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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

(UNLIMITED CIVIL JURISDICTION)

JANE DOE, individually and on behalf of all similarly situated California residents,

Plaintiff.

v.

TWITTER, INC., a California corporation and DOES I through XX.

Defendants.

ALLISON R. HAYWARD and DAVID R. HENDERSON,

Objectors.

Case No. CGC-10-503630

OBJECTION OF ALLISON R. HAYWARD AND DAVID R. HENDERSON TO PROPOSED SETTLEMENT

Judge: Hon. Curtis E.A. Karnow
Dept.: 304
Date: April 11, 2016
Time: 9:00 a.m.

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INTRODUCTION

Class members Allison R. Hayward and David R. Henderson object to the proposed settlement because, for the reasons detailed below, the settlement is not fair, reasonable, and adequate.

First, the settlement violates class members' due process rights because, as a result of the named plaintiff using a pseudonym, they are unable to assess the adequacy of representation. The nature of the all-*cy pres* settlement, in which class members release their claims in exchange for nothing that non-class members do not also receive, compared with the named plaintiffs' request for a $15,000 incentive award heightens adequacy concerns. *See* § I. Second, although the distribution of class-action settlement funds to third-parties rather than to the class has increased in prevalence in recent years, many courts (as well as scholars and practitioners) "criticize[] and severely restrict[] the practice." *See, e.g.*, *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015). In this vein, California courts have carefully limited their approval of *cy pres* to those cases in which distribution of funds to the class is not practical. Here, the parties have not shown that distribution to class members via a claims process is not practicable and, in fact, other courts' experience shows otherwise. *See Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939 (N.D. Cal. 2013). The Court should reject the proposed *cy pres* on the independent ground that any distributions to the proposed organizations would violate class members' First Amendment rights. *See* § II. Third, if the Court nevertheless approves the settlement, it should drastically reduce the attorneys' fees below the 33.3% requested. Whether the Court employs a percentage-of-recovery or lodestar approach, a dollar of *cy pres* recovery should be valued as significantly less recovery than a dollar of monetary compensation to the class. *See* § III. Finally, the publication-only notice to the class was constitutionally deficient. *See* § IV.

I. Objectors Allison R. Hayward and David R. Henderson are members of the class and intend to appear through counsel at the fairness hearing.

Objector Allison R. Hayward has lived in California since July 2014, and therefore resided in California as of October 27, 2015, the date of preliminary approval and conditional class certification. Declaration of Allison L. Hayward ("Hayward Decl.") ¶ 3. She began using Twitter in February 2008. *Id.* ¶ 4. She is neither a defendant, an entity in which any defendant has a controlling interest or which has a controlling interest in any defendant, nor a legal representative, predecessor, successor, or employee of a defendant. *Id.* ¶ 5. She is not a member of the judge's immediate family. *Id.* Hayward therefore is a member

of the settlement class with standing to object to the proposed settlement. Hayward's address is 2215 Madison St., Cambia, CA 93428, her telephone number is (805) 927-1412, and her email address is allisonhayward@gmail.com.

Objector David R. Henderson has lived in California since August 1984 and therefore resided in California as of October 27, 2015. Declaration of David R. Henderson ("Henderson Decl.") ¶ 3. He began using Twitter on October 15, 2008. *Id.* ¶ 4. He is neither a defendant, an entity in which any defendant has a controlling interest or which has a controlling interest in any defendant, nor a legal representative, predecessor, successor, or employee of defendant. *Id.* ¶ 5. He is not a member of the judge's immediate family. *Id.* Henderson therefore is a member of the settlement class with standing to object to the proposed settlement. Henderson's address is 944 Forest Ave., Pacific Grove, CA 93950, his telephone number is (831) 648-1776, and his email address is davidrhenderson1950@gmail.com.

The Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF"), through attorney Theodore H. Frank, represents Hayward and Henderson (collectively, "Hayward") *pro bono*. Frank gives notice of his intent to appear at the fairness hearing, where he wishes to discuss matters raised in this Objection. Hayward does not intend to call any witnesses at the fairness hearing, but reserves the right to make use of all documents entered on the docket by any settling party or objector. Hayward reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval.

