NO. 20-15616

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: GOOGLE LLC
STREET VIEW ELECTRONIC COMMUNICATIONS LITIGATION

BENJAMIN JOFFE, *et al.*,
Plaintiffs-Appellees,

DAVID C. LOWERY,
Objector-Appellant,

v.

GOOGLE, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California at San Jose
No. 3:10-cv-2184-CRB, District Judge Charles R. Breyer

Opening Brief of Appellant David C. Lowery

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Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

…

(4) the representative parties will fairly and adequately protect the interests of the class.

…

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

…

(3) the court finds that … a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. …

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

…

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

…

(C) the relief provided for the class is adequate, taking into account: …

…

(ii) the effectiveness of any proposed method of distributing relief to the class;

(iii) the terms of any proposed award of attorney's fees, including timing of payment;

… and

(D) the proposal treats class members equitably relative to each other.

…

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). …

…

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…

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs.

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, direct to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

…

Statement of Subject Matter and Appellate Jurisdiction

The district court had federal question jurisdiction under 28 U.S.C. § 1331, because the complaint alleged violations of a federal statute, 18 U.S.C. § 2511, and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367. Dkt. 54 at ¶ 15. The district court found Article III jurisdiction. ER4-9.[1]

This court has appellate jurisdiction under 28 U.S.C. § 1291. The court's final judgment, pursuant to Fed. R. Civ. Proc. 54(b), issued on March 18, 2020. ER30. The court's award of attorneys' fees issued on March 18, 2020, and was modified on March 27, 2020. ER3; ER1. Objector-Appellant David C. Lowery filed a notice of appeal on April 3, 2020. ER31. This notice is timely under Fed. R. App. Proc. 4(a)(1)(A). Lowery, as a class member who objected to settlement approval below, has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Statement of the Issues

1. The new Fed. R. Civ. Proc. 23(e)(2)(C)(ii) requires a court to analyze "the effectiveness of any proposed method of distributing relief to the class" when deciding whether to approve a settlement. The Fifth, Seventh, and Eighth Circuits hold that a *cy pres* distribution is "supposed to be limited to money that can't feasibly be awarded" to the class. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) (Posner, J.) (rejecting

[1] "ER" refers to the Excerpts of Record; "Dkt." refers to docket entries in the district court below.

$1.1 million *cy pres* residual in class with over 10 million members); *Klier v. Elf Atochem N.A., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063-66 (8th Cir. 2015); *accord* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07(a) (2010) ("*ALI Principles*"). This Circuit recognizes that Rule 23 requires a district court to investigate the "economic reality" of the settlement relief provided to class members in a class-action settlement. *Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015); *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049, 1052-55 (9th Cir. 2019). Did the district court err as a matter of law when it approved a class action settlement that consisted solely of *cy pres* distribution of millions of dollars when there is no dispute that similar settlements in this Circuit have successfully distributed similar sums to similarly-sized classes through a claims process? (Raised at ER116-21, ER59-66; decided at ER20-25.)

2. *Briseno v. ConAgra Foods, Inc.* holds that "self-serving affidavits" are sufficient for class members to participate in a claims process. 844 F.3d 1121, 1130-32 (9th Cir. 2017). Fed. R. Civ. Proc. 23(e)(2)(D) requires that class action settlements "treat[] class members equitably relative to each other." Did the district court err when it held that a claims process was not feasible because absent class members could not self-identify although it permitted named plaintiffs to receive service awards of $500 to $5000 based on self-identification? (Raised at ER116-18, ER59-66; decided at ER22-23.)

3. In the alternative, this Court holds that "Whenever the principal, if not the only, beneficiaries to the class action are…not the individual class members," Rule 23(b)(3)'s superiority requirement is not met, and a class should not be certified.

In re Hotel Tel. Charges, 500 F.2d 86, 91-92 (9th Cir. 1974). If it is true that any distribution to the class was not because of the size of the class or because claimants could not self-identify, did the district court err as a matter of law in certifying the class on superiority grounds? (Raised at ER128-31; decided at ER12-13.)

4. "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 *comment (b)*. *Accord Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011); *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (disapproving *cy pres* where a defendant might be using "previously budgeted funds" to make the sort of donations it has long made); *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) ("appearance of divided loyalties of counsel" by itself impermissible); *but see Lane v. Facebook,* 696 F.3d 811 (9th Cir. 2012).

(a) Did the district court err as a matter of law when it failed to apply § 3.07 and approved a *cy pres* distribution that paid money to organizations affiliated with the defendant and class counsel?

(b) Did class counsel breach its fiduciary duty to the class when it propounded a *cy pres* settlement that awarded *cy pres* to a third parties including a former client and co-counsel instead of class members?

(Raised at ER123-28; decided at ER10-11, ER27.)

5. "[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). Is a *cy pres* settlement that awards

money to self-described advocacy groups that advance contentious public policy positions with which at least some class members disagree impermissible compelled speech under the First Amendment? (Raised at ER121-23; decided at ER25.)

6. The Third and Seventh Circuits hold that attorneys' fees should be reduced when class counsel prioritizes *cy pres* over direct recovery to the class. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3rd Cir. 2013); *Pearson*, 772 F.3d at 781. Did the district court err as a matter of law by treating a $13 million *cy pres*-only settlement as worth $13 million to the class for purposes of calculating the 25% attorneys' fees benchmark? (Raised at ER131-33; decided at ER12-16.)

Standard of Review

"We review a district court's approval of a proposed class action settlement, including a proposed *cy pres* settlement distribution, for abuse of discretion." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). An error of law is a *per se* abuse of discretion. *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 956 (9th Cir. 2013). A district court's interpretation of the Federal Rules of Civil Procedure is reviewed *de novo*. *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 612 n.2 (9th Cir. 2016).

Statement of the Case

This is an appeal of a district court's approval of a class-action settlement that pays $13 million to the attorneys and to third-party *cy pres* beneficiaries affiliated with Google and with class counsel (some of which beneficiaries take political positions on behalf of Google contrary to that of many class members, including objector David

Lowery), but nothing to class members except injunctive relief equally applicable to class members and non-class members alike.

A. Plaintiffs sue over Google's collection of Wi-Fi data.

Google's admission that roving vehicles used to create its Street View mapping service also collected private information from unencrypted wireless networks ("Wi-Fi") sparked substantial press coverage. *See, e.g., Joffe v. Google, Inc.*, 729 F.3d 1262, 1264 (9th Cir. 2013); Brad Stone, *Google Says It Collected Private Data by Mistake*, N.Y. TIMES (May 14, 2010); Jessica E. Vascellaro, *Google Says It Mistakenly Collected Data on Web Usage*, WALL ST. J. (May 14, 2010). In response to this press coverage, Plaintiffs brought several class actions, which were consolidated under an MDL in the Northern District of California. Dkt. 1; ER1. Plaintiffs claimed Google's actions violated various federal and state law rights. ER1; Dkt. 54. Plaintiffs demanded billions of dollars in statutory and punitive damages and an injunction. Dkt. 54.

Google disputed that the named plaintiffs had standing, and the parties engaged a special master to conduct discovery on the issue. The special master conducted complex technical searches on data collected by Google to determine whether any Plaintiff's communications were acquired by Google. ER5. It took the special master three years to conduct the inquiry, much of it organizing a database of Google's acquired "Payload Data" and deciding what searches to conduct of the database on eighteen plaintiffs. *Id.* The special master issued a sealed report in 2017 that apparently did not preclude the standing of at least some of the named plaintiffs. *Id.*; Dkt. 138.

B. Google settles with attorneys general from 39 states.

While the underlying litigation was pending, Google entered into an agreement in March 2013 with attorney generals from 39 states—the "Assurance of Voluntary Compliance"—regarding Google's collection of Wi-Fi data from its Street View vehicles. ER166. The Assurance of Voluntary Compliance included a "Privacy Program" which required Google, among other things, to (1) delete or destroy the "Payload Data" it had collected; (2) not collect and store "Payload Data" for use in any product or service without notice and consent; (3) maintain a privacy program as set forth in the Assurance; and (4) implement a public-service and educational campaign. *Id.*

C. Google and plaintiffs settle.

In June 2018, Google and plaintiffs reached a settlement for a class comprised of "all persons who used a wireless network device from which Acquired Payload Data was obtained." ER181 ("Settlement"). "Acquired Payload Data" was data that Google's Street View vehicles acquired from unencrypted wireless networks from January 1, 2007 through May 15, 2020. ER183. The class size was about 60 million members. ER9.

