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March 6, 2017

**VIA ECF**

Molly Dwyer, Clerk of Court  
Office of the Clerk  
U.S. Court of Appeals for the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94119-3939

Re: *In re Google Referrer Header Privacy Litigation*, No. 15-15858 (9th Cir.)  
Scheduled for oral argument March 13, 2017  
(Wallace, McKeown, and Bybee, Circuit Judges)

Dear Ms. Dwyer:

Appellants submit this FRAP 28(j) response to Google's March 1 letter.

*Google Cookie* is an unpublished, out-of-circuit district-court decision on appeal to the Third Circuit. Its reasoning is conclusory and fails to squarely address objections Frank raised both there and in this case. For example, *Google Cookie* incorrectly states that there were no objections to class certification. 2017 WL 446121 at \*2. But Frank had objected, as he did here, that a settlement-only certification for purposes of effectuating a *cy pres*-only settlement fails to satisfy the Rule 23(b)(3) superiority requirement or the Rule 23(a)(4) adequacy requirement. Frank Opening Br. 28-32; Reply Br. 10-15; *Gallego v. Northland Group*, 813 F.3d 123 (2d Cir. 2016); *In re Walgreen Stockholder Litig.*, 832 F.3d 718, 725-26 (7th Cir. 2016) (affirming applicability of *Aqua Dots* to settlement certifications). *Google Cookie* summarily determined that the “realities of litigation” dictated that “direct monetary payments to absent class members ... [would] result[] (at best) with direct compensation of a *de minimus* [sic] amount,” but clearly erroneously failed to account for the unrebutted record evidence of a dozen settlements of comparable size and scope demonstrating that a claims-made process was feasible. Compare also 2017 WL 446121 at \*4 with Frank Opening Br. 23 (*Fraley* example). *Google Cookie*'s definition of economic feasibility commits the same legal error regarding what it means for a fund to be distributable that is at issue in this appeal. Compare 2017 WL 446121 at \*4 with Frank Opening Br. 23-25; Reply Br. 3-7.

Relying on the erroneous decision on appeal here and a misreading of *Lane* (Frank Opening Br. 34), *Google Cookie* ratified the selection of a charity for which class counsel served as chairman.

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The fact that certain charities overlap in the *Google Cookie* settlement and the settlement at bar reinforces Frank's contention that "there is no demonstrable value added" by giving to institutions to whom Google regularly contributes. Frank Op. Br. 38. Finally, conspicuously absent from the *Google Cookie* recipients is Chicago-Kent Law School, class counsel's *alma mater* only in this case, demonstrating the *Nachshin* violation that occurred here. Frank Op. Br. 32-38.

Respectfully submitted,

/s/ Adam E. Schulman

Adam E. Schulman

cc: Counsel via ECF system

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/s/ Adam E. Schulman

Adam E. Schulman