CCAF, which was founded in 2009 and became part of the non-profit Competitive Enterprise Institute in 2015, litigates *pro bono* on behalf of class members against unfair class action procedures and settlements. *E.g.*, *In re Dry Max Pampers Litig.* ("*Pampers*"), 724 F.3d 713, 716-17 (describing objections as "numerous, detailed, and substantive") (reversing settlement approval and certification); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling CCAF's president "[t]he leading critic of abusive class-action settlements"). CCAF has won millions of dollars for class members. *E.g.*, *In re Classmates.com Consol. Litig.*, No. C09-45RAJ, 2012 U.S. Dist. 83480, at *11-*13 (W.D. Wash. June 15, 2012). Unlike those termed "professional objectors," who attempt or threaten to disrupt a settlement unless plaintiffs' counsel buy them off with a share of fees, CCAF refuses to engage in *quid pro quo* settlements, does not extort attorneys, and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees.

II. The court has a fiduciary duty to unnamed members of the class.

"The court has a fiduciary responsibility as guardian of the rights of absentee class members when deciding whether to approve a settlement agreement." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 129 (2008) (internal quotation omitted). "The court must determine whether the settlement is fair, adequate, and reasonable. The purpose of the requirement is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996) (internal citations omitted).

There should be no presumption in favor of settlement approval: "The proponents of a settlement bear the burden of proving its fairness." *True v. Am. Honda Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal. 2010) (citing 4 Newberg on Class Actions § 11:42 (4th ed. 2009)); *see also Clark v. Am. Residential Servs.*, 175 Cal.App.4th 785, 801 (2009) ("question[ing]" any presumption of fairness); *accord* American Law Institute, *Principles of the Law of Aggregate Litig.* ("*ALI Principles*") § 3.05(c) (2010).

It is insufficient that the settlement happened to be at "arm's length" without express collusion between the settling parties; because of the danger of conflicts of interest, third parties must monitor the reasonableness of the settlement as well. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003)). Courts "must be particularly vigilant" not only for explicit collusion, but also for more "subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Pampers*, 724 F.3d at 718 (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)).

III. Class members' due process rights are violated by a pseudonymous named representative.

The named plaintiff filed this class action under a pseudonym, seeking to represent herself and "all similarly situated California residents." By not identifying herself, however, those class members whom "Jane Doe" has decided to represent, as well as the Court, are deprived of adequate notice and constrained in their ability to evaluate the adequacy of her representation. *See Better v. YRC Worldwide*, No. 11-2072, 2015 U.S. Dist. LEXIS 140431, at *10 (D. Kan. Oct. 15, 2015) (notice must identify class representative).

Adequate representation is a prerequisite to class certification. Cal. Civ. Code § 1781(b)(4); *Seastrom v. Neways, Inc.*, 149 Cal.App.4th 1496, 1500-1501 (2007) ("The party seeking certification as a class representative must establish the existence of an ascertainable class and a well-defined community

of interest among the class members. The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (quoting *Richmond v. Dart Indus., Inc*., 29 Cal.3d 462, 470 (1981))) (discussing Cal. Code. Civ. P. § 382). The U.S. Supreme Court has long recognized that adequate representation denotes a constitutional imperative. Purported adjudication or settlement of an absent class member's legal claim by an inadequate representative deprives that person of property without due process of law. *Hansberry v. Lee*, 311 U.S. 32 (1940); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring) (stressing "the centrality of the procedural due process protection of adequate representation in class-action lawsuits"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (adequacy requirement "represents a measured response to the issues of how the due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation.").

