WILMER CUTLER PICKERING HALE AND DORR LLP
SONAL N. MEHTA (SBN 222086)
sonal.mehta@wilmerhale.com
2600 El Camino Real, Suite 400
Palo Alto, CA 94306
Telephone: (650) 858-6000
Facsimile: (650) 858-6100

ARI HOLTZBLATT (*pro hac vice*)
Ari.Holtzblatt@wilmerhale.com
ALLISON SCHULTZ (*pro hac vice*)
Allison.Schultz@wilmerhale.com
ROBIN C. BURRELL (*pro hac vice*)
robin.burrell@wilmerhale.com
1875 Pennsylvania Ave, NW
Washington, DC 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

ANDY R. O'LAUGHLIN (*pro hac vice*)
andy.olaughlin@wilmerhale.com
60 State Street
Boston, MA 02109
Telephone: (617) 526-6220
Facsimile: (617) 526-5000

CINDY PAN (*pro hac vice*)
cindy.pan@wilmerhale.com
250 Greenwich Street
New York, NY 10007
Telephone: (212) 937-7275
Facsimile: (212) 230-8888

Attorneys for Plaintiff/Counterclaim Defendant
Meta Platforms, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

META PLATFORMS, INC., a Delaware corporation,

Plaintiff/Counterclaim Defendant,

v.

BRANDTOTAL LTD., an Israeli corporation, and UNIMANIA, INC., a Delaware corporation,

Defendants/ Counterclaim Plaintiffs.

Case No. 3:20-CV-07182-JCS

PLAINTIFF META PLATFORM INC'S NOTICE OF MOTION AND MOTION FOR ATTORNEY'S FEES

Hon. Joseph C. Spero
Courtroom F – 15th Floor
Date: October 7, 2022
Time: 9:30 a.m.

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NOTICE OF MOTION AND MOTION FOR ATTORNEY'S FEES

PLEASE TAKE NOTICE THAT, on October 7, 2022 at 9:30 a.m. or as soon thereafter as the matter may be heard, in Courtroom F of the U.S. District Court for the Northern District of California, San Francisco Division, at 450 Golden Gate Avenue, San Francisco, California, plaintiff Meta Platforms, Inc. ("Meta") will and hereby does move for reasonable attorney's fees pursuant to Federal Rule of Civil Procedure 54(d)(2) and California Penal Code § 502(e)(2). Meta's Motion for Fees is based on this Notice of Motion; the Memorandum of Points and Authorities; the Declarations of Sonal Mehta, Ari Holtzblatt, Allison Schultz, and Michael Chmelar; and the accompanying exhibits.

STATEMENT OF REQUESTED RELIEF

Pursuant to Federal Rule of Civil Procedure 54(d)(2) and California Penal Code § 502(e)(2), Meta requests an award of attorney's fees in the amount of $2,733,750.

MEMORANDUM OF POINTS AND AUTHORITIES

Meta filed this lawsuit nearly two years ago to stop BrandTotal's unlawful data-scraping operation. Meta alleged that BrandTotal violated, among other things, the California Comprehensive Computer Data Access and Fraud Act ("CDAFA"), Cal. Penal Code § 502; Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030; and the Facebook Terms of Service and Instagram Terms of Use by scraping user- and advertising-related information from Meta's platforms using automated means and without authorization. On May 27, 2022, this Court granted Meta's motion for partial summary judgment, holding conclusively and on the merits that BrandTotal's conduct violated the CDAFA and Meta's Terms.

Because Meta prevailed on its CDAFA claim, it is entitled under California Penal Code § 502(e)(2) to all reasonable attorney's fees incurred in connection with that and all related claims. Meta thus requests $2,733,750.00, an amount reflecting a portion of fees Meta incurred and calculated based on the fixed-fee amounts actually paid in this litigation for litigating the CDAFA and related claims, and also consistent with prevailing market rates for complex civil litigation in the San Francisco Bay Area given the 4,228.2 hours expended on those claims.

I. FACTUAL BACKGROUND

A. BrandTotal Scraped Data From Meta's Platforms Without Authorization

Between 2017 and October 2020, BrandTotal developed and distributed at least 10 browser extensions and mobile applications (which BrandTotal has referred to as its "legacy" tools) for the specific purpose of scraping user- and advertising-related information from password-protected locations on Meta's computers. *See* Dkt. 272-7 (Meta's MSJ Ex. 16) at 2-4. BrandTotal accomplished this by designing the apps and extensions to "hijack[] a user's logged-in session with Facebook or Instagram to manipulate Meta's servers to divulge … information." Dkt. 344 (MSJ Op.) at 52. The applications and extensions (1) monitored logged-in users' activities and surreptitiously scraped data while users browsed Facebook and Instagram and also (2) sent unauthorized automated requests for the users' demographic data—including their age, relationship status, location, and advertising interests—using the user's log-in credentials. *See* Dkt. 272 (Meta's MSJ) at 5; *see also* Meta's MSJ Ex. 1 (Martens Report) ¶¶ 34-35, 99-102. BrandTotal supplemented that data with data that it scraped using a number of fake Facebook and Instagram accounts (which BrandTotal referred to as "the Muppets") that it created and purchased to access and retrieve data directly from password-protected locations on Meta's computers. *See* Meta's MSJ at 5; MSJ Op. at 53; Meta's MSJ Ex. 1 ¶¶ 108-110.

