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,
v.
DAVID LOWERY,
Objector-Appellant,
v.
GOOGLE, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California, No. 3:10-md-02184

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

Mark Brnovich
Attorney General
Oramel H. (O.H.) Skinner
Solicitor General
Counsel of Record
Kate B. Sawyer
Assistant Solicitor General
Keena Patel
Assistant Attorney General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
o.h.skinner@azag.gov
Counsel for Amicus Arizona Attorney General's Office
(Additional counsel listed after signature block)

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INTEREST OF AMICI CURIAE

The Attorneys General of Arizona, Alabama, Alaska, Arkansas, Idaho, Indiana, Kansas, Louisiana, Missouri, Nevada, North Dakota, Ohio, and Oklahoma are their respective States' chief law enforcement or legal officers. Their interest here arises from two responsibilities: (1) an overarching responsibility to protect their States' consumers, and (2) a responsibility to protect consumer class members under CAFA, which envisions a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 5 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens"); *id.* at 35 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties."). This brief furthers each of these interests.

This brief is also a continuation of State Attorney General involvement in the district court stage of the settlement approval proceedings in this case, where the undersigned presented argument at the final settlement approval hearing. *See, e.g.*, *In re: Google Inc. Street View Elec. Commc'ns Litig.*, No. 3:10-md-02184-CRB, Dkt. 189-1 (N.D. Cal.). And it is a continuation of broader ongoing efforts

by State Attorneys General to protect consumers from class action settlement abuse, which have produced meaningful settlement improvements for class members. *See, e.g.*, *Cowen v. Lenny & Larry's, Inc.*, No. 17-cv-01530, Dkts. 94, 110, 117 (N.D. Ill.) (involvement of government officials, including State Attorneys General, produced revised settlement that increased class' cash recovery from $350,000 to ~$900,000); *Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261 (S.D. Cal.) (after State Attorney General coalition filed amicus and district court rejected initial settlement, revised deal was reached, increasing class' cash recovery from $0 to ~$700,000); *Unknown Plaintiff Identified as Jane V., et al., v. Motel 6 Operating LP*, No. 18-cv-0242, Dkts. 50, 52, 58 (D. Ariz.) (after Arizona Attorney General raised concerns regarding distribution of settlement funds to class members, parties amended settlement agreement to increase minimum class member recovery from $50 to $75 and to remove class-wide caps).[1]

[1] The Attorneys General certify that no parties' counsel authored this brief, and no person or party other than named *amici* or their offices made a monetary contribution to the brief's preparation or submission. The Attorneys General submit this brief as *amici curiae* only, taking no position on the merits of the underlying claims, and without prejudice to any State's ability to enforce or otherwise investigate claims related to this dispute. Counsel for all parties have consented to the procedural filing of this brief.

SUMMARY OF ARGUMENT

The settlement approval here must be reversed. The settlement offers no meaningful injunctive relief as compared to the injunctive relief obtained from Google by State Attorneys General in 2013. That makes this a *cy pres*-only settlement. And that *cy pres*-only status is fatal. *Cy pres*-only settlements as a category cannot be approved consistent with Rule 23. They provide no direct benefit to absent class members and so cannot be recognized as either a superior means of adjudicating and resolving absent class members' claims for purposes of Rule 23(b)(3), or fair, adequate, and reasonable under Rule 23(e)(3).

Put simply, because absent class members here receive no part of the settlement fund, no meaningful injunctive relief, and no other direct benefit in exchange for the release of their claims, the settlement class should not have been certified and the settlement should not have been approved; it cannot be a valid resolution under Rule 23 to approve a settlement that aggregates absent class members' claims solely to extinguish those claims without a direct benefit, making the absent class members definitively worse off through settlement.

ARGUMENT

I. The Settlement's Injunctive Terms Duplicate Relief State Attorneys General Obtained In 2013 And Add Nothing To The Rule 23 Analysis

The settlement offers no novel, meaningful injunctive relief to absent class members that wasn't already included in the 2013 settlement between Google and 39 State Attorneys General, which is on the district court docket at Docket 186, Exh. F. The injunctive terms are set forth in paragraphs 33-36 of the settlement here and include four components: (1) a promise to not collect or store payload data via Street View vehicles; (2) a promise to destroy the payload data that was the subject of this suit; (3) a promise to comply with the provisions of the State AG Privacy Program that was part of the 2013 State AG settlement, and (4) a promise to host educational webpages about wireless network encryption. *See* Dkt. 166-1 at 19-20. Each promise is to run for five years. *See* Dkt. 166-1 at 20.

