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16 *Attorneys for Plaintiffs and Proposed Class Counsel*

17  
18 **UNITED STATES DISTRICT COURT**

19 **NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION**

20 IN RE: YAHOO! INC. CUSTOMER DATA )  
SECURITY BREACH LITIGATION )

No. 16-md-02752-LHK

21 ) **PLAINTIFFS' NOTICE OF MOTION**  
22 ) **AND MEMORANDUM OF POINTS AND**  
23 ) **AUTHORITIES IN SUPPORT OF**  
24 ) **PLAINTIFFS' MOTION FOR CLASS**  
25 ) **CERTIFICATION**

26 ) Date: November 1, 2018  
27 ) Time: 1:30 p.m.  
28 ) Courtroom: 8, 4th Floor  
) Judge: Hon. Lucy H. Koh

1 PLEASE TAKE NOTICE THAT Plaintiffs will and hereby do respectfully move the Court,  
2 pursuant to Federal Rule of Civil Procedure 23, to grant Plaintiffs’ Motion for Class Certification in  
3 connection with the classes specified below under the following causes of action alleged in their  
4 First Amended Consolidated Class Action Complaint: (i) the California Unfair Competition Law  
5 (“UCL”) claims for unfair and unlawful business practices (First Claim for Relief and Second Claim  
6 for Relief); (ii) the breach of contract claim (Fifth Claim for Relief); (iii) the breach of implied  
7 contract claim (Sixth Claim for Relief); (iv) the breach of the implied covenant of good faith and fair  
8 dealing claim (Seventh Claim for Relief); (v) the negligence claim (Fourth Claim for Relief); (vi) the  
9 Consumers Legal Remedies Act (“CLRA”) claim (Eleventh Claim for Relief); (vii) the UCL claim  
10 for fraudulent business practices (Ninth Claim for Relief); and (viii) the California Customer  
11 Records Act (“CRA”) claim under Cal Civ. Code §1798.82 (Thirteenth Claim for Relief). Plaintiffs  
12 also seek appointment of the proposed Class Representatives and Class Counsel, as described below.

13 Hearing on this motion will be held on November 1, 2018, at 1:30 p.m. in the Courtroom of  
14 the Honorable Lucy H. Koh, located at the Robert F. Peckham Federal Building & United States  
15 Courthouse, 280 South First Street, Fourth Floor, San Jose, California.

16 **I. Plaintiffs’ Proposed Classes<sup>1</sup> and Class Representatives**

17 **A. Rule 23(b)(2): UCL Injunctive Relief Class**

18 Plaintiffs move to certify, under Rule 23(b)(2), their claims for declaratory and injunctive  
19 relief under the UCL for unfair acts or practices on behalf of the following class:

20 *UCL Injunctive Relief Class.* All persons who registered for a free Yahoo account(s)  
21 in the United States whose PII was stolen from Yahoo in the 2013 Breach, the 2014  
22 Breach, and/or the Forged Cookie Breach.

23 The proposed Class Representatives for the UCL Injunctive Relief Class are Plaintiffs  
24 Kimberly Heines, Hashmatullah Essar, Paul Dugas, Matthew Ridolfo, and Deana Ridolfo.  
25 Alternatively, Plaintiffs request that the Court certify the same claims on behalf of the following  
26 class, to be represented by Plaintiffs Heines and Dugas:

27 \_\_\_\_\_  
28 <sup>1</sup> “Classes” collectively refers to the UCL Injunctive Relief Class and the Damages Class and Subclasses.

1 CA UCL Injunctive Relief Class. All persons who registered for free Yahoo  
2 account(s) in California, or who are free Yahoo account users residing in California,  
3 whose PII was stolen from Yahoo through the 2013 Breach, the 2014 Breach, and/or  
4 the Forged Cookie Breach.

5 **B. Rule 23(b)(3)**

6 **1. The Damages Class and Subclasses**

7 Plaintiffs move to certify the following Class and subclasses under Rule 23(b)(3):

8 *Damages Class.* All persons who registered for any Yahoo or Aabaco account(s) in  
9 the United States and Israel whose PII was stolen from Yahoo in the 2013 Breach,  
10 the 2014 Breach, and/or the Forged Cookie Breach.

11 a. *Free Users Subclass.* All persons who registered for free Yahoo  
12 account(s) in the United States or Israel whose PII was stolen from  
13 Yahoo in the 2013 Breach, the 2014 Breach, and/or the Forged  
14 Cookie Breach;

15 b. *Paid Users Subclass.* All persons who registered for paid Yahoo  
16 account(s), excluding Yahoo Small Business or Aabaco accounts, in  
17 the United States or Israel whose PII was stolen from Yahoo in the  
18 2013 Breach, the 2014 Breach, and/or the Forged Cookie Breach;

19 c. *Small Business Users Subclass.* All persons who registered for  
20 Yahoo Small Business or Aabaco account(s) in the United States or  
21 Israel whose PII was stolen from Yahoo or Aabaco in the 2013  
22 Breach, the 2014 Breach, and/or the Forged Cookie Breach; and

23 d. *California Users Subclass.* All persons who registered for any Yahoo  
24 or Aabaco account(s) in California, or who are Yahoo or Aabaco  
25 account users residing in California, whose PII was stolen from  
26 Yahoo in the 2014 Breach and/or the Forged Cookie Breach.

27 The proposed Class Representatives for the Damages Class are Plaintiffs Kimberly Heines,  
28 Hashmatullah Essar, Paul Dugas, Matthew and Deana Ridolfo, Mali Granot, Yaniv Rivlin, Andrew  
Mortensen, and Brian Neff. The proposed Class Representatives for the Free Users Subclass are  
Plaintiffs Kimberly Heines, Hashmatullah Essar, Paul Dugas, Matthew Ridolfo, Deana Ridolfo, Mali  
Granot, and Yaniv Rivlin. The proposed Class Representative for the Paid Users Subclass is  
Plaintiff Andrew Mortensen. The proposed Class Representative for the Small Business Users  
Subclass is Plaintiff Brian Neff. The proposed Class Representatives for the California Users  
Subclass are Plaintiffs Heines and Dugas.

1                   **2.     The Claims**

2           Through the above defined Classes, Plaintiffs seek to litigate the following claims on behalf  
3 of Class members<sup>2</sup>:

4           On behalf of the Damages Class, with members who registered for free, paid, and small  
5 business accounts being independently represented through their respective Subclasses, Plaintiffs  
6 seek to litigate their claims for negligence, breach of express contract, breach of implied contract,  
7 and breach of the implied covenant of good faith and fair dealing.

8           Plaintiff Mortensen further seeks to litigate his claim for unfair and deceptive business  
9 practices in violation of the CLRA on behalf of the Paid Users Subclass. Should the Court  
10 determine that Plaintiff Mortensen may not litigate his CLRA claim on behalf of users who  
11 registered their accounts in, or reside outside of, California, he requests that the Court certify the  
12 following alternative subclass:

13           *CA Paid Users Subclass.* All persons who registered paid Yahoo account(s),  
14 excluding Yahoo Small Business or Aabaco accounts, in California, or who are paid  
15 Yahoo account users residing in California, whose PII was stolen from Yahoo  
through the 2013 Breach, the 2014 Breach, and/or the Forged Cookie Breach.

16           Plaintiff Neff further seeks to litigate his claim for fraudulent business practices in violation  
17 of the UCL on behalf of the Small Business Users Subclass. Should the Court determine that  
18 Plaintiff Neff may not litigate his UCL claim on behalf of users who registered their accounts in, or  
19 reside outside of, California, he requests that the Court certify the following alternative subclass:

20           *CA Small Business Users Subclass.* All persons who registered for Yahoo Small  
21 Business or Aabaco account(s) in California, or who are Yahoo Small Business or  
22 Aabaco account users residing in California, whose PII was stolen from Yahoo or  
23 Aabaco through the 2013 Breach, the 2014 Breach, and/or the Forged Cookie  
Breach.

24           Plaintiffs Heines and Dugas also seek to litigate their CRA claim on behalf of the California  
25 Users Subclass.

26  
27           

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28           <sup>2</sup> “Class members” refers to members of either or both of the UCL Injunctive Relief Class and the  
Damages Class.

1           **C.     Rule 23(c)(4): Issue Certification for the Damages Class**

2           Should the Court decline to certify the proposed Damages Class as a full class under Rule  
3 23(b)(3), Plaintiffs request the Court certify the following issues for classwide determination under  
4 Rule 23(c)(4) to streamline the litigation for all Damages Class members seeking to recover for their  
5 contract and negligence claims:

- 6           •     Whether Defendants had a contractual, legal, or statutory duty to safeguard  
7           users' PII;
- 8           •     Whether Defendants failed to adequately safeguard users' PII;
- 9           •     Whether affected users' PII was exfiltrated from Defendants' systems in the  
10          Breaches;
- 11          •     Whether the PII exfiltrated by the Breaches from all affected users' accounts  
12          could have caused identity fraud;
- 13          •     Whether Defendants' failure to adequately safeguard users' PII was a causal  
14          factor in the exfiltration of affected users' PII;
- 15          •     Whether and when Defendants knew about their inadequate security and the  
16          Breaches and, if so, whether they failed to timely notify users;
- 17          •     Whether the exfiltration of affected users' PII increased the risk that those  
18          users will suffer identity theft;
- 19          •     Whether paid users and small business users lost the benefit of their bargain  
20          for secure services and, if so, the amount of that benefit to each group;
- 21          •     The value of different categories of PII that was stolen by the Breaches; and
- 22          •     Whether Defendants' conduct is such that the burden of proof for causation  
23          should shift to them to show that the Breaches were not the but for cause of  
24          affected users' injuries.

25           **D.     Exclusions**

26           Excluded from all Classes are Defendants, any entity in which Defendants or their successors  
27 have a controlling interest, and Defendants' officers, directors, legal representatives, successors,  
28 subsidiaries, and assigns. Also excluded from all Classes are any judges, justices, or judicial officers

1 presiding over this matter, the members of their immediate families and judicial staff, and Plaintiffs’  
2 counsel.

3 **II. Plaintiffs’ Proposed Class Counsel**

4 Plaintiffs also seek the appointment of John A. Yanchunis of Morgan & Morgan, Gayle M.  
5 Blatt of Casey Gerry Schenk Francavilla Blatt & Penfield LLP, Karen Hanson Riebel of Lockridge  
6 Grindal Nauen P.L.L.P., Ariana H. Tadler of Milberg Tadler Phillips Grossman LLP, and Stuart A.  
7 Davidson of Robbins Geller Rudman & Dowd LLP as Class Counsel.

8 Plaintiffs base their Motion for Class Certification on: Plaintiffs’ Notice of Motion and  
9 Motion for Class Certification; Memorandum of Points and Authority in Support of Plaintiffs’  
10 Motion for Class Certification; Declaration of John Yanchunis, including Record Evidence  
11 Submitted in Support of Plaintiffs’ Motion for Class Certification, Report of Mary Frantz, Report of  
12 Jim Van Dyke, Declaration of Gary Parilis, and Declaration of Ian Ratner; First Amended  
13 Consolidated Class Action Complaint; and all other records and papers on file in this action and all  
14 other matters properly before the Court.