B. BrandTotal Continued Its Unlawful Conduct, Forcing Meta To Litigate

After detecting and investigating BrandTotal's scraping activities, Meta took enforcement actions against BrandTotal in September and October of 2020. Meta's MSJ at 7-8. Meta disabled BrandTotal's Facebook and Instagram accounts, reported two of its extensions to Google (on whose website the extensions were distributed), and sued BrandTotal in California state court, alleging, among other claims, that BrandTotal's conduct violated the Facebook Terms of Service and Instagram Terms of Use. *Id.*; *see also* Dkt. 40-2 (State Court Compl.). When BrandTotal nonetheless then created new Facebook and Instagram accounts and republished one of its scraping extensions on the Google Chrome Web Store—after that extension was suspended by Google—Meta dismissed its state-court case and filed this federal action, adding claims under the California Comprehensive Computer

Data Access and Fraud Act ("CDAFA"), Cal. Penal Code § 502; Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030; and California's unfair competition law ("UCL"), based on BrandTotal's continued attempts to access Meta's platforms after Meta unambiguously revoked BrandTotal's authorization to do so. *See* Dkt. 1 (Compl.); *see also* Dkt. 148 (Am. Compl.). *Id.* BrandTotal filed counterclaims, *see* Dkt. 23 (Answer and Countercl. Compl.), and sought a temporary restraining order, *see* Dkt. 27 (Mot. for TRO). This Court denied the temporary restraining order, holding that BrandTotal likely violated Meta's Terms by "us[ing] 'automated means' to access and collect data from Facebook's website without obtaining Facebook's permission," and that Meta had a significant "interest in policing access to the password-protected portions of its networks." Dkt. 63 (TRO Op.) at 22-23, 29, 34-35.

As the litigation progressed, Meta reiterated repeatedly to BrandTotal that any permission it might once have had to access Meta's platforms had been revoked. It did so not only through the filing of the two lawsuits but also through two letters to BrandTotal's counsel expressly stating that "BrandTotal's access to Meta's platforms remains revoked," and in statements during the hearing on BrandTotal's subsequent motion for preliminary injunction. Meta's MSJ Ex. 37; *see also* Dkt. 120-11 (Am. Countercl. Compl. Ex. K); May 28, 2021 Hearing Transcript, Dkt. 156 at 16 ("And I want to make clear that Facebook's position remains, of course, that access to our systems is revoked[.]").

In February 2021, BrandTotal launched a new made-for-litigation extension, called UpVoice 2021. *See* Meta's MSJ at 9. Around August 2021, BrandTotal released another new extension, called Calix, using the same scraping code as UpVoice 2021, and then similarly redesigned two of its mobile applications. *See* Meta's MSJ at 9; Dkt. 359 (Opp'n to Meta's MSJ) at 23 n.16. And around October or November 2021, BrandTotal released yet another extension, Restricted Panel, using scraping techniques similar to UpVoice 2021 to scrape from age-restricted, password-protected locations on Meta's computers. *See* Opp'n to Meta's MSJ at 23 n.16; Dkt. 361 (Reply ISO Defs.' MSJ) at 18; Meta's MSJ Ex. 1 ¶¶ 630-646.

But, despite the apparent recognition that its earlier scraping tools and practices were unlawful and that BrandTotal therefore needed to develop new scraping tools, BrandTotal continued to use its

legacy tools to scrape data from Facebook and Instagram throughout this litigation. *See* Meta's MSJ at 9. For example, after its extensions were suspended by Google in October 2020, BrandTotal continued to scrape data through approximately 10 to 15% of previously installed UpVoice extensions that remained operational and continued collecting password-protected data through approximately mid-February 2021. *Id.* BrandTotal also continued scraping password-protected data from Facebook and Instagram using its four mobile applications at least through the litigation of the parties' summary judgment motions. *Id.* And BrandTotal continued using its server-side collection software to scrape data from password-protected locations on Meta's computers for at least a year into this litigation, until at least around "late October, beginning of November 2021," right at the close of fact discovery. Reply ISO Defs.' MSJ at 18; Dkt. 167 (Scheduling Order). *But see* Meta's MSJ Ex. 1 ¶¶ 363-369 (identifying use of access credentials even after November 2021). BrandTotal not only continued to collect information from password-protected locations on Meta's platforms, but also to load it into its client-facing platform and sell that information to its customers. *See* Meta's MSJ Ex. 22.