Google would establish a $13 million fund, but none of that money would go to class members. *Id.* Rather, after attorneys' fees and costs, incentive awards to named plaintiffs, and up to $750,000 administration costs paid to the claims administrator, the remainder of the fund would be divided among *cy pres* recipients who would agree to use the funds to promote the protection of Internet privacy. ER188-89. The Settlement did not identify the *cy pres* recipients but instead required plaintiffs to recommend recipients to the district court for approval, working with "good faith regarding any

concerns Google might have." *Id.* Google's only other obligation was to agree to continue to comply to terms that were already in the Assurance of Voluntary Compliance and an "educational webpage" on configuring secure wireless networks repeating widely publicly-available information. ER189-90; ER89-92; ER120.

The district court granted preliminary approval of the Settlement. Dkt. 178. Class counsel requested $91,500 in service awards for named plaintiffs and $4 million in fees and expenses, uncontested by Google. Dkt. 185 at 7, 18. The fee request was solely based on the $13 million size of the settlement fund; class counsel made no claim that the injunction entitled them to fees. Dkt. 185 at 7.

D. The *cy pres* recipients.

At preliminary approval, plaintiffs proposed eight *cy pres* recipients: The Center on Privacy & Technology at Georgetown Law, Center for Digital Democracy, Massachusetts Institute of Technology's Internet Policy Research Initiative, World Privacy Forum, Public Knowledge, Rose Foundation for Communities and the Environment, American Civil Liberties Union Foundation, Inc. ("ACLU"), and Consumer Reports, Inc. Dkt. 166 at 6.

The Electronic Privacy Information Center ("EPIC"), which had supported plaintiffs in an earlier appeal in this case, also petitioned the district court to be included as a *cy pres* recipient; plaintiffs did not oppose the request, noting EPIC's "substantial" contributions to the litigation. Dkt. 169; Dkt. 184 at 13.

At least four of the nine *cy pres* recipients—Public Knowledge, World Privacy Forum, ACLU, and EPIC—previously received Google *cy pres* money. ER154; ER165;

ER142; Dkt. 166-1 at 61, 76, 100. Many of the recipients had received *cy pres* funds from other class actions involving big tech firms. Dkt. 166-1 at 45, 61-62, 76, 85, 99. *Cy pres* recipient ACLU also had a pre-existing relationship with class counsel Lieff Cabraser and Cohen Milstein. Dkt.166 at 15 n.12.

E. Lowery objects.

Class member David C. Lowery timely objected to the settlement approval, *cy pres* recipients, class certification, and fee request on January 20, 2020. ER100. Lowery is a professional recording and performing artist and academic who, among other things, founded the successful musical groups Cracker and Camper Van Beethoven. He is a "zealous advocate for artists, writers, musicians, and performers" and their intellectual property rights, and has long complained about Google's use of *cy pres* to fund organizations that support Google's narrower views of copyright against his interests. ER138-39.

Lowery self-identified with specificity as a member of the class, and the parties submitted no evidence rebutting his declaration. ER138.

Lowery is represented by attorneys at the Center for Class Action Fairness, now part of the non-profit Hamilton Lincoln Law Institute. ER111. The Center has won millions of dollars for class members and shareholders and numerous landmark appellate decisions protecting class members' rights. ER146-47.

Lowery argued that *cy pres* was inappropriate at all: the $13 million fund was sufficient to provide either a claims process or a lottery distribution to class members who self-identified, and thus the Settlement improperly favored the third-party

beneficiaries over the class members to whom class counsel owed a fiduciary obligation. ER116-21. The undisputed evidence was that claims rates were almost always less than one percent. ER117. In particular, the settlement for a similarly large class of over 100 million members in *Fraley v. Facebook, Inc.* was able to have a claims process after the district court rejected the possibility of a *cy pres*-only settlement, and was able to distribute $15 per class member because so few class members made claims. *Id.* (citing 966 F. Supp. 2d 939 (N.D. Cal. 2013)). Lowery submitted evidence that numerous cases successfully distributed small sums to large classes with relatively low administrative costs, even though the settlement fund provided less than a dollar or two per class member. ER143-45. If distribution was possible, Lowery argued, then Rules 23(a)(4) and (g)(4) were violated when plaintiffs prioritized third parties over the class.

Lowery argued that if it really was not feasible to distribute any money to class members, then Rule 23(b)(3) certification was inappropriate, because of the lack of superiority to other forms of adjudication: the release benefited only Google and the class was no better off than if there was no litigation at all. ER126-30. Indeed, if distribution was impossible because, as plaintiffs claimed (Dkt. 184 at 26-27), there was no feasible means to identify class members or for class members to self-identify, then the class did not meet *Briseno* standards and could not be certified. ER129-31 (citing *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017)). But Lowery argued that class members could self-identify as he did, and as the Ninth Circuit said was possible. *Id.*; ER63-64.

Lowery objected that without the affirmative consent of the class members, the *cy pres* awards constituted compelled speech in contravention of the First Amendment.

ER121-23. Lowery argued that the violation was particularly pungent because the *cy pres* recipients included advocacy groups promoting policy positions with which Lowery disagreed. ER122-23; ER139.

Lowery further argued that the *cy pres* awards were improper because the pre-existing relationships between the *cy pres* recipients and class counsel presented insurmountable conflicts of interest. ER124-25. And the pre-existing relationship between the *cy pres* recipients and Google undermined any purported value of the settlement relief as nothing prevented Google from offsetting future contributions that Google would otherwise have made to the *cy pres* recipients. ER126-27.

Finally, Lowery objected to the proposed $3.25 million fee request. ER131-34. The request was based on a 25% benchmark, but that presupposed that a $13 million fund entirely earmarked to third parties with nothing to the class was equal in value to $13 million paid to the class. ER131. Lowery argued that because the class received no real benefit, any fee award would be impermissibly disproportionate. *Id.* Even if the attorneys could be awarded fees, the request for $4 million in both fees and expenses impermissibly exceeded the Ninth Circuit's 25% benchmark, particularly where the attorneys failed to prioritize direct relief to the class. ER133.

Lowery and a group of state attorneys general argued that the injunctive relief was illusory because it merely duplicated preexisting obligations in the 2013 consent decree. ER120; ER89-92. Lowery further noted that the injunctive relief applied equally to class members and non-class members alike, and could not be consideration. ER120. The AGs also opposed the fairness of an all-*cy pres* settlement. ER92-97.

Plaintiffs disputed that self-identification was a possible means of identifying class members in a claims process. ER22.

F. The district court approves the Settlement.

The district court held a fairness hearing on February 28, 2020. ER36. Lowery appeared at the hearing through counsel. *Id.* Lowery and the Arizona solicitor general argued that *cy pres* was inappropriate because the $13 million fund could be distributed to class members using a claims process. ER74-75; ER59-66. A typical class-action settlement would have a claims rate less than 1%, but even assuming an unusually high claims rate of 2,000,000 out of 60,000,000, the $13 million fund would pay claiming class members approximately $5 each even after attorneys' fees. ER74-75.

On March 18, 2020, the district court approved the settlement, awarded $91,500 in service awards and granted attorneys' fees of $3,039,622—25% of the net settlement fund, along with $750,000 in expenses. ER18. The district court rejected Lowery's other arguments. First, the district court held that Rule 23(a)(4) and Rule (g)(4) were satisfied, finding that the *cy pres* award indirectly benefits the class and therefore, the attorneys' fee award was not a windfall. ER10-11.

