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Interim Co-Lead Counsel

25 **UNITED STATES DISTRICT COURT**
 26 **NORTHERN DISTRICT OF CALIFORNIA**
 27 **SAN JOSE DIVISION**

28 PATRICIA WEEKS, ALICIA HELMS, BRIAN
 MCCLOY, and ADRIAN ALCARAZ on behalf
 of themselves and all others similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 5:18-cv-00801-NC

**JOINT DECLARATION OF DANIEL C.
 GIRARD AND BENJAMIN F. JOHNS IN
 SUPPORT OF PLAINTIFFS' MOTION
 FOR PRELIMINARY APPROVAL OF
 CLASS ACTION SETTLEMENT**

Date: June 5, 2019
 Time: 2:00 p.m.
 Courtroom: 5, 4th Floor
 Judge: Hon. Nathanael Cousins

REDACTED - FILED UNDER SEAL

1 We, Daniel C. Girard and Benjamin F. Johns, declare as follows pursuant to 28 U.S.C. § 1746:

2 1. Daniel C. Girard is the founder and managing partner of Girard Sharp LLP (“Girard
3 Sharp”), and one of the attorneys of record for Plaintiffs.¹ Mr. Girard submits this declaration in support
4 of Plaintiffs’ motion for preliminary approval of the proposed class action settlement with Google. He
5 submits this declaration based on personal knowledge, and if called to do so, could testify to the matters
6 contained herein.

7 2. Benjamin F. Johns is a partner in the law firm of Chimicles Schwartz Kriner &
8 Donaldson-Smith LLP (“Chimicles”), and one of the attorneys of record for Plaintiffs. Mr. Johns
9 submits this declaration in support of Plaintiffs’ motion for preliminary approval of the proposed class
10 action settlement. He makes this declaration based on personal knowledge, and if called to do so, could
11 testify to the matters contained herein.

12 **I. THE LITIGATION**

13 3. Plaintiffs brought this proposed nationwide consumer class action against Google LLC.
14 Plaintiffs allege that Google designed, manufactured, marketed, and sold the original Pixel and Pixel
15 XL smartphone. Plaintiffs allege that a defect in Pixels manufactured before January 4, 2017 leads to
16 microphone or speaker failures.

17 4. On February 6, 2018, Patricia Weeks and Waleed Anbar filed a class action complaint on
18 behalf of Pixel purchasers alleging: (i) breach of express warranty; (ii) breach of the implied covenant
19 of good faith and fair dealing; (iii) breach of the implied warranty of merchantability; (iv) violation of
20 the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*; (v) violation of California’s Unfair
21 Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.*; (vi) violation of California’s Consumers
22 Legal Remedies Act, CAL. CIV. CODE § 1750 *et seq.*; and (vii) fraudulent concealment. Dkt. No. 1.

23 5. On March 29, Plaintiffs moved to appoint Girard Sharp and Chimicles as interim co-lead
24 counsel. Dkt. No. 25.

25 6. On April 11, Plaintiffs Patricia Weeks, Roberto Suarez, Alicia Helms, and Brian McCloy
26 filed a First Amended Complaint, alleging the same causes of action as the initial complaint. Dkt. No.

27 _____
28 ¹ Unless otherwise noted, capitalized terms have the meaning ascribed to them in the Settlement Agreement.

1 26. Waleed Anbar was not included in this amended complaint. *Id.* Roberto Suarez voluntarily
2 dismissed his claims on April 18. Dkt. No. 27.

3 7. On April 17, the parties met and conferred pursuant to FED. R. CIV. P. 26(f). *See* Dkt.
4 No. 38. Before the conference, Plaintiffs delivered early document requests under Rule 26(d)(2) as well
5 as a draft stipulated protective order and a draft protocol for the discovery of electronically stored
6 information. *Id.*

7 8. After the Rule 26(f) conference, the parties negotiated a prioritized discovery plan. *Id.*
8 The parties agreed that during the pendency of Google's motion to dismiss, Google would respond only
9 to certain priority discovery requests and that party discovery would not begin in full until August 15.
10 Pursuant to the parties' agreement, and in response to Plaintiffs' priority discovery requests, Google
11 produced documents regarding the named plaintiffs and portions of Google's root cause analysis of the
12 Pixel audio failures. Google also responded to eight interrogatories focused on the number of Pixels
13 sold in the United States, Pixel return rates, and Google's knowledge of the alleged defect. As part of
14 the parties' agreement, Plaintiffs took a limited deposition of Google's Rule 30(b)(6) designee covering
15 five agreed-upon topics.

16 9. On May 9, the parties appeared before the Court for the initial case management
17 conference, during which they discussed the appointment of class counsel, Google's forthcoming
18 motion to dismiss, and a schedule for the remainder of the case. Dkt. Nos. 40, 41.

19 10. On May 16, Plaintiffs submitted a proposed protocol for the recording, submission, and
20 review of attorneys' fees and expenses incurred by counsel for Plaintiffs in this action. Dkt. No. 45.
21 The next day, the Court appointed Girard Sharp and Chimicles as interim class counsel and entered the
22 protocol for time and expense reporting. Dkt. No. 46. Pursuant to the timekeeping protocol, Plaintiffs
23 have filed summary time and expense reports for each quarter. Dkt. Nos. 57, 88, 122, 146.

