NO. 15-15858

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: GOOGLE REFERRER HEADER PRIVACY LITIGATION

PALOMA GAOS, *et al.*,
Plaintiffs-Appellees,

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Objectors-Appellants,

v.

GOOGLE, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California at San Jose
No. 5:10-cv-04809-EJD, District Judge Edward J. Davila

Reply Brief of Appellants Theodore H. Frank and Melissa Ann Holyoak

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Introduction

Appellees' arguments prove too much. Their readings of § 3.07 and *Nachshin* and *Radcliffe* would not only permit this *cy pres* settlement, but any *cy pres* settlement in any large-scale class action where the parties can convince related entities such as their *alma mater* or their spouse or former non-profit client to submit a grant application. That's not the law, and only with that unprecedented abdication of review of *cy pres* abuse can this settlement survive.

Apparently hoping to distract the Court from the fact that they proposed exactly the sort of *cy pres* that *Nachshin* cited as the archetypical example of impermissible conflicts of interest that gave *cy pres* a bad name, Plaintiffs blanket the Court with hundreds of pages of irrelevant material in their supplemental appendix—including numerous documents that were never in the record below—and argue that Frank violated 9th Cir. Rule 30-1.4(c)(ii) by failing to include them. Bosh and nonsense. The only documents that belong in the excerpts of record are those "essential to the resolution of the appeal," and this settlement approval must be reversed as a matter of law based on the undisputed facts: (1) class actions—even ones where every single individual class member cannot be identified *ex ante* with certainty—regularly settle for under a dollar per class member because of the compromise of small claims, yet are able to feasibly distribute that cash to class members through a claims process; (2) class counsel had significant prior affiliations with several of the *cy pres* recipients; and (3) Google had significant prior affiliations with several of the *cy pres* recipients. These facts are undisputed, and the questions presented deal with what consequences flow as

a matter of law for this settlement. Frank asks for nothing other than application of *Nachshin* and *Radcliffe* and *BankAmerica* and *Pearson*, or, in the alternative, *Hotel Tel. Charges*. The only "new" law Frank suggests is that a lottery might be a more efficient and preferable means of distributing to class members (OB24)[1]—but while such guidance would be helpful to district courts, it is not required to reject this settlement as a matter of law. But Frank's argument is simply that *cy pres* must be a last resort, not a first one, and must not have the sorts of self-dealing conflicts of interest exhibited here. That's not "reshap[ing]" the law; it's asking to reshape the *practice* of ignoring the law and sound public policy. OB17-21.

More distractions and red herrings are in the pages and pages plaintiffs spend on the *Hanlon* factors, the adequacy of the settlement, the mediator, Rule 23(a) commonality standards, and whether the *cy pres* recipients have a nexus to the case. PB20-24; PB8; PB11-15. All of these are irrelevant to Frank's appeal: yes, these requirements are ***necessary*** for settlement or *cy pres* approval, but they are not together or separately ***sufficient*** for affirmance. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (consideration of *Hanlon* "factors alone is not enough to survive appellate review"). And while arm's-length negotiations are sufficient to protect class members regarding the ***size*** or adequacy of the settlement, they provide no protection to absent class members regarding the ***allocation*** of the defendant's payout, for "a defendant is interested only in disposing of the total claim asserted against it, and the allocation between the class payment and the attorneys' fees is of little or no interest to

[1] OB, PB, and DB refer to the opening, plaintiffs', and defendant's appellate briefs respectively; ER to the excerpts of record.

the defense." *Id.* at 949 (internal quotations omitted); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717-18 (6th Cir. 2013).

There is a certain *chutzpah* in that the appellees pretend to this Court that this case is simply a review of the district court's discretion when below they induced the district court to err with a bogus argument that *Lane* ***required*** the district court to approve the settlement—even though it thought that the settlement did not "pass the smell test" and lacked "transparency." ER54-57; ER11-12 n.1; ER19; OB9-10; OB27-28; OB33-35. The appellees abandon that argument on appeal, and make no defense of the district court's *non sequiturs* and misinterpretations of law. The district court held that there was no conflict in giving money to an *alma mater* because there were multiple attorneys with multiple *alma maters*; the parties make no effort to defend that facially flawed reasoning that would require that every attorney negotiating a settlement attend the same school—or be married to the same spouse—before there could be a conflict of interest. Even if all of Frank's other legal arguments are rejected, and it is conceivably legal to approve this settlement, remand is still required so that the district court can apply the discretion it failed to do below under correct Ninth Circuit standards.