Representatives can be inadequate for a multitude of reasons. For example, they may be collusively aligned with the opposing party in the case, *e.g.*, *Hansberry*, 311 U.S. 32; they may be beholden agents of class counsel, *e.g.*, *Apple Computer Inc. v. Superior Court*, 126 Cal.App.4th 1253, 1265-66 (2005) (named plaintiff who was attorney at the same firm as class counsel is inadequate); they may be seeking relief that harms a certain subset of the class, *e.g.*, *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997); they may be subject to unique individual defenses, *e.g., Hanon v. Dataproducts Corp*., 976 F.2d 497, 508 (9th Cir. Cal. 1992); they may be more concerned with their own incentive award than compensation to absent class members, *e.g.*, *Pampers*, 724 F.3d at 721-22; they may have suffered a different injury and therefore have a claim that is significantly stronger or weaker than another subset of the class, *e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997); or they may just not care enough about what is happening in the litigation, *e.g.*, *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482-83 (5th Cir. 2001). Without knowing the representative plaintiff's identity, it is not possible for the Court to rule out any of the above possibilities. Moreover, because the identity of the named plaintiff is indisputably material, the class notice has failed to "convey the required information" and is constitutionally infirm. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Cho v. Seagate Tech. Holdings, Inc.,* 177 Cal.App.4th

734, 746 (2009) ("[Class action notice] principles rest upon an assumption that the definition of a plaintiff class will be clear and free from obvious ambiguity.") (citing Cal. R. Ct. 3.765, 3.766, 3.771).

A common theme emerges from the above examples of inadequacy: the selection of litigation *strategies* that do not prioritize monetary redress to the class. *See, e.g.*, *City of San Jose v. Superior Court*, 12 Cal.3d 447, 464 (1974) (finding inadequate representatives who "pursue a course which, even should the litigation be resolved in favor of the class, would deprive class members of many elements of damage"). The all-*cy pres* settlement, under which class members will receive no monetary compensation, while the named plaintiff has requested $15,000 for herself thus, on the face of the settlement, indicates inadequacy. *See, e.g.*, *Amchem*, 521 U.S. at 620 (it is "altogether proper" to inspect the terms of the settlement when evaluating inadequacy); *Pampers*, 724 F.3d at 722; *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1166 (9th Cir. 2013). The settling parties cannot in good faith create a "second best" *cy pres* scheme that bypasses readily available "first best" avenues of direct compensation. *See infra* § IV. Releasing absent claims members' claims under this settlement and under the direction of an unknown, anonymous representative would violate absentees' constitutional right to due process.

IV. The settlement misuses *cy pres*.

Under the proposed settlement, Twitter will pay $2,690,000 to settle the action. Stipulated Class Action Settlement Agreement ('Settlement") ¶ 4.1. After administrative costs, attorneys' fees and expenses, and any incentive award have been deducted, the remaining amount will be paid entirely to third-party *cy pres* recipients that purportedly "educate users, regulators, businesses and the general public regarding online privacy and related social and legal issues and policy." *Id.* ¶¶ 4.3-4.4. This arrangement breaches class counsel's duty to the class and violates class members' First Amendment rights.

A. *Cy pres* may only be used as a last-resort.

It is a bedrock tenet of class action law that the plaintiff-class itself as a legal entity "is not the client. [Rather, t]he class attorney continues to have responsibilities to each individual member of the class even when negotiating a settlement." *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 835 (9th Cir. 1976). The legal construct of *cy pres* (from the French "*cy pres comme possible*"—"as near as possible") has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir.

2011). Imported to the class action context, it increasingly has been used as a method of distributing settlement funds to non-class third parties, coming under fire in the process. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari) ("*Cy pres* remedies … are a growing feature of class action settlements" that raise "fundamental concerns"); *Lane v. Facebook, Inc.*, 709 F.3d 791, 793 (9th Cir. 2013) (Smith, J., dissenting from denial of rehearing en banc).

Such non-compensatory *cy pres* distributions are disfavored and remain an inferior avenue of last resort. *See BankAmerica*, 775 F.3d at 1063 (many courts have "criticized and severely restricted" class action *cy pres*); *Klier*, 658 F.3d at 475 ("[The *cy pres*] option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly."); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) ("[A] growing number of scholars and courts have observed, the *cy pres* doctrine … poses many nascent dangers to the fairness of the distribution process."); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) ("*Cy pres* distributions imperfectly serve that purpose by substituting for … direct compensation an indirect benefit that is at best attenuated and at worse illusory."); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else."); Martin H. Redish, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

