NO. 17-1480

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re: Google Inc. Cookie Placement Consumer Privacy Litigation

Theodore H .Frank,
Appellant.

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

Reply Brief of Appellant Theodore H. Frank

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Introduction

As *Baby Products* recognized, *cy pres* invites abuse. *Baby Products* did not "approve" a *cy pres* distribution (PB2-3),[1] it vacated one because of the lack of sufficient direct benefit to class members. 708 F.3d 163, 170 (3d Cir. 2013); OB24-25. *Baby Products* recognized that class members preferred cash payments to *cy pres* and so should class counsel. *Id.* at 174; OB12-13. "The private causes of action aggregated in this class action—as in many others—were created by Congress to allow plaintiffs to recover compensatory damages for their injuries." *Id.* at 173. Nevertheless, the district court below decided that direct class compensation "does not serve the purpose of this class action." JA291. This premise is wrong as matter of law and requires reversal. OB22-23.

Frank's opening brief went into extensive detail why, as a matter of public policy courts hoping to hold class counsel to their fiduciary duty must treat *cy pres* as a last resort and prioritize class recovery, and why even potential conflicts of interest magnify the dangers to the class. OB18-24. This is a problem because class counsel has the ability to throttle—or even, as in this case, eliminate—the claims process in settlement negotiations to increase unclaimed funds for a *cy pres* recipient. OB26-30; JA161-63; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014). Simply put, none of the arguments of the appellees or NLADA grapple with these fundamental issues of *why* regulation of *cy pres* is needed; nor does the Ninth Circuit opinion in *In re Google Referrer*

[1] "JA," "OB," "PB," "DB," "AGB," and "NLADAB" refer to the joint appendix, Frank's opening brief, plaintiffs' brief, defendant Google's brief, the state AGs' *amicus* brief, and NLADA's *amicus* brief respectively.

Header Privacy Litig., -- F.3d --, 2017 WL 3601250 (9th Cir.). Yes, courts have come to different results on these questions, in part because years before *Baby Products*, *BankAmerica*, and *Turza* demanded more scrutiny of *cy pres*, district courts ruled on *ex parte* presentations of settlements. *Cf. Fujiwara v. Sushi Yasuda Ltd.,* 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014) (noting problem of precedent created by *ex parte* proceedings in class counsel fee applications); *cf. also* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997). Asking courts to rubber-stamp self-serving *cy pres* without considering the systemic effects on class-action settlements ensures abusive *cy pres* arrangements like we see here, and the problem will be only worse if an affirmance here eviscerates *Baby Products'* requirement that class counsel prioritize direct recovery. The parties' attempts to evade *Baby Products* are unavailing. *See* Section I, below. *Google Referrer* ignores *Baby Products* entirely; that the Ninth Circuit has chosen to create a circuit split does not mean this Court should ignore its own better precedent. *See* Section IV, below.

Moreover, neither of the appellees, in 18,153 combined words of briefing, find any room to defend class counsel's adequacy of representation under Rules 23(a)(4) or (g)(4), or the failure of the district court to address Frank's objection to class certification. OB32-34. They do not mention *Walgreen* or *Aqua Dots*, much less attempt to distinguish those cases. Appellees make no argument because none is available. Every single class member would have been better off opting out of this settlement, because they received no consideration for the waiver of their claims other than the payment of their putative attorneys. The failure of class counsel to take that step to protect their

clients' interests demonstrates their inadequate representation as a matter of law. *See* Section II, below.

Even if a $0 settlement where funds are distributable could be approved and the class certified, the *cy pres* here is untenable even under *Google Referrer*. Section III, below.

The parties seem to think it relevant that Frank was the only objector. PB7; DB2. This is another red herring; a valid objection to settlement fairness or class certification is not nullified because a second class member did not repeat it. This is especially true given the burdens of objection and lack of direct notice in this case. "At the end of the day, it is not the number of Objectors but the quality of their objections that should guide the court's review." *Jones v. Singing River Health Services Found.*, -- F.3d --, 2017 WL 3178624, at *10 (5th Cir.); *cf. also Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014).

I. The district court erred in approving a *cy pres*-only settlement where there was undisputed evidence that a claims process was feasible.

Appellees defend the *cy-pres* only settlement by distorting this Court's legal standards and ignoring the undisputable evidence that a distribution to the class was feasible.

