No. _____

IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(b)(3) permits representatives to maintain a class action where so doing "is superior to other available methods for fairly and efficiently adjudicating the controversy," and Rule 23(e)(2) requires that a settlement that binds class members must be "fair, reasonable, and adequate." In this case, the Ninth Circuit upheld approval of an $8.5 million settlement that disposed of absent class members' claims while providing them zero monetary relief. Breaking with decisions of the Third Circuit, Fifth Circuit, Seventh Circuit, and Eighth Circuit that require compensating class members before putting class action proceeds to other uses, the Ninth Circuit held that the settlement's award of all net proceeds to third-party organizations selected by the defendant and class counsel was a fair and adequate remedy under the trust-law doctrine of *cy pres*. The question presented is:

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Theodore H. Frank and Melissa Ann Holyoak were objectors in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Paloma Gaos, Anthony Italiano, and Gabriel Priyev were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondent Google, Inc. was the defendant in the district court proceedings and an appellee in the court of appeals proceedings.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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An $8.5 million class action settlement that awards absent class members no relief at all in exchange for their claims—no money, no alteration of the defendant's allegedly injurious conduct, not even coupons—is not "fair, reasonable, and adequate" by any measure. Yet the Ninth Circuit upheld such a settlement because class counsel and the defendant agreed to award $5.3 million to third parties, including class counsel's *alma maters* and nonprofits already funded by the defendant, for unspecified "uses consistent with the nature of the underlying action." (Most of the remainder of the settlement proceeds, of course, went to class counsel as fees.) The court held that, even in cases where it is "possible" to make payments to class members, a district court may nonetheless approve a "*cy pres*-only settlement" that gives them nothing in exchange for their claims. App. 8–9.

For good reason, every other court of appeals to consider the issue has disagreed. *See generally* Sylvia Hsieh, Class Action Settlements Face Growing Scrutiny by Objectors, Courts, Lawyers USA, Mar. 31, 2013 (noting circuit split). Those courts' decisions have recognized that *cy pres* awards require special scrutiny because they can facilitate tacit or explicit collusion between defendants, who are eager to settle at the lowest price and with a minimum of fuss, and class counsel, who are seeking to maximize their fees and may be willing to accommodate defendants' interests in exchange for a "clear sailing" agreement not to challenge the fee request. They recognize that, in this

way, *cy pres* awards present a heightened risk of conflict between class counsel and their putative clients, the members of the class. They recognize that *cy pres* awards may provide little or no benefit to class members. And above all else, they recognize that *cy pres* awards to third parties are not appropriate when any reasonable opportunity exists to compensate class members directly for their injuries—always the first-best use of settlement funds that, after all, are the property of the class.

By contrast, the Ninth Circuit's opinion in this case paves the way to divert that class property to third parties in just about every instance. In the Ninth Circuit's view, so long as the district court determines that it would be "infeasible" to make payments to *every single class member*—something that never happens in consumer class actions, where claims rates are often in the single digits—it has "discharged its obligation." App. 9–10. It therefore need not consider alternatives to a *cy pres*-only settlement, such as funding a claims process, nor second-guess the propriety of class certification. *Id*. Thus, by defining a plaintiff class broadly enough, class counsel can grease the skids for a quick and easy *cy pres* deal with defendants that sells class members "down the river." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

In this way, the decision below deepened a circuit split that already created an enormous incentive for forum-shopping by plaintiffs' attorneys seeking to bring and settle nationwide class actions like this one.

Bringing suit within the Ninth Circuit's footprint guarantees that minor things like compensating class members for their injuries, holding defendants liable to the extent the law allows, and preventing defendants from injuring class members in the exact same manner will not stand in the way of reaching a quick settlement to the mutual benefit of defendants and class counsel, at the expense of class counsel's putative clients. This has not gone unnoticed among the plaintiffs' bar, judging by the explosion in consumer class action settlements featuring *cy pres* awards within the Ninth Circuit.

The Chief Justice correctly observed that this Court has yet to address the "fundamental concerns" raised by *cy pres* relief, including "when, if ever, such relief should be considered" and "how to assess its fairness as a general matter." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari). He suggested that, "[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies." *Id*. This is that case, and the need for clarification is acute.

The Court should grant certiorari to resolve the circuit conflict, provide guidance to the lower courts on when (if ever) *cy pres* remedies are permissible, and correct a serious abuse of the class action mechanism that puts the interests of those it is intended to protect, class members, dead last.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 869 F.3d 737 and reproduced at App. 1. The opinions of the District Court for the Northern District of California are unpublished and reproduced at App. 31 and App. 62.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2017. A timely petition for rehearing *en banc* was denied on October 5, 2017. App. 67. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). As class members who objected to the settlement, Petitioners have standing to appeal the final judgment. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

RULE INVOLVED

Federal Rule of Civil Procedure 23(b)(3) provides that a class action may be maintained if, *inter alia*,

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Rule 23(e)(2) provides, with respect to a proposed settlement of a class action:

> If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

STATEMENT OF THE CASE

A. The *Cy Pres* Doctrine in Class Action Settlements

The *cy pres* doctrine originated in trust law. Short for the French "*cy près comme possible*," or "as near as possible," *cy pres* referred to a court's power, typically under statute, to reform a trust or charitable gift that has become impossible to administer according to its terms. *See generally* Martin H. Redish *et al.*, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L. Rev. 617, 625 (2010) [hereinafter "Redish"]. For example, a 19th-century court applied the doctrine to repurpose a trust that had been created to support the abolition movement to instead provide assistance to poor African Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867).

The application of the *cy pres* doctrine, or something resembling it, to class action settlements is a more recent phenomenon. The "most adventuresome" of the 1966 amendments to Federal Rules of Civil Procedure was the addition of Rule 23(b)(3)'s provision for "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614–15 (1997). That provision empowered attorneys, armed with a few representative plaintiffs, to file actions on behalf of large and diffuse classes, aggregating members' paltry claims into litigation well worth an attorney's time. When these suits prevail, often through settlement, the proceeds

typically flow into a fund out of which disbursements to individual class members are made.

It is a unique feature of opt-out class actions that, unlike in other civil litigation, funds often remain unclaimed, particularly where class members' claims are small or the claims process is burdensome. "Traditionally, such funds would revert to a defendant—often an unpopular result because reversion of the funds undermines the deterrent effect of the suit and leaves the defendant largely with the benefit of his illegal activity." Redish at 631. In the 1970s, the *cy pres* doctrine was proposed as a solution for this "problem" of unclaimed settlement funds that could achieve the "next best" result to compensation by indirectly compensating absent class members, without undermining the deterrent effect of liability. *Id*. at 631–34.

The use of *cy pres* awards in class actions quickly moved beyond these modest origins to become an integral component of many settlements. In these cases, settlement agreements expressly provide for awards to charities or foundations in addition to, or in place of, funds earmarked for distribution to class members. Used in this fashion, *cy pres* awards facilitate the filing, certification, and settlement of class actions that would otherwise be infeasible to litigate due to unmanageability or questionable merit. Redish at 639–40; *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 184–85 (2d Cir. 1987) (discussing *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973)).

As critics have documented, these types of *cy pres* awards "create the potential for conflicts of interest by ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." John Beisner, Jessica Miller & Jordan Schwartz, Cy Pres: A Not So Charitable Contribution to Class Action Practice 13 (2010) [hereinafter "Beisner"]. "Indeed, in many class actions it is solely the use of cy pres that assures distribution of a class settlement or award fund sufficiently large to guarantee substantial attorneys' fees and to make the entire class proceeding seemingly worthwhile." Redish at 621. Despite these concerns, the use of *cy pres* awards in class action settlements has grown quickly since the 1980s, accelerating sharply over the past decade. *Id*. at 653.

This Court "has not previously addressed" the propriety of *cy pres* relief, but the Chief Justice has recognized that it is "a growing feature of class action settlements" that raises "fundamental concerns." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari). Those include "when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a cy pres remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on." *Id.* "In a suitable case," the Chief

Justice suggested, "this Court may need to clarify the limits on the use of such remedies." *Id.*

B. Plaintiffs Launch a Privacy Class Action Against Google After Their Own Web Browsers Disclose Their Google Searches to Third-Party Websites

Google operates the eponymous search engine that Internet users query billions of times each day. When a user enters search terms into Google, the service returns a search-results page listing relevant websites. Each results page has a unique address—known as a "Uniform Resource Locator," or "URL"—that contains the user's search terms.[1] And when a user clicks on a search result, the user's web browser (Chrome, Internet Explorer, etc.) typically transmits a "referral header" containing the URL of the referring search-results page, including the user's search terms, to the destination website. This is not unique to Google; clicking any links on the Web will cause referral headers to be sent, unless the user has disabled them. Websites, in turn, use this referral information to inform their editorial decisions and marketing efforts.

In October 2010, Paloma Gaos filed a putative class action in the United States District Court for the Northern District of California against Google, seeking damages for the disclosure of her search terms to third-party websites through referral headers sent

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[1] For example, the results page for the search "Supreme Court" is available at the URL https://www.google.com/search?q=Supreme+Court.

when she conducted "vanity searches" for her own name and other personal information and then clicked on results links. The complaint alleged claims for fraud, invasion of privacy, breach of contract, breach of the covenant of good faith and fair dealing, breach of implied contract, and unjust enrichment under California law and for violation of the federal Stored Communications Act, which provides for statutory damages of at least $1,000 per violation. 18 U.S.C. § 2707(c). It sought certification and money damages for a class of United States-based Google users. App. 4, 32–33.

C. Class Counsel and Google Propose an $8.5 Million *Cy Pres*-Only Settlement That Awards Class Members Nothing

Gaos's claims were initially dismissed for failure to plead an injury that would support Article III standing. After Gaos amended her complaint, the parties stipulated to consolidate her action with a similar one filed by Gabriel Priyev for purposes of settlement proceedings and then filed a proposed settlement for the district court's approval. App. 34.

Under the settlement, Google would obtain a release of any and all privacy-related claims of the estimated 129 million people who used Google's search engine in the United States between 2006 and the date the class would be given notice of the settlement in 2014. App. 5. In exchange, the company would pay a total of $8.5 million into a settlement fund and revise its "Frequently Asked Questions" webpages to add an explanation of referral headers, a well-known

feature of the Web since at least 1996, two years before Google's founding.[2] App. 5, 82. The settlement specifically provided that Google "will not be required or requested to make any changes to…the practices or functionality of Google Search" or other services. App. 82.

Class counsel and Google agreed that attorneys' fees would be drawn out of the settlement fund, defeating any incentive Google might have to challenge the fee request. App. 92. Ultimately, class counsel sought, and was awarded in full, $2.125 million in fees, 25 percent of the settlement fund and more than double counsel's asserted lodestar. App. 54–55.

The settlement was less generous to class members. Other than "incentive awards" of a few thousand apiece to the named plaintiffs, class members would receive no compensation at all. Instead, their money would be awarded to organizations that "agree to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." App. 84. Class counsel and Google selected six recipients: World Privacy Forum; Carnegie Mellon University; the Center for Information, Society and Policy at Chicago-Kent College of Law; the Berkman Center for Internet and Society at Harvard University; the Stanford Center for Internet and Society; and

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[2] *See* Internet Engineering Task Force, Hypertext Transfer Protocol HTTP/1.0, RFC No. 1945 (May 1996), https://tools.ietf.org/html/rfc1945#section-10.13.

AARP, Inc. (formerly known as the "American Association of Retired Persons"). App. 5.

Petitioners Theodore H. Frank and Melissa Ann Holyoak objected to approval of the settlement, class certification, and class counsel's fee request. App. 112 *et seq*. They argued that the *cy pres*-only settlement was not "fair, reasonable, and adequate," as required by Rule 23(e)(2), because it awarded class members nothing at all while providing millions in dubious *cy pres* "relief" and millions in attorneys' fees. App. 117–25. Citing undisputed evidence that claims rates for class action payments of around $15 are typically well below 1 percent, they argued that a standard claims process was in fact a feasible means of compensating class members. App. 120–23 (discussing *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d. 939 (N.D. Cal. 2013) (approving settlement in 150-million-member privacy class action providing for $15 payments to those class members who filed claims)). At a minimum, they argued, it would be preferable to compensate identified class members chosen by lottery than to direct the class's money to third parties. App. 123. And if the court were to find that any distribution to class members was infeasible, then that should call into question class certification, because it would not be, as Rule 23(b)(3) requires, "superior to other available methods for fairly and efficiently adjudicating the controversy." App. 131–34.

Frank and Holyoak also objected to the parties' selection of *cy pres* recipients that had preexisting relationships with Google and class counsel. App. 125–31.

Prior to the settlement, Google was already a donor to the Berkman Center for Internet and Society at Harvard University, the Stanford Center for Internet and Society, AARP, and Chicago-Kent, raising concerns that any settlement proceeds directed to those entities would be chiefly to Google's benefit or, at the least, displace Google's regular donations and therefore provide no incremental benefit to the class. Likewise, three of the *cy pres* recipients—Harvard, Stanford, and Chicago-Kent—were *alma maters* of class attorneys who signed the settlement, raising a potential (and quite common) conflict of interest.[3] Frank also objected to being compelled as a class member to subsidize the AARP's advocacy and lobbying on controversial policy issues, which he often opposes. App. 131.

Finally, Frank and Holyoak objected to the $2.125 million fee request, on the basis that it assumed that the district court should treat *cy pres* funds as equally valuable to the class as actual monetary compensation. App. 134–39.

D. Relying on Ninth Circuit Precedent, the District Court Overrules Petitioners' Objections to the Settlement

Although the district court at the fairness hearing criticized the parties' conflicts of interest and "lack of

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[3] Frank and Holyoak discovered these preexisting relationships from public materials; it may well be that Google or class counsel has preexisting relationships with other of the *cy pres* recipients, as well.

transparency" in selecting *cy pres* recipients, it ultimately overruled all of Frank and Holyoak's objections. Their objections to the approval of a *cy pres*-only settlement, it stated, were inconsistent with "the law of this circuit which permits cy pres settlements such as this one." App. 58 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)). As for the selection of the *cy pres* recipients, it was enough their activities were "related" to "the subject matter of this case," and any potential conflict was negated by the fact that their identity "was a negotiated term included in the Settlement Agreement." App. 59–60. Finally, as for the fee award, the court stated simply that it disagreed with the objection and believed the amounts approved were consistent with Ninth Circuit authority. App. 60.

E. A Split Panel of the Ninth Circuit Affirms

In affirming approval of the settlement, the Ninth Circuit agreed with the district court that its own precedents disposed of all objections.

On the use of *cy pres* in general, it found that the court's "prior endorsement of *cy pres* awards that go to uses consistent with the nature of the underlying action" carried the day. App. 10. Whether or not there are "'possible' alternatives" that compensate class members, a district court may approve a "*cy pres*-only settlement" that it finds to be "fair, adequate, and free from collusion." App. 9–10 (quoting *Lane*, 696 F.3d at 819). And the district court satisfied that standard when it found that dividing $5.3 million in net settlement proceeds among all of the estimated 129 million

class members would be "infeasible." *Id*. "[T]he fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them." App. 10 n.2.

The court likewise made quick work of the objection that a class action is not "superior" to other means of adjudication, and that class certification is therefore improper, when a money-damages class is structured so as to preclude actually compensating class members. To the contrary, it explained, the very same features that can make individual litigation "economically infeasible" and thereby support class adjudication also provide "the rationale for the *cy pres*-only settlement." App. 11.

As to the particular *cy pres* recipients, the panel majority was untroubled by the appearance of a conflict of interest based on their prior relationships with class counsel and the defendant. That Google was already funding and working with four of them was of no moment "without something more, such as fraud or collusion." App. 17. And the panel categorically "reject[ed] the proposition that the link between the *cy pres* recipients and class counsel's alma maters raises a significant question about whether the recipients were selected on the merits." App. 18. Echoing Ninth Circuit precedent, the panel explained that any closer scrutiny of the settling parties' selection of *cy pres* recipients would be "an intrusion into the private parties' negotiations" and therefore "improper and disruptive to the settlement process." App. 15 (quoting *Lane*, 696 F.3d at 820–21). Instead, it is enough that

an award to a given *cy pres* recipient "be[] tethered to the objectives of the underlying statute and the interests of the silent class members," a standard that it found easily satisfied here. App. 12.

Finally, the panel summarily rejected the objection "that the settlement should have been valued at a lower amount for the purposes of calculating attorneys' fees simply because it was *cy pres*-only." App. 21. A fee equal to 25 percent of the settlement fund, it held, was generally permissible as a "benchmark" whether or not class counsel obtains any actual compensation for its putative clients, class members. App. 22.

Judge Wallace dissented in part. He took no issue with the panel majority's application of circuit precedent to resolve the challenges to the use of *cy pres* relief and the fee award, but was troubled by the district court's failure to probe the preexisting relationships between class counsel and the *cy pres* recipients. App. 23. The fact that class counsel and the defendant struck a *cy pres*-only settlement, he wrote, "raises a yellow flag," and the allocation of almost half the settlement fund to class counsel's *alma maters*, including one with only a brief history of work on Internet privacy issues, "raises a red flag." App. 28. In these circumstances, "the burden should be on class counsel to show…that the prior affiliation played *no role* in the negotiations, that other institutions were sincerely considered, and that the participant's alma mater is the proper *cy pres* recipient." App. 27. As it was, the record evidence—"one-line declarations from class

counsel stating 'I have no affiliation' with the subject"—addressed none of these things. App. 28–29.

The court subsequently denied rehearing and rehearing en banc. App. 67–68.

REASONS FOR GRANTING THE PETITION

This petition presents an ideal and timely opportunity for the Court to resolve a deep circuit split over the use of *cy pres* awards in class action settlements and provide much-needed guidance to the lower courts on a recurring issue of substantial importance.

I. The Ninth Circuit Is Out of Step with Other Circuits that Limit *Cy Pres* Remedies To Cases Where Compensating Class Members Is Impossible

The Ninth Circuit's decision conflicts with decisions of the Third, Fifth, Seventh, and Eighth Circuits—and arguably the Second Circuit, as well—on the fundamental question of when it is "fair, reasonable, and adequate" for a class action settlement to award money not to class members but to third parties unconnected to the litigation. This Court's intervention is warranted to establish a nationwide standard for the use of *cy pres* awards in class action settlements and thereby prevent counsel bringing nationwide class actions from flocking to the Ninth Circuit because it provides their putative clients the weakest protections against collusive settlements facilitated by *cy pres* awards.

The decision below permits a *cy pres*-only settlement in nearly any consumer class action. Under the standard set by the Ninth Circuit, it is not considered "feasible" to provide any compensation to class members when it would be infeasible to compensate *all of them*. The result is that, by defining a sufficiently large class, class counsel can ensure that direct compensation is *never* required, opening the door to a *cy pres*-only settlement that denies class members any real relief.

Contrast the Ninth Circuit's standard with that applied by the Seventh Circuit in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), a consumer class action challenging allegedly false representations regarding the efficacy of a dietary supplement. The settlement there set aside $2 million for awards to the 12 million class members, with any unclaimed funds going to a nonprofit as a *cy pres* award. *Id.* at 780. Only 30,245 claims were submitted, due to limited notice and a convoluted claims process. *Id.* That left $1.13 million unclaimed—just under 10 cents per class member. Nevertheless, *Pearson* held that a *cy pres* award of that money was impermissible as a matter of law because the funds could have "feasibly be[en] awarded to the intended beneficiaries," class members, by providing broader notice, simplifying the claims process, or simply mailing checks to people known to have purchased the supplements. *Id.* at 784. Although it clearly was not feasible to compensate all 12 million class members—the Ninth Circuit's standard—the

Seventh Circuit appropriately recognized that providing even incomplete compensation to class members necessarily takes precedence over awarding the funds to a third party.[4]

The Eighth Circuit took the same approach in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), a massive shareholder class action. After a series of distributions to class members over the course of a decade, the district court ordered a *cy pres* distribution of the $2.5 million remaining in the settlement fund, citing the difficulty and expense of identifying additional class members. *Id.* at 1062, 1065. Criticizing "the substantial history of district courts ignoring and resisting circuit court cy pres concerns and rulings in class action cases," the appeals court reversed and ordered the funds distributed to those class members who had already been identified. *Id.* at 1064. It held that, "[b]ecause the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members" who have not yet

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[4] *See also Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785–86 (7th Cir. 2004) (holding that a settlement that denies all direct relief to class members, in favor of a *cy pres* remedy, can be justified only if "careful scrutiny indicated that the class had no realistic prospect of sufficient success to enable an actual distribution to the class members"); *Mace v. Van Ru Credit Corp.*, 109 F. 3d 338, 345 (7th Cir. 1997) ("[T]here is no reason, when the injured parties can be identified, to deny them even a small recovery in favor of [*cy pres*].").

been fully compensated. *Id.* (quotation marks and alteration omitted). A further distribution was feasible because the claims administrator could simply mail another check to each class member who had already received one. *Id.* Like the Seventh Circuit, the Eighth refused to allow the infeasibility of compensating *all* class members justify handing over the class's money to a third party.

That is also the rule in the Fifth Circuit. In *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011), the court rejected a *cy pres* award of unclaimed funds from the settlement of a class action over exposure to toxic chemicals. It held that, so long as it is "logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so" until those members are fully compensated. *Id.* at 475. A *cy pres* award is permissible "only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Id.*

The Ninth Circuit standard also conflicts, or at least is in tension, with that of the Third Circuit. *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013), vacated district court approval of a class action settlement that, due to a low claims rate, would have distributed the bulk of the settlement fund to *cy pres* recipients. "Cy pres distributions," the court stressed, "are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action-to compensate class members." *Id.* at 169. Although declining to hold that *cy*

pres is permissible only where individual distributions to class members are impossible, it instructed the district court to place greater emphasis on "the degree of direct benefit provided to the class" by the settlement, including "the number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards." *Id.* at 174. "Barring sufficient justification," it concluded, "cy pres awards should generally represent a small percentage of total settlement funds." *Id*. The decision below of the Ninth Circuit, by contrast, broadly sanctions "*cy pres*-only settlements."[5]

Similarly in tension with the Ninth Circuit standard is the Second Circuit's decision in *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007), which vacated district court approval of a settlement containing a *cy pres* component, directing the district court to ensure that class members "have been compensated for their actual losses" before even considering a *cy pres* award.