Meta was thus forced to spend significant time and resources building a case against BrandTotal's legacy extensions and applications and server-side collection from password-protected locations. This included, for example, many hours working with Meta's technical experts to understand the technical operation of BrandTotal's legacy tools, both for purposes of developing Meta's technical expert report, taking the depositions of BrandTotal's technical witnesses, and drafting Meta's summary judgment motion. *See, e.g.*, Schultz Decl. Ex. 2 at 574, 598, 1038, 1838. Indeed, of Meta's 649 paragraph technical expert report, approximately 365 paragraphs focused specifically on BrandTotal's legacy extensions and applications and its server-side collection from password-protected locations. *See* Meta's MSJ Ex. 1 ¶¶ 32-33, 36-38, 42-44, 46-48 99-102, 108-110, 137-145, 147-156, 198-230, 247-249, 250-273, 325-470, 516-637.

C. BrandTotal's Conduct Drove Up Litigation Costs

Meta had to fight continuously to obtain discovery relevant to BrandTotal's legacy tools and server-side collection from password-protected locations. As detailed in Meta's motion for sanctions, Meta fought for a year to obtain records showing BrandTotal's use of access credentials in its server-

side collection, only to find that BrandTotal had been deleting those records. *See* Dkt. 246 (Mot. for Sanctions) at 5-11. Meta had to fight to cure many other deficiencies in BrandTotal's discovery responses. To obtain all relevant source code, for example, Meta had to seek relief from this Court and obtain an order compelling BrandTotal to produce all of its end-to-end source code. *See* Dkt. 179 (Discovery Letter Br.); *see also* Dkt. 180 (Order Re: Discovery Letter Br.). Even months after the Court ordered BrandTotal to produce all end-to-end code, Meta still had to work extensively with its technical experts to identify and resolve myriad deficiencies in BrandTotal's piecemeal source-code productions. *See* Meta's MSJ Ex. 1 ¶ 294; Dkt. 259-2 (Nov. 2, 2021 Email from Schultz). Meta also spent over a month, after the close of fact discovery, negotiating an agreement with BrandTotal for BrandTotal to search for and produce documents that should have been produced many months earlier, including files from a database of BrandTotal's internal technical documents and other documents in the possession of BrandTotal's key technical employees. *See* Dkt. 215 (Stipulation re: Discovery Disputes). The parties also agreed to allow Meta to take additional depositions after the close of fact discovery following BrandTotal's late production of relevant documents. *Id.*

Prior to the parties' stipulation, BrandTotal had produced only 816 documents in response to Meta's discovery requests. *See* Dkt. 233 (Mot. to Enlarge Time) at 1. Those documents were self-identified as relevant by BrandTotal's own witnesses, without so much as search parameters to guide them; as a result, even basic terms like "FB" and "IG" were not consistently used by witnesses when searching through their emails. Dkt. 354-3 (Nov. 9, 2021 Leibovich Tr.) at 195:19-196:10. After the stipulation, BrandTotal initially produced just 40 additional documents and then, on the deadline for complete production, moved for relief from its production obligations. *See id.*; Dkt. 217 (Mot. for Relief from Stip.). After this Court denied BrandTotal's motion, *see* Dkt. 219, BrandTotal then—just one month before summary judgment briefs were to be filed—dumped *six million* raw files on Meta. *See* Mot. to Enlarge Time at 2. BrandTotal's late-produced documents included crucial technical information regarding BrandTotal's legacy products and server-side collection from password-protected locations, including, for example, a spreadsheet identifying the fake "Muppet" accounts that BrandTotal used in connection with its server-side collection. *See* Meta's MSJ Ex. 15. In light of

BrandTotal's untimely and unprocessed data dump, Meta had to seek leave of this Court to extend the deadline for the post-discovery depositions and for summary judgment briefing, in order to allow Meta sufficient time to sift through the millions of late produced files. *See* Mot. to Enlarge Time. Notably, two of the four post-close-of-discovery depositions (as well as several earlier depositions) focused primarily on BrandTotal's legacy tools and server-side collection from password-protected locations. *See* Meta's MSJ Exs. 14, 25; Meta's Mot. for Sanctions Exs. 6, 7.

BrandTotal also failed to timely disclose that two of its key technical employees, included on BrandTotal's initial disclosures, had left the company. *See* Dkt. 201 (*Ex Parte* Hague Appl.) at 1. Though the employees left in the spring of 2021, Meta did not learn of their departure until October, when it sought to schedule their depositions. *Id.* These individuals had information about BrandTotal's historic practices, including its legacy extensions and applications and server-side collection from password-protected locations, that no remaining BrandTotal employees could provide. *See id.* Because they reside in Israel, Meta was thus forced to undertake the additional expense of obtaining permission to take their depositions through the complicated procedures established in the Hague Convention. *Id.* at 2-4.