The type of *cy pres* involved here—"*ex ante cy pres*," in which the entire award is given to beneficiaries without any attempt to compensate the absent class—is particularly disfavored and stands on the weakest legal ground. *See* Redish, *supra*, 62 FLA. L. REV. at 657 n.171; *Molski v. Gleich*, 318 F.3d 937, 954-55 (9th Cir. 2003) (rejecting all-*cy pres* settlement as inadequate substitute to individual compensation); *Zepeda v. Paypal*, No. C 10-2500 SBA, 2014 U.S. Dist. LEXIS 24388, at *21 (N.D. Cal. Feb. 24, 2014) (denying approval and expressing concern "that the only persons receiving any funds are persons *other than* class members" (emphasis in original)); *In re Groupon*, No. 11-md-2238 DMS (RBB), 2012 U.S. Dist. LEXIS 185750, at *37 (S.D. Cal. Sept. 28, 2012) (denying approval to settlement with an *ex ante cy pres* component, noting that "[c]ounsel fails to explain why the $75,000 *cy pres* award, to the extent it is available, should be reserved for the *cy pres* recipients when there may be class members who could make a claim to those funds"). "This form of *cy pres* stands on the weakest ground because *cy pres* is no longer a last-resort solution for a problem of claims administration. The concern for compensating

victims is ignored (at least unless the indirect benefits of the *cy pres* award flow primarily to the victims)." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 770-71 (2013).

ALI Principles § 3.07(a) is clear: "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members."[1] This "last-resort rule" follows from the precept that "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (citing § 3.07 cmt. (b)).

California courts have not squarely opined on either the "last-resort rule" or *ALI Principles* § 3.07 under state law, but adoption of that standard is consistent with California Court of Appeals rulings limiting the use of *cy pres*. In *In re Vitamin Cases*, the court rejected the argument that Cal. Code Civ. P. § 384, by providing for *cy pres* distributions of class action residuals, implicitly prohibits *cy pres* as part of the settlement itself. 107 Cal.App.4th 820, 826-28 (2003). But the court did not allow for unbridled *ex ante cy pres*. It affirmed a *cy pres* distribution specifically because of the: "(a) impracticability of processing the potential claims of [the] 30 million" putative class members; (b) "expense and inconvenience to individual class members with having to document specific purchases" over the 10-year class period; (c) "potential unfairness" to those class members "unable to provide evidence of their purchases"; and (d) "high cost of administering direct cash payments to millions of consumers relative to the average likely award to those consumers." *Id.* at 825. These conditions are not present here.

The appellate court reached a similar result in *In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 716 (2006). While the court again held that § 384 did not bar across-the-board *ex ante cy pres*, it again did not pronounce that *any cy pres* deal would be fair. The court only held that *cy pres* is appropriately deployed "**when it is not possible or practicable** in a class action judgment to compensate class members according

[1] Numerous courts have endorsed § 3.07 to a greater or lesser degree. *BankAmerica*, 775 F.3d at 1063-66; *Nachshin*, 663 F.3d at 1039 n.2; *Ira Holtzman, C.P.A. & Assocs. v. Turza*, 728 F.3d 682, 689-90 (7th Cir. 2013); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012); *Masters v. Wilhemina Model Agency*, 473 F.3d 423, 436 (2d Cir. 2007) (citing draft version); *Baby Prods.*, 708 F.3d at 173 (agreeing in part); *Better*, 2013 U.S. Dist. LEXIS 163569, at *19-*21 (rejecting settlement for non-compliance with § 3.07); *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-md-2087, 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (same).

to their respective damages." *Id.* at 716, 722 (emphasis added). *See Roos v. Honeywell*, 241 Cal.App.4th 1472, 1488 (2015) ("The propriety of a *cy pres* term might be less certain if a proposed settlement asked class members to accept paltry relief."); *Bruno v. Superior Court*, 127 Cal.App.3d 120, 123-24 (1981) ("The theory underlying fluid class recovery is that since each member cannot be compensated exactly for the damage he or she suffered, the best alternative is to pay damages in a way that benefits as many of the class members as possible and in the approximate proportionate that each member has been damaged.").

