No. 17-1480

In the United States Court of Appeals for the Third Circuit

In re: Google Inc. Cookie Placement

JOSE M. BERMUDEZ, ET AL.,
Plaintiffs–Appellees,

v.

THEODORE H. FRANK,
Objector–Appellant,

v.

GOOGLE INC.,
Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware, No. 12-md-2358-SLR

AMENDED BRIEF OF THIRTEEN STATE ATTORNEYS GENERAL AS *AMICI CURIAE* IN SUPPORT OF OBJECTOR-APPELLANT AND REVERSAL

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TABLE OF CONTENTS*

* The only change to this amended brief is the addition of the Kansas and North Dakota Attorneys General. No other material has changed.

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARTICLES

STATEMENT OF *AMICI CURIAE*

The Attorneys General of Alaska, Arizona, Arkansas, Kansas, Louisiana, Mississippi, Missouri, Nevada, North Dakota, Oklahoma, Rhode Island, Tennessee, and Wisconsin, are their respective States' chief law enforcement officers. Their interest here arises from two responsibilities. *First*, as chief law enforcement officers, the Attorneys General have an overarching responsibility to protect their States' consumers. *Second*, the undersigned have a responsibility to protect consumer class members under CAFA, which envisions a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

The Attorneys General make this submission to further these interests. The proposed settlement releases millions of consumer claims related to Google's electronic "cookie" placement practices in exchange for ~$5.5 million from Google, and yet it diverts the class members' ~$3.5 million portion of the settlement to *cy pres* charities when that money could be feasibly distributed to class members.[1]

SUMMARY OF ARGUMENT

The Attorneys General, acting in a bipartisan coalition, urge the Court to reverse the settlement approval and remand with instructions that, as a matter of law, distribution of settlement funds is economically infeasible (thereby allowing for *cy pres* distribution) only when it is truly impossible to direct the funds to at least some class members, *e.g.*, when the parties cannot identify or contact class members.

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[1] The Attorneys General submit this brief as *amici curiae* only as to settlement approval; the undersigned take no position on the merits of the underlying claims, and this submission is without prejudice to any State's ability to enforce its consumer protection laws or otherwise investigate claims related to this dispute. The Attorneys General certify that no parties' counsel authored this brief, and no person or party other than named *amici* or their offices made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief (reserving their rights to respond to the substance of the points raised herein).

The District Court erred as a matter of law in concluding that it was infeasible to distribute to class members their ~$3.5 million share of the settlement. The District Court applied the incorrect standard and failed to engage in the requisite analysis or make the necessary findings. This harms consumers and warrants reversal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT DISTRIBUTION OF THE PROPOSED SETTLEMENT FUNDS WAS ECONOMICALLY INFEASIBLE

The Rule 23(e) inquiry "protects unnamed class members 'from unjust or unfair settlements ... when the representatives become fainthearted ... or are able to secure satisfaction of their individual claims by a compromise.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "'Because class actions are rife with potential conflicts of interest ... district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that'" the interests of "'the class as a whole'" are served adequately. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) (quoting *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004)). In this circuit, this scrutiny specifically includes

considering "the degree of direct benefit provided to the class" by a proposed *cy pres* arrangement. *Id.* at 174.

The District Court failed to scrutinize properly the *cy pres* proposal by neglecting to conduct a sufficient "economic feasibility" and "direct benefit" analysis under *In re Baby Products*. The District Court overlooked the distributability of the proposed settlement fund and left class members with precisely the type of imbalanced settlement that courts should prevent under CAFA and Rule 23(e).

A. The District Court Failed To Apply The Appropriate Feasibility Test Before Approving Distribution Of All Class Settlement Funds *Cy Pres*

"A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). *Cy pres* is to be allowed only when it is *truly impossible* to get the settlement funds into the hands of class members. *See, e.g.*, *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) (*cy pres* arises as an option "only if it is not possible to put those funds to their very best use: benefitting the class members directly."). A proposed *cy pres* distribution must satisfy this infeasibility standard irrespective of the settlement agreement's

stipulations. *E.g.*, *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1066 (8th Cir. 2015) ("[W]e agree with the Ninth Circuit that '[a] proposed *cy pres* distribution must meet [our standards governing *cy pres* awards] regardless of whether the award was fashioned by the settling parties.'" (quoting *Nachshin v. AOL, LLC,* 663 F.3d 1034, 1040 (9th Cir. 2011) (brackets in original)).