The Ninth Circuit's outlier approach to *cy pres* remedies has also pushed its treatment of attorneys' fee

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[5] *See also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 354-55 (3d Cir. 2010) (vacating and remanding approval of a class action settlement involving a *cy pres* award of excess funds because the district court had no factual basis to determine whether a cap on individual awards to class members was reasonable based on class members' likely recovery in litigation).

awards in settlements involving *cy pres* components out of step with other circuits. The decision below upheld a fee award of 25 percent of the settlement fund on the basis that it "hewed closely to that awarded in similar Internet privacy actions," refusing to account for the fact that the settlement provided no direct benefit to class members. App. 22. The Seventh Circuit, by contrast, holds that the "ratio that is relevant" when assessing a fee award "is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014)). That approach excludes settlement funds dissipated through *cy pres* awards from the calculation, and thereby "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class." *Id*. The Third Circuit has similarly recognized a distinction between direct compensation and *cy pres* relief, instructing district courts that, where "counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class," it is "appropriate…to decrease the fee award." *Baby Products*, 708 F.3d at 108. And so has Congress. 28 U.S.C. § 1712(e) (providing that coupons provided to charitable organization as part of settlement "shall not be used to calculate attorneys' fees"). The Ninth Circuit, meanwhile, refuses to recognize any distinction.

In sum, the Court's intervention is necessary to resolve a deep and growing split between the Ninth Circuit and other circuits on the use of *cy pres* remedies in class action settlements that raises serious forum-shopping concerns. This case is an ideal vehicle for it to do so.

II. The Question Presented Is Important and Frequently Recurring

Having long recognized that Rule 23(b)(3) opt-out class actions are an "adventuresome" innovation fraught with potential conflicts, *e.g.*, *Amchem*, 521 U.S. at 614, 625–26, in recent terms the Court has policed abuses of this procedural mechanism to skirt the limitations of substantive law, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), and to undermine class members' rights, *e.g.*, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013). The availability of *cy pres* relief only accentuates these pathologies of the class action procedure by facilitating settlements that provide substantial benefits to defendants and class counsel, at the expense of class members. Not only does this case present the Court with an opportunity to resolve a circuit split with nationwide implications, it would also further the Court's efforts to ensure that the lower courts appropriately enforce the requirements of Rule 23.

A. As the Chief Justice Recognized, *Cy Pres* Settlements Raise "Substantial Concerns"

The unfettered use of *cy pres* awards has been subject to substantial criticism by courts and scholars alike. They have identified at least five specific concerns regarding the type of *cy pres* award upheld in this case.

1. As in this case, *cy pres* awards typically fail to redress class members' alleged injuries. The Seventh Circuit stated the problem plainly: "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi*, 356 F.3d at 784. Yet settlements that do just that are disturbingly routine. For example, a settlement of securities litigation proposed giving shareholder class members' money to a charity that sues banks over foreclosures. *In re Citigroup Sec. Litig.*, 199 F. Supp. 3d 845, 852–53 (S.D.N.Y. 2016). Similarly, a settlement over Pfizer's marketing of the diabetes drug Rezulin donated $2 million to Lubavitch Chabad of Illinois. Ameet Sachdev, Charities Reaping Lawsuit Dividends, Chi. Tribune (Sep. 9, 2007). And, in a settlement of claims that major music labels engaged in unlawful price-fixing, class members received coupons for discounts on further CD purchases, while all settlement funds went to pay attorneys' fees and to make a *cy pres* award to the National Guild of Community Schools of the Arts to develop an arts-related website. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 2:00MD1361-PH, 2005 WL 1923446,

at *3 (D. Me. Aug. 9, 2005). According to the district court, this award actually benefitted class members by promoting the "development of future musical artists." *Id*.

Even worse was a settlement resolving challenges to Google's unauthorized disclosure of its users' email contacts when it launched its "Buzz" social network. Class members—some of whom had suffered disclosures that aided stalkers, jeopardized confidential journalist sources, or hinted at affairs—received no part of the $8.5 million settlement, while class counsel received over $2 million and the remainder was divided among fourteen charities, including the local YMCA and the Brookings Institution—and, by the *sua sponte* order of the district court, a center at a university where the district court judge taught as a visiting professor at its law school.[6] *In re Google Buzz*

[6] While not present in this case, the problem of *cy pres* being designated for local charities at the expense of a national class is also a persistent one. *Compare Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (rejecting *cy pres* designated for local law schools and remanding for "broader nationwide use"), *with*, *e.g.*, *Perkins*, *infra*, *and In re Easysaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013) ($3 million to local San Diego schools including *alma mater* of counsel for both parties), *rev'd on other grounds*, 599 Fed. App'x. 274 (9th Cir. 2015); *see generally* Sam Yospe, Note, Cy Pres Distributions in Class Action Settlements, 2009 Colum. Bus. L. Rev. 1014, 1030–31; Examination of Litigation Abuse: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. (Mar. 13, 2013) (written testimony of Theodore H. Frank).

Privacy Litig., No. C 10-00672 JW, 2011 WL 7460099, at *3 (N.D. Cal. June 2, 2011); Pamela A. MacLean, Competing for Leftovers, California Lawyer (Sept. 2011);[7] *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 687 F. Supp. 2d 1 (D.P.R. 2010) (proceeds from hotel fire litigation paid as *cy pres* to Animal Legal Defense Fund); *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414–15 (S.D.N.Y. 2009) (collecting numerous cases where *cy pres* awards in class action settlements "stray[ed] far from the 'next best use'").

If "funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members," American Law Institute, Principles of The Law of Aggregate Litigation § 3.07 cmt. (b) (2010)—something that would unquestionably be the case had class members pursued individual litigation under the same substantive law—it is at the least troubling that some lower courts claim the discretion to distribute that property to third parties before class members have been compensated and, more generally, to certify classes structured so as to stymie or preclude class members' recovery.

2. *Cy pres* awards drive a wedge between the interests of class counsel and their putative clients. The chief problem is that, when attorneys settle a class action, they are negotiating both their own fees and class recovery. But *cy pres* awards divorce attorneys'

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[7] Available at https://www.dailyjournal.com/articles/264819-competing-for-leftovers.

fees (typically based on the total value of the settlement) from their clients' recovery, "ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." Beisner at 13; *see also Baby Products*, 708 F.3d at 178. As a result, class counsel are financially indifferent as to whether a settlement is structured to compensate their clients or direct settlement proceeds to third parties. Where *cy pres* can be used to facilitate an early settlement, with a full fee award, class counsel have every incentive to sell their putative clients down the river.

Class counsel can take advantage of *cy pres* awards in other ways, also at the expense of class members. For example, class counsel have used *cy pres* awards to fund the development of future litigation and to make sizable donations to their *alma mater*. *See, e.g.*, Ashley Roberts, Law School Gets $5.1 Million to Fund New Center, GW Hatchet, Dec. 3, 2007 (describing $5.1 million *cy pres* award to George Washington University School of Law to create a "Center for Competition Law"); *see also* Andrews Osborne gets $50,000 in Cy Pres funds, The News-Herald (Jun. 3, 2012) (newspaper report identifying law firm as source of *cy pres* award to private boarding school, with picture of attorney handing over an oversized check).[8]

[8] Available at http://www.news-herald.com/article/HR/20120603/NEWS/306039972.

Arguably, "[b]y disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members." Redish at 650 (citing *Hansberry v. Lee*, 311 U.S. 32, 45–46 (1940), and Fed. R. Civ. P. 23(a)(4) (requiring adequacy of representation)).

3. Defendants, facing no resistance from class counsel, use *cy pres* awards to structure settlements to minimize costs or even benefit themselves. Such awards create the illusion of relief that can "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff." Redish at 661.

Google and Facebook, for example, have directed *cy pres* awards in privacy-breach cases to the Electronic Frontier Foundation, a nonprofit that "is often an ally of Google and Facebook when it comes to staving off liability to rights holders over user-generated infringing content" and on other public policy issues. Roger Parloff, Google and Facebook's new tactic in the tech wars, Fortune (Jul. 30, 2012) (noting criticism in *Google Buzz* case that *cy pres* awards were steered to organizations that are currently paid by Google to lobby for or to consult for the company). At the same time, those companies have apparently vetoed awards to privacy-focused nonprofits that they view as "too aggressively devoted to combatting the wrongs that allegedly harmed the class." Parloff, *supra*. And Google, in particular, has been sharply criticized for using its funding decisions to influence the research

and advocacy of nonprofits. *See* Kenneth P. Vogel, Google Critic Ousted From Think Tank Funded by the Tech Giant, N.Y. Times (Aug. 30, 2017).

Even if class action defendants like Google and Facebook ultimately receive no direct benefit from *cy pres* awards, they still are able to take credit for their charity. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) (observing that "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties"); *Dennis v. Kellogg Co.*, 697 F.3d 858, 867–68 (9th Cir. 2012) (noting that *cy pres* awards that overlap with charitable gifts to which the defendant has already committed are a "paper tiger," in terms of deterrence).

And, in some cases, a *cy pres* award may simply redirect money that the defendant would have given to a charity anyway, creating the illusion of relief when all that the settlement changes is the labeling of accounting entries. One *cy pres* recipient here, for example, is the Stanford Center for Internet and Society, to which Google has contributed millions of dollars in donations and whose scholars regularly support Google's positions on a variety of policy issues, including privacy litigation. *See* Jeffrey Toobin, The Solace of Oblivion, The New Yorker (Sep. 29, 2014); John Hechinger and Rebecca Buckman, The Golden Touch of Stanford's President, Wall St. J. (Feb. 25, 2007) ("It might as well be the Google Center.").

4. The Second Circuit has expressed concern that the availability of *cy pres* relief "would have allowed

plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not." *Agent Orange*, 818 F.2d at 185. This, in turn, "would have induced plaintiffs to pursue 'doubtful' class claims for 'astronomical amounts' and thereby 'generate…leverage and pressure on defendants to settle.'" *Id*. (alteration in original) (quoting *Eisen*, 479 F.2d at 1019); *see also Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125, 1129 (9th Cir. 2017) (holding that, because *cy pres* remedies are available, class proponents are not required "to demonstrate that there is administratively feasible way to determine who is in the class"). In this way, *cy pres* incentivizes both the bringing of "strike suits" and their settlement on terms mutually agreeable to class counsel and the defendant. *Cf. Amchem*, 521 U.S. at 620 (stating that the Rule 23 prerequisites "demand undiluted, even heightened, attention in the settlement context").

5. Finally, *cy pres* awards often create the appearance or reality of judicial conflicts of interest. New York University's Samuel Issacharoff, Reporter for ALI's Principles of the Law of Aggregate Litigation, has described *cy pres* relief as "an invitation to wild corruption of the judicial process." Adam Liptak, Doling Out Other People's Money, N.Y. Times, Nov. 26, 2007. As the *New York Times* has documented, charities are increasingly lobbying judges for a cut of the proceeds in class action settlements. *Id*. And "[a]s part of their effort to secure judicial approval of proposed settlements, the parties often include a *cy pres* award

that benefits a charity with which the judge or his or her family is affiliated." Beisner at 13.

While greasing the wheels of justice, these tactics can create a conflict between the interests of the presiding judge and those of class members, who may be better served by direct compensation or some other mode of relief. *See Klier*, 658 F.3d at 482 (Jones, C.J., concurring) ("[D]istrict courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations."); *Bear, Stearns*, 626 F. Supp. 2d at 415 ("[W]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety."); *see, e.g.*, *Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788 (M.D. Ga. July 10, 2012) (approving $1.5 million *cy pres* award to the presiding judge's *alma mater*).

Indeed, it is even conceivable that "parties can effectively judge-shop by selecting *cy pres* recipients that would force recusal." Theodore H. Frank, Fraley v. Facebook update, Point of Law (July 12, 2012) (noting district judge recusal for unspecified reasons after parties proposed *cy pres* settlement that named charitable beneficiaries affiliated with judge and her husband);[9] *but see Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (permitting parties to select

[9] Available at http://www.pointoflaw.com/archives/2012/07/fraley-v-facebook-update.php.

judge's spouse's charity as *cy pres* recipient without requiring recusal).

A more fundamental problem is that an open-ended *cy pres* doctrine is incompatible with the judicial role. "Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others; and we do not have the institutional resources and competencies to monitor that 'grantees' abide by the conditions we or the settlement agreements set." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006). Yet those things are exactly what federal judges are asked to do with increasing frequency.

B. *Cy Pres* Settlements Are Increasingly Prevalent

Given the convenience of *cy pres* awards to defendants and class counsel, it should not be surprising that their use in class action settlements is growing at a rapid clip. A paper surveying *cy pres* awards in federal court cases from 1974 through 2008 reports the following empirical findings:

> First, the prevalence of class action cy pres awards has increased steadily by decade since the 1980s and has accelerated noticeably after 2000. Second, since 2000, the majority of class action cy pres awards are associated with cases that were certified solely for the purposes of

> settlement, over one-third of class action cy pres awards are associated with faux class actions, and approximately two-thirds of class action cy pres awards are associated with either settlement or faux class actions. Third, in a quarter of cy pres class actions, the amount and recipient of the cy pres award was determined *ex ante*, or prior to giving absent class members the opportunity to make claims on the fund. Fourth, the average cy pres award was $5.8 million and accounted on average for 30.8% of total compensatory damages.

Redish at 661.

A more recent survey concluded that the use of *cy pres* awards in class action settlements skyrocketed after "the Class Action Fairness Act of 2005 took a hammer to so-called coupon settlements," leaving plaintiffs' attorneys to seek out an alternative means of facilitating quick settlements. Natalie Rodriguez, Era of Mammoth Cases Test Remedy of Last Resort, Law360, May 2, 2017.[10] According to the survey, *cy pres* settlements were at their highest levels ever in 2015 and 2016, the most recent years covered. *Id*.

The question presented by this petition is therefore both important and frequently recurring.

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[10] Available at https://www.law360.com/in-depth/articles/918296.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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JANUARY 2018

APPENDIX

TABLE OF APPENDICES

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION

PALOMA GAOS; ANTHONY ITALIANO; GABRIEL PRIYEV, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

MELISSA ANN HOLYOAK; THEODORE H. FRANK,

Objectors-Appellants,

v.

GOOGLE, INC., a Delaware corporation,

Defendant-Appellee.

No. 15-15858

D.C. No.

5:10-cv-04809-EJD

OPINION

App. 2

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted March 13, 2017
San Francisco, California

Filed August 22, 2017

Before: J. Clifford Wallace, M. Margaret McKeown, and Jay S. Bybee, Circuit Judges.

Opinion by Judge McKeown;
Partial Concurrence and Partial Dissent by Judge Wallace

COUNSEL

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OPINION

McKEOWN, Circuit Judge

Google's free Internet search engine ("Google Search") processes more than one billion user-generated search requests every day. This case arises from class action claims that Google violated users' privacy by disclosing their Internet search terms to owners of third-party websites. We consider whether the district court abused its discretion in approving the $8.5 million *cy pres*–only settlement and conclude that it did not.

BACKGROUND

In these consolidated class actions, three Google Search users—Paloma Gaos, Anthony Italiano, and Gabriel Priyev (collectively "plaintiffs")—asserted claims for violation of the Stored Communications Act, 18 U.S.C. § 2701 et seq.; breach of contract; breach of the covenant of good faith and fair dealing; breach of implied contract; and unjust enrichment. The plaintiffs sought statutory and punitive damages and declaratory and injunctive relief for the alleged privacy violations.

The claimed privacy violations are the consequence of the browser architecture. Once users submit search terms to Google Search, it returns a list of relevant websites in a new webpage, the "search results page." Users can then visit any website listed in the search results page by clicking on the provided link.

When a user visits a website via Google Search, that website is allegedly privy to the search terms the user originally submitted to Google Search. This occurs because, for each search results page, Google Search generates a unique "Uniform Resource Locator" ("URL") that includes the user's search terms. In turn, every major desktop and mobile web browser (including Internet Explorer, Firefox, Chrome, and Safari) by default reports the URL of the last webpage that the user viewed before clicking on the link to the current page as part of "referrer header" information. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1102 (9th Cir. 2014) (explaining how "referrer headers" operate).[1]

The genesis of the plaintiffs' complaints is the application of the search protocol, coupled with Google's "Web History" service, which tracks and stores account holders' browsing activity on Google's servers.

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[1] For instance, if a user enters "2016 presidential election" into Google Search and clicks on a link to www.cnn.com/election on the search results page, the "referrer header" would tell CNN that the user found her way there via "http://www.google.com/search?q=2016+presidential+election."

Following mediation, the parties reached a settlement, which they submitted to the district court for preliminary approval in July 2013. The settlement provided that Google would pay a total of $8.5 million and provide information on its website disclosing how users' search terms are shared with third parties, in exchange for a release of the claims of the approximately 129 million people who used Google Search in the United States between October 25, 2006 and April 25, 2014 (the date the class was given notice of the settlement).

Of the $8.5 million settlement fund, approximately $3.2 million was set aside for attorneys' fees, administration costs, and incentive payments to the named plaintiffs. The remaining $5.3 million or so was allocated to six cy pres recipients, each of which would receive anywhere from 15 to 21% of the money, provided that they agreed "to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." The six recipients were AARP, Inc.; the Berkman Center for Internet and Society at Harvard University; Carnegie Mellon University; the Illinois Institute of Technology Chicago-Kent College of Law Center for Information, Society and Policy; the Stanford Center for Internet and Society; and the World Privacy Forum. Each of the recipients submitted a detailed proposal for how the funds would be used to promote Internet privacy.

After a hearing, the district court certified the class for settlement purposes and preliminarily approved the settlement. Notice was given to the class on April 25, 2014, via a website, toll-free telephone number, paid banner ads, and press articles. Thirteen class members opted out of the settlement, and five class members, including Melissa Ann Holyoak and Theodore H. Frank (collectively "Objectors"), filed objections.

Following a final settlement approval hearing at which the district court heard from both the parties and Objectors, the district court granted final approval of the settlement on March 31, 2015. With respect to the objections, the district court found that: (1) a cy pres–only settlement was appropriate because the settlement fund was non-distributable; (2) whether or not the settlement was cy pres–only had no bearing on whether Rule 23(b)(3)'s superiority requirement was met; (3) the cy pres recipients had a substantial nexus to the interests of the class members, and there was no evidence that the parties' preexisting relationships with the recipients factored into the selection process; and (4) the attorneys' fees were commensurate with the benefit to the class. The district court awarded $2.125 million in fees to class counsel and $15,000 in incentive awards to the three named plaintiffs. Objectors appealed.

ANALYSIS

The settlement at issue involves a *cy pres*–only distribution of the $5.3 million or so that remains in the settlement fund after attorneys' fees, administration costs, and incentive awards for the named plaintiffs are accounted for. *Cy pres*, which takes its name from the Norman French expression *cy pres comme possible* (or "as near as possible"), is an equitable doctrine that originated in trusts and estates law as a way to effectuate the testator's intent in making charitable gifts. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). In the class action settlement context, the *cy pres* doctrine permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best" class of beneficiaries for the indirect benefit of the class. *Id.*

Here, the cy pres recipients were six organizations that have pledged to use the settlement funds to promote the protection of Internet privacy. We review for abuse of discretion the district court's approval of the proposed class action settlement. *Id.* In addition, because the settlement took place before formal class certification, settlement approval requires a "higher standard of fairness." *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)), *cert. denied sub nom. Marek v. Lane*, 134 S. Ct. 8 (2013). Recognizing that, at this early stage of litigation, the district court cannot as effectively monitor for collusion and other abuses, we scrutinize the proceedings to discern whether the court sufficiently "account[ed] for

the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit." *Id.*

I. Appropriateness of the *Cy Pres*–Only Settlement

As an initial matter, we quickly dispose of the argument that the district court erred by approving a *cy pres*–only settlement. Notably, Objectors do not contest the value of the settlement nor do they plead monetary injury. To be sure, *cy pres*–only settlements are considered the exception, not the rule. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (explaining that direct distributions to class members are preferable because "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims," are "the property of the class"); *accord* William B. Rubenstein, Newberg on Class Actions § 12:26 (5th ed. 2017). However, they are appropriate where the settlement fund is "non-distributable" because "the proof of individual claims would be burdensome or distribution of damages costly." *Lane*, 696 F.3d at 819 (quoting *Nachshin*, 663 F.3d at 1038). We have never imposed a categorical ban on a settlement that does not include direct payments to class members.

The district court's finding that the settlement fund was non-distributable accords with our precedent. In *Lane*, we deemed direct monetary payments

"infeasible" where each class member's individual recovery would have been "*de minimis*" because the remaining settlement fund was approximately $6.5 million and there were over 3.6 million class members. *Id.* at 817–18, 820–21. The gap between the fund and a miniscule award is even more dramatic here. The remaining settlement fund was approximately $5.3 million, but there were an estimated 129 million class members, so each class member was entitled to a paltry 4 cents in recovery—a *de minimis* amount if ever there was one. The district court found that the cost of verifying and "sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class."

To begin, the district court found that the amount of the fund was appropriate given the shakiness of the plaintiffs' claims. Objectors do not contend that it would have been feasible to make a 4-cent distribution to every class member. Instead, they ask us to impose a mechanism that would permit a miniscule portion of the class to receive direct payments, eschewing a class settlement that benefits members through programs on privacy and data protection instituted by the *cy pres* recipients. Objectors suggest, for example, that "it is possible to compensate an oversized class with a small settlement fund by random lottery distribution," or by offering "$5 to $10 per claimant" on the assumption that few class members will make claims. Our review of the district court's settlement approval is not predicated simply on whether there may be "possible" alternatives; rather,

we benchmark whether the district court discharged its obligation to assure that the settlement is "fair, adequate, and free from collusion." *Lane*, 696 F.3d at 819 (quoting *Hanlon*, 150 F.3d at 1027). If we took their objections at face value, Objectors would have us jettison the teachings of *Lane*. Objectors would also have us ignore our prior endorsement of *cy pres* awards that go to uses consistent with the nature of the underlying action. *Nachshin*, 663 F.3d at 1039–40.[2]

Likewise, we easily reject Objectors' argument that if the settlement fund *was* non-distributable, then a class action cannot be the superior means of adjudicating this controversy under Rule 23(b)(3). "[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (alteration in original) (quoting 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1779 (3d ed. 2005)). Not surprisingly, there is a relationship between the superiority requirement and the appropriateness of a *cy pres*–only settlement.