Finally, BrandTotal submitted an expert report purporting to opine on the technical operation of BrandTotal's non-UpVoice legacy extensions and applications and server-side collection, despite its expert never having reviewed the relevant source code or otherwise conducted any independent analysis of them. *See* Dkt. 251 (Meta's Mot. to Exclude) at 4. BrandTotal also submitted a report opining on the ostensibly public nature of the information that BrandTotal scraped, despite that expert having never independently assessed what information BrandTotal actually scraped. *Id.* at 19. To guard against these unreliable opinions, Meta had to expend additional resources to file a motion to exclude.

D. Meta Prevailed At Summary Judgment

This Court granted Meta's motion for partial summary judgment, holding that all of BrandTotal's challenged conduct was unlawful under either the CDAFA (and CFAA), Meta's Terms, or both. Meta prevailed on its claim that BrandTotal's ten "legacy" applications and extensions and

server-side collection from password-protected locations violate, as a matter of law, the CDAFA and CFAA. *See* MSJ Op. at 57, 67-68. As to just the CFAA, the Court held that Meta had satisfied all elements necessary for liability except the $5,000 loss requirement. *Id.* at 50, 57. Meta was also entitled to judgment on its UCL claim by virtue of its favorable judgments under the CDAFA. *Id.* at 59. And finally, Meta also prevailed across the board on its breach of contract claim, on which this Court granted summary judgment in full in Meta's favor. *Id.* at 41.[1]

E. BrandTotal Stopped Its Unlawful Conduct Only After The Court Granted Meta's Motion For Summary Judgment

BrandTotal shut down its data-scraping operation after the Court granted Meta's motion for partial summary judgment. On June 29, 2022, BrandTotal informed current and potential UpVoice users that "BrandTotal has ceased operating and has shut down all operations, including UpVoice." Schultz Decl. Ex. 5. The shutdown included not just BrandTotal's applications and extensions, but also all server-side operations; on July 27, 2022, Meta received notice from BrandTotal that "BrandTotal's systems are down," including the Rapid7 logging service used to log all of BrandTotal's data-collection operations. *See* Schultz Decl. Ex. 4.

II. ARGUMENT

A. Meta Is Entitled To Recover All Reasonable Attorney's Fees

Meta prevailed on its CDAFA claim and is therefore entitled to recover all reasonable attorney's fees incurred in connection with its CDAFA and related claims. The CDAFA provides that "[i]n any action brought pursuant to [the statute's civil-remedies provision] the court may award reasonable attorney's fees." Cal. Penal Code § 502(e)(2). Courts have construed this language to authorize prevailing plaintiffs, but not prevailing defendants, to recover attorney's fees. *See Facebook, Inc. v. Power Ventures, Inc.*, 2017 WL 3394754, at *6 (N.D. Cal. Aug. 8, 2017) (holding that the CDAFA "allows prevailing Plaintiffs to recover attorney's fees"); *Facebook, Inc. v.*

[1] Meta also prevailed on BrandTotal's interference counterclaims (the only counterclaims to have survived dismissal on the pleadings), *see* MSJ Op. at 68, but that victory is not relevant to Meta's request for attorney's fees because BrandTotal's interference counterclaims do not involve the same facts and law as Meta's CDAFA claim. *See Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 614 (9th Cir. 2010) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)).

Sluchevsky, 2020 WL 5823277, at *10 (N.D. Cal. Aug. 28, 2020) (awarding attorney's fees to Facebook as prevailing plaintiff under CDAFA), *report & recommendation adopted*, 2020 WL 5816578 (N.D. Cal. Sept. 30, 2020).[2]

Meta is a prevailing plaintiff with respect to its CDAFA claim. A plaintiff prevails when it obtains "'actual relief on the merits of [its] claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715 (9th Cir. 2013) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)) (addressing availability of attorney's fees under 42 U.S.C. § 1988). Here, this Court's summary judgment order definitively held on the merits that BrandTotal's "legacy" applications and extensions and its server-side collection from password-protected locations "violated the CFAA and the CDAFA." MSJ Op. at 57. By virtue of that ruling, BrandTotal modified its behavior to Meta's benefit by shutting down all of its scraping operations. *See* Schultz Decl. Ex. 4. An injunction, when one issues, will secure that change by precluding BrandTotal from (1) accessing Facebook or Instagram or scraping data from those platforms, including from users while they are interacting with those platforms; (2) selling or distributing the code that it has used to scrape data from Facebook and Instagram; and (3) selling or distributing the data that it has illegally scraped from Facebook and Instagram. *See* Dkt. 367 at 2; Dkt. 367-1. Meta is thus the prevailing party.[3]

[2] Though the statute is silent as to which party may recover fees, its legislative history makes clear that fees may be recovered by prevailing plaintiffs only. The CDAFA originally authorized any "'prevailing party'" to obtain fees. *Physician's Surrogacy, Inc. v. German*, 311 F. Supp. 3d 1190, 1195 (S.D. Cal. 2018) (quoting 1987 Cal. Legis. Servs. ch. 1499 (S.B. 255) (West)). In 2000, the statute was amended to remove the reference to the prevailing party, which courts have construed to mean that only prevailing plaintiffs, but not prevailing defendants, may recover fees under the CDAFA. *See id.* (citing 2000 Cal. Legis. Servs. Ch. 635 (A.B. 2727) (West) and collecting cases).