24 11. On June 5, the Court entered the parties' negotiated Protective Order and protocol for the
25 discovery of electronically stored information. Dkt. Nos. 49, 50.

26 12. On May 10, Google filed a motion to dismiss the First Amended Complaint in its
27 entirety. Dkt. No. 42. Plaintiffs' filed their opposition brief on June 6 (Dkt. No. 51), and Google filed
28 its reply brief on June 20 (Dkt. No. 54).

1 13. After holding oral argument on August 15 (Dkt. No. 63), the Court on August 16 issued
2 an opinion which granted in part and denied in part Google’s motion to dismiss, with leave to amend
3 consistent with the Court’s order. Dkt. No. 66.

4 14. On September 20, the Court granted Plaintiffs’ motion for leave to amend their
5 complaint to add Adrian Alcaraz as an additional named plaintiff. Dkt. Nos. 72, 81-82

6 15. On September 24, Plaintiffs filed a Second Amended Class Action Complaint asserting
7 claims for: (i) breach of the implied covenant of good faith and fair dealing; (ii) violation of California’s
8 Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.*; (iii) violation of California’s
9 Consumers Legal Remedies Act, CAL. CIV. CODE § 1750 *et seq.*; and (iv) fraudulent concealment. Dkt.
10 No. 83.

11 16. On October 15, Google filed an Answer to Plaintiffs’ Second Amended Complaint. Dkt.
12 No. 89.

13 17. Pursuant to the parties’ agreement, party discovery began in full on August 15. Between
14 August 15 and the close of fact discovery (February 15, 2019), Plaintiffs propounded, and Google
15 responded to, four sets of interrogatories, two sets of requests for documents, an inspection demand, and
16 one set of requests for admission.

17 18. In response to Plaintiffs’ requests, Google produced over 350,000 pages of documents
18 pertaining to, *inter alia*, Google’s failure analysis, technical specifications for the Pixel, product testing
19 and development, communications about the Pixel and the Audio Defect, marketing materials, market
20 research, sales figures, pricing data, warranty claims, consumer complaints, and the relationship
21 between Google and HTC.

22 19. On November 27, Plaintiffs moved to compel Google’s production of revenue data
23 relating to the Pixel. Dkt. No. 104. After hearing oral argument on December 12 (Dkt. No. 112), the
24 Court denied Plaintiffs’ motion to compel, finding that such revenue data was not proportional to the
25 needs of the case. Dkt. No. 115.

26 20. On January 10, 2019, Plaintiffs moved to compel Google’s supplemental responses to
27 interrogatories. Dkt. No. 114. The Court ordered Google to provide supplemental responses by
28

1 Google's proposed deadline and ordered the parties to file a status report concerning the responses.
2 Dkt. No. 121.

3 21. Google propounded and Plaintiffs responded to three sets of interrogatories, three sets of
4 requests for production of documents, an inspection demand, and requests for admission. Plaintiffs
5 complied with Google's discovery requests, timely responding to its written discovery requests and
6 producing responsive documents. The parties were in the process of negotiating a protocol for
7 inspection of Plaintiffs' Pixels when the case settled.

8 22. Over the course of fact discovery, Plaintiffs deposed six Google employees, three
9 Google declarants, and Google's Rule 30(b)(6) designee on two separate occasions. Google deposed all
10 four of the named Plaintiffs at defense counsel's offices in San Francisco, which required each of the
11 Plaintiffs to travel.

12 23. Google also sought to depose two former Plaintiffs. Plaintiffs moved for a protective
13 order to prevent these depositions from taking place, which the Court granted on January 28, 2019.
14 Dkt. No. 136.

15 24. Plaintiffs retained and worked closely with an electrical engineering expert, Dr. Shahin
16 Nazarian to review the technical underpinnings of the audio defect, and an economist, Stefan Boedeker,
17 to analyze class-wide damages. Google deposed both of these experts.

18 25. Plaintiffs served document subpoenas on 10 non-parties: Google's contract manufacturer
19 for the Pixel (HTC); the manufacturer of the audio codec chip inside the Pixel (Qualcomm); Pixel
20 retailers/distributors/cellular carriers (Verizon, Best Buy, Reliance, Ingram Micro); Pixel repair vendors
21 (Cynergy, uBreakiFix, Puls), and the issuer of insurance policies for the Pixels (Assurant). In response
22 to these subpoenas, Plaintiffs received over 100,000 pages of documents relating to sales data, the
23 Pixel's technical specifications, consumer complaints, repair records, and insurance claims. In addition,
24 Plaintiffs deposed Verizon's corporate representative.