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[2] It bears noting, of course, that district courts are not precluded from approving other distribution methods that might benefit the class more directly under certain circumstances. However, the fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them. *See Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010) (per curiam) (holding that "[t]he abuse of discretion standard requires us to uphold a district court determination that falls within a broad range of permissible conclusions").

The two concepts are not mutually exclusive, since "[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Id.* The district court did not abuse its discretion in finding the superiority requirement was met because the litigation would otherwise be economically infeasible. This finding dovetails with the rationale for the *cy pres*–only settlement.[3]

II. The *Cy Pres* Recipients

We now turn to the crux of this appeal: whether approval of the settlement was an abuse of discretion due to claimed relationships between counsel or the parties and some of the *cy pres* recipients. We have long recognized that the *cy pres* doctrine, when "unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries[,] poses many nascent dangers to the fairness of the distribution process," because the selection process may then "answer to the

[3] Objectors point to *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974), as an example of a case where we found the superiority requirement not met because "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." But *In re Hotel* did not involve a *cy pres* distribution or even a settlement. *See id.* Instead, we held that a class action was not the superior means of resolving the controversy because the class members' antitrust claims involved a "great variety" of individualized determinations. *Id.* at 90–91; *see also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305–06 (9th Cir. 1990) (distinguishing *In re Hotel* on the basis that the case raised concerns regarding "individual proof of damages").

whims and self interests of the parties, their counsel, or the court." *Nachshin*, 663 F.3d at 1038–39; *see also Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308–39 (9th Cir. 1990). Due to these dangers, we require *cy pres* awards to meet a "nexus" requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members. *Nachshin*, 663 F.3d at 1039.

Objectors suggest that the district court rubberstamped the settlement, by "simply h[olding] that the Ninth Circuit and district courts have approved other all–*cy–pres* settlements and class members effectively had no right to complain about the parties' choice of compromise." That characterization is unfair and untrue. And oddly, despite this claim, Objectors do not dispute that the nexus requirement is satisfied here.

The district court found that the six *cy pres* recipients are "established organizations," that they were selected because they are "independent," have a nationwide reach and "a record of promoting privacy protection on the Internet," and "are capable of using the funds to educate the class about online privacy risks." Although the district court expressed some disappointment that the recipients were the "usual suspects," it recognized that "failure to diversify the list of distributees is not a basis to reject the settlement . . . when the proposed recipients otherwise qualify under the applicable standard." Accordingly, the district court appropriately found that the *cy pres* distribution

addressed the objectives of the Stored Communications Act and furthered the interests of the class members. Previous *cy pres* distributions rest on this same understanding of the nexus requirement. *See, e.g.*, *Dennis*, 697 F.3d at 866–67 (no nexus between false advertising claims relating to the nutritional value of Frosted Mini-Wheats® and charities providing food for the indigent); *Lane*, 696 F.3d at 817, 820–22 (nexus between Facebook privacy claims and charity giving grants promoting online privacy and security); *Nachshin*, 663 F.3d at 1039–41 (no nexus between breach of privacy, unjust enrichment, and breach of contract claims relating to AOL's provision of commercial e-mail services and the Legal Aid Foundation of Los Angeles, the Boys and Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center Foundation); *Six (6) Mexican Workers*, 904 F.2d at 1307–09 (no nexus between Farm Labor Contractor Registration Act claims and foundation operating human assistance projects in areas where plaintiffs resided).

Nonetheless, Objectors take issue with the choice of *cy pres* recipients because Google has in the past donated to at least some of the *cy pres* recipients, three of the *cy pres* recipients previously received Google settlement funds, and three of the *cy pres* recipients are organizations housed at class counsel's *alma maters*. *See In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011). The Objectors point to a comment from the American Law Institute's ("ALI") Principles of the

Law of Aggregate Litigation which suggests 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 selection of the recipient was made on the merits." Principles of the Law of Aggregate Litig. § 3.07 cmt. b (Am. Law Inst. 2010) (emphasis added).[4]

The benchmark for "significant prior affiliation" is left undefined. *Id.* Of course it makes sense that the district court should examine any claimed relationship between the *cy pres* recipient and the parties or their counsel. But a prior relationship or connection between the two, without more, is not an absolute disqualifier. Rather, a number of factors, such as the nature of the relationship, the timing and recency of the relationship, the significance of dealings between the recipient and the party or counsel, the circumstances of the selection process, and the merits of the recipient play into the analysis. The district court explicitly or implicitly addressed this range of considerations.

We do not need to explore the contours of the "significant prior affiliation" comment because in the context of this settlement, the claimed relationships do not "raise substantial questions about whether the selection of the recipient was made on the merits." *See*

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[4] This statement is found in a comment that is unsupported by any illustration, case law, or other authority. *Id.* § 3.07 cmt. b.

id. § 3.07 cmt. b.[5] As a starting premise, Google's role as a party in reviewing the *cy pres* recipients does not cast doubt on the settlement. In *Lane*, we approved a *cy pres*–only settlement in which the distributor of the settlement fund was a newly-created entity run by a three-member board of directors, one of whom was defendant Facebook's Director of Public Policy. 696 F.3d at 817. We rejected the claim that this structure created an "unacceptable conflict of interest," explaining that "[w]e do not require . . . that settling parties select a *cy pres* recipient that the court or class members would find ideal" since "such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process." *Id.* at 820–21. Instead, we recognized that, as the "'offspring of compromise,'" settlement agreements "necessarily reflect the interests of both parties to the settlement." *Id.* at 821 (quoting *Hanlon*, 150 F.3d at 1027). Thus, we concluded that Facebook's ability to have "its say" in the distribution of *cy pres* funds was "the unremarkable result of the parties' give-and-take negotiations" and acceptable so long as the nexus requirement was satisfied. *Id.* at 821–22.

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[5] Other circuits have endorsed § 3.07's preference for direct distribution to class members over the use of *cy pres* awards where practicable. *See In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064–65 (8th Cir. 2015); *Klier*, 658 F.3d at 475 n.16. And though we have not adopted § 3.07, we too have expressed a similar preference. *See Nachshin*, 663 F.3d at 1036. However, no circuit has yet adopted § 3.07 comment b's "significant prior affiliation" reference.

Given the burgeoning importance of Internet privacy, it is no surprise that Google has chosen to support the programs and research of recognized academic institutes and nonprofit organizations. Google has donated to hundreds of third-party organizations whose work implicates technology and Internet policy issues, including university research centers, think tanks, advocacy groups, and trade organizations.[6] These earlier donations do not undermine the selection process employed to vet the *cy pres* recipients in this litigation. The district court conducted a "careful[] review" of the recipient's "detailed proposals" and found a "substantial nexus" between the recipients and the interests of the class members. Notably, some of the recipient organizations have challenged Google's Internet privacy policies in the past.[7] Most

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[6] *See Transparency – U.S. Public Policy – Google*, Google.com, https://www.google.com/publicpolicy/transparency.html (last visited July 21, 2017) (listing third-party organizations Google has supported in the past).

[7] At least one of the recipients, World Privacy Forum, has publicly criticized Google's lack of transparency regarding its privacy policies. *See* Joseph Menn, *Privacy Advocates Target Google*, L.A. Times (June 4, 2008), http://articles.latimes.com/2008/jun/04/business/fi-google4. And a complaint filed by the World Privacy Forum and a Stanford Center for Internet and Society study played a key role in the $17 million fine Google paid to the Federal Trade Commission for circumventing user's privacy choices in Apple's Safari Internet browser. *See* Kukil Bora, *FTC Appears Ready to Fine Google Millions Over Apple Safari Privacy Breach*, Int'l Bus. Times (May 5, 2012), http://www.ibtimes.com/ftc-appears-ready-fine-google-millions-over-apple-safari-privacy-breach-report-696537; Claire

importantly, there was transparency in this process, with the proposed recipients disclosing donations received from Google. Each recipient's *cy pres* proposal identified the scope of Google's previous contributions to that organization, and, unlike in *Lane*, explained how the *cy pres* funds were distinct from Google's general donations. *See Dennis*, 697 F.3d at 867–68 (casting doubt on the value of *cy pres* funds that a defendant "has already obligated itself to donate"). Citing *Lane*, the district court found that "[t]he chosen recipients and their respective proposals are sufficiently related so as to warrant approval; they do not have to be the recipients that objectors or the court consider ideal."

The objection that three of the *cy pres* recipients had previously received *cy pres* funds from Google does not impugn the settlement without something more, such as fraud or collusion. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). That "something more" is missing here. Indeed, the proposition that *cy pres* funds should not be awarded to previous recipients would be in some tension with our nexus requirements. As we have recognized, it is often beneficial for a *cy pres* recipient to have a "'substantial

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Cain Miller, *Google to Pay $17 Million to Settle Privacy Case*, N.Y. Times (Nov. 18, 2013), http://www.nytimes.com/2013/11/19/technology/google-to-pay-17-million-to-settle-privacy-case.html; Elinor Mills, *Privacy Brouhaha Reveals Google's Split Personality*, CNET (Feb. 17, 2012), http://www.cnet.com/news/privacy-brouhaha-reveals-googles-split-personality/. Both organizations are *cy pres* recipients here.

record of service,'" because such a record inspires confidence that the recipient will use the funds to the benefit of class members. *See Dennis*, 697 F.3d at 865 (quoting *Six (6) Mexican Workers*, 904 F.2d at 1308); *Lane*, 696 F.3d at 822. But in emerging areas such as Internet and data privacy, expertise in the subject matter may limit the universe of qualified organizations that can meet the strong nexus requirements we impose upon *cy pres* recipients. Given that, over time, major players such as Google may be involved in more than one *cy pres* settlement, it is not an abuse of discretion for a court to bless a strong nexus between the *cy pres* recipient and the interests of the class over a desire to diversify the pick via novel beneficiaries that are less relevant or less qualified. *See Nachshin*, 663 F.3d at 1040 (considering whether the *cy pres* distribution "provide[s] reasonable certainty that any member will be benefitted").

Finally, we reject the proposition that the link between the *cy pres* recipients and class counsel's *alma maters* raises a significant question about whether the recipients were selected on the merits. There may be occasions where the nature of the alumni connections between the parties and the recipients could cast doubt on the propriety of the selection process. But here, we have nothing more than a barebones allegation that class counsel graduated from schools that house the Internet research centers that will receive funds.

The claim that counsel's receipt of a degree from one of these schools taints the settlement can't be entertained with a straight face. Each of these schools graduates thousands of students each year. Objectors have never disputed that class counsel have no ongoing or recent relationships with their *alma maters* and have no affiliations with the specific research centers. Nor did the district court simply accept this concession or put the burden on the Objectors. The district court appropriately considered the substance of the objections and explained why those challenges did not undermine the overall fairness of the settlement. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 1995). The court affirmatively analyzed the issue and was cognizant of the claim of a potential conflict. All class counsel swore that they have no affiliations with the specific research centers. Class counsel repeated that attestation at the final settlement approval hearing and added that they sit on no boards for any of the proposed recipients. As one class counsel put it, "I simply got my law degree [at Harvard], and that's simply the end of it."[8] The recipients are well-recognized centers focusing on the Internet and data privacy, and the district court conducted a "careful[] review" of the recipients' "detailed proposals" and found a "substantial nexus" between the recipients

[8] The dissent's suggestion that what is needed is a hearing with sworn testimony seems superfluous in view of the extensive hearing held by the district court, the specific queries to counsel about the *cy pres* recipients, and the submission of sworn declarations.

and the interests of the class members.[9] No one suggested that any of the centers acted with any impropriety, and the Objectors provided no alternative suggestions for other law schools with more qualified centers or institutes. The district court found "no indication that counsel's allegiance to a particular alma mater factored into the selection process," particularly since the identity of the recipients "was a negotiated term included in the Settlement Agreement and therefore not chosen solely by . . . alumni." Thus, the district court gave a "sufficient[ly] reasoned" response

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[9] The dissent challenges the inclusion of the Chicago-Kent College of Law Center for Information, Society and Policy ("CISP") as a recipient, noting that the center was only inaugurated in 2012. *See* CHICAGO-KENT MAG., Summer 2012, at 8, *available at* https://issuu.com/chicagokentlaw/docs/chicago-kent-magazine-2012. This judicial second-guessing does not bear scrutiny, particularly in a field that is developing quickly and where the record reveals a different story. CISP's *cy pres* proposal, which outlines a "privacy preparedness" project that would develop interactive materials to educate the public about ways to protect their Internet and data privacy, notes that the five faculty involved in the proposed project are respected leaders in the field of Internet and privacy law, that CISP has received other *cy pres* awards and grants, and that CISP has hosted five conferences on Internet and data privacy issues that have attracted hundreds of attendees and trained over a hundred journalists on data privacy. In addition, CISP conducts research in such areas as data aggregation, social networks and health information, and children and internet privacy; engages in policy advocacy, community outreach, and public education; and holds seminars on Internet and data privacy issues for law students. *See Center for Information, Society and Policy*, Kentlaw.iit.edu, https://www.kentlaw.iit.edu/institutes-centers/center-for-information-society-and-policy (last visited July 24, 2017).

to the objections as to the claimed preexisting relationships. *In re Pac. Enters. Sec. Litig.*, 47 F.3d at 377. We can hardly say that the alumni connections cloud the fairness of the settlement.

As an overarching matter, nothing in this record "raise[s] substantial questions about whether the selection of the recipient was made on the merits." *See* Principles of the Law of Aggregate Litig. § 3.07 cmt. b. We do not suggest, however, that a party's prior relationship with a *cy pres* recipient could not be a stumbling block to approval of a settlement. *Cf. Marek*, 134 S. Ct. at 9 (mem.) (statement of Roberts, C.J., respecting the denial of certiorari) (recognizing that given the "fundamental concerns surrounding" *cy pres* awards and their increasing prevalence, the Court "may need to clarify the limits on the use of such remedies" in the future). We hold merely that, under the circumstances here, the district court did not abuse its discretion in approving the *cy pres* recipients.

III. Attorneys' Fees

Turning to the issue of attorneys' fees, the district court did not abuse its discretion by approving $2.125 million in fees and $21,643.16 in costs. As an initial matter, there is no support for Objectors' view that the settlement should have been valued at a lower amount for the purposes of calculating attorneys' fees simply because it was *cy pres*–only. *See generally Lane*, 696 F.3d at 818 (acknowledging a 25% fee award that also involved a *cy pres*–only settlement).

Rather, the question is whether the amount of attorneys' fees was reasonable. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

In a settlement that produces a common fund for the benefit of the entire class, a court has discretion to employ either the "percentage-of-recovery" method or the "lodestar" method to calculate appropriate attorneys' fees, so long as its discretion is exercised so as to achieve a reasonable result. *See id.* at 942. Here, the district court found that the requested fees were appropriate under either metric.

Under the percentage-of-recovery method, the requested fee was equal to 25% of the settlement fund. According to the district court, this percentage was commensurate with the risk posed by the action and the time and skill required to secure a successful result for the class, given that class counsel faced three motions to dismiss and participated in extensive settlement negotiations. The district court also found that this percentage hewed closely to that awarded in similar Internet privacy actions. *See, e.g.*, *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *9–10 (N.D. Cal. Mar. 18, 2013); *see also In re Bluetooth*, 654 F.3d at 942 (noting that 25% is our "benchmark" for a reasonable fee award).

Although not required to do so, the district court took an extra step, cross-checking this result by using the lodestar method. *See In re Bluetooth*, 654 F.3d at

941–44 (checking the district court's percentage-of-recovery fees calculation against the lodestar method, which is "calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation . . . by a reasonable hourly rate for the region and the experience of the lawyer"). The district court found that class counsel provided sufficient support for its lodestar calculation that fees totaled $2,126,517.25.

AFFIRMED.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I concur in Sections I and III of the majority opinion. I agree that a *cy pres*-only settlement was appropriate in this case and do not contend that the district court abused its discretion in calculating class counsel's fees.

I dissent, however, from Section II of the opinion, in which the majority blesses the district court's approval of the settlement, despite the preexisting relationships between class counsel and the *cy pres* recipients. To me, the fact alone that 47% of the settlement fund is being donated to the alma maters of class counsel raises an issue which, in fairness, the district court should have pursued further in a case such as

this. The district court made no serious inquiry to alleviate that concern. Accordingly, I would vacate the district court's approval of the class settlement, and remand with instructions to hold an evidentiary hearing, examine class counsel under oath, and determine whether class counsel's prior affiliation with the *cy pres* recipients played *any* role in their selection as beneficiaries.

I.

As the majority opinion outlines, plaintiffs in this case alleged that Google violated class members' privacy rights by disclosing personal information (such as search terms) to unauthorized third parties. Google's practice allegedly violated the federal Stored Communications Act, along with various state laws. After several rounds at the motion to dismiss stage, the parties agreed to a class-wide settlement (before formal class certification by the district court). The parties estimated the size of the class to be 129 million people.

The settlement contained the following key terms: (1) Google agreed to pay $8.5 million into a settlement fund; (2) Google would provide notice of the settlement on its website; (3) each class representative would receive $5,000, claims administration costs would be $1 million, and attorney's fees would be $2.125 million (25% of the settlement fund); and (4) the remainder of the settlement fund (about $5 million) would go to six *cy pres* recipients. The six *cy pres*

recipients were to be Carnegie Mellon University (21% of the remainder), the World Privacy Forum (17%), Chicago-Kent College of Law Center for Information, Society and Policy (16%), the Stanford Center for Internet and Society (16%), the Berkman Center for Internet and Society at Harvard University (15%), and that the AARP Foundation (15%).

II.

We review a district court's approval of a class action settlement for an abuse of discretion. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). Here, however, the parties reached the settlement before the class certification stage. "Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

As stated above, three of the *cy pres* distribution payments in our case are to Chicago-Kent College of Law (16%), Stanford (16%), and Harvard (15%). Attorneys for the class attended all three of these institutions. We, along with other courts and observers, have pointed out the unseemly occurrence of *cy pres* funds being doled out to interested parties' alma maters. *See, e.g., Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011); *Securities & Exchange Comm'n*

v. Bear, Stearns & Co., Inc., 626 F.Supp.2d 402, 414–16 (S.D.N.Y. 2009); Adam Liptak, *Doling out Other People's Money*, N.Y. Times, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like").

In response to this all-too-common development, the American Law Institute has set forth, in its Principles of the Law of Aggregate Litigation, 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 selection of the recipient was made on the merits." American Law Institute (ALI), Principles of the Law of Aggregate Litigation § 3.07 comment b (2010) (emphasis added). Although the majority tells us correctly that no circuit has adopted the specific "prior affiliation" language, circuits have endorsed § 3.07's guidance regarding scrutinizing *cy pres* disbursements. *See, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064–65 (8th Cir. 2015) (vacating a *cy pres* settlement because "class counsel and the district court entirely ignored this now-published ALI authority"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (quoting ALI § 3.07, comment a (2010)); *In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012) (citing to ALI § 3.07 and asserting that "[c]ourts have generally agreed with the ALI Principles").

I conclude that our circuit should adopt the ALI's guidance as set forth in § 3.07. District courts should be required to scrutinize *cy pres* settlements when the proffered recipients of the funds have a "prior affiliation" with counsel, a party, or even the judge, especially when one of those players is a loyal alumni of a *cy pres* recipient. I do not mean to suggest that class counsel's alma mater can never be a *cy pres* beneficiary. Rather, I propose that the burden should be on class counsel to show through sworn testimony, in an on-the-record hearing, that the prior affiliation played *no role* in the negotiations, that other institutions were sincerely considered, and that the participant's alma mater is the proper *cy pres* recipient.

The majority responds to this line of argument by asserting that "here, we have nothing more than a barebones allegation that class counsel graduated from schools that house the Internet research centers that will receive funds." The majority then salutes the district court's conclusion that there is "no indication that counsel's allegiance to a particular alma mater factored into the selection process," and stresses that the *cy pres* recipients were a negotiated term, not chosen solely by alumni. In essence, the majority holds that despite the nascent dangers posed by apportioning *cy pres* funds to the distributing parties' alma maters, the burden is entirely on the objectors to show that the settlement might be tainted.

I disagree fundamentally with this analysis. Our precedent requires that district 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 and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947. In our case, we have a *cy pres*-only settlement. That alone raises a yellow flag. Furthermore, we have a class settlement before formal class certification. That raises another yellow flag. Lastly, we have almost half of the settlement fund, several million dollars, being given to class counsel's alma maters. To me, that raises a red flag. I am especially dubious of the inclusion of the Center for Information, Society and Policy at Chicago-Kent Law School (a law school attended by class counsel), which center appears to have inaugurated only a year before the parties herein agreed to their settlement. Even with these red and yellow flags, under the majority's holding, the burden is still on the objectors to prove more, despite the objectors' lack of access to virtually any relevant evidence that would do so.

I would hold that the combination of a *cy pres*-only award, a pre-certification settlement, and the fact that almost half the *cy pres* fund is going to class counsel's alma maters, is sufficient to shift the burden to the proponents of the settlement to show, on a sworn record, that nothing in the acknowledged relationship was a factor in the ultimate choice. Here, the only sworn-to items in the record on this issue are boiler plate, one-line declarations from class counsel stating

"I have no affiliation" with the subject institutions. While the majority asserts that the district court conducted a "careful review," these terse declarations are the only shred of sworn-to evidence in the record. There was essentially nothing for the district court to review—carefully or not. Although there was some discussion between counsel and the district court during the hearings on the settlement, this was nothing more than unsworn lawyer talk during an oral argument.[1]

I still have many questions surrounding how these universities were chosen, such as: What other institutions were considered? Why were the non-alma mater institutions rejected? What relationship have counsel had with these universities? Have counsel donated funds to their alma maters in the past? Do counsel serve on any alma mater committees or boards? Do counsel's family members? How often do counsel visit their alma maters? There are many questions still lingering that have not been answered under oath. Here, as we have directed before, "the district court should have pressed the parties to substantiate their bald assertions with corroborating evidence." *Id*. at 948.