[3] Indeed, Meta is the prevailing party even absent entry of a permanent injunction. A plaintiff prevails for purposes of an entitlement to fees even without a final judgment or permanent injunction when the plaintiff obtains a judgment "'on the merits'" of its claims that "'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715-717 (9th Cir. 2013) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)); *accord Watson v. County of Riverside*, 300 F.3d 1092, 1095-1096 (9th Cir. 2002). That is precisely the case here, where Meta's summary judgment victories on the merits of its claims have, as discussed above, caused BrandTotal to shut down its entire scraping operation.

Meta is also entitled to recover fees incurred for litigating other related claims. A statutory fee provision extends to authorize the recovery of attorney's fees for "work done on claims that 'involve a common core of facts *or* [are] based on related legal theories' as the claims governed by the statutory … fees provision." *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 614 (9th Cir. 2010) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)) (emphasis added). "[T]he focus" in determining relatedness "is on whether the claims arose out of a common course of conduct." *Webb v. Sloan*, 330 F.3d 1158, 1169 (9th Cir. 2003). Claims are unrelated only if "'distinctly different' *both* legally *and* factually." *Id.* (citation omitted) (emphasis in original).

Therefore, Meta is also entitled to recover fees for work performed in connection with its CFAA, UCL, and breach of contract claims because each involved facts and/or legal theories common to Meta's CDAFA claim. Each claim was based on the same factual course of conduct: BrandTotal's unauthorized scraping of data from Meta's platforms using a combination of mobile applications, browser extensions, and direct server-side collection. The CFAA and CDAFA claims, moreover, shared nearly identical legal frameworks; as the Ninth Circuit has recognized, the legal "analysis under both statutes is similar." *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1069 (9th Cir. 2016). And the UCL claim was based entirely on BrandTotal's CDAFA and CFAA violations. *See* Meta's MSJ at 22-23. Accordingly, because the work on each claim was "'expended in pursuit of the ultimate result achieved'"—*i.e.*, ceasing BrandTotal's unauthorized data scraping operation—Meta's fees incurred in connection with its CDAFA, CFAA, UCL, and breach of contract claims are recoverable.[4]

Finally, Meta's motion is timely under Federal Rule of Civil Procedure 54(d) and Local Rule 54-5. Federal Rule of Civil Procedure 54(d)(2) and Local Rule 54-5 each require any motion for fees to be filed no later than 14 days after entry of a judgment entitling the party to recover fees. Fed. R.

[4] Although Meta prevailed on its CDAFA, CFAA, and UCL claims only in part, because the aspects of those claims on which Meta prevailed are related to those on which it did not, Meta is entitled to recover fees incurred in connection with all work on those claims in an amount proportional to the "significance of the overall relief obtained." *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986) (quoting *Hensley*, 461 U.S. at 435). Accordingly, Meta has calculated its fee request by excluding amounts attributable only to those parts of its CDAFA and CFAA claims on which it did not prevail, and by otherwise discounting the remaining amount by 10% to account for Meta's degree of success. *See infra* pp. 13-14.

Civ. P. 54(d)(2)(B); L.R. 54-5. Meta has filed a motion for a permanent injunction. Dkt. 367. An order entering a permanent injunction is a "judgment" under Rule 54. *See* Fed. R. Civ. P. 54(a) (a "judgment" is "any order from which an appeal lies"); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 984 (9th Cir. 2007) (a permanent injunction is appealable as of right) (citing 28 U.S.C. § 1292(a)(1)). Meta's motion for fees, filed before entry of any judgment entering a permanent injunction, is therefore timely. Meta has also met and conferred with counsel for BrandTotal six times over the course of more than two months regarding all remaining issues in this case, including Meta's fee request, thus satisfying the additional procedural requirements of Local Rule 54-5. *See* Holtzblatt Decl. ¶¶ 3, 6.