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1 Plaintiffs move this Honorable Court for an order certifying their claims<sup>1</sup> against  
2 Defendants Yahoo! Inc. (“Yahoo”) and Aabaco Small Business, LLC (“Aabaco”) (collectively,  
3 “Defendants”)<sup>2</sup> under Rule 23 of the Federal Rules of Civil Procedure, and appointing  
4 themselves and their counsel as Class Representatives and Class Counsel, respectively. The  
5 common questions of law and fact raised by Defendants’ inadequate data security practices  
6 predominate, both in significance and in ability to move the case toward adjudication, over any  
7 individual questions, making this action ideal for class treatment.

8 **I. STATEMENT OF ISSUES TO BE DECIDED**

9 The issue to be decided is whether Plaintiffs’ claims satisfy the requirements for class  
10 certification under Federal Rule of Civil Procedure 23(b)(2), (b)(3), and (c)(4).

11 **II. STATEMENT OF FACTS DEVELOPED THROUGH DISCOVERY**

12 **A. Yahoo’s Services and Representations Concerning Data Security**

13 Yahoo provides comprehensive internet services. Yahoo’s core service is Yahoo Mail, a  
14 free email service. [REDACTED]

15 [REDACTED]

16 [REDACTED]<sup>3</sup> Ex. 3 at 939-941. [REDACTED]

17 [REDACTED]

18 [REDACTED] Ex. 3 at 941 [REDACTED]

19 Anyone creating a Yahoo account in the United States or Israel agrees to Yahoo’s Terms  
20 of Service (“Yahoo TOS”). Ex. 4. Each time the Yahoo TOS was revised, users were required to

21 <sup>1</sup> A chart of Plaintiffs’ proposed classes and claims is attached as Ex. 1 to the Declaration of John  
22 Yanchunis in Support of Plaintiffs’ Motion for Class Certification (“Yanchunis Dec.”).  
References to “Ex.” or “Exs.” shall reference those exhibits attached to the Yanchunis Dec.

23 <sup>2</sup> In June 2017, Yahoo’s operating business and assets were acquired by Verizon  
24 Communications, Inc. (“Verizon”), who, through its subsidiary Oath Holdings, Inc. (“Oath”),  
continues to operate all Yahoo services, while all remaining assets were renamed Altaba, Inc.  
25 (“Altaba”). Ex. 2, ¶¶1-3; Ex. 5. Oath and Altaba have stipulated to the Court’s jurisdiction, as if  
an order had been issued substituting them as real parties in interest under Rule 25(c). Ex. 2, ¶¶5-  
26 6.

27 <sup>3</sup> Yahoo Mail Pro is Yahoo’s premium email service. From October 2013 to June 2017 it was  
called Yahoo Ad-Free Mail, and prior to October 2013, it was called Yahoo Mail Plus.

28 <sup>4</sup> Since November 2015, Aabaco, a wholly owned and controlled subsidiary of Yahoo, has  
provided services to Yahoo’s small business owners.

1 accept its new terms. ECF No. 220 ¶39. The Yahoo TOS incorporated a “Privacy Policy,” which  
2 describes the types of personal information collected from users, and touted: “We have physical,  
3 electronic, and procedural safeguards that comply with federal regulations to protect personal  
4 information about you.” Ex. 6. On the “Security at Yahoo” web page linked to the Privacy  
5 Policy, Yahoo represented: “We deploy industry standard physical, technical, and procedural  
6 safeguards that comply with relevant regulations to protect your personal information.” Ex. 7.  
7 Aabaco made similar, uniform representations in the Yahoo Small Business or Aabaco Terms of  
8 Service (“Aabaco TOS”) (Ex. 8)<sup>5</sup> and incorporated Privacy Policy (Ex. 9) throughout 2011-2016.

9 **B. The 2013 Breach, 2014 Breach, and Forged Cookie Breach**

10 In 2016, Yahoo made repeated public confessions that its users’ Personally Identifiable  
11 Information (“PII”) had been stolen in a series of massive data breaches – *i.e.*, the 2013 Breach,  
12 2014 Breach, and Forged Cookie Breach (collectively, “Breaches”). First, in September 2016,  
13 Yahoo revealed that PII “associated with at least 500 million user accounts was stolen” from its  
14 user database (“UDB”) in late 2014 (“2014 Breach”). Ex. 10. The stolen PII “included names,  
15 email addresses, telephone numbers, dates of birth, hashed passwords (the vast majority with  
16 bcrypt) and, in some cases, encrypted or unencrypted security questions and answers.” *Id.*

17 [REDACTED] (Ex. 11 at 919), [REDACTED]  
18 [REDACTED]  
19 [REDACTED] Ex. 12 at 9.

20 A few months later, Yahoo revealed that “an unauthorized third party . . . stole PII  
21 associated with more than one billion user accounts” in August 2013 (“2013 Breach”). Ex. 14.  
22 Ten months later, Yahoo announced the 2013 Breach affected all three billion existing accounts.

23 Ex. 13. [REDACTED] (Ex. 11 at 919), [REDACTED]  
24 [REDACTED]  
25 [REDACTED] Ex. 12 at 7.

26 Around the same time the 2013 Breach was announced, Yahoo confirmed that “an  
27 \_\_\_\_\_

28 <sup>5</sup> The Yahoo TOS and Aabaco TOS are collectively referred to as the “TOS.”

1 unauthorized third party accessed the company’s proprietary code to learn how to forge cookies,”  
2 and that [REDACTED]  
3 [REDACTED] Ex. 14; Ex. 11 at 918.  
4 [REDACTED] (Ex. 11 at 919), [REDACTED]  
5 [REDACTED]  
6 [REDACTED] Ex. 12 at 10.

7 **C. Yahoo’s Inadequate Information Security Was Ongoing and**  
8 **Pervasive and Negatively Impacted All Yahoo Users**

9 **1. Yahoo’s Information Security Was Woefully Inadequate**

10 Yahoo’s story is one of flagrant inattention to data security, where upper management  
11 continually starved for resources the “Paranoids,” the group “primarily responsible for the  
12 protection of Yahoo information and systems,” including the safety of user data. Ex. 11 at 909.

13 Yahoo’s first Chief Information Security Officer (“CISO”), Justin Somaini, was hired in  
14 2011. Ex. 15 at 22:06-09.<sup>6</sup> The paltry budget Yahoo gave Somaini was far under what he asked  
15 for (and felt was needed). *Id.* at 121:07-123:05, 125:11-126:04. [REDACTED]

16 [REDACTED].  
17 Ex. 15 at 275:04-276:16; 280:10-281:16; Ex. 16. [REDACTED]  
18 [REDACTED]  
19 [REDACTED] Ex. 17.

20 [REDACTED]. Ex. 16; Ex. 18. [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED] Ex. 15 at 166:21-  
25 174:07; 236:12-237:19, 288:10-290:19; Exs. 16-19; Ex. 20 at 991. Ramses Martinez, Senior  
26 Director of Threat Response, aptly described information security as “*deplorable*” when he was

27 <sup>6</sup> Before then, “there were no functional roles and definitions” in the Paranoids “that you would  
28 find in a typical security organization.” *Id.* at 24:05-18, 29:10-23. [REDACTED]  
[REDACTED] *Id.* at 29:24-30:09, 148:15-25.



1 hired in September 2011. Ex. 21 at 108:03-109:04. According to Martinez, the Paranoids  
2 “needed more resources” and “had a lot of work to do.” *Id.* at 134:13-136:21. [REDACTED]

3 [REDACTED]

4 [REDACTED] *Id.* at 104:25-106:07.

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 Ex. 22 at 428, 449. [REDACTED]

9 [REDACTED]. Ex. 23 at 289.

10 From April 2011 to January 2013, Yahoo had *five* different CEOs. Ex. 15 at 50:05-14.

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]. Ex. 24 at 74:12-75:05. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED] Ex. 25 at 635, 659. From January 2013 until March 2014 – while the 2013

17 Breach was happening (undetected) and the stage was being set for the 2014 Breach and Forged

18 Cookie Breach – Yahoo had no permanent, full-time CISO. Yahoo abruptly fired Somaini in

19 January 2013 without a succession plan, and did not have another permanent CISO until 14

20 months later when Stamos was hired. Ex. 15 at 60:12-64:11; Ex. 21 at 36:10-37:09.

21 Unsurprisingly, Martinez confirmed that “not having a CISO at the helm [during that period] was

22 extremely detrimental to the [Paranoids] team.”<sup>7</sup> But a new CISO was no panacea.

23 In February 2015, Stamos told Yahoo’s Executive Vice President Jay Rossiter: “*As a*

24 *result of [planned staffing] cuts we will be well below what I consider the minimum staffing*

25

26

27

28

<sup>7</sup> Ex. 21 at 109:09-110:09 (many important projects initiated by Somaini stopped when he left, and many Paranoids team leaders left Yahoo at that same time).

1 *necessary to protect Yahoo in the current threat environment.*<sup>8 9</sup> Ex. 26. Martinez confirmed  
2 that “the security team was underfunded,” and “[w]e never seemed to be able to get enough to  
3 staff up, as I felt, and most of the folks I worked with felt was adequate. [W]e always had . . .  
4 more work to do than . . . we really had the resources to handle.” Ex. 21 at 135:16-136:21,  
5 138:20-139:06, 153:21-154:11. [REDACTED]

6 [REDACTED] (Ex. 25 at 645, 659), [REDACTED]  
7 [REDACTED]  
8 [REDACTED] Ex. 28 at 758.

9 [REDACTED]  
10 [REDACTED] . Ex. 17; Ex.  
11 15 at 38:20-41:03, 110:06-14, 184:14-193:11. [REDACTED]

12 [REDACTED]  
13 [REDACTED]

14 [REDACTED] Ex. 17. When Martinez left in August 2015, the information security organization “was  
15 nowhere near where [it] needed to be.” Ex. 21 at 134:13-136:21; *see also* Ex. 93 at 4-8.

16 **2. Yahoo Failed to Meet Industry Standards and Federal Regulations**

17 Class members<sup>10</sup> [REDACTED]  
18 [REDACTED]  
19 [REDACTED] Ex. 29 at 5971; Ex. 21 at 127:21-128:15. [REDACTED]

20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED] Ex. 30. [REDACTED]

23 [REDACTED]  
24 [REDACTED] Ex. 31 at 802,

25 \_\_\_\_\_  
26 <sup>8</sup> *See also* Ex. 27 at 53:12-54:22, 64:04-20, 83:09-22 (staffing and funding was inadequate throughout his tenure as CISO).

27 <sup>9</sup> Emphasis is added, and citations are omitted throughout unless otherwise noted.

28 <sup>10</sup> “Class members” refers to members of either or both of the UCL Injunctive Relief Class and the Damages Class, which together with their Subclasses are referred to as the “Classes.”

1 806 (emphasis in original).