Directing settlement funds to members of the class wherever feasible is important. Since class members extinguish their claims in exchange for settlement funds, the funds belong to class members. *E.g.*, *In re BankAmerica,* 775 F.3d at 1064 ("[S]ettlement funds are the property of the class[.]"); *Klier*, 658 F.3d at 474 ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."); American Law Institute, Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010) ("funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members").

This Court in particular has made plain that "direct distributions to the class are preferred over *cy pres* distributions." *In re Baby Prods.*, 708 F.3d at 173; *see also id.* at n.8 ("[C]ourts should favor class

settlements that provide direct compensation to the class through individual distributions."). In this Court's first statements on *cy pres* in the class action settlement context, it mandated that a settlement must provide a "direct benefit to the class" before a court may "giv[e] its approval." *Id.* at 170; *see also id.* at 174 (making "degree of direct benefit provided to the class" a factor required for settlement approval); *id.* at 175-176 (mandating "findings necessary to evaluate whether the settlement provides sufficient direct benefit to the class."). And the Court specified that "*cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* at 174.

Moreover, this Court in *In re Baby Products* provided definitive guidance for how courts should weigh proposed *cy pres* arrangements. Perhaps most pertinent here, the Court mandated consideration of the actual, real-world possibility for distribution of funds to class members, noting that a court may need "to withhold final approval of a settlement until the actual distribution of funds can be estimated with reasonable accuracy." *Id.* The Court further explained that "a court may urge the parties to implement a settlement structure that attempts to maintain an appropriate balance between payments to the class and *cy*

pres awards." *Id.* This includes "condition[ing] 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.*

The District Court failed to apply properly these mandates. The District Court made no reasonably accurate estimate of the actual distribution of funds to individual class members that could have occurred. Instead, the District Court offered only the following conclusory sentence by way of feasibility analysis: "The court concludes that the realities of the litigation at bar demonstrate that direct monetary payments to absent class members would be logistically burdensome, impractical, and economically infeasible, resulting (at best) with direct compensation of a *de minimus* amount." Dkt. 173 at 9 §11.[2] And the District Court made no determination as to the direct benefit the proposed settlement would provide to the class in the course of approving a 100% *cy pres* distribution of class settlement funds.

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[2] Even in this limited discussion, the District Court focused on factors from the Ninth Circuit—e.g., "logistical burden"—that are absent from *In re Baby Products*. Dkt. 173 at 8-9 (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012); relegating *In re Baby Products* to an unadorned *see also* citation).

The District Court's failure to apply this Court's economic feasibility precedent was reversible error. The District Court took an improperly narrow view of distributability, ignored the need to ensure a direct benefit to class members, and thereby approved a *cy pres* settlement arrangement that was not fair, adequate, or reasonable under Rule 23 and this Court's precedent.

B. In Failing To Properly Apply This Court's Economic Feasibility Precedent, The District Court Overlooked The Feasibility Of Distributing The Multi- Million-Dollar Settlement Fund To Members Of The Class

Contrary to the erroneous legal conclusion below, there is a feasible path to distribution here—class members are available and a mechanism can be crafted to distribute the funds to individual class members such that each distribution almost certainly will be of a meaningful amount that does not result in unjust enrichment.

Distribution to class members is truly infeasible "when class members cannot be identified, when the class changes constantly, or when class members' individual damages—although substantial in the aggregate—are too small to justify the expense of sending recovery to individuals." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009); *see also Powell v. Georgia-Pac. Corp.*, 119

F.3d 703, 706 (8th Cir. 1997) (*cy pres* is used "in cases in which class members are difficult to identify or where they change constantly"). Indeed, as the American Law Institute (ALI) explained in its highly persuasive (and oft-cited) Principals of the Law of Aggregate Litigation (2010), "[i]f 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." § 3.07(a).