The district court found that the injunctive relief was adequate though "not the main benefit to the class" because of changes in the website. ER23-24. The district court rejected Lowery's Rule 23(b)(3) argument that a class action was not superior if it was too impractical to distribute settlement funds based on *Lane's* approval of a *cy pres*-only settlement, though it did not address Lowery's argument that the injunctive relief was not targeted to class members. ER12-13 (citing *Lane*, 696 F.3d 811; *In re Google*

Referrer Header Privacy Litigation, 869 F.3d 737, 741 (9th Cir. 2017), *vacated on other grounds by Frank v. Gaos*, 139 S. Ct. 1041 (2019)).

The district court disagreed with Lowery's argument that the class could not be certified if there was no practical means of ascertaining the identify of class members. ER13.

The court rejected Lowery's argument that it was feasible to distribute the $13 million settlement fund to class members because while a claims process could yield $15 per class member, the court need "not calculate feasibility based on whether some money can be paid to some small fraction of the class." ER21 (citing *Google Referrer*, 869 F.3d at 742). The court agreed with plaintiffs that a claims process was infeasible because class members were unable to self-identify, holding that Google possessed the data regarding class member's membership and could only identify class members after a lengthy process. ER22. (The district court did not reconcile this conclusion with its holding that there was standing based on the allegations of the complaint, or its $500 incentive award to named plaintiffs who never subjected themselves to discovery on their standing. ER6-8; ER 18.) The district court further held that even if a claims process were practical, delivering relief to *cy pres* recipients was superior to delivering relief to 1% of class members. ER23.

The district court noted the Supreme Court's interest in *cy pres*-only settlements, but reasoned that controlling authority does not hold that direct relief is preferable. ER24.

The district court held that the *cy pres* relief was not compelled speech in violation of the First Amendment because it did not constitute state action and that class

members had the opportunity to exclude themselves from the settlement. ER25 (citing *In re Motor Fuel Temp. Sales Practices Litig.*, 872 F.3d 1094, 1113-14 (10th Cir. 2017) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)).

The district court reallocated the shares of the *cy pres* among the different recipients from what class counsel proposed, and included EPIC as a recipient. ER27 & n.12.

Finally, the district court rejected Lowery's argument that because the class received no direct relief that the fee award should be zero or discounted. ER15. The court issued final judgment under Rule 54(b). ER30.

After the district court made a stipulated ministerial adjustment reducing the attorneys' fees to $3,000,125 a few days later (ER1-2), Lowery filed a timely notice of appeal on April 3, 2020. ER31.

Summary of Argument

In this case, the attorneys receive over $3.75 million, and class members releasing Rule 23(b)(3) damages claims receive nothing but an injunction establishing a webpage, publicly available to class members and non-class-members alike of already-public information. The main "relief" is *cy pres* of about $9 million, going to organizations affiliated with Google and with class counsel, and one, EPIC, that successfully lobbied to be included after opposing previous Google *cy pres* settlements. "In recent years, federal district courts have disposed of unclaimed class action settlement funds after distributions to the class by making *cy pres* distributions. Such distributions have been controversial in the courts of appeals" with many circuits "criticiz[ing] and severely

restrict[ing] the practice." *BankAmerica*, 775 F.3d at 1063 (citing cases) (cleaned up). *See generally* 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).

The Ninth Circuit has been among the leaders in recognizing that courts evaluating class-action settlements must focus on the "economic reality" of the settlement, and finding it reversible error when courts fail to do that and protect absent class members. *E.g, Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015); *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1052-55 (9th Cir. 2019). But it has been inconsistent in applying that principle to settlements with a *cy pres* component that pay nothing to the class. *E.g.*, *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), *vacated on other grounds*, *Frank v. Gaos*, 139 S. Ct. 1041 (2019); *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), *cert. denied*, *Marek v. Lane*, 571 U.S. 1003 (2013).

In *Marek*, Chief Justice Roberts concurring in the denial of *certiorari* noted the possible need of the Supreme Court "to clarify the limits" of *cy pres* "including when, if ever, such relief, should be considered." 134 S.Ct. 8, 9 (2013) (citing Redish). The Court went on to grant *cert* in *Frank*; oral argument there suggested that the Court would have reversed if it had reached the merits. *Cf. Frank*, 139 S. Ct. at 1046 (Thomas, J., dissenting).

This case is distinguishable from *Lane* in two important ways. *First*, the objectors in *Lane* "conceded" that monetary payments to the class were "infeasible." 696 F.3d at 821. Here, however, Lowery demonstrated the feasibility of payments to the class through the same sort of claims process that dozens of class actions in this circuit

regularly use. *Second*, *Lane* (and *Google Referrer*) both involved settlements approved before the 2018 amendments to Rule 23. The new Rule 23(e)(2)(C)(ii) requires courts to consider "the effectiveness of any proposed method of distributing relief to the class." If it is acceptable for settling parties to propose "We refuse to distribute relief to the class" when it is feasible to do so, it renders the rule a nullity. It must be legal error for courts to permit *cy pres* when it is feasible to distribute money to the class.

So holding would both be good public policy and end the circuit split where every other circuit to decide the issue has rejected *cy pres* when it is feasible to distribute money to a Rule 23(b)(3) class. *E.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) (Posner, J.) (rejecting $1.1 million *cy pres* residual in class with over 10 million members); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063-66 (8th Cir. 2015); *Klier v. Elf Atochem N.A., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011). Affirming here when *Lane* is readily distinguishable would effectively recreate a circuit split, but this Court only does that upon "painstaking inquiry." *Zimmerman v. Oregon Dep't. of Justice*, 170 F. 3d 1169, 1184 (9th Cir. 1999).

The district court erred as a matter of law in holding that it was infeasible to identify class members. Yes, proof beyond a reasonable doubt might require database searches, but *Briseno v. Conagra Foods, Inc.*, holds that proof beyond a reasonable doubt is not required to ascertain a class member in a claims process. 844 F.3d 1121, 1131-32 (9th Cir. 2017). If named class members who received $500 awards (ER18) can self-identify without discovery, so can absent class members. Fed. R. Civ. Proc. 23(e)(2)(D).

One reason *cy pres* can be problematic is that it uses the class's money to support organizations with a political valence opposite that of many class members. "[E]xcept

perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). The district court erred as a matter of law in holding the First Amendment was not implicated because of the Rule 23(b)(3) opt-out right: silence is not consent, and before such spending can occur, class members must opt in. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 312-22 (2012).

"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 *comment* (b); *accord In re Google Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 331 (3d Cir. 2019) (adopting § 3.07 *comment* (b) standard); *Google Referrer*, 869 F.3d at 749 (Wallace, J., dissenting) (advocating the adoption of same), *vacated*, *Frank*, 139 S. Ct. 1041. *Lane* permits such conflicts as "compromise" in the case of a defendant, but it is a breach of fiduciary duty for class counsel to favor third parties over their own clients, especially when the recipients include an organization with whom they have significant prior affiliation. "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). Rule 23(a)(4) and (g)(4) are not met, and it was legal error to approve a settlement in such instances.

At a minimum, it is a misuse of the Ninth Circuit's 25% benchmark to treat *cy pres* as identical to direct distribution to the class. "Class members are not indifferent to

whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3rd Cir. 2013).

One more issue: the now-vacated *Google Referrer* held that class certification is appropriate when class counsel takes the position that it is impossible to provide material relief to the class. But 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, then a class action is not an efficient and superior means of adjudicating this controversy. *Frank*, 139 S. Ct. at 1047-48 (Thomas, J., dissenting). If the parties insist that distribution to the class is impossible, as the court found, then the class flunked Rule 23(b)(3) and should not have been certified.

And if it is feasible for class members to self-identify, as both Lowery and several named plaintiffs did, then a *cy pres*-only settlement violates class counsel's fiduciary duty and Rule 23(e)(2)(C)(ii), and should not have been approved as a matter of law.

Argument

I. Approval of a *cy-pres*-only settlement is legal error under Rule 23(e)(2)(C)(ii) when it is feasible to make distributions to some class members.