I. The district court erred as a matter of law in approving this *cy pres*-only settlement.

A. It was feasible to make individual distributions to the class as a matter of law.

Plaintiffs agree that the relevant rule is "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." PB34-35. The dispute is whether "economically viable" means that a settlement must be distributable to every single class member, or whether "economically viable" means whether a typical class-action settlement claims process is feasible. *Lane* never addressed this question because appellants there never raised it. But other appellate courts that did squarely address the question in specific cases with relatively small amounts of money have held that § 3.07 requires at least the *attempt* to make distributions to *some* class members, even if it would be impossible or infeasible to identify and pay *every* class member.

Pearson v. NBTY, Inc., is directly on point. 772 F.3d 778 (7th Cir. 2014). The class there involved twelve million class members, but the parties could identify only 4.7 million of them after subpoenaing third-party retailer loyalty programs. *Id.* at 783-84. The defendant agreed to a $2 million fund, and the parties created the illusion that the settlement was larger by a claims-made process that would hypothetically pay every single class member, though they knew that there was no chance every class member would make a claim or that more than $2 million would be claimed. *Id.* at 780-83. Because only 30,245 class members made claims, there was $1.13 million in residual money that was designated by the settlement for *cy pres*. *Id.* at 780. Though that $1.13 *cy pres* payment (or even the entire $2 million fund) divided by 12 million class members (or even the 4.7 million *known* class members) would be less than a dollar each per class member, *Pearson* held the *cy pres* inappropriate as a matter of law. *Id.* at 784. Appellees' interpretation of the law comes to the opposite conclusion: by their proposed rule, the parties in *Pearson* could have simply agreed to a $0 settlement with all $2 million in the settlement fund going to *cy pres*. (*Pearson* also took issue with the outsized attorneys' fee

request of $4.5 million and the settlement's kicker, but even putting all $4.5 million of the proposed fees into the settlement bucket and paying the *Pearson* attorneys zero would still be a settlement of less than a dollar per class member.) It was not feasible to pay *every* class member, but the fact that it was feasible to pay *some* class members meant that those class members should be paid before any money went to *cy pres*, even if the class members received only $3 each. (Nothing in *Pearson* suggests "less the incremental distribution expenses of processing the payments," a strange invention by Google. DB37.) Google does not contend it is not feasible to pay a million or so class members $3 each, so their argument that *Pearson* is somehow distinguishable from the facts of this case (DB27-28) because it was feasible there to make payments to some of the class fails; it is no less feasible to distribute $8 million to a fraction of 130 million class members $3 at a time than it is to distribute $1.1 million to a fraction of 12 million class members $3 at a time.

Indeed, *Fraley v. Facebook* demonstrates conclusively as a factual matter that settling parties are feasibly able to distribute small funds to large classes through a claims process. 966 F. Supp. 2d 939 (N.D. Cal. 2013). The *Fraley* class was as large in magnitude as this one, but the settlement fund was distributable (despite being only $0.20 or so per capita) and there was still a residual of millions of dollars even after paying every claiming class member $15.[2]

[2] As Google's 28(j) letter points out, in 2016 a divided Ninth Circuit panel in *Fraley* affirmed the district court's decision to distribute the residual to *cy pres* instead of to class members. This certainly contradicts § 3.07 and Frank's argument here, but the unpublished majority opinion's conclusory decision, which makes no public-policy

Similarly, there was no dispute that it was impossible to pay every single shareholder in *In re BankAmericaCorp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015). But because there was a list of *some* shareholders and it was feasible to distribute a $2.7 million residual to them, *cy pres* was not permissible. *Id.* at 1064-66. *BankAmericaCorp.* also took issue with the *cy pres* recipient's nexus, but for Google to suggest that this was the only reason *BankAmericaCorp.,* struck the *cy pres* is a bald misreading: the decision plainly ordered distribution to the known class members. *Compare id.* with DB27.[3]

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argument, and no reference to the circuit split it created, is not persuasive authority, much less binding on this Court.

Appellees go into great detail about the reasoning of *Fraley* to reject preliminary approval, PB37-38 and DB23, but this is entirely irrelevant to Frank's argument. Frank simply points out that the parties cannot, as a matter of law, assert that it is not feasible to distribute the settlement fund in this case when the *Fraley* settlement did so successfully in a similar Internet privacy case with a gargantuan class and a similar settlement of loose change per class member; it was clearly erroneous as a matter of law for the district court to hold otherwise. OB22-23. Appellees identify no reason a *Fraley*-style distribution can't be done here; they just prefer to spend the class's money on class counsel's *alma mater*.