The parties try to claim these components as a benefit of this settlement, but class members receive no new relief here beyond a short extension of a small subset of provisions that Google implemented long ago in connection with the State AG Settlement. When weighed against the commitments Google already made in the State AG Settlement, as well as the material changes in the privacy landscape in the near-decade since that 2013 settlement, it is patent that the injunctive terms of the settlement here provide no material benefit to class members and add nothing to the Rule 23 superiority or fairness analysis.

A. Google Already Made Each Of These Injunctive Promises in 2013

1. Google Already Promised State Attorneys General That It Would Cease The Type Of Data Collection At Issue Here

The overlap with the State AG Settlement is perhaps most striking when looking at the settlement provision stating that Google will not "collect and store … Payload Data via Street View vehicles, except with notice and consent." Dkt. 166-1 at 19. There is nothing in the settlement but a pure overlap with the State AG Settlement—the operative language is word-for-word identical. *Compare* Dkt. 186 at 82 ("Google … [s]hall not collect and store for use in any product or service Payload Data via Street View vehicles, except with notice and consent.") *with* Dkt. 166-1 at 19 ("Google shall not collect and store for use in any product or service Payload Data via Street View vehicles, except with notice and consent"). And the promise in the State AG Settlement is still active and binding, as it contains no time limit or sunset provision. [2]

2. Google Already Promised State Attorneys General That It Would Destroy The Pertinent Data Once Litigation Ended

Similarly mirroring the State AG Settlement, the settlement states that Google will "destroy all Acquired Payload Data." Dkt. 166-1 at 19. But, in almost identical terms, Google already agreed to delete or destroy the same data. Dkt. 186

[2] It appears as though the district court may have misapprehended this aspect of the State AG Settlement in the final approval order, although this point was made clear at the final fairness hearing by undersigned counsel, *see* Dkt. 210 at 12, and, class counsel indicated in the motion for final approval that the time extension applies only to Google's compliance with the privacy program, *see* Dkt. 184 at 11.

at 82. The full operative language of the settlement commitment here states that "Google shall destroy all Acquired Payload Data, including the disks containing such data, within forty-five (45) days of Final Approval" with a caveat for any preservation obligations relating to opt-outs. Dkt. 166-1 at 19. And the full operative language of the State AG Settlement states that Google "shall delete or destroy, as soon as practicable and not inconsistent with any current, pending or future litigation holds … or preservation requests of any kind, all Payload Data it collected in the United States of which Google has possession or control," with a confirmation that this is to include whatever physical or electronic destruction is required such that the data is rendered unrecoverable. Dkt. 186 at 82.

There is nothing in the settlement but an overlap on the 2013 destruction promise. The only barrier to final destruction is litigation-related obligations, which is true of each set of settlement provisions. And, again, the promise in the State AG Settlement is still active and binding, as it contains no time limit or sunset provision. Indeed, that is not surprising—as Judge Breyer recognized, "Google cannot destroy the data twice." Dkt. 211 at 23; *see also* Dkt. 210 at 15-16 (class counsel acknowledging that the data is not being destroyed twice and that the provision is "not necessarily an added feature").

3. The Incorporation Of State AG Settlement Provisions Here Further Confirms This Settlement's Duplicative Nature

Further confirming the overlap, the third component of the Settlement's injunctive provisions specifically adopts and incorporates portions of the State AG Settlement. Specifically, at paragraph 35, the settlement commits Google to complying with "all aspects of the Privacy Program described in paragraph 16 of Section I of the" State AG Settlement "and with the prohibitive and affirmative conduct described in paragraphs 1-5." Dkt. 166-1 at 19. Other than copying the precise words of the State AG Settlement, as with the promise to cease the data collection (discussed above), there can be no greater demonstration of overlap than referencing and incorporating obligations set forth in the State AG Settlement; it is beyond peradventure that Google's promises in paragraph 35 here do exactly what it promised to do in the corresponding paragraphs of the State AG Settlement.