Thus, the relevant question for the Court is whether it would be practicable to distribute the $2.69 million (after fees and expenses are deducted) either through a claims process or a lottery distribution to identifiable class members. The answer is yes. *See Fraley*, 966 F. Supp. 2d 939 (rejecting *cy pres*-only settlement for class of over 100 million class members and a settlement fund of less than $0.20/class member). In *Fraley*, a settlement involving a much larger class of over 100 million members was able to have a claims process after the district court rejected the possibility of a *cy pres*-only settlement where the fund was valued at $0.20 per class member, significantly less than the per-class member value here. *Fraley*'s claims process resulted in a distribution of $15 per class member because so few class members made claims. 966 F. Supp. 2d 939. Just as in *Fraley*, the settlement fund here could be distributed to class members through a claims process. Claims rates in claims-made settlements are notoriously low, usually under 1% for small-dollar amounts. *Pearson v. NTBY*, 772 F.3d 778, 782 (7th Cir. 2014) (0.25% claims rate in that case despite payments of over $28/class member); Daniel Fisher, *Odds of a Payoff in Consumer Class Action? Less Than a Straight Flush*, Forbes.com, May 8, 2014, *available at* http://www.forbes.com/sites/danielfisher/2014/05/08/odds-of-a-payoff-in-consumer-class-action-less-than-a-straight-flush. Assuming even a 1% claims rate from the present class, approximately 37,000 class members would be compensated with a not-insignificant monetary recovery. *See* Decl. of Linus Lee 1.

"Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Prods.*, 708 F.3d at 178 (counsel has "responsibility to seek an award that adequately prioritizes direct benefit to the class"). If it really is not feasible to distribute any money to class members, then class certification was inappropriate: the release benefited only Twitter and the class was no better off than if there was no litigation at all. Favoring third-party charities over class members to whom counsel owes a fiduciary obligation in the first instance was a breach of that duty and

casts doubt on the adequacy of counsel's representation of the class. *See* Cal. Civ. Code § 1781(b)(4); *Radcliffe*, 715 F.3d at 1167 (fiduciary responsibilities to class member do "not permit even the appearance of divided loyalties."). Indeed, if the *cy pres* recipients' work will be "for the benefit of not only the class but all Californians," Points & Authorities ISO Mot. for Prelim. Approval 5, then class members receive the same benefit whether or not they stay in the class and release their claims. In this circumstance, counsel has a fiduciary duty to recommend that its clients not provide such a valueless release and instead opt out.

California courts have given *cy pres* a narrow berth; the application of *cy pres* in the settlement here exceeds that authority and should be rejected. The settling parties cannot in good faith create a "second best" *cy pres* scheme that bypasses readily available "first best" avenues of direct compensation. To the extent California law permits the distribution, objectors reserve the right to make the good-faith argument to request California appellate courts to join their federal sisters in putting more constraints on *cy pres*.

B. *Cy pres* constitutes compelled speech in contravention of the First Amendment.

The proposed *cy pres* distributions raise an additional free-speech problem. "[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). Making a political contribution is First Amendment-protected expressive and associational activity. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Concomitantly, individuals have a right to refrain from making such a donation, a right to not be compelled to engage in expressive and associational activity. *See Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (the government "may not … compel the endorsement of ideas it approves"). "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (attorney bar dues cannot be used for political or ideological purposes); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (recognizing the right of an individual to reject a state measure that forces him "as a part of his daily life … to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable"); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977) (teacher union dues cannot be used for ideological activities not "germane" to their bargaining representative duties). In articulating this right, the Supreme Court has acknowledged Thomas Jefferson's view that "to compel a man to furnish

contributions of money for the propagation of opinions which he disbelieves[] is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31 (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)).

These principles render class action third-party awards (at least those awards like this one that will be reserved for organizations that advance policy positions and seek to influence the direction of the law) unconstitutional. Three premises support this conclusion. First, "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (citing *ALI Principles* § 3.07 cmt. (b)). Second, a third-party donation is an expression of support, association, and endorsement of the third party's agenda and activities. *See, e.g.*, *Buckley*, 424 U.S. 1; *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (Alito, J.) ("Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection."). "[C]ompelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Harris*, 134 S. Ct. at 2639 (internal quotation omitted). Third, absent class members are being compelled into participating in the donations pursuant to the Court's order disbursing the funds to the *cy pres* recipients.