The Ninth Circuit has been among the leaders in recognizing that courts evaluating class-action settlements must focus on the "economic reality" of the settlement, and finding it reversible error when courts fail to do that and protect absent class members. *E.g, Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015); *Roes v.*

SFBSC Mgmt., LLC, 944 F.3d 1035, 1052-55 (9th Cir. 2019). But it has been inconsistent in applying that principle to settlements with a *cy pres* component that pay nothing to the class. *E.g.*, *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), *vacated on other grounds*, *Frank v. Gaos*, 139 S. Ct. 1041 (2019); *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012).

Google Referrer is no longer good law, even though it was vacated on other grounds; the district court erred as a matter of law to the extent it relied upon it to divine Ninth Circuit views. *O'Connor v. Donaldson*, 422 U.S. 563, 578 n.12 (1975); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991).

And this case is distinguishable from *Lane* in two important ways. *First*, the objectors in *Lane* "conceded" that monetary payments to the class were "infeasible." 696 F.3d at 821. Here, however, Lowery demonstrated the feasibility of payments to the class through the same sort of claims process that dozens of class actions in this circuit regularly use. *Second*, *Lane* and *Google Referrer* both involved settlements approved before the 2018 amendments to Rule 23. The new Rule 23(e)(2)(C)(ii) requires courts to consider "the effectiveness of any proposed method of distributing relief to the class." If it is acceptable for settling parties to propose "We refuse to distribute relief to the class" when it is feasible to do so, it renders the rule a nullity. It must be legal error for courts to permit *cy pres* when it is feasible to distribute money to some class members.

So holding would be both good public policy and would avoid creating a circuit split where every other circuit to decide the issue has rejected *cy pres* when it is feasible to distribute money to the class. *E.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir.

2014) (Posner, J.) (rejecting $1.1 million *cy pres* residual in class with over 10 million members); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063-66 (8th Cir. 2015); *Klier v. Elf Atochem N.A., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *but cf. Google Cookie*, 934 F.3d 316 (dicta that such settlements may be appropriate in (b)(2) settlements where there is no release of damages claims). "[T]he presumption is not to create an intercircuit conflict." *Environmental Protection Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001).

A. *Cy pres* is part of a larger problem of conflicts of interest in class-action settlements where gamesmanship exploits recognized incentive problems.

The district court improperly approved a settlement agreement that favored class counsel and the defendant Google at the expense of the absent class members. Under Rule 23, the courts have a duty to protect the absent class members from this precise scenario. *E.g., Roes*, 944 F.3d at 1049, 1054-55, 1060. "Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) ("*Pampers*"). To combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own," the district court must act as a fiduciary of the class and apply zealous scrutiny to the proposed settlement. *Id.; Allen*, 787 F.3d at 1223.

The court has this special role in class actions because class counsel will bargain effectively with defendants to reach the efficient settlement amount, but "a defendant

is interested only in disposing of the total claim asserted against it," "and the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 943, 949 (9th Cir. 2011) (cleaned up). Class attorneys, like other attorneys, have a fiduciary duty to their clients, the class members; so do class representatives with respect to the absent class members. *Pampers*, 724 F.3d at 718; *ALI Principles* § 1.05 cmt. (f); *see also* Rule 23(a)(4), (g)(4). But in the absence of sufficient judicial scrutiny under Rule 23(e), it is simple for class counsel to game class-action settlements to self-deal at the expense of their clients, be it with *cy pres* or other gimmicks.

While a defendant and a class counsel might happily agree to a settlement where the defendant simply writes a check to class counsel in exchange for the release of the class's claims, something so blatant is rarely seen outside of John Grisham novels. An unfair result does not require collusion, merely class counsel and the defendant acting in their own self-interest at the expense of the absent class members in breach of class attorneys' fiduciary duty to their clients. The problem, however, is that class counsel have various tools for obscuring some of the allocative decisions that get made between counsel and class recovery, and can very subtly trade benefits to defendants for bigger fees. These tools primarily function by inflating the settlement's *apparent* relief, which will in turn justify outsized fee requests absent rigorous doctrinal tests designed to weed them out, accomplishing a result that is effectively economically equivalent to more blatantly abusive settlements.

Imagine a hypothetical settlement where class counsels tried to compromise the consumer class action *Coyote v. Acme* with a straightforward cash settlement paying them

$14 million, while paying the class a total of $3 million in compromise of the class's much larger claims. Ninth Circuit courts would reject that deal. *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (counsel receiving even 38.9% of settlement benefit is "clearly excessive"); *Allen*, 787 F.3d at 1224 n.4 (fee award three times greater than class recovery is disproportionate). Accordingly, to have any chance of surviving review, settling parties must structure the deal to obfuscate the true allocation. This is accomplished by larding the analysis with hypothetical class recoveries and amorphous "benefits" that ultimately have little value to the class, but are cheap for defendants to provide and so easy to include in the deal. *See generally* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859 (2016).

The most infamous tool to create the illusion of relief is the coupon settlement. The settlement awards the class expiring coupons or vouchers or credits to purchase defendants' goods or services; class counsel seeks a fee award based on the face value of the coupons; the parties know that the vast majority of the coupons will expire unused, costing the defendant nothing, while the redeemed coupons may be viewed by the defendant as simply a marketing cost. *Roes*, 944 F.3d at 1053; Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. & PUB. POL. 769, 777-78 (2016). So a settlement might provide "$100 million" worth of coupons, supposedly rationalizing class counsel's $14 million fee request. But the class will typically actually receive less than $3 million in benefit—the same upside-down ratio as our obviously unacceptable hypothetical Acme settlement above.

Similar to the coupon settlement is a "claims-made" structure where defendants agree to make a large amount of money hypothetically *available* but pay out only on the

claims that class members actually file, retaining the rest. Erichson, 92 NOTRE DAME L. REV. at 889-93. The defendant agrees to make an amount available to all of the many people who might be eligible to make a claim—say, $5 each for 10 million possible claimants, in our *Acme* hypothetical. The settling parties then call this a $50 million settlement in press releases and court papers based on the amount "available," and the fee request is made on this basis. *E.g.,* Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Actions: Improving Investor Protection* 7 (Wash. L. Found. 2005) (noting AT&T consumer class settlement characterized as worth "$300 million," though lawyers received over $80 million and class members received only $8 million from the claims process). The Ninth Circuit correctly rejects this. *Allen*, 787 F.3d at 1224 n.4.

Indeed, when legal rules permit such behavior, class counsels would punish themselves if they sought a better settlement for their clients: every dollar reserved to the class is a dollar that will not be paid to class counsel. *Pearson*, 772 F.3d at 783, 787. Thus, no collusion is needed to reach an unfair settlement; merely parties working in their self-interest and against absent class members' interests. A rule requiring evidence of collusion before rejecting a class-action settlement will green-light many abusive settlements. Erichson, 92 NOTRE DAME L. REV. at 871; *Pampers*, 724 F.3d at 717-18.

Cy pres is yet another mechanism that create illusory relief to exaggerate the apparent size of the settlement to benefit class counsels at the expense of the class. Redish, 62 FLA. L. REV. at 661.

B. *Cy pres* is especially prone to abuse.

As the Chief Justice recognized in *Marek*, *cy pres* settlements raise "fundamental concerns." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari). There are at least five specific concerns regarding the type of *cy pres* award upheld in this case.

1. When courts award attorneys' fees based on the size of the *cy pres* fund rather than on the amount the class actually directly received, class attorneys can receive substantial fees regardless of the actual benefit to the class. As a result, class counsels 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 settlement with a more profitable fee award by expanding the apparent size of the settlement, class counsels are encouraged to sell their putative clients down the river.

Cy pres can also be an enticing settlement feature for lawyers interested in promoting their own personal political or charitable preferences. It is not uncommon to see publicity photographs of attorneys handing oversized checks to their selected *cy pres* recipients or to see recipients issue public statements of gratitude to the class attorneys. *E.g.,* Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs*, 163 U. PENN. L. REV. 1463, 1484 (2015). Class counsels have used *cy pres* awards to fund the development of future litigation and to make sizable donations to their *alma mater*. *See, e.g.*, *Google Referrer*, 869 F.3d at 748 (Wallace, J., dissenting), *vacated on other grounds by Frank*.