25 26. On November 5, Plaintiffs filed their Motion for Class Certification. Dkt. No. 94.
26 Plaintiffs' moved, pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3), for an order certifying
27 a class of all individuals in the United States who purchased from Google or an authorized reseller,
28 other than for resale, a Pixel smartphone that was manufactured before January 5, 2017—the date on

1 which Google changed its manufacturing process, allegedly to correct the Audio Defect. *Id.* Plaintiffs
2 proposed that the class exclude Google, its officers, directors, employees, subsidiaries, and affiliates; all
3 judges assigned to this case and any members of their immediate families; the parties' counsel in this
4 litigation; and any individuals who received a full cash refund or a fixed Pixel as a replacement for a
5 defective Pixel. *Id.* In support of their motion, Plaintiffs relied upon evidence obtained from Google
6 and non-parties through discovery, and the opinions of Plaintiffs' own experts. Evidence that Plaintiffs
7 submitted at class certification included the testimony of Google's 30(b)(6) designee, Steven James;
8 documents produced by Google and non-parties; the report of Plaintiffs' technical expert, Dr. Shahin
9 Nazarian; and the report of Plaintiffs' damages expert, Stefan Boedeker. *Id.*

10 27. Google opposed Plaintiffs' class certification motion on January 23. Dkt. No. 133. The
11 parties reached an agreement in principal to settle this matter before the due date for Plaintiffs' reply
12 brief in support of class certification. Google's opposition brief relied on documents produced in
13 discovery, declarations of several Google employees, excerpts from the Plaintiffs' deposition testimony,
14 and reports from a technical expert, an economic expert, and a survey expert. *Id.* Plaintiffs were
15 scheduled to take the depositions of Google's three expert witnesses within days of the parties'
16 February 22 settlement conference had the parties not reached an agreement in principle.

17 28. Pursuant to the Court's Case Management Scheduling Order, the parties completed all
18 non-expert discovery as of February 15, 2019. Dkt. No. 44.

19 **II. THE SETTLEMENT**

20 **A. The Settlement Negotiations**

21 29. On June 19, 2018, pursuant to a stipulation of the parties, the Court entered an Order
22 referring the case to Magistrate Judge Donna M. Ryu for a settlement conference, which the Court
23 recommended should be scheduled by November 5. Dkt. No. 53. On June 25, Judge Ryu set a
24 settlement conference for September 11. Dkt. No. 56.

25 30. On August 13, the parties participated in a telephonic meeting with Judge Ryu to prepare
26 for the settlement conference. Dkt. No. 61.

27 31. On August 31, Plaintiffs sent Google a settlement demand and a proposed term sheet
28 setting forth all of the material terms associated with Plaintiffs' proposed resolution of this matter.

1 32. On September 4, the parties submitted confidential settlement briefs to Judge Ryu in
2 advance of the settlement conference.

3 33. On September 7, Judge Ryu held pre-settlement telephone conferences with the parties
4 and, after consulting with them, vacated the September 11 settlement conference and set a planning call
5 for the same date. Dkt. No. 75.

6 34. On September 11, the parties participated in a planning call with Judge Ryu and agreed
7 to continue the settlement conference to January 25, 2019. Dkt. No. 79.

8 35. On January 8, 2019, pursuant to Google's unopposed request, Judge Ryu continued the
9 parties' settlement conference to February 22. Dkt. Nos. 116, 117.

10 36. On February 22, the parties participated in a settlement conference with Judge Ryu. Dkt.
11 No. 117. Over the course of an eight-hour mediation, Judge Ryu succeeded in bridging the gap between
12 the parties' positions, and the parties reached an agreement in principle to settle the case, which they
13 confirmed in writing on February 25. Dkt. No. 141. The terms of that agreement were then
14 memorialized in a term sheet signed on March 8.

15 37. Since then, the parties have engaged in further negotiations regarding the terms of the
16 Settlement, and on May 10 they executed the Settlement Agreement, a copy of which is attached hereto
17 as **Exhibit A**. The parties' Supplemental Settlement Agreement, which specifies the conditions under
18 which Google may elect to terminate the Settlement Agreement, is attached hereto as **Exhibit B**.

19 **B. The Settlement Class**

20 38. The Settlement Class consists of all individuals in the United States who purchased a
21 new Pixel, other than for resale, manufactured before January 4, 2017. Excluded from the Settlement
22 Class are (a) Google, and its officers, directors, employees, subsidiaries, and Affiliates; (b) all judges
23 assigned to this case and any members of their immediate families; (c) the parties' counsel in this
24 litigation; and (d) all individuals who returned a Pixel manufactured before January 4, 2017 to Google
25 or Verizon and received as a replacement a new Pixel manufactured after January 3, 2017 or a Pixel
26 refurbished after June 5, 2017, as determined by Google's records.

27 39. The Settlement Class is substantively identical to the class proposed in Plaintiffs' Motion
28 for Class Certification. *See* Dkt. No. 94.