At a minimum, the failure of the district court to give a "reasoned response" to Frank's argument that a *Fraley*-style settlement was feasible requires remand. OB26. Appellees do not dispute that the district court failed its obligation to give a reasoned response.

[3] Plaintiffs distinguish *Pearson and BankAmericaCorp.* by arguing that these were residual *cy pres* distributions. PB41-42. But that distinction cuts in favor of reversal here. *Ex ante cy pres* "stands on the weakest ground because *cy pres* is no longer a last-resort solution for a residual problem of claims administration. The concern for compensating victims is ignored… ." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 770-71 (2013). Separately, *BankAmericaCorp.* gives the same broad reading to *Klier*'s reasoning that Frank does, rather than Google's cramped interpretation

Simply put, the appellees' definition of "distributable" would permit ***almost every consumer class-action settlement*** to completely ignore payments to class members. For example, this Court recently affirmed a settlement that established a $27 million fund and paid class members about $14.1 million in cash and gift cards to 35 million class members. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 941(9th Cir. 2015). $27 million divided by 35 million class members—all of whom were identifiable—is less than 80 cents a class member. By the appellees' definition of "distributable," it would not be economically viable for the *Online DVD* parties to distribute money to the class. But they did. It was feasible through a *pro rata* claims process that ultimately paid 1.1 million class members about $12 each. By appellees' proposed rule, the settling parties in that case could have given zero dollars to the class and donated the entire $14.1 million to class counsel's *alma maters*, so long as those schools submitted a grant proposal about antitrust law. Such an absurd and unprecedented result is dictated by appellees' interpretation of "distributable" as meaning something other than "able to be distributed."

And appellees' proposed rule would turn almost every consumer class action settlement in this circuit, most of which are far less generous than *Online DVD*, into an all-*cy-pres* settlement. By appellees' lights, every class counsel that goes through the trouble of fulfilling their fiduciary duty to try to win money for their class clients is a sucker. After all, why work to pay faceless class members when one can instead bask in the glory of a ceremony with an oversized check and appreciative non-profit bigwigs

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limiting those principles to settlements that do not explicitly provide *cy pres*. 775 F.3d at 1064, 1066.

who might return the favor some day? *Cf.* Stanford Center for Internet and Society, http://cyberlaw.stanford.edu/about-us (thanking law firms and defendants that previously arranged *cy pres*) (last accessed January 15, 2016); Roger Parloff, *Google and Facebook's new tactic in the tech wars*, FORTUNE (Jul. 30, 2012) (Google and Facebook *cy pres* beneficiaries benefit their *cy pres* benefactors).

The hypothetical alternative *Online DVD* settlement doesn't even begin to reach the limits of the absurdity of appellees' argument. Plaintiffs take the position that a ***ten-dollar distribution*** is "*de minimis*" money that can instead be devoted to *cy pres*. PB37. In other words, if Google had felt sufficiently threatened by this lawsuit to offer $650,000,000 to settle the claims of 130 million class members, plaintiffs' standard holds it permissible for the parties to agree to devote the entirety of that settlement fund to their *alma maters* so long as they submitted a grant proposal and pay the class zero. After all, $650,000,000 is only $5 for each and every class member, and according to plaintiffs that's too small to be distributed. The failure of appellees to devise a limiting principle for their reading of § 3.07(a) that doesn't render it a nullity shows why Frank's reading of § 3.07 is correct and requires reversal here.

Google complains that paying a small percentage of class members $5 or $10 would be unjust and a windfall. DB22-23. Google gives no reason why it is preferable to leave 100% of the class uncompensated (any indirect benefits of the *cy pres* fall equally on non-class members, opt-outs, and class members that have released claims; thus class members have received no marginal benefit for their release) rather than 99%. Nor do they explain why $5 to a class member surrendering a $10,000 claim is more of an unjust "windfall" than giving $1,000,000 to class counsel's *alma mater*. Google's

implicit answer seems to be that it is unfair to pay class members for a "feeble" claim. But that's what settlement is: a compromise. As published appellate opinions have unanimously held, a "windfall" is defined by whether class members are receiving more than the damages alleged in the complaint, not by self-serving *ex post* valuations of the litigation. *BankAmericaCorp.*, 775 F.3d at 1064; *Klier v. Elf Atochem, Inc.*, 658 F.3d 468, 475 (5th Cir. 2011). If Google finds it so unjust to agree to a settlement that pays less than one percent of the class less than one percent of their alleged statutory damages, they have a solution if the case is as feeble as they assert: win the litigation. But if Google prefers compromise, they have no basis to complain that class counsel held to their fiduciary duty to their clients are ensuring that some class members are getting some small fraction of their possible damages.