"By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of

those class members." Redish, 62 FLA. L. REV. at 650. Class counsels are tempted to shirk their constitutional duties to adequately defend class members' legal rights because their compensation is no longer tied to such advocacy. *Id.* When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery, class counsels' all-too-human predilection will prefer to fund their favorite charities or causes over thousands or millions of anonymous and likely ungrateful class members.

2. Defendants, facing no resistance from class attorneys, use *cy pres* awards to structure settlements to minimize costs or even benefit themselves. The *Lane v. Facebook* settlement, for example, directed all of its *cy pres* to a new charity "to be funded by Facebook, partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own purported counsel." 696 F.3d 811, 829, 835 (9th Cir. 2012) (Kleinfeld, J., dissenting).

Google and Facebook have directed *cy pres* awards in other 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 (July 30, 2012). 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." *Id.* Respondent 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) ("it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties"). And defendants have reasons to prefer giving money to *cy pres* to reduce the chances of having their customers learn that they have paid money to resolve claims of wrongdoing. Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997 (2016).

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: what *Dennis* calls a "paper tiger" of deterrence. 697 F.3d at 867-68. Here, Google has previously donared to several of the recipients. ER154; ER165; ER142; Dkt. 166-1 at 61, 76, 100. *Cy pres* awards to organizations that Google already donates to are the functional equivalent of the much-criticized reversion clause where unclaimed class funds revert to defendant.

Though here, plaintiffs chose the *cy pres* beneficiaries, Google left itself the power to object to individual recipients. ER188. Plaintiffs had the tacit incentive to choose institutions that Google would not object to.

3. As in this case, *cy pres* awards typically fail to redress class members' alleged injuries for which they are waiving their rights. 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 v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). "[S]ettlement-fund proceeds, having been generated by the value of the class members'

claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (citing *ALI Principles* § 3.07 *comment* (b)). This would unquestionably be the case had class members pursued individual litigation under the same substantive law. Rule 23 cannot operate to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Neither lower courts nor class attorneys should have 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. *Cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 (1989) ("There is no constitutional principle that gives one person the right to give another's property to a third party.").

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 law professor. *In re Google Buzz Privacy Litig.*, 2011 WL 7460099 at *3 (N.D. Cal. Jun. 2, 2011); Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 U.S.C. L. REV. 97, 124-25 n. 119 (2014).

4. As discussed in Section II below, many *cy pres* recipients, including some in this case, ER139, have political valence sympathetic to the preferences of class counsel or the defendant, but contrary or offensive to a substantial proportion, or even the majority, of class members. *E.g., In re Citigroup Sec. Litig.*, 199 F. Supp. 3d 845, 853-54

(S.D.N.Y. 2016). Requiring class members to surrender their rights to "subsidize speech by a third party that he or she does not wish to support" contravenes the First Amendment. *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014).

5. Finally, *cy pres* awards often create the appearance or reality of judicial conflicts of interest, as in the *Google Buzz* settlement discussed above. New York University's Samuel Issacharoff, Reporter for the *ALI Principles*, 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). Charities are increasingly lobbying judges for a cut of the proceeds in class-action settlements, *id.*, as EPIC successfully did here. ER27. (EPIC filed *amicus* against Google's *cy pres* in *Frank v. Gaos*; apparently their real complaint was that they didn't get to share in the lucre there.) *See also* Erichson, 92 NOTRE DAME L. REV. at 885.

More generally, an open-ended *cy pres* doctrine is fundamentally incompatible with the judicial role, which "is limited to providing relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, J., concurring) (cleaned up). If it is untenable to compensate non-injured class members, it is all the more untenable to compensate non-injured third parties, who do not even fall within the zone of risk of injury. "Federal judges are not generally equipped to be charitable foundations…" *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006); *accord Keepseagle v. Perdue*, 856 F.3d 1039, 1071 (D.C. Cir. 2017) (Brown, J., dissenting). Yet those things are exactly what federal judges are asked to do when faced with a

proposed *cy pres* settlement where they get to divvy up the pie to decide which recipients are deserving, as happened here. ER27.

There are thus good reasons for making *cy pres* a last, rather than first, resort.

C. The district court erred as a matter of law in holding it was not feasible to make payments to the class.

Rule 23(e)(2)(C)(ii) codifies these reasons, by requiring courts consider the "effectiveness of any proposed method of distributing relief to the class." If, for example, a settlement required class members to go through the difficult process of creating and submitting an original poem written in Aramaic to recover, Rule 23(e)(2)(C)(ii) would require the rejection of the settlement. Parties cannot short-circuit Rule 23(e)(2)(C)(ii)'s analysis by simply making it impossible instead of especially difficult for class members to obtain any distribution. If that is acceptable, Rule 23(e)(2)(C)(ii) becomes a nullity.

Cy pres is, by definition, "next best." Thus, 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." *Klier*, 658 F.3d at 475; *accord BankAmerica*, 775 F.3d at 1063-66; *Pearson*, 772 F.3d at 784; *Ira Holtzman, C.P.A. & Assocs. v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013) (Easterbrook, J.). This rule follows from the 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; *accord ALI Principles* § 3.07 *comment* (b). *See also Bluetooth*, 654 F.3d at 947 (reversing approval of *cy pres*-only settlement and noting that it is a sign of self-dealing when "the class receives no monetary distribution but class counsel is amply rewarded").

Here, there was an analogous settlement in the Northern District of California, *Fraley v. Facebook, Inc.*, involving a gigantic class of over a hundred million class members and a settlement fund of less than $0.20/class member. The district court rejected a proposed *cy pres*-only settlement. "Merely 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 (N.D. Cal. Aug. 17, 2012). Instead, the settling parties were able to distribute millions of dollars by creating a claims process that offered $10 to each claiming class member without coming close to exhausting a $20 million settlement fund. 966 F. Supp. 2d 939 (N.D. Cal. 2013). Indeed, there were so few claims that the parties responded to objections by increasing the payment to claimants to $15 without any risk of exhausting the settlement fund. *Id.* at 944.

Another privacy class-action settlement in this circuit distributed a net settlement fund of $5.9 million amongst a 30-million-member class. *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366 (N.D. Cal. Aug. 25, 2016). As *Carrier* observed, "if all 30 million people were to make claims, then each person would get approximately 20 cents. … However, that is not what actually happens under the settlement." *Id.* at *2. Rather, claims rates of less than 1% are common. *Id.* at *4 (citing authorities). The *Carrier* settlement funds were distributed *pro rata* to eligible claimants, with a contingent *cy pres* provision only if distribution proved "economically unfeasible." *Id.* at *2. Ultimately, only 42,577 class members (0.14% of the class) filed claims, resulting in individual payments of well over $100. Even if the *Carrier* class size had been five times larger, and the claims rate five times higher, claiming class members still would have received over $5.50 each.

Indeed, Google's most recent privacy settlement provides for a claims process for tens of millions of class members with electronic distribution of funds through its Google Pay service, despite a smaller settlement fund than in this case. Motion for Preliminary Approval of Class Action Settlement, *In re Google Plus Profile Litig.*, No. 5:18-cv-06164-EJD, Dkt. 57 (N.D. Cal. Jan. 6, 2020).

Lowery offered into evidence a list of 23 such settlements. ER145. The settling parties, by contrast, provided no evidence that a similar *pro rata* claims process by self-identifying class members paying $5 to $30 per claimant could not have distributed the approximately $9 million in the settlement fund to the class. Rather, the settling parties asserted and the court agreed that (1) it is better to distribute nothing to the class than something to a small percentage of the class; and (2) self-identification cannot determine class membership.. Both conclusions are wrong as a matter of law.

1. Feasibility is determined by the ability of *some* class members to make a claim, rather than *every* class member, because otherwise nearly every class action settlement could become a *cy pres* settlement, nullifying Rule 23(e)(2)(C)(ii).