That class members have a right to exclude themselves from the action does not remedy the compelled-speech problem. The "opt out" right is not the right to merely abstain from the *cy pres* donation, it is simply the right to exit the class action entirely. The settling parties are conditioning class members' right to participate in the action on their acceptance of the compelled donation, tantamount to telling union members or regulated professionals that their dues are not mandatory because they are always free to quit and find a new profession. This is a Hobson's choice, not a true opt-out. *See Keller*, 496 U.S. at 10 ("Claimants cannot be required by government action to relinquish First Amendment rights as a condition of retaining employment."); *Wash. Legal Found. v. Mass. Bar Found*., 993 F.2d 962, 978 (1st Cir. 1993), *superseded on other grounds by Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (where the burden to avoid is "more than an inconvenience" a rule requiring monetary contribution should be viewed as compulsory). The opt-out right here is only an option to opt back into the "problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Moreover, recent jurisprudence has suggested that even an actual opt-out scheme may be too

burdensome and that an opt-in scheme may be required by the First Amendment. *Knox*, 132 S. Ct. at 2290-96. Because silence does not equate to consent, "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id*. at 2290; *see also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071-72 (2013) (Alito J., concurring) (inaction in response to class arbitration opt out form is not consent); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007) ("Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low."); Theodore Eisenberg & Geoffrey Miller, *Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) ("Common sense indicates that apathy, not decision, is the basis for inaction."). "[A]cceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Knox*, 132 S. Ct. at 2290.

While most class members might agree with the notion of charitable giving generally, they will disagree as to the type of organizations worthy of financial support. In light of the diversity of views among class members, it is inappropriate for class counsel, defendant, or even the Court to presume to select a "worthy" organization to receive funds that represent damages owed to class members.[2] The organizations proposed by the settlement here conduct studies and advocacy work on privacy issues that necessarily incorporate certain value judgments, despite the fact that class members will have wide-ranging views on the same issues, heightened by recent court battles and news stories raising questions about the appropriate balance between (i) privacy and consumer protection, (ii) law enforcement and national security, and (iii) technological advancement made possible by sharing data. *See, e.g.*, Supp. Decl. of Michael L.

[2] Although it would not resolve the First Amendment problem, a "best practice" that is especially appropriate for a class of Twitter users is to poll class members—efficiently done through the settlement website—as to which charities should be designated *cy pres* beneficiaries. *See, e.g., In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1197 (N.D. Cal. 1998) (Walker, J.) ("The fact remains that this money belongs to class members, and it is they who should decide whether and to whom to donate it."); Alexandra Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1961-63 (2011).

Rodenbaugh Ex. A at 5 (describing a goal of work to be funded by *cy pres* as "to better inform consumer protection regulations"); *id.* Ex. B at 2, 5 (work "address[es] California privacy issues through individual research and policy issues," including a framework for "privacy issues related to government drone use").

Because the proposed settlement compels speech subsidies, it cannot be approved unless it satisfies strict scrutiny. *See Frudden v. Pilling*, 742 F.3d 1199, 1207 (9th Cir. 2014). Although reaching a satisfactory private class settlement is a laudable goal, it does not rise to the level of a critical or "compelling" governmental interest, and does not justify an infringement on absent class members' rights. *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 929 n.8 (5th Cir. 1996) (the possibility of "lengthen[ing] the process" of settlement does not justify infringing First Amendment rights); *cf. also Amchem*, 521 U.S. at 620-21 (interest in settlement does not override procedural safeguards); *Keller v. Mobil Corp.*, 55 F.3d 94, 98 (2d Cir. 1995) ("The public interest in having rules of procedure obeyed is at least as important as the public interest in encouraging settlement of disputes."). And if this Court believes that facilitating settlement is a compelling governmental interest, then there are less restrictive alternatives than the *cy pres* settlement as proposed. For example, the parties could propose an opt-in arrangement or a true opt-out arrangement that allows class members to divorce themselves from the *cy pres* without exiting the class entirely. Or they could excise the unnecessary *cy pres* element entirely.