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[1] I disagree with the majority's assertion that "sworn testimony seems superfluous" because counsel submitted one-line boilerplate declarations and the district court heard some unsworn argument from the lawyers. My experience as a trial judge taught me to be skeptical of unsworn statements from lawyers, especially when it comes to conflict of interest issues. To me, there is a significant difference between sworn and unsworn testimony.

Although I would vacate the parties' settlement, I express no opinion on the definitive fairness of the parties' agreement. It is not the province of appellate judges to "substitute our notions of fairness for those of the district judge." *Officers for Justice v. Civ. Serv. Commission of the City and County of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982) (internal citations omitted). Instead, I would remand the case to the district court for further fact finding in accordance with the concerns I have expressed.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION	Case No. 5:10-cv-04809-EJD **ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; GRANTING MOTION FOR ATTORNEYS FEES, COSTS AND INCENTIVE AWARDS** Re: Dkt. Nos. 65, 66

This consolidated internet privacy litigation against Defendant Google Inc. ("Google") returns for final approval of a class action settlement. *See* Docket Item No. 65. Representative Plaintiffs Paloma Gaos, Anthony Italiano and Gabriel Priyev ("Plaintiffs") also seek an order approving their request for attorneys fees, costs and incentive awards. *See* Docket Item No. 66.

Federal jurisdiction arises pursuant to 28 U.S.C. § 1331. Having carefully considered the written brief-

ing along with the arguments of counsel at the hearing on this matter, the court has determined the motions should be granted for the reasons explained below.

I. FACTUAL AND PROCEDURAL BACKGROUND

The court previously described the factual allegations underlying this lawsuit and repeats them again here. According to the Consolidated Class Action Complaint ("CCAC"), "searching" is one of the "most basic activities performed in the Internet," and Google's website offers "the most-used search engine in the world." *See* CCAC, Docket Item No. 50, at ¶¶ 15, 16. This case focuses on that proprietary search engine. Plaintiffs allege Google operated its search engine in a manner that violated their Internet privacy rights by disclosing personal information to third parties.

Specifically, Plaintiffs allege that Google's search engine intentionally and by default included the user's search terms in the resulting URL of the search results page. *Id.* at ¶ 56. Thus, when a user of Google's search engine clicked on a link from the search results page, the owner of the website subject to the click receives the user's search terms in the "referrer header" from Google. *Id.* at ¶ 57. This information is then disseminated further, since several web analytics services parse search query information from web server logs, or otherwise collect the search query from the

referrer header transmitted by each user's web browser. *Id.* at ¶ 58. Indeed, Google's own analytics product provides webmasters with this information in the aggregate. *Id.*

According to Plaintiffs, the problem with Google's disclosure of users' search information to the third parties is that the referrer header - which displays the user's search terms - can sometimes contain certain personal information often subject to search queries, including "users' real names, street addresses, phone numbers, credit card numbers, social security numbers, financial account numbers and more, all of which increases the risk of identity theft." *Id.* at ¶ 3. "User search queries can also contain highly-personal and sensitive issues, such as confidential medical information, racial or ethnic origins, political or religious beliefs or sexuality, which are often tied to the user's personal information. *Id.* at ¶ 3.

Based on these allegations, Plaintiffs assert the following causes of action against Google: (1) violation of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) breach of implied contract; (5) unjust enrichment; and (6) declaratory and injunctive relief.

Gaos initiated an action in this court on October 25, 2010, and Priyev filed an action on February 29, 2012, in the Northern District of Illinois. On April 30,

2013, the cases were consolidated after the Priyev action was transferred to this court. On March 26, 2014, the court granted the parties motion for preliminary approval of the settlement, certified a settlement class and appointed counsel. These motions were filed upon completion of the notice plan.

The court received four written objections to the settlement from Kim Morrison, David Weiner, Melissa Holyoak, Theodore H. Frank, and Cameron Jan. A hearing addressing final approval was held on August 29, 2014.

II. LEGAL STANDARD

A class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the parties to a putative class action reach a settlement agreement prior to class certification, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

"Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage,

the primary inquiry is whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Having already completed an preliminary examination of the agreement, the court reviews it again, mindful that the law favors the compromise and settlement of class action suits. *See, e.g.*, *Churchill Village, LLC. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Ultimately, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof." *Hanlon*, 150 F.3d at 1026.

III. DISCUSSION

A. Continuing Certification of Settlement Class

This analysis begins with an examination of whether class treatment remains appropriate. The court found at the preliminary approval stage that Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequate protection by the named representatives were satisfied. As to those issues, Plaintiffs anticipated a class comprised of approximately 129 million individuals who all share a common injury. The existence of this injury for each class

member could be determined by resolving one question: whether Google's system-wide practice and policy of storage and disclosure of their search query information was unlawful. Plaintiffs' claims were also typical, if not identical, to that of other class members. For that reason, there was no indication that Plaintiffs' interest would conflict with that of the class, and Plaintiffs and their counsel had proven a desire to vigorously pursue class claims as evidenced by prior motion practice.

As to Rule 23(b), the court found that common questions predominate and that the class action mechanism was a superior process for this litigation. The alternatives to class certification - millions of separate, individual and time-consuming proceedings or a complete abandonment of claims by a majority of class members - were not preferable. Moreover, class treatment was appropriate because Defendant's policy was directed at all of its users as whole rather than at particular users of its search engine. Since an adequate showing was made as to all of the Rule 23 factors, the court conditionally certified the class for settlement purposes.

The filings related to this motion do not compel an alteration to the prior findings under Rule 23. Although Objectors Frank and Holyoak argue the class should be decertified unless the class members receive direct payments from the settlement fund, such an argument is unpersuasive under these circum-

stances. Frank and Holyoak appear to generally contend that the only acceptable benefit is some form of monetary compensation. If it is too costly to distribute settlement funds to class members, then Frank and Holyoak believe the class action mechanism is an inferior method of resolution under Rule 23(b).

This argument directed at the superiority element of Rule 23(b) is misplaced. Within the context of a class action settlement, the superiority inquiry focuses on "whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. Here, the primary objective of the class action procedure - to enable litigation where it would otherwise be economically infeasible - is achieved in this case. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). As noted, the alternatives to a class action are not preferable since they involve either thousands of individual cases or a complete abandonment of millions of claims. *Hanlon*, 150 F.3d at 1023 (holding that a superiority determination "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution.").

Moreover, a class-wide resolution is not rendered inferior simply because the settlement agreement calls for an indirect rather than a direct benefit to the

class. Assuming the circumstances support it, a settlement calling for a cy pres remedy can be approved. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (recognizing that federal courts frequently use the cy pres doctrine where proof of individual claims would be overly-burdensome or distribution of damages too costly.); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012) (affirming approval of class action settlement providing for $6.5 million distribution of funds to cy pres recipients where direct monetary payments to class members would be de minimis). This case is distinguishable from the one relied upon by Frank and Holyoak, *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), because, while the Court discussed the issue of de minimis recovery versus extraordinary costs of administration, the possibility of a cy pres distribution in place of direct payments to the class was not considered.

Accordingly, the objection of Frank of Holyoak on this topic is overruled. The class shall remain certified for settlement purposes.

B. Appropriateness of the Notice Plan

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." However, individual notice is not always practical. When that is the case, publication or some similar mechanism can be sufficient to provide notice to the individuals that will be

bound by the class action judgment. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

On the issue of appropriate notice, the court previously recognized the uniqueness of the class asserted in this case, since it could potentially cover most internet users in the United States. On that ground, the court approved the proposed notice plan involving four media channels: (1) internet-based notice using paid banner ads targeted at potential class members (in English and in Spanish on Spanish-language websites); (2) notice via "earned media" or, in other words, through articles in the press; (3) a website decided solely to the settlement (in English and Spanish versions); and (4) a toll-free telephone number where class members can obtain additional information and request a class notice. In addition, the court approved the content and appearance of the class notice and related forms as consistent with Rule 23(c)(2)(B).

The court again finds that the notice plan and class notices are consistent with Rule 23, and that the plan has been fully and properly implemented by the parties and the class administrator.

C. Fairness of the Settlement

The court now reexamines the fairness of the proposed settlement, this time with the benefit of notice having been provided to the class. The settlement agreement contains the following major components:

- Google will pay a total amount of $8.5 million, which will constitute the entirety of the settlement fund. All payments will be made from this fund, including: (1) distributions to cy pres recipients, (2) attorneys fees and costs awards, (3) incentive awards to named plaintiffs, and (4) administration costs, including the costs due to the claims administrator. Funds that remain after all payments are made will not revert to Google.

- Google will maintain information on its website under the "FAQ," "Key Terms," and "Privacy FAQ for Google Web History" webpages which discloses how information concerning users' search queries are shared with third parties. Specifically, the "FAQ" webpage will include an answer to the question "Are my search queries sent to websites when I click on Google Search results?" which notifies users that search terms may be disclosed to the destination webpage in the referrer header. In conjunction, the "Key Terms" webpage will include a definition of "HTTP Referrer," and the "Privacy FAQ for Google Web History" webpage will direct users to the Privacy Policy FAQ for more information on how Google handles search queries generally. Importantly, however, Google is not required to make changes to its homepage, www.google.com, or to practices or functionality of Google Search, Google AdWords, Google Analytics or Google Web History.

- As to particular payments to be made from the settlement fund, Plaintiffs request that each of the three representative plaintiffs receive incentive awards $5,000, and anticipate up to $1 million in claims administration costs. They also request the court approve their counsel's request for $2.125 million in fees and $21,643.16 in costs.

- After all contemplated payments are made from the fund, the balance will be distributed to the cy pres recipients previously approved by the court. To that end, Plaintiffs propose that Carnegie Mellon University receive 21% of the remainder, that the World Privacy Forum receive 17%, that Chicago-Kent College of Law Center for Information, Society and Policy receive 16%, that the Stanford Center for Internet and Society receive 16%, that the Berkman Center for Internet and Society at Harvard University receive 15%, and that the AARP Foundation receive 15%.

To determine whether a class action settlement is fair, adequate and reasonable, the court must balance a series of factors, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experi-

ence and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.*

When, as here, settlement occurs before formal class certification, approval requires a higher standard of fairness in order to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the class. *Lane*, 696 F.3d at 819.

i. Strength of Plaintiffs' Case

To assess strength of the case, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice,* 688 F.2d at 625 (internal quotations omitted). There is no "particular formula by which that outcome must be tested," (*Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)), and the district court is not required to render specific findings on the strength of all claims. *Lane*, 696 F.3d at 823. Instead, the court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm Mutual Auto. Ins. Co.*, No. 08-CV-1365-CW, 2010 U.S. Dist. LEXIS 49477, at *24, 2010 WL 1687832 (N.D. Cal. April 22, 2010).

Here, Plaintiffs readily state that the alleged privacy violation underlying all of their claims is novel and was potentially one of first impression in this circuit. Thus, from the outset, there was no guarantee that any claims would survive pre-trial challenges if adversarial litigation had continued. Indeed, by the time the parties reached a settlement, some of the claims were facing a third motion to dismiss and the one claim that had survived the second dismissal motion, the SCA claim, was subsequently invalidated by the Ninth Circuit in a case presenting a similar theory. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1107 (9th Cir. 2014) (rejecting a claim under the SCA based on webpage disclosures in a referrer header).

Plaintiff also faced challenges had the case proceeded to trial. In light of the technology involved, the jury would have been required to review complex technical evidence about the inner-workings of Google's search engine, leaving significant opportunity for misunderstanding. Furthermore, success at trial would not have equated to an ultimate success for the class. This is because the calculation of damages based on a potentially unquantifiable privacy injury would have posed a serious challenge to Plaintiffs in obtaining some type of valuable relief, and any meaningful monetary amount awarded to each class member would have resulted in an astronomical judgment far exceeding the value of Google, given the size of the class. For that reason, the judgment would undoubtedly have been met with a remittitur motion and an appeal.

This factor weighs strongly in favor of the settlement. Without a compromise, there was little guarantee of any benefit to the class without a substantial amount of further litigation.

ii. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

This case was a particularly risky one for counsel because the type of privacy injury asserted by Plaintiffs renders it legally unproven, technically complex and potentially of little value. It also would have been expensive to litigate and try since expert testimony would be necessary to explain the referrer header technology and establish a basis for damages in an untested area.

Moreover, Google's denial of liability means Plaintiffs would continue to face "serious hurdles," including a motion for summary judgment, *Daubert* challenges, and inevitable appeals that would "likely prolong the litigation, and any recovery by class members, for years." *Rodriguez*, 563 F.3d at 966. Because a negotiated resolution provides for a certain recovery in the face of an uncertain legal theory, this factor favors the settlement. *Curtis-Bauer v. Morgan Stanley & Co.*, Inc., No. 06-C-3903 TEH, 2008 U.S. Dist. LEXIS 85028, at *13, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.").

iii. The Risk of Maintaining Class Action Status

Although a class can be certified for settlement purposes, the notion that a district court could decertify a class at any time is an inescapable and weighty risk that weighs in favor of a settlement. *See Rodriguez*, 563 F.3d at 966 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). Here, there is little doubt that Google would have vigorously opposed class certification at every opportunity before the district and appellate courts. In addition, the sheer size of the class - essentially covering all persons in the United States who submitted a search query to Google for a period of years - all but invites challenges to class certification based on overbreadth or management difficulties, some of which could be considered meritorious. Thus, the very real risk of never obtaining or losing class status in the absence of settlement weighs in favor of approval.

iv. The Amount Offered in Settlement

This settlement has a monetary component requiring Google to pay $8.5 million into a common fund and an injunctive component obligating certain disclosures on the Google website. After court-approved payments, the remainder of the fund will be distributed to identified cy pres recipients in proportions designated by Plaintiffs' counsel.

In support of final approval, Plaintiffs point out that the amount of the agreed-upon settlement fund

compares favorably to that of other similar class actions. *See, e.g.*, *In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at *3-4 (N.D. Cal. June 2, 2011) (approving $8.5 million settlement fund for unauthorized disclosure of email contact lists; *Lane*, 696 F.3d at 818 (approving $9.5 million settlement fund for unauthorized disclosure of online behavior); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 U.S. Dist. LEXIS 372862013, at *16-18, WL 1120801 (N.D. Cal. March 18, 2013) (approving $ 9 million settlement fund for unauthorized storage of personal information). This comparison is instructive because, like those cases, the potential value of this case far exceeds that of the settlement fund. But also like those cases, a theoretical value in the trillions of dollars does not preclude approval here since a fund of $8.5 million is significant given the substantial legal obstacles to a recovery through litigation.

Plaintiffs also believe that a distribution of the settlement funds to cy pres recipients is appropriate in this case. Cy pres payments like those proposed for this case can be approved when actual funds are "non-distributable," or "'where the proof of individual claims would be burdensome or distribution of damages costly.'" *Nachshin*, 663 F.3d at 1038 (quoting *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)). But due to a heightened potential for collusion at the expense of absent class members, this form of settlement must be examined to ensure it is the "next best" remedy to direct payments to the class. *See id.*; *see also Lane*, 696 F.3d at

819 (holding that a class settlement should not be approved unless it was evaluated "to account for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit."). A district court should not approve a cy pres distribution "unless it bears a substantial nexus to the interests of the class members" such that it accounts for the nature of the lawsuit, the objectives of the underlying statutes, and the interests of the non-appearing class members. *Lane*, 696 F.3d at 821.

On this issue, the court echoes the comments it made at preliminary approval describing why a cy pres remedy is the "next best" result here. First, the settlement fund, while sizeable, is "non-distributable." Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would undeniably impose a significant burden to distribute, review and then verify. Similarly, the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.

Second, the cy pres distribution accounts for the nature of this suit, meets the objectives of the SCA, and furthers the interests of class members. The recipients are established organizations chosen by Plaintiffs' counsel after considering whether they are independent and free from conflict, have a record of promoting privacy protection on the Internet, reach

and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online privacy risks.[1] Having carefully reviewed the proposals submitted by counsel, the court is satisfied that the proposed cy pres distribution "bears a substantial nexus to the interests of the class

[1] Some of the proposed cy pres recipients are "usual suspects," or organizations that routinely receive distributions from class action settlements. At the two approval hearings held in this case, the court expressed a concern with using the same list of cy pres recipients in every internet privacy class action and observed that this practice discourages the development of other worthy organizations. This practice also raises questions about the effectiveness of those organizations that have received prior distributions. The court was somewhat surprised at the final list of distributees, since Plaintiffs' counsel suggested the selection process would potentially cast a wider net. *See* Tr. of Proceedings on Aug. 23, 2013, Docket Item No. 57, at p. 14:25-15:4 ("We are raising the bar, and I think raising the bar for all cy pres settlements like this to follow. We're treating the cy pres allocation more like a grant making organization would treat grant - prospective grant recipients.").

Despite this concern, the court recognizes that failure to diversify the list of distributees is not a basis to reject the settlement, particularly when the proposed recipients otherwise qualify under the applicable standard. *See Lane*, 696 F.3d at 820-21 ("We do not require…that settling parties select a cy pres recipient that the court or class members would find ideal ….such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process."). However, if class action counsel truly seeks to raise the bar for cy pres settlements, they should consider contributing to organizations other than the same typical few.

members," as required by the Ninth Circuit. *Id.* at 821.

Aside from the cy pres portion of the settlement, the court must also comment on the fact that Google's allegedly unlawful practice will not change as a result of this case. Instead, Google will be obligated to make certain "agreed-upon disclosures," or changes to certain portions of its website, the purpose of which is to better inform users how their search terms could be disclosed to third parties through a referrer header. It was noted previously that this relief is not the best result when compared to that sought in the CCAC, since the order contemplated by that pleading would have required Google to stop disclosing search queries altogether.

At the same time, a class action settlement does not need to embody the best possible result to be approved. The court's role is not to advocate for any particular relief, but instead to determine whether the settlement terms fall within a reasonable range of possible settlements, giving "proper deference to the private consensual decision of the parties" to reach an agreement rather than to continue litigating. *Hanlon*, 150 F.3d at 1027; *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Considering all of the circumstances which led to a compromise here, the relief obtained for the class falls within a reasonable range of possible settlements since it was entirely possible that nothing would be obtained if the case were to proceed further. Under

the terms of the parties' agreement, and contrary to what the objectors argue, future users of Google's website will receive something from the injunctive relief: the capability to better understand Google's disclosure practices before conducting a search on its website, and the ability to make a better informed choice based on that information.

In sum, this factor favors settlement.

v. The Extent of Discovery Completed and the Stage of the Proceedings

Prior to reaching a settlement, the parties had engaged in extensive document exchange and had fully briefed three motions to dismiss. They also met in person numerous times and engaged an experienced neutral to assist them in reaching a negotiated resolution. The extent of Plaintiffs' counsel factual investigation and the amount of pre-compromise litigation shows they "had a good grasp on the merits of their case before settlement talks began." *Rodriguez*, 563 F.3d at 967. As such, this factor weighs in favor of the settlement.

vi. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Id.* Consequently, "'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *In re Omnivision Techns., Inc.*, 559

F. Supp. 2d 1036, 1043 (N.D. Cal. 2009) (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)). Given the extensive experience of Plaintiffs' counsel with complex class action lawsuits of a similar size to the instant case, this factor favors approval of the settlement.

vii. The Presence of a Governmental Participant

The Class Action Fairness Act, or "CAFA," requires that notice of a settlement be given to state and federal officials and provides those officials a window of time to comment. 28 U.S.C. § 1715(b). "Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures." *Garner*, 2010 U.S. Dist. LEXIS 49477, at *37. Here, the Class Administrator complied with the CAFA notice requirement on August 8, 2013. No objections from a government official have been received. Thus, this factor favors the settlement.

viii. The Reaction of Class Members

A low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval. *See Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the

class presents at least some objective positive commentary as to its fairness."); *see also Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."). Here, out of a class of more than 100 million individuals, the Class Administrator received thirteen requests for exclusion and four written objections from five class members. These low rates of exclusion and objection can be characterized as, at most, a favorable reaction by the class, or at least, as an absence of an overwhelming negative reaction. This factor does weigh in favor of approval, albeit without significant force.

In sum, all of the applicable factors weigh in favor of finally approving the settlement.

IV. ATTORNEYS FEES, COSTS AND INCENTIVE AWARDS

When attorneys fees and costs are requested by counsel for the class, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

"Where a settlement produces a common fund for the benefit of the entire class, courts have discretion

to employ either the lodestar method or the percentage-of-recovery method." *Id.* at 942. The former method is routinely used when "the relief sought - and obtained - is often primarily injunctive in nature and thus not easily monetized." *Id.* The figure is calculated "by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Id.* The court can "adjust [the figure] upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.* at 941-42 (internal quotations omitted). "Foremost among these considerations, however, is the benefit obtained for the class." *Id.* at 942.

Under the latter method, the court awards as fees a percentage of the common fund in lieu of the lodestar amount. *Id.* "[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *Id.* Relevant factors to a determination of the percentage ultimately awarded include: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *Tarlecki v. bebe Stores, Inc.*, No. C 05-1777 MHP, 2009

U.S. Dist. LEXIS 102531, at *10, 2009 WL 3720872 (N.D. Cal. Nov. 3, 2009).

"Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *Id.*

A. Percentage of the Fund

Plaintiffs' counsel seek a fee award of $2.125 million, which is equal to 25% of the settlement fund. According to counsel, the combination of monetary distributions and injunctive relief obtained in the settlement is an excellent result for the class because they "work in concert . . . reshape the landscape of Internet privacy protections" and "enact a regime of informed consent for Google Search users, who can now access complete and truthful information about the ways Google handles user search queries before deciding whether to use Google Search, Google Encrypted Search, or a competing search engine."

Plaintiffs' counsel also believe they undertook substantial risk by agreeing to litigate this case on a purely contingent basis given the unsettled legal issues, and, for that reason, spent considerable time and money with no guarantee of payment. In addition, they assert the novel nature of this case coupled with an opponent armed with substantial defenses and resources required sophisticated litigation and negotiation skills. Finally, counsel points out that the award requested is consistent with that awarded in other similar cases.