A. Plaintiffs misstate the applicable legal standards regarding settlement fairness and *cy pres* standards.

1. There is no presumption of fairness for the allocation of the settlement relief.

Plaintiffs would have this court ignore the unfairness of this *cy-pres* only settlement based on an initial presumption of settlement fairness and satisfaction of the

Third Circuit's *Girsh* factors. PB11-13. This misstates the law. "Where the court has not yet certified a class or named its representative or counsel, this assumption is questionable." *GM Trucks*, 55 F.3d at 787-88. Instead, a pre-certification settlement such as this one requires "heightened" judicial scrutiny of the certification and the accompanying settlement. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010).

Plaintiffs misplace reliance on *Ehrheart v. Verizon Wireless* to argue deference for "voluntary settlement agreements," PB12, but that case discussed only the enforceability of a settlement as a binding contract (where defendant tried to back out based on a change in the law), not the district court's 23(e) fairness review. 609 F.3d 590 (3d Cir. 2010). Plaintiffs' argument that the settlement is a private compromise, PB15, ignores that the nature of class actions requires stringent judicial oversight to protect absent class members who had nothing to do with the compromise. "Because class actions are rife with potential conflicts of interest between class counsel and class members, however, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlement in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Baby Prods.*, 708 F.3d at 175.

Indeed, any initial presumption of settlement fairness pertains only to the total *amount* obtained in a settlement and not whether that settlement relief is misallocated; plaintiffs' reliance on *NFL Concussion* (PB12) is thus misplaced. "Hard-fought negotiations extends only to the amount the defendant will pay, not the manner in which that amount is *allocated* between the class representatives, class counsel, and

unnamed class members." *Pampers*, 724 F.3d at 717-718 (emphasis in original; cleaned up) (citing *GM Trucks*, 55 F.3d at 820). Again, Frank is not arguing that the total amount of settlement relief ($5.5 million) is not enough to settle this action, but he challenges how that amount (the class's money (OB24)) is being divvied up among class counsel, class members, and third parties unrelated to the class, but related to class counsel and the defendants. OB10.

Plaintiffs proclaim the "heavy burden" to establish an abuse of discretion. PB9 (quoting *Lindy Bros. Builders, Inc of Phila v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976)). But, "if the trial court has not properly identified and applied the criteria, the court's determination will not be entitled to deference." *Id.* at 116.

Plaintiffs complain that Frank does not discuss the Third Circuit's *Girsh* factors. PB13. But while the *Girsh* test is necessary, it is not sufficient: "district courts should also consider other potentially relevant and appropriate factors." *In re AT&T Corp.*, 455 F.3d 160, 165 (3d Cir. 2006). Satisfaction of the *Girsh* factors was not enough in *Baby Products* where this Court reversed settlement approval because the district court had not ensured that direct benefit to class members had been prioritized. 708 F.3d at 174-75. Thus, while plaintiffs claim that Frank's appeal focuses on Frank's "preferred distribution method," PB13, Frank simply insists that plaintiffs follow Third Circuit law: the settlement improperly fails to prioritize class members over non-class charities.

2. The threshold for *cy pres* is "infeasibility" rather than "logistically burdensome."

Plaintiffs expand the test regarding the propriety of *cy pres* awards from whether further distributions would be "feasible" to whenever direct distributions would be

"logistically burdensome, impractical, *or* economically infeasible." PB16-17 (emphasis added). But a finding that class distributions would be "costly and difficult" is insufficient to justify *cy pres* where class distributions ultimately remain "viable." *BankAmerica*, 775 F.3d at 1065. The cases cited by plaintiffs, PB16, do not prove otherwise. *See Klier*, 658 F.3d at 475 (rejecting *cy pres* award and holding 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.'") (emphasis added); *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1005 (N.D. Ohio 2016) (holding that *cy pres* was appropriate because it was no longer "economically feasible" to make *residual* distributions to the class).[2] Distribution of settlement relief will always involve some logistical burden. If plaintiffs need only show some "logistical burden" to justify use of *cy pres*, then every settlement could lawfully resort to *cy pres* awards instead of class compensation. *Baby Products* rejected appellees' argument that more than $2.8 million of distribution would be too burdensome. Sure enough, on remand, the parties found a way to get $15 million originally earmarked for *cy pres* to the class. OB28-30.[3]

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[2] We discuss *Google Referrer* in Section IV below.