1 **C. The Settlement Amount**

2 40. Subject to Court approval and pursuant to FED. R. CIV. P. 23, Google will pay
3 \$7,250,000 on a non-reversionary basis in settlement of all claims that were alleged or could have been
4 alleged in the case. Notice and administrative expenses will be deducted from the settlement amount, as
5 will any attorneys' fees and expense reimbursements approved by the Court. The balance will be
6 applied to pay claims of Class members. Plaintiffs will seek up to 30% of the fund in attorneys' fees
7 and up to \$350,000 in reimbursement of expenses, as well as a service award of \$5,000 for each of the
8 four Class representatives. Notice and administration expenses are not expected to exceed \$310,000. If
9 the above deductions are allowed in full, the settlement will provide approximately \$4,395,000 to pay
10 Class member claims. The parties propose to donate any residual funds to the National Consumer Law
11 Center ("NCLC"). Neither Google nor counsel for any party would derive any benefit, direct or
12 indirect, from the selection of NCLC as the recipient of a *cy pres* contribution.²

13 41. Plaintiffs believe the \$7,250,000 settlement is a favorable result in relation to their
14 potential aggregate recoverable damages had they obtained class certification and prevailed at trial. The
15 information available, as developed through discovery, shows that approximately ██████ Pixels were
16 manufactured before January 4, 2017 and did not include a material called ██████ surrounding the
17 audio codec.³ Plaintiffs allege that, without ██████, the solder balls that connect the audio codec to
18 the Pixel's circuit board are prone to cracking, which causes the Audio Defect to manifest. Of the
19 ██████, Google's records indicate that approximately ██████ were returned to Google and
20 Verizon⁴ for failures consistent with the Audio Defect. Thus, the estimated failure rate is ██████.

21 42. Out of the ██████ Pixels that were returned to Google or Verizon, Google's records
22 indicate that ██████ were replaced with a Pixel that ██████. Given that there have been no
23 confirmed Audio Defect failures in phones with ██████ (see Dkt. 133-10 ¶ 17), those ██████ who
24 received a replacement ██████ were made whole and have been excluded from the Settlement

25 _____
26 ² As noted in the accompanying declaration submitted on behalf of NCLC, this entity is also the
27 proposed *cy pres* recipient in another proposed settlement pending in this Court.

28 ³ The audio codec is the computer chip responsible for the Pixel's audio functions.

⁴ Together, Google and Verizon account for approximately 93% of Pixel sales.

1 Class, just like they were excluded from the proposed class in Plaintiffs' motion for class certification.
 2 Accordingly, the Settlement Class consists of [REDACTED] Class members, approximately [REDACTED]⁵ of whom
 3 experienced an Audio Defect failure and did not receive an adequate remedy. Of these [REDACTED] Class
 4 members, approximately [REDACTED] reported *multiple* failures to Google or Verizon (*e.g.*, the customer's
 5 original Pixel failed and the customer received a replacement Pixel that also failed from the Audio
 6 Defect).

7 43. The information available, as developed through discovery, indicates that the cost to
 8 properly repair or refurbish a Pixel—by replacing the motherboard and [REDACTED] to the audio
 9 codec—is approximately [REDACTED]. Attached as **Exhibit C** is an excerpt of an agreement between Google
 10 and its authorized repair provider, uBreakiFix, which demonstrates that [REDACTED] is the approximate cost to
 11 repair a Pixel by replacing the motherboard with a motherboard that [REDACTED] (UBIF/Pixel
 12 0172-73). While Mr. Boedeker did not complete his conjoint analysis before the parties reached an
 13 agreement in principle to settle this matter, his preliminary analysis suggests that the value consumers
 14 place on a smartphone's working audio features is generally comparable to the [REDACTED] repair cost.

15 44. Had the case proceeded to trial, Plaintiffs could have argued that the [REDACTED] Class
 16 members who experienced a failure and did not receive a non-defective replacement phone each
 17 suffered damages of approximately [REDACTED] or aggregate damages equating to approximately [REDACTED]
 18 [REDACTED]. The remaining [REDACTED] Class members also were damaged, Plaintiffs would argue,
 19 because they purchased a defective Pixel and never received a fixed Pixel as a replacement. The latter
 20 group, however, did not experience an Audio Defect failure, and the chance that they will ever
 21 experience an Audio Defect failure is statistically insignificant.⁶ Accordingly, their damages
 22 correspond to the [REDACTED] risk of a failure—a risk that was, and likely will continue to be, unrealized.
 23 Because the damages associated with failure are approximately [REDACTED], and the group of [REDACTED] Class
 24

25 ⁵ [REDACTED] is the result when [REDACTED] is subtracted from [REDACTED].

26 ⁶ Google's Director of Operations attested that Google [REDACTED] through its
 27 [REDACTED], which applies to audio failure claims made after expiration of the one-year
 28 warranty. Declaration of Steven Nickel, Dkt. No. 133-11, ¶ 13. It can thus be estimated that the failure
 rate after one year of ownership is approximately [REDACTED] at issue.

1 member had a [REDACTED] risk of a failure occurring, the expected damages for each such member is [REDACTED]
2 [REDACTED], or approximately [REDACTED] in aggregate damages.

3 45. Had the case proceeded to trial, Plaintiffs could have argued that every Class member
4 who purchased a Pixel and did not receive a fixed replacement Pixel overpaid by at least [REDACTED], and every
5 Class member who experienced a failure overpaid by [REDACTED]. Thus, had Plaintiffs prevailed at trial,
6 Plaintiffs estimate total damages for the Class of [REDACTED].

7 46. Accordingly, the settlement recovery of \$7,250,000 represents approximately [REDACTED] of the
8 Plaintiffs' estimated recoverable damages at trial.