Having considered the relevant factors, the court agrees with Plaintiffs' counsel that this action posed a substantial risk and required significant time and skill to obtain a result for the class. This case was not one where settlement was easily secured; to the contrary, Plaintiffs' counsel was required to defend their claims against three motions to dismiss. An agreement only materialized after extensive in-person negotiations, first without and then including a professional neutral. Moreover, counsel's request is not disproportionate to the class benefit and is comparable to awards approved in other similar internet privacy class actions, including one previously approved by this court. *See In re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 372862013, at *29 (approving benchmark award of $2.25 million). Accordingly, a benchmark fee award of amounting to 25% of the settlement fund is appropriate.

B. Lodestar Comparison

The Ninth Circuit encourages district courts "to guard against an unreasonable result" by cross-checking attorneys fees calculations against a second method. *In re Bluetooth*, 654 F.3d at 944. Since a 25% benchmark award might be reasonable in some cases but arbitrary in cases involving an extremely large settlement fund, the purpose of the comparison is to ensure counsel is not overcompensated. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 103 F.3d 602, 607 (9th Cir. 1997).

Here, Plaintiffs' counsel calculates a lodestar figure of $966,598.75 for 2085.6 billing hours from four law firms, to which they apply a 2.2 multiplier for a total amount of $2,126,517.25. They also seek compensation for total costs of $21,643.16. These amounts are attributable to each firm as follows:

Firm	**Fees**	**Expenses**	**Total Cost**
Aschenbrener Law, P.C.	$321,184.00	$5,844.54	$327,028.54
Nassiri & Jung LLP	$253,776.50	$4,464.95	$258,241.45
Progressive Law Group	$331,967.25	$7,551.27 (+ $22.40)	$339,540.92
Edelson PC	$59,671.00	$3,760.00	$63,431.00
Totals	$966,598.75	$21,643.16	$988,241.91

Among the participating law firms, the hourly rates charged by attorneys range from $300 to $685. The hourly rate for law clerks is $75, and for paralegals is $125. Altogether, the average hourly rate for all work performed is $463.

Plaintiff's counsel has provided sufficient support for its proposed lodestar calculation. The amount of hours and other costs attributed to this case are reasonable in light of the efforts required to litigate and ultimately engage in a lengthy settlement process. In

addition, the hourly rates charged fall within the range of those approved in other similar cases, and the suggested lodestar multiplier of 2.2 is comparable to that previously permitted by other courts in similar internet privacy cases. Accordingly, the lodestar cross-check confirms the reasonableness of the percentage-based calculation.

C. Incentive Awards

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. To determine the appropriateness of incentive awards a district court should use "relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation." *Id.* (internal quotation marks omitted).

The Settlement Agreement provides that the named Plaintiffs may receive incentive awards of up to $5,000 each. In this district, that amount is presumptively reasonable. *Jacobs v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, No. C 07-00362 MHP, 2009 U.S. Dist. LEXIS 101586, at *13-14, 2009 WL 3562871 (N.D. Cal. Oct. 27, 2009). Since the named plaintiffs assumed the responsibilities and burdens of acting as representatives in this lawsuit, including

providing documents, verifying allegations, and consulting with counsel, the court finds the incentive awards reasonable in light of the eligibility factors set forth in *Staton*.

V. OBJECTIONS

The court now addresses the points raised in the four written objections, keeping in mind that objectors to a class action settlement bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990).

The objectors have not satisfied this burden. To begin, all four objectors take issue with the cy pres character of this settlement, or with cy pres settlements in general. These arguments overlook both the law of this circuit which permits cy pres settlements such as this one, and the indirect benefit provided by a cy pres settlements. *See Lane*, 696 F.3d at 819. In addition, the court has explained why Plaintiffs made a sufficient showing that the cost of distributing this or really any settlement fund to the class members would be prohibitive.

The objectors similarly argue that the size of the settlement fund is insufficient in comparison to the value of the case, and believe that a fair settlement would have resulted in an end to Google's "unlawful" practices. This contention is misguided, however, because the objectors do not account for the significant and potentially case-ending weakness in the SCA

claim brought about by the Ninth Circuit's decision in *Zynga Privacy Litigation*. In light of this development, whether or not Google's practice of disclosing search queries can actually be characterized as unlawful is questionable. In the end, the parties fashioned a settlement in consideration of the favorable and unfavorable aspects of each side's case. And it is the parties themselves, as opposed to the court or the objectors, who are in the best position to assess whether a settlement "fairly reflects" their "expected outcome in litigation." *In re Pac. Ents. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Just because a settlement could be improved does not mean it is not fair, reasonable or adequate. *Hanlon*, 150 F.3d at 1027. Here, there is no reason to believe the settlement is inadequate when viewed against the diminished strength of the claims.

Objectors also argue that the cy pres recipients are unrelated to the subject matter of this case, and one claims there is a conflict of interest because some of the attorneys representing Plaintiffs attended Harvard University. The court rejects these arguments. The chosen recipients and their respective proposals are sufficiently related so as to warrant approval; they do not have to be the recipients that objectors or the court consider ideal. *Lane*, 696 F.3d at 820-21. Additionally, while the potential for a conflict of interest is noted, there is no indication that counsel's allegiance to a particular alma mater factored into the selection process. Indeed, the identity of potential cy pres recipients was a negotiated term included in the

Settlement Agreement and therefore not chosen solely by Harvard alumni.

Some objections challenge the notice plan or the contents of the notice and describe alternative ways that notice could have been provided to the class. It may be true that other methods of notice exist. But here, the court approved one specific plan that satisfied the standard Rule 23(c)(2)(B) standard. Although the plan did not call for individual notice, that type of notice is not required in all cases. *See Mullane*, 339 U.S. at 315.

Finally, the objectors challenge the provisions of the Settlement Agreement which provide for attorney's fees and incentive awards. The court does not agree that the fees and incentive awards are inconsistent with the value of the class benefit, and notes that the approved amounts are consistent with the relevant Ninth Circuit authority on this topic.

For these reasons, the court is unpersuaded by the objections. They are each overruled.

VI. CONCLUSION AND ORDER

Based on the preceding discussion, the court finds that the terms of the settlement, including the awards of attorneys fees, costs, and incentive awards, is fair, adequate, and reasonable; that it satisfies Federal Rule of Civil Procedure 23(e) and the fairness and adequacy factors; and that it should be approved and implemented.

The Motion for Final Approval (Docket Item No. 65) and the Motion for Attorneys Fees and Costs (Docket Item No. 66) are therefore GRANTED. The Clerk shall close this file upon entry of Judgment.

IT IS SO ORDERED.

Dated: March 31, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PALOMA GAOS, ANTHONY ITALIANO, AND GABRIEL PRIYEV individually and on behalf of others similarly situated, Plaintiffs, v. GOOGLE, INC., a Delaware corporation, Defendant.	CASE No. 5:10-cv-04809-EJD CLASS ACTION ~~**[PROPOSED]**~~ **FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE** Judge: Edward J. Davila

Pending before the Court is Plaintiffs' Motion for Final Approval of the Class Action Settlement (Dkt. 65) and Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Awards (Dkt. 66). Having reviewed the papers filed in support of the Motion, heard argument of counsel, and good cause appearing therein, Plaintiffs' Motions are hereby GRANTED and it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Any terms and phrases in this Order shall have the same meaning as the Settlement Agreement reached by the Parties.

2. This Court has appropriate subject matter jurisdiction over this action and over all Parties to the Action, including all Settlement Class Members.

3. The Court affirms certification of the Class and gives final approval to the Settlement and finds the Settlement is fair, adequate, and reasonable, and in the best interests of the Class. The Settlement Agreement is the result of arms-length negotiations and was overseen by a neutral mediator. The Class Representatives and Class Counsel appropriately represented the Settlement Class for purposes of entering into and implementing the Settlement. Accordingly, the Settlement Agreement is finally approved in all respects, and the Parties are directed to perform its terms.

4. The Court-approved Notice Plan to the Class was the best practicable under the circumstances and included substantial Internet advertising and a website comprehensively detailing the terms of the Settlement. The Notice Plan was successfully implemented and satisfies the requirements of Due Process and Federal Rule of Civil Procedure 23.

5. The Court finds that the Parties properly and timely notified the appropriate state and federal officials to alert them to the Settlement, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1714 ("CAFA"). The Court reviewed the substance of this notice and accompanying materials and finds that they complied with all necessary CAFA requirements.

6. Subject to the terms and conditions of the Settlement, this Court dismisses the action on the merits and with prejudice.

7. Twelve individuals timely and validly excluded themselves from the Settlement.

8. Plaintiffs and each member of the Class, fully, finally, completely, and forever release, acquit, and discharge Google from any and all claims that were raised in this litigation, as further described in the Settlement Agreement.

9. This release of claims and the Settlement Agreement will be binding on and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiffs and all other Class Members, and their heirs, executors, and administrators, successors, and assigns. All Class Members who have not been properly excluded from the Settlement are hereby permanently barred and enjoined from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any lawsuit or other action in any jurisdiction based on or arising out of the released claims.

10. The Court awards $2,125,000 in fees to Class Counsel and $21,643.16 in expenses for costs incurred.

11. The Court will distribute the awarded fees according to the following formula:

a. 39% of fees awarded to Nassiri & Jung LLP;

b. 39% of fees awarded to Aschenbrener Law, P.C.; and

c. 22% of fees awarded to Progressive Law Group, LLC.

12. Costs and expenses awarded to Class Counsel shall be distributed as follows: Aschenbrener Law is entitled to $5,844.54; Nassiri & Jung is entitled to $4,464.95; and Progressive Law Group is entitled to $7,551.27; Edelson PC is entitled to $3,760.00; and Diemer, Whitman & Cardosi LLP is entitled to $22.40.

13. The Court awards $5,000 to each of the three Class Representatives (Plaintiff Gaos, Plaintiff Italiano, and Plaintiff Priyev) for a total of $15,000 in incentive awards.

14. Defendant shall pay the Fee Award and Incentive Award pursuant to and in the manner provided by in the terms of the Settlement Agreement.

15. The Court directs entry of final judgment based on the Court's finding that there is no just reason for delay of enforcement or appeal of this judgment, notwithstanding the Court's retention of jurisdiction to oversee the implementation and enforcement of the Settlement.

16. Without affecting the finality of this judgment, the Court shall continue to have jurisdiction over (a)

the implementation, enforcement, and administration of the Settlement; (b) the resolution of any disputes concerning class membership or entitlement to benefits under the terms of the Settlement; and (c) all Parties, for the purpose of enforcing and administering the Settlement and this litigation until each act agreed upon amongst the Parties is performed pursuant to the Settlement.

IT IS SO ORDERED.

Dated: April 2, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GOOGLE REFERRER HEADER PRIVACY LITIGATION PALOMA GAOS; et al., Plaintiffs-Appellees, v. MELISSA ANN HOLYOAK; THEODORE H. FRANK, Objectors-Appellants, v. GOOGLE, INC., a Delaware corporation, Defendant-Appellee.	No. 15-15858 D.C. No. 5:10-cv-04809-EJD Northern District of California, San Jose ORDER

Before: WALLACE, McKEOWN, and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

Judge McKeown and Judge Bybee vote to deny the petition for rehearing en banc. Judge Wallace recommends granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

SETTLEMENT AGREEMENT AND RELEASE

This Class Action Settlement Agreement and Release ("Agreement") is made by and between Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev (the "Class Representatives" or the "Plaintiffs"), on behalf of themselves and others similarly situated (collectively, the "Class"), on the one hand, and Google Inc. ("Google" or "Defendant," and together with Plaintiffs, the "Parties"), on the other hand. The Parties intend this Agreement to fully, finally, and forever resolve, discharge, and settle the Released Claims (as the term is defined below), subject to the terms and conditions of this Agreement, and subject to final approval of the Court.

WHEREAS, on October 25, 2010, Plaintiff Gaos brought a putative class action against Google in the Northern District of California, captioned *Gaos v. Google Inc.*, Case No. 5-10-CV-04809, that was initially assigned to Chief Judge Ware (the "Gaos Action"), alleging violations of certain federal and state laws;

WHEREAS, following the April 7, 2011 dismissal of that initial complaint, Plaintiff Gaos filed the First Amended Complaint on May 2, 2011, alleging similar claims;

WHEREAS, the case was re-assigned from Chief Judge Ware to Judge Davila;

WHEREAS, following the March 29, 2012 dismissal of the First Amended Complaint's state-law claims for lack of standing, Plaintiff Gaos, together with Plaintiff Italiano (the "Gaos Plaintiffs"), filed the operative Second Amended Complaint ("Gaos Complaint") alleging (i) violations of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*; (ii) breach of contract; (iii) violations of California's Unfair Competition Law, Cal. Bus. & Prof Code § 17200; and (iv) unjust enrichment;

WHEREAS, Google's motion to dismiss the Gaos Complaint is still pending before this Court;

WHEREAS, on February 29, 2012, Plaintiff Priyev brought a putative class action in the United States District Court, Northern District of Illinois, Eastern Division, against Google, formerly captioned *Priyev v. Google Inc.*, Case No. 12-CV-01467 (the "Priyev Action" and, together with the Gaos Action, the "Actions"), alleging violations of certain federal and state laws;

WHEREAS, following Google's April 30, 2012 motion to dismiss the Priyev Action, Plaintiff Priyev twice sought and obtained leave to amend his initial complaint, and on August 10, 2012 filed the operative Second Amended Class Action Complaint ("Priyev Complaint") alleging (i) breach of contract; (ii) breach of contract by breach of covenant of good faith and fair dealing; (iii) breach of contract implied in law; (iv) violations of the Electronic Communications Privacy

Act; (v) violations of California's Unfair Competition Law; and (vi) seeking declaratory judgment and corresponding injunctive relief;

WHEREAS, on August 28, 2012, the Priyev Action was transferred from the Northern District of Illinois to the Northern District of California and is now docketed as Case No. 5-13-00093, and, after Plaintiff Priyev declined consent to assignment to Magistrate Judge Grewal, the case has been assigned to Judge Koh;

WHEREAS, Priyev intends to file a notice of related case to the Gaos Action to seek transfer of the Priyev Action to Judge Davila, and both Google and the Gaos Plaintiffs intend to support the transfer request;

WHEREAS, the Parties engaged in direct negotiations during 2012 in each of the Actions and participated in an all-day mediation before Randall Wulff of Wulff, Quinby & Sochynsky on January 28, 2013;

WHEREAS, Plaintiffs have conducted meaningful investigation and analyzed and evaluated the merits of the claims made to date against Google in the Actions, and the impact of this Agreement on Plaintiffs and the Class, and based upon that analysis and the evaluation of a number of factors, and recognizing the substantial risks of continued litigation, including the possibility that the Actions, if not settled now, might not result in any recovery whatsoever for the Class,

or might result in a recovery that is less favorable to the Class, and that any such recovery would not occur for several years, Plaintiffs are satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate, and that this Agreement is in the best interest of the Class; and

WHEREAS, Google has denied and continues to deny each allegation and all charges of wrongdoing or liability of any kind whatsoever asserted or that could have been asserted in the Actions; and

WHEREAS, while Plaintiffs believe these claims possess substantial merit and while Google vigorously disputes such claims, without in any way agreeing as to any fault or liability, the Parties have agreed to enter into this Agreement as an appropriate compromise of the Class claims to put to rest all controversy and to avoid the uncertainty, risk, expense, and burdensome, protracted, and costly litigation that would be involved in prosecuting and defending the Actions;

NOW, THEREFORE, it is hereby agreed by the Parties that, in consideration for the undertakings, promises, and payments set forth in this Agreement and upon the entry by the Court of a Final Order and Judgment approving and directing the implementation of the terms and conditions of this Agreement, the Actions shall be settled and compromised upon the terms and conditions set forth below.

1. DEFINITIONS

Whenever the following capitalized terms are used in this Agreement and in the attached exhibits (in addition to any definitions elsewhere in this Agreement), they shall have the following meanings:

1.1 "Actions" means both the Priyev Action and the Gaos Action, as those terms are defined below.

1.2 "Agreed-Upon Disclosures" means the additional disclosures that Google has agreed to make to its "FAQs" webpage currently located at http://www.google.com/policies/privacy/faq/, the "Key Terms" webpage currently located at http://www.google.com/policies/privacy/key-terms/, and the "Privacy FAQ for Google Web History" web page currently located at https://support.google.com/accounts/bin/answer.py?hl=en&answer=54050, pursuant to Paragraph 3.1.

1.3 "Agreement" means this Settlement Agreement and Release, including all exhibits.

1.4 "Class" means all Persons in the United States who submitted a search query to Google at any time during the period commencing on October 25, 2006, up to and including the date of the Notice of Proposed Class Action Settlement pursuant to the Notice Plan. This term wholly encompasses, but is not limited to, the Classes set forth in Paragraph 72 of the

Priyev Complaint and in Paragraphs 97, 98, and 99 of the Gaos Complaint, respectively.

1.5 "Class Administrator" means a third-party class action settlement administrator to be selected by the Parties' mutual agreement and whose responsibilities will include overseeing and implementing the Notice Plan and managing the dissemination of funds from the Common Fund until all financial obligations under this Agreement have been satisfied and no funds remain in the Common Fund.

1.6 "Class Counsel" means Kassra Nassiri of Nassiri & Jung LLP, Michael Aschenbrener of Aschenbrener Law, P.C., and Ilan Chorowsky of Progressive Law Group, LLC.

1.7 "Class Member" means any person who qualifies under the definition of "Class," excluding: (i) Google, its subsidiaries and affiliates, officers, and directors; (ii) the judge(s) to whom these cases are assigned and any member of the judge's or judges' immediate family; (iii) Persons who have settled with and released Google from individual claims substantially similar to those alleged in the Gaos Complaint and the Priyev Complaint; and (iv) Persons who submit a valid and timely Request for Exclusion pursuant to Paragraph 6.1.

1.8 "Class Representatives" or "Plaintiffs" means named Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev, acting either individually or through Class Counsel.

1.9 "Combined Action" means the action consolidating the Gaos Action and the Priyev Action, as set forth in Paragraph 2.3.

1.l0 "Court" means the United States District Court for the Northern District of California.

1.11 "*Cy Pres* Recipients" means any of the following entities (and any other mutually-agreed upon entity) that is approved by the Court for a *cy pres* distribution pursuant to Paragraph 3.3: Berkman Center for Internet and Society (Harvard Law School), Center for Internet and Society (Stanford Law School), MacArthur Foundation, and AARP, Inc.

1.12 "Day" or "days" refers to calendar days.

1.13 "Effective Date" means the first date after a Final Order and Judgment is entered in the Action granting approval to the terms of this Agreement without modification (unless any modification is accepted by all Parties to this Agreement, pursuant to Paragraph 13.3) *and* either of the following events also has occurred (i) the date upon which the time to appeal the Final Order and Judgment expires with no appeal having been filed; or (ii) the date upon which any such appeal of the Final Order and Judgment is

successfully resolved such that, in either case, the Final Order and Judgment approving this Agreement is no longer subject to any challenge on direct appeal.

1.14 "Fee Award" means any attorneys' fees, reimbursement of expenses, and other costs awarded by the Court to Class Counsel.

1.15 "Final Approval Hearing" means the hearing before the Court where (i) the Parties request that the Court approve this Agreement as fair, reasonable, and adequate; (ii) the Parties request that the Court enter its Final Order and Judgment in accordance with this Agreement; and (iii) Class Counsel request approval of their petition for reasonable attorneys' fees and expenses, as well as any requested incentive award to the Class Representatives.

1.16 "Final Order and Judgment" means the order entered by the Court, in a form that is mutually agreeable to the Parties, approving this Agreement as fair, reasonable, adequate, and in the best interest of the Class as a whole, and making such other findings and determinations as the Court deems necessary and appropriate to effectuate the terms of this Agreement, without modifying any terms of this Agreement that either Party deems material.

1.17 "Gaos Action" means *Gaos v. Google Inc.,* No. 5-10-CV-04809, filed on October 25, 2010 in the United States District Court for the Northern District of California.

1.18 "Gaos Complaint" means the Second Amended Complaint filed in the Gaos Action on May 1, 2012 and available on the online docket at ECF No. 39.

1.19 "Google" means Google Inc. and its affiliates, agents, assigns, attorneys, directors, divisions, employees, officers, or other representatives.

1.20 "Google AdWords" means Google's advertising service currently described at http://adwords.google.com.

1.21 "Google Analytics" means Google's web analytics service currently described at http://www.google.com/analytics/.

1.22 "Google Releasees" means Google and any of Google's current or former administrators, affiliates, agents, assigns, attorneys, beneficiaries, branches, contractors, directors, divisions, employee benefit plans, employees, insurers, investors, joint venturers, members, officers, parents, predecessors, related entities, representatives, servants, shareholders, subsidiaries, successors, trustees, units, and all other individuals and entities acting on Google's behalf.

1.23 "Google Search" means the search engine accessible at www.google.com.

1.24 "Google Web History" means a product available to Google account holders, currently described at http://support.google.com/accounts/bin/topic.py?hl=en&topic= 14148.

1.25 "Incentive Award'" means any amount awarded by the Court to the Class Representatives for their time and effort in bringing these Actions and for serving as Class Representatives.

1.26 "Notice Plan" means the content of the notice of this Agreement and the agreed upon program by which that notice will be disseminated.

1.27 "Notice of Proposed Class Action Settlement" means the notice as described in the Notice Plan.

1.28 "Opt-Out Deadline" means the deadline for a Class Member to properly submit a Request for Exclusion as set forth in Paragraph 6.1 of this Agreement and in the Preliminary Approval Order and which shall be no more than sixty (60) days from the completion date of the Notice of Proposed Class Action Settlement.

1.29 "Party" means any one of the Plaintiffs or Google, and "Parties" means Plaintiffs and Google.

1.30 "Person" means an individual or legal entity, including an association, or his, her, or its respective successors or assigns.

1.31 "Preliminary Approval Order" means the order issued by this Court (i) granting preliminary approval of this Agreement; (ii) provisionally certifying the Class for settlement purposes; (iii) appointing Plaintiffs as Class Representatives and their counsel as Class Counsel; (iv) approving the form and manner of the Notice Plan and appointing a Class Administrator; (v) approving the proposed *Cy Pres* Recipients; (vi) establishing deadlines for Requests for Exclusion and the filing of objections to the proposed settlement contemplated by this Agreement; (vii) finding that Google has complied with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715; and (viii) scheduling the Final Approval Hearing.