[3] NLADA asks the Court to consider five factors without "tests," NLADAB5, but "a consider-everything approach lacks a benchmark; a list of factors without a rule of decision is just a chopped salad." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) (cleaned up). NLADA purports to identify "best practices," but provides no normative reasoning why one court's rule is better than another's. NLADA pushes for expanded *cy pres* because legal-aid societies are good. But the moral worthiness of a third party has nothing to do with their legal entitlement to "monies gathered to settle complex disputes among private parties." *BankAmerica*, 775 F.3d at 1065. That

3. Plaintiffs conflate the legal standard regarding propriety of the *cy pres* recipients ("next best") with propriety of whether a class action settlement should utilize *cy pres* awards ("infeasibility").

Plaintiffs argue that Frank applied the wrong legal "standard" regarding the propriety of *cy pres* awards, arguing that the "proper inquiry is whether the *cy pres* awards are 'the next best distribution.'" PB17-18. But it is plaintiffs who are confused. They conflate two separate questions: (1) the propriety of the *cy pres* recipient (nexus between the *cy pres* recipient and the class) and (2) whether *cy pres* should be awarded at all (whether it is feasible to give the class's money to the class). One makes the "next best" distribution *only* when the best distribution—to the class—is not feasible. Similarly, Google cites *Baby Products* in support of idea that cy pres "is appropriate if used for a purpose related to the class injury." DB31-32. But *Baby Products* was referring only to *cy pres* from "the distribution of excess settlement funds" not a $0 recovery, all-*cy pres* settlement. 708 F.3d at 172.

Plaintiffs' discussion of *Fraley* and *Lane* demonstrates their confusion. PB18. Before a court determines whether a *cy pres* recipient is "next best," it must first determine whether any *cy pres* award may be made at all, i.e., whether distribution to the class is feasible. *Lane* did not consider the antecedent question of whether class distributions were feasible because the class objector conceded that they were not possible. *See* NLADAB11, 14 (discussing *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th

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NLADA's collection of factors does not point to an outcome either way in even this clear-cut case demonstrates the problem with their self-serving approach. Public policy dictates that the *cy pres* in this case be rejected, whether it be for lack of "sufficient direct benefit" or for the unquestionable conflicts of interest in the choice of the *cy pres* recipients

Cir. 2012)). *Lane* skipped directly to the second question of recipients' appropriateness. *See id.* Thus, *Lane* does not "trump" *Fraley* as plaintiffs contend, PB18; rather, *Fraley* contradicts plaintiffs' contention regarding feasiblity. PB19. *Fraley* and *Carrier IQ* demonstrate that the settlement money here can feasibly be distributed to a class of tens or hundreds of millions through a claims process. 966 F. Supp. 2d 939 (N.D. Cal. 2013); 2016 WL 4474366, at *2 (N.D. Cal. Aug. 25, 2016); JA183-85 (documenting several other similar distributions); OB24-29; Section I.D below.

B. The district court disregarded *Baby Products'* key holdings and approved a settlement that contravenes Third Circuit law.

Plaintiffs argue that the district court properly distinguished *Baby Products* when it approved the *cy-pres* only settlement. PB14 (citing JA12). Not so. The district court found that because of "the substantial problems of identifying the millions of potential class members and then of translating their alleged loss of privacy into individual cash amounts," "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* (sic) amount." JA12. Based on this finding, the district court concluded: "The facts of record, then, are clearly distinguishable from those addressed in *In re Baby Products Antitrust Litigation*, where the district court had approved a *cy pres* award without first confirming the amount of direct compensation." JA9.

The district court's quick dismissal of *Baby Products* ignores fundamental principles of Third Circuit law regarding *cy pres* relief in class action settlements. This Court explained:

> We add today that one of the additional inquiries for a thorough analysis of settlement terms is the **degree of direct benefit provided to the class**. In making this determination, a district court may consider, among other things, 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. Barring sufficient justification, ***cy pres* awards should generally represent a small percentage of total settlement funds**.

Baby Prods., 708 F.3d at 174.