9 47. Plaintiffs' estimate assumes the Court would rule in favor of Plaintiffs on class
10 certification, Plaintiffs would prevail on every claim and the Court would award damages on an
11 aggregate basis. Google opposed class certification, and the Court could have accepted Google's
12 arguments. Google could have argued at trial that it acted swiftly and responsibly upon learning of the
13 Pixel problems, and that it lacked knowledge of the Audio Defect when Plaintiffs and/or a large number
14 of Class members purchased their phones. In addition, were the case to have proceeded to trial, a jury
15 could have rejected a complex model for calculating aggregate class-wide damages, such as the conjoint
16 theory Mr. Boedeker was developing before this case settled. The attorneys working on this matter
17 include a member of the trial team in a major product defect class action against Whirlpool,⁷ which
18 resulted in a defense verdict after a jury trial. Class Counsel, therefore, recognize the difficulty of
19 presenting a complex, class-wide damages theories to a lay jury.

20 48. If, assuming Plaintiffs prevailed at trial, the Court required any form of individualized
21 damage prove-up process—with individual Class members being required to come forward to establish
22 whether or not they ultimately suffered any damage depending on whether they experienced the alleged
23 defect in or out of warranty, and whether Defendant's warranty adjustments adequately compensated
24 them—Class Counsel believe a victory at trial would be Pyrrhic. In contrast, the claims procedure
25

26
27 ⁷ *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (Glazer v. Whirlpool Corp.)*, No.
28 1:08-wp-65001-CAB (N.D. Ohio Oct. 31, 2014), Dkt. No. 60; *see also*
<https://www.reuters.com/article/us-whirlpool-washers-verdict-idUSKBN0IJ25Y20141030>.

1 made available under the Settlement offers substantial recoveries to consumers who make the minimal
2 effort needed to submit a claim.

3 **C. The Plan of Allocation**

4 49. Exhibit 1 to the Settlement Agreement sets forth the proposed Plan of Allocation. In
5 developing the Plan of Allocation, Class Counsel used records produced in discovery to ensure that
6 Class members with identified losses will readily receive a payment and to allocate compensation
7 equitably among the Class members in light of their experiences and records. Class members will be
8 encouraged but not required to file claims online using a dedicated website.

9 50. The parties have records of email addresses for nearly all Class members, though some
10 of those addresses may no longer be valid. The parties also have records of Class members who
11 reported to Google or Verizon a failure consistent with the Audio Defect and records of Class members
12 who, after reporting the failure and receiving a replacement Pixel, experienced another Audio Defect
13 failure on the replacement Pixel. Finally, the parties have records of the insurance claims made through
14 Assurant—the authorized insurance provider for the Pixel—and the amount of the deductible paid for
15 each approved claim. The parties intend to use these records to pre-populate Claim Forms, to the extent
16 practicable, to encourage Class members who experienced Audio Defect failures to make claims.

17 51. In developing the Plan of Allocation and claims process, Class Counsel worked to make
18 the settlement accessible and to ensure ease of administration, while also balancing the imperatives of
19 targeting the greater relief to those individuals who experienced failures and deterring fraudulent or
20 overstated claims. In order to allocate the fund equitably, verify eligibility, obtain updated address
21 information, and allow Class members to choose a payment preference, Class members will be asked to
22 complete and return a simple claim form Class Counsel developed in consultation with the Settlement
23 Administrator. A copy of this proposed Claim Form is attached hereto as **Exhibit D**.

24 52. To the extent practicable, the Claim Form will be pre-populated with Class member
25 names, email addresses, purchase information, whether the Class member reported one or more failures,
26 and whether the Class member paid an insurance deductible. The Claim Form will require each
27 claimant to confirm his or her current contact information and desired payment option, and to certify
28 that he or she purchased a new Pixel, not for resale, in the United States and that any other information

1 provided on the Claim Form is true and correct to the best of his or her knowledge. If a Class member
2 experienced one or more failures, but information about the failure is not pre-populated on his or her
3 claim form, the Class member can attest to such failure(s) and provide supporting documentation, such
4 as emails, customer service chat logs, repair records, insurance claims, or Return Merchandise
5 Authorizations.

6 53. The Settlement Administrator will determine which claims are eligible for payment and,
7 based on the following criteria, sort each eligible claim into one or more of four Claim Groups:

8 a. Group 1 includes claimants who purchased a Pixel and did not report
9 experiencing the Audio Defect and claimants who do not submit sufficient Documentation to show that
10 their Pixel experienced the Audio Defect.

11 b. Group 2 includes claimants who paid a deductible to Assurant on an insurance
12 claim relating to the Audio Defect. The members of this group—and the respective amounts of their
13 deductible payments—will be determined through records provided by Assurant. The Claim Form
14 provided to such Class members will be pre-populated to show that Assurant’s records indicate they
15 paid a deductible on an insurance claim relating to the Audio Defect, and are eligible to be reimbursed
16 for that payment under the Settlement. To complete a claim, Group 2 claimants will only need to
17 confirm the information and submit the form. Group 2 claimants are also eligible for an additional
18 payment as a member of another Claim Group.