1.32 "Priyev Action" means *Priyev v. Google Inc.,* No. 12-CV-01467, initially filed on February 29, 2012 in the United States District Court for the Northern District of Illinois and now transferred to the United States District Court for the Northern District of California.

1.33 "Priyev Complaint" means the Second Amended Class Action Complaint filed in the Priyev Action on August 10, 2012 and available on the online docket at ECF No. 40.

1.34 "Released Claims" means any and all claims that any Class Member may now or at any time have up to the date of preliminary approval of this Agreement, whether or not known or existing at

the time of this Agreement, arising out of the subject matter giving rise to the claims in the Actions.

1.35 "Releasing Party" means Plaintiffs and all Class Members.

1.36 "Request for Exclusion" means the form attached as Exhibit B to this Agreement which must be completed and returned in the manner and within the time period specified in Paragraph 6.1.

1.37 "Settlement Amount" means the total sum that Google will pay in connection with this Agreement, as described in Paragraph 3.2.

1.38 "Settlement Website" means the third-party website, referred to in Paragraph 5.5, created and maintained by the Class Administrator to provide, among other things, Notice of Proposed Class Action Settlement and containing the operative complaint(s), and neutral information about this Agreement and the Notice of Proposed Class Action Settlement.

2. SETTLEMENT PURPOSES ONLY

2.1 This Agreement is for settlement purposes only, and to the fullest extent permitted by law, neither the fact or content of this Agreement or its attachments, nor any action based on it, shall constitute, be construed as, or be admissible in evidence as an admission of the validity of any claim, of any fact

alleged by Plaintiffs in the Actions or in any other pending or subsequently filed action, or of any wrongdoing, fault, violation of law, or liability of Google. Likewise, neither the fact or content of this Agreement, nor any action based on it, shall constitute, be construed as, or be admissible in evidence as an admission by any of the Parties of the validity or lack thereof of any claim, allegation, or defense asserted in these Actions, the Combined Action, or in any other action.

2.2 Subject to approval by the Court, Google conditionally agrees and consents to certification of the Class for settlement purposes only and within the context of this Agreement only. If this Agreement, for any reason, is not approved or is otherwise terminated, Google reserves the right to assert any and all objections and defenses to certification of a class, and neither this Agreement nor any order or other action relating to this Agreement shall be offered as evidence in support of a motion to certify a class for a purpose other than settlement pursuant to this Agreement.

2.3 The Parties agree that, within ten (10) days of all Parties signing this Agreement, Plaintiffs in the Gaos Action and the Priyev Action will seek to consolidate the Actions into a single Combined Action, with Plaintiffs filing a consolidated complaint to the extent appropriate to encompass the definition of the Class (and not reducing the scope of the substantive allegations from those set forth in the Actions).

3. RELIEF

3.1 Google agrees to make certain Agreed-Upon Disclosures concerning search queries on or before the date of Notice of Proposed Class Action Settlement pursuant to the Notice Plan. These Agreed-Upon Disclosures will appear on Google's "FAQs" webpage currently located at http://www.google.com/policies/privacy/faq/, "Key Terms" webpage currently located at http://www.google.com/policies/privacy/key-terms/, and the "Privacy FAQ for Google Web History" webpage currently located at https://support.google.com/accounts/bin/answer.py?hl=en&answer=54050, as further described in Exhibit A. If a subsequent change to Google's services renders the Agreed-Upon Disclosures inaccurate, Google may make future changes to its disclosures to ensure continued accuracy. Likewise, Google may change the form or placement of the disclosures as part of future changes to its privacy policies, provided that the substance remains substantially the same and that it is incorporated into the applicable terms of service or privacy policy and is reasonably accessible to the user. Google will not be required or requested to make any changes to its homepage www.google.com or to the practices or functionality of Google Search, Google Ad Words, Google Analytics or Google Web History.

3.2 Google agrees to and shall deposit in an interest-bearing bank account designated and controlled by the Class Administrator (the "Common

Fund") the total sum of eight million five hundred thousand dollars ($8,500,000.00) (the "Settlement Amount"). That Settlement Amount will represent the full payment to be made by Google under this Agreement, and the Class Administrator will draw from the Common Fund to cover all obligations with respect to costs related to this Agreement, including the expenses of the Class Administrator, the Notice Plan, payments to *Cy Pres* Recipients, any Incentive Awards, the Fee Award, and any other administrative fees and expenses in connection with this Agreement; provided, however, that the Parties must approve any payments to the Class Administrator. The first installment, of one million dollars ($ 1,000,000.00) shall be deposited within fourteen (14) business days of entry of the Preliminary Approval Order. The remainder shall be deposited within twenty-one (21) days of the Effective Date. If this Agreement is terminated pursuant to Section 11, the Class Administrator shall return all funds to Google within ten (10) days of the termination date; provided, however, that the Class Administrator need not return any funds already spent on notice and on reasonable Class Administrator expenses before the termination date. Other than the Settlement Amount, Google shall have no financial obligations to Plaintiffs, the Class, the *Cy Pres* Recipients, or the Class Administrator under this Agreement.

3.3 The *cy pres* amount will consist of the Settlement Amount, including any accrued interest, and minus any expenses for the Class Administrator, the

Notice Plan, the Fee Award, any Incentive Award, and any other administrative and notice costs or other expenses in connection with this Agreement. As a condition to receiving the payment, each *Cy Pres* Recipient must agree to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet. If any *Cy Pres* Recipient does not agree to these conditions, then its portion will be distributed pro rata to the other identified recipients; if no recipient agrees to the conditions, or if the Court so requires, the Parties shall meet and confer to identify other appropriate recipients. The Class Administrator shall make payments to the *Cy Pres* Recipients within sixty (60) days after the Effective Date.

3.4 Because the *Cy Pres* Recipients will receive the remaining amounts due after all other payment obligations listed in Paragraph 3.2 are met, no portion of the Settlement Amount or interest thereon will revert to Google.

3.5 Under no circumstances will Google have any liability for taxes or the tax expenses of any Person that receives a portion of the Settlement Amount under this Agreement to the extent permitted by applicable law.

4. SUBMISSION FOR PRELIMINARY APPROVAL

4.1 Within the later of thirty (30) days of the execution of this Agreement by both Parties and ten (10) days after an order consolidating the Actions, Class Counsel shall submit this Agreement to the Court and request that the Court enter the Preliminary Approval Order in a form mutually agreed to by all parties.

4.2 Class Counsel will take any acts reasonably necessary to carry out this Settlement Agreement's expressed intent.

5. NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

5.1 The Class Administrator will be allocated up to one million dollars ($l,000,000.00) out of the Settlement Amount to implement a Notice Plan, subject to the Parties' agreement in consultation with the Class Administrator and further subject to Court approval as part of the Preliminary Approval Order and consistent with the requirements of due process. The Parties shall agree to the Notice Plan before submission of this Agreement for preliminary approval. The Notice Plan will not take the form of a bulk email message to Class Members.

5.2 The specific text and content of the Notice Plan and Notice of Proposed Class Action Settlement

will be mutually agreed upon by the Parties, subject to Court approval.

5.3 The Class Administrator will oversee and implement the Notice Plan. Although the Class Administrator may purchase commercial services at standard rates from Google as part of the Notice Plan, Google has no obligation to otherwise facilitate delivery of the Notice of Proposed Class Action Settlement. For example, Google will have no obligation to send bulk email messages to any Person or group of Persons. All costs associated with the Notice Plan and Class Administrator will be paid by Google as part of the overall payment obligation in Paragraph 3.2.

5.4 The Notice Plan will be implemented, and all announcements at least initially posted on the Settlement Website, within thirty (30) days of entry of the Preliminary Approval Order.

5.5 The Settlement Website shall (i) post, without limitation, the operative complaint(s), this Settlement Agreement, and Long Form Notice and Opt-Out Form; (ii) notify Class Members of their rights to object or opt out; (iii) inform Class Members that they should monitor the Settlement Website for developments; and (iv) notify Class Members that no further notice will be provided to them once the Court enters the Final Order and Judgment, other than through updates on the Settlement Website. The Settlement Website will remain active until at least thirty (30)

days after the Final Settlement Date. The Class Administrator will establish an email account and P.O. Box to which Class Members may submit questions regarding the Settlement. The Class Administrator will monitor the email account and P.O. Box and respond promptly to administrative inquiries received from Class Members and may direct substantive inquiries to Class Counsel.

5.6 Within ten (10) days after filing of this Settlement Agreement with the Court, the Class Administrator shall notify the appropriate state and federal officials of this Agreement pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

6. CLASS MEMBERS' RIGHT OF EXCLUSION/INCLUSION

6.1 A Class Member may request exclusion from the Class up until the Opt-Out Deadline. To request exclusion, the Class Member must complete, sign, and mail to the Class Administrator a Request for Exclusion, using the form attached as Exhibit B. The Request for Exclusion must be signed by the Class Member seeking exclusion under penalty of perjury. The Request for Exclusion must be postmarked on or before the Opt-Out Deadline. Any Person who submits a valid and timely Request for Exclusion shall not be entitled to relief under, and shall not be affected by, this Agreement or any relief provided by this Agreement.

6.2 The Parties shall have the right to challenge the timeliness and validity of any Request for Exclusion. The Court shall determine whether any contested exclusion request is valid.

6.3 Within ten (10) days after the Opt-Out Deadline, the Class Administrator will provide the Parties a list of all Persons who opted out by validly requesting exclusion.

7. OBJECTIONS

7.1 Any Class Member who does not submit a valid and timely Request for Exclusion may object to the fairness, reasonableness, or adequacy of this Agreement. Class Members may not seek to exclude themselves from the Class ***and*** submit an objection to this Agreement.

7.2 No later than twenty-one (21) days before the Final Approval Hearing, any Class Member who wishes to object to any aspect of this Agreement must send to the Class Administrator, Class Counsel and Google's counsel, and file with the Court, a written statement of the objection(s). The written statement of the objection(s) must include (i) a detailed statement of the Class Member's objection(s), as well as the specific reasons, if any, for each objection, including any evidence and legal authority the Class Member wishes to bring to the Court's attention and any evidence the Class Member wishes to introduce in support of his/her objection(s); (ii) the Class Member's full

name, address and telephone number; and (iii) information demonstrating that the Class Member is entitled to be included as a member of the Class.

7.3 Class Members may raise an objection either on their own or through an attorney hired at their own expense. If a Class Member hires an attorney other than Class Counsel to represent him or her, the attorney must (i) file a notice of appearance with the Court no later than twenty-one (21) days before the Final Approval Hearing or as the Court otherwise may direct, and (ii) deliver a copy of the notice of appearance on Class Counsel and Google's counsel, no later than twenty-one (21) days before the Final Approval Hearing. Class Members, or their attorneys, intending to make an appearance at any hearing relating to this Agreement, including the Final Approval Hearing, must deliver to Class Counsel and Google's counsel, and file with the Court, no later than twenty-one (21) days before the date of the hearing at which they plan to appear, or as the Court otherwise may direct, a notice of their intention to appear at that hearing.

7.4 Any Class Member who fails to comply with the provisions of the preceding subsections shall waive and forfeit any and all rights he or she may have to appear separately and/or object, and shall be bound by all the terms of this Agreement and by all proceedings, orders, and judgments in the Actions.

8. EXCLUSIVE REMEDY; DISMISSAL OF ACTIONS; JURISDICTION OF COURT

8.1 This Agreement shall be the sole and exclusive remedy for any and all Released Claims. Upon entry of the Final Order and Judgment, each Class Member shall be barred from initiating, asserting, or prosecuting any Released Claims against Google. If any Class Member attempts to prosecute an action in contravention of the Final Order and Judgment and this Agreement, counsel for any of the Parties may forward this Agreement and the Final Order and Judgment to such Class Member and advise him, her, or it of the releases provided pursuant to this Agreement.

8.2 Upon entry of Final Order and Judgment, the Combined Action shall be dismissed with prejudice.

8.3 The Court retains exclusive and continuing jurisdiction over the Combined Action and all Parties and Class Members to interpret and enforce the terms, conditions, and obligations of this Agreement.

9. RELEASES

9.1 Upon entry of the Final Order and Judgment, and regardless of whether any Class Member executes and delivers a written release, each Plaintiff and each Class Member (each of whom is a Releasing

Party) shall be deemed to waive, release and forever discharge Google and the Google Releasees from all Released Claims, whether or not known. Each Releasing Party is deemed to provide the waiver, release and discharge on his, her, or its own behalf, as well as on behalf of any administrators, affiliates, agents, assigns, attorneys, beneficiaries, contractors, dependents, descendants, directors, employees, executors, heirs, insurers, investors, joint venturers, members, officers, parents, predecessors, related entities, representatives, servants, shareholders, subsidiaries, successors, underwriters, units, and anyone else who could bring any Released Claim on his, her, or its behalf or based on a transfer of rights—by law, contract, or otherwise—from any Releasing Party.

9.2 The release described in Paragraph 9.1 is, and shall remain, a full and complete release, notwithstanding the discovery or existence of any additional or different facts or claims existing before the Effective Date. The Releasing Parties shall, by operation of the Final Order and Judgment, expressly waive the provisions of California Civil Code § 1542 (and all other similar provisions of law) to the full extent that these provisions may be applicable to this release. California Civil Code § 1542 provides:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,**

WHICH IF KNOWN TO HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Releasing Parties shall, by operation of the Final Order and Judgment, be deemed to assume the risk that facts additional, different, or contrary to the facts which each believes or understands to exist, may now exist or may be discovered after the release set forth in this Agreement becomes effective, and the Releasing Parties shall, by operation of the Final Order and Judgment, be deemed to have agreed that any such additional, different, or contrary facts shall in no way limit, waive, or reduce the foregoing releases, which shall remain in full force and effect.

9.3 Nothing in this Agreement shall be construed in any way to prejudice or interfere with any Releasing Party's ability to pursue his, her, or its rights under any applicable insurance policies.

10. CLASS COUNSEL FEES AND COSTS AND INCENTIVE AW ARDS

10.1 Plaintiffs may apply to the Court seeking a reasonable proportion of the Settlement Amount as payment of any reasonable attorneys' fees and costs ("Fee Award"). The Fee Award will be paid as part of the Settlement Amount specified in Paragraph 3.2. It is not a condition of this Settlement that any particu-

lar amount of attorneys' fees, costs or expenses or incentive awards be approved by the Court, or that such fees, costs, expenses or awards be approved at all. Any order or proceeding relating to the amount of any award of attorneys' fees, costs, or expenses or inventive awards, or any appeal from any order relating thereto, or reversal or modification thereof, shall not operate to modify, terminate or cancel this Settlement Agreement, or affect or delay the finality of the Final Order and Judgment, except that any modification, order or judgment cannot result in Google's overall obligation exceeding the Settlement Amount specified in Paragraph 3.2. The Class Administrator will distribute from the Common Fund any Fee Award approved by the Court within thirty-one (31) days of the Effective Date. The Class Administrator shall wire the amount awarded in the Fee Award to the trust account of Nassiri & Jung LLP, on behalf of all Class Counsel; Nassiri & Jung LLP shall be responsible for distributing the Fee Award among Class Counsel.

10.2 In recognition of Plaintiffs' efforts on behalf of the Class, and subject to Court approval, Class Counsel may apply to the Court for an award for each Plaintiff of up to $5,000 each, as appropriate compensation for their time and effort expended in serving as Class Representatives. The Incentive Award will be paid as part of the Settlement Amount specified in Paragraph 3.2. It shall be paid contemporaneously and in the same manner as any Fee Award, as specified in § 10.l.

10.3 Except as otherwise provided in this section, each Party will bear its own costs, including attorneys' fees, incurred in connection with the Actions.

11. TERMINATION OF THE AGREEMENT

11.1 The performance of this Agreement is expressly contingent upon achieving the Effective Date. This includes both (i) the entry of the Preliminary Approval Order approving this Agreement, including the Notice Plan and the selection of the *Cy Pres* Recipients, and the Final Order and Judgment approving this Agreement and the expiration of all appeal periods and appeal rights without modification to the Final Order and Judgment that any Party deems material. If the Court fails to issue either (i) the Preliminary Approval Order or (ii) the Final Order and Judgment approving this Agreement without modification that any Party deems material following conclusion of the Final Approval Hearing, or if the circumstances in Paragraph 11.2 are met, this Agreement will be deemed terminated.

11.2 If the Final Order and Judgment is vacated, modified in a manner deemed material by any Party, or reversed, in whole or in part, this Agreement will be deemed terminated (except with respect to rulings on any Fee Award), unless all Parties who are adversely affected thereby, in their sole discretion within thirty (30) days of receipt of such ruling, provide written notice through counsel to Class Counsel

and Defendant of their intent to proceed with this Agreement as modified by the Court or on appeal.

11.3 If this Agreement is deemed terminated pursuant to any provision in Paragraph 11, it will have no force or effect whatsoever, shall be null and void, and will not be admissible as evidence for any purpose in any pending or future litigation in any jurisdiction.

12. CONFIDENTIALITY

12.1 Other than responses to inquiries from governmental entities or as necessary to comply with federal and state tax and securities laws, no Party shall initiate any publicity relating to or make any public comment regarding this Agreement until a motion seeking the Preliminary Approval Order is filed with the Court.

12.2 Unless and until all Parties execute this Agreement and present it to the Court in a motion seeking the Preliminary Approval Order, the Parties agree that all terms of this Agreement will remain confidential and subject to Federal Rule of Evidence 408.

13. MISCELLANEOUS PROVISIONS

13.1 Google will provide Plaintiffs with confirmatory discovery no later than thirty (30) days after Preliminary Approval. The confirmatory discovery

shall consist of a declaration from the appropriate Google personnel consisting of an explanation of when search queries are transmitted to third parties via referrer headers, any differences for users signed in to a Google account or using SSL, and when those differences arose.

13.2 This Agreement, including all attached exhibits, shall constitute the entire agreement among the Parties (and covering the Parties and the Class) with regard to the subject matter of this Agreement and shall supersede any previous agreements and understandings between the Parties.

13.3 This Agreement may not be changed, modified or amended except in writing signed by Class Counsel and Google's counsel, subject to Court approval if required.

13.4 Each Party represents and warrants that it enters into this Agreement of his, her, or its own free will. Each Party is relying solely on its own judgment and knowledge and is not relying on any statement or representation made by any other Party or any other Party's agents or attorneys concerning the subject matter, basis, or effect of this Agreement.

13.5 This Agreement has been negotiated at arm's length by Class Counsel and Google's counsel. In the event of any dispute arising out of this Agreement, or in any proceeding to enforce any of the terms of this Agreement, no Party shall be deemed to be the

drafter of this Agreement or of any particular provision or provisions, and no part of this Agreement shall be construed against any Party on the basis of that Party's identity as the drafter of any part of this Agreement.

13.6 The Parties agree to cooperate fully and to take all additional action that may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

13.7 This Agreement shall be binding upon and inure to the benefit of all the Parties and Class Members, and their respective representatives, heirs, successors, and assigns.

13.8 The headings of the sections of this Agreement are included for convenience only and shall not be deemed to constitute part of this Agreement or to affect its construction.

13.9 The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to this Agreement.

13.10 Prior to pursuing relief or submitting any dispute relating to this Agreement or the Actions to the Court, the Parties and Class Counsel agree to mediate the dispute before Randall Wulff of Wulff, Quinby & Sochynsky, located at 1901 Harrison Street, Suite 1420, Oakland, California, 94612.

13.11 All claims arising out of or relating to this Agreement will be litigated exclusively in the federal or state courts of Santa Clara County, California, U.S.A. The Parties (i) irrevocably submit to the personal jurisdiction of; (ii) waive any objection to venue in; and (iii) waive any objection to the convenience of litigating in the above courts in any claim arising out of or related to this Agreement.

13.12 Any notice, instruction, court filing, or other document to be given by any Party to any other Party shall be in writing and delivered personally or sent by registered or certified mail, postage prepaid, or overnight delivery service to the respective representatives identified below or to other recipients as the Court may specify. As of the date of this Agreement, these respective representatives are as follows:

For the Class:

NASSIRI & JUNG LLP
c/o Kassra P. Nassiri
47 Kearny Street, Suite 700
San Francisco, CA 94108

For Google:

MAYER BROWN LLP
c/o Edward D. Johnson
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112

13.13 The Parties agree to work in good faith to effectuate the settlement proposed in this Agreement. This Agreement shall be dissolved, and shall be null and void, if the Parties do not execute this Agreement, if the Court does not preliminarily or finally approve this Agreement, or if this Agreement does not become final and effective due to any ruling on any appeals or remand from any appeals. If the Court does not approve this Agreement in its entirety (except as provided in Paragraph 10.1), or if the approval is not upheld in its entirety on any appeals and remand from any appeals, this Agreement cannot be enforced against either Party; in other words, this Agreement's terms are not separable unless otherwise subsequently agreed in writing or except as provided in Paragraph 10.1.

13.14 The Parties each represent and warrant that they have not sold, assigned, transferred, conveyed, subrogated, or otherwise disposed of any claim or demand covered by this Agreement. If a Class Member has sold, assigned, transferred, conveyed, subrogated or otherwise disposed of any claim or demand, the Person that acquired such claim or demand is bound by the terms of this Agreement to the same extent as the Class Member would have been but for the sale, assignment, transfer, conveyance, or other disposition.

13.15 The signatories to this Agreement represent that they have been duly authorized to execute this Agreement on behalf of the Parties they purport

to represent. This Agreement may be executed by the Parties in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Dated: March 16, 2013 Plaintiff Paloma Gaos

/s/ Paloma Gaos
Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

_____
Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____
Individually and in his representative capacity

Dated: March 15, 2013 NASSIRI & JUNG LLP

/s/ Kassra Nassiri
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano.