First, the district court's distinction that unlike *Baby Products'* district court, it confirmed the "amount" of direct compensation ($0) misunderstands the holding. *Baby Products* was concerned with settlements that prioritize payments to non-class charities over class members. *Id.* at 178. Thus it directed district courts to carefully consider not simply the "amount" of direct benefit to class members, but whether the "degree of direct benefit" to class members is "sufficient" vis-à-vis payments to non-class members. *Id.* at 170, 174, 176, 181. Class members must remain "the foremost beneficiaries of the settlement." *Id.* at 179. The district court's substitution of "amount" for "degree" eliminates the crucial comparison between *cy pres* and class relief. Knowing may be half the battle; but *Baby Products* requires district courts overseeing class settlements to do more.

Second, the district court failed to follow *Baby Products* because it never considered how a claims process would deliver direct compensation to class members. *Baby Products* specifically directs district courts to consider "the claims process" in assessing the degree of direct benefit to class members. *Id.* at 174. In *Baby Products*, this Court

criticized the burdensome claims process where it required documentary proof, questioning whether "such a restrictive claims process was in the best interest of the class." *Id.* at 176. Restrictions on a claims process (*Baby Products*) or even the elimination of any claims process (like here) is important in determining whether a settlement is designed to prioritize class recovery. The undisputed evidence here demonstrates that a claims process would feasibly deliver direct compensation to class members. JA183-85; OB24-29; Section I.C below. The district court's failure to even consider such evidence is independent error.

And *third*, the district court's approval of a *cy-pres* only settlement contravenes this Court's preference that *cy pres* relief remain a "small percentage" of the settlement relief. *Id.* at 174. *Baby Products* reflects this Court's judgment that *cy pres* should be a last resort when distributing settlement relief. *Contra* DB22 (citing *Baby Products* out of context). Accordingly, plaintiffs' citation to out-of-circuit authorities approving *cy-pres* only settlements, PB19-22, are unpersuasive, as well as distinguishable. *New York v. Reebok Int'l Ltd.*, 96 F.3d 44 (2d Cir. 1996) was *parens patriae*, not a class action. An enforcement action consent decree does not deprive the victims their rights to bring an action. *Cf. SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 294 (2d Cir. 2014). *Boyle v. Giral*, 820 A.2d 561 (D.C. App. 2003) interpreted D.C. Code § 28-4507(b), not Rule 23(e), in assessing whether D.C. law required direct relief to consumers. 820 A.2d at 567-58. *Boyle* also lacked "record evidence" that distribution to the class was feasible through a claims process. 820 A.2d at 569 n.7. In *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672 (7th Cir. 2013), the statute capped total relief for the class at $10,000. *Id.* at 674. While not raised by the parties, *Hughes* ruminated in *dicta* on whether a $10,000

payment to charity would be preferable to a claims process. *Id.* at 675-76. Those ruminations do not alter Seventh Circuit law that a settlement must prioritize feasible economic recovery (even small payments) to class members over non-class charities. *Pearson*, 772 F.3d at 784 (proposing $3 checks to class instead of diverting the money prematurely to *cy pres*). Finally, all but one of the district court cases cited by plaintiffs, PB19 n.6, pre-date the guidance provided by *Baby Products* (2013)*, BankAmerica* (2015), *Klier* (2011), and *Pearson* (2014), and have other important distinctions.[4]

Defendants argue that "absent class members here would surely benefit more by having the settlement funds go to Internet privacy organizations that have promised to use the funds in a way that helps protect the class" than if the class members took the money, and, well, just spent it. DB23; *accord* Dkt. 163-1 at ¶9 (class counsel declaration). The claim is extraordinary, and extraordinarily wrong. By this argument, no money should ever go to class members in a settlement, so long as the attorneys think they can find a better way to spend the money. Courts, as they should, reject such condescending paternalism:

> Class counsel also argues that a further distribution to the class is inappropriate because it would primarily benefit large institutional investors, who are less worthy than charities such as LSEM. We flatly reject this contention. It endorses judicially impermissible misappropriation of monies gathered to settle complex disputes among private parties, one of the "opportunities for abuse" that

[4] In *In re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 37286 (N.D. Cal. Mar. 18, 2013), the court found that objectors had not demonstrated "economic feasibility" of objectors' proposed alternative settlement relief. Frank, on the other hand, presented undisputed evidence of that feasibility. Section I.C, below.

> make it "inherently dubious" to apply the *cy pres* doctrine from trust law "to the entirely unrelated context of a class action settlement." *Klier*, 658 F.3d at 480 (Jones, C.J., concurring).