19 c. Group 3 includes claimants who, according to Google’s records, reported
20 experiencing the Audio Defect and then reported experiencing the Audio Defect at least once on a
21 replacement Pixel. The Claim Form provided to such Class members will be pre-populated to show
22 that Google’s records indicate they are eligible to receive a Settlement payment based on multiple Pixel
23 failures. To complete a claim, Group 3 claimants who receive the pre-populated Claim Form will only
24 need to confirm the information and submit the form. Group 3 will also include claimants who submit
25 Documentation sufficient to establish that they that they reported experiencing the alleged Audio Defect
26 and then reported experiencing the alleged Audio Defect at least once on a replacement Pixel.

27 d. Group 4 includes claimants who, according to Google’s records, reported
28 experiencing the Audio Defect once. The Claim Form provided to such Class members will be pre-

1 populated to show that Google's records indicate they are eligible to receive a Settlement payment
2 based on an alleged Pixel failure. To complete a claim, Group 4 claimants who receive the pre-
3 populated Claim Form will only need to confirm the information and submit the form. Group 4 will
4 also include claimants who submit Documentation sufficient to establish that they reported experiencing
5 the alleged Audio Defect once.

6 54. The parties propose to distribute the Net Settlement Fund as follows:

7 a. An amount sufficient to pay each Group 1 claimant \$20 will be set aside and
8 reserved for such payments; provided, however, that if the sum of such payments would exceed 25
9 percent of the fund, 25 percent of the fund will be set aside and reserved for payments to the Group 1
10 claimants on a *pro rata* basis. Payment for each claim within Group 1 will be capped at \$20.

11 b. An amount sufficient to fully reimburse the insurance deductibles paid to
12 Assurant by the Group 2 claimants will be set aside and reserved for such reimbursements.

13 c. An amount sufficient to pay each Group 3 claimant \$500 will be set aside and
14 reserved for such payments. Payment for each claim within Group 3 will be capped at \$500.

15 d. The remaining money in the fund will be allocated as follows:

16 i. An amount sufficient to pay each Group 4 claimant \$350 will be set aside
17 and reserved for such payments; provided, however, that if such payments would exceed the remaining
18 money in the fund, the remaining money in the fund will be allocated to the Group 4 claimants on a *pro*
19 *rata* basis. Payment for each claim within Group 4 will be capped at \$350.

20 ii. If the fund is not then exhausted and the amount reserved for each Group
21 1 claimant is less than \$20, the reserved payments for the Group 1 claimants will be increased *pro rata*,
22 up to \$20 for each such payment, so as to exhaust the fund.

23 iii. If the fund is not then exhausted, the reserved payments for all claimants
24 within Group 4 will be increased *pro rata* so as to exhaust the fund, subject to the Group 4 payment cap.

25 iv. If any additional funds remain in the Net Settlement Fund after payment
26 of all eligible claims, Class Counsel will notify the Court and propose a reasonable alternative or
27 alternatives for distribution of the remaining funds, subject to Google's approval.
28

1 increase payments to claimants within this group. Payment to members of Group 1 is capped at \$20
2 because the full amount of their estimated damages is [REDACTED].

3 59. Members of Group 4 reported experiencing the Audio Defect once. While members of
4 this group did not experience the same degree of harm as members of Group 3, they were similarly
5 deprived of the use of the audio features on their Pixels and incurred time and expense in attempting to
6 obtain a remedy. Thus, members of Group 4 will receive a payment of \$350, which will only be
7 reduced if the claims rate within this group exceeds 34%. \$350 exceeds [REDACTED]
8 [REDACTED], as described in paragraph 43, *supra*. After setting aside 25% of the Net Settlement Fund for
9 Group 1 and funds sufficient to pay in full the members of Groups 2 and 3, the remainder of the Net
10 Settlement Fund—close to [REDACTED]—will be distributed to members of Group 4. Here, Google’s
11 records indicate that [REDACTED] Class members fall within this group. Even assuming a [REDACTED] claims rate
12 within this group—a claims rate that would be exceptionally high—there would be more than sufficient
13 funds to pay each claimant \$350. \$350 provides these claimants not only [REDACTED] but also [REDACTED]
14 [REDACTED] in recognition of the burden, lost time and inconvenience incurred in dealing with the
15 failure. A lower claims rate—which is likely—will ensure that each claimant in Group 3 receives a
16 payment of \$350, and that any residual funds can be applied to increase the payments to members of
17 Group 1, up to \$20.

18 60. In the event that there are any residual funds after these distributions, such as from
19 unclaimed checks, the parties agree that such funds should be distributed to the National Consumer Law
20 Center. Plaintiffs selected the National Consumer Law Center because its mission closely aligns with
21 the subject matter of this case and because other courts in this district have recently approved
22 settlements awarding it *cy pres* funds. The NCLC is a non-profit consumer advocacy organization that
23 advocates on behalf of consumers, provides legal services and aid, and represents consumers on matters
24 of interest before Congress and state legislatures and by filing amicus briefs in courts across the
25 country. Neither Google nor counsel for any party derives a direct or indirect benefit from the selection
26 of NCLC as the recipient of a charitable contribution. Courts in this district have approved distribution
27 of class action remainders to NCLC in analogous consumer class action settlements. *See McKnight v.*
28 *Uber Techs., Inc.*, No. 14-cv-05615-JST, 2017 U.S. Dist. LEXIS 124534, at *17-18 (N.D. Cal. Aug. 7,