Indeed, Google's implicit argument that class counsel has no fiduciary duty to the class if they bring a "feeble" lawsuit creates extraordinarily perverse incentives. It means that class counsel can win a multiple of their lodestar *and* a *cy pres* award for their *alma mater* by bringing a "feeble" lawsuit and settling a $10,000 claim for pennies a class member. But if attorneys bring a colorable consumer class action, as in *Pearson* (which Google does not contend was incorrectly decided), a court should strike down a settlement of a claim for $12 or so settling for about $0.35 to $0.50/class member that pays lodestar without a multiplier unless efforts are made to identify and pay class members a proportionate amount of the settlement fund. Why exactly should this Court give greater incentives to attorneys to bring "feeble" lawsuits than stronger ones by relieving the former of any duty to their clients (and ensuring greater payment in the process)? Google never says.

Contrary to plaintiffs' claims, neither *Lane* nor *Nachshin* consider the propriety of *cy pres* when comparably-sized settlements are able to be distributed to class members through a claims process. As a matter of law, a *cy pres* settlement was inappropriate here.

B. *In re Hotel Telephone Charges* applies here: a settlement where individual class members are not the principal beneficiaries does not satisfy superiority under Rule 23(b)(3).

Frank argued that if the settlement must provide *cy pres*-only relief because it is too costly to dsitribute funds to the individual class members, then Rule 23(b)(3) superiority cannot be satisfied. OB28-OB32. Appellees' response briefs are deafening silent on the paramount question: how is a class action a superior method when the individual class members release their claims in exchange for nothing? Instead, appellees offer inapplicable and illogical distinctions of the relevant case law.

As Frank argued in his opening brief, in *In re Hotel Telephone Charges*, this Court concluded that superiority is not satisfied when individual class members are not the principal beneficiaries of the proposed class action. 500 F.2d 86, 91 (9th Cir. 1974). This Court held that "[w]henever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute." 500 F.2d at 91. Plaintiffs' insistence that the phrase "to be the attorneys for the plaintiffs" is important, PB44, does not help their cause. Just as in *Hotel Telephone Charges*, the principal beneficiaries here are not individual class members, but instead

are class counsel and the *cy pres* recipients.[4] The same conclusion in *Hotel Telphone Charges* is true here: a class action can hardly be superior where class members release their claims in exchange for money that goes to *other* people (their attorneys and *cy pres* recipients).

Plaintiffs argue that *Hotel Telphone Charges* was a *litigated* class that involved "manageability problems," and this case is a *settlement* class without trial management problems. PB43. True, but this distinction doesn't mean *Hotel Telephone Charges* doesn't apply. Manageability is but one factor in determining whether predominance and superiority are satisfied under Rule 23(b)(3). *See* Fed. R. Civ. P. 23(b)(3)(D). In finding that the class did not satisfy Rule 23, lack of compensation to class members was a factor *separate* from the management problems. 500 F.2d at 92. Class counsel provides no explanation why the superiority holding in *Hotel Telephone Charges* is any less true in the settlement context. Class counsel's reasoning defies logic: a litigation class that *potentially* provides no recovery to class members is not superior (*Hotel Telephone Charges*), but the settlement class here that *actually* provides no recovery to class members because it is not feasible to do so *is* superior?

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)—on which class counsel relies—rejects class counsel's notion that superiority is not a concern in the settlement context. True, a court need not inquire into "management problems" in the settlement

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[4] Even accepting the appellees' hopeful prediction that the *cy pres* recipients will use the funds for "specific projects closely tailored to plaintiffs' claims," DB16, any Internet-privacy "projects" that are successful will not benefit the class but Internet users at large—class members and non-class members and opt-outs alike—and therefore cannot be counted as a benefit to the class.

context. PB43. But manageability is not synonymous with superiority. *Amchem* instructs that even though management problems are not at issue when there is a settlement class, district courts must still provide "undiluted, even heightened, attention in the settlement context" to the superiority and predominance requirements of Rule 23. 521 U.S. at 620; *see also Pampers*, 724 F.3d at 721 (certification requirements "are scrutinized more closely, not less, in cases involving a settlement class"); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 380 (3d Cir. 2013) ("policy in favor of voluntary settlement does not alter the 'rigorous analysis' needed to ensure that the Rule 23 requirements are satisfied"). *Amchem* found that even though there were no manageability concerns, Rule 23 requirements were still not satisfied. Here, even without manageability concerns, the class cannot satisfy Rule 23's superiority requirement.