2 [REDACTED]  
3 Ex. 29 at 973. [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 [REDACTED]. Ex. 29 at 973.

8 Since at least 2008, Yahoo’s Privacy Policy represented that “[w]e limit access to  
9 personal information about you to employees who we reasonably believe need to come into  
10 contact with that information.” Ex. 6. [REDACTED]

11 Ex. 29 at 980; Ex. 33. [REDACTED]

12 [REDACTED]. Ex. 21 at 113:15-115:08, 171:10-173:06. [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15 [REDACTED] (Ex. 27 at 111:16-113:09, 116:20-117:23) – [REDACTED]

16 [REDACTED] (Ex. 34 at 271-77).

17 Until late 2013, Yahoo continued to “hash” user passwords using the outdated and  
18 insecure MD5 algorithm. Research, well-known since early 2009, stated that MD5 was  
19 “cryptographically broken and unsuitable for further use.” Ex. 35. [REDACTED]

20 [REDACTED]  
21 [REDACTED] Ex. 21 at 610:16-612:11. Yahoo knew this, and by  
22 2011, considered switching to a more secure mechanism called “bcrypt.” Ex. 15 at 198:06-  
23 204:19; Ex. 21 at 611:20-612:01. [REDACTED]

24 [REDACTED]  
25 [REDACTED] Ex. 32 at 341.

26 [REDACTED]<sup>11</sup> Ex. 11 at

27 \_\_\_\_\_  
28 <sup>11</sup> See also Ex. 21 at 229:05-24 [REDACTED]

1 919. [REDACTED]  
2 [REDACTED] Ex. 21 at 167:21-168:11. [REDACTED]  
3 [REDACTED] Ex. 11  
4 at 919. [REDACTED]  
5 [REDACTED]  
6 [REDACTED]. *Id.*  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED] Ex. 36; Ex. 24 at 25:01-32:13, 77:17-81:11.  
11 [REDACTED]  
12 [REDACTED] Ex. 24 at 77:17-81:11. [REDACTED]  
13 [REDACTED] Ex. 3 at 958.

14 **3. Yahoo Knew Its Data Security Measures Were Grossly Inadequate**

15 Well before the Breaches, Yahoo knew about severe vulnerabilities in its networks and  
16 deficiencies in its security capabilities. [REDACTED]  
17 [REDACTED]  
18 [REDACTED] Ex. 37.  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]. Ex. 27 at 128:19-129:20; Ex. 38 at 588:15-593:09.  
22 [REDACTED]  
23 [REDACTED] Ex. 39. [REDACTED]  
24 [REDACTED]  
25 [REDACTED] (Ex. 40 at 060; Ex. 41 at 527-33) – [REDACTED]  
26 [REDACTED] Ex. 41 at 525. [REDACTED]  
27 [REDACTED]  
28 [REDACTED] Ex. 40 at 061. [REDACTED]

1 [REDACTED]

2 [REDACTED] Ex. 42 at 332.

3 [REDACTED]

4 [REDACTED]

5 [REDACTED] Ex. 43

6 at 166. [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED] Ex. 24 at 74:12-75:05; Ex. 27 at

10 84:18-85:11.

11 One glaring deficiency was the lack of an intrusion detection system (“IDS”). [REDACTED]

12 [REDACTED]

13 [REDACTED] Ex. 21 at 104:25-105:15, 150:05-15; *see also* Ex. 44; Ex. 30. [REDACTED]

14 [REDACTED]

15 [REDACTED] Ex. 21 at 150:19-151:25; Ex. 45 at 171:23-176:07; Ex. 24 at 142:14-145:04. [REDACTED]

16 [REDACTED]

17 [REDACTED] Ex. 46 at 7-11. [REDACTED]

18 (Ex. 47 at 365; Ex. 29 at 6001) [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Ex. 48. [REDACTED] Ex. 49 at 677.

22 Inadequate logging was another pervasive problem. [REDACTED]

23 [REDACTED]

24 [REDACTED] Ex. 21 at 147:01-150:04. [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED] Ex. 50. [REDACTED]

28 [REDACTED]

1 [REDACTED] . Ex. 51 at 587.

2 [REDACTED]<sup>12</sup> [REDACTED]

3 [REDACTED]

4 [REDACTED] Ex. 38 at 533:14-534:06; Ex. 54 at 16:03-

5 23, 29:03-30:12. [REDACTED]

6 [REDACTED]

7 [REDACTED] Ex. 55.

8 [REDACTED]

9 [REDACTED] Ex. 56. [REDACTED]

10 [REDACTED]

11 [REDACTED]<sup>13</sup> Ex. 52 at 176:16-

12 180:09, 283:10-285:06, 367:15-25; Ex. 57. [REDACTED]

13 [REDACTED]

14 [REDACTED] Ex. 59 at 341.

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED] Ex.

22 60 at 262; Ex. 21 at 209:10-25. [REDACTED]

23 [REDACTED] Ex. 21 at 206:22-207:25; *see also* Ex. 93 at 20-23.

24 [REDACTED]

25 <sup>12</sup> Ex. 52 at 100:05-101:22 [REDACTED]

26 [REDACTED] Ex. 53

27 [REDACTED]

28 <sup>13</sup> *See also* Ex. 58 at 404 [REDACTED]

1           **D. Senior Executives Had Contemporaneous Knowledge of the 2014 Breach**

2           In late 2014 or early 2015, Yahoo’s CISO Stamos, EVP Rossiter, General Counsel Ron  
3 Bell, CEO Mayer, and its Board were all informed that the attackers in the 2014 Breach had  
4 exfiltrated PII for hundreds of millions of user accounts from Yahoo’s UDB. [REDACTED]

5 [REDACTED]

6 [REDACTED]. Ex. 61 at 009; Ex. 62 at 407; Ex. 60 at 258; Ex. 46. [REDACTED]

7 [REDACTED]

8 [REDACTED] Ex. 61 at 6008-09; Ex. 62 at 407. [REDACTED]

9 [REDACTED]

10 [REDACTED] Ex. 60 at 258; Ex. 63 at 131; Ex. 61 at 6008-09.

11 [REDACTED]

12 [REDACTED] Ex. 63 at 131; Ex. 64. Martinez briefed Stamos daily throughout  
13 late 2014, and Stamos informed Rossiter about the investigation and response. Ex. 45 at 87:10-  
14 89:12, 117:14-121:09; Ex. 24 at 36:03-37:12, 44:11-45:01, 104:12-105:10. Stamos also met  
15 regularly with Ron Bell. Ex. 24 at 50:04-52:25. [REDACTED]

16 [REDACTED]. Ex. 65; Ex. 66. [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED] Ex. 60 at 257. [REDACTED]

20 [REDACTED]

21 [REDACTED] Ex. 67 at 425; Ex. 63 at 131; Ex. 61 at  
22 010; Ex. 45 at 57:18-59:05. [REDACTED]

23 [REDACTED] Ex. 67 at 425; Ex. 63 at 131; Ex. 61 at 010.

24 [REDACTED]

25 [REDACTED] Ex. 68 at 560; Ex. 63  
26 at 131; Ex. 24 at 61:15-62:17. [REDACTED]

27 [REDACTED]

28 [REDACTED] Ex. 63 at 131-32; Ex. 68 at 560; Ex. 69. [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED] Ex. 63 at 136; Ex. 21 at 229:25-231:05. [REDACTED]

4 [REDACTED]

5 [REDACTED].<sup>14</sup>

6 [REDACTED] Ex. 67 at 426;

7 Ex. 61 at 010; Ex. 45 at 57:05-59:05. [REDACTED]

8 [REDACTED]

9 [REDACTED]. Ex. 68 at 560; Ex. 72; Ex. 38 at 482:03-20. [REDACTED]

10 [REDACTED]. Ex. 68 at

11 560; Ex. 73. But, Yahoo sent *no notifications* to the hundreds of millions of users whose PII was

12 stolen from the UDB, and it would not do so until September 22, 2016 – *almost two years later*.

13 [REDACTED]

14 [REDACTED] Ex. 74; Ex. 75; Ex. 24 at 139:06-155:25. [REDACTED]

15 [REDACTED]

16 [REDACTED] Ex. 24 at 105:18-108:15, 150:12-152:14; Ex. 76; Ex. 21 at

17 256:14-257:21; Ex. 27 at 278:10-282:02 and its Exhibits 11 and 12.

18 [REDACTED]

19 [REDACTED]. Ex. 77; Ex. 68 at 553. In March 2017,

20 Yahoo disclosed the SCRC’s findings, which conceded Yahoo’s information security team’s

21 contemporaneous understanding of the severity of the 2014 Breach, but questioned the extent to

22 which that understanding “was effectively communicated and understood outside the information

23 security team,” and found that “the 2014 Security Incident was not properly investigated and

24 analyzed at the time, and the Company was not adequately advised with respect to the legal and

25 business risks associated with the 2014 Security Incident.” Ex. 78.

26 Martinez strongly disagreed with any notion that the 2014 Breach was “not properly

27 \_\_\_\_\_

28 <sup>14</sup> Ex. 68 at 560; Ex. 70; Ex. 71; Ex. 27 at 171:07-179:11, 254:12-262:05, 266:23-267:16, 272:17-275:08, and its Exhibit 11.



1 investigated or analyzed,” stating: “That’s bullshit. Right. It was thoroughly investigated for  
2 months. So that is false.” Ex. 45 at 165:05-24. Martinez testified that the Paranoids also  
3 effectively communicated all relevant facts to Yahoo senior management, including “wide  
4 dissemination of the facts” about the user data exfiltration. Ex. 45 at 167:02-169:18, 171:14-19.  
5 Stamos likewise testified that it was “definitely not true” that the Paranoids were the only ones  
6 with contemporaneous knowledge of the UDB exfiltration; the data exfiltration “was understood  
7 . . . by multiple people that we had briefed on it above me,” including Rossiter, Mayer, Bell, the  
8 Board Committee, and Filo. Ex. 24 at 82:17-83:12, 89:07-91:05; Ex. 27 at 446:10-452:11.  
9 According to Stamos, his team “communicated everything we knew [about the 2014 Breach] to  
10 upper management,” and he had “no doubt” that the information was communicated to Mayer  
11 and Filo in December 2014. Ex. 24 at 92:22-95:21.

12 **E. Yahoo’s Information Security Is Still Inadequate**

13 Yahoo’s history of repeated, un-remedied security failures strongly suggests its systems  
14 remain inadequate to secure users’ PII. In responding to Plaintiffs’ Interrogatory No. 3, regarding  
15 “what, if any, security measures pertaining to Users’ PII have been implemented at Oath  
16 following Verizon’s acquisition of Yahoo,” Yahoo directed Plaintiffs to pages in its CID  
17 Responses. Ex. 12 at 5-6. [REDACTED]

18 [REDACTED]  
19 [REDACTED] Ex. 3 at 5957-960, 5962-965; Ex. 79 at 0590-593. [REDACTED]

20 [REDACTED]  
21 [REDACTED]. Ex. 93 at 6, 10, 25. Evidence  
22 collected to date shows users’ PII is still in Yahoo’s possession and control. According to  
23 Frantz’s analysis of that evidence: [REDACTED]

24 [REDACTED]  
25 [REDACTED]

26 [REDACTED] *Id.* at 6. [REDACTED]  
27 [REDACTED] Ex. 32 at 343. The risk to users of additional

28 intrusions and exfiltration continues unabated.