Class counsel has a fiduciary obligation to the class. *E.g., Bluetooth*, 654 F.3d at 946. Counsel has "responsibility to seek an award that adequately prioritizes direct benefit to the class." *Baby Prods.*, 708 F.3d at 178-79. Class counsel cannot choose to favor third-party non-class members over the class—even if those third parties are "worthy" charities. *BankAmerica,* 775 F.3d at 1065, 1067; *Turza*, 728 F.3d at 689. The conflicts of interest that *cy pres* awards can create are easily eliminated by restricting such awards to those narrow circumstances in which any pecuniary relief to the class is

infeasible. Class counsel may claim noble intent in wishing that settlement funds go to their favorite charity, but class counsel should fulfill their good intentions with their own money, rather than that of their clients. Feasible compensation to class members legally trumps *cy pres* payments that do not directly benefit the class.

The divided panel in *Lane v. Facebook* signed off on an all-*cy-pres* settlement, but the appellants there focused on the *cy pres* selection process and the adequacy of the settlement, and "concede[d] that direct monetary payments to the class of remaining settlement funds would be infeasible." *Id.* at 821. Lowery makes no such concession here. "Unstated assumptions on non-litigated issues are not precedential holdings binding future decisions." *United States v. Kimsey*, 668 F.3d 691, 699 (9th Cir. 2012) (cleaned up); *see also Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) (citing cases). *Lane* did not consider *Klier*, and did not have the benefit of *BankAmerica Corp.*, *Pearson*, *Turza*, *Frank*, or Rule 23(e)(2)(C)(ii).

The district court erred as a matter of law in holding that feasibility is determined by whether it is feasible to hand-deliver checks to every single class member. The legal question to be answered has never been "Is it feasible to make a distribution to every single member of the class?" The answer is almost always "No" for any settlement because, if nothing else, it is often administratively impossible to know who all of the class members are. Even in billion-dollar securities settlements where class members have suffered substantial losses, the parties do not know who each and every class member is and must rely upon class members to identify themselves and the size of their loss in a claims process. Even more so in consumer class actions involving small-dollar goods which depend solely upon the affirmations of self-identifying class

members to distribute settlement funds that often are much smaller than $13 million. *E.g.,* ER143-45. By the district court's standard, it would be permissible to sweep all of these settlements under the *cy pres* rug rather than make distributions to class members. Rather, the legal question is whether it is *possible* to identify class members to pay.

The district court's reasoning that it's better for 100% of the class to get indirect benefit (that benefits non-class members and opt-outs equally) than for 100% of the class to get the opportunity to get direct benefit when only a small percentage will take advantage of that opportunity proves too much. As *Briseno* recognized, many consumer class action settlements leave over 90% of the class uncompensated. 844 F.3d at 1130. And that figure is optimistic: the median claims rate of a claims-made class-action settlement without direct notice is less than 1%. *Carrier IQ*, 2016 WL 4474366 at *4 (citing authorities).[2] The district court's argument would imply that it is preferable for virtually every consumer class action settlement to refuse to distribute any funds to the class and be an all-*cy pres* settlement, essentially destroying the village in order to save it. But no appellate court has ever so much as implied that, so long as some class members go uncompensated, it would be unfair to directly compensate *any* class members. Trial

[2] The district court asserted that Lowery's attorney took the position in *Frank v. Gaos* that a settlement with a 1% claims rate is an example of "illusory relief." ER23 n.7. This misstates Lowery's and Frank's position. It is illusory relief if a settlement pays $1 million to 1% of the class, and a court treats the settlement as worth $100 million because that amount was made available, though the class only received 1% of $100 million. *Pearson*, 772 F.3d at 783, 787. It is not illusory relief if a settlement pays $1 million to the class *pro rata*, there is a 1% claims rate, and a court treats it as $1 million in settlement value. It is the reversion to the defendant that makes relief illusory, not the claims rate.

courts engage in "judicially impermissible misappropriation" when they conclude that class members are less deserving than a charity. *BankAmerica*, 775 F.3d at 1065.

Under the correct legal standard, the district court erred in holding that the settlement fund was non-distributable. Indeed, the ratio in this case is not materially different than that in *Pearson*, which rejected a $1.1 million ***residual*** *cy pres* distribution in a class of over 12 million members, because it was possible to improve the claims process so that more than 0.25% of the class received money. 772 F.3d at 782, 784, 787. The *Fraley* process—in a settlement with a larger class exceeding one hundred million individuals—demonstrates that this settlement was "distributable."

Fraley isn't the only case that demonstrates that when courts insist that class members be compensated before the attorneys get paid, settling parties suddenly discover resourcefulness they hadn't previously had. For example, in *Baby Products*, the settling parties unsuccessfully attempted to defend a settlement with a claims process that paid less than $3 million of its $35.5 million settlement fund to the class, where over $15 million would have gone to *cy pres*. 708 F.3d at 169-70. On remand, the restructured settlement identified hundreds of thousands of class members who could be issued checks so that there would no longer be a multi-million dollar remainder. *McDonough v. Toys 'R' Us,* No. 06-cv-00242, Motion for Preliminary Approval of Settlement (Dkt. 847) (E.D. Pa. Dec. 18, 2013). The remand of *Pearson* after the Seventh Circuit reversed settlement approval also resulted in a new settlement with millions of dollars of direct distribution to class members instead of $0.9 million in claims and $1.1 million in *cy pres*. *Pearson v. Target Corp.*, No. 1:11-cv-07972, Mem. in Support of Mot. For Preliminary Approval of Settlement (Dkt. 213) (N.D. Ill. May 14, 2015).

Google might protest that issuing $5 to $10 checks to class members would have made this a different settlement, and that it would prefer to pay money to EPIC than to class members. If so, this just supports Lowery's argument that the settlement was structured to create the *illusion* of relief rather than actual relief, and should not be considered more than a $3.75 million settlement with 100% of the benefit to the attorneys.

By explicitly adopting the presumption in favor of class distributions, this Court can help to cabin unfettered use of *cy pres* and again make class members the "foremost beneficiaries" of class settlements. *Baby Prods.*, 708 F.3d at 179. Any other result would contradict *Molski* and also create a circuit split with the Third, Fifth, Seventh, and Eighth Circuits. This Court will only create a circuit split upon "painstaking inquiry." *Zimmerman*, 170 F.3d at 1184. But neither the settling parties nor the district court provide any reason here to reject what other circuits have done, and neither does *Lane* or the now-vacated *Google Referrer*. And even if *Lane* or *Google Referrer* were correct when they created unacknowledged circuit splits, they now contradict Rule 23(e)(2)(C)(ii). Settlement approval must be reversed.

2. The district court's holding that claiming class members could not self-identify is inconsistent with its treatment of named plaintiffs and Rule 23(e)(2)(D).

There is no reason class members cannot self-identify in this case. When the district court found that a claims process would not work in this case, he accepted the settling parties' arguments that class member could not self-identify their membership in the class. ER22-23. "The problem is that unlike a case in which a class member could

self-identify as having bought, for example, a particular brand of cereal during the class period, no member of the class here can know whether Google intercepted his or her data. The only evidence is the intercepted data, and that evidence is not in the class member's possession." ER22.

Plaintiffs' argument against self-identification is belied by the settlement's $500 service awards to three of the named plaintiffs that never submitted to jurisdictional discovery with the Special Master. ER18. In other words, those three plaintiffs received $500 based solely on their self-identifying averments that they were class members. What is good enough for the named-plaintiffs goose is good enough for the absent-class-members gander who would be making claims for far less than $500. Moreover, to demonstrate named plaintiffs' standing at the time of settlement consistent with *Frank v. Gaos*, the plaintiffs did not rely on the special master report at all; rather they relied solely on the complaint's allegations. Dkt. 184 at 14-15 & n.7. On that basis, each of the eighteen plaintiffs sought and was awarded $5,000 individual award. ER18. All absent class members who can, like Lowery, aver the same facts as the named plaintiffs should have been permitted to self-identify and file a claim for a portion of the settlement fund on that basis. *See* Rule 23(e)(2)(D) (settlement must "treat[] class members equitably relative to each other").