Though parties typically file motions for fees following the entry of a final judgment, there is no requirement to do so; Rule 54 "does not require that a motion for fees be filed only after entry of judgment." *Illumina, Inc. v. BGI Genomics Co.*, 2022 WL 899421, at *28 n.9 (N.D. Cal. Mar. 27, 2022). And here, there is good reason to resolve the issue of fees prior to entry of final judgment given the significant risk that BrandTotal would not be able to pay if Meta delayed this motion. BrandTotal has expressed throughout this litigation that its financial circumstances are precarious. In October 2020, BrandTotal's CEO Alon Leibovich submitted a declaration stating that, in light of the litigation, BrandTotal could not raise capital or otherwise generate new funding and that, without new funding streams, it could not long survive. *See* Dkt. 62-1 (Leibovich Decl. Mot. for TRO) ¶¶ 52-64. Similarly, in March 2021, Mr. Leibovich filed a declaration stating that BrandTotal was "burning through its cash reserves" and that its remaining "cash balance will be depleted well before any trial in this matter." Dkt. 126-3 (Leibovich Decl. ISO Renewed Mot. for Prelim. Inj.) ¶¶ 5-6 (capitalization altered). Indeed, at that point, Mr. Leibovich estimated that the company's funds would be depleted as of "June 2022." *Id.* ¶ 11. Accordingly, there is a substantial risk that delaying resolution of Meta's motion for fees until after entry of a final judgment would deprive Meta of the fees due to it. And, in any event, Meta has filed a motion for a permanent injunction and noticed a hearing on that motion for September 30, 2022.

B. The Requested Fee Amount Is Reasonable

Meta's request for an amount discounted from what it actually paid to litigate the claims on which it prevailed is reasonable. Meta requests $2,733,750 for work performed over the course of a year and a half. The amount requested is based on the fixed fees that Meta, a highly sophisticated consumer of legal services, negotiated for representation in this matter, and reflects a discount from WilmerHale's standard billing rates. And Meta has reduced the fees sought here to account for the degree of success in connection with Meta's CDAFA and related claims to an amount more than reasonable in light of both the significance of the overall relief obtained—*i.e.*, the total cessation of BrandTotal's data-scraping operation—and BrandTotal's conduct that needlessly drove up Meta's legal fees.

1. Meta's Fee Request Is Reasonable In Light Of Its Significant Success

The requested fees are reasonable in light of the degree of Meta's success in this litigation. Meta incurred a total of approximately $3.2 million in attorney's fees litigating its CDAFA, CFAA, UCL, and breach-of-contract claims. *See* Schultz Decl. ¶ 7, Ex. 1.[5] Of that, Meta seeks to recover $2,733,750, an amount reduced to account for the fact that Meta prevailed on almost all CDAFA-related issues on which it moved for judgment.

Where a plaintiff prevails in part, the Ninth Circuit applies a two-step inquiry to determine whether and how much to reduce a fee award. "First, the court asks whether the claims upon which the plaintiff failed to prevail were related to the plaintiff's successful claims." *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986). If the claims are unrelated, then "the final fee award may not include time expended on the unsuccessful claims." *Id.* If, on the other hand, the claims are related, "then the court must apply the second part of the analysis, in which the court evaluates the

[5] This amount was calculated by excluding work attributable only or primarily to BrandTotal's counterclaims, and thus not related to Meta's CDAFA claim. Meta thus excludes from its fee request work performed in connection with BrandTotal's motion for a temporary restraining order; Meta's multiple motions to dismiss; BrandTotal's motions for preliminary injunction; answering BrandTotal's second amended complaint; researching and writing those sections of Meta's summary judgment brief and reply regarding BrandTotal's counterclaims; and to be conservative, preparing for and taking or defending the depositions of individuals with knowledge relevant only or primarily to the counterclaims, including Alon Leibovich, Oscar Padilla, Mark Mansfield, Brian Hickey, and Kim Stonehouse. *See* Schultz Decl. ¶ 7.

'significance of the overall relief obtained by the plaintiff in relation to the'" total fees incurred. *Id.* (quoting *Hensley*, 461 U.S. at 435). "'[E]xcellent results'" overall may warrant "full compensation," while some reduction might be appropriate to account for "'partial or limited success.'" *Id.* (quoting *Hensley*, 461 U.S. at 435-437).

Here, the CDAFA claims on which Meta prevailed are closely related to those on which it did not. As discussed, claims are related if they "involve a common core of facts *or* are based on related legal theories." *Webb*, 330 F.3d at 1168 (emphasis in original); *see also* supra pp. 7-10. The claims on which Meta prevailed—that BrandTotal's 10 "legacy" applications and extension and server-side collection from password-protected locations violate the CDAFA, CFAA, UCL, and Meta's terms—are closely related in both facts and law to the claims on which Meta did not prevail—whether UpVoice 2021 (and the related extensions) and server-side collection from non-password-protected locations violate the CDAFA, CFAA, and UCL. All involve a common course of conduct: BrandTotal's repeated attempts to scrape user- and advertising-related information from Meta's computers. *See* Meta's MSJ at 11, 16-18, 22-23. And the CDAFA, CFAA, and UCL claims involve common legal questions; each of Meta's CDAFA and CFAA claims involves the legal questions whether BrandTotal's conduct involved the accessing and obtaining of information from Meta's computers without authorization, *see id.* at 22; MSJ Op. at 51-57, and Meta's UCL claims turned upon BrandTotal's CDAFA and CFAA violations, *see* Meta's MSJ at 22-23; MSJ Op. at 59-60.