Judged by these criteria, and based on proceedings to date, distribution here is feasible—class members can be identified through reasonable effort and a claims-made process crafted that will almost certainly ensure distributions that are sufficiently large to make individual distributions economically viable.[3] By way of example,

[3] The Parties and the District Court have treated class members as reachable and ascertainable, including in connection with class certification. *See, e.g.*, Dkt. 173 at 3. But inability to ascertain or reach the class would not warrant *cy pres*. A class settlement cannot overcome such failures by stipulation—they are fatal to the action itself. *See, e.g.*, *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013) ("Class ascertainability is 'an essential prerequisite of a class action'"); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) ("If class members are impossible to identify without extensive and

counsel could create a claims-made fund, with a pro rata distribution across claimants. Claims rates in small-dollar cases are reliably in the very low single digits (if not below one percent).[4] It seems safe to assume that the claims rate against a fund in this case would be no greater than ~2% at the high end (and very likely much lower). Neither the papers below nor the District Court's approval order detail the exact class size. But even assuming a class in the tens of millions, such a claims rate would result in an economically meaningful and feasible distribution to each claiming class member (likely ranging from a few dollars to $15 or $20, if not more). *See Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (feasibility standard satisfied where *cy pres* restricted so it could only occur when settlement funds were

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individualized fact-finding or 'mini-trials,' then a class action is inappropriate.").

[4] *See, e.g.*, *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (en banc) (noting evidence that "claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns."); *In re Apple iPhone 4 Prods. Liab. Litig.*, No. 10-md-2188, 2012 WL 3283432, at *1 (N.D. Cal. Aug. 10, 2012) (claim rate was ~.25% for $15 cash payment in settlement involving 20 million or more iPhone owners*); see also Pollard v. Remington Arms Co., LLC*, --- F.R.D. ---, 2017 WL 991071, at *13 (W.D. Mo. Mar. 14, 2017) (gathering numerous examples of cases featuring claims rates between ~.25% and ~2%).

insufficient to provide "at least $2 to each approved claimant"). And this type of distribution would fall far short of unjust enrichment for recipients. *See, e.g.*, *Villegas v. Google, Inc.*, No. 12-cv-00915, Dkt. 1 (N.D. Cal. 2012), consolidated in underlying case, No. 12-md-2358 (claiming substantial per-person statutory and actual damages); Dkt. 171 at 10 (estimating total claims as "billions").

While such a claims-made system would not ensure distribution to every class member, distribution of all settlement funds to some class members is preferable to making no distribution to any class members. Courts in this circuit have made that very determination. For example, in *In re Matzo*, 156 F.R.D. 600, 606 (D.N.J. 1994), the court rejected a proposed settlement predicated entirely on *cy pres* because "class members [were] not given the opportunity to make a claim against the settlement fund." And courts beyond this circuit have tackled exceptionally large classes in similar circumstances without resorting solely to *cy pres*. For example, in *Fraley v. Facebook Inc.*, 966 F. Supp. 2d 939, 943 (N.D. Cal. 2013), the court handled a nearly 150 million member class and initially rejected a settlement composed entirely of *cy pres*, leading counsel to successfully craft a claims-made settlement

that ultimately distributed ~$20 million amongst claiming class members, resulting in $15 per claimant.

And, in a related *cy pres* context, both ALI and this Court have explained that where some class members could not be identified (or chose not to participate), extinguishing an existing settlement fund as fully as possible through further distributions to participating class members is preferable to *cy pres*. *In re Baby Prods.*, 708 F.3d at 173 ("*cy pres* distributions are most appropriate where further individual distributions are economically infeasible."); ALI § 3.07 (b) (where some class members "could not be identified or chose not to participate" "the settlement should presumptively provide for further distributions to participating class members" where such distributions are possible).

* * *

Based on proceedings to date, the millions of dollars here are distributable to members of the class and doing so would be a direct benefit to the class. The District Court's erroneous legal conclusion that it is infeasible to distribute the settlement funds—and that all funds instead should be distributed *cy pres*—contravenes the guidance of this Court, fails the "direct benefit" test, and constitutes reversible error.