In *Briseno*, it was irrelevant that individual class members might "submit illegitimate claims and thereby dilute the recovery of legitimate claimants." 844 F.3d at 1129-30. In particular, "consistently low participation rates in consumer class actions make it very unlikely that non-deserving claimants would diminish the recovery of participating, bona fide class members." *Id.* at 1130. "As the Seventh Circuit put it,

when it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good." *Id.* (cleaned up). There is no legal reason to hold Google privacy victims making claims for $5 to $15 to a higher standard than cooking-oil consumers making similar-sized claims.

We deprive accused criminals of liberty on nothing more than a putative victim's sworn testimony. The district court erred as a matter of law when it held that such sworn testimony could not establish a civil claim for damages in a claims process though the parties were happy to let the twenty-one named plaintiffs prove standing with that information. It was feasible to distribute the settlement fund to claiming class members.

D. In the alternative, if it is impossible to create a settlement with "distributable" funds, Rule 23(b)(3) certification was an error of law.

In the alternative, if it is not possible to identify class members (by Google's records or self-identification), then class certification is not capable at all. The district court rejected that argument based on *Briseno*'s holding that "the language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification." ER13 (quoting 844 F.3d at 1133). But in *Briseno*, defendant complained that it could not feasibly identify *all* class members (everyone who had purchased Wesson-brand cooking oil during the class period)—the Ninth Circuit held that it need not feasibly identify all class members because class members could self-identify by submitting affidavits as proof of class membership. 844 F.3d at 1132. Here, by contrast, plaintiffs claim that class members are *unable* to self-identify or determine their membership.

Briseno declined "to impose a separate administrability requirement to assess the difficulty of identifying class members, in part, because the superiority criterion already mandates considering 'the likely difficulties in managing a class action.'" *Walker v. Life Ins. Co. of the SW.*, 953 F.3d 624, 632 (9th Cir. 2020) (noting that circuits vary widely in assessing class member identification issues under ascertainability, predominance or superiority). Courts adjudicating Rule 23(b)(3) actions "must provide notice that a class has been certified and an opportunity for absent class members to withdraw from the class." *Briseno*, 844 F.3d at 1127. The superiority requirements of Rule 23(b)(3) fail because the class device cannot work here: class members cannot have the opportunity to withdraw from a class if no one (neither Google nor absent class members) can know who even belongs in the class.

It makes no difference that the class definition, as the district court reasoned (ER13), is couched in "objective" terms if identification of class members is not possible. *See Brecher v. Republic of Argentina*, 806 F.3d 22, 25 (2d Cir. 2015) ("The use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class."). "A class definition framed in objective terms that make the identification of class members possible promotes due process in at least two ways." *Noel v. Thrifty Payless, Inc.*, 445 P.3d 626, 643 (Cal. 2019) (following *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015)). First, the notice requirements of due process and Rule 23 presuppose class members can be given sound platform for assessing the merits and demerits of the settlement in deciding whether to object or opt-out. If class members are unaware that they are class members in the first instance, then they are deprived of these rights that

are the very justification for permitting class treatment. *Id.* Second, "[t]his kind of class definition also advances due process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment." *Id.*

A 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. Proc. 23(b)(3). A class action that "serves only as a vehicle through which to extinguish the absent class members' claims without providing them any relief" is hardly superior. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting). If a *cy pres*-only settlement is necessary because it is infeasible to distribute the settlement funds to individual class members, then a class action is not an efficient and superior means of adjudicating this controversy. *In re Hotel Tel. Charges*, 500 F.2d 86, 91-92 (9th Cir. 1974); *but cf. In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 751-52 (7th Cir. 2013) (Easterbrook, J.) (rejecting superiority argument but agreeing that class cannot be certified when no incremental relief to class possible because such self-serving litigation violates Rule 23(a)(4)).

Superiority must be contemplated from the perspective of putative absent class members, among other angles. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 713 (9th Cir. 2010) (quoting *Kamm v. California City Development Co.*, 509 F.2d 205, 212 (9th Cir. 1975)). What is best for them? This settlement releases their rights in exchange for no compensatory relief that a non-class member does not receive. (Opt-outs get all the benefits of the meager injunctive relief of website changes the court valued; the court erred when it failed to account for the lack of consideration to class members for their release. ER12-13.) From the perspective of a class member, that cannot be a superior method of adjudicating this controversy.

Here, while the class membership criterion was objective, members and Google held different parts of the puzzle that could identify class members only if pieced together. If, as the settling parties argue, the class members could not self-identify, then class certification fails.

E. Class certification was inappropriate because class counsel's and the class representatives' breach of fiduciary duty in favoring third parties over the class violated Rules 23(a)(4) and (g)(4).

The "fact that class counsel and the named plaintiffs were willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—strongly suggests that the interests of the class were not adequately represented." *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (citing Rules 23(a)(4), (g)(4) and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619-620 (1997)).

Ninth Circuit law agrees. "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; *see also Nachshin*, 663 F.3d at 1039 (criticizing *cy pres* where "the selection process may answer to the whims and self interests of the parties [or] their counsel"); *Google Cookie*, 934 F.3d 316 (vacating settlement approval where class counsel sat on the board of one of the *cy pres* recipients).

Rule 23(a)(4) conditions class certification upon a demonstration that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(g)(4) imparts an equivalent duty on class counsel. Together these provisions demand that the representatives manifest "undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998). Class counsel's fiduciary duty "forbids a lead lawyer from advancing his or her own interests by acting to the detriment of the persons on whose behalf the lead lawyer is empowered to act." *ALI Principles*, § 1.05, cmt. f. Class counsel must maximize class recovery; they "cannot agree to accept excessive fees and costs to the detriment of class plaintiffs." *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000). Nor may they sacrifice class recovery for "red-carpet treatment on fees." *Pampers*, 724 F.3d at 718 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)). Likewise, the named representatives may not "leverage" "the class device" for their own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). If they are "more concerned with maximizing their own gain than with judging the adequacy of the settlement as it applies to class members at large," they fail to satisfy Rule 23(a)(4). *Radcliffe*, 715 F.3d at 1165 (cleaned up).

Here, not only did class counsel structure a settlement to benefit third parties over any single absent class member, liaison and co-lead class counsel firms Lieff Cabraser and Cohen Milstein have both litigated cases with the ACLU and ACLU's state-based affiliates. Dkt. 166 at 15 n.12. Such a recipient is not independent and free from conflict and thus "is not an appropriate designee." *Knapp v. Art.com*, 283 F. Supp. 3d 823, 835 (N.D. Cal. 2017). This Court should not approve any settlement afflicted

by such a conflict of interest; it weighs heavily against a finding that counsel is adequately representing the class under Rule 23(g)(4).

As a bedrock principle, the specifications of (a)(4) "demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620. Here, the *cy pres*-only settlement combined with a sizable clear-sailing attorneys' fee, sizable incentive awards, and a donation to a third party working with class counsel, combine to indicate inadequate representation. *See, e.g., Molski*, 318 F.3d at 956; *Pampers*, 724 F.3d at 721; *Aqua Dots*, 654 F.3d at 751-52. "The lack of any benefit for the class renders the settlement unfair and unreasonable." *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (cleaned up).

"A class settlement that results in fees for class counsel but yields no meaningful relief for the class is no better than a racket." *In re Subway Footlong Sandwich Mkt'g and Sales Practices Litig.*, 869 F.3d 551, 556 (7th Cir. 2017) (internal quotation omitted). Class members would be unequivocally better off opting out: whatever indirect benefit they receive from *cy pres* accrues to opt-outs as well. Yet their fiduciaries intend to bind them to a general release in exchange for no meaningful relief. Class counsel has breached their duty to the class by not advising absent class members of the superiority of opting out en masse.

Class certification thus cannot satisfy either Rule 23(a)(4) or 23(g)(4).

II. Distribution of a class settlement fund by court order without affirmative consent by individual class members is state action in violation of the First Amendment.

"[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). Making a charitable contribution is First Amendment protected expressive and associational activity. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Concomitantly, individuals have a right to refrain from making such a donation, a right to not be compelled to engage in expressive and associational activity. *See, e.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018) ("Because the compelled subsidization of speech seriously impinges on First Amendment rights, it cannot be casually allowed"); *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) (the government "may not … compel the endorsement of ideas it approves").