Because these claims are related, the Court must move to the second step of the inquiry and assess the "'significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.'" *Thorne*, 802 F.2d at 1141 (quoting *Hensley*, 461 U.S. at 435). "There is no precise rule or formula" for assessing how much to reduce a fee award in light of a plaintiff's partial success. *Hensley*, 461 U.S. at 436. "[S]pecific hours" attributable only to unsuccessful claims may be excluded if they are identifiable. *Id.*; *accord Rodriguez v. Barrita, Inc.*, 53 F. Supp. 3d 1268, 1289-1290 (N.D. Cal. 2014). Alternatively, the total fee amount "may simply [be] reduce[d]" by some amount roughly proportional to the plaintiff's degree of success. *Hensley*, 461 U.S. at 436-437.

Whichever approach is taken, the ultimate determination must be guided by consideration of the over "level of success" achieved by the plaintiff. *Id.* at 434, 437.

Here, Meta achieved a substantial victory. This Court declared all of BrandTotal's challenged conduct unlawful under Meta's Terms, and all but BrandTotal's made-for-litigation technologies unlawful under the CDAFA and CFAA. The Court thus held all 10 of BrandTotal's legacy applications and extensions unlawful, as well as all server-side collection from password protected locations. BrandTotal is already shutting down its business, *see* Schultz Decl., Ex. 5, and if Meta's motion for a permanent injunction is granted, BrandTotal will be permanently enjoined from accessing and obtaining information from Meta's computers for commercial purposes and ordered to delete its scraping software code and any data scraped from Meta's platforms. Meta has thus fully achieved its objectives in bringing this lawsuit. In light of these "excellent results," Meta could recover all of its fees. *Hensley*, 461 U.S. at 435. Nonetheless, Meta has reduced the fees it seeks to account for the fact that it did not prevail at summary judgment on its CDAFA, CFAA, and UCL claims as to UpVoice 2021 and BrandTotal's server-side collection from non-password protected locations. Accordingly, Meta does not seek fees in connection with the following work, which is attributable entirely or primarily to those aspects of Meta's claims on which it did not prevail: (1) preparing for and taking the March 10, 2021 deposition of Mr. Oren Dor, which focused on the technical operation of UpVoice 2021 and (2) responding to BrandTotal's motion for summary judgment under the CDAFA and CFAA with respect to UpVoice 2021 and its server-side collection from non-password protected locations. Excluding this work reduces the fee amount by $192,500, resulting in a total fee amount of approximately $3.04 million.

Meta has further reduced that remaining fee amount by 10% to account for the degree of its success, reaching Meta's total fee request of $2.73 million. Given how "closely related" the claims on which Meta prevailed are to those on which it did not, a larger reduction is not warranted because "it would not be reasonable to conclude that [Meta]'s counsel would have spent half as many hours litigating this action if [it] had pursued only" its CDAFA and related claims as to BrandTotal's "legacy" products and server-side collection from password-protected locations. *Caplan v. CAN Fin.*

Corp., 573 F. Supp. 2d 1244, 1251 (N.D. Cal. 2008). Meta's proposed 10% reduction is consistent with reductions in similar cases. *See, e.g.*, *Barnes v. AT&T Pension Benefit Plan*, 963 F. Supp. 2d 950, 979 (N.D. Cal. 2013) (holding that, in the absence of a "concrete" basis for a different amount, the court "should take no more than a 10% 'haircut'" to account for a plaintiff's degree of success); *Caplan*, 573 F. Supp. 2d at 1251 (reducing fee amount by 8% where plaintiff did not prevail on claim that would have provided basis for injunctive relief). Meta's request is therefore reasonable in light of the significant success achieved in this lawsuit.

2. The Fee Rate Is Reasonable

The fees actually negotiated and paid by Meta reflect a reasonable rate. Though the lodestar method is often used to reach a "rough approximation of general billing practices," the amount actually paid pursuant to a fixed-fee agreement is "just as effective an approximation of general billing practices," as it reflects "*what clients actually pay* for legal services." *Straight Path IP Grp., Inc. v. Cisco Sys., Inc.*, 2020 WL 2539002, at *5 (N.D. Cal. May 19, 2020) (emphasis in original). Indeed, "evidence that an institutional client in a competitive legal market was willing to pay the rates charged without any guarantee of reimbursement is important evidence that the rate was reasonable." *Perfect 10, Inc. v. Giganews, Inc.*, 2015 WL 1746484, at *18 n.14 (C.D. Cal. Mar. 24, 2015), *aff'd*, 847 F.3d 657 (9th Cir. 2017); *accord Amphastar Pharms. Inc. v. Aventis Pharma SA*, 2020 WL 8680070, at *27 (C.D. Cal. Nov. 13, 2020) (holding that rate actually paid by sophisticated client is a reasonable rate). Here, billing records show that the fees Meta seeks to recover are based on the amounts that Meta, one of the most sophisticated consumers of legal services in the market, actually negotiated and paid in connection with this litigation. *See* Mehta Decl. ¶ 4. There is no need to approximate the reasonable market value of these services; the price negotiated by Meta reflects just that.