BankAmerica, 775 F.3d at 1065. Attorneys and courts don't get to neglect fiduciary duties and override legislative remedial schemes because they think they know best how to achieve public good. "Certainly, this law suit is not charitable." *Pet Food*, 629 F.3d at 363 (Weis, J., concurring and dissenting). If class counsel represented a single multi-millionaire instead of a class, there would be no question that it would not have the authority to redistribute its client's assets to a worthy charity without the client's permission. This remains true even if the client was an especially odious Martin Shkreli-type who would only spend the money on particularly distasteful bacchanalia. The principle shouldn't change just because class counsel represents many clients, rather than just one. Andrew J. Trask, *The Roberts Court and the End of the Entity Theory*, 48 AKRON L. REV. 831 (2015).

C. There was undisputed evidence that a claims process was feasible.

The *only* record evidence on the feasibility of distribution contradicts plaintiffs' unsupported claim that distribution was not feasible. *Compare* PB18 *with* JA183-85. Appellees claim this is "factually inapposite" because class members in the other cases were "easily and objectively identified." PB32n.13; DB19-20. The claim is false; Frank identified several settlements where the only identification of class members was self-identification through declaration, including *Carrier IQ*, where there was only publication notice. 2016 WL 4474366, at *3; JA184-85.

More importantly, because the court certified the class here, that is effectively a finding that class members are ascertainable; if they were not, then the class could not have been certified. *See* Section II.B, below. Plaintiffs cannot have it both ways. If class certification was appropriate, then class members are ascertainable, distribution is feasible, and this settlement flunks *Baby Products*. If class members are not ascertainable, then class certification is not appropriate, and this Court must reverse settlement approval for that reason.

D. A *cy pres* settlement is not a settlement for injunctive relief.

Google attempts to reconceptualize the *cy pres* as "injunctive relief," a fiction plaintiffs reject. *Compare* DB12-17 *with* PB19. Google analogizes this zero monetary recovery settlement to others in which class member shareholders or insurance subscribers obtained only injunctive relief. DB12-13 (citing cases). However, the test for permissibility of an injunctive settlement is not the same for that of a *cy pres* settlement. That is because *cy pres* settlements create a pot of funds, but then divert those funds to non-class members. On the other hand, an objection claiming an injunctive relief settlement is inadequate is often tantamount to saying the class should have gotten more from the defendant, perhaps because the injunctive relief is worthless. *E.g.*, *Walgreen*, 832 F.3d 718. Frank does not claim the $5.5 million gross settlement total is inadequate, merely that it is allocated in an unfair manner to third parties instead of the class. OB10. Google asks for a test that depends upon speculating about the litigation value of the class's claims when the settlement value is objectively known.

Contrary to Google's assertion (DB16-17), the *cy pres* payments *are* a substitute for monetary compensation because the settlement waives class members' damages claims. *Molski v. Gleich* rejected the attempt to substitute *cy pres* as an injunctive (b)(2) remedy for individual monetary recoveries, when the settlement released significant monetary claims. 318 F.3d 937, 953-55 (9th Cir. 2003). The operative complaint sought monetary relief, not *cy pres*. JA111, 113, 118, 121, 122, 124. And "in the class action context, the relief sought in the complaint serves as a useful benchmark in deciding the reasonableness of a settlement." *GM Trucks*, 55 F.3d at 810 (cleaned up). In response to a similar contention that damages were never the object of the action, and that an all-*cy pres* settlement was appropriate, the Northern District of California demurred, finding the contention "somewhat curious" given the complaint's allegations. *Zepeda v. Paypal*, 2014 WL 718509, at *6 (N.D. Cal. Feb. 24, 2014). *Zepeda* later settled, like *Fraley* and *Baby Products*, with real cash payments to the class.

II. In the alternative, if it is impossible to create a settlement with "distributable" funds, class certification was an error of law.

The specifications of Rule 23(a) "demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 620 (1997); *accord GM Trucks*, 55 F.3d at 797-800.