1 **III. ARGUMENT**

2 **A. Rule 23 Was Designed to Aggregate Common Issues**

3 The requirements of Federal Rule of Civil Procedure 23 are well known: numerosity,  
4 commonality, typicality, and adequacy, and satisfaction of the requirements for one of the class  
5 types defined in Rule 23(b). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir.  
6 2011). To certify a Rule 23(b)(2) class, the plaintiff must show that “the party opposing the class  
7 has acted or refused to act on grounds that apply generally to the class, so that final injunctive  
8 relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R.  
9 Civ. P. 23(b)(2). Certification under Rule 23(b)(3) requires that ““questions of law or fact  
10 common to class members predominate over any questions affecting only individual members,  
11 and that a class action is superior to other available methods for fairly and efficiently  
12 adjudicating the controversy.”” *Sali v. Corona Reg’l Med. Ctr.*, 889 F.3d 623, 629 (9th Cir.  
13 2018). Rule 23(c)(4) provides a court with discretion to certify a class to resolve particular  
14 issues, such that “[e]ven if the common questions do not predominate over the individual  
15 questions,” a court may “isolate the common issues . . . and proceed with class treatment of these  
16 particular issues.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

17 While a ““rigorous analysis”” is required, *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 586  
18 (N.D. Cal. 2015), this does not equate to “a mini-trial.” *Sali*, 889 F.3d at 631. A “district court is  
19 not limited to considering only admissible evidence in evaluating whether Rule 23’s  
20 requirements are met.” *Id.* at 632. Where the merits are probed, they may be so only to the extent  
21 “that they are relevant to determining whether the Rule 23 prerequisites for class certification are  
22 satisfied.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). Plaintiffs  
23 meet their burden under Rule 23, such that certification of the proposed Classes is warranted.

24 **B. The Proposed Classes Meet the Requirements of Rule 23(a)**

25 **1. Numerosity**

26 The Classes number in the hundreds of thousands and, in some cases, the millions. The  
27 Court “may consider reasonable inferences drawn from the facts before it” in determining  
28 whether numerosity exists. *Yahoo Mail*, 308 F.R.D. at 589-90. Based on the number of user

1 accounts in the United States, Israel, and California impacted by the Breaches, including free,  
2 paid, and small business accounts, and the number of accounts impacted worldwide, the  
3 proposed Classes are sufficiently numerous. *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir.  
4 2010) (noting numerosity usually met with at least 40 class members).

## 5 **2. Commonality**

6 Rule 23(a)(2) requires “questions of law or fact common to the class.” A single common  
7 question is sufficient. *See Ellis*, 657 F.3d at 981. Here, each of the claims Plaintiffs seek to  
8 advance turn on the question of whether Defendants’ security protocols and policies were  
9 adequate to protect Class members’ PII. This involves examining related questions that are also  
10 common across all Classes and Subclasses, including what steps Defendants took (or did not  
11 take) to identify and respond to security threats, whether Defendants complied with industry  
12 norms and applicable regulations, and whether and when Defendants knew or should have  
13 known of the Breaches. Further, discovery reveals that the Breaches were part of a single course  
14 of conduct that gives rise to the legal rights Plaintiffs seek to enforce under California law.

15 As set forth in the operative complaint and discussed herein, additional questions of law  
16 and fact arise from Defendants’ course of conduct that are common to Damages Class members,  
17 such as: (1) whether Plaintiffs and Damages Class members’ accounts were governed by valid  
18 and binding contracts; (2) whether the TOS required Defendants to adequately safeguard  
19 Plaintiffs and Damages Class members’ PII; (3) whether Defendants breached the TOS by  
20 failing to adequately safeguard PII; (4) whether Defendants owed a duty to exercise due care in  
21 collecting, storing, and safeguarding PII; (5) whether Defendants breached that duty; (6) whether  
22 Defendants knew about the Breaches and the state of their security (and when); (7) whether  
23 Defendants failed to timely notify Plaintiffs and Damages Class members of the Breaches; and  
24 (8) whether Plaintiffs and Damages Class members are entitled to punitive damages.

25 Questions common to the UCL Injunctive Relief Class include whether Yahoo’s  
26 provision of inadequate security was (1) an unfair business practice under either the tethering or  
27 balancing tests, or (2) an unlawful business practice. Additional common questions for the Paid  
28 Users Subclass and Small Business Users Subclass include: (1) whether Yahoo and/or Aabaco

1 had a duty to disclose the inadequacy of its security; and (2) whether Plaintiffs Mortensen and  
2 Neff and Subclass members would have been aware and would have acted differently had  
3 Defendants disclosed those facts (*i.e.*, whether they were material to a reasonable person).

4 Last, the inadequacy of Yahoo’s security protocols and procedures also resulted in the  
5 same fundamental injury to each Damages Class member – compromise of their PII – causing all  
6 Damages Class members to lose value in their PII. Members of the Paid Users Subclass and  
7 Small Business Users Subclass also suffered the lost benefit of their bargain. Moreover, the same  
8 legal theories and facts giving rise to claims for lost value of PII and benefit of the bargain  
9 damages give rise to Damages Class members’ claims for losses related to identity fraud.

### 10 3. Typicality

11 Rule 23(a)(3)’s typicality standard is permissive. “[C]laims are ‘typical’ if they are  
12 reasonably co-extensive with those of absent class members.” *Hanlon v. Chrysler Corp.*, 150  
13 F.3d 1101, 1020 (9th Cir. 1998). “[T]hey need not be substantially identical.” *Id.*

14 Plaintiffs and Class members were injured through Defendants’ pattern of misconduct.  
15 Plaintiffs’ claims and legal theories, both in their individual and representative capacities, arise  
16 under this same factual predicate. *Mullins v. Premier Nutrition Corp.*, 2016 WL 1535057, at \*4  
17 (N.D. Cal. Apr. 15, 2016) (“Putative class members’ claims are usually typical if their claims  
18 arise[] from the same course of events, and each class member makes similar legal arguments to  
19 prove the defendant’s liability.”). The elements Plaintiffs must prove for negligence, breach of  
20 express or implied contract, and breach of the implied covenant of good faith and fair dealing,  
21 and for their claims under California’s Unfair Competition Law, Cal. Bus. & Prof. Code §17200,  
22 *et seq.* (“UCL”), Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* (“CLRA”), and  
23 Customer Records Act, Cal. Civ. Code §1798.80, *et seq.* (“CRA”) are identical to what absent  
24 Class members would need to prove, and there are no defenses unique to Plaintiffs.

#### 25 a. UCL Injunctive Relief Class

26 Plaintiffs Heines, Essar, Dugas, and the Ridolfos are typical of the UCL Injunctive Relief  
27 Class because each signed up for a free Yahoo account pursuant to the Yahoo TOS, and, as  
28 required by Yahoo, each provided their PII. Yahoo maintained their PII in its UDB. Plaintiffs

1 suffered the access, compromise, or theft of their PII by the Breaches as a result of Yahoo's  
2 unfair and unlawful practices of inadequately safeguarding that PII and failing to timely identify,  
3 investigate, and remediate security threats or to notify users of the Breaches, and all suffered lost  
4 money or property as a result. Indeed, all Class members suffered a loss in the value of their PII  
5 maintained on the UDB when the intrusion occurred, and when that PII was used to access Class  
6 members' accounts, the loss of value extended to their PII contained therein. Not only did each  
7 Class member lose the value of their PII, each is also now at an increased risk of future harm.  
8 That risk of future harm persists because their PII remains in Yahoo's possession and because  
9 Yahoo has not yet adequately remediated its security policies and practices. Thus, their PII is not  
10 adequately safeguarded from future unauthorized intrusions into the UDB.

11 **b. Damages Class and Subclasses**

12 Plaintiffs and Damages Class members' accounts were governed by nearly identical  
13 contracts. Free Users Subclass members, including Plaintiffs Heines, Essar, Dugas, the Ridolfos,  
14 Granot, and Rivlin,<sup>15</sup> and Paid Users Subclass members, including Plaintiff Mortensen, signed up  
15 for accounts governed by the Yahoo TOS. Small Business Users Subclass members, including  
16 Plaintiff Neff, similarly signed up for Yahoo small business or Aabaco accounts and agreed to  
17 the Aabaco TOS. The TOS contain parallel terms regarding privacy protections, choice of law  
18 and venue, and limitations on Defendants' liability, which have all remained materially  
19 unchanged during the relevant time period. Each time Defendants updated the TOS, Plaintiffs  
20 and Damages Class members were required to agree to their revised terms. Accordingly, the  
21 same principles of contract formation, and the same material terms, apply across the Damages  
22 Class. To the extent there is variation, either in the formation or interpretation of the governing  
23 TOS, or in damages sought, those differences are universal across each Subclass. Either the  
24 governing TOS are valid, or they are not. Either the TOS imposed an implied covenant of good  
25 faith and fair dealing or they did not. If the TOS are not express contracts, then each Damages  
26 Class member's creation of a user account either gave rise to an implied contract or did not.

27 \_\_\_\_\_  
28 <sup>15</sup> Plaintiff Rivlin's deposition is being taken concurrent with the filing of Plaintiffs' Motion, on  
July 13, 2018, and so citation to his testimony is not possible.

1 Similarly, to the extent that Defendants owed Plaintiffs and members of the Damages  
2 Class a legal duty to exercise due care in safeguarding their PII, that duty is identical across all  
3 Damages Class members. Either Defendants owed a duty to Plaintiffs and members of the  
4 Damages Class, or they did not. Either Defendants breached that legal duty, or they did not.  
5 Plaintiffs and Damages Class members all suffered the access, compromise, and theft of their PII  
6 by the Breaches, resulting from Yahoo’s uniform failures to adequately safeguard their PII. Their  
7 contract and negligence claims clearly arise from the same course of conduct.

8 Plaintiff Mortensen is also typical of Paid Users Subclass members because he was a  
9 consumer who purchased Yahoo premium email services and whose PII was stolen in the  
10 Breaches. The course of conduct underlying his claim and that of all Paid Users Subclass  
11 members is the same: Yahoo’s withholding of material information regarding the safeguarding of  
12 their PII and the 2014 Breach and Forged Cookie Breach. Mortensen, like all Paid Users  
13 Subclass members, has suffered a loss of value in his PII and is an increased risk of future harm.  
14 Plaintiff Neff is typical of Small Business Users Subclass members because he was exposed to  
15 the same small business advertising (and fraudulent omissions) to which all such members were  
16 exposed when they created their accounts. Neff is also seeking the same relief to which all Small  
17 Business Users Subclass members are entitled – restitution of the price paid minus the actual  
18 value of the small business services for which he received. *Mullins*, 2016 WL 1535057, at \*6.  
19 Plaintiffs Heines and Dugas are typical of the California Users Subclass because they were both  
20 residents of California when the 2014 and Forged Cookie Breaches occurred, both suffered the  
21 exfiltration of their PII, and neither was notified until years after the fact.