If more were needed, the fees sought are also consistent with prevailing market rates given the time reasonably spent litigating the case. Courts in this district have recently held rates of $600 to $1,325 for partners, $895 to $1150 for counsel, $500 to $600 per hour for associates, and $80 to $490 for paralegals to be reasonable and consistent with prevailing market rates in the area. *See, e.g.*, *Fleming v. Impax Labs. Inc.*, 2022 WL 2789496, at *9 (N.D. Cal. July 15, 2022); *Cottle v. Plaid Inc.*,

2022 WL 2829882, at *12 (N.D. Cal. July 20, 2022). Applying rates consistent with those recently held reasonable in this district and commensurate with experience—*i.e.* between $975 and $1,200 per hour for partners, between $895 and $950 for counsel, between $650 and $700 for senior associates, $550 for associates, and between $200 and $475 for paralegals and other support staff—Meta would, under a traditional lodestar calculation, be entitled to recover $3.28 million based on the 4,228.2 hours of work performed by timekeepers at WilmerHale in connection with the claims on which Meta has prevailed. *See* Schultz Decl. ¶¶ 16-17 & Ex. 3. Reducing that amount by 10% to account for the degree of Meta's success would result in a total fee amount of $2.95 million. *Id.* ¶ 18 & Ex. 3. Meta's request of $2.73 million is thus reasonable in light of prevailing market rates in the area.

3. Meta's Fee Request Is Reasonable In Light Of BrandTotal's Litigation Conduct

BrandTotal's litigation conduct also supports the reasonableness of Meta's fee request. A fee award should take into consideration a defendant's conduct that unnecessarily prolongs or complicates the litigation. *See Wit v. United Behav. Health*, __ F. Supp. 3d __, 2022 WL 45057, at *24 (N.D. Cal. Jan. 5, 2022) (holding multiplier appropriate in light of protracted litigation); *Envirosource, Inc. v. Horsehead Res. Dev. Co.*, 981 F. Supp. 876, 882 (S.D.N.Y. 1998) (finding fees reasonable "especially when that work was made necessary and more complicated by defendant's improper conduct"). As discussed above, BrandTotal's many deficient discovery responses and untimely disclosures needlessly drove up litigation costs. BrandTotal repeatedly failed to produce relevant evidence in response to Meta's discovery requests, including key technical records, documents, and source code pertaining to BrandTotal's legacy products and server-side collection from password-protected locations. *See supra* pp. 4-5. BrandTotal's inadequate responses forced Meta to expend time and resources identifying the specific deficiencies in BrandTotal's responses, negotiating with BrandTotal for their resolution, and, when BrandTotal remained recalcitrant, seeking relief from this Court. And when BrandTotal finally did belatedly produce all relevant discovery, the significant delay further drove up costs by necessitating an extension in the case schedule and forcing Meta to undertake an extensive eleventh-hour document review and conduct four additional depositions all in the weeks

before the parties filed their summary judgment briefs. *See supra* p. 6. BrandTotal's failure to timey disclosure the departure of two key technical employees also forced Meta to seek and obtain their depositions through the complicated Hague Convention procedures. *See supra* p. 6. BrandTotal's conduct significantly drove up the costs of litigation, further supporting the reasonableness of Meta's requested fee reimbursement.

4. Meta Is Not Seeking Fees Paid To Hunton Andrews Kurth

Meta initially retained the firm Hunton Andrews Kurth ("Hunton") to represent it with respect to Meta's affirmative claims in this litigation. Hunton led the litigation of Meta's affirmative claims through approximately July 2021, including drafting Meta's complaints and drafting discovery requests. Chmelar Decl. ¶ 2. Meta incurred $645,000 in fees paid to Hunton. *See id.* ¶ 3. Despite that work pertaining to the claims on which Meta prevailed, Meta does not seek to recover them in order to eliminate any possibility of seeking to recover fees duplicative with those incurred in connection with the work performed by WilmerHale. Meta accordingly foregoes recovering the $645,000 paid to Hunton for its work in this litigation.

III. CONCLUSION

For the forgoing reasons, the Court should grant Meta's motion for fees in the amount of $2,733,750.

Dated: August, 17, 2022

WILMER CUTLER PICKERING HALE AND DORR LLP

By: */s/ Sonal N. Mehta*
Sonal N. Mehta

Attorney for Plaintiff
Meta Platforms, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2022, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

Dated: August 17, 2022

By: */s/ Sonal N. Mehta*
Sonal N. Mehta