A. Appellees do not claim that class certification satisfies Rule 23(a)(4) or Rule 23(g)(4).

Frank argued that if a class action is brought that cannot benefit the class, then adequacy of representation certification requirements under Rules 23(a)(4) and (g)(4) cannot be satisfied. OB32-34. Plaintiffs and Google have absolutely no response to

these adequacy-of-representation arguments, and no defense for the district court's failure to address them. They do not argue that *Walgreen* and *Aqua Dots* do not apply; they do not argue that this Court should create a circuit split with *Walgreen* and *Aqua Dots*; they do not even mention these cases or Rules 23(a)(4) and (g)(4). An appellee who "fails to respond to an appellant's argument in favor of reversal" waives any objections to that argument "not obvious to the court." *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 437 n.11 (3d Cir. 2005) (cleaned up). Google asserts that there is a different standard for litigation certifications than for settlement-only certifications, but they cite no case involving Rule 23(a)(4). DB24-28. Any such case would transgress *Amchem*.

Google asserts that it need only show that it acted on grounds "that apply generally to the class, so that final injunctive relief … is appropriate respecting the class as a whole." DB27-28. Yes, this is necessary, but not sufficient. Just because a certification satisfies Rule 23(b)(2) doesn't mean it satisfies Rule 23(a), and it must satisfy both.

There was no marginal benefit to the class from this settlement (opt-outs and non-class members receive the same benefit as class members), and, according to plaintiffs, no marginal benefit to the class was possible from the litigation. Zealous and faithful class counsel would have opted out all of the class members rather than let them waive their claims. If the class cannot benefit, then class certification was inappropriate as a matter of law, and this Court must reverse.

B. Google's argument that class members cannot be identified misconstrues the class definition; but if Google is correct, then class certification fails.

While ignoring the Rule 23(a)(4) argument, Google misconstrues Frank's certification arguments as somehow supporting their Rule 23 ascertainability arguments. DB24-25.

Google argues that ascertainability cannot be satisfied because "class members could not be identified," DB24. (And similarly, Google argues that a claims process would be impossible because members cannot "self-identify." DB19.) Google's argument that class members cannot be identified is based on Google's counter-textual complication of the class definition. The class is defined as those "who used Apple Safari or Microsoft Internet Explorer web browsers and who visited a website from which Doubleclick.net (Google's advertising serving service) cookies were placed by the means alleged in the Complaint." JA6. Google contends that the "means alleged" is proved through "highly-technical experiments" performed by a Stanford University researcher. DB20 (citing JA69-JA81). But the class representatives did not prove their class membership by replicating those complex experiments. Instead, they each alleged that they "used the Apple Safari web browser with the default privacy settings to interact with the Internet for uses including reviewing and transmitting confidential and personal information and visited websites with third-party advertisements of the Defendants." JA50-51. Nothing more is required of absent class members. Indeed, if more was required from the class representatives to prove their class membership, then

this provides an additional reason the class representatives were inadequate under Rule 23(a)(4).[5] OB32-34.

Further, if Google's interpretation of the class definition is correct (requiring replication similar to Dr. Mayer's experiments to identify class members) and ascertainability cannot be satisfied, then class certification would fail. *Shelton v. Bledsoe*, 775 F.3d 554, 559 (3d Cir. 2015) (noting that ascertainability is "essential prerequisite of an action under Rule 23"). Google suggests that while ascertainability is not satisfied, it is not required here because (1) this was a settlement class and (2) the class was certified under Rule 23(b)(2). DB25, DB27. Both are misstatements of the law.

First, that this was a settlement class does not remove the ascertainability requirements. Indeed, ascertainability is vital in the settlement context because "ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class." *Carrera v. Bayer Corp.*, 727 F.3d 300,

[5] Google suggests that Frank *may* not be a class member because he too could not replicate complex experiments showing that he hadn't received the cookies prior to the alleged time period. DB19n.4. Frank provided even greater detail demonstrating his class membership than the class representatives. *Compare* JA179 *with* JA50-51; OB8. Google demands that Frank prove a negative, namely that each time he visited the websites alleged to have transmitted the cookies, his browser didn't have preexisting cookies from visits before the class period that blocked new cookies from placing. This isn't part of the class definition that was approved by the court in its preliminary approval order. OB8. Again, the named plaintiffs did not allege any such facts in their complaint or present any such evidence to the district court.

In any event, Google's argument is raised in an undeveloped footnote and "arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived." *John Wyeth & Brother Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997).