#### 22 **4. Adequacy of Representation**

23 Rule 23(a)(4) requires the representatives to “fairly and adequately protect the interests of  
24 the class.” Fed. R. Civ. P. 23(a)(4). Adequacy involves a two-part inquiry: “(1) do the named  
25 plaintiffs and their counsel have any conflicts of interest with other class members and (2) will  
26 the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”  
27 *Hanlon*, 150 F.3d at 1020. Plaintiffs and proposed Class Counsel satisfy these requirements.

1 **a. Plaintiffs Are Adequate Class Representatives**

2 Plaintiffs have no conflicts of interests with absent Class members, as they ““possess the  
3 same interest and suffer[ed] the same injury as the class members.”” *In re LDK Solar Sec. Litig.*,  
4 255 F.R.D. 519, 532 (N.D. Cal. 2009). Indeed, their claims flow from the same underlying  
5 conduct, all suffered the compromise of their accounts and theft of their PII, and now suffer an  
6 increased risk of harm. Plaintiffs’ and Class members’ interests are indisputably aligned.<sup>16</sup>

7 Second, Plaintiffs have each demonstrated their unwavering commitment to the Classes  
8 they seek to represent in their vigorous prosecution of this case. Plaintiffs’ sworn deposition  
9 testimony and the actions they have undertaken in this litigation demonstrate that they  
10 understand the role and obligations of class representatives.<sup>17</sup><sup>18</sup> The record shows that Plaintiffs  
11 have actively participated in the prosecution of this action on behalf of the Classes and have  
12 monitored their experienced counsel at every step. Plaintiffs have reviewed numerous documents  
13 and pleadings in the case, and each has participated in in-person meetings with their attorneys  
14 and regularly communicates with them regarding litigation strategy, the status of the litigation,  
15 and major case developments.<sup>19</sup> Plaintiffs have responded to Defendants’ discovery requests,  
16 producing documents, including, for instance, through the imaging and examination of their  
17 personal computers, responding to interrogatories, and giving informed testimony.<sup>20</sup>

18  
19  
20 <sup>16</sup> That only some Class members suffered identity theft does not create an “intraclass conflict.”  
21 *See In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 973 (8th Cir. 2018).

22 <sup>17</sup> Ex. 80 at 11:24-25, 21:2-9; Ex. 81 at 224:25-225:10; Ex. 82 at 257:23-258:13; Ex. 83 at 21:5-  
23:21-24:5, 119:21-23, 246:9-247:25; Ex. 84 at 250:14-252:5; Ex. 85 at 13:18-14:5, 18:18-  
22:24; Ex. 86 at 94:8-95:7, 96:15-97:4; Ex. 87 at 143:21-145:25, 208:10-209:11.

23 <sup>18</sup> Plaintiff Rivlin’s deposition is being taken concurrently with the filing of Plaintiffs’ Motion,  
24 and therefore, his testimony is not yet available for citation.

25 <sup>19</sup> Ex. 80 at 36:17-37:25, 186:4-9, 184:25-185:6, 191:19-192:2; Ex. 81 at 23:19-24:11, 25:15-17,  
27:1-17, 138:7-20, 142:1-9; Ex. 82 at 23:1-17, 24:16-25:20, 57:10-60:6, 219:6-220:10; Ex. 83 at  
26 27:3-28:5, 160:22-162:1, 169:7-171:9; Ex. 84 at 252:1-255:12; Ex. 85 at 283:8-284:2; Ex. 86 at  
18:2-23, 106:11-25; Ex. 87 at 23:11-24:17, 153:5-155:3, 158:8-19, 216:13-217:22.

27 <sup>20</sup> Ex. 80 at 61:6-23, 119:14-23, 313:16-314:24, 318:8-17; Ex. 81 at 27:18-28:3, 142:24-145:2;  
28 Ex. 82 at 57:10-60:6, 259:5-260:11; Ex. 83 at 80:18-81:6, 267:11-16; Ex. 84 at 22:12-23:12,  
227:20-228:7; Ex. 85 at 283:8-284:2; Ex. 87 at 23:24-24:17, 153:5-155:3, 158:8-19, 216:13-  
217:22.



1 **b. Plaintiffs Have Selected Adequate Class Counsel**

2 Plaintiffs have selected competent counsel with no conflicts of interest. Class Counsel are  
 3 experienced class action litigators that regularly prosecute and obtain significant victories for  
 4 injured consumers. *See Exs. 88-92.* This Court previously appointed this same slate of attorneys  
 5 as Lead Counsel and Plaintiffs’ Executive Committee. ECF No. 58. Since their appointment,  
 6 Plaintiffs’ proposed Class Counsel have litigated this action vigorously, including by: (1)  
 7 successfully opposing two motions to dismiss; (2) reviewing and analyzing over 9 million pages  
 8 of documents produced by Defendants; (3) uncovering key documents in discovery; (4)  
 9 reviewing and producing 13,856 pages of Plaintiff-related documents; (5) taking a lengthy, 2-day  
 10 30(b)(6) deposition, as well as the depositions of numerous persons with personal knowledge of  
 11 the facts alleged in the case; (6) propounding discovery requests on key non-parties; and (7)  
 12 working with experts to study and explain issues for the factfinders in this litigation. There is no  
 13 reason to doubt their adequacy.

14 **C. Rule 23(b)(2) Certification of the UCL Injunctive Relief Class Is Appropriate**

15 As provided under the UCL,<sup>21</sup> Plaintiffs request certification of the UCL Injunctive  
 16 Relief Class for the specific declaratory and injunctive relief outlined in the report of Plaintiffs’  
 17 information security expert. Ex. 93 at 10-14. UCL Injunctive Relief Class members’ claims arise  
 18 under two prongs of the UCL: (1) unlawful, for violating the CRA, §5(a) of the Federal Trade  
 19 Commission Act, 15 U.S.C. §45(a), Cal. Bus. & Prof. Code §22576 (as a result of Yahoo failing  
 20 to comply with its own posted privacy policies), and the CLRA; and (2) unfair, for failing to  
 21 employ adequate safeguards to protect users’ PII.

22 Under Rule 23(b)(2), it is “sufficient if class members complain of a pattern or practice  
 23 that is generally applicable to the class as a whole.” *Yahoo Mail*, 308 F.R.D. at 598 (citing  
 24 *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)). “Even if some class members have not  
 25 been injured by the challenged practice, a class may nevertheless be appropriate.” *Id.* “Unlike

26 \_\_\_\_\_  
 27 <sup>21</sup> “Any person who engages, has engaged, or proposes to engage in unfair competition may be  
 28 enjoined in any court of competent jurisdiction.” Cal. Bus. & Prof. Code §17203. Any person  
 who has suffered injury in fact and lost money or property as a result of unfair competition “may  
 pursue representative claims or relief on behalf of others.” *Id.*; *see also id.* at §17204.



1 Rule 23(b)(3), a plaintiff does not need to show predominance of common issues or superiority  
2 of class adjudication to certify a Rule 23(b)(2) class.” *Yahoo Mail*, 308 F.R.D. at 587; *see also*  
3 *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 2466559, at \*10 (N.D. Cal. May 30, 2014)  
4 (“Ordinarily, it follows that there is no need [in evaluating a Rule 23(b)(2) class] ‘to undertake a  
5 case-specific inquiry into whether class issues must predominate or whether class action is the  
6 superior method of adjudicating the dispute . . . .’”).

7 Plaintiffs challenge a pattern or practice that is generally applicable to all UCL Injunctive  
8 Relief Class members.<sup>22</sup> Plaintiffs contend all users provided PII to Yahoo when registering for  
9 accounts, and that PII, in turn, provided access to the additional PII found in their emails. As  
10 previously discussed, Yahoo failed to adequately safeguard that PII, and continues to do so.<sup>23</sup>  
11 Specifically, Yahoo maintains and stores U.S. users’ PII in the UDB and has failed to take the  
12 steps necessary to prevent and stop unauthorized access to that UDB.

13 As the record evidence in this case makes clear, from at least 2011, Yahoo had a uniform  
14 practice of: (1) understaffing and underfunding its departments charged with securing user data;  
15 (2) failing to provide or pay for industry standard core competency training for its information  
16 security personnel; (3) failing to ensure that its security personnel consistently used Yahoo’s  
17 tools for detecting and monitoring adverse security events; (4) failing to implement industry  
18 standard protocols or to employ best practices, thus failing to properly encrypt user data, harden  
19 Yahoo’s internal network, and prevent unauthorized external access into the Yahoo environment;  
20 and (5) ignoring and blatantly erasing documentation of known and persistent security  
21 deficiencies. *See, e.g.*, Ex. 93 at 4-10, 14-15, 20-25. Discovery in this case shows these failings  
22 were uniform across the Class, persistent throughout the relevant time period, and directly  
23 impacted the security of all UCL Injunctive Relief Class members’ PII, which was stored in the  
24 UDB. [REDACTED]

25 <sup>22</sup> Because the applicable TOS for all Class members includes a choice of law provision  
26 specifying California law shall apply regardless of California’s conflict of law principles (ECF  
No. 196, ¶¶174, 177, 178), the application of the UCL to all Class members’ claims is proper.

27 <sup>23</sup> As noted above, evidence thus far shows that Oath still has possession of all of the UCL  
28 Injunctive Relief Class members’ PII, and Plaintiffs believe many of Yahoo’s unsafe data  
security practices are being continued by Oath, making injunctive relief appropriate.

1

2

██████████<sup>24</sup>

3           Because Yahoo’s company-wide policies and failures were uniform and persistent  
4 through the entire relevant time period, and continue to significantly increased the risk of harm to  
5 all UCL Injunctive Relief Class members, Rule 23(b)(2) certification is particularly apt. *See*  
6 *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (affirming certification seeking injunction of  
7 systemic deficiencies in policies and practices that put all plaintiffs at substantial risk of harm).  
8 *Yahoo Mail* is instructive on this point. There, the plaintiffs asked this Court to certify a class of  
9 non-Yahoo mail subscribers to enjoin Yahoo from intercepting and scanning non-Yahoo mail  
10 subscribers’ emails to Yahoo users. Though the same policy applied to all non-Yahoo mail  
11 subscribers, Yahoo argued that the issue of whether individualized users consented to the  
12 interception precluded Rule 23(b)(2) certification. This Court rejected Yahoo’s argument, noting  
13 the focus of a Rule 23(b)(2) analysis is “not on the claims of individual class members, but rather  
14 whether [defendant] engaged in a ‘common policy.’” *Yahoo Mail*, 308 F.R.D. at 599.