Class counsel repeats their argument that *Hotel Telephone Charges* does not "address the propriety of *cy pres* distributions where payments to individual class members are not economically viable." PB18. As Frank's opening brief pointed out, this is not true. OB31. The Ninth Circuit specifically rejected the appellees's request in *Hotel Telephone Charges* to allow "damages in the form of fluid recovery" and also recognized the "nonexistent, or miniscule, recoveries" that would be available to individual class members. 500 F.2d at 89, 91.

Google's attempt to distinguish *Hotel Telephone Charges* fares no better. Google argues that the concerns of fluid recovery in a litigated case like *Hotel Telephone Charges* are not present in the settlement context because defendants "trade away the right to challenge the individual claims of plaintiffs and putative class members." DB24. As an initial matter, "the requirements for certification are not the defendant's to waive; they

are intended to protect absent class members." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. Rev. 1494, 1506 (2013). More important, *Hotel Telephone Charges* recognizes the impropriety of allowing *cy pres* payments to replace direct payments to individual class members. The court explained that the antitrust laws at issue focus on "compensation of parties actually injured" and did not "contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large." 500 F.2d at 92. Here, plaintiffs similarly sought statutory damages here to compensate the injured class members. Dkt. 1. The *cy pres*-only settlement for "the general interest of society at large" is exactly the improper use of "private attorneys … act[ing] as prosecutors" that this Court condemned.

Again, this settlement is not even fluid recovery: there is no *marginal* benefit from the *cy pres* to being in the class versus being outside of the class. Even with the underlying nexus to the underlying cause of action, the class's settlement money is simply being sent into the ether for the vague good of society, and perhaps not even that given the conflicts of interest discussed in Section II below. As the Supreme Court has reminded us time and time again, class counsel have *clients*; the class action is a procedural joinder device, not a substantive policy tool authorizing private attorneys general. Even when attorneys seek to do social good with far greater problems such as resolution of the "elephantine mass of asbestos cases," their failure to adhere to their duties to their clients' interests require class decertification despite the inconvenience to the courts. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). If that is true in a case involving the thousands of asbestos cases clogging state and federal systems that would actually

provide material pecuniary benefits to class members, it is surely true here where the parties haven't identified even a handful of individual cases troubling federal courts that this settlement would resolve.

Plaintiffs complain that Frank does not cite appellate cases where certifications of a settlement class was denied for superiority reasons. PB45. But plaintiffs do not cite appellate cases of a *cy-pres*-only settlement class where superiority was challenged or even considered. No law requires this Court to reject Frank's argument. Two recent district court cases have held superiority not satisfied in the settlement context: *Smith v. Georgia Energy, USA, LLC*, 2014 U.S. Dist. LEXIS 166367, at *7 (S.D. Ga. Dec. 1, 2014) (finding no superiority where "no benefit will inure to the plaintiff representatives or classes in this case"); *Foley v. Buckley's Great Steaks, Inc.*, 2015 U.S. Dist. LEXIS 46477 (D.N.H. Apr. 9, 2015) (finding no superiority because, *inter alia*, proposed settlement "substantially lawyer-driven").

The superiority requirement protects class members, who did not have a negative-value claim here because the underlying statute provided sizable damages and attorneys' fees. When individual suits are possible to bring, a class action that has no chance of paying class members cannot meet the superiority requirement.[5] If appellees

[5] Some individual causes of action, like a contractual warranty claim for a few dollars, are negative-value because they do not provide attorneys' fees or damages large enough to bring suit. If so, it is conceivable that a class can be certified for an all-*cy-pres* settlement. *Cf.* OB31. Google's assertion that Frank's class certification argument would "never" permit an all-*cy-pres* settlement (DB29-30) is thus false. Note that the fact that a claim might be "feeble," as Google attempts to argue, does not make it "negative-value" by itself; it means that the case should be dismissed, not that the attorneys should be rewarded for bringing a frivolous claim. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948,

are correct that a class action cannot feasibly pay class members anything, then the class should not be certified. Google's defense that the suit is "feeble" is better addressed with a Rule 11 motion against plaintiffs than by paying plaintiffs' attorneys millions to waive the claims of class members.

II. Of course the defendant and class counsel had "significant prior affiliation with the intended recipient that would raise substantial questions"; after all, the district court and outside observers *did* raise substantial questions.