II. THE DISTRICT COURT'S ERRONEOUS ORDER THREATENS THE INTERESTS OF CONSUMERS, WHO ARE INHERENTLY DISADVANTAGED IN THE CLASS ACTION SETTLEMENT PROCESS

A. The Class Action Settlement Process Puts Class Members At Risk, As *Cy Pres* Arrangements Illustrate

In dividing settlement proceeds, the interests of class counsel and class members can sharply diverge. *In re Baby Prods.*, 708 F.3d at 175. Class counsel has an incentive to obtain the maximum possible fee award, but that fee almost invariably comes out of class members' pockets. Ultimately, "[a]lthough under the terms of each settlement agreement, attorney fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source." *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996).

Defendants are no help. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003). "Allocation ... is of little or no interest to the defense." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768,

820 (3d Cir. 1995). To a defendant, the fee award and the class award (whether it reaches the class or is distributed *cy pres*) "represent a package deal," *Johnston*, 83 F.3d at 246, with the defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015).

Cy pres presents a particularly stark illustration of these concerns. *Cy pres* represents a "conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *In re Baby Prods.*, 708 F.3d at 173; *see also Lane*, 696 F.3d at 834 (acknowledging "incentive for collusion" in class action settlements including *cy pres*; noting defendant "may prefer a *cy pres* award" "for the public relations benefit," and "the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award.").

B. The District Court's Failure To Properly Consider The Feasibility Of Distributing Settlement Funds To Class Members Has Resulted In An Imbalanced Settlement That Fails The Class

Infeasibility is a limit on *cy pres* specifically designed to protect the interests of class members by exhausting every option of direct

compensation before directing funds to *cy pres*. But here, thanks to the District Court's failure to properly analyze distributability, Defendant is paying ~$5.5 million that is supposed to go to the class in exchange for the release of their claims, and yet the class members take home nothing. Dkt. 173 at 2, 12.

A settlement cannot be in the class's best interest or fair, adequate, and reasonable under Rule 23 where, as here, it generates millions of distributable settlement dollars (and includes a release of millions of claims) yet the class languishes with no direct compensation. *Cf. In re Baby Prods.*, 708 F.3d at 174, (requiring direct benefit to the class and appropriate balance between payments to class and *cy pres*). This type of arrangement is precisely why courts are tasked with policing the "inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003). Class counsel will obtain a percentage fee regardless of whether the money goes to *cy pres* or to class members. *See In re Baby Products*, 708 F.3d at 173; *Lane*, 696 F.3d at 834. And Defendant has no incentive to push any funds to direct distribution vis-

a-vis *cy pres*. *See, e.g.*, *In re GM Pick-Up Truck*, 55 F.3d at 819–20. If anything, Google is likely to prefer *cy pres*. *See, e.g.*, *Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting Google's existing donations to many *cy pres* recipients, including proposed recipients from this action, and the support those recipients often give to the side of Google on cases and public policy issues).

* * *

The District Court's *cy pres* analysis was error. Distribution of settlement funds is only infeasible (allowing for *cy pres* distribution in lieu of class distribution) when it is truly impossible to direct the settlement funds to at least some class members—*e.g.*, when class members cannot be identified or reliably contacted. Applying this Court's *cy pres* criteria, the District Court should have rejected the settlement and directed that the millions in class settlement dollars be distributed to members of the class through a mechanism that provides a direct class benefit while maintaining an appropriate balance between class recovery and *cy pres*. *See In re Baby Prods.*, 708 F.3d at 174. Instead, the District Court failed in its duties by improperly concluding, as a matter of law, that the settlement funds were undistributable,

leaving the class in its present predicament—with none of the ~$5.5 million that is changing hands.

CONCLUSION

For the forgoing reasons, the undersigned Attorneys General, acting in a bipartisan coalition, request that this Court reverse the District Court's settlement approval and remand with instructions to properly analyze the distributability of the settlement funds and condition approval on the inclusion of a mechanism for direct payouts to individual class members.

July 10, 2017

Respectfully Submitted,

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COMBINED CERTIFICATIONS

Pursuant to Local Appellate Rule 46.1(e), I hereby certify that I am counsel of record in this matter and a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit. I further certify that the text of the electronically filed brief and the hard copies of the brief mailed to the Clerk of Court on July 11, 2017 by express mail are identical. I also certify that the PDF copy of this brief e-mailed to the Court on July 10, 2017 was checked for viruses by Symantec Endpoint Protection version 12.1.6 anti-virus software and that no virus was detected.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 3,430 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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