15           Likewise, Plaintiffs challenge Yahoo’s practice of inadequately safeguarding UCL  
16 Injunctive Relief Class members’ PII and, therefore, “‘seek uniform relief from a practice  
17 applicable to’ the entire class.” *Id.* at 600. Rule 23(b)(2) certification is appropriate even if some  
18 UCL Injunctive Relief Class members do not ultimately have viable UCL claims. *See id.* And, as  
19 in *Yahoo Mail*, because the equitable relief Plaintiffs seek is identical across the UCL Injunctive  
20 Relief Class, it may be properly sought through a Rule 23(b)(2) class. *Id.* at 600.

21           **D.       Rule 23(b)(3) Certification of the Damages Class and Subclasses Is Proper**

22           There is “‘clear justification for handling the dispute on a representative . . . basis if  
23 common questions present a significant aspect of the case and they can be resolved for all  
24 members of the class in a single adjudication.’” *In re Lenovo Adware Litig.*, 2016 WL 6277245,  
25 at \*17 (N.D. Cal. Oct. 27, 2016). They do so here, as demonstrated below.

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27

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28           <sup>24</sup> *See* Ex. 21 at 150:05-151:25; Ex. 45 at 171:23-176:07; Ex. 24 at 142:14-145:04; Ex. 44; Ex.  
30; Ex. 46 at 7-11; Ex. 48.

1                   **1. Common Questions of Law and Fact Predominate**

2                   “The predominance analysis under Rule 23(b)(3) focuses on ‘the relationship between the  
3 common and individual issues’ in the case, and ‘tests whether proposed classes are sufficiently  
4 cohesive to warrant adjudication by representation.’” *Just Film, Inc. v. Buono*, 847 F.3d 1108,  
5 1120 (9th Cir. 2017); *see also Davidson v. Apple*, 2018 WL 2325426, at \*14 (N.D. Cal. May 7,  
6 2018) (articulating five-principle approach to predominance analysis).

7                   **a. Common Evidence Proves Plaintiffs’ Claims**

8                   A predominance analysis generally begins with an examination of the elements  
9 underlying a plaintiff’s causes of action. *Ellsworth v. U.S. Bank, N.A.*, 2014 WL 2734953, at \*19  
10 (N.D. Cal. June 13, 2014). “In determining whether common questions predominate, the Court  
11 identifies the substantive issues related to plaintiff’s claims (both the causes of action and  
12 affirmative defenses); then considers the proof necessary to establish each element of the claim  
13 or defense; and considers how these issues would be tried.” *Id.*

14                   **(1) Plaintiffs’ Contract Claims**

15                   Plaintiffs will use common evidence to prove the elements of their breach of contract  
16 claim, applying California law: (1) formation; (2) Damages Class members’ performance; (3)  
17 Defendants’ breach; and (4) resulting appreciable and actual damages. ECF No. 132 at 75.

18                   First, whether the TOS created express contracts will be determined on the face of the  
19 documents and on common facts. Elements “essential to the existence of a contract” are  
20 “[p]arties capable of contracting,” “consent,” a “lawful object,” and “sufficient cause or  
21 consideration.” Cal. Civ. Code §1550. When Damages Class members created their accounts,  
22 they were required to agree to the TOS in an identical manner, through an adhesion agreement  
23 presented at registration, and each time Defendants modified terms, Damages Class members  
24 were required to accept, as is, or lose access to their accounts. In consideration, Defendants  
25 agreed to provide members of the Free Users, Paid Users, and Small Business Users Subclasses  
26 with promised services. In exchange, members of those Subclasses provided their PII and agreed  
27 to either a payment for, *e.g.*, ad-free or small business services, and/or to the inclusion of  
28 advertisements and other communications from Defendants. The determination of whether these

1 facts establish the formation of an express contract do not vary among Damages Class members.  
2 These same facts will also demonstrate the formation of implied contracts between Damages  
3 Class members and Defendants, in the alternative to express contracts. *Northstar Fin. Advisors*  
4 *Inc. v. Schwab Inv.*, 779 F.3d 1036, 1050-51 (9th Cir. 2015) (“An implied-in-fact contract  
5 requires proof of the same elements necessary to evidence an express contract: mutual assent or  
6 offer and acceptance, consideration, legal capacity and lawful subject matter.”).

7         Second, common proof will demonstrate that Damages Class members performed under  
8 the governing TOS. Defendants admit all Damages Class members “accepted Defendants’ terms  
9 of service when they registered to use Defendants’ services.” ECF No. 220, ¶¶173, 176, 178.  
10 According to both the Yahoo TOS and Aabaco TOS, a user’s breach or violation was cause for  
11 termination of the account. By definition, all Damages Class members continued to maintain  
12 accounts when one or more of the Breaches occurred and, thus, had not been terminated.

13         Third, whether Defendants breached their contracts with Damages Class members will be  
14 judged by universal facts. Plaintiffs will prove that Defendants’ Privacy Policies, including the  
15 incorporated and hyperlinked “Security at Yahoo” page, is part of their contracts. Each TOS  
16 version has language expressly incorporating the Privacy Policies, which are identical in their  
17 promises to safeguard users PII consistent with industry standards and applicable regulations.  
18 The interpretation of these provisions does not turn on extrinsic evidence; it is solely a judicial  
19 function. *Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865 (1965).

20         Common proof will also establish Defendants’ breach of the TOS by failing to provide  
21 “physical, electronic, and procedural safeguards that comply with federal regulations” and failing  
22 to “deploy industry standard physical, technical, and procedural safeguards that comply with  
23 relevant regulations” to protect Damages Class members’ PII. This evidence will include  
24 deposition testimony, Defendants’ admissions and discovery responses, investigative reports of  
25 government agencies and security consultants, and Defendants’ own documents. Common  
26 evidence will also demonstrate Defendants’ breach of the implied covenant of good faith and fair  
27 dealing, by showing Defendants deliberately ignored the warnings of their security personnel and  
28 outside consultants to implement measures to safeguard Damages Class members’ PII after the

1 2013 Breach (and earlier incidents) and the 2014 Breach, and that Defendants knowingly failed  
2 to notify Damages Class members of the 2014 Breach. Thus, a jury will be able to answer, at  
3 once, whether Defendants committed a conscious and deliberate act, unfairly frustrating the  
4 agreed common purpose of the contract, as to all Damages Class members. *Careau & Co. v.*  
5 *Security Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1394 (1990).

## 6 (2) Plaintiffs' Negligence Claim

7 Classwide application of California law moots many of the predominance concerns  
8 nationwide negligence classes often raise. *See Marsh v. First Bank of Del.*, 2014 WL 554553, at  
9 \*16 (N.D. Cal. Feb. 7, 2014) (certifying negligence class under California law). All Damages  
10 Class members must prove the same elements to prevail on their negligence claim: (1) a duty; (2)  
11 breach of that duty; (3) causation; and (4) a cognizable injury. *Ileto v. Glock Inc.*, 349 F.3d 1191,  
12 1203 (9th Cir. 2003) (citing *Martinez v. Pacific Bell*, 225 Cal. App. 3d 1557, 275 (1990)).

13 In a case such as this, where the operative conduct giving rise to both the duty and breach  
14 is uniform, Plaintiffs' negligence claim is appropriate for classwide resolution. *See Giroux v.*  
15 *Essex Prop. Tr., Inc.*, 2018 WL 2463107, at \*4 (N.D. Cal. June 1, 2018). Each Damages Class  
16 member was a Yahoo or Aabaco user, each alleges their PII was stolen, each alleges injury as a  
17 result of that theft, and each suffered the same general type of damages – lost value of PII and  
18 the foreseeable losses stemming from identity theft. Thus, questions of legal duty and  
19 Defendants' breach of that duty – like the questions of the existence and breach of a contract –  
20 are common issues susceptible to common proof. *See, e.g., Smith v. Triad of Alabama, LLC*,  
21 2017 WL 1044692, at \*13 (M.D. Ala. Mar. 17, 2017) (certifying negligence class in data breach  
22 suit against hospital where “each class member was a non-hospital patient at Flowers, each class  
23 member alleges injury as a result of Millender’s records heist, . . . each class member suffered  
24 the same general type of damages,” and class members’ claims were subject to a single state’s  
25 law), *aff'd on reconsideration*, 2017 WL 3816722 (M.D. Ala. Aug. 31, 2017).

## 26 (3) Plaintiffs' CRA Claim for Failure to Notify

27 Cal. Civ. Code §1798.82 requires timely notice to Californians of a data breach. Using  
28 Yahoo's own admissions, the September 2016 notice, and evidence already on record, Plaintiffs

1 Heines and Dugas will establish that Yahoo violated the CRA as to all members of the California  
 2 Users Subclass. Common evidence shows Yahoo knew about the 2014 Breach as it was  
 3 happening and failed to notify compromised users for two years.<sup>25</sup> The September 2016 notice  
 4 details the data points that were stolen – including, notably, PII specifically covered under the  
 5 CRA statute that was operative during and after the 2014 Breach. Ex. 10. This is the same  
 6 evidence every California Users Subclass member would use in proving liability.

7 **(4) Plaintiffs’ UCL and CLRA Claims**

8 Plaintiff Neff asserts a claim for omissions in the small business advertisements, and  
 9 Plaintiff Mortensen asserts a CLRA claim based on Yahoo’s material omissions of fact regarding  
 10 the true state of its security and the Breaches. Those Plaintiffs may seek to bring their claims on  
 11 behalf of the Small Business Users Subclass and Paid Users Subclass,<sup>26</sup> because their Subclass  
 12 members’ reliance is established under an objective standard.

13 Though both the UCL and CLRA “require plaintiffs to prove members of the public are  
 14 likely to be deceived by the defendant’s business practices,” *Williams v. Gerber Prods. Co.*, 552  
 15 F.3d 934, 938 (9th Cir. 2008), the burden of proof is modest. *Friedman v. AARP*, 855 F.3d 1047,  
 16 1055 (9th Cir. 2017). It is subject only to an objective “reasonable consumer standard,” *id.*, and  
 17 does not implicate individual issues specific to each consumer. *Lilly v. Jamba Juice Co.*, 308  
 18 F.R.D. 231, 242 (N.D. Cal. 2014); *see Kumar v. Salov N. Am. Corp.*, 2016 WL 3844334, at \*7  
 19 n.9 (N.D. Cal. 2016) (“Claims under the UCL . . . do not require[] individualized proof of  
 20 reliance, deception, or causation.”); *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 901-02  
 21 (N.D. Cal. 2015) (reliance for CLRA “can be determined relative to the class as a whole”).

22 “[A]n inference of common reliance arises if representations are material.” *Lilly*, 308  
 23 F.R.D. at 242. The test for materiality is whether ““a reasonable man would attach importance to  
 24 its existence or nonexistence in determining his choice of action in the transaction.”” *Mullins*,

25 \_\_\_\_\_  
 26 <sup>25</sup> *See*, ECF No. 220, ¶8; Ex. 78 at p. 47; Ex. 11 at 923.