Google does not dispute that the *cy pres* recipients are rife with "significant prior affiliations," but correctly notes (DB39) that the § 3.07 test in full is that a "*cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient *that would raise substantial questions about whether the award was made on the merits*," and complains that Frank did not discuss the italicized text. That's not true (OB36), but even if it were, so what? Frank is guilty of brevity, but it's self-evident that class counsel choosing to favor his *alma mater* over his clients or other institutions "would raise substantial questions about whether the award was made on the merits," and not only because Frank devoted scarce non-profit resources to raise those questions at the district court and here. Even aside from *Nachshin* quoting commentators naming that conflict as the epitome of abusive *cy pres*, ***the district court raised precisely those "substantial questions" at the fairness hearing and in its decision!*** ER59-60 ("*cy pres* recipients, they shouldn't serve as a substitute, should they, for alumni checks?");

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952 (7th Cir. 2006). In any event, appellees waived any argument that this was a negative-value case requiring certification; they do not even mention "negative value," *Murray*, or *Castano*. OB31.

OB36 (same); *see also* ER54 ("it raises a red flag"); ER55 ("doesn't pass the smell test"); ER59 ("all of the things I mentioned earlier, I think they're a problem"); ER22 (noting "potential for a conflict of interest").

Similarly, it is undisputed that *years* before this settlement, *Fortune* magazine "raise[d] substantial questions" about Google's conflict of interest in steering *cy pres* in earlier settlements to Stanford's Center, to which it has provided as much as a majority of funding. OB5-6; Parloff, *supra*. If these recipients don't raise substantial questions, which ones do? Google never says what sort of "significant prior affiliation" would ever be on the wrong side of the line; nor can they without demonstrating that they have chosen a particularly poor battleground. Google once again proposes a reading of the *ALI Principles* that entirely nullifies the rule.[6]

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[6] Google does not deny there's no evidence that the settlement had any effect on how much it would have given Stanford's Center anyway, but suggests the donation is nevertheless acceptable because Stanford's Center created this particular privacy program in response to the invitation for a grant proposal. DB38. This Court disagrees. *Dennis v. Kellogg, Inc.*, 697 F.3d 858, 867-68 (9th Cir. 2012) (noting *cy pres* is "form over substance" if a defendant uses "previously budgeted funds…to offset its settlement obligation"); OB38. If the million dollars for a privacy program is deducted from Google's previously budgeted funds for contributions to Stanford's Center, Stanford's Center is merely shifting a million dollars it would have devoted to other beneficial programs to the one with a *cy pres* grant proposal with no net benefit to the class or society—and probably a cost in jumping through the hoop of a grant proposal and having earmarked funds that must be limited to a specific purpose. And the same is true for the several other recipients that previously received money from Google. Google ignores this aspect of *Dennis*; plaintiffs address it only to falsely assert that *Dennis* doesn't say anything about prior affiliations with beneficiaries. *Compare* PB47 with OB38.

The district court made precisely the factual findings that raise "substantial questions about whether the award was made on the merits"; it simply committed an error of law in applying those findings, and Google invites this Court to do the same.

Plaintiffs go even further and argue that *Nachshin* does not actually require scrutiny of conflicts of interest, just a reasonable nexus. PB49. But that ignores *Nachshin*'s reasoning. *Nachshin* demanded a nexus because beneficiaries "not tethered to the nature of the lawsuit and the interests of the silent class members" could present problems of conflict of interest, such as donations to *alma maters*. 663 F.3d at 1038-39 (citing numerous commentators). But it is entirely disingenuous to suggest that an *actual* substantial prior involvement would be acceptable to *Nachshin* when the whole point of the nexus test was to avoid the *possibility* of those "whims and self interests of the parties," the "appearance of impropriety," and "nascent dangers to the fairness of the distribution process" to begin with. *Id.*

If the Court for some reason disagrees that *Nachshin* directly controls here, it just means that it is confronted with a question of first impression. It still should adopt Frank's reading and § 3.07's stricture. Frank and the authorities he cited went into great detail about the public-policy problems of this sort of *cy pres*. OB17-22 (citing authorities). In over 21,000 words of briefing, the appellees never challenge this reasoning, provide alternative public-policy reasons to ever permit the practice, or even identify a single third-party authority that approves of this sort of self-serving donation. No appellate court has ever signed off on class counsel using *cy pres* to give money to an *alma mater*, and all agree that some limits are required; it would be strange to say those boundaries stop short at class counsel using *cy pres* to benefit their own personal whims