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

_____
Michael Aschenbrener
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

_____
Individually and in her
representative capacity

Dated: March 15, 2013 Plaintiff Anthony Italiano

__/s/ Anthony Italiano____
Individually and in his
representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____
Individually and in his
representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

_____

Kassra Nassiri
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

_____

Michael Aschenbrener
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

_____

Individually and in her
representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

_____

Individually and in his
representative capacity

Dated: March 16, 2013 Plaintiff Gabriel Priyev

/s/ Gabriel Priyev
Individually and in his representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

_____
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

_____
Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

_____
Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

_____
Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____
Individually and in his representative capacity

Dated: March 15, 2013 NASSIRI & JUNG LLP

/s/ Kassra Nassiri
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

_____
Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

_____
Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

_____
Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____
Individually and in his representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

_____
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March 15, 2013 ASCHENBRENER LAW, P.C.

/s/ Michael Aschenbrener
Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March 15, 2013 PROGRESSIVE LAW GROUP, LLC.

/s/ Ilan Chorowsky
Ilan Chorowsky
on behalf of Plaintiff Gabriel Priyev

Dated: March __, 2013 GOOGLE, INC.

_____
Kent Walker
SVP and General Counsel

Dated: March __, 2013 PROGRESSIVE LAW GROUP, LLC.

/s/ Ilan Chorowsky
Ilan Chorowsky
on behalf of Plaintiff Gabriel Priyev

Dated: March 15, 2013 GOOGLE, INC.

/s/ Kent Walker
Kent Walker
SVP and General Counsel

EXHIBIT A TO SETTLEMENT AGREEMENT

1. Content for Disclosure on Google's "FAQ" webpage:

A disclosure in substantially the same content and form as the following shall be included on Google's "FAQ" webpage currently located at https://www.google.com/policies/privacy/faq/:

"Are my search queries sent to websites when I click on Google Search results?

In some cases, yes. When you click on a search result in Google Search, your web browser also may send the Internet address, or URL, of the search results page to the destination webpage as the HTIP Referrer [preceding term will be a hyperlink to the Key Terms page, located at https://www.google.com/intl/en/policies/privacy/key-terms/]. The URL of the search results page will sometimes contain the search query you entered. If you are using SSL Search (Google's encrypted search functionality) or if you are logged in to your Google Account, under most circumstances your search terms will not be sent as part of the URL in the HTTP Referrer. There are some exceptions to this behavior. For example, if you click on an ad appearing on the search results page, your browser will continue to send the search terms in the HTIP Referrer to help advertisers to improve the relevancy of the ads they present to you. More information on SSL Search can be found

here [preceding term will be a hyperlink to: http://suppo1t.google.com/websearch/bin/answer.py?hl=en&answe1= 173733]. Google may provide Google Analytics users with the search query or with the information contained in the HTTP Referrer."

2. Content for Disclosure on Google's "Key Terms" webpage:

A disclosure in substantially the same content and form as the following shall be included on Google's "Key Terms" webpage currently located at https://www.google.com/intl/en/policies/privacy/key-terms/:

"HTTP Referrer"

An HTTP Referrer is information transmitted to a destination webpage by a web browser, typically when you click a link to that webpage. The HTTP Referrer contains the URL of the last
webpage the browser visited."

3. Content for Disclosure on Google's "Privacy FAQ for Google Web History" webpage:

A disclosure in substantially the same content and form as the following shall be included on the "Privacy FAQ for Google Web History" webpage currently located at https://support.google.com/accounts/bin/an-

swer.py?hl=en&answet=54050 in a separate paragraph set off from the existing answer to the FAQ: "How do you use the information you collect when I use Google Web History":

"For more information on how Google handles search queries generally, see the Privacy Policy FAQ." [preceding term will be a hyperlink to the Privacy Policy FAQ (available at available at https://www.google.com/policies/privacy/faq/)].

Theodore H. Frank (SBN 196332)
CENTER FOR CLASS ACTION FAIRNESS
1718 M Street NW
No. 236
Washington, DC 20036
Voice: (703) 203-3848
Email: tfrank@gmail.com

Attorneys for Objectors Melissa Holyoak and Theodore H. Frank

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION	Case No. 5:10-cv-04809-EJD
	OBJECTION OF MELISSA HOLYOAK AND THEODORE H. FRANK
MELISSA HOLYOAK and THEODORE H. FRANK, Objectors.	Date: August 29, 2014 Time: 9:00 a.m. Courtroom: 4 Judge: Hon. Edward J. Davila

INTRODUCTION

Plaintiffs filed a complaint alleging trillions of dollars in statutory damages on behalf of a class consisting of more than one hundred million people, and then settled it for $8.5 million, of which the class members will see not one penny. Instead, the entire net settlement fund will go third-party *"cy pres"* recipients, even though it would be practicable to allow class members to recover through a claims-made process and/or a sampling lottery method. Moreover, several of the proposed *cy pres* recipients have prior relationships with class counsel or defendants. Preexisting relationships with the defendant undermine the value of the settlement to the class. Preexisting relationships with class counsel qualify as improper conflicts of interest. These defects render the settlement substantively unfair. *See infra* §§ III-IV.

Procedurally, notice to the class is inadequate under this proposed settlement because it fails to directly notify those class members for whom the defendant has contact information, thus depriving them of due process. The settlement makes objecting or opting out of the settlement artificially and needlessly burdensome by requiring paper-mail printouts from a class of internet users. *See infra* §§ VII-VIII.

The proposed settlement structure suggests that class certification is untenable. If in fact distributions to class members are impossible, then a class action

is not superior to other methods of adjudicating the dispute. *See infra* § V.

Finally, in the alternative, if the Court overrules all the above objections, the Rule 23(h) request is excessive and should be reduced. *See infra* § VI.

I. The objectors are members of the class.

Objectors Theodore H. Frank and Melissa Holyoak are United States residents who have submitted at least one search query to Google between October 26, 2006 and the present. *See* Declaration of Theodore H. Frank ¶3; Declaration of Melissa Holyoak ¶3. They are therefore members of the settlement class with standing to object to the settlement. Fed. R. Civ. P. 23(e)(5).

Frank's mailing address is 1718 M Street NW, #236, Washington DC 20036, his phone number is (703) 203-3848, and his email address is tfrank@gmail.com. Frank Decl. ¶2. Holyoak's mailing address is 1718 M Street NW, #236, Washington DC 20036, her phone number is (573) 823-5377, and her email address is melissaholyoak@gmail.com. Holyoak Decl. ¶2. Frank represents Holyoak, and himself *in pro per*. As discussed in their contemporaneously-filed Notice of Intent to Appear, Frank plans to attend the fairness hearing in this case, where he wishes to discuss matters raised in this objection. Objectors do not intend to call any witnesses at the fairness hearing,

but reserve the right to make use of all documents entered on to the docket by any settling party or objector. Objectors reserve the right to cross-examine any witnesses who testify at the hearing in support of final approval. Objectors join the objections of any other objectors or *amici* to the extent those objections are not inconsistent with this one.

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

A district court must act as a "fiduciary for the class," "with a jealous regard" for the rights and interests of absent class members. *In re Mercury Interactive Corp*., 618 F.3d 988, 994–95 (9th Cir. 2010) (internal quotation and citation omitted); *see also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 623 (1997) ("Rule 23(e) protects unnamed class members from 'unjust or unfair settlements' agreed to by 'faint-hearted' or self-interested class 'representatives.'")). "Both the class representative and the courts have a duty to protect the interests of absent class members." *Silber v. Mabon,* 957 F.2d 697, 701 (9th Cir. 1992). *Accord Diaz v. Trust Territory of Pacific Islands,* 876 F.2d 1401, 1408 (9th Cir. 1989) ("The district court must ensure that the representative plaintiff fulfills his fiduciary duty toward the absent class members").

There should be no presumption in favor of settlement approval: "[t]he proponents of a settlement bear the burden of proving its fairness." *True v. American Honda Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal.

2010) (*citing* 4 Newberg on Class Actions § 11:42 (4th ed. 2009)). *Accord* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05(c) (2010) ("*ALI Principles*") ("In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable.").

"[W]here the court is '[c]onfronted with a request for settlement-only class certification,' the court must look to the factors 'designed to protect absentees.'" *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (*quoting Amchem*, 521 U.S. at 620). "[S]ettlements that take place prior to formal class certification require a higher standard of fairness." *Molski*, 318 F.3d at 953. "[P]re-certification settlement agreements require that we carefully review the entire settlement, paying special attention to 'terms of the agreement contain[ing] convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of the negotiations.'" *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (*quoting Staton v. Boeing*, 327 F.3d 938, 960 (9th Cir. 2003)). Where the Court confronts a pre-certification settlement, consideration of the eight *Churchill*[1] factors "alone is not enough to survive appellate review." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

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[1] *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

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 endemic to class action procedure, third parties must monitor the reasonableness of the settlement as well. *Bluetooth*, 654 F.3d at 948 (*quoting Staton*, 327 F.3d at 960). 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." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (quoting *Dennis*, 697 F.3d at 864).

III. The settlement improperly favors third party charities over class members through its *cy pres* provision.

It is a foundational premise that the plaintiff-class itself as a legal entity "is not the client. [Rather,] the 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, 834-35 (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 has become an increasingly popular method of distributing settlement funds to non-class third parties. *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).

Despite its growing popularity among some members of the class action bar, *cy pres* distributions are non-compensatory, disfavored among both courts and commentators alike, and remain an inferior avenue of last resort. *See e.g., 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."); *Dennis*, 697 F.3d at 868 (*cy pres* settlement can easily become "a paper tiger"); *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") (citing authorities); *In re Baby Prods. Antitrust Litig.,* 708 F.3d 163, 173 (3d Cir. 2013) ("*Cy pres* distributions imperfectly serve that purpose by substituting for that 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, Peter Julian, & Samantha

Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

One variety of class action *cy pres* is *ex ante cy pres*. It can be defined as an award "that was designated as part of a settlement agreement or judgment where: (1) an amount *and* at least one charity was named as a recipient of part of the fund from the outset and the charity's receipt of the award was not contingent on there being remaining/unclaimed funds in the settlement fund, or (2) the entire award was given to at least one charity with no attempt to compensate the absent class. Redish et al., *Cy Pres Relief and Pathologies,* 62 FLA. L. REV. 617, 657 n.171. The relief here is a clear example of (2). Settlement Agreement (Dkt. 52-3) § 3. It provides that the entire $8.5 million settlement fund will be disbursed to non-class member charities, with no payments to the vast majority of class members who are not stakeholders in those charities.

As compared with *ex post cy pres*—third-party awards made only after class members fail to cash checks that are distributed—*ex ante cy pres* stands on even shakier footing. *See Molski*, 318 F.3d at 954-55 (rejecting all *cy pres* settlement as inadequate substitute to individual compensation); *Fraley v. Facebook*, No. C 11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at *4-*7 (N.D. Cal. Aug. 17, 2012) ("*Fraley I*") (questioning propriety of an all *cy pres* settlement); *Zapeda v. Paypal*, No. C 10-2500 SBA, 2014 U.S. Dist LEXIS

24388, at *21 (N.D. Cal. Feb. 24, 2014) (expressing concern "that the only persons receiving any funds are persons *other than* class members" and denying settlement approval) (emphasis in original). "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).

Cy pres is improper when it is feasible to make distributions to class members, at least where there is no other compelling reason for preferring non-class members. This "last-resort rule" is a well-recognized principle of law. §3.07(a) of the *ALI Principles* succinctly states the limitation: "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."[2] The last-resort rule follows from the

[2] Numerous other courts have also endorsed §3.07 to a greater or lesser degree. *Nachshin*, 663 F.3d at 1039 n.2; *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 689-690 (7th Cir. 2013); *In re Lupron Mktg and Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012); *Klier*, 658 F.3d at 474-75 & nn. 14-16; *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (citing draft version); *Baby Prods.*, 708 F.3d at 173 (agreeing in part); *Better v. YRC Worldwide Inc.*, No. 11-cv-2072- KHV, 2013

precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (5th Cir. 2011) (citing *ALI Principles* §3.07 cmt. (b)).

While it may be true that the full statutory damages that would be owed to every class member in the event that plaintiffs were to prevail at trial would be greater than the market capitalization of Google, that is not the relevant question. The relevant question is whether it would be practicable to distribute the available $8.5 million settlement fund to class members through a lottery or claims-made process. The answer is yes. *See Fraley v. Facebook, Inc.*, 966 F. Supp. 2d. 939 (N.D. Cal. 2013) ("*Fraley II*"). In *Fraley*, the class of Facebook users numbered in the hundreds of millions, and the parties proposed a *cy pres*-only settlement to the court alleging that class distributions "[are] simply not practicable in this case, given the size of the class." *Fraley I.*, 2012 U.S. Dist. LEXIS 116526, at *6. Judge Seeborg refused to accept the proposal because "[m]erely pointing to the infeasibility of dividing up the agreed-to $10 million recovery...is insufficient...to justify resort to purely cy pres payments." 2012 U.S. Dist. LEXIS 116526, at *5. After the court denied approval, the agreement was

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U.S. Dist. LEXIS 163569, at *19-*21 (D. Kan. Nov. 18, 2013) (rejecting settlement for non-compliance with §3.07); *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-md-2087 BTM (KSC), 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (same).

then restructured as a claims-made settlement disbursing cash directly to class members. *See Fraley II*. Claimants under the amended agreement were so few in fact that the court would have been able to double the baseline $10 awards and did actually augment the awards by 50%. *Id*. at 944. Here too, the percentage of the 100+ million person class that will submit claims is likely low enough that a claims-made settlement would not be impracticable.

Recently, a well-respected settlement administration company conducted a wide-ranging survey that concluded "settlements with little or no direct mail notice will almost always have a claims rate of less than one percent (1%)." *Poertner v. The Gillette Co.*, No. 6:12-v-00803-GAP-DAB, Declaration of Deborah McComb re Settlement Claims (Dkt. 156) ¶5. Recent data points reveal that this is true in low-stakes settlements with or without direct notice. *In re Livingsocial Mktg. and Sales Practices Litig.*, 298 F.R.D. 1, 19 (D.D.C. 2013) (0.25% claims rate with direct email notice); *Spillman v. RPM Pizza, LLC*, No. 10-349-BAJ-SCR, 2013 U.S. Dist. LEXIS 72947, at *8 (M.D. La. May 23, 2013) (0.27% claims rate for $15 max claim); *Lagarde v. Support.com, Inc.*, No. 12-0609 JSC, 2013 U.S. Dist. LEXIS 67875, at *7 (N.D. Cal. May 13, 2013) ("[A] mere 1,259 timely claims were submitted for the $10 refund, which represents 0.17% of the total number of class members and 0.18% of the total number of class members who received notice."); *Pearson v. Nbty, Inc.*, No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357, at *22 (N.D. Ill. Jan. 3, 2014) (0.25%

claims rate overall where maximum claim was $12 without proof of purchase and $50 with proof of purchase). *Fraley* is the proof; even where a class numbers over one-hundred million, that a claims-made device can be feasible.

Even if it were not possible to distribute $8.5 million through a claims-made process, there is no legitimate reason why the parties should not randomly sample the class and/or accept claims submission, and then make payouts on a lottery basis. *See* Shay Levie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011).

Which alternate method the parties elect is not crucial; what matters is that non-compensatory *cy pres* remains the last resort. As discussed thoroughly in the Third Circuit's *Baby Products* opinion, for individual class members, direct payment matters. "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; *id.* at 178-79 (counsel has "responsibility to seek an award that adequately prioritizes direct benefit to the class" and fees should reflect that fact). "Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* at 174. If *cy pres* is an excessive share of the total relative to direct class recovery, a district court should consider whether to

> urge the parties to implement a settlement structure that attempts to maintain an appropriate balance between payments to the class and *cy pres* awards. For instance, it could condition approval of a settlement on the inclusion of a mechanism for additional payouts to individual class members if the number of claimants turns out to be insufficient to deplete a significant portion of the total settlement fund.

Id.

Furthermore, it is perhaps the case that some of the *cy pres* recipients are class members. There is no reason to favor those recipients in an uncertified subclass over other class members, and even less reason to favor non-class members over the actual class members.

Where there is a will, there is a way. But class counsel did not negotiate for using the fund to compensate class members, either on a claims-made, lottery, or some combination thereof basis. Rather, in dereliction of their fiduciary obligations, class counsel proposes to give that money away to non-class entities.[3] The bare legitimacy of *cy pres* in the class action

[3] If it was apathy toward class members or—worse yet—preference for non-class third-parties that drove the decision to prioritize *cy pres* distributions, that casts even further doubt on the

context is controvertible with good reason. *See Klier*, 658 F.3d at 480-82 (Jones J., concurring); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 358 (3d Cir. 2010) (Weis, J., concurring and dissenting); *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105-12 (D.N.M. 2012) (collecting sources); Redish et al., *supra*. Although *cy pres* has been given a narrow berth in the Ninth Circuit, settled law requires that this application of *cy pres* be rejected for the foregoing reasons.

IV. The Court must consider the pre-existing relationships between the cy pres recipients, class counsel and the defendant.

The proposed *cy pres* recipients include institutions with prior relationships with both the defendant and class counsel. "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." *ALI Principles* §3.07 cmt. (b). Where, as here, class counsel are the alumni of several of the *cy pres* recipients, there is the appearance of divided loyalties of class counsel. And where

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adequacy of class representation. *See Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998) ("The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members.").

the defendant is already an established donor to certain of the *cy pres* recipients, there is the significant risk that the value of the settlement will be less beneficial to the class than it would appear.

A. Cy pres beneficiaries should not have a pre-existing relationship with class counsel.

"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." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) (internal quotation omitted). "Cy pres distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations." *Dennis*, 858 F.3d at 867.

Yet undisclosed to the class is the fact that two of the three class attorneys who signed the settlement agreement, Kassra Powell Nassiri and Michael Aschenbrener, are alumni of three of the *cy pres* recipients. Settlement 16-17. Nassiri has a master's degree from Stanford and a juris doctorate from Harvard. Nassiri and Jung, LLP, http://njfirm.com/kassra-nassiri/ (last visited July 23, 2014). Aschenbrener received his juris doctorate from the Chicago-Kent College of Law. Aschenbrener Law, http://aschenbrenerlaw.com/michael-aschenbrener/ (last visited July 23, 2014). Harvard, Stanford, and

Chicago-Kent are three of the four proposed university recipients. Preliminary Approval Order (Dkt. 63) ("PAO") at 8. These are not recipients that are "independent and free from conflict." *Id*. at 11 n.7; Motion for Final Approval (Dkt. 65) at 14 n.2.

In *Nachshin*, the Ninth Circuit criticized *alma mater cy pres* distributions, suggesting that such dispensations present exactly the sort of conflicts of interest that are problematic. 663 F.3d at 1039. Other commentators are in accord, specifically identifying the *alma mater* problem as the type of conflict that is objectionable. *E.g.*, George Krueger & Judd Serotta, Op-Ed, *Our Class-Action System is Unconstitutional*, WALL ST. J., Aug. 6, 2008 ("Judges...have occasionally been known to order a distribution to some place like their own alma mater ..."); Adam Liptak, *Doling out Other People's Money*, N.Y. TIMES, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like."). In *Nachshin,* the court cited each of these three sources approvingly. 663 F.3d at 1039, 1039 n.2.

"Courts are wary of distributing cy pres funds to organizations that have a close relationship with class counsel given the appearance of a conflict of interest." *Weeks v. Kellogg Co.*, No. CV-0908102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *69 n.102 (C.D. Cal. Nov. 23, 2011); *see also Schwartz v. Dallas Cowboys Football Club, Ltd.,* 362 F. Supp. 2d 574, 577 n.2 (E.D.

Pa. 2005) (noting the appearance of impropriety in selecting a beneficiary (the University of Pennsylvania) with long established ties to the Eastern District bench). *Weeks* properly refused to ratify such a conflict. 2011 U.S. Dist. LEXIS 155472, at *70-*71. *Accord In re Linerboard Antitrust Litig.*, MDL No. 1261, 2008 U.S. Dist. LEXIS 77739, at *14-*15 (E.D. Pa. Oct. 3, 2008) (rebuffing proposed *cy pres* awards to institutions with preexisting relationships to class counsel); *but see In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1050-51 (S.D. Cal. 2013), *appeal pending* No. 13-55373 (9th Cir.) (overruling objection where one of three university *cy pres* recipients had *alma mater* affiliation with class counsel). This objection may have only scratched the surface; who knows what conflicts lurk deeper? Before the Court approves any award, it should require the parties to certify that the beneficiaries have no ties to the parties or the lawyers. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 1361, 2005 U.S. Dist. LEXIS 11332, at *4 (D. Me. June 10, 2005). This Court should not approve any settlement afflicted by such a conflict of interest.[4]

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[4] An all too rare best practice that mitigates this problem 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."); *see generally* Alexandra Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1961-63 (2011) (recommending polling the class as a "modest proposal" to increase class members' voice).

B. Pre-existing relationships between the defendant and the cy pres recipients undermine the value of the settlement.

As the Ninth Circuit has warned, "[t]he issue of the valuation of [the *cy pres*] aspect of a settlement must be examined with great care to eliminate the possibility that it serves only the "self-interests" of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis*, 697 F.3d at 868. Google is already a donor to Berkman Center for Internet and Society at Harvard University; Stanford Center for Internet and Society; AARP; and Chicago-Kent. *See* http://cyber.law.harvard.edu/about/support (last visited July 23, 2014);
http://cyberlaw.stanford.edu/about-us (last visited July 23, 2014).
http://www.google.com/publicpolicy/transparency.html (AARP) (last visited August 8, 2014); http://www.alumni.kentlaw.edu/s/815/index.aspx?sid=815&gid=1&pgid=773 (last visited August 8, 2014). When the defendant is already a regular contributor to the proposed *cy pres* recipient, there is no demonstrable value added by the defendant's agreement to give money to that institution. *See Dennis*, 697 F.3d at 867-68. Google is agreeing to do something that it was in all likelihood going to do anyway. Such an agreement is of little or no incremental value to the class. *See Reynolds v. Beneficial Nat'l*

Bank, 288 F.3d 277, 286 (7th Cir. 2002) (it is the "*incremental* benefits" that matter, not the "total benefits") (emphasis in original)); *see also In re Hydroxycut Mktg. and Sales Practices Litig.*, No. 09-md-2087 BTM (KSC), 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (rejecting *cy pres* that provided not additional benefit to class members beyond the status quo); American Law Institute, Principles of the Law of Aggregate Litig. § 3.13 (settlement benefit does not include gratuitous inclusion of actions that defendant was conducting pre-settlement). This Court should require additional disclosures from Google, as they are likely to have preexisting relationships with the other two *cy pres* recipients that are not readily publicly available.