1 2017) (“Numerous courts, including this one, have previously approved *cy pres* awards to NCLC in
2 consumer class actions”) (quoting *Miller v. Ghirardelli Chocolate Co.*, No. 12-CV-04936-LB, 2015
3 U.S. Dist. LEXIS 20725, at *8 (N.D. Cal. Feb. 20, 2015)). The parties agree that NCLC’s consumer
4 advocacy work is reasonably related to the consumer protection claims advanced here. Class Counsel
5 have confirmed directly with NCLC that any remainder distributed to NCLC will be used in furtherance
6 of NCLC’s consumer protection objectives. A copy of the Declaration of Richard Dubois, the Executive
7 Director of NCLC, is attached hereto as **Exhibit F**. No settlement funds will revert to Google under
8 any circumstances.

9 61. The parties considered various approaches for paying claimants without a claim
10 procedure. For several reasons, the parties agreed that making payments without verification and input
11 from Class members was not practicable in this case. Due to variations in how customer contacts were
12 coded in Google’s, Verizon’s and Assurant’s records, it is difficult to precisely match consumer
13 contacts with the Audio Defect alleged in the case. In addition, direct payment without a claims process
14 would have prevented the parties from distributing funds through an electronic payment system,
15 requiring the issuance of thousands of checks without verifying the identity, contact information or
16 payment preference of the claimant. Direct payment thus would have resulted in higher administrative
17 costs as a result of checks being sent to incorrect addresses, checks made with incorrect payee names,
18 and checks to people who, due to inaccurate or incomplete data, are not Settlement Class members. The
19 notice program will allow the Settlement Administrator to collect up-to-date information for every
20 Settlement Class member who files a claim and distribute payments efficiently to verified physical and
21 electronic addresses.

22 62. In light of the considerations above, and in consultation with the proposed Settlement
23 Administrator, Class Counsel believe that the Plan of Allocation and notice program are an effective
24 means of informing the Settlement Class of the settlement and distributing settlement funds.

25 **III. NOTICE AND SETTLEMENT ADMINISTRATION**

26 63. Plaintiffs propose the appointment of Kurtzman Carson Consultants, LLC (“KCC”) as
27 the Settlement Administrator. KCC was selected by class counsel through a neutral and competitive
28 bidding process among five well-established class action settlement administration firms. KCC was the

1 low bidder among the five firms. After reviewing KCC’s bid and the relevant claim assumptions, Class
2 Counsel negotiated a further reduction in KCC’s “not to exceed” bottom-line number. Class Counsel
3 believe from experience that KCC is otherwise qualified to perform all of the settlement administration
4 tasks contemplated by the Settlement Agreement. KCC, on behalf of Google, will also provide notice
5 of the Settlement to the appropriate federal and state authorities pursuant to the Class Action Fairness
6 Act (“CAFA”), 28 U.S.C. § 1715.

7 64. Plaintiffs have proposed notice forms and a notice program that comport with due
8 process, Federal Rule of Civil Procedure 23, and the Northern District’s Procedural Guidance for Class
9 Action Settlements. The Settlement provides for direct, individual notice to Settlement Class members
10 via email and U.S. mail. Class member contact information has been gathered from Google’s records
11 and the records of subpoenaed non-party resellers, including the largest reseller, Verizon. This contact
12 information will be provided to the Settlement Administrator within 7 business days after preliminary
13 approval. Class Counsel have conferred with counsel for Defendant and non-parties and believe that
14 email and/or physical addresses (or both) exist for substantially all of the Settlement Class members.

15 65. For persons whose contact information was obtained from Google or Verizon, notice
16 will be sent via email. Where email notices bounce back (or where a physical address—but not an
17 email address—is available), the Settlement Administrator will mail Supplemental Postcard Notice.

18 66. Plaintiffs’ proposed long-form notice (which will be available on the settlement website),
19 email notice and supplemental postcard notice are attached hereto as **Exhibits G, H, and I**.

20 67. Class Counsel will also issue a press release providing Notice of the Settlement, a link to
21 the Settlement Website and contact information for the Settlement Administrator. If KCC determines
22 that less than 70% of the Settlement Class receive notice through individual notice efforts, KCC will
23 implement a digital notice campaign, consisting of advertisements on a digital advertising network
24 designed to reach Class members. If supplemental notice is required, KCC will ensure a net combined
25 direct notice and digital reach of at least 70%. A comprehensive description of the notice plan appears
26 in the Declaration of Carla Peak of KCC, attached hereto as **Exhibit J**.

27 68. The proposed notices advise class members of the pendency of the action, including the
28 nature of the action and a summary of the claims; the essential terms of the Settlement; the rights of

1 Class members to share in the recovery or to request exclusion from the Class; the rights of Class
2 members to object to the Settlement and to appear before the Court at the Final Fairness Hearing; and
3 will provide the date, time, and place of the Final Fairness Hearing. The notices also contain
4 information regarding Class Counsel's anticipated fee and expense application, requests for service
5 awards, and the Plan of Allocation.