V. The requested 33.3% of attorneys' fees from the all-*cy pres* settlement is excessive.

"Because of the potential for fraud, collusion or unfairness, thorough judicial review of fee applications is required in all class action settlements," with courts acting "as 'fiduciaries' for the protection of absent class members whose rights may not have been given due regard by the negotiating parties." *In re Consumer Privacy Cases*, 175 Cal.App.4th 545, 555 (2009) (internal citation and quotation marks omitted). Class counsel's request for attorneys' fees of 33.3% of the gross all-*cy pres* settlement amount, or $896,666.66, plus expenses, is excessive. Even if the net settlement were being dispersed to class members, it would be unreasonable. *See id.* at 557 n.13 ("A fee award of 25 percent "'[i]s the 'benchmark' award that should be given in common fund cases.'" (quoting *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 797, 802 n.1 (2000) (internal quotation marks omitted))). It is completely untenable where the funds will be dispersed to third parties rather than class members. The request evidences class counsel's belief that the Court's approach to attorneys' fees applies equivalently regardless of whether a defendant

is obligated by a settlement to make payment to class members or to make payment to non-class member third parties. This belief is wrong as a matter of law and would be disastrous as a matter of public policy.

While the California Supreme Court presently is reviewing a case addressing the proper methodology for awarding attorneys' fees under California law, courts may—and Hayward submits, should—apply the percentage-of-recovery approach. Regardless of the approach, however, the "ultimate goal" is "the award of a 'reasonable' fee." *See id.* at 557.[3] When a percentage-of-the-fund approach is employed, the focus is on the class *recovery*, and whether "the fee awarded is within the range of fees [that would be] freely negotiated in the legal marketplace in comparable litigation." *Lealao*, 97 Cal.Rptr.2d at 821 (citing opinions by Judge Posner). Although obligating Twitter to pay funds to third parties may impose a cost on Twitter, this is not the appropriate measure of class benefit. *See Bluetooth*, 654 F.3d at 945. "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). As the Seventh Circuit remarked in an opinion by Judge Posner, it is "obvious" that *cy pres* amounts donated to third parties should not be counted as a "benefit to the class" in determining attorneys' fees. *Pearson*, 772 F.3d 3d at 781.

Cy pres is less beneficial to the class than direct compensation *as a matter of law.* "There is no indirect benefit to the class," much less direct benefit, from "the defendants' giving the money to someone else." *Mirfasihi*, 356 F.3d at 784. *See supra* § III. Accordingly, when "counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, … it [is] appropriate for the court to decrease the fee award." *Baby Prods.*, 708 F.3d at 178-79 (citing *Dennis*, 697 F.3d at 867-68, and *ALI Principles* § 3.13); Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 U.S.C. L. REV. 97, 136-47 (2014) ("presumption reduction of attorneys' fees" appropriate where settlement includes significant *cy pres* component).

[3] The notice states that class counsel will file the fee request after the Court approves the settlement. This timing prevents class members from making an informed decision of whether to object or opt out. It is a denial of due process and class counsel's fiduciary duty to deprive class members the opportunity to contest class counsel's fee motion or to object or opt out with full information from that motion. *In re Mercury Interactive Secs. Litig.*, 618 F.3d 988 (9th Cir. 2010); *Redman v. RadioShack*, 768 F.3d 622 (7th Cir. 2014). Hayward acknowledges that California courts have not yet adopted this rule but preserves the argument. Hayward also reserves the right to file a supplemental objection after counsel files a fee motion.