4. Google's Educational Webpage Promise Echoes The Public Service Campaign Promised In The State AG Settlement

The final provision in the settlement's injunctive terms is equally duplicative. At paragraph 36, Google promises "to host and maintain educational webpages that instruct users on the configuration of wireless security modes and the value of encrypting a wireless network," including a how-to video on how to encrypt a wireless network. Dkt. 166-1 at 19. But this merely echoes the State AG Settlement. In paragraph 5 of the prohibitive and affirmative conduct in the State

AG Settlement, Google already agreed to design and implement "a Public Service Campaign [ ] reasonably designed to educate consumers about steps they can take to better secure their personal information while using wireless networks." Dkt. 186 at 82-83. Amongst other aspects, Google promised that this campaign would at a minimum feature "a video on YouTube that explains how users can encrypt their wireless networks (the 'how-to-video')" and "a blog post for the Google Public Policy Blog explaining the value of encrypting a wireless network" while directing readers to the YouTube video. Dkt. 186 at 83.

B. The Injunctive Provisions Offer No Material Support To The Settlement For Purposes Of The Judicial Analysis Under Rule 23

1. There Is No Settlement Value In The Wholly Duplicative Promises To Cease Collection And Destroy Existing Data

The overlap between the State AG Settlement and the two chief injunctive provisions in the settlement (data destruction and ceasing collection) prevents these provisions from contributing any value at all to the Rule 23 superiority or fairness analysis here. There can be no settlement value in these provisions here given that any benefit to class members from Google ceasing collection and destroying existing data was wholly created by Google's 2013 agreement with State Attorneys General. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 338 (3d Cir. 1998) (error for district court to fail "to distinguish between those benefits created by the [governmental agencies] and

those created by class counsel" (cited favorably by *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011)); *see also Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017) (recognizing that a settlement's "injunctive relief [was] of no real value" where it did "not obligate [defendant] to do anything it was not already doing").

2. The Educational Webpage And Incorporation Of The AG Privacy Program Offer No Material Settlement Value Here

For the same reasons, the settlement's duplication of the promises in the AG Privacy Program and the AG Public Service Campaign cannot contribute any settlement value for purposes of Rule 23 superiority or fairness, as duplication doesn't itself confer value. *See, e.g.*, *Koby*, 846 F.3d at 1080; *In re Prudential Ins. Co.*, 148 F.3d at 338 (cited favorably by *In re Bluetooth*, 654 F.3d at 943).

It is no answer to point to the extension of these provisions by a few years such that they will expire later in the 2020s as opposed to earlier in the 2020s. *See* Dkt. 186 at 82 (requiring AG Privacy Program be maintained "for a period of ten years"); Dkt. 166-1 at 20 (injunctive provisions to run for five years). Whatever value these provisions provided when first implemented in 2013, any extension provides no material settlement value here for purposes of Rule 23, especially given the intervening changes to the privacy landscape for technology companies.

As an initial matter, the nature of some of these secondary promises undermines the notion that an extension carries independent value. For example,

the first three AG Privacy Program requirements focus on ensuring delivery of the State AG Settlement documents to various internal Google stakeholders within "30 Days of the Effective Date" of the State AG Settlement. Dkt. 186 at 80. There can be no settlement value here from extending a Google promise to deliver the State AG Settlement documents during 2013 to certain Google personnel.

Moreover, the value of the other secondary promises has been dramatically altered in the years since the State AG Settlement, as the privacy landscape for technology companies has fundamentally changed. At a basic level, consumers have grown far more sophisticated about electronic privacy and the need for passwords, encryption, and other security measures on their electronic devices. *See, e.g.*, Dkt. 211 at 24 (noting "consumers' sophistication about privacy issues"). And Google, like all large technology companies, has in turn been forced to focus on user-privacy questions; indeed, the drumbeat of high-profile, critical articles about Google's handling of privacy and user information have placed Google's approach to privacy at the forefront of the public discussion.[3]

It follows that while these secondary commitments in the State AG Settlement may have been novel, material, and valuable in 2013, their extension