simply because the desired recipients submitted an application for review by counsel in a secretive selection process. The parties' unprecedented proposed rule of decision would permit *cy pres* to a class counsel's relative or former employer or current client so long as the proposed beneficiary jumped through the hoop of a grant application meeting the substantial nexus test, and forbid a district court to interfere with such self-dealing; they provide no limiting principle. Worse, combined with plaintiffs' arguments for their heavily-multiplied attorneys' fees, appellees' proposed rule even incentivizes class counsel to do so because attorneys' fees would be calculated the same whether money went to class members or to class counsel's spouse or *alma mater*. That's a ludicrous abuse of the class-action system to benefit class counsel at the expense of the class's interests, and the sort of self-dealing warned against by *Bluetooth*, *Radcliffe, Pearson*, and *Pampers*—and even *Lane*. 696 F.3d at 819.

Appellees rely on *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990), to claim that objectors failed to carry some sort of burden, but that is a misapplication of the precedent. *Oregon* recognizes the distinction between an objection to a settlement's ***adequacy*** (which Frank has not made) if there are good-faith arm's-length negotiations, and an objection to a settlement's ***allocation***. *Id. Oregon* recognized that "other circuits have placed the burden on the party moving for approval" in the allocational context. *Id.* For good reason. "In class-action settlements, the adversarial process—or what the parties here refer to as their 'hard-fought' negotiations—extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F.3d at 717. Thus, even if settling parties deserve deference

regarding the *size* of the settlement, the burden of proving the fairness of the allocation rests on the settling parties. *Id.* at 719 (citing numerous authorities).

The settling parties seem to suggest that, rather than a *per se* rule against this universally-criticized objective conflict-of-interest rule, it is rather objectors' burden to make a mind-reading showing of subjective bad intent. But they do not dispute Frank's argument that this would be a logistical nightmare and create unnecessary, expensive, and wasteful collateral litigation requiring objecting class members to engage in discovery into likely privileged settlement negotiations. OB37; *see also* ER55 (district court suggests that it can't investigate opaque selection process because it's "protected and sacrosanct").

Moreover, even aside from § 3.07, *cy pres* donations to class counsel's *alma mater* violate Ninth Circuit law on class counsel's fiduciary duty. OB33; *Radcliffe v. Experian Info. Solutions,* 715 F.3d 1157, 1167 (9th Cir. 2013). Google does not mention *Radcliffe*. Plaintiffs argue that *Radcliffe* is only a case about improperly structured incentive payments. PB49. It is more than a little disingenuous to assert that *Radcliffe*'s holding that the "responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel" has no applicability here. Given that the district court found a "potential conflict of interest" (ER22)—a finding that neither appellee contests or even mentions—*Radcliffe* precluded settlement approval as a matter of law, and is independent reason alone to reverse.

At a minimum, Frank demonstrated that the district court committed an egregious error of reasoning in concluding there was no conflict of interest. OB36;

ER22. Frank further argued that the district court committed reversible error by failing to give a "reasoned response" to his complaint about Google's significant prior affiliation with Stanford's Center, and by failing to address *Radcliffe*. OB38; OB33. Appellees make no effort to defend the district court's reasoning or lack thereof; *Dennis*'s "reasoned response" standard never appears in their briefs. As a matter of law, the *alma maters* and Stanford's Center could not be *cy pres* beneficiaries, and *Lane* does not hold otherwise. But even if appellees were correct that a district-court has the hypothetical discretion to approve beneficiaries with such substantial prior affiliations, remand is required to correct the district court's *non sequitur* defense of the *alma mater* selection and its failure to give a reasoned response to Frank's objection that *Dennis* precluded credit for Google giving money to Stanford's Center.

III. If nothing else, the district court applied existing Ninth Circuit law incorrectly, requiring remand at a minimum.

The district court was right at the fairness hearing: this settlement does not pass the "smell test" and lacked "transparency." ER54-55. But it approved the settlement because, even though it explicitly disapproved of the *cy pres* recipients, it felt *Lane* tied its hands and forbade it from interfering with the parties' "compromise" choices and "negotiated term[s]" so long as the recipients were "sufficiently related." ER11-12 n.1; ER19.[7] Plaintiffs do argue that *Lane* requires deference to the settling parties. PB53.

[7] Google misrepresents Frank's argument as claiming this is *Frank*'s interpretation of *Lane*, rather than the district court's. DB18. But they admit that this is not what *Lane* says, *id.*, and thus effectively concede that remand is required to apply *Lane* correctly.