Recently, a divided panel of the Ninth Circuit affirmed a *cy pres* distribution over an objector's challenge to the fact that the beneficiary was closely affiliated with the defendant. *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), *rehearing en banc den'd*, 709 F.3d 791 (2013), *cert den'd sub nom* 134 S. Ct. 8 (2013). In that case, however, the objectors argued that there was a per se conflict of interest when the defendant had a pre-existing relationship with a *cy pres* recipient. The rationale by which the *Lane* court sanctioned the *cy pres* award—that the terms of the settlement are "the offspring of compromise" that "necessarily reflect the interest of **both** parties"—has no application to this objection, where the assertion is that Google's promise to give money to organizations to which it was already giving money simply is

not worth the release of individual class members' claims, nor commensurate with the attorneys' fees request. 696 F.3d at 821 (emphasis added).[5] *Cf. Webb v. Carter's*, 272 F.R.D. 489, 504 (C.D. Cal. 2011) (rejecting class certification where the manufacturer of children's tagless clothes was already offering the relief sought by the putative class members).

C. Frank further objects to AARP as a recipient.

The AARP takes political positions opposed by many class members, including Frank. They should not be receiving *cy pres* funds.

V. In the alternative, if distributions to individual class members are impracticable, then a class action is not superior to other available methods of adjudicating the controversy.

One prerequisite of class certification is that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). If a *cy pres*-only settlement is necessary because it would be too costly to distribute the settlement funds to individual class members,

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[5] *Lane* also has no application to a distribution that unjustifiably favors non-party class counsel. *See supra* § IV.A. Settlement concessions should reflect the interest of "both parties" —the class members themselves and the defendant—but not the interest of class counsel.

then a class action is not an efficient and superior means of adjudicating this controversy. *Supler v. FKAACS, Inc.*, No.. 5-11-CV-00229-FL, 2012 U.S. Dist. LEXIS 159210, at *10-*11 (E.D.N.C. Nov. 6, 2012) (holding that, because "benefits to putative class members" from *cy pres* payments "are attenuated and insignificant..., class certification does not...promote judicial efficiency.") (internal quotations, ellipses, and citations omitted). The Ninth Circuit came to a similar conclusion in *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974). There, the court reasoned that "[w]henever the principal, if not the only, beneficiaries to the class action are...not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute," and that, "[w]hen, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind-boggling manageability problems should be rejected." *Id*. at 91-92. In this case, the proposed settlement falls into that category. It provides at most an indirect and attenuated benefit to the class, justified on the grounds that individual distributions would be too costly because of the size of the class. PAO at 10-11.

If true, then these claims should proceed as individual actions. Under such actions, class members can seek statutory damages of up to $10,000. 18 U.S.C. § 2520(c)(2)(B) (authorizing statutory damages for violations of the Electronic Communications Pri-

vacy Act). No matter how slim the possibility of attaining such damages, that possibility is superior to releasing those claims for no compensation. *See Brown v. Wells Fargo & Co.*, No. 11-1362 (JRT/JJG), 2013 U.S. Dist. LEXIS 181262, at *16-*17 (D. Minn. Dec. 30, 2013) (concluding that superiority was not satisfied where individuals would be "entitled to between $100 and $1,000 dollars in statutory damages" in successful individual litigation, but only $55 as a class member); *Sonmore v. CheckRite Recovery Servs.*, 206 F.R.D. 257, 265-66 (D. Minn. 2001) (holding that the discrepancy between the $25 that class members could recover and the $1000 in statutory damages they could recover individually meant that a class action was not superior); *cf. also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234 n.5 (9th Cir. 1974) (finding no superiority where individual recoveries could have amounted to $1,875 and attorneys' fees and costs were statutorily recoverable); *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716 (9th Cir. 2010) ("We think it clear that the Rule 23(b)(3) superiority analysis must be consistent with the congressional intent in enacting a particular statutory damages provision.").

Superiority must be contemplated from the perspective of putative absent class members, among other angles. *Bateman*, 623 F.3d at 713 (quoting *Kamm v. California City Development Co.*, 509 F.2d 205, 212 (9th Cir. 1975)). What is best for them? This settlement intends to release their rights in exchange for no compensatory relief. From the perspective of a

class member, that cannot be a superior method of adjudicating this controversy. *Cf. Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 U.S. Dist. LEXIS 74081, at *8 (N.D. Cal. May 29, 2014) ("No one should have to give a release and covenant not to sue in exchange for zero (or virtually zero) dollars. The collective-action opt ins would be better off simply walking away from this lawsuit with their rights to sue still intact."). A *cy pres* settlement, in which many of the beneficiaries are already receiving donations from the defendant, is not be superior in either fairness or efficiency to other methods of adjudication.

VI. If the Court approves the certification and settlement, it should decline to award the $2.125 million attorneys' fees requested.

For several reasons, the settlement is substantively unfair (*see supra* §§ III-IV), procedurally unfair (*see infra* §§ VII-VIII), and premised on a theory that makes class certification untenable (*see supra* § V). Nevertheless, if this Court disagrees with each of those propositions, it should still deem unreasonable the $2.125 million fee requested by plaintiffs. *See* Motion for Approval of Fees and Costs ("Fee Motion") (Dkt. 66).

Plaintiffs believe that the Ninth Circuit's 25% benchmark approach applies equivalently regardless of whether the defendant is obligated by a settlement to pay class members $8.5 million or obligated to pay

non-class member third parties $8.5 million. Fee Motion at 2-4. Plaintiffs' belief is wrong as a matter of law and would be disastrous as a matter of public policy.[6]

As a matter of law, class members are simply "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. When "class 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 award." *Id.* at 178-79 (citing, *inter alia*, two Ninth Circuit decisions and *ALI Principles* §3.13); *accord* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV.__ (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstractid=2413951 (advocating for "presumptive reduction of attorneys' fees" where settlement includes

[6] One principle on which objectors can agree with plaintiffs is that any hypothetical value of the prospective injunctive relief should not be included in the denominator for purposes of making a percentage fee award. *See Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) ("Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund. We hold, therefore, that only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees."); *compare* Fee Motion at 2 (seeking a percentage upon "only the cash portion of the total recovery").

significant *cy pres* component). Although obligating Google to donate to third parties may impose a cost on Google,[7] the Ninth Circuit has been clear that compensable value "is not how much money a company spends on purported benefits, but the value of those benefits to the class." *Bluetooth*, 654 F.3d at 944 (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)).

A dollar that goes to *cy pres* is less valuable than a dollar that goes directly to a class member. So, although plaintiffs reference a number of district court decisions that disregard this reality (*see* Fee Motion at 3 (citing cases)), plenty of courts have wisely concluded otherwise and have refused to value *cy pres* donations the same as a dollar to the class. *E.g., In re Heartland Payment Sys., Inc.*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (discounting *cy pres* by 50% for purposes of awarding fees); *In re Livingsocial Mktg. & Sales Practice 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 (MMM) (RZx), 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.

[7] Of course, it also may not impose very much of a cost at all. *See supra* § IV.B.

Pa. 2005) (excluding *cy pres* and non-economic injunctive relief benefits entirely). More importantly, the only Ninth Circuit case mustered by the plaintiffs, *Lane,* did not confront the question of whether the fee award in that case was excessive, nor whether the Ninth Circuit's benchmark should apply identically to *cy pres* only settlements. Rather, the objectors in *Lane* focused their attack solely on the substantive fairness of the settlement, not the fee award. 696 F.3d at 818, 820.

The "key consideration in determining a fee award is reasonableness in light of the benefit *actually conferred*." *In re HP Inkjet Printer Litig.,* No. 5:05–cv-3580 JF, 2011 WL 1158635, at *10 (N.D. Cal. Mar. 29, 2011), *rev'd on other grounds* 716 F.3d 1173 (9th Cir. 2013) (emphasis in original) (internal citation and quotation omitted); *accord* Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (in awarding fees the "fundamental focus is the result actually achieved *for class members*") (emphasis added). For this reason, where actual benefit is slim, courts will deviate downward from the 25% benchmark. *Pearson v. Nbty, Inc.*, No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357, at *21-*27 (N.D. Ill. Jan. 3, 2014) (reducing 25% benchmark to 9.6% based on "low claims rate in combination with funds being remitted to *cy pres* in an amount greater than the actual benefit to the Class"); *Tarlecki v. Bebe Stores, Inc.*, No. C 05-1777 MHP, 2009 WL 3720872, 2009 U.S. Dist. LEXIS 102531, at *12 (N.D. Cal. Nov. 3, 2009) (reducing fee award to less than 13%) (cited by Fee Motion at 4).

If this Court endorses a rule that makes class counsel financially indifferent between a settlement that awards cash directly to class members and a *cy pres* only settlement, the parties will always agree to the *cy pres* arrangement and unnamed class members will be permanently left out in the cold. The reason that the parties will incline toward the *cy pres* arrangement is because of reasons related to those discussed *supra* at 9-10: defendants will prefer to make payments to third parties to whom they are already donating money rather than payments to absent class members. Donations may engender good will, and often merely replace or supplement donations that are already in the pipeline, or which the defendant has a habit of making: in the latter case, then the "relief" to the class is even more illusory, because it merely reflects a shift in accounting entries. Coupled with the class counsel's financial indifference, the defendant's preference *for* charitable donations means that the easy way of reaching settlement will be agreeing to *cy pres* only settlements.

The percentage of recovery/ benchmark is the prevailing Ninth Circuit methodology because it aligns the incentives of class counsel and the class much better than does the competing lodestar method. *In re Apple Iphone/Ipod Warranty Litig.*, No. C 10-1610 RS, 2014 U.S. Dist. LEXIS 52050, at *8-*9 (N.D. Cal. Apr. 14, 2014) ("[A]pplying the lodestar to common fund cases does not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work

and protracting the litigation. It adds to the work load of already overworked district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process.") (internal quotation and ellipsis omitted); *see generally* Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809 (2000) (observing "solid consensus that the contingent approach minimizes conflicts more efficiently than the lodestar"). To apply the benchmark equally regardless of whether the class actually recovers funds is to undermine its core benefit and to again misalign the interests of class counsel and its clients.

Put simply, "courts need to consider the level of direct benefit provided to the class in calculating attorneys' fees." *Baby Prods.*, 708 F.3d at 170. If the court it inclined to approve the settlement and certification, to comply with Rule 23(h), it should reduce the fee award to no more than 10% of the $8.5 million *cy pres* fund.

VII. The notice plan is inadequate because it does not include direct notice for class members for whom Google has contact information.

The principle of disclosure through notice has been referred to as the "first and perhaps most important principle for class action governance." Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 118 (2003).

While "direct notice to class members by mail, e-mail or other electronic individualized means [may be] impractical" for the entirety of the class, it is obligatory for those class members for whom the defendant has contact information. PAO at 12. And yet the notice plan here is publication only. *Id*.

Google would have contact information at least for all class members who have gmail accounts. According to AYTM Market Research, 74% of all consumers use Google as their primary search engine, and 60% of all consumers use Google's gmail as their primary email service, suggesting that, if an even higher percentage of class members (Google's search engine users) have gmail accounts, Google has contact information for approximately perhaps 80% of the class or more. *74 Percent of Consumers Use Google Search, 60 Percent Own Gmail Accounts*, Brafton (Apr. 9, 2012), http://www.brafton.com/news/74-percent-of-consumers-use-google-search-60-own-gmail-accounts (last visited July 25, 2014).

The *Mullane* constitutional imperative is 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 Co.*, 339 U.S. 306, 314 (1950). As *Mullane* held, "[w]here 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.

Likewise, in *Eisen v. Carlisle and Jacquelin*, the Supreme Court held that "individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case....each class member who can be identified through reasonable effort must be notified." 417 U.S. 156, 176 (1974). There, the class numbered approximately 6 million, with only a minority, 2.25 million, being identifiable to the defendant. *Id*. at 166-67. Nevertheless, the large size of the class and the expense of the notice did not obviate the need for individual notice where the requisite information was in the possession of the defendant. *Id*. at 175-76.

Following these decisions, the Ninth Circuit holds that "[t]o comply with the spirit of [Rule 23 notice provisions], it is necessary that the notice be given in a form and manner that does not systematically leave an identifiable group without notice." *Mandujano*, 541 F.2d 832, 835. Class members for whom Google 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*, *supra*; *Smith v. Levine Leichtman Capital*, 2012 U.S. Dist. LEXIS 163672, at *7-*8 (N.D. Cal. Nov. 15, 2012) (holding that "[n]otice to class...must be 'the best...practicable under the cir-

cumstances, including individual notice to all members who can be identified through reasonable effort,'" and that even where only 75-85% of the class could be reached through direct mail, direct mail was still required.) (quoting *Amchem*); *Fraser v. Asus Computer Int'l*, 2012 U.S. Dist. LEXIS 181315, at *10-*12 (N.D. Cal. Dec. 21, 2012) (concluding that postal notice is required even when only would reach 30% of class, publication is not sufficient).

The fact that class members will not recover any money for themselves under this settlement in no way negates their right to direct notice. *Hecht v. United Collection Bureau*, 691 F.3d 218, 225 (2d Cir. 2012) (repudiating argument that "the negligible amount of money to be awarded per person under the...settlement justified lesser notice.") "A cause of action for damages is a property right, and thus cannot be taken without due process." *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir. 1989). In other words, at the very least whenever any monetary claims are released as part of a class action, the stringent due process standards of *Mullane* and *Eisen* apply. In this case, where the class members would be giving up their individual causes of action as part of the settlement, individual notice is necessary wherever possible.

Once it is established that the full rigors of due process notice apply, there should be no dispute that the publication only notice here is unacceptable when the defendant's records house class members' contact

information. *See, e.g., Larson v. AT&T Mobility LLC*, 687 F.3d 109, 122-31 (3d Cir. 2012) (reversing notice plan that did not require defendants to search through their record for the purpose of providing individual notice). "Plaintiffs' pocketbooks are not a factor—the mandatory notice requirement may not be relaxed based on the high cost of providing notice." *In re Motor Fuel Temperature Sales Practices Litig.*, 279 F.R.D. 598 (D. Kan. 2012) (citing *Amchem* and *Eisen*).

For the settling parties, meager notice means less resistance, and even more importantly, less cost to settlement. But for class members, it means an abridgment of statutory and constitutional rights. This Court should consider the wisdom of the Western District of New York in a recent decision. "If plaintiffs and their attorneys are acting like they have something to hide from the absent class members, perhaps it's because they do." *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 408 (W.D.N.Y. 2013).

VIII. The parties have artificially burdened the right of objection and opt-out by requiring four separate paper-mail submissions for a class of internet users; no positive inference should be drawn from a low number of formal objectors.

Almost any given class action settlement, no matter how much it betrays the interests of the class, will

produce only a small percentage of objectors. The predominating response will always be apathy because objectors without counsel must expend significant resources on an enterprise that will create little direct benefit for themselves. *See Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey that found between 42% and 64% of settlements engendered no filings by objectors). Another common response from non-lawyers will be the affirmative avoidance, whenever possible, of anything involving a courtroom.

Class counsel argues that this understandable tendency to ignore notices or free-ride on the work of other objectors is best understood as acquiescence or even affirmative support for the settlement. Motion for Final Approval (Dkt. 65) at 18-19. This is wrong. Silence is simply *not* consent. *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001). "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." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007).

Without *pro bono* counsel to look out for the interests of the class, filing an objection is economically irrational for any individual. "[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (internal citation omitted). Moreover, "where notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a *fait accompli*." *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co.*., 834 F.2d 677, 680-81 (7th Cir. 1987).

"[T]he absence or silence of class parties does not relieve the judge of his duty and, in fact, adds to his responsibility." *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D. 373, 375 (D. Kan. 1971). The Court should draw no inference in favor of the settlement from the number of objections, especially given the vociferousness of the objectors that do appear. *GM Trucks*, 55 F.3d at 812-13; *Vought*, 901 F. Supp. 2d. at 1093. "One good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement." *Richardson v. L'Oreal USA, Inc.*, __F. Supp. 2d__, 2013 WL 5941486, at *14 (D.D.C. Nov. 6, 2013) (sustaining Ms. Holyoak's objection).

Yet more conducive to apathetic inaction, the parties have elected a process of objecting and opting out which is "unnecessarily burdensome." *Newman v. Americredit Fin. Servs.*, No. 11-cv-3041 DMS (BLM), 2014 U.S. Dist. LEXIS 15728, at *17 (S.D. Cal. Feb. 3, 2014) ("The Court is not inclined to approve a settlement which makes it unnecessarily burdensome to submit a claim or opt out. The class members are required to submit claim forms and opt out requests by mail, although the settlement administrator is obligated to provide a phone number and a website. The only justification offered for the mailing requirement is that the claim forms require an affirmation. Plaintiff does not explain why an affirmation could not be provided through an online form or by phone with adequate identification of the class member.") (internal citations omitted); *Galloway v. Kan. City Landsmen*, No. 4:11-1020-CV-W-DGK, 2012 U.S. Dist. LEXIS 147148, at *16 (W.D. Mo. Oct. 12, 2012) (denying settlement in part based on parties' failure to allow class members to opt out via email alone), *later proceeding reported at* 2013 U.S. Dist. LEXIS 92650, at *10-*11 (W.D. Mo. Jul. 2, 2013) (noting that after the initial settlement rejection "[t]he parties have simplified the opt-out provision so that in order to opt-out, class members need only send a single email to defense counsel."). The requirement that objectors print and post multiple copies of their objection/exclusion is both expensive and outdated in 2014. *E.g.*, *Newman*, *supra*; *Smith*, 2012 U.S. Dist. LEXIS 163672, at *8-*9 ("[T]he parties have made the procedures for filing objections unduly burdensome. There is no reason to

require...the objectors to mail their objections to three different locations.").

Rather than requiring class members to snail-mail an objection to four recipients, other cases permit the relatively efficient (indeed, close to costless) method of transmitting objections and by a single electronic submission. *See e.g., In re Motor Fuel Temperature Sales Practices Litig.*, No 07-md-01840-KHV-JPO, Order (Dkt. No. 3019), at 2 (D. Kan. Nov. 10, 2011) ("If Costco plans to proceed with email notification, it must allow class members to opt out of the class and object to the settlement electronically"); *Boring v. Bed Bath & Beyond,* No. 12-cv-05259-JST (N.D. Cal. Nov. 21, 2013) ("The Court notes that the filing of objections with the Court constitutes service upon counsel for the parties, as the parties' counsel are registered to receive filings through the Court's Electronic Case Filing system."). Likewise, there is no valid reason why a class member in this settlement should have to download, print, fill out and mail an exclusion in this day and age. *See, e.g.,* http://ebayfeaturedplus classaction.com/#qf (allowing email opt out); http://www.copyrightclassaction.com/exclusion.php3(online opt out); http://www.fraleyfacebook settlement.com/faq#Q14 (same)

Where electronic modes of opting-out and objecting are available, the "vast majority" of participating class members will use those avenues. *Motor Fuel Temperature*, 2012 U.S. Dist. LEXIS 57981, at

*76 (D. Kan. Apr. 24, 2012); *id.* at *74 n.13 (nearly three times more people opted-out electronically than by mail); *Fraley v. Facebook, Inc.*, No. 11-cv-01726 RS (N.D. Cal. Jun. 7, 2013), Declaration of Jennifer M. Keough Regarding Settlement Administration (Dkt. 341) at ¶12 (6,884 of 6,946 opt-out requests (99.1%) were submitted electronically via the settlement website when that option was available). This is especially true of course, when, as here, the class consists entirely of internet users. *See* Declaration of Richard W. Simmons (Dkt. 65-4) ¶16 ("By definition, all of the interaction between Google and class members occurred on-line.")

At the very least it is improper for the parties to require objectors to mail their objections to **four** different locations. *See* Procedural Guidance for Class Action Settlements, *available at* http://cand.uscourts.gov/ClassActionSettlementGuidance ("The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filing.").

Imposing a costly, inefficient alternative over affordable, seamless electronic processes can only give rise to the inference that the parties wished to undermine the autonomous decisions of class members. It has been known for at least a half-decade that "the ease and cost-efficiency of such direct internet submissions increases the likelihood of absent class

member participation." Robert H. Klonoff, *Making Class Actions Work: The Untapped Potential of the Internet,* 69 U. PITT. L. REV. 727, 766 n. 251 (2008); Leslie, *The Significance of Silence*, 59 FLA. L. REV. at 128-29. Indeed, notice was almost entirely distributed via the internet, yet absent class members' expressions of dissent cannot be made in the same medium. Class counsel is not licensed to consign objectors or opt-outs to second class status.

"One hallmark of a reasonable settlement agreement is that it makes participation as easy as possible, whether class members wish to make a claim, opt out, or object." *McClintic v. Lithia Motors*, No. C11-859RAJ, 2012 U.S. Dist. LEXIS 3846, at *17 (W.D. Wash. Jan. 12, 2012) (critiquing comparable opt-out and objection process and ultimately rejecting settlement). Together, the hurdles imposed on exclusion and objection do not appropriately respect class members' Fed. R. Civ. P. 23 rights. Moreover, the court loses the benefit of valuable adversarial perspectives that objectors can bring to the evaluation of a settlement's fairness. Not only do the hurdles constitute a reason to reject the settlement in this case, they provide an added reason to discredit any argument that the lack of objectors signals the class members' approval of the settlement.

CONCLUSION

For the forgoing reasons, the settlement cannot be approved. It asks class members to surrender their

individual claims in exchange for a few million dollars being given to unrelated third parties, many of whom have prior relationships to the defendant or class counsel. The settlement does not afford effective notice to the class and makes objecting or opting out needlessly and artificially burdensome. The class itself is not certifiable, both because, if individual recoveries are genuinely impossible, then a class action is not superior to other methods of adjudication. If the Court decides to approve the settlement anyhow, it should drastically pare down the requested fee award.

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Respectfully submitted,

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