[3] *See, e.g.*, Geoffrey A. Fowler, *Goodbye, Chrome: Google's Web Browser Has Become Spy Software*, WASH. POST (June 21, 2019); Ryan Nakashima, *AP Exclusive: Google Tracks Your Movements, Like It or Not*, AP NEWS (Aug. 13, 2018), https://apnews.com/828aefab64d4411bac257a07c1af0ecb/AP-Exclusive:-Google-tracks-your-movements,-like-it-or-not.

offers no material settlement value now. Beyond the document-delivery mandate (and designating an employee coordinator for "the Privacy Program"), the other requirements relate to Google and its personnel: (1) staying informed about the importance of user privacy; (2) implementing policies to address unauthorized use, collection, or release of user information, and (3) continuing publicity about how to secure personal information in connection with wireless networks. *See* Dkt. 186 at 80-82; Dkt. 166-1 at 19 (incorporating Section I, paragraph 16 and Section II, paragraph 5 of State AG Settlement). With privacy concerns currently front and center for consumers, Silicon Valley as a whole, and Google in particular, there can be no doubt that Google will be independently maintaining privacy training, privacy-related advertising, and management-level attention to questions of user privacy and unauthorized collection or disclosure of user information.[4]

* * *

As the district court recognized, there was not a lot more that could be done in terms of injunctive relief in light of the State AG Settlement. *See* Dkt. 211 at 23. But material settlement value cannot be attributed merely from a conclusion that there were no additional injunctive terms obviously available for negotiation. And a finding that the provisions provide *some* nominal or theoretical value is not

[4] There is the additional problem that extending these secondary provisions is forward-looking, and this Court has found similar forward-looking injunctive relief to be "worthless" for purposes of Rule 23. *See Koby*, 846 F.3d at 1079 (promise regarding future disclosures was "worthless to most members of the class" because relief was not designed to benefit "those who had suffered a past wrong").

the same as providing *meaningful* value for purposes of Rule 23. *See Frank v. Gaos*, 139 S. Ct. 1041, 1047 & n.* (2019) (Thomas, J., dissenting) (although the settlement included future disclosures, "no party argue[d] that the[] disclosures were valuable enough on their own to independently support the settlement" and they provided no "meaningful relief"). Given the nature of the injunctive provisions here, and the overlap with the provisions in the State AG Settlement from 2013, the injunctive relief here should have been treated as immaterial to the Rule 23 superiority and fairness analysis.

II. Viewed Appropriately As Being *Cy Pres*-Only, This Settlement Cannot Pass Muster Under Rule 23

Without meaningful injunctive relief, the settlement can only stand based on the $13 million cash fund, and yet that fund is actively diverted away from class members: over $9 million goes to select *cy pres* recipients, nearly $4 million to class counsel, and $91,500 to class representatives. *See* Dkt. 211 at 16; Dkt. 214.

The use of *cy pres* in class action settlements, especially in *cy pres*-only settlements, has been widely contested in courts across the nation. The issue has "'been controversial in the courts of appeals,'" *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015), and has resulted in appellate reversals, albeit without clear instruction to the lower courts about the available contours of the remedy going forward, *see, e.g.*, *In re: Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 321 (3d Cir. 2019) (reversing *cy pres*-only

settlement approval; noting that "in some Rule 23(b)(2) class actions, a *cy pres*-only settlement may properly be approved."). The issue has also twice garnered attention from the Supreme Court, most recently leading to the vacatur of a prominent Ninth Circuit *cy pres* decision.[5]

This Court should take this opportunity to hold that *cy pres*-only settlements fail to pass muster under Rule 23 and basic conceptions of fairness.

A. *Cy Pres*-Only Class Action Settlements Categorically Fail And Cannot Be Certified Or Approved Under Rule 23

It is critical that any class action settlement under Rule 23(b)(3) include a direct benefit to the class. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) ("very best use" of settlement funds is "benefitting the class members directly").[6] Without a direct class benefit, a class action is being certified and approved under Rule 23 solely to aggregate claims for purposes of extinguishing them. This turns Rule 23 on its head. Rule 23 is to be "applied with the interests of absent class members in close view," *Amchem Prods., Inc. v.*

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[5] *See Frank*, 139 S. Ct. at 1043 (Court "granted certiorari to review whether [*cy pres*-only] settlements satisfy the requirement that class settlements be 'fair, reasonable, and adequate,'" but remanded to address a question of standing without reaching *cy pres* question); *Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., statement respecting denial of certiorari) (recognizing need to address "fundamental concerns" surrounding use of *cy pres*).