Here, the settlement distributed funds to third-party beneficiaries that take lobbying positions adverse to class member David Lowery. ER139.

The district court held there was no First Amendment violation because there was no state action when a court orders a *cy pres* distribution. ER25 (citing *In re Motor Fuel Temp. Sales Practices Litig.*, 872 F.3d 1094, 1113-14 (10th Cir. 2017)). But *Motor Fuel* is wrong as a matter of law. The Supreme Court rejects the idea that court judgments affecting First Amendment rights are not state action. *N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964). And approvals of class-action settlements is state action subject to constitutional limitations. *E.g., Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846-48 (1999).

It is no less state action when the First Amendment rights of class members are at stake rather than Due Process rights. Imagine a settlement agreement that gags absent class members by stipulating that no class member may talk to the media about any aspect of the case, with violations to be punished by the contempt power. Under the district court decision, because such a gag is merely the product of a voluntary settlement between the named plaintiffs and the defendant, the court's approval of the agreement does not infringe constitutional rights of absent class members. No appellate court has ever held that. There is a qualitative difference between enforcing a voluntary bilateral nondisclosure agreement and imposing that agreement upon non-consenting absent class members. "The process by which a class action settlement is approved has the effect of turning the private settlement into . . . a judgment," which is preclusive for *res judicata* purposes. William B. Rubenstein, 6 NEWBERG ON CLASS ACTIONS § 18:19 (5th ed.).

Similarly, the Rule 23(b)(3) opt-out right that the district court relied upon does not ameliorate the First Amendment violation. A million class members opting out in this settlement wouldn't reduce the contribution in the class members' name and would have no effect on class counsel's ability to transform the class-action procedure into a political funding mechanism. Moreover, silence is not consent and a waiver of First Amendment rights "cannot be presumed." *Janus*, 138 S. Ct. at 2486; *see also Knox v. SEIU, Local 1000*, 567 U.S. 298, 312-22 (2012).

The settlement violates Lowery's First Amendment rights.

III. Even if *cy pres* were appropriate, the defendant's and class counsel's "significant prior affiliation" with the *cy pres* recipients made settlement approval legal error.

As discussed in the statement of the case, Google and class counsel had significant prior affiliations with most of the *cy pres* recipients.

While *Lane* and the now-vacated *Google Referrer* permitted significant affiliations, *Nachshin* rejects the idea of a *cy pres* "selection process [that] answer[s] to the whims and self interests of the parties, their counsel, or the court." 663 F.3d at 1039. The correct legal standard under Section 3.07 is that a "*cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was made on the merits." *ALI Principles* § 3.07 *comment (b)*; *Google Cookie*, 934 F.3d at 331. This settlement flunks that test. ER142.

Because of the potential conflict of interest of class counsel in favoring a former client and co-counsel over the class, the lower court needed to reject the settlement. "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*, 715 F.3d at 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. Lowery cited *Radcliffe* to the district court, but the district court did not give any reasoned response why it was inapplicable, or even mention *Radcliffe*.

Lane does not contend otherwise. The appellants in *Lane* protested that defendant Facebook would have a role in selecting the *cy pres* recipients to avoid harm

to Facebook; they did not identify any recipient that presented an actual conflict of interest, but simply speculated that there might be one that acted against class interests in the future despite the charter of the entity that would distribute *cy pres* funds. 696 F.3d at 821-22. *Lane* held that a recipient need not be "ideal," *id.* at 821, but it did not hold that anything goes once the parties make a choice. Moreover, *Lane* has no bearing on a distribution that raises conflicts between *class counsel* and the 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 a distribution that unjustifiably favors non-party class counsel. 696 F.3d at 821 (emphasis added).

This one does not meet *Nachshin*'s or Section 3.07's standards because of the conflicts of interest. Surely *Lane* does not permit class counsel to direct *cy pres* to a charity run by class counsel's family member by the mere fact of a negotiated settlement; the conflict of interest would be blatantly self-serving. *Cf. Eubank v. Pella Corp.*, 753 F.3d 718, 728 (7th Cir. 2014).

The district court entirely failed to provide a "reasoned response" (*Dennis*, 697 F.3d at 864) to Lowery's objection to the beneficiaries' pre-existing relationships with class counsel, other than to say that *Lane* permitted *cy pres* beneficiaries with more "ethical hurdles." ER27 n.11. While *Lane* (for better or worse) permits a defendant to take steps to ensure a *cy pres* beneficiary won't act against the defendant's interest, and does not require the beneficiary to be "ideal," nothing in *Lane* obviates *Dennis*'s requirement that *cy pres* donations not be a "paper tiger" sham of "previously budgeted funds." 697 F.3d at 867-68. 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. *Id.* Google agreed to pay money to institutions that it was in all likelihood going to pay 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 no additional benefit to class members beyond status quo).

Google's and class counsel's "significant prior affiliation with the intended recipient[s] … raise[s] substantial questions" about the merits of the selection process, and is an independent reason to require reversal of the settlement approval. *ALI Principles* § 3.07 *comment (b)*. *Lane* does not hold otherwise with respect to conflicts with class counsel, and to the extent the appellees claim otherwise, *Lane* conflicts with *Dennis*, *Nachshin*, and *Google Cookie*, and should be jettisoned to that extent. In the alternative, Lowery preserves the issue for *en banc* review to resolve the circuit split with *Google Cookie*.

IV. Even if the settlement could be legally approved, it is inappropriate to use the 25% benchmark for a *cy pres*-only settlement fund.

The district court decision, relying on *Google Referrer*, that the Ninth Circuit's 25% benchmark approach applies equivalently regardless of whether the defendant is obligated by a settlement to pay class members $9 million or obligated to pay third parties $9 million. ER15. This is wrong.

The standard "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 (internal quotation and citation omitted). 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*, *Dennis*, *Nachshin*, and *ALI Principles* § 3.13); *accord* Wasserman, 88 U.S.C. L. REV. at 136-47 (advocating for "presumptive reduction of attorneys' fees" where settlement includes significant *cy pres* component). "The class benefit conferred by cy pres payments is indirect and attenuated. That makes it inappropriate to value cy pres on a dollar-for-dollar basis." *In re Heartland Payment Sys., Inc.*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (Rosenthal, J.); *see also Pearson*, 772 F.3d at 781 ("obvious" that no credit should be given for *cy pres* in valuing settlement benefit when calculating fees).

The district court's equivalence is bad public policy to boot. 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 prefer the *cy pres* arrangement and unnamed class members will be permanently left out in the cold. Class counsel seeks to maximize its own profit from the class action, while defendants wish to minimize the cost of settlement to themselves. *Pearson*, 772 F.3d at 787; *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014); *Pampers,* 724 F.3d at 717-18. *Cy pres* that crowds out actual class recovery will always be preferable to actual payments to the putative clients in that scenario. Class counsel will prefer a

ceremony with an oversized check and prominent members of the community to anonymous small-dollar payments to relatively ungrateful involuntary clients. Defendants will prefer to make payments to third parties to whom they are already donating money rather than payments to absent class members; donations 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. A rule of decision that fails to counter these perverse incentives will result in a disproportionate number of *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. "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). 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. *Accord* Fed. R. Civ. Proc. 23(e)(2)(C)(iii). It was legal error for the district court to blindly apply the 25% benchmark to a *cy pres*-only settlement.

Conclusion

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

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

At a minimum, the attorneys' fees impermissibly treat *cy pres* recovery as equivalent to actual payments to the class, and should be reversed and remanded to value the *cy pres* at a substantial discount to reflect actual class interests.

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Respectfully submitted,

/s/ Theodore H. Frank

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Statement of Related Cases
Under Circuit Rule 28-2.6

Joffe v. Google, Inc., 729 F.3d 1262 (9th Cir. 2013), resolved an interlocutory appeal affirming the district court's decision that the complaint stated a cause of action for a violation of the Wiretap Act, 18 U.S.C. § 2511.

Executed on August 12, 2020. */s/ Theodore H. Frank*
Theodore H. Frank

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