27 <sup>26</sup> Plaintiffs Neff and Mortensen seek to bring their respective claims on behalf of nationwide  
 28 classes. Alternatively, Neff and Mortensen request the Court certify additional subclasses  
 consisting of California users only, as defined in the Notice of Motion and Motion, and allow  
 Neff and Mortensen to proceed as Class Representatives on behalf of those subclasses.



1 2016 WL 1535057, at \*5. “As materiality is an objective inquiry, no individualized examination  
2 of materiality is necessary.” *Lanovaz v. Twinings N. Am., Inc.*, 2014 WL 1652338, at \*4 (N.D.  
3 Cal. Apr. 24, 2014). “As a general rule, materiality may be established by common proof.”  
4 *Mullins*, 2016 WL 1535057, at \*5; *see also Amgen Inc*, 568 U.S. at 459 (“materiality of alleged  
5 misrepresentations and omissions is a question common to all members of the class”).

6 Plaintiffs are not required to “produce a consumer survey or similar extrinsic evidence to  
7 prevail on a claim that the public is likely to be misled by a representation.” *Mullins*, 2016 WL  
8 1535057, at \*5. However, the report of Plaintiffs’ expert Jim Van Dyke demonstrates that  
9 reasonable consumers place and extremely high value on security. Ex. 94 at ¶¶79, 92. Thus,  
10 Defendants’ omissions regarding the true state of their security were material and caused  
11 members of the Paid Users and Small Business Users Subclasses to pay more than they  
12 otherwise would have. “While a plaintiff must show that the misrepresentation was an  
13 immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the  
14 only cause.” *Mullins*, 2016 WL 1535057, at \*5.

15 Last, the classwide exposure element of reliance under the UCL and CLRA is easily  
16 established here, where all Small Business Users Subclass members were exposed to  
17 Defendants’ omissions in the small business advertisements they were required to view when  
18 creating their accounts. *Mullins*, 2016 WL 1535057, at \*2. Paid Users Subclass members’  
19 exposure to Yahoo’s omissions can be inferred from the scope and force of the public outcry  
20 once Yahoo revealed the truth. *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1226 (9th Cir. 2015).

21 **b. Damages Can Be Established with Common Proof and**  
22 **Calculated with Common Methodologies**

23 Plaintiffs’ and Damages Class members’ alleged losses are cognizable injuries in fact.  
24 ECF No. 132 at 22-28. Plaintiffs will use common proof to establish that Damages Class  
25 members suffered these injuries as a result of Defendants’ conduct and common methodologies  
26 to calculate the amount of those losses. Specifically, Plaintiffs will use expert testimony to  
27 establish that: (1) all members of the Small Business Users Subclass and Paid Users Subclass  
28 lost the benefit of their bargain and are entitled to restitution; (2) all members of the Damages

1 Class suffered the lost value of their PII and an increased risk of future harm; (3) many members  
2 of the Damages Class suffered additional losses from identity theft; and (4) there is a logical and  
3 foreseeable causal connection between Defendants’ failures and these injuries. Any  
4 individualized issues going to causation are minimal in comparison to the common questions that  
5 stretch across the Damages Class. Further, that some or all of Damages Class members’ damages  
6 may ultimately require individual calculation, does not defeat class certification. *Pulaski &*  
7 *Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2410  
8 (2016) (“differences in damage calculations do not defeat class certification”).

9 **(1) Benefit of the Bargain and Restitution**

10 Choice-based conjoint analysis has become a widely accepted tool for determining  
11 benefit of the bargain damages. *See Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 2018  
12 WL 3126385, at \*17-\*18 (N.D. Cal. June 26, 2018) (supporting predominance). Plaintiffs’  
13 expert, Gary Parilis, proposes a conjoint analysis to determine the amount of money Damages  
14 Class members overpaid for Defendants’ services because of the concealed security  
15 inadequacies. That analysis involves the surveying of consumers to determine how much value  
16 they place on security when selecting an email service, and as Parilis demonstrates, that value  
17 can be isolated and calculated through mathematical analyses of the survey results. *See Ex. 95.*

18 **(2) Lost Value of PII**

19 Plaintiffs may establish classwide causation for the lost value of Damages Class  
20 members’ PII by showing Defendants’ conduct meets California’s “substantial factor” test. *See*  
21 *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1044 n.2, 1052 (1991) (negligence); *In re San Jose*  
22 *Airport Hotel, LLC*, 2018 WL 1426702, at \*5 (N.D. Cal. Mar. 22, 2018) (contract). “The  
23 substantial factor standard . . . has been embraced as a clearer rule of causation – one which  
24 subsumes the ‘but for’ test while reaching beyond it to satisfactorily address other situations,  
25 such as those involving independent or concurrent causes in fact.” *Rutherford v. Owens-Illinois,*  
26 *Inc.*, 16 Cal. 4th 953, 968-69 (1997). Under this standard, a cause in fact is something that is a  
27 substantial factor in bringing about the injury. *Mitchell*, 54 Cal. 3d at 1052-53; *see also Britz*  
28 *Fertilizers, Inc. v. Bayer Corp.*, 665 F. Supp. 2d 1142, 1172 (E.D. Cal. 2009).



1 A defendant’s conduct “must be more than a remote or trivial factor.” Judicial Council Of  
2 California Civil Jury Instruction (“CACI”) 430 (2018). However, even “a very minor force that  
3 [] cause[s] harm is a substantial factor.” *Bockrath v. Aldrich Chem. Co.*, 21 Cal. 4th 71, 79  
4 (1999). And, it “does not have to be the only cause of the harm.” CACI 430. A defendant’s  
5 conduct can be a substantial factor even where harm is caused by a third party. *See Liberty*  
6 *Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.*, 5 Cal.5th 216, 418 P.3d 400, 404-05  
7 (Cal. 2018) (a company’s negligent hiring could be a substantial factor in sexual molestation by  
8 one of its employees). *See also* Restatement (Second) of Torts §448.

9 Plaintiffs will use the expert testimony of Mary Frantz and Jim Van Dyke, as well as the  
10 evidence gathered to date, to show that Defendants’ inadequate safeguarding of Plaintiffs’ PII  
11 was a substantial factor causing them to lose the value of their PII. Specifically, Plaintiffs will  
12 show that Defendants’ inadequate security compromised the entire UDB and was a substantial  
13 factor in causing the Breaches. *See* Ex. 93 at 4-9. Plaintiffs will also use the notices sent by  
14 Defendants, expert testimony, and common evidence to prove that their PII was exfiltrated  
15 during the Breaches. Next, Plaintiffs will use expert testimony to prove that the data stolen in the  
16 Breaches is different in breadth and value than that stolen in many other breaches. *See* Ex. 93 at  
17 6,9; Ex. 94 at ¶¶ 19-35. [REDACTED]

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED] Ex. 93 at 9; Ex. 94 at ¶¶19-  
22 35. Thus, Damages Class members’ PII is inherently more valuable than singular data points.

23 Plaintiffs will also show that Damages Class members’ PII was stolen by “unauthorized  
24 malicious actors” specifically seeking to use their PII to cause them harm. Ex. 93 at 9. Hackers  
25 deliberately targeted, and exfiltrated, the *entire* UDB, and they were able to and did harvest  
26 users’ PII for years before Damages Class members were notified. The length of delayed notice  
27 precluded Damages Class members from taking necessary remedial precautions in monitoring  
28 credit and bank accounts, exposing even more valuable PII to would-be thieves.

1 Plaintiffs propose two models to calculate the aggregate lost value of PII through the use  
2 of statistical sampling, an accepted method for determining aggregate damages on a classwide  
3 basis. *See Villalpando v. Exel Direct Inc.*, 2016 WL 1598663, at \*14 (N.D. Cal. Apr. 21, 2016)  
4 (“[R]epresentative testimony, surveys, and statistical analysis all are available as tools to render  
5 manageable determinations of the extent of liability.”); *see also In re Estate of Marcos Human*  
6 *Rights Litig.*, 910 F. Supp. 1460, 1464 (D. Haw. 1995) (“The use of aggregate procedures, with  
7 the help of an expert in the field of inferential statistics, for the purpose of determining class  
8 compensatory damages is proper.”), *aff’d sub nom. Hilao v. Estate of Marcos*, 103 F.3d 767 (9th  
9 Cir. 1996). Here, the methods of calculating damages are tied to Plaintiffs’ theory of liability and  
10 the representative evidence is “reliable and the inferences to be drawn . . . [are] just and  
11 reasonable in light of the facts of this case.” *McLeod v. Bank of America, N.A.*, 2017 WL  
12 6373020, at \*17 n.24 (N.D. Cal. Dec. 13, 2017); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136  
13 S. Ct. 1036, 1047 (2016) (holding statistical evidence can be used to fill in evidentiary gaps  
14 created by defendants’ own misconduct). Statistical sampling techniques will allow Class  
15 members to protect their rights while freeing the Court of the specter of unmanageability. And  
16 while Plaintiffs, through their experts, have met their burden of demonstrating that statistical  
17 sampling is appropriate here, any perceived shortcoming does not defeat certification. *See*  
18 *Jimenez v. Allstate Ins. Co.*, 2012 WL 1366052, at \*15 (C.D. Cal. Apr. 18, 2012) (“*Jimenez I*”).

19 Plaintiffs’ identity theft expert, Jim Van Dyke, proposes to use statistical sampling to  
20 determine the PII in an average users’ account and the value of that PII in order to calculate  
21 aggregate damages. The methodology consists of surveying consumers as to the type of PII they  
22 have emailed and applying a pricing analysis for particular types of PII in order to determine an  
23 aggregate lost value for the Damages Class. *See* Ex. 94 at ¶¶67-77. Plaintiffs’ damages expert,  
24 Ian Ratner, proposes a market-based approach to determine Class members’ damages resulting  
25 from the diminution of value of their PII as a result of the Data Breaches. Under this approach,  
26 sources of market-based transactions are analyzed to value the PII based on comparable  
27 transactions involving similar, or in some cases, the same PII. As detailed by Ratner, through  
28 additional analysis of the Damages Class’ composition and value Verizon allocated to the Yahoo

1 user base, the market-based approach can be used to calculate Class-wide damages. *See* Ex. 96.

2 Plaintiffs' proposed models afford Defendants an adequate opportunity to litigate their  
3 affirmative defenses by attacking the representativeness and reliability of the statistical models,  
4 rather than through cross-examining individual Class members. *Vaquero v. Ashley Furniture*  
5 *Indus., Inc.*, 824 F.3d 1150, 1150 (9th Cir. 2016).

### 6 (3) Identity Theft Losses

7 It is undisputed that data breaches can cause identity theft. *See Stollenwerk v. Tri-West*  
8 *Health Care Alliance*, 254 F. App'x 664, 668 (9th Cir. 2007) ("theft of a computer hard drive  
9 [containing PII] certainly *can* result in an attempt by a thief to access the contents for purposes  
10 of identity fraud") (emphasis in original). This Court also has concluded that it is plausible a data  
11 breach is the casual factor in injuries related to identity theft. ECF No. 132 at 29-32; *In re*  
12 *Anthem, Inc. Data Breach Litig.*, 2016 WL 3029783, at \*16 (N.D. Cal. May 27, 2016); *see also*  
13 *In re Zappos.com, Inc.*, 888 F.3d 1020, 1027 (9th Cir. 2018).