[6] Rule 23(b)(3) class actions present different considerations than those under (b)(1) and (b)(2). Rule 23(b)(3) actions are focused specifically on "individualized monetary claims," whereas under (b)(1) or (b)(2), "individual adjudications [are] impossible or unworkable" or "the relief sought must perforce affect the entire class at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361-62 (2011).

Windsor, 521 U.S. 591, 629 (1997), and "is meant to provide a vehicle to compensate class members," *In re Thornburg Mortgage, Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1105 (D.N.M. 2012).

A tenuous, illusory benefit from a third-party distribution should not be blessed as satisfying the need for a direct benefit to the class, much less as serving the interests of the class; being fair, reasonable, and adequate; or being a superior method of adjudication under Rule 23. As courts have well noted, any "indirect benefit" received by the class from *cy pres* "is at best attenuated and at worse illusory." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013).

Indeed, Justice Thomas recently expressed his view that a similarly-structured *cy pres*-only settlement should not have been approved. *See Frank*, 139 S. Ct. at 1048 (Thomas, J., dissenting). He reasoned that because the class members in that case "received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, … the class action should not have been certified, and the settlement should not have been approved." *Id.* He further explained that "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such[.]" *Id.* at 1047.

The diversion of settlement funds away from consumers in *cy pres*-only cases is particularly concerning because consumers already face disadvantages in the class action settlement process. *Cy pres* deepens existing concerns about

conflict of interest, given that "the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *In re Baby Prods.*, 708 F.3d at 173; *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J. dissenting) (noting "incentive for collusion" in *cy pres* settlements; "the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award."). And defendants are often no help, as they are "ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 820 (2003). Indeed, judges have noted that Defendants may actually prefer *cy pres*, and commentators have identified Google in particular as fitting this mold.[7]

[7] *See, e.g.*, *Lane*, 696 F.3d at 834 (Kleinfeld, J. dissenting) ("A defendant may prefer a *cy pres* award ... for the public relations benefit"); *S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs," as "defendants reap goodwill from the donation of monies to a good cause"); *see also* Matt Vella, *Google and Facebook's New Tactic in the Tech Wars*, FORTUNE (July 30, 2012, 1:18 PM), https://fortune.com/2012/07/30/google-and-facebooks-new-tactic-in-the-tech-wars/ (noting existing corporate donations to many proposed *cy pres* recipients and support on cases and issues those recipients often give to donating corporations).

B. There Is No Controlling Ninth Circuit Precedent On The *Cy Pres*-Only Issue Presented Here

There is no controlling Ninth Circuit precedent in which the parties disputed the distributability of a settlement fund, there was no meaningful injunctive relief, and yet the Court nonetheless affirmed a *cy pres*-only settlement arrangement.

The parties cannot rely on *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737 (9th Cir. 2017) as settling the *cy pres*-only settlement question. That opinion was vacated by the Supreme Court in *Frank v. Gaos*, and has no precedential effect. *See, e.g.*, *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect"); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) ("A decision may be *reversed* on other grounds, but a decision that has been *vacated* has no precedential authority whatsoever.").

Lane likewise does not control here. *Lane* did affirm the approval of a settlement that sent no cash to class members, but only where all parties accepted that *cy pres* was an appropriate resolution. The objectors in *Lane* did not challenge the use of *cy pres* as a category of relief. *See, e.g.*, 696 F.3d at 821 ("Objectors concede that direct monetary payments to the class of remaining settlement funds would be infeasible[.]"). Rather, the objectors raised two more narrow disputes on appeal: "the structure of DTF, the organization that would distribute cy pres funds

under the settlement," and "the overall amount of the settlement." *Id.* at 820. The objectors contended Facebook's involvement with the designated *cy pres* entity was a categorical conflict that barred approval of the entity as a valid *cy pres* recipient, *id.*, and that "the district court did not sufficiently evaluate the plaintiffs' claims and compare the value of those claims" against the $9.5 million sum that was provided for *cy pres*, *id.* at 822. The Court's rejection of those arguments on appeal does not control the *cy pres*-only issue in this case, especially considering that Facebook also promised to terminate the program at issue in that litigation. *See id.* at 825.