But this is not the law, as Google itself argues. DB18. The *Lane* settlement deferred the actual recipient of the *cy pres* funds to a later date by giving money to a new "grant-making organization" where a Facebook executive was one of three members of the board. *Lane v. Facebook*, 696 F.3d 811, 817 (9th Cir. 2013). Objectors complained about the *potential* conflict, but did not identify any actual problematic grant. *Id.* at 820. The Court rejected the argument that the participation of Facebook in the future recipient selection was "categorically" impermissible. *Id.* at 821. This makes some sense: after all, a defendant may have a role in the *cy pres* selection at the settlement stage, so why not in the post-settlement grant-making stage? This is the only "compromise" *Lane* was referring to. But ***nothing*** in *Lane* meant that a district court would be precluded from blocking an ***actually*** abusive *cy pres* grant. If the new entity later distributed its settlement corpus to a charity run by class counsel's children or gave all its money to a Bay Area-focused entity, class members would be entitled to redress from the district court under *Nachshin*, and nothing in *Lane* says otherwise. *Cf. id.* (*cy pres* may not be of limited geographic scope); DB19. Indeed, as the parties concede, *Lane* requires that class counsel not "secure a disproportionate benefit." *Id.* at 819. Class counsel using the *cy pres* procedure to indirectly benefit themselves through donations to entities like *alma maters* is precisely the disproportionate benefit warned against. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011); *see also id.* at 1040 (no deference to settling parties' preferences required). The district court incorrectly applied *Lane* at the settling parties' urging, and because of that never exercised the discretion appellees now ask this court to defer to.

This by itself is reversible error. Appellees do not dispute that an error of law is an abuse of discretion. Remand is required at a minimum so that the district court can correctly apply *Lane*.

IV. Even if the settlement could be legally approved, it is bad public policy to treat a *cy pres*-only settlement fund as equivalent to the same fund paid to the class for purposes of fees.

In their response to Frank's appeal of the application of the 25% benchmark to the fee award for the *cy pres*-only settlement fund, Plaintiffs argue for an abuse-of-discretion standard, but Frank is appealing a question of law. And "[a]ny elements of legal analysis" in a fee decision are reviewed *de novo*. *K.C. v. Torlakson*, 762 F.3d 963, 966 (9th Cir. 2014).

Plaintiffs further argue that *Pearson* is inapplicable because it was simply discussing a district court's exercise of discretion. PB55-56. This is wrong. *Pearson* didn't say "the district court did not abuse its discretion"; rather, it rejected the district court's valuation of the settlement as $20.2 million, and held that the appropriate valuation of the settlement as a matter of law was the $865,284 direct payment to the class without including *cy pres*—despite a cross-appeal by class counsel seeking to increase their fees. 772 F.3d at 780-81.

Appellees do not dispute the *Baby Products* holding that "Class members are not indifferent to whether funds are distributed to them or to cy pres recipients, and class counsel should not be either." 708 F.3d at 178; OB39-40. Nor do they dispute that a blind 25% benchmark equating a dollar of *cy pres* with a dollar of direct distribution to the class has bad public-policy implications. OB40-42. This is especially true when the

"indirect benefit" of *cy pres* is an even stronger "indirect benefit" to class counsel receiving the psychic benefit of giving the class's money to their *alma mater*. (If $1,000,000 in indirect benefit counts as a $1,000,000 benefit to the class, why doesn't $1,000,000 in the indirect benefit of an alumni donation count as $1,000,000 towards a fee award?) It shocks the conscience that class counsel is getting over 3 times lodestar—over $1000/hour—for a settlement of a $10,000 claim for less than 1/100,000 of that amount per class member. For the reasons stated in Frank's opening brief, this Court needs to establish attorney-fee standards that appropriately incentivize class counsel to prioritize direct recovery, and should remand for proceedings consistent with those standards.

Conclusion

This Court should expressly adopt *ALI Principles* § 3.07, and reverse this settlement approval as a breach of class counsel's fiduciary duty to prioritize class recovery. The preexisting relationships between the *cy pres* recipients, class counsel, and Google, provide an independent *per se* reason to reverse the district court's settlement approval under § 3.07, *Dennis*, *Nachshin*, and *Radcliffe*.

If it is truly the case that any distribution to the class is infeasible, then the class should not have been certified, and the Court should reverse on those grounds.

At a minimum, the district court misapplied *Lane* and failed to give a reasoned response to Frank's objections, and remand is required. The attorneys' fees impermissibly treat *cy pres* recovery as equivalent to actual payments to the class, and

should be reversed and remanded to value the *cy pres* at a substantial discount to reflect actual class interests.

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Respectfully submitted,

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