14 Plaintiffs can establish both a temporal and a logical connection between the Breaches  
15 and Damages Class members' injuries. Temporally, the identity theft must follow the Breach in  
16 which a Damages Class members' PII was taken. This point can be addressed through a basic  
17 claims process. Whether the common PII stolen was the same kind needed to commit the identity  
18 theft suffered by any Class member is "a matter of common knowledge from which a jury could  
19 reasonably draw inferences regarding its probative value in establishing causation." *Stollenwerk*,  
20 254 F. App'x at 667. Taken together with the facts that are common to all Damages Class  
21 members, discussed here and above, these data points go well beyond loose, merely temporal  
22 connections and establish a logical connection between the Breaches and Damages Class  
23 members' harms. All Damages Class members' PII was actually stolen by thieves who  
24 specifically targeted their PII, and who have sold and resold that PII on the dark web to other bad  
25 actors, who bought it for the explicit purpose of causing the harm Damages Class members  
26 suffered. In this context, and in the light of their significantly increased risk of future harm,  
27 Damages Class members' purchases of credit mitigation services were the logical and  
28 foreseeable results of the Breaches, as were their losses suffered through identity theft.

1 This case differs markedly from other data breach class actions where the individualized  
2 nature of causation defeated predominance. Here, the PII taken was broader in scope, easier to  
3 obtain, use, and re-use (for years), and unchangeable – giving thieves the simplest, most effective  
4 way to commit fraud. As Plaintiffs’ two experts explain, there is a very close connection between  
5 the Breaches and Class Members’ identity theft. *See* Ex. 93 at 9; Ex. 94 at ¶¶ 38-48. Also, the  
6 length of time between the Breaches and their notice has eviscerated much, if not all, of the  
7 evidence Defendants will claim is needed to show individual causation for every Damages Class  
8 member. Thus, Plaintiffs offer the same causation proof that Damages Class members would  
9 need to offer. To the extent more is needed, it is Defendants’ burden to disprove causation, given  
10 that their negligence precludes Plaintiffs’ ability to offer additional proof. *See Haft v. Lone Palm*  
11 *Hotel*, 3 Cal. 3d 756, 774 n.19 (1970). Defendants cannot meet this burden as to *any* Damages  
12 Class member. It took Yahoo over three years to determine that PII from all users had been  
13 exfiltrated in the 2013 Breach, and Defendants claim to still be unable to determine how the  
14 exfiltration occurred. Notwithstanding, any attempt to disprove causation would not defeat  
15 predominance because such an affirmative defense would be a common question.

16 Thus, the same evidence showing a causal connection between Defendants’ conduct, the  
17 Breaches, and Damages Class members’ lost value of PII also establishes Defendants’ conduct as  
18 a substantial factor causing Damages Class members’ other damages. While it is possible that a  
19 particular Damages Class member’s claim for losses stemming from identity theft will require  
20 more individual determination, these instances are likely to be isolated and few and, therefore, do  
21 not defeat predominance. *See Smith*, 2017 WL 1044692, at \*13 (common issues of duty and  
22 breach in data breach case were “pivotal to the resolution of the litigation, and therefore  
23 predominate[d] despite individualized questions of causation and damages”). As with lost value  
24 of PII, statistical evidence can be used to determine the aggregate damages relating to identity  
25 theft by calculating the average user’s out of pocket costs and required hours for identity fraud  
26 resolution during the applicable risk period. Plaintiffs’ expert, Jim Van Dyke, demonstrates how  
27 data on costs and resolution for 2012 through 2016 can be obtained from industry leading Javelin  
28 Strategy & Research, and then used to compute averages for those data points. Ex. 94 at ¶50.



1 policies and security protocols were adequate to safeguard its users' PII), and would increase the  
2 delay and expense to all parties and the court system.

3 "Courts retain discretion to shape the proceedings and could ultimately choose an option  
4 such as the use of individual claim forms or the appointment of a special master, which plainly  
5 would allow [d]efendants to raise any defenses they may have to individual claims." *Jimenez v.*  
6 *Allstate Ins. Co.*, 765 F.3d 1161, 1168-69 (9th Cir. 2014) ("*Jimenez II*") (finding "statistical  
7 analysis [was] capable of leading to a fair determination of [defendant's] liability" and  
8 individualized damages hearings "preserved the rights of [defendant] to present its damages  
9 defenses on an individual basis"). Here, damages can be calculated through a simple claims  
10 process whereby Class members submit receipts for identity theft related losses and testify as to  
11 the PII stolen from their accounts. *See Just Film*, 847 F.3d at 1120-21. Even so, the common  
12 liability questions are sufficient to support class certification. *Tyson Foods*, 136 S. Ct. at 1045.

13 Notice should not be cumbersome. Each Damages Class member can be contacted  
14 directly by email using Defendants' records (in the same way notification of the Breaches was  
15 eventually sent), or by publication for Damages Class members who no longer have their  
16 accounts. Further, because the Breaches have been highly publicized around the world (they are  
17 still the largest Breaches in history), a public notice in the U.S. and Israel would be effective.  
18 Last, because Damages Class members can easily be verified using data maintained by  
19 Defendants – who have already identified compromised user accounts and sent notices to the  
20 Damages Class members who own them – the claims process will be straightforward. *Id.* Thus,  
21 while ascertainability is not a requirement in the Ninth Circuit, *Briseno v. ConAgra Foods, Inc.*,  
22 844 F.3d 1121, 1133 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017), the manageability  
23 problems that often plague certification do not exist here.

#### 24 **E. Certification of Issues Under Rule 23(c)(4) Is Also Appropriate**

25 Should the Court determine the individualized issues of causation or damages for certain  
26 of Class members' injuries overwhelms common questions, Plaintiffs request that the Court  
27 certify the issues listed in its Notice of Motion and Motion.

28



### 1                   **1.       The Court Has Broad Discretion to Certify Issues**

2                   “When appropriate,” Rule 23(c)(4) allows a court great discretion to certify an action “as  
3 a class action with respect to particular issues.” Fed. R. Civ. P. 23(c)(4). It does not prescribe  
4 elements that representatives must show in order to maintain an issue class, but courts recognize  
5 its value in resolving cases where, though common questions may not predominate, denying  
6 certification of common issues would all but strip class members of their right to seek relief.

7                   The Ninth Circuit has endorsed the use of issue certification. *Valentino*, 97 F.3d at 1234.  
8 So have many other circuit courts. *See In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir.  
9 2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013); *In re Whirlpool Corp.*  
10 *Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013); *see also Jimenez*  
11 *II*, 765 F.3d at 1168 (noting *Butler*, *Whirlpool*, and *Deepwater Horizon* “are compelling . . .  
12 [a]nd their reasoning is consistent with our circuit precedent”).

13                   As explained above, basic liability questions predominate for Plaintiffs’ contract,  
14 negligence, consumer, and CRA claims. However, if the Court determines that Damages Class  
15 members’ lost value of PII or losses from identity theft require a more specific showing of  
16 causation, and defeat predominance, it may still allow Plaintiffs to proceed under Rule 23(c)(4).  
17 *Tasion Commc’ns, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 633 (N.D. Cal. 2015) (Rule  
18 23(c)(4) issues class “must still meet the requirements of Rule 23(a) and (b) (except for the  
19 predominance requirement of Rule 23(b)(3))”). The Court may certify issues under Rule 23(c)(4)  
20 if it materially advances the litigation as a whole, with the focus being “‘judicial economy and  
21 efficiency.’” *Kamakahi v. Am. Soc’y for Reprod. Med.*, 305 F.R.D. 164, 193 (N.D. Cal. 2015).  
22 Importantly, the analysis focuses only on the issues to be certified. *See Deane v. Fastenal Co.*,  
23 2012 WL 12552238, at \*7 (N.D. Cal. Sept. 26, 2012).

24                   Here, the issues Plaintiffs propose to certify are key elements of their contract and  
25 negligence claims – claims that can be brought by all U.S. and Israeli users under a single state’s  
26 law. They are costly and complicated issues to litigate, and the answers to the questions posed by  
27 those issues will be the same for every Class member. If the answer to one or more of the  
28 questions is “No,” then the litigation ends. If the answers are “Yes,” then all remaining issues are

1 capable of adjudication through a streamlined process that is far superior to requiring users to  
 2 independently establish what Defendants did (or did not) do to safeguard their PII and what  
 3 Defendants knew and when. Thus, their answers would help to efficiently resolve the litigation.

## 4 **2. Issue Certification Will Significantly Advance Resolution**

5 Plaintiffs acknowledge that this Court has recently denied several requests for Rule 23  
 6 (c)(4) issue certification.<sup>27</sup> This case differs significantly. In those cases, plaintiffs provided no  
 7 rationale for how the individualized issues that defeated predominance would otherwise be  
 8 resolved, once the certified issues had been decided, and in several instances more than one issue  
 9 remained to be addressed (*i.e.*, reliance and a workable damages methodology). Plaintiffs here  
 10 provide expert testimony showing how benefit of the bargain damages can be calculated and two  
 11 viable methods for determining lost value of PII, once liability is determined.

12 But, even if the Court ultimately finds fault with Plaintiffs' models on an aggregate level,  
 13 expert testimony demonstrates that users' damages for lost value of their PII and identity theft  
 14 losses costs can still be calculated individually, which "at this time is sufficient to allow the  
 15 Court to conclude that resolution of the common issues would materially advance this case's  
 16 disposition as a whole." *Loritz v. Exide Techs., Inc.*, 2015 WL 6790247, at \*24 (N.D. Cal. July  
 17 21, 2015). Plaintiffs' expert's declarations show that individual pieces of PII, including the  
 18 common PII taken from all Damages Class members, have value. Ex. 94 at ¶¶67-77; Ex. 96 at  
 19 ¶¶17-33. Thus a claims process can be used to calculate lost value of non-common PII, as well as  
 20 identity theft losses. The only substantive issue to be resolved after the certified issues are  
 21 answered would be causation, and more specifically, whether the PII necessary to cause a user's  
 22 injuries may have come from a source other than the Breaches.

## 23 **IV. CONCLUSION**

24 For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs'  
 25 Motion for Class Certification.

26 \_\_\_\_\_  
 27 <sup>27</sup> See *Davidson*, 2018 WL 2325426, at \*26; *Huu Nguyen v. Nissan N. Am., Inc.*, 2018 WL  
 28 1831857, at \*8 (N.D. Cal. Apr. 9, 2018); *Backhaut v. Apple Inc.*, 2015 U.S. Dist. LEXIS 107519,  
 at \*9-\*11 n.3 (N.D. Cal. Aug. 13, 2015); *Werdebaugh v. Blue Diamond Growers*, 2014 U.S.  
 Dist. LEXIS 173789, at \*49 n.9 (N.D. Cal. Dec. 15, 2014).



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**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that on July 13, 2018, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all ECF participants.

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