certification.**

16 **a.** The Class is provisionally certified as all natural persons in the United
17 States meeting one or more of the following class definitions:

18 **i.** who received from Apple’s App Store a copy of versions 2.5
19 through 3.1 of the iOS mobile application entitled **Foodspotting**, and activated via such App on
20 their Apple iDevice the “Find iPhone Contacts” feature of the Foodspotting mobile application
21 between August 9, 2011 and February 19, 2012;

22 **ii.** who received from Apple’s App Store one or more of versions 1.1
23 through 4.2 of the iOS mobile application entitled **Foursquare**, and did one or both of the
24 following between April 4, 2009 and February 14, 2012: (1) for versions 1.1 through 4.2,
25 activated via such App on their Apple iDevice (iPhone, iPad, iPod Touch) the “Add Friends”
26
27
28

PHILLIPS, ERLEWINE & GIVEN, LLP
50 California Street, 32nd Floor
San Francisco, CA 94111
(415) 398-0900

1 feature of the Foursquare mobile application or (2) for versions 3.1 through 4.2, registered via
2 their iPhone as a Foursquare user through the Foursquare mobile application;

3 **iii.** who received from Apple’s App Store one or more of versions
4 1.5.0 through 4.1 of the iOS mobile application entitled **Gowalla**, and did one or both of the
5 following within the Gowalla mobile application between February 23, 2010 and February 23,
6 2012: (1) selected a checkbox stating “Automatically connect with friends from my address
7 book” and then depressed a “Let’s Get Started” button; (2) depressed a “Find Friends” button
8 and then depressed an “Address Book” button;

9 **iv.** (A) owned an Apple iPhone on which he or she registered an
10 account for any of the versions 1.0.0 through 2.0.7 of the **Instagram** App obtained from the
11 Apple App Store; (B) utilized the Find Friends feature of the Instagram App between October 6,
12 2010 and February 10, 2012; and (C) resided within the United States at the time he or she
13 registered an Instagram account and used the Find Friends Feature;

14 **v.** (A) owned an Apple iPhone on which he or she downloaded from
15 Apple App Store, installed, and registered an account on the **Kik** App; (B) installed version 5.4.0
16 of the Kik App; (C) after installing version 5.4.0, utilized the Suggested Friends feature of the
17 Kik App between December 22, 2011 and February 11, 2012; (D) as a result of such use of the
18 Suggested Friends Feature, had contacts data uploaded to Kik’s servers in non-hashed format;
19 and (E) resided within the United States at the time he or she registered a Kik account and used
20 the Suggested Friends Feature;

21 **vi.** who received from Apple’s App Store a copy of version 2.0
22 through 2.0.5 of the iOS mobile application entitled **Path**, and who were Path registrants and
23 activated via such App on their Apple iPhone the Path mobile application between November
24 29, 2011 and February 7, 2012;

25 **vii.** who received preinstalled on an Apple iPhone and/or from
26 Apple’s App Store between March 11, 2011 and February 21, 2012 a copy of versions 3.3
27
28

PHILLIPS, ERLEWINE & GIVEN, LLP
50 California Street, 32nd Floor
San Francisco, CA 94111
(415) 398-0900

1 through 4.0.1 of the iOS mobile application entitled **Twitter**, and activated via such App on their
2 Apple iDevice the “Find Friends” feature of the Twitter mobile application; and/or

3 **viii.** who received from Apple’s App Store a copy of versions 4.0.0
4 through 5.6.0 of the iOS mobile application entitled **Yelp**, and activated via such App on their
5 Apple iDevice the “Find Friends” feature of the Yelp mobile application between January 16,
6 2010 and February 22, 2012.

7 **b.** Excluded from the Class are (a) Defendants, (b) any entities in which
8 Defendants have a controlling interest or which have a controlling interest in Defendants, (c)
9 Defendants’ respective officers, directors, employees, subsidiaries, affiliates, and attorneys, and
10 (d) the Judge presiding over the Action and any of their employees or immediate family
11 members.

12 **9. Conditional Appointment of Class Representatives and Class Counsel.**

13 Plaintiffs are conditionally certified as the Class Representatives to implement the Parties’
14 settlement in accordance with the Settlement Agreement. The law firms of Kerr & Wagstaffe
15 LLP; Phillips, Erlewine, Given & Carlin LLP; Edwards Law; the Law Offices of Carl F.
16 Schwenker; and Gardy & Notis, LLP are conditionally appointed as Class Counsel.

17 **10. Termination.** If the Settlement Agreement terminates for any reason, the
18 following will occur: (a) Class certification provided by this Order will be automatically
19 vacated;¹ (b) Plaintiffs will stop functioning as Class representatives (except as provided in the
20 July 15, 2016 Order); (c) Class Counsel will revert to their prior status as Interim Class Counsel
21 (except as provided in the July 15, 2016 Order); and (d) this Action (as it relates to the claims
22 settled in the Settlement Agreement) will revert to its previous status in all respects as it existed
23 immediately before the Parties executed the Settlement Agreement. This Order will not waive or
24 otherwise impact the Parties’ rights or arguments.

25 _____
26 ¹ With respect to the claims against Path and Apple (for aiding and abetting Path), vacating
27 this Order will reinstate the Class certified by this Court on July 15, 2016.
28

PHILLIPS, ERLEWINE & GIVEN, LLP
50 California Street, 32nd Floor
San Francisco, CA 94111
(415) 398-0900

1 **11. No Admissions.** Nothing in this Order is, or may be construed as, an admission
2 or concession on any point of fact or law by or against any Party.

3 **12. Stay of Dates and Deadlines.** All discovery and pretrial proceedings and
4 deadlines with respect to the claims against the App Defendants, are stayed and suspended until
5 further notice from the Court, except for such actions as are necessary to implement the
6 Settlement Agreement and this Order. This stay shall have no effect on litigation of the pending
7 misrepresentation claims against Apple.

8 **13. Fairness Hearing.** On November 16, 2017, at 2:00 p.m., this Court will hold a
9 Fairness Hearing to determine whether the Settlement Agreement should be finally approved as
10 fair, reasonable, and adequate. Based on the date of this Order and the date of the Fairness
11 Hearing, the Court sets the following additional deadlines consistent with the Settlement:

Event	Timing	Date
Last day for the Administrator to send Notice & start operating Settlement Website	30 days after entry of this Order	June 26, 2017
Last day for Plaintiffs to file their motion for attorneys' fees, costs, and incentive awards to be heard at the Fairness Hearing	106 days after entry of this Order	September 11, 2017
Last day for Class Members to file a claim, request exclusion or object to the Settlement	120 days after entry of this Order	September 25, 2017
Last day for parties to file motion for final approval and supporting briefs	137 days after entry of this Order	October 12, 2017

24
25 This Court may order the Fairness Hearing to be postponed, adjourned, or continued. If that
26 occurs, the updated hearing date shall be posted on the Settlement Website but other than the
27
28

1 website posting the Settlement Administrator will not be required to provide any additional notice
2 to Class Members.

3
4 DATED: May 25, 2017

5 _____
6 HON. JON S. TIGAR
7 U.S. DISTRICT COURT JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PHILLIPS, ERLEWINE & GIVEN, LLP
50 California Street, 32nd Floor
San Francisco, CA 94111
(415) 398-0900