306 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591-592 (3d Cir. 2012) (finding that ascertainability serves, *inter alia*, the important purpose of allowing absent class members the opportunity to make conscious litigation decisions).[6] Google's quotation of *Sullivan v. DB Investments*, 667 F.3d 273, 315 (3d Cir. 2011), is misleading because *Sullivan* was not referring to ascertainability but to Rule 23(c)(1)(B)'s requirement that "An order that certifies a class action must define the class and the class claims, issues, or defenses." Contrary to Google's contention, ascertainability is required regardless of whether this class is a litigation class or a settlement class.

Second, the fact that this case was certified as a (b)(2) class does not remove the ascertainability requirements. While this case was certified as a (b)(2) class, it is functionally equivalent to a (b)(3) class because class members waived damages claims and were permitted to opt out. In *Shelton*, which Google relies upon, this Court recognized that a (b)(2) class with notice and opt-out rights (such as here) would require ascertainability: "[w]here notice and opt-out rights are requested [in a (b)(2) class action]

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[6] Google relies on the unpublished *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.,* 656 F. App'x 8, 8-9 (3d Cir. 2016). *Comcast* was decided in an uncontested non-adversarial appeal and is at odds with published Third Circuit cases like *Marcus* that recognize ascertainability as serving the interests of absent class members as well as defendants. *Marcus*, 687 F.3d at 591-592. "[T]he requirements for certification are not the defendant's to waive; they are intended to protect absent class members." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013). If ascertainability does not apply to a settlement class, then that assures that defendants have unfair leverage to use the promise of attorneys' fees to impose a relatively worthless settlement on a class to extinguish possibly legitimate individual claims, because class counsel can only achieve class certification in the settlement context. This Court should not adopt such a counterproductive rule.

. . . a precise class definition becomes just as important as in the [R]ule 23(b)(3) context." 775 F.3d at 562 (quoting *In re Monumental Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004)). Because ascertainability is required here, if Google is correct that ascertainability cannot be satisfied, then certification of this settlement class fails, and this Court should reverse settlement approval for that reason.

III. Significant prior affiliations also make the *cy pres* inappropriate.

The *cy pres* recipients can be divided into friends of Google and the legal-aid society where class counsel is chair of the board. That sort of self-dealing is inappropriate as a matter of law.

That Public Counsel has "seventy board members" (PB34) might or might not be relevant in a case dealing with one board member. But it is irrelevant in this case; they have a single chairperson, the lead class counsel here, and class counsel does not dispute that chairing the board of that non-profit implies fundraising obligations. If a donation to one's *own* charity is not a "significant prior affiliation" that "would raise substantial questions about whether the award was made on the merits," what is? (Note that Google, which has repeatedly used the *cy pres* dodge to avoid paying Google customers in class-action settlements, never ended up with Public Counsel as a recipient until this case.) "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) (cleaned up); OB37. Neither appellee disputes that *Radcliffe* applies here, nor that it dictates rejection of the *cy pres*; neither even mentions *Radcliffe*. Google argues that

the *cy pres* was not "collusive," DB28-30, but that's not the relevant standard. Google's proposed test of whether the individual involved in the decision-making "personally and directly benefit[s] from the distribution" (DB29) is unsupported by appellate precedent and narrower even than basic conflict-of-interest standards. Google's test would permit class counsel to divert *cy pres* funds to a close relative, and permit other conflicts "palpabl[y]" improper in class-action proceedings. *Cf. Eubank v. Pella Corp.*, 753 F.3d 718, 722 (7th Cir. 2014) (citing cases of improper conflicts).

The nature of class action proceedings requires that class representatives "possess undivided loyalties to absent class members." *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998). Mr. Strange harbors a conflict between his fiduciary duties as chair of the board at Public Counsel and his fiduciary duties to all the absent class members he seeks to represent here. Even under *Google Referrer,* presence on a charity's board—much less chairing it!—is damning. 2017 WL 3601250, at *7. That Mr. Strange also failed to disclose this conflict to the court and class before Frank objected is more so. JA169.

(Google implies that the standard of review is one for clear error. DB30. But the facts—Google regularly donates to these charities, and Mr. Strange is chair of Public Counsel, and neither bothered to disclosed this to the class or court—are not disputed, only the legal consequences of those facts. This is a question of law, and reviewed *de novo. Warner Lambert Co. v. LEP Profit Int'l, Inc.*, 517 F.3d 679, 681 (3d Cir. 2008).)