6 69. The estimated cost of notice and administration is \$310,000, which Class Counsel
7 believe is reasonable because the direct notice campaign contemplates supplemental postcard notice
8 (with associated postal costs) to thousands of Settlement Class members, supplemental digital notice,
9 and processing and auditing of claims. In Class Counsel's experience, the cost of notice and settlement
10 administration—approximately 4% of the Settlement Fund—is consistent with or below the average in
11 similar cases.

12 70. Class Counsel expects between 5% and 20% of Settlement Class members to submit
13 claims. In accordance with the Procedural Guidance for Class Action Settlements, a table including the
14 information concerning analogous settlements and past work with the Settlement Administrator is
15 attached hereto as **Exhibit K**.

16 71. Class Counsel anticipate applying for an award of attorneys' fees of up to 30% of the
17 Settlement Fund, or \$2,175,000, plus reimbursement of expenses not to exceed \$350,000, and for
18 Service Awards in the amount of \$5,000 for each of the four named Plaintiffs. Class Counsel's current
19 combined lodestar through May 1, 2019 is approximately \$2,975,081, representing 6,406.8 hours of
20 work on this case. The corresponding multiplier if the Court awards a fee of 30 percent of the fund
21 based on these figures is .73 (a negative multiplier). These figures do not account for time and expenses
22 that will be incurred subsequent to this date. The Service Awards are intended to compensate the
23 Plaintiffs for the considerable time they devoted to this case, which included assisting counsel in
24 preparing the complaint, communicating with Plaintiffs' counsel about case developments, responding
25 to written discovery requests, gathering and producing documents, and providing deposition testimony
26 in this case. Service awards in the amount of \$5,000 have been approved by this Court in similar cases.
27 *See, e.g., In re Lenovo Adware Litig.*, No. 15-md-02624-HSG, ECF No. 258 at 16 (N.D. Cal. Apr. 24,
28 2019); *Gergetz v. Telenav, Inc.*, No. 16-cv-04261-BLF, 2018 U.S. Dist. LEXIS 167206 at *30 (N.D.

1 Cal. Sept. 27, 2018); *Ehret v. Uber Techs., Inc.*, Case No. 3:14-cv-113-EMC, 2017 U.S. Dist. LEXIS
2 22586 (N.D. Cal. Feb. 16, 2017); *In re Carrier IQ, Inc., Consumer Privacy Litig.*, Case No. 12-md-
3 02330-EMC, 2016 U.S. Dist. LEXIS 114235 (N.D. Cal. Aug. 25, 2016).

4 72. All of the work performed by Class Counsel has been done on a contingency-fee basis,
5 and neither of our firms have been reimbursed for any of the billable time or out-of-pocket costs
6 advanced to prosecute this case.


7 73. If the Court approves the settlement, the parties will request that the Court enter the Final
8 Order and Judgment, releasing all claims that were or could have been asserted against Google in this
9 litigation related to the Pixel. The proposed Order Granting Plaintiffs' Motion for Preliminary
10 Approval of Class Action Settlement and Providing for Notice, and the proposed Final Order and
11 Judgment, are attached hereto as **Exhibits L and M**.

12 **IV. RECOMMENDATION OF CLASS COUNSEL**

13 74. Girard Sharp and Chimicles each have considerable experience in class action litigation,
14 including the prosecution and resolution of consumer class actions. Our respective law firm resumes are
15 attached as **Exhibits N and O**. In negotiating this settlement, we have considered the relative risks and
16 benefits of settlement in relation to the risks of litigation. We have also negotiated this settlement to
17 comply in all respects with the relevant case law and this District's Procedural Guidance for Class
18 Action Settlements. We believe that considering the relative benefits of Settlement at this time on the
19 terms offered, in comparison to the risk of a less favorable outcome, taking into account the risk,
20 expense and delay attendant upon obtaining an order certifying a consumer class action such as this one
21 for trial, and the prospects of prevailing at trial and on appeal, the proposed settlement meets the
22 standard for preliminary approval under Rule 23 in that the Court "will likely be able to" approve the
23 settlement as fair, reasonable, and adequate under Rule 23(e)(2) and certify the class for purposes of
24 judgment. We respectfully request that the Court grant preliminary approval so that notice can be given
25 and Settlement Class members have the opportunity to exercise their rights under Rule 23 and the terms
26 of the settlement.

1 We declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed this 10th day of May 2019 at San Francisco, California, and
3 Haverford, Pennsylvania.

4 By: 
5 Daniel C. Girard

6
7 By: 
8 Benjamin F. Johns (*Pro Hac Vice*)

9
10
11 **ATTESTATION STATEMENT**

12 I, Simon S. Grille, am the ECF User whose identification and password are being used to file
13 this document pursuant to Civil L.R. 5-1(i)(3). I attest under penalty of perjury that counsel have
14 concurred in this filing.

15
16 */s/ Simon S. Grille*
17 Simon S. Grille

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to all counsel of record registered in the CM/ECF system. I also caused copies of the under seal documents to be served *via electronic mail* on counsel of record for Defendant and counsel for non-parties Assurant and uBreakiFix, where appropriate.

/s/ Simon S. Grille