"The class benefit conferred by cy pres payments is indirect and attenuated. That makes it inappropriate to value cy pres on a dollar-for-dollar basis." *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (discounting *cy pres* by 50% for purposes of awarding fees). Numerous courts have reached this conclusion, refusing to value *cy pres* donations the same as a dollar given directly to the class. *E.g.*, *Pearson*, 772 at 781 ("obvious" that no credit should be given for *cy pres* in valuing settlement benefit); *In re Livingsocial Mktg. & Sales Prac. Litig.*, 298 F.R.D. 1, 19, 22 (D.D.C. 2013) (cutting fees to 18% in consideration of "proportion of the award that is going to *cy pres*"); *Weeks v. Kellogg Co.*, No. CV 09-08102, 2011 U.S. Dist. LEXIS 155472, at *111 (C.D. Cal. Nov. 23, 2011) (awarding 16.2% "in light of the fact that almost half of the settlement's value is guaranteed not to directly benefit individual class members"); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 123 n.9 (E.D. Pa. 2005) (excluding *cy pres* and non-economic injunctive relief benefits entirely). Awarding fees of 33.3% of the *cy pres* settlement would be unfair. Instead, the Court should award no fees or, at most, 10% of the net settlement; if the Court uses the lodestar, it should apply a negative multiplier.

VI. The manner of notice was defective.

Direct notice is obligatory as a matter of due process for those class members for whom Twitter has contact information—even if Twitter does not have such information for the entire class. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974). "The purpose of class notice in the context of a settlement is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement." *In re Vitamin Cases*, 132 Cal.Rptr.2d 425, 431 (2003). Accordingly, it is a constitutional imperative that the settlement notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950); *cf.* Cal. R. Ct. 3.766(f), 3.769(f). "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. *Id.* at 318; *see also Eisen*, 417 U.S. at 176 ("individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case…. [E]ach class member who can be identified through reasonable effort must be notified."); *Cooper v. Am. Savings & Loan Assn.*, 55 Cal.App.3d 274, 284 (1976) ("Notice is particularly requisite when those purporting to represent the class

seek payment of substantial compensation from all members of the class."); Cal. Civ. Code § 1781(d) (publication notice allowed only if personal notice is not possible or "unreasonably expensive").

Thus, "it is necessary that the notice be given [to class members] in a form and manner that does not systematically leave an identifiable group without notice." *Mandujano* , 541 F.2d at 835. Putative class members for whom Twitter has contact information are just such an identifiable group. Even where only a limited percentage of the class can be reached through direct notice, direct notice is still mandatory for those class members. *Eisen*, 417 U.S. at 175-76; *Smith v. Levine Leichtman Capital*, No. C 10-00010, 2012 U.S. Dist. LEXIS 163672, at *7-*8 (N.D. Cal. Nov. 15, 2012) ("[n]otice to class … must be 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort'" (quoting *Amchem*)).

Here, the proposed forms of notice do not include *any* notification by direct mail, email, message, or other individualized means. *See* Hayward Decl. ¶ 7; Henderson Decl. ¶ 7. The only notice provided to putative class members is by publication, including internet ads and a "promoted tweet" that appears on the same terms as any other Twitter advertisement. Settlement ¶ 8.1. But class members receive emails and other messages from Twitter and through Twitter's platform. *See* Hayward Decl. ¶ 7; Henderson Decl. ¶ 7. "[T]he fact that [defendant] has been able to give mailed notice to known beneficiaries … is persuasive that postal notification at the time of accounting would not seriously burden the plan." *Mullane*, 339 U.S. at 319. The complaint, too, recognizes that "Class Members can also be notified of this class suit through publication and *direct electronic mailings to email addresses maintained in the usual course of Twitter's business*, and/or through tweets to Twitter's users." First Amd. Class Action Compl. ¶ 25 (emphasis added). Any objection by Twitter that sending an email to the same users at whom the promotional tweet is directed would be "unreasonably expensive" should be rejected as incorrect and in conflict with constitutional demands. *Amchem*, 521 U.S. at 617 (notice "requirement may not be relaxed based on high cost").

CONCLUSION

For the forgoing reasons, the settlement cannot be approved. It favors *cy pres* recipients at the expense of the class, despite the feasibility of distributing monetary compensation to class-member claimants. The settlement violates class members' First Amendment rights, and it does not afford them effective notice. If the Court approves the settlement, it should drastically reduce the requested fees.

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Respectfully submitted,

/s/ Theodore H. Frank
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