The parties produced no evidence below or on appeal that Google's donations here aren't simply fungible replacements for donations they would have made to Stanford and other long-time charitable affiliates anyway. OB7-8; OB36. Plaintiffs call

these "***additional*** *cy pres* contributions," (PB37) but that assumes the answer without record evidence. They argue that Google donates to many charities. PB37-38. So what? That doesn't mean that this money isn't simply displacing existing donations. Google asserts that the settlement requires the money to be used in "specific" ways. DB31. The argument is specious. The "only permitted" use (JA133) is just a broad statement in line with all the recipients' missions. Any donation to those charities' general funds would be used in the same manner.

Google protests that the argument of displacement is "speculative." DB32. But the evidence was solely in Google's possession, and objectors cannot be expected to be mind-readers. Google could have presented evidence demonstrating that the *cy pres* was outsized relative to past contributions and would not affect future ones; they did not. (And could not possibly do so with respect to Stanford.) The vague statements by Google's counsel at the fairness hearing (JA281) (cited by DB30) are not evidence and if they were, don't speak to the pertinent concerns. Settling parties have the burden of proving the fairness of the settlement. *GM Trucks*, 55 F.3d at 785; *Pampers*, 724 F.3d at 718 (citing cases and authority). "A presumption is generally employed to benefit a party who does not have control of the evidence on an issue... It would be unjust to employ a presumption to relieve a party of its burden of production when that party has all the evidence regarding that element of the claim." *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1362 (11th Cir. 2002). *Google Referrer* did find Google self-dealing acceptable under *Lane*, after improperly shifting the burden to objectors to prove otherwise. But in the Third Circuit, *GM Trucks* puts the burden on the settling parties, and they failed to meet the burden

here—or present any record evidence whatsoever—that the *cy pres* will be new money, rather than redesignated money.

IV. *Google Referrer* conflicts with *Baby Products* and this Court should not follow it.

Days before this brief was filed, the Ninth Circuit affirmed a similar settlement approval in *Google Referrer*. Without addressing class counsel's fiduciary duties to the class, *Google Referrer* held that the question of whether money went to the class or to third parties was a question of "possible" alternatives that was irrelevant to settlement fairness. 2017 WL 3601250 at *4. It made no effort to reconcile its decision with *Baby Products*' and *Pearson*'s requirement that direct recovery be prioritized.

Google Referrer further held that whether a settlement fund was non-distributable depended on the payments that one could hypothetically make to every single class member. *Id.* It failed to address the perverse incentives that rule will create. *Google Referrer*'s assertion that distribution of settlement proceeds was not "practicable" contradicts the undisputed facts in that case and this case, and fails to address or acknowledge cases like *Fraley* or *Carrier IQ* where similarly small settlement amounts were successfully distributed to large classes. Indeed, under *Google Referrer*, even *Sullivan v. DB Investments*, with its $135,400,000 fund, could have been an all-*cy pres* settlement. After attorneys' fees, there would be less than $1-$2/class member left for each of 67 to 117 million consumer subclass members. 667 F.3d at 290. Similarly, *Pearson* struck down $1.13 million in *cy pres*, though there were 12 million class members. 772 F.3d at 784. The *Google Referrer* standard would all but end the practice of ever giving class members any recovery. *Baby Products* is correct and *Google Referrer* is wrong; *Google Referrer*

does not provide a reason to fail to reverse a settlement approval that conflicts with *Baby Products*.

Conclusion

This Court should reverse this settlement approval as a breach of class counsel's fiduciary duty to prioritize class recovery. The preexisting relationships between the *cy pres* recipients, class counsel, and Google, provide an independent reason to reverse the district court's settlement approval as a matter of law.

If it is truly the case that any distribution or injunctive relief to the class is infeasible, then the district court improperly certified the class (whether because of lack of adequate representation or because of Google's claim of lack of ascertainability), and the Court should reverse on those grounds.

Dated: August 25, 2017

Respectfully submitted,

/s/ Theodore H. Frank

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Combined Certifications

1. Certification of Bar Membership

I hereby certify under L.A.R. 28.3(d) that I, Theodore H. Frank and Adam E. Schulman are both members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,444 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond font.

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I hereby certify that on August 25, 2017, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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In accordance with L.A.R. 31.1(c), I hereby certify that the electronic and hard copies of this brief in the instant matter contain identical text

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Executed on August 25, 2017.

/s/ Theodore H. Frank
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