The rest of the Court's *cy pres* decisions feature reversal of the underlying *cy pres* settlement approval and are of no greater assistance on the *cy pres*-only question. In *Six (6) Mexican Workers v. Arizona Citrus Growers*, the Court reversed a settlement approval and narrowly addressed the use of *cy pres* to distribute unclaimed funds. *See* 904 F.2d 1301, 1307 (9th Cir. 1990) ("district court properly considered cy pres distribution for the limited purpose of distributing the unclaimed funds"). This was also the case in *In re Easysaver Rewards Litigation*, 906 F.3d 747 (9th Cir. 2018). And in *Nachshin v. AOL, LLC*, the Court reversed when faced with a settlement that included "significant prospective relief" and a truly miniscule *cy pres* distribution (~$100,000 as compared to a class of ~66 million). 663 F.3d 1034, 1036-38 (9th Cir. 2011).

* * *

The settlement fund here could have provided at least $9 million to class members through a typical claims process. Even assuming 4% of the class made a claim (~2.4 million members), claiming class members would receive a pro rata distribution of ~$4.[8] And, as the undersigned explained at the final fairness hearing, no matter the precise claims rate, this type of claims-made outcome would result in a meaningful amount getting into the hands of the class members who have given up their claims to generate the settlement proceeds here:

> If you have a $8-, $9-, $10 million pot of money … and you set up a claims-made process and you had 2 million class members come forward, we believe that putting $10 million into the pockets of 2 million people is meaningful.

Dkt. 210 at 39:18-21.

But the district court rejected this approach, and went so far as to note that diverting all money away from absent class members in a settlement like this one may well be preferable—"A settlement that benefits 1% of the class, and that has no benefit to 99% of the class, is not so obviously superior to a cy pres-only settlement that the Court must reject this settlement as unfair." Dkt. 211 at 21; *see also id.* at 22 ("'[L]arge multimillion dollar contributions to charities related to the

[8] This would be a typical claims rate for a case of this scale. *See, e.g.*, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns,* FED. TRADE COMMISSION (September 2019), at 11, 22 (study showing that "the median claims rate was 9%, and the weighted mean—where each case is weighted based on its number of notice recipients—was 4%.").

plaintiffs' causes of action arguably do more good for the plaintiffs than would a miniscule sum of money distributed directly to them.'").

That approach writes consumers out of the class action settlement process in a way that fundamentally contravenes not only Rule 23 but also the fiduciary duty that courts owe to absent class members. The Court should step in to correct the district court's misapprehension and reverse the settlement approval because absent class members receive no part of the settlement fund here, no meaningful injunctive relief, and no other direct benefit in exchange for the release of their claims; it cannot be a valid Rule 23(b)(3) resolution to certify absent class members' claims solely to extinguish those claims without a direct settlement benefit.

CONCLUSION

For the foregoing reasons, this Court should reverse the settlement approval, sending parties back to ensure consumers properly benefit from meaningful relief here.

August 19, 2020

Respectfully submitted.

/s/ Oramel H. Skinner
Mark Brnovich
Attorney General
Oramel H. (O.H.) Skinner
Solicitor General
Counsel of Record
Kate B. Sawyer
Assistant Solicitor General
Keena Patel
Assistant Attorney General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
o.h.skinner@azag.gov

Counsel for Amicus Arizona Attorney General's Office
(Additional counsel listed after signature block)

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

KEVIN G. CLARKSON
Attorney General
State of Alaska

LESLIE RUTLEDGE
Attorney General
State of Arkansas

LAWRENCE G. WASDEN
Attorney General
State of Idaho

CURTIS T. HILL, JR.
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

ERIC SCHMITT
Attorney General
State of Missouri

AARON D. FORD
Attorney General
State of Nevada

WAYNE STENEHJEM
Attorney General
State of North Dakota

DAVE YOST
Attorney General
State of Ohio

MIKE HUNTER
Attorney General
State of Oklahoma

CERTIFICATE OF COMPLIANCE

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

1. This brief is 4,692 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32(a)(5) and (6).

/s/ Oramel H. Skinner
Oramel H. (O.H.) Skinner
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Oramel H. Skinner
Oramel H. (O.H.) Skinner
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025